

FOREWORD

Can the Government Do That?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this ninth 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. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

That larger setting for the Court's October 2009 Term was colored, above all else, by the sheer ambition of the Obama administration and its congressional agenda: The massive federal "bailout" schemes; the governmental intrusions into the banking, investment, and mortgage fields, concerning even executive pay and benefits; the auto industry takeovers, including the upending of traditional bankruptcy law; and of course ObamaCare, presently the subject of unprecedented suits by some 21 states, among others. That is but a sampling of recent events beyond the Court's doors that have brought to the fore that most basic of constitutional questions: Where does the federal government find its authority to do all of that?

More than once during her recently concluded Senate confirmation hearings was that question put before the Court's newest member, Justice Elena Kagan. And for good reason, what with mid-term elections just ahead and the growing Tea Party movement, sure to figure prominently in their outcome, taking as its leitmotif the restoration of limited constitutional government. But the Court, too,

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began its term with that question—more precisely, ended its prior term with a special September session to hear additional oral argument on the question that had stopped it in June: Can the government ban books? Or ban guns in Chicago, to move to the term before us? Or ban law student groups in San Francisco from enjoying the same benefits that other groups enjoy if they're selective in choosing their members? Or incarcerate "sexually dangerous" inmates after they've completed their sentences? Or, to bring matters to the moment, can government order individuals to buy government prescribed health insurance policies from private vendors?

In each of those cases and many others before the Court this term or soon to come before it, the same basic question kept coming up: Can the government do that? That's the question, globally, behind the cover story of *The Economist* as we edit this volume, "Leviathan Inc: The state goes back into business." Yet in America the state is not supposed to be in the business of business. Our Constitution was written not simply to separate church and state but, far more broadly, to separate society and state. Government sets the rules and enforces them. It's not supposed to be a player in the game—the game of life. (As the Declaration put it, "That to secure these Rights, Governments are instituted among Men.") And the reason is simple: To the extent that government is in the game, decisions are made collectively, not individually. The vote one gets biennially, at best, is the palest reflection of the countless votes we get daily in our private capacities. In a word, our Constitution was written to secure individual, not collective, freedom.

And so we ask how the Court, the non-political branch, did this term in holding the political branches and the states within their constitutional bounds. The problem in answering that question, of course, is that those bounds, at least since the New Deal, have been largely ignored by the Court, the political branches, and the people themselves. But as noted above, there are signs today, owing in large part to the excesses of the Obama administration, that at least some of the people and some in the political class are coming to appreciate the vast gap between modern "constitutional law" and the Constitution itself. Thus, in asking whether the Court this term stood as "an impenetrable bulwark against every assumption of power in the Legislative or Executive," the role Madison envisioned for it, we have to temper the question and ask simply whether the

Court was moving in the right direction, back toward the Constitution; for the restoration of constitutional government is not the work of a day or of the Court alone.

This term, as usual, the record was mixed, but on balance the Roberts Court seemed to be moving in the right direction, however haltingly at times. Thus, in policing one of the government's proper functions, the Court limited the reach of a vague statute that afforded prosecutors unbridled power to charge individuals with depriving another of "the intangible right of honest services," albeit in a set of opinions that themselves were hardly models of precision. Similarly, concerning the fiduciary duty of investment advisors, the Court affirmed the limited power of courts to interfere with contractual agreements fairly reached. And in a challenge to the sweeping Sarbanes-Oxley Act, the Court modestly enhanced the political accountability of public officials by reaffirming the separation-of-powers and unitary-executive principles. But let's look more fully at a few of the Court's other decisions to try to discern where it may be going, beginning with that special case from the prior term, *Citizens United v. Federal Election Commission*.

When the Court announced its decision at last on January 21, the political reaction was immediate and intense, culminating, one could say, with the unseemly spectacle of President Obama berating captured justices on national TV during his State of the Union address—and misstating the case's holding at that. Yet the *Citizens United* majority, unable to speak for itself in that setting, had simply stood up for the rights of the rest of us to speak freely at election time in the only way most of us are able to speak, by joining with others of like mind and pooling our financial resources to try thereby to better be heard. That we should so speak through corporations or unions would be noteworthy only if doing so led to corruption or its appearance, the sole rationale for campaign finance restrictions the Court allowed in its seminal 1976 *Buckley v. Valeo* decision. Yet there was no evidence of corruption here, so the Court, to its credit, struck down the relevant provisions of the 2002 McCain-Feingold Act and reversed its own anomalous 1990 decision in *Austin v. Michigan Chamber of Commerce*. That the government had actually claimed during earlier oral argument that under *Austin* it could ban books expressly advocating the election or defeat of a candidate that were published or distributed by a corporation or union is a mark

of how far we've strayed from our founding principles. In this case, then, the Court moved smartly to restore a lost liberty, telling the government in the process, you can't do that.

The disquieting aspect of the case, of course, was Justice John Paul Stevens's lengthy dissent for himself and three other justices. Obsessed, it seems, with the concept of corporate "personality"—the *persona ficta* that our law has long recognized because it enables all manner of market and legal efficiencies—the dissent was unable or unwilling to notice that there are real people with real interests standing behind the corporate entity, much like behind the union entity, and those people may have reasons to want to speak through *their* entity. But how could the dissent have thought otherwise, after decades of teachings about the modern business corporation as a creature of the state, imbued with only those rights the state gives it, rather than as a creature of contract? Here, the Court "pierced the corporate veil"—for the right reason—whereas the dissent saw only the surface, which it read in simple "powerful v. powerless" terms.

Nor did the dissent's analysis improve when it turned to procedural matters. Making much of the majority's having sustained a facial challenge that the parties had agreed to dismiss, the dissent would have entertained only an as-applied challenge. But this was a First Amendment case, where facial challenges are the rule owing to the chilling effect that successful as-applied challenges leave in their wake. Thus, the charge of judicial overreaching fails because the real defendant here was Congress, not the FEC, Congress's agent. It was Congress that had overstepped its constitutional bounds. The Court had allowed that in *Austin*. That mistake needed correcting.

Other mistakes the Court has made are more longstanding, but no less in need of correction—in fact, more in need, because they have long distorted our understanding of the Constitution. And none, perhaps, cries out more for correction than the Court's 1873 decision in the infamous *Slaughterhouse Cases*. Arising from "a fetid stew of corruption" in the city of New Orleans in the aftermath of the Civil War, the case has stood ever since for the Court's having eviscerated the Privileges or Immunities Clause from the recently ratified Fourteenth Amendment. As much scholarship has since shown, the debates in the 39th Congress and in the state ratifying conventions make it clear that the clause was meant to be the principal font of substantive rights under the amendment, not only for

the newly freed slaves but for all American citizens. But the *Slaughterhouse* majority rendered the clause “a vain and idle enactment,” as the four dissenters put it, bitterly, leaving the Court to decide cases thereafter under the amendment’s less substantive Due Process Clause. From that has come the uneven history of “substantive due process”—including the Court’s episodic, unsystematic “incorporation” of rights as constitutionally protected against infringement by the states.

In the century and a half that has ensued since the *Slaughterhouse* decision came down, a few halting efforts have been made to revive the Privileges or Immunities Clause and the jurisprudence it was intended to effect, but none was more promising than the one mounted this term in *McDonald v. Chicago*. Two years ago in *District of Columbia v. Heller*, a case effectively of first impression, the Court gave life and meaning at last to the individual right to keep and bear arms under the Second Amendment. But because *Heller* was decided only against the federal government, it remained to be determined whether the right was good against state governments as well under the Fourteenth Amendment’s “incorporation” doctrine.

That was the immediate question before the Court in *McDonald*, given Chicago’s draconian handgun ban. But because *Heller* had been a case of first impression, taking the Court to a searching discussion of the nation’s first principles and early history, its further development in *McDonald* seemed a perfect opportunity to revisit the *Slaughterhouse* Cases. For not only was the Privileges or Immunities Clause meant above all, with newly freed slaves in mind, to protect the right of self-defense—the very right at issue in *McDonald*—but *Slaughterhouse*, like *Heller*, on which *McDonald* was building, was also a case of first impression; it concerned the very issue at stake in *McDonald*, the bearing of the newly settled law upon the states; and its focus, again as in *Heller*, was on a period when the American people had made fundamental changes in their constitutional order—on the founding, in *Heller*, and on the aftermath of the Civil War, in *Slaughterhouse*. In short, the stars were aligned for revisiting the egregious *Slaughterhouse* mistakes.

But it was not to be. True, in *McDonald* the Court got the immediate question right in holding that the Second Amendment was good against the states, leaving it to future courts to determine the precise contours of the right to keep and bear arms. Few thought it would

be otherwise, however—that states, but not the federal government, could ignore Second Amendment rights. Yet that, in effect, is what the Court’s four liberals argued in dissent as they essentially restated their *Heller* dissent—an approach not unlike the one they took to banning books in *Citizens United*.

But on the deeper constitutional question of whether the Court should bring the Privileges or Immunities Clause back to life, only Justice Clarence Thomas was prepared to be an originalist. Justice Antonin Scalia, whose trenchant historical analysis in *Heller* only two years before had breathed life into the uncertain Second Amendment, seized the opportunity at oral argument in *McDonald* to summarily dismiss the case for reviving the Privileges or Immunities Clause. It is near impossible to square Scalia’s sound textualist approach to constitutional interpretation in general with his dismissal of the plain text before him in this case, especially since that text’s rich historical pedigree renders it far more determinate than the substantive due process jurisprudence he invoked here, against which he has so often railed, finding it the source of endless judicial mischief. He’s often right about that, which makes it all the more curious that he would dismiss a better tool that was readily at hand—and in the Constitution besides.

Nonetheless, it is worth noting that Thomas’s originalist interpretation was not disputed by any other member of the Court. Rather, both the plurality and dissenting justices chose not to revisit the Privileges or Immunities question but instead to decide the case by applying the settled law of the Due Process Clause. Thus, the door is now open for reviving the Privileges or Immunities Clause in a future case, using Thomas’s concurrence as a roadmap. We should remember that Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson* kept alive the hope of overturning that decision’s separate-but-equal ruling, and that too was a long time coming.

Here also, then, the Court told the government what it could not do, even if its opinion was not properly grounded and it missed an all-too-rare opportunity to restore the Constitution the Framers of the Fourteenth Amendment had crafted after the bloodiest war in the nation’s history. There were other important decisions this term, however, where the Court got it quite wrong. *Christian Legal Society v. Martinez* was one. The question at issue in that case was whether Hastings Law School, a public entity, could require CLS, a small

student organization formed around Christian beliefs, to admit any Hastings student as a member or officer, failing which it would be ineligible for benefits such as funding, meeting space, school recognition, and the like that were otherwise available to student organizations. If CLS discriminated in its membership, that is, Hastings would discriminate in turn against CLS by denying the group the benefits it gave to some 60 other student groups organized around all manner of interests.

During the course of litigation below, however, Hastings' nondiscrimination policy, which singled out certain legally recognized grounds on which discrimination might be forbidden, became an "all-comers" policy, which swept far more broadly by forbidding student groups from discriminating on *any* ground. Thus, this theretofore unnoticed policy was content neutral. Unfortunately, Justice Ruth Bader Ginsburg, writing for the Court's majority, bought that argument, dismissing out of hand its implications—among other things, if a student group must admit anyone as a member or officer, it could easily lose its identity as the group it wants to be. In this case, not surprisingly, CLS required its members to subscribe to certain religious beliefs and practices, including abstention from premarital and homosexual sex.

The deeper problem here, however, is with the strained antidiscrimination law the Court has sanctioned over the years: Arising from the civil rights movement of the 1960s, it has compromised private freedom of association—perhaps understandably, given the context in which it arose. While rightly prohibiting public discrimination on a variety of grounds, this body of law has prohibited private discrimination as well, except for certain "intimate expressive associations." Thus, the Boy Scouts may discriminate against homosexuals and atheists who might wish to join or be scout leaders; the Jaycees may not. The Court has drawn a line rooted in value judgments—the Court's—not in the far clearer and far more justifiable distinction between private and public associations.

Clearly, CLS, a group formed around religious beliefs, is an intimate expressive association entitled to discriminate in its selection of members and officers. Accordingly, Hastings could not *directly* prohibit CLS from doing so. But neither may it reach that same result *indirectly* by conditioning the receipt of benefits available to other similarly situated groups on CLS's giving up its constitutional

right to freedom of association. We have here the classic doctrine of unconstitutional conditions—sometimes difficult to apply, but not here—which Justice Ginsburg utterly ignored. Beguiled perhaps by the “content neutral” all-comers policy, perhaps also by her own prior experience in this area of the law, she not only found for Hastings but took the occasion to label Justice Samuel Alito’s powerful dissent for himself and the Court’s three other conservatives “desperate” and “warped”—unseemly comment coming from an institution noted for its comity.

Here, then, the Court failed to tell the government that it could not do what it did, that it could not put a private group to a choice between two of its entitlements: its right to freedom of association, and its right to access benefits otherwise available to similar organizations. And in the process it upheld a patently absurd policy, with Democrats able to join the Republican student group, Muslims able to join the Jewish student group, and conversely, *ad infinitum*. That result, inconsistent as it is with other recent decisions in this area, marks how far modern antidiscrimination policy and law are capable of straying not only from basic constitutional principles but from simple common sense.

Turning back to federal power, yet another decision this term that found the Court wrongly allowing the government to act was *United States v. Comstock*. Here the Court upheld Section 4248 of the Adam Walsh Child Protection Act of 2006, which authorizes the Department of Justice to civilly commit “sexually dangerous” persons *after* they’ve completed their federal sentences. The case was not about the serious due process questions that surround that power but simply about that most basic of constitutional questions: Where does Congress find its authority to enact such a statute? As a model for future Courts inclined to assist federal expansion, the implications are far-reaching.

Under their general police power, *states* can civilly commit dangerous people, of course, provided due process has been afforded. And the federal government can too—but only in federal territory. Otherwise, the bedrock principle of constitutional design is that Congress’s powers are enumerated and hence limited, and a general police power of the kind at issue here is not among them. So where does the federal government find its authority?

Justice Stephen Breyer, writing for the Court with brief concurrences in the judgment by Justices Anthony Kennedy and Alito,

found it in the Constitution's Necessary and Proper Clause, in Congress's power "to make all Laws which shall be necessary and proper for carrying into Execution" its other powers. But which of Congress's 17 other enumerated powers does Section 4248 "carry into execution"? And is Section 4248 necessary and proper for executing that power?

Unfortunately, the Court focused mainly on the second question, arguing that Congress has "broad authority" to enact laws to further its enumerated powers. And the five-factor test Breyer offered asked not whether Section 4248 was necessary and proper for executing an *enumerated* power but for "a jumble of *unenumerated* 'authorities,'" as Justice Thomas put it in a searching dissent for himself and Justice Scalia. In fact, the closest the Court ever got to that core first question was to say, in Thomas's clearer words, "that the civil detention of a 'sexually dangerous person' under §4248 carries into execution the enumerated power that justified that person's arrest or conviction in the first place."

And what exactly is that enumerated power? Well it turns out that three of the five respondents who brought this case were in federal custody for possession of child pornography, a federal crime under the 1977 Protection of Children Against Sexual Exploitation Act. (The other two were charged with crimes committed in federal territory, so the federal government was home free there.) But since Congress has no enumerated power to criminalize such possession, we're still short of the Constitution. To complete the chain of argument, therefore, we have to turn to the ground for that 1977 Act. And it is, no surprise, that boundless congressional power, under modern readings, to regulate interstate commerce. So criminalizing the possession of child pornography, the argument runs, is a necessary and proper means for carrying into execution the regulation of interstate commerce. Thus, the federal power to civilly commit sexually dangerous people after they've completed their sentence is derived ultimately from Congress's power to regulate interstate commerce. If that seems a stretch, it is, especially if we consider the history of the matter.

What that history shows is that the commerce power was granted mainly to enable Congress to ensure the free flow of goods and services among the states, given that states under the Articles of Confederation had imposed various protectionist impediments to

interstate commerce. One of the main reasons for drafting a new constitution, in fact, was to address that problem, which the Framers thought they had done by giving Congress the power to regulate, or “make regular,” interstate commerce. Chief Justice John Marshall said as much in 1824 in the first great Commerce Clause case, *Gibbons v. Ogden*. And in his concurrence, Justice William Johnson stated the matter explicitly: “If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.”

But abandon that functional understanding of the commerce power and it’s only a matter of time before Congress uses the power not to ensure a free national market but to regulate and even criminalize all manner of activities having nothing to do with unimpeded interstate commerce—many of those regulations serving, ironically, to impede a free market. Thus does the Commerce Clause, in conjunction with the Necessary and Proper Clause, become in effect a general police power of a kind that was reserved to the states—and with that, a Constitution of *limited* government evolves into its opposite.

Speaking for the government at oral argument, then-Solicitor General Kagan granted that Congress would have no power to civilly commit sexually dangerous people who were outside of federal detention, but she was hard-pressed to explain why mere detention, after completion of sentence, justified commitment. Her core contention was that the commitment power “is necessary and proper to the responsible exercise of the Federal power to operate a criminal justice system.” But she added that “these are the people who are most likely to violate Federal laws based on the Commerce Clause in the future”—presumably by possessing child pornography *in the future*. That sounds like a straightforward general police power rationale.

Citing *New York v. United States*, Justice Breyer concluded that “the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role” (original emphasis). Language has its limits, to be sure, which is why judgment is needed as well,

and that was sorely lacking in this decision. As Justice Thomas noted, sexual abuse is despicable, but “the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.” In the matter at hand, states have all the power they need to protect us from sexually dangerous people.

Conservatives have long lamented the expansion of the commerce power in ways that have undermined its original purpose. But the modern reading that so often limits economic liberty, championed by liberals, has no principled bounds. Today it serves as a font, through the Necessary and Proper Clause, for civilly committing people we might want to see committed anyway, but only through proper authority. Tomorrow it could be expanded in ways we would not want to see. The Austrian-English philosopher Ludwig Wittgenstein wrote that when language goes on holiday, philosophical problems begin. So too do constitutional problems.

And nowhere do those problems loom more clearly before the nation today than in the many legal challenges to ObamaCare that are currently in our courts, because no legislation Congress has ever passed has more clearly raised that most fundamental of constitutional questions: Are there any limits on what Congress may do? The main focus of the suits, of course, is on the so-called individual mandate, which forces individuals to buy federally prescribed health insurance or pay a “penalty” (or tax—one of the crucial constitutional questions). Enacted pursuant to the Commerce Clause, that mandate takes the commerce power into uncharted territory, as many have noted. Indeed, the furthest reaches of the power—as sanctioned by the Court in *Wickard v. Filburn* and, even more, in *Gonzales v. Raich*—were confined to *prohibiting* action, not requiring it. And so we are left with the question: Under our Constitution, written to secure liberty through limited government, can the government do that?

We will have answers from the courts soon enough, and from the Supreme Court in time. But in the end it is the people, through the political process and all that it entails, who will give the ultimate answer. And on that score, there is mounting evidence that the people are awakening to the widening gap between the Constitution and what has been made of it—and that is good.

