

Introduction

*Ilya Shapiro**

This is the eighth volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the Supreme Court term just ended. We release this journal every year on September 17, Constitution Day, about two and a half months after the previous term concludes and two weeks before the next one begins (though this year we will already have had the *Citizens United* campaign finance case reargument in early September). We are proud of the speed with which we publish this tome—authors of articles about the last-decided cases have little more than a month to provide us full drafts—and of its accessibility, at least insofar as the Court's opinions allow for that. This is not a typical law review, after all, whose prolix submissions use more space for obscure footnotes than for article text. Instead, this is a book about law intended for everyone from lawyers and judges to educated laymen and interested citizens.

And we are happy to confess our biases: We approach our subject matter from a classical Madisonian perspective, with a focus on individual liberty, property rights, and federalism, and a vision of a government of delegated, enumerated, and thus limited powers. We also try to maintain a strict separation of politics (or policy) and law; just because something is good policy doesn't mean it's legal, and vice versa. Similarly, certain decisions must necessarily be left to the political process: We aim to be governed by laws, not lawyers, so just as a good lawyer will present all plausibly legal options to his client, a good public official will recognize that the ultimate buck stops with him.

Having said that, let's take a quick survey of the term that was. October Term 2008 produced more divisions but fewer headlines than the previous term. Of the 79 cases with opinions after argument,

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23 went 5-4 (29.1 percent, up from 20 percent last year) and 26 had no dissenters (32.9 percent, up from 30 percent last year but down significantly from previous years). More interestingly, the total number of dissenting votes across all cases was notably high, with an average decision producing 2.04 justices in dissent, up from an average of 1.66 over the preceding 10 years. Justice Anthony Kennedy regained his usual status as the justice most often in the majority (92.4 percent of cases and 16 of 23 5-4 decisions), while Justice John Paul Stevens was most likely to dissent (35.4 percent of cases and an incredible 52.8 percent in cases that had dissenters). Chief Justice John Roberts and Justice Samuel Alito were the justices most likely to agree, voting the same way at least in part in 73 of 79 cases (92 percent, followed by six different pairings at 86-87 percent), while Justices Stevens and Clarence Thomas voted together in only 36 cases (46 percent).¹

Looking beyond the statistics, this was of course the final term for Justice David Souter. Souter did not write any notable opinions, but buried in his dissent in *District Attorney's Office v. Osborne* was a meditation on the wisdom of judicial minimalism—or incrementalism—regarding the recognition of new rights in light of changes in “societal understandings of the fundamental reasonableness of government actions.”² Some have suggested that this passage reflects the retiring justice’s views on gay marriage,³ but more broadly it was a sort of valedictory address on the nature of the judicial process.

Replacing Souter, of course, will be Justice Sonia Sotomayor, late of the Second Circuit Court of Appeals. While her confirmation was never in any serious doubt, Sotomayor faced strong criticism from legal analysts and Republican senators on issues ranging from property rights and the use of foreign law in constitutional interpretation to *Ricci v. DeStefano*—noted below is our article on the case—and

¹ All statistics taken from SCOTUSblog, Summary Memo and Super Stack Pack (Updated), June 30, 2009, available at <http://www.scotusblog.com/wp/end-of-term-super-stat-pack/>.

² *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. ____, 129 S. Ct. 2308, 2341 (2009) (Souter, J., dissenting).

³ See, e.g., Walter Dellinger, *Souter: A Last Lecture on Gay Marriage?*, *Slate*, June 29, 2009, available at <http://www.slate.com/id/2220927/entry/2221719>.

the “wise Latina” speeches that led people to question her commitment to judicial objectivity.⁴ Only time will tell what kind of a justice Sotomayor will be now that she is unfettered from higher court precedent.

Turning to the *Review*, we begin, as always, with the previous year’s B. Kenneth Simon Lecture in Constitutional Thought, which in 2008 was delivered by Professor Randy Barnett of the Georgetown University Law Center. Prof. Barnett poses the provocative question—evoking Justice Oliver Wendell Holmes’s infamous *Lochner* dissent—“Is the Constitution Libertarian?” Barnett confronts Holmes’s dismissal of Herbert Spencer’s “law of equal freedom”—which affirmed that each man “has freedom to do all that he wills provided that he infringes not the equal freedom of any other”—and finds that the Constitution “may be the most explicitly libertarian governing document ever actually enacted into law.” While we have lost much of that libertarian understanding, we can regain it if we elect presidents who will appoint and senators who will confirm judges who interpret the Constitution properly—giving effect to its original public meaning, applying a “presumption of liberty,” and construing vague terms in a way that enhances constitutional legitimacy.

We move then to the 2008 Term, beginning with provocative essays on the big civil rights cases of the year. Roger Clegg, president of the Center for Equal Opportunity, tackles *Bartlett v. Strickland* and *NAMUDNO v. Holder*, which challenged sections 2 and 5, respectively, of the Voting Rights Act. He discusses Section 2’s internal contradictions—prohibiting racially disparate treatment but requiring racial gerrymandering—and Section 5’s violation of federalism, questioning their continuing constitutionality. Notably, the *NAMUDNO* decision avoided the constitutional questions at the heart of our voting rights regime, an unsatisfying result that Clegg

⁴ This editor was one of the critics. See, e.g., Ilya Shapiro, The Sotomayor Vote, *Washington Times*, August 7, 2009, available at <http://www.washingtontimes.com/news/2009/aug/07/all-americans-should-take-pride-in-seeing-our-firs>; Ilya Shapiro, Sotomayor Doesn’t Deserve a Supreme Court Seat, *Cato@Liberty*, July 22, 2009, available at <http://www.cato-at-liberty.org/2009/07/22/sotomayor-doesnt-deserve-a-supreme-court-seat>; Ilya Shapiro, Five Questions for Sotomayor, *Christian Science Monitor*, June 9, 2009, <http://www.csmonitor.com/2009/0609/p09s01-coop.html>; Ilya Shapiro, Sotomayor Pick Not Based on Merit, *CNN.com*, May 27, 2009, available at <http://www.cnn.com/2009/POLITICS/05/27/shapiro.scotus.identity/index.html>.

laments. He concludes, "The Act should be refocused on fulfilling—not undermining—the Fifteenth Amendment's purpose: ensuring that the right to vote is not denied or abridged on account of race."

Ken Marcus of the City University of New York's Baruch College School of Public Affairs writes on *Ricci v. DeStefano*, the New Haven firefighters' case that figured so prominently in Justice Sotomayor's confirmation hearings. *Ricci* exposed the long-simmering tension between the disparate impact provisions of Title VII of the Civil Rights Act and the Fourteenth Amendment's Equal Protection Clause—which Justice Scalia pointed out in his concurrence. Disparate impact is constitutionally dubious, Marcus argues, because it is "sometimes used to level racial disparities that do not arise from intentional or unconscious discrimination," a purpose for which the Equal Protection Clause "does not permit state actors to take race-conscious actions." The Court will surely revisit this issue, and Congress may be forced to act.

Roger Pilon—director of Cato's Center for Constitutional Studies—dives into the biggest business case of the year, *Wyeth v. Levine*, where the Court had to decide whether a pharmaceutical company that satisfied the FDA's labeling requirements could nevertheless be held liable under state law for the harm that followed when a physician's assistant ignored the label's warnings. It's a tricky issue, not least because normally libertarians and conservatives support limited federal power and the role of states as "laboratories of democracy." Yet here it is the reverse, with (modern) liberals arguing that state law is the ultimate guarantor of individual rights. Pilon argues that "if the text of a constitutionally authorized statute or regulation implies the purposes or objectives of the measure . . . and a state law conflicts with the administrative execution of those purposes or objectives . . . then the effect of the Supremacy Clause is clear: the state law must yield."

Next, the University of Michigan's Dan Crane provides a page-turning look at the state of antitrust law—you read that right—through the lens of this term's price-squeeze case, *Pacific Bell v. Link-Line*. It turns out that this spring's announcement of a change in policy on monopolization offenses by Christine Varney, the new Antitrust Division head at the Department of Justice, renewed a rift between the Chicago and Harvard Schools of antitrust. And as re-regulation comes to the political fore, the Court's antitrust jurisprudence may

come under attack. “Only a deliberate and patient strategy that addresses the two schools’ institutionalist concerns,” Crane explains, “stands a chance of advancing the new administration’s ambitious agenda.”

We then have two articles on the term’s Fourth Amendment cases. *Herring v. United States* asked whether evidence should be excluded when it is found as a result of a search based on a warrant that was erroneously listed in a police database. *Arizona v. Gant* explored the power to search incident to arrest in a case where police searched an arrestee’s car after its owner had been secured in the back of a patrol car. *Arizona v. Johnson* probed the scope of the “stop and frisk” doctrine in the context of a patdown of a car’s passenger by an officer who believed him to be armed and dangerous but had no reasonable grounds to believe he committed a crime. *Pearson v. Callahan* presented the Court with a police entry into a home based on consent given to an undercover informant. And *Safford v. Redding*, which got the most headlines, inquired into school officials’ liability for strip-searching a middle school student. Law professors Erik Luna and Michael O’Neill give their nuanced takes on where the Court is going in this vital area.

Luna, of Washington and Lee, criticizes the Court’s *Herring* decision as continuing “the movement toward constitutional rights without remedies, allowing law enforcement to infringe upon an individual’s Fourth Amendment rights and then present the fruits of that violation against him at trial.” He supports *Gant*’s result but notes his agreement with the dissent in that case regarding the Court’s disingenuousness in its treatment of precedent. More broadly, Luna identifies “a sort of doctrinal creep-and-crawl” in constitutional criminal procedure, eroding our civil liberties as citizens place greater demands on law enforcement.

O’Neill, of George Mason, surveys the two big battlegrounds in Fourth Amendment jurisprudence: the warrant requirement and the exclusionary rule. He gleans several interesting insights from how each justice—including the newly arrived Sotomayor—will vote in these cases but also expresses frustration at a lack of judicial clarity about the meaning of “(un)reasonableness.” O’Neill ultimately suggests that Congress “consider providing greater privacy protections for individuals and better guidance for law enforcement.”

Mark Chenoweth of the Pacific Research Institute similarly surveys the Court's Sixth Amendment jurisprudence, focusing on *Oregon v. Ice* and *Melendez-Diaz v. Massachusetts*. *Ice* queried whether a sentencing judge may find facts apart from the jury verdict to determine whether a defendant will serve consecutive or concurrent sentences. *Melendez-Diaz* considered whether a defendant has the right to demand the live testimony of a lab technician when the prosecution wants to present forensic evidence. The latter-stage Rehnquist Court decisions in *Apprendi v. New Jersey* and *Crawford v. Washington* threw this area of law into a flux, but Chenoweth helps make sense of the current state of play.

Switching to the First Amendment, University of South Dakota law professor Patrick Garry examines the quixotic *Pleasant Grove City v. Summum*. Does a city displaying a privately donated Ten Commandments monument in a public park have to also display the monument an obscure religious sect wants to donate? Curiously, the Court refrained from addressing the obvious Establishment Clause issue here—the government endorsement of one religion's symbol over another's—and ruled for the city because the Free Speech Clause doesn't apply to government speech. Garry delves into those Establishment Clause implications, however, arguing that this sort of monument refusal may well violate the doctrine of "nonpreferentialism."

Communications and media law guru Robert Corn-Revere, also a Cato adjunct scholar, contributes a piece on yet another case where the Court declined to address the more interesting constitutional issue: *FCC v. Fox*. Here the Court reviewed the FCC's policies regarding broadcast indecency for the first time in 30 years. It ended up affirming the agency's new ban on "fleeting expletives"—following several celebrated incidents where, for example, Cher told us what she thought of her critics and Nicole Richie explained how difficult it was to get manure out of a designer purse—on administrative law grounds. Corn-Revere predicts that the Court will not long avoid the inherent First Amendment issues—representing CBS, he may know something about this—and sketches the parameters of that future litigation.

In a fascinating confluence of the First and Fourteenth Amendments—political speech and the right to unbiased judges—Center for Competitive Politics co-founders Steve Hoersting and Brad Smith

(also former FEC chairman) cover *Caperton v. Massey Coal*. In this case, Massey Coal's CEO spent three million dollars to unseat a state supreme court justice unfriendly to the company's interests—without coordinating with his preferred candidate's campaign—which his legal adversary later claimed required judicial recusal under the Due Process Clause. Hoersting and Smith contend that *Caperton* “typifies the old maxim that hard cases make bad law,” with the Court here creating a “new, largely unworkable standard” for recusals and then constitutionalizing it. Interestingly, the Court's decision on whether to overrule *Austin v. Michigan* and a related portion of *McConnell v. FEC*—via the reargued *Citizens United v. FEC*—will control *Caperton*'s broader ramifications on independent political speech.

At this point we normally would've had an article on *Citizens United* itself, the case about the regulation of *Hillary: The Movie* as “electioneering communication” under McCain-Feingold. The Court chose to hold the case over, however, and ask for briefing and reargument relating to the regulation of corporate and union speech generally. This is a positive development for the First Amendment, we hope—but alas we'll have to wait till next year for an analysis in these pages.

In any event, this volume concludes with a look ahead to October Term 2009—and what we can expect from Justice Sotomayor—by Jan Crawford Greenburg, ABC News legal correspondent and author of the best recent history of the modern court.⁵ Continuing its trend from this past term, the Court has further front-loaded its caseload—with 46 arguments on its docket before the term has even started. Fortunately, unlike last year, we should see many blockbuster constitutional cases, including: First Amendment challenges to national park monuments and a statute criminalizing the depiction of animal cruelty; an Eighth Amendment challenge to life sentences for juveniles; a potential revisiting of *Miranda* rights; federalism concerns over legislation regarding civil commitment of “sexually dangerous” persons; a separation-of-powers dispute concerning the agency enforcing Sarbanes-Oxley; and judicial takings of beachfront property. Cato has filed amicus briefs in many of these cases, so I will be paying extra-close attention.

⁵ Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court (2007).

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This is the second volume of the *Cato Supreme Court Review* that I have edited. While the learning curve was steeper last year, the amount of work has not decreased—and so I have many people to thank for their contributions to this endeavor. I first need to thank our authors, without whom there would obviously not be anything to edit or read. My gratitude also goes to my colleagues at Cato’s Center for Constitutional Studies, Bob Levy and Tim Lynch, who continue to provide valuable counsel in areas of law with which I’m less than familiar. A big thanks to research assistant Jonathan Blanks for making the trains run on time and keeping me honest, as well as to legal associate Travis Cushman and interns Matthew Aichele, Christian Brockman, Will Hild, and Jeff Widmayer, for doing the more thankless (except here) tasks. Neither the *Review* nor our Constitution Day conference would be the successes they are without them. Finally, thanks to Roger Pilon, the founder and *éminence not-so-grise* of this now well-established journal, without whom I would now be fretting about my role in the new legal economy.

I reiterate our hope that this collection of essays will deepen and promote the Madisonian first principles of our Constitution, giving renewed voice to the Framers’ fervent wish that we have 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 modern regulatory state—in which judges, politicians, and ordinary citizens alike understood that the Constitution reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against the abuse of state power. In this uncertain time of “bailout,” “stimulus,” “public options,” and general government overreach, it is more important than ever to remember our humble roots in the Enlightenment tradition.

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