

Introduction

*Ilya Shapiro**

This is the ninth 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 in conjunction with our annual Constitution Day symposium, about two and a half months after the previous term concludes and two weeks before the next one begins. We are proud of the speed with which we publish this tome—authors of articles about the last-decided cases have no 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 of articles 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 2009 produced fewer divisions but more headlines than the previous term. Of the 86 cases with decisions on the merits—

* Senior Fellow in Constitutional Studies, Cato Institute and Editor-in-Chief, *Cato Supreme Court Review*.

72 after argument, 11 summary reversals, two decided before argument, and one certified question—16 went 5–4 (19 percent, down from 30 percent last year but close to OT07’s 17 percent) and 40 had no dissenters (47 percent, up from 33 percent last year and continuing a general Roberts Court trend).¹ More interestingly, the total number of dissenting votes was notably low, with an average decision producing only 1.33 justices in dissent, down from an average of 1.70 over the preceding 10 years. Still, this apparent judicial “era of good feelings”—is the Chief Justice finally succeeding in his quest for less divisiveness?—was overshadowed by stark splits in big cases such as *Citizens United v. FEC* (campaign finance), *McDonald v. Chicago* (right to keep and bear arms), *Christian Legal Society v. Martinez* (freedom of association), and *Free Enterprise Fund v. PCAOB* (separation of powers).

Chief Justice John Roberts tied Justice Anthony Kennedy for the title of “winning justice,” voting with the majority in 91 percent of cases (though Kennedy joined the majority in 12 of the 5–4 decisions, beating Roberts’s 10 such votes). Justice John Paul Stevens was again most likely to dissent (26 percent of all cases and 48 percent of cases with dissenters), but less so than last year, when the senior associate justice dissented in over half of all cases that had dissents. Justices Antonin Scalia and Clarence Thomas were the justices most likely to agree—ousting last year’s most-collegial duo of the Chief Justice and Justice Samuel Alito and voting the same way, at least in judgment, in 79 of the 86 merits cases (92 percent, followed by “rookie” Justice Sonia Sotomayor’s 90 percent agreement with each of Justices Ruth Bader Ginsburg and Stephen Breyer). Justices Stevens and Thomas again found themselves on opposite sides of a judicial outcome most often, voting together in only 51 cases (60 percent).

Looking beyond the statistics, this was of course the last term for Justice Stevens. The long-time leader of the Court’s “liberal” wing—

¹ All statistics taken from SCOTUSblog, Super Stack Pack OT09 Available, July 7, 2010, available at <http://www.scotusblog.com/blog/2010/07/07/super-stat-pack-ot09-available/>. Note that SCOTUSblog classifies *Citizens United v. FEC* as an OT08 case (meaning one from the previous term) because it was argued and reargued before the official start of October Term 2009. I disagree with this classification—not least because the *Cato Supreme Court Review* article examining the case appears in this volume, not last year’s—but will accept it here in order to use the invaluable statistical analysis that SCOTUSblog provides.

and therefore the assigning justice for the majority opinions and lead dissents in all those “conventional” 5–4 splits—Stevens did not retire quietly to that Florida condo. While he only wrote for the Court six times this term, he had two of its most memorable dissents—the stem-winders in *Citizens United* and *McDonald* that will go down among his most memorable writings. With Stevens’s departure, perhaps we will finally stop hearing the media’s lament about how the “moderate Republican” stood in place while the Court shifted right around him.²

Replacing Justice Stevens is Justice Elena Kagan, who had a cup of coffee as the “tenth justice”—the honorific given the solicitor general—before being nominated to be the ninth. While her confirmation was never in any serious doubt, Kagan faced strong criticism from legal analysts and senators on a variety of issues—most importantly on her refusal to “grade” past Court decisions or identify any specific limits to government power.³ The 37 votes against Kagan were the most ever for a successful Democratic nominee, which statistic is emblematic of a turbulent political environment in which the Constitution and the basic question of where government derives its power figure prominently. Only time will tell what kind of justice Kagan will be now that she is, seemingly for the first time in her ambitious life, unconstrained to speak her mind.

Turning to the *Review*, the volume begins, as always, with the text of the previous year’s B. Kenneth Simon Lecture in Constitutional Thought, which in 2009 was delivered by Professor Michael McConnell of Stanford University Law School. Although some characterize the Ninth Amendment as an “inkblot,” McConnell—formerly of the Tenth Circuit Court of Appeals—analyzes “The Ninth Amendment in Light of Text and History,” demonstrating how this vital 21-word

² For a fascinating article taking issue with this narrative—which Stevens himself has done much to propagate—see Justin Driver, *The Stevens Myth*, *The New Republic*, April 7, 2010, at 19.

³ This editor was one of the critics. See, e.g., Ilya Shapiro, *Kagan’s Confirmation Could Be High-Water Mark for Big Government*, *Cato@Liberty*, August 5, 2010, <http://www.cato-at-liberty.org/kagans-confirmation-could-be-high-water-mark-for-big-government/>; Sallie James and Ilya Shapiro, *Elena Kagan Balances Your Diet*, *The Daily Caller*, July 2, 2010, <http://dailycaller.com/2010/07/02/elena-kagan-balances-your-diet/>; Ilya Shapiro, *Kagan Failed the Kagan Standard*, *Reuters*, July 2, 2010, <http://blogs.reuters.com/great-debate/2010/07/02/kagan-failed-the-kagan-standard/>.

provision is designed to “helps us understand the constitutional structure of powers granted and rights reserved, the relation of the Bill of Rights to the original Constitution of 1787, and the role of natural rights in American constitutionalism.” As a basic rule, McConnell declares that “natural rights control in the absence of sufficiently explicit positive law to the contrary.” He parses historical evidence regarding pre- and post-constitutional natural law jurisprudence to explain the need to return to the Blackstonian equitable interpretation of unenumerated rights claims.

We move then to the 2009 term, with four articles on an impressive array of First Amendment cases. The biggest of these is the most controversial case of the past couple of years, *Citizens United v. FEC*. This decision—liberalizing the rules surrounding independent expenditures and express advocacy by corporations and unions—caused President Obama to upbraid the Court at his State of the Union address (while misstating the Court’s holding) and led Congress to launch an effort to chill political speech in the name of “leveling the playing field.” Longtime campaign finance lawyers James Bopp Jr. and Richard E. Coleson tackle this fascinating ruling, describing the litigation strategy leading up to a rare two-argument Court appearance and outlining the case’s implications. They conclude that, despite the overall liberalization, “the way *Citizens United* was decided has caused some damage to citizens’ speech, association, and self-government rights with regard to imposed disclosure.”

Nadine Strossen, New York Law School professor and former president of the ACLU, takes on the case of *United States v. Stevens*, which at base deals with the rationale behind content-based speech restrictions. In *Stevens*, the Supreme Court struck down a federal statute that criminalized the commercial creation, sale, or possession of certain depictions of treatment of animals. The law was intended to “dry up” the production of so-called crush videos—don’t ask, just read Strossen’s piece—but in effect extended to all sorts of speech and activity. Strossen’s analysis takes you through the Court’s history of designating unprotected categories of speech, beginning with *Chaplinsky v. New Hampshire* (fighting words) and ending with *New York v. Ferber* (child pornography). Strossen notes that *Stevens* is part of a line of cases in which the Court has reversed this trend and, instead, “contract[ed] government power to enforce content-based regulations of expression, even when such regulations receive

overwhelming [public] support.” This trend started with *Texas v. Johnson*, the 1989 case striking down restrictions on flag burning, and continues here. It includes cases that uphold the burning of crosses, the advertising of tobacco products to minors, and the possession of images that only appear to depict minors. Strossen’s article succinctly presents the importance of *Stevens*, in that the case “generated analysis and holdings that should significantly reinforce the general ban on content-based regulations of expression” by reining in *Chaplinsky* and *Ferber’s* “precedential force for further content-based restrictions.”

Professor Richard Epstein—one of my mentors at the University of Chicago Law School—follows with an assessment of the state of Free Exercise and Establishment Clause jurisprudence after the “bitterly contested” case of *Christian Legal Society v. Martinez*, a decision that reflects, he says, “not the Court’s finest hour.” The Christian Legal Society applied for the privileges normally afforded to all registered student organizations at a public California law school and was turned down because it required members to subscribe to certain beliefs and practices concerning pre-marital sex and homosexuality, and that violated the school’s anti-discrimination policy. In a 5–4 decision, the Court upheld the law school’s decision on the ground that excluding CLS “encourages tolerance, cooperation, and learning among students.” Epstein argues that public institutions cannot directly regulate the membership of private expressive associations like CLS; but neither can they do that indirectly by imposing unconstitutional conditions before benefits otherwise available will be granted. And he sees two other issues here. First, the law school’s “all-comers” position was never a formal policy and was only adapted in light of the litigation—so whatever the case’s outcome, “the causes of toleration and cooperation will not be served.” Second, there is a question of how much the privileges/rights distinction will be reborn after *CLS* with regard to gay marriage. Epstein’s guess is that the “doctrine of unconstitutional conditions that lay in ruins after *CLS* will rise again.”

The final First Amendment case is *Doe v. Reed*. Here the Court addressed the question of whether disclosing the identities of petition signers violated the signers’ rights to freedom of association, holding that states can require the public identification of those who seek issues placed on the electoral ballot. Steve Simpson, a senior

attorney with the Institute for Justice, writes about the potential effects *Doe* will have on campaign finance rules. He notes how *Doe* works in conjunction with *Citizens United*, which, as noted above, struck down restrictions on corporate speech but didn't address how burdensome laws requiring disclosure of those who fund independent advocacy can be. While *Doe* came out at a time of "great controversy" surrounding campaign finance laws, Simpson believes that the case is "more important for what it did not say than for what it did." Disclosure requirements are allowed because the Court sees them as only *burdening* speech, not *preventing* it. Simpson suggests that readers should "recognize, as Justice Thomas did [in dissent], that if we take First Amendment rights seriously, *all* speakers must be protected from what amounts to state-sponsored harassment and intimidation."

Next we move to *McDonald v. Chicago*, the sort of case that was expected to reach the Court soon after *D.C. v. Heller*, in 2008, recognized that the Second Amendment guaranteed an individual right. In "The Tell-Tale Privileges or Immunities Clause," Alan Gura (who argued both *Heller* and *McDonald*), Josh Blackman, and I discuss the Court's reluctance—except for a significant concurrence by Justice Thomas—to use the Fourteenth Amendment's Privileges or Immunities Clause, rather than the Due Process Clause, as the textual vehicle for applying the right to keep and bear arms to the states. Despite the fact that the Court granted a cert petition specifically presenting the question of how exactly to "incorporate" the Second Amendment, the Court—and in particular Justice Antonin Scalia—seemed unwilling to seriously entertain the Privileges or Immunities issue. We argue that Justice Thomas—the necessary fifth vote for extending the right to the states—correctly found that the Privileges or Immunities Clause provides a method for extending rights "that is more faithful to the Fourteenth Amendment's text and history." There is extensive evidence, moreover, that the clause was understood to apply both enumerated and unenumerated rights. Justice Thomas's concurrence thus opens the door to future litigation regarding constitutional rights, such as the right to earn an honest living, that have long been disparaged.

In a trio of cases this term the Court rolled back one of the worst sources of federal overcriminalization and due process violations, the "honest services fraud" statute. The defendant in the leading

case, Jeffrey Skilling, was the CEO of Enron. Like everyone else, however, he deserved a clear explanation of what the law prohibits; some of the worst abuses of tyrannical governments have occurred via vague criminal laws that can be stretched to encompass nearly any act or omission. Here, the honest services fraud statute failed to adequately describe just what conduct was prohibited. Thus, except for “core” prohibitions on bribery and kickbacks, the Court found it to be void for vagueness. As Harvey Silverglate and Monica Shah explain, the Court did not go nearly far enough in clarifying the void for vagueness doctrine and curbing federal abuses of the criminal law. Not only does vagueness infect the undisturbed “core” of the statute, but federal prosecutors are still free to “go after state and local politicians—whether under ‘honest services’ or extortion or other such statutes—for engaging in practices that are *not* criminalized under state and municipal law.” Even post-*Skilling*, the problem remains: “As long as federal prosecutors and courts attempt to superimpose federal standards on local political culture, there is going to be a problem . . . that traps even the well-intentioned state or local politician.”

Continuing the theme of expanding government power—and increasing challenges to it (for example, the ObamaCare lawsuits)—the Supreme Court in *United States v. Comstock* made it a little more difficult to limit the scope of federal authority. As George Mason law professor and Cato adjunct scholar Ilya Somin recounts in “Taking Stock of *Comstock*: The Necessary and Proper Clause and the Limits of Federal Power,” the clause was never intended to be a free-standing expansion of federal power. It was instead intended to be tied to—to “carr[y] into execution”—one of Congress’s enumerated powers as listed in Article I, Section 8 of the Constitution. Somin argues that the Court seems to have forgotten this vital source for *limiting* federal power in *Comstock*, where the issue was the power granted to the Bureau of Prisons to detain “sexually dangerous” federal prisoners after they have served their full sentences. The Court upheld the law as being “necessary and proper” to implement Congress’s power to operate a penal system and to act as custodian of its prisoners. Somin illustrates how this reasoning threatens to stretch the enumeration of powers to the breaking point in that there is no independent enumerated power for the federal government to operate a penal system or act as custodian of its prisoners. Instead,

the Court creates a chain of connected powers that gives Congress the power ultimately “to enact any law that might be connected to an ancillary power that is in turn somehow connected to an enumerated power, even if the challenged law does not actually do anything to enforce any enumerated power.”

We next examine the constitutionality of a vital part of the Sarbanes-Oxley Act, which has cost the economy an estimated \$1.4 trillion and caused many businesses to scratch their heads at the myriad rules and regulations now imposed on them. At the administrative center of Sarbanes-Oxley is the Public Company Accounting Oversight Board—and the PCAOB (pronounced “peek-a-boo”) was in turn at the center of *Free Enterprise Fund v. PCAOB*. Hans Bader, a senior attorney at the Competitive Enterprise Institute and one of the lawyers on the case, explains the infirmities of the Court’s half-a-loaf decision, which nevertheless struck down the PCAOB’s two layers of protection from executive oversight as violating the separation of powers. The Court refused to sustain an Appointments Clause challenge, however, even though it is the Securities and Exchange Commission as a whole that appoints PCAOB members rather than—as the Constitution demands—either the president or a “head of department” (here, the SEC chairman). Bader is critical both of the denial of the Appointments Clause claim and the Court’s preservation of Sarbanes-Oxley despite its constitutional infirmities and lack of severability clause. He explains how this sort of “judicial minimalism” demonstrates at least that the Roberts Court is not a “pro-business” entity as many have claimed. Instead, the Court seemed to bend over backwards to protect the anti-business Sarbanes-Oxley Act by “engaging in a radical judicial surgery that retroactively changed the relationship between the SEC and the PCAOB.”

Further, as Congress enacts another round of financial regulations, University of Illinois law professor Larry E. Ribstein says that the case of *Jones v. Harris Associates* should serve as “a warning against the dangers of federal regulation of firms’ structure and governance.” Faced with a circuit split and two prominent intra-circuit views about the nature of mutual funds, a unanimous Court rejected Seventh Circuit Court of Appeals Judge Frank Easterbrook’s rule for evaluating the appropriateness of compensation of investment advisers under the Investment Company Act (without siding with

dissenting Seventh Circuit Judge Richard Posner either). Ribstein argues that while the ruling in *Jones* is not ideal, “the Court cannot do much more” without rewriting the law. As Justice Samuel Alito commented at the end of his opinion, “this really is a matter for Congress, not the courts.”

Professor Michael Risch, newly of Villanova Law School, then reviews *Biksi v. Kappos*, which was supposed to be the patent case of the century but ultimately tread warily in this contentious area (to the relief of many practitioners). When the Federal Circuit Court of Appeals rejected a patent application based solely on the nature of the “invention” at issue—a method for hedging risk in commodities trading—the U.S. Patent and Trademark Office sought to force the Supreme Court to consider the “patentable subject matter” question. Although several Supreme Court decisions have made clear that abstract ideas, natural phenomena, and products of nature are not patentable subject matter, “it seems that no one can figure out what constitutes abstract ideas, natural phenomena, or products of nature.” When the Court unanimously voted to deny the patent application here because the “concept of hedging is no more than an abstract idea,” most considered the opinion a non-event. Risch, however, regards *Bilski* as “remarkably important.” He provides analysis of the legal decision and reflects on “*Bilski*’s effect on business research and development,” cautiously offering good news for those businesses and individuals seeking patents on software and business methods.

In our final article about the 2009–10 term, Judd Stone and Joshua Wright survey competing interpretations of the Court’s intriguing antitrust decision, *American Needle v. NFL*. In this case, a clothing manufacturer alleged that the exclusive license the NFL granted to Reebok to manufacture team-branded headwear was an illegal conspiracy to restrain trade. For months, antitrust observers and football fans alike awaited the Supreme Court’s decision—inspiring an article even from the quarterback of the defending champion New Orleans Saints. Yet the implications of the decision, which effectively narrowed the scope of “intra-enterprise immunity” to firms with a complete “unity of interests,” are unclear. While some depict the decision as a departure from the last several decades of antitrust law, Stone and Wright explain why this interpretation is meritless and discuss the practical impact of the Court’s holding.

They argue that the Court's antitrust jurisprudence has broadly embraced rules that are both relatively easy to administer and conscious of the error costs of deterring pro-competitive conduct. Intra-enterprise immunity potentially provided such a "filter" that enabled judges to dismiss a non-trivial subset of meritless claims prior to costly discovery. Rather than marking a drastic change in antitrust jurisprudence, *American Needle* should be viewed as the Supreme Court's replacement of an unreliable screening mechanism with a more cost-effective alternative.

Our volume concludes with a look ahead to October Term 2010—and what we can expect from Justice Kagan—by appellate specialist and longtime Cato contributor Erik S. Jaffe. While we have yet to see as many blockbuster constitutional cases as we did last term, we do look forward to: two big free speech challenges, one over a statute prohibiting the sale of violent video games to minors, another the offensive protesting of a fallen soldier's funeral; an Establishment Clause lawsuit against Arizona's tax credit for private tuition funds (an alternative to educational voucher programs); federal preemption cases involving safety standards for seatbelts, an Arizona statute regarding the hiring of illegal aliens, and the forbidding of class-arbitration waivers as unconscionable components of arbitration agreements; important ERISA and copyright cases; a case examining privacy concerns attending the federal government's background checks for contractors; and a criminal-procedure dispute regarding access to DNA testing that may support a claim of innocence. With some interesting cases still seeking Supreme Court review, it should be a good and varied year.

* * *

This is the third volume of the *Cato Supreme Court Review* that I have edited—and so I have reached the median tenure for someone in my position. (So far, so good!) While the learning curve keeps flattening, the amount of work has increased in parallel with the constitutional issues raised by various government actions. There are thus many people to thank for their contributions to this endeavor. I first need to thank our authors, without whom there obviously would not be anything to edit or read. My gratitude also goes to my colleagues at Cato's Center for Constitutional Studies, Bob Levy, Tim Lynch, and David Rittgers, who continue to provide valuable counsel in areas of law with which I'm less familiar. Wally Olson

has also recently joined our group, and I look forward to exploring civil justice issues with him. A big thanks to research assistant Jonathan Blanks for making the trains run on time and keeping me honest, as well as to legal associates Trevor Burrus, Nicholas Mosvick, Evan Turgeon, and Caitlyn Walsh, and legal interns Jennifer Fry and Jonathan Wood, for doing the more thankless (except here) tasks. Neither the *Review* nor our Constitution Day symposium would be the successes they are without them. Finally, thanks to Roger Pilon, the ageless founder of this now well-established journal—and of Cato’s legal policy shop—who gave me the first job that I’ve managed to stay in for more than two years (a lifetime in Washington).

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 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 power. In this uncertain time of individual mandates, endless “stimulus,” financial “reform,” and general government overreach, it is more important than ever to remember our proud roots in the Enlightenment tradition.

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

