

Introduction

*Ilya Shapiro**

This is the 11th 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 ends 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. This is not a typical law review, after all, whose prolix submissions use more space for pedantic and abstruse footnotes than for article text. Instead, it's 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 law and politics; just because something is good policy doesn't mean it's constitutional, 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.

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Despite its incredible and unprecedented headlines, October Term 2011 produced a striking amount of unanimity and near-unanimity, which many observers attribute to Chief Justice John Roberts's long-expressed desire for the Court to speak more with one voice. Of the 75 cases with decisions on the merits—65 after argument and 10 summary reversals—33 had no dissenters (44 percent, a bit down from last year) and 8 had only one dissenter (11 percent).¹ That means that more than half of the opinions went 8–1 or better, which is quite high historically but in line with last year's remarkable 61 percent and the previous year's 56 percent. While some commentators accuse the Court of conservative or pro-business biases—which don't mean the same thing, and alas differ even more from a pro-market or pro-liberty skew—such aspersions are belied when so many cases aren't even close.

Indeed, only 15 cases went 5–4 (20 percent, exactly the same as last year)—including only 3 that we judged interesting or important enough to cover in this volume—but that included the biggest of them all, *National Federation of Independent Business v. Sebelius*. Equally interesting is that the total number of opinions (majority, concurring, dissenting) was historically low—160—and even the average of 2.13 opinions per case was down slightly from last year and down from an average of 2.37 over the preceding decade. Neither Chief Justice Roberts nor Justice Elena Kagan wrote a solo dissent—and indeed neither has yet issued one in their entire careers on the Court (seven and two terms, respectively).

Unsurprisingly, Anthony Kennedy was again the justice most often on the winning side of a case (93 percent), just ahead of the chief justice (92 percent). Even more notably, Justice Kennedy was in the majority in 12 of the 15 5–4 decisions—five times with the “conservatives” in the ten cases that divided on “ideological” lines, five with the “liberals,” and twice in “unconventional” alignments. The justices thought to be the most ideologically committed—Antonin Scalia, Ruth Bader Ginsburg, and Clarence Thomas—authored no 5–4 decisions.

¹ These figures include four 8–0 cases. All statistics taken from SCOTUSblog, Final October Term 2011 Stat Pack and Summary Memo, available at <http://www.scotusblog.com/2012/06/final-october-term-2011-stat-pack-and-summary-memo> (Jun. 30, 2011).

Ruth Bader Ginsburg repeated as the justice most likely to dissent (31 percent of all cases and 55 percent of cases that had dissenters). Antonin Scalia and Clarence Thomas took over from John Roberts and Samuel Alito as the justices most likely to agree: Justices Scalia and Thomas voted together, at least in judgment, in 70 of 75 merits cases (93 percent), while Chief Justice Roberts and Justice Alito were together at least in part in 67 of 74 cases (91 percent). Justices Scalia and Ginsburg—notably good friends—voted together less than anyone else (in only 42 of 75 cases, or 56 percent) save Justices Thomas and Ginsburg (same). What’s more, three of the four pairings who were least likely to agree included Justice Ginsburg.

Looking beyond the statistics, this was the second term for Justice Kagan. Kagan only recused herself from 4 cases this term—down from 26 last term—and so the effects of her year as solicitor general have essentially run their course. Not unexpectedly for a sophomore term, Justice Kagan tied with Justice Kennedy for the fewest total opinions (11), although 9 of Kennedy’s were for a majority of the Court, more than anyone else. Still, Kagan went from the least-frequent questioner (save the always-silent Thomas) in her first year to the middle of the pack now. That rate will likely increase, though perhaps not matching Justice Sonia Sotomayor, who in her third year was second only to the ebullient Justice Scalia in number of questions asked. Agree with her or not, Justice Kagan is quickly gaining a reputation as a quick wit and a stylish writer.²

Before turning to the *Review*, I would be remiss if I didn’t say a few specific words about the case decided this term that occupied about two-thirds of my time over the last two and a half years. I refer of course to *NFIB v. Sebelius*, which will in time likely be known as the *Health Care Cases*—a ruling that has already gained as much ignominy among those who believe that the Constitution means what it says as the *Slaughter House Cases*. (It will also spark similar debate about whether “health care” should be one word or two, hyphenated or not.) This volume contains two articles—plus a foreword—that analyze what the decision means for constitutional theory and practice, so let me just say that I never thought I could feel so empty

² See, e.g., @ishapiro, Tweet (Jun. 28, 2012, 8:51 a.m. EST), <https://twitter.com/ishapiro/status/218325778759290881> (noting author’s encounter with Justice Kagan in Supreme Court cafeteria, which included a conversation supporting the point made in the sentence to which this footnote refers).

(still) after having Court majorities offer such ringing endorsements of my theories (and not mine alone) on the Commerce, Necessary and Proper, and Spending Clauses.

Having filed 10 *amicus* briefs (4 in the Supreme Court), written dozens of articles and blogposts, and engaged in more than 100 debates and other public events regarding “the constitutionality of Obamacare,” I thought I knew what to expect. Indeed, in my very first writing on the litigation, I predicted that the Court would “either strike down the reform or find a technical way to avoid ruling on the constitutional merits and thus allow the law to stand.”³ I was nevertheless gobsmacked as I sat in the courtroom the morning of June 28, 2012, and heard the chief justice hand the government a bottom-line victory while neither expanding federal regulatory authority nor dismissing the case on standing, ripeness, Anti-Injunction Act, or some other technical ground.

What had I (and everyone else) missed? The possibility that the case would be decided based on something other than competing legal theories. That is, eight justices decided the *Health Care Cases* on the law—four finding that the Constitution limits federal power, four that constitutional structure must yield to “Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy”⁴—and one had other concerns on his mind. Sure, it’s frustrating that the chief justice changed his vote after being poised to strike down the law—we have no reason to distrust CBS’s Jan Crawford, who broke the news of the Court’s astonishing leaks—but jurists are allowed to do that and Court watchers are used to losing close ones, even (especially) in big cases. What bothers me instead, having combed through Roberts’s taxing-power section numerous times, is that his opinion on this issue simply doesn’t compute. (Even Justice Ginsburg, who expressed skepticism about the taxing-power justification during oral arguments, was quizzical about Roberts’s theory in orally summarizing her partial dissent on behalf of the no-limits-on-federal-power bloc.)

The regrettable inference to draw, the most likely explanation for what transpired, is that for reasons of politics or reputation (his own

³ Ilya Shapiro, *State Suits against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 *Health Affairs* 1229, 1232 (June 2010).

⁴ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2629 (2012) (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part).

or the Court's), Roberts decided that he needed to uphold the law while not expanding federal power. That's quite a conundrum, and it's why we're left with a ruling hinging on a head-scratching tax on inactivity—a rewritten piece of legislation no Congress would ever have passed—that has never been seen before. I've taken to calling it Obamacare's "unicorn tax," a creature of no known constitutional pedigree that will never be seen again.

The sad thing about this entire episode is that the chief justice didn't have to do what he did to "save the Court." For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional.⁵ For another, he has only damaged his own reputation by making this move after months of warnings from pundits and politicians (including President Obama) that striking down the law would be "conservative judicial activism" that would sully the Court—regardless of whether that pressure had anything to do with his ultimate decision (which I don't think it did). Perhaps most importantly, though, the whole reason we care about the Court's maintaining its independence and integrity is so it can make the tough calls in the controversial cases while letting the political chips fall where they may. Had the Court struck down Obamacare, it would have "simply" been a very high-profile legal ruling, just the sort of thing for which the Court needs all that accrued institutional respect and gravitas. Instead, we have a political or otherwise strategic decision dressed up in legal robes, judicially enacting a law Congress did not pass. But what was Roberts saving the Court for if not the sort of big once-in-a-generation case that *NFIB* exemplified? In short, John Roberts, in refraining from making that hard balls-and-strikes call he discussed at his confirmation hearings, has shown why we don't want our judges playing politics.

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Turning to the *Review*, the volume begins, as always, with the text of the previous year's B. Kenneth Simon Lecture in Constitutional

⁵ Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, Gallup Politics, Feb. 27, 2012, <http://www.gallup.com/poll/152969/americans-divided-repeal-2010-healthcare-law.aspx> (summarizing results of Feb. 20–21 USA Today / Gallup poll).

Thought, which in 2011 was delivered by Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. Co-authored with his former clerk, Eric Nguyen, Kozinski's entertaining and enlightening speech asks, "Has Technology Killed the Fourth Amendment?" Taking issue with the conventional wisdom that "technology has made us care less and less about [privacy]," Kozinski makes three counterintuitive arguments: (1) the technology that erodes privacy often escapes criticism only because not enough people are aware of it; (2) we expect technology to *increase* our privacy more than is commonly recognized; and (3) we can certainly protect our privacy in this brave new technological world. The "reasonable expectation of privacy" still very much exists in the age of GPS, Facebook, and smartphones, but "we must do our share by becoming aware of the privacy implications of many of the things we do and starting to impose a measure of discipline on ourselves and those around us."

We move then to the 2011–2012 term, with two articles on the *Health Care Cases*—which consumed most of the media coverage and public debate about the Court and the Constitution this past year. Baker & Hostetler's David Rivkin, Lee Casey, and Andrew Grossman, who represented the plaintiffs in the lower courts, offer an admirably dispassionate assessment of the Supreme Court's work. Labeling John Roberts's opinion an exercise in "fig-leaf federalism," the authors are less than sanguine about the ruling despite the Court's adoption of the very good Commerce, Necessary and Proper, and Spending Clause arguments the challengers advocated. "Despite its strongest statement yet on the limits of Congress's power to regulate interstate commerce, 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." Only time will tell if *NFIB* is the start of a judicial movement toward real limits on government power or merely a finely articulated portage on the inevitable road to Leviathan.

James Blumstein of Vanderbilt University Law School then focuses on what is probably the best part of *NFIB*, the Court's finding—for the first time since the New Deal—that a piece of legislation exceeded Congress's power under the Spending Clause. It is an understatement to say that the 26 state plaintiffs' claim that the conditions attached to Obamacare's Medicaid provisions—accept these new budgetary and regulatory burdens or lose all (not just new) Medicaid

funds—received far less attention than the debate over the individual mandate. Nevertheless, as Blumstein says to begin his essay, “*NFIB* went a long way toward clarifying how the federal-state relationship should be conceptualized and establishing that the power of the federal government’s spending power is circumscribed in a judicially enforceable manner when that government substantially and unforeseeably modifies the terms and conditions of a major preexisting and ongoing spending program.” Blumstein commends the Court’s application of contract-law principles in finding, by a 7–2 margin, that Obamacare unconstitutionally coerces the states.

Next we have two articles on *Sackett v. Environmental Protection Agency*, a case that was the term’s “sleeper hit” and one central to an important part of *Cato*’s mission: protection of private property rights. Pacific Legal Foundation’s Damien Schiff, who argued *Sackett* before the Court—winning a unanimous ruling—details the EPA’s history of abusing administrative compliance orders, against which property owners previously had no legal recourse. The root of the problem is that “the government routinely finds regulable ‘wetlands’ on land that to the layman appears totally dry.” Indeed, the Supreme Court had already found twice in the last decade that the EPA and Army Corps of Engineers overextended their authority under the Clean Water Act. Fortunately, the Court recognized at least that people subject to this oft-abused power should be able to challenge it at the front end of the process rather than either accruing incredible fines (up to \$75,000 daily) or abandoning plans to build on their property. “Now, although a landowner may not wish to bring a lawsuit, the mere fact that he *can* bring one will . . . have a salutary effect on the EPA’s enforcement practice.”

Jonathan Adler of Case Western Reserve University Law School—as well as the *Volokh Conspiracy* and the *Cato Supreme Court Review* editorial board—builds on Schiff’s contribution with a broader analysis of “Wetlands, Property Rights, and the Due Process Deficit in Environmental Law.” How did we get to the point where the CWA has become a blank check for federal power far beyond the legislation’s original goal of eliminating water pollution, and what can be done to reverse this trend? More fundamentally, why has environmental law been seen as largely exempt from constitutional considerations? “Progressives in particular have recognized that we need not sacrifice fundamental liberties in order to keep Americans safe from

terrorist threats,” Adler comments, “[y]et private landowners and corporations accused of environmental wrongs are no less worthy of due process protections than alleged terrorists.”

Staying in the realm of property rights, Jim Huffman, former dean of Lewis & Clark Law School (and also a *Cato Supreme Court Review* editorial board member), examines *PPL Montana v. Montana*. This little-known case resolved the legal title to the lands adjoining and submerged under certain rivers in Montana—a seemingly arcane issue but one with serious consequences for hydroelectric, transportation, industrial, agricultural, and recreational facilities. Indeed, an array of interest groups—including Cato—thought the case important enough to file *amicus* briefs. The Montana Supreme Court had ruled that the State of Montana had title to the lands (and was thus owed millions of dollars in back rent). “Given that the state had made no claim to these lands for over a century after statehood, and that it had participated in federal licensing proceedings for hydropower facilities located on the lands in dispute,” Huffman observes, “PPL [the energy company challenging the ruling] appeared to have the better case.” The U.S. Supreme Court agreed unanimously with that assessment.

Turning to a case that in any other year would have been everyone’s focus, NYU Law School’s Rick Hills tackles *Arizona v. United States*, the culmination of the federal government’s attempt to stop Arizona’s S.B. 1070. Whether S.B. 1070 is in fact an “immigration” law is a large part of what the Court considered, because the federal government has plenary power over immigration even as states have primacy over criminal law, business regulation, and other aspects of their residents’ health and safety. What’s more, immigration is an area where, as Hills documents, the federal and state governments often engage in “cooperative federalism,” with the latter helping the former on enforcement. The Court ultimately struck down three of the four provisions that came before it—the rest of the law (most of it) has been in effect since July 2010—which Hills sees as an unfortunate victory for unitary executive discretion. “So long as the presidential monopoly on enforcement of federal law is confined to the narrow category of immigration law,” however, “the loss for both federalism and congressional oversight is likely going to be modest, and the gains for aliens’ fair treatment substantial.”

We next have two articles on new developments in criminal procedure doctrine. First, my colleague Jim Harper, Cato's director of information policy studies, took his J.D. out of mothballs to write about *United States v. Jones*. In *Jones*, the Court unanimously—albeit for several reasons that split the justices in an interesting way—held that police cannot pursue long-term GPS-tracking of suspects without a warrant. Harper, who also wrote Cato's *amicus* brief in the case, says that "*Jones* is a potential watershed because it has put Fourth Amendment law into a state of flux." He describes how *Jones* opened the door to a reconsideration of the "reasonable expectation of privacy" standard the Court has been using since 1967. Rather than putting the onus on individuals to defend the reasonableness of their privacy expectations, it is the government that should have to justify its actions. "Though privacy is an important touchstone, protecting privacy should not be the Court's goal," Harper concludes, arguing instead that "the Court should enforce the legal guarantee against unreasonable searches and seizures."

Wesley Oliver, newly of Duquesne University Law School, then examines this term's fascinating gloss on the Sixth Amendment guarantee of a right to counsel. Two cases, *Missouri v. Frye* and *Lafler v. Cooper*, dealt with the scope of that right in the context of plea bargaining. In a pair of 5–4 opinions by Justice Kennedy that split along "ideological" lines (with the "liberals" prevailing here), the Court found that the defendants—one whose counsel never told him of a proposed bargain and another who was convicted after rejecting a plea deal on counsel's terrible advice—were entitled to constitutional relief. Oliver agrees with these rulings but doesn't dispute the analysis and warnings that Justice Scalia presents in dissent regarding the Court's having opened here a new field of practice: plea-bargaining law. On balance, however, it's "hard to see how a system that imposes the sorts of risks Scalia describes—and creates an alternative criminal justice system where defendants are punished quite differently—should exist without judicial oversight."

If *Sackett* was the term's sleeper case, *Fox v. Federal Communications Commission*—regarding the regulation and punishment of so-called fleeting obscenities on broadcast television—was the bust. Instead of reaching the obvious First Amendment question that the Court left unanswered when it upheld the FCC's

policy on administrative law grounds in 2009, the justices unanimously struck down that policy as applied in this instance on the narrow ground that the broadcasters had not received sufficient notice. In other words, the case was still important, but the Court ultimately declined to address the fully briefed arguments regarding a decades-old indecency doctrine that seems increasingly outdated. John Elwood of Vinson & Elkins, joined by his associates Jeremy Marwell and Eric White, gamely review the incoherent state of that doctrine—which treats broadcasters differently from cable, DVD, Internet, and every other entertainment and communications medium—and try to divine why a Court that seemed so interested in the First Amendment at oral argument backed away in the end.

Addressing a different aspect of the First Amendment, Notre Dame law professor Richard Garnett (also on this journal's editorial board) and John Robinson, now a Harvard Law School student—no doubt after leveraging his co-authorship on this article—take up *Hosanna-Tabor v. Equal Employment Opportunity Commission*. This case involved the so-called ministerial exception, “a judicial doctrine that constrains the force of anti-discrimination laws in employment disputes between religious institutions and their ‘ministerial’ employees.” The Court ruled unanimously against the government's argument that a recently fired parochial-school teacher did not qualify as a “minister” and, moreover, that such an exception isn't constitutionally required. But far beyond explaining and analyzing that surely correct ruling, Garnett and Robinson place the case in the larger context of the freedoms of religion and association—and how these First Amendment rights check government power and reinforce the Constitution's respect for civil society.

Moving to yet another aspect of the First Amendment, James Young of the National Right to Work Legal Defense Foundation reviews the case he argued this term, *Knox v. Service Employees International Union*. *Knox* challenged the collection of dues under an “agency shop” or so-called “fair share” unionization scheme. Under this scheme, unions can charge dues to nonmembers, but only to the extent these funds support collective bargaining—on the theory that even nonmembers benefit from such union activity, and would otherwise free-ride on those efforts. In *Knox*, however, a California union imposed a special assessment to fund political activities without bothering to notify, let alone seek consent from, the nonmembers.

The Court held that this practice violated those workers' speech and associational rights and required future such schemes to function as "opt-in" rather than "opt-out" programs. *Knox* could thus herald the end of forced-unionism schemes altogether, which Young says would "eliminate a state-provided political advantage that has been given to one preferred class of political actors [public-sector unions]: the ability to extract political contributions from individuals who—while refusing to associate with them—may opt out of inertia or inadvertence fail affirmatively to object to those exactions."

In our final article about the 2011–2012 term, Tulane law professor Elizabeth Townsend Gard uses the term's two big intellectual property cases, *Golan v. Holder* (copyright) and *Mayo v. Prometheus* (patent), as vehicles for examining the scope of First Amendment protections for artists and inventors. Townsend Gard "discusses how each case directly sidesteps or completely ignores" those issues, and is especially kind in her treatment of Cato's *amicus* briefs.⁶ Alas, the Court didn't engage the arguments Cato made regarding the scope of federal authority over either international copyright agreements (*Golan*) or the freedom of thought with respect to medical processes (*Mayo*). "In many ways," Townsend Gard explains, "the two decisions demonstrate the Court's uneasiness with intellectual property's commingling with the First Amendment."

Our volume concludes with a look ahead to October Term 2012 by Kannon Shanmugam—who joined Williams & Connolly after a stellar tenure (and many Supreme Court arguments) in the solicitor general's office—and James McDonald, who joined the firm after clerking for Chief Justice Roberts. The Court's docket as of this writing is a bit sparse but not without heft by any means. Indeed, were it not for this past term's *Obamacare* and *S.B. 1070* cases, OT12 would likely be considered the term of the decade. Already in its first two sittings, the Court will hear important cases on international law (*Kiobel v. Royal Dutch Petroleum*, which was already argued and then set for re-argument), property rights (*Arkansas Game & Fish Commission v. United States*), racial preferences in higher education (*Fisher v.*

⁶ Indeed, her explicitly Cato-centric analysis made it easy for us to accept what has now become the first unsolicited article we have ever published in these pages. Damien Schiff's *Sackett* piece, described above, would soon become the second—although I already knew Damien and was quite familiar with his and PLF's work, which was not the case with Prof. Townsend Gard.

University of Texas at Austin), and the Fourth Amendment (*Bailey v. United States* and *Florida v. Jardines*), as well as the follow-up to the class action blockbuster from OT10, *Wal-Mart v. Dukes* (*Comcast v. Behrend*). Cato has filed briefs in all of these cases, as well as in several other pending *certiorari* petitions that, if granted, would become high-profile additions: Challenges to Section 5 of the Voting Rights Act (*Nix v. Holder* and *Shelby County v. Holder*) and the scope of the treaty power (*Bond v. United States*). And then there are the multiple looming cases relating to gay marriage and various provisions of the Defense of Marriage Act. In short, if you thought that you were getting a breather this year, I'm sorry to disappoint you.

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This is the fifth volume of the *Cato Supreme Court Review* that I have edited, which means that I've been at the helm longer than any of my predecessors and for nearly half of the journal's existence. While certain tasks become easier with repetition, other challenges have grown in parallel with the plethora of constitutional issues raised by various government actions. There are thus many people responsible for this endeavor. I first need to thank our authors, without whom—and without whose adherence to our demanding deadlines—there would not be anything to edit or read. My gratitude also goes to my colleagues at Cato's Center for Constitutional Studies, Trevor Burrus, Bob Levy, Tim Lynch, and Walter Olson, who continue to provide valuable counsel and editing time in areas of law with which I'm less familiar. Then there's my incomparable research assistant, Jonathan Blanks, who makes sure that the trains run on time and watches my blind spots. Perhaps most importantly, Jon kept track of this volume's outgoing/incoming legal associates Sophie Cole, Carl DeNigris, Matthew Gilliam, Kathleen Hunker, and David Scott—and legal interns Peter Biberstein, Matthew Cavedon, Byron Crowe, and Ryan Mulvey—who in turn performed our more thankless tasks without complaint. Neither the *Review* nor our Constitution Day symposium would be what they are without them.

Finally, thanks to Roger Pilon, the founder of Cato's Center for Constitutional Studies, who had the foresight to start this journal. I will always be grateful for the opportunities he and Cato have given

me, sending my life in a much different direction than had I remained on the Big Law ladder.

I reiterate our hope that this collection of essays will secure and advance 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 understand that the Constitution reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against the abuse of government power. In these uncertain times when both the legal and political processes seem unable to rein in the (largely unconstitutional) growth of government, it is more important than ever to remember our proud roots in the Enlightenment tradition.

We hope you enjoy this 11th volume of the *Cato Supreme Court Review*.