Introduction

*Ilya Shapiro**

This is the tenth 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 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 even Chief Justice John Roberts, who this past summer questioned law reviews' utility and relevance.[1]

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 (and 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

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

[1] Chief Justice John G. Roberts, Remarks at the Fourth Circuit Court of Appeals Conference (Jun. 25, 2011) (video available at http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/). I happen to agree with this critique generally but, of course, don't consider our *Review* to be in the class of publications the Chief Justice was criticizing: the traditional law-school-based, student-run academic journals.

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.

* * *

October Term 2010 produced a striking amount of unanimity and near-unanimity, a phenomenon possibly related to the relatively low-key nature of the term but also perhaps to Chief Justice Roberts's long-expressed desire for the Court to speak with more of one voice. Of the 80 cases with decisions on the merits—75 after argument and five summary reversals—38 had no dissenters (48 percent, about the same as last year), 10 had only one dissenter (13 percent), and 12 more had but two (15 percent). That means that three-quarters of the opinions went 7-2 or better, which is higher than any term in recent memory (OT09 was the previous high at 71 percent, but OT08 was 54 percent).[2] While some commentators tried to create controversy by accusing the Court's ''conservatives'' of a pro-business bias, such entreaties fell flat given that so many allegedly anti-little-guy cases (including the main holding of *Wal-Mart v. Dukes*) were unanimously decided.

Indeed, only 16 cases went 5-4 (20 percent, about the same as last year), but of course these included most of the highest-profile ones like the Grand Canyon State trio of *Arizona Christian School Tuition Organization v. Winn, Chamber of Commerce v. Whiting*, and *Arizona Free Enterprise v. Bennett*. Equally interestingly, the total number of dissenting votes was notably low, with an average decision producing only 1.34 justices in dissent, about the same as last year but down from 1.70 over the preceding decade. Neither Chief Justice Roberts nor Justice Elena Kagan wrote a solo dissent—nor, curiously, any concurrences—and after six full terms on the Court, the Chief Justice has still never been on the short end of an 8-1 (or 7-1) ruling.

Justice Anthony Kennedy was, unsurprisingly, the justice most often on the winning side of a case (94 percent), just ahead of the Chief Justice (91 percent). Even more notably, Kennedy was in the

[2] This includes five 6-2 cases, four 7-1 cases, and 18 8-0 cases. All statistics taken from SCOTUSblog, Stat Pack for October Term 2010, available at http://www.scotusblog.com/2011/06/final-october-term-2010-stat-pack-available (Jun. 27, 2011).

majority in 14 of the 16 5-4 decisions—all those that divided on ''ideological'' lines (ten times with the ''conservatives,'' four with the ''liberals,'' but none in ''unconventional'' alignments). Justice Ruth Bader Ginsburg took over from retired Justice John Paul Stevens as most likely to dissent (26 percent of all cases and 50 percent of cases with dissenters). The justices most likely to agree were the pairs most recently appointed, by Presidents George W. Bush and Barack Obama, respectively: The Chief Justice and Justice Samuel Alito voted together, at least in judgment, in 76 of 79 merits cases (96 percent), while Justices Sonia Sotomayor and Kagan were together at least in part in 47 of 50 cases (94 percent). Justices Ginsburg and Alito found themselves on opposite sides most often, voting together in only 50 of 80 cases (62.5 percent). What's more, the four pairings who were least likely to agree all include Justice Ginsburg.

Looking beyond the statistics, this was of course the first term for Justice Kagan. After a somewhat tumultuous confirmation process—the 37 votes against her were the most ever for a successful Democratic nominee—Kagan quickly settled in to the Court's routines. Not unexpectedly for a rookie justice—and one who was recused from 26 cases—Kagan wrote the fewest opinions of anyone, just seven for the majority (all in relatively low-profile cases) and three dissents. She also asked the fewest questions of any justice save, of course, the always-silent Justice Clarence Thomas. The most notable of her writings came on the last day of the term, when she issued—and read from the bench—the dissent for four justices in *Arizona Free Enterprise* (the matching-public-campaign-funds case). Accusing the petitioners of ''chutzpah,'' Kagan continued an unbroken line of left-wing support for all sorts of election campaign regulations. As Kagan further gains her judicial legs, we can expect more of the wit with which she approaches her work and, agree with the result or not, a clear and concise writing style.

Justice Sotomayor too, in her sophomore year, is starting to find her own voice. Not only did she ask the third-most number of questions (after Justices Antonin Scalia and Stephen Breyer), but she had the second-most number of concurrences (after Scalia). Clearly, she's not holding back like Justice Alito did his first couple of years. Perhaps showing her background as a prosecutor and district court judge, she wrote the Court's opinion in two Fourth Amendment cases, *Michigan v. Bryant* and *JDB v. North Carolina*, as well as the

dissents in three preemption cases, *Bruesewitz v. Wyeth, PLIVA v. Mensing*, and *Chamber of Commerce v. Whiting*. Curiously, Justice Sotomayor joined the ''conservative'' majority in *Sorrell v. IMS Health*, the prescription-related commercial speech case—one of the few times she and Kagan were on opposite sides.

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 2010 was delivered by Professor William Van Alstyne of William and Mary Law School. Having observed the four recent Supreme Court confirmation hearings, Van Alstyne analyzes ''Clashing Visions of the 'Living' Constitution'' to determine ''the proper scope of judicial review of constitutional questions.'' Reducing the multifarious theories on judicial review to two—''opportunists'' and ''obligationists''—Van Alstyne assails both liberals and conservatives to describe how our constitutional discourse has detoured from interpreting the text of our Founding document and, when necessary, amending it via Article V. ''My concern,'' he says, ''is that we may have gotten so accustomed to the 'exogenous' constitution that the amendment process has itself begun to recede as down a rabbit hole, as in *Alice in Wonderland*, and the country, frankly, is significantly less well off on that account.''

We move then to the 2010 term, with five articles on the constitutional provision that had the highest profile at the Court over the past year, the First Amendment. Temple University Law School's David Post, also a member of the *Cato Supreme Court Review*'s editorial board, provides a provocative essay on the ''violent videogames case,'' *Brown v. Entertainment Merchants Association*. In *Brown*, the Court struck down a California statute that prohibited the sale of so-called violent videogames to minors because it was overbroad and tried to remove a new type of speech from First Amendment protection. After on overview of the Court's convoluted obscenity jurisprudence, Post evaluates the four very different views on the case provided by Justice Scalia's majority opinion, Justice Alito's concurrence, and the respective dissents of Justices Thomas and Breyer. Pronouncing himself somewhat of an outsider to the field—he specializes in internet and intellectual property law, with which this case obviously overlaps—Post teases out the ''peculiarities'' and ''doctrinal oddities'' in our First Amendment doctrine. After trying to reconcile what often seems contradictory, he gives the Court ''two cheers'' for its ruling.

University of Kentucky law professor Paul Salamanca then examines the ''offensive funeral protest case,'' *Snyder v. Phelps*. In *Snyder*, the Court affirmed the lower court's ruling that the bizarre and often hurtful protesting techniques of a particular religious sect still constituted protected speech. Salamanca argues that the case was not particularly difficult doctrinally—even if the uniquely disturbing facts put pressure on the Court to reach the opposite result—especially once the Court found that the subject of the protests (homosexuality and America's wars) was a matter of public concern. That the demonstrations, which accorded with all municipal regulations, took place surrounding a private military funeral was simply of no moment for First Amendment purposes. ''The Court therefore deserves credit,'' Salamanca concludes, ''for adhering to previously recognized principles and for not constructing an artificial category to sustain an otherwise desirable result.'' Still, the decision was fairly ''minimalist'' and ''left it to future cases to clarify the law in the area between the categories of protected and unprotected speech.''

Professor Joel Gora of Brooklyn Law School, who has had a long involvement in campaign-finance litigation while in high-ranking positions with the ACLU and NYCLU, has contributed a detailed yet engaging piece on *Arizona Free Enterprise v. Bennett*. Known as the ''Arizona public financing case,'' *Arizona Free Enterprise* involved a challenge to that state's ''clean elections'' scheme, whereby qualifying candidates could choose to have their campaigns funded by the government, rather than relying on their own or contributed funds. The problem was that every dollar raised or spent by that candidate's opponent *or independent groups supporting that opponent* triggered an equal amount of public funding for the ''clean'' candidate. Such a program would seem to be foreclosed, however, by the Court's 2009 decision in *Davis v. FEC*, the Millionaire's Amendment case, and indeed that's how the Court ruled (by the same 5-4 margin). Gora notes that ''most 'triggers' are now presumptively unconstitutional, whether they result in more public funding or higher private-funding limits,'' but identifies a host of intriguing legal and political questions that remain open.

A less predictable First Amendment case was *Sorrell v. IMS Health*, wherein the Court grappled with its commercial speech doctrine in light of a Vermont statute—and, implicitly, several others like it—

that restricted the access of pharmaceutical companies to information about doctors' prescribing habits. (The companies use this information for marketing purposes, a practice known as ''detailing.'') The Washington Legal Foundation's chief counsel, Richard Samp, begins his treatment of *Sorrell* by noting a ''remarkable trend'' in First Amendment jurisprudence: conservative justices are now much more likely to strike down government speech restrictions than liberal ones—while these roles were largely reversed a few decades ago. And so it went here, as the Court struck down the Vermont speech regulations for being impermissibly viewpoint- and speaker-based—although, as I noted above, Justice Sotomayor joined the ''conservative'' majority (in one of only three cases where she and Justice Kagan differed). ''While conservatives appear to be contemplating expanded commercial speech rights,'' Samp concludes, ''liberals . . . appear ready to abolish the entire commercial speech doctrine.''

Next, in a case that ended up not quite reaching its central First Amendment issue, Tim Keller, who directs the Institute for Justice's Arizona chapter, covers *Arizona Christian Scholarship Trust Organization v. Winn*. IJ represented one of the parties here, in a long-running legal saga involving an Establishment Clause challenge to the tax credit Arizona gives to those who donate to specially created charities that provide scholarships to a wide variety of K-12 schools. The Court ultimately ruled 5-4 that the plaintiffs lacked standing because no state funds actually went to religious institutions. Keller's article weaves together personal perspectives, policy perspectives, and legal doctrine to contextualize this latest battle over school choice. While the larger war will continue in other arenas, Keller generally approves of the Court's disposition here—particularly Justice Kennedy's distinction between state subsidies and tax credits. To hold otherwise, after all, would be to concede that the government owns all income in the first instance but allows taxpayers to retain some of it. ''Fortunately,'' Keller concludes, ''the money in your wallet still belongs to you and not the government.''

From a First Amendment case that barely grazed the First Amendment, we go to a criminal law case that wasn't really about criminal law. *Bond v. United States* is your typical sordid tale of adultery, toxic chemicals, and federalism—or, as author John Eastman writes, ''Don't mess with the husband of someone who works in a chemical

lab!'' The unique feature here is that instead of being prosecuted for assault or attempted murder, the defendant—who used the aforementioned toxins to injure her husband's paramour (her own erstwhile best friend)—was brought up on federal charges of violating the law implementing an international chemical weapons treaty. The Supreme Court wisely and unanimously held that Mrs. Bond does indeed have standing to challenge the constitutionality of the statute under which she was convicted. That is, she can raise a Tenth Amendment challenge even though she is not a state—because, as Justice Kennedy describes at some length (in a passage that should hearten those challenging Obamacare, among others), federalism is ultimately a means of protecting individual liberty. Eastman, law professor and former dean at Chapman University, says the case is an opportunity ''for a further restoration of the principles of federalism that underlie our constitutional system.'' He also introduces a fascinating discussion about the scope of the treaty power that will likely heat up in future.

Cato's own David Rittgers makes his inaugural contribution to our house legal journal, writing about *Connick v. Thompson*. This case presents the unfortunate situation of a man who was wrongly convicted of murder and served 18 years in jail (14 on death row)—all due to prosecutorial misconduct. To add grievous insult to that nonremediable injury, the Supreme Court held 5-4 that John Thompson could not recover his jury-awarded $14 million dollars because the district attorney's office that framed him could not be liable for failing to train its prosecutors based solely on this one instance of not disclosing exculpatory evidence to defense counsel. Rittgers characterizes both the Court's ruling and the ''current regime of immunity for constitutional violations'' as an ''injustice'' resulting from the unfortunate convergence of a warped concept of prosecutorial immunity and a similarly flawed doctrine of municipal liability—which treats public officials' tortious actions differently than those of private entities. He suggests that legislative reform may be the best avenue by which to fix a criminal justice system that ''locks up not just too many people, but too often the wrong people.''

Orin Kerr of the George Washington University Law School presents a fascinating article on the law's development through the prism of two of this year's Fourth Amendment cases, *Davis v. United States* (which Kerr himself argued before the Court) and *Camreta v. Greene*.

Davis concerned the scope of the exclusionary rule in criminal cases, while *Camreta* involved standing and mootness issues in civil litigation. Kerr argues that both cases ''deal with the basic tension between the costs of Fourth Amendment remedies and the needs of law-developing litigation'' and finds a common theme: The Court is now ''more focused on limiting short-term remedial costs than the long-term needs of elaborating Fourth Amendment law.'' That is, the Court is marginally more concerned about getting a particular case right and not imposing the short-term social cost of freeing guilty people than setting administrable rules for the future or establishing robust protections for civil liberties. ''Such concerns may seem abstract,'' Kerr summarizes, ''But today's decisions on remedies will have a major impact on tomorrow's decisions about Fourth Amendment substance.''

Switching gears, the publisher of this august journal, Roger Pilon, ventures ''Into the Preemption Thicket Again,'' continuing a theme he started in these pages two years ago. Pilon's essay begins with an overview of ''preemption as federal supremacy'': Article I, Section 8 of the Constitution grants Congress certain limited powers that, under Article VI's Supreme Clause, trump state action to the contrary. ''To better protect liberty,'' Pilon explains, ''the Constitution institutes federalism, a system of dual sovereignty between the federal and state governments, sometimes pitting power against power, other times allowing overlapping power.'' The rub, of course, is identifying when it is that state law conflicts with federal law—particularly when it is alleged to have done so *implicitly* rather than *explicitly*. The Court grappled with that problem five times this term—in areas of law ranging from immigration to arbitration, drug labeling and vaccines to seatbelt design—but, according to Pilon, only solved it correctly three times. But ''even if the Court does 'get it right' in a preemption case,'' he observes, ''that does not mean, of course, that the decision necessarily secures or advances the liberty the Constitution was written, at bottom, to secure.''

Case Western's Jonathan Adler, another member of the *Review*'s editorial board and the third ''Volokh Conspirator'' in these pages (the others are Post and Kerr—while Randy Barnett and Ilya Somin have also contributed in recent years), takes a look at the term's ''global warming case.'' In *American Electric Power v. Connecticut*, a number of states, New York City, and three conservation organizations sued several electricity companies, alleging that the power

producers' greenhouse gas emissions constituted a public nuisance. While similar suits had been dismissed around the country, the Second Circuit allowed this case to proceed—until the Supreme Court unanimously reversed, on the narrow ground that Congress's environmental legislation (such as the Clean Air Act) ''displaced'' claims under the federal common law of nuisance. As Adler puts it, the Court rejected ''an ambitious effort to turn the federal common law of nuisance into a judicially administered environmental regulatory regime.'' While the Court's reasoning didn't go as far as Cato would have liked—we argued that the plaintiffs' claims constituted a non-justiciable political question asking courts to resolve competing economic, environmental, and ethical concerns—global warming defendants are safe unless Congress withdraws EPA authority over greenhouse gases. Because the question of the degree to which human influence on climate is desirable or acceptable—and what remedial measures are needed—lie ''far beyond the capability of common-law courts,'' Adler concludes, ''we have to leave climate change in the hands of the political process.''

In our final article about the 2010-11 term, McGuire Woods partner Andrew Trask examines *Wal-Mart v. Dukes*, the latest case that has driven left-wing activists to apoplexy over the Roberts Court's alleged pro-business bias. In *Dukes*, the Court rejected an attempt to certify a class of 1.5 million women because their alleged claims of sex discrimination failed the ''commonality'' prong of the applicable federal rule of civil procedure. That is, they failed to prove that Wal-Mart was engaging in some common practice that was harming all women. Dissenting from the Ninth Circuit ruling that the Court ended up reversing, Chief Judge Alex Kozinski—whose B. Kenneth Simon Lecture you'll get to read in these pages next year—remarked that the putative class members ''have little in common but their sex and this lawsuit.'' Trask, who literally wrote the book on class actions (*The Class Action Playbook*, with Brian Anderson), calls *Dukes* ''an important decision''—not least because of the size of the claimed class and large sums of money at issue—but predicts that it won't really change litigation strategy. ''All it has done is make the game of certification a little fiercer.''

Our volume concludes with a look ahead to October Term 2011 by former solicitor general Greg Garre, now head of Supreme Court practice at Latham & Watkins, and Roman Martinez, fresh off a

clerkship with Chief Justice Roberts and now a Latham associate. The Court's docket as of this writing already presents a more interesting mix of legal issues than we saw this past term, including broadcast indecency (the return of the ''fleeting expletives'' saga), the use of mandatory union fees on political activities, and religious institutions' ''ministerial exception'' to employment discrimination laws—and that's just the First Amendment docket. The Court will also take up cutting-edge criminal procedure questions involving warrantless GPS surveillance, jailhouse strip searches, and ineffective legal assistance relating to plea bargains, as well as its usual diet of regulatory preemption, sovereign immunity, arbitration, and intellectual property cases. There's even a quirky yet diplomatically significant case about whether judges can require the State Department to identify the birth country of someone born in Jerusalem to be Israel. And all that is before we even get to what Garre and Martinez call the ''elephant in the room,'' the constitutional challenges to the Patient Protection and Affordable Care Act (Obamacare). Indeed, the room contains a veritable herd of elephants, with cases involving affirmative action, gay marriage, and Arizona's S.B. 1070 all on the horizon. It could turn out to be the term of the century!

* * *

This is the fourth volume of the *Cato Supreme Court Review* that I have edited—matching the output of my longest-tenured predecessor. 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, Walter Olson, and David Rittgers, who continue to provide valuable counsel in areas of law with which I'm less 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 associates Trevor Burrus, Chaim Gordon, Paul Jossey, Anna Mackin, and Nicholas Mosvick, and to legal interns Matthew Carter, Mario Cerame, and A.K. Shauku, for doing the more thankless (except here) tasks. Neither

the *Review* nor our Constitution Day symposium would be what they are without them.

Finally, thanks to Roger Pilon, the indefatigable founder of Cato's legal policy shop and of this now well-established journal. I don't know how Roger envisioned the *Review*'s content or reputation in its tenth year—or indeed how likely he thought it would be that we'd reach this milestone—but I'd like to think that his decade-younger self would be pleased. (You can read his reflections in the foreword to this volume.) I was incredibly fortunate that Roger plucked me off the Big Law treadmill when he did—as he reminds me each time we hear the latest discouraging news about the legal market—and much appreciate the opportunities he and Cato have given me.

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 understood 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 it seems so difficult to rein in (largely unconstitutional) federal spending and reform our unsustainable entitlement programs, it is more important than ever to remember our proud roots in the Enlightenment tradition.

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