

Introduction

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This is the seventh volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the most recently completed Supreme Court term. 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. 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 100-page articles use more space for footnotes than article text. (I say this somewhat shamelessly, as the author of both the longest article in this volume and the one with by far the most footnotes.) 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 legal does not mean it's good policy, and vice versa. Similarly, certain decisions must necessarily be left to the political process: We aim to be governed by laws, not lawyers. 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 2007 was characterized, as many have been in recent years, by several high-profile 5–4 decisions—cases about the rights

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of detainees in Guantanamo, the Second Amendment, and capital child rape, for example. But, unlike last year, the term saw an even greater number of very high-profile, difficult, important cases that were decided by large majorities. This latter occurrence is in contradistinction to October Term 2006, when every major case—and a full third of the total 72 cases!—broke 5–4. That term, Justice Anthony Kennedy was in the majority for every single one of those narrow decisions, dissenting only twice altogether. The term just concluded saw fewer 5–4 splits—interestingly, there were also fewer unanimous and 8–1 decisions—and Chief Justice John Roberts was the leading majoritarian, voting 90 percent of the time on the winning side.

Given the relatively small number of decided cases—the Court filed a leisurely 67 opinions on the merits after argument, the lowest number since 1953—all these statistics need to be taken with a grain of salt. And for whatever the tealeaf-reading is worth, it's largely a function of the vagaries of the docket. The docket itself does seem to be changing as the Chief Justice and Justice Samuel Alito get settled on the Court; for reasons I won't go into here, we see relatively more business cases, as well as more technical issues of statutory interpretation (as opposed to hot-button constitutional disputes). And the cases tend to be decided along narrower grounds, perhaps reflecting the "minimalist" approach Chief Justice Roberts advocated at his confirmation hearings. So, even if Kennedy remains the "swing vote" on most of the cases making headlines, it is not wholly accurate to label this the "Justice Kennedy court."¹

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 2007 was given by Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit. Judge Brown focuses on the First Amendment to build provocatively on an idea that often appears in these pages: that economic, personal, and political rights are indivisible. Invoking the likes of Tocqueville, Hayek, Lincoln, and Kurt Vonnegut's character Harrison Bergeron, she inveighs against the "new censors," the "new neutrals" and the "new moralists." These groups present challenges to the intellectual

¹ Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, *New York Times*, June 29, 2008, at A1. (Full disclosure: Greenhouse quoted me in this article on a different point.)

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freedom and marketplace of ideas that have spurred the American qua classical liberal rejection of speech regulation, but Judge Brown is hopeful that all is not lost.

We move then to the 2007 Term, beginning with a point-counterpoint between Professors Eric Posner of the University of Chicago and David Cole of Georgetown on what was probably the most controversial issue of the past term: Whether enemy combatants captured abroad as part of the U.S.-led war on terror have a right to challenge their detention and, if so, what kind of review is appropriate. These sorts of national security cases form a growing part of the Court's docket (and even more so that of the D.C. Circuit) and highlight the fault lines among competing theories of executive, legislative, and judicial power. They also evince distinct ideas about the relationship between domestic and international law and constitutionalism more broadly.

Posner sees the Court's decision in *Boumediene v. Bush*, which held that noncitizen enemy combatants captured abroad and detained at Guantanamo have the constitutional privilege of habeas corpus, as a move toward "judicial cosmopolitanism." He posits that, more than resolving a relatively simple (though deep) disagreement over how the Constitution divides power among the branches of government, Justice Kennedy's opinion advanced "the emerging view that the interests of nonresident aliens deserve constitutional protection secured by judicial review." Kennedy's opinion might seem modest and relatively innocuous, but Posner shows how it threatens the entire American constitutional order—and indeed all of modern political theory.

In stark contrast, Cole agrees with *Boumediene* and suggests that it did not go far enough because it "merely decided . . . a question the Court seemed to have decided four years earlier." He notes that the case was nevertheless groundbreaking, for at least three reasons: 1) Never before has the Court struck down a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict; 2) this is also the first time the Court extended constitutional protections to noncitizens outside U.S. territory during wartime; and 3) the Court declared unconstitutional a federal law restricting federal court jurisdiction in the absence of rationales independent of the pure question of jurisdiction. Cole

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ultimately argues that, in moving away from traditional understandings of sovereignty, territoriality, and rights, the Court “ushers U.S. law into the 21st century.”

Leaving issues of national security but staying in the realm of foreign affairs, I tackle the most complicated case of the year: *Medellín v. Texas*, which involved treaty interpretation, federalism, separation of powers, and criminal procedure. *Medellín’s* convoluted factual and legal history take longer to explain than to analyze, but the significance of the case outstrips even its fascinating twists and turns. At bottom, the case centered on a ruling by the so-called World Court, and President George W. Bush’s attempt to enforce it against Texas state courts. The Supreme Court held that neither an international judgment based on a non-self-executing treaty nor a presidential memorandum creates binding domestic law. This was a great victory for sovereignty, democracy, and federalism; but how long the Court can resist “global governance”—the complement to Posner’s judicial cosmopolitanism—remains an open question.

Frequent *Review* contributor and Cato amicus brief author Erik Jaffe then looks at two cases dealing with the regulation of political parties and elections. The outcomes of the *López Torres* and *Washington State Grange* cases are not as important, he argues, as the weaknesses they reveal in how courts currently today protect speech and association rights in electoral contexts. The decisions “illustrate the First Amendment problems and confusion arising from the dual public and private roles, and excessive entanglement, of political parties in formal election mechanisms.” Jaffe urges that parties be treated as the private expressive associations they are. Thus, courts and legislatures should separate the public function of regulating ballot access from the private associative advocacy and activities of political parties.

Next we have a thoroughly engaging walk through the instant classic “D.C. gun case,” which has already generated follow-on litigation around the country over a part of the Constitution—the Second Amendment—that had lain dormant for so long. Clark Neily, senior attorney at the Institute for Justice and co-counsel in *District of Columbia v. Heller*, revisits the intellectual history interpreting the right “to keep and bear arms,” the background to the suit he filed with Alan Gura and my Cato colleague Bob Levy, the case before the Court, and the aftermath of Justice Antonin Scalia’s historic

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opinion striking down D.C.'s ban on functional firearms. In addition to lawsuits now pending in Chicago, San Francisco, and elsewhere, the case has also produced challenges to the substitute regulations the D.C. Council implemented in *Heller's* wake.

Young scholar Edward Loya, about to join the Criminal Division of the U.S. Department of Justice, provides our lone contribution in the area of criminal law. Loya argues, through the spectrum of *Danforth v. Minnesota* and *Virginia v. Moore*, that the Roberts Court increasingly stands for judicial supremacy—that, for good or ill, the interpretative buck stops with the Supreme Court. Ultimately, whether dealing with a criminal defendant's right to confront his accuser or the right to be free from unreasonable search and seizure, "states can create and administer greater protections than those provided in [the] Constitution, [but] the application of the Constitution should remain the same in every state."

Next, appellate labor lawyers Bill Kilberg and Jennifer Schulp (Kilberg was the youngest-ever solicitor of the Department of Labor) take on *Chamber of Commerce v. Brown*. In *Chamber v. Brown*, the Court invalidated a California law that prohibited the recipients of state program funds—everything from MediCal reimbursements to payments on construction contracts—from using those funds to speak on unionization-related issues. The Court found the law preempted by the National Labor Relations Act because the state was regulating in an area Congress had "protected and reserved for market freedom." Aside from the technical labor law questions, the case also raised issues of a state's attaching unconstitutional conditions to employers' First Amendment rights to freedom of speech.

In the first of four articles on the Court's business docket, *Review* board member Adam Pritchard of the University of Michigan presents a fascinating analysis of the state of securities law in the wake of class action reform. *Stoneridge v. Scientific-Atlanta* was the biggest securities case to come before the Court in decades. While the Court correctly rejected an implied cause of action that would have exposed to liability third parties who made no fraudulent public statements, Pritchard argues that the way the Court thinks about securities cases generally is misguided as a matter of political economy. Congress and the SEC having also previously failed at reforming this area of law, Pritchard suggests that shareholders should take it upon

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themselves to amend articles of incorporation in a way that better deters fraud.

Experienced commercial litigators Dan Troy—previously chief counsel of the FDA, now general counsel at GlaxoSmithKline—and Rebecca Wood then survey the regulatory preemption cases before the Court. From a wide-ranging docket spanning important cases on medical device regulation, arbitration clauses, the aforementioned NLRA, and punitive damages relating to the Exxon Valdez oil spill, the authors find several trends: 1) a focus on statutory interpretation rather than constitutional conflict; 2) preemption where a case involves a special national interest or calibrated judgment by an expert federal agency; and 3) the Court's increasing comfort with an agency's having applied its considered judgment within the scope of its delegated power. All these trends point to greater uniformity in the justices' votes on preemption issues.

Administrative lawyers Richard Bress, Michael Gergen, and Stephanie Lim grapple with *Morgan Stanley Capital Group v. Public Utility District No. 1*, the most important energy regulation case in years. Arising out of the California electricity crisis of 2000–01, this case tested the integrity of contract law generally, with energy buyers wanting to modify previously negotiated contracts—whose prices were high relative to historic prices but lower than spot prices during the crisis—when prices dropped. While the Federal Energy Regulatory Commission rejected such ex post facto complaints, the Ninth Circuit ruled that, regardless even of a review for reasonableness, FERC must lower rates to protect consumer welfare. Bress, Gergen, and Lim explain how and why the Supreme Court disagreed, saying in essence that “a deal is still a deal.”

Rounding out our business law quartet, Scott Kieff examines the latest in a continuing trend in patent cases of Supreme Court reversals of Federal Circuit decisions. The Court in *Quanta v. LG Electronics* decided that a patent license from LG to Intel that was limited to exclude Intel's customers (such as Quanta) would be treated as also giving patent permission to those Intel customers. Kieff argues, not uncontroversially, that the Court got it wrong—unanimously!—complicating future patent transactions and thereby preventing entrepreneurial efficiencies and innovation. One reading would limit the Court's holding to the failure of a poorly written contract in this particular case. If Kieff is right, lower courts would be well advised to take that narrow view.

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Finally, SCOTUSblog founder and Supreme Court practitioner Tom Goldstein, along with SCOTUSblog contributor Ben Winograd, look ahead to October Term 2008. Possibly reversing a much-noted trend, the Court is now on pace to hear more cases than it has in over 20 years—and it has front-loaded its docket to buy time for opinion-writing at the end of the term. The Court will hear significant cases in the areas of voting rights, national security, the First Amendment (including private speech in a public forum and obscenity regulation), separation of powers (including a rare Appointments Clause case), and criminal law (Fourth and Sixth Amendments), as well as big-dollar business cases involving FDA preemption, punitive damages, and international trade. While there is no *Heller* or *Medellin* on the horizon, we're certainly in for another big year.

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This is the first volume of the *Cato Supreme Court Review* that I have edited, and I could not have done it without more than a little help from many, many friends. I first need to thank our contributors—one of the most distinguished groups we've ever had—for sharing our pain of putting this *Review* together while colleagues are on vacation or otherwise enjoying the “easy living” of summertime. I should single out Tom Goldstein, not for hitting his deadlines or being easy to work with (though he was fine on both counts) but for creating and expanding SCOTUSblog, which is easily the most useful resource available for us Court-watchers. Following the Supreme Court is a bit like Kremlinology: Any lawyer worth his salt can analyze opinions after they come out, but you make your name by anticipating trends and noticing operational minutiae. SCOTUSblog is the best decoder ring around for understanding the machinations of One First Street and reading between the lines of its *Pravda*.

Thanks also to my colleagues at Cato's Center for Constitutional Studies, Bob Levy and Tim Lynch, who provided valuable counsel especially on the Second Amendment and criminal law, respectively. A big thanks to research assistant Jonathan Blanks for making the trains run on time, and to interns Seth Bailey, Adam Peshek, Roberto Valenzuela, and Curtis Waldo for doing some of the more thankless (except here) tasks. Neither the *Review* nor our Constitution Day conference would have gotten done without them. Finally, thanks

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to Roger Pilon, the founder and spiritual guru of this now well-established journal. Roger plucked me from the Big Law trenches and into a whole new career path; so far, so good.

As my predecessors Mark Moller and James Swanson did, 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 after the end of our post-Cold War “holiday from history,” it is more important than ever to remember our humble roots in the Enlightenment tradition.

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