

Free speech, privacy, and federalism

Constitution Day at Cato: Judging the Supreme Court

On September 17, Cato welcomed scholars, practitioners, and the general public back to the F. A. Hayek Auditorium for the 20th Annual Constitution Day Symposium. Held every year on the holiday commemorating the anniversary of the signing of the Constitution in 1787, the symposium features a daylong conference with some of the nation's most accomplished constitutional experts and litigators. The 2021 symposium featured panel discussions on the First Amendment, property and criminal law, constitutional structure, and looking ahead to the Court's new term set to begin in October.

Constitution Day also marks the release of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus discussion about the upcoming term. The *Review* is the first such journal to be released every year. As Ilya Shapiro, Cato vice president and director of the Robert A. Levy Center for Constitutional Studies, explains in the fore-



Ilya Shapiro, vice president and director of the Robert A. Levy Center for Constitutional Studies, introduces Rachel E. Barkow, who delivered the Annual B. Kenneth Simon Lecture.

Prosperity Foundation v. Bonta. California had required nonprofit organizations to disclose the identity of their donors in their state tax returns. This requirement was a thinly veiled attempt to enable harassment and retaliation against donors to controversial political advocacy groups, especially libertarian and conservative organizations. The policy was originally imposed by California's then-attorney general Kamala Harris, since elected vice president.

The Supreme Court sided with the plaintiffs in a 6 to 3 ruling, holding that California was violating the constitutional rights to free speech and association, including anonymous speech and nonpublic association, in what Smith considers "arguably the most important decision on the rights of privacy and association in over 60 years."

Another key case of the past term concerned the nature of federalism and state autonomy, in particular the degree to which states are entitled to control their own election process. Derek T. Muller writes in this year's *Review* about *Brnovich v. Democratic National Committee*, in which Democrats challenged Arizona's changes to election laws banning so-called "ballot harvesting" as well as requiring all voters to vote in their own precincts. Arizona's attorney general Mark Brnovich is himself a past contributor to the *Review* and a speaker at the Constitution Day symposium.

"We are in a time of public skepticism over elections," explains Muller. "The losing side doubts the fairness of the outcome, attributing the loss to suppression, fraud, foreign

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Cato News Notes

WELCOME TO THE TEAM

Cato continues to bring new talent on board to further its mission of individual liberty, limited government, free markets, and peace. Recent additions include



Norbert Michel as vice president and director of the Center for Monetary and Financial Alter-

natives, Colleen Hroncich as a policy analyst in the Center for Educational Freedom, Gabriella Beaumont-Smith as an analyst in the Herbert A. Stiefel Center for Trade Policy Studies, Faith Jablow as Cato's new marketing coordinator, and Alexandra Perez as health policy project manager. In addition, Mark Calabria is returning to Cato as a senior adviser. Calabria was previously Cato's director of financial regulation studies before serving as chief economist to Vice President Mike Pence and then as director of the Federal Housing Finance Agency.

FREEDOM SWAG

As the holidays approach, you can find the perfect gift for any lover of liberty (including yourself!) through Cato's partnership with Lands' End, offering Cato-branded merchandise including sweaters, hats, bags, and shirts. Cato apparel can be found at Cato.org/landsend.

adds some further constraints, such as equal protection and noninfringement of the right to vote on the basis of race or sex.

However frustrating it may be to centralizers and systemizers, this decentralization has in fact proved a source of deep resilience. Aside from fostering gradual and piecemeal innovation, it means that there is no figure or agency in Washington that can start bossing around local election officials generally and on short notice. By not entrusting running elections to a single central agency, we have avoided the danger, as economist Steven Landsburg has put it, “of centralizing the power to decide who will yield power.”

Technology itself isn't the enemy. Low-tech voting methods aren't intrinsically virtuous or accurate. One time-honored method of verification that regularly shows its creakiness, for example, is signature matching. Colorado, a vote-by-mail state, rejected 29,000 ballots last fall (about 1 in 112) because the mailed signatures didn't seem to match those on file. (Most of the voters got a second chance.) While it seems intuitive, studies show that signature matching is wildly unreliable, bordering on pseudoscience. An individual's signature can vary by a lot, and election bureaucrats are no handwriting experts. While the value of a paper trail is real, fields like banking

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and inventory control may have much to teach about security and authentication.

Simple is often best. In confronting the genuine evil of gerrymandering, for example, progressive reformers these days tend to reach for complicated mandates designed by academics (as with the briefly hyped “efficiency gap” test) whose assumptions are opaque to nonspecialists and perhaps manipulable. Many Republicans, meanwhile, seem to be content denying that gerrymandering is much of an evil at all. In between, however, much good can be done by adopting simple, long-recognized rules of good districting based on concepts like compactness and respect for county boundaries. These are often understandable to both laypersons and judges, can be made the subject of objective formulas by applying simple math methods, and, as an empirical matter, seem to greatly reduce (although not fully eliminate) the range of discretion within which line drawers can manage to

help their political allies and punish their enemies.

Turn down the temperature. Election administration is an imperfect art with plenty of genuine tradeoffs. Don't treat ordinary disagreements as attempts to “rig” results. Conservatives should not act as if there is something wrong with the goal of making voting more convenient. (People like convenience! Not everyone has the same schedule, time demands, or car access.) Liberals should be willing to concede that a practice like “ballot harvesting,” in which a single operative can be paid to collect hundreds of absentee ballots, does raise genuine concerns relating to voter privacy, undue pressure, and, yes, security.

When good faith is assumed, there's a lot of room for agreement. Florida, whose election laws were once the butt of national jokes following the Bush-Gore election, is now something of a national leader in good practice. In March, the heavily Republican Kentucky legislature passed by near-unanimous margins a bill that, to quote the *Courier-Journal*, “will make three days of widespread early voting a regular part of the state's future elections and expand people's access to the ballot in other ways while also instituting new security measures.”

America has weathered election crises before, and it can get past this one. ■

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influence, or late-breaking changes to laws—some ‘true reason’ outside the legitimate political process why a preferred candidate failed.” Such was the case in *Brnovich*, in which relatively mundane changes to election law, reflecting common practices in many other states, were challenged as violating the Voting Rights Act due to claimed racially discriminatory intent. Six justices on the Supreme Court disagreed, ruling in Arizona's favor. Mueller observes that “I think it is fair to

say that *Brnovich* is the latest in a line of cases suggesting that the federal courts should play a smaller role in the patrolling of how states administer elections.”

Each year's Constitution Day symposium also features the Annual B. Kenneth Simon Lecture, a keynote address offered by a distinguished scholar or public intellectual and printed in the next year's *Review*. Last year's speaker was Judge Don R. Willett of the U.S. Court of Appeals for the Fifth Circuit, who addressed civic lit-eracy.

This year's Simon lecturer was Rachel E. Barkow of New York University School of Law, who (among her many accomplishments) clerked for Justice Antonin Scalia as his so-called counter-clerk, a progressive-minded devil's advocate to point out any faults resulting from partisan bias, and served as an appointee by President Obama on the U.S. Sentencing Commission. Barkow addressed America's broken criminal justice system and how the Supreme Court has contributed to mass incarceration (see Policy Forum, page 9). ■