Introduction

*Trevor Burrus**

This is the 20th volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the Supreme Court term just ended, plus a look at the term ahead. Things changed last year, my second year as editor in chief, as the COVID-19 pandemic shut down Cato's offices and the *Review* had to be put together while working remotely. We then had a virtual version of our annual Constitution Day symposium, which came together nicely, all things considered. Now, as the pandemic continues to persist in many ways, Cato's employees are still working mostly remotely, and the future remains distressingly uncertain. That also applies to the Supreme Court, which hasn't yet announced whether oral arguments will continue to be conducted telephonically for the October 2021 term.

While the pandemic continues, it can't stop the *Cato Supreme Court Review*. We release the *Review* every year in conjunction with our annual Constitution Day symposium (which this year will be both online and in person), less than three months after the previous term ends and two weeks before the next term begins. It would be difficult to produce a law journal faster, even under normal conditions. The Court typically likes to hold big decisions until the end of June—rarely going into July—but in 2020 the last decision was issued July 9. In 2021, it was a little better, with the last major decisions coming down July 1. Our authors work hard to produce quality work in a short time. I thank them for that. Some even submitted early, which allowed us to get a welcomed head start on our furious editing process.

We're proud that this isn't a typical law review, filled with long, esoteric articles on, say, the influence of Immanuel Kant on evidentiary

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approaches in 18th-century Bulgaria.[1] Instead, this is a book of essays on law intended for everyone from lawyers and judges to educated laymen and interested citizens. This year, we asked our authors to adhere to even shorter word counts. I think the result is a tighter and more readable edition.

Despite some authors' attachment to them, we try to keep footnotes relatively low in number and length, and we don't make our authors provide cites for sentences like "the Internet exploded in the late 90s" (as once happened to me). There's more than enough esoteric legal scholarship out there, and the workings of the Supreme Court should be, as much as possible, accessible and understandable to average citizens. In the end, the Constitution is sustained by Americans' belief in it, and every year the justices write several thousand words explaining and expounding on our founding document. This review provides a deeper look into a few of the most important decisions.

And we're happy to confess our bias: It's the same bias that infected Thomas Jefferson when he drafted the Declaration of Independence and James Madison as he contemplated a new plan for the government of the United States. After discarding ideas like the divine right of kings and other theories by which governments are said to be imbued with a monopoly on the legitimate use of force in a geographic area, Enlightenment thinkers, most prominently John Locke, properly concluded that governments don't inherently have any power whatsoever. Like a pile of stones found in the woods, a government, by itself, is not a moral agent or an object of moral concern. Yet if someone takes those stones and turns them into a house, that pile of stones becomes an object of moral concern—a piece of property—via the actions of

[1] Chief Justice John Roberts once opined on the uselessness of law reviews: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Remarks at the Annual Fourth Circuit Court of Appeals Jud. Conf. 28:45–32:05 (June 25, 2011), https://cs.pn/30QsLpx. See also Orin S. Kerr, The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria, 18 Green Bag 2d 251, 251 (2015) ("Chief Justice Roberts has drawn attention to the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria. No scholarship has analyzed Kant's influence in that context. This Article fills the gap in the literature by exploring Kant's influence on evidentiary approaches in 18th-century Bulgaria. It concludes that Kant's influence, in all likelihood, was none.").

the primary moral agent: a rights-holding person. Governments don't have rights, they have powers. People have rights and they can sometimes delegate to a government the power to secure those rights. Or, as was once said by a much wiser person: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

Individual liberty is protected and secured by a government of delegated, enumerated, separated, and thus limited powers. Through the ratification process, the People created a federal government bound by the strictures of the Constitution. A government that acts beyond those powers is not just unconstitutional, it is fundamentally immoral and illegitimate. It is pure force without reason or justification.

The delicate balance of powers within the government is partially maintained by a judiciary that enforces the Constitution according to its original public meaning, which sometimes means going against the "will of the people" and striking down popularly enacted legislation. The Constitution is not an authorization for "good ideas." Everyone who cares about the Constitution should be able to think of something that they believe is a good idea but is unconstitutional, as well as something that is a bad idea but is constitutionally authorized. If you can't think of such examples, then you don't really believe in the Constitution, you just believe in your good ideas. That's fine if you're a member of Congress—although they also take an oath to support and defend the Constitution—but judges are supposed to think beyond their preferences and to enforce the law.

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On September 18, 2020, a few weeks before the October 2020 term was to begin, we saw the death of Justice Ruth Bader Ginsburg. Although I had many disagreements with her, I respected her as someone rightly revered as a liberal lion on the Court. And she was an old-school liberal who didn't regard those who disagree with her as somehow evil or stupid. Her long-time friendship with Justice Antonin Scalia was ample evidence of that. Few jurists in history have ever had more diametrically opposed judicial philosophies while being such great friends.

Ginsburg's death set up a political clash that, while bad, could have been much worse. After the contentious confirmation of Justice

Brett Kavanaugh to replace Justice Anthony Kennedy, there was little doubt in most Court-watchers' minds that Justice Ginsburg's replacement would be a woman, and that it was likely to be Seventh Circuit Judge Amy Coney Barrett. As a practicing Catholic and a mother of seven (two adopted from Haiti), Barrett's character was seemingly unimpeachable—that is, of course, except for those who attacked her for being a Catholic, as had happened during her first confirmation process.

In the end, the Democrats did not have the votes to stop her, and she was approved 52-48. It was the first time since 1870 that a justice was confirmed without a single minority party vote.

There were, of course, many dire predictions about how Justice Barrett would bring about a *Handmaid's Tale* vision of America. While those fears are obviously overblown, replacing Ginsburg with the decidedly conservative Barrett promises to be one of the most consequential nominations in generations.

As Justice Byron White liked to say, "every justice makes a new Court." And while that is true, it might be truer with the arrival of Justice Barrett. In July 2020, before Justice Ginsburg's death, CNN's Joan Biskupic published a major story shedding light on some of the behind-the-scenes action among the justices. The story was surprising in that it clearly resulted from leaks from within the Court, something that is extremely rare (and concerning). Biskupic reported how Chief Justice John Roberts had "maneuvered on controversial cases in the justices' private sessions, at times defying expectations as he sided with liberal justices."[2] The chief also "exerted unprecedented control over cases and the court's internal operations," particularly the cert. docket. In one of the more surprising revelations, Biskupic wrote that "Roberts also sent enough signals during internal deliberations on firearms restrictions, sources said, to convince fellow conservatives he would not provide a critical fifth vote anytime soon to overturn gun control regulations." This was particularly shocking because Roberts voted with the majority in both landmark gun-rights cases: *District of Columbia v. Heller* and *McDonald v. City of Chicago*. In the 11 years since *McDonald*, many lower courts have been in almost open resistance to the implications of those rulings, a classic situation

[2] Joan Biskupic, "Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court," CNN, July 27, 2020, https://cnn.it/3iG0laI.

demanding Supreme Court review. That Roberts had apparently telegraphed that he was no longer a reliable vote for the Second Amendment is concerning and raises the question: what is he thinking?

Conservatives have been asking that question at least since Roberts saved the Affordable Care Act in 2012. That decision continues to haunt Roberts's public image among conservatives. Whatever he was thinking, it seems clear that it was more political than jurisprudential. His fears of the Court's becoming politicized overrode his jurisprudential sensibilities.

And that seems to be what's been happening in recent years. In my estimation, what keeps John Roberts up at night is a fear of presiding over a Court that comes to be regarded as illegitimate by a substantial number of Americans. That is an understandable concern, but acting on it by, say, not voting to take any Second Amendment cases when there is a clear reason for the Court to take them is, paradoxically, what turns Roberts into a political rather than judicial actor.

But those trained to be on the Supreme Court aren't (usually) very good at politics. Being a judge is a singular skill, and judges often lose their way when they try to bring nonjudicial considerations to decision-making. Sometimes that makes more sense, such as when Chief Justice Earl Warren (himself a former politician) exhorted his colleagues to reach a unanimous decision in *Brown v. Board of Education*. While the legal reasoning in that case is suspect—there were better ways the Court could have decided school segregation was unconstitutional—Warren wasn't wrong to be concerned with the consequences of even a single dissenting vote.

Yet, whatever the state of John Roberts's political sensibilities, it is a very different Court after Justice Barrett joined. Roberts's vote—whether for cert. or on the merits—is now less necessary. The six Republican-appointed justices can achieve the four votes for cert. or the five votes for a majority without the chief. And that was likely made clear by the Court granting cert. to both a Second Amendment case and an abortion case for next term. For more about those cases, see Amy Howe's excellent "Looking Ahead" article in this volume.

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Turning to the *Review* and the Supreme Court term itself, the Court continued its recent trend of deciding fewer cases—a trend that has increased during the pandemic. The Court issued 57 total opinions,

with 43 percent of the cases being decided unanimously. That's a bit lower than the 47 percent rate of unanimity over the past decade, but it still shows that, much of the time, the justices are not deciding cases along purely partisan lines. Twelve of the decisions were 6-3, but only six of those were along the expected "partisan" line.

Justice Brett Kavanaugh and Chief Justice Roberts continue to occupy the Court's "middle," but this term Kavanaugh replaced Roberts as the justice most often in the majority—97 percent of the time. The chief justice tied with Justice Barrett for second—91 percent in the majority. Justice Sonia Sotomayor was most often on the losing side, voting with the majority 69 percent of the time. Sotomayor also wrote half (four of eight) of the solo dissents in the term, but Justice Clarence Thomas continued his trend of writing the most total opinions, mostly due to his penchant for writing solo concurrences.

All in all, the justices continue to demonstrate that they are *judges* who decide cases on judicial rather than political grounds. Nevertheless, many Americans believe that the Court is a pure political institution, not too different from our dysfunctional Congress. Yet, fundamentally, the justices are trying their best to expound on a constitution—*the* Constitution—a fact which is increasingly forgotten by American citizens.

That point is highlighted in Judge Don Willett's excellent 2020 Simon Lecture, which leads off this volume. Judge Willett took to the difficult task of remotely delivering the keynote address at our 2020 Constitution Day with characteristic gusto. Wearing a coat and tie—while strategically concealing the shorts from the camera—Judge Willett reminded us that a well-functioning republic requires not just an informed citizenry, but an engaged citizenry. Americans are woefully uninformed about even the most basic facts of our constitutional system. The Framers knew that "American citizenship is not a spectator sport," but Judge Willett fears it is becoming one. His Simon Lecture is a good reminder of the responsibility that comes with being an American.

Next, Douglas Laycock of the University of Virginia School of Law and Thomas Berg of the University of St. Thomas School of Law discuss *Fulton v. City of Philadelphia*, which may end up being seen as one of the most consequential religious liberty decisions in recent history. *Fulton* was a challenge to the city of Philadelphia's decision to terminate the foster-services contract of Catholic Social Services (CSS) on the ground

that CSS does not certify same-sex couples as foster parents. The Court was asked to overturn the 30-year-old precedent of *Employment Division v. Smith*, a decision that has long troubled many religious-liberty scholars. In *Smith*, the Court held that the Free Exercise Clause does not exempt religious practitioners from generally applicable and neutral laws. While the Court's decision in *Fulton* did not overturn *Smith*, at least five justices indicated that the *Smith* precedent is on shaky ground. Justice Barrett wrote separately to say she is skeptical of *Smith* but does not know what can replace it. Laycock and Berg try to assuage Barrett's doubts by arguing for a heightened scrutiny approach that "balances the burden on religion against government interests, with the thumb on the scale for religious exercise." Ultimately, "the logic and purpose of free exercise can generate a protective but workable doctrine for challenges to generally applicable laws."

Next, Bradley A. Smith of Capital University Law School, and former chairman of the Federal Election Commission, writes on the important decision in *Americans for Prosperity Foundation v. Bonta* (*AFPF*). In *AFPF*, the Court reaffirmed what has been true since the Founding: Americans have a right to anonymously support charitable causes. The case arose almost a decade ago when the then-attorney general of California, Kamala Harris, decided that all nonprofits that raised money in the state would have to file with the state a special IRS form called a Schedule B. Schedule Bs disclose the top donors to a charitable organization. In this time of "cancel culture," when people have lost their jobs when their political giving was publicized, AFPF and Thomas More Law Center, the co-plaintiff, understandably feared for the disclosure of their top donors. They fought all the way to the Supreme Court to vindicate the right to anonymously support charities, and they won by a 6-3 vote. Smith argues that the Republican-appointed justices in the majority were well-aware of the current climate of shaming and "cancelling" people because of their political activities. "At a minimum," he writes, "the government should neither be harassing citizens for their beliefs, nor forcing citizens to provide the information for their own undoing, without a darn good reason." Thankfully, most of the Court agrees.

In the third article covering a First Amendment issue, David Hudson of Belmont University College of Law comments on *Mahanoy Area School District v. B.L.*, the "cussing cheerleader" case. After "B.L."—a minor when the case arose but later revealed herself to be Brandi

Levy—failed to make the varsity cheerleading squad, she posted to Snapchat a profanity-laden rant about her feelings on the matter. The school disciplined her by suspending her from cheerleading for a year. She and her parents sued, arguing that the school's action violated her free-speech rights. The Court agreed and weighed in on an increasingly common issue: How much does the First Amendment protect online student-speech outside of school grounds and activities? While it was a welcome victory for the free-speech rights of students, it unfortunately "leaves many unanswered questions." "For one," writes Hudson, "the Court never really defined off-campus speech or explained precisely the boundaries between on-campus and off-campus speech." Justice Stephen Breyer's majority opinion, while leaving "much to be desired," is still an important "victory for student rights" and a "victory for parental rights." For off-campus speech, it's better to let parents discipline their children, not government officials.

Turning to questions of constitutional structure, Josh Blackman of the South Texas College of Law Houston returns to the pages of the *Review* to discuss the third part of the "epic" trilogy of cases reviewing the Affordable Care Act (ACA, a.k.a. "Obamacare"). First, in 2012's *National Federation of Independent Business v. Sebelius* (*NFIB*), there was the question of whether Congress could constitutionally impose a fine on those who failed to purchase health insurance. Chief Justice Roberts saved the ACA by rewriting the statute to turn a penalty into a "tax." Then in 2015's *King v. Burwell*, the chief justice again saved the ACA by ruling that subsidies are available to those who buy health insurance on federally created exchanges, even though the statutory words "established by the state" seemed to preclude that possibility. This term, in *California v. Texas*, it was Justice Breyer, joined by six justices, who saved the ACA by dismissing the challenge for lack of standing. The case arose after Congress in 2017 reduced to $0 the "tax" for not purchasing health insurance, thus calling into question the continued viability of Chief Justice Roberts's decision in *NFIB*. Justice Breyer ruled that the lack of any enforceable penalty meant that the plaintiffs were not being sufficiently harmed by the individual mandate to challenge it. Blackman disagrees, arguing that "the individual mandate—working in conjunction with the ACA's insurance-reform provisions—force the plaintiffs to buy unwanted, overpriced products." The ACA's interrelated provisions—namely the mandate and the "guaranteed issue" and "community

rating" provisions—function together to create "standing-through-inseverability." And although the Court managed to dodge the ACA bullet this year, Blackman argues that the ACA "trilogy will become a quadrilogy" when someone "who is subject to an ACA enforcement action can raise the mandate's unconstitutionality as a defense."

Aaron Nielson of the J. Reuben Clark Law School at Brigham Young University writes about a case that he argued before the Court: *Collins v. Yellen*. After the federal government changed its position, Nielson was appointed by the Court to argue that the structure of the Federal Housing Finance Agency (FHFA) was constitutionally permissible after last term's decision in *Seila Law*. In that case, covered by Professor Ilan Wurman in last year's *Review*, the Court held unconstitutional the removal restrictions on the director of the Consumer Financial Protection Bureau. Plaintiffs challenging several actions by the FHFA raised the same issue about the removal protections on that agency's director—limiting the president's power to remove the director only "for cause." The Court decided that *Seila Law* also applies to the FHFA, and the then-director of FHFA, Mark Calabria, formerly Cato's director of financial regulatory studies, was removed by the president the same day the decision came down. Nielson writes about his experience with the case and the Court's broad ruling, which he says "may be the most pro-'unitary executive' decision in history." At bottom, however, *Collins* is "three cases in one"—a statutory debate, the constitutional question, and the remedy—and to understand it one needs to "view all three parts at the same time."

My colleague Sam Spiegelman joins Gregory C. Sisk of the University of St. Thomas School of Law to comment on one of the term's under-the-radar blockbusters. In *Cedar Point Nursery v. Hassid*, the Court ruled 6-3 that it was a per se taking under the Fifth Amendment for California to allow union organizers access to the grounds of agricultural businesses for up to three hours a day, 120 days per year. What made the Court's decision particularly important was that Chief Justice Roberts's majority opinion eschewed the complex and unpredictable *Penn Central* test in favor of a clearer rule. *Penn Central* has long been rightly criticized both for being confusing and for allowing judges substantial leeway in "balancing" their way to a result. Spiegelman and Sisk argue that *Cedar Point*, while imperfect, "moves regulatory takings in a direction that accords far better with the history of Anglo-American property law."

Christopher Slobogin of Vanderbilt Law School contributes what is likely the article on the shortest Court opinion in *Cato Supreme Court Review* history. In *Caniglia v. Strom*, Justice Thomas took four pages to decide that the "community caretaking exception" to the Fourth Amendment did not justify the police entering Edward Caniglia's house to take his guns after Mr. Caniglia had been voluntarily taken for a psychiatric evaluation. Chief Justice Roberts, Justice Samuel Alito, and Justice Kavanaugh all wrote concurring opinions expressing their views on when the "community caretaking exception" should be allowed. Slobogin's commentary is timely because it looks to current questions over the use—and misuse—of police in America. Should we be resorting to police in so many situations where it might be better to use other types of government officials, like mental-health experts? Thomas's *Caniglia* opinion rejects a broad reading of the caretaker exception, so "the argument is strong that, when a nonexigent search or seizure is carried out by police, the assertion that it is not aimed at 'ordinary crime control' should be irrelevant to Fourth Amendment analysis, regardless of whether it occurs inside or outside the home." *Caniglia* can "provide doctrinal support for the fledgling movement to de-police those government services that, whatever might be the tradition, do not require the intervention of armed individuals trained to fight crime."

Derek Muller of the University of Iowa College of Law comments on the voting-rights decision in *Brnovich v. Democratic National Committee*, in which the Court by a 6-3 "partisan" vote upheld two Arizona voting provisions that the DNC had challenged under Section 2 of the Voting Rights Act (VRA) as disproportionately burdening minority voters. One provision, the "out-of-precinct" policy, requires election officials to discard ballots cast in the wrong precinct. The other prohibits "ballot harvesting," that is, collecting and delivering another person's ballot. Justice Alito's opinion looks to the "totality of circumstances" when a change in voting laws might violate the Voting Rights Act. It's important, argues Muller, that the Court looked to the "usual burdens of voting" and declined to say that the VRA applies to "mere inconvenience." *Brnovich* "continues the Court's path away from federal judicial involvement in election rules and toward greater deference to state power." As with all "totality of circumstances" tests handed down by the Court, we will have to wait and see how lower courts apply it. In the end, *Brnovich*

is unlikely to "stem the tide of litigation in the politically polarized years ahead."

The final article covering a decision from the 2020 term is by Adam Mossoff of George Mason University's Antonin Scalia Law School. Adam is expert in intellectual property, so the *Review* is lucky to have a contribution from him on the significant copyright dispute decided in *Google v. Oracle*. It's a little technical, but the gist is this: Google copied from Oracle about 11,500 lines of "declaring code" (a type of a back-end interface) and didn't want to pay for it. Years of litigation ensued, culminating in the Court's opinion by Justice Breyer, holding that Google's use of the code was protected under the fair use doctrine. Oddly, Mossoff argues, Justice Breyer brushed aside many of the core legal issues in the case. The result is an opinion focused on a novel view of the fair use doctrine that ignores some of the problems that will inevitably result. As Mossoff writes, "There are early indications of lawyers and judges being as creative with *Google* as *Google* itself was with the fair use doctrine that preexisted it."

Finally, we have the annual "Looking Ahead" article, this year by Amy Howe of "Howe on the Court." Amy focuses on three hot-button issues that the Court will hear next year: guns, abortion, and school choice/religious liberty. Those cases alone mean that next term will be contentious. The possibility that *Roe v. Wade* could be overturned will be discussed extensively, as well as the possibility that the Court will extend the protections of the Second Amendment to carrying a gun outside the home. And in the school-choice case, *Carson v. Makin*, the Court will decide whether a state violates the Constitution if it "prohibits students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or 'sectarian,' instruction." It'll be a big term.

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This is the third volume of the *Cato Supreme Court Review* I've edited, and I could not have done so without help. I'd like to thank Ilya Shapiro for being an excellent vice president and director of the Robert A. Levy Center for Constitutional Studies, and Roger Pilon for supplying the vision for the department and leadership for so many years. I'd also like to thank the authors, without whom there

would be nothing to edit or read. They are often given a difficult task—to write a 10,000-word article in about five weeks. This year the authors were all on time, and a surprising number were even early. Thank you.

Thanks also goes to Thomas Berry, the new managing editor. Tommy was a superstar intern, then a superstar legal associate, and now he's a superstar research fellow and managing editor. I look forward to many years of collaboration. Also, my colleagues Walter Olson, Will Yeatman, and (again) Ilya and Roger helped edit the articles, while legal associates Spencer Davenport, Stacy Hanson, Nived Rajendran, Mallory Reader, and Christian Townsend performed the thankless but essential tasks of cite checking and proofreading. Legal interns Madalyn Brooks and Richard Friedl were also essential in these tasks, despite the unfortunate fact that their entire internship was remote. Special thanks goes again to Sam Spiegelman, who stepped up and did an exceptional job with all the nuts and bolts of putting out the *Review*, as well as a significant amount of editing. Sam again proved indispensable.

I 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. Our Constitution was written in secret but ratified by the people in one of the most extraordinary acts of popular governance ever undertaken. During that ratification process, ordinary people debated the pros and cons of the document, and, in so doing, helped turn the Constitution into a type of American DNA, belonging to no one but part of all of us. Those of the Founding generation shared many of our concerns today. They fretted over the possibility of rule by elites. They wished to ensure prosperity throughout the country. They worried that self-interested rulers would ignore the law and collect power in themselves. The Constitution is their best attempt at creating an energetic yet restrained government. It reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against government abuses. In this schismatic time, it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope that you enjoy this 20th volume of the *Cato Supreme Court Review*.