

Introduction

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This is the 13th 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, this is 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 the predictable ideological divisions over certain cases, the 2013–2014 term recorded a level of unanimity not seen since the 1940s. To wit, all the justices agreed on the final judgment in about two-thirds of cases decided on the merits: 48 of 73, or 66 percent.¹ (The previous five terms registered 36, 44, 46, 45, and, last year, 49 percent.) This development logically resulted in dramatically fewer dissenting opinions than any term in modern history (31, whereas last term there were 52 and the average going back to 2000–2001 is 56.8). Not surprisingly, the total number of all opinions (majority, concurring, and dissenting) was also historically low (145, down from 169 last term)—and the average of 1.99 opinions per case was down from an average of 2.33 over the preceding decade. And due to the scarce 8-1 or 7-1 decisions (just two), only Justices Ruth Bader Ginsburg and Sonia Sotomayor wrote solo dissents. Notably, neither Chief Justice John Roberts nor Justice Elena Kagan has ever written one of those during their entire tenures on the Court (nine and four terms, respectively).

Some commentators called the above level of agreement a “faux-unanimity” given that some of these rulings were either quite narrow or had strident concurrences that were dissents in all but name—especially in high-profile cases like *McCullen v. Coakley*, *NLRB v. Noel Canning*, and *Bond v. United States* (all analyzed in these pages), which also share the distinction of having Justice Antonin Scalia write the lead “concurrence.” But even if you count only cases where every justice joined some part of the majority opinion—not just the judgment—you get unanimity in more than half the docket (38 cases, or 52 percent). That’s significantly higher than the previous five terms—which came in at 27, 29, 33, 36, and 41 percent, respectively—but continues that increasing trend. And if you further narrow the unanimity count to cases where every justice joined the majority opinion in full, you’re still left with a large chunk (28 cases, or 38 percent),

¹ These figures include two 8-0 cases and six summary (without oral argument) reversals. All statistics taken from Kedar Bhatia, Final Stat Pack for October Term 2013 and Key Takeaways, SCOTUSblog, June 30, 2014 (updated July 3, 2014), <http://www.scotusblog.com/2014/06/final-stat-pack-for-october-term-2013-and-key-takeaways-2>. See also Kedar Bhatia, A Few Notes on Unanimity, SCOTUSblog, July 10, 2014, <http://www.scotusblog.com/2014/07/a-few-notes-on-unanimity>. For more detailed data from previous terms, see Stat Pack Archive, SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack> (last visited Aug. 28, 2014).

which, except for 2002–2003’s 39 percent, is the highest for any term going back at least two decades

Part of this dynamic can be attributed to the Court’s considerable control of its docket, such that it can decide not to hear what would otherwise be divisive cases. About 10 percent of this term’s docket consisted of non-ideological patent cases, for example, and the Court has stayed away from the Second Amendment since 2010—to its shame, in my view, because lower courts have been willfully confused (to put it charitably) in protecting the individual right to keep and bear arms in states that have engaged in massive resistance to the Court’s rulings in that regard.² Irrespective of the reason and any way you slice it, the Court definitely spoke more often with one voice this term than it has in the past—which accords with Chief Justice Roberts’s stated wishes.

At the same time, only 10 cases went 5-4 (14 percent, the lowest rate since at least 1995–1996 except for 2005–2006’s 13 percent)—but those included contentious rulings on campaign finance (*McCutcheon v. FEC*), legislative prayer (*Town of Greece v. Galloway*), workers’ rights (*Harris v. Quinn*), and Obamacare’s contraceptive mandate (*Burwell v. Hobby Lobby*). That means that 80 percent of judgments were either unanimous or 5-4, beating last term’s 78 percent and significantly higher than the 64.5 percent average of the preceding four terms. In other words, the Court is of one mind on most issues—including important rulings against outlandish assertions of federal power—but continues to be split on constitutional rights and civil liberties, as well as certain types of criminal procedure cases that produce heterodox but consistent divisions.

The Court reversed or vacated 55 lower-court opinions (73 percent), which is essentially the same as last term and in line with recent years. Of the lower courts with significant numbers of cases under review, the U.S. Court of Appeals for the Ninth Circuit attained a 1-11 record (92 percent reversal), decisively beating its traditional rivals the Sixth Circuit (2-9, 82 percent) and Federal Circuit (1-5, 83 percent)—as well as new contender the Fifth Circuit (1-6, or 86 percent)—for the title of “biggest loser.”

² See, e.g., Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. Times, July 1, 2014, available at <http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html>.

Anthony Kennedy was yet again the justice most often in the majority (69 of 73 cases, or 95 percent), followed by the chief justice (92 percent). Even more significantly, Kennedy was on the winning side in all 10 of the 5-4 decisions—four times with the “conservatives,” twice with the “liberals,” and four times in “unconventional” alignments. The second-most winner of 5-4 cases was the chief justice—which may seem unsurprising, except that it was Justice Clarence Thomas who was runner-up to Justice Kennedy in each of the previous four terms. Interestingly, Justices Samuel Alito, Kagan, and Kennedy combined to author 8 of the 10 majority opinions in the 5-4 cases, with Kagan authoring 60 percent of the 5-4 opinions in cases where she was in the majority (up from 10, 17, and 0, respectively, in her previous three terms). Most notably, Justice Alito wrote the majority opinions in both *Harris v. Quinn* and *Hobby Lobby*—both decided on the last day of term, June 30—while Justice Kagan wrote the leading dissents in *Harris v. Quinn* and *Town of Greece*. I’m not the only observer to note that both of these justices, who are the most junior of their respective ideological blocs, are coming into their own.

Justice Sotomayor took over from Justice Scalia as the justice most likely to dissent (18 percent of all cases and 54 percent of cases that had dissenters)—most memorably in *Schuette v. Coalition to Defend Affirmative Action*. This was the first time she has been in this position, but she’s come close in previous years.

The justice pairings most likely to agree, at least in part, were Justices Thomas and Alito (69 of 72 cases, or 95.8 percent), followed by Justices Scalia and Thomas (69 of 73, or 94.5 percent) and last year’s winners Justices Ginsburg and Kagan (67 of 71, or 94.4 percent). Curiously, the Roberts-Alito pairing, which had traded off with Scalia-Thomas for several years, dropped out of the top 10. Justices Alito and Sotomayor voted together less than anyone else (in only 53 of 71 cases, or 74.6 percent), followed very closely by Justices Thomas and Sotomayor (54 of 72, or 75 percent), Justices Ginsburg and Alito (same), and Justices Thomas and Ginsburg (55 of 73, or 75.3 percent). Seen another way, the top two pairings who were least likely to agree included Justice Sotomayor, while the next three included Justice Ginsburg.

My final statistics are more whimsical, relating to the number of questions asked at oral argument. Justice Scalia regained his perch as the Supreme Court’s most frequent interlocutor—Justice Sotomayor

edged him out last year—with an average of 19.6 questions per argument. That was below his 25.8 average from two terms ago, but it still made Scalia the top questioner in 36 percent of cases and put him in the top three 69 percent of the time. Justice Ginsburg again asked the first question most often (in 31 percent of cases), followed by Sotomayor (20 percent). Justice Thomas continued his non-questioning ways. Finally, it's safe to say that Scalia remains the funniest justice, easily generating the most transcript notations of “[laughter]” per argument.

Before turning to the *Review*, I would be remiss if I didn't say a few words about what some people are calling the Court's libertarian turn—both those alarmed and heartened by this development.³ While some commentators have long accused the Court of a pro-business bias, to the extent that's the case, the entire Court is guilty of it, not just the “conservative” cohort. (And for the record, the Chamber of Commerce went 13-4 this term, though most of its wins were in less significant cases.) In terms of a pro-liberty bent—which alas isn't the same thing as being pro-business—that's a more distinct and salubrious trend, but it's also a more complicated story.

In July 2013, the Simon Lazarus of the “progressive originalist” Constitutional Accountability Center sounded the alarm against the growing threat of libertarianism and its “potentially seismic” influence on the Court. The “recent surge of libertarianism among conservative academics, advocates, politicians, and of course, voters,” Lazarus wrote, has now “begun to register at the Supreme Court.”⁴

There was surely something to that claim. For example, the Court's ruling against the Defense of Marriage Act in *United States v. Windsor* was laden with libertarian legal principles, including Justice

³ See, e.g., Damon Root, *The Supreme Court Now Leans Libertarian*, Reason.com, July 8, 2014, <http://reason.com/blog/2014/07/08/the-supreme-court-now-leans-libertarian>. For an examination of the similarities and differences between the conservative and libertarian legal movements, see Damon Root, *Conservatives v. Libertarians*, Reason, July 2010, also available at <http://reason.com/archives/2010/06/08/conservatives-v-libertarians>.

⁴ Simon Lazarus, *Alito Shrugged*, New Republic, July 28, 2013, <http://www.newrepublic.com/article/114059/supreme-court-libertarianism-ron-pauls-bench> (subtitle: “Libertarianism has won over the Supreme Court conservatives”). For one analysis of Lazarus's claims, see Ilya Shapiro, “Libertarianism Has Won Over Supreme Court Conservatives,” *Cato at Liberty*, July 30, 2013, <http://www.cato.org/blog/libertarianism-has-won-over-supreme-court-conservatives>.

Kennedy's favorite theme of how federalism operates to protect for individual liberty. Cato went 15-3 that term, and we were the only organization in the country to file on the winning side of the three blockbusters: *Fisher v. UT-Austin* (racial preferences), *Shelby County v. Holder* (voting rights), and *United States v. Windsor* (DOMA).

That libertarian trend accelerated this term, as the Court issued one broadly freedom-protecting ruling after another, voting against aggregate limits on campaign spending; in favor of a legal challenge to Ohio's truth commission; against warrantless cellphone searches; against compelled unionization; and against executive overreach in a host of ways. So Lazarus was right to worry—and he's even more worried now: Roughly a year after his last jeremiad, he took to the pages of the *New Republic* again to decry that "radical libertarianism is reshaping the bench." He wrote:

It is not just about reclaiming what Randy Barnett famously called the "lost Constitution." Less visibly but often more consequentially, libertarian academics, advocates, and judges have long advocated thrusting the courts into much more aggressive roles in resolving the details of messy non-constitutional disputes—in interpreting statutes, and, in particular, in scrutinizing and micro-managing executive and regulatory agencies' applications of the laws they administer.⁵

Well, yes. Much as it might frustrate Barack Obama, there's no "if Congress won't act, the president and executive agencies get extra powers" clause in the Constitution. The latest confirmation of that truism came in the unanimous ruling in *Noel Canning*, which invalidated our constitutional-scholar-in-chief's so-called recess appointments of January 2012. For the 13th time since those ill-fated National Labor Relations Board nominations, the Obama Justice Department lost unanimously at the Supreme Court. Each time, the government argued for a radically expansive federal—and especially executive—power and each time not a single justice agreed. In areas of law ranging from criminal procedure to securities regulation, immigration to religious liberty, Obama couldn't even get the votes of the justices

⁵ Simon Lazarus, John Roberts' Supreme Court Is the Most Meddlesome in History, *The New Republic*, July 10, 2014, <http://www.newrepublic.com/article/118648/john-roberts-supreme-court-most-meddlesome-us-history> (subtitle: "How radical libertarianism is reshaping the bench").

he himself appointed. In other words, the Supreme Court is increasingly embracing the Constitution's structural and rights-based protections for individual freedom and self-governance. Not in every case and not without fits and starts, but on the whole the justices are moving in a libertarian direction.

Accordingly, Cato again did swimmingly, compiling a 10–1 record for the year. And, similar to last year, Cato was the only group that filed on the winning side of this term's three highest-profile 5-4 cases: *McCutcheon*, *Harris v. Quinn*, and *Hobby Lobby*. Notably, we again vastly outperformed the solicitor general's office, which went 11–9. While an improvement over last year, when the government failed to win even 40 percent of its cases—against a historical norm of 70 percent—it still wasn't a good performance. As Miguel Estrada commented when summarizing the government's abysmal results last term, “when you have a crazy client who insists you make crazy arguments, you're gonna lose some cases.”⁶ Perhaps the government would be better served following Cato's lead on constitutional interpretation, advocating positions that reinforce our founding document's role in securing and protecting liberty.

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Turning to the *Review*, the volume begins as always with the previous year's B. Kenneth Simon Lecture in Constitutional Thought, which in 2013 was delivered by Senior Judge David Sentelle of the U.S. Court of Appeals for the D.C. Circuit. Judge Sentelle's address was a pithy yet trenchant look at a part of the First Amendment not often examined in any depth, even in scholarly circles: the freedom of the press. That is, the Supreme Court's docket sees a steady stream of free-speech and religion cases—some of which are detailed in these pages—and the idea that free people should have the rights “peaceably to assemble” and “to petition the Government for a redress of grievances” is intuitive in a democratic society. But what is this press freedom that we all support unflinchingly? We recognize the importance of a fourth estate to provide a further check on our government,

⁶ 2013 Annual Supreme Court Roundup, Speech to the Federalist Society's Washington Lawyers Chapter, July 8, 2013, <http://www.fed-soc.org/events/detail/2013-annual-supreme-court-round-up>.

but is there a media officialdom that gets more freedom along with that responsibility? Did colonial pamphleteers—and then men running around in fedoras with “press” tags—get special rights, so that now the law’s main challenge is to draw a line between “legitimate” new media and a motley crew of celebri-tweeters and kitty bloggers? No, says Sentelle in his typically engaging manner, because the Press Clause protects a “method of communication” not a “privileged class of communicators”—the “dissemination of information or opinion by anyone, not just the institutional press.”

We move then to the 2013–2014 term, starting with two articles on religious liberty, which came to the Court in very different ways. First we have the libertarian legal world’s indomitable lion—and a member of our editorial board, and my former professor—Richard Epstein, with his characteristically unique take on *Burwell v. Hobby Lobby*. He first notes that this would’ve been a much different case had Obamacare’s contraceptive mandate actually come from the text of the Affordable Care Act rather than in an implementing regulation. As it turned out, however, it became a fairly simple exercise in interpreting the Religious Freedom Restoration Act.⁷ Epstein thinks that the Supreme Court got this case right, but for the wrong reason: after finding that the mandate imposed a substantial burden on religious exercise, the Court should’ve considered whether the government nevertheless advanced a compelling interest—rather than assuming that it did—before moving to the question of whether it had used the least-restrictive means to achieve it. He writes that Justice Alito’s “intellectual mistake was to think that it is possible to leap from the first to the third question under RFRA without addressing this middle question.”

Then we have Eric Rassbach of the Becket Fund for Religious Liberty, who contributes a fascinating article on the Court’s rediscovery of historical analysis in its interpretation of the constitutional prohibition on the government’s “establishment” of religion. He writes this in the context of *Town of Greece v. Galloway*, the term’s legislative-prayer case. The Court’s Establishment Clause jurisprudence has

⁷ I’ve said all along that this case wasn’t that big a deal, at least not for legal doctrine—or Obamacare, for that matter, let alone for “women’s rights,” since access to birth control was never in question—but instead was a straightforward application of a clear statute. See David H. Gans & Ilya Shapiro, *Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution?* (forthcoming 2014).

long been muddled, but “the process of historical examination that *Town of Greece* has set in motion will continue to reshape how these cases are decided for years to come.” Indeed, municipalities’ ability to continue opening sessions with invocations is but the smallest consequence of the Court’s ruling. Lower courts will now have to “look for historical support (or lack thereof) for particular government practices.” This is a healthy development because, instead of forcing judges “into the uncomfortable and irreducibly subjective role of psychological representative of society, the historical approach gives judges objective facts to work with.”

Staying within the First Amendment but moving to the Free Speech Clause, newlywed Allen Dickerson of the Center for Competitive Politics analyzes *McCutcheon v. FEC*. While exercised progressives painted this campaign finance case as *Citizens United* redux, any observer who took a moment to read up on the case could see that it’s actually the flip side of that misunderstood ruling. Instead of corporate/union/organizational interests, here we had an individual. Instead of independent spending on political speech of various kinds, here we had donations to candidates and parties. Moreover, this case didn’t even challenge “base limits”—how much a donor can give to a particular candidate—but only “aggregate limits.” In effect, why is it okay (not corrupting) to “max out” to 9 candidates but, once you start on the 10th, it’s the end of the Republic? The Court struck down this illogical restriction, which Dickerson says is a “narrow” holding that “clarified that exacting scrutiny requires searching review that pays close attention to the ‘fit’ between the asserted government interest and Congress’s policy choices.”

Sticking with election regulation, the next article is under my byline, although I claim it on behalf of my colleagues and all that is true and beautiful. Let me explain: if you followed the Supreme Court this past year, you may have heard of a case involving an Ohio law that *sends you to jail for making “false statements” about politicians*. (As Dave Barry would say, I’m not making this up!) Even if you weren’t following the Court, however, you may have heard of the “funniest brief ever” or the “best amicus brief ever.” Well, that’s where I take my (partial) credit. My brief, co-authored by Trevor Burrus and Gabriel Latner and joined by Cato’s esteemed H.L. Mencken Research Fellow, one P.J. O’Rourke, defended truthiness, satire, and the American way of public discourse. Accordingly, instead of analyzing the case in any depth—it turned on

rather technical issues of civil procedure—I provide a sketch of it followed by a reprint of the brief. It all goes to show that criminalizing political speech is no laughing matter.

In dealing with another kind of speech—“sidewalk counseling”—the Court provided another narrow holding in *McCullen v. Coakley*, the abortion-clinic buffer zone case. This is one of the notable cases this term where the justices were unanimous in judgment—here striking down a Massachusetts law—but starkly divided in reasoning. Our own Trevor Burrus tackles the case, with a rollicking historical examination of “injordinances,” which are a combination of injunctions and ordinances that were originally applied to labor pickets during the Progressive Era and have since moved to modern culture wars. “An injordinance resembles a law in most regards—it is passed by a legislative body and is enforced through criminal sanctions against the general public—but it resembles an injunction in that it applies to specific places and proscribes specific conduct around that space.” Regardless of whether you agree with Chief Justice Roberts’s measured majority opinion or Justice Scalia’s emperor-has-no-clothes dissent concurrence, there’s much to learn at the intersection of First Amendment jurisprudence and injordinances used to ensure public safety.

Moving from protections against union pickets to protections against union compulsion, Jacob Huebert of the Illinois Policy Institute—and a year behind me in law school—covers *Harris v. Quinn*. *Harris* came out on the last day of term and was thus overshadowed by *Hobby Lobby*, but some years hence, when the contraceptive mandate is a footnote to the decade’s political narrative, we could be talking about this case as the big one from the October Term 2013. Huebert rightly begins his essay by asking the fundamental question, “When can the government force someone to give money to a union to speak on his or her behalf?” The Court ruled that, when it comes to home health aides whose terms of employment are controlled by people they care for, the mere fact that their compensation comes from state Medicaid funds doesn’t turn them into state employees who can be coerced into unionization. While Justice Alito’s magisterial opinion left in place the 1977 case of *Abood v. Detroit Board of Education*—which enables the compulsion of public-sector employees in states that go in for that sort of thing—it cast as much doubt on its logic as possible without overruling it.

Another constitutional case affecting labor relations was *National Labor Relations Board v. Noel Canning*, a challenge to President Obama's purported use of his recess-appointment power in the context of three NLRB nominations in January 2012, when the Senate didn't consider itself to be in recess. A member of Jones Day's victorious legal team in that case, Bryan Leitch, presents a tour de force of legal scholarship and litigation strategy. The Supreme Court unanimously found executive excess here, albeit again with a blistering Scalia concurrence—which he read from the bench!—about the majority's theory of the executive's "acquiring power by adverse possession." "Going beyond the propriety of one presidential action," Leitch writes, "*Noel Canning* highlighted important jurisprudential debates and brought to the fore the intricate institutional relationships among the federal branches—illustrating the ways in which the Constitution advantages and disadvantages each in the performance of its essential functions."

Next comes George Mason law professor David Bernstein, another member of our editorial board, with a characteristically provocative exposé of a case that provoked great emotions on both sides. Bernstein's title bears noting: "Reverse *Carolene Products*,' the End of the Second Reconstruction, and Other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*." There's a lot to unpack in this article, which challenges the conventional wisdom about whether and when it might be appropriate to use race in university admissions and other areas of public policy. Indeed, it even challenges what "race" is and whether the Supreme Court doctrines that have arisen to protect the supposed political interests of racial minorities actually do the reverse. "The political process doctrine has become entirely unstable," he explains, "both because of a huge decline since the 1960s in racist attitudes by whites and because issues have changed from rectifying overt racial discrimination to more complex social policies."

Cato senior fellow Nicholas Quinn Rosenkranz, whose day job is as a Georgetown law professor, contributes an essay analyzing *Bond v. United States*—that typical case of federalism, adultery, and chemical weapons. This is the second time that *Bond* has come before the Court and the second time that the government's position has lost unanimously. It was Rosenkranz's scholarship that planted the seed for this case, which challenged the idea that the federal government could gain extra powers—beyond those constitutionally

enumerated—pursuant to a duly ratified treaty. Chief Justice Roberts, writing for the majority, didn't go so far as to reject that principle or cabin its application. Instead he rewrote the statute at issue such that Mrs. Bond's use of chemicals was a ~~tax~~ beyond its reach. Justices Scalia, Thomas, and Alito would've gone further and struck down the law on constitutional grounds. As Rosenkranz puts it, their "powerful concurrences went unanswered, and they may well provide a roadmap in a future case."

Our final article about the term just past concerns yet another unanimous ruling, this one without multiple opinions splintering the unified judgment. In a bout of refreshing boldness, the Court held in *Riley v. California* that police can't automatically search the digital contents of a cell phone seized from an arrested suspect. Mayer Brown's Andrew Pincus explains that the "Court refused simply to extend to this new technology the exception to the Fourth Amendment's general requirement of a warrant based on probable cause that had been developed in the pre-digital era." Instead it looked to the "practical, real-world intrusion on long-standing legitimate privacy expectations that would result from taking that step and [rejected] the less-protective standard developed for the pre-digital environment." Pincus runs through the Court's major recent decisions regarding new technologies and concludes that the justices have "charted a course . . . to safeguard Americans' privacy against arbitrary invasion through abuse of government power."

The volume concludes with a look ahead to October Term 2014 by Miguel Estrada and Ashley Boizelle, who are appellate lawyers at the Washington office of Gibson, Dunn & Crutcher. As of this writing, the Court has 39 cases on its docket, down from last year but on par with recent practice, such that we can expect about 75 opinions at term's end. Here are some of the issues: whether a police officer's mistaken belief that someone had committed a traffic violation can form the basis for a lawful search (*Heien v. North Carolina*); whether a prison can prohibit a Muslim inmate from growing a beard (*Holt v. Hobbs*); whether a fisherman can be prosecuted under Sarbanes-Oxley's record-keeping provision for throwing undersized fish overboard (*Yates v. United States*) (again, not making this up); whether Congress can force the State Department to recognize Jerusalem as part of Israel on U.S. passports (*Zivotovsky v. Kerry*); and the circumstances under which criminal charges can attach to Facebook posts

(*Elonis v. United States*). These cases don't yet reach the high profile of recent terms, but if the Court takes up one of the same-sex marriage or Obamacare lawsuits now at its doorstep, all bets are off. As Estrada and Boizelle conclude, "after a 2013 term that featured several controversial decisions and kept commentators on their toes, all eyes will be on the Court again in October."

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This is the seventh volume of the *Cato Supreme Court Review* that I have edited, which means that, for good or ill, I've now been responsible for a majority of the volumes. I'll take all the credit but am happy to share the blame with many people. I first need to thank our authors, without whom there would literally be nothing to edit or read. My gratitude also goes to my colleagues Trevor Burrus, Bob Levy, Tim Lynch, and Walter Olson, who provide valuable counsel and editing in legal areas in which I can't even feign expertise. I joke that research associate Jonathan Blanks "makes the trains run on time" in Cato's Center for Constitutional Studies, but he really does more than that for the *Review*, including many steps in the process that I'm sure I've forgotten about. Jon makes all of us look good and, most importantly, keeps track of legal associates Julio Colomba (making his second appearance in these acknowledgments) and Olivia Grady, along with interns Jack Bussell and Carolyn Iodice—who in turn performed many thankless tasks without complaint. Neither the *Review* nor our Constitution Day symposium would be possible without them.

Finally, thanks to Roger Pilon, the founder of Cato's Center for Constitutional Studies, who I know is pleased with how this journal has turned out so many years after he created it. Roger has advanced liberty and constitutionalism for longer than I've been alive, and I've benefited greatly from the high standard of excellence he's set on those fronts. He's also a *mensch*.

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 heady times when the People are beginning to demand an end to unconstitutional government actions and expansions of various kinds, it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope you enjoy this 13th volume of the *Cato Supreme Court Review*.