

Introduction

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This is the 16th 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. We release this journal every year in conjunction with our annual Constitution Day symposium, less than three months after the previous term ends. We are proud of the speed with which we publish this tome and of its accessibility, at least insofar as the Court's opinions allow. I'm particularly proud that this isn't a typical law review, whose submissions' esoteric prolixity is matched only by their footnotes' abstruseness. Instead, this is a book of essays on law intended for everyone from lawyers and judges to educated laymen and interested citizens.

And we're happy to confess our biases: We approach our subject from a classical Madisonian perspective, with a focus on individual liberty that is protected and secured by a government of delegated, enumerated, separated, and thus limited powers. We also maintain a strict separation of law and politics; just because something is good policy doesn't mean it's constitutional (see President Obama's executive actions on immigration) and vice versa (see President Trump's). Moreover, just because being faithful to the text of a statute might produce unfortunate results doesn't mean that judges should take it upon themselves to rewrite the law—as the new “junior justice,” Neil Gorsuch, has already reminded us in his early writings. Accordingly, just as judges must sometimes overrule the will of the people—as when legislatures act without constitutional authority or trample individual liberties—resolving policy problems caused by poorly conceived or inartfully drafted legislation must be left to the political process.

* Senior fellow in constitutional studies, Cato Institute, and editor-in-chief, *Cato Supreme Court Review*. I dedicate this volume to Judge E. Grady Jolly, who this summer marked 35 years on the Fifth Circuit bench and is now taking senior status. It was my great good fortune to have clerked for Judge Jolly in 2003–04.

This was a term for legal nerds rather than political junkies, with plenty of interesting cases but not really any front-page news. (A transgender-bathroom-access case, *Gloucester County v. G.G.*, would've gotten plenty of attention, but it was ultimately remanded for reconsideration after the Trump administration rescinded the Obama-era guidance to which the lower court had simply deferred.) We had gotten used to the idea that every year the Supreme Court decides several of the biggest national political issues—we've seen six or seven consecutive "terms of the century"—but this year saw a regression to the mean.

Most of the reason for the low-key term is Justice Antonin Scalia's death in February 2016 and the delay in confirming a successor. Scalia's absence didn't change the result of that many cases—the previous term's *Friedrichs v. California Teachers Association* was by far the biggest exception (and the issue presented there, "agency fees" for public-sector-union nonmembers, will likely return to the Court next term)—but cert grants decreased in both quantity and quality. Now that the Court is back at full strength, cert grants are picking up in both number and profile; simple math tells you that getting four votes out of nine is easier than four out of eight. Already this summer we talked more about the travel ban, cell site location information, vendors for same-sex weddings, partisan gerrymandering, and sports betting in New Jersey—all cases granted in June—than anything that was decided this term.

The term's theme—to the extent this theme-searching exercise is productive—thus had little to do with the cases decided and everything to do with the culmination of the battle over the Scalia seat. More than a year after Scalia's death, the high court finally returned to a full complement of nine justices. But the newest justice's confirmation happened only after the Senate decided, on a party-line vote, to remove filibusters for Supreme Court nominations. The exercise of the "nuclear option" returns Senate procedures to what they were 15 years ago. Before 2003, the filibuster simply wasn't used for partisan purposes against nominees who had majority support. Now, a Senate majority will still be able to stall a nomination made by a president of the opposing party—we could see more Merrick Garlands—but a Senate minority will lack that power.

These developments sound like a big deal, but they were predictable given our political climate and won't actually change the

operation of either the Court or the Senate. For every commentator who rues that our justices will now decline in quality, there's one who explains that this moment actually broke the fever of our toxic judicial politics. Given that judges are now selected for jurisprudential correctness (and on the left for demographic correctness) rather than party loyalty and cronyism, I can't imagine that nominees will be all that different. And opportunities for obstruction will continue too—pushed down to the “blue slip” and other arcane steps—even as control of the Senate remains by far the most important aspect of the whole endeavor.

The elimination of the filibuster for Supreme Court nominees was the natural culmination of a tit-for-tat escalation by both parties, with partisan disagreements over who started it. The Gorsuch denouement was retaliation for the Garland blockade, which in turn followed Harry Reid's nuking of filibusters for lower-court and executive-branch nominees in 2013, which came a decade after Reid used the tactic to block President George W. Bush's nominations (most notably Miguel Estrada, whom Democrats didn't want to set up for elevation as the first Hispanic justice not named Benjamin Cardozo).

At a certain point, it doesn't really matter who started it. The senatorial brinksmanship is all symptomatic of a much larger problem that began long before Ted Kennedy smeared Robert Bork: the Supreme Court's own self-corruption, aiding and abetting the warping of federal power by Congress and the executive branch. Living constitutionalists and their judicial-restraint handmaidens have politicized the law such that judges quail at enforcing the Constitution's structural limits and face attacks for not seeing statutes in a way that favors “the little guy.” As we've gone down the wrong jurisprudential track since the New Deal, the judiciary now affects the direction of public policy more than it ever did—and those decisions increasingly turn on the party of the president who nominated the judge or justice. So of course confirmations will be fraught.

Given the highly charged battle we saw over Gorsuch—only three Democrats, from states Trump won “bigly” (Indiana, North Dakota, West Virginia), voted for him, and just one more, fellow Coloradan Michael Bennet, voted against filibuster—too many people will now think of the justices in partisan terms. That's too bad, but not a surprise when contrasting methods of constitutional and statutory interpretation largely track identification with parties that are (at least

in Congress) more ideologically coherent than ever before. Relatedly, confirmation hearings will continue to be kabuki theater, educational about various legal doctrines but illuminating little of the nominee's judicial philosophy. On the other hand, perhaps nominees will occasionally feel free to express themselves, knowing that they don't need any of the minority party's votes. I'm just glad we can stop talking about filibusters and nuclear options in this context.

In any case, the Court has effectively returned to the status quo we saw before Scalia's death. No two justices are the same, but Gorsuch can probably be expected to vote the same as Scalia on all the issues that broke down 5-4, including the cases (especially in criminal procedure) that joined the Court's left and right against the middle. More accurately, based on the one sitting's worth of cases in which he participated, Gorsuch will probably vote most often with Justice Clarence Thomas—so think about where you stand on cases where Scalia and Thomas diverged. Regardless, Gorsuch is the real deal. Those who hoped for (or feared) a smooth-writing textualist got what they expected. "Wouldn't it be a lot easier if we just followed the plain text of the statute?" he asked at his first argument, in the otherwise forgettable case of *Henson v. Santander*. He continued in that vein in his opinion in that case, where he noted that "we begin, as we must, with a careful examination of the statutory text." You may not agree with him on every case, but his opinions will be well-reasoned and clearly written. Gorsuch's mentor, Justice Byron White, liked to say that each new justice makes for a new court, and I welcome the breath of fresh air, intellectual rigor, collegiality, and constitutional seriousness that Justice Gorsuch is bringing.

Still, the Court's ideological dynamic—with four liberals, four conservatives, and a "swing" vote—is in its last stages. Whenever Justice Anthony Kennedy retires—there was no telegraph from Salzburg this summer—and whenever Justice Ruth Bader Ginsburg departs (unless she outlasts Trump and a Democrat is president), the Court will move right, with Chief Justice John Roberts at its center. But if and when there's a vacancy, there'll be no incentive for the president to moderate his choice of nominee. By filibustering the anodyne Gorsuch, the Democrats destroyed their leverage over the next nominee. It's not at all clear that "moderate" or "institutionalist" Republican senators like Susan Collins, Lisa Murkowski, or Lindsey Graham would've gone along with a "nuclear option" to replace Justice

Kennedy or Ginsburg with a nominee more controversial than Gorsuch, but now they won't face that dilemma.

Moving to the statistics, the 2016–2017 term set a dubious record for low output—only 62 cases decided after argument—and approached the record-level unanimity from three years ago, when two-thirds of the cases produced no dissents and only 14 percent were split 5-4. Forty-one of the 69 cases decided on the merits (59 percent) ended up with unanimous rulings.¹ The previous term it was 48 percent, and the preceding five terms registered 41, 66, 49, 45, and 46, respectively (so you see the anomaly that was October Term 2013, which papered over real doctrinal differences). Six more cases were decided by 8-1 or 7-1 margins, which brings us to nearly 70 percent of the docket. Some of this can be attributed to Chief Justice Roberts's working hard to facilitate narrow rulings and thus avoid 4-4 splits, but this term (unlike the previous one), a diminished docket filled with fewer controversial cases is what really drove the Court to speak with more of one voice.

The term produced three actual 5-4 decisions, though it's fair to count four cases that went 5-3 as "5-4" for comparison with previous years. These included a couple of death-penalty cases, as well as the big property-rights ruling in *Murr v. Wisconsin*, but the overall rate (10 percent of the total) is one of the lowest in modern history. Only the previous term's five-percent rate of 5-4 splits was lower—but then when you add in the four 4-4s (in which Scalia would've broken the tie), this term is comparable.

The decrease in sharp splits naturally resulted in fewer dissenting opinions, 32, whereas in the previous term there were 50 (the yearly average going back to 2005–2006 is 52). Not surprisingly, the total number of all opinions (majority, concurring, and dissenting) was also low—139, down from 162 last term and far lower than the 12-year average of 172—and the average of 2.0 opinions per case was

¹ The total includes seven summary reversals (without oral argument), four of which were unanimous. It does not include two cases that were set for re-argument, presumably because they were split 4-4 and can now get Justice Gorsuch's tie-breaking vote. All statistics taken from Kedar Bhatia, Final Stat Pack for October Term 2016 and Key Takeaways, SCOTUSblog, June 28, 2017, <http://www.scotusblog.com/2017/06/final-stat-pack-october-term-2016-key-takeaways>. For detailed data from previous terms, see Statpack Archive, SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack>.

similarly low. Justice Thomas per usual wrote the most opinions (31, including nine dissents), followed far behind by Justices Samuel Alito (18), Stephen Breyer (17), and Ginsburg (17). Justice Alito produced the most opinion pages (217), however, followed by Justices Thomas (189) and Breyer (180). This was all a far cry from the previous term, when Justice Thomas produced 341 opinion pages.

The Court reversed or vacated 56 lower-court opinions—79 percent of the 71 total, including the separate cases that were consolidated for argument—which is higher than last term and the last several 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 1-7 record (88 percent reversal), maintaining its traditional crown as the most-reversed court, followed by the Sixth and Federal Circuits (both 1-6, 86 percent reversal). State courts also fared poorly, attaining a 3-14 record (82 percent reversal). But really, whatever court you're appealing from, it's safe to say that getting the Supreme Court to take your case is almost the entire battle.

Less notable than some of the quirks described above is *which* justices were in the majority. Justice Kennedy kept his near-annual crown by being on the winning side in 69 of 71 cases (97 percent!) and 28 of the 30 divided cases (93 percent). Chief Justice Roberts regained his typical second place (93 percent) after having dropped to fourth last year, behind Justices Elena Kagan (now 93 percent) and Breyer (now 90 percent). Justice Thomas brought up the rear (82 percent and just 57 percent of divided cases).

Justice Kennedy also maintained his typical lead in 5-4 cases. Even though there were only seven of those, Kennedy was the only justice on the winning side of six. He was with the "liberals" in four of them and with the "conservatives" in the other two. In the remaining decision, in the racial gerrymandering case of *Cooper v. Harris*, Justice Thomas joined the "liberals" in a heterodox split (and without agreeing on the reasoning).

Thomas had enjoyed a long run of success in 5-4 cases—he was second to Kennedy in October Terms 2010-2013—but this year was ahead only of the chief justice and Justice Alito. Not surprisingly, Thomas was also the justice most likely to dissent (18 percent of all cases and 43 percent of divided cases). He also maintained his status as the leading "lone dissenter"—since 2005-2006 he's averaged 2.2 solo dissents per term, more than double his closest colleague—writing

two such dissents, as did Justice Ginsburg. Justices Breyer and Sotomayor each wrote one. Chief Justice Roberts and Justice Kagan have still *never* written one of those during their entire tenures (12 and 7 terms, respectively). And neither yet has Justice Gorsuch, but he's still gotten off to a flying start on his writing. Setting aside his single opinion for the Court, in June alone he wrote more separate opinions than Justice Kagan did in her first two terms.²

More news comes from judicial-agreement rates. Two terms ago, the top six pairs of justices most likely to agree, at least in part, were all from the "liberal bloc." The three that tied for first all involved Justice Breyer—perhaps an unlikely "Mr. Congeniality." This term there seems to be no rhyme or reason to the top pairings, but number one is amazing: Justices Thomas and Gorsuch agreed completely *in every single case* (17 of them). They were followed by Justices Alito and Gorsuch at 94 percent (16 of 17 cases), followed by Justices Ginsburg and Sotomayor (93 percent), Breyer and Kagan (93 percent), and then Thomas/Alito, Roberts/Kennedy, Roberts/Alito, and Sotomayor/Kagan in a virtual tie at 91 percent. The rest of the pairings were below 90 percent. Justices Sotomayor and Gorsuch voted together less than anyone else (in 10 of 17 cases, or 59 percent). The next three lowest pairs all involve Justice Gorsuch, with Justices Ginsburg, Breyer, and Kagan, respectively (each at 65 percent). The least-agreeable pair in the non-Gorsuch division consisted of Justices Thomas and Ginsburg (65 percent).

My final statistics are more whimsical, relating to the number of questions asked at oral argument. Without Justice Scalia on the bench as the Supreme Court's most frequent interlocutor, it fell on others to pick up the slack. Justice Breyer asked more than 20 questions per argument and was among the top three questioners two-thirds of the time, more than all his colleagues except Justice Sotomayor (73 percent). Sotomayor, who had been just behind Scalia the last few terms, was about a question per argument behind Breyer. Justice Gorsuch was respectably in the middle of the pack, with 14 questions per argument—though he did beat Sotomayor's short-lived record for most questions asked during his first argument. Justice Ginsburg again asked the first question most often (in 30 percent of cases),

² See Adam Liptak, Confident and Assertive, a New Justice in a Hurry, N.Y. Times, July 4, 2017, at A13.

followed by Justices Sotomayor and Kennedy (22 percent). Justice Thomas, who some thought might fill in for his departed friend, resumed his silent ways.

Moving closer to home, Cato filed amicus briefs in 13 merits cases on issues ranging from the separation of powers to free speech (both commercial and disparaging) and property rights. Improving on a 4-4 performance in an unusual previous term—when we still beat the government handily—Cato achieved a 9-4 showing, besting the combined Obama-Trump effort of 8-12. Cato also effectively drew votes from across the judicial spectrum, winning 10 votes from each of Chief Justice Roberts and Justice Kagan, 9 votes from Justice Breyer, and 8 votes each from Justices Kennedy, Alito, and Ginsburg.

Donald Trump's inauguration also marked the official end of the Obama era at the Supreme Court. A pair of unanimous losses brought the administration's total to 48, more than a quarter of all cases it argued and approximately 50 percent higher than both the Bush and Clinton teams. President Obama's total winning percentage of under 47 percent was also significantly lower than both of his predecessors, who finished at 60 and 63 percent respectively. Of course, the Trump administration is off to an even less auspicious start, with a 1-9 record and five unanimous losses in just half a term. (The apportionment of cases on either side of the inauguration may be somewhat artificial, given that most or all of these relatively low-profile Supreme Court arguments were handled by career lawyers, not political appointees, and the government's position didn't change with the change of administration.)

The reason President Obama did so poorly is because he saw no limits on federal—especially prosecutorial—power and accorded himself the ability to enact his legislative agenda when Congress refused to do so. If President Trump wants to improve the government's legal record, I humbly suggest that his lawyers follow Cato's lead, advocating positions (and advising executive actions) that are grounded in law and that reinforce the Constitution's role in securing and protecting liberty.

Here I should make one final note about the Gorsuch nomination-announcement ceremony. The then-judge mentioned two figures who had occupied the seat he now fills: Justice Scalia, of course, but also Justice Robert Jackson. Jackson was one of the best writers the Court has ever seen, also served as attorney general and Nuremberg

prosecutor, and was the last justice appointed who didn't graduate from law school. He's famous especially for two opinions: (1) the 1952 *Steel Seizures Case*, in which the Court rejected President Truman's attempt to nationalize the steel industry (where Jackson's concurrence became the legal standard for evaluating executive actions); and (2) *Korematsu v. United States* (1944), in which the Court allowed the war-time internment of Japanese Americans (Jackson dissented). It's no coincidence that the silver-haired nominee name-checked Jackson, and that should hearten those dismayed by a politics gone off the rails. When push comes to shove, the elegant Justice Gorsuch will help preserve our republic.

Turning to the *Review*, the volume begins as always with the previous year's B. Kenneth Simon Lecture in Constitutional Thought, which in 2016 was delivered by Justice Clint Bolick of the Arizona Supreme Court. Before his appointment to the bench, Bolick headed up the Goldwater Institute's litigation program—and earlier, he had co-founded the Institute for Justice—so it's no surprise that the subject of his remarks was the use of *state* constitutions to protect liberty. He explains that “even as the national constitution moved to the fore . . . many essential liberties were protected by state constitutions or not at all.” Economic liberties, such as the right to earn an honest living, enjoy far better explicit coverage in many state charters than in our national one. Ironically, the “earliest clarion call for freedom advocates to repair to state constitutions came not from the right but the left,” from Justice William Brennan in the late 1970s and early 1980s. Justice Bolick's engaging and pithy lecture blends theory and practice—with examples drawn from cases he himself handled—and concludes appropriately with a discussion on the role of judges in enforcing those long-neglected state-constitutional provisions.

Then we move to the 2016–17 term, starting with what is undoubtedly the most colorful case, *Matal v. Tam*. This is the case of the Asian-American electric-rock band that was denied trademark registration of their name, The Slants, because it “disparaged” Asian-Americans. The rockers' explanation that they were just trying to “take back” the slur went nowhere with the Patent and Trademark Office, so of course several years of litigation ensued before they were vindicated. University of Florida professor Clay Calvert—who was part of Cato's satirical brief on behalf of “a basket of deplorable people and organizations”—provides a thorough examination of the issues involved.

Tam “vindicates and reaffirms key First Amendment principles regarding both offensive expression and viewpoint discrimination,” he writes. The fate of the Washington Redskins’ trademarks also hung in the balance, so the team filed a brief with an 18-page appendix of registered marks that are far more offensive than “The Slants.”

Stanford Law School’s David Goldberg and his recently graduated former student Emily Zhang contribute an engaging piece on a case they worked on together through Stanford’s Supreme Court clinic. Goldberg himself argued *Packingham v. North Carolina*, in which a unanimous Court held that even sex offenders have First Amendment rights. In addition to explaining the case and how it treated the role of social media in society, the authors show that *Packingham* raises profound issues about the treatment of sex offenders more broadly. “All of which is to say that we likely have reached a new day,” Goldberg and Zhang write. “Courts will expect to see more challenges to restrictions on registrants that marshal the true facts and then ask judges to decide under equal-protection-infused understandings of state constitutions and the Ex Post Facto, Due Process, and other clauses.”

We then move to an article on the term’s big religious-liberty case, *Trinity Lutheran v. Comer*, authored by Notre Dame professor Rick Garnett and law student Jackson Blais. This was supposed to be a politically fraught culture-war case, so much so that, even though it was granted in January 2016, it wasn’t argued until April 2017—presumably on the assumption that a ninth justice would be needed to break the tie. As it turned out, the Court ruled 7-2 in the church’s favor, finding it problematic that Missouri had denied access to a playground-resurfacing subsidy solely because of religious status. “By taking seriously the fact that ‘Trinity Lutheran is a member of the community too,’” Garnett and Blais conclude, “the justices appropriately pushed back against the notions that church-state separation precludes cooperation and that maintaining a secular government requires what Father Richard John Neuhaus called a ‘naked public square.’”

Following Rick Garnett is his wife! Nicole Stelle Garnett is also a law professor at Notre Dame and serves on our editorial board. She writes on *Murr v. Wisconsin*, which, like *Trinity Lutheran*, was granted before Justice Scalia’s death but argued more than a year later. *Murr* did, however, break down on conventional ideological lines, with

Justice Kennedy joining the liberal bloc to rule against property owners in this dispute over the regulatory burdens imposed on a choice piece of land. The “regulatory takings” doctrine is a thorny one. “On the one hand, the Court has long insisted that state laws define the contours of property rights,” Garnett writes. “On the other, it also has admonished that state laws for other than traditional health and safety reasons will be treated as takings for which the regulated property owners are entitled to compensation.” But apparently not when a nebulous multifactor balancing test is applied on the shores of St. Croix River.

Next we have young legal scholar Tommy Berry, who is now with the Pacific Legal Foundation but wrote his essay while a Cato legal associate. Berry covers the most important case of the term that nobody’s heard about, *NLRB v. S.W. General*. Here the Supreme Court struggled to interpret the Federal Vacancies Reform Act, which sets the rules concerning who can serve as an acting official, for how long, and under what authority. At a time when political battles emerge over even the most obscure Senate-confirmed positions, understanding the FVRA’s dictates has never been more important. Indeed, this obscure statute is the reason why Noel Francisco stopped serving as acting solicitor general the moment he was nominated to fill that position permanently. As Berry puts it, in *S.W. General*, “the Supreme Court has indisputably reined in the power of the president to bypass the Senate in appointing acting officers.”

From an obscure but significant case we turn to a high-profile case that resulted in an unsatisfying punt. *Salman v. United States* was supposed to simplify the complicated and convoluted jurisprudence surrounding insider trading, but all it succeeded in doing was to further muddy the waters. My colleague Thaya Brook Knight, associate director of financial regulation studies at Cato, breaks down the three theories of insider-trading criminality before unpacking *Salman*. Ultimately, the continued lack of a unified theory of who’s been harmed when traders benefit from inside information makes insider-trading law unworkable. “The core problem with devising good insider-trading law,” she offers, “is that the central function of insider trading—introducing material information to the market—is good.” The Court here clarified a small issue—whether an insider could gift information to curry favor—but left unexplained *why* such trading is illegal.

Then we have an essay by David Post, law professor emeritus at Temple University and a Cato adjunct scholar. He writes on *Nelson v. Colorado*, a case in which the Court again slapped down an outlier state statute. Here, Colorado required people who had been wrongly convicted to pursue a new legal claim under the state Exoneration Act to recover money paid as punishment, restitution, and other fees. Being ultimately found not guilty wasn't enough; you had to affirmatively prove your innocence to recover your funds. "It is entirely understandable that Colorado would want to restrict the award of special compensation to those who can show that they were actually innocent of the crimes charged, not merely 'legally innocent,'" Post explains, but surely recovering your own property is a different situation. This may seem "in some ways a very small case," but it's important for protecting basic due process and the presumption of innocence.

Our final contribution regarding the past term comes from Mark Chenoweth, a Washington lawyer who's served in all three branches of government, on a dispute over whether a particular law had anything to do with the First Amendment. Specifically, is telling merchants how they can advertise different prices for paying cash rather than credit "economic regulation" (to which courts are alas deferential) or a speech restriction (which would subject the law to heightened judicial scrutiny)? Readers of this publication are no doubt aware that credit-card companies charge businesses a small percentage of each card transaction. Most retailers pass along most of that cost to consumers—so cash-payers subsidize their plastic-wielding brethren—but some have two sets of prices. New York, where *Expressions Hair Design v. Schneiderman* originates, is one of 10 states that allow "discounts" for cash but not "surcharges" for credit. Of such semantics are constitutional cases made!

The volume concludes with a look ahead to October Term 2017 by Chris Landau, the head of appellate litigation at Kirkland & Ellis, and his colleague Sopan Joshi, who was one of Justice Scalia's last clerks. As of this writing, before the term starts, the Court has 31 cases on its docket—one other case was dismissed over the summer after the parties in interest changed—a bit low given recent history but certainly above where we were at this point last term. And this term will be anything but a snooze. Here are some of the issues: partisan gerrymandering (*Gill v. Whitford*), the "travel ban" executive order (*Trump v. International Refugee Assistance Project*), whether bakers can

be forced to make wedding cakes for same-sex couples (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*), warrantless searches of cellphone-location data (*Carpenter v. United States*), and sports betting in New Jersey (*Christie v. NCAA*). There's something for everyone, really, and that's before the Court takes up (again) the question of compelled "agency fees" assessed against union nonmembers in the public sector—the previous iteration of which fizzled 4-4 when Justice Scalia died—and the structural challenges to the Consumer Finance Protection Board and administrative law judges at the Securities and Exchange Commission. "These are unconventional times," Landau and Joshi conclude, "and the Supreme Court may be headed for an unconventional term."

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This is the 10th volume of the *Cato Supreme Court Review* I've edited, and the third with Trevor Burrus as managing editor. Trevor has been a huge help over the years with both the *Review* and our amicus brief program, so I'm delighted to give credit where it's due. I'm also most thankful to our authors, without whom there would literally be nothing to edit or read. We ask leading legal scholars and practitioners to produce thoughtful, insightful, readable commentary of serious length on short deadlines, so I'm grateful that so many agree to my unreasonable demands every year.

My gratitude goes also to my colleagues Bob Levy and Walter Olson, who provide valuable counsel and editing in legal areas less familiar to me. My new colleague (and old friend) Clark Neily has stepped in to lead *Cato's* criminal-justice efforts; he edited one article in this volume and I look forward to working with him more in future. Our research assistant, Anthony Gruzdis, managed to avoid the sophomore slump last year and is an MVP not only on *Cato's* softball team, but here too. Anthony kept track of legal associates Tommy Berry, Meggan DeWitt, Frank Garrison, Matt Larosiere, David McDonald, and Devin Watkins—we welcomed a new class midway through the production process—and interns Jack Brown, Patrick Moran, and Matthew Robinson, 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, who founded *Cato's* Center for Constitutional Studies when fresh from doing good at the Reagan

administration and established this journal a decade later. Roger has advanced constitutionalism and the rule of law for decades, with an integrity and intellectual honesty that even Cato's harshest critics acknowledge and respect. He's not just a great boss and mentor, but a good friend.

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 feel betrayed by the elites—legal, political, corporate, and every other kind—it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope that you enjoy this 16th volume of the *Cato Supreme Court Review*.