

Introduction

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This is the 15th 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 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 final 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. 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 are 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, and vice versa. 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 and bail out politicians. 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.

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* Senior fellow in constitutional studies, Cato Institute, and editor-in-chief, *Cato Supreme Court Review*. I dedicate this volume to my baby son, Jacob.

It was an odd and sad year at the Supreme Court. Most years, pundits strain to concoct some sort of “theme” to the judicial year gone by. They try to connect disparate cases into a coherent narrative about, for example, the “triumph of minimalism,” “the court’s turn to the left,” or even its “libertarian moment” (guilty as charged on that one). Such trendspotting is mainly an artificial exercise driven by docket vagaries; it’s not like the justices suddenly decide to make ideological shifts, alter jurisprudential approaches, or grant certiorari based on a “theme of the term.” But this term there actually was a phenomenon that overshadowed the Court’s work and put a metaphorical black ribbon on the proceedings: the passing of Justice Antonin Scalia.

Scalia’s mid-term departure—he participated in more than half of the oral arguments, but his vote counted in only 16 cases—couldn’t help but alter the course of history. His passing “deflated” what would otherwise have been yet another blockbuster term in many ways, defusing several high-profile cases as well as removing one of the most quotable pens on Earth from media coverage those last weeks of June. He was a legal giant, whose impact on both legal theory and judicial practice can’t be overstated—even if he wasn’t able to move the law as much in his direction as he would’ve liked.

And you could see the effect of Scalia’s absence immediately: Two weeks after his friend’s passing, Justice Clarence Thomas asked a question during oral argument for the first time in over a decade, picking up the Second Amendment gauntlet right where his friend had left it. The whole tenor of the hearings changed; sure, some justices—especially Sonia Sotomayor and Samuel Alito—filled some of the vacuum, but there was clearly more time for the advocates to talk, and fewer notations of “[laughter]” in the oral argument transcript.¹

In practical terms, however, Scalia’s absence was felt in ways different than most people assume: his vote wouldn’t have changed all that many outcomes. For example, of the major cases, only *Friedrichs v. California Teachers Association* would likely have come out the other

¹ See generally Jay Wexler, SCOTUS Humor, <http://jaywex.com/wordpress/scotus-humor> (last visited July 10, 2016).

way with Scalia's participation. In *Friedrichs*, five justices seemed poised to strike down mandatory "agency fees" for public-sector nonunion members, but that would-be reversal of the lower court became a 4-4 affirmance without opinion. Another such 4-4 came in *United States v. Texas*, the case taking up President Obama's executive actions on immigration. But there, the affirmance meant that the lower-court injunction stands, which is surely the position Justice Scalia would've taken. Yes, a five-justice majority would have produced an opinion, but at best that opinion would be useful as a precedent for some future case; the practical result would be what it is now.

The other "big" cases similarly wouldn't have changed. In *Fisher v. UT-Austin II*, Justice Anthony Kennedy surprisingly voted to uphold a use of racial preferences in college admissions, the first time he's ever done that. But Justice Scalia's vote would've just made this into another 4-4 case—Justice Elena Kagan was recused—so the lower-court ruling that upheld a *sui generis* program would still have stood.

In *Whole Woman's Health v. Hellerstedt*, Kennedy again went left—striking down an abortion regulation for the first time since *Planned Parenthood v. Casey* (1992)—but that just means that Scalia's inclusion would've been on the dissenting side of a 5-4 split. Even *Zubik v. Burwell*, which involved the application of Obamacare's contraceptive mandate to nonprofit religious groups, turned out to be a unanimous punt. While Scalia would likely have made this a cleaner 5-4 ruling against the government—*Hobby Lobby* redux—an 8-0 instruction to the lower courts to facilitate a workable compromise is essentially a win for the challengers given the case dynamics.

And then there were the true unanimous rulings, deferring to states on how to implement the "one person, one vote" principle in *Evenwel v. Abbott* and reversing a public-corruption conviction due to failure to prove a *quid pro quo* in *McDonnell v. United States*. Justice Scalia may have produced some interesting writings here—as he would have elsewhere—but again his vote wouldn't have changed the final result.

Moreover, even if President Obama's nominee to fill the vacancy left by Scalia's departure had been confirmed in due course, Merrick Garland wouldn't have joined the Court in time to consider any of this term's cases.

Now, it's no doubt true that Scalia's absence affected the Court's decisionmaking regarding future cases to review. It takes four votes to grant "cert," and the justices have been much more reluctant in counting to four, as well as declining cases with high probabilities of 4-4 splits (because why bother?). But some of this profile-lowering is a natural regression to the mean: after five straight years of "terms of the century"—covering Obamacare, voting rights, abortion, affirmative action, campaign finance, and seemingly every other hot-button legal issues under the sun—this fall's crazy political scene will be accompanied by a more typically mundane legal one.

In short, Antonin Scalia's death will continue to have repercussions on our law and politics—but its least significance was on the undecided cases he left behind.

Moving to the statistics, the 2015–2016 term neither approached the record-level unanimity from two years ago nor was it bipolar, with the next biggest voting breakdown being 5-4. Thirty-eight of the 76 cases decided on the merits (48 percent) ended up with unanimous rulings.² The previous term it was 41 percent, and the preceding five terms registered 66, 49, 45, 46, and 47, respectively (so you see the anomaly that was October Term 2013, which papered over real doctrinal differences). Nine more cases were decided by 8-1 or 7-1 margins, which brings us to nearly 60 percent of the docket. Some of this can be attributed to Chief Justice John Roberts's working hard to craft or facilitate narrow rulings and thus avoid 4-4 splits.

The term produced exactly *zero* actual 5-4 decisions—there were no such rulings released before Justice Scalia's death—though it's fair to count four cases that went either 5-3 or 4-3 as "5-4" for comparison with previous years. These included such contentious ones as *Fisher II* (affirmative action) and *Whole Woman's Health* (abortion), but the overall rate (five percent of the total) is the lowest in modern history. Even if you add in the four 4-4s—which don't get counted in the statistics because they aren't opinions on the merits—October Term 2015 represents a modern low for sharp splits.

² The total includes 13 summary reversals (without oral argument), nine of which were unanimous. It does not include the four 4-4 affirmances. All statistics taken from Kedar Bhatia, Final October Term 2015 Stat Pack, SCOTUSblog, June 29, 2016, <http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack>. For more detailed data from previous terms, see Statpack Archive, SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack>.

At the same time, the term featured an abnormally high number of “7-2” rulings—no actual 7-2s but 15 that were 6-2 and one 5-2 that fits—20 percent, a level not hit since October Term 2007. To be fair, some of these featured Justices Thomas and Alito in dissent, so Justice Scalia would likely have joined his conservative brethren in making at least a few of this record haul into 6-3 votes. Regardless, the Court is still of one mind on many issues—typically lower-profile cases—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 decrease in sharp splits naturally resulted in fewer dissenting opinions, 50, whereas in the previous term there were 68 (the yearly average going back to 2000–2001 is 56). Not surprisingly, the total number of all opinions (majority, concurring, and dissenting) was also low—162, down from 186 last term and lower than the 15-year average of 181—and the average of 2.1 opinions per case was similarly low. Justice Thomas wrote the most opinions (39, including 18 dissents), followed far behind by Justices Alito (19), Sotomayor (18), and Ruth Bader Ginsburg (17). Justice Thomas also produced the most opinion pages (341), more than doubling those of Chief Justice Roberts (155) and Justice Kennedy (166).

The Court reversed or vacated 55 lower-court opinions—67 percent of the 82 total, including the separate cases that were consolidated for argument—which is a bit lower 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 2-8 record (80 percent reversal), recapturing its traditional crown as the most-reversed court. Its usual competitors for the “biggest loser” title, the Fifth, Sixth, and Federal Circuits, meanwhile, went 2-5 (71 percent reversal), 1-3 (75 percent), and 1-3 (75 percent), respectively. But really, state courts collectively did the worst, attaining a 3-17 record (85 percent reversal)—so it’s safe to say that if you can get the U.S. Supreme Court to take your case from a state’s judicial system, the odds are ever in your favor.

Despite some of the quirks described above, none of the stats thus far are that remarkable, falling generally within the modern norm for the Court’s ebbs and flows. What is notable, however, is *which* justices were in the majority. After dropping to third place last term, Justice Kennedy regained his otherwise annual crown by being

on the winning side in 81 of 83 cases (98 percent!). Justice Kagan moved up to second (95 percent), tying her previous best, while Justice Stephen Breyer dropped from first to third (94 percent). Justice Sotomayor had the biggest drop, from second to eighth (83 percent).

Justice Kennedy also maintained his usual lead in 5-4 cases. Even though there were only four of those—or, rather, the 5-3 and 4-3 ones that would've been 5-4 with a full bench—Kennedy was incredibly the only justice on the winning side of all four. He was with the “liberals” in three of them and with the “conservatives” in the other. By definition, then, Justices Breyer and Sotomayor were only one case behind Kennedy (and Justice Kagan went 2-1).

Justice 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 he was tied with Chief Justice Roberts and Justice Alito, and didn't author any of the majority opinions. Not surprisingly, Thomas was also the justice most likely to dissent (28 percent of all cases and 51 percent of divided cases)—most memorably in *Fisher II* and *Whole Women's Health*. Thomas also maintained his status as the leading “lone dissenter”—since 2006–2007 he's averaged 1.9 solo dissents per term, nearly double his closest colleague—writing five dissents in 8-1 or 7-1 cases. Justice Sotomayor wrote two solo dissents, while Justices Ginsburg and Alito each wrote one. The chief justice and Justice Kagan have still *never* written one of those during their entire tenures (11 and 6 terms, respectively).

Justice Alito, despite being on the winning side of only one 5-4 ruling, made the most of his opportunities and authored that decision (*RJR Nabisco, Inc. v. European Community*) and the lead dissents in *Fisher II*—more than double the length of Justice Kennedy's opinion for the Court—and *Whole Woman's Health*. All three of these cases came down at the end of June and Alito read all three of his opinions from the bench.

More big news comes out of an examination of judicial-agreement rates. Last term, 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—the most unlikely “Mr. Congeniality” in recent memory. This term there seems to be no rhyme or reason to the top pairings. Number one consisted of Justices Kennedy and Kagan, at 95 percent (71 of 76 cases), followed by Justices Scalia and Alito (94 percent), Breyer and Kagan (92 percent), and Kennedy and Breyer (91 percent)—the key pair to watch going forward, some

have said.³ The rest of the pairings were below 90 percent. If we remove Scalia from consideration, however, then Roberts-Kennedy and Ginsburg-Sotomayor (both about 88 percent) round out the top five. Justices Thomas and Ginsburg voted together less than anyone else (in 50 of 76 cases, or 62 percent). The next three lowest pairings all involve Justice Sotomayor, with Justices Thomas, Alito, and Scalia, respectively (each duo in agreement in 64 to 65 percent of cases).

My final statistics are more whimsical, relating to the number of questions asked at oral argument. For the last time, Justice Scalia maintained his perch as the Supreme Court's most frequent interlocutor, with an average of 22 questions per argument (essentially the same as last term). Although he missed three of the Court's seven sittings (roughly 40 percent of the arguments), he was still among the top three questioners 76 percent of the time, more than any other justice. Justice Sotomayor, who was just behind Scalia the last few terms—including this one, at 21 questions per argument and the top questioner in 29 percent of cases, more than anyone else—is clearly poised to take Scalia's mantle (with less humor, alas). Justice Ginsburg again asked the first question most often (in 52 percent of cases), with nobody even close. Justice Thomas broke his long silence in a big way, asking 11 questions during argument in *Voisine v. United States*, one of the first arguments after Scalia's passing.

Annual statistics aside, this term confirmed a very real phenomenon: At the end of the Obama presidency, we can safely declare that this administration, by historical standards, has done exceedingly poorly before the Supreme Court. While this conclusion may seem counterintuitive given the recent liberal victories on abortion and affirmative action—or previous terms' rulings upholding Obamacare—the statistics are telling.

This past term, the federal government won 13 cases and lost 14.⁴ Such mediocrity may seem surprising, but the 48 percent win rate is

³ See, e.g., David G. Savage, How the Two Justices from California Are Moving the Supreme Court to the Left, *L.A. Times*, June 29, 2016, <http://www.latimes.com/nation/la-na-court-breyer-kennedy-center-20160628-snap-story.html>.

⁴ Cato went 4-4 on our amicus brief filings, which is the worst record we've had in recent memory—but still good enough to beat the government. See Ilya Shapiro, Cato Batted .500 at the Supreme Court, Still Besting the Government, June 27, 2016, <http://www.cato.org/blog/cato-batted-500-supreme-court-still-besting-government>.

actually the Obama Justice Department's third-best result. The administration's best term was 2013-14, when it went 11-9 (55 percent), while its worst record of 3-9 (25 percent) came in the abbreviated 2008-09 term—counting only cases argued after the January 2009 inauguration.

Overall, the administration has managed a record of 79-96, a win rate of just above 45 percent. There's little difference between the first term's 35-44 (just above 44 percent) and second term's 44-52 (just below 46 percent). There may be a handful of cases to add to the totals before the next president takes office, but we can essentially audit the 44th president's judicial books now. That audit doesn't look too good when compared to the record of his predecessors. George W. Bush achieved a record of 89-59 (60 percent)—and that's if you fold in all of 2000-01, including cases argued when Bill Clinton was president in what was an unusually bad term for the government (roughly 35 percent). Clinton, in turn, had an overall record of 148-87 (63 percent), again including all of 1992-93. George H.W. Bush went 91-39 (70 percent), while Ronald Reagan weighed in with an astounding record of 260-89 (about 75 percent). While it looks like this is merely a tale of a downwards trend in recent years, Jimmy Carter still managed a 139-65 record (68 percent). Indeed, the overall government win rate over the last 50 years—I've calculated back to the early 1960s—is comfortably over 60 percent.

To be sure, this isn't an exact science, with some judgment calls to be made about certain cases that aren't pure wins or losses for either side. The Supreme Court also used to hear many more cases, so the last 20 years or so are statistically less significant. But even giving Barack Obama every benefit of the doubt, his 45 percent score falls far short of the modern norm—which is really the relevant period, regardless of how well or poorly Andrew Jackson or Benjamin Harrison may have done.

You could argue, of course, that a simple won-loss rate doesn't tell the whole story. After all, Obama's solicitors general have faced a majority of Republican appointees. (As did Clinton's, but that didn't stop him from pipping his Republican successor.) But the news gets even worse when you look at unanimous losses.

This term, the federal government argued an incredible 10 cases without gaining a single vote, not even that of one of President Obama's own nominees. That brings his total to 44 unanimous losses.

For comparison, George W. Bush suffered 30 unanimous losses, while Bill Clinton withstood 31. In other words, Obama has lost *unanimously* 50 percent more than each of his two immediate predecessors.

These cases have been in such disparate areas as criminal procedure, religious liberty, property rights, immigration, securities regulation, tax law, and the separation of powers. The government made arguments in this wide variety of cases that would essentially allow the executive branch to do whatever it wants without meaningful constitutional restraint. That philosophy conflicts with another unanimous decision, *Bond v. United States* (2011). *Bond* vindicated a criminal defendant's right to challenge her federal prosecution. As Justice Kennedy wrote, "federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." Curiously, *Bond* again came before the Court in 2014—asking whether a weapons-trafficking statute could be used against someone who used household chemicals in a bizarre revenge plot—and again the government lost unanimously.

Now, I'm not saying that the government's lawyers are sub-par. Solicitor General Donald Verrilli and his predecessors (including Elena Kagan) are very well respected, and their staffs are people who graduated at the top of elite law schools and often clerked on the Supreme Court. If they're not qualified to represent the government, nobody is. No, this is a situation where, as noted Supreme Court advocate Miguel Estrada put it a few years ago when asked to opine on the administration's poor record: "When you have a crazy client who makes you take crazy positions, you're gonna lose some cases."

The reason this president has done so poorly is because he sees few limits on federal—especially prosecutorial—power and assumes for himself the power to enact his legislative agenda when Congress refuses to do so. The numbers don't lie. If the next president wants to improve the government's record, I humbly suggest that it follow Cato's lead, advocating positions (and taking executive actions) that are grounded in law and that reinforce the Constitution'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 2015 was delivered by Professor Steven G. Calabresi of Northwestern University Law School. A co-founder of the Federalist Society, former clerk to Justice Scalia and Judge Bork, and longtime stalwart of academic originalism, Calabresi has been moving in Cato's direction of late. It is altogether fitting, then, that the title of his talk is "On Originalism and Liberty." "I have studied the history of the Constitution and of the Fourteenth Amendment and Magna Carta in great depth," he writes, "and have concluded that the original meaning of those documents is somewhat more libertarian than Justice Scalia, for example, realizes." He goes on to perform a historical exegesis of the concept of liberty in texts relevant to American government and of "libertarian constitutionalism"—particularly at the times the Constitution and Bill of Rights were written and the Fourteenth Amendment ratified. In the end, he endorses a "presumption of liberty" against which government action must be evaluated, rather than the "presumption of constitutionality" that judges are taught to apply when evaluating legislative enactments.

Then we move to the 2015–16 term, starting with the biggest surprise of the year, *Fisher II*. Peter N. Kirsanow, a member of the U.S. Civil Rights Commission, pulls no punches in critiquing Justice Kennedy's about-face, rationalizing racial discrimination in university admissions yet again. After telling the lower court in 2013 to give no deference to college administrators in determining whether their use of racial preferences was narrowly tailored to achieve educational diversity, three years later he essentially said, "never mind." Did Kennedy simply tire of this case, or decide that UT-Austin's system was unique, such that this ruling would set no real precedent? "Perhaps Justice Kennedy's blessing of racial preferences will be cabined to the higher-education context," Kirsanow concludes, "[b]ut to paraphrase Chief Justice Roberts. . . the best way to stop racial discrimination is to stop discriminating on the basis of race."

The next "article" is a real treat. My good friend and Cato adjunct scholar Josh Blackman has produced an "alternate reality" concurring opinion that the late Justice Scalia might have written had *United States v. Texas* not tied 4-4. Josh was the primary author of Cato's briefing in this challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents, better known as DAPA, and he knows his stuff. After providing hints at what the

imagined “majority opinion” held—and even Justice Alito’s “conurrence”—he launches into an explanation and application of the president’s constitutional duty to take care that the laws be faithfully executed. “Justice Scalia” invokes the Constitutional Convention, the law review articles of one Josh Blackman, Justice Robert Jackson’s canonical opinion in the *Steel Seizures Case*, and even *King v. Burwell* (the 2015 Obamacare case). “While deferred action historically served as a temporary *bridge* from one status to another,” he writes, “DAPA acts as a *tunnel* to dig under and through the [immigration laws].” This is not academic argle-bargle!

Following that “opinion” is an examination of what I’ve described as the Court’s unanimous “punt” regarding how to apply the “one person, one vote” standard at a time when population numbers in state legislative districts no longer track the number of voters. Heritage Foundation senior fellow Hans von Spakovsky—also a former member of the Federal Election Commission—notes that, in deferring to states’ choice of which population figure to use, the Court “deviated from its established electoral equality principle that the votes of citizens cannot be weighted differently during the redistricting process.” In other words, states can continue to draw districts that, while equal in population and satisfying judicial interpretations of the Voting Rights Act regarding concentrations of racial minorities, may contain significantly different numbers of voters. But the Court left the door open for some enterprising state, after the next census, to start using measures of eligible voters when designing their house and senate constituencies.

Moving to another unanimous “punt,” albeit a much more unusual one, Mark L. Rienzi of Catholic University’s law school tackles *Zubik v. Burwell*. Wearing his other hat as senior counsel at the Becket Fund for Religious Liberty, Rienzi represented several of the religious nonprofits that challenged Obamacare’s contraceptive mandate, including the Little Sisters of the Poor. He now covers the twists and turns of this surprisingly technical case, whose complexion changed after Justice Scalia’s death. That includes a call for supplemental briefing and a final ruling that reads more like a directive to facilitate settlement than a judicial opinion. “The Court’s unorthodox approach,” he explains, “makes an administrative resolution more likely and continued litigation less likely . . . and produced a clarity on the key issues that had evaded the lower courts.” “For a Court that was

shorthanded and once thought to be deadlocked on a hot-button case, these are significant accomplishments.”

Florida International University law professor Elizabeth Price Foley contributes a fascinating article about the incoherent jurisprudence surrounding constitutional rights. The piece ostensibly concerns the only case in this volume in which Cato didn’t file a brief—I can’t tell you what an “undue burden” is, so we passed on *Whole Woman’s Health*—but it really presents an indictment of the artificial “scrutiny levels” judges apply to make their casuistry seem intellectually rigorous. Foley scoffs that “the level of review that the Supreme Court has applied to abortion regulations has shifted from strict scrutiny, to undue burden, to undue burden ‘plus’ (with a dose of legislative deference), to undue burden ‘minus’ (without the deference).” Remarkably, she completes this provocative essay without any hints of what her own views are on abortion—which is especially useful in this venue because libertarians are all over the map on this contentious issue.

The term’s biggest criminal-law case led Justice Breyer to ask at oral argument, “Are you asking us to criminalize all of politics?” Indeed, in *McDonnell v. United States*, the unanimous Court made clear that merely being a sleazy politician should not be enough to throw someone in jail. Harvey Silverglate and Emma Quinn-Judge of Zalkind Duncan & Bernstein in Boston have the unenviable task of explaining the justices’ latest attempt to make sense of honest-services-fraud statutes, this time in the context of public corruption. “The time has come,” they argue, “for the Court to recognize that the honest services statute is hopelessly vague and must be invalidated because it fails entirely to define the boundary between permitted and proscribed conduct.” Indeed, the Court keeps knocking down these sorts of prosecutions but never draws a clear line that would be useful for prosecutors and potential defendants alike in future.

Experienced criminal-defense attorneys Terrance G. Reed and Howard Srebnick provide an intriguing rundown on what I consider to be the term’s sleeper hit. In *Luis v. United States*, the Supreme Court ruled that the government could not freeze a criminal defendant’s untainted assets because this would impede her Sixth Amendment right to counsel of choice. As Reed and Srebnick describe, *Luis* “represents the first effort by the Court to reassess and limit the government’s authority to impose the consequences of forfeiture

allegations prior to trial.” Srebnick was actually Sila Luis’s counsel here, so he’s now doubly pleased given that he can get paid. But in all seriousness, the importance of this 5-3 ruling in criminal cases where large-money seizures are at stake cannot be understated. As forfeiture abuse continues to make national news and produce reform efforts among ideological odd couples, this case will get more attention than it has so far.

Next we have Professor Steven Eagle from George Mason University’s newly renamed Antonin Scalia Law School, detailing the term’s big property-rights case—which is actually more about administrative law. In *U.S. Army Corps of Engineers v. Hawkes Co.*, a peat-mining company sought to challenge a “jurisdictional determination”—an agency’s decision that it could, if it wanted to, regulate and restrict development under the Clean Water Act. The unanimous Supreme Court ruled that of course such agency action had to be subject to judicial review under the Administrative Procedure Act, such that Hawkes Company would get its day in court. If this story sounds familiar, it’s because four years ago in *Sackett v. EPA*, property owners won the same sort of unanimous victory. Eagle thus explains that “*Hawkes* continues the Court’s recent trend toward alleviating unnecessary procedural hurdles that have stymied property owners.”

The final article about this past term comes from Andrew Trask, co-chair of the class-action group at McGuireWoods. Trask appropriately covers the term’s biggest class-action case—probably its biggest business case altogether—*Tyson Foods v. Bouaphakeo*. This is the latest iteration in the “donning and doffing” saga, where plaintiffs claim a denial of wages for the time spent putting on and taking off specialty clothing and equipment required for their jobs. The rub in *Tyson Foods*, however, is that nobody knows how much time anyone spent donning and doffing—and moreover the range of time spent varied widely among putative class members. A first-year law student would tell you that this doesn’t sound like a recipe for class certification: the plaintiffs lack “commonality” and damages can only be determined by a generalized statistical proof, a “trial by formula.” Still, the Court affirmed the lower-courts’ certification of the class, albeit on narrow grounds that require further judicial inquiry on remand. Trask posits that this isn’t really a loss for the defense bar, but instead shows how litigation strategy can make the difference between victory and defeat in fact-bound cases.

The volume concludes with a look ahead to October Term 2016 by Glenn Harlan Reynolds, a University of Tennessee law professor known online as the Instapundit. As of this writing—before the term starts—the Court has taken up only 29 cases, essentially guaranteeing an historically low number of opinions at term’s end. Here are some of the issues: whether the Eighth Amendment requires that current tests for intellectual disability be used in determining eligibility for the death penalty (*Moore v. Texas*); whether you can bring a claim for malicious prosecution under the Fourth Amendment (*Manuel v. City of Joliet*); whether the government can retry individuals who have had their convictions vacated (*Bravo-Fernandez v. United States*); and whether the exclusion of churches from a neutral state program violates the Free Exercise and Equal Protection Clauses (*Trinity Lutheran Church v. Pauley*). This paucity of cases leads Reynolds to lament “the cases not heard” and to question whether we even have a supreme court. “Indeed, in examining the Supreme Court’s behavior, one might almost compare its role to that of the Turkish or Argentinean armies over much of the 20th century—as an independent check on the political system that overturns things whenever the politicians seem to have gone too far.”

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This is the ninth volume of the *Cato Supreme Court Review* that I’ve edited, and the second 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, Tim Lynch, and Walter Olson, who provide valuable counsel and editing in legal areas less familiar to me. Our research assistant Anthony Gruzdis, who made his rookie debut with the *Review* last year—and also as the star of Cato’s softball team—has managed to avoid the sophomore slump. Anthony not only made the trains run on time but helped set the conductors’ schedules: He kept track of legal associates Tommy Berry, David McDonald, Randal Meyer, and Jayme Weber, and legal interns

Erika Johnson and Matt Larosiere—who in turn performed many thankless tasks without (much) 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 and established this *Review* a decade later. As his foreword to this volume shows, Roger has advanced liberty and constitutionalism (but I repeat myself) for decades, with an integrity and intellectual honesty that even Cato's harshest critics acknowledge and respect. He is also a mentor nonpareil; I would not be where I am without him.

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 difficult days 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 15th volume of the *Cato Supreme Court Review*.