

Introduction

*Ilya Shapiro**

This is the 12th 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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* Senior fellow in constitutional studies, Cato Institute, and editor-in-chief, *Cato Supreme Court Review*.

Despite the fanfare regarding the Court's heated divisions over certain high-profile cases, the 2012-2013 term saw a high level of unanimity. Indeed, the term saw a relatively low (but in line with recent years) number of dissents, whether that's due to Chief Justice John Roberts's oft-stated desire for the Court to speak more often with one voice, a spate of lower-court intransigence, or something else. Of the 78 cases with decisions on the merits—75 after argument and 3 summary reversals—38 had no dissenters (49 percent, the highest percentage since 2002-2003) and 4 had only one dissenter (5 percent).¹ That means that more than half of the opinions went 8-1 or better, in line with the previous three terms' 55, 61, and 56 percent, respectively. And there were only 52 total dissenting opinions, the lowest in modern history save for those last three years (48, 47, 51). While some commentators accuse the Court of certain biases—most notably of being “pro-business,” which alas differs from a pro-market skew—to the extent that's the case, the entire Court is guilty of it, not just the “conservative” coterie.

At the same time, 23 cases went 5-4 (29 percent, the highest percentage since 2008-2009), including the rulings striking down Section 4 of the Voting Rights Act (*Shelby County v. Holder*) and Section 3 of the Defense of Marriage Act (*United States v. Windsor*), and dismissing the Proposition 8 appeal on standing grounds (*Hollingsworth v. Perry*). This means that 78 percent of judgments were either 9-0 or 5-4, significantly higher than the 65 percent average of the previous four terms. In other words, the Court is of one mind on most issues—including significant rulings against outlandish assertions of federal power—but hopelessly split on culture-war and civil-rights issues, as well as certain types of criminal-procedure cases that produce heterodox but consistent divisions.

The Supreme Court reversed or vacated 56 lower-court opinions (72 percent), which is slightly higher than, but in line with, recent years. Following another trend, the total number of opinions (majority, concurring, dissenting) was historically low—169, surpassing only last year's 161, which came from two fewer cases—and the average of 2.17 opinions per case was down from an average of

¹ These figures include one 8-0 case and two 7-1 cases. All statistics taken from Kedar Bhatia, October Term 2012 Summary Memo, SCOTUSblog, Jun. 29, 2013, <http://www.scotusblog.com/2013/06/october-term-2012-summary-memo>.

2.35 over the preceding decade. And due to the low number of 8-1 or 7-1 decisions, only Justices Samuel Alito (twice), Antonin Scalia, and Ruth Bader Ginsburg wrote solo dissents. Notably, neither Chief Justice Roberts nor Justice Elena Kagan have ever written one of those during their entire tenures on the Court (eight and three terms, respectively).

Anthony Kennedy was yet again the justice most often in the majority (71 of 78 cases, or 91 percent), followed by the chief justice (86 percent). Even more significantly, Kennedy was on the winning side in 20 of the 23 5-4 decisions—10 times with the “conservatives,” 6 with the “liberals,” and 4 in “unconventional” alignments. The second-most winner of 5-4 cases was Justice Clarence Thomas—which may seem surprising, except that he was runner-up to Justice Kennedy each of the previous three years as well. Interestingly, Justices Alito, Kennedy, and Scalia combined to author 13 of the 23 majority opinions in the 5-4 cases, and each justice wrote at least one (which hadn’t happened in recent years).

Justice Scalia took over from Justice Ginsburg as the justice most likely to dissent (22 percent of all cases and 42 percent of cases that had dissenters). He thus continued his slide down the list of winning-side justices: going in order from the 2008-2009 term, he has been second, third, fourth, fifth, and, now, dead last. This was the first time he has been in this position during the Roberts Court.

The justice pairings most likely to agree, at least in part, were Justices Ginsburg and Kagan (72 of 75 cases, or 96 percent), almost the same as Justices Sotomayor and Kagan (70 of 73 cases, or 95.9 percent). This is a curious shift from the last few years when the Scalia-Thomas and Roberts-Alito pairs traded off as most likely to agree. And given that the top four agreement pairs, and six of the top eight, consist entirely of Democratic appointees, we could be in an era of significant coherence among the Court’s “liberals.” Justices Ginsburg and Alito voted together less than anyone else (in only 45 of 77 cases, or 58 percent)—recall that Ginsburg orally read her dissent from two Alito opinions for 5-4 majorities on the final Monday, which apparently displeased Alito²—followed very closely by Justices Thomas

² See Debra Cassens Weiss, Did Alito Roll His Eyes During Ginsburg Dissent?, ABA Journal, Jun. 26, 2013, http://www.abajournal.com/news/article/did_alito_roll_his_eyes_during_ginsburg_dissent.

and Ginsburg (46 of 78, or 59 percent). What's more, three of the four pairings who were least likely to agree included Justice Alito.

The final statistics I have are more whimsical, relating to the number of questions asked at oral argument. Shockingly, Justice Sonia Sotomayor dethroned Justice Scalia as the most frequent Supreme Court talker—though not necessarily the most loquacious; Justice Stephen Breyer tends to ask the longest questions, typically consisting of winding hypotheticals—with an average of 21.6 questions per argument. That was below Scalia's 25.8 average from the last term, but still made Sotomayor the top questioner in 35 percent of cases and put her in the top three a whopping 80 percent of the time. Justice Ginsburg asked the first question most often (in 37 percent of cases), however, followed by Sotomayor (27 percent). Justice Thomas, meanwhile, continued his non-questioning ways—he last issued an interrogatory on February 22, 2006—but did break his silent streak to make a joke, apparently about his alma mater, Yale Law School.³ Finally, regardless of Justice Sotomayor's exertions, it's safe to say that Justice Scalia remains the funniest justice, generating the most transcript notations of "[laughter]" per argument.⁴

Before turning to the *Review*, I would be remiss if I didn't say a few words about the term's biggest cases, all decided that fateful last week of June.⁵ I refer of course to the cases involving racial preferences in college admissions (*Fisher v. UT-Austin*), voting rights (*Shelby County*), and same-sex marriage (*Windsor* and *Perry*).

The casual observer must have been quite confused that last week. First, the Court punted on affirmative action, making it harder to

³ Tom Goldstein, Justice Thomas Speaks, SCOTUSblog, Jan. 14, 2013, <http://www.scotusblog.com/2013/01/justice-thomas-speaks>.

⁴ See, e.g., Bruce Carton, As Usual, Justice Scalia Provokes Most Courtroom Laughter in Supreme Court's Latest Term, Legal Blog Watch, Aug. 14, 2012, http://legalblogwatch.typepad.com/legal_blog_watch/2012/08/as-usual-justice-scalia-provokes-most-laughter-in-supreme-courts-2012-term.html; Adam Liptak, So a Guy Walks Into a Bar, and Scalia Says . . . , N.Y. Times, Dec. 31, 2005, at A1.

⁵ Despite the mad dash to the finish, the Court thankfully got all its opinions out without invading July—which was especially fortuitous this year because I was scheduled to (and did) leave on my honeymoon the Saturday after the last scheduled week of opinion releases. Kristin and I had gotten married three weeks earlier but, like most D.C. legal couples, waited till the end of the term to get away. See generally, Ilya Shapiro, The Framers and Love, Cato at Liberty, Jun. 17, 2013, <http://www.cato.org/blog/framers-love>.

use race in admissions decisions without prohibiting the practice altogether. It then struck down a key part of the Voting Rights Act—and the very next day gutted the Defense of Marriage Act. What is going on? Is the Court liberal or conservative? Is Chief Justice Roberts “playing the long game”⁶ or are we living in Justice Kennedy’s world?

None of the above. The theme of these cases was captured by President Barack Obama’s reaction to the same-sex marriage rulings: “We are all equal under the law.” If we’re all equal, then we shouldn’t be judged by skin color or sexual orientation, and the machinery of democracy shouldn’t be gummed up by outdated racial classifications.⁷ 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.

It’s therefore no coincidence that Cato’s Center for Constitutional Studies is the only organization to have filed briefs supporting the winning side in each of the three big issues (or that we went 15-3 on the year).⁸ Even beyond racial preferences and gay rights, this Court is coming to be defined by what Justice Kennedy has called “equal liberty.”

Part of that is Justice Kennedy himself, the swing vote ever since Justice Sandra Day O’Connor retired in 2006. Kennedy was appointed by a Republican president, of course, but his jurisprudence is about as libertarian as we’ve had on the Court since before the New Deal. How else do you reconcile his votes in hot-button cases ranging from presidential wartime powers to social issues to campaign finance?

Kennedy often frustrates legal scholars, but it’s not fair to say that he lacks a coherent legal theory. He’s a strong federalist who believes

⁶ See, e.g., Adam Liptak, Roberts Pulls Supreme Court to the Right, Step by Step, *N.Y. Times*, Jun. 26, 2013, at A1.

⁷ For more on this equal protection theme, see Roger Pilon, Foreword, 2012-2013 *Cato Sup. Ct. Rev.* i (2013).

⁸ I don’t count *Perry* in either column. While we ended up with a favorable result—Prop 8 struck down—the Court decided the case on standing grounds, incorrectly in my view, rather than on the constitutional merits. See Ilya Shapiro, A Great Year for Cato at the Supreme Court, *Cato at Liberty*, Jun. 27, 2013, <http://www.cato.org/blog/great-year-cato-supreme-court>.

in the inherent dignity of the individual—and that constitutional structures protect that personal liberty. Hence his emotional reading of both the joint dissent in the Obamacare case last year and the majority opinion in the DOMA case now.

But it's more than just Kennedy's vote in 5-4 rulings or any other idiosyncrasies among the justices. Again invoking President Obama's political tropes, to appreciate the Supreme Court dynamic you have to transcend the old ideological divisions and reject the "false choice" between liberal and conservative. Instead, to understand this brave new Court you have to know that it doesn't rule in a vacuum but rather on the laws and government actions that come before it.

Of late, many of the Court's cases involve appeals of restrictions on various freedoms or expansive claims of federal authority. Accordingly, the Court unanimously reversed lower courts on criminal law, environmental regulation, class actions, and more. And the government won fewer than 40 percent of its cases this year—down from a historic norm of 70 percent—including unanimous losses on issues including property rights, securities regulation, tax law, and administrative procedure.

Moreover, most laws have some defect, constitutional or otherwise, and government officials often err in applying them. Prosecutors are overzealous, regulators and bureaucrats overreach, and the Department of Justice pushes the envelope in its legal arguments. The more that these issues are presented to the Court, the more the Court will strike down laws and official actions, thus enhancing its libertarian quotient.

With the term's "big three" cases, the real surprise should be that most people find themselves on opposite sides of the affirmative action (or voting rights) and gay marriage debates. The Constitution is quite clear in its protection of "due process" and "equal protection" of the laws, which means that the government has to treat people fairly and equally. There is thus no justification for a public university to vary admissions standards based on race—much less, as the University of Texas does, to defend preferences for Hispanics by pointing to the need for a "critical mass" of such students, even as it discriminates against Asians, who comprise a smaller part of the student body.

Similarly, while it would be best for the government to get out of the marriage business altogether—and let churches and other private organizations celebrate the institution however they like—if there is

to be civil marriage, at the very least the federal government should recognize the lawful marriages that states do.

This year, the Supreme Court vindicated these ideas. We may thus be living the Court's "libertarian moment."

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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 2012 was delivered by former solicitor general Paul Clement and focused on the "constitutional moment" that was the legal challenge to Obamacare. Clement appears frequently before the Court—I joke that I make a living commenting and filing briefs on his docket—and this year was no exception, though he took a rare position opposite Cato to defend DOMA. Last year, however, was his real star turn, when he represented the 26 states suing the federal government in what eventually became *NFIB v. Sebelius*. Clement quickly realized that to win he would have to "run the table" on the five Republican-appointed justices, getting their votes on each of the Commerce Clause, Necessary and Proper Clause, and taxing power arguments. "The good news from the perspective of my clients is that we received 14 out of a possible 15 votes," he comments wryly. While many observers lament the tragedy that Chief Justice Roberts brought on the country by rewriting the law in order to save it, Clement finds a silver lining: Given the five votes against the individual mandate as a mandate, and the seven votes against the coercive expansion of Medicaid, "the long struggle to define the proper balance of power between the federal and state governments—and the judiciary's role in enforcing that balance—will continue."

We move then to the 2012-2013 term, starting with four articles on those hot-button cases that were decided the last week of June. Will Consovoy and Tom McCarthy, partners at Wiley Rein who were among the lawyers who represented Shelby County, Alabama in its challenge to the Voting Rights Act, describe the Court's ruling in the case as a "restoration of constitutional order." By that they mean that throwing out the VRA's outdated "coverage formula" (Section 4(b)) recognizes the reality that, thankfully, America has changed since the systemic racial disenfranchisement of the 1960s justified the constitutional deviation of effectively putting certain states under federal

electoral receivership. Moreover, Attorney General Eric Holder's aggressive use of other VRA provisions against jurisdictions that the Justice Department thinks are violating minority voting rights "may prove the points Shelby County was making all along: the emergency necessitating preclearance has passed; traditional litigation remedies can address the vestiges of discrimination that Congress targeted in 2006; and the places where these problems are most prominent are not concentrated in the jurisdictions that used discriminatory tests or devices in 1964, 1968, and 1972."

Next, University of San Diego law professor Gail Heriot, also a member of the U.S. Commission on Civil Rights, writes about *Fisher v. University of Texas at Austin*, the affirmative action case that ended in a bit of a fizzle. We may never know why it took the Supreme Court eight-and-a-half months to come up with a 13-page, near-unanimous ruling, but Heriot puts the case into its proper historical place: "By demanding that in the future a college or university supply 'a reasoned, principled explanation' for its diversity goal and directing courts to use tough-minded strict scrutiny in determining whether its admissions policy is narrowly tailored to achieve that goal, the Court inched the country toward a more sensible vision of the Constitution's requirements in the higher education context." As social scientists increasingly establish that racial preferences don't even benefit the people getting them—because of a phenomenon known as "mismatch"—we may see *Fisher* as their high-water mark.

Our first of two articles on the same-sex marriage cases—really just on the DOMA case, *Windsor*, because the Prop 8 case, *Perry*, ended up being about standing and civil procedure—features Elizabeth Wydra, chief counsel at the Constitutional Accountability Center. Cato and CAC don't always agree on the law, but when we do, it's the most interesting brief in the world (perhaps you've seen the graphic our crack new-media team put together). In any event, here Wydra provides a humanizing background to the case before engaging each of the opinions. "Perhaps most important for advocates of marriage equality," she writes, "the majority's opinion recognizes that the 'States' interest in defining and regulating the marital relation' is 'subject to constitutional guarantees.'" As to the future, I for one agree that Justice Scalia's memorable dissent will prove prophetic: whichever side of the issue you support, the Court's ruling ensures that state bans on gay marriage aren't long for this world.

The other article on *Windsor* comes to us from Duke law professor Ernie Young and Robbins Russell associate Erin Blondel, who coauthored the so-called Federalism Scholars brief (and who will be married the week this volume is released). The brief, which was joined by several law professors whose work has graced these pages, argued that DOMA's Section 3 should fall simply because the federal government has no business defining "marriage." The article is therefore sympathetic to Justice Kennedy's intertwining of federalism, liberty, and equality. Most marriage-equality advocates, Cato included, point to the Fourteenth Amendment—especially its Equal Protection Clause—to advance their cause. As Young and Blondel explain, however, "*Windsor* recognized that federalism *additionally* protects liberty and equality when federal actions threaten those rights."

Moving from federalism to international law, Ken Anderson of American University's Washington College of Law (and the *Volokh Conspiracy* blog) analyzes a case that he originally agreed to cover for last year's *Cato Supreme Court Review*. The Court set *Kiobel v. Royal Dutch Petroleum* for re-argument this term, however, so Anderson had twice the time to cover twice the number of issues. *Kiobel* was a lawsuit brought under the Alien Tort Statute by Nigerians against certain oil companies for alleged complicity with the Nigerian army in various human rights abuses. There were two issues in play: (1) whether the ATS—one of our nation's oldest laws, dating to the first Congress and covering violations of the "law of nations"—recognizes *corporate* liability (as opposed to, say, individual pirates); and (2) whether the ATS can even apply to a suit between foreigners over foreign activities. The Court unanimously answered in the negative on the second question, albeit for two different reasons, and called it a day. Anderson explains the ruling and puts it into its proper context regarding liberty, sovereignty, and civil procedure.

Next we have Dan Epps, a new Climenko Fellow at Harvard Law School, writing on a fascinating criminal procedure case, *Bailey v. United States*. In a 1981 case called *Michigan v. Summers*, the Supreme Court ruled that police can detain the occupants of a premises being searched pursuant to a lawful search warrant. This is an exception to the Fourth Amendment's general prohibition on detentions (not just formal arrests) without probable cause. But how far does this exception extend? In *Bailey*, the Court set a bright line: Police cannot detain people who have left the "immediate vicinity" of the searched

area. Epps calls this result correct but “disappointing” because the *Summers* rule itself “is broader than necessary in light of its legitimate justifications.” Nevertheless, it’s a good thing that the Court “now takes the Fourth Amendment more seriously as a source of determinate legal rules, rather than as an open-minded invitation to declare what is reasonable under all the circumstances of each case.”

Ilya Somin of George Mason University Law School, another “Volokh conspirator” and a new member of the *Cato Supreme Court Review* editorial board, then examines the state of the Takings Clause, which has long been like a “poor relation” in the Bill of Rights. This was a good term for property rights, and my nominal doppelganger focuses specifically on the “two steps forward” represented by *Koontz v. St. Johns River Water Management District* and *Arkansas Game & Fish Commission v. United States*. The latter was a unanimous ruling—of course a temporary flooding is subject to the same takings analysis as a permanent flooding or a temporary physical invasion—but *Koontz*, involving the conditions that can be placed on land-use permits, was a 5-4 split along ideological lines. Somin labels that division “a further sign that most liberal jurists are unwilling to support anything more than extremely limited judicial enforcement of constitutional property rights.” “In the long run,” he laments, “no constitutional right is likely to get robust judicial protection unless there is at least some substantial bipartisan and cross-ideological consensus in favor of it.”

Staying on property rights, University of Missouri law professor Josh Hawley covers the term’s quirky “raisin case,” which got far more media attention than a typical dispute over administrative-law remedies. *Horne v. Department of Agriculture* exemplifies the extent to which all business owners are made to suffer a needless, Rube Goldberg-style litigation process to vindicate their constitutional rights. In this case, the USDA imposed on farmers Marvin and Laura Horne a “marketing order” demanding that they turn over 47 percent of their crop, without compensation, to the Raisin Administrative Committee—a New Deal-era structure that enables the government to control raisin supply and price. A cockamamie scheme, to be sure, but the lawsuit involved whether the Hornes could even challenge the order before transferring their crop. A unanimous Court said, “of course.” Hawley explains that “the mere availability of a remedy at law never renders a takings claim *premature* [because] the Takings

Clause is not fundamentally a promise to pay for certain types of property burdens. It is a limit on the government's power to impose those burdens in the first place."

Next we have two articles presenting different perspectives on an area of law that tends to divide libertarians: no, not national security, but intellectual property. This term saw two patent cases that herald the sorts of issues that the Supreme Court is likely to face in coming decades as biotechnology advances. One, *Bowman v. Monsanto*, involved ownership of successive generations of a genetically modified soybean. The Supreme Court rather easily—and unanimously—ruled that a farmer couldn't evade a patent simply by planting and harvesting patented seeds. The other, *Association for Molecular Pathology v. Myriad Genetics*, more controversially involved the patentability of two genes that cause breast cancer—not ownership of the genes in someone's body, as was widely misreported, but the ability to isolate them. The Court was again unanimous here, in a sort of "split the baby" decision, finding that no "naturally occurring" gene could be patented but that complementary DNA ("cDNA") *that is synthesized in a lab* could be.

University of Baltimore law professor Greg Dolin, who also happens to have an M.D., was concerned early in the term about the trend in Court decisions that "have been far less solicitous of patentees than those emanating from the Federal Circuit." For example, "it is precisely because the issue seemed so clear-cut that the decision to hear *Bowman* raised significant worries about the direction that the Supreme Court might take." In *Myriad*, meanwhile, the Court produced "an incoherent opinion instead of a clear exposition of patent law." In the end, however, it "could've been worse."

David Olson of Boston College Law School agrees that the Court "has not clearly stated a uniform statutory interpretation and policy rationale for what should be patentable." Rather than erring on the side of patent protections, however, as would Dolin, Olson suggests a utilitarian analysis: "Instead of trying to decide patentability for cDNA based on whether cDNA is man-made. . . . the Court should ask the simple and central question: will society on net benefit from patents on DNA and cDNA?" Overall, Olson is more upbeat than Dolin and concludes that "the Court's decisions this term should maintain conditions for the encouragement of important genetic science."

My predecessor as editor of this fine publication, the newly tenured DePaul University law professor Mark Moller, makes his triumphant return to these pages with an article on the term's biggest class-action cases. *Amgen v. Connecticut Retirement Plans & Trust Funds* involved the materiality of certain non-disclosures in a securities-fraud lawsuit, while *Comcast v. Behrend* related to the admissibility of expert evidence in an antitrust case—or, rather, whether these issues need be resolved before a class can be certified (which is the whole ballgame in these sorts of cases because of the high cost of civil litigation). Moller views these cases through the lens of the late professor Richard Nagareda's "pro law" framework, which sought to put substantive law onto the procedural bones of the class-action vehicle—such that the goal of the class-certification process becomes finding "common answers" that can drive the remaining litigation. While the Supreme Court ultimately ruled for the plaintiffs in *Amgen* and the defendants in *Comcast*, "every justice signed onto majority opinions that applied some version of the common answers test, confirming that the test is here to stay."

Andrew Grossman of Baker & Hostetler, who co-authored last year's lead article on Obamacare, returns to analyze *City of Arlington v. FCC*, one of the three cases that Cato *lost* this term. *City of Arlington* asked a sort of metaphysical question: Does an administrative agency have jurisdiction (the authority) to decide its own jurisdiction (the scope of that authority)? That may seem like an easy question, but the easy answer—no, that's for Congress to decide, through the legislation that creates and empowers the agency—is unavailable when the statutory text isn't clear regarding whether an agency is properly regulating a given object. The Court, in a split decision, decided to defer to the agencies themselves on this question, just as courts have been doing since the infamous *Chevron* decision in 1984 when evaluating the propriety of agency actions that are non-controversially *within* their jurisdiction. It was a confusing ruling, to say the least. As Grossman puts it, "the Court may, from time to time, engage in misdirection to pull rabbits out of hats, [but] this case was more like pulling a trout out of a pencil-case."

Our final article about the term just past concerns the Court's sole First Amendment case—which is quite a change given that last year we had four articles in this area. My one-time debate opponent, Charles "Rocky" Rhodes of the South Texas College of Law,

ably handles *Agency for International Development v. Alliance for Open Society International*, whose mouthful of a title belies the relatively simple issue at its heart: What kinds of conditions can the government attach to federal funds? Here, as part of a program to combat HIV/AIDS, the federal government required its contractors to adopt a policy opposing prostitution. Several funding recipients sued, claiming that this requirement constituted compelled speech that had nothing to do with the purpose of the government program. The Supreme Court agreed. “While the government may impose limits on its grants to ensure that the funds are used appropriately,” Rhodes explains, “such limits can’t regulate a private entity’s speech outside the funded project.”

The volume concludes with a look ahead to October Term 2013 by Howard Bashman, who has his own appellate boutique in suburban Philadelphia and authors one of the oldest and most popular “blawgs,” *How Appealing*. The Court has already put 47 cases on its docket, perhaps in part due to the justices’ desire to front-load oral argument a bit more to avoid the frenetic opinion-writing in the final weeks of June. Here are some highlights: *NLRB v. Noel Canning*, testing the validity of President Obama’s recess appointments; *Schuette v. Coalition to Defend Affirmative Action*, regarding a state-constitutional ban on racial preferences in public employment, education, and contracting; *McCutcheon v. FEC*, challenging the aggregate-contribution limits in campaign-finance law; *Kaley v. United States*, on the right to counsel of choice in the context of criminal forfeiture; and *Bond v. United States*, a case on the scope of the treaty power that’s making a rare return trip to the high court. Cato has filed briefs in all of those cases, as well as in several other pending certiorari petitions that, if granted, would become high-profile additions. In other words, even if, as Bashman puts it, the new term “does not yet rival the past two terms with regard to the likelihood of capturing the general public’s attention”—it feels a bit like an off-year given the absence of Obamacare, gay marriage, and the like—there’s still plenty for Court-watchers to watch.

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This is the sixth volume of the *Cato Supreme Court Review* that I have edited, which means that I’ve now been responsible for half

of its volumes. While certain tasks have become easier, others have grown in line with the constitutional issues raised by various government actions. There are thus many people responsible for this endeavor. 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 continue to provide valuable counsel and editing in areas of law with which I'm less familiar. Research assistant Jonathan Blanks makes all of us look good and, most importantly, keeps track of legal associates Lauren Barlow, Julio Colomba, Elisabeth Gusfa, and Gabriel Latner—plus summer associates Zöe O'Herin and Lindsay Short, and legal interns Zachary Politis and Stephen Richer—who in turn performed the more thankless tasks without complaint. Neither the *Review* nor our Constitution Day symposium would be what they are without them.

Finally, thanks to Roger Pilon, the founder of Cato's Center for Constitutional Studies, who I hope is pleased with how this journal has turned out so many years after he conceived 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.

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 12th volume of the *Cato Supreme Court Review*.