

Introduction

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This is the 14th 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 matter 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 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. 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 the 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 and political problems caused by poorly conceived or inartfully drafted legislation must be left to the political process.

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Statistics and Trends

Following a term that saw a record level of unanimity, the 2014–2015 term regressed to the mean. Thirty of the 74 cases decided on the merits (41 percent) ended up 9-0.¹ The previous term it was 66 percent, but that term was the real outlier, given that the preceding five terms registered 36, 44, 46, 45, and 49 percent, respectively. Five more cases were decided by 8–1 margins, which brings us to nearly half the docket. And recall that the superficial harmony of the term that ended in June 2014 papered over real doctrinal differences, producing many narrow rulings that were often accompanied by strident concurrences—dissents in all but name. Many of those scorching writings were produced by Justice Antonin Scalia, who this year, if anything, only turned up the heat.

The term produced 19 5–4 decisions (26 percent, the second-highest of the last six years), including in such contentious areas as campaign finance (*Williams-Yulee v. Florida Bar*), same-sex marriage (*Obergefell v. Hodges*), environmental regulation (*Michigan v. EPA*), and the death penalty (*Glossip v. Gross*). And that doesn't even include the big *Obamacare* RobertsCare case, *King v. Burwell*, which came out 6–3—as did another 10 cases (15 percent of the total). That means that 41 percent of the rulings were either 5-4 or 6-3, demolishing last term's 22 percent—and higher than any term in recent memory (30 percent is the average of the preceding five terms). In other words, 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 increase in split judgments naturally resulted in significantly more dissenting opinions, 68, whereas the previous term there were 32 and the average going back to 2000-2001 is 55.9. Not surprisingly, the total number of all opinions (majority, concurring, and dissenting) was also high—186, up from 146 last term and the highest since 2009–2010—and the average of 2.51 opinions per case was up slightly

¹ These figures include eight summary reversals (without oral argument), seven of which were unanimous. All statistics taken from Kedar Bhatia, Final Stat Pack for October Term 2014, SCOTUSblog (June 30, 2015; updated July 5, 2015), <http://www.scotusblog.com/2015/06/final-stat-pack-for-october-term-2014>. For more detailed data from previous terms, see SCOTUSblog, Statpack Archive, <http://www.scotusblog.com/reference/stat-pack> (last visited Aug. 18, 2015).

from the average of the preceding decade. Justice Clarence Thomas wrote the most opinions (37, including 19 dissents), followed by Justices Samuel Alito (30) and Scalia (28), after which there's a big drop to the next number (16 each by Justices Stephen Breyer and Sonia Sotomayor). Justice Thomas also produced the most opinion pages (432), more than tripling those of Justice Ruth Bader Ginsburg (143).

Some of this "divisive" dynamic—which, again, followed a "unified" term, so take all of this with a grain of salt—can be attributed to the Court's controlling its docket such that four justices can decide to take a case guaranteed to prove controversial. But of course no justice generates his or her own cases, so if fewer non-ideological circuit splits or bald errors in complicated legal areas emerge from the lower courts—this term saw many fewer patent cases than the previous term, for example—there may be less opportunity for technical agreement. Such are the vicissitudes of the litigation calendar. Nevertheless, any way you slice it, the Court was definitely more discordant than it has been in the recent past—so Chief Justice John Roberts didn't manage to orchestrate the minimalistic unity he craves.

The Court reversed or vacated 53 lower-court opinions (72 percent), which is essentially the same as last term and in line with recent years. Of the lower courts with significant numbers of cases under review, the U.S. Court of Appeals for the Eighth Circuit attained a 1-7 record (88 percent reversal), narrowly "beating" the Fifth Circuit (2-6, 75 percent). Traditional "big loser" Ninth Circuit did suffer the most reversals, but also the most affirmances, for a respectable record in this context of 6-10.

None of the stats thus far are that remarkable, falling generally within the modern norm, without much if any significance for the Court's ebbs and flows. What is remarkable, however, is *which* justices were in the majority. After six straight years being most often on the winning side, Justice Anthony Kennedy dropped to third (65 of 74 cases, or 88 percent). In that time, Chief Justice Roberts tied Kennedy for that honor twice and was second three times—and yet this term he dropped to sixth (80 percent). So who took their places? Amazingly, it was Justices Breyer (92 percent) and Sotomayor (89 percent). Still, Justice Kennedy maintained his typical lead in those 5-4 cases, being in the majority in 14 of them—eight times with the "liberals," five times with the "conservatives," and once in a

heterodox coalition. But even here Justice Breyer tied him and Justice Sotomayor was only one case behind (with Justice Ginsburg one more back).

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 ahead only of Justice Scalia (by one case) and didn’t author any of the majority opinions. Not surprisingly, Thomas was also the justice most likely to dissent (39 percent of all cases and 66 percent of divided cases)—most memorably in *Obergefell*. He takes over from Justice Sotomayor, who went from worst to (almost) first. Thomas also maintained his status as the leading “lone dissenter”—since 2006–2007 he’s averaged 1.8 solo dissents per term, nearly double his closest colleague—writing three dissents in 8–1 cases. Justices Alito and Sotomayor each wrote one solo dissent. Chief Justice Roberts and Justice Elena Kagan have still *never* written one of those during their entire tenures (ten and five terms, respectively).

Justice Scalia, despite being on the winning side of six 5–4 rulings, made the most of his opportunities and authored three such decisions. He was particularly active on the last three days that the Court handed down opinions, producing important majority opinions in *Johnson v. United States* and *Michigan v. EPA*, memorable dissents in *King v. Burwell*, *Obergefell v. Hodges*, and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, and a notable concurrence in *Glossip v. Gross* (which he read from the bench, the fourth justice to do so in that case).

More big news comes out of an examination of judicial-agreement rates. The top six pairs of justices most likely to agree, at least in part, were all from the “liberal bloc.” Heck, the three tied for first all involved Justice Breyer—with Justices Ginsburg, Sotomayor, and Kagan, by definition, each pair at 94.4 percent—the most unlikely “Mr. Congeniality” in recent memory. The top conservative pairing consisted of Chief Justice Roberts and Justice Scalia, coming in seventh at 83.8 percent, which is a steep drop from the sixth slot. Justices Thomas and Sotomayor voted together less than anyone else (in only 37 of 74 cases, or 50 percent). Indeed, the next three-lowest pairings also involve Justice Thomas, with Justices Breyer (51.4 percent), Kagan (54.1), and Ginsburg (55.4). Justices Scalia and Sotomayor were on opposite ends of all of the 5–4 cases, as were Justices Alito and Kagan.

My final statistics are more whimsical, relating to the number of questions asked at oral argument—and how funny they were. Not surprisingly, Justice Scalia maintained his perch as the Supreme Court’s most frequent interlocutor, with an average of 22 questions per argument. That was up from his 19.6 average from two terms ago, made Scalia the top questioner in 43 percent of cases, and put him in the top three 63 percent of the time. Justice Ginsburg again asked the first question most often (in 29 percent of cases), followed by Justice Sotomayor (21 percent). Justice Thomas continued his non-questioning ways. With respect to laughter—or “[laughter],” as it’s noted on oral-argument transcripts—Scalia maintained his commanding lead, followed by a “not-so-close” Justice Breyer.² And Justice Kagan finally lived up to her potential, matching Chief Justice Roberts for third spot on the laugh track.

Statistics aside, this term, which was supposed to give a bit of a breather to Court-watchers, was obviously overshadowed by two cases. I won’t belabor them here because this volume features not just two articles on *RobertsCare* and one on same-sex marriage, but also a trenchant foreword by Roger Pilon that synthesizes the two rulings by way of explaining what both liberals and conservatives get wrong about judging. Looking back on the term, in sum, we do see a few trends: fewer unanimous rulings; more results that experts classify as “liberal” than “conservative”—though that’s largely due to the vagaries of the docket—and the lockstep voting of the Democratic appointees, contrasted against the inscrutability of Chief Justice Roberts and Justice Kennedy.

Despite the highs and lows of the term, however, when the dust cleared, there was one aspect of continuity that’s particularly gratifying to me: *Cato* continued its winning streak in cases in which we filed amicus briefs. While not as dominating as in the previous two terms—when we went 15–3 and 10–1, respectively—we still managed to pull off an 8–7 record. I’m also proud to note that we were the

² This part of the analysis comes from Boston University law professor Jay Wexler, who tracks such things. See Kimberly Robinson, *A Sikh, a Jew, a Muslim and a Catholic: Funniest Moments from the Supreme Court’s 2014 Term*, U.S. Law Week Blog, Bloomberg BNA (July 27, 2015), <http://www.bna.com/sikh-jew-muslim-b17179933918>. For Wexler’s work in this area going back a decade, see Jay Wexler, *SCOSTUS Humor*, <http://jaywex.com/wordpress/scotus-humor> (last visited Aug. 18, 2015).

only organization in the country to support those challenging both state marriage laws and the IRS's reworking of the Affordable Care Act. So it was a pretty good year for liberty, though obviously not without its disappointments—even beyond *King v. Burwell*.

Moreover, we fared way better than the U.S. government, which compiled an 8-13 record. Curiously, for the first time ever, both Cato and the feds found ourselves on the winning side of one case (see below)—but that was against a state government, so some Leviathan had to lose there. UCLA law professor Adam Winkler, writing at *Slate*, attributed the government's poor performance to its "conservative" positions on criminal justice.³ I don't buy the ideological characterization: Justices Scalia and Thomas often vote against the prosecution, so does that mean they're "liberal," in contrast to "law-and-order conservative" Justices Breyer and Kagan? But the larger point is correct: many of the government losses, including two unanimous ones, were in criminal cases. (Overcriminalization, anyone?)

But regardless—and regardless of its RobertsCare victories—this administration is easily the worst performer of any before the Court in modern times⁴ (and probably ever, though it's more relevant to compare Obama to Bush, Clinton, Bush, and Reagan than, say, Benjamin Harrison). Whether you look overall—where Obama is below 50 percent, against a historical norm of 70 percent—or just at unanimous cases—where he has a record average of nearly four unanimous losses per term—it's not a pretty picture. There are three basic reasons for this: expansive executive action (including overzealous prosecution), envelope-breaking legal theories, and the fact that, regardless of his reasoning, Justice Kennedy tends to act like a libertarian in close cases. If the administration wants to improve its standing before the Court, I humbly suggest that it follow Cato's lead, advocating positions (and engaging in actions) that are grounded in law and that reinforce the Constitution's role in securing and protecting liberty.

³Adam Winkler, *Is the Supreme Court More Liberal Than Obama?*, *Slate* (June 30, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/supreme_court_liberal_on_criminal_justice_issues_clarence_thomas_sided_with.html.

⁴ See Oliver Roeder, *Despite This Week's Victories, Obama Has Struggled at the Supreme Court*, *FiveThirtyEight* (June 26, 2015), <http://fivethirtyeight.com/datalab/despite-this-weeks-victories-obama-has-struggled-at-the-supreme-court>.

Finally, before I whet your appetite for the articles to come, a few words on the consequences of the marriage case for which this term will become known. Just because the ruling was expected doesn't make it any less momentous. In sometimes-soaring rhetoric, Justice Kennedy explained that the Fourteenth Amendment's guarantee of both liberty and equality means that there's no valid reason to deny this particular institution—the benefit of these particular laws—to gay and lesbian couples. Okay, fair enough: there's a constitutional right for gay and lesbian couples to get marriage licenses—at least as long as everyone else gets them.

But where do we go from here? What about people who disagree, in good faith, with no ill intent toward gay people? Will ministers, to the extent they play a dual role in signing state licenses, have to officiate at big gay weddings? Will bakers and photographers have to work them? What about employment-discrimination protections based on sexual orientation—around half the states lack them, but are they now required? And what about tax-exempt status for religious schools, an issue that came up during oral argument?

It's unclear, to be honest—much depends on whether Kennedy remains on the Court to answer these questions in his own hand-waving way—but all of these examples, including marriage-licensing itself, show the folly inherent in government insinuation into the sea of liberty upon which we're supposed to sail our ship of life.

If the government didn't get involved in regulating private relationships between consenting adults—whether sexual, economic, political, athletic, educational, or anything else—we wouldn't be in that second-best world of adjudicating competing rights claims. If we maintained that broad public non-governmental sphere, as distinct from both the private home and state action, then we could let a thousand flowers bloom and each person would be free to choose a little platoon with which to associate. But that live-and-let-live world is rapidly contracting, so we're forced to fight for carve-outs of liberty amidst a sea of mandates, regulations, and other authoritarian “nudges.”⁵

In any event, good for the Court. And while I echo Justice Kennedy's hope that both sides now respect each other's liberties and

⁵ See Ilya Shapiro, *Hobby Lobby and the Future of Freedom*, 23 *Nat'l Affairs* 132 (Spring 2015), available at http://object.cato.org/sites/cato.org/files/articles/hobby_lobby_for_natl_affairs_28published28.pdf.

the rule of law, I stand ready to defend anybody's right to offend or otherwise live his or her life in ways I might not approve.

Articles

Turning to the *Review*, the volume begins as always with the previous year's B. Kenneth Simon Lecture in Constitutional Thought, which in 2014 was delivered by Judge Diane Sykes of the U.S. Court of Appeals for the Seventh Circuit. Judge Sykes's lecture focused on "Minimalism and Its Limits," describing the pitfalls judges face when they try too hard not to affect the real world. While jurists ought not to think of themselves as legislators and rewrite the laws they're tasked with interpreting, they shouldn't hesitate to make legal rulings and let the political chips fall where they may. Too much deference to the political branches amounts to an abdication of the judicial role, after all. "At a time of deep political polarization," Judge Sykes says, "the modesty and consensus values claimed by judicial minimalism seem especially attractive." "But strong avoidance and deference doctrines are not the answer. . . . The Court's legitimacy arises from [the Constitution] and is best preserved by adhering to decision methods that neither expand, nor contract, but *legitimize* the power of judicial review."

It's altogether fitting then, and ironic, that as we move next to the 2014–2015 term, we start with two articles on a case exhibiting both judicial overreach and over-deference, *King v. Burwell*. The progenitors of the lawsuits against the IRS tax-credit rule at issue, Jonathan Adler of Case Western and my Cato colleague Michael Cannon, present a comprehensive overview of *King* and related lawsuits. Those who followed the litigation know that it turned on the ACA provision that authorizes tax credits (subsidies) for buying health insurance on exchanges "established by the State." A six-justice majority found that this seemingly clear text nevertheless allowed credits for purchases made on the *federal* exchange. Cannon elsewhere found this interpretive legerdemain to be akin to "six Humpty Dumpty's playing Calvinball."⁶ The consequences of this judicial rewriting are dire for the health care system and the rule of law, of course, but also for federalism. "The Court's decision to disregard Congress's express

⁶ Michael F. Cannon, *Six Humpty Dumpty's Playing Calvinball*, SCOTUSblog (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-six-humpty-dumpty's-playing-calvinball>.

plan has deprived states of a power Congress granted them, and that many states were eager to use,” Adler and Cannon write. “And it creates uncertainty about whether citizens can trust that federal statutes mean what they say.”

Vanderbilt’s Jim Blumstein has a similar take on *King*, though if anything he’s even less charitable to John Roberts. “Effectively reading pivotal statutory text out of a statute seems well beyond the umpire or referee function much proclaimed by the chief justice during his confirmation process.” Invoking the biblical story regarding Joseph’s interpretation of Pharaoh’s dreams, Blumstein posits that “the Court in *King* looked to the dreams of the drafters of the ACA . . . and took measures to accommodate, empower, and implement those dreams.” Who needs to do the hard work of textual exegesis when judges simply know what Congress wanted to do? Blumstein is much more alarmed by *King* than he was by *NFIB v. Sebelius*—the individual-mandate case he wrote about in these pages three years ago—labelling the ruling “institutionally corrosive.”

We got the principal author of Cato’s brief in *Obergefell v. Hodges*, Yale law professor Bill Eskridge, to write about the same-sex marriage cases. In a preview of his forthcoming book on the subject, Eskridge colorfully describes how members of the LGBT community have moved “from outlaws to ‘inlaws.’” While not uncritical of Justice Kennedy’s majority opinion—it’s disappointing that he didn’t engage the clear original-meaning evidence regarding the Equal Protection Clause⁷—Eskridge recognizes it as a “landmark decision.” The result was wholly expected given the rapid shifts in popular opinion on the subject, as well as the Court’s ruling on the Defense of Marriage Act two years ago in *United States v. Windsor*—which Kennedy also authored, as he did the case that struck down sodomy laws in 2003, *Lawrence v. Texas*. Still, the Supreme Court, Eskridge write, “is not the primary engine for the process by which Americans work through the implications of gay rights, but that process will,

⁷ Cf. Roger Pilon, Fair Decision in Same-Sex Marriage, but Based Mostly on Faulty Logic, Nat’l L.J., July 20, 2015, available at <http://www.cato.org/publications/commentary/fair-decision-same-sex-marriage-based-mostly-faulty-logic>; Ben Domenech, Symposium Contribution, Gay Marriage Is Here—Now What?, The Federalist (June 27, 2015) (“It would have been much better if Justice Kennedy had just quoted from the entirety of [Cato’s] *Obergefell v. Hodges* amicus brief, and written at the end: ‘This!’”), <http://thefederalist.com/2015/06/27/gay-marriage-is-here-now-what>.

assuredly, bring new equality–liberty clashes to the Court in the next decade.”

My colleague Walter Olson makes his debut in the *Review* with an article on a case in which Cato was on the losing side of an 8–1 decision, *EEOC v. Abercrombie & Fitch*. This was the one where the clothing retailer declined to hire a teenager who was wearing a headscarf—for religious reasons, as it turns out—which violated the chain’s (since-relaxed) “Look Policy.” Justice Scalia called this case “easy” when he announced the ruling, but there are plenty of complexities here that Olson does well to tease out. For example, are employers simply supposed to indulge whatever religious stereotypes they have in dealing with job applicants who seem to present some manifestation of religiosity? If someone shows up with a cross around her neck, does that indicate something about how they dress—whether modestly or like Madonna—and if an applicant wears a yarmulke, does that mean you can’t schedule him for Saturday shifts? Amazingly, the case brought together the Becket Fund for Religious Liberty, Americans United for Separation of Church and State, the ACLU, and the Christian Legal Society—all on the same side and against both Cato and a rare joint brief by the Chamber of Commerce and the National Federation of Independent Business (the leading advocate for small businesses). Don’t expect another religious-accommodation case like it.

Next, Roger Clegg of the Center for Equal Opportunity returns to our journal for a look at what may have been the term’s most surprising ruling—and one that was overlooked because it came down the same day as *King v. Burwell*. The case had a mouthful of a name—*Texas Department of Housing and Community Affairs vs. The Inclusive Communities Project*—and asked whether the Fair Housing Act allows claims for “disparate impact” liability. That is, the FHA, like all civil-rights statutes, prohibits the use of race in decisions relating to housing (including development plans, mortgage-financing, and many other areas)—but does there have to be intentional discrimination, or can race-neutral policies that have a statistically disparate impact on particular racial groups also land you in hot water? Although all appellate courts to have decided the question have permitted disparate-impact claims, the federal government so feared the Supreme Court’s response that it facilitated settlements in two other such cases that the high court took up in the last four years.

And for good reason: after oral argument, it seemed that there were clearly four votes against disparate impact—with Justice Scalia, of all people, as the swing vote (and it seemed that his view might be that the law did contemplate disparate impact, but that this made the law unconstitutional). But it was not to be. Justice Kennedy wrote a majority opinion that left the door open to disparate-impact claims but gave plenty of language to both plaintiffs’ and defendants’ lawyers.

Then we have Tim Sandefur, principal attorney at Pacific Legal Foundation and Cato adjunct scholar, for a fascinating take on the most interesting antitrust case in recent memory. *North Carolina Board of Dental Examiners v. FTC* was so unusual that it was the first one ever where Cato filed a brief supporting the federal government! Here, the state governing board of dentists was trying to prevent non-dentists from performing a procedure that’s so safe that people can do it on themselves: teeth-whitening. The Court ultimately ruled that such a board can get the antitrust immunity given to “state action” only if the state is indeed actively supervising the regulatory activities—not merely giving its imprimatur to a self-interested cartel. Come to think of it, this is really the flip-side of all those economic-liberty cases brought by PLF, the Institute for Justice, and a host of other libertarian public-interest law firms. Sandefur writes: “Legal barriers to entry such as licensing laws raise the cost of living and deprive entrepreneurs of economic opportunity and their constitutionally protected right to pursue the lawful vocation of their choice.”

Following that remarkable case comes one with a truly bizarre factual scenario (which I’ll try to describe without making any bad puns). In *Yates v. United States*, a Gulf Coast fisherman was caught by a fish-and-wildlife inspector with undersized grouper—and was eventually prosecuted for violating the anti-shredding provision of the Sarbanes-Oxley Act of 2002 (which was enacted in response to the turn-of-the-century financial-accounting scandals). It seems that when John Yates (presumably) cast overboard the evidence of his fishing infractions, he provided an opportunity for an overzealous prosecutor to use a provision meant for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede” any federal investigation. Here to help us untangle this net—darn it, I was so close to a pun-free summary—is John Malcolm,

who directs the Edwin Meese Center for Legal and Judicial Studies at the Heritage Foundation. Malcolm, an experienced prosecutor now heavily involved in the movement against overcriminalization, notes that “while it should not be unduly onerous for the federal government to prosecute those who engage in what is arguably criminal conduct, it shouldn’t be like shooting fish in a barrel either.”

Staying with the criminal law but moving to its constitutional aspects, Louisville law professor Luke Milligan tackles *Los Angeles v. Patel*, the “no-tell motel” case. At issue here was an ordinance in the City of Angels that required places of public accommodation to maintain certain guest records, and to make those records available at any time to police (without a warrant). A group of hotel operators sued the city, arguing that this provision violated the Fourth Amendment’s protection against unreasonable search and seizure. It was an unusual lawsuit in that most Fourth Amendment cases involve allegations that law enforcement officers made an unconstitutional search in a particular situation—typically finding drugs or guns that a criminal defendant wants to exclude from evidence as being “fruit of the poisonous tree.” Milligan argues that the key to *Patel* isn’t a mere determination of whether a given search is “unreasonable”—or even whether most would be under the L.A. ordinance—but instead goes to understanding the right “to be secure” from such searches. So “the original meaning of the Fourth Amendment appears to have played a silent but important role.”

BakerHostetler’s Andrew Grossman, a prolific adjunct scholar for Cato’s Center for Constitutional Studies—we got him in a trade with Heritage for a bag of pocket Constitutions and three interns to be named later—covers *Michigan v. EPA*, the term’s big environmental case. And he makes this exceedingly complicated administrative-law case look simple. The Court ruled that an EPA regulation ostensibly aimed at mercury but really targeting greenhouse gases was illegal because the agency didn’t follow the proper procedures in promulgating it. In a nutshell, Grossman writes, “*Michigan* establishes as a baseline principle of administrative law that agencies must give some consideration to costs when regulating under statutes that do not preclude them from doing so.” In other words, this wasn’t even about the propriety of using a bogus pretext (mercury emissions, which are already exceedingly low) to pursue policy that’s been legislatively stymied (carbon-dioxide emissions related to global

warming climate change bad weather). The EPA didn't even bother trying to justify imposing billions of regulatory costs to reap (speculative) millions in benefits; not good enough, said the justices.

From the War on Coal we turn to the War on Raisins. Former federal judge Michael McConnell, now director of Stanford's Constitutional Law Center, provides an eminently readable essay about a case that he actually argued at the Supreme Court—twice. In a story that sounds like it was ripped from an Ayn Rand novel, the Raisin Administrative Committee, which of course dates back to the New Deal, requires all raisin producers to withhold some of their crop from the market each year, and instead to deliver it to the government. The government, in its infinite wisdom, does whatever it wants with those raisins, from putting them in school lunches, to letting them rot, to selling them to large packers (think Sun-Maid) and using the proceeds for export subsidies. All in the name of “stabilizing” prices, you see, and all for the benefit of those farmers. But the issue here wasn't “really, this is still a thing?” Instead, it was whether taking these raisins—47 and 30 percent of the crop, respectively, in the years relevant to the litigation—constituted a “taking” of private property without just compensation under the Fifth Amendment. “Seems like an easy question,” McConnell says, stating the obvious. “Yet the case took three published opinions in the [Ninth Circuit] . . . and two trips to the U.S. Supreme Court. It even earned a mock investigative report on Comedy Central.” If you've lost Jon Stewart, you've lost America.

Speaking of dry and shriveled doctrines, Adam White—new to the *Review* but a frequent contributor to *National Affairs*, *City Journal*, *The Weekly Standard*, and more—considers how much deference courts must give agencies with respect to interpretive rules (and what makes for an “interpretive” rule as opposed to some other kind). It's a pretty thorny question, and one that, if you follow the logical thread, goes to the heart of the administrative state. After all, White points out, “agencies wield immense powers delegated to them by Congress. . . . [which delegations] violate the Constitution only in the most extreme cases—namely, when Congress's grant of power to the agency is so open-ended as to contain no ‘intelligible principle’ guiding and limiting the agency's discretion.” Thus most of our “law” is made not in the gleaming-marble halls and mahogany-paneled committee rooms of Congress but in the bowels of Washington's less-attractive federal buildings. In the context of *Perez v. Mortgage*

Bankers Association—which asked whether mortgage-loan officers are entitled to overtime pay (a question whose answer only matters to said officers and their employers)—White sensibly concludes that “Congress must take seriously the extent to which the [Administrative Procedure Act] fails to impose meaningful constraints upon agency discretion . . . and the extent to which [the resulting] rules receive deference from the courts.”

If that’s not deferential enough for you, our final article on the term just past features Emory law professor Sasha Volokh’s chugging through the “private nondelegation” doctrine. The issue arises in *Department of Transportation v. Association of American Railroads* in the context of certain “metrics and standards”—regulations addressing the performance and scheduling of passenger rail services—which Congress has allowed Amtrak to set. Surely there’s something wrong with allowing an entity to set the regulations by which it (and its competitors) operate. The Supreme Court doesn’t really dispute that; but still, Amtrak (and the government) win this one because, at least for these purposes, Amtrak *is* the government. Amtrak may not be part of the government for other purposes, however—it’s apparently Schrödinger’s rail company. Moreover, as Justices Thomas and Alito point out in separate concurrences, Amtrak’s being part of the government raises other constitutional issues. As Volokh puts it, the ruling “is the narrowest, most fact-based, most Amtrak-specific decision one could imagine,” leaving many questions unanswered.

The volume concludes with a look ahead to October Term 2015 by John Elwood and Conor McEvily, who are appellate lawyers at the Washington office of Vinson & Elkins. As of this writing—before the term starts—the Court has 35 cases on its docket, down from last year’s 39 (which was further down from previous years), such that we can expect about 70 opinions at term’s end. Here are some of the issues: whether public employees can be forced to subsidize unions whose activities they don’t support (*Friedrichs v. California Teachers Association*); whether and how racial preferences can be used in college admissions (*Fisher v. University of Texas at Austin*); whether state legislative districts should be drawn to equalize people or eligible voters (*Evenwel v. Abbott*); whether a class action can proceed on a statistical theory of damages and where certain class members weren’t injured (*Tyson Foods v. Bouaphakeo*); and whether a criminal defendant has a right to use untainted assets to pay for her legal

defense (*Luis v. United States*). These cases don't quite reach the high profile of recent terms, but they should be enough to shift the "liberals ascendant" narrative that came out this past June. As Elwood and McEvily conclude, "we would hesitate to say that this is another candidate to be the Term of the Century, [but] we can all agree that OT2015 is a strong contender to be the outstanding term of the third fifth of the 20-teens."

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This is the eighth volume of the *Cato Supreme Court Review* that I've edited. The process gets a bit more comfortable each year but the workload certainly doesn't—which is why we've promoted Trevor Burrus to managing editor. This way I can still take credit for producing the wonderful book you hold in your hands, but can more effectively slough off the blame for any errors. Trevor has been a big help over the years with both the *Review* and our amicus brief program, so I'm delighted to be working more closely with him.

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 further goes to my colleagues Bob Levy, Tim Lynch, and Walter Olson, who provide valuable counsel and editing in legal areas less familiar to me. I used to joke that Jonathan Blanks "makes the trains run on time" in our department—no relation to the Amtrak case noted above—and he proved so good at his job that he's now a research associate with our Project on Criminal Justice. Taking his spot in the lineup is sensational rookie Anthony Gruzdis (who's also a star for Cato's softball team, so the metaphor is doubly apt). Anthony previously worked as a corporate paralegal, so he has special skills in dealing with hot-headed lawyers and arcane court rules alike. He also ably stepped into Jon's shoes in keeping track of legal associates Gabriel Latner and Randal John Meyer and legal interns Thomas Berry, Robert Fountain, and Devin Watkins—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, the founder of Cato's Center for Constitutional Studies, who has advanced liberty and constitutionalism for longer than I've been alive. I'm confident that Roger is pleased with how his journal has turned out, and how its production runs like clockwork—though not without his editorial hand and oversight as he otherwise enjoys the summer. My career has benefited greatly from the high standard of excellence and integrity that he sets. Roger also demonstrates, especially if you catch him after-hours, what it is to be a happy warrior.

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 demanding government accountability and an end to unconstitutional actions of various kinds—and anger is afoot, real anger at where the political class has taken us—it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope you enjoy this 14th volume of the *Cato Supreme Court Review*.