

FOREWORD

A Tale of Two Justices

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 18th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium on September 17 (or a day or two before or after if Constitution Day is on a weekend). And each year in this space the publisher briefly discusses a theme that emerged from the Court's term or from the larger setting in which the term unfolded.

For the first time since the *Review's* inception, that publisher is someone other than Roger Pilon. At the end of 2018, Roger stepped down as director of the Levy Center and handed the reins to me. Roger founded the Center in 1989, after holding five senior posts in the Reagan administration, and directed its growth into a respected and influential voice. Although he has taken emeritus status, Roger remains close to Cato, continuing to hold our B. Kenneth Simon Chair in Constitutional Studies and working on a book that will tie together the legal philosophy and constitutional theory that represent his life's work. He also recently oversaw the production of 10 videos for the Students for Liberty "Law 201" series, spreading the word to the next generation.

Having taken over the Levy Center, I in turn passed down editorial responsibility for the *Cato Supreme Court Review*, 11 volumes

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of which were produced on my watch. Stepping into my shoes is Trevor Burrus, who started at Cato as a legal intern after graduating from law school in 2010 and immediately made himself indispensable. Now a research fellow, as well as book review editor for the *Cato Journal* and cohost of the popular “Free Thoughts” podcast, Trevor is doing a wonderful job with the *Review*.

Of course, this was also the rookie year for a Supreme Court justice. After a bruising confirmation fight, Brett Kavanaugh took his seat on the Court the second week of the term. Replacing the predictably unpredictable Justice Anthony Kennedy, Justice Kavanaugh seemed poised to move the Court to the right. But looks can be deceiving. In a few high-stakes cases and, especially, petition rejections and other votes on the “shadow docket” (as opposed to fully briefed and argued cases), Kavanaugh demonstrated a pragmatic—not wholly originalist/textualist or “conservative”—approach to his craft.

And Kavanaugh has tried to keep a low and agreeable profile, easily becoming the justice most often in the majority (91 percent of the time) and second-most in the majority in 5-4 decisions (trailing only Justice Neil Gorsuch). That was a mild surprise to the conventional wisdom that now holds Chief Justice John Roberts to be at the Supreme Court’s jurisprudential center—the first time the chief justice was also the median vote in half a century. This was an unusual term, however, with a small spread between winners and losers and no real ideological dominance. The justices least in the majority (a four-way tie among Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Gorsuch) were still on the winning side 70 percent of the time. And for all the doomsday prophesying from progressives, of the twenty 5-4 rulings, only seven had Republican appointees versus Democratic appointees, while eight others saw a “conservative” justice cast the deciding vote alongside the “liberals” (four of those Gorsuch) and another four were beyond characterization. A reinvigorated conservative bloc may yet come to dominate the Court—especially if President Trump fills another seat—but that isn’t the story yet.

What’s more interesting than trying to discern some theme from the last term is to contrast the two newest justices. Justice Gorsuch is rapidly becoming a libertarian darling in many ways—his “defections” tend to be in criminal law—while Justice Kavanaugh steers down the middle of the road. Kavanaugh actually aligned

himself as much with Justices Stephen Breyer and Elena Kagan this term as with Gorsuch. According to Adam Feldman at *Empirical SCOTUS*, Gorsuch and Kavanaugh voted together less often in their first term together than any other two justices appointed by the same president, going back at least to JFK.

Probably the starkest difference emerging between Gorsuch and Kavanaugh is in constitutional criminal procedure, where in close cases Gorsuch essentially occupies the Scalia role as a friend of criminal defendants caught up in sloppy government action or legislation, while Kavanaugh slides toward a pragmatic deference to law enforcement.

For example, *United States v. Davis* was a 5-4 decision in which Justice Gorsuch wrote the majority opinion, striking down the federal law that provided enhanced penalties for using a firearm during a “crime of violence” as unconstitutionally vague. Justice Kavanaugh authored the dissent on behalf of the other more conservative justices, arguing that the provision focused on conduct during the specifically charged crime and was therefore distinguishable from other catch-all clauses that were struck down for vagueness.

Then in *United States v. Haymond*, another 5-4 case, Gorsuch again authored the lead opinion, joined by the more liberal justices (Justice Breyer only in the judgment). Here, the Court ruled that the defendant sex offender’s Fifth and Sixth Amendment right to trial by jury were violated when he was sent back to jail for five years based on a judicial determination that he had violated the terms of his supervised release. Kavanaugh joined Justice Samuel Alito’s dissent, which argued that supervised-release revocation proceedings simply do not require a jury trial.

Justice Kavanaugh got his revenge in *Mitchell v. Wisconsin*, finally coming out on the winning side of a 5-4, joining Justice Alito’s plurality opinion (also joined by Chief Justice Roberts and Justice Breyer, with Justice Thomas concurring in the judgment), which held that when a person is unconscious, the exigent-circumstances doctrine allows for a blood test without a warrant. Justice Gorsuch filed a dissenting opinion, arguing that he would have dismissed the case as improvidently granted because the case was brought regarding implied consent to the blood-draw and the lower courts hadn’t adequately addressed the exigent-circumstances doctrine. (Cato filed a brief on the losing side here.)

A couple of other criminal-justice-related cases show divergence between Gorsuch and Kavanaugh on constitutional structure. Although *Timbs v. Indiana* was a unanimous decision “incorporating” the Eighth Amendment’s Excessive Fines Clause against the states through the Fourteenth Amendment, it contained Justice Kavanaugh’s biggest disappointment of the term for originalists. Kavanaugh joined Justice Ginsburg’s majority opinion that invoked substantive due process as the principal font of substantive rights. Justice Gorsuch wrote a brief concurrence to explain that, while it may not matter as to the right to be free from excessive fines, the Privileges or Immunities Clause, not the Due Process Clause, was the constitutionally faithful way of applying rights against the states. (Justice Thomas concurred separately along the same lines, which also echoed Cato’s briefing.)

Then in *Gamble v. United States*, the 7-2 majority, writing through Justice Alito, upheld the dual sovereignty doctrine, under which identical offenses—here, felon in possession of a firearm—are not the “same offence” for purposes of the Fifth Amendment’s Double Jeopardy Clause if charged by separate sovereigns. Gorsuch filed a dissenting opinion, on Cato’s side, arguing essentially that if you read federalism to give state and federal governments multiple opportunities to prosecute someone for the same basic crime, you’re doing it wrong. (Justice Ginsburg was the other dissenter; Justice Thomas had previously questioned the dual sovereignty doctrine, but reconsidered in the light of history.)

Three cases on the civil docket are also worth mentioning. In *Air and Liquid Systems Corp. v. Devries*, Kavanaugh authored a 6-3 majority opinion holding that manufacturers of asbestos-dependent equipment can be held liable to Navy sailors who became ill because of their contact with the asbestos. Under maritime law, Kavanaugh explained, the manufacturer has a duty to warn if (1) its product requires the incorporation of a part manufactured by a third party, (2) the combined product is likely dangerous for its intended use, and (3) the manufacturer has no reason to think that the users would be conscious of that danger. Gorsuch wrote the dissent (joined by Thomas and Alito), arguing that the common law of torts should apply instead—and thus the manufacturer cannot be held liable when shipping the product in “bare metal” form, which was not by itself dangerous.

Apple Inc. v. Pepper also featured dueling Kavanaugh-Gorsuch opinions. Kavanaugh, joined by the liberals in a 5-4 case in the only configuration of its kind this term, held that iPhone owners who bought apps through Apple's App Store are "direct purchasers" and therefore can sue Apple for anti-competitive pricing. Gorsuch in dissent argued that precedent does not allow for "pass on" anti-trust damages, and thus the plaintiffs can't sue Apple directly. This was a close case, to be sure, but if a functionalism/formalism divide deepens between the two newest justices, it could prove prophetic.

Finally, a trio of sui generis cases offer further contrasts. First, in *Washington State Department of Licensing v. Cougar Den, Inc.*, five justices found that the "right to travel" provision of an 1855 treaty between the United States and the Yakama Nation of Indians preempts the state's fuel tax as applied to Cougar Den's importation of fuel by public highway for sale within the reservation. There was no majority opinion, but Justice Gorsuch wrote an opinion concurring in the judgment (joined by Justice Ginsburg), in which he argued that the treaty should be interpreted the way that the Yakama understood it because the United States drafted it in a language foreign to the tribe—and the Yakama gave up a large land area in exchange for the treaty rights. Justice Kavanaugh joined the other conservatives on Chief Justice Roberts's main dissenting opinion, which argued that the tax burdened possession of fuel, not travel, and so the treaty did not shield the Yakama. Kavanaugh also filed his own dissent (joined by Justice Thomas), arguing that the Yakama have only those rights to use public highways equal to other U.S. citizens—and so the non-discriminatory fuel tax could be applied to them.

Second, in *Tennessee Wine and Spirits Retailers Association v. Thomas*, Justice Kavanaugh joined Justice Alito's 7-2 majority opinion that found the dormant Commerce Clause—which prevents states from interfering with interstate commerce even if Congress hasn't legislated in the area—to preclude a state from granting retail liquor licenses only to people who met state residency requirements. Justice Gorsuch, joined by Justice Thomas, argued in dissent that the Twenty-first Amendment (which repealed Prohibition) allows states to impose broad regulations on alcohol. The dormant Commerce Clause is probably the only broad doctrinal area on which Cato has taken positions diametrically opposite Justice Gorsuch—it's certainly the only kind of case in which I've found myself disagreeing with

him—but here Gorsuch gives special solicitude to alcohol regulation rather than parsing state legislators’ protectionist motives and effects.

And third there’s *Kisor v. Wilkie*, which may seem to be an odd case for this discussion, both because it was nominally unanimous—remanding an agency determination back to the lower courts for further scrutiny—and because Gorsuch and Kavanaugh found themselves on the same side of the larger issue not-so-buried within. The majority, in an opinion by Justice Kagan and joined by the other liberals and Chief Justice Roberts, declined to overrule the so-called *Auer* doctrine—whereby courts defer to agencies’ reinterpretations of their own ambiguous regulations—and instead tightened the evaluative rubric judges should apply before deferring. Justice Gorsuch’s concurrence was a dissent in all but name and was joined by the remaining conservatives, including Justice Kavanaugh. Gorsuch argued that the majority “has maimed and enfeebled—in truth, zombified” *Auer* deference, keeping it “on life support” in a way that deprives lower courts of clarity and litigants of independent judicial decisions. Kavanaugh wrote a separate concurrence (joined by Justice Alito) minimizing the distance between the Kagan and Gorsuch opinions—which, curiously, Roberts had also done in his concurrence.

Time will tell whether lower courts vindicate the Roberts/Kavanaugh view that Kagan essentially mended *Auer* without ending it, but *Kisor*’s nuances reveal the subtle differences between two justices who are second to no one—except perhaps Columbia law professor (and former Cato Constitution Day Simon Lecturer) Philip Hamburger—in pushing back on the administrative state. Whereas Gorsuch wants to pare back judicial deference, period, Kavanaugh focuses on reducing the number of instances where deference is at issue in the first place. For example, under the famous *Chevron* doctrine, judges defer to reasonable agency interpretations when the agency’s operational statute is ambiguous—and Kavanaugh would rather that judges work not to find (or manufacture) that ambiguity. In this, as in certain other areas of both legal theory and judicial process, the Gorsuch-Kavanaugh divide will likely echo the Thomas-Scalia one.

In any event, this unconventional and relatively low-key term did little to establish exactly where among the more conservative justices Kavanaugh will eventually settle, or exactly how close he’ll be

to John Roberts's minimalistic pragmatism. My fervent hope is that, wherever he ends up, it'll be for principled reasons rather than out of concern for "legitimacy"—be it his own or the Court's.

Although the radical right turn that many expected, whether out of hope or fear, failed to materialize this year, there was plenty of handwringing over judicial partisanship and warnings about the Court's integrity and independence. We've come to expect this sort of "working the refs"—most notoriously ahead of *NFIB v. Sebelius* (the 2012 Obamacare individual-mandate case), and this year making an appearance in the case about the inclusion of a citizenship question on the census—a cynical tactic that will continue so long as it appears to be an effective guilt trip against "institutionalist" judges.

In the end, the only measure of the Court's legitimacy that matters is the extent to which it maintains, or rebalances, our constitutional order. Indiana law professor Luis Fuentes-Rohwer put it best last year in a *Chicago-Kent Law Review* article titled "Taking Judicial Legitimacy Seriously," where he wrote that "judicial legitimacy is a trope deployed by judges in the pursuit of specific outcomes . . . a warning about the future and how a judicial outcome may be received, yet a warning that operates more as a boogeyman. It is a criticism, a call for restraint, yet lacking in empirical support."

"The man on the street does not care that the Court appears to side with one party over the other," Fuentes-Rohwer (no libertarian) explained in what is effectively an update of Berkeley law professor John Yoo's "In Defense of the Court's Legitimacy," which was published in the *University of Chicago Law Review* in the wake of *Bush v. Gore*. "He only cares that the Court follows a principled process."

As I wrote in the *Washington Examiner* magazine in July, the reason we have these legitimacy disputes isn't because the Court is partisan, but because it can't be divorced from the larger political scene, and because sometimes justices seem to make decisions not based on their legal principles but for strategic purposes. The public can see through that. Ultimately, it's when justices think about avoiding political controversy that they act most illegitimately.