

Introduction

*Trevor Burrus**

This is the 19th 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. Things changed a bit in my second year as editor in chief. In response to the COVID-19 pandemic, Cato employees have been working remotely since March. Like the Supreme Court, which heard oral arguments over the phone for the first time in history, the pandemic has disrupted the normal flow of life and challenged us to find new ways to work, socialize, and just live life.

The pandemic changed a lot, but it hasn't changed the *Cato Supreme Court Review*. We release the *Review* every year in conjunction with our annual Constitution Day symposium—which is virtual this year, of course—less than three months after the previous term ends and two weeks before the next term begins. It would be difficult to produce a law journal faster, even under normal conditions. The Court generally likes to hold big decisions until the end of June, but in this crazy year, due to delays in oral arguments (and no pressing European vacations for the justices), the Court's last decision was issued on July 9. Normally, authors would have little more than a month to produce their articles. This year, for some of our authors, it was less than that. I'm thankful that they (mostly) met their deadlines and, in some cases, even submitted early, which, trust me, became Christmas in July for the *Review's* editor.

We're proud that this isn't a typical law review, filled with long, esoteric articles on, say, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria.¹ Instead, this is a book

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¹ Chief Justice John Roberts once opined on the uselessness of law reviews: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't

of essays on law intended for everyone from lawyers and judges to educated laymen and interested citizens. Despite some authors' attachment to them, we try to keep footnotes relatively low in number and length, and we don't make our authors provide cites for sentences like "the Internet exploded in the late 90s" (as once happened to me). There's more than enough esoteric legal scholarship out there, and the workings of the Supreme Court should be, as much as possible, publicly accessible and understandable to average citizens. In the end, the Constitution is sustained by Americans' belief in it, and every year the Supreme Court justices write thousands of words explaining and expounding on our founding document. This review provides a deeper look into a few of the most important decisions.

And we're happy to confess our bias: It's the same bias that infected Thomas Jefferson when he drafted the Declaration of Independence and James Madison as he contemplated a new government. After discarding ideas like the divine right of kings and other theories by which rulers are said to be imbued with a monopoly on the legitimate use of force in a geographic area, Enlightenment thinkers, most prominently John Locke, properly concluded that governments don't inherently have any power whatsoever. Like a pile of stones found in the woods, a government, by itself, is not a moral agent or an object of moral concern. Yet if someone takes those stones and turns them into a house, that pile of stones becomes an object of moral concern—a piece of property—via the actions of the primary moral agent: a rights-holding person. Governments don't have rights, they have powers. People have rights and they can sometimes delegate to a government the power to secure those rights. Or, as was once said by a much wiser person: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

Individual liberty is protected and secured by a government of delegated, enumerated, separated, and thus limited powers. Through the ratification process, the People created a federal government

of much help to the bar." Remarks at the Annual Fourth Circuit Court of Appeals Judicial Conference 28:45–32:05 (June 25, 2011), <https://cs.pn/30QsLpx>. See also Orin S. Kerr, *The Influence of Immanuel Kant Evidentiary Approaches in Eighteenth-Century Bulgaria*, 18 *Green Bag* 2d 251, 251 (2015) ("This Article fills the gap in the literature by exploring Kant's influence on evidentiary approaches in 18th-century Bulgaria. It concludes that Kant's influence, in all likelihood, was none.").

bound by the strictures of the Constitution. A government that acts beyond those powers is not just unconstitutional, it is fundamentally immoral and illegitimate. It is pure force without reason or justification.

The delicate balance of powers within the government is partially maintained by a judiciary that enforces the Constitution according to its original public meaning, which sometimes means going against the “will of the people” and striking down popularly enacted legislation. The Constitution is not an authorization for “good ideas.” Everyone who cares about the Constitution should be able to think of something that they believe is a good idea but is unconstitutional, as well as something that is a bad idea but is constitutionally authorized. If you can’t think of either, then you don’t really believe in the Constitution, you just believe in your good ideas. That’s fine if you’re a member of Congress—although they also take an oath to support and defend the Constitution—but judges are obligated to think beyond their preferences and enforce the law.

This has been a difficult year for the U.S. Constitution, as it has been for nearly everything else. A pandemic, protests in the streets over police violence, an erratic and divisive president, and a presidential election have combined to make things seem quite dire. Some argue for a radical restructuring of our government, possibly even throwing out or heavily amending the Constitution. That document, the argument goes, is irrevocably tainted by slaveholding signatories and its countenancing of America’s original sin. But while the absolute evil of slavery should never be forgotten and the lasting effects of racial discrimination must not be ignored, going after the Constitution is targeting the wrong suspect. At the Founding, slavery tainted the new republic. Any governing document produced by and with people who held others in bondage would inevitably protect an institution that would eventually require a vicious war and 750,000 lives to formally abolish. Even after the war, the South clung to its old ways like a man clinging to a life raft, with decades of peonage laws, Black Codes, Jim Crow, lynchings, and state-condoned (if not encouraged) violence.

There never would’ve been a union of free and slaveholding states without accommodating slavery, so the Founding generation left it to its successors to resolve that contradiction. In a sense, then, the Constitution wasn’t “completed” until the adoption of the Thirteenth,

Fourteenth, and Fifteenth Amendments. Those amendments did something that couldn't have been done at the Framing: establish a human-rights floor below which states were not allowed to go that could be enforced by federal courts. Southern states would have walked out of the Constitutional Convention if the proposed constitution meddled with slavery. The likely result would have been two countries, with a proto-confederacy having even fewer reasons to change its ways.

All of this history should be common knowledge to Americans. Yet, given the well-known decrepit state of American civics education, it's worth a reminder. I have seen more than one person on social media or interviewed at a protest saying something remarkably ignorant about the Constitution. One masked protester told a reporter, "the Constitution didn't abolish slavery, so it's worthless."

It has never been more important for Americans to understand what the Constitution is and what it can and can't do. It was created with the hope that a fledgling nation with a vast, still-unknown amount of territory would have the power and energy to address issues of common concern. Yet it was well known, even then, that the nation was large and diverse, with many clashing values and ideals. Aside from slavery, New Yorkers viewed South Carolinians as essentially citizens of a foreign nation, and vice versa. They could join forces on questions that concerned all states—foreign policy, defense, interstate trade, and a few others—but there was no way they could agree on issues like education and religion. There is thus no federal power to administer education, and the First Amendment prohibits Congress from meddling in religion.

The Framers knew that giving powers over important local matters to a central government was impractical and unworkable. Some critics of the Constitution, today called the anti-federalists, thought that the Constitution as written gave far too much power to the federal government. The result would be chaos and hatred within the nation. The pseudonymous "Brutus"—probably Robert Yates of New York, an anti-federalist who actually attended the Constitutional Convention until July 5, when he left in disgust because the convention had decided to scrap rather than amend the Articles of Confederation—penned one of the first essays opposing the Constitution. That essay, usually termed "Brutus 1," published on

October 18, 1787, a month after the Constitution was signed, contains one of the anti-federalists' most prescient critiques:

The territory of the United States is of vast extent; it now contains near three millions of souls, and is capable of containing much more than ten times that number. Is it practicable for a country, so large and so numerous as they will soon become, to elect a representation, that will speak their sentiments, without their becoming so numerous as to be incapable of transacting public business? It certainly is not.

In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good. If we apply this remark to the condition of the United States, we shall be convinced that it forbids that we should be one government. The United States includes a variety of climates. The productions of the different parts of the union are very variant, and their interests, of consequence, diverse. Their manners and habits differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite; each would be in favor of its own interests and customs, and, of consequence, a legislature, formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogeneous and discordant principles, as would constantly be contending with each other.

The territory of the United States certainly is now "of vast extent," and we contain more than one hundred times the three million souls of Yates's time, but everything else in that passage is stunningly prophetic. He could be describing our current situation, in which half the country hates the other half and each party is viewed as an existential threat by the other. Presidential elections have become apocalyptic events, partially because the executive is the only effective policymaking branch of government. Congress doesn't pass laws anymore; it has already empowered administrative agencies to legislate so much that the executive branch essentially runs the entire government.

For the foreseeable future we will whip back and forth between different regulatory regimes. A Republican president will rescind some environmental and labor regulations, and four or eight years later they will be put back in place by a Democratic president. President Donald Trump, like all recent presidents, has raised (lowered?) the bar for unilateral and constitutionally dubious presidential actions. Future presidents will thus have a new arrow in their quiver: the “national emergency” executive action. A President Joe Biden or Kamala Harris could declare a national emergency on gun violence or health care or climate change. Meanwhile Congress bickers away, the only purely democratic branch reduced to people of such “heterogeneous and discordant principles,” that they are “constantly [] contending with each other.”

This bickering and stagnation are directly related to how much power the federal government has over our daily lives and our deepest values. By expanding the powers of the federal government to extend to just about every aspect of our lives, we compromised the Framers’ vision of a diverse federal structure that would allow diverse people to live together cooperatively rather than combatively. As in 1787, South Carolinians don’t want to be governed like New Yorkers, but rather than follow the guiding principle of federalism—good fences make good neighbors—we continually try to cram unwanted forms of government onto unwilling states. The spate of recent state-led lawsuits against federal actions highlights this fact. Twenty-six states sued to stop Obamacare. Dozens of sanctuary states and cities are still fighting the Trump administration over its attempt to coerce cooperation on immigration enforcement.

This is unsustainable. Our constitutional system, if it isn’t broken already, is getting there fast. For decades, critics like myself and my colleagues at Cato have been emphasizing the importance of maintaining the critical aspects of constitutional governance, such as the separation of powers, federalism, and the nondelegation of legislative power. That was not persnickety carping about tedious details, as opponents often claimed, but attempts to protect vital constitutional guardrails. We will continue to do that, because hopefully it is not too late. We still have a republic, if we can keep it.

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Turning to the *Review* and the Supreme Court term itself, it was another big year. Some long-percolating issues returned (executive power

over immigration, Obamacare's contraceptive mandate), and some new ground was forged on questions of presidential power and the administrative state. We saw a strange abortion ruling in which the chief justice did perhaps the most John Roberts thing ever and went against his own dissent from a four-year-old ruling because he felt bound by that precedent. And we saw a major ruling that extended Title VII protections against sex discrimination to cover sexual orientation and gender identity.

Oh, and the chief justice presided over the third presidential impeachment trial in American history. Wait, did that happen?

The *Review* kicks off, as always, with the annual B. Kenneth Simon Lecture, delivered at last year's Constitution Day symposium by Judge Thomas Hardiman of the Third Circuit. Hardiman gives a stirring reminder of not only the importance of an independent judiciary but also the fact that, despite many claims to the contrary, we have one. The Supreme Court is routinely lambasted as a partisan institution, usually by those who don't follow the Court's work closely, but also occasionally by those who should know better. Yes, the justices have their particular judicial philosophies that can produce predictable results, but, for an independent judiciary that is freed from political controls, those results often diverge from simplistic "conservative" or "liberal" outcomes. Hardiman shows how the current Court is actually composed of nine independent justices, not simply blocks of "conservative" or "liberal" ones.

Next, Jonathan Adler of Case Western Reserve University School of Law (and the *Review's* editorial board) discusses the Trump subpoena cases in the cleverly titled article, "All the President's Papers." Litigation against President Trump is by this point not new, but, in the subpoena cases, the Court decided important questions on the scope of presidential immunity to state and congressional subpoenas. Because the Court was refereeing a dispute between two branches of government, Chief Justice Roberts unsurprisingly wrote both opinions. In the end, writes Adler, "the Court reaffirmed two fundamental constitutional values: No person is above the law and the powers of Congress are limited. In the process, the Court also demonstrated an ability to resolve important constitutional questions without descending into the political polarization that engulfs the body politic in 2020."

For history aficionados, Princeton's Keith Whittington contributed a fascinating and informative article on the Electoral College cases.

The Electoral College is probably one of the Framers' biggest oversights. Yes, it performs a valuable role in raising the importance of small states in presidential campaigns, requiring broad-based support across different regions to be elected, but that wasn't how it was envisioned. The Framers left many questions concerning the presidency until the final weeks of the convention. They extensively debated the method for choosing the president, and the same rivalries—big states versus small states, northern versus southern—formed the contours of the debate. Allowing Congress to choose the president would create too much dependency between the two branches, and a popular vote was certain to fail because average voters were thought to be too ignorant and provincial to choose the best candidate. The Electoral College was the compromise, but it was quickly subsumed by partisanship and political machines. Now, even though most Americans are generally aware of the Electoral College, they're often unaware that, technically speaking, they're not voting for the president but rather for electors who will vote for their candidate when the Electoral College convenes in December. But what happens if a pledged elector breaks his or her pledge, as happened seven times in 2016? Can a state punish that so-called faithless elector? In the Court's decision, all "justices agreed that states could adopt measures to discourage faithless electors, but they disagreed on the source of that authority." Many questions were left unanswered, however, and the Court may one day have to address whether, as Whittington asks, states can "require electors to vote only for presidential candidates who have released their tax returns."

Paul Larkin of the Heritage Foundation returns to the pages of the *Review* for the second straight year with an article on a fascinating and somewhat overlooked case, *Kahler v. Kansas*. In *Kahler*, the Court was asked whether a state can alter its insanity defense via statute. Traditionally, the insanity defense lets a defendant attempt to show either that (1) he didn't know what he was doing or (2) that he didn't know that what he was doing was wrong. Kansas changed its law to essentially eliminate the second option, although it can be raised at the sentencing stage. Ultimately, a defendant could plead insanity if he shot someone he truly thought was the devil. If, however, he said the devil told him to shoot someone, the defense would not be available. The Court was asked to declare this change unconstitutional and it declined. This was a rare Supreme Court case on substantive,

rather than procedural, criminal law. Substantive criminal law—such as the definition of crimes and the defenses available—is almost always left to the states. Larkin praises the Court for continuing that doctrine. “The states and Congress remain free to decide how best to reconcile the need to deter crime,” he writes, “as well as punish the people who disregard society’s rules, with the need to define the rules of the road in a way that respects our fundamental beliefs about not holding parties accountable for conduct they truly believed was legal or lawful.”

Peter Margulies of Roger Williams University School of Law writes on the Deferred Action for Childhood Arrivals (DACA) cases, which challenged the Trump administration’s rescinding of President Obama’s DACA program. DACA allowed people who were brought to the country illegally as children to stay and receive certain benefits, at least under some circumstances. Through a series of memoranda, Trump administration officials announced that DACA would be wound down, causing potentially great harm to its beneficiaries. “Consider a DACA recipient who enrolled in a four-year college in September 2016 and whose two-year DACA period of participation was due to end on March 6, 2018,” writes Margulies. Such considerations formed an important part of Chief Justice Roberts’s opinion. Much like in the census case the previous term, in which the chief justice joined with the “liberal” justices to stop an immigration-status question from being added to the census due to a defect in administrative procedure, the chief justice “defected” here, writing for the Court on a sensitive political issue. It was classic John Roberts, diplomatically charting his Court down a precarious middle path. The agency didn’t think through the consequences of rescinding the program, and “in ending the program, Roberts explained, an agency had to at least address the interests of stakeholders as part of ‘the agency’s job’ and its ‘responsibility.’”

Next, Ilan Wurman of the Sandra Day O’Connor College of Law at Arizona State University dives deep into the president’s removal power in his article on *Seila Law v. Consumer Financial Protection Bureau* (CFPB). For some time, constitutional scholars in the originalist camp have been complaining about a 1935 case called *Humphrey’s Executor v. United States*, which limited the president’s ability to remove appointees to independent agencies. Rather than being able to remove someone for any reason whatsoever, *Humphrey’s* said that

Congress can limit a president's removal power to only "for cause" dismissal. This has been used to create various "independent" agencies, like the CFPB. In *Seila Law*, the Court ruled that the CFPB's structure, with a single director, removable only for cause, violates the separation of powers. The Court didn't go so far as to overrule *Humphrey's*, however, leaving many constitutional law scholars waiting for the other shoe to drop. Wurman's article goes deep into the debate over the removal power and past cases that helped shape the doctrine today. "It may be better in the future to recognize that the reasoning of *Humphrey's* has been abandoned," he concludes. But it will take a future case to overrule *Humphrey's*.

Jennifer Schulp, Cato's new director of financial regulation studies, uses her considerable expertise in the area to comment on *Liu v. SEC*. To extract ill-gotten gains from wrongdoers, the SEC has long used a remedy called "disgorgement." While it's easy enough to say, "someone shouldn't unduly gain from violations of securities laws," in practice it's difficult to figure out exactly what gains are ill-gotten and who should receive recompense. As Schulp writes, "[a]s a practical matter, SEC disgorgement often penalizes by leaving the defendant worse off, and it routinely fails to return disgorged funds as restitution to those harmed by the wrongdoer." In *Liu*, the Court was asked "whether the SEC is authorized to seek, and district courts are empowered to grant, disgorgement by statutory authority providing for 'any equitable relief that may be appropriate or necessary for the benefit of investors.'" The Court's answer seems obvious: "a disgorgement award [must not] exceed a wrongdoer's net profits and [must be] awarded for victims." While many questions remain, writes Schulp, *Liu's* "immediate effects are welcome, and include increased scrutiny of SEC requests for disgorgement, more frequent return of disgorged funds to victims, and increased transparency and consistency in the application of SEC remedies."

The saga of the Little Sisters of the Poor has been going on since the Obama administration. Tanner J. Bean of the firm Fabian VanCott and Robin Fretwell Wilson of the University of Illinois College of Law recount the saga, explain the Catholic nuns' ultimate victory at the Court, and explain why that victory is probably fleeting. The Affordable Care Act did many things, but one of the most controversial, and most litigated, has been the so-called contraception mandate. Employers of a certain size are required to provide qualifying health

care plans for their employees. Via regulations, “qualifying plans” were defined as covering the full range of contraception and fertility treatments for women. For those who object to contraception or view some types of contraception as abortifacients—by preventing a fertilized egg from implanting in the uterus—the mandate clashed with their core values. In the most high-profile case, Hobby Lobby Stores sued, winning at the Supreme Court an exemption from the mandate as a closely held corporation run on Christian values. Little Sisters of the Poor qualified for an accommodation to the mandate but “rejected its mechanics.” *Little Sisters of the Poor v. Pennsylvania*, however, was ultimately about whether the Trump administration could rescind Obama-era regulations and pass broader employer exemptions. The Court ruled it could, but the truce will last only until the next Democratic president changes those regulations. Echoing my concerns voiced earlier in this introduction, Bean and Wilson write, “Just as *Little Sisters of the Poor* will not lay to rest conflicting claims over the coverage mandate, the holding that broad delegation by Congress supports virtually any agency action (that is not arbitrary or capricious) almost certainly means that administrative whiplash will become commonplace for culture-war clashes.”

Stephen Vladeck of the University of Texas School of Law writes about a case that he argued before the Court, *Hernández v. Mesa*. Arising from a tragic cross-border shooting incident in which a 15-year-old Mexican boy standing on Mexican soil was shot by a U.S. border agent standing in the United States, this was the second time *Hernández* has been at the Court. This time the question was whether the once somewhat notorious but now basically toothless *Bivens v. Six Unknown Federal Narcotics Agents* (1971) could be used to provide an implied federal cause of action in this cross-border shooting case. The Court declined to extend *Bivens*. “In *Bivens*, the Supreme Court recognized at least some circumstances in which federal courts can and should fashion a judge-made damages remedy for constitutional violations by federal officers,” writes Vladeck. In the ensuing decades, however, conservatives have attacked *Bivens* as an illegitimate “usurpation of the legislative power,” and called for it to be overturned. The problem with that position, Vladeck argues, is that court-fashioned remedies like the one in *Bivens* have a longer pedigree than conservatives admit. Moreover, if understood in context of the federal Westfall Act, which preempts all state tort claims

against federal officers acting within the scope of their employment, then curtailing *Bivens* often means the victims will have no avenue to try to remedy constitutional violations. Because of this, even if the Court reached the right result in *Hernández*, “it certainly shouldn’t have been that easy.”

Arizona Supreme Court Justice Clint Bolick, who delivered the 2016 B. Kenneth Simon Lecture, returns to the *Review* to comment on a case near to his heart, *Espinoza v. Montana Department of Revenue*. *Espinoza* was brought by our friends at the Institute for Justice (IJ). Justice Bolick co-founded IJ and litigated school-choice cases there for many years. One problem that such litigation often encounters are states with so-called “Blaine amendments” in their constitutions—named after anti-Catholic Senator James G. Blaine, who ran for president in 1884. Under Blaine’s influence, more than 30 states added amendments to their constitutions to prohibit any public money going to “sectarian” schools, which basically meant Catholic schools. As more states create school-choice programs, opponents have used Blaine amendments to prevent vouchers or even tax-creditable donations from going to any religious school. *Espinoza* arose from the Montana Supreme Court’s decision to invalidate an entire tax-credit program because the “program allowed public funds to flow to religious schools, a result incompatible with the state’s Blaine amendment.” The Supreme Court ruled that “the Montana Constitution discriminates based on religious status,” thus neutering Blaine amendments around the country. Bolick writes, “*Espinoza*, in a very important sense, is the culmination of a long journey meant to make America safe for school choice.” While there are still questions to be resolved, “school-choice advocates have a victory to cherish.”

The final article looking back at last term is by Nicholas Mosvick, former Cato legal associate and current senior fellow at the National Constitution Center, and his brother Mitchell, a lawyer in England. They cover *Ramos v. Louisiana*, a fascinating case that asked whether it violates the right to trial by jury to allow nonunanimous verdicts in criminal cases. The Court, in an opinion by Justice Neil Gorsuch, ruled that Evangelisto Ramos’s Louisiana conviction violated the Sixth Amendment because it was achieved by a 10-2 vote. “Trial by jury” can’t mean just anything, Gorsuch argues, and he reviewed historical sources to argue that it means, among other things, a unanimous verdict. The Mosvick brothers take issue with

Gorsuch's analysis. A good originalist would have found that jury trials at the Founding and before had many characteristics, including some that would appall modern sensibilities. Sometimes unanimity was required, but sometimes not. Sometimes unanimity was seen as harmful because it led to coercion of juries—literally locking up and starving jurors until they all agreed. “*Ramos* risks damaging ‘original public meaning’ as an interpretive method,” the Mosvicks write, “making it seem reducible to a process of finding historical evidence for a common view at the time of ratification.”

This volume concludes with our annual “looking ahead” essay, this time written by former Cato legal associate and now Pacific Legal Foundation senior attorney, Anastasia Boden. Anastasia takes a look at a coming term that is quite interesting, although maybe not yet as interesting as last term. John Roberts's chickens are coming home to roost as a result of his taxing decision in *NFIB v. Sebelius*—holding that the individual mandate to purchase health insurance was constitutional if construed as an exercise of Congress's taxing powers. Since Congress has now lowered the penalty tax to where people without health insurance have to pay \$0, the Court in *California v. Texas* will answer whether the individual mandate can still be maintained, and, if not, how much of the rest of the Affordable Care Act must fall. The Court will also hear a challenge to one of religious-freedom advocates' more reviled cases, *Employment Division v. Smith*, which held that the Free Exercise Clause doesn't require religious exemptions from laws of neutral applicability. The case, *Fulton v. City of Philadelphia*, which involves Philadelphia's decision not to work with Catholic agencies in placing children for fostering and adoption, will be one of the most watched of the term. The Court will also hear another high-profile interbranch dispute, *Department of Justice v. House Committee on the Judiciary*, which came out of the House Judiciary Committee's attempt to get the full, unredacted Mueller Report from the Justice Department. And there will, of course, be more cases taken up when the justices return from summer break.

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This is the second volume of the *Cato Supreme Court Review* I've edited, and I could not have done so without a lot of help. I'd like to thank Ilya Shapiro for being an excellent director of the Robert A. Levy Center for Constitutional Studies and Roger Pilon for supplying

the vision for the department and leadership for so many years. I'd also like to thank the authors, without whom there would be nothing to edit or read. They're often given a difficult task—to write an 8–12,000-word article in four or five weeks—and this year it was even more difficult given the pandemic and the Court's extended term.

Thanks also to my colleagues Bob Levy (even though the department is named after him and he's chairman of the Cato Institute, he still likes to get his hands dirty), Clark Neily, Walter Olson, Jay Schweikert, Will Yeatman, and (again) Ilya for helping to edit the articles, and legal associates Michael T. Collins, Dennis Garcia, James T. Knight, Christian Townsend, and Mallory Reader for helping with the thankless but essential tasks of cite-checking and proofreading. Legal interns Brandon Beyer and Wentao Zhai were also quite helpful in these tasks, despite the unfortunate fact that their entire internship was remote. Special thanks again go to legal associate Sam Spiegelman, who stepped up and did an exceptional job with all the nuts and bolts of putting out the *Review*, as well as a significant amount of editing. Sam was indispensable.

I 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. Our Constitution was written in secret but ratified by the People in one of the most extraordinary acts of popular governance ever undertaken. During that ratification process, ordinary people debated the pros and cons of the document, and, in so doing, helped turn the Constitution into a type of American DNA, belonging to no one but part of all of us. Those of the Founding generation shared many of our concerns today. They fretted over the possibility of rule by elites. They wished to ensure prosperity throughout the country. They worried that self-interested rulers would ignore the law and collect power. The Constitution is their best attempt at creating an energetic yet restrained government. It reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against government abuses. In this schismatic time, it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope that you enjoy this 19th volume of the *Cato Supreme Court Review*.