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A Less Corrupt Term: 2016–2017 Supreme Court Roundup

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A LESS CORRUPT TERM

Marc O. DeGirolami and *Kevin C. Walsh* report on the 2016–2017 Supreme Court.

In these unusually turbulent times for the presidency and Congress, the Supreme Court's latest term stands out for its lack of drama. There were no 5–4 end-of-the-term cases that mesmerized the nation. There were no blockbuster decisions.

Even so, the Court was hardly immune to the steady transformation of our governing institutions into reality TV shows. Over the weekend leading into the final day of the term, speculation ignited from who-knows-where about the possible departure of its main character, Justice Anthony Kennedy. To us, the chatter seemed forced—as if the viewing

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public needed something to fill the vacuum left by a season of episodes with fewer sex scenes and less louche intrigue than usual.

But the scriptwriters did not disappoint entirely. In the season finale, the justices delivered split opinions in two cases that had not even been fully briefed and argued on the merits—one about President Trump's limits on immigration from six majority-Muslim nations, the other about the right of a female same-sex spouse to be listed as a parent on a birth certificate alongside the birth mother. These opinions hint at some of the stories that will shape next year's plotline—the first full term for the new character, Justice Neil Gorsuch.

And the producers promise a thrilling new season. For readers of this journal, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* is likely to be the most prominent case, one about the freedom of a Christian baker to decline to design a custom cake for a same-sex wedding celebration. Other potential showstoppers include a case about partisan gerrymandering and another round on President Trump's executive order on immigration. We may also see more shake-ups in the cast. Before peering ahead to what may be coming, though, we look back at some of the signal events of the past term.

The biggest Supreme Court case in recent memory remains *Obergefell v. Hodges*, in which the Court two years ago created a constitutional right to same-sex marriage. Our retrospective begins with two cases in which *Obergefell* continued its work. Neither was directly about marriage, but both involved challenges to laws that differentiated between men and women with respect to parenthood.

First is *Sessions v. Morales-Santana*, a constitutional challenge to the immigration rules governing the eligibility for U.S. citizenship of children born abroad to only one U.S. citizen parent. Under the then-current scheme, U.S. citizen fathers such as Luis Ramón Morales-Santana's needed to reside in the United States for longer than similarly situated mothers for their children born abroad to be eligible for citizenship.

The Court unanimously held that Morales-Santana was not eligible for the relief he sought: eligibility for citizenship under the shorter time period. The vote on the outcome was 8–0 (Justice Gorsuch did not participate). There was, however, a 6–2 split on rationale. Justice Ruth Bader Ginsburg, writing for the Court, held that the differential treatment of mothers and fathers was unconstitutional, but that the remedy was to apply the longer time period to the children of both. Justice Clarence Thomas, joined by Justice Samuel Alito, concurred only in the judgment. The Court's lack of authority to order the shorter time period sought by Morales-Santana, he wrote, fully disposed of the case and made it unnecessary to decide the merits of the constitutional claim.

Obergefell was not essential to the reasoning of *Morales-Santana*. But it was cited in the majority opinion and emblematic of its narrative. The challenged rules were enacted decades ago, Justice Ginsburg wrote, in "an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are." Happily, more enlightened understandings obtruded onto our constitutional law in the 1960s and 1970s. "In light of the equal protection jurisprudence this Court has developed since 1971," she said, the differential treatment of unwed mothers and fathers is "stunningly anachronistic." The disparate criteria, the majority stated, "cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens."

The judicial perspective that conceived *Obergefell* is the same progressive mindset that brings us the majority's contestable and unnecessary disquisition in *Morales-Santana*. It is on full display in Justice Ginsburg's quotation of Justice Kennedy's opinion for the Court in *Obergefell*: "New insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." The passive voice suggests that the Court remains open to the voice of revelation, inspiring it to issue its next blockbuster.

If the question in *Obergefell* boiled down to whether states could insist on marriage certificates with spaces for "husband" and "wife," the question in the other *Obergefell*-inflected case of the term, *Pavan v. Smith*, was whether states could insist on birth certificates with spaces for "father" and "mother." In an opinion issued *per curiam* rather than under the name of any individual justice writing for the Court, a majority of the justices treated this question as easily resolved by *Obergefell*. The right of a male spouse to list his name on the birth certificate of a child born of the biological mother, said the Court, is a marriage-related benefit. And *Obergefell* announced a constitutional "commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" Because male spouses of birth mothers are presumptively listed on birth certificates, states must provide the same thing to the female spouses of birth mothers. According to the Court, Arkansas uses birth

certificates "to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."

The decision in *Pavan* was a summary reversal, which means that the Court reversed without the full briefing and argument usual in cases it decides on the merits. Justice Gorsuch wrote a brief dissent, joined by Justice Thomas and Justice Alito, arguing that the case did not meet the demanding standard for summary reversal, which is "reserved for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" The Supreme Court of Arkansas, Gorsuch continued, "did not in any way seek to defy but rather [sought to] earnestly engage *Obergefell*. . . . And it is very hard to see what is wrong with [that court's] conclusion." The state's scheme was based on biology, he reasoned, and "nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution."

Pavan pierces the pretense that one can dispense with husbands and wives relative to marriage without also dispensing with fathers and mothers relative to children born within marriages. Changes in marriage and birth certificates illustrate this starkly. "Spouse" replaces "husband" and "wife," while "parent" replaces "father" and "mother."

Although the dissenting justices were right that summary reversal was not warranted, one need not interpret the summary treatment as an aggressive move (though that is certainly a possibility). Given that Justice Kennedy did not retire, the case would have come out the same way after full-dress treatment. And that opinion likely would have been worse. If Chief Justice John Roberts had dissented, which he very well could have in light of his dissent in *Obergefell*, the opinion assignment would have fallen to Justice Kennedy, who almost certainly would have taken the occasion to inflict more damage on family law in the Constitution's name. Yet it is worth noting that the chief justice did not dissent—either in *Pavan* or *Morales-Santana*.

When it came to the freedom of speech this term, there was broad agreement on outcomes, but not on too much else. In *Packingham v. North Carolina*, the state had made it a felony for registered sex offenders to visit a broad range of social media sites that the offender knew could also be visited by children. The law included not only sites like Facebook and Twitter, but also Amazon, WebMD, and the *Washington Post*. The Court struck down the statute 8–0 (Justice Gorsuch did not participate) as a violation of the speech clause of the First Amendment, but the opinions reveal some interesting divisions among the justices.

Justice Kennedy's opinion for the Court gave us yet another sample of his grandiloquent and pontificating style. Not content to strike down the law simply as overly broad, Kennedy composed a panegyric on the democratic glories of social media: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general . . . and social media in particular." After all, he continued, "Facebook has 1.79 billion active users . . . about three times the population of North America"—as if naked numerosity were self-evident proof of the value of social media. One wonders whether Justice Kennedy has ever explored 4chan or Reddit to see how his Court's decisions are received there.

Then it got worse. Justice Kennedy described the advent of social media as a "revolution of historic proportions." Like that other Revolution of 1776, "we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." And while, he wrote, it is true that "advances in human progress" such as the railroad have been exploited by "the criminal mind," the juggernaut of progress must not be stopped. Close readers will see traces of the self-definitional, identitarian, solipsistic quality of constitutional rights that Justice Kennedy has made the centerpiece of his substantive due process opinions in cases like *Planned Parenthood v. Casey* and *Lawrence v. Texas*. In his universe, rights are about who we are, not what we do.

Writing for the chief justice, Justice Thomas, and himself, Justice Alito concurred only in the judgment. He agreed that this law swept too broadly, but he could not join the opinion for the Court "because of its undisciplined dicta" and "unnecessary rhetoric." The Court's opinion, Alito wrote, "is unable to resist musings that seem to equate the entirety of the internet with public streets and parks." The recklessly romantic language of the decision, he said, might suggest to a state that it was powerless to preclude an adult who had been convicted of molesting a child from visiting dating sites for teenagers or sites in which "minors communicate with each other about personal problems." A few months ago, the editor of this journal wrote that "we know we are in

trouble when the right of free speech becomes a right to unlimited pornography." But we are well beyond that point if the Court's bloated rhetoric is taken at face value. Let's hope it won't be.

The other notable free speech case of the term was *Matal v. Tam*, a challenge to a statutory provision authorizing the federal government to deny a trademark if it "disparaged" someone or brought someone "into contempt or disrepute." The trademark application of a rock group of Asian ancestry calling itself "The Slants" was denied under this provision because the government believed the name was derogatory even though the group's aim was to "reclaim" it.

The Supreme Court overturned that determination in another 8–0 decision (again, without Justice Gorsuch). In an opinion by Justice Alito, the Court held that the law violated the speech clause because trademarks are private speech, not government speech, and discriminated on the basis of viewpoint. In essence, the government conditioned the granting of trademarks on the saying of nice things, not mean things. Justice Alito's opinion went on to decide several other issues concerning the law's constitutionality under the Court's doctrine regarding speech in the context of government subsidies and commercial speech, while a separate opinion authored by Justice Kennedy and joined by Justices Ginsburg, Kagan, and Sotomayor that joined in the judgment would not have addressed these issues. But the bottom line in *Tam* was another solid statement by the Court in favor of powerful protection for free speech, and against any sort of "hate speech" exception to the First Amendment.

Just as for the speech clause, so, too, for law and religion cases: The October 2016 term gave us a few interesting decisions, some of which faltered in their language or reasoning, but nothing explosive. In a kind of coda to the *Little Sisters of the Poor* litigation, the Court decided unanimously that religious nonprofits that operate hospitals and that offer defined employee benefit plans not only operated but also established by those hospitals qualify as exempt "church plans" under the Employee Retirement Income Security Act. The case was a fairly straightforward exercise in statutory interpretation, and Justice Elena Kagan's opinion for the Court was noteworthy for its textualist approach. The Court chose an interpretation of the statutory text that was both consonant with its plain meaning and Congress's objective in getting the IRS out of the business of "deciding just what a church is and is not—for example . . . whether a particular Catholic religious order should count as one." Justice Sonia Sotomayor wrote a concurring opinion with the sole purpose of advising Congress to change its mind.

The most important law and religion case of the term was *Trinity Lutheran Church of Columbia, Inc. v. Comer*, in which the state of Missouri denied the application of a church-operated preschool and day care center to share in certain public grant monies set aside for the resurfacing of playgrounds. The state argued that its decision was required by Article I, Section 7 of the Missouri Constitution, which states in part that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

The Supreme Court ruled 7–2 in favor of the church, but once again the opinions were fractured. The chief justice's opinion for the Court (except as to a footnote, about which more in a moment) held that the exclusion of Trinity Lutheran Church violated the free exercise clause because Missouri was targeting religious status for especially bad treatment. The state's interest in avoiding the appearance of violating the establishment clause by including churches in its disbursement of monies for nonreligious uses was insufficiently compelling to justify its policy.

In reaching this result, the Court drew a distinction between religious status and religious belief or conduct: The state had excluded Trinity Lutheran Church and other religious institutions because of their religious "character" or identity. While in a previous case, *Locke v. Davey*, the Court had upheld a state scholarship program that prohibited the use of funds for devotional studies, that, said the Court, was different: "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." In a concurring opinion joined by Justice Thomas, Justice Gorsuch pointed out the instability of the line drawn by the Court: "Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission?" Not unreasonable questions.

The status/conduct distinction is an old one, and not strictly a legal one. Yet it fits awkwardly, to put it gently, with the manner in which religion is protected under the Constitution, which enjoins the government not to prohibit "the free exercise" of religion. The clause seems to protect exactly what people and institutions "propose to do," and not who or what they

are. But the Court's emphasis on identitarian concerns is of a piece both with other cases like *Packingham* and with what the Court has come to believe is the most powerful justification for the First Amendment's protections: authenticity and self-actualization. Once again, and regrettably, identity seems to be supplanting activity as the constitutional touchstone.

Justice Sotomayor, joined by Justice Ginsburg, dissented. In her view, the exclusion of Trinity Lutheran Church was not merely permitted but actually compelled by the establishment clause. Perhaps the most intriguing bit of her sprawling dissent was the final footnote, in which she cited a case about Bible reading in school for the proposition that "while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs." One wonders which American religious majority Justice Sotomayor had in mind.

While *Trinity Lutheran* was a victory for the church, two important questions remain open. First, its scope. In a footnote joined only by four justices, the Court appears to limit the holding of the case to "express discrimination based on religious identity with respect to playground resurfacing," giving new meaning to judicial minimalism. At the same time, however, the Court remanded several other cases involving school vouchers to the circuit courts for reconsideration in light of its decision, perhaps intimating that the case may have more precedential weight than is suggested by the footnote. Interestingly enough, the placement of this scope limiter in a footnote may itself be a sign of its importance. The initial draft circulated by Chief Justice Roberts probably did not contain this footnote, but rather similar language in the body of the opinion. Its segregation from that opinion into a footnote probably gave the justices who would not sign on to that language a simple way of expressing their disagreement.

Second, the role of "animus" analysis in these cases is still unclear. Missouri's constitutional provision was passed at about the time of the failure of the notorious federal "Blaine Amendment," named after Sen. James G. Blaine of Maine. As Philip Hamburger has noted on *firstthings.com*, the federal amendment and its state analogues, which prohibited the disbursement of any public funds to "sectarian" or "pervasively sectarian" schools, were motivated in large part by hatred and suspicion of Catholics and their schools. There is scholarly disagreement about whether Missouri's constitutional provision is part of this history: Its exclusion of churches reflects a policy that was adopted some decades before the Blaine Amendment controversies of the 1870s. Yet it seems highly artificial and historically obtuse to isolate this provision from the more general liberal theological anxieties and suspicions that attended these laws in the late nineteenth century. It certainly illustrates that those who rely on arguments about animus have powerful motives to control the terms of the debate—to prescribe exactly which groups and evidence count, and for how long the stain of hatred lasts. At any rate, the Court, probably prudently, did not mention any of this history in *Trinity Lutheran Church*, and it remains to be seen whether it will affect similar cases.

Animus was also in the background of another season thriller. The challengers in *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii* sought to block enforcement of an executive order imposing temporary immigration restrictions on would-be entrants from six majority-Muslim countries. Soon after the order was issued, federal district courts in Maryland and Hawaii granted sweeping injunctions preventing its enforcement against anyone anywhere, and the Fourth and Ninth Circuits upheld these orders. The Supreme Court granted a partial stay of the lower courts' overbroad injunctions, accepted the cases for full review, and set them for argument in October 2017.

The justices were unanimous with respect to most of the outcomes in the consolidated *Trump v. IRAP* cases. All nine justices supported a significant rollback of the lower courts' injunctions. The order may now be enforced against everyone it covers except "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." Questions about precisely who fits that description have unsurprisingly given rise to immediate litigation. But whatever the contours of the stay, the injunctions now cover a fraction of total potential entrants. In a partial concurrence and dissent, Justice Thomas, joined by Justice Alito and Justice Gorsuch, would have gone further and stayed the injunctions in their entirety.

The unsigned *per curiam* opinion for the Court in *Trump v. IRAP* is most notable for what it does not say. The opinion is silent about the administration's likelihood of success on the merits—that is, whether the administration is ultimately likely to prevail after full review—the lead element under the test for a stay. Justice Thomas's separate opinion interpreted this silence as tantamount to "the Court's implicit

conclusion that the Government has made a strong showing that it is likely to succeed on the merits." But sometimes silence is just silence. The justices likely disagreed about the merits, including a set of controversial issues that made no appearance in the *per curiam* opinion: Donald Trump's statements about Islam and Muslims as candidate and as president. Was the executive order a "Muslim ban" infected by unconstitutional animus? The challengers relied on statements by candidate Trump, President Trump, and others associated, sometimes only very loosely, with the campaign and administration. The Supreme Court said nothing about them.

Will the challengers or the administration prevail? We may never know. The executive order set temporary rules that are likely to run out before the Supreme Court decides. If so, the expiration of the order will "moot" the challenges, which is lawyer-speak for rendering their legality no longer susceptible of judicial resolution. The Supreme Court would then have acted deftly, absorbing the order and the challenges to it, lowering the temperature, stretching things out, and providing some relief while upholding those parts of the order most plausibly related to the safety of American citizens. Of course, the president may extend or renew the order, effectively compelling the Court to take the case up again.

Safety of a different sort is at the center of one of the potentially most significant cases to be decided next term: the security of politicians in districts that have been gerrymandered on partisan lines to be safely Republican or Democratic.

The case of *Gill v. Whitford* is a reprise of issues last addressed by the Supreme Court in the 2003 case of *Vieth v. Jubelirer*. The claim there was that Pennsylvania legislators had impermissibly configured their election districts to advance partisan interests excessively. The Court in *Vieth* fragmented into a 4–1–4 configuration. Writing for a four-justice plurality, Justice Scalia held that partisan gerrymandering presented a nonjusticiable "political question": Once one acknowledged that some partisanship is permissible in drawing districts, how much partisanship is too much? The lack of judicially manageable standards for answering that question, wrote Justice Scalia, required dismissal. Four dissenting justices contended that judicially manageable standards did exist, but they could not agree on what those standards were. That left Justice Kennedy, who was unwilling to accept that there are issues he should not resolve. He joined in the disposition of dismissal and agreed that the case was nonjusticiable. But he refused to declare political gerrymandering claims categorically nonjusticiable. Although no judicially manageable standards for these claims had yet emerged, he held out hope that perhaps they might in the future.

Fast-forward fourteen years. A divided three-judge appellate court found a partisan gerrymandering challenge to Wisconsin's legislative districting plan to be justiciable, held the statewide plan unconstitutional, and ordered a new plan. Lawyers for the state obtained a Supreme Court stay of this ruling (over the objections of Justices Ginsburg, Breyer, Sotomayor, and Kagan), and the Supreme Court will hear Wisconsin's appeal at the beginning of the October 2017 term. As always, all eyes will be on Justice Kennedy.

Justice Kennedy will also be the center of attention in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Christian cake baker case. As a legal matter, the case involves not only the scope of federal constitutional protection for the free exercise of religion and against compelled expression, but also the distinction between a conjugal understanding of marriage and discrimination on the basis of sexual orientation. Just below the surface are questions about the government's authority to coerce people not to hurt others' feelings, the tolerable scope of moral disagreement in a free society, and the distinction (as in both *Packingham* and *Trinity Lutheran*) between status and conduct.

The events at issue in *Masterpiece Cakeshop* took place in 2012—one year before the Supreme Court held the federal Defense of Marriage Act unconstitutional in *United States v. Windsor*, and three years before it created a constitutional right to same-sex marriage in *Obergefell*—at a time when Colorado law still required a husband and a wife for marriage. Charlie Craig and David Mullins planned to get married in Massachusetts and then celebrate with a wedding reception in Colorado. They went to Jake Phillips at his Masterpiece Cakeshop business and asked him to design and create a custom wedding cake for their celebration. Phillips politely declined, which led to a complaint of sexual orientation discrimination. The Colorado Civil Rights Commission adjudged Phillips a lawbreaker and ordered Masterpiece to comply with the law and bake the cake.

Backers of the baker had been bracing for disappointment for several weeks before the Court granted review because the chance to act on the petition came and went many times. But the addition of native Coloradan Neil Gorsuch apparently provided the needed vote to hear the case.

The briefing aside, *Masterpiece Cakeshop* is best conceived as concerning the scope of *Obergefell* rather

than free speech or religious free exercise. The center of the Court on the questions presented is Justice Kennedy, and his self-conception is likely to drive the outcome. Justice Kennedy is sometimes susceptible to arguments for free speech limits on government power. There is, of course, a more direct argument in Masterpiece Cakeshop's favor: that politely declining to design and bake a custom cake because one adheres to the conjugal understanding of marriage is not discrimination on the basis of sexual orientation. The Supreme Court typically does not decide state law questions like that, but might in this case because the Colorado court relied on what it believed Supreme Court precedent required in rejecting the cake artist's key argument on this state law question. And determining the meaning of its own precedent is obviously within the Supreme Court's domain.

If the Court follows the parties' lead, though, it will focus on the Colorado appellate court's view of the relationship between First Amendment freedom and the right to same-sex marriage decreed in *Obergefell*. In holding that Phillips's refusal violated state antidiscrimination law, the Colorado court wrote: "Masterpiece admits that its decision to refuse Craig's and Mullins' requested wedding cake was because of its opposition to same-sex marriage which, based on Supreme Court precedent, we conclude is tantamount to discrimination on the basis of sexual orientation." The Colorado court therefore ruled as categorically illicit the view of marriage described by Justice Kennedy himself in *Obergefell* as one that "has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." Although this incompatibility seems to cut in favor of the cake artist, experience suggests it would be a mistake to rule out the possibility of a majority opinion in *Masterpiece Cakeshop* authored by Justice Kennedy about the logical and spiritual imperatives of extending *Obergefell*'s legacy. Of all the cases on the Supreme Court's docket next term, this one has the greatest blockbuster potential.

In fact, *Masterpiece Cakeshop* is less a sequel to *Obergefell* than an aftershock. For a blockbuster is not just a TV and film sensation. It is also—and originally—a bomb powerful enough to destroy a neighborhood block. Blockbusters wipe out the existing habitations of civilization so that new structures can replace them. And, as in much home building today, the new construction's obsolescence begins the moment it is finished. Impermanence is part of its design, a planned feature, the better to stimulate the urge to blow it up in its turn. It is built not to last.

To say that a blockbuster decision is destructive is not to say that it is extreme or unexpected. To the contrary, the blockbuster has become a critical moment in the Court's ordinary time, the passing over of which generates howls of protest that the Court has shockingly regressed or even abdicated its office. The weeks of late June have become the Court's most avidly anticipated, when each year it issues its exalted mandates of creative destruction.

True, some justices do not share in these enthusiasms. In his *Obergefell* dissent, Justice Alito wrote that the majority's opinion "evidences . . . the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation." *Deep and perhaps irremediable corruption.* The phrase suggests not merely that the justice disagrees with the outcome, but that *Obergefell* is simply the latest symptom in a persistent and possibly terminal sickness in constitutional adjudication. But what, exactly, is the disease, the rot, the "corruption"?

It is the unslakable thirst to see the Court break things, upend existing arrangements, upset the patterns and traditions of law and life that offer some stability and solace to the people who rely on them, and to do it over and over again in each new constitutional season. This has been the Court's most prominent mission for at least half a century. This is constitutional law today: the relentless smashing and remaking of rights to match the Court's advancing conception of American identity. And it seems to be the lasting temptation of perennially disillusioned court watchers to hope against hope that changes in personnel—the arrival of Neil Gorsuch! The departure of Anthony Kennedy!—will at last cure that chronic illness. This time, they intone term after term, surely it will be different.

Judged by what Michael Paulsen described in this journal three years ago as the "low standards of the desperate," the 2016–2017 term was by turns inoffensive and disappointing, but not devastating. It was a less corrupt term. And yet as soon as the season ended, reviewers were already salivating over the potentially world-shattering cases on the upcoming docket. There's always next year. FT