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# Book Reviews

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## THE SUPREME COURT IN CRISIS: A GOOD READ, BUT NO CRISIS

by Donald A. Daugherty, Jr.

A Review of:  
American Justice 2017: The Supreme Court in Crisis, by Kimberly Robinson

<https://www.amazon.com/American-Justice-2017-Supreme-Crisis/dp/0812249976>

### Note from the Editor:

This book review discusses and critiques Kimberly Robinson's book reflecting on the 2016 Term of the Supreme Court.

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- Jeffrey Toobin, *How Badly Is Neil Gorsuch Annoying the Other Supreme Court Justices?*, THE NEW YORKER (Sept. 29, 2017), <https://www.newyorker.com/news/daily-comment/how-badly-is-neil-gorsuch-annoying-the-other-supreme-court-justices>.
- Mark Joseph Stern, *Feud: Elena and Neil*, SLATE (Oct. 18, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/10/why\\_rumors\\_of\\_a\\_gorsuch\\_kagan\\_supreme\\_court\\_clash\\_are\\_such\\_a\\_bombshell.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/why_rumors_of_a_gorsuch_kagan_supreme_court_clash_are_such_a_bombshell.html).
- Editorial, *Neil Gorsuch, the Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html>.

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*About the Author:*

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Kimberly Robinson's *The Supreme Court in Crisis* is the latest from the University of Pennsylvania's *American Justice* series, an annual review of Supreme Court cases and happenings published shortly after a term ends. This breezy, informative account of the 2016 Term is largely even-handed and particularly useful for the reader wanting a quick overview of the term.

The book is organized by chapters discussing different themes from the term identified by Robinson. Robinson's challenge is that, as she notes, the term was characterized by a "light docket with relatively inconsequential cases." This resulted from the fact that for the first six of the nine months it was in session, the Court had only eight justices, which, Robinson writes, "impacted not only the kinds of cases the justices took but also the way that they resolved them." The Court chose (or was forced by circumstances) to avoid the most difficult, closely-contested cases until a new justice could be confirmed, which Robinson believes "cast it even more as a political institution."

In the chapter "Stand Idly By," Robinson reviews controversial cases that the Court delayed deciding or sidestepped altogether. Most notable is *Trinity Lutheran Church of Columbia v. Comer*, for which certiorari was granted a month before Justice Scalia passed in February 2016, but oral argument not held until April 19, 2017—nine days after Neil Gorsuch was sworn in. Robinson also points to the Court declining to review cases involving changes to voting requirements in Texas and North Carolina in the wake of 2013's Voting Rights Act decision, *Shelby County v. Holder*. Chief Justice Roberts took the unusual step of explaining why the Court denied certiorari in those cases, which Robinson interprets as protesting too much in anticipation of criticism that the Court was trying to avoid difficult decisions.

In a chapter entitled "Quarter Loaf Outcomes," Robinson writes that another tactic the Court used to deal with the incomplete complement of justices was to decide certain cases on the narrowest possible grounds. As an example, she cites *Salman v. United States*, which held that disclosing confidential company information to a close relative as a gift could constitute insider trading, but which gave no guidance as to whether such gifts to non-relatives would. Similarly, in determining whether Miami had standing to sue Bank of America for discriminatory lending practices, the Court only decided that the city could constitute an "aggrieved party" if neighborhoods blighted by widespread foreclosures resulted in increased expenditures for municipal services; to the dismay of some observers, however, the Court left another prong of the standing analysis—whether the city's increased expenses were proximately caused by discriminatory lending, or by something else—to be decided by the lower court on remand.

Due in large part to its cautious approach, the 2016 Term was marked by an unusually high degree of consensus and a greater-than-usual number of unanimous decisions, with only two dissents read from the bench. Along with the absence of divisive, blockbuster cases, the relative consensus among the justices makes

it hard to agree that the Supreme Court was in “crisis.” In fact, the 2016 Term is perhaps most interesting because it showed the Court’s ability to continue to function, and retain its cohesion and credibility, even while lacking a full complement of personnel and notwithstanding any political turmoil swirling outside One First Street. The Court wisely and prudently chose to put off some of the biggest cases until it returned to full strength. This is not a weakness or shortcoming, as Robinson seem to imply, but reflects a humility that is less often seen in the two political branches. Wisdom and prudence do not necessarily make for an interesting read, however, so the book instead repeatedly refers to various “crises.”

The book’s first example of a crisis caused by the Court’s cautious approach is its declining to hear the North Carolina transgender school bathroom case, *Gloucester County School Board v. G.G.* Treatment of transgender students is a societal concern of relatively recent vintage and, although undoubtedly important to the individuals directly involved, it does not yet seem to present legal issues with wide-ranging, national significance that the Supreme Court must address. Only a single circuit had considered the matter at the time certiorari was sought in *Gloucester County*, and no circuit split has arisen since; even with nine justices, the Court presumably will continue to let these issues percolate in the lower courts for the foreseeable future. That the book leads with this example supports the conclusion that there was no real crisis in the 2016 Term.

The notion that the Court was in crisis through the end of its term in June 2017 seems not to have arisen until after the unexpected election of Donald Trump as President in November 2016. Before then, there was little talk of any crisis; since then, everything about our country has been “in crisis,” at least in the view of his unyielding opposition. It is generally acknowledged that the vacancy on the Court focused public attention on the importance of the judiciary as an issue in the 2016 presidential race, and drew support for candidate Trump that he might not otherwise have had. However, this does not mean the Court itself was experiencing any crisis in the 2016 Term.

The 2016 Term’s large number of immigration-related cases are reviewed in “The Priceless Value of Citizenship.” The chapter begins with the partial reinstatement on the term’s very last day of President Trump’s executive order temporarily barring entry into the United States of individuals from six predominantly Muslim countries. Robinson writes that the vagueness of the exception created by the Court for individuals having “bona fide relationships” with American citizens or entities was likely a product of sharp disagreement among the justices about the order’s legality. At the same time, the partial reinstatement may have been an early example of the Court pushing back on resistance by inferior courts to executive actions that would have been perfectly acceptable if taken by previous presidents, culminating in a 7-2 vote last December to stay any judicial order enjoining implementation of the revised executive order.

The book’s most interesting chapter is “Courting Politics,” which discusses the Roberts Court’s so-called “one last chance” doctrine for resolving tough constitutional issues on narrow grounds in order to avoid wreaking immediate, widespread havoc; in such decisions, the Court often warns in dicta that without

some legislative or other non-judicial fix, the outcome could be different the next time it is faced with the issue. Robinson argues that decisions causing momentous, social disruption risk exposing the Court to criticism that it is merely another political actor. Beginning with Justice Owen Roberts “switch in time” that mooted FDR’s court-packing plan and ended the *Lochner* era, Robinson cites other possible examples of a politicized Court—*Bush v. Gore*, *National Federation of Independent Business v. Sebelius*, *Obergefell v. Hodges*, and *Citizens United v. Federal Elections Commission*. At the same time, although the Court is sometimes fairly accused of deciding issues better left to the political branches or the states, this was not a problem in the 2016 Term, and this chapter has little to do with the term specifically. Further emphasizing the anti-climactic nature of the term, Robinson notes at the chapter’s end that, early in 2016, the Court teed up the issue of whether state laws allowing unions to charge nonmembers “agency fees” or to require that they affirmatively object to contributing to support political causes should be struck down under the First Amendment. After Justice Scalia’s death, however, the Court could only reach a 4-4 non-decision in the *Friedrichs* case, and it is now revisiting the same issue with nine justices in this term’s *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.

The term’s most significant, lasting development was undoubtedly the confirmation of Neil Gorsuch, and Robinson gives it due attention in a chapter (regrettably) entitled, “The Stolen Seat.” Like the purported sense of a “crisis,” the notion that the seat was “stolen” only arose after Donald Trump pulled off one of the biggest political upsets in American history. Between the time it became apparent that he would be the Republican nominee until early in the morning after Election Day, the only issue in the minds of Democrats regarding filling the ninth seat was whether President Hillary Clinton would renominate Judge Merrick Garland, or nominate someone to his left.

Furthermore, by replacing Justice Scalia with Justice Gorsuch, the GOP merely held serve. An interesting angle that Robinson leaves unexamined is the decision by Senate Democrats to expend political capital (and allow Republicans to justify extending suspension of the judicial filibuster to the Supreme Court) resisting the exchange of one conservative justice for another. Arguably, Democrats should have kept their powder dry for greater credibility if and when a moderate or liberal justice needs to be replaced.

Rather than an unprecedented “political hijacking” of the Court, as Robinson calls it, Senator McConnell’s refusal to even consider Judge Garland’s nomination simply made things easier for his GOP colleagues, as he drew to himself all the accompanying criticism. It is unlikely that a Republican Senate would have confirmed Judge Garland in the twilight of President Obama’s tenure (unless it was to deny the seat to a more liberal justice whom President Clinton might nominate). This is consistent with the conventional wisdom that a justice must resign early in a President’s term if she wants him to be able to pick her successor; as Justice Ruth Bader Ginsberg explained while responding to calls for her to retire in Fall 2014, President

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Obama at that point “could not successfully appoint anyone I would like to see on the court.”

The book closes with a discussion of Justice Gorsuch’s first months on the Court, and then previews the 2017 Term. Robinson observes that early on, Justice Gorsuch showed “he would not shy away from acting on his opinions or fail to make his preferences known;” to her credit, however, she avoids caricaturing Justice Gorsuch as a version of the ambitious, overeager Tracy Flick from the movie *Election*, as some legal commentators have tried to do. Rather, Robinson writes that his genteel yet folksy style during his confirmation hearing was endearing (particularly in contrast to the bitter, partisan approach of many Senators), and that given his academic credentials and judicial experience, “it was hard to poke holes” in his qualifications.

Even the final chapter’s title—“The Calm Before the Storm”—is at odds with Robinson’s contention that the Court was in crisis during the 2016 Term. Looking ahead, Robinson describes the many high profile cases currently before the Court. Besides *Janus* and challenges to the third version of the temporary travel ban, the Court is now considering important post-*Obergefell* issues arising under the First Amendment in *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission*, as well as the political blockbuster *Gill v. Whitford*, which could curb partisan gerrymandering and drastically change how states approach redistricting. Although there is no dispute that the 2017 Term will exceed its predecessor in excitement and controversy, however, Robinson succeeds in turning a sleepy term into an interesting read, even without any real crisis.

