Introduction

*Thomas A. Berry**

This is the 21st 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. This is also my second year as managing editor of the *Review*. With Trevor Burrus assuming the duties of writing this year's foreword, it falls to me for the first time to write this introduction.

While the personnel behind the *Review* may change, its core purpose and unique speed remain the same. We release the *Review* every year in conjunction with our annual Constitution Day symposium, less than three months after the previous term ends and two weeks before the next term begins. It would be almost impossible to publish a journal any faster, and credit for that goes first and foremost to our authors, who year after year meet our unreasonable but necessary demands and deadlines.

This isn't a typical law review. We want you to read this, even if you're not a lawyer. We don't want to scare you off with lots of weird Latin phrases, page-long footnotes, or legalistic jargon. And we don't want to publish articles that are on niche topics, of interest only to the three other academics who write on the same topic. Instead, we publish digestible articles that help Americans understand the decisions of their highest court and why they matter, in plain English.

And as both Trevor and Ilya Shapiro were wont to note in the introductions to previous volumes, we freely confess our biases. We start from the first principles: We have a federal government of limited powers, those powers are divided among the several branches, and individuals have rights that act as shields against those powers. We take seriously those liberty-protective parts of

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the Constitution that have been too often neglected, including the affirmation of unenumerated rights in the Ninth Amendment and the reservation of legislative power to only the *legislature* (not the president) in Article I.

We also reject the tired dichotomy of judicial "restraint" versus "activism." We urge judges to engage with and follow the law, which includes most importantly the Constitution. If that means invalidating a statute or regulation, it is the judiciary's duty to do so, without putting a "deferential" thumb on the scale in favor of the elected branches. At the same time, judges should not be outcome oriented. Some decisions may lead to a bad *policy* outcome, but that's not an argument that the decision was *legally* wrong. Indeed, any honest legal philosophy must sometimes lead to policy outcomes a judge doesn't prefer, or else it is not really a *legal* methodology.

Our articles this year exemplify several of those themes. One author, Jonathan Adler, believes that addressing climate change is "one of the most pressing policy concerns of the 21st century." Yet, as he explains in his contribution to this volume, such a *policy* argument does not answer the *legal* question of whether an EPA regulation addressing climate change was authorized by the Clean Air Act. Respect for the separation of powers sometimes requires saying that an action is good policy, but bad law.

In a similar vein, as Jennifer Mascott and Trent McCotter note in their article on *Egbert v. Boule*, there is a strong policy argument in favor of allowing suits for damages against government agents for violations of constitutional rights. But, they explain, that does not necessarily mean the Constitution authorizes the *courts*, rather than Congress, to make that policy.

Those authors also demonstrate another core value of the *Review*: We acknowledge that many cases are hard and that people of good faith can disagree on both outcomes and reasoning. We don't want the *Review* to simply echo every Cato position on every case; if we did, we could just reprint the amicus briefs we filed throughout the year. Rather, we gather a stellar group of authors we respect and give them the freedom to write what they believe. Sometimes, as in the case of Mascott and McCotter's article, our authors take a position on the opposite side of a Cato amicus brief. Sometimes, as in the case of Evan Bernick's article on *Dobbs*—the monumental case that overturned *Roe v. Wade*—our author takes a strong position in a case where Cato chose not to file a brief at all.[1]

We fully acknowledge that lawyers applying originalism, textualism, and a presumption of liberty can reach differing conclusions on the same cases. We believe that the differing views of authors who broadly share our judicial philosophies are evidence of the strengths and nuances of these theories, not of their weakness or under-determinacy.

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This term the Court's operations approached something closer to normalcy, without getting all the way there. After instituting remote telephonic oral arguments in 2020 in response to the pandemic, the Court finally returned to its marble home for in-person arguments in October 2021. But while the Court, the lawyers, and credentialed reporters got to be in the room where it happened, the general public was still excluded on public-health grounds. Given that we are not likely to have televised hearings any time soon, the continued exclusion of the general public from even the few limited in-person seats is a blow to transparency.[2] In normal times, it is at least theoretically possible for anyone on any given day to see what the Court looks like as it ponders its cases. This year, in a highly contentious term, we had to rely on a few Supreme Court reporters for first-hand accounts of the justices' alleged shrugs and eye rolls from the bench. We can only hope that in the upcoming term the Court will allow some members of the general public back inside its walls.

This term was also unusual for the historically early retirement announcement (relative to the end of the term) of Justice Stephen Breyer. With Judge Ketanji Brown Jackson's swift confirmation to his seat, Breyer spent the latter months of the term in the unusual posture of a lame-duck justice, knowing that his days on the Court were numbered and that his confirmed successor was waiting in the wings. Fortunately, there is no evidence that this knowledge put

[1] For a thorough explanation of the reasons why Cato did not file a brief in that case, see Clark Neily & Jay Schweikert, The Hard Problem of Abortion Rights, Cato at Liberty (blog) (June 24, 2022), https://bit.ly/3QsQdjZ.

[2] To give credit where it is due, the Court continued its welcome practice from last term of live-streaming the audio of oral arguments.

Breyer in a funk, as his questions from the bench remained cheerful and whimsical to the last day. And rather than enjoy a well-earned retirement, Justice Breyer has instead jumped right back into the academic career that he had to (mostly) leave behind when elevated to the high court. Now again on the faculty at Harvard Law School, Breyer will hopefully have the chance to bat around long-winded hypotheticals with many lucky students in the seminar room for many years to come. We congratulate Justice Breyer on a long and distinguished judicial career, and congratulations are also warranted for Justice Jackson, the first female African-American justice, who will stake out her own role on the Court in the terms ahead.

Finally, this term was of course extremely unusual for the shocking leak of a draft of Justice Samuel Alito's majority opinion in *Dobbs*. With the leaker still not publicly identified as of this writing, it remains to be seen how this breach of the Court's confidences will affect its work going forward. Perhaps surprisingly, the Court met its customary end-of-June deadline for issuing opinions even as the leak investigation continued. But it seems certain that internal procedures and security will have to change in some ways in terms to come. Court watchers will be looking closely for any signs that the Court's output might also change as a result.

As for the statistics from this past term, just one speaks volumes for the current balance of the Court: each justice's percentage of cases voting in the majority. A glance at the relative rankings reveals three distinct tiers of success, which (roughly) map onto the Court's ideological wings.[3] In the center, and dominating the success rates, are Chief Justice John Roberts (95 percent in the majority), Justice Brett Kavanaugh (95 percent), and Justice Amy Coney Barrett (90 percent). In the next tier, what might be called the "right" tier, are Justices Alito (85 percent), Clarence Thomas (80 percent), and Neil Gorsuch (75 percent). And finally, at the low end of the success-rate curve is the "left" tier, consisting of Justices Elena Kagan (69 percent), Breyer (68 percent), and Sonia Sotomayor (58 percent). Sotomayor's record of being in the majority in only 58 percent of cases is particularly notable as the lowest mark for any of the currently sitting justices in at least the last 10 years (the next closest was Justice Thomas at 61 percent in the 2014–2015 term).

[3] All statistics come from Angie Gou, Ellena Erskine, & James Romoser, STAT PACK for the Supreme Court's 2021–2022 Term, SCOTUSblog (July 1, 2022), https://bit.ly/3C7KsEi.

Still, while "left, right, and center" might work as a rough general heuristic to describe these three tiers, the reality in individual cases is often more complicated. The prime example from this term is *Concepcion v. United States*, the only case to have Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett all in dissent. Justices Thomas and Gorsuch joined the three "liberal" justices in interpreting the First Step Act to provide defendants with greater opportunities for arguments at resentencing, demonstrating that their textualist methodology can sometimes lead to more "liberal" results if that's where the statutory text lies. It is thus not strictly true that you have to win at least one justice from the "center" bloc to win a case at this Court, but it certainly helps.

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Turning to this year's *Review*, we begin as always with last year's annual B. Kenneth Simon Lecture. Professor Rachel Barkow of NYU Law School offers a sweeping critique of the Supreme Court's "almost complete abdication to the government in criminal proceedings—in spite of clear constitutional language to the contrary." Barkow identifies several key Supreme Court decisions that have led to the rise of mass incarceration in the United States since the early 1970s. These include decisions giving the green light to coercive plea bargaining, pretrial detention, and excessively long sentences. Barkow identifies the lack of justices with any criminal defense experience as one explanation for these consistently pro-prosecution rulings. Barkow urges that more judges with defense experience be appointed to the bench, to lend their critical perspective.

Barkow's advice has been followed in the year since she delivered the lecture, with Ketanji Brown Jackson becoming the first Supreme Court justice with criminal defense experience since Thurgood Marshall. It remains to be seen whether that new perspective on the Court will temper the reflexive deference toward police and prosecutors that Barkow describes.

Next, Jonathan Adler of Case Western Reserve University School of Law writes on *West Virginia v. EPA*. Adler explains the significance of the Court "invoking the 'major questions doctrine' for the first time in a majority opinion." By doing so, the Court "bolstered the argument that delegations of broad regulatory authority should not be lightly presumed." Nonetheless, Adler finds that the Court provided "little clarity on how the invigorated major questions doctrine should inform statutory interpretation." The decision thus "represents a missed opportunity to clarify and ground the major questions doctrine." To fill this gap, Adler proposes a fleshed-out version of the major questions inquiry, under which courts should ask whether the evidence of an asserted delegation of authority "is commensurate with the nature of the authority asserted."

Ilya Somin of George Mason's Scalia Law School tackles the Court's two vaccine mandate cases, *NFIB v. OSHA* and *Biden v. Missouri*. Given that one decision struck down a mandate and the other upheld a mandate, Somin notes that he is perhaps "one of the relatively few observers who believe the Court got both cases right." Nonetheless, Somin finds that "there are notable flaws and omissions in the majority's reasoning in both cases," and that the opinion striking down OSHA's mandate in particular "got the right result in part for the wrong reasons." Somin explains why the polarized and partisan reactions to the two rulings have been shortsighted and why "Americans across the political spectrum have much to gain from judicial enforcement of limits on executive power." And Somin concludes by noting that "the significant missteps in the reasoning of both cases—especially *NFIB*—reinforce arguments for reform of the shadow docket."

Cato's own Will Yeatman tackles two administrative law cases that both concern regulations issued by the Department of Health and Human Services, and thus both carry the name of the secretary, Xavier Becerra. In the two cases, the Court surprisingly declined to even mention the doctrine of *Chevron* deference, under which courts defer to an agency's reasonable interpretation of an ambiguous law. Yeatman explores the potential meaning behind this silence and questions the "conventional wisdom" that the Court was sending a signal to lower courts "to pay closer attention to the text." Instead, Yeatman suggests that two other factors were at play and contributed to *Chevron*'s absence: a risk-averse litigation strategy by the federal government and deep-seated disagreement within the Court on the continuing wisdom of *Chevron*. Yeatman concludes by noting that if a majority of the Court wishes to rein in the deference often shown by lower courts, "this muted strategy is unlikely to succeed."

Jennifer Mascott and Trent McCotter, also of George Mason's Scalia Law School, write on *Egbert v. Boule*, a case about remedies for constitutional wrongs. They recount a case with perhaps the most colorful background facts of any this term, centering on a hotel at the U.S.-Canada border called the "Smuggler's Inn." After the inn's owner alleged that a border patrol agent assaulted him, the case eventually reached the Court on the question whether the owner could sue for money damages for this alleged constitutional violation. Continuing a consistent trend in its decisions stemming from the 1971 case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that he could not. Mascott and McCotter defend this decision, arguing that under the original understanding of the Constitution, it is Congress, not the courts, that should create a cause of action to recover damages for constitutional wrongs.

Enrique Armijo of Elon University School of Law writes on the term's First Amendment signage case, *City of Austin v. Reagan National Advertising*. Armijo criticizes *Austin* for its "partial unwinding" of another signage decision from just seven years earlier, *Reed v. Town of Gilbert*. *Reed* had seemingly set a simple and bright-line rule for determining whether a speech regulation is "content based" and thus subject to strict First Amendment scrutiny. But, as Armijo explains, that line is now less bright after *Austin*. Armijo suggests that the Court may have feared that a strict application of *Reed* would result in "casting tens of thousands of ordinances into constitutional doubt," a fear that was perhaps unfounded. Whatever the cause, the result is that it will now unfortunately be easier for cities and states to discriminate against certain messages based on what they say.

Michael Bindas of the Institute for Justice writes on this term's school-choice case, *Carson v. Makin*. Bindas, who successfully argued *Carson* on behalf of two Maine families, explains how the decision "removed the most significant legal cloud that remained over educational-choice programs." *Carson* held that Maine could not discriminate against sectarian private schools in administering the state's school-choice program for rural students. And while prior Supreme Court cases had already held that states may not discriminate on the basis of a school's religious *status*, *Carson* clarified that states also may not discriminate on the basis of whether funds will go to religious classroom *education*. Bindas concludes that, after *Carson*, "opponents of educational choice can no longer argue that religious use-based exclusions in educational-choice programs are permissible."

Next, Elizabeth Goitein of the Brennan Center for Justice at NYU School of Law writes on the term's two state secrets cases. Goitein explains that in both *United States v. Husayn, aka Zubaydah* and *FBI v. Fazaga*, the Supreme Court "took pains to avoid the primary questions" about the state secrets doctrine "that have occupied courts and commentators." Moreover, the Court in *Zubaydah* "exhibited an unwarranted degree of deference to the government's national security claims." In holding that the "government may assert the state secrets privilege over matters that are well-known to the public," *Zubaydah* "created a dangerous new precedent." Goitein concludes with a call for Congress to step in and institute reforms to ensure "that judicial deference does not turn into judicial abdication" when the government asserts a state secrets privilege.

Next, Evan Bernick of Northern Illinois University College of Law, and a former Cato intern, writes on *Dobbs v. Jackson Women's Health Organization*. Bernick writes that *Dobbs* "lands some justified blows on *Roe* but falls well short of demonstrating that it was 'egregiously wrong.'" Bernick argues that although the majority opinion's "historical critique of *Roe* is compelling," its "other critiques are not." Bernick explains the most important reason why the opinion falls short of making a compelling originalist case for overruling *Roe*: "Originalists generally agree that the Fourteenth Amendment imposes some kind of anti-discrimination requirement on the states," and there is a strong argument that abortion restrictions discriminate on the basis of sex. Because *Dobbs* dismisses these anti-discrimination arguments in a single paragraph, Bernick concludes that "*Dobbs* isn't originalism and gives almost no sense of an obligation to try to be."

Kelly Dineen Gillespie of Creighton University tackles *Ruan v. United States.* Gillespie writes that *Ruan* is an important decision that "constrains federal law enforcement's ability to invade medical care under the Controlled Substances Act." *Ruan* held that to convict a doctor under the act for wrongly prescribing opioids, "the government must prove not only that the doctor acted outside the limits of their federal authorization to prescribe controlled substances, but also that they did so knowingly or intentionally." As Gillespie explains, that means doctors no longer need fear risking felony prosecution under the act "for innovative, mistaken, negligent, or less-than-careful prescribing." Through examples from her own nursing career, Gillespie illustrates why this is a welcome result and why it will hopefully allow practitioners to be "more willing to provide care that they believe is in their patient's interest."

David Kopel of the Independence Institute and University of Denver, Sturm College of Law writes on *New York State Rifle & Pistol Association v. Bruen*. Kopel explains that the opinion is a landmark not only because it "vindicates the right of law-abiding Americans to carry handguns for lawful protection." In addition, *Bruen* "announces a judicial standard of review that applies to all gun control laws throughout the United States," one based on a law's consistency with history, text, and tradition. Kopel describes how *Bruen* will set the standard for future legal battles over other types of gun restrictions, such as red flag laws, handgun bans, and under-21 restrictions. Thanks to *Bruen*, when courts evaluate these laws in the future, "the personal views of judges on gun policy will matter less. Instead, judicial decisions will be based on analysis of the historical facts of the American right to keep and bear arms."

Finally, our former colleague Ilya Shapiro, now of the Manhattan Institute, makes his triumphant return to these pages as author of our annual "Looking Ahead" article. Ilya identifies several major cases to watch next term, on topics ranging from the Clean Water Act to personal jurisdiction over corporations to the dormant Commerce Clause. The Court will also consider whether universities may consider race in admissions decisions and whether a state may compel a website designer to work for same-sex weddings. Add in cases on the constitutionality of the Indian Child Welfare Act, state legislative control of election procedures, and federal immigration policy, and next term has the makings of another high-profile year for the Court.

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This is my second year as managing editor of the *Review*. Cato has been a huge part of my professional life since I first interned here in my second year of law school seven years ago. Reading through the introductions of past volumes of the *Review* offers snapshots of some of my own professional milestones, as I win mention for helping out as an intern, then legal associate, then contributor, then managing editor. Now, as I author my own introduction for the first time, I'm filled with immense gratitude to both Ilya Shapiro and Trevor Burrus, who were there on my first day as an intern and who have both been invaluable mentors in getting me to this point.

Trevor now shoulders the lion's share of work in the Herculean task of getting the *Review* published. I'm grateful to him for showing me the ropes, teaching best editorial practices by example, and playing the bad cop to my good cop in keeping the authors on schedule. And by the transitive property of mentorship, I also owe Roger Pilon a great deal for creating Cato's Robert A. Levy Center for Constitutional Studies and for mentoring Ilya and Trevor, who in turn mentored me.

Trevor and I also had help from many other people. Most important, of course, are the authors themselves, without whose work there would be no *Review*. Our authors this year produced excellent, polished articles under tremendous time pressure and for that I thank them all sincerely. Thanks also go to our Cato Institute colleagues Will Yeatman, Clark Neily, and Jay Schweikert for help in editing the articles. Legal associates Nicole Saad Bembridge, Gregory Mill, and Isaiah McKinney performed the difficult (believe me, I remember) and vital task of cite checking and proofreading. Legal intern Christopher Condon also provided essential help in these tasks. And special thanks to Laura Bondank, who this year replaced Sam Spiegelman (off to greener pastures as a new attorney at Pacific Legal Foundation) as the legal associate tasked with the nuts and bolts of publishing the review. Laura learned a complex process on the fly like a pro, and this volume couldn't have happened without her.

We hope that you enjoy this 21st volume of the *Cato Supreme Court Review*.