Introduction

*Thomas A. Berry**

This is the 23rd volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the most recent Supreme Court Term, plus a look at the Term ahead. This is also my second year as editor in chief of the *Review*. It's an honor to continue to lead a publication I've long admired, and I feel a responsibility to keep the *Review* at the same high level of quality our readers expect.

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 my predecessors 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 the Constitution that have been too often neglected, including the affirmation of unenumerated

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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" vs. "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.

And there is 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. Rather, we gather a stellar group of authors we respect and give them the freedom to write what they believe. We don't want the *Review* to be an echo chamber.

We fully acknowledge the fact that lawyers applying originalism, textualism, and a presumption of liberty can reach differing conclusions on the same questions. 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, there were eleven cases in which the Court split 6–3 along ideological lines, an increase from five such cases last Term. Some of the biggest cases of the Term were among those 6–3 splits, including cases on *Chevron* deference, the right to a jury in agency adjudications, and the legal status of "bump stocks." But many other cases produced ideological coalitions in the majority, including cases on the First Amendment rights of social media platforms and the constitutionality of an indefinite appropriation. So while the ideologically split cases may get the most attention, the Court is not a legislature and the Justices don't just vote along party lines.

Within these pages, you'll read about many cases with all sorts of unexpected lineups, cases that prove litigants and advocates can't take anything for granted with this Court.

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Turning to this year's *Review*, we begin as always with last year's annual B. Kenneth Simon Lecture. The lecture was delivered by the Honorable Bridget Mary McCormack, president and CEO of the American Arbitration Association–International Centre for Dispute Resolution and former Chief Justice of the Michigan Supreme Court. McCormack's topic is access to justice and public confidence in courts. She begins by setting out with startling clarity "the massive market failure of the civil justice system and its role in undermining the rule of law." But she also brings solutions. She sets out how both regulatory reform and impact litigation have begun to loosen the stranglehold that lawyers currently possess on providing anything resembling legal advice. The rule of law may be wobbly, but "lawyers and judges are uniquely positioned to shore it up."

Next, Jack Beermann of Boston University School of Law writes on *Loper Bright v. Raimondo*. Although most have treated the end of the *Chevron* doctrine as a momentous occasion, Beermann writes that "the demise of *Chevron* deference standing alone may turn out to be much less important for the future of administrative law and agency regulation than many believe." That is because the Supreme Court "explicitly approved of deference under the *Skidmore* factors, which instruct reviewing courts to 'resort for guidance, even on legal questions' to 'the interpretations and opinions of the relevant agency, made in pursuance of official duty and based upon specialized experience.'" Beermann concludes that whether *Chevron* was good or bad, it "was doomed from the start because the opinion was internally inconsistent and hopelessly unclear."

Will Yeatman of the Pacific Legal Foundation then covers *SEC v. Jarkesy*, which held that the subjects of SEC enforcement actions have the right to request a jury. Yeatman predicts that *Jarkesy* "will alter agency enforcement from the course it has run for nearly a half century." Yeatman points out that to see the decision's full effects, scholars will need to look past jury decisions and evaluate

how *settlements* change. Given that "more than 90 percent of money penalty actions end in settlement," a defendant's improved bargaining position against the government may end up being more consequential than the actual decisions reached by juries.

Next, Chad Squitieri of The Catholic University of America Columbus School of Law writes on *Consumer Financial Protection Bureau v. Community Financial Services Association of America*. The Supreme Court upheld a unique, indefinite funding arrangement (called Section 5497) against a challenge that it violated the Constitution's Appropriations Clause. Squitieri writes that "the Supreme Court got it right in *Community Financial*. But here's the kicker: That does *not* mean that Section 5497 is constitutional." Squitieri explains that the "appropriate" challenge would have looked to other provisions and asked whether the indefinite appropriation is a "'necessary and proper' means of carrying Congress's Commerce Clause power 'into execution.'"

Sean McElroy of Fenwick & West then writes on *Moore v. United States*, which rejected a challenge to the unusual one-time "mandatory repatriation tax." McElroy explains that although the tax at issue may have seemed technical, the case actually addressed a more fundamental question: "What, precisely, are the limits of Congress's taxing power? Specifically, how do those limits fit into the design of the U.S. international tax system?" Unfortunately, "although the Court ruled in *Moore* that the MRT was constitutional, the answer to this question remains unclear." As McElroy explains, the majority opinion seems motivated in large part not by first principles, but rather by consequentialism: "Specifically, the Court gave significant weight to the fear that constitutional limitations on the MRT would be too expensive to uphold."

Next, Eric Goldman of Santa Clara University School of Law writes on *Moody v. NetChoice*, which evaluated two state laws regulating social-media content moderation. Goldman explains that "although the Court's remand was anti-climactic, Justice Elena Kagan's majority opinion was a rousing celebration of the First Amendment online. Critically, the majority said that the First Amendment protects social media platforms' content moderation efforts. This conclusion jeopardizes much of the Florida and Texas laws as well as many other laws being enacted around the country." As Goldman soberingly observes, "both Democrats and Republicans favor censorial restrictions of the internet," and "this leaves the Supreme Court as the last

line of defense for internet freedoms of speech and press." The question now is "how long the Court's resolve will last."

The next article is by Derek Bambauer of the University of Florida Levin College of Law, writing on *NRA v. Vullo* and *Murthy v. Missouri*. These two "jawboning" cases reached different outcomes, with one a win for the challengers and one a win for the government. Although both cases appear to have been resolved on procedural issues rather than on the merits, Bambauer concludes that "upon closer inspection, there is far more bang than whimper in *Vullo* and *Murthy*." The cases show that "jawboning as a species of First Amendment violation is alive and well." But because none of the opinions of the Court provided the specifics of what is needed to win such a claim, Bambauer provides his own proposed "three-part test," which "would both guide courts in determining when jawboning occurs and focus attention on the most problematic instances of the phenomenon."

Anya Bidwell and Patrick Jaicomo of the Institute for Justice next write on *Gonzalez v. Trevino*, a case they themselves litigated up to the Supreme Court. The case concerned what evidence a people may use to prove that the police arrested them because of their protected speech. They explain that the Court's opinion "is an encouraging development for free speech and bad news for those looking to use the power of arrest to silence their critics" because the Court "clarified that the only evidence that must be excluded at the threshold stage is state-of-mind evidence." The Court also "rejected the defendants' request for a sweeping rule that would have rubberstamped all retaliatory arrests supported by warrants." The upshot is that "retaliatory arrest claims . . . now stand a chance."

Next up is an article by George Mocsary of the University of Wyoming College of Law on *United States v. Rahimi*, the Term's Second Amendment case. In *Rahimi*, the Court rejected a facial challenge to a law that disarms people subject to certain restraining orders. In Mocsary's view, the Court illustrated that "its Second Amendment jurisprudence is a straightforward application of the centuries-old practice of common-law reasoning that is taught to first-year law students." *Rahimi* followed closely on the heels of the Court's important *Bruen* decision, and "*Rahimi* shows that *Bruen* is easy to apply if one does it in good faith." On this view, *Rahimi* is a success story, because "both the majority's and the dissent's common-law analyses fit within *Bruen*'s boundaries. . . . *Rahimi*, in other words, is an example of the common law working as it should."

Turning from the Second to the Eighth Amendment, John Stinneford of the University of Florida Levin College of Law writes on *Grants Pass v. Johnson*. The Court held that a ban on sleeping in homeless encampments did not violate the "Cruel or Unusual Punishments" Clause. Stinneford addresses not just the decision, but also a much bigger question about the current Court: "Will it be a serious originalist court or merely a conservative political one? If the former, its decisions may endure. If the latter, they will be written in sand. . . . The *Grants Pass* opinion gives us some reasons to be hopeful, but also significant reasons to worry." Stinneford concludes that "*Grants Pass* is an easy case under the original meaning of the Cruel and Unusual Punishments Clause," but it's not clear that the Court is ready to apply a fully originalist methodology to the Eighth Amendment.

Up next is an article written by three law professors, Ann Woolhandler, Julia Mahoney, and Michael Collins, all of the University of Virginia School of Law. They write on a case concerning the Fifth Amendment's "Takings Clause," *DeVillier v. Texas*. As they explain, "*DeVillier* had the makings of a major property rights decision, because the question of whether the Takings Clause is 'self-executing' has long remained unresolved." But the Court "declined the opportunity to overhaul constitutional doctrine, opting instead to take a 'wait and see' approach toward modifying the existing and highly complicated system of just compensation remedies."

Cato's own Clark Neily authors the next article, on *FBI v. Fikre*. The case raised the question of whether a lawsuit challenging a placement on the "No Fly" list became moot when the government, without explanation, took the plaintiff off the list. Neily notes that it is "one of several cases this Term in which government officials employed various stratagems designed to forestall judicial review of their alleged misconduct." In this case, the stratagem did not work. "*Fikre* was neither a close call nor a difficult case to get right," because the government had not guaranteed that it would refrain from putting the plaintiff back on the list for an improper reason. Neily notes that "the Justices should be commended for sending a clear and unanimous message that when government actors seek to moot judicial review of their plausibly unlawful policies by suspending those policies after the commencement of litigation, the judiciary will not presume the purity of their motives where no such presumption is remotely warranted."

Our final two articles on cases from this past Term both address the unique status of the President in our system of separated powers. First, Keith Whittington of Yale Law School writes on *Trump v. United States*, the presidential immunity case. Whittington finds the majority opinion lacking, writing that it "bears all the hallmarks of an uneasy negotiation and compromise among the Justices in the majority." Because its opinion did not resolve key issues, "the Court has thrown the hot potato back into the hands of the lower courts, perhaps hoping that the case will not return to the Court too soon or that the circumstances will look rather different when it does." Among all the opinions in the case, Whittington argues that Justice Amy Coney Barrett's is the most persuasive.

Last but not least among our articles on the Term's cases, Ilya Somin of Antonin Scalia Law School tackles *Trump v. Anderson*, the disqualification for insurrection case. The Court held that the Fourteenth Amendment alone cannot disqualify someone from holding *federal* office unless Congress has passed a statute providing a mechanism for disqualification. All nine Justices agreed that the Colorado Supreme Court had improperly removed Trump from the ballot. But Somin writes that "the Court achieved unanimity by making a grave error. In so doing, they went against the text and original meaning of the Fourteenth Amendment and undermined a potentially vital constitutional safeguard of liberal democracy." Somin concludes that the Court's opinion contains "highly dubious reasoning at odds with text and original meaning," and "is also defective on consequentialist grounds."

Finally, Jeremy Broggi of Wiley Rein authors our annual "Looking Ahead" article. Broggi identifies several major cases to watch next Term, on topics ranging from sex-transition treatments for minors to laws requiring "adult" websites to verify the age of their visitors to homemade "ghost guns." The Court will also potentially consider cases on mandatory disclosures of donor identity and state-based climate-change lawsuits against oil companies. With the overruling of *Chevron* this Term, Broggi notes that "the October Term 2024 should provide an early glimpse at the Court's revised approach to the proper interpretation of statutes that are administered by federal agencies."

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As mentioned at the outset, this is my second year as editor in chief of the *Review* after two years as its managing editor. Cato has been a huge part of my professional life since I first interned here in my second year of law school nine years ago. Reading through the introductions of past volumes of the *Review* offers snapshots of my own professional milestones, from intern, to legal associate, onto contributor, and then to managing editor. Now, as I author my own introduction as editor in chief 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. I'm grateful to both for showing me the ropes and teaching me best editorial practices by example. 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 bringing Ilya and Trevor aboard so that they could in turn bring me on.

This year, as always, I have 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 my Cato Institute colleagues Clark Neily, Walter Olson, and Brent Skorup for help in editing the articles and for taking on a heavier load of other Cato work in August when I was buried in editing. Legal associates Christine Marsden, Charles Brandt, Ethan Yang, Christopher Barnewolt, Nathaniel Lawson, Alexander Khoury, and Caitlyn Kinard performed the difficult (believe me, I remember) and vital task of cite checking and proofreading. Legal intern Finn McCarthy also provided essential research assistance. And special thanks to Laura Bondank, who handled all the nuts and bolts of publishing the *Review* (along with pitching in on edits as well). Laura learned a complex process on the fly two years ago and I now rely on her completely to remind me what needs to get done and when; this volume couldn't have happened without her.

We hope that you enjoy this 23rd volume of the *Cato Supreme Court Review*.