Foreword

An Optimist's Appreciation of the Term's Highlights

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 23rd volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the Term just ended plus a look at the Term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective. We release this volume each year at Cato's annual Constitution Day symposium.

Like every Supreme Court Term, this past Term featured some decisions that were cause for celebration and some that were cause for concern. But I'm an optimist at heart. So for this Foreword, I'd like to highlight three cases from this Term that I believe classical liberals should be excited about. Taken together, they represent important victories for the separation of powers, individual rights, and freedom of speech.

Loper Bright Enterprises v. Raimondo

Herring fishing is hard work on a crowded boat, but the federal government wanted to make it even harder. Every inch of space on a small fishing boat is valuable room for supplies, fishers, and the catch. Space becomes even tighter when the government forces fishers to carry a monitor to track compliance with federal regulations. And profits become even narrower when the fishers are forced to *themselves* pay that monitor's salary.

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A federal statute lays out three specific circumstances in which the government may force fishers to pay a monitor's salary. Outside of those three cases, the statute is silent. Yet the government nonetheless took that silence as permission, issuing a rule that forced herring fishers in New England waters to pay for their own monitors. The regulation would have cost those herring fishers around $700 per day and reduced their profits by about 20 percent.

Several fishers sued to challenge this rule, including Loper Bright Enterprises, a family-owned fishing company that operates in New England waters. Because they did not fall within any of the three categories mentioned in the statute, they argued that the government did not have the authority to force them to pay their monitors' salaries. Their challenge reached the D.C. Circuit, which held that the statute was ambiguous on this question of monitor salary. But under a precedent called *Chevron v. NRDC*, that ambiguity meant the government won.

Chevron set out a two-step process that courts had to follow when reviewing an agency's interpretation of a statute. First, the court had to apply the traditional tools of statutory interpretation and determine if the statute had a clear meaning. If the statute was clear, then the court had to apply that clear meaning. If, however, the statute was "ambiguous," the court then had to move to the next step and defer to the agency's interpretation so long as it was "reasonable." The court was required to defer to an agency's reasonable interpretation even if the court believed that the agency's interpretation was not the *best* interpretation.

Chevron thus gave judicial power—the power to interpret the meaning of the law—to the executive branch. The Constitution, however, grants all judicial power to the *judicial* branch. And *Chevron* deference applied even when the agency demanding deference was also a party to the case. *Chevron* thus biased the courts toward government agencies, stripping the judiciary of impartiality and denying litigants basic due process.

In addition to these fundamental problems, *Chevron* was also ahistorical and unworkable. *Chevron* was ahistorical because courts did not reflexively defer to the executive at the time of the Constitution's framing or for a hundred years after. The nineteenth-century precedents that some have cited to support *Chevron* were all

fundamentally different, such as when courts gave interpretive weight to long-held or contemporaneous executive interpretations. It was not until the New Deal era that the Supreme Court began to defer to the executive solely *because* it was the executive. And it was not until *Chevron* that deference to the executive became a binding rule for all federal courts.

Further, *Chevron* was unworkable because courts failed to ever find a consistent definition of "ambiguous." The Supreme Court itself went back and forth, sometimes applying all the tools of statutory construction rigorously at the first *Chevron* step and other times quickly deferring with little statutory analysis. Even when the Supreme Court declined to defer for seven years, lower appellate courts continued to find statutes ambiguous more than half the time. The failure to reach a consensus on the meaning of "ambiguous" itself demonstrated that *Chevron* was arbitrary and unworkable.

When the *Loper Bright* case reached the Supreme Court, the Court could have ruled for the fishers on narrower grounds, attempting to pare back *Chevron* without ending it. But instead the Court went big and overruled *Chevron* once and for all. That's an outcome that would have been unthinkable even a decade ago. And it's not one that should be taken for granted.

SEC v. Jarkesy

The Securities and Exchange Commission (SEC) has become increasingly reliant on in-house adjudications, which replace juries with in-house administrative law judges (ALJs) who work for the same team as the prosecutors. The Commissioners are the ultimate adjudicators of SEC cases, since they hear appeals of the judges' decisions. But that's cold comfort to the defendants, since the Commissioners have a close working relationship to the prosecutors, are allowed to pre-judge the evidence at an early stage, and give the green light about whether to proceed with investigations in the first place. Not surprisingly, the SEC is able to amass a higher win rate when it litigates in house, and Commissioners rarely overturn ALJ decisions.

George Jarkesy had managed several investment funds geared toward sophisticated parties who wanted high-risk, high-reward investments. After the funds suffered losses during the 2008 market collapse, the SEC launched an investigation into Jarkesy's management

of the funds. In 2013, the SEC alleged that he had violated federal securities law and elected to prosecute its case through the agency's in-house court system.

Before the 2010 Dodd-Frank Act, Jarkesy would've gotten his day in court before a jury of his peers. Instead, he was subjected to an administrative adjudication that lasted more than seven years. Predictably, the SEC ruled against Jarkesy and imposed a lifetime ban on employment in the securities industry in addition to a $350,000 fine.

Jarkesy challenged the SEC's ruling, arguing that its in-house proceedings violated his due process guarantees and his Seventh Amendment right to a trial by jury. He won in the Fifth Circuit, and then the Supreme Court took up his case.

Once again, the Supreme Court could have gone small, but instead it went big. The Court held that Jarkesy was entitled to a jury under the Seventh Amendment. And in the process, the Court took a major step toward restoring the protections of that amendment against the administrative state.

Moody v. NetChoice

Three years ago, Texas passed a law declaring that large social media services are "common carriers" subject to onerous regulations dictating what speech they must disseminate. The law prohibits services from removing, demonetizing, or blocking a user or a piece of content based on the viewpoint expressed. Services found to violate this requirement face liability for each piece of content they remove.

The law was soon challenged by NetChoice and CCIA, two internet trade associations whose members operate a variety of websites covered by the law. Although a federal district court held that the law violated the First Amendment, a panel of the Court of Appeals for the Fifth Circuit reversed that decision by a 2–1 vote. The panel held that the law does not inflict a First Amendment injury because the websites "are free to say whatever they want to distance themselves from the speech they host" and thus would not be falsely identified as endorsing the speech they are forced to disseminate.

Meanwhile, Florida passed a similar law around the same time as Texas's, which was also challenged by NetChoice and CCIA. In that case, the Court of Appeals for the Eleventh Circuit struck down key portions of the law as violating the First Amendment rights of the websites.

The Supreme Court granted review of both cases and issued a single decision in both. Although the court did not resolve the cases—due to the need for more factfinding on the full scope of the laws—the high court completely rejected the Fifth Circuit's misguided holding that social media platforms have no First Amendment right to control the content of their feeds. As the Court put it, "the editorial judgments influencing the content of those feeds are, contrary to the Fifth Circuit's view, protected expressive activity."

As Justice Elena Kagan explained, writing for a majority of the court, social media platforms have the same First Amendment rights as newspapers, magazines, and others who compile and present speech. Social media platforms "include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression. And while much about social media is new, the essence of that project is something this Court has seen before." As the court summed up, the principle that the First Amendment protects editorial freedom "does not change because the curated compilation has gone from the physical to the virtual world."

Two points are particularly important in the Supreme Court's opinion. First, the court rejected the theory proffered by Florida and Texas (and accepted by the Fifth Circuit) that the government has an interest in regulating the balance of speech on a private platform. The Court explained that it "has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social media platforms as it does for others."

As the Court explained, this principle holds true no matter how biased a speech marketplace may be, because the "cure" of governmental regulation will be worse than the disease. "However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others," wrote Kagan. Put simply, "a State may not interfere with private actors' speech to advance its own vision of ideological balance."

Second, the Court held that "the major social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post."

The court explained that its decisions have "never hinged a compiler's First Amendment protection on the risk of misattribution." Instead, the Court clarified that the relevant question is whether the "host of the third-party speech was . . . itself engaged in expression." This holding will go a long way toward ending lower courts' expansion of the so-called *PruneYard* doctrine, which the Fifth Circuit and other courts have wrongly relied on when forcing private entities to host speech.

The cases have now gone back to the Fifth and Eleventh Circuits for further factfinding because the laws were challenged "facially." As the Court explained, the lower courts will have to determine what effect these laws have on other websites besides classic social media feeds. The courts will then have to weigh the legitimate applications of the laws (if there are any) against the unconstitutional applications to decide if they should be struck down in full.

But despite this uncertainty, the principle the Court reaffirmed was far from a sure thing, and its holding is a great relief for anyone who publishes the speech of others online.

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In all three of *Loper Bright*, *Jarkesy*, and *NetChoice*, the Supreme Court took just about the most libertarian position it could have. The result is less concentrated power, more procedural safeguards for the accused, and more rights for those in the business of publishing others' speech. While there is plenty to make libertarians pessimistic in the world, this Term showed once again that the Supreme Court is often (though certainly not always) a major bright spot. The articles in this volume of the *Review* will give a fuller picture of the Term, both the good and the bad. But it never hurts to start with a healthy dose of optimism. We hope you enjoy the 23rd volume of the *Cato Supreme Court Review*.