Introduction

*Thomas A. Berry**

This is the 22nd 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 first year as editor in chief of the *Review*. It's an honor to take the reins of 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. My aim is to follow the examples set by all of my predecessors as editors of the *Review*: James Swanson, Mark Moller, Ilya Shapiro, and Trevor Burrus.

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

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seriously those liberty-protective parts of 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" 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; 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. We don't want the *Review* to be an echo chamber. For example, this edition features an article by Professor Jed Handelsman Shugerman writing on *Biden v. Nebraska*, the student-loan forgiveness case. Professor Shugerman criticizes Justice Amy Coney Barrett's concurrence in that case, which attempted to establish a textualist justification for the major questions doctrine. Unlike Professor Shugerman, I happened to find her concurrence persuasive. And I'm proud to publish an article that disagrees with my view in good faith.

We fully acknowledge the fact 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 finally returned to near normalcy, with members of the general public finally allowed back inside its walls as spectators. It is vitally important that any citizen, not

just members of the Supreme Court Press, have a chance to see the High Court in action. And this term was also the first for new Justice Ketanji Brown Jackson, who immediately made her mark as the most active questioner in the Court's oral arguments. Justice Jackson has sometimes used originalist-style arguments to make a case for what might be seen as traditionally progressive judicial outcomes, such as in the affirmative action decisions. Whether she was right or wrong in any particular case, it is a noteworthy moment when a new member of the Court's "liberal" wing demonstrates a willingness to engage with originalist arguments on their own terms. Every new Justice makes an entirely new Court, and Justice Jackson has not been an exception to that rule.

This Term, there were only five cases in which the Court split 6–3 along ideological lines, a drop from 14 such cases last term. But some of the biggest cases of the term were among those 6–3 splits, including cases on affirmative action, student-debt forgiveness, and public accommodations and the First Amendment. 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. Professor Akhil Reed Amar of Yale Law School offers 18 arguments for 18-year term limits on the Supreme Court. Amar argues that term limits would have several beneficial effects, such as making presidential appointments of Supreme Court Justices more regular and more predictable. Amar also argues that term limits would remove the incentive for Presidents to appoint Justices when they are too young and for Justices to stay on the Court until they are too old. And Amar argues that such a regulation would be constitutional. By designating Justices who serve longer than 18 years as "emeritus" Justices, Congress can effectively impose term limits pursuant to its power to shape the operations and functions of the Supreme Court.

Next, Brannon Denning of Samford University Cumberland School of Law writes on *National Pork Producers v. Ross*. Even though the

Court rejected a challenge to a California pork regulation under the "dormant Commerce Clause doctrine," Denning explains why the decision makes clear that the doctrine is here to stay. Denning recounts how the opinion cleared up several open questions surrounding the doctrine, including how courts should consider state laws that have large, but unintended, effects in other states.

Margaret Little of the New Civil Liberties Alliance then covers the consolidates cases of *Axon v. FTC* and *SEC v. Cochran*, the latter of which she had a front-row seat for as one of Cochran's counsel. In both cases, the Court held that litigants can bring constitutional challenges to administrative agencies straight into federal court, without going through an agency proceeding first. Little explains just how important the holding of these cases will be for litigants who often don't have the time or resources to spend years in administrative proceedings before they can even reach federal court. Little also previews the battles to come over the constitutionality of the two agencies at issue.

Next, Eric Franklin Amarante of the University of Tennessee College of Law writes on the term's First Amendment overbreadth case, *United States v. Hansen*. Amarante criticizes the Court's decision, which upheld the federal statute banning speech that encourages or induces violations of immigration law. Amarante argues that the majority opinion understated the harms caused by the "chilling effect" of a broadly worded law, harms that can't be measured solely by counting the number of prosecutions under the law. Amarante makes the case that the dissenting opinion has the better of the argument on both statutory interpretation and First Amendment doctrine.

Christopher Green of the University of Mississippi School of Law then writes on *303 Creative v. Elenis*. Most commentators have focused on the First Amendment aspects of this case, in which the Court held that a website designer may not be compelled by state law to design a custom site for a same-sex wedding. Green points out that there is another issue at play, however, which is the scope of the traditional power of the state to compel access to public accommodations. Looking at the history of this power, Green argues that it has always been limited to cases where rights of access were necessary for health or safety, such as transportation bottlenecks. This suggests that in a situation where ample alternative businesses are available, the state does not have the same interest in compelling access.

Continuing with the Court's speech cases, Clay Calvert of the University of Florida Levin College of Law writes on *Counterman v. Colorado*. Calvert explains the various exceptions to the First Amendment's protection of the freedom of speech, focusing on the particular exception at issue in this case: the "true threats" doctrine. The Court held that to convict someone for making a threat, the First Amendment requires that the speaker must have been at least reckless to the risk that the message would be understood as a threat. Calvert notes that this was a middle-ground position and that the Court could have required a higher mental standard or none at all—both positions that at least some on the Court espoused. Calvert concludes by noting with encouragement that no Justice joined Justice Clarence Thomas's call to reexamine the "actual malice" standard for libel of public figures.

Next, David Bernstein of the Antonin Scalia Law School writes on the Term's affirmative action cases, *Students for Fair Admissions v. Harvard/UNC*. Bernstein focuses in particular on the Court's discussion of the racial categories that were used by universities and how those particular categories came to be standardized. This history, of which Bernstein is the leading expert, shows just how arbitrary these categories are (for example, there is no separate Middle Eastern category, meaning Afghan-American applicants are put in the same category as white immigrants from England). Bernstein explores some of the implications that the Court's decision may have in areas of the law beyond college admissions, such as racial preferences in public contracting.

Timothy Sandefur of the Goldwater Institute then tackles the Court's Indian Child Welfare Act case, *Haaland v. Brackeen*. Sandefur first lays out the history of the statute and the many ways in which it distinguishes between children on the basis of race. Sandefur then explains why the Supreme Court's decision is most notable for what it did *not* decide—whether the law violates the Equal Protection Clause of the Constitution. As Sandefur notes, the constitutional concerns with ICWA will not go away and will remain a live controversy in the courts.

Next, Jed Handelsman Shugerman of Boston University School of Law writes on *Biden v. Nebraska*, the student loans case. Shugerman argues that the Court reached the right result, because the Biden administration did not explain how the relief it wished to offer was tailored to the COVID emergency specifically. Shugerman examines

some of the discussions of the major questions doctrine in both the majority opinion and a concurrence by Justice Amy Coney Barrett, finding Barrett's account unpersuasive. Shugerman suggests that going forward, courts should develop a doctrine to evaluate claims of emergency power to ensure that emergencies are not used as pretexts to enact long-term policy goals.

Moving to environmental law, Damien Schiff of Pacific Legal Foundation writes on *Sackett v. EPA*, a case he argued and won at the Supreme Court. Schiff relates the long history of the Clean Water Act and its mysterious statutory definition "waters of the United States." Multiple Supreme Court cases had considered what this definition means, but *Sackett* finally resulted in a majority of the Court setting out a clear test. Schiff contrasts the majority opinion with the opinions concurring in the judgment, finding that the textual arguments in the majority opinion were much stronger because they focused on the operative language in the statute.

Next, Vikram David Amar of UC Davis School of Law tackles *Moore v. Harper*, the "independent state legislature doctrine" case. Amar argues that the Court's rejection of the doctrine was clearly right as a matter of original constitutional meaning. Amar also explains the consequences that would have resulted if the Court had ruled the other way. Amar suggests that the case is not just a victory for state judicial review but also for originalist scholars, who aided the Court's historical inquiry through the use of scholarly historical amicus briefs.

Wrapping up the articles on cases from this past Term, Gregory Dolin of the University of Baltimore School of Law covers *Andy Warhol Foundation for the Visual Arts v. Goldsmith* and *Jack Daniel's Properties v. VIP Products*. In both cases, the Court narrowed the circumstances in which artists or parodists may adapt copyrighted or trademarked material without permission. Dolin argues that both cases were decided correctly and both can be understood as treating *intellectual* property similar to physical property. Dolin argues that we need not fear the concerns raised in the *Warhol* dissent, namely that artistic expression will be seriously hindered by a stricter copyright rule.

Finally, Wen Fa of the Beacon Center of Tennessee authors our annual "Looking Ahead" article. Fa identifies several major cases to watch next term, on topics ranging from *Chevron* deference to an

agency's self-funding powers to the original meaning of "income" in the Sixteenth Amendment. The Court will also consider the First Amendment implications of public officials "blocking" citizens on social media and the standing of ADA online "testers." Even though this past Term was undoubtedly a blockbuster, Fa suggests the sequel may end up being just as exciting.

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As mentioned at the outset, this is my first 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 eight 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 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. And I am very grateful for the trust that my colleagues Clark Neily and Anastasia Boden have put in me as I take the reins of the *Review*.

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, Anastasia Boden, Walter Olson, and Joshua Katz 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 Christopher Barnewolt, Nathaniel Lawson, Isaiah McKinney, and Nicholas DeBenedetto performed the difficult (believe me, I remember) and vital task of cite checking and proofreading. Legal interns Delaney Epley and Jacob Snyder also provided essential research assistance. Recent Scalia Law School graduate Christian Bush

did excellent work as an article citechecker to help us ensure accuracy. And special thanks to Laura Bondank, who handled all of the nuts and bolts of publishing the *Review* (along with pitching in on edits as well). Laura learned a complex process on the fly last year, and this volume couldn't have happened without her.

We hope that you enjoy this 22nd volume of the *Cato Supreme Court Review*.