Introduction

*Thomas A. Berry**

This is the 24th volume of the *Cato Supreme Court Review*, the nation's first in-depth assessment of the most recent Supreme Court Term, plus a look at the Term ahead. This is also my third 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 at 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 volume, even if you're not a lawyer. We discourage authors' use of Latin phrases, page-long footnotes, and 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 in plain English that help Americans understand the decisions of their highest court and why they matter.

And as my predecessors have regularly noted in introductions to previous volumes, we freely confess our biases. We start from 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 rigorous 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 don't want the *Review* to be an echo chamber. 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 repeat the "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.

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 of these theories, not of their weakness or indeterminacy.

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This year's *Review* opens, as usual, with the annual B. Kenneth Simon Lecture, delivered last year by the Honorable Judge Neomi Rao of the D.C. Circuit. Rao's topic is the Supreme Court's embrace of best meaning interpretation. As Rao explains, this approach "recognizes that law has an objectively best meaning. Judges must find that meaning by exercising independent judgment. And, importantly, best meaning interpretation is incompatible with judicial minimalism and strong forms of *stare decisis*."

Next, Larissa Whittingham writes on *FCC v. Consumers' Research*. In that case, the Supreme Court once again rejected a challenge to a statute on "nondelegation" grounds. The Court found that the law in question gave sufficient guidance to the FCC to comply with the rule against delegating legislative power to the executive. Whittingham

writes that the case reveals both "the continued pattern of relying on principles of interpretation to save a statute" and "a glimpse into conceptual differences among the Justices that may divide the Court differently in future cases."

Damien Schiff and Charles Yates of the Pacific Legal Foundation cover *Seven County Infrastructure Coalition v. Eagle County*, which rejected a challenge under the National Environmental Policy Act of 1970. As they explain, the decision represents a "clear and decisive rejection of the lower courts' habit of hyper-enforcing NEPA's procedural obligations, with little deference given to agencies—all with the result of converting NEPA into a formidable substantive statute oftentimes fatal to federal projects."

Eli Nachmany of Covington & Burling writes on *Diamond Alternative Energy, LLC v. EPA*. As he explains, the decision is important not just for what it had to say about Article III standing, but also for its implications regarding the relief available under the Administrative Procedure Act. As Nachmany writes, the question remains open whether the APA allows plaintiffs to completely vacate an illegal rule. If it does not, that "would close the courthouse doors to a substantial number of plaintiffs seeking to challenge regulations that injure them."

Cato legal associate Charles Brandt and I write on *Kennedy v. Braidwood Management*, which rejected an Appointments Clause challenge to the makeup of a board exercising decision-making authority under the Affordable Care Act. We argue that the decision too generously read the interplay of several statutes to permit appointments by the HHS Secretary rather than the President. Going forward, so long as the statute might reasonably be read to require principal officer approval for the inferior appointment, the courts will deem the appointment "vested" "by law" in the sense of the Appointments Clause.

Matthew Cavedon, the new director of Cato's Project on Criminal Justice, writes on *Barnes v. Felix*. In that case, the Court held that the Fifth Circuit had taken too narrow a view of which facts are relevant to an excessive force claim against a police officer. Looking more broadly at recent cases involving the police, Cavedon writes that "safety can be endangered not just by recognizing Fourth Amendment limits but also by abandoning them. Recently, the Supreme Court has cast the Fourth Amendment only as a threat and not as

a shield. Recovering a more balanced approach may bring more Americans to appreciate the Constitution, rather than dismissing it as an obstacle to normative values and urgent needs."

Patrick Jaicomo and Anya Bidwell of the Institute for Justice write on *Martin v. United States*, which they litigated up to the Supreme Court. The question in the case seems straightforward: "If federal officers raid the wrong house, causing property damage and assaulting innocent occupants, may the homeowners sue the government for damages?" But as they explain, the decision "reveals a bizarre landscape of immunities through which the Martins continue their journey in search of a remedy."

Vera Eidelman of the ACLU covers *Free Speech Coalition v. Paxton*, in which the Court upheld a Texas law mandating that websites with a given percentage of pornographic content verify the age of every visitor. Eidelman writes that the "opinion adds to the Court's expanding list of cases reflecting motivated reasoning and outcome-driven results." However, she finds some silver linings—for instance, "the Court emphasizes that strict scrutiny is really, truly strict."

Cynthia Crawford of the Americans for Prosperity Foundation writes on *Mahmoud v. Taylor*, which held that the First Amendment right to the free exercise of religion required giving parents the option to opt their kids out of certain public school reading lessons with books on gender identity themes. Crawford concludes that "*Mahmoud* presents an affirmation that parental rights to guide the religious upbringing of their children are not narrow rights that apply only where the religious community requires total, or near-total, withdrawal from the public schooling system. Rather, they extend to discrete conflicts within the public school from which the parents seek to have their children excused."

Ezra Young writes on *United States v. Skrmetti*, which upheld a Tennessee law banning gender transition surgeries for minors. Criticizing the decision, Young writes that "equal protection is an individual right that cannot be denied any person because of a label applied to her by the government. And it should make no difference whether the label is applied by voters, the political branches, or the judiciary. Nevertheless, the Supreme Court's equal protection jurisprudence allows and facilitates the judiciary meting out equal protection unequally."

Finally, John Vecchione of the New Civil Liberties Alliance authors our annual "Looking Ahead" article. Vecchione identifies several major cases to watch next Term, on topics ranging from tariffs to transgender participation in sports to redistricting and the Voting Rights Act.

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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 sincerely thank them all. Thanks also go to my Cato Institute colleagues Clark Neily, Walter Olson, Brent Skorup, Dan Greenberg, Matthew Cavedon, and Mike Fox 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, Harrison Prestwich, Samuel Rutzick, Caitlyn Kinard, Alexander Xenos, and Vikram Valame performed the difficult (believe me, I remember) and vital task of cite-checking and proofreading. Cato interns Caleb Krebs, Karan Gupta, Quinton Crawford, and Ben Woods also provided essential research assistance. And special thanks to Laura Bondank-Harmon, who handled all the nuts and bolts of publishing the *Review* (and assisted on edits as well). This volume couldn't have happened without her.

We hope that you enjoy this 24th volume of the *Cato Supreme Court Review*.