Global Journal of Politics and Law Research
Vol.10, No.4, pp.14-39, 2022
ISSN: ISSN 2053-6321(Print),
ISSN: ISSN 2053-6593(Online)

# The "Big Five" Decisions of the United States Supreme Court from June 2022: Ten Days of Consequences for the United States Supreme Court and the American People

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**Citation**: Richard J. Hunter, John H. Shannon, and Hector R. Lozada (2022) The "Big Five" Decisions of the United States Supreme Court from June 2022: Ten Days of Consequences for the United States Supreme Court and the American People, *Global Journal of Politics and Law Research*, Vol.10, No.4, pp.14-39

**ABSTRACT**: *This study on the United States Supreme Court will feature five opinions handed down by the Court relating to abortion, Second Amendment rights, two cases relating to religious liberty, and the confluence of "climate change" and administrative law that the Court decided before it adjourned for its 2022 summer recess. The paper will explain what the Supreme Court decided and then include critical passages from the holdings of the actual opinions handed down by the Court by quoting from the Supreme Court syllabus or summary, as well as pertinent portions of any majority or dissenting opinions*.

**KEYWORDS**: United States Supreme Court; abortion; religious liberty; Second Amendment; administrative law.

## INTRODUCTION

> "*When the Supreme Court released its usual end-of-term rush of decisions last week, American experienced nothing less than a constitutional earthquake, a massive jolt caused by deep shifts in the tectonic plates of American jurisprudence" (Akhil Reed Amar).*

In the space of barely ten days, the United States Supreme Court has fundamentally altered the legal landscape in the United States. Between June 21, 2022 and June 30, 2022, the Court handed down a series of momentous decisions that will impact not only the individual litigants in these

cases, but society and societal norms for generations to come as well. Stated the well-respected Constitutional scholar Akhil Reed Amar (2022): "When the Supreme Court released its usual end-of-term rush of decisions last week, American experienced nothing less than a constitutional earthquake, a massive jolt caused by deep shifts in the tectonic plates of American jurisprudence."

Having described the nature, function, and importance of the United States Supreme Court (Hunter, Shannon, & Lozada, 2022a), we will now identify what we term as the "Big Five" decisional areas, actually referenced in five opinions handed down by the United States Supreme Court (abortion, Second Amendment, two cases relating to religious liberty, and "climate change"/administrative law) before it adjourned for its 2022 summer recess. The paper will explain what the Supreme Court decided and then include critical passages from the holdings of the actual opinions handed down by the Court by quoting from the Supreme Court *syllabus* or summary as well as pertinent portions of any majority or dissenting opinions.

**Abortion**

Perhaps the most controversial issue to come before the Court was abortion. Reports of the Court's leaked decision by *Politico* in *Dobbs v. Jackson Women's Health Organization* (2022) indicated that Justice Clarence Thomas, the longest serving justice on the current court, had assigned fellow conservative Justice Samuel Alito to write the draft majority opinion that would cause so much controversy (see Deese, 2022; Biskupic, 2022a).

The initial case concerned a Mississippi law that banned abortion after 15 weeks. Subsequent events led the State of Mississippi to ask the Supreme Court to take the additional step of overturning *Roe v. Wade* (1973), a case that had established a constitutional right to abortion before fetal viability. By implication, also in question was the Court's decision in *Planned Parenthood v. Casey* (1992).

The five provisions that were at issue in *Casey* may be summarized as follows:

- Informed consent — a woman seeking abortion had to give her informed consent prior to the procedure. The doctor had to provide her with specific information at least 24 hours before the procedure was to take place, including information about how the abortion could be detrimental to her health and about the availability of information about the fetus.
- Spousal notice — a woman seeking abortion had to sign a statement declaring that she had notified her husband prior to undergoing the procedure, unless certain exceptions applied.
- Parental consent — minors had to get the informed consent of at least one parent or guardian prior to the abortion procedure. Alternatively, minors could seek *judicial bypass* in lieu of consent.
- Medical emergency definition — defining a medical emergency as "[t]hat condition, which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her

pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

- Reporting requirements — certain reporting and record keeping mandates were imposed on facilities providing abortion services.

The plurality opinion in *Casey*, co-authored by Justices Kennedy, O'Connor, and Souter, coincidentally all Republican appointees to the Court, stated that it was upholding what it called the "essential holding" of *Roe*. The *essential holding* consisted of three parts: (1) Women had the right to choose to have an abortion *prior to viability* and to do so without undue interference from the State (the plurality found that continuing advancements in medical technology had proven that a fetus could be considered viable at 23 or 24 weeks rather than at the 28 weeks as previously understood by the Court in *Roe*; (2) the State could restrict the abortion procedure post-viability, so long as the law contained exceptions for pregnancies which endangered the woman's life or health; and (3) the State had legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. The plurality opinion affirmed the "essential holding" of *Roe* that the fundamental right to abortion was grounded in the Due Process Clause of the Fourteenth Amendment, and reiterated what the Court had said in *Eisenstadt v. Baird* (1972), in which the Court had established the right of unmarried people to possess contraception on the same basis as married couples.**:** "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

At one point, Supreme Court precedents established in *Eisenstadt*, *Roe*, and *Casey* might have resulted in *Dobbs* being dismissed on the basis of its unconstitutionality; however, that understanding was shaken when in December of 2021, the Justices allowed a *six-week* ban on abortions in Texas to remain in effect on the basis of what is termed its "shadow docket" (Hurley & Chung, 2021; LeBlanc, 2022; Hunter, Lozada, & Shannon, 2022).

However, in the draft opinion leaked to the public (Deese, 2022), Justice Alito stated emphatically that *Roe* "must be overruled." Supporters of abortion rights were "clinging to the fact that Alito's opinion was a draft and hope it only reflects an opening salvo written after the justices casted initial votes at conference" (de Vogue, 2022). Their hopes were dashed by the Supreme Court on Friday, June 24, when the Court issued its formal opinion. The Court voted 6-3 to side with Mississippi in upholding its 16-week law, but 5-4 on the broader question of whether to overrule *Roe* and *Casey*. "The ruling, one of the most consequential in modern memory, marked a rare instance in which the court reversed itself to eliminate a constitutional right that it had previously created" (Kendall & Bravin, 2022).

Kendall and Bravin (2022) set the tone for the analysis by writing: "A deeply divided Supreme Court eliminated the constitutional right to an abortion, overruling the 1973 *Roe v. Wade* decision and leaving the question of abortion's legality to the states."

In siding with the state of Mississippi, the solid conservative majority on the Court held that the decision reached in *Roe* in 1973 was "egregiously wrong" in recognizing a constitutional right to an abortion, an error the court had perpetuated in the decades since and reaffirmed in *Casey* in 1992. Writing for the Court, Justice Alito stated: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." He continued: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."

The majority's reasoning was based heavily on the philosophy of *originalism*, the principle that a text should be interpreted in a way consistent with "how it would have been understood or was intended to be understood at the time it was written" (see Messina, 2021; Boykin, 2021; Sachs, 2022). Justice Alito noted that in 1868, when the 14th Amendment was adopted, the practice of abortion was widely restricted throughout the U.S. Therefore, Justice Alito wrote, the right to end a pregnancy could not be derived from the amendment's provisions protecting individual liberty and equality from infringement by legislation enacted by the individual states. "A right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."

Justice Alito argued strongly against the philosophy of judicial activism, which reflects the view that Courts "can and should go beyond the applicable law to consider broader societal implications of its decisions" (see Fingerhut, 2022). In countering this view, Justice Alito wrote: "In interpreting what is meant by the 14th Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."

Four Justices—Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett—joined in the Alito opinion overruling both *Roe* and *Casey*. Chief Justice John Roberts concurred in the decision to uphold the Mississippi statute, but did not support overruling *Roe* and *Casey*. The Chief Justice wrote: "Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share." The Chief Justice argued that states should be free to ban abortion before fetal viability (the *Casey* standard), but it was not necessary to overrule *Roe*. He regarded this course as both a "more prudent and responsible course" of action. The Chief Justice, however, was not able to gather the support of any other of the Justices. Presumably, however, it might be argued that had the Chief Justice been successful in gaining the votes any other of the conservative Justices in his more modest approach, he might have secured the votes of the dissenting Justices in order to save *Roe* from being overruled (Willmer, 2022a).

The Chief Justice was very direct on this point: "The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases." He continued: "A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case." The Chief Justice had clearly failed in his efforts.

**The Dissenters**

The dissenting opinion was both simple and direct. The Court's three liberal Justices—Sotomayor, Breyer and Kagan—issued a joint dissent, arguing that the majority had discarded the balance that prior precedents had struck between a woman's interest and that of the state in protecting "potential life." They wrote: "Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of."

**What the Future May Hold: "Going Forward"**

The Court also decided "what standard will govern if state abortion regulations undergo constitutional challenge…." Since abortion is no longer a "fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history," under Supreme Court precedents found in *Ferguson v. Skrupa* (1963), *Dandridge v. Williams* (1970), and *United States v. Carolene Products Co.* (1938), a *rational-basis review* would be the appropriate standard for any future challenges that would certainly arise (see Kelso, 2021).

> "It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.' That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."

Specifically, in applying the "rational basis" test to the Mississippi statute (and perhaps other proposed regulations or restrictions in the future), Justice Alito wrote:

> "These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. These legitimate interests justify Mississippi's Gestational Age Act. Except 'in a medical emergency or in the case of a severe fetal abnormality,' the statute prohibits abortion 'if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.' The Mississippi Legislature's findings recount the stages of 'human prenatal development' and assert the State's interest in 'protecting the life of the unborn….' These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail."

Although *Dobbs* specifically involved the 15-week ban enacted by Mississippi, the overruling of *Roe* and *Casey* gives states broad latitude to enact regulations relation to restricting abortion or to prohibit abortion as they determine their state's public policy. In anticipation of the ruling, several states had passed laws limiting or banning abortion. Thirteen states have so-called "trigger laws" on their books that prohibited abortion if *Roe* were overruled (Cole, 2022).

Indeed, it did not take long to see the practical implications of the Court's actions. After the ruling was issued, the Supreme Court ordered the Seventh Circuit to "reconsider Indiana law requiring parental notification when minors get abortions" (WTHR, 2022). Hurley and Chung (2022) reported that "The U.S. Supreme Court, in the aftermath of its decision… to overturn the landmark *Roe v. Wade* ruling that legalized abortion nationwide, on Thursday [June 29] threw out lower court rulings that invalidated three abortion laws at the state level. All three laws—from Arizona, Arkansas and Indiana—were blocked by lower courts based on *Roe* and the subsequent 1992 ruling that reaffirmed it…. In one case, the court on Thursday threw out a ruling that blocked an Arizona law that bans abortions performed because of fetal genetic abnormalities such as Down Syndrome."

**The Thomas Concurring Opinion: A Portent of the Future?**

While the Court took pains to state that said its decision in *Dobbs* was limited to abortion, and would not implicate other rights established in such cases as *Griswold v. Connecticut* (1954) (Hunter, Shannon, & Lozada, 2022), *Lawrence v. Texas* (2003), and *Obergefell v. Hodges* (2015), a concurring opinion issued by senior Associate Justice Clarence Thomas raised the issue whether the line of cases related to *Roe* grounded in the right to privacy should be overruled as well.

Justice Thomas wrote in his concurring opinion:

> "For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* [right of marital privacy and the use of contraceptives], *Lawrence* [striking down laws prohibiting sex between consenting same-sex adults], and *Obergefell* [providing for same-sex marriage]. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents.
>
> After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

> *Griswold v. Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." Since *Griswold*, the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process.
>
> To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." At least three dangers favor jettisoning the doctrine entirely. First, "substantive due process exalts judges at the expense of the People from whom they derive their authority." Because the Due Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis...." (substantive due process is "a jurisprudence devoid of a guiding principle"). The Court divines new rights in line with "its own, extra-constitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees."

**Second Amendment**

After oral arguments last year, many observers predicted that the conservative majority was ready to strike down a New York law – enacted more than a century ago – that placed restrictions on carrying a concealed weapon *outside* of the home (see *New York State Rifle & Pistol Association Inc. v. Bruen*, 1913; Levin, 2022). As it turns out, the *Dallas Morning News* (2022) noted: The decision will have the most immediate impact on New York and seven other states -- home to 80 million Americans -- with a similar "proper cause" requirement on the concealed carry of guns in public" (see also Boston, 2022). Rosenblatt (2022, p. 239) writes: "In this pivotal Second Amendment case, the Court finds its first opportunity to substantially extend its 2008 decision in *District of Columbia v. Heller* and to define the scope of the Second Amendment right to bear arms outside the home."

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense *within the home*.

The New York statute, often referred to as a "proper cause" requirement, mandates that a gun owner obtain a license to carry a handgun. To get the license, however, an applicant is required to demonstrate a *specific need* for carrying the gun. Did the New York statute violate an individual's fundamental right to carry a concealed handgun outside the home in public for self-defense?

However, would recent events now affect the outcome of the challenge as the debate may have shifted in recent months? Since the Justices began deliberating, mass shootings occurred across the country, including the massacre of 19 school children in Uvalde, Texas or the murder of ten individuals in Buffalo, New York. While the shootings did not directly implicate the issue of concealed carry, the country as a whole was engaged in a serious debate on gun safety laws. Would the Supreme Court rethink entering into the fray in any way that counteracted strong public opinion? Fingerhut (2022) wrote: "The court and public opinion have clashed at times, but they've entered into a 'symbiotic relationship' over the past 60 years…. The court doesn't stray too far from public opinion."

These questions were answered dramatically. As Levinson (2022) stated: "The court's decision means we do not take current circumstances into account when analyzing gun control measures."

On Thursday, June 23, 2022, the Court struck down the more than century-old New York law. The 6-3 opinion was authored by Justice Clarence Thomas, the court's most senior conservative member. Not unsurprisingly, the three liberal justices dissented.

Justice Thomas wrote that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense *outside* the home as well as *within* the home. Justice Thomas wrote:

> "Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution."
>
> "The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"
>
> "In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."
>
> "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command."

Justice Thomas explicated the philosophy that would guide the Court in determining the constitutionality of any further attempts at regulation—perhaps even including the imposition of a "red flag" law which may be challenged on the basis that it violates constitutionally mandated due process requirements (Asmelash, 2021), although enjoying wide-spread popular support.

Gay (2020, p. 1534) offered a positive view of the "red flag" approach, and opined about the standard the Court should employ in the future in assessing their constitutionality:

> "In the face of increased gun violence and mass shootings, red flag laws have become a popular legislative tool among policymakers, commentators, and legal scholars for protecting public safety. The laws are gaining momentum in state houses around the country because they provide law enforcement with a means to expeditiously remove firearms from potentially dangerous individuals--regardless of the individual's criminal record and mental health history. Thus far, the laws have been a magnet for constitutional challenges--many of which have been brought under the Second Amendment. In considering such challenges, courts should conclude that red flag laws *do* regulate individuals protected by the Second Amendment, and then proceed to apply intermediate scrutiny."

Justice Thomas, however, signaled that he did not agree with an "intermediate scrutiny" standard for assessing restrictions on gun ownership (Blocher & Charles, 2029). He wrote: wrote: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."

In summary, Justice Thomas wrote that when confronted by government regulations relating to the Second Amendment: "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command'"—seemingly endorsing a more restrictive "strict scrutiny" standard of review.

In a dissenting opinion joined by Justices Sotomayor and Kagan, Justice Breyer stated that the majority "severely burdens" state laws aimed at curbing violence. "Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds," Justice Breyer wrote. "The Court today severely burdens States' efforts to do so." Justice Breyer added: "The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence, … And yet the Court today purports to answer that question without discussing the nature or severity of that problem."

> "Balancing… lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures," Breyer added. "It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant

> values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work."

Breyer also criticized a "history-based approach" taken by the majority, and argued that "legal restrictions on the public carriage of firearms" are not uncommon. Breyer also noted that the unique circumstances in major cities like New York City necessitated that lawmakers consider where it is or is not practical to allow guns. Referencing *Heller*, Justice Breyer noted that "We are bound by *Heller* insofar as *Heller* interpreted the Second Amendment to protect an individual right to possess a firearm for self-defense," However, Breyer added: "But *Heller* recognized that that right was not without limits and could appropriately be subject to government regulation."

**Religious Liberty: A Tale of Two Cases**

In December of 2021, the Court heard arguments in *Carson v. Makin* (2021) concerning a Maine initiative that excluded some religious schools from a state-funded tuition assistance program. The program allowed parents living in rural areas with no school district to use vouchers to send their children to public or private schools elsewhere. The program was challenged when some parents wanted to use the vouchers to send their children to religious schools (Howe, 2021).

On Tuesday, June 21, 2022, the Supreme Court issued its decision (Liptak, 2022). In sum, the Supreme Court ruled that Maine may not exclude religious schools from a state tuition program. The decision, noted Liptak (2022), reflects "… a court that has grown exceptionally receptive to claims from religious people and groups in a variety of settings…."

The vote was 6 to 3, with the court's three liberal justices in dissent (Seddiq, 2022a). Chief Justice Roberts wrote the majority opinion in which the Court held that "Maine's 'nonsectarian' requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause," basing the decision on *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) (Miller, 2017) and *Espinoza v. Montana Department of Revenue* (2020).

In *Trinity Lutheran* (2017), the Court considered a State of Missouri program that "offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces, but denied such grants to any applicant that was owned or controlled by a church, sect, or other religious entity." The Court held that the Free Exercise Clause did not permit Missouri to "expressly discriminate [] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" (see Joseph, 2018; Myers, 2019).

In *Espinoza v. Montana Department of Revenue* (2020), the Court held that a provision of the Montana Constitution barring government aid to any school "controlled in whole or in part by any church, sect, or denomination" violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at religious schools (see Lindberg, 2021).

Jacobson (2022, p. 65) noted that:

> "While the Supreme Court does not recognize the right to public education as a fundamental right, the plaintiffs in *Espinoza v. Montana Department of Revenue* asked the Court to recognize an analogous right: a fundamental right to funding private religious education. Framed as a violation of the petitioners' free exercise rights, the petitioners in *Espinoza* alleged that the Montana Department of Revenue infringed their right by excluding private religious schools from a tax credit program, and the Supreme Court agreed."

**Returning to *Carson***

The following are the main points from the Roberts' opinion in *Carson*:

> "The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'
>
> A law that operates in that manner must be subjected to 'the strictest scrutiny.' Maine's program cannot survive strict scrutiny. A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. Maine's decision to continue excluding religious schools from its tuition assistance program after Zelman thus promotes stricter separation of church and state than the Federal Constitution requires. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use based discrimination."

The dissenting judges raised several points (Kampeas, 2022). Justice Stephen Breyer, in authoring the opinion, in which he was joined by Justice Elena Kagan and in part by Justice Sonia Sotomayor, argued that the majority's decision dismantles the separation of church and state.

"The key word is 'may,'" Justice Breyer wrote. "We have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education."

Justice Breyer asked several questions: "What happens once 'may' becomes 'must? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?" These questions and others would be left to another day—but the thrust of the Court's jurisprudence seems clear. Had the "wall of separation" been replaced by a slatted picket fence?

***Kennedy v. Bremerton School District***

Liptak (2022) wrote that "Over the last 60 years, the Supreme Court has rejected prayer in public schools, at least when it was officially required or part of a formal ceremony like a high school graduation. As recently as 2000, the court ruled that organized prayers led by students at high school football games violated the First Amendment's prohibition of government establishment of religion." In *Santa Fe Independent School District v. Doe* (2000, p. 312), Justice John Paul Stevens wrote: "The delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship" (see also McGreal, 2008).

In a second case, *Kennedy v. Bremerton School District*, the Justices would consider the case of Joe Kennedy, a former Washington state high school football coach at a public school, who lost his job for praying at the 50-yard line after games. The school district maintained that it had suspended Kennedy in order to avoid the appearance that the school was endorsing a particular faith, in violation of the Establishment Clause of the Constitution (Gresko, 2021).

Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor made clear at the oral arguments that they were concerned that players would feel coerced to pray in violation of the Constitutional provision providing for the separation of church and state.

On June 27, 2022, the Supreme Court in a 6-3 decision ruled that Coach Kennedy had a constitutional right to pray at the 50-yard line after his team's games, with the Court's three liberal members in dissent.

The case was not decided without some controversy. Liptak (2022) reports that:

> "The two sides offered starkly different accounts of what had happened in Mr. Kennedy's final months, complicating the Supreme Court's task. Mr. Kennedy said he sought only to offer a brief, silent and solitary prayer little different from saying grace before a meal in the school cafeteria. The school board responded that the public nature of his prayers and his stature as a leader and role model meant that students felt forced to participate, whatever their religion and whether they wanted to or not."

Justice Gorsuch delivered the opinion of the Court.

> "The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.
>
> The First Amendment's protections extend to 'teachers and students,' neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" [citing *Tinker v. Des Moines Independent Community School Dist*., 1969].

> Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. …"

Justice Gorsuch discussed the standard the Court would employ in deciding cases brought under the Establishment Clause.

> "[T]his Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' A natural reading of the First Amendment suggests that the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'
>
> A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.' No historically sound understanding of the Establishment Clause begins to 'mak[e] it necessary for government to be hostile to religion' in this way.
>
> There is no conflict between the constitutional commands of the First Amendment in this case. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause. A government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights."

In conclusion, Justice Gorsuch wrote:

> "Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination."

As might be expected, the three dissenting Justices raised serious concerns about the majority opinion. Justice Sonia Sotomayor wrote that "the decision ran counter to the line of cases that began when *Engel v. Vitale* (1962) invalidated teacher-led prayer in public schools (Marshall, 2018). Whereas the majority characterized Kennedy's prayers as private, she thought that they were very public and that Kennedy had encouraged others to join, some of whom may have felt an element of coercion to do so" (Vile, 2022).

Justice Sotomayor voiced particular concern with Gorsuch's substitution of "history and tradition" for the test enunciated by the Court in *Walz v. Tax Commissioner* (1970), later refined in *Lemon v.*

*Kurtzman* (1971), when "a law or governmental activity [such as aid to parochial schools, or the introduction of religious observances into the public sector, such as school prayer] violates the Establishment Clause of the First Amendment" Pacelle, 2022). Under this three-pronged test, the Court would "examine the proposed aid to the religious entity" and would determine that the practice or activity was impermissible if it:

- lacked a clear secular legislative purpose;
- had the primary effect of advancing or inhibiting religion; or
- promoted excessive entanglement between church and state (see Pacelle, 2022).

In defense of approach taken by the Court under the *Lemon Test*, Alembik (2006, p. 1178) had noted: "The Lemon Test is the only coherent test of the Establishment Clause that a majority of the Court has ever adopted."

Justice Sotomayor stated that reasonable observers would view his public prayers on the field as an expression of practices which were sanctioned by the school district. His prayer was thus an attempt "to incorporate a public communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched." Justice Sotomayor stated that the action "violated the principle of governmental neutrality in religious matters, and that such violations were more dangerous in public school settings than elsewhere. She was particularly concerned about the possibility of indirect coercion in this context" (Vile, 2022).

Justice Sotomayor concluded that the majority decision "elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection."

**The Confluence Climate change and Administrative Law: A Decision with Larger Implications**

The Court also agreed to decide a case concerning the authority of the Environmental Protection Agency to regulate carbon emissions from existing power plants, in a dispute that could literally cripple the Biden administration's attempts to slash emissions. The challenge was brought by the State of West Virginia and several other states, "many of which are fossil fuel producers that took issue with the EPA's authority to impose regulations on the energy sector (Seddiq, 2022b).

The syllabus accompanying *West Virginia v. The Environmental Protection Agency* (2022) noted that: "In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, addressing carbon dioxide emissions from existing coal- and natural-gas-fired power plants. The EPA cited Section 111 of the Clean Air Act authorizes regulation of certain pollutants from existing source. Although states are responsible for establishing rules governing existing sources

such as power plants, the EPA determines the emissions limit with which they will have to comply."

On August 21, 2018, the U.S. Environmental Protection Agency, reflecting the views of the Trump Administration (Gibbons, 2019), proposed the Affordable Clean Energy rule, also known by the acronym ACE (see EPA, 2019), which would establish emission guidelines under which states could develop their own plans to address greenhouse gas emissions (GHG) from existing coal-fired power plants. ACE would replace the 2015 Clean Power Plan proposed by the Obama Administration. The Clean Power Plan was stayed by the U.S. Supreme Court on February 9, 2016 (Scobie, 2016), and had never gone into effect.

McCormick (2019, p. 106) notes that the EPA released its proposed rule in August 2018. After a period of public comment, the rule was finalized in June 2019 (EPA, 2019). "The ACE ... establishes emission guidelines for states to develop plans to address... (GHG) emissions from existing coal-fired power plants, without setting individual state GHG emissions limits. Under the ACE, states would have wide latitude to institute their own performance goals, and the expected emissions reductions will be extremely low - in fact, an increase in emissions may even occur in some states" McCormick, 2019)

The EPA under the Biden Administration announced that it was working on the promulgation of a new rule (Guillen, 2021; Frazin, 2022). The decision by the Supreme Court to take up the issue signaled to many observers that the Court wished to limit the scope of the EPA's authority even before a new rule was promulgated by the Biden Administration. The vehicle for such action would be on "improper delegation" grounds.

On Thursday June 30, 2022, the Supreme Court ruled that the Environmental Protection Agency did not have the authority to regulate the amount of pollution power plants emit under the Clean Air Act. The court ruled 6-3, with Chief Justice John Roberts writing the majority opinion. Interestingly, the Court focused on the "*delegation*" issue, and not the merits of the rule itself or the larger issues surrounding climate change.

These are the most important portions of the Chief Justice's opinion:

> "Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day, but it is not plausible that Congress gave the EPA the authority to adopt on its own such a regulatory scheme … A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."
>
> There is little question that the petitioner states are injured, since the rule requires them to more stringently regulate power plant emissions within their borders. The Government's argument in this case boils down to its representation that EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section

> 111(d) rule. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111.
>
> Under this body of law, known as the major questions doctrine, the agency must point to "clear congressional authorization" for the authority it claims power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).
>
> On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy. There is little reason to think Congress did so. EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise. And this Court doubts that "Congress intended to delegate . . . decision[s] of such economic and political significance," i.e., how much coal-based generation there should be over the coming decades, to any administrative agency. The importance of the policy issue and ongoing debate over its merits "makes the oblique form of the claimed delegation all the more suspect."

The essence of the Court's opinion may be seen in the following passage"

> "The Government must point to "clear congressional authorization" to regulate in that manner. Such a vague statutory grant is not close to the sort of clear authorization required.
>
> But the only question before the Court is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no."

Justice Kagan offered a spirited dissent, joined by Justices Breyer and Sotomayor. Justice Kagan reminded the Court about both the history and necessity of delegation of power by Congress to a competent regulatory body or agency.

> "It is not surprising that Congress has always delegated. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." Consider just two reasons why. First, Members of Congress often don't know enough— and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us

> rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why wouldn't Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself? Congress knows that systems of emission reduction lie not in its own but in EPA's "unique expertise."
>
> Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress delegates. It enables an agency to adapt old regulatory approaches to new times, to ensure that a statutory program remains effective.) … [A] statute's broad language was meant to ensure that an agency had "the tools needed to confront emerging dangers."

Justice Kagan spoke of the positive results of administrative delegation in American society as well.

> "Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines."

Reflecting the view that the Court had traditionally respected this deference, Justice Kagan invoked the views of Justice Scalia in *Mistretta v. United States* (1989).

> "This Court has historically known enough not to get in the way. Maybe the best explanation of why comes from Justice Scalia. The context was somewhat different. He was responding to an argument that Congress could not constitutionally delegate broad policymaking authority; here, the Court reads a delegation with unwarranted skepticism, and thereby artificially constrains its scope. But Justice Scalia's reasoning remains on point. He started with the inevitability of delegations: "[S]ome judgments involving policy considerations," he stated, "must be left to [administrative] officers." Then he explained why courts should not try to seriously police those delegations,

> barring—or, I'll add, narrowing—some on the ground that they went too far. The scope of delegations, he said, dissenting "must be fixed according to common sense and the inherent necessities of the governmental co-ordination. Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

As a summary, Justice Kagan wrote:

> "In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest. Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much."

Finally, Justice Kagan offered this candid evaluation of the import of the Court's decision:

> "The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening."

**Implications for the Future**

There is a great debate about the implications of this decision. Will the decision be limited to the specific facts and issues raised in the case or will its philosophy—some may say, its hostility to the idea of administrative regulation or more broadly, and the administrative state —by that of the solid conservative majority on the Supreme Court provide the basis for other attacks on regulation in the American economy unaccompanied by detailed authorization or guidance by Congress on

delegation grounds? Does *West Virginia v. The Environmental Protection Agency* represent a first thrust in the attempt to reign-in the powers of administrative agencies and return the United States to the pre-New Deal period of limited regulation?

DeVore (2022), writing for *Forbes*, sets the general parameters of the debate and describes the administrative state as "as a form of government that uses an extensive professional class to provide oversight over government, the economy and society (see Hunter, Shannon, O'Sullivan-Gavin, & Blodgett, 2011). It stands in stark contrast to a representative democracy with limited powers and reach" (see also Bulman-Pozen, 2019). Jones (2022) joins the debate and maintains that "Fundamentally, though, the case will effectively determine whether, according to the six conservative justices on the Supreme Court, the government has any authority to impose regulations at all. Republicans have been attacking the so-called administrative state — that is, government agencies — for decades now."

Jones (2022) concludes: "Americans need to realize this is the country conservatives want: a country in name only. They want each state to operate as its own fiefdom, free to inflict whatever harm it pleases on its residents without any government agencies telling it that it can't. And barring fierce opposition, that's the world they might get."

Kane (2022) commented on the wider implications of the case.

> "The Supreme Court did not arrive at this pivotal moment by chance. For decades, ultra-wealthy conservative donors, libertarian think tanks, and their allies within the Republican Party have orchestrated a campaign to thwart the federal government's efforts to regulate corporations — including efforts to regulate greenhouse gas emissions, which threaten the profits of the fossil fuel industry. Over the years, they have paid considerable attention to the judiciary, methodically installing conservative judges in anticipation of a case that could kneecap agencies they view as overstepping their authority."

A contrary view was offered by Tubb (2022), writing for the Heritage Foundation:

> "One of the many consequences of the plan was that the EPA completely ignored important considerations, such as grid reliability, affordability, consumer choice, and the responsibilities of states. Instead, the EPA's sole interest was to regulate the grid to achieve then-President Barack
> Obama's radical climate agenda mandating a transition away from conventional energy to politically correct renewable energy.
>
> Had the court on Thursday affirmed a near-limitless authority of the EPA to regulate the grid, the Biden EPA was poised to follow up with its own version as a

> centerpiece of President Joe Biden's unilateral commitment to the Paris Agreement of 2015."

**Some Concluding Commentary**

"That really was the week that was!"

The decisions of the concluding week of the spring term of the United States Supreme Court represent a clear "clash of philosophies" between the Justices and the triumph of the viewpoints of the six conservative Justices who have been willing to overrule or simply ignore prior case precedents. The Court has not been shy in elaborating on areas of public policy in *Dobbs*, or in breaking down the "wall of separation" between church and state, or in expanding gun rights into areas not contemplated in prior Court decisions, seemingly against the weight of public opinion. In resolving a challenge to the reaches of administrative law, the Court expressed its skepticism about the bent of history and the rise of the administrative state by hobbling the ability of the federal government to deal with perhaps the most consequential issue of our time.

There are three larger questions: By seemingly intentionally ignoring public opinion in cases involving abortion and gun control or very relevant factual circumstances (for example, in *West Virginia*, the Court did even not make reference to the issue of climate change), has the Court damaged its reputation in the public eye? Richman (2022) reports that "54 percent disapprove of the Supreme Court while 36 percent approve." Fingerhut (2022) reports that "Seventy percent of U.S. adults say… that the Supreme Court should leave Roe as is, not overturning it." *Reuters* (2022) reported that 79 percent of voters were "more likely to support a candidate who supported passing background checks and red flag laws for all new gun purchases…."

Secondly, has the inability of the Chief Justice to forge a moderate consensus in *Dobbs* called his leadership on the Court into serious question? Biskupic (2022b) stated directly: "Chief Justice John Roberts has long piloted America's highest court, securing majorities on controversies over religion, race, voting rights and campaign finance regulation. But on fundamental abortion rights and in the defining case of his generation, Roberts came up short" (see also Willmer, 2022a).

Willmer (2022b) added:

> "Roberts's waning influence has coincided with dramatic changes in the composition of the court. Former President Donald Trump appointed three conservative justices and was vocal about only choosing candidates who would vote to overturn *Roe*. First was Neil Gorsuch and then came Brett Kavanaugh, who replaced swing vote Anthony Kennedy, who sided with liberals on gay marriage and, for the most part, abortion.

> Only weeks before the 2020 election, Trump's third pick, Amy Coney Barrett, gave the wing a solid 6-3 majority, which diminished the influence of Roberts.
>
> "With a 6-3 majority, he still has a lot of influence, but he is no longer the swing voter on many issues" said Ilya Somin, a law professor at George Mason University."

Third, what do these decisions portent for the future? While Justice Alito took pains to assure Americans that *Dobbs* was limited to the particular facts and issues surrounding abortion, Justice Thomas was not as circumspect. Gerstein and Ward (2022) state emphatically: "The massive jolt the new conservative supermajority delivered to the political system last week by overturning *Roe v. Wade* could just be the beginning. The next targets could include voting rights, state court's power over elections, affirmative action and laws banning discrimination against LGBTQ people."

Justice Roberts once stated that his role on the Court was to simply "call balls and strikes"—not to write the rules of the game. The five decisions described in this study may call this metaphor into question, as the Supreme Court asserts its power in determining the nature of the relationship between the government and its citizens in a complex and technologically sophisticated economic and political environment at the same time its relevancy and authority are increasingly challenged.

As Bette Davis famously said in "All About Eve": "Fasten your seat belts, it's going to be a bumpy night"—or a bumpy few years for the Court,

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