WHAT HAS HAPPENED TO THE UNITED STATES SUPREME COURT?

A CAUTIONARY TALE

PAUL C. SAUNDERS
INTERNATIONAL RULE OF LAW PROJECT

ABSTRACT

Five cases decided by the United States Supreme Court at the close of its 2021-2022 term have fundamentally changed the political landscape in the United States and raised serious questions about the neutrality and socio-political agendas of the members of the Court's new majority. These decisions overturned a fifty-year plus old federally-recognized right to abortions, a more than one hundred-year old ban on the carrying of firearms in public, essentially gutted the "establishment of religion" prohibition of the First Amendment to the US Constitution and threatened the end of the so-called "administrative state" as it has operated for more than one hundred years. The jurisprudential and political implications of these decisions have been earth-shaking.

This essay, written by Paul C. Saunders, President of the International Rule of Law Project, discusses these cases and their implications for the future of the Rule of Law in the United States. His conclusions may not be optimistic for the future but they are important factors to be considered by those who consider the Rule of Law essential to the survival of our shared experiment of equal justice for all.

The International Rule of Law Project is a United States-based affiliate of the Bingham Centre for the Rule of Law, created in honor of one of England's greatest Jurists, Lord Tom Bingham, and the British Institute of International and Comparative Law in London in which the Bingham Centre is located. It is dedicated to carrying on Lord Bingham's vision that the Rule of Law is "one of the greatest unifying factors, perhaps the greatest. It remains an ideal but it is an ideal worth striving for." The International Rule of Law Project monitors and speaks out on Rule of Law issues in the United States and is committed to the preservation and practice of the Rule of Law in all of its elements. The International Rule of Law Project recognizes, in the words of Lord Bingham, that the Rule of Law is essential to the preservation of a civilized society and is "too important to remain the exclusive preserve of courts and lawyers."

WHAT HAS HAPPENED TO THE UNITED STATES SUPREME COURT?

A CAUTIONARY TALE

Paul C. Saunders[1]

At his Senate Confirmation Hearing in 2005, then soon-to-be Chief Justice John Roberts told the Senators that in his view, "judges are like umpires. Umpires do not make the rules, they apply them . . . It's my job to call balls and strikes, and not to pitch or bat." But when two Justices disagree, it is a ball or a strike? Or, is it, in the words of the Baseball Hall of Fame Umpire Bill Klem, "ain't nothin' till I call it."

Justice Antonin Scalia would have been on the side of Chief Justice Roberts. In one of his more famous books, Scalia argued that statutory interpretation—primarily interpreting the Constitution—went astray when judges moved beyond the strike zone of the words themselves, whereas his colleague, Justice Stephen Breyer, wrote in one of his books that the job of the Court was to make democracy work and that often meant going beyond the words to discern the purposes that the law-makers had in mind.

Lord Tom Bingham might also have been on the side of Chief Justice Roberts. In his magnum opus *The Rule of Law*, Bingham wrote that although judges must be permitted to exercise discretion in some circumstances, "*It must be law, not discretion, which is in command.* . . . The rule of law does not require that official or judicial decision-makers

[1] President, International Rule of Law Project, Inc., BS Fordham College, *Egregia Cum Laude, Phi Beta Kappa*, JD, Georgetown University Law Center, CEP, Institut d'Études Politiques, MS in Global Affairs, New York University, Distinguished Visitor from Practice, Georgetown University Law Center, Fellow, American College of Trial Lawyers, Retired Partner, Cravath, Swaine & Moore LLP.

should be deprived of all discretion," but it does "require that no discretion should be unconstrained so as to be potentially arbitrary. *No discretion may be legally unfettered."*[2]

In his Confirmation Hearing remarks, Chief Justice Roberts went even further: "Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have modesty to be open in the decisional process to the considered views of their colleagues on the bench."

No set of cases decided by the Supreme Court in recent memory more clearly calls into question the Court's current adherence to the principles Chief Justice Roberts espoused and Lord Bingham's peroration against "unfettered discretion" than the Court's recent gun rights, abortion, environmental protection, and religion cases. Taken together, they foreshadow a future Court unlike anything we have seen in the last century. This is troublesome. We are not here talking about the outcomes of those decisions, troublesome though they were. We are talking about something even more basic: how the politically conservative new majority of the Court reached its conclusions in these cases, in particular whether the Supreme Court is functioning as an independent judicial body or instead as an entity that appears to have abandoned decades-long methods of interpreting ambiguous parts of laws and the Constitution and has created a new test that will make it far easier the Court to carry out what has the appearance of an ideologically-motivated agenda. In other words, is the Court now exercising a partisanship that determines the outcome of divisive socio-political debates that are raging throughout our country? Is that what our Framers had in mind when then envisioned lifetime appointments for Supreme Court Justices?

[2] Lord Tom Bingham, The Rule of Law, pp. 51, 54, Penguin Books (2010) (Emphasis added.)

Text, History and Tradition

How does the Court interpret statutes and the Constitution? For many decades, the test that the Court used was referred to as "tiers of scrutiny." It was a method of analyzing ambiguous parts of the laws and the Constitution by looking first at the goal or the purpose of the passage and second at the means set forth for accomplishing the goal. There were three possible tiers of scrutiny: "strict scrutiny," which required a showing that the law or passage satisfied a "compelling governmental interest" and that the means chosen were narrowly tailored to achieve that interest; "intermediate scrutiny," which required a showing that the means chosen are "no more burdensome than reasonably necessary," and "rational-basis review," which upheld the law if there is "any conceivable, rational reason supporting the law." We typically saw these tests applied to laws involving the First and Fourteenth Amendments, since they are among the Constitution's most ambiguous provisions.

However, there was another set of tests that conservative members of the Supreme Court sometimes applied to ambiguous passages in the Constitution, "textualism" and "originalism." The former looked only at the words of the passage themselves and if they do not clearly reveal what the founders meant, then the Court could apply the second test, "originalism," to attempt to decipher the authors' intent. Justice Antonin Scalia was the quintessential "textualist" (sometimes, when "in a crunch," he called himself a "faint-hearted originalist") who believed that the Court should look only at the original meaning of the text itself, and not what the authors might have intended to write. In his book *Reading Law: The Interpretation of Legal Texts*, Scalia wrote that "Originalism . . . gives effect to the original meaning of the text, rather than a new meaning that may shift unpredictably,

even radically, over time."[3] Scalia continued: "The conclusive argument in favor of originalism is a simple one: It is the only objective standard of interpretation even competing for acceptance. Nonoriginalism is not an interpretive theory—it is nothing more than a repudiation of originalism, leaving open the question: How does a judge determine when and how the meaning of a text has changed? . . .Give text the meaning it bore or else let every judge decide for himself what it should mean today?"

Scalia was not wedded to the Court's adoption of the "tiers of scrutiny" and he believed that they should be modified in order to reflect the "people's understanding of ambiguous constitutional texts." Similarly, Justice Neil Gorsuch, a textualist *and* an originalist, believed that if neither textualism nor originalism renders a satisfactory answer, then the Court should attempt to discern what a reasonable reader would have understood the law to be. One issue was when the perception of the reasonable reader should be measured, at the time of the promulgation of the law or at the time of the event under review. The Supreme Court's 1939 Second Amendment gun-rights decision in *United States v. Miller* seemed to suggest that the proper time of measure was whether the weapon was in use at the time of the subject provision's promulgation although that was somewhat unclear.[4] The views of Scalia and Gorsuch seemed to adopt both propositions, depending on the outcome. In *District of Columbia v. Heller*, discussed further below, Justice Scalia

[3] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, p. 78, Thomson West (2012)

[4] For example, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2020) (plurality opinion) reads *Miller* as holding that the original meaning inquiry is carried forward in time (it does not do so explicitly, however). *Ezell v. City of Chicago*, 651 F. 3d 684 (7th Cir. 2011) argues that the limitation depends on how the right was understood when the Fourteenth Amendment was ratified. As we will see below, Justice Thomas argued in *McDonald* that the right to bear arms was a "preexisting right" that preceded the Second Amendment. If you are confused, you are not alone.

clearly adopted the "present time" test. As can be seen, this test was a departure from the "originalism" interpretation that Scalia referred to elsewhere, that gave effect to the original meaning of the text rather than a new meaning that might have "shift[ed] unpredictably" over time.

Some passages in the Constitution need no interpretation at all, such as the requirement that the President must be at least thirty-five years old, whereas others, such as the Fourteenth Amendment's "due process of law" and "equal protection of the laws" passages require a good deal of interpretation.

Today, a new test is being applied by the Court's conservative majority to determine the "rights" that are guaranteed or prohibited by the Constitution. This test is generally referred to as the "text, history and tradition" test. If the "right" is mentioned in the text of the Constitution or statute, or found in the Nation's "history or tradition", it is guaranteed by the Constitution. If not, it is not a guaranteed right. If, for example, the right of public school children to attend a de-segregated school was not found in the text of the Constitution or in our history and tradition, it is not a right that the courts should enforce. If the new test had been applied in the *Brown v. Board of Education of Topeka* case, which found that the "separate but equal" doctrine violated the Equal Protection Clause of the Fourteenth Amendment (which does not mention the doctrine or anything at all about education) the result almost certainly would have been different.

The story of the new test being applied by the conservative majority in the Supreme Court in order to determine the "rights" that are guaranteed or prohibited by the Constitution begins with *District of Columbia v. Heller*, decided in 2011, whose majority opinion was written by Justice Scalia. At issue was whether a District of Columbia law

prohibiting individuals from keeping a loaded handgun at home without a trigger lock violated the Second Amendment. Textualist Scalia—who was also very much in favor of allowing persons to "keep and bear" guns and who died on a Texas hunting ranch after a day of quail shooting—was asked by Chief Justice John Roberts to write the majority opinion. In doing so, he had great difficulty with the words of the Second Amendment: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Leaving aside the misplaced commas, Scalia found that the text of this amendment was nearly impossible to understand.

As a matter of history, at the time the Second Amendment was being drafted, there was a great distrust of a standing army and for that reason, each state and locality in the new United States had a militia that could be called upon to put down insurrections and to capture escaped slaves in order to return them to their masters. If the militias were not "well-regulated" they might not be available when called upon, especially if the members of the militia did not have firearms readily available. If that happened too often, it might bring on the creation of the dreaded "standing army," which the Jeffersonian faction of the founders wanted very much to avoid. So according to one Supreme Court case quoted favorably by Justice Scalia in his *Heller* opinion, "the [Second] amendment was designed to preserve the militia." But as a matter of history, according to Scalia, it should not have been difficult to put the two clauses of the Second Amendment together. As Scalia wrote, "the way tyrants had eliminated a militia consisting of able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[5] Nevertheless, Scalia separated the two

[5] Enrique Schaerer, What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence, 82 U. Cin. L. Rev. 795, (2018). Schaerer observes that this was precisely what happened in

clauses, finding that the second clause, which he said guaranteed the right to "individual defense" was unrelated to the militia clause. The "original meaning" of the second clause, according to Scalia, was a right to bear arms, but only certain arms for certain purposes. But what were those purposes if they were not for the militia?

In one of the early drafts of the Second Amendment, James Madison added a provision that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." This addition would have reinforced the proposition that the Second Amendment was about militias and not about personal self-defense. However, Elbridge Gerry of Massachusetts and "gerrymandering" fame objected vehemently, arguing that the purpose of the amendment was to prevent the rise of a standing army and that permitting conscientious objectors might render the militias ineffective. As a result, the addition was abandoned.

In fact, the viability of the militia was so important that in 1792, Congress passed the Uniform Militia Act that required every white man under age 45 to join a militia and to own a firearm. Of course blacks, whether slave or free, could do neither. Militias were critical in putting down uprisings like the Whisky Rebellion in 1794 and the Gabriel slave uprising of 1800.

Scalia obviously had a goal in mind. He wanted to create and preserve an absolute right for individuals to own a firearm. Such a right was an essential part of the conservative agenda. However, because he was a textualist, Justice Scalia could not find a way to reconcile the first part of the Second Amendment with the second part. Scalia's solution

---

England under the Stuart Kings, prompting codification of the right of Protestants to have arms in the English Bill of Rights. Id. p. 809, n.96.

was simply to ignore the first part. He wrote that the first clause was merely a "prefatory clause" that announced the purpose of the amendment ("to prevent elimination of the militia") and that the second clause was the "operative clause," because it guaranteed an inalienable right to keep and bear arms without regard to whether or not it related to a "well-regulated militia." Even that solution had its problems. If the prefatory clause announced the purpose of the operative clause, then that necessarily meant that the second clause was directly linked to a militia and had nothing to do with individual self-defense. However logical the linkage between the Amendment's purpose and the "operative clause" might be, Scalia never mentioned it in his opinion. Instead, Scalia rewrote the Second Amendment: "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right [of bearing arms]; most undoubtedly thought it even more important for self-defense and hunting." Really? If so, the "prefatory" purpose clause was woefully deficient and its words needed to be expanded judicially, a textualist sin.

Scalia claimed, without proffered basis, that when the Second Amendment was ratified in 1791, this was how people read it. Scalia argued that the phrase "the people" meant "the people individually" and not collectively, as they would be in a militia, because in the First and Fourth Amendments, the phrase "right of the people" referred to them individually, whereas the phrase "the militia" referred only to a subset of "the people."

Scalia agreed that the real purpose of the Second Amendment was to prevent the government from abolishing militias by talking arms away from "the people." His evidence was that in the 1760s and 1770s, George III attempted to disarm the inhabitants of the most rebellious areas of the colonies. But even this explanation is insufficient to explain Scalia's

interpretation of the Second Amendment. If only white men under the age of 45 could join a militia, why would "all Americans" (his phrase) be entitled to keep and bear arms? Even though it is clear that the purpose of keeping arms was to insure the viability of a "well-regulated militia," only two pages of the sixty-four in the *Heller* majority opinion discuss a "well-regulated militia," which Scalia defined as including militias not yet in existence and only militias that had "proper discipline and training." As to the phrase "security of a free State," Scalia said that it did not refer to States as we know them, but to "states" as a "polity." Presumably that means that under the Second Amendment, any group of people with "proper discipline and training" could establish a "well-regulated militia" and bear arms if they chose to do so

Scalia also found that the right to keep and bear arms was a "pre-existing right" because it came from our English forebears. His support was a passage in Joseph Story's *Commentaries on the Constitution of the United States* stating that the English bill of rights of 1688 provided that "protestants, may have arms for their defence suitable to their condition and as allowed by law." Yet Story made it clear that in fact the passage had fallen into desuetude: "But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." Even if Story's assessment was lacking, Scalia's textualism could not have found the necessary words in the Second Amendment.

In effect, Scalia and his conservative colleagues simply rewrote the Second Amendment in order to preserve an absolute right enjoyed by the "people" to possess a firearm. And not just a handgun, but any modern weapon such as an M-16 military rifle that served the same general purposes as the firearms that existed at the time of the Second

Amendment.[6] The differences between an M-16 and a musket did not deter Scalia. He noted that "it may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause." But he rejected that analysis:

> It may well be true that today a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the fit between the prefatory clause and the protected right cannot change our interpretation of the right.

In this one sentence, Scalia overruled an earlier Supreme Court opinion, *United States v. Miller*, which held that the only "arms" protected by the Second Amendment were those "in common use at the time." Scalia wrote in *Heller* that "whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." So much for originalism, much less textualism.

It is worth pausing for a moment to understand Justice Scalia's methodology. As a true textualist, he tried to interpret the words. He did not even try to ascertain the founders' intent. According to Scalia—but not necessarily the founders—the "people" whose rights were being created by the Second Amendment were all members of the political community. In his opinion, Scalia wrote that "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." Wasn't it for the purpose of preserving a "well-regulated militia?" What about freedmen who were former black slaves? They could not join a militia and were not permitted to

[6] As a former Captain in the U.S. Army, Paul Saunders attests that the M-16 is a weapon of war not designed for self-defense but as an offensive weapon designed to kill as many of the enemy as quickly as possible.

"bear arms." What about existing slaves? Were they not "people?" What about women, who were not then voting members of the "political community" and were not permitted to join militias? Could they "keep and bear arms?" [7]

The infamous *Dred Scott v. Sandford* decision of 1861 answered some of those questions. Chief Justice Roger Taney wrote that "[People of African ancestry] are not included and were not intended to be included, under the word 'citizens' in the Constitution and therefore can claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. . . . If they were so received . . . it would give to persons of the negro race the right . . . to keep and carry arms wherever they went, . . . inevitably producing discontent and insubordination among them . . .". Indeed, after the Civil War, "systematic efforts" were made to disarm blacks.

In the *Bruen* case discussed below, many of the amicus briefs cited Justice Taney's passage as additional proof that the Second Amendment permitted "carrying" arms. Fair enough. But what this passage really refers to is whether, when Justice Scalia held that the right to keep and bear arms "belongs to all Americans," he included freedmen, former slaves, current slaves and non-voting women. It is virtually impossible to conclude that he intended to exclude these groups. Assuming that he intended to include them, how is such an outcome to be reconciled with textualism or originalism? Justice Taney, at least, took the position that "negros," who were brought to the United States involuntarily, whatever their current situation, had no rights whatsoever under the Second Amendment. Justice

[7] Although it is not a part of this essay, it should be noted that the oft-cited claims that the Second Amendment and "gun control" were "racist" has largely been de-bunked. Historian Patrick Charles reminds us that although the militias were often used as "slave patrols" and were the racially oppressive version of the common law *posse comitatus*, there were many instances of military service by people of color, both slave and free, during the Revolutionary War. Patrick J. Charles, Racist History and the Second Amendment: A Critical Commentary, 43 Cardozo L. Rev. 1343 (2022).

Scalia did not directly address the question when he spoke of "a right that belongs to all Americans."

Scalia's attempt at originalism was unique, perhaps because he did not really adopt it. He did not care what the founders intended when they wrote the words of the Amendment; at most, he asked what the words must have meant at the time. He called this the "original public meaning." Scalia called the Second Amendment the "greatest vindication of originalism." Despite the fact that Scalia made it clear in the past that he did not believe in a "living" Constitution (Scalia once told a group of college students that the Constitution "isn't a living document. It's dead, dead, dead!"), Scalia was not always consistent. As we have seen, there were times when his opinions were very much a reflection of what he thought Americans believed today, not two hundred years ago.

In fact, shifting the time frame deemed to be determinative was the only way he could reconcile the carrying of arms that did not and could not have existed at the time the Second Amendment was written. As Michael Waldman pointed out in his landmark book *The Second Amendment: A Biography*, Scalia's philosophy "appears motivated more by animus to the politically liberal interpretations he saw driving notions of the evolving Constitution. In fact, Scalia put those words in the lexicon of the liberals: "If it is good, it is so. Never mind the text we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause." And Scalia "picked and chose when to focus on the text, when to plumb the thinking of the Founders, when to rely on precedent." He wrote in one of his books that "As I have explained, *stare decisis* is not part of my originalist philosophy; it is a pragmatic *exception* to it." And he would often add "I am a textualist. I am an originalist. I am not a nut."

The *Heller* opinion was widely criticized by liberal and conservative scholars alike. Not only did the Court abandon nearly two hundred years of precedent to the contrary, but it created its own version of the Second Amendment; only the second clause was operational; the militia clause was window dressing. Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals wrote that "In *Heller*, the majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in more than two hundred years since the amendment's enactment." Judge Richard Posner of the Seventh Circuit called the opinion "questionable in both method and result."

Heller was one of the first Supreme Court cases that created or prohibited rights for apparently political, or at least non-constitutional reasons. Later opinions eliminated a ban on corporations making large contributions to candidates for election, eviscerated the Voting Rights Act as an impermissible "racial entitlement," and nearly killed the Affordable Care Act. Behind all of these decisions, either explicitly or by implication, was the assertion that a claimed right is not consistent with the Constitution unless it is explicitly stated in the text of the document or is consistent with our "history and tradition."

The origin of the phrase "text, history and tradition" is often attributed to then Judge Brett Kavanaugh when he sat on the DC Circuit Court and dissented in the *Heller II* case even though it appeared in earlier opinions written by other judges.

Kavanaugh wrote that "In my view, *Heller* and *McDonald* (a subsequent case in which the Court held that the Second Amendment applied to the states under the Fourteenth Amendment) leave little doubt that courts are to assess gun bans and regulations based on

text, history and tradition . . .". He was correct; this test is now a central part of the Supreme Court's jurisprudence, for better or worse.

The Gun Case

This brings us to the Court's recent decision in *New York State Rifle & Pistol Association v. Bruen.* In that case, decided on June 23, 2022, the Supreme Court set aside New York State's 121-year-old Sullivan Law that made it a misdemeanor for an individual over age 16 to have or carry concealed upon his person in any city or village [of New York] any pistol, revolver or other firearm without a written license . . . issued to him by a police magistrate." In 1911, the law was expanded to apply to the possession of all handguns—concealed or otherwise—without a government-issued license. Possessing a loaded firearm outside one's home or place of business without a license was a felony. In order to obtain a license to carry a firearm outside the home or place of business, the applicant must demonstrate that "proper cause" exists, generally considered to be a demonstration of a "special need for self-protection distinguishable from that of the general community." The Supreme Court held that the more than a century-old law was unconstitutional.

In an opinion written by Justice Clarence Thomas and concurred in by all of the other conservative Justices, the Court expanded the *Heller* decision to create a Constitutional right to carry arms in public for self-defense. The explicit basis for the decision was that the regulations in question burdened the right of armed self-defense and that "individual self-defense is the central component of the Second Amendment right." If you find that somewhat confusing, you are not alone. For starters, *Heller* did not speak of self-defense outside of the home, and second, the words "self-defense" do not appear in the Second Amendment. Self-defense is plainly at odds with the Second Amendment's

initial clause that Scalia found to be "prefatory". The incantation of that term does not relegate the language to meaninglessness—especially when the jurist is an avowed textualist.

Instead of interpreting the text of the amendment, Justice Thomas revisited the history of gun regulation. He repeated his position that nothing in the English history relied on by the *Heller* Court suggested that English law would have justified restricting the right to publicly carry arms for self-defense. This notwithstanding Justice Story's conclusion that the rights afforded to protestants who wished to carry arms for self-defense were more "nominal than real."

With respect to the history of the Colonies, the Court found that "there is little evidence of an early American practice of regulating public carry by the general public." Justice Thomas brushed off two Massachusetts and New Hampshire statutes that authorized the arrest of persons "[who] shall as such ride or go armed Offensively . . . by Night or by Day, in Fear or Affray of Their Majesties Liege People." Notwithstanding amicus briefs by highly qualified Professors of History and Law who made it clear that the word "offensively" referred to the carry of "dangerous or unusual weapons," Justice Thomas concluded that they misunderstood the statutes, which "merely codified the existing common law offense of bearing arms to terrorize the people . . . " even though the words of the statutes do not support that conclusion, but rather suggest that what was being prohibited was "going armed Offensively . . . in fear [of other people]," which suggests self-defense.

Justice Thomas's explanation should not have taken readers by surprise. It was the same view that he expressed in his concurring opinion in an earlier gun case, *McDonald v.*

City of Chicago, decided in 2010. That case held that the Fourteenth Amendment of the Constitution made the Court's earlier *Heller* decision applicable to the states. Unlike the other Justices, Thomas believed that when the Fourteenth Amendment was adopted in 1868, it automatically applied all of the "privileges and immunities of citizens of the United States" to the states, without regard to the Second Amendment since, according to Thomas, one of those "privileges and immunities" protected by Section 1 of the Constitution was the "inalienable right" to bear arms. According to Justice Thomas, that was a pre-existing right that was a fundamental right enjoyed by the colonists in their capacity as English citizens. Accordingly, there was no reason to explain the relationship between the first and second sentences of the Second Amendment, since the right to bear arms was already an "inalienable right of all men."[8] Although Thomas's majority colleagues did not agree with his concurring opinion in the *McDonald* case, they remained silent in *Bruen*.

Perhaps for that reason, the Court held that the respondent State of New York did not carry its burden of identifying a "tradition" justifying New York's "proper cause" requirement and, for that reason alone, the majority concluded that individuals had a constitutional right to carry firearms in public, whether or not concealed, for the purpose of self-defense. Why, you might ask, was the burden New York's to carry? New York State was the defendant. Does this mean that in the future, when states decide to regulate the sale and use of firearms, they must show that their regulation was part of this Nation's "history and tradition?" Probably, but that burden will be impossible to carry if Justice Thomas's

[8] As authority, Thomas cited the Statement of Rep. Madison proposing a Bill of Rights in the First Congress, 1 Annals of Cong. 431-432 and No. 84 of the Federalist Papers.

view—that the "inalienable" right to bear arms preceded the existence of the Constitution—remains the law.

From these two cases, it is easy to see that the "text, history and tradition" test has become a favorite vehicle for conservative Justices either to uphold or strike down a constitutional right. Again, what is particularly disconcerting about this test is that the application of the test is largely, if not entirely, in the eye of the beholder and dependent on those parts of our "history and tradition" the beholder includes and excludes. One person's "history and tradition" is another person's "outlier."[9]

Justice Stephen Breyer's dissenting opinion, joined in by Justices Elena Kagan and Sonia Sotomayor, is a tour de force. With respect to Justice Thomas's "history" test, Breyer points out that not a single Court of Appeals has adopted his "rigid history-only approach." To the contrary, he notes, every Court of Appeals to have addressed the question has adopted the traditional two-step framework. "We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade." Breyer continued: "I am not a historian, and neither is the Court. But the history, as it appears to me, seems to establish a robust tradition of regulations restricting the public carriage of concealed firearms. To the extent that any uncertainty remains between the Court's view of history and mine, that uncertainty counsels against relying on history alone."

[9] It is worth noting that one of the amicus briefs, filed on behalf of a group of "Second Amendment Law Professors," made a powerful argument that the proper tests were "strict scrutiny" if the regulation burdened the Second Amendment and "intermediate scrutiny" if it did not. Justice Thomas rejected that argument out-of-hand and wrote that "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."

It appears that, unlike the abortion case discussed below, the Supreme Court has made it virtually impossible for any city or state legislature to regulate the possession or carrying firearms anywhere in this country, whether indoors or outdoors, except in "sensitive places such as schools and government buildings" and we do not know whether firearms carried in churches, mosques and synagogues, subways, airplanes, movie theaters, restaurants and hospitals are included in this exemption's "sensitive places".

However, the final chapter of this exegesis of the Second Amendment might not have been written. On October 27, 2022, in *United States v. Jessie Bullock*, a case concerning whether the federal statute prohibiting felons from possessing firearms, 18 U.S.C., § 922(g)(1), is unconstitutional, a federal district court judge from the Southern District of Mississippi, Carlton W. Reeves, issued an order asking the parties "whether it should appoint a historian to serve as a consulting expert in this matter." The Court's rationale was that "Scholars continue to debate the evidence of historical precedent for prohibiting criminals from carrying arms" and that "this Court is not a trained historian [and that] the Justices of the Supreme Court, distinguished as they may be, are not trained historians. . . . In reviewing the briefing and authorities presented in this case, and after conducting its own research, this Court discovered a serious disconnect between the legal and historical communities. Simply put, [t]he firearms history that appears in law journals and court briefs is not the firearms history familiar to many mainstream historians."[10] Meanwhile, open carry of firearms is the law of the land, at least at the moment, and many states have already eliminated their firearms regulations entirely. Stay tuned!

[10] Citing Jennifer Tucker, et al, A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment, (2019).

The Abortion Case

This takes us to the next case in the Court's remarkable run of decisions overruling precedent, *Dobbs v. Jackson Women's Health Organization,* decided on June 24, 2022, the Mississippi abortion case. Here we can see the "text, history and tradition" test in full bloom.

The word "abortion" is not mentioned in the Constitution and neither is the word "woman," but in *Roe v. Wade,* the Court held that the right to an abortion is implied in the Due Process Clause of the Fourteenth Amendment. The Court noted that although the Constitution does not mention any right of privacy, the Court had earlier recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, exists under the Constitution. Citing cases such as *Griswold* (contraception) and *Loving* (inter-racial marriage) among many others, the Court reaffirmed that there is a constitutional right to privacy although it only applied to personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." Further, the *Roe* Court held that whether the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty or in the Ninth Amendment's reservation of rights to the people, it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Chief Justice Rehnquist's dissent took issue with the Court's decision to break pregnancy into three distinct terms and to outline the permissible restrictions that the State may impose on each one, because it "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." He noted that at the time the Fourteenth Amendment was adopted in 1868, there were 36 laws enacted by state or territorial legislatures limiting abortion. His conclusion was that the drafters of

the Fourteenth Amendment did not intend to "withdraw from the States the power to legislate with respect to this matter." As we will see, that is precisely what *Dobbs* now permits.

In a subsequent case preceding *Dobbs*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reexamined its decision in *Roe* and reaffirmed that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.

We need to take a moment to understand exactly what is "due process of law," and in particular "substantive due process." Recall that a principal purpose of the Fourteenth Amendment, which came shortly after the end of the Civil War, was to protect individual rights from being taken away by the states. Although the Fifth Amendment also spoke of due process, it applied only to action taken by the federal government. The Fourteenth Amendment prohibited the states from depriving "any person of life, liberty, or property, without due process of law."

There are three types of rights that are protected by the Amendment: procedural due process, the rights mentioned in the Bill of Rights that have been "incorporated" or applied to the states, and substantive due process. Substantive due process is by far the most difficult and contentious of the elements because it is basically a methodology to determine which unenumerated rights are nevertheless protected by the Fourteenth Amendment. For example, in the now infamous *Lochner v. New York* case in 1905, the Court struck down economic regulations that were meant to create better working conditions for workers, on the ground that they violated the workers' "freedom of contract"

even though those words cannot be found in the Fourteenth Amendment. The case was roundly criticized because it appeared that the Court was overstepping its authority. The case was not repudiated until 1937, in the *West Coast Hotel v. Parrish* case.

Determining which rights are protected by substantive due process is difficult; Justice John Harlan once acknowledged that discerning such rights "has not been reduced to any formula" and must be left to "case by case adjudication." In *Washington v. Glucksberg,* decided in 1997, the Court said that substantive due process rights must be "deeply rooted in the Nation's history and traditions" and "implicit in the concept of ordered liberty." But that formulation did not last long, and it essentially disappeared in the *Obergefell* same-sex marriage case of 2015.

The *Casey* Court probably began the trend that was reflected in *Obergefell* by noting that

> neither the Bill of Rights not the specific practices of the States at the time the Fourteenth Amendment was adopted marked the outer limits of such liberty and therefore the adjudication of substantive due process claims may require the Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.[11]

Perhaps the most important aspect of *Casey* for this discussion is its treatment of precedent and *stare decisis.* The *Casey* Court was taking on directly the question whether the essential holding of *Roe* should be retained. *Roe* was clear precedent and "settled law." Must such clear precedent and settled law be followed or may it be ignored and overridden?

The legal doctrine known as *stare decisis* translates as "to stand by things decided." At their Confirmation Hearings in the US Senate, Justices Neil Gorsuch, Brett Kavanaugh

[11] Of course, it would be assumed that a Court's decision to exercise "reasoned judgment" would be limited by Lord Tom Bingham's expectation that "discretion should not be unconstrained so as to become potentially arbitrary."

and Amy Coney Barrett were asked, in one form or another, whether they believed that *Roe* was precedent and "settled law." All responded "yes." Some, especially Justice Barrett, referred to *stare decisis*, a subject she has written about at some length. What exactly is it? The term *stare decisis* came from the common law and in general, it refers to the fact that courts often look to earlier decisions as precedent to be followed. It was not always so. In twelfth century England, for example, it was virtually impossible for a judge to look to precedent since most judicial decisions were not committed to writing.

However, in time, almost all judicial opinions were in writing and contained in law reports, making them easier to follow. Judges began to refer to precedents as binding, largely through the efforts of Lord Edward Coke, who was the Chief Justice of the King's Bench in the early seventeenth century. There were, however, many exceptions to this principle, since Lord Mansfield declared in the eighteenth century that precedent was evidence of the law, but was not "law itself." During the early days of Colonial America, the principle that judges should follow precedent was weakened because of a belief that law should be mutable in order to deal with the requirements of a changing society.

When the Constitution was being drafted, much attention was devoted to the Supreme Court and lower courts and their role in the new government. This focus is especially evident in large parts of the Federalist Papers, especially those written by Alexander Hamilton. Of particular interest to this discussion was Hamilton's argument in Federalist Paper 78 that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .". Note the words "bound by . . . precedents."

Many, including the legal history scholar Dr. William Treanor, the dean of the Georgetown University Law Center, have used that passage to reinforce the principle that *Roe* was binding precedent under *stare decisis* and that even for originalist justices like Justice Samuel Alito, "originalist judges must follow precedent . . . Which means that, as the court potentially reconsiders precedent like *Griswold, Loving, Lawrence, Obergefell* and *Grutter* it should remember that, for a true originalist, settled law is settled law." None other than Justice Joseph Story wrote convincingly in his *Commentaries on the Constitution* that "the conclusive effect of judicial adjudications . . . was in the full view of the framers of the constitution." In other words, they understood that Justices of the Supreme Court should follow their own precedent. But was that a command or a wish?

There are two types of *stare decisis*: vertical and horizontal. The former applies to lower courts that are required to follow precedent set by superior courts. The latter applies to whether judges should follow precedents set by their own court, which is more problematic. Horizontal *stare decisis* is precatory, not mandatory. Nevertheless, in his book *Reading Law,* Justice Scalia wrote that *stare decisis* is an "exception to textualism (as is any theory of interpretation) born not of logic but of necessity. Courts cannot consider anew every previously decided question that comes before them. *Stare decisis* has been part of our law from time immemorial, and we must bow to it."

The *Casey* Court dealt directly with horizontal *stare decisis* and concluded that the *Roe* precedent should be followed. "The obligation to follow precedent begins with necessity and a contrary necessity marks its outer limit." The Court wrote that the very concept of the rule of law requires continuity over time, and that continuity demands that precedent should be followed. The "contrary necessity" typically comes into play only if a

prior judicial ruling is seen as clearly erroneous. While it is true that many Supreme Court decisions have recognized following precedent as a "demand," is also true that the Court has, from time to time, recognized exceptions. Justice Alito's opinion in *Dobbs* suggests that "clearly erroneous" may be one of them.[12]

In making its decision with respect to whether or not to overrule *Roe*, the *Casey* Court looked at four factors: Was *Roe*'s central rule found to be unworkable? Could its limitation on state power be removed without serious inequity to those who have relied on it or significant damage to the stability of the society governed by it? Has the law's growth in the intervening years left *Roe*'s central rule a doctrinal anachronism discounted by society? Have *Roe*'s premises of fact so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable?

The only one of those factors that was given a quasi-affirmative response by the *Casey* Court was the change in the premises of fact. Medical advances since *Roe* made it possible to advance viability of a fetus earlier than *Roe*'s 28-week test and for that reason, the *Casey* Court advanced the date on which the state's interest in fetal life was constitutionally adequate to justify a legislative ban on non-therapeutic abortions to the date of "attainment of viability," whenever it occurs.

Although normally consideration of factors such as those four would be sufficient for the Supreme Court to decide whether or not its own precedent should be followed under

[12] For many years, "conventional wisdom" was that "a purported demonstration of error is not enough to justify overruling a past decision." Even Justice Scalia believed that "the doctrine [of *stare decisis*] would be no doctrine at all if it did not require overruling judge to give reasons . . . that go beyond mere demonstration that the overruled opinion was wrong." Recently, Professor Caleb Nelson has argued that a blanket presumption against overruling precedent is "too facile" and that eliminating the presumption would "not unduly threaten the rule of law." Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Virginia L. Rev. 1 (2001).

the principle of *stare decisis*, the *Casey* Court went further and discussed two preceding cases in the Supreme Court that presented similar issues of national controversies, *Lochner v. New York*, and *Brown v. Board of Education*. In each of those two cases, the Court applied the principles later adopted by the *Casey* Court. Of those two, only *Brown*, like *Roe*, called on both sides in a national controversy to end their division and to accept a common mandate rooted in the Constitution. *Casey* would be the third. The *Casey* Court wrote that

> Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed . . . the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. . . .[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first place. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. . . The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure . . . .The price may be criticism or ostracism, or it may be violence.

And the Court reminded us that in an earlier case, Justice Stewart had written that "a basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of or Government." In its conclusion, the *Casey* Court wrote that

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

Unfortunately, that is not the end of the story. The role of *stare decisis* in today's Supreme Court is very much up for grabs. For example, Justice Amy Coney Barrett, one

of the leading scholars on *stare decisis*, has made it clear in her writings that *stare decisis* does not mean that the Supreme Court must always follow precedent. In fact, nothing in the Supreme Court's rules or practice requires that precedent be followed at all. The unspoken secret is that, as a practical matter, Justices are free to follow precedent or not since they have life tenure and can only be impeached for treason, bribery, high crimes and misdemeanors, no one of which is "failing to follow precedent."

Of course, when long-standing precedent is characterized by the Court as "egregiously wrong from the start," it makes the Court that decided the prior case so wrongly look not only foolish, but overtly political, as even Justice (then Professor) Barrett has acknowledged:

> If the Court's opinions change with its membership, public confidence in the Court as an institution might decline. Its members might be seen as partisan rather than impartial and case law as fueled by power rather than reason. . . . that is why Supreme Court nominations are an issue in presidential elections. [To be fair, she went on to say that] a change in personnel may well shift the balance of views on the Court with respect to constitutional methodology. . . . [Yet this] does not itself render the overruling illegitimate, as criticisms of overruling sometimes suggest.

Nevertheless, it is worth remembering that, in the words of Professor Richard H. Fallon, Jr. of Harvard Law School,

> Article III [of the Constitution]'s grant of 'the Judicial Power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication. The constitutional authorization is itself part of 'the supreme Law of the Land' . . . The legitimate authority of the Supreme Court to apply a principle of stare decisis in constitutional cases can be supported at least partly on grounds of acceptance and reasonable justice and prudence . . . .Within constitutional practice, stare decisis has acquired a lawful status that is partly independent of the language and original understanding of the written Constitution. [In other words, the Court would have been well within its practice and procedure to let *Roe* remain the law of the land because] it would overwhelm Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history.

And then along came *Dobbs v. Jackson Women's Health Organization*.

Dobbs shredded beyond any recognition the principle of *stare decisis* articulated so clearly by the *Casey* Court and in many prior Supreme Court decisions. In *Dobbs*, the State of Mississippi passed a law prohibiting abortions beyond fifteen weeks of pregnancy. The petition to the Supreme Court for a writ of certiorari asked the Court to rule on only three issues: whether all "pre-viability prohibitions on elective abortions are unconstitutional," whether the validity of such a law should be analyzed as an "undue burden" or under the balancing of burdens and benefits, and whether abortion providers have standing to invalidate the State's new law. The petition did *not* ask the Court to overrule *Roe v. Wade* and when the petition was granted, the Court limited its review only to the first question concerning the constitutionality of *Roe's* pre-viability prohibitions. However, when its main brief was filed, the State of Mississippi changed its position and asked the Court to overrule *Roe*; in response, the Court agreed and changed the question at issue to "whether the Constitution, properly understood, confers a right to obtain an abortion." In a flash, a relatively minor case of judicial interpretation became a case of epic proportions, constitutionally speaking.

The Court's majority opinion was written by Justice Samuel Alito, who had been trying to outlaw abortions since he was a young lawyer in the Department of Justice. In 1985, he was asked to advise the Solicitor General about the positions that he should take in *Thornburgh v. American College of Obstetricians and Gynecologists*, a case in which the Third Circuit held that Pennsylvania's Abortion Control Act was unconstitutional in part. The Supreme Court had agreed to hear Pennsylvania's appeal. In his memorandum, Alito noted that the fact that in deciding to take the case, the Supreme Court may be signaling an inclination to cut back. What can be made of this opportunity to advance the

goals of bring about the eventual overruling of Roe v. Wade, and, in the meantime, mitigating its effects? Alito's recommendation was that the Solicitor General should take a subtle approach: "I find this approach preferable to a frontal assault on Roe v. Wade. It has most of the advantages of a brief devoted to the overruling of Roe v. Wade: it makes our position clear, does not even tacitly concede Roe's legitimacy, and signals that we regard the question as live and open." Justice Alito's own words establish that he had been trying to overturn *Roe* since he was 35 years old.

Justice Alito's opinion held that at the time the Constitution was being written, abortion "was not rooted in the Nation's history and tradition" and that the right to receive an abortion was not an essential component of "ordered liberty." It was not protected by the Fourteenth Amendment.

Even at first blush, these conclusions obviously conflicted directly with earlier Court decisions that had found there was a Constitutional "right of personal privacy" that included the "right to make and implement important personal decisions without governmental interference" and that abortion was grounded in the Fourteenth Amendment's Due Process Clause. Alito's explanation was blunt and totally ignored Chief Justice Roberts' plea that Justices should recognize that "they operate within a system of precedent shaped by other judges equally striving to live up to their judicial oath." Of his predecessors, Alito wrote that "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences." So much for the legal research capabilities of Justice Blackmun, who wrote the majority opinion in *Roe*, or those of the other Justice who joined in his opinion.

The principal basis for the *Dobbs* decision was said to be "text, history and tradition." The text of the Constitution does not mention abortion and Justice Alito asserted that until the latter part of the 20th Century, there was no support in American law for a right to obtain an abortion. In fact, Justice Alito wrote, abortion had been a crime in every state as well as under common law. This inaccurate recital of history and tradition was plainly a cornerstone of the Court's willingness to throw *Roe* aside as precedent and was all that the majority of the Court evidently believed it needed to overrule *Roe*. So, too, "settled law," *stare decisis* and precedent meant nothing based on Justice Alito's conclusion that *Roe* was "egregiously wrong from the start" and suffered from "exceptionally weak reasoning." If the right to an abortion is not in the text of the Constitution or in our history or tradition, it simply is not a right guaranteed by the Constitution. When Alito wrote that *Roe* was "egregiously wrong from the start," he clearly meant that abortion had never been a part of the "text, history or tradition" of the United States Constitution or our Nation's historical experience.

Although it not the purpose of this essay to chronicle the history of the regulation of abortion in the United States (many historians have already taken on that task), it is important to understand the respects in which Alito's history is fundamentally misleading and wrong. In that respect, he was inaccurate.

Saints Augustine and Jerome, both of whom lived in the Second Century, differentiated between an *embryo informatus* (i.e. prior to its having a soul) and an *embryo formatus* (after the fetus was endowed with a soul). Although neither knew when the endowment occurred, they would not punish abortions that took place prior to that time. The Catholic Church used Aristotle's assessment that "ensoulment" occurred within 40 to

80 days after conception and as a result by the Twelfth Century, medical schools, such as they were, began to teach the techniques and practice of abortion. Later in that century, Saint Thomas Aquinas articulated the doctrine of "quickening" (i.e. the moment at which the woman can feel the movement of the fetus) and Aristotle's 40/80 rule was no longer necessary.

By the Sixteenth Century, Sir Edward Coke had incorporated the notion of "quickening" into English common law and as a result, abortion before "quickening" was not unlawful. Later, Blackstone's *Commentaries on the Laws of England* made the point clearly; abortion before quickening was not a crime because "Life . . . begins in [the] contemplation of law as soon as an infant is able to stir in the mother's womb." Later English statutes imposed minor penalties for pre-quickening abortions but the American colonies continued to accept the common law provision that permitted pre-quickening abortions. This is an important fact, since Justice Alito asserted that prior to *Roe* there was no "history or tradition" of permissible abortion of any type in the United States.

Indeed, prior to 1821, there was no American statute that prohibited abortion (before or after quickening) or provided for the prosecution of abortion. This bears repeating: Abortion was not unlawful anywhere in the United States when the Constitution was written, when the War of 1812 was being waged, during the lifetime of James Madison and during all but four years of the life of Thomas Jefferson. "History and tradition?"

It was not until 1821 that Connecticut passed the first anti-abortion statute prohibiting post-quickening abortions. In the next twenty years, seven additional states prohibited abortions by statute, but the prohibitions only applied to post-quickening

abortions. The rest of the states had no prohibitions at all. The abortion trade flourished. Abortifacients were advertised and abortion clinics were established.

In 1847, a man named Horatio Robinson Storer began a campaign to make abortion illegal. He was initially scoffed at but his attempt continued and took hold in 1857. According to one of the amicus briefs submitted to the Supreme Court by the American Historical Association and the Organization of American Historians, "Storer believed that abortions were endangering what he saw as the ideal America: a society of white Protestants in which women adhered strictly to their proper 'duties'—marriage and childbearing." Storer convinced the American Medical Association to join his cause, giving him a method of reaching physicians, governors and legislators nationwide. By 1868, five states enacted new anti-abortion laws. Nevertheless, "By the time the Fourteenth Amendment was ratified in 1868, nearly half of the states retained some vestige of the common law: in eleven states abortion remained legal before quickening and of the twenty-six remaining states, seven imposed a lesser punishment."

The amicus brief concludes: "These historical findings confirm that *Roe*'s central conclusion was correct: American history and traditions from the founding to the post-Civil War years included a woman's ability to make decisions regarding abortion, as far as allowed by the common law."

Missing almost entirely from the majority opinion in *Dobbs* were the historical facts described above. That history was as much a part of this Nation's history and tradition as statutes prohibiting abortion but it is not mentioned in Justice Alito's opinion. Nor does Alito acknowledge that for more than the fifty years since *Roe*, abortion was very much a part of the Nation's "history and tradition."

It remains to be seen what each of the states will do, now that the Supreme Court has passed the baton to them. Some, like New York, will continue to permit abortions and will welcome women from other states who cannot receive them in their home states. Other states have "trigger" laws that prohibit abortion—sometimes even in cases of rape or incest or maintaining the life of the mother—that came into effect as soon as *Roe v. Wade* was overturned.

Chief Justice Roberts concurred only in the Court's judgment, not in its reasoning. He reminded the majority that the Court granted certiorari only to consider "whether pre-viability prohibitions on elective abortions are unconstitutional" and not to decide whether or not *Roe v. Wade* should be overturned. His concurrence preferred a more measured course, addressing only the trimester approach of *Roe* that *Casey* already essentially discarded. In his view, the right of a woman to choose to terminate a pregnancy "should extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability." He reminded his colleagues that "if it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."

Justice Alito was unmoved. He wrote that Chief Justice Roberts does not claim "that the right to a reasonable opportunity to obtain an abortion is 'deeply rooted in this Nation's history and tradition and is implicit in the concept of ordered liberty.'" Notably, despite his misgivings, Roberts still voted with the majority. The vexing question is that in light of his misgivings, why didn't he dissent? Because he chose not to, his vote counted. But what was he voting for? Recall that the judgment of the Court was that "the judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings *consistent with this opinion.*" (Italics added.) The majority opinion overruled *Roe*, something Roberts

said that he was against doing. Was he just "calling balls and strikes"? It strains the most nuanced metaphysics to reconcile his objections to the length to which the majority went and the jurisprudential basis for his objections with his concurrence in the judgment. Again, his vote counted, but what did it mean?[13]

Perhaps the most troublesome part of the *Dobbs* decision is Justice Thomas's concurring opinion, which attacks head-on the substantive due process portion of the Fourteenth Amendment's jurisprudence. In his view, "substantive due process is an oxymoron that lacks any basis in the Constitution. . . . Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion." For that reason, Thomas says, the Court "should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence* and *Obergefell* . . . . 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." If that happened, it would obviously create a firestorm and perhaps that is why no other Justice joined Thomas's dissent.

The principal takeaway from *Dobbs* is that the states will now be able to decide for themselves whether abortion is legal and that many states will say "yes" and many will say "no." There will be follow-on litigation concerning issues such as the right to travel from

[13] The issue of the Court's remand is somewhat complicated. 18 U.S.C. § 2006 gives the Supreme Court and any other court of appellate jurisdiction the power to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." Here, the court of appeals did not rule on the constitutionality of *Roe v. Wade*; it only considered whether Mississippi's 15-week statute is consistent with *Roe.* The constitutionality of *Roe* was never before the court of appeals. *Roe* may have been constitutional at the time of the appeals court decision, but since *Roe* is no longer the law, what should the court of appeals do? Merely strike down the 15-month statute? Or hold that under *Dobbs*, there may be no abortions in Mississippi at all, even that question was never before it? The answer remains unclear.

one state to another to receive an abortion, but it is unlikely that we will soon hear about abortion again from the Supreme Court. As President Obama said, "elections have consequences."

There is another takeaway. The assertion that an unspecified right must be a part of our "history and tradition" before it can be guaranteed gives the six conservative justices *carte blanche* to deem anything to be a right or not as they choose to view that history and tradition. There is no objective test; there is no subjective test; there is in fact no workable test at all. As we have seen, saying that abortion was never a part of this country's "history and tradition" despite the fact that it was allowed for the first thirty five years after the country's birth and the last fifty years of its existence conflicts directly with Chief Justice Roberts' assertion that judges do not "pitch or bat." While it could fairly be said that they should not, they obviously do, as *Dobbs* clearly demonstrates.

The Environmental Protection Agency Case

The *West Virginia v. Environmental Protection Agency,* decided on June 30, 2022, case might be the most historically significant of all of the Court's 2021-2022 Term cases. We will try our best to simplify this complicated case but first we will attempt to put it in context.

The federal government of the United States is essentially governed on a day-to-day basis by administrative agencies. In fact, there are so many of them that the federal government itself cannot even say how many such agencies there are. (For example, the US Government Manual lists 316 and the Federal Register Agency List includes 440). Most agencies are authorized by Congress to conduct their work and make regulations and are populated by government employees who are experts in their fields, unlike most in

Congress. Nevertheless, for several decades, culminating during the administration of President Trump, there has been a concerted attack from conservatives, particularly extreme conservatives, against the so-called administrative state. In fact, President Nixon attacked the federal bureaucracy and President Reagan made "regulatory relief" a cornerstone of his campaign. The Trump administration promised to "deconstruct the administrative state" and his budgets reduced funding for many nonmilitary agencies.

Nevertheless, for many years, the federal judicial system, and in particular the Supreme Court, appeared to remain above the fray. In fact, far from trying to reign in the administrative state, the Court actually gave it considerable freedom. In the landmark 1984 case *Chevron USA, Inc. Natural Resources Defense Council,* the Supreme Court faced the question of under what circumstances courts should defer to an agency's interpretation of a statute. Obviously agencies like the EPA know far more about what they are doing and why than legislators or judges do. The Supreme Court came up with the following solution: when a legislative delegation to an administrative agency on a particular issue is not explicit, but rather implicit, a court may not substitute its own interpretation of the statute if the agency has made a reasonable interpretation. If the agency's action was based on a reasonable construction of the statute, that is the end of the matter. This is known today as "*Chevron* deference."

However, conservative judges, especially those who wanted to bring down or limit the administrative state, did not like the principle of *Chevron* deference. When he was a judge on the Tenth Circuit Court of Appeals, now Justice Neil Gorsuch attacked *Chevron* deference mercilessly:

Chevron permits executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little

difficult to square with the Constitution of the framers' design. . . . *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. . . . When does a court independently decide what a statute means and whether it has or has not vested a legal right in a person?

Gorsuch's Senate Confirmation Hearing was basically a debate between the Democrats and the Republicans over the doctrine of *Chevron* deference. We now know that was just the beginning. In fact, *Chevron* deference has been on life-support for many years; the Supreme Court has not applied the principle at all in the past six years.

In the 1994 case *MCI Telecommunications Corp. v. AT&T,* the Supreme Court was asked to decide whether the Federal Communications Commission had the authority to relieve certain long-distance carriers from filing tariffs so that only AT&T would be subject to filing them. The agency had statutory authority to modify the tariff requirement in its discretion. The Supreme Court rejected the FCC's interpretation, concluding that it was "highly unlikely that Congress left the determination whether an industry would be entirely rate-regulated to agency discretion." This case marked the beginning of something that later became known as the "major-questions doctrine." At the time, it was regarded as an expansion of the *Chevron* deference doctrine because learning whether the issue was "major" might help courts determine whether the language of the statute at issue was plain and unambiguous. As one court put it, Congress "does not hide elephants in mouseholes."

In 2015, the EPA promulgated the Clean Power Plan rule addressing carbon dioxide emissions from existing coal and natural-gas-fired plants. For its authority to do so, the EPA cited Section 111 of the Clean Air Act, which had been initially enacted in 1963. The Clean Air Act, hundreds of pages long, is the primary federal air quality law and is one of this country's most influential modern environmental laws. The Act that was at issue in the *West Virginia* case was an amended version of the original act and was enacted in 1970.

Section 111 of that Act controls air pollution from stationary sources such as power plants. It does so in three principal regulations, one of which was the New Source Performance Standards Program and was at issue in this case. This part of the statute directs the EPA to list categories of stationary sources that it determines cause or contribute significantly to air pollution that may be reasonably anticipated to endanger public health or welfare. The EPA must then promulgate standards of performance for new sources. These standards must reflect

> the degree of emission limitation achievable through application of the best system of emission reduction ["BSER"] which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated.

In addition, Section 111(d) of the statute authorizes regulation of certain pollutants from existing sources. This provision was referred to as a "gap-filler" provision because it authorized the EPA to regulate harmful emissions not already controlled under other provisions of the law. Other parts of Section 111 authorized the EPA to shift electricity production from higher-emitting to lower-emitting producers. This was referred to as "generation shifting."

In its proposed Clean Power Plan, the EPA determined that the "best system for emission reduction" included "heat rate improvements," "generation shifting" from coal plants to natural gas plants, and shifting from coal and gas plants to renewables such as wind and solar.

In 2016, the Court stayed the Clean Power Plan in one of its "shadow docket" decisions (i.e. without briefs or argument). After President Trump was elected, it was repealed and replaced by a new EPA regulation under Section 111(d) that was known as the Affordable Clean Energy Rule and that pursuant to which a BSER would be based on

a combination of equipment upgrades and operating practices that would improve a facility's heat rates.

Why, you might ask, would the Supreme Court take up a case whose principal issue had already been resolved by the agency in question? The Solicitor General asked the same question during her oral argument. The EPA had stated clearly that it did not intend to enforce the Clean Power Plan. But the Supreme Court had something else in mind. Invoking the "mootness" doctrine, the Court held that a "voluntary cessation" does not make a case moot unless it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur" and that is obviously a subjective, not an objective, test.

We now know that the Supreme Court took the case because it wanted to recognize and fully adopt the "major-questions" doctrine.

Here is how Chief Justice Roberts put it:

> [I]n certain extraordinary cases, both separation of powers principles and practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.

Here, the EPA found its authorization in the so-called "gap filler" portion of Section 111, but Roberts concluded that this was merely the assertion of a "highly consequential power beyond what Congress could reasonably be understood to have granted. Under our precedents, this is a major-questions case." In other words, even if the statute seems to grant the agency the authority to regulate, a court may nevertheless set the regulation aside if it concludes that Congress could not have meant what it said in the words of the statute or did not express itself with a degree of clarity deemed sufficient. As Justice Gorsuch

repeated in his concurring opinion, "When an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." This would apparently be the case even if the statute passed by Congress did exactly what the Court "presumed" Congress would not do.[14] Once the regulation is set aside by a court, it is up to Congress to attempt to revise the legislation in order to satisfy a reviewing court. This would not be "textualism," it would be judicial legislation.

Of interest is that although the doctrine of *Chevron* deference was lurking in the background, the Court's majority opinion never mentioned it. As a practical matter, the "major questions doctrine" may replace *Chevron* deference, but the *Chevron* deference doctrine is still alive, at least as a technical matter. But the *EPA* case clearly gives courts the authority, on their own, to decide whether the agency in question was following a "clear congressional authorization" in taking action, without deferring to the agency's interpretation of that question.

The dissent, written by Justice Kagan, was full of outrage. She pointed out that nothing in the Clean Air Act or any other statute conflicts with the EPA's reading of the clear language in Section 111 nor did anything in the now-defunct Clean Power Plan conflict with Congress's design. And she said that there was no support at all for the Court's claim that the EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. In fact, she wrote, the Supreme Court has already recognized that Congress had "delegated to EPA" in

[14] Gorsuch made that clear when he noted that "the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an 'obscure, never-used section of the law'." He did not say that the statute did not give the agency the authority that it used.

Section 111 "the decision whether and how to regulate carbon-dioxide emissions from powerplants" in the *American Electric Power* case.

In a lecture at Harvard Law School several years ago, Justice Kagan remarked that "we are all textualists now." She has since corrected herself:

> It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major-questions doctrine" magically appear as get-out-of-text cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority and it suffuses the concurrence [by Justice Gorsuch].

She ended her dissent in fear of the future: "[L]et's say the obvious: The stakes are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon emissions. The Court appoints itself—instead of Congress or the expert agency—as the decision-maker on climate policy. I cannot think of many things more frightening."

There are several takeaways from this case. First, courts can now decide, with no concrete standard to guide them, that a federal agency's action constitutes a "major question" and can summarily set the action aside. This will make Congress's job exponentially more difficult. No longer will Congress be able to rely solely on the agencies to make regulations based on their own scientific and technical expertise. Congress will now be required to be extra-careful and specific in drafting legislation, not an easy task, especially in these hyper-partisan days.

Second, once a court declares the existence of a "major question," the agency bears the burden of proving that it acted on the basis of a "clear congressional authorization." If the agency does not submit proof of such a "clear congressional authorization" (another subjective test) for the agency's regulation, it may no longer act. The Supreme Court did

not define how "clear" the Congressional rule-making must be in order to pass muster, nor whether any material other than the statutory text may be taken into consideration by a court in making the decision as to whether the authorization is a "clear congressional authorization."

Third—and perhaps the most significant—this may be the beginning of the imposition of a doctrine that conservative justices and others have been talking about for several years, the doctrine of "non-delegation." Are there matters that Congress may not delegate to any other entity and if so, how should such matters be defined?

In 2017, Columbia Law School Professor Gillian Metzger wrote that "dismissing the present anti-administrative movement as a passing craze with little long-term impact would be a mistake" and with considerable prescience, she predicted the result in *West Virginia*: "Challenges to administrative adjudication on the horizon may portend more dramatic judicial decisions, and some seemingly limited constitutional challenges could yield significant administrative disruption."

In his concurring opinion, Justice Gorsuch affirmed that prediction and addressed the non-delegation doctrine head-on:

> Like Chief Justice Marshall, we all recognized that the Constitution does impose some limits on the delegation of legislative power . . .And while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a meaningful say in the laws that govern them. . . . In our Republic, it is the peculiar province of the legislature to prescribe general rules for the government of society.

Of course, Chief Justice Marshall died in 1835, 52 years before the first permanent federal administrative agency, the Interstate Commerce Commission, was established in 1887. In any event, we now have a Supreme Court that has gone from "calling balls and strikes" to "it ain't nothin' till I call it." There will undoubtedly be similar challenges to

come. In fact, in the days following the release of the *West Virginia* decision, the State of Texas filed several challenges to agency decisions and more are expected. Fasten your seat belts.

The Religion Cases

In its two religion cases, the Supreme Court continued its recent evisceration of the Court's 60-year history of interpreting the First Amendment's command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The current Court is tilting far more toward religion than any of its recent predecessors. In order to understand the significance of the Court's most recent decisions—one of which was plainly wrong on the facts—it is necessary to understand the two clauses of the religion portion of the First Amendment and their relationship. The first clause essentially builds a wall between "church and state," making sure that the state was neutral when it came to religion, and could not favor one religion over another. The second clause bars all governmental restraint on religion and religious practices. The two clauses are meant to work together, but as the Court itself has recognized, there is some "play in the joints" between them. Justice Breyer puts it this way: "That 'play' gives States some degree of legislative leeway. It sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion." Apparently, according to the Court's conservative majority, Justice Breyer was wrong, as we will see in a moment.

In the first of its religion cases, *Carson v. Makin,* decided on June 21, 2022, Maine had enacted a tuition assistance program for high school students who lived in school districts that did not have a public secondary school. The students and their parents could

use the tuition assistance grant to pay the tuition at a private school, so long as the private school was approved. To become approved, the school had to be accredited by the New England Association of Schools and Colleges and meet certain curricular requirements.

In 1981, Maine changed the rules and required that the approved school must be "a nonsectarian school in accordance with the First Amendment of the US Constitution." Maine was concerned that its tuition assistance program might violate the Establishment Clause of the First Amendment, even though in 2002, the Supreme Court held, in *Zelman v. Simmons-Harris* that a benefit program that allows citizens to direct their payments to religious schools did not violate the Amendment so long as the aid was a result of the parents' "genuine and independent choice." Nevertheless, the Maine program stayed in place with its 1981 change.

In a majority opinion written by Chief Judge Roberts for the usual six-justice majority, the Court held that the Maine program violated the Free Exercise Clause of the First Amendment and that Maine's decision to continue to exclude religious schools from the assistance program "promotes stricter separation of church and state than the Federal Constitution requires." In other words, there is no "play in the joints." As the Court recently held in *Espinoza v. Montana Dept. of Revenue*, a State's "interest in separating church and State 'more fiercely' than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise. . . ." Once again, "more fiercely" is a subjective test. And the Court added that a State's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause."

In *Carson,* the Court said that "a State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." However, in a case decided in 2004, *Locke v. Davey,* the Court did just that and upheld a Washington State prohibition on using a tuition assistance payment to pay for the training of a minister. When reminded of that decision by the dissenters, Chief Justice Roberts explained that the limitation was upheld against a free exercise challenge because "the State had merely chosen not to fund a distinct category of instruction." This explanation seems unsatisfactory since more than "funding a category of instruction" was involved. Accordingly, Justice Breyer, as one might expect, fired back, reminding the Chief Justice that the *Locke* Court had written that there are

> few areas in which a State's antiestablishment interests come more into play than state funding of ministers who will lead their congregations in religious endeavors. There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children.

Justice Sotomayor was nearly beside herself: "What a difference five years makes. In 2017, I feared that the Court was 'lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.' Today, the Court leads us to a place where separation of church and state becomes a constitutional violation."

What are the takeaways from this decision? There are several. First, the Establishment Clause is severely weakened, if not put entirely out of its misery. The Court holds that if a state funds secular activities, it must also fund similar religious activities. And the funding requirement is not limited to schools. Any state spending, for example on social welfare programs, that has a sectarian component must treat both sectarian and non-sectarian component alike.

A second major takeaway is that it is now very clear that the Establishment Clause, if it has any viability left, is taking a back seat to the Free Exercise Clause. There is no longer symmetry between the two. For the first time in nearly eighty years, the government not only *may* but *must* fund religious institutions if it is funding similarly situated non-religious institutions that are engaged in the same activities.

The third takeaway is that there is no difference between excluding religious entities because of their status and excluding religious entities because of their use. Although earlier Court opinions such as *Trinity Lutheran v. Comer* and *Espinoza v. Montana Department of Revenue* suggested such a distinction, *Carson* makes it clear that there is no such distinction:

> Those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. . . [E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. . . Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.

The fourth takeaway is that the century-old theory that states could purchase textbooks for use in religious and public schools alike because they benefited the students, not the religious institution (called the "child benefit" theory) has been replaced by a theory that recognizes and in fact applauds a benefit flowing from the state through an intermediary to the religious institution itself.

The final takeaway is that the so-called *Lemon* test is dead. In *Lemon v. Kurtzman* decided in 1971, the Court struck down a Pennsylvania statute that paid parochial school teachers' salaries and a Rhode Island law that supplemented their salaries. The Court

articulated a three-part test for determining whether or not such statutes complied with the First Amendment or constituted "excessive entanglement" between church and state.

The first part of the three-part test was determining whether the statute has a secular legislative purpose. The second part was whether the statute's principal or primary purpose advanced or inhibited religion. The third part was whether the statute fostered an excessive government entanglement with religion.

The *Lemon* test was later modified in *Agostini v. Felton* in 1997. The Court retained the first two parts of the test, but replaced the third part with three additional criteria to determine the effect of the payment. Did the program create religious indoctrination? Are recipients chosen on the basis of religious criteria? Does the program create excessive entanglement between religion and government? Some academics described the new test as one of "neutrality."

The *Carson* case did not replace the *Lemon* test with a new test, but a careful reading of the opinion suggests that it continues the "neutrality" principle. Chief Justice Roberts said as much: "Maine's administration of the benefit is subject to the free exercise principles governing any such public benefit program—including prohibitions on denying the benefit based on a recipient's religious exercise."

The second of the Court's religion cases was *Kennedy v. Bremerton School District*, decided on June 27, 2022, Joseph Kennedy was a high school football coach who had spent two decades in the Marine Corps before becoming a coach. For many years, he engaged in the practice of saying a few prayers after each game. He did so on the field, after the players had exchanged handshakes when the game was over. He knelt on the fifty-yard line and prayed for about thirty seconds. After a while, his players joined him and the

number grew until it included most of his team and even some players from the opposing teams. Seven years after the practice began, an employee from another school remarked favorably about Kennedy's practice to Bremerton's principal. The result was a letter from the principal to Kennedy complaining about his prayers with the players on the field and also about his prayers with the players in the locker room. The principal was concerned that Kennedy's prayers in a public-school setting might violate the Supreme Court's school prayer cases. The letter outlined what Kennedy could and could not do. After a while, Kennedy decided that he could not comply with the requirements in the letter and he continued his practices even though some of them were now prohibited. He was ultimately fired and brought suit against the School District.

This case contained several apparently erroneous facts, as noted above, that probably influenced the Court's decision. For starters, Justice Gorsuch's majority opinion made it appear as if Kennedy's prayers were undertaken alone, "during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied."

That description appears to drive the result of the case, which overturned Kennedy's dismissal, but as Justice Sotomayor clearly showed through photographs that were reprinted in her dissenting opinion, it was not true. The photos show Kennedy standing in the middle of a crowd of kneeling players while holding a football helmet aloft, with a group of players whose heads were all bowed along with his, and who were kneeling in a prayer circle around the Coach. Nevertheless, Justice Gorsuch's majority opinion was

primarily based on the individuality of the football coach's prayer activities, occurring nearly in solitude:

> Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment.

Was the coach was actually engaging in a "brief, quiet, personal religious observance" or was he was acting in his capacity as a public-school teacher who was "leading students in prayer," which the Supreme Court prohibited in *Engle v. Vitale* sixty years ago. The photographs clearly suggest the latter, but they did not reveal whether the players freely chose to participate in the coach's solitary activity or whether his position crossed the line through undue influence.

In the *Engle* case, the Court prohibited "school sponsored" prayer in public schools. The prayer in question, created by the New York State Board of Regents, was short: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, out teachers and our Country."

The majority opinion, written by Justice Hugo Black, held that "government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people." Justice Potter Stewart, the lone dissenter, referred to the many examples of religious influences in our society, such as "In God We Trust" on money and "God Save This Honorable Court" spoken when the Supreme Court goes into public session.

Nevertheless, *Engle* and its follow-on decision, *Abington School District v. Schempp,* decided in 1963, striking down Bible-reading and reciting the Lord's Prayer in

public schools, drew substantial criticism. The decisions were among those that gave birth to a religious-right movement and were ignored in many public schools.

Later Supreme Court cases outlawed "moments of silence" in public schools on the ground that they were being undertaken with an improper sectarian purpose (*Wallace v. Jaffree*, 1985), prayer at a middle-school graduation ceremony (*Lee v. Weisman*, 1992), and student-led recitals of prayer at public-school football games (*Santa Fe Independent School District v. Doe*, 2000). The rationale for most of these decisions was that school-sponsorship of a religious message sent a message to non-adherents that they are outsiders, not full members of the political community, and that the insiders were favored members of the community. Other cases turned on whether there was a secular purpose for the prayer or whether school prayer was a form of improper coercion.

It is clear from those cases that students themselves may pray while in school, so long as the prayers are not disruptive and do not infringe on the rights of other students. But the same has not been true of teachers and football coaches. If their prayer is "organized" or sponsored by the school, it is prohibited, at least it was before the *Kennedy* decision.

The *Kennedy* decision upsets all of that precedent and has given rise to a debate as to whether teachers and coaches may pray out loud in front of their students—especially if it appears that the prayer is part of their duties. Take Coach Kennedy as an example: he was the ultimate leader of the sports teams; he prayed with his players in the confined space of a locker room and in the middle of the football field after the game, surrounded by kneeling players who were also praying. Is that "personal" prayer or is it a practice that the school prayer cases clearly prohibited because of undue influence? If we look only to our

"history and tradition" to answer that question, the answer would almost certainly be that proselytizing Christian prayer is allowed in all public schools, since at the time the Constitution was being written, most schools were Christian in orientation. Recall that when written, the Establishment Clause applied only to the federal government, not to the states, many of which had established religion and promoted the teaching of the Christian religion in their public schools. Yet for more than fifty years, this "history and tradition" was not mentioned in any Supreme Court case, nor is it mentioned in the *Kennedy* case.

Kennedy leaves many unanswered questions and will almost certainly lead to a renewal of prayer in school by teachers who are praying in front of their students "personally" and "quietly" while the students are "speak[ing] with a friend or call[ing] for a reservation at a restaurant." But if the Kennedy Court's conclusion is based on our "history and tradition," that is not apparent from the majority's opinion. Apparently "A foolish consistency is the hobgoblin of little minds."

Justice Sotomayor was having none of it. She reminded her colleagues that ever since *Engle v. Vitale* in 1962, the Court made it clear that "the Constitution does not authorize, let alone require, Kennedy's behavior, which included kneeling, bowing his head and saying a prayer in the center of a school event. . . [Since then,] this Court consistently has recognized that school officials leading prayer is constitutionally impermissible." Accusing her colleagues of "ignoring history" and "misreading the record," she also noted that the Court has now explicitly overruled its earlier *Lemon* test and has replaced it with an interpretation of the Establishment Clause that must include "reference to historical practices and understandings." Once again, the conservative majority of the Court has

replaced earlier, well-understood bright line tests with "history and tradition" whose applications are in the eye of the beholder.

Sotomayor continued:

> Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections of religious liberty for all . . . [T]he Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty.

The takeaway from this case is that the long-time prohibition of sponsored or "organized" school prayer in public schools is greatly diminished, if not gone. Now, teachers and coaches have First Amendment rights to pray out loud, at times and places of their choosing, surrounded by their kneeling students, at least if they do so "personally" and "quietly" however those terms are applied to the facts.

Once again, the Court has held that the Free Exercise Clause of the First Amendment is far more important than the Establishment Clause and that, in the words of George Washington Law School Professors Ira Lupu and Robert Tuttle, "Religion always wins. . . and in almost every case, the religion is Christianity." Although we may see more school-prayer cases in the future, we may not hear much more from the Supreme Court on this issue for a while.

Conclusion

The cases discussed in this essay are troublesome on several different levels. They display a Supreme Court that appears to have become more ideological and partisan in the Nation's socio-political debates. It is a Supreme Court that also appears to be determined to remake more large swathes of American jurisprudence than ever before, at least in recent

memory. As we have seen, the new "text, history and tradition" test for the creation of a right recognized under the Constitution allows the Court to create—or eliminate—constitutional rights as suits the majority, without any meaningful regard for precedent or *stare decisis*. As a separate, co-equal branch, the Court is free to create or refuse to create any rights that it deems appropriate, merely because in the Court's sole judgment, America's "history and tradition" recognized (or didn't) such rights. Gun rights and abortion rights are but two recent examples; there will be more, as Justice Thomas's concurring opinion in *Dobbs* predicts.

Similarly, the Court's new application of the "major-questions doctrine" gives any federal court the free reign to declare that any administrative regulation null and void solely because the court concludes that Congress could not have meant what it said or didn't express itself clearly enough when it delegated rule-making power to the agency in question. This leaves it up to Congress to revise its delegation legislation to make it crystal clear that it did in fact intend to delegate such power, a huge challenge in today's environment. In other words, the Court is taking unto itself the power to validate or eviscerate any regulation that it perceives to have been improperly delegated, almost without regard to what the words of the delegation actually say, or what Justice Kagan called a "get out of text" card.

The Court's religion cases lead to a somewhat different conclusion, although they are similar to the gun and abortion cases in that they ignore precedent and *stare decisis*. Those cases seem to reflect the Court's belief that the "Free Exercise Clause" of the First Amendment of the Constitution should take precedence over the "Establishment Clause." No longer is there a "wall of separation" between church and state; under certain

circumstances, the state may now permit funding of religious schools and may promote school prayer in public schools in broad circumstances. One could argue persuasively that the current makeup of the Court, and not the application of neutral principles, explains such an outcome. Of special interest is the fact that in these cases, the conservative majority of the Court did not mention the "text, history and tradition" test as a basis for its opinion. Why not?

These conclusions reflect some of the most partisan—and we submit potentially dangerous—results and rationales that we have seen since *Plessy v. Ferguson* ("separate but equal" was sufficient for public schools that separated black and white students) and represent a clear warning that the Supreme Court is not an entity whose members wear blinders when they decide cases. They now in fact "pitch and bat" and it is clear that, notwithstanding Chief Justice Roberts's statements to the contrary during his Confirmation Hearing, today's Justices—at least a majority of them—have ideologically-motivated agendas after all. The Supreme Court is a neutral arbiter with less frequency and is now increasingly through its decisions a determinative player in the Nation's most heated socio-political debates. The Court's composition for the coming term suggests that this direction will continue.

Perhaps the most important of the Court's upcoming cases is *Moore v. Harper*, a case arising out of North Carolina, in which the Court will consider whether the Constitution's provision that "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" means that such legislatures are not constrained by the normal procedures and limitations contained, for example, in their constitutions or traditions, and are free to regulate federal elections as they choose, with no external review.

If permitted after more than two hundred years of contrary practice, this theory, known as the "Independent State Legislature" theory, could, in the words of one of the Respondents' briefs, "wreak havoc on election administration nationwide, and embroil federal courts in endless state-law disputes." Under the theory, state constitutions would not be able to impose any limits at all on state legislatures' regulation of congressional elections, creating uncertainty about what state courts and state executives can do in federal elections. The ability of states to reallocate power between their own governmental branches would be in jeopardy. It is a theory that has led the highly-regarded and very conservative retired federal appeals court Judge J. Michael Luttig to observe that "Such a doctrine would be antithetical to the Framers' intent, and to the text, fundamental design, and architecture of the Constitution."[15]

***

We conclude with the words of the noted law school dean and professor Erwin Chemerinsky:

> Now is the time to get past the debate over originalism and non-originalism and focus instead on a far more consequential question. What meaning for the words of the Constitution would advance the noblest goals of a modern, democratic, pluralistic society, and how should that meaning be applied in specific cases? The Constitution has always been, and will always be, about balancing the majority's values against the values that should be protected from societies majorities. That is what every Supreme Court opinion concerning the Constitution should be about, and what scholars and commentators on constitutional matters should consider first and last. Everything else is a distraction.[16]

[15] J. Michael Luttig, There is Absolutely Nothing to Support the 'Independent State Legislature' Theory, The Atlantic, October 3, 2022.

[16] Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism, Yale University Press (2022).