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U.S. Supreme Court Check-In: One Monumental Term Rolls Into Another

Catherine Hawke

"Seismic" may be the most apt description of the conclusion of the 2021-22 U.S. Supreme Court term. In recent years, changes in the Court membership and a string of decisions and opinions caused tremors that signaled potential for momentous changes in the nation's legal and constitutional landscape. And as the Court released its final opinions this June, ruling on cases involving abortion, gun rights, the administrative state, and religious freedom, it triggered an earthquake that has already led to legal, political, and social aftershocks that show no signs of diminishing.

A Look Back at the Last Year

Many of the Court's rulings this past term centered on long-standing precedent, with the Court narrowing or overturning a number of landmark cases. In particular, the Court took a deep look at: *Roe v. Wade* (protected abortion rights), *Lemon v. Kurtzman* (established the *Lemon* test to determine whether government actions violate the Establishment Clause), and *Chevron v. Natural Resources Defense Council, Inc.* (established the main test in administrative law to determine whether an agency action is owed deference by a federal court reviewing that action). As Elizabeth Slattery, senior legal fellow at the Pacific Legal Foundation, noted for *ABA Supreme Court Preview*:

> *Roe*, *Lemon*, and *Chevron* have all been criticized as being inconsistent with the original public meaning of the Constitution. Given the increase in self-professed originalists on the Court, pressure to overrule those decisions has mounted. The Court's treatment of *Roe*, *Lemon*, and *Chevron*, however, demonstrates two very different approaches to overturning precedent: death-by-one-thousand-cuts or something closer to ripping off the Band-Aid. A third option is to leave the precedent undisturbed, and readers—like justices—will disagree about when that is appropriate. Nevertheless, there are different consequences for the rule of law regarding the approach the Court uses when it does overrule precedent, and it is prudent to consider what they are.

This term, the Court applied those different approaches to its precedent, with differing results and public reaction.

Dobbs v. Jackson Women's Health Organization

It is impossible to review the last term without mentioning the Court's ruling in *Dobbs v. Jackson Women's Health Organization*, directly overturning *Roe*. In 1973, the Court in *Roe* held that the right to

abortion was constitutionally protected. Subsequently, in 1992, the Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, announced an "undue burden" framework, which meant that a state could only restrict abortion so long as the restrictions did not create an undue burden on a woman's right to obtain an abortion prior to viability (around gestational week 23–24).

Dobbs involved a direct challenge to *Roe* after Mississippi enacted a law prohibiting abortions performed after 15 weeks' gestation, with limited exceptions for medical emergency or severe fetal abnormality. The Court upheld the Mississippi law, and in the process, directly overturned *Roe*. Writing for the majority, Justice Samuel Alito explained,

> *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."

And according to the majority, abortion was not one of those deeply rooted rights.

Chief Justice John Roberts voted with the majority, although in doing so, he offered a detailed concurrence noting that he would have upheld the Mississippi law on much narrower grounds which would have saved *Roe*, at least on paper. The Chief Justice argued,

> Whether a precedent should be overruled is a question "entirely within the discretion of the court." In my respectful view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely. The Court says there is no "principled basis" for this approach, but in fact it is firmly grounded in basic principles of stare decisis and judicial restraint.

Justices Steven Breyer, Sonia Sotomayor, and Elena Kagan issued a stinging joint dissent (a rare occurrence at the Court) which walked through the half century long history of *Roe*. The dissent then detailed the real-world consequences of the Court's holding, noting that "Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty."

Kennedy v. Bremerton School District

Three days after announcing that *Roe* was no longer the law of the land, the Court continued to knock down precedent when it released the decision in *Kennedy v. Bremerton School District*. *Kennedy*, brought by a high school football coach who was told he could not lead prayers on the field after games, was the final nail in the coffin for the long-standing, and much maligned, *Lemon* test. The *Lemon* test, which had existed since 1971, was applied to determine whether a state action dealing with religion violated the First Amendment's Establishment Clause. The test asked a court to look at the law's purpose, effects, and potential to create entanglements between the state and religion.

In writing for the majority and ruling in favor of the coach, Justice Neil Gorsuch reviewed the criticism of the *Lemon* test from lower courts and from the Supreme Court itself. According to Gorsuch, the "'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot." The process by which the Court "abandoned" *Lemon*

(Bill Clark/CQ Roll Call via AP Images)

People kneel and pray as Christian singer/ songwriter Sean Feucht performs outside the Supreme Court following the ruling that a former Washington State high school football coach had the right to pray on the field after games, June 27, 2022.

harkens back to the "death by a thousand papercuts" noted by Elizabeth Slattery above. In issuing the final blow to *Lemon*, Justice Gorsuch announced a new standard for reviewing claimed violations of the Establishment Clause:

> an analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence."… In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."

West Virginia v. EPA

On the last day of the term, the Court issued a decision that is likely one of a "thousand paper cuts" in the slow death of a long-standing precedent, *Chevron v. Natural Resources Defense Council, Inc. Chevron* announced a deferential standard (referred to as *Chevron* deference) whereby judges defer to a federal agency's reasonable interpretation of ambiguous statutory language. Like the now-obsolete *Lemon* test, the *Chevron* deference has long been the subject of criticism, and, after this term, its longevity appears to be limited.

West Virginia v. EPA asked the Court whether the Environmental Protection Agency (EPA) had authority under the Clean Air Act to enact its Clean Power Plan. The Plan was announced by the Obama Administration in 2015; the Plan set limits on carbon emissions and pushed high-polluting energy sources to shift to lower pollution options like natural gas. A group of states and energy industry groups sued, claiming the EPA had exceeded the

(Photo by Bryan Olin Dozier/NurPhoto via AP)

Climate activists gather outside the Supreme Court in Washington, D.C., on February 28, 2022, during arguments in *West Virginia v. Environmental Protection Agency.*

authority granted by Congress through the Clean Air Act.

In a 5-4 decision, the Court slotted this case into a small exception it had previously created to the *Chevron* deference—the "major questions" doctrine. Under the doctrine, if an agency is making a decision that will have a major political or economic implication, it must have "clear congressional authorization." Thus, due to its sweeping impact, the Clean Power Plan would have to get congressional approval to be implemented.

After determining that *Chevron* did not apply in this case, the Court left open how lower courts should review agency decisions that implicate "major questions." After all, the lower courts in *West Virginia v. EPA* disagreed on this question. We can expect to see much litigation attempting to clarify the correct standard for judges to apply. And there is a very good chance that the Supreme Court will use this future litigation to continue to chip away at *Chevron* with the potential to one day overturn another long-standing precedent.

A Look Ahead

The term that starts in October 2022 will likely prove to have just as many blockbusters and potentially sweeping rulings on, for example, environmental law, higher education's affirmative action practices, and voting rights.

Sackett v. EPA

On the first day of the term, the Court will hear the next step in an ongoing legal battle between a family in Idaho and the federal government. The Sacketts own a residential lot in Priest Lake, Idaho, that the Environmental Protection Agency claimed was subject to the Clean Water Act (CWA) as "navigable waters." This designation prevents the Sacketts from being able to build a home on the land. In a previous case, nearly 20 years

ago, the Supreme Court held that the Sacketts *could* bring a challenge to this designation, and so they did. And now, in this second trip to the Supreme Court, the Sacketts argue that the lower court used the wrong test when determining whether the relevant wetlands were "waters of the United States."

Although seemingly technical, the Biden administration argues that a ruling in favor of the Sacketts would "seriously compromise the CWA's comprehensive scheme by denying protection to many adjacent wetlands—and thus the covered waters with which those wetlands are inextricably linked." The Court's ruling has the potential to either greatly limit or expand the EPA's reach over the nation's water and wetlands.

Affirmative Action Cases

At the end of October, the Court will once again wade into a topic frequently before the justices: affirmative action in higher education. Throughout the years, the Court has consistently upheld colleges and universities using affirmative action in admissions, although with some caveats. The Court has prohibited straight racial quotas for decades but has allowed universities to consider race as one of many factors in the admissions process. However, given the recent changes in the Court's membership, particularly the retirement of Anthony Kennedy and the death of Ruth Bader Ginsburg, the future of such admission programs is up in the air.

The lower courts ruled in favor of Harvard and UNC, finding that the universities' use of race during the admissions process was narrowly limited for the purposes of meeting the universities' compelling interest in diversity.

In these current challenges, anti-affirmative action advocacy groups sued Harvard and the University of North Carolina (UNC). The challengers claimed that Harvard's admissions policies discriminate against Asian American students and that the policies in place at UNC discriminate against Asian American and white students. The lower courts ruled in favor of Harvard and UNC, finding that the universities' use of race during the admissions process was narrowly limited for the purposes of meeting the universities' compelling interest in diversity. The Supreme Court will determine whether it should overrule its previous affirmative action rulings on the basis that affirmative action programs violate either the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Right Act.

One interesting note on the fact that there are two cases being heard separately (the Court often hears multiple cases on similar issues at once—referred to as consolidated cases): Justice Ketanji Brown Jackson had previously said that she would recuse herself from the Harvard case as she served on the board that advised the university on its policies. However, by hearing the two cases separately (even if on the same day), Justice Brown will likely be able to participate in the North Carolina case. What this means for the outcome is yet to be seen, but it is worth noting that the order to keep the cases separate was issued in July after Justice Brown had been sworn in (although Justice Brown took no part in the consideration of that order).

Merrill v. Milligan* and *Merrill v. Caster

While the 2020 Census was underway, much of the commentary urging individuals to be counted focused on ensuring that everyone was appropriately represented in our elections and recognizing the lasting implications of electoral redistricting. As the Census results started to come in, many states began the often politically fraught process of redrawing their electoral districts. In Alabama, the state released a new map for its U.S. House of Representatives districts. The

map originally called for one majority-Black district out of the seven total districts.

Voters and civil rights advocates challenged the map in court, claiming that the proposed map packed too many Black voters into the majority-Black district and scattered (or in voting rights lingo, cracked) the remaining Black voters over the other districts, diluting their power as a voting bloc to elect their chosen candidate. The lower federal court found that the proposed map likely violated Section 2 of the Voting Rights Act and ordered the state to draw a new map with two majority-Black districts. In early 2022, Alabama asked the Supreme Court to put the lower court's order on hold (to issue an injunction) while the underlying challenges could be resolved; the Court agreed in a 5–4 decision along traditional partisan lines.

The Supreme Court will now have the chance to determine whether the original Alabama plan, with one minority-majority district, violated Section 2 of the Voting Rights Act. Although voting rights cases can often seem technical and focus on statistics and probabilities, in its amicus brief, the Constitutional Accountability Center notes that a ruling in favor of Alabama would have the potential for "substantial minority populations in multiple States [to] lose their ability to elect representatives to Congress. And a similar pattern could play out in state legislatures, unwinding decades of racial progress."

The 2022 term has the potential to continue some of the trends we saw during the 2021 term as the justices dig into issues fundamental to our system of government. Whether the Court takes the opportunities to issue more earth-shattering rulings or whether it issues rulings that are much more limited in scope (and political aftershocks) is yet to be seen.

All of these cases highlight how seemingly technical legal questions have broad, very obvious, implications for larger issues affecting our society. They offer opportunities for discussions of civics, government, and the Constitution, through current events, grounded facts, and relevant questions. If you're interested in using current U.S. Supreme Court cases in your teaching, visit www.supremecourtpreview.org for resources.

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