State Bar of Michigan, Government Law Section / Michigan Association of Municipal Attorneys
22nd annual summer educational conference
Grand Traverse Resort, June 25, 2022

Supreme Court Update(The Square Root of) 25 or Six-to-Three

Supreme Court Review, October Term 2021
Presented by James Ming Chen (Michigan State University)

Prologue: It's hardly an overstatement to describe the 2021 Term as one of the most contentious and controversial in recent memory. Given the suddenness with which the Court reached some of its decisions — and, perhaps paradoxically, the still pending status of several key decisions — I will circle back and complete this outline after this weekend's events. I've also chosen to write these comments as an outline instead of PowerPoint slides.

You may write me at chenjame@law.msu.edu if you have any questions after today's presentation. I will make sure that the organizers of today's program can send an updated version of this outline to all registered participants. *Updated:* July 3, 2022.

The (positive) square root of 25, of course, is 5. This Term delivered decisive wins to the 5G agenda in the culture wars: God, guns, gays, gynecology, and gerrymandering. So much so that this Term's rather striking results in criminal justice (which I'll cover) and the phantom menace of the independent state legislature doctrine (which I won't) take a back seat to a potential blow to the foundations of the modern administrative state. Perhaps the fifth "G" should be recast as "government," at a high level of abstraction.

Let's progress through the rest of the culture war "G's" in reverse order:

- Gynecology: *Dobbs*. We could devote all 90 minutes of our program to this single case.
- Gays: The implications of *Dobbs* for other substantive due process decisions, including:
    - *Lawrence*, which decriminalized sodomy
    - *Obergefell*, which legalized same-sex marriage
- Guns: *Bruen* and "proper cause" gun licensing
- God: An aggressive version of free exercise and establishment clause jurisprudence
    - *Carson v. Makin*, the Maine school voucher case
    - *Kennedy v. Bremerton School District*, the case of the praying football coach
- Government: *West Virginia v. EPA* may have the longest-lasting consequences of all the decisions in this very influential Supreme Court Term

Dobbs v. Jackson Women's Health Org., No. 19-1392, managed to rock the political and social landscape of the United States, even though its outcome had been implicitly and explicitly telegraphed. Implicitly, in the guise of the Court's refusal to enjoin Texas's scheme for private enforcement of bounties against those who perform abortions or assist in the performance of abortions. *Whole Women's Health v. Jackson*, No. 21-463.

In May, a leak of Justice Alito's draft decision represented the most significant breach of the Court's traditions of confidentiality. The Chief Justice ordered the Marshal of the Court to conduct an investigation.

In reality, though, *Dobbs* and the overruling of *Roe v. Wade* had been set in motion by the appointments of Neil Gorsuch and Amy Coney Barrett to the Supreme Court. Those two appointments, plus that of Brett Kavanaugh, surely rank among the most consequential legacies of the Trump presidency. Of note is the diminished role of Chief Justice John Roberts in this Term's most prominent decisions (besides *Carson v. Makin*).

Dobbs explicitly overruled *Roe v. Wade* and the 1992 decision that supplanted its trimester framework with the "undue burden" standard, *Casey v. Planned Parenthood*. Chief Justice Roberts tried in vain to confine *Dobbs* by upholding the Mississippi abortion law as a measure that permitted abortion within the first 15 weeks of pregnancy. But *stare decisis* knows no refuge in a jurisprudence of culture war. Taking advantage of Justices Gorsuch and Kavanaugh's aggressive approach to precedent in *Ramos v. Louisiana*, Justice Alito characterized *Roe* as egregiously wrong, damaging, and an abuse of judicial authority.

Dobbs confines substantive due process protection to only those rights recognized at the time of the ratification of the 14th amendment (1868). Abortion fails this standard because it had never attained this level of historical support. Justice Alito also rejected alternative efforts to recast the right in *Roe* as an expression of equal protection. *Cf. Geduldig v. Aiello*.

Dobbs's new rational basis standard would uphold nearly every conventional restriction on abortion: gestional age, waiting periods, disclosure of information regarding fetal development, and the like. States are not obliged to make exceptions for rape, incest, or even the life or health of the mother. Although *Dobbs* as a state-law restriction had no occasion to ponder the constitutionality of a hypothetical federal statute banning abortion — or, for that matter, codifying *Roe* as a federal statute — it would be trivially easy to rationalize a federal abortion ban as an exercise of Congress's power to regulate interstate commerce. *But cf. NFIB v. Sebelius*.

Because only five of the Court's 6-3 conservative majority joined Justice Alito's opinion, any concurrence by a member of this coalition might be considered critical in the tradition of Justice Powell's solo opinions in *Branzburg v. Hayes* and *Bakke v. Regents of the University of California*. An opinion expressing *narrower* grounds for decision is likelier to attain critical status. *Cf. Marks v. United States*.

The Kavanaugh concurrence in *Dobbs* is therefore more likely to be critical and consequential in its impact on lower courts and on future Supreme Court controversies. Justice Kavanaugh emphasized that state-law efforts to ban women from traveling out-of-state for abortions would violate either the constitutional right to travel or the *ex post facto* clause. He pointedly cited *Bouie v. City of Columbia* for the *ex post facto* principle. But there is no explicit right to travel as clear as art. I, § 9, cl. 3 or art. I, § 10, cl. 1. Presumably Justice Kavanaugh does not regard precedents such as *Saenz v. Roe* to be "egregiously" wrong.

In addition to interstate travel, a prospect that immediately drew the attention of California Governor Gavin Newsom and his fellow Pacific coast governors and many corporations (including, perhaps surprisingly, Starbucks, Dick's Sporting Goods, and Tesla [!!]), the legality of mifepristone (an abortifacient drug) came immediately into the spotlight. Attorney General Merrick Garland opined immediately that the legality of mifepristone is a function of the federal Food, Drug, and Cosmetic Act and that the FD&CA would preempt state-law efforts (undoubtedly contemplated, if not already comprehended by "trigger laws" in many states) to ban the drug. Plan B emergency contraception, not to be confused with mifepristone, is just that: contraception. A strong argument can and should be made that Plan B is governed by the distinct substantive due process framework for contraception rather than the jurisprudence of abortion.

At least for now. Justice Thomas, by contrast, explicitly invited the Court to reexamine its entire substantive due process theory. He singled out these three decisions:

- *Griswold v. Connecticut:* Contraceptive use by married couples
- *Lawrence v. Texas:* Sodomy
- *Obergefell v. Hodges:* Same-sex marriage

Critics of Justice Thomas have been quick to point out that he omitted any mention of *Loving v. Virginia*, which invoked substantive due process in invalidating laws restricting marriage to partners of the same race. *Loving*, however, also rested on equal protection, and its characterization of anti-miscegenation laws as rooted in white supremacy should shield that decision from *Dobbs*'s recalibration of substantive due process. *Cf. Palmore v. Sidoti; Hunter v. Underwood*.

If there is to be a wholesale reconsideration of substantive due process, there are other candidates for reevaluation:

- *Skinner v. Oklahoma:* Three strikes and your gonads are out
- *Meyer v. Nebraska:* Teach your children well, first verse — *natürlich auf Deutsch*
- *Pierce v. Society of Sisters:* Teach your children, second verse — religious instruction and homeschooling
- *Eisenstadt v. Baird:* Contraceptive use by *unmarried* couples, which arguably rests on a weaker moral basis than the right upheld in *Griswold*

- Other expressions of parental rights and family relationships: *Moore v. East Cleveland*; *Troxel v. Granville*

Asserted rights to physician-assisted suicide, parental rights for adulterers, and renting hotel rooms by the hour (yes, the Supreme Court has upheld a ten-hour minimum on the reasoning that intimate associations formed in hourly rentals are not implicit in the notion of ordered liberty) have all failed. *E.g.*, *Washington v. Glucksberg*. *Dobbs* does not presage a revival of such claims, under a due process or a ninth amendment theory.

The emphasis on history leads naturally to another 2021 Term blockbuster: Justice Thomas's majority opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 20-843. It is safe to say that after *Bruen*, the second amendment as an individual right to bear arms for self-defense is no longer a "disfavored" right. Even as he extended the core holdings of *District of Columbia v. Heller* (which recognized the second amendment, for the first time, as creating a personal right to bear arms for self-defense without formal membership in the organized militia) and *McDonald v. Chicago* (which incorporated the *Heller* right against the states through — ahem! — the substantive component of the 14th amendment's due process clause), Justice Thomas discarded a key component of both *Heller* and *McDonald*. Second amendment scrutiny now consists *exclusively* of a historical inquiry into the presence of comparable gun regulation in 1791 or 1868, the dates of the ratification of the second and 14th amendments. Traditional means-end scrutiny, a component of nearly every other constitutional doctrine affecting civil rights and individual liberties — including the residue of substantive due process scrutiny of abortion — is no longer part of second amendment jurisprudence.

The practical effect of *Bruen*'s placement of individual self-defense at the heart of the second amendment is the immediate and almost certain invalidation of every "may issue" gun licensing scheme in the United States. Any statute conditioning a license to carry arms outside the home upon a demonstration of a heightened need for self-defense will probably violate *Bruen*. Justice Thomas's historical review did find two antecedents that could sustain modern gun regulation: "affray," or a founding-era crime for the overt use of weapons to intimidate others, and "surety," laws requiring the posting of bond as a condition of licensure. The *Bruen* majority rejected Reconstruction-era laws requiring a showing of heightened need for self-defense as historical "outliers."

The separate opinions in *Bruen* are worthy of some attention. Justice Breyer's dissent emphasized the empirical evidence correlating violence and death with reduced regulation of privately held arms. Justice Alito wrote separately to reject Justice Breyer's signature appeal to empiricism. He retorted that the New York law failed to prevent the recent mass shooting of African Americans at a grocery store in Buffalo.

Because he wrote for himself and Chief Justice Roberts, Justice Kavanaugh's concurrence in *Bruen* may have the hallmarks of another critical concurrence. Presumably these two votes hold

the balance of decisional power within the Court's 6-3 conservative majority. Justice Kavanaugh emphasized that "shall issue" gun licensing statutes, in as many as 43 states, should remain constitutional. Conditions such as a background check and the completion of a gun safety course are not fatal, in his view. The official discretion to deny a permit is the legally fatal flaw in a "may issue" regime.

In addition, Justice Kavanaugh took pains to quote, in its entirety, Justice Scalia's concluding remarks in *Heller*, which recognized a wide range of gun regulations that would pass means-end scrutiny: limitations on gun possession by felons and the mentally ill (the punching bags of all second amendment jurisprudence, so it seems), the exclusion of guns from "sensitive places," commercial conditions on the sale of guns, and prohibitions on "dangerous and unusual" weaponry. The second amendment, in this telling, is neither a regulatory straitjacket nor a blank check.

The Court's religion clause jurisprudence made considerable strides during October Term 2021 toward the eventual overruling of two decisions despised by religious conservatives. The older *Lemon v. Kurtzman* applied an "entanglement" test to establishment clause claims. The 1990 decision in *Smith v. Employment Division* all but eliminated free exercise objections to facially neutral laws burdening religious practices, such as the sacramental use of peyote or other controlled substances. *Smith* is notable as a Justice Scalia opinion and as a precedent older than the ill-fated approach to stare decisis in *Casey*. It has survived efforts at congressional overruling through the Religious Freedom Restoration Act. *See Boerne v. Flores*.

This Term's leading religion case was *Carson v. Makin*, 20-1088. The Court invalidated the inclusion of a "nonsectarian" condition in Maine's scheme for tuition assistance for parents electing to send their children to private schools. Under the emerging, perhaps now dominant "most favored nation" approach to free exercise, a law may not apply more favorable treatment to other bases for a dispensation or exemption from otherwise generally applicable legislation, while simultaneously denying such grace to religion. As Justice Gorsuch stated, then only for himself, a Covid-19 shutdown should not exempt a bicycle repair shop while prohibiting in-person worship, on the evident rationale that transportation is compelling, whereas religious worship can take place effectively over the Internet. (A credible distinction between settings where business is conducted with a minimum of interpersonal contact and settings where congregants sing, in one of the most powerful ways of transmitting airborne viruses, would be irrelevant to strict scrutiny and an insistence on the least restrictive legal alternative.) In short, although states are not obliged (yet) to offer voucher assistance for nonpublic schools, they may not exclude sectarian schools if they do offer such programs.

Kennedy v. Bremerton School District, 21-418, involved overt but silent prayer by a public school's football coach at the 50 yard line before games. The question is whether the coach's display of religiosity constitutes public speech or otherwise implicates an establishment clause rationale for prohibiting the gesture. The concern raised by the school district is the perceived

need by players to join the coach during his prayer, if they hope to start or enjoy significant playing time.

The Court held that the Constitution neither requires nor allows a public school district to forbid the coach's private expression of religion. As a factual matter, the 6-3 majority characterized the prayer as strictly private. Justice Sotomayor's dissent displayed images showing the coach praying with players from both teams in the center of the field. Justice Gorsuch characterized *Lemon v. Kurtzman*'s doctrinal framework as "long since abandoned." Without *Lemon*, the school district had no justification for subjecting the coach to discipline. Although the Court did not formally overrule *Lemon*, at least by using any form of the verb *overrule*, that case should no longer be regarded as controlling precedent.

This Term also involved other cases arising under the religion clauses. The Court invalidated Texas's prohibition on religious touching and audible prayer during capital punishment. *Ramirez v. Collier*, 21-5592. In *Shurtleff v. Boston*, 20-1800, the Court invalidated a flag-raising program's exclusion of a Christian flag while other flags, including the gay pride flag, were permitted.

As presented in Grand Traverse: Although the Court has not yet decided *West Virginia v. EPA*, 20-1536, the question presented in that case has the potential to subject *Chevron U.S.A. v. NRDC*'s two-step framework for deference to administrative interpretations of law to a powerful variant of the "major questions" doctrine:

> Whether, in 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, Congress constitutionally authorized the Environmental Protection Agency to issue significant rules — including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy — without any limits on what the agency can require so long as it considers cost, nonair impacts and energy requirements.

Many observers expect the Court to strike down these rules. The rationale chosen has huge implications for the future of the regulatory state, or the vast system of decisions delegated to expert agencies. *Chevron* prescribes a two-step process for judicial deference to administrative decisionmaking: If a statute is vague or ambiguous, whether Congress consciously compromised with such imprecise language or simply neglected to anticipate the interpretive bottleneck, a reviewing court is to defer to any reasonable interpretation offered by the responsible federal agency.

Chevron is easily the most influential decision of the Supreme Court, as measured by lower court citations. Its rationale is twofold: Courts are neither experts in their field nor elected by the public. Agencies at least have Ph.D.-level staffers (as opposed to lowly judicial clerks and their elite law degrees). And someone like Anne Gorsuch Burford, the administrator of the EPA

during *Chevron*, is accountable to the President who appointed her. Ronald Reagan could unilaterally dismiss Administrator Gorsuch Burford, in a way that her son Neil Gorsuch cannot be removed from the Supreme Court absent impeachment and conviction.

Since 1994 (*MCI v. AT&T*) and 2000 (*Brown & Williamson v. FDA*), the "major questions" doctrine has emerged as a major check on *Chevron*. More modestly, Justice Scalia has characterized this as an interpretive guideline to the effect that Congress does not hide elephants in mouseholes. More ambitiously, Justice Gorsuch has argued that reserving major questions for Congress vindicates the nondelegation doctrine, which the Supreme Court has not used to invalidate a federal statute since *Panama Refining* and *Schechter Poultry*. Major questions played a key role in invalidating the Biden administration's OSHA rule requiring vaccinations or masking plus testing. *See National Fed. of Indep. Businesses v. OSHA*, 21A244; *cf. Biden v. Missouri*, 21A240, 241 (upholding a similar requirement for health-care facilities receiving Medicare and/or Medicaid funding).

The effect of a major questions holding in *West Virginia v. EPA* would not be confined to the already momentous significance of the EPA's effort to regulate greenhouse gas emissions. It has the potential to undermine the entire post-New Deal/Great Society superstructure of administrative law. An eventual overruling of *Chevron*, something Justice Gorsuch has hinted at in his pre- and post-confirmation opinions, is not out of the question.

Updated, July 3, 2022: On the final day of its 2021 Term, the Supreme Court invalidated the Biden administration's Clean Power Plan (CPP). The 6-3 majority, through Chief Justice Roberts, held that the CPP exceeded the EPA's authority under § 7411 of the Clean Air Act. The power to determine the "best system of emission reduction" for buildings emitting air pollutants is confined to the physical premises of individual power plants, not the industry-wide approach embodied in the CPP.

As expected, the Chief Justice Roberts placed dispositive reliance on the major questions doctrine. *West Virginia v. EPA* framed this doctrine as a clear statement rule: If Congress wants to delegate the power to make "decisions of vast economic and political significance," it must do so clearly. Although § 7411 was "designed as a gap filler and had rarely been used in the preceding decades," the CPP represented an "unprecedented" extension of regulatory "power over American industry." As sensible as it might be to cap "carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity," Chief Justice Roberts reasoned that only Congress itself can adopt a "decision of such magnitude and consequence," either on its own or through an unambiguous delegation of authority.

The Court's enthusiastic application of the major questions doctrine will have repercussions throughout administrative law. How far *West Virginia v. EPA* will reach, however, remains uncertain. The majority opinion did not even mention *Chevron*, let alone overrule it. In his concurrence, Gorsuch described the major questions doctrine as one raising "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." His effort to link "major questions" to the previously moribund nondelegation doctrine lives on.

Although *Chevron* lives another Term, the jurisprudential terrain beneath that decision may be trembling. At a minimum, administrative law controversies hinge on the unpredictable whims of the Supreme Court. When precisely will the Court find the major questions doctrine applicable, and when will it retreat to a more strictly textualist approach to interpretation? Justice Kagan's dissent characterized major questions as "a get-out-of-text card," playable at the whim of a majority of the Justices.

Other notable decisions:

- The failure to offer the "prophylactic" *Miranda* warnings may not form the basis for recovery under 42 U.S.C. § 1983. *Vega v. Tekoh*, 21-499
- There is no cause of action under *Bivens v. Six Unknown Named Federal Agents* for fourth amendment excessive force or first amendment retaliation claims. *Egbert v. Boule*, 21-147.
    - This decision is notable for both Justice Gorsuch (concurring) and Justice Sotomayor (in dissent) recognizing no distinction with the facts in *Bivens*.
- A federal habeas court may not hold an evidentiary hearing or otherwise entertain evidence beyond the state court record to evaluate a sixth amendment claim of ineffective assistance of counsel. *Shinn v. Ramirez*, 20-1009
- The Court decided, 5-4, to allow the Biden administration to abandon the Trump administration's "Remain in Mexico" policy toward migrants at the country's southern border. *Biden v. Texas*, 21-954
- The Court voted, by a surprisingly narrow 5-4 margin, to stay enforcement of Texas's effort to regulate social media platforms and limit these operators' efforts at content moderation.
    - Justices Gorsuch, Alito, and (especially) Thomas are known for their hostility toward social media platforms and their willingness to treat Facebook, Twitter, and the like as common carriers
    - Justice Kagan's vote against the stay has been interpreted as a sign of her displeasure with aggressive uses of the Court's emergency docket, as opposed to substantive disagreement with § 230 of the Telecommunications Act of 1996 or with established precedent recognizing the speech interests of a platform operator. *Cf.*, *e.g.*, *Hurley* (excluding gay pride participants from a St. Patrick's Day parade in Boston).