

## ORIGINALISM CARRIES ON\*

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A review of ERWIN CHEMERINSKY, *A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021* (American Bar Association 2022)

For many years, the political left has warned that because of the composition of its Supreme Court, the United States is experiencing a right-wing revolution that has been turning back the clock on various civil rights and otherwise inflicting numerous other harms on the country. Now, long after liberals first began crying that he was at the door, the conservative judicial wolf may have finally, actually arrived with the Court's October 2021-2022 Term. However, viewed with clear eyes, this wolf looks more like some domesticated mutt than the dire creature liberals have predicted, and far less menacing than real threats to the country.

Regardless, no one disputes that the Term was "A Momentous Year in the Supreme Court," the title of a post-term review by Dean Erwin Chemerinsky published recently by the American Bar Association.<sup>1</sup> The book is the second term summary Chemerinsky has written for the ABA. It offers a compact yet insightful overview of the cases and their implications, as well as some thoughts about what the Court may do in coming terms.

Chemerinsky is a brilliant legal scholar whose in-person talks demonstrate an encyclopedic knowledge of not just caselaw, but the specific background facts of each case. He is very much a political progressive but, in the book's Introduction, he promises to discuss the Term in a neutral manner.

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\* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

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<sup>1</sup> ERWIN CHEMERINSKY, *A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021* (2022), available at <https://www.americanbar.org/products/inv/book/426889972/>.

Chemerinsky acknowledges his deeply-held, personal views about the law, and he allows that these may sometimes color his analysis. Nonetheless, he largely keeps his promise.

Chemerinsky avoids heavy-handed caricatures, tired handmaiden memes, speculation about chambers intrigue, and other examples of lazy, nonlegal analysis that infect the writing of too many court watchers. Like a good jurist, Chemerinsky has the self-discipline and intellectual honesty to work to keep his personal opinions out of his legal analysis. This may have been especially challenging here because, as he notes, “the October 2021 term was truly one of the most momentous in recent history,” and not in a way that aligned with his progressive point of view.

Statistically, the Term was fairly unremarkable. Chemerinsky notes that the number of cases decided ticked up slightly from the past two terms to 60, but the Court’s docket continues to be substantially lighter than before John Roberts became Chief Justice. Nineteen cases were decided 6-3 (the most since at least 1937), 9 were decided 5-4, and only 29% were unanimous, which is the smallest percentage in recent history. Notwithstanding the attention that greeted *Dobbs v. Jackson Women’s Health Organization*, the decision overturning *Roe v. Wade*, the Roberts Court continued to overturn precedent at a much lower rate than the Warren, Burger, and Rehnquist Courts.

Chemerinsky states that “virtually every major case was resolved in a conservative direction.”<sup>2</sup> This is true of the Term’s five blockbuster cases—*Dobbs*, *West Virginia v. EPA*, *Carson v. Makin*, *Kennedy v. Bremerton School District*, and *New York State Rifle and Pistol Association v. Bruen*—the outcomes of which pleased political conservatives.

Besides examining the five blockbuster cases, the book includes chapters discussing the Term’s cases on civil rights, criminal law and procedure, elections, federal jurisdiction, free speech, immigration, Indian law, and the state secrets doctrine. Not all of those went in a conservative direction. For example, the Court upheld the Biden Administration’s rescission of its predecessor’s “remain in Mexico” immigration policy, and Chemerinsky notes that “[t]here were several cases involving federal criminal statutes where the criminal defendant triumphed.”<sup>3</sup> However, none of these other cases were what made the Term so momentous.

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 51.

Rather than a conservative coup, it would be more accurate as a legal matter to characterize the Term as reflecting outcomes that are rooted in an originalist/textualist<sup>4</sup> approach. It is also accurate to say that, for a majority of the Court, living constitutionalism and other approaches that invite judges to inject their personal senses of justice, morality, and good public policy are dead, at least for the foreseeable future. Instead, as has occurred over the course of the Roberts Court, many issues that the Court previously arrogated to itself are being returned to the federal political branches and the states. This leaves battles over those issues to be fought there, with both liberals and conservatives having a chance to persuade voters to support their candidates and policies. Many of the outcomes from the Term decried by liberals can be redressed through political processes—if a consensus to do so exists.

Chemerinsky laid out his criticisms of originalism in greater detail in his other recent book, “Worse Than Nothing: The Dangerous Fallacy of Originalism.”<sup>5</sup> But as that book’s title suggests, he and most other critics of originalism offer no alternative. Originalism certainly has its limits and can be improved by fair criticism, but you can’t beat something with nothing. Thus, many attacks on the methodology come off as little more than knee jerk, ad hoc reactions to politically-disfavored outcomes, not principled disagreement with the legal approach that led to them.

In the book’s Introduction, Chemerinsky repeats an assertion he has made elsewhere, describing originalism dismissively as “not long ago . . . regarded as a controversial theory of the far right.”<sup>6</sup> This is inaccurate and unfair. Liberal hero Justice Hugo Black advocated for originalism during his years on the Court from 1937 to 1971. In fact, interpreting the Constitution by looking to the original public understanding of its text dates back to the beginning of judicial review, and is reflected in landmark decisions of the Marshall Court like *Marbury v. Madison* and *McCulloch v. Maryland*.

In any event, as Chemerinsky acknowledges, originalism is embraced by a majority of the current Justices. Even the Court’s newest addition, Justice

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<sup>4</sup> To clarify terms, by textualism, I mean interpreting the Constitution or statutes from the words on their face, along with the text’s structure and established canons of construction. Like textualism, originalism focuses on text, but it comes into play most often when the interpreter is construing older legal texts, where the meaning of words has changed over time. To try to capture the commonly understood meaning of an older text at the time it became law, originalism may look to historical context and tradition in addition to other textualist methods of construction.

<sup>5</sup> ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022).

<sup>6</sup> Chemerinsky, *supra* note 1, at 5.

Ketanji Brown Jackson, testified at her March 2022 confirmation hearing, “I believe that the Constitution is fixed in its meaning” and that “original public meaning [is] a limitation on my authority to import my own policy.”<sup>7</sup> Further, during oral argument this past October in a case over alleged racial gerrymandering, Jackson’s questioning exhibited an originalist mindset, at least for interpreting the Fourteenth Amendment.<sup>8</sup> In fact, Jackson’s approach has sparked calls for a theory of “progressive originalism.”<sup>9</sup>

Commenting in the Introduction on Justice Stephen Breyer’s retirement at the end of the Term, Chemerinsky asserts that liberal Justices are pragmatic while conservatives are dogmatic. Chemerinsky states that Breyer “advocated interpreting statutes to achieve their purpose on a Court that moved sharply away from that approach in favor of focusing on the plain language of laws.” Proponents of legislation always try to make the text further their intentions, however, so that a statute’s language and its purpose are usually closely connected. Looking for some extratextual purpose invites judges to substitute their views for those of the legislators who voted to enact the statute. And to the extent courts clarify ambiguities or fill in gaps that legislators have created either intentionally or by carelessness, they may only encourage more bad lawmaking.

Concluding his Introduction, Chemerinsky notes the deep political polarization in the United States and wonders how the Term’s decisions “decisively on one side” will affect the Court’s reputation. He cites low public approval ratings for the Court in a fall 2021 Gallup poll.<sup>10</sup> However, he neglects the fact that approval of the other branches of the federal government is even lower; a September 2021 Gallup poll found that “[t]rust in the three branches of the federal government is low on a relative basis,” and that while only 54% of American adults trusted the federal judiciary, trust was substantially less

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<sup>7</sup> Andrew Koppelman, *Ketanji Brown Jackson’s originalism*, THE HILL, April 10, 2022, <https://thehill.com/opinion/judiciary/3263173-kejanji-brown-jacksons-originalism/>.

<sup>8</sup> Debra Cassens Weiss, *Justice Jackson uses originalism to undercut ‘conservative juristocracy’*, ABA JOURNAL, Dec. 13, 2022, <https://www.abajournal.com/news/article/justice-brown-jackson-uses-originalism-to-undercut-conservative-juristocracy>.

<sup>9</sup> See, e.g., *Launching Originalism Watch and Exploring Progressive Originalism*, CONSTITUTIONAL ACCOUNTABILITY CENTER, May 25, 2021, <https://www.theconstitution.org/blog/launching-originalism-watch-and-exploring-progressive-originalism/>; Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama’s Attack on the Voting Rights Act*, SLATE, Oct. 4, 2022, <https://slate.com/news-and-politics/2022/10/kejanji-brown-jackson-voting-rights-originalism.html>.

<sup>10</sup> Chemerinsky, *supra* note 1, at 10.

for the President (44%) and Congress (37%).<sup>11</sup> Americans have lost faith in all of their institutions—governmental and private—over many decades, and this is not somehow unique to the Supreme Court. Furthermore, there are significant segments of the American political establishment that, because they do not like the outcomes of cases decided by the current Court, want to trash its reputation down to the levels of institutions that they inhabit. That their efforts have had some success does not necessarily reflect poorly on the Court.

Also not helpful to the Court's reputation was the leak of the *Dobbs* draft opinion in early May 2022, which Chemerinsky refers to only briefly, observing that it was “unprecedented” and cut against the “[s]ecrecy [which] is exalted at the Court.”<sup>12</sup> As with political efforts to diminish its reputation, the leak shouldn't reflect on the Court, but on the source of the leak, who presumably disagreed with the outcome and hoped to change it and/or undermine the Court's authority generally. Although the outcome didn't change, the leak did give an additional talking point to those who want to complain that the Court has become simply another political branch.

However, while unauthorized disclosure of the *Dobbs* draft was unprecedented for the Court, such leaks are an everyday occurrence for the Executive and Legislative branches. In fact, they are an essential tool of political trade-craft. Also unlike members of Congress, Justices do not hold demonstrations outside the Capitol, shaking their fists and braying at representatives responsible for the poorly-drafted statutes out of which the Court must try to make sense. Thankfully, for the sake of the Republic, it is hard to envision the Supreme Court exhibiting such hallmarks of the political branches anytime soon.

The first blockbuster case Chemerinsky examines in the book is *Dobbs*, and he writes that the memorable Term “will be most remembered for overruling *Roe v. Wade*.”<sup>13</sup> Although this is likely true, subsequent developments should diminish the decision's practical effect. Less than a year after the decision, and notwithstanding the tumult that greeted it, *Dobbs* has proven to be a boon for liberals, who have racked up early political victories in favor of abortion rights. *Dobbs* was an important case, but less because of abortion than for its restorative effect on our constitutional structure of government,

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<sup>11</sup> Megan Brennan, *Americans' Trust in Government Remains Low*, GALLUP, Sept. 30, 2021, <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx>.

<sup>12</sup> Chemerinsky, *supra* note 1, at 14.

<sup>13</sup> *Id.* at 13.

including requiring citizens to govern themselves, even in areas they may prefer not to face.

In *Dobbs*, the Court overruled *Roe* and *Casey v. Planned Parenthood*, which, respectively, first found and later reaffirmed a constitutional right to abortion. Writing for a five-Justice majority, Justice Samuel Alito stated that regulation of “[a]bortion presents a profound moral question” not addressed by the Constitution, and that the Court’s decision would “return that authority to the people and their elected representatives.”

No longer the swing vote that he was before the addition of Justices Brett Kavanaugh and Amy Coney Barrett, the Chief Justice concurred by himself in the judgment only. Roberts would have overruled *Roe* to the extent that it prohibited regulation of pre-viability abortions, but would “leave for another day” the issue of whether there is a constitutional right to abortion. Given that a prime characteristic of the Roberts Court has been to direct issues away from the Supreme Court to be decided elsewhere through the federal political processes or by the states (e.g., redistricting), the Chief Justice’s position is surprising. Roberts explained that certiorari had been granted on the issue of fetal viability only, and that the majority’s “dramatic and consequential rule” went beyond it. Such caution, however, would not protect the Court’s reputation from those intent on trashing it and, more likely, would breed further contempt, along with continuing litigation over *Roe*’s status.

Given that few have ever argued that *Roe* has any real grounding in the Constitution, the dissent offered only gauzy support for it. The dissent argued that *Roe* and cases protecting the rights to access contraception and to same-sex intimacy and marriage were “all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions.”

Echoing the dissent’s concern, Chemerinsky cites various unenumerated rights found by the Court to be liberty interests protected by the Fourteenth Amendment’s Due Process Clause which, he believes, cannot be justified after *Dobbs*. However, this seems to be little more than a scare tactic raised in the absence of sound legal footing for *Roe*. Only one of the Justices—Clarence Thomas in a solo concurrence—suggested that the Court should reconsider cases like *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, while the rest of the Justices in the majority went out of their way to make clear that such precedent was not at risk.

The strongest legal argument in favor of upholding *Roe* was based on stare decisis, given that a constitutional right to abortion had been the law of the

land for five decades. However, keeping a long-standing decision solely because it is long-standing—without regard for its weak legal merits—puts the cart before the horse, and would have argued against overruling other poorly-reasoned cases like *Plessy v. Ferguson*.

Chemerinsky also cites the dissent's assertion that overruling *Roe* would greatly damage the Court's public perception, with Justice Sonia Sotomayor wondering at oral argument about the "stench" caused by such a decision. Again, those who don't like the outcome in *Dobbs* trash the Court without hesitation or regard for its standing with the public, so this contention rings a bit hollow. In any event, this institutional argument in favor of keeping *Roe* did little to support its validity as a legal matter.

As the *Dobbs* majority pointed out, even *Casey* was highly critical of *Roe*. After *Roe* was first decided, it was not uncommon for pro-choice legal scholars like John Hart Ely and (then-Professor) Ruth Bader Ginsburg to denounce the asserted constitutional basis for *Roe*. As *Roe* became a badge of progressive bona fides, such analyses became more rare. A notable exception is Akhil Amar, who wrote after the *Dobbs* leak, "I am a Democrat who supports abortion rights but opposes *Roe*," which "was simply not grounded either in what the Constitution says or in the long-standing, widely embraced mores and practices of the country."<sup>14</sup>

Although Chemerinsky does not go as far as Amar, and he certainly would argue against overruling *Roe*, he says little about its legal merits. Rather, he focuses on the potential implications of its reversal. For example, he "[e]xpect[s] to see doctors and women prosecuted for violating state laws prohibiting abortion much more frequently than occurred prior to *Roe*," although he doesn't explain the basis for his expectation.<sup>15</sup> He also is not reassured by the fact that eight Justices made clear that they would not support eroding other precedent protecting basic aspects of privacy and autonomy based on *Dobbs*.

However, as the *Dobbs* majority stated, abortion is "inherently" and "fundamentally different": where one side of the political argument sees an outpatient medical procedure, the other sees infanticide. Although opposition to abortion both in the courts and the public square have been unrelenting in the decades since *Roe*, this is not the case for contraception, interracial marriage, same-sex marriage, or other widely-accepted matters that liberals

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<sup>14</sup> Akhil Amar, *The End of Roe v. Wade: A Precedent With Weak Constitutional Reasoning*, WALL ST. J., May 14, 2022, <https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609>.

<sup>15</sup> Chemerinsky, *supra* note 1, at 21.

contend are at risk after *Dobbs*. There have never been annual marches on the Supreme Court building in favor of, for example, outlawing contraception or interracial marriage, nor has any litigation strategy to such an effect gone anywhere. Thus, notwithstanding the claims of abortion advocates, the case should be largely self-contained.

Chemerinsky acknowledges that “*Dobbs* means that the issue of abortion is left to the political process, for the states and perhaps Congress.”<sup>16</sup> From a constitutional point of view, this is as it should be. Pro-choice advocates are likely correct that most Americans generally favor some level of access to abortion, but because *Roe* took it out of the voters’ hands, it has never been determined what level that is in each state.

Chemerinsky complains, “States will be able to prohibit abortion or allow abortion, whatever they choose.”<sup>17</sup> In fact, California, New York, Washington, Illinois, and other blue states are now racing to enact laws that will make them the nation’s leading abortion havens. Easy access may lead to abortion tourism, in the same way that Oregon has drawn people since *Gonzalez v. Oregon* upheld the state’s physician-assisted suicide statute. Even in purple and red states, voters and supreme courts have rejected regulations supported by the pro-life movement.

In coming years, Americans will work out through political processes what limitations on abortion they are willing to live with. Like most other Western democracies, Americans will be forced to consider fetal pain, abortions based on race, sex, or disability, and other wrenching issues arising out of the practice. As that plays out, the current excitement over *Dobbs*—and enthusiasm for abortion—may fade.

Chemerinsky writes, “All of this will lead to litigation and the Court will have to decide if there are any constitutional limits on the states or if the matter is truly entirely left to the political process.”<sup>18</sup> Again, given the polls cited by pro-choice advocates, abortion should find support in much of the country. At the least, Americans will have to take ownership of the lines they draw and not look to the Court to save them from difficult moral decisions about when human life begins.

While the societal impact of *Dobbs* will be limited to abortion and, further, the procedure appears likely to remain available throughout most of the country, the book’s next chapter discusses two administrative law cases that

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<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 21.



will have an impact far beyond the subjects immediately at issue in them. As Chemerinsky points out, both the blockbuster case *West Virginia* and *National Federation of Independent Business v. Department of Labor* “invalidated administrative actions in areas of great social significance, climate change and vaccinations[,] [b]ut even more crucial, they provide a path for challenges to countless agency actions in the lower courts.”<sup>19</sup>

In *West Virginia*, a 6-3 Court rejected the EPA’s sweeping claim that a vague, rarely-used provision of the Clean Air Act empowered it to impose draconian carbon emission reduction mandates that would transform America’s power industry.<sup>20</sup> Apart from its immediate effect on balancing national interests in reliable energy and air quality, *West Virginia* continues a recent trend that may help to pare back the goliathan administrative edifice.

The Court relied on the “major questions doctrine” to decide that the EPA had overstepped its congressional authority. For the majority, Roberts wrote that the doctrine requires Congress to give agencies clear direction when acting on questions of major economic or social significance. In the absence of such legislative guidance on a major question, the agency’s action is invalid.

The Court was skeptical of the EPA’s statutory interpretation, which would have greatly enhanced its ability to address through regulation—without clear congressional authorization—momentous subjects like climate change and the economy. The EPA contended that it had discovered in an obscure provision of the Clean Air Act far-ranging authority that no one had ever before noticed since its enactment in 1970. The Court allowed that the EPA’s plan “may be a sensible ‘solution to the crisis of the day,’” but said that it was “not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in [the provision]. A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”

In contrast, Chemerinsky writes, Justice Elena Kagan “began her dissent by describing the enormous peril to the planet from climate change,” and how the decision stripped the EPA of the power Congress gave it to respond to “the most pressing environmental challenge of our time.”<sup>21</sup> Of course, even Congress doesn’t have planet-wide jurisdiction, and as a legal matter, whether

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<sup>19</sup> *Id.* at 26.

<sup>20</sup> *West Virginia v. EPA*, 597 U.S. \_\_ (2022).

<sup>21</sup> Chemerinsky, *supra* note 1, at 29.

the EPA had in fact been given such power by Congress in the first place was the very issue before the Court.

Kagan also accused Justices in the majority of betraying their principles, asserting that “the current Court is textualist only when being so suits it” and that when it doesn’t, “special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”

Chemerinsky echoes Kagan by “guess[ing] that few judges or lawyers had heard of the major questions doctrine until very recently.”<sup>22</sup> This misses the mark. The rationale for the doctrine is hardly newfangled or judicial gloss motivated by hostility towards progressive environmental policy or the administrative state; rather, as Chemerinsky recognizes, the doctrine is grounded in the separation of powers, which is fundamental to the constitutional structure of the federal government. Similarly, the interpretive tenet that “elephants don’t hide in mouseholes” (i.e., the previously unheard-of authority to overhaul the country’s energy sector likely isn’t found in an obscure statutory provision) is well-established. As Chemerinsky does in mischaracterizing originalism, those who don’t like the results that come from application of the major questions doctrine try inaccurately to dismiss it as only recently conjured up to achieve a “conservative” result.

Furthermore, the major questions doctrine may be a way of reviving the non-delegation doctrine—which dates back almost a hundred years—while still accepting realities of the modern federal government. The Article I, Section 1 command that “*All* legislative Powers herein granted shall be vested in a Congress of the United States” casts doubt on administrative authority to regulate even less-than-major questions. If anything, the major questions doctrine seems to be a practical approach to reining in the administrative state without reconsidering less-than-originalist precedent dating back to the New Deal.

Similarly, the major questions doctrine may help to rectify the mistaken assumption by the Founding Fathers that each of the three federal branches would jealously guard its authority and not cede it to the other two. In fact, over the past decades, at least Congress has proven happy to let Executive Branch bureaucrats make decisions for it. Like *Dobbs* forcing voters and their representatives to decide the availability of abortion for themselves, the major question doctrine may help to force Congress to reassert control over law-making consistent with the Constitution.

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<sup>22</sup> *Id.* at 34.

As in *West Virginia*, the Court struck down an administrative rule in *NFIB*.<sup>23</sup> Specifically, the Court invalidated an emergency temporary standard promulgated by OSHA requiring that individuals working in places with more than 100 employees be vaccinated against COVID-19 or tested on a weekly basis.

Chemerinsky notes that although the majority opinion didn't invoke the major questions doctrine expressly, its "reasoning was much the same as in" *West Virginia*: "The Court said, 'this is no everyday exercise of federal power. It is instead a significant encroachment into the lives—and health—of a vast number of employees. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"<sup>24</sup>

Again construing the statute at issue to reach the opposite conclusion from the majority, the dissenters found clear authority for OSHA to deal with the risk of spreading COVID in the workplace. To the extent that OSHA's policy was unusually aggressive, the dissent argued that it "respond[ed] to a workplace health emergency unprecedented in the agency's history." Although personal bodily autonomy had been paramount for the dissenters in *Dobbs*, it became less so in the face of COVID.

A third administrative law decision that Chemerinsky discusses is *Biden v. Missouri* which, unlike *West Virginia* and *NFIB*, upheld the contested federal regulation.<sup>25</sup> In the case, the Centers for Medicare and Medicaid Services had ordered facilities receiving federal funds to have their workers vaccinated against COVID. The decision was issued along with *NFIB*, and Chemerinsky asserts, "It is hard to reconcile that these two decisions came from the same Court on the same day" because they reached different conclusions about COVID policies.<sup>26</sup> Chemerinsky himself provides a reasonable reconciliation a few sentences later, however, when he explains that the federal government has more legal authority to impose conditions on recipients of federal funds than on private businesses.

Many legal trends that began before the pandemic were accelerated by it. This includes the assertion of ever expanding power by federal agencies. Furthermore, newly asserted authority often seemed to go beyond any subject matter expertise an agency might have. For example, OSHA is understood to

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<sup>23</sup> *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 595 U.S. \_\_\_ (2022).

<sup>24</sup> Chemerinsky, *supra* note 1, at 31.

<sup>25</sup> *Biden v. Missouri*, 595 U.S. \_\_\_ (2022).

<sup>26</sup> Chemerinsky, *supra* note 1, at 33.

be concerned with the health and safety of employees in the workplace, not with that of all Americans in any context. Similarly, shortly before the Term began, the Court had struck down the moratorium on evictions mandated by the Centers for Disease Control and Prevention, which has no particular insight into landlord-tenant matters.<sup>27</sup> These claims of expanded authority seemed less a matter of bringing expertise to bear than an effort to impose preferred policies by any means necessary.

Addressing the Term's Religion Clause cases in the next chapter, Chemerinsky writes that *Carson* and *Kennedy* reflect the "deep political divide on the Supreme Court, and in the country, over the Constitution and religion."<sup>28</sup> Liberals understand the Establishment Clause "through Thomas Jefferson's metaphor that there should be a wall separating church and state," and the Supreme Court had followed that approach since the late 1940's.<sup>29</sup>

Jefferson's metaphor, however, is a weak reed on which to rest any interpretation of the Religion Clauses. His reference to a "wall" in a short letter written more than a decade after the Bill of Rights was enacted and in response to religious minorities concerned about government-established religion in their states was aimed at protecting their free exercise, not promoting strict separation.<sup>30</sup> And Jefferson's views on religion generally were unorthodox for his times and not widely shared, and he was not involved in drafting the Bill of Rights because he was then serving in France.

Chemerinsky writes that in contrast to strict separation, conservatives believe the Establishment Clause is only violated where the government "coerces religious participation or gives assistance that favors some religions over others," and that this view is now ascendant at the Court.<sup>31</sup>

In *Carson*, a six-Justice majority held that where Maine provided funds for parents in rural areas without public schools to send their children to private schools, it could not exclude religious schools.<sup>32</sup> Chemerinsky writes that as a result, "whenever the government provides aid to private secular schools it is constitutionally required to make that aid available to religious institutions as well."<sup>33</sup>

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<sup>27</sup> *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

<sup>28</sup> Chemerinsky, *supra* note 1, at 91.

<sup>29</sup> *Id.*

<sup>30</sup> See *Jefferson's Letter to the Danbury Baptists* (Jan. 1, 1808), available at <https://www.loc.gov/loc/lcib/9806/danpre.html>.

<sup>31</sup> Chemerinsky, *supra* note 1, at 91.

<sup>32</sup> *Carson v. Makin*, 596 U.S. \_\_\_ (2022).

<sup>33</sup> Chemerinsky, *supra* note 1, at 94.

*Carson* stated that the First Amendment protects against “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions” on free exercise, and that this principle applies to state efforts to withhold otherwise available public benefits from religious organizations. The case continued a line that began with *Trinity Lutheran v. Comer*, which held that Missouri violated the Free Exercise Clause when it subsidized resurfacing playgrounds to protect children from injury at public and secular private schools, but not religious schools.<sup>34</sup> The Court stated that such discrimination against religion must meet strict scrutiny and that Missouri’s interest in avoiding an establishment of religion did not justify denying to religious schools a generally available benefit. *Carson* similarly rejected Maine’s defense, citing *Trinity Lutheran*.

Chemerinsky writes that the *Trinity Lutheran–Carson* line of cases marks “a significant change in the law”:

For decades, the issue before the Court was determining when *may* the government provide assistance to religious schools without violating the Establishment Clause of the First Amendment. Now the Court says that the Free Exercise Clause means that the government *must* provide aid for religious schools whenever it subsidizes secular private education.<sup>35</sup>

Although Chemerinsky doesn’t refer to it, *Carson* also relied on *Zelman v. Simmons-Harris*, which held that an Ohio school choice program under which “private citizens ‘direct government aid to religious schools wholly as a result of their own genuine and independent private choice’” did not offend the Establishment Clause.<sup>36</sup> *Trinity Lutheran–Carson* took a further step to hold that excluding religious schools from such benefits violated the Free Exercise Clause.

In *Kennedy*, Chemerinsky writes, the Court found for the first time that “a teacher’s prayer in a public school setting was constitutionally permissible. Indeed, the Court held that restricting this violated the teacher’s free speech and free exercise of religion rights.”<sup>37</sup> There, the petitioner was a high school football coach who had been fired by the public school district that employed him for praying briefly and quietly on the 50-yard line of the field after games.

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<sup>34</sup> 582 U.S. \_\_\_ (2017).

<sup>35</sup> Chemerinsky, *supra* note 1, at 95.

<sup>36</sup> 536 U.S. 639, 649 (2002).

<sup>37</sup> Chemerinsky, *supra* note 1, at 96 (citing *Kennedy v. Bremerton School District*, 597 U.S. \_\_\_ (2022)).

For yet another 6-3 majority, Justice Neil Gorsuch wrote that the Free Exercise and Free Speech Clauses work in tandem to doubly protect religious speech as “a natural outgrowth of the framers’ distrust of government attempts to regulate religion and suppress dissent.” The Court explained that the school district infringed upon the coach’s free exercise rights because its actions “were neither neutral nor generally applicable” and “by its own admission, the District sought to restrict [his] actions at least in part because of their religious character.” The Court held that the coach’s free speech rights had also been violated because he prayed in his capacity as a private citizen, not as a government employee.

Applying strict scrutiny, the Court found further that the district could not justify infringing the coach’s First Amendment rights. Rejecting the school district’s defense that the coach’s termination was required by the Establishment Clause, the majority overruled *Lemon v. Kurtzman*, which had set forth a multi-factor test for determining whether government action violated the Clause.<sup>38</sup> Gorsuch recognized that “this Court long ago abandoned *Lemon* and its endorsement test offshoot,” stating that now “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’ ‘[T]he line’ that courts and government ‘must draw between the permissible and the impermissible’ has to ‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’” As Chemerinsky notes throughout the book, moving away from judge-made tests like *Lemon* towards a strictly text-based approach is among the most significant of the Court’s recent trends.

As a final defense, the district argued that some students might feel compelled to join the coach in his post-game prayer to get playing time in games. However, no evidence supported this defense, and the Court rejected the argument that “*any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students.”

The Court found—on facts that were not disputed by the parties—that the coach was entitled to summary judgment. To reach its decision, the majority had accepted as undisputed the district’s stated grounds for dismissing the coach, namely, his public prayers after three games in 2015. Even so, and unusually for a Supreme Court decision, there was substantial disagreement

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<sup>38</sup> 403 U.S. 602 (1971).

between the majority and the dissent as to how to read the evidentiary record in the case and what the relevant facts even were.

Sotomayor's dissent sought to frame the case as one about coercion of students to participate in a government-established religious ritual, instead of the coach's free exercise and speech rights. She included three photographs to bolster her version of events. However, one photograph did not depict any of the three instances relied on by the district for terminating the coach, one showed him surrounded by players from the opposing team (over whom he had no coercive leverage), and the third showed him by himself.

Although the Court and most lower courts had criticized and ignored *Lemon* for two decades, Sotomayor objected to overruling it formally. However, the value of retaining a discredited legal theory is unclear, and *Kennedy* simply tidied up the jurisprudence. As Scalia wrote in a concurrence thirty years ago, the *Lemon* test had "stalk[ed] our Establishment Clause jurisprudence" "[l]ike some ghoul in a late-night horror movie."<sup>39</sup> The majority opinion put the test to its long overdue final rest.

Chemerinsky concludes the chapter by noting that, "[f]or decades, the Court took a robust approach to the Establishment Clause and provided relatively weak protections under the Free Exercise Clause."<sup>40</sup> But now, he says, it is "taking . . . exactly the opposite course."<sup>41</sup> However, rebalancing the way the Court has resolved any tension between the clauses may be appropriate in an era when the religious faithful may be nearing minority status. With the nation's dominant culture increasingly secularized (and sometimes even hostile to religion), it shouldn't be surprising that the need to protect individual rights of believers against government overreach gains in importance.

Moreover, as *Kennedy* pointed out, along with the Free Speech Clause, the Religion Clauses work together with "complementary purposes, not warring ones where one Clause is always sure to prevail over the others." The prohibition on government-established religion serves to enhance, not inhibit, free exercise. This is more in keeping with what Jefferson and others understood the clauses to mean at the time of the Bill of Rights than the strict separation theory adopted by the Court a century and a half later.

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<sup>39</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

<sup>40</sup> Chemerinsky, *supra* note 1, at 100.

<sup>41</sup> *Id.*

The last blockbuster case Chemerinsky examines is *Bruen*.<sup>42</sup> Although its holding was narrow, he writes, the Court gave “greater protection for Second Amendment rights than virtually any other in the Constitution,” and the case “will have enormous implications for gun regulation in the United States.”<sup>43</sup>

Chemerinsky recounts how until *Heller v. District of Columbia* was decided in 2008,<sup>44</sup> the Court had “never once declared unconstitutional any law—federal, state, or local—as violating the Second Amendment.”<sup>45</sup> He concedes, however, that before *Heller* there were only a handful of Supreme Court cases construing the Second Amendment (and the most recent was from 1939), so little precedent of any kind existed. Never having served as the basis for striking down a statute made the Second Amendment nearly alone among all other Bill of Rights provisions; well before 2008, the Court had struck down scores of federal, state, and local laws for violating rights of free speech and free exercise, the prohibition on establishment of religion, freedom from unreasonable search and seizure and cruel and unusual punishment, and the like. As stated in *McDonald v. Chicago*, there is no reason to believe there was any intention at the time of either the Founding or the enactment of the Fourteenth Amendment to make the right to keep and bear arms second class.<sup>46</sup>

Even after *Heller* and *McDonald*, Chemerinsky writes, “[t]here were no Supreme Court decisions about the Second Amendment for the last twelve years, a time during which the composition of the Court changed greatly and became much more conservative.”<sup>47</sup> However, this does not discredit *Bruen*, but simply suggests that *Heller* and *McDonald*’s protection of individual Second Amendment rights came from a more “liberal” Court. In any event, the outcome in *Bruen* was hardly out of line with the two prior cases, nor was it at all unexpected.

If anything, the Court had been too reticent to give further direction to lower courts and legislators after *Heller* and *McDonald*. Such caution has been a hallmark of the Roberts Court. Now, however, given that there is still a paucity of Second Amendment caselaw, and the fact that a majority without the Chief Justice seems ready to offer guidance to lower courts and legislators

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<sup>42</sup> *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. \_\_\_ (2022).

<sup>43</sup> Chemerinsky, *supra* note 1, at 121.

<sup>44</sup> 554 U.S. 570 (2008).

<sup>45</sup> Chemerinsky, *supra* note 1, at 121-22.

<sup>46</sup> 561 U.S. 742 (2010).

<sup>47</sup> Chemerinsky, *supra* note 1, at 123.



on the contours of the right, it is unlikely that another decade will pass between *Bruen* and the Court's next Second Amendment decision.

Adopted in 1911, the New York statute at issue in *Bruen* prohibited having weapons in public without a permit, and it required an applicant to establish that "proper cause exists" for such a license to be issued. New York courts had interpreted "proper cause" to require that an applicant "demonstrate a special need for self-protection distinguishable from that of the general community."

For a six-Justice majority, Thomas wrote that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," and that state laws restricting concealed weapons permits to those who can show some special cause were unconstitutional.

Since *Heller* and *McDonald*, most circuits had adopted a two-step test, which combined history and means-end scrutiny, to evaluate gun restrictions. The Court accepted the historical approach as consistent with *Heller*. However, it rejected the means-end component, stating that the government may not simply posit an important interest served by the challenged law, but "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." By doing so, Chemerinsky writes,

The Court expressly rejected any balancing of the government's interest in regulating guns with a claim of Second Amendment rights; as Justice Thomas wrote, "[T]he Second Amendment is the very product of interest balancing by the people and *it surely elevates above all other interests* the right of law-abiding, responsible citizens to use arms for self-defense."<sup>48</sup>

Chemerinsky is correct that a movement away from the balancing of factors by a court, as occurs under the various tiers of scrutiny, towards an approach based more exclusively on text and historical analysis, would be an important development from the Term, especially if it catches on in other areas of constitutional jurisprudence.

Although, as in *Heller*, the *Bruen* majority saw application of the Second Amendment as straightforward, Thomas's opinion included an extensive discussion of the proper use of history in interpreting legal texts, including analogic reasoning for applying the text to present day circumstances beyond those anticipated at the time the text's meaning was fixed. For example, such reasoning could assist in understanding the permissible regulation of "arms" beyond those that existed in 1791.

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<sup>48</sup> Chemerinsky, *supra* note 1, at 124.

The majority made clear that Second Amendment rights are not absolute, offering as an example the government's authority to regulate guns in "sensitive places." History establishes that prohibitions on guns in legislative assemblies, polling places, and courthouses were widely accepted in 18th and 19th century America, and so more recently enacted analogous prohibitions are permissible for schools, government buildings, and other places where, similarly, people congregate and law enforcement is presumptively available.

As in the other blockbuster cases, the dissent focused on the policy issue that New York's law sought to address—namely, gun violence in that state. Breyer cited depressing statistics about the numbers of Americans killed annually by firearms. Of course, this problem is not uniform across the country; to the extent such laws would be justified by the local level of gun violence, the meaning of the Second Amendment rights would vary by region.

Regarding methodology, Breyer wrote that the Court should not have rejected strict scrutiny, which is the usual standard for assessing restrictions on fundamental constitutional rights: "although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far." Breyer's position would not have changed the outcome, however, as the New York law would almost certainly have failed strict scrutiny.

Breyer also noted that history is often unclear, with inconsistent traditions and practices, and that attorneys and judges may lack the training and resources needed to sift through extensive historical evidence. Such problems, though, are hardly insurmountable. Through dueling expert testimony in an adversarial system, evidence is admitted routinely in all kinds of litigation to resolve complex, disputed issues, and there is no reason such evidence can't be used to shed light on the meaning of legal texts.

At the chapter's end, Chemerinsky identifies what he sees as the crux of the matter, namely, that there is "a complete disagreement over who should decide whether gun regulations are allowed."<sup>49</sup> The six Justices in the majority see it as their role "to enforce the Second Amendment and to declare unconstitutional laws that infringe it," while the dissenters "see this as a matter for the legislature and the political process."<sup>50</sup>

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<sup>49</sup> *Id.* at 129.

<sup>50</sup> *Id.*

As a threshold matter, it is hard to ignore the irony in Chemerinsky's assertion that a right that is express under the Constitution (i.e., "to keep and bear arms") should be left to politicians, while a putative right about which the Constitution is silent (i.e. abortion) should be guarded aggressively by the judiciary.

Also ironic is Chemerinsky's reversing (presumably intentionally) the labels usually associated with conservatives and liberals—"restraint" and "activism."<sup>51</sup> Judicial conservatives value restraint and humility in decisionmaking, deferring to the political branches in non-legal matters. Because originalism/textualism looks backward for authority from laws that were written in the past, it will necessarily never be au courant with policy matters; that is the responsibility of the political branches. At the same time, the Court must still ultimately say what the law is, especially with regard to constitutional matters, and no one has ever argued for blanket deference by the courts. Enforcing constitutional boundaries is hardly "activist," but is at the heart of the judiciary's role.

As gun violence has risen in America, the Court has failed to provide much guidance on Second Amendment law. If Second Amendment jurisprudence develops to the same extent as that of other constitutional provisions, what legislators can and can't do will become clearer. Then, if some political consensus can be achieved, appropriate legislation should follow.

In the book's Conclusion, Chemerinsky finds some common ground, observing that no one, "liberal or conservative, would deny that October 2021 was a momentous term in the Supreme Court" and, in light of the 6-3 conservative majority, "a harbinger of what is to come."<sup>52</sup>

A significant trend from the Term identified by Chemerinsky may be a gradual move away from means-end scrutiny of restrictions on constitutional rights toward an analysis more exclusively rooted in history. *Bruen* and *Kennedy* were the clearest examples of this. Whether Thomas and Gorsuch will continue to successfully push their colleagues in this direction will be something to watch for going forward.

*West Virginia* will have the most impact of the Term's cases if it serves to revitalize the separation of powers. Relying on the major questions doctrine, challenges to executive administrative authority will likely increase, although many plaintiffs may file beyond the Beltway in more friendly Circuits, like

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 137.

the Fifth. Relatedly, the Court has already agreed to hear next term a case that may eliminate the *Chevron* doctrine, which urges judicial deference to agency interpretation of ambiguous statutes.

Chemerinsky's criticism notwithstanding, originalism/textualism will continue to be the dominant interpretive methodology on the Court. In its truest application, the approach should have little to do with conservative politics and much more to do with using the proper tools (e.g., text, structure, history) and determining the proper constitutional locus for decisionmaking. Seen this way, there is no reason scholars like Chemerinsky can't work to develop some form of "progressive originalism," such as suggested by Justice Jackson.

Relatedly, it will be interesting to see whether Chemerinsky and other prominent figures in legal education begin to adopt originalism/textualism. If not, an unfortunate disconnect will grow between what future lawyers are taught and the actual practice of law (at least before the Supreme Court).

In closing, Chemerinsky opines with regret, "the Court would be very different today if Justice Ginsburg had retired in 2014 when President Obama could have appointed her successor or if she had lived a few more months so that President Biden would have filled that seat on the Court."<sup>53</sup> (Ginsburg said she didn't believe Obama could get a sufficiently liberal successor confirmed.) Repeating a lament made in the Introduction, Chemerinsky acknowledges, "The current Court is very much a product of Donald Trump rather than Hillary Clinton winning the presidency in 2016."<sup>54</sup> Because Trump had little interest in or patience for legal niceties such as the separation of powers, he "outsourced" much of the judicial appointment process to members of the conservative legal movement, who then helped to produce the current Court, and a momentous Term.

#### Other Views:

- *The U.S. Supreme Court term in review*, NPR, July 5, 2022, <https://www.npr.org/2022/07/05/1109883082/the-u-s-supreme-court-term-in-review>.

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<sup>53</sup> *Id.* at 142.

<sup>54</sup> *Id.* at 143.

- David Cole & Rotimi Adeoye, *A Radical Supreme Court Term in Review*, ACLU (July 7, 2022), <https://www.aclu.org/news/civil-liberties/a-radical-supreme-court-term-in-review>.
- Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/>.