THE 2021-22 TERM OF THE SUPREME COURT OF THE UNITED STATES: EVERYTHING YOU WANTED TO KNOW (BUT WERE AFRAID TO ASK)

Webinar Presentation by

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My colleague and friend Nina Gardner is always too kind in her introductions. I am grateful to her not only for her words, but for her work in organizing this event. It is a testament to the strength of the international law program at SAIS that I share this virtual platform today with Nina, a world-renowned expert in the field of business and human rights, and Dan Magraw, a pioneer in international environmental law.

When I presented a recap of the 2019-20 Term of the U.S. Supreme Court two years ago, I began with these words: "This has been indeed a historic year for the Court: … by far the most consequential Supreme Court Term so far this century." I had good reason to say so.

Yet that Term of the Court pales in significance compared with what has just come down from the Justices. Today we will review four areas in which Supreme Court decisions have been no less than explosive: separation of church and state; the right to bear arms; abortion; and the powers of administrative agencies to set rules, especially regarding threats to our environment (on which Prof. Magraw will offer his expert views). These were among over 60 opinions issued by the Court after briefing and argument, along with other important cases decided in what is aptly called "the shadow docket."

I have to begin with an obvious, unavoidable observation: in every one of the cases we will discuss, the six Justices appointed by Republican presidents were in the majority, and the three put on the Court by Democrats were the dissenters. This in itself marks a historic shift from the traditions of the Court.

Chief Justice John Marshall wrote in the landmark case of *Marbury v. Madison* that the role of the Court is "to say what the law is." But it gets a little hard for Americans to believe that what is handed down from the Court is free of politics, when the divisions are so stark and so partisan. When Justice Antonin Scalia, in a dissent, told his colleague, Justice Anthony Kennedy, to "hide [his] head in a bag," he was roundly criticized as intemperate. But that has become the norm, not the exception.

Some of this mistrust derives from Justices' increasing willingness to engage openly in politics when they are off the bench. Justice Thomas, for example, has complained that in their

confirmation hearings, Republican nominees for the High Court, but not Democratic ones, have been "trashed." Remarkably, this was months after Justice Ketanji Brown Jackson was accused by Republican Senators of being an enabler of pedophiles. Justice Brett Kavanaugh, in his hearings, portrayed himself as the victim of "a political hit fueled with apparent pent-up anger about … the 2016 election, … [and] revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups." This outburst was so striking that it provoked retired Justice John Paul Stevens to opine that Kavanaugh was not fit to sit on the Court.

Justice Thomas's participation in partisan political life is especially troubling, compounded by his wife's remarkable involvement in denying the outcome of the 2020 presidential election. It does not help that the Justice has not seen fit to recuse himself in cases concerning that very issue.

And of course, the means by which the current bench was constituted is relevant too. The refusal of a hearing to President Obama's nominee, Merrick Garland – the current Attorney General – while not unconstitutional, was unprecedented, and struck many Americans as inconsistent with good faith and fair play. Some Republicans – including, unusually, Justice Thomas himself – have tried to justify the treatment of the Garland nomination under what they claim was a Democrat-sponsored rule that a judicial appointment hearing should not be held during a presidential election year. But there never was such a "rule," and Republicans stampeded the confirmation of Justice Barrett through the Senate just days before the election of 2020. And it is a fact that three of the six Justices in the majority in the cases we will discuss were appointed by a president who lost the popular vote, and were confirmed by Senators representing far less than half of the country's population.

All of this – even before the decisions announced two weeks ago – has sharply eroded Americans' respect for the Court as a fair and neutral institution. When five Justices installed George W. Bush as President in 2000, Justice Stevens prophesied this very outcome. He wrote that the Court's decision, delving so deeply into partisan politics:

> can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

At the same time, it is extremely troubling to hear voices from the left protesting that the unelected Justices of the Supreme Court have too much power over our lives, and that their authority should be constrained by the popular will. That position is deeply frightening. The genius of the Constitution lies precisely in the fact that the Founders placed certain rights – and the obligations of the government to protect them – beyond the mercurial will of the people. The

First Amendment proclaims that "Congress shall make no law …" abridging or restricting certain freedoms, and under the Fourteenth Amendment the States may not do so either, even if the people support such a law virtually unanimously.

It is far from clear that in 1954, there was consensus among the American people that the segregation of schools based on race was unacceptable. But constitutional rights are not to be affected by popular opinion. That is why the drafters of the Constitution were so careful in the language of the Bill of Rights. And it is why they included the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

So, what are the rights that the people have and how do we identify them? That is the ground on which the divisions among the Justices of the current Court must be understood. The question is not whether there are unlisted rights; it is how to locate them, and how to restrain the government from infringing them.

The conservative members of the Court claim that "originalism" is the key to constitutional interpretation. That means that the language of the Constitution should be read as it was understood by the Founders in the 1780s. A variant of that approach is called "textualism," by which only its words, and not any extrinsic source, dictate the meaning of the Constitution. Yet the Founders were conscious that norms and customs would change as the country changed. They deliberately bequeathed to us open-textured language, leaving precise meanings to later legislatures, courts, and citizens to sort out.

The first eight Amendments to the Constitution protect rights that were of special concern to former colonists who had just thrown off the English crown. There would be no state religion and no bar to the espousal of different religions. The judiciary would be constrained by standards, and criticism of the government would be robust and free. But the Drafters did not attempt to lock in future generations. For example, they prohibited "cruel and unusual punishment," but they did not specify what that meant. They wrote that "excessive bail" and "excessive fines" could not be imposed, but they did not define what might count as "excessive."

The theme that will run through our presentations of the individual cases is that the majority did not adhere to their espoused theories of how the Constitution should be interpreted. They rushed to judgment when they did not need to, despite the Chief Justice's admonition that "if it is not necessary to decide more to dispose of a case, then it is necessary not to decide more." In *Dobbs*, the Court was not asked to overrule *Roe v. Wade*: it did so anyway. In *West Virginia*, the rule that the Court was addressing was not in effect, and the opinion goes far beyond the four corners of the dispute before it. In the religion cases, and the case relating to concealed weapons, the Court likewise showed a willingness to ignore precedent and to make new rules way outside its proper function. All of these demonstrate precisely the kind of "judicial activism," the lack of judicial restraint, of which the conservative side of the political spectrum has always accused the

liberals. And I am confident that next Term will see even more of this kind of activism, because that is what the political faction that put these men and women on the Court favor.

Now let's turn to the cases.

1. *Kennedy v. Bremerton School District* and *Carson v. Makin*

The Constitution provides that neither the federal government nor the States may establish a church or prohibit the free exercise of religion. Although these provisions at times overlap and even conflict, and decades-old precedents in this area still provoke controversy in some circles, their application has been reasonably consistent.

The government may not endorse a religion, be seen as preferring religion over non-religion, or use public funds for the promulgation of sectarian doctrine. Thus public schools may not require, or even encourage, students to participate in religious activities, nor may they teach creationism or intelligent design. Furthermore, while public funds may be made available to schools that have religious affiliations, they may not be used to promote religious curriculums. The basic principle here is what Thomas Jefferson called "the separation of church and state."

Over 50 years ago, in assessing programs making State taxpayers' money available to private institutions, the Court offered what is usually called the *Lemon* test. A proposed expenditure will not violate the Constitution if it has a secular purpose, its primary effect neither advances nor inhibits religion, and it does not foster "excessive entanglement" between the government and religious institutions. This is hardly a perfect solution to address a question that frequently arises, but it is a workable one.

The Roberts Court has for some time eroded the *Lemon* test. In *Town of Greece v. Galloway* in 2014, the Court saw no problem in a New York township council beginning its public meetings with a Christian prayer. But in the *Kennedy* decision just issued, the Court announced the demise of *Lemon* altogether, without saying what should replace it.

Kennedy concerned a high school football coach in the State of Washington who knelt to pray on the 50-yard line after games. His employment contract was not renewed after he was ordered to stop, and he sued. He lost in lower courts, but the Supreme Court reversed, in a 6-3 vote, holding that Kennedy's dismissal violated his rights to both free exercise of religion and free speech.

It seems obvious that a prayer by a school official, in a context where it is clear that he is acting in a purely private capacity, is permissible. A teacher may say grace, or may make the sign of the cross, before lunch in the school cafeteria. The question in *Kennedy* was whether the coach's prayer was private, or whether it suggested to a reasonable observer the endorsement of the public school that employed him. Justice Gorsuch held that Kennedy was acting as a private individual, not a school employee, when, in the middle of the football field where his team had just finished a game, in front of stands still full of people, he performed a Christian ritual.

The *Carson* case arose from an unusual set of facts. The population of the State of Maine is so dispersed that many small counties cannot provide a public high school. The Legislature enacted a law offering parents tuition money to send their children to private schools, so long as the schools are accredited, and are "non-sectarian." Maine defined that term on the basis of the content of the educational curriculum: an eligible school could not "promote the faith or belief system with which it is associated and/or present the [academic] material taught through the lens of this faith." Two families wished to send their daughters to fundamentalist Christian schools in Maine, and applied for funding, but they were turned down.

Chief Justice Roberts, writing for the 6-3 majority, held that Maine not only **may** but **must** offer tuition subsidies to students attending those schools, and that the failure to do so renders the Maine program unconstitutional. Justices Breyer, Sotomayor, and Kagan dissented.

The Court has for decades permitted the use of public funds to support religiously-connected institutions that offer secular services: think of universities like Georgetown, Yeshiva, and Texas Christian. It has never allowed the use of taxpayers' money to teach religion. Yet one of the schools at issue in *Carson* states that its goal is "to help every student develop a truly Christian world view by integrating studies with the truths of Scripture." *Carson* permits the use of public funds to support this very clearly sectarian institution in the promotion of those religious values.

Justice Alito, in a concurrence two years ago, suggested that the views of religious people must be accommodated despite the mandatory secular nature of public education: "many parents of many different faiths still believe that their local schools inculcate a worldview that is antithetical to what they teach at home." While obviously such parents have the perfect right to seek education for their children elsewhere, the Court has now permitted them to demand public funds to pay for that choice.

In declaring the end of the *Lemon* test in *Kennedy*, and in requiring Maine taxpayers to pay for students to receive a Christian education in *Carson*, the Court has overturned the precedents insisting that the First Amendment protects not only the right of people to exercise their religion, but the rights of others not to have religion imposed on them. In the majority's America, persons of other faiths, or of none at all, may be forced to underwrite the costs of teaching, for example, "the truths of Scripture." In **that** America, government officials may promote religion in their official capacities.

These results are grounded in neither history nor precedent: they are anchored in preference. The Justices in the majority believe that this is a nation in which religion is not purely a private matter, but should be supported by government actors and government money.

2. *New York State Rifle & Pistol Association v. Bruen*

The Second Amendment says: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This is the only provision of the Constitution in which the Founders revealed the **purpose** of protected rights.

The First Amendment, for example, does **not** say, "The role of the media being necessary to keeping the government transparent and accountable, Congress shall make no law … abridging the freedom … of the press."

But whether the right to bear arms is restricted by that preface has been foreclosed since 2008. The Court held in *Heller v. District of Columbia*, that the right is an individual one. Justice Scalia wrote for the 5-4 majority in *Heller* that the Second Amendment is violated by any prohibition against keeping "a lawful firearm **in the home operable for the purpose of immediate self-defense**." Two years later, in *McDonald v. Chicago*, the Court held that the Second Amendment also applies to the States.

But let's look again at Justice Scalia's conclusion. The District of Columbia had to allow people to own weapons (a) in their own home, and (b) for the purpose of self-defense. More attentive listeners will have noticed that the Second Amendment includes no limitation as to either location or objective, beyond the one that the *Heller* Court expressly disavowed. So the Court must have been relying on something else, not the language of the Amendment: something outside the text of the document, which is to say, something inadmissible under the theory of textualism. And although Justice Thomas's concurrence and Justice David Souter's dissent provided contrasting versions of history, both of them looked at history – not text and not original intent – to determine the scope of "the right to keep and bear arms."

This sleight of hand by the Court is completely understandable. It would be impossible to read the Amendment as suggesting that **any** arms may be "kept and borne" by **any** person at **any** time in **any** place. The *Heller* Court specifically said that State licensing rules are not precluded, which means that States may regulate who may carry a firearm, even banning guns completely from "sensitive places."

So the Court in *Heller* did not, in fact, and could not, underwrite a restriction-free interpretation of the Second Amendment. That judges recognize limitations on rights is not unusual. The First Amendment says that Congress may pass "no law … abridging the freedom of speech," but that does **not** suggest that incitement to riot, or perjury, cannot be prohibited. The Court has held that the right to free exercise of religion does **not** mean that States must allow the use of drugs in religious services.

Bruen concerned a century-old New York State statute that required a showing of good cause before someone could be licensed to carry a concealed weapon in public. Six Justices of the Court found the law unconstitutional. But when Justice Thomas wrote that "[w]e know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need," he was engaging in pure sophistry. Constitutional rights may be, and regularly are, made subject to regulation, and even to the requirement of official permission.

To obtain the tax exemption that is the constitutional right of churches, you must satisfy the Internal Revenue Service that your institution qualifies under government-issued rules. And *Heller* acknowledges that Second Amendment rights may be made dependent on satisfying State-

created criteria. Even Justice Thomas would, presumably, prefer that concealed weapons not be carried into his workplace on First Street, Northeast.

Bruen does **not** mean that States may not restrict who may own and carry guns, what kinds of weapons they may have, and where those arms may be introduced. What it **does** mean is less clear. *Bruen* will surely lead to a flood of litigation to define the "sensitive places" into which, by applicable State law, you may not bring your pistol.

New York argued that all of Manhattan is a "sensitive place." The Court rejected that contention. But it did so based not on logic, text, or empirical evidence, but on an appeal to history. Justice Thomas dismissed the argument because "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place.'" Is there not? Is the danger of large-scale mayhem in America's most densely-populated city not something the Court can take into account? No guidance was offered by Justice Thomas about what might actually count as a "historical basis" for evaluating "sensitivity." Apparently, what might be said of "historical basis" is that, unlike Justice Potter Stewart in the famous pornography case, Justice Thomas knows it when he **doesn't** see it.

If Manhattan is not a "sensitive place," what about the New York City subways, or the Washington area Metro? Why is a government building bristling with armed police a "sensitive place," while the University of Michigan football stadium, capable of holding 115,000 human beings, is not? Are elementary schools in Uvalde, Texas, or Sandy Hook, Connecticut, sensitive places? Will their status change if teachers are packing heat, or if armed guards patrol their halls?

Presumably, after *Bruen*, the owners, custodians, or managers of particular venues will have to justify their status as "sensitive," in court if necessary. Only then might any restriction on the carrying of concealed lethal weapons be upheld.

Two consequences of *Bruen* are absolutely certain. First, people will die, because virtually anyone may now carry a concealed weapon in public without hindrance. And second, the courts will be flooded with cases challenging State restrictions. Judges will have to search for historical evidence that a Fourth of July parade, or wherever the next mass shooting will occur, is, or is not, a "sensitive place."

In *Bruen*, and in the religion cases, all of the Justices agreed that States may not tamper with constitutional rights. Yet in determining the coverage of that term – the rights in the Constitution, which are inviolable, as opposed to those created by government – the majority has shown no dedication to precedent, and no consistency with their own theories of constitutional interpretation. They have handed down opinions driven not by caselaw, not by logic, and not by any coherent theory of how a judge should, to quote John Marshall again, "say what the law is," but by their political preferences.

With that in mind, I turn now to the highest-profile of this Term's cases,

3. *Dobbs v. Jackson Women's Health Organization*.

To understand *Dobbs*, it is necessary to understand the precedents it overruled: the 1973 decision in *Roe v. Wade*, and the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

Of course, the Supreme Court is not bound by *stare decisis*, a rule of judicial creation and certainly not a constitutional requirement. And its sudden elevation into liberal dogma strikes me as at least ironic. We liberals certainly had no objection when the Court annulled *Plessy v. Ferguson* in 1954. We cheered when the Court in 2003 overruled *Bowers v. Hardwick*, which had permitted States to criminalize same-sex intimacy between consenting adults. Justice Alito is absolutely correct when he says that the doctrine does not prohibit the Court from overruling an earlier decision that is, in his words, "egregiously wrong from the start." The question, however, is not about the logic of that conclusion, but about its premise. Was *Roe* so obviously wrong?

Roe was decided, in substantial part, in reliance on *Griswold v. Connecticut*, a 1965 case that struck down a Connecticut statute barring access to information about birth control. And although the opinion by Justice William Douglas regrettably included mystical musings about "emanations" and "penumbras," the bases for the outcome was twofold. First, the right to privacy – the right of individuals to make decisions about the most intimate aspects of their lives, including marriage and procreation – is an unenumerated right that comes within the Ninth Amendment's purview; and second, as such, it is one of the liberties protected from government interference without due process of law.

Justice Harry Blackmun, in *Roe*, went far beyond what he needed to do to find the Texas statute unconstitutional. He laid out an elaborate structure by which the constitutional right to abortion was nearly absolute in the first trimester of a pregnancy, subject to restrictions but not outright ban in the second, and open to outright denial in the third. Critically, though, the majority found that before the time of fetal viability – around six months when *Roe* was decided – it was a woman's right to choose to terminate her pregnancy. And that right, supported by six votes to three (with four Justices in the majority appointed by Republican presidents), was grounded in the Due Process Clause of the Fourteenth Amendment.

Casey dismantled Blackmun's trimester analysis, but left in place – in an opinion written jointly by three Republican appointees including the first female Justice – the basic principle of *Roe*. Pre-viability, States may not impose an undue burden on a woman's right to decide to end a pregnancy. Numerous cases in the Supreme Court applied *Casey* over three decades.

Yet of course the controversy about abortion never abated. And because the links between the controversy and partisan politics have been so profound, it has been clear for years that, once reliably anti-abortion Justices became the majority, *Roe* and *Casey* would be overruled. The death of Justice Ruth Ginsburg provided that opportunity. There was little doubt about the outcome of *Dobbs*, even before the draft opinion was leaked. The former president of the United States

regularly promised that he would appoint Justices who would strike down *Roe*, and for once, he kept his word.

The Supreme Court has long observed that, while *stare decisis* is not a requirement it must follow, precedents are not to be overruled unless doing so is strictly necessary. But that tradition fell victim to the determination of Justice Alito and his colleagues to do what the politicians with whom they align wanted done. They could not permit a legislative ban on abortion at the State level unless they could deny the existence of a constitutional right. The upshot of all of the sound and fury of *Dobbs* is precisely this.

As the Chief Justice plaintively observed in his concurrence, the outcome in *Dobbs* **could** have been reconciled with *Roe* and *Casey.* The Court **could** simply have concluded that the Mississippi statute at issue, banning abortions after 15 weeks, did not present an undue burden. This **could** have been based on the fact that medical progress has accelerated the moment of fetal viability.

The majority opinion found no historical evidence of a specific constitutional right to abortion. But what the Justices should have sought – and what they would easily have found – is plenty of evidence of the constitutional right to privacy, to bodily integrity, to individual agency. As the *Griswold* Court observed, many of the provisions of the Bill of Rights are illustrations of that right. Private spaces may not be searched without a warrant. Homes may not be appropriated for the quartering of soldiers. Private property may not be seized without due process of law. All of these underscore a right – a constitutional right, an unalienable right – as the Ninth Amendment provides, "retained by the people": the right to be left alone.

Whether and to what extent the right to end a pregnancy is part of that right is not entirely obvious. Surely there are state interests that might be understood as limiting it, including the proximity of a fetus to the ability to survive on its own. That is what Justice Blackmun's trimester structure in *Roe* attempted to emphasize, and the same balancing of interests underlies the decision in *Casey*. But *Dobbs* simply explodes all of that, not by virtue of persuasive legal analysis, but because of the Court's eagerness to carry out a political agenda.

Of course, the *Dobbs* decision does not make abortion illegal: it allows the States to do so. *Dobbs* has been portrayed as a victory for democracy, because it allows elected officials to decide a question very obviously of enormous public importance and controversy. But this argument is wrong, for two reasons. First, denying that a right qualifies for constitutional protection means that it is conferred by the government, and may be altered, restricted, or revoked by the government. It may be granted in some States, conditioned in others, denied in others still. The existence of constitutional rights, however, which are not subject to popular whims, is the cornerstone of democratic governance, not an exception to it. We do not have votes to decide whether a Muslim community may build and attend a mosque.

The second flaw in the argument is the assumption that devolution of the decision regarding whether abortion should be legal to State legislatures ensures democratic participation. Given the degree of partisan gerrymandering, and the increased barriers to voting, that we are now

witnessing in many States, there is little reason to believe that those bodies accurately reflect the will of the people.

Of course, if we accept that a fetus is a human being from the moment of conception, *Roe* and *Casey* are indefensible, and the outcome of *Dobbs*, if not its reasoning, is clearly correct. Yet in *Roe*, the Court specifically addressed the question of fetal "personhood," and decided – according to good originalist and textualist principles – that when the drafters of the Constitution used the word "person," they did not intend the unborn. Furthermore, to the extent that fetal "personhood" claims are grounded in religion and not science, as they most frequently are, assessing them is outside the province of the courts and of the government as a whole.

Much attention has deservedly been paid to Justice Thomas's concurrence. It is Justice Thomas's view that a right must be expressly named or acknowledged in the Constitution, or it simply does not exist. Using that framework, he suggested that *Griswold* and cases relying on it – including cases concerning gay rights, such as *Obergefell v. Hodges* and *Lawrence v. Texas* – should be reconsidered. And the protestations of the majority in *Dobbs*, as well as in the concurrence by Justice Kavanaugh, that the decision is limited to abortion and nothing else, are plainly disingenuous. If the *Dobbs* outcome can be defended because abortion is not a right recognized in the Constitution or contemporaneous records, it is hard to see how, as a matter of logic, Justice Thomas's wrecking ball approach to constitutional rights can be resisted.

I think it is unlikely, but far from impossible, that the current Court will go as far as its most radical members would have it go. The draconian limitation of constitutionally-guaranteed rights is inconsistent with too much of the ethos of America, and our deference to history is less than Justice Thomas's. This is not only because the in the years that he considers to be decisive all laws were made, interpreted, and enforced by men, and white men at that. It is not only because there have been such dramatic changes in all aspects of this country's life. It is because our Constitution was meant, and has until now been held, to be a living document, reflecting the values not only of the time at which it was written, but of our times, and of future times.

The Founders of our nation never contemplated that the meaning of the text they bequeathed to us was forever to be locked in the narrow perimeter of their world. Yet this is the legacy of the 2021-22 Term of the United States Supreme Court. And I suspect that the task of rights defenders, following these decisions, will be the prevention of further erosion.

I wish I could conclude on a happier note.

I'm now going to hand the virtual microphone to my friend Prof. Magraw, to tell you about *West Virginia v. Environmental Protection Agency*, another case of far-reaching importance, which also did not require the slashing and burning of precedent to which this Court seems committed. And following him, Professor Gardner will offer some thoughts on potential consequences of the *Dobbs* decision, and then we will all be pleased to entertain your questions and comments.

Thank you very much for your attention.