At Supreme Court, willingness to reshape law creates opportunities and challenges for businesses

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Although the October 2021 Term opened with aspirations of a return to pre-pandemic business as usual, all signs showed that a new normal was in store. That new normal is coming into focus, and it's a Court that is ready to reshape the law. "A new normal at the Supreme Court," Reuters Legal News, Oct. 18, 2021.

This Term saw a precipitous decline in consensus, with the Court issuing a record-low proportion of unanimous decisions — 29% (18 cases). Over the prior decade, unanimous decisions had averaged 46%. That percentage dropped slightly last Term, to 43%, when Justices still managed to forge agreement on several hot-button issues. "Supreme Court marked by unexpected alignments and incrementalism," Reuters Legal News, July 26, 2021.

Instead of the narrow consensus that characterized last Term, the 2021 Term saw a surge in 6-3 decisions. For the first time in at least a decade, a plurality of the Court's decisions were sharply divided rather than unanimous. Thirty percent of the Court's docket this Term — 19 decisions — were decided by a vote of 6-3, and 14 of them along ideological lines.

To be sure, many of those cases involved polarizing issues like abortion, guns, religion, and climate change. But the six-Justice majority's votes paint a broader picture about the direction of the Court and what businesses might anticipate going forward. Of course all of this also has implications for the country about which people understandably have strong feelings, but for purposes of this article, we focus on the implications for businesses.

This Term's decisions demonstrate a Court that is increasingly willing to overrule or narrow precedent. The most obvious example is *Dobbs v. Jackson Women's Health Organization,* in which five Justices voted to overrule *Roe v. Wade*. As Chief Justice John Roberts pointed out, the Court could have decided the case more narrowly, focusing only on the constitutionality of Mississippi's pre-viability prohibition on abortion. But a majority of the Court was willing to go further to overturn a precedent it viewed as "egregiously wrong."

In so doing, the majority set forth a view of stare decisis — the rule that courts "stand by things decided" — that applies only to "very concrete reliance interests, like those that develop in property on contract rights." That articulation of stare decisis suggests a path for future majorities to reshape the law in other areas.

The Court also changed the landscape of administrative law. In *West Virginia v. Environmental Protection Agency*, the Court approved and applied for the first time a "major questions" doctrine which dictates that federal agencies have power to act on "decisions of vast economic and political significance" only if Congress has clearly said so. Applying that standard, the Court curtailed the EPA's authority to regulate carbon emissions under the Clean Air Act.

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While *West Virginia* has immediate ramifications for the Biden administration's ability to combat climate change, it also provides a roadmap for litigants to challenge major policymaking efforts by federal agencies. The Court's delineation of "major questions" may be sufficiently capacious to give lower courts leeway to revisit powers that federal agencies took for granted.

At the same time, notably absent from the Court's administrative-law decisions this Term was any discussion of the long-maligned *Chevron* doctrine — the rule that courts defer to an agency's reasonable interpretation of an ambiguous statute.

Going into the Term, overruling *Chevron* seemed like a real possibility. Several Justices have criticized it, and the Court had at least three cases where it could have curtailed if not jettisoned the doctrine. During oral argument for *American Hospital Association v. Becerra,* a case challenging the Department of Health and Human Services' rule cutting certain Medicare reimbursement rates, the Justices openly grappled with *Chevron*'s continued validity.

But instead of overruling *Chevron*, the Court's unanimous *AHA* decision simply ignored it. *Chevron* likewise was absent from other administrative-law decisions, including *West Virginia* and *Empire Health v. Becerra* (in which the Court rebuffed a challenge to HHS's

expanded definition of a key phrase in the Medicare statute) — despite substantial discussion of the case in several of the parties' briefs.

The Court's silent treatment nevertheless may speak volumes about *Chevron*'s future. By relying on traditional tools of statutory interpretation to discern the "clear meaning" of the relevant statutes, the Court may be limiting *Chevron*'s relevance to only the closest of cases.

The Court subtly demonstrated its willingness to narrowly construe precedent in other areas of the law, too. In *Tekoh v. Los Angeles*, for instance, the Court held that *Miranda* violations do not give rise to a claim for civil damages under 42 U.S.C. § 1983—a restriction that, according to Justice Elena Kagan's dissent, "injures the right by denying the remedy."

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In *Egbert v. Boule*, the Court substantially constricted the damages actions available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* against federal officers who violate a citizen's constitutional rights. And in *Kennedy v. Bremerton School District,* the Court described the *Lemon* test for Establishment Clause challenges—which considers whether a "reasonable observer" would consider the government activity to be an "endorsement" of religion—as "abandoned," without expressly overruling it.

Next Term's docket provides even more opportunities for the Court to reconsider precedent. In *Sackett v. EPA*, the Court will revisit its 2006 decision in *Rapanos v. United States* about the Clean Water Act's regulation of wetlands. In *303 Creative v. Elenis,* the Court may revisit some of its decisions on free exercise. And two cases challenging affirmative action in college admissions call upon the Court to overrule its 2003 decision in *Grutter v. Bollinger*.

The Court's choice to hear these particular questions is especially interesting given its shrinking docket. The 2020 Term saw the fewest decisions in argued cases since the Civil War, and this Term didn't produce many more. Moreover, the Court recently denied several petitions presenting questions of critical nationwide importance to businesses. It declined to resolve an acknowledged circuit split about personal jurisdiction in collective actions under the Fair Labor Standards Act, despite petitions from both sides of the question.

The Court also denied cert in a case presenting important questions about patent eligibility, notwithstanding the United States' invited recommendation to grant cert. And it declined to resolve questions about the preemptive scope of the Federal Insecticide, Fungicide, and Rodenticide Act, the District of Columbia U.S. Circuit Court of Appeals' revival of a federal regulation subjecting Medicare Insurers to False Claims Act liability, and courts' ability to create Article III jurisdiction by adding a new plaintiff.

Against this backdrop, the Court's willingness to hear several controversial issues suggests an eagerness among at least some Justices to revisit or remake precedent in significant ways.

All of this presents new challenges and opportunities for businesses. On the one hand, the current Court is even more focused on statutory text than the Rehnquist and early Roberts Courts, which prioritized statutory language but also were attuned to the policy consequences of judicial decisions for businesses. That is evident from both recent cert denials on critical business issues and the Court's merits decisions.

Take, for example, this spring's decision in *Badgerow v. Walters*, a case about jurisdiction to confirm or vacate arbitral awards under the Federal Arbitration Act. For petitions to compel arbitration, the Court previously held in *Vaden v. Discover Bank* that federal jurisdiction is determined by "looking through" the petition to the jurisdictional basis of the "underlying substantive controversy." To reach that conclusion, *Vaden* looked not only at the text but also to "practical consequences."

In *Badgerow*, however, the Court held that the same "look-through" approach doesn't apply to petitions to confirm or vacate an arbitral award. Focusing on the statutory text, the Court cast aside "practical consequences" as irrelevant. Only Justice Stephen Breyer, in his lone dissent, was willing to look beyond the text to consider the policy consequences of the parties' competing interpretations.

On the other hand, while the current Court may be less moved by policy ramifications, it is exhibiting two trends that may benefit businesses. First, the Court is increasingly willing to question the basis for government regulation. That tendency often works in business' favor, as it did in several cases this Term — perhaps most notably in *West Virginia* and *NFIB v. OSHA* (staying OSHA's rule regarding COVID vaccines). Both decisions limited federal agencies' power.

Second, the Court's decisions reflect a renewed interest in returning to what the Court sees as the original meaning of some constitutional provisions. We saw that this Term, for example, a trio of cases strengthening First Amendment rights: *Kennedy,* which sided with a high school football coach who prayed with students on the field; *Shurtleff v. City of Boston,* which held that Boston couldn't refuse to fly a religious organization's flag; and *Carson v. Makin*, which held that Maine cannot deny tuition assistance payments to parents who choose sectarian schools.

And last Term, the Court reinvigorated the Takings Clause. In *Cedar Point Nursery v. Hassid*, the Court held that it was a per se physical taking for California to grant labor organizations a right to access an employer's property to promote unionization. Comparing that access to a physical easement on the property marked a departure

from many years of Takings jurisprudence, which generally required balancing the government's interests against the property owner's.

The Court's skepticism of government agencies and questioning of constitutional doctrine may create opportunities for businesses to bring new challenges to government action. For businesses, the new normal might just forge a brave new world.

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