2021-2022
Supreme Court Wrap-Up

Professor Emeritus Howard Tolley
Principles, Politics, and Preferences
June 2022
Supreme Court Justices 2021-2022

<table>
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<tr>
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Merits Docket — Agenda Setting

- 7,000 to 8,000 appeals per year

  *amicus curiae* friend of the court briefs

- **Rule of 4**: required to grant *certiorari*

- 62 Cases heard in person by April 2022 in 2021 Term begun on 1st Monday in Oct.

- 33 opinions issued as of 6/14/22

- 26 opinions TBA by 6/30/22 or early July
Emergency Appeals — Shadow Docket

Unsigned order of several sentences that stays lower court injunction blocking a change in the law before oral argument and final decision of the merits. Critics: violates the Court’s traditional preference to maintain the status quo or apply past precedent until they can properly rule on the merits

From 2005 to 2013 the Court never granted more than 8 applications for emergency relief in a given term
2017-2021  41 DOJ appeals for emergency orders
2019-2020 Term
  12 of 53 Merits Docket decisions 5-4
  11 Emergency orders decided 5-4

By the halfway point of the 2021–2022 Term, the Court had granted emergency relief  13 times
•reinstating new, post 2000 census districting maps in Alabama and Wisconsin for elections in 2022, overriding lower court injunctions responding to claims of racial gerrymandering
•5-to-4 vote, reinstated a Trump administration Clean Water Act regulation that limited the ability of states to block projects that could pollute rivers and streams.
•blocked the Occupational Safety and Health Administration’s (OSHA) vaccinate-or-test rule for businesses with 100 or more employees.
Abortion

1973. *Roe v Wade*. 7-2 including 3 of 4 Nixon appointees over dissents by the 4th, Rehnquist, and JFK appointee White. 14th Amendment privacy right to be regulated based on trimester formula


5 Republican appointees including O’Connor replace trimester formula with “undue burden” test

2021 *Dobbs v Jackson Women’s Health*. TBA

Mississippi bans abortion after 15 weeks. Leak: Alito, Thomas + 3 Trump appointees in February voted to overturn Roe. Roberts favors allowing 15 week ban without overturning Roe. Clerks investigated

2021 *Whole Women’s Health v. Texas*.

Ban after 6 weeks enforced by private litigants entitled to damages. Sept. reject Emergency Stay 5-4 order lifting lower court stay blocking enforcement over 4 dissents, including Roberts.

*Cameron v. EMW Women’s Surgical Center, P.S.C.* 8-1. Grant Kentucky Attorney General right to intervene to defend law.
Guns

2008. *DC v Heller*. 5-4. Scalia finds 2nd Amendment Right to keep private weapon at home while acknowledging constitutionality of reasonable limits TBA. Follow up decisions extended 2d Amendment limits to state and local gun regulations.

2022 *New York State Rifle & Pistol Association Inc. v. Bruen* New York prohibits its ordinary law-abiding citizens from carrying a handgun outside the home without a license, and it denies licenses to every citizen who fails to convince the state that he or she has “proper cause” to carry a firearm.

TBA: Whether the state of New York’s denial of petitioners’ applications for concealed-carry licenses for self-defense violates the Second Amendment.
By What Right?

Strict Scrutiny for special groups and selected rights = Double Standard

*US v Carolene Products.* 1938

Chief Justice Harlan Stone, appointed by Republican Coolidge, promoted by Democrat FDR. Footnote 4

Applied “rational basis test” presuming government economic regulations of corporations constitutional

Articulate “strict scrutiny” standard to protect individual liberties + “discrete and insular minorities”

a) Suspect Classifications — marginalized, subordinate groups
   Race, national origin, religious minorities
   Quasi suspect — gender

b) Fundamental Rights — express (speech, religion, bear arms) or deemed essential (privacy, abortion, procreation, voting)
Liberal v. Conservative Agendas

Liberal precedents.

1960s 8-1 Democratic appointed Justices a super majority,
1970’s Republican moderates
Counter majoritarian, Independent Judiciary
Racial Integration, Voting Rights, School Prayer, Religious liberty, Criminal due process, immigrant rights, Equal rights for women, Abortion, labor rights

Conservative Agenda to Reverse Liberal Precedents: (Federalist Society, Heritage Found)
1. That favor government regulation of free enterprise and protect unions allowing US laws that violate fundamental property rights of entrepreneurs and corporations
2. That create reverse discrimination in favor of racial, religious, immigrant and sexual minorities in violation of majority rights of white, Christian, heterosexual citizens
Checks on an Independent Judiciary

1. Congressional:
   - limits on jurisdiction 1868 *Ex parte Milligan* + *McCardle*
   - 2022 financial disclosure.
   - Impeachment. Clarence Thomas breach of ethical obligation to recuse in case involving his wife and Jan. 6 inquiry.
   - Revise statutes to correct misreading. Amend Constitution Move to Amend (*Citizens United*)

2. Executive (Election Campaign for 1968 + 2016 votes)
   - Nixon 4, Trump 3 appointees.
   - Forced Removal. Johnson induce Goldberg to resign in favor of Fortas who forced out by Nixon.

3. State constitutions and courts

4. Extra legal —
   - non-compliance — school prayer,
   - peer/public pressure
   - assassination
President’s Commission

Biden Executive Order 36 members
December 2021 report on reform proposals
1. Size of the court
2. 18 year term limits or mandatory retirement
3. Super majority to find law unconstitutional
4. Increase number of cases on the merit docket
5. Oral argument and briefing for shadow docket
Immigration: Executive Orders

Biden v Texas. TBA

Issues:
1) Whether 8 U.S.C. § 1225 requires the Department of Homeland Security to continue implementing the Migrant Protection Protocols, revoked by the Biden administration ordered by the previous Trump administration under which certain non-citizens arriving at the southwest border were returned to Mexico during their immigration proceedings; and

(2) whether the U.S. Court of Appeals for the 5th Circuit erred by concluding that the secretary of homeland security’s new decision terminating MPP had no legal effect.
January 6 Investigation

Trump sought emergency Supreme Court order barring House committee subpoena of White House documents related to planning challenges to Biden’s election. Rejected 8-1 with Thomas in dissent.

As with Watergate investigation of Richard Nixon’s impeachable, election related crimes, a Republican President’s appointed Justices voted to compel disclosure of incriminating documents, including evidence of Ginnie Thomas’ support for “stop the steal.”
Affordable Care Act

In an opinion for a 7-2 majority Justice Breyer upheld the Affordable Care Act (or Obamacare) against a challenge that claimed the act was invalid after Congress eliminated its minimum essential coverage fine. The majority justices disagreed, citing a lack of standing by the plaintiffs.

Barrett+Alito concurring, split on overruling *Smith*
Free Exercise + Religious Establishment

Death Penalty: *Ramirez v. Collier*

Alito for 8 member majority, Thomas dissenting: Texas’ restrictions on religious touch and audible prayer in the execution chamber burden religious exercise and are not the least restrictive means of furthering the state’s compelling interests.

Tax $ for Religious Schools: *Carson v. Makin*

TBA: Issue(s): Whether Maine violates the religion clauses or equal protection clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction.


TBA: Issue(s): (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection; and (2) whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the establishment clause nevertheless compels public schools to prohibit it.
COVID-19

In response to petitions for emergency orders challenging Biden administration vaccination mandates the court scheduled in person hearings for January, just after the Omicron surge. Justice Sotomayor, who has diabetes, was the only Justice to wear a mask until all except Gorsuch did so at the January hearing which Sotomayor attended remotely from her office.

*National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*

Holding: The 6 member conservative majority granted the applications to stay the Occupational Safety & Health Administration’s challenged rule mandating that employers with at least 100 employees require covered workers to receive a COVID–19 vaccine. Justices Breyer, Sotomayor, and Kagan filed a dissenting opinion.

*Biden v. Missouri*

Holding: In a 5-4 *per curiam* opinion the court granted the applications to stay the two injunctions barring the Secretary of Health and Human Services’ regulation requiring facilities that participate in Medicare and Medicaid to ensure that their employees are vaccinated against COVID–19. Roberts and Kavanaugh joined Breyer, Sotomayor + Kagan. Four conservatives dissented.
Environmental Protection Agency. Argued 2/28/22

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

Emergency Docket. Louisiana Clean Water Act
Qualified Immunity

Per Curiam Orders Granted Reversing Appeals Court findings that police used excessive force without oral argument

*Rivas-Villegas v. Cortesluna*

Holding: Officer Rivas-Villegas is entitled to qualified immunity in this excessive force action brought under *42 U.S.C. § 1983*; the U.S. Court of Appeals for the 9th Circuit’s holding that circuit precedent “put him on notice that his conduct constituted excessive force” is reversed.

*City of Tahlequah, Oklahoma v. Bond*

Holding: Officers Girdner and Vick are entitled to qualified immunity in this excessive force action brought under *42 U.S.C. § 1983*; the U.S. Court of Appeals for the 10th Circuit’s contrary holding is not based on a single precedent finding a Fourth Amendment violation under similar circumstances.
2021 - 2022 Scorecard

**Liberal**
- COVID Vaccine
- Medicare
- Free Exercise
- Death Penalty
- Affordable Care Act
- January 6 Subpoena
- Pa undated absentee ballots

**Conservative**
- COVID-19 OSHA No
- Excessive Use of Force Qualified Immunity
- Emergency Order Clean Water Act
- Emergency Orders allowing gerrymanders

**TBA**
- Abortion
- Gun Rights
- Free Exercise Prayer
- Religious Establishment Tax $ for Church Schools
- Environmental Regulation
- Immigration Remain in Mexico
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Ketanji Brown Jackson
Confirmed as 116th Justice 53-47
Affirmative Action
*Students for Fair Admission Harvard*
Issue(s): (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether Harvard College is violating *Title VI* of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.

Environment
*Sackett v. Environmental Protection Agency*, No. 21-454
Issue(s): Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the *Clean Water Act, 33 U.S.C. § 1362(7).*

Voting
*Merrill v. Milligan*, No. 21-1086
Issue(s): Whether the state of Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the *Voting Rights Act*.

Free Speech
*303 Creative LLC v. Elenis*, No. 21-476
Issue(s): Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment. Lorie Smith is the owner and founder of a graphic design firm, 303 Creative LLC. She wants to expand her business to include wedding websites. However, she opposes same-sex marriage on religious grounds so does not want to design websites for same-sex weddings. She wants to post a message on her own website explaining her religious objections to same-sex weddings that would violate *The Colorado AntiDiscrimination Act ("CADA")*
Texas v. Haaland, No. 21-378
Issue(s): (1) Whether Congress has the power under the Indian commerce clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian; (2) whether the Indian classifications used in the Indian Child Welfare Act and its implementing regulations violate the Fifth Amendment’s equal-protection guarantee; (3) whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring states to implement Congress’s child-custody regime; and (4) whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

Haaland v. Brackeen, No. 21-376 Issue(s): (1) Whether various provisions of the Indian Child Welfare Act of 1978 — namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) — violate the anticommandeering doctrine of the 10th Amendment; (2) whether the individual plaintiffs have Article III standing to challenge ICWA’s placement preferences for “other Indian families” and for “Indian foster home[s]”; and (3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

Cherokee Nation v. Brackeen, No. 21-377
Issue(s): (1) Whether the en banc U.S. Court of Appeals for the 5th Circuit erred by invalidating six sets of Indian Child Welfare Act provisions — 25 U.S.C. §§1912(a), (d), (e)-(f), 1915(a)-(b), (e), and 1951(a) — as impermissibly commandeering states (including via its equally divided affirmation); (2) whether the en banc 5th Circuit erred by reaching the merits of the plaintiffs’ claims that ICWA’s placement preferences violate equal protection; and (3) whether the en banc
Cruz v. Arizona, No. 21-846
Issue(s): Whether the Arizona Supreme Court’s holding that Arizona Rule of Criminal Procedure 32.1 (g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

Andy Warhol Foundation for the Visual Arts v. Goldsmith, No. 21-869
Issue(s): Whether a work of art is “transformative” when it conveys a different meaning or message from its source material (as the Supreme Court, U.S. Court of Appeals for the 9th Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material (as the U.S. Court of Appeals for the 2nd Circuit has held).
Who Should Decide?

Legislators
  Congress, State Assemblies, City Councils
Executives
  President, Governors, Mayors
Regulatory Officers
  EEOC, DHS, EPA
Judges
Politics, Principles and Preferences

• Judicial Review makes the court a political actor
• Justices are unavoidably influenced by both legal and political principles, that invariably involve personal preferences to varying degrees.
• Court lawmaking can modify a flawed Constitution, poorly drafted legislation, and check abuse of executive and legislative power or be an abuse of judicial power
• Reasonable, informed citizens when disagreeing about which judicial lawmaking was appropriate can do so with respectful appreciation of others’ values
Housekeeping

Ask Questions
Make Comments
Stay Calm
Consider Other Values/Perspectives
Follow Up at oyez.org/
supremecourt.gov/
scotusblog.com/