Looking Ahead: October Term 2022

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Last term, the much-advertised, -expected, -feared, -longed-for conservative Supreme Court majority coalesced. After many false starts, misfires, and disappointments—going back to Richard Nixon's pledge in the 1968 campaign to reverse the Warren Court's activism, or even Dwight Eisenhower's appointment of Earl Warren and Bill Brennan—conservatives will remember the term as the one when they finally, *finally*, had enough votes to overcome "defections."

Five years after Neil Gorsuch was confirmed, and in the second term with Amy Coney Barrett on the bench, the Republican-appointed majority asserted itself.

The statistics bear this out: of the term's 60 opinions in argued cases—a historically low number—14 involved a 6-3 "partisan" split, to which can be added ten 5-4 decisions, in all of which the three liberal justices stuck together. So 40 percent of cases were "ideological"—including the big ones on school choice, religion, guns, vaccine mandates, environmental regulation, and, of course, abortion—and only 25 percent (15 cases) were unanimous. These are striking numbers—the former high, the latter low—and very different from any year since I became a Court watcher.

Moreover, when you look at those 5-4 cases, it wasn't a simple story about the cagey chief justice. Indeed, in all three 5-4 splits resulting in a conservative win, it was Gorsuch who joined the liberals. And in the seven liberal results, every conservative except Samuel Alito moved over, with John Roberts and Brett Kavanaugh doing so four times.

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What all of that numerology shows is that having a "margin of error" matters. There's just a lot of fluidity, showcasing the differing approaches to originalism and other text-, history-, and structure-focused interpretive methods on the right. It's intellectually fascinating, but in practice comes together to make for stability in the law. While some conservatives have made hay in recent years about the need for "common-good" constitutionalism, this year's return to *common-sense* constitutionalism has largely obviated that heterodoxy. While some liberals fear a reversal of the Warren Court's groovy civil rights gains of the 1960s, really what we're seeing is a stripping of Warren Burger's gaudy legal wallpaper of the 1970s.

These developments also mean that, to a large extent, this is much less the Roberts Court than it has been since Justice Anthony Kennedy retired. But even as Kavanaugh is still the median justice—he and Roberts were both in the majority 95 percent of the time—we can't really call it the Kavanaugh Court. Indeed, if anything this was the breakout term for Clarence Thomas, the senior associate justice, who wrote the majority opinion in the Second Amendment case (*N.Y. State Rifle & Pistol Association v. Bruen*) and assigned it to Justice Alito in the abortion case (*Dobbs v. Jackson Women's Health Organization*).

It's all the more remarkable when you realize that none of it would've happened without the following historical twists:

1. Democratic Senate Majority Leader Harry Reid nukes the filibuster for lower-court judges in 2013, which Republican Senate Minority Leader Mitch McConnell says Democrats will regret;
2. Justice Ruth Bader Ginsburg declines to retire under President Barack Obama;
3. Justice Antonin Scalia dies in February 2016, creating a rare election-year vacancy;
4. McConnell, now majority leader, pledges "no hearings, no votes" on a successor—and his caucus holds firm on that politically risky maneuver;
5. Donald Trump wins the Republican nomination with a plurality in a fractured field;
6. The open seat holds Republicans together, turning out cultural conservatives and populists, providing Trump winning margins in key states;

7. Trump empowers White House Counsel Don McGahn and his team to pick judges who will be originalist-textualist and have spines;
8. Senate Democrats, now led by Chuck Schumer, filibuster Gorsuch, leading McConnell to thermo nuke the filibuster for Supreme Court nominations;
9. The Trump White House stands with Kavanaugh when Democrats launch 11th-hour sexual assault allegations;
10. The Democrats' smear of Kavanaugh triggers Republican Senate gains in the 2018 elections;
11. Justice Ruth Bader Ginsburg dies on the eve of the 2020 presidential election;
12. Republicans push through the Barrett nomination.

Those unlikely events brought us to the point where the Constitution is now interpreted for what it says, not through alternative theories of outcome-oriented jurisprudence. On such hinges does history swing.

So where are we as we enter what promises to be another high-profile term? Well, the Court isn't backing off from controversy, as next term already has some blockbuster issues on the docket, including: the use of race in college admissions (*SFFA v. Harvard/UNC*); the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act (*Sackett v. EPA*); whether a graphic designer can be compelled to create a website for a same-sex wedding (*303 Creative v. Elenis*); the extraterritorial effects of pig-farming regulations (*National Pork Producers v. Ross*); and the "independent state legislature" doctrine (*Moore v. Harper*). Let's dive right in, in rough order of when the cases will be argued.

Environmental Regulation and Property Rights

The very first case of the term, to be argued at 10 a.m. on the first Monday in October, *Sackett v. EPA* involves an Idaho couple who have been prohibited from building a home because their lot allegedly contains wetlands that qualify as "navigable waters" regulated by the Clean Water Act. The justices will decide whether the U.S. Court of Appeals for the Ninth Circuit used the correct test to determine whether the wetlands are indeed "waters of the United States."

If that fact pattern sounds familiar, you have a good memory. The Supreme Court already ruled on the case *a decade ago*. In 2004, Mike and Chantell Sackett bought a vacant lot near Priest Lake, Idaho, and obtained local building permits. But when the Sacketts started the construction process, the Environmental Protection Agency (EPA) ordered them to stop work and sent a compliance order claiming the property contained a wetland. The EPA demanded costly restoration work and a three-year monitoring program, during which the property was to be left untouched. The agency also threatened the Sacketts with fines of up to $75,000 per day if they didn't obey the order. In 2012, the Supreme Court unanimously agreed that the Sacketts could challenge the administrative compliance order before the EPA began any enforcement action.[1]

For nearly a decade since, the Sacketts have been in court battling the EPA over the Clean Water Act, which protects the navigable waters of the United States from pollution. The definition of "navigable waters" has changed several times since the law went into effect in 1972. The Sacketts are asking the Court to revisit its fractured decision in *Rapanos v. United States* (2006), which held that the act doesn't regulate all wetlands but failed to produce a majority for any governing standard.[2] The EPA has since tried to sidestep that ruling by issuing new rules and guidance documents, each of which has been met with lawsuits and an uneven approach to *Rapanos*. The result is a confusing patchwork of regulations that are inconsistently applied across the country.

The Sacketts want the Court to adopt a test proposed by the four-justice conservative plurality in *Rapanos*, which would allow wetlands to be regulated only when they themselves have a continuous surface-water connection to regulated waters.[3] If I were a betting man, I'd bet that's exactly what the Court will do, in a ruling that, like *West Virginia v. EPA* last term, is likely to have the biggest jurisprudential and governance impact without necessarily drawing the most front-page headlines.[4]

[1] Sackett v. EPA, 566 U.S. 120 (2012).

[2] Rapanos v. United States, 547 U.S. 715 (2006).

[3] *Id*. at 732 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ.).

[4] I was counsel of record on Cato's cert-stage brief in *Sackett*, and Cato went on to file on the merits as well.

Although the EPA withdrew its compliance order and its past threats of massive fines, it maintains that it has the power to regulate the Sacketts' property. But if that property can be regulated by the federal government, so too can the properties of other homeowners, farmers, and businesses that are engaging in non-harmful activities.

Civil Procedure

Civil procedure involves the rules regarding who can sue and be sued; how a lawsuit begins; what kind of service is required; the types of pleadings, motions, and orders allowed; the manner of discovery; the conduct of trials and post-trial procedures; and the process for judgments and available remedies. It's the backbone of litigation: what non-lawyers consider to be mind-numbing technicalities but mastery of which can mean the difference between great success and spectacular failure. It was also my best class the first year of law school, so I hope you'll indulge me in presenting a really important case in this area.

In *Mallory v. Norfolk Southern Railway Co.*, the justices take up the case of Robert Mallory, a longtime railroad employee who developed colon cancer. Mallory sued the railroad in Pennsylvania state court, seeking to hold the company liable for his exposure to asbestos and other toxic chemicals that he says caused his cancer. The state court dismissed his suit, agreeing with the railroad that it lacked jurisdiction over the company. The court rejected Mallory's contention that the company had agreed to be sued in Pennsylvania when it registered to do business in the state.

The Pennsylvania Supreme Court upheld that decision, holding that the Pennsylvania law requiring corporations to consent to suit to do business is unconstitutional. Noting that corporations frequently require consumers to enter into contracts that require them "to litigate disputes with businesses in often-distant tribunals," Mallory asked the U.S. Supreme Court to review that ruling. The specific issue is whether the Fourteenth Amendment's Due Process Clause stops a state from requiring a corporation to consent to "personal jurisdiction"—local-court authority—to do business in the state.

With this type of case, it's hard to be more specific without getting into the weeds very quickly. Suffice it to say, a change in the rules over where companies can be sued would quickly have a massive impact on how they conduct business—and the costs they

pass onto consumers. Note, however, that "corporate personhood," an issue that riles progressive activists when it involves rights protections of the sort upheld in *Citizens United v. FEC* and *Hobby Lobby Stores v. Burwell*, isn't in dispute. The railroad is a person, but that doesn't answer the question of where it can be sued. State and lower federal courts are hopelessly split on that question, so it's high time that the Supreme Court resolved the confusion.

Pig Farming and the Dormant Commerce Clause

In 2018, California voters approved Proposition 12 (Prop 12), a far-reaching law designed "to prevent animal cruelty by phasing out extreme methods of farm animal confinement." The law requires that all pork, veal, and eggs sold in the state comply with new restrictions on how the animals can be confined. That means that pork producers in other states will have to comply with California law if they want to sell there.

In the wake of the law, lawsuits were filed by various agricultural entities arguing that the California law was unconstitutionally crossing state borders and regulating national markets. That's especially true for the pork industry, which has very little presence in the state—only about 0.2 percent of the country's breeding sows are in California. The pork industry is a highly integrated interstate market in which a pig farmer in North Carolina might sell his stock to a meatpacker in Illinois, who then distributes to California. It's near-impossible to trace a given cut of meat back to its source and verify that the farmer complied with a particular state's law.

The Ninth Circuit agreed with pork-producing plaintiffs that the law would "require pervasive changes to the pork production industry nationwide," but ruled that they had failed to make out a legally cognizable claim under what's known as the "dormant" Commerce Clause.

Because the Constitution gives Congress power over interstate commerce, it's possible for state laws that regulate extra-territorially to encroach on federal power. Claims of such encroachments invoke the dormant or "negative" Commerce Clause, and they have long been conceptually difficult for judges to evaluate. By no means a sleepy area of law, it also tends to cut across conventional ideological lines. Justices Thomas and Gorsuch, for example, tend to be skeptical of dormant Commerce Clause challenges, even as they apply robust limits to federal power through the "positive" Commerce Clause.

In *National Pork Producers Council v. Ross*, the Supreme Court will hopefully provide clarity, as well as give guidance to state legislatures that increasingly pass laws affecting their neighbors, sometimes intentionally so. Specifically, the justices will consider (1) whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant Commerce Clause; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.* (1970). *Pike* held that the power of states to pass laws interfering with interstate commerce is limited when those laws pose an "undue burden" on businesses. What's an undue burden? *Pike*'s half-century-old balancing test has allowed plenty of lawyers to bring home the bacon, but has failed to provide legislatures, lower courts, and businesses a clear answer.[5]

Not every law that burdens interstate commerce is necessarily unconstitutional, but Prop 12 will have Golden State agents travelling around the country to ensure that farmers in other states comply with California law. It will also raise the price of pork around the country. While laws that try to reduce animal cruelty are often admirable, the question here is not about the law's wisdom, but its scope.

Affirmative Action

The highest-profile case on the docket is undoubtedly the challenge to the use of racial preferences in university admissions. Given that the Court overturned *Roe v. Wade* and recognized the "abandonment" of *Lemon v. Kurtzman* last term, is *Regents of the University of California v. Bakke* the next 1970s precedent on the chopping block? *Bakke*, you'll recall, is the 1979 case in which one justice, Lewis Powell, planted the seed for the entire "diversity" conceit that now seems to be a bigger priority in higher education than the search for knowledge. Where four justices would've outlawed the consideration of race in admissions and four would've broadly allowed it to remedy past prejudice, Justice Powell voted to invalidate the racial

[5] I was counsel of record on Cato's cert-stage brief, which urged the Court to take the case due to the interstate nature of the pork industry and the unique burdens of Prop 12.

quotas at UC-Davis's medical school, but to allow the use of race as one of many factors to advance what he considered to be a compelling state interest in educational diversity. Twenty-four years later, in a pair of cases from the University of Michigan, the Court by a 5-4 majority endorsed that diversity rationale as part of a holistic race-conscious admissions program (*Grutter v. Bollinger*) while rejecting a mechanical system that assigned race a fixed number of points (*Gratz v. Bollinger*). The swing vote in those cases, Justice Sandra Day O'Connor, suggested that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[6]

Well, here we are 19 years later and the trendlines aren't looking good for an organic sunsetting of the evaluation of college (and graduate/professional-school) applicants by the color of their skin. The composition of the Supreme Court has, of course, changed, with Justice O'Connor having been replaced by Justice Alito. Equally important, the author of the 2016 decision that upheld the University of Texas's consideration of race in undergraduate admissions—in an unusual 4-3 split after Justice Scalia's death and Justice Elena Kagan's recusal—Justice Kennedy, was replaced by Justice Kavanaugh. And that's not even mentioning the swap of Justice Barrett for Justice Ginsburg.

Enter an organization called Students for Fair Admissions (SFFA), a group of more than 20,000 students and parents working "to support and participate in litigation that will restore the original principles of our nation's civil rights movement: A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university."[7] On November 17, 2014, SFFA sued the oldest private and public universities in the country, Harvard and the University of North Carolina (UNC), respectively, over their use of race in admissions. The case against Harvard focuses on Title VI of the Civil Rights Act, which bans racial discrimination by institutions that receive federal funding, while the case against UNC adds a Fourteenth Amendment equal protection claim.

The claims center on discrimination against Asian American applicants, who are much less likely to be admitted than similarly

[6] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[7] Students for Fair Admissions, https://studentsforfairadmissions.org (last visited July 29, 2022).

qualified white, black, or Hispanic applicants. Both the district court and First Circuit upheld Harvard's policy—which SFFA likens to the Jewish quotas of a century before—prompting the group to file for cert back in February 2021. But the justices sat on that petition, and then in June asked for the solicitor general's views—a cynical maneuver to push the case past the 2021–2022 term, particularly given that there was no doubt as to what the Biden administration thinks. Indeed, in a brief filed last December that surprised no one, the Justice Department explained that it had "reexamined" and reversed the Trump administration's support for the lawsuit.

Meanwhile, the case against UNC got bogged down in procedural wrangling, with the district court finally ruling for the university in October 2021. SFFA then went straight to the top, asking the justices to consider the case alongside the one against Harvard even before the Fourth Circuit could rule on appeal. In January 2022, the Court did just that, granting cert in both *SFFA v. President & Fellows of Harvard College* and *SFFA v. UNC*, and consolidating them for argument.[8] Then in July, the Court un-consolidated the cases, which will allow the new Justice Ketanji Brown Jackson, who is recused from the Harvard case because she had served on the university's board of overseers, to participate in the UNC case.

The challengers can't be accused of hiding the ball or minimizing the significance of this litigation. The first question they present is the same in both cases: "Whether the Supreme Court should overrule *Grutter v. Bollinger* (2003) and hold that institutions of higher education cannot use race as a factor in admissions." The second in the Harvard case asks "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." The second in the UNC case asks "whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall

[8] I filed a cert-stage brief on Cato's behalf asking the Court to add the UNC case so a public institution would be in the mix, as it had been in all previous affirmative action cases. Later, I both signed and joined as co-amicus a brief filed by the Hamilton Lincoln Law Institute on the merits in the then-consolidated cases.

student-body diversity." In other words, the entirety of the racial-preferences-in-higher-education regime is at stake.

Nobody expects different results in the two cases, whether because of the public/private distinction or Justice Jackson's involvement in one but not the other. On the first point, a long line of cases has held the standards for evaluating the use of race under Title VI to be concomitant with those under the Fourteenth Amendment. There's no reason that it must be that way—we may think it worse when a public institution engages in racial discrimination—but there's no indication that the Court wants to reevaluate that aspect of affirmative-action jurisprudence here. On the second, if Harvard is likely to lose 6-2, then adding Jackson still gives UNC a 6-3 loss. Six votes for the challengers is indeed the most likely outcome, because the typically most "gettable" vote for progressives, Chief Justice John Roberts, has shown no sign of squishiness in race cases. He was in dissent in *Fisher v. UT-Austin II*, after all, and in a 2007 school busing case famously wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[9]

Indeed, in his very first term on the Court, the new chief justice wrote, "It is a sordid business, this divvying us up by race."[10] So it would seem more likely than not that he'll follow his own logic and collapse the entire racialist edifice built on *Bakke*'s shaky one-vote foundation rather than trying to engineer a patchwork compromise along the lines of his concurrence in *Dobbs*. That would mean that progressives' only hope for moderation, a "mend it, don't end it" compromise that pillories Harvard but salvages the "diversity" rationale for racialist shenanigans, lies with Justices Kavanaugh and Barrett. It's possible, but I wouldn't count on it.

Administrative Law

The term's big administrative-law case is different from most in recent years. Those often were about the level of deference that judges owe agency interpretations of their operative statutes or whether a generally phrased legal provision authorizes a novel but awesome

[9] Parents Involved in Cmty. Sch. v. Seattle Sch, District No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ.).

[10] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

grant of regulatory authority. The case doesn't even involve structural arguments about executive branch agencies, such as whether certain officers were properly appointed or whether they enjoy any removal protections. *Axon Enterprise, Inc. v. Federal Trade Commission* instead asks whether Congress can insulate the agencies it creates from constitutional challenge.

Axon, a body camera manufacturer, bought a competitor in 2018 and thereby incurred "antitrust concerns" at the Federal Trade Commission (FTC). After investigating for 18 months, the FTC threatened to initiate an in-house enforcement proceeding unless Axon agreed to onerous settlement terms. The company responded by suing in federal court, arguing that the FTC's in-house dispute-resolution processes are unconstitutionally stacked in favor of the government. Indeed, the agency hasn't lost on its home turf in more than a quarter century.

The district court sided with the government, holding that Axon could bring its constitutional challenges against the FTC's in-house court system only after the company first raised these arguments before the agency in the very proceedings that Axon challenges on constitutional grounds. The district court's holding makes little sense. Is it remotely plausible that the FTC would find itself unconstitutional? The district court's order seems to facially offend fundamental notions of fairness: should Axon have to suffer the crippling cost, business disruption, and adverse outcome of an FTC in-house proceeding before seeking judicial review of that proceeding's constitutional legitimacy?[11]

A divided Ninth Circuit panel upheld the district court, despite conceding that "it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals."[12] Ultimately, the majority felt bound by the Supreme Court, due to what many commentators feel is a misreading of that Court's precedent.

Axon asked the Supreme Court to weigh in on both whether the district court has the power to review constitutional challenges to

[11] Cato joined the Atlantic Legal Foundation on a cert-stage amicus brief that I signed, making this point.

[12] Axon Enter. v. FTC, 986 F.3d 1173, 1184 (9th Cir. 2021).

the FTC's structure and whether the FTC's structure violates the Constitution. The justices agreed to take up the first question, but not the second. The issue is framed as "whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence by granting the courts of appeal jurisdiction to 'affirm, enforce, modify, or set aside' the Commission's cease-and-desist orders." It seems likely that a majority will say no, prompting further litigation that, given what we've seen in other recent challenges to agency structures,[13] augurs a return to the Court in a few years.

First Amendment

Five years ago, the blockbuster case was that of the baker who refused to bake a cake celebrating a same-sex wedding, in alleged contravention of Colorado anti-discrimination law. Was he a free-speech martyr or a half-baked bigot? Cato was the only organization in the entire country—and I'm proud to have been one of only three lawyers (the others are Thomas Berg and Douglas Laycock)—to have filed a brief supporting Masterpiece Cakeshop owner Jack Phillips after having filed in support of Jim Obergefell in the same-sex marriage cases a few years earlier.

Ultimately, the Supreme Court ruled 7-2 that the Colorado Civil Rights Commission expressed hostility to Phillips's Christian beliefs and thus violated his right to religious free exercise and reversed the commission's remedial order. In so ruling, the Court avoided considering the broader intersection of anti-discrimination laws and freedom of speech.

It also didn't rule on whether cake baking is an expressive activity protected by the First Amendment's Free Speech Clause, and later declined to take up a case that would've asked the same question, in the same context, with respect to floristry. Well, now we have a case where there's no question that the commercial activity at issue is protected speech. *303 Creative LLC v. Elenis* involves a graphic designer who has long wanted to expand her business to wedding websites but ran into the same Colorado law at issue in *Masterpiece Cakeshop*. Specifically, the state's law prohibits businesses that are open to the

[13] Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (holding that the SEC's adjudication of fraud claims through its own administrative law judges violated the Seventh Amendment, the nondelegation doctrine, and the Take Care Clause).

public from discriminating against gay people or announcing their intent to do so.

Not waiting to be prosecuted, the designer, Lorie Smith, sought a ruling in federal court that Colorado could not enforce its public-accommodations law against her. The Tenth Circuit agreed that Smith's "creation of wedding websites is pure speech," and that Colorado law compels Smith to create speech that she would otherwise refuse. But the law survives constitutional scrutiny here, the court concluded, because it's narrowly tailored to the state's interest in ensuring that LGBTQ customers have access to the "custom and unique" product that Smith provides. The court characterized Smith as having "monopolistic" control over her specific designs. Refusing to provide her services would, definitionally then, result in some people being denied access to an entire "market." Same-sex couples might be able to have their wedding websites designed by someone else, but those customers "will never be able to obtain wedding-related services of the same quality and nature as those that" Smith offers.

That's a bizarre ruling, to say the least. It effectively says that every business is a monopoly unto itself and, indeed, that any artist or other expressive professional can be compelled to speak because that speech is, in every case, unique. In following and debating this type of litigation for many years now, I'd never before encountered this argument. If Smith ends up losing at the Supreme Court—which seems highly unlikely—it won't be under the Tenth Circuit's rationale.[14]

The Supreme Court will hear this case, but only on the issue of whether compelling someone to speak to comply with anti-discrimination law violates the Free Speech Clause. The justices declined to review two other questions that Smith raised in her cert petition: whether requiring Smith to create custom websites violates the Free Exercise Clause, and whether the Court should overrule *Employment Division v. Smith* (1990), which held that laws that infringe religious free exercise are constitutional so long as they apply to everyone equally. In other words, *Smith* tells people to seek religious accommodations in legislatures, not courts—which was the rule (and practice) before *Sherbert v. Verner* (1963) read implicit religious exemptions into generally applicable laws.

[14] I filed briefs, together with Professors Dale Carpenter and Eugene Volokh, through all stages of appeal. After my departure, Cato dropped out of this collective effort, declining to join our Supreme Court merits brief.

Will the Court in any event rule foursquare against speech compulsions, or again find some narrower path to avoid resolving the purported conflict between free speech and gay rights? It could perhaps vacate the lower court's self-monopoly ruling and remand for more conventional First Amendment analysis. Or it could adopt the more traditional monopoly analysis that was the basis for public-accommodations rules at common law: for example, that the only inn for miles around had to provide food and shelter to travelers but that competing merchants in a city owed no such obligation.

Indian Law

Back in February, the justices granted review in a quartet of cases challenging the constitutionality of a federal law intended to protect against the separation of Native American families. Supporters of the law contend that a ruling invalidating the law could have significant negative consequences for Native American children, while opponents argue the exact opposite.

Provisions of the Indian Child Welfare Act of 1978 (ICWA) dictate that in any custody proceeding "under State law" and involving an "Indian child," "preference shall be given" to placing the child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families" rather than with non-Indian adoptive parents. ICWA has long roused controversy, and these cases, coming out of Texas and consolidated under the name *Haaland v. Brackeen*, afford an opportunity for the Supreme Court to make clear that rights under family law cannot be made to depend on race. Of course, Indian law operates differently than normal considerations of race under the Fifth and Fourteenth Amendments, because it's based in ancestry connected to political sovereignty rather than skin color as such. Will that make a difference?

Last year, the Fifth Circuit declared some aspects of ICWA unconstitutional, but left other parts in place, creating confusion about how to comply with the law.[15]

[15] Cato joined the Goldwater Institute and Texas Public Policy Foundation on a cert-stage brief (which I signed) urging the Supreme Court to bring that confusion to an end by invalidating any provisions that treat kids and parents differently simply because of their biological ancestry and, ultimately, the color of their skin.

At the heart of this case is Andy, a young boy with foster parents who wanted to adopt him. Although Andy's birth parents agreed to that request, it was denied because Andy is part Navajo and part Cherokee, and tribal officials invoked ICWA to block the adoption.

If Andy were of any other ethnicity, his adoption would have been quickly approved, allowing him to stay with the family he has lived with for nearly his whole life. But ICWA says Texas must remove him from his foster parents and place him with "Indian" adults. Remarkably, ICWA applies to kids who are not members of tribes, who have no social or cultural connection to a tribe, and who have never lived on a reservation or in Indian country, simply because a tribe's own rules designate them as biologically "eligible" for tribal membership.

When states are required to impose differing outcomes in family law depending on race, many people lose rights: birth parents, adoptive parents, and the children themselves. To make matters worse, the law in practice has tended to prevent many abused or neglected children from finding safe and loving permanent homes, in cases that occasionally make national news.

ICWA is also in conflict with an area of law—family law—that has almost universally been the preserve of the states. Indeed, the Fifth Circuit ruled that certain provisions violate, among other things, the Tenth Amendment because they "commandeer" the states.

Securities Law

In April 2016, the Securities and Exchange Commission (SEC) began an enforcement action against Michelle Cochran, a Texas-based accountant, for alleged violations of federal accounting regulations. The SEC brought this action internally, where the agency acts as both prosecutor and judge. From the start, Ms. Cochran has denied the government's allegations, but she also challenges the constitutionality of the agency's in-house courts.

An administrative law judge (ALJ) agreed that Cochran had violated federal law, fined her over $20,000, and banned her from practicing before the SEC for five years. After the Supreme Court's 2018 decision in *Lucia v. SEC*, which held that the appointments of SEC ALJs violated the Constitution because they were made by the SEC's staff rather than the commission itself, the SEC sent Cochran's case back for a new hearing in front of a different ALJ.

Cochran went instead to a federal district court in Texas, seeking to block the administrative proceedings entirely. She argued, among other things, that restrictions on the SEC's power to remove ALJs—who can only be terminated "for cause"—violate the Take Care Clause, which requires the president to ensure that the laws are "faithfully executed."

The district court dismissed Cochran's case, reasoning that she must first exhaust the (interminable) administrative trial process before she can get an Article III judge to weigh her constitutional arguments, which, again, challenge the very legitimacy of that administrative process. A split three-judge panel on the Fifth Circuit affirmed, but the en banc Fifth Circuit reversed, siding with Cochran and allowing her constitutional challenge to proceed.

The SEC filed a cert petition but asked the Supreme Court to hold it until the Court decides *Axon Enterprise v. FTC*, a somewhat similar structural challenge that seeks a judicial off-ramp from internal agency adjudication (see above). But Cochran urged the justices to grant review now, arguing that doing so is the only way to eliminate both the conflict among the lower courts and "the otherwise inevitable and unnecessary spin-off litigation that would accompany an FTC-specific decision in Axon." On the merits, the government seeks to have Cochran restart the administrative process at step one.

The SEC's sluggishness forced Cochran into a Catch-22: either she bets the farm on her constitutional claims by defaulting on the underlying allegations—and thereby "wins" her day in federal court—or she continues to litigate in the agency proceeding, which has lasted for more than six years with no plausible end in sight. As Cato's brief puts it, that's "a choice worthy of Camus or Kafka, not America."[16]

Election Law

The Supreme Court is finally taking up an issue that recurs with increasing frequency—and acrimony—at election time: whether there's a federal constitutional violation or remedy when a state court rewrites the electoral rules devised by the state legislature. Pointing to the Elections Clause (Article I, Section 4), proponents of

[16] Cato filed briefs throughout this litigation, which I signed, and went on to file a brief on the merits as well, highlighting the SEC's backlog of cases, which have been languishing for an average of six years.

cutting back state judicial authority frame the issue in stark terms: "Whether a state's judicial branch may nullify the regulations governing the 'Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,' and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election."

Those "vague constitutional provisions" regarding "fair or free elections" come from the North Carolina Constitution, such that the specific dispute at issue arises from the Tarheel State's redistricting after the 2020 census. In *Moore v. Harper*, the state supreme court set aside the legislatively devised congressional maps as being too gerrymandered.

Those challenging those invalidations invoke the "independent state legislature" theory, which holds that only the legislature has the power to regulate federal elections, without interference from state courts. Chief Justice William Rehnquist was an early proponent of the theory, outlining it in a concurring opinion in *Bush v. Gore* (2000) that Justices Scalia and Thomas joined. There, Rehnquist argued, the recount ordered by the Florida supreme court conflicted with election deadlines set by the state legislature.

The issue returned to the Supreme Court in 2020, when the justices both before and after that hotly contested election declined to review a Pennsylvania supreme court ruling that extended the deadline for receipt of mail-in ballots and changed the standard for their validity. In an opinion accompanying the court's order, Justice Alito (joined by Justices Thomas and Gorsuch) suggested that the state court's decision likely violated the Constitution.

A year later, a group of Democratic voters and activist groups challenged the new congressional map devised by the Republican-controlled North Carolina legislature. These plaintiffs alleged that allowing Republicans to gain as many as 10 of the state's 14 seats violated the state constitution. In February 2022, the North Carolina supreme court agreed and ordered the trial court to either approve or adopt a new map before the end of the month. The trial court adopted a new map, drawn by three experts appointed by the court.

Republican legislators then asked the U.S. Supreme Court to stay the state ruling and reinstate the original map at least for the

primaries, which took place May 17. The Court turned down that emergency request, again over a dissent by Justice Alito that was joined by Justices Thomas and Gorsuch. Justice Kavanaugh wrote a concurring opinion, however, that agreed with the dissent that the Court would have to consider the independent state legislature theory "sooner or later."

Well, that time is now—but it's hard to predict what the Court will do, perhaps harder than in any other major case yet on the docket. The Court closed the door on federal constitutional challenges of partisan gerrymanders in 2019 for want of an administrable standard, which is why *Moore v. Harper* was brought under state constitutional law. Will a majority of justices now be able to decide when a state court's otherwise legitimate interpretation of state law crosses the line into depriving the legislature of its role in regulating elections?

I should also mention another election law case, to be argued in the Court's first sitting in October. *Merrill v. Milligan* considers whether Alabama's redistricting plan for its seven seats in the House of Representatives violates Section 2 of the Voting Rights Act, which prohibits racial discrimination in voting. This is the first Section 2 case since 2021's *Brnovich v. Democratic National Committee* set out a heightened standard—plaintiffs now essentially have to prove actual racial discrimination, as in most civil rights laws—for making such claims.

Criminal Law

The biggest criminal law case on the docket so far is *Percoco v. United States*, which asks whether a private citizen who holds no government office or employment—but has informal influence over governmental decisionmaking—owes a fiduciary duty to the public such that he can be convicted of honest-services fraud. The question arises in the case of Joseph Percoco, who served as the manager for New York Governor Andrew Cuomo's re-election campaign. A developer, Steven Aiello, paid Percoco $35,000 to lobby a state agency to allow Aiello's company to receive state funding without entering into an agreement with a local union. Percoco was convicted and sentenced to six years in prison. Aiello was separately convicted of bribery, but his cert petition is still pending, most likely awaiting the outcome of Percoco's case.

The Court has taken up several honest-services-fraud cases in the last decade, as well as considering other broadly worded criminal

statutes that leave it to prosecutorial whim whether to prosecute behavior that might be "shady" but not technically illegal. After all, when a private citizen accepts money to convince the government to do something, we call that person a lobbyist—and it's unclear why a private citizen's close relationship to a government official (even the governor!) transforms that transaction into a bribe. Public officials hold a fiduciary obligation to act in the best interests of the public, while private citizens—even political consultants—do not.

That basic dichotomy lies at the heart of our representative democracy: Citizens are entitled to petition the government in service of their own interests, while public officials and employees are entrusted with making final decisions based on the public good as a whole. The Second Circuit's rule here made it a jury question whether a private person exercises enough de facto influence over government decisionmaking that he can be convicted of public corruption.

On the other hand, the facts of this particular case muddy the waters of those lofty principles. Percoco had served as executive deputy secretary in the governor's office and only temporarily left that state job to manage Cuomo's campaign. Despite formally leaving state employment, however, Percoco used his executive-office desk and phone, and made representations that he would return to the Cuomo administration after the election. Indeed, after Cuomo was reelected and Percoco signed his state reinstatement forms, but a few days before he officially returned to his old job, Percoco called a state official from his official desk and directed him to waive the required labor-peace agreement for Aiello's project. And Percoco continued doing other favors for Aiello, though not ones explicitly tied to the $35,000 payment.

I honestly don't know how this one will end, but pop some popcorn ahead of what could be an entertaining oral argument—though perhaps less entertaining without a two-minute hypothetical from Justice Stephen Breyer.

Immigration Law

As of this writing, the last case the Court added to its docket is one reviewing executive authority over immigration policy. Given Congress's inability to legislate in this important area, immigration is perhaps the preeminent example of "pen and phone" governance, so this is by no means the first—and won't be the last—time the justices

will grapple with a claim that a president is violating the law by acting or not acting in a certain way in this context. The case also involves four controversial procedural mechanisms that seem to be on the upswing: (1) "shopping" for favorable district judges who will enter (2) nationwide injunctions, which are appealed on (3) the Supreme Court's emergency (or "shadow") docket by (4) a solicitor general seeking "cert before judgment" (without waiting for a federal circuit court to review the merits of a case).

In *United States v. Texas*, Texas and Louisiana, supported by 19 other states, allege that a Biden administration policy that sets priorities for the arrest and deportation of illegal aliens is both contrary to the Immigration and Naturalization Act (INA) and violates the Administrative Procedure Act (APA). The policy stems from a September 2021 memorandum by Department of Homeland Security (DHS) Secretary Alejandro Mayorkas—all these disputes seem to start with a memo—explaining that DHS doesn't have the resources to apprehend and deport all illegal aliens and thus instructing immigration officials to prioritize the apprehension of three groups: suspected terrorists, people who have committed serious crimes, and those caught at the border.

U.S. District Judge Drew Tipton vacated the policy on June 10, 2022, but there's disagreement between the parties whether that vacatur effectively represents a nationwide injunction against reliance on the priority-setting memo. The Fifth Circuit then rejected the Biden administration's emergency request to stay that ruling pending appeal, as did the Supreme Court, in a 5-4 vote that represented the first recorded official act by Justice Jackson, who joined the court on June 30.[17] That vote also featured a novel alignment that won't necessarily become too common, with all the male justices in the majority and all the female justices in dissent—meaning that Justice Barrett joined the progressives. Regardless of the decision to deny a stay, the Court granted the solicitor general's request to treat the filing as a petition for cert before judgment, setting the case for argument in November.

The government argues that states don't even have standing to challenge the policy because otherwise they could "challenge

[17] In a separate case, Arizona, Montana, and Ohio also challenged the policy in a federal district court in Ohio. The court there also ruled against the Biden administration, but the Sixth Circuit reversed that ruling.

virtually any federal policy by leveraging even a dollar's worth of incidental, indirect effect on state expenditures into a nationwide vacatur or injunction."[18] Moreover, it asserts, Judge Tipton's ruling impermissibly compels the executive branch to exercise policy discretion in a certain way, thereby disrupting DHS operations and violating the separation of powers.

The states reply that they have a right to sue over direct financial harms from a federal policy, such as certain aliens' remaining in state prisons for longer than they otherwise would. Moreover, they claim that the Mayorkas memo conflicts with Congress's specific statutory instructions regarding INA enforcement and that DHS didn't jump through the proper hoops in setting its policy (which was a stumbling block for President Trump's attempt to rescind DACA).

Those are indeed the issues the Supreme Court will be resolving: whether the states can bring the lawsuit; whether the policy is consistent with the INA and APA; and whether Tipton had the power to set aside the policy. Interestingly, the decision to hear *United States v. Texas* came less than a month after the Court ruled 5-4 in the Biden administration's favor regarding its desire to end the "remain in Mexico" policy for people seeking asylum at the southern border, which was another case brought by Texas's active office of attorney general.

Conclusion

If you get your legal news from social media, with occasional links to reporting by actual media, you'd think that the Supreme Court has made an extreme right turn in the law and is pushing ahead full steam in that direction. On this reading, its rulings on last term's big cases represent an ideological hijacking of our Constitution. What's more, because the six justices in the majority of each of those cases were appointed by Republican presidents, these radical decisions were all just partisanship disguised as law.

That take, which unfortunately comes not just from Twitter trolls and Facebook lawyers but from highly regarded law professors and journalists in all the top print and broadcast media, is disingenuous at best. To use the technical legal term, it's hogwash.

[18] Reply in Support of Application for Stay at 2, United States v. Texas (2022) (No. 22A17), https://bit.ly/3zByTTZ.

I don't mean that reasonable people, legally trained or otherwise, can't disagree on these cases, or that anyone who contradicts my analysis is stupid or politically motivated. To the contrary, it's those attacking the Court's legitimacy and calling the justices partisan hacks who seem to believe that the only way to reach the results we've seen is to act in bad faith. That sort of attitude isn't healthy for our republic, particularly at a time when institutional trust is already low and political tribalism increasingly prevents either side from accepting electoral outcomes.

Although I don't have any magic fixes for our national discord, there's a way to understand what's going on at the Court as a very deep and serious legal dispute that nevertheless easily fits within the parameters of the rule of law. All one has to do is take at face value the originalism and textualism that the Court's majority applies. It's perfectly fine to disagree with that methodology or its application, but there's no more evidence that Justices Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett are results-oriented than that Justices Breyer, Sotomayor, and Kagan are.

To be sure, some on the right accuse the latter three of acting on their policy preferences, but there's no reason to question their good faith either. They simply have a different way of looking at the law, especially in the politically sensitive cases with ideological salience. Perhaps many of the Court's critics who align with the liberal justices think that all jurists are results-oriented and vote their values—*which is illegitimate when going in a conservative direction*. I'm not versed enough in psychology to know if that kind of "projection" is at play, but it's really no way to run a popsicle stand.

In no sane world are the legal rules announced in last term's big cases, or those proposed in the high-profile cases I analyze above, radical. People (and lawyers) can debate them in good faith, but there's simply nothing extreme about them. The policy consequences may or may not be significant, but that's not the constitutional question. And with abortion, the issue that's gotten the most attention, it's healthier for us to fight democratically. That's what most countries have done—Europe generally settled at restrictions after 12 or 14 weeks, which is more conservative than the Mississippi law that the Supreme Court upheld—and what would've happened in the United States had *Roe v. Wade* not short-circuited that process nearly 50 years ago.

As the *Wall Street Journal* put it, "The fury of the left's reaction isn't merely about guns and abortion. It reflects their grief at having lost the Court as the vehicle for achieving policy goals they can't get through legislatures."[19] It's an understandable impulse but not one that fairly impugns the highest court in the land.

I for one am here for a further unraveling of the Burger Court.

[19] The Justices Don't Lie to the Senate, Wall St. J., June 26, 2022, https://on.wsj.com/3ozon9G.