REPORT ON THE PRESENTATION
THE SUPREME COURT 2021-2022 TERM IN REVIEW

Prepared by:

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Note: Judge Rhonda Nishimura is retired and currently serving as a mediator and arbitrator with Dispute, Prevention & Resolution, Inc. Robin William Girard and Michael Covenant Ratcliffe are JD candidates at the William S. Richardson School of Law, University of Hawai‘i.

THE SUPREME COURT 2021-2022 TERM IN REVIEW
July 6, 2022
12 noon – 1:30 (HST) via Zoom
AJS Report

Tom Goldstein, featured speaker
Partner of the Washington D.C. firm Goldstein and Russell, and an appellate advocate, best known as one of the most experienced Supreme Court practitioners having served as counsel to a party in roughly 150 merit cases at the U.S. Supreme Court. He is the co-founder and publisher of SCOTUSblog, and named one of the nation's 40 most influential lawyers of the decade by the National Law Journal. He has taught Supreme Court litigation at Harvard Law School since 2004 and previously taught the same subject at Stanford Law School for nearly a decade.

Honorable Mark Bennett, moderator
Circuit Judge, United States Court of Appeals for the Ninth Circuit

Louise Ing, emcee
Partner, Dentons

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The Supreme Court 2021-2022 Term in Review was live streamed through Webinar, attracting local, national, and international attendees, totaling 363 registrants, with 79% rating the presentation "excellent" and 16% of 92 respondents rating the presentation "very good".

INTRODUCTION

The Supreme Court decided several major cases during the past 2021-2022 term, which ended June 30, 2022, including: 1) Dobbs v. Jackson Women's Health Organization, 597 US ____ (2022), the most important abortion case in the last 30 years, providing the Supreme Court with an unprecedented opportunity to reconsider and potentially overrule Roe v. Wade, 2) New York State Rifle & Pistol Association, Inc. v. Bruen, 597 US ____ (2022), where the Supreme Court for the first time in 11 years reviewed a significant 2nd Amendment case, and 3) Carson v. Makin, 596 US ____ (2022), addressing whether a state violates the Constitution by prohibiting parents from choosing to use public funds that are available to pay for tuition at schools that provide religious instruction.

Mr. Goldstein, eloquently and with forthright clarity examined these major opinions along with other notable decisions, dissecting their rationale and potential, consequential, and far-reaching implications. In addition, Mr. Goldstein provided the attendees with a "sneak preview" of the upcoming Supreme Court Term 2022-2023 and possible future trends in American jurisprudence.

Dobbs v. Jackson Women's Health Organization, 597 US ____ (2022)
"Precedent no longer respected"

The biggest decision of this already historic term was Dobbs, where the Supreme Court (6-3) overturned 50 years of precedent following Roe v. Wade by approving a Mississippi law banning abortions after six weeks. In overruling Roe, the Court left abortion rights to be decided at the state level. Already in at least 12 states, abortion is illegal or heavily restricted, while at least 10 other states have laws in place that could quickly ban or restrict access to abortions.
https://www.npr.org/sections/health-shots/2022/06/24/1107126432/abortion-bans-supreme-court-roe-v-wade

In an earlier case this term, United States v. Texas, 595 U.S. ___ (2021), the Court (per curiam) sided with Texas by allowing citizens to file civil suits against abortion providers. The statute provided a novel workaround to constitutional challenges by empowering citizens to sue. Since no state officials were allowed to file suit, this precluded a pre-enforcement injunction. By approving the statute, the Court opened the door to other states enacting similar statutes for other controversial topics.

In deciding Dobbs, the Court overruled prior decisions that had recognized a woman's right to an abortion. The rights to be protected under the 14th Amendment, the Court reasoned, are those that are deeply rooted in American history and tradition and essential to the nation's scheme of ordered liberty. The decision diminishes the role of precedent. Chief Justice Roberts attempted, in his concurrence, to "slow the train" on overruling Roe by recommending issuing a narrower decision upholding the Mississippi statute, but not overruling Roe; however, he was unsuccessful in persuading either Justice Kavanaugh or Justice Barrett.

The Dobbs decision generated considerable controversy even prior to its formal opinion due to an unprecedented leak of the draft opinion, which leak is still being investigated and may never be solved.

What comes next in terms of substantive due process? Dobbs upended a rationale supported by cases relying on an implied right to privacy (for example, cases finding contraception and same-sex marriage protected). Justice Alito's rationale in justifying Dobbs held those rights differ from abortion since abortion involves the taking of a human life. Justice Thomas's strongly worded concurrence clearly suggests his willingness to reject a number of these existing protections, and some predict political activity at the state level seeking to overturn these previously protected rights.

Post-Dobbs Challenges: Red states with existing abortion restrictions will likely propose ever-increasing constraints, e.g., preventing women from traveling to other states to access abortions, although Justice Kavanaugh has already suggested in his concurrence that this would violate the right to travel. Other challenges concerning morning-after pills and IUDs are also expected in state and federal courts. This politically divisive issue will continue to generate litigation at both the state and federal levels.

NY State Rifle & Pistol Association v. Bruen, 597 US ____ (2022)

In District of Columbia v. Heller, 554 U.S. 570 (2008), the Court recognized a Second Amendment right to keep and bear arms separate from, and untethered to service in an organized militia. In Heller, the court struck down a Washington D.C. prohibition on having a firearm in one's home for self-defense. While Heller sustained the "keep" provision of the second amendment, Bruen recognized a constitutional right arising from the "bear" arms provision.

In Bruen, New York State adopted a restrictive rule requiring a gun permit applicant to show valid grounds justifying a carry permit. Presently, seven (7) other states have similar statutes. Other states place the burden upon the state to justify denying the carry permit. The Court invalidated the New York system but did not amplify places where individuals could not carry firearms. In Heller, the Court noted that there were "sensitive places," (like schools or government buildings) where government could prohibit firearms. But the Court has not, since Heller, elaborated on or defined the limits to or definitions of "sensitive places"

In addition to not amplifying the sensitive places doctrine, the Court was also silent as to what restrictions government can impose on the right to carry of particular classes of individuals. But importantly, the Court adopted a general presumption in favor of an individual's right to bear a firearm outside the home.

Post-Bruen: We may expect movement in other cases that have been waiting in the lower courts (e.g., magazine capacities, different kinds of firearms, silencers, etc.). Should they find their way to the Court, we should expect the Court, consistent with Bruen, to be protective of the Second Amendment.

***Carson v. Makin*, 596 US ____ (2022)**
Supreme Court: "We Don't Care," if state taxpayer funds are used to subsidize private religious schools.

Carson's 6-3 majority (6-3) decided that taxpayer funds may be used to subsidize tuition at private religious schools as part of a general tuition assistance program. This is a definite blurring of the separation between church and state. The State of Maine allowed religious schools' participation in the State's general tuition assistance program so long as the religious schools provided a secular curriculum and did not use state

funding for explicitly religious instruction or activities. The Supreme Court concluded that restricting the general tuition state funding to secular private schools violated the Free Exercise clause of the First Amendment --parents' right to free exercise of their religion includes choosing taking advantage of the general tuition assistance program to pay tuition at any religious school in Maine.

Explicitly rejecting the state's secular argument, the Supreme Court, by adopting the religious organizations' singular perspective, unequivocally voiced its support for an anti-discrimination approach. Simply put, "What is good for the goose, is good for the gander[,]" and "churches will not be less favored."

***Kennedy v. Bremerton School District*, 597 US _____ (2022)**

Upholding a high school football coach's kneeling and praying at the 50-yard line at Bremerton High School, a public school in Washington State, and allowing other students to join him in prayer, the Supreme Court in a 6-3 opinion, held that the free exercise and free speech clauses of the First Amendment protect an individual's right to engage in a personal religious observance. The Supreme Court held the Establishment Clause neither mandates nor permits government suppression of such religious expression.

Anticipate expansion of the ruling to other public facilities and buildings. Individuals will try to take full advantage of the ruling, and try to incorporate symbolic gestures, such as prayers, within the context of their employment or government-sponsored activities.

***West Virginia v. Environmental Protection Agency*, 597 US ____ (2022)**
"MAJOR QUESTIONS" doctrine.

Expanding a newly developed body of law known as the "major questions" doctrine, the Supreme Court (6-3) placed a heavy burden upon the agency to point to "clear congressional authorization" for the authority it claims in enacting any major policy initiatives. Ruling against the EPA, the Supreme Court soundly rejected the agency's reliance on the Clean Air Act's broad statutory grant, finding that the Act did not give the EPA broad power over carbon emissions. The Court held that if Congress wants to give an administrative agency the power to make "decisions of vast economic and political significance," it must say so clearly. The Supreme Court imposed additional hurdles upon the Biden administration's ongoing efforts to tackle major policy initiatives such as climate change. Given a Senate almost equally divided, this could stand in the way of effectuating major policy changes through administrative agency regulation.

Biden v. Missouri, 595 US ____ (2022)

National Federation of Independent Business v. Dept. of Labor, OSHA, , 595 US ____ (2022)

The Supreme Court took up two challenges to the Biden administration's vaccination and mask mandates, imposed in response to the on-going COVID-19 pandemic. Both cases came to the Court on motions for stays of lower court decisions.

In the first, *Biden v. Missouri*,, the Court (5-4), granted applications to stay 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. The Court emphasized that a key responsibility of the Department of Health and Human Services is "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety." The Court reasoned that because there is an established tradition of imposing conditions for the use of federal funds, vaccination and mask requirements are permissible as conditions for funding through government programs. Such a mandate, "fits neatly within" the power given to HHS by Congress. Hospitals and other similar facilities have been operating under mask and vaccination mandates ever since. Chief Justice Roberts and Justice Kavanaugh were part of the majority which issued a per curiam opinion.

In the second case, *National Federation of Independent Business*, the Court (6-3) reached a different conclusion, putting on hold while the case proceeds through the lower courts, a vaccination and mask mandate for large employers, imposed by OSHA on employers with 100 or more employees. Applying the new "major questions" doctrine, the Court found that Congress had not given OSHA the authority to require vaccinations or masking involving large employers. In the absence of such authorization, the Court reasoned that OSHA had exceeded the traditional limits of its regulatory power. The Court emphasized that Congress must speak clearly if it intends to give a federal agency the authority to "exercise powers of vast economic and political significance." The Court thus may have significantly curtailed the executive branch's ability to respond quickly to emergent national crises like the COVID-19 pandemic, especially in the context of hyper-partisanship in Congress.

"Sneak Preview" 2022-2023 Term

Affirmative Action cases:

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College
2. Students for Fair Admissions, Inc. v. University of North Carolina

A significant issue in the upcoming term with potential far-reaching implications, will be affirmative action. Twenty years ago, in Grutter and Gratz, the Court upheld the equitable application of affirmative action in higher education, recognizing race as a factor in determining admissions. See Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

Justice Jackson is expected to recuse herself from the Harvard case because she sat on a Harvard board. The Court may essentially invalidate affirmative action. If Chief Justice Roberts takes the conservative initiative on this issue, the Court's ruling is likely to be extremely hostile to race-based classification.

"Independent State Legislature Doctrine"

Can a state legislature appoint a different set of electors previously selected by the voters? There exists a provision in the Constitution that suggests that state legislatures are to determine the method for appointing electors and drawing congressional districts. See U.S. Const. art. I, § 4, cl. 1; U.S. Const. art. 2, § 1, cl. 2. The interpretative dispute hinges on how to understand the word "legislature." The independent state legislature theory is a controversial reading of the Constitution, supported in recent years by a small but vocal group of advocates, insisting that these clauses give state legislatures exclusive and near absolute power to regulate federal elections. These proponents argue in a more expansive but dangerous manner that the state legislatures can basically do whatever they desire under the auspices of the "Independent State Legislature" doctrine.

Should the Court adopt this more expansive reading of the "Independent State Legislature" doctrine, more state legislatures being controlled by Republicans may be emboldened in their efforts to decertify elections, refuse to accept their electors, and may invoke the power as to reapportionment or remapping.

Attendee Questions

1. *Q: Import of the Supreme Court granting cert. regarding the "Indian Child Welfare Act".*

A: Haaland v. Brackeen, represents a collection of petitions addressing the "Indian Child Welfare Act." The cases raise major legal issues. One, is whether the state's desire to apply a rational-basis test vs. strict scrutiny in ICWA's placement preference will prevail. Another is whether ICWA and its implementing regulations, which disfavor non-Indian adoptive families in child placement proceedings involving an "Indian child," violate the 5th Amendment's equal protection guarantee, as being discriminatory on the basis of race. Should the Supreme Court, having granted cert., answer in the affirmative, Goldstein envisions such a ruling as a harbinger of an increased and aggressive right-ward trend push from conservative litigants which could completely disfavor indigenous preference and lead to a radical reshaping of Indian law. Notwithstanding Justice Gorsuch's possible sympathy towards Native Americans, his one vote would probably not change the conservative court's outcome.

2. Q: Explain the "shadow docket".

A: The Supreme Court cases take one of two tracks: merits docket or shadow docket. Fundamentally and traditionally, the "shadow docket" is where the Court rules on procedural matters; however, the shadow docket's role has dramatically and substantively changed. Since the appointment of the three most recent justices prior to Justice Jackson, the Court is much more willing to act upon sensitive and significant cases without extensive briefing or a hearing and to issue orders containing little to no explanation.

3. Q: The diminution or disappearance of "stare decisis."

A: "Stare decisis," the doctrine of respecting prior decisions, underwent glaring scrutiny with the overturning of Roe v. Wade in the Dobbs decision. In particular, certain conservative justices made clear that in overturning Roe v. Wade, they "place a high value on having the matter 'settled right,'" and would not hesitate on tackling cases which they feel are "grievously wrong" (no existing Constitutional or American tradition footing).

4. Q: Proposed court reform measures.

A: There is no inherent mandate restricting the number of sitting justices to nine members. However, it is unlikely that any proposed legislation to increase the number from 9 to 13 (or some other number) would pass, given the ever-present filibuster rule.

Responding to another attendee's inquiry regarding term limits, Mr. Goldstein responded that although understandable given the current court's composition, term limits would be deemed unconstitutional because Article III grants lifetime appointment.

5. Q: Would justice's spouses' expressions of political or personal opinions and beliefs raise possible conflicts of interest?

A: There exists no standards or clearly defined rules addressing recusal of justices from hearing cases before them. Instead, any recusal is addressed by the individual justice, at his or her discretion. To date, Justice Thomas has declined to recuse himself from hearing any case that may directly or indirectly raise questions regarding his impartiality.