

## Surprises abound in Supreme Court's 2022 term

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The Supreme Court's October 2022 Term paints two different pictures of the Court — the first is a Court looking for consensus even in controversial cases, and the second is a conservative 6-3 majority flexing its muscles in other headline-grabbing cases.

The contrast is stark with the 2021 Term, where the Court experienced record-low unanimity and shifted the law in dramatic ways on abortion, guns, and environmental regulation. But this Term, the Justices forged agreement in surprising cases, and the Court's liberal bloc produced half as many dissents as the previous Term. Indeed, the October 2022 Term was full of surprises, many of which signify more than meets the eye.

One notable surprise was the strength and independence of the Court's newest member. Justice Ketanji Brown Jackson quickly emerged as the Court's most vocal participant, asking focused questions that resulted in her speaking roughly 50% more at oral argument than any of her colleagues. She also penned 11 separate writings and displayed independence through her willingness to split from her fellow Democrat appointees.

In *National Pork Producers Council v. Ross*, for example, Justice Jackson dissented along with Chief Justice John Roberts, Justice Samuel Alito, and Justice Brett Kavanaugh, who would have greenlighted a commerce clause challenge to California's law requiring farms to meet certain animal-welfare criteria in order to sell their pork in that state. And in *Pugin v. Garland*, she joined five Republican-appointed colleagues to expand the government's ability to deport noncitizens for offenses related to obstruction of justice.

Likewise, in *Abitron Austria GmbH v. Hetronic International*, Justice Jackson joined Justices Clarence Thomas, Neil Gorsuch, Alito and Kavanaugh to hold that the Lanham Act's prohibitions on trademark infringement generally apply only when an infringing "use in commerce" occurs in the United States. She also wrote separately to flesh out the phrase "use in commerce," something that the majority left open.

Perhaps the biggest surprise this Term was the Justices' ability to forge consensus. Many people expected a continuation of last Term's plummeting unanimity and sharp uptick in 6-3 decisions. There was, after all, ample fodder for the conservative majority to flex its muscles. To be sure, the Term ended with some significant conservative victories — prohibiting affirmative action in college admissions (*Students for Fair Admissions Inc. v. President & Fellows of Harvard College*), allowing a wedding web site designer to refuse

services to same-sex couples (*303 Creative v. Elenis*), and striking down the Biden administration's student loan forgiveness plan (*Biden v. Nebraska*).

Each of those decisions was polarized along ideological lines. But looking at the bigger picture, 45% of the Court's decisions were unanimous — similar to the average since 2010 and significantly more than last Term's 29%. And while the 2021 Term saw a rise in 6-3 decisions (19, with 14 of them decided along ideological lines), this Term produced only five decisions decided along ideological lines (and only 11 6-3 decisions total).

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Some unanimity or near unanimity came in surprising cases. In *Axon Enterprise v. Federal Trade Commission*, for example, the Justices okayed a new avenue for pre-enforcement challenges to federal agencies' administrative proceedings by allowing regulated parties to bring those challenges directly in federal district court.

That holding continues a string of recent decisions cabining administrative power, but its unanimity is striking. Similarly, despite sharp division in the lower courts as to whether an objectively reasonable interpretation can defeat False Claims Act liability, the Justices all agreed in *U.S. ex rel. Schuette v. SuperValu* that it cannot — instead, liability hinges on a defendant's subjective beliefs about a claim's falsity.

Other examples abound. In *Groff v. DeJoy*, the Justices unanimously raised the burden under Title VII for employers to deny religious accommodations. And by a vote of 7-2, the Justices rejected a constitutional challenge to the Indian Child Welfare Act (ICWA) in *Haaland v. Brackeen*. The Court also allowed the Biden administration to keep a controversial immigration policy prioritizing certain groups of unauthorized immigrants for arrest and deportation, holding by a vote of 8-1 that the challengers in *United States v. Texas* lacked standing.

Even in closely divided cases, this Term produced unusual coalitions to forge agreement on incendiary questions. Most notably, Chief

Justice Roberts and Justice Kavanaugh joined with their three more liberal colleagues in *Allen v. Milligan* to affirm a lower court ruling validating a claim that Alabama impermissibly diluted Black votes. The challengers' victory was surprising because the Court previously granted Alabama's request for an emergency stay — a move that signaled skepticism of the decision below.

The same five justices were joined by Justice Amy Coney Barrett in *Moore v. Harper* to reject a theory that would have given state legislatures exclusive authority to set the rules governing federal elections. *Moore* — an important victory for democracy — is particularly noteworthy because several parties on both sides urged the Court to dismiss the case as moot after an intervening decision from the North Carolina Supreme Court.

The willingness of Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett to join the liberal bloc to both grapple with and reject a theory embraced by some conservative circles reflects their emerging role as the Court's center — now a trio rather than a single swing vote (as was the case for many years before Justice Anthony Kennedy retired).

All of this combined to create another surprising aspect of the Term: Two of the Court's most conservative members — Justice Thomas and Justice Alito — penned the most dissents (16 total), while the Court's three most liberal members voted with the majority more frequently than any Democrat-appointed Justice has since the 2018 Term (80-82%).

At the same time, decisions like *Students for Fair Admissions, 303 Creative*, and *Nebraska* confirm that the 6-3 majority is very much intact on the issues that matter most to this Court. And looking beyond the statistics, a clearer picture of that majority's strength emerges. While the 6-3 ideological decisions represent robust conservative victories on questions like affirmative action, religious liberty, and administrative power, the Term's ostensibly liberal victories are more tenuous, often avoiding an issue rather than resolving it. In other words, some of this Term's most surprising outcomes may turn out to be surprisingly short-lived.

For example, while *Haaland* upheld ICWA, the Court didn't address the plaintiffs' most contentious claim — that the law's racial classifications violate equal protection — and instead dismissed it on technical standing grounds. But as Justice Kavanaugh noted

in his concurrence, that just means that the Court can consider the "serious" equal protection issue when it is "properly raised by a plaintiff with standing." And although *Moore* rejected the notion that state courts have no role to play in state regulation of federal elections, it didn't specify how much of a role courts can actually play.

In several other decisions — on topics spanning from immigration policy (*United States v. Texas*) to trademark law (*Abitron and Jack Daniel's Properties v. VIP Products LLC*) and social media companies' liability for third-party content (*Gonzalez v. Google*) — the Justices forged agreement by emphasizing the narrowness of their decision, leaving key questions for the lower courts, or dodging an issue altogether. The 2022 Term leaves behind some significant unfinished business that the Court may grapple with another day, perhaps with more dramatic results.

So what to make of the 2022 Term? To be sure, it was not as momentous as it could have been, given the cases on the Court's docket. But that doesn't mean that the 6-3 majority's muscle is atrophying. Instead, it likely reflects some division among the conservative Justices about both the degree and the pace that they effect change. That struggle is likely to persist next Term, where the Court's shrinking docket continues to include a combination of hot-button cases (including gun restrictions for domestic violence offenders and the validity of the *Chevron* doctrine) and low-profile cases (such as veterans' educational benefits and choice-of-law in admiralty).

For advocates, all of this means that it's more important than ever to strategically offer narrow approaches for deciding a case alongside other strong arguments that may lead to sweeping positions. That may include thinking about how to appeal to some of the Justices to vote against stereotype in a way that builds institutional legitimacy but does not undermine their long-term worldview. This is especially critical in business cases, where the Justices increasingly have been willing to find common ground regardless of the policy consequences. After all, we're likely to continue to see surprising ways of counting to five votes.

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