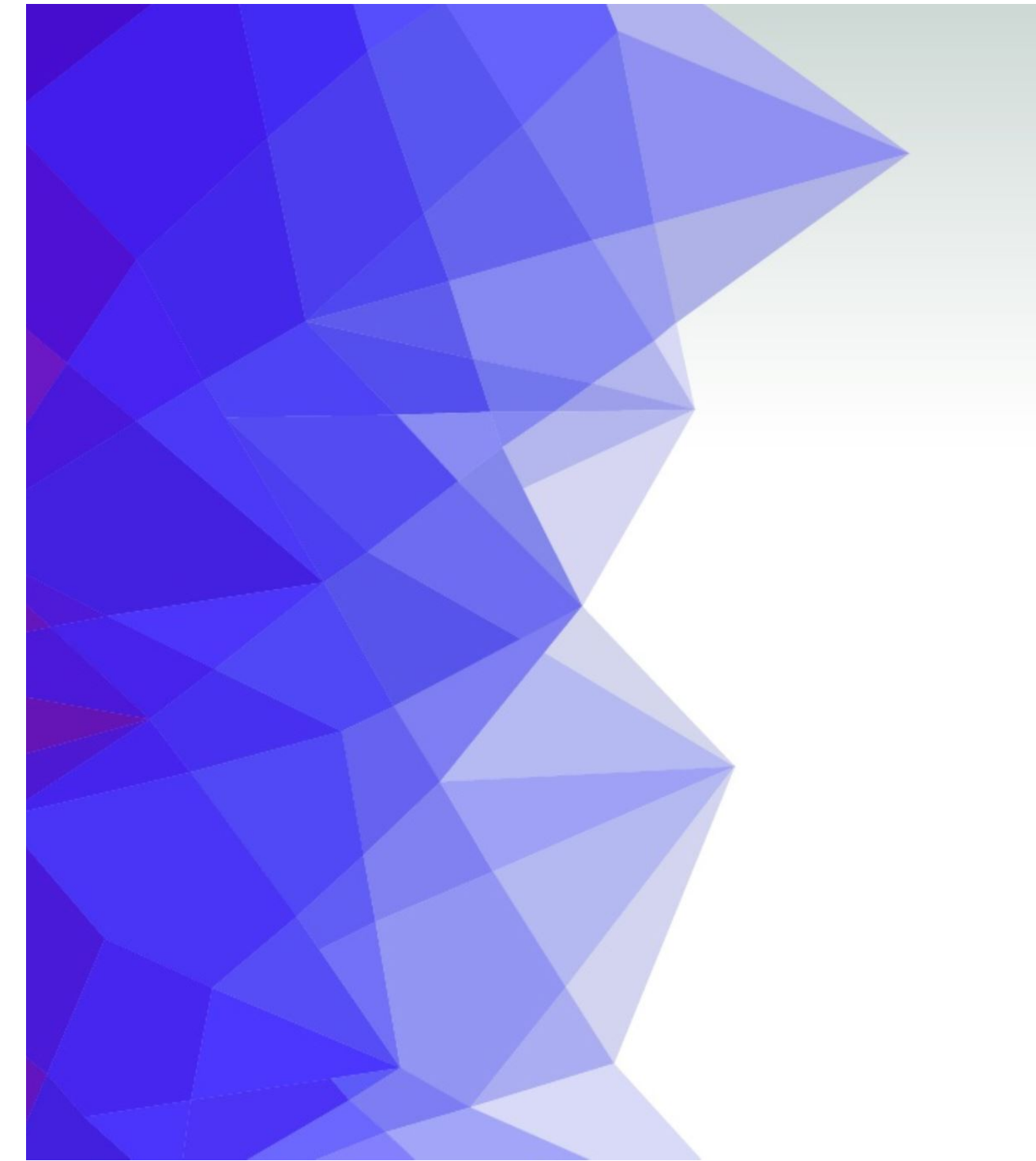


Judicial Supremacy and the Supreme Court

Howard Tolley

OLLI. - February 2025. Week 3

The Roberts' Court: 2005-2025



February 20, 1956. EJI Calendar of Racial Injustice

Local officials issued warrants for the arrests of civil rights activists, including Dr. Martin Luther King Jr., Rosa Parks, and the Rev. Ralph Abernathy, for organizing the Montgomery Bus Boycott. The following day, a grand jury indicted 89 of the leaders of the boycott, accusing them of violating a 1921 statute forbidding boycotts without “just cause.”

<https://calendar.eji.org/racial-injustice/feb>

The New Chief

50 year old former Rehnquist law clerk groomed for the court as deputy solicitor general arguing 39 cases.

January 1992 Bush #1 nominated to DC Court of Appeals. Senate Judiciary Committee chair Biden declined to hold hearings and Clinton elected President in November.

Bush #2 2005 nominated him to succeed Rehnquist as Chief Justice.

Confirmed 78 yes + 22 Democrats no, including Obama



Special Role of the Chief Justice

- **US has had 17 Chief Justices, 46 Presidents**
Roberts excludes 12 Chiefs in his count of 101 associate justices (5 promoted)
Currently paid \$271,000, Associates receive \$258,000
- **As administrative head of the Judicial branch serves as Chief Executive Officer of the Judicial Conference overseeing lower federal courts**
- **Gives annual “State of Judiciary” report. Advocate for increased budget for pay, staff and facilities**
- **Presides over oral argument, meetings to decide cases and opinion assignments, and Senate trials to impeach a President.**
- **Rehnquist wore distinctive robe, Burger appointed to head Bicentennial Commission, Warren appointed to head Commission investigating Kennedy Assassination**

The Justices

The Supreme Court as composed June 30, 2022 to present.

Front row, left to right: Associate Justice Sonia Sotomayor, Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Samuel A. Alito, Jr., and Associate Justice Elena Kagan.

Back row, left to right: Associate Justice Amy Coney Barrett, Associate Justice Neil M. Gorsuch, Associate Justice Brett M. Kavanaugh, and Associate Justice Ketanji Brown Jackson.

Credit: Fred Schilling, Collection of the Supreme Court of the United States

<https://www.supremecourt.gov/about/justices.aspx>



2024-2025 Justices

6 Republicans, 3 Democrats

6 Conservatives, 3 Liberals

5 Men, 4 Women

6 White, 3 of color with humbler origins

7 Catholic, 1 Jew, 1 Protestant

5 Harvard, 3 Yale, 1 Notre Dame

4 in their 50's, 3 in their 60's, 2 age 76

Judicial Values + Sex, Religion, Race, Party

	<u>Liberal/Progressive</u>	<u>Moderate</u>	<u>Conservative/Traditionalist*</u>
Women	Ginsberg, Sotomayor, Kagan, Jackson	O'Connor	Barrett
Catholics	Brennan, Sotomayor	Kennedy	Scalia, Thomas, Roberts, Alito, Gorsuch, Kavanaugh, Barrett
Jewish	Ginsberg, Bryer, Kagan		
Black	Marshall, Jackson		Thomas
Republican	Stevens, Souter	Kennedy	Scalia, Thomas, Roberts, Alito, Gorsuch, Kavanaugh, Barrett
Democrat	Ginsberg, Sotomayor, Jackson Bryer, Kagan		

Realignment to a 6-3 Conservative Court

Constitutional Flaws: Unrepresentative Electoral College + Senate
Republican Presidents Bush and Trump lost the popular vote but won an electoral college majority, Bush after a 2000 5-4 Supreme Court decision awarding him Florida's electors.

Their five conservative Justices were confirmed by an unrepresentative Senate — 6 small states have 12 Senators while the 6th largest state with more voters has only two.

Roberts'/Trump Court 2020-2025

<u>Roberts:</u> GW Bush (R, 2005), Male, Catholic, Harvard.	69
<u>Thomas:</u> GHW Bush (R, 1991) M, Catholic, Yale, Georgia.	76
<u>Alito:</u> GW Bush (R, 2006), Male, Catholic, Yale, NJ.	76
<u>Sotomayor:</u> Obama (D, 2009), Female, Catholic, Yale, NY.	70
<u>Kagan:</u> Obama (D, 2010), F, Jewish, Harvard, NY.	64
<u>Gorsuch:</u> Trump (R, 2017), M, Cath/Episc, Harvard, COL	58
<u>Kavanaugh:</u> Trump (R, 2018), M, Catholic, Yale, DC.	50
<u>Barrett:</u> Trump (R, 2020), F, Catholic, Notre Dame, Indiana	53
<u>Jackson:</u> Biden (D, 2022), F, Protestant, Harvard, DC	55

LGBT Marriage

Groups of same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. The plaintiffs argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, as well as the Civil Rights Act.

Joining the 4 liberals Justice Kennedy held that the Fourteenth Amendment

(1) requires a state to license a marriage between two people of the same sex

(2) requires a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state

Obergefell v. Hodges. 2015

LGBT Discrimination

An employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Gorsuch opinion joined by Roberts and 3 liberals.

RG Funeral Homes v EEOC. 2020 (6-3)

Future Issue:

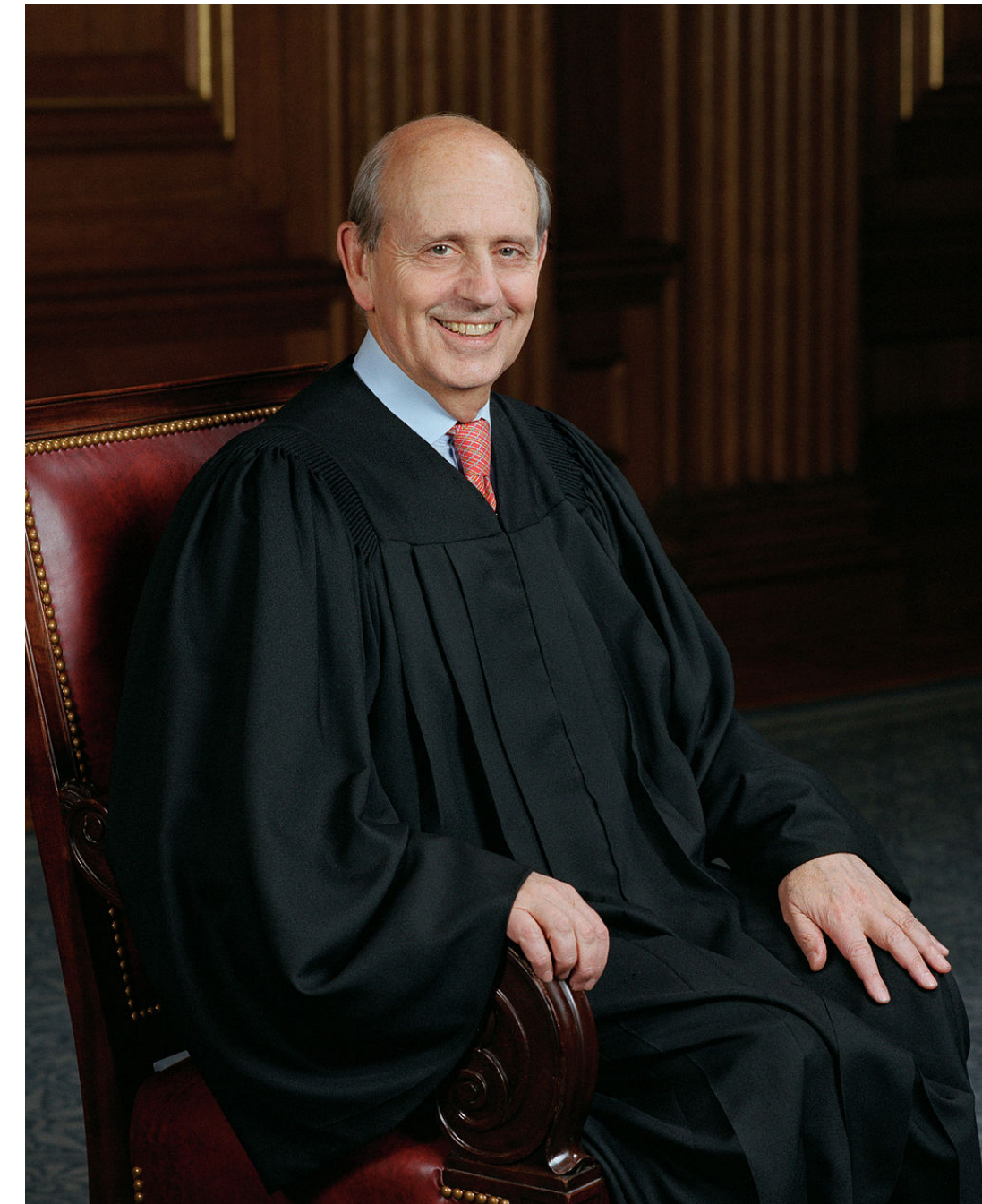
Are state laws that bar local jurisdictions from adopting anti-discrimination measures on behalf of Transgender persons unconstitutional? Applicable precedent: *Romer v Evans* found Colorado constitutional amendment barring LGBT anti-discrimination policy unconstitutional.

Congressional Power: Affordable Care Act

***National Federation of Independent Business v. Sebelius*, 2012 (5-4) Upheld the mandate that most Americans have health insurance. Roberts**

***California v. Texas* (2021).**

In an opinion for a 7-2 majority Justice Breyer upheld the Affordable Care Act 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 plaintiff — the Texas state government.



Free Speech, Religious Liberty + Compelled Expression

Roberts court conservative activists overruled Scalia's rational basis review in *Smith* restoring strict scrutiny to free exercise claims.

The new majority guaranteed Christians free exercise and free speech rights by

1. invalidating COVID restrictions limiting church attendance (*Tandon v Newsom*) and

2. anti-discrimination mandates requiring a baker to provide a cake affirming same sex marriage. (*Masterpiece Cakeshop*).

Free Exercise on Death Row

Ramirez v. Collier. 2022

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.

In death penalty appeals with no free exercise claim, the conservative majority refused emergency orders to stay executions during the Trump administration's rush to carry out 13 executions of US death row inmates after abolitionist Biden won the Presidency, right up until his inauguration.

Catholics Sotomayor and Biden's positions depart from their church on abortion but not capital punishment, while Catholics Thomas, Alito, Roberts, and Kavanaugh depart from their church on capital punishment but not abortion.

Abortion Switch: End of the 3rd Republic?

Disregarding *Roe v Wade*, 5-4 majority upholds Texas Heartbeat Law criminalizing abortion after 6 weeks enforced only by private citizens (“bounty hunters”) paid \$10,000 by the defendants for bringing suits against abortion providers. Liberal states could similarly disregard conservative precedent.

Whole Woman's Health v. Jackson, + U.S. v Texas

2022 *Dobbs v Jackson Women's Health*.

Mississippi bans abortion after 15 weeks. Leak of Alito's February draft 5 overrule *Roe*, returning to states the authority to allow or deny choice.

The 1937 Switch overruling *Lochner* rescinded the judicially created fundamental liberty of contract, marking the start of a 3rd American Republic

Pending Issue: Medication Abortions

in 2016 and 2021 the Food and Drug Administration expanded access to mifepristone, one of the two drugs used in medication abortions

In 2024 Kavanaugh for a unanimous court ruled that the Doctors lacked legal standing, the right to sue, because the FDA decision had no impact on their medical practice.

The justices declined to rule on whether the FDA acted properly in expanding access to mifepristone. Plaintiffs with standing have brought new challenges.

Guns

2008. *DC v Heller*. 5-4.

Scalia textualist 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 citizens from carrying a handgun outside the home without a license, and only grants licenses to those who satisfy the government that they have “proper cause” to carry a firearm.

6-3 Justice Thomas, originalism. No such limit found in US history or tradition. Sequel: New York passed new gun-control measures that, among other things, bar handguns in places like parks, libraries, and schools, as well as private businesses unless the owners specifically authorize concealed firearms. 2023 court rejects appeal for emergency stay and allows enforcement.

Was framer’s intent for armed citizens to defend the state, to enable individual self defense against an assailant or to enable citizen’s to resist state oppression?



Elections: Congressional Power

Citizens United v. Federal Election Commission, 2010

Kennedy's opinion (5-4) overruled the precedent that had found constitutional the post Watergate bipartisan McCain-Feingold campaign finance reform law setting limits on contributions.

Corporations including both businesses and employee unions are legally “persons” entitled to 1st Amendment free speech rights that include spending unlimited amounts in elections.

Elections: Congressional Voting Rights Act

States and localities no longer need federal approval to change voting laws as required by 1965 Voting Rights Act. Roberts rejects Congressional data analysis. Shelby County v. Holder, 2013 (5-4 decision)

Upheld black voters removal from Republican Congressional District based on political calculus rather than unconstitutional racial bias. 2024. Alexander v S. Carolina NAACP. 6-3

Affirmative Action

In Seattle and Louisville school boards that had for many years operated segregated schools decided to achieve racially diverse enrollments by requiring transfers.

Parents Involved in Community Schools v. Seattle School District No. 1

In a 2007 5-4 decision CJ Roberts applied strict scrutiny finding that diversity was not a compelling interest that justified the use of race in selecting students for admission to public schools and that doing so violated the Equal Protection Clause. Contrary to the 5-4 *Bakke* decision using intermediate scrutiny that would allow affirmative action, he reasoned that *Brown v Board of Education* required a color blind approach.

In 2023 the court applying strict scrutiny in *Students for Fair Admissions Inc. v. Harvard* overruled *Bakke* and *Grutter v Bollinger* thus ending court approved race based affirmative action in university admissions. Republicans charge that Kagan, Harvard's former law Dean, should have recused herself.

Anti Establishment Rules + Free Exercise

Tax \$ for Religious Schools: *Carson v. Makin* 2022 6-3

Maine violated the religion clauses or equal protection clause of the US 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.

School Prayer: *Kennedy v. Bremerton School District*.

6-3 Gorsuch. School that disciplined a football coach for engaging in a post game prayer at the 50 yard line violated his free exercise rights and could not be approved based on the establishment clause. *Lemon* test effectively overturned.

Regulatory Agency Cases. 2023-2024

1. Court, 6-3, overrules 40 year *Chevron* precedent applied in over 17,000 cases that required judges to defer to agency technical experts who administer regulation of corporations. Roberts faults Congress for delegating unchecked authority to agencies. Instead of deferring to agencies, federal judges can decide. *Relentless v Department of Commerce*. *Lopez Bright v. Raimondo*

2. Securities and Exchange Commission regulatory agency administrative law Judges levied penalties for securities fraud. Roberts opinion for 6-3 majority holds that the 7th Amendment guarantees those charged with a right to trial by jury, thus invalidating similar tribunals in other regulatory agencies. *SEC v Jarkesy*.

Executive Immunity

Roberts holds the Constitution permits a NY county prosecutor to subpoena a third-party custodian for the financial and tax records of a sitting President, over which the President has no claim of executive privilege. *Trump v Vance* 2020 7-2

Based on separation of power limitations, Roberts opinion rejects two committees of the U.S. House of Representatives subpoena to the creditors of President Trump and several of his businesses for financial tax records as overly broad. Concludes over dissents of Alito and Thomas that a narrowly tailored subpoena might be justified. *Trump v Mazars* 2020. 7-2

January 6 Investigation

Trump sought emergency Supreme Court order barring House committee subpoena of White House documents related to his planned challenges to Biden's election — potentially incriminating documents, including evidence of Ginnie Thomas' support for "stop the steal." Rejected 8-1 with Thomas in dissent. No recusal.

As with investigations of Nixon's and Clinton's potentially impeachable crimes, a President's appointed Justices voted against Trump and incriminating evidence was obtained.



Immigration Executive Orders: DACA

Congress fails to act on needed immigration reform.

Obama Executive Order defers deportation of 700,000 young adults brought to US as children. Entitled to attend school, work.

Trump orders Department of Homeland Security to revoke deferrals and begin deportation. Roberts opinion blocks revocation for procedural violation of Administrative Procedure Act

Immigration: Executive Orders

Trump Travel Ban on Muslims, upheld 5-4 Roberts *Trump v Hawaii*

Trump reallocated \$2.5 Billion of Pentagon Funds to build border wall: In unsigned Emergency order court approved use of funds for ongoing construction, overruling a lower court stay to await results in the litigation. *Trump v Sierra Club*

5-4 Roberts opinion allows Biden's homeland security officials to revoke Trump administration's "remain in Mexico" Migrant Protection Protocols until they are able to obtain a hearing on US soil. *Biden v Texas*.

Dismissal for Cause

The Congressional statute creating the Consumer Financial Protection Bureau provided the director “may be removed by the president only for inefficiency, neglect of duty or malfeasance in office.” Justice Roberts for a five member majority found the provision unconstitutionally violated the separation of powers. “The executive power belongs to the president, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead.” SEILA LAW LLC v. CONSUMER FINANCIAL PROTECTION BUREAU

2025 Emergency Docket Pending Appeal

After a lower court blocked him, President Trump filed an emergency petition for the court to sustain the dismissal of the Special Counsel responsible for protecting government whistleblowers. without explanation. The court may now overrule a 1930's precedent that found FDR exceeded his authority by dismissing a Federal Trade Commissioner without regard for the Congressional requirement to show cause. Bessent v Dellinger

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*
- 63 Cases heard in person by April 2022 in 2021
Term begun on 1st Monday in Oct.
- 63 decisions issued by 6/30/22

Emergency Docket

Petitions to one Justice asking the Supreme Court to issue a temporary injunction/stay in order to avoid irreparable injury — such as an execution — before the lengthy legal process is resolved.

Arizona 9th Circuit Kagan

Ohio 6th Cir. Kavanaugh

When referred to the full court may result in a short unsigned order before the court receives full briefing, hears oral argument and issues a final decision on the merits explained in longer written opinions.

Either a: Allows government to proceed or b: blocks immediate government implementation until final adjudication of whether the law is constitutional.

Emergency Appeals — “Shadow” Docket

From 2005 to 2013 the Court never granted more than 8 applications for emergency relief in a given term

2001-2017 8 Petitions from US Justice Dept.

2017-2021 41 Trump Administration 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.**

2022-2023 Term. Rejected attempts to block gun control laws and FDA approval of abortion pill.

Approved a stay of law barring Transgender students from competing own girls sports.

3 Decisions for Trump 2023-2024

1. States can not enforce the Constitutional prohibition barring a Presidential candidate guilty of insurrection. 6-3. *Trump v. Anderson*
2. Chief Justice Roberts rejects the legal basis for two of the four prosecution's charges against Trump for crimes seeking to overturn Biden's election. 6-3. *Fischer v US*.
3. Roberts grants broad grant of immunity for acts within the outer perimeter of the President's official responsibilities. Case remanded to trial court for a determination of which alleged crimes were private acts outside of the President's official responsibility. *Trump v US*.



Recusal Standards

28 USC section 455. Recusal Act

“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

2023 Supreme Court Code of Conduct

“A justice is presumed impartial and has an obligation to sit unless disqualified.” “Should” recuse when a “reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties.”

***Quid Pro Quo* Bribes or Gratuities?**

In June 2024 the Court overturned the conviction of a mayor convicted of federal bribery for soliciting and accepting \$13,000 in connection with the city's purchases of garbage trucks. Six justices held the statute proscribes bribes to state and local officials but does not make it a crime for those officials to accept gratuities for their past acts. *Snyder v US*

**Jury awarded \$50 million payment by Massey coal whose CEO then contributed \$3 million enabling a candidate elected to the state Supreme Court to vote to overturn the award. Majority of 5 mandated recusal to assure due process. Roberts, Thomas and Alito dissented arguing that there was no *quid pro quo*
Capperton v. A.T. Massey Coal. 2009. John Grisham *The Appeal*.**

Bipartisan Presidential Study Commission

Biden Executive Order 36 members

December 2021 pro and con 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**

2022 Democrats successfully campaign against the court, as the Republicans did in Nixon's 1968 election campaign

Senate Judiciary Committee Hearings

1. **1978 Ethics in Government Act. Annual Reports Thomas/Crowe. Gorsuch**
2. **28 USC section 455. Recusal Act
Democrats fault Scalia (VP Cheney) Thomas. (Jan. 6 Wife Ginny). Alito
Republicans fault Ginsburg for anti Trump bias, Kagan for role in Harvard case,
denounce Senator Schumer for threatening Gorsuch and Kavanaugh.**
3. **May 2022 Courthouse Ethics and Transparency Act. Disclose stocks within 45 days**
4. **1973 Code of Conduct for US Judges of the US Judicial System**

Roberts declines invitation to appear claiming separation of powers concern. Extensive investigation of leaked draft abortion opinion, little or no effort to improve accountability for ethical misconduct, leaving preparation of a code for the Justices to Congress — subject to Supreme Court determination of its constitutionality.

Court's public approval rating steadily drops as media reports continue to reveal improper conduct.

Constitutional Transformation

If successful in securing the extraordinary executive power he claims, Donald Trump will bring a transformation in Constitutional governance comparable to those resulting from the Presidencies of Abraham Lincoln in the civil war and Franklin Roosevelt during the great depression.

One party control of all three branches of the national government overwhelms the system of checks and balances. Attorney generals from the states controlled by the opposition resist. Control of the Senate is critical for shifting the composition of the court, or in combination with the House limiting its power.