

BRACE YOURSELF:

More Threats from the Supreme Court



INTRODUCTION

With Justice Ketanji Brown Jackson, the Supreme Court begins its first term with a Black woman justice this fall. For the first time, millions of Black women and girls can look at the nation's highest court and see someone who looks like them.

Justice Jackson's presence is a testament to her extraordinary qualifications and to the powerful desire of the American people to repair the damage done to the Supreme Court by Donald Trump and Mitch McConnell from 2016-2020. The ill-gained 6-3 far-right majority they created has regularly ruled in favor of the powerful at the expense of the rest of us. Most notably, they ended the constitutional right to abortion in the infamous *Dobbs v. Jackson Women's Health* decision.

The Far Right got this power because decades ago, they recognized the importance of the courts. Opponents of abortion rights, racial justice, church-state separation, environmental justice, and LGBTQ+ equality have long understood that by capturing the Supreme Court and the entire federal judiciary, they could impose their agenda on the rest of us.

But that's not what the majority of the American people want. We want to protect our families, our health, our communities, and our lives from an out-of-control Court. And the way to do that is to make sure our elected officials nominate and confirm justices like Ketanji Brown Jackson.

For now, the current majority still has power. The cases they have decided to hear so far this term can do immense damage. But like *Dobbs*, they are likely also to galvanize the American people to vote for elected officials who will give us a better Court. Issues before the justices this term will affect:

- **Free and Fair Elections**
- **LGBTQ+ Equality**
- **Affirmative Action in Education**
- **Safe Medical Care**
- **Protecting the Environment**
- **Protecting Immigrants' Rights**
- **Maintaining Native American Families**

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People For the American Way

Free and Fair Elections

A power grab to end free and fair elections: *Moore v. Harper*

Oral arguments: **not yet scheduled**

The Far Right has concocted a legal theory that would let right-wing state legislators undo vital checks and balances that promote fair elections. They claim that state legislatures can adopt unquestionably illegal voter suppression methods that violate their own state laws and even their own state constitutions. Observers fear the current Court majority will use this case to help their allies sabotage free elections in 2024 and beyond.

The conflict in this case began with an illegal partisan gerrymander designed to guarantee North Carolina Republicans a majority of that state's congressional districts even when voters statewide prefer Democrats.

Didn't the Court already address partisan gerrymandering?

The Supreme Court majority has already held that partisan gerrymandering cannot be struck down under the *federal* constitution. That happened in 2019's 5-4 decision in [Rucho v. Common Cause](#). But the chief justice's majority opinion stated that partisan gerrymandering can be addressed by *state* courts, based on provisions in *state* laws and *state* constitutions. Justices Thomas, Alito, Gorsuch, and Kavanaugh all signed on to Roberts' opinion.

This term, we will learn if the majority's reassurance in *Rucho* was a lie.

What happened in North Carolina?

The North Carolina Supreme Court took the *Rucho* majority at their word. In early 2022, they ruled that the Republican-controlled legislature's partisan gerrymander of congressional and state legislative districts violated the North Carolina Constitution. But the state legislators who pushed the gerrymander appealed the part of the ruling addressing congressional districts to the U.S. Supreme Court. They argue that for federal elections, the U.S. Constitution gives state legislatures the final word over any other state entity on laws relating to federal elections.

A theory to justify a dangerous power grab

Under this new and extreme "independent state legislature" theory, state constitutional protections for democracy simply don't apply to federal elections. It's based on an extremely narrow and ahistorical reading of the Constitution, which says that the manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof" (and by Congress). North Carolina Republicans claim this means that state courts, state governors, and other state officials are constitutionally prohibited from changing the state legislature's rules for federal elections – even if the legislature engages in outright voter suppression that its own state constitution prohibits.

This flies in the face of how the Elections Clause has always been understood: that state laws about congressional elections are made the same way and with the same checks and balances as any other state laws. That means governors can veto them, and state courts can interpret them – and strike them down if they violate the state constitution. Also, the people are the ultimate source of legislative authority: Underscoring this fact, in 2015 the Supreme Court upheld an Arizona ballot initiative in which the people gave redistricting power to a nonpartisan commission rather than to the state legislature. These protections against the abuse of power by gerrymandered state legislatures are threatened by the “independent state legislature” theory.

Our democracy is in enough peril already. Protecting it would become even harder if highly gerrymandered partisan state legislatures could illegally game the system to help their party overcome the will of the people, with no checks and balances in the state.

Undoing the state’s presidential vote

As if that were not bad enough, the “independent state legislature” theory could also be used to undo a state’s choice for president under a similarly-worded constitutional provision. The Constitution says that a state’s presidential electors shall be appointed “in such Manner as the Legislature thereof may direct.” A partisan legislature hostile to democracy in swing states like Georgia, Michigan, Wisconsin, or Pennsylvania could vote after Election Day to award the state’s electoral votes to the person who lost the popular vote in that state, even if that violates the state’s own laws and constitution.

In spite of that danger – or perhaps *because* of it – at least four of the Supreme Court’s arch-conservatives have already expressed some level of support for this theory in concurring or dissenting statements: Thomas, Alito, Gorsuch, and Kavanaugh. Indeed, [Ian Millhiser](#) has rightly called this case “perhaps the gravest threat to American democracy since the January 6 attack.”

Diluting Black votes by denying majority-Black districts:

Merrill v. Milligan

Oral arguments: **October 4**

The Court may use this case to weaken the Voting Rights Act and make it harder to create majority-Black voting districts. In fact, most of the justices have already signaled their hostility to such districts in this case from Alabama.

The need for a second majority-Black district

The 2020 Census showed that Black voters had increased to 27 percent of Alabama’s voters since the last redistricting. However, the state legislature drew new congressional lines so that only one of its seven districts – only half of 27 percent – was majority-Black. So Black voters seeking a second majority-Black district sued. They argued that the redistricting plan gave Black Alabamians less opportunity than others to elect the candidates of their choice to Congress. A three-judge federal court panel agreed, even though two of those judges were put on the bench by Donald Trump. It was a straightforward application of the Voting Rights Act under principles laid out by the Supreme Court back in a 1980s case called *Thornburg v. Gingles*.

The threat to the Voting Rights Act

Alabama officials appealed to the Supreme Court. They argue the lower court engaged in an unconstitutionally race-based gerrymander. The justices agreed to consider the case in the 2022-23 term. But five of the justices did more than that: Without explanation, they ordered that in the meantime, the 2022 congressional elections must proceed under the districts the lower court found racially discriminatory. This shadow docket order came over the dissents of Justices Kagan (joined by Breyer and Sotomayor) and even Chief Justice Roberts. Kagan wrote that due to the majority’s action, Black Alabamians had seen “their electoral power diminished – in violation of a law this Court once knew to buttress all of American democracy.” A similar shadow docket order was issued to freeze a lower court decision that redistricting in Louisiana violated the Voting Rights Act.

While Roberts agreed with Kagan that the lower court in Alabama had properly applied Supreme Court precedent, his separate dissent suggested he is open to reconsidering that precedent. That suggests that five and possibly six justices are set to reinterpret the Voting Rights Act to make it harder to ensure meaningful representation for Black Americans.

LGBTQ+ Equality

Letting businesses illegally discriminate against same-sex couples:

303 Creative v. Elenis

Oral arguments: **not yet scheduled**

A commercial wedding website designer in Colorado wants to deny service to same-sex couples, which is illegal under the state’s anti-discrimination laws. Her case is the next step in the Far Right’s effort to undermine equality by giving themselves a constitutional right to discriminate against LGBTQ+ people, and perhaps others as well.

Colorado's anti-discrimination law

Colorado law prohibits businesses from turning away customers on the basis of their sexual orientation. Lorie Smith owns a website design company called 303 Creative. Smith wants to expand into wedding website designs, but only for opposite-sex couples. She wants to post a statement on her website stating that she has religiously based opposition to same-sex couples marrying, and she will not create websites celebrating their marriages because that would violate her religious beliefs. Since that discrimination would violate state law, she sued the Colorado Civil Rights Division.

Smith claims that Colorado is violating her First Amendment free speech rights by compelling her to speak against her convictions. Colorado argues that the law regulates discriminatory sales practices, not speech. But even if it did regulate speech, Colorado argues that the law is constitutional because it is the only way to further the state's compelling interest in ensuring equal access to goods and services.

The Court's previous commitment to ending discrimination

In 1968, the Court held that a restaurant owner's religiously-based beliefs about race did not exempt him from the Civil Rights Act. And as recently as 2018's *Masterpiece Cakeshop* decision, Justice Kennedy's majority opinion made clear that:

[While] religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

That same opinion reaffirmed the importance of anti-discrimination laws, including those protecting LGBTQ+ people from discrimination:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.

The threat facing LGBTQ+ people and others

But this is a different Court than it was just four years ago. Two justices who recognized the constitutional rights and human dignity of LGBTQ+ people – Kennedy and Ginsburg – have been replaced by far-right conservatives Kavanaugh and Barrett. That could be enough to make the Court change directions, even if Justice Jackson shares her predecessor Justice Breyer's commitment to civil rights.

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In fact, in last term's notorious *Dobbs* decision, five justices undermined key Supreme Court precedents protecting LGBTQ+ people, including *Obergefell v. Hodges* (marriage equality) and *Lawrence v. Texas* (protecting the right to sexual intimacy). Justice Thomas even went out of his way to call for them to be reconsidered.

One of the reasons the Far Right works so hard to elect Republican presidents and senators is to make the federal courts hostile to LGBTQ+ equality. They have long sought to exempt themselves from anti-discrimination laws protecting people whose rights they have vigorously opposed in every legal, political, and social arena.

Also, if there is a right to discriminate on the basis of a business owner's religious beliefs, that would apply regardless of the religion. So, for instance, a website designer with religiously-based disapproval of interracial or interfaith marriage would have the same right as the owner of 303 Creative to turn interracial or interfaith couples away. Otherwise, the justices are choosing whether to protect a religious belief based on their own personal approval of that belief.

Affirmative Action in Education

Ending affirmative action in education: *Students for Fair Admissions v. UNC*; *Students for Fair Admissions v. President and Fellows of Harvard*

Oral arguments: **October 31**

Although the Court has upheld affirmative action in higher education in the past, that was before Donald Trump and Mitch McConnell created the current 6-3 far-right majority. The precedents that expanded educational opportunities for millions of students, especially young people of color, are now at risk this term in these two cases.

The Court's previous support for affirmative action

In the 2003 *Grutter* case, the Court rejected an Equal Protection challenge to a public law school's limited use of race and ethnicity in admissions to promote diversity in the educational experience. The Court reaffirmed *Grutter* in 2016 in the *Fisher* case involving the University of Texas, again confirming that universities have a compelling interest in the educational benefits that flow from student body diversity. In an opinion written by former Justice Anthony Kennedy, the court upheld the school's affirmative action program because all consideration of applicants remained individualized and there were no quotas and no numerical targets used in the selection process. It was a major victory for Americans who cherish our national ideals of fairness and equal opportunities for all.

The new challenges to affirmative action

Seeing how extreme the current majority is, opponents of affirmative action are back with two cases being heard at the same time. One case involves another public school, the University of North Carolina, that is subject to the Equal Protection Clause. The other involves Harvard, which is private, but which is subject to similar prohibitions against racial discrimination because it accepts federal funding. The lawsuits have been brought by a group called Students for Fair Admissions (SFFA).

SFFA urges the new majority to overturn *Grutter* and rule that colleges and universities cannot consider race at all in admission. Alternatively, they claim that even under the standards set forth in *Grutter* and *Fisher*, Harvard and UNC's affirmative action programs are unconstitutional. SFFA claims that Harvard discriminates against Asian students and has "enormous" racial preferences that the two precedents prohibit. The group also argues that both Harvard and UNC can achieve the educational benefits of diversity with race-neutral alternatives.

Refusing to see the reality of racial discrimination

As in the case with the majority-Black voting districts, the Far Right is purporting to use "race neutrality" in a way that will have a devastating impact on the rights and opportunities of people of color. This is shown in an [amicus brief submitted by the National Women's Law Center](#) (which People For the American Way joined). The brief points out that when states have banned or severely restricted race-conscious admission policies, the representation of people of color has dropped significantly.

Nevertheless, SFFA cites the chief justice's highly criticized statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Justice Sotomayor criticized that idea in a 2014 dissent:

[The] refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.

Justice Jackson may very well deeply understand this, based on her own life experiences. Although she has recused herself from the Harvard case due to her ties to the university, she will be fully involved in the UNC case.

Safe Medical Care

Protecting nursing homes that give substandard care: *Health and Hospital Corp. v. Talevski*

Oral arguments: **November 8**

In this case, a nursing home is asking not to be held accountable for giving substandard care to a resident with dementia in violation of federal law. But the Court majority could use this case to close the courthouse door to victims of *any* business or organization that violates protections set by Congress for recipients of federal funds.

Alleged mistreatment of a nursing home resident

Ivanka Talevski sued her husband Gorgi's nursing home for overprescribing unnecessary and powerful psychotropic drugs that she says caused his rapid physical and cognitive decline. She also accuses them of moving him to another facility without his or his family's consent. These actions violate the standards of care the nursing home agreed to when it accepted Medicaid funding.

How Congress has protected us from substandard care

Through the Constitution's "Spending Clause," Congress can set conditions for recipients of federal funds – like nursing homes that take Medicaid funds. What happens if the recipient violates those terms and hurts someone who those terms were supposed to protect? Decades ago, the Supreme Court established the principle that the victim can generally sue for damages – unless the spending statute in question clearly denies victims that right. That's because a federal civil rights law dating back to Reconstruction – called "Section 1983" – protects a person's right to sue when a federally protected right is violated.

Overturning precedent and its impact

The Court is being asked to overrule its precedent and shut down victims' lawsuits. The nursing home argues that even if Talevski's allegations are true and the hospital violated the conditions it had agreed to, Talevski should not be able to sue. It says any Supreme Court precedent to the contrary should be overruled.

This threatens anyone with a loved one in a nursing home subject to standards of care established by Congress in the Medicaid program. But if the Court majority issues an expansive ruling, it could threaten anyone whose health and rights are protected from abuse by businesses and other entities that accept federal funding

Protecting the Environment

Weakening the Clean Water Act: *Sackett v. EPA*

Oral arguments: **October 3**

The current 6-3 far-right majority may weaken the Clean Water Act and make it easier to pollute or fill wetlands. This is a result long sought by business interests even though it would cause significant environmental damage.

What the Clean Water Act says

The Clean Water Act protects “waters of the United States” from pollution, and that includes wetlands. The question in this case is *which* wetlands? Conservatives want the Supreme Court to reinterpret the CWA so it only protects wetlands with a continuous surface connection to relatively permanent bodies of water like rivers, streams, and lakes. That’s a definition that five justices rejected in a 2006 case called *Rapanos v. United States*. It would let people and businesses pollute or fill in numerous wetlands without a permit, which would severely undermine efforts to protect the nation’s water.

Rapanos has guided lower courts, but it actually had no majority opinion. Justice Scalia wrote for four justices (himself, Roberts, Alito, and Thomas) with the narrow definition that the plaintiffs in this case argue should be applied. But courts and the EPA have followed Justice Kennedy’s concurring opinion in that case, since anything he considered a protected wetland was also protected under the more expansive definition of “waters of the United States” that the four more moderate justices would have adopted. Under Kennedy’s test, a wetland or non-navigable waterway must bear a “significant nexus” to a traditional navigable waterway in order to fall within the protection of the Clean Water Act. It does not have to be visibly connected to such a waterway.

Reconsidering precedent

But with much more conservative justices now on the bench, the Court has decided to reconsider *Rapanos*. The plaintiffs are Chantell and Michael Sackett, who want to build a house on land currently protected as wetlands. Their house is 30 feet from a creek tributary that ultimately feeds into Priest Lake, and a subsurface flow of water connects their property to other nearby wetlands and the lake. The EPA has determined that the land is part of an area that significantly affects the lake.

The Sacketts argue that since a road separates their property from the tributary and there is not a continuous surface-level water connecting them, it is not covered by the Clean Water Act. That would mean they could fill in the land without a permit regardless of the impact on the creek or the lake. They are urging the Court to adopt the extremely narrow definition of waters protected by the CWA that Justice Scalia pushed in his four-justice *Rapanos* opinion.

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The impact if the majority rewrites the Clean Water Act

The Supreme Court's decision would have an enormous impact beyond this one house. The Sacketts are represented by the conservative Pacific Legal Foundation, and numerous mining, oil, real estate development, lumber, and other industry groups have submitted amicus briefs on their behalf.

Protecting Immigrants' Rights

Blocking the Biden administration's immigration guidelines: *U.S. v. Texas*

Oral arguments: **December [specific date not yet determined]**

The Biden administration's efforts to change the Trump administration's cruel immigration policies have been stymied by Trump judges. This case will determine the extent to which Trump will still control our nation's immigration policy two years after losing reelection.

Leaving the Trump policies behind

One of the things Trump's presidency was notable for was its deliberate cruelty to immigrants. The images of kids in cages were horrifying, yet they only captured a portion of the misery intentionally imposed on innocent people. When Biden took office, he sought to end the policy of detaining and deporting as many immigrants as possible. In September 2021, the Secretary of Homeland Security, Alejandro Mayorkas, issued a memo with guidelines for immigration enforcement. The memo directed immigration agents to focus their efforts on people who pose threats to public safety and national security.

Trump's judges step in

Courts have long recognized the president's authority to determine immigration priorities, especially since Congress has never provided the funding necessary to fully enforce the nation's immigration laws. Nevertheless, Texas sued, and Trump judge Drew Tipton ruled that the guidance could not be put into effect anywhere in the country. He held that the immigration statutes require all immigrants in certain categories to be deported, and that the guidance illegally gave officials discretion.

On appeal, the conservative Fifth Circuit let Tipton's order remain in effect, and so did the Supreme Court, in a 5-4 shadow docket ruling without explanation. In Justice Jackson's first action on the Court, she dissented, as did Justices Sotomayor, Kagan, and Barrett. At the same time, the Court also said it would hear oral arguments on the legal issues in December and issue a formal decision on the merits later this term.

Maintaining Native American Families

Undercutting the Indian Child Welfare Act: *Haaland v. Brackeen*

This case concerns the constitutionality of congressional efforts to protect Native American tribes from having their children taken away from them.

The Indian Child Welfare Act

The federal government has a trust obligation to act in the welfare of tribes. Congress passed the Indian Child Welfare Act (ICWA) in 1978 because so many Native American families were having their children removed and raised by non-Native families and institutions. The law states that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” The ICWA established rules for state custody proceedings to increase the likelihood that Native children would be raised by Native families.

Challenges to the law

Several non-Native families whose adoption plans were affected by the law sued in federal court, as did the governments of Texas, Louisiana, and Indiana. Among other things, they claim that the ICWA is racially discriminatory and therefore unconstitutional. The Cherokee Nation, the Oneida Nation, the Morongo Band of Mission Indians, the Quinault Indian Nation, and the Navajo Nation are defending the law. Because the tribes are sovereign nations, they argue that the ICWA makes legitimate political classifications, not illegitimate racial ones.

The law’s opponents also argue that child custody decisions are state decisions, not federal ones. They claim that the ICWA unconstitutionally “commandeers” state courts and adoption agencies to carry out a federal program. In response, the tribes point to Congress’s broad authority to act as a trustee to protect the Indian Nations. In addition, Congress routinely “preempts” state laws in areas where both have authority, and the tribes argue that this is no different.

Conclusion

The cases featured in this report demonstrate the potential for the Court to do great harm this term. The Court may well do even more in cases they may decide later to hear in 2022-23. While the headlines will be about the Court, this is really about people. We cannot lose sight of the tremendous suffering the far-right majority is causing with decisions like the *Dobbs* case taking away the right to abortion.

But, as the months following the *Dobbs* decision have shown, the more damage the far-right justices do, the more the American people recognize the danger and understand the remedy: voting.

If we act with resolution and focus, the current majority’s extremism may be what ends their reign.

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