

# The Roberts Court 2023-2024

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# Some Statistics

59 Opinions

4 Per Curiam (one dismissing the writ)

45.8% with 8 or 9 votes (55.9% in 2022-2023);

8.5% with 5 votes (11.9% in 2022-223)

# Some Statistics

Authored opinions:

Roberts, C.J., and Justices Thomas, Sotomayor  
and Kagan (7)

Justices Gorsuch, Kavanaugh, and Barrett (6);

Justice Jackson (5), and Justice Alito (4)

# Some Statistics

## Total or Partial Dissents in 2023-2024 Term:

Six conservative Justices = 44 (7.3 avg.) compared to 49 (8.1 avg.) in 2022-23.

Three liberal Justices = 51 (17.0 average) compared to 31 (10.3 avg.) in 2022-23.

It takes four votes to grant a writ of certiorari. The conservative bloc controls what cases are taken.

# Some Statistics

## Fewest Dissents in 2023-2024 Term:

The Chief Justice had two. Justice Kavanaugh had four. Justice Barrett had five.

(Last Term it was three for Justice Kavanaugh, four for the Chief Justice, five again for Justice Barrett).

# Some Statistics

Five Authored decisions with 5-vote majorities:

Generally, these cases do not fall into the “conservative-liberal” boxes.

When Justices Sotomayor, Kagan, and Jackson voted together, they were on the losing side in two of those five opinions and on the winning side in two.

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# Some Statistics

As I have written before, 6-3 is the new 5-4.

There were 22 decisions with 6-3 votes.

Justices Sotomayor, Kagan, and Jackson dissented in 11 of those 22 cases.

They were in the majority in six of those 22 cases.

They split up in five of those decisions. • When Justices Sotomayor, Kagan, and Jackson voted together, they were on the losing side in two of those five opinions and on the winning side in two.

## *Impeachment Clause, Art. II, Section 4*

“The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”



## *Art. I, Section 3*

“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

## *Trump v. United States*

The President may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. Government must show that applying a criminal prohibition to an official act would pose no “dangers of intrusion on the authority and functions of the Executive Branch.”

## *Fourteenth Amendment, Section 3*

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States . . . who, having previously taken an oath . . . or as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

## *Fourteenth Amendment, Section 5*

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## *Trump v. Anderson*

With respect to the Colorado Supreme Court determination that Donald Trump could be kept off the November 2024 Presidential ballot under Section 3 of the Fourteenth Amendment, states have no power under the Constitution to enforce Section 3 of the Fourteenth Amendment with respect to federal offices, especially the Presidency; only Congress has that power through legislation enacted under Section 5 of the Fourteenth Amendment.

# Separation of Powers

The text of the Constitution does not expressly refer to the doctrine of separation of powers. However, the Constitution divides governmental power among three branches by vesting the Legislative Power of the Federal Government in Congress; the Executive Power in the President; and the Judicial Power in the Supreme Court and any lower courts created by Congress.

# Section 6 of the Administrative Procedure Act

- “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U. S. C. §706. It requires courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.” §706(2)(A).

## *Loper Bright Enterprises v. Raimondo*

*Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984) is overruled. Under the Administrative Procedure Act, courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. Careful attention to the judgment of the Executive Branch may help inform that inquiry. When a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. Courts need not and under the APA may not defer to an agency interpretation of the law because a statute is ambiguous.



## *SEC v. Jarkesy*

When the Securities and Exchange Commission seeks civil penalties against a defendant for securities fraud, the defendant is entitled to a jury trial because the SEC's antifraud provisions replicate common law fraud, and common law claims must be heard by a jury. None of the exceptions under the "public rights" doctrine (permitting Congress to assign certain matters to agencies for adjudication) are applicable.

# *Corner Post Inc. v. Board of Governors of the Federal Reserve System*

An Administrative Procedure Act claim does not accrue under 5 U. S. C. §2401(a), which provides for a six-year statute of limitations, until a plaintiff is injured by final agency action.

# *Ohio v. EPA*

Where (1) EPA disapproved the State Implementation Plans of 23 states relating to attainment of ozone air quality standards downwind of these states under the Good Neighbor Provision of the Clean Air Act, and instead developed a Federal Implementation Plan for these states to meet the standards, (2) modeling underpinning the FIP was based on data from the 23 states, (3) based on litigation, at least 12 of those states would not be covered by the FIP, and (4) EPA did not explain why its modeling was still valid if those 12 states were not covered, applicants demonstrated that they were likely to succeed on the merits of their claim that the FIP was arbitrary and capricious under the Administrative Procedure Act, and thus a stay of the FIP was entered pending review of the FIP by the D.C. Circuit Court of Appeals.

# Second Amendment

- “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

## *Garland v. Cargill*

A semiautomatic weapon equipped with bump stock is not a machine gun as that weapon is defined in the National Firearms Act of 1934 because it requires more than a single function of a trigger to fire and does not fire “automatically.”

## *United States v. Rahimi*

18 U. S. C. §922(g)(8), which prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he “represents a credible threat to the physical safety of [an] intimate partner,” or a child of the partner, does not violate the Second Amendment.

# Abortion-Related Cases

Challenges to FDA's decisions regarding mifepristone.

The conflict between Idaho's abortion law and the Emergency Medical Treatment and Labor Act.

## *FDA v. Alliance for Hippocratic Medicine*

Several pro-life doctors and four medical associations lacked standing to challenge the FDA's 2019 approval of generic mifepristone and its 2021 decision to allow prescription of mifepristone without an in-person visit to a healthcare provider's office because they did not prescribe or use mifepristone and the FDA was not requiring them to do or refrain from doing anything.



## *Moyle v. United States*

The Court, *per curiam*, dismissed the writ of certiorari as improvidently granted and vacated the stays entered in the case on January 5, 2024.

# Partisan Gerrymandering

14<sup>th</sup> Amendment, Section 1: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

# *Alexander v. South Carolina State Conference of the NAACP*

Where the South Carolina legislature engaged in non-justiciable partisan gerrymandering to draw the lines of District 1 following the 2020 census, it was entitled to a presumption of good faith; the district court's finding that race, not politics, played a predominant role in the formation of District 1 was clearly erroneous because the district court failed to account for this presumption and failed to apply the correct legal standards to the facts.

# First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

## *Lindke v. Freed*

When a government official posts about job-related topics on social media, such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

## *O'Connor-Ratcliff v. Garnier*

The Court remanded for reconsideration in light of the decision in *Freed* this First Amendment claim resulting from school board trustees blocking the use of individual social media platforms of the trustees by a citizen criticizing the school board.

## *Moody v. NetChoice, LLC and NetChoice v. Paxton*

When a state law is challenged as facially unconstitutional under the First Amendment, the question is whether the law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other.

## *National Rifle Association v. Vullo*

The First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or through private intermediaries. The NRA's second amended complaint plausibly alleged that New York insurance officials did so because they did not favor the NRA's gun-related views.



## *Murthy v. Missouri*

Plaintiffs alleging that Government agencies or officials coerced social media platforms into eliminating certain messages related to COVID or the 2022 mid-term elections lacked standing.

## *Vidal v. Elster*

The “names clause” in the Lanham Act that prohibits registration of a trademark consisting of or comprising a name identifying a particular living individual except by that person’s written consent does not violate the First Amendment’s Free Speech clause.

# Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to the “terms” or “conditions” of employment. 42 U. S. C. §2000e–2(a)(1).

## *Muldrow v. City of St. Louis*

A Title VII plaintiff alleging that a job transfer was discriminatory need only show “some harm” to establish a claim, and not, as the Eighth Circuit had held, a “significant” harm.

# Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## *City of Grants Pass v. Johnson*

The enforcement of generally applicable laws regulating camping on public property by homeless people does not constitute Cruel and Unusual Punishment prohibited by the Eighth Amendment.

# Appropriations Clause

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

*Consumer Financial Protection  
Bureau v. Community Financial Services Assn. of  
America*

The funding mechanism approved by Congress for the Consumer Financial Protection Bureau—authorizing the Bureau to draw from the Federal Reserve System the amount its Director deems “reasonably necessary to carry out” the Bureau’s duties, subject only to an inflation-adjusted cap. 12 U. S. C. §§5497(a)(1), (2)—satisfies the Appropriations Clause in Art. I, §9, cl. 7 of the Constitution.



## Article I, Sections 8 and 9

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises. . . .



No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

# Sixteenth Amendment

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## *Moore v. United States*

The 2017 Mandatory Repatriation Tax which attributes active business income of a foreign corporation to its shareholders is constitutional under Article I, §§8 and 9 and the Sixteenth Amendment.

# Arbitration

Sections 1 and 3 of the Federal Arbitration Act.

Who decides arbitrability?

Who is a worker engaged in interstate commerce?

Staying not dismissing an action referred to arbitration.

## *Coinbase v. Suski*

Where the Coinbase Users Agreement contains an arbitration clause delegating arbitrability to the arbitrator, but a Coinbase customer who agreed to the Users Agreement entered a Coinbase sweepstakes with “Official Rules” that called for disputes to be resolved not by arbitration but in California courts, a court, not an arbitrator, decides which contract is applicable to a dispute involving the sweepstakes.

## *Bissonnette v. LePage Bakeries*

A transportation worker need not work in the transportation industry to fall within the exemption from compelled arbitration in Section 1 of the Federal Arbitration Act (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”)

## *Smith v. Spizzirri*

Under Section 3 of the Federal Arbitration Act, where a party has moved to refer a dispute to arbitration, the trial court must stay, not dismiss, the action pending the outcome of the arbitration.

# Bankruptcy

- 11 U. S. C. §1123(b) establishes what a plan of reorganization “may” include. There is a “catch-all” subparagraph (6):
  - ***“include any other appropriate provision not inconsistent with the applicable provisions of this title.”***



## *Harrington v. Purdue Pharma L.P.*

- The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.
- (Voiding a multi-billion dollar resolution of opioid claims)

# Copyright

- There is no time limit on monetary recovery in the remedial sections of the Copyright Act. They state only that an infringer is liable either for statutory damages or for the owner's actual damages and the infringer's profits. 17 U. S. C. §504(a)–(c).

## *Warner Chappell Music, Inc. v. Nealy*

- Assuming without deciding that the discovery rule applies to start the three-year limitations period for an infringement claim under the Copyright Act (i.e., the cause of action accrues when the plaintiff discovers the infringement) damages are not limited to the three years prior to filing suit, but instead can be sought back to the time that infringement began.

# Securities Law

- Section 10(b) of the Securities Exchange Act of 1934 makes it “unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.” 48 Stat. 891, 15 U. S. C. §78j(b).
- Rule 10b–5(b) makes it unlawful for issuers of registered securities to “make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” 17 CFR §240.10b–5(b) (2022).

# *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*

- A failure to disclose information required by Item 303 of Regulation S-K of the Securities and Exchange Commission (under which Form 10-K is filed) can support a Rule 10b–5(b) claim for securities fraud only if the omission renders affirmative statements made misleading.

# National Labor Relations Act

- Section 10(j) of the NLRA provides that, “upon issuance of a complaint,” the Board may “petition any United States district court . . . for appropriate temporary relief.” §160(j). A district court considering a §10(j) petition may “grant to the Board such temporary relief . . . as it deems just and proper.”

## *Starbucks Corporation v. McKinney*

- When the National Labor Relations Board brings an enforcement action seeking a preliminary injunction under Section 10(j) of the National Labor Relations Act to prevent an alleged unfair labor practice, it must satisfy the traditional four-factor test for a preliminary injunction articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7 (2008).

# Whistleblower Protection

- The Sarbanes-Oxley Act of 2002 provides that no covered employer may “discharge, demote, suspend, threaten, harass, or in any other manner **discriminate against an employee** in the terms and conditions of employment **because of**” protected whistleblowing activity. 18 U. S. C. § 1514A(a).



## *Murray v. UBS Securities, LLC*

- A whistleblower need not prove retaliatory intent to establish a claim under the Sarbanes-Oxley Act of 2002, 18 U. S. C. § 1514A(a).

# National Banks: Federal Preemption

- Does the State Law significantly interfere with the national bank's exercise of its powers?

## *Cantero v. Bank of America, N.A.*

- Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, courts may find a state law regulating a national bank preempted only if, “in accordance with the legal standard” from *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the law “prevents or significantly interferes with the exercise by the national bank of its powers.” 12 U. S. C. §25b(b)(1)(B).

# Questions? Follow Up?

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# Post Script

Takings under the 5<sup>th</sup> Amendment

Sixth Amendment right to confront witnesses

Section 1983 Cases/4<sup>th</sup> Amendment

Preliminary Hearings in Civil Forfeiture/14<sup>th</sup>

Amendment Due Process

# Fifth Amendment (Taking of Property Without Just Compensation)

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## *Sheetz v. El Dorado County*

The Takings Clause of the Fifth Amendment does not distinguish between legislative and administrative permit conditions. Hence, an impact fee imposed on a homeowner by the legislature was not exempt from a Takings Clause analysis.

## *DeVillier v. Texas*

Because Texas law provides a procedural vehicle to DeVillier to obtain just compensation under the Takings Clause of the Fifth Amendment for an inverse condemnation claim, the Court did not have to decide whether there is a direct cause of action under the Fifth Amendment to obtain just compensation for the taking of private property for a public use.



# Sixth Amendment (Confrontation Right)

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . .

## *Smith v. Arizona*

Because of the right to confront a witness under the Confrontation Clause: (1) a State may not introduce the testimonial out-of-court statements of a forensic analyst at trial unless she is unavailable and the defendant has had a prior chance to cross-examine her; (2) the State may not introduce the statements through a surrogate analyst who did not participate in their creation because the statements are being offered as proof that they are true, and (3) this remains the case even if the surrogate presents out-of-court statements as the basis for his expert opinions.

## 42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

## *Gonzalez v. Trevino*

To satisfy the exception in *Nieves v. Bartlett*, 587 U. S. 391, 402 (2019) that allows a false arrest claim to proceed even when probable cause to arrest exists, a plaintiff need not show that there is a similarly situated person who engaged in the same conduct but was not arrested, but must produce objective evidence of “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.”

## *Chiaverini v. City of Napoleon, Ohio*

Where there were valid charges and one invalid charge (*i.e.*, without probable cause, leading to an unreasonable seizure of the person) brought against an individual, after the charges were dismissed, a Section 1983 claim for malicious prosecution is allowable as to the invalid charge, subject to proof that it was the invalid charge and not the valid charges that resulted in the arrest and detention of the individual for three days.

## Fourteenth Amendment, Section 1

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## *Culley v. Marshall*

The Constitution requires a timely forfeiture hearing but does not require a preliminary hearing to permit police to retain possession of a vehicle pending the civil forfeiture hearing.