

Supreme Court Term May Upend Precedent, Push Back Regulation

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Key Points

- The Supreme Court’s 2022 docket raises politically and socially charged questions concerning race, election law and civil rights, as well as potentially wide-ranging business issues.
- The Court could dramatically shift the law in several areas if its willingness to reexamine precedent continues.
- The justices may be more likely to forge consensus in business cases, agreeing on narrow issues without sacrificing their broader worldviews.
- The Court’s tendency to question the basis for government regulation may continue to create new opportunities for businesses to challenge administrative action.

The U.S. Supreme Court’s 2022 term opened in October with another docket that is teeming with controversial issues, ranging from affirmative action in college admissions and third-party liability for social media posts to corporations’ consent to being sued in jurisdictions outside their home state. Many of these cases won’t be decided until the term draws to a close in June 2023. In the meantime, businesses should be watching for meaningful trends as the term unfolds.

How Dramatically Will the Court Shift the Legal Landscape?

The 2021 term revealed the Court’s willingness to revisit precedent. The most obvious example was *Dobbs v. Jackson Women’s Health Organization*, in which five justices voted to overrule *Roe v. Wade*. The *Dobbs* majority’s articulation of a weakened version of *stare decisis* — one that applies only to “very concrete reliance interests, like those that develop in property or contract rights” — may allow the Court to reshape the law in other areas.

The Court also signaled its inclination to narrowly construe other precedent, including by undermining the force of *Chevron* — the long-standing framework for deferring to an agency’s reasonable interpretation of an ambiguous statute — by conspicuously omitting it from several important administrative law decisions.

The 2022 term provides additional opportunities for the Court to reconsider precedent, on issues such as affirmative action, the Clean Water Act’s regulatory reach, the intersection between LGBTQ+ rights and religious freedom, and the scope of the Voting Rights Act’s protections against racial gerrymandering.

Impacts on Businesses

The justices are also poised to tackle important questions that could have broad nationwide ramifications for businesses.

Where companies can be sued. In *Mallory v. Norfolk Southern Railway Co.*, the Court will address the constitutionality of a Pennsylvania law requiring corporations to consent to personal jurisdiction in order to do business in the state, a decision that could significantly affect the number of states in which a business can be sued.

Whether states can regulate out-of-state conduct. *National Pork Producers Council v. Ross* requires the justices to revisit the scope of the dormant commerce clause — the doctrine that restricts states from burdening interstate commerce by regulating conduct in other states. The Court will decide whether California, which imports more than 99% of its pork, can require farms outside California to meet certain animal welfare criteria before

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selling their pork there. The answer could greatly impact states' ability to regulate other types of out-of-state conduct, from using pesticides and union labor to mailing abortion pills. The decision will also shed light on the current justices' views of the dormant commerce clause, which has long divided the Court across ideological lines. Justice Samuel Alito embraces the doctrine, while Justice Clarence Thomas rejects it, and the views of the newest justices remain to be seen.

Who is accountable for social media posts. In *Gonzalez v. Google LLC* and *Twitter, Inc. v. Taamneh*, the Court will consider the extent to which social media companies may be held liable for content third parties post on their platforms. The answer could have significant implications for users and hosts alike.

How U.S. law applies abroad. In *Abitron Austria GmbH v. Hetronic International, Inc.*, the Court will revisit decisions governing the extraterritorial application of U.S. law — specifically, whether the Lanham Act's protections for U.S. trademarks apply to purely foreign sales. The decision could change the Court's framework for assessing extraterritoriality, considerably expanding or restricting the scope of liability for conduct that takes place abroad.

The Bottom Line

Just how far the Court will move the law in any of these instances remains to be seen, but if last term is any indication, the justices may not shy away from major changes. Businesses will want to monitor these and other cases so they can anticipate potential ramifications.

Will the Court Continue To Find Common Ground in Business Cases?

Any of these business cases could result in a watershed decision, but they might also once again unite the justices in a term filled with divisive social issues.

Overall unanimity fell in the last term to 29% (compared to 43% over the last decade), marking it the first term in many years when 9-0 wasn't the most common voting alignment. Instead, 6-3 decisions predominated.

But business cases provided a noteworthy exception. Of the 10 signed decisions from last term in which the U.S. Chamber of Commerce filed an *amicus* brief, seven were unanimous and two were 8-1. Only one decision in a Chamber-supported case divided the justices along ideological lines. And of the signed decisions in Chamber-supported matters, businesses prevailed in six.

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In other words, the justices largely agreed on business cases, regardless of which side won. It may be that, against the backdrop of highly controversial issues like abortion, guns, religion and climate change, the justices were more willing to find common ground in the 2021 term's business cases, where they could agree on narrow questions without sacrificing their broader views. If that trend continues, the 2022 term's docket might once again encourage them to forge consensus in this area.

The Bottom Line

Business litigants in particular may want to think strategically about offering narrower approaches for deciding cases. Advocates still need to present strong doctrinal arguments — which can sometimes lead to sweeping positions — but they also must consider how to appeal to some of the justices to vote, potentially atypically, in a way that builds institutional legitimacy but does not undermine their long-term worldviews.

Will Skepticism of Government Regulation Continue To Create Opportunities for Businesses?

In recent years, the Court has been increasingly willing to question the basis for government regulation. It has narrowed doctrines that afford agencies latitude, as in *Chevron* and *Auer*. And it has christened new limitations on agency action: In *West Virginia v. EPA*, the Court approved the “major questions” doctrine, which restricts federal agencies' power to act on “decisions of vast economic and political significance” absent clear congressional authorization. That rule, which may hamper agency action across the executive branch, dovetails with several justices' interest in reinvigorating the nondelegation doctrine — a move that would restrict Congress' ability to delegate its lawmaking authority to other branches.

The 2022 term provides another opportunity for the Court to cabin administrative power. In *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, the Court will consider whether individuals and businesses that seek to contest agencies' ability to regulate their conduct can go directly to federal court with their jurisdictional and constitutional challenges, or instead must first litigate them before the agency. The answer could make it easier to challenge administrative action, adding to the line of recent decisions limiting the administrative state.

It might also impact the validity of agencies' adjudicative proceedings more generally, an issue that is percolating in the lower courts. The U.S. Court of Appeals for the Fifth Circuit's [May 2022 decision in *Jarkesy v. SEC*](#) dealt a considerable blow to the SEC's in-house enforcement actions, holding that they violate the Seventh Amendment right to a jury trial and unconstitutionally delegate legislative power. While those questions are not currently before the Court, the justices are likely to be thinking about them as they consider *Axon Enterprise, Inc.* and *Cochran*.

The Bottom Line

The Court's willingness to question the basis for government action often works in businesses' favor, as it did last term — perhaps most notably in *West Virginia* and *NFIB v. OSHA* (staying the Occupational Safety and Health Administration's rule regarding COVID-19 vaccines). Both decisions limited administrative power and represented victories for the business interests that opposed the challenged regulations. If that trend continues this term,

it may open new avenues for businesses to challenge government action. And if the Court also continues to be open to revisiting precedent, there may be more room to bring novel or creative challenges to government regulation.

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While we won't know the full impact of the 2022 term until June 2023, the trends discussed here may shed early light on where the Court is heading.