

14th Annual
U.S. Supreme Court

Review of Oct 2020 Term
Preview of Oct 2021 Term

William J. Holloway, Jr.
American Inn of Court
November 17, 2021

1

1

2020 – 2021 Term Stats

- 67 Cases Granted
- 2 *Per Curiam* granting emergency relief
- 8 summary reversals
- 55 Signed Opinions
 - Lowest since – last year
 - But that was lowest since 1862

2

2

Covid Effect

- Arguments were held via phone & live streamed
- But this year have returned to in – person
- With a new twist.
 - After normal argument, Justices each have time for questions,
 - in order of seniority

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12 "6 - 3" Cases
The New 5 - 4
On "Usual" Ideological Lines



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Votes

Vote	Number of Opinions
9 - 0	26
8 - 1	7
7 - 2	4
6 - 3	12
5 - 4	11% 6

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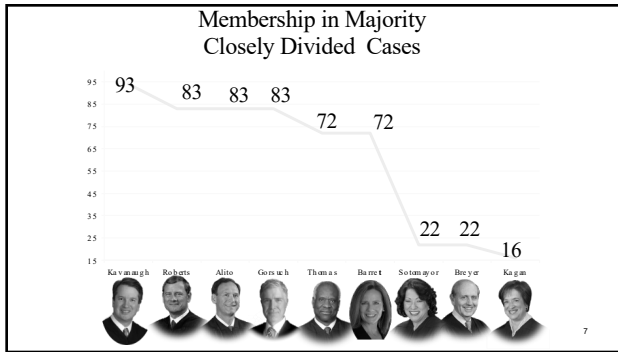
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Votes

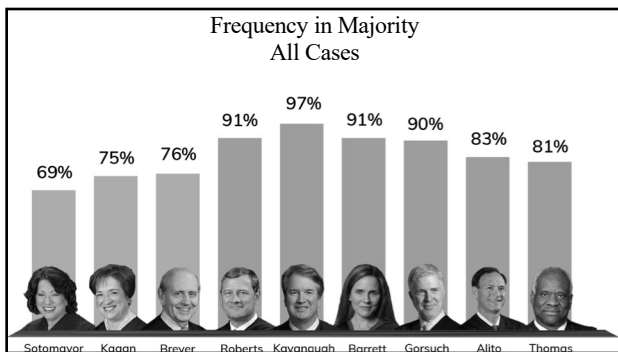
Vote	Number of Opinions
9 - 0	26 47%
8 - 1	7
7 - 2	4
6 - 3	12
5 - 4	6 33%

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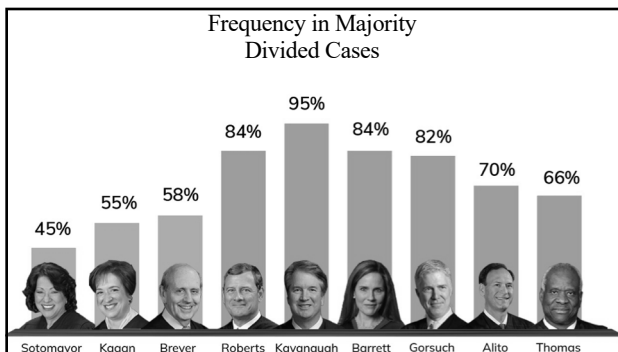
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The Cases

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The “Shadow Docket”

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Covid Restriction on Religious Services

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*South Bay United Pentecostal Church v.
Newsom*

- May 29, 2020
- Court upholds California prohibition on in person worship



13

13

*Roman Catholic Diocese of Brooklyn, New
York v. Cuomo (2020)*

- 10- and 25-person occupancy limits on religious services during the COVID-19 pandemic
- In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish
 - acupuncture facilities,
 - campgrounds,
 - garages

14

*Roman Catholic Diocese of Brooklyn, New
York v. Cuomo (2020)*

- November 25, 2020
- Because the challenged restrictions are not “neutral” and of “general applicability,” they must satisfy “strict scrutiny”
- “It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows”

15

Roman Catholic Diocese of Brooklyn, New York v. Cuomo (2020)

- What changed since California case in May?
- *South Bay United Pentecostal*



16

The Roberts Court and Religion



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Eviction Moratorium

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*Alabama Association of Realtors, et al. v.
Department Of Health And Human Services*

- Court initially declined to vacate a district court stay of an order holding the moratorium unlawful
- But then CDC again extended it
- This time Court said enough is enough



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Texas Abortion Statute

- Texas statute empowers private citizens to sue
- Attempt to avoid *Ex Parte Young*
- Court allowed the Texas statute to remain in effect



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Free Speech

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Mahanoy Area School District v. B.L.

- Brandi Levy tried to sue the school district
- Didn't make it
- Posted on Snapchat a video of herself flipping off the camera with a sign that said "fuck school for everything"
- School's cheerleaders were suspended for a year
- She sues

22

22

Mahanoy Area School District v B.L.

- Speech did not cause "substantial disruption" or threaten harm to the rights of others
- Thus, her off-campus speech was protected by the First Amendment, and the school's decision to suspend her violated her First Amendment rights

23

23

Mahanoy Area School District v. B.L.

- It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein.
- But sometimes it is necessary to protect the superfluous in order to preserve the necessary.
- "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."

24

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Freedom of Religion

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Fulton v. Philadelphia

- Long expected collision of LGBTQ rights and Religious Liberty
- But ends up as more of a fizzle than a bang
- Catholic Social Services foster parent screening
- CSS described as “shining star” of the program
- Nevertheless excluded
- Did the City violate free exercise?

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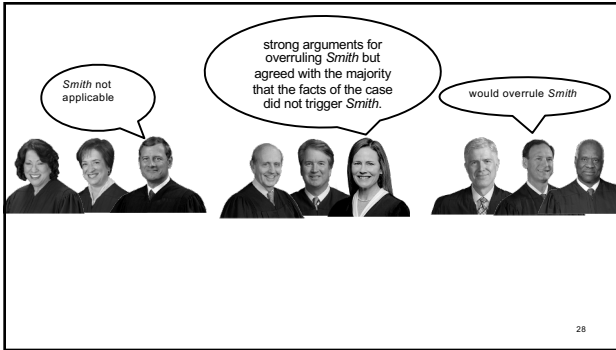
Fulton v. Philadelphia



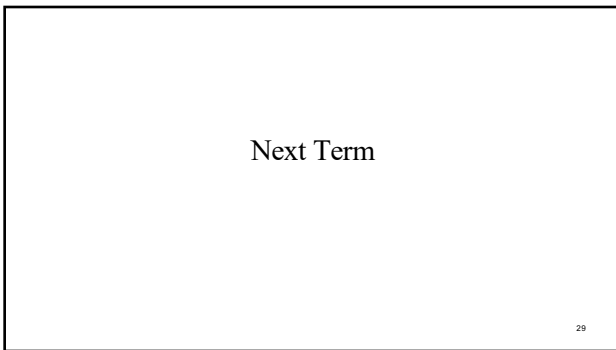
- YES
- Philadelphia’s actions burdened CSS’s religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents, in violation of its stated religious beliefs.
- City has provision for granting exemptions. Should have done so.

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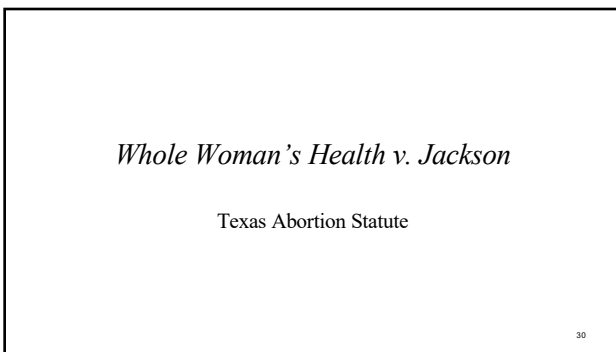
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Whole Woman's Health v. Jackson

- Can a state legislature create a statutory scheme that avoids Federal Court constitutional review until after the fact?
- No pre-enforcement review?
- Evasion of *Ex Parte Young* has serious implications



» Suppose a state used same scheme in connection with "gun rights," free speech or religious rights?

31

31

Abortion

- *Whole Woman's Health v. Jackson*
 - Focused on the scheme to avoid *Ex Parte Young* review, not the merits of a challenge to *Roe* and *Casey*
- *Dobbs v. Jackson Women's Health Organization*
 - Mississippi law banned abortion after 15 weeks
 - *Roe* set bar at "viability" or around 24 weeks

32

32

Gun Control

New York Rifle & Pistol Association v. Corlett

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DC v. Heller (2008)

- ~~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.
- Court held Second Amendment creates an *individual* right to possess a firearm in the home for self defense
- Holding has not been extended to carrying a gun outside the home

34

New York Rifle & Pistol Association v. Corlett

- Argued Nov 3
 - In New York, to receive an unrestricted license to carry a concealed firearm outside the home, a person must show “proper cause” – meaning a non-speculative, unique, special need for self-protection.
 - Not enough to say you live in a high-crime neighborhood
 - Are other constitutional rights limited by location?
 - Easier in upstate NY v. NYC
 - Can you only get a parade permit if you show a “special need?”

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New York Rifle & Pistol Association v. Corlett

- Isn't the point of a constitutional right that you don't have to satisfy a government official that you have a special reason to exercise it?
- What about “sensitive places,”
 - Courthouses
 - Schools
 - Stadiums
 - Airports

36

36

New York Rifle & Pistol Association v. Corlett



- “the constitution gives you that right, and if someone’s going to take it away from you, they have to justify it.”
- Why should someone have to prove that they have a special need to exercise a constitutional right?
- Constitutional rights should not “depend on a permit system.”

37

37

Establishment Clause

- *Carson v. Makon*
- In Maine, over half of the school districts don’t operate their own high schools and instead pay for students to attend public or private schools, both inside and outside the state
- The tuition-assistance program only allows the funds to be used, however, at “nonsectarian” schools
- Does the restriction violate the religion clauses or equal protection clause?

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Trinity Lutheran



- Exclusion from program violates free exercise clause
- Footnote 3
- This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

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Trinity Lutheran



- To hear the Court tell it, this is a simple case about recycling tires to resurface a playground.
- The stakes are higher.
- This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state.
- I dissent.

41

41

Espinoza v Montana Department of Revenue



- Court extended *Trinity Lutheran* to Montana scholarship program.
- Montana policy is subject to Strict Scrutiny.
- Desire to create greater separation of church and state than federal Constitution requires does not satisfy Strict Scrutiny.

42

42

Affirmative Action

- *Students for Fair Admission v. Harvard*
- Is Harvard violating Title VI and the Equal Protection Clause by penalizing Asian-American applicants in its admissions process by considering race?
- *Grutter v. Bollinger*, 539 U.S. 306 (2003)
- *Gratz v. Bollinger*, 539 U.S. 244 (2003)

43

43

Death Penalty

- *Ramirez v. Collier*
 - Argued Tuesday Nov. 9
 - 2008 Ramirez convicted of murder and sentenced to death
 - He wants to have pastor in death chamber to
 - Sing hymns
 - Pray aloud
 - Lay hands on Ramirez

44

44

Spiritual Advisors in Death Chamber

- *Dunn v Ray* (2019)
 - Alabama Death Penalty Cases – No Imam in death chamber
 - Held request untimely
 - Stay Vacated



45

45

Death Penalty Cases

- *Murphy v Collier* (2019)
 - Texas case
 - Buddhist Priest in death chamber
 - Texas only allowed Christian or Muslim staff
 - Stay Granted



46

46

Murphy v Collier



- Called it “denominational discrimination”
- What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.
- Distinguished *Dunn v Ray* on timing basis

47

47

Murphy v Collier



- On April 2, five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately.
- Texas now allows all religious ministers only in the viewing room and not in the execution room.

48

48

Dunn v. Smith (2021)



The Eleventh Circuit was right to bar Alabama from executing Smith without his pastor by his side.

The law guarantees Smith the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death.

49

49

Death Penalty



- *United States v. Tsarnaev*
- Boston Marathon Bomber
- Issue of adequacy of *voir dire* of jurors in issue of pretrial publicity
- 1st Cir. reversed death sentence
- Interesting twist of why is current DOJ appealing.

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The Future of the Roberts Court



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