Key trends to watch as the Supreme Court reopens its doors

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On Oct. 3, the Supreme Court began its 2022 Term, welcoming the public back into the courtroom for the first time in two-and-a-half years. The Court is also continuing its pandemic-precipitated livestreaming of oral argument audio, making this Term a high-water mark for public access to the Court's proceedings.

That access comes at an opportune time: With a new Justice and a docket that is (once again) teeming with blockbuster questions, the country will be as interested as ever in the Court's activity. There are several key trends we'll be watching as the Court reopens its doors for the 2022 Term.

The first is how Justice Ketanji Brown Jackson's presence impacts the Court. From her active participation in the Term's first oral arguments to her votes in argued cases, the 2022 Term will provide an initial glimpse of the Court's newest Justice in action. The first Justice to have served as a public defender, Justice Jackson is expected to be more favorable to criminal defendants than her predecessor, Justice Stephen Breyer, who sometimes sided with his more conservative colleagues on criminal-law questions. And at the cert-stage (where a grant requires only four votes), Justice Jackson's new perspective may help influence the types of cases that the Court agrees to hear.

It's less likely that Justice Jackson's vote will shift the outcome of the Term's most controversial cases, given the conservative six-Justice majority. But as Chief Justice John Roberts recently remarked, having a new Justice is a bit like welcoming a "new in-law at Thanksgiving dinner." Everyone ups their game, going out of their way to "more careful[ly] ... explain" their position to a new colleague. The entire Court (and the nation) benefits when a new member comes on board.

While Justice Jackson's addition marks the beginning of a new trend, the other trends we're watching involve looking back: Will patterns that emerged last Term repeat themselves?

Two of the biggest stories from last Term were the decline in unanimity and the Court's willingness to revisit precedent. ("At Supreme Court, willingness to reshape law creates opportunities and challenges for businesses," Reuters Legal News, July 20, 2022.) Unanimity fell sharply last Term (29% compared to 43% over the last decade), and the 2021 Term was the first in many years where 9-0 wasn't the most common voting alignment. Instead, 6-3 decisions predominated, at 30% of decisions (19 decisions, 14 of which were decided along ideological lines, with all Republican-appointed Justices in the majority and all Democrat-appointed Justices in the dissent).

Accompanying the rise in closely divided cases, last Term also demonstrated a willingness among some Justices to revisit precedent. Many of those decisions could reverberate throughout the law. 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 future majorities to reshape the law in other areas.

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And the Court's approval of the "major questions" doctrine in *West Virginia v. EPA* — restricting federal agencies' power to act on "decisions of vast economic and political significance" absent clear congressional authorization — may hamper agency action across the Executive Branch.

The new Term will help illuminate whether those trends were aberrations or, more likely, reflect the Court settling into its new 6-3 alignment.

The 2022 Term has ample fodder to test the staying power of last Term's trends. In a pair of cases challenging Harvard's and University of North Carolina's admissions policies, the Court will consider the continuing validity of its 2003 decision in *Grutter v. Bollinger* upholding affirmative action. Another case, *Sackett v. EPA*, will require the Court to revisit its 2006 decision in *Rapanos v. United States*, which held that the Clean Water Act does not regulate *all* wetlands but failed to produce a majority for the governing standard.

The Court will also revisit decisions about the scope of the Voting Rights Act's protections against racial gerrymandering in *Merrill v. Milligan*. And *Moore v. Harper* invites the Court to shift the landscape

of election law by sanctioning the "independent state legislature" theory — the idea that state legislatures have the sole power under the Constitution to regulate federal elections, without interference from state courts.

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In *Axon Enterprises 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 those challenges before the agency. The answer could make it easier to challenge administrative action, adding to a line of recent decisions limiting the administrative state. ("At Supreme Court, willingness to reshape law creates opportunities and challenges for businesses," Reuters Legal News, July 20, 2022.)

In another case, *Mallory v. Norfolk Southern Railway Co.*, the Court will address the constitutionality of state laws 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.

National Pork Producers Council v. Ross invites the Court to revisit the scope of the dormant commerce clause — the doctrine that restricts states from burdening interstate commerce by regulating conduct that takes place in other states.

The Court will decide whether California, which imports more than 99% of its pork, can require farms to meet certain criteria before their pork can be sold in the state. The answer could have a big impact on states' ability to regulate other types of out-of-state conduct, from climate change and fast-food regulation to travel for an abortion.

The decision will also shed light on the current Justices' views of the dormant commerce clause, a doctrine that has long been divisive across ideological lines. Justice Samuel Alito embraces the dormant commerce clause, Justice Clarence Thomas rejects it, and the views of the newest Justices remain to be seen.

Finally, in two recently granted cases — *Gonzalez v. Google* and *Twitter v. Taamneh* — the Court will consider the extent to which social media companies may be held liable for content that third parties post on their platforms. The answer may have significant implications for users and hosts alike.

While these questions may be less charged than the social issues confronting the Court this Term, any of these cases has the potential to be a watershed decision affecting businesses nationwide. That provides an opportunity to evaluate the staying power of another trend from the 2021 Term: the Justices' ability to forge narrow consensus in business cases.

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 nearly unanimous (8-1, with a lone dissenter). Only one of the Chamber-supported decisions divided the Justices along ideological lines — *Cummings v. Premier Rehab Keller*, in which the Court held 6-3 that emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act or the Affordable Care Act. And of signed decisions in Chamber-supported cases, businesses prevailed in six.

In other words, the Justices largely agreed with each other in business cases, regardless of which side won. It's possible 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's the case, the 2022 Term's docket might once again encourage the Justices to find their common ground in business cases.

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For business litigants in particular, that may mean thinking strategically about offering narrower approaches for deciding a case. While advocates still need to present strong doctrinal arguments, which can sometimes lead to sweeping positions, they also need to think about how to appeal to some of the Justices to vote against stereotype in a way that builds institutional legitimacy but does not undermine their long-term worldview.

This brings us to one last trend to monitor: When it comes to persuading Justices through narrow or more incremental approaches, Chief Justice Roberts and Justice Brett Kavanaugh are the ones to watch. Over the last few years, both Justices have emerged as a dual swing vote, regularly voting with the majority more often than their colleagues (95% of the time in the 2021 Term).

Justice Kavanaugh, in particular, seems to embrace his role as a median Justice. Despite voting with the majority in 95% of last Term's cases, Justice Kavanaugh penned eight concurrences — often to emphasize limits on the Court's decision or to clarify his own understanding of the opinion. Justice Kavanaugh's efforts to make his views — and their limits — known suggests that litigants' narrower approaches in certain cases might gain particular traction with him.

With newly opened courtroom doors, a new Justice, and another hot-button docket, the 2022 Term promises to be monumental. As for whether last Term's trends persist, only time will tell. We'll be watching, so stay tuned for our next column.

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