THE WALL STREET JOURNAL.

Journal Reports: Year in Review
US

10 Takeaways From the Supreme Court in 2023; For starters, the justices are deciding fewer cases than in the past. But they aren't shying away from the big ones.

By Vikram Amar

1,547 words
8 December 2023
10:00
The Wall Street Journal Online
WSJO
English

It has been another year of significant decisions for the Supreme Court—some of which are likely to be revisited down the road. The year also saw unexpected agreements and coalitions among some of the justices.

Here is a look at the biggest trends in the high court in 2023, and how they may affect its rulings in the year ahead.

1. Fewer cases, but plenty of memorable ones

In the term that ended in June, the court decided just 58 cases, a modern low extending a long downward trend—in the 1980s, the court decided around 140 cases a year. There is no agreed-upon explanation for the decline, but some legal scholars (and perhaps justices themselves) think the court should decide more cases to clarify unresolved questions of federal law. Numbers aside, the court continues to render pathbreaking rulings in many politically and culturally contested arenas.

In 2022, for instance, the court repudiated a constitutional right to abortion yet affirmed a constitutional right to carry firearms outside the home. In 2023, it followed up on those decisions with a constitutional ban on the consideration of applicants' race in public and private university admissions, and a recognition of a First Amendment right of certain types of businesses to refuse service to clients seeking to celebrate same-sex unions.

At the same time, the court rejected the North Carolina General Assembly's claim that it alone—without interference by the state courts, the state governor or the state people—has the power to regulate federal elections.

2. A court's work is never done

Big decisions like these are rarely the last word. In the coming year(s), cases will undoubtedly reach the court in matters such as abortions necessary to preserve the life or health of the mother; state and federal regulation of abortion pills; and state efforts to regulate out-of-state abortions. In university admissions, many questions remain about a key passage in June's rulings indicating that while colleges can't consider race per se, they can consider the role race has played in the lives of individual applicants.

And November's oral argument in Rahimi v. United States demonstrates that an important issue remains to be worked out: the limits the Second Amendment erects on government's ability to keep guns away from dangerous persons.

3. Election rulings remain key

June's Moore v. Harper decision from North Carolina was the biggest election ruling in many years, rejecting the so-called Independent State Legislature theory advanced by North Carolina legislators. Had the case come out the other way, elected state legislatures, provided they did so before Election Day 2024, could have taken the

power to pick presidential electors away from each state's voters, or could have taken the power to resolve election disputes away from each state's courts, despite what each state's constitution requires.

Although many predicted a different result, the theory advanced by North Carolina legislators lost 6-2 (or 8-0, depending on how you count noses). This clearly correct ruling builds on an admirable election-dispute record of American courts in 2020-21. It also serves, along with the court's 2023 upholding of parts of the Voting Rights Act in a case from Alabama, as a hopeful indicator heading into the 2024 election cycle.

Although we don't know which (if any) of the cases involving Donald Trump will get to the court, chances are good that the justices will decide some important election-related matters in the coming year.

4. The court has an originalist tilt, except when it doesn't

In the recent abortion and gun-rights rulings, the court's conservative majority has professed a commitment to interpreting the Constitution according to the understandings and expectations of those who wrote and ratified the Constitution's words in the 18th and 19th centuries. And originalist arguments featured prominently in Moore.

Yet originalism wasn't central to most of the court in the affirmative-action cases. And in this year's Rahimi case, the court might back away from exclusive reliance on history for understanding gun rights. That is because it is difficult to decide whether the relevant history should be looked at a high level of general principles or at a more specific level—for instance, looking at whether violent people in general were forbidden from possessing guns or instead looking at specific types of violent people, such as domestic abusers.

Originalism does (and should) remain a basic starting point of constitutional interpretation. But proper originalism focuses not just on historical understandings of isolated words and clauses in the Constitution. It also considers the entire structure of the document itself, and the ways in which various provisions operate together to identify and protect values the framers thought would enable a functional government and a fair society.

5. Originalism isn't synonymous with conservatism

This point is illustrated by Moore, where originalist arguments may have influenced multiple justices to rethink their earlier embrace of the Independent State Legislature theory. And the court's newest justice, Ketanji Brown Jackson, is also demonstrating in her writings and oral questions that originalism need not invariably generate conservative results. Having a progressive originalist on the court holding the conservative majority to account would be good.

6. The administrative state is under attack

Another current area of interest is the powerful federal administrative state. For example, a case this term involves a seemingly far-fetched claim that the Consumer Financial Protection Bureau's funding mechanism is unconstitutional. And in repudiating President Biden's student-loan forgiveness in June, the court reiterated its recent admonition: If Congress seeks to give the president broad policy-making power with far-reaching fiscal and social consequences, Congress must say so explicitly.

This "major questions" doctrine may foreshadow how the court will decide in an important case this term. The court is expected to repudiate (or at least narrow) a 1980s-vintage idea that judges should defer to federal agencies' interpretations of the scope of their own regulatory powers.

Rejection of deference here isn't necessarily unwise; broad assertions of agency power can be problematic, since congressional efforts to reclaim delegated authority are complicated by the president's veto power. But if agencies are defanged, and Congress remains dysfunctional, major problems—like climate change and border controls—may go unaddressed.

7. Precedent isn't sacrosanct

As abortion and affirmative-action cases illustrate, the current court is unafraid of overruling constitutional precedents it deems mistaken. Liberal dissenters decry the court's failure to abide by past cases, but the dissenters would be better off arguing why those earlier decisions were correct. Sometimes it is justified (because of people's detrimental reliance on the court's decisions) to stick with a mistaken past ruling, but that should be the exception, not the rule. In general, the focus should be on what the constitution means, not just what past cases say.

After all, if stare decisis (adherence to precedent) were absolute, the court couldn't have applied the Bill of Rights to state and local governments, or handed down Brown v. Board of Education, or reversed course on whether states can punish gay sex, to name just a few developments worth celebrating.

8. The court is sensitive to ethics criticisms

The court's recent release of a first-ever set of written ethical rules for the justices themselves was noteworthy, notwithstanding questions about enforcement, in part because the court itself acknowledged that it needed to "dispel [the] misunderstanding…that the justices…are unrestricted by any ethics rules." While the justices aren't beholden to public opinion, neither are they oblivious to its long-term importance.

9. Not all Republican appointees are the same

Although six justices were appointed by Republicans, this isn't a 6-3 court. The outcome and scope of many contested cases come down to Chief Justice John Roberts and Justice Brett Kavanaugh, who operate as the court's fulcrum. This pattern emerged in 2022 (in both the abortion and Second Amendment cases, where Kavanaugh wrote moderating concurring opinions) and continued in 2023 in Allen v. Milligan, where Roberts (and Kavanaugh) unexpectedly joined Democratic appointees to invalidate Alabama's redistricting plan under the Voting Rights Act.

10. The court remains unlike the other two branches

Detractors are quick to point out the court's decline in public standing. But respect for all institutions of government has waned. The court still generally enjoys more esteem than Congress or the White House. That is partly because the court is less partisan, as the preceding point (and the significant number of unexpected agreements among some justices in meaningful cases) shows. And the justices, unlike leaders of the other branches, do most of their work themselves and explain their decisions in published opinions that outsiders can evaluate. These essential attributes of the court abide, and we should be grateful for them.

Vikram Amar is Distinguished Professor of Law at the UC Davis School of Law. He can be reached at reports@wsj.com.

Document WSJO000020231208ejc8002p9

