The Supreme Court Returns on Monday, Stronger and More Terrible Than Ever

This term, the high court will cement its grip on political life in America, overturning affirmative action and other critical protections along the way.

By Elie Mystal

SEPTEMBER 29, 2022

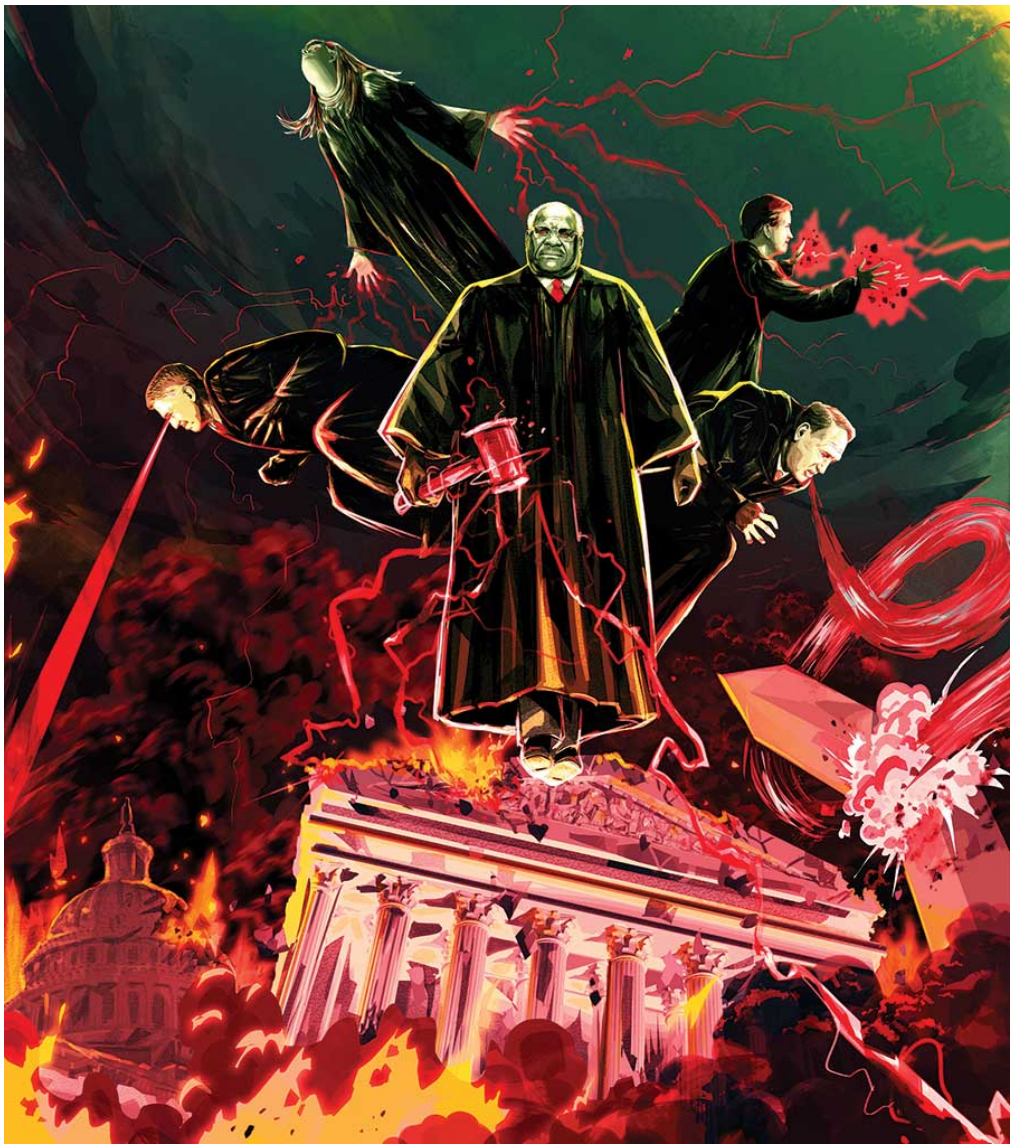
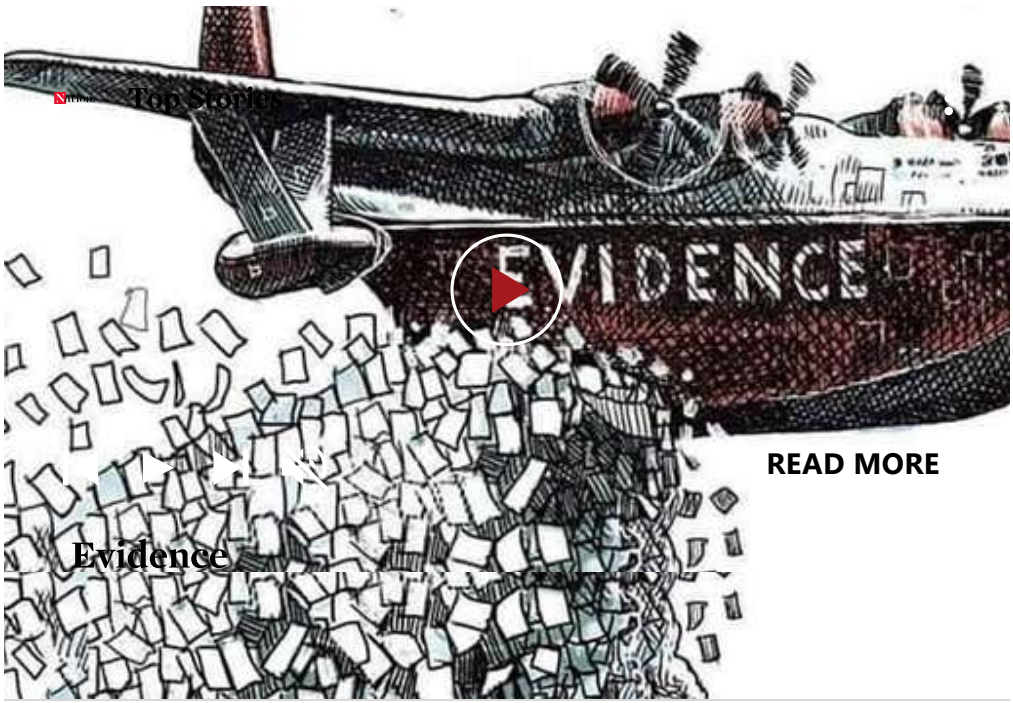


Illustration by Ryan Inzana.

The Supreme Court will return to work on the first Monday of October, after a three-month summer break, with all the determination of a Renaissance-era explorer looking for new lands to conquer. Last term, the court's conservative supermajority showed it was willing to ignore precedent (overturning *Roe v. Wade*), reality (issuing rulings that will lead to more gun violence and climate pollution), and facts (making up evidence in the praying-football-coach case) to arrive at its preferred judicial outcomes.

In the process of revoking abortion rights, Justice Samuel Alito dismissed the rights of people the white men who wrote the Constitution didn't bother to include. This term, the court's conservatives will continue to apply their racist, misogynist logic to other groups yearning to progress beyond what white men allowed in the 1850s.

The greatest improvement we've made to the founders' plan for a Western apartheid state was the institution of universal suffrage. Naturally, that simple idea of one person, one vote is under threat from this Supreme Court. Even before the midterm elections take place in November, we know that the results in some of those elections will be challenged in court —especially if Republican candidates are on the losing side. The conservative Supreme Court has been willing to suppress the vote or let Republican-controlled state legislatures gerrymander district maps to the point where the popular vote is all but meaningless, but so far, the court has been unwilling to throw away enough votes after the fact to change the outcome of an election. We'll see if there's a first time for everything.



While we don't yet know what election-specific cases will make their way to the Supreme Court, it may be that the court itself doesn't have to dirty its hands by ending democratic self-government this term the way it ended equality for women last term. The court could just let Republican-controlled state legislatures do it themselves. The most important case on the upcoming docket is one that tests the "independent state legislature" theory, which is a fancy way of saying that state legislatures, not the voters, get to choose the state's representatives in Congress.

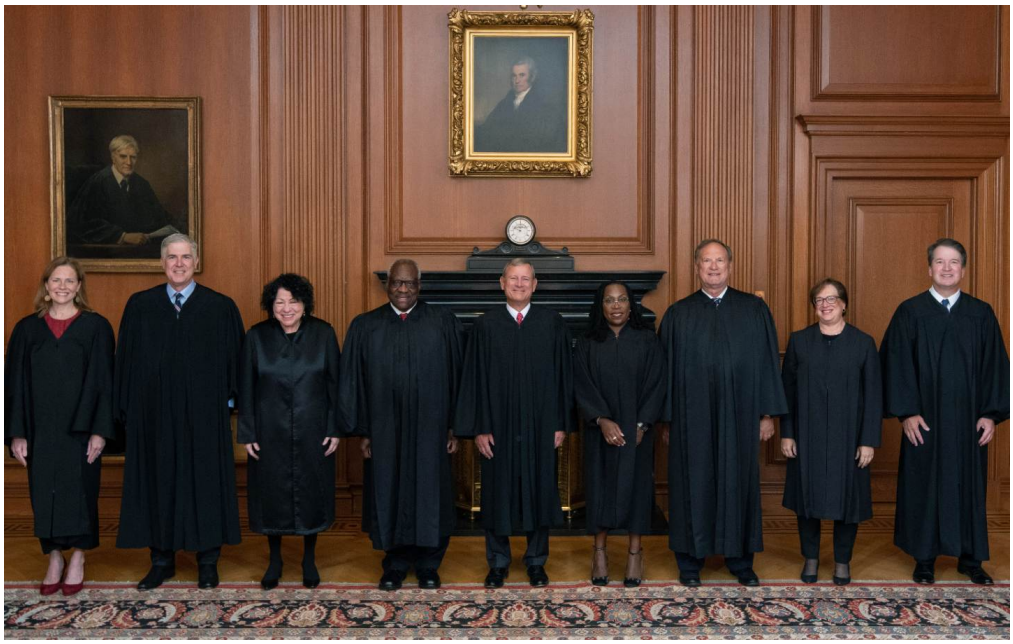
I can't predict how the court will assert its political dominance over our country, but what I do know is that it will continue to wage war on the forces of tolerance and fairness. This term will see the end of affirmative action, a particularly bitter pill given that it will be the first term for Ketanji Brown Jackson, the first Black woman to serve as a Supreme Court justice. This term will also see renewed attacks on LGBTQ rights, tribal sovereignty, and, of course, any programs to address climate change or the destruction of the environment.

This isn't how things are supposed to work in a constitutional republic. The people are supposed to elect representatives, and those representatives are supposed to pass laws within constitutional bounds as interpreted by impartial arbiters. If the arbiters are not impartial, they should be able to be recalled, and if the representatives don't do what the people want, they should be able to be fired. That would be healthy. That would be self-government.

Instead, we are living in something akin to a juristocracy: a system in which unelected judges with lifetime appointments rule us from on high. Arguably, we've been trending in that direction for decades, and perhaps the flaw goes all the way back to *Marbury v. Madison* and the court's 1803 power grab. But at least since 2000's *Bush v. Gore*, the Supreme Court has steadily abandoned the pretense of interpreting the rules of the game and has revealed itself as the body that decides who is allowed to win. Now that Donald Trump has stacked the court with extremist conservatives, Trump judges can accomplish by judicial fiat what Republicans cannot pass through popular majorities.

This version of pretend democracy has devastating consequences for popular ideas that conservative judges don't like. If Democrats pass legislation protecting abortion rights, this court will strike it down. If Democrats pass legislation restoring voting rights, this court will gut that law. This court will overturn state gun-safety laws one day, then block federal climate legislation the next. This court will not allow President Joe Biden to use executive orders to achieve immigration reform or debt relief, or to set public health and safety standards.

This Supreme Court is not a "court" in the traditional sense. It is a council of rulers: a Supreme Hexumvirate. This term, our unelected rulers will continue to reshape the law in ways most people don't want. We can only hope the midterms will elevate officials we do elect who will take power back, not for themselves but for the people.



MOORE V. HARPER

NOT YET SCHEDULED

MERRILL V. MILLIGAN

DATE OF HEARING: **OCTOBER 4**

In 2019, in a case called *Rucho v. Common Cause*, the Supreme Court ruled that partisan gerrymandering claims are "nonjusticiable." This means that states can draw whatever districting maps they like, and no matter how much they favor one party over another, the Supreme Court will not tell them no. The *Rucho* decision all but encouraged states to do their absolute worst.

The Confederate states have been up for the challenge, but perhaps none more so than North Carolina, where the *Rucho* case unfolded. In 2021, the Republican-controlled state legislature drew up a map that gave such an extreme advantage to Republicans that even in the case of an evenly divided vote between the two parties, Republicans would take 10 of the state's 14 congressional seats. The Brennan

Center for Justice has described this map as such a "statistical outlier" that it is "more favorable to Republicans than 99.9999 percent of all possible maps."

Voters who would have been disenfranchised by the North Carolina map decided to sue in state court, arguing that the map violated North Carolina's state Constitution. North Carolina's Supreme Court agreed and ordered the legislature to redraw the map. The Republican legislature was obstinate and came back with essentially the same partisan favoritism. The state Supreme Court then commissioned an independent map. That is the map North Carolina will be operating under for the upcoming midterm elections. The Republican legislature appealed that decision in federal court, and the Supreme Court agreed to hear its case, called *Moore v. Harper*, after the midterms.

In arguing its case, the Republican legislature dusted off one of the most dangerous and insipid things to come out of the *Bush v. Gore* decision: the independent-state-legislature theory. This theory holds that individual state legislatures are the only authorities on state election laws, and that they can remake those laws whenever they want.

Chief Justice William Rehnquist breathed life into this idea in a concurrence he wrote in *Bush v. Gore* as he was casting about for ways to make George W. Bush president by ending a court-ordered recount. Rehnquist theorized that the Florida legislature, and not the Florida courts, had the final say over the state's election rules. In recent years, this scheme has picked up steam on the right as the white wing works to empower red-state legislatures to disenfranchise millions of nonwhite voters.

When it comes to today's Supreme Court, we know that Justice Clarence Thomas is almost certain to re-up Rehnquist's misguided theory, since he signed on to the former chief justice's initial concurring opinion; he, along with Justices Alito and Neil Gorsuch, would also have granted an emergency appeal by North Carolina Republicans to reinstate their gerrymandered maps before the midterms. Alleged attempted rapist Brett Kavanaugh voted against that emergency appeal but said that the arguments raised by North Carolina Republicans were "serious."

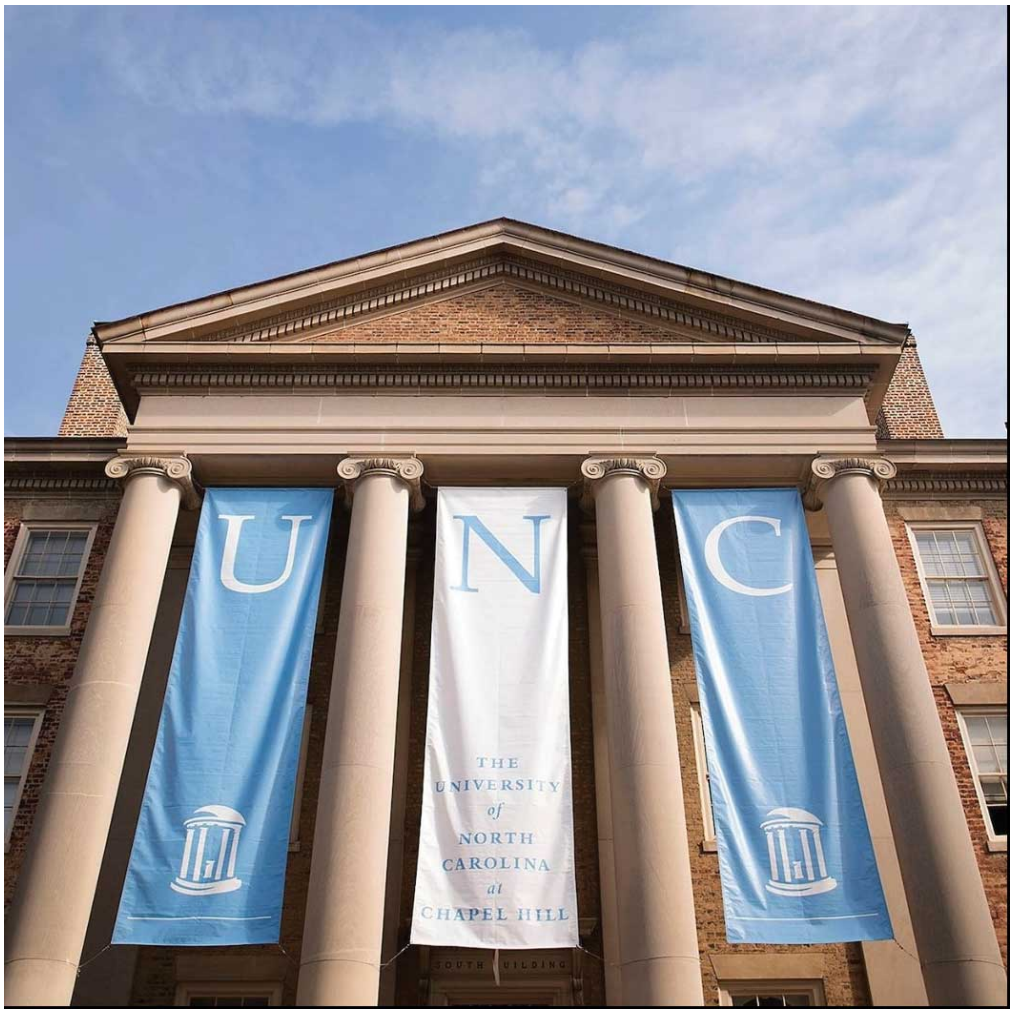
But that only accounts for four justices. I don't know if there is a fifth vote to allow the gerrymander; what I do know is that while North Carolina Republicans are going for galaxy-brain legal theories, Alabama Republicans are also at the court this term with a case called *Merrill v. Milligan*, which offers the kind of tried-and-true racism this court has long been comfortable approving.

The difference between *Moore* and *Merrill* lies in a legal distinction the Supreme Court makes between "political" gerrymanders (which favor one party over another) and "racial" gerrymanders (which favor one race over another). With *Rucho*, the court abdicated its responsibility to police political gerrymanders, but it still retains its authority to rule racist gerrymanders unconstitutional. That may seem like a mercy, until you remember that the six conservatives on the Supreme Court don't seem to believe structural racism exists. By allowing states to implement racist gerrymanders, the conservatives on the court can get closer to their long-standing goal of suppressing nonwhite voting power, and they can do so without relying on the kooky independent-state-legislature theory.

At the heart of *Merrill* is Alabama's new district maps, which were drawn in a way that produced only one majority-minority district, even though the demographics of the state suggest there should be two. The Alabama Supreme Court ordered the state to redraw its maps, but the US Supreme Court blocked that order, reinstated the racist maps for this election cycle, and agreed to hear the case on appeal. Disenfranchised voters argue that these maps violate Section 2 of the Voting Rights Act, which prohibits discrimination against voters on the basis of race. But this case gives conservatives the opportunity to reject that argument and further weaken the Voting Rights Act, as they have done consistently since John Roberts joined the court.

I expect that this Supreme Court will rule, 6-3, to allow Alabama to disenfranchise Black voters as much as possible. I believe we are heading toward a world in which the Supreme Court will look the other way on political gerrymanders and rubber-stamp racist gerrymanders. This is the world that conservatives want, and they can have it without adopting the ridiculous independent-state-legislature theory.

They only need that theory if they want to reinstate Trump as president after he loses another presidential election. Right now, I'm not sure that there are five justices who want to appoint Trump as a king.



School spirit: Banners wave at the University of North Carolina, which is at the center of one of two affirmative action cases this term. *(UNC)*

STUDENTS FOR FAIR ADMISSIONS INC. V. PRESIDENT & FELLOWS OF HARVARD COLLEGE

DATE OF HEARING: **OCTOBER 31**

STUDENTS FOR FAIR ADMISSIONS INC. V. UNIVERSITY OF NORTH CAROLINA

DATE OF HEARING: **OCTOBER 31**

White conservatives and Clarence Thomas have been trying to end affirmative action for as long as I can remember, and this term they'll finally get their way. The Supreme Court will hear two cases that take direct aim at the civil rights policy, one brought against a private university, Harvard, and the other against a public one, the University of North Carolina. Both cases ask the court to overturn its ruling in *Grutter v. Bollinger*, the 2003 case that

held that race can be a factor in college admissions, and to ban the schools from even knowing the race of applicants during the admissions process.

The cases that will allow conservatives to accomplish this generational goal have nominally been brought by a group of Asian American and Pacific Islander students and parents, who claim that Harvard and UNC's affirmative action programs illegally discriminate against AAPI applicants. But the lawsuit has been orchestrated by a conservative white man named Ed Blum, who is using the legitimate concerns of Asian American parents to make college admission easier for mediocre whites. The students have a good case that elite schools unfairly depress the number of AAPI students they admit, but Blum and white conservatives like him have helped convince entire communities that the beneficiaries of that discrimination are competitive Black and brown candidates rather than white legacy failsons. Excluding race from college admissions doesn't help high-achieving AAPI students, unless you exclude all of the other factors that help middling white kids get into school—like geography, expensive extracurricular activities, private tutoring, and legacy status.

But none of that will matter to this Supreme Court. Thomas is already on the record as having dissented, in part, from the *Grutter* decision, and I expect he will be able to turn that dissent into a majority opinion in this case. Any hope that his conservative colleagues will find a more nuanced take than banning race-conscious admissions practices should be extinguished by looking at the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. The court's full repudiation of *Roe v. Wade* shows that conservatives have the

votes to be as extremist as they want to be. On affirmative action, things will be no different. The conservatives have the votes to kill it, and they will strike it down. All that's left is the shouting.

Who will get to do the shouting from the left might be interesting. Justice Sonia Sotomayor is now the chief liberal on the court, and she has written forceful defenses of affirmative action in the past. Justice Elena Kagan is the former dean of Harvard Law School, and she knows firsthand how important diversity is when putting together a class of students. And then there's the new justice, Ketanji Brown Jackson. She will recuse herself from the Harvard case, but Chief Justice Roberts has kindly split it from the UNC case, making them separate arguments, and she will be able to participate in the latter. I would imagine that the first Black woman justice on the Supreme Court will have something relevant to say about affirmative action at state universities.

But these three women will be in dissent. Conservatives are going to take down affirmative action. I guess that will reduce the price that white parents have to pay to get their kids into a good school.

HAALAND V. BRACKEEN

DATE OF HEARING: **NOVEMBER 9**

Haaland v. Brackeen is a case that asks the court to misconstrue the Indian Child Welfare Act, a law that seeks to keep Native American children with their families or tribes, as unconstitutional discrimination against white people. I'm not making that up. The sheer nerve and

unmitigated gall of the white plaintiffs pushing this case are unfathomable to me. For the beneficiaries of centuries of forced dispossession and murder of Native people to cry "discrimination" when Native groups try to stop them from taking their children is madness. And yet it's totally on brand for the modern conservative movement.

The Indian Child Welfare Act is a 1978 law with the simple goal of keeping Native families together. In cases where a birth family cannot care for a child and the child is placed in foster care, the law gives the relevant tribal government jurisdiction over custody and a preference to place those children with extended family members or with other Native families within their tribe. The law was necessary because, before it was enacted, rapacious white folks were removing Native children from their communities, often by force, and placing them in non-Native homes. Before Congress passed ICWA, more than three-quarters of Native families living on reservations had lost at least one child to the child welfare system. The law helped change that.

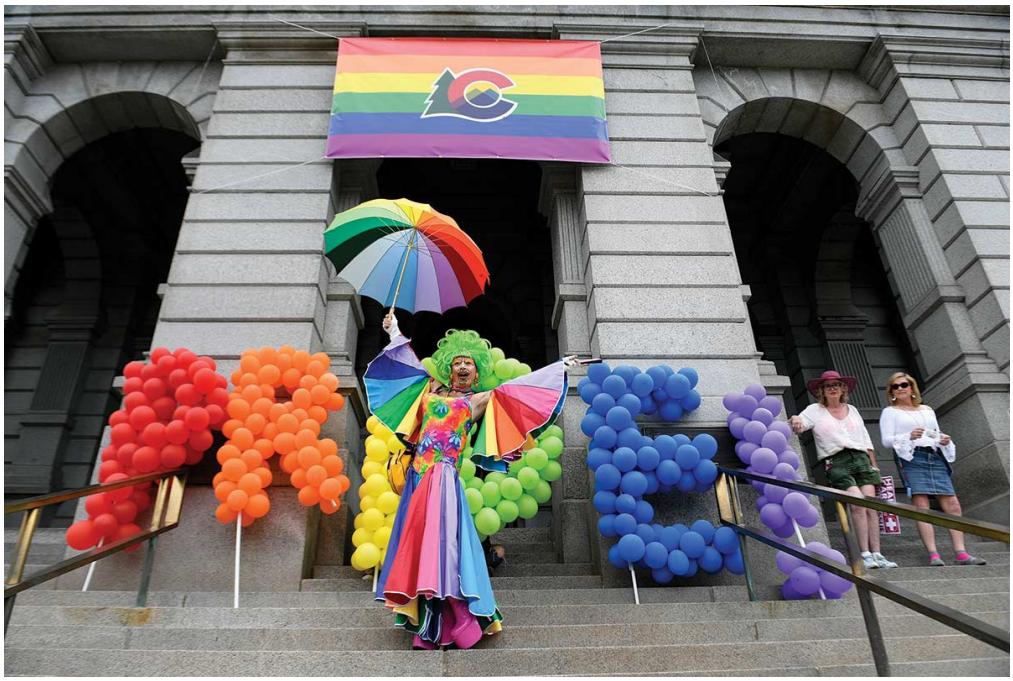
Then, a few years ago, three white couples who wanted to adopt Native children challenged the law; they were joined by a number of states (Texas, Louisiana, and Indiana) that are filled with Republicans but, notably, very few Native tribes. The plaintiffs argued that ICWA was unconstitutionally discriminatory on the basis of race, while the states argued that ICWA "commandeered" their states' rights under the 10th Amendment.

The conservative Fifth Circuit Court of Appeals agreed with the states' rights argument, because of course they did. The federal government appealed (the "Haaland" in the case

refers to Deb Haaland, one of the first Native women elected to Congress, who currently serves as secretary of the US Department of the Interior, which administers ICWA), and the Supreme Court agreed to take the case. Waiting on the court will be conservatives like Alito, who has already written a controversial 5-4 opinion weakening ICWA, and Amy Coney Barrett, whose adoption of nonwhite children was touted as a positive by conservatives during her confirmation hearings. Barrett has already espoused weird views about adoption, including the ridiculous idea that forcing women to give birth against their will is more reasonable now than it was 50 years ago because they can just leave their babies at the firehouse after they perform the free, unwanted labor of carrying a child for nine months.

But the court also has Neil Gorsuch, who has consistently ruled on the side of Native sovereignty. That's really what this case should be about: sovereignty and citizenship. ICWA doesn't discriminate against white people because they're white; instead, it acknowledges the sovereignty of tribal nations and gives them the primary say over what to do with their citizens.

Of course, to see the case that way, you have to recognize tribal nations as sovereign entities. Historically, white Americans have treated Native peoples as obstructions standing in the way of exploitable resources. Historically, what white people want from these people, they take.



Colorado pride: Denver celebrates Pride in style, with a parade and flags festooning the State Capitol on June 16, 2019. *(Helen H. Richardson / The Denver Post via Getty Images)*

303 CREATIVE V. ELENIS

NOT YET SCHEDULED

Today's conservative court has set its sights on meddling in elections and asserting white cultural dominance, but it still has time for the vicious, bog-standard bigotry that keeps donations to the Federalist Society rolling in. This term, the court will take up the case of Lorie Smith, a woman who started a graphic design business, 303 Creative, in Colorado.

Smith designs websites, and she wants to design marriage websites, but she doesn't want to design marriage websites for same-sex couples, for reasons I'm not bigoted enough to understand but appear to have something to do with Christian fundamentalism. Smith also wants to declare on her business website that she will not serve same-sex couples, even though no same-sex couple that I am aware of has asked Smith to design their Evite landing page.

Both of these desires run afoul of Colorado's antidiscrimination law (which was famously at the heart of the *Masterpiece Cakeshop* case, wherein a bigoted baker didn't want to make wedding cakes for same-sex couples). The Colorado law makes it illegal for businesses open to the public to discriminate against, or announce their intention to discriminate against, the LGBTQ community. Smith sued, claiming both her religious freedom and her free speech rights would be infringed on if she wasn't allowed to use her business to discriminate against gay people (she used different words when complaining), and she lost in front of the 10th Circuit Court of Appeals. But the Supreme Court agreed to hear her case—because if there's one thing the six conservatives controlling the court like, it's bigotry in the name of Jesus.

However, this case offers a little twist on the classic conservative anti-LGBTQ claptrap. Usually these cases are litigated as "free exercise" cases, meaning that the bigot in question is arguing that they should be allowed to discriminate against same-sex couples because they've been commanded to do so by an oddly specific invisible sky-friend. In this instance, the court declined to take up the free-exercise issue raised by Smith and instead will review the case on free-speech grounds.

Frankly, that's a much more solid legal argument. "Free speech" means that I can say what I want to, but it also means that nobody can force me to say what I don't want to. Everybody implicitly understands that the government cannot make me write, or paint, or sculpt a message or an

image I do not want to create. Smith is arguing that graphic design is a speech act, and that the government cannot make her say or create something that she doesn't want to.

It's a better argument, but still a crap one. A business that is open to the public cannot discriminate against members of the public, even if that business is engaged purely in speech acts. A concert venue cannot prevent women from listening to a performance; a comedy club cannot refuse to serve drinks to Black patrons. Oh, they used to be able to do those things, but that was under the old American apartheid system of the segregation era. Since the passage of the Civil Rights Act, the kind of bigotry Lorie Smith would like to practice has been frowned upon in this country.

But this Supreme Court generally views the progress of civil rights as a mistake. It will take us back to a time before these protections existed, when the law protected bigots rather than stopped them.

Torture device: A sow lies in a gestation crate at a facility owned by a pork supplier that sells to Walmart.

NATIONAL PORK PRODUCERS COUNCIL V. ROSS

DATE OF HEARING: **OCTOBER 11**

First and foremost, this case is about the pork industry's cruelty to animals for no reason other than to maximize profits. There are important and nuanced legal issues here, but we can't lose sight of the literal animal torture at the heart of this case.

The pork industry uses something called "gestation crates" to confine pregnant pigs. These contraptions are actually 2-by-7-foot metal cages that aren't big enough to allow the 400-to-500-pound animal to move or turn around. The sows are kept in the cages until they give birth; the piglets are taken and, when they get to be five or six months old, killed; and then the sows are reimpregnated and the torturous process resumes.

Pork producers use gestation crates purely because it allows them to house more pigs, closer together, than not using the crates would do. It also minimizes the amount of human care it takes to raise a litter for slaughter. All of this increases their profits: more pigs, less space, fewer costs.

In 2018, California voters approved a ballot initiative banning the sale of products derived from the offspring of pigs or other farm animals confined in a "cruel" manner. Predictably, instead of addressing these inhumane practices, the National Pork Producers Council and the American Farm Bureau Federation sued, arguing that the California law was unconstitutional under the commerce clause.

This is where the wonky yet critical legal jargon comes in, because what the pig torturers are talking about is something called the "dormant commerce clause." The commerce clause, as written, gives the federal government the power to regulate interstate commerce. Congress can do that by passing laws—but even when Congress has not passed a specific law (hence the congressional power is "dormant"), individual states are not allowed to pass laws that discriminate against or "unduly burden" commerce from other states.

The pork producers are arguing that California's ban on products created through animal cruelty discriminates against or unduly burdens commerce from other states where pig torture takes place. They argue that California's rule has an effect on the entire pork production industry, and that such a power belongs to Congress, not to the states.

This case is scary because the conservatives on the Supreme Court might come to the right conclusion for the wrong reasons. They could well side with California against the pork industry, but do so in a way that obliterates or severely weakens the dormant commerce clause. A lot of federal regulation rests on the government's commerce clause authority, including most civil rights legislation. The reason the federal government can force a motel in Alabama to admit Black citizens flows from the federal commerce power.

Allowing California to de facto regulate pork production sounds like a good idea if you like the humane treatment of pigs, but we have to remember what white supremacists in the Confederate states are capable of. The court's conservative extremists could use this case to set a

precedent that Republican-controlled states will then use to justify prohibitions on same-sex marriage or restrictions on out-of-state travel, and we know red-state legislators are always looking for some way to reinstitute segregation and Jim Crow. An expansively written opinion here could help them do just that.

It doesn't have to go that way. The commerce clause (dormant or otherwise) prevents states from discriminating against other states. It prevents them from engaging in state protectionism and doling out preferential treatment to some states and not others. It doesn't stop any state from trying to improve conditions for itself or for an industry. And conservatives might be reluctant to completely do away with the dormant commerce clause, because while red states might take advantage of the increased opportunities to discriminate, blue states will relish the opportunity to try to regulate polluters and environmentally destructive practices.

Whatever happens, torture by gestation crate needs to be stopped. Worrying about what bad-faith Republican legislatures will do next is not a good reason to continue to allow inhumane pig farms to operate right now.

These cases are just the lowlights of the upcoming term. For the next nine months, the six conservatives on the Supreme Court will continue to do all the things that Republicans cannot persuade voters to do. They will execute innocent people. They will make it harder for people to press for their civil rights. They will make it more difficult for executive agencies to stop corporate malfeasance.

And they'll probably throw in one or two decisions that protect Donald Trump from ever being held liable for his many crimes. Trump's entire legal defense is premised on the belief—almost certainly correct—that his handpicked justices on the Supreme Court will never allow him to face responsibility for stealing national security documents or committing election fraud or orchestrating a coup.

That's just how it goes in a juristocracy: Arguments don't matter, facts don't matter, votes certainly don't matter. We don't live under the rule of law; we live under the rule of whatever at least five unelected justices decree. Until the political branches reform the court, this will remain the reality. White male conservatives will continue to win every meaningful political, social, and cultural battle for years to come, so long as the rest of us submit to the rule of their judges.

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COMMENTS (22)