



*The Supreme Court: A Look
Back at the 2020 and 2021
Terms and a Look Ahead to
the Current Term 2022*



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Daniel A. Cotter is Attorney and Counselor at Howard & Howard Attorneys PLLC. Dan focuses his practices in a variety of areas of corporate law and litigation, including insurance law, complex business disputes and counseling, employment law, corporate transactions, corporate governance and compliance, and cybersecurity and privacy law. His clients benefit from his diverse professional experience, which – in addition to his years serving as trusted outside counsel – includes positions as a corporate accountant and an in-house attorney. He spent 14.5 years in-house at insurance organizations, where he focused on insurance, regulatory, technology, IT, compliance and transactional matters.

Dan served as President of The Chicago Bar Association for the 2014-2015 bar year and is former Chair of The Young Lawyers Section of the CBA. Dan was an adjunct professor at The John Marshall Law School, and has taught Insurance Law, Accounting for Lawyers and SCOTUS Judicial Biography.

Dan graduated summa cum laude from The John Marshall Law School and received his B.A. in Accounting from Monmouth College, magna cum laude. Dan is a frequent writer and presenter on various substantive topics, including technology and privacy, and in 2019, his book, “The Chief Justices,” was published.”

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II. COURSE DESCRIPTION

The Supreme Court has gone through a lot of changes from the 2020 term to the present term. There was the death of one judge and the retirement of another judge. The addition of two women onto the court one of whom is the first Black women justice in the history of the Supreme court. The Court moved out of the Coronavirus lock down back to a normalcy. Dan Cotter, author of "The Chief Justices," covers some of the big cases and the Court in general and discusses what is next.

A. Course Presentation

This course provides an in-depth look back examination of the 2020 and 2021 terms. It will discuss the Supreme Court opinions and inner workings of the Court. It will also explore the 2022 present term and the importance of the cases that will be ahead for the Court.

This course will provide a comprehensive overview of the Supreme Court Justices, their views, the new Justices on the court and the political makeup

This course provides an intellectual foundation and introduces a set of learning skills essential for success in the legal profession and for life beyond. The course will provide opportunities for careful reading, for creative and critical thinking, for oral and written communication, and for engaging with others in a shared conversation about stimulating material.

B. Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situation

III. COURSE LEARNING OBJECTIVES AND OUTCOMES

This course is designed to provide the following learning objectives:

The ability to understand the relevant U.S. Supreme Court opinions in the 2020 term and the 2021 term.

The ability to understand the importance of the 2022 term that is in progress.

The ability to understand the duties, roles and responsibilities of U.S. Supreme Court justices and the Chief Justice.

The ability to understand, discuss and analyze U.S. Supreme Court opinions from the 2020 term and the 2021 term.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Participants will develop an understanding of the justices that are on the present court

This course covers ethical issues faced by the Supreme Court Justices

IV. TIMED AGENDA

Presenter Name: Daniel Cotter

CLE Course Title: The Supreme Court: A Look Back at the 2020 and 2021 Terms and a Look Ahead to the Current Term 2022

Time Format (00:00:00 - Hours: Minutes: Seconds)	Description
00:00:13	ApexCLE Company Credit Introduction
00:00:21	CLE Presentation Title
00:00:32	CLE Presenter Introduction
00:00:50	CLE Substantive Material Presentation Introduction
00:06:00	Blue Ribbon Committee Looks at Court and Makes Suggestions
00:07:42	Course Agenda
00:09:40	Background on the Supreme Court
00:9:45	Live Hearings
00:12:50	Clarence Thomas
00:14:11	2021 Return to Live In Person Hearings
00:14:43	Cases Are More Like the 1800's – Advocate has 2 minutes, then question Free for All, Questions by Seniority of Justices
00:19:24	The Case is Submitted Heard Much Later in the Arguments Lately
00:22:42	Katanji Brown Jackson – Although newest Justice, speaks more and asks more questions than the other Justices
00:23:10	Chief Justice Roberts – 17 th Chief Justice
00:25:49	"The Chief Justices"
00:30:16	This Court Leaves Crumbs/Nuggets in Its Written Concurrences/Dissents that Find their way into Majority Opinions

00:31:20	Chief Justice John Roberts has been a Pivotal Vote in Certain Important Cases in trying to Uphold the Prestige of the Court
00:32:05	5 Other Conservative Justices – John Roberts not the Pivotal Vote anymore – Trouble Reigning in the other Conservative Justices
00:33:27	Do Not Expect Roberts to be the New Kennedy
00:35:49	Roberts is not a Liberal or Moderate
00:37:51	Kavanaugh and Roberts- Vote 90% with each Other
00:39:30	Kavanaugh Median Justice
00:41:26	The October 2021 Term
00:42:00	The Shadow Docket
00:42:59	The By-Pass Docket
00:43:36	Major Cases
00:43:43	Dobbs V. Jackson’s Woman’s Health Organization (6-3) Leaked Ahead of Time
00:49:09	New York State Rifle & Pistol Assoc. v. Bruen (6-3)
00:51:40	West Virginia v. EPA (6-3)
00:53:35	Carson v. Makin (6-3)
00:54:20	A Lot of Other Cases – Prayer Case with the Coach, Native American Sovereignty Case, A lot of Covid Cases, Stay in Mexico Policy on Immigration
00:55:19	End of 2021 Term – Justice Breyer Announces Retirement
00:56:00	October 2022 Ketanji Brown Jackson Sworn in as new Justice - Most Vocal During Oral Arguments
00:56:29	October 2022 Term
00:56:54	Arguments Long
00:56:59	Scarcity of Grants - 42 Granted 34 Scheduled for Arguments – No Opinions Issued yet – Low Production
00:57:35	Student for Fair Admission v. Harvard College and Students for Fair Admissions v UNC – Affirmative Action and College Admissions – Experts Believe it will be the End of Affirmative Action with College Admissions
00:58:11	Sackett v. EPA – Definition of Navigable Waters will be an Extension of West v. EPA and a Continued Erosion of the Administrative State,

00:59:00	Another Native American Case Haylen v. Bray King Challenge to 1978 Child Welfare Act Gorsuch is a big Proponent of Native American Rights- Case heard recently. Hard to tell how it aligns with the Justices
00:59:48	US v. Texas Claim Biden Administration has broken the Law by Focusing on Border Enforcement on only Certain Categories of Migrants – such as those Deemed a Threat to Public Safety – Looking at Impeaching over Immigration Policies
01:00:24	Moore v. Harper – Involves the State Independent Legislature Theory – At the State Level the Elections shall be determined with the State Legislators and that State Supreme Courts have no place in decision making Expect the Court to Rule Narrowly but will be a Slow Erosion of the Voting Rights Act. Could Effect Outcome of Elections in the Future
01:02:04	303 Loc v. Elenas Web Designer who Plans to Build Wedding Websites and Does not Want to do Same Sex Marriages which Contrary to her Religion – Expect the Court will Side with the Designer even though she has not even set up a website or Designed a Wedding it is pure intent. Most Courts do not give advisory and there usually needs to be a case in controversy. Believe her Intent gives her Standing
01:03:07	Merrill v. Milligan Involving Section 2 of the Voting Rights Act Alabama Redistricting – 1 Majority African American Districts v. Two Districts Final Nail in Coffin of Voting Rights Act
01:03:32	6-3 is the new 5-4 Dr. Adam Feldman – 31% of Decisions have been 6-3 Decisions
01:04:04	Something to Ponder – The Confidence of the Supreme Court is a Historical Low at 25%
01:05:30	Presenter Closing End of Video
01:05:40	ApexCLE Company Closing Credits
01:05:41	End of Video

DISCLAIMER

The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended, nor should they be construed, to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speakers and are not to be attributed to their firm, the courts, or their clients.

V. LIVE HEARINGS

A. During Covid, for seventeen months, Court was remote.

1. Heard toilet flush
 2. Questions by seniority
-

B. October 4, 2021- return to in person

1. Justice Brett Kavanaugh remote-tested positive for Covid
-

C. Free for all sort of back, but then does by seniority

D. The case is submitted” is heard much later in the arguments lately.

1. CNN in November:

“Until the Covid-19 pandemic, beginning in early 2020, Roberts presided over fairly tight one-hour sessions. As justices jockeyed to ask questions of a lawyer standing below the bench, speed and brevity were valued. The clock ruled, and rarely would a case get more than one hour of time.

“When the justices moved to teleconference questioning during the pandemic, Roberts necessarily changed the routine so that the attorneys at the other end of the phone line knew which justice was speaking. Each of the nine justices was to take about three minutes to ask questions, in order of seniority.

“Many of them went over time, as did the lawyers at the other end of the phone line. But the format had the

advantage of ensuring that no justice was elbowed out of the Q-and-A.

“Since returning to the courtroom late last year, the justices have employed a format that begins largely with the old free-for-all but then adds a second round during which each justice gets a chance to ask any lingering queries. “That has encouraged talkativeness – especially of the newest justice, Jackson. Adam Feldman, who tracks patterns during oral arguments at his Empirical SCOTUS blog, found that during the first two weeks of cases argued in October Jackson spoke more than twice as much as any other justice, based simply on word count.”

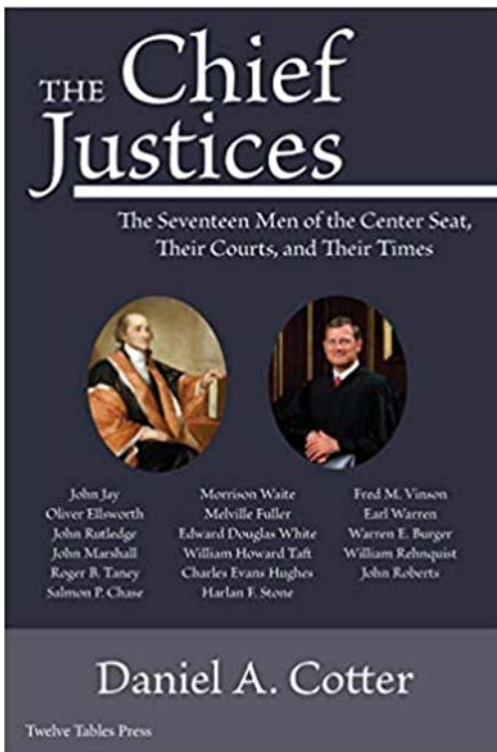
VI. THE TELL

A. Some members seem ready to take the Court further to the right; liberals trying to call attention to the work of the Court and where heading.

B. Many who follow SCOTUS are complaining, hard to listen in real time or any time when they are three or more

hours in some instances, such as the
current term's affirmative action cases.

VII. Chief Justice John Roberts



A. “The Chief Justices” P. 392: “Time will tell, and the Roberts Court legacy will continue to be closely watched. If the reports of Roberts strong interest in seeing the integrity of the judicial process

maintained and the prestige upheld are true, watchers on both sides of the aisle might be disappointed by how Roberts and the Court decide matters.”

B. The Court’s Pacer? P. 402: “The Chief Justices are the ones that pace the Court and strive to maintain the Court’s prestige in the eyes of we, the people. Time will tell if the Court is now different.”

C. Recent Terms - Pivotal vote in certain cases

D. But more and more, with five other conservative justices, he is less and less the pivotal vote and has had trouble reining in the other five.

E. But ...Do not expect Roberts to be the new Kennedy, as some have ascribed

1. Kennedy was not that broad in his topics for which he voted with liberal bloc
- 2 Roberts will not be even as broad, but *see stare decisis*
 - a. And even here, stare decisis not always holding

F. Roberts is not a liberal or moderate

1. Wrote the majority in *Shelby County*, dissent in *Obergefell* and in *Whole Woman's Health*, and signed on to *Citizens United*.
2. He would probably look farther to the right though if the Court didn't already seem so clearly ideologically split.

G. Kavanaugh and Roberts

1. Kavanaugh and Roberts have voted around 90% together or more each term since Kavanaugh joined the Court.
2. This duo has immense power in controlling the direction of the majority to the extent this relationship continues.

H. Kavanaugh Median Justice

1. As long as the majority is predominantly conservative, Alito and Thomas' values rise on the right.
2. We saw this in *Dobbs* and will likely see it in several cases this term.
3. Even if the justices on the right won't all write the most opinions, to the extent they are willing to delegate to the far right, the policy output will be more ultra-conservative.

I. General About Court

1. Tries to balance load by justice every year

2. Typically, the Court when a new justice joins, do not take on major lightning rod matters

a. Amy Coney Barrett

b. Brett Kavanaugh

(1) Does not appear to be the case this term:

(a) Big affirmative action

(b) Independent state legislature

VIII. THE OCTOBER 2021 TERM

A. Low production continues

IX. MAJOR CASES, 2021 TERM

A. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION (6-3)

1. A word on the leak(s) and the status of finding

2. Majority: "Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, Roe and Casey have inflamed debate and deepened division."

a. Noted, not a right found in the Constitution.

3. Quote from prior Court: "There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice.

4. The Quote.... Was Justice Thomas, in a case not about abortion.

a. Penumbras?

B. NEW YORK STATE RIFLE & PISTOL ASSOC. V. BRUEN (6-3)

1. Guns and 2A- law-abiding Americans have a right to carry handguns outside the home for self-defense.
2. “History and tradition”

 - a. Debate about robed individuals and historian status
 - (1) Dissent also used history and tradition

C. WEST VIRGINIA V. EPA (6-3)

1. Clean Water Act

 - a. Roberts: “Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible ‘solution to the crisis of the day.’ But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme.”
2. We will see continued challenges to Congress delegation

D. CARSON V. MAKIN (6-3)

1. The court’s conservative majority invalidated a Maine tuition program that barred religious schools from receiving public grants extended to other private schools. Roberts for the majority found that the tuition program “promotes stricter

separation of church and state” than the Constitution otherwise requires.

- a. Again, history and tradition or policy driven?

E. Others

1. Prayer- coach case
 2. Native American Sovereignty- Oklahoma police
 3. Covid
 4. Stay in Mexico policy- immigration
 5. Others
 6. Low productivity
-

X. BREYER RETIREMENT

A. Announced during

B. Confusion on how that happened once Ketanji Brown Jackson confirmed

C. She began first Monday in October 2022 term

1. Asking questions
2. By word count, most vocal during oral arguments

3. Will not matter – see prior term, 6-3 decisions
-

XI. OCTOBER 2022 TERM

A. The Jackson Court?

1. Brennan/Stevens noted when new justice the Court changes and should be named for the new justice.
-

B. To date, the arguments are really long compared to last term and even more compared to historically

C. Scarcity of Grants

1. To date, 42 granted
 - a. 34 scheduled for arguments
 2. Also, no opinions issued yet- first time in memory by this time of year
 3. Will likely hear 60-65 cases
 - a. Down from 120+ few years ago.
-

D. Sackett v. EPA

1. Narrow question- definition of “navigable waters”—but could be broader dismantling of various regulatory regimes. Another Clean Water Act case (see last term and Chevron).
-

E. Haaland v. Brackeen

1. Challenge to the 1978 Indian Child Welfare Act, could upend relations between the government and federally recognized tribes.

a. See last term, Native American rights and police powers.

(1) Continued erosion?

(2) Gorsuch has been protector of Native American rights

(3) Will be an interesting one to see how the justices align

F. US v. Texas

1. Texas and Louisiana claim the Biden Administration has, in effect, broken the law by focusing its border-enforcement efforts only on certain categories of migrants, such as those deemed a “threat to public safety.”

a. Might see impeachment in the coming months of President Biden by McCarthy-led House

G. Moore v. Harper

1. Independent State Legislature Theory

a. Have written extensively on this.

2. Significant number of amici briefs the theory is not consistent with Constitution

a. Including co-founder of Federalist Society

3. Seems like the Court will rule narrowly, but expect a VRA-like erosion of elections as right continues to challenge
-

H. 303 Creative LLC v. Elenis

1. Graphic designer plans to build wedding websites
 2. Does not want to do same-sex marriage sites as contrary to her religion
 - a. Has not built any
 3. Court likely to side with designer
-

I. Merrill v. Milligan

1. Section 2 of the Voting Rights Act
Alabama Redistricting 1 African American Majority Districts v. two Districts
 2. Seems to be final nail in coffin of the Voting Rights Act from hearings
-

XII. 6-3, the New 5-4?

- A. Dr. Adam Feldman – 31% of the decisions recent terms have been 6-3 decisions which is very telling
- B. Historically 6-3 Decisions since 1937 have been in the teens and high teens, 20's and 30's with the Roberts' Court

XIII. SOMETHING TO PONDER

A. Confidence in SCOTUS at historic low-25% will it go lower?

1. Source: Gallup Poll

Creativity. Results. Practicality. Solutions

These words define not only successful businesses, but also the law firm that represents them. Howard & Howard is the law firm businesses use because our vision of success is not lavishly decorated offices. The attorneys at Howard & Howard use a different measure - *Your Success*

IVX. RESOURCES

A. Resources Specific to this Course

In addition, please see the resources cited within the material.

B. Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation -
www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org