

# **Overview of 2020 Supreme Court Term**

Professor David Schultz,  
Political Science, Hamline University,  
University of Minnesota School of Law

# Observations and Highlights

- ▶ Exit Ginsburg enter Barrett
- ▶ Court moves (further) to the right with a 6-3 majority?
- ▶ The Shadow Docket?
- ▶ Surprisingly Kavanaugh as the new center?
- ▶ Barrett's impact?
- ▶ Free Speech wins
- ▶ Free exercise of religion wins
- ▶ Student athletes and expletive cheerleaders win
- ▶ Criminal defendants, human rights, and labor loses.

## Nice Work If you Can Get It: Comparing the 2020 and 2019 Docket

### ► 2020 Term

- 67 Merit opinions released
- 55 opinions after orals
- 2 per curiam
- 8 summary reversals

### 2019 Term

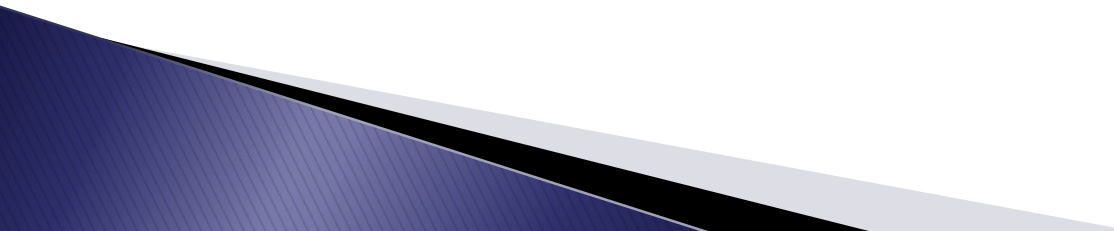
61 Merit opinions released  
53 Opinions after orals  
2 per curiam  
5 summary reversals

# The Shadow Docket: The Alternative Docket?

- ▶ Cases decided without full  
orals and opinions
- ▶ Often decisions on  
summary judgment or  
TRO requests
- ▶ Does the docket exist and  
explain the shrinking of  
the regular docket?
- ▶ Justice Alito acknowledges  
its existence?



# Case Composition

- ▶ 97% certiorari (67 cases)
  - ▶ 3% original jurisdiction (2 cases)
  - ▶ 6% from state courts (4 cases)
  - ▶ 1% from district court (1 case)
  - ▶ 1% from military courts (1 case)
  - ▶ 13.4% criminal cases (9 cases)
  - ▶ 32.8% constitutional law (22 cases)
- 

# Case Dispositions

Jurisdiction	Affirmed	Reversed	Reverse Percentage
CA1	0	1	100%
CA2	1	2	67%
CA3	2	4	67%
CA4	0	3	100%
CA5	2	5	71%
CA6	0	5	100%
CA7	0	1	100%
CA8	1	3	75%
CA9	1	15	94%
CA 10	0	3	100%
CA 11	2	3	60%
CA DC	0	4	100%
CA Fed	0	3	100%
State	3	1	25%
Total	12	54	82%

# Observations on Case Disposition

- ▶ If the Supreme Court accepts the case, odds are you face a reversal
- ▶ Ninth Circuit (most liberal court) the numerical loser
- ▶ Clash of conservative Supreme Court and more liberal lower courts?
  - What does this mean for Biden appointees? As of July 13, 2021, only seven Biden judges confirmed by the Senate (with approximately 78 vacancies).

# Article III Standing

- ▶ Five cases address Article III standing and deny or limit it.
- ▶ Continues Roberts Court trend of limits on access to federal courts.
- ▶ Are State Courts and litigation a better option?





# Fastest (and slowest) Justice in the East

- Fastest:
  - Thomas, 78 days (at one time he was the slowest...by far)
- Slowest
  - Kagan, 132 days
- At one time the liberals were the fastest and the conservatives the slowest.
  - Changing ideological composition and dissents factor into rapidity of the opinion

# 2020Term Voting % Agreement: Split Decisions (full/partial/judgment)

	Thomas	Breyer	Alito	Sotomayor	Kagan	Gorsuch	Kavanaugh	Barrett
Roberts	75%	73%	83%	66%	72%	81%	94%	84%
Thomas		63%	82%	55%	67%	88%	78%	85%
Breyer			59%	93%	93%	66%	73%	64%
Alito				53%	58%	88%	86%	87%
Sotomayor					88%	58%	66%	58%
Kagan						70%	72%	69%
Gorsuch							87%	91%
Kavanaugh								91%

# Voting Alignments

## Among Justices: All Cases

### ► Agreements

- Roberts-Kavanaugh 94%
- Breyer-Kagan 93%
- Breyer-Sotomayor 93%
- Barrett-Gorsuch 91%

### ► Lowest Agreements

Sotomayor-Alito 53%  
Sotomayor-Thomas 55%  
Kagan-Alito 58%  
Sotomayor-Barrett 58%

# Voting Alignment Among Justices: Divided Cases

## ► Agreements

- Roberts-Kavanaugh 89%
- Ginsburg-Breyer 89%
- Alito-Thomas-87%

## ► Lowest Agreements

- Sotomayor-Thomas 13%
- Alito-Sotomayor 16%
- Thomas-Ginsburg 21%



# 5-4 Cases

Term	Number 5-4 opinions	Percentage of 5-4	Ideological Conservative Victory	Liberal Victory
OT 18	20	28%	40%	40%
OT 20	8	12%	50%	37%
16 Year Ave	15	20%	45%	31%

# Opinion Writing 2020 Term

Justice	Majority	Concurrence	Dissent
Roberts	7	2	2
Thomas	7	11	5
Breyer	6	1	7
Alito	6	8	5
Sotomayor	6	7	9
Kagan	6	1	4
Gorsuch	6	9	3
Kavanaugh	6	8	2
Barrett	4	1	3

# Majority Rules: Percentage in Majority

Justice	All cases	Split Cases	5-4 cases
Roberts	91%	84%	
Thomas	81%	70%	
Breyer	76%	58%	
Alito	83%	66%	
Sotomayor	69%	45%	
Kagan	75%	55%	
Gorsuch	90%	82%	
Kavanaugh	97%	95%	
Barrett	91%	84%	

# Kavanaugh as the New Center Justice?

- ▶ 90%+ in majority for all types of decisions
- ▶ 87% majority in 5-4 cases
- ▶ Tied for most majority opinions (7)
- ▶ Wrote two 5-4 opinions (tied for first)





# The Barrett Factor

- ▶ Barrett strengthens the conservative majority and pushes Roberts out of the swing role
- ▶ A 6-3 or 5-4 Conservative Court

# The Emerged Conservative Majority

- ▶ Ideological 6-3 vote most common vote in split decisions
- ▶ Barrett is the difference (shifts Roberts from a 4-1-4) majority maker to less of a power player
- ▶ Conservative outcomes at least 50% in split cases
- ▶ Unanimous decisions shift overall Court to the right



# A Partisanly-viewed Court with Declining Approval Ratings?

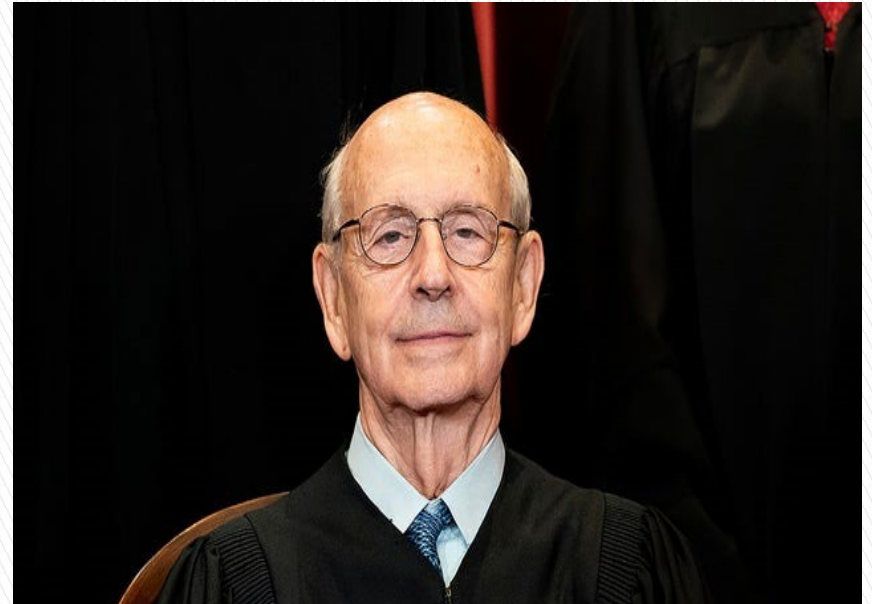
- ▶ "My goal today is to convince you that this court is not comprised of a bunch of partisan hacks." Justice Barrett
- ▶ "I think the media makes it sound as though you are just always going right to your personal preference. So if they think you are antiabortion or something personally, they think that's the way you always will come out. They think you're for this or for that. They think you become like a politician." Justice Thomas
- ▶ "The catchy and sinister term 'shadow docket' has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways," Alito said. "And this portrayal feeds unprecedented efforts to intimidate the court or damage it as an independent institution." Justice Alito
- ▶ "Supreme Court Justices Aren't 'Junior-League Politicians.'" Justice Breyer



"The lady doth protest too much, methinks."

# Pressure on Breyer to Resign?

- ▶ Liberals want Stephen Breyer to resign now to give Biden a chance to replace him and avoid the Ginsburg issue

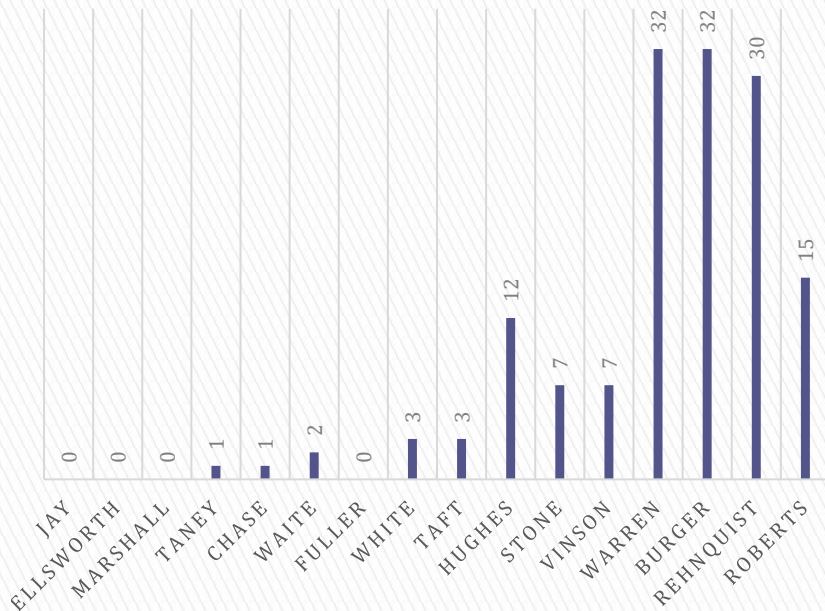


Stephen Breyer, age 82,  
oldest Court Justice

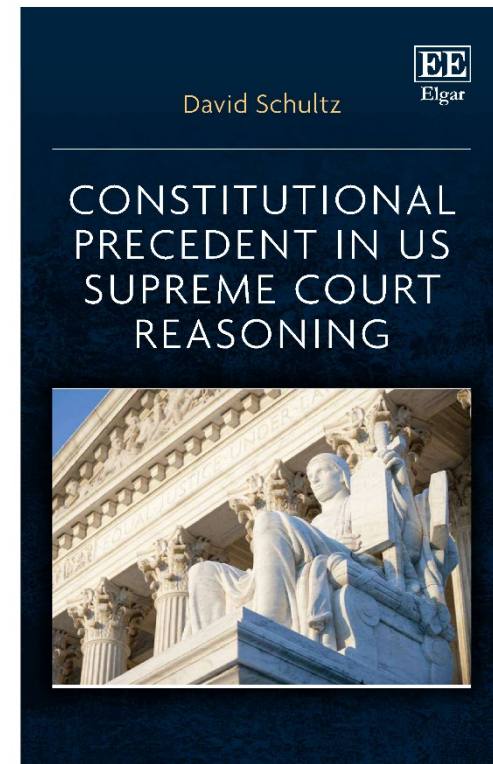


# What if Roe v. Wade is overturned?

**TABLE ONE: SUPREME COURT CONSTITUTIONAL PRECEDENT REVERSALS**



Over time the Supreme Court have reversed 145 of its constitutional precedents



Forthcoming April 2022

# Top Decisions: 2020 Term

- ▶ *California v Texas* (7-2) Upholds the constitutionality of the Affordable Care Act even though the tax for the those who do not have insurance was eliminated.
- ▶ *Fulton v. Philadelphia* (9-0) Refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment.
- ▶ *NCAA v. Alston* (9-0) NCAA limits on student athletes' compensation violates US antitrust laws.

# Top Decisions: 2020 Term

- ▶ *Mahanoy Area School District v. B.L.* (8-1) Public school violated student's free speech rights when sought to discipline her for vulgar speech posted on social media when it did not take place on school time, was not disruptive, and and not use school account.
- ▶ *Brnovich v. DNC* (6-3) Upholds state law banning third parties from picking up ballots (case limits scope of VRA Section 2 to a totality of circumstances when assessing racial impact which has to be more than inconvenient.

# Top Decisions: 2020 Term

- ▶ *Americans for Prosperity v. Bonta* (6-3) California law compelling disclosure of major donors to charities violated the First Amendment.
- ▶ *Cedar Point Nursery v Hassid* (6-3) State regulation giving union organizers the right to visit farmworkers on agricultural fields violated growers' private property rights.
- ▶ *USA v. Doe* (8-1) Cargill and Nestle cannot be sued in US for human rights violations in the Ivory Coast.



# Top Criminal Decisions: 2020 Term

- ▶ *Jones v. Mississippi* (6-3) States need not find juveniles permanently incorrigible to sentence them to live in prison.
- ▶ *Edwards v. Vannoy* (6-3) Court decisions establishing new procedural rules may never provide relief for inmates whose direct appeals have concluded.
- ▶ *Borden v. U.S.* (5-4) A reckless offense cannot qualify as a "violent felony" if it only requires a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge.



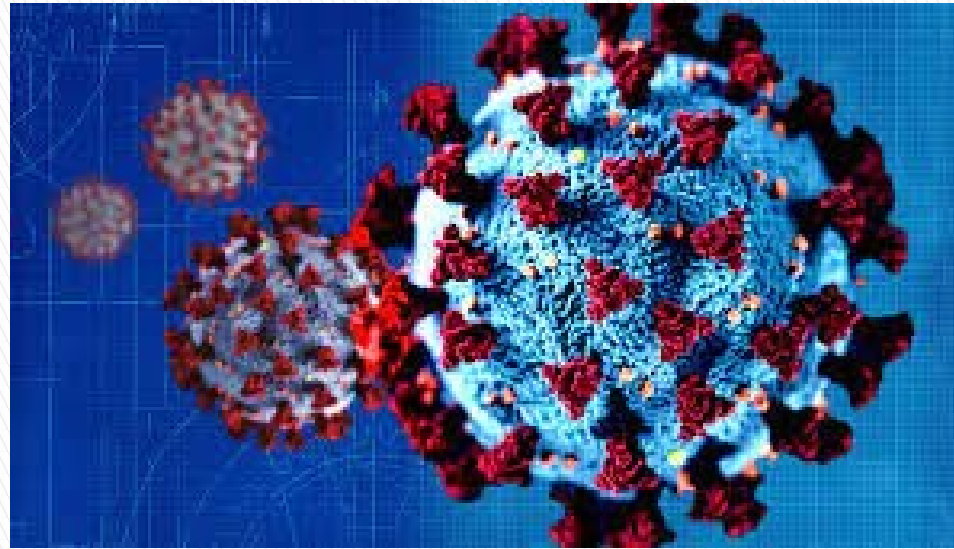
# Top Criminal Decisions

- ▶ *Shinn v. Kayer* (6-3 per curiam)  
Vacates and remands Ninth Circuit opinion granting post-conviction relief to a man on Arizona's death row for his claim of ineffective assistance of counsel. Such relief violated the Antiterrorism and Effective Death Penalty Act of 1996.
- ▶ *Torres v. Madrid* (5-3) A Fourth Amendment seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting.



# Pandemic Cases

- ▶ *South Bay United Pentecostal Church v. Newsom* (5-4) Overturns governor's executive order limiting religious gatherings. (Previous order upheld 5-4 with Ginsburg on the Court)
- ▶ *Roman Catholic Diocese of Brooklyn v. Cuomo* (per curiam) Overturns governor's orders restricting occupancy of houses of worship during the Covid-19 pandemic



# Original Jurisdiction Cases

- ▶ *Texas v. New Mexico* (8-0)  
New Mexico wins in water dispute over the Pecos River.
- ▶ *Florida v. Georgia* (9-0)  
Georgia wins in a water dispute (case actually dismissed)



# For Admin Law Nerds (like me)

- ▶ *United States v. Arthrex Inc.*  
(5-4) Unreviewable authority wielded by Administrative Patent Judges during inter partes review is incompatible with their appointment by the Secretary of Commerce to an inferior office.





# Questions?

Thank you!