The Supreme Court, 2020-21:
Sith Lords in the Courtroom of Good and Evil

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An overview of today's session, and some goals

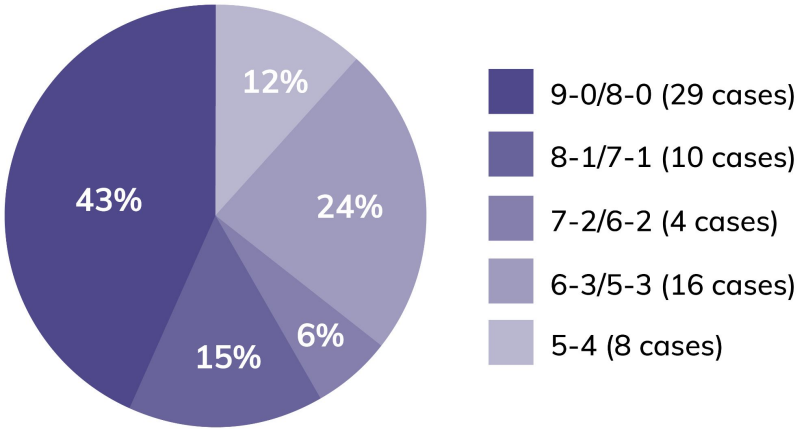
- The most consequential development in October Term 2020 was the arrival of the 115th Justice
  - Amy Coney Barrett was the third Justice appointed by Donald Trump
  - The Trump Court is lauded or feared as an epochal shift in the nation's highest court
  - But just how cohesive and coordinated is the Court's vaunted 6-3 conservative majority?
  - A surprising (?) 2020 decision, *Bostock*, served notice that this 6-3 majority is hardly monolithic
- A good time to review the "passive virtues," or the role of restraint in the "least dangerous branch"
  - Certiorari: The Rule of Four (and its antimatter counterpart, the Rule of Five)
  - *Stare decisis*: Revisiting a pivotal decision decided from OT 2019 (*Ramos*) and its OT 2020 sequel (*Edwards*)
  - *Ashwander* and *Marks*: Finding the narrowest grounds of decision — a virtue or a vice?
- Then we will review the parade of decisions from OT 2020
  - And take a look ahead at some of the more interesting twists lying ahead in OT 2021
- Questions are welcome throughout this presentation — Please type them in the chat window

Associate Justice Amy Coney Barrett

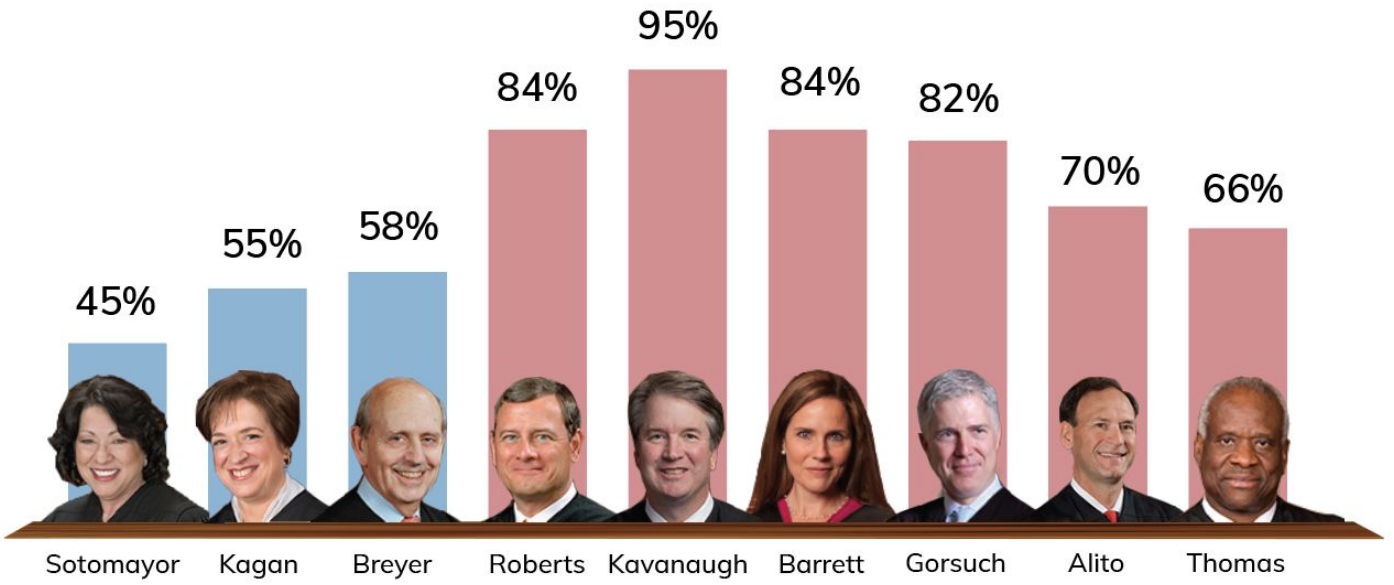
- Appointed October 27, 2020, exactly one week before Election Day
- Then-Senate Majority Leader Mitch McConnell moved the goalposts
  - In 2016, Sen. McConnell denied Merrick Garland, a hearing on the rationale that the next President should fill Antonin Scalia's seat
  - In 2020, Sen. McConnell accelerated Senate proceedings to ensure that Donald Trump would nominate Ruth Bader Ginsburg's successor
- Like it or hate it, Barrett's appointment was bare-knuckled *Realpolitik*
  - Republican Presidents have appointed 15 of the 19 last Justices
  - Including a shocking 10 consecutive appointments from 1969-93
  - The salience and perhaps victory of the "5G" judicial agenda
- She is expected, by allies and foes alike, to reverse Ginsburg's legacy
- Nina Totenberg of NPR: "Justice Barrett turned out to be … congenial"

Supreme Court coalitions aren't perfectly stable

- The 6-3 coalition did *not* dominate this Term
- Many observers were surprised by the high degree of unanimity and near-unanimity
- And not every 6-3 decision broke along ideological lines
- *E.g.*, *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, No. 20-472, appears to have been the first perfect split between 3 female and 6 male Justices
- *Cf.* last Term's big shock: *Bostock v. Clayton County*, No. 17-1618 ("sex" in Title VII)



Justice Kavanaugh dominates divided cases



Stare decisis: The traditional framework

Type	Degree of deference	Rationale	Canonical case(s)
Statutory	Strong	Congress can just amend the statute	*Flood v. Kuhn*, 407 U.S. 258 (1972) (but it's an antitrust case!)
Common law (*e.g.*, federal admiralty)	Moderate	Statutory reform is presumably possible	*Moragne v. States Marine Lines*, 398 U.S. 375 (1970)
Constitutional	Weak (?)	Change requires amending the Constitution	*Payne v. Tennessee*, 501 U.S. 808 (1991); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

Seismic movement on *stare decisis*: *Ramos*

- *Ramos v. Louisiana*, No. 18-5924, overruled *Apodaca v. Oregon*, 404 U.S. 406 (1972), during OT 2019
  - Non-unanimous jury convictions violate the 6th amendment guarantee of trial by jury
- Gorsuch's majority opinion described the conventional hierarchy and rationale for *stare decisis*
  - the quality of the decision's reasoning
  - its consistency with related decisions
  - legal developments since the decision
  - reliance on the decision
- Kavanaugh's concurrence aggressively defined "special justification" or "strong grounds" for overruling constitutional precedent
  - Is the prior decision not just wrong, but grievously or egregiously wrong?
  - Has the prior decision caused significant negative jurisprudential or real-world consequences?
  - Would overruling the prior decision unduly upset reliance interests?

Kavanaugh's "structured methodology" prevails

- *Edwards v. Vannoy*, No. 19-5807, denied retroactive application to *Ramos*
  - Unsurprising: Purely prospective application of *Ramos* means that only Oregon needs new sentencing rules
  - Shocking: The Court overruling the "watershed" exception in *Teague v. Lane*, 489 U. S. 288, 310–11 (1989)
    - Such an exception had never been recognized in 32 years
  - Gorsuch's concurrence: "Teague held out a 'false hope' and the time has come to close its door."
  - Kagan's dissent slammed the Court's decision to "overrul[e] a critical aspect of *Teague*"
    - The majority follows none of the usual rules of stare decisis
    - It discards precedent without a party requesting that action
    - And it does so with barely a reason given, much less the "special justification" our law demands
- *Cf. Jones v. Mississippi*, No. 18–1259, as a form of stealth overruling, *stare decisis* notwithstanding
  - A discretionary sentencing scheme, even without a separate factual finding of permanent incorrigibility, to impose a sentence of life without parole on a juvenile. *Cf. Roper v. Simmons*, 543 U.S. 551 (2005)
  - *Miller v. Alabama*, 567 U. S. 460 (2012); *Montgomery v. Louisiana*, 577 U. S. 190 (2016), didn't say otherwise!

“Always two there are…” Sith Lords as Justices

- One to embody the power — Chief Justice Roberts and Justice Barrett as institutionalists
- The other to crave it — Justices Thomas and Alito, ready to overrule cases without apology
- Torn between the Dark and the Light Side — *Stare decisis* whisperers Gorsuch and Kavanaugh
    - Kavanaugh seems warmer to passive virtues; Gorsuch seems more amenable to overthrowing precedent

Holy wars: Fictional, historical, contemporary

- *E.g.*, Justice Thomas (plus Justice Gorsuch on *Sullivan*) wants a 1st amendment revolution
  - *Biden v. Knight Inst.*, No. 20–197: Urging the regulation of social media as common carriers in a GVR
  - *Berisha v. Lawson*, No. 20–1063: Urging the overruling of *New York Times v. Sullivan*, 376 U. S. 254 (1964), in a dissent from denial of cert.
- Ancient Greece had two war deities
  - Athena: Ordered combat
  - Ares: Chaotic killing
- Text vs. tradition in Christianity
  - "Protestant" textualism
  - "Catholic" tradition
  - The "letter of the law" vs. the "familiar rule" of Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)
    - The spirit of the law
    - The intentions of its makers
- ***Ecco ancilia legibus: Natura non facit saltum, et ipso lex***

The Court's biggest OT 2020 feat? Nothing!

The passive virtues of avoiding Trump's Big Lie

- *Texas v. Pennsylvania*, No. 220155, a complaint seeking to invoke the Court's original jurisdiction in cases between states, was dismissed for want of standing to attack another state's election rules
  - Alito and Thomas's subtle distinction: The Court must allow an original complaint to be filed
  - Then the Court can decline to grant relief (an outcome in which these Justices acceded)
- But keep an eye out on a literalist reading of Article I, § 4, cl. 1 favored by Kavanaugh and Gorsuch
  - *E.g.*, *Democratic Nat'l Comm. v. Wisconsin State Legislature*, No. 20A66; *Republican Party v. Boockvar*, No. 20A54
  - "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State ***by the Legislature thereof***; but the Congress may at any time by Law make or alter such Regulations" (emphasis added)
- These Justices' interpretation of Article I, § 4 has no support in prior cases or in academic commentary, but all that matters is these Justices' interpretation

But the Voting Rights Act may be moribund

- Background: *Shelby County* v. Holder, 570 U.S. 529 (2013), invalidated §§ 4(c), 5 of the Voting Rights Act of 1965 and eliminated the preclearance provisions of the VRA
- *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, very narrowly interprets § 2 of the VRA
  - States may refuse to count votes cast in the wrong precinct
  - States may restrict the range of people allowed to collect and deliver ballots
  - The conservative 6-3 majority held firm on what may be the most aggressive partisan legislative agenda of the moment, in the aftermath of The Big Lie: Measures ostensibly designed to combat voter fraud
  - § 2 is limited to purposeful discrimination against nonwhite voters, contrary to 1982 VRA amendments
- Two related cases: (1) Forced donor disclosure, *Americans for Prosperity v. Bonta*, No. 19-251
  - Requiring nonprofits to report major donors violates the organizations' 1st amendment right of association
- (2) Corporate denial of union access to farmworkers: *Cedar Point Nursery v. Hassid*, No. 20-107
  - The Court treated even momentary physical occupation as a *per se* taking and struck down California's law

Remarkably, the Affordable Care Act survives

- This third chapter in the "ACA Trilogy" drew a violent dissent by Justice Alito
  - "Fans of judicial inventiveness will applaud once again"
  - A canonical instance of the "craving" wing's impatience with the slow pace of constitutional change
- Chapter 1: *National Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)
  - Congress could not impose the individual mandate under its Art. I, § 8, cl. 3 power to regulate interstate commerce (the infamous "broccoli horrible" bars legal coercion of participation in a market)
  - But Congress could mandate the individual responsibility payment under its § 8, cl. 1 tax power
- Chapter 2: *King v. Burwell*, 576 U.S. 473 (2015)
  - Subsidies to persons purchasing insurance through exchanges established by a "State," 26 U.S.C. §§ 36B, include exchanges established by the federal government
- Chapter 3: *California v. Texas*, No. 19-840
  - Trump and two Republican-controlled houses couldn't repeal the ACA, but they did zero out the mandate
  - *Held:* The zeroed-out penalty deprived challengers of standing to sue

The ACA trilogy demonstrates passive virtues

- Chief Justice Roberts mastered "passive virtues" in *NFIB* and *King*
  - The word "tax" means different things in different texts
    - Anti-Injunction Act
    - Art. I, § 8, cl. 1 of the Constitution
  - Individual responsibility payments are constitutional without respect to underlying congressional intent as long as they raise revenue
  - The resurrection of the *Charming Betsy* avoidance canon, 6 U.S. (2 Cranch) 64 (1804), to rescue Medicaid expansion
  - *King* Houdini: "State" means the federal government
- Standing doctrine as a "heads I win, tails you lose" maneuver
  - Clause 1 legislation needs revenue, but its absence denies standing (!)

A history of holy wars over the religion clauses

- The religion clauses of the 1st amendment are constitutional *yin* and *yang*, matter and antimatter
  - "Congress shall make no law respecting an establishment of religion, …"
  - "… or prohibiting the free exercise thereof; …"
  - But excluding religion from public affairs suppresses its exercise by believers
  - While granting religious exemptions erects an establishment in its own right

- Credible positions for the Overton window of religion clause jurisprudence … plus an outrage
  - The "wall of separation": *E.g.*, the bar to "entanglement" in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
    - *Lemon* is older than *Roe v. Wade*, 410 U.S. 113 (1973), and perhaps more despised in religious circles
  - "Neutrality": Government must not favor one faith over another
    - The definition of neutrality is fluid and has emerged as the contemporary flash point
  - But this is outrageous: Religious exemptions favoring the societal majority flexing its raw political power
- Constraining *both* establishment and free exercise promotes soft, *de facto* religious majoritarianism

Let us now praise famous cases

- *Employment Division v. Smith*, 494 U.S. 872 (1990), is the free exercise counterpart of *Lemon*
  - No facially neutral law impairs against the free exercise of religion
  - The 1st amendment claim for an exemption fails even if the banned activity (peyote use) is sacramental
  - Alongside *D.C. v. Heller* (q.v.), *Smith* is one of the most durable legacies of Antonin Scalia beside his dissents
  - But discrimination against religion is unconstitutional. *Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993)
- Efforts to neuter if not overrule *Smith* included the Religious Freedom Restoration Act of 1993
  - RFRA itself ran into constitutional problems, wholly apart from the establishment/free exercise equilibrium
  - *City of Boerne v. Flores*, 521 U.S. 507 (1997), held that RFRA, as applied to state and local legislation (including historic preservation laws) exceeded the scope of Congress's powers under § 5 of the 14th amendment
- Two versions of neutrality have emerged
  - *Smith*'s approach: Free exercise is satisfied as long as religious conduct is regulated alongside secular acts
  - Most favored nation: If another interest gets an exemption, religious conduct must also enjoy the privilege

Religion is winning, but some Siths crave more

- *Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, tipped the scales in favor of MFN neutrality
  - No limits on large, in-person religious services because the presence of exemptions for secular interests from Covid restrictions deprives the law of neutrality and general applicability under *Smith*
  - Gorsuch concurrence: “So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?”
- The big prize, *Fulton v. City of Philadelphia*, No. 19-123, struck down city rules on foster care
  - A 6-3 division in reasoning, but not along stereotypically ideological lines, and unanimous as to the illegality of the city’s requirement that Catholic Social Services certify same-sex couples as eligible foster parents
  - Roberts’s majority framed *Fulton* as a *Lukumi Babalu Aye* problem: No system of exemptions is truly neutral if there is no recourse to petitioning for an exemption on religious grounds
  - Alito, joined by Thomas and Gorsuch, excoriated the majority for a hyper-narrow, easily evaded opinion
  - “This decision might as well be written on the dissolving paper sold in magic shops”

OT 20's leading 4th amendment case

- *Torres v. Madrid*, No. 19-292, resolves a vexing and frequently arising issue in law enforcement
  - High-speed chases and shootouts where the police apply force, often without successful apprehension
  - The highest-profile instance from the last year or two may be the Breonna Taylor shooting in Louisville
- *Held:* The application of physical force to the body of a person with intent to restrain is a seizure under the 4th amendment, even if the person does not submit and is not subdued
  - Roberts's majority rejected the contrary rule based on intentional *acquisition* of control
  - The Thomas/*Alito*/Gorsuch again dissented
- A likely double win for 42 U.S.C. § 1983 plaintiffs under *Pearson v. Callahan*, 555 U.S. 223 (2009)
  - Substantive 4th amendment claim
  - Qualified immunity

F-bombing restrictions on off-campus speech

- $f(x), x \in$ {school, softball, cheer, everything}
  - You can translate the math into Brandi's Snapchat
  - Not on school grounds, but school officials kicked her off JV cheer (after she lamented not making varsity)
- All Justices except Thomas sided with Brandi Levy
  - *Mahanoy Area School Dist. v. B.L.*, No. 20-255 , evokes *Tinker v. Des Moines Schools* (anti-war armbands)
  - The Court reversed a long losing streak for students in *Fraser*, *Kuhlmeier*, and *Bong Hits 4 Jesus*
- *Cf. Van Buren v. United States*, No. 19-783
  - A person cannot "exceed[] authorized access" under federal computer fraud law by *misusing* his access

Getting schooled, part 2: NCAA amateurism

- A unanimous decision in *NCAA v. Alston*, No. 20-512, striking down NCAA limitations on paid compensation to college athletes as a violation of the Sherman Act
  - Kavanaugh took the opportunity to deliver broadsides against the NCAA far beyond Gorsuch's majority
  - Hard to dispute his assertion that NCAA-style "managed competition" would be unlawful anywhere else
- Ending the strange career of *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984)
  - *Oklahoma* invalidated the NCAA's restrictions on college football television broadcasts
  - The NCAA somehow held onto the notion that *Oklahoma* upheld its amateurism rules
- After *Alston* and a close call in the 2016 case of *O'Bannon v. NCAA*, the NCAA and its lobbyists are reported to be working on rules to allow athletes to commercialize their names, images, and likenesses (NIL)

Forthcoming cases: Abortion and gun rights

- Key cert. grants foreshadow a momentous Term for the 5G agenda
  - God, guns, gays, gynecology, and gerrymandering (and election law controversies)
  - Guns and gynecology were the only culture-war topics missing from OT 2020 — Just you wait!
- The Rule of Four: *New York v. Uplinger*, 467 U.S. 246, 249-51 (1984) (Stevens, J., concurring)
  - By Supreme Court tradition (and not a federal statute), the Court hears any case 4 Justices want to hear
  - A natural corollary: You don't bring a case if you expect to be on the losing side of a 5-4 split
- Expanding the personal right to bear arms after *Heller* (2008) and *McDonald* (2010)?
  - Thomas and Alito have openly accused their colleagues of treating the 2nd amendment as a "disfavored" right
  - *New York State Rifle & Pistol Ass'n. v. Corlett*, No. 20-843: Can a state or city condition unrestricted concealed-carry licenses upon the demonstration of a special need for self-defense?
- Gunning for the Great White Whale of constitutional law: *Roe v. Wade* and the right to abortion
  - *Dobbs v. Jackson Women's Health Org.*, No. 19-1392: Open season on elective abortions before fetal viability?

Thank you

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