KILPATRICK TOWNSEND

ACC Association of Corporate Counsel
SOUTH/CENTRAL TEXAS

U.S. Supreme Court Update

Overview

- Overview of OT21
- Discussion of Important OT21 Cases
- Discussion of Significant Cases on the Docket in OT22
- Questions

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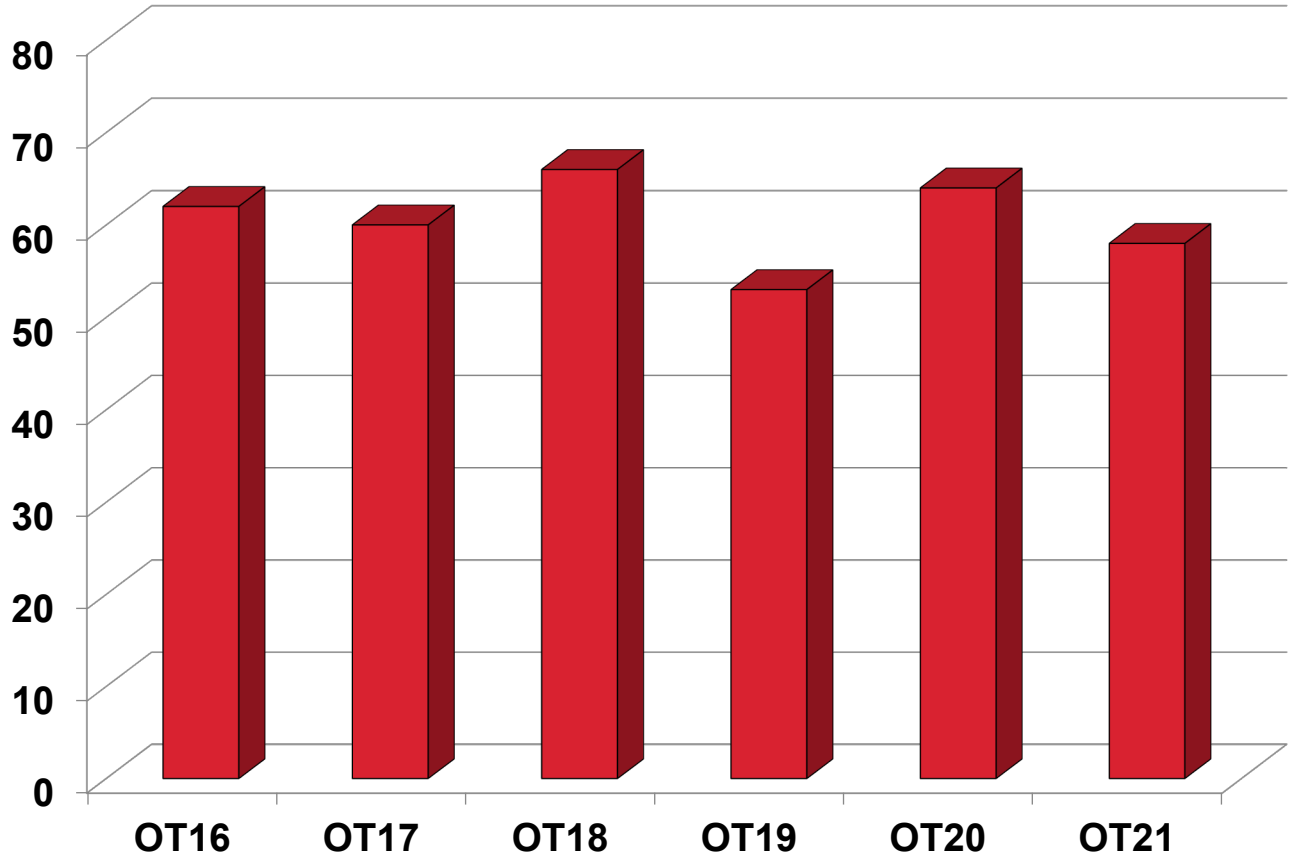
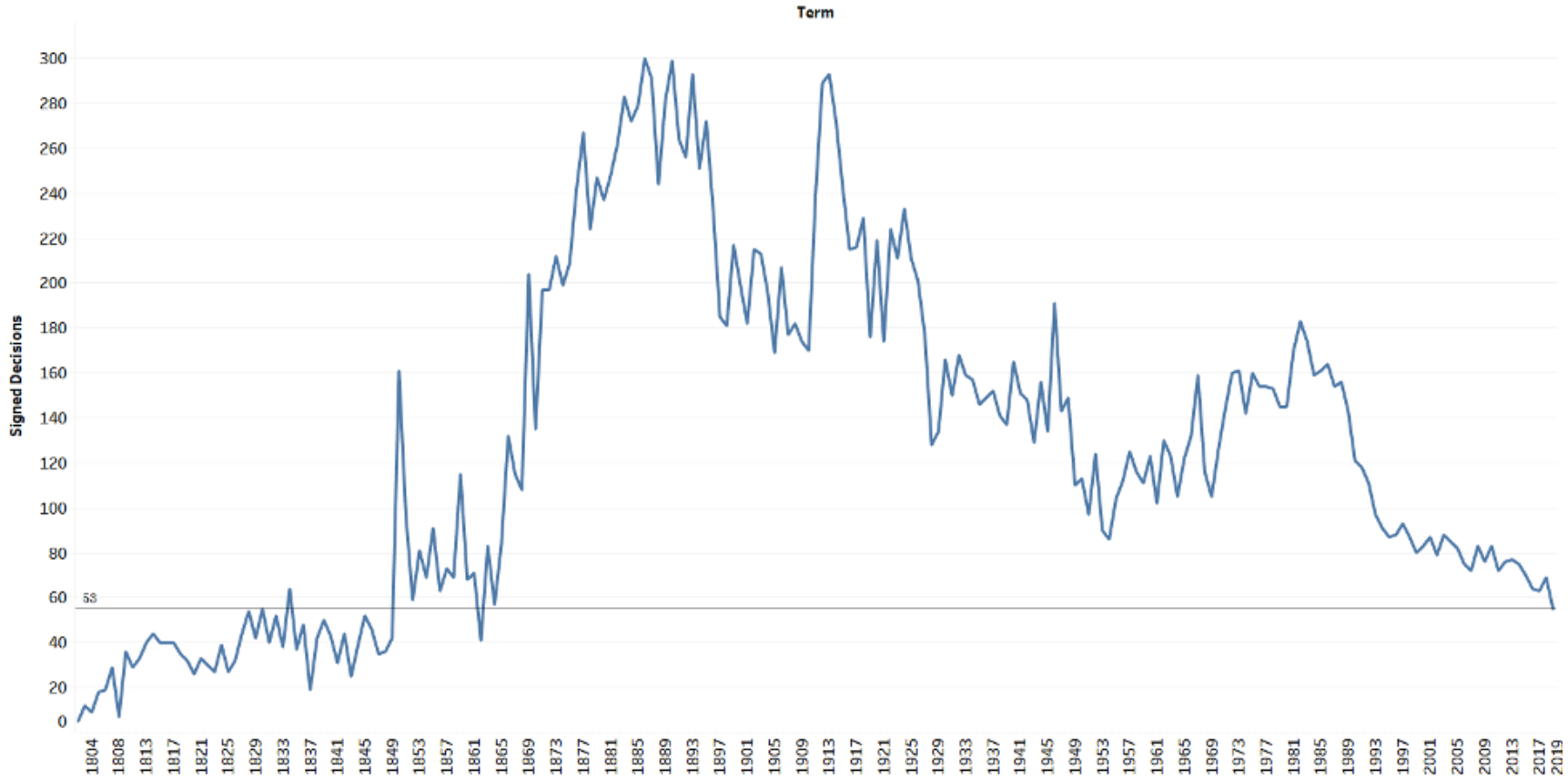
Overview of OT21

Workload

Opinions After Oral Argument by Term



Workload in Historical Context

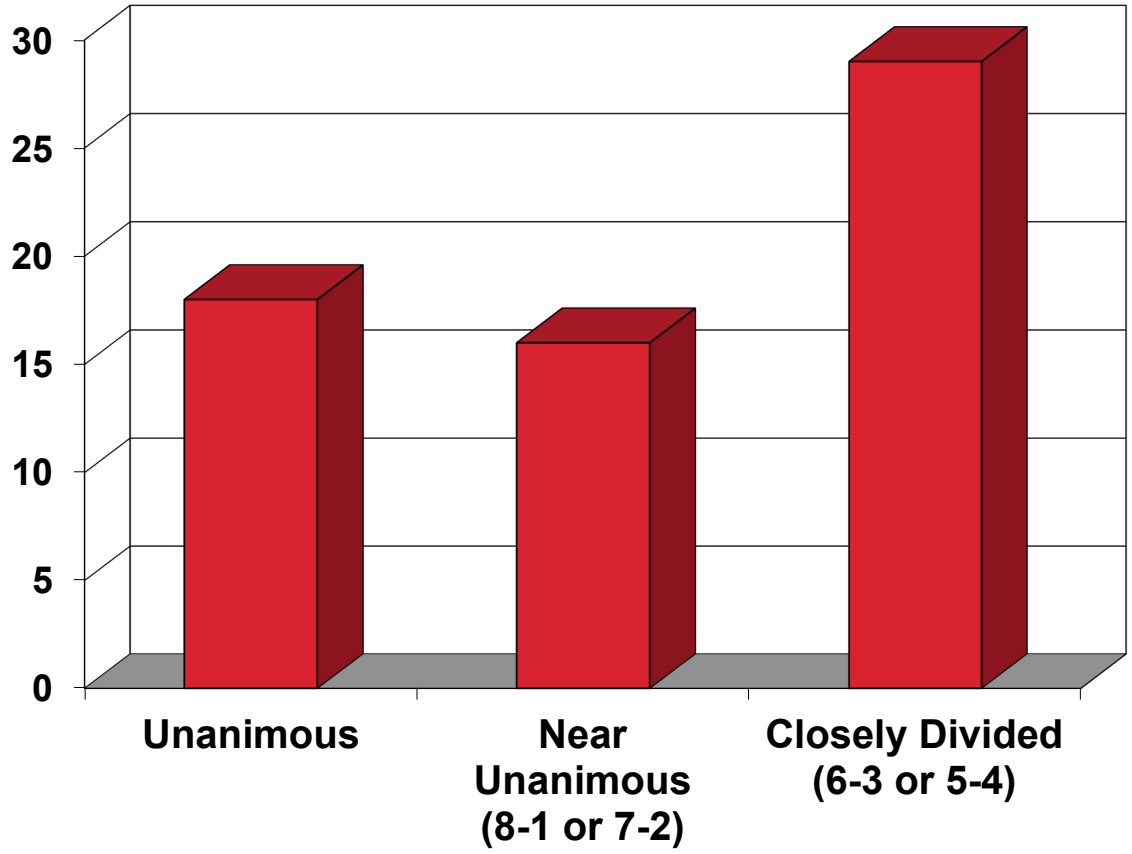


Source: Scotusblog.com

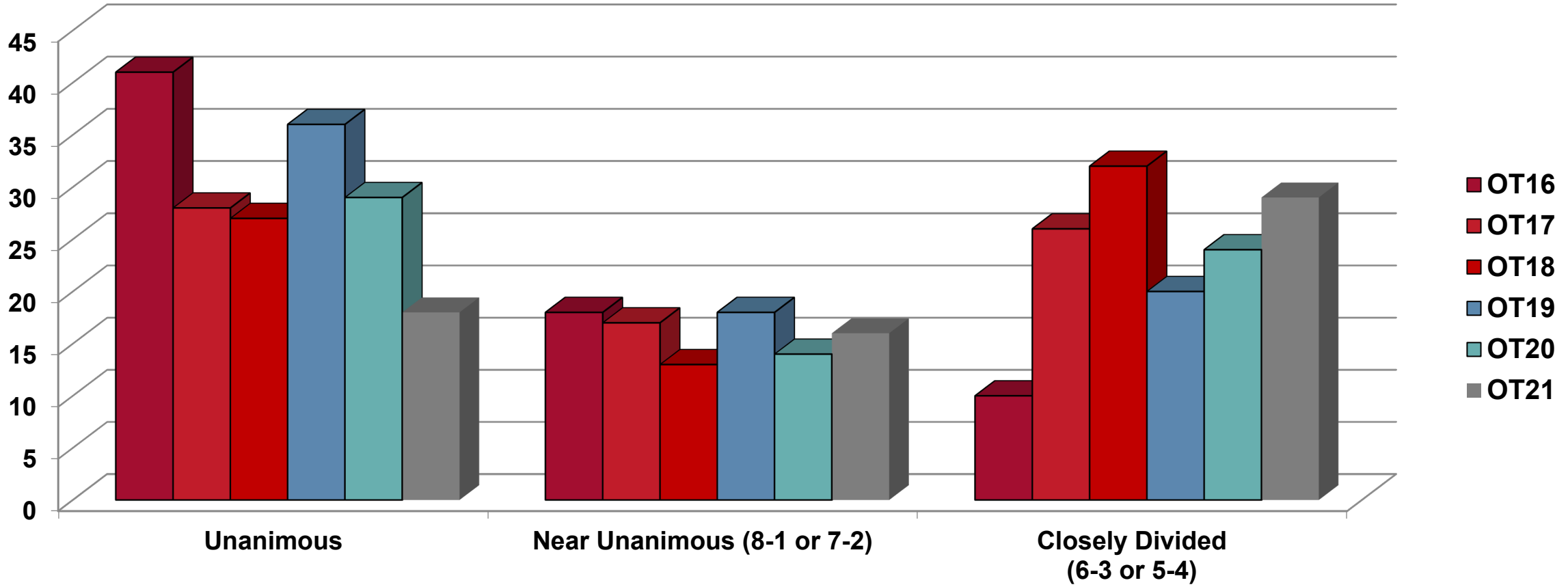
Reversal Rate

- Overall reversal rate: 82 percent
- Outliers:
  - Ninth Circuit: Reversed in 12 out of 12 cases (100 percent)
  - Also reversed in every case: First, Second, Third, Eighth, and D.C. Circuits and state courts.

A Divided Court?



A Divided Court?



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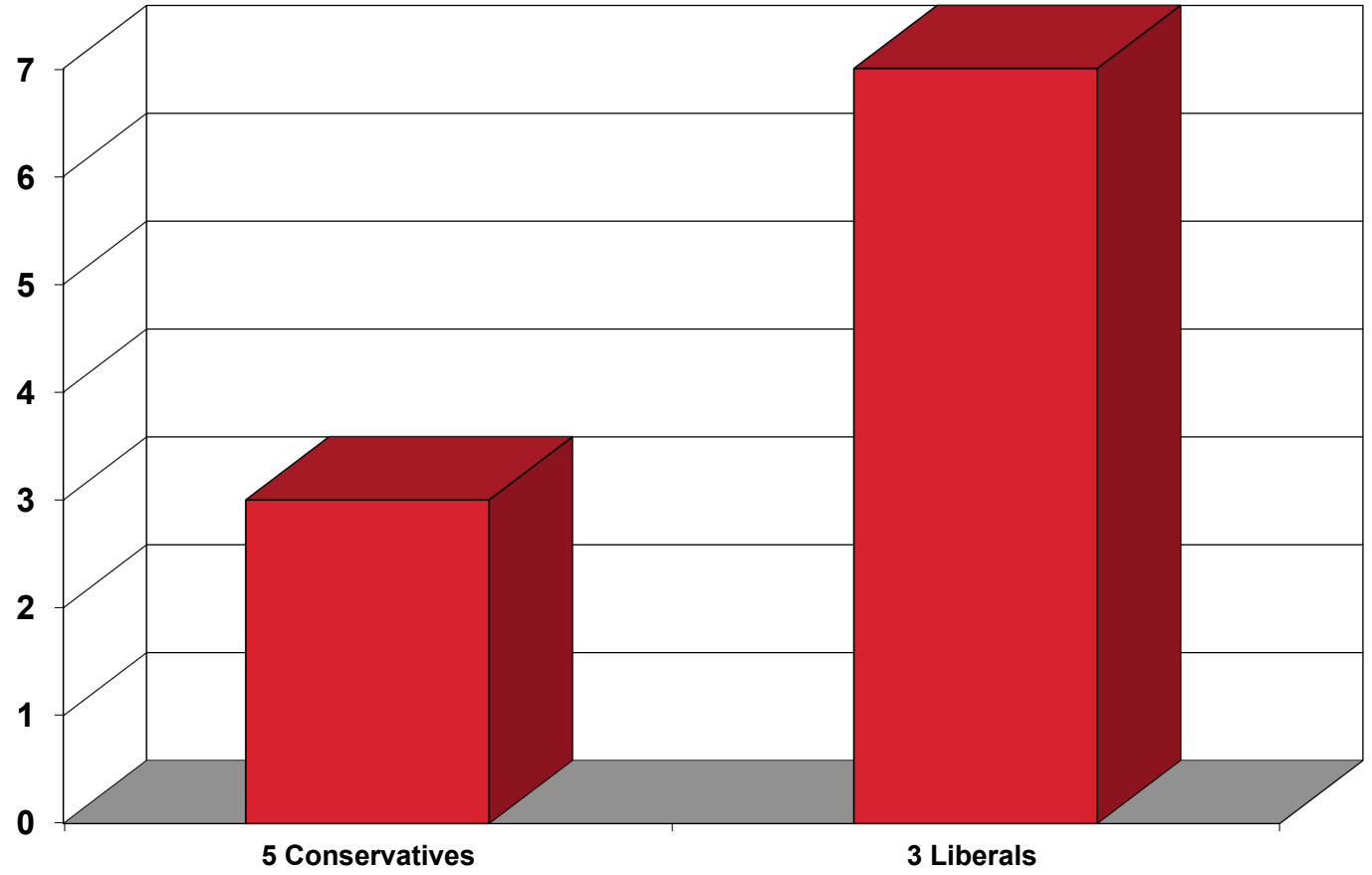
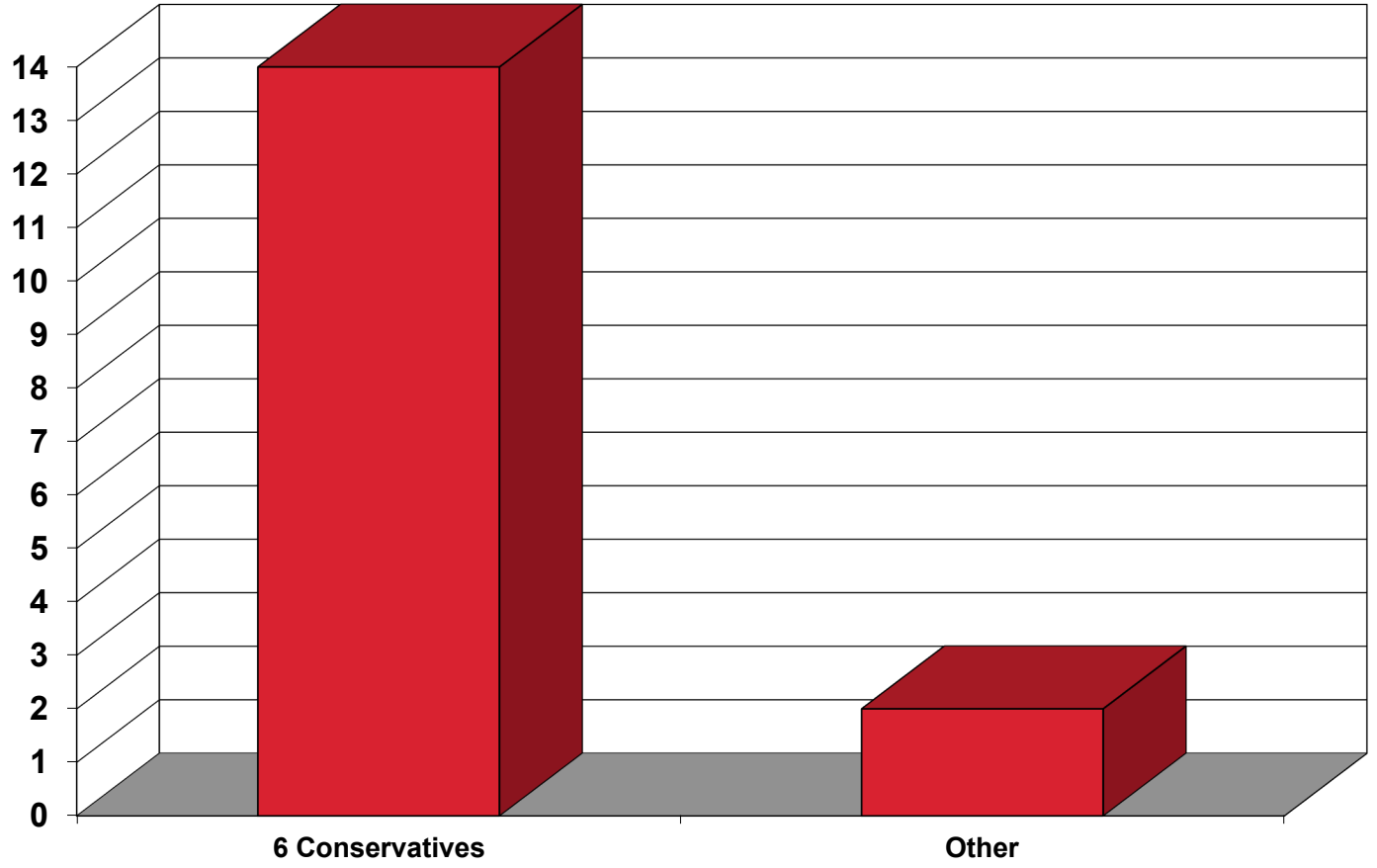
How Conservative Is the Supreme Court?

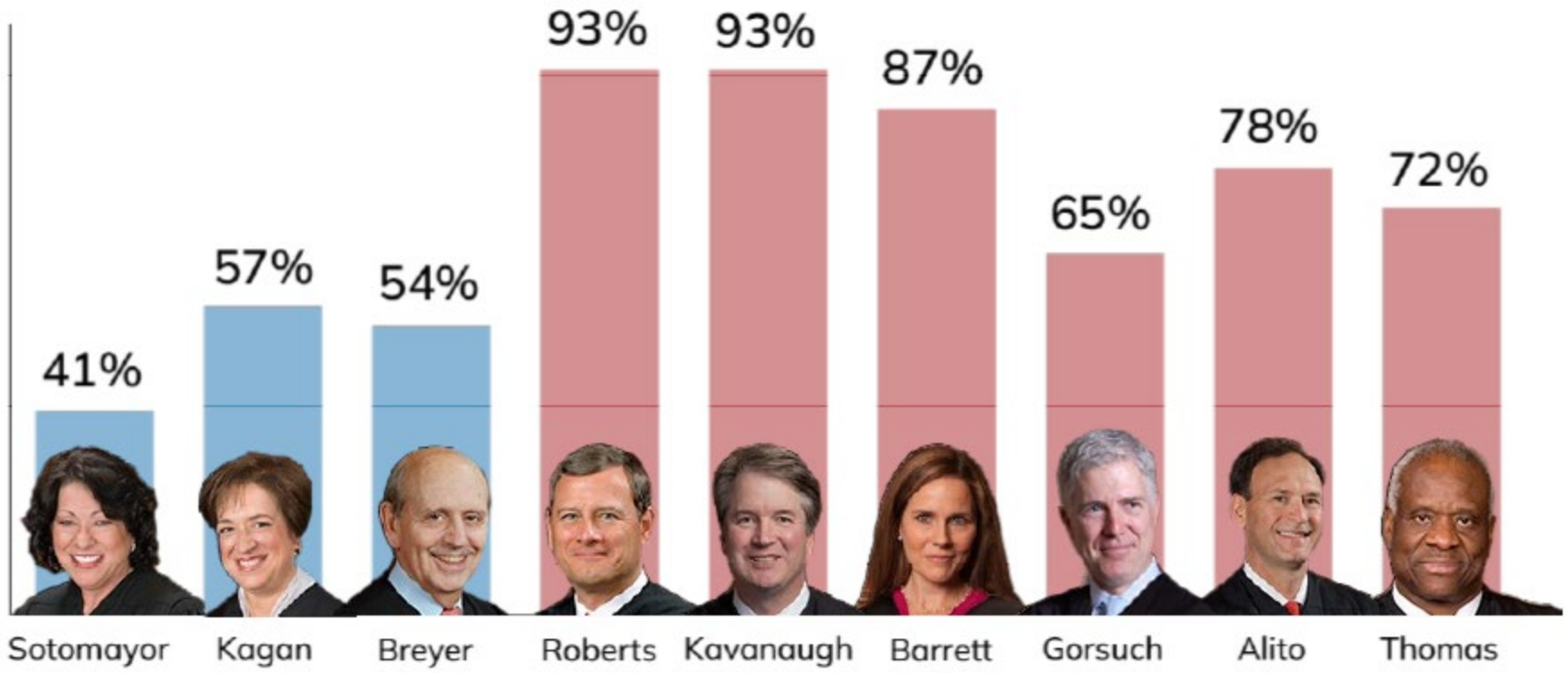
5-4 Case Alignments



The Emergence of the Six-Justice Majority: 6-3 Cases



Percentage in the Majority (non-unanimous cases)



Justices Who Agree the Most Often

1. Roberts-Kavanaugh: 100 percent
2. Thomas-Alito: 90 percent
3. Barrett-Alito: 90 percent
4. Sotomayor-Kagan: 90 percent

Justices Who Agree the Least Often

1. Thomas-Sotomayor: 40 percent
3. Alito-Sotomayor: 43 percent
4. Thomas-Breyer: 48 percent
5. Thomas-Kagan: 49 percent

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Notable Cases of the 2021 Term

Second Amendment

N.Y. State Rifle & Pistol Ass'n v. Bruen

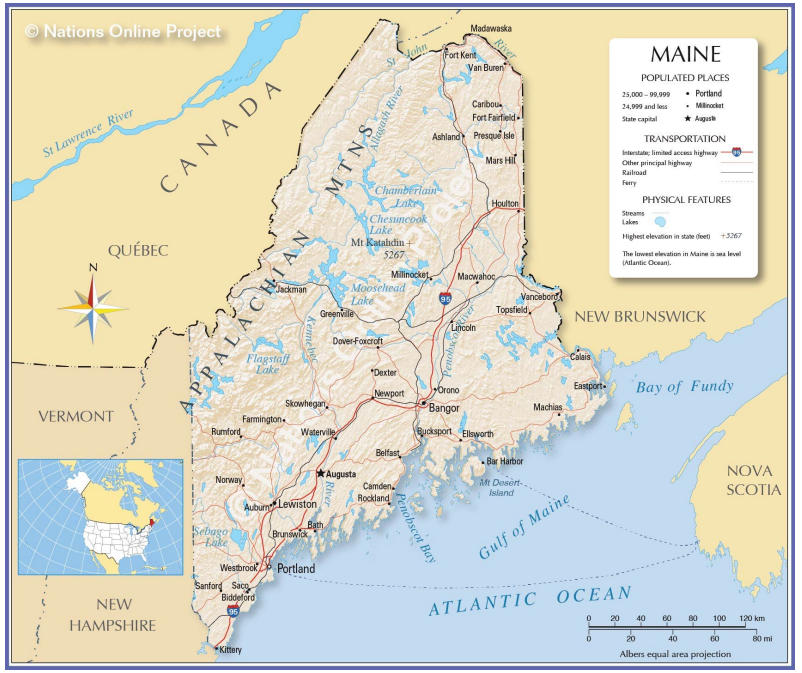
Second Amendment

N.Y. State Rifle & Pistol Ass'n v. Bruen

- New York makes it a crime to possess a firearm without a license. State law allows a permit if "proper cause exists," which requires the applicant to "demonstrate a special need for self-protection distinguishable from that of the general community." Petitioners were denied such a permit.
- The Court held, per Thomas (6-3), that the proper-cause requirement violated the Second Amendment by preventing those with ordinary self-defense needs from getting a license. Any firearm regulation must be consistent with the Nation's historical tradition of firearm regulation. While historically public carry was subject to reasonable regulation, no laws prevented law-abiding citizens with ordinary self-defense needs from carrying arms in public.

Free Exercise Clause

Carson v. Makin



Free Exercise Clause

Carson v. Makin

- A Maine program provides tuition assistance for parents who live where there is no public secondary school. Private schools are eligible for these payments, but not religious schools.
- The Court held 6-3, per Roberts, that the exclusion of religious schools violates the Free Exercise Clause. Maine offers citizens a benefit for which it excludes religious schools solely because of their religious character. Maine's claimed justification—promoting the separation of church and state—does not justify excluding citizens from a generally available public benefit because of religious exercise.

Arbitration

Badgerow v. Walters

Arbitration

Badgerow v. Walters

- Badgerow was fired and, pursuant to her employment agreement, filed an arbitration. The arbitrator rejected her claims, but she sued to vacate the award in state court. Employer removed to federal court, seeking to confirm the award.
- The Court, per Kagan (8-1), held that a federal court must have independent subject-matter jurisdiction over an action to confirm or vacate an arbitral award based solely on the application itself. The Court rejected the analogy to a petition to compel arbitration, where a court "looks through" to the underlying dispute itself to determine if there is federal jurisdiction.

Arbitration

Morgan v. Sundance, Inc.

Arbitration

Morgan v. Sundance, Inc.

- Morgan, an hourly Taco Bell employee, filed a nationwide collective action regarding overtime pay—despite her agreement to arbitrate any employment dispute. Employer litigated for 8 months, but then moved to compel arbitration. The 8th Circuit applied an arbitration-specific waiver requirement: that to find that a party's conduct waived arbitration, the other party must have been prejudiced. It did so because of the policy favoring arbitration.
- The Court, per Kagan, unanimously held that the courts should not adopt arbitration-specific procedural rules. The FAA specifically forbids such rules. Because the usual federal waiver rule does not have prejudice element, the arbitration waiver rule cannot either. The question is whether the employer knowingly relinquished a known right by acting inconsistent with that right.

Arbitration

Viking River Cruises, Inc. v. Moriana

Arbitration

Viking River Cruises, Inc. v. Moriana

- Moriana sued her former employer under California's private attorney general statute (PAGA), alleging a violation of state labor law. She also alleged other violations against other employees. But Moriana's employment agreement waived the right to file PAGA claims and required arbitration. The California courts refused to enforce the arbitration and no representative actions provision as against California policy.
- The Court held, per Alito (8-1), that California's prohibition on waivers of PAGA claims was not preempted by the FAA. But the Court held that state law was preempted to the extent it barred dividing PAGA actions into individual and non-individual claims through an arbitration agreement.

Free Speech

Shurtleff v. Boston

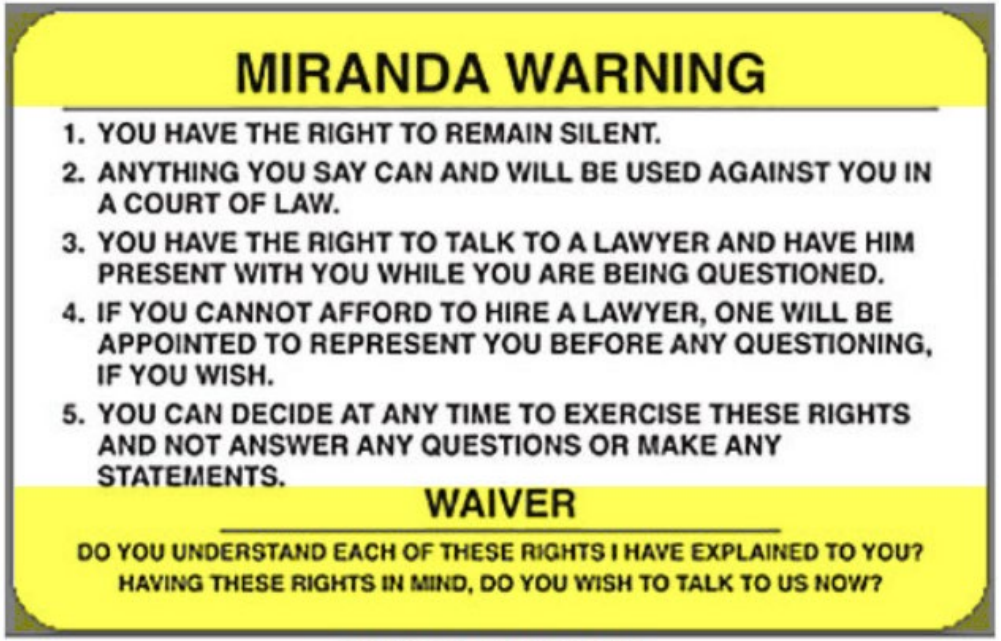
Free Speech

Shurtleff v. Boston

- Boston allows private groups to fly their own flag on a flagpole outside of city hall. Some flags were associated with groups or causes, including the Pride Flag. But Boston refused to fly a “Christian flag.”
- The Court unanimously, per Breyer, held that the refusal violated the Free Speech Clause.
- First, though the government can decline to express a view, the private flag is not government speech. Here there is evidence both ways, but the flag is not government speech since Boston exercises limit control.
- The prohibition is unconstitutional because the city cannot exclude speech based on its religious viewpoint.

Miranda

Vega v. Tekoh



Miranda

Vega v. Tekoh

- Tekoh was interrogated in violation of *Miranda*. His statement was admitted at trial and he was found not guilty. He then sued the officer for violating his constitutional rights.
- The Court held 6-3, per Alito, that the civil rights laws do not allow a suit based on a violation of *Miranda. Miranda* established prophylactic rules; violation of *Miranda* is not necessarily a Fifth Amendment violation—only an involuntary statement compelled by the government is. And in some instances, statements in violation of *Miranda* can be used in court—for example, they can be used to impeach; fruits of the statement can be used, etc.

Administrative Law

West Virginia v. EPA

Administrative Law

West Virginia v. EPA

- The EPA issues a Clean Power Act rule, limiting CO^2 emissions from coal and natural gas power plants. The EPA had used this authority only rarely since enactment.
- The Court held 6-3, per Roberts, that the rule was invalid under the "Major Questions Doctrine." Under that doctrine, in "extraordinary cases," the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.
- Here, EPA discovered "unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler."

Free Speech and Free Exercise

Kennedy v. Bremerton School District

Free Speech and Free Exercise

Kennedy v. Bremerton School District

- Football coach was fired because he prayed, midfield, after games.
- The Court held 6-3, per Gorsuch, that his firing violated the Free Exercise and Free Speech Clauses. The district's "object" was prohibiting a religious practice, and postgame supervision was not applied in an evenhanded way. Further, the coach's prayer was not within the scope of his duties and he was not communicating a government message. Therefore, his speech was protected by the Free Speech Clause. There is no evidence of coercion of students to participate.
- Sotomayor disputed the Court's rendition of the facts. "This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event."

Abortion

Dobbs v. Jackson Women's Health Organization

Abortion

Dobbs v. Jackson Women's Health Organization

- Mississippi law prohibited most abortions after 15 weeks of gestational age.
- The Court 5-1-4, per Alito, upheld the law and overruled *Roe v. Wade* and *Planned Parenthood v. Casey*. "The Constitution does not confer a right to an abortion." The Court refused to follow those decisions based on stare decisis, because no "concrete reliance interests" would be overturned. The Court held that abortion restrictions were constitutional if they had a rational basis. It based this holding on an extensive inquiry into "history and tradition," finding "no support" in the nation's history for a right to an abortion.

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Preview of the 2022 Term

Personal Jurisdiction

Mallory v. Norfolk Southern Railway Co.

- Whether the due process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

Affirmative Action

Students for Fair Admissions v. University of North Carolina

Students for Fair Admissions Inc. v. President & Fellows of Harvard College

- (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions.
- (2) Whether a university can reject a race-neutral alternative because it would change the composition of the student body without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.
- (3) Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable, race-neutral alternatives.

First Amendment

303 Creative LLC v. Elenis

- Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

Elections

Moore v. Harper

- Whether a state's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . Prescribed . . . by the Legislature thereof," and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

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Questions?

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