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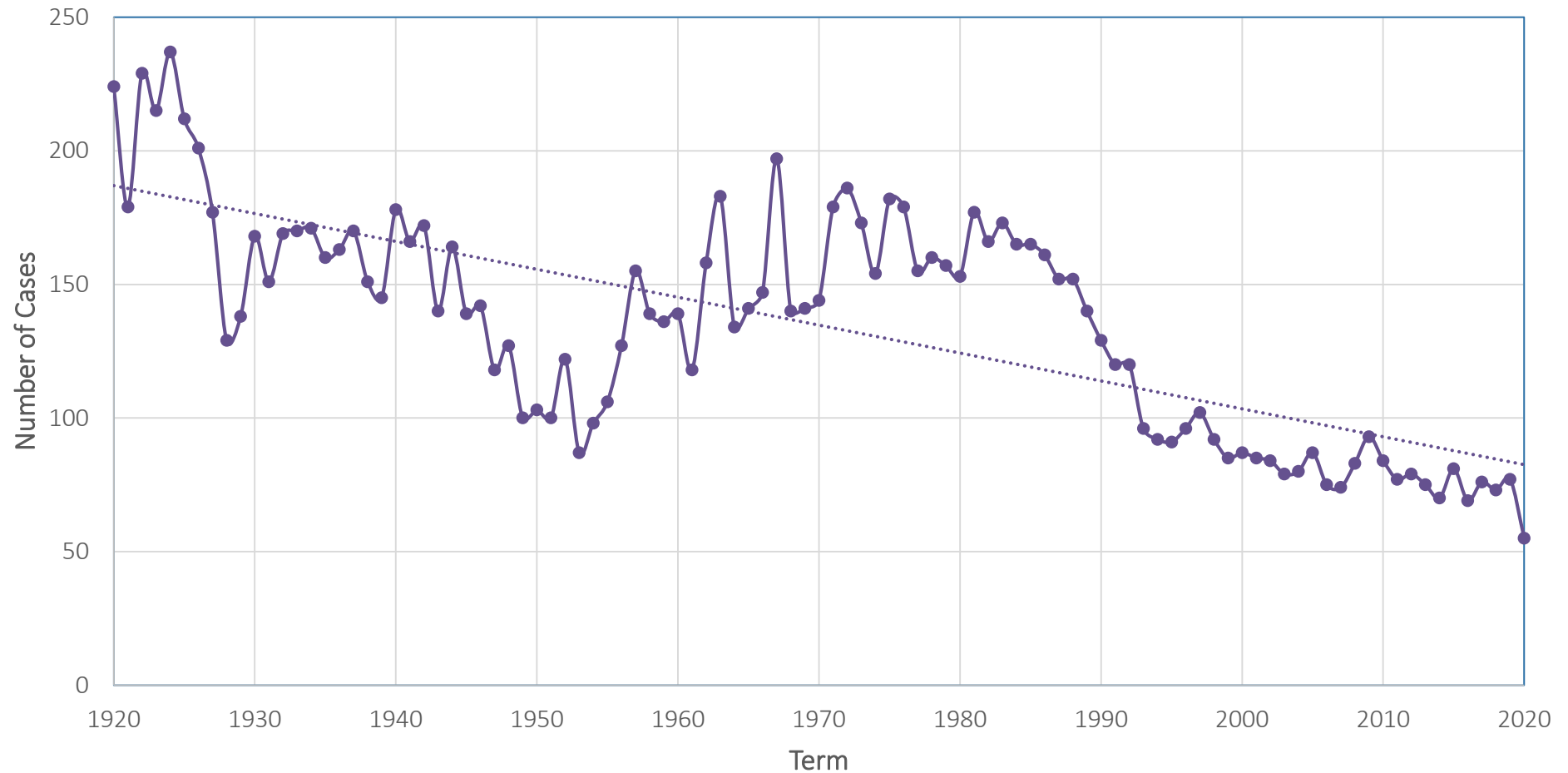
Supreme Court Roundup

Blaine Evanson
Lauren Blas

January 19, 2021

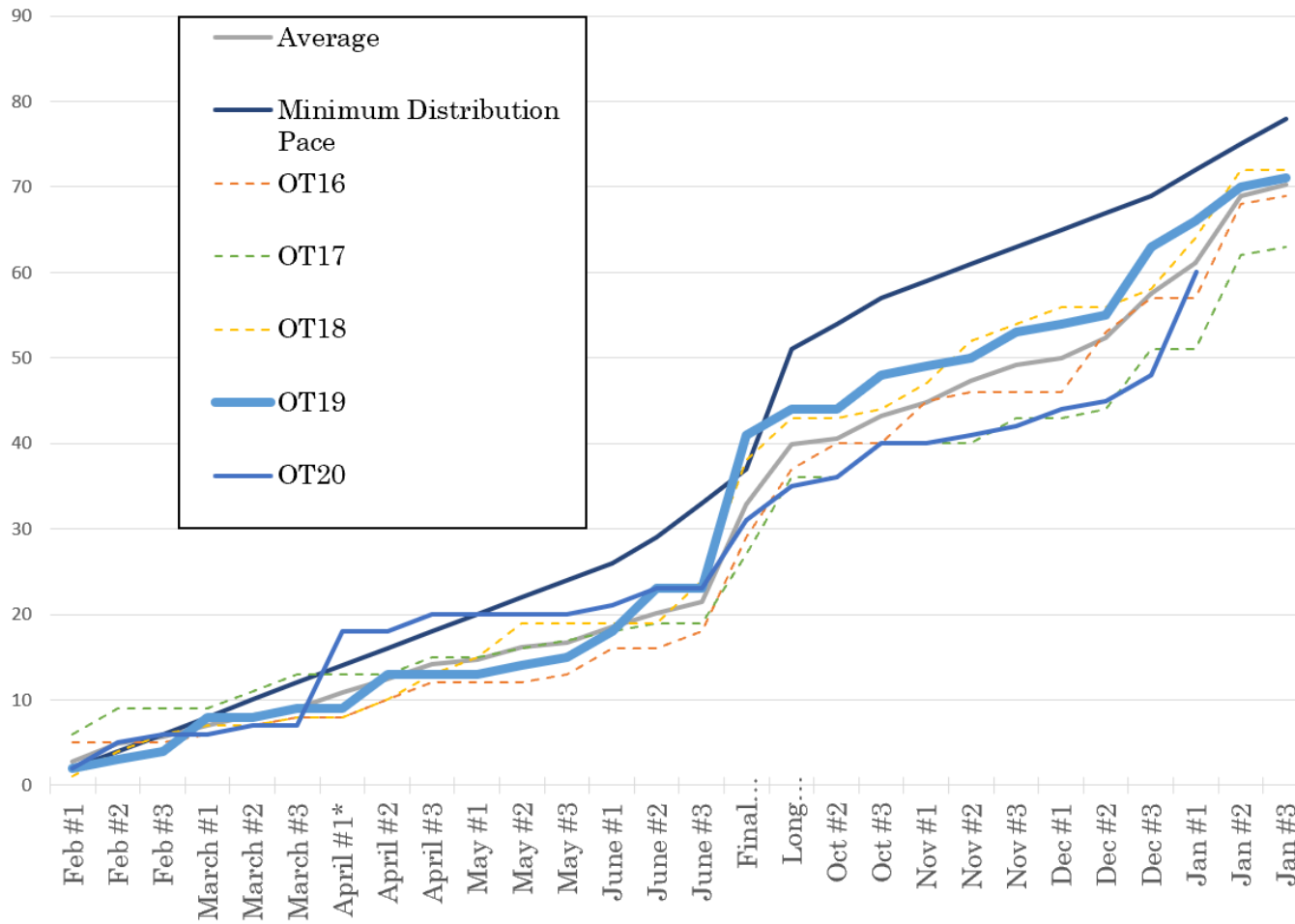
Decreasing Caseload and Increasing Discretion

Number of Cases Per Term, 1920 to Present



Source: Harold J. Spaeth, Lee Epstein et al., 2020 Supreme Court Database (2020 = granted to date)

Cert. Grants in OT20: A Slow Start and Recent Spike



	Total	%Total
CA1	1	1%
CA2	3	4%
CA3	5	7%
CA4	3	4%
CA5	10	15%
CA6	4	6%
CA7	1	1%
CA8	3	4%
CA9	14	21%
CA10	3	4%
CA11	4	6%
CADC	6	9%
CAFC	3	4%
CAAF	1	1%
State	4	6%
Dist. Court	1	1%
Orig.	1	1%
Total	67	100%

Source: SCOTUSblog, Statistics

New Nexuses of Agreement

	Highest Agreement			Lowest Agreement		
All Cases	1	Roberts - Kavanaugh	93%	1	Sotomayor - Thomas	44%
	2	Ginsburg - Breyer	93%	2	Alito - Sotomayor	46%
	3	Alito - Thomas	92%	3	Thomas - Ginsburg	49%
	4	Breyer - Kagan	90%	4	Thomas - Kagan	50%
	5	Ginsburg - Sotomayor	89%	5	Ginsburg - Alito	51%
	6	Gorsuch - Kavanaugh	88%	6	Breyer - Thomas	52%
	7	Sotomayor - Kagan	88%	7	Breyer - Alito	54%
	8	Ginsburg - Kagan	87%	8	Alito - Kagan	55%
	9	Gorsuch - Roberts	85%	9	Ginsburg - Gorsuch	62%
	10	Breyer - Sotomayor	85%	10	Sotomayor - Gorsuch	64%
Divided Cases	1	Roberts - Kavanaugh	90%	1	Sotomayor - Thomas	13%
	2	Ginsburg - Breyer	90%	2	Alito - Sotomayor	16%
	3	Alito - Thomas	87%	3	Thomas - Ginsburg	21%
	4	Breyer - Kagan	84%	4	Thomas - Kagan	21%
	5	Ginsburg - Sotomayor	82%	5	Ginsburg - Alito	23%
	6	Gorsuch - Kavanaugh	82%	6	Breyer - Thomas	26%
	7	Sotomayor - Kagan	82%	7	Breyer - Alito	28%
	8	Ginsburg - Kagan	79%	8	Alito - Kagan	29%
	9	Gorsuch - Roberts	77%	9	Ginsburg - Gorsuch	41%
	10	Breyer - Sotomayor	77%	10	Sotomayor - Gorsuch	44%

Source: SCOTUSblog, October Term 2019 Stat Pack

5-4 Decisions Take a Slight Downturn

Term	Number of 5-4 Opinions	Percentage of Total Opinions
OT05	11	12%
OT06	24	33%
OT07	12	17%
OT08	23	29%
OT09	16	19%
OT10	16	20%
OT11	15	20%
OT12	23	29%
OT13	10	14%
OT14	19	26%
OT15	4	5%
OT16	7	10%
OT17	19	26%
OT18	20	28%
OT19	14	21%
Average	15	21%

- In OT 2019, 21% of the Court's decisions were decided 5 to 4.
- That 21% rate is consistent with the average since 2005 and down from high years in OT 2017 and OT 2018.

Source: SCOTUSblog, October Term 2019 Stat Pack

Shifting Majorities: 5-4 Majority Membership in Recent Terms

Justice	Cases Decided	Frequency in Majority	OT18	OT17	OT16	OT15	
Roberts	14	13	93%	55%	89%	29%	25%
Thomas	14	10	71%	65%	79%	43%	25%
Ginsburg	14	3	21%	50%	26%	71%	75%
Breyer	14	3	21%	50%	21%	71%	75%
Alito	14	10	71%	60%	79%	29%	25%
Sotomayor	14	4	29%	45%	21%	71%	75%
Kagan	13	4	31%	45%	17%	71%	50%
Gorsuch	14	12	86%	70%	84%	67%	-
Kavanaugh	14	11	79%	67%	-	-	-

Source: SCOTUSblog, October Term 2019 Stat Pack

OT19 Reversal Rates High Across the Board

October Term 2019							
	Number	Percent	Decided	Aff'd	Rev'd	Aff'd %	Rev'd %
CA1	1	1%	1	0	1	0%	100%
CA2	8	12%	8	2	6	25%	75%
CA3	4	6%	4	2	2	50%	50%
CA4	4	6%	4	3	1	75%	25%
CA5	7	10%	7	1	6	14%	86%
CA6	3	4%	3	3	0	100%	0%
CA7	1	1%	1	0	1	0%	100%
CA8	1	1%	1	1	0	100%	0%
CA9	10	14%	10	1	9	10%	90%
CA10	4	6%	4	1	2	33%	67%
CA11	7	10%	7	3	4	43%	57%
CA DC	4	6%	4	1	3	25%	75%
CA Fed	4	6%	4	1	3	25%	75%
CA AF	0	%	0	0	0	0%	0%
State	11	16%	11	3	8	27%	73%
Dist. Court	0	%	0	0	0	0%	0%
Original	0	%	0	0	0	0%	0%
	68	100%	68	22	46	32%	68%

Source: SCOTUSblog, October Term 2019 Stat Pack

Changing Composition: Justices Gorsuch and Kavanaugh



- Highest rates of agreement with Chief Justice Roberts and Justice Kavanaugh
- Has joined a number of Justice Thomas's opinions
- Has voted with the liberal bloc of the Court in cases involving criminal defendants, tribal rights, and civil rights
- Influential writing style



- Highest rates of agreement with Chief Justice Roberts and Justice Gorsuch
- Less likely than Justice Gorsuch to vote with liberal bloc in 5-4 decisions
- Has authored important majority opinions in antitrust, immigration, and criminal procedure
- Often writes short, thoughtful concurrences

Changing Composition: Justice Ginsburg's Legacy

- Much like Justice Marshall, built an enduring legal legacy even before taking the bench
- Best known for her advocacy and opinions on sex discrimination, most notably 1996's *VMJ*
- The Court's foremost authority on matters of civil procedure; wrote crucial decisions on matters of jurisdiction in particular
- In recent years, known for forceful dissents, some of which spurred legislative action
- Immeasurable and incomparable impact in the public arena



Changing Composition: Justice Barrett



- “I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too.” —Amy Coney Barrett
- During her four years on the Seventh Circuit, then-Judge Barrett wrote significant opinions on arbitration, abortion, civil rights, criminal procedure, gun rights, immigration, Article III standing, and religious liberty
- Strong textualist and originalist; Court watchers predict high rates of agreement with Justices Thomas and Gorsuch

The “Shadow Docket”

- Consists of orders and decisions decided outside of the regular docket without oral argument.
- Has received more attention and scrutiny in recent years.
- Notable examples include:
 - Applications for stays of injunctions issued against Trump administration policies: travel ban, border wall funding, “asylum transit” rule.
 - Challenges to state election laws and procedures.
 - Injunctions against COVID-related state policies.
 - Death penalty.

October 2019 Term in Review: Key Cases of Interest

Gender and Employment:

- *Bostock v. Clayton County, Georgia*

Abortion:

- *June Medical Services, LLC v. Russo*

Presidential Immunity

- *Trump v. Vance*
- *Trump v. Mazars USA, LLP*

Immigration

- *Department of Homeland Security v. Regents of University of California*

Religious Liberty

- *Espinoza v. Montana Department of Revenue*

Administrative Law

- *Seila Law LLC v. CFPB*

October 2020 Term: Key Cases of Interest

Election Law

- *Democratic National Committee v. Wisconsin State Legislature*

Healthcare

- *California v. Texas*
- *Texas v. California*

Religious Liberty

- *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*

First Amendment

- *Americans for Prosperity v. Becerra*
- *Mahanoy Area School District v. B.L.*

October 2020 Term: Key Cases of Interest

Corporate Liability

- *Nestlé USA, Inc. v. Doe I* and *Cargill, Inc. v. Doe I*
- *TransUnion LLC v. Ramirez*

Antitrust

- *National Collegiate Athletic Association (NCAA) v. Alston*

Administrative Law

- *Collins v. Mnuchin*

Democratic National Committee v. Wisconsin State Legislature

- Article II, Section 1, Clause 2: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”
- Independent State Legislature doctrine: *only* state legislatures—not state courts or governors—have authority to set rules for federal elections.
- Kavanaugh concurrence: cites *Bush v. Gore* for only the second time (ever).



California v. Texas and Texas v. California

- Issue:

- Whether the Affordable Care Act's individual mandate is unconstitutional, and if so, whether it is severable from the rest of the ACA.



Image: Art Lien



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Roman Catholic Diocese of Brooklyn v. Cuomo

- Issue:
- Whether Governor Cuomo's executive order restricting attendance at houses of worship likely violated the First Amendment.



Pacific Press/LightRocket via Ge

Collins v. Mnuchin

- Issue:
 - Whether the structure of the Federal Housing Finance Agency is unconstitutional.



Image: Art Lien

Nestlé USA, Inc. v. Doe I and Cargill, Inc. v. Doe I

- **Issues:**
 - Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute (ATS) may overcome the extraterritoriality bar where it is based on corporate activity in the United States.
 - Whether corporations can be defendants in lawsuits brought under the Alien Tort Statute.

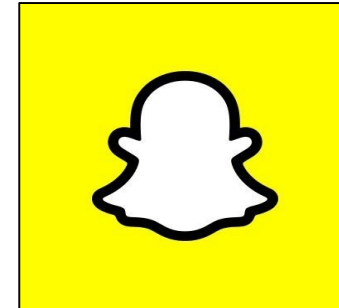


Americans for Prosperity v. Becerra and Mahanoy Area School District v. B.L.



- Issue:

- Whether California must show a compelling interest for requiring the disclosure of the names and addresses of charitable donors.



- Issue:

- Whether public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school when student speech occurs off campus.

TransUnion LLC v. Ramirez

- Issue:
 - Whether the Constitution or the federal rules governing class actions permit a damages class action when most of the class did not suffer *any* injury, let alone an injury resembling what the class representative suffered.



National Collegiate Athletic Association v. Alston

- Issue:

- Whether the NCAA's ban on compensation for student-athletes violates federal antitrust law.



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Professional Profiles

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Practice Groups

- Appellate and Constitutional Law
- Class Actions
- Intellectual Property
- Labor and Employment
- Litigation

Education

- Columbia University
- Brigham Young University

Blaine H. Evanson is a litigation partner in the Orange County office of Gibson, Dunn & Crutcher, and is a member of the firm's Appellate and Constitutional Law, Class Actions, Labor and Employment, and Intellectual Property practice groups. He was named one of five national appellate "Rising Stars" by Law360 in 2018, and has received numerous professional accolades from Benchmark Litigation, Euromoney, The Best Lawyers in America, and Super Lawyers Magazine. Mr. Evanson is a member of the California Academy of Appellate Lawyers, and has taught advanced constitutional law seminars at the University of Southern California and University of California, Irvine Law Schools.

Mr. Evanson's practice is focused on complex commercial litigation both in the trial court and on appeal. He has represented clients in several industries in appellate matters in the Supreme Court of the United States and federal and state appellate courts around the country. He has briefed dozens of appeals, and has argued several appeals in the Ninth Circuit and California's Courts of Appeal. In the trial court, Mr. Evanson has broad commercial litigation experience, particularly with complex motion practice before, during, and after trial. And he has handled dozens of employment and consumer class actions at every stage of trial and appeal, helping defeat class certification and/or compel individual arbitration in some of the largest and most complex putative class actions in the country.

Before joining the firm, Mr. Evanson served as a law clerk for Judge A. Raymond Randolph of the United States Court of Appeals for the D.C. Circuit. He graduated from Columbia Law School, where he was a James Kent Scholar and a Senior Editor on the Columbia Law Review. He received his Bachelor of Science degree in Information Systems from Brigham Young University.

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Practice Groups

- Appellate and Constitutional Law
- Betting and Gaming
- Class Actions
- Labor and Employment
- Litigation
- Privacy, Cybersecurity and Consumer Protection

Education

- Yale Law School
- Yale University

Lauren Blas is a litigation partner in the Los Angeles office of Gibson, Dunn & Crutcher. She practices in the firm's Class Actions, Appellate and Constitutional Law, and Labor and Employment practice groups, with a focus on complex litigation and class actions in the trial courts and on appeal. Ms. Blas was named a "Rising Star" in Appellate Litigation in Southern California by Super Lawyers Magazine in 2018 and 2019 and Class Actions/Mass Torts in 2020.

Ms. Blas has represented clients in employment, consumer and securities class actions, and has litigated a wide range of appellate matters before the California Supreme Court, the federal courts of appeals, and the U.S. Supreme Court. She has briefed nearly twenty appeals in the state and federal courts on issues ranging from the False Claims Act, various provisions of California employment law, to California's False Advertising Law, and has argued before the U.S. Court of Appeals for the Seventh Circuit, the California Court of Appeal, and the Wisconsin Supreme Court. Ms. Blas was also a core member of the appellate team in New Jersey's successful challenge to the Professional and Amateur Sports Protection Act. After nearly four years of litigation, the U.S. Supreme Court held that the Act violated the Tenth Amendment and invalidated it in full.

Before joining the firm, Ms. Blas served as a law clerk to the Honorable Sandra S. Ikuta of the U.S. Court of Appeals for the Ninth Circuit. Ms. Blas received her J.D. and Bachelor's degrees in history and economics from Yale.