

SCOTUS 2022

MAJOR DECISIONS AND DEVELOPMENTS
OF THE US SUPREME COURT



Edited by MORGAN MARIETTA



Morgan Marietta
Editor

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Noteworthy But Not Unprecedented: The 2021–2022 Term in Historical Context

Ryan C. Black and Timothy R. Johnson

To call the Supreme Court’s 2021–2022 term a consequential one is akin to saying the RMS Titanic was a big boat, that Star Wars was a popular movie, or that Mount Everest is a sizable hill. That is, it borders on being a comical—though thoroughly nerdy—understatement. Despite deciding just 63 cases—one of the least productive terms in the Court’s modern history—the Court, as our colleagues’ chapters in this book describe, made sweeping alterations to the legal landscape in the United States.

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In this chapter, we take the proverbial “step back” and provide a quantitative snapshot of the Supreme Court’s behavior. Our focus moves beyond just this term as we compare how 2021 stacks up to recent and not-so-recent Court terms. We also explore the early years of behavior of the three Justices appointed by President Donald Trump.

Our data crunching reveals the Court’s 2021–2022 term was, in terms of ideological decision making, the single most conservative term in at least 85 years. Sixty-three percent of its fully briefed, argued, and signed opinions were conservative in their ideological outcomes. News reports were correct to say the Court had “moved relentlessly to the right” or entered a “new era of ambitious conservatism.”¹

We also learned that, over the last 85 years, there have been 16 other Supreme Court terms where its rulings were at least as ideologically skewed as in 2021. However, they were skewed in the liberal, rather than conservative, direction. When the Court was at its most liberal in the 1960s, fully 75% of its decisions, many of them “blockbusters,” were ideologically liberal. When stacked up against terms with a liberal majority, then, the 2021 term is, objectively, less noteworthy than many commentators have let on.

Much has been made of the behavior of President Trump’s three appointees in driving the conservative shift. Our analysis of their behavior reveals that, yes, they cast consistently conservative votes. However, when we compare their ideological (or partisan) voting to that of other President’s Justices—Republicans and Democrats alike—their overall performance is unremarkable. And there is preliminary evidence that one—Justice Neil Gorsuch—takes an appreciably less reliable conservative position than either of his fellow Trump appointees, Justices Brett Kavanaugh and Amy Coney Barrett.

In short, the current Supreme Court includes six Justices appointed by Republican Presidents. It has, in turn, produced a set of decisions that

¹ See Nina Totenberg, “The Supreme Court Is the Most Conservative in 90 Years,” *National Public Radio*, 5 July 2022; Jess Bravin, “Supreme Court Marks New Era of Ambitious Conservatism,” *Wall Street Journal*, 30 June 2022; Adam Liptak, “A Transformative Term at the Most Conservative Supreme Court in Nearly a Century,” *The New York Times*, 2 July 2022.

are predominantly conservative in nature because, well, that's how math and majority rule decision-making works. We turn now to fleshing out these various conclusions.

Ideological Outcomes Across Time

We start with a basic accounting of the Court's ideological output across its last 85 terms. To do so we examine the Supreme Court Database (SCDB), which identifies dozens of aspects of the Court's decisions spanning back to 1791.² We take advantage, in particular, of the SCDB's coding of the ideological direction of each Court decision. To make this determination, the SCDB team analyzes the underlying issue of the opinion and who that opinion favors. These classifications generally align with a contemporary understanding of liberal and conservative politics. For example, if the Court decides a case involving criminal procedure, the decision is said to be liberal if the ruling favors the person accused or convicted of a crime but is conservative if it favors the government.

Figure 18.1 presents the annual percentage of conservative ideological outcomes from the Court's 1937 to 2021 terms. To make these calculations we included all orally argued cases that resulted in either a signed majority opinion or a judgment of the Court. We excluded the fewer than 2% of decisions coded as having an unspecifiable ideological direction. The dashed horizontal line across the top of the figure provides an easy way to compare the Court's ideological output in 2021 versus the previous 84 terms.

By this accounting, the Court's 2021 term was its single most conservative since 1937 (the year many historians consider the beginning of the post-New Deal contemporary Court). Again, this jives with what was reported by a bevy of media outlets at the end of the Court's term. Our figure also reveals what we believe has gone entirely unreported by these summaries. First, two other somewhat recent terms—2005 and

² Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2021 Supreme Court Database, Version 2021 Release 01. URL: <http://Supremecourtdatabase.org>.

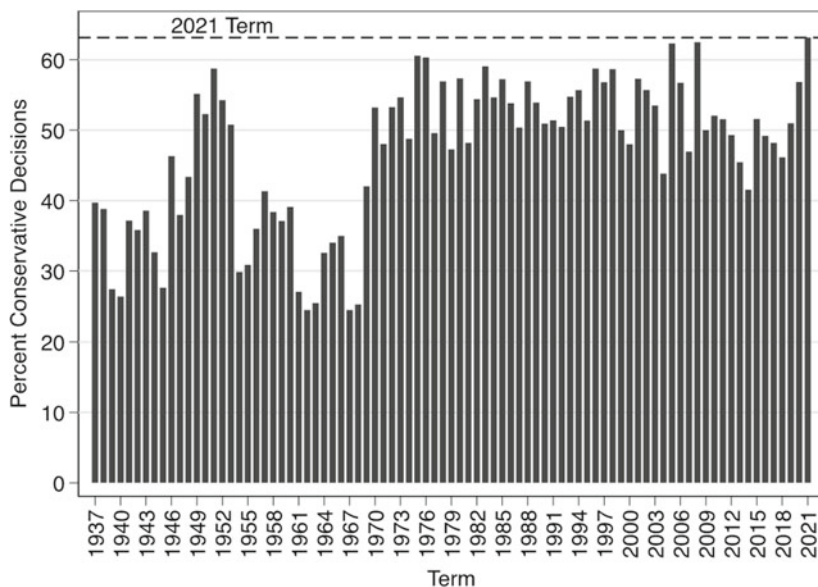


Fig. 18.1 Ideological direction of opinions by term (1937–2021)

2008—came extremely close to rivaling the 2021 term in their conservative slant. Second, and more important, although the Court’s *conservative* ideological leanings were “unprecedented” in the modern era, there have been other terms—and quite a few of them—where the Court showcased *liberal* ideological leanings greater than or equal to the conservative slant it produced in 2021. The most noteworthy of these can be seen from 1937–1969, when, except for a five-year period from 1949 to 1953, the Court produced a majority of liberal decisions across an impressive 28 terms.

Figure 18.2 provides another view of the Court’s 2021 rulings with the same historical context. Here we illustrate what we call the Court’s ideological “bias,” which we calculated simply by subtracting 50 from the percent of the Court’s conservative output each term. Positive values, then, mean a majority of decisions in a term were conservative while negative values mean liberal decisions were more common. A value of zero which we observe twice—1999 and 2009—means the Court’s output was evenly split between liberal and conservative outcomes.

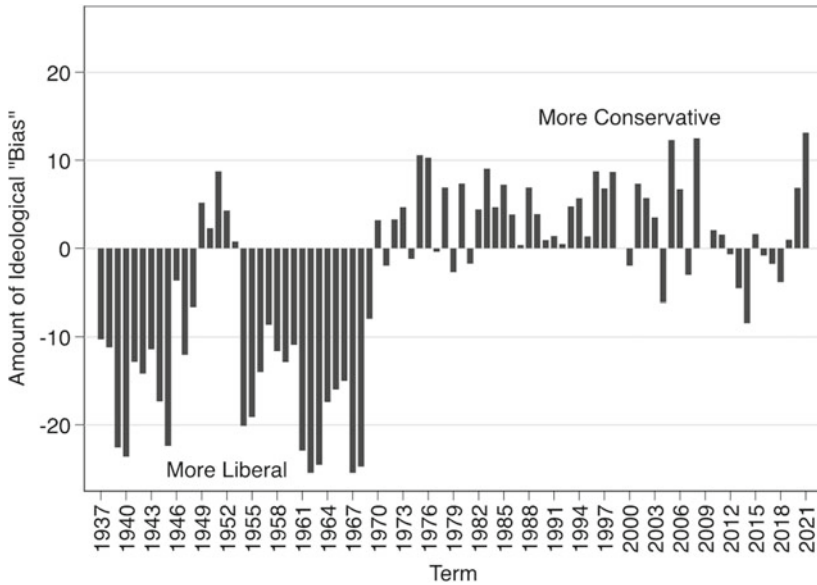


Fig. 18.2 Ideological "bias" by term (1937–2021)

Consider, first, that the basic direction of the bias—liberal or conservative—shows a near even split with 41 terms having some amount of conservative slant versus 42 terms that feature some amount in the liberal direction. This basic comparison obscures what the figure makes clear: the magnitude of the bias—as evidenced by the height of the bars—is not at all equal. Indeed, when there was liberal bias in a term, the amount of that bias tended to be considerably larger than the amount of bias if the term was conservative. More specifically, when a term was mostly conservative, the average amount of bias was equal to 5.4%. When a term was mostly liberal, however, the bias was more than twice as large, at 11.5%.

To summarize, the 2021 term represents—by a rather slim margin—a highwater mark for conservative leanings, which is certainly a notable event. However, when viewed in historical context, it seems less impressive on at least two fronts. First, it has previous parallels in other majority-conservative terms in both 2005 and 2008. Second, it falls far

short of what we observed in majority-liberal terms, where, multiple times (especially in the 1960s) fully 75% of the Court's decisional output was ideologically liberal in nature.

Trump's Justices

In addition to the Court's overall conservative leanings, the 2021 term was important as it provided the first complete term in which all three of President Trump's Justices were on the Court. Not since President Richard Nixon has a President, in a single term, had the opportunity to fill three open seats. According to exit polls from both the 2016 and 2020 elections, many people who voted for Trump did so because of their desire to have conservative appointments to the Supreme Court. Here we ask the basic question of how (so far) have his Justices performed for these voters?

We start by considering the three Trump Justices as a single unified block. Figure 18.3 illustrates the percent of ideologically-matching rulings—a Republican-appointed Justice deciding in a conservative direction or a Democrat-appointed Justice deciding in a liberal direction—by each President's Justices going back to President Franklin Delano Roosevelt's appointees. We observe that most Presidents have been at least somewhat successful at appointing Justices who behave in their preferred way. Fully 10 of the 13 President's Justices have ideological voting records over 50%.

As the varying length of the bars makes clear, however, there is considerable variation in success across presidencies. Interestingly, the top four performing Presidents are all Democrats, though President George W. Bush, whose appointees are still, as of this writing, both serving, is just a tiny bit behind his predecessor, President Clinton, at breaking into the top four.

As to the early verdict on President Trump's appointees, with an ideological decision rate of 60.4%, our analysis puts him above the overall average of 56.9%. Further, his performance matches, but does not appreciably differ from, that of other Republican Presidents. Indeed, he currently lags slightly behind Presidents George W. Bush and Reagan,

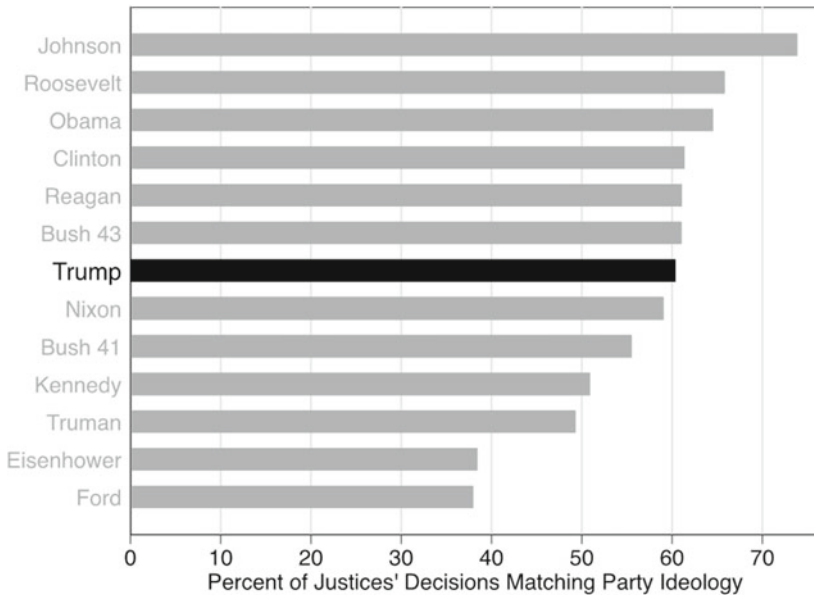


Fig. 18.3 Ideological direction and appointing President

both of whom have values of 61.1%. Trump is slightly ahead of President Nixon, with 59.1% but is, notably, nearly five full percentage points above President George H. W. Bush.

We also observe that Republican appointees have become more consistently conservative across time. Earlier Republican administrations such as Ford and Eisenhower—before the current political polarization set in—did not tend to appoint ideologically-aligned Justices. Both administrations' choices resulted in below 50% conservative voting, while the two most recent Republican administrations (Trump and Bush 43) have been far more successful in appointing truly conservative Justices.

As a group, Trump's Justices have, so far, delivered a solidly conservative record. To conclude our data analysis, we assess whether there is meaningful variation among the three of them and examine how their individual behavior compares to that of previous Presidents. Figure 18.4 shows the same ideological patterns as the previous figure, but now breaks it down for each of the last 11 Justices.

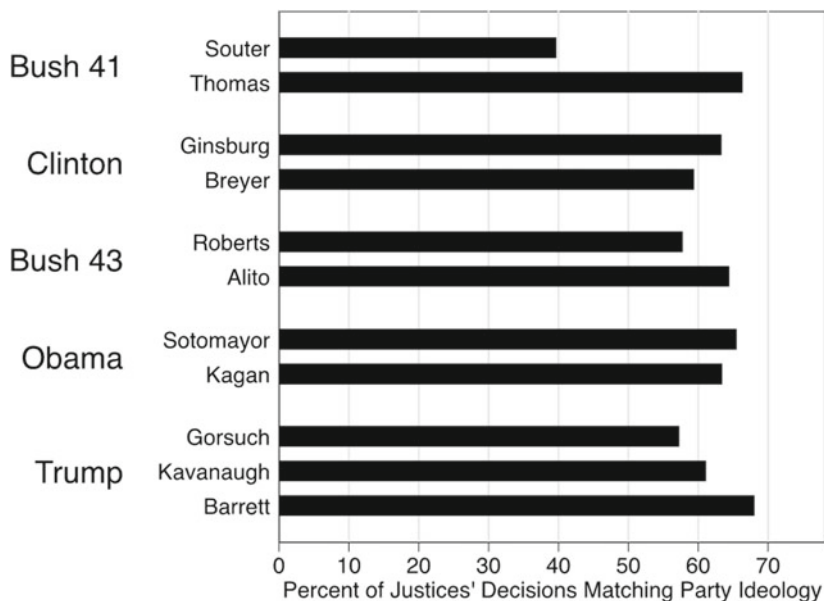


Fig. 18.4 Ideological direction of Justices

Recall that President Trump's appointees, overall, had an ideological decision rate of about 60% but Fig. 18.4 suggests that there are differences among the three. We observe the ideological decision rate at 57.3% for Gorsuch, 61.1% for Kavanaugh, and 68.0% for Barrett. At almost 11 percentage points, the gap between Gorsuch and Barrett is quite large. However, bear in mind that we have nearly three times as many observations for Gorsuch as we do for Barrett, which means this gap could narrow considerably in future terms.

As before, Trump's appointees don't stand out especially as compared to other Presidents' appointees. Gorsuch and Kavanaugh show ideological consistency well within the range of what we see for other Presidents, both Democratic and Republican. Chief Justice Roberts, for example, has a consistency rate nearly identical to that of Gorsuch's (57.8%) and Kavanaugh is sandwiched between President Clinton's two appointees, Breyer (59.4%) and Ginsburg (63.3%). For Barrett, we see that she is, so far, the most ideologically consistent of the 11 most recent Justices, but she is reasonably close to Thomas (66.3%).

Conclusion

In this chapter, we have attempted to provide the so-called “10,000 foot view” of the Supreme Court’s 2021 term. This approach is, to be sure, not without its limitations and possible criticisms. Our analysis, for example, allots equal weight to all of the Court’s decisions even though we can imagine extreme variation regarding the personal importance of the Court’s rulings to individuals, especially given the highly salient issues the Justices faced. But what we lose in detail we gain back in our ability to put the Court’s term in comparative historical perspective. Only the passage of time will reveal the extent and longevity of the Court’s conservative turn.

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