October Term 2013

Compromise at the Court Veils Its Rifts

ADAM LIPTAK, The New York Times National Edition, JULY 2, 2014, A1, A17

Photo

From left, Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan in 2013.
CreditImage by Pool photo by Charles Dharapak

WASHINGTON — Two very different group portraits of the Supreme Court emerged this term, one familiar and one unexpected.

The familiar was on display Monday in two 5-to-4 decisions that were split by angry divisions and seemed to advance a conservative agenda.

But the more finely drawn portrait takes account of the 67 decisions in argued cases this term. The court was unanimous about two-thirds of the time, and those cases revealed signs of compromise and restraint, which many Supreme Court specialists said was a testament to the leadership of Chief Justice John G. Roberts Jr., 59.

“The chief has done a remarkable job this term navigating divisions and dodging the most controversial of issues,” said Lisa S. Blatt, a lawyer with Arnold & Porter who argues frequently before the court.

Chief Justice Roberts, who completed his ninth term, does not get his way by backslapping or horse-trading, but by writing savvy opinions, making strategic opinion assignments to the other justices and sometimes working to protect the Supreme Court from accusations that it is a political institution.

A More Unified Court

This term, the Supreme Court justices voted unanimously in 65 percent of orally argued cases — the highest share since at least 1953.

Chief Justice Roberts’s handiwork was apparent this term in major rulings onabortion protests and cellphone searches, both unanimous decisions.

His majority opinion striking down buffer zones around Massachusetts abortion clinics was much narrower than his earlier First Amendment jurisprudence would have suggested, narrow enough to attract the votes of all four liberal justices. And he wrote a muscular opinion for a unanimous court requiring the police to get warrants before they search the cellphones of people they arrest.

All of the justices are sensitive to the accusation that they are motivated by politics.

The current set of nine justices is, for the first time in history, firmly divided along partisan lines, with all of the Republican appointees more conservative than all of the Democratic ones. Their efforts to find common ground may have been partly an attempt to counter the charge that they are, in Justice Stephen G. Breyer’s words, “nine junior varsity politicians” motivated by partisan agendas better left to elected officials.

But the number of unanimous decisions — a record for the Roberts court and the highest percentage since at least 1953 — masked some powerful disagreements, as the justices often agreed only on the bottom line, as was true in the abortion protest and recess appointment cases.

What matters most in Supreme Court decisions is what legal principle commanded a majority, not which side won. Lower courts will apply those principles, and the divisions about the reasoning supporting decisions can be vital. They mattered so much to Justice Antonin Scalia that he all but created a new judicial genre — he wrote three furious concurrences.

The Roberts court’s conservative majority has not retreated from several of its core concerns. It remains skeptical of campaign finance regulations,efforts to drive religion from public life and race-conscious decision-making by the government. It remains solicitous of corporate rights and of efforts to curb union power.

When the chief justice was in the majority in such cases, most decided by narrow margins, another side of him emerged. In all of them, he wrote or joined opinions that claimed to be modest extensions of existing law but may well portend wrenching change.

But the 5-to-4 splits dropped, to just 10. Of those, six featured the classic alignments, with Justice Anthony M. Kennedy joining either the court's four more liberal members or its four more conservative ones. He leaned right two-thirds of the time.

But in a great many cases the justices found ways to agree. This was the fourth term together for the nine current justices. Its newest members, Justices Sonia Sotomayor and Elena Kagan, have grown increasingly comfortable in their roles, and all of the justices seemed, mostly, eager to find common ground with their colleagues.

It did not hurt that the term lacked huge and profoundly divisive cases like those that ended the last two terms. In June 2012, months before the presidential election, the court narrowly upheld the Affordable Care Act. In June 2013, the court issued one major ruling on same-sex marriage but kicked an even bigger question down the road.

The story of the current term was somewhat anticipated in a book published last year by three political scientists: Pamela C. Corley, Amy Steigerwalt andArtemus Ward. It was called "The Puzzle of Unanimity: Consensus on the United States Supreme Court."

It is, after all, not obvious that the justices should ever all agree. The issues that reach them are complicated and usually susceptible to multiple plausible answers. Lower courts have almost always given varying answers. The justices themselves have differing judicial philosophies.

But the justices know that unanimous decisions have more force, which is why they worked hard to issue them in Brown v. Board of Education, the 1954 school desegregation case, and United States v. Nixon, the 1974 decision that hastened the end of the Nixon administration.

Lower courts are less likely to follow divided decisions. But, and here is the bad news for the current court, there are two ways to be divided. "While dissents are clearly detrimental to the authority of majority opinions, concurrences can be equally damaging," the "Puzzle of Unanimity" authors wrote. "In fact, if a decision of the court is accompanied by a concurrence that does not support the majority opinion, lower courts are less likely to comply with it."

While the court's level of agreement this term was authentically high, the numbers overstate the case. "A lot of the unanimity is ersatz," said David A. Strauss, a law professor at the University of Chicago.

It is not every day, for instance, that you see a Supreme Court justice reading an angry concurrence from the bench, as Justice Scalia did last week in the recess appointments case. (Even oral dissents are rare, issued perhaps four times a term.)

Justice Scalia was similarly dismissive of the majority opinion in the unanimous case on abortion clinic buffer zones, issued the same day, though he concurred in the result. "I prefer not to take part in the assembling of an apparent but specious unanimity," he wrote.

The majority opinion was written by Chief Justice Roberts and joined by the court's four liberals, an exceedingly unusual alignment. It was the same alignment that saved the Affordable Care Act in 2012.

Justice Scalia was no happier about two other narrow Roberts opinions for the same coalition plus Justice Kennedy, one avoiding a major decision on the scope of congressional power in a treaty case, the other rejecting a request to do away with securities fraud class actions.

Both times, Justices Scalia, Clarence Thomas and Samuel A. Alito Jr. would have gone much bigger, and they refused to adopt the majority's reasoning in either case. But nonetheless the vote counts said the decisions were unanimous.

The court has the luxury, with very few exceptions, of picking the cases it will decide. It has studiously avoided accepting a Second Amendment case since it established an individual right to own guns in 2008 and applied it to the states in 2010. It flirted with hearing an abortion case this term butthought better of it.

All of this means that rates of agreement must be judged against the texture of the term. Almost 10 percent of the court's docket was made up of patent cases, for instance, and all of those decisions were unanimous.

"The higher unanimity rate might reflect an increase in cases with low ideological stakes," said Lee Epstein, a law professor and political scientist at Washington University in St. Louis. "This term, about 36 percent involved questions of rights and liberties, compared with 57 percent in the three previous terms."

Justice Kennedy was most often in the majority, though not by much. He was rivaled by Chief Justice Roberts.

But Justice Kennedy was the only justice in the majority in all of the 5-to-4 decisions. The six that featured the classic ideological splits were telling.

Justice Kennedy joined the court's conservative wing in major cases allowing more money in politics, more religion in official settings, religious liberty rights for corporations and limits on union power. He joined the court's liberals in limiting the use of the death penalty and sustaining the use of a federal gun control law to curb so-called straw purchases.

Business groups had a good if relatively quiet year at the court. The U.S. Chamber of Commerce filed briefs in 17 cases decided by signed opinions and was on the winning side 13 times. "As in past terms, the court continued to curb the worst excesses of the

plaintiffs' bar and overreach by regulators," said Lily Fu Claffee, general counsel to the group. "We consider that a great year."

The administration suffered stinging losses in several major cases, including ones on campaign finance, recess appointments and the contraception coverage put in place under the Affordable Care Act. The court "rejected Obama's position in nearly all the high-profile cases of the term," said Adam Winkler, a law professor at the University of California, Los Angeles.

But the administration still won 56 percent of the cases in which it was a party, compared with 39 percent last term, Professor Winkler said. It did even better in cases in which it had filed supporting briefs, ending up on the winning side 70 percent of the time.

Some of this may reflect decisions to take fairly conservative positions, notably in the case on opening town board meetings with a prayer. But the administration did well in major environmental cases in which it was not obvious that it would prevail.

The current term may have been a chance for the court to catch its breath, said Ms. Blatt, the lawyer with Arnold & Porter. "They are either resting up and saving their fire for all of the abortion, guns and gay marriage cases in the lower courts," she said, "or the cases this term were simply not as controversial as in the past two years."

Samuel Issacharoff, a law professor at New York University, cautioned that it was too soon to declare a new era of harmony and light based on, say, the unanimous votes on recess appointments and abortion clinic buffer zones.

"No one should confuse these outcomes with a sudden outbreak of Kumbaya fever at the court," he said. "The familiar lines of division were in evidence in all these cases. But, surprisingly, the court found a way to channel its core divisions into compromise holdings that allowed controversial cases to be settled rather than resolved."

Correction: July 1, 2014

An earlier version of this article misidentified the member of the Supreme Court who assigned to Justice Stephen G. Breyer the majority opinion in the court's recess appointments decision. It was Justice Anthony M. Kennedy, not Chief Justice John G. Roberts Jr.

Key Supreme Court Decisions in 2014

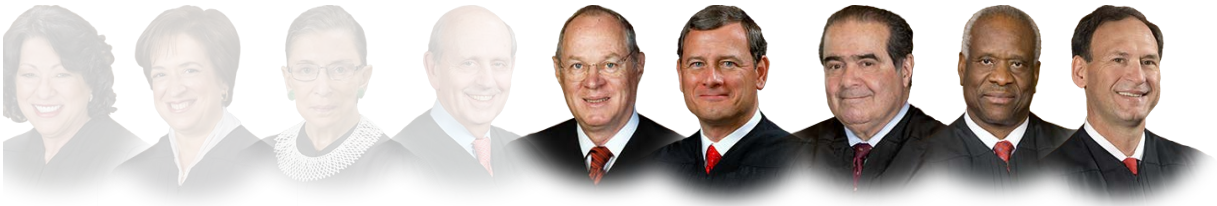
How the justices decided in major cases during the term ending June 30, 2014, and the implications of their decisions. UPDATED June 30, 2014

June 30, 2014
CONTRACEPTION COVERAGE

Burwell v. Hobby Lobby

THE DECISION	The court ruled that corporations controlled by religious families **cannot be required to pay** for contraception coverage for their female workers.
PREVIOUSLY	In 2012, the court **upheld the centerpiece** of the Affordable Care Act by a 5-to-4 vote.
OUTLOOK	The case **may affect** many other kinds of religious objections from businesses.

MAJORITY(FULLCOLOR) / DISSENT (FADED)

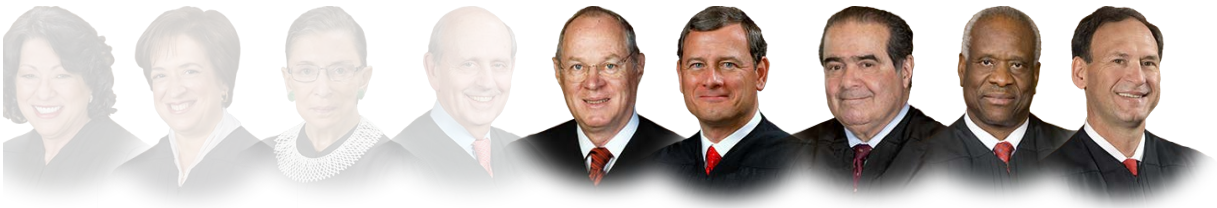


Sotomayor Kagan Ginsburg Breyer Kennedy Roberts Scalia Thomas Alito

June 30, 2014
PUBLIC UNIONS

Harris v. Quinn

THE DECISION	The court ruled that some government workers **are not required** to pay union dues.
PREVIOUSLY	In 1977, the court said that teachers who declined to join a union **could be forced to pay** for its collective bargaining expenses.
OUTLOOK	The 1977 decision was called into question but **not overruled.**

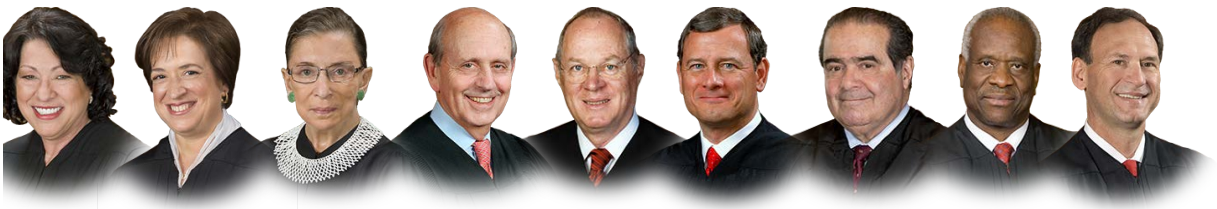


Sotomayor Kagan Ginsburg Breyer Kennedy Roberts Scalia Thomas Alito

June 26, 2014
ABORTION PROTESTS

McCullen v. Coakley

THE DECISION	The court ruled that buffer zones around abortion clinics in Massachusetts **violated the First Amendment.**
PREVIOUSLY	In 2000, the court **upheld similar buffer zones** in a case from Colorado.
OUTLOOK	The court **left open the possibility** that states may use other methods to address harrassment and violence at clinics.



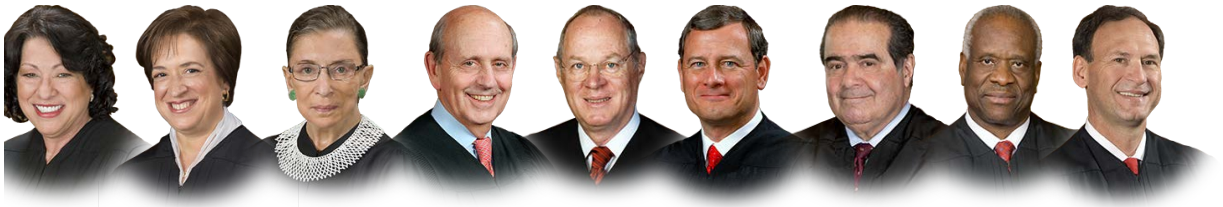
Sotomayor Kagan Ginsburg Breyer Kennedy Roberts Scalia Thomas Alito

June 26, 2014
RECESS APPOINTMENTS

N.L.R.B. v. Noel Canning

THE DECISION	The court **limited but did not eliminate** presidential recess appointment powers.

PREVIOUSLY	Presidents of both parties have **long made appointments** during brief breaks in the Senate's work.
OUTLOOK	Recess appointments **remain generally permissible** during breaks of 10 days or more.

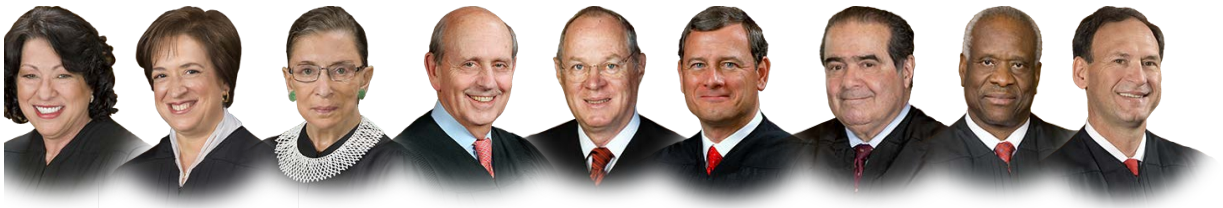


Sotomayor Kagan Ginsburg Breyer Kennedy Roberts Scalia Thomas Alito

June 25, 2014
CELLPHONE SEARCHES

Riley v. California

THE DECISION	The court **ruled that the police need warrants** to search the cellphones of people they arrest.
PREVIOUSLY	The courts have **long allowed warrantless searches** in connection with arrests. But in 2012 several justices suggested that the era of big data may require a new approach to privacy rights.
OUTLOOK	The case will **affect millions of arrests** every year.



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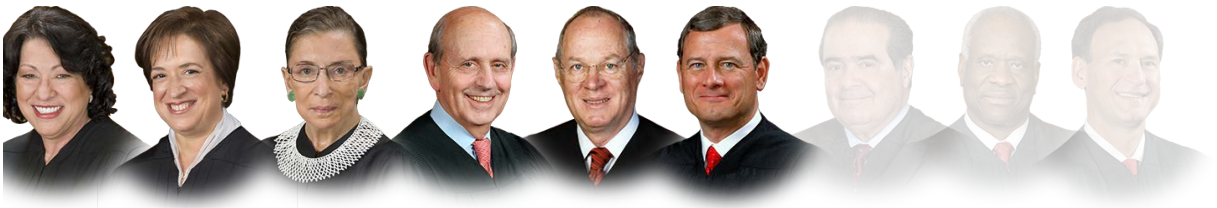
June 25, 2014
STREAMING VIDEO OF BROADCAST TELEVISION

ABC v. Aereo

THE DECISION	The court **ruled that it was unlawful** for the Internet start-up to capture and stream broadcast television signals to subscribers.
PREVIOUSLY	The court has been **wary of shutting down** disruptive technologies. In 1984, it refused to block home video recorders.

OUTLOOK	The majority said its decision **does not affect** new technologies like cloud computing.



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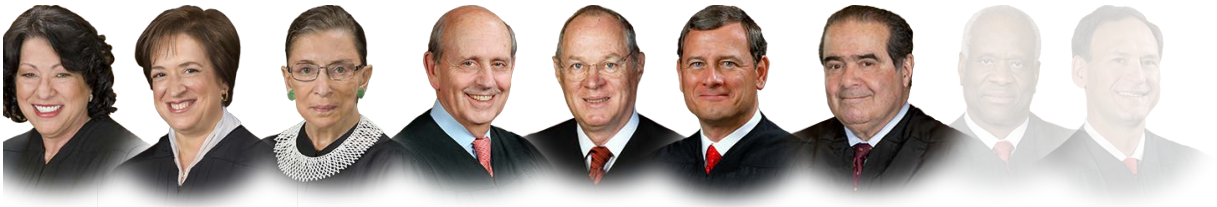
June 23, 2014
GREENHOUSE GASES

Utility Air v. E.P.A.

THE DECISION	The court largely **upheld the E.P.A's authority** to regulate greenhouse gases from stationary sources like power plants under two permitting programs.
PREVIOUSLY	In 2007, the court **required the E.P.A.** to regulate greenhouse gases if it found that they endangered public health.
OUTLOOK	The E.P.A. had a good year at the court, but its more ambitious efforts to address climate change remain **open to legal challenges.**



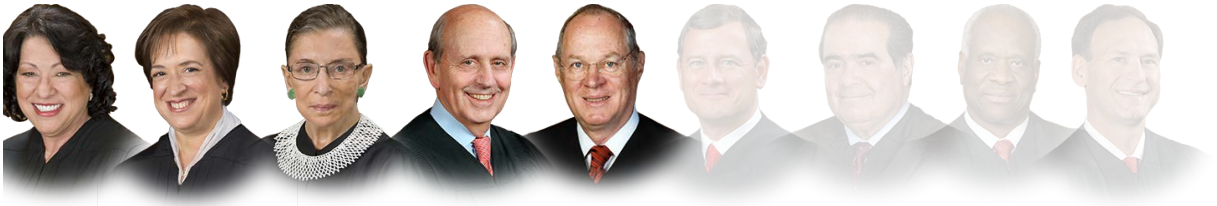
Sotomayor Kagan Ginsburg Breyer Kennedy Roberts Scalia Thomas Alito

May 27, 2014
DEATH PENALTY

Hall v. Florida

THE DECISION	The court **rejected Florida's I.Q. cutoff** as too rigid to decide which mentally disabled people must be spared the death penalty.
PREVIOUSLY	The case **followed and refined** a 2002 ruling from the court that banned the execution of the mentally disabled but left the determination largely to the states.
OUTLOOK	The decision, which may spare the lives of perhaps 20 death row inmates, is part of the court's incremental approach to **cutting back eligibility for the death penalty**. Earlier decisions had spared juvenile offenders and people who commited crimes other than

murder.



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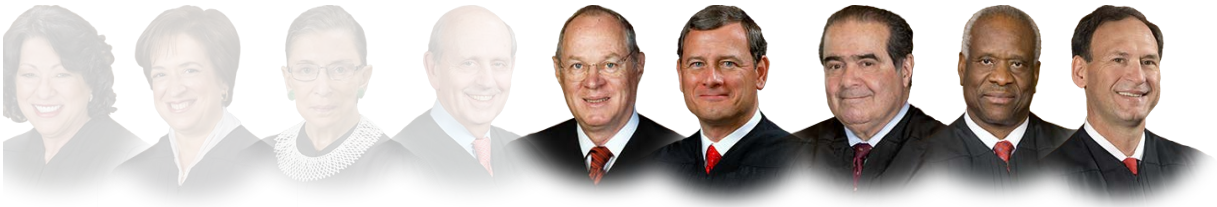
May 5, 2014
RELIGION

Town of Greece v. Galloway

THE DECISION	The court ruled that town boards may start their meetings with sectarian prayers, **rejecting a First Amendment challenge** from residents who said the practice offended them.
PREVIOUSLY	In 1983, the court **upheld the Nebraska Legislature's practice** of starting its sessions with a prayer, saying the practice was "deeply embedded in the history and tradition of this country."
OUTLOOK	The decision, along with earlier ones, suggests that the Roberts court is **open to a larger role for religion** in public life.



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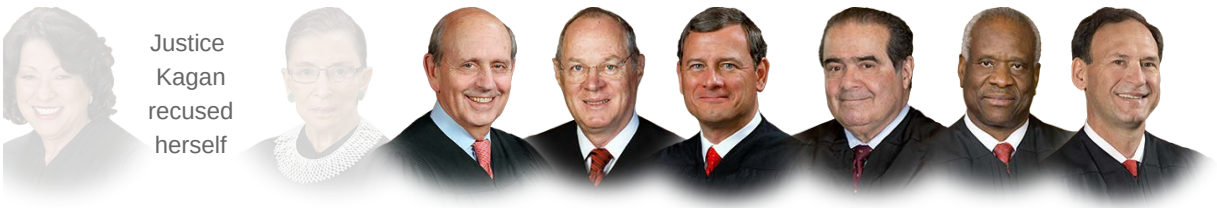
April 22, 2014
AFFIRMATIVE ACTION

Schuette v. BAMN

THE DECISION	The court **upheld a Michigan voter initiative** that banned taking account of race in admissions to the state's public universities.
PREVIOUSLY	The court has said race-conscious admissions are sometimes constitutionally permissible, though under **increasingly exacting standards**. The new decision essentially said the practice is not constitutionally required.
OUTLOOK	In 2013, the justices instructed an appeals court to take a fresh look at the University of

Texas' admissions practices. That case **may yet return to the Supreme Court** for another showdown over affirmative action.



April 2, 2014

CAMPAIGN FINANCE

McCutcheon v. Federal Election Commission

THE DECISION	The court **struck down overall limits** for contributions from individuals to candidates and political parties. It did not disturb base limits of $2,600 per election.
PREVIOUSLY	The court had **never before struck down** a federal contribution limit.
OUTLOOK	The Roberts court has been consistently hostile to campaign finance regulation. Experts say **other limits are now at risk**, including base contribution limits for individuals, the ban on corporate contributions (as opposed to the independent expenditures allowed in Citizens United) and public financing of elections.

BY ADAM LIPTAK and ALICIA PARLAPIANO