

October Term 2018

A Supreme Court Term Marked by Shifting Alliances and Surprise Votes

Even as the court's center of gravity shifted to the right, the court's more liberal justices held their own.



Adam Liptak and Alicia Parlapiano, *The New York Times* Online Edition, June 29, 2019.

WASHINGTON — The Supreme Court term that ended on Thursday was expected to be a blood bath for its four-member liberal wing. Instead, shifting alliances produced a series of surprising liberal victories. Some were minor, and some were tentative.

But in the end, the court's liberals prevailed in fully half of the 14 rulings decided by 5-to-4 votes in which they voted together.

[Two decisions on the last day of the term](#) — barring judicial review of claims of partisan gerrymandering but blocking the Trump administration’s plan to add a question on citizenship to the census — neatly captured this dynamic. But the trend went deeper, and the court’s liberals had far more success than they did last term, when Justice Anthony M. Kennedy was still on the court.

There were few blockbusters this term. In what appeared to be a studied effort to keep a relatively low profile after Justice Brett M. Kavanaugh’s ferociously divisive confirmation hearings and President Trump’s casual attacks on the federal judiciary, the court tried to stay out of major controversies, [denying review in abortion](#) and [gay rights cases](#). It decided many cases narrowly, often in coalitions that scrambled expectations. When it overruled precedents, it was in technical cases that attracted little attention.

“The court very much looks, and is acting, like a court in transition,” said [Gregory G. Garre](#), a lawyer at Latham & Watkins who served as solicitor general in the George W. Bush administration. “The fault lines are still shifting on the court.”

The court is adjusting to [the departure of Justice Kennedy](#), its longtime swing vote. His replacement by Justice Kavanaugh was expected to shift the court’s center of gravity to the right and thrust Chief Justice John G. Roberts Jr. into the court’s ideological center. Both of those things happened.

What was unexpected was the crucial role Justice Kavanaugh has played in the balance of power at the court. His voting was almost indistinguishable from that of the chief justice, according to data compiled by [Lee Epstein](#) and [Andrew D. Martin](#) of Washington University in St. Louis and [Kevin Quinn](#) of the University of Michigan.

Indeed, for now at least, it is possible to make the case that Justice Kavanaugh is the new swing justice.

“It’s unusual for a new justice to be the median,” Professor Epstein said. The last time it happened was in 1990, she said, when Justice David H. Souter joined the court. Appointed by President George Bush, Justice Souter only briefly held the center spot and soon drifted to the left.

Justice Kavanaugh was in the majority in divided decisions in argued cases 81 percent of the time last term, more than any other member of the court. Chief Justice Roberts was second, at 73 percent. Justice Elena Kagan, appointed by President Barack Obama, was not far behind, at 71 percent.

Chief Justice Roberts and Justice Kavanaugh voted together 86 percent of the time in divided cases, which tied for first place. By contrast, Justice Kavanaugh voted with Justice Neil M. Gorsuch just 53 percent of the time, though both men were appointed by Mr. Trump. That was barely ahead of the rate at which Justice Kavanaugh voted with two Democratic appointees, Justices Kagan and Stephen G. Breyer.

“The Trump appointees are clearly not fungible,” Professor Epstein said. “At this point, Justice Kavanaugh is more moderate.” But Professor Epstein cautioned that a justice’s early votes can be deceptive, noting that the initial voting records of both Justices Gorsuch and Clarence Thomas were more moderate than their later ones.

Mr. Garre said the two newest justices are a study in contrasts. “Both have shown themselves to be confident and happy to go their own ways, even when it means joining the more liberal justices,” he said. “But Justice Gorsuch is more frequently on the right end of the court, and Justice Kavanaugh, so far at least, has gravitated more toward the center.”

Even before the stormy end of the term, the court had not always succeeded in staying out of the spotlight. In an extraordinary exchange in November, for instance, Chief Justice Roberts [tangled with Mr. Trump](#), who had criticized an asylum ruling by saying it had been issued by an “Obama judge.”

The chief justice responded that “we do not have Obama judges or Trump judges, Bush judges or Clinton judges” but only “an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”

[Richard J. Lazarus](#), a law professor at Harvard, said the court helped prove the chief justice right with its unpredictable voting, singling out its three most junior members.

“Although the large number of closely divided votes was inconsistent with the chief justice’s stated preference for unanimity, the shifting membership of those in the majority and dissent was very much in keeping with the chief’s admonition that there are not Bush, Obama or Trump judges and justices,” he said. “There was a striking number of cases in which the votes of individual justices, especially Kagan, Gorsuch and Kavanaugh, defied such ready political labels.”

The chief justice joined the court’s four liberal members — Justices Kagan, Breyer, Ruth Bader Ginsburg and Sonia Sotomayor — to form a majority in 5-to-4 decisions just once, in part of the census case. Justice Gorsuch voted with the liberal bloc in such cases four times. Justices Kavanaugh and Thomas each voted with that bloc once.

“The justices also seemed happy to celebrate such voting behavior,” Professor Lazarus said. “In many of those cases, the senior justice in the majority rewarded the justice who defied expectations by assigning them the job of writing the opinion for the court, including in big cases that a junior justice would otherwise be unlikely to get.”

For example, Justice Ginsburg assigned the majority opinion in [a giant antitrust case against Apple](#) to Justice Kavanaugh, a plum assignment for a new member of the court.

The court overruled two precedents, on procedures in property rights cases and whether states may be sued in the courts of other states. [Dissenting from that second ruling](#), Justice Breyer said he feared for the future. “Today’s decision can only cause one to wonder which cases the court will overrule next,” he wrote.

But the term ended without any major shocks to the system, as the justices retained two more significant precedents, one on [double jeopardy](#), the other on [deference to administrative agencies](#).

Some of the court's most significant work does not show up in calculations limited to argued cases. The court also acted on an unusually large number of emergency applications that illuminated tensions on the court. Twice, Chief Justice Roberts joined the court's four liberals in 5-to-4 votes in such cases, once to [block a restrictive Louisiana abortion law](#) from going into effect and once to sustain a lower-court ruling that [blocked a Trump administration asylum policy](#).

Emergency applications in capital cases also laid bare divisions. Seemingly inconsistent positions on whether death row inmates may have [their spiritual advisers accompany them](#) into the death chamber exposed the court to criticism from across the ideological spectrum and gave rise to [testy and sometimes quite belated opinions](#) in which the justices tried to justify their votes.

There was a throat clearing aspect to the term that just ended, said [Sarah Harrington](#), a Supreme Court specialist at Goldstein & Russell. "The term seems to be mostly about setting the stage for battles to come," she said.

And there are indeed big cases on the horizon: on whether the Trump administration can end [a program shielding young, undocumented immigrants, on the Second Amendment, on whether a federal law prohibits discrimination against gay and transgender workers](#) and very likely on abortion.

"This feels," said [Tara Leigh Grove](#), a law professor at William & Mary, "like a term on the brink."

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For this article with its graphics, see <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html>. For Supreme Court justices' votes in its biggest decisions for October Term 2018 <https://www.nytimes.com/interactive/2019/06/21/us/supreme-court-key-cases-2019.html>

The Supreme Court's Biggest Decisions in 2019

By ADAM LIPTAK and JASON KAO **UPDATED** JUNE 27, 2019

The Supreme Court was transformed this term by the departure of Justice Anthony M. Kennedy, its longtime swing vote, and the arrival of his more conservative successor, Justice Brett M. Kavanaugh. Here are some of the term's most important cases, ones that will help chart the future of a court in transition.

Census

5-4

DECIDED JUNE 27

In [Department of Commerce v. New York](#), the court sent back to a lower court a case on whether the census should contain a citizenship question, leaving in doubt whether the question would be on the 2020 census.

LIBERAL BLOC

CONSERVATIVE BLOC



Sotomayor



Ginsburg



Kagan



Breyer



Roberts



Kavanaugh



Alito



Gorsuch



Thomas

5-4

DECIDED JUNE 27

Partisan Gerrymandering

In two cases, *Rucho v. Common Cause* and *Lamone v. Benisek*, the court ruled that the Constitution does not bar extreme partisan gerrymandering.

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CONSERVATIVE BLOC



Sotomayor



Ginsburg



Kagan



Breyer



Roberts



Kavanaugh



Alito



Gorsuch



Thomas

6-3

DECIDED JUNE 21

First Amendment

In *Iancu v. Brunetti*, the court struck down a federal law barring the registration of vulgar trademarks, saying it ran

DECIDED JUNE 24

afoul of the First Amendment.

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CONSERVATIVE BLOC



Sotomayor



Ginsburg



Kagan



Breyer



Roberts



Kavanaugh



Alito



Gorsuch



Thomas

Race Discrimination

7-2

DECIDED JUNE 21

In *Flowers v. Mississippi*, the court decided that a white prosecutor violated the Constitution in excluding potential black jurors at the sixth trial of Curtis Flowers, who is on death row in Mississippi.

LIBERAL BLOC

CONSERVATIVE BLOC



Sotomayor



Ginsburg



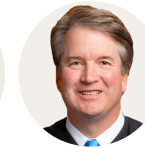
Kagan



Breyer



Roberts



Kavanaugh



Alito



Gorsuch



Thomas

7-2

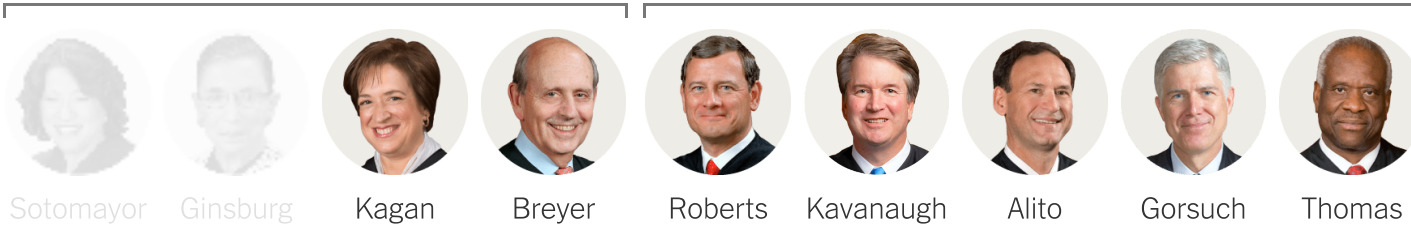
DECIDED JUNE 20

Separation of Church and State

In [American Legion v. American Humanist Association](#), the court allowed a 40-foot cross honoring soldiers from World War I to remain on government land.

LIBERAL BLOC

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7-2

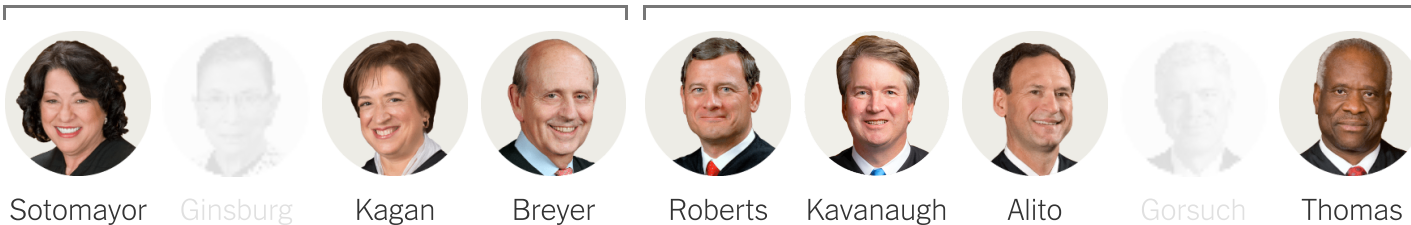
DECIDED JUNE 17

Double Jeopardy

In [Gamble v. United States](#), the court refused to overrule precedents allowing two prosecutions for the same crimes, one in federal court and one in state court.

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Antitrust

5-4

DECIDED MAY 13

In [Apple v. Pepper](#), the court allowed an enormous antitrust class action against Apple to move forward, saying consumers should be allowed to try to prove that the technology giant had used monopoly power to raise the prices of iPhone apps.

LIBERAL BLOC



Sotomayor Ginsburg Kagan Breyer

CONSERVATIVE BLOC



Roberts Kavanaugh Alito Gorsuch Thomas

Civil Forfeiture

9-0

DECIDED FEB. 20

In [Timbs v. Indiana](#), the court limited the ability of police to seize private property used to commit crimes.

LIBERAL BLOC



Sotomayor Ginsburg Kagan Breyer

CONSERVATIVE BLOC



Roberts Kavanaugh Alito Gorsuch Thomas

After 14 Years, Chief Justice Roberts Takes Charge



Chief Justice John G. Roberts Jr. made his clout clear in a pair of stunning decisions on Thursday, providing the decisive votes and writing the majority opinions in cases on the census and partisan gerrymandering.
Credit: Pool photo by Jabin Botsford

Adam Liptak, *The New York Times* Online Edition, June 27, 2019.

WASHINGTON — Chief Justice John G. Roberts Jr. has sat in the center seat on the Supreme Court bench since his arrival in 2005. But only this term did he assume true leadership of the court.

He made clear his influence in a pair of stunning decisions on Thursday, joining the court's liberal wing in one and his fellow conservatives in the other. In providing the decisive votes and writing the majority opinions in cases on the census and partisan gerrymandering, he demonstrated that he has unquestionably become the court's ideological fulcrum after the [departure last year of Justice Anthony M. Kennedy](#).

The key parts of both decisions were decided by five-justice majorities, and the chief justice was the only member of the court in both.

The two rulings, one a rebuke to the Trump administration and the other a boon to Republicans, was consistent with Chief Justice Roberts's insistence that politics should play no role in judging. "We don't work as Democrats or Republicans," he said in 2016.

Conservatives expressed bitter frustration on Thursday about what they saw as the chief justice's unreliability, if not betrayal.

“Chief Justice John Roberts disappointed conservatives today — to a degree not seen since he saved Obamacare in 2012 — when he sided with the court’s four liberals to second-guess the Trump administration’s reasons for adding a citizenship question to the census,” Curt Levey, the president of the Committee for Justice, a conservative activist group, said in a statement. “The census decision will surely deepen the impression that Roberts is the new Justice Kennedy, rather than the reliable fifth conservative vote that liberals feared and conservatives hoped for.”

[The Supreme Court’s rulings on gerrymandering and the census have profound implications for American politics. [Here’s what the decisions mean.](#)]

On the horizon next term are significant cases — [on the Second Amendment](#), [on whether a federal law prohibits discrimination against gay and transgender workers](#) and very likely on abortion — that will help bring Chief Justice Roberts’s new role into sharper focus. But he may not retain the decisive vote indefinitely.

The court’s two oldest members — Justice Ruth Bader Ginsburg, 86, and Justice Stephen G. Breyer, 80 — are members of its liberal wing. If President Trump gets the chance to replace one of them, the court would shift decisively to the right.



Mr. Roberts being sworn in as chief justice in 2005. Credit: Mark Wilson/Getty Images

The dissenting members of the court in both of Thursday's cases all had the same criticism — that the chief justice's analysis was warped by politics.

In the census decision, which at least temporarily stopped the Trump administration from adding a question on citizenship to the forms that will be sent to every household next year, Justice Clarence Thomas suggested that the chief justice had been swayed by the overheated emotions of the day.

“It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit and illicit motives,” Justice Thomas wrote. “Significant policy decisions are regularly criticized as products of partisan influence, interest group pressure, corruption and animus.”

Justice Thomas may have overstated things — he said judges inclined to distrust the administration were working with a corkboard, a jar of pins and a spool of string to “create an eye-catching conspiracy web” — but he was right that there was a whiff of disdain in Chief Justice Roberts's majority opinion.

The chief justice is mild, witty, controlled and precise, and he must have little patience for Mr. Trump's more freewheeling and slashing approach.

During his presidential campaign, Mr. Trump called Chief Justice Roberts “an absolute disaster.” The chief justice did not return fire at the time.

But in an extraordinary exchange in November, he did [tangle with Mr. Trump](#), who had criticized an asylum ruling by saying it had been issued by an “Obama judge.”

The chief justice issued a statement: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”

In the census decision, Chief Justice Roberts basically accused Wilbur Ross, the secretary of commerce, of lying about why he wanted to add the citizenship question. “The sole stated reason” for adding the question, the chief justice wrote, “seems to have been contrived.”

That willingness to look behind an administration official's asserted reason for taking an action was at odds with last year's decision [upholding Mr. Trump's travel ban](#).

In that case, writing for the court's five conservatives, Chief Justice Roberts acknowledged that Mr. Trump had made any number of statements concerning his desire to impose a “Muslim ban.” He recounted the president's call for a “total and complete shutdown of Muslims entering the United States,” and he noted that the president has said that “Islam hates us.”

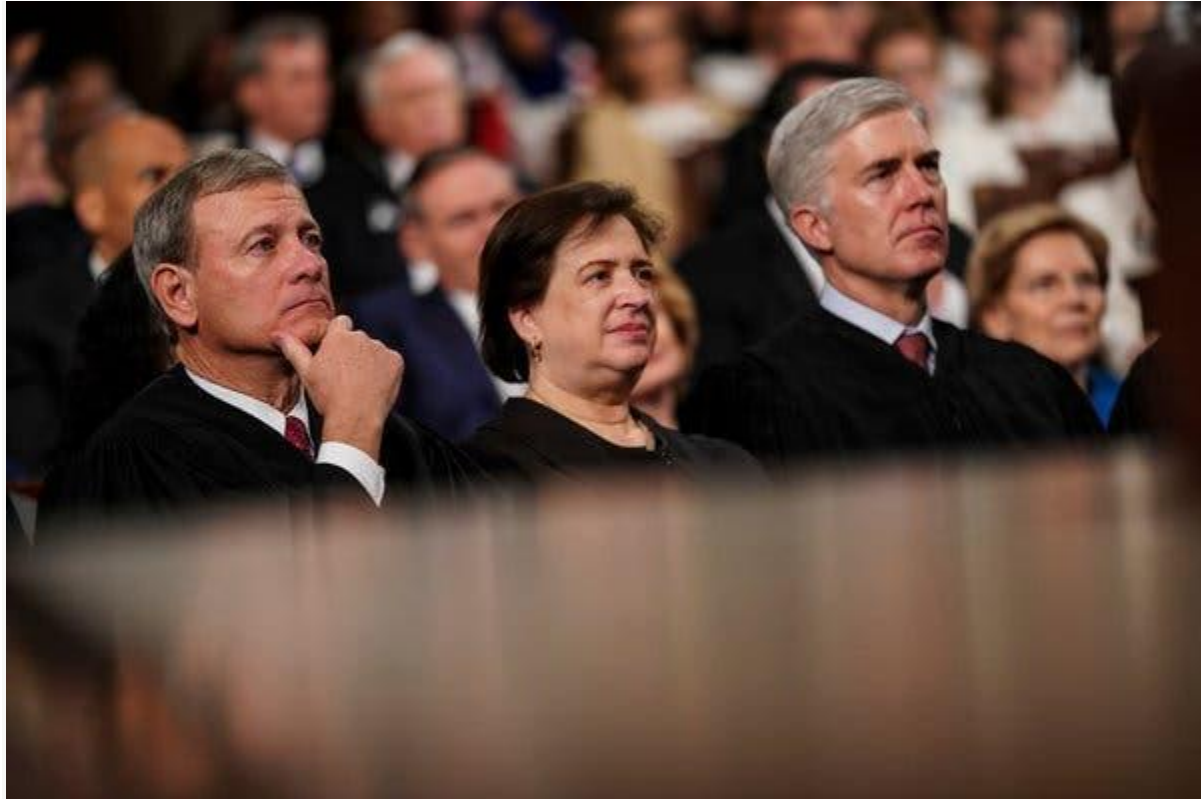
But the chief justice declined to rely on what Mr. Trump had said.

“The issue before us is not whether to denounce the statements,” Chief Justice Roberts wrote in 2018. “It is instead the significance of those statements in reviewing a

presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”

Last year, Chief Justice Roberts was willing to ignore evidence of an ulterior motive. This year, in the census case, the chief justice had had enough.

“Accepting contrived reasons would defeat the purpose of the enterprise,” he wrote. “If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.”



Chief Justice Roberts with Justices Elena Kagan and Neil M. Gorsuch at President Trump's State of the Union address in February. Credit Doug Mills/The New York Times

The chief justice stuck with his usual allies in Thursday's second blockbuster, which said judges cannot hear claims of partisan gerrymandering, the practice of drawing election districts to help candidates of the political party in power.

It was the more consequential of the two decisions, and, as a practical matter in the current electoral landscape, it will mostly help Republicans.

Dissenting in the gerrymandering case, the court's liberals accused the chief justice of refusing to acknowledge political realities.

“Of all times to abandon the court's duty to declare the law, this was not the one,” Justice Elena Kagan wrote in dissent. “The practices challenged in these cases imperil our system of government. Part of the court's role in that system is to defend its foundations. None is more important than free and fair elections.”

The chief justice is often said to have conflicting impulses. He is a product of the conservative legal movement, and his voting record reflects that. On issues of racial discrimination, religion and campaign finance, his views are in the mainstream of conservative legal thinking.

In major 5-to-4 decisions, he voted with the majority in [District of Columbia v. Heller](#), the 2008 Second Amendment decision that established an individual right to own guns; [Citizens United](#), the 2010 campaign finance decision that amplified the role of money in politics; and [Shelby County v. Holder](#), the 2013 voting rights decision that effectively gutted the Voting Rights Act.

But the chief justice also considers himself the custodian of the Supreme Court's prestige, authority and legitimacy.

That puts the chief justice in an impossible situation. [A recent essay](#) in The Harvard Law Review by [Tara Leigh Grove](#), a law professor at William & Mary, called it a "legitimacy dilemma."

If the chief justice always votes with the court's four other Republican appointees to advance a conservative agenda, he may appear political, raising questions about the court's legitimacy. But if he takes account of that public perception in deciding how to vote, he may appear to be caving to pressure that is itself illegitimate.

That was the dilemma Chief Justice Roberts faced in 2012, when he voted to save President Barack Obama's signature legislative achievement, the Affordable Care Act.

Liberals called him a statesman, conservatives a traitor.

In her recent biography, "The Chief," Joan Biskupic concluded that the chief justice had sacrificed legal rigor for something bigger.

"Viewed only through a judicial lens," Ms. Biskupic wrote, "his moves were not consistent and his legal arguments were not entirely coherent. But he brought people and their different interests together. He acted, in short, more like a politician."

A version of this article appears in print on June 27, 2019, on Page A1 of the New York edition with the headline: Roberts Is the New Swing Vote, And Neither Party Is Overjoyed