

2019

Section 2: What to Expect from the Roberts Court

Institute of Bill of Rights Law at the William & Mary Law School

Repository Citation

Institute of Bill of Rights Law at the William & Mary Law School, "Section 2: What to Expect from the Roberts Court" (2019).
Supreme Court Preview. 291.
<https://scholarship.law.wm.edu/preview/291>

II. What to Expect from the Roberts Court

In This Section:

“AFTER 14 YEARS, CHIEF JUSTICE ROBERTS TAKES CHARGE”

Adam Liptak

“CHIEF JUSTICE JOHN ROBERTS IS ABOUT TO SHOW HIS CARDS”

Joan Biskupic

“CHIEF JUSTICE TRIED TO ASSURE THE SUPREME COURT IS APOLITICAL, BUT TERM’S BIGGEST CASES PRESENT PARTISAN CHALLENGES”

Robert Barnes

“SUPREME COURT WRAP-UP: A SLATE OF CONSERVATIVE, IF LESS PREDICTABLE, RULINGS”

Jess Bravin and Brent Kendall

“SUPREME COURT WITH ROBERTS IN CHARGE: CONSERVATIVE, BUT NOT ALWAYS PREDICTABLE”

David Savage

“SUPREME COURT TERM FOUND TRUMP’S JUSTICES, AND OTHERS, FORMING UNPREDICTABLE ALLIANCES”

Pete Williams

“EMPIRICAL SCOUTS: CHANGES ARE AFOOT — 5-4 DECISION DURING OCTOBER TERM 2018”

Adam Feldman

“TRUMP ON COLLISION COURSE WITH SUPREME COURT; JUSTICES MAY AVOID INTERFERENCE IN 2020 ELECTION”

Richard Wolf

“THEY’RE NOT ‘WONDER TWINS’: GORSUCH, KAVANAUGH SHIRT THE SUPREME COURT, BUT THEIR DIFFERENCES ARE STRIKING”

Robert Barnes

“THE LATEST CHAPTER IN THE GORSUCH-KAVANAUGH SAGA IS THE MOST REVEALING YET”

Leah Litman

“After 14 Years, Chief Justice Roberts Takes Charge”

The New York Times

Adam Liptak

June 27, 2019

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.”

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.

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.”

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.”

“Chief Justice John Roberts is about to show his cards”

CNN

Joan Biskupic

June 12, 2019

With a deadline for nearly 30 cases looming and weighty issues of religion, gerrymandering and the 2020 census pending, Chief Justice John Roberts took his black leather chair at the bench this week and said three decisions were ready to be announced.

It was a paltry total for a week in June, the final month of the annual session. What's more, two of the three were by unanimous votes and none made big headlines.

But the term won't end this way. And much of the weight of this momentous session is on Roberts' shoulders.

This is the first time in Roberts' 14 years as chief justice that he will likely be the deciding vote on several final, tense cases -- a total of 24 over the next two weeks. Roberts landed in the ideological center of the court last year when Justice Anthony Kennedy retired after a three-decade tenure. And because Roberts has long been to the right of centrist conservative Kennedy, the court is primed to make a sharp conservative turn.

Last Friday, Justice Ruth Bader Ginsburg, the court's senior liberal, warned of a spate of 5-4 rulings to come and said Kennedy's retirement would be "of greatest consequence" for pending cases.

While close observers of the court have forecast that for nearly a year, such a prediction is of a different magnitude coming from a justice who has witnessed firsthand the court's private votes in its closed conference room. Ginsburg knows where the majority is headed.

Two of the most politically charged cases awaiting resolution, testing 2020 census questions and partisan gerrymanders, could lead to decisions favoring Republican Party interests and reinforce the partisan character of a court comprising five GOP appointees and four Democratic ones.

That is a signal Roberts -- always insisting the court is a neutral actor -- does not want to send, despite past sentiment that would put him on the Republican side in both.

"People need to know that we're not doing politics," he said in a February appearance at Belmont University in Nashville. "They need to know that we're doing something different, that we're applying the law."

Conflicts over such interpretations of the law, and the churning environment of the nation's capital, are no doubt adding to protracted disagreements behind the scenes.

Among the most awaited cases are those testing whether the Trump administration

may validly add a citizenship question to the 2020 census; whether judges will be allowed to curtail partisan gerrymanders that make it nearly impossible to unseat the controlling party in a state; and whether a 40-foot cross, a World War I memorial known as the Peace Cross, may remain on public land in Maryland.

Predictions at this stage can be fraught but based on oral arguments and other signs from the justices, the answer to all three questions may be yes. It is certain the nation is headed for more 5-4 rulings. It is also likely that the 64-year-old chief justice, concerned about the place of the high court in these volatile times, will try to neutralize any appearance of politics.

In June 2018, when Roberts wrote the five-justice decision upholding President Donald Trump's travel ban on nationals from certain majority-Muslim countries, he deferred to the executive and insisted (over a dissent from the four liberals): "This is an act that could have been taken by any other president."

Decider on the census

June is always arduous as the justices finish opinions in the toughest cases and decide which pending appeals should be scheduled for arguments in the upcoming term, which begins in October.

Roberts has said that he tries to persuade colleagues to decide cases as narrowly as possible, with an opportunity for greater consensus. Some cases defy that goal, sometimes because of the chief justice's own interest.

In the dispute over a citizenship question on the census, Roberts appeared ready during April oral arguments to accept the government's assertion that Commerce Secretary Wilbur Ross wanted the question added to help the Department of Justice enforce the Voting Rights Act.

The state of New York and Democrat-dominated challengers reject those grounds as contrived and point to Census Bureau analyses that predict such a question would diminish the response rate from noncitizens and Hispanics. That could have consequences for political power and government money across the US. The decennial count is used to apportion seats in the US House and allocate hundreds of billions of dollars in federal and state funds.

Since those April arguments, the American Civil Liberties Union and others that joined the legal challenge against the Trump administration said they had found new evidence that the Commerce Department was trying to help Republicans. They cited a newly disclosed 2015 study written by Dr. Thomas Hofeller, a Republican redistricting expert, that using only the citizen voting-age population for redistricting purposes would be "advantageous to Republicans and Non-Hispanic Whites."

The Supreme Court has not responded to the revelation, which was relayed to the justices in a letter. But Roberts had made clear, during oral arguments, that he did not believe the justices should consider material that was not part of the earlier lower court record in the case.

In public appearances, Roberts has downplayed his role at the helm of the nation's top court. "There have been 17 chief justices, and I'd be very surprised if people in here could name" them, he said at Belmont University. "My point is that you're not guaranteed to play a significant role in the history of your country, and it's not necessarily a bad thing if you don't."

But now he is not only in the center chair, presiding. He is also positioned to decide the outcome of cases. It is not yet known how he will balance his institutional and ideological interests.

Supreme Court justices can be inscrutable, and on Monday, nothing in Roberts' nor his colleagues' courtroom demeanor revealed what to expect between June 17 (when the nine are scheduled to return to the bench) and the end of the month.

In her New York speech last Friday, Ginsburg intimated that the court was about to drop a series of contentious decisions, and

that the absence of Kennedy's steadying influence would be consequential.

Ginsburg pointed to comparisons between the census dispute and last term's "travel ban" case.

She referred to the deference that the Roberts majority had shown the Trump administration in the latter and closed her discussion of the former with this observation: The challengers "in the census case have argued that a ruling in Secretary Ross's favor would stretch deference beyond the breaking point."

What to read into Ginsburg's speech? Irrespective of whether she intended it, Ginsburg has a reputation for dropping sly hints outside the courtroom.

In mid-June 2012, she said in a speech that, "The term has been more than usually taxing." That was just before a narrow majority of justices, with Roberts casting the deciding vote, upheld the Affordable Care Act based on the surprising rationale of congressional taxing power.

“Chief justice tried to assure the Supreme Court is apolitical, but term’s biggest cases present partisan challenges”

The Washington Post

Robert Barnes

June 16, 2019

Chief Justice John G. Roberts Jr. began the Supreme Court’s term last fall seeking to assure the American public that his court does not “serve one party or one interest.”

He will end it playing a pivotal role in two of the most politically consequential decisions the court has made in years.

One initiative is to include a citizenship question in the 2020 Census, which has fueled a partisan showdown on Capitol Hill. The other could outlaw the partisan gerrymandering techniques that were essential to Republican dominance at the state and congressional level over the past decade.

The politically weighted decisions, by a court in which the five conservatives were chosen by Republican presidents and the four liberals were nominated by Democrats, threaten to undermine Roberts’s efforts to portray the court as independent.

They are among two dozen cases the court must decide in the next two weeks, and never before has the spotlight focused so intently on the 64-year-old chief justice.

Roberts sits physically at the middle of the bench in the grand courtroom, and now, for the first time since he joined the court in 2005, at the center of the court’s ideological

spectrum. With the retirement of Justice Anthony M. Kennedy last summer, the most important justice on the Roberts Court became Roberts himself.

Roberts in the past has shown himself to be far more conservative than Kennedy, and Justice Ruth Bader Ginsburg suggested recently that has not changed.

Kennedy’s retirement, she told a group of judges and lawyers in New York, was “the event of greatest consequence for the current term, and perhaps for many terms ahead.”

Roberts has been on a mission to convince the public that if the court is ideologically split, it is about law, not politics.

“We do not sit on opposite sides of an aisle, we do not caucus in

separate rooms, we do not serve one party or one interest, we serve one nation,” Roberts told an audience at the University of Minnesota in October.

He repeated the message at Belmont University in Nashville in February. “People need to know we’re not doing politics,” he said.

In between was the well-publicized spat with President Trump, who just before

Thanksgiving criticized an “Obama judge” serving on a lower court who had ruled against his administration in a contentious case centered on immigration policy and border security.

Roberts issued a rare public 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.”

Trump shot back on Twitter: “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country.”

So the citizenship question and gerrymandering cases, which have generally split along party lines, do not come at an opportune time.

The battle for Roberts has been joined.

Brianne J. Gorod, chief counsel of the liberal Constitutional Accountability Center, said the many questions about whether Trump’s citizenship question is intended to benefit Republicans should be a warning for Roberts.

“If Roberts votes to uphold this plainly unlawful administration action, it will give credence to Trump’s claim that he can simply look to the conservative justices on the Supreme Court to save him,” Gorod wrote on the Take Care blog.

“That would be a deeply troubling state of affairs — both for the court and for the country.”

Lawyers challenging the census question seemed to make a similar overture in an unusual motion filed Wednesday, months after the case was argued.

They asked the court to either affirm lower courts that have ruled the question can’t be added to the census form or delay a ruling until those courts can examine new evidence about a Republican political operative’s role in Commerce Secretary Wilbur Ross’s decision to add the citizenship question, which critics contend is discriminatory and politically motivated and will result in a significant undercount of the nation’s immigrant population.

“This court should not bless the secretary’s decision on this tainted record, under a shadow that the truth will later come to light,” they said.

The administration has said the new allegations are more like conspiracy theories than legal analysis. Conservatives said it was a familiar ploy to portray the court as apolitical only if one of the conservative members agrees with liberals, not the other way around.

“Whenever you read ‘legitimacy’ in a sentence about the court, you know it’s a political missile aimed directly at Chief Justice John Roberts,” wrote the conservative editorial board of the Wall Street Journal.

Josh Blackman, a law professor at South Texas College of Law and a frequent conservative legal commentator, picked up the theme on Twitter: “At some point, the ‘legitimacy’ missiles will begin to bear diminishing returns. Abortion: legitimacy.

Census: legitimacy. Gerrymandering: legitimacy. Obamacare: legitimacy. Death penalty: legitimacy.”

The focus on Roberts is unsurprising, said Curt A. Levey of the conservative Committee for Justice. Although the jury is still out on Trump appointee Brett M. Kavanaugh, the justice who replaced Kennedy, Roberts is the conservative most likely to be in play, Levey said.

“I think it is a predicament for him,” Levey said. The chief justice is the member of the court most sensitive “to what history and the nightly news says about you.”

Levey recently wrote that proposals from Democratic presidential candidates and members of Congress to restructure the Supreme Court — increasing the number of justices, for instance, or trying to impose term limits — are better seen as attempts to push Roberts to more moderate outcomes in the court’s decisions.

“Such a shift, after all, is progressives’ only real hope of avoiding a conservative majority,” Levey wrote.

After arguments in the census case, it appeared the court’s conservative majority would agree with the Trump administration that Congress has given it wide authority to add questions to the form.

Lawyers for the government said Ross considered objections from his own experts — who said the question would cause an undercount of those reluctant to disclose that noncitizens lived in their households — but

decided the additional information would still be worth the risk.

Lower courts said Ross’s stated reason for adding the question — that it would aid enforcement of the Voting Rights Act — was pretext. Challengers contended that adding the question would lead to undercounts in Democratic areas and be beneficial to future Republican redistricting plans. But the justices seemed more focused on whether Ross had the authority to add the question than his motivations.

But since those April arguments, the case has gotten only more political.

On Capitol Hill, the House Oversight Committee voted to hold Ross and Attorney General William P. Barr in contempt for not turning over documents about the administration’s decision to add the question.

The nearly party-line vote came hours after Trump asserted executive privilege to shield the materials from Congress.

In the gerrymandering cases, the court’s decision could have far-reaching results for how elections are conducted in the United States. The court often polices redistricting plans drawn by the states to ensure they do not discriminate based on race, but it has never found a plan so infected by politics that it violates voters’ rights.

On the surface, a decision that courts have no role in trying to decide when there has been too much partisan interference would not help Republicans more than Democrats. The court is considering a North Carolina plan drawn by Republicans to give the party a

huge edge, and a Maryland congressional district drawn by Democrats to oust a longtime Republican incumbent.

But as a practical matter, being able to draw districts to help the party in control currently benefits the GOP. The party is in control of both the governorship and legislature in 22 states, compared to 14 for Democrats.

The Republican National Committee, the Republican National Congressional Committee and the National Republican Redistricting Trust filed briefs supporting North Carolina's plan. Democratic committees stayed out of the cases.

Decisions in any of the 24 remaining cases on the court's docket could come as soon as Monday.

“Supreme Court Wrap-Up: a Slate of Conservative, If Less Predictable, Rulings”

The Wall Street Journal

Jess Bravin and Brent Kendall

June 28, 2019

Chief Justice John Roberts closed the Supreme Court’s term with an assertion of institutional—and individual—power, casting tiebreaking votes that checked the Trump administration on its census plans and put partisan gerrymandering beyond the reach of federal courts.

Yet the chief justice’s performance Thursday capped a year of uncertainty and occasional disarray at the court, which began its term last October a member short. With new Justice Brett Kavanaugh in the seat of retired Justice Anthony Kennedy, the court proved more conservative in some ways—and less predictable in others. While some cases split the court along its conservative-liberal divide, surprising coalitions emerged, suggesting a court preferring to tread cautiously toward the right rather than make a headlong rush.

Even Chief Justice Roberts, who now holds the court’s ideological center as well as its formal leadership, couldn’t always retain the reins. The chief justice found himself in dissent in 10 cases, including an antitrust ruling against Apple Inc., a case that upheld a Virginia ban on uranium mining and another Virginia matter where the justices let stand a lower-court ruling that found the commonwealth engaged in racial gerrymandering. That case scrambled the

ideological map, with Justices Clarence Thomas, Elena Kagan, Sonia Sotomayor and Neil Gorsuch joining Justice Ruth Bader Ginsburg’s opinion that the Republican state House of Delegates had no legal standing to press the appeal.

The justices generally tilted their docket toward routine disputes over criminal procedure and business litigation rather than blockbuster cases involving fundamental rights and political tripwires. That came after a fiery start to the term, just after Justice Kavanaugh’s nomination was nearly derailed over sexual-assault allegations from when he was in high school. His furious denials powered through his Republican-backed Senate confirmation on a near-party line vote, reinforcing the court’s conservative majority but eroding its oft-professed identity as an institution apart from politics.

The court’s business docket produced a few notable rulings. A 5-to-4 court, with Justice Kavanaugh forming a majority with the liberal wing, ruled Apple could be sued on allegations that it unlawfully monopolized sales for smartphone apps, a rare high-court victory for antitrust plaintiffs written by a Trump appointee who had been accused of narrowly viewing the reach of antitrust law.

In rare moves, the court rejected an employer's attempt to force truck drivers to arbitrate a wage dispute, and it sided with Securities and Exchange Commission efforts to sanction a stock broker for disseminating false statements, after a string of recent rulings that clipped the regulator's enforcement efforts.

At oral argument and in opinions, the justices wrestled not only with specific cases but the jurisprudential question that has hung over the court since conservatives solidified their grip: the weight of precedent, which will take center stage if the court decides to take up, at some point, a challenge to *Roe v. Wade*, the 1973 opinion recognizing abortion rights that President Trump once predicted his appointees "automatically" would overrule.

The court heard no abortion cases this term, but it entertained challenges to precedent in several areas of law, from its interpretation of the Fifth Amendment to whether state governments are immune from suit in the courts of other states.

The answers varied. The court refused to overturn precedent allowing successive prosecutions for the same acts in both federal and state courts; the dissenters, Justice Ginsburg on the left and Justice Gorsuch on the right, argued that the court had blessed a form of double jeopardy, or twice being tried for the same crime.

In the double-jeopardy case, Justice Thomas, who previously had expressed doubts, said in the end he was persuaded the precedent was correct. But he went on to call for the near abolition of *stare decisis*, the principle that

adhering to precedent, even if subsequent judges consider it imperfect, is important to a society that relies on stability and predictability. The court's affirmation of "demonstrably erroneous decisions" enshrined the arrogance of past judges, he wrote.

Dissenting in the state-sovereignty case, Justice Stephen Breyer asked why the conservative majority found it necessary to overrule precedent regarding an issue that almost never arises. It is one thing when a precedent proves unworkable, he wrote. "It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters," he wrote. "Today's decision can only cause one to wonder which cases the Court will overrule next."

Justice Kennedy in 1992 had voted to uphold abortion rights in large part for reasons of *stare decisis*.

The issue that broke open the court's divisions, however, wasn't abortion, executive power or any of the other marquee topics of the Kavanaugh confirmation. It was capital punishment, a subject that has gone all but unmentioned during recent Supreme Court vacancies.

Condemned inmates typically seek a reprieve from the Supreme Court as their executions approach—either because they claim legal error in their conviction or sentence, or that the method slated to kill them would be unconstitutionally cruel and unusual. The majority made clear repeatedly that its patience for such actions had run out.

In February, the justices stepped in to lift a stay granted by a federal appeals court to a Muslim Alabama inmate who complained the state had denied his imam access to the death chamber, even though a Christian chaplain was on staff to stand alongside inmates of that faith in their last moments.

The majority's unsigned opinion said the inmate had waited too long to raise his complaint. Justice Kagan, dissenting for the liberals, called that decision "profoundly wrong."

When a similar case arose the following month—this time, a Buddhist inmate in Texas—votes switched. Justice Kavanaugh issued an opinion explaining why he voted to stay the execution, while Justices Thomas and Gorsuch indicated they opposed it. In April, the court switched again, denying a stay to an inmate who requested to die by nitrogen gas rather than lethal injection.

"Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay," Justice Gorsuch wrote in yet another 5-4 execution-method case in April.

Later, Justice Samuel Alito disclosed he had voted against a stay for the Buddhist inmate, while Chief Justice Roberts revealed he had joined Justice Kavanaugh in voting for it.

The Trump administration, too, filed emergency applications throughout

the term, seeking to block lower-court rulings against government policies.

The justices allowed the administration to implement for now restrictions on military service by transgender individuals, but a 5-4 court, with the chief justice and the liberals in the majority, declined for now to reinstate a ban on asylum claims by immigrants who cross the southern U.S. border illegally.

The court also issued an interim order—again supported by the chief justice and the liberal wing—that prevented Louisiana from moving forward with restrictions that could have limited the availability of abortion in the state, a case the court likely will consider in full during its next term.

Other blockbuster cases are in the pipeline, including a review of gay and transgender rights in the workplace, and a Trump administration bid to cancel an Obama-era program that provided benefits to young illegal immigrants.

“Supreme Court with Roberts in charge: Conservative, but not always predictable”

Los Angeles Times

David Savage

June 28, 2019

The Supreme Court, despite the emergence of a new conservative majority, ended its annual term last week signaling an inclination to go slow, but spring a few surprises.

The court did not move aggressively to the right, as many Democrats and liberal activists feared and many abortion foes had fervently hoped.

Instead, with Chief Justice John G. Roberts firmly holding the ideological center — a position once held by retired Justice Anthony Kennedy — the court took a cautious path, reflecting Roberts’ determination to avoid the appearance of a court that is predictably conservative.

Even President Trump’s two appointees — Justices Neil M. Gorsuch and Brett M. Kavanaugh — did not march in lockstep to advance the conservative legal agenda, taking different paths in several important cases.

“For the last dozen years, this was the Roberts Court in name only, and the Kennedy Court in reality. Now, it’s really John Roberts’ Court,” said University of Chicago law professor Daniel Hemel, a former court clerk.

Roberts knows the court “risks being seen as an entirely partisan institution if every

ideologically divisive case breaks 5-to-4 conservative-to-liberal. So I think we can expect to see him voting against ideological type — at least occasionally,” Hemel continued. “There will still be lots of 5-to-4 conservative-to-liberal decisions, but I think Roberts understands the damage to the institution if every high-profile case breaks that way.”

For much of this term, the chief justice acted to put off major decisions on abortion, gun rights, transgender troops in the military, as well as an explosive clash over the rights of Christian bakery owners to refuse to make a wedding cake for a same-sex couple.

Roberts’ dominant role was on full display on the final day in two major cases on political power, both effectively decided by the chief justice.

First, Roberts dashed the hopes of liberal reformers with a 5-4 ruling that closed the federal courts to claims of partisan gerrymandering.

In the opinion, joined by the four other conservative justices, Roberts said there was no legal formula or mathematical rule for a judge to decide when an election map drawn by state legislators crosses a line to become unconstitutionally partisan. Therefore,

judges should stay out of this business, Roberts said in the North Carolina case called *Rucho vs. Common Cause*.

This was not a new idea for the chief justice, but with Kavanaugh having replaced the wavering Kennedy, who remained open to deciding gerrymandering cases, Roberts had the five votes he needed.

Immediately after announcing that conservative victory, Roberts began to slowly read his opinion in the term's final case: a challenge to the Trump administration's effort to put a citizenship question on the 2020 census for the first time since 1950.

States dominated by Democrats — led by California and New York — had sued over the move, and census experts predicted millions of immigrant families would refuse to answer, thereby knocking down the population counts in areas most likely to vote for Democrats.

Roberts explained the court was deciding only a “narrow” matter under the Administrative Procedure Act, not a grand constitutional issue.

But the chief justice noted that Trump's commerce secretary, Wilbur Ross, had supplied only “contrived reasons” for adding the question.

No one believed a block-by-block count of citizens was needed to enforce the Voting Rights Act, as Ross had testified, Roberts concluded. “In these unusual circumstances, the district court (in New York) was

warranted” in its decision to block the question, “and we affirm that disposition.”

The “we” in that one paragraph included only the four liberal justices who joined Roberts. They had dissented on much of the rest in *Dept. of Commerce vs. New York*, while the four conservatives dissented from the crucial Part V of the chief justice's five-part opinion.

The surprising result angered the four other justices on the right. All year, they were frustrated with the chief justice's cautious approach.

“A politically fraught issue does not justify abdicating our judicial duty,” Justices Clarence Thomas, Samuel A. Alito Jr. and Gorsuch wrote in December after the court in *Box vs. Planned Parenthood* refused to hear Indiana's bid to deny Medicaid funds to Planned Parenthood clinics.

In May, the court refused to hear Indiana's appeal of another law that would have prohibited abortions when a fetus was diagnosed with Down syndrome or any other disability.

And on Friday, the court refused to hear Alabama's appeal of a law that would have ended nearly all second-trimester abortions. It takes only four votes to grant review of a case, indicating that Kavanaugh, like Roberts, is not ready to rule soon on abortion.

“The most controversial cases taken this term were ones where the court had no choice,” said Erwin Chemerinsky, dean of the UC Berkeley School of Law. The court was obliged to rule on the partisan gerrymandering issue because federal courts

in North Carolina and Maryland struck their election maps, and the state had a right to appeal. And in the census case, Trump's lawyers said the government needed a ruling by July.

"I think after the Kavanaugh hearings, the justices wanted a lower profile term — and, overall, they succeeded," Cherminsky said, recalling Kavanaugh's bruising confirmation.

The conservative justices were not themselves always united, however.

Gorsuch, for example, is a strict libertarian who is skeptical of government power, whether in hands of federal regulators or police and prosecutors. This unusual combination aligns him with the conservatives on many cases but with the liberals on some.

Last week, he spoke for a 5-4 liberal majority that overturned part of a vaguely worded 1980s crime law that tacked on as many as 25 extra years in federal prison for thousands of convicts already serving time for crimes such

as robbery. "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors and judges," Gorsuch said in *United States vs. Davis*. In dissent, Kavanaugh called the decision "a serious mistake."

For his part, Kavanaugh is a more traditional conservative, but he spoke for a 5-4 liberal majority in a case that clears the way for Apple to be sued in an antitrust suit, alleging it wields monopoly power over apps on the iPhone.

Kavanaugh also wrote this year's most important opinion on racial bias, overturning the murder conviction of a Mississippi man who was tried six times by nearly all white juries.

"Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process," Kavanaugh said in *Flowers vs. Mississippi*. The white prosecutor had repeatedly sought to exclude African Americans, he said, and "we cannot ignore that history."

“Supreme Court term found Trump’s justices, and others, forming unpredictable alliances”

NBC

Pete Williams

June 30, 2019

Although the Supreme Court split between conservative and liberal justices in one of its most high-profile cases — a 5-4 ruling that said federal judges could not referee disputes over partisan gerrymandering — the court's just-ended term was notable for a series of unusual lineups.

The court divided along the typical ideological lines only seven times, with justices appointed by Republican presidents on one side and those appointed by Democrats on the other. After the bruising hearing for the court's newest member, President Donald Trump's nominee Brett Kavanaugh, the court seemed determined to keep a low profile and to avoid being perceived as a partisan body.

Kavanaugh turned out to be the justice most often in the majority. He joined with the court's liberals in allowing iPhone customers to sue Apple over pricing in the App Store, and in blocking the execution of a Texas death-row inmate after the state refused to let him have his Buddhist priest in the lethal injection chamber.

Kavanaugh was in the majority in 91 percent of the term's decisions in which he participated, slightly more than Chief Justice John Roberts. Justice Neil Gorsuch, Trump's

other appointee, and Justice Clarence Thomas were least often in the majority.

Roberts, however, voted more often, because Kavanaugh did not take part in cases that he heard previously as a judge on the federal Court of Appeals in Washington.

The two Trump justices were on opposite sides in almost half of the opinions that were not unanimous, including rulings in which the high court found that separate prosecutions for the same offense in state and federal court do not violate the protection against double jeopardy, tossed out a lawsuit over political boundaries for the state legislature, and narrowed the grounds for prosecuting some federal crimes.

They also split in December when the court refused to hear appeals from states seeking to prevent Medicaid patients from using the services of Planned Parenthood. Gorsuch joined a dissent written by Thomas, who said the cases were not about abortion. Then Thomas asked: "So what explains the court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named 'Planned Parenthood.'"

But Kavanaugh and Gorsuch were together in one of the court's most unusual lineups, as the justices struck down a provision of federal law that prevented the government from issuing trademarks considered "scandalous" or "immoral" — a victory for a California man whose clothing line bears the word "FUCTION." They joined fellow conservatives Thomas and Justice Samuel Alito and liberal justices Elena Kagan and Ruth Bader Ginsburg in the majority.

The term was also notable for the hot-button cases the court put off until next year or avoided entirely. It declined to rule on whether business owners can refuse to provide their services for same-sex weddings based on their religious beliefs. But next year, the court will consider whether existing anti-discrimination laws make it illegal to fire employees on the basis of their sexual orientation.

The court declined to hear a challenge to the federal ban on bump stocks — devices that

allow a rifle to be fired rapidly like a machine gun — that went into effect in March. But next year, the justices will take up the first gun-rights case they've heard in almost a decade. It's a challenge to New York City's restriction on transporting guns outside the city limits. Some gun-control advocates were hoping the city will repeal the law in order to keep the gun issue from being taken up by the Supreme Court.

Even though the Justice Department has repeatedly urged it to act quickly, the court waited until the last day of the term to say it will take up the government's appeal of lower court rulings requiring the Trump administration to continue the Deferred Action for Childhood Arrivals program. DACA allows children of illegal immigrants to remain here if they were younger than 16 when their parents brought them to the United States and if they arrived by 2007. The White House has been trying for almost two years to shut down the Obama-era program.

“Empirical SCOUTS: Changes are afoot — 5-4 decision during October Term 2018”

SCOTUSblog

Adam Feldman

July 8, 2019

Every year, the SCOTUSblog Stat Pack provides readers with an unparalleled look at the business of the Supreme Court across all the merits cases it hears during a term. This year was no exception. The 2018 Term Stat Pack examines the details of the 67 cases the court decided after oral argument as well as the five summary reversals, for a total of 72 decisions this term. This post tracks some of the Stat Pack’s measures back to 2005 to compare the justices’ work over the years. It also highlights some differences that we saw this term and tracks these trends across the Roberts Court’s 14 terms so far.

Some of the most interesting facets of the justices’ work this term relate to the Supreme Court’s closest decisions in 5-4 and 5-3 splits (referred to here as 5-4 decisions), in which a single vote could change the coalition in the majority. In the past, Justice Anthony Kennedy played the role of swing justice, but after he retired at the end of last term, many were unsure who, if anyone, would inherit this role. Although Kennedy’s retirement was sure to change the composition of these majority coalitions, it was unclear to what extent this would insulate the court’s five more conservative justices in close cases. Interestingly, at the statistical level the court took a step back from the domination of conservative justices in 5-4 decisions that we

saw during the 2017 term. In 2017, all the votes in 5-4 cases that split the justices ideologically went in the conservatives’ favor. By contrast, in the 2018 term only 50 percent of the ideologically split 5-4 decisions had the more conservative justices in the majority, with the majority in the other half comprised of the four more liberal justices and one conservative justice. This also led to a Roberts Court record in terms of the number of alignments in these 5-4 decisions.

The total of 10 alignments this term is up from five in the previous term and a previous high of seven since 2005. This was also the first time since Chief Justice John Roberts joined the court that we have seen each of the five more conservative justices vote with the four more liberal justices in five-justice majorities. In *Gundy v. United States*, Justice Samuel Alito played this role for the first time since he joined the court in 2005. Interestingly, each of the more liberal justices also voted in coalitions this term in which they were the lone liberal in the majority.

For the purpose of this post, Justice Sandra Day O’Connor/Alito, Justice Antonin Scalia/Justice Neil Gorsuch, Justice Clarence Thomas, Roberts and Justice Brett Kavanaugh are coded as conservative

justices. Kennedy is not treated as a conservative or liberal justice. Justice David Souter/Justice Sonia Sotomayor, Justice John Paul Stevens/Justice Elena Kagan, Justice Ruth Bader Ginsburg and Justice Stephen Breyer are coded as liberal justices. A swing justice is counted when four conservative or four liberal justices are in the majority along with one member of the opposite ideological grouping or Kennedy. The next figure shows each of the justices' swing votes between the 2005 and 2017 Supreme Court terms.

In this figure, we see that the greatest number of different conservative justices providing liberal swing votes in a past Roberts Court term was four in 2005. In part because O'Connor was on the court for the first portion of the 2005 term and departed after Alito was confirmed to take her seat, 10 different justices voted on cases during that term. Even so, this number of different justices providing swing votes in the liberal direction was surpassed in the 2018 term, which was the first time five different justices provided such swing votes (Here are the different majority compositions.).

Gorsuch provided the most swing votes for the more liberal justices this term with four. These decisions fell into two main areas — tribal and criminal law. Gorsuch has shown a propensity to find common ground with the more liberal justices on these issues in the past. *United States v. Davis*, like *Sessions v. Dimaya* a term earlier, dealt with unconstitutionally vague statutory language in the criminal justice context. Both cases came down to 5-4 votes, with Gorsuch siding with the more liberal justices in the majority. In the 2017 term, Gorsuch voted in

the opposite direction from Alito and Thomas in *Upper Skagit Indian Tribe v. Lundgren*. Because Gorsuch already differentiated his position in this area from those of the other more conservative justices, his votes with the more liberal justices in the two tribal-law cases this term, *Washington State Department of Licensing v. Cougar Den* and *Herrera v. Wyoming*, were not entirely unexpected.

When we separate out the justices into coalitions in 5-4 decisions based on whether there were four liberal justices in the majority, at least four conservative justices in the majority, or a different mix of justices in the majority, we see that the greatest percentage of 5-4 decisions that went to liberal majorities in a term since 2005 was 50 percent in both the 2014 and 2016 terms. The greatest percentage that went to conservative coalitions was 70 percent during the 2017 term.

If the majority in *Department of Commerce v. New York* is treated as Roberts with the four more liberal justices, then coalitions with liberal justices fall just below the 50 percent mark in the 2018 term with 45 percent. Conservative coalitions were at half of their rate from 2017 during the 2018 term with 35 percent. This marks the fourth term since 2005 as well as the fourth term over the past five in which a higher percentage of liberal coalitions were in 5-4 majorities than conservative coalitions.

This term Gorsuch, who voted on the same side as the more liberal justices in four different decisions, was the justice most frequently in the majority in 5-4 decisions at

65 percent. Gorsuch was followed by Kavanaugh, who was in the majority in 61 percent of the court's 5-4 decisions. Compared to previous terms, these are relatively low percentages for the justices most frequently in the majority in such decisions.

When we look at majority-opinion authorship in 5-4 decisions, Roberts wrote the largest percentage of these of all of the justices at 36 percent.

Each of the justices aside from Kavanaugh (who was in his first term on the court in 2018) had terms with higher frequencies in the majority in 5-4 decisions than they did this term. Gorsuch, who was at the top of this metric this term, was still in the majority nearly 20 percent more of the time last term. Roberts' highest frequency was last term at 90 percent.

Focusing on the fraction of majority opinions authored by each justice in 5-4 decisions out of all 5-vote majority decisions for the term, both Roberts and Thomas wrote a greater percentage of such opinions than they have in previous Roberts Court terms, at 36 and 33 percent, respectively. Note that the justices no longer on the court are not shown in this figure, although their respective percentages (especially Kennedy's) are what keeps the aggregate 5-4 decision authorship by term below 100 percent.

The Supreme Court with Kavanaugh is distinctly different from the court with Kennedy. There is no longer a clear swing vote. Justices like Gorsuch have shown willingness to side with the liberal justices in certain case areas, but this will likely only manifest in a limited set of cases each term. This term it was apparent that all justices may be attempting to reinvent their identities, at least to some extent. We can see this reinvention in the court's 5-4 decisions in which justices appear to be willing to make concessions to reach a consensus. Still, the justices' positions on different ideological poles are quite evident, as the coalition most frequently in the majority in 5-4 decisions was composed of the five more conservative justices, who voted together in seven of these cases. This fracture between the more conservative and the more liberal justices was especially clear in the court's decision on partisan gerrymandering in *Rucho v. Common Cause*.

With a bevy of contentious cases on the horizon dealing with issues ranging from the Second Amendment, to DACA, to Title VII discrimination against transgender individuals, we should continue to see the justices split predictably on certain issues, while we might expect some surprises as the justices seek consensus in ways they never needed to with Kennedy on the court.

“Trump on collision course with Supreme Court; justices may avoid interference in 2020 election”

USA Today

Richard Wolf

May 5, 2019

President Trump is on a collision course with the Supreme Court, a trajectory that threatens to put the justices in the middle of the 2020 election.

Disputes over congressional subpoenas for documents and testimony, as well as legal battles over administration policies and Trump's businesses, finances and personal affairs, are moving inexorably toward a court Trump has sought to shape in his image.

In one box are myriad disputes over immigration, as well as health care and transgender troops in the military. In another are lawsuits seeking to pry open – or keep secret – Trump's business dealings, financial records and tax returns. Even his Twitter account is a target.

Most recently, the president's vow to fight all subpoenas from House Democrats and Attorney General William Barr's refusal to testify before a House panel have threatened to add another layer to the looming high court showdown.

Some battles already have reached the justices. They ruled narrowly last year in favor of the president's travel ban on several majority-Muslim countries. They seemed inclined last month to allow the Commerce

Department to add a question on citizenship to the 2020 census, again by the slimmest of margins.

The question now is how many hot-button squabbles the high court will settle or sidestep in the 18 months remaining before Election Day.

Several factors may delay or derail many of the confrontations. The wheels of justice turn slowly. The Supreme Court turns down 99 of every 100 cases that come its way.

And the justices likely want to stay "three ZIP codes away" from political controversy, as their newest colleague, Brett Kavanaugh, put it during his confirmation hearing last year.

"All these cases are long shots for multiple, independent reasons," said Stephen Vladeck, a law professor at the University of Texas who follows the high court closely. "If this is a one-term presidency, the clock will run out while these cases are still percolating."

The likelihood that the Supreme Court will face a flurry of Trump-related cases increases exponentially if he wins re-election, however. Second terms tend to be litigious; think Richard Nixon's Watergate scandal and Bill Clinton's Whitewater investigation. If Democrats retain control of the House or win

the Senate in 2020, the collisions could come in bunches. Special interest groups challenging Trump up and down the federal court system hope they don't have to wait that long.

"I think it could be next year that we get the beginnings of the Trump rule-of-law docket," said Elizabeth Wydra, president of the liberal Constitutional Accountability Center. "You don't want the court to essentially sit on these issues simply to avoid grappling with the tough questions."

Mixing politics and law

Since Kavanaugh's high-wire confirmation last fall, the justices have sought a lower profile, although not always with success. That's particularly true for the nation's 17th chief justice, John Roberts, who shuns mixing politics and the law.

For three months, the court has been sitting on a Justice Department petition to end protections for undocumented immigrants brought to the United States as children – as if the court is waiting for the White House and Congress to negotiate a compromise.

Following that case in lower courts are others challenging immigration policies on asylum, temporary protections and families separated at the border.

The administration has lost a series of court decisions in its effort to withhold funds from local governments that refuse to help federal immigration authorities. Now it faces a handful of lawsuits over the use of emergency funds to build part of a wall along the southern border. Lurking in federal

appeals courts are lawsuits challenging the Affordable Care Act passed under President Barack Obama in 2010, which the Supreme Court has upheld twice before, as well as federal policies restricting access to abortion and contraception services.

The justices weighed in earlier this year on Trump's partial ban on transgender troops in the military, ruling along ideological lines that it could take effect while lower court challenges continued. The broader policy switch still may reach the justices in the future.

On that issue and others, the Trump administration's chances of legal salvation are better at the high court than many of those en route. Its conservative majority, bolstered by Kavanaugh's replacement of retired Associate Justice Anthony Kennedy, likely will be sympathetic toward executive branch authority over immigration and national security policy.

"I think these are all plausible cases for the administration," said Eugene Volokh, a prominent conservative professor and blogger at UCLA School of Law.

Roberts, in particular, "thinks the court should play an important role in resolving legal questions," Volokh said. "It's hard to do that if you punt on those legal questions." 'A very different world'

Lawsuits involving Trump's tax returns, hotels and golf courses, and private life are less likely to be considered by the high court during the 2020 campaign. But that won't stop challengers from trying.

Subpoenas from House Democrats seeking testimony and documents, including a redaction-free copy of special counsel Robert Mueller's report on Russian interference in the 2016 election, are expected to result in protracted negotiations. The same goes for the battle over Trump's tax returns.

Democrats continue to press their case that Trump violated the emoluments clause of the Constitution by doing business with foreign governments while in office. A federal appeals court in Virginia appeared skeptical of that challenge during a hearing in March. But U.S. District Judge Emmet Sullivan ruled Tuesday that Democrats in Congress can press ahead with allegations that Trump is

violating the Constitution's ban on foreign gifts and payments. A federal appeals court in New York, meanwhile, is nearing a decision on whether Trump had the right under the First Amendment to ban followers from his Twitter account.

"Many of these cases may not make it all the way to a merits decision at the Supreme Court if Trump's is a one-term presidency," said Joshua Matz, a lawyer and legal blogger who co-authored a book on impeachment last year. "If Trump's is a two-term presidency, then we'll be living in a very different world."

“They’re not ‘wonder twins’: Gorsuch, Kavanaugh split the Supreme Court, but their differences are striking”

The Washington Post

Robert Barnes

June 29, 2019

President Trump’s nominees shifted the Supreme Court during their first term together but hardly transformed it, and their differences were on display as much as their famous similarities.

On the big issues, it turned out, Justices Neil M. Gorsuch and Brett M. Kavanaugh were ready to move the court as far to the right as Chief Justice John G. Roberts Jr. would abide — and then some.

Because of them, the court finally and forcefully disavowed any role in policing partisan gerrymandering, a decades-long goal of conservative justices. Both were ready to approve the Trump administration’s desire to put a citizenship question on the 2020 Census, even as Roberts said, hold up.

Both appear tough on death penalty appeals and more open to the concerns of religious interests. Abortion rights supporters have cause for concern.

But it is differences between the Georgetown Prep alums — in style and substance — that are drawing the most attention, both in the term just completed and in projections for their long future on the court. According to data compiled by Adam Feldman, who runs the website Empirical SCOTUS, Gorsuch

and Kavanaugh have disagreed more than any pair of new justices chosen by the same president in decades.

Kavanaugh was about as likely to be in sync with his liberal seatmate Elena Kagan as his fellow conservative Gorsuch, Feldman’s research shows.

“One of the most interesting dynamics on the court is that Justice Gorsuch and Kavanaugh, at least early on in their time on the court, have charted different paths,” said Washington lawyer Gregory G. Garre, who was solicitor general for President George W. Bush.

“They do not seem intent on playing the role of ‘wonder twins.’”

According to Feldman’s numbers, rookie Kavanaugh was in the majority more than any other justice, with Roberts in second place. Gorsuch was at the bottom, with the court’s liberals and the iconoclastic Justice Clarence Thomas, a conservative who specializes in dissent.

“I think there was some thought that the common backgrounds of Justice Gorsuch and Kavanaugh might cause them to look at issues the same way,” veteran Supreme Court practitioner Carter G. Phillips told an

audience at the Washington Legal Foundation recently.

“I’m sure they will in some instances, but I think there are a lot of instances where I don’t think they will.”

Gorsuch, 51, and Kavanaugh, 54, have known each other since their days at the Catholic prep school in the Washington suburbs. They both went to Ivy League law schools — Harvard for Gorsuch, Yale for Kavanaugh — and clerked at the Supreme Court at the same time for the same justice: Anthony M. Kennedy.

Both worked in the Bush administration and both were named appeals court judges in the same year, 2006. Their conservative jurisprudence made them favorites of like-minded lawyers in the Federalist Society, and favorites for a spot on the Supreme Court the next time there was an opening and a Republican was president.

But once there, the differences have become more apparent. At times, they seem to be walking in the shoes of the men they replaced: the late conservative Antonin Scalia in Gorsuch’s case, the more moderate Kennedy for Kavanaugh.

Gorsuch took the bench in April 2017. By the time the term ended two months later, he had shown himself skeptical of the reach of the court’s decision granting same-sex couples the right to marry, further to the right than almost all of his colleagues on gun rights and not particularly deferential to Roberts.

There are gradations among the conservatives on the court, just as there are

with the liberal justices. Gorsuch most frequently aligns himself with Justice Samuel A. Alito Jr. and Thomas. He and Thomas, particularly, are usually ready to discard the court’s past rulings.

They are “rock-ribbed originalists,” in the words of Allyson Ho, another lawyer who argues before the court.

Gorsuch’s libertarian instincts are strong, and sometimes they put him more in agreement with the liberals than the conservatives. That happened several times this term, mostly in criminal cases where Gorsuch felt the law was too vague.

In one such case, Gorsuch wrote the majority opinion; Kavanaugh wrote the dissent.

He plans to outline his views further in a book, due this fall, titled “A Republic, If You Can Keep It,” for which he reported a \$225,000 advance in his recent financial disclosure. Events are being planned at the presidential libraries of Bush and Ronald Reagan.

“Justice Gorsuch has been incredibly interesting to watch, because I think he’s charting his own path,” said Nicole Saharsky, a lawyer who frequently argues before the court. “I don’t think we know exactly where the path is going to lead, but I think he’s confident that he can be on it by himself.”

Kavanaugh, on the other hand, “has gravitated to the center of the court, and the chief,” said Garre.

It is not surprising the Marylander has kept a low profile after his bitterly partisan and

brutal confirmation battle. The public's image of Kavanaugh is likely his angry, tearful rebuttal of Christine Blasey Ford's accusation of a teenage assault.

There have been no public speaking events, save for an appearance before judges and lawyers. A planned law school teaching gig overseas this summer brought protests at George Mason University.

On the bench, Kavanaugh is polite, deferential with his colleagues and often chatting and laughing quietly with Kagan. He, too, has occasionally sided with liberals, and been rewarded for it.

Justice Ruth Bader Ginsburg, as the senior justice in the majority, picked Kavanaugh to write the court's high-profile opinion saying an antitrust lawsuit against Apple could move forward. (Gorsuch wrote the dissent.)

Roberts chose Kavanaugh to write the court's decision overturning the conviction and death sentence of Curtis Flowers, a black Mississippi man who has been tried six times for murder by a white prosecutor. Kavanaugh wrote that the "State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."

Thomas and Gorsuch dissented.

In his almost nine months on the court, Kavanaugh has been eager to explain himself in writing. When he voted to allow a Louisiana law to go into effect that would have closed all but one of the state's abortion clinics, he offered what he said would be a compromise that would allow additional review if warranted.

No other member of the court joined it, and Roberts voted with the court's liberals to block the law for now.

The differences between Gorsuch and Kavanaugh might be more noticeable because the term was without many contentious political disputes. In the two that mattered on the last day of the term, gerrymandering and the census, they were together.

Also, there were plenty of odd coalitions this term. According to Feldman's statistics, every conservative member of the court at some point voted to form a majority with the liberal justices. And every liberal at least once left behind all of his or her usual voting partners to join the conservatives.

"On the whole, this term has seen a court acting as though it is in transition, with the justices still figuring each other out," said Garre. "Even the justices don't seem to know where the court is headed at this point.

“The latest chapter in the Gorsuch-Kavanaugh saga is the most revealing yet”

The Washington Post

Leah Litman

June 27, 2019

Of all the dynamics at play in the Supreme Court’s just-concluded term, none was more intriguing than this latest chapter in the story of Justices Neil M. Gorsuch and Brett M. Kavanaugh. Graduates of the same high school, members of the same Supreme Court clerks’ class and now fellow Supreme Court justices, the differences between their conservative philosophies — especially in the realms of criminal justice and respect for precedent — began to emerge this term. Gorsuch and Kavanaugh were always going to alter the balance of the court in ways that would reverberate for years to come. And this term revealed that their ongoing disagreements may have an unexpected impact on the court’s reputation.

It’s true that in cases with big stakes for our democracy, the five conservative justices often voted together in ways that favor the Republican Party. Most notably, they hung together in ruling that the federal courts may not interfere in drawing legislative districts, even to balance out extreme partisan gerrymanders. And the five conservatives also voted in lockstep to overturn a series of precedents on issues that tend to divide along ideological lines, among them a 40-year-old precedent that had allowed private citizens to sue states in another state’s court, and a 70-year-old line of cases that made it harder for

private parties to challenge government takings of private property.

But in a series of cases, the two most recent nominees to the court diverged from one another, with Gorsuch revealing a libertarian perspective and Kavanaugh representing a vision closer to big-government conservatism.

Gorsuch wrote majority opinions in two separate cases invalidating criminal-justice statutes, in which he was joined by the four liberal justices. In one case in which the majority declared that a criminal statute Congress had written was too vague to be enforced, Chief Justice John G. Roberts Jr. assigned the dissent to Kavanaugh. The result was an opinion that highlighted Kavanaugh’s differences with his colleague. Gorsuch’s majority opinion warned of the dangers to liberty from overbroad criminal laws; Kavanaugh opened his dissent with statistics about the dangers of violent crime.

The differences between Gorsuch and Kavanaugh also reflect the two justices’ differing approaches to Supreme Court precedent. Gorsuch revealed that he is extremely comfortable with overruling the court’s prior cases, to the extent that he mocked the other justices for flinching at the opportunity to overturn an earlier precedent.

And he wrote an opinion that carved out a newly fashioned exception to the doctrine of *stare decisis*, which generally requires the court to adhere to its prior cases.

Kavanaugh took a more traditional approach, most notably in *June Medical Services v. Gee*, in which he felt the need to place his vote in the context of earlier Supreme Court decisions despite his divergence from precedent. In that case, the court was asked to decide whether Louisiana could enforce a law regulating abortion providers before the court has the opportunity to decide whether to hear a challenge to the Louisiana law.

The Louisiana law in *June Medical*, which required abortion providers to obtain admitting privileges at hospitals within 30 miles of where they perform abortions, is the same law that the Supreme Court invalidated three years ago in a case arising out of Texas. Gorsuch would have allowed Louisiana to enforce its law, and he did not feel the need to explain his vote. Kavanaugh, however, felt compelled to argue that his vote could be reconciled with the court's previous decisions on abortion, including the case that had invalidated the same law Louisiana enacted. Kavanaugh's position in *June Medical* is still very conservative. But by comparison with Gorsuch's more aggressive approach to precedent, both Kavanaugh and Roberts end up appearing more moderate to the general public.

The Trump administration inadvertently created another opportunity for the Supreme Court to make what to laymen might seem to be a surprising decision. The administration attempted to engineer a reasonable justification for adding a question about citizenship to the 2020 Census. The result was that in *Department of Commerce v. New York*, the chief justice joined the four liberal justices in concluding that the Trump administration had not adequately justified the addition of a citizenship question to the census. As Roberts cautioned, this was a "rare" case with "extensive" evidence of the administration's dishonesty.

That laxness, not a conviction that a citizenship question is inherently out of bounds, animated the court's decision Thursday. But in an environment where observers eager for victory are sometimes too quick to seize on encouraging signs, the census case suggests that without careful scrutiny, the Supreme Court can make conservative decisions and still get credit for showing flashes of liberalism.

But there is a difference between a split in the five-justice conservative majority and a loss for conservative principles. If this term is any evidence of what's to come, the differences between Kavanaugh and Gorsuch may occasionally move observers to argue that the Supreme Court remains a nonpartisan institution, even as it frequently advances partisan goals.