# Review of the U.S. Supreme Court's Term
# 2018-19

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# "The Supreme Court in Transition"

**I. First, the Term is not quite finished. Which cases (five are left) remain to be decided?**

-- **Census citizenship** case (*Dept. of Commerce v. New York*).

-- Partisan **gerrymandering** cases from Maryland (*Lamone*) and North Carolina (*Rucho*).

**II. Let's take a quick "overview" look at the membership, and work, of the Court today.**

**A. Workload**

-- "Low output" has become the norm. This Term, 69 signed majority opinions (7-8 per Justice) after full briefing and argument, which is significantly higher than last year's 59 (although well below the 150+ cases that were argued and decided per Term in the 1980s).

-- Plus 1 "DIG" and 5 "summary reversals" this Term (cases reversed just on the *certiorari* briefs, without full briefing or argument). Some Justice has to write these.

-- Ninth Circuit still produces a large chunk of the docket, and is not the most reversed.

-- The Court has already granted over 30 cases for review next Term (and more coming).

**B. Who are the Justices** and (importantly?), where do they sit?

-- Kavanaugh sits next to Sotomayor; Gorsuch sits next to Kagan. Does this matter?

**II. "Headlines" – and the Term is not yet quite finished!**

**1. Justice Kavanaugh's first Term, and Justice Gorsuch's second; how do they compare?**

**-- 5-4 decisions: a remarkable set of shifting line-ups (a least nine different ones).**

**-- Any retirements or vacancies coming? – The "Trump Court"?**

**2. "Stare Decisis" -- What does it mean, and are there any "neutral principles" for it?**

**3. "Big" decisions, by topical areas.**

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**1. Justices Gorsuch and Kavanaugh -- their differences are emerging.**

-- They clerked together with Justice Kennedy in 1993-94, now both "Trump Justices."

-- Certainly they are both "conservative." But exactly what will that mean?

-- They do not always vote the same way.

[1] Credit where credit is due: I draw much of my raw data from SCOTUSblog.com, to which I am a regular contributor.

-- *E.g.*: ***U.S. v. Davis*** (June 24): 5-4, Gorsuch majority, BK dissent. Very different. A "pro-defendant" criminal result. Gorsuch took Scalia's seat, and shows similar occasional "pro-defense" (Libertarian? Individualist?) inclinations?

-- More examples: Today's ***Haymond***: Gorsuch again with the "libs" while BK joins Alito dissent. Also, Gorsuch dissent in ***Gundy***, again with the "libs": The "chief prosecutor" may not "write his own criminal code"; ***Gamble*** dissenting (also Ginsburg): "When governments may unleash all their might … against an individual, … it is the poor and the weak, and the unpopular and controversial, who suffer".

-- But is BK more "conciliatory" on "societal concerns"? *E.g.*, concur in ***American Legion*** cross case: "I have deep respect for the plaintiff's sincere objections to seeing the cross on public land. … I recognize their sense of distress and alienation." Versus tough NMG dissent: no "offended observer" standing?

-- And BK majority opinion in ***Flowers*** (Gorsuch dissented): much race bias awareness.

-- Lesson? Even in today's ultra-vetted & partisan confirmation world, it's hard to predict where Justices will be on important issues once they have lifetime and unreversible "Highest Court" tenure,

**-- Which leads to considering this Term's various 5-4 Justice splits.**

-- There have been nine variations (how many are mathematically possible?), out of 19 5-4 decisions (as of Wednesday morning June 26). **10 "won" by the "libs"!** Very different from last Term when Kennedy did not vote with the libs once in a 5-4 case.

-- **Four** are "Gorsuch plus libs." Two are libs plus CJ; and one is "libs plus BK."

-- Meanwhile, two are "conservs" plus Ginsburg (one) or Breyer (one).

-- Of course, half are the "predictable" 5-4 split. Examples: *Nielsen v. Preap* (no-bail immigration detention); *Knick* (Takings overruling precedent) a good example.

-- Note: Kagan and SS don't always agree either (*Davis*; *McDonough*). But they usually do.

-- Finally, there was one weird 3-3-3 decision (6-3 on result). *Virginia Uranium* (pre-emption). Maybe nine Justices is not the perfect number? (It's not in the Constitution.)

-- A bunch of proposals to change the number, or life-tenure, have been twittered.

**-- As for retirements,** those of you who were here last year know that I am always right.

-- Thomas (71)? Breyer (80)? Ginsburg (86) health? They all say no.

**2. The Court's huge internal debate about precedents and the doctrine of "Stare Decisis."**

-- At least six cases this Term posed "overrule precedent" issues (four explicitly). Two overruled, plus two almost did; two did not overrule. A doctrine in flux; more to be done.

-- ***Gamble*** (dual sovereignty); ***Gundy*** (non-delegation); ***American Legion*** (religion *Lemon* test); ***Knick*** (Takings, precedent overruled); ***Hyatt*** (States are immune from lawsuits by other States; precedent overruled); ***Kisor*** (*Auer* not overruled: deference to agency interps of own rules is sometimes, but not always, warranted).

-- Kagan in *Knick*: direct and almost bitter: "smashes a hundred-plus years of legal rulings to smithereens." "We may as well not have principles about precedents at all." "Now one may wonder yet again."

-- Today's ***Kisor*** opinions (Kagan, Roberts, Gorsuch and Kavanaugh) provide perhaps the best discussion of the doctrine, albeit on an obscure (but important) doctrine of agency deference.

-- The obvious future concern: abortion/choice rights (*Roe v. Wade* (1973); *Casey* (1992)). This Term there was **one abortion case**: ***Box v. Planned Parenthood***, an unusual non-argued case, summarily reversing invalidation of fetal remains disposal statute, and denying review of invalidation of ban on "sex, race or disability-selective" abortions (no Circuit split).

**3. Before we run out of time, "big" cases already on NEXT year's docket.**

-- Transgender and sexual orientation discrimination: included in Title VII (employment)?
  -- 3 cases: *Altitude Express*; *Bostock*; and *Harris Funeral Homes*.
-- Second Amendment and gun regulations: *New York State Rifle & Pistol v. NYC*.
-- Five consol. cases from Puerto Rico w/ "heavy-hitter" SCt lawyers. Issues: "Appointments Clause" and "de facto officer" doctrine (*Financial Oversight Board v. Aurelius*).
-- *Hernandez v. Mesa*: cross-border shooting of minor; is there a *Bivens* action?
-- **Criminal cases** (including):
  -- *Kahler v. Kansas*: can state abolish insanity defense entirely?
  -- *Ramos v. Louisiana*: are unanimous criminal jury verdicts required nationally?
  -- *Kansas v. Glover*: 4th A: is registered owner not driving reasonable suspicion to stop?
  -- At least two death penalty cases: *Mathena v. Malvo*; and *McKinney v. Arizona*.

## III. "Big" Decisions of this Term

This is always somewhat "in the eye of the beholder." As always, the Court decided some extremely important cases, even if media attention was fleeting or non-existent.

-- And there are still five to go, including …. Census & partisan gerrymandering.

### A. First Amendment cases.

-- ***American Legion*** (the "Bladensburg Cross" case), **Alito**, 7-2: A "Latin cross" erected in 1925 as a World War I memorial does not violate the Establishment Clause. Seven separate opinions. Kagan dissent is particularly complementary to Alito. Kavanaugh, while concurring, expresses particular sympathy for the plaintiffs' concerns.

-- ***Iancu v. Brunetti*** (F-U-C-T trademark case; reminiscent of *Cohen v. Calif* (1971) "F*** the Draft" t-shirt case). **Kagan**, 6-3. Statute that allows rejection of trademarks that are "immoral or scandalous" is viewpoint-based and therefore unconstitutional. Roberts, Breyer and Sotomayor all express the view, in separate opinions, that "obscene, vulgar, or profane" modes of expression, could or should still be denied as trademarks.

-- ***Mannhattan Community Access v. Halleck*** **(Kavanaugh**, 5-4; Sotomayor dissent): Privately owned "public access" cable channel operators are not "state actors," even if state law requires public access, so they may restrict access based on content.

-- ***Nieves v. Bartlett*** (**Roberts**, 6-3; Ginsburg dissent in part; Gorsuch dissent in part; Sotomayor dissent): When plaintiff files a "First Amendment retaliatory arrest" claim, the existence of probable cause to arrest will ordinarily defeat it. But a narrow exception should exist when, although there was probable cause to arrest, objective evidence shows that similarly-situated persons engaged in the same sort of speech have not been arrested.

### B. "Non-delegation" doctrine

**-- *Gundy v. United States*.** An 8-Justice Court splits 4-1-3 (**Kagan** writing; case was argued before Kavanaugh confirmed), finding this an "eas[y]" case once the (criminal) statute here is interpreted to clearly provide an "intelligible principle" for the Executive branch to follow. "If [this statute] is unconstitutional, than most of Government is unconstitutional."

This case is a "big deal" because **Gorsuch writes in dissent** that the "intelligible principle" standard "has no basis in the original meaning of the Constitution, or history, or [precedent]." Justice **Alito**, concurring only in the judgment, writes "If a majority .. were willing to reconsider the

approach …, I would support that effort." If you add **Kavanaugh's** non-vote, that makes five – possibly placing in danger the non-delegation doctrine, remarkably deferential since 1935.

**C. The "Dormant ("negative") Commerce Clause" and the 21st Amendment**

-- ***Tennessee Wine & Spirit Retailers v. Thomas*** (**Alito**, 7-2; Gorsuch dissent w/ Thomas): State two-year-residency requirement for retail liquor sales licenses violated the "negative" Commerce Clause, and the 21st Amendment does not save it. It "blatantly favors the State's residents and has little relationship to public health and safety." And "the Commerce Clause by its own force restricts state protectionism;" this is "deeply rooted in our caselaw. **Gorsuch** dissent: States have imposed residency requirements on alcohol sales for more than 150 years, and a 1913 federal statute endorse the States' freedom here. The "peculiar" and non-textual dormant commerce clause should not override this; instead, the 21st Amendment endorses traditional State differences in this area.

**D. Constitutional "Standing"**

-- ***Virginia House of Delegates*** (a gerrymandering challenge) **-- Ginsburg**, 5-4; Alito dissents with Roberts, Breyer and BK.: The State House of Delegates lacks standing, because "This Court has never held that a judicial decision invalidating a state law … inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." Leaves in place pro-Democrat districting. Does it endanger standing for the federal House of Representatives or Senate?

**E. Antirust law.**

-- ***Apple v. Pepper*** (the "Iphone app" case) -- **Kavanaugh**, 5-4; Gorsuch dissent with the three other "conservatives": Iphone owners who purchase "apps" from the Iphone "app store" may sue Apple for alleged antitrust violatioons, as "direct purchasers," even though the price of apps is set by an intermediary, the app producer. "*Illinois Brick* is not a get-out-of-court-free card."

**D. Criminal cases.**

This is my personal bread and butter; but still, there were some "big" decisions this Term. In addition to *Gundy* and *Neilsen v. Preap*, mentioned above, here are some of them:

-- ***Gamble v. United States*** **(Alito**, 7-2; dissents by Ginsburg and Gorsuch): Longstanding "dual sovereignty" doctrine for Double Jeopardy, allowing a State and the federal government to prosecute the same person for the same offense, is not overruled.

-- ***Timbs v. Indiana***: The 8th Amendment's prohibition of "excessive fines" is now incorporated against the States. So it applies to criminal forfeitures. Brief 9-page opinion, but not the shortest of the Term (6-pager in PDF). **Ginsburg**, 9-0; Gorsuch concur; Thomas concur in judgment.

-- ***Flowers v. Mississippi*** (**Kavanaugh**, 7-2; Alito concur; Thomas dissent): Outrageous striking of African-American potential jurors, repeatedly by same DA in six trials of Flowers, violates *Batson* (1986). The record proves that Mississippi Supreme Court was wrong to hold that strikes were not "motivated in substantial part by discriminatory intent." Long and sensitive history of race bias in jury selection. **Alito**: I agree, but "likely one of a kind." **Thomas** (joined by Gorsuch): 42 pages of vitriol; *Batson* was wrongly decided.

-- ***United States v. Haymond*** (**Gorsuch**, 5 (4-1) to 4; Breyer concur in judgment; Alito dissent): Federal supervised release statute -- mandating an additional five years imprisonment if person (on release after serving imprisonment sentence) is found by a preponderance of evidence to possess child pornography – violates the Sixth Amendment doctrine of *Apprendi* (2000). First

sentence: "Only a jury, acting on proof beyond reasonable doubt, may take a person's liberty." (Coincidence(?): affirming underlying Tenth Circuit judgment, Gorsuch's former court). Remanded to consider whether a jury trial could "save" the statute. Breyer's fifth vote says only this "specific provision;" but "I agree with much of the dissent." Alito dissent: No "constitutional basis;" and Gorsuch opinion "sports rhetoric with potentially revolutionary implications."

-- ***Rehaif v. United States*** (**Breyer**, 7-2; Alito dissent): When a federal statute prohibits nine categories of people from possessing firearms, and criminalizes anyone who "knowingly violates" the statute, the mens rea of "knowingly" applies "both to the defendant's conduct and … status." For example, for "felon in possession," the government must prove beyond reasonable doubt that the defendant knew s/he possessed a firearm and that s/he knew she was a felon. The "longstanding presumption" that a "culpable mental state" (*mens rea*) applies to every element of the offense (except, perhaps, jurisdiction). **Alito** (at twice the length): "Today's decision will make it significantly harder to convict persons…."

-- ***Garza v. Idaho*** (**Sotomayor**, 6-3; Thomas dissent with Gorsuch and Alito): It is Sixth Amendment ineffective assistance for a lawyer to not file a notice of appeal when instructed by the defendant, even if the defendant has pled guilty with a signed "waiver of appeal." Even if "many claims were surrendered" the defendant has a "right to a [appellate] proceeding" and can "always challenge whether the waiver itself was knowing and voluntary." Also, some claims are simply "unwaivable." When the lawyer does this, courts must presume prejudice rather than require a specific showing that unwaived appellate claims had merit (which we think would "prove both unfair and inefficient in practice"). **Thomas** dissent: "no basis" in precedent or "in the original meaning of the Sixth Amendment."

-- **Federal enhanced sentencing cases:**

***U.S. v. Davis*** ("crime of violence" definition is unconstitutionally vague).

***Stitt*** and ***Quarles*** (burglary), and ***Stokeling*** (robbery): all Armed Career Criminal Act cases, and all decided for the government.

-- **Death penalty cases** (in addition to *Flowers*, above):

-- ***Bucklew v. Precythe*** (**Gorsuch**, 5-4; Thomas and Kavanaugh concurs; Breyer and Sotomayor dissents): Method-of-execution rules from *Baze-Gossip* precedents apply to all such challenges; Bucklew's medical condition, while unusual, shows no "clear and considerable risk" of "severe pain." Also, "Last-minute stays should be the extreme exception." **Kavanugh**: requirement to identify an "alternative method of execution" does not require a method "authorized under state law," so it will be easily met. **Sotomayor**: that requirement is wrong; and majority's "troubling dicta" on last-minute stays is wrong and "a radical reinvention of … the judicial role."

-- ***Madison v. Alabama*** (**Kagan**, 5-3; Alito dissent): Eighth Amendment does not prohibit execution of person who has no memory of the crime. But 8th A does prohibit executing person who has no "rational understanding" of why the State seeks to execute, whether due to "dementia" or any other "distorted mental state" or "mental condition." They are "all the same under *Panetti*" (2007).

-- Summary reversals: ***Moore v. Texas*** (6-3) and ***Shoop v. Hill*** (9-0).

-- Stays, denial of stays, denials of *certiorari*: *Lance v. Sellers*; Christopher *Price*; Spiritual advisors: Dominieque ***Ray*** (Muslim), stay denied, execution averted only by happenstance) versus Patrick ***Murphy*** (Buddhist, stay granted 6-3, BK explains his concur).

**E. Trivia: a final gratuitous swipe at the late Judge Reinhardt.**

**--** In ***Yovino v. Rizo*** (per curiam summary reversal), the Court ruled that when a judge dies before an opinion is released, and that judge's vote "made the difference" (here, the 6th vote in an 11-member en banc Ninth Circuit decision), that judge's vote may not be counted even if all the votes were settled prior to his death (he wrote this one) and only Clerk's Office corrections remained to be done. The Court saw fit to mention Judge R by name; Justice Sotomayor noted that she only "concurred in the judgment."

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