

FOREWORD

The Roberts Court

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 19th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium on September 17—which this year also coincides with the release of my new book, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court*.

Of course, this year is unusual in that our Constitution Day symposium, like so many other annual events that mark the rhythms of Cato's, Washington's, and the legal community's calendar, is virtual. Those of us fortunate enough to be able to continue gainful employment during the COVID-19 pandemic, at vocations that allow relatively uninterrupted remote work, have had to adjust to a new way of doing business.

That includes the Supreme Court. After canceling the March and April oral arguments, the Court set a rare May argument session, while also pushing a dozen cases into next term. The Court's ten arguments that month were the first time since 1997 that the court heard arguments so late—and the most May arguments since 1961. These arguments, like so much else these days, relied on technology rather than in-person meetings, albeit as 20th-century teleconferences instead of 21st-century videoconferences.

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Chief Justice John Roberts, soon after presiding over Donald Trump's impeachment trial—remember that?—choreographed what turned out to be genteel hearings, with the justices asking questions one at a time by seniority, not the traditional free-for-all where advocates have a hard time getting a word in edgewise. It turns out that the Supreme Court's teleconferences are just like ours, with flushing toilets and participants' forgetting to unmute.

The argument delays and cancellations left the Court with just 53 signed opinions, the lowest number since the Civil War. Many of those opinions came down in July, as the Court pushed into the second week of that month for the first time in recent memory. Of course, like the rest of us, this year the justices had nowhere else to be.

More importantly, for the substance of the Court's work, John Roberts emerged in the majority more than any of his colleagues, including in all but one of the 5-4 decisions. Although Justice Brett Kavanaugh was in the majority in just three fewer cases than Roberts, and Justice Neil Gorsuch in just two fewer than that—that trio is the Court's nucleus—this is the year it really became the Roberts Court.

To put a finer point on it, Roberts was in the majority in 58 of 60 cases, a 97-percent win rate. The only other justice who participated in at least 50 cases in a term and was in the majority that much since Roberts joined the Court in 2005 was Anthony Kennedy, who did it three times. Before Kennedy, the most recent justice to be in the majority that much was William Brennan in the 1968-69 term. The last chief justice to do it was Fred Vinson in 1949-50.

Now, Roberts isn't a true "swing" vote, even though this term he went with the progressives in 5-4 rulings more than any other conservative—twice, with Gorsuch the only other "defector," in the Indian law case on the last day of term (*McGirt v. Oklahoma*). Instead, he's the Court's "driver," steering the institution where he wants to go. Or the "anchor" justice, as SCOTUSblog's Adam Feldman put it, because of his tendency to vote in the Court's majority.

Most notably, Roberts shocked court-watchers by joining the liberals on three key cases decided at the end of June, involving LGBTQ rights (*Bostock v. Clayton County*), immigration (*DHS v. Regents of the University of California*), and abortion (*June Medical Center v. Russo*). That, plus Gorsuch's writing the opinion in *Bostock*, which had a

6-3 margin, set off a circular firing squad on the right, as so-called common-good constitutionalists—more interested in conservative results than neutral methods—went after originalists and textualists. That outrage tamped down a bit a few weeks later, when the Court issued three key religious-liberty rulings, two of them by 7-2 margins (*Little Sisters of the Poor v. Pennsylvania* and *Our Lady of Guadalupe School v. Morrissey-Berru*) and the other an emphatic rejection of any unequal treatment of religious schools in school-choice programs (*Espinoza v. Montana Department of Revenue*), written by the chief justice himself.

Moreover, when you look at the numbers, it was a pretty good term for conservatives. Of the thirteen 5-4 decisions, nine had the conservative justices together, and only three had a conservative defection. (The other was a quixotic copyright case with a heterodox alignment.) Compare that to the previous term, when there were eight 5-4 cases where a conservative justice joined the liberals and only seven where conservatives stuck together. Losses in high-profile cases sting, but this is by no means a left-wing court—which is why progressives breathed sighs of relief but aren't treating Roberts as the second coming of Anthony Kennedy, let alone David Souter.

Roberts has gone out of his way not to rock the boat, to maintain the status quo, and to try to extricate the Court from the larger political narrative. He strives mightily to defy political—and especially partisan—expectations. The chief justice is acutely aware that it's historically unusual to have all the Court's conservatives appointed by Republican presidents and all its liberals by Democrats, and yet that's where we are, at a time of maximum polarization and toxic public discourse.

That's why Roberts made several important moves this term that frustrated those of us who want clarity and the development of legal doctrine from the Court rather than the avoidance of potentially controversial decisions. In April, he led the Court to dismiss as moot *New York State Rifle and Pistol Association v. City of New York*, the first Second Amendment case the Court had taken up in more than a decade. Justice Brett Kavanaugh concurred in that 6-3 decision not to decide but urged the Court to "address that issue soon." Alas, Roberts's maneuvering apparently scared off Justice Gorsuch or Justice Samuel Alito—or he explicitly warned them off—because six weeks later, the Court lacked the four votes necessary to grant

any of the 10 pending Second Amendment petitions for review, over a dissent by Justices Kavanaugh and Clarence Thomas.

The same day as those denials—and further denials in a slew of qualified-immunity cases, with Justice Thomas again dissenting—the Court decided *Bostock*, which found that Title VII of the Civil Rights Act of 1964 protected against employment discrimination based on sexual orientation and gender identity. This was a textualist decision, interpreting “based on sex” to include those categories, not progressive cant about the meaning of words changing over time or finding contrived legislative history that trumped statutory text. Justice Kavanaugh had the better of the argument in dissent, explaining that Gorsuch was being too literal and that, even in 2020, we wouldn’t say that someone fired for being gay was fired “based on sex.” But regardless, Roberts wasn’t the deciding vote, instead sliding over to make the Court look more united and achieve a popular result.

Then in *DHS v. Regents*, Roberts wrote an opinion saying that the Trump administration didn’t properly explain why it rescinded DACA, the Obama-era program that allowed people who entered the country illegally as children to stay and receive certain benefits. There are many problems with that ruling—including requiring the government to maintain a potentially unconstitutional program without examining whether President Obama had the authority to create it in the first place—but Roberts again deferred to the political process. If President Trump is reelected, he can try rescission again to force Congress to fix our broken immigration system, but otherwise another popular policy remains in force. Regardless, Roberts’s opinion here serves as a roadmap for evermore ratcheting up executive power.

June Medical was perhaps Roberts’s most strategic, and most cynical, move. Here he joined the liberals’ invalidation of a Louisiana abortion regulation, but only on *stare decisis* grounds—the idea that sometimes we preserve erroneous precedent because it would be more disruptive to get it right. Roberts maintained his disagreement with a four-year-old case involving a similar Texas law *where he himself dissented*, but felt bound by that ruling. It was an unprincipled application of a doctrine that didn’t stop him from overturning more longstanding precedents in *Citizens United v. FEC* (2010), *Janus v. AFSCME* (2018), and *Knick v. Township of Scott* (2019). It also didn’t

prevent his vote in *Gonzales v. Carhart* (2007), which upheld a federal ban on partial-birth abortion seven years after the Court invalidated a similar Nebraska ban in *Stenberg v. Carhart* (2000).

Finally, the last day of the term brought John Roberts's finest hour, perhaps because constitutional principle coincided with his strategic machinations. In *Trump v. Vance*, the Court held that the president doesn't have absolute immunity from state grand jury subpoenas seeking his financial records. In *Trump v. Mazars*, it held that Congress doesn't have carte blanche to engage in a fishing expedition against the president. It was a split decision—President Trump won one and lost one—but both cases ended up 7-2, with Roberts writing both majority opinions. The chief justice assembled strong coalitions for balancing state-federal relations and checking both the legislative and executive branches. Equally important to his own purposes, both cases will now continue in the lower courts, with no final resolution until after the election.

Those "Trump tax" rulings hearkened to the end of the previous term, the first in the post-Kennedy era. June 2019 saw Roberts write the controlling opinions in decisions to (1) remove federal courts from policing partisan gerrymandering; and (2) reject a question regarding citizenship for the 2020 census while allowing the Commerce Department to try again with a better rationale.

All of these rulings show that Chief Justice Roberts is acting politically, not in the partisan sense or even to curry favor with the progressives who control elite institutions, but in thinking about how to best to position his beloved Court. That's nothing new: he's always had a strong belief in the judiciary's independence, but he's also always been cautious.

All that was evident 15 years ago, when George W. Bush named him to replace Sandra Day O'Connor. Roberts had an underwhelming interview with Vice President Dick Cheney and senior White House officials, playing his cards close to the vest and not admitting to any overarching legal theories. Speculation was rampant that others had the edge, with movement types pushing Fourth Circuit Judge Michael Luttig, who was a clear and unabashed legal conservative.

President Bush went with Roberts because of a gut instinct for what a justice was like. Then, when Chief Justice William Rehnquist died, picking Roberts for chief avoided the sort of fight that would've attended the nomination of someone with a longer record of originalist

jurisprudence—including the possible elevation of Justice Antonin Scalia—at a time when Bush was politically weakened by his Iraq policy and the government’s response to Hurricane Katrina.

Roberts put on a clinic at his hearing, emphasizing his dedication to precedent, restraint, and a limited role for the judiciary. Judicial “modesty” became his watchword, likening the role of a judge to a baseball umpire, to “call balls and strikes and not to pitch or bat.” And this wasn’t some “confirmation conversion”: memos from his time in the Reagan White House showed that he was critical of the Court’s intervention in too many cases. There was speculation about Roberts’s membership in the Federalist Society, the conservative/libertarian legal network, but he disclaimed the association. That’s telling.

Roberts became the youngest chief justice since his hero John Marshall. It didn’t take long for a man who had planned for this moment seemingly all his life to settle in. And it didn’t take long for him to make his mark; to the extent that Roberts’s project is to have the Court speak more with one voice, his first term, 2005–06 saw a marked increase in unanimous decisions: 45 percent, up from a five-year average of just over 25 percent.

The Roberts Court hasn’t hit that level of agreement every term—this past year it was at 36 percent—and some “bipolar” terms have seen high rates of both unanimity and 5-4 decisions. But the statistics bear out the fact that, if you go beyond the cases that trend on Twitter, this Court is more united now than it has been since the days of FDR. The 2013–14 term, for example, saw a record two-thirds of the cases decided unanimously in the judgment, although many of those had strident concurrences that were dissents in all but name.

It’s readily apparent that the chief justice has a conservative judicial philosophy, but it’s a conservatism of restraint and minimalism. “If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case,” he explained in a speech toward the end of his first term. “Division should not be artificially suppressed, but the rule of law benefits from a broader agreement.” Chief Justice Roberts practices what he preaches, writing fewer opinions than all of his colleagues—and he has *never* issued a solo dissent.

In other words, the Court will only go as far and as fast on any particular issue as the chief justice wants. That’s typically not very far and not very fast.

Where he has supported “big” changes in the law, those have been preceded by small moves in that direction. *Citizens United*, which threw out the restriction on using corporate and union funds for independent political speech, was preceded by several campaign-finance cases rejecting justifications for various other parts of the 2002 Bipartisan Campaign Reform Act (also known as “McCain-Feingold”). *Shelby County v. Holder* (2013), which invalidated the “coverage formula” for determining which jurisdictions had to “preclear” their electoral rules under Section 5 of the Voting Rights Act, was preceded by *Northwest Austin Municipal Utility District No. 1 v. Holder* (2010), in which Roberts essentially warned Congress and the American people that Section 5 stood on dubious constitutional ground.

Of course, Roberts is most famous (or infamous) for his role in upholding the Affordable Care Act, first against constitutional attack in *NFIB v. Sebelius* (2012), and then statutory attack in *King v. Burwell* (2015). In both cases, he attempted to show judicial restraint or even “modesty” by tweaking Congress’s work rather than invalidating it.

Unfortunately, he failed on his own terms. As the four *NFIB* dissenters wrote, “The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect.” The chief’s judicial passivism, combined with the activism of the four liberal justices who saw no judicially enforceable limits on federal power, created a Frankenstein’s monster. Justifying a mandate with accompanying penalty for noncompliance under the taxing power doesn’t rehabilitate the statute’s constitutional abuses. And by letting Obamacare survive in such a dubious manner, Roberts undermined the trust people have that the justices act as impartial arbiters, not politicians.

Ironically, the chief didn’t have to do what he did to “save the Court.” For one thing, Obamacare was highly unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional. For another, Roberts damaged his own reputation by doing what he did only after warnings from pundits and politicians that striking down the law would be “conservative judicial activism.” Had the Court sent Obamacare back to the drawing board, it would have been just the sort of thing for which the Court needs its institutional gravitas. Instead, we had a strategic

decision dressed up in legal robes, judicially enacting a new law and feeding public cynicism.

Nor did the ruling legitimate President Obama's health care reform; eight years after *NFIB* and over a decade since the ACA was enacted, litigation continues. After Congress in 2017 zeroed out the "tax" for not purchasing a complying insurance policy—seemingly eliminating Roberts's taxing-power justification—the Supreme Court next term faces *déjà vu* all over again in *California v. Texas*.

In any case, with Justice Kennedy's retirement in June 2018, Roberts became the first chief justice to be the median vote in half a century and the first to be the deciding vote since Charles Evans Hughes in the 1930s. It's a very different Court than what we would've seen had Luttig been picked instead of Roberts in 2005—whether as chief justice or with Scalia elevated and Alito in Scalia's place. While it's possible that Roberts might be voting differently had he become an associate justice instead of the chief, he was never a Scalia or Thomas (or Gorsuch) to begin with.

Meanwhile, anyone can judge the success of Chief Justice Roberts's project to depoliticize the judiciary: tacking left and right while issuing narrow decisions, even if marginally improving public perception, does nothing to address an underlying dynamic that's driven by irreconcilable interpretive theories.

While Chief Justice Roberts now has even more incentive to indulge his minimalist fantasies, he is a surer vote for conservatives—if not libertarians—than Justice Kennedy was. What that means in the long term only time will tell, though of course Roberts will only remain in the middle of the Court if a Democratic president gets to replace Justices Ruth Bader Ginsburg and Stephen Breyer. If it's President Trump making one or both of those appointments, we'll all start talking about the Kavanaugh Court.