THE KING IN HIS COURT: CHIEF JUSTICE JOHN ROBERTS AT THE CENTER

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This was supposed to be the United States Supreme Court Term in which everything changed.[1] From the moment when Justice Anthony Kennedy announced his retirement from the federal government's loftiest bench, observers and commentators burst forth with predictions of a new order on the Court, a new day in which political conservatives would finally maintain an unquestioned majority.[2] Opinions emerged from both sides of the aisle about the imminent reversal of longstanding precedents, with political liberals worrying and political conservatives cheering.[3] Statements from many

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[1] *See* Chris Cillizza, *Anthony Kennedy's Retirement Just Confirmed Every Republican's Dream Scenario for Trump*, CNN (June 27, 2018, 5:00 PM), https://www.cnn.com/2018/06/27/politics/kennedy-retirement-donald-trump/index.html [https://perma.cc/K3HZ-BCG7]; Filipa Ioannou, *Liberals Freak Out over Supreme Court Justice Anthony Kennedy's Retirement*, S.F. CHRON. (June 27, 2018, 2:50 PM), https://www.sfgate.com/politics/article/twitter-reaction-anthony-kennedy-retirement-trump-13031093.php [https://perma.cc/5H6M-GCXK]; Ezra Klein, *Democrats Sat Out the 2014 Midterms and Lost the Supreme Court for a Generation*, VOX (June 27, 2018, 3:19 PM), https://www.vox.com/policy-and-politics/2018/6/26/17506054/anthony-kennedy-retirement-supreme-court [https://perma.cc/56RR-DX5F].

[2] *See Anthony Kennedy's Retirement Comes at a Worrying Time*, ECONOMIST (June 30, 2018), https://www.economist.com/leaders/2018/06/30/anthony-kennedys-retirement-comes-at-a-worrying-time [https://perma.cc/UHD5-XNNV]; Cillizza, *supra* note 1; Ioannou, *supra* note 1; Klein, *supra* note 1. This Article uses the expressions *political liberal* and *political conservative* throughout, referring to ideologies typically endorsed by politicians on the modern political left and the modern political right. These expressions are not intended to mean that the Justices to whom these labels apply vote uniformly with politically liberal and politically conservative causes. Rather, these designations refer to the manner in which these Justices customarily vote in nonunanimous Supreme Court cases.

[3] *See* Richard Fausset et al., *Elated v. Scared: Americans Are Divided on Justice Kennedy's Retirement*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/democrats-republicans-anthony-kennedy.html [https://perma.cc/A6Z4-7DFU]; Abigail Simon, *The Era of the Swing Justice Is Over. Here's How Democrats May Adapt*, TIME (Aug. 13, 2018), http://time

individuals returned to the familiar theme of the political polarization of the Court, a chorus that only intensified after the lengthy battle over the confirmation of Justice Brett Kavanaugh ended in a Senate vote split almost uniformly along political lines.[4] With the departure of the Court's venerable "swing justice," and the replacement of that jurist with an individual viewed as a reliable proponent of the political conservative agenda, plenty of prognosticators focused on a future in which arguments before the nine Justices would be little more than a show trial, given that the outcomes would already be pre-ordained along partisan lines.[5]

The reality, however, appears to be rather different from what these stark predictions anticipated.[6] At the conclusion of the first Term of the post-Kennedy era, the precedents of decades past do not all lie in tatters, even those precedents that were authored by Justices viewed as politically liberal.[7] In fact, political conservatives found plenty of opportunities to complain about decisions rendered

.com/5363918/supreme-court-brett-kavanaugh-conservative-bloc/ [https://perma.cc/75YA-WWDT]; George Will, *For the First Time, Conservatives Might Thank God for Kennedy*, NAT'L REV. (June 28, 2019, 11:08 AM), https://www.nationalreview.com/2018/06/anthony-kennedy-retirement-conservatives-get-gift [https://perma.cc/Y5NY-NRPA].

[4] *See* William Cummings, *It's the Constitution, Not Brett Kavanaugh Liberals Don't Like, Conservatives Say*, USA TODAY (July 11, 2018, 12:10 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/07/10/brett-kavanaugh-supreme-court-media-reaction-bubble/772188002/ [https://perma.cc/QGE5-Z386]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/89UK-TKBL]; *see also* Joan Biskupic, *A Sense of Inevitability for Kavanaugh, Who Can Transform the Court for Decades*, CNN (Sept. 4, 2018, 5:25 AM), https://www.cnn.com/2018/09/04/politics/a-sense-of-inevitability-for-kavanaugh/index.html [https://perma.cc/T5JX-29S2] (discussing the confirmation of Justice Kavanaugh and the battle it created in the Senate).

[5] *See* Cillizza, *supra* note 1; Fausset et al., *supra* note 3; Ioannou, *supra* note 1; German Lopez, *Anthony Kennedy's Retirement Is Devastating for LGBTQ Rights*, VOX (June 27, 2018, 3:43 PM), https://www.vox.com/identities/2018/6/27/17510902/anthony-kennedy-retirement-lgbtq-gay-marriage-supreme-court [https://perma.cc/4VWS-FGJA]; *Good Riddance, Justice Kennedy*, NAT'L REV. (June 28, 2018, 6:30 AM), https://www.nationalreview.com/2018/06/anthony-kennedy-retirement-good-riddance-rulings-aggrandized-power-of-court/ [https://perma.cc/3K8T-5FY5]. *But see* Andrew Cohen, *Anthony Kennedy Was No Moderate*, NEW REPUBLIC (June 27, 2018), https://newrepublic.com/article/149449/anthony-kennedy-no-moderate [https://perma.cc/9F8A-W4EM]; Jack Goldsmith, *The Shape of the Post-Kennedy Court*, WASH. EXAMINER (July 2, 2018, 2:46 PM), https://www.weeklystandard.com/jack-goldsmith/the-post-kennedy-supreme-court-isnt-likely-to-be-as-conservative-as-liberals-fear [https://perma.cc/ZB6E-X6TS].

[6] *See, e.g.*, Kimberly Strawbridge Robinson, *Roberts, Gorsuch Cross-Over Votes Deliver Wins for Liberals*, BLOOMBERG L. (June 26, 2019, 3:33 PM), https://news.bloomberglaw.com/health-law-and-business/roberts-gorsuch-cross-over-votes-deliver-wins-for-liberals [https://perma.cc/FV5T-PNZV] (describing several divided cases during this past term in which politically conservative Justices on the Court unexpectedly "crossed over" and voted with their more politically liberal colleagues).

[7] *See infra* Part III.

by the Court during this Term, while political liberals discovered that they had unexpected reasons to applaud the Court's majority in several instances.[8] Disputes involving the death penalty, the rights of the accused, abortion, asylum, legal deference to government agencies, and the addition of a question about citizenship on the United States Census all ended in a manner that left many political conservatives condemning the Court.[9]

Amid the bloc of politically conservative Justices, subtle but important fissures emerged.[10] Justice Neil Gorsuch, for instance, broke ranks with Kavanaugh regarding the power of law enforcement in one case involving a vaguely worded statute, a move that Kavanaugh denounced as "a serious mistake."[11] In another criminal law case, Gorsuch angered Justice Samuel Alito by opining that a violator of a supervised release program could be sentenced only by a jury, not by a judge, causing Alito to reply that Gorsuch's opinion "is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications."[12] Kavanaugh split with Gorsuch on the impact of racial bias, writing the Court's majority opinion—in opposition to Gorsuch's vehement objections—to overturn the murder conviction of an African-American man tried six times by juries that were nearly uniformly Caucasian.[13] Justice Clarence Thomas provided opinions that mystified even his fellow conservatives, such as casting doubt about the validity of *Gideon v. Wainwright*'s[14]

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[8] *See* Adam Feldman, *Is the Court Tracking Right or Roberts Left?*, SCOTUSBLOG (Mar. 20, 2019, 1:19 PM), https://www.scotusblog.com/2019/03/empirical-scotus-is-the-court-tracking-right-or-roberts-left/ [https://perma.cc/XS4G-X27F]; Robinson, *supra* note 6; Richard Wolf, *Conservatives' Takeover of Supreme Court Stalled by John Roberts-Brett Kavanaugh Bromance*, USA TODAY (Apr. 14, 2019, 4:01 PM), https://www.usatoday.com/story/news/politics/2019/04/07/supreme-court-bromance-john-roberts-brett-kavanaugh-tie-up-court/3342377002 [https://perma.cc/M2Q3-9KFZ].

[9] *See infra* Part III.

[10] *See* Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019, 6:00 AM), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/ [https://perma.cc/V3LB-GHBB]; Richard Wolf, *Supreme Court in Transition: Conservatives Ascendant but Roberts, Gorsuch, Kavanaugh Prove Unpredictable*, USA TODAY (June 28, 2019, 12:55 PM), https://www.usatoday.com/story/news/politics/2019/06/28/supreme-courts-conservative-shift-stalls-political-scrutiny-swells/1573001001/ [https://perma.cc/3GHL-V3M6].

[11] *See* United States v. Davis, 139 S. Ct. 2319, 2323, 2336 (2019); *Id.* at 2338 (Kavanaugh, J., dissenting).

[12] United States v. Haymond, 139 S. Ct. 2369, 2373–74 (2019) (plurality opinion); *id.* at 2386 (Alito, J., dissenting).

[13] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019); *id.* at 2252–53, 2255 (Thomas, J., dissenting). Justice Gorsuch joined parts I, II, and III of Justice Thomas's dissent. *Id.* at 2252.

[14] Gideon v. Wainwright, 372 U.S. 335 (1963).

guarantee of the right to effective counsel in criminal court proceedings and expressing a desire to overturn fifty years of Court precedents to make it easier for public officials to win lawsuits for defamation of character.[15] Even in cases where the conservatives on the Court united in the outcome of the case, it was not uncommon to find a separate concurring opinion or a separate dissent from Thomas endorsing a more ardent position on the issues in the case than the other conservative Justices were willing to take.[16]

Yet the focal point of this latest Court Term was unquestionably Chief Justice John Roberts.[17] The man who became the youngest Chief Justice in two centuries when George W. Bush appointed him to the Court has long been a lightning rod for public controversy, an ironic reality given that Roberts takes great pains to avoid any semblance of controversy in his public image.[18] In many ways, Roberts is at once visible and invisible, a highly public ambassador for the Court and for the legal profession who still manages to remain intensely private, a man lauded for his intellectual eminence who does not succumb to the entreaties of politically conservative groups like the Federalist Society, which seeks Roberts's public endorsement

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[15] *See* Kevin Daley, *When Clarence Thomas Speaks*, LIBERTARIAN REPUBLIC (Mar. 25, 2019), https://thelibertarianrepublic.com/when-clarence-thomas-speaks/ [https://perma.cc/M8DV-TAMU]; Matt Ford, *Clarence Thomas's Unprecedented America*, NEW REPUBLIC (June 26, 2019), https://newrepublic.com/article/154307/clarence-thomas-precedent-america [https://perma.cc/7DQX-VEYP]; Mark Walsh, *After Nearly 30 Years on the Court, Justice Thomas' Supporters and Detractors Are Still Debating Who He Really Is*, A.B.A. J. (July 1, 2019, 2:05 AM), http://www.abajournal.com/magazine/article/justice-clarence-thomas-opinions [https://perma.cc/Q497-JMWT].

[16] *See* Garrett Epps, *Clarence Thomas Is in the Wrong Line of Work*, ATLANTIC (Mar. 7, 2019), https://www.theatlantic.com/ideas/archive/2019/03/clarence-thomas-thinks-he-knows-best/584263/ [https://perma.cc/TW9Y-63AP]; Nina Totenberg, *Clarence Thomas: From 'Black Panther Type' to Supreme Court's Conservative Beacon*, NPR (July 14, 2019, 7:00 AM), https://www.npr.org/2019/07/14/740027295/clarence-thomas-from-black-panther-type-to-supreme-court-s-most-conservative-mem [https://perma.cc/ZX5U-YKCG].

[17] *See* Joan Biskupic, *What to Make of Chief Justice John Roberts?*, CNN (Mar. 1, 2019, 10:57 AM), https://www.cnn.com/2019/03/01/politics/john-roberts-conservative-supreme-court/index.html [https://perma.cc/PU3P-YDAT]; David French, *The Temptation of John Roberts*, NAT'L REV. (Mar. 4, 2019, 2:23 PM), https://www.nationalreview.com/2019/03/the-temptation-of-john-roberts/ [https://perma.cc/NN6R-M3FZ]; Jay Michaelson, *John Roberts Isn't the Conservative You Thought He Was*, DAILY BEAST (June 26, 2019, 12:01 PM), https://www.thedailybeast.com/supreme-court-kisor-v-wilkie-case-john-roberts-isnt-the-conservative-you-thought-he-was [https://perma.cc/27RM-EQXJ]; Melissa Quinn, *John Roberts Is Voting with Liberal Justices, but He's Not One of Them*, WASH. EXAMINER (Mar. 8, 2019, 12:03 AM), https://www.washingtonexaminer.com/policy/courts/john-roberts-is-voting-with-liberal-justices-but-hes-not-one-of-them [https://perma.cc/8NCF-S3Y9]; Robinson, *supra* note 6; Greg Stohr, *Hold the Revolution: Roberts Keeps Joining High Court Liberals*, BLOOMBERG L. (Mar. 1, 2019, 4:00 AM), https://www.bloomberg.com/news/articles/2019-03-01/hold-the-revolution-roberts-keeps-joining-high-court-liberals [https://perma.cc/434B-RXHM]; Wolf, *supra* note 8.

[18] *See infra* Parts I, II.

of their viewpoints.[19] His own reputation has been a paramount concern for him since at least his high school days, and bound up in his own reputation now is the reputation of the Court on which he occupies the center seat.[20] In 2006, he bluntly told journalist Jeffrey Rosen that "of the [prior] [C]hief [J]ustices; certainly a solid majority of them have to be characterized as failures."[21] In Roberts's life, failure in any form has never been an option that he has willingly accepted.[22]

Plenty of people, however, denounce Roberts as a failure on the Court.[23] Many of these attacks come from political liberals, an unsurprising fact given that Roberts has spent much of his career working for politically conservative administrations and defending politically conservative positions.[24] A surprising number of arrows, however, have been fired by political conservatives, beginning when Roberts stunned the nation by ruling with the Court's liberal wing in 2012 to uphold the Affordable Care Act as an exercise of Congress's power to levy taxes.[25] In the intervening seven years since that

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[19] *See infra* Part II.

[20] *See infra* Parts I, II.

[21] Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ [https://perma.cc/W5ZQ-2RNM].

[22] *See infra* Part II.

[23] *See, e.g.*, Gilad Edelman, *Everybody Hates John Roberts*, WASH. MONTHLY (June 29, 2019), https://washingtonmonthly.com/2019/06/29/everybody-hates-john-roberts/ [https://perma.cc/7EPM-LN75]; Elias Isquith, *John Roberts, Abysmal Failure: How His Court Was Disgraced by Corporations and Theocrats*, SALON (July 1, 2014, 3:00 AM), https://www.salon.com/2014/06/30/they_have_no_principles_how_corporations_and_theocrats_took_over_america/ [https://perma.cc/J5MM-75RS]; Editorial, *The Contradictions of John Roberts*, WALL STREET J. (June 27, 2019, 7:02 PM), https://www.wsj.com/articles/the-contradictions-of-john-roberts-11561676526 [https://perma.cc/LX47-RVYK]; Vann R. Newkirk II, *How* Shelby County v. Holder *Broke America*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/ [https://perma.cc/77HJ-FC9C].

[24] *See* Garrett Epps, *Will John Roberts Block the Triumph of Legal Conservatism?*, ATLANTIC (Apr. 2, 2019), https://www.theatlantic.com/ideas/archive/2019/04/john-roberts-isnt-really-moderate/586273/ [https://perma.cc/FML8-ZECC]; Cody Fenwick, *Chief Justice John Roberts Isn't Our Savior From Trump—He's the President's Chief Enabler*, NEW C.R. MOVEMENT (July 6, 2019, 8:00 AM), https://www.thenewcivilrightsmovement.com/2019/07/chief-justice-john-roberts-isnt-our-savior-from-trump-hes-the-presidents-chief-enabler/ [https://perma.cc/PU5C-CZB3]; William Greider, *Should We Impeach Chief Justice John Roberts?*, NATION (Nov 19, 2014), https://www.thenation.com/article/should-we-impeach-chief-justice-john-roberts/ [https://perma.cc/ADF6-URHN]; Ian Millhiser, *When John Roberts Said There Isn't Enough Racism in America to Justice the Voting Rights Act*, THINKPROGRESS (June 18, 2015, 2:06 PM), https://thinkprogress.org/when-john-roberts-said-there-isnt-enough-racism-in-america-to-justify-the-voting-rights-act-1be12735d44a/ [https://perma.cc/VHQ9-5JMW]; Oliver Roeder, *John Roberts Has Cast a Pivotal Liberal Vote Only 5 Times*, FIVETHIRTYEIGHT (July 5, 2018, 11:02 AM), https://fivethirtyeight.com/features/john-roberts-has-cast-a-pivotal-liberal-vote-only-5-times/ [https://perma.cc/6SBS-NKZP].

[25] W. James Antle III, *John Roberts's Betrayal*, AM. CONSERVATIVE (June 28, 2012, 6:25 PM), https://www.theamericanconservative.com/articles/john-robertss-betrayal/ [https://perma.cc

decision, virtually any voting alignment involving Roberts and any of the political liberal Justices received condemnation from conservative camps, with some conservatives even shouting for the impeachment of the man whom they had once hailed as a hero.[26] President Donald Trump was one of these critics, publicly lashing out at Roberts after the Affordable Care Act decision and continuing to fire shots across the bow at the Chief Justice during his presidential campaign.[27] Even today, this battle continues, exemplified by a recent exchange when Trump attacked the Ninth Circuit Court of Appeals as a court of "Obama judges," and Roberts rapidly returned fire, vigorously declaring in multiple public appearances that the federal judiciary maintained its impartiality—statements that drew quick retorts from the President on his ever-active Twitter feed.[28]

With the retirement of Kennedy, the attention on Roberts reached unprecedented heights.[29] Most commentators agreed that Thomas,

/SVJ6-BPTA]; Doug Bandow, *John Roberts: Rarely Has Such a Smart Judge Written Such a Bad Opinion*, FORBES (July 2, 2012, 12:51 PM), https://www.forbes.com/sites/dougbandow/2012/07/02/john-roberts-rarely-has-such-a-smart-judge-written-such-a-bad-opinion/#58ef76f74fee [https://perma.cc/UQA6-Z43L]; Kristen A. Lee, *Wrath of Cons: Chief Justice John Roberts Bashed as 'Traitor' After Casting Key Vote to Uphold Health Care Law*, DAILY NEWS (June 28, 2012), http://www.nydailynews.com/news/national/wrath-cons-chief-justice-john-roberts-bashed-traitor-casting-key-vote-uphold-health-care-law-article-1.1104064 [https://perma.cc/C77H-B45G]; Ted Nugent, *Turncoat Roberts*, WASH. TIMES (July 5, 2012), https://www.washingtontimes.com/news/2012/jul/5/turncoat-roberts/ [https://perma.cc/R5CG-USCA].

[26] *See, e.g.*, Stephen Dinan & Dave Boyer, *Top Conservative Calls for Impeachment of Chief Justice Roberts*, WASH. TIMES (June 27, 2019), https://www.washingtontimes.com/news/2019/jun/27/matt-schlapp-calls-impeachment-chief-justice-john-/ [https://perma.cc/S7SJ-NQAZ]; Josh Gerstein, *Right Fears Roberts Going Soft*, POLITICO (Oct. 18, 2014, 7:00 AM), https://www.politico.com/story/2014/10/john-roberts-conservative-quake-112000 [https://perma.cc/6B6Z-RLGM]; Quin Hillyer, *In Battle vs. Bureaucracies, John Roberts Wimps Out Again*, WASH. EXAMINER (June 26, 2019, 5:06 PM), https://www.washingtonexaminer.com/opinion/columnists/in-battle-vs-bureaucracies-john-roberts-wimps-out-again [https://perma.cc/5L4M-USC3]; Tony Mauro, *Roberts, Ruling Against Trump, Faces New Round of Conservatives' Criticism*, NAT'L L. J. (June 27, 2019, 3:23 PM), https://www.law.com/nationallawjournal/2019/06/27/roberts-ruling-against-trump-faces-new-round-of-conservatives-criticism/ [https://perma.cc/HQ33-S4PK]; David G. Savage, *Chief Justice Roberts' Record Isn't Conservative Enough for Some Activists*, L.A. TIMES (Sept. 25, 2015, 6:00 AM), https://www.latimes.com/nation/la-na-roberts-conservative-backlash-20150924-story.html [https://perma.cc/VX4J-LD6H].

[27] *See* Joan Biskupic, *John Roberts Played the Long Game. He Just Won*, CNN (June 29, 2018, 9:39 PM), https://www.cnn.com/2018/06/29/politics/john-roberts-long-game-supreme-court/index.html [https://perma.cc/R4TX-A33A].

[28] John Cassidy, *Why Did Chief Justice John Roberts Decide to Speak Out Against Trump?*, NEW YORKER (Nov. 21, 2018), https://www.newyorker.com/news/our-columnists/why-did-chief-justice-john-roberts-decide-to-speak-out-against-trump [https://perma.cc/5NZ3-SLNW].

[29] *See* Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court*, 82 ALB. L. REV. 449, 456–59 (2019); Tom Vanden Brook, *Supreme Court: What's Next After Anthony Kennedy Leaves the Court*, USA TODAY (July 31, 2018, 8:09 AM), https://www.usatoday.com/story/news/politics/2018/07/31/whats-next-supreme-court-anthony-kennedy-retirement-brett-kavanaugh/860189002/ [https://perma.cc

Alito, Gorsuch, and Kavanaugh had been and would continue to be reliable votes for all of the favored positions of modern political conservatives.[30] On the other side of the political spectrum, most observers determined that Ruth Bader Ginsburg, Elena Kagan, Stephen Breyer, and Sonia Sotomayor would continue to side with the views of modern political liberals on most issues.[31] In this analysis, Roberts remained the only wild card.[32] Historically, his conservative bona fides were unquestioned.[33] With growing public scrutiny of the political alliances on the Court, however, some commentators questioned whether Roberts would be willing to be a reliable conservative voice on "his" Court, or whether he would fear damage to his Court's reputation—and, by extension, his own carefully cultivated legacy—if he routinely sided with the other conservatives.[34] When Trump's appointment of Kavanaugh turned into a battle that captured the nation's attention and appeared to further erode the public's respect for the Court, observers again wondered whether Roberts would seek to distance himself from the

/YR8P-EDKX]; Andrew Kirell, *Justice Anthony Kennedy Retiring from Supreme Court*, DAILY BEAST (June 27, 2018, 6:17 PM), https://www.thedailybeast.com/justice-anthony-kennedy-is-retiring-from-the-supreme-court [https://perma.cc/3C4G-G926].

[30] Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX (Sept. 14, 2018, 11:12 AM), https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon [https://perma.cc/B9DN-MCU4]; Oliver Roeder & Amelia Thomson-DeVeaux, *How Conservative Is Brett Kavanaugh?*, FIVETHIRTYEIGHT (July 17, 2018, 6:54 AM), https://fivethirtyeight.com/features/how-conservative-is-brett-kavanaugh/ [https://perma.cc/5CX5-WDSW]; *see* Cillizza, *supra* note 1; Fausset et al., *supra* note 3; Klein, *supra* note 1; Simon, *supra* note 3.

[31] Chang, *supra* note 30; Cillizza, *supra* note 1; Roeder & Thomson-DeVeaux, *supra* note 30.

[32] *See* Pomerance, *supra* note 29, at 456–58; Goldsmith, *supra* note 5; *see also* Benjamin Pomerance, *Inside a House Divided: Recent Alliances on the United States Supreme Court*, 81 ALB. L. REV. 361, 430–31, 437 (2018) (predicting the potential for Roberts to become the next "swing vote" after Kennedy retired from the Court).

[33] *See infra* Part II.

[34] *See* Pomerance, *supra* note 29, at 523, 526, 531; W. James Antle III, *Is John Roberts the Next Anthony Kennedy?*, WEEK (June 28, 2018), https://theweek.com/articles/781635/john-roberts-next-anthony-kennedy [https://perma.cc/D3DL-UKVN]; Goldsmith, *supra* note 5; French, *supra* note 17; Lawrence Friedman, *John Roberts Has Tough Job of Keeping Faith in Supreme Court*, HILL (Oct. 26, 2017, 6:00 PM), https://thehill.com/opinion/judiciary/357392-john-roberts-has-task-of-keeping-americas-faith-in-supreme-court [https://perma.cc/A4EU-5EW6]; Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception that It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html [https://perma.cc/55VA-AEKJ]; Jennifer Rubin, *John Roberts, You Are Chief Justice, Not Chief of PR*, WASH. POST (Oct. 4, 2017, 10:30 AM), https://www.washingtonpost.com/blogs/right-turn/wp/2017/10/04/john-roberts-you-are-chief-justice-not-chief-of-pr/ [https://perma.cc/DN4T-FNAE]; Dylan Scott, *John Roberts Is the Supreme Court's New Swing Vote. Is He Going to Overturn* Roe v. Wade*?*, VOX (July 9, 2018, 9:00 AM), https://www.vox.com/policy-and-politics/2018/7/9/17541954/roe-v-wade-supreme-court-john-roberts [https://perma.cc/YY4K-JLAU]; Simon, *supra* note 3.

views of a Justice accused of sexual assault and partisan politicking and seek a more moderate ground.[35]

One Court Term does not satisfactorily resolve all of these questions. Ample opportunity exists for Roberts—and, indeed, the Court overall—to transform itself many times during the upcoming years. Still, it is difficult to resist the temptation to draw at least some initial conclusions from the outcomes of this highly anticipated Term. This Article does so by focusing specifically on the actions of the Chief Justice, the man believed to be the only potential successor to Kennedy as the "swing voter" on this lofty bench.[36] It begins by examining the criteria that Roberts appears to apply when determining whether a Chief Justice is "successful" as a leader of the Court, and then summarizes certain aspects of Roberts's own character and background that seem to contribute to these viewpoints. From there, the Article moves to a review of the 2018 Term—the Court's most recent—with a focus on the cases in which Roberts broke ranks with at least some of his politically conservative brethren to render decisions that a contemporary political liberal would customarily favor. Lastly, the Article discusses the trends that seem to emerge from this admittedly limited sample size, determining what has changed, what has remained the same, and what may change in the future on the post-Kennedy Court, an undeniably divisive Court on which a man who seeks to avoid division now sits both literally and figuratively at the center.

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[35] *See* Lawrence Baum & Neal Devins, *The Hidden Silver Lining if Kavanaugh Is Confirmed*, WASH. POST (Oct. 5, 2018, 6:54 PM), https://www.washingtonpost.com/opinions/the-hidden-silver-lining-if-kavanaugh-is-confirmed/2018/10/05/fc2d7fb6-c8ce-11e8-b2b5-79270f9cce17_story.html [https://perma.cc/28VH-D3C6];Ronald Brownstein, *Brett Kavanaugh Is Patient Zero*, ATLANTIC (Oct. 1, 2018), https://www.theatlantic.com/politics/archive/2018/10/kavanaughs-partisanship-threatens-supreme-court/571702/ [https://perma.cc/L2TM-Z4ZP]; Dominique Mosbergen, *Chief Justice John Roberts Stresses Court's Independence After Kavanaugh Confirmation*, HUFFINGTON POST (Oct. 17, 2018, 6:15 AM), https://www.huffpost.com/entry/chief-justice-roberts-kavanaugh-court-independence_n_5bc6b856e4b0a8f17ee7113e [https://perma.cc/4ZSB-42WE]; Melissa Quinn, *Chief Justice John Roberts Might Have to Rein in 'Angry and Upset' Kavanaugh on Supreme Court*, WASH. EXAMINER (Oct. 5, 2018), https://www.washingtonexaminer.com/policy/courts/chief-justice-roberts-might-have-to-rein-in-angry-and-upset-kavanaugh-on-supreme-court [https://perma.cc/L24F-4D68]; *All Things Considered: How Will the Battle over Kavanugh's Nomination Impact the Other Justices?*, NPR (Oct. 5, 2018, 5:45 PM), https://www.npr.org/2018/10/05/654941283/how-will-the-battle-over-kavanaughs-nomination-impact-the-other-justices [https://perma.cc/725E-7K3Z].

[36] *See* Pomerance, *supra* note 29, at 458.

I. CHIEF PRINCIPLES: ROBERTS'S VIEWS ON A CHIEF JUSTICE'S LEGACY

If there is one individual whom Roberts considers successful in the role of Chief Justice, that individual is John Marshall.[37] Such a decision is, by itself, not astonishing, given that Marshall tends to inspire reverence today as the leader who established the Court's standing as an institution to be respected and obeyed as an arbiter of the Constitution.[38] Yet the primary reasons for Roberts's lionization of Marshall are more surprising.[39] Cementing the legitimacy of the Court in the public's eye is, of course, the end result of Marshall's tenure that Roberts praises.[40] Yet the current Chief Justice devotes even greater attention to the tools that Marshall used to carve out this reputation, particularly the Marshall Court's conspicuous absence of public dissent.[41]

"I think that every Justice should be worried about the Court acting as a Court and functioning as a Court," Roberts told Rosen in that July 2006 interview, "and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[42] For thirty years, Roberts stated, the Marshall Court exemplified this level of concern about the citizenry's perception of their craft.[43] For thirty years, with Marshall at the helm,

> there weren't a lot of concurring opinions. There weren't a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we're reverting back to the English model, where everybody has to have their say. It's more being

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[37] *See* Rosen, *supra* note 21.

[38] *See, e.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT, at xvi (2001) ("To save the Framers' Constitution from the resurgent forces of democratic localism and states' rights theory, he helped put the Supreme Court, the weakest of the three branches in 1800, at the epicenter of the constitutional government of America. . . . John Marshall remains America's representative jurist: a judge for all seasons."); JOEL RICHARD PAUL, WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 440 (2018) ("Though he did not have the benefit of precedent, Marshall creatively navigated his way through a thicket of domestic and international controversies, choosing his battles prudently and forging consensus where none seemed possible."); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1 (1996) ("Under his leadership, the Supreme Court became a dominant force in American life. The broad powers of the federal government, the authoritative role of the Court, and a legal environment conducive to the growth of the American economy stem from the decisions that flowed from Marshall's pen.").

[39] *See* Rosen, *supra* note 21.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See id.*

> concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court.[44]

A decade after this interview, legal journalist Mark Joseph Stern observed that Roberts's views on this topic had not changed.[45] Roberts was a reluctant dissenter, Stern noted, and did not summon particularly strong declarations on the rare occasions when he did author a minority opinion.[46] "Unlike many of his colleagues—who seem to take intellectual pleasure in ripping apart a majority opinion—John Roberts loathes writing in the minority," Stern determined.[47] Instead, the Chief Justice preferred to devote time to brokering compromises amid his colleagues on the Court, including fellow Justices who were known for viewpoints far more politically liberal than his own.[48] In that sense, Roberts seemed to be emulating his historic mentor, whom Roberts praised for sharing glasses of Madeira wine with the Justices of his Court during gentlemanly discussions about the legal disputes of the day—most of which, in Roberts's opinion, evidently ended in an equally genteel resolution about the decisions that the unified Court should render.[49]

Roberts contrasts this dignified image of the Marshall Court with the actions of most of the other Chief Justices.[50] To Roberts, all of the many failures who occupied the Court's "first among equals" position shared a penchant for placing their own voice about the voice of the judicial institution.[51] Tellingly, he explained to Rosen that far too many Chief Justices see themselves as law professors, so eager to publish a victory in their own intellectual battle that they ultimately lose the Court's ongoing war for public legitimacy.[52] As an example, he described the behavior of Harlan Fiske Stone, the former Columbia Law School dean who set up a desk separate from the table at which his brethren sat and presided solo over the Court's private

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[44] *Id.*

[45] *See* Mark Joseph Stern, *The Chief Justice's Biggest Decision*, SLATE (Feb. 26, 2016, 2:37 PM), https://slate.com/news-and-politics/2016/02/john-roberts-can-either-moderate-his-views-or-let-himself-drift-into-irrelevance.html [https://perma.cc/J79P-3597].

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* Rosen, *supra* note 21.

[50] *Id.* Some would argue, however, that Marshall's historical grandeur is overstated, and that Roberts is simply one more jurist to pay homage to a reputation that history has inflated. *See* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1146 (2001); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1037, 1039 (1997).

[51] *See* Rosen, *supra* note 21.

[52] *See id.*

conferences, often lecturing his fellow Justices as if he were teaching introductory concepts of contract law to first-year law students.[53] Not surprisingly, Roberts concluded in his interview with Rosen, the Justices of the Stone Court rebelled against such imperious behavior, leading to a Court that frequently issued divided decisions.[54]

From the outset of his tenure as Chief Justice, Roberts said that he sought "a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record."[55] By making such a statement, Roberts appeared to issue a warning to jurists on both sides of the political aisle—including beloved politically conservative Justices such as Thomas, with his insistence on amassing a record of "pure" textualism without bowing to modern pressures,[56] and the late Antonin Scalia, who became one of the nation's most in-demand speakers by constantly and colorfully insisting that his legal positions represented the original views of the Framers of the Constitution, even when those positions represented a stark minority view on the Court.[57] Had the Marshall Court contained Justices with similarly individualistic mindsets, Roberts argued, the Supreme Court never would have acquired the legitimacy that it needed in the eyes of the American public, and might not even exist today.[58]

Roberts had a front-row seat to the maneuvers of one of the modern Court's strongest individual personalities during his clerkship with

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[53] *See id.*

[54] *See id.*

[55] *Id.*; *see also* Jeffrey Rosen, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html [https://perma.cc/B3SR-S2EQ] ("[H]e believes that judges should set aside their policy views and generally uphold laws unless they clash with clear prohibitions in the Constitution.").

[56] Anita S. Krishnakumar, Hyatt *Is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precedent*, SCOTUSBLOG (May 24, 2019, 10:20 AM), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/ [https://perma.cc/QV2X-DDM2].

[57] Robert Schapiro, *Justice Antonin Scalia: More Quotable than Influential*, CONVERSATION (Feb. 14, 2016, 10:31 PM), https://theconversation.com/justice-antonin-scalia-more-quotable-than-influential-54721 [https://perma.cc/DFK4-6A4U]; *see* Robert Barnes, *Supreme Court Antonin Scalia Dies at 79*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html [https://perma.cc/CLZ3-V2A7]. Some commentators, however, argue that Roberts has not lived up to the consensus-building ideal that he vehemently endorsed in this interview with Rosen and in other similar remarks. *See, e.g.*, JAMES C. FOSTER, BONG HITS 4 JESUS: A PERFECT CONSTITUTIONAL STORM IN ALASKA'S CAPITAL 178 (2010) ("The record shows that Roberts himself violates Roberts' Rules. . . . Since the close of the 2005–2006 term, the abnormal nature of that series of unanimous decisions has become clear, with cacophony remaining the rule. Chief Justice Roberts' own decision making has fueled the dissonance.").

[58] *See* Rosen, *supra* note 21.

then-Justice William Rehnquist.[59] During his tenure on the Court, Rehnquist issued more than sixty dissents that were not joined by any other Justice, the type of behavior that seemed to fly in the face of the Marshall model.[60] From the outset, his voting record was predictable, favoring the prosecution in criminal cases and siding with the government over individuals in civil disputes.[61] He held little regard for preserving the Court's precedents,[62] preferring instead to issue relatively short but extremely pithy opinions that kept the federal government away from decisions that Rehnquist believed belonged solely to state and local governments,[63] prevented individual plaintiffs from suing states,[64] enhanced the ability of law enforcement to take broad measures in the name of public safety,[65] and ensured that "radical" behavior did not undermine governmental operations[66]—even if no one else would join his typically hard-line decisions.[67] Even after ascending to the Chief Justice's chair, Rehnquist continued down the same jurisprudential path that he had charted for himself years earlier.[68] Far from the Madeira-sharing ways of Marshall, Rehnquist ran a Court that prided itself on

[59] *See id.*

[60] *See* DAVID L. HUDSON, JR., THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY 15 (2007); John Cloud, *William Rehnquist: 1924-2005*, TIME (Sept. 4, 2005), http://content.time.com/time/nation/article/0,8599,1101296,00.html [https://perma.cc/V37D-EUL3].

[61] *See* HUDSON, *supra* note 60, at 123; David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976); Michael Bobelian, *Examining Rehnquist's Legacy*, FORBES (July 29, 2013, 2:53 PM), https://www.forbes.com/sites/michaelbobelian/2013/07/29/examining-rehnquists-legacy/ [https://perma.cc/52D9-PHFT].

[62] Adam Feldman, *The Strength of Precedent Is in the Justices' Actions, Not Words*, SCOUTSBLOG (Nov. 28, 2018, 2:11 PM), https://www.scotusblog.com/2018/11/empirical-scotus-the-strength-of-precedent-is-in-the-justices-actions-not-words/ [https://perma.cc/73MZ-53Y9].

[63] Shapiro, *supra* note 61, at 294; Michael O'Donnell, *Raw Judicial Power: On William Rehnquist*, NATION (Oct. 3, 2012), https://www.thenation.com/article/raw-judicial-power-william-rehnquist/ [https://perma.cc/4K29-FGJ5].

[64] Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 9 (2004).

[65] Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES (Sept. 27, 2005), https://www.nytimes.com/2005/09/05/politics/politicsspecial1/william-h-rehnquist-architect-of-conservative.html [https://perma.cc/8FUT-L77Z].

[66] *See, e.g.*, Tex. v. Johnson, 491 U.S. 397, 421–22 (1989); *see also* Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555, 562 (1983) (quoting scholars Owen Fiss and Charles Krauthammer in a *New Republic* article stating that Rehnquist "repudiates precedents; he shows no deference to the legislative branch; and he is unable to ground state autonomy in any textual provision of the Constitution").

[67] O'Donnell, *supra* note 63.

[68] *See* Thomas R. Marshall, *Evaluating the Rehnquist Court's Legacy*, 89 JUDICATURE 104, 105 (2005); Bobelian, *supra* note 61; Cloud, *supra* note 60; Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court*, WASH. POST (Sept. 5, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/04/AR2005090 401251.html [https://perma.cc/RV96-G9WZ]; O'Donnell, *supra* note 63; Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC (Dec. 27, 2004), https://newrepublic.com/article/64247/the-rehnquist-revolution [https://perma.cc/6ZZM-JP75].

efficiency, even when that speed came at the expense of deliberations and consensus-building.[69]

Still, Rehnquist demonstrated that even he could occasionally be swayed by considerations of the Court's reputation.[70] For years, he expressed his distaste for the Court's decision in *Miranda v. Arizona*,[71] because it unnecessarily expanded the rights of the accused and permitted dangerous criminals to go free.[72] Yet when the Rehnquist Court heard the case of *Dickerson v. United States*,[73] a dispute that presented a golden opportunity to overrule *Miranda*, Rehnquist declined to take that step.[74] Instead, the Chief Justice not only broke ranks with Scalia and Thomas to uphold *Miranda*, but also assigned himself the majority opinion that preserved this historically famous precedent.[75] In his majority opinion, Rehnquist declared that the *Miranda* warnings had "become part of our national culture" and were now "embedded in routine police practice" without causing any measurable detriments to prosecutors.[76] There was, therefore, no reason to abandon this practice now.[77] Plenty of writers concluded that Rehnquist's decision was driven entirely by pragmatic concerns for the legacy of himself and his Court, a reputation that would have been badly damaged if his Court had jettisoned this widely popular precedent.[78]

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[69] *See* HUDSON, *supra* note 60, at 142–43; Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1224 (2010); Joan Biskupic, *The Quirks of the Highest Order*, WASH. POST (May 3, 1999), https://www.washingtonpost.com/archive/politics/1999/05/03/the-quirks-of-the-highest-order/077261da-8c05-4112-85ad-bf12d8d3f4f4/ [https://perma.cc/8UR2-C3SQ]; Bobelian, *supra* note 61; O'Donnell, *supra* note 63. In reminiscing about his clerkship with Rehnquist to an interviewer, Roberts described Rehnquist's unyielding emphasis on efficiency, at times at the expense of robust discussion. *See* Snyder, *supra* note 69, at 1224–225. When Rehnquist felt that a discussion had lasted for too long, he would simply terminate the debate with a brusque declaration of "Well, I'm just not going to do it." *Id.* at 1225. Roberts recalled being the target of this phrase from Rehnquist on multiple occasions. *See id.* "That meant that was the end of it, no matter how much you were going to try to persuade him," Roberts remembered, "It wasn't going to happen." *Id.*

[70] *See infra* notes 71–76 and accompanying text.

[71] Miranda v. Arizona, 384 U.S. 436 (1966).

[72] *See* Jan Crawford Greenburg, *High Court Upholds Miranda Warnings*, CHI. TRIB. (June 27, 2000), https://www.chicagotribune.com/news/ct-xpm-2000-06-27-0006270175-story.html [https://perma.cc/2DEJ-4QZZ] (describing Rehnquist's prior opposition to *Miranda*).

[73] Dickerson v. United States, 530 U.S. 428 (2000).

[74] *Id.* at 444.

[75] *See id.* at 430–31.

[76] *Id.* at 443 (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)).

[77] *See Dickerson*, 530 U.S. at 443.

[78] *See, e.g.*, Mitch Reid, Note, United States v. Dickerson*: Uncovering* Miranda*'s Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1378–79 (2001) ("The simplest answer is that to hold otherwise, the Court would have overturned a simple, yet comforting

Some commentators compare Roberts's decision to uphold the Affordable Care Act with his former boss's affirmation of the *Miranda* warnings in his *Dickerson* opinion.[79] Yet Roberts may have also considered the public outcry that arose after a different decision by Rehnquist: the holding that resulted when the Court considered whether the Florida Supreme Court had erred in ordering a recount of ballots in the 2000 presidential election.[80] Rehnquist, the longtime herald of restricting the ability of the federal government to interfere with state government affairs,[81] determined that the federal government could force Florida to cease recounting the ballots immediately, effectively ending the election dispute in favor of George W. Bush.[82] Unlike more moderate Justices David Souter and Stephen Breyer, who agreed that the Florida Supreme Court had acted unconstitutionally but argued that a constitutional recount could be provided, Rehnquist simply terminated the process and ignored the opinion of the state's highest court.[83] The fact that this sudden change of heart from a politically conservative jurist led to a politically conservative politician winning the presidential election was recognized—and criticized—by observers nationwide.[84] A

legal procedure embraced by most Americans. . . . Considering *Miranda*'s popularity, imagine the enormity of the public backlash the Court would have received if it overturned such a distinguished decision."); Linda Greenhouse, *The Supreme Court: The Precedent; Justices Reaffirm* Miranda *Rule, 7-2; A Part of 'Culture'*, N.Y. TIMES (June 27, 2000), https://www.nytimes.com/2000/06/27/us/supreme-court-precedent-justices-reaffirm-miranda-rule-7-2-part-culture.html [https://perma.cc/B4F3-NHF2] ("*Miranda v. Arizona* was a hallmark of the Warren Court, and Chief Justice Rehnquist, despite his record as an early and tenacious critic of the decision, evidently did not want its repudiation to be an imprint of his own tenure.").

[79] *Cf.* Daniel Breen, *Avoiding "Wild Blue Yonders": The Prudentialism of Henry J. Friendly and John Roberts,* 52 S.D. L. REV. 73, 127–28 (2007) (noting that during his confirmation hearing, Roberts defended the importance of precedents by citing to the principles used by Rehnquist to uphold *Miranda* warnings in *Dickerson*).

[80] *See* Bush v. Gore, 531 U.S. 98, 100, 111 (2000).

[81] *See* Ilya Somin, *Rehnquist's Federalist Legacy*, CATO INST. (Sept. 9, 2005), https://www.cato.org/publications/commentary/rehnquists-federalist-legacy [https://perma.cc/XBZ9-MK4Z].

[82] *See Bush*, 531 U.S at 122 (Rehnquist, C.J., concurring).

[83] *Compare Bush*, 531 U.S. at 121–22 (Rehnquist, C.J., concurring) (stopping the recount of the Florida Supreme Court), *with id.* at 134–35 (Stevens, J., dissenting) (stating that the Court should allow Florida to remedy the Equal Protection violation by establishing uniform standards and proceeding with the recount), *and id.* at 144, 146 (Breyer, J., dissenting) (arguing that the Court should never have taken the case in the first place, but since the Court had done so, the only proper remedy was to remand the case back to the Florida Supreme Court with an order to develop a uniform standard for recounting all undercounted ballots).

[84] *See, e.g.*, Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–94 (2001); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 193–94 (2002); Louis Michael Seidman, *What's So Bad About* Bush v. Gore*? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 1005 (2001); Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 28, 2010), https://www.newyorker.com/magazine/2 010/12/06/precedent-and-prologue [https://perma.cc/68NP-TQPQ].

realization that the Justices, and the Chief Justice in particular, had played such an apparently partisan role in deciding the race for the White House harmed the public opinion of the Court, with repercussions that are arguably still felt today.[85]

Roberts makes no secret of the fact that he strives to avoid such negative impressions of his Court.[86] Even if it means running a longer and more verbose conference than Rehnquist would have tolerated, he appears willing to take this additional time if necessary to show the other Justices "that they will benefit, from the shared commitment to unanimity, in a way that they wouldn't otherwise."[87] He has expressed displeasure with journalists and law professors who analyze which Justices most frequently vote together, stating that such an evaluation places too much emphasis on the individual Justices and not enough focus on the Court as a single institution.[88] He continues to take pride in gaining unanimous decisions, playing the role of mediator and resisting the temptation of trying to pursue through judicial opinions a law professor's brand of individual scholarship.[89] In recent years, he has grown even more vocal about the Court's independence, defending Justices of all political affiliations from the allegations of partisanship that arise from the media, from the populace, and even from the current President of the United States.[90]

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[85] *See* Jakob Brecheisen, Bush v. Gore*: Can the Supreme Court's Most Political Case Prevent Russian Hacking of Voting Machines?*, MINN. L. REV. (Apr. 1, 2018), http://www.minnesotalawreview.org/2018/04/bush-v-gore/#post-3248-endnote-2 [https://perma.cc/Y9AJ-QSMF]; Richard L. Hasen, *The Legacy of* Bush v. Gore, WEEK (Dec. 9, 2010), https://theweek.com/articles/488658/legacy-bush-v-gore [https://perma.cc/8Z2B-USBZ]; Linda Hirschman, *Sandra Day O'Connor Was a Trailblazer. Too Bad* Bush v. Gore *Ruined Her Legacy*, WASH. POST (Oct. 24, 2018, 6:00 AM), https://www.washingtonpost.com/outlook/2018/10/24/sandra-day-oconnor-was-trailblazer-too-bad-bush-v-gore-ruined-her-legacy/ [https://perma.cc/CB2R-WHFC]; Harold Meyerson, *Janus: Son of* Bush v. Gore, AM. PROSPECT (June 27, 2018), https://prospect.org/article/janus-son-bush-v-gore [https://perma.cc/WF59-9HC9]; Jamie Raskin, Bush v. Gore's Ironic Legal Legacy, L.A. TIMES (Dec. 13, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-1213-raskin-bush-v-gore-anniversary-20151213-story.html [https://perma.cc/SG9L-7MU6].

[86] *See, e.g.*, JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 130–31 (2019).

[87] Rosen, *supra* note 21.

[88] *Id.*

[89] *Id.*; *see* Mark Tushnet, *The First (and Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495, 495–96 (2007); Stern, *supra* note 45.

[90] *See* Cassidy, *supra* note 28; Epps, *supra* note 24; Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/63KR-6BBK]; William McGurn, *John Roberts's 'Illegitimate' Court*, WALL STREET J. (May 28, 2019, 4:35 PM), https://www.wsj.com/articles/john-robertss-illegitimate-court-11558989312 [https://perma.cc/X7SD-CBBP]; Andrew O'Reilly, *Trump Continues War of Words with Chief Justice John Roberts; Calls 9th Circuit Court a 'Total Disaster'*, FOX NEWS (Nov. 22,

On this last topic, Roberts has indicated that the Chief Justice possesses a fundamental obligation to stand up against a President who seeks to undermine judicial independence.[91] In a 2015 speech at New York University, he praised Chief Justice Charles Evans Hughes for standing up against President Franklin D. Roosevelt when the President, displeased with the Court for invalidating New Deal programs, proclaimed his intention of "packing" the Court with a greater number of Justices.[92] "It fell to Hughes to guide a very unpopular Supreme Court through that high-noon showdown against America's most popular president since George Washington," Roberts told the audience.[93] "[T]here are things to learn from it."[94] One of those things, Roberts continued, was Hughes's commendable ability to work "under the radar" to help Congress understand the harm that would come from the President's proposal.[95] It was a classic Roberts viewpoint, praising Hughes not only for squashing the President's attempt to intrude upon judicial territory but also for his ability to accomplish this work with relative stealth, preventing the public from seeing the government's dirty laundry.[96]

Like Hughes, Roberts has not shied away from confronting the White House when he feels that his Court is under attack.[97] Unlike Hughes, however, Roberts has surprisingly not worked entirely "under the radar" when defending the Court.[98] For instance, during President Barack Obama's State of the Union Address in January 2010, the President chastised the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[99] condemning the Court's majority opinion regarding removing campaign finance

2018), https://www.foxnews.com/politics/trump-continues-war-of-words-with-chief-justice-roberts-calls-9th-circuit-court-a-total-disaster [https://perma.cc/GW47-RRB4]; Geoffrey R. Stone, *Chief Justice Roberts's Delicate Seat at the Center of a Divided Supreme Court*, WASH. POST (Mar. 29, 2019), https://www.washingtonpost.com/outlook/chief-justice-robertss-delicate-seat-at-the-center-of-a-divided-supreme-court/2019/03/29/a87deb9e-3476-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/QF2V-FGB4].

[91] *See* Jess Bravin, *Chief Justice John Roberts on Taking on a Democratic President (FDR)*, WALL STREET J. (Nov. 21, 2015, 5:01 PM), https://blogs.wsj.com/law/2015/11/21/chief-justice-john-roberts-on-taking-on-a-democratic-president-fdr/ [https://perma.cc/4MRX-T9P9].

[92] Robert Barnes, *Roberts Recalls Another Chief Justice and Reveals a Little About Himself*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/politics/courts_law/roberts-recalls-another-chief-justice-and-reveals-a-little-about-himself/2015/11/22/896390e0-9133-11e5-b5e4-279b4501e8a6_story.html [https://perma.cc/C8ES-57L7]; Bravin, *supra* note 91.

[93] Barnes, *supra* note 92.

[94] Bravin, *supra* note 91.

[95] Barnes, *supra* note 92; Bravin, *supra* note 91.

[96] *See* Barnes, *supra* note 92.

[97] Cassidy, *supra* note 28.

[98] *See* Barnes, *supra* note 92; O'Reilly, *supra* note 90.

[99] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

barriers for corporations and unions.[100] As the crowd stood and applauded, the cameras immediately swept over to the group of Justices in the audience, zeroing in on their reactions.[101]

Roberts said nothing that night about Obama's remarks, but raised the issue later while giving a speech at the University of Alabama.[102] Responding to a student's question, he declared that the State of the Union amounted to nothing more than a "political pep rally" that had positioned the justices for embarrassment.[103] "I have no problem with [criticism of the Court]," the Chief Justice stated.[104]

> On the other hand, . . . there is the issue of the setting, the circumstances, and the decorum. The image of having the members of one branch of government, standing up, literally surrounding the Supreme Court, cheering and hollering while the Court—according the requirements of protocol—has to sit there expressionless, I think is very troubling.[105]

More recently, Roberts has responded with equal adamancy when President Trump criticized the Ninth Circuit for being packed with politically liberal "Obama judges."[106] This time, Roberts took the unusual step of issuing a statement disagreeing with the President.[107] "We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Roberts wrote.[108] "What we do have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[109] Later, in a speech at the University of Minnesota shortly after Kavanaugh's confirmation battle had finally ended with a sharp partisan divide in Congress and

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[100] Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), https://www.nytimes.com/2010/01/29/us/politics/29scotus.html [https://perma.cc/2HA9-AUUP].

[101] *Id.*

[102] *Chief Justice Found State of the Union Scene 'Troubling'*, WASH. POST (Mar. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030903672.html [https://perma.cc/8LJL-6GJW].

[103] *Id.*

[104] David G. Savage, *Chief Justice Unsettled by Obama's Criticism of Supreme Court*, L.A. TIMES (Mar. 10, 2010, 12:00 AM), https://www.latimes.com/archives/la-xpm-2010-mar-10-la-na-roberts-speech10-2010mar10-story.html [https://perma.cc/Y5UV-THK8].

[105] Linda Feldmann, *Chief Justice Roberts and Obama White House: A Tit for Tat*, CHRISTIAN SCI. MONITOR (Mar. 10, 2010), https://www.csmonitor.com/USA/Politics/2010/0310/Chief-Justice-John-Roberts-and-Obama-White-House-a-tit-for-tat [https://perma.cc/TR7Y-42GB].

[106] Quinn, *supra* note 17.

[107] *Id.*

[108] *Id.*

[109] *Id.*

among the general public, he took great pains to assure the audience that the Court had not separated among political party lines.[110] "[W]e 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 said.[111] "I want to assure all of you that we will continue to do that to the best of our abilities, whether times are calm or contentious."[112]

Of course, the challenge confronting Roberts is that his Court is not the Marshall Court, and the era in which Roberts presides is no longer the early nineteenth century, immutable facts that Roberts ruefully acknowledges.[113] During one luncheon with his clerks, the Chief Justice said that he would never share Marshall's historic legacy because Marshall "had the opportunity to decide the great questions because the Constitution was undeveloped."[114] "It's not like that anymore," Roberts stated.[115] "I was born in the wrong era."[116] Unlike Marshall, Roberts and his brethren cannot work largely in isolation.[117] Every move of the Court is closely watched and widely reported, especially when those moves impact social policies that the Marshall Court not only never reviewed, but also likely never even imagined would exist.[118] Two centuries of Court decisions now provide abundant counterpoints for people to leverage when they want to critique the current Court's functioning.[119] Individual Justices maintain a far higher public profile than they ever did in

[110] Brent Kendall, *Chief Justice Roberts Emphasizes Supreme Court's Independence*, WALL STREET J. (Oct. 16, 2018, 8:26 PM), https://www.wsj.com/articles/chief-justice-roberts-emphasizes-supreme-courts-independence-1539735984 [https://perma.cc/DJ6F-8MEX].

[111] *Id.*

[112] *Id.*

[113] *See* David A. Kaplan, *John Roberts's Chance for Greatness*, ATLANTIC (Oct. 10, 2018), https://www.theatlantic.com/ideas/archive/2018/10/roberts-court/572482/ [perma.cc/3MWU-8YKP]; Rosen, *supra* note 21.

[114] Kaplan, *supra* note 113.

[115] *Id.*

[116] *Id.*

[117] *See id.*; McGurn, *supra* note 90; Michaelson, *supra* note 17; Quinn, *supra* note 17; Stohr, *supra* note 17.

[118] *See, e.g.*, Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–17, 1543 (2010) (pointing out the impact of media coverage on the judicial decision-making of Supreme Court Justices); Michael A. Zilis et al., *Hitting the "Bullseye" in Supreme Court Coverage: News Quality in the Court's 2014 Term*, 9 ELON L. REV. 489, 493 (2017) (describing the emphasis in media coverage on public reactions to the Court's opinions rather than the legal intricacies of the opinions themselves); Richard A. Posner, *The Court of Celebrity*, NEW REPUBLIC (May 5, 2011), https://newrepublic.com/article/87880/supreme-court-burger-blackmum-media-celebrity [https://perma.cc/L6NQ-XV25] (discussing Supreme Court Justices' increasing utilization of media coverage to boost their own public profiles).

[119] *See* Kaplan, *supra* note 113.

Marshall's day, delivering lectures and publishing books about their individual theories on the Constitution, the Court, the craft of judging, and seemingly every other topic imaginable.[120] Amid such a climate, the odds are starkly against Roberts securing the type of atmosphere that he seeks to create on his Court.[121]

Still, Roberts seems determined to try.[122] As Part II of this Article demonstrates, such an attempt is not exactly novel for the Chief Justice. Rather, he appears to be trying to cultivate on his Court the manner of living and working that he has pursued for most of his life.

II. ROBERTS'S RULES: A CHIEF JUSTICE'S CAREFUL FORMATION

In December 1968, the headmaster at an all-male Catholic boarding school received a letter written in immaculate script by a thirteen-year old boy.[123] "The main reason why I would like to attend La Lumiere School is to get a better education," it began.[124] "I've always wanted to stay ahead of the crowd, and I feel that the competition at La Lumiere will force me to work as hard as I can."[125] The remainder of the document continued in the same tone until reaching an audacious-yet-attractive conclusion: "I won't be content to get a good job by getting a good education, I want to get the best job by getting the best education."[126] The signer of that letter was John Roberts, Jr.[127]

In 2004, Roberts—now the Chief Justice—delivered a speech about the preparations that an advocate before the Supreme Court must

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[120] Peter Canellos, *Why We Should Worry About the Cult of RGB*, POLITICO (Dec. 25, 2018), https://www.politico.com/magazine/story/2018/12/25/on-the-basis-of-sex-review-rbg-223557 [https://perma.cc/T8WV-LGNL]; Bill Mears, *Supreme Court Justices: They Do OK Financially*, CNN (June 20, 2014, 4:46 PM), https://www.cnn.com/2014/06/20/politics/supreme-court-pay/index.html [https://perma.cc/R3GS-ZW2Q]; Maxwell Tani, *Here's How Supreme Court Justices Really Make Money*, BUS. INSIDER (July 10, 2015, 9:59 AM), https://www.businessinsider.com/heres-how-supreme-court-justices-really-make-money-2015-7 [https://perma.cc/42MS-DL4Z]; Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO (Nov. 1, 2017), https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772 [https://perma.cc/H293-5BK8]; *see also* Margaret Talbot, *Supreme Confidence*, NEW YORKER (Mar. 28, 2005), https://www.newyorker.com/magazine/2005/03/28/supreme-confidence [https://perma.cc/TT5R-JVFJ] (describing the popularity of several Supreme Court Justices on the national lecture circuit).

[121] *See* Kaplan, *supra* note 113.

[122] *See infra* Part II.

[123] BISKUPIC, *supra* note 86, at 12.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

undergo to present an effective argument.[128] For Roberts, who served for years as one of the nation's most successful practitioners before the Supreme Court,[129] the work of an advocate before the Court was equivalent to the task of a medieval stonemason constructing a cathedral.[130] Just as a mason would spend months carving the details of gargoyles that would never be seen from the cathedral floor, Roberts explained, a successful Supreme Court advocate needed to "prepare, analyze, and rehearse answers to hundreds of questions, questions that in all likelihood will actually never be asked by the Court."[131] Stonemasons approached their craft with such reverence because they believed that "they were carving for the eye of God."[132] Roberts insisted that Supreme Court advocates needed to perform their work with similar devotion to a larger purpose, for what happens in the Court "in mundane case after mundane case, is extraordinary—the vindication of the rule of law."[133]

The similarity between these two sets of statements made thirty-six years apart from one another is striking. Both the adolescent and the Chief Justice focus their attention on the same themes: scrupulously hard work that is unseen by others, a commitment to being the best in a particular craft, and a devotion to some sort of lofty set of principles.[134] In many ways, Roberts the Chief Justice is indeed a product of Roberts the boarding school student: a work ethic that knows no boundaries, an unquenchable desire to succeed, and a personal compass of how that success needed to appear to others.[135]

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[128] Roger Parloff, *On History's Stage: Chief Justice John Roberts Jr.*, FORTUNE (Jan. 3, 2011), http://fortune.com/2011/01/03/on-historys-stage-chief-justice-john-roberts-jr/ [https://perma.cc/3DJN-77EQ].

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Compare supra* notes 123–127 and accompanying text (discussing the Chief Justice's letter from 1968), *with supra* notes 130–133 and accompanying text (discussing the Chief Justice's speech from 2004).

[135] *See* Toby Harnden, *The Private Thoughts of Chief Justice Roberts*, TELEGRAPH (Sept. 25, 2005, 12:01 AM), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1499187/The-private-thoughts-of-Chief-Justice-Roberts.html [https://perma.cc/36T7-VGY9]; Tim Jones et al., *John Roberts' Rule: Reach for the Top*, CHI. TRIB. (July 24, 2005), http://articles.chicagotribune.com/2005-07-24/news/0507240376_1_john-roberts-hogan-hartson-new-liberalism/2 [https://perma.cc/V33F-X5A7]; Todd S. Purdum et al., *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES (July 21, 2005), https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html [https://perma.cc/Q437-T97Z]; Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 18, 2009), https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy/amp [https://perma.cc/E9S6-GUHN] ("You couldn't think of a guy who was a straighter arrow.").

The manner in which Roberts seeks to shape the Court under his leadership appears to arise from these deeply engrained principles as well.[136]

After earning admission to La Lumiere School, Roberts quickly proved that he meant everything that he had stated in his application letter.[137] "At 8 at night John would be studying," one former classmate recalled in an interview with CNN legal analyst Joan Biskupic.[138] "[A]t 8 in the morning John would be studying."[139] Somehow, amid all of the studying, he found time to win the regional wrestling championship, become captain of the football team, participate in the school's choir and drama club, and win election to the student council.[140] During these years, he also demonstrated a commitment to a highly personal code of dignity, one that was at odds with many teenage boys in its devotion to a particular sense of order.[141] He became the strictest enforcer of the school's dress code, and wrote an editorial in the school newspaper denouncing the possibility of the school ever opening its doors to women.[142] "[T]he presence of the opposite sex in the classroom will be confining rather than catholicizing," he opined.[143] "I would prefer to discuss Shakespeare's double entendre and the latus rectum of conic sections without a [b]londe giggling and blushing behind me."[144]

After graduating as the class valedictorian from La Lumiere, Roberts enrolled at Harvard, where he continued to excel academically.[145] His dissertation on the philosophies of Daniel

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[136] *See* BISKUPIC, *supra* note 86, at 278–79; Breen, *supra* note 79, at 128; Kendall, *supra* note 110; Rosen, *supra* note 21; *infra* Part III.

[137] *See* Joan Biskupic, *'The Chief': John Roberts's Journey from 'Sober Puss' to the Pinnacle of American Law*, CNN (Mar. 27, 2019, 9:16 AM), https://www.cnn.com/2019/03/27/politics/john-roberts-sober-puss-the-chief/index.html [https://perma.cc/N5AH-83WG]; *Roberts Started on Path to Success at Young Age*, WASH. TIMES (Aug. 16, 2005), https://www.washingtontimes.com/news/2005/aug/16/20050816-122951-1663r/ [https://perma.cc/SG9R-NTTD] [hereinafter *Path to Success*].

[138] Biskupic, *supra* note 137.

[139] *Id.*

[140] JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 8 (2012); P.J. Huffstutter, *Tiny, Insular Town Was Home*, L.A. TIMES (July 21, 2005, 12:00 AM), http://articles.latimes.com/2005/jul/21/nation/na-profile21 [https://perma.cc/4R35-PMMP]; *John Roberts*, Biography, https://www.biography.com/law-figure/john-roberts [https://perma.cc/8B6X-GFRW] (last updated Sept. 16, 2019).

[141] *See* Daniel Klaidman, *How Chief Justice John Roberts Will Handle Obamacare*, NEWSWEEK (Sept. 10, 2012, 1:00 AM), https://www.newsweek.com/how-chief-justice-john-roberts-will-handle-obamacare-64631 [https://perma.cc/TD37-CRWK].

[142] *Id.*

[143] *Path to Success*, *supra* note 137.

[144] *Id.*

[145] *See* BISKUPIC, *supra* note 86, at 29, 36, 44.

Webster captured the school's coveted Bowdoin Prize.[146] Yet it was his senior thesis that proved particularly telling about the future Chief Justice's viewpoints, critiquing the British Liberal Party for engaging in personality-based combat among the likes of Winston Churchill and Lloyd George rather than focusing their collective attention on broader policy issues.[147] Partisan bickering, much like admitting women into an all-male boarding school or violating the school's dress code, felt messy and undignified to Roberts, and therefore merited no place in his personal code of standards.[148]

As a student at Harvard Law School, Roberts cemented his reputation as the purveyor of an almost-Puritan lifestyle, with trips to Mass on Sundays serving as the longest break each week from his studies.[149] Pilgrimages to Baskin-Robbins in Harvard Square to indulge in sundaes with chocolate chip ice cream and marshmallow fluff appeared to be his lone vice.[150] His self-imposed work schedule was so severe that shortly after his law school graduation in 1979, he checked himself into a hospital, where he was treated for exhaustion.[151] Still, his rigorous standards for himself never seemed to translate into rudeness or animosity toward his classmates in the highly competitive law school environment.[152] Nor did he betray his feelings about the controversial topics that both students and professors were more than willing to fiercely debate, choosing to delicately avoid the fray whenever possible.[153] He was, in the words of one commentator, "a genteel, almost old-fashioned conservative who opened doors for women and stayed out of the ideological wars that were roiling the faculty."[154]

His successes at Harvard led to a clerkship with one of the most influential members of the federal judiciary: Henry Friendly, arguably the finest jurist never to sit upon the United States

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[146] *Id.* at 38–39.

[147] *Id.* at 44.

[148] *See* BISKUPIC, *supra* note 86, at 25–26; Klaidman, *supra* note 141; Toobin, *supra* note 135.

[149] Klaidman, *supra* note 141; Debra Cassens Weiss, *Biography of Chief Justice Roberts Views Him as an Enigma*, A.B.A. J. (Mar. 20, 2019, 7:00 AM), http://www.abajournal.com/news/article/biography-of-chief-justice-roberts-views-him-as-an-enigma [https://perma.cc/6YPR-54UL].

[150] *See* Michael Levenson, *Supreme Court Justices Reminisce About Their Harvard Days*, BOS. GLOBE (Oct. 26, 2017, 7:33 PM), https://www.bostonglobe.com/metro/2017/10/26/supreme-court-justices-reminisce-about-their-harvard-days/cWGQdZMh3cs45xp2ozGuvI/story.html [https://perma.cc/CZ6F-YT8G].

[151] Klaidman, *supra* note 141.

[152] *See* Purdum et al., *supra* note 135.

[153] *See id.*

[154] Klaidman, *supra* note 141.

Supreme Court.[155] None of the cases on which Roberts worked during his time with Friendly produced any particularly trailblazing outcomes.[156] Yet Friendly's devotion to even the most pedestrian areas of legal analysis impressed Roberts, finding in the judge a kindred spirit who was willing to work endless hours to reach the right outcome and who tried to avoid public expressions of political partisanship.[157] Friendly famously treated his clerks as a team of equals, not as his subordinates, engaging in daily battles of wits with them about daunting legal conundrums.[158] Often, if Friendly conceded that a clerk had outdueled him on a legal matter, the judge would spend hours redrafting his work until that clerk agreed that the opinion was satisfactory.[159] In Roberts's praise of the collegiality of the Marshall Court, one can also see echoes of the future Chief Justice's days clerking for Friendly, rigorously analyzing cases behind closed doors before painstakingly unveiling their unified opinion for the public to see.[160]

Friendly also preached to his clerks the gospel of "judicial self-restraint," the notion that judges needed to police themselves and avoid extending their influence into arenas where it did not belong.[161] He did not brand himself as an originalist or a textualist, as Scalia and Thomas later did, and remained open to interpretations of the Constitution in a contemporary context rather than viewing it solely through an eighteenth-century lens.[162] Yet he focused heavily on the

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[155] David M. Dorsen, *Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents*, 31 PACE L. REV. 599, 602 (2011) (declaring that Friendly was one of the greatest federal judges never to be appointed to the Supreme Court); Snyder, *supra* note 69, at 1216, 1219.

[156] Snyder, *supra* note 69, at 1220.

[157] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing on S.H. 109-158 Before the S. Comm. on the Judiciary*, 109th Cong. 202 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of Hon. John G. Roberts, Jr., Circuit J., U.S. Court of Appeals for the D.C. Circuit) ("[Friendly had] total devotion to the rule of law and the confidence that if you just worked hard enough at it, you'd come up with the right answers."); Snyder, *supra* note 69, at 1220–21.

[158] Snyder, *supra* note 69, at 1210–11.

[159] *See id.* at 1213–14.

[160] *Compare id.* at 1211–13 (discussing the rigorous analysis of cases for clerks of Judge Friendly), *with* Rosen, *supra* note 55 (discussing the Marshall Court's propensity to not have many concurring or dissents).

[161] *See* HENRY J. FRIENDLY, BENCHMARKS 209–10 (1967) (cautioning judges to avoid overturning a statute unless no other acceptable outcome is available); Snyder, *supra* note 69, at 1236.

[162] *See* Robert Gordon, *Friendly Fire: How John Roberts Differs from His Hero and His Mentor*, SLATE (Aug. 11, 2005, 5:24 PM), https://slate.com/news-and-politics/2005/08/friendly-fire.html [https://perma.cc/5RSW-6AUX]; Eric J. Segall, *Does Original Matter Anymore?*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/opinion/kavanaugh-originalism-supreme-court.html [https://perma.cc/F2ZU-ZSHE].

separation of powers between the judiciary and the politically elected branches of government, and frequently reminded his clerks of the need to respect these distinctions.[163] At his Supreme Court confirmation hearings, Roberts spoke at length about Friendly's influence, describing Friendly as the person who taught him "the essential humility to appreciate that he was a judge, and that this decision should be made by this agency or this decision by that legislature."[164] In this manner, Roberts indicated to his inquisitors that he would follow his early mentor's lead if appointed to the Court, restraining himself and his colleagues from treading on territory that was not rightfully theirs to claim.[165]

A far different clerkship experience awaited Roberts in the chambers of Rehnquist.[166] The Justice nicknamed "The Lone Ranger" for his penchant for penning dogmatic dissenting opinions that no other Justice would join—similar in many ways to the reputation that Thomas has developed on the Court today—was far more politically engaged than Friendly and far less interested in turning his chambers into a debating society.[167] All of Rehnquist's clerks had to prepare their first drafts of an opinion within ten days after receiving an assignment, a process far different from the more painstaking approach that Friendly favored.[168]

Still, Roberts evidently adjusted well and earned Rehnquist's acclamation, one future Chief Justice impressing another future Chief Justice.[169] A call from Rehnquist to President Ronald Reagan's

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[163] Snyder, *supra* note 69, at 1204–05, 1209–10.

[164] *Roberts Confirmation Hearing*, *supra* note 157, at 202 (statement of Hon. John G. Roberts, Jr., Circuit J., U.S. Court of Appeals for the D.C. Circuit).

[165] *See id*. at 177, 202, 288. Roberts has frequently paid homage to these same principles in word if not necessarily always in practice. *See, e.g.*, Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL'Y REV. 1, 10, 13 (2007); Snyder, *supra* note 69, at 1231 n.497; S. Ernie Walton, *The Judicial Philosophy of Chief Justice John Roberts: An Analysis Through the Eyes of International Law*, 30 EMORY INT'L L. REV. 391, 420 (2016); Robert Barnes, *Roberts Emphasizes High Court's Restraint, Independence*, WASH. POST (May 7, 2016), https://www.washingtonpost.com/politics/courts_law/chief-justice-says-independence-and-restraint-should-be-high-courts-guiding-lights/2016/05/07/c42fdf5c-139d-11e6-8967-7ac733c56f12_story.html [https://perma.cc/62SU-USF7]; Michael O'Donnell, *John Roberts's Biggest Test Is Yet to Come*, ATLANTIC (Mar. 2019), https://www.theatlantic.com/magazine/archive/2019/03/john-roberts-biography-review/580453/ [https://perma.cc/9YN8-5KD4]; Edward Whelan, *A Model of Judicial Restraint, Not Activism*, L.A. TIMES (Sept. 6, 2005, 12:00 AM), https://www.latimes.com/archives/la-xpm-2005-sep-06-oe-whelan6-story.html [https://perma.cc/Q3R5-QF4H].

[166] *See* Snyder, *supra* note 69, at 1221, 1232.

[167] HUDSON, *supra* note 60, at 15; Snyder, *supra* note 69, at 1224; Bobelian, *supra* note 61; O'Donnell, *supra* note 63.

[168] *See* Snyder, *supra* note 69, at 1211–12, 1224.

[169] *Id.* at 1224.

Attorney General, William French Smith, allowed the twenty-six-year-old Roberts to obtain a job in the Justice Department.[170] Again, he quickly gained popularity through both his brilliance and his collegiality.[171] "He may've been double Harvard with honors," remembered Kenneth Starr, then serving as Smith's chief of staff, "but he came across as a son of the heartland."[172] He also caught Starr's attention for his ability to sidestep most instances of partisan bickering within the federal government, preferring to view all issues "through an analytical lens more than an ideological lens."[173]

In November 1982, White House Counsel Fred Fielding recruited Roberts to join his staff.[174] In this role, Roberts gained a reputation as a loyal foot soldier for the President, sometimes even flying on Air Force One with Regan to brief the "Great Communicator" on issues.[175] Like many burgeoning political conservatives of that era, Roberts seemed to view Reagan as the key to America's future, praising the President as "a great communicator because he communicated great ideas with the sincerity of a deep-felt and abiding belief in those ideas."[176]

The lawyer also found himself adopting the same role for the President that he had played among the student body at La Lumiere: a filter that kept out any influence that Roberts deemed impure.[177] When fundamentalist Christian leader Bob Jones, an outspoken Reagan supporter, sought political and financial favors from the White House, Roberts declared that the White House should tell Jones to "go soak his head."[178] When a fourteen-year-old Girl Scout tried to sell cookies to the President, Roberts launched an ethical investigation into the girl's motivations, sincerely calling the Girl Scout a "little huckster."[179]

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[170] Parloff, *supra* note 128.

[171] *Id.*

[172] *Id.*

[173] *Id.* Perhaps the greatest measure of Roberts's strength in this area came when Ted Olsen, leader of the Office of Legal Counsel, called upon Roberts to write a brief supporting legislation that would prevent the Supreme Court from maintaining jurisdiction over cases involving prayer in public schools, abortion, bussing, and other equally controversial topics. *See id.* Finding solid legal footing for such an argument was difficult, despite the popularity of this idea among many political conservatives, but Roberts managed to do so, finding ways to surgically pick apart every argument against this proposed legislation and leaving his bosses thoroughly impressed with his analytical skills. *See id.*

[174] *Id.*

[175] *See id.*

[176] *Id.*

[177] *See* Harnden, *supra* note 135.

[178] *Id.*

[179] *Id.*

When the White House considered presenting Michael Jackson with an award, the typically reserved Roberts reacted with the level of unbridled disdain that most small children reserve for their vegetables.[180] Roberts wrote,

> If one wants the youth of America and the world sashaying around in garish sequined costumes, hair dripping with pomade, body shot full of female hormones to prevent voice change, mono-gloved, well, then, I suppose 'Michael' as he is affectionately known in the trade, is in fact a good example . . . .[181]

After more invectives toward the King of Pop, Roberts arrived at his conclusion: "Quite apart from . . . appearing to endorse Jackson's androgynous lifestyle, a presidential award would be perceived as a shallow effort by the President to share in the constant publicity surrounding Jackson."[182]

Still, Roberts never allowed his emotions to reach such a fever pitch on any of the larger political controversies of the 1980s.[183] While other politically conservative lawyers spoke and wrote about the "Reagan Revolution" and openly pledged their support for the causes that the Reagan administration espoused,[184] Roberts continued to be largely circumspect in his public actions.[185] Clearly, he had aligned himself with Reagan, yet he allowed others in the administration and the broader legal community to go out on a limb with their declarations.[186] Unlike many of his fellow legal travelers in the

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[180] *See* Dana Milbank, *Young Roberts to King of Pop: Request Denied*, WASH. POST (Aug. 16, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/15/AR2005081501387.html [https://perma.cc/ASK4-MW7D].

[181] Harnden, *supra* note 135.

[182] *Id.*

[183] *See* Klaidman, *supra* note 141; Parloff, *supra* note 128.

[184] *See* Klaidman, *supra* note 141; Parloff, *supra* note 128.

[185] *See* Klaidman, *supra* note 141 ("Roberts was on the ground floor of the Reagan legal revolution—but he didn't seem to have the ideological zeal of many of his colleagues, the so-called movement lawyers.").

[186] *See id.* Consequently, Roberts became an exasperatingly difficult judicial candidate for his political opponents to attack. *See, e.g.*, David Bernstein, *A Thought About Chief Justice Roberts*, VOLOKH CONSPIRACY (June 30, 2012, 1:32 PM), http://volokh.com/2012/06/30/a-thought-about-chief-justice-roberts/ [https://perma.cc/3GUX-WEYU] ("When Roberts was nominated to the Supreme Court, one especially remarkable biographical detail came to light: every one of his friends interviewed by the media, conservative, liberal, and otherwise, swore they had never heard him express any opinion in private conversation on any controversial Supreme Court cases."); Ellen Goodman, *Who Is John Roberts?*, N.Y. TIMES (Sept. 7, 2005), https://www.nytimes.com/2005/09/07/opinion/who-is-john-roberts.html [https://perma.cc/UC7G-UJR3] ("We've spent months poring over 60,000 pages from the National Archives and

Reagan administration, he did not even play a high-profile role within the Federalist Society for Law and Public Policy Studies, the organization of scholars seeking to reform the American legal system in accordance with supposedly originalist or textualist constitutional interpretations.[187] It was as if Roberts was positioning himself for eventual scrutiny, ensuring that he would never state anything about any social or political matter that could later stand between him and a future high-profile position.[188]

In 1986, Roberts entered a new phase of his legal career, joining the appellate unit at the law firm now known as Hogan Lovells.[189] As an advocate before the Supreme Court, he quickly gained esteem not only among his colleagues and his clients, but also within the inner sanctum of the Court itself.[190] Tom Goldstein, one of the nation's preeminent Supreme Court advocates and the cofounder of the highly regarded *SCOTUSblog*, anointed Roberts as "the best Supreme Court advocate of his generation."[191] Similarly high praise flowed from others who observed Roberts calmly navigating the pressure-packed atmosphere of oral arguments, responding to questions from the bench with plain language, perfectly tailored analogies, and even the occasional joke.[192]

To anyone watching these performances, Roberts gave the impression that these answers simply flowed from him with ease.[193] In reality, it was his willingness to work for endless hours that fueled his success before the lectern.[194] To prepare for an oral argument, he would write on a legal pad hundreds of questions that one of the

reams of personal profiles for clues about how John Roberts would rule on the highest court in the land. And all we got from this paper trail is a handful of confetti.").

[187] *See* BISKUPIC, *supra* note 86, at 130; Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RES. Q. 366, 366 (2009); *It Depends on What 'Member' Means*, N.Y. TIMES (July 26, 2005), https://www.nytimes.com/2005/07/26/opinion/it-depends-on-what-member-means.html [https://perma.cc/SS53-59LX].

[188] *See* Klaidman, *supra* note 141 ("One former colleague says Roberts was ever mindful that high appointments in the executive branch or to the courts were a serious possibility. He didn't want to jeopardize those chances by stepping on a political land mine.").

[189] Parloff, *supra* note 128.

[190] *See* BISKUPIC, *supra* note 86, at 119.

[191] Parloff, *supra* note 128; *Thomas C. Goldstein*, GOLDSTEIN & RUSSELL, P.C., https://www.goldsteinrussell.com/attorneys/thomas-c-goldstein/ [https://perma.cc/9XD2-UD5M].

[192] *See* Michael Grunwald, *Roberts Cultivated an Audience with Justices for Years*, WASH. POST (Sept. 11, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/10/AR2005091000807.html [https://perma.cc/C675-5273]; Charles Lane, *Nominee Excelled as an Advocate Before Court*, WASH. POST (July 24, 2005), https://www.washingtonpost.com/archive/politics/2005/07/24/nominee-excelled-as-an-advocate-before-court/ddee45ee-f71f-4af0-a95b-4bbe81568985/ [https://perma.cc/YPS6-2DB7]; Parloff, *supra* note 128.

[193] *See* Lane, *supra* note 192; Parloff, *supra* note 128.

[194] *See* Parloff, *supra* note 128.

Justices might ask.[195] Then he would write all of the questions on flash cards, shuffle the deck, and test himself by pulling out cards at random, readying himself to answer any question that could possibly be asked in any order that it was asked.[196] His work did not end there, either.[197] Every possible contingency received his personal scrutiny, including bringing cold medicine to every oral argument in case he happened to develop a sniffle or a cough while presenting his case.[198]

Even as his star as an appellate advocate rose, however, Roberts retained the same modest and formal characteristics that had stayed with him since early adolescence.[199] E. Barrett Prettyman, Jr., the head of the Supreme Court practice group during Roberts's tenure with Hogan Lovells, recalled that Roberts always came to the firm's cafeteria clad wearing a jacket and tie, even after "business causal" became the office's manner of dress.[200] "He has a private side to him, which he watches carefully," Prettyman told one reporter.[201] "He's a fellow who has carefully seemed totally outward in everything but who's—I don't want to say 'guarded'—he doesn't just say anything that happens to occur to him."[202] Once again, Roberts seemed to be carefully preparing himself for his future.[203] Reflecting upon this behavior, Prettyman concluded that Roberts was "the only person I've ever seen who was actually headed toward [a federal appellate judgeship], and acted accordingly, before he ever got into serious consideration."[204]

Before entering the judiciary, however, Roberts returned again to the executive branch.[205] Kenneth Starr, now serving as the Solicitor General for President George H. W. Bush, had kept a close watch on the achievements of his former Justice Department colleague.[206] In October 1989, he invited Roberts to become his principal deputy.[207]

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195 *Id.*
196 *Id.*
197 *See* Klaidman, *supra* note 141; Lane, *supra* note 192.
198 Klaidman, *supra* note 141.
199 *See id.*
200 Parloff, *supra* note 128.
201 *Id.*
202 *Id.*
203 Klaidman, *supra* note 141; Parloff, *supra* note 128.
204 Parloff, *supra* note 128.
205 *See* BISKUPIC, *supra* note 86, at 94–96.
206 *See* Parloff, *supra* note 128.
207 *Id.* At the time, it seemed as if Starr was destined for a Supreme Court seat of his own, an apparent destiny that Starr never attained. *See* BISKUPIC, *supra* note 86, at 94–95, 100; Ron Elving, *Ken Starr's Memoir 'Contempt' Looks at the Rocky Road to Clinton Impeachment*, NPR (Sept. 10, 2018, 7:12 AM), https://www.npr.org/2018/09/10/643124271/ken-starr-s-new-

Starr later described Roberts as his "very closest, most trusted advisor," noting that the future Chief Justice was "involved personally in substantially every single case of moment," including nineteen appearances representing the federal government before the Supreme Court.[208] The cases in which Roberts was involved were indeed contentious, advocating for such positions as limiting the exercise of affirmative action programs, supporting the use of the death penalty, opposing abortion, and preventing defense attorneys from excluding evidence as inadmissible in criminal trials.[209] Yet Roberts has remained careful when describing this period in his career, emphasizing that his job was to zealously represent the positions of his client—the President—and refraining from betraying his personal opinions regarding these subjects.[210]

When Bill Clinton defeated George H.W. Bush for the presidency, Roberts returned to the appellate practice group at Hogan Lovells, where he continued to amass an impressive record of victories before the Court.[211] To the astonishment of many of his colleagues, he also fell in love, courting and ultimately marrying attorney Jane Sullivan.[212] Four years later, the two forty-five-year-old lawyers adopted two infant children, Josie and Jack.[213] To many of Roberts's acquaintances, married life and fatherhood had a noticeable effect on the man who previously avoided spontaneity as if it were a plague.[214] Still, the new family kept a low profile overall, typically avoiding the types of society functions that attorneys of their level of affluence commonly frequented.[215]

memoir-on-the-rocky-road-to-impeachment [https://perma.cc/J96H-C64L].

[208] Parloff, *supra* note 128.

[209] *See* BISKUPIC, *supra* note 86, at 96–97, 101–03*;* Parloff, *supra* note 128.

[210] *See* Parloff, *supra* note 128; R. Jeffrey Smith & Jo Becker, *Record of Accomplishment—and Some Contradictions*, WASH. POST (July 20, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/19/AR2005071902065.html [https://perma.cc/EB58-TYYE].

[211] Grunwald, *supra* note 192. This return to private practice came after perhaps the most bitterly disappointing period of Roberts's life: a nomination by President Bush to a seat on the United States Court of Appeals for the District of Columbia Circuit that ultimately went nowhere, thwarted by partisan pressures within the Democrat-controlled Senate that even Roberts's customary charm could not overcome. *See* Klaidman, *supra* note 141. A member of the Justice Department later revealed that this ultimately unsuccessful attempt at confirmation "was the only time I ever saw John so upset and wear his frustration so openly." *Id.*

[212] *Weddings; Jane Sullivan, John Roberts Jr.*, N.Y. TIMES (July 28, 1996), https://www.nytimes.com/1996/07/28/style/weddings-jane-sullivan-john-roberts-jr.html [https://perma.cc/S7D6-C589]; *see* Klaidman, *supra* note 141.

[213] BISKUPIC, *supra* note 86, at 121, 128; Klaidman, *supra* note 141.

[214] *See* Klaidman, *supra* note 141.

[215] *See id.*

If Roberts had been grooming himself for a federal judgeship, as Prettyman suspected, the effort paid off when George W. Bush appointed him to the D.C. Circuit Court of Appeals in May 2003.[216] Two years later, some commentators raised their eyebrows when Bush selected the young judge to replace the retiring Sandra Day O'Connor for a seat on the Supreme Court's bench.[217] Those commentators were even more surprised a couple months later when Rehnquist passed away and the President nominated Roberts to fill Rehnquist's shoes as Chief Justice.[218] On the D.C. Circuit, Roberts's record had been solid but unspectacular, devoid of any precedent-setting opinions that sent shock waves through the legal and political universe.[219] Still, Bush believed that Roberts's career made him a safe pick, if not a potentially great one.[220]

Then came a confirmation hearing performance for the ages.[221] Before the Senate, Roberts displayed the same quick-hitting but eternally disarming nature that had impressed so many Supreme

[216] *See* Adam J. White, *Judging Roberts*, WEEKLY STANDARD (Nov. 23, 2015, 12:00 AM), https://www.weeklystandard.com/adam-j-white/judging-roberts [https://perma.cc/Z32X-PCQ8]. At his confirmation hearings for this judgeship, Roberts addressed the question of whether he was an "originalist," a "textualist," or a disciple of any other school of jurisprudential philosophy with his typical degree of non-committal caution: "I don't have an overarching, guiding way of reading the Constitution. I think different approaches are appropriate in different types of constitutional provisions." *Id.*

[217] *See* Ben Shapiro, *President Bush's Roberts Pick Disappoints*, TOWN HALL (July 20, 2005, 12:00 AM), https://townhall.com/columnists/benshapiro/2005/07/20/president-bushs-roberts-pick-disappoints-n1301811 [https://perma.cc/2XAK-UBCV]; Smith & Becker, *supra* note 210 ("Roberts's short time on the bench, coupled with the relative paucity of his writings, has left critics and potential supporters with little by which to judge how he will vote on the Supreme Court."). To an extent, Bush's attention to Roberts may be attributable to Roberts's dedicated efforts on Bush's behalf in the recount litigation during the contested presidential election of 2000. *See* Toobin, *supra* note 84.

[218] *See* Peter Baker, *Bush Nominates Roberts as Chief Justice*, WASH. POST (Sept. 6, 2005), https://www.washingtonpost.com/archive/politics/2005/09/06/bush-nominates-roberts-as-chief-justice/ddd7565e-5022-4347-8438-9d03b6f2a077/ [https://perma.cc/L64M-C9C2].

[219] *See* Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 998–99 (2008). Given Roberts's praise for unanimous court decisions, serving on the D.C. Circuit must have been a pleasure for the future Chief Justice. *See id.* Roberts wrote all but four of his forty-three D.C. Circuit majority opinions for unanimous panels. *Id.* at 998. He wrote only two dissents during his D.C. Circuit tenure, one of which focused solely on a brief procedural matter and never addressed the merits of the case. *Id.* at 999.

[220] *See* Caroline Daniel, *Bush's Choice Shows Voters He Still Has Deft Political Touch: John Roberts Is a Candidate Who Can Unite the Republican Party's Two Sides While Even Pleasing Some Democrats, Says Caroline Daniel*, FIN. TIMES (July 21, 2005), https://link.gale.com/apps/doc/A134231351/ITOF [https://perma.cc/B3ER-LQ9V]; Julie Hirschfeld Davis, *Bush Picks Roberts for Chief Justice*, BALT. SUN (Sept. 6, 2005), https://www.baltimoresun.com/news/bal-te.roberts06sep06-story.html [https://perma.cc/89A8-QU2R].

[221] *See* Linda Greenhouse, *An Opening Performance Worthy of an Experienced Lawyer*, N.Y. TIMES (Sept. 13, 2005), http://www.nytimes.com/2005/09/13/politics/politicsspecial/13roberts.html [https://perma.cc/LEG6-4D3G].

Court Justices during his oral arguments.[222] Most of the time, he followed the intentionally evasive "judges don't make law" rhetoric that every Supreme Court nominee since Robert Bork has been carefully coached to follow.[223] Still, he presented his responses in a manner that was eloquent without sounding superior, deferential without becoming worshipful, and humorous without acting flippant.[224] A confirmation by the vote of seventy-eight to twenty-two was the result, with twenty-two Democrats joining all fifty-five Republicans in voting "yes."[225] Once again, Roberts's oral advocacy skills had carried him to victory.[226]

On the Court, Roberts has generally remained a reliable vote for politically conservative positions.[227] His most notable votes with the Court's majority on divided decisions include diminishing the strength of the Voting Rights Act in *Shelby County v. Holder*;[228] recognizing an individual right to possess firearms in *District of Columbia v. Heller*[229] and *McDonald v. City of Chicago*;[230] preventing a group of lawyers from aiding a foreign group that was on the State Department's "watch list" in *Holder v. Humanitarian Law Project*;[231] upholding the firing of an assistant district attorney who tried to raise apparent ethical concerns regarding his supervisor in *Garcetti*

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[222] Klaidman, *supra* note 141 ("[Roberts] put on a virtuoso performance at his confirmation hearing, dazzling senators with his encyclopedic knowledge of constitutional law and Supreme Court precedents while casting himself as an avatar of judicial modesty."); Toobin, *supra* note 135 ("[Roberts] charmed the Senate Judiciary Committee at his confirmation hearing . . . .").

[223] *See* Greenhouse, *supra* note 221; *see also* Clyde Haberman, *Want to Know Where Supreme Court Nominees Stand? Don't Bother Asking*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/us/supreme-court-bork-hearings.html [https://perma.cc/VK2Y-7MC3] (stating that Supreme Court nominees are coached not to reveal their true viewpoints on controversial issues after Robert Bork's candid responses at his confirmation hearings led to his rejection by the Senate).

[224] *See* Greenhouse, *supra* note 221. For some commentators, this deft handling of the Senate epitomized Roberts's strengths, the product of decades of carefully forming relationships and building a solid reputation among leaders on all sides of the political spectrum. *See, e.g.*, Smith & Becker, *supra* note 210 ("[Roberts's] strong relationships on both sides of the Beltway's partisan divide could help smooth his Senate confirmation, enabling him to convince conservatives that he won't be the next David H. Souter without worrying Democrats that he will be the next Antonin Scalia.").

[225] Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html [https://perma.cc/E98U-U5F8].

[226] *See* Greenhouse, *supra* note 221.

[227] *See, e.g.*, Fenwick, *supra* note 24; Kaplan, *supra* note 113; Millhiser, *supra* note 24; Quinn, *supra* note 17; Roeder, *supra* note 24.

[228] Shelby County v. Holder, 570 U.S. 529, 534–35, 556–57 (2013).

[229] District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

[230] McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (citation omitted).

[231] Holder v. Humanitarian Law Project, 561 U.S. 1, 39–40 (2010).

v. Ceballos;[232] allowing employers to refuse legally mandated contraceptive coverage to their employees in *Burwell v. Hobby Lobby*;[233] permitting police to strip search an individual arrested for a non-violent offense even if there is no reasonable suspicion that the individual in question is carrying contraband in *Florence v. Board of Chosen Freeholders*;[234] deeming constitutional a state law requiring individuals to provide photographic identification before they would be allowed to vote in *Crawford v. Marion County Election Board*;[235] and, of course, holding unconstitutional limitations on corporate expenditures in political campaigns in *Citizens United*.[236] His record on affirmative action cases has drawn particularly strong criticism from politically liberal groups, with Roberts staunchly opposing affirmative action programs with critiques such as "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[237]

For a Justice known to dissent only reluctantly, one can reasonably assume that the times when Roberts does dissent are instructive

[232] Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

[233] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 763 (2014).

[234] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 322, 338–39 (2012).

[235] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185, 204 (2008) (citation omitted).

[236] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 392–93 (2010) (Roberts, C.J., concurring).

[237] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007); *see also* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215–16, 2242–43 (2016) (Alito, J., dissenting) (maintaining that the University of Texas's race-based plan to create diversity was unconstitutional; joined in full by Roberts); Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring) ("The dissent . . . urges that '[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."' But it is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good." (quoting *id.* at 380 (Sotomayor, J., dissenting))); David Cole, *Race Matters at the Supreme Court*, N.Y. REV. BOOKS (Dec. 8, 2015, 3:55 PM), https://www.nybooks.com/daily/2015/12/08/supreme-court-threat-to-campus-diversity-affirmative-action/ [https://perma.cc/AN53-PSRW] ("According to Roberts's vision of equality, in which a color-blind society can apparently be willed into existence by simply closing one's eyes to race, any affirmative action plan is invalid."); Christian Farias, *Chief Justice John Roberts Wants to Know Exactly When Affirmative Action Can Die*, HUFFINGTON POST (Dec. 10, 2015), https://www.huffpost.com/entry/supreme-court-affirmative-action-university_n_5668 6835e4b0f290e5217b20 [https://perma.cc/DB5A-QAUE] (highlighting that the Chief Justice was looking for "a timeline for an end to affirmative action"); Mike Sacks, *Affirmative Action Isn't Oppressive, but the Roberts Court Wants to End It Anyway*, DAILY BEAST (July 12, 2017, 2:24 PM), https://www.thedailybeast.com/affirmative-action-isnt-oppressive-but-the-roberts-court-wants-to-end-it-anyway [https://perma.cc/2MGK-SHV6] ("The travesty . . . is the Roberts Court's inevitable march toward its virtual eradication of affirmative action . . . ."); Jeffrey Toobin, *Chief Justice Out to End Affirmative Action*, CNN (Feb. 28, 2013, 3:15 PM), https://www.cnn.com/2013/02/28/opinion/toobin-roberts-voting-rights-act/index.html [https://perma.cc/8HTT-UJ77] ("John Roberts has made his choice: to declare victory in the nation's fight against racial discrimination and then to disable the weapons with which that struggle was won.").

regarding his most vehement beliefs.[238] Perhaps the most stinging of these dissents came in the 2015 decision in which the Court's majority cleared the pathway for legalized same-sex marriage nationwide.[239] Roberts even took the unusual step of reading portions of this dissent aloud from the bench, revealing his disdain for the majority's holding in full public view.[240] In this opinion, and in other dissents in which Roberts focused on the ability of law enforcement officers to conduct a search without a warrant; the rights of a bank to force a credit card holder into arbitration rather than facing a lawsuit in open court; the protections of a state against a lawsuit commenced by a state agency; the ability of Arizona voters to divest the state's legislature of the ability to draw election districts and place such power in an independent commission; the legality of a statute that prohibited same-sex couples from obtaining federal benefits for married couples; the autonomy of state supreme courts to use state law standards when deciding whether Supreme Court decisions on rules of criminal procedure apply retroactively; the constitutionality of sentencing a juvenile offender to life without parole; and the disqualification of a judge who decided a case in favor of the coal company that spent millions of dollars in that judge's re-election campaign, the man who preaches collegiality rebuked the Court's majority for interfering in affairs that rightfully belonged in legislative and executive hands, language that is perhaps reminiscent of Friendly's conversations with his clerks about the importance of judicial self-restraint.[241]

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[238] *See* Rosen, *supra* note 21 (discussing Roberts's views about ways that too many dissenting opinions can damage the Court's reputation); Stern, *supra* note 45 (describing Roberts's reticence to dissent and awkwardness when he does so).

[239] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational.").

[240] *See* Amber Phillips, *John Roberts's Full-Throated Gay Marriage Dissent: Constitution 'Had Nothing to Do with It'*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/john-robertss-full-throated-gay-marriage-dissent-constitution-had-nothing-to-do-with-it/ [https://perma.cc/Z8WR-CGN8]; *see also* Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 8–12 (2008) (discussing the use of the relatively rare oral dissent as a rhetorical tool by Supreme Court Justices to publicly and dramatically demonstrate their extreme distaste for the majority's position).

[241] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677–78 (2015) (Roberts, C.J., dissenting); United States v. Windsor, 570 U.S. 744, 775, 817–18 (2013) (Roberts, C.J., dissenting); Miller v. Alabama, 567 U.S. 460, 493–94 (2012) (Roberts, C.J., dissenting); Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 2872–73 (2011); *id.* at 266 (Roberts, C.J., dissenting); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890–91 (2009) (Roberts, C.J., dissenting); Vaden v. Discover Bank, 556 U.S. 49, 72, 80 (2009) (Roberts, C.J., dissenting); Danforth v. Minnesota, 552 U.S. 264, 291–92 (2008) (Roberts, C.J., dissenting);

Yet Roberts has also made intermittent forays across the political aisle.[242] Upholding the Affordable Care Act was the most unexpected and most famous of these shifts, but Roberts also broke apart from at least some of the Court's politically conservative Justices prior to this past term in cases involving ineffective assistance of counsel in criminal proceedings,[243] malicious prosecutorial conduct by law enforcement,[244] sovereign immunity of a Native American tribe,[245] due process for same-sex couples,[246] and the inability of the First Amendment to prevent states from limiting judicial candidates from fundraising in certain situations.[247] At times, these unexpected decisions came on the heels of public criticism against Roberts for choices made in similar cases.[248] For instance, in one dispute earlier in Roberts's tenure as Chief Justice, he received public criticism for finding that no conflict of interest existed when a judge presided over a case involving a litigant who contributed millions of dollars to that judge's election campaign.[249] Subsequently, Roberts seized some unexpected opportunities to write that legal practitioners need to be held to a high standard of morality.[250] An even more striking

Georgia v. Randolph, 547 U.S. 103, 127–28 (2006) (Roberts, C.J., dissenting).

[242] *See infra* notes 243–247 and accompanying text.

[243] *See* Buck v. Davis, 137 S. Ct. 759, 767, 780 (2017); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 529–30, 588 (2012).

[244] *See* Manuel v. City of Joliet, 137 S. Ct. 911, 919–20 (2017).

[245] *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 804 (2014).

[246] *See* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (per curiam).

[247] *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015).

[248] *See infra* notes 249–251 and accompanying text.

[249] *See* Edward A. Fallone, *Justice Roberts Has a Little List*, MARQ. U. L. SCH. FAC. BLOG (June 10, 2009), https://law.marquette.edu/facultyblog/2009/06/justice-roberts-has-a-little-list/ [https://perma.cc/Q2RM-MVSA] ("By demanding that the judicial remedy be clear and manageable before the Court should undertake to recognize the existence of a constitutional right, Chief Justice Roberts would transform judicial restraint into judicial timidity."); *Raising the Bar*, L.A. TIMES (June 9, 2009, 12:00 AM), http://articles.latimes.com/2009/jun/09/opinion/ed-scotus9 [https://perma.cc/N9NW-4B8S] ("[Roberts was] wrong to bewail a decision that will force judges, including members of his own court, to take apparent conflicts of interest more seriously."); *see also* James Sample, *Justice for Sale*, WALL STREET J., (Mar. 22, 2008, 12:01 AM), https://www.wsj.com/articles/SB120614225489456227 [https://perma.cc/W2LP-JFNR] (critiquing the Court's stance on this topic even before the opinion in this particular case was rendered).

[250] *See* Lee v. United States, 137 S. Ct. 1958, 1969 (2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (determining that the incompetence of the defendant's attorney led to the defendant accepting a plea against the defendant's best interests, constituting ineffective assistance of counsel because the defendant would not have pled guilty but for the attorney's legally and factually inaccurate advice); Buck v. Davis, 137 S. Ct. 759, 767, 780 (2017) (overturning the defendant's death sentence because the defendant's attorney failed to zealously represent the best interests of the client and even introduced evidence suggesting that the client had a high propensity to commit future crimes because the defendant was black); *Williams-Yulee*, 135 S. Ct. at 1672 (holding that states may bar candidates for judicial positions from personally soliciting funds for their election campaigns).

example occurred after Roberts was criticized for reading his dissenting opinion out loud in the courtroom in the same-sex marriage case.[251] Just two years later, Roberts determined that a state law preventing parents of matching gender from being listed on their child's birth certificate was unconstitutional.[252] True to form, this jurist who observed how Rehnquist was widely praised for preserving the *Miranda* warnings in *Dickerson* and how this same Chief Justice was widely condemned for ending the Florida recount in *Bush v. Gore* may be determined not to repeat his predecessor's mistakes.[253]

At times, Roberts even went out of his way to avoid answering particularly messy questions that litigants sought to bring before the Court.[254] For example, he vigorously objected to an attempt to extract a decision from the Court regarding a political gerrymandering dispute in 2017.[255] "We will have to decide in every case whether the Democrats win or the Republicans win," Roberts stated during oral arguments.[256] "So it's going to be a problem here across the board. . . . And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country."[257] Many observers recoiled from such language, arguing that the Chief Justice should not dodge a thorny legal dispute in an effort to safeguard the reputation of his Court.[258] Nevertheless, Roberts again avoided reaching a decision on the merits regarding gerrymandering allegations during this most recent Term, invoking the ever-nebulous political question doctrine to keep away from this issue.[259] To the

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[251] *See supra* note 240 and accompanying text.

[252] *See* Pavan v. Smith, 137 S. Ct. 2075, 2076, 2079 (2017).

[253] *See supra* notes 70–85 and accompanying text.

[254] *See infra* notes 255–260 and accompanying text; *see also infra* Part III (reviewing Robert's voting pattern after Kennedy retired).

[255] *See* Dahlia Lithwick, *The Supreme Court Is Not Going to Save You*, SLATE (June 18, 2018, 5:47 PM), https://slate.com/news-and-politics/2018/06/in-gill-v-whitford-and-benisek-v-lamone-john-roberts-supreme-court-shows-its-too-afraid-to-do-anything.html [https://perma.cc/NJ48-5YCV].

[256] *Id.*

[257] *Id.*

[258] *See* David Daley, *Mr. Chief Justice, It's Not "Gobbledygook": New N.C. Ruling Shows How to Fix Gerrymandering*, SALON (Jan. 13, 2018, 2:00 PM), https://www.salon.com/2018/01/13/mr-chief-justice-its-not-gobbledygook-new-n-c-ruling-shows-how-to-fix-gerrymandering/ [https://perma.cc/D9QM-QAWM]; Lithwick, *supra* note 255; Philip Rocco, *Justice Roberts Said Political Science Is 'Sociological Gobbledygook.' Here's Why He Said It, and Why He's Mistaken*, WASH. POST (Oct. 4, 2017, 4:10 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/04/justice-roberts-said-political-science-is-sociological-gobbledygook-heres-why-he-said-it-and-why-hes-mistaken/ [https://perma.cc/9G4Z-R5Y7]; Rubin, *supra* note 34.

[259] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019). Of particular note in Roberts's opinion is a comment showing that the Chief Justice is particularly concerned about

consternation of some politically conservative activists, he also played a pivotal role in the Court refusing to hear certain highly controversial cases during this past Term, including a widely publicized dispute concerning the legalities of a state defunding Planned Parenthood, thus keeping his Court further removed from the political spotlight.[260]

One can view Roberts's careful cultivation of the Court's image even in an act as mundane as the ceremonial admission of attorneys to the Supreme Court Bar, a task that many Justices find boring and unnecessary.[261] Roberts, however, devotes personal attention to every lawyer who is being admitted to the Supreme Court Bar and conducts the swearing-in ceremony with the utmost gravity.[262]

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going down the proverbial slippery slope in this area:

> What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Id. at 2507. The message, therefore, is clear: Roberts, no matter how distasteful and undignified he finds political gerrymandering to be, simply is unwilling to have his Court dragged into the ever-renewing politically charged dispute about whether a new district's borders constitutes an improper act of gerrymandering. *See id.*

[260] *See* Sam Baker, *John Roberts' Quiet Supreme Court*, AXIOS (Dec. 19, 2018), https://www.axios.com/supreme-court-john-roberts-conservative-c8dc708e-e0c2-44f5-b279-122567ac253e.html [https://perma.cc/P6FZ-ZBHS] ("The Supreme Court has been quiet in the months since Justice Brett Kavanaugh's wildly polarizing confirmation. And that's how Chief Justice John Roberts seems to want it."); Adam Liptak, *Supreme Court Won't Hear Planned Parenthood Cases, and 3 Court Conservatives Aren't Happy*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/us/politics/planned-parenthood-supreme-court.html [https://perma.cc/4ZB6-UBDX] ("That split on the right side of the [C]ourt [of Roberts and Kavanaugh refusing to vote to accept the case, while Thomas, Alito, and Gorsuch voted for the Court to accept the case] is evidence that Chief Justice Roberts is trying to keep the [C]ourt out of major controversies . . . ."); Mark Sherman & Jessica Gresko, *Roberts' Supreme Court Defies Easy Political Labels*, DAILY HERALD (June 29, 2019, 7:00 AM), https://www.dailyherald.com/article/20190629/news/306299986 [https://perma.cc/FFH3-DSU6] ("The [C]ourt seemed determined to maintain as low a profile as possible once Kavanaugh joined the bench in early October, finding a variety of ways to keep hot-button topics like abortion, guns, immigration and gay rights, that might divide conservatives from liberals, off the term's calendar.").

[261] *See* Toobin, *supra* note 135 ("[Former Chief Justice William] Rehnquist barely tolerated the practice, rushing through it and mumbling the names, and several colleagues (notably [Justice David] Souter) display an ostentatious boredom that verges on rudeness.").

[262] *See* Lincoln Caplan, *John Roberts's Court*, NEW YORKER (June 29, 2015), https://www.newyorker.com/news/news-desk/the-chief-justice/amp [https://perma.cc/B24J-UZST]; Toobin, *supra* note 135.

Journalist Lincoln Caplan took notice of this when observing Roberts presiding over this ritual in 2015.[263] "He projects qualities that fit his formal role as Chief Justice of the United States," Caplan wrote.[264] "His manner conveys the sense that, while his work is primarily at the Court, the job calls for him to go about it with a sense of duty to the nation outside the cloistered courtroom, made tangible in the far-flung states the lawyers represent."[265]

This scrupulous attention to detail in a typically-overlooked ceremony epitomizes Roberts's approach to leading the Court.[266] In many respects, the Chief Justice brings to the bench a mindset that has stretched all the way from his boarding school days onward through the present: adhering to his own perception of dignity at all times, avoiding controversy whenever possible, working tirelessly to reach the right outcome, avoiding sweeping decisions when narrower outcomes are available, and refraining from any activities that might cause long-term reputational harm.[267] There is little dispute that these characteristics have long defined Roberts as a person.[268] What remains to be determined are the ways in which these traits impact Roberts's performance as the first among equals at the top of the federal judiciary.

III. AFTER ONE TERM: REVIEWING ROBERTS'S VOTES WITH LIBERAL JUSTICES ON THE FIRST TERM OF THE POST-KENNEDY COURT

A. Madison v. Alabama[269]

Vernon Madison killed an Alabama police officer in 1985 and was sentenced to death.[270] Today, at the age of seventy, he confronts daily difficulties walking and speaking, and he is severely cognitively impaired due to a series of strokes and vascular dementia.[271] Medical professionals have confirmed that as a consequence of these conditions, he can no longer remember the crime that he

263 *See* Caplan, *supra* note 262.
264 *Id.*
265 *Id.*
266 *See supra* text accompanying notes 50–58, 86–90, 98–112.
267 *See supra* notes 123–226 and accompanying text.
268 *See id.*
269 Madison v. Alabama, 139 S. Ct. 718 (2019).
270 *Id.* at 723.
271 *Id.*; Mark Joseph Stern, *Roberts Confirms He's the New Swing Justice*, SLATE (Feb. 27, 2019, 12:12 PM), https://slate.com/news-and-politics/2019/02/madison-v-alabama-john-roberts-death-penalty.html [https://perma.cc/3RR6-ALER].

committed.[272] His attorney argued that due to this lack of memory, the Eighth Amendment prohibits the State of Alabama from carrying out the sentence of death.[273] In 2007, the Supreme Court had held in the case of *Panetti v. Quarterman*[274] that the government cannot execute an individual whose mental illness is so severe that the individual "lacks a 'rational understanding' of 'the . . . rationale for [the individual's] execution.'"[275] Such an execution, the Court held, would be "cruel and unusual" in violation of the Eighth Amendment.[276]

The State of Alabama argued that *Panetti* did not apply to Vernon Madison's case, as *Panetti* dealt with an inmate who suffered from delusions and Madison, by contrast, suffered from dementia rather than from delusions.[277] The Court's majority, however, disagreed with the Alabama's attempt to distinguish the two situations.[278] According to the Court, speaking through Justice Kagan, if an inmate's memory loss "combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend" that individual's death sentence, "then the *Panetti* standard will be satisfied."[279] It does not matter whether the inability to remember the crime and comprehend its impact arises from dementia, delusions, or some other source.[280] The only test demanded by *Panetti*, according to the Court's majority, is whether the individual in question lacks the "rational understanding" of the "rationale for [the individual's] execution," without any consideration of the cause for the inmate's lack of such understanding.[281]

Justices Alito, Thomas, and Gorsuch joined in dissent, arguing that the *Panetti* standard did not prevent Alabama from executing Madison.[282] Kavanaugh took no part in the decision, as he had not yet been confirmed to the Court when oral arguments in the case took place.[283] Roberts, however, joined the Court's majority opinion, determining that *Panetti*'s protections were not limited to individuals

[272] *See Madison*, 139 S. Ct. at 724.
[273] *See id.* at 722.
[274] Panetti v. Quarterman, 551 U.S. 930 (2007).
[275] *Madison*, 139 S. Ct. at 723 (quoting *Panetti*, 551 U.S. at 958–59).
[276] *Madison*, 139 S. Ct. at 722 (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1986)).
[277] *See Madison*, 139 S. Ct. at 724.
[278] *Id.* at 728.
[279] *Id.* at 727–28.
[280] *See id.* at 728.
[281] *See id.* at 723, 728 (quoting *Panetti*, 551 U.S. at 958–59).
[282] *See Madison*, 139 S. Ct. at 731, 734 (Alito, J., dissenting).
[283] *Id.* at 731; Stern, *supra* note 271.

with dementia.[284] This vote surprised commentators, and likely surprised Alito, Thomas, and Gorsuch, as Roberts had dissented in *Panetti*, arguing that the Eighth Amendment did not prevent the execution of an inmate who was suffering from delusions.[285] In some circles, speculation arose that Roberts had changed his views about the scope of the Eighth Amendment between his 2007 dissenting vote in *Panetti* and his current vote upholding and even expanding *Panetti*'s reach in *Madison*.[286] Such opinions were fueled not only by Roberts's decision to join Kagan's majority opinion, but also by Roberts's rather assertive questioning of Alabama's deputy attorney general during oral arguments, ultimately pushing the state's advocate to concede that *Panetti* may block Madison's execution due to the impairments caused by Madison's dementia.[287] His questions on this topic provided the responses that underscore much of Kagan's majority opinion.[288]

Still, motivations beyond a complete change of thought regarding the Eighth Amendment may have fueled Robert's vote.[289] Roberts has spoken previously about his dislike for cases on which the Court deadlocks.[290] Voting with Alito, Thomas, and Gorsuch in this matter would have tied the voting at 4-4.[291] Furthermore, the dissent authored by Alito may have gone further than Roberts was willing to go, laced with strong language attacking the Court's majority for engaging in activism, not rigorous legal analysis, to dishonestly reach their desired outcome.[292] By joining Kagan's opinion, Roberts

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[284] *See id*. at 722, 728 (majority opinion).

[285] *See* Charles P. Pierce, *The Supreme Court Just Served Up a Slice of Humanity, Courtesy of John Roberts*, ESQUIRE (Feb. 27, 2019), https://www.esquire.com/news-politics/politics/amp26559050/supreme-court-dementia-execution-madison-v-georgia-john-roberts/ [https://perma.cc/JP97-CLVS]; Jordan S. Rubin, *Roberts Casts Swing Vote for Death Row Inmate with Dementia*, BLOOMBERG L. (Feb. 27, 2019, 2:36 PM), http://news.bloomberglaw.com/us-law-week/roberts-casts-swing-vote-for-death-row-inmate-with-dementia-3 [https://perma.cc/J4JM-5Z2Q]; Stern, *supra* note 271.

[286] *See* Garrett Epps, *Is It Cruel and Unusual to Execute a Man with Dementia?*, ATLANTIC (Feb. 28, 2019), https://amp.theatlantic.com/amp/article/583792 [https://perma.cc/AP7G-37U7]; Pierce, *supra* note 285; Stern, *supra* note 271; Stohr, *supra* note 17.

[287] *See* Stern, *supra* note 271 ("He then pushed Alabama's deputy attorney general to concede that Madison's dementia may shield him from execution under *Panetti*, even though he isn't delusional.").

[288] *Id.* ("These concessions, extracted by Roberts' masterful questioning at oral arguments, formed the bedrock of Kagan's opinion.").

[289] *See id*.

[290] *See* Pomerance, *supra* note 32, at 363, 433; Stern, *supra* note 271.

[291] *See* Stern, *supra* note 271.

[292] *See Madison*, 139 S. Ct. at 737–38 (Alito, J., dissenting) ("[W]hat the Court has done in this case cannot be defended, and therefore it is hard to escape thinking that the real reason for today's decision is doubt on the part of the majority regarding the correctness of the state court's factual finding on the question whether Madison has a rational understanding of the

accomplished two objectives that he frequently cites as important: upholding the Court's precedents and reaching the narrowest possible outcome in the case.[293] Notably, even Kagan's majority opinion does not guarantee that Madison's life will be spared.[294] Rather, the majority opinion remands the case back to the Alabama court that approved Madison's execution, ordering that court to reconsider their decision in light of the Supreme Court's analysis.[295] At the end of the day, the decision to execute or not to execute another human being will reside with a state court in Alabama, not with Roberts or with the Court whose decisions define his legacy.[296]

B. Moore v. Texas[297]

In 1980, at the age of twenty, Bobby James Moore murdered a store clerk during a robbery attempt.[298] The State of Texas sought the death penalty for Moore.[299] Moore's attorney sought state habeas relief, arguing that his client was severely intellectually disabled, unable to comprehend even rudimentary concepts such as the days of the week, the months of the year, the four seasons, and the fact that subtraction was different from addition.[300] The state habeas judge determined that Moore's intellectual disabilities rendered him ineligible for the death penalty in accordance with the Supreme Court's precedent in *Atkins v. Virginia*,[301] which held that executing an individual too intellectually disabled to appreciate the consequences of that individual's crime violated the Eighth Amendment.[302] The Texas Court of Criminal Appeals, however,

reason for his execution. . . . [T]he question whether he is capable of understanding the reason for his execution was vigorously litigated below. But if the Court thinks it is proper for us to reach that question and to reverse the state court's finding based on a cold record, it should own up to what it is doing.").

[293] *See id*. at 726, 731 (majority opinion) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007) (affirming the validity of the Court's precedent in *Panetti* as the standard governing this dispute, stating that the Court will neither permit Madison's immediate execution to proceed nor refuse to permit Alabama to ever carry out their desired execution, and remanding the case back to the state court for its determination not inconsistent with the Court's findings).

[294] *See Madison*, 139 S. Ct. at 731.

[295] *Id.*

[296] *See id.*

[297] Moore v. Texas, 137 S. Ct. 1039 (2017), *relief denied sub nom*. *Ex parte* Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018), *rev'd sub nom*. Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam).

[298] *Moore,* 137 S. Ct. at 1044 (citing *Ex parte* Moore, 470 S.W.3d 481, 490–91 (Tex. Crim. App. 2015)).

[299] *See Moore,* 137 S. Ct. at 1044 (citing *Ex parte Moore*, 470 S.W.3d. at 492).

[300] *Id.* at 1045.

[301] Atkins v. Virginia, 536 U.S. 304 (2002).

[302] *See Atkins*, 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1996));

reversed this decision and found that Moore was not intellectually disabled enough for *Atkins* to apply.[303] Moore's counsel then appealed to the Supreme Court.[304] In a divided opinion, the Court's majority determined that the case should be remanded to the Texas appeals court for further review not inconsistent with the Court majority's critiques.[305] Even the three dissenting Justices—Roberts, Thomas, and Alito—who believed that execution could constitutionally proceed did agree with the majority on one concept: the Texas Court of Criminal Appeals' problematic lack of consideration of medical evidence in evaluating Moore's level of intellectual disability.[306]

By the time Moore's case returned to the Texas Court of Criminal Appeals, the county in which Moore's original trial took place had elected a new district attorney.[307] Upon reviewing Moore's case and the Supreme Court's decision, this new district attorney determined that the death penalty for Moore would be unconstitutional due to his intellectual disability, stating that Moore should be sentenced to life in prison instead.[308] Nevertheless, despite the district attorney's opinion, the Texas Court of Criminal Appeals determined that Moore's original death sentence was constitutional and needed to be carried out by the government.[309] Once again, Moore's attorney appealed to the Supreme Court.[310]

As before, the Court's majority determined that the Texas Court of Criminal Appeals lacked adequate clinical analysis in deciding that Moore's execution would not violate the Eighth Amendment in accordance with the Court's precedent in *Atkins*.[311] This time, though, the Court's majority included Roberts, separating himself from the still-adamant dissenting opinion of Alito, Thomas, and Gorsuch.[312] In a separate concurring opinion, Roberts explained why he shifted positions between the Court's first review of Moore's petition and the current case.[313] While he still found flaws in the

Moore, 137 S. Ct. at 1044).

303 *Moore*, 137 S. Ct. at 1044; *id.* at 1053 (Roberts, C.J., dissenting).

304 *See id.* at 1048 (majority opinion).

305 *See id.* at 1053.

306 *See id.* at 1050; *id.* at 1053, 1060 (Roberts, C.J., dissenting).

307 Jordan S. Rubin, *Divided High Court Throws Out Texas Death Sentence Again*, BLOOMBERG L. (Feb. 19, 2019, 4:16 PM), https://news.bloomberglaw.com/us-law-week/divided-high-court-throws-out-texas-death-sentence-again-2 [https://perma.cc/3NHT-CX42].

308 *See id.*

309 *Id.*

310 Moore v. Texas, 139 S. Ct. 666, 667, 670 (2019) (per curiam).

311 *See id.* at 669, 671–72 (quoting *Moore*, 137 S. Ct. at 1048, 1051–52).

312 *See Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring); *id.* at 673 (Alito, J., dissenting).

313 *See id.* at 672–73 (Roberts, C.J., concurring).

Court's original analysis, Roberts concluded that he joined the majority in this decision because the Texas Court of Criminal Appeals repeated the same mistakes that the Court had previously ordered it to correct.[314] "[The Texas court] again emphasized Moore's adaptive strengths rather than his deficits," the Chief Justice stated.[315] "That did not pass muster under this Court's analysis last time. It still doesn't."[316]

As with Vernon Madison's case, however, it is difficult to discern from this one opinion whether this decision represents a politically leftward shift by Roberts regarding the death penalty or whether other intervening factors caused him to change course on this case between 2017 and 2019.[317] Given that Roberts voted during this past Term to permit the execution of a death row inmate without his spiritual advisor present, a decision that led to widespread public criticism, it seems likely that his personal views about the death penalty have not shifted much, if at all.[318] Notably, Roberts's concurring opinion in Moore's case continues to cast some doubt on the logic employed by the remainder of the Justices who voted for the Court's majority position.[319] What swayed Roberts to the majority's

[314] *See id.* at 672 (citing *Moore*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting)).

[315] *Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring).

[316] *Id.*

[317] *See supra* notes 285–295 and accompanying text; *infra* notes 318–321 and accompanying text.

[318] Dunn v. Ray, 139 S. Ct. 661, 661 (2019); *id.* 661 (Kagan, J., dissenting) ("Holman Correctional Facility, the Alabama prison where Domineque Ray will be executed tonight, regularly allows a Christian chaplain to be present in the execution chamber. But Ray is Muslim. And the prison refused his request to have an imam attend him in the last moments of his life."); *see* David French, *The Supreme Court Upholds a Grave Violation of the First Amendment*, NAT'L REV. (Feb. 8, 2019, 2:30 PM), https://www.nationalreview.com/corner/the-supreme-court-upholds-a-grave-violation-of-the-first-amendment/ [https://perma.cc/ZES8-86Z6]; Dahlia Lithwick, *An Execution Without an Imam*, SLATE (Feb. 8, 2019, 2:56 PM), https://slate.com/news-and-politics/2019/02/domineque-ray-alabama-execution-imam-first-amendment-scotus.html [https://perma.cc/6D2W-VSEL]. In a subsequent decision, however, Roberts voted as part of the Court's majority—and against politically conservative Justices Thomas and Alito—holding that the execution of a murderer who was a practicing Buddhist could not proceed because the prison refused to permit the inmate to have his spiritual advisor present in the execution chamber. Murphy v. Collier, 139 S. Ct. 1475, 1474 (2019) (mem.). Why a practicing Buddhist's request was granted and a virtually identical request from a practicing Muslim was denied is unclear. *See* Erwin Chemerinsky, *In Death Do They Part—SCOTUS Justices Show Divisions over Capital Cases*, A.B.A. J. (May 30, 2019, 6:00 AM), http://www.abajournal.com/news/article/chemerinsky-in-death-do-they-part-justices-show-divisions-over-capital-cases [https://perma.cc/79KD-2CDK] (describing the difficulty of reconciling the *Ray* and *Murphy* rulings). Given the extremely public backlash from both sides of the political aisle against the Court for permitting the execution to proceed in *Ray*, however, one might surmise that this represents yet another example of Roberts changing his vote to a position against his own personal beliefs in an effort to protect the reputation of the Court against further damage. *See supra* notes 248–253 and accompanying text.

[319] *See Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring) ("When this case was before us

side, it appears, was his disgust at the Texas Court of Criminal Appeals' failures to follow the instructions of his Court.[320] Repeating the same set of mistakes twice seemed to be egregious enough in Roberts's estimation to cause him to switch his vote on a case that was truly a matter of life and death.[321] The message from the Chief Justice therefore seems clear: when the Supreme Court commands a lower court to reconsider a case in accordance with the Supreme Court's instructions, failure to abide by those edicts will not be viewed favorably.[322]

C. Stokeling v. United States[323]

Denard Stokeling was convicted in 2015 of a federal felon-in-possession violation, a crime that would earn him a minimum of fifteen years in prison if his prior conviction for robbery qualified as a "violent felony" under the federal Armed Career Criminal Act (ACCA).[324] The robbery statute in the State of Florida under which Stokeling was convicted allowed the government to convict an individual who employs any form of physical "force sufficient to overcome a victim's resistance."[325] Stokeling argued that a conviction under this statute should not qualify as a "violent felony" under the ACCA, given the lack of the word "violence" in the Florida robbery statute.[326] The United States Court of Appeals for the Eleventh Circuit disagreed with Stokeling, finding that the Florida law's prevention of "force sufficient to overcome a victim's resistance" was essentially synonymous with the ACCA definition of the term *violence*.[327]

The Supreme Court's majority affirmed the Eleventh Circuit's determination.[328] Justice Thomas, authoring the opinion of the Court, pointed to treatises written in 1828 and 1923 stating that "common-law authorities frequently used the terms 'violence' and

two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins v. Virginia*, 536 U.S. 304 (2002), lacked clarity. It still does." (citing *Moore*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting))).

[320] *See Moore*, 139 S. Ct. at 672 ("On remand, the [Texas] court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance.").

[321] *See id.*

[322] *See id.* at 672–73.

[323] Stokeling v. United States, 139 S. Ct. 544 (2019).

[324] *See id.* at 549.

[325] *Id.* at 548–49 (quoting Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997)).

[326] *Stokeling*, 139 U.S. at 549.

[327] *See id.* at 548–50; United States v. Stokeling, 684 F. App'x 870, 871–72 (11th Cir. 2017) (quoting *Robinson*, 692 So. 2d. at 886).

[328] *Stokeling*, 139 S. Ct. at 550.

'force' interchangeably."[329] Another treatise, this one written in 1905, said that when the victim of a crime's "resistance is overcome, there is sufficient *violence* to make the taking robbery, however slight the resistance."[330] Since Congress exhibited no intent to depart from this common law understanding of these terms when drafting the terms of ACCA, no reasons existed to depart from the common law understanding of these terms now.[331] Therefore, the Florida robbery statute requiring "force necessary to overcome a victim's resistance" supported a finding that Stokeling had committed a "violent felony" within the ACCA definition of this term.[332]

Justice Sotomayor dissented, arguing that the majority opinion misinterpreted and misapplied Congress's intentions in drafting the ACCA.[333] Citing the Court's 2010 opinion in *Johnson v. United States*, Sotomayor stated that the Court had already determined that mere physical contact between perpetrator and victim was not enough to meet the higher standards set by the ACCA.[334] In *Johnson*, Sotomayor pointed out, the Court found that the ACCA required a showing of a "substantial degree of force," "great physical force," "strong physical force," and "active violence" by the perpetrator, a bar substantially higher than the standard set by Thomas in the majority opinion in *Stokeling*.[335] A mandatory minimum fifteen-year prison sentence, Sotomayor argued, was not intended by Congress to apply to "glorified pickpockets."[336]

Sotomayor was joined in her dissent by Ginsburg, Kagan, and—to the likely surprise of the drafters of the majority opinion—Roberts.[337] Given Roberts's historically pro-prosecution record, this dissenting vote in favor of a convicted robber was particularly unexpected.[338] As with the decision regarding Vernon Madison, however, Roberts may have determined that a precedent of his Court was under attack.[339] The majority's opinion expanded the holding in *Johnson*—a case during Roberts's tenure in which Scalia, the longtime intellectual

[329] *Id.*
[330] *Id.*
[331] *Id.* at 551–52 (citing Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010)).
[332] *Stokeling*, 139 S. Ct. at 555 (quoting Johnson v. United States, 599 U.S. 133, 140 (2010)).
[333] *See Stokeling*, 139 S. Ct. at 556, 565 (Sotomayor, J., dissenting).
[334] *See id.* at 557 (quoting *Johnson*, 599 U.S. at 140–41).
[335] *See Stokeling*, 139 S. Ct at 557–58 (quoting *Johnson*, 599 U.S. at 140).
[336] *See Stokeling*, 139 S. Ct at 558–59.
[337] *Id.* at 555.
[338] *See* Don Samuel, *The Impact of a Trump Presidency on Criminal Law*, 4 EMORY CORP. GOVERNANCE ACCOUNTABILITY REV. 249, 251 (2017); *supra* notes 227, 241 and accompanying text.
[339] *See supra* notes 284–285, 287–288, 293 and accompanying text.

leader of the Court's politically conservative wing, wrote the majority opinion—despite Thomas's written protestations that this decision did not do so.[340] Roberts appeared to favor Sotomayor's concerns that the majority's holding in this case would "bury" Scalia's opinion in *Johnson*, an act that Sotomayor denounced as representing a "brave new world of textual interpretation."[341] The fact that Roberts had voted with Scalia—and against Thomas and Alito—in *Johnson* likely contributed heavily to the Chief Justice's concerns about any attempt to "bury" that precedent.[342]

D. June Medical Services v. Gee[343]

Louisiana Act 620 requires medical professionals who provide abortions to have "admitting privileges" at a licensed hospital within thirty miles of the clinic where they practice.[344] In 2016, the Supreme Court overturned a Texas statute containing this same mandate.[345] If this law were strictly applied, the Court determined in 2016, then most of the licensed abortion clinics in Texas would be forced to close their doors, thereby constituting an unconstitutional "undue burden" on the right of a pregnant woman to have an abortion.[346] In considering the Louisiana statute, a federal district court judge found that Louisiana Act 620 would have the same chilling effect on this constitutional right that the Texas statute had in 2016.[347] However, the United States Court of Appeals for the Fifth Circuit determined that the district court judge did not properly interrogate the abortion clinic practitioners about their ability to obtain admitting privileges

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[340] *See Stokeling*, 139 S. Ct. at 552, 552, 554 (majority opinion); Johnson v. United States, 559 U.S. 133, 135 (2010)

[341] *See Stokeling*, 139 S. Ct. at 560 (Sotomayor, J., dissenting).

[342] *See id.*; *Johnson*, 559 U.S. at 133.

[343] June Med. Servs., LLC v. Gee, 139 S. Ct. 663 (2019) (mem.).

[344] *See June Med. Servs.*, 139 S. Ct. at 663 (Kavanaugh, J., dissenting); Robert Barnes, *Abortion Case Provides an Unexpected Quick Test for Supreme Court Conservatives*, WASH. POST (Jan. 31, 2019, 5:47 PM), https://beta.washingtonpost.com/politics/courts_law/abortion-case-provides-an-unexpected-quick-test-for-supreme-court-conservatives/2019/01/31/c04e10a2-24cf-11e9-ad53-824486280311_story.html [https://perma.cc/RD84-NYHY]; Jordan Ross, *Abortion Clinics Appeal to Supreme Court to Block Louisiana Law*, JURIST (Jan. 29, 2019, 4:39 PM), https://www.jurist.org/news/2019/01/abortion-clinics-appeal-to-supreme-court-to-block-louisiana-law/ [https://perma.cc/7AUE-7JBV].

[345] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (citing Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion)).

[346] *See Whole Woman's Health* at 2310–11, 2313 (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 681 (W.D. Tx. 2014)) (citing *Casey*, 505 U.S. at 885–87).

[347] *See June Med. Servs.*, 139 S. Ct. at 663 (Kavanaugh, J., dissenting).

at a licensed hospital within thirty miles of their clinic, and reversed the district court's determination.[348]

The case arrived at the Supreme Court with high anticipation from parties on both sides of this issue.[349] Justice Kennedy had provided the pivotal vote in the 2016 case that struck down the Texas statute.[350] With Kennedy off the Court, commentators wondered whether this decision would become the first brick to fall in the ultimate demolition of the Court's precedents in *Planned Parenthood v. Casey* and *Roe v. Wade*,[351] effectively eliminating the notion that a pregnant woman has a constitutional right to an abortion.[352] Notably, Roberts had dissented in the 2016 decision regarding the Texas law, stating that the requirement did not impose an undue burden on women seeking an abortion.[353] Such history indicated that he would likely vote with the other four politically conservative Justices to uphold the constitutionality of Louisiana Act 620.[354]

Instead, Roberts sided with the Court's liberal bloc in determining that Louisiana Act 620 could not immediately go into effect.[355] In keeping with the Court's traditions regarding emergency orders, Roberts provided no written insight into his thought process that led him to this decision.[356] The way that Roberts would have voted if he were deciding the case on the merits rather than simply reviewing whether the Fifth Circuit's decision could stand remains very much an open question.[357] Still, when the news arrived that Roberts had broken ranks with the other politically conservative Justices, plenty of conservative commentators reacted as if the Chief Justice had personally stabbed them in the back.[358] Questions arose about

[348] *See* June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018).

[349] *See* Barnes, *supra* note 344; Prachi Gupta, *Louisiana Is Starting Down a Future as an Abortion Desert*, JEZEBEL (Jan. 30, 2019, 8:50 AM), https://theslot.jezebel.com/louisiana-is-staring-down-a-future-as-an-abortion-deser-1832161972 [https://perma.cc/4953-URG7]; Mark Joseph Stern, Roe v. Wade *Is Under Immediate Threat*, SLATE (Jan. 29, 2019, 5:19 PM), https://slate.com/news-and-politics/2019/01/june-medical-services-abortion-end-of-roe.html [https://perma.cc/H5JY-DXD8].

[350] Stern, *supra* note 349.

[351] Roe v. Wade, 410 U.S. 113 (1973).

[352] Barnes, *supra* note 344; Garrett Epps, *A Temporary Win for Abortion Rights*, ATLANTIC (Feb. 10, 2019), https://www.theatlantic.com/ideas/archive/2019/02/june-medical-services-v-gee-abortion-rights-win/582463/ [https://perma.cc/AJ4D-6H5X]; Stern, *supra* note 349.

[353] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting) (showing that Roberts joined Alito's dissenting opinion).

[354] *See* Stern, *supra* note 349.

[355] *See* June Med. Servs., LLC v. Gee, 139 S. Ct. 663, 663 (2019) (mem.).

[356] *See id.*

[357] *See id.*; Epps, *supra* note 352.

[358] *See* Heather Clark, *Supreme Court Chief Justice John Roberts Joins Court's Liberals in Blocking Louisiana Regulation on Abortionists*, CHRISTIAN NEWS (Feb. 8, 2019), https://

whether Roberts would someday provide the fifth vote to overrule *Planned Parenthood v. Casey* and *Roe v. Wade*, decisions that people believe that Roberts dislikes, or whether Roberts's respect for the precedents of his own Court would ultimately triumph over his personal opinions about this nationally divisive issue.[359] For now, thanks in part to Roberts, the opinion that Roberts voted against in 2016 remains the law of the land.[360] Yet a much larger test looms in the near future.[361] How Roberts votes when the challenge to Louisiana Act 620 returns for a decision on the merits will speak volumes about how far his desire to continue his own Court's precedents will extend.

E. Kisor v. Wilkie[362]

Technically, the most eagerly awaited administrative law decision of the Term hinged on the definition of a single word: *relevant*.[363] In the context of an administrative action by the United States Department of Veterans Affairs (VA), the meaning of this word made a tremendous financial difference for the veteran of the Vietnam War who was the plaintiff in this case.[364] No definition of the word *relevant* existed in the regulatory provision that governed this veteran's claim for disability compensation benefits from the VA.[365]

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christiannews.net/2019/02/08/supreme-court-chief-justice-john-roberts-joins-courts-liberals-in-blocking-louisiana-regulation-on-abortionists/ [https://perma.cc/CA3V-53ZH]; Michael Gryboski, *Supreme Court Blocks Louisiana Law Regulating Abortionists*, CHRISTIAN POST (Feb. 8, 2019), https://www.christianpost.com/news/supreme-court-blocks-louisiana-law-regulating-abortion-clinic-doctors.html [https://perma.cc/843G-YQZM]; Tom Strode, *Pro-Life Concerns Mount over High Court's La. Ruling*, BAPTIST PRESS (Feb. 8, 2019), http://www.bpnews.net/52392/prolife-concerns-mount-over-high-courts-la-ruling [https://perma.cc/WMH7-8AX3].

[359] *See* Steve Benen, *Why the Supreme Court's Latest Move on Abortion Is So Important*, MSNBC (Feb. 8, 2019, 3:16 PM), http://www.msnbc.com/rachel-maddow-show/why-the-supreme-courts-latest-move-abortion-so-important [https://perma.cc/LD2G-ER4U]; Kate Kushner, *What's Next for* Roe v. Wade*?*, POLITIC (July 12, 2019), https://thepolitic.org/whats-next-for-roe-v-wade/ [https://perma.cc/LER7-XNFS]; Harry Litman, *John Roberts Plays a Waiting Game on* Roe v. Wade, WASH. POST (Feb. 13, 2019, 2:58 PM), https://www.washingtonpost.com/opinions/2019/02/13/john-roberts-plays-waiting-game-roe-v-wade/ [https://perma.cc/6EWN-Q4RX]; Rosemary Westwood, *The Future of Abortion in America Is in Chief Justice John Roberts's Hands*, PAC. STANDARD (Feb. 25, 2019), https://psmag.com/social-justice/the-future-of-abortion-in-america-is-in-chief-justice-john-roberts-hands [https://perma.cc/E7HR-5J9R].

[360] *See June Med. Servs., LLC*, 139 S. Ct. at 663; Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting).

[361] *See* Gryboski, *supra* note 358; Kushner, *supra* note 359; Litman, *supra* note 359.

[362] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

[363] *See id*. at 2409.

[364] *See id*.

[365] *See id*. (quoting Kisor v. Shulkin, 869 F.3d 1360, 1367 (Fed. Cir. 2017)).

Using the doctrine of administrative deference established in the 1997 decision of *Auer v. Robbins*[366]—the concept that a federal agency may apply any reasonable meaning to an ambiguous term contained within that agency's own regulations—the VA crafted a definition of *relevant* that resulted in the veteran losing a substantial retroactive payment for benefits earned from disabilities that he incurred in combat service.[367] The veteran vehemently disagreed, arguing that the Court should overturn not only the VA's decision in his case but also the entire administrative deference doctrine.[368] Under the rationale put forth by the veteran and his attorney, a federal agency should not be rewarded for drafting and promulgating vague regulations by allowing that agency to graft into those regulations any definition that the agency chooses to use.[369]

For any observer concerned about the high degree of power wielded by executive branch agencies, this case presented reasons to hope that the Court would end this tradition of deferring to administrative authority in the vast majority of instances.[370] Unanimously, the Court decided that the Federal Circuit did not scrutinize the VA closely enough, vacating the Federal Circuit's decision and remanding it back to the Federal Circuit for further review.[371]

Yet the controlling opinion of the Court—with Roberts joining the Court's politically liberal Justices—stopped short of overturning the doctrine of administrative deference established by *Auer*.[372] In a concurring opinion, Roberts did admonish lower courts for not applying *Auer* properly, stating that *Auer* generally required a more rigorous analysis by courts before a judge should concede that administrative deference is appropriate.[373] The words of his concurring opinion undeniably echo a concern raised by many political conservatives about the power of an unchecked

366 Auer v. Robbins, 519 U.S. 452 (1997).

367 *See Kisor*, 139 S. Ct. at 2408–09 (citing *Auer*, 519 U.S. 452).

368 *Kisor*, 139 S. Ct. at 2418.

369 *Id.* at 2421.

370 *See* Corbin Barthold, *Four Things to Watch in Supreme Court's* 'Kisor v. Wilkie' *Case*, FORBES (May 28, 2019, 9:00 AM), https://www.forbes.com/sites/wlf/2019/05/28/four-things-to-watch-in-supreme-courts-kisor-v-wilkie-case/ [https://perma.cc/YF8D-ZMPP]; Jay Michaelson, *Supreme Court Ready to Grant GOP's Wish to 'Roll Back the Administrative State'*, DAILY BEAST (Mar. 27, 2019, 5:15 AM), https://www.thedailybeast.com/supreme-court-kisor-v-wilkie-case-could-wreck-administrative-state [https://perma.cc/FLT3-43CM]; William Yeatman, *Preview of Oral Arguments in* Kisor v. Wilkie, CATO INST. (Mar. 25, 2019, 9:26 AM), https://www.cato.org/blog/preview-oral-arguments-kisor-v-wilkie [https://perma.cc/XUN6-MT3L].

371 *See Kisor*, 139 S. Ct. at 2423–24.

372 *Id.* at 2422–23.

373 *See id.* at 2424–25 (Roberts, C.J., concurring in part).

administrative state.[374] Still, he passed up the opportunity to formally tighten the reins, allowing *Auer* to stand.[375] The controlling opinion authored by Kagan pays ample homage to the desirability of letting longstanding precedents remain in place, language that seemed tailored to Roberts's views on this issue.[376] Much like Rehnquist surrendering the chance to eliminate the *Miranda* warnings in *Dickerson*, Roberts had once again chosen to uphold a widely utilized precedent in spite of his apparent suspicions about the effectiveness of the doctrine that this precedent created.[377]

F. Trump v. East Bay Sanctuary Covenant[378]

The outburst from President Trump about "Obama judges" that raised Roberts's hackles came in November 2018.[379] United States District Judge Jon Tigar issued an order blocking the federal government from enforcing a rule that prohibited immigrants who enter the United States illegally from receiving asylum, leaving the White House vowing to challenge Tigar's order and promising to "win that case in the Supreme Court of the United States."[380] The federal government had good reason for their confidence, given that Thomas, Alito, and Gorsuch had consistently voted in favor of most Trump administration policies and Kavanaugh seemed poised to follow suit.[381] A fifth vote seemed likely to come from Roberts, who previously exhibited solicitude for the executive branch's powers in upholding the Trump administration's "travel ban" on individuals from certain nations deemed to be a national security threat, despite his apparent distaste for the manner in which the President enacted these policies.[382]

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374 *See id.* at 2424 (drawing parallels between the Court's majority opinion and the concerns raised in Gorsuch's dissent, and stating that the two seemingly opposed positions actually had a lot in common regarding their concerns for a court awarding too much administrative deference to a government agency).

375 *See id.*

376 *See id.* at 2422 (majority opinion).

377 *See* Dickerson v. United States, 530 U.S. 444 (2000); *Kisor*, 139 S. Ct. at 2424–25 (Roberts, C.J., concurring in part).

378 Trump v. E. Bay Sanctuary, 139 S. Ct. 782 (2018).

379 *See* Cassidy, *supra* note 28.

380 Amy Howe, *Justices Rebuff Government on Asylum Ban*, SCOTUSBLOG (Dec. 21, 2018, 3:56 PM), https://www.scotusblog.com/2018/12/justices-rebuff-government-on-asylum-ban/ [https://perma.cc/FQW3-2CRU].

381 *See supra* note 30 and accompanying text.

382 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on

This time, though, Roberts did not side with the White House.[383] Breaking away from Thomas, Alito, Gorsuch, and Kavanaugh, Roberts joined the liberal wing of the Court in denying the government's request to put Judge Tigar's order on hold while it appealed his ruling to the Ninth Circuit Court of Appeals.[384] Despite the solicitor general's argument that allowing Tigar's order to stand while the government commenced an appeal in the federal courts would hinder "a coordinated effort by the President, the Attorney General, and the Secretary to re-establish sovereign control over the southern border, reduce illegal and dangerous border crossings, and conduct sensitive and ongoing diplomatic negotiations," Roberts remained unmoved.[385]

The Court's denial of the government's request came in only a cursory statement, leaving the public—perhaps intentionally—with little guidance about how Roberts views the merits of the case.[386] One can speculate that Roberts saw the government's actions as an attempt to undermine the orderly manner in which federal disputes are to be adjudicated, seeking immediate intervention from the Supreme Court before the Ninth Circuit—another court that Trump has often publicly criticized—had the opportunity to hear the case.[387] Previously, in *Nken v. Holder*,[388] Roberts articulated the government's burden in requesting such immediate action, including demonstrating to the Court that irreparable harm to the nation would result if the Court did not quickly intervene.[389] By not granting the government's application regarding the asylum issue, Roberts may have been sending a reminder about the high bar that the government must overcome to prevail in this type of request and

its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.").

383 *See* Howe, *supra* note 380.

384 *Id.*

385 Application for a Stay Pending Appeal to the U.S. Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court at 37, Trump v. E. Bay Sanctuary, 139 S. Ct. 782 (2018) (No. 18A615).

386 Howe, *supra* note 380.

387 *See* Andrew Chung, *After Legal Setbacks, Trump Administration Races to Supreme Court*, REUTERS (Feb. 1, 2018, 6:03 AM), https://www.reuters.com/article/us-usa-court-trump-analysis/after-legal-setbacks-trump-administration-races-to-supreme-court-idUSKBN1FL4TH [https://perma.cc/YN4P-BEUA]; Jeremy Diamond & Ariane de Vogue, *Trump Rails Against 9th Circuit Court of Appeals in Wake of Asylum Ruling*, CNN (Nov. 20, 2018, 5:02 PM), https://www.cnn.com/2018/11/20/politics/donald-trump-9th-circuit-court-of-appeals/index.html [https://perma.cc/D3US-HTMV].

388 Nken v. Holder, 556 U.S. 418 (2009).

389 *Id.* at 426, 435–36 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

a message that he would find irreparable harm to the nation only in the most blatant of cases.[390]

Beyond demonstrating respect for the federal circuit courts, a number of administrative factors may have played a role in Roberts's decision, particularly the desire of the Chief Justice to carefully curate the Court's docket by avoiding a deluge of petitions for extraordinary relief directly from the lower courts.[391] During Trump's time in the White House, the solicitor general has been extremely active in requesting immediate action from the Court, seeking extraordinary relief on more occasions in just one year than the Justice Department did during Obama's entire eight years in office.[392] For Roberts, a jurist who probably remembers well the lessons in operational efficiency preached daily by Rehnquist, this upswing in requests may present a warning signal that his Court risks becoming inundated with these requests from a Justice Department not known for its tact or its patience.[393] Joining the liberal Justices to vote against the federal government's application in this case may have been a very deliberate counterattack by Roberts, a warning to the solicitor general to think twice before seeking extraordinary relief from his Court again.[394]

Lastly, there is the elephant in the courthouse: the possibility that Roberts was at least partially impacted by Trump's public allegations that Judge Tigar was an "Obama judge."[395] If five Justices of the Supreme Court—none of them appointed by Obama—united to grant the federal government's request, then Trump's castigation of Tigar would have gained further traction, particularly among the nation's politically conservative commentators.[396] Already, Roberts had taken

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[390] *See Nken*, 556 U.S. at 422; David Cole, *Keeping Up Appearances*, N.Y. REV. BOOKS (Aug. 15, 2019), https://www.nybooks.com/articles/2019/08/15/john-roberts-supreme-court-keeping-up-appearances/ [https://perma.cc/S88W-GURH] (noting that in both this asylum case and in *June Medical Services v. Gee*, Roberts sided with the politically liberal Justices in rejecting attempts to gain emergency relief from the Court on extremely controversial issues).

[391] Steve Vladeck, *Power Versus Discretion: Extraordinary Relief and the Supreme Court*, SCOTUSBLOG (Dec. 20, 2018, 3:29 PM), https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/ [https://perma.cc/7A2R-PM8C].

[392] *See id.*

[393] *See* Snyder, *supra* note 69, at 1223–24; Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC (Apr. 2005), https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/ [https://perma.cc/R5EN-4FM2]; Vladek, *supra* note 391.

[394] *See* Vladeck, *supra* note 391 ("[E]ventually, the [C]ourt as a whole, or at least some of the justices, may have to address the propriety of such frequent requests for extraordinary relief head on.").

[395] Cassidy, *supra* note 28.

[396] *See* Jacey Fortin, *Among Conservatives, Some Measured Support for Chief Justice's Rebuke of Trump*, N.Y. TIMES (Nov. 23, 2018), https://www.nytimes.com/2018/11/23/us/politics/judges-john-roberts-rebuke.html [https://perma.cc/P5T2-LSZ8]; Adam Liptak, *Supreme Court*

the unusual step of issuing a statement denouncing Trump's remarks as false.[397] To preserve the legitimacy of his own rebuke to the President, and to show that the federal judiciary was indeed undaunted by political considerations, rejecting the government's application in this case may have been the only answer Roberts felt comfortable choosing.

There is also the possibility that Roberts feels strongly about the merits of the case, believing that the Trump administration's rule about asylum-seeking truly cannot stand.[398] If this case eventually does return to the Court for a judgment on the merits, Roberts will be forced to reveal his opinion on this issue.[399] For now, though, in a move that allowed him to defend his own statement about the non-partisan nature of federal judges, to uphold the procedural order of the federal judiciary, and to warn the Solicitor General that extraordinary relief needs to be reserved for only legitimately extraordinary cases where irreparable harm to the nation could result, this decision to break ranks with his fellow political conservatives was likely a choice that Roberts felt at least relatively secure making.

G. Department of Commerce v. New York[400]

When the United States Department of Commerce stated its intentions to add a question to the 2020 Census asking about the responder's citizenship, the government likely felt confident in success if a legal challenge reached the Supreme Court.[401] As noted previously, Roberts has a prior record of deferring to the executive

Won't Revive Trump Policy Limiting Asylum, N.Y TIMES (Dec. 21, 2018), https://www.nytimes.com/2018/12/21/us/politics/supreme-court-asylum-trump.html [https://perma.cc/8L4W-H44T].

397 Cassidy, *supra* note 28.

398 *See* Howe, *supra* note 380.

399 *Id.* ("The administration may eventually, as Trump predicted, win in the Supreme Court, but this round went to the challengers, and the eventual fate of the case almost certainly lies in Roberts's hands.").

400 Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019).

401 *See* Garrett Epps, *A Supreme Court Case That Will Affect Every Aspect of National Life*, ATLANTIC (Apr. 21, 2019), https://www.theatlantic.com/ideas/archive/2019/04/can-census-ask-about-citizenship/587503/ [https://perma.cc/P747-2VMP]; Ed Kilgore, *Supreme Court Telegraphs Approval for Adding Citizenship Question to Census*, INTELLIGENCER (Apr. 23, 2019), http://nymag.com/intelligencer/2019/04/scotus-telegraphs-approval-of-census-citizenship-question.html [https://perma.cc/WA46-EPF2]. *But see* Jay Michaelson, *Supreme Court Census Case Could Decide the 2024 Election*, DAILY BEAST (Apr. 23, 2019, 12:00 AM), https://www.thedailybeast.com/department-of-commerce-v-new-york-supreme-court-case-could-decide-2024-election-9 [https://perma.cc/7ZSR-TRQB] (noting that the Trump administration wins only about six percent of Supreme Court cases involving review of agency decisions, compared to the roughly-sixty-percent win rate in previous administrations).

branch, including upholding the White House's travel ban despite an apparent personal reticence to do so.[402] Multiple experts, including researchers within the Census Bureau, determined that adding this question would have a chilling effect on ethnic and racial minority groups from responding to the Census, leading to an overall undercount of the nation's minorities.[403] By extension, this underrepresentation in Census data could shift the balance of power in the House of Representatives away from more ethnically and racially diverse states such as New York, California, Texas, Arizona, and Florida and toward more homogeneously Caucasian states such as Minnesota, Ohio, and Montana.[404] In response to such concerns, Secretary of Commerce Wilbur Ross testified before Congress that such fears were unfounded, and that the citizenship question was aimed "solely" at enforcing the Voting Rights Act, which relies heavily on Census data.[405]

At oral arguments, Roberts seemed to agree with Ross and the rest of the Trump administration about the validity of the citizenship question.[406] Media outlets reported that the Chief Justice appeared willing to accept the government's argument that asking this question would solidify federal enforcement of the Voting Rights Act—the same Voting Rights Act, notably, about which Roberts had expressed extreme skepticism and even outright distaste in the past—without any outward concerns about other motivations from the Trump administration in asking this question.[407] At times, Roberts seemed aggravated during oral arguments when other Justices on the Court posed assertive queries regarding the

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[402] *See supra* note 382 and accompanying text. *See generally supra* Part II (describing multiple rulings in which Roberts demonstrated deference to the executive branch).

[403] *See* Michaelson, *supra* note 401.

[404] *See* Ted Mallnik & Kate Rabinowitz, *Where a Citizenship Question Could Cause the Census to Miss Millions of Hispanics*, WASH. POST (July 4, 2019), https://www.washingtonpost.com/politics/2019/06/06/where-citizenship-question-could-cause-census-miss-millions-hispanics-why-thats-big-deal/ [https://perma.cc/DM33-X52F]; Michaelson, *supra* note 401.

[405] *See* Ronald Brownstein, *In Supreme Court Case, Chief Justice's Priorities Are Colliding*, CNN (June 25, 2019, 6:00 AM), https://www.cnn.com/2019/06/25/politics/census-citizenship-question-john-roberts/index.html [https://perma.cc/PZ6G-LGKD]; Michaelson, *supra* note 401.

[406] *See* Kilgore, *supra* note 401.

[407] *See* Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 20, 2015), https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222 [https://perma.cc/2PL5-XSQB]; Josh Gerstein & Ted Hesson, *Supreme Court Divided on Citizenship Question for Census*, POLITICO (Apr. 23, 2019, 10:05 PM), https://www.politico.com/story/2019/04/23/supreme-court-census-citizenship-question-1287672 [https://perma.cc/Y4EL-P44Y]; Kilgore, *supra* note 401.

purported chilling effect of the citizenship question upon Census participation.[408]

Yet when the opinion of the Court emerged, conservative commentators—and the President of the United States himself—were enraged to find that the government had lost, and that Roberts had authored the controlling opinion.[409] Furthermore, in a portion of his opinion joined only by the politically liberal Justices on the Court, Roberts gently, but firmly, declared that Ross had concealed his true intentions for asking this question, stating that the Secretary of Commerce's statements about enforcing the Voting Rights Act were mere "pretext."[410] In the plain terms, the Chief Justice had publicly declared that a Cabinet official was deceiving Congress, the Court, and the American people.[411]

However, Roberts stopped short of banning the citizenship question entirely.[412] Instead, in a portion of his opinion which the Justices from the Court's politically conservative wing joined, Roberts wrote that the federal government may ask a direct question about citizenship, provided that the government has a legitimate

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[408] *See* Gerstein & Hesson, *supra* note 407 ("Roberts—as usual—seemed irritated by Sotomayor's aggressive questioning, urging that Francisco be given a chance to finish his answers. Roberts also glared at Breyer after a protracted question he asked.").

[409] *See, e.g.*, Tessa Berenson, *For Donald Trump, Courts Are Another 2020 Battleground*, TIME (July 9, 2019), https://time.com/5622706/trump-supreme-court-census-obamacare-2020/ [https://perma.cc/NLF3-QQRR]; Jerry Giordano, *The Census Case and Our Radical Chief Justice?*, RICOCHET (July 14, 2019), https://ricochet.com/643255/the-census-case-and-our-radical-chief-justice/ [https://perma.cc/YQ4D-AEJ7]; Matt Shuham, *Conservatives Rage at Roberts for Siding with Liberals on Census Case*, TALKING POINTS MEMO (June 27, 2019, 1:25 PM), https://talkingpointsmemo.com/news/gop-trumpers-roberts-vote-census-citizenship-question [https://perma.cc/22G6-9A5D].

[410] *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573–75 (2019).

[411] *See id.* Roberts did not use the word *deceive* in his opinion, of course, but came unusually close to doing so, including drafting the following passage:

> We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, *we cannot ignore the disconnect between the decision made and the explanation given*. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. 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.

Id. at 2575 (emphasis added) (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

[412] *See Dep't of Commerce*, 139 S. Ct. at 2576.

reason for doing so.[413] Where the federal government failed, Roberts emphasized, was articulating a reasonable and honest rationale for adding this question to the Census.[414] By sending the case back to the Department of Commerce, Roberts opened the door for Ross and his colleagues to craft a new justification for asking the question—a validation that would need to pass a fundamental veracity test before the Court would take it seriously.[415]

Of all of the cases that the Court decided during the last Term, this decision may have won the grand prize as the Court's most controversial ruling.[416] Politically conservative commentators attacked Roberts with a level of venom not seen since his vote upheld the Affordable Care Act.[417] Politically liberal commentators grumbled that Roberts had granted the Department of Commerce a second opportunity to explain why the government wanted to add this question to the Census, even providing them (in the view of some observers) a roadmap for doing so successfully.[418] On both sides of the aisle, writers accused Roberts of "splitting the baby" in formulating an opinion that left neither side of the dispute contented and the ultimate issue still in doubt.[419]

Perhaps the only individual satisfied by the Court's holding was Roberts himself. In issuing this opinion, he called out a member of

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[413] *Id.* at 2569, 2571; *see also id.* at 2576 ("We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

[414] *See id.* at 2575–76.

[415] *See id.* at 2576.

[416] *See* Brownstein, *supra* note 405; *infra* notes 417–419 and accompanying text.

[417] *See, e.g.*, Curt Levey, *Supreme Court: On Census, Roberts Disappoints Conservatives (Again). Is He New Justice Kennedy?*, FOX NEWS (June 28, 2019), https://www.foxnews.com/opinion/curt-levey-supreme-court-on-census-roberts-disappoints-conservatives-again-is-he-new-justice-kennedy [https://perma.cc/Q98B-4482]; Editorial, *The Contradictions of John Roberts*, *supra* note 23; Ben Weingarten, *Why John Roberts' Citizenship Decision Is Legally and Politically Corrupt*, FEDERALIST (July 15, 2019), https://thefederalist.com/2019/07/15/john-roberts-citizenship-decision-legally-politically-corrupt/ [https://perma.cc/T3QC-AS47].

[418] *See, e.g.*, Noah Feldman, *Roberts Won't Let Trump Get Away with a Lie in Census Case*, BLOOMBERG (June 27, 2019, 12:14 PM), https://www.bloomberg.com/opinion/articles/2019-06-27/supreme-court-census-citizenship-case-roberts-won-t-accept-a-lie [https://perma.cc/3YXJ-3Q8R]; Dahlia Lithwick, *The President vs. the Chief Justice*, SLATE (July 8, 2019, 11:00 AM), https://slate.com/news-and-politics/2019/07/trump-roberts-supreme-court-citizenship-question-census.html [https://perma.cc/2H3G-MEKN]; Charles P. Pierce, *John Roberts's Legacy Is Finished if He Revives the Census Citizenship Question*, ESQUIRE (July 8, 2019), https://www.esquire.com/news-politics/politics/a28326756/john-roberts-census-citizenship-question-supreme-court/ [https://perma.cc/Z27T-NC85]; Thomas Wolf & Brianna Cea, *How the Supreme Court Messed Up the Citizenship Case*, ATLANTIC (July 1, 2019), https://www.theatlantic.com/ideas/archive/2019/07/citizenship-questions-are-not-historically-normal/593014/ [https://perma.cc/ZZ9R-M7RW].

[419] *See* Dinan & Boyer, *supra* note 26; Feldman, *supra* note 418.

the Cabinet for being dishonest about his motivations, sending a signal flag for any other litigant who tried to pull the proverbial wool over his Court's eyes.[420] At the same time, however, he kept the door ajar for the government to still add the citizenship question to the Census, giving the Department of Commerce an opportunity to remedy their poor behavior and painting himself as a stern but still-generous arbiter of justice.[421] In doing so, he avoided a sweeping declaration that such a question is inherently unconstitutional.[422] He also quietly set himself up for potentially avoiding a final decision on this issue in the future.[423] Considering the likely timetable for the Department of Commerce to revise their rationale for adding the citizenship question and then proceed with the inevitable legal challenges that will inevitably ensue, every likelihood exists that the issue about the citizenship question will not be resolved in time to print the 2020 Census questionnaires.[424] Thus, while commentators predictably attacked Roberts immediately after learning of his opinion in this case, the Chief Justice may have navigated this highly controversial case with little long-term damage due to his ultimate reputation and the ultimate reputation of his Court.[425] To Roberts, such an outcome in a case of this magnitude seems to qualify as a victory.[426]

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[420] *See Dep't of Commerce*, 139 S. Ct. at 2575.

[421] *See id.* at 2576.

[422] *See id.*; *see also* Brownstein, *supra* note 405 ("Roberts over the years has shown he's uneasy with decisions on big cases that routinely align the [C]ourt, in effect, along those party lines . . . . [A] party-line decision supporting the Trump administration on the [C]ensus case would more clearly bear his stamp—and thus more directly undercut his attempts to portray the [C]ourt as nonpartisan.").

[423] *See* Amy Howe, *Court Orders Do-Over on Citizenship Question in Census Case*, SCOTUSBLOG (June 27, 2019, 5:50 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-orders-do-over-on-citizenship-question-in-census-case/ [https://perma.cc/8MX4-4FM2].

[424] *See id.* At first, President Trump sought to delay the 2020 Census until the federal government had an opportunity to present a new argument justifying the inclusion of a citizenship question. *See* Ronn Blitzer & Adam Shaw, *Trump Seeks 2020 Census Delay After Supreme Court Blocks Citizenship Question*, FOX NEWS (June 27, 2019), https://www.foxnews.com/politics/supreme-court-blocks-citizenship-question-in-2020-census-for-now [https://perma.cc/8E78-Q2B3]. Ultimately, rather than providing the Court with a revised argument, Secretary Ross announced that the Census would not include a question about citizenship in 2020. *See* Ted Hesson, *Census to Leave Citizenship Question Off 2020 Questionnaire*, POLITICO (July 2, 2019, 8:43 PM), https://www.politico.com/story/2019/07/02/census-wont-include-citizenship-question-on-2020-questionnaire-1395933 [https://perma.cc/74ES-XD94].

[425] *See Dep't of Commerce*, 139 S. Ct. at 2576.

[426] *See generally supra* Parts I, II (discussing Roberts's lifelong emphasis on his own reputation and the reputation of the institutions of which he is a member, a stance that continues to impact the manner in which he adjudicates cases before the Supreme Court).

IV. THE CENTER AS HE SEES IT: OBSERVATIONS ABOUT CHIEF JUSTICE ROBERTS CROSSING THE POLITICAL AISLE

John Roberts is not a political liberal. Historically, he never has been, and the decisions of this past Term provide no indication that he intends to change his stripes anytime soon.[427] Nevertheless, the Chief Justice has become the focus of public attention on the Supreme Court.[428] As prior decisions indicated, and as this past Term affirmed, Roberts has shown a willingness to cross the political aisle and vote with the traditionally politically liberal Justices of the Court—not merely in below-the-radar legal disputes, but in some of the most contentious and highly visible cases that the Court hears.[429] For that occasional and often-unexpected willingness, some Court observers have applied the label of "the new swing vote" to Roberts.[430] Others, however, caution that Roberts's occasional alliances with the politically liberal Justices are merely a mirage, concluding that Roberts will ultimately vote with the Court's conservative wing when deciding the merits of the most consequential cases.[431]

Roberts's decisions during this past Term indicate that both of these arguments contain elements of truth. Looking purely at outcomes, Roberts's actions throughout this Term were indeed reminiscent of Kennedy's legacy.[432] Lost in the public furor that erupted over Kennedy's retirement was the reality of Kennedy's overall record: that of a predictable political conservative in a significant majority of cases.[433] On a relatively compact number of key issues, such as same-sex marriage, the right to an abortion, and the application of the death penalty to minors and to people with severe mental illness, he consistently voted with the Court's liberal wing.[434] In 2016, he even changed course after years of rejecting the constitutionality of affirmative action and authored the majority

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[427] *See supra* notes 227–241 and accompanying text.; *see also* Quinn, *supra* note 17 (noting that Roberts mostly voted with the liberal Justices on procedural issues, not on "the merits of the policies").

[428] *See supra* notes 17, 29, 34 and accompanying text.

[429] *See supra* notes 241–247 and accompanying text; *supra* Part III.

[430] *See, e.g.*, Antle, *supra* note 34; Michaelson, *supra* note 17; Scott, *supra* note 34; Stern, *supra* note 271; Stohr, *supra* note 17.

[431] *See, e.g.*, Fenwick, *supra* note 24; Roeder, *supra* note 24; Quinn, *supra* note 17.

[432] *See infra* notes 432–437 and accompanying text.

[433] *See* Cohen, *supra* note 5.

[434] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015); United States v. Windsor, 570 U.S. 744, 775 (2013); Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Lawrence v. Texas, 539 U.S. 558, 562, 578–79 (2003); Atkins v. Virginia, 536 U.S. 304, 306, 321 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1996)); Planned Parenthood v. Casey, 505 U.S. 833, 843, 846, 901 (1992).

opinion upholding a university's use of race as a factor in making admissions decisions.[435] Typically, though, Kennedy joined politically conservative Justices such as Scalia, Thomas, and Alito on the outcomes of cases involving such issues as the right to bear firearms, labor issues, voting rights, the extent of executive power, the right to privacy (and lack thereof), the unfettered spending of corporations in political campaigns, the Affordable Care Act, and the degree of authority that law enforcement could lawfully exercise over civilians.[436] While Kennedy may always be best remembered for the minority of cases when he crossed his typical political lines, he was far from the flaming liberal that many political liberals painted with their mourning of his departure from the bench.[437]

With this in mind, one can reasonably say that Roberts's voting record during this past Term was in many ways Kennedy-esque.[438] In the vast majority of cases, Roberts continued to join the Court's politically conservative wing on the outcome, if not the rationale.[439]

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[435] Ronald Turner, *Justice Kennedy's Surprising Vote and Opinion in* Fisher v. University of Texas at Austin, WAKE FOREST L. REV. (Oct. 31, 2016), http://wakeforestlawreview.com/2016/10/justice-kennedys-surprising-vote-and-opinion-in-fisher-v-university-of-texas-at-austin/ [https://perma.cc/3L29-UQL6].

[436] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–319 (2010); District of Columbia v. Heller, 554 U.S. 570, 636 (2008); David Cole, *The Kennedy Court*, NATION (July 14, 2006), https://www.thenation.com/article/kennedy-court/ [https://perma.cc/7PT4-MD5H]; Josh Gerstein et al., *Supreme Court's Swing Justice Barely Swung This Year*, POLITICO (June 27, 2018, 6:00 PM), https://www.politico.com/interactives/2018/anthony-kennedy-supreme-court-swing-votes-trump/ [https://perma.cc/QV2P-D3TY]; Stephanie Mencimer, *Anthony Kennedy Is Not the Supreme Court's Swing Justice Anymore*, MOTHER JONES (June 27, 2018), https://www.motherjones.com/politics/2018/06/anthony-kennedy-is-not-the-supreme-courts-swing-justice-anymore/ [https://perma.cc/644D-65H8]; Amelia Thomson-DeVeaux, *Justice Kennedy Wasn't a Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/ [https://perma.cc/R9XE-V5AW]; Ariane de Vogue, *Anthony Kennedy Didn't Save the Liberals*, CNN POLITICS (June 27, 2018, 3:23 PM), https://www.cnn.com/2018/06/27/politics/anthony-kennedy-didnt-save-the-liberals/index.html [https://perma.cc/N5TT-NFJ9].

[437] *See* Erwin Chemerinsky, *Justice Kennedy Will Be Best Remembered for the Times He Disappointed Conservatives*, SACRAMENTO BEE, (July 30, 2018, 7:33 PM), https://www.sacbee.com/opinion/california-forum/article215781395.html [https://perma.cc/D92N-9F4K]; Goldsmith, *supra* note 5; Mencimer, *supra* note 436; Ben Shapiro, *Get a Grip, Liberals. Justice Kennedy's Retirement Won't Be as Tragic as You Think*, SACRAMENTO BEE (June 28, 2018, 1:10 PM), https://www.sacbee.com/opinion/california-forum/article214014009.html [https://perma.cc/LPA8-5RY4].

[438] *Compare supra* notes 433–437 and accompanying text (showing Kennedy's voting pattern as the swing voter), *with supra* Part III (showing Roberts's voting pattern as the swing voter last term), *and infra* notes 439–444 and accompanying text (showing that the Court during last term acted similar to the Court during recent terms while Kennedy was still on the Court).

[439] *See* Dahlia Lithwick & Mark Joseph Stern, *John Roberts Played This Supreme Court Term Perfectly*, SLATE (June 28, 2019, 1:14 PM), https://slate.com/news-and-politics/2019/06/john-roberts-supreme-court-census-case-well-played.html [https://perma.cc/BM94-S6BR]; Quinn, *supra* note 17; *supra* notes 227–241 and accompanying text.

On occasion, however, Roberts's jurisprudential pendulum swung to the outcome favored by the politically liberal Justices of the Court.[440] When he did, the cases tended to be highly controversial and the breakaway of the Chief Justice from the Court's other politically conservative Justices became widely publicized.[441] This gave the public impression that Roberts was voting with the politically liberal Justices more often than he actually did—a phenomenon that also occurred on practically every occasion when Kennedy cast a "swing vote."[442]

If this past Term is a harbinger of the future, then the post-Kennedy Court may indeed be less dramatically different than political liberals feared and political conservatives hoped.[443] Overall, the Court during this last Term acted similar to the Court during recent Terms while Kennedy was still on the Court, with the Court's politically liberal Justices voting in one bloc and the Court's politically conservative Justices voting in another bloc on the most highly contested cases.[444] All of the politically conservative Justices—not just Roberts—crossed the aisle with their votes on occasions during this Term.[445] Kagan and Breyer surprised political liberals by voting with the politically conservative Justices in finding that a forty-foot cross placed on public land to honor World War I veterans did not violate the Establishment Clause.[446] Yet these votes were aberrations, not the norm.[447] If Roberts indeed hopes to eradicate criticism that the Court decides cases along political party lines, such critiques will not be washed away by the outcomes of this past Term.[448]

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[440] *See supra* Part III.

[441] *See id*.

[442] *See* Quinn, *supra* note 17; *supra* Part III, and notes 433–437 and accompanying text.

[443] *Compare infra* notes 444–447 and accompanying text (noting that when Kennedy was on the Court, the Court voted in one liberal bloc and one conservative bloc, but in a few cases, the Justices crossed the aisle), *with* Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html [https://perma.cc/6KT6-7BBA] (showing that in the 2017 Term, the voting pattern of the Justices was similar to the votes while Kennedy was still on the Court).

[444] Goldsmith, *supra* note 5; Lithwick & Stern, *supra* note 439; Mencimer, *supra* note 436; Shapiro, *supra* note 437.

[445] Ephrat Livni, *We Charted the Ideological Lines Along Which Each Supreme Court Justice Voted*, QUARTZ (July 3, 2019), https://qz.com/1657742/ideological-alliances-and-divides-on-the-us-supreme-court-charted/ [https://perma.cc/YKK9-E57D]; Wolf, *supra* note 10.

[446] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) (quoting Van Orden v. Perry, 545 U.S. 677, 702, 704 (2015) (Breyer, J., concurring in the judgment)).

[447] Thomson-DeVeaux, *supra* note 10; Livni, *supra* note 445.

[448] *See* Robert Barnes, *Chief Justice Tries to Assure the Supreme Court Is Apolitical, But*

Delving deeper into the instances when Roberts voted with the liberal Justices, however, potential distinctions between the Chief Justice and Kennedy do become apparent.[449] These differences emerge not in the frequency of their across-the-aisle votes, but rather in their motivations for siding with their politically liberal colleagues.[450] Over time, Kennedy grew somewhat predictable in the issues that drew him to the politically liberal side of the table, tending to favor certain causes, such as preserving and even expanding the extent of equal protection guarantees for same-sex couples, upholding the constitutional right to an abortion, and preventing death sentences for minors and for individuals with severe mental disabilities.[451] When these subjects arose before the Court, a vote from Kennedy on the politically liberal side of the equation became virtually a foregone conclusion.[452] Certainly, a devout Roman Catholic Justice voting in favor of same-sex marriage and the right to an abortion, and a Ronald Reagan law-and-order appointee siding with criminal court defendants against prosecutors who sought the death penalty, retained the element of surprise each time Kennedy made these decisions.[453] Overall, though, the issues on which Kennedy tended to swing leftward remained rather

Term's Biggest Cases Present Partisan Challenges, WASH. POST (June 16, 2019), https://www.washingtonpost.com/politics/courts_law/chief-justice-assures-the-supreme-court-is-apolitical-hes-facing-his-next-big-test/2019/06/16/8603bac6-8def-11e9-8f69-a2795fca3343_story.html [https://perma.cc/Y64A-9KPG]; Matt Ford, *The Supreme Court Steps to the Right*, NEW REPUBLIC (July 1, 2019), https://newrepublic.com/article/154401/conservative-supreme-court-term-review [https://perma.cc/6568-UNSQ]; Scott Lemieux, *5 Takeaways from the Supreme Court's Just-Ended Term*, VOX (June 29, 2019, 8:00 AM), https://www.vox.com/2019/6/29/19154283/supreme-court-roberts-kavanaugh-gerrymandering-census-abortion [https://perma.cc/UA8H-QY9D].

[449] *See* Epps, *supra* note 24; Noah Feldman, *Justice Roberts is a Different Kind of Swing Voter*, NEWSDAY (July 6, 2019 2:00 PM), https://www.newsday.com/opinion/commentary/feldman-justice-john-roberts-scotus-1.33300964 [https://perma.cc/3G8T-NPZL]; Brent Kendall, *Chief Justice Roberts Moves to Man in the Middle on the Supreme Court*, WALL STREET J. (July 2, 2018 6:05 PM), https://www.wsj.com/articles/chief-justice-roberts-moves-to-man-in-the-middle-on-the-supreme-court-1530569142 [https://perma.cc/2XZF-N7YR]; Lithwick & Stern, *supra* note 439; Quinn, *supra* note 17.

[450] *See* Feldman, *supra* note 449 ("Not every swing voter is the same, however. Roberts is extremely different from Kennedy.").

[451] *See* Anne Jelliff, Comment, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy's Approach to the Constitution*, 76 ALB. L. REV. 335, 351–52 (2013); *supra* notes 434–435 and accompanying text.

[452] *See* Lithwick & Stern, *supra* note 439.

[453] *See* Jelliff, *supra* note 451, at 348–349; Josh Gerstein & Jennifer Haberkorn, *It's Not Just Abortion: 5 Issues Likely to Be Affected by Kennedy's Exit*, POLITICO (June 27, 2018, 10:59 PM), https://www.politico.com/story/2018/06/27/anthony-kennedy-retirement-supreme-court-cases-680104 [https://perma.cc/3D4B-9XBN]; Ilya Shapiro, *Justice Kennedy: The Once and Future Swing Vote*, CATO INST. (Nov. 13, 2016), https://www.cato.org/publications/commentary/justice-kennedy-once-future-swing-vote [https://perma.cc/LUZ6-YRCA].

consistent, often arriving with opinions from the Justice containing impassioned language about why he was voting in this manner.[454]

Roberts also seems to have preferred causes.[455] His jurisprudence has long favored business interests over the concerns of individuals, regardless of whether the case centers on environmental issues, freedom of expression, employment disputes, access to the court system, or personal injury matters.[456] Equal protection and due process concerns raised by minority groups rarely resonate with him, leading to a catalog of extreme skepticism from the Chief Justice in this area of focus.[457] National security and public safety matters typically earn substantial deference for the federal government from Roberts, even in cases where Roberts seems rather skeptical about the merits of the government's case.[458] Yet in contrast to Kennedy, none of the causes typically favored by Roberts consistently draw the Chief Justice toward the politically liberal side of the aisle.[459] Just as political conservatives predicted when George W. Bush nominated Roberts, the Chief Justice appears to favor politically conservative viewpoints in virtually all of the issues that are brought before the Court.[460]

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[454] *See* Feldman, *supra* note 449 ("[Kennedy's] swing decisions tended to ring with high rhetoric, not pragmatism. What made him a centrist was that sometimes his principles led him to the left (as in his signature gay marriage decision) and sometimes to the right (as in a series of states' rights cases where he trumpeted the 'dignity' of the state)."); Lithwick & Stern, *supra* note 439 ("Whether [Kennedy] was the fifth vote to bless marriage equality or a reluctant vote to prop up affirmative action or the right to choose, he consulted with his own conscience and made the most dignity-affording call he could muster.").

[455] *See supra* notes 227, 236–241 and accompanying text.

[456] *See* Brianne J. Gorod, *The First Decade of the Roberts Court: Good for Business Interests, Bad for Legal Accountability*, 67 CASE W. RES. 721, 722, 727 & n.36, 728, 741 (2017) (determining that the Roberts Court has generally been quite good for businesses and quite poor for consumer protection); Editorial, *In Its Latest Pro-Business Ruling, the Roberts Court Undermines Workers' Rights*, ST. LOUIS POST-DISPATCH TODAY (May 22, 2018), https://www.stltoday.com/opinion/editorial/editorial-in-its-latest-pro-business-ruling-the-roberts-court/article_c527b31a-c633-548a-94b6-aadb7902f6f7.html [https://perma.cc/E53H-LMFY] ("Since John G. Roberts Jr. became [C]hief [J]ustice in 2005, the Supreme Court has repeatedly issued rulings favoring corporate rights over those of individuals."); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), http://www.nytimes.com/2013/05/05/business/ pro-business-decisions-are-defining-this-supreme-court.html [https://perma.cc/U3Q2-DMK2].

[457] *See supra* note 237 and accompanying text.

[458] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418–19, 2423 (2018) (first quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977); and then quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)) (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)); Miller v. Alabama, 567 U.S. 460, 495, 501–02 (2012) (Roberts, C.J., dissenting); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 322, 338–39 (2012); Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010).

[459] *See* Feldman, *supra* note 449; *supra* notes 227–241, 456–458 and accompanying text.

[460] *See supra* notes 227–241, 456–458 and accompanying text.

Something beyond personal preferences, therefore, must compel Roberts in the cases where he votes with the Court's political liberals.[461] There is no indication that he has morphed into a champion of the rights of the accused or an opponent of the death penalty in criminal cases, or that he wants to lower the nation's drawbridge to immigrants seeking asylum, or that he supports the wide deference traditionally granted to the administrative state, or that he genuinely does not want the federal government to ask a question about citizenship in the next Census, or that he truly opposes Louisiana's efforts to prevent doctors from performing abortions.[462] In all of these areas, however, Roberts has voted with the political liberals of the Court in highly publicized cases, often withstanding extremely adamant attacks from political conservative commentators—and even the President of the United States—in the process.[463] For a politically conservative individual who is constantly focused on preserving his own reputation, such decisions seem outwardly inexplicable.[464]

Yet Roberts has long been a master of winning wars even when losing battles was necessary to accomplish his ultimate aim.[465] In the cases where he votes with the Court's liberal wing, the Chief Justice may be utilizing this same cagy discretion that he has employed for much of his life.[466] He oversees a Court in which the majority of the public lacks faith, a Court that commentators frequently accuse of political partisanship, a Court that indeed often does divide in split decisions along conventional political lines with Justices on both sides of the aisle frequently staking out extreme positions and issuing verbally stinging opinions.[467] Historians would likely look back upon such a Court with criticism, a fate that Roberts fears.[468] The only way to avoid such an outcome, it seems, is for the Chief Justice to

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461 *See* Feldman, *supra* note 449.

462 *See supra* Part III (noting that while Roberts voted with the Court's politically liberal justices on these issues in the most recent term, the Chief Justice never indicated that his personal views on these issues have changed).

463 *See id.*

464 *See supra* Part II (discussing Roberts's painstaking efforts from his boarding school days onward through the present to avoid controversy and ensure a sterling reputation).

465 *See* Lithwick & Stern, *supra* note 439; *supra* Parts I, II.

466 *See* Lithwick & Stern, *supra* note 439 ("Roberts is not a romantic. He is a tactician and an able steward of the [C]ourt's path through troubled political times. It is true that he is principally concerned about the [C]ourt's legacy and his own, but it is also true that he knows exactly which lines to push before producing a public outcry, and precisely how far to push them.").

467 *See supra* notes 34–35, 90 and accompanying text.

468 *See supra* Part I.

take a leadership role in moving the Court in a direction of moderation, bipartisanship, and dignity.[469]

In crossing the aisle, Roberts appears to be doing exactly that. With each swing vote comes a new round of commentaries speculating that the Chief Justice's jurisprudence is not as politically motivated as people initially suspected.[470] Such commentaries help both Roberts's own reputation and the reputation of his Court, weakening the oft-repeated claim that a case brought before the Court is virtually a foregone conclusion depending on the political interests at stake.[471]

At the same time, Roberts appears to be quite careful in his decisions to break ranks with the politically conservative Justices of the Court.[472] During this past Term, for instance, he commonly sided with the politically liberal Justices when doing so meant preserving a precedent of the Court—particularly a precedent that the Roberts Court had established.[473] Roberts's prior voting record demonstrates that he is willing to overturn longstanding Court precedents in a range of areas, showing that he is no slave to the concept of stare decisis.[474] Yet when litigants attacked decisions that the Roberts Court had rendered—even decisions with which Roberts disagreed—the Chief Justice repeatedly showed a desire to uphold these precedents.[475] Such a record at first seems surprising, given that Roberts could have leveraged enough votes during this past Term to overturn prior decisions in which he had authored dissents, thereby

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469 *See supra* notes 86–90 and accompanying text.

470 *See supra* Part III.

471 *See* Feldman, *supra* note 449; Kendall, *supra* note 449; Lithwick & Stern, *supra* note 439; *supra* Part III. *But see* Barnes, *supra* note 448; Ford, *supra* note 448 ("It might be tempting to think of Roberts as a swing justice in the footsteps of Kennedy and Sandra Day O'Connor before him. That would be a mistake.").

472 *See* Erwin Chemerinsky, *It's Now the John Roberts Court*, 15 GREEN BAG 2D 389 (2012).

473 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring) (upholding the doctrine of deference to federal agencies interpreting their own regulations established in *Auer v. Robbins*, 519 U.S. 452 (1997)); Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (clarifying the extent of the precedent set in *Panetti v. Quarterman*, 551 U.S. 930 (2007)); Stokeling v. United States, 139 S. Ct. 544, 555 (2019) (Sotomayor, J., dissenting) (arguing that the Court's majority misconstrued the limitations imposed by *Johnson v. United States*, 559 U.S. 133 (2010)).

474 *See, e.g.*, Robert Barnes, *Supreme Court's Conservatives Overturn Precedent as Liberals Ask 'Which Cases the Court Will Overrule Next'*, WASH. POST (May 13, 2019, 8:01 PM), https://www.washingtonpost.com/politics/courts_law/supreme-courts-conservatives-overturn-precedent-as-liberals-ask-which-cases-the-court-will-overrule-next/2019/05/13/b4d3c4f8-7595-11e9-bd25-c989555e7766_story.html [https://perma.cc/KAE5-NAT5]; *supra* notes 228, 237 and accompanying text.

475 *See supra* notes 242–253 and accompanying text.

turning his previously stated positions into the national standard.[476] Still, these opportunities evidently were not tempting enough for Roberts to publicly declare that his Court had previously been wrong.[477] In the internal struggle between his opinions about the issues in the case and the chance to publicly affirm a precedent of his Court, the opportunity to affirm his Court's legal righteousness repeatedly emerged victorious.[478]

Roberts also leveraged multiple opportunities throughout this past Term to assert the authority of his Court. He scolded the Texas Court of Criminal Appeals for ignoring the Supreme Court's remand instructions.[479] He rebuffed the Solicitor General's attempt to obtain emergency relief in a case that Roberts evidently felt fell short of the standards that he had previously articulated in *Nken*, reinforcing his statement that Judge Tigar was not merely an "Obama judge" in the process.[480] Perhaps most notably, he admonished the Department of Commerce—and, by extension, the President—for claiming that their desired citizenship question on the Census was solely for the purpose of enforcing the Voting Rights Act, essentially telling the federal government that they were lying so overtly that the Court could not possibly rule in their favor.[481] In all of these decisions, Roberts firmly stated that the Court needed to be respected.[482] His Court would not tolerate a state judicial body ignoring the Court's explicit instructions.[483] His Court would not permit the federal government to circumvent the typical judicial structure with emergency requests in non-emergency situations.[484] Most of all, his Court would not defer to the federal government's demands when the rationale provided for such demands was baseless and false.[485] Each of these maneuvers represented a pointed statement by Roberts that the Supreme Court over which he presides is indeed supreme.

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[476] For instance, Roberts had dissented in *Panetti v. Quarterman*, but passed up a golden opportunity in *Madison v. Alabama* to weaken the impact of the *Panetti* precedent. *See supra* Section III.A. Similarly, in *Moore v. Texas*, Roberts had dissented in the Court's 2017 decision, but declined the chance to dissent again in this past Term's iteration of this decision. *See supra* Section III.B.

[477] *See supra* Sections III.A, III.B.

[478] *See id.*

[479] *See* Moore v. Texas, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring).

[480] *See supra* Section III.F.

[481] *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2574–76 (2019).

[482] *See infra* notes 483–485.

[483] *Moore*, 139 S. Ct. at 672 (Roberts, C.J., concurring).

[484] *See supra* Section III.F.

[485] *Dep't of Commerce*, 139 S. Ct. at 2574–76.

Notably, Roberts tended to cross the aisle during this Term in cases where the political conservatives on the Court staked out hard-line positions.[486] The death penalty cases, the Louisiana abortion law, and the citizenship question dispute all generated opinions from politically conservative Justices on the Court containing angry denunciations of the opposing points of view.[487] Even *Kisor v. Wilkie*, the administrative deference case, ended with a separate opinion by Gorsuch that was nearly as long as the Court's controlling opinion, accusing the Court of "flinch[ing]" when given the opportunity to overrule the *Auer* doctrine and then criticizing the Court for "forc[ing] litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve."[488]

Roberts seems to dislike such highly charged declarations.[489] John Marshall—or at least John Marshall as Roberts seems to conceive him—did not attack his fellow Justices in such an angry and public manner.[490] To avoid the type of failing legacy that Roberts feels many of his predecessors as Chief Justice possess, Roberts may feel inclined to avoid joining opinions that contain such adamant language, even if he personally agrees with the ultimately position taken in the case by some or even all of the politically conservative Justices.[491] Roberts has said before that he dislikes dissents, and appeared to try in at least some of his aisle-crossing decisions during this past Term to wear the hat of a dignified conciliator.[492] "I write separately to suggest that the distance between the majority and Justice Gorsuch is not as great as it may initially appear," he stated in his concurring opinion in *Kisor*.[493] In *Moore*, he indicated that he agreed with many of the dissenters' statements, but ultimately stated that he could not join them because the Texas Court of Criminal Appeals had ignored the Court's orders.[494] His decision in *Department of Commerce v. New York* pays homage to the powers of the executive branch upon which

[486] *See infra* notes 487–488 and accompanying text.

[487] *Dep't of Commerce*, 139 S. Ct. at 2595 (Alito, J., dissenting); Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (Alito, J., dissenting); *Moore*, 139 S. Ct. at 673–74 (2019) (Alito, J., dissenting); June Med. Servs., LLC v. Gee, 139 S. Ct. 663, 664–65 (2019) (Kavanaugh, J., dissenting).

[488] Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment).

[489] *See supra* notes 45–58, 87–90 and accompanying text.

[490] *See supra* notes 37–58 and accompanying text.

[491] *See* Rosen, *supra* note 21.

[492] *See supra* notes 45–58.

[493] *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part).

[494] *See* Moore v. Texas, 139 S. Ct. 666, 672–73 (2019) (Roberts, C.J., concurring) (citing Moore v. Texas, 137 S. Ct. 1039, 1054 (2017) (Roberts, C.J., dissenting)).

the dissenting Justices based their decision before finally concluding that the Secretary of Commerce's specious argument represents a bridge too far.[495]

Lastly, Roberts appears to cross the political aisle with great caution. Most of the cases in which he sided with the Court's liberal wing during this past Term do not result in the establishment of a binding precedent, and many of these decisions did not even reach the merits of the dispute. His vote did not spare Vernon Madison from the death penalty, but instead sent the case back to the state court to decide how to interpret the Supreme Court's guidance.[496] *June Medical Services* ended up being a warning about abusing the Court's emergency relief powers, not a holding on whether a constitutional right to an abortion legitimately exists.[497] The same holds true with *Trump v. East Bay Sanctuary Covenant*, in which Roberts betrayed no indication of how he felt about the legalities of the President's desired asylum policy.[498] *Kisor* was not an ode to the administrative state, but rather a reluctant upholding of the doctrine of administrative deference coupled with admonishments to courts that did not scrutinize agency interpretations of their own regulations closely enough.[499] *Department of Commerce v. New York* never rules out the possibility of a citizenship question on the Census, but instead merely orders the federal government to come up with a better rationale for doing so.[500]

In this way, Roberts navigated the choppy waters of this past Term without ever pulling back the curtain on his true feelings for some of the most sensitive issues to come before the Court. Skillfully, he found ways to prove to the public that his Court is not always divided along uniform partisan lines while never stating that he fully agreed with his politically liberal brethren on any of these cases. Such a deft balancing act is challenging, but Roberts managed to do so throughout his first Term without Kennedy serving as the Court's

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[495] *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2571, 2575–76 (2019) (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

[496] Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).

[497] *See* June Med. Servs., LLC v. Gee, 139 S. Ct. 663, 663 (2019) (mem.); Chung, *supra* note 387; Diamond & de Vogue, *supra* note 387.

[498] *See* Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782, 782 (2018) (mem.); Diamond & Vogue, *supra* note 387; Greg Stohr, *Supreme Court Rejects Trump Bid to Curb Asylum Claims at the Border*, BLOOMBERG L. (Dec. 21, 2018, 2:52 PM) https://www.bloomberg.com/news/articles/2018-12-21/supreme-court-rejects-trump-bid-to-curb-asylum-claims-at-border-jpygbmcr [https://perma.cc/S5JD-875N].

[499] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019).

[500] *See Dep't of Commerce*, 139 S. Ct. at 2576.

swing vote.[501] Then again, the Chief Justice's ability to tread this middle ground may come as no surprise.[502] As this Article has shown, he has found ways to do so for his entire life.[503]

V. FINAL THOUGHTS

Perhaps the most definite conclusion from this past Term is that the Court without Kennedy bears a striking resemblance to the Court with Kennedy. This Court remains a judicial body in which politically conservative positions commonly prevail, just as it was prior to Kennedy's retirement. At times, however, one of the Court's politically conservative Justices crosses the anticipated political lines and votes with his more politically liberal colleagues, sending shock waves throughout Court commentators. On the surface, such a picture has stayed consistent between the prior Term when Kennedy was the most likely swing voter and the current Term when all eyes were on Roberts to see how the Chief Justice would act. Fears of a Court in which every decision of any consequence split along party lines have thus far been unfounded.

Yet in a subtler way, the Court does appear to be different. Roberts's forays across the aisle so far are more carefully calculated than Kennedy's divergences from the positions of the politically conservative Justices, seemingly grounded in concerns about the legacy of his Court rather than in response to a particular viewpoint on the merits of a particular legal issue. Upholding the precedents of his Court, demanding respect for the authority of his Court, preventing perceptions that the jurists on his Court or any federal court decide cases in line with the President who appointed them, avoiding extreme and dogmatic positions taken by Justices on his Court, and presenting his Court in a legitimizing light without making needless jurisprudential waves seem to be Roberts's primary goals. With such a mindset, Roberts may continue to emerge as a swing voter on his Court, but one who crosses the aisle in a far different manner and in far different decisions than Kennedy ever did.

Roberts's own history may instruct the nation in what lies ahead. In boarding school, college, judicial clerkships, the Justice Department, the White House, Hogan Lovells, and even his own confirmation hearing, Roberts has deftly danced away from

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501 *See* Lithwick & Stern, *supra* note 439.

502 *See supra* Part I.

503 *See supra* Part II.

controversy, almost always preserving his own conception of dignity and typically emerging as a dispassionate arbiter of justice. This is the image and the mindset that he has groomed for a lifetime. For better or for worse, it is highly unlikely that he will change now. With his place in the history books now assured, he seems to have set his sights upon what those records will say. On today's divided and highly scrutinized Court, there is little opportunity for him to carve out a legacy equivalent to that of the Marshall Court, his purported model. Nevertheless, he appears to be set on getting as close as he can to this ideal.

Advocates before the Court seeking Roberts's vote would seem wise to focus their arguments on a middle ground solution, one that upholds precedent, affirms the dignity of the Court and the judicial system overall, and does not result in sweeping changes. For Justices in conference seeking to sway Roberts's opinion, analyzing a case along these same lines would appear to be prudent. Avoiding hard-line opinions or language attacking opposing viewpoints is vital, as Roberts seems to have little appetite for such histrionics. For the Chief Justice, the right decision appears to be the outcome that casts his Court in the best possible light.

In his confirmation hearing, Roberts famously compared Justices to umpires, impartial and unemotional.[504] An old baseball adage states that an umpire does well when nobody knows who the umpire is, calmly making the right call and staying out of the limelight.[505] In this sense, Roberts's umpire analogy is perfect for the type of Chief Justice that Roberts seeks to be, far more akin to the staid demeanor of Friendly than the judicial combustibility of Rehnquist, quietly issuing opinions that avoid the political frenzy as much as possible.[506] Neither side may be satisfied by narrowly tailored opinions that refuse to go an inch further than necessary to dispose of the case, but for Roberts, this seems to be the best avenue for gaining some modicum of consensus on the Court and ultimately preventing blemishes on the Court's legacy.

Of course, Roberts will not be able to avoid decisions on the merits in these thorny matters forever. Challenges on such issues as abortion, same-sex marriage, the Trump administration's

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[504] *Roberts Confirmation Hearing*, *supra* note 157, at 55 (statement of Hon. John G. Roberts, Jr., Circuit J., U.S. Court of Appeals for the D.C. Circuit).

[505] *See* Ken Lipshez, *A Different Kind of Strike for Umpires*, MIDDLETOWN PRESS (Apr. 9, 2019, 12:00 AM), https://www.middletownpress.com/news/article/A-different-kind-of-strike-for-umpires-11906621.php [https://perma.cc/5C8N-XZZP].

[506] *See supra* notes 157–168 and accompanying text.

immigration policies, the death penalty, religious liberty, and other difficult topics will inevitably arise in which a decision on the merits is the only possible outcome, no matter how much Roberts tries to narrow the Court's focus. In these cases, the nation will finally gain a true picture of how far across the political aisle Roberts is inclined to go. Delaying the outcome of a legal dispute is one thing; rendering a precedential decision that could stand for decades to come is quite another.

Yet Roberts seems prepared to avoid such decisions for as long as possible. If the Court is to shift in the post-Kennedy era, the shifts thus far seem destined to be incremental, light years away from the overwhelming rapid-fire politically conservative revolution that so many observers had feared. For some Justices and for plenty of followers of the Court, this pace of play is exasperatingly slow, delaying or possibly preventing the Court and the nation from moving in their desired directions. Roberts, however, is inclined to firmly hold these reins, preventing the Court from breaking away whenever he can. After years of the spotlight shining on Kennedy, the Chief Justice is now in position to be the king of his Court. How he uses this authority will ultimately answer his all-important question about what his legacy will be.