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SUPREME COURT UPDATE 2020

The CJ's Court Emerges in a Blockbuster Year

August 7, 2020

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
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SUPREME COURT UPDATE 2020

The CJ's Court Emerges in a Blockbuster Year

Vincent Martin Bonventre
Albany Law School

Agenda

9:00am – 9:05am	Introduction
9:05am- 10:00am	The Justices <i>Personal Profiles & Political Patterns</i>
10:00am – 10:10am	Break
10:10am – 11:00am	The Highlights of a Highlight Year <i>Decisions, Differences & Directions</i>
11:00am – 11:10am	Break
11:10am – 12:00pm	Allies, Adversaries & Frenemies <i>Right, Left & Center; Stationary & Shifting</i>
	Concluding Observations and Ruminations

Supreme Court Update 2020

August 7, 2020

Speaker Biography

Vincent Martin Bonventre is the Justice Robert H. Jackson Distinguished Professor at Albany Law School. He received his PhD in Government, specializing in public law, at University of Virginia; a JD from Brooklyn Law School; and a BS from Union College.

Dr. Bonventre teaches, comments and advises on courts, judges, and various areas of public law. Those areas include the judicial process, the Supreme Court and the New York Court of Appeals, criminal law, and civil liberties. He has authored numerous works and lectures regularly on those subjects.

Prior to joining the Albany Law School faculty in 1990, he was a law clerk to Judges Matthew J. Jasen and Stewart F. Hancock, Jr. of New York's highest court, the Court of Appeals. Between those clerkships, he was selected by Chief Justice Warren Burger to serve as a Supreme Court Judicial Fellow. Previously, he served two tours in the U.S. Army—one in military intelligence and one as trial counsel in the JAG Corps.

Dr. Bonventre is the author of *New York Court Watcher*, a blog devoted to research and commentary on the U.S. Supreme Court and the New York Court of Appeals. He is also the founder and Editor of *State Constitutional Commentary*, an annual publication of the Albany Law Review devoted to American state constitutional law, and he is the founder and Director of the *Center for Judicial Process*.

Recent publications include *Religious Liberty: Fundamental Right or Nuisance*, 14 U. St. Thomas L.J. 650 (2018); and LIVING ON DEATH ROW: THE PSYCHOLOGY OF WAITING TO DIE [co-edited with Hans Toch and James Acker] (Amer. Psych. Assoc., 2018; PROSE Award in Psychology, 2019)

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SUNDAY, JUNE 21, 2020

It's Roberts' (somewhat less right-wing) Court (Part 1)



Source: Reuters/Jonathan Ernst

Sure, let's not go overboard. Despite some recent decisions welcomed by political liberals, the Supreme Court has hardly turned liberal.

Indeed, most decisions of the past year--let alone of the last few decades--have

been those favored by political conservatives. Whether in civil rights and liberties, the rights of the accused, employment and labor law, war and foreign affairs, and other crucial areas that define the nation's principles, the Court has largely rendered rulings that conservative Republican politicians would reach if up for a vote in their elected representative chambers.

BUT...

Neither can it be denied that the Court has issued some major politically-liberal decisions. And the difference often has been Chief Justice Roberts. He is the one who, more than any of the other conservative Republican appointees, has deviated from the Court's typical partisan divide.

There were some indications, even before the retirement of "swing vote" Justice Anthony Kennedy, of Roberts disrupting the holy political alliances among the Justices. ("Holy," because some members of the Court, such as the late Justice Antonin Scalia, would react to Roberts breaking with the conservatives as though it were blasphemy, heresy, or some other mortal religious transgression.) But the Chief Justice's breaking with the other conservatives has in the past few years become a foreseeable--if not expected--phenomenon of Court dynamics.

A quick survey of some major decisions in which Roberts voted on the politically liberal side of a hot-button issue should leave little doubt. Oftentimes, the Chief Justice authored the majority opinion himself--meaning that he often assigned the Court's opinion to himself in these high profile cases. And oftentimes, his vote was the deciding one in giving his liberal colleagues a victory over his usual conservative allies. Here's a sample:

Obamacare. Perhaps Roberts' best known break with the conservatives was his saving of Obamacare: his dispositive opinion for the 5-4



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majority--himself and the Court's 4 liberals--upholding the constitutionality of the Affordable Care Act's "individual mandate." He did so, over the bitter opposition of the other 4 Republican appointees [Scalia, Kennedy, Thomas, and Alito], by characterizing the enforcement mechanism as a tax imposed within Congress's power, rather than an otherwise invalid penalty. *National Federation of Independent Business v. Sebelius*, 2012.

Three years later, Roberts again saved a major aspect of Obamacare: his 6-3 majority opinion--joined by all 4 liberals and Justice Kennedy [with Scalia, Thomas, and Alito dissenting]--upholding federal tax subsidies for all lower-income Obamacare insureds, even if their state declined to set up an insurance exchange. *King v. Burwell*, 2015.

Immigration. Like Obamacare, there are, of course, the immigration issues that have been among the most contentious and divisive along party lines. And like Obamacare, the Chief Justice saved DACA [the Deferred Action for Childhood Arrival program] from partisan attempts at elimination. In his majority opinion, this past week, for himself and the Court's 4 liberals--once again raising the ire of the other conservative Republican Justices [Thomas, Alito, Gorsuch, and Kavanaugh]--he declared the Trump administration's attempt to scrap DACA "arbitrary and capricious."

Moreover, Roberts made clear his determination that the administration's proffered reasons were dishonest, labeling them "post-hoc rationalizations" and "convenient litigation arguments." *Department of Homeland Security v. Regents of the University of California*, 2020.

A pair of related decisions should be included here: one dealing with state immigration policy; the other dealing with immigrants and, again, the Trump administration's dishonesty.


The immigration case, eight years prior to the DACA decision, involved an Arizona law allowing the arrest of any person, without a warrant, who the police suspected was an unauthorized immigrant "removable" from the United States. The Chief Justice joined a 5-3 decision--together with 3 liberals [Justice Kagan did not participate] and Justice Kennedy, who authored the opinion--invalidating the Arizona law for interfering with federal immigration policy. The remaining Republican appointees [Scalia, Thomas, and Alito] each wrote dissenting opinions emphasizing states' rights and denying any conflict with federal law. *Arizona v. U.S.*, 2012.

The Citizenship Question--and Dishonesty Before the Court. The other case related to the DACA decision was the one last year involving the Trump administration's attempt to insert a citizenship question on census forms. The Chief Justice's vote was decisive in thwarting this transparent attempt to undercount the population of states such as New York and California--home to large numbers of immigrants who would be discouraged from completing such a form.


In his 5-4 majority opinion, Roberts, joined by the Court's 4 liberals--and again denounced by the other Republican appointees [Thomas, Alito, Gorsuch, and Kavanaugh]--blocked this initiative of the administration, just as he did the attempted repeal of DACA, because the administration's beneficent rationale for doing so was a lie. That's my word, not his. But, his words were no less pointed.

As Roberts himself put it, there was "a significant mismatch between the decision the Secretary [of Commerce] made and the rationale he provided." For emphasis, the Chief Justice repeated that "the evidence tells a story that does not match the explanation the Secretary gave."

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And just in case any doubt remained, he said the same thing a third way: the "rationale—the sole stated reason—seems to have been contrived."

Roberts concluded by leaving no doubt about his contempt for the administration's dishonesty. "We are presented," he wrote, "with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." And therefore, the Court--meaning at least the Chief Justice with the 4 liberals--"cannot ignore the disconnect between the decision made and the explanation given." *Department of Commerce v. New York, 2019*.

Ok, let's start with those cases. Only a few, but major and very revealing.

We'll continue our look at the Chief Justice's and his Court's "somewhat less than right-wing" record next time with LGBTQ rights, search and seizure, the death penalty, and then a few other issues.



Labels: DACA, Immigration, Judicial Decisionmaking, Roberts Court, Roberts_John, SupCt, Trump_Donald

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THURSDAY, JUNE 25, 2020

It's Roberts' (somewhat less right-wing) Court (Part 2)



Source: AP/Dave Tulis/Larry Downing

In [Part 1](#), we saw how Chief Justice Roberts joined decisions that saved so-called Obamacare and that protected immigrants. In those cases, he often authored the majority opinion himself, allying himself with his liberal colleagues to render decisions that triggered unconcealed outrage

on the part of all or most of his conservative colleagues in dissent.

We witnessed exactly that last week in the DACA case (*Department of Homeland Security v. Regents of the University of California*, 2020) which was discussed in the [previous post](#). Let's now turn to last week's other momentous decision, as well as an earlier related one that is, perhaps, even more revealing about the role and direction of Roberts as the *primus inter pares*.

LGBTQ Rights. In a long-awaited decision--it took over 8 months from oral arguments on October 8, 2019--the Court ruled last week that the prohibition against "sex" discrimination in the Civil Rights Act of 1964 protects gay and transgender employees. The Chief Justice joined his 4 liberal colleagues, as well as one of the Trump-appointed conservative Justices, Neil Gorsuch, to whom he assigned the writing of the majority opinion.

Over the dissents of the 3 remaining Republican appointees [Thomas, Alito, and Kavanaugh], the Roberts-assigned/Gorsuch-penned majority opinion agreed with the fired employees that discrimination on the basis of "sex" necessarily covered discrimination against gays and transgenders. The crux of the argument [*distilled from what I found to be a mostly insufferable 33 pages*] was that the term "sex," as a matter of sheer linguistics and logic, does apply to gays and transgenders, even if that application was not within the underlying legislative intent of the law.

The 3 remaining conservatives wrote 134 combined pages of dissent. Justice Samuel Alito's seething 107-page opinion, joined by Justice Clarence Thomas, as well as the separate dissent of Justice Brett Kavanaugh, evinced frustration triggered not only by the Court's



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decision, but no doubt also by the loss of another Roberts vote to the liberals--this time, together with Gorsuch's vote as well. *Bostock v. Clayton County*, 2020.

[I feel compelled to add that, regardless of my unqualified agreement with the Court's result, I find much of the majority opinion unnecessary, unpersuasive, and perilous. The same decision could have been reached by simply sticking to the inexorable logic of what sex discrimination necessarily includes. (E.g., if a woman prefers men, that's ok. But if a man does, that's not? The only difference is the different sex of the person who prefers men.)

Beyond that, a far better majority opinion, in my view, would have embraced the overarching principle in prohibiting sex discrimination. Sex and sex-related characteristics are utterly irrelevant for most purposes. For like reason, most disparate treatment on those bases is born of bigotry or some other form of ignorance, rather than some justified reason--which is precisely what discrimination means. On the other hand, Gorsuch's "it's clear from the original understanding of the plain terms of the statute" argument (I'm paraphrasing) can be expected to be used in the future to support reactionary results. The 6 votes his opinion received will surely be used as a strong endorsement of his insistent originalism--i.e., the "ordinary public meaning" of the terms of the law "at the time of the enactment" (his language)--about which he waxed and waned ad nauseam. This will be thrown back at the liberals--all of whom joined his opinion without a whisper of discomfort--when he and the other conservatives (including those in dissent in this case) use it in future cases to undercut past progress and block attempts to move the law forward.


I wish at least one of the liberal Justices had authored a separate concurrence making clear that they weren't endorsing Gorsuch's originalist interpretive approach. The need to do so should have been especially clear in light of Alito's dissenting opinion. Regarding what "sex discrimination" was understood to mean "at the time of enactment," Alito's dissent had the much stronger argument. Just consider this: would the law's prohibition of "sex discrimination" have been passed--"at the time of enactment" in 1964--if legislators were told that those terms protected gays and transgenders as well as women? Now ask the same question about progressive interpretations of countless other statutory and constitutional provisions. The liberals should at least have expressed their reservations about the originalism touted by Gorsuch.

*Others have raised similar concerns. See e.g., **Neil Gorsuch Lays Landmines Throughout LGBTQ Discrimination Opinion.** <https://abovethelaw.com/2020/06/neil-gorsuch-lays-landmines-throughout-lgbtq-discrimination-opinion/>]*


An earlier decision of the Court, three years before *Bostock*, was arguably more revealing about Roberts' view of his role as Chief Justice (as well as of Gorsuch's view of LGBTQ rights). Roberts' position in that earlier case took many by surprise because he had dissented two years before in *Obergefell v. Hodges* (2015). In *Obergefell*, Roberts, together with the other Republican appointees-- except for Justice Anthony Kennedy--had rejected the notion that the Constitution guarantees same-sex couples the right to marry. But in 2017, Roberts broke with the Court's conservatives and, aligning with the *Obergefell* majority, helped reaffirm that landmark decision.

In a *per curiam* opinion, with the Chief Justice in the 6-3 majority, the Court invalidated an Arkansas rule that treated same-sex and opposite-sex spouses differently on their children's birth certificates. While the male spouses of biological mothers were entitled to be identified,

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female spouses were not. Repeatedly quoting from the *Obergefell* majority opinion--against which the Chief Justice had originally dissented--Roberts, together with his 4 liberal colleagues and Justice Kennedy, summarily granted review, reversed the state's supreme court, and struck the Arkansas practice on the ground that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'"

Justice Gorsuch, this time writing a dissent, which was joined by Thomas and Alito, argued that, although the *Obergefell* decision held that "a State must recognize same-sex marriages," it said "nothing" about "a birth registration regime based on biology." In response, the Roberts-joined *per curiam* majority noted that opposite-sex spouses identified on Arkansas birth certificates need not be biological parents. Applying another line excerpted from *Obergefell*, the Chief Justice and his more liberal colleagues concluded that Arkansas has "denied married same-sex couples access to the 'constellation of benefits that the Stat[e] ha[s] linked to marriage.'" *Pavan v. Smith*, 2017.

Roberts had thus apparently decided that his role as Chief Justice included adhering to the Court's recent progressive landmark and opposing attempts to undermine it--regardless of his original position on the matter.

Death Penalty/Intellectual Disability. A similar pattern is evident in positions taken by Roberts in some recent death penalty cases. He had dissented in *Moore v. Texas* when that case came before the Court in 2017. The Court's majority ruled that the state court's judgment that the death row inmate was mentally competent to be executed "had no grounding in prevailing medical practice." Accordingly, the case was remanded for a determination "informed by the medical community's diagnostic framework." Roberts dissented on the ground that the "independent basis for [the state court's] judgment" was adequate. When the case returned to the Supreme Court two years later, the majority once again disapproved the state court's determination that the inmate was competent. This time, however, the Chief Justice broke with the conservative dissenters [Thomas, Alito, and Gorsuch] and joined the majority [which notably included Justice Kavanaugh]. Despite Roberts' own previous dissent, he acknowledged that the Texas determination "did not pass muster under this Court's analysis last time" and, because "[i]t still doesn't," he joined the majority's opinion to again reverse the state court's judgment. *Moore v. Texas*, 2019.

The Chief Justice joined his liberal colleagues in several other related death penalty cases in 2019. A few weeks prior to the Court's decision in *Moore*, Roberts signaled his break with his conservative colleagues in *White v. Kentucky*. In that early 2019 decision, he joined the majority's order [over the dissent of Thomas, Alito, and Gorsuch] to grant review and simultaneously, without argument, reverse a judgment of the state's supreme court--on the basis of the Court's earlier 2017 *Moore* decision.

Similarly, in *Madison v. Alabama*, also decided in early 2019, Roberts again broke with his conservative colleagues [Thomas, Alito, and Gorsuch]. In that case, he sided with the liberals to vacate the judgment of the state court that had approved an execution. He joined Justice Elena Kagan's majority opinion that the Constitution prohibits executing a person who is unable to understand why he's being punished, regardless of the particular intellectual disability he suffers, dementia or psychosis.

One more. In *Murphy v. Collier*, decided several weeks thereafter, the Chief Justice again sided with his liberal colleagues to halt to another

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execution. Over Justice Alito's dissenting opinion, which was joined by Thomas and Gorsuch, the Roberts-joined majority summarily enjoined Texas from carrying out the execution, at least until it first granted the inmate's request to be accompanied into the chamber by a Buddhist chaplain.

To be sure, Chief Justice Roberts' positions in the cases thus far discussed do not mean that he has transformed into an ideological liberal. But they do demonstrate a pattern of willingness to break with his more natural political allies on the Court and, moreover, to do so on some of the most highly charged issues of the day. We'll look at a few more of these in the next and final post in this series.



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TUESDAY, JUNE 30, 2020

It's Roberts' (somewhat less right-wing) Court (Part 3)

As this is being prepared, the 5-4 Court--Roberts voting with the liberals--invalidated the Louisiana abortion restrictions. More on that and on that continuing pattern below.



Source:Reuters/Leah Mills

We've previously looked at Chief Justice Roberts' breaking with his conservative colleagues and aligning with the Court's liberals to help form majorities in politically charged cases dealing with Obamacare and immigration (see [Part 1](#)), and LGBTQ rights and the death

penalty (see [Part 2](#)). The point is not that I applaud his doing so (*although I do, and wish he did so more regularly*). The point is that he has been doing so and, whatever else political liberals may think of him, it simply cannot be denied that on some major issues he has prevented the Court from veering off too far to the right.

Let's finish this series by recalling a few other decisions reflecting the same pattern. Perhaps these cases, like those we've previously discussed, evince a Chief Justice concerned primarily about the legitimacy of his Court, i.e., rebuffing criticisms that it is just another institution polarized along partisan lines. Perhaps it's Roberts holding his Court together by giving the benefit of the doubt to the Court's liberals--at least every once in a while in close cases where he could honestly support either side. Perhaps it's the Chief Justice upholding the integrity of the Court's authority by supporting precedents against which he had originally dissented (*as he just now did again in the Louisiana abortion case*). Or perhaps it's actually the Chief Justice changing his mind after some time for reconsideration.

Again, whatever the reason--and likely there are different reasons in different cases--the emerging pattern is clear. Roberts has given political liberals, both on and off the Court, some significant victories

(Of course this has not escaped the President's notice--and ire.)



VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. ([More.](#))

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Okay,
enough
with
preliminari
es. Let's
get to the
last few

cases we'll look at in this series that illustrate the pattern that may well be the most salient characteristic of this otherwise quite politically conservative Court.

Church and State. Late last month, the Chief Justice joined his liberal colleagues in refusing to lift the COVID-crisis restrictions on church attendance that had been imposed by California's governor. Roberts' 4 conservative colleagues all dissented. Justice Kavanaugh, in an opinion joined by Justices Thomas and Gorsuch, argued that the numerical limitations on gatherings and the requirement for social distancing unconstitutionally discriminated against religious exercise. This was so, according to Kavanaugh, because other similarly situated activities did not face such restrictions. [Alito's dissenting vote was simply noted.]

Although the Court's decision was merely an order, Roberts' authored an opinion explaining why the majority got it right. The standard for granting emergency relief is that the constitutional merits are already "indisputably clear." Roberts deemed it "quite improbable" that the religious objectors could show that. Two basic reasons. First, despite the dissenters' claim, "only dissimilar activities...in which people neither congregate in large groups nor remain in close proximity for extended periods" are treated more leniently than churches. Second, the need for restrictions "during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," which the Constitution "principally entrusts" to the "especially broad" latitude of the states' political officials. And such matters of public health and safety should usually "not be subject to second-guessing" by the federal judiciary.

In short, the Chief Justice disagreed with his conservative colleagues that the religious objectors had demonstrated that they were being treated disparately or too harshly. *South Bay United Pentecostal Church v. Newsom*, 2020.

Three years earlier, in another church-state case, Roberts held the middle ground to which some of his conservative colleagues and some of his liberal colleagues objected--naturally for different reasons. Writing the opinion for the Court, the Chief Justice explained that the ineligibility of religious organizations from a state program that subsidized the safety improvement of school playgrounds violated free exercise--i.e., the disqualification discriminated on the basis of religion, despite the purely secular purpose of the program's assistance.

Although Justices Kennedy and Alito joined Roberts' opinion in full, Thomas and Gorsuch objected that the ruling was too limited--i.e., it should *not* have been limited to playground safety, nor to secular versus religious uses.

While Justice Kagan fully joined Roberts' opinion, Breyer wrote a separate concurrence to emphasize that the program in question, as well as the Court's ruling, *was* limited to a public service--here "the health and safety of children." The remaining liberals, Justice Sotomayor joined by Ginsburg, dissented on the ground that directly funding a

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religious organization violated the constitution's non-establishment mandate.

Here, as we have seen elsewhere, the Chief Justice struck a balance. He crafted a ruling that was narrow enough to secure a majority, despite differences or even dissents from some of his more ideologically-driven colleagues--conservative or liberal. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, (2017).

Right to Choose/Abortion Rights. Four years ago, in *Whole Woman's Health v. Hellerstedt*, the Court ruled that a Texas law, that limited which physicians and facilities could provide abortion services, imposed an unconstitutional "undue burden" on a woman's right to choose. Chief Justice Roberts dissented, along with his conservative colleagues, Justices Thomas and Alito. [Justice Scalia had recently passed away and his vacancy had not yet been filled.]

Since that decision, Justice Gorsuch was appointed to fill Scalia's seat, and Justice Kavanaugh was appointed to replace Justice Kennedy who had retired in the interim. With Kennedy now missing from the 5 Justices who comprised the majority in *Whole Woman's Health*, the Court was confronted this term with another case term involving similar abortion restrictions. This time the state was Louisiana, but the restrictions, the prospective consequences, and the outcome were similar. Only physicians with privileges at a nearby hospital could perform abortions. The restrictions would drastically reduce the availability of abortion services. The restrictions were ostensibly to protect the health of women. The restrictions, according to expert analysis, actually had minimal health-related benefits. And the Court again found such restrictions to be an unconstitutional burden on a women's right to choose.

The big difference? This time the Chief Justice sided with the liberals to give them the bare 5-4 majority. In a separate concurrence, Roberts insisted that he still believed that *Whole Woman's Health* was wrongly decided. But, in a 16 page opinion in which he reviewed the reasons for *stare decisis* and the Court's abortion rights precedents to date, the Chief Justice set forth a jurisprudence that has become a distinctive part of his opinion and voting patterns: "The legal doctrine of *stare decisis* requires us, *absent special circumstances*, to treat like cases alike." [My emphasis.] Then, he concluded by applying that formula to his vote in this case: "The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law"--despite his disagreement then. *June Medical Services L. L. C. v. Russo*, 2020. [Notably, Roberts signaled his thinking about this case when, in February 2019, he joined the liberals to form the same 5-4 majority to grant an order stopping the Louisiana law from taking effect while litigation was pending.]

One last one. This is one of my very favorites. I've written about it **previously on New York Court Watcher**.

Technological Searches. In the last few decades, the Court has seriously diluted constitutional search and seizure protections. It has done so, for example,

- by adding exceptions to the warrant requirement (e.g., warrantless searches and seizures incident to minor traffic infractions);

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- by adding exceptions to the rule excluding unconstitutionally obtained evidence (e.g., the "good faith" exception);
- by diluting what is required for probable cause (i.e., the "totality of the circumstances" test);
- by diluting the 1967 landmark *Katz* decision which protected legitimate expectations of privacy (e.g., denying legitimacy to a host of privacy expectations);
- by (mis)using that landmark's formula in order to rule that searches are not "searches" for constitutional purposes (e.g., police searches from a hovering helicopter);
- by employing doctrines such as "third party" (i.e., if anyone else has access to information about you, then government needs no warrant or probable cause to access it);
- and "public access" (i.e., if members of the public can see you in a public place, then government can surveil you without a warrant or probable cause);
- and "trespass" (i.e., equating search and seizure rights to property rights whereby a physical trespass is necessary to constitute a violation);
- by limiting search and seizure protections to those specific items enumerated in the 4th Amendment.

Well, two years ago, Chief Justice Roberts joined the liberals and, in the 5-4 majority opinion he assigned to himself, he avoided or simply dispensed with some of those foregoing dilutions--to the considerable consternation of his more law and order minded colleagues. Roberts wrote that a warrant supported by probable cause is required for law enforcement to access cellphone location data about a suspect from a cellphone company. No, the fact that some entity, the company itself, already had access to the information (i.e., the third party doctrine) didn't allow the government to have warrantless access. No, the fact that the data did not belong to the individual, but to the company (i.e., the property rights/trespass doctrine), didn't mean that the individual was without some entitlement to privacy from the government. No, the fact that the individual's movements and location in public might be observed by members of the public (i.e., public access doctrine), didn't mean that he had no legitimate expectation of privacy from government surveillance. Etc.

Yes, acknowledged Roberts, the Court's opinion six years earlier in *U.S. v. Jones*, authored by Justice Scalia, did assert that the warrantless monitoring of a suspect's movements and location was unconstitutional because the police had "trespassed" on his property--i.e., by attaching a GPS device to his vehicle without his consent. But, the Chief Justice pointed out that a majority of the Justices in *Jones* had actually reaffirmed the *Katz* "legitimate expectation of privacy" doctrine. There was Justice Alito and the 3 liberals who joined his concurring opinion, stridently rejecting Scalia's trespass analysis in favor of *Katz*; and Justice Sotomayor who authored a separate concurrence, joining Scalia but also reaffirming *Katz*.

As Roberts explained in declining to apply some of the previously adopted doctrines, "few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." He went further: "Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user

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voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements."

The concerns expressed by the Chief Justice in his majority opinion sounded much more like those of the liberal Justices who had previously dissented while the Court was diluting search and seizure protections. And Roberts' conservative colleagues in this case understood that and objected to his aligning with the liberals in refusing to apply those law and order doctrines. *Carpenter v. U.S.*, 2018.

[For more on the *Carpenter* decision, see ***The Supreme's Cell Location Data Decision: Right, Revealing, and a Real Milestone***, June 26, 2018.]

There are other cases--an increasing number of them at that--where Chief Justice Roberts has indeed established a distinct pattern of parting with his usual ideological allies on the Court and siding with the liberals to form a majority on some major, highly-charged issues. That point, I believe, has been well made, and continuing further is not only unnecessary but perhaps fatiguing. So we shall end here.

Of course, decisions handed down by the Court in the next few days, as the current term comes to a close, may well make all of the foregoing seem like wishful thinking based on a few isolated exceptions. But the pattern is there, it is clear, and there no particular reason to think that it won't continue.



Labels: Abortion Rights, Alito_Samuel, Church and State, Free Speech, Gorsuch_Neil, Judicial Ethics, Judicial Decisionmaking, Roberts Court, Roberts_John, Scalia_Antonin, Search and Seizure, SupCt, Trump_Donald

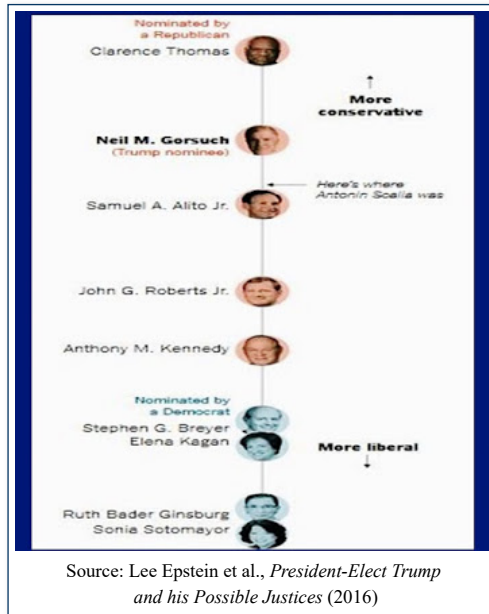
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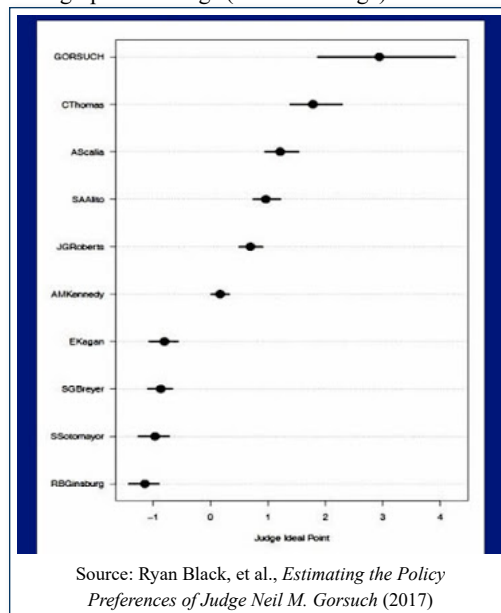
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the Justice he replaced, Antonin Scalia. Here's that graph ([click to enlarge](#)):



In yet another study, this one completed the following year, Gorsuch's appellate record again placed him among the Court's most politically conservative Justices. In fact, this study estimated that his policy preferences would position him at the far end of the Court's right wing. Here are those graphed findings ([click to enlarge](#)):



It was thus widely expected, among those who closely study such things, that Gorsuch would be a very politically conservative Justice. Not a judicial restraintist. Not a stickler for stare decisis. Not one who defers to the other branches or to the states. Not a strict constructionist. Not a faithful adherent of previously settled constitutional principles. Not a philosophical conservative in a classic libertarian sense. But a conservative in the common contemporary political sense.

In short, how would conservative Republican politicians be expected to vote on the controversial issues of the day? And how closely would Justice Neil Gorsuch's voting align with conservative politicians on those issues?

Right from the start, in his first few months on the Court--from the time

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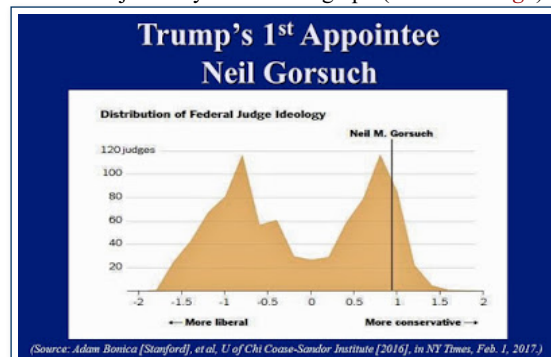
Trump's Justices (Part 1): Gorsuch to Date



President Trump's first appointee, Neil Gorsuch, took his seat on the Supreme Court in the spring of 2017. By that time, judicial scholars--both political scientists and law professors--had studied his record on the federal appeals court from which he was elevated.

Based on his voting patterns as an appellate judge, Gorsuch's position among the other federal judges on the ideological spectrum had been mapped. Similarly, once he was nominated, his ideological place on the Supreme Court was predicted.

A 2016 study, sponsored by the University of Chicago, compiled and compared voting data on federal judges. A graph based on that data was published in the New York Times the following year when Gorsuch was nominated. It placed his record on the far right, politically conservative side of the federal judiciary. Here's that graph ([click to enlarge](#)):



Another study by a team of judicial scholars, led by Lee Epstein and published shortly following Trump's election, inserted Gorsuch among the sitting Justices on the Supreme Court's own ideological spectrum. Gorsuch was placed among the Court's most politically conservative members--between Justices Clarence Thomas and Samuel Alito. Indeed, he was determined to be even more politically conservative than



VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. ([More.](#))

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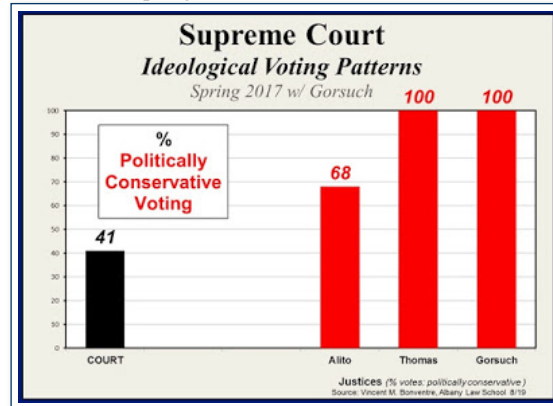
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of his appointment in April of 2017 to the end of the 2016-17 term that spring--Gorsuch did cast votes on many such issues. The death penalty, campaign finance restrictions, gun rights, gay rights, workers' rights, church and state, President Trump's travel ban, and other politically charged issues among them.

What kind of record did he compile at the very start of his Supreme Court career? How did his record compare to that of other conservatives on the Court in that spring of 2017? Well, take a look ([click to enlarge](#)):



Justice Gorsuch's voting record, in his very first weeks on the Court, was at least as politically conservative as the judicial studies had predicted. From his appointment in April 2017, thru the end of the Court's term in the closing days of June, he compiled a voting record which, together with that of Justice Thomas, was the most conservative of the Justices.

On every one of those previously mentioned issues confronted by the Court in those final weeks of the 2016-17 term, the Justices were divided and Gorsuch, like his colleagues, chose sides. And on every one of those issues, he chose the politically conservative position--or the most politically conservative position when there was more than one.

So, for example, on the death penalty issue, he supported the execution. On campaign finance restrictions, he was against them. Gun rights, supported them. Gay rights, against them. Workers' rights, against them. Church and state, argued for lowering the wall of separation even more than the Court majority and other conservative Justices. Trump's travel ban, argued for upholding it to an even greater extent than the Court majority and other conservative Justices.

Indeed, as displayed in the graph, he took the politically conservative side--including the most politically conservative position among his colleagues--on those and every other politically charged issue that came before the Court in that spring of 2017 immediately upon his appointment.

And note well how starkly Gorsuch's politically conservative record on those politically charged issues contrasts with the record of the Court as a whole--100% politically conservative versus 41%. When the Justices divided between politically conservative and liberal sides, Gorsuch supported the conservative position. Even when the Court majority rendered a politically conservative decision, Gorsuch would sometimes argue for an even more politically conservative resolution.

In the next post, we'll take a closer look at some of this, including how Justice Gorsuch's voting record compared to that of all of his colleagues--not just the most conservative ones. And we'll look at his

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voting record in the following two full terms that he's been on the Court, 2017-18 and the term that just finished, 2018-19.



Labels: Gorsuch_Neil, Judicial Decisionmaking, Judicial Selection, SupCt, Trump_Donald

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Trump's Justices: Gorsuch to Date (Part 2)



In the [previous post](#), we saw how studies of Neil Gorsuch's judicial record prior to his nomination by President Trump for the Supreme Court showed him to be among the most politically conservative members of the federal

judiciary. We also saw how his record immediately following his appointment, the last couple of months of the Supreme Court's 2016-17 term—the spring of 2017—reflected the very same strong politically conservative leanings.

In fact, together with Justice Clarence Thomas, his record on politically charged issues was the most politically conservative on the Court. Indeed, 100% politically conservative voting in cases involving the death penalty, campaign finance restrictions, gun rights, gay rights, workers' rights, church and state, President Trump's travel ban, and similar politically divisive matters. Significantly, Gorsuch's 100% politically conservative voting record contrasted sharply with the 41% conservative decisional record of the Court as a whole. (See [Trump's Justices \(Part 1\): Gorsuch to Date](#).)

Now what about Gorsuch's voting record for the next two terms on the Court—2017-18 and last term, 2018-19? Specifically, how did his voting record compare to that of the Court's other strongly politically conservative members, Justices Thomas and Samuel Alito, and to the Court as a whole? Let's take a look at the very next term, Gorsuch's first full one on the Court, the 2017-18 term ([click to enlarge](#)):



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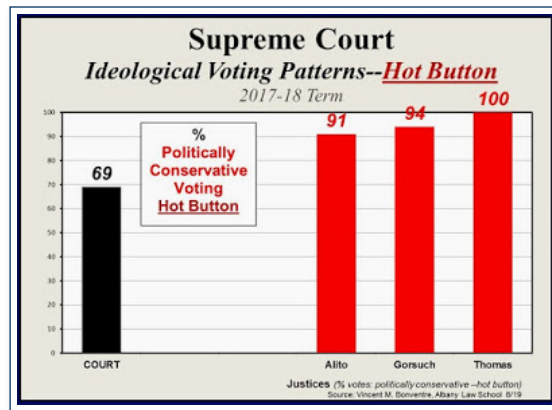
NEW YORK COURT WATCHER: RECENT TITLES

- Religious Institutions Must Pay Abortion Coverage in NY (Part 2)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1a--addendum)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1)
- It's Roberts' (somewhat less right-wing) Court (Part 3)

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- CHIEF JUSTICE JOHN G. ROBERTS: LIBERALS' SAVING GRACE IN

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- CrimLvApps (NYCOA)
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- Cuomo_Andrew
- Cuomo_Mario
- DACA
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_St Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality



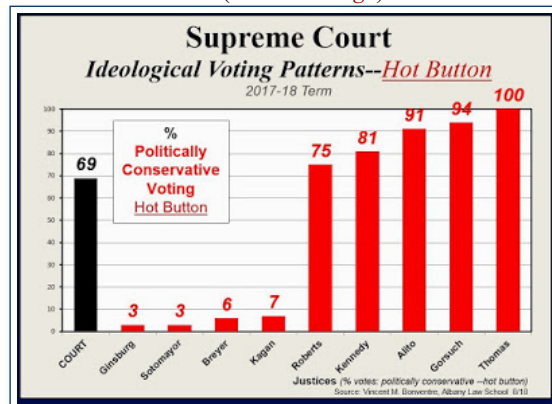
The politically charged issues confronted by the Court during the 2017-18—and voted on by Gorsuch—included Trump's travel ban (again), immigrant rights, abortion rights, gay rights, union representation, worker rights, voting rights, gerrymandering, search and seizure protections, and international human rights. In virtually every case, Gorsuch voted for the politically conservative position.

In fact, in some cases, Gorsuch took a position that was even more politically conservative than the already conservative majority or dissenting opinions. For example, in the *Masterpiece Cakeshop* case, where the bakery refused to create a cake for a same-sex marriage celebration, the majority of the Court ruled for the bakery on very narrow grounds. It held that the Colorado civil rights commission's decision, that the bakery was guilty of sexual orientation discrimination, was tainted by the commission members' explicit hostility to the baker's religion--comparing it to Nazi hatred of the Jews. In short, the Court majority ruled that the baker did not receive a fair hearing. But *not* that businesses were free to violate state anti-discrimination laws, even for religious reasons.

That decision of the Court was inadequate for Gorsuch. He authored a separate concurring opinion making the claim that the bakery did not actually engage in any discrimination at all—unlawful or otherwise. Gorsuch's rationale? The bakery would not create a same-sex cake for any couple, whether same-sex or opposite-sex. So the bakery was treating everyone the same. Not kidding!

(You know, like the old anti-miscegenation laws did not really discriminate against anyone. Everyone—black or white or Asian—was required to marry within their own race. So those laws treated everyone the same. Gorsuch's argument was reminiscent of that nonsense.)

Let's finish this post by taking a look at the ideological voting spectrum of the entire Court. Here it is ([click to enlarge](#)):



“HOT-BUTTON” CASES OR SUPREME COURT LEGITIMIZER?

- Former New York Court of Appeals Chief Judge Judith Ann Kaye [mini-presentation]
- Former New York Court of Appeals Judge Howard A. Levine [mini-presentation]
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INTERNATIONAL LAW STUDIES

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- [Lethal Injection](#)
- [Levine_Howard](#)
- [LGBTQ rights](#)
- [Lippman_Jonathan](#)
- [Literalism](#)

As the graph shows, Gorsuch's voting record was not only the most politically conservative on the Court, other than that of Justice Thomas, but it was also significantly more so than that of Chief Justice Roberts and the decisional record of the Court as a whole.

To be sure, the voting records of the Court's four liberal Justices, were at least as politically liberal as Gorsuch's record was politically conservative. But in nearly one-third of the cases, the Court as a whole joined the liberals, In a full one-quarter of those cases, the Chief Justice did. Gorsuch virtually never did—in fact, it was only one case. [I.e., *Sessions v. Dimaya*, involving the meaning of "crime of violence" as a basis for deporting immigrants.]

So once again, Justice Gorsuch's voting record on the Court—this time for the 2017-18 term—mirrors the studies based on his pre-appointment record as a federal appellate judge. In the next post, we'll look at Gorsuch's record in the next and most recent term, 2018-19.



Labels: [Gay Rights](#), [Gorsuch_Neil](#), [Judicial Decisionmaking](#), [Judicial Selection](#), [Same-Sex Marriage](#), [SupCt](#), [Trump_Donald](#)

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State Const'l Comm & Cooke Symposia	THE SEVEN: About the Court, By the Court - 2016 Cooke Symposium				2018 Cooke Symposium: Right to Die		

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THURSDAY, JUNE 11, 2020

Trump's Justices: Gorsuch to Date (Part 3)

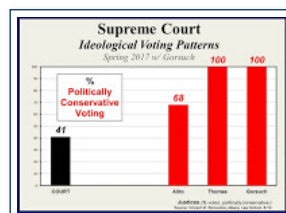
Pandemic restrictions, transitioning to remote teaching, exams, grading, other projects, preoccupation with breaking news, etc. Now back at last.



In the **first post in this series**, we took a look at Justice Neil Gorsuch's voting record immediately following his appointment in the final few months of the 2016-17 term. As shown in that post, Gorsuch voted for the politically

conservative side of every politically charged issue in cases involving the death penalty (pro), campaign finance restrictions (con), gun rights (pro), gay rights (con), workers' rights (con), separation of church and state (con), President Trump's travel ban (pro), and similar politically divisive matters.

Yes, there were legitimate (or semi-legitimate) arguments that supported each side in these cases. A reasonable, good-faith judge might have voted either way. But Gorsuch always chose arguments that supported the politically conservative side. Never the other side. In short, connect the dots! Moreover, Gorsuch's 100% politically conservative record was more than double the 41% conservative decisional record of the Court as a whole.



Juxtaposing his record with that of the other conservatives on the Court, as well as of the Court as a whole, in that spring of 2017 looks like this ([click to enlarge](#)).

Then, in the **second post in this series**, we saw that Gorsuch continued to amass a very politically conservative record throughout the 2017-18 term, his first full term on the Court. As noted in that post, in cases involving highly charged matters, Gorsuch voted for the politically conservative side virtually every time: Trump's travel ban (again, pro), immigrant rights (con), abortion rights (con), gay rights (con), union representation (con), worker rights (con), voting



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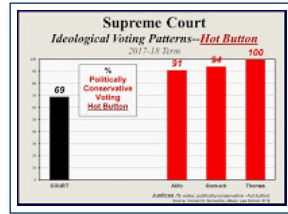
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- Fuld_St Stanley
- Fundamental Rights
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- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality

rights (con), ending gerrymandering (con), search and seizure protections (con), and international human rights (con). Again, connect the dots.



And again, let's juxtapose Gorsuch's voting with that of the other conservatives on the Court, as well as of the Court as a whole. His record for the first full term on the Court, the 2017-18 term, looks like this ([click to enlarge](#)).

Now, let's take a look at Gorsuch's record for the last completed term, 2018-19, his second full year on the Court. Among the cases involving those "hot-button" or politically charged issues, these were his positions:

- *American Legion v. Amer. Humanist Assn.* (2019) [re: the 40 Foot Cross maintained by Maryland state government]--the majority approved the cross; Gorsuch's separate concurring opinion would have lowered the separation of church and state even more by disallowing concerned groups even to complain.
- *Dept. of Commerce v. New York* (2019) [re: the Trump administration's proposed citizenship question on the census form]--the majority, in an opinion by the Chief Justice, disallowed the question because the administration's claimed justification was a lie; Gorsuch joined the dissenters' argument that the administration did have some legitimate reasons.
- *June Med. Servs. v. Gee* (2019) [re: the Louisiana abortion services restriction law]--the majority summarily blocked the law from going into effect; he joined the dissenters to approve the law until it actually resulted in unduly burdening the right to choose.
- *Rucho v. Common Cause* (2019) [re: partisan gerrymandering]--he voted with the majority which held that the Court should do nothing about it.
- *Bucklew v. Precythe* (2019) [re: lethal injection]--he authored the majority opinion to approve the use of a method of execution on an inmate, despite the inmate's particular's medical condition that would make that method excruciating.
- *Moore v. Texas* (2019) [re: intellectual disability of a death row inmate]--in this and several similar cases, the majority (which included Chief Justice Roberts and Justice Kavanaugh) halted the execution because the state applied outdated mental health standards which the Court had previously invalidated; he joined the dissent in each case to nevertheless allow the executions.
- *Murphy v. Collier* (2019) [re: the Buddhist chaplain case]--the majority (which again included Roberts and Kavanaugh) halted an execution until the state honored the inmate's request to be visited by a chaplain of his faith; he joined the dissent to excuse the state and allow the execution to go forward.

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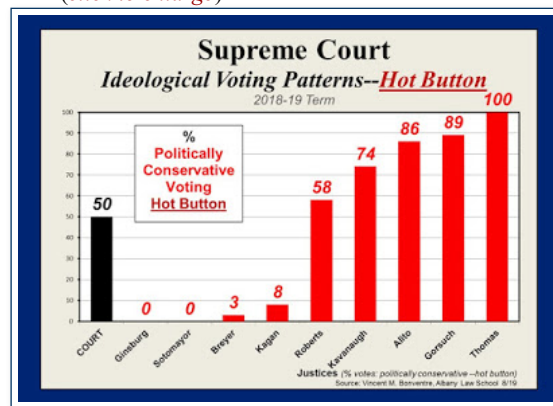
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- Lippman_Jonathan
- Literalism

- *Garza v. Idaho* (2019) [re: ineffective counsel]--the majority (once more including Roberts and Kavanaugh) ruled that the defense counsel's failure to file an appeal violated the defendant's right to effective counsel; he joined the dissent arguing that the defendant's waiver of appeal upon his guilty plea disposed of the question.
- *Flowers v. Mississippi* (2019) [re: race-based juror discharges]--the majority (which this time included Roberts, Alito, and Kavanaugh who authored the opinion) condemned as unconstitutional the "relentless" use of peremptory challenges by the prosecution to strike all black jurors, throughout 6 trials and retrials; he joined the dissent which declined to condemn the pattern.

Well, speaking of patterns, Gorsuch's voting pattern should be quite evident. Whether it's church and state, abortion rights, the death penalty, race-related questions, the Trump administration's initiatives, and other politically charged issues, Gorsuch voted like a conservative Republican partisan. And he did so even more than some other conservatives on the Court.

Take a look ([click to enlarge](#)):



Gorsuch's 89% politically conservative voting record for the 2018-19 term contrasts dramatically with the 50% decisional record of the Court as a whole. And remember, this is a Court where a majority of the Justices are political conservatives--who worked in politically conservative Republican administrations before being appointed by Republican presidents. It is compared to just such a politically conservative Court that Gorsuch's record is so extreme!

Indeed, Gorsuch's record for the 2018-19 term is not only significantly more politically conservative than that of conservative Chief Justice Roberts, 89% to 58%. But his record is notably more politically conservative than that of the second Trump appointee to the Court, Brett Kavanaugh.

The difference between the two Trump appointees, 89% politically conservative for Gorsuch, 74% for Kavanaugh, is underscored by the sorts of politically charged issues on which they disagreed. Take a look at some of them ([click to enlarge](#)):

- Madison_James
- Malone_Bernard
- Marshall_Margaret
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Original Intent
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- RFRA
- Right to Counsel
- Right to Die
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John



Church and state, racial discrimination, the death penalty, an accused's right to effective counsel--these are among the critical areas of constitutional law in which Gorsuch took the more politically conservative side of the issue than did Kavanaugh.

To be sure, there are many many other areas of constitutional law, as well as non-constitutional but still highly charged political issues, about which we do not yet have Supreme Court decisions in which both Gorsuch and Kavanaugh participated. There are some of those in cases to be handed down by the Court within the next few weeks. That will give us more evidence of the individual and the comparative ideological leanings of the two Trump appointees. Stay tuned!



Labels: Death Penalty, Gerrymandering, Gorsuch_Neil, Judicial Decisionmaking, Kavanaugh_Brett, Non-Establishment of Religion, Racial Discrimination, Roberts Court, Roberts_John, SupCt, Trump_Donald

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Trump Justice

*Gorsuch
Kavanaugh
&
The Current
Court*



Green Mountain Academy for Lifelong Learning

January 28, 2020

Vincent Martin Bonventre

Albany Law School

Trump Justice

Gorsuch, Kavanaugh, & The Current Court

Green Mountain Academy for Lifelong Learning January 28, 2020

Agenda

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Neil Gorsuch

Predictions, Votes, Patterns

Brett Kavanaugh

Predictions, Votes, Patterns

2018 – 2019 Case Highlights

Votes, Patterns, Disagreements

Concluding Observations

Trump 2nd Term?

Gorsuch

Kavanaugh



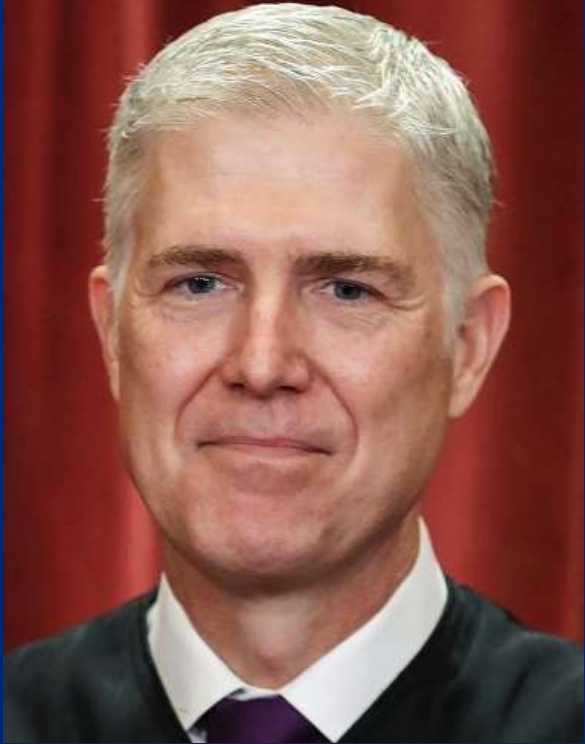
The Current Court

Trump's 1st Appointee



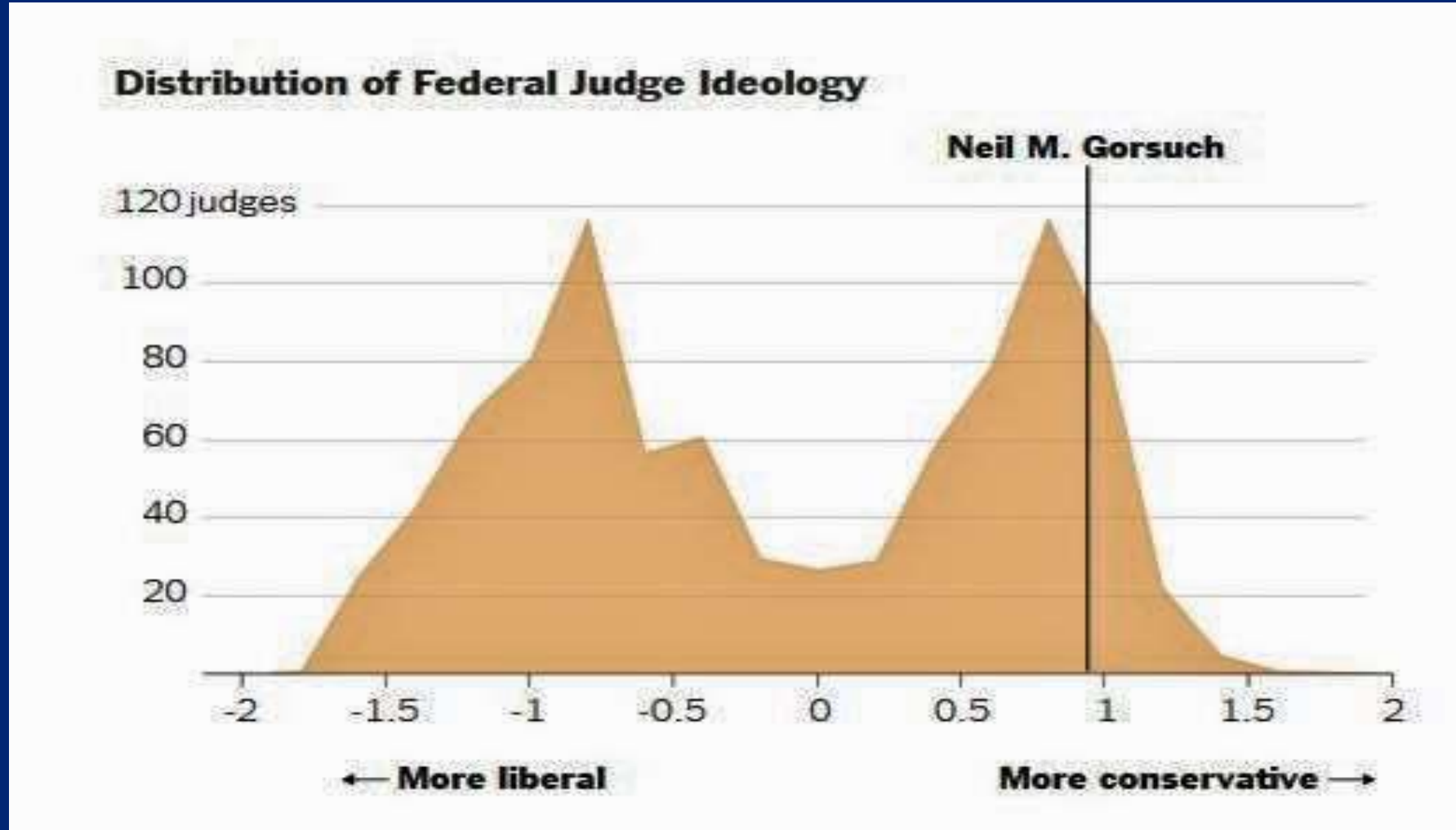
Neil M. Gorsuch

Neil M. Gorsuch



- 52 years old
- **53, end of current Trump term**
- **57, end of a 2nd term**
- 2/3/7 years on Court
- Trump Appointee, 2017
- Conservative/Republican
- **30 more years on the Court?**

Trump's 1st Appointee Neil Gorsuch



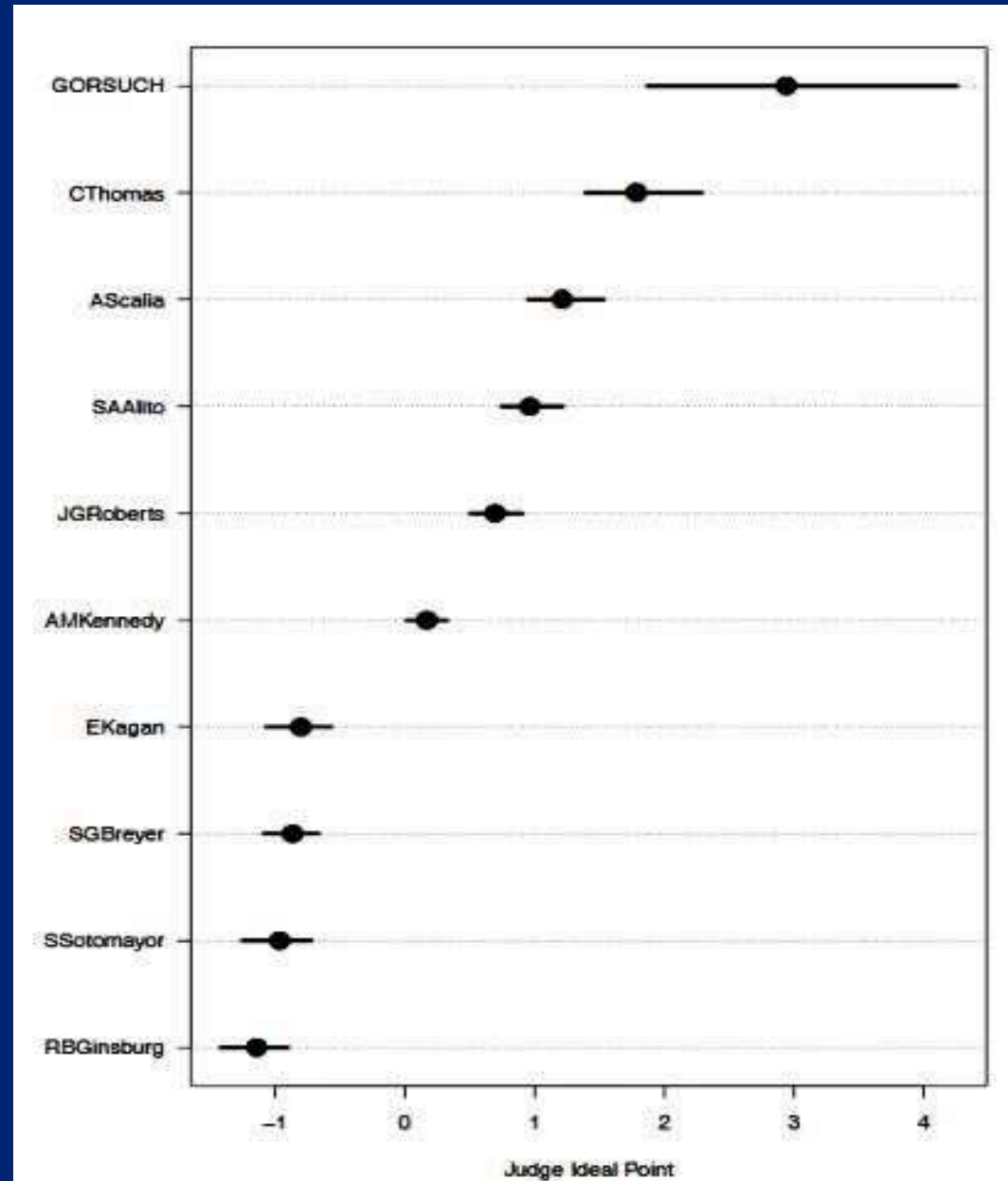
(Source: Adam Bonica [Stanford], et al, U of Chi Coase-Sandor Institute [2016], in NY Times, Feb. 1, 2017.)

Neil Gorsuch



(Source:
Lee Epstein [Washington Univ.],
et al,
President-Elect Trump and his
Possible Justices [2016])

Neil Gorsuch



(Source:
Ryan C. Black [Michigan State]
&
Ryan J. Owens [Univ. of Wisc.],
*Estimating the Policy Preferences
of Judge Neil M. Gorsuch [2017]*)

Gorsuch's Spring 2017 Record

Death Penalty

Campaign Finance

Indigent Criminal Defense

Worker Rights

Trump's Travel Ban

Church-State

Gay Rights

Gun Rights

McGehee v. Hutchinson

Death Penalty

Vote: 5-4 Order



COURT'S RULING: Arkansas allowed to proceed with several executions before its lethal drugs expired.

Republican Party of Louisiana v. FEC

Campaign Finance

Vote: 7-2 Summary Disposition



COURT'S RULING: Summarily upheld “McCain-Feingold” restrictions on unregulated contributions made to political parties.

McWilliams v. Dunn

Indigent Criminal Defense

Vote: 5-4

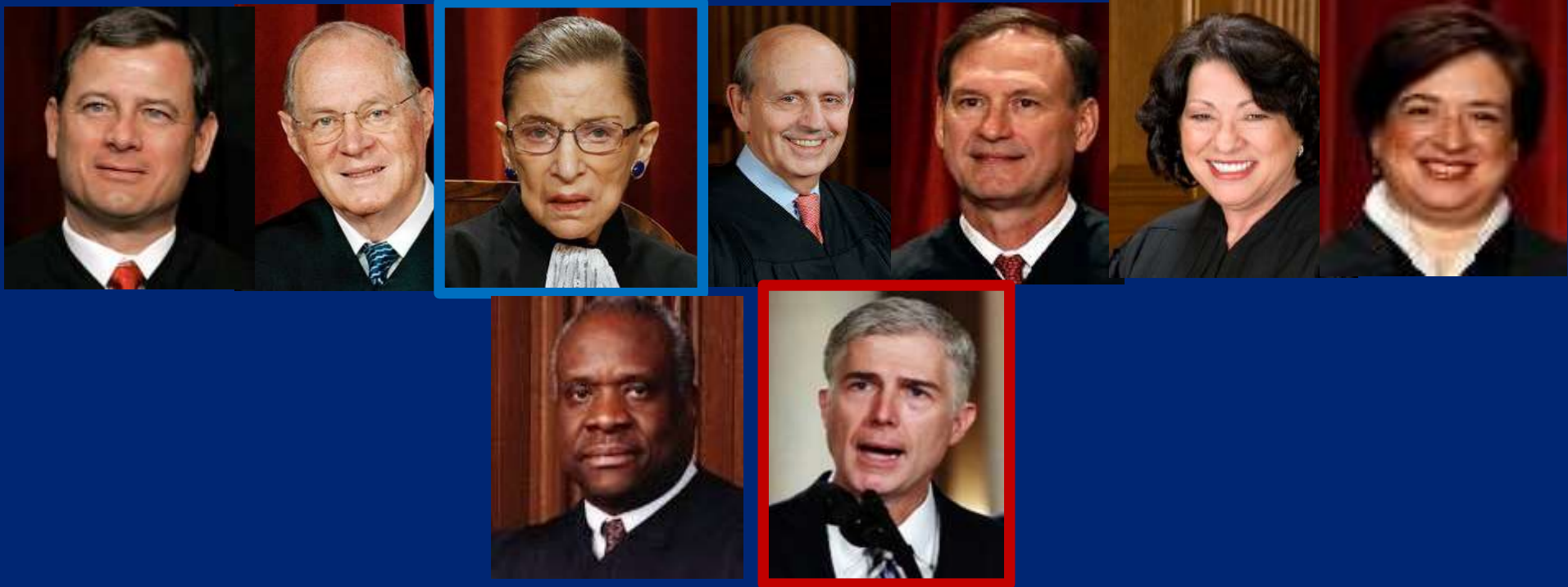


COURT'S RULING: Indigent defendants who raise serious mental health issues have a right to a mental health expert.

Perry v. Merit Systems Protection Bd

Worker Rights

Vote: 7-2



COURT'S RULING: Worker with a “mixed” civil service/discrimination grievance can bring *de novo* suit in non-deferential district court.

Trump v. Int'l Refugee Asst Project

Trump's Travel Plan

Vote: 6-3

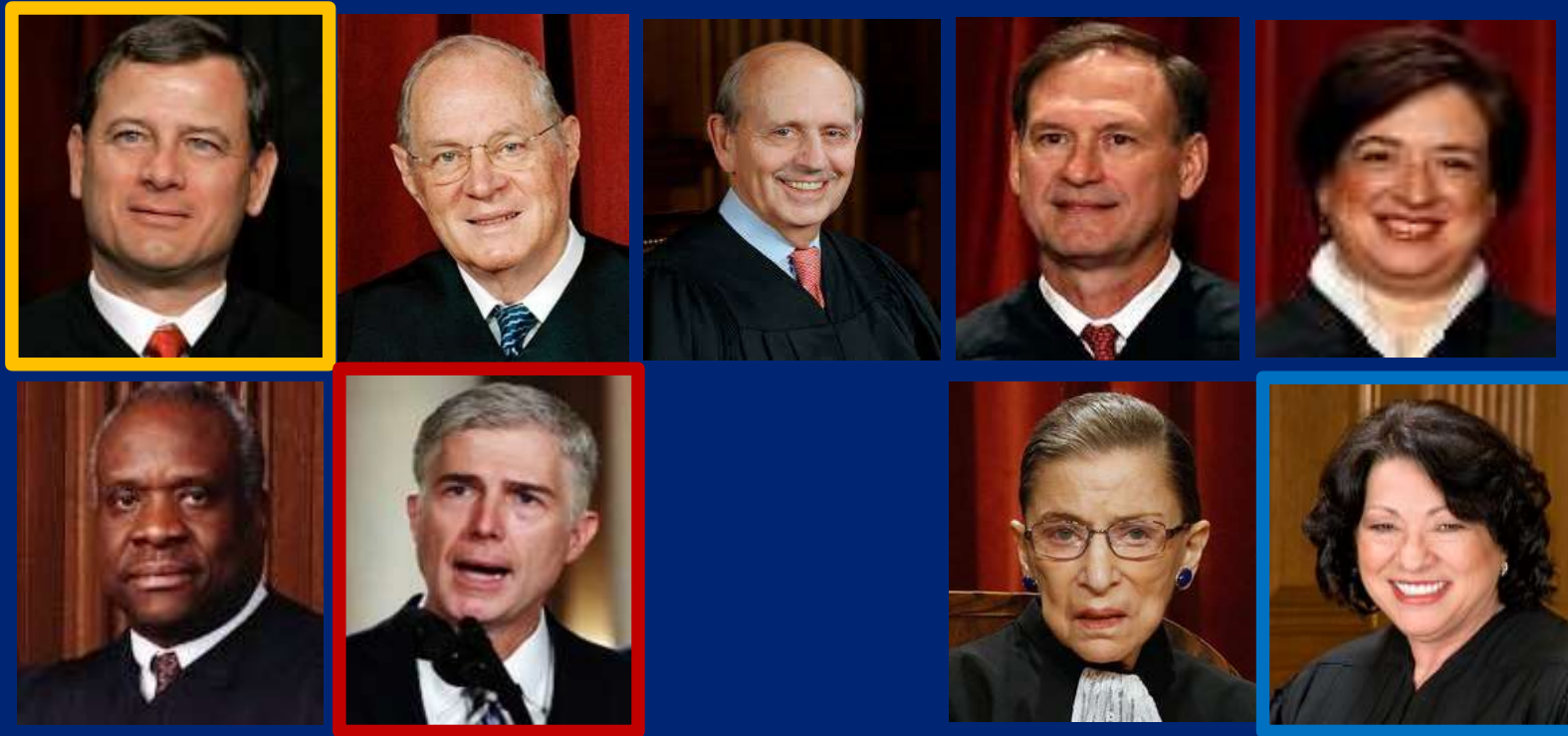


COURT'S RULING: Trump's EO suspending entry into U.S. for certain foreign nationals may be enforced as to those with no tie to this country.

Trinity Lutheran Church v. Comer

Church-State Separation

Vote: 5-2-2

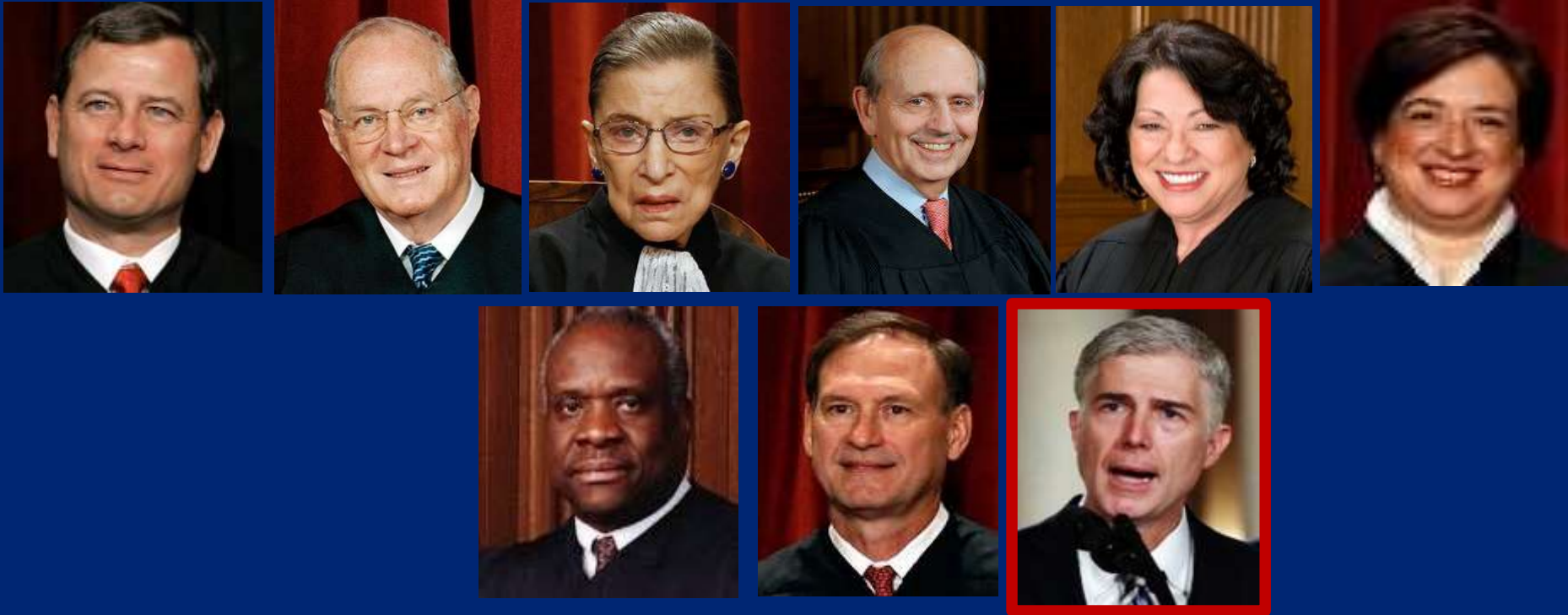


COURT'S RULING: State's denial to the church of generally available playground funding is unconstitutional religious discrimination.

Pavan v. Smith

Gay Rights

Vote: 6-3 Per Curiam



COURT'S RULING: State's refusal to allow same-sex spouse's name on birth certificate of biological mother's child violates *Obergefell*.

Peruta v. California

Gun Rights

Vote: 7-2 Cert Denial

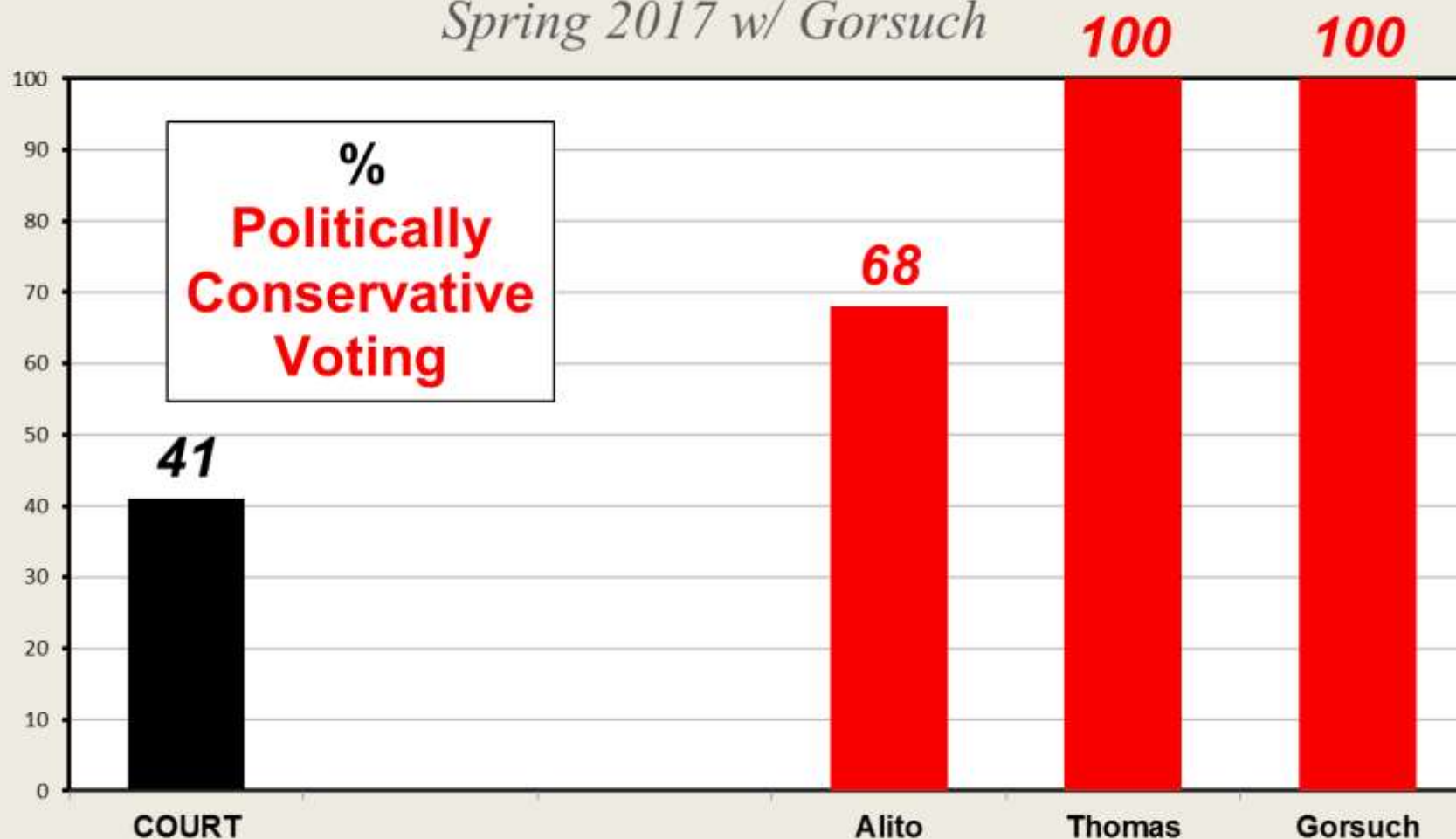


COURT'S RULING: Declined to review lower court's decision upholding state law generally prohibiting concealed guns in public.

Supreme Court

Ideological Voting Patterns

Spring 2017 w/ Gorsuch



Justices (% votes: politically conservative)

Source: Vincent M. Bonventre, Albany Law School 8/19

Gorsuch's 2017-18 Term Record

Trump "Travel Ban"

Immigration

Free Speech vs Abortion Rights

Free Speech vs Union Representation

International Human Rights

Voting Rights & Gerrymandering

Search & Seizure/Cell Phone Privacy

Religious Liberty vs Gay Rights

"Crime of Violence"

Trump v. Hawaii

“Travel Ban”

Vote: 5-4



COURT'S RULING: The Proclamation is within the "extraordinary" authority of the President under the Immigration and Nationality Act.

Jennings v. Rodriguez

Immigrant Detention

Vote: 5-3



COURT'S RULING: Detained immigrants have no right under immigration law to bond hearings to assess whether continued detention is justified.

Nat'l Inst of Family & Life Advocates

Pregnancy centers

Vote: 5-4



COURT'S RULING: State law requiring pro-life centers to provide information about abortion likely violates free speech.

Janus v. AFSCME

Agency Fees

Vote: 5-4

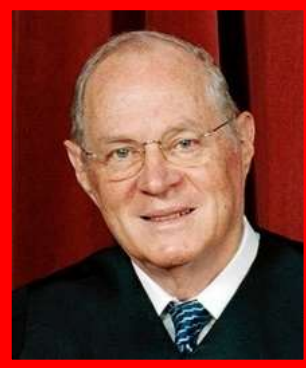


COURT'S RULING: State may not require non-member public-sector employees to pay dues to union; overruled *Abood v. Detroit* (1977).

Jesner v. Arab Bank

Foreign Human Rights Violations

Vote: 5-4

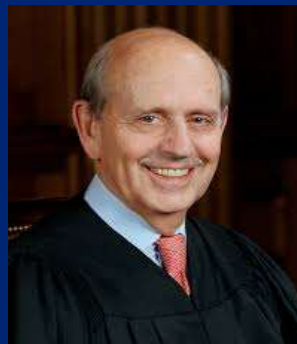
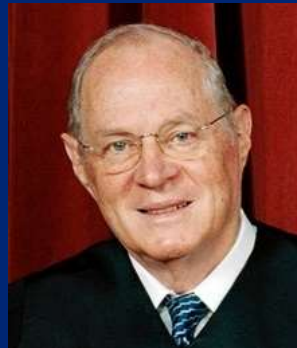


COURT'S RULING: The Alien Tort Statute (ATS) does not permit lawsuits against foreign corporations in U.S. federal courts.

Husted v. Philip Randolph Inst.

Voting Rights

Vote: 5-4

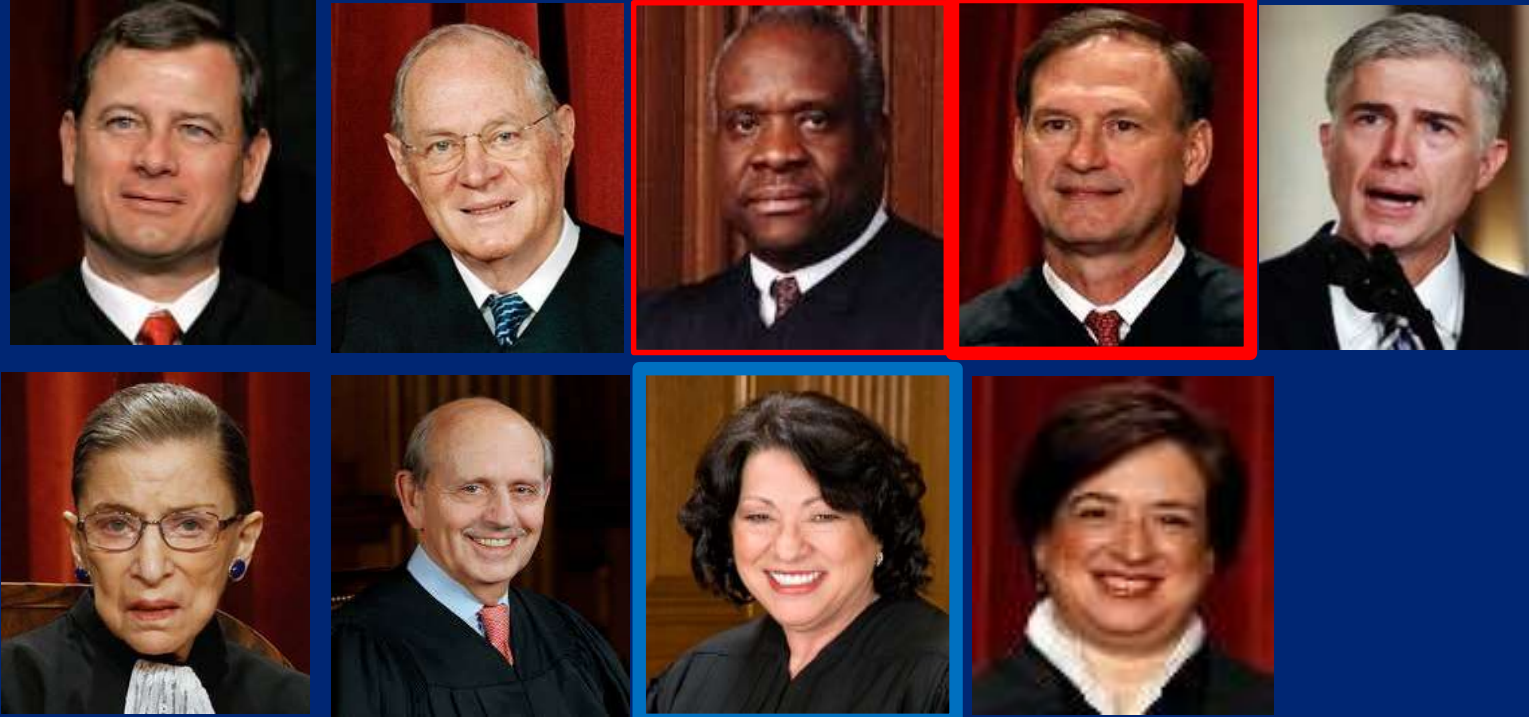


COURT'S RULING: State's process to remove non-active voters from the rolls does not violate the Nat'l Voter Registration Act.

Abbot v. Perez

Racial Gerrymandering

Vote: 5-4



COURT'S RULING: Legislative good faith is to be presumed; burden not on government to prove lack of discriminatory intent.

Gill v. Whitford

Partisan Gerrymandering

Vote: 9-0 (7-2-0)



COURT'S RULING: On remand, challengers must show particularized harm to voting from the gerrymandering, not general statewide harm.

Carpenter v. U.S.

Cell Location Data

Vote: 5-4

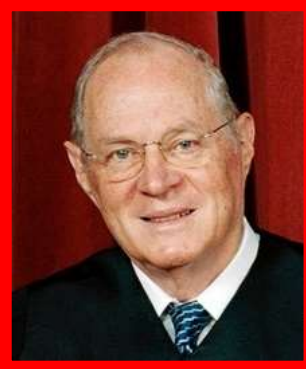


COURT'S RULING: Government access to cell company's data of cell phone user's location and movements generally requires a warrant.

Masterpiece Cakeshop v. Colorado

Religious Liberty/Gay Rights

Vote: 7-2 (4-3-2)



COURT'S RULING: State civil rights commission's hostility to baker's religious beliefs deprived him of a fair hearing and violated religious liberty.

Sessions v. Dimaya

Violent Crime Deportation

Vote: 5-4

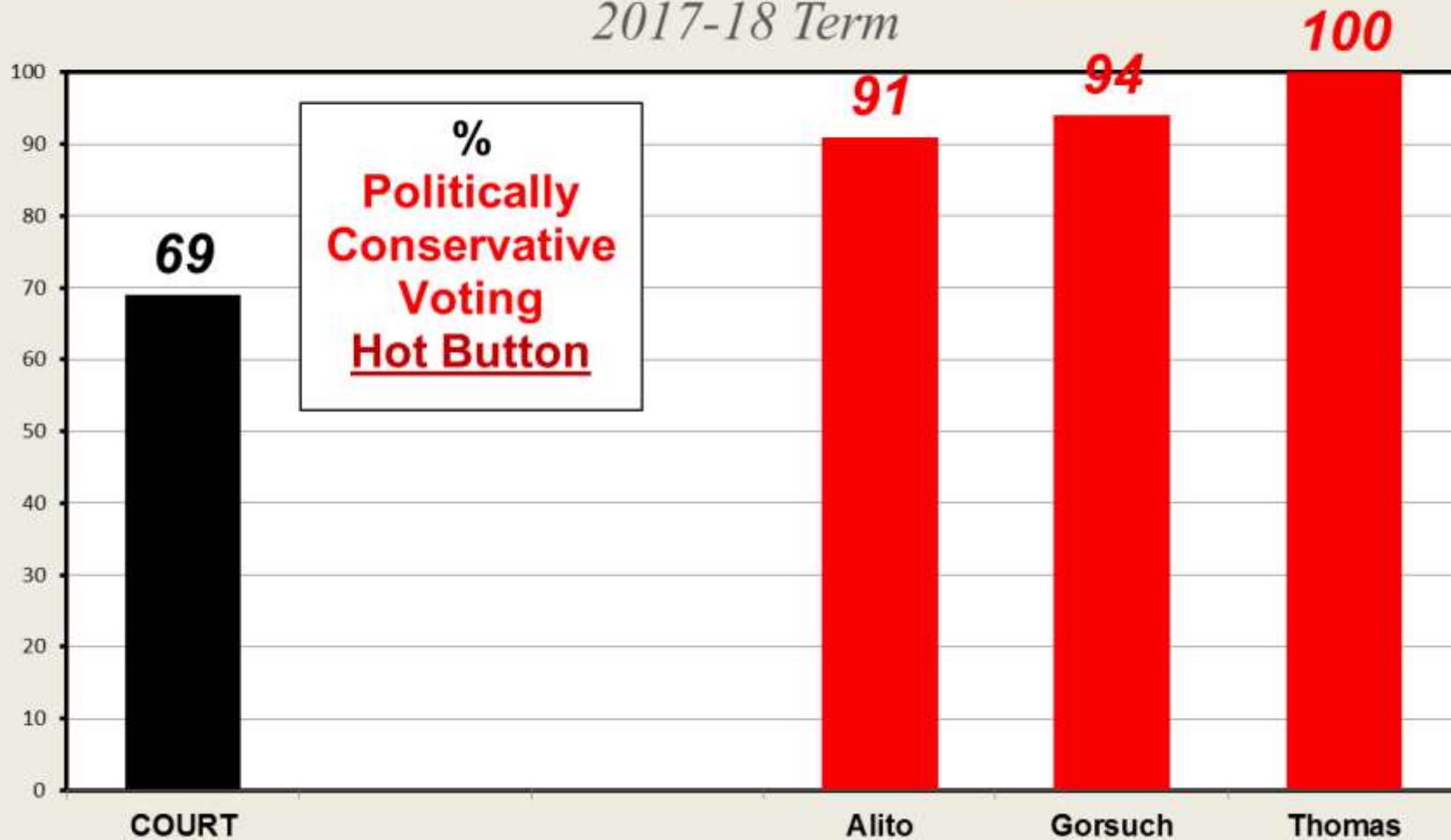


COURT'S RULING: “Crime of violence,” as basis for deporting immigrants under Immigration and Nationality Act, is void for vagueness .

Supreme Court

Ideological Voting Patterns--Hot Button

2017-18 Term



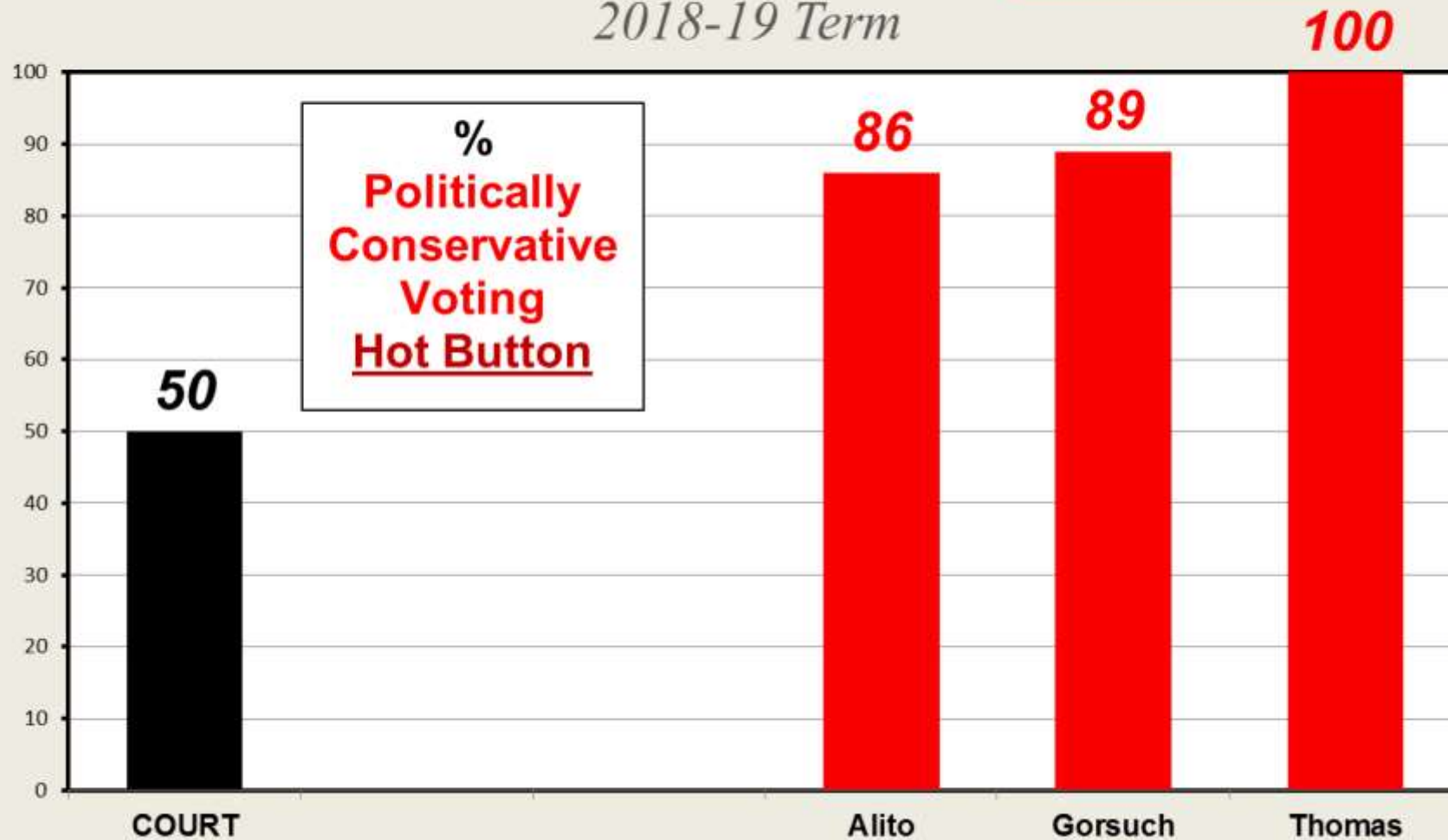
Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Trump's 2nd Appointee



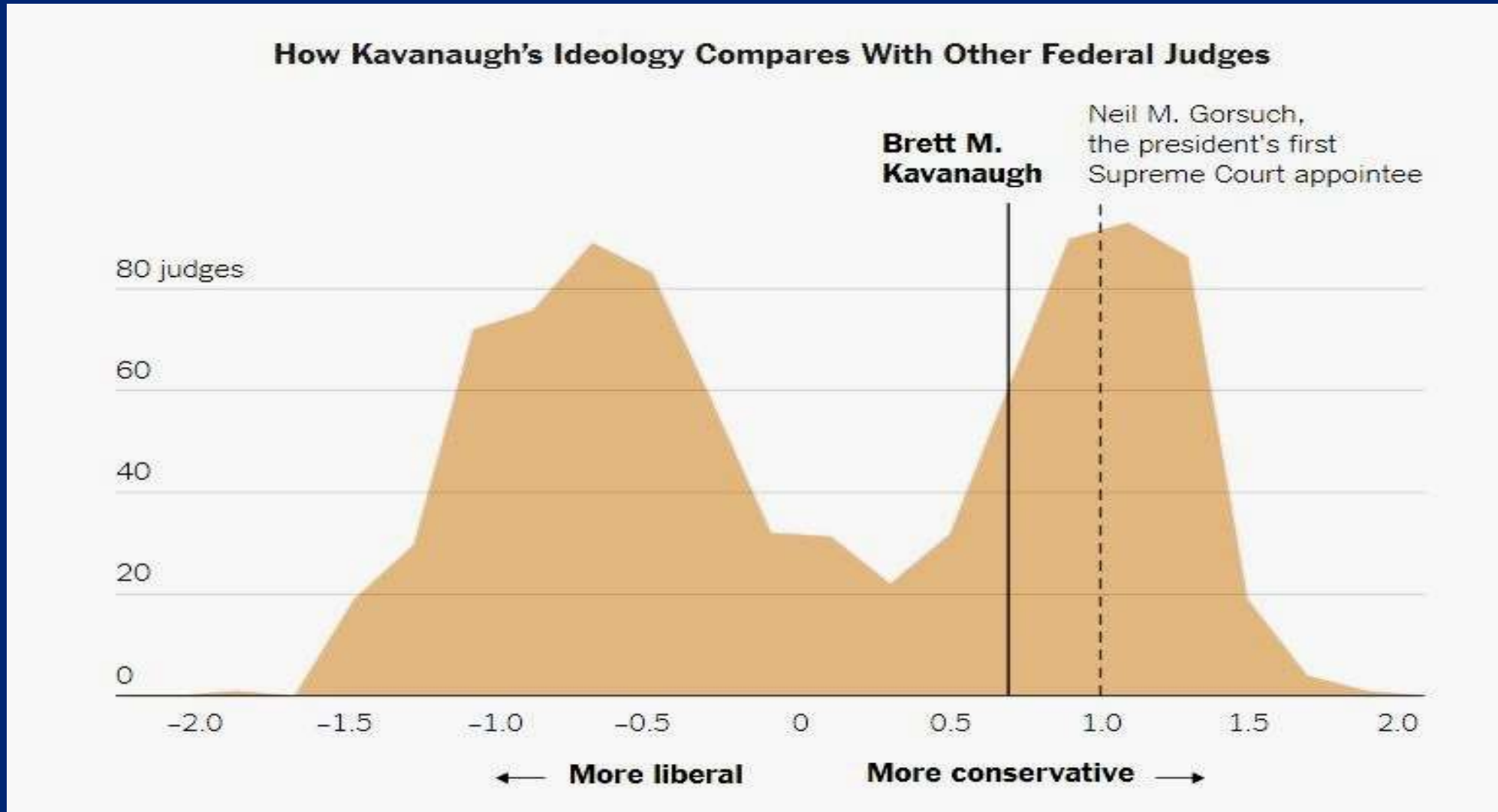
Brett Kavanaugh

Brett Kavanaugh



- 55 years old
- **56 (almost), end of current Trump term**
- **60 (almost), end of a 2nd term**
- 1/2/6 years on Court
- Trump Appointee, 2018
- Conservative/Republican
- **25-30 more years on the Court?**

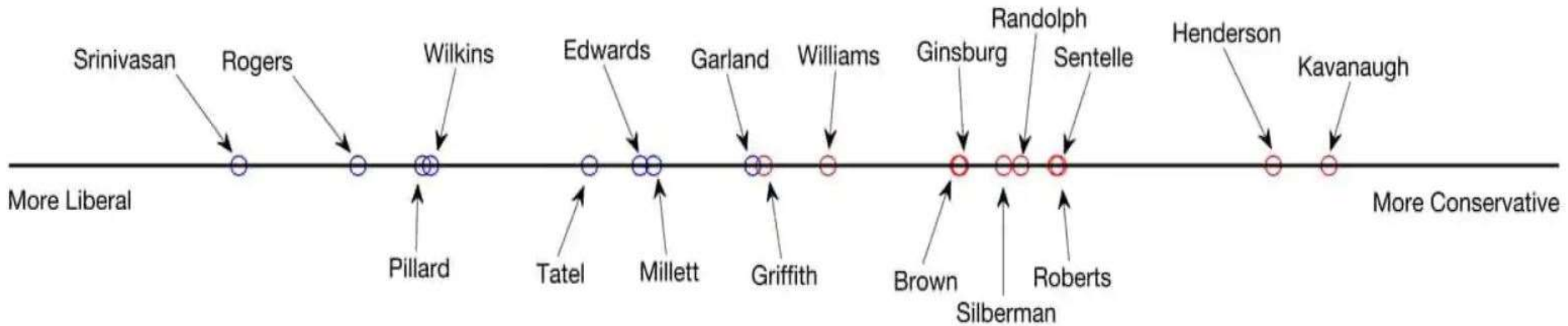
Brett Kavanaugh



(Source: Adam Bonica [Stanford], et al, *Database on Ideology, Money in Politics, and Elections* [2016], reported in *Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court*, NY Times, July 9, 2018.)

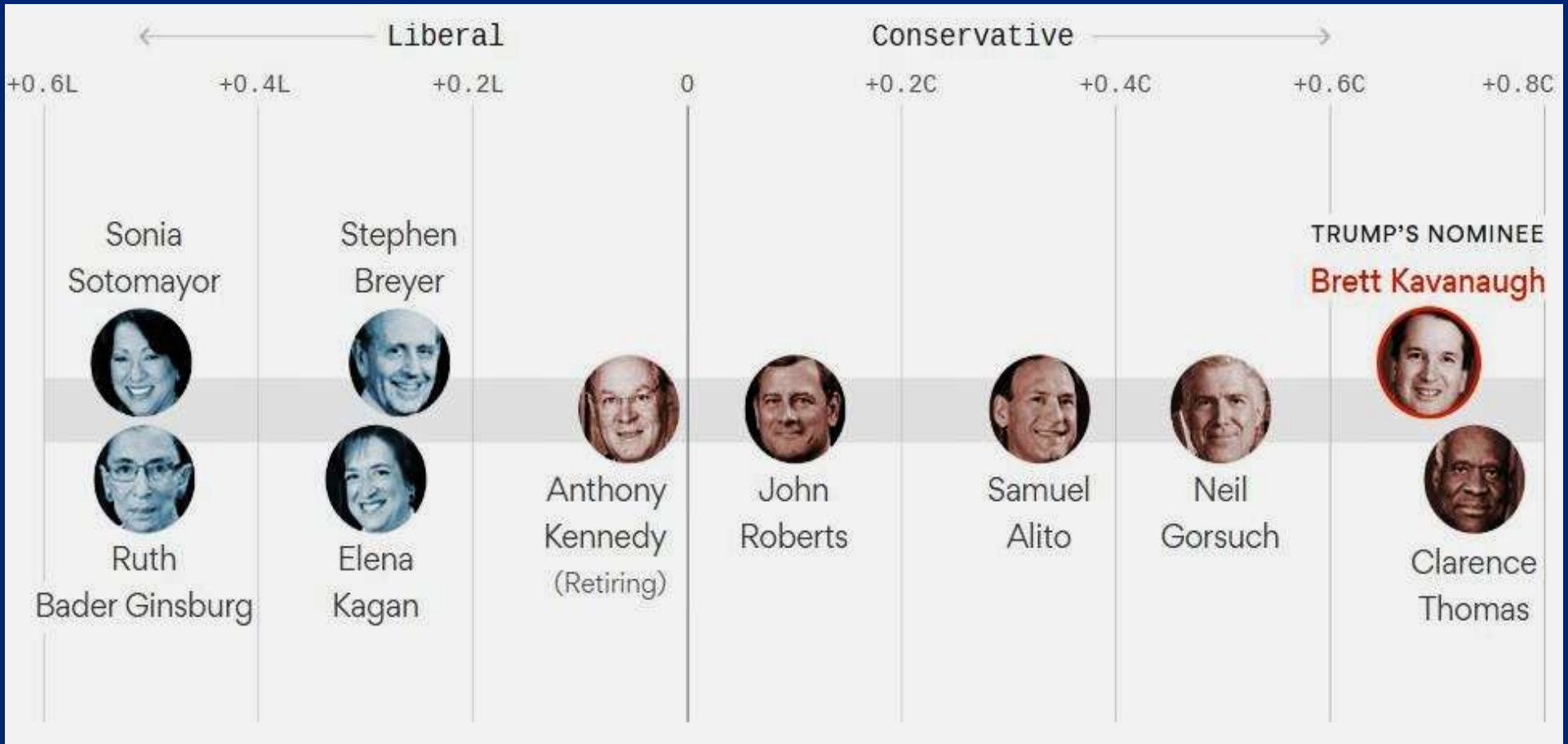
Brett Kavanaugh

How Brett Kavanaugh's ideology compares to other appellate judges



(Source: Chart in Kevin Cope and Joshua Fischman [Univ. of Virginia], "It's hard to find a federal judge more conservative than Brett Kavanaugh," *Washington Post*, Sept. 5, 2018)

Brett Kavanaugh



(Source: Chart in Andrew Witherspoon, Harry Stevens, "Where Brett Kavanaugh sits on the ideological spectrum," Axios, July 10, 2018, based on Epstein [Washington Univ.], et al, "President-Elect Trump and his Possible Justices" [2017] and Epstein [Washington Univ.], et al, "Possible Presidents and their Possible Justices" [2016].)

Gorsuch's & Kavanaugh's 2018–19 Record

The 40 Foot Cross

The Citizenship Question

Louisiana's Abortion Law

Partisan Gerrymandering

Death Penalty

Race-Based Jury Selection

Ineffective Counsel

American Legion v. Amer. Humanist Assn. (2019)

The 40 Foot Cross

Vote: 7(5+1+1) - 2



COURT'S RULING: The 1918 cross, on a World War I memorial park, has taken on a secular meaning and thus does not violate Non-Establishment.

Trinity Lutheran Church v. Comer (2017)

Church-State Separation

Vote: 7[5-2] - 2



COURT'S RULING: State's denial to the church of generally available playground funding is unconstitutional religious discrimination.

Dept. of Commerce v. New York (2019)

The Citizenship Question

Vote: 5 - 4(3+1)



COURT'S RULING: Although the Enumeration Clause(s) permit a citizenship question in the census, the administration's proffered reason is contrary to the evidence.

June Med. Servs. v. Gee (2019)

The Louisiana Abortion Law

Vote: 5 - 4

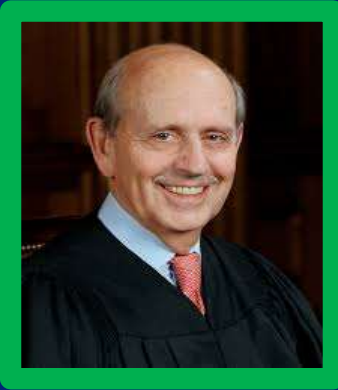


COURT'S RULING: The application to stay the law--limiting abortion providers to physicians with nearby hospital privileges—is granted.

Whole Woman's Health v. Hellerstedt (2016)

Right to Choose/Life

Vote: 5-3



COURT'S RULING: Texas' restrictions on abortion clinics constitute invalid "undue burdens."

Rucho v. Common Cause (2019)

Partisan Gerrymandering

Vote: 5 - 4



COURT'S RULING: Partisan gerrymandering is nonjusticiable because 1) explicitly left to the states and 2) there is no limiting, precise standard.

Common Cause v. Lewis (2019)

Partisan Gerrymandering

North Carolina Court of Justice

Vote: 3 - 0

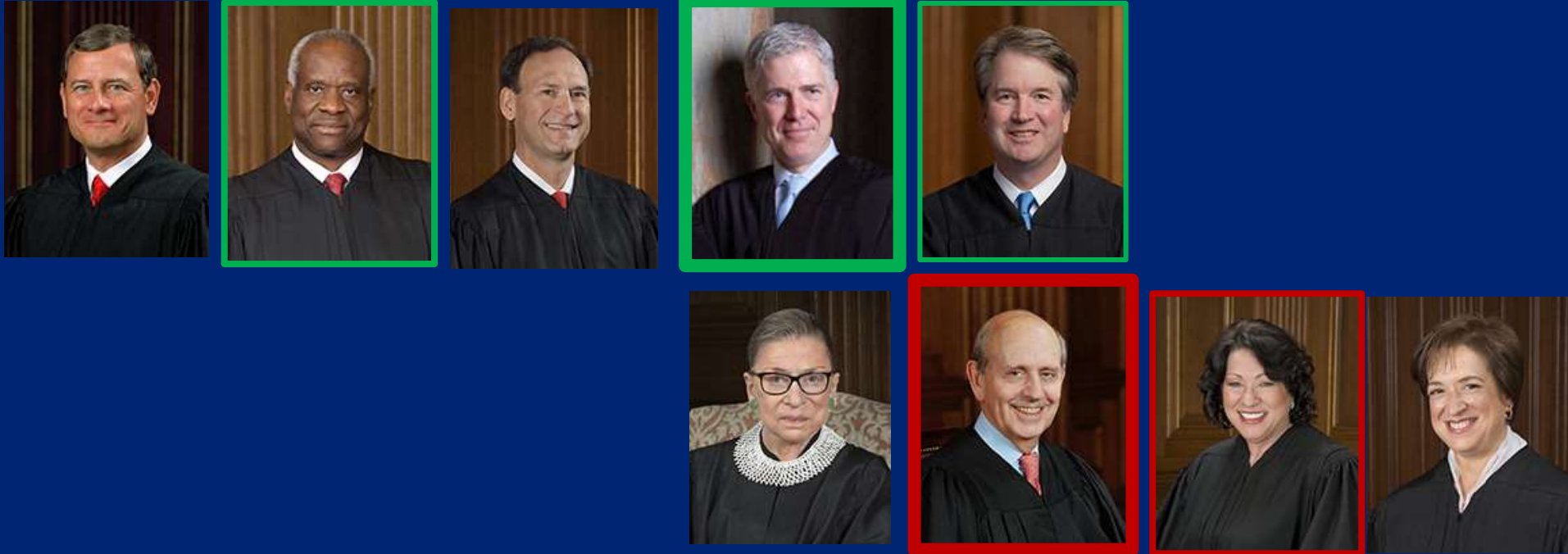


STATE COURT'S RULING: Extreme partisan gerrymandering is a violation of state constitutional rights to free and honest elections, equal protection, freedom of speech, and freedom of assembly.

Bucklew v. Precythe (2019)

Lethal Injection, as Applied

Vote: 5 - 4



COURT'S RULING: An execution method that causes pain to a particular inmate is not “categorically” cruel and unusual.

Moore v. Texas (2019)

Intellectual Disability Determination

Vote: 6 - 3



COURT'S RULING: Judgment below that inmate did not suffer intellectual disability reversed and case remanded (again) to apply the appropriate modern standards.

Moore v. Texas (2016)

Intellectual Disability Determination

Vote: 5 - 3



COURT'S RULING: Reversed judgment below, that inmate did not suffer intellectual disability, because Texas court refused to consider anything but 2 IQ scores.

White v. Kentucky (2019)

Intellectual Disability Determination

Vote: 6 - 3



COURT'S RULING: Certiorari summarily granted, death penalty vacated, and case remanded to determine inmate's intellectual disability claim.

Madison v. Alabama (2019)

Intellectual Disability Determination

Vote: 5 - 3



COURT'S RULING: The 8th Amendment prohibits the execution of one who lacks a “rational understanding” of the reasons for his execution, whether due to psychosis or dementia.

Dunn v. Ray (2019)

Muslim Chaplain Accompaniment

Vote: 5 - 4



COURT'S RULING: The stay of execution is vacated, because the inmate took too long to request the chaplain, despite the stay granted by the court below based on the state's refusal.

Murphy v. Collier (2019)

Buddhist Chaplain Accompaniment

Vote: 6 - 3



COURT'S RULING: The application to stay the execution is granted, pending the certiorari petition, unless the state permits a Buddhist chaplain to accompany the inmate.

Garza v. Idaho (2019)

Ineffective Counsel

Vote: 6 - 3



COURT'S RULING: Ineffective counsel is presumed where counsel fails to file an appeal, as requested by defendant, despite waiver of the right to appeal as part of the plea agreement.

Flowers v. Mississippi (2019)

Race-Based Peremptory Challenges

Vote: 7 - 2



COURT'S RULING: The “relentless” use of peremptory challenges to strike all black jurors, throughout the 6 trials and retrials, by the same prosecutor, violated *Batson*.

U.S. v. Davis (2019)

“Crime of Violence”

Vote: 5 - 4

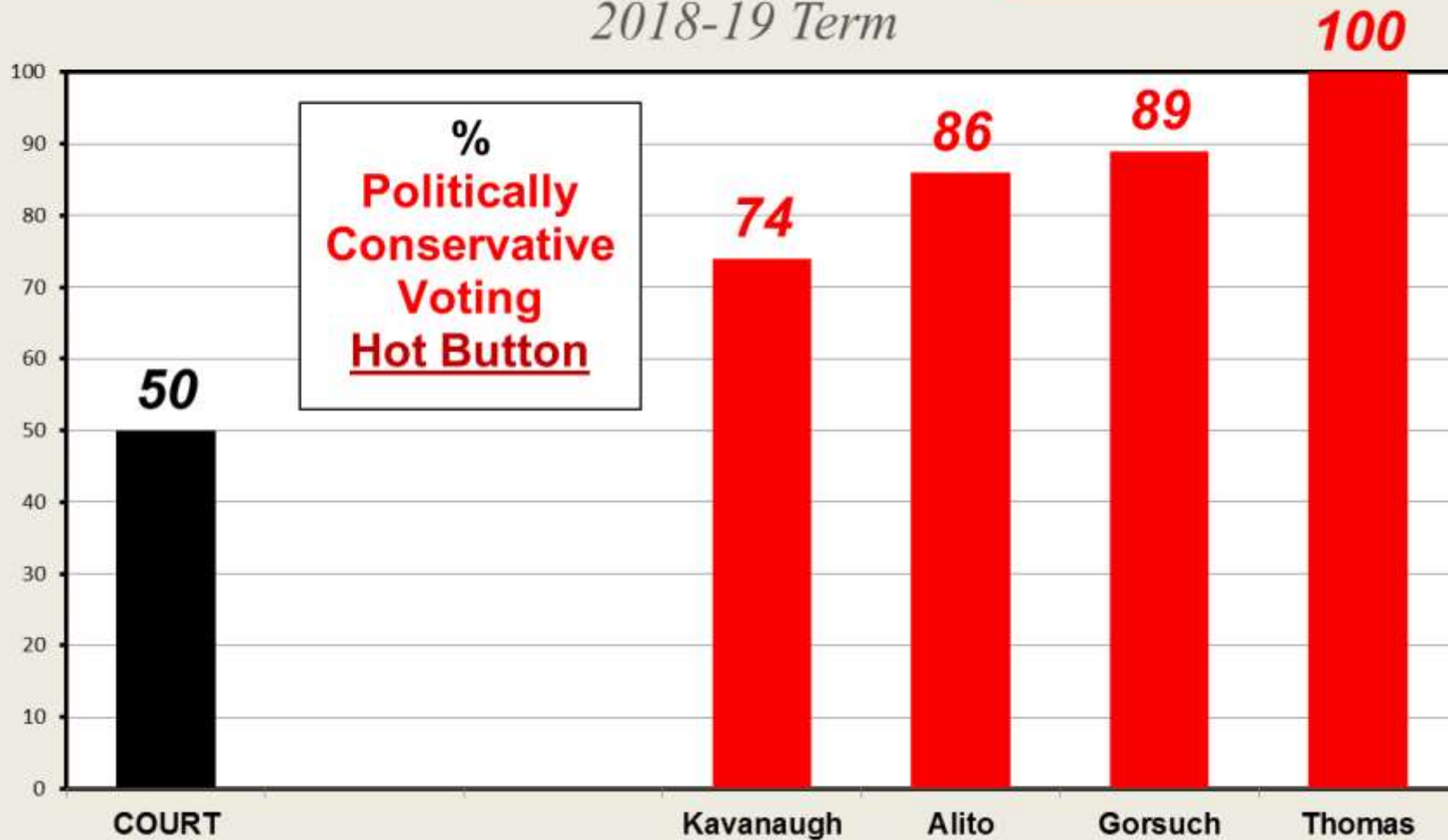


COURT'S RULING: Provision for enhanced sentence where a firearm was used in a “crime of violence,” categorically applied, is unconstitutionally vague.

Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



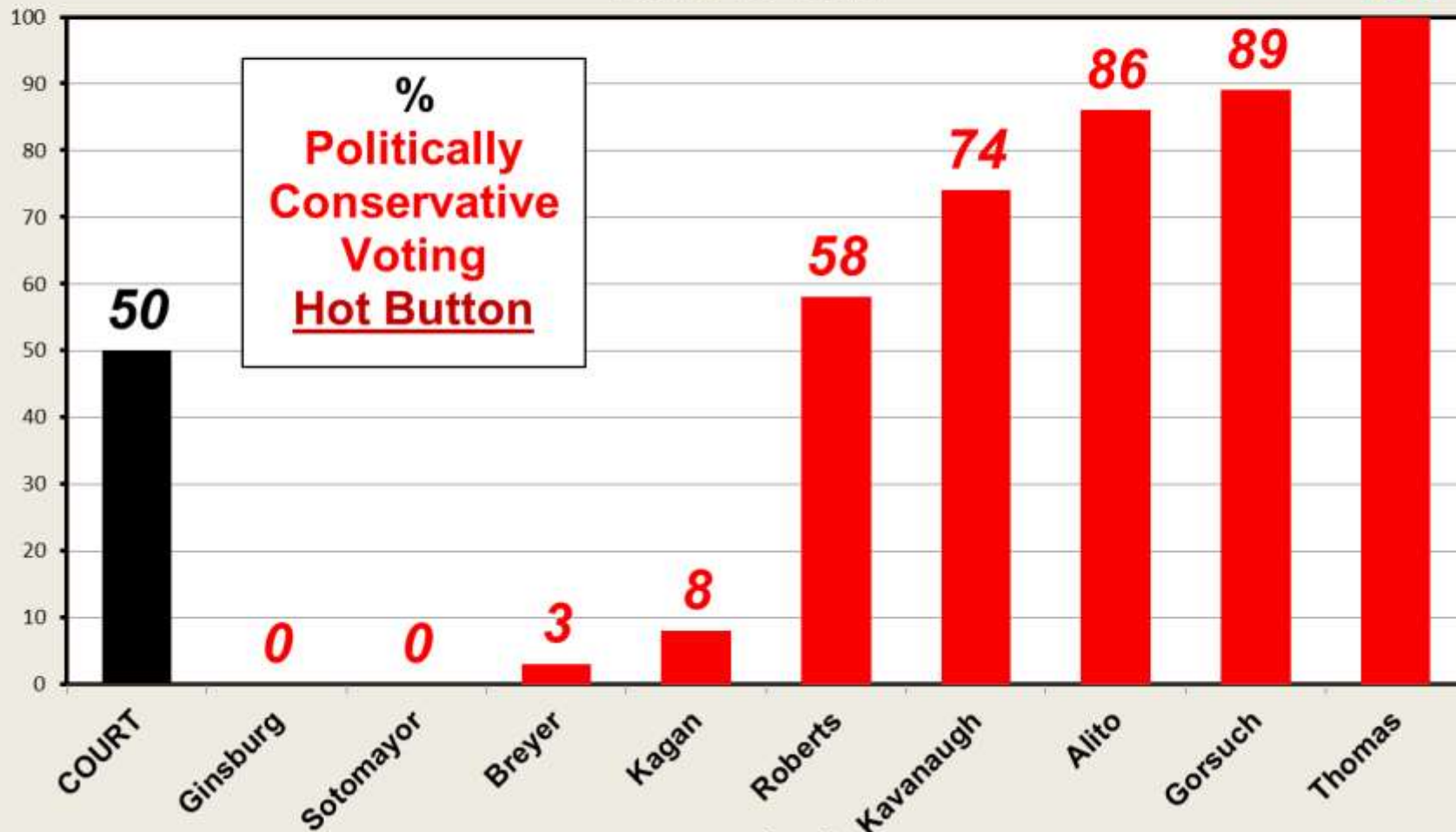
Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



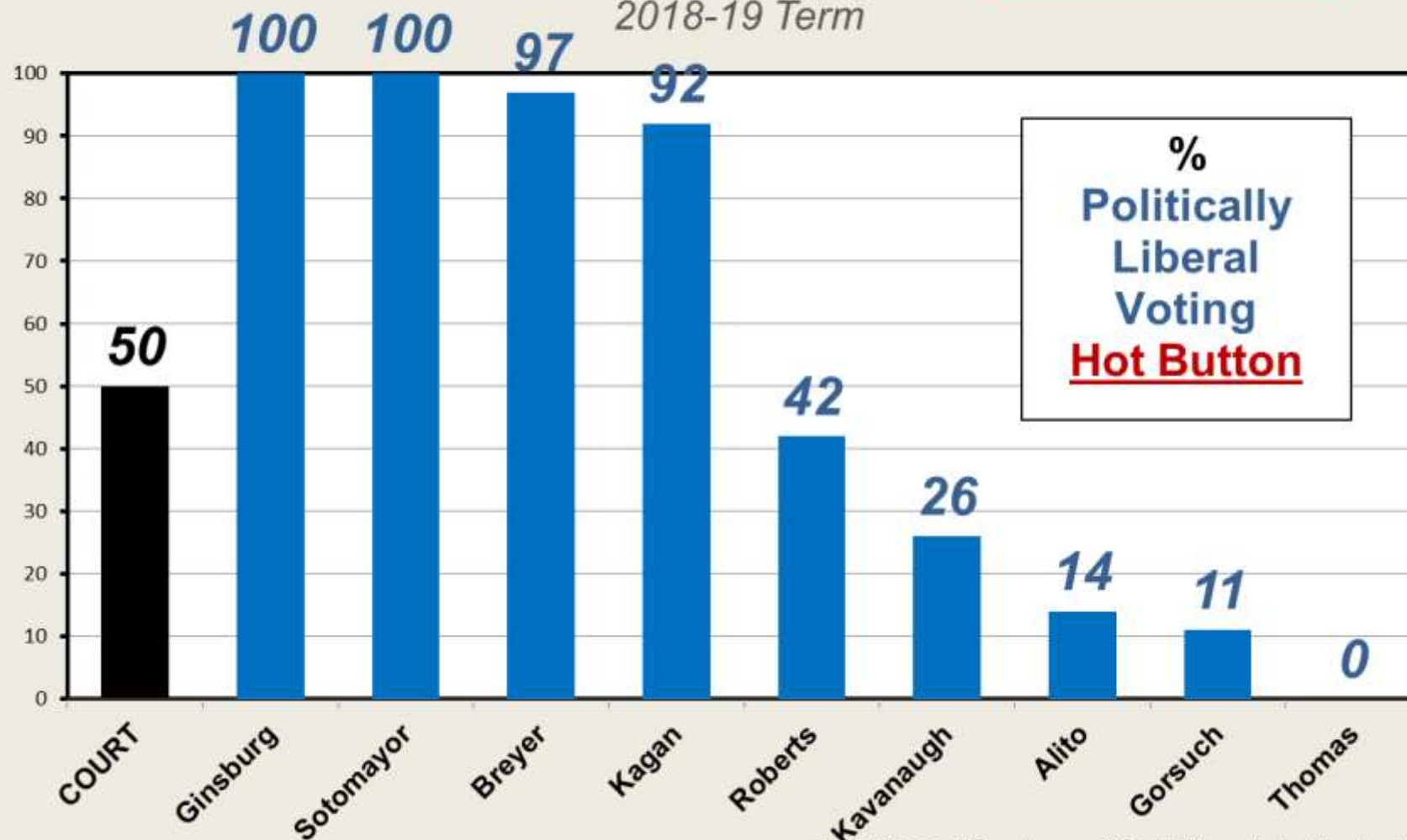
Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

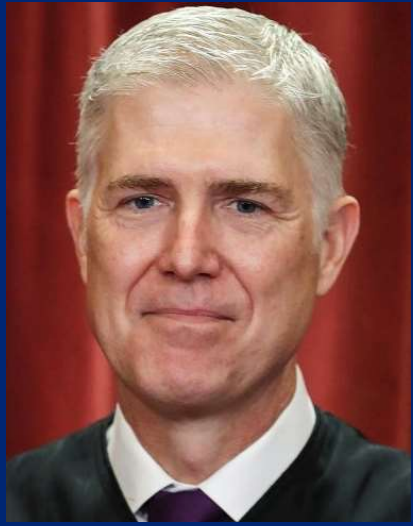
Ideological Voting Patterns--Hot Button

2018-19 Term



Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19



Gorsuch
v.
Kavanaugh



Trump Appointees at Odds

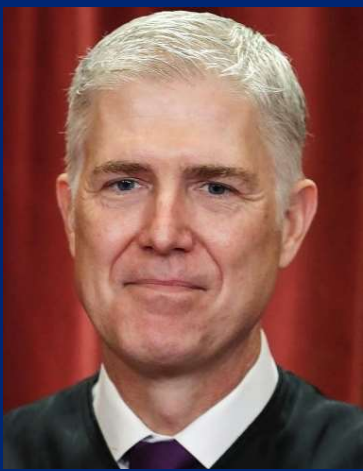
American Legion v. Amer. Humanist Assn. —Kavanaugh w/ Alito on non-establishment; Gorsuch insisting no standing

Flowers v. Mississippi—Kavanaugh majority finding Batson violation; Gorsuch joined Thomas dissent

Moore V. Texas—Kavanaugh joined majority remanding for new intellectual disability determination; Gorsuch joined Alito dissent

Murphy v. Collier—Kavanaugh joined majority ordering Buddhist chaplain for death penalty inmate; Gorsuch joined Alito dissent

U.S. v. Davis—Gorsuch wrote majority invalidating “crime of violence;” Kavanaugh wrote dissent



Trump Appointees at Odds

American Legion v. Amer. Humanist Assn. —Kavanaugh w/ Alito on non-establishment; Gorsuch separately insisting no standing—i.e., right to legally complain

Flowers v. Mississippi—Kavanaugh majority finding invalid race-based jury selection; Gorsuch joined dissent

Moore V. Texas—Kavanaugh joined majority remanding for new intellectual disability determination; Gorsuch joined dissent

Murphy v. Collier—Kavanaugh joined majority ordering Buddhist chaplain for death penalty inmate; Gorsuch joined dissent

Garza v. Idaho—Kavanaugh joined majority ruling ineffective defense counsel for failing to file an appeal requested by defendant; Gorsuch joined dissent

Gorsuch

v.

Kavanaugh





Roberts versus The Conservatives

Dept. of Commerce v. NY—the citizenship question

June Med. Servs. V. Gee—Louisiana abortion restrictions

Death Penalty cases—intellectual disability

—Buddhist Chaplain

Garza v. Idaho—ineffective counsel

Concluding Observations

For Now ...



Trump 2nd Term?

Retirements?



RETIREMENTS?



Ruth Bader Ginsburg

- 87 years old
- **87, end of current Trump term**
- **91, end of a 2nd term**
- 26/27/31 years on Court



Stephen G. Breyer

- 81 years old
- **82, end of current Trump term**
- **86, end of a 2nd term**
- 25/26/30 years on Court

RECENT RETIREMENTS

(since 1990)

	YEAR	TIME	AGE
William J. Brennan, Jr.	(1990)	33	84
Thurgood Marshall	(1991)	23	83
Byron White	(1993)	30	76
Harry Blackmun	(1994)	23	86
Sandra Day O'Connor	(2006)	24	76
David Souter	(2009)	18	70
John Paul Stevens	(2010)	34	90
<u>Anthony Kennedy</u>	<u>(2018)</u>	<u>30</u>	<u>82</u>
	Avg.	27	81
	Median	24-30	82-83

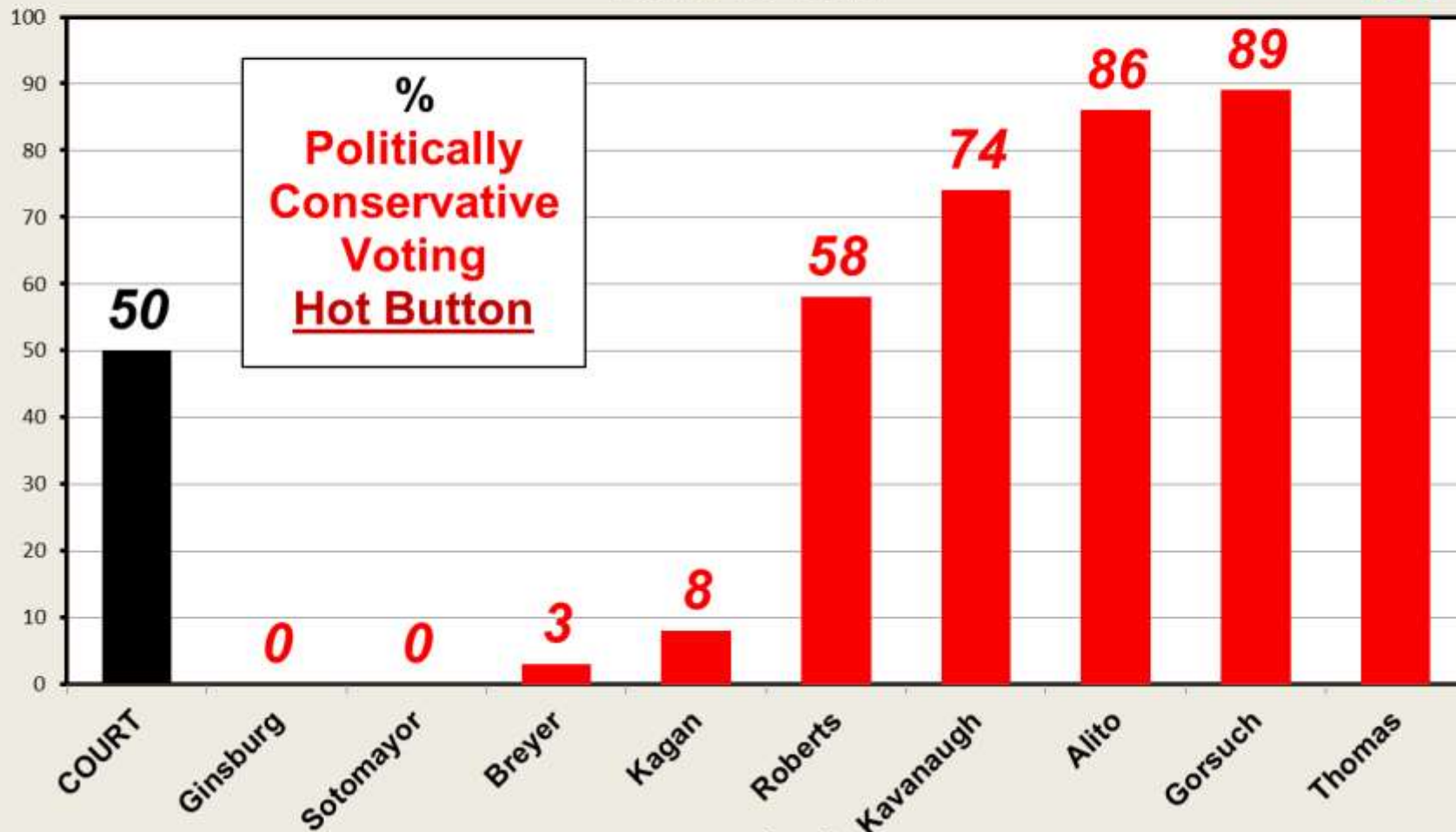
But Trump 2nd Term?



Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term

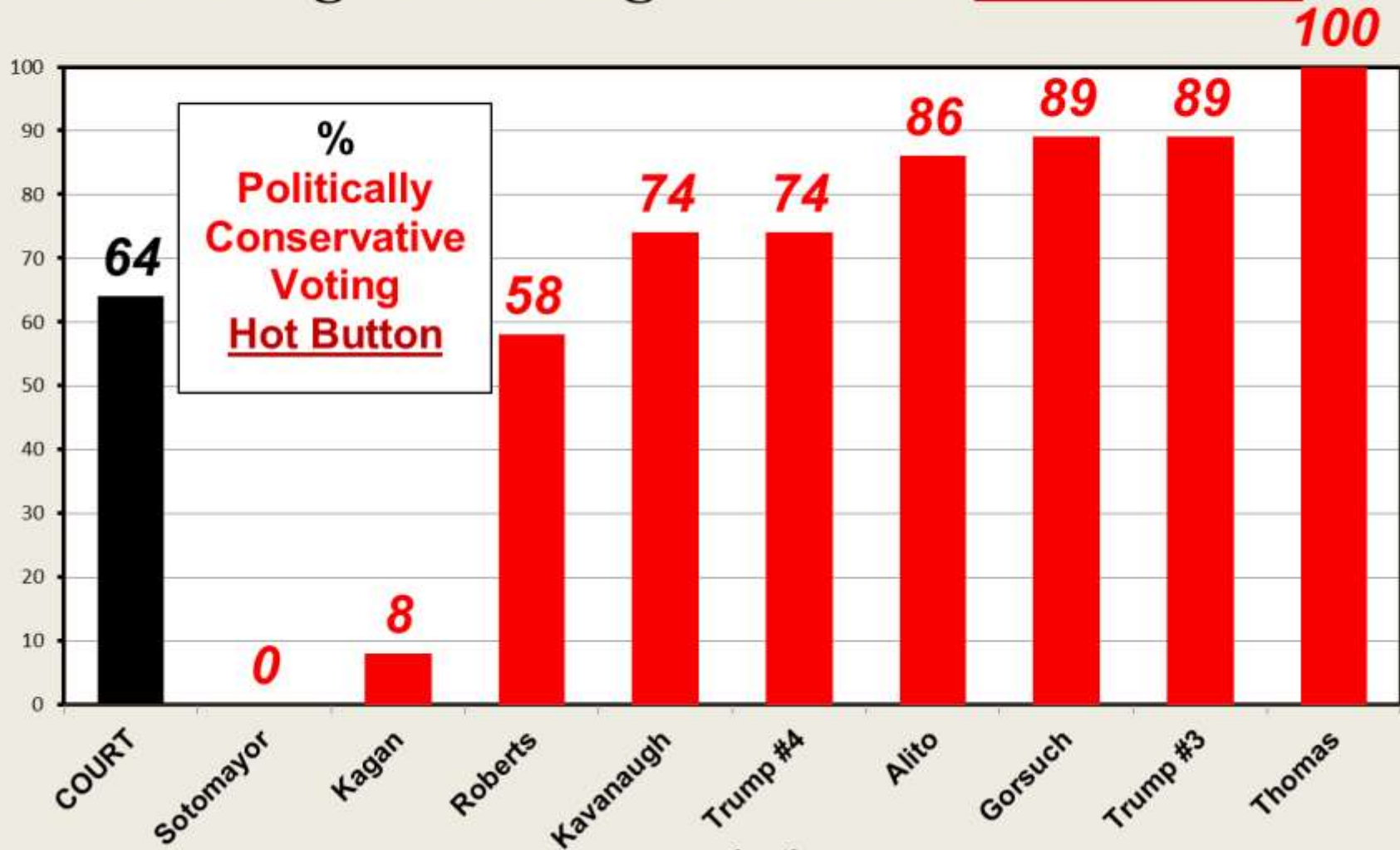


Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Trump 2nd Term?

Ideological Voting Patterns--Hot Button



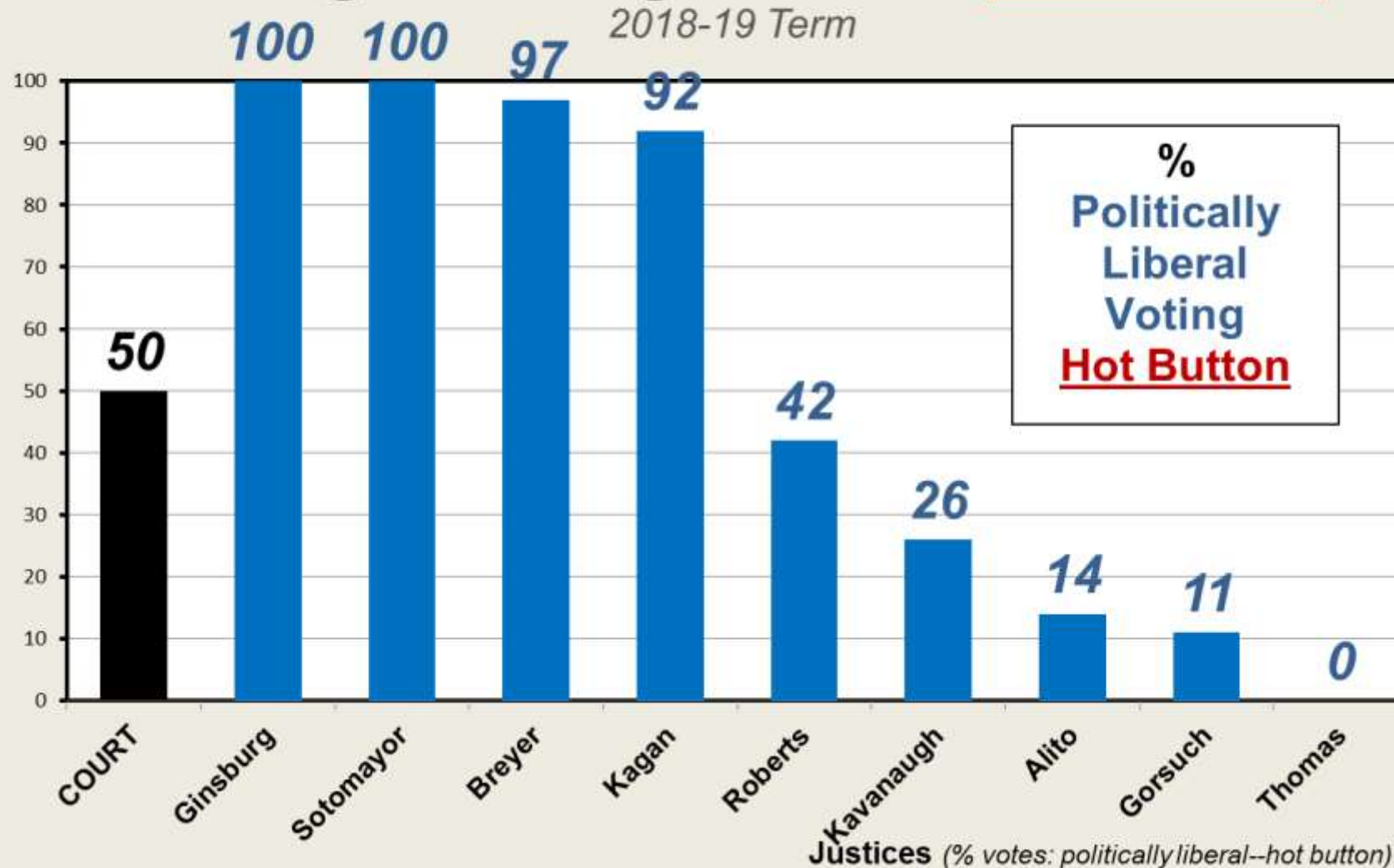
Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting Patterns--Hot Button

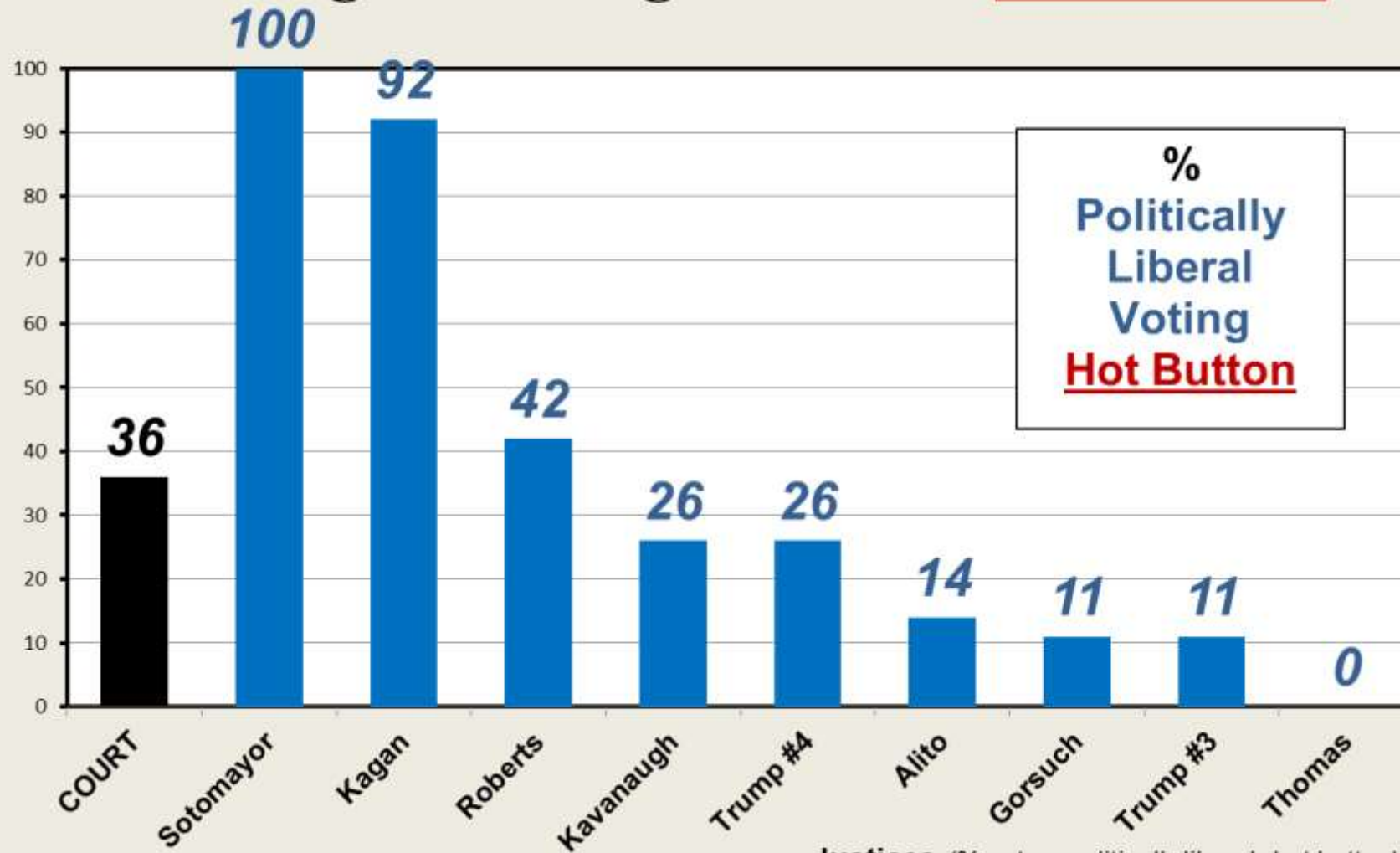
2018-19 Term



Source: Vincent M. Bonventre, Albany Law School 8/19

Trump 2nd Term?

Ideological Voting Patterns--Hot Button



Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Trump 2nd Term?

How will the Constitution be Expounded?

Gun Rights/Control?

Church-State?

LGBTQ Rights?

Racial Equal Protection?

Right to Choose/Life?

Immigration?

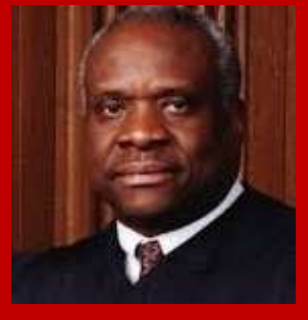
Death Penalty?

Campaign Spending?

Voting Rights/Gerrymandering?

Environmental Regulations?

But Trump 2nd Term?



The
End

Thank You!

New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More

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State Const'l Comm & Cooke Symposia	THE SEVEN: About the Court, By the Court - 2016 Cooke Symposium				2018 Cooke Symposium: Right to Die		

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MONDAY, JULY 6, 2020

Religious Institutions Must Pay Abortion Coverage in NY (Part 1)

More Aftermath of Scalia's Dreadful *Oregon v. Smith* Opinion



Last week, in *Roman Catholic Diocese of Albany v. Vullo*, a New York appellate court rejected religious objections to paying for abortion coverage.

The state's Appellate Division, Third Department, voted unanimously to deny the Albany Catholic Diocese, as well as other religious groups, an exemption from New York's administrative regulation that mandates abortion coverage in employer provided health insurance.

Despite the objectors' religious belief that abortion is--or is akin to--the killing of a human being, the appeals court held that an earlier decision of the state's highest court, the Court of Appeals, was controlling authority to deny a exemption. In that 2006 ruling, *Catholic Charities v. Serio*, the state's contraceptive mandate was at issue. Although the Court of Appeals acknowledged the sincerity of the religious objections, it nevertheless concluded that the burden on free exercise of religion was permissible.

In last week's case, the Appellate Division, the state's intermediate court, applied the *Catholic Charities* precedent to hold that the state was not required to grant any exemption to the religious objectors. The constitutional guarantee of religious liberty, that court held, provides no protection for the religious objectors. They are entitled to no exemption. They must violate their religion and pay for what they sincerely believe is--or is akin to--murder.

But wait, you might say. Wasn't there a Supreme Court decision not too long ago that said that the government could not force religious objectors to pay for contraceptive coverage? Wouldn't that decision apply to abortion coverage as well? And New York can't violate a Supreme Court decision, right?

Well, yes (*Hobby Lobby v. Burwell*, 2014), yes, and yes. **BUT...**



VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. ([More.](#))

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NEW YORK COURT WATCHER: RECENT TITLES

- Religious Institutions Must Pay Abortion Coverage in NY (Part 2)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1a--addendum)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1)
- It's Roberts' (somewhat less right-wing) Court (Part 3)

CENTER FOR JUDICIAL PROCESS: RECENT TITLES

- Justice Kagan: Are There Possible Conservative Undercurrents in Her, Otherwise, Liberal "Stream of Tendency?"
- CHIEF JUSTICE JOHN G. ROBERTS: LIBERALS' SAVING GRACE IN

- CN SupCt
- Coglianesi_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- DACA
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_St Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality

The Supreme Court's protection of religious freedom in that case simply does not apply to New York or to any other state. What, you ask, can that really be? Doesn't the Constitution's 1st Amendment rights apply to New York and other states? Aren't New York and other states required to obey Supreme Court decisions about the Constitution?

Again, yes, yes, and yes. **BUT...**



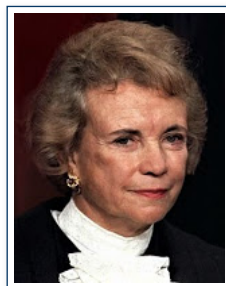
That's where Antonin Scalia's dreadful--yes, and disgraceful and dishonest--opinion in the 1990 decision in *Oregon v. Smith* comes in. [*The full formal name of the case is actually Employment Division, Department of Human Resources of Oregon v. Smith. I'll stick with Oregon v. Smith.*]

The late Justice, in his opinion for the Court, insisted that the 1st Amendment did not protect religious liberty from laws that were "*otherwise valid*." So as long as a law does not violate some *other* constitutional right, it's permissible for that law to interfere with freedom of religion. As Scalia further explained, as long as a law is "*generally applicable*"--i.e., it does not deliberately target or discriminate against a religion--it makes no difference if the law abridges religious liberty. And no, according to Scalia's opinion, the law doesn't even have to be a particularly important one. And no, it doesn't even matter if the government can do what it wants to do in some other way that doesn't interfere with freedom of religion.

Just in case there are doubts that Scalia, who apparently was a devout Roman Catholic, could actually dilute freedom of religion so drastically, here are his own words:

*[I]f prohibiting the exercise of religion . . . is not the object of the [law], but merely the incidental effect of a **generally applicable** and **otherwise valid** provision, the First Amendment has not been offended.* [My emphasis]

Not surprisingly, the Court in *Smith* was deeply divided.



Four of the Justices disagreed vehemently with Scalia. Justice Sandra Day O'Connor agreed with the ultimate result reached by the majority, but she condemned Scalia's evisceration of constitutional religious freedom, as well as his dishonesty about the Court's prior decisions. She catalogued a long line of decisions that had protected the 1st Amendment right

*by requiring the Government to justify any substantial burden on religiously motivated conduct by a **compelling state interest** and by means narrowly tailored to achieve that interest...The compelling interest test effectuates the First Amendment's command that **religious liberty is an independent liberty**, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, **whether direct or indirect**, unless **required by clear and compelling governmental interests of the highest order.*** [My emphasis]

"HOT-BUTTON" CASES OR SUPREME COURT LEGITIMIZER?

- Former New York Court of Appeals Chief Judge Judith Ann Kaye [mini-presentation]
- Former New York Court of Appeals Judge Howard A. Levine [mini-presentation]
- 1 IN 8: A Look at Failed Nominations to the Supreme Court

INTERNATIONAL LAW STUDIES

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- International Law and Nuclear Weapons: An Overview
- Regulation of Human Subject Research in the United States and China
- Anglo-Irish War: Authority for Independence?

- Gerrymandering
- Ginsburg_Ruth Bader
- Goats
- Gorsuch_Neil
- GPS
- Graffeo_Victoria
- Great Women_Great Chiefs
- Guest Post
- Guns
- Hancock_Stewart
- Holmes_Oliver W
- Honest Services Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jasen_Matthew
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Ethics
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kavanaugh_Brett
- Kaye_Judith
- Kennedy_Anthony
- Korematsu decision
- Lehman_Irving
- Lethal Injection
- Levine_Howard
- LGBTQ rights
- Lippman_Jonathan
- Literalism

Justice O'Connor was justly upset with Scalia's dishonest devaluation of religious liberty. In fact, as she spelled out in her separate concurring opinion, the Supreme Court had repeatedly scrutinized interference with religious liberty very strictly. The Court had repeatedly required government to show that an interference with religious liberty was *necessary* for a *compelling* purpose. And the Court had repeatedly exempted sincere religious objectors from "generally applicable" and "otherwise valid" laws. The Jehovah's Witnesses' objection to pledging allegiance to the flag, the Seventh Day Adventists' objection to working on their Saturday Sabbath, the Amish objection to their children completing high school--all of these and other religious objections were held to be entitled to exemptions from generally applicable, otherwise valid laws in landmark Supreme Court decisions. (See respectively, *West Virginia v. Barnette*, 1943; *Sherbert v. Verner*, 1963; *Wisconsin v. Yoder*, 1972.)

At issue in *Oregon v. Smith* was a Native American religious ritual that included smoking peyote, which was illegal under the state's anti-drug law. Justice O'Connor concluded that the government's prohibition of the religious ritual was justified, but only because prohibiting the use of hallucinogens was a compelling interest. Scalia, on the other hand, denied that religious liberty was even entitled to the compelling interest/strict scrutiny test. He did so despite the well-established Supreme Court landmarks affirming that test, and despite that test's unquestioned application to every other right in the 1st Amendment. (The 3 dissenting liberal Justices agreed entirely with Justice O'Connor's recitation of the constitutional law of religious liberty, but not that prohibiting the religious use of peyote was justified under the compelling interest/strict scrutiny test.)

[I've written and spoken at length about the *Smith* decision and its impact on religious liberty. See e.g., [Justice Scalia's Record \(Part 1\)](#), 2/18/16; [Religious Liberty--commentary, interview, video, presentation \[updated 5/15/13\]](#); [Religious Liberty: Fundamental Right or Nuisance](#), 14 *U. St. Thomas L.J.* 650 (2018); [The Fall of Free Exercise](#), 70 *Alb. L. Rev.* 1399 (2007). Ironically, but not surprisingly, conservatives today are much more supportive of free exercise of religion than previously, and liberals much less so, because recent cases have involved majority and fundamental religions objecting to abortion rights, LGBTQ rights, and other rights favored by political liberals.]

OK then, but what about that 2014 *Hobby Lobby* case mentioned earlier? Didn't the Supreme Court hold that Obamacare violated the rights of religious objectors and, therefore, that those objectors did not have to pay for contraceptive coverage? Didn't the Court rule that the religious objectors were entitled to an exemption from the law? And yet, isn't the Obamacare contraceptive mandate--in words that Scalia used in *Smith*--a *generally applicable* and *otherwise valid* law which, according to Scalia's majority opinion in *Smith*, defeats 1st Amendment religious liberty?

Yes, absolutely right. **BUT...**

Congress--both Democrats and Republicans, liberals and conservatives; as well as the overwhelming majority of constitutional scholars--was appalled by Scalia's opinion. So Congress passed a law, with almost unanimous support, to overrule *Smith* and to reimpose the "compelling interest/strict scrutiny" test. That legislation, the Religious Freedom Restoration Act (RFRA), however, applies only to federal laws. Not to

- Madison_James
- Malone_Bernard
- Marshall_Margaret
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
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state laws. Why? Well, without getting into the weeds here, the Supreme Court ruled shortly thereafter that the *statutory* protection of RFRA cannot overrule the *constitutional* decision in *Smith*. Consequently, the 1st Amendment's protection of free exercise of religion is still what it was defined to be in Scalia's *Smith* opinion, and *that--not RFRA--*is the federal protection for religious freedom against state laws. (See *Boerne v. Flores*, 1997.)

So let's be clear. The Supreme Court's decision in *Hobby Lobby*, protecting religious objectors from the contraceptive mandate of Obamacare, was an application of the *statutory* "compelling interest/strict scrutiny" protection of *RFRA* against a *federal* law. It was *not* about 1st Amendment *constitutional* protection, and it was *not* about a *state* law. In fact, if the case were about *constitutional* protection, or if it was about a *state* law, the religious objectors would have *lost!* That's because Scalia's "*generally applicable*" and "*otherwise valid*" standard would have applied, and the contraceptive mandate would have defeated any religious liberty objections.

Now, with that as background--the minimalist 1st Amendment constitutional protection (i.e., Scalia's opinion in *Smith*) and the rigorous federal statutory protection (RFRA, which does not apply to state laws)--we can better understand New York's religious liberty decisions. The only 1st Amendment constitutional protection against New York laws is Scalia's opinion in *Smith*. And the statutory RFRA protection--i.e., the *Hobby Lobby* decision--does not apply.

We'll look at those New York decisions--the Court of Appeals in *Catholic Charities* (2006) and the Appellate Division in last week's *Roman Catholic Diocese*--in the next post.

[Disclosure: Readers may be curious and deserve to know that I strongly believe in a woman's right to choose; I do not share the religious belief that human person-hood begins at conception and therefore that abortion is always wrong; but I do believe that freedom of religion and conscience are extremely vital to a free society (although I am not much of a religious believer myself) and I think that Scalia's opinion in Smith was dishonest and disgraceful and has dreadful consequences for 1st Amendment free exercise of religion.]



Labels: 1st Amendment, Abortion Rights, Constitutional Law, Contraceptive Coverage, Free Exercise of Religion, NY Court of Appeals, O'Connor_Sandra Day, Religion and the Law, RFRA, Scalia_Antonin, SupCt

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SUNDAY, JULY 12, 2020

Religious Institutions Must Pay Abortion Coverage in NY (Part 1a--addendum)

More Aftermath of Scalia's Dreadful *Oregon v. Smith* Opinion

Before advancing to the New York decisions, it probably makes sense to first address the three rulings just handed down by the Supreme Court dealing with religion. One dealt with discrimination against religion, another with discrimination by religion, and the third one with a regulation accommodating religion. None of these affect what we've been discussing. But to avoid any possible confusion, let's clarify.

Recall that in [Part 1](#), we reviewed the federal constitutional and statutory protections for free exercise of religion. First, the only *1st Amendment constitutional* protection is Scalia's opinion in *Oregon v. Smith*. Under *Smith*, there is no protection at all if the law is "generally applicable" and "otherwise valid." So religious liberty is protected under the 1st Amendment only when the law singles out religion or religious organizations for disparate treatment, or when the law happens to be illegal for some other reason than religious liberty.

Second, the federal *statutory* protection for free exercise of religion is the Religious Freedom Restoration Act (RFRA). That legislation applies the "compelling interest/strict scrutiny" test to interference with religious liberty--i.e., the same test that had been applied under the 1st Amendment before Scalia's opinion in *Smith* denied that was so. Under that test, the government must prove that it has a really, really important reason ("compelling interest") to do what it's doing and that there is no other way to do it without burdening religious liberty. But remember, RFRA and its *statutory* "compelling interest/strict scrutiny" test does *not apply to state laws*.

Again, none of that has been changed by the three decisions just rendered by the Supreme Court?

So then, what exactly did the Court decide?
OK, here they are.

Discrimination against Religion

Espinoza v. Montana Dept. of Revenue, June 30, 2020.

The state of Montana was subsidizing tuition scholarships which, under its own law, could not be used to attend religious schools. In an opinion by Chief Justice Roberts, a 5 to 4 majority held that Montana was unconstitutionally discriminating on the basis of religion. The dissenters, on the other hand, viewed Montana's exclusion of religious schools as consistent with, and even compelled by, the constitutional



VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. ([More.](#))

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separation of church and state.

The decision in *Espinoza* is the latest in a long line of Supreme Court precedents that have prohibited government from treating religious activities and institutions less favorably than others. For example, almost 40 years ago in *Widmar v. Vincent* (1981), the Court held that it was unconstitutional discrimination for a public school to allow all student activities to use its classrooms after hours, but not student groups that were religious. More recently, in *Trinity Lutheran Church v. Comer* (2017), the Court held the same for a state program that subsidized safety improvements in children's playgrounds, but not those owned by religious institutions.

In short, the Montana program in *Espinoza* even failed the minimal protection of *Smith*: the program was not "generally applicable" and "otherwise valid" because it singled out religion and did so for discriminatory treatment. (Whether such disparate treatment is actually permissible under the Constitution's non-establishment mandate, or even required to keep church and state separate, is another way the case could have been viewed--thus, the 4 dissenters.)

Discrimination by Religion

Our Lady of Guadalupe School v. Morrissey-Berru, July 8, 2020.

Two teachers sued Catholic elementary schools for employment discrimination when they were fired. In an opinion by Justice Alito, a 7 to 2 majority dismissed the lawsuits on the basis of the so-called "ministerial exemption." That doctrine, emerging as far back as the Court's 1952 decision in *Kedroff v. Saint Nicholas Cathedral*, generally prohibits government from interfering in internal church affairs, including church employment decisions--think the Catholic Church's limiting the priesthood to men.

The majority in this latest decision extended the "ministerial exemption" to employment decisions about teachers whose responsibilities include religious instruction. Regardless of the age or disability discrimination that might have been involved in the firings, the Court explained that the 1st Amendment prohibited the entanglement with church governance that interfering with employment decisions would entail. (The 2 dissenters objected to the extension of the "ministerial exemption" to clear violations of employment anti-discrimination laws involving teachers who were not ministers.)

In short, the decision in *Our Lady of Guadalupe School* dealt with the extent to which the constitutional guarantees of non-establishment and free exercise restrict government intrusion into church decisions about who shall carry out its religious activities. The majority favored rigorous restrictions; the dissenters favored rigorous enforcement of laws prohibiting employment discrimination.


Contraceptive Coverage Exemptions

Little Sisters of the Poor, Saints Peter and Paul Home v. Pennsylvania, July 8, 2020.


The issue in this case was not whether religious objectors must be granted exemptions. Rather, it was whether recent federal regulations that do grant exemptions--and do so very broadly to all religious and moral objectors--are valid.

In an opinion by Justice Thomas, another 7 to 2 majority held that the federal agency that promulgated the regulations had the authority to do so under the Affordable Care Act, and that the agency did follow the

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proper procedures in doing so. (The 2 dissenters noted that "all agree" that the 1st Amendment does not require such exemptions, and they complained that the broad scope of the regulatory exemptions conflicts with the purpose of the Affordable Care Act's contraceptive coverage.)

Recall that in its 2014 decision in *Hobby Lobby v. Burwell*, the Court held that certain religious objectors were entitled to an exemption under RFRA. According to the majority in that case, the federal government had failed to satisfy that RFRA's "compelling interest/strict scrutiny" test to justify burdening the objectors' religious freedom. This new *Little Sisters of the Poor* case was not about that. It was about the new regulations which provided for exemptions beyond those that the Court had required in *Hobby Lobby*--or what, if any, would be required under Scalia's "generally applicable/otherwise valid" standard in the *Smith* decision.

So, you ask, what does all this mean?

Well, none of this alters the minimal 1st Amendment constitutional protection for religious freedom set forth in Scalia's opinion in *Smith*. And none of this extends the reach of the much more rigorous statutory protection in RFRA.

What these decisions do, however, is to demonstrate that the current Supreme Court is more sympathetic to claims of religious liberty--or, flip side, less sympathetic to other competing interests. In these decisions, the majority of the Justices have extended the precedents that prohibit the disparate treatment of religion and religious institutions--or, flip side, diluted the precedents that prohibit government aid to them. The majority have extended precedents that insulate religious institutions from government interference--or, flip side, weakened laws that protect against employment discrimination. And the majority have approved expansive regulatory exemptions for religious objectors--or, flip side, undermined the ready availability of contraceptive health care.

There are always competing interests in cases that reach the Supreme Court. Oftentimes, those interests that compete are each quite compelling. One possible decision might be more consistent with legal provisions or precedents than another. A different decision might be more consistent with overriding principles or simply wiser. Every once in a while, the Court's decision is just dead wrong. It might be patently dishonest or downright foolish or otherwise contrary to those overriding principles that should guide all Court decisions. But most of the time, these cases are close, and they're tough to resolve. Someone who denies that--who is constantly insisting that the right answer is clear in these close cases--is likely clouded by a hyper-partisan or over-ideological perspective.

OK, enough of my sermon, which likely reveals a nagging uncertainty about most things. Or as extolled by Learned Hand: *The spirit of liberty is the spirit which is not too sure that it is right.*

Now, while I'm claiming Judge Hand's imprimatur, let's proceed in the next post to the ultimate destination of this series--this month's decision by New York's Appellate Division in *Roman Catholic Diocese of Albany v. Vullo*, with the 2006 ruling of New York's highest court, the Court of Appeals, in *Catholic Charities v. Serio*, as the background.



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Religious Liberty: Fundamental Right or Nuisance

Vincent Martin Bonventre

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ARTICLE

RELIGIOUS LIBERTY: FUNDAMENTAL RIGHT OR NUISANCE

VINCENT MARTIN BONVENTRE*

I. INTRODUCTION

Is free exercise of religion a fundamental right or simply a nuisance? The fact of the matter is that it is both. Indeed, all of the fundamental rights, including the freedom of speech, freedom of association, freedom of the press, right to counsel, right to a jury trial, and privilege against compulsory self-incrimination, are nuisances in the sense that they require resources and interfere with the efficiency of government. These fundamental rights impede societal goals and require us to confront complications that we would often prefer to avoid. Moreover, the current climate of increasingly hostile and superficial public discourse has underscored the difficulties in resolving questions involving the protection of fundamental rights, including the collision of religious liberty and important competing values.

II. THE FIRST AMENDMENT

The First Amendment of the United States Constitution begins with, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”¹ The significance of this provision is exceptionally clear.² It was not buried deep in the Constitution where it would be difficult to find. This dual protection of religious liberty is the very first provision in the Bill of Rights³—the very first guarantee enumerated in the very first amendment made to the Constitution.

* Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School; Ph.D., M.A.P.A., University of Virginia; J.D., Brooklyn Law School; B.S., Union College. Blog: New York Court Watcher. This article was adapted from several presentations delivered to academic and bar groups. The author is grateful to Albany Law School student Eric O’Bryan who helped transform the transcript of one such presentation into article form, and to Kayla M. Kienzle, Andrew Hanson, and other members of the *University of St. Thomas Law Journal* for their fine editorial work.

1. U.S. CONST. amend. I.
2. *See id.*
3. *See id.*

Thomas Jefferson and James Madison are widely credited with developing the foundation for First Amendment religious freedom.⁴ Thomas Jefferson, while Governor of the State of Virginia, drafted the Bill for the Establishment of Religious Freedom in 1777.⁵ Jefferson's bill was passed into law several years later largely through the efforts of James Madison who navigated it through the state legislature, turning Bill No. 82 into the Virginia Statute for Religious Freedom.⁶ This statute expressed Jefferson's belief that there should be a separation of church and state to allow each man the freedom to choose his religious beliefs.⁷ The Virginia Statute for Religious Freedoms stated that "no man shall be compelled to frequent or support any religious worship whatsoever, nor be enforced, restrained, molested or burdened, nor otherwise suffer on accounts of his religious opinions or beliefs."⁸ Under this statute, Virginia no longer required the support of the Anglican Church, nor restricted the practice of other religions.⁹ James Madison, in addition to drafting the Bill of Rights, Constitution, and many of the Federalist Papers, authored the Memorial and Remonstrance against Religious Assessments in 1785 to further support the concept of religious liberty set forth by Jefferson in the Virginia Statute for Religious Freedom.¹⁰ This support is evident in the document's language: "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."¹¹ The "duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."¹²

The work of the founders, especially Thomas Jefferson and James Madison, has helped save this country from much of the religious strife that most of mankind has confronted. Without their efforts in Virginia, our

4. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 162–164 (1878); *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947); see also Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 427 (1983). See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND THE STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

5. *Virginia Statute for Religious Freedom*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom> (last visited Apr. 9, 2018).

6. *Id.* Jefferson considered the Virginia Statute for Establishing Religious Freedom to be one of his proudest accomplishments and one of a list of only three for which he wanted to be remembered. His self-written epitaph, engraved on his tombstone at Monticello, Virginia, identifies him as the author of that statute, author of the Declaration of Independence, and the Father of the University of Virginia. DUMAS MALONE, *THE SAGE OF MONTICELLO* 499 (1981).

7. *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. MUSEUM OF HIST. & CULTURE, <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/the-mas-jefferson> (last visited Apr. 9, 2018).

8. *Id.*

9. See *id.*

10. James Madison, *Memorial and Remonstrance Against Religious Assessments*, U. CHI. PRESS (2000), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Apr. 9, 2018).

11. *Id.*

12. *Id.*

newly-formed country might well have perpetuated the cycle of religious tribalism and violence that has characterized much of the history of mankind.¹³ They saved us from the continuous religious wars that had plagued the previous generations.¹⁴

This was not a feat that could be accomplished by only one of the founding fathers, regardless of how extraordinary he was. Thomas Jefferson was a scientist, an inventor, a philosopher, an architect, and a statesman, but he needed James Madison to ultimately maneuver Jefferson's bill through the political landscape of Virginia.¹⁵ In fact, despite being governor, Thomas Jefferson could not get his bill passed. It became law, the Virginia Statute for Religious Freedom, only when James Madison was governor.¹⁶

Nevertheless, the statute was one of the accomplishments of which Jefferson was most proud. On his gravestone in Monticello, Virginia, his self-authored epitaph reads, "Here was buried, Thomas Jefferson, author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia."¹⁷ Notably, he did not include being President on his gravestone, but apparently viewed his authorship of the Statute of Virginia for Religious Freedom to be more significant.¹⁸ This was, for him, one of the crowning achievements of his life.¹⁹

Additionally, including the University of Virginia, of which he was the founder—and architect—truly reflects Thomas Jefferson's view of education as unencumbered by religious mandates or preferences. Instead, he believed it essential to free government that citizens be educated to pursue truth wherever it might take them—in religion as well as all other endeavors.²⁰ That was among the reasons for which he espoused a strict wall of separation between church and state. Indeed, having established the University of Virginia as a state institution—which it continues to be—Jefferson ensured that it would be separate from any particular religion.²¹

13. See, e.g., *Thirty Years' War*, HISTORY.COM, <http://www.history.com/topics/thirty-years-war> (last visited Apr. 9, 2018).

14. See, e.g., *id.*

15. JOHN P. KAMINSKI, THOMAS JEFFERSON: PHILOSOPHER AND POLITICIAN 7 (2005); *Virginia Statute for Religious Freedom*, *supra* note 5.

16. See *id.*

17. *Jefferson's Gravestone*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/jeffersons-gravestone> (last visited Apr. 9, 2018).

18. See *id.*

19. See *id.*

20. See *Our Endless Pursuit*, U. OF VA., <http://www.virginia.edu/overview> (last visited Apr. 9, 2018).

21. See *id.*; *Virginia Statute for Religious Freedom*, *supra* note 5.

III. SUPREME COURT DEVELOPMENT

The Free Exercise Clause of the First Amendment states that “Congress shall make no law . . . prohibiting the free exercise” of religion.²² The language of the clause prevents us and, more importantly jurists, from applying it literally.²³ The literal application of the Free Exercise Clause would allow the most egregious and otherwise harmful behaviors to be treated as constitutionally protected religious practices.²⁴ For example, government would be prohibited from enacting legislation that prohibited human sacrifices, which have been part of many religious practices throughout human history.²⁵ Unless such religious practices, as well as others that pose serious dangers to public health and safety, are to be allowed, the Free Exercise Clause cannot be applied literally. Civilized society must be permitted to pass laws prohibiting some religious practices. And yet, such a non-literalist reading of the free exercise guarantee ought not to be extended to allow government interference with religious practices in the absence of some genuinely important justification.

A. *Unsympathetic Beginnings*

Unfortunately, as with many other fundamental constitutional guarantees, the history of free exercise of religion in the United States and at the Supreme Court is a history of difficulty in getting it right.²⁶ In early religious liberty litigation, despite the First Amendment expressly allowing “no law” prohibiting the free exercise of religion, the Supreme Court approved aggressive legal interference with the Church of Jesus Christ of Latter-Day Saints—commonly referred to as the Mormon Church.²⁷ In fact, the United States Supreme Court avoided First Amendment difficulties by determining that the Church of Latter-Day Saints was not truly a religion.²⁸

The Supreme Court stated that “call[ing] [polygamy] a tenet of religion . . . offend[s] the common sense of mankind.”²⁹ The polygamous practice of the Mormon Church was compared to religious traditions of human sacrifice and determined to be a “cultus” activity that has long “been an offence against society.”³⁰ The Court claimed in *Reynolds v. United States*

22. U.S. CONST. amend. I.

23. *See id.*

24. *See id.*

25. *See id.*; *see generally* Human Sacrifice, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/human-sacrifice> (last visited Apr. 9, 2018).

26. I have discussed this elsewhere. *See* Vincent Martin Bonventre, *The Fall of Free Exercise: From ‘No Law’ to Compelling Interests to Any Law Otherwise Valid*, ALB. L. REV. 1399, 1403–1409 (2007); Vincent Martin Bonventre, *Religious Liberty as American History*, 17 UPDATE ON L.-RELATED EDUC. 41, 43–44 (1993).

27. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 168 (1878).

28. *See id.* at 166; *Davis v. Beason*, 333 U.S. 333, 345 (1890).

29. *Davis*, 333 U.S. at 342.

30. *Reynolds*, 98 U.S. at 165.

that “[p]olygamy has always been odious.” The Court went further and, in diluting the Constitution’s guarantee that “no law” shall prohibit religious freedom, insisted that protecting religious polygamy under the First Amendment would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”³¹

One might well ask whether protecting religious polygamy necessarily would have such drastic ramifications. And, more basic than that, whether the *constitutional* immunity *explicitly* provided to religious exercise by the First Amendment made religious freedom superior to legislation.

Following its decision in *Reynolds*, the Court in *Davis v. Beason* again ruled against the Mormons. Explaining that “[w]hile legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated,”³² the Court upheld severe penalties for polygamy and even for professing a belief in polygamy.³³ Between its decisions in *Reynolds*, *Davis*, and *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,³⁴ the Court approved the Mormons’ felony convictions, loss of voting rights, and forfeiture of property, for practicing their sincerely held religious belief.

There were, to be sure, decisions interfering with the free exercise of religion that were less questionable. For example, the State of Massachusetts passed legislation mandating smallpox vaccinations for adults, and it disallowed exemptions based on religious beliefs.³⁵ The Supreme Court held that the legislation was “enacted in a reasonable and proper exercise of the police power” and was “maintained by high medical authority.”³⁶ The need for the state to pass and uphold laws to protect citizens from contagious or infectious diseases was deemed significantly to outweigh religious-based objections.³⁷

But then there is the case of *United States v. Schwimmer*, where the Supreme Court held that the religious practice of pacifism was not protected by constitutional free exercise.³⁸ In this ultimately overruled decision involving the pacifist religious beliefs of Quakers, the Court infamously ruled that individuals who immigrated to this country were not entitled to be naturalized as citizens if they would not take up arms.³⁹ The Court characterized pacifists as “offenders [of] the principles of the Constitution” who

31. *Id.*

32. *Davis*, 333 U.S. at 345.

33. *Id.* at 345, 348.

34. 136 U.S. 1 (1890).

35. *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

36. *Id.* at 30, 35.

37. *See id.* at 28–29.

38. *See United States v. Schwimmer*, 279 U.S. 644 (1929).

39. *See id.* at 652–653.

were “incapable of the . . . devotion to the principles of our Constitution that [are] required of aliens seeking naturalization.”⁴⁰

A significant dissent by Justice Oliver Wendell Holmes, joined by Justice Louis Brandeis, provided some exception to the Court’s collective ignominy.⁴¹ Two of the truly eminent Justices in Supreme Court history combined their voices in a powerful dissent in *Schwimmer*.⁴² Holmes, the named author of that opinion, declared that “there is [no] principle of the Constitution that [is] more imperative[] than . . . the principle of free thought.”⁴³ Holmes continued with words that should have made the majority even more uncomfortable: “I had not supposed that [the Court] would expel [the Quakers] because they believe more than some of us do in the teachings of the Sermon on the Mount.”⁴⁴

B. A Preferred Freedom

Several years thereafter, in 1937, change was in the making at the Supreme Court.⁴⁵ This particular time in American constitutional history is often labeled after the “switch in time [that] saved nine”—the famous quote of Thomas Reed Powell that referred to the change in voting at the Court that is sometimes credited with defeating President Franklin D. Roosevelt’s court-packing plan.⁴⁶ At the time, the Court was comprised of four stalwart conservatives (Justices Willis Van Devanter, Pierce Butler, George Sutherland, and James C. McReynolds), the three liberal “musketeers” (Justices Harlan F. Stone, Louis D. Brandeis, and Benjamin N. Cardozo), and two swing members (Chief Justice Charles Evan Hughes and Justice Owen J. Roberts). In the years preceding 1937, the Court repeatedly invalidated President Roosevelt’s New Deal initiatives, as well as similar social welfare state laws, doing so for a variety of different reasons.⁴⁷

Whether the laws provided for maximum hours, minimum wages, child labor restrictions, workplace safety, food health, regulations on

40. *Id.* at 652.

41. *Id.* at 653–655. As I often tell my students, regardless of the vote in a decision being seven to two, or even eight to one, if the dissent is by Justice Brandeis, Holmes, Cardozo, or another jurist of such extraordinary stature, it’s almost a certainty that the dissent had the much better opinion and resolution for the case.

42. *Id.*

43. *Id.* at 654–655.

44. *Schwimmer*, 279 U.S. at 655. Shortly thereafter, in *United States v. Macintosh*, 283 U.S. 605 (1931), the Court repeated itself, this time upholding the denial of naturalization to a pacifist chaplain at Yale University. But this time, the Court’s majority was a bare five votes. Holmes and Brandeis were now joined in dissent by Justices Charles Evans Hughes and Harlan Stone. Ultimately, seventeen years after *Schwimmer*, the dissent became the majority and the Court explicitly overruled *Schwimmer* and *Macintosh* in *Girouard v. United States*, 328 U.S. 61 (1946).

45. A. Frank Reel, *When a Switch in Time Saved Nine*, N.Y. TIMES (Nov. 10, 1985), <http://www.nytimes.com/1985/11/10/opinion/1-when-a-switch-in-time-saved-nine-143165.html>.

46. *Id.*

47. See *id.*; Daniel E. Ho & Kevin Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

pharmaceuticals, or Social Security, the Supreme Court invalidated the legislation.⁴⁸ And it did so for a host of different reasons to justify the majority's holdings in support of its extremely pro-business philosophy.⁴⁹ But in 1937, the Court took a turn and the decisions changed. They did so because the "swing" justices, ostensibly—whether or not actually—fearful of Roosevelt's proposed court-packing, started voting with the liberal "muskeeters" instead of the conservative stalwarts.⁵⁰ Suddenly, many of the revived social welfare laws of the New Deal, as well as of the states, were upheld by the Court.⁵¹

Hence, the "switch in time"—i.e., Hughes' and Roberts' voting with the other side—is viewed as having "saved nine."⁵² Eventually the conservative stalwarts began to retire from the Court, giving Roosevelt the opportunity to replace them,⁵³ and the much differently composed Court, not surprisingly, began to behave much differently.⁵⁴

The Court's behavior and, indeed, its overall jurisprudence changed dramatically. In large measure owing to justices such as Benjamin Cardozo, the Court established religious liberty as among the "Honor Roll of Superior Rights" deserving of special constitutional protection.⁵⁵ In *Palko v. Connecticut*, Cardozo authored the Court's opinion in a case involving a question of federal constitutional double jeopardy protection applying to the states through the Fourteenth Amendment.⁵⁶ In addressing that specific issue, however, Cardozo—in his typically eloquent and masterful fashion—articulated the seminal jurisprudence of constitutional rights that remains the foundation of fundamental rights and liberties in America today.⁵⁷

In *Palko*, Cardozo recognized that there are certain rights that are essential to a free society.⁵⁸ Such a society could not exist without rights such as free speech, freedom of the press, and the right to counsel in a criminal prosecution.⁵⁹ Without these protections—fundamental rights—there can

48. See William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

49. See *id.*

50. See Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

51. See Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

52. See Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

53. See Reel, *supra* note 45; HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM & THE COURT: CIVIL RIGHTS & LIBERTIES IN THE UNITED STATES* 512 (8th ed. 2003).

54. See ABRAHAM & PERRY, *supra* note 53, at 14.

55. See *id.* at 62–66 (discussing Cardozo's seminal opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937)).

56. See *Palko*, 302 U.S. at 321.

57. See ABRAHAM & PERRY, *supra* note 53, at 96, 108; see also Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1483–1501 (2007).

58. See *Palko*, 302 U.S. at 324–325.

59. *Id.*

be no free and fair society.⁶⁰ Among these fundamental rights, Cardozo included religious freedom. Along with those indispensable others, “the free exercise of religion [is] implicit in the concept of ordered liberty”⁶¹—“neither liberty nor justice would exist if [such fundamental rights] were sacrificed.”⁶²

In the years shortly thereafter, the Court enforced free exercise in a series of decisions dealing with proselytizing and solicitation by Jehovah’s Witnesses. It did so by prohibiting the application of various licensing, taxing, and bookselling laws to religious activities.⁶³ But the foremost landmark of the period, one of the most magnificently composed decisions in Court history, arose in the context of state laws mandating that public school children salute the American flag.

In *West Virginia State Board of Education v. Barnette*,⁶⁴ the state law requiring children to recite the pledge of allegiance and salute the flag treated failure to do so as “insubordination,” resulting in the expulsion of the child and prosecution of the parents.⁶⁵ The religious beliefs of the Jehovah’s Witnesses, including a literal belief in certain verses of Exodus, precluded them from obeying the West Virginia law.⁶⁶ Accordingly, the children refused to perform the requisite pledge and salute, they were expelled, and their parents were prosecuted.⁶⁷

The Supreme Court, three years earlier, had upheld a similar state law against similar religious objections.⁶⁸ This time, however, the religious objections prevailed. In what might well have been providential, the task to author the Court’s opinion fell upon Justice Robert H. Jackson. Perhaps the most beautiful stylist in Supreme Court history,⁶⁹ Jackson penned what is

60. *Id.*

61. *Id.*

62. *Id.* at 326.

63. See *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door distribution of literature); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (tax for soliciting orders for articles); *Jones v. City of Opelika*, 319 U.S. 103 (1943) (license tax on bookselling). Curiously, the early history of free exercise jurisprudence can be felicitously summed up as the Mormons losing their cases and the Jehovah’s Witnesses winning theirs—compare *Reynolds*, *Davis*, and *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints* with *Martin*, *Murdock*, and *Jones*, and, of course, with the decision in the landmark case to be discussed presently. The contrasting outcomes no doubt resulted, at least in part, due to the different eras in which the cases arose—the Jehovah’s Witness cases being decided after the 1937 change in the Court’s overall jurisprudence and, particularly, its much more protective treatment of fundamental liberties.

64. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

65. *Id.*

66. *Id.* at 629.

67. *Id.* at 630.

68. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

69. See e.g., Bryan A. Garner, *Celebrating the Powerful Eloquence of Justice Robert Jackson*, A.B.A. J. (Oct. 2016), http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson. As the holder of the Justice Jackson chair at Albany Law School—where Jackson received his single year of formal legal education—I am admittedly partial. But I have been stirred by Justice Jackson’s prose, as well as by that of Benjamin Cardozo, since my days at

surely one of the most beautiful paeans to First Amendment freedom or, indeed—to paraphrase Cardozo in *Palko*—to the scheme of liberty implicit in American free government.

In response to arguments that the Court ought to defer to the legislative enactments of the people's elected representatives, Jackson reminded us of the meaning of higher law:⁷⁰

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁷¹

And while most actions taken by government are within its valid authority as long as based on some reasonable purpose, much more than that is required to justify interference with fundamental liberties. As Jackson put it:

[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.⁷²

Jackson then explained why the Court should not and would not permit intrusion on these paramount liberties except in those rare circumstances where the government's justification was so compelling. He did so in some of the most oft-quoted and most stirring words in the United States Reports:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁷³

Concluding for the Court, Jackson announced its decision in no uncertain terms. “[C]ompelling the flag salute and pledge transcends constitu-

the University of Virginia in Supreme Court seminars taught by Henry J. Abraham who would recite from memory so many of the powerful and poignant passages from Jackson's opinions. See generally Robert H. Jackson Center, *Henry Abraham (2003) Interview*, YOUTUBE (Jul. 18, 2016), https://www.youtube.com/watch?v=3NKejQ3_mvU. Though he only attended Albany Law School for one academic year, 1911–1912, he recognized the law school as his alma mater, and it recognized him as its graduate, on his return for commencement nearly thirty years later. See Commencement Address of United States Attorney-General Jackson, N.Y.L.J., June 10, 1941, at 1.

70. That term, as used here, is from a classic work. See EDWARD S. CORWIN, *THE HIGHER LAW BACKGROUND ON AMERICAN CONSTITUTIONAL LAW* (1955).

71. *Barnette*, 319 U.S. at 638 (1943).

72. *Id.* at 639.

73. *Id.* at 642.

tional limitations,” he wrote, for it “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”⁷⁴

Twenty years hence, the Supreme Court confronted another religious objection, from another religious minority, resulting in another religious liberty landmark. This time, the case involved Saturday Sabbatarians, the Seventh Day Adventists, who were bound not to work on their religious day of rest.⁷⁵ In *Sherbert v. Verner*, an employee’s refusal to work on her Saturday Sabbath was treated by the state as “without good cause.”⁷⁶ Consequently, the employee not only lost her job, but she was also determined to be ineligible for unemployment benefits.⁷⁷

That determination, however, was overruled by the Supreme Court which held that a state “may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.”⁷⁸ The Court explained that “to condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”⁷⁹ Government may not force an individual to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”⁸⁰ Substantial infringements on free exercise of religion, even unintended “incidental burden[s] on free exercise,”⁸¹ may be justified only by “some compelling state interest.”⁸² The Court, speaking through Justice William Brennan, was unequivocal about the Court’s ruling and rationale:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” No such abuse or danger has been advanced in the present case.⁸³

Nearly a decade later, even as the Court grew increasingly conservative in many areas of the law, with a new Chief Justice and several other

74. *Id.* In yet another memorable passage, Jackson warned about seeking national unity through forced patriotic uniformity: “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.” *Id.* at 641.

75. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

76. *Id.* at 401.

77. *Id.*

78. *Id.* at 410.

79. *Id.* at 406.

80. *Id.* at 404.

81. *Sherbert*, 374 U.S. at 403.

82. *Id.* at 406.

83. *Id.* at 406–407 (citation omitted).

appointees of President Richard Nixon,⁸⁴ it rendered a decision that equaled, if not exceeded, the earlier landmarks safeguarding religious liberty. In *Wisconsin v. Yoder*,⁸⁵ Amish parents sought an exemption from the state law that mandated school-attendance for children until the age of sixteen.⁸⁶ The parents objected on religious grounds, fearing the worldly influence from the compulsory education beyond the basics of reading, writing, and arithmetic taught in elementary school.⁸⁷ When the parents failed to enroll their under-sixteen children in school, the parents were charged and convicted of violating the state law.⁸⁸

Despite the "general applicability" of the law, as well as the concededly "strong interest" underlying it, the Supreme Court ruled that the Amish were entitled to an exemption.⁸⁹ Rejecting the state's argument to the contrary, the Court, speaking through Chief Justice Warren Burger, recounted what those earlier landmarks had settled:

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.⁹⁰

Then, distilling the standard to be applied whenever government interfered with religious liberty, the Chief Justice was emphatic:

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.⁹¹

To be sure, the right to free exercise of religion is not absolute and has never been considered as such by the Court. Even in the era of robust protection of religious liberty and the stringent standards established to justify any abridgement, the Court recognized justifiable limits on that fundamental freedom. In another opinion authored by Chief Justice Warren Burger,

84. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 205 (3d ed. 1993); see generally Russell W. Galloway, Jr., *The Burger Court (1969-1986)*, 27 SANTA CLARA L. REV. 31 (1987).

85. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

86. *Id.* at 207.

87. See *id.* at 208-211.

88. See *id.* at 207-208.

89. *Id.* at 236.

90. *Id.* at 220.

91. *Yoder*, 406 U.S. at 215.

the Court identified one of those limits when it addressed the racially discriminatory religious practices of Bob Jones University.⁹²

The officials of that university, who “genuinely believe[d] that the Bible forbids interracial dating and marriage,” governed their institution in accord with this “fundamentalist” interpretation and, to effectuate their religious belief, historically refused to admit African American students.⁹³ Following a decision of the Fourth Circuit Court of Appeals prohibiting racial exclusion in private schools, however, Bob Jones University opened its doors to Black applicants—but only to unmarried ones.⁹⁴ Moreover, applicants who were either engaged in or supportive of interracial marriage or dating were denied admission or, if already enrolled, were expelled.⁹⁵ Similarly, the university maintained racial segregation policies on participation in student organizations.⁹⁶

Under the administration of President Richard Nixon, the Internal Revenue Service began to challenge the tax exempt status of any private school that practiced racial discrimination in admissions.⁹⁷ When the IRS, in accord with its policy against racial discrimination, revoked Bob Jones’s tax-exempt status in 1976,⁹⁸ the university filed suit claiming a violation of their Free Exercise of Religion under the First Amendment.⁹⁹

Under the administration of President Jimmy Carter, the IRS policy was vigorously enforced.¹⁰⁰ When Carter lost the election in 1980, however, the administration of President Ronald Reagan sought to repeal the relevant regulation.¹⁰¹ Indeed, although some Carter holdovers in the Justice Department disagreed, the Reagan administration submitted an amicus brief to the Supreme Court in opposition of the IRS regulation.¹⁰²

Writing for the Court, Chief Justice Burger made clear that denying “charitable” status and, therefore, tax benefits to an educational institution should be done “only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”¹⁰³ But, he continued that “there can no longer be any doubt that racial discrimination in education violates

92. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

93. *Id.* at 580.

94. *Id.* (citing *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff’d*, 427 U.S. 160 (1976)).

95. *Id.*

96. *Id.*

97. See *id.* at 581.

98. *Bob Jones University*, 461 U.S. at 581.

99. *Id.* at 582.

100. See Olati Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress’ Extraordinary Acquiescence* 14 (Columbia Law Sch. Pub. L. & Legal Theory Working Papers, Paper No. 9184).

101. *Id.* at 15–16.

102. *Id.* at 15, 17.

103. *Bob Jones University*, 461 U.S. at 592.

deeply and widely accepted views of elementary justice.”¹⁰⁴ Then, summarizing the Court’s religious freedom case law, he explained that

the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief. However, “[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”¹⁰⁵

Chief Justice Burger proceeded to apply that free exercise jurisprudence to the particular case and to conclude that denying tax benefits to the religious school was appropriate:

The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs. The interests asserted by [Bob Jones University] cannot be accommodated with that compelling governmental interest; and no “less restrictive means” are available to achieve the governmental interest.¹⁰⁶

The *Bob Jones University* decision solidified the Supreme Court’s jurisprudence of religious liberty. That freedom held a preferred position as a fundamental constitutional right “implicit in the scheme of ordered liberty,” as Cardozo characterized it a half-century earlier.¹⁰⁷ And as such, similarly to the freedoms of speech and press and peaceable assembly, may not be abridged unless there is no alternative way to achieve a “compelling,” “overriding” interest.¹⁰⁸

C. *No Longer Preferred*

Just a few years hence, Justice Antonin Scalia, writing for a majority of his colleagues, denied that the Court had ever really adopted such jurisprudence.¹⁰⁹ Constitutional and religious scholars of all political and ideo-

104. *Id.*

105. *Id.* at 603 (citations omitted) (quoting *United States v. Lee*, 455 U.S. 252, 257–258 (1982)).

106. *Id.* at 604 (footnote omitted) (citations omitted).

107. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

108. *See Bob Jones University*, 461 U.S. at 604. During this same period, the Court similarly found other government interests to outweigh claimed infringements on free exercise claims. *See e.g.*, *Bowen v. Roy*, 476 U.S. 693 (1986) (ruling that the government’s internal use of social security numbers outweighs religious objections to such numbers being assigned); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (deferring to military need for discipline in dress uniformity to defeat request to wear religious headgear).

109. *Emp’t Div. v. Smith (Smith II)*, 494 U.S. 872 (1990).

logical stripes found that opinion to be shocking¹¹⁰ and, at the least, disingenuous.¹¹¹ In it, the majority recharacterized the freedom to exercise religion in a way that “dramatically depart[ed] from well-settled First Amendment jurisprudence, appear[ed] unnecessary to resolve the question presented, and [was] incompatible with our Nation’s fundamental commitment to individual religious liberty.”¹¹²

The underlying facts involved members of a Native American church whose rituals included the centuries-old sacramental use of peyote.¹¹³ When those church members were fired from their jobs and denied unemployment benefits because they had violated the state’s criminal drug law, they claimed entitlement to a Free Exercise exemption for their concededly sincere religious practice.¹¹⁴ But notwithstanding previous landmarks which seemed clearly to mandate an exemption, the Court this time, in *Employment Division v. Smith*, declaring exactly the opposite of what those landmarks had held, denied the exemption:

[I]f prohibiting the exercise of religion . . . is not the object of the [law], but merely the incidental effect of a *generally applicable* and *otherwise valid* provision, the First Amendment has not been offended.¹¹⁵

Justice Sandra Day O’Connor agreeing with the ultimate result in the case, but condemning the majority’s newly eviscerated protection of religious liberty, catalogued a long line of decisions that demonstrated what the Supreme Court’s jurisprudence actually had been. That long line of decisions protected Free Exercise

by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. *See Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987); *United States v. Lee*, 455 U.S. 252, 257–258 (1982); *Thomas v. Review Bd. of Indiana Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626–629 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Sherbert v. Verner*, 374

110. *See e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (finding that the majority’s “purported . . . use of precedent is troubling, bordering on the shocking”); *see also* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990).

111. *See, e.g.*, Vincent Martin Bonventre, Symposium, *A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States*, 70 ALB. L. REV. 1399 (2007).

112. *Smith II*, 494 U.S. at 891 (O’Connor, J., concurring).

113. *See Emp’t Div. v. Smith (Smith I)*, 485 U.S. 660, 667 n.11 (1988).

114. *See Smith II*, 494 U.S. at 874–875 (1990).

115. *Id.* at 878 (emphasis added).

U.S. 398, 403 (1963); *see also* *Bowen v. Roy*, 476 U.S. 693, 732 (opinion concurring in part and dissenting in part); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder*, 406 U.S. at 215.¹¹⁶

Despite O'Connor's catalogue of decisions impeaching the majority's characterization of the Court's Free Exercise case law, Scalia insisted that "[o]ur decisions reveal that . . . [w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."¹¹⁷ And in support of that indisputably inaccurate proposition, Scalia relied upon and quoted from an overruled 1940 decision, *Minersville School District Board of Education v. Gobitis*.¹¹⁸ That decision, upholding a mandatory flag salute and Pledge of Allegiance for school children despite religious objections, was of course repudiated by the Court three years later in Justice Jackson's magnificent opinion in *West Virginia State Board of Education v. Barnette*.¹¹⁹

Among other decisions Scalia relied upon, in addition to the overruled *Gobitis*, were the 1879 decision upholding anti-polygamy laws against Mormons,¹²⁰ the 1944 decision upholding child labor laws against Jehovah Witnesses,¹²¹ and the more contemporary decisions upholding military conscription against conscientious objectors¹²² and social security taxes against the Amish.¹²³ But, in fact, what was made pellucidly clear in that latter 1982 case relied upon by Scalia is precisely the opposite of what Scalia was insisting. In that case, *United States v. Lee*, the Court was explicit and unequivocal about the sum and substance of its prior decisions applying the Free Exercise guarantee. "The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding* governmental interest"¹²⁴—not simply by any "generally applicable" and "otherwise valid" law.¹²⁵

116. *Id.* at 894–895 (O'Connor, J., concurring). The three dissenting Justices—William Brennan, Thurgood Marshall, and Harry Blackmun—joined that part of O'Connor's concurring opinion. *Id.* at 891.

117. *Id.* at 878.

118. *Id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–595 (1940)).

119. *See supra* notes 64–74 and accompanying text.

120. *Reynolds v. United States*, 98 U.S. 145 (1878).

121. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

122. *Gillette v. United States*, 401 U.S. 437 (1971).

123. *United States v. Lee*, 455 U.S. 252 (1982).

124. *Id.* at 257 (emphasis added).

125. *Emp't Div. v. Smith (Smith II)*, 494 U.S. 872, 878 (1990). Scalia dismissed the Free Exercise protections enforced in many of the landmark decisions by insisting that those cases involved other fundamental rights. So *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory

And yet, as a result of *Smith*, Scalia's formulation has effectively removed free exercise of religion from its previously preferred place where it was immunized from abridgement except for the most compelling government reasons. Indeed, Justice Jackson's pronouncement for the Court in *Barnette*, that the "freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger,"¹²⁶ is no longer true for religious liberty. Instead of that "compelling interest" protection for free exercise which, according to the majority in *Smith*, "contradicts both constitutional tradition and common sense"¹²⁷ and even "court[s] anarchy,"¹²⁸ any hospitality toward that freedom should be left to the democratic process.

Indeed, lest there be any doubt that the *Smith* majority anticipated and intended that to be the very consequence of its ruling, Scalia stated it plainly in concluding his opinion for the Court:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred.¹²⁹

D. *The Aftermath of Employment Division v. Smith*

Condemnation of the Supreme Court's decision in *Smith* was immediate and widespread. Specifically, Scalia's recharacterization of the Court's free exercise landmarks and jurisprudence was met with the harshest criticism.¹³⁰ The most eminent constitutional and religious liberty scholars reacted with both shock and disbelief.¹³¹ Indeed, scholarly reflections on the decision many years later continued to evince dismay and outright hostility.¹³² Representative of those views were the observations of one such scholar expressed seventeen years after the decision was rendered:

school attendance) was really about parental rights and *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute) was solely about free speech. See *Smith II*, 494 U.S. at 881–882. Scalia dismissed the Saturday Sabbatarian cases of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Rev. Bd.*, 450 U.S. 707 (1981) as simply aberrational decisions confined to denials of unemployment benefits. See *Smith II*, 494 U.S. at 883–884.

126. *Barnette*, 319 U.S. at 639.

127. *Smith II*, 494 U.S. at 885.

128. *Id.* at 888.

129. *Id.* at 890.

130. Much of that criticism mirrored the concurring and dissenting opinions: *Smith II*, 494 U.S. at 892 (O'Connor, J., concurring) (the majority "disregard[ed] our consistent application of free exercise doctrine"); *id.* at 907–908 (Blackmun, J., dissenting) ("Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.").

131. See e.g., Laycock, *supra* note 110; McConnell, *Free Exercise Revisionism and the Smith Decision*, *supra* note 110.

132. Scalia's assertions and newly refashioned rule in *Oregon v. Smith* were condemned by constitutional and religious scholars of all political and ideological stripes. See, e.g., Symposium, *A Second Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States*, 70 ALB. L. REV. 1399 (2007). See also Steven D. Smith, *Religious Freedom*

Although Justice Scalia's majority opinion in that case did not acknowledge that it was discarding a free exercise approach that had been in place for many years, the opinion in fact turned existing free exercise law on its head. . . . It is difficult to believe that the Framers of the federal Constitution, who valued religious liberty so highly, would have relegated it to so peripheral a status and put it so much at the mercy of majoritarian beliefs and insensitivities as *Employment Division v. Smith* assumes.¹³³

Another religious liberty scholar was even more blunt about what the Court had done with the (formerly?) fundamental First Amendment guarantee:

[T]his right was essentially written out of the Constitution by the Supreme Court in [*Employment Division v. Smith*]. To put it plainly, I believe that the decision in that case effectively repealed the Free Exercise Clause of the First Amendment to the US Constitution rendering it, *at best*, a second class right.¹³⁴

Similarly, the other two branches of the federal government disagreed vehemently with the Supreme Court majority's re-rendering of the free exercise right. The House of Representatives unanimously passed a bill sponsored by then Representative Charles Schumer to overrule *Oregon v. Smith* and to reinstate the "compelling interest" test as spelled out in *Wisconsin v. Yoder* and *Sherbert v. Verner*.¹³⁵ The Senate, where the bill was sponsored by Senator Edward Kennedy,¹³⁶ passed the bill by a vote of 97 to 3.¹³⁷ President Bill Clinton then signed the bill into law.¹³⁸

The legislation, titled the Religious Freedom Restoration Act ("RFRA"),¹³⁹ in veritable denunciation of Scalia's majority opinion in *Smith*, declared that:

The Congress finds that . . . in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exer-

and Its Enemies, or Why the Smith Decision May Be a Greater Loss Now than It Was Then, 32 CORDOZO L. REV. 2033 (2011); Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999).

133. Gary J. Simson, *Reflections on Free Exercise: Revisiting Rourke v. Department of Correctional Services*, 70 ALB. L. REV. 1425, 1426–1427, 1433 (2007).

134. Timothy A. Byrnes, *The Politics of a Second Class Right: Free Exercise in Contemporary America*, 70 ALB. L. REV. 1441, 1441 (2007) (emphasis added).

135. See Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions>.

136. See Religious Freedom Restoration Act of 1993, S. 578, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/senate-bill/578>.

137. H.R. 1308, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

138. H.R. 1308, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions?q=%7B%22action-by%22%3A%22Executive+Branch%22%7D>.

139. Religious Freedom Restoration Act, Pub. L. No. 103–141 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (1993)).

cise imposed by laws neutral toward religion; and [] *the compelling interest test* as set forth in prior Federal court rulings *is a workable test for striking sensible balances* between religious liberty and competing prior governmental interests.¹⁴⁰

[Therefore,] to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application *in all cases where free exercise of religion is substantially burdened*¹⁴¹

[The g]overnment may substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹⁴²

In repudiating *Smith*, the purpose of RFRA was not only to restore religious liberty protection to that which had been provided in *Sherbert* and *Yoder*. More broadly, it was to return free exercise of religion to the preferred status it previously enjoyed with other fundamental rights. Like other First Amendment rights and other vital freedoms, religious liberty was once again to enjoy the protection of the “compelling interest” standard. Under RFRA, burdens on the freedom to practice one's religion would once again be subjected to enhanced or “strict” scrutiny and, thus, be permitted only when necessary to accomplish some exceedingly important government interest.

Indeed, contrary to Scalia's insistence in *Smith* that such a standard contravened constitutional tradition and common sense, and that it courted anarchy,¹⁴³ such enhanced or strict scrutiny has in fact been the standard long applied by the Supreme Court to protect fundamental rights generally.¹⁴⁴ Where government has interfered with one of those most basic civil rights or liberties—whether it be free speech,¹⁴⁵ freedom of association,¹⁴⁶

140. 42 U.S.C. §§ 2000bb(a)(4)–(5) (emphasis added).

141. *Id.* at § 2000bb(b)(1) (emphasis added).

142. *Id.* at § 2000bb–1(b) (emphasis added).

143. *Emp't Div. v. Smith*, 494 U.S. 872, 885, 888 (1990).

144. The compelling interest or strict scrutiny test, however phrased, has been the standard generally applied by the Supreme Court to government intrusions on fundamental rights at least since the era that produced Justice Benjamin Cardozo's foundational opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937) (establishing the doctrine of fundamental rights as those “implicit in the scheme of ordered liberty”) and, the very next year, Justice Harlan Stone's famed footnote four in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the need for “more exacting judicial scrutiny” to protect political rights). See generally ABRAHAM & PERRY, *supra* note 53, at 14–32.

145. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

146. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *NAACP v. Alabama*, 357 U.S. 449 (1958).

the right to vote,¹⁴⁷ racial equal treatment,¹⁴⁸ or others deemed essential to the American scheme of liberty¹⁴⁹—that interference has been ruled constitutionally invalid, unless government could satisfy the heightened scrutiny of the compelling interest test.

Sixteen years after the decision in *Smith*—and the very next year after he was appointed to the Court¹⁵⁰—Chief Justice John Roberts, writing for his unanimous colleagues, applied RFRA on behalf of religious objectors and seemed clearly to share the sentiments underlying that legislation.¹⁵¹ In rebutting the government’s argument, that the good reasons Congress had for enacting the Controlled Substances Act justified denying the religious exemption sought in this case, Roberts explained what he viewed as the overriding purposes of RFRA:

The Government repeatedly invokes Congress’ findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress *recognized* that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” and legislated “the *compelling interest test*” as the means for the courts to “*stri[k]e sensible balances* between religious liberty and competing prior governmental interests.” 42 U.S.C. §§2000bb(a)(2), (5).¹⁵²

In addition to his evident concurrence with the reasoning underlying RFRA, Roberts rejected the government’s characterization of several pre-*Smith* decisions,¹⁵³ which was similar to how Scalia had characterized them in that case.¹⁵⁴ Those decisions, as Roberts explained, did not stand for the proposition that a generally applicable valid law necessarily defeated a free exercise claim for an exemption. Rather, as Roberts unequivocally stated:

Those cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated. In *United States v. Lee* [citation omitted], for example, the Court rejected a claimed exception to the obligation to pay Social Security taxes,

147. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

148. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

149. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (parental rights); *Shapiro v. Thompson*, 394 U.S. 16 (1968) (right to interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation).

150. John G. Roberts, Jr., nominated to be Chief Justice of the United States by President George W. Bush, was confirmed by the Senate on September 29, 2005. See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 9, 2018).

151. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

152. *Id.* at 439 (emphasis added).

153. *Id.* at 435.

154. *Emp’t Div. v. Smith (Smith II)*, 494 U.S. 872, 879–880.

noting that “mandatory participation is indispensable to the fiscal vitality of the social security system” and that the “tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.” [Citations omitted] See also *Hernandez v. Commissioner* [citations omitted] (same). In *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion), the Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions “might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day.” The whole point of a “uniform day of rest for all workers” would have been defeated by exceptions. See *Sherbert* [citations omitted] (discussing *Braunfeld*). These cases show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.¹⁵⁵

But *O Centro* involved the application of RFRA to federal legislation. Several years earlier, and only a few years after the enactment of RFRA, the Court invalidated the application of that statute to state and local laws.¹⁵⁶ According to the Court in *City of Boerne v. Flores*, Congress had exceeded its authority in attempting to impose, upon the states and their subdivisions, greater protection than the First Amendment provided for religious freedom.¹⁵⁷

In that case, a church had sought to utilize RFRA’s protection to obtain a religious exemption to a local zoning ordinance.¹⁵⁸ But the Court ruled that Congress’s attempt to impose the compelling interest standard to protect free exercise, in contradiction to the rejection of that standard in *Smith*, was beyond the power given to Congress in the Fourteenth Amendment to enforce constitutional rights *against the states*.¹⁵⁹ Under that Amendment’s grant of power, Congress could enforce *Smith*’s limited free exercise protection against state and local laws, but nothing more.¹⁶⁰

Hence, the *statutory* “compelling interest” protection of RFRA does not apply to burdens imposed on religious liberty by state or local governments. Instead, the “otherwise valid” constitutional standard of *Smith* is the applicable test for determining the legality of those governments’ interfer-

155. *O Centro*, 546 U.S. at 435.

156. See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

157. See *id.* at 519, 534–536.

158. See *id.* at 512.

159. See *id.* at 534–536. Chief Justice Roberts stated it plainly in *O Centro*: “As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), we held the application to States to be beyond Congress’ legislative authority under [Sec.] 5 of the 14th Amendment.” *O Centro*, 546 U.S. at 424 n.1.

160. See *City of Boerne*, 521 U.S. at 519, 534–536.

ing with the First Amendment right of free exercise.¹⁶¹ Moreover, regarding interferences with religious liberty by the federal government, *Smith* is the standard for free exercise of religion under the Constitution. The protection previously afforded against federal intrusion, by landmarks such as *Sherbert* and *Yoder*, are now available only statutorily under RFRA.

E. The Constitution, the Statute, and the States

The First Amendment's guarantee of Free Exercise of Religion protects religious liberty against both federal and state actions.¹⁶² But since *Smith*, that guarantee only protects against laws that are *not* "otherwise valid."¹⁶³ If a law is invalid for some other reason—e.g., it is invalid because it violates some other constitutional right—then free exercise is protected, albeit incidentally so.¹⁶⁴ This would similarly include laws that were not "neutral" and "generally applicable"—i.e., laws that actually targeted religion or particular religions.¹⁶⁵ But such laws that discriminated on the

161. See *id.* at 536. Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), a "compelling government interest" statute like RFRA but with a much narrower scope and based on the Spending and Commerce powers. See 42 U.S.C. § 2000cc. As explained by the Court in *Cutter v. Wilkinson*, 544 U.S. 709, 715–716 (2005): "Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas . . . land-use regulation [and] institutionalized persons . . . in a program or activity that receives Federal financial assistance [or affects] commerce with foreign nations, among the several States, or with Indian tribes."

162. The First Amendment's free exercise guarantee was deemed one of the fundamental rights made assertable against the states through the Fourteenth Amendment in Justice Cardozo's opinion for the Court in *Palko v. Connecticut*, 302 U.S. 319, 324–325 (1937), see *supra* notes 64–74 and accompanying text. Its application to the states was then treated as settled in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

163. See *Emp't Div. v. Smith* (Smith II), 494 U.S. 872, 878–879 (1990).

164. *Id.* at 881–882. Scalia referred to these cases where free exercise was incidentally protected only because some other right was actually violated as "hybrid situation[s]." In his opinion for the Court, he explained this novel proposition as follows: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell*, 310 U.S. at 304–307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)." *Smith II*, 494 U.S. at 881.

165. *Id.* at 879–880. Among other cases cited for this proposition, Justice Scalia relied upon *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court had denied a claim for a religious exemption from child labor laws stating, as quoted by Scalia, there was "no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.'" *Prince*, 321 U.S. at 171 (*quoted in Smith II*, 494 U.S. at 880).

basis of religion would be invalid in any event as equal protection violations.¹⁶⁶

So it is not clear from *Smith* what little protection remains, if any, that the constitutional guarantee of free exercise of religion actually provides in and of itself.¹⁶⁷ But whatever that might be, it applies to both federal and state government actions.

By contrast with constitutional free exercise, the statutory protection under RFRA¹⁶⁸ is strong. Legislatively reviving the compelling interest standard of *Sherbert* and *Yoder* that significantly restricted burdens on religious liberty, Congress intended RFRA to restore free exercise to the protected status it formerly had and which other fundamental rights enjoy. But unlike the constitutional protection enjoyed by other fundamental rights,¹⁶⁹ that statutory protection for religious liberty extends only against federal interference. The Court in *City of Boerne* blocked the application of RFRA to any state and local actions.¹⁷⁰ Henceforth, *Smith*'s minimalist (re)construing of constitutional free exercise is the outer limit of Congress's enforcement power under the Fourteenth Amendment.¹⁷¹

Of course, individual states themselves may choose to protect constitutional rights under their own law beyond those standards set by the Su-

166. The full quote from *Prince* makes this clear: "However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is *no denial of equal protection in excluding their children* from doing there what no other children may do." 321 U.S. at 170–171 (emphasis added). Indeed, it is settled doctrine that constitutional equal protection prohibits government action that discriminates on the basis of religion. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (equal protection prohibits "an unjustifiable standard such as race, *religion*, or other arbitrary classification") (emphasis added) (citation omitted); *Plyler v. Doe*, 457 U.S. 202, 216–217 (1982) ([I]n accord with "*elemental constitutional premises* . . . we have treated as *presumptively invidious those classifications* that disadvantage a 'suspect class,' or that impinge upon the exercise of a '*fundamental right*.'" (emphasis added) (footnotes omitted); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[A] classification [that] trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage" will not be presumed to be constitutional.) (emphasis added).

167. This is no idiosyncratic observation. See, e.g., Gary J. Simson, *Reflections on Free Exercise: Revisiting Rourke v. Department of Correctional Services*, 70 ALB. L. REV. 1425, 1430 (2007) (*Smith II* "relegated [free exercise] to so peripheral a status"); Timothy A. Byrnes, *The Politics of a Second Class Right: Free Exercise in Contemporary America*, 70 ALB. L. REV. 1441 (2007) ("this right was essentially written out of the Constitution by the Supreme Court"); Laycock, *supra* note 110, at 1–4 ("[T]he Court's account of its precedents in *Smith III* is transparently dishonest . . . [T]he Free Exercise Clause itself now has little independent substantive content.").

168. As well as its expansion under RLUIPA. See *supra* note 161 and accompanying text.

169. See generally ABRAHAM & PERRY, *supra* note 53, at 14–32.

170. See *City of Boerne v. Flores*, 521 U.S. 507, 519, 534–536.

171. *Id.* The Court did subsequently uphold the narrow application of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 ("RLUIPA") to state and local land use regulations and prisons where there was either federal subsidization or impact on interstate commerce, as within Congress's spending and commerce powers. See *Cutter v. Wilkinson*, 544 U.S. 709, 715–716 (2005).

preme Court under the federal Constitution.¹⁷² Free exercise of religion is among those rights where states have often done so. Indeed, very shortly after the Supreme Court had made that First Amendment right applicable to the states through the Fourteenth Amendment,¹⁷³ New York's highest court, the Court of Appeals, made clear it would not be bound by less protective federal standards.¹⁷⁴ Speaking through Chief Judge Irving Lehman, the state high court explained:

Parenthetically we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.¹⁷⁵

More recently, some state courts have chosen to reject *Smith* and to provide greater protection for religious liberty as a matter of independent state constitutional law.¹⁷⁶ Others have decided to do the opposite and have adopted *Smith*'s "otherwise valid" standard as their own law.¹⁷⁷ The result is that the freedom to exercise religion is different in different parts of the country. Despite free exercise being a fundamental right guaranteed by the First Amendment of the Constitution—and made applicable to the states through the Fourteenth Amendment—there is no uniform, nationwide protection but, instead, it depends upon location. In some states that right is protected as are other fundamental rights with the compelling interest test; in other states it is protected with the bare minimum standard of *Smith*.

172. This is a basic truism of federalism recognized by the Court, by state courts, and by constitutional scholars countless times. See, e.g., *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints."); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (reaffirming "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 62 ST. JOHN'S L. REV. 399 (1987).

173. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Palko v. Connecticut*, 302 U.S. 319, 324–325 (1937).

174. *People v. Barber*, 46 N.E.2d 329 (N.Y. 1943) (rejecting the Supreme Court's denial of a religious exemption for Jehovah's Witnesses from laws restricting door-to-door solicitation in *Jones v. City of Opelika*, 316 U.S. 584 (1942)).

175. *Barber*, 46 N.E.2d at 331.

176. See, e.g., *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (adhering to the compelling interest standard under the state constitution).

177. See, e.g., *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012) (holding that the state constitution provides the same protection as the First Amendment).

1. *The Constitution*

As a consequence of its ruling in *Smith*, that any “otherwise valid law” defeats a claim that constitutional free exercise of religion has been burdened, the Supreme Court has protected that fundamental right—if at all—only when the government action is otherwise *invalid*. So if a government action violates constitutional freedom of speech, and that speech happens to be religious, then religious liberty is protected as a by-product.¹⁷⁸ Or if a government action is not “neutral” or “generally applicable” within the meaning of *Smith*—i.e., it actually targets a particular religion or religion generally—then that action is invalid because it invidiously discriminates on the basis of religion.¹⁷⁹ But government actions that happen to interfere with religious free exercise are no longer *constitutionally* invalid solely for that reason.¹⁸⁰

A brief review of the Court’s post-*Smith* decisions, where religious freedom *was* constitutionally protected, makes these points clear. There are those cases where the Court sided with the religious complainants, but only because the government action was deemed to violate free speech rights.

Lamb’s Chapel v. Center Moriches Union Free School District,¹⁸¹ decided three years after *Smith*, involved a local school district that permitted the use of its facilities after hours by various community groups, except for religious purposes.¹⁸² The Court held that the denial of a church group’s application to use the facilities to show a religious film series was an unconstitutional viewpoint-based abridgement of free speech.¹⁸³

Similarly, several years later in *Good News Club v. Milford Central School*,¹⁸⁴ the Court found another free speech violation where a Bible group was denied the after-hours use of school facilities.¹⁸⁵ Because the denial was specifically based on the religious nature of the discussions in-

178. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (invalidating the restriction on after-school use of facilities for discussion on non-religious subjects); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (invalidating the refusal of the state university to fund a student organization’s publication because of its religious viewpoint); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (invalidating a school district’s refusal to permit groups with a religious viewpoint to use its facilities).

179. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017) (invalidating the denial of state benefits to a church that were available to all other organizations); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a law that prohibited the animal slaughtering of only a particular disfavored religion).

180. Such interference with religious liberty may be illegal as a *statutory* matter under RFRA, but not as a violation of the First or Fourteenth Amendments. See discussion of RFRA at *supra* notes 135–161 and *infra* 215–240 and accompanying text.

181. 508 U.S. 384 (1993).

182. *Id.* at 386.

183. *Id.* at 393–394.

184. 533 U.S. 98 (2001).

185. *Id.* at 103–104.

tended by the group, the Court deemed the case indistinguishable from the viewpoint-based discrimination in *Lamb's Chapel*.¹⁸⁶

In a somewhat different context, but with the same result, a state university—the University of Virginia, founded by Thomas Jefferson¹⁸⁷—sought to keep Jefferson's "wall of separation between church and state"¹⁸⁸ high and impregnable.¹⁸⁹ It therefore refused to provide student activity funds to subsidize a student group's religious publication. But in *Rosenberger v. Rector and Visitors of University of Virginia*, the Court held that the denial of support for the students' publication was a "denial of their right of free speech"¹⁹⁰—again, much like the viewpoint-based discrimination in *Lamb's Chapel*.¹⁹¹ And in another common thread tying all three cases together, *Smith* and the diminished right of free exercise that it defined were entirely absent from the Court's decisions.¹⁹²

In two other decisions where the Court sided with religious claimants, *Smith* did figure prominently—at least ostensibly so. Notably, the Court's reasoning in those cases was actually a rejection of invidious discrimination, not the protection of free exercise as a self-standing fundamental liberty.¹⁹³

186. *Id.* at 107.

187. See MALONE, *supra* note 6, at 251–282 (1981).

188. See DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805, at 108–109 (1970) (discussing Jefferson's 1802 Letter to the Danbury Baptists). The Supreme Court has often relied on Jefferson's letter to determine the meaning of the First Amendment's religion clauses. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (referring to Jefferson's letter as an "authoritative declaration of the scope and effect of the [First] amendment").

189. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

190. *Id.* at 837.

191. *Id.* at 832.

192. The opinions for the Court in these three cases—authored by Justice Byron White in *Lamb's Chapel*, by Justice Anthony Kennedy in *Rosenberger*, and by Justice Clarence Thomas in *Good News*—never even mentioned *Smith* as support for the decisions.

193. Others have also noted the Court's modern approach to free exercise as being the equivalent of equal protection analysis. See, e.g., Susan Gelman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 680–682 (2008); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 338, 344 (2006). Some have been urging such an approach to religious liberty. See, e.g., Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313–314 (1986). In a more recent case, the Court did reject a religious speech claim made under *Rosenberger*, *Good News Club*, *Lamb's Chapel*, and earlier analogous precedents—but this case did not involve the religious discrimination involved in those cases. In *Christian Legal Soc. Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010), a state law school denied an exemption from its policy, requiring open membership in all student organizations, to a religious group that wished to exclude gays and lesbians. *Id.* at 672–673. Justice Ginsburg, writing for the five to four majority, reasoned that—unlike the regulations at issue in those other cases—the membership requirement here was reasonable, viewpoint neutral, applicable to all student groups, and thus constitutional despite the incidental burden on the religious group. *Id.* at 694–696. Notably, the four dissenters who sided with the student group—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—are the same Justices who dissented in other major gay rights cases. See, e.g., *United States v. Windsor*, 133 S.Ct. 2675

In the first of those cases, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁹⁴ the Court held that the local ordinance in question violated constitutionally guaranteed free exercise as outlined in *Smith*, because the law was not a “neutral” law of “general applicability.”¹⁹⁵ The facts showed that the ordinance in question, which prohibited a narrowly drawn category of animal slaughtering, deliberately targeted the practices of an unpopular religious group for no reason other than “animosity” toward that particular group.¹⁹⁶ The Court, speaking through Justice Anthony Kennedy, employed “an equal protection mode of analysis”¹⁹⁷ and invalidated the ordinance because of its intentionally discriminatory treatment of a religion.¹⁹⁸ In fact, the Court left no doubt that the free exercise violation it found was discrimination, not merely some burden on religious practice. The Court’s opinion is replete with explicit reference to discrimination, as well as to precedents where the evil the Court says it had condemned was unequal treatment.¹⁹⁹

In the other post-*Smith* victory for constitutional free exercise, the Court was even more emphatic that the impermissible evil was discriminatory treatment of religion, not mere interference with it.²⁰⁰ In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a state law excluded religious organizations from an otherwise generally available program that provided grants to help improve child playgrounds.²⁰¹ Explaining that this exclusion violated constitutional religious liberty, the Court left no doubt about the basis for its ruling. Speaking through Chief Justice John Roberts, the Court began quite plainly: “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious sta-

(2013) (invalidating discrimination against same-sex married couples in the Defense of Marriage Act); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (recognizing a right to marry for same-sex couples).

194. 508 U.S. 520 (1993).

195. *Id.* at 531–532, 546–547.

196. *Id.* at 542.

197. *Id.* at 540 (quoting *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

198. *Id.* at 537–538.

199. *See id.* at 532–538 (referring repeatedly to the evil of discrimination, to its unconstitutionality, and to numerous cases in which unequal treatment on the basis of religion was the evil disallowed in the Court’s rulings—not merely that free exercise happened to be burdened). In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)—especially noteworthy because the court’s opinion was authored by then Judge Samuel Alito—the circuit court relied on *Lukumi Babalu* to invalidate the discriminatory treatment of religious objectors to the police department’s grooming policy; they were denied exemptions even though others were granted exemptions for secular reasons.

200. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 1212 (2017).

201. *Id.* at 2017.

tus.’”²⁰² The Court proceeded to discuss prior decisions in which it had forbidden discriminatory—not just burdensome—treatment of religion.²⁰³

Strikingly, the Court quoted quite favorably from *Sherbert* and *Yoder* early in its analysis, despite the fact that those precedents had been disparaged, if not repudiated, in Scalia’s majority opinion in *Smith*.²⁰⁴ Just as notably, the Court did not even refer to *Smith* until several paragraphs later. Then, when the Court did, it did so only to highlight that decision’s prohibition on religious discrimination.²⁰⁵ Adding to what was especially notable, as well as particularly curious and revealing, was the evident embrace of *Sherbert*’s condemnation of even “indirect” burdens on free exercise.²⁰⁶ Quoting approvingly from *Sherbert*, Chief Justice Roberts’ majority opinion in *Trinity Lutheran* noted:

As the Court put it more than 50 years ago, “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Sherbert*, 374 U.S. at 404. . . . The “imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.” *Sherbert*, 374 U.S. at 405.²⁰⁷

The Court concluded by recalling that such conditions that penalize free exercise “must be subjected to the ‘most rigorous’ scrutiny.”²⁰⁸ In turn, that means that “only a state interest ‘of the highest order’ can justify the [state’s] discriminatory policy.”²⁰⁹ Finally, the Court readily applied that “compelling” interest test²¹⁰ to determine that the denial of benefits to a religious entity that was “otherwise qualified” violated the Constitution’s protection of free exercise.²¹¹

There was certainly no disdain for the compelling interest test applied to religious liberty as there was in *Smith*.²¹² Scalia’s opinion for the Court in that case had argued that

202. *Id.* at 2019 (quoting *Lukumi Babalu*, 508 U.S. at 533, 542).

203. *Id.* Including, most prominently, *McDaniel v. Paty*, 435 U.S. 618 (1978), where a state law disqualified religious ministers from running for political office.

204. *Contrast id.* at 2019–2020, 2022, with *Emp’t Div. v. Smith* (*Smith II*), 494 U.S. 872, 883 (1990) (“We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.”), and *Smith II* at 881 (*Yoder* protected religious liberty only because that case involved “the right of parents to direct the education of their children”) (citation omitted).

205. *Trinity Lutheran*, 137 S.Ct. at 2020–2021.

206. *Id.* at 2022.

207. *Id.*

208. *Id.* at 2024 (citation omitted).

209. *Id.* (citation omitted).

210. *Id.* The Court had just variously referred to this in terms of “the most rigorous scrutiny” and “only a state interest of the highest order.” *See id.* at 2014.

211. *Trinity Lutheran*, 137 S.Ct. at 2025.

212. *Emp’t Div. v. Smith* (*Smith II*), 494 U.S. 872, 885–886 (1990).

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, . . . or before the government may regulate the content of speech . . . is not remotely comparable. . . .²¹³

But in *Trinity Lutheran*, the Court did apply the rigor of the compelling interest test to a free exercise claim, much as it would have in a case involving racial discrimination or interference with free speech. The Court did not seem to have any hesitation or difficulty in doing so.²¹⁴ Nor has the Court had much difficulty applying that test in cases where RFRA—rather than the limited *Smith* version of religious freedom—supplied the protection for free exercise.

2. *The Statute*

Following its ruling in *City of Boerne*, that Congress had exceeded its constitutional authority in enacting Religious Freedom Restoration Act (RFRA),²¹⁵ the Supreme Court made clear that it had only been referring to RFRA’s attempted application to the states.²¹⁶ Nine years after *City of Boerne*, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, the Court additionally made clear that RFRA did, however, validly apply to federal burdens on free exercise.²¹⁷

Ironically, the Court in *O Centro* was confronted with a question very similar to that which it had faced in *Smith*. In both cases, a generally applicable drug law imposed an incidental burden on a sincere religious use of a prohibited substance.²¹⁸ But the *O Centro* case involved the statutory protection of free exercise under RFRA, not the much diminished constitutional protection of *Smith*—which RFRA was intended to undo.²¹⁹ And in applying the compelling interest test that was reinstituted in RFRA, the

213. *Id.* (citations omitted).

214. Even the two dissenting Justices, whose concerns involved the separation of church and state, did not raise any concerns about the compelling interest test or even mention it. See *Trinity Lutheran*, 137 S.Ct. at 2027 (Sotomayor, J., dissenting) (joined by Ginsburg, J.).

215. See *City of Boerne v. Flores*, 521 U.S. 507, 519, 534–536.

216. See *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (“In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress’ remedial powers under the Fourteenth Amendment.”). In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), the Court repeated that, *id.* at 424 n.1, and then proceeded to apply RFRA to a federal law.

217. See *O Centro*, 546 U.S. at 439 (applying RFRA to the federal Controlled Substances Act).

218. See *id.* at 425; *Emp’t Div. v. Smith* (Smith II), 494 U.S. 872, 874 (1990).

219. See *O Centro*, 546 U.S. at 424 (RFRA “adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.”).

Court was unanimous in ruling for the religious objectors—precisely the opposite of the result reached in *Smith*.²²⁰

As Chief Justice Roberts explained, in enacting RFRA

Congress . . . legislated “the compelling interest test” as the means for the courts to “stri[k] sensible balances between religious liberty and competing prior governmental interests.” . . . Applying that test, we conclude . . . the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the [religious group’s] sacramental use of [the prohibited drug].²²¹

Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*,²²² the Court applied the compelling interest test and ruled in favor of the religious objectors.²²³ Under the Patient Protection and Affordable Care Act of 2010 (ACA)²²⁴ and regulations promulgated thereunder,²²⁵ covered employers were required to offer their employees health insurance that included contraceptive coverage. The owners of several family owned businesses complained that obeying that contraceptive mandate would violate their sincere religious beliefs.²²⁶ The Court held that, under RFRA, the religious objectors were entitled to exemptions.²²⁷

Applying RFRA, the majority assumed *arguendo* that the government had a compelling interest in requiring contraceptive coverage.²²⁸ But that still left the question of whether it was *necessary* to impose that requirement on religious objectors—i.e., whether imposing that requirement was the “least restrictive means” of achieving the government’s interest.²²⁹ And the majority readily found such a less restrictive means in the very regulations implementing ACA.²³⁰ Those regulations already afforded exemptions to accommodate some religious objectors and, beyond that, the regulations

220. Contrast *id.* at 439, with *Smith II*, 494 U.S. at 890.

221. *O Centro*, 546 U.S. at 439. Notably, there was not a peep about the compelling interest test’s application to protect free exercise being contrary to tradition or to common sense or that it was courting anarchy—not even from Justice Scalia who had insisted just that in *Smith II*, 494 U.S. at 885, 886, or from Justice Kennedy who had joined him. None of the other members of the majority in that previous case were still on the Court for *O Centro*.

222. 134 S.Ct. 2751 (2014).

223. *Id.* at 2759.

224. Pub. L. No. 111–148, 124 Stat. 119.

225. See 42 U.S.C. § 300gg–13(a)(4) (authorizing the Department of Health and Human Services to promulgate regulations to fulfill the legislative purposes of the Act).

226. *Hobby Lobby Stores, Inc. v. Sebelius*, 134 S.Ct. 2751, 2759, 2764–2766 (2014).

227. *Id.* at 2759, 2785. To be precise, the majority relied upon RFRA as “amend[ed]” by its “sister statute” RLUIPA. *Id.* at 2772, 2781.

228. *Id.* at 2780.

229. *Id.* (referring to 42 U.S.C. § 2000bb–1(b)(2)). Notably, there was no disagreement among the Justices that the compelling interest test, including the “least restrictive means” analysis, applied in this case. Instead, the dissenters argued that for-profit corporations were not entitled to the protections of RFRA, *id.* at 2793–2797 (Ginsburg, J., dissenting) and that the exemptions sought would undermine the government’s ability to achieve its compelling interest. *Id.* at 2799–2804.

230. *Id.* at 2781–2783.

required the insurers to provide the contraceptive coverage themselves for employees who wanted it.²³¹ Hence, the majority concluded that there was no reason to deny the same exemption to the religious objectors in this case, since contraceptive coverage could be provided in the very same way to the otherwise affected employees.²³²

The very next year, the Court again applied the *statutorily* mandated compelling interest test²³³ and again ruled for the religious objector.²³⁴ In *Holt v. Hobbs*, a devout Muslim, incarcerated in an Arkansas prison, objected on sincere religious grounds to shaving in accord with the state's corrections' grooming policy.²³⁵ He was denied his request to maintain his beard to one half-inch.²³⁶

The state claimed that its strict policy was necessary to promote prison safety and security and, specifically, to prevent prisoners from hiding contraband.²³⁷ The Court, speaking through Justice Samuel Alito, responded

231. *Id.* at 2763, 2782. As the majority explained: "HHS has effectively exempted certain religious nonprofit organizations [that] . . . oppose[] providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." . . . [T]he issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services." *Id.* at 2763 (citations omitted).

232. *Hobby Lobby*, 134 S.Ct. at 2782 (concluding that such an implementation of ACA would "not impinge on the plaintiffs' religious belief . . . and it serves HHS's stated interests equally well"). Notably, the majority's approach under RFRA was the same the Court had mandated as a constitutional protection in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (only "interests of the highest order and those not otherwise served" defeat free exercise claims), which was later repudiated as unworkable in *Employment Division v. Smith (Smith II)*, 494 U.S. 872, 883–884 (1990). *See id.* at 2760 (stating that *Smith II* "largely repudiated th[at] method of analyzing free-exercise claims"). Notably also—and rather curiously—Justice Scalia, who authored the majority in *Smith*, to do away with that approach, had no such concerns in *Hobby Lobby*. Rather, it was the more liberal, Democratic appointees on the Court who expressed such concerns in a dissent by Justice Ruth Bader Ginsburg. *Id.* at 2805–2806 (Ginsburg, J., dissenting). Curiously also—and under the category of how things change depending on what other interests are at stake—the ACLU which had supported the compelling interest/strict scrutiny test in *Smith II* (and then condemned the decision against a religious exemption in that case and urged passage of RFRA to overrule it), turned against the application of that test and RFRA in *Hobby Lobby*. *Contrast The ACLU and Freedom of Religion and Belief*, ACLU, <https://www.aclu.org/other/aclu-and-freedom-religion-and-belief> (last accessed Apr. 21, 2018) (favoring strict scrutiny and a religious exemption for the Native Americans to use peyote in *Smith*, as well as urging passage of RFRA), with Leah Rutman, *The Hobby Lobby Decision: Imposing Religious Beliefs on Employees*, ACLU (Aug. 11, 2014), <https://www.aclu-wa.org/blog/hobby-lobby-decision-imposing-religious-beliefs-employees> (opposing the application of RFRA to provide a religious exemption from the contraception mandate in *Hobby Lobby*).

233. To be precise, the Court applied RLUIPA which the Court has described as an "amendment" and "sister act" of RFRA. *Hobby Lobby*, 134 S.Ct. at 2772, 2781. *See also supra* note 161.

234. *Holt v. Hobbs*, 135 S.Ct. 853, 859, 864–865 (2015) (citing and applying the same analysis as in *Hobby Lobby*).

235. *See id.* at 859.

236. *See id.* at 861.

237. *See id.* at 863.

that, while the restriction of contraband in prison facilities is a compelling interest, “the argument that this interest would be seriously compromised by allowing an inmate to grow a half-inch beard is hard to take seriously.”²³⁸ Moreover, the Court could not take seriously that this or other justifications of prison security passed the least restrictive means analysis noting, among other things, that numerous other prisons successfully use other methods in order to accommodate the same religious requests.²³⁹

This time, the Court’s application of the statutory compelling interest test was unanimous.²⁴⁰

3. *The States*

As a result of the Supreme Court’s current jurisprudence, states have wide latitude in whether or not to protect free exercise of religion. Under the Court’s decision in *Smith*, states may disregard any burden imposed on the constitutional guarantee of religious freedom, as long as their laws are “otherwise valid.”²⁴¹ So unless a state law or action is invalid *for some other reason*—e.g., it violates freedom of speech²⁴² or invidiously discriminates on the basis of religion²⁴³—the interference with free exercise is constitutionally irrelevant.

Additionally, under the Court’s decision in *City of Boerne*, the attempted restoration of the compelling interest test in RFRA to safeguard free exercise of religion does not apply to the states at all.²⁴⁴ And even with the corrective enactment of RLUIPA, that stringent statutory protection of free exercise is applicable to the states in only two narrow categories—i.e., the use of land and the treatment of prisoners.²⁴⁵ Otherwise, *Smith*’s narrow reading of First Amendment religious freedom applies.

238. *See id.*

239. *See id.* at 864–867 (citing and applying the same analysis as in *Hobby Lobby*).

240. There were two separate concurring opinions, but they did not take issue with the Court’s analysis. *Holt*, 135 S.Ct. at 867 (Ginsburg, J., concurring); *id.* (Sotomayor, J., concurring). The next year, in a follow-up contraceptive mandate case, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016), several nonprofit organizations claimed entitlement under RFRA to a religious exemption from even submitting the required notice to the insurer or to the federal government that they chose not to provide contraceptive coverage. In a unanimous *per curiam* decision, the Court relied on the supplemental briefs of both sides to the controversy which acknowledged that there were feasible options for accommodating the competing interests. Accordingly, the Court remanded the several cases involved back to the circuit courts to afford the parties “an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’” *Id.* at 1560 (quoting from the government’s supplemental brief).

241. *See supra* notes 109–134 and accompanying text.

242. *See supra* notes 181–192 and accompanying text.

243. *See supra* notes 193–214 and accompanying text. Such discriminatory laws are not “neutral” and “generally applicable” within the meaning of those terms as used in *Smith*. *See discussion of Lukumi Babalu*, *supra* notes 194–199 and accompanying text.

244. *See supra* notes 156–161 and accompanying text.

245. *See supra* notes 161, 233–240 and accompanying text.

Not surprisingly, with federal constitutional and statutory law imposing very few limits on the states' interference with free exercise, the treatment of religious liberty nationwide is in disarray. This fundamental First Amendment right, previously treated as a "preferred freedom" that is essential to the American "scheme of ordered liberty,"²⁴⁶ is now treated differently—rigorously protected or hardly at all—depending upon the different states' different decisions.

Other fundamental rights—whether free speech, free press, freedom of assembly, parental rights, or others—are all safeguarded under federal constitutional law to the highest extent. Interference with any of those rights triggers strict scrutiny, requiring the state to justify its law or action as being needed to achieve some compelling government interest.²⁴⁷ But not so for free exercise of religion.

Other than the two narrow areas statutorily protected by RLUIPA, a state is free under federal law to burden free exercise of religion as long as whatever it is doing is not *otherwise invalid*. The result is that while some states have chosen to continue protecting religious liberty as a fundamental right, others have chosen to treat it as little more than a nuisance.

In *Smith*, Justice Scalia condemned the compelling interest test for free exercise as "courting anarchy."²⁴⁸ In fact, the Court's decision to eliminate that protection for free exercise has resulted in a kind of "anarchy" that would not be permissible for any other fundamental constitutional right. A few illustrations will make the point.

In *State v. Hershberger*,²⁴⁹ decided the same year as *Smith*, Minnesota's high court rejected the Supreme Court's decision and, as a matter of its own state constitutional law, adhered to the more protective standards that the Supreme Court had just abandoned.²⁵⁰ In that case, members of the

246. See *supra* notes 55–108 and accompanying text.

247. See *supra* notes 144–149 and accompanying text. As Justice Jackson wrote for the Court long ago in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), "[F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." Well, since *Smith II*, that remains true today except for freedom of worship.

248. *Emp't Div. v. Smith* (*Smith II*), 494 U.S. 872, 888 (1990).

249. 462 N.W.2d 393 (1990), *on remand from* 485 U.S. 901 (1990).

250. *Id.* at 398. Of course it is a truism that under our federal system of government a state and its courts may afford greater protection, under the state's own law, for rights and liberties than that which is mandated by the Supreme Court, as a matter of federal law. Indeed, a state and its courts may decide to protect rights and liberties however they choose as long as they do not actually violate federal law—e.g., infringe upon a federal constitutional right or liberty—in doing so. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (avoiding the federal issue because "a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee") (citations omitted); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (affirming the state court's decision on the ground that Supreme Court rulings do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive

Old Order Amish objected on sincere religious grounds to the state requirement that they display a fluorescent orange-red triangular sign on their slow moving vehicles.²⁵¹ In its initial decision prior to *Smith*, the state's high court applied the federal constitutional standards then in effect and, accordingly, ordered the state to allow the Amish to use a less restrictive alternative that would still achieve the state's safety purposes.²⁵²

When the Supreme Court vacated that decision in light of the diluted standard just adopted in *Smith*, the state court chose to adhere to its prior decision on the basis of its own constitutional guarantee of religious liberty.²⁵³ Applying the same heightened scrutiny that would be triggered by infringements on other fundamental rights, Minnesota's Supreme Court explained that to "infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means."²⁵⁴ Because the state had failed to show that the "use of white reflective tape and a lighted red lantern" was inadequate to serve its highway safety interests, the state's high court ruled for the religious objectors.²⁵⁵

Several years later, in *State v. Miller*,²⁵⁶ a case involving the same religious objections, the Wisconsin Supreme Court also rejected *Smith*, and ruled that "guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims."²⁵⁷ Applying that analysis, the state's high court mandated the accommodation for the religious objectors just as the Minnesota court had in *Hershberger*.²⁵⁸

than those conferred by the Federal Constitution"). See generally William J. Brennan, *supra* note 172; Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 842 (2007); Vincent Martin Bonventre, *Beyond the Reemergence—'Inverse Incorporation' and Other Prospects for State Constitutional Law*, 53 ALB. L. REV. 403 (1989). See also *supra* notes 172–176 and accompanying text.

251. *State v. Hershberger*, 444 N.W.2d 282, 284 (Minn. 1989), *vacated* (1990) 495 U.S. 901 (1990), *remanded to* 462 N.W.2d 393 (Minn. 1990).

252. *Id.* at 289.

253. *Hershberger*, 462 N.W.2d at 399 (1990), *on remand from* 495 U.S. 901 (1990).

254. *Id.*

255. *Id.* In another case where a state court's pre-*Smith* decision was vacated by the Supreme Court, *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), *cert. granted, vacated*, 499 U.S. 901 (1991), *remanded to* 840 P.2d 174 (Wash. 1992), the Washington Supreme Court similarly adhered to its initial decision as a matter of its own state constitutional guarantee of freedom of conscience. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185–186 (1992). Although the state court found that applying *Smith II* would not necessarily lead to a different result, it chose instead to decide the case under the compelling interest test from its own case law and, in doing so, it held that applying the local landmarks preservation law in disregard of the church's religious needs "is not necessary to prevent a grave danger to the public health, peace, or welfare." *Id.* at 188.

256. 549 N.W.2d 235 (Wis. 1996).

257. *Id.* at 241.

258. *Id.* at 242.

Under *Smith*, however, an “otherwise valid” traffic law would defeat sincere religious objections. And when state courts decline to adopt a more protective standard under their own law and, instead, choose simply to march lockstep with that Supreme Court decision, free exercise claims are dismissed. That is exactly what happened in *Gingerich v. Commonwealth*.²⁵⁹

Despite a readily available alternative that would have served the state’s interests and avoided burdening religious liberty—as the courts in *Hershberger* and *Miller* had found—Kentucky’s Supreme Court simply decided that it “will follow federal precedent” and forego any independently protective state standard.²⁶⁰ That state’s high court thus abandoned the compelling interest test, just as the Supreme Court had done, and it held that the traffic law would be “presumed constitutional unless there is no *rational* basis for it.”²⁶¹ So mere rationality would henceforth defeat genuine claims of free exercise in that state.

It would seem that a fundamental right—if that’s what free exercise of religion is—would at least require that government make some effort to accommodate its exercise. A fortiori when an accommodation to protect that right is so obvious and available. But the Kentucky court in *Gingerich*, like the Supreme Court in *Smith*, chose to treat religious liberty more like a nuisance to be casually disregarded than a right to be taken seriously. As the dissenter in *Gingerich* recognized, “[e]mploying a rational basis standard renders inconsequential Kentucky’s free exercise guarantee in that virtually any asserted governmental interest could justify laws of general applicability that have the effect of substantially burdening individuals’ religious liberty.”²⁶²

This same disparate treatment of religious liberty has arisen in numerous other contexts since *Smith*. Not surprisingly, employment is among them. In *Humphrey v. Lane*,²⁶³ a state correctional employee who wore his hair long as a sincere practitioner of Native American Spirituality was ordered to cut his hair in accordance with the official grooming policy or he would be fired.²⁶⁴ The trial court, applying the compelling interest test, granted the employee injunctive relief; but the intermediate appellate court applied *Smith*, rejected the free exercise claim, and reversed.²⁶⁵

259. 382 S.W.3d 835, 844 (Ky. 2012).

260. *Id.* at 844.

261. *Id.* (emphasis added).

262. *Id.* at 847 (Scott, J., dissenting).

263. 728 N.E.2d 1039 (Ohio 2000).

264. *Id.* at 1041. The prefatory statement of the case in an Ohio Supreme Court opinion is an official “Syllabus by the Court,” *Id.* at 1040.

265. *Id.* at 1042–1043.

The Ohio Supreme Court, however, rejected *Smith* as the standard for the state's own religious freedom guarantee. Instead, the state's high court declared:

We adhere to the standard long held in Ohio regarding free exercise claims—that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. That protection applies to direct and indirect encroachments upon religious freedom.²⁶⁶

Applying that heightened scrutiny as a matter of independent state constitutional law, the court acknowledged a strong interest in uniformity and professionalism among the prison guards, but it insisted upon the “simple accommodation of allowing [the employee] to wear his hair pinned under his uniform cap” which would satisfy the need for guards to present a “professional and dignified image.”²⁶⁷

Another state court adopted the much less protective approach to free exercise. In *Hagy v. Commissioner*,²⁶⁸ an employee objected, on religious grounds, to newly assigned duties involving advertisements that “promoted witchcraft, satanic worship, drugs, homosexuality, and violence.”²⁶⁹ When the employer refused to accommodate his religious objections, the employee quit and the state's labor department approved his application for unemployment benefits on the ground that his religious objections were a “good work-related cause to quit.”²⁷⁰ That determination in his favor, however, was overruled and, ultimately, the state's intermediate appellate court ruled against him as well.²⁷¹

The Tennessee court, favorably citing *Smith*, announced its own similar rule: “the enforcement of a ‘facially neutral and uniformly applicable’ law which incidentally burdens a religious practice is valid.”²⁷² Finding that the state's unemployment compensation law fit that description, the court concluded that there was “no merit in plaintiff's argument regarding constitutional violations.”²⁷³ None? Not even a close or difficult balance between a fundamental constitution right and mere legislation? Well no—not if that right is treated as a mere nuisance, which current First Amendment jurisprudence permits.²⁷⁴

266. *Id.* at 1045.

267. *Id.* at 1046.

268. No. E2003-01685-COA-R3-CV, 2004 WL 1170031 (Tenn. Ct. App., May 26, 2004). The opinion notes that “Application for Permission to Appeal Denied by Supreme Court, Nov. 29, 2004.” *Id.*

269. *Id.* at 1.

270. *Id.*

271. *Id.* at 4.

272. *Id.*

273. *Id.* (emphasis added).

274. Tennessee subsequently adopted its own version of the federal RFRA. The state's Preservation of Religious Freedom Act was signed into law in 2009. Tenn. Code Ann. § 4-1-407(b). Like the federal law, it reinstates the compelling interest test for burdens on free exercise and

While religious freedom may readily be accommodated in some contexts—which, however, does not necessarily mean that the accommodation will be ordered—there are some contexts in which the competing interest makes an accommodation or exemption much more complicated. Housing discrimination is one such context. With *Smith* mandating very little federal constitutional protection for free exercise, state courts have resolved the resulting issues quite differently.

In *State v. French*,²⁷⁵ the Minnesota Supreme Court—several months prior to its final *Hersherberger* decision²⁷⁶—granted an exemption from the state’s Human Rights Act to a landlord who refused to rent to an unmarried opposite-sex couple.²⁷⁷ The law prohibited discrimination based on marital status, but the landlord had sincere religious objections to an adult couple living together in a sexual relationship outside of marriage.²⁷⁸ Applying the state’s independent constitutional protection of religious freedom, Minnesota’s high court required the government to demonstrate a sufficiently compelling interest to outweigh the landlord’s right to exercise his religion.²⁷⁹

The state argued that it had an overriding interest in “eliminating pernicious discrimination.”²⁸⁰ But finding nothing particularly “pernicious” about “refusing to treat unmarried, cohabiting couples as if they were legally married,” the court ruled that the state had failed to demonstrate an interest sufficient to defeat the religious rights of the landlord.²⁸¹

The Alaska Supreme Court, confronting a similar religious objection and applying a similar standard under its own constitution, nevertheless reached the opposite result.²⁸² In *Swanner v. Anchorage Equal Rights Commission*, the landlord had refused on religious grounds to rent to several unmarried opposite-sex couples.²⁸³ The landlord’s religious beliefs were that “even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful.”²⁸⁴ The state’s high court agreed with the administrative determination that the landlord’s refusal to rent violated state and

effectively overrules decisions of its own courts such as in *Hagy*. At the time of this writing, twenty-one states have adopted similar legislation rejecting *Smith*’s dilution of free exercise protection. See National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx#RFRA>.

275. 460 N.W.2d 2 (Minn. 1990).

276. See *supra* notes 249–255 and accompanying text.

277. *French*, 460 N.W.2d at 11.

278. *Id.* at 3–4.

279. *Id.* at 10. The court viewed the Minnesota constitution as providing “far more protection of religious freedom” than the United States Constitution. *Id.* at 9.

280. *Id.*

281. *Id.* at 11.

282. *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994).

283. *Id.* at 276–277.

284. *Id.* at 277.

local laws prohibiting marital status discrimination, and it also agreed that enforcement of those laws against him did *not* violate his religious freedom.²⁸⁵

Adhering to the heightened scrutiny of *Sherbert* and *Yoder* as a matter of state constitutional law,²⁸⁶ the Alaska court outlined the test as whether a government “interest of the highest order” would “suffer if a [religious] exemption is granted.”²⁸⁷ Applying that test, the court found that the interest in eliminating housing discrimination “that degrades individuals, affronts human dignity, and limits one’s opportunities” would necessarily “suffer” if exemptions were permitted.²⁸⁸

That different courts might reach different results in cases involving competing interests that are both strong is not a surprise. Nor is it a surprise that such a case becomes much easier to resolve when one of the competing interests is treated like a nuisance and downgraded. That is what the California Supreme Court did with religious liberty in *Smith v. Fair Employment & Housing Commission*.²⁸⁹ In that case, California’s high court raised the possibility that free exercise would be more protected under the state’s constitutional law than under the Supreme Court’s interpretation of the federal Constitution.²⁹⁰ But as the dissenting opinion complained, the state court’s treatment of religious freedom was, instead, “virtually indistinguishable from the rationale and holding of *Smith*.”²⁹¹

Similar to the Minnesota and Alaska cases, this California case involved a landlord who refused on religious grounds to rent to unmarried couples because she believed “it is a sin for her to rent her units to people who will engage in nonmarital sex.”²⁹² Upholding the administrative determination that the landlord’s religious objections did not excuse her violation of the state’s prohibition against marital status discrimination in housing, the court analyzed the case under both *Smith* and the compelling interest test that decision had abandoned. Under the former, the California court simply recited that the law was “generally applicable and neutral towards religion” and, therefore, that the landlord was bound to comply with it.²⁹³

285. *Id.* at 278, 285.

286. *Id.* at 281–282.

287. *Id.* at 282.

288. *Swanner*, 874 P.2d at 283.

289. 913 P.2d 909 (Cal. 1996)

290. *Id.* at 930–931.

291. *Id.* at 966 (Baxter, J., dissenting).

292. *Id.* at 913.

293. *Id.* at 919.

Then, ostensibly applying the compelling interest test,²⁹⁴ the court dismissed the free exercise claim by denying that the law imposed any substantial burden on the religiously objecting landlord. The court summarized its analysis this way:

[The landlord's] religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood. The asserted burden is the result not of a law directed against religious exercise, but of a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive.²⁹⁵

It is, apparently, not the duty of government to avoid burdens on free exercise of religion. Rather, according to the California court in this case, that duty falls upon the religious practitioner—even if that means having to give up one's chosen livelihood. No accommodations or exemptions need be afforded to insure that religious liberty be safeguarded. As long as religion itself is not the target of discriminatory treatment, free exercise may simply be disregarded as a nuisance.

Finally, the decision of New York's highest court in *Catholic Charities v. Serio* deserves some attention.²⁹⁶ If free exercise of religion jurisprudence after *Smith* is a hodgepodge of incoherence, inconsistency, and contradictions across the states—with varying tests and interpretations and protections (or lack thereof) for what is supposed to be a fundamental right under the United States Constitution—the New York decision is a microcosm of it all. The court's denial of a religious exemption from the state's contraceptive insurance mandate²⁹⁷—agree with it or not—is one of the few understandable aspects of the decision. What free exercise law actually

294. The court did so believing at the time—prior to the Supreme Court's decision in *City of Boerne*—that the federal RFRA and, thus, the heightened scrutiny under *Sherbert* and *Yoder* applied to state cases. *Id.* at 922–923.

295. *Smith v. Fair Emp't*, 913 P.2d at 928–929 (citations omitted). Albeit using a different rationale, the Florida Supreme Court in *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004), also diluted the compelling interest test it was ostensibly applying. Interpreting the state's own RFRA—which, like the federal counterpart, reinstated the heightened scrutiny of *Sherbert* and *Yoder*—the court held that a “substantial burden” on free exercise only covers “conduct that his religion forbids or . . . conduct that his religion requires,” but not “religiously motivated conduct.” *Id.* at 1033. Apparently, conduct based on *mere* religious beliefs does not count, only religiously *obligated* or *prohibited* conduct.

296. 859 N.E.2d 459 (N.Y. 2006). Disclosure: I consulted with the attorney for Catholic Charities in this case. Although I am not a religious believer and do support the contraceptive mandate, I support religious liberty and the requested religious exemptions even more fervently. Moreover, though I do believe that a court could reasonably decide that granting the exemptions would undermine the important purposes of the law, I think the court's analysis and the rule it adopted for dealing with burdens on religious freedom is—to be blunt—dreadfully unprotective of that fundamental right.

297. *Id.* at 461, 468.

is in New York after this case is, at best, perplexing. On the one hand, the New York court claimed that, as a matter of independent state constitutional law, it was rejecting the “inflexible rule” of *Smith* that neutral and generally applicable laws defeat free exercise claims.²⁹⁸ But within a few paragraphs, the court largely backtracked. The court announced that “the principle stated by the United States Supreme Court in *Smith*—that *citizens are not excused* by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets—*should be the usual, though not the invariable, rule.*”²⁹⁹

Reviewing its previous decisions, the court failed to acknowledge its early landmark, *People v. Barber*,³⁰⁰ where the court applied the state constitution to carve out a religious exemption from an otherwise valid generally applicable law, even though the Supreme Court had just declined to do so.³⁰¹ Instead, the court characterized the cited precedents as creating some as yet undefined balancing test between the competing religious and government interests.³⁰² It then proceeded to formulate a balancing test that *relieved the government of any requirement to justify* the burden placed on religious liberty.³⁰³ The rule fashioned by the court was that the *religious objector* “bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom.”³⁰⁴

Lest there be any doubt that it was placing the burden on the party whose fundamental right was being interfered with, rather than the government which was interfering with that right, the court repeated itself. It insisted that “[t]he burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption.”³⁰⁵ Although the burden of justification is on the government, under the strict scrutiny test, whenever it interferes with other fundamental rights³⁰⁶—and for free exercise as well under RFRA and other states’ constitutional law³⁰⁷—the New York Court of Appeals simply referred to “legislative prerogative” and “efficient government” as the supposed reasons to treat religious liberty differently.³⁰⁸

Then, to add some mystery and apparent second-thoughts to its adopted rule, the court identified some burdens on religious liberty that,

298. *Id.* at 466.

299. *Id.* at 467 (emphasis added).

300. 46 N.E.2d 329 (N.Y. 1943).

301. See *supra* notes 174–175 and accompanying text.

302. *Catholic Charities v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006).

303. *Id.* (holding that “substantial deference is due the Legislature.”)

304. *Id.*

305. *Id.* at 467.

306. See *supra* notes 144, 247 and accompanying text.

307. See *supra* notes 217–240, 249–259 and accompanying text.

308. *Catholic Charities*, 859 N.E.2d at 467.

regardless of what it had just outlined, it would not tolerate. These included “a requirement that all witnesses must testify” without an exemption for priest-penitent confidences, “a general prohibition of alcohol consumption” without an exemption for Christian communion, and a “uniform regulation of meat preparation” without an exemption for kosher slaughtering.³⁰⁹ The court declared “these hypothetical laws to be well beyond the bounds of constitutional acceptability.”³¹⁰

Does that mean that the application of such laws to the religious practice would be *per se* invalid? And that the religious objector would not bear the burden of demonstrating unreasonableness to obtain an exemption? Even though none of those neutral and generally applicable laws would themselves be unreasonable?³¹¹

So is the real test a matter of how important the burdened belief or practice is to the religion?³¹² Does that test then entail courts engaged in examining a religion and assessing how important that belief or practice is? And does that in turn also entail courts deciding that some religious beliefs and practices are not that important?³¹³

Beyond that, with those enumerated and similar exceptions in mind, what exactly is the free exercise jurisprudence that New York’s high court adopted in *Catholic Charities*? To what extent is that right protected? As a fundamental liberty? Or as a nuisance usually to be dismissed as not quite so important, as it was in that case?

As the cases discussed show, that is precisely the disparity with which the constitutional guarantee of religious freedom is being treated across the country since the Supreme Court’s decision in *Smith* permitted that to be so.

IV. CONCLUSION: FUNDAMENTAL RIGHT OR NUISANCE

The Supreme Court majority in *Smith*, speaking through Justice Scalia, repudiated the compelling interest test for free exercise of religion as “con-

309. *Id.* (quoting Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418–1419 (1990)).

310. *Id.*

311. In all candor, the recitation of these hypotheticals as “well beyond the bounds of constitutional acceptability” seems so at odds with the thrust of the court’s opinion that it seems an addition by or at the urging of someone other than the primary author of the opinion. A unanimous opinion—as this was—is oftentimes more compromise than conviction, and often the product of additions and deletions at the behest of others who have joined it. See Vincent Martin Bonventre, *New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the New York Court of Appeals*, 67 TEMPLE L. REV. 1163, 1167 nn.18–19 (1994).

312. What does the court’s rule mean for an *abortion* coverage mandate? That question is now in litigation. See *Roman Catholic Diocese v. Vullo*, No. 7536–17, (N.Y. Sup. Ct. filed Dec. 5, 2017).

313. Of critical note is that any such “intrusive inquiry into religious belief” would likely run afoul of both the non-establishment and free exercise guarantees of the First Amendment. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). See also *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

tradict[ing] common sense” and as “courting anarchy.”³¹⁴ But, in fact, the consequences wrought by that decision are what makes little sense and what has created a veritable anarchy. A fundamental, First Amendment, constitutional right was stripped of the protection of heightened judicial scrutiny³¹⁵ which safeguards every other First Amendment right and, indeed, every other fundamental liberty.³¹⁶

As a result of *Smith*, free exercise of religion has been afforded varying levels of protection, from a great deal to nearly none at all, depending upon the varying decisions of the various states.³¹⁷ Except where a violation of some other fundamental right incidentally interferes with free exercise,³¹⁸ or where a religion is the intended victim of invidious discrimination,³¹⁹ the states have been left with virtually free reign to treat religious liberty as a fundamental right or as little more than a mere nuisance.

Hence, some state supreme courts have rejected *Smith* and retained the compelling interest protection spelled out in *Sherbert* and *Yoder* as a matter of their own constitutional law.³²⁰ Others have chosen to march lockstep with the Supreme Court and have simply adopted the *federal* constitutional decision in *Smith* as their own *state* constitutional rule.³²¹ Then there are those state courts which have claimed to be applying the compelling interest test but, in fact, applied a much diluted version of it and denied that there had been a cognizable burden on free exercise—either under the state’s constitution³²² or under the state’s RFRA.³²³ And there is at least one state high court that 1) explicitly rejected *Smith* as a matter of state constitutional law but, 2) in the same opinion, also rejected the compelling interest test and 3) announced that the *Smith* rule would usually apply and, 4) if that were not confusing enough, spelled out its own extremely unprotective rule, but 5) then identified exceptions that seemed to contradict or at least seriously undermine the rule just announced.³²⁴

314. *Emp’t Div. v. Smith (Smith II)*, 494 U.S. 872, 885, 888 (1990).

315. *See supra* notes 109–134 and accompanying text.

316. *See supra* notes 144, 247 and accompanying text.

317. *See supra* notes 241–313 and accompanying text.

318. *See supra* notes 181–192 and accompanying text.

319. *See supra* notes 193–214 and accompanying text. There is also the *statutory* protection under RLUIPA that restricts state interference with religious liberty in land use and prison matters. *See supra* notes 233–240 and accompanying text.

320. *See, e.g., State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990), *on remand from* 495 U.S. 901 (1990); *see also supra* notes 249–258 and accompanying text.

321. *See, e.g., Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012); *see also supra* notes 259–262 and accompanying text.

322. *See, e.g., Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996); *see also supra* notes 289–295 and accompanying text.

323. *See, e.g., Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004); *see also supra* note 295.

324. *See Catholic Charities v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *see also supra* notes 296–313 and accompanying text. Again, *see disclosure at supra* note 296.

Smith's supposed rescuing free exercise jurisprudence from "anarchy" in the name of "common sense" has thus generated enormous disarray and confusion and has left that First Amendment right at the mercy of a vast disparity of treatments. A case currently pending at the Supreme Court demonstrates much of what has been discussed in these pages and provides a fitting illustration with which to conclude.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³²⁵ the owners of a bakery in Colorado refused, on sincere religious grounds, to create a cake sought by a same-sex couple to celebrate their upcoming wedding.³²⁶ The state found the bakery's refusal to be a violation of its law that prohibits sexual-orientation discrimination in places of business³²⁷ and, on appeal, the state's intermediate court agreed.³²⁸ The state's supreme court declined to review the case,³²⁹ but the United States Supreme Court chose to do so.³³⁰

In its decision, the Colorado appellate court addressed the bakery owners' religious objections after first rejecting their free speech arguments.³³¹ The court held that, because Colorado's anti-discrimination statute was a "neutral law of general applicability, it defeated the free exercise claim as a matter of federal constitutional law under *Smith*."³³² The court then rejected the argument for greater protection under the state constitution and, instead, held that *Smith* was the standard for Colorado's law.³³³ In accord with that decision, the Colorado court applied a "rational basis" test to summarily dismiss the religious objections as a matter of state constitutional law as well.³³⁴

At the United States Supreme Court, the bakery owners' brief relies largely on free speech, claiming that creating a cake for the same-sex couple would be expressive activity endorsing that couple's marriage.³³⁵ In that brief, there are also two arguments ostensibly based on the "Free Exercise Clause." The first such argument is in fact about "discriminatory application" and "discriminatory reading" of the state law, allegedly resulting in

325. 137 S.Ct. 2290 (2017).

326. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276–277 (Colo. Ct. App. 2015), cert. granted sub. nom. *Masterpiece Cakeshop v. Colo. Rights Comm'n*, 137 S.Ct. 2290 (2017). On June 4, 2018, while publication of this article was pending the Supreme Court rendered its decision. See *infra* note 343.

327. *Id.*

328. *Id.* at 294.

329. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (denying certiorari).

330. *Masterpiece Cakeshop*, 137 S. Ct. 2290. The decision was pending at the time of this writing.

331. *Masterpiece Cakeshop*, 370 P.3d at 288.

332. *Id.* at 292.

333. *Id.* at 292–294.

334. *Id.*

335. See Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S.Ct. 2290 (2017) (No. 16–111), 2017 WL 3913762, at *16–37.

“discriminatory treatment” of the bakers.³³⁶ It is entirely in the nature of an invidious discrimination claim.³³⁷ The other ostensibly “Free Exercise Clause” argument, which discusses so-called “hybrid rights,” is nothing more than a very brief restatement that the bakers’ have a “strong free-speech interest” in their religion claim.³³⁸ It is essentially their free speech argument under a different heading.

To underscore that latter point. The amicus brief filed by the United States³³⁹ does not even make a free exercise of religion argument.³⁴⁰ Instead, it rests its support for the bakers solely on free speech.³⁴¹ Whether the bakers should prevail in this case, or whether eliminating sexual-orientation discrimination in the market place is more important, it is extraordinarily significant that an undeniable burden imposed on First Amendment *freedom of religion, in and of itself*—i.e., as opposed to the bakers’ free speech or the alleged deliberate discrimination against them—has become such a comparably insignificant aspect of this litigation. That fundamental right is being treated as little more than a nuisance unless tied to some other constitutional concern.³⁴²

But that is the current state of free exercise under the Constitution and the legacy of *Smith*.³⁴³

336. *Id.* at *38–46.

337. For a related discussion, see *supra* notes 193–214 and accompanying text.

338. *Id.* at *46–48.

339. Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S.Ct. 2290 (2017) (No. 16–111), 2017 WL 4004530 (filed by the Department of Justice under the administration of President Donald Trump).

340. *Id.* at *33 n.6.

341. The sole argument is based on “The First Amendment Free Speech Clause.” *Id.* at *9.

342. Disclosure: Despite my fervent support for religious liberty, I strongly favor the elimination of sexual-orientation discrimination and believe that the Supreme Court should view eliminating that evil as an interest of the very highest order, just as it did with regard to racial discrimination in *Bob Jones University v. United States*, 461 U.S. 574 (1983). See *supra* notes 92–108 and accompanying text. So I would not favor granting an exemption to the bakers.

343. On June 4, 2018, while publication of this article was pending, the Supreme Court ruled in favor of the baker in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). The 7-2 decision, authored by Justice Anthony Kennedy, narrowly held that Colorado’s Civil Rights Commission was hostile to the baker’s religious beliefs and thus did not give him a fair and neutral hearing. The Court avoided the underlying issue of whether a religious objector would be entitled to an exemption from an otherwise valid, generally applicable anti-discrimination law. Instead, the Court relied on its precedents, such as *Church of the Lukumi Babalu Awe, Inc. v. City of Hialeah* which ruled in favor of religious objectors solely on the ground that the legislation was the product of hostility toward a particular religion. See discussion *supra* note 179. In short, the Court found that the Colorado determination that the baker was not entitled to an exemption was not “otherwise valid,” because it unlawfully assessed the baker’s religious belief as illegitimate and subjected it to ridicule. In the Supreme Court’s own words, the Colorado commission “disparage[d]” the baker’s religious faith “by describing it as despicable, and also characterizing it as merely rhetorical—something insubstantial and even insincere.” *Masterpiece Cakeshop*, 138 S. Ct. at 1729. *Oregon v. Smith* as the current standard for protecting—or not—religious liberty was left untouched. See *The Cakeshop case: What the Court Did NOT Decide*, <http://www.newyorkcourtwatcher.com/2018/06/the-cakeshop-case-what-court-did-not.html>.

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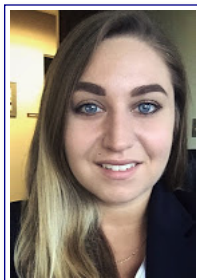
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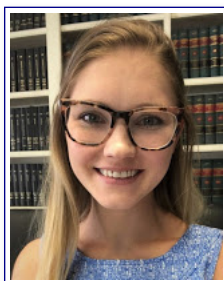
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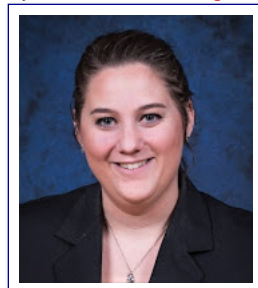
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TUESDAY, FEBRUARY 25, 2020

CHIEF JUSTICE JOHN G. ROBERTS: LIBERALS' SAVING GRACE IN "HOT-BUTTON" CASES OR SUPREME COURT LEGITIMIZER?

By [Lauren N. Mordacq](#)



Lauren N. Mordacq is a third-year law student at Albany Law School. Prior to attending law school, Lauren attended Robert Morris University (Illinois) and was a member of both the women's softball and volleyball teams, while earning degrees in both Business Administration and Paralegal Studies.

While attending Albany Law School, Lauren has served as an intern to the Honorable Daniel J. Stewart and to the Honorable Christian F. Hummel, both federal magistrate judges for the United States District

Court for the Northern District of New York. Additionally, she currently serves as the Executive Editor for Symposium for the Albany Law Review, Volume 83 and works as a teaching assistant for Professor Redwood's Constitutional Law.

Upon graduation from Albany Law School in May, Lauren will be serving as an Appellate Court Attorney for the New York State Supreme Court, Appellate Division, Third Department.

As one commentator has observed, "Chief Justice John Roberts' recent votes with the liberal members of the Supreme Court have given rise to speculation he has become the court's new swing vote, but court watchers say he has not suddenly moved to the Left."

Justice Anthony Kennedy's retirement from the Supreme Court has left an opening for another Justice to fill the void as a swing vote. Over the last several years, Chief Justice John Roberts has dealt some major blows to the conservative agenda as a "swing vote" in 5-4 decisions involving "hot-button" issues.

Most notably, Roberts: (1) authored the opinion upholding the Affordable Care Act; (2) voted to block the Trump administration from adding a citizenship question to the census; (3) voted to block a Louisiana abortion law from going into effect; and (4) essentially voted to temporarily block a Trump administration asylum policy. By siding with his liberal counterparts, some argue the Chief Justice is defending the integrity of the Court and preventing a partisan process. Others simply say this is the Roberts practicing judicial restraint.

Maybe the Chief Justice is doing his best to do equal right in his role as the Supreme Court's leader, and that means being the "swing vote" when the situation calls for it. Chief Justice Roberts appears to be somewhat of an enigma

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in terms of his judicial philosophy, inasmuch as he has demonstrated his belief in not having one. But maybe that is his greatest strength.

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**CHIEF JUSTICE JOHN G. ROBERTS
LIBERALS' SAVING GRACE IN "HOT-BUTTON" CASES
OR
SUPREME COURT LEGITIMIZER?**

By Lauren N. Mordacq
Albany Law School, Class of 2020
Supreme Court Watch Seminar, Fall 2019
Prof. Vincent M. Bonventre

I. INTRODUCTION

“Chief Justice John Roberts’ recent votes with the liberal members of the Supreme Court have given rise to speculation he has become the court’s new swing vote, but court watchers say he has not suddenly moved to the Left.”¹ Since the retirement of Justice Anthony Kennedy from the Supreme Court of the United States in 2018,² speculation as to the new “swing vote” or “median voter” on the Court has been directed towards Chief Justice John Roberts.³ Since Chief Justice Roberts’ appointment to the Supreme Court in September 2005,⁴ he has arguably maintained what some would deem a “conservative” point of view.⁵ Although the Chief Justice has maintained a consistently “moderate” voting record, he has sided with the liberal justices numerous times.⁶ Over the last several years, the Chief Justice has dealt some major blows to the Republican party/conservative agenda as a “swing vote” in 5-4 decisions. First, in 2012, Chief Justice Roberts threw conservatives for a loop when he penned the majority opinion to uphold the Affordable Care Act.⁷ Second, in a more recent setting, he has provoked harsh criticisms from conservatives as he has: (1) voted to block the Trump administration from adding a citizenship question to the census; (2) voted to block a Louisiana abortion law from going into effect; and (3) essentially voted to temporarily block a Trump administration asylum policy.⁸ What are the

¹ 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>.

² See *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy (last visited Dec. 12, 2019).

³ See 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/>.

⁴ See *John G. Roberts, Jr.*, OYEZ, https://www.oyez.org/justices/john_g_roberts_jr (last visited Dec. 12, 2019).

⁵ “Conservative” point of view meaning “the outcome was considered consistent with Republican Party values and goals.” Aaron Belkin & Sean McElwee, *Don’t Be Fooled. Chief Justice John Roberts Is as Partisan as They Come*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/opinion/john-roberts-supreme-court.html>.

⁶ See Quinn, *supra* note 1; Adam Liptak, et al., *The Roberts Court’s Surprising Move Leftward*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/06/23/upshot/the-roberts-courts-surprising-move-leftward.html> (last updated June 29, 2019).

⁷ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

⁸ See Adam Liptak & Alicia Parlapiano, *A Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html>.

driving forces behind the Chief Justice's decisions to side with the liberal justices when "hot-button" issues are being decided by the Supreme Court? Some argue he is defending the integrity of the Supreme Court of the United States and preventing a partisan process by siding with the liberal justices.⁹ This paper will first discuss Chief Justice Roberts' background and purported judicial ideology, and then transition to discussions of major cases involving "hot-button" issues where he sided with liberal justices. This paper will then analyze the likelihood that the Chief Justice is only siding with liberal justices in cases involving "hot-button" issues to preserve the Supreme Court's legitimacy and to lessen fears of a highly-politicized Supreme Court. As a whole, this paper will seek to explore Chief Justice Roberts in his role as the Supreme Court's leader in terms of his voting record involving controversial issues and how the influence of skepticism of the legitimacy of the Supreme Court has shaped his jurisprudence in the last decade.

II. BACKGROUND OF CHIEF JUSTICE ROBERTS

John G. Roberts, Jr. grew up in a small-Midwestern town in Indiana, and later worked his way to both Harvard University for undergraduate studies and Harvard Law School.¹⁰ "[I]n Harvard Law [] he found his passion for the legal field. During his time there, Roberts became the managing editor of the Harvard Law Review. In 1979, Roberts graduated law school magna cum laude."¹¹ Following his graduation from Harvard Law, John Roberts went on to clerk for Judge Henry Friendly, a judge for the United States Court of Appeals, Second Circuit.¹² After clerking for Judge Friendly, he then clerked for United States Supreme Court Justice William Rehnquist.¹³ "Legal analysts believe that working for both Friendly and Rehnquist influenced Roberts's

⁹ See Belkin & McElwee, *supra* note 5.

¹⁰ See *John G. Roberts, Jr.*, *supra* note 4.

¹¹ *Id.*

¹² See *John Roberts Biography*, A&E, <https://www.biography.com/law-figure/john-roberts> (last visited Dec. 12, 2019).

¹³ See *id.*

conservative approach to the law, including his skepticism of federal power over the states and his support of broad executive branch powers in foreign and military affairs.”¹⁴ After Roberts finished clerking he worked as an aide to Attorney General William French Smith and as an aide to White House counsel Fred Fielding.¹⁵ In 2001, President George W. Bush nominated Roberts as a judge for the United States Court of Appeals for the District of Columbia.¹⁶ Roberts’ appointment to the District of Columbia was affirmed in 2003.¹⁷ Two years later, President Bush nominated Roberts to fill the seat of Chief Justice of the Supreme Court of the United States following Chief Justice Rehnquist’s death.¹⁸

There is little evidence of a “concrete” judicial philosophy or ideology that the Chief Justice draws from in approaching his jurisprudence other than his respect for *stare decisis*. “[Roberts’] stint on the U.S. Court of Appeals didn't provide an extensive case history to determine his judicial philosophy. Roberts has denied he has any comprehensive jurisprudential philosophy and believes not having one is the best way to faithfully construe the Constitution.”¹⁹ As far as the role of a judge, the Chief Justice stated the following at his Senate confirmation hearing, “Umpires don’t make the rules . . . [t]hey apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a *limited* role. Nobody ever went to a

¹⁴ *Id.*

¹⁵ See *John G. Roberts, Jr.*, *supra* note 4. “During these years, Roberts earned the reputation of being a political pragmatist, tackling some of the administration’s toughest issues . . .” *John Roberts Biography*, *supra* note 12.

¹⁶ See *John Roberts Fast Facts*, CNN (Jan. 15, 2019), <https://www.cnn.com/2013/03/25/us/john-g-roberts-fast-facts/index.html>.

¹⁷ See *id.*

¹⁸ See *id.* “Roberts was confirmed by the full Senate on September 29, 2005, as the 17th Chief Justice of the United States by a margin of 78-22, more than any other nominee for Chief Justice in American history. At age 50, Roberts became the youngest person confirmed as Chief Justice since John Marshall in 1801.” *John G. Roberts, Jr.*, *supra* note 4.

¹⁹ *John Roberts Biography*, *supra* note 12. While he believes the best approach is “faithfully constru[ing] the Constitution[.]” he does not claim to be, nor does he appear to be, an Originalist or Textualist. See *id.*

ballgame to see the umpire.”²⁰ In his role as Chief Justice he seeks “greater consensus on the Supreme Court . . . [and] believes that more consensus would be likely if controversial issues could be decided on the ‘narrowest possible grounds.’”²¹ The Chief Justice is also a proponent of judicial restraint and respecting precedent and *stare decisis*.²² For example, his belief in *stare decisis* spurred a dissenting opinion in *Citizens United*²³ where he wrote “separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.”²⁴ Although there is little evidence of a concrete judicial philosophy, Chief Justice Roberts is at the very least a strategist in his approach and a proponent of judicial restraint, consensus on the Supreme Court, and precedent.

III. “HOT-BUTTON” CASES WHERE CHIEF JUSTICE ROBERTS VOTED WITH THE LIBERAL JUSTICES

A. 2012: CONSTITUTIONAL CHALLENGES TO THE AFFORDABLE CARE ACT

In 2012, the Supreme Court resolved constitutional challenges to two different provisions of the Patient Protection and Affordable Care Act (“ACA”).²⁵ Chief Justice Roberts authored the opinion and was joined by Justices Ginsburg, Breyer, Kagan, Sotomayor, and Breyer.²⁶ Challenges made to the ACA included: “the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care

²⁰ Jennifer Finney Boylan, *Getting Beyond Balls and Strikes*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/opinion/getting-beyond-balls-and-strikes.html> (emphasis added). At his confirmation hearing, the Chief Justice compared the role of judges to umpires who call balls and strikes. *See id.*

²¹ *Chief Justice Says His Goal Is More Consensus on Court*, ASSOCIATED PRESS (May 22, 2006), <https://www.nytimes.com/2006/05/22/washington/22justice.html>.

²² *See* Noah Feldman, *Supreme Court’s Administrative Law War Previews Abortion Battle*, BLOOMBERG (June 26, 2019), <https://www.bloomberg.com/opinion/articles/2019-06-26/justice-roberts-stare-decisis-and-abortion-matter-in-kisor-case>.

²³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

²⁴ *Id.* at 373.

²⁵ *Sebelius*, 567 U.S. at 530.

²⁶ *See id.* at 529.

to all citizens whose income falls below a certain threshold.”²⁷ In addressing the “soundness” of the policies contained in the ACA he wrote, “That judgment *is entrusted to the Nation’s elected leaders*. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.”²⁸ He continued the opinion by addressing the Supreme Court’s role in deciding this specific controversy and the limits of the government’s power.²⁹ He analyzed the government’s power by looking at the federal government’s enumerated powers in the Constitution and the rights given to individual’s in the Bill of Rights.³⁰ He wrote, “If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.”³¹ The Chief Justice continued to lay out a Constitutional backdrop of Congress’s power under the Commerce Clause, Tax and Spending Clause, and Necessary and Proper Clause while reiterating that the Supreme Court “possess[es] neither the expertise nor the prerogative to make policy judgments.”³²

In deciding the constitutionality of the mandate requiring individuals to buy a minimal level of coverage, and addressing the government’s argument (under the Commerce Clause), the majority held: “The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception . . . [t]he [] mandate forces individuals into commerce [] because they elected to refrain from commercial activity. Such a law cannot be

²⁷ *Id.* at 530–31.

²⁸ *Id.* at 532 (emphasis added). This line from the opinion showcases Chief Justice Roberts using the Supreme Court as a platform for calling “balls and strikes,” like he referred to at his confirmation hearing, and deciding cases on the narrowest possible grounds.

²⁹ *See id.* at 534.

³⁰ *See id.* at 534–35.

³¹ *Sebelius*, 567 U.S. at 535.

³² *Id.* at 536–38. He added that policy judgments are “entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.” *Id.* at 538.

sustained under a clause authorizing Congress to ‘regulate Commerce.’”³³ The same conclusion was found with regard to the government’s argument under the Necessary and Proper Clause,³⁴ however, the government’s power under the Tax and Spending Clause sparked a long discussion.³⁵ Ultimately, the majority found that the mandate was constitutional because the “requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”³⁶

As for the Medicaid expansion, the majority found that to be unconstitutional:

[The Medicaid expansion] of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.³⁷

The Chief Justice concluded the decision by giving a nod to the Framers and their creation of a government of limited powers and the Supreme Court’s duty of enforcing limits on those powers.³⁸ He again noted that any opinion or judgment on the “wisdom of the Affordable Care Act” is reserved for the people.³⁹ This decision was deemed to be the decision that saved Obamacare.⁴⁰

³³ *Id.* at 558.

³⁴ “Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms.” *Id.* at 560.

³⁵ *Sebelius*, 567 U.S. at 563–74.

³⁶ *Id.* at 574.

³⁷ *Id.* at 588.

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ See Joan Biskupic, *John Roberts' Argument for Saving Obamacare Helping Power Legal Challenge*, CNN (July 10, 2019), <https://www.cnn.com/2019/07/10/politics/john-roberts-affordable-care-act-5th-circuit/index.html>.

B. 2018-2019: CENSUS AND CITIZENSHIP, ABORTION, AND ASYLUM

1. *Department of Commerce, et al., v. New York, et al.*⁴¹

“The U.S. Supreme Court [] [] handed President Donald Trump a stinging defeat, blocking his contentious citizenship question planned for the 2020 census because officials gave a ‘contrived’ rationale and prompting Trump to suggest an extraordinary delay in the constitutionally mandated population count.”⁴² This case reached the Supreme Court to resolve the question of whether the Commerce Department’s decision to add a citizenship question to the 2020 census violated federal law.⁴³ This opinion drew an interesting, divided vote as the remaining Justices unanimously agreed with respect to Parts I and II.⁴⁴ The conservative Justices⁴⁵ joined Parts III, IV–B, and IV–C and the liberal Justices⁴⁶ joined Part V, and Justices Ginsburg, Thomas, Sotomayor, Breyer, Kagan, and Kavanaugh all agreed with respect to Part IV–A.⁴⁷ Justice Thomas penned an opinion concurring in part and dissenting in part and was joined by Justices Gorsuch and Kavanaugh.⁴⁸ Justice Alito also wrote a separate opinion concurring in part and dissenting in part.⁴⁹ Lastly, Justice Breyer filed an opinion concurring in part and dissenting in part and was joined by the liberal justices.⁵⁰ The ultimate result of this divided vote was a 5-4 win for the liberal Justices with the Chief Justice on their side.

⁴¹ Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019).

⁴² Lawrence Hurley & Andrew Chung, *Trump Fumes as Supreme Court Blocks Census Citizenship Question*, REUTERS (June 27, 2019, 6:08 AM), <https://www.reuters.com/article/us-usa-court-census/trump-fumes-as-supreme-court-blocks-census-citizenship-question-idUSKCN1TS1BL>.

⁴³ See Kelly Percival & Brianna Cea, *Four Takeaways from the Supreme Court’s Census Citizenship Question Ruling*, BRENNAN CTR. JUST. (July 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/four-takeaways-supreme-courts-census-citizenship-question-ruling>.

⁴⁴ See Dep’t of Commerce v. New York, 139 S. Ct. at 2555.

⁴⁵ The remaining conservative Justices being Justices Thomas, Kavanaugh, Gorsuch, and Alito.

⁴⁶ Liberal Justices being comprised of Justices Kagan, Breyer, Sotomayor, and Ginsburg.

⁴⁷ Dep’t of Commerce v. New York, 139 S. Ct. at 2555.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

Focusing on Part V of the opinion where the Chief Justice was joined by the liberal Justices, the majority came to the conclusion that “the Secretary’s decision must be set aside because it rested on a *pretextual* basis.”⁵¹ Chief Justice Roberts laid the legal backdrop for reviewing the District Court’s decision by noting that “in order to permit meaningful judicial review, an agency must ‘disclose the basis’ of its action . . . [and that] a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.”⁵² The majority agreed with the District Court in that the evidence demonstrated the decision to reinstate a citizenship question on the census “cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.”⁵³ Furthermore, the majority relied on the record evidence in finding that the Secretary took steps to add the citizenship question to the census no more than a week into the position, and there was nothing indicating a connection to VRA enforcement.⁵⁴ Ultimately, the majority concluded the explanation for adding the citizenship question “is incongruent with what the record reveals about the agency’s priorities and decision-making process . . . *we cannot ignore the disconnect between the decision made and the explanation given.*”⁵⁵ Chief Justice Roberts delivered a setback to President Trump’s conservative agenda with this decision as he knew the

⁵¹ *Id.* at 2573 (emphasis added).

⁵² *Id.*

⁵³ *Dep’t of Commerce v. New York*, 139 S. Ct. at 2575.

⁵⁴ *See id.* (“[T]he record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data.”).

⁵⁵ *Id.* (emphasis added). This opinion can be interpreted as Chief Justice Roberts, being one of the few individuals (with the help of the liberal justices on the Supreme Court) with power, actually putting a “check” on the Executive branch’s agenda.

ultimate goal of the census was not to acquire additional data, but to intimidate immigrant populations in an attempt to gain additional Republican seats in the House of Representatives.⁵⁶

2. *Abortion and Asylum*

In 2018, Chief Justice Roberts joined the liberal wing of the Supreme Court to block a Louisiana abortion law that essentially would have left the state with one doctor authorized to perform abortions because the law requires doctors performing abortions to have admitting privileges at nearby hospitals.⁵⁷ The Chief Justice's role in this temporary stay, by way of a 5-4 vote, set the stage for the Supreme Court to hear an argument on the merits of the law in its next term.⁵⁸ Interestingly, the Chief Justice "dissented in the court's last major abortion case in 2016, voting to uphold a Texas law essentially identical to the [Louisiana law]."⁵⁹ The Supreme Court's Order on this issue was brief and drew a dissent from Justice Kavanaugh where he took the position that he would have preferred additional information on the effect of the law.⁶⁰ In disappointing his conservative allies on the Supreme Court, he found praise from Nancy Northup, the president of the Center for Reproductive Rights: "The Supreme Court has stepped in under the wire to protect the rights of Louisiana women[.]"⁶¹ When the Supreme Court does make a decision on the merits of the Louisiana law, it will be interesting to see where the Chief Justice lands as he has defended strict regulations on abortion in the past. For now, he has support in his liberal counterparts on the

⁵⁶ See Hurley & Chung, *supra* note 42 ("Critics have called the citizenship question a Republican ploy to scare immigrants into not taking part in the decennial population count and engineer an undercount in Democratic-leaning areas with high immigrant and Latino populations. That would benefit non-Hispanic whites and help Trump's fellow Republicans gain seats in the U.S. House of Representatives and state legislatures.").

⁵⁷ See *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663 (2019); Adam Liptak, *Supreme Court Blocks Louisiana Abortion Law*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/louisiana-abortion-law-supreme-court.html>.

⁵⁸ See *Supreme Court Blocks Louisiana Abortion Law*, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ See *id.*

⁶¹ *Id.*

Supreme Court in temporarily blocking the Louisiana law – delivering a blow to the conservative agenda.

Last December, Chief Justice Roberts again joined the liberal Justices in dealing another setback to the President’s agenda “by refusing to allow his administration to implement new rules prohibiting asylum for people who cross the U.S. border illegally.”⁶² President Trump has made an effort in his time as the sitting executive to implement sweeping changes to immigration policies and programs. The asylum policy at issue in this case specifically sought out to make “anyone crossing the U.S.-Mexican border outside of an official port of entry ineligible for asylum.”⁶³ Again, in leaving his conservative counterparts on the Supreme Court and joining the liberal wing, Chief Justice Roberts drew support from the American Civil Liberties Union, which challenged the Trump policy. An attorney for the ACLU commented, “The Supreme Court’s decision to leave the asylum ban blocked will save lives and keep vulnerable families and children from persecution. We are pleased the court refused to allow the administration to short-circuit the usual appellate process[.]”⁶⁴ Comparable to the aforementioned stay on Louisiana’s abortion law, the Supreme Court did not rule on the merits of this case, leaving it to move forward in the lower-level courts.⁶⁵

IV. CRITICISM OF THE SUPREME COURTS’ LEGITIMACY AND CHIEF JUSTICE ROBERTS’ DECISION-MAKING

What motivates the Chief Justice to side with the liberal wing of the court when these “hot-button” issues present themselves to the Supreme Court? Some would argue that this is the Chief

⁶² Yet another 5-4 vote decided this issue, inviting additional speculation that Chief Justice Roberts is becoming a Kennedy-like swing vote. Andrew Chung & Lawrence Hurley, *Roberts, Liberal Justices Snub Trump Bid to Enforce Asylum Policy*, REUTERS (Dec. 21, 2018, 2:56 PM), <https://www.reuters.com/article/us-usa-court-asylum/roberts-liberal-justices-snub-trump-bid-to-enforce-asylum-policy-idUSKCN1OK26O>; *see also* Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018).

⁶³ *Roberts, Liberal Justices Snub Trump Bid to Enforce Asylum Policy*, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *See* Adam Liptak, *Supreme Court 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>.

Justice practicing judicial restraint, while others would argue it is the Chief Justice attempting to de-politicize the Supreme Court and preserve his legacy.⁶⁶ Possibly, the Chief Justice has been attempting to de-politicize the Supreme Court since before President Trump took office as evidenced by his opinion “saving” Obamacare 2012.⁶⁷ Since President Trump’s executive reign began, he has introduced an era of partisanship and a highly polarized social and political environment. I would argue that the Chief Justice is attempting to restore faith in the judicial system and legitimize the Supreme Court in this wake of political strife, but only doing so by strategically penning 5-4 majority opinions on hot-button issues on very narrow grounds.⁶⁸ In a way he is a saving grace for the liberal wing of the Supreme Court *and* the Supreme Court’s legitimizer, but only every once in a while and only when it would result in a devastating blow to Democratic ideals. As much as the Chief Justice would like to be immune from the influence of criticism of the Supreme Court and its legitimacy, it is not out of the realm of possibilities that his jurisprudence has been subconsciously shaped to de-politicize the Supreme Court and legitimize the judiciary.

Just what are some of the comments directed at the Chief Justice and his agenda? Brianne Gorod, the Constitutional Accountability Center’s chief counsel said, “Roberts’ recent votes should be considered against the backdrop of Kavanaugh’s confirmation process. The Supreme Court’s reputation is something the chief justice cares a lot about it[.]”⁶⁹ She added that, “He doesn’t want them to be seen as politicians in robes. For a justice like the chief justice who cares very deeply about the institutional legitimacy of the Supreme Court . . . it wouldn’t be at all

⁶⁶ See Quinn, *supra* note 1.

⁶⁷ See *John Roberts Fast Facts*, *supra* note 16.

⁶⁸ We saw narrow decisions in the Affordable Care Act case, the Louisiana abortion law stay, and the citizenship/census case. Each decision was decided on narrow grounds and left the opportunity for re-hearing on the merits or the opportunity to re-write the laws.

⁶⁹ Quinn, *supra* note 1.

surprising that he’s particularly sensitive to those concerns at this moment in time.”⁷⁰ Allison Orr Larsen, William & Mary Law School professor stated, “He’s in between a rock and a hard place . . . He’s desperate to keep the court out of the political fray. He wants to further the message that there are no Obama judges or Trump judges, Bush judges or Clinton judges . . . the court is at a very politically charged moment.”⁷¹ Interestingly, President Trump has been a critic of the Chief Justice and the current term has introduced very ideologically dividing issues for the Supreme Court to decide.⁷² These issues will “test how Roberts treats Republicans in the White House and Congress. His relationship with Trump was rocky from the start . . . [with Trump] call[ing] [Roberts] ‘an absolute disaster’ during the 2016 campaign ‘because he gave us Obamacare.’”⁷³ The Chief Justice has responded to critics by stating: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges[.] What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”⁷⁴ Maybe the Chief Justice is doing his best to do equal right in his role as the Supreme Court’s leader, and that means being the “swing vote” when the situation calls for it.⁷⁵

⁷⁰ *Id.*

⁷¹ Richard Wolf, *His Supreme Court Divided Like the Country, Chief Justice John Roberts Prepares for Outsized Role as Umpire*, USA TODAY (Sept. 25, 2019, 5:00 AM), <https://www.usatoday.com/story/news/politics/2019/09/25/chief-justice-john-roberts-straddles-supreme-courts-left-and-right/2422156001/>.

⁷² The Supreme Court’s October term has the Justices slated to hear cases on partisan gerrymandering, LGBT rights, immigration, gun rights, and healthcare. Brent Kendall & Jess Bravin, *Supreme Court to Weigh Hot-Button Issues Against Tense Political Backdrop*, WALL ST. J. (Oct. 6, 2019, 11:00 AM), <https://www.wsj.com/articles/supreme-court-to-weigh-hot-button-issues-amid-tense-political-backdrop-11570374041>.

⁷³ Richard Wolf, *supra* note 71.

⁷⁴ 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>.

⁷⁵ Maybe it even means preserving his legacy as Chief Justice along the way.

V. CONCLUSION

Chief Justice Roberts appears to be a somewhat of an enigma in terms of his judicial philosophy seeing as he has demonstrated his belief in not having one, but maybe that is his greatest strength.⁷⁶ In his role as the Supreme Court's leader, he has become its legitimizer and defender when its integrity has been called into question by siding with liberal justices in attempts to depoliticize the Court.⁷⁷ By being a proponent of judicial restraint and *stare decisis* he has artfully crafted 5-4 majority opinions on issues ranging from the Affordable Care Act to a citizenship question on the census to prevent devastating blows to the progressive agenda. His enigmatic presence on the Supreme Court has recently led to speculation of him in a new role as the "median" vote: "[Roberts] in the center chair is now at the ideological middle of the bench and plainly more willing to break from his customary allies on the right to forge compromises with the left, particularly in cases with an outsized national impact."⁷⁸ With a solidified conservative majority on the Supreme Court we could see an interesting voting record from the Chief Justice in the coming months on "hot-button" issues in an effort to lower political tensions and secure faith in the judicial system. Only time will tell, but Chief Justice Roberts certainly has left a legacy thus far as a champion for de-politicization of the Supreme Court.

⁷⁶ See *John Roberts Biography*, *supra* note 12.

⁷⁷ See *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, *supra* note 74.

⁷⁸ Joan Biskupic, *How John Roberts Controls the Supreme Court*, CNN (July 2, 2019), <https://www.cnn.com/2019/07/02/politics/supreme-court-john-roberts-control/index.html>.

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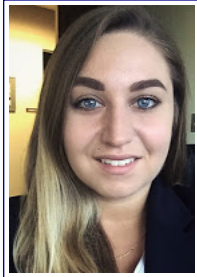
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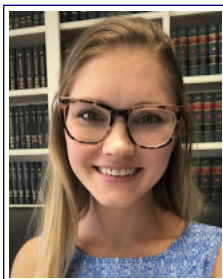
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SUNDAY, FEBRUARY 24, 2019

The Chief Justices' Marriage to Stare Decisis

An Analysis of Burger's, Rehnquist's, and Roberts' Relationship with Precedent

By **Kieran T. Murphy**



Kieran Murphy, a second year student at Albany Law School, is a member of the Albany Law Review, an associate member of the Anthony V. Cardona '70 Moot Court Board, a Dean Thomas Sponsler honors teaching fellow, and President of the Class of 2020.

Kieran has served as a judicial extern both to the Hon. Thomas J. McAvoy at the United States District Court for the Northern District of New York, and to the Hon. Judge John C. Egan, Jr. at the NYS Supreme Court, Appellate Division, Third

Department. He has received multiple moot court awards, including the Hon. Judith S. Kaye Advocate Award from the New York State Bar Association. Prior to attending law school, Kieran earned degrees in Integrative Neuroscience and Economics from Binghamton University, graduating in 2017. This summer, Kieran will be at the law firm of Milbank, Tweed, Hadley & McCloy, LLP in Manhattan as a summer associate. This paper was prepared for Prof. Bonventre's Supreme Court Seminar in the fall of 2018.

"I don't get to pick and choose which Supreme Court precedents I get to follow . . . I follow them all." During his controversial nomination process, now-Justice Brett Kavanaugh sat directly in the lap of *stare decisis* while answering Senate Judiciary Committee questions—a fallback that has become commonplace for recent judicial nominees.

For decades, Supreme Court Justices have relied on *stare decisis* to skirt difficult questions concerning personal or political views on case law, as well as to maintain a neutral image of balance at the judiciary. What becomes most important, however, is not how precedent is used as a talking point during the confirmation process, but how the doctrine plays out on the Court after a certain Justice has been confirmed.

The *stare decisis* doctrine has monitored the Court for hundreds of years, dating back to eighteenth century English common law. *Stare decisis et non quieta moevre*, translated to mean "to stand by matters that have been decided and not to disturb what is tranquil" is the idea that, in order to maintain uniformity among changing courts, prior decisions must stand as final word. While clear in translation, most courts have maintained that, while *stare decisis* is a vital element of judicial decision making, it "is a principle of policy and not a mechanical formula to the adherence to the latest decision." As such,

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**The Chief Justices' Marriage to *Stare Decisis*:
An Analysis of Burger's, Rehnquist's, and Roberts'
Relationship with Precedent**

By Kieran T. Murphy
Albany Law School, Class of 2020
Supreme Court Watcher Seminar, Fall 2018
Prof. Vincent M. Bonventre

I. INTRODUCTION

“I don’t get to pick and choose which Supreme Court precedents I get to follow . . . I follow them all.”¹ During his controversial nomination process, now-Justice Brett Kavanaugh sat directly in the lap of *stare decisis* while answering Senate Judiciary Committee questions—a fallback that has become commonplace for recent judicial nominees.² For decades, Supreme Court Justices have relied on *stare decisis* to skirt difficult questions concerning personal or political views on case law, as well as to maintain a neutral image of balance at the judiciary.³ What becomes most important, however, is not how precedent is used as a talking point during the confirmation process, but how the doctrine plays out on the Court after a certain Justice has been confirmed.

The *stare decisis* doctrine has monitored the Court for hundreds of years, dating back to eighteenth century English common law.⁴ The importance of this principle was backed by influencers such as Alexander Hamilton and James Madison at the Supreme Court’s creation, and has been heavily debated by legal scholars in academia for years.⁵ *Stare decisis et non quieta moevre*, translated to mean “to stand by matters that have been decided and not to disturb what is tranquil” is the idea that, in order to maintain uniformity among changing Courts, prior

¹See Seung Min Kim, Ann E. Marimow, Robert Barnes & Elise Viebeck, *Supreme Court Nominee Brett Kavanaugh Won’t Commit to Removing Himself from Cases Direct Affecting Trump*, WASHINGTON POST (Sept. 5, 2018), https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-senate-grilling/2018/09/05/97fda1ac-b081-11e8-9a6a-565d92a3585d_story.html?utm_term=.e73577ca321b.

²See generally Senate Judiciary Committee Hearing on the Nomination of The Honorable Brett M. Kavanaugh To Be An Associate Justice of the United States, CQ TRANSCRIPTIONS (2018); see also Susan Jones, *Gorsuch: ‘For a Judge, Precedent is a Very Important Thing*, CNSNEWS (Mar. 21, 2017), <https://www.cnsnews.com/news/article/susan-jones/gorsuch-judge-precedent-very-important-thing> (for a showing of how Justice Gorsuch fell back on precedent during his confirmation hearing); see also Ari Shapiro, *Sotomayor Differs with Obama on ‘Empathy’ Issue*, NPR (Jul. 14, 2009), <https://www.npr.org/templates/story/story.php?storyId=106569335&refresh=true> (for a showing of how Justice Sotomayor relied on precedent in her confirmation hearing).

³*Id.*

⁴See Derigan Silver & Dan V. Kozlowski, *Preserving the Law’s Coherence: Citizens United v. FEC and Stare Decisis*, 21 COMM. L. & POL’Y 39, 45 (2016).

⁵*Id.* at 46.

decisions must stand as final word.⁶ While clear in translation, most Courts have maintained that while *stare decisis* is a vital element of judicial decision making, it “is a principle of policy and not a mechanical formula to the adherence to the latest decision.”⁷ As such, interpretations of the doctrine at the federal level have been severely scattered due to its inherent flexibility.⁸ Nevertheless, hesitancy in overturning case law has been critical to a strong judicial branch and contributes to important democratic functions.⁹

The dichotomy that exists between the importance of the Court’s marriage to precedent and the obvious, fast-changing social policies of the 20th and 21st centuries is an interesting one. While the Court’s foundational philosophy revolves around a need to maintain stability in decision making, the fast-changing social construct of today’s world makes doing so nearly impossible in certain situations.¹⁰ Aforementioned, the implementation of *stare decisis* in the Justices chambers as a result of this ongoing social pressure is much more important than their pre-written speeches on Capitol Hill. As such, this paper will focus on the doctrine’s evolution as it relates to three separate, recent Courts: (1) the Burger Court, (2) the Rehnquist Court, and (3) the Roberts Court. In an attempt to make sense of the Supreme Court’s position on the doctrine within their chambers’ walls, this paper will analyze how each Chief Justice stuck with, or strayed from, *stare decisis* in their decisions to uphold or overturn certain precedent. This

⁶John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFFALO L. REV. 187, 189 (1994) (quoting DICTIONARY OF FOREIGN PHRASES AND ABBREVIATIONS 187 (Kevin Guinach trans., 3d ed. 1983)).

⁷See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995).

⁸*Burnet v. Colo. Oil & Gas Co.*, 285 U.S. 393, 406-06 (1932) (Brandeis, J., dissenting) (“Stare decisis is not . . . a universal, inexorable command. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible.”).

⁹*Id.*

¹⁰See Michael Stokes Paulsen, *Precedent & the Roberts Court: Perspectives on the Doctrine of Stare Decisis: Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?*, 86 N.C.L. REV. 1165, 1194 (2008).

paper will first analyze the doctrine's execution among the individuals in *seriatim*, and will then briefly assess the Courts together to establish any commonality, should there be any.

II. FORMER CHIEF JUSTICE WARREN E. BURGER

Former Chief Justice Burger's Court is an extremely fascinating one due to its transitional nature.¹¹ Burger "inherited a court still dominated by the Warren majority," and due to Burger's attempt to avoid the palpable liberalism associated with the Warren Court, the Burger Court is considered by many scholars to be much more "moderate" in practice.¹² The Warren Court established a reputation whereby it was typical to overrule historic precedent, and as such, it received an enormous amount of publicity.¹³ That same attention followed Chief Justice Burger to his Court, as all eyes were on him to see how reactive the rulings from his bench would be in terms of upholding the Warren Court's arguable judicial activism.¹⁴

The attention the Burger Court received, paired with pressure from a conservative leadership with high expectations, created a Court whose reputation became one of tired, divided, overworked individuals.¹⁵ It was unclear as to whether the nine justices were going to comply with the activism set forth by the Warren Court or give way to the pressure to overturn.¹⁶ As such, there seems to be no better way to assess Burger's own understanding of *stare decisis* than to analyze

how he handled certain landmark Warren Court decisions as they came before him.

¹¹Phillip Craig Zane, *An Interpretation of the Jurisprudence of Chief Justice Warren Burger*, 1995 UTAH L. REV. 975, 976 (1995).

¹²*Id.*

¹³See e.g. Chris Schmidt, *The Forgotten Backlash Against the Warren Court*, IIT CHICAGO-KENT SCHOOL OF LAW SCOTUS NOW (Dec. 30, 2014), <http://blogs.kentlaw.iit.edu/iscotus/forgotten-backlash-warren-court/>.

¹⁴ZANE, *supra* note 10, at 976.

¹⁵See Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1450 (1987).

¹⁶A.E. Dick Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 465–67 (1972) (warning that the Burger Court would overturn Warren Court legacy).

A. *MIRANDA V. ARIZONA & MAPP V. OHIO*

*Miranda v. Arizona*¹⁷ was one of many major cases handed down during the Warren Court's tenure. The decision, which addressed four separate cases concerning custodial interrogations, held that law enforcement officers were required to advise suspects of their Fifth Amendment right to remain silent and obtain an attorney during interrogations while in police custody.¹⁸ Although *Miranda* is precedent that is still widely used in litigation today, Chief Justice Burger was nevertheless presented with opportunities to overturn the case while he was on the bench.¹⁹ For example, in *Harris v. New York*,²⁰ a case involving a post-arrest confession that was used for prior inconsistent statement impeachment purposes by the prosecution at trial, the Chief Justice authored a majority opinion that explicitly declined to entertain a *Miranda* overrule.²¹ Instead, Burger "held that a statement otherwise inadmissible under the *Miranda* rule could be used to impeach a defendant's credibility at trial."²² This ruling narrowed the scope of the 1966 case, eliminating a need to address its constitutionality generally. In other cases, such as *New York v. Quarles*²³ and *Oregon v. Elstad*²⁴, Burger joined in majority opinions establishing the public-safety exception to *Miranda*, and that "a confession obtained in violation of *Miranda* did not taint a second, valid confession."²⁵ From these opinions, we can see the Chief Justice

¹⁷384 U.S. 436 (1966).

¹⁸*Id.* at 467. ("there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

¹⁹See James L. Volling, *Warren E. Burger: An Independent Pragmatist Remembered*, 22 WM. MITCHELL L. REV. 39, 44 (1996).

²⁰401 U.S. 222 (1971).

²¹*Id.* at 226.

²²VOLLING, *supra* note 18, at 43–44.

²³467 U.S. 649 (1984).

²⁴470 U.S. 298 (1985).

²⁵VOLLING, *supra* note 18, at 44.

often narrowly tailored precedent to avoid a grapple with *stare decisis*—showing a generally preference to “leave the rulings intact.”²⁶

*Mapp v. Ohio*²⁷ was yet another Warren landmark decision that the Burger Court had the opportunity to address. In *Mapp*, a defendant was convicted of being in possession of obscene material after an illegal police search.²⁸ The Warren Court, speaking through Justice Clark, held that all evidence found by searches and seizures in violation of the fourth amendment was inadmissible in a state court and that the federal exclusionary rule, “which forbade the use of unconstitutionally obtained evidence in federal court, was also applicable to the states.”²⁹ This decision left the judiciary in a state of ambiguity, launching future Justices on a troubled path into how and when to apply the exclusionary rule.³⁰ This ambiguity did not sit well with Chief Justice Burger, who joined the majority in *Mapp*’s sister opinion of *United States v. Leon*.³¹ In *Leon*, Burger limited the exclusionary rule by establishing “good faith exceptions” and asserted that the rule cannot deter police where they act in good faith on a warrant issued by a judge.³² Here, we see yet another example of the former Chief Justice narrowing scope rather than overturning as a means of complying with *stare decisis*.

B. BROWN V. BD. OF ED.

For purposes of this discussion, it should be recognized that Burger’s appreciation for *stare decisis* and preference to stick with precedent was not overcome by political influence.

Arguably the most influential and most well-cited case from the Warren Court’s tenure is *Brown*

²⁶*Id.* at 43.

²⁷367 U.S. 643 (1961).

²⁸*Id.* at 645.

²⁹See Brian Duignan, *Mapp v. Ohio*, BRITANNICA (last visited Dec. 18, 2018), <https://www.britannica.com/event/Mapp-v-Ohio>.

³⁰*Id.*

³¹468 U.S. 897 (1984).

³²*Id.* at 925.

*v. Bd of Ed.*³³ Eyes were on the Burger Court during the early stages of his tenure to see how the comparatively less liberal Justice would handle such a monumental case. In 1971, Burger was presented with an opportunity to assess the constitutionality of the Warren Court's decision by tackling *Swann v. Charlotte-Mecklenburg Board of Ed.*³⁴ In that case, the Court wrestled with whether to approve busing and redrawing of district lines as ways to integrate public schools.³⁵ Burger wrote for a unanimous court, affirming *Brown*, and declared that "local school officials could make racial integration a priority even if it did not improve education outcomes because it helped 'to prepare students to live in a pluralistic society.'"³⁶

C. TO CONCLUDE

The surmounting pressure on the Burger Court to reconsider some activist decisions from the Warren Court, coupled with the Court's reputation for being overworked and tired, led Chief Justice Burger to narrow the scope of cases rather than overrule them. We can see clearly by the cases discussed above that Burger had an implicative appreciation for the *stare decisis* principle. Accordingly, it seems that judicial precedent was much more important to the judge than any sort of political pressure from other branches of government. For instance, in *U.S. v. Nixon*³⁷, Burger's Court outwardly defeated presidential outcry when it held that neither the separation of powers doctrine, nor the generalized need for confidentiality of high-level communications could sustain an absolute presidential privilege.³⁸ This opinion stunned America and led to the impeachment of the same president that appointed Burger only years earlier.³⁹ While not

³³347 U.S. 483 (1954).

³⁴401 U.S. 1 (1971).

³⁵*Id.* at 30.

³⁶See Juan Williams, *Don't Mourn Brown v. Board of Education*, NEW YORK TIMES (Jun. 29, 2007) <https://www.nytimes.com/2007/06/29/opinion/29williams.html> (quoting *Swann*, 401 U.S. 1 at 16).

³⁷418 U.S. 683 (1974).

³⁸*Id.* at 714–15.

³⁹See NCC Staff, *Looking Back: The Supreme Court Decision that Ended Nixon's Presidency*, NATIONAL CONSTITUTION CENTER (Jul. 24, 2018), <https://constitutioncenter.org/blog/anniversary-of-united-states-v-nixon> ("As

explicitly discussed *ad nauseam* in his opinions, Burger nonetheless spent his tenure establishing a reputation for precedent appreciation by way of defining outer limits.

III. FORMER CHIEF JUSTICE WILLIAM REHNQUIST

While former Chief Justice Burger's views on the *stare decisis* seem to be much more implicative in nature, former Chief Justice Rehnquist's views, by contrast, are seemingly much more overt.⁴⁰ Rehnquist has received criticism from scholars concerning his position on *stare decisis*, with some considering him to be "in the forefront of efforts to overrule prior decisions on a broad range of issues, including, but not limited to, abortion rights, the death penalty, and federalism."⁴¹ Further research into these accusations, however, does not comport with how dramatic some academics attempt to make Rehnquist's respect (or lack thereof) for precedent seem.⁴²

While it is worth noting that "in the 1991 term, the Rehnquist Court overturned more precedent than any court before it,"⁴³ it is significant that upon his appointment to the Chief Justice seat, Rehnquist was in the midst of a drastically changing Court.⁴⁴ The conservative slate of judges that followed Rehnquist to the high Court ascended rapidly, and, as "history indicates[,] the Court has frequently reversed precedent when changing majorities reassess old law in new cases."⁴⁵ With an extremely controversial dissent in *Planned Parenthood v. Casey*,⁴⁶

the Supreme Court drama was unfolding, the House Judiciary Committee worked on three articles of impeachment against President Nixon. The evidence on the tapes was critical to the impending House impeachment proceedings against Nixon.")

⁴⁰See generally *infra*, part II.

⁴¹Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669, 669 (1994).

⁴²See e.g. Carolyn D. Richmond, *The Rehnquist Court: What is in Store for Constitutional Law Precedent?*, 39 N.Y.L. SCH. L. REV. 511, 512 (1994) (asserting that the Rehnquist Court has led jurisprudence to a place where *stare decisis* can no longer be used as an indicator).

⁴³William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 76 (2002).

⁴⁴See SILVER & KOZLOWSKI, *supra* note 4, at 52.

⁴⁵*Id.*

⁴⁶505 U.S. 833 (1992).

as well as deciding to overturn two longstanding cases in *Payne v. Tennessee*,⁴⁷ it seems easy to pin an anti-precedent tail on Rehnquist. However, Rehnquist joined and authored a multitude of decisions that explained an actual appreciation for the doctrine, making his conservative legacy on *stare decisis* ambiguous at best.

A. *PATTERSON V. MCCLEAN CREDIT UNION*

In 1989, the Court grappled with whether an employee, limited to a specific type of evidence in attempting to prove an employer's stated nondiscriminatory reason for its conduct, was pretext.⁴⁸ The opinion, authored by Justice Kennedy and joined by Rehnquist, affirmed that once an employee makes a *prima facie* showing of discrimination, the burden shifts to the employer to offer a nondiscriminatory reason for its action against the employee.⁴⁹ This case is a curious one because it was originally granted certiorari for the Justices to "determine the appropriateness of the specific jury instruction given on [a] promotion claim, and to consider whether racial harassment was actionable" under 42 U.S.C. § 1981.⁵⁰ However, oral argument for this issue was followed with a request by the Court for briefing on the question of "whether the Court should overrule *Runyon v. McCrary*."⁵¹ This is significant because while we see the opinions authored by former Chief Justice Burger were ones that attempted to avoid dealing with *stare decisis*,⁵² the *sua sponte* decision in *Patterson* indicates that the Rehnquist Court addressed *stare decisis* issues head on, even when they weren't asked to do so.

⁴⁷501 U.S. 808 (1991).

⁴⁸*See generally* *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989).

⁴⁹*Id.* at 187 (internal citations omitted) ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. In doing so, petitioner is not limited to presenting evidence of a certain type. This is where the District Court erred.")

⁵⁰MALTZ, *supra* note 40, at 670.

⁵¹*Id.* at 670 (citing *Runyon v. McCrary*, 427, U.S. 160 (1976)).

⁵²*See generally supra* II(a).

In a 5-4 decision, the Rehnquist Court declined to overrule *Runyon*, which held that § 1981 reached to cases concerning private racial discrimination.⁵³ Significant about this decision was that Rehnquist dissented from the majority in the *Runyon* case, for the same reasons the four justices dissented in *Patterson*.⁵⁴ Contradicting a previous dissent on similar merits seems surprising, especially when given the outright opportunity to overrule the previous loss by simply voting the opposite way. Accordingly, it seems that Rehnquist's vote with the majority in *Patterson* shows an appreciation for precedent, as there seems to be no other explanation for such a bizarre contradiction.⁵⁵

B. *GEORGIA V. MCCOLLUM*

Another unexpected example of Rehnquist's adherence to precedent comes from his decision to join the majority in *McCollum*.⁵⁶ The case, which held that an exercise of peremptory challenges in a racially discriminatory manner violated the Equal Protection Clause, adhered to the precedent from *Edmonson v. Leesville Concrete Co.*,⁵⁷ a case in which Chief Justice Rehnquist dissented.⁵⁸ Even though Rehnquist joined the majority in *McCollum*, he authored a separate, short concurrence addressing his decision to stray from his previous dissent:

I was in dissent in *Edmonson v. Leesville Concrete Co.*, and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the issue of "state action" under the Fourteenth Amendment. I therefore join the opinion of the Court.⁵⁹

⁵³*Runyon*, 427 U.S. 160 at 160.

⁵⁴*Id.* at 192 ("The majority's belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive. I therefore respectfully dissent.").

⁵⁵MALTZ, *supra* note 40, at 671 ("[B]y following a precedent with which he disagrees, the judge is sacrificing an opportunity to advance his own political agenda, choosing instead to enhance the authority of the judge or judges who decided the precedential case").

⁵⁶505 U.S. 42, S. Ct. 2348 (1992).

⁵⁷500 U.S. 614 (1991).

⁵⁸*Id.* at 631 ("Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.").

⁵⁹*See McCollum*, 505 U.S. 42 at 59–60 (internal citations omitted).

This decision to author a separate concurrence recognizing the skew seems momentous in establishing Rehnquist's recognition of precedent's importance. The concurrence in *McCullum* is an explicit showing of Rehnquist's appreciation for *stare decisis*, even when conflicted with his own personal agenda.

C. To CONCLUDE

Aforementioned, the Rehnquist Court is tagged by many as a Court that frequently disregarded precedent.⁶⁰ While omitted from lengthy discussion in this paper, the Rehnquist Court was responsible for overruling a vast amount of cases including *Swift Co. v. Wickham*⁶¹ and *Bowers v. Hardwick*.⁶² Also noteworthy here is arguably the most overt discussion of *stare decisis* in Supreme Court history: *Planned Parenthood v. Casey*.⁶³ While the majority of Rehnquist's Court sided with precedent by affirming *Roe*,⁶⁴ Rehnquist himself was partially in dissent as a proponent for overturning the case.⁶⁵ Nonetheless, after diving deeper into cases that didn't get as much political attention, it seems that Rehnquist's views on precedent are unique due to surprising decisions to disregard his own dissents.

IV. CHIEF JUSTICE JOHN ROBERTS

As the Court's Chief since 2005, John Roberts has been at the forefront of some of America's most modernly contested judicial opinions.⁶⁶ Similar to Justice Kavanaugh, discussed at Section I, *infra*, John Roberts's confirmation hearing revolved mostly around his views of

⁶⁰See RICHMOND, *supra* note 41.

⁶¹382 U.S. 111 (1965).

⁶²478 U.S. 186 (1986).

⁶³505 U.S. 833 (1992).

⁶⁴410 U.S. 113 (1973).

⁶⁵*Casey*, 505 U.S. 833 at 944 ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

⁶⁶See Scott Chuisano, *Landmark Decisions During John Roberts' Decade as Chief Justice*, NEW YORK DAILY NEWS (Sept. 29, 2015), <https://www.nydailynews.com/news/national/landmark-cases-john-roberts-decade-chief-justice-article-1.2378637>.

stare decisis.⁶⁷ While emphasizing that the doctrine “serves as an important check on judges,” the Chief Justice followed preaching the doctrine’s importance by asserting that “*stare decisis* is not an inexorable command.”⁶⁸ Following this testimony, it wasn’t evident how the new Chief Justice was going to view commanding authority and up until today, clarity on this issue has not been fully established. While the future of the Roberts Court is still very much undetermined, an assessment into a few decisions he and his Court have already handed down may serve as an appropriate predictor into how the Justice manages precedent.

A. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

It would be a mistake not to begin with arguably one of the most controversial cases from Roberts’s tenure thus far. In *Citizens United*⁶⁹, the Court was responsible for determining, *inter alia*, whether corporate funding of independent political broadcasts in candidate elections can be limited.⁷⁰ A 5-4 decision written by Justice Kennedy concluded that it could not be limited, with Roberts filing a separate concurring opinion with Justice Alito.⁷¹ By reaching the decision it did, the Court overruled portions of *McConnell v. FEC*⁷² and the entirety of *Austin v. Michigan Chamber of Commerce*.⁷³

Regardless of the fact that the majority opinion did not comply with *stare decisis*, Roberts’s concurrence addressed the issue expressly.⁷⁴ Justice Roberts laid out a multitude of cases by which the Court had expressly ruled against precedent in order to justify his decision to

⁶⁷Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2005).

⁶⁸*Id.*

⁶⁹558 U.S. 310 (2010)

⁷⁰*Id.* (holding that political speech is indispensable to democracy and that indispensable right does not change just because the speech comes from a corporation).

⁷¹*Id.* at 311.

⁷²540 U.S. 93 (2003).

⁷³494 U.S. 652 (1990).

⁷⁴*See Citizens United* 558 U.S. 310 at 370.

ultimately do so in *Citizens United*.⁷⁵ Specifically, Roberts argued that “*stare decisis* . . . counsels deference to past mistakes, but provides no justification for making new ones” and asserted that a narrow ruling could not accompany the evident constitutional issues that were associated with *Citizens United*.⁷⁶ By filing this concurrence, it was clearly important to Roberts to show the American people they can still feel secure that the Court complies with precedent. In fact, he referred to *stare decisis* as the “preferred course” and asserted that “departures from precedent are inappropriate in the absence of a special justification.”⁷⁷ However, while the recognition of the principle is commendable, the concurrence was followed by intense political backlash, with critics “predict[ing] that the Roberts Court will continue to weaken the doctrine of *stare decisis*” as a result of *Citizens United*.⁷⁸ This prediction is not completely unsupported; as there have been other recent instances the Chief Justice has chosen to outwardly neglect precedent.

B. *JANUS V. AFCSME*

The most recent overturn handed down from the Roberts Court was in *Janus*⁷⁹ when the Court, in a 5-4 decision, overturned *Abood v. Detroit Bd. of Ed.*⁸⁰ The opinion, published by Justice Alito and joined by Roberts, examined the constitutionality of mandatory agency fee requirements placed on the shoulders of non-members of unions—holding that an Illinois statute mandating public employees to subsidize a union in which they did not belong violated “free speech rights . . . by compelling them to subsidize private speech on matters of substantial public

⁷⁵*Id.* at 372–73.

⁷⁶*Id.* at 384.

⁷⁷*Id.* at 377.

⁷⁸See David L. Berland, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court From Further Modification of the Search Incident to Arrest Exception*, 2011 U. ILL. L. REV. 695, 707 (2011).

⁷⁹138 S. Ct. 2448 (2018).

⁸⁰431 U.S. 209 (1977).

concern.”⁸¹ Public outcry following *Janus* was vast and was debated heavily by both Democratic and Republican political pundits.⁸² Some argued that mandatory collective bargaining precedent was always associated with controversial policy concerns; while others claimed *Janus* will inevitably force “free-rider” issues on the economy.⁸³

Regardless of the political scene surrounding the opinion, the decision to stray from *stare decisis* was a main area of attack for the *Janus* dissenters. Justice Kagan authored a dissent which argued heavily for the Court to consider the precedent of *Abood* and how the implications of ignoring such a longstanding history could have grave implications on the Court’s image.⁸⁴ Nonetheless, Alito did address the decision not to adhere to precedent by falling back on the case of *Harris v. Quinn*.⁸⁵ There, the Court juggled with whether to overturn *Abood*, noting that the precedent had “questionable foundations” with “administrative problems.”⁸⁶ Using that case, Alito argued that the unworkability of *Abood* was evident for years prior to *Janus* and that the historic unworkability of the case rendered its overturn reasonably inevitable.⁸⁷ With no separate concurrence from Roberts, like in *Citizens United*, one can only assume that he agreed with Alito’s reasoning as to why *Abood* should be thrown out. As such, in this instance, Roberts is implicatively relying on historic predictability to justify ignoring *stare decisis*.

D. To CONCLUDE

⁸¹See *Janus*, 138 S. Ct. 2448 at 2460.

⁸²See Alana Semuels, *Is This the End of Public-Sector Unions in America?* THE ATLANTIC (2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/>; see also Brian Miller, *Unpacking the Janus Decision* FORBES (2018), <https://www.forbes.com/sites/briankmiller/2018/06/27/unpacking-the-janus-decision/>

⁸³*Id.*

⁸⁴See *Janus*, 138 S. Ct. 2448 at 2487 (“[The *Abood*] holding fit comfortably with this Court’s general framework for evaluating claims that a condition of public employment violates the First Amendment.”).

⁸⁵134 S. Ct. 2618 (2014).

⁸⁶*Id.* at 2621.

⁸⁷See *Janus*, 138 S. Ct. 2448 at 2479 (“as we explained in *Harris*, *Abood* was poorly reasoned).

By recognizing the importance of the doctrine when ruling in *Citizens United*, and voting with the majority's reasoning in *Janus*, the assessment that Roberts "appears to view stare decisis as an evolving process" seems to be most accurate.⁸⁸ While Roberts clearly is a proponent (like Burger) in tailoring cases to their narrowest boundaries in order to avoid constitutional questions of precedent⁸⁹, he seems to be transforming the *stare decisis* doctrine in a manner that is quite unconventional. While Roberts very clearly believes in the importance of the doctrine, he doesn't seem to utilize precedent in the strict way we have grown accustomed. Thus, with the introduction of another conservative to his Court, it will be interesting to see how the *stare decisis* principle plays out in our modern Court's future.

V. CONCLUSION: ASSESSING COMMONALITY BETWEEN THE COURTS

As is evident from the foregoing, our three most modern Chief Justices have viewed *stare decisis* principles in substantially dissimilar lights. While the recognition of the doctrine's importance is evident in all three of their tenures, the extent to which that recognition reaches is likely to remain a mystery. As time progresses, however, it seems more evident that the Justices are willing to lay their interpretations on precedent outright rather than rely on decisions to implicatively define their viewpoints. For instance, with the Court's shift from Burger to Rehnquist, we saw opinions evolve to include intensive discussions about *stare decisis* generally.⁹⁰ In fact "a 1991 study found that more than 80% of constitutional arguments raised

⁸⁸See STOKES PAULSEN, *supra* note 9, at 1276.

⁸⁹See *e.g.* *Citizens United*, 558 U.S. 310 at 384 (explaining that the Court had no narrower grounds upon which to rule, and emphasizing that the Court should avoid constitutional issues when at all possible); *see also* Scott Looper, *Reading Roberts: A Critical Framework for Analyzing the Supreme Court's Decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 46 HOUS. L. REV. 177, n.212 ("Unless Roberts convinced the Court to agree on narrow, unanimous opinions that did not affirm bad precedents, he permitted the majority to overturn them."); *see also* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Where Roberts narrowly interpreted the gender-equity provisions of the Civil Rights Act).

⁹⁰See *e.g.* *Casey*, 505 U.S. 833 at 850.

in majority opinions written by . . . Rehnquist were based on precedent.”⁹¹ Discussed above in sections II & III, *infra*, Burger’s assessment of *stare decisis* came in a much more subtle, implicative form when compared to Rehnquist. Interestingly, this shift to more transparent assessments of *stare decisis* was paired with a higher willingness to overturn case law.⁹²

In terms of common philosophy between the three Justices and *stare decisis*, it seems only slight characteristics are shared across Courts. Burger employs, quite frequently, a philosophy that could be associated more with “constitutional avoidance”—meaning, he attacked many Constitutional issues by narrowing scope rather than overturning them completely.⁹³ We can see similar qualities in Roberts if we take the language of his *Citizens United* concurrence on its face.⁹⁴ However, it is noteworthy that while Roberts seems to be preaching constitutional avoidance, he is doing so in a controversial case where his ultimate decision was to stray from precedent.⁹⁵ It cannot be said that Rehnquist fills a similar philosophical mold, mainly because of his reputational frequency to overturn.⁹⁶ However, the anti-precedent reputation associated with Rehnquist is differentiated well with his appreciation for the doctrine by means of dissociating from previously authored dissents.⁹⁷

While their separate appreciations for the doctrine are seen in the language of their famous opinions, the individual relationships that the Chief Justices had with *stare decisis* is seemingly quite different. Our most recent three Courts have had a Chief Justice who fell on the heels of constitutional avoidance, a Chief Justice who contradicted his own dissents, and now has

⁹¹See SILVER & KOZLOWSKI, *supra* note 4, at 44.

⁹²*Id.*

⁹³For discussion on the relationship with the Burger Court and constitutional avoidance, see Jonathan D. Urick, *Chevron and Constitutional Doubt*, 99 VA. L. REV. 375, 398 (2013).

⁹⁴See *Citizens United*, 558 U.S. 310 at 384.

⁹⁵*Id.*

⁹⁶MALTZ, *supra* note 40, at 670.

⁹⁷See Section III (A) & (B), *infra*, for discussion.

a Chief Justice who seemingly views the *stare decisis* principles to be evolving.⁹⁸ While the Supreme Court's future regarding precedent may be foggy, the stability and importance associated with *stare decisis* is still clearly appreciated and well-respected by our modern Court's leaders.

⁹⁸See STOKES PAULSEN, *supra* note 9, at 1276.

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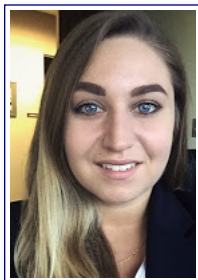
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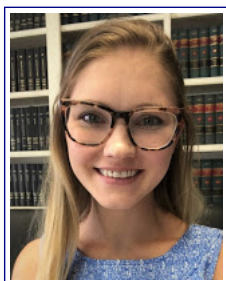
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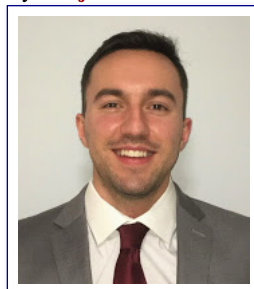
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WEDNESDAY, JUNE 17, 2020

Justice Kagan: Are There Possible Conservative Undercurrents in Her, Otherwise, Liberal “Stream of Tendency?”

By **Benjamin J. Wisher**



Benjamin Wisher, a 2020 graduate of Albany Law School, was an Associate Editor of the Albany Law Review, a Dean Thomas Sponsler Honors Teaching Fellow, and a Research Assistant for Professor Patrick M. Connors. Prior to attending law school, Benjamin earned a bachelor's degree in Criminal Justice with a minor in Sociology from SUNY Albany.

After his first year of law school, Benjamin was a Summer Law Clerk for Rivkin Radler LLP in their Albany office. During his second year of law school, Benjamin was a Judicial Extern to the Honorable Mae A. D'Agostino, District Court Judge for the United States District Court for the Northern District of New York. Thereafter, Benjamin was a Summer Associate for Barclay Damon LLP in its Commercial Litigation practice group. Currently preparing for the bar exam, Benjamin looks forward to working at Barclay Damon LLP full-time.

The law is imperfect. Imperfect because it leaves “gaps” to be filled and “ambiguities” to be cleared. So, how do judges and justices rectify the law’s shortcomings? As Justice Cardozo theorized (expounding on Justice Holmes’ earlier writings), in each of us, justices and judges included, lies a “stream of tendency.” This “stream,” comprised of, both, subconscious and conscious “tides and currents,” give “coherence and direction to thought and action.” For judges and justices, this results in judicial decisions.

Today, there is much ado about how the justices on the United States Supreme Court are perceived to be filling the law’s “gaps” with their respective political ideologies. However, what is far less known, and surely far more interesting, are the instances in which the Justices buck their political leanings and vote against their typical voting bloc.

This paper applies these principles to one Supreme Court Justice: Elena Kagan. Upon an examination of the instances in which Justice Kagan goes rogue on her liberal colleagues, a conservative “undercurrent” within her otherwise liberal “stream of tendency” can be deduced. As evidenced by the research within, this paper concludes that Justice Kagan maintains a conservative “undercurrent” which flows against criminal defendants accused of heinous crimes against young women.

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**Justice Kagan: Are There Possible Conservative
Undercurrents in Her, Otherwise, Liberal “Stream of
Tendency?”**

By: Benjamin J. Wisher
Albany Law School, Class of 2020
Supreme Court Watch Seminar, Fall 2019
Prof. Vincent Bonventre

I. Introduction

As Justice Cardozo deduced, the law is imperfect – imperfect because it is manmade; imperfect because it leaves “gaps to be filled” and “doubts and ambiguities to be cleared.”¹ But how do judges and Justices fill these “gaps” when deciding cases? As Justice Holmes eloquently theorized:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.²

Simply, each person is affected by the conscious and subconscious, both of which, individually and when combined, give “coherence and direction to thought and action.”³ In other words, in each of us exists a “stream of tendency” that produces “tides and currents” which engulf all men.⁴ This “stream,” Cardozo mentioned, is one that “judges cannot escape . . . any more than other mortals.”⁵ And for judges, this means that their decisions, just as Cardozo and Holmes articulated, are reliant on more than the law.⁶

Nowhere is this reality more apparent than the United States Supreme Court, where the cases focus on the law’s “gaps” and “ambiguities” requiring each Justice to routinely utilize and, therefore, expose his or her “stream of tendency.” Simply by culminating a Justice’s votes, one

¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), available at https://www.constitution.org/cmt/cardozo/jud_proc.htm.

² Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 45, 465–66 (1897).

³ CARDOZO, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *See id.*; Holmes, *supra* note 2, at 465–66.

can apprehend that Justice's general voting tendency. And of course, such studies have been conducted.⁷

However, what is much less studied and far less known are the instances in which a certain Justice votes in contravention of their general "stream of tendency" and the reasons why.⁸ Such knowledge would have, both, practical and academic value. Here, the ensuing research will apprehend this idea as to one Supreme Court Justice: Elena Kagan.

II. Analysis

To effectively ascertain Justice Kagan's "undercurrents," the ensuing research will abide by the following discipline: (A) determine Justice Kagan's general voting patterns;⁹ (B) identify and review the cases in which Justice Kagan voted in contravention to her general voting pattern; and (C) analyze the "anomalous cases" to ascertain their commonalities.¹⁰

A. Justice Kagan's General Tendency

To determine Justice Kagan's general "stream of tendency," her votes in the Court's most polarizing cases, deduced from the fact they resulted in five-to-four decisions, from the following three years will be identified.

⁷ See, e.g., Richard G. Wilkins et al., *Supreme Court Voting Behavior 2005 Term*, 34 HASTINGS CONST. L.Q. 505, (2007); Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2009–2010 Term*, 41 CUMB. L. REV. 227 (2011); Christopher E. Smith & April Sanford, *The Roberts Court and Wrongful Convictions*, 32 ST. LOUIS U. PUB. L. REV. 307 (2013); Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115 (2016); John S. Summers et al., *An Econometric Investigation of the Determinants of U.S. Supreme Court Decisions*, 83 TENN. L. REV. 1137 (2016).

⁸ In the title and hereafter, this idea will be coined as a Justice's "undercurrent."

⁹ Although there have been studies conducted about Justice Kagan's general voting pattern, the author finds it imperative to conduct new research which includes the Court's latest decisions in the 2019 term.

¹⁰ The term "anomalous cases" or "anomalous votes" is used throughout this research and it simply refers to cases in which Justice Kagan voted against her general tendency.

1. 2019 Voting Record

In 2019, Justice Kagan repeatedly voted with her liberal colleagues¹¹ in the Court's most politically polarizing, five-to-four decisions. For instance, Justice Kagan was in the Court's majority in the following 2019 five-to-four decisions. In *Virginia House of Delegates v. Bethune-Hill*,¹² an unlikely coalition of Justices, comprising of Justices Kagan, Sotomayor, Ginsburg, Gorsuch, and Thomas, voted against their four colleagues and restricted a state legislative body's ability to challenge a federal court decision ordering eleven districts invalid due to racial gerrymandering.¹³ In *Apple Inc. v. Pepper*,¹⁴ another five-to-four decision, the "liberal wing" of the Court was joined by newly confirmed Justice Kavanaugh and held that iPhone users could state a cognizable anti-trust claim against Apple for excessive prices in the Apple App Store.¹⁵

Justice Kagan was in the minority with her liberal colleagues in the following 2019 five-to-four decisions. For instance, in *Department of Commerce v. New York*,¹⁶ all the Justices struck down the Trump Administration's plan to place a citizenship question on the 2020 census.¹⁷ However, the conservative majority¹⁸ simply required the case to be remanded to the district court and the administrative agency to formulate a rational basis for the citizenship question.¹⁹ In contrast, the liberal minority, including Justice Kagan, found that the plan to add

¹¹ These writings make numerous uses of the terms "liberal Justices," "liberal colleagues," and "liberal wing." These terms refer to the Court's four, notably liberal, Justices: Justices Ginsburg, Sotomayor, Breyer, and Kagan.

¹² *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

¹³ *See id.*

¹⁴ *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

¹⁵ *See id.* at 1525.

¹⁶ *DOC v. New York*, 139 S. Ct. 2551 (2019).

¹⁷ *See id.*

¹⁸ These writings make numerous references to the term "conservative Justices" and "conservative majority." These terms simply refer to the Court's conservative Justices at the time of the decision. This includes Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Kennedy, Justice Gorsuch, and Justice Kavanaugh.

¹⁹ *See DOC*, 139 S. Ct. at 2576.

the question was arbitrary and capricious altogether and tantamount to a violation of the Administrative Procedure Act.²⁰ In *Rucho v. Common Cause*,²¹ consolidated with *Lamone v. Benisek*,²² Justice Kagan and the other liberal Justices found themselves outvoted by their conservative colleagues who held that federal courts lacked jurisdiction to intercede in political gerrymandering because such questions are purely political.²³ In *Lamps Plus Inc. v. Varela*,²⁴ the liberal Justices again lost out to a conservative majority who held that certain employees could not bring class actions to dispute their employment contracts and, instead, could only seek relief by participating in individual arbitration.²⁵ In *Nielsen v. Preap*,²⁶ the liberal Justices failed to get a fifth vote and the Court held that the federal government can detain noncitizens with criminal records after their release from custody, regardless of the time that had elapsed since being released.²⁷ Similarly, in *Bucklew v. Precythe*,²⁸ the liberal minority could only watch as the conservative majority held that a petitioner who was sentenced to death failed to state a claim to stay his execution.²⁹ In review of the Court's 2019 five-to-four decisions, it is clear that Justice Kagan had a general tendency to vote with her liberal colleagues.

2. 2018 Voting Record

In 2018, similar to 2019, Justice Kagan continually voted with the Court's liberal Justices in the Court's most polarizing five-to-four decisions. Kagan and the liberal Justices were in the majority in the following five-to-four decisions. For instance, in *Carpenter v. United States*,³⁰

²⁰ *See id.* at 2584.

²¹ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

²² *Lamone v. Benisek*, 348 F. Supp. 3d 493 (D. Md. 2018).

²³ *See Rucho*, 139 S. Ct. at 2508.

²⁴ *Lamps Plus Inc. v. Varela*, 139 S. Ct. 1407 (2019).

²⁵ *See id.* at 1419.

²⁶ *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

²⁷ *See id.* at 972.

²⁸ *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

²⁹ *See id.* at 1134.

³⁰ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

the liberal Justices, along with Chief Justice Roberts, voted to expand the protections of the Fourth Amendment as it relates to cell-site location information.³¹ In *Sessions v. Dimaya*,³² Kagan and her liberal colleagues were joined by Justice Gorsuch in holding that a federal statute allowing the deportation of immigrants was unconstitutionally vague.³³

The “liberal wing” of the Court, including Kagan, composed the minority in the following five-to-four decisions. In *Janus v. American Federation of State, County and Municipal Employees*,³⁴ a case that has garnished much academic attention,³⁵ the conservative majority ruled that government workers who choose not to join unions cannot be required to help pay for a union’s collective bargaining.³⁶ In *Trump v. Hawaii*,³⁷ another one of 2018’s most polarizing cases,³⁸ Kagan and the liberal Justices again lost out to the conservative majority who determined that President Trump had the legal authority to restrict travel from majority Muslim countries.³⁹ The “liberal wing” of the Court was again outvoted in *National Institute of Family and Life Advocates v. Becerra*,⁴⁰ where the five conservative Justices blocked a California statute that required “crisis pregnancy centers” to provide their patients with abortion literature.⁴¹ In *Husted v. A. Phillip Randolph Institute*,⁴² the liberal Justices were in the minority when the Court

³¹ See *id.* at 2223.

³² *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

³³ See *id.* at 1223.

³⁴ *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

³⁵ See, e.g., Sarah W. Cudahy et al., *Total Eclipse of the Court? Janus v. Afsome, Council 31 in Historical, Legal, and Public Policy Contexts*, 36 HOFSTRA LAB. & EMP. L.J. 55 (2018); Theo A. Lesczynski, *Redefining Workplace Speech After Janus*, 113 NW. U. L. REV. 885 (2019); Hallie Guidry, *Wyoming, Take Another Look at Unions: How Unions Can Increase Equality for Women in the Workplace*, 19 WYO. L. REV. 363 (2019).

³⁶ See *Janus*, 138 S. Ct. at 2486.

³⁷ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³⁸ See, e.g., *First Amendment-Establishment Clause-Judicial Review of Pretext-Trump v. Hawaii*, 132 HARV. L. REV. 327, 336 (2018) (insisting that the Court deviated from the correct principles to adjudicate an unconstitutional motive).

³⁹ See *Trump*, 138 S. Ct. at 2423.

⁴⁰ *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁴¹ See *id.* at 2378.

⁴² *Husted v. A. Phillip Randolph Inst.*, 138 S. Ct. 1833 (2018).

upheld an Ohio program to purge Ohio voting rolls.⁴³ In *Epic Systems Corporation v. Lewis*,⁴⁴ the liberal minority could only watch as the conservative majority constricted the rights of employees to bring lawsuits by increasing the scope of the Federal Arbitration Act.⁴⁵ One more time, the liberal Justices comprised the minority in *Jesner v. Arab Bank*,⁴⁶ where the Court held that foreign corporations could not be sued in American courts for being complicit in alleged human rights abuses abroad.⁴⁷ Justice Kagan's 2018 voting record in the Court's five-to-four decisions clearly implicates a conclusion that she has a general tendency to vote with her liberal colleagues.

3. 2017 Voting Record

In 2017, Justice Kagan maintained her general tendency of voting with the Court's liberal Justices. Again, this is denoted by her votes in the Court's polarizing five-to-four decisions from that year. Kagan and her liberal colleagues were in the majority in the following cases. For instance, in a racial gerrymandering case, *Cooper v. Harris*,⁴⁸ Kagan was joined by the liberal Justices and Justice Thomas when she penned the majority decision holding that North Carolina's redistricting plan was predominately based on race and could not surpass strict scrutiny.⁴⁹ In *Texas v. Moore*,⁵⁰ Justice Kennedy joined the Court's liberal Justices in the majority and held that the use of an outdated medical definition defining "intellectual disability" violated the Eighth Amendment.⁵¹ Justice Stevens again joined the liberal Justices in *Pena-*

⁴³ See *id.* at 1848.

⁴⁴ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

⁴⁵ See *id.* at 1632.

⁴⁶ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

⁴⁷ See *id.* at 1408.

⁴⁸ *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

⁴⁹ See *id.* at 1481–82.

⁵⁰ *Moore v. Texas*, 137 S. Ct. 1039 (2017).

⁵¹ See *id.* at 1053.

Rodriguez v. Colorado,⁵² holding that a Colorado Rule of Evidence could not preclude evidence of racial bias being offered to prove a violation of the right to an impartial jury under the Sixth Amendment.⁵³

The liberal Justices found themselves comprising the minority in the following five-to-four decisions. For instance, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*,⁵⁴ to the dismay of the “liberal wing” minority, the conservatives held that a putative class action did not satisfy the three-year time limitation under Section 13 of the Securities Act, thus barring the plaintiffs from seeking relief.⁵⁵ In *Davila v. Davis*,⁵⁶ Kagan and her liberal colleagues again comprised the minority when the Court held that the ineffective assistance of appellate counsel does not overcome the procedural default of ineffective assistance of counsel claims.⁵⁷ Justice Kagan's 2017 votes in the Court's five-to-four decisions support a conclusion that her general tendency is to vote with the other liberal Justices.

4. *Determination of Justice Kagan's General Voting Tendency*

The above data demonstrates Justice Kagan's general voting tendency. She continually voted with her liberal colleagues in the Court's most polarizing cases.⁵⁸ Therefore, the ensuing research will proceed on the conclusion that Justice Kagan's general tendency is to vote with the other liberal Justices.

⁵² *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

⁵³ *See id.* at 871.

⁵⁴ *Ca. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017).

⁵⁵ *See id.* at 2055–56.

⁵⁶ *Davila v. Davis*, 137 S. Ct. 2058 (2017).

⁵⁷ *See id.* at 2070.

⁵⁸ *See supra*, Point II, Section A.

B. Justice Kagan’s “Anomalous Votes”

Now that Justice Kagan’s general voting tendency has been deduced,⁵⁹ her “anomalous votes” can be identified. Upon thorough review of Justice Kagan’s votes during her entire tenure on the Court, she only broke rank with her three liberal colleagues⁶⁰ the following ten times.

1. Cavazos v. Smith

*Cavazos*⁶¹ involved the murder of a seven-week old baby who was shaken to death by the respondent.⁶² At respondent’s trial, the prosecution offered three experts who each testified that the cause of death was indeed shaken baby syndrome (SBS).⁶³ The defense had two experts, each of who testified to the contrary and provided a different cause of death.⁶⁴ The jury found respondent guilty and the judge declined respondent’s motion that the verdict was against the weight of the evidence.⁶⁵ Eventually, the case made its way to the United States Supreme Court and in a six-to-three decision, the Court’s majority, comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, and Kagan, upheld the verdict, holding that it is the province of the jury — not the Court — to make fact and credibility assessments.⁶⁶ This is the first time that Justice Kagan broke rank with Justices Breyer, Sotomayor, and Ginsburg, her three liberal colleagues.

2. Howes v. Fields

*Fields*⁶⁷ was the second time Justice Kagan found herself opposite to her liberal colleagues. In this case, a Michigan state prisoner was taken out of his prison cell and escorted

⁵⁹ *See id.*

⁶⁰ Referring to Justices Sotomayor, Ginsburg, and Breyer.

⁶¹ *Cavazos v. Smith*, 565 U.S. 1, 2 (2011).

⁶² *See id.* at 3.

⁶³ *See id.* at 3–5.

⁶⁴ *See id.* at 5.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *Howes v. Fields*, 132 S. Ct. 1181 (2012).

to a conference room where he was questioned by two sheriff's deputies about criminal, sexual conduct involving a minor.⁶⁸ Fields was never notified of his rights under *Miranda v. Arizona*,⁶⁹ and after five to seven hours of questioning, Fields confessed.⁷⁰

At trial, Fields moved to suppress the confession under *Miranda*.⁷¹ Fields' motion was denied and he was convicted.⁷² At the Supreme Court, the majority, consisting of the same Justices as *Cavazos*,⁷³ held that *Miranda* was not violated and Fields' confession was properly admitted by the trial court.⁷⁴

3. *Kurns v. Railroad Friction Products, Corporation*

In *Kurns*,⁷⁵ Kagan rejected her liberal colleagues' contentions and joined the conservative Justices in the majority.⁷⁶ Justice Thomas, writing for the majority, held that the federal Locomotive Inspection Act preempted state-law design defect claims and state-law failure to warn claims.⁷⁷ Justice Kagan filed a concurring opinion, which agreed with the majority, but opined that a prior Supreme Court case, *Napier*,⁷⁸ should be overturned.⁷⁹

4. *Taniguchi v. Kan Pacific Saipan*

In *Taniguchi*,⁸⁰ Justice Kagan joined the five conservative Justices in holding that expenses related to translating documents from Japanese to English did not suffice the definition

⁶⁸ See *id.* at 1183.

⁶⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷⁰ See *Fields*, 132 S. Ct. at 1183.

⁷¹ See *id.*; see also *Miranda*, 384 U.S. at 436.

⁷² See *Fields*, 132 S. Ct. at 1183.

⁷³ See *supra* Point II, Section B, Subsection 1.

⁷⁴ See *Fields*, 132 S. Ct. at 1194.

⁷⁵ *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012).

⁷⁶ See *id.* at 627.

⁷⁷ See *id.* at 637–38.

⁷⁸ *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

⁷⁹ See *Kurns*, 565 U.S. at 638–39.

⁸⁰ *Taniguchi v. Kan Pacific Saipan*, 566 U.S. 560 (2012).

of “compensation of interpreters” under 28 U.S.C. Section 1920(b) and, therefore, could not be recovered as litigation costs under the statute.⁸¹

5. *White v. Woodall*

In *White v. Woodall*,⁸² another case involving the Fifth Amendment, the respondent was sentenced to death for the horrific rape and murder of the sixteen-year old female victim.⁸³ The troublesome facts demonstrated that the respondent kidnapped the victim, unclothed her, raped her, slit her throat, and dumped her body into a nearby lake.⁸⁴ At trial, the respondent pleaded guilty and was sentenced to death after the court declined to give a no-adverse inference charge for the respondent’s decision to not testify.⁸⁵ Due to the trial judge’s decision to give no such charge, the respondent appealed and the case eventually made its way to the United States Supreme Court.⁸⁶ Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito and Kagan, delivered the Court’s majority opinion holding that it was not reversible error for the state trial judge to fail to give a no adverse-inference charge, therefore, upholding the respondent’s conviction.⁸⁷ Justices Ginsburg, Breyer, and Sotomayor dissented arguing the opposite.⁸⁸

6. *Luis v. United States*

In *Luis*,⁸⁹ a five-to-three decision (after Scalia’s death, and before the confirmation of Justice Gorsuch), the Court was tasked with determining whether a court, under 18 U.S.C. Section 1345(a)(2), could freeze the assets of a defendant resulting in the defendant’s inability to

⁸¹ *See id.* at 575.

⁸² *White v. Woodall*, 572 U.S. 415 (2014).

⁸³ *See id.* at 417.

⁸⁴ *See id.* at 417.

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.* at 427.

⁸⁸ *See id.* at 428.

⁸⁹ 136 S. Ct. 1083 (2016).

choose counsel of his or her choice.⁹⁰ The majority, comprised of an unlikely coalition of Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, and Sotomayor, held that such acts by a trial court violate a defendant's Sixth Amendment rights.⁹¹ Justice Kagan, disagreeing with the majority, filed an independent, dissenting opinion arguing that "the government's interest in recovering the proceeds of crime ought to trump the defendant's . . . right to retain counsel of choice."⁹² This is the first time Justice Kagan broke rank with her liberal colleagues to find herself in the minority.

7. *Murphy v. National Collegiate Athletic Association*

In *Murphy*,⁹³ a six-to-three decision, the liberal Justices saw Justice Kagan join the conservative Justices in the majority.⁹⁴ Here, the Court was reviewing the constitutionality of a federal statute which made it unlawful for the states to "authorize" sports gambling.⁹⁵ The Court's majority held that the federal statute violated the sovereignty of the states.⁹⁶ In contrast, the dissent, written by Justice Ginsburg and joined by Justices Breyer and Sotomayor, found that only part of the statute was unconstitutional and, therefore, the rest of the statute should have been left enforceable.⁹⁷

8. *Food Marketing Institute v. Argus Leader Media*

In the case of *Food Marketing Institute v. Argus Leader Media*,⁹⁸ the Court was tasked with determining whether information regarding the amount of Supplemental Nutrition Assistance Program (SNAP) funds received by individual retailers could be sought by the

⁹⁰ See *Luis v. United States*, 136 S. Ct. 1083 (2016).

⁹¹ See *id.* at 1096.

⁹² See *id.* at 1112 (Kagan, J., dissenting).

⁹³ 138 S. Ct. 1461 (2018).

⁹⁴ See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁹⁵ See *id.* at 1468.

⁹⁶ See *id.* at 1484–85.

⁹⁷ See *id.* at 1490 (Ginsburg, J., dissenting).

⁹⁸ 139 S. Ct. 2356 (2019).

petitioner via a Freedom of Information Act (FOIA) request to the Department of Agriculture.⁹⁹

Justice Gorsuch, writing for the majority and joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, and newly confirmed Justice Kavanaugh, held that the information being sought did not have to be disclosed by the Department of Agriculture because the type of information sought fell into an exemption to the Freedom of Information Act.¹⁰⁰ The liberal Justices, without their usual colleague, Justice Kagan, concurred in part and dissented in part, arguing that one of the exemptions the majority found applicable did not apply to the information being sought.¹⁰¹

9. *McDonough v. Smith*

McDonough involved a 2009 fraudulent election scheme and the framing of an elections board commissioner in Troy, New York.¹⁰² After being erroneously prosecuted and eventually acquitted, the elections board commissioner brought a Section 1983 claim alleging that the special prosecutor violated the commissioner's due process rights by fabricating evidence and impermissibly using it at trial.¹⁰³ The special prosecutor moved to dismiss the claim as time-barred and, after making its way to the Supreme Court, the Court had to decide when the commissioner's claim accrued.¹⁰⁴ The majority held that the claim was not barred because the claim accrued when the commissioner was acquitted in 2012 – not in 2009 when he learned of the fabricated evidence.¹⁰⁵ However, this case saw an unusual coalition of Justices band together in dissent to disagree with the majority's holding. Specifically, Justice Thomas authored the

⁹⁹ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

¹⁰⁰ See *id.* at 2366.

¹⁰¹ See *id.* at 2368.

¹⁰² See *McDonough v. Smith*, 139 S. Ct. 2149 (2019).

¹⁰³ See *id.* at 2153–54.

¹⁰⁴ See *id.* at 2153.

¹⁰⁵ See *id.*

dissent and was joined by Justices Kagan and Gorsuch.¹⁰⁶ The dissent argued that the Court could not reach the question of accrual because the commissioner failed to designate which of his constitutional rights was violated by the special prosecutor and, therefore, the Court could not properly adjudicate the case.¹⁰⁷

10. *Dutra Group v. Batterton*

In *Dutra*,¹⁰⁸ the respondent was a deckhand on a vessel owned and operated by the petitioner when a hatch blew open and smashed the respondent's hand.¹⁰⁹ The respondent brought a personal injury claim against the petitioner and sought general damages as well as punitive damages on the theory that the vessel was unseaworthy under admiralty common-law.¹¹⁰ The issue of whether punitive damages were proper in this type of admiralty law case made its way to the Supreme Court. Writing for the majority, consisting of Justices Alito, Kagan, Gorsuch, Kavanaugh, Thomas and the Chief Justice, Justice Alito held that a plaintiff may not recover punitive damages on a maritime claim involving unseaworthiness.¹¹¹ Justice Ginsburg, writing for the dissent and joined by Justices Breyer and Sotomayor, found the opposite.¹¹²

C. Commonalities in Justice Kagan's "Anomalous Votes"

Based on the ten foregoing cases involving Justice Kagan's "anomalous votes,"¹¹³ some commonalities in the criminal and civil cases can be deduced.

1. *Commonalities in the Criminal Cases*

¹⁰⁶ See *id.* at 2161 (Thomas, J., dissenting).

¹⁰⁷ See *id.* (Thomas, J., dissenting).

¹⁰⁸ *Dutra Grp. v. Batterton*, 139 S. Ct. 2275 (2019).

¹⁰⁹ See *id.* at 2282.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 2287.

¹¹² See *id.* at 2288 (Ginsburg, J., dissenting).

¹¹³ See *supra* Point II, Section B, Subsections 1–10.

Of the ten cases identified, four were criminal. The criminal cases identified were *Cavazos*,¹¹⁴ *Fields*,¹¹⁵ *White*,¹¹⁶ and *Luis*.¹¹⁷ Comparing these cases, three commonalities can be drawn.

First, in each of these cases, Justice Kagan voted against the criminal defendant – while her liberal colleagues voted for the criminal defendant.¹¹⁸ This could be evidence that Justice Kagan does not share the same views as her liberal counterparts when it comes to criminal due process.

Second, each of these cases involved egregious facts. For instance, *Cavazos* involved the murder of a child;¹¹⁹ the defendant in *White* brutally raped and murdered a young woman;¹²⁰ and the defendant in *Fields* confessed to having criminal, sexual contact with a minor.¹²¹ Lastly, *Luis*, although not violent, involved a fraudulent health care provider receiving forty-five million dollars in illegal kickbacks.¹²² Perhaps the egregious nature of the facts in these cases, especially the violent ones, leads Justice Kagan to vote for a harsher result, regardless of the underlying legal issue.

This leads to a third commonality between three of the cases: *Cavazos*, *Fields*, and *White*. The victims were all innocent minors. In *Cavazos*, it was a seven-week old child.¹²³ In *Fields*, it was an underage woman being sexually assaulted.¹²⁴ And in *White*, the most brutal of the three,

¹¹⁴ *Cavazos v. Smith*, 565 U.S. 1 (2011).

¹¹⁵ *Howes v. Fields*, 132 S. Ct. 1181 (2012).

¹¹⁶ *White v. Woodall*, 572 U.S. 415 (2014).

¹¹⁷ *Luis v. United States*, 136 S. Ct. 1083 (2016).

¹¹⁸ *See Cavazos*, 565 U.S. at 5, 17; *Fields*, 132 S. Ct. at 1194, 1195; *White*, 572 U.S. at 427, 428; *Luis*, 136 S. Ct. at 1096, 1112.

¹¹⁹ *See Cavazos*, 565 U.S. at 1, 2, 5.

¹²⁰ *See White*, 572 U.S. at 417.

¹²¹ *See Fields*, 132 S. Ct. at 1183.

¹²² *See Luis*, 136 S. Ct. at 1096.

¹²³ *See Cavazos*, 565 U.S. at 1, 2, 5.

¹²⁴ *See Fields*, 132 S. Ct. at 1183.

the victim was a sixteen-year old female high school student.¹²⁵ Justice Kagan's votes in these cases can be evidence that she is more willing to depart from her liberal colleagues when the case's victim is a brutalized minor.

2. *Commonalities in Civil Cases*

Six of the ten identified cases were civil. The civil cases identified were *Argus*,¹²⁶ *Murphy*,¹²⁷ *Batterton*,¹²⁸ *McDonough*,¹²⁹ *Taniguchi*,¹³⁰ and *Kurns*.¹³¹ Unlike the criminal cases, comparing these civil cases does not result in any ascertainable commonalities (and one will not be forced).

III. Conclusion

Based on the foregoing research, the following conclusions have been drawn. First, Justice Kagan's general tendency is to vote with her liberal colleagues.¹³² This is especially apparent in the Court's most polarizing cases which often result in five-to-four decisions.¹³³ Second, sometimes Justice Kagan votes in contravention of her general tendency.¹³⁴ Specifically, there are certain types of cases in which it appears Justice Kagan is more willing to abandon her usual tendency and vote with the conservative Justices.¹³⁵ In a criminal context, these instances appear to occur when there are egregious facts, a victim that is an innocent minor, and/or a combination of the two.¹³⁶ In civil matters, Justice Kagan's "anomalous votes" do not

¹²⁵ See *White*, 572 U.S. at 417.

¹²⁶ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

¹²⁷ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

¹²⁸ *Dutra Grp. v. Batterton*, 139 S. Ct. 2275 (2019).

¹²⁹ *McDonough v. Smith*, 139 S. Ct. 2149 (2019).

¹³⁰ *Taniguchi v. Kan Pacific Saipan*, 566 U.S. 560 (2012).

¹³¹ *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012).

¹³² See *supra* Point II, Section A.

¹³³ See *id.*

¹³⁴ See *supra* Point II, Section B.

¹³⁵ See *supra* Point II, Section C.

¹³⁶ See *id.*

lend themselves to any ascertainable commonalities.¹³⁷ Although these conclusions may be incorrect as to the true motivations of Justice Kagan in these “anomalous cases,” knowledge of these possibilities may be vital to an attorney submitting papers to, or appearing in, the United States Supreme Court before the Honorable Elena Kagan.

¹³⁷ *See id.*

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FRIDAY, JANUARY 3, 2020

Some Late 2019 Commentary: Gorsuch, Kavanaugh, Indicting Trump, Cuomo's Court

To begin the New Year, here are a few appearances late last year on radio, TV, and podcast, commenting on a variety of constitutional and judicial matters of national and state interest.

In the coming posts, we'll tend to some other overdue matters. Meanwhile, wishing all a very happy, healthy 2020!

December 30, 2019: Cuomo's reshaping of the Court of Appeals



In his nine years in the Governor's Office, Andrew Cuomo has reshaped the state's highest court. Vin Bonventre, Justice Robert H. Jackson Distinguished Professor of Law at Albany Law School and Editor of the New York Court Watcher blog, shared his insights on the changing dynamic

at the Court of Appeals.

<http://www.wcny.org/december-30-2019-cuomos-reshaping-of-the-court-of-appeals/>

November 25, 2019: Can New York—or any other state—indict a sitting president?



As the impeachment hearings continue in Washington, New York has been at the center of President Donald Trump's legal woes. From Federal cases concerning his family charity to investigations of business dealings with banks by State Attorney General Leticia

James, the majority of his legal battles are being fought hundreds of miles from Washington—in the Empire State.

On this episode of New York Now, host Ray Suarez sits down with two Constitutional law scholars—Paul Finkelman of Gratz College and Vincent Bonventre of Albany Law School—to discuss what the future may hold for the president's legal troubles, and what role New York state might play in that future.

<https://nynow.wmht.org/blogs/politics/can-new-york-or-any-other-state-indict-a-sitting-president/>

October 7, 2019: Judicial Records of Gorsuch & Kavanaugh, Supreme Court Preview

New York State Bar Assn Podcast: Miranda Warnings

Albany Law Professor Vincent Bonventre returns to discuss the judicial records of Associate Justices Neil Gorsuch and Brett Kavanaugh and the tribal voting nature of the current Supreme Court.



VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. ([More.](#))

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NEW YORK COURT WATCHER: RECENT TITLES

- Religious Institutions Must Pay Abortion Coverage in NY (Part 2)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1a--addendum)
- Religious Institutions Must Pay Abortion Coverage in NY (Part 1)
- It's Roberts' (somewhat less right-wing) Court (Part 3)

CENTER FOR JUDICIAL PROCESS: RECENT TITLES

- Justice Kagan: Are There Possible Conservative Undercurrents in Her, Otherwise, Liberal "Stream of Tendency?"
- CHIEF JUSTICE JOHN G. ROBERTS: LIBERALS' SAVING GRACE IN

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- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
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- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
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- Danforth_George
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- FBI
- Federalism
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- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_St Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality



Professor Bonventure then gives us a primer on what types of cases he expects the Supreme Court to hear this Fall, including some hot button issues like abortion, gerrymandering, the death penalty, and immigration.

Make sure you stay tuned to the end as

Professor Bonventure continues his tradition of singing a few lines from one of his favorite crooners, Bobby Vinton.

Miranda Warnings is hosted by NYSBA's 118th President David Miranda

https://www.nysba.org/Podcast/MirandaWarnings/Judicial_Records_of_Gorsuch_Kavanaugh_Supreme_Court_Preview/

Nov. 15, 2019: Discussing President Trump's Tax Returns and the Legal Process

By Nick Reisman



President Donald Trump has kept his tax returns private, breaking with tradition that candidates for president release them. But now, a subpoena to an accounting firm with the taxes could lead to them being released

to New York prosecutors.

Albany Law Professor Vin Bonventure says the question over whether the president can be prosecuted in a criminal case is unclear.

"Anybody tells you they're certain one way or the other is just speaking nonsense. There isn't anything in the constitution that suggests one way or other the president can be prosecuted or can't be prosecuted while in office," Bonventure said.

In similar cases, like when the court forced President Nixon to turn over recorded conversations in the Oval Office, those help provide a guide.

"Can we really allow all 50 states to be interfering with the president doing his duties? That may be too much," Bonventure said.

Governor Cuomo this month suggested President Trump changed his residency from New York to Florida to avoid having his taxes released.

"My hypothesis is Mr. Trump changed his residence for legal purposes," Cuomo said.

But Bonventure says that's unlikely.

"That shouldn't have anything to do with it. If one person commits a crime in one state and then goes to another state, that doesn't immunize them from prosecution," Bonventure said.

The president's legal team has said he is immune from prosecution while he is in office.

[https://spectrumlocalnews.com/nys/capital-](https://spectrumlocalnews.com/nys/capital-region/news/2019/11/15/discussing-president-trump-s-tax-returns-and-the-legal-process?cid=share_email)

[region/news/2019/11/15/discussing-president-trump-s-tax-returns-and-the-legal-process?cid=share_email](https://spectrumlocalnews.com/nys/capital-region/news/2019/11/15/discussing-president-trump-s-tax-returns-and-the-legal-process?cid=share_email)



Labels: Cuomo_Andrew, DiFiore_Janet, Gorsuch_Neil, Judicial Selection, Kavanaugh_Brett, NY Court of Appeals, Trump Investigation, Trump_Donald

"HOT-BUTTON" CASES OR SUPREME COURT LEGITIMIZER?

- Former New York Court of Appeals Chief Judge Judith Ann Kaye [mini-presentation]
- Former New York Court of Appeals Judge Howard A. Levine [mini-presentation]
- 1 IN 8: A Look at Failed Nominations to the Supreme Court

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- The Possibility To Live In A World Without Nuclear Weapons
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- Regulation of Human Subject Research in the United States and China
- Anglo-Irish War: Authority for Independence?

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Some Additional Resources on the Supreme Court's 2019-20 Term

The 2019-2020 Supreme Court Review

American Constitution Society

Video: <https://www.acslaw.org/video/the-2019-2020-supreme-court-review/>

Looking Back At The Supreme Court's 2019-2020 Term

Goldwater Institute

Video: <https://indefenseofliberty.blog/2020/07/17/looking-back-at-the-supreme-courts-2019-2020-term/>

Annual Supreme Court Term Round Up

Center for Constitutional Democracy

Video: <https://www.youtube.com/watch?v=u1yrqlUD9Ts>

Legal Roundup on 2020 Supreme Court Rulings

Freedom From Religion Foundation

Video: <https://www.youtube.com/watch?v=SV9pek40008>

The Future of Church and State at SCOTUS

National Constitution Center

Podcast: <https://constitutioncenter.org/interactive-constitution/podcast/the-future-of-church-and-state-at-scotus>

Kavanaugh Pleases the Base: The Supreme Court's 2019-2020 Term

People For the American Way

Report: <https://www.pfaw.org/report/kavanaugh-pleases-the-base-supreme-court-2019-2020-term/>