



## Roberts at 10: A Look at the First Decade of John Roberts's Tenure as Chief Justice

### Introduction

John Roberts is about to begin his tenth year as Chief Justice of the United States. At his confirmation hearings in 2005, then-Judge John Roberts described himself as a “modest judge,”<sup>1</sup> one with “no agenda.”<sup>2</sup> In the years since, Chief Justice John Roberts has had the opportunity to define himself as a Justice—through the votes he has cast, the decisions he has written, and the manner in which he has led the Supreme Court and the federal judiciary. In the years since his confirmation, many have also tried to define him. To some, Chief Justice Roberts is exactly who Judge Roberts promised he would be: a moderate statesman who has brought greater legitimacy and consensus to an otherwise partisan Court.<sup>3</sup> To others, the reality has not lived up to the promise: Chief Justice Roberts has been anything but modest, instead aggressively using the power of the Court to move the law dramatically to the right.<sup>4</sup> Which is the more accurate account? There can be no doubt that over the past nine years the Supreme Court has moved the law dramatically to the right in many areas—indeed, since our inception six years ago, we have been among the most vocal critics of this rightward movement—but what role has John Roberts actually played in this movement? Is the Chief Justice strategically and deliberately leading the Court to the right, or is he simply being swept along by a conservative legal movement that is largely beyond his control? Is this truly the “Roberts Court,” or is it, as some have suggested, the “Kennedy Court” or the “Alito Court”? These questions loom large as we begin his tenth term as Chief Justice, a term that already features important cases on topics such as pregnancy discrimination and presidential power and might ultimately include blockbusters on issues ranging from same-sex marriage to abortion to affirmative action.

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<sup>1</sup> Roberts Confirmation Hearing, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html>.

<sup>2</sup> Roberts Confirmation Hearing, Sept. 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>.

<sup>3</sup> See, e.g., Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, *The New Republic*, June 29, 2012 (“On Thursday, Roberts did precisely what he said he would do when he first took office: He placed the bipartisan legitimacy of the Court above his own ideological agenda. . . . Roberts’ decision was above all an act of judicial statesmanship.”).

<sup>4</sup> See, e.g., Jeffrey Toobin, *The John Roberts Project*, *The New Yorker*, Apr. 2, 2014 (“Every Chief Justice takes on a project. . . . It increasingly appears likely that, for John Roberts, the project will be removing the limits that burden wealthy campaign contributors . . . . So far, that project is doing pretty well.”).

Over the course of the next year, we plan to try to answer these questions by taking a look at the first decade of John Roberts’s tenure as Chief Justice. By examining John Roberts’s votes and decisions across different areas of the law, we hope to be able to assess whether Chief Justice Roberts has fulfilled the promises made by Judge Roberts, and to understand John Roberts’s role in the decisions of the “Roberts Court” during his first ten years on the Court. What has been John Roberts’s impact on the law, the courts, and the country during his first ten years on the Supreme Court, and what is it likely to be in the future?

## I. Background

The Chief Justice of the United States is often known as the “first among equals,”<sup>5</sup> but that appellation understates the potential significance of the Chief Justice’s role—both as leader of the Court and leader of the federal judiciary. Although the Chief Justice has no greater vote than any of his colleagues, his position gives him the potential to have an outsized impact not only on the Supreme Court, but also on the federal courts as a whole.

As a jurist, the most significant of the Chief Justice’s formal powers derives from the fact that the Chief Justice is, by virtue of his position, treated as the most senior Justice on the Court. He presides over the Justices’ conferences at which they discuss cases, decide which cases to hear, and ultimately vote on the merits of those cases. When the Chief Justice is in the majority in any case, he has the prerogative to determine who will write the Court’s opinion; he can keep the opinion for himself or decide which of his colleagues also in the majority will write it. This is an important power because how an opinion is written shapes not only the contours and scope of the Court’s decision, but also can determine the extent to which other Justices will join the Court’s opinion rather than write a separate concurrence. Indeed, this power has the potential to be so significant that Chief Justice Warren Burger is widely thought to have “held back from voicing his opinion in conference until the position of the majority was clear, so that he could ensure that he was in the majority and thus able to assign the writing of the opinion.”<sup>6</sup>

The Chief Justice also is responsible for numerous, potentially significant administrative tasks related to the management of the federal judiciary. As one scholar has noted, “the office has come to exercise a range of bureaucratic powers that extend far beyond the Supreme Court’s walls, and influence the federal judiciary as a whole.”<sup>7</sup> Among other things, the Chief Justice is responsible for managing the budget of the federal courts; he presides over the Judicial Conference, which makes policy for the management of the U.S. courts; he appoints judges to specialized courts, including the Foreign Intelligence Surveillance Court (“FISC”); and he communicates with Congress about the state of the judiciary. All of these responsibilities

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<sup>5</sup> See, e.g., Hon. John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* 6-7 (2011).

<sup>6</sup> Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. Legal Analysis 411, 411 (2009).

<sup>7</sup> Theodore W. Ruger, Symposium, *The Chief Justice’s Special Authority and the Norms of Judicial Power*, 154 U. Pa. L. Rev. 1551, 1552 (2006).

give the Chief Justice the potential to shape the law in significant ways. For example, one study found that both Chief Justice Rehnquist and Chief Justice Burger “stocked the most important special tribunals, such as the Special Division of the District of Columbia Circuit that chooses independent counsels, with conservative Republican appointees.”<sup>8</sup> And other scholars have noted that those Chief Justices also used their platforms as Chief Justice to encourage limits on the scope of federal jurisdiction.<sup>9</sup>

## II. Nomination and Confirmation Hearing

On September 5, 2005, President George W. Bush nominated John Roberts to succeed William Rehnquist as the seventeenth Chief Justice of the United States.<sup>10</sup> John Roberts had, at that point, served for a little over two years as a judge on the United States Court of Appeals for the District of Columbia Circuit. Prior to taking the bench, Roberts had been a partner at Hogan & Hartson, where he headed the firm’s appellate practice, and he had also served as a Special Assistant to the Attorney General and an Associate Counsel to the President in the Reagan Administration and the Principal Deputy Solicitor General in the first Bush Administration.

At his confirmation hearing in 2005, then-Judge Roberts discussed at length his views on the proper role of judges in our democratic system and stated that he “prefer[red] to be known as a modest judge.” He further explained what he meant by that: “It means an appreciation that the role of the judge is limited; the judge is to decide the cases before them; they’re not to legislate; they’re not to execute the laws.”<sup>11</sup> According to Judge Roberts, this modest judicial role reflects the properly limited role of the courts: “I think courts have a limited role in general, and that is that they only interpret the law. They don't make the law. They don't shape the policy.”<sup>12</sup> As he most famously put it, “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. . . . Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally

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<sup>8</sup> *Id.* at 1566-67.

<sup>9</sup> Judith Resnik & Lane Dilg, Symposium, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev. 1575, 1608 (2006).

<sup>10</sup> On July 19, 2005, President Bush had nominated Roberts to succeed Justice Sandra Day O’Connor, but when Chief Justice Rehnquist passed away while Roberts’s confirmation was still pending, President Bush withdrew his nomination of Roberts as O’Connor’s successor and nominated him to the position of Chief Justice.

<sup>11</sup> *Supra* n.1.

<sup>12</sup> Roberts Confirmation Hearing, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301469.html>.

striving to live up to the judicial oath.”<sup>13</sup> “[T]he worst thing you can say about a judge,” he explained, is to say he is “result-oriented.”<sup>14</sup>

At his hearing, then-Judge Roberts also emphasized the importance of consensus at the Court and explained that one of his priorities as Chief Justice would be trying to achieve consensus: “I do think the chief justice has a particular obligation to try to achieve consensus consistent with everyone’s individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed.” He further elaborated: “[A]s the chief, with responsibility for assigning opinions, I think he has greater scope for authority to exercise in that area and perhaps over time can develop greater persuasive authority to make the point.” Judge Roberts explained that greater consensus at the Court would benefit the institution and that “we do need to take a step and think whether or not we really do feel strongly about a point in which a justice is writing a separate concurrence which only he or she is joining, or whether the majority opinion could be revised in a way that wouldn’t affect anyone’s commitment to the judicial oath to decide the cases as they see fit, but would allow more justices to join the majority so the court speaks as a court. That is something that the priority should be, to speak as a court.”<sup>15</sup> He also expressed concern about the politicization of the courts: “I think it is a very serious threat to the independence and integrity of the courts to politicize them. I think that is not a good development, to regard the courts as simply an extension of the political process. That’s not what they are.”<sup>16</sup>

In interviews the next year, Chief Justice Roberts elaborated on some of the points he made at his confirmation hearing. In particular, he emphasized that division on the Court could undermine the legitimacy and integrity of the institution: “If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have. That suggests that what the Court’s been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up. I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.”<sup>17</sup> He echoed his statements at his confirmation hearing, explaining that as Chief Justice he could use his power to assign opinions to help achieve consensus on the Court, and he also emphasized why this is so important: “Politics are closely divided. The same with the Congress. There ought to be some sense of some stability, if the government is not going to polarize completely. It’s a high priority to keep any kind of partisan divide out of the judiciary as

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<sup>13</sup> Roberts Confirmation Hearing, Sept. 12, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

<sup>14</sup> Roberts Confirmation Hearing, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301981.html>.

<sup>15</sup> Roberts Confirmation Hearing, Sept. 14, 2005, <http://www.nytimes.com/2005/09/14/politics/politicsspecial1/14text-roberts.html?pagewanted=all&r=0>.

<sup>16</sup> Roberts Confirmation Hearing, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301838.html>.

<sup>17</sup> Jeffrey Rosen, *Roberts’s Rules*, The Atlantic, Jan. 1, 2007, <http://m.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

well.”<sup>18</sup> In a separate interview, Chief Justice Roberts also highlighted how prioritizing consensus can facilitate judicial restraint: “The more justices that can agree on a particular decision, the more likely it is to be decided on a narrow basis, and I think that’s a good thing when you’re talking about the development of the law, that you proceed as cautiously as possible.”<sup>19</sup>

### III. Our Project

At least superficially, the story of Chief Justice Roberts’s first decade on the bench is a complicated one. To be sure, in numerous areas of the law, John Roberts has consistently—and successfully—voted to move the law to the right. Justice Breyer’s famous statement from the bench in a case involving school desegregation could easily be applied to other areas as well: “It is not often in the law that so few have so quickly changed so much.”<sup>20</sup> For example, in *Citizens United v. FEC*, in a 5-4 decision, the Court overruled long-standing precedent to begin the dismantling of the nation’s campaign finance laws,<sup>21</sup> and in *Shelby County v. Holder*, also a 5-4 decision, it invalidated a key provision of the decades-old Voting Rights Act that had been reauthorized with overwhelming bipartisan support in 2006.<sup>22</sup> We have, of course, been highly critical of the Roberts Court’s decisions in these cases; we described the majority’s decision in *Citizens United* as “completely divorced from the text and history of the Constitution”<sup>23</sup> and we criticized the majority’s decision in *Shelby County* for “flout[ing] the text and history of the Fifteenth Amendment.”<sup>24</sup>

In other areas the Chief Justice has advocated for conservative results, but has simply been unable to convince all of his conservative colleagues to agree, leaving him in a four-Justice minority. For example, in *Massachusetts v. EPA*, Justice Kennedy agreed with the Court’s more liberal members that the Clean Air Act gives the Environmental Protection Agency the authority to regulate greenhouse gases.<sup>25</sup> And there was the same 5-4 split in *United States v. Windsor*, which held that the provision of the Defense of Marriage Act that defined “marriage” to mean

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<sup>18</sup> *Id.*

<sup>19</sup> Jan Crawford Greenberg, *Interview with Chief Justice Roberts*, ABC News, Nov. 28, 2006, <http://abcnews.go.com/Nightline/story?id=2661589&page=1&singlePage=true>.

<sup>20</sup> Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times, July 1, 2007. The school desegregation case that prompted what Greenhouse called “Justice Breyer’s highly unusual declaration from the bench” was *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

<sup>21</sup> 558 U.S. 310 (2010).

<sup>22</sup> 133 S. Ct. 2612 (2013).

<sup>23</sup> “*We the People? Corporate Spending in American Elections after Citizens United*”: *Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Doug Kendall, President, Constitutional Accountability Center), <http://theusconstitution.org/news/congressional-testimony-we-people-corporate-spending-american-elections-after-citizens-united>.

<sup>24</sup> *CAC Reacts to Supreme Court Opinion Striking Down Part of Iconic Voting Rights Act*, June 25, 2013, <http://theusconstitution.org/media/releases/cac-reacts-supreme-court-opinion-striking-down-part-iconic-voting-rights-act>.

<sup>25</sup> 549 U.S. 497 (2007).

the union of a man and a woman for purposes of federal law violated the Constitution's promise of equality for all persons.<sup>26</sup>

But in other contexts, the Chief Justice has parted ways with at least some of his conservative colleagues. In some cases he has simply resisted his conservative colleagues' push to go as far to the right as they would like,<sup>27</sup> and in others he has actually supported relatively progressive outcomes. For example, in *Arizona v. United States*, Chief Justice Roberts joined Justice Kennedy and the Court's more liberal members to hold that key provisions of an Arizona immigration law were preempted by federal law.<sup>28</sup> And in some cases, the Chief Justice has actually united the Court around progressive outcomes. Just last Term, the Chief Justice wrote for a unanimous Court in *Riley v. California*, upholding a robust view of the Fourth Amendment that generally prohibits the police from engaging in warrantless searches of an arrestee's cell phone.<sup>29</sup>

Perhaps the best illustration of the complicated story of John Roberts's tenure as Chief Justice is his decision in *NFIB v. Sebelius* to uphold the individual mandate of the Affordable Care Act.<sup>30</sup> The Chief was celebrated by many progressives for his decision in the case. Law professor Adam Winkler, for example, heralded Chief Justice Roberts for living up to his "confirmation hearings pledge to respect the co-equal branches of government, push for consensus, and reach narrow rulings designed to build broad coalitions on the Court."<sup>31</sup> But in the same decision, the Chief Justice wrote at length about the limits of the federal government's power under the Commerce Clause and wrote that the statute's expansion of Medicaid violated the Spending Clause. Should the Chief Justice be celebrated for upholding a critical part of the landmark legislative achievement of President Obama's first term, or should he be condemned for striking down another important component of the law? How do we make sense of the Chief Justice's more moderate votes against the backdrop of other seemingly aggressive conservative ones?

We believe that the best way to understand John Roberts's first decade as Chief Justice is to look at his decisions across a range of issue areas, as well as examine how he has handled the managerial and administrative responsibilities of his position. Over the course of the next year, we will issue a series of "snapshots," each of which will take a look at the Chief Justice's first decade on the bench in the context of a particular area of law. These snapshots will cover a range of areas, likely including campaign finance, gay rights, voting, preemption, federalism, criminal law, and access to the courts. By taking a look at the Chief Justice's positions across a range of issue areas, we hope to be able to answer some of the questions we've already set out

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<sup>26</sup> 133 S. Ct. 2675 (2013).

<sup>27</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077 (2014); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

<sup>28</sup> 132 S. Ct. 2492 (2012).

<sup>29</sup> 134 S. Ct. 2473 (2014).

<sup>30</sup> 132 S. Ct. 2566 (2012).

<sup>31</sup> Adam Winkler, *The Roberts Court Is Born*, Huffington Post, June 28, 2012, [http://www.huffingtonpost.com/adam-winkler/the-roberts-court-is-born\\_b\\_1634070.html](http://www.huffingtonpost.com/adam-winkler/the-roberts-court-is-born_b_1634070.html).

and to develop a better sense of what our nation might be able to expect from John Roberts in the years to come.

## **IV. Conclusion**

Next September, the nation will mark the conclusion of the tenth year of John Roberts's tenure as Chief Justice of the United States. The first nine years of John Roberts's tenure as Chief Justice have seen many significant cases, and from same-sex marriage to abortion to affirmative action, others loom on the horizon. By looking at what Chief Justice John Roberts has done in the past, as well as what he does this Term, we hope to be able to offer some fresh insights into whether Chief Justice Roberts has lived up to the promises made by Judge John Roberts.