



Roberts at 10:

A Very Conservative Chief Justice Who Occasionally Surprises

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I. Overview

As we have approached the tenth anniversary of the start of John Roberts's tenure as Chief Justice, we have engaged in a [year-long](#) project looking at his first decade as Chief Justice. As we noted in our opening [snapshot](#), "[t]here can be no doubt that over the past nine years the Supreme Court has moved the law dramatically to the right in many areas," but what we sought to examine was "what role . . . John Roberts [has] actually played in this movement." To answer that question, we looked at a number of different areas of law—from campaign finance and voting to race and women's rights to the environment and business cases—and examined not just the record of the Roberts Court, but the record of John Roberts himself.

In this final snapshot, we take one last look back and also a look forward. We first examine a number of big cases from last Term, most of which were not discussed in previous snapshots and all of which shed additional light on the story of John Roberts's first decade as Chief Justice. We then offer some thoughts on what we know about John Roberts, a decade into his tenure on the Court. The story is not altogether a simple one.

To be sure, John Roberts is a very conservative Justice, one who votes to move the law sharply to the right far more often than not. Indeed, there are some areas (such as race and access to the courts, to name just two) in which Roberts has firm ideological convictions; in these areas, it is often easy to predict his vote, no matter how strongly the law might point in the opposite direction. But there are other areas, as well—areas in which Roberts's deep concern about the institutional legitimacy of the Court and his reputation as its Chief Justice can lead him to put law over ideology. Those areas may be few, but they can also be important. This past Term's decision in *King v. Burwell*, the case about tax credits under the Affordable Care Act, is one notable example.

After taking one last look back at Roberts's first ten years, we look ahead to see what the nation might expect in the first year or two of his second decade on the high court. The Court has already decided to hear a number of significant cases this coming Term, touching on issues from affirmative action and voting to unions and access to the courts. Moreover, other significant cases loom on the horizon, such as a challenge to President Obama's executive action on immigration and challenges to state restrictions on abortion. Some of these cases are in areas in which Chief Justice Roberts's long record of advancing conservative ideological ends provides little reason for optimism about how Roberts will ultimately vote. But importantly this

is not true of all of these cases, and we identify a few cases where we hope that this very conservative Justice will end up surprising us.

II. Last Term

Over the course of the past year, we have taken a close look at many different areas of the law to try to understand John Roberts's first decade as Chief Justice, but the story of that first decade is decidedly incomplete without considering some of the key cases that came down in the latter half of this past Term. In the last week of the Term alone, the Court handed down five incredibly significant decisions on a range of different issues.¹ In those cases, Roberts cast four votes for conservative outcomes and a single vote for a progressive outcome in a case in which the Court's institutional legitimacy was clearly on the line. The story of those cases is entirely consistent with the story of John Roberts's first decade as Chief Justice: he is a very conservative Justice, but one who occasionally surprises. It is also in some sense consistent with the story of the Court as a whole during Roberts's first decade as Chief Justice: in four of those five cases, Justice Kennedy's vote was critical to the outcome, but in the fifth case, the Chief Justice may have played an important leadership role, even though his vote was not dispositive. In this part, we first consider those big end-of-Term cases and two other significant cases that shed additional light on the story of John Roberts's first decade as Chief Justice.

One of the two biggest cases of last Term (and arguably of Roberts's entire tenure) was *Obergefell v. Hodges*, in which the Court recognized a nationwide right to marriage equality for gay men and lesbians grounded in the Fourteenth Amendment's independent guarantees of liberty and equality. In a 5-4 opinion authored by Justice Kennedy (and joined by the Court's more liberal members), the Court held that the reasons why marriage is a fundamental right under the Constitution "apply with equal force to same-sex couples."² In our [snapshot](#) on LGBT rights earlier this year, we previewed this case, noting that Roberts's record on LGBT issues was not good, but suggesting some reasons why the Chief Justice might vote in favor of marriage equality and asking whether he would be "content to have such a momentous ruling issued over his dissent."

The answer, we now know, was yes. Indeed, Roberts wrote his own lengthy dissent in *Obergefell* and read a summary of it from the bench, marking the first time he has read from a dissent in the ten years since he became Chief Justice.³ In his dissent, Roberts argued that

¹ The Court also handed down a sixth very important decision in the death penalty case of *Glossip v. Gross*, 135 S. Ct. 2726 (2015). In that case, the Court held, 5-4, that the plaintiff death row inmates failed to establish a likelihood of success on the merits of their claim that Oklahoma's lethal injection protocol was unconstitutional. Significantly, in dissent, Justice Breyer (joined by Justice Ginsburg) called on the Court to reconsider the constitutionality of the death penalty. Although this case is significant in a number of respects, we do not discuss it here because the Eighth Amendment is beyond the scope of our Roberts at 10 project.

² 135 S. Ct. 2584, 2599 (2015).

³ Amy Howe, *In Historic Decision, Court Strikes Down State Bans on Same-Sex Marriage: In Plain English*, SCOTUSBLOG (June 26, 2015, 1:07 PM), <http://www.scotusblog.com/2015/06/in-historic-decision-court-strikes->

“[t]he fundamental right to marry does not include a right to make a State change its definition of marriage.”⁴ It was a disappointing opinion from the Chief Justice—not only because it conflicted with the Constitution’s [text and history](#),⁵ but also because it conflicted with Roberts’s own explanation of how legal questions like the one posed in *Obergefell* should be answered. As we explained in our [snapshot](#) on LGBT rights, Roberts was asked at his Supreme Court confirmation hearing how courts should analyze cases involving fundamental rights. In response, he affirmatively pointed to the Supreme Court’s 1967 decision in *Loving v. Virginia* as a key example of how the Court should analyze such cases, explaining that the Court should look to the more general right at issue, rather than defining the right narrowly by the facts of the case. The latter approach, he elaborated, would be “completely circular.”⁶ Unfortunately, Roberts ignored his own statements about how the Constitution should be interpreted, instead dismissively stating, in his *Obergefell* dissent, that the Constitution “had nothing to do with” the Court’s decision.⁷ He was also surprisingly disrespectful of the Court as an institution when he pejoratively referred to the Court’s majority as “[f]ive lawyers [who] have closed the debate” over marriage.⁸

Obergefell was not the only case at the end of the Court’s Term in which Roberts’s vote seems to have been a reflection of his own strong ideological views on the issue. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Court considered whether disparate impact claims are cognizable under the Fair Housing Act (“FHA”). The FHA is a landmark civil rights law designed to end racial discrimination and segregation in housing, and the use of disparate impact claims has been critical to its enforcement.⁹ Significantly, every lower court to have considered the issue had concluded that disparate impact claims may be brought under the FHA.

In our [snapshot](#) on race, we noted that “as Chief Justice, Roberts has consistently worked to move the law to the right, aiming to get the government out of the business of redressing our nation’s long history of racial discrimination,” and we asked whether “the next

down-state-bans-on-same-sex-marriage-in-plain-english/; *see id.* (observing that Roberts’s decision to read from the bench “signaled how strongly he disagreed with the Court’s ruling”).

⁴ 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

⁵ *See also* David H. Gans, *Originalism in the Marriage Equality Cases*, CONST. ACCOUNTABILITY CTR. (Apr. 13, 2015), <http://theusconstitution.org/text-history/3227/originalism-marriage-equality-cases>.

⁶ Judith E. Schaeffer, *When Deciding Gay Marriage, SCOTUS Should Listen to John Roberts’ Confirmation Hearing*, SLATE (Mar. 26, 2015, 11:44 AM), http://www.slate.com/blogs/outward/2015/03/26/gay_marriage_scutus_should_listen_to_john_roberts_confirmation_hearings.html (quoting *Confirmation 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. 360, 330 (2005)).

⁷ 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

⁸ *Id.* at 2612. Indeed, the lawyer for a Kentucky county clerk who has refused to comply with the Supreme Court’s decision picked up on this language in defending his client’s actions, stating that “‘five lawyers’ on the Supreme Court changed [his client’s] job duties ‘without any constitutional authority.’” Ken McIntyre, *County Clerk Appeals Federal Judge’s Gay Marriage Mandate*, DAILY SIGNAL (Aug. 13, 2015), <http://dailysignal.com/2015/08/13/county-clerk-appeals-federal-judges-gay-marriage-mandate/>.

⁹ 135 S. Ct. 2507 (2015).

casualty of Chief Justice Roberts’s effort to gut key civil rights protections that have ensured equal opportunities for millions of Americans” would be the FHA. The answer to our question, fortunately, was no, but only because Justice Kennedy voted with the Court’s four more liberal members to hold that the FHA “encompasses disparate-impact claims.”¹⁰ Writing for the Court, Justice Kennedy explained that “the logic of [the Court’s precedents] provides strong support for the conclusion that the FHA encompasses disparate-impact claims,”¹¹ and the history of the law also buttresses that conclusion.¹² Kennedy also acknowledged that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation,” and the FHA has a “continuing role [to play] in moving the Nation toward a more integrated society.”¹³ Chief Justice Roberts, consistent with his long-standing record in cases involving racial discrimination, disagreed and joined Justice Alito’s dissent, which chastised the Court for making a “serious mistake,” one that “will have unfortunate consequences for local government, private enterprise, and those living in poverty.”¹⁴

Two of Roberts’s other votes at the Term’s end—in *Michigan v. EPA* and *Arizona State Legislature v. Arizona Independent Redistricting Commission*—were perhaps less predictable than his vote in the FHA case, but both were unsurprising in one key respect: they were votes with the Court’s other conservatives in 5-4 decisions that broke down along ideological lines. In *Michigan*, the Court considered the EPA’s ability to regulate hazardous air pollutants (like mercury and arsenic) emitted by electric utilities.¹⁵ In our [snapshot](#) on the environment, we observed that “while Roberts’s environmental law record thus far has been bad, those who favor strong environmental protections still shouldn’t count him out going forward.” While we think that’s still true, Roberts’s vote in *Michigan* was of a piece with the vast majority of votes he has cast during his first decade as Chief Justice.

In an opinion authored by Justice Scalia (and joined by Roberts), the Court held that “the phrase ‘appropriate and necessary’ [in the governing statute] requires at least some attention to cost.”¹⁶ According to the Court, “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”¹⁷ In dissent, Justice Kagan (joined by the Court’s more liberal members) disagreed with the Court’s fundamental framing of the issue, noting that the EPA did consider costs “again and again and . . . so on.”¹⁸ Indeed, as she explained, “the regulatory path

¹⁰ *Id.* at 2518.

¹¹ *Id.*

¹² *Id.* at 2520 (“Against this background understanding in the legal and regulatory system, Congress’ decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability.”).

¹³ *Id.* at 2525-26.

¹⁴ *Id.* at 2532 (Alito, J., dissenting).

¹⁵ 135 S. Ct. 2699 (2015).

¹⁶ *Id.* at 2707.

¹⁷ *Id.*

¹⁸ *Id.* at 2714 (Kagan, J., dissenting).

EPA chose parallels the one it has trod in setting emissions limits, at Congress’s explicit direction, for every other source of hazardous air pollutants over two decades.”¹⁹ In short, according to the dissenters, the Court’s decision “deprives the Agency of the latitude Congress gave it to design an emissions-setting process sensibly accounting for costs and benefits alike” and produced “a decision that deprives the American public of the pollution control measures that the responsible Agency, acting well within its delegated authority, found would save many, many lives.”²⁰

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court considered whether states may use independent redistricting commissions to draw congressional district lines.²¹ In our [snapshot](#) on voting and campaign finance, we discussed how “[o]ver the course of his nine years as Chief Justice, John Roberts has transformed our system of democracy.” Although this past Term’s big voting case involved a very different legal issue than most of the Court’s recent voting cases, it is another example of the ways in which Roberts’s view of the law, when supported by four of his colleagues, would produce significant change in the way our democracy functions.

In the Arizona case, however, four other Justices did not agree with him. Writing for the Court’s more liberal members and Justice Kennedy, Justice Ginsburg explained that “the people of Arizona [may] creat[e] a commission operating independently of the state legislature to establish congressional districts” because “[t]he history and purpose of the [Elections] Clause weigh heavily against [reading it to preclude such a choice], as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.”²² In dissent, Roberts made clear his disdain for the Court’s opinion, noting that “[j]ust over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment,” which “transferred power to choose United States Senators from ‘the Legislature’ of each State to ‘the people thereof.’”²³ After explaining that “[t]he Amendment resulted from an arduous, decades-long campaign,” he observed, “What chumps! Didn’t they realize that all they had to do was interpret the constitutional term ‘the Legislature’ to mean ‘the people’? The Court today performs just such a magic trick with the Elections Clause.”²⁴ Roberts went on to write that “[t]he Court’s position has no basis in the text, structure, or history of the Constitution,” and to fault the majority for relying on, among other things, “naked appeals to public policy.”²⁵

In only one of the Court’s final big decisions of the Term did the Chief Justice part ways with the Court’s conservative bloc, voting in *King v. Burwell* (along with Justice Kennedy and the

¹⁹ *Id.* at 2715.

²⁰ *Id.* at 2726.

²¹ 135 S. Ct. 2652 (2015).

²² *Id.* at 2671.

²³ *Id.* at 2677 (Roberts, C.J., dissenting) (internal citation omitted).

²⁴ *Id.*; see *id.* 2677-78 (describing the majority as “approv[ing] this deliberate constitutional evasion”).

²⁵ *Id.* at 2678.

Court’s more liberal members) to uphold the nationwide availability of tax credits under the Affordable Care Act.²⁶ In fact, Roberts wrote the opinion for the Court, explaining how the text, history, and structure of the ACA made clear that the tax credits should be available nationwide.²⁷ While the Chief Justice only deserves so much credit for his vote, given the overwhelming strength of the legal arguments in support of it, he does deserve credit for the opinion he wrote: one that illustrated exactly how laws should be interpreted, why the availability of tax credits nationwide makes perfect sense in light of the text and structure of the ACA, and one that underscored that it is the responsibility of the Court to “respect the role of the Legislature, and take care not to do undo what it has done.”²⁸ “A fair reading of legislation,” he explained, “demands a fair understanding of the legislative plan.”²⁹ Thus, Roberts wrote, “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.”³⁰ *King* was an incredibly important decision in its own right, and also because it sent a clear message that the Chief Justice (and Justice Kennedy) has no appetite for further efforts by ACA opponents to try to achieve through the courts what they have been unable to achieve through the political process.

There are two other decisions issued last Term that merit brief mention, in part because both make clear that despite the Chief Justice’s overall conservatism, he shouldn’t always be counted out when it comes to casting a progressive vote: *Young v. United Parcel Service, Inc.*³¹ and *Williams-Yulee v. The Florida Bar*. In *Young*, the Court considered how the Pregnancy Discrimination Act should apply in a context in which the employer “accommodates many, but not all, workers with nonpregnancy-related disabilities.”³² In our [snapshot](#) on women’s rights, we observed that “[w]here there has been disagreement [on the Court on women’s rights issues], the Court has almost always split on its ideological 5-4 axis, with the Chief Justice joining the Court’s majority to limit workplace equality and reproductive freedom,” often evincing “a ‘blind spot’ when it comes to issues affecting women’s rights and the practical realities of women’s lives.”

Young marks an important exception to that observation. In *Young*, the Court held, 6-3, that “the [Pregnancy Discrimination] Act requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.”³³ In an opinion authored by Justice Breyer (and joined by the Chief Justice), the Court explained that the approach it adopted (one that was

²⁶ 135 S. Ct. 2480 (2015).

²⁷ *Id.* at 2489-95.

²⁸ *Id.* at 2496.

²⁹ *Id.*

³⁰ *Id.*

³¹ 135 S. Ct. 1338 (2015).

³² *Id.* at 1344.

³³ *Id.*

advanced by neither party, but was a win for the female employee) made the most sense of the statute’s text and history and the Court’s precedent.³⁴ In dissent, Justice Scalia (joined by Justices Kennedy and Thomas) criticized the Court’s majority for “craft[ing] . . . a new law that is splendidly unconnected with the text and even the legislative history of the Act.”³⁵ To the dissenters, the employer of a pregnant woman has no obligation to offer her any accommodation even if it does accommodate some other workers who are similarly situated in their ability to work.³⁶

In *Williams-Yulee*, the Court upheld, against a First Amendment challenge, Florida’s ban on the personal solicitation of campaign funds by candidates for state court judgeships. It was a 5-4 decision with Chief Justice Roberts joining the Court’s more liberal members in the majority.³⁷ (Notably, this was the only 5-4 decision last Term in which the Chief Justice joined the four progressives.³⁸) Writing for the Court, Roberts observed that “[j]udges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.”³⁹ Thus, he concluded, “[a] State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.”⁴⁰ Justice Scalia (joined by Justice Thomas) dissented, accusing the Court of “flatten[ing] one settled First Amendment principle after another,”⁴¹ and Justices Kennedy and Alito each wrote separate dissents, as well.⁴² *Williams-Yulee* was an important victory for those seeking to regulate judicial elections, although it is far from clear that this victory says anything about what this Court or its Chief Justice will do in future cases involving campaign finance laws that do not also involve the election of judges. After all, Chief Justice Roberts’s vote in this case surely reflects his oft-stated view (repeated in the opinion itself) that judges are not politicians and should not be viewed as such.

III. Looking Back and Looking Ahead

Roberts’s record this past year was, in many respects, like his record every year since he has joined the high court: very conservative. Indeed, when it comes to some areas of the law

³⁴ *Id.* at 1353-55. Justice Alito did not join the Court’s opinion, but concurred in the judgment. *Id.* at 1356 (Alito, J., concurring in the judgment).

³⁵ *Id.* at 1361 (Scalia, J., dissenting).

³⁶ Justice Kennedy, writing just for himself, did note that “[t]here must be little doubt that women who are in the work force . . . confront a serious disadvantage after becoming pregnant,” and “[t]his is why the difficulties pregnant women face in the workplace are and do remain an issue of national importance.” *Id.* at 1367 (Kennedy, J., dissenting).

³⁷ 135 S. Ct. 1656 (2015).

³⁸ Kedar Bhatia, *Final Stat Pack for October Term 2014*, SCOTUSBLOG 22 (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf.

³⁹ 135 S. Ct. at 1662.

⁴⁰ *Id.*

⁴¹ *Id.* at 1676 (Scalia, J., dissenting).

⁴² *Id.* at 1682 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

and some legal questions, it is apparent that Chief Justice Roberts has firm ideological convictions. And in those areas—race and access to the courts, to name just two—Roberts is stridently conservative, consistently voting to move the law dramatically to the right. This past Term, he was ready to gut a critically important civil rights law, even though every lower court to consider the question had come out the other way. He also could not bring himself to recognize that the Constitution guarantees gay men and lesbians the same right to marry that it guarantees everyone else, despite his confirmation hearing testimony about fundamental rights. Moreover, it seems clear from Roberts’s record in his first decade as Chief Justice that he sympathizes with corporate interests more than with individuals, as shown in our snapshots on the Court’s [business record](#), [the First Amendment](#), and [access to the courts](#). In short, the evidence so far points to John Roberts remaining a very conservative Justice in the years to come.

But this year was not without its surprises from the Chief Justice—cases in which he broke rank with at least some of his conservative colleagues and seemed less driven by ideology. And such outcomes are likely to continue. After all, it’s clear that Roberts does care a great deal about the Court as an institution (despite his demeaning remarks in *Obergefell*), and that he worries about its legitimacy. Early in his tenure, Roberts talked about the importance of keeping a “partisan divide out of the judiciary.”⁴³ He echoed those comments just this year, expressing worry that the Court is being seen as a political body.⁴⁴ Indeed, as discussed above, this concern appears to have manifested itself in one of his most surprising votes of the Term—his vote in *Williams-Yulee*. These institutional concerns may well provide a partial explanation for some of Roberts’s more surprising votes; in areas where he does not have firm ideological convictions, he may be driven more by institutional concerns. In fact, in some of those cases, he has emphasized that judges do not make policy decisions. In deciding the first ACA case a few years ago, for example, he wrote that he did not “express any opinion on the wisdom of the Affordable Care Act.”⁴⁵ He echoed the same sentiment in *King*, making clear that the Court must “respect the role of the [Congress]” and not “undo what it has done.”⁴⁶

In fact, looking back over the first ten years of Roberts Court decisions, it’s clear there has been some shift in Roberts’s voting. It may well be that as there has been increasing evidence that the political polarization in Washington may be starting to taint the Court, he has begun to distance himself from at least some of the other conservatives on the Court, at least some of the time. Again, Chief Justice Roberts remains unquestionably conservative, but he is becoming less invariably so. Since his decision in the first ACA case, there have been at least ten other significant, divided cases in which Roberts parted ways with at least some of his conservative colleagues to vote with the Court’s more progressive members. This shift may to

⁴³ Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC, Jan./Feb. 2007, <http://m.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

⁴⁴ Leslie Reed, *Chief Justice Roberts’ Visit Draws 500*, UNL TODAY (Sept. 19, 2014), <http://news.unl.edu/newsrooms/unltoday/article/chief-justice-roberts-visit-draws-500/>.

⁴⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

⁴⁶ King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

some degree reflect the cases the Court is taking up, and in some cases, it may simply reflect Roberts's willingness to author narrower opinions than his conservative colleagues are willing to join. But whatever the cause in each specific case, these decisions send an important message that the Chief Justice apparently wants sent: just because a group of Justices were all appointed by a president of the same party does not mean they will always vote the same way.

In our opening [snapshot](#), we said we wanted to understand what role John Roberts has played in the rightward movement of the Roberts Court. As we conclude our examination of his first decade, it is clear that Roberts has played a leading role. He has certainly been aided by his conservative colleagues and by a conservative legal movement eager to bring cases before this Court, but he has also demonstrated his strong and unwavering ideological convictions in a number of areas. These convictions are what make him a generally predictable vote in favor of conservative outcomes and surely help guide the cases that the conservative legal movement chooses to bring before the Court in the first place. Roberts has also demonstrated, however, that he has limits, and he will (at least occasionally) not go along with the conservative legal movement when it pushes too far and asks the Court to take steps that will undermine its own legitimacy.

Commentators will surely continue to call this the Kennedy Court, and, in an important sense, that appellation is appropriate; in four of the five big end-of-Term cases discussed above, Justice Kennedy's vote was critical to the outcome. But it's impossible to discount the importance of Roberts's role, as a potential swing vote and a potential leader within the Court. And that will only be truer in the coming years if Roberts continues to break rank occasionally with at least some of his fellow conservatives, making his vote one that both sides view as meaningfully in play. Importantly, even if Roberts does not often break rank with his fellow conservatives, he has demonstrated that sometimes he is willing to do so in critically important cases. So as we mark the end of Roberts's tenth Term, one thing seems clear: there will likely be many cases in which the Chief Justice's vote will be fairly predictable, but there will be some in which no party should count him out.

As we approach the start of John Roberts's second decade as Chief Justice, it's not difficult to see examples of both types of cases already on the Court's docket or likely to be there soon. For example, the Court has already agreed to hear a case on affirmative action this coming Term. In *Fisher v. University of Texas at Austin*, the Court will consider (for the second time) the constitutionality of the University's use of racial preferences in undergraduate admissions decisions. The last time the Court heard this case, it concluded that the Fifth Circuit had applied the wrong standard for reviewing such policies, and sent the case back to that court to reconsider; on remand, the Fifth Circuit again upheld the University's policy. Given Roberts's consistent efforts "to get the government out of the business of redressing our nation's long history of racial discrimination,"⁴⁷ it is difficult to imagine him voting to uphold the

⁴⁷ David H. Gans, *Roberts at 10: Turning Back the Clock on Protections for Racial Equality*, CONST. ACCOUNTABILITY CTR. 3, http://theusconstitution.org/sites/default/files/briefs/Roberts_at_10-Race_snapshot.pdf (last visited Aug. 26, 2015).

policy. What the Court will do is less clear; it is certainly not a good sign that the Court decided to hear *Fisher* again, but then Court watchers almost universally assumed that the writing was on the wall when the Court decided to hear the FHA case last Term, and those predictions proved wrong.

When it comes to Roberts's vote, there's also little reason for optimism regarding two important access-to-court cases the Court will hear this coming Term: *Spokeo, Inc. v. Robins* and *Campbell-Ewald Company v. Gomez*. In the former, the Court has been asked to decide whether Congress has the power under the Constitution to provide an individual with a right to sue for damages to vindicate his rights under federal law when he has suffered no tangible injury. In the latter, the Court has been asked whether a defendant can moot a class action plaintiff's individual and class claims simply by offering him complete relief on his individual claims. Although there are strong arguments grounded in the Constitution's text and history that the plaintiffs in both of these cases should be able to bring their claims, Roberts has consistently voted to limit access to the courts during his first decade on the Court, as we discussed in our [snapshot](#) on that topic. Fortunately for individuals who seek access to the courts, Roberts has not always been on the winning side in these cases.

There are two other cases the Court will be hearing next Term in which one can hardly feel confident of the Chief Justice's vote, but he should not be counted out from supporting a progressive result in either. In *Evenwel v. Abbott*, the Court has been asked whether the Constitution permits states to use total population, rather than voter population, when apportioning state legislative districts. Although, as previously discussed, the Chief Justice's record in voting cases is not good, we think the specific question raised in this case may be one on which Roberts does not have firm ideological convictions, and the legal arguments that states may use total population to apportion state legislative districts are compelling. Moreover, Roberts may find persuasive the argument that states should have discretion to determine what measure to use in apportioning state legislative districts.⁴⁸

In *Friedrichs v. California Teachers Association*, the Court has been asked to overrule a nearly 40-year-old precedent that upheld "agency shop" arrangements under which all employees who reap the benefits of union representation (even non-members) must help pay for the services the union provides. As we discussed in our [snapshot](#) on the First Amendment,

⁴⁸ Interestingly, while in the Solicitor General's Office, Roberts argued that total population is a permissible basis for state legislative apportionment, observing that under the view of the petitioners in that case, "what is constitutionally required for apportionments for the House of Representatives is constitutionally forbidden in apportionments for state and local legislative bodies," and concluding that "[p]etitioners have pointed to nothing that would sanction such a curious result." Marty Lederman, *An "Indefensible Tension" in Evenwel?: Does the Constitution Prohibit for State Districts the "One Person/One Vote" Formula that the Constitution Requires for Federal Districts?*, BALKINIZATION (May 27, 2015), <http://balkin.blogspot.com/2015/05/the-curious-result-urged-by-appellants.html> (quoting Brief for the United States in Opposition at 6, *County of Los Angeles v. Garza*, 498 U.S. 1028 (1991) (No. 90-849)). He is, of course, not bound by arguments he made while in government—in theory, those may not have even been his personal views at the time—but that he made such arguments surely speaks to their strength and how compelling they should be to justices of all ideological stripes.

Roberts has written or joined a series of rulings “in which the Court has favored the privileged and powerful,” including one “sharply limit[ing] the power of public-sector unions to collect fees for collective-bargaining, dealing a serious blow to organized labor.”⁴⁹ This record does not bode well for the union seeking Roberts’s vote in *Friedrichs*. Nevertheless, Roberts’s concerns about the institutional legitimacy of the Court may cause him to hesitate before allowing the Court to be enlisted in a political fight against unions and voting to overrule a long-standing precedent (one on which individuals have relied for decades) in the absence of any evidence that the precedent is inconsistent with the Constitution’s text and history.

In addition to these significant cases that the Court has already decided to hear, there are two other important issues looming on the horizon: abortion and immigration. With respect to the former, a number of cases involving state restrictions on abortion have been working their way through the lower courts, and the Supreme Court could well take up one of those cases this coming Term. Given Roberts’s decisions on reproductive rights thus far and the hostility to fundamental rights that he expressed in his dissent in *Obergefell*, it will likely be an uphill battle for those supporting women’s reproductive freedom to win his vote in any reproductive rights case that may come before the Court. (Indeed, it is noteworthy that in *Young*, anti-choice organizations filed in *support* of the plaintiff.⁵⁰)

With respect to immigration, a challenge is currently pending in the Fifth Circuit to President Obama’s executive action on immigration, which directed immigration officials to exercise their discretion, on a case-by-case basis, to defer deportation for certain undocumented immigrants. As in *King*, the Chief Justice may be unwilling to see the Court turned into a tool in another on-going political fight between the Administration and its opponents, especially given the strength of the Administration’s arguments in favor of the executive action. After all, the legal authority for the action rests, in part, on the significant discretion enjoyed by immigration officials, a discretion routinely exercised by Presidents of both parties and recognized by the Supreme Court (in an opinion written by Justice Kennedy and joined by Chief Justice Roberts) just two years ago.⁵¹

IV. Conclusion

Over the course of the past year, we have looked at John Roberts’s record during his first decade on the Court across a number of areas of law, to try to get a better sense of how he has helped shape the law during that time, and what the nation may expect from him in the future. What we have found, not surprisingly, is that John Roberts is a very conservative Justice, and that there are some areas of law in which he has consistently worked to move the

⁴⁹ David H. Gans, *Roberts at 10: The Strongest Free Speech Court in History?*, CONST. ACCOUNTABILITY CTR. 2, 3, <http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-First-Amendment-Snapshot.pdf> (last visited Aug. 26, 2015).

⁵⁰ Brief of *Amici Curiae* 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young, *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536934.

⁵¹ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

law dramatically to the right. But there are also some areas—and some significant cases—in which Roberts seems to have been driven more by his concerns about the institutional legitimacy of the Court. And in those cases, Roberts’s votes have sometime been surprising. We have seen this over the last several years as there has been a subtle shift in his voting, with Roberts occasionally distancing himself from at least some of the other conservatives on the Court. In the next few years, the Court is likely to hear cases as controversial as those it has heard over the last few. While Roberts’s record in his first decade as Chief Justice suggests his overall record is likely to remain very conservative, it also provides reason to think that he might occasionally surprise us.