Principles, Politics, and Preferences at the Supreme Court

Howard Tolley
OLLI. - October 2021. Week 2
The Roberts’ Court Use of Judicial Power 2005-2020
Week 1 Review  Political Checks on the Court’s “Supreme” Power

Judicial Review — counter majoritarian, deliberate check

Competing Approaches to Constitutional Interpretation
   - Fundamentalist: Strict Construction, Plain Meaning, Originalist, Textualist
   - Progressive: Evolving standards, organic charter, adaptation to meet changing times

Appointment Shenanigans — Recess appointment for Earl Warren
   - Make America Great Again
   - Take back the court
      - 1960s. Liberal activism for racial, religious and criminal minorities, pro labor, defendant’s rights
      - 1920s. Conservative activism for corporate interests, property rights
      - 1840s. Conservative activism for slave holding states

Not the least dangerous branch but the most conservative
Self Restraint as a Political Check

• Political Questions delegated to a coordinate branch unsuited to judicial review held to be non justiciable — Congressional demands for Presidential papers, Foreign policy decisions, war making, Apportionment of Congressional voting districts

• Whenever possible ruling narrowly a) on the basis of a statute rather than establishing a Constitutional rule, b) distinguishing a precedent as inapplicable rather than overruling established caselaw

• Finding the issue presented moot or not ripe— already resolved or too early to resolve

• The petitioner has no standing — lacks a personal stake in result that could be met

• DIG — dismiss as improvidently granted after granting certiorari

• Individual recusal to avoid the appearance of partisan interest — former solicitor general
Judicial Lawmaking by Incorporation Plus

Bill of Rights only applies to U.S.

1\text{st} Amendment: Congress shall make no law

14\text{th} Amendment requires states to guarantee all persons

due process and

equal protection of law

Court used the 14\text{th} Amend. to make one after another right binding

on the states (5th Amend property rights first, 2d Amend last) +

Fundamental rights not mentioned -- contract, travel, privacy
McDonald v City of Chicago 2010

Justice Scalia in *District of Columbia v. Heller* (5-4) held that a District of Columbia handgun ban violated the Second Amendment as binding on the federal government.

Justice Alito’s 5-4 majority opinion found that Chicago’s gun law violated McDonald’s right to keep and bear arms for self defense because the Second Amendment applies to the states since it is incorporated by the Fourteenth Amendment's Privileges and Immunities or Due Process clauses.

Stevens, Ginsberg, Breyer and Sotomayor dissent.
Lawmaking by Standards of Judicial Review

**Rational Basis:** deference to policies unless arbitrary, capricious and unreasonable, plaintiff’s burden, government generally wins needing to show only

- a. A legitimate government purpose
- b. Means reasonably related to achieve that end

**Strict Scrutiny** Government’s burden to show

- a. Compelling state interest, and
- b. Least restrictive means
Strict Scrutiny

Plaintiff usually wins, heightened protection for

a. fundamental rights
   expressly mentioned — speech, religion
   or unwritten — liberty of contract, privacy (abortion *Roe*)

b. Suspect classifications:
   discrete, historically disadvantaged racial or other group, a
   minority unable to defend rights in the political process
Espinoza v Montana Department of Revenue 2020

Scalia in *Employment Division v. Smith* ended strict scrutiny review in free exercise cases and in response Congress adopted the Religious freedom Restoration Act to restore the highest standard now supported by Alito, Thomas, and Gorsuch.

Montana constitution prohibits “direct or indirect” public funding of religiously affiliated educational programs that prevented low income families attending a Christian school from using state scholarships available to children attending secular private schools.

Justice Roberts for a 5-4 majority applied strict scrutiny and found a violation of the free exercise clause.

4 liberal dissenting justices in three separate opinions reasoned that Montana was properly applying the 1st amendment limitation of state support for religious establishment.

Questions/Comments?
Intermediate Scrutiny

Four justices on the Warren Court favored strict scrutiny in cases of sex discrimination without the need for the Equal Rights Amendment.

Instead, Justice Brennan in a case brought by the ACLU’s Ruth Bader Ginsberg won a majority to create an intermediate level of review between strict scrutiny and rational basis.

The government must show that the law
1. Furthers an important (not compelling) government interest
2. and does so by means that are substantially related to that interest. (not the least restrictive means)
Statute distinguished between the physical presence requirements in the US for transferral of citizenship derived from parents for unwed citizen mothers and unwed citizen father of a child born in the Dominican Republic.

Justice Ruth Bader Ginsburg applying intermediate scrutiny found a violation of the Equal Protection Clause component of the Fifth Amendment. 2017 7-1

“Natural Born” candidates for US President whose eligibility challenged
John McCain, born to US parents in the Panama Canal Zone
Mitt Romney, born to Mormon father (polygamy) in Mexico
Barrack Obama, falsely identified as child of Kenyan father born in Africa
Standard of Review: Affirmative Action

4 conservative Justices support strict scrutiny rejecting rationale of need for race conscious remedies and racial diversity

4 liberal justices favor intermediate scrutiny approving temporary preferences for racial minorities.

1 centrist justice applying intermediate scrutiny either approves or disapproves temporary preferences on a case by case basis
ADMISSIONS

DAUGHTER OF ALUM
SON OF BIG DONOR
SOCCER PLAYER
RAISED IN DISTANT STATE
MINORITY
DIDN'T GET IN

IT'S HIS FAULT!
Parents Involved in Community Schools v. Seattle School District No. 1

In Seattle and Louisville school boards that had for many years operated segregated schools switched to achieve racially diverse enrollments involving transfers challenged by a white student wanting to email closer to home.

In a 5-4 2007 decision Justice Roberts applied strict scrutiny finding that diversity was not a compelling interest that justified the use of race in selecting students for admission to public schools and that doing so violated the Equal Protection Clause. Contrary to the 5-4 Bakke decision using intermediate scrutiny that would allow affirmative action, he reasoned that Brown v Board of Education required a color blind approach.

Stevens, Ssouter, Ginsburg and Breyer dissented
Standard of Review in LGBT Cases

**Strict Scrutiny** requiring a compelling state interest and the least restrictive means since

A. “suspect classification” = to race Equal Protect

B. a “fundamental right” to privacy Due Process

**Heightened Scrutiny** requiring a significant government interest and substantially related means impacting a “quasi-suspect” class

A **rational basis**, not arbitrary or capricious. (Kennedy)
Groups of same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. The plaintiffs in each case argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act.

Joining the 4 liberals Justice Kennedy held that the Fourteenth Amendment

(1) requires a state to license a marriage between two people of the same sex

(2) requires a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state
## Policy Preference

<table>
<thead>
<tr>
<th>Issue</th>
<th>Liberal</th>
<th>Conservative</th>
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</thead>
<tbody>
<tr>
<td><strong>Civil Liberties</strong></td>
<td>Limited Government Activism</td>
<td>Government Regulation Restraint</td>
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<tr>
<td>1st Amend Speech, Press, Religion</td>
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<tr>
<td>Criminal due process</td>
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<tr>
<td>Equal Protection</td>
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<tr>
<td><strong>Economic Rights</strong></td>
<td>Government Regulation Restraint</td>
<td>Limited Government Activism</td>
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<tr>
<td>Property, Minimum Wage</td>
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<td>Unions, v Management</td>
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<td>Health Care, Environment</td>
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</table>
Libertarian “That government is best which governs least.”
allies of liberals on civil rights and conservatives on economic liberty
In the extreme — anarchism

Authoritarian Hobbes Leviathan Strong government to keep us safe
allies of liberals on economic liberty and conservatives on civil rights.
In the extreme — Fascism or Communism

Flip Flops on President’s Power and State’s Rights
Judgments based on whether executive orders and state laws are liberal or conservative
without consistent support for either Presidential power or stat’s rights.
  Gorsuch + 4 liberals in McGirt uphold Indian territorial rights against Oklahoma 2020
  Questions/Comments?
The New Chief

50 year old former Rehnquist law clerk groomed for the court as deputy solicitor general arguing 39 cases.

January 1992 Bush #1 nominated to DC Court of Appeals.

Senate Judiciary Committee chair Biden declined to hold hearings and Clinton elected President in November.

Bush #2 2005 nominated him to succeed Rehnquist as Chief Justice.

Confirmed 78 yes +

22 Democrats no, including Obama
Special Role of the Chief Justice

- US has had 17 Chief Justices, 46 Presidents
  Roberts excludes 12 Chiefs in his count of 101 associate justices
  Rehnquist wore distinctive robe
  Burger appointed to head Bicentennial Commission
  Warren appointed to head Commission investigating Kennedy Assassination
  Currently paid $271,000, Associates receive $258,000
- As administrative head of the Judicial branch serves as Chief Executive Officer of the Judicial Conference, gives State of Judiciary report.
- Advocate for increased budget for pay, staff and facilities
- Presides over oral argument, meetings to decide cases and opinion assignments
## Roberts Court 2005—2021

<table>
<thead>
<tr>
<th>Year</th>
<th>Justices</th>
<th>President</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>7 Republican, 2 Democratic appointees</td>
<td>Bush #2</td>
</tr>
<tr>
<td>2005</td>
<td>Roberts/Rehnquist</td>
<td>Bush #2</td>
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<tr>
<td></td>
<td>Alito/O’Connor</td>
<td></td>
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<tr>
<td>2009 + 2010</td>
<td>Sotomayor/Souter and Kagan/Stevens</td>
<td>Obama</td>
</tr>
<tr>
<td>2017</td>
<td>Gorsuch/Kennedy</td>
<td>Trump</td>
</tr>
<tr>
<td>2018</td>
<td>Kavanaugh/Scalia</td>
<td></td>
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<tr>
<td>2020</td>
<td>Barrett/Ginsburg</td>
<td></td>
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</tbody>
</table>

- **2004**: 7 Republican, 2 Democratic appointees
- **2005**: Roberts/Rehnquist, Alito/O’Connor
- **2009 + 2010**: Sotomayor/Souter and Kagan/Stevens
- **2017**: Gorsuch/Kennedy
- **2018**: Kavanaugh/Scalia
- **2020**: Barrett/Ginsburg

**Composition Milestones**: 6 Republicans + 3 Democrats, 7 Catholics and 2 Jews, 6 Men and 3 Women, 1 African American, 1 Latina, 1 Italian American, 4 Yale Law, 4 Harvard, 1 Notre Dame
Roberts: GW Bush (R, 2005), Male, Catholic, Harvard. 65
Thomas: GHW Bush (R, 1991) M, Catholic, Yale, Georgia. 71
Breyer: Clinton (D, 1994), Male, Jewish, Harvard, CA. 82
Alito: GW Bush (R, 2006), Male, Catholic, Yale, NJ. 70
Sotomayor: Obama (D, 2009), Female, Catholic, Yale, NY. 66
Kagan: Obama (D, 2010), F, Jewish, Harvard, NY. 60
Gorsuch: Trump (R, 2017), M, Cath/Episc, Harvard, COL 54
Kavanaugh: Trump (R, 2018), M, Catholic, Yale, DC. 55
Barrett: Trump (R, 2020), F, Catholic, Notre Dame, Indiana 49
Merits Docket — Agenda Setting

- 7,000 to 8,000 appeals per year
  - *amicus curiae* friend of the court briefs
- **Rule of 4**: required to grant *certiorari*
- 70-80 cases per year (1%) selected for argument. 64 heard in 2020-2021
- 2021 Term 1st Monday in Oct. – June/Sept. 2022
- 30 minutes per side for oral argument
- Friday conference, Opinion Monday
Emergency Docket

Petitions to one Justice asking the Supreme Court to issue a temporary injunction/stay before the lengthy legal process is resolved in order to avoid irreparable injury — such as an execution.

- Arizona 9th Circuit Kagan
- Florida 11th Circuit Thomas
- Ohio 6th Cir. Kavanaugh

When referred to the full court may result in a short unsigned order before full briefing, oral argument and final decision of the merits explained in longer written opinions.

Allows government to proceed or blocks immediate government implementation until final adjudication of whether the law is constitutional.
Written Opinions

**Majority** assigned by Chief Justice, or most senior

Whether 9-0 or 5-4 sets precedent binding on lower federal and state courts.

**Concurrence**

Accepts the result based on a different rationale, may result in a fragmented *plurality* decision *Bakke*

**Dissent**

Partial or total, appeal to future court

**Per Curiam** Unsigned, short order
Inter Agreement %

1. What per cent of the cases granted review and oral argument were decided 9-0 from 2005-2017?
   a. 20%  b. 40%  c. 60%  d. 80%

2. What per cent of the cases granted review and oral argument were decided 5-4?
   a. 20%  b. 40%  c. 60%  d. 80%

3. In what per cent of the cases did RBG and Antonin Scalia vote on the same side?
   a. 20%  b. 40%  c. 60%  d. 80%

4. In what per cent of the cases did Clarence Thomas and Antonin Scalia vote on the same side?
   a. 20%  b. 40%  c. 60%  d. 80%
Inter-Agreement Index

- 57% Unanimous
- 14%-22% 5-4 or 5-3 decisions
- 2 Justice Inter-Agreement Index: 63% to 96%
- Scalia and Ginsburg agree in 63% of cases
- Kennedy with majority in 75% - 90% of 5-4 decisions.
- 0 in final term Roberts central

Partisan Inter-Agreement 2018-2019

• Out of 19 5-4 Decisions,
  7 decided by five Republican appointees
  12 decided by 4 Democratic appointees + 1 Republican

• Chief Justice Roberts voted with Republican appointees on gerrymandering but with Democratic appointees on the citizenship census question
## JUSTICE AGREEMENT

### Percent of cases in which the justices agreed in judgment

Agreement in judgment is defined as two justices voting for the same outcome – affirm or reverse – even if they do not join any part of the same opinion (it encompasses partial and full agreement).

<table>
<thead>
<tr>
<th></th>
<th>Thomas</th>
<th>Breyer</th>
<th>Alito</th>
<th>Sotomayor</th>
<th>Kagan</th>
<th>Gorsuch</th>
<th>Kavanaugh</th>
<th>Barrett</th>
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<tbody>
<tr>
<td>Roberts</td>
<td>75%</td>
<td>73%</td>
<td>83%</td>
<td>66%</td>
<td>72%</td>
<td>81%</td>
<td>94%</td>
<td>84%</td>
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<tr>
<td>Thomas</td>
<td>-</td>
<td>63%</td>
<td>82%</td>
<td>55%</td>
<td>67%</td>
<td>88%</td>
<td>78%</td>
<td>85%</td>
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<tr>
<td>Breyer</td>
<td>-</td>
<td>-</td>
<td>59%</td>
<td>93%</td>
<td>93%</td>
<td>66%</td>
<td>73%</td>
<td>64%</td>
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<tr>
<td>Alito</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>53%</td>
<td>58%</td>
<td>88%</td>
<td>86%</td>
<td>87%</td>
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<tr>
<td>Sotomayor</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>88%</td>
<td>58%</td>
<td>66%</td>
<td>58%</td>
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<tr>
<td>Kagan</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>70%</td>
<td>72%</td>
<td>69%</td>
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<tr>
<td>Gorsuch</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>87%</td>
<td>91%</td>
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<tr>
<td>Kavanaugh</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>91%</td>
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# Justice Agreement

Percent of cases in which the justices agreed in part

Partial agreement is defined as two justices joining at least part of the same opinion, even if one writes separately (it encompasses full agreement).

<table>
<thead>
<tr>
<th></th>
<th>Thomas</th>
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<th>Sotomayor</th>
<th>Kagan</th>
<th>Gorsuch</th>
<th>Kavanaugh</th>
<th>Barrett</th>
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<tr>
<td>Roberts</td>
<td>70%</td>
<td>69%</td>
<td>80%</td>
<td>58%</td>
<td>66%</td>
<td>76%</td>
<td>93%</td>
<td>82%</td>
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<td>Thomas</td>
<td>-</td>
<td>58%</td>
<td>77%</td>
<td>48%</td>
<td>61%</td>
<td>87%</td>
<td>75%</td>
<td>84%</td>
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<tr>
<td>Breyer</td>
<td>-</td>
<td>-</td>
<td>55%</td>
<td>88%</td>
<td>91%</td>
<td>63%</td>
<td>73%</td>
<td>64%</td>
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<tr>
<td>Alito</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>45%</td>
<td>52%</td>
<td>83%</td>
<td>82%</td>
<td>81%</td>
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<td>Sotomayor</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>85%</td>
<td>52%</td>
<td>63%</td>
<td>55%</td>
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<tr>
<td>Kagan</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>66%</td>
<td>70%</td>
<td>67%</td>
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<tr>
<td>Gorsuch</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>84%</td>
<td>89%</td>
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<tr>
<td>Kavanaugh</td>
<td>-</td>
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<td>-</td>
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<td>-</td>
<td>-</td>
<td>-</td>
<td>91%</td>
</tr>
</tbody>
</table>
# JUSTICE AGREEMENT

Percent of cases in which the justices agreed in full

Full agreement is defined as two justices joining the same opinion(s) in all parts, without writing separately.

<table>
<thead>
<tr>
<th></th>
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<th>Sotomayor</th>
<th>Kagan</th>
<th>Gorsuch</th>
<th>Kavanaugh</th>
<th>Barrett</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roberts</td>
<td>51%</td>
<td>64%</td>
<td>68%</td>
<td>49%</td>
<td>63%</td>
<td>58%</td>
<td>84%</td>
<td>76%</td>
</tr>
<tr>
<td>Thomas</td>
<td>-</td>
<td>43%</td>
<td>59%</td>
<td>30%</td>
<td>46%</td>
<td>73%</td>
<td>46%</td>
<td>62%</td>
</tr>
<tr>
<td>Breyer</td>
<td>-</td>
<td>-</td>
<td>42%</td>
<td>76%</td>
<td>85%</td>
<td>54%</td>
<td>63%</td>
<td>56%</td>
</tr>
<tr>
<td>Alito</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>30%</td>
<td>42%</td>
<td>65%</td>
<td>62%</td>
<td>67%</td>
</tr>
</tbody>
</table>
| Sotomayor | - | - | - | - | 81% | 42% | 51% | 45% |}
| Kagan  | -      | -      | -     | -         | -     | 57%     | 61%       | 62%     |
| Gorsuch| -      | -      | -     | -         | -     | -       | 57%       | 69%     |
| Kavanaugh | - | - | - | - | - | - | - | 75% |
Liberal to Conservative 2005-2018

Ginsburg
Sotomayor
Kagan
Breyer

Kennedy (Gorsuch 2018)
Roberts
Alito
Scalia (Kavanaugh 2019)
Thomas

Questions/Comments?
Conservative Roberts Court Decisions

**Gonzales v. Carhart 2007 5-4**
Kennedy opinion upholds state ban on late term abortions over Ginsberg dissent

**Citizens United v. Federal Election Commission, 2010 (5-4)**
- Corporations and unions can spend unlimited amounts in elections. $=Speech
  - Kennedy overrule precedent + McCain Feingold

**Shelby County v. Holder, 2013 (5-4 decision)**
- States and localities do not need federal approval to change voting laws.
  - Roberts. Reject Congressional data analysis

**Janus v AFCSME. 2019. 5-4**
Alito holds that public employees who do not belong to a union cannot be required to pay a fee to cover the union’s costs to negotiate a contract that applies to all public employees, including those who are not union members overruling precedent that allowed agency shop.
Pro-Business Rulings on Arbitration

*AT&T Mobility v. Concepcion*

*American Express v. Italian Colors*

Empowering businesses to avoid any threat of private lawsuits or class actions

Require consumers and employees as individuals to accept arbitrators selected by the company to resolve grievances.
Liberal Roberts Court Decisions

*National Federation of Independent Business v. Sebelius, 2012 (5-4)*
Upheld the mandate that most Americans have health insurance. Roberts

*United States v. Windsor, 2013 (5-4)*
Federal government must provide benefits to legally married same-sex couples. Kennedy

*RG Funeral Homes v EEOC. 2020 (6-3)*
An employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Gorsuch opinion joined by Roberts and 3 liberals.

*June Medical Services v. Russo 2020 4-1-4*
Breyer for 4 upholds 5-4 precedent striking down Texas requirement that abortion providers have admitting privileges. Roberts dissented in that case but followed *stare decisis* to strike Louisiana law
Executive Orders: DACA

Congress fails to act on immigration reform

Obama Executive Order defers deportation of 700,000 young adults brought to US as children.

Entitled to attend school, work.

Trump orders Department of Homeland Security to revoke deferrals and begin deportation. Roberts opinion blocks revocation for procedural violation of Administrative Procedure Act
Executive Orders: Emergency Docket

Trump Travel Ban on Muslims upheld 5-4 Roberts

Trump Reallocation $2.5 Billion of Pentagon Funds to build border wall
In unsigned opinion court approves use of funds, overruling lower court stay as litigation underway
Executive Immunity

**Trump v Vance** 2020 7-2
Roberts holds the Constitution permit a county prosecutor to subpoena a third-party custodian for the financial and tax records of a sitting president, over which the president has no claim of executive privilege.

**Trump v Mazars** 2020. 7-2
Based on separation of power limitations, Roberts opinion rejects two committees of the U.S. House of Representatives subpoena to the creditors of President Trump and several of his businesses for financial records as overly broad. Concludes over dissents of Alito and Thomas that a narrowly tailored subpoena might be justified.
OLLI Supreme Court Resources

Books
Lawrence Baum, The Supreme Court. 13th ed. 2018
Jonathan Haidt The Righteous Mind: Why Good People are Divided by Politics and Religion (2012)
Jill Lapore These Truths: A History of the United States. 2019 960 pp
Joan Biskupic, The Chief: The Life and Turbulent Times of Chief Justice John Roberts 2019
Jeffrey Toobin, The Oath: The Obama White Housed the Supreme Court. 2012

Two Video Previews of the 2021-2022 Term

Top Websites
https://www.scotusblog.com Latest updates, data, analysis
https://www.oyez.org. Case summaries, audio with photo of justice speaking
https://www.supremecourt.gov Briefs, Transcripts, Audio

“Supreme Court Shenanigans." https://www.youtube.com/watch?v=dDYF1g1l5Dg
1. What does "incorporation" mean in relation to The Supreme Court's application on Constitutionally guaranteed rights?
   A. Corporations are deemed persons entitled to the same rights as individuals.
   B. Newspapers have not only 1st Amendment guarantees of a free press but additional rights as corporate entities.
   C. Provisions in the Bill of Rights became binding on the states under terms of the 14th Amendment.
   D. None of the above.

2. Which did the Supreme Court identify as a fundamental right warranting strict scrutiny even though not expressly mentioned in the Constitution?
   A. Marriage
   B. Abortion
   C. Vote
   D. Free Exercise of Religion

3. Which Republican Justice voted most often with liberal Democratic appointees occasionally denying newly appointed Chief Justice Roberts a conservative majority?
   A. Alito who replaced O'Connor.
   B. Kagan who replaced Stevens
   C. Gorsuch who replaced Kennedy
   D. Kennedy appointed after Bork was not confirmed