



5-2022

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Recommended Citation

97 Notre Dame L. Rev. 1327 (2022)

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NOTES

CALLING BALLS AND STRIKES? CHIEF JUSTICE ROBERTS IN OCTOBER TERM 2019

*Meghan Dalton**

INTRODUCTION

At the confirmation hearing following his nomination to serve as Chief Justice of the Supreme Court of the United States, then-Judge John G. Roberts, Jr. made an analogy that members of the Judiciary Committee referred to with vigor over the course of the confirmation process¹ and that commentators have often returned to when discussing the Roberts Court in the fifteen years since.² During his opening statement, Roberts compared the role of a judge to that of an umpire: “I will decide every case based on the record, according to the

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1 The word “umpire” was used thirty-nine times during the confirmation hearing. See *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. (2005) [hereinafter *Confirmation Hearing*]. After Roberts made the comparison during his opening statement, Senators on both sides of the aisle made reference to the metaphor in their questioning. Some, such as Chuck Grassley, noted that it showed Roberts’s commitment to impartiality, while others, including Joe Biden, used it to question Roberts’s true intent. *Id.* at 177 (statement of Se. Chuck Grassley, Member, S. Comm. on the Judiciary); *id.* at 186 (statement of Sen. Joseph R. Biden, Member, S. Comm. on the Judiciary) (“So Judge, you are going to be an inferer. You are not going to be an umpire. Umpires do not infer.”).

2 See, e.g., Jennifer Finney Boylan, Opinion, *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> [https://perma.cc/FE36-RQSG]; Bruce Weber, *Umpires v. Judges*, N.Y. TIMES (July 11, 2009), <https://www.nytimes.com/2009/07/12/weekinreview/12weber.html> [https://perma.cc/R6TF-SUEL]; *I Come with “No Agenda,” Roberts Tells Hearing*, CNN (Sept. 13, 2005), <https://www.cnn.com/2005/POLITICS/09/12/roberts.hearings/> [https://perma.cc/FUL6-CHRF].

rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."³ The Committee took kindly to this metaphor, as well as Roberts's amiable demeanor and extensive experience as an advocate before the Supreme Court, and he was confirmed in the Senate by a vote of seventy-eight to twenty-two.⁴

As Chief Justice, Roberts has publicly demonstrated a commitment to this characterization of the Court as a passive institution and of the judge's role as "to suppress his or her ideological agenda in the interest of achieving consensus and stability."⁵ This representation, however, does not leave Roberts powerless to influence the direction of the law while working within the confines of the rules of the Court. While the Chief Justice is often referred to as the "first among equals," a nod to the fact that each Justice's vote counts equally in determining the resolution of the cases that come before the Court, there is "[r]arely . . . equality in practice."⁶ By virtue of his position as Chief Justice, Roberts enjoys various procedural responsibilities that allow him to shape the law in ways that his colleagues cannot.⁷ One such responsibility is the assignment power, by which the Chief Justice

3 *Confirmation Hearing*, *supra* note 1, at 56.

4 *U.S. Senate Roll Call Votes 109th Congress—1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245 [<https://perma.cc/9B5V-SH3E>]. It is notable that Roberts earned the support of fifty-one percent of opposing party senators, "a far better showing than other [recent] Supreme Court nominees." Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 758 (2011). "[H]is evident talent and his ability to project a comforting judicial disposition" during the confirmation process "attracted widespread praise." *Id.*; see also Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), <https://www.washingtonpost.com/archive/politics/2005/09/30/roberts-confirmed-as-17th-chief-justice/f0b7282a-8efe-43d5-bf5a-ad74babe2c99/> [<https://perma.cc/R62J-UK57>] (noting that Roberts "drew rave reviews from many senators" during his "almost flawless confirmation process").

5 Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC (Feb. 15, 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/> [<https://perma.cc/96CS-W8GM>].

6 David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE 19, 19 (David J. Danelski & Artemus Ward eds., 2016).

7 See Goldstein, *supra* note 4, at 718 ("The formal powers of the Chief Justice regarding the Court's work are few—presiding at conference and assigning opinions when in the majority—and the linkage between a Chief's action and historic effect is often inscrutable. Most of the activities that may significantly and distinctively affect the Court's work occur behind closed doors, obscured from the view of all but a few observers."); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1562–67 (2006) (describing the development of the "Chief Justice's current discretionary authority").

is tasked with assigning the majority opinion.⁸ The assignment power is “unique among the Chief’s duties in its ability to shape the development of the law,” and is only available when the Chief falls in the majority at the conference following oral arguments.⁹ This power, when coupled with a high rate of voting in the majority, allows a Chief Justice broad discretion to assign each opinion in a way which comports with his or her goals for the Court.¹⁰ Chief Justice Roberts has recorded a notably high rate of voting in the majority throughout his tenure on the Court,¹¹ but this trend reached a historic peak during October Term 2019 when Roberts cast his vote with the majority ninety-seven percent of the time.¹² As a Chief Justice who almost always votes in the majority, Roberts finds himself “uniquely positioned” to strategically assign opinions in order to “control the narrative of the court,” a position no Justice has occupied since Chief Justice Charles Evans Hughes in the 1930s.¹³ Given the rare position in which Chief Justice Roberts found himself in October Term 2019, this Note explores to what extent Roberts may have used the assignment power this term in order to pursue his goals, and whether those goals were grounded in substantive policy outcomes, organizational concerns, institutional legitimacy, or some combination thereof.

Part I of this Note will outline the scope of the assignment power, focusing on the strategic considerations a Chief Justice can make in assigning opinions. Part II will analyze Roberts’s voting and assignment patterns in October Term 2019, specifically applying the earlier discussions to his assignment choices in three key cases decided this term. Part III will focus on Chief Justice Roberts’s jurisprudential values and explore how these concerns might have informed his decision making in October Term 2019. Finally, this Note concludes by asking to what extent Roberts’s recent assignment choices are

8 See Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731 (2006).

9 *Id.* at 1730. If the Chief is not in the majority at conference, “the senior Associate Justice in the majority receives the responsibility of assigning the opinion.” *Id.* at 1731.

10 Some have gone as far as to say that the assignment power “provides the Chief with the capacity to direct the Court’s policy-making agenda.” *Id.* at 1730.

11 Adam Liptak, *John Roberts Was Already Chief Justice. But Now It’s His Court*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html> [<https://perma.cc/VP6Q-LB2W>] (“In his first 14 terms, [Roberts] was in the majority about 88 percent of the time.”).

12 Nina Totenberg, *Chief Justice John Roberts Rebuked Trump This Term. What’s He Up To?*, NAT’L PUB. RADIO (July 10, 2020), <https://www.npr.org/2020/07/10/889653156/chiefjustice-john-roberts-major-role-in-the-recent-supreme-court-term> [<https://perma.cc/PX3U-BZ2Y>] (“Roberts voted in the majority an astounding 97% of the time this term.”).

13 *Id.* (first quoting Richard Lazarus, then quoting Guy-Uriel Charles); see also Liptak, *supra* note 11.

consistent with his signature promise to “call balls and strikes,” and whether Roberts will be able to continue to wield such widespread influence on a changing Court.

I. THE ASSIGNMENT POWER

“Although the Constitution is virtually silent about the offices of the Chief Justice and the Associate Justices of the Supreme Court,” the parameters of the office of the Chief are understood today to include various procedural and substantive duties.¹⁴ The Constitution only explicitly tasks the Chief Justice with presiding over impeachment trials.¹⁵ But “[t]hrough gradual statutory and customary accretion,”¹⁶ the office has come to include procedural duties as to the Supreme Court, such as presiding over oral arguments and presenting each case to the other Justices at conference,¹⁷ and duties and bureaucratic powers as to the federal judiciary as whole.¹⁸ The assignment power is regarded as one of the most potent tasks the Chief Justice undertakes, due to the manner in which “the Chief Justice may seek to influence the Court’s agenda and the course of legal development through the exercise” of assigning opinions.¹⁹ Justice Felix Frankfurter characterized the assignment power as the Chief’s “single most influential function.”²⁰ This power “allows the chief justice . . . to frame whether the opinion is going to be written by . . . a broad brush, or a narrow one.”²¹ When making an assignment, the Chief must balance these policy objectives with the expectations of the other Justices, as “[f]ailure . . . to equitably distribute assignments across Justices will

14 G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1465–66 (2006).

15 U.S. CONST. art. I, § 3, cl. 6. Although impeachment trials are rare, Chief Justice Roberts recently had the chance to exercise this constitutional power when President Donald J. Trump was impeached in January 2020. Some observers noted that his role in the impeachment trial came with little power to control the proceedings, a role that “represents the polar opposite of his life at the Supreme Court.” Joan Biskupic, *John Roberts Presides Over the Impeachment Trial—But He Isn’t in Charge*, CNN (Jan. 21, 2020), <https://www.cnn.com/2020/01/21/politics/john-roberts-trump-impeachment-trial-strategy/index.html> [<https://perma.cc/T3MB-FWDP>].

16 Ruger, *supra* note 7, at 1552.

17 See Danelski, *supra* note 6, at 23–31 (discussing the ways in which the Chief Justice can “influence his associates” first during oral arguments and later at conference).

18 See Ruger, *supra* note 7, at 1552 (“[T]he 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. . . . [T]he Chief Justice currently presides over the important Judicial Conference, which helps set judicial policy, appoints key managerial personnel in the federal courts, and selects the judges who sit on various specialized federal courts.”).

19 Wahlbeck, *supra* note 8, at 1730.

20 Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 904 (1953).

21 Totenberg, *supra* note 12.

inevitably lead to tension on the Court.”²² In addition to any policy and peacemaking goals the Chief Justice may have, the assignment power can be employed to “enhance the legitimacy of the Court’s opinions . . . and ensure that the Court completes its work in a timely fashion.”²³

The most direct way in which the Chief Justice can use the assignment power to pursue his or her own objectives as to the trajectory of the Court is through self-assignment of the majority opinion. The tendency of Chief Justices to assign themselves important opinions can be traced back to the Marshall Court.²⁴ The Chief has the most control over the scope and impact of the opinion when he writes it himself. The Associate Justices understand this and even “expect him to write in those [big] cases to lend the prestige of his office to the Court’s pronouncements.”²⁵ Because the Chief Justice “occupies a singular role” in the mind of the American public as the embodiment of the Court, a majority opinion penned by the Chief in a divisive case can “serve[] a signaling function” to the country that the issue has “received the Supreme Court’s full attention and that the Court’s answer bears the imprimatur of the highest judicial officer in the land.”²⁶ Examples of self-assignment by former Chief Justices that have had significant impact on the public perception of the Supreme Court include landmark cases like *Marbury v. Madison*,²⁷ *Brown v. Board of Education*,²⁸ and *United States v. Nixon*.²⁹ Relatedly, data analysis of the opinion assignments by all Chief Justices from 1921 (Taft) to 1973 (Burger) suggests that Chief Justices are more likely to assign themselves “important” cases and unanimous decisions.³⁰ Notably, while Chief Justices are generally most likely to assign themselves unanimous decisions, they are also more likely to assign themselves the opinion in highly divided cases than in moderately divided cases.³¹

22 Wahlbeck, *supra* note 8, at 1730.

23 *Id.* at 1735.

24 See Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice’s Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 91 (2013) (“Ever since John Marshall, who replaced the early practice of *seriatim* opinions with a single opinion for the Court as the norm, chief justices have been moved to assign themselves the most important cases . . .”).

25 Danelski, *supra* note 6, at 31.

26 Greenhouse, *supra* note 24, at 91.

27 5 U.S. (1 Cranch) 137 (1803) (Chief Justice Marshall).

28 347 U.S. 483 (1954) (Chief Justice Warren).

29 418 U.S. 683 (1974) (Chief Justice Burger).

30 Elliot E. Slotnick, *The Chief Justices and Self-Assignment of Majority Opinions: A Research Note*, 31 W. POL. Q. 219, 225 (1978) (“[E]ach Chief Justice has a higher [opinion assignment rate] in important cases . . . [and] Chief Justices seek to assert the symbolic nature of their position by writing relatively often for unanimous Courts.”).

31 *Id.* at 224.

This suggests that, although unanimous decisions are most preferable, there may be an “added impetus for writing opinions for a highly divided court” because “when a Chief Justice is in the unique position of being able to make or break a given Court majority . . . his exercise of the self-assignment prerogative gives him the potential to structure and guide the parameters of the final majority decision.”³²

Of course, a Chief Justice cannot assign every opinion to himself. There is a “norm of equal distribution” among the Justices, and failure to adhere to this distribution can be counterproductive to a goal of cohesion on the Court.³³ While they must strive to achieve equality, and usually “achieve remarkably even distributions of opinions,” Chief Justices are not precluded from “pursu[ing] strategic objectives” and even “favoring those who are ideologically most like themselves.”³⁴ In making assignment decisions to the Associate Justices, some Chiefs focus on policy considerations, while others are swayed by organizational concerns. “[T]he rational strategy” for a substantive policy-oriented Chief Justice “is to assign the opinion to the justice whose views are most like his own on the issue being decided.”³⁵ In this way, a Chief Justice most concerned with the impact on a given area of law can assign opinions so as to maximize policy gain and minimize policy loss.³⁶

There are other strategic objectives, besides substantive policy-setting, that a Chief Justice may consider in approaching the assignment of opinions. Some Chief Justices have organizational concerns: Chief Justice Rehnquist famously used the assignment process in order to maximize efficiency and reduce the amount of time between oral argument and the issuance of an opinion.³⁷ Chief Justice Rehnquist was open with the Justices about this goal, incentivizing them to do their work quickly if they wanted the opportunity to write more opinions later in the Term.³⁸ A Chief Justice may also consider the eventual reception of a published opinion when making the opinion assignment. Having a stronger majority behind the decision in a given case can “give weight and solidarity” to the opinion of the

32 *Id.*

33 Sara C. Benesh, Reginald S. Sheehan & Harold J. Spaeth, *Equity in Supreme Court Opinion Assignment*, 39 *JURIMETRICS* 377, 377 (1999).

34 *Id.* at 389.

35 DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 174 (1976).

36 Wahlbeck, *supra* note 8, at 1733.

37 Goldstein, *supra* note 4, at 739 (“Although Rehnquist initially would seek to distribute [opinions] equally each term, he would minimize assignments during the second half of a term to a Justice who was slow to circulate a majority or dissenting opinion or to vote in a case in which opinions had circulated.”).

38 *Id.*

Court.³⁹ Chief Justice Taft, for example, suggested that the Chief Justice “is expected to promote teamwork by the Court” by seeking more unanimous opinions and broader voting coalitions so that the Court’s decisions can have more weight and influence.⁴⁰ As such, a Chief Justice with concerns about institutional legitimacy might seek to use the assignment power in such a way as to attract the most possible votes to a majority decision. A Chief Justice may also consider ability and expertise when assigning authorship duties.⁴¹ When making the assignment in a case that deals with a thorny issue of civil procedure, for example, the Chief may choose a Justice with expertise and scholarly interest in that area of the law to author the opinion.⁴²

A Chief Justice risks drawing criticism when he uses the assignment power too overtly to his own benefit. Chief Justice Burger, for example, infamously used his assignment power in a way that created “a frayed and bitter Court full of needless strains and quarrels.”⁴³ Some of Burger’s colleagues “resented his perceived practice of deferring initial comment [at conference] and then strategically voting with the winning side so he, rather than Douglas or Brennan, would assign the Court’s opinion.”⁴⁴ Justice Stevens observed that Chief Justice Burger would assign the opinions in contentious First Amendment cases “to himself when the First Amendment claim was vindicated but to Byron White when the opinion would receive a hostile reception on the editorial pages.”⁴⁵ When making opinion assignments, a Chief Justice must take into account the norms of equitable opinion distribution and the risk of angering his or her colleagues with obvious self-dealing while still seeking to achieve any policy and organizational goals he may have.

It is significant that the considerations discussed up until this point hinge on the assumption that the Chief Justice is in the majority

39 See Danelski, *supra* note 6, at 34 (quoting William Howard Taft, Draft of a Tribute to Edward Douglass White (c. May 1921)).

40 *Id.*

41 *Id.* at 33.

42 The late Justice Ruth Bader Ginsburg, for example, as a former professor of civil procedure, was often assigned majority opinions related to procedural issues throughout her tenure on the Court, including by Chief Justice Roberts. Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 1, 11 (2004); see, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

43 Wahlbeck, *supra* note 8, at 1730–31 (quoting Draft Letter from Justice William O. Douglas to Chief Justice Warren E. Burger (May 1, 1972)).

44 Goldstein, *supra* note 4, at 737. It seems that Chief Justice Burger also did himself no favors by “moving a desk into the Court’s conference room and appropriating it as his reception room.” *Id.*

45 Greenhouse, *supra* note 24, at 94 (quoting JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 236 (2011)).

and, as such, eligible to make the assignment. The Chief Justice is still “functionally dependent on the agreement of at least half of his peers to achieve his preferred result or rationale.”⁴⁶ When the Chief Justice is not in the majority, the most senior Justice in the majority makes the assignment for the Court.⁴⁷ Therefore, voting in the majority is of the utmost importance for a Chief Justice hoping to control the direction of the Court in a given area. Theoretically, a Chief Justice may choose to vote in the majority, even when his personal ideology would point him in a different direction, so that he can control the assignment of the majority opinion or so that he can preserve the perceived institutional legitimacy of the Court. By joining the majority and assigning the opinion to a Justice who will craft a narrow holding, a Chief Justice can try to ensure that in an area of the law which he does not want to shift, “the opinion of the Court may be of limited consequence.”⁴⁸ This concern is especially salient in narrow decisions where the Chief Justice could be the deciding vote, a position in which Chief Justice Roberts is increasingly finding himself.

II. OCTOBER TERM 2019

The conclusion of October Term 2019 presents a distinct opportunity to reflect on Chief Justice Roberts’s voting patterns for several reasons. This Term marked Roberts’s fifteenth year on the Court, and while there was some commentary on his voting and assignment choices following his first few years on the bench,⁴⁹ there has been little comprehensive analysis in the years since. The confirmation of Justice Amy Coney Barrett following the death of Justice Ruth Bader Ginsburg in September 2020 may serve to shift the balance among the Justices moving forward,⁵⁰ such that October Term 2019 represents the last time for a while that Chief Justice Roberts occupies the “pivotal” center seat ideologically.⁵¹ October Term 2019 was also “unlike any other” for a few reasons unrelated to the Justices

46 Ruger, *supra* note 7, at 1552.

47 Benesh et al., *supra* note 33, at 378.

48 Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 *YALE L.J.* 405, 405 (1975).

49 See, e.g., Greenhouse, *supra* note 24, at 95–96 (commenting on Roberts’s self-assignment patterns after his first eight terms).

50 See *Amy Coney Barrett Will Be Asked to Rule on Election Disputes and Much More*, *ECONOMIST* (Oct. 26, 2020), <https://www.economist.com/united-states/2020/10/26/amy-coney-barrett-will-be-asked-to-rule-on-election-disputes-and-much-more> [<https://perma.cc/3D8P-AT8S>] (noting that while “[e]very appointment to America’s Supreme Court ushers in ‘a new court,’” Barrett’s confirmation to the late Justice Ginsburg’s former seat “could skew the ideological balance on the court for decades”).

51 See Liptak, *supra* note 11.

themselves.⁵² The outbreak of the novel Coronavirus in the spring of 2020 postponed scheduled arguments and led to the release of several opinions in July, a rarity in the Court's history.⁵³ The Court issued its fewest number of signed decisions since the Civil War.⁵⁴ Another change came in the format of oral arguments—the Supreme Court conducted oral arguments over the phone, and provided a livestream for the public to listen in, for the first time ever.⁵⁵

Observers, however, suggested that the Term was most notable in that there were a number of cases in which conservative Justices, led by Chief Justice Roberts, surprised the country by ruling with the liberal wing of the Court in some hot-button, politically charged cases.⁵⁶ Some claimed that Roberts had “abandoned principle in an effort to protect the court's reputation—and his own—from accusations that it is a political institution.”⁵⁷ Regardless of opinion as to the policy outcomes of the cases, one thing was clear: Chief Justice Roberts's vote in October Term 2019 was the “crucial one.”⁵⁸ With the highest rate of majority voting since Chief Justice Hughes in 1938, Roberts's sharpest tool for directing the Court strategically through the thorny issues it faced was the assignment power.⁵⁹

52 Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 10, 2020), <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/> [<https://perma.cc/J9WE-4WCX>].

53 See *id.*; Josh Gerstein, *Supreme Court Postpones More Arguments Amid Coronavirus Outbreak*, POLITICO (Apr. 3, 2020), <https://www.politico.com/news/2020/04/03/supreme-court-postpones-more-arguments-due-to-virus-164000> [<https://perma.cc/ANK2-S68L>].

54 See Feldman, *supra* note 52 (“The 53 signed decisions represent the court's lowest number since 41 in OT 1862 during the Civil War.”).

55 See Ariane de Vogue, *Supreme Court to Continue Hearing Oral Arguments by Telephone Next Month*, CNN (Sept. 16, 2020), <https://www.cnn.com/2020/09/16/politics/supreme-court-oral-arguments-teleconference/index.html> [<https://perma.cc/M974-DASD>]. This format was generally well-received, but the Court resumed in-person arguments in October 2021. Becky Sullivan, *The U.S. Supreme Court Will Resume In-Person Oral Arguments This Fall*, NAT'L PUB. RADIO (Sept. 8, 2021), <https://www.npr.org/2021/09/08/1035107155/the-u-s-supreme-court-will-resume-in-person-oral-arguments-this-fall> [<https://perma.cc/LDD9-P77Z>].

56 See Liptak, *supra* note 11 (“In a series of stunning decisions over the past two weeks, Chief Justice John G. Roberts Jr. has voted to expand L.G.B.T.Q. rights, protect the young immigrants known as Dreamers and strike down a Louisiana abortion law. In all three decisions, he voted with the court's four-member liberal wing.”).

57 *Id.* Citing an earlier rebuke of President Trump, see *infra* note 133 and accompanying text, some also claimed that Roberts's voting patterns in October Term 2019 were “at least partly based on a distaste for Mr. Trump” himself. Liptak, *supra* note 11.

58 Liptak, *supra* note 11.

59 *Id.* (“To be both the chief justice and the swing vote confers extraordinary power. . . . He uses that power strategically, picking colleagues likely to write broadly or narrowly and saving important decisions for himself.”).

A. *Roberts by the Numbers*

The total number of cases with authored opinions in which Chief Justice Roberts voted from the start of his career on the Supreme Court through the close of October Term 2019 is more than 990.⁶⁰ About 880 of those he voted with the majority. There has been notable variation across terms:

October Term	Frequency in the Majority
2005 ⁶¹	92.4
2006 ⁶²	88.4
2007 ⁶³	89.7
2008 ⁶⁴	81
2009 ⁶⁵	91
2010 ⁶⁶	91
2011 ⁶⁷	92
2012 ⁶⁸	86
2013 ⁶⁹	92

60 The total number of cases with authored opinions in which Chief Justice Roberts has voted since the start of his career on the Supreme Court is approximately 992, and in 889 of those he voted with the majority. These figures do not include per curiam opinions or cases in which the Chief Justice did not take part. Throughout this Section, where not otherwise specified, the aggregate opinion authorship and assignment data referred to has been compiled from the SCOTUSblog annual Stat Packs and the Georgetown Supreme Court Institute. See *Stat Pack Archive*, SCOTUSBLOG, <https://www.scotusblog.com/reference/stat-pack/> [<https://perma.cc/4TR2-SPD7>] (data from October Term 2006 through October Term 2019); GEORGETOWN UNIV. L. CTR. SUP. CT. INST., SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2005 OVERVIEW (2006) [hereinafter OT 2005 OVERVIEW] (data for October Term 2005).

61 OT 2005 OVERVIEW, *supra* note 60, at 3.

62 SCOTUSBLOG.COM & AKIN GUMP STRAUSS HAUER & FELD LLP, SCOTUSBLOG SUPER STATPACK—OT07 TERM RECAP (2008) [hereinafter OT 2007 STAT PACK].

63 *Id.*

64 SCOTUSBLOG, SCOTUSBLOG STATPACK FINAL DATA 6.29.09, at 8 (2009) [hereinafter OT 2008 STAT PACK].

65 SCOTUSBLOG, SCOTUSBLOG FINAL STATS OT09, at 6 (2010) [hereinafter OT 2009 STAT PACK].

66 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2010, at 10 (2011) [hereinafter OT 2010 STAT PACK].

67 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2011, at 13 (2012) [hereinafter OT 2011 STAT PACK].

68 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2012, at 13 (2013) [hereinafter OT 2012 STAT PACK].

69 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2013, at 19 (2014) [hereinafter OT 2013 STAT PACK].

2014 ⁷⁰	80
2015 ⁷¹	92
2016 ⁷²	93
2017 ⁷³	93
2018 ⁷⁴	85
2019 ⁷⁵	97
Average	89.6

Given the context of this variation in frequency, this Section will examine Roberts's patterns of self-assignment of majority opinions, assignment to other Justices with whom he has both high and low average rates of alignment, and authorship of nonmajority opinions in October Term 2019. Additionally, this Section will compare these statistics to Chief Justice Roberts's assignment and voting patterns across all terms and in terms where he voted less frequently in the majority in order to analyze what differences, if any, this historic Term presents.

The Court issued fifty-three signed merits opinions during October Term 2019.⁷⁶ Of these fifty-three, Chief Justice Roberts voted with the majority in fifty-one cases.⁷⁷ The distribution of majority opinion authorship across the Justices was fairly even, with each Justice writing between five and seven majority opinions during the Term.⁷⁸ Chief Justice Roberts assigned himself seven of the majority opinions, all of which were in divided cases.⁷⁹ Four of these opinions were decided by a vote of five-to-four and the rest were in cases with seven-member majorities.⁸⁰ Seven decisions is well within the normal range

70 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2014, at 21 (2015) [hereinafter OT 2014 STAT PACK].

71 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2015, at 21 (2016) [hereinafter OT 2015 STAT PACK].

72 SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2016, at 17 (2017) [hereinafter OT 2016 STAT PACK].

73 SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2017, at 17 (2018) [hereinafter OT 2017 STAT PACK].

74 SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2018, at 17 (2019) [hereinafter OT 2018 STAT PACK].

75 SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019, at 15 (2020) [hereinafter OT 2019 STAT PACK].

76 *Id.* at 1.

77 Roberts voted with the majority in fifty-nine cases this Term, six of which were summary reversals and two of which were per curiam merits opinions. *Id.* at 1, 15.

78 *Id.* at 13. Chief Justice Roberts and Justice Gorsuch each wrote seven majority opinions, while Justices Ginsburg, Alito, Kagan, and Kavanaugh authored six apiece and Justices Thomas, Breyer, and Sotomayor each wrote five. *Id.*

79 *Id.*

80 *Id.*

of self-assigned opinions for the Chief Justice,⁸¹ but the distribution was notable in that it was the first time ever that Roberts assigned himself zero unanimous opinions.⁸² It is also notable that this Term tied Roberts's record for self-assigned five-member majority opinions.⁸³ October Term 2019 represents the first time that, of the majority opinions Chief Justice Roberts has assigned himself, most were five-four opinions and none were unanimous. The average strength of the majority for which he wrote the opinion was 5.9.⁸⁴ In October Term 2014, the year in which Chief Justice Roberts's frequency in the majority was the lowest, he self-assigned two five-four decisions, one six-three decision, one seven-two decision, two eight-one decisions, and one unanimous decision, resulting in an average majority strength of 6.9.⁸⁵

Chief Justice Roberts assigned the other forty-four opinions in which he voted with the majority to his fellow Justices.⁸⁶ Only one Justice, Justice Brett Kavanaugh, finished the Term with a lower average strength of majority than Chief Justice Roberts.⁸⁷ Of the eleven five-four majority opinions assigned by Roberts this term, four he assigned to himself, four more he assigned to Justice Kavanaugh, two

81 During October Terms 2015 and 2017, Chief Justice Roberts authored only six opinions. See OT 2015 STAT PACK, *supra* note 71, at 17; OT 2017 STAT PACK, *supra* note 73, at 13. In every other term, Roberts has authored either seven or eight majority opinions. See, e.g., OT 2016 STAT PACK, *supra* note 72, at 13.

82 Chief Justice Roberts had authored just one unanimous opinion in each of four previous terms. See OT 2009 STAT PACK, *supra* note 65, at 7; OT 2014 STAT PACK, *supra* note 70, at 17; OT 2018 STAT PACK, *supra* note 74, at 14; see also SCOTUSBLOG, SUPREME COURT VOTING LINEUPS IN OCTOBER TERM 2008, at 33 (2009), <https://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack-part-ii-visuals.pdf> [https://perma.cc/M7LA-S2RZ] (showing that in October Term 2008, Roberts authored only one unanimous opinion in the case of *Pacific Bell Telephone Co. v. linkLine Commc'ns, Inc.*). Based on voting lineup data compiled from the Oyez case database, Chief Justice Roberts authored a record high six unanimous opinions in his first Term. See 2005-2006 Term, OYEZ, <https://www.oyez.org/cases/2005> [https://perma.cc/WZ8R-LZKL].

83 Roberts wrote four five-member controlling opinions only twice before: in October Terms 2006 and 2018. See SCOTUSBLOG & AKIN GUMP STRAUSS HAUER & FELD LLP, END-OF-TERM "SUPER STATPACK"—OT06 (2007) [hereinafter OT 2006 STAT PACK] (noting that Roberts wrote three five-to-four majority opinions and one five-to-four plurality, which it treated as a majority opinion); OT 2018 STAT PACK, *supra* note 74, at 14.

84 OT 2019 STAT PACK, *supra* note 75, at 13.

85 OT 2014 STAT PACK, *supra* note 70, at 17.

86 For the other two opinions, the most senior Justice in the majority assigned authorship, as is customary. See *supra* note 9 and accompanying text. In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the most senior Justice in the majority was Justice Thomas, who assigned the opinion to Justice Gorsuch. Gorsuch was also assigned the majority opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), this time by Justice Ruth Bader Ginsburg.

87 Justice Kavanaugh's average strength of majority for October Term 2019 was 5.5, slightly lower than Chief Justice Roberts's average of 5.9. OT 2019 STAT PACK, *supra* note 75, at 13.

he assigned to Justice Samuel Alito, and one was authored by Justice Stephen Breyer.⁸⁸ Some Justices, however, were assigned opinions with much stronger majorities: Justices Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor all finished the term, on average, writing for a majority greater than eight.⁸⁹ Notably, Justices Ginsburg, Kagan, and Sotomayor have much lower average rates of alignment⁹⁰ with Chief Justice Roberts in divided cases as compared to the other members of the Court.⁹¹ When including unanimous cases, however, Chief Justice Roberts's average rates of alignment with Ginsburg, Kagan, and Sotomayor are much higher,⁹² as are the alignment rates of all Justices when the Court's many unanimous decisions are taken into account. Justice Breyer, who was assigned one five-four case, wrote for a lower majority on average during the Term but has the third-lowest average rate of alignment with Chief Justice Roberts of the members of the Court in 2019.⁹³ Justices Neil Gorsuch and Clarence Thomas wrote for average majorities of similar strength that were slightly narrower than their more liberal counterparts,⁹⁴ though it is important to note that two of Gorsuch's opinions for narrower majorities came in the two cases that Chief Justice Roberts did not assign this Term.⁹⁵ Justices Gorsuch and Thomas also have similar average rates of alignment with Chief Justice Roberts during their tenure on the Court, both in divided cases and overall, which are markedly higher than those of Justices

88 *Id.*

89 *Id.* Ginsburg finished with the highest average, 8.5, writing sixty-seven percent of her assigned majority opinions for a unanimous Court. *Id.* Justices Sotomayor and Kagan each ended the Term with writing for an average majority of 8.2. *Id.*

90 Rates of alignment represent how often two Justices voted together on the merits in a given Term. Throughout the discussion, the average rates of alignment referenced were compiled by averaging the alignment rates between Chief Justice Roberts and the other members of the Court for each Term from 2006 to 2019 published in the annual SCOTUSblog Stat Packs. See *Stat Pack Archive*, *supra* note 60. The data for October Term 2005 was sourced from the Georgetown Supreme Court Institute. See OT 2005 OVERVIEW, *supra* note 60, at 9.

91 Justice Roberts's average rates of alignment in divided cases with Justices Ginsburg, Kagan, and Sotomayor are 44.8%, 60.8%, and 52.2%, respectively. Together with Justice Breyer's average alignment rate of 53.9%, these are the four Justices voting in October Term 2019 with the lowest average rates of alignment over their tenure on the Court with Chief Justice Roberts.

92 However, they are still three of the four lowest average rates among Justices on the Court in 2019. Chief Justice Roberts's overall average rates of alignment with Justices Ginsburg, Kagan, Sotomayor, and Breyer are 69.3%, 75%, 72.2%, and 74.1%, respectively.

93 See OT 2019 STAT PACK, *supra* note 75, at 13 (listing Breyer's average majority as 7.2).

94 Gorsuch and Thomas wrote for average majorities of 7.6 and 7.2, respectively. *Id.*

95 See *supra* note 86 and accompanying text.

Ginsburg, Kagan, Sotomayor, and Breyer.⁹⁶ Justice Alito wrote for the next lowest average majority in October Term 2019, behind Chief Justice Roberts and Justice Kavanaugh.⁹⁷ Of the Justices on the Court in 2019, Justice Alito has the second highest average rate of alignment with Chief Justice Roberts during his tenure.⁹⁸ The standout in Chief Justice Roberts's assignment patterns this term, however, comes with respect to Justice Brett Kavanaugh. Justice Roberts assigned Justice Kavanaugh as many five-four decisions as he assigned himself.⁹⁹ Kavanaugh is the only Justice besides Chief Justice Roberts who did not author a unanimous opinion this Term.¹⁰⁰ While Chief Justice Roberts and Justice Kavanaugh have only served on the Court together for two years, Kavanaugh has the highest average rate of alignment with Roberts, both in divided cases and overall, of any other Justice whom Roberts has served with on the Court since his confirmation in 2005.¹⁰¹ In October Term 2014, when Chief Justice Roberts voted with the majority only eighty percent of the time,¹⁰² the distribution of opinion authorship across strong and weak majorities was more even. Each Justice wrote at least one unanimous opinion¹⁰³ and everyone except Justice Thomas wrote at least one five-four opinion.¹⁰⁴ Eight of the nine Justices finished that Term having authored opinions with an average majority between 6.3 and 7.4.¹⁰⁵

Another area of note in October Term 2019 related to Chief Justice Roberts's choices in opinion assignment and authorship comes in the form of concurrences and dissents. While Chief Justice Roberts has averaged 1.8 concurrences and 3.5 dissents per term since he

96 In divided cases, Gorsuch and Thomas's average rates of alignment with Chief Justice Roberts are 67% and 67.6%, respectively. Overall, Gorsuch's average rate of alignment is 80.8% and Thomas's is 82%.

97 See OT 2019 STAT PACK, *supra* note 75, at 13 (average majority strength of 6.8).

98 Alito, who like Roberts was nominated to the Court by President George W. Bush in 2005, has an average rate of alignment with Roberts of 77.7%. See Laura Sullivan, *Bush Taps Alito for Supreme Court Vacancy*, NAT'L PUB. RADIO (Oct. 31, 2005), <https://www.npr.org/templates/story/story.php?storyId=4982338> [<https://perma.cc/53A6-F34T>].

99 See OT 2019 STAT PACK, *supra* note 75, at 13.

100 *Id.* Like Chief Justice Roberts, the narrowest majority Justice Kavanaugh was assigned this Term was seven-two. *Id.*

101 Kavanaugh and Roberts have aligned in 88.5% of divided cases and 92.5% of cases overall on average since Kavanaugh joined the Court in October Term 2018.

102 OT 2014 STAT PACK, *supra* note 70, at 21.

103 See *id.* at 17. Justice Thomas wrote six unanimous majority opinions that term, the most of any Justice and double that of the next closest Justices. *Id.*

104 *Id.* No Justice wrote more than three five-four opinions in October Term 2014. *Id.*

105 *Id.* Only Justice Thomas fell outside that range, writing for an average majority of 8.6. *Id.*

joined the Court,¹⁰⁶ in October Term 2019 he wrote only one concurrence and one dissent.¹⁰⁷ This was the first year that Chief Justice Roberts wrote just one dissent in a term. In contrast, Chief Justice Roberts authored two concurrences and five dissents during October Term 2014.¹⁰⁸ Chief Justice Roberts has authored a record high of nine nonmajority opinions in three prior terms.¹⁰⁹

B. Case Studies

While many cases decided in October Term 2019 received widespread media coverage, three in particular warrant special attention given the way in which Chief Justice Roberts voted and assigned the majority opinions. In *June Medical*, the Court considered a Louisiana law that required physicians who performed abortions in the state to have active admitting privileges at a hospital.¹¹⁰ Justice Breyer wrote an opinion declaring the law unconstitutional for a plurality including Justices Kagan, Ginsburg, and Sotomayor in which Chief Justice Roberts filed a concurring opinion.¹¹¹ As Roberts pointed out in his concurrence, the law at issue was “nearly identical”¹¹² to a Texas law that had been struck down by the Court just four years prior in *Whole Woman’s Health*.¹¹³ According to Roberts, despite the fact that he had dissented in *Whole Woman’s Health* and “continue[s] to believe that the case was wrongly decided,” the fate of the Louisiana law was controlled by the Court’s prior decision because the doctrine of “[s]tare decisis instructs [the Court] to treat like cases alike.”¹¹⁴

In *DHS v. Regents*, Chief Justice Roberts joined Justices Ginsburg, Breyer, Sotomayor, and Kagan in a five-four majority finding that, because the Department of Homeland Security did not supply a “reasoned analysis” for its decision to end the DACA program, the decision was arbitrary and capricious and in violation of the

106 These averages were calculated by compiling the numbers of concurrences and dissents Chief Justice Roberts wrote in each Term as published in the SCOTUSblog annual Stat Packs. See *Stat Pack Archive*, *supra* note 60. The data for October Term 2005 was sourced from the Georgetown Supreme Court Institute. See OT 2005 OVERVIEW, *supra* note 60, at 7.

107 See OT 2019 STAT PACK, *supra* note 75, at 11.

108 See OT 2014 STAT PACK, *supra* note 70, at 8.

109 See OT 2007 STAT PACK, *supra* note 62, at 14 (five concurrences and four dissents); OT 2008 STAT PACK, *supra* note 64, at 1 (four concurrences and five dissents); OT 2012 STAT PACK, *supra* note 68, at 8 (two concurrences and seven dissents).

110 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112 (2020).

111 *Id.* at 2109, 2133.

112 *Id.* at 2133.

113 *Id.* at 2133. See generally *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

114 *June Med. Servs.*, 140 S. Ct. at 2133, 2141–42.

Administrative Procedure Act.¹¹⁵ Chief Justice Roberts assigned himself authorship duties and wrote a majority opinion that focused narrowly on the Department's procedural shortcomings in making the decision to end the program, rather than any policy arguments as to "whether DACA or its rescission are sound."¹¹⁶ Roberts reasoned that by "fail[ing] to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients," DHS failed to provide a reasoned explanation in accordance with the APA's procedural requirements, and remanded the issue to DHS "so that it may consider the problem anew."¹¹⁷

The same week, the Court also issued its decision in *Bostock v. Clayton County*.¹¹⁸ In *Bostock*, Chief Justice Roberts joined a six-member majority comprised of himself and Justices Ginsburg, Breyer, Sotomayor, Kagan, and Gorsuch which concluded that terminating employment on the basis of sexual orientation or gender identity ran afoul of Title VII's "command" that it is unlawful for an employer to discriminate on the basis of sex.¹¹⁹ Roberts assigned the majority opinion to Justice Gorsuch, who wrote a decision focused on the clear meaning of the language of Title VII.¹²⁰ According to Justice Gorsuch, because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," this type of discrimination falls within the "express terms" of Title VII's prohibition against sex discrimination.¹²¹ Justice Gorsuch's opinion applied traditionally conservative canons of interpretation to reach the conclusion that the types of discrimination at issue fell within the plain terms of the statute, an approach that drew criticism from his dissenting colleagues.¹²²

These cases, when viewed in connection with Chief Justice Roberts's assignment patterns in October Term 2019, as compared to his patterns in previous terms, provide the basis from which we can

115 *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901, 1913 (2020).

116 *Id.* at 1916. In one of the dissents, Justice Thomas characterized "[t]he majority's demanding review of DHS' [sic] decisionmaking process" as "especially perverse." *Id.* at 1926 (Thomas, J., concurring in part and dissenting in part).

117 *Id.* at 1916 (majority opinion).

118 140 S. Ct. 1731 (2020).

119 *Id.* at 1737–38.

120 *Id.*

121 *Id.* at 1737 ("Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.")

122 In his dissent, Justice Alito compared the majority opinion to a "pirate ship" that "sails under a textualist flag, but . . . actually represents . . . a theory of statutory interpretation that Justice Scalia excoriated." *Id.* at 1755–56 (Alito, J., dissenting).

analyze his assignment approach and how, if at all, it allows him to meaningfully steer the direction of the Court.

III. THE ASSIGNMENT CONCERNS OF CHIEF JUSTICE ROBERTS

In order to effectively analyze the considerations that may shape Chief Justice Roberts's decisionmaking, it is important to start with the context in which he first came to the Court. Roberts has been described as an "accidental" Chief Justice due to the fact that he was first nominated to succeed Associate Justice Sandra Day O'Connor in July 2005.¹²³ Before he was confirmed, and following the unexpected death of Roberts's mentor, Chief Justice William Rehnquist, President George W. Bush withdrew Roberts's first nomination and nominated him instead to take Rehnquist's seat as Chief.¹²⁴ These unusual circumstances meant that Roberts became the Chief Justice less than a month before a new term was set to begin, and was not only the new Chief, but also the first new Justice to join the Court in eleven years.¹²⁵ In this setting, Roberts made it a "priority of his first term to promote unanimity and collegiality."¹²⁶ After his first term, Roberts's understanding of success as a Chief Justice could be summed up in one word: consensus. Asked directly about his use of the assignment power soon after becoming Chief Justice, Roberts was clear that he intended "to use his power to achieve as broad a consensus as possible."¹²⁷

He acknowledged that this approach might be perceived on the Court as a more controversial use of the assignment power than Chief Justice Rehnquist's stated policy of punishing only those justices who were slow in producing opinions. Roberts's colleagues were likely to understand a neutral policy that denied them new assignments when they were late with opinions, he said, but they might well object if they felt that he was giving the plum assignments to those justices who agreed with him. Roberts wanted to make clear that he would instead reward those who write opinions in ways that might attract more votes, regardless of their ideological orientation.¹²⁸

Chief Justice Roberts's emphasis on consensus and unanimity is shaped, in part, by his desire to retain bipartisan confidence in the Court. A Court with a higher degree of consensus is less likely to be perceived as making decisions along the party lines of the President

123 Greenhouse, *supra* note 24, at 91, 94.

124 See Richard W. Stevenson, *President Names Roberts as Choice for Chief Justice*, N.Y. TIMES (Sept. 6, 2005), <https://www.nytimes.com/2005/09/06/politics/politicsspecial1/president-names-roberts-as-choice-for-chief.html> [<https://perma.cc/D4US-J26V>].

125 Greenhouse, *supra* note 24, at 94.

126 Rosen, *supra* note 5.

127 *Id.*

128 *Id.*

that appointed them.¹²⁹ Part of the issue, according to Roberts, is the “personalization of judicial politics.”¹³⁰ “[J]ustices who act more like legal academics than members of a collegial Court . . . who seem more interested in demonstrating their jurisprudential consistency by writing opinions that read like law-review articles than in finding common ground with their colleagues” make this personalization more apparent, and stoke Roberts’s commitment to achieving consensus on narrow holdings.¹³¹ At the beginning of his tenure, Roberts noted that the intense polarization of the country made it especially important to “resist the politicization of the judiciary.”¹³² Fifteen years later, this could be more true than ever before. Chief Justice Roberts conveyed this sentiment clearly when he issued a rare political rebuke in November 2018—after President Donald Trump referred to a district judge who ruled against one of his policies as an “Obama judge,” Roberts “defended the independence and integrity of the federal judiciary” by making a “blunt statement” reiterating that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . [but we have] an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”¹³³ That Chief Justice Roberts felt it necessary to issue these remarks, against his usual tendency to stay firmly out of politics, suggests the strength of his commitment to judicial integrity.

Chief Justice Roberts is “more interested in institutional legitimacy than methodological purity.”¹³⁴ Put differently, Chief Justice Roberts is willing to vote with a majority to retain precedent rather than vote according to his own jurisprudentially preferred outcome. An analysis of his first five years as Chief Justice suggested that “institutional concerns may guide his conduct to a greater degree than that of most of his colleagues.”¹³⁵ Roberts has observed that his

129 *Id.* (“Unanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court; by contrast, closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.”).

130 *Id.*

131 *Id.*

132 *Id.* (“It’s a high priority to keep any kind of partisan divide out of the judiciary as well.”).

133 Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge’*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/68P5-MV8P>]. Chief Justice Roberts continued to say that the “independent judiciary is something we should all be thankful for.” *Id.*

134 Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC (July 14, 2020) <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/> [<https://perma.cc/GRR7-594H>].

135 Goldstein, *supra* note 4, at 754.

predecessor, Chief Justice William Rehnquist, “was willing to join opinions with which he disagreed as the sixth vote, but not as the fifth—in other words, he would compromise for the good of the Court, but only when his vote could not change the outcome.”¹³⁶ Roberts himself, on the other hand, is more open to joining majorities “to foster institutional solidarity.”¹³⁷ In October Term 2019, this was evidenced most clearly by his vote in *June Medical*.¹³⁸ Chief Justice Roberts voted such that a statute “nearly identical” to a law invalidated by the Court four years prior would be struck down, despite the fact that he had been in the minority in the prior case.¹³⁹ He made it clear that although he still believed that the earlier case was wrongly decided, respect for the doctrine of stare decisis dictated such a result.¹⁴⁰ This choice by Chief Justice Roberts is especially important in relation to the institutional legitimacy of the Court, as it sent a signal that changes on the bench will not change the Court’s commitment to following precedent and should not open the door to those seeking different outcomes in cases that are essentially identical to prior cases.¹⁴¹ Especially in light of his recent remarks defending judicial independence, this suggests that Roberts takes seriously his commitment to avoiding politicization of the judiciary.¹⁴²

This is not to say that Chief Justice Roberts has completely given up on his own jurisprudence.¹⁴³ Roberts faced criticism early on for being unwilling to compromise on his principles, with some observers commenting that he “might not be as conciliatory as he promised.”¹⁴⁴ There is evidence from October Term 2019 that suggests that Roberts may assign opinions with substantive policy in mind. In this vein, it is notable that Chief Justice Roberts assigned himself and Justice Kavanaugh, with whom he has a historically high average rate of alignment, the vast majority of five-four cases this term.¹⁴⁵ This suggests that in these close cases, where a Chief Justice is often tempted to self-

136 Rosen, *supra* note 5 (“Rehnquist cared somewhat about building consensus, but not all that much.”).

137 Goldstein, *supra* note 4, at 754.

138 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

139 *Id.* at 2133.

140 *Id.* at 2133, 2141–42.

141 See Liptak, *supra* note 11 (suggesting that Roberts voted in the majority in *June Medical* partly because he “was offended by the idea that a change in the composition of the court should warrant a different outcome in what was, at bottom, the identical case”).

142 See *supra* note 133 and accompanying text.

143 Goldstein, *supra* note 4, at 756 (“Roberts clearly has not abandoned his convictions, and in some areas he has aggressively pursued jurisprudential goals.”).

144 Jeffrey Rosen, *Roberts Versus Roberts*, THE NEW REPUBLIC (Mar. 2, 2010), <https://newrepublic.com/article/73200/roberts-versus-roberts> [<https://perma.cc/P7VB-87TT>].

145 See *supra* notes 99–101 and accompanying text.

assign the opinion in order to “structure and guide the parameters of the final majority decision,”¹⁴⁶ Roberts could be making the next best choice when he cannot self-assign by assigning to a Justice who votes and thinks similarly. The idea that Roberts is assigning strategically is further supported by the fact that the average strength of majority that the Justices wrote for this term loosely correlated with their average rate of alignment with Chief Justice Roberts.¹⁴⁷ In other words, the less likely Chief Justice Roberts is to agree with another Justice based on their historical voting patterns, the more likely he was in October Term 2019 to assign them unanimous opinions, where their rates of alignment are much higher. Relatedly, when Chief Justice Roberts votes in divided cases with his more liberal colleagues, he often assigns the opinion to himself or to the most conservative Justice joining him in the majority.¹⁴⁸ Given the fact that Chief Justices in the past have been found most likely to assign themselves the majority opinion in unanimous cases,¹⁴⁹ it is interesting that Chief Justice Roberts self-assigned zero unanimous cases this term, a first since he took the center seat fifteen years ago.¹⁵⁰ The fact that he tended to assign himself highly divided cases instead suggests that the Chief may have found writing the opinion in these cases and determining the breadth of the holdings especially important.

However, these assignment choices can also be viewed as a method of coalition building. As he stated at the beginning of his tenure, one of Chief Justice Roberts’s main goals in the assignment process is consensus.¹⁵¹ By assigning the opinion to someone who will write a more narrow holding, Chief Justice Roberts can attract a larger group of Justices to vote with the majority, which in turn adds to the

146 Slotnick, *supra* note 30, at 224. A notable example of Robert’s self-assignment this term is *DHS v. Regents*, where he voted with the more liberal Justices in a case that attracted much partisan attention, but wrote a narrow, procedurally focused opinion that remanded the issue to the Department, allowing them to reconsider the issue. See *supra* notes 115–17 and accompanying text.

147 See *supra* notes 86–105 and accompanying text.

148 Of the fifteen five- or six-member majority opinions Chief Justice Roberts assigned this term, only three were assigned to a Justice who traditionally votes more liberally than Roberts. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (opinion authored by Justice Breyer); *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (opinion authored by Justice Kagan), *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (opinion authored by Justice Breyer).

149 See Slotnick, *supra* note 30, at 225.

150 See *supra* note 84 and accompanying text. The fact that Roberts self-assigned highly divided cases does align with Slotnick’s assertion that, when not writing for a unanimous Court, Chief Justices are more likely to write for highly divided, rather than moderately divided, courts. See Slotnick, *supra* note 30, at 224.

151 See *supra* note 127 and accompanying text.

legitimacy of the Court.¹⁵² An example of this came in the assignment of the majority in *Bostock* to Justice Gorsuch¹⁵³: Gorsuch may not have joined an opinion authored by another Justice who reached the same result on different grounds of interpretation. In this way, Roberts is able to use the assignment power to create opinions that generate greater consensus on the Court.

Drawing inspiration from his role model, John Marshall, Chief Justice Roberts noted at the beginning of his tenure that he would seek as many unanimous opinions, and as few concurring and dissenting opinions, as possible.¹⁵⁴ Early in his time on the Court, it was observed that Roberts held himself to those standards.¹⁵⁵ This was also true in October Term 2019, when Roberts authored just one concurrence and one dissent, falling below his already low rates of nonmajority opinion authorship.¹⁵⁶ However, it is important to note that his record low rate of concurrence and dissent came in a term where he was in the majority and able to assign the opinion almost all of the time, not creating many situations in which he may have felt the need to write separately.¹⁵⁷ Observers have noted that Roberts's rare concurrences are sometimes used in cases where he feels the need to explain the majority's decision in order to retain institutional legitimacy.¹⁵⁸ His lone concurrence this term in *June Medical* could be characterized in such a way: Chief Justice Roberts used much of his opinion to describe why it was necessary for the Court to adhere to precedent, despite his personal opinions about the reasoning of the prior case.¹⁵⁹ These types of concurrences provide further evidence of Chief Justice Roberts's commitment to retaining the institutional legitimacy of the Court.

152 See *supra* note 129 and accompanying text.

153 See *supra* notes 118–22 and accompanying text.

154 See Rosen, *supra* note 5 (“In particular, Roberts declared, he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions.”).

155 Goldstein, *supra* note 4, at 754 (“[H]e writes fewer dissenting opinions than does virtually any other Justice.”). While this figure was explained in part by the fact that Roberts is so often in the majority, Goldstein found that his rate of dissent was still lower than Justices with similarly high majority rates. *Id.*

156 See *supra* notes 106–09 and accompanying text.

157 In October Term 2014, on the other hand, Chief Justice Roberts wrote two concurrences and five dissents while voting in the majority only eighty percent of the time. See OT 2014 STAT PACK, *supra* note 70, at 8, 21.

158 Goldstein, *supra* note 4, at 756 (“[Roberts’s] concurring opinion in *Citizens United v. Federal Election Commission*, in which he defended the majority’s opinion from the charge that it reflected judicial activism in reaching to decide an issue not necessarily before the Court and in not according proper respect to precedent, reflects concerns regarding the Court’s institutional standing.” (internal citation omitted)).

159 See *supra* notes 112–14 and accompanying text.

CONCLUSION

When Chief Justice Roberts committed to “call[ing] balls and strikes” during his confirmation hearings in 2005, he committed to “decid[ing] every case based on the record, according to the rule of law, without fear or favor.”¹⁶⁰ Repeatedly, he has publicly announced his commitment to institutional legitimacy, putting precedent above the politicization of the judiciary and resisting the personalization of judicial decisionmaking by prioritizing consensus among his colleagues. One of the most powerful ways in which he is able to achieve these goals is through the assignment of majority opinions. Voting in the majority at an unprecedented rate for a Chief Justice, October Term 2019 presented an opportunity for Roberts to use this power to nearly always achieve his policy preferences. However, the commitment to fairness evoked by his original “balls and strikes” metaphor rang true. Taking the results of October Term 2019 into account, it appears that Chief Justice Roberts used this largely unprecedented power as both a swing vote and the assignor of the majority opinion in a way that aligned with his signature commitment to consensus and legitimacy of the Court. This term, he “voted with liberal and conservative justices at roughly equivalent rates.”¹⁶¹ While the data compiled in this Note suggests that Roberts is able to, and sometimes does, use the assignment power to reach the substantive outcome he prefers when he is in the majority, he is also careful to vote and assign in a way that is meant to create greater consensus and faith in the legitimacy of the Court. On the whole, Chief Justice Roberts has demonstrated a commitment to precedent and institutional legitimacy, while remaining grounded in his conservative roots.¹⁶²

It is important to note that this discussion aimed only to make observations about Chief Justice Roberts’s voting and assignment choices in October Term 2019 and what these patterns suggest about his concerns and goals for the Court. More comprehensive research is needed to analyze Roberts’s voting and assignment choices throughout his tenure, and more research will be needed as the Court moves forward. Roberts is only sixty-five and has good reason to believe he will be in the center chair for years to come.¹⁶³ Recent changes on the bench, however, suggest that the type of control Roberts exerted this term may not be possible in the near future. In October Term 2020, the arrival of Justice Amy Coney Barrett shifted the ideological

160 *Confirmation Hearing*, *supra* note 1, at 56.

161 Liptak, *supra* note 11.

162 *Id.* (“An incrementalist and an institutionalist, [Roberts] generally nudges the court to the right in small steps, with one eye on its prestige and legitimacy.”).

163 *Id.*

balance of the Court such that the conservative wing of the Court now holds a six-member majority, “thrusting the chief justice out of his spot at the court’s ideological center” and potentially placing Justice Kavanaugh at the median.¹⁶⁴ While it is not yet clear how this change will play out, Justice Kavanaugh’s record of voting similarly to Chief Justice Roberts suggests that Roberts will continue to be in the majority and assigning opinions in many key cases. Kavanaugh’s recent opinions in the highly politicized voting cases leading up to the 2020 presidential election, however, suggest that he may be less concerned with avoiding partisan issues than the Chief,¹⁶⁵ presenting potential conflicts the Chief Justice will have to face. Chief Justice Roberts’s concern with creating consensus and preserving faith in the legitimacy of the Court, as evidenced by his voting and assignment in October Term 2019, is sure to guide his decisionmaking going forward and may prove to be more important than ever before as concerns about the polarization of the judiciary continue to grow.

164 Adam Liptak, *In Voting Cases, Chief Justice Roberts Is Alone but in Control*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/john-roberts-supreme-court-voting.html> [<https://perma.cc/E32S-GTHE>].

165 *Id.* Kavanaugh’s votes on both sides of election issues in cases following a concurrence that “attracted considerable attention” for its perceived partisanship and factual errors, however, suggest that he may be willing to take these concerns into account. *Id.*

