TAKE BACK THE COURT

Chief Justice John Roberts is Not a Moderate

By Aaron Belkin and Sean McElwee, with data analysis by Adam Feldman

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One of the most conservative justices

- Chief Justice John Roberts's reputation for moderation is not warranted by his judicial record. His votes, opinions, and assignments of opinions reveal that Roberts is neither a moderate nor a swing vote, but rather a staunch right-wing conservative.
- Original data, never before reported, show that Roberts has been one of the most conservative justices since joining the Supreme Court in 2005 and that there is almost no partisan difference distinguishing Justices Roberts, Gorsuch, Alito, Roberts, and Scalia.
- Roberts has been the leader of a robust conservative voting bloc, almost always siding with the most conservative of his colleagues in 5-4 decisions: Justice Kavanaugh (89%); Justice Alito (88%); Justice Thomas (85%); Justice Scalia (84%).
- Ideological coding of 5-4 decisions reveals that Justice Roberts is among the most conservative members of the Court. His conservative voting frequency is 60% higher than that of any liberal justice.
- Even in the two decisions that sustain his reputation for centrism, Roberts has advanced a partisan agenda under the guise of reasonableness by transforming easy questions into opportunities to sabotage democracy and narrow Congress's ability to protect the public.

PARTISAN DISREGARD FOR PRECEDENT

- During his 2005 confirmation hearings, Roberts emphasized his respect for precedent, affirmed that flaws in precedent are "not enough…to justify revisiting it," and underscored "the values of respect for precedent, evenhandedness, predictability, stability."
- Roberts's frequent votes to overturn precedent, however, are wholly inconsistent with his testimony at his confirmation hearing that he would respect past Supreme Court rulings.
- During his 14 years as Chief Justice, Roberts presided over 21 precedent-overturning cases and voted to overturn precedent in 17 of them (81%), making him the second most frequent member of the majority in precedent-overturning cases.
- Roberts's voting record in precedent-overturning cases is among the most partisan of any justice in the modern era. In 15 precedent-overturning cases with partisan implications, he voted for conservative outcomes 14 times (93%). He is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.

REPRODUCTIVE RIGHTS CASE STUDY

- Roberts testified at his 2005 confirmation hearings that he considered the right to abortion to be settled law. His record as Chief Justice, however, shows that his assurances were cynical.

CHIEF JUSTICE JOHN ROBERTS IS NOT A MODERATE

Some perceive Chief Justice Roberts as a moderate member of the Supreme Court, but this reputation is not warranted by his judicial record. Original data, never before reported, reveal that Roberts is neither a moderate nor a swing vote, that he has been one of the most conservative justices since joining the Supreme Court in 2005, and that there is almost no partisan difference distinguishing Justices Roberts, Gorsuch, Alito, Roberts, and Scalia.[1]

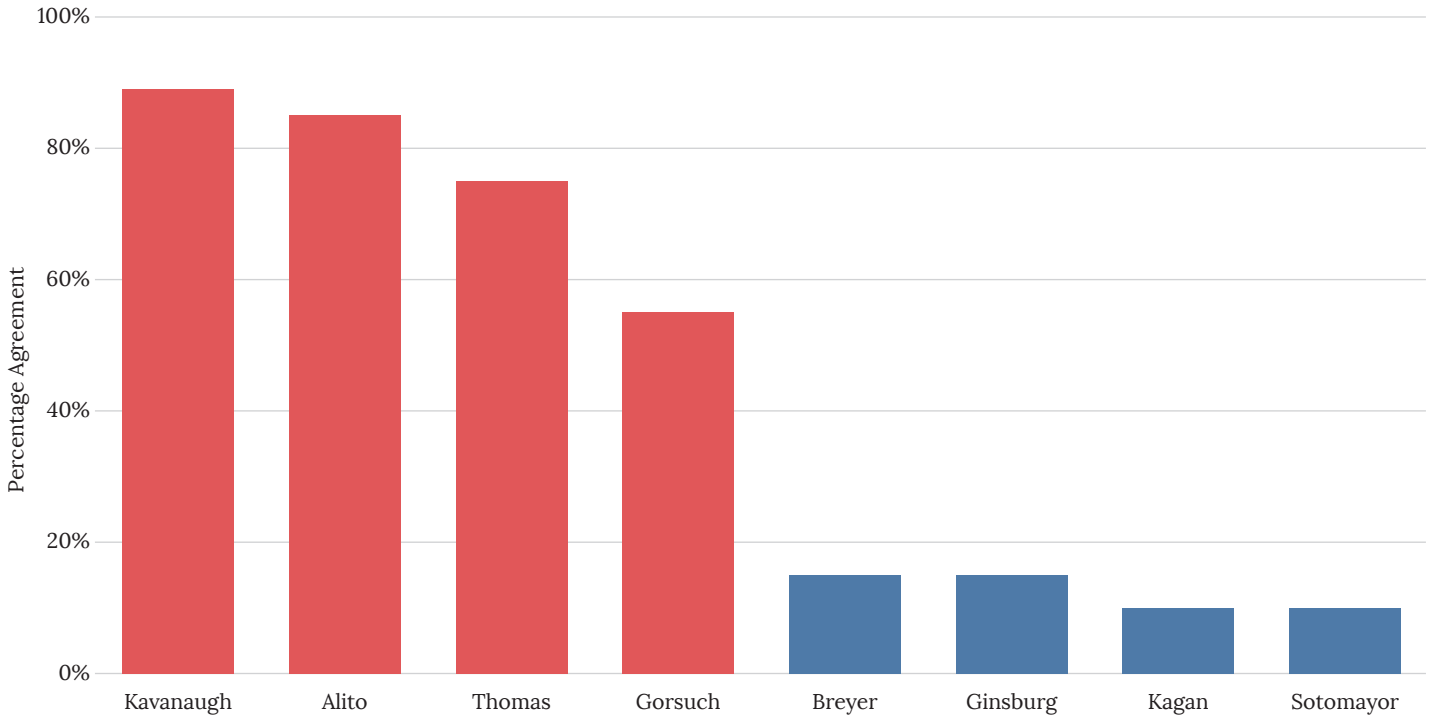
Throughout his career, Roberts has almost always sided with the most conservative of his colleagues in 5-4 decisions, rarely voting with moderates or liberals. He almost always assigns 5-4 decisions to conservative colleagues or to himself and almost never assigns them to liberals. Even in the small number of decisions that sustain his reputation for moderation, Roberts has advanced a partisan agenda under the guise of reasonableness by transforming easy constitutional questions into new opportunities for narrowing protections for the neediest Americans.

CONSERVATIVE VOTING DURING THE 2018 TERM

After Justice Kennedy retired at the end of the 2017 Supreme Court term, observers expected that Chief Justice Roberts would take his place as the Court's swing justice. While Kennedy had sided with liberal justices in a handful of important 5-4 decisions, the expectation that Roberts would become a swing justice was not confirmed by his subsequent voting behavior.

The following graph, which shows Roberts's alignment with colleagues in 5-4 decisions during the 2018 term, indicates that his was almost never a swing vote, and that his decisions were virtually indistinguishable from those of the other justices considered most conservative.

ROBERTS'S AGREEMENT LEVELS IN 2018 TERM 5-4 DECISIONS



During the 2018 term, Justice Roberts aligned with Justice Kavanaugh in 89% of 5-4 decisions, Justice Alito in 85% of such decisions, and Justice Thomas in 80%. In contrast, he aligned with Justices Ginsburg and Breyer in 15% of 5-4 decisions and with Justices Kagan and Sotomayor in 10% of such decisions. During the 2018 term, Roberts was the pivotal swing vote siding with liberal justices in just two split decisions, two fewer than Justice Gorsuch.[2]

A key 5-4 decision at the end of the 2018 Supreme Court session reveals the depth of Justice Roberts's conservativism. In *Rucho v. Common Cause*, a case examining partisan gerrymandering, Roberts foreclosed the possibility of federal courts intervening to rectify unconstitutionally drawn voting districts, even when they recognize that the districts are unconstitutional. His decision underscores how the language of judicial modesty can disguise a conservative result that advantages the Republican party. Roberts wrote,

"Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is 'incompatible with democratic principles,' Arizona State Legislature, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."

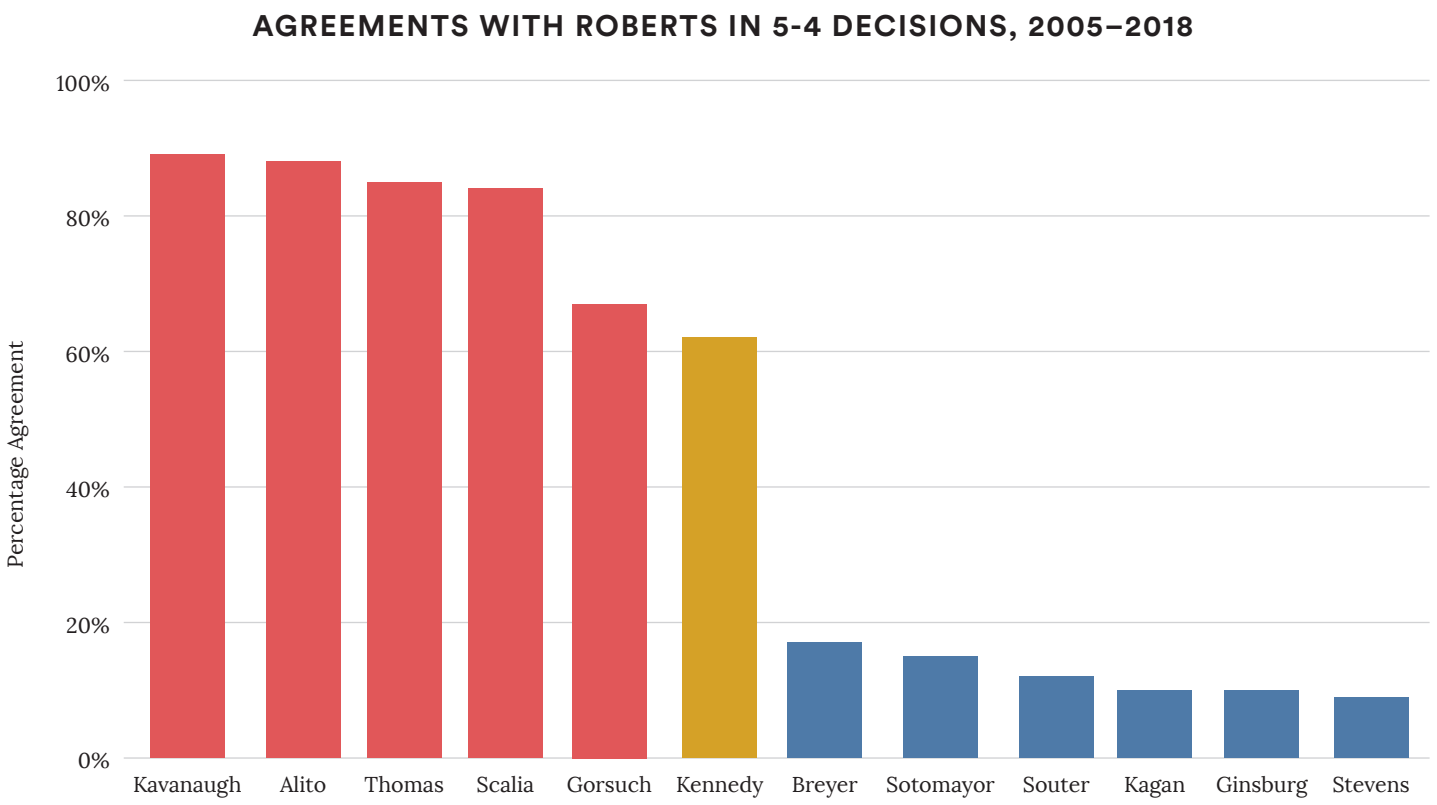
This decision, which was joined by the Court's other conservative justices, prompted a vociferous dissent by Justice Kagan and her liberal colleagues. Kagan wrote that, "[f]or the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities."

ROBERTS = THOMAS = SCALIA = ALITO = GORSUCH

Chief Justice Roberts joined the Supreme Court in 2005 after the death of the late Chief Justice Rehnquist. Since that time, he has voted in total of 241 5-4 split decisions. In 175 of such cases, Justices Scalia, Thomas, and Alito also participated. This conservative coalition voted with Roberts in more cases than any other set of justices. In 5-4 decisions, these four justices voted together either in the Court's majority or dissent 75% of the time.[3] By comparison, Justices Roberts, Ginsburg, Breyer, and Sotomayor have voted in 158 5-4 decisions together since Sotomayor joined the Court in 2009. These justices were on the same side of such decisions just 8% of the time.

The following graph reports Justice Roberts's agreement level with each of his colleagues in 5-4 decisions since 2005.[4] Data indicate that throughout his career, the Chief Justice has almost always sided with the most conservative of his colleagues in such decisions: Justice Kavanaugh (89%); Justice Alito (88%); Justice Thomas (85%); Justice Scalia (84%). By contrast, his alignment frequency with liberal justices is 10% or less with Justices Kagan, Ginsburg, and Stevens.

Roberts's steadfast conservatism is apparent from his individual voting record, not just his history of siding with his conservative colleagues in split decisions. One of the most widely-used Supreme Court data resources, the United States Supreme Court Database, codes each justice's vote as conservative or liberal based primarily on the issue at stake and the partisan underpinnings of the case.[5] A vote supporting a person convicted or accused of a crime in a criminal case, for instance, is treated as liberal while a vote supporting the government is coded as conservative. Although this reductionist method of coding sacrifices some nuance, it provides a straightforward and consistent way to compare the justices' votes across time.



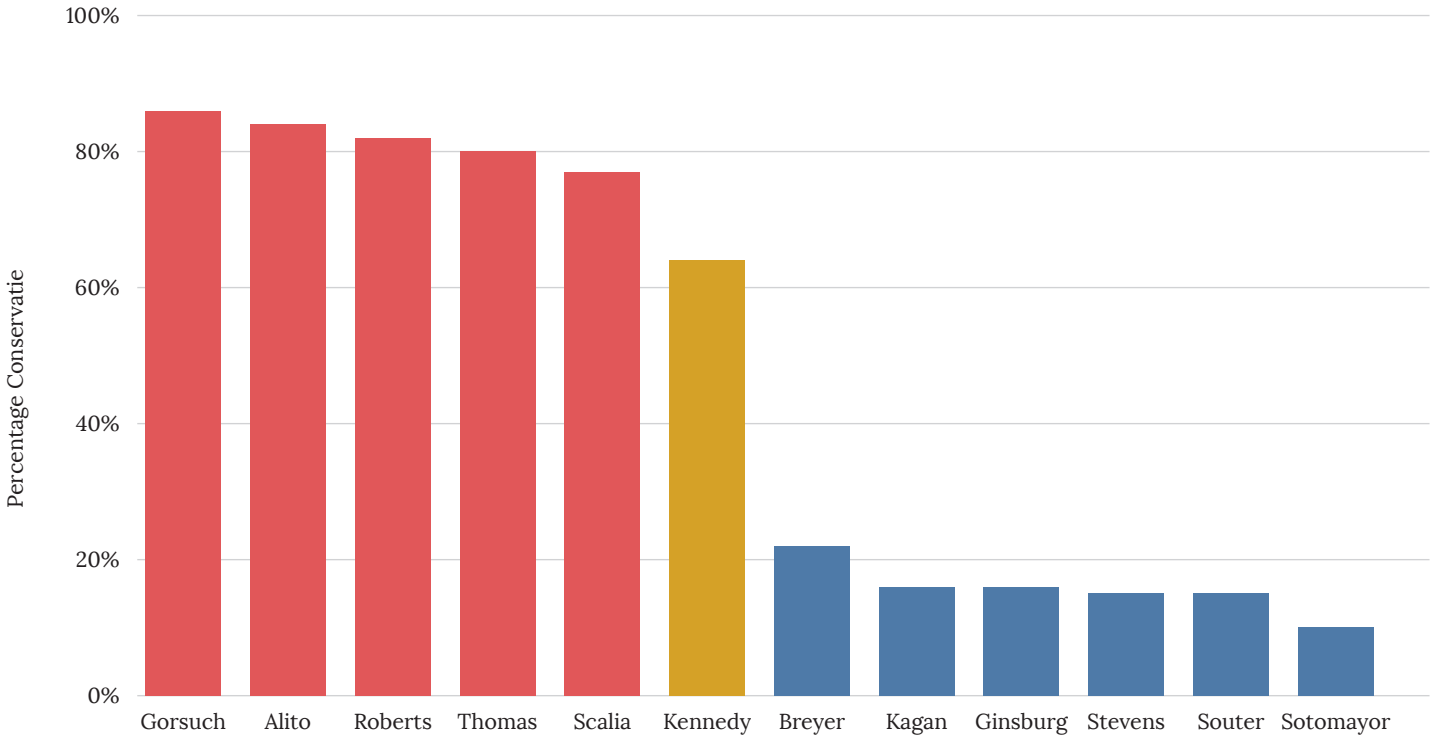
Data on the ideological direction of each justice's votes in 5-4 decisions between 2005, when Roberts joined the Court, and 2017 confirm that the Chief Justice has an arch-conservative voting record, and that he has been among the Court's most conservative members. With an 82% conservative voting record in split decisions, Roberts falls just four percentage points lower than his most conservative colleague, Justice Gorsuch, according to this measure. His percentage of conservative votes in 5-4 decisions is just two percentage points lower than Justice Alito's and two points above Justice Thomas's. As the chart below indicates, there is almost no partisan difference between Justices Roberts, Gorsuch, Alito, Roberts, and Scalia.

OPINION ASSIGNMENTS FAVOR CONSERVATIVE JUSTICES

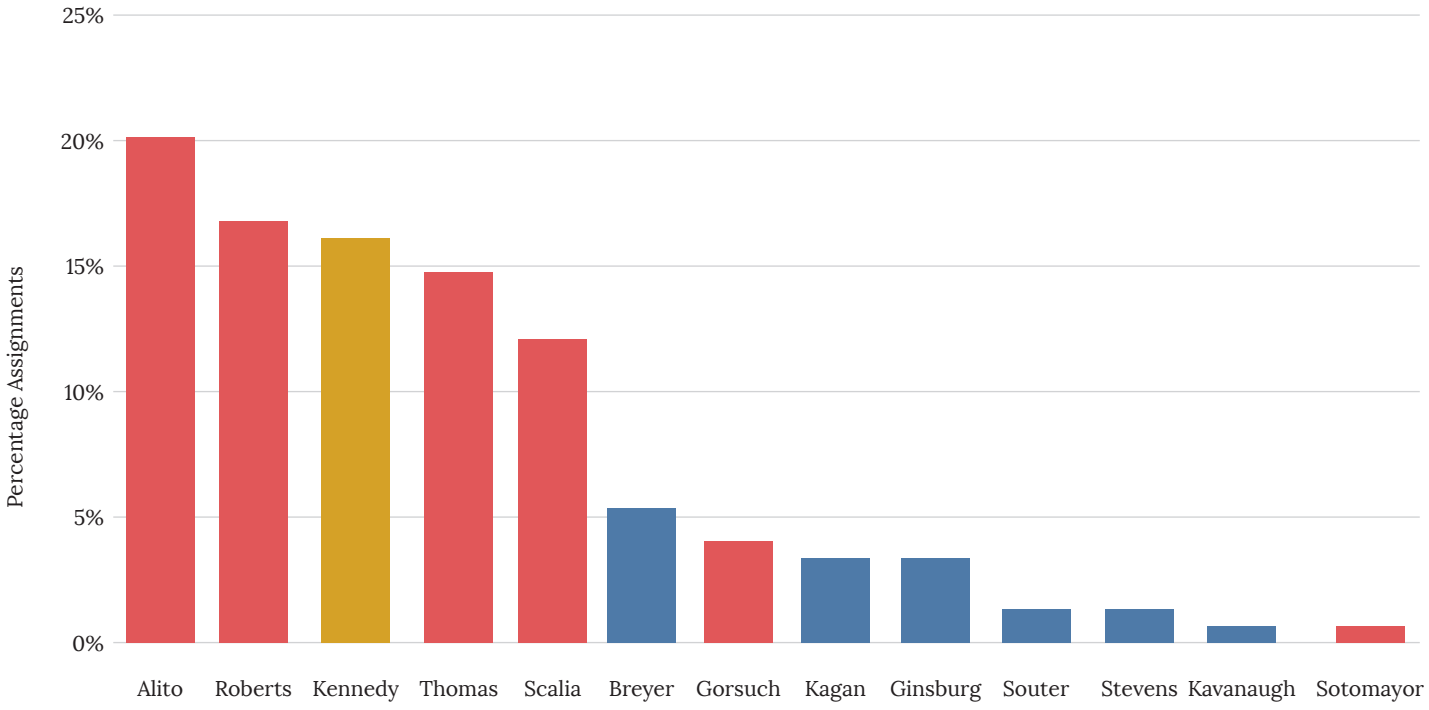
One of the Chief Justice's main responsibilities is to assign the majority opinion author in cases in which the Chief is a member of the majority. If Roberts is not in the majority, then the most senior justice in the majority assigns the opinion. This assignment power has provided another means for Roberts to solidify the Court's conservative jurisprudence, as he usually delegates assignments to himself and to his most conservative colleagues. Occasionally, he assigns 5-4 majority opinions to liberal justices to entice them to side with a conservative majority when one of the more conservative justices is expected to vote in dissent.[6]

Roberts assigned opinions in 149 5-4 decisions between 2005 and the end of the 2018 term, equating to just over 64% of such opinions. As the chart below indicates, he almost always assigns decisions to himself and to the Court's most conservative members, rarely assigning them to liberals.

PERCENT OF CONSERVATIVE VOTES IN 5-4 DECISIONS



PERCENT OF ROBERTS'S OPINION ASSIGNMENTS BY JUSTICE

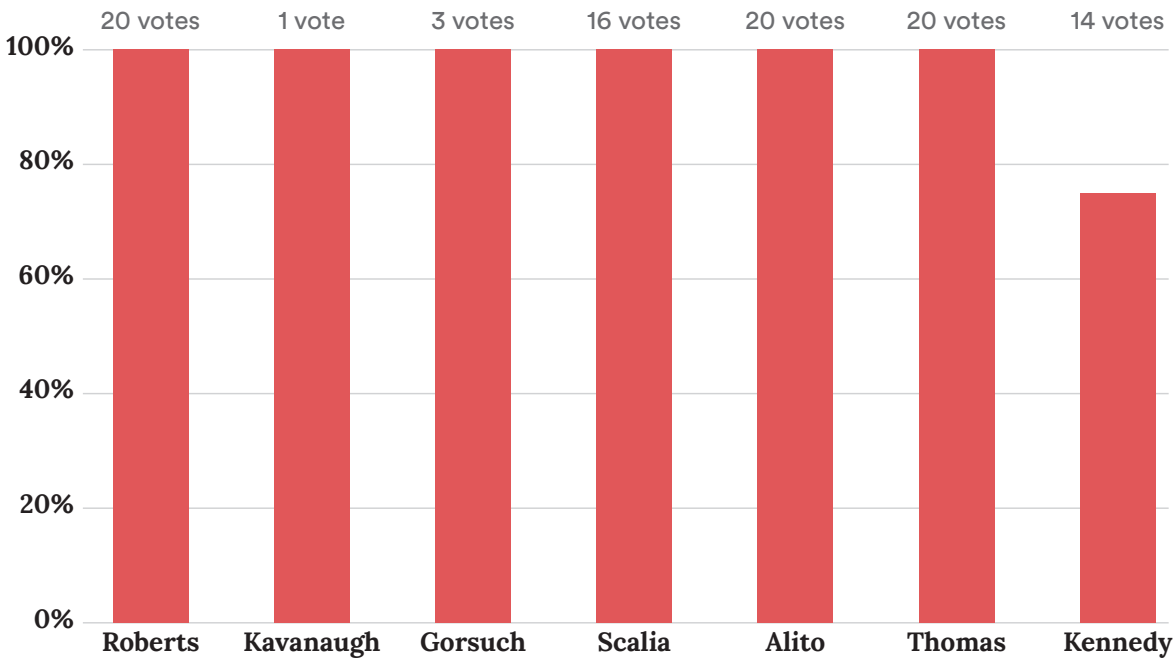


BREADTH OF CONSERVATIVE JURISPRUDENCE

Across of range of critical issues, Chief Justice Roberts has set aside precedent to narrow or undermine individual rights, erode the ability of citizens to participate in democracy, and advance corporate power. He has a history of authoring some of the most partisan 5-4 decisions on the modern Supreme Court. His partisan record includes the following cases:

- **Race**: Issued opinion for 5-4 majority in *Shelby County* (2013), dismantling the Voting Rights Act despite its recent reauthorization by a nearly unanimous Congress, and despite evidence suggesting that disabling the Act would allow voter suppression. In 20 race-related cases decided by a single vote, Roberts voted for anti-minority positions 100% of the time.
- **Labor**: Joined 5-4 majority that undermined workers' rights to organize in *Janus v. AFSCME* (2018).
- **Immigration**: Issued opinion for 5-4 majority upholding President Trump's Muslim travel ban in *Trump v. Hawaii* (2018), ignoring evidence of the administration's intent to discriminate on the basis of religion. Roberts has ruled in 9 immigration-related cases decided by a single vote. In those 9 cases, he voted for anti-minority positions 100% of the time.
- **Gun safety**: Joined 5-4 decision in *Heller* (2008) that prohibited gun safety regulations, finding for the first time that the Second Amendment protects an individual's right to bear arms.
- **Campaign finance**: Joined 5-4 decision in *Citizens United* (2010), setting aside precedent to find a First Amendment right for corporations and allowing unlimited dark money in elections.
- **Consumer rights**: Joined 5-4 decision in *AT&T Mobility v. Concepcion* (2011), undercutting consumers' ability to hold corporations accountable for fraudulent behavior.

ANTI-MINORITY VOTES IN CASES DECIDED BY ONE VOTE (2005-2018)



- **Reproductive rights**: Joined conservative justices in a dissent that would have effectively overturned *Roe v. Wade* in *Whole Women's Health* (2016). Roberts has ruled in 6 cases involving reproductive rights, and voted in opposition each time (100%).
- **LGBT**: Voted to oppose marriage equality in *Windsor* (2013) and *Obergefell* (2015). Joined 5-4 majority (2018), allowing the Trump administration to ban transgender service members from the military.

Majorities that Chief Justice Roberts has joined appear, on occasion, to disregard factual records. In granting the Trump administration's request for emergency relief from preliminary injunctions prohibiting the military from firing transgender service members, for example, a 5-4 majority agreed that inclusive policy posed "too great a risk to military effectiveness and lethality," overlooking that all five Service Chiefs testified that inclusive policy had not compromised readiness, and that more than two years after the lifting of the transgender ban, the administration was unable to identify any evidence that inclusion had harmed readiness.[7]

CHIEF JUSTICE ROBERTS'S CENTRISM IS CAREFULLY DESIGNED PARTISANSHIP

Chief Justice Roberts's reputation for moderation has been sustained by just two rulings during his fourteen years on the Court: the narrow 2012 vote to uphold the Affordable Care Act's individual mandate and the recent decision to remand a case involving the addition of a citizenship question to the Census to a lower court. Even in these two cases, however, Chief Justice Roberts reinforced dangerous constitutional precedent while undermining individual rights as well as Congress's ability to protect the public.

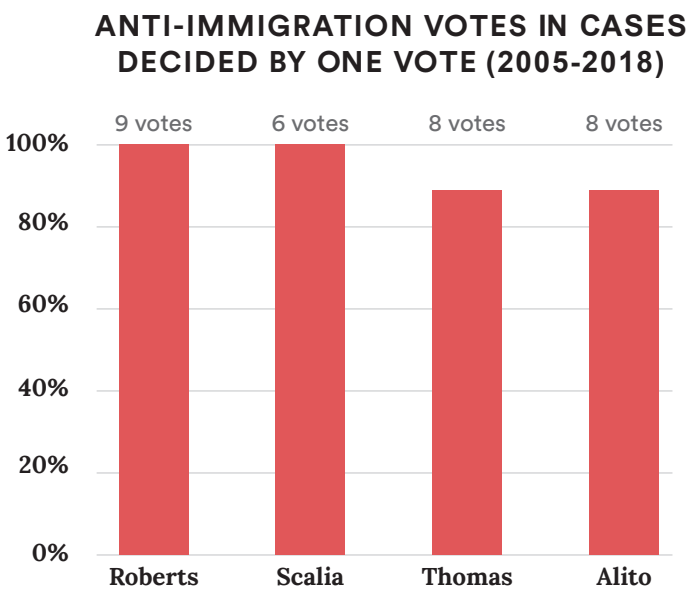
Robert's recent ruling in *Department of Commerce v. New York* effectively allowed the Trump administration to add a citizenship question to the Census, even though the White House declined to pursue the matter.[8] What some described as Roberts's thoughtful preservation of the role of the Court misses the fact that the Chief Justice reinforced a dangerous precedent by inviting the administration to reverse-engineer a justification for discrimination after its original pretext was exposed

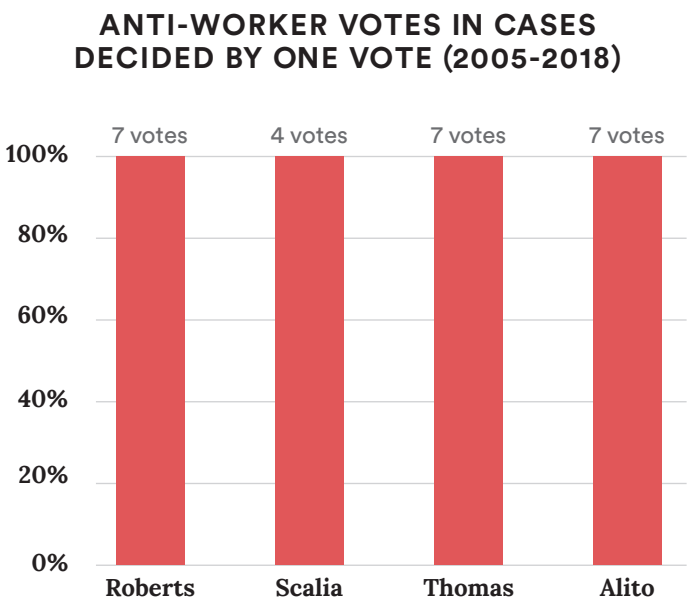
as constitutionally unacceptable. In addition, reporters who praised Roberts's ruling for its moderation missed its practical implications and discounted that, as a legal and constitutional matter, the case should not have been a close vote, given clear evidence of the administration's partisan and racial motive for adding a citizenship question to the Census. The democracy-compromising ramifications of Roberts's decision quickly became apparent when the Trump Administration directed the Census Bureau to provide states with information about "citizenship voting age population." These data will enable states to draw districts that advantage white Republican voters, the discriminatory rationale that Justice Roberts failed to reject.

This was not the first time that observers have mischaracterized one of Roberts's partisan rulings as centrist. In 2012, Chief Justice Roberts sided with liberals in a 5-4 decision narrowly upholding the constitutionality of the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius*. Those who praised Roberts for his centrism, however, (1) overlooked that he decided what should have been a straightforward case in an unnecessarily narrow way that reversed clear and long-standing precedent, curtailing Congress's ability to address national problems through its Commerce Clause powers; (2) effectively rewrote Medicaid expansion in a way not intended by Congress, enabling Republican governors to deny health insurance to millions of people; and (3) left the door open for continued (and current) partisan court challenges to the Affordable Care Act. Despite his ostensible commitment to judicial restraint, Chief Justice Roberts curtailed the signature initiative of a President elected with a mandate to reform U.S. health insurance by limiting a statute that solid House and Senate majorities had approved. By any reasonable standard, *Sebelius* was not a moderate ruling.

While Robert's decisions in these two cases have been widely praised for their centrism and have sustained his reputation as a moderate, observers have ignored the partisan implications of these two supposedly middle-of-the-road rulings. To the extent that the two decisions can be characterized, in part, as moderate, both transformed clear-cut constitutional and legal questions into opportunities for narrow rulings with partisan practical and doctrinal implications. They appear to be centrist only in the context of the radicalism of the rest of Roberts's voting record and that of his conservative colleagues.

> Justice Roberts is among the most conservative members of the Court. His conservative voting frequency is 60% higher than that of any liberal justice.





> Original data, never before reported, show that there is almost no partisan difference distinguishing Justices Roberts, Gorsuch, Alito, Roberts, and Scalia.

One of the Most Conservative Justices

Chief Justice Roberts has voted repeatedly to compromise the rights of minority and traditionally disadvantaged groups while advancing corporate power. He has a history of authoring some of the most partisan 5-4 decisions on the modern Supreme Court, often in pursuit of limiting civil and human rights.

In his 5-4 majority opinion in *Shelby County v. Holder* (2013), the case that dismantled the Voting Rights Act, Roberts ignored the constitutional authority of Congress to enforce the guarantees of the Fourteenth and Fifteenth Amendments, substituting his own policy judgment for the findings of Congress. Despite a factual record that indicated that disabling the Act would allow voter suppression, he wrote that, "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

His dissents in 5-4 decisions have been no less forceful. In his minority opinion in *Obergefell v. Hodges* (2015), a case that upheld the constitutionality of marriage equality, Roberts stated, "Today…the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage…for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening."

While the contrast between Roberts's positions in *Shelby County* and *Obergefell* is stark, both 5-4 decisions illustrate the key finding that emerges from an analysis of original data, never before reported, about his voting record: Chief Justice John Roberts's reputation for moderation is not warranted by the evidence. While Roberts's personal style is thoughtful and understated, the data we analyze in this report indicate that his jurisprudence is staunchly partisan. His record in the Court's closest decisions, those decided by one vote, present a clear picture of an arch-conservative intent on solidifying a partisan majority on the bench.

Even in the two decisions that sustain his reputation for centrism, Roberts has advanced a partisan agenda under the guise of reasonableness by transforming straightforward constitutional questions into opportunities for limiting rights. His votes and opinions reveal that Roberts is neither a moderate nor a swing vote. Since joining the Court in 2005, he has been an arch-conservative jurist whose voting record aligns with the most partisan conservative justices on the modern Supreme Court.

ROBERTS'S SWORN COMMITMENT TO FOLLOW SUPREME COURT PRECEDENT UNDERMINED BY HIS VOTING RECORD AS CHIEF JUSTICE

During his 2005 confirmation hearings for Chief Justice of the Supreme Court, John Roberts emphasized the importance of precedent in his opening statement to the Senate Judiciary Committee. According to Roberts, "Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath."[9] As the hearings continued, participants referenced "precedent" 273 times, often when Senators asked Roberts whether he would vote to overturn *Roe v. Wade*, the Supreme Court decision affirming the right to abortion. In fact, Roberts's claims to respect for precedent was the key to his successful attempt to assuage concerns that he would overturn *Roe v. Wade* based on his personal views. For example, later in the hearings, Roberts reinforced his prior commitment to precedent by adding, "Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under

principles of stare decisis" and "[T]here's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis."[10]

Despite Roberts's pledge to respect precedent before he was confirmed, his voting record on the Court tells a contrary story, and underscores the conservatism of his jurisprudence. As Chief Justice, Roberts presided over 21 precedent-overturning cases, and voted to overturn precedent in 17 of them (81%).

Fifteen of those 21 precedent-overturning cases ended in split 5-4 decisions with liberal and conservative blocs aligned against one another. In these fifteen ideologically-charged cases, Roberts's voting record lines up almost perfectly with his partisanship. He voted to overturn precedent in all 11 of the 15 cases with a conservative outcome, and in just 1 of the 4 cases with a liberal or mixed outcome (25%). In the 15 precedent-overturning cases with partisan implications, in other words, Justice Roberts voted for a conservative outcome 14 times (93%).

Chief Justice Roberts is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.

While the quantitative data we offer below confirm that Roberts's reputation for moderation is unfounded, the qualitative data point to an even more of a striking contrast between his reputation and his record. By examining every precedent-overturning case that Robert has heard, we discovered that the Chief Justice has voted to overturn precedent across a wide range of hot-button issues including campaign finance, reproductive health, workers' rights, gun safety, affirmative action, and procedural justice. In split-decision cases involving these issues, Roberts voted to overturn precedent 100% of the time, and his votes always lined up with the partisan interests of the GOP. The only time Roberts votes against overturning precedent in ideologically-charged cases is when doing so would lead to a liberal outcome, for example marriage equality.

> Even in the two decisions that sustain his reputation for moderation, Roberts has advanced a partisan agenda under the guise of reasonableness.

ROBERTS ALMOST ALWAYS VOTES TO OVERTURN PRECEDENT FOR PARTISAN ENDS

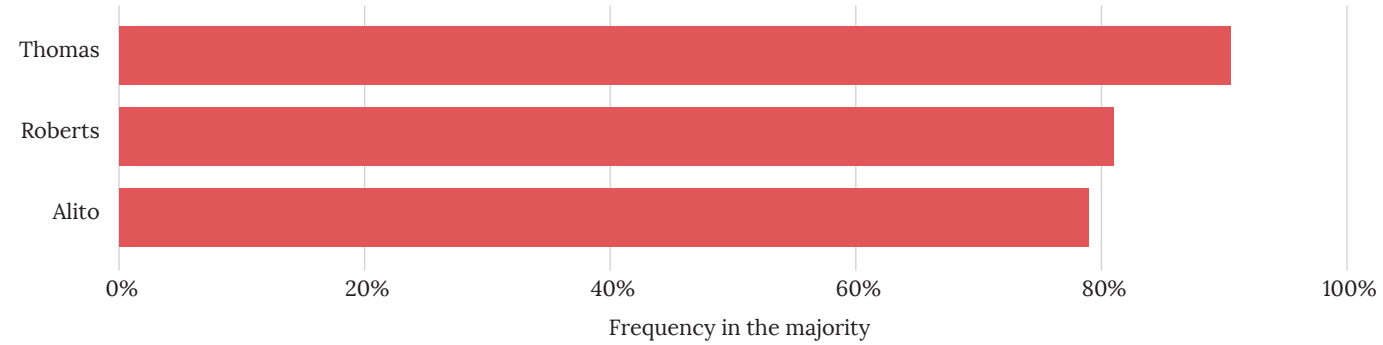
Chief Justice, Roberts voted to overturn precedent in 17 out of the 21 precedent-overturning cases he has heard (81%), making him the second most frequent member of the majority in precedent-overturning cases.[11] Only Justice Thomas was a more frequent member of the majority in such cases (90%). Justice Kagan was in the majority in 50% of such decisions while Justice Breyer was in the majority just 43% of the time.

Chief Justice Roberts's voting record in precedent-overturning cases is not ideologically balanced. Quite to the contrary, his track record in such cases is among the most partisan of any Supreme Court Justice in the modern era. Using the Supreme Court Database's ideological coding, we compared the partisanship of rulings in precedent-overturning cases of every justice who has ruled in at least five such cases since 1946.[12] By comparing each justice's fraction of conservative votes in cases overturning precedent, we were able to determine that Roberts's record is the second most conservative among the 37 justices included in the analysis. With 84% conservative votes in precedent-overturning cases, Roberts only trails Justice Alito's 88%. And, Roberts and Alito are the only justices with frequencies above 80%. By contrast, Justices Sotomayor and Kagan have two of the least conservative voting records in precedent-overturning cases at 10% and 13% respectively.

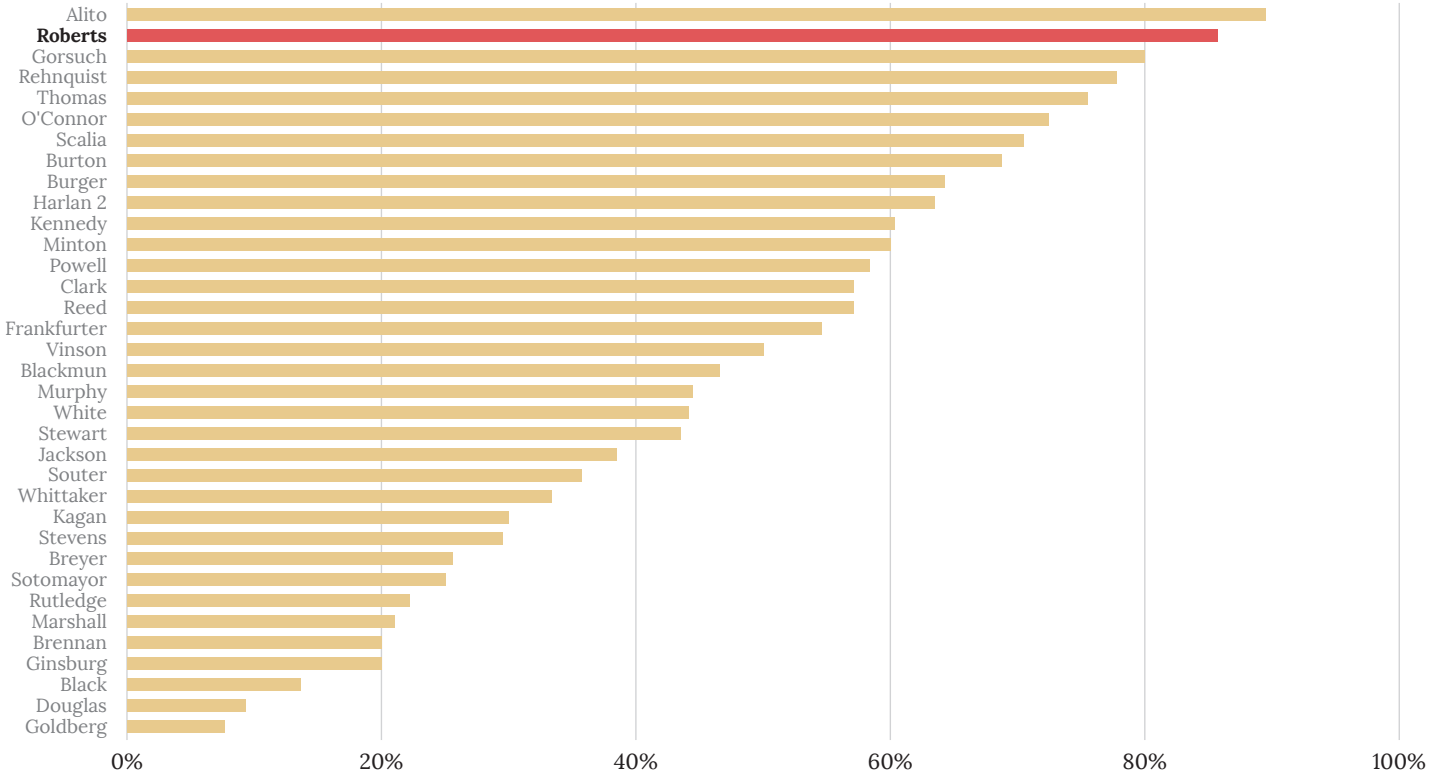
Of the 21 precedent-overturning cases that Roberts has presided over, fifteen were decided by split 5-4 votes in which liberal and conservative blocs aligned against one another. By examining this subset of fifteen decisions, one can assess how Justice Roberts votes in hot-button, ideologically charged cases in which past Supreme Court precedent is at stake.

As noted above, Roberts is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.[13] While the frequency of Roberts's votes to overturn precedent to achieve conservative outcomes alone undermines his reputation for moderation, a qualitative assessment of these rulings

FREQUENCY IN THE MAJORITY IN DECISIONS OVERTURNING PRECEDENT, SINCE 2005



FREQUENCY OF CONSERVATIVE VOTES IN CASES OVERTURNING PRECEDENT



reveals the extent of the impact of his ideological rulings. Roberts voted to overturn precedent across a wide range of ideological issues including campaign finance, reproductive health, workers' rights, gun safety, affirmative action, and procedural justice, and voted against overturning precedent when doing so would lead to liberal outcomes such as marriage equality.

- **Campaign Finance -** Roberts voted with the 5-4 majority in *Citizens United v. Federal Election Commission,* a decision that overturned previous campaign finance limitations by applying First Amendment Rights to corporations and allowing unlimited funding for independent political broadcasts in elections. Roberts wrote in his concurrence, "The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union." Thanks to *Citizens United*, special interests play a greater role in influencing election outcomes.
- **Reproductive Health –** Chief Justice Roberts voted in the 5-4 majority in *Gonzales v. Carhart*, a case that struck down past precedent by upholding aspects of the Partial Birth Abortion statute. This decision, which the majority ruled was in accordance with the undue burden standard spelled out in *Planned Parenthood* v. *Casey,* significantly curtails abortion options, especially for pregnancies beyond the earliest stages.
- **Workers' Rights –** Chief Justice Roberts joined the 5-4 majority in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, a case that overturned past precedent that had required all public sector employees to pay union dues. Observers fear that this ruling could lead to a decrease in funding and membership for public sector unions.

- **Procedural Justice-** In *Montejo v. Louisiana*, Roberts joined the 5-4 majority that limited protections for defendants from unwanted interrogation. In overturning past precedent, the majority in *Montejo* held that a defendant who invokes a right to counsel may be interrogated. The ruling cleared the way for more admissible statements from defendants and curbed protections for defendants against making statements that previously would have been excluded without the presence of an attorney.
- **Gun Safety -** Roberts joined the 5-4 majority in *McDonald v. Chicago*, a ruling that protected Second Amendment rights from infringement by state and local governments and extended the scope of gun rights in states and cities by limiting their ability to enforce gun safety laws. By extending protections to gun owners, the decision raised questions about the constitutionality of Chicago's handgun ban.
- **Affirmative Action -** Roberts supported the conservative plurality decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, a ruling that found an affirmative action program to be unconstitutional, and that overturned past decisions that had allowed broader affirmative action protections. The Court held that racial imbalances in a population are no longer a sufficient basis for upholding the constitutionality of affirmative action programs, thus limiting school districts' ability to address racial imbalances in education that resulted from decades of discriminatory practices.
- **Same-Sex Marriage -** In *Obergefell* v. *Hodges*, Roberts was one of four dissenting justices who voted to uphold Supreme Court precedent enforcing marriage as only valid between members of opposite sex. Roberts argued that the Court overstepped its boundaries when, "[it took] the extraordinary step of ordering every State to license and recognize same-sex marriage."

Chief Justice Roberts's voting record in cases involving past precedent is wholly inconsistent with his sworn testimony at his confirmation hearing that he would respect previous Supreme Court rulings. During the hearings, particularly to assuage concerns that he would vote to overturn *Roe v. Wade* in response to questions from members of the Senate Judiciary Committee, Roberts testified that he accorded nearly sacrosanct status to Supreme Court precedent:

"It's the notion that it's not enough that you might think that the precedent is flawed, that there are other considerations that enter into the calculus that have to be taken into account, the values of respect for precedent, evenhandedness, predictability, stability…So to the extent that the statement is making the basic point that it's not enough that you might think the precedent is flawed to justify revisiting it, I do agree with that."[14]

His voting record, however, presents a contrary picture. Roberts always votes to overturn precedent when doing so advances a conservative partisan agenda, and almost always votes to affirm precedent when doing otherwise would advance a liberal end. His voting record concerning past precedent, in other words, has nothing to do with questions of "evenhandedness, predictability, [and] stability," and everything to do with partisanship.

Chief Justice Roberts eviscerated a wide range of protections by voting to overturn precedents involving campaign finance, reproductive health, workers' rights, gun safety, affirmative action, and procedural justice, and he sought to deny protections for gay and lesbian Americans by voting to affirm precedent in opposition to marriage equality. Among all Supreme Court justices since 1946 who have ruled in at least five precedent-overturning cases, Roberts is the second most conservative. With 84% conservative votes in such cases, Roberts only trails Justice Alito's 88%, and Roberts and Alito are the only justices with frequencies above 80%.

Chief Justice Roberts's record of overturning critical Supreme Court precedents has been so successful that GOP complaints about activist judges have become much more muted. Roberts is not a moderate, despite his reputation for centrism. He is an activist, partisan jurist in the mold of his most conservative colleagues, Justices Thomas, Alito, Scalia, and Kavanaugh. His reputation for moderation is completely at odds with his actual record.

Reproductive Rights

Chief Justice John Roberts has been a staunch opponent of women's reproductive rights throughout his career, and in a gradual effort to dismantle the constitutional right to abortion, he has consistently voted to undermine *Roe* v. *Wade* (1973). Although Roberts testified at his 2005 confirmation hearings that he considered the right to abortion to be settled law, his record as Chief Justice leaves little doubt that his assurances were cynical, and that—thanks to former Justice Anthony Kennedy's retirement and replacement by Justice Brett Kavanaugh—he will succeed at overturning *Roe* v. *Wade* at the next opportunity.

During his 2005 confirmation hearings, Former Senate Judiciary Chairman Arlen Specter asked, "Judge Roberts, in your confirmation hearing for circuit court, your testimony read to this effect, and it has been widely quoted: '*Roe* is the settled law of the land.' Do you mean settled for you, settled only for your capacity as a circuit judge, or settled beyond that?" Roberts responded that, "Well, beyond that, it's settled as a precedent of the Court, entitled to respect under principles of stare decisis. And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the Court, yes."[15]

Roberts was asked repeatedly about his views of *Roe* v. *Wade* during the 2005 hearings, and some have suggested that if he had been candid about a desire to overturn the ruling at the time, he may not have been confirmed.[16] Roberts's record before and after his confirmation hearings indicates that, with the sole exception of his 2005 Senate testimony, he has never wavered from his desire to undermine and ultimately overturn *Roe*.

Roberts's pre-Supreme Court Opposition to Reproductive Rights

Prior to his nomination to the Supreme Court, Roberts expressed clear and consistent opposition to reproductive rights. As Associate Counsel to President Ronald Reagan and then as Principal Deputy Solicitor General under President George H.W. Bush, Roberts articulated views contrary to a constitutional right to an abortion.

In a draft article that was to appear in the American Bar Association journal in the 1980's, for example, Roberts argued against the constitutional right to privacy, the doctrine that is the underlying fundamental right sustaining the right to abortion in *Roe v. Wade*. Referring to the right to privacy found by the Supreme Court in *Griswold v. Connecticut* (1965), Roberts wrote that, "The broad range of rights which are now alleged to be 'fundamental' by litigants, with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine."[17]

As lead attorney on the United States brief in *Rust v. Sullivan* (1991), Roberts wrote that, "We continue to believe that *Roe* was wrongly decided and should be overruled. As more fully explained in our briefs…the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution."[18]

In a 1985 memo to a fellow White House attorney, Roberts endorsed President Reagan's opposition to abortion: "[Reagan's] remarks call for reversing 'the tragedy of *Roe v. Wade*…'" Roberts wrote. "But the President has done that often in the past. The rest of the remarks simply express support for the pro-life position, noting advances in medical technology that permit increased care for the unborn, and applauding those who are providing compassionate alternatives to abortion. *I have no objections*."[19]

Finally, in his 1981 summary of a lecture delivered by former Solicitor General Erwin Griswold, Roberts wrote that, "He devotes a section to the so-called 'right to privacy,' arguing as we have that such an amorphous right is not

to be found in the Constitution. He specifically criticizes *Roe v. Wade*."[20] Roberts drafted a response to Griswold on behalf of former Attorney General William Smith stipulat-ing that, "Although some editorial writers have seen fit to criticize my efforts in this area, I was cheered to see that you have been making many of the same points and also stressing the desirability of commentary from outside the

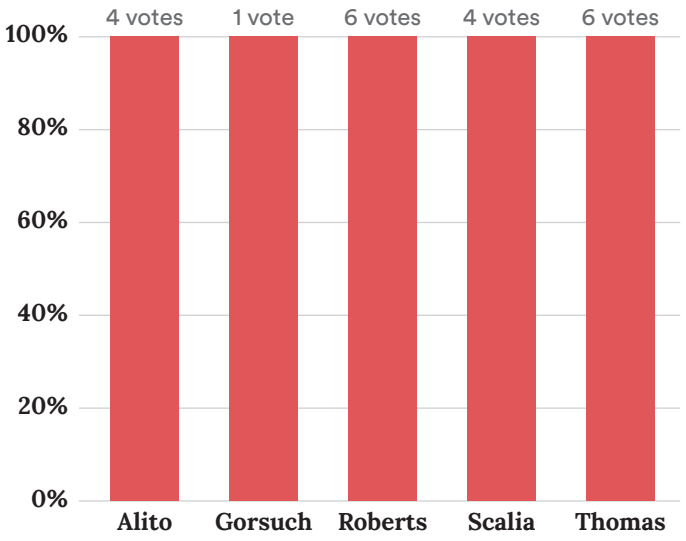
Court on the decisions of the Court."

Unblemished (100%) Voting Record to Undermine Roe v. Wade

Roberts has led an ongoing effort to dismantle the constitutional right to abortion since he became Chief Justice in 2005. During that time, the Court ruled in six cases involv-ing reproductive rights, and Roberts voted in opposition each time (100%).[21]

His staunch resistance to reproductive rights is evident in positions he took in some of these six cases. In *Whole Woman's Health v. Hellerstedt* (2016), for example, he joined a dissent that would have effectively shut down all abortion clinics in Texas had it been the majority. Even Justice Alito, the dissent's author, acknowledged the impact of the law, struck down by the Court's narrow 5-4 majority, requiring doctors to maintain admitting privileges at hospitals in impractical locations. He wrote, "[t]here can be no doubt that H. B. 2 caused some clinics to cease operation.

VOTES AGAINST REPRODUCTIVE FREEDOM (2005-2018)



Roberts was in the majority in *Gonzales v. Carhart* (2007), a ruling that limited access to certain forms of medically necessary abortion on the basis of morality. As Justice Ginsburg explained in her dissent, the decision "tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG)…And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health…Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion."

In tandem with his direct attacks on the constitutionality of the right to abortion, Roberts has undermined reproductive rights by restricting women's access to reproductive health care. In *Burwell v. Hobby Lobby* (2014), for example, the Court created a First Amendment right for corporations to deny women access to legally mandated contraceptive coverage on the basis of their "religious beliefs." To make the leap of extending First Amendment protections to corporations, the Court's majority conflated the term "person" with "corporation."

Justice Ginsburg observed in her dissent in *Hobby Lobby* that, "In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." She added that the extension of First Amendment rights to corporations is a means to circumvent otherwise protected rights: "Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law…The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities." By extending First Amendment religious protections to Hobby Lobby, the Court gave corporations significant latitude to compromise female employees' reproductive health.

Justice Roberts doubled down on his position in *Hobby Lobby* in a subsequent dissent from the denial of certiorari in *Stormans v. Wiesman*, a 2016 case that involved a Washington state law requiring pharmacies to dispense certain contraceptive products. The case involved a pharmacy owner who argued that the requirement to stock emergency contraceptives violated his conviction that life begins at contraception. Had they prevailed,

Chief Justice Roberts and the Court's other conservatives would have enshrined the religious beliefs of the pharmacy owner over women's need for reproductive care.

The Roberts Majority is Poised to Strike Down Roe v. Wade

Opportunities now abound for Justice Roberts and his conservative colleagues to dismantle *Roe* wholesale, or to continue to chip away at *Roe*'s remaining vestiges. Since replacement of Justice Kennedy, who upheld the right to an abortion, with Justice Kavanaugh, who has a clear record of opposing abortion, states have moved to implement highly restrictive abortion laws in expectation that the Court will no longer serve as a bulwark preventing such legislation.

This approach supposes that Justice Roberts and his conservative colleagues will strike down *Roe* directly, or will avoid overturning state laws that prohibit abortion. In either case, women's reproductive rights would disappear. Prohibitions are working their way through state legislatures throughout the U.S., and nine states passed more restrictive laws in 2019, limiting access according to the following prohibitions:[22]

- Utah and Arkansas: 18 weeks of pregnancy
- Louisiana, Georgia, Ohio, Mississippi, and Kentucky: Once a fetal heartbeat is detected (approximately six weeks)
- Missouri: 8 weeks of pregnancy
- Alabama: Outlaws abortions entirely

In his dissent in *Planned Parenthood v. Casey* (1992), the late Chief Justice Rehnquist signaled that conservative justices would not hesitate to overturn *Roe v Wade:* "We believe that *Roe* was wrongly decided, and that it can and should be overruled…" Chief Justice Roberts follows in this tradition. Based on his record as in the Reagan and Bush administrations and on the Supreme Court, Roberts will continue to be a sure vote against *Roe* and against women's reproductive rights more generally.

> Roberts is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.

Conclusion

Chief Justice John Roberts's reputation for moderation is not warranted by his judicial record. His votes, opinions, and assignments of opinions reveal that Roberts is neither a moderate nor a swing vote, but rather a staunch right-wing conservative. Original data show that Roberts has been one of the most conservative justices since joining the Supreme Court in 2005 and that there is almost no partisan difference distinguishing Justices Roberts, Gorsuch, Alito, Roberts, and Scalia.

Roberts's conservative voting frequency is 60% higher than that of any liberal justice. And, even in the two decisions that sustain his reputation for centrism, Roberts has advanced a partisan agenda under the guise of reasonableness by transforming easy questions into opportunities to sabotage democracy and narrow Congress's ability to protect the public.

During his 2005 confirmation hearings, Roberts emphasized his respect for precedent, affirmed that flaws in precedent are "not enough…to justify revisiting it," and underscored "the values of respect for precedent, evenhandedness, predictability, stability." Roberts's frequent votes to overturn precedent, however, are wholly inconsistent with his testimony at his confirmation hearing that he would respect past Supreme Court rulings.

During his 14 years as Chief Justice, Roberts presided over 21 precedent-overturning cases and voted to overturn precedent in 17 of them (81%), making him the second most frequent member of the majority in precedent-overturning cases. Roberts's voting record in precedent-overturning cases is among the most partisan of any justice in the modern era. In 15 precedent-overturning cases with partisan implications, he voted for conservative outcomes 14 times (93%). And, he is one of only ten justices since 1946 to support 100% of decisions overturning precedent that led to conservative outcomes.

Roberts testified at his 2005 confirmation hearings that he considered the right to abortion to be settled law. His record as Chief Justice, however, suggests that his assurances were cynical. Roberts has consistently voted to undermine *Roe* v. *Wade* in a gradual effort to dismantle the constitutional right to an abortion without drawing attention to his efforts. Since joining the Supreme Court in 2005, Roberts has been on the anti-abortion side of all six (100%) of the Court's decisions involving reproductive rights. Now that Justice Kennedy has been replaced by Justice Kavanaugh, Roberts's voting record leaves little doubt that he will succeed at overturning *Roe* v. *Wade* at the next opportunity.

> Roberts's voting record in precedent-overturning cases is among the most partisan of any Supreme Court Justice in the modern era.

ENDNOTES

1. Data analyzed in this report were compiled from the United States Supreme Court Database as well as from SCOTUSBlog's 2018 Stat Pack.

2. For the purposes of this report, 5-4 decisions also encompass 5-3 decisions, since both hinge on the vote of a single justice. Justice Kavanaugh was recused in two five-vote majorities during the 2018 Supreme Court term, leaving a total of eight voting justices in these cases.

3. Figures do not add up to 100% because there are several permutations of justices in 5-4 decisions.

4. Before she retired, Justice O'Connor voted in two 5-4 decisions alongside Roberts, but due to this small set of cases she was not included in this analysis.

5. Votes that do not fit within the database's framework are not coded.

6. This theory of strategic opinion assignment is examined in detail in Paul Wahlbeck, "Strategy and Constraints on Supreme Court Opinion Assignment," *University of Pennsylvania Law Review* (2006).

7. Donald C. Arthur, Gale Pollock, Alan M. Steinman, Nathaniel Frank, Diane H. Mazur, and Aaron Belkin, "DoD's Rationale for Reinstating the Transgender Ban is Contradicted by Evidence," San Francisco, CA: Palm Center (2018).

8. Joshua Matz, "Thoughts on the Chief's Strategy in the Census Case," *Take Care Blog* (July 1, 2019), available at https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case.

9. Confirmation hearings, page 55.

10. Confirmation hearings, pages 158; 146.

11. Justices Gorsuch and Kavanaugh are excluded from the comparison because they have only ruled in five and two such cases, respectively.

12. Ideological coding of each cases reflects the key issue at stake as well as attributes of the main parties. Up until this point in this section of the paper, our discussion of cases with conservative outcomes refers to decisions in which conservative justices voted as a bloc. In this part of our discussion, however, conservative outcomes reflect the coding of the Supreme Court Database (with the exception of *South Dakota v. Wayfair, Inc.*, whose outcome we code as mixed ideological). The fact that both conceptualizations of the ideological outcome of a case yield the same result (that Justice Roberts's voting record is extremely partisan) enhances the robustness of our conclusion.

13. Analyses are based on the Supreme Court Database's ideological coding for decision outcomes.

14. Confirmation hearings, page 144.

15. Gwyneth Shaw, "Roberts: Roe 'settled as precedent'," *Baltimore Sun*, September 14, 2005.

16. Jeffrey Rosen, "So, Do You Believe in 'Superprecedent'?" *New York Times,* October 30, 2005.

17. John Roberts, "Draft Article on Judicial Restraint," initially prepared for the American Bar Association Journal *available from Washington Post Documents*: http://www.washingtonpost.com/wp-srv/documents/roberts/draft_privacy_article.pdf

18. Brief for Respondents in *Rust v. Sullivan* (89-1391), October Term 1990, *Available from The Justice Department:* https://www.justice.gov/sites/default/files/osg/briefs/1990/01/01/sg900805.txt

19. John G. Roberts, "Memorandum for Fred F. Fielding," June 7, 1985, Available from: http://www.washingtonpost.com/wp-srv/nation/documents/roberts/Box1-JGR-Abortion3.pdf. Emphasis added.

20. John Roberts, "Erwin Griswold Correspondent," December 11, 1981, *available from Washington Post Documents*: http://www.washingtonpost.com/wp-srv/nation/documents/roberts/griswold_lecture_summary.pdf

21. The six cases that involve reproductive rights are *Whole Woman's Health v. Hellerstedt*, *Gonzales v. Carhart*—both of which we discuss in the text—and the following four cases: In *Scheidler v. National Organization of Women* (2005), the Court held that anti-abortion protests that lead to violence are not in violation of additional statutes such RICO (Racketeer Influenced and Corrupt Organizations Act) that could result in increased penalties. *McCullen v. Coakley* (2014) was a First Amendment decision concerning a buffer zone around abortion clinics. The Court held that the zone infringed on the protesters' rights and was unconstitutional. In *NIFLA* v. *Becerra* (2018), the Court overturned a California disclosure law that would have forced anti-abortion pregnancy clinics to inform patients of their agenda. *Ayotte v. Planned Parenthood of Northern New England* (2006) was a narrow, technical ruling that, according to *Vox* journalist Emily Crocket, "allowed courts to strike only the unconstitutional parts of an anti-abortion law without striking the entire law. That helped encourage states to pass omnibus anti-abortion bills with many different provisions—because even if some provisions were struck down, others would stick." And, *Ayotte* made it harder for courts to strike down an anti-abortion law *on its face* — that is, before it can actually go into effect and harm somebody who might later bring suit to try to strike it down." See Emily Crocket, "How the Supreme Court weakened *Roe v. Wade* and set the stage for a new abortion case," *Vox*, March 1, 2016. We do not include *June Medical v. Gee (2019)* in our analysis because the Supreme Court's involvement in the case thus far has been limited to consideration of a stay, a decision that does not yield precedent or address the merits of the case.

22. Jiachuan Wu and Daniel Arkin, "What's Going on with the State Abortion Laws? A State-By-State Look," June 1, 2019, *NBC News*, *Available from:* https://www.nbcnews.com/news/us-news/guide-anti-abortion-laws-state-n1012566

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