

The Roberts Court Is Nothing Like America

In a polarized nation, the justices continue to defy partisanship.

July 14, 2020

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Illustration by Elena Scotti; photographs by Getty Images

As the Supreme Court ends its term and a momentous presidential election looms ahead, the contrast between the Roberts court and the country could hardly be starker.

Much of American government and politics is dysfunctional. Each party

panders to extremists in its base, and media outlets have correspondingly polarized. Presidential politics, congressional politics and local politics have all suffered. Each side produces and consumes the news and facts it prefers, and almost every leading American politician hesitates to ever cross the aisle.

Fortunately, there is no aisle on the Supreme Court bench, literally or figuratively. True, most justices most of the time vote in line with their partisan affiliation. But their partisan affiliations do not invariably result in partisan decisions.

In some of the biggest cases of the modern era, justices have in fact "swung." Most notable, of course, was Justice Anthony Kennedy, who retired in 2018. He joined fellow Republican appointees on most issues, but sided with Democrat appointees in four major gay rights cases and split the difference on abortion and affirmative action. He sided with liberal free-speech advocates in major cases involving legal aid and flag-burning, and with conservative free-speech advocates in important cases involving political advertising.

But Justice Kennedy has not been the only one on the Roberts court to defy ideological pigeonholing. Chief Justice John Roberts has cast his lot with Democratic appointees to uphold Obamacare (twice!), block President Trump's flawed census policies, keep alive President Barack Obama's DACA program for young immigrants and invalidate Louisiana's draconian abortion law.

Justice Neil Gorsuch, joined by Democratic appointees and Chief Justice Roberts, wrote a landmark ruling last month on behalf of employees with nontraditional gender identities. He also wrote a major decision, joined only by Democratic appointees, upholding tribal rights in Oklahoma.

Justice Clarence Thomas has likewise led the charge for certain liberal causes, insisting that the rights of criminal defendants to confront witnesses against them should be unflinchingly enforced and suggesting that police officers should pay damages when they misbehave.

Justice Brett Kavanaugh has championed the right of people of color to be free from racial discrimination in the jury selection process. He also found the sweet spot on a deeply contested issue of separation of powers. It was he, as a Court of Appeals judge, who foreshadowed a major ruling by the Roberts court last week: Independent agencies, beloved by New Deal liberals, should be upheld, but conservative adherents to the "unitary executive" theory should prevail whenever the president seeks to control a cabinet head or comparable executive-branch czar.

This month, Justices Kavanaugh and Gorsuch also joined liberals by concurring in a momentous judgment by Justice Roberts allowing prosecutors in New York to investigate the financial records of President Trump, who put them both on the court.

Justices on the left have also opened themselves to good arguments on the right. Justice Elena Kagan closely parses statutory texts in ways that Justice Antonin Scalia would have loved. Justice Stephen Breyer has written and joined major opinions reflecting deep respect for the rights and sensibilities of religious traditionalists.

To be sure, a justice need not "swing" to enrich American jurisprudence. Justice Ruth Bader Ginsburg has brilliantly championed gender-equality rights and voting rights at the heart of the 13th, 14th and 15th Amendments, while Justice Samuel Alito has dazzlingly deployed those same amendments to protect the rights of Americans to keep guns in their homes and to remain

free from anti-Catholic bigotry. Justice Sonia Sotomayor has championed the legitimate interests of Puerto Ricans, who lack full representation in the federal government. And her penetrating questions at oral argument in the first Obamacare case may have been the proverbial nail that saved the kingdom, stressing that the individual mandate could be upheld as a simple tax law.

It's also true that the court makes many mistakes. I have doubts, for instance, about some things that the justices said in two key cases last week about so-called faithless electors. But there was nothing remotely partisan in this error, if error it was. The court was in fact unanimous in its result.

How have the members of the Roberts court managed to outperform the other branches and the media? By listening carefully to one another and to the parties who come before them, be they rich or poor, liberal or conservative, religious or atheist. By paying close attention to the facts of each case and the letter and spirit of the laws at issue. By hiring law clerks who do not always share their political leanings. By not needing to raise money from party bosses or pander to party extremists.

It is not clear that this recipe would work for other branches of government or civic institutions. But it is working for the court, and that is good news for all Americans, at a time when we could use some good news.

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