

The Conservative Court: Examining the Impact of Replacing RBG with ACB

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Ruth Bader Ginsburg: before SCOTUS



- 1959-1961 - Law clerk to a judge in the US District Court, Southern District of New York
- 1961-1963 - Research associate and associate director, Project of International Procedure at Columbia Law School
- 1963-1972 - Professor at Rutgers University School of Law
- 1972-1980 - Professor at Columbia University School of Law; first woman to be hired with tenure at Columbia University School of Law
- 1973-1980 - General counsel for the ACLU Women's Rights Project, which she co-founded in 1972
- 1977-1978 - Fellow at the Center for Advanced Study in Behavioral Sciences, Stanford, California
- 1980-1993 - Judge of the US Court of Appeals for the District of Columbia Circuit
- August 10, 1993 - Sworn in as Supreme Court justice filling the seat held by Justice Byron White (second woman to serve)



Ginsburg's Appointment

- Clinton appointee (1993), recommended by Attorney General Janet Reno after suggestion from Utah Senator Orrin Hatch
- Approved overwhelmingly by Senate (96-3) despite declining to answer some questions at her confirmation hearings



Who is that guy?



Total Results: 0

Ruth Bader Ginsburg: Gender Discrimination

- *United States v. Virginia* (1996): “Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection . . . Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities” (writing for majority in 7-1-1 decision)
- *Ledbetter v. Goodyear* (2007): “Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII” (dissent in 5-4 decision)



Ruth Bader Ginsburg: Other Cases

- *Obergefell v. Hodges* (2015): “We have changed our idea about marriage. Marriage today is not what it was under the common law tradition, under the civil law tradition” (comment during oral arguments, 5-4 majority decision authored by Kennedy)
- Multiple abortion rights cases: “The basic thing is that the government has no business making that choice for a woman” (2009 New York Times interview).
 - But didn’t love *Roe v. Wade* as the foundation of abortion rights jurisprudence: “My criticism of Roe is that it seemed to have stopped the momentum on the side of change . . . Roe isn’t really about the woman’s choice, is it? It’s about the doctor’s freedom to practice . . . it wasn’t woman-centered, it was physician-centered.” (2013 University of Chicago appearance on 40th anniversary of *Roe*)



SCOTUS Eras

Dean Chemerinsky believes we effectively entered into a new “era” of the Supreme Court:



- 1890s to mid-1930s (very conservative Supreme Court)
- 1937 to 1969 (progressively more liberal court, particularly in 1960s under Earl Warren)
- 1971 to today (beginning with Nixon’s appointees, always at least five ideologically conservative, Republican-appointed justices, but with a “swing justice” to effect a liberal result in high-profile cases)



Swingers: Sandra Day O'Connor

- *Planned Parenthood v. Casey* (1992):
 - broke with Chief Justice Rehnquist in affirming *Roe v. Wade*
- *Lee v. Weisman* (1992):
 - finding that government-sponsored prayer is not permitted at high school graduations
- *Stenberg v. Carhart* (2000):
 - overturned a Nebraska ban on “partial-birth” abortions
- *Grutter/Gratz v. Bollinger* cases (2003):
 - affirmed, but limited, the right of state colleges and universities to use affirmative action in admissions policies



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Swingers: Anthony Kennedy



Kennedy the Conservative:

- Campaign finance
- Church and state (accommodationist view)
- Business (free speech, environmental issues, favoring arbitration over adjudication)
- Executive authority

Kennedy The Liberal:

- Affirmative action
- Gay rights
- Abortion rights

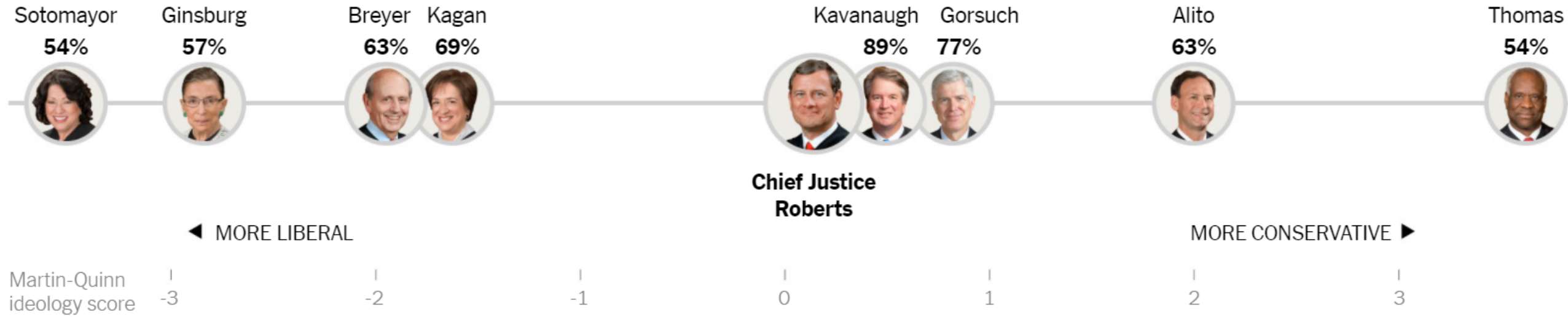


Swingers: John Roberts

In the most recent term, Roberts was in the majority in all but one of the term's 5-to-4 or 5-to-3 decisions (92%) and 94% of all divided decisions.

How Often Each Justice Agreed With Roberts This Term

Chief Justice John G. Roberts Jr.'s agreement rates with justices on the liberal end of the spectrum matched those with the most conservative justices.



By Alicia Parlapiano - Note: Justices are sorted left to right by their Martin-Quinn scores, which estimate ideology based on voting patterns. - Source: The Supreme Court Database by Lee Epstein and Andrew D.

Current State of SCOTUS

- Most recent term: 53 cases with signed opinions after oral arguments (fewest since 1852)
 - 14 of 53 were 5-4 decisions
 - 10 of 14: conservative bloc + Roberts
 - 2 of 14: liberal bloc + Roberts
 - *Department of Homeland Security v. Regents of the University of California* (2020)
 - *June Medical Services, LLC v. Russo* (2020)



Recent Close Cases: Abortion Rights

- *Hodgson v. Minnesota* (1988): O'Connor as swing vote striking down two-parent notification requirement for minors prior to abortion, but upholding parental notification generally with judicial bypass (Kennedy in conservative bloc)
- *Planned Parenthood v. Casey* (1992): Created "undue burden" standard, upheld "essential holding" in *Roe v. Wade* (1973), upheld parental consent, informed consent, and waiting period restrictions in Pennsylvania, but struck down spousal consent. Kennedy helped author 5-4 plurality opinion (dissenters argued for overturning *Roe* entirely).
- *Stenberg v. Carhart* (2000)/*Gonzales v. Carhart* (2007): "Partial-birth" abortion cases, Kennedy in 5-4 minority in *Stenberg* and 5-4 majority in *Gonzales*
- *June Medical Services, LLC v. Russo* (2020): 5-4 plurality decision (Roberts concurring in judgment)
- Current issues:
 - Will *Roe v. Wade* (1973) be overturned, returning regulation of abortion to the states?
- PREDICTION:
 - Depends on deference of Gorsuch/Kavanaugh/ACB to precedent.



Recent Close Cases: Affirmative Action

- *Metro Broadcasting* (1990)/*Adarand Constructors* (1995): 5-4 cases in which Kennedy vehemently argued against lower standard of judicial review for race-based affirmative action
- *Grutter v. Bollinger* (2003): 5-4 case, Kennedy in minority
- *Gratz v. Bollinger* (2003): 5-4 case, Kennedy in majority
- *Fisher v. Texas I* (2013): Kennedy wrote 7-1 majority opinion
- *Fisher v. Texas II* (2016): Kennedy wrote 4-3 majority opinion, joined liberal justices
- Current issues:
 - Is promoting diversity (and avoiding racial isolation) a compelling state interest?
 - *Parents Involved in Community Schools v. Seattle School District No. 1* (2007): 4-1-4 decision, with Kennedy as the “1.”
 - Roberts quote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”
- PREDICTION:
 - Nothing on SCOTUS docket, but eventually colleges and universities will be “colorblind” with respect to admission



Recent Close Cases: LGBTQ+ Rights

- *Obergefell v. Hodges* (2015): 5-4, four scathing dissents, only dissent ever read from the bench by John Roberts
- *United States v. Windsor* (2013): 5-4 federal Defense of Marriage Act case (for purpose of federal benefits, marriage is between a man and a woman)
- *Pavan v. Smith* (2017): *per curiam* decision with Gorsuch, Alito, and Thomas dissenting (*note* no Roberts), Arkansas law re: birth certificates
- *Bostock v. Clayton Co.* (2020): 6-3 decision holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of sexual orientation or gender identity



Bostock v. Clayton Co. (2020) was a 6-3 decision. Who wrote

Bostock Detour

- *PriceWaterhouse v. Hopkins* (1989): 4-1-1-3 plurality decision (O'Connor concurring, Kennedy dissenting)
- “But-for” test
- Collision course:
 - Religious Freedom Restoration Act
 - Ministerial Exception
 - BFOQs
 - Free speech/free exercise claims
 - *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)

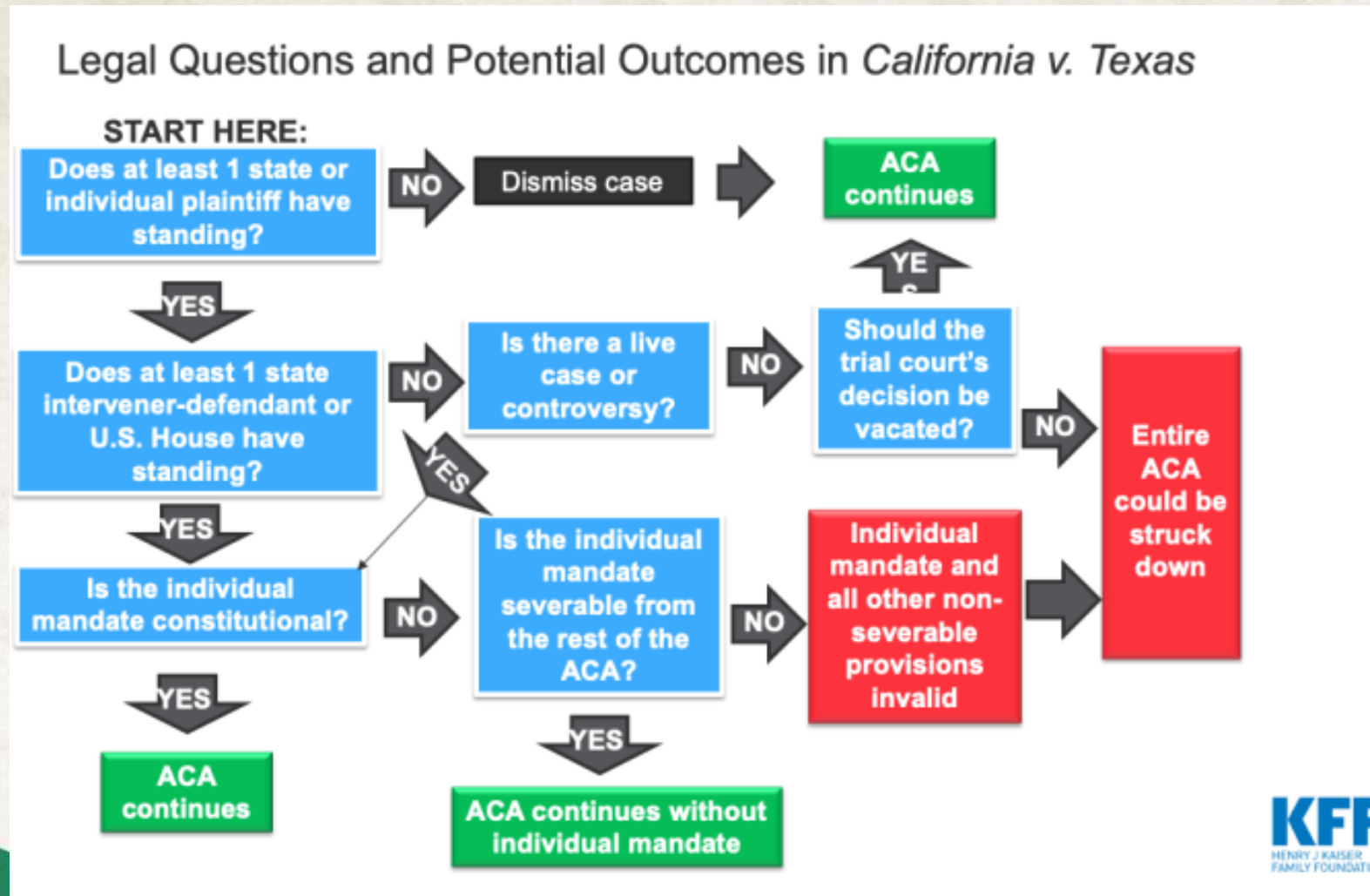


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- *Bostock v. Clayton Co.* (2020): 6-3 decision holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of sexual orientation or gender identity
- Current issues:
 - Unclear whether Title IX addresses discrimination on the basis of sexual orientation or gender identity
 - Religious Freedom v. Title VII
 - Future of gay marriage
- PREDICTION:
 - Title IX will be interpreted consistent with Title VII
 - “Compelled expression” will be invalidated under RFRA and the First Amendment
 - *Obergefell* will remain law of the land



Other Issues: Affordable Care Act



Other Issues: Gun Rights

- Very few 2nd Amendment cases, unresolved issues:
 - Right to bear arms *outside* the home
 - Constitutionality of “assault weapon” bans
 - Appropriate level of scrutiny for gun control laws
- Texas enacted “campus carry” law, faculty challenged that in 5th Circuit Court of Appeals and lost
- Kavanaugh and ACB have authored opinions in their respective circuits indicating that they favor gun rights



Other Issues: Disparate Impact Analysis

- Several federal civil rights laws—such as in the areas of employment discrimination, voting rights and fair housing—allow liability upon proof of **disparate impact**.
 - *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.* (2015): Kennedy-authored 5-4 decision holding that there is disparate impact liability under the Fair Housing Act of 1964
 - *Ricci v. DeStefano* (2009): 5-4 Kennedy-authored decision; can't fail to promote one race because of fear of disparate impact claims (Alito, Thomas, Scalia concurring that disparate impact liability is unconstitutional) (*note* no Roberts)



Wildcards

- Chief Justice Roberts
 - Institutionalism
 - Stare decisis
- Gorsuch/Kavanaugh
- ACB herself
- Age of justices
- Court packing

