



## Swing vote to soft power: How Chief Justice John Roberts is exerting influence

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When Associate Justice Amy Coney Barrett joined the Supreme Court last year, some predicted a diminished role for the man who had emerged in recent years as the court's unlikely swing vote: Chief Justice John Roberts.

After all, with six conservatives on the high court for the first time in decades, Roberts' vote was technically no longer needed to decide legal challenges over abortion, guns, religious freedom and other issues with the outcomes long sought by the right.

But as one big opinion after another landed in the term that ended this month, a more nuanced picture of Roberts' power came into focus. Though the chief justice no longer cast tiebreaking votes, his incremental approach to the court's work – narrow opinions designed to build coalitions resulting in majorities – once again prevailed.

Out of 67 opinions, two ended with Roberts outflanked by his fellow conservatives. Both of those involved the same issue: government regulations intended to slow the coronavirus pandemic that the court concluded trampled on Americans' right to worship.

"Roberts is still exercising a considerable amount of influence, though it's not by being the swing vote," said David Cole, national legal director at the American Civil Liberties Union. "He's continuing to exercise his influence through his commitment to the institution, his commitment to avoiding partisan decisions, and in particular by his championing of what he calls minimalism."

Roberts' soft power was most pronounced in a dispute between Philadelphia and a Catholic foster care agency that, citing religious objections, declined to screen same-sex couples as potential parents. Few were surprised the court sided with the Catholic agency, but most were astonished the opinion was unanimous.

In his opinion for the court, the chief justice concluded Philadelphia's anti-discrimination requirement included an exemption for secular entities, therefore didn't treat religious and non-religious groups the same. By taking that route, he avoided the more contentious question of whether to overturn a 1990 precedent that makes it harder to file religious claims when a regulation does apply equally to, say, hardware stores and churches.

In another narrow decision, the court threw out the latest challenge to the Affordable Care Act by concluding the plaintiffs did not have standing to sue because they were not harmed by the 2010 law's requirement that all Americans obtain health insurance.

Roberts, nominated to the court in 2005 by President George W. Bush, needed help to push for those more limited outcomes – and he got it in case after case. That help most often came in the form of votes from Associate Justice Brett Kavanaugh and, to a lesser extent, Barrett.

"What's important isn't John Roberts' power," said Michael McConnell, director of the constitutional law center at Stanford Law School and a former federal appeals court judge. "What's important is that (court dynamics) are likely to augur a longer-term shift toward less disruptive and fewer aggressive decisions."

Chief Justice John Roberts on December 03, 2018.

### **Counterargument**

By one measure – the share of opinions in which he was in the majority – Roberts lost influence. The chief justice sided with the majority 86% of the time in divided cases over the past nine months, compared with 94% during the 2019-2020 term, according to the Supreme Court Database, housed at Washington University School of Law.

That allowed Kavanaugh – who was on the winning side in 93% of cases – to surpass Roberts as the justice most often in the middle.

Other measures suggest Roberts, 66, is getting his way. Even as the court became more conservative, 43% of its opinions were unanimous, according to data compiled by SCOTUSblog. That's the highest share since the 2016-2017 term.

Roberts, who just finished his 16th term, has touted the message unity sends.

"The more justices that can agree on a particular decision, the more likely it is to be decided on a narrow basis," he told ABC in 2006. "I think that's a good thing when you're talking about the development of the law, that you proceed as cautiously as possible."

This term, the court handed down nine opinions in which it split 6-3 along conservative-liberal lines, including two highly political cases at the end. In one, Roberts joined with the court's other conservatives in placing curbs on when voters may challenge election laws that have a disproportionate impact on racial and ethnic minorities.

Those were the exceptions.

"I'll put it very colloquially: It wasn't the Democratic bloodbath some expected," said Lee Epstein, a law professor at Washington University in St. Louis. "The data show a conservative court, but a more moderate conservative court."

There were four other 6-3 combinations in which the justices didn't vote along expected lines. Barrett, for instance, wrote an opinion absolving a police officer from violating a 1986 anti-hacking law when he ran a license plate in exchange for cash. She was joined by three liberals and two conservatives, Kavanaugh and Associate Justice Neil Gorsuch.

Roberts dissented in that case.

"There were very few conventional ideological splits," said Ilya Shapiro, a vice president at the libertarian Cato Institute. "In some respects, Roberts is fighting a rear-guard action. Since he's not in the middle, he's got more work to do."

### **Rarely alone**

Epstein said one explanation for the unusual voting lineups is the notion of a moderate wing emerging, bringing together at least some conservatives and liberals in the middle. Another is that the justices appeared to go out of their way to not hear the kind of controversial cases that would draw attention to the court.

Roberts had a hand in both situations.

The chief justice has long been tough to pin down. Conservatives fumed when he sided with liberals in the case upholding the Affordable Care Act in 2012. Liberals never forgave him for joining conservatives in 2013 to strike a provision of the 1965 Voting Rights Act requiring some states to get federal approval for new voting laws.

Chief Justice John Roberts sits during a group photo of the justices at the Supreme Court in Washington, D.C., on April 23, 2021.

Even as he built coalitions, Roberts did something unusual this term: He wrote his first and only solo dissent, siding with a university after a student challenged a policy barring him from handing out religious material on campus. At issue was whether the student could pursue his claim by seeking \$1.

Writing for the majority, Associate Justice Clarence Thomas pointed to English common law, which provides the first principles for much of U.S. law, and said judges historically permitted a plaintiff to keep a lawsuit alive for "nominal damages."

Acknowledging his lonely position, Roberts noted that one of the arguments Thomas cited from English courts came from a solo dissent in 1703 by John Holt, the lord chief justice of England.

"Lord Holt was alone in dissent," Roberts quipped in his own solo dissent. "No shame there."

Though the dissent drew attention when it was handed down in March as a possible signal that Roberts' power of persuasion was slipping, it was notable mostly because of just how unusual it was. Unlike Associate Justices Sonia Sotomayor, Thomas and Samuel Alito, Roberts was never on his own again for the rest of the term.

"He's not the clear center of the court," Epstein said. "But he's still very much a player."