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# Last Hurrah for the Minimalist Court?

By Donald A. Daugherty, Jr.

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## Litigation Practice Group

### A Review of:

SCOTUS 2020: Major Decisions and Developments of the U.S. Supreme Court, edited by Morgan Marietta (Palgrave Macmillan), <https://www.palgrave.com/gp/book/9783030538507>

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### Other Views:

- Adam Feldman, *Final Stat Pack for October Term 2019 (updated)*, SCOTUSBLOG, July 10, 2020, <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/>.
- Leah Litman, *Progressives' Supreme Court Victories Will Be Fleeting*, THE ATLANTIC (July 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/court-gave-progressives-hollow-victories/614101/>.
- Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. TIMES, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/supreme-court-term.html>.
- Ilya Shapiro, *Foreword: The Roberts Court*, CATO SUPREME CT. REV., ix (2020), [https://www.cato.org/sites/cato.org/files/2020-09/2020-supreme-court-review\\_foreword.pdf](https://www.cato.org/sites/cato.org/files/2020-09/2020-supreme-court-review_foreword.pdf).

*SCOTUS 2020: Major Decisions and Developments of the U.S. Supreme Court* offers an evenhanded, thoughtful overview of the Supreme Court's October 2019 Term. The book recaps the Term's most important decisions, with each chapter addressing a different case and written by a different author. *SCOTUS 2020* is accessible to nonlawyers and useful either as a pedagogical tool for learning about the Court, or for readers wanting a recap of the Term without wading through the opinions in all 16 cases it considers.

In welcome contrast to some other Supreme Court term reviews, the *SCOTUS 2020* writers focus on the decisions themselves (and related legal issues), and their analyses resist ranging into speculation about the motives of individual Justices, or other chambers intrigue. While most of the authors are conventional academics, there appears to have been a real effort to offer a diversity of viewpoints, resulting in an overall balanced discussion. And notwithstanding different authors covering each case, common themes about the Term emerge over the course of the book.

In his Introduction, editor Morgan Marietta observes that the Term "was the most eventful in decades," with significant decisions in areas like employment discrimination, immigration, administrative law, religious liberty, and separation of powers. For the first time since Justice Antonin Scalia passed in early 2016, there was no distraction by questions about filling an open seat, and the composition of the Court remained stable.

Although the Term unfolded against the backdrop of the 2020 presidential election, the campaign plays only a small role in the book, with a brief discussion in the conclusion of stay requests in five election-related cases on the shadow docket. Similarly, the case reviews aren't distorted by an obsession with former President Donald Trump, which would quickly have left them dated.

Court operations were, of course, affected by the pandemic, with no in-person oral arguments after early March. Still, the Term had more blockbuster cases than the three previous ones, even though, as a result of COVID, the Court only rendered 61 decisions on the merits, which is low even under Chief Justice John Roberts. Also because of the pandemic, 10 cases were rescheduled to be heard in the October 2020 Term, and several opinions were not issued until July, which is the latest a term had gone in decades.

On the whole, the Term's decisions generally balanced out to be fairly centrist, offering something for both political conservatives and political liberals. This is true notwithstanding the fact that there was a clear majority of Justices who are considered conservative. Furthermore, as noted in *SCOTUS 2020*, Republican presidents have appointed 11 of the 15 (now, 12 of 16) Justices to take the bench since 1973; given that there has been no sharp right turn over the last 47 years, this data point undermines any contention that these Justices are beholden to the politics of whoever nominated them. Despite claims over the

years that a conservative revolution from the Court is nigh, we're still waiting for it, which gives the lie to any current forecasts of an imminent hard shift to the right.

Although with the addition of Amy Coney Barrett in Fall 2020, it may no longer be accurate to characterize this as the "Roberts Court," there is no question that the Chief Justice was a decisive, but moderating, presence in the Term. He was in the majority in 97% of the cases decided, including significant 5-4 decisions as discussed below. Also as discussed below, the Roberts Court can be defined by its minimalistic, incremental approach, as reflected by, for example, the fact that it strikes down federal laws as unconstitutional and overturns precedent at a much lower rate than the Warren, Burger, and Rehnquist Courts did.

Marietta observes that some of the Term's most significant decisions turned on issues of statutory interpretation. He usefully describes the differences between interpretive methods that focus on the purpose of the statute (even if that involves looking to extratextual sources) and those holding that judges must determine the law based on the statute's text. The latter is affiliated with the textualist/originalist approach, and there is little doubt that it is now preferred by most of the Justices, especially those described as conservative.

Over the decades that it has gained support as an interpretive method, textualism/originalism has been subjected to thorough, constructive criticism, and this has made it a more robust theory today. For example, after early references to the original "intent" behind provisions of the Constitution were sometimes derided as efforts to delve into the crania of the Founding Fathers, originalists shifted their focus to the original public meaning of these provisions. Similarly, concern about the accuracy of common textualist tools (e.g., contemporaneous dictionaries) is being addressed through the use of new tools (e.g., corpus linguistics). In the meanwhile, coherent, viable alternatives are few, and they often seem like mere covers for outcome-driven Posnerism.

At the same time, the textualist/originalist approach has never promised that it always leads inexorably to a single possible legal conclusion, nor that that conclusion will necessarily be "conservative" as a policy matter. Relatedly, as in previous terms, the conservative Justices were much less predictable this Term than the liberal ones. This is shown by the first case discussed in *SCOTUS 2020*, *Bostock v. Clayton County*.

Julie Novkov writes that *Bostock* was a landmark win for LGBT rights, and a "surprise victory" for many who believed the Court was heading in a more conservative direction after the addition in Fall 2018 of "Federalist Society stalwart" Brett Kavanaugh. The opinion was authored by another such stalwart, Neil Gorsuch, who was joined in a 6-3 majority by the Chief Justice and the four liberal Justices.

The issue in the case was whether the provision in Title VII making it unlawful to "discriminate against" an employee "because of . . . sex" prohibits termination based on sexual orientation or transgender status. Finding that it does, Gorsuch seemed to divorce textualism from originalism, as *Bostock's* understanding of the relevant statutory language does not comport with the phrase's ordinary meaning. *Bostock* notwithstanding, "sex discrimination" is universally understood to be something different from "discrimination based on sexual orientation" or "gender identity."

As a general matter, originalism primarily deals with interpreting the text of the Constitution, while textualism applies more to statutory interpretation. At the same time, textualism necessarily includes originalist considerations. The meaning of text as originally understood is the interpretive goal of both, but that is less of a challenge with more recent statutes. To the extent that the meanings of words change over time, originalist tools for investigating the original public meaning of those words become more important to interpreting statutes containing them.

Recognizing this, Novkov acknowledges that "Title VII's framers would not have anticipated" the Court's statutory construction, but she points out that Gorsuch insisted that "the limits of the drafter's imagination supply no reason to ignore the law's demands." However, it wasn't only Title VII's drafters who would not have imagined the Court's interpretation; no one in Congress, or in larger society, would have imagined it in 1964. (Even in common parlance today, the word "sex" is rarely used in the sense the majority used it in *Bostock*.) Although the decision may arguably be textualist, it cannot be considered originalist and, given the overlap between the two, this undermines the majority's entire analysis.

Novkov explains, "Rather than reading the statute as rigidly frozen in time, [Gorsuch] advocated for the language's meaning as something that could develop." If so, this is the antithesis of a textualist/originalist approach, under which the meaning is fixed when words become law and does not later morph independent of democratically-elected representatives in Congress and the White House. For this reason, Justice Samuel Alito's dissent accused Gorsuch of sailing "like a pirate ship" under a false "textualist flag."

Novkov traces the legislative history of Title VII through its enactment as part of the Civil Rights Act, as well as the case law that has interpreted it since, and that precedent may better account for the outcome than textualism. Before *Bostock*, the Supreme Court had interpreted the statute broadly to prohibit, for example, refusing to hire women with young children, requiring that women make larger pension contributions, and same-sex sexual harassment in the workplace, and Gorsuch's opinion relied on such precedent. There is surely little interest on the Court in revisiting those decisions, but their less-than-textualist foundations raise the issue of how much weight a strict textualist should give them.

Besides *Bostock*, the Court also released in mid-June *Department of Homeland Security v. University of California Regents*, a 5-4 decision that blocked Trump's repeal of President Obama's executive order creating the Deferred Action for Childhood Arrivals (DACA) program. The 2012 order had halted the deportation of aliens brought to the United States illegally as children. For the majority, Roberts stated that even if the previous executive order was unlawful, the Administrative Procedure Act (APA) still required the Trump Administration to "compl[y] with the procedural requirement that it provide a reasoned explanation for" rescinding the order, notwithstanding the fact that all parties agreed that DHS had the authority to rescind it.

In short, as John Eastman writes, the DACA opinion rested not on the legality of the DACA program, but on the process by which the decision to rescind it was made. Eastman posits that going forward, the DACA decision will require "a presidential

administration to put forth arguments the Court considers to be complete, candid, and considering all the relevant factors before shifting course from a prior administration's policies or risk the actions of executive agencies being struck down," which he characterizes as an "honesty review."

Eastman argues that along with *Department of Commerce v. New York* from the previous term (holding that the DOC hadn't adequately disclosed the basis for its (entirely lawful) decision to include a citizenship question on the 2020 census), the DACA decision shows the Court failing during the Trump Administration to give administrative agencies the judicial deference ordinarily accorded an agency's interpretation of the law.

Eastman concludes that the DACA decision created "a more stringent standard of review" under the APA, but whether the same standard will apply to the rash of executive orders issued at the outset of the Biden Administration remains to be seen. At least initially, it appears that the same standard is being applied by lower courts, as a Texas district court imposed in February 2021 a nationwide injunction against the new president's 100-day pause on deporting migrants, in part on grounds that DHS had not adequately justified its abrupt reversal of the Trump-era policy. The institutional credibility of the Court will suffer greatly if some Justices now become more deferential to exercises of discretion by the current administration than they were to those by its immediate predecessor.

Further, it is not clear that the 2012 executive order itself would have survived "honesty review" in the courts. The Obama Administration justified the DACA program as "an exercise of prosecutorial discretion." This rationale seems contrived, however, as the exercise of such discretion is ordinarily understood to be refraining from criminal prosecution of an individual defendant in a specific case based on considerations such as finite government resources. By contrast, DACA effected a wholesale suspension of enforcement of the deportation statute against an entire category of potential defendants.

In the Term's only abortion decision (and the last case to be argued in person before the COVID shutdown in early March), *June Medical Services v. Russo*, the Court followed recent precedent in striking down a Louisiana law that required physicians performing abortions to have admitting privileges at a hospital within 30 miles of where they perform the procedure.

Gerald Rosenberg writes that in 2016, the Court had struck down a nearly identical Texas statute in *Whole Woman's Health v. Hellerstedt*. In the earlier case, the Chief Justice had been one of three dissenting Justices who would have upheld the Texas law, but in *June Medical*, he voted with the four liberal Justices while concurring separately. In his concurrence, Roberts stated that he was compelled by "the legal doctrine of *stare decisis* . . . , absent special circumstances, to treat like cases alike." At the same time, he "continue[d] to believe that [*Whole Woman's Health*] was wrongly decided."

Some commentators have opined that Roberts' concurrence contains a landmine for future abortion cases. Specifically, as Rosenberg observes, Roberts reiterated the assertion in his *Whole Woman's Health* dissent that when assessing the constitutionality of abortion restrictions, courts should not seek to balance the benefits and burdens associated with the restriction but, rather,

must defer to the balance struck by the legislature. Citing the standard announced in *Planned Parenthood v. Casey*, Roberts argued that a court's sole focus should be on whether the law "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." If adopted in the future by a clear majority of the Court, this test could make it easier to find that abortion restrictions comply with *Casey*. In light of a post-*June Medical* circuit split developing on the issue, it will likely be back before the Court soon.

Rosenberg recognizes that neither *Roe* nor *Casey* resolved the issue of abortion with finality, as they had purported to do, and believes that "[p]olitics, rather than legal argument, will determine the future of the constitutional right to abortion." Thus, he predicts that "the opinions of most of the Justices [in the next abortion case] will coincide with the party of the president who appointed them." Although this is certainly true for Democratic appointees, it fails to take into account Warren Burger, Harry Blackmun, Lewis Powell, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, and, at least in *June Medical*, Roberts. The constitutional right to abortion endures almost 50 years after *Roe*.

As mentioned by Marietta in his Introduction, on the day *June Medical* was argued, Senator Charles Schumer stood in front of the Court, addressing pro-choice supporters and jabbing his finger at the building, and yelled, "I want to tell you Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind, and you will pay the price. You will not know what hit you if you go forward with these awful decisions." The Chief Justice quickly rebuked him, stating that such "threatening statements . . . are dangerous." In the event, the two Justices named by Schumer did not heed his demand but, presumably because they were in the minority, Schumer did not act on his threat.

After *Bostock*, the DACA case, and *June Medical* had left conservatives demoralized in a "blue June," three of the Term's last decisions (two issued in July) offered consolation in the area of religious liberty. Kevin Pybas writes that together, the three cases "indicate a majority of the Justices supporting the equal treatment of religious institutions in public benefit programs, and an even stronger majority willing to exempt religious institutions from some of the legislative burdens imposed by the contemporary regulatory state."

The most consequential of the three was *Espinoza v. Montana Department of Revenue*, which held that the First Amendment's Free Exercise Clause mandated that government benefit programs must treat religious providers of services in the same way that they treat their secular counterparts. At issue was a Montana program allowing scholarships funded by a state tax-credit program to be used in private schools. The Montana Supreme Court held that because it allowed scholarship money to be distributed to private religious schools, the entire program was unlawful under the state constitution's prohibition on aid to such schools.

Writing for the 5-4 majority, Roberts found that the constitutional no-aid provision did not pass strict scrutiny because it did not prohibit tax dollars from being directed to nonreligious private schools, which meant that the state's purported interest

in protecting the funding of public education clearly was not compelling.

*Espinoza* extended the Court's 2017 decision in *Trinity Lutheran v. Comer*, which held 7-2 that excluding churches from a public benefit (there, funds to resurface daycare playgrounds) solely because of their status as churches violated the Free Exercise Clause. *Trinity Lutheran* made clear in a footnote that the opinion did "not address religious uses of funding or other forms of discrimination" beyond the immediate issue of playground resurfacing; this limitation presumably persuaded Justices Stephen Breyer and Elena Kagan to join the *Trinity Lutheran* majority because they dissented in *Espinoza* on the grounds that the Montana program funded "the inculcation of religious truths."

The potential effect of *Espinoza* on state funding for vouchers, tax credits, educational savings accounts, and the like for religious schools is considerable. Thirty six other states have no-aid provisions similar to Montana's in their constitutions; such provisions are referred to as "Blaine Amendments," and most were enacted in the 19th and early 20th centuries explicitly to prevent any government funding of Catholic schools. Shortly after *Espinoza* was issued, the Second Circuit cited it in enjoining the prohibition under Vermont's Blaine Amendment on students from religious high schools enrolling in college courses through a state-funded program. Pybas doubts, however, that a majority of the Court is willing to go so far as to extend *Espinoza* to mandate that states fund religious schooling on a basis identical to public schools.

The other two cases were decided by larger margins of 7-2. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court held that the First Amendment's Religion Clauses together prohibit courts from adjudicating employment claims brought against religious schools by teachers whose responsibilities include instilling the school's faith because such teachers fit within the "ministerial exception" to federal antidiscrimination law. In the latest decision in a long-running fight brought by federal and state governments against a small denomination of nuns, *Little Sisters of the Poor v. Pennsylvania* held that an administrative rule exempting religious employers who object to including contraception benefits in their insurance plans was promulgated lawfully under the Affordable Care Act.

Unlike the three Religion Clauses cases, *New York State Rifle and Pistol Association v. City of New York* had little precedential significance; nonetheless, Austin Sarat offers an interesting review of how the decision reflects the Roberts Court's minimalism.

*NYSRPA* involved a Second Amendment challenge to a New York City ordinance that criminalized transporting firearms to any place other than seven designated shooting ranges in the City, thereby restricting licensed gun owners from carrying their weapons outside their homes. After the Court agreed to review decisions upholding the ordinance from a federal district court and the Second Circuit, the City amended the ordinance to narrow the restriction. In an unsigned per curiam opinion, the Court dismissed the case as moot because the amendment provided "the precise relief that petitioners requested in the prayer for relief in their complaint." The Chief Justice and the four liberal Justices said nothing beyond the short opinion; writing

separately, Kavanaugh concurred and Alito, Thomas, and Gorsuch together dissented.

Sarat compares Roberts' approach to the "passive virtue" of judicial restraint advocated by the late Professor Alexander Bickel. Bickel famously contended that because the Justices are appointed rather than elected, "they should interfere as little as possible in the democratic political process, jealously guarding the Court's legitimacy in the face of" the notion that judicial review of lawmaking by elected representatives is anti-democratic. Invoking the doctrine of mootness was one way of exhibiting this passive virtue.

The *NYSRPA* dissenters contended that the City had tried to manufacture mootness in order to evade an unfavorable ruling, and that live, justiciable issues still remained under the amended ordinance. The dissent also hypothesized that the outcome would be different if the City had sought to restrain publication of a newspaper editorial, and it argued that rights under the Second Amendment are no less precious than those under the First Amendment.

Sarat contrasts Roberts' restraint with what he sees as Alito's Second Amendment "activism." Of course, given that since 2010 it has issued no guidance in this continually relevant area of jurisprudence, the Court as a whole seems restrained to a fault. Further, both the concurrence and the dissent expressed "concern" that, in Kavanaugh's words, "some federal and state courts may not be properly applying *Heller* and *McDonald*"; inaction in the face of lower courts ignoring binding precedent is not virtuous.

The dissenters also called out another unseemly attempt by Democratic senators to bully the Court. As Sarat writes, Sheldon Whitehouse and four others filed an amicus brief that "offered a broad and unprecedented indictment of the Court's conservative majority," "accus[ing] them of pursuing a 'political project' and being in league with the National Rifle Association and other pro-gun groups seeking to radically expand gun owners' protections provided by the Second Amendment," and warning that Congress might seek to "restructure" the Court with additional Justices if the case was not dismissed. Bickel probably didn't anticipate such attempts by members of Congress to whip up pressure on the Court.

Sarat muses that Roberts and Kavanaugh may be "waiting for a [Second Amendment] case that is not open to the kind of criticism launched by the senators' brief." If so, this would seem incredibly naïve because, short of the Court overturning *Heller* and *McDonald*, there seems to be no scenario in which these senators will withhold criticism. Regardless, the Court won't be able to continue dodging Second Amendment issues, especially in light of, among other things, skyrocketing gun sales since the beginning of the COVID-19 pandemic, and its minimalism in *NYSRPA* can be seen as a failure to give much-needed direction in an unsettled area of the law.

Also because of the Roberts Court's minimalism, conservatives were heartened only mildly by *Seila Law v. Consumer Finance Protection Bureau*. *Seila Law* held that the creation by Congress in the Dodd-Frank Act of an administrative agency with a single head who could only be removed by the President for cause, not at will, violated the constitutional separation of powers.

Howard Schweber discusses the omission from the Appointments Clause in Article II, Section 2 of a process for removing federal officers, along with early congressional debates over filling this constitutional lacuna. Schweber traces the debate through the “unitary executive” theory articulated by President Andrew Jackson when he terminated the Treasury Secretary, who had refused to carry out his directive during a dispute with Congress over creation of a national bank: “the President controlled the appointment and removal of executive officers [because] all their actions were his actions and subject to his control.”

Schweber follows the development of the unitary executive theory through the expansion of the federal government beginning in the 1870s, and as driven later by “the Progressives’ belief in the efficacy of regulatory executive agencies.” Although the theory waned significantly as the Court’s decisions accommodated a growing administrative state, Roberts relied on a slimmed-down version of it in his opinion for the 5-4 majority. In his typically cautious style, Roberts didn’t question prior caselaw, but distinguished it by making the CFPB’s single director structure the key: unlike with commissions that have multiple members serving staggered terms, a President might never appoint a CFPB director during his or her four-year term, leaving the director too independent to pass constitutional muster.

On the corollary issue of the effect of the invalidity of the director-termination provision on the constitutionality of the CFPB itself, a different majority of seven Justices did not go so far as to declare the entire agency unconstitutional; rather, it concluded that the termination provision could be severed, and the balance of the statute left in place. These Justices’ reticence contrasts with the boldness of Thomas and Gorsuch, who concurred that the for-cause removal requirement was unconstitutional, but dissented as to severability, asserting, “Free-floating agencies simply do not comport with [the] constitutional structure,” and calling for all independent and inter-branch agencies to be abolished.

Kagan voted conversely to Thomas and Gorsuch and, along with Justices Ginsburg, Breyer, and Sotomayor, called for restraint: “compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration” and the way “political power operates.” Although this may be true, these realpolitik considerations shouldn’t be allowed to operate outside the constitutional framework, which was the heart of the legal issue before the Court and about which the Court should have a superior understanding.

In the book’s concluding chapter, “Ideology and the Court’s Work,” Lawrence Baum offers meaningful insights through a statistical analysis of the Justices’ voting patterns over the Term. For example, he finds that there were more ideological crossovers than had been expected, especially by Roberts, Gorsuch, and Kagan. Thus, Baum is careful not to fall into the trap of casually ascribing political labels to the Court’s decisions, which he believes “oversimplifies the Justices.” Records of “votes on case outcomes—who wins or loses—provide only a partial picture of their ideological positions, because it is ultimately the legal rules they support in opinions that have the greatest impact.”

By “ideology,” Baum appears to mean *political* ideology, which he states “alone could not have predicted many of the surprising outcomes” of the Term. At the same time, certainly individual Justices have their own *legal* ideologies as to the proper methods and tools for deciding cases, and it is fair to expect these to be more accurate predictors. Again, textualism/originalism seems to have the widest acceptance on the Court. In fact, the less that the vote in a case by an individual Justice can be explained by his or her preferred legal “ideology” (that is, interpretive method), the more reasonable it is to suspect that the vote resulted from some personal, non-legal ideology. Of course, wedding oneself to an interpretive method may in specific applications lead a jurist to results that he or she doesn’t like personally, so some resist it; the desire to retain the use of multiple interpretive methods may be akin to a preference for multi-factor tests where, as the factors multiply, a judge’s individual discretion broadens.

Baum’s statistical analysis shows that “it was common for conservative Justices to join with the liberal Justices to produce a liberal decision or for liberals to join with their conservative colleagues to increase the size of the majority for a conservative decision.” In other words, although conservative Justices may sometimes provide the margin that results in a liberal outcome, the liberal Justices will only increase a margin of victory that already exists for a conservative outcome. Kagan and other liberal Justices may help conservatives run up the score, but they will never provide the margin of victory. In the most important cases, the liberal bloc is steadfast.

Labeling based on a Justice’s presumed political ideology may distort an understanding of the Court even more than Baum recognizes. Like most observers, Baum believes that “in general, votes for litigants who claimed that their civil liberties have been violated” are properly “characterized as liberal.” To the extent this characterization had any validity in the past, however, it has become inaccurate in recent years as the dominant culture in the United States is increasingly hostile to civil rights that are considered conservative, like First Amendment rights of free speech, free association, and free exercise of religion, the Second Amendment right to bear arms, and property rights protected by the Fifth Amendment. Because the Bill of Rights is largely intended as a bulwark against majoritarian excesses, it makes sense that it would be invoked against the current orthodoxy, whether conservative or liberal. In any event, that conservatives may be the new civil libertarians is another reason to be wary of using conventional political labels when trying to understand the Court.

Undoubtedly, many political conservatives want the Court to more actively enforce the Constitution and view Roberts’ minimalism as timidity. For them, Baum states, “Roberts has become the most recent example of a frequent pattern in which Justices appointed by Republican Presidents establish moderate or even liberal records on the Court.” As Baum acknowledges, “the deviations from conservative positions taken by Roberts alone came in two of the most important decisions of the term,” *June Medical* and the DACA case. Baum continues:

Roberts has expressed concern over perceptions of the Court as a partisan body, perceptions that reflect on his leadership as Chief Justice. Roberts may also be seeking to strengthen his reputation in another way by showing that he does not

follow a consistent ideological line. And it is possible that he has reacted to changes in the political world over the past few years.

Baum's observation is probably on point, but such concern with extralegal factors when deciding legal disputes does not reflect favorably on the Roberts Court.

Deciding cases with an eye towards avoiding backlash from certain quarters does not bolster the Court's credibility, and it may actually be giving the wrong incentives to politicians hoping to influence its decisions. Although Baum doesn't mention the "enemy of the court" brief filed in *NYSRPA* or Schumer calling out Kavanaugh and Gorsuch on the Court's steps while *June Medical* was being argued, the senators may believe that their efforts are having some beneficial effect beyond merely whipping up their base. For example, in March 2021, Whitehouse held Senate hearings entitled, "What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary," and he is pressuring the Court to change its rules to add disclosure requirements that would chill participation by amici. Then, later in the month, Whitehouse requested that the Attorney General reinvestigate allegations made without corroboration during Kavanaugh's confirmation about events purportedly occurring four decades ago. Observers will be watching closely to see whether in the face of such pressure, the Court adheres to passive virtues or tries to assert itself as a co-equal branch.

As Baum notes in closing, "the appointment of Amy Coney Barrett as the sixth conservative will make a considerable difference," and any "deviations" by the Chief Justice may now have less impact. For example, instead of concurring with the liberal Justices to form a majority in *June Medical*, would Roberts have dissented separately by himself if Justice Barrett had been on the Court? Whether minimalism will continue to be a defining characteristic of the Roberts Court remains to be seen.

