Supreme Court term marked by unexpected alignments and incrementalism

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The Court's October 2020 Term opened with drama: Mourning Justice Ruth Bader Ginsburg, adjusting to a new colleague, bracing for the accompanying shift in the Court's long-time balance of power, and anticipating a contentious election — all in the pandemic-induced arena of telephonic arguments and conferences. But this Term's controversy and discord ended up being more subtle than the Term's beginnings foreboded.

The bulk of the Court's decisions were characterized by consensus and cautious incrementalism. The Court issued more unanimous decisions than last Term (26 vs. 18), including in several controversial cases. But it often forged agreement on narrower grounds than expected — likely reflecting the Court's distaste for being seen as another political actor in a highly polarized and volatile time. In *Fulton v. City of Philadelphia*, for example, the Court unanimously held that requiring a Catholic group to certify same-sex couples as foster parents violates the First Amendment but dodged more controversial and sweeping questions about the constitutional framework for religious exemptions.

And in *Ford Motor Company v. Montana Eighth Judicial District Court*, the Court unanimously held that plaintiffs could sue Ford in the state where their car accident occurred, even though Ford hadn't made or sold the allegedly defective vehicle there, but left open broader questions about the ramifications of internet transactions for assessing personal jurisdiction. Similarly, in *Mahanoy Area School District Board v. B.L.*, a highly anticipated First Amendment decision about a high school cheerleader's profanity-laced Snapchat rant, the Court ruled 8-1 for the cheerleader but did not ban schools from punishing all online student speech.

Even in divided cases, the Court often achieved agreement through narrow holdings and unexpected coalitions. Four conservative Justices joined Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan to uphold the Affordable Care Act in *California v. Texas* but did so on technical grounds. And in *Van Buren v. United States*, the three youngest conservative Justices teamed up with their more liberal colleagues to narrow the scope of a statute prohibiting unauthorized computer use.

In several cases, Chief Justice John Roberts and Justice Brett Kavanaugh voted with Justices Breyer, Sotomayor, and Kagan, leaving their other conservative colleagues to dissent on an array of questions, from what counts as a Fourth Amendment seizure to procedural technicalities about judicial review of agency decisions.

Against this backdrop, Justice Amy Coney Barrett's arrival produced less of a tidal wave than many predicted. She voted with the majority 91% of the time and cast the fifth vote in only four 5-4 decisions. Although one Term is too early to make confident predictions, Justice Barrett's voting pattern so far suggests that she, like Chief Justice Roberts and Justice Kavanaugh, is more likely than the other conservatives to join her more liberal colleagues to forge narrow consensus.

To be sure, the Court decided a number of cases that were polarized along ideological lines — including upholding two Arizona voting-rights restrictions, invalidating the California Attorney General's policy requiring charities to disclose their major donors, expanding takings law to include a California regulation granting labor organizations access to employers' property, and rejecting further restrictions on sentencing juveniles to life without parole.

But the more surprising controversies this Term came through the subtler avenue of separate writings, several of which were uncharacteristically caustic. While the vote was unanimous in *Lange v. California*, a case limiting the authority of the police to enter a home in hot pursuit of a suspect, Chief Justice Roberts' separate concurrence (joined by Justice Samuel Alito) reads more like a dissent, denouncing the majority decision as "absurd and dangerous."

And in *Edwards v. Vannoy*, Justices Kavanaugh and Kagan openly sparred in their majority and dissenting opinions. *Edwards* held that the jury-unanimity rule announced in *Ramos v. Louisiana* (a case from just last Term) does not apply retroactively to habeas petitioners. Justice Kavanaugh accused Justice Kagan of hypocrisy for arguing that a decision she did not join applies retroactively, and Justice Kagan chastised Justice Kavanaugh for judicial "scorekeeping."

This Term also saw Chief Justice Roberts' first lone dissent in his 16 years on the Court. In *Uzuegbunam v. Preczewski*, the Chief Justice criticized the majority for "turning judges into advice columnists" by holding that a request for nominal damages can satisfy Article III standing.

The Term's separate writings also suggest growing fractures among the conservative Justices. While *Fulton*'s holding in favor of a Catholic group was unanimous, Justice Alito drafted a 77-page concurrence (joined by Justices Clarence Thomas and Neil Gorsuch) condemning the Court for not going further. And in *Caniglia v. Strom*, the Court issued an unusually concise four-page opinion unanimously holding that the so-called "community caretaking" exception to the Fourth Amendment's warrant requirement does not extend to homes. But Chief Justice Roberts, Justice Alito, and Justice Kavanaugh collectively spilled nearly thrice the ink penning their own separate concurrences to explain the limits of the Court's decision.

In addition to muddying guidance for lower courts, all of this creates both challenges and opportunities for advocates before the Court. Advocates still need to present strong doctrinal arguments, which can sometimes lead to sweeping positions. At the same time, knowing that some Justices are thinking incrementally, advocates also need to be strategic about offering narrower approaches for deciding a case. That may include thinking about how to appeal to some of the Justices to vote against stereotype in a way that builds institutional legitimacy but does not undermine their long-term worldview. This past Term has shown us that there are often unexpected ways to count to five votes.

We may see this play out in high-profile cases next Term, in cases such as *Dobbs v. Jackson Women's Health Organization*. While the parties' arguments will put *Roe v. Wade* in the crosshairs, the Court could take a more incremental approach and uphold the Mississippi law without rejecting *Roe*'s holding that the Constitution provides some protection to a woman's decision to have an abortion.

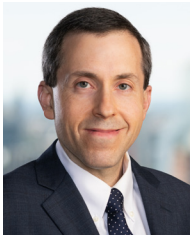
Incrementalism and unexpected alignments may play out in business cases, too. *City of Austin v. Reagan National Advertising of Texas* is about the validity of Austin's distinction between on-premise and off-premise digital signs, which the plaintiffs claim impermissibly discriminates between signs based on their content. The Court will not be writing on a blank slate: The cert grant in this case follows from confusion generated by multiple separate writings in the 2015 case, *Reed v. Town of Gilbert*.

While *Reed* was unanimous, three concurrences (representing the views of six Justices) expressed very different understandings of the Court's opinion and, in particular, what it means for a distinction to be "content-based." Several Justices likely will be concerned about respecting so recent an opinion, so the outcome of *Reagan* may hinge as much on first principles as on which side offers the least disruptive interpretation of *Reed*.

Other upcoming cases, like *American Hospital Association v. Becerra*, invite the Justices to make broad or narrow pronouncements about agency deference, which in turn may impact regulatory challenges by businesses.

If Justice Breyer retires, which now seems unlikely before next spring, the voting permutations will shift again and advocates will (again) face the challenge of learning to persuade a new Justice. One prediction seems safe, however: Replacing Justice Breyer would probably have the greatest impact on criminal justice cases, where Justice Breyer has been more pro-government than a nominee by President Biden is likely to be. Of course, if Congress decides to expand the Court, all bets are off.

About the authors



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