

Judicial Independence and the Roberts Court

*Judge Thomas M. Hardiman**

Thank you, Ilya Shapiro, for that generous introduction. Roger Pilon may be the only one here who appreciates just how honored I am to have been invited to give the B. Kenneth Simon Lecture on this Constitution Day. Roger was kind enough to travel to Pittsburgh to honor Ken at the memorial celebration after his passing. And as Roger knows, I had the privilege of knowing Ken personally. We met in the summer of 2000 in Pittsburgh and I was immediately drawn to the man's energy, intellect, and love of liberty. I don't know what Ken saw in me, but we became fast friends even though he was 42 years my senior.

Ken and I enjoyed many wonderful lunches together. No subject was off limits. He taught me about history, business, and even law, though he wasn't a lawyer. One particularly fond memory involved Ken's profound disappointment upon learning that I had never read *The Law* by Frederic Bastiat. Ken was so distressed by this lacuna in my Great Books education that he refused to have lunch again until I read Bastiat. Fortunately, the brevity of that work enabled me to complete the homework assignment, and our lunches quickly resumed.

It's hard to believe Ken left us over 16 years ago. I hope he would be pleased with my remarks today. One thing's for sure: Ken would have opinions—and thoughtful criticisms—to offer.

I would like to speak to you today about judicial independence and the Roberts Court. Alexander Hamilton wrote in Federalist 78: “[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . [Since] liberty can have

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nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . [t]he complete independence of the courts of justice is . . . essential.”¹

Hamilton viewed an independent judiciary as a “citadel of the public justice and the public security.” But he knew the judicial branch—which he regarded as “the weakest of the three departments” and “least dangerous to the political rights of the Constitution”—required greater autonomy than colonial courts enjoyed. For federal courts to be “bulwarks” of liberty, judges needed *more* than an “independent spirit.” They needed structural protections to bolster their “firmness and independence” in faithfully performing “so arduous a duty.” So what were Hamilton’s “indispensable ingredients” for an independent judiciary? “[P]ermanency in office” and tenure “during good behavior.”

I see the wisdom in Hamilton’s insistence upon permanency in office. But my affinity for life tenure has nothing to do with comfort and security. Some may consider a federal judgeship a sinecure, but that is the corruption of life tenure. Properly understood, life tenure is a necessary, but not a sufficient, condition for judicial independence. And judicial independence is essential to ensure that everyone who comes before the court is heard “without respect to persons,” so we can “do equal right to the poor and to the rich,” and “faithfully and impartially discharge and perform all the duties incumbent upon [us] . . . under the Constitution and laws of the United States.”² We judges protect liberty by our fidelity to the oath of office, which includes the timeless principles I just mentioned. And for over two centuries, judicial independence has made the discharge of that oath a reality.

Court watchers and commentators alike have spent the summer wrapping their minds around what they have called the “shifting alliances” and “surprise votes” that marked the end of the last term.³ How do those regarded as the Supreme Court’s liberal justices prevail in

¹ The Federalist No. 78 (Hamilton). The quotations in the following paragraph also come from this source.

² Oaths of Justices and Judges, 28 U.S.C. § 453.

³ Adam Liptak & Alicia Parlapiano, “A Supreme Court Term Marked by Shifting Alliances and Surprise Votes,” N.Y. Times, June 29, 2019, <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html>.

almost half of the cases decided 5-4? Why have Justices Neil Gorsuch and Brett Kavanaugh disagreed in nearly half of those rulings? For those of us who have served as judges for a number of years, there's nothing surprising at all about this. It's simply a function of nine *independent* justices.

Whether you are pleased or displeased with recent decisions of the Court, one conclusion seems indisputable: The Roberts Court practices and embraces the judicial independence fundamental to our founding. Hamilton believed that tenure "during good behavior" was "the best expedient . . . to secure a steady, upright, and impartial administration of the laws."⁴ And he hoped that independent judges would be "an essential safeguard against the effects of [society's] occasional ill humours."⁵ After more than 230 years, our federal judiciary continues to vindicate Hamilton's aspiration.

The idea of an independent judiciary arose within a broader conversation about separation of powers prior to the American Revolution. Hamilton and fellow delegates brought to the Philadelphia Convention of 1787 an informed perspective on English and American judicial precedents, as well as insights from Locke and Montesquieu. More poignantly, they brought their experience as colonists under the British Crown.

Until 1701, English judicial officers served at the pleasure of the king.⁶ Even jurists appointed during good behavior—who effectively possessed a judicial life estate—could be forced to forfeit their office for misconduct, whether real or manufactured. That appointment practice went unchallenged until 1628, when Charles I ordered Sir John Walter to surrender his post as chief baron of the court of the exchequer.⁷ Walter's offense? He defied King Charles's call for the dissolution of Parliament. When his court sanctioned members of Parliament for conspiring to resist dissolution of the Commons, Walter dissented. King Charles deemed that dissent treasonous, and he wanted Walter gone.

⁴ The Federalist No. 78.

⁵ *Id.*

⁶ Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104, 1105 (1976).

⁷ *Id.* at 1106 n.11; J.M. Rigg, *Walter, John*, 59 *Dictionary of National Biography* (Sidney Lee ed., 1899).

Walter challenged the king. Unlike English jurists removed before him, Walter insisted that his tenure was based on good behavior, so he could be removed only if the King's Bench found he had misbehaved.⁸ Charles begrudgingly allowed Walter to remain in his post, although Charles later dismissed several judges before ultimately accepting Parliament's petition for judicial tenure *quam diu se bene gesserint*, "during good behavior."⁹ And while English monarchs continued to dismiss judges intermittently, the governing commitment generally remained. Judges enjoyed tenure during good behavior, independent from the pleasure of England's Crown. With Parliament's 1701 Act of Settlement, tenure during good behavior became part of English law.¹⁰

But the rules were different in the American colonies. Early colonial judges served overwhelmingly at the pleasure of their royal governors. And other than Pennsylvania's, no colonial assembly could impeach a despotic royal governor.¹¹ England wanted it that way—because the colonial bench was deemed so mediocre. Colonial bars lacked competent men for the bench, so Westminster's Colonial Office begged the best English lawyers to serve in America—to no avail. King George III established tenure at royal pleasure in 1761 because the "state of learning in the colonies" was ostensibly too low.¹²

George III not only distrusted the colonial bar, he distrusted the colonies themselves—especially in the run up to Lexington and Concord. Attempting to assert ever greater control, in 1772 George established a fixed salary for superior court judges in Massachusetts, effectively preventing them from receiving grants from local governments.¹³ That's why the Declaration of Independence charged, "[The king] has made judges dependent upon his good will alone, for the tenure of their offices, and the amount and

⁸ Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 *Yale L.J.* 1475, 1480–81 (1970).

⁹ Smith, *supra* note 6, at 1106–09.

¹⁰ *Id.* at 1110–11.

¹¹ *Id.* at 1113–14.

¹² William Seal Carpenter, *Judicial Tenure in the United States: With Special Reference to the Tenure of Federal Judges 2–3* (1918).

¹³ *Id.* at 3.

payment of their salaries.”¹⁴ To whom would judges be beholden, London or their local constituents? So frustrated were the colonists by the Crown’s refusal to grant judicial tenure during good behavior that it became a feature of nearly every state constitution drafted after 1776.

Although state constitutions varied in their models for selecting judges and granting tenure, judicial independence was ubiquitous. The 1780 Massachusetts Bill of Rights offers one example, stating:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, and of every citizen, that judges hold their office as long as they behave themselves well; and that they should have honourable salaries ascertained and established by standing laws.¹⁵

“Impartial interpretation of the laws” and “administration of justice” struck particular chords in Philadelphia in the summer of 1787. Before the Revolutionary War, Parliament was paramount—whatever it said *was* law. This absolute sovereignty insulated legislative error from review, so English citizens had no recourse but for Parliament to correct itself. Pamphleteers wrote about this dynamic in America, suggesting that an independent judiciary could correct the legislature. Delegates in Philadelphia took that proposition one step further: An independent judiciary could invalidate legislation that contravened the Constitution.¹⁶ This form of separation of powers—our “checks and balances”—did not meet the strict separation championed by Montesquieu.¹⁷ But, as James Madison argued in Federalist 47, such overlapping separation at least precluded the “accumulation of all powers, legislative, executive and judiciary, in

¹⁴ The Declaration of Independence, Grievance 9 (U.S. 1776).

¹⁵ Mass. Const. art. XXIX.

¹⁶ Carpenter, *supra* note 12, at 24–25.

¹⁷ Sam J. Ervin Jr., Separation of Powers: Judicial Independence, 35 *Law & Contemp. Probs.* 108, 108–109 (Winter 1970).

the same hands, whether of one, a few, or many . . . the very definition of tyranny."¹⁸

At the Constitutional Convention of 1787, John Randolph of Virginia proposed that “indispensable ingredient”¹⁹ for an independent judiciary, calling for judges to “hold their offices during good behavior.”²⁰ Charles Pinckney of South Carolina and Hamilton likewise submitted proposals calling for judicial tenure during good behavior.²¹ Only John Dickinson of Delaware suggested keeping Parliament’s practice of legislative “address,” allowing Congress to remove judges for less-than-impeachable, noncriminal misconduct.²² Unsurprisingly, Dickinson was voted down seven-to-one. Randolph thought legislative address would “weaken[] too much the independence of judges,”²³ while Gouverneur Morris—whose own grandfather had been removed as chief justice of New York after displeasing royal Governor William Cosby—found the removal of tenured judges without trial a “contradiction in terms.”²⁴ And so we find in the Constitution’s Article III, Section 1: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” The Framers thus constitutionalized an independent judiciary.

So after two centuries of experience, has the framework secured an independent judiciary? Chief Justice John Roberts assumed office right before the October 2005 term.²⁵ And although the Supreme Court is often known by the name of the chief justice—think Warren Court, Burger Court, Rehnquist Court—for the first 13 years of Chief Justice Roberts’s tenure, the Court was often

¹⁸ The Federalist No. 47 (Madison).

¹⁹ The Federalist No. 30 (Hamilton).

²⁰ Carpenter, *supra* note 12, at 23.

²¹ *Id.* at 24–25, 30.

²² John T. Nugent, Note, Removal of Judges by Legislative Action, 6 J. Legis. 140, 144 (1979).

²³ Carpenter, *supra* note 12, at 30.

²⁴ *Id.* at 29.

²⁵ Chief Justice John G. Roberts, Jr., The Supreme Court Historical Society, <https://supremecourthistory.org/history-of-the-court/the-current-court/chief-justice-john-roberts-jr>.

called the “Kennedy Court.” During those years, Justice Anthony Kennedy was in the majority a striking 70 percent of the time when the Court split 5-4.²⁶

Immediately following Justice Kennedy’s retirement, a host of commentators made dire predictions about what it would mean for judicial independence. Similar concerns were voiced following Justice Antonin Scalia’s death, but they took on an apocalyptic tone with the Kennedy vacancy. Some criticisms were undoubtedly fueled by antipathy for President Trump. But they went beyond critique of the White House, pointing at the Supreme Court itself. Here’s just a sampling of what we heard last summer:

From an op-ed in the *Washington Post* on June 27: “[Justice Kennedy] and the court have served as a bulwark for the rule of law in a world often set against it. As a result, his retirement will spark chaos. . . . Things will get ugly—very ugly. [The] court’s very legitimacy is now up for grabs.”²⁷

Then an op-ed in the *New York Times*: “For the first time in living memory, the court will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of recent presidents.”²⁸

As summer 2018 turned into fall, the headlines told an increasingly desperate story. Powerful news corporations told us: “The Supreme Court is coming apart.”²⁹ “Stop pretending everything is okay.”³⁰

²⁶ Andrew Nolan et al., *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, Cong. Research Serv. 31–33 (2018); Alicia Parlapiano & Jugal K. Patel, “With Kennedy’s Retirement, the Supreme Court Loses Its Center,” *N.Y. Times*, June 27, 2018, <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html>.

²⁷ Joshua Matz, “The Supreme Court Will Now Fall into Chaos,” *Wash. Post*, June 27, 2018, https://www.washingtonpost.com/opinions/with-anthony-kennedys-departure-the-supreme-court-will-fall-to-chaos/2018/06/27/a052dfde-5a01-11e7-a9f6-7c3296387341_story.html.

²⁸ Lee Epstein & Eric Posner, “If the Supreme Court Is Nakedly Political, Can It Be Just?” *N.Y. Times*, July 9, 2018, <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html>.

²⁹ David Leonhardt, “The Supreme Court Is Coming Apart,” *N.Y. Times*, Sept. 23, 2018, <https://www.nytimes.com/2018/09/23/opinion/columnists/supreme-court-brett-kavanaugh-partisan-republicans.html>.

³⁰ Molly Roberts, “Stop Pretending Everything Is Okay,” *Wash. Post*, Oct. 11, 2018, <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/10/11/the-supreme-court-celebrates-its-own-corruption>.

“President Trump’s nominee would bring a virus of illegitimacy and partisanship to the Supreme Court.”³¹ “The Supreme Court was America’s least-damaged institution—until now.”³²

In his dystopian “Requiem for the Supreme Court,” one *Atlantic* contributor captured the emotion thus:

Critically, skeptically, but deeply, I loved that Supreme Court. Where is it? Where is the Court that claimed it was at least striving to transcend partisan politics? That Court is gone forever. We will spend at least the rest of my lifetime fighting over its rotting corpse. No prating about civility can change that fact. The fight is upon us now, and the party that shirks it will be destroyed.³³

Have these concerns proved justified? Let’s review the Roberts Court during the past two years. But first, let me offer a disclaimer. I reject the labels “conservative” and “liberal” as valid descriptors of judges. I agree with Justice Gorsuch that they are reductionist and fail to capture the judicial enterprise. I will use those labels here only as a reluctant concession to their widespread adoption in the academy and the media.

During the October 2017 term, Justice Kennedy’s final year, nearly 75 percent of the Court’s 5-4 decisions divided along supposedly ideological lines, and all 14 of them were conservative majorities.³⁴ The following term, with Justice Kennedy absent for the first time, only a third of those 5-4 or 5-3 decisions went that way (7 of 21).³⁵

³¹ Ronald Brownstein, “Brett Kavanaugh Is Patient Zero: President Trump’s Nominee Would Bring a Virus of Illegitimacy and Partisanship to the Supreme Court,” *The Atlantic*, Oct. 1, 2018, <https://www.theatlantic.com/politics/archive/2018/10/kavanaughs-partisanship-threatens-supreme-court/571702>.

³² George F. Will, “The Supreme Court Was America’s Least-Damaged Institution—Until Now,” *Wash. Post*, Sept. 21, 2018, https://www.washingtonpost.com/opinions/the-supreme-court-was-americas-least-damaged-institution-until-now/2018/09/21/7600e14e-bdc0-11e8-8792-78719177250f_story.html.

³³ Garrett Epps, “Requiem for the Supreme Court,” *The Atlantic*, Oct. 7, 2018, <https://www.theatlantic.com/ideas/archive/2018/10/supreme-court-loses-its-special-status/572416>.

³⁴ Adam Feldman, “Changes Are Afoot: Evidence from 5-4 Decisions during the 2018 Term and What This Tells Us about the Supreme Court Moving Forward,” *Empirical SCOTUS*, July 7, 2019, <https://empiricalscotus.com/2019/07/07/changes-are-afoot>.

³⁵ *Id.*

And that's not the half of it. *Ten* of last term's 21 5-4 or 5-3 decisions involved four liberal justices joined by one conservative.³⁶ Let me say that again: Last term nearly half of what has been called a "conservative" Supreme Court's closest cases were decided by "liberal" majorities.

And while Justice Gorsuch provided the "swing vote" more often than any other justice in the 2018–2019 term—voting four times with his liberal colleagues, on questions of criminal and tribal law—he was far from alone in showing an independent streak. *All five* of the Court's conservative justices joined at least one 5-4 decision when the liberal justices voted together. That's a first in the 13 years since Chief Justice Roberts joined the Court.³⁷

But there's more. As I noted earlier, this is a two-way street. Not only did the Court's conservative justices join liberal majorities, but each of the four liberal justices—who generally stay together more than their conservative colleagues³⁸—in turn joined conservative majorities. And, as always, there were mixed alignments that defy ideological explanation.

As Court watchers have noted, there were 10 different alignments in the 5-4 decisions during the 2018 term.³⁹ *Ten*. Three more than any previous Roberts Court term. Twice as many as we saw during Justice Kennedy's final term. Justice Gorsuch voted with the majority most frequently this past term, in 62 percent of all 5-4 or 5-3 decisions.⁴⁰ Justice Kavanaugh was close behind at 58 percent, with Chief Justice Roberts at 57 percent.⁴¹ But even Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan, who were least frequently in the majority that term, still voted with the majority in more than half of all 5-4 decisions.⁴² To put that in perspective: The 2017 term produced

³⁶ *Id.*

³⁷ *Id.*; Adam Feldman, "SCOTUSBlog Stat Pack 2018," Empirical SCOTUS, July 1, 2019, <https://empiricalscotus.com/2019/07/01/scotusblog-stat-pack-2018>.

³⁸ See Ilya Shapiro, "Liberal Supreme Court Justices Vote in Lockstep, Not the Conservative Justices," USA Today, Sept. 10, 2019, <https://www.usatoday.com/story/opinion/2019/09/10/liberal-supreme-court-justices-vote-in-lockstep-not-the-conservative-justices-column/2028450001>.

³⁹ Feldman, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

19 5-4 decisions—two fewer than the following term—and Justice Kagan voted with the majority in only 17 percent of those decisions. Chief Justice Roberts? 89 percent.⁴³

To what can we ascribe this state of affairs, which seems to be the polar opposite of so many pundits' dire predictions? Let's take a look at some of the most notable cases that account for those statistics.

A criminal case likely to affect legions of the accused and the already convicted is *United States v. Davis*.⁴⁴ In that case, the Court held unconstitutionally vague Section 924(c)(3)(B) of Title 18, which defines "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."⁴⁵ Justice Gorsuch—joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sotomayor, and Kagan—began his opinion for the Court by stating: "A vague law is no law at all."⁴⁶ Justice Kavanaugh, in a dissent joined by the chief justice and Justices Clarence Thomas and Alito, noted that tens of thousands of cases have been prosecuted under Section 924(c).⁴⁷ In their view, the statute could have been saved by the doctrine of constitutional avoidance.

In another case involving criminal law, *United States v. Haymond*, Justice Gorsuch wrote for a plurality that included Justices Ginsburg, Sotomayor, and Kagan.⁴⁸ At issue in *Haymond* was the punishment to be imposed on certain violators of their conditions of supervised release. According to the plurality, Section 3583(k) of Title 18 violates the Fifth and Sixth Amendments because it imposes a mandatory minimum punishment when the district judge finds by a preponderance of the evidence that the defendant engaged in certain criminal conduct.⁴⁹ Justice Breyer concurred only in the judgment, saying that he agreed with much of the dissent and that because supervised

⁴³ Epps, *supra* note 33; Adam Feldman, "Final Stat Pack for October Term 2018," SCOTUSblog, June 28, 2019, <https://www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018>.

⁴⁴ *United States v. Davis*, 139 S. Ct. 2319 (2019).

⁴⁵ *Id.* at 2323–24.

⁴⁶ *Id.* at 2323.

⁴⁷ *Id.* at 2337 (Kavanaugh, J., dissenting).

⁴⁸ *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality op.).

⁴⁹ *Id.* at 2373–75.

release is like parole, the *Apprendi* line of cases (requiring juries to find all elements of a crime that enhance punishments) does not apply.⁵⁰ Justice Breyer's opinion was especially significant to Justice Alito, who authored a dissent joined by Chief Justice Roberts and Justices Thomas and Kavanaugh. According to Justice Alito, Justice Breyer's concurrence "saved our jurisprudence from the consequences of the plurality opinion, which is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications."⁵¹ In the view of the dissenters, the Sixth Amendment applies only to criminal prosecutions, so it doesn't apply in supervised release revocation proceedings. Don't be surprised by future spirited disagreements over the original public meaning of constitutional guarantees.

Justice Gorsuch joined his liberal colleagues in two other closely divided cases that involve the rights of Native Americans. In *Herrera v. Wyoming*, the Court held that Wyoming's admission to the Union did not abrogate the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States."⁵² In *Washington State Department of Licensing v. Cougar Den*, the Court held that the "right to travel" provision of the Yakama Treaty of 1855 preempts the state's fuel tax as applied to Cougar Den's importation of fuel by public highway for sale within the Yakama Indian Reservation.⁵³ Justice Gorsuch concurred in the judgment in that case.⁵⁴ In his separate opinion joined by Justice Ginsburg, Justice Gorsuch criticized the state of Washington for trying to get more from the Yakama than it had initially bargained for. It remains to be seen whether these cases—along with Justice Gorsuch's votes the previous year in *Upper Skagit Indian Tribe v. Lundgren* and *Patchak v. Zinke*⁵⁵—portend a particular solicitude for the rights of Native Americans. More broadly, it's worth watching whether Justice Gorsuch's Colorado roots influence his thinking on cases involving

⁵⁰ *Id.* at 2386 (Breyer, J., concurring in the judgment).

⁵¹ *Id.* (Alito, J., dissenting).

⁵² *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

⁵³ *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

⁵⁴ *Id.* at 1016–21 (Gorsuch, J., concurring).

⁵⁵ *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018); *Patchak v. Zinke*, 138 S. Ct. 897 (2018).

not just Native Americans but also other Western concerns involving water rights and land use.

As I noted previously, Justice Gorsuch was not the only conservative justice to join with the four liberals to form a majority. In *Gundy v. United States* it was Justice Alito's turn. That case involved the Sex Offender Registration and Notification Act (SORNA), in which Congress delegated to the attorney general the power to issue regulations establishing registration requirements for sex offenders convicted before SORNA was enacted.⁵⁶ Justice Gorsuch dissented, joined by the chief justice and Justice Thomas, deeming SORNA an unconstitutional delegation of authority from Congress to the executive branch. In his concurrence, Justice Alito didn't think *Gundy* was the right case to reconsider the Court's nondelegation doctrine but expressed a willingness to do so in a later case.⁵⁷

In a highly anticipated commercial case, *Apple v. Pepper*, Justice Kavanaugh joined his liberal colleagues to hold that consumers have standing to sue Apple for antitrust harm caused by prices set by app developers who sell their product on Apple devices.⁵⁸

In a less newsworthy civil procedure case, *Home Depot U.S.A. v. Jackson*, Justice Thomas wrote an opinion joined only by the four liberal justices.⁵⁹ The Court held that Section 1441(a) of Title 28 does not permit a third-party counterclaim defendant to remove a case to federal court. Justice Thomas also joined the majority in a Voting Rights Act case, *Virginia House of Delegates v. Bethune-Hill*, where Justice Ginsburg authored the majority opinion joined by Justices Sotomayor, Kagan, and Gorsuch.⁶⁰

And last, but certainly not least, Chief Justice Roberts joined his liberal colleagues in one of the term's most significant cases, *Department of Commerce v. New York*.⁶¹ In that expedited matter, which bypassed review by the Second Circuit "because the case involved an issue of imperative public importance,"⁶² the Court prevented the

⁵⁶ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

⁵⁷ *Id.* at 2131 (Alito, J., concurring in the judgment).

⁵⁸ *Apple v. Pepper*, 139 S. Ct. 1515 (2019).

⁵⁹ *Home Depot, U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

⁶⁰ *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

⁶¹ *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

⁶² *Id.* at 2565.

Department of Commerce from including a citizenship question on the 2020 census questionnaire.

As the brief summaries I just described show, all five of the conservative justices joined liberal colleagues to form majorities. But this was not a one-way street, as the liberal justices did just the same.

Consider the 5-4 decision in *Mont v. United States*, in which the Court held that pretrial detention later credited as time served for a new conviction tolls a supervised-release term under 18 U.S.C. §3624(e).⁶³ Justice Ginsburg provided an essential vote in support of Justice Thomas's opinion for the Court, which was joined by the chief justice and Justices Alito and Kavanaugh.

In a patent case, *Return Mail, Inc. v. U.S. Postal Service*, Justice Sotomayor broke ranks from Justices Ginsburg, Breyer, and Kagan to author an opinion for the Court holding that the federal government is not a "person" capable of petitioning the Patent Trial and Appeal Board to institute patent review proceedings.⁶⁴

And in another 5-4 decision, Justice Breyer, along with Justices Alito, Gorsuch, and Kavanaugh, joined Justice Thomas's opinion in *Stokeling v. United States*. In that case, the Court held that a state robbery offense that includes "as an element" the common-law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(b)(i).⁶⁵

Another interesting line of division appears when we compare the votes of Justices Gorsuch and Kavanaugh, who disagreed in nine cases. In addition to the *Davis* and *Cougar Den* cases I already mentioned:

- They parted ways in a *Batson* case (racial discrimination in jury selection) called *Flowers v. Mississippi*.⁶⁶
- They disagreed about the presumption of prejudice to establish ineffective assistance of counsel in *Garza v. Idaho*.⁶⁷

⁶³ *Mont v. United States*, 139 S. Ct. 1826, 1829 (2019).

⁶⁴ *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019).

⁶⁵ *Stokeling v. United States*, 139 S. Ct. 544, 548–55 (2019).

⁶⁶ *Flowers v. Mississippi*, 139 S. Ct. 222 (2019).

⁶⁷ *Garza v. Idaho*, 139 S. Ct. 738 (2019).

- They disagreed in *Tennessee Wine and Spirits Retailers Association v. Thomas*, which involved the dormant Commerce Clause and the Twenty-first Amendment.⁶⁸
- They were on opposite sides in *Gamble v. United States*, where the Court upheld its “separate sovereigns” exception to the Double Jeopardy Clause.⁶⁹
- They did the same with *Mitchell v. Wisconsin*, involving the administration of a warrantless blood test.⁷⁰
- They disagreed in *Biestek v. Berryhill*, a case involving evidence in Social Security appeals.⁷¹
- And they disagreed in a bankruptcy case involving the debtor’s rejection of a license agreement in *Mission Product Holdings, Inc. v. Tempnology, LLC*.⁷²

And there are perennial cases where the voting patterns of the justices defy any ideological classification. For example, following on the heels of the *Matal v. Tam* case about the registrability of allegedly disparaging trademarks,⁷³ the Court in *Iancu v. Brunetti* held that the Lanham Act’s prohibition on the federal registration of “immoral” or “scandalous” marks also violates the Free Speech Clause of the First Amendment.⁷⁴ Justice Kagan wrote for the Court, joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. Dissents were filed by each of Chief Justice Roberts and Justices Breyer and Sotomayor.

In the *Gamble* case, seven justices joined the opinion of the Court, with only Justices Ginsburg and Gorsuch dissenting—the first and only time we’ve seen that alignment.⁷⁵ Similarly, *Biestek*—the Social Security case—was a 6-3 decision with Justices Ginsburg, Sotomayor, and Gorsuch in dissent.⁷⁶

⁶⁸ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019).

⁶⁹ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

⁷⁰ *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

⁷¹ *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

⁷² *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019).

⁷³ *Matal v. Tam*, 137 S. Ct. 1744 (2017).

⁷⁴ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

⁷⁵ *Gamble*, 139 S. Ct. 1960.

⁷⁶ *Biestek*, 139 S. Ct. 1148.

Finally, in *American Legion v. American Humanist Association*, Justices Breyer and Kagan joined Justice Alito's opinion for the Court, upholding display of the World War I Peace Cross in Bladensburg, Maryland.⁷⁷

In highlighting these variable voting patterns, I do not suggest a randomness to the judicial process. Judicial philosophy influences the work of each justice and the most astute Court watchers can offer thoughtful predictions as to how each justice might rule. With less than one term as a guide, it is too early to predict how Justice Kavanaugh will decide cases. Although Justice Gorsuch has been on the Court for just two years, his approach to criminal procedure cases has often earned the votes of Justices Ginsburg, Sotomayor, and Kagan. Those alignments are reminiscent of Justice Scalia's Confrontation Clause jurisprudence, as reflected in his opinions in *Crawford v. Washington*⁷⁸ and *Melendez-Diaz v. Massachusetts*,⁷⁹ and in his votes in *Bullcoming v. New Mexico*⁸⁰ and *Williams v. Illinois*.⁸¹ Does Justice Gorsuch's vote for privacy in *Collins v. Virginia*⁸² portend future votes echoing Justice Scalia's opinion for the Court in *United States v. Jones*⁸³ or his dissents in *Navarette v. California*⁸⁴ and

⁷⁷ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

⁷⁸ *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the state violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation).

⁷⁹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding that it was a violation of the Confrontation Clause to submit a chemical drug test report without the testimony of the person who performed the test).

⁸⁰ *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (holding that a surrogate analyst could not testify about the testimonial statements in the forensic report of the certifying analyst).

⁸¹ *Williams v. Illinois*, 567 U.S. 50 (2012) (allowing expert testimony about DNA evidence the analysis of which the expert herself did not perform; Justice Scalia dissented).

⁸² *Collins v. Virginia*, 138 S. Ct. 1663 (2019) (holding that the automobile exception to the Fourth Amendment's warrant requirement does not apply to vehicles parked within the curtilage of a private home).

⁸³ *United States v. Jones*, 565 U.S. 499 (2012) (holding that installing a GPS on a suspect's car without a warrant violated the Fourth Amendment).

⁸⁴ *Navarette v. California*, 572 U.S. 393, 404 (2014) (Scalia, J., dissenting from a holding that officers need not personally observe criminal activity when acting upon information provided by an anonymous 911 call).

Maryland v. King?⁸⁵ We shall see. But perhaps the most significant question for the future is whether the chief justice will anchor the middle of the Roberts Court as many commentators have suggested, or will Justice Gorsuch continue in the majority more than any other justice? Only time will answer that question.

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The Supreme Court's October 2018 term reflects the constitutional structure perfectly designed for all nine justices to exercise independent judgment. And judicial independence is hardly unique to The Nine. After more than 12 years as an appellate judge, I have had the privilege of serving with dozens of judges and hearing thousands of cases. And I can tell you that in every single one of those cases, the judges with whom I served, and I myself, *always* exercised independent judgment.

Cloaked with life tenure and salary protection, we owe fealty to no man or woman, just the law. Our duty is straightforward. We must adhere to the judicial oath and with the utmost solemnity honor our promise to "administer justice without respect to persons, and to do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform [our] duties . . . under the Constitution and laws of the United States."⁸⁶ I have every confidence that the justices of the Supreme Court, the judges of the United States Courts of Appeals, and the judges of the United States District Courts will continue to do just that.

⁸⁵ *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting from a holding that DNA-swabbing an arrestee's cheek is comparable to fingerprinting and thus a reasonable booking procedure under the Fourth Amendment).

⁸⁶ Oaths of Justices and Judges, 28 U.S.C. § 453.