THE ROBERTS COURT

THE STRUGGLE FOR THE CONSTITUTION

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For Ray, Robbie, and Kat

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INTRODUCTION

A bell rings through the chambers of the nine justices of the Supreme Court just five minutes before they take their seats in the courtroom to hear arguments in the day's cases. The sound reminds them that it is time to go to the robing room, an oak-paneled room, containing nine closets, each with a brass nameplate of the justice whose robes are inside. As soon as more than one justice enters, the traditional handshake in which each justice shakes hands with each of the other eight begins. If someone is missed there, the next opportunity is the next stop: the main conference room off of the chief justice's chambers. Chief Justice John Roberts Jr. likes to be the first justice into the conference room in order to greet his colleagues as they enter.

The handshake is done before arguments and before each conference in which the justices discuss petitions for review and vote on cases. Chief Justice Melvin Fuller started the tradition in the late nineteenth century as a reminder that although they may differ—sometimes passionately—in their opinions, they can find harmony in their common purpose.

When the justices leave the conference room on argument days, they wait in a small area behind the heavy maroon drapes that separate them from the courtroom for the buzzer announcing the 10 am start of court. On some days, the waiting public may hear muffled voices or laughter behind those drapes. On June 28, 2012, the day on which the Roberts Court would issue its most important decision in seven years, a decision with the potential to shape a presidential election and to alter the constitutional structure of government, no sound came from behind the

curtains, and silence quickly descended upon a courtroom whose atmosphere was electric with anticipation.

All of the justices did shake hands that morning before the fate of the nation's new health care law was revealed, confirmed one justice, but the harmony of a shared purpose was harder for some to grasp. This was a bitterly divided Court.

In one sense, the Roberts Court had come full circle. The last day of the 2006–07 term (ironically also June 28), had been the high-water mark for intense emotion and disagreement on the Court. A 5–4 conservative majority, led by Roberts, rejected two school districts' attempts to maintain racial diversity in their public schools. The Court's four moderate-liberal justices, in passionate dissent, accused Roberts and the majority of distorting the meaning of the landmark *Brown v. Board of Education*, which ended school segregation, and of abandoning other important precedents on issues ranging from abortion to antitrust law. On the final day of the 2011–12 term, Roberts and the four moderate-liberal justices found common ground to save the linchpin of the new health care law—the individual mandate—while the four remaining conservatives, in angry dissent, skewered the majority for rewriting the law, they claimed, to make it constitutional. That day, one justice later said, was as intensely emotional for all of them as the day of the school race decision five years earlier.

Disparagingly dubbed "Obamacare" by its opponents, the Patient Protection and Affordable Care Act became the centerpiece of the latest struggle for ownership of the true meaning and scope of some of the U.S. Constitution's most significant grants of power. It is a struggle as old as the Constitution itself, and it engages public passions particularly when the nation faces pressing social or economic questions.

The struggle is not between one president and one chief justice, or between the Congress and the Supreme Court. It is a struggle within the Supreme Court itself and it reflects differing visions as well within the other branches of government, the political parties, and the American people themselves.

"However counterintuitive it may seem, the integrity and coherence of constitutional law are to be found in, not apart from, controversy," wrote one constitutional law scholar a decade ago.[1]

Four signature decisions of the Roberts Court expose the fault lines among the justices as they engage in this ongoing struggle. They reveal a confident conservative majority with a muscular sense of power, a notable disdain for Congress, and a willingness to act aggressively and in distinctly unconservative ways by:

Boldly raising questions not asked or not necessary to resolve, as in the 2010 campaign finance blockbuster, *Citizens United v. Federal Election Commission*;

Refusing to defer to decisions by elected and accountable local or national officials, as in the 2008 Second Amendment gun ruling—*District of Columbia v. Heller*—the 2007 Seattle-Louisville public school integration decision, and the 2012 landmark health care ruling,

And overruling precedents, both old and recent, as in *Citizens United*, *Heller*, and the Seattle-Louisville cases.

In each of the four decisions, the justices do battle and ultimately divide 5–4 over the meaning of parts of the Constitution: the Fourteenth Amendment's guarantee of equal protection in the school race cases; the Second Amendment's right of the people to keep and bear arms in the gun challenge; the First Amendment's guarantee of free speech in the campaign finance case; and Article I's grant of power to Congress to regulate commerce and to tax and spend for the general welfare in the health care challenge.

Cases usually get to the Supreme Court after an expensive, hard slog through the lower courts. Some begin, as the Seattle-Louisville cases did, with mothers upset that their children did not get into their first choice of a public school. Others, like the *Heller* gun case, start with two lawyers deciding, over drinks, to manufacture a Second Amendment case.

All four landmark Roberts Court decisions had at their inception very smart and talented conservative or libertarian lawyers who, when

necessary, handpicked the most sympathetic clients for their lawsuits, strategized over the best courts in which to file, and, with an eye toward their ultimate target—an increasingly friendly and conservative Supreme Court—framed the winning arguments.

In fact, the same scenario is unfolding in the 2012–13 term in the Court's most important challenge to affirmative action in almost a decade. *Fisher v. University of Texas* is a challenge by a white student rejected for admission to the university. She claims that the consideration of race as one of many factors in the admissions policy violates the Constitution. The driving force behind the *Fisher* lawsuit was not the student, Abigail Fisher, but Edward Blum, head of the conservative one-man, anti–affirmative action organization, the Project on Fair Representation.

As he said in a *Texas Tribune* interview: "I find the plaintiff, I find the lawyer, and I put them together, and then I worry about it for four years."[2] Blum, who opposes all race-based classifications, is also behind a key challenge in the Supreme Court to the Voting Rights Act of 1965, the most successful civil rights law in history.

More than 50 percent of the Court's cases each term are decided unanimously or nearly unanimously by 8–1 or 7–2 votes. That fairly consistent rate of agreement is a reflection of the remarkable ability of the Court to achieve consensus on widely varying questions of law. So why focus on 5–4 decisions and these four rulings in particular? First, the four cases are defining—landmark—rulings of the Roberts Court and deserve close scrutiny. Second, it is from the Court's 5–4 decisions that we learn the most about the justices themselves. The most closely divided rulings of the Roberts Court reveal sharply divergent views of history, approaches to interpreting the Constitution, the role of government in American lives, and what makes a just society.

Those decisions also are a reminder of the importance of presidential elections to the future direction of the Court. As a new presidential term unfolds this year, four justices are in their seventies, two on the Court's conservative wing—Antonin Scalia and Anthony Kennedy—and two

on the moderate-liberal wing—Ruth Bader Ginsburg (who turned eighty on March 15, 2013) and Stephen Breyer. Although none shows any inclination to step down, the replacement of just one of the four has implications for the outcomes on issues that narrowly divide them.

Consider the four decisions whose stories are told here. Each has left the door open to future efforts to push the envelope in those controversial areas of the law. Gun rights activists are filing challenges to state bans on assault weapons and the open carrying of guns and to guns on campuses. State public finance systems for election campaigns are under attack post–*Citizens United*. The affirmative action challenge to the University of Texas's admissions policy, now before the Supreme Court, is being pursued in the name of the "color-blind Constitution" endorsed by four conservative justices in the Seattle-Louisville ruling. And after the health care decision, new suits attacking parts of the law on religious and other grounds have been filed. Supreme Court decisions matter, and so too do presidential elections.

The health care challenge, perhaps the most important of the four cases here, arrived at the U.S. Supreme Court at a particularly sensitive time for the Roberts Court. In what one presidential and Supreme Court scholar has called an "unprecedented" phenomenon, the ideologies of the nine justices are aligned with the politics of the presidents who appointed them.[3] The Court's five conservative justices were appointed by Republican presidents, and the four liberal justices by Democratic presidents. That was not the case when recently retired Justices John Paul Stevens and David Souter sat on the Court. Both were Republican appointees, but they sided most often with the Court's Democratic appointees, and so blurred the ideological and political lines.

As if sensing the coming political tornado embodied by the health care challenge, Justice Ruth Bader Ginsburg, in an interview in the summer of 2011, said: "What I care most about, and I think most of my colleagues do, too, is that we want this institution to maintain the position that it has had in this system, where it is not considered a political branch of government."[4]

The Supreme Court, however, sits atop a political branch of government, one of three branches whose powers and duties are enshrined in the Constitution. Federal judges and justices get their jobs through a political process: political recommendations to the president, appointment by the president, and confirmation by the Senate. Ginsburg's real concern and fervent hope were that the Court not be considered a partisan institution.

"The Court survived one great danger—*Bush v. Gore*," said one justice, referring to charges that politics drove the outcome in the 2000 ruling by the Rehnquist Court that decided the presidential election. "At least to me that seemed highly political."

However, *Bush v. Gore* triggered an enduring cynicism about the Court among many Americans. That cynicism deepened with the Roberts Court's 2010 decision in *Citizens United v. Federal Election Commission*, which eliminated legal bans on the use of general treasury funds by corporations and unions for making independent expenditures in elections. "It's the most hated of any recent Supreme Court decision, even more than *Bush v. Gore*," said the lawyer who won both cases, Theodore Olson.[5] And this cynicism was reflected in a number of public opinion polls taken shortly before the 2012 health care ruling in which a majority of voters said politics would influence the outcome of the challenge to the new law.

Whether the justices are practicing law or politics in their most controversial cases is a profoundly difficult question, but one that scholars and others have tried to define, measure, or answer in various ways. "Judicial activism" is by now an overused and mostly unsatisfactory way of answering the question and implying a political agenda. For many people, a charge of judicial activism today has come to mean a decision with which those making the charge disagree.

Yale Law School's Jack Balkin and others have written about "high politics" and "low politics" on the Supreme Court.

"It is ok for judges and Justices to have constitutional politics, to have larger visions of what the Constitution means or should mean and what

rights Americans have or should have," explains Balkin. "That is what I mean by 'high politics,' and there's nothing wrong with judges having such views." Judges pursue "high politics," he adds, through their legal arguments.[6]

On the other hand, judges should not pursue "low politics"—the manipulation of doctrine to give an advantage or power to a particular group or political party. For Balkin, the decision in *Bush v. Gore* was "low politics," and others would point to the *Citizens United* decision.

The justices themselves vehemently deny that politics, especially of the "low" kind, ever enters their deliberations.

"I don't think the Court is political at all," Justice Scalia said during a television interview a month after the health care decision. "People say that because at least in the recent couple of years since John Paul Stevens and David Souter have left the Court, the breakout is often 5 to 4, with 5 [Republican-appointed judges] and 4 by Democrats on the other side. Why should they be surprised that after assiduously trying to get people with these philosophies, [presidents] end up with people with these philosophies?"[7]

Politics is what happens "across the street," Justice Clarence Thomas has said, referring to Congress, which meets across the street from the U.S. Supreme Court Building.

Another justice, speaking only on background, explained, "I think when Justice *X* sits down and starts working on a case, that justice doesn't think, 'This is the result I want to reach because I'm a [liberal Democrat or a conservative Republican].' That justice does what I do: reads the briefs, reads the statute, reads the cases. And even if nine times out of ten looking back you see it in a certain way, we all know that's just not how the process works."

Justice Stephen Breyer too has chafed at what he considers to be the media's portrayal of the justices at times as "junior league politicians." Breyer has written that "[p]olitics in our decision-making process does not exist. By politics, I mean . . . will it help certain individuals be elected? Personal ideology or philosophy is a different matter. Judges

have had different life experiences and different kinds of training, and they come from different backgrounds. Judges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world."[8]

When the Roberts Court split 5–4 along ideological lines in the four cases at the center of this book, or when it divides that way in any of its cases, the media covering the Court, often short of time and space, may find it simpler to speak in terms of the conservative or liberal wings of the Court in explaining those votes. However, as the four decisions here show, those wings or blocks are not monolithic.

In the Seattle-Louisville school cases, Justice Anthony Kennedy refused to join Roberts, Scalia, Samuel Alito Jr., and Thomas in their view that the Constitution is color-blind even though he agreed that the school plans were unconstitutional. A color-blind Constitution, said Kennedy, is still an aspiration.

Although they divided 5–4 in *Citizens United* in striking down the ban on the use of treasury funds for corporate independent expenditures, eight justices agreed that the federal law's reporting and disclosure requirements on those expenditures were constitutional. Thomas did not agree.

And four conservative justices in the health care ruling—Kennedy, Scalia, Thomas, and Alito—disagreed with Roberts that the penalty for not having minimum health insurance was a constitutional tax.

The Court's liberal justices also do not always stand as one. Justices Breyer and Elena Kagan disagreed with Ginsburg and Sonia Sotomayor on the constitutionality of the health care law's expansion of Medicaid for the poor and disabled. Ginsburg and Breyer part company with each other over Scalia's view of the Sixth Amendment's confrontation clause and on certain sentencing issues.

"It's always troubling, and I know it's an easy way to get a hook on things, to say that there are however many conservatives or liberals on one side or another, but that's not the way we approach any individual

case," insisted another justice. "The results are what the results are, but this idea that there's one bloc or two blocs is just not the way we do it."

Each of the justices is the product of his or her experiences in life and in law, and each brings those experiences to bear when deciding cases. The justices' personal biases are constrained by certain doctrines, such as *stare decisis* (respect for precedents), and some justices adhere to those doctrines more strongly than others do.

"Justice Scalia has a fixed view of what is good for the country and of the Constitution," said one justice, adding, "I have my own view."

So what is the public to make of the Roberts Court and its signature decisions? Few who closely watch the Court doubt that it is the most conservative Supreme Court in decades, despite the ruling upholding the health care reform law. It is more conservative than its predecessor, the Rehnquist Court, primarily because Samuel Alito Jr. replaced Sandra Day O'Connor, formerly the center of the Court, and Alito is more conservative than O'Connor was. And because Alito replaced O'Connor, Anthony Kennedy moved into the current center of the Court—its crucial swing vote—and he votes more often with his conservative colleagues in cases closely dividing the Court than O'Connor did.

However, that is the easiest way to tell the story of the Roberts Court and the ongoing struggle for the Constitution. There is a more difficult way.

In a recent public conversation about civics and the Supreme Court, retired Justice David Souter spoke of the range of language in the Constitution. Some language is specific, such as the age of eligibility to be president is thirty-five years old. Other language, he said, has "extraordinary breadth," for example, "unreasonable searches and seizures," or even "freedom of speech."

Those general terms, he said, are best understood as a "listing or a menu of approved values, the application of which has got to be worked out over time." A great deal of what the Supreme Court does is to attempt to figure out the application of those values.

Sometimes the values compete. In *Citizens United*, he said, the liberty model of free expression says corporations can spend all the money they want independent of candidates. However, an equality approach would say there must be some limitation on corporations so they do not drown out other speech. The Constitution does not contain a provision telling the justices how to resolve the tension between those values.

How then does the public judge the justices? The public, said Souter, has to read the Court's decisions.

"A principled decision is one in which the Court candidly and convincingly explains why this principle prevailed over that principle," he said. "It is the choice of principles that is the tough part. The public judgment has got to be a judgment on whether they believe what the Court says, whether they believe what the Court says is convincing in making that choice between principles."[9]

In the four rulings on schools and racial diversity, gun rights, campaign finance, and health care reform, the justices confront and choose between principles amidst a modern-day tsunami of special interests trying to sway the final choice. In the end, however, the public's judgment remains the key to the Court's most important and only institutional power: its legitimacy in the eyes of the American people.