CHIEF JUSTICE JOHN ROBERTS AND THE COMBINATION OF CONSERVATISM AND INSTITUTIONALISM

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With renewed public focus on the Supreme Court of the United States in what many commentators refer to as an era of a conservative Court, the spotlight has fallen most brightly on Chief Justice John Roberts. The media and academia have zeroed-in on the Chief Justice in part because of his penchant for crossing the ideological aisle in high-profile cases. The result? Roberts tends to face criticism from both conservatives and progressives alike. But when examining the Chief Justice's jurisprudence more closely, it appears that conservatives, at least, have misplaced their frustrations. Indeed, viewing Roberts's early jurisprudence in the context of his more recent opinions, including those from the landmark 2022 and 2023 terms, reveals not only that the Chief Justice's conservative bona fides remain intact but also that he has employed his institutionalist perspective to achieve long-sought-after conservative legal goals.

I. INTRODUCTION

In the summer of 2022, the Supreme Court of the United States entered the public spotlight like never before.[1] While the Court routinely rules on cases of serious magnitude, the June 24, 2022 pronouncement in *Dobbs v. Jackson Women's Health Organization*[2] marked a major shift in abortion law with historic ramifications.[3] *Dobbs* arguably represented the most divisive—and

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1. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (last updated May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/M73U-9XB7] (exposing unprecedented leak of draft Supreme Court opinion to overturn landmark *Roe v. Wade* abortion decision).

2. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. *See* Josh Gerstein, Alice Miranda Ollstein & Quint Forgey, *Supreme Court Gives States Green Light to Ban Abortion, Overturning Roe*, POLITICO (last updated June 24, 2022, 1:24 PM), https://www.politico.com/news/2022/06/24/supreme-court-overturns-roe-v-wade-00042244 (sending "the country into uncharted political, legal, social and medical territory") [https://perma.cc/LKE6-JCVV].

watched—Supreme Court case since 2012, when the Court upheld the politically controversial Patient Protection and Affordable Care Act ("ACA," or "Obamacare") in *National Federation of Independent Business v. Sebelius*.[4] But while the *Dobbs* and *Sebelius* rulings differ as to the partisan outcome—with *Dobbs* labeled as conservative and *Sebelius* as liberal[5]—one common thread runs between the two: criticism of Chief Justice John Roberts.[6]

Interest in the Chief Justice's jurisprudence skyrocketed after he joined the Court's liberal justices in *Sebelius*.[7] The conventional wisdom on the subject argues that Roberts occasionally sides with the Court's progressive wing in hopes of preserving the institutional integrity of the Court.[8] Consistent with this approach, the Chief Justice concurred in only the judgment in *Dobbs*, seeking a narrow ruling to avoid overturning a popular precedent.[9] Still, instances of the Chief Justice towing this line, while thoroughly litigated in the press, remain sparse in practice.[10]

4. *See* NFIB v. Sebelius, 567 U.S. 519 (2012); *see also* Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), https://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html [https://perma.cc/D54U-L94Q] (discussing battle over and implications of *Sebelius* decision); *see also* Erwin Chemerinsky, Opinion, *Another Conservative Attack on Obamacare, Another Loss at the Supreme Court*, L.A. TIMES (June 17, 2021, 1:31 PM), https://www.latimes.com/opinion/story/2021-06-17/supreme-court-affordable-care-act-constitutional-obamacare-aca [https://perma.cc/J7H2-CABC] (providing overview of ACA fighting over years).

5. Philip Klein, *The Greatest Victory in the History of the Conservative Movement*, NAT'L REV. (June 24, 2022, 1:36 PM), https://www.nationalreview.com/2022/06/the-greatest-victory-in-the-history-of-the-conservative-movement/ [https://perma.cc/P4RY-HC7Z]; Liptak, *supra* note 4.

6. *See, e.g.*, Hugh Hewitt, Opinion, *Why John Roberts's Wise Prudence Was the Wrong Answer on Abortion Law*, WASH. POST (June 25, 2022, 5:02 PM), https://www.washingtonpost.com/opinions/2022/06/25/john-roberts-chief-justice-dobbs-overrule-roe-abortion-rights/ [https://perma.cc/EY4J-WG39]. Regarding *Sebelius*, Hewitt opined, "Roberts looked for any conceivable argument for upholding such a milestone and found a tenuous hook on which to hang the 5-to-4 majority opinion: the taxing power given to Congress." *Id.* On *Dobbs*, Hewitt explained that Roberts's position "appeal[ed] for prudence and another invocation of the tradition that [the] [C]ourt doesn't decide more than it is obliged to, especially, again, when it comes to constitutional issues. Roberts's approach is appropriate, nine times out of 10. But on Friday the [C]ourt wasn't reviewing a statute. It was considering the mess it had made of abortion law over half a century. Legislatures at the state level were demanding deference." *Id.*

7. *See, e.g.*, Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137; William Spruance, Note, *Heckling the Umpire: John Roberts, Public Scrutiny, and the Court's Legitimacy*, 19 GEO. J. L. & PUB. POL'Y 633 (2021); Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/ [https://perma.cc/EWV9-PHNK].

8. Spruance, *supra* note 7, at 634; Gerson, *supra* note 7. *But see* Eric J. Segall, *John Roberts: Institutionalist or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 107–08 (2021) (arguing Roberts focuses on his own preferences).

9. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2310–17 (2022) (Roberts, C.J., concurring in the judgment); PEW RSCH. CTR., *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade* (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/P55V-JYDR].

10. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519 (2012) (joining progressive wing); June Med. Serv., L.L.C. v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring in the judgment) (emphasizing importance of precedent), *abrogated by Dobbs*, 142 S. Ct. 2228; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (overturning rescission of Deferred Action for Childhood Arrivals program).

Indeed, six days after the Court announced *Dobbs*, the Chief Justice wrote for a conservative majority in another landmark decision: *West Virginia v. Environmental Protection Agency*.[11] While not as divisive as *Dobbs*,[12] *West Virginia* provides important precedent enabling the Court to attack major regulatory action using separation of powers principles.[13] In penning *West Virginia*, the Chief Justice departed from his cautionary approach in *Dobbs*,[14] forgoing an opportunity to again rule on narrow grounds.[15]

And Roberts's display of conservatism did not stop there. In writing for the Court in its 2023 decision in *Biden v. Nebraska*,[16] the Chief Justice followed his approach in *West Virginia* by invalidating President Biden's student debt cancellation plan on similar grounds.[17] In addition, Roberts took the lead in providing a second conservative victory in 2023, this time on the issue of affirmative action in another closely watched decision, *Students for Fair Admissions v. President and Fellows of Harvard College*.[18] All the while, the Chief Justice took steps intended to preserve the Court's institutional integrity.[19]

By casting the public instances of the Chief Justice's departure from conservative stances in the context of his overall jurisprudence, this Essay explores how Roberts's institutionalist streak does not always require departure from his conservative judicial principles.[20] Ultimately, when reflecting on the development of legal doctrine during the Roberts era, commentators should not question the Chief Justice's commitment to conservative judicial philosophy nor should historians fault his institutional focus. Instead, they should consider him a principal architect of modern conservative jurisprudence, as well as a jurist doing his level best to preserve the Court's public integrity.

This Essay proceeds in three parts. Part I summarizes the conventional wisdom surrounding the Chief Justice as an institutionalist. Part II puts this view in perspective by tracing Roberts's major conservative decisions over time while accounting for his departures to join the Court's liberal justices. Part III outlines how his 2022 opinions in *Dobbs* and *West Virginia*, as well as his 2023 opinions in *Biden v. Nebraska* and *Students for Fair Admissions*, mark a continuation of

11. *See generally* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

12. For example, the *West Virginia* decision received far less press coverage than *Dobbs*. A search on the *New York Times* website for mentions of "West Virginia" and "Environmental Protection Agency" returned 57 results between February of 2022 and February of 2023. A search for "*Dobbs*" and "abortion" returned 296 results.

13. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610. For example, the states challenging President Biden's student debt relief plan featured *West Virginia* prominently in their brief. Brief for the Respondents at 30–36, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506).

14. *See West Virginia*, 142 S. Ct. at 2606–07 (discussing and rejecting mootness argument).

15. *See id.* at 2627–28 (Kagan, J., dissenting) (noting Court could have avoided decision on mootness grounds).

16. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

17. *Id.*

18. *See generally* Students for Fair Admissions v. President and Fellows of Harvard College, 143 S. Ct. 2141 (2023).

19. *See Nebraska*, 143 S. Ct. at 2375–06.

20. *See infra* notes 28–65, 123–35 and accompanying text.

this theme, underscoring Roberts's role in advancing conservative law while fighting to retain the Court's independence.

II. THE CONVENTIONAL WISDOM: JOHN ROBERTS THE INSTITUTIONALIST

It makes sense to begin a discussion on Chief Justice Roberts's judicial philosophy with reference to his introductory salvo in the national spotlight: the oft-quoted "baseball" analogy.[21] In his opening statement before the Senate Judiciary Committee during his nomination hearing, Roberts remarked, "[j]udges are like umpires. Umpires don't make the rules, they apply them. . . . They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[22] Like many nominees, Roberts sought to cast himself as apolitical, characterizing a judge's role as "limited" and behind-the-scenes.[23] As Chief, Roberts has doubled down on the concept of an independent judiciary, claiming "[judges] don't work as Democrats or Republicans,"[24] and later describing his colleagues as "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[25]

The Chief Justice's portrayal of the Court as above politics has found favor in analysis of his jurisprudence as well. Various scholars and commentators broadly label Roberts as an institutionalist.[26] Some define this institutionalism to mean that the Chief Justice seeks to rule on narrow grounds when possible to promote incremental change in law and thus avoid public ire.[27] One such scholar attributes Roberts's nature to an internal conflict waged in his own mind between "social legitimacy" (public perception) and "legal legitimacy" (consistent interpretation of the law).[28] Even Roberts has recognized the importance of these ideals, commenting, "[i]n most cases . . . I think the narrower the better, because

21. *Chief Justice Roberts Statement–Nomination Process*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (last visited Aug. 5, 2023) [https://perma.cc/DC5F-H8CA].

22. *Id.*

23. *See id.*

24. Adam Liptak, *John Roberts, Leader of the Supreme Court's Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html [https://perma.cc/X4L5-88XD].

25. Editorial Board, Opinion, *John Roberts Said There Are No Trump Judges or Obama Judges. Clarence Thomas Didn't Get the Memo.*, WASH. POST (June 28, 2019, 4:54 PM), https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/MS8A-Z89A] ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges.").

26. *See, e.g.*, Brennan-Marquez, *supra* note 7, at 140–42; Spruance, *supra* note 7, at 634–38; Gerson, *supra* note 7.

27. Gerson, *supra* note 7 ("He strives to have the Court decide cases on the narrowest grounds possible and that create the least discoloration to the coordinate branches of government and the generally-accepted expectations of the citizenry."); Robin J. Effron, *Institutional Integrity and the Roberts Court: Will the Judicial Get Political?*, BROOKLYN L. NOTES (Fall 2019), https://www.brooklaw.edu/en/News-and-Events/Brooklyn-Law-Notes/Fall-2019/feature-institutional-integrity [https://perma.cc/AN62-7SL3] ("[H]e is also deeply committed to protecting the institution of the Supreme Court itself and insulating it from the charge that it has just become a third political branch of the federal government.").

28. Spruance, *supra* note 7, at 634–36.

people will be less concerned about it."[29] Still, it remains less clear how institutionalism maps onto the Chief Justice in practice. Does the institutionalist label make Roberts a "moderate"?[30] A "swing vote"?[31] Or can institutionalism coexist alongside his conservative tendencies?

III. "CONSERVATIVE" PHILOSOPHY WITH "LIBERAL" CURVEBALLS: JOHN ROBERTS IN PRACTICE

A review of the record suggests it remains possible to reconcile the two notions—John Roberts the institutionalist justice and John Roberts the conversative justice. This Part proceeds in two Sections. The first outlines Roberts's early conservative jurisprudence and the seeds of his institutional approach. The second delves into his later decisions that precipitated the whole conservative-institutionalist debate in the first place.

A. Early John Roberts Jurisprudence: Conservative Ends through Institutionalist Means

1. Affirmative Action and Voting Rights

Perhaps Chief Justice Roberts's most conservative legal viewpoints come in his rulings on issues related to race. Early in his tenure, Roberts expressed disdain for categorizing citizens based on race.[32] Dissenting in the 2006 redistricting case *League of United Latin American Citizens v. Perry*,[33] the Chief Justice opined, "[i]t is a sordid business, this divvying us up by race."[34] One year later, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[35] Roberts invalidated a school district's use of race in assigning students to public schools.[36] In doing so, he concluded that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[37] With his emphatic soundbite, the Chief Justice refused to accept even diversity, recognized by the Court in 2003,[38] as a rationale for affirmative action.[39] Instead, he

29. JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 177 (2019) [hereinafter BISKUPIC, THE CHIEF].

30. *See* Andy Smarick, *John Roberts's Moderate Gambit*, L. & LIBERTY (July 12, 2022), https://lawliberty.org/john-robertss-moderate-gambit/ [https://perma.cc/BL7H-N93G].

31. Amelia Thomson-DeVeaux, Laura Bronner & Elena Mejia, *Roberts is the New Swing Justice. That Doesn't Mean He's Becoming More Liberal.*, FIVETHIRTYEIGHT (July 16, 2020), https://fivethirtyeight.com/features/roberts-is-the-new-swing-justice-that-doesnt-mean-hes-becoming-more-liberal/ [https://perma.cc/BR5C-83TV].

32. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 492–511 (2006).

33. *See id.*

34. *Id.* at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

35. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); BISKUPIC, THE CHIEF, *supra* note 29, at 178–79.

36. *Parents Involved*, 551 U.S. at 709–711; BISKUPIC, THE CHIEF, *supra* note 29, at 182–90.

37. *Parents Involved*, 551 U.S. at 748.

38. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

39. BISKUPIC, THE CHIEF, *supra* note 29, at 183–86.

doubled down on conservative viewpoints he honed as a lawyer in the first Bush Administration.[40]

When the opportunity to overturn the diversity justification for affirmative action resurfaced (twice), internal Court divisiveness prevented Roberts from formalizing his colorblind view of the Constitution.[41] Yet during the first of these debates in 2013, the Chief Justice may have backed down over concerns about public perception of the Court given that Roberts already planned to issue a majority opinion advancing conservative jurisprudence in another controversial case that term pertaining to voting rights: *Shelby County v. Holder*.[42]

The Chief Justice's road to issuing the *Shelby County* ruling began with the Court's consideration of Section 5 of the Voting Rights Act ("VRA") in *Northwest Austin Municipal Utility District No. 1 v. Holder*.[43] Roberts had long opposed aspects of the VRA—a landmark civil rights statute—on federalism grounds, dating to his time in the Reagan Administration.[44] But in *Northwest Austin*, Roberts did not have the votes to fully invalidate Section 5, which requires certain state and local municipalities to obtain federal approval before changing election procedures.[45] As a result, the Chief took an incremental, institutionalist approach in holding that the district qualified for an exemption from needing federal approval to change its process.[46] Still, Roberts did not proceed without a firm rebuke of the VRA, calling on Congress to reform Section 5 and noting that "[t]hings have changed in the South."[47]

When the VRA returned to the Court's docket in 2013 via *Shelby County*, however, the Chief Justice had the votes to handicap the law.[48] Specifically, the Court held as unconstitutional the coverage formula that determined which jurisdictions needed to comply with Section 5—a monumental shift for voting rights.[49] Roberts returned to his rhetoric from *Northwest Austin*, proclaiming that in addition to the South, "[o]ur country has changed."[50] And, underscoring the gravity of the *Shelby County* decision on civil rights law, Roberts biographer Joan Biskupic concluded that, "[i]n the end, [Roberts's] opinion in *Shelby County* marked the first time since the nineteenth century that the Supreme Court struck down a provision of civil rights law protecting people based on race."[51] Ultimately, the Chief Justice achieved a major victory for the conservative legal movement, and he employed his institutionalist perspective to obtain it.

40. *See id.* at 187–88.

41. *See id.* at 264–67, 308–11.

42. Shelby Cnty. v. Holder, 570 U.S. 529 (2013); BISKUPIC, THE CHIEF, *supra* note 29, at 267.

43. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009); *see* BISKUPIC, THE CHIEF, *supra* note 29, at 258.

44. Spruance, *supra* note 7, at 638–39.

45. *Id.*; BISKUPIC, THE CHIEF, *supra* note 29, at 258.

46. Spruance, *supra* note 7, at 639–40; BISKUPIC, THE CHIEF, *supra* note 29, at 258–60.

47. BISKUPIC, THE CHIEF, *supra* note 29, at 258; *Nw. Austin*, 557 U.S. 193 at 202.

48. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

49. *Id.*

50. *Id.* at 557.

51. BISKUPIC, THE CHIEF, *supra* note 29, at 249–50.

2. Campaign Finance and Abortion

Chief Justice Roberts also helped engineer conservative legal victories on the issues of campaign finance and abortion, enabling the Court to circumvent relatively recent precedent in the name of conservative legal principles. At the root of the campaign finance issue stood *McConnell v. Federal Election Commission*,[52] a 2003 decision upholding advertising restrictions impacting corporate participation in political elections.[53] When Roberts joined the Court in 2005, he sought to roll back the reach of campaign finance regulations.[54] The opportunity soon presented itself in the 2007 case *Federal Election Commission v. Wisconsin Right to Life*.[55] Yet, the Chief shied away from overturning *McConnell*—again in part due to institutionalist concerns[56]—and he faced ridicule from fellow conservative Justice Antonin Scalia for employing this tactic.[57]

Roberts did not give up, however. In 2008, the Chief Justice joined the majority in *Davis v. Federal Election Commission*[58] to invalidate campaign finance provisions related to contribution limits for wealthy individuals.[59] Next, after the Court heard oral argument in *Citizens United v. Federal Election Commission*[60] in 2009, Roberts scheduled the case for reargument to squarely address whether the Court should overturn *McConnell* on grounds that campaign finance restrictions violated the First Amendment.[61] The Court then did just that.[62] While institutionalism again motivated Roberts's incremental action, his strategy, from *Wisconsin Right to Life* to *Davis* to *Citizens United,* eventually allowed conservative doctrine to win the day, thus doing away with the *McConnell* precedent in only seven years. Interestingly, the Chief Justice forewent an opportunity to rule narrowly on *Citizens United* in 2010,[63] electing instead to cement conservative judicial thought in the face of fierce public rebuke.[64]

Another example of Roberts's conservative streak, at least early on in his tenure, comes in the form of abortion jurisprudence. In 2000, the Court invalidated Nebraska's partial birth abortion ban in *Stenberg v. Carhart*.[65] Congress reacted by passing a federal ban on such procedures in 2003.[66] But by 2007, when the federal law appeared before the Supreme Court, Roberts led a new conservative majority.[67] The Court, including Roberts, voted to uphold the

52. *See generally* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
53. *See id.* at 224.
54. BISKUPIC, THE CHIEF, *supra* note 29, at 207.
55. *Id.* at 209; Spruance, *supra* note 7, at 642.
56. BISKUPIC, THE CHIEF, *supra* note 29, at 209; Spruance, *supra* note 7, at 642–43.
57. BISKUPIC, THE CHIEF, *supra* note 29, at 209.
58. *See generally* Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).
59. *Id.* at 744–45; Spruance, *supra* note 7, at 643; BISKUPIC, THE CHIEF, *supra* note 29, at 210.
60. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
61. Spruance, *supra* note 7, at 644; BISKUPIC, THE CHIEF, *supra* note 29, at 210.
62. *Citizens United*, 558 U.S. at 318–19.
63. BISKUPIC, THE CHIEF, *supra* note 29, at 213.
64. *Id.* at 219–20; Spruance, *supra* note 7, at 645–46.
65. Stenberg v. Carhart, 530 U.S. 914, 920–22 (2000).
66. BISKUPIC, THE CHIEF, *supra* note 29, at 181.
67. *Id.* at 181–82.

federal ban in *Gonzales v. Carhart*,[68] providing another win for conservatives and again discarding precedent in seven years.[69] Thus, especially in the beginning of his tenure as Chief Justice, John Roberts readily pursued a conservative legal agenda, with his institutionalist concerns serving to guide it rather than restrict it.

B. Sebelius and the Trump Presidency: The Focus on John Roberts the Institutionalist

1. The ACA Cases: Sebelius and Burwell

While *Shelby County* marked highwater (to that point) for Chief Justice Roberts's conservative jurisprudence, the public narrative on Roberts began to shift just one term prior when he authored the majority opinion upholding Obamacare.[70] In *Sebelius*, the Chief Justice joined the Court's liberals to validate the ACA's controversial individual mandate, which required Americans to purchase health insurance or pay a penalty.[71] Politicization of the issue likely had an impact on Roberts, who left argument ready to strike down the legislation but later worked hard to achieve compromise with the Court's liberal bloc.[72] In the end, Roberts provided the key fifth vote to preserve the ACA,[73] thus shattering his conservative aura.[74]

The *Sebelius* holding, the extent of its departure from Roberts's conservative principles, and the nature of the ultimate decision showcase not only the Chief Justice's institutionalism but also its conflict with his conservatism.[75] First, in voting with the Court's liberals, Roberts once again cast himself as above politics.[76] In this way, he also prioritized the Court's public perception given the popularity of Obamacare.[77] Second, the Chief Justice upheld the ACA in a manner as to give some weight to conservatism. Roberts found the individual mandate consistent with Congress's power to lay and collect taxes[78] instead of constitutional on Commerce Clause grounds, which would have appeased the Court's liberals.[79] Moreover, his opinion delivered a partial conservative victory by invalidating Obamacare's stringent Medicaid expansion provision,[80] taking some wind out of the law's sails.

68. Gonzalez v. Carhart, 550 U.S. 124, 132–33 (2007).
69. BISKUPIC, THE CHIEF, *supra* note 29, at 181–82.
70. *See* Shelby County v. Holder, 570 U.S. 529 (2013).
71. NFIB v. Sebelius, 567 U.S. 519, 575 (2012).
72. Spruance, *supra* note 7, at 648–49; *see also* BISKUPIC, THE CHIEF, *supra* note 29, at 221–22.
73. *Sebelius*, 567 U.S. at 575. *See also* BISKUPIC, THE CHIEF, *supra* note 29, at 222; Spruance, *supra* note 7, at 649–50.
74. *See* BISKUPIC, THE CHIEF, *supra* note 29, at 222; Spruance, *supra* note 7, at 649–50.
75. Spruance, *supra* note 7, at 648–51.
76. *See* BISKUPIC, THE CHIEF, *supra* note 29, at 222.
77. Spruance, *supra* note 7, at 647–48.
78. *Sebelius*, 567 U.S. at 575.
79. *See* BISKUPIC, THE CHIEF, *supra* note 29, at 244.
80. *Id.* at 248.

But as it turns out, *Sebelius* would not constitute Roberts's last brush with institutionalism, and conservative frustration, on the issue of Obamacare. In 2015, the law appeared before the Court again in *King v. Burwell*.[81] This time, the dispute revolved around the ACA's furnishing of tax credits to individuals purchasing health insurance through "an exchange established by the State."[82] Specifically, the federal government interpreted "State" to include exchanges (marketplaces) established by the federal government in addition to those crafted by the States.[83] In the end, Roberts again upheld the ACA, noting that to read the provision as only pertaining to the States would defeat the law's purpose, though he conceded that Obamacare contained many instances of "inartful drafting."[84] Still, conservatives again took notice of the Chief's departure, with Justice Scalia taking Roberts to task for ruling that "'[e]xchange established by the State' [] [meant] '[e]xchange established by the State or the Federal Government.'"[85] Despite conservative criticism, however, Roberts's leftward lurch on Obamacare came to stand out as an anomaly: he soon returned to his conservative principles,[86] albeit with an increasingly institutionalist tilt.

2. Obergefell v. Hodges: John Roberts Retreats to His Conservative Roots

In fact, Chief Justice Roberts's conservatism reared its head with a vengeance the very day after he handed down his majority decision in *Burwell*.[87] Roberts's conservative display came in the form of an emphatic dissent in *Obergefell v. Hodges*,[88] which some commentators label as the Chief's "fieriest" opinion.[89] In *Obergefell*, Justice Anthony Kennedy upheld the constitutionality of same-sex marriage on substantive due process grounds.[90] Roberts disagreed. Writing colorfully, the Chief Justice concluded:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[91]

Roberts's scathing language in *Obergefell* represents a departure from his previous institutional tack, especially considering shifting public perception of same-

81. King v. Burwell, 576 U.S. 473 (2015).
82. *Id.* at 483–84.
83. *Id.*; *see also* Spruance, *supra* note 7, at 651–52.
84. *Burwell*, 576 U.S. at 491, 498.
85. *Id.* at 498 (Scalia, J., dissenting); *see also* BISKUPIC, THE CHIEF, *supra* note 29, at 291–92.
86. BISKUPIC, THE CHIEF, *supra* note 29, at 222.
87. *See* Jeffrey Rosen, Opinion, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html [https://perma.cc/5EHC-DBGY].
88. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).
89. Rosen, *supra* note 87.
90. *Obergefell*, 576 U.S. at 651–52, 681.
91. *Id.* at 713 (Roberts, C.J., dissenting).

sex marriage.[92] Perhaps this changing norm has led many to overlook the Chief's dissent in the first place.[93] But institutionalism may also explain away his dissent as an anomalous result. Though Roberts disagreed on conservative jurisprudential grounds, he has since acquiesced to *Obergefell*'s landmark holding, suggesting at least in part that he recognizes the case's institutionalist value.[94]

3. Executive Authority, June Medical, and John Roberts in the Trump Era

With the inauguration of Donald Trump as the 45th President of the United States, and the flood of litigation that followed President Trump's administrative actions, Chief Justice Roberts again assumed the institutionalist mantle to block some—but not all—of the Trump Administration's signature policies.[95]

In *Department of Commerce v. New York* (the "census case"),[96] Roberts led the majority in pausing the Trump Administration's placement of a citizenship question on the 2020 census questionnaire.[97] Roberts refused to defer to the executive branch's justification for the inquiry, casting the census decision as pretextual and requesting the Administration try again to provide a reasoned basis for its policy.[98] In taking this approach, the Chief Justice's institutionalism came to the front, employing the pretextual reasoning to defy the Administration while giving Trump a second chance. The separate opinions of other Justices underscore Roberts's strategy, generating chagrin from conservatives and leaving the liberals wanting to fully rebuke the President's action.[99]

The following year, Chief Justice Roberts dealt another blow to the Trump Administration in authoring the majority opinion invalidating the Administration's rescission of the Obama-era Deferred Action for Childhood Arrivals ("DACA") immigration program. DACA allows children illegally entering the

92. *See* BISKUPIC, THE CHIEF, *supra* note 29, at 301.

93. *Id.*

94. Spruance, *supra* note 7, at 647.

95. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (invalidating attempt to add citizenship question to census); Dep't of Homeland Sec. v. Regents of the Univ. of Ca., 140 S. Ct. 1891 (2020) (invalidating rescission of Obama-era Deferred Action for Childhood Arrivals program). *But see, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (reversing preliminary injunction blocking Trump's controversial travel ban) Still, whether the Court upheld or struck down controversial Trump Administration action generally depended on the Chief Justice's vote. *See, e.g.*, *Dep't of Com.*, 139 S. Ct. 2551; *Dep't of Homeland Sec.*, 140 S. Ct. 1891; *Hawaii*, 138 S. Ct. 2392; June Med. Serv., L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (striking down restrictive Louisiana abortion law); *see also* JOAN BISKUPIC, NINE BLACK ROBES: INSIDE THE SUPREME COURT'S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES 215–35 (2023) (ebook) [hereinafter BISKUPIC, NINE BLACK ROBES].While the law at issue in *June Medical* did not represent a Trump policy, it remained relevant in the public's eye given Trump's politicization of abortion. *See* Emma Green, *What the Supreme Court's Abortion Decision Means*, ATL. (June 29, 2020), https://www.theatlantic.com/politics/archive/2020/06/supreme-court-abortion-trump/613642/ [https://perma.cc/T67N-9U5P].

96. *See generally* Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

97. *Id.* at 2561, 2576.

98. *Id.* at 2575–76.

99. *See id.* at 2576 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 2584 (Breyer, J., concurring in part and dissenting in part).

United States to postpone deportation indefinitely.[100] Siding with the Court's liberals in *Department of Homeland Security v. Regents of the University of California* (the "DACA case"),[101] Roberts held that the Department of Homeland Security ("DHS") did not fully consider certain aspects of DACA when ending the program, again giving the Trump Administration a shot at a do-over.[102] In offering another second chance, the Chief Justice continued pursuing an institutionalist approach, evidenced by Justice Clarence Thomas calling Roberts's opinion "an effort to avoid a politically controversial but legally correct decision."[103] In the end, rather than give either side a victory on the merits, and as President Trump recognized later, Roberts had simply asked the Administration for "enhanced papers."[104]

Beyond addressing conservative Trump Administration policies from an institutionalist view, the Chief Justice also walked back his conservative legal stance on another political hand grenade: abortion.[105] In 2016, when the Court heard a challenge to restrictive abortion legislation, Roberts followed his conservative jurisprudence from *Gonzales* and dissented from the invalidation of Texas abortion restrictions in *Whole Woman's Health v. Hellerstedt.*[106] But in 2020, Roberts shifted ever so slightly, joining the Court's liberals to invalidate a Louisiana law, similar to the Texas law considered by the Court in *Hellerstedt*, in *June Medical Services, L.L.C. v. Russo*.[107] This decision epitomized Roberts's institutionalism. Though he believed the Court wrongly decided *Hellerstedt*, he voted to invalidate the Louisiana law at issue in *June Medical* on *stare decisis* grounds.[108]

However, the Chief Justice did not always rule contrary to his conservative roots. In fact, Supreme Court voting alignment data reveals no major shift in the

100. Mark Joseph Stern, *Why John Roberts Had to Block Trump's DACA Repeal*, SLATE (June 18, 2020, 12:23 PM), https://slate.com/news-and-politics/2020/06/john-roberts-daca-dreamers-supreme-court-trump.html [https://perma.cc/9ZS5-QHZC].

101. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

102. *Id.* at 1916.

103. *Id.* at 1919 (Thomas, J., concurring in part and dissenting in part). *See also* BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 220–26 (describing the DACA case's development at the Court).

104. *See* Robert Barnes & Seung Min Kim, *Trump Has No Patience for Legal Intricacies. The Supreme Court is All About Them.*, WASH. POST (June 19, 2020, 8:00 PM), https://www.washingtonpost.com/politics/courts_law/daca-trump-john-roberts-supreme-court/2020/06/19/1c41e1e6-b240-11ea-8758-bfd1d045525a_story.html [https://perma.cc/55RT-N7QG].

105. As discussed, Roberts played a key role in the 2007 *Gonzales v. Carhart* decision to uphold the federal ban on partial birth abortions, reversing recently-set precedent. *See* notes 59–63 and accompanying text.

106. *See generally* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); Spruance, *supra* note 7, at 656.

107. *See* June Med. Serv. v. Russo, 140 S. Ct. 2103, 2133 (2020).

108. *See id.* at 2133–35 (Roberts, C.J., concurring in the judgment); Spruance, *supra* note 7, at 656–58. An interesting thought remains, however: Roberts worked to invalidate *Stenberg* after only seven years as precedent. Why did he not feel comfortable doing the same in *June Medical*, decided only four years after *Hellerstedt* and on essentially the same issue? Perhaps a wariness about the Court's public perception during an election year (2020) played a role. Spruance, *supra* note 7, at 659.

Chief's conservative approach since President Trump's inauguration.[109] The major example of Roberts taking a conservative tack to uphold a Trump-era policy came in a procedural sense, not in an affirmation on the merits. In 2018, the Chief Justice penned the majority in *Trump v. Hawaii*,[110] siding with the Court's conservatives and reversing on national security grounds a preliminary injunction stopping the Trump Administration's travel ban that prevented citizens of certain African and Middle Eastern countries from entering the United States.[111] But, while the Court only overturned a preliminary injunction, such a holding requires a finding that the plaintiffs would not likely succeed on the merits.[112] Roberts questioned the plaintiffs' case on both administrative and constitutional grounds, strengthening the President's hand in immigration matters.[113] For example, with the conservative-leaning national security basis in place, district courts implemented the *Hawaii* decision with general deference to administrative action, chilling immigration plaintiffs' success in court.[114]

Ultimately, while scholars and commentators correctly apply the institutionalist label to Roberts, his highly-publicized departures from strict adherence to conservative jurisprudence tend to cast the Chief Justice in a more moderate light than reality. Roberts remains committed to a conservative judicial philosophy on many issues, including race, and as his votes on the ACA and subsequent cases during the Trump Administration reveal, he does not fully depart from these positions when exhibiting his institutionalist streak.[115]

IV. THE 2022 AND 2023 TERMS: JOHN ROBERTS THE CONSERVATIVE

109. From 2016 to 2022, Roberts's votes remained highly conservative. ANGIE GOU, ELLENA ERSKINE & JAMES ROMOSER, SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2021-22 TERM 16 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/S3Y2-GGCP]; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020-21 TERM 15 (July 2, 2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf [https://perma.cc/Z3GT-WQKH]; SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019 23–26 (July 20, 2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf [https://perma.cc/5JF2-K4EY]; SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2018 23–26, https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf [https://perma.cc/W2DJ-6V6J]; SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2017 23–25 (June 29, 2018), https://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf [https://perma.cc/EHY6-YF9Y]; SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2016 23–25 (June 28, 2017), https://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf [https://perma.cc/XB5K-W53Z]. The author would like to acknowledge the assistance of the University of North Carolina at Chapel Hill's Davis Library Research Hub for separately analyzing Supreme Court voting data to confirm and add color to the SCOTUSBLOG data. The author can make their analysis available upon request.

110. *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

111. *Id.* at 2403, 2423.

112. *Id.* at 2423; *see also* Shalini Bhargava Ray, *The Emerging Lessons of Trump v. Hawaii*, 29 WM & MARY BILL RTS. J. 775, 778 (2021).

113. *See id.* at 2415, 2420–23; Ray, *supra* note 112, at 808; BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 215.

114. Ray, *supra* note 112, at 808. Roberts also played a key role in the Trump victory on border wall funding. BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 215–16.

115 *See supra* Section II.B.3.

INSTITUTIONALIST

A case study of the Chief Justice's most recent high-profile opinions, his concurrence in the judgment in *Dobbs* and his majority decisions in *West Virginia*, *Biden v. Nebraska*, and *Students for Fair Admissions*, exemplify the tension between Roberts's dual institutionalist and conservative strategy on today's Supreme Court.

A. Dobbs. v. Jackson Women's Health Organization

The *Dobbs* decision marked a tectonic shift in American abortion jurisprudence. Writing for the majority, Justice Samuel Alito struck 50 years of Supreme Court precedent which recognized some form of a woman's right to terminate her pregnancy,[116] overruling landmark cases from *Roe v. Wade*[117] to *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[118] To do so, Justice Alito relied on conservative reasoning espoused for generations:

> The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but . . . [t]he right to abortion does not fall within this category.[119]

Justice Alito added that "[*s*]*tare decisis* . . . does not compel unending adherence to [] abuse of judicial authority," calling the Court's abortion precedent "egregiously wrong from the start."[120]

With the decision grounded in accepted conservative legal principles, why did Chief Justice Roberts not join it? After all, Roberts's anti-abortion stance materialized as a lawyer in the George H.W. Bush Administration.[121] It also reared its head in his 2007 vote in *Gonzales* and his 2016 vote in *Hellerstedt*, as well as his concurrence in the judgment in 2020's *June Medical*.[122] The answer again comes down to Roberts's struggle between institutionalism and conservatism. In his opinion concurring in the judgment in *Dobbs*, the Chief Justice stressed the importance of "tak[ing] a more measured course."[123] He called for "judicial restraint," describing the majority's "dramatic and consequential ruling" as "unnecessary to decide the case before [the Court]."[124] But at the same time, evidence of Roberts's misgivings with abortion jurisprudence resurfaced. He agreed with the majority that aspects of *Roe* and *Casey* "never made any

116. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
117. *See generally* Roe v. Wade, 410 U.S. 112 (1973).
118. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
119. *Dobbs*, 142 S. Ct. at 2242.
120. *Id.* at 2243.
121. Spruance, *supra* note 7, at 655–56.
122. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); June Med. Serv. v. Russo, 140 S. Ct. 2103 (2020).
123. *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment).
124. *Id.* at 2311.

sense."[125] He also would have upheld the restrictive Mississippi law at issue, allowing state regulations on abortion pre-viability and seriously walking back the existing doctrine.[126]

Against the backdrop of the *Dobbs* decision, one might cast Roberts's opinion as an attempt to find middle ground. Yet Roberts's approach would have resulted in an abortion jurisprudence almost as conservative on the law as *Dobbs*. Moreover, it would seem that the Chief Justice, if successful, likely would have only delayed the inevitable represented by *Dobbs*. For instance, assuming the Court extinguished the pre-viability line set by *Roe* and *Casey*, a state could pass a more restrictive law and bring a new challenge to *Roe* and *Casey* in short order, with the conservative Court nearly guaranteed to use such an opportunity to hold as it did in *Dobbs*. When considered as a whole, his previous positions, including in *Gonzales*, *Hellerstedt*, and *June Medical*, along with his concurrence in the judgment in *Dobbs*, thus showcase a conservative Chief—albeit one with an institutionalist tilt.

B. West Virginia v. Environmental Protection Agency

With the *Dobbs* decision and the national outcry it generated still fresh in the public's mind, it remains no wonder that the Court's decision a week later in *West Virginia v. Environmental Protection Agency*, and its majority opinion authored by Roberts, received less attention. But all else considered equal, *West Virginia* marks just as much of a conservative legal victory.[127]

In a way, *West Virginia* followed from the Chief Justice's jurisprudence regarding Presidential power during the Trump Administration, as Roberts invalidated a politically controversial executive action.[128] This time, however, Roberts held an Obama-era policy, the Clean Power Plan ("CPP"), as unconstitutional.[129] The issue revolved around whether the Environmental Protection Agency ("EPA") could regulate the nation's electric power producers as to force a shift from generating energy with fossil fuels to using only clean energy sources.[130] Roberts led the Court in determining that the EPA could not regulate in such a drastic way, as the "ancillary" provision of the Clean Air Act cited by the Obama Administration in the CPP did not provide the agency with clear authority on the matter.[131] Specifically, Roberts invoked the major questions doctrine, which cautions that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[132]

125. *Id.* at 2310.
126. *Id.* at 2313–15.
127. *See* BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 319–20.
128. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).
129. *See id.* at 2602, 2616.
130. *See id.* at 2599–2600.
131. *Id.* at 2602, 2616.
132. *Id.* at 2609 (quoting Util. Air. Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

As compared to Roberts's approach in the census and DACA cases, employing the major questions doctrine—though grounded in precedent[133]—seems a far cry from narrow rulings based on the type and validity of the justifications provided by the agency record. Instead, Roberts's opinion remains much more in tune with conservative jurisprudence seeking to bolster the separation of powers inherent in the federal system by curtailing the power of the administrative state.[134] In particular, conservatives target the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*,[135] which directs courts to defer to reasonable agency readings of statutory language when Congressional meaning remains unclear.[136] With the resurgence of the major questions doctrine authorized in *West Virginia*, courts will no longer defer to major agency action without basis in clear Congressional intent.[137] The decision thus represents a conservative legal victory, and advocates have already harnessed it to successfully challenge the latest significant, politically-controversial policy announced by the executive branch: President Biden's student loan forgiveness plan.[138]

In addition, where Roberts may have pursued a narrow ruling in *Dobbs* as to avoid political controversy, he ignored a similar opportunity in *West Virginia*. Given the complex procedural history of the case, Roberts could have foregone a ruling on the merits entirely by dismissing the case as moot, kicking the can down the road as he sought to do in *Dobbs*.[139] Still, *West Virginia*'s power as conservative jurisprudence does not entirely dispense with Roberts's institutionalist lens: while some conservatives seek the end of *Chevron* deference, *West Virginia* makes no mention of the case, thus leaving it intact.[140]

C. Biden v. Nebraska

Chief Justice Roberts doubled down on his *West Virginia* approach exactly one year later when he issued the majority opinion in *Biden v. Nebraska*.[141] This time, one of President Biden's signature domestic policies—student debt relief—stood before the Court, and again, Roberts led the conservatives in concluding that a President had overstepped Congress's grant of authority.[142]

In response to the COVID-19 pandemic, the Trump Administration paused repayment and interest accrual on federally-held student loans.[143] In 2022, the Biden Administration took this freeze one step further by announcing up to

133. *Id.*

134. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 477–78 (2022).

135. *See generally* Chevron v. NRDC, 467 U.S. 837 (1984).

136. *Id.* at 865–66.

137. *See supra* note 13 and accompanying text; *infra* notes 141–150 and accompanying text.

138. *See supra* note 13 and accompanying text; *infra* notes 141–150 and accompanying text.

139. *See West Virginia*, 142 S. Ct. at 2627–28 (Kagan, J., dissenting).

140. Smarick, *supra* note 30.

141. *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

142. *Id* .at 2362.

143. *Id.* at 2364.

$20,000 in debt forgiveness for 43 million borrowers.[144] Both policies relied on language from the Higher Education Relief Opportunities for Students Act of 2003 (the "HEROES Act"), which specifically authorized the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[145]

However, rather than "waive or modify" existing statutory authority, Roberts concluded that President Biden's approach attempted to "rewrite the statute from the ground up"—an unconstitutional endeavor.[146] But like *West Virginia*, the Chief Justice's opinion makes no mention of *Chevron*. Moreover, while still grounding the *Biden v. Nebraska* decision in the major questions doctrine as espoused in *West Virginia*,[147] Roberts first rebukes the Biden student loan plan by way of a direct analogy to the Court's precedent in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, which held that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[148]

At the same time, the Chief Justice could have again avoided reaching the issue on the merits and kept the Court out of the political spotlight, as, similarly to *West Virginia*, *Biden v. Nebraska* came with its own interesting justiciability question.[149] Instead, Roberts employed his institutionalist perspective in a different way—a plea to preserve the Court's public integrity:

> It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. . . . We have employed the traditional tools of judicial decisionmaking in [reaching our conclusion today]. Reasonable minds may disagree with our analysis—in fact, at least three do. We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.[150]

Thus, while the Chief Justice's opinion in *Biden v. Nebraska* furthers the conservative precedent he set in *West Virginia*, it does not do so by fully departing from his institutionalist tilt.

D. Students for Fair Admissions v. President and Fellows of Harvard

144. *Id.* at 2365.
145. *Id.* at 2368 (quoting 20 U.S.C. § 1098bb(a)(1)).
146. *Id.*
147. *Id.* at 2368–69.
148. *Biden*, 143 S. Ct. at 2368 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994).
149. *See id.* at 2375–76.
150. *Id.*

College

Still, Roberts's opinion in *Students for Fair Admissions v. President and Fellows of Harvard College*, like the Chief Justice's previous approaches on issues related to race in cases such as *Parents Involved* and *Shelby County*, reveals a more full-fledged conservatism.

In *Students for Fair Admissions*, Roberts first reiterates his view that the Constitution seeks to prevent race-based classifications and state actions except in the most extraordinary circumstances.[151] He then articulates why two specific affirmative action college admissions programs—those employed by Harvard and the University of North Carolina at Chapel Hill—fail to satisfy the stringent constitutional parameters associated with race-based classifications: "Both programs lack sufficiently focused and measurable objectives warranting use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[152] Based on this reasoning, the Chief Justice led the Court in gutting affirmative action,[153] a legal goal long pursued by conservatives.

In theory, however, while the *Students for Fair Admissions* decision showcases Roberts's conservatism, the Chief Justice's institutionalism explains why the Court waited until 2023 to take the plunge. Indeed, despite the tenor in Roberts's rhetoric in cases like *Parents Involved*, he previously shied away from the affirmative action issue on two occasions due to both the public perception of the Court and the other cases on the Court's docket.[154] His opinion in *Students for Fair Admissions*, then, represents the culmination of a jurisprudential goal Roberts has pursued since ascending the bench, and his willingness to take nearly two decades to evolve this goal into precedential reality showcases not only Roberts's commitment to the Supreme Court as an institution but also his adherence to conservative legal philosophy.

V. CONCLUSION

As Chief Justice Roberts's opinions in *Dobbs*, *West Virginia*, *Biden v. Nebraska*, and *Students for Fair Admissions* reveal, despite the scrutinizing coverage of his jurisprudence from all angles, the Chief remains a stalwart conservative.[155] Why, then, does Roberts continue to weather criticism from commentators and scholars on both sides of the political spectrum? One observer posits that the Chief attracts attention because he represents the least conservative figure—while reliably conservative—in the cohort of conservative

151. Students for Fair Admissions v. President and Fellows of Harvard College, 143 S. Ct. 2141, 2162–63 (2023).

152. *Id.* at 2175.

153. *See id.*

154. *See supra* notes 41–42 and accompanying text.

155. In addition to *Dobbs* and *West Virginia*, Roberts has in recent years joined the Court's new conservative "supermajority" on the "culture-war issues of guns and religion," as well as on cases pertaining to executive power and public health. BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 319.

justices.[156] One could also argue that Roberts's reasoning does not go far enough to the right and gives the left a false sense of security that he will retain hard-fought liberal precedent from decades past, leaving both sides unsatisfied.[157]

At the same time, the nuances in many of Roberts's decisions reveal the tension between his conservatism and his institutionalist perspective. For instance, in 2019, Roberts remarked that "when you live in a politically polarized environment, people tend to see everything in those terms, . . . [but] [t]hat's not how we at the Court function, and the results in our cases do not suggest otherwise."[158] But while Roberts maintains his public descriptions of an impartial Court, many of the Court's recent decisions reflect its ideological division, leading one cynical analyst to suggest that "Roberts [thinks] that if he [makes] th[at] assertion often enough, people [will] believe it."[159] Ultimately, his commitment to both camps can lead the Chief Justice to seek conservative ends through a different means than his colleagues, with his success in achieving some of these goals indicating that Roberts possesses a winning formula, at least in part.[160]

156. Oliver Roeder, *Is Chief Justice Roberts a Secret Liberal?*, FIVETHIRTYEIGHT (Nov. 27, 2017, 12:42 PM), https://fivethirtyeight.com/features/is-chief-justice-roberts-a-secret-liberal/ [https://perma.cc/6NHC-SLMQ].

157. *See* BISKUPIC, THE CHIEF, *supra* note 29, at 222.

158. Adam Liptak, *Politics Has No Place at the Supreme Court, Chief Justice Roberts Says*, N.Y. TIMES (last updated June 30, 2020), https://www.nytimes.com/2019/09/25/us/politics/chief-justice-john-roberts-interview.html [https://perma.cc/VP8L-WFNF].

159. BISKUPIC, NINE BLACK ROBES, *supra* note 95, at 217.

160. *See supra* notes 28–65, 127–40, 151–54 and accompanying text.