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NO MORE MR. NICE GUY

The Supreme Court's stealth hard-liner.

by Jeffrey Toobin

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Chief Justice John Roberts, in 2007. Photograph by Steve Pyke.

When John G. Roberts, Jr., emerges from behind the red curtains and takes his place in the middle of the Supreme Court bench, he usually wears a pair of reading glasses, which he peers over to see the lawyers arguing before him. It's an old-fashioned look for the Chief Justice of the United States, who is fifty-four, but, even with the glasses, there's no mistaking that Roberts is the youngest person on the Court. (John Paul Stevens, the senior Associate Justice, who sits to Roberts's right, is thirty-five years older.) Roberts's face is unlined, his shoulders are broad and athletic, and only a few wisps of gray hair mark him as changed in any way from the judge who charmed the Senate Judiciary Committee at his confirmation hearing, in 2005.

On April 29th, the last day of arguments for the Court's current term, the Justices heard Northwest Austin Municipal Utility District No. 1 v. Holder, a critical case about the future of the Voting Rights Act. Congress originally passed the law in 1965, and three years ago overwhelmingly passed its latest reauthorization, rejecting arguments that improvements in race relations had rendered the act unnecessary. Specifically, the bill, signed by President George W. Bush in 2006, kept in place Section 5 of the law, which says that certain jurisdictions, largely in the Old South, have to obtain the approval of the Justice Department before making any changes to their electoral rules, from the location of polling places to the boundaries of congressional districts. A small utility district in Texas challenged that part of the law, making the same argument that members of Congress had just discounted—that this process, known as preclearance, amounted to a form of discrimination against the citizens of the New South.

Roberts said little to the lawyer for the plaintiff, but when Neal K. Katyal, the Deputy Solicitor General, took to the lectern to defend the Voting Rights Act, the Chief Justice pounced. "As I understand it, one-twentieth of one per cent of the submissions are not precleared," Roberts said. "That, to me, suggests that they are sweeping far more broadly than they need to to address the intentional discrimination under the Fifteenth Amendment"—which guarantees the right to vote regardless of race.

"I disagree with that, Mr. Chief Justice," Katyal said. "I think what it represents is that Section 5 is actually working very well—that it provides a deterrent." According to Katyal, the fact that the Justice Department cleared almost all electoral changes proved, in effect, that the South had been trained, if not totally reformed.

Roberts removed his glasses and stared down at Katyal. "That's like the old elephant whistle," he said. "You know, 'I have this whistle to keep away the elephants.' You know, well, that's silly. 'Well, there are no elephants, so it must work.' "

Roberts was relentless in challenging Katyal: "So your answer is that Congress can impose this disparate treatment forever because of the history in the South?"

"Absolutely not," Katyal said.

"When can they—when do they have to stop?"

"Congress here said that twenty-five years was the appropriate reauthorization period."

"Well, they said five years originally, and then another twenty years," Roberts said, referring to previous reauthorizations of the act. "I mean, at some point it begins to look like the idea is that this is going to go on forever."

And this, ultimately, was the source of Roberts's frustration—and not just in this case. In a series of decisions in the past four years, the Chief Justice has expressed the view that the time has now passed when the Court should allow systemic remedies for racial discrimination. The previous week, the Court heard a challenge by a group of

white firefighters in New Haven who were denied promotions even though they had scored better than black applicants on a test. Roberts was, if anything, even more belligerent in questioning the lawyer defending the city. "Now, why is this not intentional discrimination?" he asked. "You are going to have to explain that to me again, because there are particular individuals here," he said. "And they say they didn't get their jobs because of intentional racial action by the city." He added, "You maybe don't care whether it's Jones or Smith who is not getting the promotion," he said. "All you care about is who is getting the promotion. All you care about is his race."

When Antonin Scalia joined the Court, in 1986, he brought a new gladiatorial spirit to oral arguments, and in subsequent years the Justices have often used their questions as much for campaign speeches as for requests for information. Roberts, though, has taken this practice to an extreme, and now, even more than the effervescent Scalia, it is the Chief Justice, with his slight Midwestern twang, who dominates the Court's public sessions.

Roberts's hard-edged performance at oral argument offers more than just a rhetorical contrast to the rendering of himself that he presented at his confirmation hearing. "Judges are like umpires," Roberts said at the time. "Umpires don't make the rules. They apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire." His jurisprudence as Chief Justice, Roberts said, would be characterized by "modesty and humility." After four years on the Court, however, Roberts's record is not that of a humble moderate but, rather, that of a doctrinaire conservative. The kind of humility that Roberts favors reflects a view that the Court should almost always defer to the existing power relationships in society. In every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff. Even more than Scalia, who has embodied judicial conservatism during a generation of service on the Supreme Court, Roberts has served the interests, and reflected the values, of the contemporary Republican Party.

Two days after the argument in the Voting Rights Act case, David H. Souter announced his resignation, giving President Barack Obama his first chance to nominate a Justice to the Court. The first Democratic nominee to the Court in fifteen years will confront what is now, increasingly, John Roberts's Court. Along with Scalia, Clarence Thomas, Samuel A. Alito, Jr., and (usually) Anthony Kennedy, the majority of the Court is moving right as the rest of the country—or, at least, the rest of the federal government—is moving left. At this low moment in the historical reputation of George W. Bush, his nominee for Chief Justice stands in signal contrast to what appears today to be a failed and fading tenure as President. Roberts's service on the Court, which is, of course, likely to continue for decades, offers an enduring and faithful reflection of the Bush Presidency.

The Justices of the Supreme Court, as a rule, spare themselves unnecessary tedium. Their public hearings are lean and to the point; they hear lawyers' arguments and, later, announce their decisions. Still, one relic of more leisurely times remains. Several times a month, before the start of the day's oral arguments, the Justices allow attorneys to be sworn in as members of the Supreme Court bar in person, a process that can take fifteen minutes. (Most lawyers now conduct the swearing-in process by mail.) Rehnquist barely tolerated the practice, rushing through it and mumbling the names, and several colleagues (notably Souter) display an ostentatious boredom that verges on rudeness.

John Roberts, in contrast, welcomes each new lawyer with a smile, and when fathers or mothers put forth their lawyer children for admission—a tradition of sorts at the Court—the Chief makes sure to acknowledge "your son" and "your daughter" on the record. Everyone beams. It's a small thing, of course, but just one example of Roberts's appealing behavior in public, much as the nation viewed it during his testimony before the Judiciary Committee. At the time, Senator Dick Durbin, an Illinois Democrat who voted against Roberts's confirmation, nonetheless observed that he was so ingratiating that he had "retired the trophy" for performance by a judicial nominee. When, early in his tenure, a light bulb exploded in the courtroom in the middle of a hearing, Roberts quipped, "It's a trick they play on new Chief Justices all the time." Laughter broke the tension.

Roberts was born in Buffalo on January 27, 1955, and raised in northern Indiana, where his father was an executive with a steel company and his mother a homemaker. (He has three sisters.) Jackie, as he was known, was educated at Catholic schools, and graduated from La Lumiere, at the time an all-boys parochial boarding school in LaPorte. He was the classic well-rounded star student—valedictorian and captain of the football team. He went on to Harvard, majored in history, and graduated in three years, summa cum laude.

At Harvard Law School, Roberts continued to excel, in an even more competitive atmosphere. "He was extremely smart," said Laurence Tribe, the liberal scholar who taught Roberts constitutional law and grew to know him through his work on the *Law Review*. "He was really very good at being thoughtful and careful and not particularly conspicuous. He was very lawyerly, even as a law student." In the mid-seventies, the atmosphere at Harvard still reflected the tumult of the sixties. Roberts stood out as a conservative, though not a notably intense one. "On the *Law Review*, John was the managing editor, so that meant he gave us our work assignments every day," Elizabeth Geise, who was a year behind Roberts in law school, said. "He was very honest, straightforward, lot of integrity, fair. He was conservative, and we all knew that. That was unusual in those days. You couldn't think of a guy who was a straighter arrow." After graduating magna cum laude, in 1979, Roberts first clerked for Henry J. Friendly, of the federal appeals court in New York, who was legendary for his scholarship and erudition, but was not known as an especially partisan figure.

From New York, Roberts moved to the Supreme Court, where he became a clerk for Associate Justice William H. Rehnquist, and it was in Washington that his political education began. Rehnquist, appointed by Richard Nixon in 1972, was, in his first decade as a Justice, almost a fringe right-wing figure on the Court, which was then dominated by William J. Brennan, Jr. But Ronald Reagan's election to the Presidency, which took place just a few months into Roberts's clerkship, lifted Rehnquist to power and, more broadly, gave flight to the conservative legal movement.

At that early stage of the Reagan era, conservatives had a problem, because there were no institutions where like-minded lawyers could be nurtured; the Federalist Society, the conservative legal group, was not founded until 1982. "Roberts got a lot of attention because he clerked for Rehnquist," said Steven Teles, a professor of political science at Johns Hopkins and the author of "The Rise of the Conservative Legal Movement." "Without the Federalist Society, there were not a lot of other ways for the Administration to make sure that they were getting true conservatives. The Rehnquist clerkship marked Roberts as someone who could be trusted."

As a former law clerk to Rehnquist, not to mention his immediate successor as Chief Justice, Roberts was an obvious choice to deliver the annual lecture named for Rehnquist at the University of Arizona law school in February. Roberts is a gifted public speaker—relaxed, often funny, sometimes self-deprecating—and he began his speech with a warm remembrance of his mentor. Like Barack Obama, Roberts can make reading from a prepared text look almost spontaneous. "I first met William Rehnquist more than twenty-eight years ago," he told the audience in Tucson. "The initial meeting left a strong impression on me. Justice Rehnquist was friendly and unpretentious. He wore scuffed Hush Puppy shoes. That was my first lesson. Clothes do not make the man. The Justice sported long sideburns and Buddy Holly glasses long after they were fashionable. And he wore loud ties that I am confident were never fashionable."

Before long, though, Roberts steered away from nostalgic reverie and into constitutional controversy. He maintained his relaxed and conversational cadence, but his words reflected a sharply partisan world view. "When Justice Rehnquist came onto the Court, I think it's fair to say that the practice of constitutional law—how constitutional law was made—was more fluid and wide-ranging than it is today, more in the realm of political science," Roberts said. "Now, over Justice Rehnquist's time on the Court, the method of analysis and argument shifted to the more solid grounds of legal arguments—what are the texts of the statutes involved, what precedents control. Rehnquist, a student both of political science and the law, was significantly responsible for that seismic shift." Rehnquist joined the Court toward the end of its liberal heyday—the era when the Justices expanded civil-rights protections for minorities, established new barriers between church and state, and, most famously, recognized a constitutional right to abortion for women. This period, in Roberts's telling, was the bad old days.

These sentiments reflect a common view for conservatives like Roberts. "There really was a sense at the time among the lawyers in his Administration that Reagan had a mandate for comprehensive change in the nature of government," Teles said. "They thought a lot of what the liberals had done in creating, say, affirmative action was simply interest-group politics and not really 'law' at all, and it was their job to restore professionalism to the legal profession in government."

"I heard about John, and I immediately tried to hire him," Charles Fried, the Harvard law professor who was Reagan's second Solicitor General, said. Kenneth Starr, who was chief of staff to William French Smith, Reagan's Attorney General, had hired Roberts as a special assistant to Smith. Roberts then went to work at the White House, as an associate counsel.

All the lawyers who worked for Reagan were, in some general sense, conservative, but there is a difference between those, like Roberts, who came of age during Reagan's first term in office and those who prospered in his second. "The Department of Justice in the first term was full of serious, principled people," Teles said. "They didn't see themselves as part of the Christian right, or even necessarily part of a larger political movement, but they did think of themselves as real lawyers who were reacting to what they thought of as the excesses of liberalism." They believed, Teles said, "in what they called judicial restraint and strict constructionism. Roberts comes out of this world." Liberal critics, in turn, regard this view as unduly deferential to the status quo and thus a kind of abdication of the judicial role.

The legal philosophy of Edwin Meese III, which promoted an "originalist" view of the Constitution, dominated Reagan's second term. Originalists, whose ranks now include Scalia and Thomas, believe that the Constitution should be interpreted in line with the intentions and beliefs of its framers. "John was not part of the Meese crowd," one lawyer who worked with Roberts in the Reagan years said. "They cared more about a strict separation of powers, and even some limitations on executive and government power."

Originalists and judicial-restraint conservatives generally reach similar conclusions on legal issues, but their reasoning differs. Both, for example, believe that the Constitution does not protect a woman's right to abortion. "An originalist on abortion would say that at the time of the Constitution, or of the adoption of the Fourteenth Amendment, abortion was prohibited, and that's it," Akhil Reed Amar, a professor at Yale Law School, said. "A conservative like Roberts, on the other hand, wouldn't look immediately at the question of whether all abortions should be outlawed, but examine the specific restriction on abortion rights at issue in the case and probably uphold it. He'd avoid the culture-war rhetoric and gradually begin cutting back on abortion rights without making lots of noise about getting rid of it altogether." In 2007, Roberts joined Kennedy's opinion that followed this approach in upholding a federal anti-abortion law. The Court's two originalists, Scalia and Thomas, wrote a separate concurring opinion in that case, urging, as they had before, that Roe v. Wade be overturned once and for all.

In documents from the Reagan era that were made public during Roberts's confirmation hearing, the young lawyer emerges as a loyal (and low-level) foot soldier in the Reagan revolution. On issues where there was disagreement within the Administration, Roberts's memos generally show him supporting the more conservative position, especially on matters of race and civil rights. Roberts said that affirmative action required the "recruiting of inadequately prepared candidates," and sought a narrow scope for Title IX, the law that mandates equal rights for men and women in educational settings. In 1981, Roberts wrote that a revision of the Voting Rights Act would "establish essentially a quota system for electoral politics by creating a right to proportional racial representation." (Reagan signed the revision anyway.)

Roberts's reputation soared in his White House years. "He was already on that superstar trajectory," said Henny Wright, a lawyer, now living in Dallas, who became friends with Roberts in Washington at the time. "He was pretty much like he is today, except without the bald spot. Extremely attractive, in every sense of the word. He's smart, he's funny, he's gregarious, he's good-looking. In those days, he was never too busy to play a round of golf. He's not a very good golfer, but, unlike a lot of golfers, he doesn't let that ruin his day or your day." Roberts's wit even came through in the usually stultifying format of the interoffice memo. In 1983, Fred Fielding, the White House counsel, asked Roberts to evaluate a proposal then in circulation to create a kind of super appeals court to assist the Supreme Court with its ostensibly pressing workload. In response, Roberts noted, "While some of the tales of woe emanating from the court are enough to bring tears to the eyes, it is true that only Supreme Court justices and schoolchildren are expected to and do take the entire summer off."

With the completion of oral arguments in the Voting Rights Act case, the Court has now entered the most contentious weeks of its year. The Justices almost always save their most controversial cases for the end of the term, and this year tensions may run higher than usual. For starters, the Supreme Court Building is now in the sixth year of a renovation—the first since it was dedicated, in 1935—that has forced each of the Justices to move to temporary chambers. The Justices do not take kindly to such disruptions, especially because they are now, by historical standards, a very old Court. John Paul Stevens just turned eighty-nine, and four Justices (Ruth Bader Ginsburg, Scalia, Kennedy, and Stephen Breyer) are in their seventies. The renovation project will also involve closing the entrance to the Court at the top of its iconic front steps—a change that is said to be a security measure but that several Justices regard as a distressing symbol. Souter's impending departure, and unknown replacement, is another source of anxiety.

The substance of the Court's work, of course, contributes most to the strains among the Justices. The Chief Justice has not yet embraced one particular judicial principle as his special interest—in the way that Rehnquist chose federalism and states' rights—but Roberts is clearly moved by the subject of race, as illustrated by his combative performance during the Texas and New Haven arguments. His concerns reflect the views that prevailed at the Reagan White House: that the government should ignore historical or even continuing inequities and never recognize or reward individuals on the basis of race. In a recent case, a majority of the Justices applied a provision of the Voting Rights Act to reject part of a Texas redistricting plan that was found to hurt Hispanic voters. Roberts dissented from that decision, writing, in an unusually direct expression of disgust, "It is a sordid business, this divvying us up by race."

Race was also at the center of the most important opinion so far in his career as Chief Justice—a case that also displayed his pugnacious style in oral argument. Parents Involved in Community Schools v. Seattle School District No. 1 concerned a challenge to the city's racial-integration plan. The Seattle plan assigned students to schools based on a variety of factors, including how close the student lived to the school and whether siblings already attended, but the goal of maintaining racial diversity was considered as well. At the oral argument, on December 4, 2006, the Chief Justice tore into Michael F. Madden, the lawyer for the Seattle school district.

"You don't defend the choice policy on the basis that the schools offer education to everyone of the same quality, do you?" he asked, and Madden said that he did defend it on those grounds.

"How is that different from the 'separate but equal' argument?" Roberts went on. "In other words, it doesn't matter that they're being assigned on the basis of their race because they're getting the same type of education."

"Well, because the schools are not racially separate," the lawyer said. "The goal is to maintain the diversity that existed within a broad range in order to try to obtain the benefits that the educational research shows flow from an integrated education."

Roberts wouldn't let the issue go. "Well, you're saying every—I mean, everyone got a seat in Brown as well; but, because they were assigned to those seats on the basis of race, it violated equal protection. How is your argument that there's no problem here because everybody gets a seat distinguishable?"

"Because segregation is harmful," Madden said. "Integration, as this Court has recognized . . . has benefits."

In the Seattle case, the Court ruled by a five-to-four vote that the integration plan did indeed violate the equal-protection clause of the Constitution, and Roberts assigned himself the opinion. The Chief Justice said that the result in the Seattle case was compelled by perhaps the best-known decision in the Court's history, Brown v. Board of Education. In that ruling, in 1954, the Court held that school segregation was unconstitutional and rejected the claim that segregated schools were "separate but equal." In Roberts's view, there was no legal difference between the intentionally segregated public schools of Topeka, Kansas, at issue in Brown, and the integration plan in Seattle, five decades later. In the most famous passage so far of his tenure as Chief Justice, Roberts wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

Roberts's opinion drew an incredulous dissent from Stevens, who said that the Chief Justice's words reminded him of "Anatole France's observation" that the "majestic equality" of the law forbade "rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." For dozens of years, the Court had drawn a clear distinction between laws that kept black students out of white schools (which were forbidden) and laws that directed black and white students to study together (which were

allowed); Roberts's decision sought to eliminate that distinction and, more generally, called into question whether any race-conscious actions by government were still constitutional. "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision," Stevens concluded.

In Roberts's first term, when Alito also joined the Court, there were fewer controversial cases than usual, as well as an apparent effort by the Justices to reach more unanimous decisions. But the Seattle case came down on June 28, 2007, which was the last day of Roberts's second full term as Chief Justice and a year of routs for liberals on the Court. That same day, the Justices overturned a ninety-six-year-old precedent in antitrust law and thus made it harder to prove collusion by corporations. Also that year they upheld the federal Partial Birth Abortion Ban Act, in Kennedy's opinion, even though the Court had rejected a nearly identical law just seven years earlier. The case of Ledbetter v. Goodyear, brought by a sympathetic grandmother who had been paid far less than men doing the same work at the tire company, became a political flashpoint because the conservative majority, in an opinion by Alito, imposed seemingly insurmountable new burdens on plaintiffs in employment-discrimination lawsuits. (Ginsburg, in an unusual move, read her dissent from the bench.) In all these cases, Roberts and Alito joined with Scalia, Clarence Thomas, and Kennedy to make the majority. On this final day, Breyer offered an unusually public rebuke to his new colleagues. "It is not often in the law that so few have so quickly changed so much," Breyer said.

Roberts's sure-handed sense of pub lic relations has deserted him only once during his tenure so far. The Chief Justice, as the leader of the federal judiciary, is obligated to prepare an annual report, which historically has been a fairly anodyne document—a set of modest requests to Congress, like faster confirmation of judges or new construction funds for courthouses. In 2006, however, Roberts devoted his entire report to arguing for raises for federal judges, and he even went so far as to call the status quo on salaries a "constitutional crisis." Most federal judges are paid a hundred and sixty-nine thousand dollars, and at that point they had not had a real raise in fifteen years. This request to Congress was universally popular among Roberts's colleagues, who were long used to watching their law clerks exceed their own salaries in their first year of private practice.

Congress, however, snubbed the Chief Justice. Six-figure salaries, lifetime tenure, and the opportunity to retire at full pay did not look inadequate to the elected officials, who make the same amount as judges and must face ordinary voters. Roberts's blindness on the issue may owe something to his having inhabited a rarefied corner of Washington for the past three decades.

In 1986, after his service in the Reagan White House, Roberts went to the Washington law firm of Hogan & Hartson, where he developed a successful practice as an appellate advocate. "John's a very, very conservative fellow, and I'm the opposite, but that was never a problem for us," E. Barrett Prettyman, Jr., a longtime partner at the firm and a co-counsel with Roberts on dozens of cases, said. "Our work was mostly corporate, some criminal, a few individuals as clients. The key to his success was that he was very clear, very articulate, and never confusing."

When George H. W. Bush won the Presidency, in 1988, his new Solicitor General, Kenneth Starr, hired Roberts again, this time as his principal deputy. Near the end of the first Bush's term, Roberts was nominated to the United States Court of Appeals for the D.C. Circuit, but Democrats in the Senate, sensing a victory in the approaching 1992 election, refused to let him come up for a vote. So, for Bill Clinton's eight years in office, Roberts went back to Hogan & Hartson, where, according to his financial-disclosure forms, he made more than a million dollars a year. In 1996, Roberts, then forty-one, married Jane Sullivan, a fellow-lawyer, also in her forties, who now works as a legal recruiter. In 2000, they adopted two children, who are both now eight years old.

While at Hogan, Roberts became a lunchtime regular at the table of J. William Fulbright, the former Arkansas senator, in the firm's cafeteria. Fulbright was affiliated with Hogan from the time of his departure from office, in 1974, until his death, in 1995, and he presided over a salon of sorts for partners with an interest in politics. "It was a politically diverse group, and they'd just get together and talk about the issues of the day," David Leitch, who was also a partner at Hogan, said. "John is interested in political issues, he is interested in the process of politics. He used to like to handicap elections." Roberts took a direct role in the contested 2000 election, travelling to Tallahassee to assist George W. Bush's legal team in the recount litigation. He was rewarded for his efforts the following year, when Bush, like his father before him, nominated Roberts to the D.C. Circuit. He was confirmed two years later, and he served there until Bush chose him for the Supreme Court.

In one respect, Roberts's series of prestigious jobs all amounted to doing the same thing for more than twenty years—reading and writing appellate briefs and, later, appellate decisions. During the heart of his career, Roberts's circle of professional peers consisted entirely of other wealthy and accomplished lawyers. In this world, a hundred and sixty-nine thousand dollars a year might well look like an unconscionably low wage. "Some judges have actually left the bench because they could make more money in private practice, and some Justices have complained privately about how it's almost impossible to educate your family on that kind of money," Prettyman said. "You don't want an unhappy court, judges who are worried about their salaries. John saw that."

Roberts's career as a lawyer marked him in other ways as well. In private practice and in the first Bush Administration, a substantial portion of his work consisted of representing the interests of corporate defendants who were sued by individuals. For example, shortly before Roberts became a judge, he successfully argued in the Supreme Court that a woman who suffered from carpal-tunnel syndrome could not win a recovery from her employer, Toyota, under the Americans with Disabilities Act. Likewise, Roberts won a Supreme Court ruling that the family of a woman who died in a fire could not use the federal wrongful-death statute to sue the city of Tarrant, Alabama. In a rare loss in his thirty-nine arguments before the Court, Roberts failed to persuade the Justices to uphold a sixty-four-million-dollar fine against the United Mine Workers, which was imposed by a Virginia court after a strike.

One case that Roberts argued during his tenure in the Solicitor General's office in George H. W. Bush's Administration, Lujan v. National Wildlife Federation, seems to have had special resonance for him. The issue involved the legal doctrine known as "standing"—one of many subjects before the Supreme Court that appear to be just procedural in nature but are in fact freighted with political significance. "One of the distinctive things about American courts is that we have all these gatekeeper provisions that keep courts from getting involved in every single dispute," Samuel Issacharoff, a professor at New York University School of Law, says. "The doctrine of standing says that you only want lawsuits to proceed if the plaintiffs are arguing about a real injury done to them, not simply that they want to be heard on a public-policy question." Liberals and conservatives have been fighting over standing for decades. "Standing is a technical legal doctrine, but it is shorthand for whether courts have a role in policing the conduct of government," Issacharoff says. "Typically, the public-interest advocates, usually on the liberal side of the spectrum, favor very loose standing doctrines, and people who want to protect government from scrutiny, who tend to be on the conservative side, want to require more and more specific standing requirements."

Lujan v. National Wildlife Federation was one of the Rehnquist Court's most important standing cases. The environmental group had challenged the Reagan Administration's effort to make as much as a hundred and eighty million acres of federal land available for mining. In an argument before the Court on April 16, 1990, Roberts said that the mere allegation that a member of the National Wildlife Federation used land "in the vicinity" of the affected acres did not entitle the group to standing to bring the case. "That sort of interest was insufficient to confer standing, because it was in no way distinct from the interest any citizen could claim, coming in the courthouse and saying, 'I'm interested in this subject,' " Roberts told the Justices. By a vote of five to four, the Justices agreed with Roberts and threw out the case. According to Issacharoff, "Lujan was the first big case that said, Just because you are really devoted to a cause like the environment, that doesn't mean we are going to let you into the courthouse."

As a lawyer and now as Chief Justice, Roberts has always supported legal doctrines that serve a gatekeeping function. In DaimlerChrysler v. Cuno, a group of taxpayers in Toledo, Ohio, went to court to challenge local tax breaks that were given to the carmaker to expand its operations in the city; the Supreme Court held that the plaintiffs lacked standing. In a broadly worded opinion that relied in part on the Lujan case, Roberts suggested that most state and local activities were off limits to challenge from taxpayers. "Affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury, " Roberts wrote, "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." As usual with Roberts's jurisprudence, the citizen plaintiffs were out of luck.

In the past four years, Roberts and Scalia, while voting together most of the time, have had a dialogue of sorts about how best to address the Court's liberal precedents. For example, Roberts wrote a narrow opinion in 2007 holding that the McCain-Feingold campaign-finance law did not apply to certain political advertisements in Wisconsin. Scalia agreed with Roberts's conclusion in the case, but he said that the Chief Justice should have gone farther and declared the whole law unconstitutional, on free-speech grounds. Scalia insisted that Roberts was just being coy, that his opinion had in fact overruled an earlier ruling that upheld the campaign-finance law, but that he wouldn't come out and say it. "This faux judicial restraint is judicial obfuscation," Scalia wrote.

In a case about the free-speech rights of students, Roberts wrote the opinion approving the suspension of a high-school student in Alaska for holding a sign that said "BONG HiTS 4 JESUS" on a street off school grounds. The Chief Justice said the school had the right to "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." Thomas, characteristically, wrote a concurring opinion urging the Court to go farther and hold that students have no First Amendment rights at all. But the larger point remained that Roberts, Scalia, and Thomas voted together in that case, as they do virtually all the time. "These kinds of distinctions among the conservatives are just angels-on-the-head-of-a-pin stuff," says Theodore B. Olson, the former Solicitor General, who remains a frequent advocate before the Court. "Roberts is just what he said he would be in his hearing—a judge who believes in humility and judicial restraint." Like the other conservatives, for instance, Roberts has been a consistent supporter of death sentences, and he wrote the Court's opinion holding that lethal injection does not amount to the sort of cruel and unusual punishment prohibited by the Eighth Amendment. Many liberals, too, feel that Roberts is far more similar to his conservative colleagues than he appeared to be at the time of his confirmation hearing. According to Harvard's Laurence Tribe, "The Chief Justice talks the talk of moderation while walking the walk of extreme conservatism."

On issues of Presidential power, Roberts has been to Scalia's right—a position that's in keeping with his roots in the Reagan Administration. "John was shaped by working at the White House, where you develop a mind-set of defending Presidential power," the lawyer who worked with Roberts in the Reagan years said. Just a few days before Bush appointed Roberts to the Supreme Court, in 2005, Roberts joined an opinion on the D.C. Circuit in Hamdan v. Rumsfeld that upheld the Bush Administration's position on the treatment of detainees at Guantánamo Bay. (With Roberts recused from the case, the Supreme Court overruled that decision in 2006, by a five-to-three vote, with Kennedy joining the liberals.) Scalia has occasionally shown a libertarian streak, but Roberts, true to his White House past, has consistently voted to uphold the prerogatives of the executive, especially the military, against the other branches. Last year, Roberts dissented from Kennedy's opinion for a five-to-four Court in Boumediene v. Bush, which held that the Military Commissions Act of 2006 violated the rights of Guantánamo detainees. Roberts saw the case as mostly a contest between the executive branch and the rest of the federal government. "Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants," Roberts wrote in his dissent. "One cannot help but think . . . that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."

Roberts's solicitude for the President and the military extends to lower-profile cases as well. In Winter v. National Resources Defense Council, the question was whether the Navy had to comply with a federal environmental law protecting dolphins and other wildlife while conducting submarine exercises off California. Roberts said no. "We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals," the Chief Justice wrote. "Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." Though Roberts was writing for only a five-to-four majority, he added, "Where the public interest lies does not strike us as a close question."

On the morning of January 20th, the Supreme Court held a small reception for the Justices and their guests before they all headed across First Street to the Capitol for the Inauguration of Barack Obama. Friends present say that Roberts was nervous that morning. He was used to appearing before crowds, of course, but this was the first time that he would be performing the most public of the Chief Justice's duties—administering the Presidential oath of office—and the audience, in person and by broadcast, would be in the many millions. In keeping with his perfectionist nature, Roberts had rehearsed the oath ceremony and had long since committed the words to memory.

Through intermediaries, Roberts and Obama had agreed how to divide the thirty-five-word oath for the swearing in. Obama was first supposed to repeat the clause "I, Barack Hussein Obama, do solemnly swear." But, when Obama heard Roberts begin to speak, he interrupted Roberts before he said "do solemnly swear." This apparently flustered the Chief Justice, who then made a mistake in the next line, inserting the word "faithfully" out of order. Obama smiled, apparently recognizing the error, then tried to follow along. Roberts then garbled another word in the next passage, before correctly reciting, "preserve, protect, and defend the Constitution of the United States."

At the lunch in the Capitol that followed, the two men apologized to each other, but Roberts insisted that he was the one at fault. For the day, Roberts lost some of his customary equanimity as he brooded about making such a public mistake. (He went to the White House the next day, and the oath was repeated, correctly, to forestall any challenges to its legality.) Since then, Roberts has put the embarrassment behind him and even made it the subject of a little humor at his own expense. On January 26th, he presided over the installation of the new leader of the Smithsonian Institution. "Those of you who have read it will see from the program that the Smithsonian some time ago adopted the passing of a key in lieu of the administration of an oath," Roberts said. "I don't know who was responsible for that decision. But I like him."

Still, the flubbed oath will always link Roberts and Obama, whose lives reflect considerable similarities as well as major differences. They belong to roughly the same generation—Roberts is six years older—and received similar educations. Roberts and Obama graduated from Harvard Law School in 1979 and 1991, respectively—Obama had taken time off to work as a community organizer in Chicago—and both served on the *Law Review*. (Obama was president, the top position; Roberts, in his capacity as managing editor, was just below that.) They share an even-tempered disposition, obvious but unshowy intelligence, and fierce ambition leavened by considerable charm.

But the distinctions between these two men are just as apparent. Obama is the first President in history to have voted against the confirmation of the Chief Justice who later administered his oath of office. In his Senate speech on that vote, Obama praised Roberts's intellect and integrity and said that he would trust his judgment in about ninety-five per cent of the cases before the Supreme Court. "In those five per cent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision," Obama said. "In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions . . . the critical ingredient is supplied by what is in the judge's heart." Obama did not trust Roberts's heart. "It is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak," the Senator said. The first bill that Obama signed as President was known as the Lilly Ledbetter Fair Pay Act; it specifically overturned the interpretation of employment law that Roberts had endorsed in the 2007 case.

In a way, Obama offers a mirror image of the view of the Supreme Court that Roberts presented in his tribute to Rehnquist in Tucson. To Obama, what Roberts called the "solid grounds of legal arguments" was only the beginning of constitutional interpretation, not the end. In his statement announcing Souter's resignation, on May 1st, the President defined the qualities he was looking for in a Justice in a very different way from Roberts's description of Rehnquist. "I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook. It is also about how our laws affect the daily realities of people's lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation," Obama said. "I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes."

The differences between Roberts and Obama include such issues as abortion and affirmative action, but they extend beyond such familiar legal battlegrounds to what Roberts called, in his Tucson speech, "the nature of the Court itself." "When Justice Rehnquist went on the Court, a minority of the Justices had been former federal judges," Roberts observed. "Today, for the first time in its history, every member of the Court was a federal court-of-appeals judge before joining the Court—a more legal perspective, and less of a policy perspective."

Obama does not regard the all-former-judge makeup of the Supreme Court as an unalloyed virtue. "The obvious sources of candidates have been people already on the bench and people who are distinguished academic legal scholars and teachers," Gregory Craig, the White House counsel, told me in February. "But he's also looking for

lawyers who have been public defenders or prosecutors, or representing points of view with respect to immigration or the Innocence Project. He doesn't think you have to be a member of the circuit courts of appeals to be on the Supreme Court." Obama has spoken fondly of Earl Warren, the fourteenth Chief Justice, who came to the Court from the governorship of California.

When Vice-President Biden publicly mocked Roberts about his gaffe at a ceremony shortly after the Inauguration, Obama shot him a scathing look of rebuke. (Biden later called Roberts to apologize.) Still, there is no disputing that the President and the Chief Justice are adversaries in a contest for control of the Court, and that both men come to that battle well armed. Obama has at most one more chance to take the oath of office, and Roberts will probably have a half-dozen more opportunities to get it right. But each time Roberts walks down the steps of the Capitol to administer the oath, he may well be surrounded—and eventually outvoted—by Supreme Court colleagues appointed by Barack Obama. ♦

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