

The Atlantic Monthly | January/February 2007

STATE OF THE UNION

ROBERTS' RULES

In an exclusive interview, Chief Justice John Roberts says that if the Supreme Court is to maintain legitimacy, its justices must start acting more like colleagues and less like prima donnas.

BY JEFFREY ROSEN

.....

Last July, I went to the Supreme Court to interview John G. Roberts Jr., who had just completed his first term as chief justice of the United States. I was finishing a book about judicial temperament, and Roberts, who is a keen student of constitutional history, had agreed to share some thoughts on the subject. I had interviewed Roberts once before, when his nomination to the U.S. Court of Appeals for the District of Columbia Circuit was stalled in the Senate, but I had not talked to him since he became chief justice and was eager to hear his thoughts about the new job.

The chief justice's chambers are impressive without being showy. They include a paneled waiting room, the private conference room in which all nine justices meet to discuss cases after oral arguments, and a cozy inner office with fading photographs—hung by the late Chief Justice William Rehnquist in the 1980s—that Roberts hadn't yet bothered to replace. In shirtsleeves and a tie, Roberts invited me to take off my jacket and have a seat in his office, on a nineteenth-century couch that, according to Court lore, is the one on which John Quincy Adams expired in the House of Representatives.

Before long, the conversation turned to judicial disappointments. "It's sobering to think of the seventeen chief justices; certainly a solid majority of them have to be characterized as failures," Roberts said with a rueful smile. "The successful ones are hard to number." I asked him to elaborate: Why had so many chief justices been failures? Partly, Roberts explained, it was because the powers of the office are not extensive. "A chief justice's authority is really quite limited, and the dynamic among all the justices is going to affect whether he can accomplish much or not," he said. "There is this convention of referring to the Taney Court, the Marshall Court, the Fuller Court, but a chief justice has the same vote that everyone else has." As a result, "the chief's ability to get the Court to do something is really quite restrained."

Some of the least successful chief justices, Roberts suggested, had faltered because they misunderstood the job, approaching it as law professors rather than as leaders of a collegial Court. Harlan Fiske Stone, a former dean of Columbia Law School, was a case in point. Stone "was a failure



John Roberts at the University of Miami last November

From the archives:

"Whose Court Is It Really?" (January/February 2006)
John Roberts is the new chief justice, but the Supreme Court isn't his to lead just yet. By Benjamin Wittes

"Rehnquist the Great?" (April 2004)
Even liberals may come to regard William Rehnquist as one of the most successful chief justices of the century. By Jeffrey Rosen

as chief, because of his misperception of what a chief justice is supposed to be,” Roberts said, gesturing to the justices’ private conference room through an open door of his office. “It’s his desk out there that is separate from the conference table, and he ... sat at his desk, and the others were at the table, and he almost called on them and critiqued their performances. They hated that.” Roberts laughed. “As a result, he was a failure as a chief justice.”

In Roberts’s view, the most successful chief justices help their colleagues speak with one voice. Unanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court; by contrast, closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.

Roberts suggested that the temperament of a chief justice can be as important as judicial philosophy in determining his success or failure. And based on the impression he made in his first year on the Court and throughout his career, Roberts seems to have many of the personal gifts and talents of the most successful and politically savvy chief justices, such as Rehnquist and John Marshall, rather than those of a heavy-handed academic like Stone.

As one of the leading Supreme Court advocates of his generation, Roberts appeared before the Court many times, representing clients on both sides of the political spectrum and earning a reputation for fair-mindedness. He was widely respected as a legal craftsman who came to cases without preconceived grand theories, but instead took positions based on the arguments and legal materials in each case. Personally as well as jurisprudentially modest, Roberts prefers baseball analogies to showy displays of his formidable intellect, and he treats litigants with evenhanded courtesy. He sends gifts to acquaintances who have newborn children, or notes to those whose family members are ill. Despite the daunting administrative and social demands of being chief justice, Roberts, who turns fifty-two this year, has tried to maintain a balanced life. Most nights, he is home for dinner with his wife, Jane Sullivan Roberts, and two young children, Josephine and Jack; he plays with the kids until their 8:30 p.m. bedtime, and then works for a few hours before going to sleep. Because of his personal thoughtfulness and sense of proportion, it’s easy when talking to him to forget that he is the chief justice of the United States.

When I met with Roberts, the question of judicial temperament was much on his mind, since he had made it a priority of his first term to promote unanimity and collegiality on the Court. He was surprisingly successful in this goal: under his leadership, the Court issued more consecutive unanimous opinions than at any other time in recent history. But the term ended in what Justice John Paul Stevens called a “cacophony” of discordant voices. Opposing justices addressed each other in unusually personal terms and generated a flurry of stories in the media about the divisions on the Court, especially in cases involving terrorism, the death penalty, and gerrymandering. Roberts seemed frustrated by the degree to which the media focused on the handful of divisive cases rather than on the greater number of unanimous ones, and also by the degree to which some of his colleagues were acting more like law professors than members of a collegial Court. As a result, Roberts looked to the example of his greatest predecessor—Marshall, who served as chief justice from 1801 to 1835—for a model of how to rein in a group of unruly prima donnas.

“If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have,” he said.

Related graphic:

Getting to Yes

Fifty-four percent of decisions in the first year of the Roberts Court were unanimous. This graphic shows the percentage of written court opinions on which each pair of justices agreed with one another.

“That suggests that what the Court’s been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up.” Roberts added, “I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.”

In particular, Roberts declared, he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions. “I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”

In Roberts’s view, Marshall’s success in unifying the Court was a reflection of his temperament. “He gave everyone the benefit of the doubt; he approached everyone as a friend. The assumption was ... ‘This is someone I’m going to like unless proven otherwise,’” Roberts said. “He was convivial, he took great pride in sharing his Madeira with his colleagues ... [He was not] the artificial glad-hander type; it was just in his nature to get along with people. I think that had to play an important role in his ability to bring the Court together, to change the whole way judicial decisions were arrived at, to really create the notion that we are a Court—not simply an assemblage of individual justices ... It was the force of his personality. That lack of pretense, that openness and general trustworthiness, were very important personality traits in Marshall’s success,” Roberts observed.

I asked Roberts to contrast Marshall’s temperament with that of Thomas Jefferson, his archrival. “Jefferson certainly did not have the common touch,” he emphasized. “To some extent, maybe affected, and perhaps I’m being unfair to Jefferson but [he had] more of almost like a philosophe’s attachment to the ideas.” Roberts shook his head. “When you look at [Jefferson] side by side with Marshall, Marshall comes across as a more substantial character, certainly more likable. Yes, I think they’d both invite you to share their table and pour you a drink, but you kind of think you’d have a very academic discussion with Jefferson, and you’d have a good time with Marshall.”

Roberts believes that Marshall’s temperament and worldview came from his experiences as a soldier at Valley Forge, where he developed a commitment to the success of the nation. “Some have speculated that the real root of Marshall’s ill feeling to Jefferson was that Jefferson was not at Valley Forge, was not in the fight, and had what Marshall might regard as a somewhat precious attachment to ideas for the sake of ideas, while Marshall was more personally invested in the success of the American experiment.”

Related graphic:

Vital Signs

Tenure, productivity, and dissent on the Supreme Court.

Roberts decided early in his first term to embrace Marshall as a model. “Once you’re here you don’t immediately think you’ve got to be like Oliver Ellsworth,” he said, laughing. (Ellsworth, the chief justice from 1796 to 1800, was one of Marshall’s obscure and forgotten predecessors.) If you want to become “a competitive bicyclist, you’re going to wonder how Lance Armstrong did it—you’re not going to pick somebody else.”

Roberts said his decision to embrace Marshall’s vision was a reaction to “the personalization of judicial politics.” During Marshall’s thirty years as chief, “there weren’t a lot of concurring opinions. There weren’t a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we’re reverting back to the English model, where everybody has to have their say. It’s more being concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court.” Roberts praised justices who were willing to put the good of the Court above their own ideological agendas. “A justice is not like a law professor, who might say, ‘This is

my theory ... and this is what I'm going to be faithful to and consistent with,' and in twenty years will look back and say, 'I had a consistent theory of the First Amendment as applied to a particular area,'" he explained. Instead of nine justices moving in nine separate directions, Roberts said, "it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record."

Despite his concern about separate opinions, Roberts was proud of his relative success in encouraging unanimity, especially in less visible cases. He seemed especially frustrated, therefore, by the media's focus on the number of high-profile 5-4 decisions and the shifting coalitions that had determined them. "There was a question from one of these [tour] groups that come in here: 'How do you decide who's going to be the swing vote?'" Roberts laughed and shook his head. "I don't know, we rotate. That has to undermine—that's a steady wasting away of the notion of the rule of law, a personalization of it." He acknowledged that he was "kind of put out" by some of the media emphasis on divisions on the Court. "We had more unanimous opinions announced in a row than ever before ... in the modern era ... but in the first 5-4 decision, people are writing, 'So much for unanimity.'" Roberts said it was a bad thing that, at the end of each term, commentators published graphs and charts about who on the Court agreed most often with whom [for an example, see opposite page]. "It is such an egotistical analysis of the Court," he lamented. "The whole notion that it's functioning as a Court doesn't seem to appeal to anyone ... I think it's bad, long-term, if people identify the rule of law with how individual justices vote."

Promoting unanimity will not be an easy task, Roberts acknowledged, after years of "the personalization of judicial politics." He said that he had to emphasize the benefits of unanimity for individual justices, in order to influence what he called the "team dynamic." "You do have to [help people] appreciate, from their own point of view, having the Court acquire more legitimacy, credibility; [show them] that they will benefit, from the shared commitment to unanimity, in a way that they wouldn't otherwise," he said. Roberts added that in some ways he considered his situation—overseeing a Court that is evenly divided on important issues—to be ideal. "You do need some fluidity in the middle, [if you are going] to develop a commitment to a different way of deciding things." In other words, on a divided Court where neither camp can be confident that it will win in the most controversial cases, both sides have an incentive to work toward unanimity, to achieve a kind of bilateral disarmament.

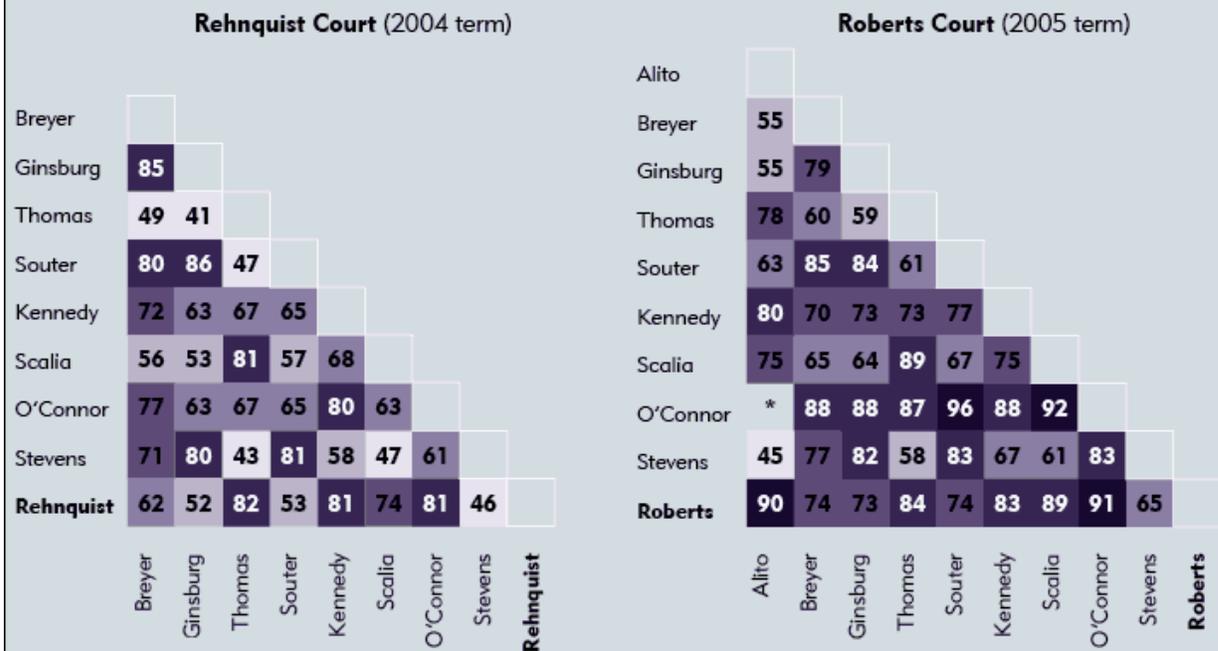
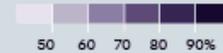
Marshall's example had taught him, Roberts said, that personal trust in the chief justice's lack of an ideological agenda was very important, and Marshall's ability to win this kind of trust inspired him. "If I'm sitting there telling people, 'We should decide the case on this basis,' and if [other justices] think, 'That's just Roberts trying to push some agenda again,' they're not likely to listen very often," he observed. "Marshall could easily have got on the Court and said, 'I'm the last hope of the Federalists—we're out of Congress, we're out of the White House—and I'm going to pursue that agenda here.' And he would have not only damaged the Court but could have smothered it in the cradle. But instead he said, 'No, this is my home now, this is the Court, and we're going to operate as a Court, and that's important to me,' and as a result he made the Court the institution that it has become."

People naturally tend to focus on the controversial cases, but Roberts says he has tried to promote unanimity in less high-profile cases, too. "It's not just on the tough cases. And it's easier to do it if you get into the habit of doing it as a matter of routine." In the less visible cases of the term, he says, he has tried to develop "a culture and an ethos that says 'It's good when we're all together.'" He added that even smaller cases can provoke fierce initial disagreements. "Just because a case ends up unanimous doesn't mean that's how it started," he emphasized. "The vote may be divided in

STATE OF THE COURT

GETTING TO YES

The Supreme Court has exhibited a high degree of consensus under John Roberts. Fifty-four percent of signed decisions in the first year of the Roberts Court were unanimous—a much higher rate than the norm for the last decade. The graphic shows the percentage of written Court opinions on which each pair of justices agreed with one another.



STATE OF THE COURT

VITAL SIGNS

Tenure, productivity, and dissent on the Supreme Court

	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Age as of January 2007	51	86	70	70	67	58	73	68	56
Years on Court	1	31	20	18	16	15	13	12	1
Opinions written per year	13*	28	26	19	18	26	17	22	9*
Average length of each opinion of the Court written (word counts, Fall 2005 term)	4,369	6,466	3,642	5,832	4,400	2,717	3,802	3,875	4,103
Dissents per year	6*	21	19	11	15	20	17	15	5*
Lone dissenting votes cast, last five years	0	10	4	1	1	6	0	2	0

Per-year statistics are averages over the past five years, unless otherwise noted.

* Fall 2005 term only

ALL PHOTOS FROM COLLECTION, THE SUPREME COURT HISTORICAL SOCIETY: ROBERTS, GINSBURG, BREYER, AND ALITO BY STEVE PETTEWAY; STEVENS AND SOUTER BY JOSEPH H. BAILEY; SCALIA BY MOLLIE ISAACS; KENNEDY BY ROBIN REID; THOMAS BY HUGH TALMAN.

SOURCES: HARVARD LAW REVIEW; SCOTUS BLOG BY AKIN GUMP STRAUSS HALER & FEID LP

conference, and yet if you think it's valuable to have consensus on it, you can get it, and ... once you do it in a little case, you can move on" to get it in big ones.

Roberts said he intended to use his power to achieve as broad a consensus as possible. "It's not my greatest power; it's my only power," he laughed. "Say someone is committed to broad consensus, and somebody else is just dead set on 'My way or the highway. And I've got five votes, and that's all I need.' Well, you assign that [case] to the [consensus-minded] person, and it gives you a much better chance, out of the box, of getting some kind of consensus." He acknowledged that this approach might be perceived on the Court as a more controversial use of the assignment power than Chief Justice Rehnquist's stated policy of punishing only those justices who were slow in producing opinions. Roberts's colleagues were likely to understand a neutral policy that denied them new assignments when they were late with opinions, he said, but they might well object if they felt that he was giving the plum assignments to those justices who agreed with him. Roberts wanted to make clear that he would instead reward those who write opinions in ways that might attract more votes, regardless of their ideological orientation.

Rehnquist was famous for running a briskly efficient conference, but Roberts said that his own vision of unanimity sometimes requires longer discussions. "There's a lot less flexibility once something is in writing," he said. According to tradition, each justice speaks once, in order of seniority, before anyone can speak for the second time, but as the moderator, Roberts can shape the discussion by the way he frames the issues in a case, inviting responses to particular points. He finds that the hardest work he does is deciding "how you present a case and what you say it's about," he said. "I have a short amount of time, for sometimes very tough cases, to figure out how to present this that will make it most useful to the conference." To encourage consensus, Roberts often tries to define the principle in question as narrowly as possible. "In most cases, I think the narrower the better, because people will be less concerned about it," he said.

John Marshall's experiences as the oldest of fifteen unruly siblings may have had something to do with his penchant for winning unity and consensus. I asked Roberts whether anything in his own background would account for his interest in bringing people together. He said he hadn't thought about it before, but he recalled that his father, an executive at Bethlehem Steel, "was most known for his willingness to work with unions, at a time [when] there was a lot of enmity ... between management and the unions." John Roberts Sr., his son recalled, would "show up unexpectedly at the union hall, buy a round of drinks for the people in the union." In the 1960s and '70s, when the Japanese were the great economic threat to the steel industry, Roberts's father insisted that union leaders accompany management executives on a trip to Japan, so that both sides could personally evaluate the competition. "I would say that's a general view of bringing a broader degree of consensus ... than his peers might have adopted," Roberts said.

In high school at La Lumiere, a Catholic boarding school in La Porte, Indiana, John Roberts Jr. was known for his leadership skills—he was captain of the football team—and for his academic ability, which he cultivated with a light touch. His elementary-school principal, in an interview with *The Christian Science Monitor*, recalled that Roberts was "an outstanding student, but very quiet, low-key, never lorded his intelligence over others." Roberts downplayed the idea that he learned leadership skills in elementary or high school: "It's kind of an unusual situation, where there are twenty-five people in the class," he said modestly. He acknowledges that his undergraduate thesis at Harvard about the failure of the British Liberal Party in the Edwardian era may have reflected his early suspicion of the politics of personality. "My central thesis with respect to the Liberal Party was that they made a fatal mistake in investing too heavily in the personalities of Lloyd George and Churchill, as opposed to adopting a more broad-based reaction to the rise of Labour; that they were

steadily fixated on the personalities.” But Roberts insisted that his most formative experiences were as a Supreme Court advocate and as an appellate judge.

“You’re always trying to persuade people, obviously, as an advocate,” he said. “And I do find, I did find, that you can be generally more successful in persuading people, in arguing a case [when you] go in with something that you think has the possibility of getting seven votes rather than five. You don’t like going in thinking, ‘Here’s my pitch, and I’m honing it to get five votes.’ That’s a risky strategy,” he said with a laugh. As an advocate, Roberts prided himself on having represented both sides of an issue—liberal and conservative, government and industry—and this increased his belief in the importance of a bipartisan vision of law. “I do think it’s extremely valuable for people to be on both sides, and I mean being in private practice and being in government, arguing against the government and for the government,” he said. “It does give you a perspective that you just can’t get any other way, in terms of what the concerns of the other side really are. And it also gives you an added credibility, and that’s very, very important.”

The most important source of his decision to resurrect Marshall’s vision of unanimity, Roberts says, was his brief experience as an appellate judge on the U.S. Court of Appeals for the District of Columbia Circuit. “For whatever reason, it is firmly embedded [in] that court that you function as a court,” he said approvingly. “It is part of a pushback against the higher degree of politicization of the appointment process there.” In reaction to this politicization, judges on the D.C. Circuit have agreed, in Roberts’s words, “We’re not politicians; we’re judges, we’re a court, and we’re going to work real hard to be a court—partly because we don’t like people thinking we’re not, and partly because some of us had experience [on the court] in the bitter period where we weren’t.” Roberts served on the D.C. Circuit for only two years, but the experience of seeing his colleagues working to achieve consensus impressed him. “That was my first experience as a judge, and I liked the way it worked,” he said. On the D.C. Circuit, the convention was that the most-junior judge spoke first in the private conference for each three-judge panel. (On the Supreme Court, the chief speaks first.) “So I always spoke first,” Roberts said with a laugh. “And what it meant was that I kind of had to be prepared, almost like law school, to state the case from the very beginning.”

Roberts sounded frustrated that consensus was more elusive on the Supreme Court than on the appellate court. “It’s so much harder, first of all, with nine people than with three. You sit around with three people and ask, ‘Where’s the common ground?’ and it’s easy. With nine, it’s much harder. It is, whatever else, a fascinating personal psychology dynamic, to get nine different people with nine different views. It’s going to take some time,” he said. Some justices prefer arguments in writing, others are more receptive to personal appeals, and all react badly to heavy-handed orders. To lead such a strong-willed group requires the skills of an orchestra conductor, as Felix Frankfurter used to say—or of the extremely subtle and observant Supreme Court advocate that Roberts used to be.

Chief justices, Roberts acknowledged, are more likely to sublimate their personal views for the good of the Court than associate justices are; he cited the example of his former boss, William Rehnquist, for whom he clerked. “I think there’s no doubt that he changed, as associate justice and chief; he became naturally more concerned about the function of the institution,” Roberts said, pointing out that though Rehnquist had previously opposed the *Miranda v. Arizona* decision of 1966, which required the police to read suspects their rights, he wrote the opinion upholding *Miranda* in 2000. “He appreciated that it had become part of the law—that it would do more harm to uproot it—and he wrote that opinion as chief for the good of the institution.”

Another reason for Rehnquist’s success as a chief justice, Roberts said, was his temperament—

namely, that he knew who he was and had no inclination to change his views simply to court popularity. “That Scandinavian austerity and sense of fate and complication,” as Roberts put it, were important parts of Rehnquist’s character, as was his Lutheran faith. “It’s a significant and purposeful mode of worship to get up in the morning to do your job as best you can, to go to bed at night and not to worry too much about whether the best that you can do is good enough or not. And he didn’t: once a case was decided, it was decided, and if every editorial page in the country was going to trash it, he didn’t care.” Roberts said he associated Rehnquist with a certain midwestern stubbornness. “Anyone who clerked for him was familiar with him intoning the phrase, ‘Well, I’m just not going to do it.’” Here Roberts did a spot-on impersonation of Rehnquist’s deadpan drawl. “That meant that was the end of it, no matter how much you were going to try to persuade him. It wasn’t going to happen.”

In the end, Roberts suggested, Rehnquist cared somewhat about building consensus, but not all that much. For example, he was willing to join opinions with which he disagreed as the sixth vote, but not as the fifth—in other words, he would compromise for the good of the Court, but only when his vote could not change the outcome. “I don’t remember [promoting unanimity] as a feature that Rehnquist stressed much,” Roberts recalled.

In deciding to resist the politicization of the judiciary, Roberts acknowledged, he has set himself another daunting task; but he said he views it also as a “special opportunity,” especially in our intensely polarized age. “Politics are closely divided,” he observed. “The same with the Congress. There ought to be some sense of some stability, if the government is not going to polarize completely. It’s a high priority to keep any kind of partisan divide out of the judiciary as well.”

Roberts recognizes that much of his success or failure will be determined by his colleagues, and their readiness to embrace his vision of consensus and political neutrality. During his first term, he was surprised to find some justices talking openly about how to protect the legitimacy of the Court. His colleagues “are concerned about having new justices on the Court,” he said, and “don’t want the Court to seem to be lurching around because of changes in personnel.” And he felt that his success in achieving an unusually high number of unanimous opinions was due to the other justices’ eagerness to be helpful to a newcomer, much like a fiancé meeting his in-laws for the first time at Thanksgiving. “I do think people were being particularly helpful and accommodating in the first term,” he said. “Maybe they won’t feel the same way the second. We’ll see.”

But even if Roberts’s honeymoon lasts a little longer, he will confront a series of challenges that Marshall never faced. In an age when we insist on seeing public officials as personalities and evaluating their actions in personal terms, Roberts faces an uphill battle in persuading his colleagues to resist the spotlight.

The focus on justices as personalities—demanded by the public and cultivated by some justices—directly challenges Roberts’s view that justice itself should be impersonal. “What you’re trying to establish—wearing black robes and, in earlier times, wigs—[is] that it’s not the person; it’s the law.” To persuade individual justices to resist the pressures to promote themselves rather than the interests of the Court as a whole, he will have to appeal, in different ways, to their respective self-interests, and to a broader understanding of their judicial role. Roberts understandably declined to criticize his colleagues by name. But when he objected to justices who act more like legal academics than members of a collegial Court, it was hard not to think of Clarence Thomas and Antonin Scalia, who seem more interested in demonstrating their jurisprudential consistency by writing opinions that read like law-review articles than in finding common ground with their colleagues.

Roberts could, in theory, appeal to justices like Scalia and Thomas—and their counterparts on the liberal wing of the Court—in the following terms: In important cases, on this evenly divided Court, neither the four liberals nor the four conservatives can confidently expect to prevail. Surely it would be in the best interest of each side if it could win half the cases by a unanimous vote, rather than trying to win slightly more often by a 5–4 vote, since a unanimous victory would be harder, in the future, to overturn. Of course, the justice who would be most resistant to this kind of bargain would be the swing justice—at the moment, Anthony Kennedy, who naturally enjoys his unique opportunity to determine the outcome of the most controversial cases on his own. When the swing justice is as self-dramatizing as Kennedy, even the chief’s most skillful appeals to the Court’s common interests may fall on deaf ears. But Kennedy, like most of the justices, also cares deeply about his own reputation as well as the Court’s. So perhaps the best way for Roberts to appeal to Kennedy and his colleagues is by invoking the lessons of history.

I asked Roberts to define the qualities of judicial temperament that he thought successful justices like Marshall embodied. “I think judicial temperament is a willingness to step back from your own committed views of the correct jurisprudential approach and evaluate those views in terms of your role as a judge,” he said. “It’s the difference between being a judge and being a law professor.” In other words, Roberts said, judicial temperament involves a judge’s willingness to “factor in the Court’s institutional role,” to suppress his or her ideological agenda in the interest of achieving consensus and stability.

The history of the Court confirms this insight. On the Court, the brilliant academics are less successful, over time, than the collegial pragmatists. The self-centered loners are less effective than the convivial team players. The resentful braggarts wear less well than the secure justices who know who they are. The narcissists wield judicial power less sure-handedly than the judges who show personal as well as judicial humility. The loose cannons shoot themselves in the foot, while those who know when to hold their tongues appear more judicious. (A justice often achieves more by saying less.) The ideological purists are marginalized on the Court, while those who understand when not to take each principle to its logical extreme are vindicated by history. Justices who view cases in purely philosophical terms are less sure-footed than those who are aware of a case’s practical effects. And those with the common touch win broader support than those who live entirely in abstractions.

Two of the most ambitious constitutional philosophers in American history—Thomas Jefferson and Oliver Wendell Holmes Jr.—achieved greatness in public life because of, not in spite of, their philosophical inconsistencies. Jefferson was a relatively successful president because he was willing to abandon his strict constructionist ideals and approve the Louisiana Purchase: he understood that America’s future depended on it. And Holmes is a liberal and libertarian hero today largely because toward the end of a career staked on judicial restraint, he belatedly embraced judicial activism in Supreme Court cases involving free speech. The examples of Jefferson and Holmes suggest that a coherent judicial philosophy is important, but so is a degree of flexibility. At the same time, Jefferson and Holmes were repeatedly outfoxed by the less scholarly John Marshall and John Marshall Harlan—judicial thinkers whose conviviality, practicality, and sense of the possible allowed them to transform the law in their own image.

Marshall, after all, had a strong philosophy of his own, rooted in vigorous protections for national power and property rights, but he chose not to press his philosophy in cases he knew he couldn’t win. (Remember his axiom: “I am not fond of butting against a wall in sport.”) Although conservative Federalists charged that he was too fond of popularity, Marshall was not noted for his willingness to compromise—but he articulated his principles in ways that his opponents were able to accept. Part of what made Marshall trustworthy, Roberts told me, was that “he was not a deal maker, not a broker.

That's not how he facilitated consensus. He had strongly felt principles, principles for which he had risked his life ... But he was willing to explain, to talk it out with people, and he had a prodigious intellect but he didn't scare people off with it ... He was friendly, open—people trusted him—and [he] was able to bring people along.” As for Marshall's willingness to disappoint his ideological supporters, Roberts says that even if Marshall had the votes to push the Federalist agenda harder than he did, he thought it “better to proceed in a way that ... wasn't going to alienate people on the Court and turn the Court into another battleground.”

Throughout its history, Roberts argues convincingly, the Court has best served itself—and the nation—when its individual justices have been willing to subordinate their own agendas in the interest of building judicial consensus and institutional legitimacy. Whether he will be able to resurrect John Marshall's vision in a polarized, unbuttoned, and personality-driven age remains to be seen. But his ultimate success will depend not only on his colleagues but also on his own temperament and character. Roberts approvingly quoted the observation of Chief Justice Charles Evans Hughes that “Marshall's preeminence was due to the fact that he was John Marshall.” If Roberts succeeds, his success will be due to the fact that he is John Roberts.

Photo by Joe Raedle/Getty Images

The URL for this page is <http://www.theatlantic.com/doc/200701/john-roberts>.

