The Oath: The Obama White House and the Supreme Court Study Guide

The Oath: The Obama White House and the Supreme Court by Jeffrey Toobin

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Plot Summary

"The Oath: The Obama White House and the Supreme Court", written by liberal American lawyer, author and legal analyst for CNN, Jeffrey Toobin, provides an insider's view of the ideological conflict between Supreme Court Chief Justice John Roberts and conservative jurisprudence and the policies of the Obama Administration. Toobin is a clear partisan, constantly criticizing conservatives for hypocrisy, venom, ideology and the like. While Toobin pays some respect to Roberts, he characterized Roberts as a partisan of the Republican Party, contrasting him with the liberals on the court, whom he describes in positive and often glowing terms.

One aim of the book is to illustrate just how much conflict there is between the conservative Roberts Court and the Obama Administration, illustrated from the start when John Roberts swore Barack Obama into the office of the presidency with a well-known erroneous repetition of the oath of office. Toobin thinks that Obama is the real conservative, as he only believed in incremental change led by Democratic movements. Obama is seen as a pragmatist, not an ideologue. But the Roberts court is prepared to rewrite the constitution to undo the greatest progressive victory—the New Deal.

The Oath is divided into an introduction, epilogue and twenty-three chapters spread over five parts. Over the course of the book, Toobin introduces a variety of personalities, biographies and jurisprudential attitudes, though largely in chronological order, beginning roughly with Roberts's appointment to the SCOTUS and ending with Roberts' decision in the Obamacare/Affordable Care Act ruling (known as Sebilius). Part One contrasts Obama and Roberts' political views and personal history, along with making the first part of the case that the Roberts Court is an activist court. In Part Two, Toobin reviews constitutional issues surrounding gun control, Obama's "unrequited" bipartisanship and the appointment of Sonia Sotomayor to the court. Part Three focuses on the Citizens United case, which upheld the legality of corporation political contributions to affect election outcomes, and outraged progressives, so much so that Obama attacked the court in one of his state of the union addresses.

Part four attempts to draw out a point made throughout the book, namely that some of the "liberals" on the court were appointed by moderate Republicans and watched the Republican Party move sharply to the right of them. He brings Justice Thomas in for particular scrutiny. Part Five largely covers the story of Sebilius. The book then ends with what amounts to an editorial, where Toobin warns his readers that despite the fact that John Roberts did not give into "extremism" by overruling Obamacare, that he is still a dangerous judicial activist. His ruling was intended to buy political space for the court to continue its activist judicial agenda and that he is a full partisan for the Republican Party. He also argues that the Roberts Court has proven that the constitution really is living, as liberals have long argued, by their judicial activism. The constitution "lives" because the conservatives are prepared to change its meaning to suit their political agenda.

Prologue, The Oaths, Part One, Chapter 1, The Politician's Path

Prologue, The Oaths, Part One, Chapter 1, The Politician's Path Summary and Analysis

Author Jeffrey Toobin opens with a brief history of the Presidential Oath of Office for the United States Presidency. The oath is specified in the U.S. Constitution, in Article II, Section 1. It is the only oath specified in the constitution. However, alternatively, the administration of the presidential oath, during inaugural ceremonies evolved haphazardly. In 1797, Chief Justice Oliver Ellsworth administered the oath for the first time, but sometimes future Chief Justices did not follow up. Calvin Coolidge took the oath from his father, a notary public. The wording has also evolved over time.

So when Chief Justice Roberts misstated the oath during Barack Obama's inauguration, questions about the legality of Obama's installation as president arose. David Barron, a professor at Harvard Law School, began to research the question in order to put any worries aside.

But controversy over the oath arose in the context of larger controversies in constitutional law. In the 1960s, liberals on the Supreme Court of the United States (hereafter: SCOTUS) developed a doctrine of "unenumerated rights" where explicit provisions of the Constitution, prior decisions and cultural evolution supplied the materials to develop new rights as constitutional, most controversially the right to privacy used in Roe v. Wade. Conservative justices have in the last three decades, argued against the doctrine of unenumerated rights, a view called "textualism" a cousin to originalism. So Barron ultimately recommended that Roberts and Obama redo the oath to get it right.

Toobin then reviews the details related to setting up the oath, as set out in recent decades by former Chief Justice William Rehnquist. After the text was set, Chief Justice John Roberts started memorizing the oath. Toobin notes that in Roberts's past, he was famous for his memory and he rehearsed many times. And yet while he memorized the oath, his new card had never been shown to Obama, and so they differed over whether "do solemnly swear" was in the oath. This flustered Roberts, who was knocked off guard and misstated the remainder.

Worries about the oath arose immediately given Obama's planned executive actions. Gregory Craig and his assistant Daniel Meltzer, both professors at Harvard Law, consulted on the matter. And on their advice, the Chief Justice and the President redid the oath, to much consternation on behalf of Obama and Roberts's staffers. They decided not to keep the redo a secret but not to call attention to it either. Roberts did not bring a card this time, out of pride, and so they redid the oath slowly without incident.

Toobin points out that Roberts and Obama had a great deal in common, at ages 47 and 53, they were at the top of their generation's offices. They both had intellect and charm, both products of Chicago and Harvard Law School. But they had greater differences, especially their familiar backgrounds. The two men's most important difference concerned the constitution. Roberts preferred stability, precedence and conservatism, whereas Obama preferred change, moving forward and visionary leadership. But Roberts was the agent of change, moving the country to a new understanding of the Constitution. Roberts is part of the demolition of the old center-right moderate wing of the Supreme Court, following Lewis Powell and Sandra Day O'Connor. Now there were only conservatives and liberals on the Court.

But Roberts towers over his colleagues, most in evidence when Roberts joined the liberals in upholding Obamacare (The Affordable Care Act). While conservatives were bitterly disappointed, Roberts was playing the long game. He could not overturn this legislation and achieve broader conservative goals. His aim is to undermine the idea of the "living Constitution." Obama, however, wishes to preserve this more malleable approach to constitutional law. And that conflict is the heart of the book.

In Chapter 1, Toobin opens by pointing out that while a junior senator, Obama claimed that the 2nd amendment protects an individual's right to bear arms, then a much more controversial position, though he reads that right so as to allow for a great deal of regulation. The Supreme Court would soon issue District of Columbia v. Heller, which would be the culmination of this reading. This was part of Obama's long game for the presidency, however. Toobin then notes that Obama has a cautious approach to politics and prefers to focus on legislative rather than judicial change.

The conservative legal ascendancy began prior to the arrival of Critical Legal Theory, which saw the generation of law as based solely on power relations. This view became controversial at Harvard, but after Roberts had graduated. Obama arrived in its heyday. Obama went with the anti-Crits and generally positioned himself as a center-leftist. Obama nonetheless did not have great faith in American law, especially in light of its treatment of blacks. And for this reason he put more stock in election results, preferring to fight social battles through votes and not rulings. Toobin then explains how Obama's Chicago-based legal background contributed to this focus. Progressive causes could only succeed via coalition-building. He would not push judges to find new rights. And his desire to win led him to take more moderate positions.

Chapters 2-4,

Chapters 2-4, Summary and Analysis

Obama would ultimately vote against Roberts' nomination to the Supreme Court, one of twenty-two in the Senate, though largely for electoral reasons. Yet in his speech on the Senate floor, he claimed that while Roberts was qualified, he used his skills on behalf of the strong in opposition to the weak, even though the next day he defended his colleagues who voted yes. He stressed his long-held view that progressive causes were best advanced in the ballot box. And yet when Alito's nomination came up, Obama easily voted no.

Turning to Roberts, his career path was one of quiet ascendancy, grand accomplishments without drawing attention to himself. He had celebrated Rehnquist's attempt to move the SCOTUS to the right, away from giving government the power to create new individual rights and so, perhaps, to take them away. He had supported Reagan's presidency and its general approach. Roberts agreed with its generally more restrained attitude towards government. But he also focused on the practice of actually winning legal battles, and so came to hold that the law was ultimately about winning.

Toobin then reviews Obama's rise to the presidency, showing Obama taking moderate positions on the composition of the court during the election. When elected, he set up a team to determine his future nominees. He now had to make his preferences concrete.

In Chapter 3, Toobin notes that the transition from Rehnquist to Roberts was not as dramatic as that between Bush Obama. The SCOTUS changes slowly and life on the Court is lonely. Roberts made the transition with some finesse. He first showed his true colors in Hamdan v. Rumsfeld, a case that concerned the constitutionality of the treatment of prisoners at Guantanamo Bay. Justice Kennedy, due to his internationalist background, was prepared to vote against Bush and Rumsfeld and with the liberals, as he knew that Bush's policies were widely hated. Roberts recused himself, as he had ruled as a lower court judge on the issue. But he generally resisted controversy and grand-standing.

Chapter 4 opens with a brief biography of SCOTUS justice Ruth Bader Ginsburg. After marrying her husband, the two, as lawyers, decided to take up a case where the equal treatment of women was at stake, with respect to military service. Ginsburg developed a strong distaste for "Appendix E" which covers federal statues that differentiate treatment based on sex. Ginsburg mapped out her career basedon Appendix E as it was a "treasure trove" of challengible laws. Ginsburg wanted to bring womens' rights issues to the SCOTUS. She was strategic and wise in doing so, bringing cases on behalf of men in order to change laws that discriminated (in her view) against women. She won five of the six cases she argued before the court, making her a feminist icon and so after Jimmy Carter nominated her to the D.C. Circuit in 1980, Bill Clinton nominated her for the Supreme Court in 1993. While on the court, Ginsburg has had few total victories and

has had to endure colon cancer, though she had held back the abolition of Roe v. Wade, one of Rehnquist's main career goals. In 2006 she would have to face the challenge to abortion rights.

Roe v. Wade had been based on the earlier Griswold v. Connecticut decision, which laid the groundwork for a right to privacy. Ginsburg supported abortion rights but she disliked the privacy-based rationale. Abortion rights were about equality, not privacy. In the new case, Gonzales v. Carhart, raised in 2006, the abortion attitudes on the court had changed considerably. She used her dissent in the case to take an uncharacteristically polemical tack, accusing Justice Kennedy of having backward views on women. Ginsburg was appalled by the Court's decision and wanted others to know. She thought abortion rights were under siege.

Chapters 5-6, The Ballad of Lilly Ledbetter, The War Against Precedent

Chapters 5-6, The Ballad of Lilly Ledbetter, The War Against Precedent Summary and Analysis

Roberts was also shaped by the cases he argued before the SCOTUS, specifically in the case of Lujan v. National Wildlife Federation, which he won by using procedural objections to block a review of important "public interest" laws like civil rights and environmental protections. Conservatives tend to like procedural rules to prevent cases from being heard. Roberts became a constitutional lawyer when procedural doctrines were more controversial. The Warren Court wanted to push the law into new fields and create new rights. Procedural rules limited their power, which Roberts strongly believed in given his and other conservatives' reaction to Harvard Professor Abram Chayes, who celebrated an aggressive court. And in one of Roberts's early decisions as chief justice gave him a chance to appeal to procedure once against (DaimlerChrysler v. Cuno).

Toobin believes that all the justices built their judicial philosophies based on their prior lives. Roberts's experience with procedural constraints helps to make sense of many of his decisions, including that affecting Lilly Ledbetter. A production supervisor at a car tire plan in Gadsden, Alabama in the 1980s, Ledbetter complained that she was sexually harassed at work. Towards retirement, she was anonymously informed she was being paid less than men doing the same job. So Ledbetter decided to sue under Title VII anti-discrimination law. While she was initially awarded a settlement, the Eleventh Circuit threw it out. But Ledbetter was prevented from bringing suit to the SCOTUS because of procedural issues - she had filed too late. The case took forever to make it to the Court, nine years after it was initiated (in 1998), and illustrates the challenges faced by plaintiffs. While Ginsburg clearly sided with Ledbetter in oral arguments, Roberts worried that the case would allow anyone to sue for lost back wages from many years before. The conservatives, including Kennedy, agreed.

While Ledbetter and Ginsburg lost the vote, Ginsburg was not prepared to let the case go, reading her dissent aloud in 2007 and called on Congress to change the discrimination law (a rare event for a Supreme Court justice).

In Chapter 6, Toobin explains that this dissent ended the "era of good feelings" among the Justices. Unanimous opinions fell from 45% to 25%. Conservatives almost always won. Stephen Breyer was the most "traumatized" liberal on the court. Toobin then gives a bit of Breyer's biography, showing that Breyer had an appetite for compromise. He was first seen as a technocrat, teaching complex administrative law. Toobin points out that such justices are important, as broadly ideological jsutices like Chief Justice Marshall can set down legal precedents that cause great harm, as Toobin thinks was the case in the first twelve decades of the court, based on three decisions: Dred Scott v. Sanford (endorsing the constitutionality of slavery), Plessy v. Ferguson (endorsing the

constitutionality of segregation) and Lochner v. New York (endorsing the constitutionality of freedom of contract), all of which in Toobin's opinion led to the subordination of the weak to the strong. Toobin then goes on to draw an analogy with those opinions and Roberts' criticisms of civil rights and affirmative action law. Breyer was especially exasperated, though partly because he had to write dissent after dissent throughout the latter part of his career and that the Roberts' court had decided to abandon precedent time and time again.

Part Two, Chapters 7-8, The Hunter, Lawyers, Guns, and Money

Part Two, Chapters 7-8, The Hunter, Lawyers, Guns, and Money Summary and Analysis

Chapter 7 opens with an attack on Antonin Scalia, the outspoken conservative, disappointed that he never became chief justice, was unable to overturn Roe v. Wade, and who craves the spotlight. Culture war issues drove him, as he often spoke to Catholic groups and encouraged Christians to prepare to be hated by elite secular social classes for religious commitment. Toobin then details a bit of Scalia's biography and his interest in changing second amendment jurisprudence, arguing that the second amendment protects an individual right to bear arms. Toobin points out that for much of American history, gun ownership was not controversial, even if people disagreed about how to interpret the second amendment. Only with the rise of crime in the 1960s did calls for gun control begin. It was Ronald Reagan who made gun ownership a liberty issue in the 1970s. The political and legal branches of conservatism joined forces on this issue. Scalia and Clarence Thomas were able to make their first chink in the armor of gun control in 1997.

But Toobin explains their greatest victory in Chapter 8. The story begins with a man, Robert Levy, a libertarian-leaning businessman who became a legal scholar starting when he was middle-aged. Levy was entrepreneurial in promoting his second amendment jurisprudence and was successful, composing litigants in ways that would appeal to the justices. After many challenges, a plaintiff named Dick Heller gave Levy his change in 2008, in the case of District of Columbia v. Heller. The D.C. lawyers claimed that the second amendment did not protect an individual right to own a firearm, but the Heller lawyers disagreed.

The split in Heller was 5-4, with the conservatives winning. Roberts asked Scalia to write the majority opinion in this case, something Roberts felt Scalia deserved, and Scalia made Heller a "textualist" and "originalist" manifesto. He was even honored by the liberals, who followed the same sort of textualist methodology in making the opposite case (or, rather, Justice Stevens did, writing for the minority). Heller simply changed the terms of the debate. In the 20th century, justices would never have spent thousands of words exploring seventeenth and eighteenth century sources.

Problems arose with Scalia's opinion when law scholars started to read it. It was historically inaccurate and in conjunction with Stevens' opinion showed that much of the law was indeterminate. Toobin contends that Scalia did exactly what he condemned in Roe: the creation of a new right.

Chapters 9-10, The Unrequited Bipartisanship of Barack Obama, Wise Latina

Chapters 9-10, The Unrequited Bipartisanship of Barack Obama, Wise Latina Summary and Analysis

Chapter 9 opens with Roberts inviting Obama and Vice President Biden to tour the Supreme Court's offices. The three men get along, despite the fact that both Obama and Biden had voted against Roberts's confirmation. In the coming weeks, however, Obama would lead the charge to overrule Alito's 2007 decision in the Lilly Ledbetter case, and he won the vote by large margins.

Toobin emphasizes that Obama took office facing more challenges than any president since FDR. He needed as many political friends as he could get to pass his legislative agenda and so took a low-temperature approach to his Supreme Court nominees. Obama's first nominee, David Hamilton, was dead on arrival. But Justice David Souter was about to step down and he had to be replaced.

Souter, given Toobin's description, was a moderate Republican who didn't care much for Washington's political culture. He and previous moderate Republicans prized stability and venerated precedent. He also had a distaste for the modern court, especially following Bush v. Gore, which the justices had a silent agreement not to bring up. Souter decided to step down after the 2008-9 term, and so a Democratic president had the first chance to nominate a justice in fifteen years, as conservative ideas like originalism had a great deal of power.

Many liberals wanted Obama to fight an ideological battle against these ideas, but Obama was not terribly interested. He had four suggestions: Elena Kagan, Sonia Sotormayor , Diane Wood and Cass Sunstein. Despite his accomplishments, Sunstein was too controversial on the left and the right. Janet Napolitano was added, but her political background made her politically radioactive. Elena Kagan was also an outsider shot, given her political background as solicitor general and having never argued a case in any court in her career. So she was left off the list as well. The field had two players: Wood and Sotomayor.

In Chapter 10, Toobin argues that Sotomayor was practically perfect as a Democratic nominee to the court, with excellent credentials, experience and politics. But Obama really liked Diane Wood. Toobin then reviews Wood's biography, which is impressive, and she was a defender of the "living Constitution" view along with Roe v. Wade. She had ruled in several abortion cases while on the Seventh Circuit. To the Obama Administration, she was a fighting and a thinker, a counterweight to Scalia. But she

ultimately proved too controversial for Obama, who wanted someone who could build winning coalitions.

Toobin then turns to review Sotomayor's biography which is a perfect "American story." Obama liked Sotomayor for many reasons, but in particular because she had a kind of quiet radicalism, arguing that minority and female voices on the court brought a much needed perfective, which led her to make her later famous "wise Latina" remark. So she too was controversial, though on affirmative action rather than abortion. Wood looked less controversial given that abortion was more popular than affirmative action. But Obama, in his interview, came to like Sotormayor better and made her the new nominee.

The nomination process was challenging, as confirmation interviews were difficult since Bush's disastrous nomination of Harriet Miers. She emphasized in her Senate confirmation hearing that she would not let her personal views on issues like affirmative action color her decisions if there were more important factors, which allowed her to get through. She was confirmed just prior to the (on the left, infamous) case of Citizens United v. the Federal Election Commission.

Part Three, Chapters 11-13, Money Talks, Samuel Alito's Question, The Rookie

Part Three, Chapters 11-13, Money Talks, Samuel Alito's Question, The Rookie Summary and Analysis

The fight over Citizens United was just a manifestation of a broader debate in American political life about the relationship between corporate power and free speech. Those on the small government, libertarian side hold that corporations should be able to act as they like, whereas those on the larger government, left-liberal side hold that corporate contributions should be restricted to protect the integrity of the democratic process. The saga is over one hundred years old, starting with the 1886 case, Santa Clara County v. Southern Pacific Railroad, an odd case where corporate personhood was endorsed by the SCOTUS but there was no clear explanation for their decision.

The court at the time was quite conservative and this trend continued into the 20th century, where in Lochner, the court endorsed liberty of contract as part of the 14th amendment, which in Toobin's left-liberal view means that they endorsed the rights of business owners over workers. It is here, Toobin thinks, that judicial activism began, and it generated a political backlash in the form of progressivism. Teddy Roosevelt was brought to power by progressives and received massive corporate contributions, but then turned on his contributors and attempted to restrict the contributions that helped him win. From hear, the influence of money in politics only grew.

Only after Watergate did campaign finance reform in the 20th century get off the ground, with the Election Campaign Act Amendments of 1974. The court restricted the Act's power in the 1976 case of Buckley v. Valeo, a complex and contradictory case. The court held that money is speech and this created a new area of campaign finance law. Toobin then reviews some of the recent history, such as John McCain's crusade for campaign finance reform following his embarrassing role in the "Keating Five" scandal in 1989, leading to the McCain-Feingold law. The Roberts court, in Toobin's opinion, truncated the law through the Wisconsin Right to Life decision. Souter wrote the dissent, arguing that McCain-Feingold had been overruled. But the real end of the law came in Citizens United.

The organization "Citizens United" was founded by Floyd Brown, a conservative attack ad artist who produced the infamous "Willie Horton" ad in the 1988 election. Brown and David Bossie, his sidekick, published the book "Slick Willie" on Bill Clinton in 1992. But once George W. Bush was elected, their importance subsided until the 2008 election, when Citizens United made a documentary attacking Hillary Clinton known as "Hillary: The Movie." But Bossie was worried the documentary might run afoul of campaign finance law, as it was unclear how to characterize the documentary (for money? Just for politics?). The FEC ruled that the documentary was "electioneering communication" and banned its use prior to the end of the primary. To press their free speech case, Bossie

hired Ted Olson, a famous conservative lawyer who had argued in front of the Supreme Court for many years. Olson was an excellent legal strategist, and so limited the Citizens United objection to Hillary: The Movie's release on Video On Demand, barred because Citizens United have received a bit of corporate money. To win, Olson had to convince the court that they did not have to rule McCain-Feingold unconstitutional, only that the law did not apply to documentaries or nonprofits.

The federal government's lawyer in the case (always the solicitor general) and this time Malcolm Stewart, a qualified, stand-up lawyer whose performance was a disaster. The morning the case began, Justice Alito was uncomfortable due to the public nature of the case. He rarely asked questions, but when he did they were good ones. Alito pressed Stewart on whether the federal government had the authority to regulate a book under the same law, and Stewart said yes. Roberts then was prepared to go for the jugular, rendering Stewart's reasoning absurd. Now the case was about government censorship. According to Toobin, Stewart should have dodged the questions, but the damage was done.

Kennedy's majority decision, which went so far as to claim that McCain-Feingold's restrictions were unconstitutional, overturn an earlier 1990 decision and gut the Tillman Act. The conservatives then rallied and transformed Citizens United into a force that would rewrite decades of constitutional law, shocked the liberals. Souter's dissent was one of his last, and he used it to attack the conservatives for using improper procedure, and Roberts was worried that the opinion would damage the court's public standing. Roberts responded ingeniously, delaying the decision until the next term, issuing a "Questions Presented" brief that would make their decision clear, and pre-empt the claim that the liberals had been sandbagged. The liberals had no choice but to stand down.

In the reargument, Kagan would replace Souter, and she had never argued a case in the courtroom. Olson realized things were going his way and so played it safe. The liberals did their best to raise public alarm. But in the reargument, Kagan was still solicitor general, and was arguing her first case before the court. The liberals helped her, and she was able to state that the government had changed its answer to the question that threatened Stewart. Toobin then takes a tangent into Kagan's biography. In sum, Kagan's background was impressive, but her first failed nomination, through a series of odd events, put her in place to be an effective second nominee. After the second argument of Citizens United, however, the votes were the same, 5-4. When the decision was issued, it was clearly a case that pit Republicans against Democrats. Republicans, according to Toobin, were the moneyed class, fighting campaign finance law, which Democrats ardently supported. Roberts was prepared to help the Republican Party, a lot.

Chapters 14-15, The Ninety-Page Swan Song of John Paul Stevens,

Chapters 14-15, The Ninety-Page Swan Song of John Paul Stevens, Summary and Analysis

When Sandra Day O'Connor was the court's swing vote, she tended to split the difference, giving one side 51% and the other 49%. But Kennedy's swing vote vacillated wildly from case to case (from conservative to liberal, often in opposition to government power) but he had a particular attachment to the first amendment. In his Citizens United decision, he saw the case as a free speech case. It was simple for him, as the government was muffling political voices.

But for John Paul Stevens, a consistent liberal, the case was complicated and had critical implications for American politics. Stevens was nearly 90 at the time and in surprising shape, and Toobin then reviews his biography. Nominated by moderate Republican, Gerald Ford, he too was a moderate Republican, settling into the ideological center, but as contemporary Republicans shifted to the right, he increasingly found himself on the left. He was usually optimistic, that is until Roberts and Alito were nominated to the Court. In Kennedy's Citizens United decision, he attacked Roberts directly for overreaching and turning a narrow case into a much broader one.

Stevens' decision was ninety-pages, the longest of his career. He attacked every one of Kennedy's arguments. His conclusion despair, as the Court violated the American people's "common sense." Kennedy's announcement on January 21st, 2010, was widely observed. Stevens read some of his dissent as well, and stumbled a bit, signaling his exist.

In Chapter 12, Toobin introduces White House counsel and fierce Democratic partisan Bob Bauer, who realized that Citizens United would empower Republicans by giving corporations more power to dominate. It was unclear what the Obama Administration should do, especially what it should say in the State of the Union Address about it. Justices were rarely present at such addresses, at least all of them. Addresses were highly political. But due to the administration's anger over Citizen United, President Obama decided to attack the Supreme Court directly, and the Democrats rose with an ovation. Cameras were then trained on the justices, and famously, Alito shook his head and mouthed, "Not true." Toobin thinks that Obama actually understated the problem, reflecting Toobin's highly partisan tilt throughout the book. It was now clear, however, that the White House and the Roberts court were at odds. It became clear later that Roberts thought Obama's behavior was deeply troubling.

Two months later, Stevens's departure was imminent. Ginsburg's husband also died at the same time and she showed up for work the next day.

Part IV, Chapters 16-18, The Retired Justices Dissent, Softball Politics, The Tea Party and the Justice's Wife

Part IV, Chapters 16-18, The Retired Justices Dissent, Softball Politics, The Tea Party and the Justice's Wife Summary and Analysis

Part IV refocuses on Sandra Day O'Connor, still the most famous of the Supreme Court justices, as she was the most influential woman in American history. Typically when SCOTUS judges retired, they died, but not O'Connor. She had retired to help her husband, who had Alzheimer's. After Roberts's nomination, Bush nominated Harriet Miers, who was completely unqualified. While O'Connor had voted with the conservatives in Bush v. Gore, she came to regard the Bush Administration as a disaster, especially against Bush. But in 2006 she stepped down, to be replaced by Alito. O'Connor's departure was bittersweet, as she relished the time away from the court but had to take care of her husband until his death in 2009.

O'Connor then began to push for increased civics education across the country, to help citizens know more about how their government works. She was also concerned with judicial independence in the appointment process. She also traveled to Iowa to defend the three judges who legalized gay marriage. After pushing for a failed ballot initiative in Las Vegas in 2010, her stature was diminished.

O'Connor was initially enamored with John Roberts, but she came to be upset by his decisions. Roberts represented the Republican Party of his era, not hers. She thought Roberts had an agenda (though Toobin thinks this exaggerates the extent to which Rehnquist did not). And O'Connor was especially upset by Citizens United, as her work for an independent judiciary was all about insulating government from the effects of money.

Toobin then turns to discuss Souter's life after serving on the SCOTUS. He spent much of his time defending a more expansive and non-literalist reading of the constitution.

Chapter 17 turns to the nomination story of Elean Kagan, who would replace Stevens. Napolitano was still too controversial. Obama added moderate liberal Merrick Garland to the list as a safe bet if his party lost too many seats in the 2010 election, along with Sidney Thomas. But the real choice came down to Diane Wood and Elena Kagan. Kagan had the advantage of not having to prove her political loyalties, but Obama supported Wood, given her cerebral nature and even temperament. He thought she could help win, but choosing Wood meant fighting over abortion in the Senate. Kagan

was also much younger, suggesting a longer tenure and a greater legacy for Obama. This was one of many reasons Obama eventually went with Kagan.

But during the nomination, the Wall Street Journal ran a large front-page photograph of her playing softball, which the New York Post used to suggest she was a lesbian, as she was never married. The picture was circulated and it took on a life of its own. The Obama administration fought back by insisting based on friends' testimony that she was heterosexual. Kagan was prepared by the nomination process after that, but Republicans made her politics an issue, especially on gun control. In the nomination process, it became clear that the Republicans were uniformly originalists, a great achievement for Scalia. Kagan did not fight their questions, but Toobin thinks she should have tried harder to refute them.

In Chapter 18, Toobin notes that Kagan' confirmation was the last piece of good news Obama would get in 2010. The political energy belonged to the Tea Party. The Tea Party was similar to Republican orthodoxy but it was especially skeptical of experts and believed strongly in citizen activism, also caring deeply about the Constitution, even sometimes obsessed with its history. Small government was a constitutional requirement. Toobin points out that they were so strongly originalist that only one justice since World War II agreed with them - Clarence Thomas. Thomas's wife, Ginni Thomas, worked with them, participating in a number of political activities. Toobin then describes her activities.

Both Thomas's disagreed with Obamacare. Obama had sought to compel people to buy health insurance from large healthcare corporations, so Obama capitulated to the political reality: no major health reform legislation could be passed without the so-called mandate requiring people to fund these corporations on pain of a penalty. During the run-up to the passage of Obamacare (the Affordable Care Act), no one had suggested that the mandate was unconstitutional. And many conservatives had endorsed it in previous years. It was first raised in 2009, changing the debate and Virginia Thomas made the case. Her activity became some public that she drew journalistic scrutiny.

Chapters 19-20, The Thomas Court,

Chapters 19-20, The Thomas Court, Summary and Analysis

Toobin begins Chapter 19 recalling the Anita Hill controversy where Justice Thomas was accused of sexually harassing a staff member, Anita Hill. Toobin claims that evidence has surfaced since his confirmation that the allegations were true, some of which could have been made available ahead of time. Apparently, Thomas and his wife spent most of their time since only interacting with people that agree with Thomas's version of the events. But Thomas is not only known for the Anita Hill controversy, but for his silence on the bench, last asking a question in February 2006. Apparently he reclines during oral arguments, but his silence should not be taken as evidence that he has nothing to say.

For instance, Thomas was partly responsible for reviving the 2nd amendment argument, which illustrates his role as a conservative intellectual path-breaker. Thomas is in fact so "extreme" that he believes the constitution requires a "laissez-faire government." Thomas's influence, however, is unusual due to the fact that he seldom writes majority opinions, instead influencing ideas on the court and outraging his ideological opponents. He is also fairly indifferent to precedent despite being a strict originalist. The intent of the framers trumps all.

New questions about Thomas were raised when his wife began to criticize Obama's healthcare plan publicly. Seventy-four congressmen asked Thomas to recuse himself from the Obamacare ruling, though Toobin thinks Thomas was right not to do so.

Toobin really brings Thomas in for scrutiny due to his view that much of the New Deal jurisprudence, which reinterpreted the commerce clause much more narrowly than before, was unconstitutional. Thomas first indicated this view in US v. Lopez in 1995. If Thomas's view ruled, Social Security, Medicare and Medicaid might all be ruled unconstitutional. And this view would affect Thomas's view in the Obamacare ruling.

Turning to Chapter 20, Toobin recounts that the Democrats were routed in the 2010 election cycle, with the Republicans taking back the House on the wave of Tea Party activism. The court, however, remained much the same, with Kagan becoming Ginsburg's protégé (both were secular Jewish women from New York City and ultimately opera buddies, though Kagan did develop a good relationship with Scalia). Kagan would write her first dissent in 2010 and become an influential liberal justice, with Alito establishing the same for himself on the conservative side, though he was considerably less libertarian and more authoritarian than Roberts, Scalia and Thomas. He would often oppose them on morals issues, where he was more inclined to let state restrictions stand. Roberts, Toobin argues, continued on his quest to "deregulate American politics" which apparently depressed Breyer. Toobin remarked that in the

1960s it was the liberals who were activists, and the conservatives ... conservative. But in the 2000s and 2010s, the conservatives were the activists.

Part Five, Chapters 21-23,

Part Five, Chapters 21-23, Summary and Analysis

Obama bet his political career on Obamacare and conservatives fought him at every turn, including in the courts, arguing the mandate was unconstitutional, an argument that did not exist until very recently. In preparation for legal challenges, Elena Kagan in a private email supported attempts to build a counterargument. The key conservative argument is that the commerce clause of Article I of the Constitution, which authorizes Congress to regulate commerce between the states, was meant to have a limited scope such that Congress was only permitted to regulate commerce when it concerned interstate economic transactions, not any transaction at all, especially not forcing people to buy private health insurance. For decades every act of Congress had passed the test. A threat to this wide reading threatened the activist government vision of many liberals.

Obama's lawyer, Neal Katyal, held that to defend the healthcare law, the Obama Administration had to be prepared to admit that the commerce clause does rule out some possible legislation. Katyal's answer was that it prohibited the regulation of "non-economic" activity. But Katyal was only the temporary solicitor general and did not keep the job, as Obama went with Don Verrilli. Verrilli would be the lawyer in the Obamacare case.

On Monday, Mark 26th, 2012, oral arguments in the Obamacare case opened up (as Chapter 22 opens). Council, Verrilli, the new Solicitor General, argued that the mandate is a penalty, not a tax. Scalia and Kennedy quickly attacked, asking whether the government had the power to regulate someone just because they decided not to buy something. Roberts and Alito quickly joined in. Thomas didn't need to join in to signal his view. Toobin severely criticizes the conservatives for not caring about precedent and misunderstanding New Deal jurisprudence on the commerce clause. Scalia asks his famous broccoli question, that is, whether the constitution allows forcing people to buy broccoli as an example raised in other cases as a "reductio ad absurdum" of the Obama Administration's view. After Verrilli stumbled, the liberals jumped in and helped Verrilli's defense. Ginsburg argues that not buying health insurance constitutes commerce since in case of emergency without insurance, one would want to buy it.

Next Kennedy asked Verrilli whether the commerce clause specifies any limits at all. Verrilli couldn't name any good examples, as in the past sixty years he would not have had to do so. When Paul Clement, the lawyer for the prosecution, stood up, Breyer tried to show in his line of question the radical nature of the conservatives' argument. The court in the past had repeatedly upheld Congress's right to create commerce for themselves. Sotomayor then countered that states had the right to force automobile drivers to buy car insurance, so what could the objection to the mandate be? But Toobin thinks the justices were mostly locked in.

In the SCOTUS chamber, the justices argued for six hours, the longest they had devoted to a case in forty-five years. One big question was severability, whether striking down the mandate required striking down the entire ACA. Judicial restraint suggests that the court should strike down as little of a law is possible, but this was not enough for Kennedy, as he thought eliminating the mandate would involve as much of an imposition as voiding the entire act. After deliberation, Roberts seemed to lean in the conservatives' direction, but his vote was unclear.

When the justices voted, they were divided 4-4 prior to Roberts's decision. Obamacare would come down to his judgment. His vote would symbolize his court more than the Citizens United case. He did think Congress exceeded its powers and assigned himself writing a decision. Roberts was concerned about overruling the whole law, as this seemed to be an extraordinary overreach of judicial power. Roberts had no affection for Obama and was a lifelong conservative, but he wanted to preserve the Court's place as the final arbiter of the nation's disputes. The court would be at the center of the forthcoming election campaign. So Roberts started to look for a way out.

Verrilli provided him with the out, as he suggested that the mandate might still be regarded as a tax, even though Congress thought it might be more effective if it was called a tax. The word "effective" amused Roberts, as what Congress called it was not definitive of the mandate's function. When Roberts went wobbly, the conservatives, especially their law clerks, were outraged and started to speak out, which was a breach of court decorum. The conservatives, however, had overplayed their hand, only allowing Roberts to throw out the whole law. They still lobbied him but Roberts would vote to uphold the law under a special condition (while throwing out the Medicaid expansion as a violation of states' rights).

When the decision was announced, Roberts was almost mournful. The individual mandate, he says, compels people to become active in commerce. That is a violation of the commerce clause. However, that meant going to the second part of the government's argument, which held that the mandate is a tax. With this argument Roberts agreed. The judgment of the ACA would then be left to the people.

With this, Toobin moves to the epilogue. Conservatives quickly turned on Roberts. The outrage was understandable, as the conservative movement had lost an important battle. Roberts had never before sided with the liberals, and his argument that the mandate was a tax was dubious. But with his decision, the Supreme Court would no longer come under vicious attack by Democrats, buying the court huge political space for future rulings, taking on a great many controversial issues. Roberts did not poison his relationship with the other conservatives either. Roberts had acted as a leader, making the court his own.

Toobin concludes that John Roberts is still a powerful advocate for "the full Republican agenda" and is the candidate of change. While he refrained from extremism, he is no moderate. The conservatives have proven just how much the Constitution and its values can change, showing that the Constitution lives.

Characters

Chief Justice John Roberts

The 17th and current Chief Justice of the United States, appointed by President George W. Bush in 2005. Roberts is perhaps the chief character of "The Oath", the book being, by and large, an extended criticism of Roberts' decisions and judicial philosophy throughout his tenure as chief justice. While Toobin treats Roberts with great personal respect, never suggesting that he is dishonest or anything but thoughtful, careful, knowledgeable and principled. However, Roberts is brutally attacked for being a partisan of the Republican Party and convinced that he should use the constitution to promote conservative ideas at the expense of precedent.

Roberts claims to be "conservative" in the sense of believing in a measured approach to judicial review that does not legislate but simply reviews whether laws are constitutional as determined by court history. But Toobin argues extensively that this is not the real way that Roberts operates. Instead, he repeatedly has used the law to empower corporations (in Citizens United in particular) and to attempt to return the court to pre-New Deal Jurisprudence on the commerce clause.

In fact, Toobin is so concerned about Roberts that he ends the book warning his readers that Roberts cannot be trusted despite the fact that he ruled in the correct (read: progressive) way in Sibelius. Roberts ruled the way he did to buy the court legitimacy so that they could continue to push their conservative agenda.

President Barack Obama

The 44th president of the United States, Obama primarily plays the role of thoughtful, pragmatic hero attempting to carefully preserve democratic politics and progressive political aims despite an activist, aggressive, Republican majority on the Supreme Court. Toobin repeatedly paints Obama as an "unrequited" bipartisan who believes primarily in democratic-led politics and not judicial activism. His nominees to the court, Elena Kagan and Sonia Sotomayor, were measured, qualified center-leftists and reflected Obama's pragmatic priorities.

Roberts is consistently contrasted with Obama unfavorably. Both men share a careful, patient attitude towards politics and both are deeply ideologically committed to certain goals and aims. But Obama was horrified by the Citizens United decision, as it opened the floodgate to money in politics, and attacked the Roberts court to its face in his 2010 state of the union address, and rightly so on Toobin's progressive view.

While in some ways Roberts is the main character, he is also a kind of villain. Obama is the understated hero, though he is not as central as Roberts. Instead, Obama is used to show what kind of thinker and politician Roberts ought to be and could have been. At the very least, Roberts could share Obama's love of democracy and his sense of

importance that the political process be protected from the rich and powerful, even if he must be a conservative. In sum, Roberts would be good if he were a pragmatic progressive rather than an ideological conservative.

Justice John Paul Stevens

An associate Supreme Court Justice from 1975 to 2010, appointed by Republican Gerald Ford but serving as one of the more liberal justices as, on Toobin's view, Republicans moved to the right. He was replaced by Elena Kagan.

Justice Sandra Day O'Connor

A retired associate justice of the Supreme Court, serving from 1981 to 2006, O'Connor was a moderate Republican swing-vote on the court and the first female justice. She was horrified by Citizens United.

Justice Stephen Breyer

A liberal associate justice on the Supreme Court known as a pragmatist and often frustrated by casting losing votes.

Justice David Souter

Souter served as a Supreme Court Justice from 1990 to 2009. He was replaced by Sonia Sotomayor and generally was on the liberal side of the court.

Justice Ruth Bader-Ginsburg

A current associate justice of the Supreme Court, who started serving after appointed by Bill Clinton in 1993. She is a solid liberal and prior to her appointment fought for the advancement of women's rights.

Justice Samuel Alito

An associate justice appointed by George W. Bush in 2006. Alito is a reserved conservative, sometimes with a more authoritarian conservative bent.

Justice Clarence Thomas

An associate Supreme Court justice, the second African American justice and deeply conservative, advocating a return to pre-New Deal jurisprudence on the commerce

clause. Toobin is bitterly critical of Thomas, reviewing the Anita Hill scandal that almost cost him his seat and arguing that his views are intemperate, ideological and extreme.

Justice Antonin Scalia

The longest serving justice presently on the court, appointed by Ronald Reagan in 1986, Scalia is an outspoken, energetic and emotional justice, on Toobin's view, and a reactionary conservative. He is a powerful advocate of "textualism" a view of judicial philosophy close to originalism.

Justice Anthony Kennedy

An associate Supreme Court justice known for his power as a swing vote on the court, often determining the outcome. He leans conservative, but supports liberals on a number of issues. Toobin characterizes him as a free speech radical.

Justice Sonia Sotomayor

The first latino female associate justice, Sotomayor is a highly qualified and deeply committed liberal on the court. She replaced Justice Souter, nominated by President Obama.

Justice Elena Kagan

Another female Obama appointee to the court and a likely reliable liberal vote.

Objects/Places

The Supreme Court of the United States (SCOTUS)

The third branch of American government is the "highest court of the land" that can overrule legislation based on its assessment of whether the law is constitutional. The SCOTUS has nine justices and the book concerns the members of the SCOTUS over the last ten to fifteen years as well as the decisions they have handed down.

Washington D.C.

Where the SCOTUS is located and many of the justices live.

Harvard University

Perhaps the most prestigious American university and where Obama and Roberts both went to law school.

Supreme Court Nomination Process

The process, carried on by the US Senate and initiated by the President's nomination, confirms or rejects Supreme Court justices.

Judicial Activism

Usually a term of opprobrium, the term is supposed to refer to the attempt by judges to go beyond their typical status of reviewing laws and instead "making laws" exceeding their judicial function by taking on a legislative function.

Originalism and Textualism

Judicial philosophies which hold that in the resolution of judicial conflicts, judges should appeal to the original intent of the writers of the constitution and related documents or the original meaning of the text. These judicial philosophies are typically used to justify conservative legal perspectives.

District of Columbia v. Heller

The landmark 2008 case where the SCOTUS held that the second amendment protects an individual's right to possess a firearm.

Conservatism

Toobin's term, commonly used in contemporary American politics, to refer to a cluster of views including allowing corporate free speech, limiting government power to regulate the economy, opposing affirmative action and abortion, etc.

Progressivism

A loose term commonly used in contemporary American politics to denote "liberal" positions that some supreme court justices affirm, including restricting corporate free political speech, endorsing affirmative action and abortion rights, and loosing the government to regulate the economy as it sees fit.

Campaign Finance Reform

A legislative process generally denoting the restriction of monetary contributions to political campaigns and causes. Citizens United famously restricted the reach of some campaign finance reform.

2nd Amendment

There is an old debate over the meaning of the 2nd amendment to the US Constitution which some claim endorses an individual right to own a firearm. The Heller decision, led by the court's conservatives, endorses this view, which Toobin thinks is incorrect.

Commerce Clause

The commerce clause of the US Constitution restricts Congress's power to regulate the economy to commerce between the states. But after the New Deal era began, the commerce clause was read as basically dormant, as not restricting Congressional activity at all. The court's conservatives hold that the commerce clause does restrict some Congressional activity. Toobin excoriates them for holding this position which he thinks is radical and extreme.

Bush v. Gore

The 2000 court case over the electoral controversy surrounding the 2000 federal election between George W. Bush and Al Gore. The court was bitterly divided and the victory for Bush soured the relationship between many of the court's members. This partisan decision (as Toobin sees it) hurt the legitimacy of the court in the eyes of the public.

Citizens United v. Federal Election Commission

The landmark 2010 Supreme Court decision holding that the First Amendment forbids the government to restrict political payments by independent corporations and unions. Progressives across the board, from President Obama, to former Supreme Court justices (some of whom were nominally conservative) were horrified at what appeared to them to be giving permission to corporations to dominate American politics.

Roe v. Wade

The landmark 1973 Supreme Court decision that legalized abortion that Ruth Bader Ginsburg in particular is interested in protecting, though the conservatives would prefer to overturn it.

National Federation of Independent Business v. Sibelius

The 2012 landmark Supreme Court case which upheld the Patient Protection and Affordable Care Act as constitution, upholding the individual mandate. Toobin thinks that had Justice Roberts not broken with the conservatives he would have deeply undermined the perceived legitimacy of the court, adding to the threats produced by the rulings in Bush v. Gore and Citizens United.

Lochner v. New York

The landmark 1905 case that held that "liberty of contract" was covered under the due process clause of the 14th amendment, a decision widely reviled among liberal constitutional lawyers. Toobin actually compares the case to pro-slavery and pro-segregation rulings like Dred Scott and Plessy v. Ferguson.

Themes

The Compatibility of Conservatism and Judicial Activism

A typical complaint about the Warren Court, a well-known liberal court responsible for a great deal of "liberal" rulings, was that it was guilty of "judicial activism." According to many conservatives, judges should merely review the law, not make it. Judges rightly have a passive attitude, respecting precedent and not attempting to undemocratically impose their will on others. The liberal justices were therefore poor judges, activists, that is, not real judges.

Toobin's complaint is that the conservative justices are presently dishonest. They pretend to be conservatives in the sense that they oppose judicial activism. But in fact they act as Republican Party partisans, imposing their view of the law on the nation as a whole. The Roberts Court is a supposed contradiction in terms, namely a conservative activist court. But Toobin points out that a conservative activist court is not a necessary contradiction but rather a reality of consistent attitudes about what the law should be. Consequently, Toobin warns the reader to be wary of conservatives, which are really ideological conservatives in judicial conservative clothing.

To make his case, Toobin cites a number of cases that liberals typically decry, such as Bush v. Gore and Citizens United. Both were attempts to legislate from the bench. Sibelius, on the other hand, was a close call, where Roberts decided to show some sense, decorum and statesmanship by refusing to overturn a law that had been passed by majorities in the house and senate, namely the Affordable Care Act.

The Corruption of Money in Politics

Toobin is a progressive and a century-old concern of progressives is the domination of democratic government by private, corporate power. The ideal of democratic governance is that all people have equal voice and so have an equal impact on political outcomes. This on many liberal views is what justice requires. The danger of great income inequality and the concentration of power and influence in the hands of large corporations is that they will corrupt this process, tilting democratic outcomes in their direction.

A variety of checks on corporate power were put into place by progressive reformers throughout the 20th century, but many conservatives chafed at these restrictions, arguing that they restricted free speech and liberty generally. These concerns made an impact on the law through conservative justices, who would sometimes strike down or limit campaign finance laws. Such actions always worried progressives.

But there was no greater defeat for progressive law on the matter than Citizens United, which Toobin almost hysterically compares to previous widely vilified rulings like Plessy and Dred Scott. Citizens United, by allowing a greater number of corporate and union contributions to politics, would fundamentally destroy democracy and Toobin thinks that Roberts and the conservatives more or less knew this when they handed down the ruling, as he thinks they did it to strengthen funding for the Republican Party. Toobin is certainly right that progressive reaction often agreed with his assessment, as Obama himself attacked the Supreme Court's conservatives on this matter to their face in one of his state of the union addresses.

The Greatness of New Deal-Era Commerce Clause Jurisprudence

Another standard progressive view is that there is an important distinctions between civil and political liberties on the one hand and economic liberties on the other. The former liberties include freedom of speech and religion and the right to vote, whereas the latter includes the right to hold private property and liberty of contract. Progressives tend to regard the latter liberties with suspicion and so react negatively to court cases that would protect economic liberties as constitutional rights. It was for this reason that so many progressive and liberal legal scholars vilify the 1905 Lochner decision, which held that liberty of contract was grounded in substantive due process.

For a long time after the New Deal, the Supreme Court read the Commerce Clause in the US constitution, which restricts Congressional legislation on economic matters to regulating commerce between the states, had no real power to limit the Congress. The commerce clause was "dormant" as giving it teeth would harken back to pre-New Deal jurisprudence, a horror to all on the left. The 1995 Lopez decision indicated that some conservatives were ready to give the Commerce Clause power again, but it was not until Sebelius that it became clear that a majority of the court (the conservatives) would revive the Commerce Clause and give it power to overrule federal legislation. This is why Toobin is so critical of the conservative ruling in the case, as it threatened to revive a jurisprudential attitude that had long ago been rightly set aside.

Style

Perspective

Jeffrey Toobin, a contemporary journalist and commentator on CNN, is the author of "The Oath". His perspective, as a legal journalist, standards squarely on the legal left in the United States. This perspective is characterized by several commitments. First, there is a great concern to protect the ideal of human equality along many dimensions, gender, race, religion and sexual orientation and the protection of personal liberties, like abortion rights and free speech for individuals. Second, there is a great belief in activist government, where government power is used to protect rights, equalize opportunities, redistribute wealth and heavily regulate the economy. These actions are not seen as liberty-limiting but rather as an expression of the nation's democratic will.

This perspective manifests in several attitudes expressed throughout the book. First, Toobin prefers liberal justices who believe in a "liberal" or "living constitution" approach which allows judges to interpret the constitution very broadly. He is keen to emphasize the importance of campaign finance law, to prevent corporations from dominating democratic politics. For this reason, he excoriates the Roberts court for Citizens United. He also believes in a limited amount of economic freedom such that reading traditional economic liberties like liberty of contract into the constitution will lead to enormous injustice, which is why he is so negative about Lochner-era jurisprudence on economic rights and why he is so opposed to the general conservative argument with respect to the Sebilius ruling.

Tone

"The Oath" combines the tone of a journalistic account of various important recent events at the Supreme Court or related to it with tone of a progressive polemicist or editorialist. First, the journalistic tone covers most of the book. By and large, "The Oath" tells the stories of all the members of the present Supreme Court along with the stories of the justices replaced by Roberts (Rehnquist), Alito (O'Connor), Sotormayor (Souter), and Souter (Stevens). There are a variety of tales that illustrate the tone of a journalist rather than a strict biographer. First, there is considerably less biographical information and stage setting for the important events in the lives of the justices. Second, the tone proceeds at a relatively fast clip, focusing on dramatic flashpoints and offering brief generalizations meant to pack in the most amount of relevant information into the most pithy and consumable prose.

On the polemical side, its quite clear throughout the book that Toobin's intent in writing "The Oath" is to fit it into a broader narrative communicating the threat of conservative judicial activism, especially with respect to issues like campaign finance reform and economic freedom. Toobin favors restricting free speech and economic liberty throughout the book and chides the conservative justices for taking a different position.

In many cases the tone is simply sarcastic or straightforwardly critical. But in other cases, Toobin often goes over the top, which is most clear in his discussion of Citizens United, which we believes effectively handed the government of the United States over to big business.

Structure

The subtitle of "The Oath" is "The Obama White House and the Supreme Court" which suggests that the structure of the book is built around conflicts between the Obama Administration and the Supreme Court. But the book has a somewhat different structure than the subtitle suggests. Much of the book is built not around Obama but around the ins, outs and formation of the Roberts Court and its attitudes and treatment of various important legal and constitutional issues.

The book is divided into five parts, with a prologue and epilogue as bookends. Part One develops the contrast between Obama and Roberts, and discusses the similarities and differences between the two men. Both Obama and Roberts are highly competent constitutional law scholars, leaders and have a calm, dispassionate demeanor. But while Obama is characterized as a bipartisan, moderate pragmatist, Roberts is painted as a committed conservative ideologue who believes in conservative judicial activism. Part Two continues to expand on this theme but focuses more on Supreme Court Justices, especially Sonia Sotormayor. Part Three covers a number of issues surrounding the Citizens United ruling, including the background of the case in conjunction with the main lines of questioning during oral arguments.

Part four continues to discuss Citizens United and analyzes, among other things, Justice O'Connor's attitude about the case after she retired. It also analyzes the potential conflict off interest with Justice Thomas over the Obamacare case, as his wife vocally opposed the bill. Part Five then covers the controversy over the case and its ultimate ruling. The epilogue ends with a warning: despite Roberts' apparent statesmanship, he's a dangerous conservative ideologue.

Quotes

"So was Obama really the president? Barron's answer was, well, complicated." (Prologue, 1)

"But the greatest, and certainly the most important, difference between the two concerned the work of the Supreme Court. Both men gave considerable thought to the Constitution, and they reached different conclusions about its current trajectory." (Prologue, 16)

"The future president picked his fights—and chose to avoid this one over the Constitution. It wouldn't be the last time, either." (Chapter 1, 34)

"When I examined Judge Roberts's record and history of public service, 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." (Chapter 2, 36)

"For Roberts, the law, ultimately, was all about winning." (Chapter 2, 41)

"Appendix E gave Ginsburg a road map for the next decade of her life—she wanted to undo as many of that long list of laws as possible." (Chapter 4, 60)

"The justices built their judicial philosophies on the foundation of their prior lives." (Chapter 5, 74)

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (Chapter 6, 90)

"The true measure of Scalia's success in Heller was that he had changed the terms of the debate." (Chapter 8, 112)

"It was, as Heller demonstrated, just another way for justices to achieve their political goals." (Chapter 8, 115)

"As a group, they prized stability and venerated precedent." (Chapter 9, 123)

"Sonia Sotomayor could have been genetically engineered to be a Democratic nominee to the United States Supreme Court." (Chapter 10, 128)

"But then the lawyer for the government stood up to defend the FEC's decision, and a single question changed the case and perhaps American history." (Chapter 12, 163)

"With all due deference to the separation of powers." (Chapter 15, 196)

"What makes this harder is that it's my party that's destroying the country." (Chapter 16, 209)

"In short, the constitutional interpretations of the Tea Party conflicted with those of every Supreme Court justice who had served on the Court since World War II—except for one: Clarence Thomas." (Chapter 18, 232)

"This stereotype is wrong in every particular." (Chapter 19, 242)

"Truly, democracy is not a game." (Chapter 20, 260)

"You should do it." (Chapter 21, 264)

"Therefore, you can make people buy broccoli." (Chapter 22, 277)

"Conservatives and liberals, on the Court and off, recognized the health care decision for what it was: an act of leadership by the chief justice. It's John Roberts's Court now." (Epilogue, 296)

Topics for Discussion

Explain the contrast that Toobin draws between Obama and Roberts. Is the comparison accurate? What is it mean to illustrate?

What is conservatism, in Toobin's view? What does he think "judicial activism" means? In what sense does Toobin think that conservatives are judicial activists?

Why does Toobin prefer the liberals on the court to the conservatives? Give three reasons.

What is Citizens United? How did the court decide it? What was Toobin's objection to their decision?

What is Sibelius? How did the court decide it? What was Toobin's objection to their decision?

What is the commerce clause? Discuss the two historically dominate ways the court has interpreted it (pre-New Deal and New Deal era). How does the Roberts Court want to challenge New Deal era jurisprudence on the clause? How does Sibelius fit in?

Which conservative justice does Toobin like least? Why?