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II. Roberts Court

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“Split Definitive”

Slate

November 11, 2011

Lawrence Baum and Neal Devins

For the first time in a century, the Supreme Court is divided solely by political party.

All eyes are on the Supreme Court this week as it considers what to do with the landmark lawsuits challenging President Obama's health care legislation. While the question that intrigues court watchers is whether the nine justices will transcend their reputations as liberals or conservatives, it is a little-noticed irony that, for the first time in more than a century, the ideological positions of the justices on today's Supreme Court can be identified purely by party affiliation. What that means is that, for the first time in our political lifetimes, each of the four Democratic appointees has a strong tendency to favor liberal outcomes, while the five Republicans typically take conservative positions.

The days of liberal Republicans and conservative Democrats are behind us, and the days of judicial moderates from either party may soon seem a relic of the past. What does that mean for the future of the Affordable Care Act, and for the court itself?

This change has been brewing for some time, but with the August 2010 confirmation of Elena Kagan to succeed liberal Republican John Paul Stevens, the deal was sealed. In its 2010-11 term, the Court divided along partisan lines to a striking degree. An unusually high proportion of cases (18 out of 75) were decided by 5-4 votes on at least some portion of the outcome (or 5-3, with Justice Elena Kagan recused because of her work as solicitor

general). In 12 of those cases, including many of last term's most important rulings, the court's Republicans were all arrayed on one side, its Democrats on the other. These cases involved regulation of campaign funding the right to sue for violations of rights by a prosecutor's office, and state powers to enforce restrictions on immigration.

Far more telling, George W. Bush's and Barack Obama's appointees are particularly likely both to agree with each other and disagree with the other pair. According to data compiled by the SCOTUS Blog, Obama nominees Kagan and Sonia Sotomayor voted together 94 percent of the time last term; Bush nominees Samuel Alito and Chief Justice John Roberts were aligned 96 percent of the time. By contrast, these two pairs disagreed with each other more than 30 percent of the time overall (an extremely high percentage considering that more than 60 percent of the decisions were either unanimous or 8-1).

Justice Anthony Kennedy, a Ronald Reagan appointee, is generally thought of as the “swing” justice on the court, one who stands between the four justices to the left of him and the four to his right. That depiction of Kennedy is basically accurate. Last term, Kennedy was in the majority in all but two of the Court's 5-4 decisions. But that doesn't mean Kennedy stood equidistant from the Court's liberals and conservative blocs. His rates of agreement on the Court's judgment in the 2010 term ranged from 83 percent to 90 percent with the other four Republicans; his rates of agreement with the Democrats

ranged from 66 percent to 74 percent.

At one level, none of this seems very surprising. We have become accustomed to a political world that features strong polarization between the parties. Congress is sharply and bitterly divided along partisan lines, and President Obama has achieved little success in winning Republican votes for his major initiatives. Why should the Supreme Court be any different? But that obscures the fact that, at least until last year, the Supreme Court was different. The court has often featured close divisions between ideological factions, but those divisions have usually crossed party lines rather than following them. Going back at least as far as the late 19th century, there has never been another year on the court like the 2010 term, when there was a contingent of Republican conservatives on one side and a contingent of Democratic liberals on the other side.

Indeed, what's striking is how far the court has departed from this sort of partisan polarization. The "Four Horsemen" who regularly voted to strike down New Deal legislation in the 1930s included a Democrat—Woodrow Wilson appointee James McReynolds—and the three justices who most regularly opposed those men included two Republican appointees—Harlan Fiske Stone and Benjamin Cardozo. In the famously "liberal" Warren Court of the 1950s and 1960s, which adopted a wide array of new rules expanding legal protections for civil liberties, two of the leaders in that effort were selected by President Eisenhower—William Brennan and Chief Justice Earl Warren himself. For their part, the justices who questioned much of the court's civil liberties revolution at that time included FDR appointee Felix Frankfurter and, later, Kennedy appointee Byron White.

As the court gradually moved to the right beginning in the 1970s, White abetted much of that effort while Republican appointees such as John Paul Stevens, David Souter, and (in the later portion of his career) Harry Blackmun stood in the liberal opposition, while other Republicans such as Sandra Day O'Connor and Lewis Powell took relatively moderate positions.

What, then, brought about the partisan court of the 2010 term? The simple answer is changes in the selection process of justices. From the 1940s until the election of Ronald Reagan, the political parties were anything but polarized. Conservative Southern Democrats and liberal Rockefeller Republicans were important counterweights within both parties. Indeed, George Wallace justified his third-party bid for president in 1968 by saying that "there's not a dime's worth of difference between the Democrat and Republican parties."

Supreme Court appointments reflect these larger trends. Before party polarization took hold, ideology was not the controlling factor in court appointments. Presidents gave attention to other considerations, such as rewarding political allies, appealing to voters, and avoiding confirmation battles in the Senate. For those reasons, Democratic presidents have often selected justices who turned out to be conservative, and a good many Republican appointees turned out to be liberal.

President Harry Truman's choices of relatively conservative nominees reflected his interest in rewarding political associates rather than choosing reliable liberals. And President Eisenhower's choices of Warren and Brennan resulted largely from political (but not ideological) considerations. Warren helped Eisenhower secure the 1952

Republican presidential nomination; Brennan was appointed to the court's so-called Catholic seat because Eisenhower wanted to appoint a Democrat to demonstrate his ability to transcend political partisanship. Kennedy appointed White, his deputy attorney general and a longtime supporter (dating back to White's writing the intelligence report on the sinking of a boat piloted by Kennedy during World War II). Richard Nixon, although criticizing Warren court criminal justice rulings, discounted ideology in his efforts to appoint a Southerner to the court. Gerald Ford's appointment of John Paul Stevens was directly linked to Watergate and Ford's need to rise above politics.

This pattern continued even as the larger political system was becoming more polarized. Strongly conservative Ronald Reagan chose relatively moderate Sandra Day O'Connor because there was only a small pool of credible Republican women from whom to choose. More striking, Reagan Attorney General Edwin Meese thought the pool of conservative Republicans so weak that he set about to devise strategies to deepen that pool for future presidents.

Today, appointment strategies have changed. As politics has become even more polarized, presidents have given greater emphasis to the goal of choosing ideologically reliable justices. More than anything, Republican presidents are now under great pressure to appoint true blue conservatives. From 1969 to 1991, even though Republicans appointed 12 justices (and Democrats none), the court frequently backed liberal outcomes. By 2001, when George W. Bush became president, the rallying call of conservative Republicans was "No More Souters." Indeed, when Bush

initially chose Harriet Miers for what became Alito's seat, vehement criticism from conservatives who doubted her ideological reliability figured into Miers' decision to quickly withdraw, underlining changes in the political atmosphere.

For their part, Bill Clinton and Barack Obama have contributed to the court's partisan divides by nominating four liberals to the court. And while some Democratic partisans lament that these justices are nothing like earlier liberals such as William Brennan or Thurgood Marshall, it is nonetheless true that today's Democratic nominees are distinctly to the left of all their Republican colleagues.

All this could change. But it's unlikely unless and until partisan polarization declines. Future appointments, like the most recent ones, will emphasize ideological reliability over anything else. And because presidents will look for nominees whose ideological views are deeply rooted, the justices who are selected will be less likely to move toward moderation after they join the court.

The court's strong polarization does not necessarily mean that the justices will divide strictly along partisan lines when they address the constitutional challenge to the healthcare law. Even on politically controversial issues, the court frequently departs from such partisan divisions. But because the court is now composed solely of Democratic liberals and Republican conservatives, decisions that follow partisan lines have become far more likely. If this situation continues, as we think it will, the most powerful effects may be on how Americans think about the Supreme Court as an institution.

“Chief Justice Roberts and the Changing Conservative Legal Movement”

The Witherspoon Institute

July 10, 2012

Joel Alicea

The clash between Chief Justice Roberts’ opinion and that of the joint dissenters is best seen as a clash between two visions of judicial restraint, and two eras of the conservative legal movement.

At the sprightly age of 57 and less than seven years into his term as chief justice, John Roberts looks like a man whom time has left behind. The reaction among legal conservatives to the Roberts opinion in *National Federation of Independent Businesses v. Sebelius* (the healthcare case) has been brutal. Many have accused the chief justice of exchanging the black robes of the jurist for the trappings of the politician. The chief justice is said to have “blinked” and “failed [his] most basic responsibility.” Noted originalist scholar Mike Rappaport strongly implied that Roberts is “both a knave and a fool.” The cataloguing could go on.

As much as these reactions reveal about differing views on a hotly contested question of constitutional law, they are at least as interesting because of what they say about the state of the conservative legal movement. Today’s legal conservatives view the chief justice’s opinion as judicial abdication, but it was not too long ago that the philosophy reflected in Roberts’ opinion would have been conservative orthodoxy. The truth is that the conservative legal movement’s conception of judicial restraint has changed, departing from the view it held when it emerged from the constitutional wilderness to which it had been banished during the Warren Court. *NFIB v. Sebelius*

displays a conservative legal movement in transition—and one that is increasingly leaving the judicial restraint in Roberts’ opinion behind.

Roberts lays down a theory of judicial restraint early in his opinion. Quoting his nineteenth-century brethren, the chief justice states: “‘Proper respect for a co-ordinate branch of the government’ requires that we strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’”

Justice John Marshall Harlan eloquently voiced this view of judicial restraint in his dissent in *Lochner v. New York* (1905). Harlan argued that a statute must be “plainly and palpably unauthorized by law” to be held unconstitutional. One of the Progressive Movement’s titanic figures—Felix Frankfurter—would adopt this as his mantra and carry it onto the Supreme Court. There he would watch his fellow New Deal justices turn against the principle preached by anti-*Lochner* jurists for a generation. By the time Frankfurter retired in 1962, the Warren Court’s revolution in constitutional law was well under way.

It was precisely this revolution that inspired a counterrevolution: the conservative legal movement. Robert Bork’s 1971 *Indiana Law Journal* article calling for a jurisprudence of “neutral principles” and a return to the intentions of the Founders raised the banner around which modern originalism was formed. The standard was taken up a few years later by then-Justice Rehnquist in his

lecture “The Notion of a Living Constitution,” and soon the prolific Raoul Berger had entered the fray with his book *Government by Judiciary*. The movement achieved major success with dizzying speed when Ronald Reagan was elected president and his attorney general, Edwin Meese, oversaw fundamental change in the federal judiciary.

Of course, originalism was not—and is not—the entirety of the conservative legal movement. There has always been a vocal libertarian element, especially with the rise of the law and economics movement. Similarly, there has been a strain of legal conservatism that rejects originalism on the one hand and libertarian ideology on the other. But when it comes to constitutional interpretation, originalism has been the default theory of legal conservatism, and it is appropriate to look at how originalism developed for insight into the broader movement.

As Princeton professor Keith Whittington has explained, the conservative legal movement of the early years was “reactive” and “motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger courts.” As such, “the primary commitment within this critical posture was to judicial restraint.”

This was the restraint of Harlan’s *Lochner* dissent resurrected, with its emphasis on deference to legislative majorities. Bork made the connection between the Warren Court’s decision in *Griswold v. Connecticut* and the *Lochner* Court’s infamous opinion quite explicit, as did Rehnquist. The call for a judiciary that was deferential to legislative enactments was a theme of this period.

All that soon began to change. Scholars began to place less emphasis on the judicial

restraint of Bork and Rehnquist. It was not so much that judicial restraint lost pride-of-place in originalist theory as much as the conception of restraint transformed. Whittington captured this new way of thinking about restraint in his book *Constitutional Interpretation*: “An originalist Court may well find itself quite active in striking down legislation at odds with the clear requirements of the inherited text. Originalism requires deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians.”

From this perspective, judicial restraint entails adherence to the original meaning: no more but also no less. *Stare decisis* might have a role to play, depending on one’s theory of originalism, but generally if the originalist judge thinks a statute is unconstitutional, he has an obligation to strike it down. A judge that adopts the attitude of Justice Harlan—waiting until a law is “plainly and palpably” unconstitutional—is too likely to subordinate the Constitution to the errant judgment of today’s self-interested legislators.

That is not to say that this new view of judicial restraint amounted to judicial “activism” or disregarded the respect due to the political branches. The difference was one of emphasis: how far should a judge go to uphold a statute at the risk of deforming the Constitution? The new view thought Justice Harlan went too far. The old judicial restraint was dismissed, in the words of Whittington, as “judicial passivism.”

Judicial restraint used to mean that a judge should bend over backwards to avoid striking down a law, and this view was once widely held within the conservative legal community. But this idea has long since

faded from the scene, and judicial restraint is less likely to be thought of by today's legal conservatives as coinciding with judicial nonintervention. How many statutes the Court strikes down is simply beside the point for today's legal conservative; the question is why the Court struck down the statutes that it did.

And so we arrive at *NFIB v. Sebelius*. The chief justice's opinion displays a clear embrace of the old judicial restraint. He announces that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Although the joint dissenters would likely agree with this principle, the key word is "reasonable." The Justice Harlan conception of judicial restraint leads Roberts to stretch the language of the statute far beyond what the dissenters believe is reasonable—or indeed constitutional.

Roberts first analyzes the individual mandate under the commerce and necessary and proper clauses of the Constitution and concludes that it cannot be upheld on those grounds. Writing for the Court, the chief justice invokes the canon of constitutional avoidance quoted above, requiring the justices to adopt "every reasonable construction" to avoid striking down the statute. Roberts proceeds to hold that the health care law does not impose a legal mandate to purchase health insurance. Rather, he reinterprets the statute as levying a tax on those who fail to acquire insurance, which he holds was a constitutional exercise of Congress's taxation power.

The chief justice's opinion is full of acknowledgments that his interpretation is a creative one. He sets the bar low for constitutionality by saying that "the question is not whether that is the most natural interpretation of the mandate, but only

whether it is a 'fairly possible' one." He concedes that "the statute reads more naturally as a command to buy insurance than as a tax," that it "states that individuals 'shall' maintain health insurance," and that "the most straightforward reading of the mandate is that it commands individuals to purchase insurance." Yet, despite these interpretive data—and a good deal more, as the dissenters point out—the chief justice concludes that the insurance requirement can be justified as a tax.

The reason Roberts does so is that his view of judicial restraint in *NFIB v. Sebelius* requires him to go to the limits of plausibility to save the statute. The dissenters, who express a different view of restraint, refuse to go that far.

The old conception of judicial restraint is evident in the chief justice's theme that the Court is a legal—rather than political—body. At the beginning of his opinion, he is at pains to state: "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions." Then, at the conclusion, almost identical language: "But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people." Like the legal conservatives of the 1970s, the Roberts opinion emphasizes the modesty of the judicial role and the importance of deferring to legislative majorities.

Just as the old theory of judicial restraint came under intellectual attack, so too does Roberts' opinion for the Court—and for the same reasons. The problem with the old theory of judicial restraint, so the critique

goes, is that in straining to sustain the will of today's fleeting majority, a judge may ignore a fairly clear constitutional command from the original popular sovereign: the people who enacted the Constitution. The more recent idea of restraint sees the old way as a straightforward abdication of a judge's duty to safeguard the limits of political power. Where a law is unconstitutional, it must be declared so, and the judge who contorts a law to save it is viewed as engaging in the very activism he disclaims.

This contemporary view of judicial restraint is on full display in the joint dissent. The four justices lambast the Roberts opinion: "The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching." In a fascinating peroration, the dissenters appeal to the same values underlying the old version of judicial restraint, but they see it better expressed in their own willingness to jettison the healthcare law entirely:

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The clash between the chief justice's opinion and that of the joint dissenters is therefore best seen as a clash between two visions of judicial restraint, and two eras of the conservative legal movement.

Of course, Roberts and the joint dissenters have nuanced views on judicial restraint, and *NFIB v. Sebelius* does not define those views. Justice Scalia has long advocated judicial modesty and deference to legislative majorities, as seen in his dissent in *Planned Parenthood v. Casey* (1992), and the chief justice joined the Court's opinion in *Citizens United v. FEC* (2010) in the face of heated political opposition. The point here is simply to identify the tensions within the conservative legal movement evident in the *NFIB* opinions.

The overwhelmingly negative response to the chief justice's analysis shows just how far the movement has distanced itself from the old theory of restraint, embracing instead a view that cares less about how many statutes are struck down than about why they are invalidated. For the chief justice, his opinion is the epitome of judicial modesty. For the dissenters, it is the height of judicial arrogance. Roberts thinks his actions are compelled by respect for the coordinate branches of government; the dissenters see his actions as flouting the Constitution that called that government into being. And at this moment in the history of the conservative legal movement, Roberts stood alone.

“No Respite for Liberals”

The New York Times

June 30, 2012

Pamela S. Karlan

Anton Chekhov once remarked that “one must not put a loaded rifle on the stage if no one is thinking of firing it.” In the term that ended last week, the Supreme Court reached a liberal outcome in cases involving President Obama’s health care law, Arizona’s draconian immigration statute and mandatory life sentences for juveniles. But the conservative majority also laid down a cache of weapons that future courts can use to attack many of the legislative achievements of the New Deal and the Great Society—including labor, environmental, civil rights and consumer protection laws—and to prevent new progressive legislation. Far from being a source of jubilation, the term may come back to haunt liberals.

The immediate result of Thursday’s 5-to-4 health care ruling was a victory for the Obama administration and the millions of Americans who will get improved access to medical care. But four justices would have struck down every provision of the 900-plus-page act, and Chief Justice John G. Roberts Jr., who provided the fifth vote to uphold the mandate that individuals buy insurance or pay a penalty, distanced himself from the law. “It is not our job,” he wrote, “to protect the people from the consequences of their political choices.” The chief justice, who at 57 is likely to sit on the court for at least another two decades, made clear that government’s ability to address many of the nation’s most pressing problems is subject to some new limitations.

We take for granted that the federal government can forbid landlords to reject a

tenant based on his race or religion; prohibit development on fragile wetlands; finance the Medicare program for the elderly; require public schools to give girls an equal opportunity to play sports; collect revenue to pay for the National Institutes of Health and the national parks; encourage energy conservation by taxing gas guzzlers; prohibit discriminatory voter ID laws; and vindicate the right of state government employees to take unpaid leave to care for sick relatives.

The conservative legal movement has already attacked many of these provisions, and the Roberts court has been steadily supplying it with ammunition to do so. Conservative judicial rhetoric—for example, Justice Antonin Scalia’s denunciation last week of the Obama administration’s decision not to deport young, law-abiding illegal immigrants who came to this country as children—may be designed to change the political climate as well.

The federal government’s ability to regulate economic and social life stems largely from four powers in the Constitution. Under the commerce clause, Congress can “regulate” national economic activity. Under the taxing power, it can “lay and collect Taxes.” Under the spending power, it can “provide for the common Defence and general Welfare of the United States.” And under the enforcement powers, it can enact “appropriate legislation” to enforce the 14th Amendment’s equal protection and due process clauses and the 15th Amendment’s guarantee of the right to vote regardless of race.

From the 1930s through the Warren and Burger courts, the Supreme Court largely deferred to the political branches' judgments about the scope of these powers; it was their partner, not their adversary. The court recognized—as Justice Ruth Bader Ginsburg pointed out in her opinion on the health care case—that the political process was the primary vehicle for limiting government's powers.

Under the last chief justice, William H. Rehnquist, the court began to turn, particularly on Congress's commerce and enforcement powers. The court limited some statutes—notably, a section of the Americans With Disabilities Act that allowed state workers to sue their employers and a section of the Violence Against Women Act that gave victims of gender-motivated violence the right to sue in federal court—but upheld others, including other applications of the disabilities law, a provision of the Family and Medical Leave Act, and a statute criminalizing possession of homegrown marijuana.

The Roberts court has intensified the effort to reduce federal power. That the individual mandate was upheld should not overshadow the court's ruling on Medicaid expansion—the part of the ruling that is most likely to affect other legislation in the near future.

For the first time since the New Deal, the court struck down an exercise of Congress's spending power. It held that Congress lacked the power to deny Medicaid funds to states that refuse to expand their coverage. Chief Justice Roberts—joined by the liberal justices Stephen G. Breyer and Elena Kagan—held that while the government can deny additional Medicaid funds to states that refuse to expand their coverage, it cannot penalize them by rescinding current Medicaid payments.

This is a loaded gun indeed.

Many state and local governments, universities and nonprofit agencies build their operations around federal financing. If the federal government can deny them additional money only when it adds conditions the recipients must meet, it will be hamstrung in ensuring compliance with critical federal objectives. For example, the government gives grants on the condition that recipients will not discriminate on the basis of race, sex and disability. If Congress adds sexual orientation to the list—which seems likely at some not-too-distant point—must it maintain existing financing for groups that defiantly persist in discriminating against lesbians and gay men?

A 2000 law requires state prisons and local jails that get federal funds to accommodate inmates' religious practices. But those facilities received money long before the law was passed. Can the government credibly threaten to cut off funds to facilities that violate the law, or are its enforcement tools now limited?

In less-noticed opinions, the court also curbed federal power in important ways. It rejected the government's view that drug company representatives should be entitled to overtime under the Fair Labor Standards Act. It seemed poised to severely restrict Congress's ability to give private plaintiffs the right to enforce consumer protection laws, unless they could show direct economic injury. (On the final day of the term, the court said it wouldn't decide the case after all.)

In another health care case, the court refused to permit state workers to sue for violations of their right to take sick leave for themselves under the Family and Medical

Leave Act. A 5-to-4 majority ignored evidence that although the act uses a gender-neutral leave model, it was designed in significant part to protect childbearing women against pervasive employment discrimination.

In the fall, the court will have further opportunities to advance the conservative agenda. It will almost certainly decide cases involving voting rights, race-conscious affirmative action and same-sex marriage. Three cases involving federal environmental law are already on the docket. And even before the court struck down Montana's century-old ban on corporate political spending, there were already a slew of new challenges to campaign finance regulations working their way toward the court.

What, then, to make of the court's landmark decision to uphold the individual mandate? Chief Justice Roberts construed the mandate not as a requirement that individuals

purchase health insurance but as a choice: buy insurance or pay a tax. But the conservatives surely know that a Congress that can tax but not do much else—spend money, regulate the economy or enforce civil rights—will be hamstrung. Taxes are unpopular and nearly every Republican member of Congress has promised to oppose any additional taxes on individuals or businesses.

A Congress that can advance national priorities only through its taxing power is a Congress with little power at all. That is the real legacy of the last term. The Supreme Court has given Americans who care about economic and social justice a reason to worry this Fourth of July. The court's guns have been loaded; it only remains to be seen whether it fires them.

Pamela S. Karlan is a professor of public interest law at Stanford and a co-author of "Keeping Faith With the Constitution."

“Court Under Roberts Is Most Conservative in Decades”

The New York Times

July 24, 2010

Adam Liptak

When Chief Justice John G. Roberts Jr. and his colleagues on the Supreme Court left for their summer break at the end of June, they marked a milestone: the Roberts court had just completed its fifth term.

In those five years, the court not only moved to the right but also became the most conservative one in living memory, based on an analysis of four sets of political science data.

And for all the public debate about the confirmation of Elena Kagan or the addition last year of Justice Sonia Sotomayor, there is no reason to think they will make a difference in the court’s ideological balance. Indeed, the data show that only one recent replacement altered its direction, that of Justice Samuel A. Alito Jr. for Justice Sandra Day O’Connor in 2006, pulling the court to the right.

There is no similar switch on the horizon. That means that Chief Justice Roberts, 55, is settling in for what is likely to be a very long tenure at the head of a court that seems to be entering a period of stability.

If the Roberts court continues on the course suggested by its first five years, it is likely to allow a greater role for religion in public life, to permit more participation by unions and corporations in elections and to elaborate further on the scope of the Second Amendment’s right to bear arms. Abortion rights are likely to be curtailed, as are affirmative action and protections for people accused of crimes.

The recent shift to the right is modest. And the court’s decisions have hardly been uniformly conservative. The justices have, for instance, limited the use of the death penalty and rejected broad claims of executive power in the government’s efforts to combat terrorism.

But scholars who look at overall trends rather than individual decisions say that widely accepted political science data tell an unmistakable story about a notably conservative court.

Almost all judicial decisions, they say, can be assigned an ideological value. Those favoring, say, prosecutors and employers are said to be conservative, while those favoring criminal defendants and people claiming discrimination are said to be liberal.

Analyses of databases coding Supreme Court decisions and justices’ votes along these lines, one going back to 1953 and another to 1937, show that the Roberts court has staked out territory to the right of the two conservative courts that immediately preceded it by four distinct measures:

In its first five years, the Roberts court issued conservative decisions 58 percent of the time. And in the term ending a year ago, the rate rose to 65 percent, the highest number in any year since at least 1953.

The courts led by Chief Justices Warren E. Burger, from 1969 to 1986, and William H. Rehnquist, from 1986 to 2005, issued conservative decisions at an almost

indistinguishable rate—55 percent of the time.

That was a sharp break from the court led by Chief Justice Earl Warren, from 1953 to 1969, in what liberals consider the Supreme Court's golden age and conservatives portray as the height of inappropriate judicial meddling. That court issued conservative decisions 34 percent of the time.

Four of the six most conservative justices of the 44 who have sat on the court since 1937 are serving now: Chief Justice Roberts and Justices Alito, Antonin Scalia and, most conservative of all, Clarence Thomas. (The other two were Chief Justices Burger and Rehnquist.) Justice Anthony M. Kennedy, the swing justice on the current court, is in the top 10.

The Roberts court is finding laws unconstitutional and reversing precedent—two measures of activism—no more often than earlier courts. But the ideological direction of the court's activism has undergone a marked change toward conservative results.

Until she retired in 2006, Justice O'Connor was very often the court's swing vote, and in her later years she had drifted to the center-left. These days, Justice Kennedy has assumed that crucial role at the court's center, moving the court to the right.

Justice John Paul Stevens, who retired in June, had his own way of tallying the court's direction. In an interview in his chambers in April, he said that every one of the 11 justices who had joined the court since 1975, including himself, was more conservative than his or her predecessor, with the possible exceptions of Justices Sotomayor and Ruth Bader Ginsburg.

The numbers largely bear this out, though Chief Justice Roberts is slightly more liberal than his predecessor, Chief Justice Rehnquist, at least if all of Chief Justice Rehnquist's 33 years on the court, 14 of them as an associate justice, are considered. (In later years, some of his views softened.)

But Justice Stevens did not consider the question difficult. Asked if the replacement of Chief Justice Rehnquist by Chief Justice Roberts had moved the court to the right, he did not hesitate.

"Oh, yes," Justice Stevens said.

The Most Significant Change

"Gosh," Justice Sandra Day O'Connor said at a law school forum in January a few days after the Supreme Court undid one of her major achievements by reversing a decision on campaign spending limits. "I step away for a couple of years and there's no telling what's going to happen."

When Justice O'Connor announced her retirement in 2005, the membership of the Rehnquist court had been stable for 11 years, the second-longest stretch without a new justice in American history.

Since then, the pace of change has been dizzying, and several justices have said they found it disorienting. But in an analysis of the court's direction, some changes matter much more than others. Chief Justice Rehnquist died soon after Justice O'Connor announced that she was stepping down. He was replaced by Chief Justice Roberts, his former law clerk. Justice David H. Souter retired in 2009 and was succeeded by Justice Sotomayor. Justice Stevens followed Justice Souter this year, and he is likely to be succeeded by Elena Kagan.

But not one of those three replacements seems likely to affect the fundamental ideological alignment of the court. Chief Justice Rehnquist, a conservative, was replaced by a conservative. Justices Souter and Stevens, both liberals, have been or are likely to be succeeded by liberals.

Justices' views can shift over time. Even if they do not, a justice's place in the court's ideological spectrum can move as new justices arrive. And chief justices may be able to affect the overall direction of the court, notably by using the power to determine who writes the opinion for the court when they are in the majority. Chief Justice Roberts is certainly widely viewed as a canny tactician.

But only one change—Justice Alito's replacement of Justice O'Connor—really mattered. That move defines the Roberts court. "That's a real switch in terms of ideology and a switch in terms of outlook," said Lee Epstein, who teaches law and political science at Northwestern University and is a leading curator and analyst of empirical data about the Supreme Court.

The point is not that Justice Alito has turned out to be exceptionally conservative, though he has: he is the third-most conservative justice to serve on the court since 1937, behind only Justice Thomas and Chief Justice Rehnquist. It is that he replaced the more liberal justice who was at the ideological center of the court.

Though Chief Justice Roberts gets all the attention, Justice Alito may thus be the lasting triumph of the administration of President George W. Bush. He thrust Justice Kennedy to the court's center and has reshaped the future of American law.

It is easy to forget that Justice Alito was Mr. Bush's second choice. Had his first nominee, the apparently less conservative Harriet E. Miers, not withdrawn after a rebellion from Mr. Bush's conservative base, the nature of the Roberts court might have been entirely different.

By the end of her almost quarter-century on the court, Justice O'Connor was without question the justice who controlled the result in ideologically divided cases.

"On virtually all conceptual and empirical definitions, O'Connor is the court's center—the median, the key, the critical and the swing justice," Andrew D. Martin and two colleagues wrote in a study published in 2005 in *The North Carolina Law Review* shortly before Justice O'Connor's retirement.

With Justice Alito joining the court's more conservative wing, Justice Kennedy has now unambiguously taken on the role of the justice at the center of the court, and the ideological daylight between him and Justice O'Connor is a measure of the Roberts court's shift to the right.

Justice O'Connor, for her part, does not name names but has expressed misgivings about the direction of the court.

"If you think you've been helpful, and then it's dismantled, you think, 'Oh, dear,'" she said at William & Mary Law School in October in her usual crisp and no-nonsense fashion. "But life goes on. It's not always positive."

Justice O'Connor was one of the authors of *McConnell v. Federal Election Commission*, a 2003 decision that, among other things,

upheld restrictions on campaign spending by businesses and unions. It was reversed on that point in the *Citizens United* decision.

Asked at the law school forum in January how she felt about the later decision, she responded obliquely. But there was no mistaking her meaning.

“If you want my legal opinion” about *Citizens United*, Justice O’Connor said, “you can go read” McConnell.

The Court Without O’Connor

The shift resulting from Justice O’Connor’s departure was more than ideological. She brought with her qualities that are no longer represented on the court. She was raised and educated in the West, and she served in all three branches of Arizona’s government, including as a government lawyer, majority leader of the State Senate, an elected trial judge and an appeals court judge.

Those experiences informed Justice O’Connor’s sensitivity to states’ rights and her frequent deference to political judgments. Her rulings were often pragmatic and narrow, and her critics said she engaged in split-the-difference jurisprudence.

Justice Alito’s background is more limited than Justice O’Connor’s—he worked in the Justice Department and then as a federal appeals court judge—and his rulings are often more muscular.

Since they never sat on the court together, trying to say how Justice O’Connor would have voted in the cases heard by Justice Alito generally involves extrapolation and speculation. In some, though, it seems plain that she would have voted differently from him.

Just weeks before she left the court, for instance, Justice O’Connor heard arguments in *Hudson v. Michigan*, a case about whether evidence should be suppressed because it was found after Detroit police officers stormed a home without announcing themselves.

“Is there no policy protecting the homeowner a little bit and the sanctity of the home from this immediate entry?” Justice O’Connor asked a government lawyer. David A. Moran, a lawyer for the defendant, Booker T. Hudson, said the questioning left him confident that he had Justice O’Connor’s crucial vote.

Three months later, the court called for reargument, signaling a 4-to-4 deadlock after Justice O’Connor’s departure. When the 5-to-4 decision was announced in June, the court not only ruled that violations of the knock-and-announce rule do not require the suppression of evidence, but also called into question the exclusionary rule itself.

The shift had taken place. Justice Alito was in the majority.

“My 5-4 loss in *Hudson v. Michigan*,” Mr. Moran wrote in 2006 in *Cato Supreme Court Review*, “signals the end of the Fourth Amendment”—protecting against unreasonable searches—“as we know it.”

The departure of Justice O’Connor very likely affected the outcomes in two other contentious areas: abortion and race.

In 2000, the court struck down a Nebraska law banning an abortion procedure by a vote of 5 to 4, with Justice O’Connor in the majority. Seven years later, the court upheld a similar federal law, the Partial-Birth Abortion Act, by the same vote.

“The key to the case was not in the difference in wording between the federal law and the Nebraska act,” Erwin Chemerinsky wrote in 2007 in *The Green Bag*, a law journal. “It was Justice Alito having replaced Justice O’Connor.”

In 2003, Justice O’Connor wrote the majority opinion in a 5-to-4 decision allowing public universities to take account of race in admissions decisions. And a month before her retirement in 2006, the court refused to hear a case challenging the use of race to achieve integration in public schools.

Almost as soon as she left, the court reversed course. A 2007 decision limited the use of race for such a purpose, also on a 5-to-4 vote.

There were, to be sure, issues on which Justice Kennedy was to the left of Justice O’Connor. In a 5-to-4 decision in 2005 overturning the juvenile death penalty, Justice Kennedy was in the majority and Justice O’Connor was not.

But changing swing justices in 2006 had an unmistakable effect across a broad range of cases. “O’Connor at the end was quite a bit more liberal than Kennedy is now,” Professor Epstein said.

The numbers bear this out.

The Rehnquist court had trended left in its later years, issuing conservative rulings less than half the time in its last two years in divided cases, a phenomenon not seen since 1981. The first term of the Roberts court was a sharp jolt to the right. It issued conservative rulings in 71 percent of divided cases, the highest rate in any year since the beginning of the Warren court in 1953.

Judging by the Numbers

Chief Justice Roberts has not served nearly as long as his three most recent predecessors. The court he leads has been in flux. But five years of data are now available, and they point almost uniformly in one direction: to the right.

Scholars quarrel about some of the methodological choices made by political scientists who assign a conservative or liberal label to Supreme Court decisions and the votes of individual justices. But most of those arguments are at the margins, and the measures are generally accepted in the political science literature.

The leading database, created by Harold J. Spaeth with the support of the National Science Foundation about 20 years ago, has served as the basis for a great deal of empirical research on the contemporary Supreme Court and its members. In the database, votes favoring criminal defendants, unions, people claiming discrimination or violation of their civil rights are, for instance, said to be liberal. Decisions striking down economic regulations and favoring prosecutors, employers and the government are said to be conservative.

About 1 percent of cases have no ideological valence, as in a boundary dispute between two states. And some concern multiple issues or contain ideological cross-currents.

But while it is easy to identify the occasional case for which ideological coding makes no sense, the vast majority fit pretty well. They also tend to align with the votes of the justices usually said to be liberal or conservative.

Still, such coding is a blunt instrument. It does not take account of the precedential and other constraints that are in play or how much a decision moves the law in a conservative or liberal direction. The mix of cases has changed over time. And the database treats every decision, monumental or trivial, as a single unit.

“It’s crazy to count each case as one,” said Frank B. Cross, a law and business professor at the University of Texas. “But the problem of counting each case as one is reduced by the fact that the less-important ones tend to be unanimous.”

Some judges find the entire enterprise offensive.

“Supreme Court justices do not acknowledge that any of their decisions are influenced by ideology rather than by neutral legal analysis,” William M. Landes, an economist at the University of Chicago, and Richard A. Posner, a federal appeals court judge, wrote last year in *The Journal of Legal Analysis*. But if that were true, they continued, knowing the political party of the president who appointed a given justice would tell you nothing about how the justice was likely to vote in ideologically charged cases.

In fact, the correlation between the political party of appointing presidents and the ideological direction of the rulings of the judges they appoint is quite strong.

Here, too, there are exceptions. Justices Stevens and Souter were appointed by Republican presidents and ended up voting with the court’s liberal wing. But they are gone. If Ms. Kagan wins Senate confirmation, all of the justices on the court may be expected to align themselves across

the ideological spectrum in sync with the party of the president who appointed them.

The proposition that the Roberts court is to the right of even the quite conservative courts that preceded it thus seems fairly well established. But it is subject to qualifications.

First, the rightward shift is modest.

Second, the data do not take popular attitudes into account. While the court is quite conservative by historical standards, it is less so by contemporary ones. Public opinion polls suggest that about 30 percent of Americans think the current court is too liberal, and almost half think it is about right.

On given legal issues, too, the court’s decisions are often closely aligned with or more liberal than public opinion, according to studies collected in 2008 in “Public Opinion and Constitutional Controversy” (Oxford University Press).

The public is largely in sync with the court, for instance, in its attitude toward abortion—in favor of a right to abortion but sympathetic to many restrictions on that right.

“Solid majorities want the court to uphold *Roe v. Wade* and are in favor of abortion rights in the abstract,” one of the studies concluded. “However, equally substantial majorities favor procedural and other restrictions, including waiting periods, parental consent, spousal notification and bans on ‘partial birth’ abortion.”

Similarly, the public is roughly aligned with the court in questioning affirmative action plans that use numerical standards or

preferences while approving those that allow race to be considered in less definitive ways.

The Roberts court has not yet decided a major religion case, but the public has not always approved of earlier rulings in this area. For instance, another study in the 2008 book found that “public opinion has remained solidly against the court’s landmark decisions declaring school prayer unconstitutional.”

In some ways, the Roberts court is more cautious than earlier ones. The Rehnquist court struck down about 120 laws, or about six a year, according to an analysis by Professor Epstein. The Roberts court, which on average hears fewer cases than the Rehnquist court did, has struck down fewer

laws—15 in its first five years, or three a year.

It is the ideological direction of the decisions that has changed. When the Rehnquist court struck down laws, it reached a liberal result more than 70 percent of the time. The Roberts court has tilted strongly in the opposite direction, reaching a conservative result 60 percent of the time.

The Rehnquist court overruled 45 precedents over 19 years. Sixty percent of those decisions reached a conservative result. The Roberts court overruled eight precedents in its first five years, a slightly lower annual rate. All but one reached a conservative result.

“Justice Kagan—Giving Liberals a Rhetorical Lift”

Reuters
April 5, 2012
Joan Biskupic

During three days of arguments over the Obama healthcare plan, Supreme Court Justice Elena Kagan put on a display of rhetorical firepower, reinforcing predictions that the newest liberal justice is best equipped to take on the conservative, five-man majority controlling the bench.

The strong views and persuasive tactics of the administration’s former top lawyer could affect the fate of the healthcare overhaul, as well as decisions in other ideologically charged issues that will come before the court, such as same-sex marriage.

Kagan’s sturdy advocacy was evident to law professors and to lawyers who practice before the court during her first term. But the healthcare debate has offered her a more prominent platform with bigger stakes. She pressed her argument as ardently as any lawyer who stepped to the lectern.

At the final session on the final day of arguments, attorney Paul Clement, representing 26 states challenging the healthcare law, had barely uttered three opening sentences when Kagan pounced.

What followed was one of the most aggressive exchanges of the entire three days. It centered on a provision expanding eligibility for Medicaid, the joint state-federal program that pays for poor people’s healthcare. Kagan tried to puncture Clement’s argument that bringing more people into the program would impinge on states’ sovereignty and further strain their budgets, even though the government would pick up 90 percent of the cost.

The justice and the lawyer—Kagan a former solicitor general for Obama, Clement for George W. Bush—went at it for several minutes. When Clement eluded her, Kagan posed trickier scenarios to test the notion that states are trapped in a program that funnels hundreds of billions of dollars their way yet consumes significant state funds, too.

“Wow! Wow!” Kagan exclaimed in disbelief, as Clement rejected her hypothetical offers of huge sums of money, which she posited anyone would accept. The money would not be attractive, Clement responded, if it “came from my own bank account. And that’s what’s really going on here, in part.”

GROUNDBREAKER, BUT IN A NEW ERA

The exchange illuminated how Kagan, President Barack Obama’s second Supreme Court appointee, who joined the bench in August 2010, has energized the four-member liberal wing of the nine-member court. A keen strategist, she can also match wits with Chief Justice John Roberts and Antonin Scalia, the longest-serving conservative on today’s bench.

Her role is distinct from that of Justice Anthony Kennedy, the conservative who is most likely to swing and occasionally permit the other side to prevail. Rather than casting a crucial vote, she lends a critical voice that could make the case for liberals within the court and beyond.

Her approach, seen in her early months and brought vividly to the fore during the healthcare case, suggests she may be adopting some of the liberal passion of her mentor, Thurgood Marshall, for whom she clerked. He also served as a solicitor general, during the Lyndon Johnson administration, before becoming the first African-American justice on the high court.

Marshall, whose tenure spanned 1967-1991, was, with the late Justice William Brennan, a standard-bearer for a liberalism that has all but disappeared from the federal bench. They opposed the death penalty in every case, consistently boosted defendants' rights and favored broad-scale solutions for past racial discrimination. They sought to give judges a strong hand in remedying social policy disputes.

Kagan is unlikely to embrace that activism of a bygone era. Yet her approach could lead her to oppose efforts by the conservative majority to reverse past rulings on race-based remedies, or break new ground on gay rights.

IDEOLOGICALLY CHARGED CASES

Kagan's fiercest dissenting opinions on behalf of the liberals have so far come in ideologically charged cases. In an Arizona campaign finance dispute, she wrote that while the conservative majority said it had found the "smoking guns" at the center of the case, "the only smoke here is the majority's, and it is the kind that goes with mirrors."

"It is absolutely clear. She is positioned to be the leader on the liberal side," said Harvard University law professor Mark Tushnet. "It was incredible," he said of the exchange with Clement. "She was just not

going to let him go. She had the questions all set up."

In the months preceding the court's healthcare hearing, conservative groups and prominent Republicans, including Senate Republican Leader Mitch McConnell, questioned whether Kagan should sit on the case because she had worked as a high-level lawyer under Obama when the healthcare law and strategy for its defense was being developed.

The overhaul, which includes a mandate that most Americans buy insurance by 2014, is intended to bring coverage to more than 32 million uninsured people in the United States.

Kagan testified during her summer 2010 confirmation hearings that she did not work on healthcare litigation, and administration officials have since said she was walled off from discussions on how to defend the law. Challengers say Congress exceeded its constitutional authority with the mandate and Medicaid expansion.

Chief Justice Roberts implicitly backed Kagan and Justice Clarence Thomas on January 1 when he wrote in an annual report on the judiciary: "I have complete confidence in the capability of my colleagues to determine when recusal is warranted." Liberal groups had urged Thomas not to sit, because his wife, Virginia, a Tea Party activist, has opposed the healthcare law.

HUNTING PHEASANT AND CRACKING WISE

If anyone had thought Justice Kagan might pull her punches during arguments because of the criticism she faced for not recusing

herself, they were wrong. She defended the Obama healthcare plan with a vigor that might have been expected if she were still Obama's first solicitor general.

"I was surprised that she didn't try to seem a little more balanced. She was certainly up there with her perspective," said Carrie Severino, a former law clerk to Thomas who is chief counsel of the Judicial Crisis Network, a conservative advocacy group that focuses on legal issues and was one of the organizations that had questioned Kagan's participation in the case.

Kagan, who declined to be interviewed for this story, has made friends with colleagues on both sides. The Manhattan native, who as dean of the Harvard law school brought in more conservative professors to a campus dominated by liberals, has taken up skeet shooting and pheasant hunting with Scalia, her ideological opposite.

For all her toughness with attorneys who stand before the court, Kagan is also mindful of her place. Last week she was cut off by senior justices and had forgotten her question by the time her turn came. Quipped the court's newest appointee: "See what it means to be the junior justice?"

The views she has brought to the court are not lost on fellow liberals, particularly veteran Justice Ruth Bader Ginsburg, who since her own 1993 appointment has witnessed the conservative takeover of the court.

Ginsburg has praised Kagan's rhetorical skills and "powerful" and "forceful" opinions—and her use of humor. In a speech in New York last July, Ginsburg cited Kagan's bench reading of one of her first court opinions. "If you understand anything

I say here, you will likely be a lawyer, and you will have had your morning cup of coffee." The daughter of a lawyer and a school teacher, Kagan became the first woman to hold the post of solicitor general when President Obama selected her in 2009. She had never argued a case before the court but, with her background in the classroom and navigation of campus politics, she swiftly proved herself a daunting presence. Her style is one of concise, declarative sentences.

Representing the Obama administration at the lectern, she sometimes clashed with Chief Justice Roberts. In a case involving potentially competing stances within the Department of Justice, he called her argument "absolutely startling." Kagan stood her ground: "The United States government is a complicated place."

She has also expressed respect for Roberts. Referring to his years as an appellate lawyer, she referred to him as "the great Supreme Court advocate of his time."

STANDOUT DISSENTS

In her first full term, Kagan aligned herself most with Obama's only other appointee. According to figures compiled by the SCOTUSblog, a site now partially sponsored by Bloomberg Law, she voted with Sonia Sotomayor 94 percent of the time, with Ginsburg 91 percent, and Stephen Breyer, the fourth liberal justice, 87 percent. She was least in accord with Justice Thomas, at 66 percent.

More than her votes, it is her opinions—mainly in dissent—that have made her stand out. She took the lead to protest a 5-4 decision in an Arizona case allowing state tax credits that benefited religious schools,

insisting the decision “damages one of this nation’s defining constitutional commitments,” that of religious liberty.

On the last day of the 2010-11 term, Kagan led dissenters in a separate hot-button Arizona case, as the majority invalidated a state law that gave extra funding to political candidates who used the public-finance system rather than relied on private backers.

Chief Justice Roberts wrote for the majority. The dueling opinions revealed the energetic style of the two young leaders: He is 56, she turns 52 this month. When Kagan wrote that challengers to the Arizona law showed “chutzpah,” Roberts countered, “The charge is unjustified.” As much as they both employed long citations of law and precedent, they also used punchy two-word sentences. One of his: “Not so.” One of hers: “Me too.”

SPEAKER FOR THE LEFT

Last week’s healthcare arguments, testing Obama’s major domestic achievement,

illustrated Kagan’s robust approach and her potential to speak for the left.

She jumped in when administration lawyers faltered, responded to conservative justices’ questions about the Obama position, and came on strong when Clement was at the lectern.

During arguments over the new insurance mandate, premised on the notion that everybody will eventually need medical care, the lead lawyer for the state challengers said: “The government can’t say that everybody is in that (healthcare) market. The whole problem is that everybody is not in that market, and they want to make everybody get into that market.”

Kagan replied: Wasn’t that “cutting the baloney thin? Health insurance exists only for the purpose of financing healthcare. The two are inextricably interlinked. We don’t get insurance so that we can stare at our insurance certificate. We get it so that we can go and access healthcare.”

“Chief Justice Roberts and His Apologists”

The Wall Street Journal

June 29, 2012

John Yoo

White House judge-pickers sometimes ask prospective nominees about their favorite Supreme Court justice. The answers can reveal a potential judge’s ideological leanings without resorting to litmus tests. Republican presidential candidates similarly promise to appoint more judges like so-and-so to reassure the conservative base.

Since his appointment to the high court in 2005, the most popular answer was Chief Justice John Roberts. But that won’t remain true after his ruling on Thursday in *NFIB v. Sebelius*, which upheld President Barack Obama’s signature health-care law.

Justice Roberts served in the Reagan Justice Department and as a White House lawyer before his appointment to the D.C. Circuit Court of Appeals and then to the Supreme Court by President George W. Bush. Yet he joined with the court’s liberal wing to bless the greatest expansion of federal power in decades.

Conservatives are scrambling to salvage something from the decision of their once-great judicial hero. Some hope *Sebelius* covertly represents a “substantial victory,” in the words of conservative columnist George Will.

After all, the reasoning goes, Justice Roberts’s opinion declared that the Constitution’s Commerce Clause does not authorize Congress to regulate inactivity, which would have given the federal government a blank check to regulate any and all private conduct. The court also decided that Congress unconstitutionally

coerced the states by threatening to cut off all Medicaid funds if they did not expand this program as far as President Obama wants.

All this is a hollow hope. The outer limit on the Commerce Clause in *Sebelius* does not put any other federal law in jeopardy and is undermined by its ruling on the tax power (discussed below). The limits on congressional coercion in the case of Medicaid may apply only because the amount of federal funds at risk in that program’s expansion—more than 20% of most state budgets—was so great. If Congress threatens to cut off 5%-10% to force states to obey future federal mandates, will the court strike that down too? Doubtful.

Worse still, Justice Roberts’s opinion provides a constitutional road map for architects of the next great expansion of the welfare state. Congress may not be able to directly force us to buy electric cars, eat organic kale, or replace oil heaters with solar panels. But if it enforces the mandates with a financial penalty then suddenly, thanks to Justice Roberts’s tortured reasoning in *Sebelius*, the mandate is transformed into a constitutional exercise of Congress’s power to tax.

Some conservatives hope that Justice Roberts is pursuing a deeper political game. Charles Krauthammer, for one, calls his opinion “one of the great constitutional finesses of all time” by upholding the law on the narrowest grounds possible—thus doing the least damage to the Constitution—while

turning aside the Democratic Party's partisan attacks on the court.

The comparison here is to *Marbury v. Madison* (1803), where Chief Justice John Marshall deflected President Thomas Jefferson's similar assault on judicial independence. Of the Federalist Party, which he had defeated in 1800, Jefferson declared: "They have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased." Jeffersonians in Congress responded by eliminating federal judgeships, and also by impeaching a lower court judge and a Supreme Court judge.

In *Marbury*, Justice Marshall struck down section 13 of the Judiciary Act of 1789, thus depriving his own court of the power to hear a case against Secretary of State James Madison. *Marbury* effectively declared that the court would not stand in the way of the new president or his congressional majorities. So Jefferson won a short-term political battle—but Justice Marshall won the war by securing for the Supreme Court the power to declare federal laws unconstitutional.

While some conservatives may think Justice Roberts was following in Justice Marshall's giant footsteps, the more apt comparison is to the Republican Chief Justice Charles Evans Hughes. Hughes's court struck down the centerpieces of President Franklin Roosevelt's early New Deal because they extended the Commerce Clause power beyond interstate trade to intrastate manufacturing and production. Other decisions blocked Congress's attempt to delegate its legislative powers to federal agencies.

FDR reacted furiously. He publicly declared: "We have been relegated to a horse-and-buggy definition of interstate commerce." After winning a resounding landslide in the 1936 elections, he responded in February 1937 with the greatest attack on the courts in American history. His notorious court-packing plan proposed to add six new justices to the Supreme Court's nine members, with the obvious aim of overturning the court's opposition to the New Deal.

After the president's plan was announced, Hughes and Justice Owen J. Roberts began to switch their positions. They would vote to uphold the National Labor Relations Act, minimum-wage and maximum-hour laws, and the rest of the New Deal.

But Hughes sacrificed fidelity to the Constitution's original meaning in order to repel an attack on the court. Like Justice Roberts, Hughes blessed the modern welfare state's expansive powers and unaccountable bureaucracies—the very foundations for ObamaCare.

Hughes's great constitutional mistake was made for nothing. While many historians and constitutional scholars have referred to his abrupt and unprincipled about-face as "the switch in time that saved nine," the court-packing plan was wildly unpopular right from the start. It went nowhere in the heavily Democratic Congress. Moreover, further New Deal initiatives stalled in Congress after the congressional elections in 1938.

Justice Roberts too may have sacrificed the Constitution's last remaining limits on federal power for very little—a little peace and quiet from attacks during a presidential election year.

Given the advancing age of several of the justices, an Obama second term may see the appointment of up to three new Supreme Court members. A new, solidified liberal majority will easily discard *Sebelius*'s limits on the Commerce Clause and expand the taxing power even further. After the Hughes court switch, FDR replaced retiring Justices with a pro-New Deal majority, and the court upheld any and all expansions of federal

power over the economy and society. The court did not overturn a piece of legislation under the Commerce Clause for 60 years.

If a Republican is elected president, he will have to be more careful than the last. When he asks nominees the usual question about justices they agree with, the better answer should once again be Scalia or Thomas or Alito, not Roberts.

“Enumerating Conservatism’s Long-term Victory”

The Boston Herald

July 1, 2012

George F. Will

Conservatives won a substantial victory on Thursday. The physics of American politics—actions provoking re-actions—continues to move the crucial debate, about the nature of the American regime, toward conservatism. Chief Justice John Roberts has served this cause.

The health care legislation’s expansion of the federal government’s purview has improved our civic health by rekindling interest in what this expansion threatens—the Framers’ design for limited government. Conservatives distraught about the survival of the individual mandate are missing the considerable consolation prize they won when the Supreme Court rejected a constitutional rationale for the mandate—Congress’ rationale—that was pregnant with rampant statism.

The case challenged the court to fashion a judicially administrable principle that limits Congress’ power to act on the mere pretense of regulating interstate commerce. At least Roberts got the court to embrace emphatic language rejecting the Commerce Clause rationale for penalizing the inactivity of not buying insurance:

“The power to regulate commerce presupposes the existence of commercial activity to be regulated. . . . The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to

regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. . . . Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the government’s theory—empower Congress to make those decisions for him.”

If the mandate had been upheld under the Commerce Clause, the court would have decisively construed this clause so permissively as to give Congress an essentially unlimited police power—the power to mandate, proscribe and regulate behavior for whatever Congress deems a public benefit. Instead, the court rejected the Obama administration’s Commerce Clause doctrine. The court remains clearly committed to this previous holding: “Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace.”

The court held that the mandate is constitutional only because Congress could have identified its enforcement penalty as a tax. The court thereby guaranteed that the argument ignited by the mandate will continue as the principal fault line in our polity.

The mandate’s opponents favor a federal government as James Madison fashioned it, one limited by the constitutional enumeration of its powers. The mandate’s supporters favor government as Woodrow

Wilson construed it, with limits as elastic as liberalism's agenda, and powers acquiring derivative constitutionality by being necessary to, or efficient for, implementing government's ambitions.

By persuading the court to reject a Commerce Clause rationale for a president's signature act, the conservative legal insurgency against Obama-care has won a huge victory for the long haul. This will help revive a venerable tradition of America's political culture, that of viewing congressional actions with a skeptical constitutional squint, searching for congruence with the Constitution's architecture of enumerated powers. By rejecting the Commerce Clause rationale, Thursday's decision reaffirmed the Constitution's foundational premise: Enumerated powers are necessarily limited because, as Chief Justice John Marshall said, "the enumeration presupposes something not enumerated."

When Nancy Pelosi, asked where the Constitution authorized the mandate, exclaimed, "Are you serious? Are you serious?" she was utterly ingenuous. People steeped in Congress' culture of unbridled

power find it incomprehensible that the Framers fashioned the Constitution as a bridle. Now, Thursday's episode in the continuing debate about the mandate will reverberate to conservatism's advantage. By sharpening many Americans' constitutional consciousness, the debate has resuscitated the salutary practice of asking what was, until the mid-1960s, the threshold question regarding legislation. Is it proper for the federal government to do this? Conservatives can rekindle the public's interest in this barrier by building upon the victory Roberts gave them in positioning the court for stricter scrutiny of congressional actions under the Commerce Clause.

Any democracy, even one with a written and revered constitution, ultimately rests on public opinion, which is shiftable sand. Conservatives understand the patience requisite for the politics of democracy—the politics of persuasion. Elections matter most; only they can end Obamacare. But in Roberts' decision, conservatives can see the court has been persuaded to think more as they do about the constitutional language that has most enabled the promiscuous expansion of government.

“Chief Justice Roberts Signals That Supreme Court Remains Independent”

The Los Angeles Times

June 30, 2012

David G. Savage

Despite widely held assumptions that he is reliably conservative, Chief Justice John G. Roberts Jr. ruled in favor of the Obama administration on the new healthcare law and Arizona’s tough immigration law.

Chief Justice John G. Roberts Jr. considers it an insult when he hears it said that he and the justices are playing politics. He has always insisted his sole duty was to decide the law, not to pick the political winners.

Until this week, however, not many were inclined to believe him. Those on the left—and the right—were convinced they could expect Roberts to be a reliable vote on the conservative side.

But no more. The chief justice took control of two of the biggest politically charged cases in a decade, involving the Affordable Care Act and Arizona’s immigration law, and he fashioned careful, lawyerly rulings that resulted in victories for the Obama administration.

Those who were surprised might have taken note of the man Roberts describes as one of his heroes—Chief Justice Charles Evan Hughes, a progressive Republican who was chief justice in the 1930s when President Franklin D. Roosevelt and the court clashed over the New Deal.

When the high court and the Roosevelt administration seemed headed for a constitutional showdown, Hughes persuaded one wavering justice to switch sides and vote to uphold a minimum-wage law and a collective bargaining measure. The “switch in time that saved the nine” defused FDR’s plan

to load up the Supreme Court with additional justices appointed by him. The court-packing plan died in the Senate. The deft leadership by Hughes preserved the court as an independent institution.

This year’s court battle over the healthcare law did not rise to the level of the New Deal-era clash. But had the Roberts court struck down Obama’s healthcare law, Democrats and progressives would be making those historic comparisons this week.

“It was masterful. Roberts believes in a modest role for the court, and he was doing just what he promised he would do,” said Stanford law professor Michael W. McConnell, a former appeals court judge appointed by President George W. Bush. “Had the court struck down the law, they would have been the focal point of the campaign. Now, the court comes out with its reputation enhanced.”

Acting on his own, Roberts saved the Affordable Care Act from being struck down as unconstitutional before it could go into effect. His four fellow conservatives had voted in favor of Republican state officials to void the Democrats’ healthcare measures that were decades in the making.

Roberts, however, found a narrow way to uphold the law as an exercise of Congress’ taxing power. “Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness,” he wrote in an opinion joined in part by the four liberal justices.

And in the immigration dispute between Arizona and the Obama administration, Roberts led a 5-3 majority Monday that said federal officials, not the states, had “broad discretion” in deciding whether to arrest and deport illegal immigrants. The ruling blocked Republican-led states from moving to aggressively enforce immigration laws on their own.

The message from Roberts was that the high court, even in a heated election year, was an independent institution and an enforcer of the Constitution—not a friendly forum for just one party or one side of the ideological divide.

But no one should expect that Roberts has moved left. Next term, the court will take on college affirmative action and possibly gay marriage, and Roberts is likely to take a conservative stand.

Still, this week’s rulings surprised much of Washington, where the partisan divide is so deep that few anticipated a nonpartisan decision. Republican leaders had been preparing to celebrate the demise of Obama’s healthcare law. Because the court had five Republican appointees, their assumption was the law would go down on a 5-4 vote.

Counting the same votes, Democrats and liberal groups were prepared to launch a political campaign against what they would describe as the pro-business, right-wing Roberts court.

The healthcare ruling would be paired with *Citizens United*, the 2010 decision that led to a gusher of new political spending.

In that case Roberts, with some hesitation, joined a 5-4 opinion written by Justice Anthony M. Kennedy that extended free-speech rights to corporate groups and unions. At first, Roberts tried to fashion a narrow ruling that would have allowed *Citizens*

United, a small nonprofit group, to sell a DVD that derided Hillary Rodham Clinton, then a Democratic candidate for president. But Kennedy insisted on a much broader opinion that struck down the long-standing ban on campaign spending. Roberts then joined to make the majority.

This time, by contrast, the chief justice kept control of the healthcare opinion. With four conservatives on his right and four liberals on his left, he chose the narrow, middle-ground ruling. He agreed with the conservatives it was unconstitutional to “compel” Americans to buy products, but he also agreed with the liberals that the insurance mandate could be upheld as a tax.

Kennedy, ousted from his spot at the center of the action, delivered an angry, stinging dissent Thursday that accused the chief justice of “vast overreaching” and having “invented” a way to uphold the law.

Constitutional experts said that when considering what was at stake, the chief justice deserves enormous credit.

Harvard Law School professor Richard Lazarus, who has known Roberts since their student days, said Thursday’s opinion shows he “does what he thinks is the right interpretation of the law, not what he thinks is necessarily popular or to curry favor.”

Conservatives said they were disenchanted. “Make no mistake: Chief Justice Roberts’ opinion is a sellout of constitutional principle of the highest magnitude,” said Chapman University law professor John Eastman.

For his part, the chief justice said he was glad to leave Washington for a summer teaching trip to Malta. It’s “an impregnable island fortress,” he told a group of judges Friday, tongue in cheek. “It seemed like a good idea.”

“The Mystery of John Roberts”

The New York Times

July 11, 2012

Linda Greenhouse

In November 1991, the Supreme Court heard argument in *Lee v. Weisman*, on the question of whether a prayer recited by a member of the clergy at a public high school graduation violated the constitutional separation of church and state. The vote after argument was 5 to 4 to allow the prayer. Chief Justice William H. Rehnquist gave the opinion-writing assignment to Justice Anthony M. Kennedy.

Some months later, Justice Kennedy sent a note to Justice Harry A. Blackmun, the senior justice on the dissenting side. He had changed his mind, Justice Kennedy said; the argument against allowing the prayer was the better interpretation of the First Amendment’s Establishment Clause. Justice Blackmun, now the senior justice in the majority, had the prerogative of reassigning the opinion. He told Justice Kennedy to keep writing.

When the 5-to-4 decision to prohibit graduation prayers was finally announced on June 24, 1992, it was huge news. From today’s perspective, it may not sound like a big deal. But *Lee v. Weisman* was one of the hot-button cases of the 1991 term, perhaps second only to *Planned Parenthood v. Casey*, the abortion case that challenged the continued validity of *Roe v. Wade*.

President George H. W. Bush was running for re-election, and having put both David H. Souter and Clarence Thomas on the Supreme Court, he was eager to show the religious right that he was the rightful heir of his predecessor, Ronald Reagan. His solicitor general, Kenneth W. Starr, made

the unusual move of filing a brief asking the court to take the case, even though as a legal matter the federal government’s interest in the outcome was far-fetched. As an administration official explained to me at the time, the strategy was to provide a vehicle for Justice Souter to declare himself lowering the church-state barrier (a profound misjudgment of this Yankee Republican, who voted with the majority).

Justice Kennedy’s position was particularly galling across the conservative spectrum: the wounds from the 1987 defeat of Robert H. Bork’s nomination were still raw, and Justice Kennedy held the seat the Reagan administration had intended for Robert Bork.

But did disappointed conservatives, inside or outside the Supreme Court, run crying to the press? They did not. The behind-the-scenes drama remained largely unknown until Justice Blackmun’s papers became available at the Library of Congress 12 years later. Terry Eastland, writing in *The American Spectator* in February 1993, said there were rumors suggesting that Justice Kennedy had switched his position, but in the pre-Internet age, the report received little traction. (There were widespread rumors that in the *Planned Parenthood* decision, issued five days after *Lee v. Weisman*, Justice Kennedy had switched his vote to join the 5-to-4 majority in upholding the right to abortion, but my own inside-the-court conversations at the time refuted that suspicion.)

The obvious reason for this trip down memory lane is to draw a then-and-now

comparison with the torrent of right-wing leaks in the immediate aftermath of the decision to uphold the Affordable Care Act. I'm not surprised by the claim that the crucial vote by Chief Justice John G. Roberts Jr. to uphold the health-care mandate under the Congressional tax power represented a late switch, having suggested that scenario myself in a column written the day of the decision. But I'm amazed by the leaks (to be clear, I had none) and by the invective that continues to be heaped on the chief justice.

Ramesh Ponnuru, a senior editor of National Review and leading conservative blogger, wrote that Chief Justice Roberts "acted less like a judge than like a politician, and a slippery one." Randy Barnett, a Georgetown University law professor and intellectual father of the Commerce Clause argument against the statute, predicted on the Volokh Conspiracy blog that "it's hard to imagine Republican politicians citing John Roberts as the type of justice they favor nominating in the future" (odd, because the Roberts opinion, actually accepting Professor Barnett's Commerce Clause analysis, has left liberals seriously alarmed about the court's future direction on congressional power). Clint Bolick, a leading libertarian who advocates aggressive activism—sorry, "engagement"—by the court to shrink government power, wrote in *The Wall Street Journal* that "the upshot is that Chief Justice Roberts has become a 'swing' justice on the Supreme Court" and is no longer a "solid conservative."

Mr. Bolick also wrote that the chief justice's supposed vote switch has the effect of "magnifying the harm" of the decision. This is a common theme of the conservative critics, although why that should be the case is not self-evident. One asserted reason for concern is that the switch reveals the chief

justice's vulnerability—now and in the future—to blandishments from the establishment to do the right thing, to care about his reputation and that of the court. I think this notion is close to fatuous. The chief justice is an astute student of history whose recreational reading includes biographies of former chief justices. He didn't need to be reminded by a handful of liberal pundits and political leaders that there was a lot riding on his role in this case.

I doubt there was a single reason for the chief justice's evolution (I know, conservatives hate that word in the context of Supreme Court justices' ideological trajectories), but let me suggest one: the breathtaking radicalism of the other four conservative justices. The opinion pointedly signed individually by Justices Kennedy, Thomas, Antonin Scalia and Samuel A. Alito Jr. would have invalidated the entire Affordable Care Act, finding no one part of it severable from the rest. This astonishing act of judicial activism has received insufficient attention, because it ultimately didn't happen, but it surely got the chief justice's attention as a warning that his ostensible allies were about to drive the Supreme Court over the cliff and into the abyss. (Extraneous question: Is the liberal love affair with Anthony Kennedy—which should have ended five years ago with his preposterously patronizing opinion in *Gonzales v. Carhart*, upholding the federal Partial-Birth Abortion Ban Act of 2003 and suggesting that women are incapable of acting in their own best interests—finally over?)

Students of the court more interested in seeking to understand rather than denounce the chief justice's performance have offered valuable insights in recent days. Steven M. Teles, a political scientist at Johns Hopkins University and author of the commendable

“The Rise of the Conservative Legal Movement,” suggested in *The Washington Monthly* that Chief Justice Roberts was not comfortable with “sweeping uses of judicial power to limit government.” Professor Teles said that while the chief justice was “sympathetic” with his fellow conservatives, he “simply lacks the taste for the jugular that they have, either as a result of his role as chief justice or his prudential sense of how far it is reasonable for the court to go in using its power.”

A Harvard law student, Joel Alicea, in a smart post on the conservative Web site The Public Discourse, wrote that the health care decision revealed “a clash between two visions of judicial restraint and two eras of the conservative legal movement.” If Chief Justice Roberts, nearly a generation younger than Justices Scalia and Kennedy, in fact represents the old form of legal conservatism, in which the judicial role is to salvage statutes if possible rather than eviscerate them in the service of a bigger agenda, that’s a fascinating and highly consequential development.

And it may be just such a fear that explains the anger and angst, the willingness of the leakers—as opposed to disappointed conservatives of an earlier era—to burn the court down in order to delegitimize one whom they happily claimed as their own only weeks ago. The fissures on the conservative side of the court may already be opening over how to approach next term’s big cases on affirmative action (scrap it or confine it) and voting rights (declare the landmark Voting Rights Act obsolete, and therefore unconstitutional, or yield to the nearly unanimous vote by which Congress

extended the law’s Section Five for another 25 years). The first case is already on the court’s docket, and the other is on its way, neither by happenstance. Both cases were created by conservative interest groups, primed and nurtured and pushed to the Supreme Court on the assumption that the moment for radical activism had finally arrived.

Is John Roberts the new swing justice? I have strong doubts. The man is conservative to his bones. So the real question is what the word “conservative” means in 2012 and the decades ahead. And that’s a mystery much more important to solve than who leaked and why.

Readers of this column know from my regular references to Judge Richard Posner of the federal appeals court in Chicago that he is one of my favorite judges. A pragmatic libertarian and prolific author, Judge Posner has the enviable quality of being willing to say out loud exactly what he thinks. So his comment on what may lie ahead for John Roberts, in a July 5 interview with Nina Totenberg of NPR, was perhaps not surprising, but I still found it amazing. Here is what he said:

“I mean, what would you do if you were Roberts? All of a sudden you find out that the people you thought were your friends have turned against you, they despise you, they mistreat you, they leak to the press. What do you do? Do you become more conservative? Or do you say, ‘What am I doing with this crowd of lunatics.’ Right? Maybe you have to reexamine your position.”

“Analysis: Roberts Sent Message of Court’s Legitimacy”

The Washington Post

June 30, 2012

Dan Balz

Chief Justice John Roberts delivered more than a historic ruling with his opinion upholding the constitutionality of the Affordable Care Act. Deliberately or not, he sent a message to politicians about the importance of protecting the vitality and reputation of public institutions.

That’s a message badly needed in Washington and nowhere more so than in the Capitol building that sits across the broad lawn from the Supreme Court. Congress is an institution designed to represent the people. It has become a body where too often its members act as if they represent only Republicans or only Democrats. No wonder so many Americans hold it in such low regard.

It is useful to remember that, in the run up to the ruling, one strong subtext of analysis was what a decision striking down President Obama’s health-care law would do to the court itself. Would the court, under those circumstances, be vulnerable to the charge that it had become as politicized as the other branches of government?

Connecting the dots

Fearing defeat, Democrats were preparing to make the court a target in the fall election. They were connecting the dots, from the ruling that handed the presidency to George W. Bush, to the Citizens United decision that helped unleash a torrent of big-money contributions in this year’s election cycle (a huge share of the money going to GOP super PACs), and, finally, to health care and a decision that would have been seen as

toppling the president’s signature accomplishment.

No Supreme Court is ever immune from the political currents swirling at any given time. But the assumption of most Americans is that the court, of the three branches of government, should be insulated from partisan politics. Its decisions may offend one side or the other, but its legitimacy should remain inviolate.

Had a majority of the justices struck down Obamacare, the court—fairly or unfairly—would have become a bigger issue in the presidential campaign than usual and in ways that could have been damaging to its authority.

How much the court’s place and reputation entered into Roberts’ thinking may never be known. Someday, the full story of how he found his way to writing a majority opinion on the health-care case with the four liberal justices may become known. The opinion he wrote was, in the estimation of some legal experts, either tortured or fiendishly clever in maneuvering toward an outcome that upheld the constitutionality of the health care law while attempting to adhere to conservative principles aimed at restraining the powers of the federal government.

One can only imagine how Obama, the former constitutional law professor, analyzed the opinion and how he evaluated the motivations of the chief justice who, surprising to some, handed him a major legal and political victory in the middle of his tight re-election campaign.

A particularly testy relationship

That was all the more intriguing because the president and the chief justice have had a particularly testy relationship. It began with Obama's speech outlining his opposition to Roberts' nomination in 2005. He said Roberts had the intellect and temperament to sit on the court but questioned whether he had the values and heart not to side with the strong over the weak.

Their relationship may have reached its nadir when Obama publicly rebuked Roberts and the court for the *Citizens United* decision as the justices sat before him in the House chamber during his 2010 State of the Union address.

Roberts' detractors believe that he reinterpreted what Congress said in the legislation to find a legal justification for upholding it—by defining the individual mandate as a tax. For that, he is taking considerable heat from conservatives. But he also handed Republicans a new justification to attack Obama for raising taxes.

Roberts wrote that he was not making a judgment about the wisdom of the policy; he said only that it was constitutionally permissible. He has thrown the debate over

health care back into the political arena. Those who looked to the court to redress political grievances over a health-care law that was passed on a party-line vote have the opportunity to win their case in the court of public opinion, which is the right place given all its history.

In his act of judicial activism, as some of his critics have described it, Roberts demonstrated restraint of a different kind—a bow to the political branches of government to exercise their powers within the broad framework of the Constitution. If it was judicial activism, it was in the service of institutional deference. The chief justice helped remind the country that each branch of government has particular powers, responsibilities and obligations. The legislative branch is designed for partisan debate but, ultimately, it is there to make laws and solve problems that it alone can solve.

On one of the most politically charged cases in years, the chief justice chose to exercise the leadership that goes with his position. He may have protected his institution at the same time. The members of Congress have not done that very often in recent years. That is one lesson they can take away from the court's historic ruling.

“Constitution Check: What Does “Chief” in “Chief Justice” Mean?”

National Constitution Center

July 10, 2012

Lyle Denniston

The statements at issue:

“His job is not to finesse the place of the Supreme Court in the political world, in which he and most justices are rank amateurs, but to get the Constitution right first and then defend the institution second.”

— John Yoo, law professor at the University of California-Berkeley, in an email message published July 3 by *The New York Times*. He was commenting on leaks to the news media that Chief Justice John G. Roberts, Jr., had switched positions from striking down the new federal health care law to upholding it.

“There is speculation in conservative circles that Roberts had intended to strike down Obamacare but flipped his position at the last minute. We don’t know if he was suddenly convinced by his liberal colleagues or simply had a failure of nerve.”

— Marc A. Thiessen, fellow of the American Enterprise Institute in Washington, in an op-ed column July 7 in *The Washington Post*, commenting on the same news reports. We checked the Constitution, and . . .

The Chief Justice of the United States—that is the correct title—is one of the few top federal officials whose job was created explicitly in the Constitution. By tradition, the Chief is also the head of the judicial branch and is its dominant administrator. And, if the federal courts’ reputation is suffering, or those courts are under political siege, it is to the Chief that the other

justices—and perhaps the nation’s people—look for restoration of its stature, and maybe its power, too.

After seven terms as Chief Justice, John G. Roberts, Jr., probably has not had his leadership tested as much as now. When he returns from a two-week teaching assignment in Malta, and retreats to his summer home in Maine, he almost certainly will start thinking about that challenge, and whether he needs to do something about it.

He can have no doubt that many conservative politicians, pundits, and academics are thoroughly displeased with his votes in the health care case. (When those tempers cool, though, they will discover on closely reading his opinion that Chief Justice Roberts has not abandoned any of his conservative philosophy, and, indeed, has given a strong push to the limited government sentiment that now runs so deeply in conservative circles.)

But the Chief Justice’s problem, if he has one right now, is not solely with conservative critics outside the Court. It now appears that the internal deliberations of the Court were the subject of very substantial leaks from inside, and those leaks were framed in a way that challenged his leadership in fashioning a majority to resolve the Affordable Care Act controversy. Mr. Thiessen’s comment in *The Post* that the Chief Justice may have suffered “a failure of nerve” is an echo of what the leaks had indicated was an internal complaint, too.

It is almost certainly not in Roberts' power to stop such leaks altogether. But, as the Chief, he does have the prestige and the rank—and perhaps the obligation—to lead the Court back toward renewed collegiality and common purpose. He is known to want to keep the Court above politics, as much as possible, and that may very well account for the way he voted on health care. He almost surely is fully aware of the criticism that the Roberts Court is a partisan bastion, but now, the sniping from inside might just reinforce such an image—unless the Chief moves to ease the tension.

But dealing with that is an internal task; Roberts also faces a task that involves the world outside the Court, and not just to woo back America's conservatives.

Although Professor Yoo sought to lecture the Chief Justice on his priorities, that critique suffered from two flaws. First, there was no “right” way to decide the health care case; that the Court was deeply divided on almost all parts of the ruling showed that mature minds can differ on basic questions of constitutionality. The Court is not “wrong” just because it displeases some of the public.

Second, because the Chief Justice is the public face of the court, he must have a highly developed sensitivity to when it is getting into political trouble. A Chief Justice

must be constantly aware of that in the digital age, when a negative response to the court can go viral instantly.

As a student of the court's history, Roberts surely is aware of what may have been the finest moment in the career of one of his predecessors. And, despite Professor Yoo, this previous Chief Justice did not consider his external obligations to be secondary.

That Chief, of course, was Charles Evans Hughes. In 1937, with the Court in the midst of the constitutional crisis over its independence of the White House, it was Hughes' public and private maneuvering that helped seal the doom of President Franklin Roosevelt's Court-packing plan. Had that plan succeeded, it might well have destroyed the Court.

In a column in *The Nation* magazine in May 1937, when the Roosevelt plan was going down to defeat, columnist Robert S. Allen wrote: “Few realize how important a part Mr. Hughes has played in the fight against the court bill. He has conducted his operations with consummate deftness and finesse—and tremendous effectiveness.”

Hughes did it, though, with the support of his colleagues. The leaks from within the Roberts Court do raise some doubt about whether this Chief can count on solidarity from within.