

College of William & Mary Law School  
**William & Mary Law School Scholarship Repository**

---

Popular Media

Faculty and Deans

---

2011

# Split Definitive

Lawrence Baum

Neal Devins

*William & Mary Law School*, [nedeви@wm.edu](mailto:nedeви@wm.edu)

---

## Repository Citation

Baum, Lawrence and Devins, Neal, "Split Definitive" (2011). *Popular Media*. 224.  
[https://scholarship.law.wm.edu/popular\\_media/224](https://scholarship.law.wm.edu/popular_media/224)

Copyright c 2011 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
[https://scholarship.law.wm.edu/popular\\_media](https://scholarship.law.wm.edu/popular_media)

# For the First Time in a Century, the Supreme Court Is Divided by Party

## Affiliation

By Lawrence Baum and Neal Devins

Posted Friday, Nov. 11, 2011, at 5:27 PM

Slate.com

### Split Definitive

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



*The nine members of the Supreme Court now adhere more strictly to party lines than any court in more than 100 years. Photo by Mark Wilson/Getty Images.*

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.