

William & Mary Law School

## William & Mary Law School Scholarship Repository

---

Supreme Court Preview

Conferences, Events, and Lectures

---

9-24-2010

### Section 3: Roberts Court, A Retrospective

Institute of Bill of Rights Law, William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/preview>



Part of the [Supreme Court of the United States Commons](#)

---

#### Repository Citation

Institute of Bill of Rights Law, William & Mary Law School, "Section 3: Roberts Court, A Retrospective" (2010). *Supreme Court Preview*. 199.

<https://scholarship.law.wm.edu/preview/199>

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/preview>

### III. Roberts Court, a Retrospective

#### *In This Section:*

“COURT UNDER ROBERTS IS MOST CONSERVATIVE IN DECADES” Adam Liptak	p. 65
“WHAT ‘PRO BUSINESS’ SUPREME COURT?” Daniel J. Popeo	p. 72
“OBAMA AND SUPREME COURT MAY BE ON COLLISION COURSE” David G. Savage	p. 74
“SUPREME COURT VS. OBAMA: THE BATTLE LINES ARE DRAWN” David A. Patten	p. 77
“IT KEEPS COMING DOWN TO THE MAN IN THE MIDDLE” Robert Barnes	p. 80
“IS THE ‘KENNEDY COURT’ OVER?” Linda Greenhouse	p. 82
“ROBERTS COURT PROTECTS THE POWERFUL” Nan Aron	p. 85
“HEART OF DARKNESS?” Dahlia Lithwick	p. 87
“THREE SUPREME COURT MYTHS” Stuart Taylor, Jr.	p. 89
“OUR FILL-IN-THE-BLANK CONSTITUTION” Geoffrey R. Stone	p. 92
“CAMPAIGN CASE MAY HAVE SET COURSE FOR COURT” Joan Biskupic	p. 95
“ROBERTS VERSUS ROBERTS” Jeffrey Rosen	p. 97
“ANALYSIS: A NEW LAW TO OFFSET CITIZENS UNITED?” Lyle Denniston	p. 101

## **“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. Asked at the law school forum in January

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. 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 *Bag*, a law journal. “It was Justice Alito

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* 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.

## “What ‘Pro Business’ Supreme Court?”

*Washington Examiner*

May 20, 2010

Daniel J. Popeo

Over the past several months, some politicians and activists have intensified their campaign to label the U.S. Supreme Court under Chief Justice Roberts’ leadership as reflexively “pro-business.”

A close examination of these arguments reveals the claim to be little more than an inside-the-Beltway urban legend. But even more troubling than the misleading facts being presented is the broader, underlying message activists want to implant in the public’s mind. They want Americans to see the judiciary as a political body whose business verdicts are biased and harmful to our well-being.

The notion of a pro-business Supreme Court has been a favorite “populist” refrain of politicians for some time. This spring, activist groups and sympathetic academics have produced “reports” on the Supreme Court and its business cases during Chief Justice Roberts’ tenure.

The assertions of these studies have in turn been parroted in news stories, op-eds, and cable news shows. And on the day President Obama announced his nominee to replace Justice Stevens, three activist organizations sponsored a full page advocacy ad in *The Washington Post* accusing the Court of being a corporate subsidiary.

Court critics have especially focused their ire on the 2009 *Citizens United* campaign finance ruling, where five justices recognized the First Amendment rights of companies and other state-created entities.

But the labeling campaign has gone far

beyond *Citizens United*, with activists citing decisions involving punitive damages, environmental and health regulations, and even procedural rules affecting civil litigation. The criticism of certain Court decisions solely on the basis that the business litigant prevailed represents one-dimensional advocacy in its most disingenuous form.

The Court’s recent rulings on punitive damages, for instance, rely on a long line of cases which respect all civil litigation defendants’ due process rights to be free from arbitrary and excessive punishment.

Instead of acknowledging that justices such as Breyer and Souter either authored or joined majority opinions in damages cases involving tobacco and oil defendants, activists instead dwell on these cases’ factual underpinnings to demonize the outcomes.

Activists have also lambasted the Court for rulings that in effect limit litigation against FDA-approved medical products, but omit the detail that federal law explicitly permits such “federal preemption.”

If the justices are in fact working on behalf of U.S. businesses, they probably should be fired: A more complete look at the Supreme Court’s rulings in commercial cases reveals numerous instances where business interests lost, and lost big.

In its current term, for example, the Court unanimously held for the plaintiffs in a securities fraud class action case; unanimously upheld shareholder suits

against investment advisors; and permitted federal class action lawsuits in a state which prohibits such suits.

Last year, the justices rejected the preemption arguments of drug makers and allowed state tort suits against FDA-approved drugs. In 2008, the Court upheld state fraud suits against cigarette manufacturers. These are but a few examples.

But let's assume for argument's sake that one can fairly label a judicial decision "pro-business." Is there something inherently wrong with that? Those who have been accusing the Court of a corporate bias certainly think so.

Activists and their allies subtly imply that when businesses win in the courts, Americans lose. They have it exactly backwards. A business is created, run, and staffed by people, and it offers useful and needed products and services to the public.

Real people thus suffer when businesses are denied constitutional rights, or are threatened by abusive prosecutors or shackled with capricious regulations and lawsuits. Those enterprises will struggle to create new jobs, generate positive returns for shareholders, contribute to pension plans, and provide consumers with new innovations. Isn't that the opposite of what hard-working Americans need?

What businesses do seek from the judiciary

is a fair hearing, protection of their rights, and a measure of predictability in the law. As Justice Breyer noted in an opinion this year involving a critical jurisdictional matter which had widely split the lower courts, "Predictability is valuable to corporations making business and investment decisions."

In other business-related cases, Supreme Court justices from across the ideological spectrum have embraced and noted this need for clarity and consistency.

The ultimate goal of this smear campaign seems to be convincing Americans that the judiciary is just another political body with an ideological ax to grind. Over the next month, the examination of a Supreme Court nominee and the Court's release of nearly 40 opinions will occur simultaneously.

Special interest legal activists will conflate the two and lecture us on how there's really no difference between the political and judicial processes. They'll label disfavored Court rulings as further proof of a pro-business agenda and demand that the nominee reject such opinions now in her hearings and on the bench if she's confirmed.

Hopefully, the public will view this charade skeptically and keep the basic principles taught in Civics 101, not to mention the U.S. Constitution, in mind—legislatures make the laws, and the judiciary interprets them.

## **“Obama and Supreme Court May Be on Collision Course”**

*Los Angeles Times*

July 6, 2010

David G. Savage

The Supreme Court wrapped up its term last week after landmark decisions protecting the right to have a gun and the right of corporations to spend freely on elections. But the year’s most important moment may have come on the January evening when the justices gathered at the Capitol for President Obama’s State of the Union address.

They had no warning about what was coming.

Obama and his advisors had weighed how to respond to the court’s ruling the week before, which gave corporations the same free-spending rights as ordinary Americans. They saw the ruling as a rash, radical move to tilt the political system toward big business as they coped with the fallout from the Wall Street collapse.

Some advisors counseled caution, but the president opted to criticize the conservative justices in the uncomfortable spotlight of national television as Senate Democrats roared their approval.

Chief Justice John G. Roberts Jr. is still angered by what he saw as a highly partisan insult to the independent judiciary. The incident put a public spotlight on the deep divide between the Obama White House and the Roberts court, one that could have a profound effect in the years ahead.

The president and congressional Democrats have embarked on an ambitious drive to regulate corporations, banks, health insurers

and the energy industry. But the high court, with Roberts increasingly in control, will have the final word on those regulatory laws.

Many legal experts foresee a clash between Obama’s progressive agenda and the conservative court.

“Presidents with active agendas for change almost always encounter resistance in the courts,” said Stanford University law professor Michael W. McConnell, a former federal appellate court judge. “It happened to [Franklin D.] Roosevelt and it happened to Reagan. It will likely happen to Obama too.”

Already, the healthcare overhaul law, Obama’s signal achievement, is under attack in the courts. Republican attorneys general from 20 states have sued, insisting the law and its mandate to buy health insurance exceed Congress’ power and trample on states’ rights.

Two weeks ago, a federal judge in New Orleans ruled Obama had overstepped his authority by ordering a six-month moratorium on deep-water drilling in the Gulf of Mexico.

On another front, the administration says it will soon go to court in Phoenix seeking to block Arizona’s controversial immigration law, which is due to take effect July 29. Republican Gov. Jan Brewer said Arizona would go to the Supreme Court, if

necessary, to preserve the law.

As chief justice, Roberts has steered the court on a conservative course, one that often has tilted toward business. For example, the justices have made it much harder for investors or pension funds to sue companies for stock fraud.

Two years ago, the court declared for the first time that the gun rights of individuals were protected by the Constitution. This year, the justices made clear this was a “fundamental” right that extended to cities and states as well as federal jurisdictions.

Since the arrival in 2006 of Justice Samuel A. Alito Jr., Roberts has had a five-member majority skeptical of campaign funding restrictions. At first, he moved cautiously. Roberts spoke for the majority in 2007 in saying that a preelection broadcast ad sponsored by a nonprofit corporation was protected as free speech even though it criticized a candidate for office.

Last year, the court had before it another seemingly minor challenge to election laws by a group that wanted permission to sell a DVD that slammed Hillary Rodham Clinton when she was running for president in 2008. This time, however, Roberts decided on a much bolder move.

The 5-4 ruling in the *Citizens United* case struck down all limits on direct election spending—for giant, profit-making corporations as well as small nonprofit groups. For more than 60 years, Congress and many states had barred corporate and union spending to sway elections. The court’s opinion dismissed all such laws as unconstitutional censorship.

The decision came as a “real shock to the administration and to the Democrats in emphasizing that the court has long said

Congress,” said Simon Lazarus, counsel for the National Senior Citizens Law Center. “It’s also caused a sea change in their thinking about the court. Before, it was all about the ‘culture wars’ issues, like abortion, prayer and gay rights. Afterward, they saw this new activist thrust among the conservatives as a direct threat to their legislative agenda.”

The change was on full display in last week’s Senate hearing on Supreme Court nominee Elena Kagan. Democrats accused the high court of judicial activism in favor of corporations—“particularly by the five Republican appointees who have steered so hard to the right,” said Sen. Sheldon Whitehouse (D-R.I.).

Republicans in the hearing targeted Obama’s “tremendous expansion” of the government and argued for the court to aggressively restrain Congress and the White House. “The Supreme Court . . . ought to go for freedom, not more government,” said Sen. Tom Coburn (R-Okla.).

Obama chose Kagan for the court believing she could bridge the gap with some of its conservatives. Her mission is to help uphold the laws that Obama and Democrats are pushing through Congress.

During her hearing, Kagan found herself in the odd spot of defending judicial restraint before senators who usually worry aloud about sending a “judicial activist” to the court.

“Can you name for me any economic activity that the federal government cannot regulate under the commerce clause?” asked Sen. John Cornyn (R-Texas).

“I wouldn’t try to,” Kagan replied, lawmakers have broad powers to regulate

economic activity.

The high court, however, will decide whether making Americans buy health insurance amounts to economic activity.

It may be another year or two before a true challenge to the Obama agenda reaches the Supreme Court.

McConnell, the law professor, said the administration's broad set of regulatory moves made a clash almost inevitable. "It does not mean the courts are being 'political,'" he said. "It is the way the institutions are designed, to create checks and balances."

## **“Supreme Court vs. Obama: The Battle Lines Are Drawn”**

*Newsmax*

July 6, 2010

David A. Patten

President Obama appears set on a collision course with the conservative-leaning Supreme Court over the constitutionality of his administration's transformative legislative agenda, legal scholars say.

Partisan battles over the Supreme Court nomination of Elena Kagan, combined with the administration's proposals to change established policy dramatically in fields ranging from healthcare to financial regulation to energy and immigration, make it likely that Obama and the court's conservative majority increasingly will be at loggerheads, these experts say.

“I was struck by the coordinated attacks on the Supreme Court by liberals on the Judiciary Committee,” Tom Fitton, president of the conservative Judicial Watch organization, tells Newsmax. “I cannot recall any similar, sustained attacks on the high court in all my years in Washington. It is likely discomfiting to all the Supreme Court justices. Obama and his liberal allies are trying to politicize the Supreme Court in a way not seen since FDR's attempt to pack it with extra appointees.”

One thing appears certain: Supreme Court Justice John Roberts isn't likely to back down to Obama. Roberts reportedly still is angry over President Obama's decision to use the State of the Union address to scold the justices for their *Citizens United v. FEC* ruling, which rejected limitations on corporate and nonprofit electioneering.

When Obama said during the State of the

Union address that the ruling would “open the floodgates” to donations by foreign companies and other special interests to influence U.S. elections, Justice Samuel Alito mouthed the words “Not true.”

Politifact, the independent fact-checking organization, agreed with Alito. It rated the president's statement “barely true,” calling it an exaggeration. In their majority opinion, the justices specifically stated that their decision would not overturn the longstanding prohibition in 2 U.S.C. 441e(b)(3) against any foreign-based organization “directly or indirectly” spending money to influence the outcome of any U.S. election.

The president's decision to use his bully pulpit to frame the ruling's political impact incorrectly may have caused lasting damage to his relationship with the judiciary. The *Los Angeles Times* reported on Tuesday that “Chief Justice John Roberts Jr. is still angered by what he saw as a highly partisan insult to the independent judiciary.”

Simon Lazarus, counsel for the National Senior Citizens Law Center, told the *Times* that the *Citizens United* ruling came as a “real shock” to the administration, which “saw this new activist thrust among the conservatives as a direct threat to their legislative agenda.”

Ever since Obama's State of the Union remarks, Democrats and the White House have moved aggressively to legislate a way around the *Citizens United* ruling. The

Disclose Act legislation that the House say is a thinly veiled attempt to regulate corporate First Amendment speech so heavily that it becomes impractical, is unlikely to enhance the court's rapport with the administration.

That the battle lines have been drawn is clear. During the Kagan confirmation hearings, for example, Sen. Sheldon Whitehouse, D-R.I., warned of "the danger of judicial activism," in reference to "the recent behavior of the court, particularly the five Republican appointees who've steered it so hard to the right."

Curt Levey, executive director of The Committee for Justice, a conservative organization that has expressed serious doubts about Kagan's ability to put the law above politics, tells Newsmax that allegations of judicial activism by conservatives are purely political.

"Democratic senators' charges of activism by the Roberts Court were remarkably free of any legal rationale and amounted to little more than complaining about outcomes they don't like—that is, decisions that don't show favoritism for the 'little guy.' Now that judicial activism has gotten a well-earned bad name, such that Democrats can no longer openly defend it, they are reduced to saying 'you do it too,' as we saw at the Kagan hearings."

The *Los Angeles Times* reported Monday that a number of legal scholars now consider a clash between the expansive pro-government plans of the Obama administration and the Roberts court to be inevitable.

On healthcare, for example, GOP leaders in 20 states have filed suit to block the imposition of federal legislation that appears

recently passed, which conservative critics to give short shrift to the states' role in providing healthcare.

"Presidents with active agendas for change almost always encounter resistance in the courts," Stanford University law professor Michael W. McConnell, a former appellate court judge, told the *Times*. "It happened to [Franklin D.] Roosevelt and it happened to Reagan. It will likely happen to Obama too."

The Obama administration has already run into a brick wall in various court venues regarding its policies. Its setbacks, beyond the *Citizens United* case, include:

- The administration's six-month moratorium on offshore drilling was blocked by a federal judge who wrote that "the plaintiffs have established a likelihood of showing that the administration acted arbitrarily and capriciously in issuing the moratorium." When the administration tried to get a stay of that judge's order, that pleading also was rejected.
- In *District of Columbia v. Heller*, the Supreme Court struck down by a 5-4 margin the ban on guns in Washington, D.C. As solicitor general, Kagan had argued that the D.C. gun ban should continue.
- In June, by another 5-4 vote, the court expanded the protections in *Heller* to residents of all states, striking down a gun ban in Chicago as a violation of the Second Amendment right to bear arms.
- The administration is soon expected to go to court to try to block the Arizona law that aims to enforce the

federal prohibitions on illegal immigration. There has been speculation the delay in the administration's lawsuit stems from

- its uncertainty over how to attack a law that is largely patterned after existing regulations that the federal government has declined to enforce.

In part, the impending clash as the administration pushes its agenda forward appears to reflect the nation's growing partisan divide.

In last week's confirmation hearings, Sen. John Cornyn, R-Texas, pushed Kagan to identify any area of economic activity that the federal government, under the U.S.

Constitution, is not permitted to regulate. Kagan declined, saying, "I wouldn't try to."

"It is not surprising that Kagan was reluctant to provide an example of an economic activity that Congress can't regulate under the Constitution's Commerce Clause," Levey tells Newsmax. "To some degree, this reflects the sorry state of Commerce Clause jurisprudence, in which the Supreme Court has refused to enforce any meaningful limits on Congress's enumerated powers."

"But Kagan also had something more specific in mind," Levey says. "She was clearly trying to keep her options open for stretching the Commerce Clause wide enough to allow her to uphold Obamacare's individual insurance mandate."

## **“It Keeps Coming Down to the Man in the Middle”**

*The Washington Post*

March 15, 2009

Robert Barnes

Justice Anthony M. Kennedy has taken over the Supreme Court. Again.

You thought you already knew that? It was easy to get the impression from the flurry of landmark decisions that flowed from the court at the end of the term last summer.

Kennedy was the only justice in each majority as the divided court ruled out the death penalty for child-rapists, found in the Second Amendment the individual right to a firearm and provided constitutional protections to the detainees held at Guantanamo Bay, Cuba.

But last year was something of a slump for Kennedy. According to the folks at *Scotusblog.com*, which keeps meticulous records of such things, Kennedy prevailed in “only” 86 percent of the cases.

The year before, as the court faced its first full term with Chief Justice John G. Roberts Jr. at the helm and Justice Samuel A. Alito Jr. taking the seat vacated by Sandra Day O'Connor, Kennedy became the essential justice. He was on the losing side of only two of the 72 cases the justices decided. He was in the majority in every one of the 24 cases decided by a 5 to 4 vote.

So far this term, with the court announcing decisions in about a third of its cases, Kennedy has a perfect record.

The caveats: It's early. The court's most divisive cases are yet to come. And much of what the court has done so far is to get the

easy ones out of the way. Of the court's 28 decisions this term, justices have been unanimous in the outcome 13 times.

Still, Roberts assigned Kennedy the task of writing the plurality opinion when the splintered court narrowed the scope of what's required under the Voting Rights Act when governments create electoral districts to protect minority voters' rights.

And, with some of the court's most notable decisions and arguments still to come, Kennedy's impact will increase.

Although the tone of an oral argument is not always predictive, few could have left the court's recent consideration of whether a West Virginia Supreme Court justice should have recused himself in a matter involving a campaign supporter thinking that Kennedy would not decide the case.

Likewise, it is hard to imagine that Kennedy will not play the key role in the court's upcoming case on the constitutionality of the linchpin of the Voting Rights Act, the section that requires states with a history of racial discrimination to get approval from the federal government before changing voting laws.

And there's one case on the docket that practically belongs to Kennedy. It is about the circumstances in which public school systems must pay for the private schooling of children with disabilities. Kennedy recused himself when the court tried to decide the issue before, and it split 4 to 4.

As is custom for the justices, Kennedy did not say why he recused himself. But the court has now accepted a case that presents a virtually identical issue, and Kennedy will apparently be back to cast the deciding vote.

“There’s clearly a center on this court,” says Supreme Court practitioner Roy T. Englert Jr., “and it consists of Justice Kennedy.”

\* \* \*

## “Is the ‘Kennedy Court’ Over?”

*The New York Times*

July 15, 2010

Linda Greenhouse

A report in *The Daily News* last week that Justice Anthony M. Kennedy has no plans to retire left me shaking my head.

Would the next report be that the sun rose in the east this morning? It never even occurred to me to wonder whether Justice Kennedy, who turns 74 next Friday, might be thinking about retiring, because the answer is so clearly no. The man obviously still loves his job after 22 years, and has no reason to leave it.

But thinking about Anthony Kennedy led me to look back over the Supreme Court term that ended last month, and what I found surprised me. A plausible case can be made that it is no longer the “Kennedy court.”

That label has been applied to the Supreme Court for the last few years, including by me. It reflected the fact that on a polarized court, with two blocs of four justices reliably taking opposite sides in any case with a hint of ideological content, the majority in important cases turned out to be wherever Justice Kennedy was. In the 2006-2007 term, the first full term after Justice Sandra Day O’Connor’s retirement, the court decided 24 cases by votes of 5-to-4, and Justice Kennedy was in the majority in all 24.

But during this past term, Justice Kennedy was in dissent in 5 of the 18 cases decided by five-vote majorities (a figure that amounts to one-quarter of the 73 cases decided with signed opinions, down from 31 percent in the previous term and 40 percent in the term before that.) Three justices to Justice Kennedy’s right, Antonin Scalia,

Clarence Thomas and Samuel A. Alito Jr., all cast fewer dissenting votes in those close cases (three, three and four, respectively) and Chief Justice John G. Roberts Jr. was tied with Justice Kennedy at five.

Those are admittedly fine distinctions from a small sample, but I would argue that it’s the trend that counts. Justice Kennedy no longer appears to reside at the court’s center of gravity. The center has shifted to the right.

(I should note here that while Supreme Court statistics are widely available on the Internet, including from the estimable Scotusblog site, the numbers I use are my own, and may not always agree with others’. There are a surprising number of judgment calls that go into Supreme Court vote-counting, such as how to count a concurring opinion that agrees with the particular outcome—as Chief Justice Roberts did in a case striking down life sentences without parole for juvenile offenders convicted of crimes other than murder—while rejecting the rationale that the majority will apply in future cases. After some pondering, I decided to count the chief justice’s vote in that case, *Graham v. Florida*, as a dissent, and to consider Justice Kennedy’s majority opinion as a 5-to-4 rather than 6-to-3 win for the court’s liberal bloc. I also count the term’s big patent case, *Bilski v. Kappos*, as 5-to-4 for its splintered reasoning, although as a technical matter the judgment was 9-to-0.)

Of course, what really counts is what Justice Kennedy voted for and against. Of the 18 cases decided by five-member majorities, 12 can be considered at least somewhat

ideological. These included *Citizens United v. Federal Election Commission*, freeing corporations and labor unions to spend money on behalf of candidates in federal elections; *Berghuis v. Thompson*, making it easier for the prosecution to show that a suspect had waived his Miranda rights; and *Salazar v. Buono*, enabling the government to keep a Christian cross standing on top of a hill on the Mojave National Preserve.

Justice Kennedy wrote the majority opinions in all three of those cases. He voted a total of 10 times with the conservative bloc in the 12 ideological cases. Compare that with the previous term, during which he gave the liberal bloc his vote in 5 of 17 close and ideological cases; during the term before that, 2007-2008, he voted fully half the time in such cases with the liberals. This term, it was only twice.

In one of those two cases, he wrote the majority opinion declaring that a sentence of life without parole for a juvenile convicted of a non-homicide offense was categorically unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope," Justice Kennedy wrote.

In the second case, he joined Justice Ruth Bader Ginsburg's majority opinion upholding a public law school's refusal to grant official status to a student religious group that excludes those who engage in "unrepentant homosexual conduct." His concurring opinion in that case, *Christian Legal Society v. Martinez*, was in some respects broader than Justice Ginsburg's majority opinion. Justice Kennedy went beyond the somewhat murky facts to give his thoughts about life in law school, where according to conscience, demean a person's

"speech is deemed persuasive based on its substance, not the identity of the speaker." He declared: "A vibrant dialogue is not possible if students wall themselves off from opposing points of view."

Those two opinions were vintage Anthony Kennedy: he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action—which is what situates a case in a constitutional framework—between the fair and the not-fair.

Affirmative action policies are not fair—he has never voted to uphold one—because, in his view, they victimize those who bear no fault, such as the white applicant with higher test scores. Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote the majority opinion striking down such a measure in a 1996 case, *Romer v. Evans*) because "central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." The restrictions on corporate speech in the McCain-Feingold campaign finance law were not fair because the First Amendment does not abide discrimination among speakers.

In a book titled "Justice Kennedy's Jurisprudence," a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an "ideal of liberty" that "independently considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting standing in the community, or violate

essential elements of human dignity.” That is, I think, a more academically elegant way of saying fair versus not-fair.

So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line. Maybe as a justice Elena Kagan will be able to work her magic as she did with the fractious Harvard Law School faculty. But a junior justice, unlike a law school dean, has no inducements to offer, and Justice Kennedy is a tough man to persuade, as other justices have learned.

The notion of a “Kennedy court” rested on the assumption that Justice Kennedy’s vote was in play, at least most of the time, that the boundary separating liberals and conservatives on the court was at least

theoretically permeable and that he was willing to cross it. If that is no longer, or hardly ever, the case, then whose court is it?

Here is a final set of numbers suggesting that the most accurate description of the Supreme Court today is that it is a court securely in the collective hands of its five most conservative members. Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy collectively dissented during the past term a grand total of only 39 times, averaging 7.8 dissents per justice over the course of a term that produced 73 decisions. The four others—Justices Ginsburg, Stephen G. Breyer, John Paul Stevens and Sonia Sotomayor—dissented 78 times, for an average of 19.5 dissenting votes per justice.

Of course Justice Kennedy isn’t going to retire—not when he is on the winning team.

## “Roberts Court Protects the Powerful”

*Politico*  
May 5, 2010  
Nan Aron

As chief justice, John Roberts has shown a strong pro-business tilt. On the eve of the appointment of a replacement for Justice John Paul Stevens, the stakes have never been clearer.

The Roberts court has repeatedly placed corporate interests first and the rights of individuals second, as shown by an in-depth analysis that we just completed, “Unprecedented Injustice: The Political Agenda of the Roberts Court.” In many cases, this court has disregarded precedents and long-held principles to do so.

For those who care about unchecked corporate power, personal freedoms and respect for judicial precedent, the picture revealed by our data isn’t pretty. The record shows that the Roberts court consistently protects the powerful at the expense of the rest of us.

In the 2006-07 term, for example, the Roberts court heard 30 business-related cases and at least 22—or 73 percent—were decided in favor of large corporations.

A litany of cases heard by the Roberts court, and often decided by 5-4 votes, demonstrates this rightward, pro-Big Business tilt—an approach that will certainly continue, even after a replacement for Stevens has been seated.

According to our analysis, these cases include:

- A consumer seriously injured by a defective medical device cannot sue the

manufacturer if the product was approved by federal government regulators—even if the company knew the product was dangerous.

- Exxon was allowed to escape full financial liability for the damage done to communities and the environment by the Exxon Valdez oil spill.

- Two decisions that left many waterways no longer protected by the Clean Water Act, resulting in 1,500 major pollution investigations being halted and a 50 percent reduction in EPA actions against water polluters.

- Corporations have the same constitutional right to free speech as ordinary citizens, which opened the floodgates of unlimited corporate spending in federal elections.

- A woman paid less than her male peers for 20 years had no right to bring a lawsuit for equal pay because she failed to file the suit within 180 days of the first instance of discrimination—though she had no way of learning about the discrimination until years later.

But this pro-Big Business tilt demonstrated in our research is just one part of the story. It seems clear that many Republicans, perhaps prodded by their corporate allies, are herding key programs of the post-New Deal era toward the front door of the Supreme Court.

With a court that appears so casual about breaking precedent (see *Citizens United v. FEC* and *Lilly Ledbetter v. Goodyear*), it

could be that the right wing is hoping that the slender five-member conservative majority might dismantle everything from Social Security and Medicare, to privacy and civil rights, to environmental and consumer protections.

In this manner, the Roberts court may be called on to undo what otherwise can't be undone by the legislative process.

For example, just look at the federal lawsuits against the health care reform bill filed by 21 Republican state attorneys general. It could well be that the conservative movement wants to use the court as the judicial arm of a political agenda.

Given the fact that, in the past 40 years, 11 out of 14 confirmed justices were appointed by Republicans, conservatives may have good reason to be confident.

The big question then becomes: Will this court play along?

Some argue that the Supreme Court rarely strays too far from the centerline of American society and that core programs and broadly held social values will ultimately be safe. But clearly, this

conservative majority is frequently willing to stray from the mainstream judicial path.

Given the stark reality our research reveals, we are concerned about the future. But we're also convinced that some measure of change can occur even without the ability to replace a conservative justice with a more progressive one.

With so much at stake, we are confident that the president will appoint someone committed to core constitutional values, willing and able to stand up to the narrow conservative majority with clearly articulated principles.

This new justice must also be able to occasionally break through and find common ground.

When so many decisions are decided with knife-edge majorities, the need to bring that fifth vote back to the side of fundamental constitutional principles, respect for precedent and a more appropriate balance between corporate and individual rights has never been more important.

Generations of social and economic progress hang in the balance.

## “Heart of Darkness?”

*Newsweek*  
September 24, 2009  
Dahlia Lithwick

Next week the Supreme Court will begin its 2009 term, secure in the knowledge that it remains completely misunderstood by the American public. A Gallup poll conducted in September showed the court's current approval rating—61 percent—to be higher than it's been in a decade. (Last year that number was 50 percent.) This fall, 50 percent of Americans believe the court is not too liberal or too conservative; that's up from 43 percent last year. The number of Americans who believe the court is too conservative has dropped from 30 to 19 percent.

All this public admiration for the court's moderation came the same week the court was hearing a campaign-finance-reform case that may dismantle a longstanding system of campaign-finance restrictions. The issue in *Citizens United v. Federal Elections Commission* is not limited to the constitutionality of the McCain-Feingold campaign-finance-reform law. The reason court watchers got so worked up about this case is that it squarely tests Chief Justice John Roberts's stated commitments to preserving precedent, deferring to the elected branches, and issuing narrow rulings instead of sweeping ones. Oral arguments revealed that the court's five conservatives feel nothing but contempt for campaign-finance regulations that demonize corporations, restrict core political speech, and—to quote the chief justice—“put our First Amendment rights in the hands of FEC bureaucrats.”

But that's where the public confusion kicks in. In last term's cases on voting rights, reverse discrimination, and a school strip

search, the court opted for narrow, case-specific rulings rather than the sweeping ones foreshadowed by dramatic oral arguments. All this hardly means the 2008 term was a triumph for liberals at the high court. On balance, the term continued a clear trend in which big business always prevails, environmentalists are always buried, female and elderly workers go unprotected, death-row inmates get the needle, and criminal defendants are shown the door. So how to explain these new poll numbers showing that 49 percent of Republicans believe the Roberts Court is too liberal and 59 percent of Democrats believe the court is “about right”?

In part, the numbers reflect a focus on the wrong data; we continue to believe in the court we see on TV. Thus, the highly charged confirmation hearings of Justice Sonia Sotomayor this summer contributed to the idea that the court was swinging leftward, even though it's clear that her substitution for Justice David Souter will do nothing to alter the balance of the court (indeed, she is generally expected to move the court to the right in some areas of criminal law). Similarly, the refusal of the court to go all the way in the big-banner civil-rights cases last year leads to the broad perception that the court is quite liberal.

To be sure, progressives who claim that the court's eventual ruling in September's campaign-finance fracas will conclusively reveal the heart of darkness that lurks inside the Roberts Court are also overstating their case. It's true that the Roberts Court is a fundamentally conservative creature and will remain that way for the foreseeable

future. But as we learned yet again last term, it's also a court that is deeply aware of, even responsive to, public opinion. This is a court willing to reverse the Warren revolution with a tablespoon instead of a wrecking ball, and that may be too nuanced an approach to be captured in public-opinion polls.

The term that opens next week promises to provide another fistful of cases that will slowly deepen our understanding of the Roberts Court. Among them: yet another challenge to a cross on government property (raising questions about who has standing to be offended by religious symbols); a dispute over the constitutionality of a federal statute criminalizing depictions of animal cruelty; questions about whether juveniles may be

sentenced to life without parole; another hot eminent-domain case; and maybe even a quarrel over whether the name "Washington Redskins" is offensive. If the tea leaves are correct, we may also see another confirmation hearing next summer.

As a generation raised on a constant diet of reality television and the inevitable "big reveal," we will continue to look to the high drama of oral argument and the staged fireworks of judicial-confirmation hearings for our views about the Supreme Court. What really happens at the high court in the coming years will continue to occur by the tablespoon—even if we are too busy with imagined wrecking balls to see it.

## “Three Supreme Court Myths”

*National Journal*

April 16, 2010

Stuart Taylor Jr.

At both ends of the ideological spectrum, politicians, activists, journalists, and academics like to stress how big a change the next Supreme Court justice could make in the course of the law. The appointment will, says the conventional wisdom, be among President Obama's most important legacies.

Many also stress how far to the right (say liberals) or left (say conservatives) of center the Supreme Court has been in recent years, the better to dramatize the need to correct the perceived imbalance.

And the dominant media image has been of “the conservative Court” (recent articles in the *Washington Post*), or “the Supreme Court's conservative majority” (*New York Times* editorials), or a Court “as conservative as it's been in nearly a century” (*Newsweek* commentary by my friend Dahlia Lithwick).

All this brings to mind three contrarian theses.

First, it simply won't make much difference in the next five or so years—if ever—whom Obama picks from the lists of moderately liberal, extremely liberal, and just plain liberal candidates leaked by the White House.

Indeed, I can't think of a single case or issue that would foreseeably be decided differently depending on whether the nominee turns out to be the most or the least liberal of those under serious consideration.

The Court is by nature quite stable. Imagine, for example, that Obama nominated and the

Senate confirmed a person more liberal than either John Paul Stevens or any other current justice. No matter how passionate, or how brilliant, or how persuasive, he or she could move the law no further than at least four others were willing to go. And given the justices' fierce independence, it's hard to imagine any of them lurching leftward at the urging of the new kid on the block.

The eventual impact of the next justice's ideology will depend on unpredictable developments, including how many allies he or she might gain from future appointments and how his or her own views might evolve, both on today's big issues and on issues that will emerge later.

Indeed, history suggests that an appointee is likely to make a dramatic difference only when three ingredients are present: 1) The president is liberal and the outgoing justice is conservative, or vice versa; 2) the Court is very closely divided along liberal-conservative lines; and 3) the president can get a strong proponent of his own ideology through the Senate.

The first ingredient is not present now because Obama and Stevens are both liberal.

The first two ingredients were present in 1987, with the retirement of moderate Justice Lewis Powell, who had been the balance-tipping vote. President Reagan named Robert Bork, who was poised to provide the fifth vote to overrule *Roe v. Wade* and other major liberal precedents. But the Senate rejected him.

That led to the appointment of Justice Anthony Kennedy, who now occupies the

same balance-tipping position that Powell once did. Kennedy was far less conservative than Bork, as he showed by reaffirming *Roe* in 1992 (with some trimming). Kennedy also proved to be more liberal than Powell on some big issues. That helps explain why during Kennedy's time the Court has moved to the left—although you'd hardly know it from most media portrayals—on national security, gay rights, the death penalty, and church-state issues.

The only time in the past 35 years that all three ingredients for a balance-tipping appointment have been present was 2005. The retirement of moderate-liberal Justice Sandra Day O'Connor allowed President Bush to move the Court to the right—but not so far as to fit the “conservative Court” caricature—by nominating the solidly conservative Samuel Alito, who was confirmed in 2006.

(Bush's 2005 appointment of John Roberts to succeed William Rehnquist as chief justice did not substantially change the Court's balance.)

This brings me to my second contrarian thesis: Despite complaints by both liberal and conservative critics, the Court has not strayed far from mainstream public opinion over the past 35 years.

The need to get the support of both the president and the Senate tends to screen out candidates with extreme views. And the Supreme Court does follow the election returns, as humorist Finley Peter Dunne's Mr. Dooley observed. Polls, too.

Indeed, no decision since *Roe* in 1973—not even *Bush v. Gore*—has produced a lasting public backlash. And that one was a surprise to the justices.

My third contrarian thesis is that although Alito did make the Court more conservative on some big issues, we have not had a consistently “conservative Court” since 1937. Indeed, since the 1970s, the Court has strayed more often to the left than to the right of center of public opinion. And it remains as liberal as ever on some big issues, if only by a one-vote margin.

Here's a brief issue-by-issue analysis, updating a more detailed commentary that I posted last June 16.

- **National security.** In three big cases involving Guantanamo detainees since 2004, the four liberals plus Kennedy (and O'Connor in the 2004 case) have pushed the judiciary deeper into second-guessing the political branches' national security policies than ever before, by sweeping aside both presidential orders and a major 2006 act of Congress. Polls suggest lopsided public disapproval.

- **Abortion.** Polls have shown for many years that although the public does not want *Roe v. Wade* overruled, majorities say that abortion should be legal in, at most, “only a few circumstances” and support restrictions that the four liberals and Kennedy have struck down. These include banning abortions in the second and third trimesters and requiring spousal notification. Kennedy did join the four conservatives in 2007 in upholding a federal ban on “partial-birth” abortion that O'Connor would have struck down, a decision that enjoyed overwhelming public support.

- **Religion.** Polls have consistently shown strong approval of the nondenominational, nonparticipatory types of school prayer outside the classroom setting that the liberals plus Kennedy and O'Connor struck down

over conservative dissents in 1992 and 2000.

- **Death penalty.** The four liberals and Kennedy have banned the death penalty for murderers who were mentally disabled or younger than 18 and for child-rapists. These decisions—the last of which candidate Barack Obama denounced in 2008—put the justices somewhat to the left of public opinion.

- **Gay rights.** Although a solid majority of the public believes that sexual relations between consenting gay adults should be legal, polls showed that many thought the four liberals and Kennedy had gone too far, too fast when they made gay sex a constitutional right in 2003. Roberts and Alito have yet to face a gay-rights case.

- **Gun rights.** The June 2008 decision by the Court's conservatives and Kennedy striking down the District of Columbia's complete ban on handguns was an unprecedented interpretation of the Second Amendment. But it was also consistent with the overwhelming public support for an individual right to keep and bear arms—and was applauded by Obama.

- **Federal power.** Conservatives plan to argue during the coming confirmation proceedings that the health care overhaul's mandate to buy insurance or pay a penalty tax exceeds Congress's constitutional powers. It is not yet clear whether Alito and Roberts would be more receptive to such claims than O'Connor and Rehnquist.

- **Race.** This is the biggest issue on which Alito appears to have made the Court markedly more conservative than it had

been. In a 2007 decision striking down race-based student assignments—which would almost certainly have gone the other way had O'Connor stayed on—the four conservatives came close to adopting an absolutist “colorblind Constitution” stance that would doom racial preferences. Kennedy didn't go as far, but has generally opposed racial preferences—as has the public, by wide margins.

- **Campaign finance regulation.** In striking down on January 21 all limits on independent election spending by corporations and (apparently) unions, the five-justice majority moved dramatically to the right not only of its own precedents but also of public opinion, which was overwhelmingly negative. This was big. Whether it foreshadows bigger things to come is unclear.

Democrats are trying to leverage public disapproval of this and other decisions into a populist backlash against justices who “always seems to side with the big corporate interests against the average American,” in the words of Senate Judiciary Committee Chairman Patrick Leahy. Lest mere exaggeration fall short of galvanizing the public, Leahy, Obama, and many in the media have added a large dose of distortion. . . .

The reality is that although Alito has moved the law to the right on some issues, the Court still has five solid liberal votes on others, thanks to Kennedy's ideological eclecticism. The same will almost certainly be true when the dust clears after this summer's confirmation vote.

## **“Our Fill-in-the-Blank Constitution”**

*The New York Times*

April 13, 2010

Geoffrey R. Stone

As the Senate awaits the nomination of a new Supreme Court justice, a frank discussion is needed on the proper role of judges in our constitutional system. For 30 years, conservative commentators have persuaded the public that conservative judges apply the law, whereas liberal judges make up the law. According to Chief Justice John Roberts, his job is just to “call balls and strikes.” According to Justice Antonin Scalia, conservative jurists merely carry out the “original meaning” of the framers. These are appealing but wholly disingenuous descriptions of what judges—liberal or conservative—actually do.

To see why this is so, we need only look to the text of the Constitution. It defines our most fundamental rights and protections in open-ended terms: “freedom of speech,” for example, and “equal protection of the laws,” “due process of law,” “unreasonable searches and seizures,” “free exercise” of religion and “cruel and unusual punishment.” These terms are not self-defining; they did not have clear meanings even to the people who drafted them. The framers fully understood that they were leaving it to future generations to use their intelligence, judgment and experience to give concrete meaning to the expressed aspirations.

Rulings by conservative justices in the past decade make it perfectly clear that they do not “apply the law” in a neutral and detached manner. Consider, for example, their decisions holding that corporations have the same right of free speech as individuals, that commercial advertising receives robust protection under the First

Amendment, that the Second Amendment prohibits the regulation of guns, that affirmative action is unconstitutional, that the equal protection clause mandated the election of George W. Bush and that the Boy Scouts have a First Amendment right to exclude gay scoutmasters.

Whatever one thinks of these decisions, it should be apparent that conservative judges do not disinterestedly call balls and strikes. Rather, fueled by their own political and ideological convictions, they make value judgments, often in an aggressively activist manner that goes well beyond anything the framers themselves envisioned. There is nothing simple, neutral, objective or restrained about such decisions. For too long, conservatives have set the terms of the debate about judges, and they have done so in a highly misleading way. Americans should see conservative constitutional jurisprudence for what it really is. And liberals must stand up for their vision of the judiciary

So, how should judges interpret the Constitution? To answer that question, we need to consider why we give courts the power of judicial review—the power to hold laws unconstitutional—in the first place. Although the framers thought democracy to be the best system of government, they recognized that it was imperfect. One flaw that troubled them was the risk that prejudice or intolerance on the part of the majority might threaten the liberties of a minority. As James Madison observed, in a democratic society “the real power lies in the majority of the community, and the invasion of private rights is chiefly to be

apprehended . . . from acts in which the major number of the constituents.” It was therefore essential, Madison concluded, for judges, whose life tenure insulates them from the demands of the majority, to serve as the guardians of our liberties and as “an impenetrable bulwark” against every encroachment upon our most cherished freedoms.

Conservative judges often stand this idea on its head. As the list of rulings above shows, they tend to exercise the power of judicial review to invalidate laws that disadvantage corporations, business interests, the wealthy and other powerful interests in society. They employ judicial review to protect the powerful rather than the powerless.

Liberal judges, on the other hand, have tended to exercise the power of judicial review to invalidate laws that disadvantage racial and religious minorities, political dissenters, people accused of crimes and others who are unlikely to have their interests fully and fairly considered by the majority. Liberal judges have ended racial segregation, recognized the principle of “one person, one vote,” prohibited censorship of the Pentagon Papers and upheld the right to due process, even at Guantánamo Bay. This approach to judicial review fits much more naturally with the concerns and intentions of people like Madison who forged the American constitutional system.

Should “empathy” enter into this process? In the days before he nominated Sonia Sotomayor to the Supreme Court, President Obama was criticized by conservatives for suggesting that a sense of empathy might make for a better judge.

But the president was correct. If all judges did was umpire, then judicial empathy would be irrelevant. In baseball, we

government is the mere instrument of the wouldn’t want an umpire to say a ball was a strike just because he felt empathy for the pitcher. But once you understand that the umpire analogy is absurd, it’s evident that a sense of empathy can, in fact, help judges fulfill their responsibilities—in at least two ways.

First, empathy helps judges understand the aspirations of the framers, who were themselves determined to protect the rights of political, religious, racial and other minorities. Second, it helps judges understand the effects of the law on the real world. Think of judicial decisions that have invalidated laws prohibiting interracial marriage, granted hearings to welfare recipients before their benefits could be terminated, forbidden forced sterilization of people accused of crime, protected the rights of political dissenters and members of minority religious faiths, guaranteed a right to counsel for indigent defendants and invalidated laws denying women equal rights under the law. In each of these situations, in order to give full and proper meaning to the Constitution it was necessary and appropriate for the justices to comprehend the effect that the laws under consideration had, or could have, on the lives of real people.

Faithfully applying our Constitution’s 18th- and 19th-century text to 21st-century problems requires not only careful attention to the text, fidelity to the framers’ goals and respect for precedent, but also an awareness of the practical realities of the present. Only with such awareness can judges, in a constantly changing society, hope to keep faith with our highest law.

This does not mean judges are free to make up the law as they go along. But it does mean that constitutional law is not a

mechanical exercise of just “applying the law.” Before there can be a serious national dialogue about our Constitution, our laws

and the proper role of our judges, that myth must be exposed.

## “Campaign Case May Have Set Course for Court”

*USA Today*  
February 8, 2010  
Joan Biskupic

As the Supreme Court nears the midpoint of its annual term and prepares to hear several momentous cases, one question looms: Will the justices’ split decision reversing past rulings and allowing new corporate spending in political races set the tone for the term, or will *Citizens United v. Federal Election Commission* be an exception?

“Is this a turning point?” asks Pamela Harris, director of Georgetown Law’s Supreme Court Institute. Harris notes that Chief Justice John Roberts’ concurring opinion in the campaign-finance case defended reversing past rulings that have been, as Roberts wrote, “so hotly contested that (they) cannot reliably function as a basis for decision in future cases.”

“That is an incredibly muscular vision of when you would overrule precedent,” which usually guides justices in new cases, Harris says. “That makes it look like this is a court that’s ready to go.”

Several pending cases—some that already have been argued, some that will be argued in upcoming weeks—are likely to show the reach of the Roberts Court and its boldness.

Temple University law professor David Kairys expects the *Citizens United* to distinguish the Roberts Court for years. “I think it will actually define more than this particular term,” he says. “It might define the Roberts Court.”

Among the most closely watched disputes: whether the Second Amendment right to keep and bear arms covers regulation by

states and cities; whether people who signed petitions for a ballot referendum against gay marriage have a First Amendment right to keep their names private; and whether a board set up to regulate public accounting firms after the Enron and Worldcom scandals violates the separation of powers and infringes on the executive branch.

That last case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, could challenge the legal consensus that Congress has the power to establish and set rules for certain independent agencies and their members within the executive branch. Some conservatives, including Justice Antonin Scalia, have argued in some situations that only the president can remove executive officials.

### Big cases ahead

*Citizens United* reinforced the court’s caustic ideological divide and may have signaled what’s to come in the nearly 70 cases that await resolution through July.

The same acrimonious split was seen earlier in January when the five-justice conservative majority—Roberts, Scalia and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito—blocked broadcast of a federal trial in San Francisco on the constitutionality of California’s ban on same-sex marriage.

Dissenting were the same four who protested in *Citizens United*: Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor.

The majority in the dispute over Proposition 8—the 2008 voter initiative that banned gay marriage—said lower-court judges failed to follow procedures for notifying the public about the potential broadcasts, and it accepted arguments that the broadcasts could lead to the harassment of witnesses who had supported the same-sex marriage ban.

Dissenters countered that “the public interest weighs in favor of providing access to the courts” and accused the majority of “extraordinary intervention” in local affairs.

Kairys sees the current majority as the most conservative in decades. “It really is their time. They seem to have this undercurrent of, ‘Let’s do the things we want to do while we’re in control.’”

President Obama appointed Sotomayor last year and may get another appointment or two. But the Democratic president’s nominees would likely succeed liberals, who are among the older members of this bench. Stevens will turn 90 in April, Ginsburg 77 in March. Roberts, who is 55, and his fellow conservatives are generally the younger justices.

### **Accusations of activism**

Of the 11 signed opinions the court has

issued for the term, *Citizens United* was the most consequential.

Kairys argues that because of how money shapes politics, *Citizens United* marks “a change in the whole system of democracy.” Notre Dame law professor Richard Garnett is among analysts who see it as having less of an impact.

“*Citizens United* did not really dramatically change the presence of ‘corporate’ money in politics,” he says. “It was there before, and always will be, for better or worse.”

Yet Garnett is watching pending constitutional cases.

In Stevens’ dissent in *Citizens United*, he referred to the “majority’s agenda” and strongly suggested the majority was not “serious about judicial restraint.”

Roberts, who said during his confirmation hearings in 2005 that his job would be “to call balls and strikes and not to pitch or bat,” defended himself against criticism of conservative activism.

The chief justice cited what he saw as flaws in past campaign-finance cases that needed to be addressed and wrote, “There is a difference between judicial restraint and judicial abdication.”

## “Roberts versus Roberts”

*The New Republic*

March 2, 2010

Jeffrey Rosen

Last month, the Supreme Court handed down its most polarizing decision since *Bush v. Gore*. The 5-4 ruling in *Citizens United v. Federal Election Commission* called into question decades of federal campaign finance law and Supreme Court precedents by finding that corporations have a First Amendment right to spend as much money as they want on election campaigns, as long as they don't consult the candidates. It was precisely the kind of divisive and unnecessarily sweeping opinion that Chief Justice John Roberts had once pledged to avoid.

In 2006, at the end of his first term on the Court, Roberts told me and others that he was concerned that his colleagues, in issuing 5-4 opinions divided along predictable lines, were acting more like law professors than members of a collegial court. His goal, he said, was to persuade his fellow justices to converge around narrow, unanimous opinions, as his greatest predecessor, John Marshall, had done. Roberts spoke about the need for justices to show humility when dealing with the First Amendment, adding that, unlike professors writing law review articles, judges should think more about their institutional role. “Yes, you may have another great idea about how to look at the First Amendment,” he said, “but, if you don't need to share it to decide this case, then why are you doing it? And what are the consequences of that going to be?”

Since then, Roberts has presided over some narrow, unanimous (or nearly unanimous) rulings and some bitterly divisive ones. And so, it's been hard to tell how seriously he is taking his pledge to lead the Court toward

less polarizing decisions. Then came *Citizens United*, by far the clearest test of Roberts's vision. There were any number of ways he could have persuaded his colleagues to rule narrowly; but Roberts rejected these options. He deputized Anthony Kennedy to write one of his characteristically grandiose decisions, challenging the president and Congress at a moment of financial crisis when the influence of money in politics—Louis Brandeis called it “our financial oligarchy”—is the most pressing question of the day. The result was a ruling so inflammatory that the president (appropriately) criticized it during his State of the Union address.

What all this says about the future of the Roberts Court is not encouraging. For the past few years, I've been giving Roberts the benefit of the doubt, hoping that he meant it when he talked about the importance of putting the bipartisan legitimacy of the Court above his own ideological agenda. But, while Roberts talked persuasively about conciliation, it now appears that he is unwilling to cede an inch to liberals in the most polarizing cases. If Roberts continues this approach, the Supreme Court may find itself on a collision course with the Obama administration—precipitating the first full-throttle confrontation between an economically progressive president and a narrow majority of conservative judicial activists since the New Deal.

The first indications that Roberts might not be as conciliatory as he promised came during his second term, which ended in 2007. During his first term, which his

colleagues treated as something of a honeymoon, the Court had decided just 13 percent of cases by a 5-4 margin. But, in the next term, that percentage soared to 33 percent. (It would fluctuate up and down a bit over the next two years.) What's more, the 2007 term ended with unusually personal invective, as both liberal and conservative colleagues expressed frustration with Roberts. That year, during the Court's second encounter with the McCain-Feingold campaign finance law (which it would gut in *Citizens United*), Antonin Scalia accused Roberts of "faux judicial restraint," for chipping away at restrictions on corporate speech without overturning them cleanly. Meanwhile, the liberal justices seemed angry that Roberts was refusing to budge from rigid positions in divisive cases. "Of course, I got slightly exercised, and the way I show that is I write seventy-seven-page opinions," Justice Stephen Breyer told me in the summer of 2007, referring to his angry dissent from Roberts's 5-4 decision striking down affirmative action in public school assignments.

That same summer, I asked Justice John Paul Stevens whether Roberts would succeed in his goal of achieving narrow, unanimous opinions. "I don't think so," he replied. "I just think it takes nine people to do that. I think maybe the first few months we all leaned over backward to try to avoid writing separately." In other words, once his first term ended, Roberts faced a choice: In cases he cared intensely about, he could compromise his principles to reach common ground or he could stick to his guns and infuriate his opponents, who would feel they had been played for dupes. On virtually all of the most divisive constitutional topics, from affirmative action to partial-birth abortion, Roberts stuck to his guns.

There were some exceptions. Roberts managed to steer the Court toward narrow,

often unanimous opinions in business cases, which now represent 40 percent of the Court's docket. (Though this didn't require him to significantly compromise his views, since most of these cases were decided in a pro-business direction.) And then, there was last term's voting-rights case, in which Roberts wrote an 8-1 decision rejecting a broad constitutional challenge to the Voting Rights Act and instead deciding the case on technical grounds. For those who wanted to believe that Roberts was a genuine conciliator, this was a powerful piece of evidence. Like others, I praised his performance in the case as an act of judicial statesmanship.

But, in retrospect, the ruling may have been less statesmanlike than it appeared. According to a source who was briefed on the deliberations in the case, Anthony Kennedy was initially ready to join Roberts and the other conservatives in issuing a sweeping 5-4 decision, striking down the Voting Rights Act on constitutional grounds. But the four liberal justices threatened to write a strong dissent that would have accused the majority of misconstruing landmark precedents about congressional power. What happened next is unclear, but the most likely possibilities are either that Kennedy got cold feet or that Roberts backed down. The Voting Rights Act survived, but what looked from the outside like an act of judicial statesmanship by Roberts may have in fact been a strategic retreat. Moreover, rather than following the principled alternative suggested by David Souter at the oral argument—holding that the people who were challenging the Voting Rights Act had no standing to bring the lawsuit—Roberts opted to rewrite the statute in a way that Congress never intended. That way, Roberts was still able to express his constitutional doubts about the law—as well as his doubts about landmark Supreme Court precedents from the civil rights era, which

he mischaracterized and seemed ready to overrule.

The voting-rights case may help explain why Roberts didn't take a similarly conciliatory posture in *Citizens United*. After all, one was certainly available. Just as Roberts had implausibly but strategically held in the voting-rights case that Congress intended to let election districts bail out of federal supervision, he could have held—far more plausibly—in *Citizens United* that Congress never intended to regulate video-on-demand or groups with minimal corporate funding. As with the voting-rights case, judicial creativity could have been justified in the name of judicial restraint.

There is, of course, a charitable explanation for why Roberts took the conciliatory approach in one case but not the other: namely, that he felt the principles involved in *Citizens United* were somehow more important and therefore less amenable to compromise. As he told me in our 2006 interview, he has strong views that he, like his hero John Marshall, is not willing to bargain away. Marshall, Roberts said, “was not going to compromise his principles, and I don't think there's any example of his doing that in his jurisprudence.”

But a less charitable explanation for the difference between the two cases is that Roberts didn't compromise on *Citizens United* because, this time, he simply didn't have to. Kennedy was willing to write a sweeping opinion that mischaracterized the landmark precedent *Buckley v. Valeo* by suggesting that it was concerned only about quid pro quo corruption rather than less explicit forms of undue influence on the electoral system. (Congress had come to the opposite conclusion in extensive fact-finding that Kennedy ignored.) As Stevens pointed out in his powerful dissent, the opinion is aggressively activist in its willingness to

twist and overturn precedents, strike down decades of federal law, and mischaracterize the original understanding of the First Amendment on the rights of corporations. “The only relevant thing that has changed” since the Court's first encounter with McCain-Feingold in 2003, Stevens wrote, “is the composition of this Court”—namely, the arrival of Roberts and Samuel Alito.

Some of Roberts's liberal colleagues have suggested that Roberts is a very nice man but that he doesn't listen to opposing arguments and can't be persuaded to change his mind in controversial cases. If so, he may have thought he could produce a unanimous court by convincing liberals to come around to his side, rather than by meeting them halfway. In the most revealing passage in his concurrence in *Citizens United*, he wrote that “we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.” But the great practitioners of judicial restraint had a very different perspective. “A Constitution is not intended to embody a particular economic theory,” Oliver Wendell Holmes wrote in his most famous dissent, in *Lochner v. New York*. “It is made for people of fundamentally differing views.” Holmes always deferred to the president and Congress in the face of uncertainty. He would never have presumed that he knew the “right” answer in a case where people of good faith could plausibly disagree.

With Roberts apparently content to impose bold decisions on a divided nation on the basis of slim majorities, the question becomes: Is the Court now on the verge of repeating the error it made in the 1930s? Then, another 5-4 conservative majority precipitated a presidential backlash by striking down parts of FDR's New Deal. In January 1937, Roosevelt also criticized the Supreme Court's conservative activism in a State of the Union address. The following

month, he introduced his court-packing plan. But, at the end of March—thanks to the famous “switch in time” by swing justice Owen Roberts, the Anthony Kennedy of his day—the Court retreated and began to uphold New Deal laws.

One lesson from the 1930s is that it takes only a handful of flamboyant acts of judicial activism for the Court to be tarred in the public imagination as partisan, even if the justices themselves think they are being moderate and judicious. Although vilified today for their conservative activism, both the Progressive and New Deal-era Courts had nuanced records, upholding more progressive laws than they struck down. As Barry Cushman of the University of Virginia notes, of the 20 cases involving maximum working hours that the Court decided during the Progressive era, there were only two in which the Court struck down the regulations. But those two are the ones that everyone remembers. And, during the New Deal era, Cushman adds, we remember the cases striking down the National Industrial Recovery Act and the first Agricultural Adjustment Act, forgetting that the Court upheld the centerpiece of FDR’s monetary policy and, by a vote of 8-1, the Tennessee Valley Authority.

It’s hard to imagine a full-scale assault by the Roberts Court on Obama’s regulatory agenda because, with the exception of Clarence Thomas, the conservatives on today’s Court tend to be pro-business conservatives, rather than libertarian conservatives, and are therefore unlikely to strike down government spending programs (like the bank bailouts and the Troubled Asset Relief Program) that help U.S. business. But it’s not hard to imagine the

four conservative horsemen, joined by the vacillating Kennedy, reversing other government actions that progressives care about. Later this term, for example, the Court may follow *Citizens United* with another activist decision, striking down the Public Company Accounting Oversight Board (nicknamed “Peek-a-Boo”), which was created to regulate accounting firm auditors in the wake of the Enron and Arthur Andersen scandals. If the Court strikes down Peek-a-Boo, even if the decision is narrow enough not to call into question the constitutionality of the Federal Reserve, it may provoke another sharp rejoinder from Obama that turns progressive rumbling against the Court into full-blown outrage.

It’s impossible, at the moment, to tell whether the reaction to *Citizens United* will be the beginning of a torrential backlash or will fade into the ether. But John Roberts is now entering politically hazardous territory. Without being confident either way, I still hope that he has enough political savvy and historical perspective to recognize and avoid the shoals ahead. There’s little doubt, however, that the success or failure of his tenure will turn on his ability to align his promises of restraint with the reality of his performance. Roberts may feel just as confident that he knows the “right” answer in cases like Peek-a-Boo as he did in *Citizens United*. But political backlashes are hard to predict, contested constitutional visions can’t be successfully imposed by 5-4 majorities, and challenging the president and Congress on matters they care intensely about is a dangerous game. We’ve seen well-intentioned but unrestrained chief justices overplay their hands in the past—and it always ends badly for the Court.

## **“Analysis: A New Law to Offset *Citizens United*?”**

*SCOTUSblog*

January 21, 2010

Lyle Denniston

President Obama ordered his aides on Thursday “to get to work immediately with Congress” to develop “a forceful response” to the Supreme Court’s ruling in the *Citizens United v. Federal Election Commission* case. In a statement, the President denounced the decision, saying it “has given a green light to a new stampede of special interest money in our politics.” It was obvious, therefore, that he was interested in working with Congress to overturn the decision, or at least to narrow it significantly.

Unless he has in mind an amendment to the Constitution, however, it is most unclear at this point whether the lawmakers could do anything—or much of anything—to cut down on “special interest money” in American politics. This was a constitutional decision, laying down (essentially for the first time), a sweeping free-speech right in politics for “special interest” bodies of all types with the concept of “speech” clearly embracing spending money to influence election outcomes. If individuals have considerable freedom to express themselves politically, corporations, labor unions, and other “special interest” entities now do, too.

While the First Amendment’s guarantees of freedom are far from absolute, any time a legislative or other government body attempts to curtail those freedoms, the effort starts with a decidedly negative outlook. Such restrictions come with the heaviest burden of proof of necessity that any governmental act must put forth in order to win judicial approval. And, on Thursday, the

Court simply made that burden a good deal heavier in the realm of curbs on political speech, in the form of spending money on campaigns, or otherwise.

Given the degree to which many Republicans in Congress had wished longingly for a First Amendment decision precisely like the one that emerged in *Citizens United*, it is by no means a certainty that the GOP leaders would enlist in what the President’s statement suggested should be a “bipartisan” effort. In fact, the Senate GOP leader, Mitch McConnell of Kentucky, has been a consistent foe of federal restrictions on corporate spending in national politics, and was one of the leaders six years ago of the effort to get the Court to strike down an array of federal campaign finance restrictions.

Moreover, given the election result Tuesday in the Massachusetts race for a Senate seat, there is reason to doubt that the White House will be able to carry off a significant effort to get a “forceful response” to *Citizens United*, especially when the real-world effect of that decision in federal campaigns is likely to be greater spending in favor of GOP candidates, since corporations have deeper pockets than, say, labor unions.

As White House legislative analysts think of potential responses to the ruling, it is conceivable that they will not even try to put new restraints on “special interest” spending, because of the constitutional barrier that now stands to stymie that approach. So long as “special interest”

groups spend their political dollars on or party organizations, the *Citizens United* barrier to restrictions will be in place. There thus are fewer options for a legislative counter-measure.

The White House and Congress perhaps could approach the new money situation indirectly, by trying to put more distance between corporate, union or other “special interest” spending and the intended beneficiaries of that spending: favored candidates. One approach would be to increase the transparency of “special interest” spending by more rigorous disclosure legislation, in hopes of exposing more vividly who is in fact benefiting and, perhaps, by embarrassing the beneficiaries. (This is the one kind of legislative approach that the Supreme Court upheld on Thursday.)

Congress conceivably could attack the perceived problem of money-in-politics by another indirect means, by tightening restrictions on dealings between lobbyists and elected officials, including legislators. Lobbying, too, has First Amendment protection, but it is an activity that can be regulated at least at the level of disclosure.

campaign efforts independent of candidates. A drastic approach might be to expand the concept of questionable vote-buying, by requiring a more detailed public accounting of how lawmakers vote in relation to lobbyists with whom they deal directly and in relation to the industries who may benefit from legislative favors that flow out of the lobbyists’ efforts. One perhaps frivolous suggestion already making the rounds of political conversation is to require legislators to wear NASCAR-style uniforms, emblazoned with the logos of their corporate “sponsors.”

Tightening of lobbying restrictions, however, has been shown to be exceedingly difficult to get through Congress, precisely because there is no such thing as a “bipartisan” consensus on the need for such new measures.

Another indirect option (mentioned by a reader of the blog) would be to move toward public financing of congressional elections and enhancing such financing arrangements for the presidential candidates. That, it is suggested, may move toward reducing the influence of big-money donors, including major corporations.