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II. Did the Roberts Court Turn Leftward?

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“Right Divided, a Disciplined Left Steered the Supreme Court”

The New York Times

Adam Liptak

June 30, 2015

The stunning series of liberal decisions delivered by the Supreme Court this term was the product of discipline on the left side of the court and disarray on the right.

In case after case, including blockbusters on same-sex marriage and President Obama’s health care law, the court’s four-member liberal wing, all appointed by Democratic presidents, managed to pick off one or more votes from the court’s five conservative justices, all appointed by Republicans.

They did this in large part through rigorous bloc voting, making the term that concluded Monday the most liberal one since the Warren court in the late 1960s, according to two political-science measurements of court voting data.

“The most interesting thing about this term is the acceleration of a long-term trend of disagreement among the Republican-appointed judges, while the Democratic-appointed judges continue to march in lock step,” said Eric Posner, a law professor at the University of Chicago.

Many analysts credit the leadership of Justice Ruth Bader Ginsburg, the senior member of the liberal justices, for leveraging their four votes. “We have made a concerted effort to speak with one voice in important cases,” she said in an interview last year.

The court’s conservatives, by contrast, were often splintered, issuing separate opinions even when they agreed on the outcome. The conservative justices, for instance, produced more than 40 dissenting opinions, the liberals just 13.

The divisions on the right, Professor Posner said, may have occurred in part because the mix of cases reaching the court has invited a backlash. “Conservative litigators who hope to move the law to the right by bringing cases to the Supreme Court have overreached,” he said. “They are trying to move the law farther right than Kennedy or Roberts think reasonable.”

For example, in *King v. Burwell*, the case brought by groups hostile to the Affordable Care Act, Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy joined the court’s four liberals in rejecting the challenge to health insurance subsidies provided through federal exchanges. Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. dissented.

In addition, Professor Posner said, the conservative justices are airing real jurisprudential disagreements. “Kennedy, Roberts and Alito’s pragmatism contrasts with the formalism of Scalia and Thomas, for example,” he said.

Lee Epstein, a law professor and political scientist at Washington University in St. Louis, said: “The Republicans can’t seem to agree even when they agree.” She added that “the chief justice has a much tougher task” than Justice Ginsburg does.

David A. Strauss, a law professor at the University of Chicago, said the cases the court agreed to hear this past term might have created a misperception about how liberal it has become. “It’s still a conservative court — just not as conservative as some had hoped and some had feared,” he said. “King might never even have been brought if the court, or at least some justices, had not given signals that they were receptive to claims like that.”

The term was not uniformly liberal, of course. On Monday alone, the court ruled against death row inmates in a case on lethal injections and against the Obama administration in a case on environmental regulations.

Nor is the court remotely as liberal as the Warren court, which issued a far greater percentage of liberal decisions, often unanimously, in cases on school desegregation, interracial marriage, voting rights and criminal procedure.

The Obama administration, though, found an unlikely ally in the court in major cases, said Pratik A. Shah, a lawyer with Akin Gump Strauss Hauer & Feld. “Not many imagined a few years ago,” Mr. Shah said, “that this court, rather than Congress, would become the more effective venue for furthering the administration’s priorities.”

When the administration ended up on the losing side, it was often because it took a conservative position, particularly in criminal cases, said Adam Winkler, a law professor at the University of California, Los Angeles.

“The administration most often lost the court because it couldn’t hold the liberals,” Professor Winkler said. “The administration’s positions in the Supreme Court were too conservative. Shockingly, the Supreme Court may have been more liberal than the Obama administration this term.” This was so, he said, in cases involving drugs, guns, searches and threats posted on Facebook.

When the four liberal members of the court — Justices Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — achieved a majority, they were often happy to let others do the talking.

“I was struck by the discipline of the liberal wing — both in sticking together and in suppressing the urge any of them may have felt to write separately,” said Michael Dorf, a law professor at Cornell. This produced strong and united opinions, he said, from Justice Kennedy in *Obergefell v. Hodges*, the same-sex marriage case, and from Chief Justice Roberts in the health care case.

Dissenting in *Obergefell*, Justice Scalia accused the court’s liberals of a sort of intellectual dishonesty in joining Justice Kennedy’s opinion, which he charged sacrificed legal rigor for soaring language. “If, even as the price to be paid for a fifth vote, I ever joined an opinion for the court”

that included such vague passages, he wrote, quoting one, “I would hide my head in a bag.”

Justice Kennedy, the member of the court at its ideological center, did his part in moving the court to the left. As usual, he was in the majority in most of the 19 decisions decided by 5-to-4 votes.

Thirteen of those rulings split along the usual lines, with Justice Kennedy joining either the court’s four more liberal members or its four more conservative ones. In previous terms, he leaned right in such cases about two-thirds of the time. This time around, he voted with the liberals eight times and with the conservatives five.

In major cases, the court seemed to capture the spirit of the time, notably in establishing a constitutional right to same-sex marriage as a majority of Americans came to embrace it. Justice Ginsburg seemed to anticipate and explain the ruling in recent remarks at the American Constitution Society, a liberal legal group. “The court is not in a popularity contest, and it should never be influenced by today’s headlines, by the weather of today,” she said. “Inevitably, it will be affected by the climate of the era.”

Samuel Issacharoff, a law professor at New York University, said the court had played a traditional and proper role in the case. “The speed of the shifting societal consensus on same-sex marriage is astonishing,” he said. “The court protecting the emerging national consensus is not.”

A second 5-to-4 decision, allowing Texas to reject specialty license plates bearing the Confederate battle flag, was issued the morning after the shootings in Charleston, S.C., started a national debate about the meaning of that symbol. The timing was coincidence, and the vote was close. The liberals, as usual, voted as a group — but they were joined by Justice Thomas in a rare alliance.

This term may have been an anomaly, and the next one may shift back to the right. The justices have already agreed to hear cases on affirmative action and the meaning of “one person, one vote,” and they are likely to hear a major abortion case. Last term, the court issued unanimous decisions in about two-thirds of its case, a modern record. This term, the number dropped to about 40 percent, a little lower than the average in recent terms.

But the court remained united in cases involving religion, issuing unanimous rulings in favor of a Muslim inmate in an Arkansas prison who wanted to grow a beard and an Arizona church that challenged a town ordinance limiting the size of signs announcing services.

Business groups had a mixed record, winning 12 of the 22 cases in which they faced individuals or the government. “This term’s business decisions should put an end to the persistent theory that the Roberts court is reflexively biased in favor of corporate interests,” said Lauren R. Goldman, a lawyer with Mayer Brown.

Moreover, she said, many of the business victories were narrow. “On the other side of the ledger,” she said, “the court handed the business community several substantial losses.” Among the setbacks, she said, were victories for plaintiffs in employment discrimination cases and a broad interpretation of the scope of the Fair Housing Act

Over all, though, the story of the last nine months at the Supreme Court was of leftward movement.

“This term feels just huge,” said Lisa S. Blatt, a lawyer with Arnold & Porter who has argued more than 30 cases in the Supreme Court and studied its work for two decades. “It’s clearly the most liberal term I’ve seen since I’ve been watching the court.”

“Supreme Court’s Liberal Admirers Get Reality Check”

Politico

Josh Gerstein

June 29, 2015

Liberals still giddy over a series of major victories at the Supreme Court last week got a bracing reality check Monday, as conservatives carried the day on key cases involving the death penalty and President Barack Obama’s environmental agenda.

Progressives got another signal that any momentum they were experiencing at the high court could be short-lived: the justices announced they will address the thorny issue of affirmative action next term, taking up for the second time a case challenging the University of Texas’s use of race in its admissions process.

For some, it felt like whiplash.

“The cases today are shocking,” said Nan Aron, a prominent liberal activist and president of Alliance for Justice. “Last week was wonderful and no one can take away the victories that occurred, but I think it’s also important to understand those victories in a context [that] the court is one that continues to rule in favor of powerful and wealthy interests at the expense of most Americans. The decisions certainly today suggest that trend continues.”

Aron dismissed conclusions that the court was shifting to the left as it ruled in favor of same-sex marriage rights and upheld the nationwide availability of insurance subsidies under Obamacare, calling such

pronouncements “largely premature and exaggerated.”

Some conservatives agreed that the court wasn’t necessarily taking a new direction.

“I always thought the claims that the Roberts court ‘is the most conservative since’ whenever were overblown and I think the claims of a dramatic leftward turn are overblown, too,” said Jonathan Adler, a law professor at Case Western Reserve. “When you kind of step back and look at the substance of the cases, what’s at issue and what the court did, I don’t think you see a great liberal shift.”

All three decisions the justices issued Monday were 5-4 rulings. Justice Anthony Kennedy voted with the court’s other Republican appointees to reject a challenge to Oklahoma’s lethal injection protocol, effectively easing application of the death penalty nationwide, and to knock back regulations the Obama administration issued trying to limit mercury in power plants, complicating Obama’s environmental policies.

Even the sole case where the court’s liberal wing prevailed Monday by winning over Kennedy had a potential downside for the left. The court’s ruling allowing the redistricting of congressional seats to be handled by independent commissions is

likely a setback to Republicans in Arizona, which brought the case to the justices, but a blow to Democrats in the much-larger state of California.

While Monday's decisions provided an important reminder that conservatism is still alive and well in the Supreme Court's chambers, some analysts insisted that the court's tilt to the left in the current term was unmistakable.

"The numbers show that this is easily the most liberal term of the Roberts Court, and probably the last couple of decades," SCOTUSblog founder and Supreme Court lawyer Tom Goldstein told POLITICO. "For all the talk of a conservative bloc, it was the more liberal Justices who hung together that counted."

Goldstein analyzed 26 cases this term in which the vote was close (either 6-3 or 5-4) and seemed to split along ideological lines. He found the left prevailed in 19 cases, while the conservatives were victorious in only seven.

One factor preventing some liberals from rejoicing about the Supreme Court results this term is a fear of what's to come. The return of affirmative action to the court's docket for the next term made some on the left jittery.

"It does seem ominous," said Caroline Fredrickson of the American Constitution Society. "I'm worried...that the justices would like to put the nail in the coffin for affirmative action."

The court muddied the waters further Monday afternoon with orders in heated disputes over abortion restrictions, as well as contraception-coverage requirements under Obamacare.

The justices, by a 5-4 vote, blocked enforcement of a new Texas state law forcing abortion clinics to upgrade their facilities and use doctors with admitting privileges at nearby hospitals. Abortion rights advocates said about half the clinics in Texas would have to close under the new rules. Kennedy joined with the court's liberals to prevent the law from taking effect until the Supreme Court has a chance to consider taking the case.

The court also issued an order giving the Catholic archdiocese in Pittsburgh and several other groups the ability to escape Obamacare's contraceptive coverage requirements until the court addresses whether exemptions the Obama administration has created for religious organizations are adequate. Only Justice Sonia Sotomayor noted a dissent from the order.

Those moves suggest the court is likely to weigh in on the polarizing issues of abortion and Obamacare next term, in addition to the affirmative action case. The justices also announced in May that they will hear another politically sensitive case: a dispute from Texas over whether election districts must be drawn to cover equal numbers of voters or can use a count which includes residents who don't vote, such as foreigners, children and prisoners.

Also looming as a possible candidate for the docket next term: a high-stakes legal fight over whether President Barack Obama's executive orders on immigration exceeded his authority.

While it's tempting to view the court as tilting to one side or another, many analysts and advocates say it isn't really the court moving, but the most frequent swing justice — Anthony Kennedy — coming down on different sides in different cases. That makes him a more pivotal figure than even Chief Justice John Roberts, whose vote is more reliably conservative.

Just as Kennedy held sway in the three cases resolved Monday, he could well be the critical vote in the affirmative action, abortion, voting rights and immigration disputes likely to be resolved in the coming term.

“It's not the Roberts Court, yet. It's the Kennedy Court in many ways,” said Fredrickson. “He really controls the decision. The one man, the one vote kind of determines the decision in almost every big case. It's an incredible power.”

“The Numbers on the Extent to which this was a ‘Liberal’ Supreme Court Term”

SCOTUSblog
Tom Goldstein
June 29, 2015

There is a lot of commentary about the unusually liberal results of this Term. I thought I would mention a few data points which back up that view of things.

For present purposes, I treat four Justices as sitting to the Court’s left: Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. I treat four Justices as sitting to the Court’s right: Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. I treat Justice Anthony Kennedy as the Court’s “center.”

I count 26 cases this Term that were both close (5-4 or 6-3) and ideological (in the sense that they broke down principally on ideological lines, with ideology seemingly an important factor).

Of the 26 cases, the left prevailed in 19. Those included the first 9 of the Term. The right prevailed in 7.

In the 26, a Justice on the left voted with the right a total of 3 times. In 2 cases, those votes determined the outcome and produced a more conservative result, because Justice Kennedy or one of the conservatives voted for the more liberal result.

In the 26, a Justice on the right voted with the left 14 times. In 6 cases, those votes

determined the outcome and produced a more liberal result, because Justice Kennedy voted for the more conservative result.

I also considered the 10 cases I consider most significant. Of those, the left prevailed in 8. Those included the first 7 of the Term. (I mention the early cases to give a sense of how the results must have appeared inside the Court as the Term went along.) The right prevailed in 2, both in the final sitting of the Term.

In the 10, no Justice on the left voted with the right; the four Justices on the left voted together in every one of those cases. A Justice on the right voted with the left 4 times. Those votes determined the outcome in 2 cases, because Justice Kennedy voted for the more conservative result.

Note that the analysis above is skewed against finding the Term particularly liberal by treating Justice Kennedy as the Court’s “center.” That is true ideologically, but he is certainly a conservative. If he were characterized that way for my analysis, the number of defections to the left would be much higher.

By that measure, a Justice on the right voted with the left 25 times (compared with 3 times the reverse happened). That occurred in all 10 of the 10 major cases (because no Justice

on the left voted with the right in any of those cases), and determined the outcome in all of them.

“Has the Supreme Court Really Moved Leftward this Term?”

The Washington Post

Jonathan H. Adler

June 25, 2015

Earlier this week the New York Times proclaimed that the Supreme Court has “move(d) leftward.” Much like earlier pronouncements that the Roberts Court was the most conservative in decades – particularly those based upon similar types of analyses, the article’s central claim needs to be taken with healthy dose of salt.

The central claim of the article is that the Supreme Court has had one of its most “liberal” terms since the end of the Warren Court. This conclusion is based upon an analysis which finds that the Court has adopted a “liberal” outcome in 54 percent of cases that have been decided thus far this term. Such an analysis, combined with consideration of the frequency each justice finds him or herself in the majority, may tell us which “side” of the court is prevailing more often this term, but I do not think it tells us all that much about the trajectory or tendency of the Court or its jurisprudence.

One immediate problem with this sort of analysis is that it does not account for the substance of individual cases and, more importantly, the effect on underlying doctrine. That is, this sort of analysis makes no distinction between a case that shifts the law in a more conservative or liberal direction and a decision that maintains the status quo. Assuming that, at least in some areas, the current justices are relatively satisfied with current doctrine, whether a case

is coded as “liberal” or “conservative” will be solely a function of the judgment under review.

Another problem with this sort of analysis, particularly when used to analyze the Court’s behavior over time, is that it does not account for shifts in the law. As a consequence, this sort of analysis can produce conclusions that are precisely the opposite of what is actually occurring. That is, if a Court adopts a liberal holding at one point in time, and then refuses to extend that holding still further in the latter, the decision maintaining the comparatively liberal rule will be coded as a “conservative” holding, even though all it did is maintain the status quo.

To illustrate this problem, consider the Court’s global warming decisions. In *Massachusetts v. EPA*, in 2005, the Court held that the greenhouse gases were “pollutants” subject to regulation under the Clean Air Act. This holding dramatically expanded the EPA’s regulatory authority. The decision also lowered the bar for standing in environmental cases for state litigants, if not more generally. This was clearly a “liberal” ruling. Several years later, in *American Electric Power v. Connecticut*, the Court held that nuisance suits against greenhouse gas emitters under federal common law were displaced by federal regulatory authority. This holding was a direct consequence of the *Massachusetts v.*

EPA holding, and would have been classified as a “conservative” ruling.

Taken together, *Mass.* and *AEP* would represent a wash – a liberal decision and a conservative decision. Yet, as a substantive matter, the combination is a dramatic shift in the law in a “liberal” direction. Analyzing individual votes only magnifies the problem, as there were 12 votes for the “conservative” position in the cases combined, while only five votes for the “liberal” position. The sort of analysis embodied in the Times article would suggest that the *Mass.* Court was more liberal than the *AEP* Court, while a consideration of the actual decisions would find no change at all. *AEP* did nothing at all to scale back the holding of *Massachusetts v. EPA*, so the consequence of this “more conservative” Court was nothing but a maintenance of the status quo.

Another concern I have with the article is its uncritical acceptance of the case coding in the Supreme Court Database. While conceding that it is “possible to quarrel with the coding of any individual case,” the article’s authors claim that “there is relatively little disagreement about the judgments among legal scholars, and the coding conventions are both consistently applied and in line with most people’s intuitions.” This may be the view of most political scientists, but it is hardly a consensus view. Indeed, multiple analyses of the Supreme Court Database’s case coding have found widespread instances of questionable coding, affecting as much as 20 to 30 percent of cases. See, for instance, the work of Carolyn Shapiro here and here. Indeed, the problems are bad enough that

some scholars who heavily relied upon the database in the past have recoded cases for more recent analyses (such as this one, which was also the subject of a Times story and discussed here).

While the coding of most contemporary cases is unlikely to be controversial (save for those where the Court splits along untraditional lines), the lack of consistent or reliable coding in the database limits the usefulness of historical analyses. This is particularly so given evidence that some coding may have been the result of confirmation bias, such that coding of some cases may have reflected coder expectations about the Court’s behavior in a given term as much as the actual merits of the case.

Another concern I have, acknowledged in the piece, is the focus on a single term. Given the relatively small number of cases the Court hears each term, no single term is particularly representative of the Court’s work as a whole. Thus it is inevitable that some terms appear more “liberal” or “conservative” than others because few, if any, terms contain a fully representative sample of the sorts of issues the Court is called upon to address. This term, for example, despite the heavy roster of high profile cases, still did not include cases in many areas that regularly divide the justices along ideological lines, such as abortion.

If we really want to know whether the Court is more liberal or conservative than it has been in the past – whether in terms of its trajectory or its performance in a given term – we need to do more than code each case as

“liberal” or “conservative” and tabulate the results. Instead we must look at the substance of the Court’s decisions to see whether it is moving the law in one direction or another – whether expanding gay rights and limiting the death penalty or constraining federal power and reducing protections for criminal defendants.

In the past I’ve argued that a substantive analysis of the Roberts Court suggests that it is a generally a “conservative minimalist” court. That is, the modal behavior of this Court is to move the law slowly, but perceptibly, in a rightward direction, while

maintaining a fairly heavy status-quo bias. There are exceptions, however, as there are areas in which the Court’s shift have not been minor (the protection of campaign-related speech) and still others where the Court has moved the law in a more liberal direction (gay rights and habeas rights for detainees). Further, in some areas in which the Court has shifted Right, such as abortion, it appears to have brought us back to where the Court had been in the early years of the Rehnquist Court. The Court may be more conservative than the Warren and Burger Courts, but it is doing very little to undo most Warren and Burger Court precedents.

“A Fractious Majority”

Slate

Eric Posner
June 30, 2015

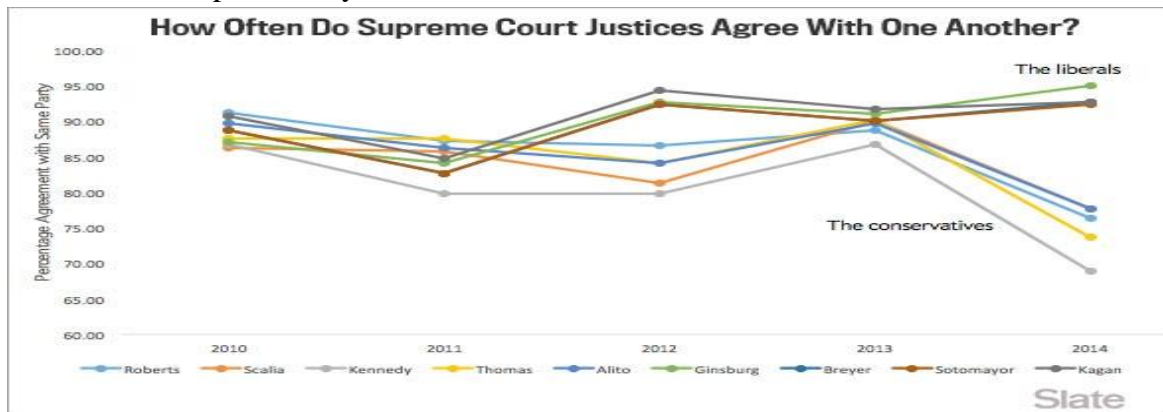
In 2010, the *New York Times*' Supreme Court reporter, Adam Liptak, wrote an article entitled “Court Under Roberts Is Most Conservative in Decades.” He noted that in its first five years, Chief Justice John Roberts' court had rendered conservative decisions 58 percent of the time, and in the 2008 term 65 percent, the highest rate in a half-century. The court was “the most conservative one in living memory.” Republicans, who have been trying to move the court to the right since Nixon was president, finally had put into place a rock-solid conservative majority.

On Monday, Liptak and some co-authors published another article, this one entitled “The Roberts Court's Surprising Move Leftward.” It turns out that the most recent term will be the most liberal since 1969, with liberal decisions accounting for 56 percent of the cases, according to the article. Liberal decisions outnumber conservative decisions over each of the past three years, the first time

that has happened since the 1960s. What happened?

Liberals credit—and conservatives blame—Republican-appointed Justice Anthony Kennedy for frequently crossing the line and voting for liberal outcomes. It was Kennedy who wrote *Obergefell v. Hodges*, the opinion recognizing a right to same-sex marriage. However, Kennedy has been Kennedy since he was appointed in 1988. He has written opinions friendly to gay rights since 2003. Kennedy himself can't explain a trend.

What does seem to be new, however, is that the Republican appointees on the court have found it increasingly difficult to form a united front against the Democratic appointees. The chart below shows that in the term that just concluded, this trend of disagreement among conservatives accelerated.



The chart shows the percentage of cases in which conservative justices agree with other conservatives, and liberal justices agree with other liberals. The liberals vote with one another more than 90 percent of the time while the conservatives vote with one another about 70–80 percent of the time. While I lack Frank Luntz’s talent for political wordplay, I humbly submit to right-wing operatives that they should call the Democratic appointees “lockstep liberals” because of their bloc voting.

You can also see this pattern in the justices’ decision writing. Most of the justices wrote six or seven majority opinions over the term. But there is wide variation in their propensity to write separate concurrences or dissents. Justice Elena Kagan wrote three separate opinions; Justice Ruth Bader Ginsburg wrote six; Justices Sonia Sotomayor and Stephen Breyer wrote eight each. Roberts and Kennedy also wrote very few. By contrast, Justice Antonin Scalia wrote 26, Justice Clarence Thomas wrote 25, and Justice Samuel Alito wrote 20.

Minorities can exercise surprising power when they exercise discipline in voting. A fractious majority—here the five Republican appointees—will find themselves on the losing side again and again if one of their own temporarily defects to the other side because of a strongly felt position on an obscure point of law.

Why can’t the Republican majority exercise more discipline? One possible explanation is ideological disagreement. Mirroring the Republican Party, the Republican justices divide between social conservatives (Scalia,

Thomas, probably Alito, and possibly Roberts) and a libertarian, Kennedy, who often casts his vote with the liberal bloc.

Of all the justices, Kennedy is the most frequently ridiculed.

As the court moved right during the first half of Roberts’ tenure, conservative litigants may have spotted the opportunity to obtain favorable decisions. To do so, they needed to challenge laws and precedents that in the past would have been secure. It is possible they overreached by bringing challenges that were more extreme than all five of the conservative justices could stomach, exposing the latent ideological fissures that existed between them.

Another explanation is jurisprudential disagreement. Here the division is between formalists (Scalia and Thomas) and pragmatists (Roberts, Alito, and Kennedy). The formalists interpret the Constitution based on its original meaning and read statutes narrowly rather than expansively (or claim to). Originalism usually generates conservative outcomes because the Constitution reflects mostly 18th- and 19th-century values. Narrow interpretation of legislation—as illustrated by Scalia’s dissent in *King v. Burwell*, which would have invalidated a key element of Obamacare based on a narrow interpretation of some of its language—tends to favor conservative outcomes because legislation usually expands government control. But not always, with the result that Scalia and Thomas sometimes come down in a liberal direction.

The pragmatists, by contrast, put more weight on precedent and usually unarticulated extra-legal factors. It is widely thought that Roberts, for example, has voted, twice now, to uphold Obamacare against challenges from the right because he believes that the obliteration of a major piece of legislation by an ideologically predictable 5–4 vote would deal a blow to the court’s credibility. Nearly everyone thinks that Kennedy has followed public opinion on gay marriage. Whatever his personal views, he would not have found a right to same-sex marriage in 1988, when it was anathema to both parties and a majority of Americans. His talentless writing style, replete with cheesy Hallmark-card sentimentality, sets the teeth of the other conservatives on edge, but it reflects a distinctive jurisprudential sensibility that he has stubbornly held to, though no one can figure out what it is.

The conservative justices also disagree with one another in more subtle ways. In *King v. Burwell*, Roberts and Kennedy rejected the narrow interpretation of the statute advanced by Scalia, Thomas, and Alito. In *Zivotofsky v. Kerry*, a case decided earlier this month, Thomas split with the other conservatives on the breadth of the president’s power to control information put in passports. In *Johnson v. United States*, a case decided on Friday, Alito dissented alone as the other justices struck down a federal statute that enhanced sentences of people who had earlier been convicted of “violent felonies.” The other justices thought the term was unconstitutionally vague; Alito thought its definition could be narrowed. In all these cases, the liberals voted with the majority and kept mum.

While partisan heterodoxy among the Republicans has grown in recent years, it is not new. Republican appointees John Paul Stevens, Sandra Day O’Connor, and David Souter all crossed party lines to vote with Democratic appointees on some of the most important issues of the day (abortion, campaign finance, rights of criminal defendants). By contrast, it’s hard to think of significant examples of liberal justices doing the same. Their loyalty to the party line is virtually unbroken.

I wish I could explain this asymmetry, but I can’t. A common explanation offered by disgruntled conservatives—that spineless justices newly arrived from the provinces want to bask in the approval of the liberal media in D.C.—strikes me as pretty implausible. Liberals will never trust Kennedy—remember that he voted to strike down Obamacare three years ago. In a polarized environment, no one respects moderates, even if they can sometimes be made use of. Of all the justices, Kennedy is the most frequently ridiculed. No one seems to admire him for his independence of mind.

Conservatives might be tempted to think that the Republican-appointed justices disagree so often, and write so frequently, because they take the law seriously while the liberals care only about pleasing the party base. If this is true, however, conservatives might wonder whether they are being well served by their justices. Our society has assigned legislative power to the Supreme Court, authorizing it to settle the hardest political questions by fiat. Gay marriage and Obamacare are now unshakable political facts in America, and will remain so long after the jurisprudential

debates among the conservatives have been forgotten.

“Why is John Roberts Siding with the Supreme Court’s Liberals?”

Slate

Adam Winkler

June 11, 2015

John Roberts has changed. Consider the chief justice’s voting record. From 2005—the year he was appointed—until 2012—the year of the first Affordable Care Act decision—Roberts was a reliable vote on the court’s staunch conservative wing. In controversies from abortion to campaign finance to guns, Roberts sided with Justices Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy. The 2012 health care case was only the second time Roberts had ever voted with the liberal side of the court in a 5–4 decision.* Lately, however, we’re seeing a very different Roberts. Last term Roberts surprised many by breaking left on a few major cases. And so far this term, Roberts has voted with Stephen Breyer (90 percent), Ruth Bader Ginsburg (85 percent), and Sonia Sotomayor (83 percent) more often than he has joined Thomas (66 percent), Kennedy (74 percent), and Alito (77 percent). And that isn’t just on minor cases. He’s recently sided with the liberals in cases on issues that typically divide the court along ideological lines, including campaign finance and anti-discrimination law.

Little wonder then that some conservatives ask if Roberts is “going wobbly.” While court watchers have recognized and speculated over Roberts’ shift to the left, the reason for the shift remains obscure. Beyond amorphous notions of Roberts’ special concerns for his “legacy” or the court’s “legitimacy,” what accounts for Roberts’

recent move to moderation? Only he truly knows the answer, but one possibility is that Roberts has learned something from his time on the bench. In particular, his transformation might have been influenced by two specific cases: one high-profile, the other largely forgotten.

Few Supreme Court decisions have sparked more controversy and subjected the court to more widespread criticism than its 2010 ruling in the campaign finance reform case *Citizens United*. The court’s 5–4 decision, with Roberts in the majority, held that corporations and unions have a First Amendment right to spend unlimited amounts of money to influence elections. The decision put the court at the very epicenter of political debate—precisely the place Roberts said he wanted to avoid during his confirmation hearings. The ruling, which many believe benefits the GOP, has been seen as partisan; almost no one sees *Citizens United* as simply a matter of balls and strikes. It was also anything but the kind of small, incremental steps Roberts claimed to prefer when altering existing doctrine.

Some conservatives ask if Roberts is “going wobbly.”

If one wanted an explanation for why Roberts changed his vote in the first Affordable Care Act case in 2012, *Citizens United* would be a good place to start. According to Jeffrey

Toobin, *Citizens United* was “orchestrated” by Roberts. Yet the opposite is likely true. Roberts preferred a narrow ruling in *Citizens United* but was persuaded by his conservative colleagues to join a very broad, precedent-reversing decision that radically shifted the terrain of campaign finance law. The country, across political lines, was angry. And two years later the Affordable Care Act case looked like a repeat performance: The chief justice sought a narrow ruling voiding the individual mandate while his conservative colleagues pushed for a more aggressive ruling that would overturn the whole law, including the hundreds of provisions on issues that didn’t relate in any way to the constitutionality of the mandate. As reporting at the time revealed, on the eve of a presidential election that promised to make the court’s decision the biggest issue in the campaign, Roberts seemingly balked. He wasn’t following his friends down the rabbit hole again.

Roberts may also have learned a similar, valuable lesson from a far less familiar ruling: *House v. Bell*, from Roberts’ very first term on the court. Few remember the facts of this case—Paul House, a man sentenced to death, won the right to file a habeas petition in federal court—but you can bet Roberts will never forget it. Joined by Scalia and Thomas, Roberts wrote a partial dissent that contemptuously dismissed House’s claims of innocence.* To House’s contention that his scratches and bruises were from his construction work and a cat’s claws, Roberts derisively replied, “Scratches from a cat, indeed.” Several years later, however, prosecutors dropped all charges against

House, who was exonerated by DNA evidence.

House is the type of case that should cause any justice to second-guess his or her own intuitions and judgments. Certainly it offered Roberts an object lesson in the perils of judicial overconfidence: Don’t be so certain you are right even when you are certain you are right. On some issues, like voting rights, Roberts’ views may be so longstanding and firmly held as to be immune to moderation. And some of his seemingly liberal votes may be strategic, part of what legal scholar and Slate contributor Richard Hasen calls Roberts’ “long game.” Yet somehow the spirit of compromise, if not the ghost of Paul House, haunts the chief justice’s chambers.

No one doubts that Roberts leans right jurisprudentially. Yet over the past two terms, we’ve seen evidence that Roberts has become a bit more circumspect of his own jurisprudential views and perhaps more wary of those of his conservative colleagues. Carrie Severino of the right-leaning Judicial Crisis Network says, “There certainly seems like a more consistent pattern on the part of Scalia, Thomas, and Alito of being really conservative to the core.” In this way, we might see the conservative wing of the court in a similar light as the intramural wars plaguing the Republican party in general: Mainstream conservatives find themselves trying to fight off the more radical, burn-down-the-house Tea Partiers. Some on the court seem less interested in incremental steps than infernos.

Of course, there are two major decisions yet to come this term that will color any analysis of Roberts for years, if not decades, to come: *King v. Burwell*, on the availability of subsidies on the federally created health care exchanges, and *Obergefell v. Hodges*, on the right of same-sex couples to marry. No one

outside the court knows how those cases will come out, but don't be surprised if once again Roberts defects from the Scalia/Thomas/Alito wing. By now he's learned to watch out for where his friends might take him.

“A Liberal But Restrained Supreme Court Term”

Wall Street Journal

Jess Bravin

June 30, 2015

The Supreme Court in the just-completed term passed up a number of opportunities to upend existing law, including the Affordable Care Act.

In areas including civil rights, employment discrimination and voting-rights laws, the justices rejected conservative-backed legal efforts to push the court’s precedents to the right. In cases that divided the court, it at times reached liberal conclusions as one or more conservatives—typically swing Justice Anthony Kennedy—sided with the court’s four liberal justices. The term’s record shows that the liberal justices stuck together with a consistency the court’s conservatives didn’t match, including in last week’s landmark rulings on same-sex marriage and health care.

The term’s dynamic showed a reluctance of the John Roberts court, where Republican appointees hold the majority, to upend the status quo. That reticence stands in contrast to rulings in recent years, when issues such as campaign finance brought conservatives together to overturn precedent.

“The chief justice really does take restraint seriously,” said University of Michigan political scientist Andrew Martin, who helps run the Supreme Court Database that provides quantitative analysis of the justices and their decisions. “At times, that is going to put a justice in contraposition to what his ideological preferences might be.”

“Lawyers overwhelmingly are raised in an environment where stability is valued, change is complicated,” said Stanford law professor Mark Kelman. Switching direction is “always more complex than whether you would have enacted it in the first place.”

The court’s hesitation to strike down existing laws was evident in several cases.

It left in place a legal tool for enforcing the Fair Housing Act of 1968 that allows housing lawsuits without proof of intentional discrimination against minorities, in a 5-4 ruling in which maverick conservative Justice Kennedy joined liberal Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan.

Conservatives and businesses for years have been trying to rein in housing lawsuits that use the legal doctrine, known as disparate impact.

Twice since 2011 the court had agreed to consider whether such cases could proceed, only to see them vanish when the parties settled or dropped appeals. This year, the justices finally had their chance, in a Texas case—and it voted to leave disparate impact intact.

“Residents and policy makers have come to rely on the availability of disparate-impact

claims,” Justice Kennedy wrote in the majority opinion.

In two voting-rights cases, majorities formed by the liberal wing and Justice Kennedy left in place mechanisms that aim to make political voting districts less partisan and fairer for minorities.

In a case from Arizona, the court said states could establish independent panels to draw electoral maps. In an Alabama case, it held that the Voting Rights Act allows challenges to political maps that allegedly dilute minority political strength by concentrating such voters in a handful of districts.

Justice Kennedy’s votes with the court’s liberals are a major factor in their success. But another conservative justice, Chief Justice Roberts, wrote the majority opinion rejecting a conservative-backed lawsuit that would have gutted the Affordable Care Act. He was joined by the liberal bloc and Justice Kennedy.

Beneath such broad trends, the term did reveal areas of consensus among the justices.

For one, the court showed a concern for individual religious expression that crossed ideological lines. It ruled unanimously, or nearly so, for Muslims who complained about religious discrimination, one an inmate who prison authorities forbid from growing a short beard, another an Abercrombie & Fitch Co. job applicant who was rejected for wearing a head scarf.

The court also appeared to share a growing bipartisan concern over harsh criminal laws, siding in several cases with criminal defendants who argued that prosecutors had overreached.

A Supreme Court decision makes gay marriage legal in all 50 states. What constitutional principles did the court’s majority apply, and what are the implications? WSJ’s Jason Bellini has #TheShortAnswer.

On Friday, for instance, an 8-1 court found that a federal “three-strikes” law was written too vaguely to be constitutional, giving prosecutors too much discretion to lengthen sentences by invoking prior convictions for undefined violent crimes.

A surprise winner this term was the Equal Employment Opportunity Commission, an agency whose legal positions historically have received little deference from the Supreme Court. The commission prevailed in all three cases it was involved in, ranging from the rejected Muslim job applicant to pregnancy discrimination to the efforts it must make to informally resolve disputes before suing an employer.

Those cases, too, can be considered status-quo rulings, said University of Colorado law professor Melissa Hart. The two cases involved “employers taking very aggressive positions about the limits of EEOC authority and the reach of federal employment discrimination law,” she said. The decisions are “less about any change in the court’s attitude toward the EEOC and more about the

kinds of arguments being made in lower courts.”

There is no guarantee the current dynamic will persist into the court’s next term, which begins in October. The justices have agreed to hear several cases in which right-leaning activists seek to overrule or limit precedents that protect affirmative action, the one-

person-one-vote rule, and public-employee collective bargaining rights.

By placing such cases on the docket—a move that takes four anonymous votes—the court’s conservatives are signaling their openness to arguments calling for major changes in the law.

“The Polarized Court”

The New York Times

Adam Liptak

May 10, 2014

When the Supreme Court issued its latest campaign finance decision last month, the justices lined up in a familiar way. The five appointed by Republican presidents voted for the Republican National Committee, which was a plaintiff. The four appointed by Democrats dissented.

That 5-to-4 split along partisan lines was by contemporary standards unremarkable. But by historical standards it was extraordinary. For the first time, the Supreme Court is closely divided along party lines.

The partisan polarization on the court reflects similarly deep divisions in Congress, the electorate and the elite circles in which the justices move.

The deep and often angry divisions among the justices are but a distilled version of the way American intellectuals — at think tanks and universities, in opinion journals and among the theorists and practitioners of law and politics — have separated into two groups with vanishingly little overlap or interaction. It is a recipe for dysfunction.

The perception that partisan politics has infected the court’s work may do lasting damage to its prestige and authority and to Americans’ faith in the rule of law.

“An undesirable consequence of the court’s partisan divide,” said Justin Driver, a law

professor at the University of Texas, “is that it becomes increasingly difficult to contend with a straight face that constitutional law is not simply politics by other means, and that justices are not merely politicians clad in fine robes. If that perception becomes pervasive among today’s law students, who will become tomorrow’s judges, after all, it could assume a self-reinforcing quality.”

Presidents used to make nominations based on legal ability, to cater to religious or ethnic groups, to repay political favors or to reward friends. Even when ideology was their main concern, they often bet wrong.

Three changes have created a courthouse made up of red and blue chambers. Presidents care more about ideology than they once did. They have become better at finding nominees who reliably vote according to that ideology. And party affiliation is increasingly the best way to predict the views of everyone from justices to bank tellers.

It tells you more than gender, age, race or class, a 2012 Pew Research Center study found. And the gap between the parties is now larger than at any time in the survey’s 25-year history.

“Polarization is higher than at any time I’ve ever seen as a citizen or studied as a student of politics,” said Kay L. Schlozman, a political scientist at Boston College.

Supreme Court nominations were never immune from political considerations. But many factors used to play a role.

That is why Republican presidents routinely appointed justices who were or would turn out to be liberals. Among them were Chief Justice Earl Warren and Justices William J. Brennan Jr. and Harry A. Blackmun.

But it has been almost 25 years since the last such appointment, of Justice David H. Souter in 1990. And it has been more than 50 years since a Democratic president last appointed a justice who often voted with the court's conservatives: Justice Byron R. White, who was nominated by President John F. Kennedy in 1962.

That timeline may suggest more ideological rigidity among Democratic presidents. But the number of opportunities played a role, too, as there have been twice as many Republican appointments since 1953. And Republican justices were until recently more apt than Democratic ones to drift away from the positions of the presidents who appointed them.

The new era arrived with the last retirement, in 2010. Justice John Paul Stevens, a liberal appointed by President Gerald R. Ford, a Republican, left the court. Justice Elena Kagan, a liberal appointed by President Obama, arrived.

Now, just as there is no Democratic senator who is more conservative than the most liberal Republican, there is no Democratic appointee on the Supreme Court who is more

conservative than any Republican appointee. "It's not coincidence," said Lawrence Baum, a political scientist at Ohio State, "that the court is now divided along partisan lines in a way that hasn't been true."

The partisan split is likely to deepen, said Neal Devins, a law professor at William & Mary and an author, along with Professor Baum, of a study examining, as its subtitle put it, "how party polarization turned the Supreme Court into a partisan court."

Consider, Professor Devins said, the eventual retirement of Justice Anthony M. Kennedy, a Republican appointee who sits at the court's ideological center and joins the court's four-member liberal wing about a third of the time when it divides along partisan lines.

"When Kennedy leaves," Professor Devins said, "it's going to move the court a whole, whole lot to the left, if the president is a Democrat, or slightly to the right, if it's a Republican."

THESE days, candidates for the court are groomed for decades and subjected to intense vetting. They are often affiliated with the networks of conservative or liberal lawyers that have replaced more neutral groups like bar associations. And they are drawn more than ever from federal appeals courts, where their views can be closely scrutinized.

Confirmation battles have grown more partisan. With the exception of Justice Clarence Thomas, the five most senior members of the current court were confirmed easily, receiving an average of three negative

votes. The four more recent nominees received an average of 33.

Once on the court, the justices surround themselves with like-minded law clerks, consume news reports that reinforce their views and appear before sympathetic audiences.

In their public statements, the justices reject the idea that their work is influenced by politics. They point out that their decisions were unanimous almost half the time in the term that ended in June 2013, and that the roughly 30 percent of 5-to-4 decisions did not all feature the classic alignments of Justice Kennedy joining either the court's conservative wing or its liberal one.

But that was how most of the closely divided decisions came out. The conservatives won 10 times, including a decision striking down a core provision of the Voting Rights Act. The liberals won six times, including a ruling requiring the federal government to provide benefits to married same-sex couples.

There are notable exceptions, of course, starting with Chief Justice John G. Roberts Jr.'s 2012 vote to uphold the heart of the Affordable Care Act.

But standard political-science measurements of ideology, based on many thousands of votes, confirm the rise of a court divided on partisan lines.

The very question of partisan voting hardly arose until 1937, as dissents on the Supreme Court were infrequent. When the justices did divide, it was seldom along party lines.

There is room for interpretation in such assessments. But of the 71 cases from 1790 to 1937 deemed important by a standard reference work and in which there were at least two dissenting votes, only one broke by party affiliation. "The dividing line in the court was not a party line," Zechariah Chafee, a law professor at Harvard, wrote in a classic 1941 book.

Nonpartisan voting patterns held true until 2010, with a brief exception in the early 1940s, when a lone Republican appointee voted to the right of eight Democratic appointees. But the general trend was the same. Of the 311 cases listed as important from 1937 to 2010 with at least two dissents, only one of them, in 1985, even arguably broke along party lines.

That adds up to two cases in more than two centuries. By contrast, in just the last three terms, there were five major decisions that were closely divided along partisan lines: the ones on the Voting Rights Act, campaign finance, arbitration, immigration and strip-searches. In the current term, last month's campaign finance ruling and Monday's decision on legislative prayer fit the pattern, too.

MANY factors seem to contribute to partisan polarization on the court, including the people who work most closely with the justices.

Every year, the justices each hire four recent law students, mostly from a handful of elite law schools. They consider grades,

recommendations and, in recent years, a political marker.

In the last nine terms, the court's current Republican appointees hired clerks who had first served for appeals court judges appointed by Republicans at least 83 percent of the time. Justice Thomas hired one clerk from a Democratic judge's chambers, Justice Scalia none.

The numbers on the other side are almost as striking. Justices Ruth Bader Ginsburg, Sonia Sotomayor and Kagan hired from Democratic chambers more than two-thirds of the time. Justice Stephen G. Breyer is the exception: His hiring has long been about evenly divided.

When law clerks move on, their career paths seem subject to the gravitational pull of ideology. Clerks for justices appointed by Democrats work for Democratic administrations, law firm practices headed by former Democratic officials and law schools dominated by liberals. Clerks for Republican appointees often go in the opposite directions.

All of this is new, according to a detailed study in the *Vanderbilt Law Review*. "The Supreme Court clerkship appeared to be a nonpartisan institution from the 1940s into the 1980s," it said.

Like the rest of the country, the justices increasingly rely on sources of information that reinforce their views.

"We just get *The Wall Street Journal* and *The Washington Times*," Justice Scalia told *New York* magazine in September. He canceled his subscription to *The Washington Post*, he said, because it was "slanted and often nasty" and "shrilly liberal." He said he did not read *The New York Times* either.

"I get most of my news, probably, driving back and forth to work, on the radio," he said. "Talk guys, usually."

Before the political and social culture of Washington grew polarized, most of the justices moved in a mixed and often liberal milieu. "The social atmosphere in Washington had a role in the leftward movement of some of the justices," Professor Baum said.

Those days are over, Justice Scalia said. "When I was first in Washington, and even in my early years on this court, I used to go to a lot of dinner parties at which there were people from both sides," he said. "Katharine Graham used to have dinner parties that really were quite representative of Washington. It doesn't happen anymore."

In a recent 10-year period, the justices made around 1,000 public appearances for which their expenses were reimbursed, which generally means they were outside Washington. They almost certainly made at least as many local appearances. But their audiences varied. Justices Scalia, Thomas and Samuel A. Alito Jr. have addressed the Federalist Society, a conservative group, while Justices Stevens, Ginsburg and Breyer spoke to the American Constitution Society,

a liberal group. Justice Sotomayor is a featured speaker at its national convention next month.

Justice Kagan, appearing before the Federalist Society in 2005 when she was dean of the Harvard Law School, said she admired its work. But, she added, “you are not my people.”

“Polar Vision”

The New York Times

Linda Greenhouse

May 28, 2014

Almost any commentary on the Supreme Court these days will include an observation about how polarized the court is: how for the first time in history, all the Republican-appointed justices (there are five) are to the right of all the Democratic appointees, and how the two groups diverge (Justice Anthony M. Kennedy occasionally excepted) in many of the court’s most ideologically charged cases.

True enough. The usual implication is that this is a problem for the Roberts court. A recent article by a law professor and a political scientist, Neal Devins and Lawrence Baum, predicts that political polarization on the court is here to stay, and they offer a compelling exploration of its origins and current context. Justice Stephen G. Breyer worried aloud in remarks at the annual meeting of the American Law Institute in Washington last week that members of the court were being viewed as “junior varsity politicians.”

Justice Breyer’s concern is well founded. But the problem goes deeper than the court’s rapidly escalating reputation for partisanship. In fact, the current emphasis on voting patterns obscures rather than illuminates the real problem with the Roberts court: what the court is actually doing. I mean what it’s doing substantively: which cases it chooses to decide, and the decisions it reaches.

It’s tempting for commentators, including journalists and some scholars, to stay on the safe side by talking about process rather than substance. Voting patterns can be displayed on a chart, and no one can question the author’s accuracy or motives. On the other hand, to argue that the Roberts court is hurtling down the wrong path substantively is to make a judgment call that invites pushback and debate. I understand that. This is an opinion column, and here is my opinion: the court’s majority is driving it into dangerous territory. The problem is not only that the court is too often divided but that it’s too often simply wrong: wrong in the battles it picks, wrong in setting an agenda that mimics a Republican Party platform, wrong in refusing to give the political system breathing room to make fundamental choices of self-governance.

I don’t relish connecting these dots; I have sometimes felt like the last person standing who still insisted, even after living through *Bush v. Gore*, that law and not politics is what drives the Supreme Court. In the newsroom of The Times, I lobbied periodically against the routine journalistic practice of identifying judges by the president who appointed them.

But I’m finding it impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda. The evidence is everywhere: from the way the

court invited and then accepted a fundamental challenge to public employee labor unions in *Harris v. Quinn*, a case argued in January and due for decision any day; to its brick-by-brick deregulation of campaign finance; to its obsession with race and with drawing the final curtain on the civil rights revolution.

I wrote “ideological” rather than “partisan” agenda because there’s something deeper going on than mere partisanship. Congress, after all, reauthorized the Voting Rights Act in 2006 by overwhelming bipartisan majorities in both houses, in a bill signed into law by President George W. Bush. The Bush administration urged the court to uphold the law in one of the last briefs filed before the president left office. It was a small cadre of right-wing activists that pressed the opposing view on the court. Success took a while: The court lost its nerve on that initial round in 2009, but conspicuously kept the door open for a renewed challenge. The result was last term’s *Shelby County v. Holder*, the 5-to-4 decision that cut the heart out of the Voting Rights Act – which had been the plan all along.

Then there is campaign finance, which didn’t use to be a specifically partisan issue. Senator John McCain of the 2002 McCain-Feingold law, Congress’s most recent attempt to curb the flow of money into politics, is, after all, a prominent Republican. The court upheld the law in 2003 with three Republican-appointed justices, John Paul Stevens, Sandra Day O’Connor and David H. Souter, joining the 5-to-4 majority.

The public was not exactly clamoring to do away with campaign finance regulation, but the Roberts court set about that project almost as soon as Justice O’Connor’s retirement in early 2006, and her replacement by Samuel A. Alito Jr. cleared the way. The majority’s most recent achievement was last month’s *McCutcheon* decision, abolishing aggregate limits for direct contributions to candidates in federal elections. In the 5-to-4 decision this time, there was no party crossover.

Nor was there any crossover in the *Town of Greece* decision earlier this month, authorizing sectarian invocations at local government meetings. Opening the doors to greater public expression and observance of religion is another central part of the Roberts court’s project. Here, the court has moved a bit more slowly. Three years ago, the United States Court of Appeals for the Fourth Circuit invalidated the practice of public prayer at county board meetings in Forsyth County, N.C. Local clergy members were offering prayers that just happened to be laden with Christian references. The Supreme Court declined to hear the county’s appeal.

But the pause was just temporary. The *Town of Greece* case didn’t differ from the North Carolina case in any meaningful way. The United States Court of Appeals for the Second Circuit had found the steady diet of Christian prayer at town board meetings to be an unconstitutional establishment of religion. This time, the justices agreed to hear the appeal. Since it was obvious that the majority’s goal was to overturn the Second Circuit’s decision, it was no great surprise that the 5-to-4 opinion did so.

But Justice Kennedy’s opinion for the court was startling nonetheless for its obliviousness to the impact that sectarian prayers can have on those citizens for whom prayer before a government meeting is not “a benign acknowledgment of religion’s role in society” (to quote the opinion) but an affront. “Adults often encounter speech they find disagreeable,” Justice Kennedy said dismissively. This from a justice who in his majority opinion in a Florida death penalty case on Tuesday emphasized the right of a convicted murderer to be treated with “dignity” by having his intellectual deficit assessed meaningfully rather than mechanically. The Constitution’s “protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be,” Justice Kennedy wrote on Tuesday, overturning a death sentence. I was left to wonder about the dignity of the two women who sued Greece, N.Y., on the claim that the price of conducting their business with the town board should not include having to listen to Christian prayers.

The country didn’t need to have the religious culture wars reignited, but thanks to the court, that’s where we now are. Alliance Defending Freedom, the Christian-right group that represented the victorious town, has taken out newspaper ads praising the decision’s “far-reaching implications” and offering its “model prayer policy” that people can press on their local governments. The Supreme Court’s “O.K. to pray” is being quickly and unsubtly turned into a right to pray. The Alliance’s reference to a “long-standing, important tradition of public prayer” isn’t

accurate, at least as to its client; the Greece town board observed only a moment of silent prayer until 1999, when for unexplained reasons, the board started inviting local ministers to pray out loud.

It’s impossible to talk about the Roberts court without coming back to race. The majority just can’t leave it alone. Last term, in addition to the Voting Rights Act case, the court reached out in *Fisher v. University of Texas* to review the affirmative action admissions plan at the flagship Austin campus. The university’s Regents, who not too many decades ago presided over a segregated system, have been trying their best to navigate the shifting tides of affirmative action and find a way to achieve diversity not only in the aggregate, but in the university’s classrooms and across its fields of study.

The majority’s effort to ride the *Fisher* case into the sunset of affirmative action failed because the case was such a manifestly poor vehicle. It was moot by any objective measure, the recruited plaintiff having already graduated from another university before the court even accepted the case. And the Texas admissions plan is so unusual – guaranteeing admission to the top 10 percent of every graduating high school class while also engaging in some racially conscious tailoring for about one seat out of five – that any opinion would be likely to have only a limited effect elsewhere. So the court was left to nibble around the edges, ultimately sending the case back to the lower court for another look. Its appetite unfulfilled, the Supreme Court will be back for more. (The

vote in the Fisher case was 7 to 1; it's easy to depolarize when you're deciding very little.)

Professors Devins and Baum, in their article on partisanship at the Supreme Court, argue that the current dynamic is a predictable, even inevitable reflection of extreme polarization in our politics. I don't think they're wrong, but it occurs to me to wonder if the flow might also be running in the other direction. I wonder whether the Supreme Court itself has become an engine of polarization, keeping old culture-war battles alive and forcing to the surface old conflicts that people were managing to live with. Suppose, in other words, that instead of blaming our politics for giving us the court we have, we should place on the court at least some of the blame for our politics.