

# Can the Judicial Branch be a Steward in a Polarized Democracy?

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*Abstract: At the beginning of his first term as Chief Justice, John Roberts pledged to try to persuade his colleagues to consider the bipartisan legitimacy of the Court rather than their own ideological agendas. Roberts had mixed success during his first years on the bench, as the Court handed down a series of high-profile decisions by polarized, 5-4 votes. In the health care decision, however, Roberts did precisely what he said he would do, casting a tie-breaking vote to uphold the Affordable Care Act because he thought the bipartisan legitimacy of the Court required it. But the reaction to the health care decision – which Democrats approved and Republicans did not – suggests that Roberts’s task of preserving the Court’s bipartisan legitimacy is more complicated than he may have imagined, and that his success in the future will depend on the willingness of his colleagues to embrace his vision. Given the Court’s declining approval ratings, an increase in partisan attacks on the Court, and a growing perception that the Court decides cases based on politics rather than law, the Chief Justice’s vision of the Court as a bipartisan steward is more difficult – and also more urgently needed – than ever.*

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In July 2006, at the end of his first term as Chief Justice of the United States, I interviewed John G. Roberts about his vision for the Supreme Court. In the interview, Roberts expressed frustration that his colleagues were acting more like law professors than members of a collegial court. By handing down a series of 5-4 decisions along predictable ideological lines, he suggested, the Court was undermining its democratic legitimacy, making it harder for the public to respect the judiciary as an impartial institution that transcends partisan politics.

Roberts said he would make it his goal as Chief Justice to help persuade his colleagues to put the institutional legitimacy of the Court above their own ideological agendas. He pledged to embrace as a model his greatest predecessor, John Marshall, who served as Chief Justice from 1801 to 1835 and championed the idea that the judicial branch should be a nonpartisan steward in a polarized democracy. In particular, Roberts said he would follow Marshall

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in discouraging his colleagues from issuing separate opinions. “I think that every justice should be worried about the Court acting as a Court and functioning as a Court,” he said. “[T]hey should all be worried, when they’re writing separately, about the effect on the Court as an institution.”<sup>1</sup>

Roberts suggested that Marshall’s success in unifying the Court was a reflection of his temperament: he persuaded his colleagues to live together in the same boardinghouse, where they discussed cases over a hogshhead of Marshall’s Madeira. Roberts explained that he had embraced Marshall as a model in reaction to the “personalization of judicial politics,” which had led both the justices and court observers in recent years to be more concerned about the consistency and coherence of the votes of individual justices than about the legitimacy of the Court as a whole. By emphasizing the benefits of unanimity for his colleagues, Roberts said, he hoped to influence the “team dynamic” that would lead both sides to work toward consensus, in order to achieve a kind of bilateral disarmament.

Roberts was effective in achieving his goal of unanimity during his first, abbreviated term, in which there were far fewer 5-4 decisions (13 percent) than in the previous term (30 percent).<sup>2</sup> But the following term ended in 2007 with a cacophony of partisan disagreement: 33 percent of the cases were decided by 5-4 votes – the highest percentage in at least a decade.<sup>3</sup> During this term, the Court decided high-profile disputes regarding partial birth abortion, affirmative action, and campaign finance reform, and the justices sniped at each other in unusually personal terms. Justice Antonin Scalia, for example, accused Roberts of “faux judicial restraint” – the equivalent of fighting words on the Supreme Court.<sup>4</sup> On the other side of the ideological divide, Justice Stephen Breyer

accused Roberts of “distort[ing] precedent” and seeking to “rewrite this Court’s prior jurisprudence, at least in practical application.”<sup>5</sup>

Since then, the rate of 5-4 decisions has fluctuated from 17 percent in the 2007 term, 29 percent in 2008, 18 percent in 2009, and 20 percent in 2010.<sup>6</sup> But then came the *Citizens United* case in 2010, which struck down the McCain-Feingold campaign finance reform by a 5-4 vote and earned a rebuke from President Obama during his State of the Union address just a week after the decision was made.

Against this background of partisan divisions, many observers expected the Roberts Court to strike down the Affordable Care Act, the centerpiece of President Obama’s domestic agenda, by a 5-4 vote. In the landmark health care decision in 2012, however, Chief Justice Roberts did precisely what he said he would do. He joined the four liberal justices in holding that the Affordable Care Act’s individual mandate is justified by Congress’s taxing power, even though he joined the four conservative justices in holding that the mandate is not justified by Congress’s power to regulate interstate commerce. For placing the bipartisan legitimacy of the Court above his own ideological agenda, Roberts deserves praise not only from liberals but from all Americans who believe that it is important for the Court to stand for something larger than politics. Seven years into his chief justiceship, the Supreme Court finally became the Roberts Court.

To question the combination of legal arguments that Roberts embraced would be beside the point: Roberts’s decision was above all an act of judicial statesmanship. On both the left and the right, commentators praised his “political genius” in handing the president the victory he sought even as he laid the groundwork for restricting congressional power in the future.

That is not to say that Roberts has reinvented himself as a liberal. He has strong views that he is unwilling to compromise, and with his strategic maneuvering in the health care case, he increased the political capital that will allow him to continue to move the Court in a conservative direction. Marshall achieved a similar act of judicial jujitsu in *Marbury v. Madison*, when he refused to confront President Jefferson over a question of executive privilege but laid the groundwork for expanding judicial power in the future. All this suggests that, as long as the composition of the Court remains balanced between five conservatives and four liberals, partisan divisions on the Roberts Court will continue. But in the most highly visible cases, in which the Court's institutional legitimacy is at stake, the Chief Justice may occasionally break ranks with his conservative colleagues.

What can explain the, at best, mixed success that Chief Justice Roberts has had in reducing polarization on the Court, despite his stated ambition to do so? Part of the explanation has to do with the Court's docket: as Justice Breyer once told me in a public interview, the more constitutional cases the Court agrees to hear, the more likely the justices are to divide because they have stronger preconceived views in constitutional, as opposed to statutory, cases. Breyer's observation is supported by the fact that Roberts has had success in achieving something approaching unanimity in cases affecting business interests, which are often decided on statutory rather than constitutional grounds. About 40 percent of the Court's docket is now made up of business cases, up from 30 percent in recent years, and 79 percent of these cases are decided by margins of 7-2 or better.<sup>7</sup> Roberts seems to have made a self-conscious effort to encourage the Court to hear business cases; and as the percentage of business cases heard by the Roberts Court has grown,

so has the percentage won by business interests: a study conducted for *The New York Times* found that the Roberts Court ruled for business interests 61 percent of the time in its five terms, compared with 46 percent in the last five years of the Rehnquist Court and 42 percent by all Supreme Courts after 1953.<sup>8</sup>

Because the Supreme Court has broad control over its docket, it does not have to agree to hear the most contentious constitutional cases. The fact that it continues to do so suggests that at least four justices are consistently voting to hear these cases despite their tendency to provoke polarization. And once the Court agrees to hear a potentially contentious case – such as *Citizens United* – the Chief Justice's ability to persuade his colleagues to decide that case on narrow, consensus-based grounds rather than broad and polarizing ones is limited by the interests, temperaments, and judicial philosophies of his fellow justices.

At the moment, the swing justice on the Court is Anthony Kennedy, who prefers sweeping abstractions to narrow legalisms. As a result, decisions like *Citizens United* are more likely to include incendiary generalizations about the constitutional personhood of corporations than they were when Sandra Day O'Connor, a more incremental and politically pragmatic judge, controlled the balance of the Court.

But Justice Kennedy cannot be blamed for the most salient symptom of polarization on the Roberts Court: the fact that the conservative justices are more conservative than their predecessors. The Roberts Court issued conservative decisions 58 percent of the time in its first five years, compared to a rate of 55 percent for the courts led by Chief Justices Warren E. Burger and William Rehnquist, and only 34 percent for the Court led by Chief Justice Earl Warren. The Roberts Court also has issued conservative opinions in 71 percent of ideologically divided cases, as op-

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posed to less than half the time in the final years of the Rehnquist Court.<sup>9</sup>

To some degree, these differences simply reflect a change in the numbers of conservative versus liberal justices: the Roberts Court is not striking down laws or overturning precedents at a higher rate than its predecessors. But in another sense, the willingness of the Roberts Court to issue polarizing decisions by narrowly divided votes reveals a decline in the culture of bipartisanship on the Court.

To be sure, this is not a culture that has prevailed for much of the Court's history. As Chief Justice Roberts told me, "It's sobering to think of the seventeen chief justices. . . . Certainly a solid majority of them have to be characterized as failures" in terms of their ability to promote consensus and unanimity.<sup>10</sup> After the comity of the early Marshall era, there have been many periods when the justices have divided along partisan lines and openly squabbled, perhaps most notably in the period before and immediately after the New Deal. The Court struck down the core of Franklin Roosevelt's recovery program by closely divided votes and, after stepping back from the brink, continued to indulge in personal and ideological vendettas. Justices Hugo Black and Robert Jackson sniped openly at each other, and Chief Justice Fred Vinson once nearly punched Justice Felix Frankfurter in the nose.

By the 1950s, however, Chief Justice Warren's leadership of the Court was characterized by a sense of stewardship, a belief that the common good would suffer if momentous decisions were made along ideological lines. Under Chief Justice Vinson, the Court had tentatively voted to uphold school segregation. But after the case was set for reargument, Vinson suddenly died, prompting Justice Frankfurter to remark, "This is the first indication I have ever had that there is a God." After Warren replaced Vinson, the

Court voted tentatively to strike down school segregation in *Brown v. Board of Education*. Warren then famously lobbied his skeptical colleagues and persuaded them to make the decision unanimously. It would be bad for the Court, he told the last holdout, Stanley Reed, for the decision to be made over a single dissent. Out of deference to Warren's leadership, Justice Reed agreed, and when Warren read the decision to a spellbound courtroom, Thurgood Marshall, the lawyer for the NAACP Legal Defense Fund, looked up at Reed in astonishment and gratitude.

Despite his reputation as the head of a liberal court, moreover, Warren viewed the Court under his leadership as a partner of Congress and the president, rather than an adversary, and he rarely made decisions that the other branches of the federal government strenuously resisted.<sup>11</sup> Warren himself was a former politician: a former GOP presidential and vice presidential candidate who had also been an elected county prosecutor, state attorney general, and governor of California, where he had a reputation for working with Democrats in the state legislature. Indeed, a majority of the justices who decided *Brown* came from a political background – including two former senators (Harold Burton and Hugo Black), two former attorneys general (Tom Clark and Robert Jackson), a former head of the Securities and Exchange Commission (William O. Douglas), and one former judge who had also served as a senator (Sherman Minton). On the court today, by contrast, there are no former politicians and eight former federal judges.

Even if the current Court contained more politicians, it could hardly reconstruct the sense of stewardship that prevailed in the Warren era. That's because the nature of politics has changed dramatically since the 1950s, as both the House and the Sen-

ate have become much more polarized and less susceptible to bipartisan compromise. The causes of this polarization have been extensively discussed – changes in media technology have surely contributed, for example – but one of the most salient causes is the growth of partisan gerrymandering. In the 1950s, a candidate who won a primary election by appealing to his base had an incentive to move to the center in the general election in order to win over undecided voters in a closely divided district. But once partisan gerrymandering increasingly ensured safe seats for the winners of primary elections, candidates instead had an incentive to move hard left or hard right to win the primary. Partisan gerrymandering explains much of the polarization of the House of Representatives; and because many senators now come from the House, it has contributed to polarization in the Senate as well.

As politics in general have become more polarized since the Warren era, judicial politics, too, have become polarized. The collapse of the center in Congress has made judicial confirmation a bruising process, and has guaranteed that those who get nominated and confirmed are farther than ever from the judicial center. It is also impossible to ignore the role of interest groups that sprung up in the wake of *Roe v. Wade*. *Roe* was decided in 1973, and by the 1980s, interest groups emerged on both sides of the political spectrum, dedicated to the goal of either overturning *Roe* or preserving it. These interest groups helped turn every Supreme Court confirmation hearing since the unsuccessful nomination of Robert Bork in 1986 into a referendum on the rightness or wrongness of *Roe*. This litmus test, in turn, led presidents of both parties to choose nominees for their ideological reliability above all: Republican nominees had to commit to overturning *Roe*, while Democrats had to commit to upholding it.

It took several judicial nominations for this strategy of ideological polarization to become well established: David Souter and Anthony Kennedy ended up affirming *Roe* rather than repudiating it. But galvanized by a “No more Souters!” battle cry, President George W. Bush appointed two justices, Roberts and Alito, who have proved to be reliably conservative votes, disinclined to moderate their views in order to meet their liberal colleagues halfway. Thus the ideological hardening of the Court, like that of Congress, seems to be increasingly entrenched.

This problem is not limited to the conservative wing of the Court. As the stakes in judicial battles have grown, both Democratic and Republican presidents have put greater emphasis on ideological reliability than they did in the 1950s, when the Court was a place to reward political allies (or opponents) rather than a perceived battleground for the culture wars. And as justices have become ideologically less flexible, so have their law clerks. Perhaps the most telling sign of judicial polarization is the fact that liberal justices are now far more likely than they were in the past to hire law clerks who worked for judges appointed by Democrats, and Republican justices are more likely than their predecessors to hire clerks who worked for judges appointed by Republicans.<sup>12</sup> Clerks are vetted for their ideological reliability by a screening system that begins in law school, where they are expected to declare their political allegiances by joining either the Federalist Society or the American Constitution Society; the system continues by securing clerkship with ideologically identified appellate judges who are considered feeders for Supreme Court clerkships. As a result, the prospect of clerks who will challenge their justices’ ideological preconceptions, rather than encouraging them, becomes increasingly remote.

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The polarization of the nominations process and of the Court itself has led to more strident attacks on judicial independence in the political arena. As politicians on both sides no longer have faith in the Court to provide neutral justice, they are willing to attack the justices in political terms. The rhetorical attacks on judges, which became especially pronounced after the Terry Schiavo controversy in 2005, culminated in the Republican presidential primaries of 2011, in which nearly all the major candidates sharply questioned judicial power. From Texas Governor Rick Perry, who called for term limits for Supreme Court justices, to former Speaker of the House Newt Gingrich, who proposed abolishing the U.S. Court of Appeals for the Ninth Circuit,<sup>13</sup> the candidates used anti-judicial rhetoric more shrill than we have heard since the Progressive Era. Together with Gingrich, candidates Michele Bachmann, a U.S. representative from Minnesota, and Herman Cain, a business executive, went so far as to say they would sign a federal ban on abortion in direct contradiction of *Roe v. Wade*, intentionally provoking a constitutional crisis.<sup>14</sup>

During the 2012 campaign, Gingrich offered the most extreme attacks along these lines, calling on Congress to subpoena judges and force them to explain their rulings under threat of arrest. But if Gingrich's judge-bashing was extreme, it was by no means an isolated phenomenon. More than at any point in recent American history, judge-bashing is now an accepted part of both conservative and liberal discourse. If we are not careful, we may slide toward a future in which neither liberals nor conservatives are willing to accept the legitimacy of judicial opinions with which they disagree.

Until recently, in the post-Warren Court era, Republican presidential candidates were more extreme in their attacks on

judges than Democrats. In the 1996 presidential campaign, for example, Pat Buchanan gave a speech called "Ending Judicial Dictatorship" that presaged many of the ideas of Gingrich's white paper "Bringing the Courts Back Under the Constitution." Buchanan's speech was ghostwritten by William J. Quirk, a law professor at the University of South Carolina and coauthor of the 1995 book *Judicial Dictatorship*. In the book and in the speech, Quirk, as channeled by Buchanan, quoted from Thomas Jefferson's writings questioning the wisdom of judicial review and endorsed Theodore Roosevelt's Progressive Era proposal to allow the people to overrule judicial decisions by popular vote.

Although Gingrich quoted some of the same Jeffersonian passages as Buchanan, his 2011 white paper on the judiciary includes some surprising sources that were not available in 1996: articles by liberal scholars questioning judicial supremacy. In the past decade, there has been an explosion of books and articles by liberals on popular constitutionalism, led by former dean of Stanford Law School Larry Kramer, whose 2004 book *The People Themselves* Gingrich quotes extensively and sympathetically. Of course, many liberal popular constitutionalists question judicial supremacy – that is, the claim that judges alone have the right to interpret the Constitution – without endorsing Gingrich's extreme attacks on judicial independence, such as his claim that the president should ignore Supreme Court decisions with which he disagrees.

Popular constitutionalism is a provocative movement, of which I'm a card-carrying member. Regardless of whether you think the courts *should* thwart the deeply felt constitutional views of the people, it is hard to deny that on the rare occasions when they *have* done so, they have often provoked popular backlashes followed by judicial retreats.

The problem is that the rise of liberal popular constitutionalism has coincided with the rise of a political and media culture in which partisan attacks on individual judges are multiplying. As a result, popular constitutionalists' criticism of judges for second-guessing democratic decisions is increasingly showing up in the political arena – where it sometimes takes the form of reasonable critiques of judicial overreach, sometimes takes the form of anti-judge demagoguery, and sometimes treads a fine line between the two. Recently, for example, Michele Bachmann took to RedState.com after Justice Ruth Bader Ginsburg recommended that post-Hosni Mubarak Egypt use the South African constitution as a model, rather than the much older U.S. one: “Unfortunately, Supreme Court Justice Ruth Bader Ginsburg doesn’t believe in the importance of the U.S. Constitution,” Bachmann wrote.

Figuring out where to draw the line between criticism and demagoguery is not easy. Sometimes the line is clearly crossed, as with Gingrich’s claim that “if the court makes a fundamentally wrong decision, the president can in fact ignore it.” In other cases, the boundary is harder to discern. Consider President Obama’s 2010 State of the Union address, in which he challenged the Court’s *Citizens United* decision while six of the justices sat in front of him. “With all due deference to separation of powers,” he said, “last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections.” Chief Justice Roberts clearly believed that some kind of protocol had been violated: “I think anybody can criticize the Supreme Court,” but “there is the issue of the setting, the circumstances, and the decorum.”

Did Obama go too far, as Roberts suggested? I don’t think so. Our greatest pres-

idents have criticized the Court, including Abraham Lincoln and Franklin Roosevelt, who did so during his 1937 State of the Union address. And Obama was careful to acknowledge “all due deference to separation of powers” before launching into his attack; like Lincoln and Roosevelt – but unlike Gingrich – he was making clear that he would obey the decision with which he disagreed.

But if Obama’s criticism of *Citizens United* was legitimate, others on the left have made more troubling arguments. “I hope Anthony Kennedy is happy,” wrote political commentator Elie Mystal in a post at Above the Law, a widely read legal blog. “[P]oint out to me a Supreme Court justice who didn’t know the *Citizens United* ruling would disproportionately favor Republicans, and I’ll point to a liar.” This is a dramatic allegation that seems intended to delegitimize the Court. Kennedy’s ruling may have been naive; but in the absence of evidence to the contrary, one must assume it was offered in good faith.

Some liberal politicians have been similarly extreme. In 2010, Democratic Representative Peter DeFazio of Oregon said that he was “investigating articles of impeachment against Justice Roberts for perjuring during his Senate hearings, where he said he wouldn’t be a judicial activist and he wouldn’t overturn precedents.” Last year, Democratic Representative Chris Murphy of Connecticut, outraged about Justice Clarence Thomas’s ties to conservative donors, argued that “there should start to be some real investigations as to whether [he] can continue to serve as a justice on the Supreme Court.”

Meanwhile, the most prominent critic of *Citizens United* has been comedian and political satirist Stephen Colbert. His central stunt – setting up his own super PAC – has been funny and illuminating, a clever way of highlighting the ruling’s drawbacks. But the limits of his approach were clear

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during his recent interview with retired Justice John Paul Stevens, who wrote the greatest dissent of his career in *Citizens United*. Instead of allowing Stevens to explain his reasoning, Colbert mocked the 91-year-old justice and cut off his answers. (When asked whether he regretted any decision in his long career, Stevens gamely joked, “Other than this interview?”) Colbert’s attack on the Court works brilliantly as comedy; but by blurring the line between entertainment and constitutional criticism, he is arguably both parodying *and* exacerbating the climate of judge-bashing.

Of course, judges on both the left and the right have contributed to the current situation by unnecessarily interfering in political debates and by issuing polarizing decisions on the most contested questions of American life by ideologically divided votes. But not all judges succumb to this temptation: in the health care cases, two of the most respected conservative appellate court judges in the country, Jeffrey Sutton and Lawrence Silberman, upheld the health care reform without hesitation, setting the stage for Chief Justice Roberts’s career-defining decision to uphold the law as well. And there are many occasions when the Supreme Court and lower courts defy ideological predictions and rule against type. Chief Justice Roberts persuaded all his colleagues to join him in a narrow, nearly unanimous decision upholding the 2006 amendments to the Voting Rights Act, despite widespread expectations that the Court would strike down the amendments on a 5-4 vote.<sup>15</sup> And following the lead of a bipartisan panel of the D.C. Circuit, the Supreme Court unanimously rejected the position that we have no expectations of privacy in public and voted to ban the police from attaching a GPS device to the bottom of a suspect’s car without a valid warrant and tracking his every move for a month. But

because, as Chief Justice Roberts has noted, ideologically divided decisions receive far more attention than ideologically unexpected or unanimous ones, a few cases like *Citizens United* may create the impression among citizens that the courts are more polarized than they actually are.

Are ideologically divided decisions in fact harmful to the legitimacy of the Court, as Chief Justice Roberts has suggested? Possibly not: the Court’s legitimacy may turn less on whether its decisions are bipartisan than on whether the public generally agrees with the handful of decisions that catch its attention. As long as the Roberts Court remains broadly within the mainstream of public opinion – as it has done on questions like partial birth abortion, law and order, affirmative action, and even the health care mandate – then perhaps it can issue a handful of unpopular decisions, such as *Citizens United*, without significantly diminishing its legitimacy. Nevertheless, the Court’s approval rating seems to be falling under Chief Justice Roberts: in Gallup polls since 2000, the Court’s approval rating has fluctuated between a high of 62 percent and a low of 42 percent in 2005.<sup>16</sup> Today that figure is 46 percent, the second lowest rating of the decade.<sup>17</sup> This may be part of an overall decline in public confidence in institutions more generally: the Court’s institutional confidence rating rose throughout the 1990s from of a low of 39 percent in 1991 to about 50 percent in 1997, and it remained in that range until 2002, when it began to plummet. By 2007, only 34 percent of those surveyed had a “great deal” of confidence in the Court.<sup>18</sup>

The health care decision had a small but significant effect on public attitudes toward the Supreme Court. A study by Nathan Persily of Columbia Law School found that the Court’s historically low approval ratings dropped further after the



decision was issued. The Court's approval rating in a *New York Times*/CBS poll fell from 44 percent in May and early June before the ruling to 41 percent in July after the ruling, although a Gallup poll in September suggested a rebound in the Court's approval, to 49 percent. Furthermore, opinions about the Court became even more polarized after the decision, with Democrats approving the decision and Republicans disapproving. But most polls showed more Americans approving of the decision than disapproving, especially when they were told that the Court had upheld the law. Before and after the decision, similar numbers of Americans thought the Court would decide the case based on their personal views, rather than the law; but after the decision, these numbers polarized, with almost two thirds of Republicans, but only 40 percent of Democrats, saying that the justices had put their personal views above their legal views. Persily also found that the Court's approval of the Affordable Care Act led some Democrats to change their minds about the health care mandate, leading to a small increase in approval of the mandate after the decision came down.<sup>19</sup>

The reaction to the health care decision suggests that Chief Justice Roberts's task of persuading the public that the Court bases its decisions on the law rather than on partisan views is complicated by the fact that people tend to approve of decisions with which they agree and to assume decisions with which they disagree are based on the justices' personal views rather than on the law. Moreover, although there may be some correlation between public approval, institutional confidence, and particular controversial decisions, the Court appears to be steadily losing ground with the public regardless of individual decisions, a reflection of declining trust in American institutions in general rather than simply the increased perception that

the Court is a polarized body. (In part, as political scientist Sarah Binder has demonstrated, partisan controversies over judicial confirmations decrease public confidence in the legitimacy of the courts.<sup>20</sup>) Therefore, Chief Justice Roberts was correct to be concerned about judicial and political polarization, but his ability to counter this perception may be more constrained than he expected.

Given the broader political forces contributing to the polarization of judicial politics, there are limits to what any individual justice or judge can do to resurrect the sense of bipartisan stewardship that characterized the judiciary of previous eras. Nevertheless, the Court can avoid self-inflicted wounds – from *Bush v. Gore* to *Citizens United* – by ruling narrowly rather than broadly; avoiding ideologically divided, 5-4 opinions; and promoting consensus as much as possible. In this sense, Chief Justice Roberts was correct to embrace Marshall's vision of narrow, unanimous opinions as a model. And by upholding health care reform, Roberts provided an inspiring example of judicial bipartisanship. Other institutional proposals to reduce judicial partisanship – from the elimination of life tenure and adaptation of a fixed eighteen-year term for Supreme Court justices to a requirement that appellate panels include judges appointed by presidents of different parties – require a constitutional amendment or bipartisan legislation and are thus unlikely to be adopted. Therefore, the only realistic antidote to judicial polarization may, for the moment, be judicial self-restraint.

If the Court is unable or unwilling to restrain itself in less visible cases, it might at least take more seriously its role in educating Americans about its role in American democracy. When the Court handed down the *Brown v. Board of Education* opinion in 1954, Chief Justice Warren

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insisted that it be written as plainly as possible, so that it could be printed in newspapers and understood by all American citizens. Similarly, in *Cooper v. Aaron* in 1958, all nine justices signed the opinion in their own hands, in order to signal the Court's seriousness (and to enlist President Eisenhower's support) in ordering the admission of African American students to Little Rock public schools over the opposition of that state's governor and the local school board. *Brown* and *Cooper* did not, on their own, create public support for ending segregation, but they were part of a dialogue between the Court, the president, Congress, and the public. The Court saw itself as playing a pedagogical role, educating and persuading Americans about basic constitutional principles. In the end, what paved the way for greater public acceptance of the societal changes heralded by *Brown* and *Cooper* was political activism that transformed social norms: in particular, the civil rights movement, followed by guidelines from the Department of Health and Human Services withholding federal funds from schools that failed to achieve integration. But the civil rights movement and the administrative regulations that followed were themselves galvanized by the *Brown* decision and the educative role that it adopted.

Might the Court reclaim this public education function today? The justices' resistance to the introduction of cameras in the courtroom suggests that they may be more concerned about enhancing their own reputations (by maintaining a sense of mystery and authority) rather than educating the public. On the other hand, Justice Scalia has argued plausibly that cameras might decrease public understanding because individual clips would be taken out of context and played on the evening news. On the other hand, the Court's decision to post audio files and same-day transcripts of oral arguments

has clearly increased the public's understanding of how the Court works and has given Americans the ability to engage with the constitutional arguments on their own terms. If the justices are unable to respond to Stephen Colbert's highly effective attacks, they can at least present their own deliberations to as wide an audience as possible.

Still, cameras or audio will never substitute for the role of public educator that the Court took on in decisions like *Brown* and *Cooper*: that required bipartisan stewardship, of unanimity across party lines, and a recognition that the Court was engaged in a task transcending partisan politics, a task that could be explained to citizens of different ideologies and backgrounds. That sense of bipartisan stewardship, which Chief Justice Roberts resurrected in the health care decision, is embattled on the Court – and Roberts cannot preserve it on his own. All of his colleagues have to decide whether they want to transcend their differences and present a united face to a divided nation, or whether they are more interested in being right than being bipartisan. Roberts has offered his vision of leadership; it remains to be seen whether the other justices will follow.

## ENDNOTES

- <sup>1</sup> Jeffrey Rosen, "Roberts's Rules," *The Atlantic*, January/February 2007, <http://www.theatlantic.com/magazine/archive/2007/01/roberts-apos-s-rules/5559/>.
- <sup>2</sup> <http://www.scotusblog.com/archives/EndofTermAnalysis.pdf>.
- <sup>3</sup> <http://www.scotusblog.com/archives/SuperStatPack.pdf>.
- <sup>4</sup> *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 498–499 n.7 (2007) (Scalia, J., concurring).
- <sup>5</sup> See, for example, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting).
- <sup>6</sup> [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_OT10\\_stat\\_pack\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf).
- <sup>7</sup> See Michael Orey, "The Supreme Court: Open for Business," *Businessweek*, July 9, 2007, 30; cited in Jeffrey Rosen, "Symposium Keynote Address: Big Business and the Roberts Court," *Santa Clara Law Review* 49 (2009): 997.
- <sup>8</sup> Adam Liptak, "Justices Offer Receptive Ear to Business Interests," *The New York Times*, December 19, 2010, <http://www.nytimes.com/2010/12/19/us/19roberts.html?pagewanted=all>.
- <sup>9</sup> Adam Liptak, "Court Under Roberts is Most Conservative in Decades," *The New York Times*, July 25, 2010, <http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all>.
- <sup>10</sup> Rosen, "Roberts's Rules."
- <sup>11</sup> See generally, Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2000).
- <sup>12</sup> Adam Liptak, "A Sign of the Court's Polarization: Choice of Clerks," *The New York Times*, September 7, 2010, <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html?pagewanted=all>.
- <sup>13</sup> Adam Liptak and Michael D. Shear, "Republicans Turn Judicial Power into a Campaign Issue," *The New York Times*, October 24, 2011, <http://www.nytimes.com/2011/10/24/us/politics/republicans-turn-judicial-power-into-a-campaign-issue.html?pagewanted=all>.
- <sup>14</sup> Jeffrey Rosen, "Boston Legal: The Law According to Mitt," *The New Republic*, November 17, 2011, <http://www.tnr.com/article/politics/magazine/96708/boston-legal-constitution-romney>.
- <sup>15</sup> <http://www.supremecourt.gov/opinions/08pdf/08-322.pdf>.
- <sup>16</sup> Benjamin Wittes, "The Supreme Court's Looming Legitimacy Crisis," June 25, 2007, [http://www.brookings.edu/opinions/2007/0625governance\\_wittes.aspx](http://www.brookings.edu/opinions/2007/0625governance_wittes.aspx).
- <sup>17</sup> Joel Connelly, "Supremes' Approval Rating Takes a Dip," October 4, 2011, <http://blog.seattlepi.com/seattlepolitics/2011/10/04/supremes-approval-rating-takes-a-dip/>.
- <sup>18</sup> Wittes, "The Supreme Court's Looming Legitimacy Crisis."
- <sup>19</sup> <http://blog.oup.com/wp-content/uploads/2012/09/Persily-Campbell-health-care-case-in-public-mind.pdf>.
- <sup>20</sup> Sarah Binder, "Consequences for the Courts: Polarized Politics and the Judicial Branch," in *Red and Blue Nation? vol. 2, Consequences and Correction of America's Polarized Politics*, ed. Pietro S. Nivola and David W. Brady (Washington, D.C.: Brookings Institution Press, 2008), 115–124.