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The Polarized Court

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WASHINGTON — 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.”

Adam Liptak is the Supreme Court correspondent for The New York Times.

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