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Court Under Roberts Is Most Conservative in Decades

By **ADAM LIPTAK**

WASHINGTON — When Chief Justice [John G. Roberts Jr.](#) and his colleagues on the [Supreme Court](#) left for their summer break at the end of June, they marked a milestone: the Roberts court had just completed its fifth term.

In those five years, the court not only moved to the right but also became the most conservative one in living memory, based on an analysis of four sets of political science data.

And for all the public debate about the confirmation of [Elena Kagan](#) or the addition last year of Justice [Sonia Sotomayor](#), there is no reason to think they will make a difference in the court's ideological balance. Indeed, the data show that only one recent replacement altered its direction, that of Justice [Samuel A. Alito Jr.](#) for Justice [Sandra Day O'Connor](#) in 2006, pulling the court to the right.

There is no similar switch on the horizon. That means that Chief Justice Roberts, 55, is settling in for what is likely to be a very long tenure at the head of a court that seems to be entering a period of stability.

If the Roberts court continues on the course suggested by its first five years, it is likely to allow a greater role for religion in public life, to permit more participation by unions and corporations in elections and to elaborate further on the scope of the Second Amendment's right to bear arms. Abortion rights are likely to be curtailed, as are affirmative action and protections for people accused of crimes.

The recent shift to the right is modest. And the court's decisions have hardly been uniformly conservative. The justices have, for instance, limited the use of the death penalty and rejected broad claims of executive power in the government's efforts to combat terrorism.

But scholars who look at overall trends rather than individual decisions say that widely accepted political science data tell an unmistakable story about a notably conservative court.

Almost all judicial decisions, they say, can be assigned an ideological value. Those favoring, say, prosecutors and employers are said to be conservative, while those favoring criminal defendants and people claiming discrimination are said to be liberal.

Analyses of databases coding Supreme Court decisions and justices' votes along these lines, one going back to 1953 and another to 1937, show that the Roberts court has staked out territory to the right of the two conservative courts that immediately preceded it by four distinct measures:

¶In its first five years, the Roberts court issued conservative decisions 58 percent of the time. And in the term ending a year ago, the rate rose to 65 percent, the highest number in any year since at least 1953.

The courts led by Chief Justices Warren E. Burger, from 1969 to 1986, and [William H. Rehnquist](#), from 1986 to 2005, issued conservative decisions at an almost indistinguishable rate — 55 percent of the time.

That was a sharp break from the court led by Chief Justice Earl Warren, from 1953 to 1969, in what liberals consider the Supreme Court's golden age and conservatives portray as the height of inappropriate judicial meddling. That court issued conservative decisions 34 percent of the time.

¶Four of the six most conservative justices of the 44 who have sat on the court since 1937 are serving now: Chief Justice Roberts and Justices Alito, [Antonin Scalia](#) and, most conservative of all, [Clarence Thomas](#). (The other two were Chief Justices Burger and Rehnquist.) Justice [Anthony M. Kennedy](#), the swing justice on the current court, is in the top 10.

¶The Roberts court is finding laws unconstitutional and reversing precedent — two measures of activism — no more often than earlier courts. But the ideological direction of the court's activism has undergone a marked change toward conservative results.

¶Until she retired in 2006, Justice O'Connor was very often the court's swing vote, and in her later years she had drifted to the center-left. These days, Justice Kennedy has assumed that crucial role at the court's center, moving the court to the right.

Justice [John Paul Stevens](#), who retired in June, had his own way of tallying the court's direction. In an interview in his chambers in April, he said that every one of the 11 justices who had joined

the court since 1975, including himself, was more conservative than his or her predecessor, with the possible exceptions of Justices Sotomayor and [Ruth Bader Ginsburg](#).

The numbers largely bear this out, though Chief Justice Roberts is slightly more liberal than his predecessor, Chief Justice Rehnquist, at least if all of Chief Justice Rehnquist's 33 years on the court, 14 of them as an associate justice, are considered. (In later years, some of his views softened.)

But Justice Stevens did not consider the question difficult. Asked if the replacement of Chief Justice Rehnquist by Chief Justice Roberts had moved the court to the right, he did not hesitate.

"Oh, yes," Justice Stevens said.

The Most Significant Change

"Gosh," Justice Sandra Day O'Connor said at a law school forum in January a few days after the Supreme Court undid one of her major achievements by reversing a decision on campaign spending limits. "I step away for a couple of years and there's no telling what's going to happen."

When Justice O'Connor announced her retirement in 2005, the membership of the Rehnquist court had been stable for 11 years, the second-longest stretch without a new justice in American history.

Since then, the pace of change has been dizzying, and several justices have said they found it disorienting. But in an analysis of the court's direction, some changes matter much more than others. Chief Justice Rehnquist died soon after Justice O'Connor announced that she was stepping down. He was replaced by Chief Justice Roberts, his former law clerk. Justice [David H. Souter](#) retired in 2009 and was succeeded by Justice Sotomayor. Justice Stevens followed Justice Souter this year, and he is likely to be succeeded by Elena Kagan.

But not one of those three replacements seems likely to affect the fundamental ideological alignment of the court. Chief Justice Rehnquist, a conservative, was replaced by a conservative. Justices Souter and Stevens, both liberals, have been or are likely to be succeeded by liberals.

Justices' views can shift over time. Even if they do not, a justice's place in the court's ideological spectrum can move as new justices arrive. And chief justices may be able to affect the overall direction of the court, notably by using the power to determine who writes the opinion for the court when they are in the majority. Chief Justice Roberts is certainly widely viewed as a canny

tactician.

But only one change — Justice Alito’s replacement of Justice O’Connor — really mattered. That move defines the Roberts court. “That’s a real switch in terms of ideology and a switch in terms of outlook,” said Lee Epstein, who teaches law and political science at Northwestern University and is a leading curator and analyst of empirical data about the Supreme Court.

The point is not that Justice Alito has turned out to be exceptionally conservative, though he has: he is the third-most conservative justice to serve on the court since 1937, behind only Justice Thomas and Chief Justice Rehnquist. It is that he replaced the more liberal justice who was at the ideological center of the court.

Though Chief Justice Roberts gets all the attention, Justice Alito may thus be the lasting triumph of the administration of President [George W. Bush](#). He thrust Justice Kennedy to the court’s center and has reshaped the future of American law.

It is easy to forget that Justice Alito was Mr. Bush’s second choice. Had his first nominee, the apparently less conservative [Harriet E. Miers](#), not withdrawn after a rebellion from Mr. Bush’s conservative base, the nature of the Roberts court might have been entirely different.

By the end of her almost quarter-century on the court, Justice O’Connor was without question the justice who controlled the result in ideologically divided cases.

“On virtually all conceptual and empirical definitions, O’Connor is the court’s center — the median, the key, the critical and the swing justice,” Andrew D. Martin and two colleagues wrote in a [study](#) published in 2005 in *The North Carolina Law Review* shortly before Justice O’Connor’s retirement.

With Justice Alito joining the court’s more conservative wing, Justice Kennedy has now unambiguously taken on the role of the justice at the center of the court, and the ideological daylight between him and Justice O’Connor is a measure of the Roberts court’s shift to the right.

Justice O’Connor, for her part, does not name names but has expressed misgivings about the direction of the court.

“If you think you’ve been helpful, and then it’s dismantled, you think, ‘Oh, dear,’ ” she said at William & Mary Law School in October in her usual crisp and no-nonsense fashion. “But life goes on. It’s not always positive.”

Justice O'Connor was one of the authors of [McCConnell v. Federal Election Commission](#), a 2003 decision that, among other things, upheld restrictions on campaign spending by businesses and unions. It was reversed on that point in the [Citizens United](#) decision.

Asked at the law school forum in January how she felt about the later decision, she responded obliquely. But there was no mistaking her meaning.

“If you want my legal opinion” about Citizens United, Justice O'Connor said, “you can go read” [McCConnell](#).

The Court Without O'Connor

The shift resulting from Justice O'Connor's departure was more than ideological. She brought with her qualities that are no longer represented on the court. She was raised and educated in the West, and she served in all three branches of Arizona's government, including as a government lawyer, majority leader of the State Senate, an elected trial judge and an appeals court judge.

Those experiences informed Justice O'Connor's sensitivity to states' rights and her frequent deference to political judgments. Her rulings were often pragmatic and narrow, and her critics said she engaged in split-the-difference jurisprudence.

Justice Alito's background is more limited than Justice O'Connor's — he worked in the Justice Department and then as a federal appeals court judge — and his rulings are often more muscular.

Since they never sat on the court together, trying to say how Justice O'Connor would have voted in the cases heard by Justice Alito generally involves extrapolation and speculation. In some, though, it seems plain that she would have voted differently from him.

Just weeks before she left the court, for instance, Justice O'Connor heard [arguments in Hudson v. Michigan](#), a case about whether evidence should be suppressed because it was found after Detroit police officers stormed a home without announcing themselves.

“Is there no policy protecting the homeowner a little bit and the sanctity of the home from this immediate entry?” Justice O'Connor asked a government lawyer. David A. Moran, a lawyer for the defendant, Booker T. Hudson, said the questioning left him confident that he had Justice O'Connor's crucial vote.

Three months later, the court called for reargument, signaling a 4-to-4 deadlock after Justice O'Connor's departure. When the 5-to-4 [decision](#) was announced in June, the court not only ruled

that violations of the knock-and-announce rule do not require the suppression of evidence, but also called into question the exclusionary rule itself.

The shift had taken place. Justice Alito was in the majority.

“My 5-4 loss in *Hudson v. Michigan*,” Mr. Moran wrote in 2006 in *Cato Supreme Court Review*, “signals the end of the Fourth Amendment” — protecting against unreasonable searches — “as we know it.”

The departure of Justice O’Connor very likely affected the outcomes in two other contentious areas: abortion and race.

In 2000, the court struck down a Nebraska law banning an abortion procedure by a vote of 5 to 4, with Justice O’Connor in the majority. Seven years later, the court upheld a similar federal law, the *Partial-Birth Abortion Act*, by the same vote.

“The key to the case was not in the difference in wording between the federal law and the Nebraska act,” Erwin Chemerinsky wrote in 2007 in *The Green Bag*, a law journal. “It was Justice Alito having replaced Justice O’Connor.”

In 2003, Justice O’Connor wrote the majority opinion in a 5-to-4 decision allowing public universities to take account of race in admissions decisions. And a month before her retirement in 2006, the court refused to hear a case challenging the use of race to achieve integration in public schools.

Almost as soon as she left, the court reversed course. A 2007 decision limited the use of race for such a purpose, also on a 5-to-4 vote.

There were, to be sure, issues on which Justice Kennedy was to the left of Justice O’Connor. In a 5-to-4 decision in 2005 overturning the juvenile death penalty, Justice Kennedy was in the majority and Justice O’Connor was not.

But changing swing justices in 2006 had an unmistakable effect across a broad range of cases. “O’Connor at the end was quite a bit more liberal than Kennedy is now,” Professor Epstein said.

The numbers bear this out.

The Rehnquist court had trended left in its later years, issuing conservative rulings less than half the time in its last two years in divided cases, a phenomenon not seen since 1981. The first term

of the Roberts court was a sharp jolt to the right. It issued conservative rulings in 71 percent of divided cases, the highest rate in any year since the beginning of the Warren court in 1953.

Judging by the Numbers

Chief Justice Roberts has not served nearly as long as his three most recent predecessors. The court he leads has been in flux. But five years of data are now available, and they point almost uniformly in one direction: to the right.

Scholars quarrel about some of the methodological choices made by political scientists who assign a conservative or liberal label to Supreme Court decisions and the votes of individual justices. But most of those arguments are at the margins, and the measures are generally accepted in the political science literature.

The leading [database](#), created by Harold J. Spaeth with the support of the National Science Foundation about 20 years ago, has served as the basis for a great deal of empirical research on the contemporary Supreme Court and its members. In the database, votes favoring criminal defendants, unions, people claiming discrimination or violation of their civil rights are, for instance, said to be liberal. Decisions striking down economic regulations and favoring prosecutors, employers and the government are said to be conservative.

About 1 percent of cases have no ideological valence, as in a boundary dispute between two states. And some concern multiple issues or contain ideological cross-currents.

But while it is easy to identify the occasional case for which ideological coding makes no sense, the vast majority fit pretty well. They also tend to align with the votes of the justices usually said to be liberal or conservative.

Still, such coding is a blunt instrument. It does not take account of the precedential and other constraints that are in play or how much a decision moves the law in a conservative or liberal direction. The mix of cases has changed over time. And the database treats every decision, monumental or trivial, as a single unit.

“It’s crazy to count each case as one,” said Frank B. Cross, a law and business professor at the University of Texas. “But the problem of counting each case as one is reduced by the fact that the less-important ones tend to be unanimous.”

Some judges find the entire enterprise offensive.

“Supreme Court justices do not acknowledge that any of their decisions are influenced by ideology rather than by neutral legal analysis,” William M. Landes, an economist at the University of Chicago, and [Richard A. Posner](#), a federal appeals court judge, [wrote](#) last year in *The Journal of Legal Analysis*. But if that were true, they continued, knowing the political party of the president who appointed a given justice would tell you nothing about how the justice was likely to vote in ideologically charged cases.

In fact, the correlation between the political party of appointing presidents and the ideological direction of the rulings of the judges they appoint is quite strong.

Here, too, there are exceptions. Justices Stevens and Souter were appointed by Republican presidents and ended up voting with the court’s liberal wing. But they are gone. If Ms. Kagan wins Senate confirmation, all of the justices on the court may be expected to align themselves across the ideological spectrum in sync with the party of the president who appointed them.

The proposition that the Roberts court is to the right of even the quite conservative courts that preceded it thus seems fairly well established. But it is subject to qualifications.

First, the rightward shift is modest.

Second, the data do not take popular attitudes into account. While the court is quite conservative by historical standards, it is less so by contemporary ones. Public opinion polls suggest that about 30 percent of Americans think the current court is too liberal, and almost half think it is about right.

On given legal issues, too, the court’s decisions are often closely aligned with or more liberal than public opinion, according to studies collected in 2008 in “Public Opinion and Constitutional Controversy” (Oxford University Press).

The public is largely in sync with the court, for instance, in its attitude toward abortion — in favor of a right to abortion but sympathetic to many restrictions on that right.

“Solid majorities want the court to uphold [Roe v. Wade](#) and are in favor of abortion rights in the abstract,” one of the studies concluded. “However, equally substantial majorities favor procedural and other restrictions, including waiting periods, parental consent, spousal notification and bans on ‘partial birth’ abortion.”

Similarly, the public is roughly aligned with the court in questioning affirmative action plans that

use numerical standards or preferences while approving those that allow race to be considered in less definitive ways.

The Roberts court has not yet decided a major religion case, but the public has not always approved of earlier rulings in this area. For instance, another study in the 2008 book found that “public opinion has remained solidly against the court’s landmark decisions declaring school prayer unconstitutional.”

In some ways, the Roberts court is more cautious than earlier ones. The Rehnquist court struck down about 120 laws, or about six a year, according to an analysis by Professor Epstein. The Roberts court, which on average hears fewer cases than the Rehnquist court did, has struck down fewer laws — 15 in its first five years, or three a year.

It is the ideological direction of the decisions that has changed. When the Rehnquist court struck down laws, it reached a liberal result more than 70 percent of the time. The Roberts court has tilted strongly in the opposite direction, reaching a conservative result 60 percent of the time.

The Rehnquist court overruled 45 precedents over 19 years. Sixty percent of those decisions reached a conservative result. The Roberts court overruled eight precedents in its first five years, a slightly lower annual rate. All but one reached a conservative result.