The sudden swing to a partisan Republican court

Rogers M. Smith

In “A decade-long longitudinal survey shows that the Supreme Court is now much more conservative than the public,” Jesse et al. make several invaluable contributions (1). They ingeniously pair public opinion survey data with Supreme Court decisions in salient cases over time to show that the court has very recently swung sharply to the right of the majority of the public. They show that many Americans are unaware of the extent of this shift, and that greater awareness may well prompt greater support for term limits for justices or for additional justices, particularly among Democrats. Since it now appears that the Supreme Court will soon overrule Roe v. Wade, a decision that many polls find to be supported by a majority of Americans, these findings suggest that dissatisfaction with the court and pressures for change are soon likely to grow, perhaps dramatically (2).

Although that conclusion is sound, the paper’s presentation is somewhat misleading in two important respects.

The Recent Swing

First, the paper’s significance statement (1) can be read to imply that the court has grown steadily more conservative from 2010 to the present. This inference is not only incorrect, it also fails to highlight a truly startling finding visible in the paper’s figure 1. The paper rests on three surveys, with none between 2010 and 2020, so changes during that decade are not tracked. In both 2010 and 2020, moreover, the Supreme Court majority’s positions in the cases examined were almost identical to those of the average survey respondent. In other words, in the first two times studied, the modern Supreme Court, often criticized by academics as unduly conservative, proved, in fact, to be almost exactly in step with American public opinion as a whole, diverging only very slightly in what the paper designates as a more conservative direction.

This pattern was sustained even though, in 2018, Chief Justice John Roberts replaced the retiring Justice Anthony Kennedy as the court’s median voter, and many perceived Roberts as more conservative than Kennedy. It is only since 2020, when Justice Brett Kavanaugh became the court’s median voter after the death of Justice Ruth Bader Ginsburg, followed by the creation of a six-three conservative supermajority with the confirmation of Justice Amy Coney Barrett, that the court majority has swung sharply away from majority public opinion, and toward virtual identity with the average positions of Republican survey respondents. The paper rightly stresses that much of the public seems unaware of the extent of the court’s current divergence from American public opinion, but that ignorance surely is, in part, because this sharp divergence is surprisingly recent. Again, the enormous attention being given to the overturning of Roe v. Wade may alter public views. If so, it will not be because the court grew more conservative over time. It will be because the court has suddenly shifted, recently and dramatically.

Ideology and Partisanship

The second point on which the paper (1) can be misleading is in its definitions of conservative and liberal ideologies. Although the authors are not as explicit as they could be in this regard, as their figures show, and as they have confirmed in correspondence with reviewers, they define “conservative” simply as the positions favored by most Republicans, and “liberal” as the positions favored by most Democrats. Consequently, their “ideological” spectrum would be better described as a “partisan” spectrum. That label is more accurate, because the meanings of “conservative” and “liberal” are much disputed, both in the history of political thought and in contemporary American politics. There is, consequently, a cost to clarity when “conservative” and “Republican” and “liberal” and “Democrat” are used interchangeably. Many economic conservatives, for example, do not believe that Donald Trump’s positions on trade and immigration are truly conservative, although Trump’s stances have become the positions of the Republican Party. Many “liberal” individualists still have deep reservations about race-targeted policies and programs, although many of those policies are officially favored by the Democratic Party and by most Democratic voters today.

Moreover, for one of the central questions concerning the legitimacy of the Supreme Court—whether it is “above” partisan politics—it may well matter greatly whether people perceive that it has not moved in a “conservative” jurisprudential direction so much as it has moved in a partisan Republican direction. In this regard, it is notable, and consistent with the paper’s findings (1), that Chief Justice Roberts has established a reputation for taking seriously his responsibilities to the court as an institution, and for therefore seeking to find common ground among the justices as often as possible. At his confirmation hearing, Roberts promised that, as chief justice, he would feel “a particular obligation to try to achieve consensus,” and he has undeniably sought to do so. Unanimous or nearly unanimous decisions, which have actually been far more common than five-four decisions for two decades, increased further after Roberts

Author affiliations: aDepartment of Political Science, University of Pennsylvania, Philadelphia, PA 19104

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1 Email: rogerss@sas.upenn.edu.

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became chief justice (3). He has also worked to preserve a sense of solidarity on the judicial bench by unexpectedly voting with the court’s “liberals” in some major decisions (4). Many observers believe that Roberts was seeking broad support for a ruling that would have further restricted but not overturned abortion rights, prior to the leak of Justice Samuel Alito’s draft opinion overruling Roe v. Wade (5).

The Partisan Trump Court

If so, it is plausible to believe that, once Justice Kavanaugh replaced Chief Justice Roberts as the court’s median voter, the chief justice became greatly weakened in his ability to lead the court to results that are close to the preferences of the average survey respondent, in the manner that previous “swing” justices, like Anthony Kennedy and Sandra Day O’Connor, had long done. It is not really the Supreme Court since 2010, it is the Supreme Court as very recently reconstituted by three appointees of President Donald Trump, that has become “much more conservative than the public.” Whether this sudden swing to judicial rulings that conform closely to partisan Republican preferences will, in fact, escalate pressures for basic changes to the court as an institution is one of the most important questions posed by this paper’s (1) highly significant findings.

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