The Extreme Partisanship of John Roberts's Supreme Court

Like Barack Obama, the chief justice came into office promising an age of apolitical comity. And like the president, he has seen his dream die.

Garrett Epps Aug 27 2014, 12:01 PM ET

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"Politics are closely divided," John Roberts told scholar Jeffrey Rosen after his first term as chief justice. "The same with the Congress. There ought to be some sense of some stability, if the government is not going to polarize completely. It's a high priority to keep any kind of partisan divide out of the judiciary as well."

No one who observes the chief justice would doubt he was sincere in his wish for greater unanimity, greater judicial modesty, a widely respected Supreme Court quietly calling "balls and strikes." But human beings are capable of wishing for mutually incompatible things—commitment and freedom, for example, or safety and excitement. In his desire for harmony, acclaim, and legitimate hegemony, the chief was fighting himself. As he enters his 10th term, his quest for a non-partisan Court seems in retrospect like the impossible dream.

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The Supreme Court's 2013 term began with oral argument in a divisive, highly political case about campaign finance and concluded with two 5-4 decisions of divisive, highly political cases, one about public-employee unions and the other about contraceptive coverage under the Affordable Care Act. In all three cases, the result furthered a high-profile objective of the Republican Party. In all three cases, the voting precisely followed the partisan makeup of the Court, with the five Republican appointees voting one way and the four Democratic appointees bitterly dissenting. In all three cases, the chief voted with the hard-right position. By the end of the term, the polarization Roberts had seen in the nation had clearly spread to the Court. In fact, the clerk's final gavel on June 30 did not signal even a momentary respite from the bitterness.

The day after the decision, 14 religious leaders sent a letter to President Obama asking for a new kind of religious exemption. Many religious charities provide various social services under contracts funded by the federal government. Obama had proposed rules banning government contractors from discriminating in employment against gays and lesbians. The singers wanted religious objectors to be free to continue policies of excluding them from employment. There was certainly language in the opinion to encourage those hopes. Could religious objections now override a civic commitment to equality?

That was Tuesday. On the Thursday after it left town, the Court issued an emergency order permitting a religious non-profit institution, Wheaton College, to reject for the time being the "accommodation" that the *Hobby Lobby* majority had hailed as the solution to religious objections to contraceptive coverage. In her *Hobby Lobby* dissent, Justice Ruth Bader Ginsburg had pointed out language in the majority opinion suggesting that the majority was not serious about this accommodation; many read the emergency order as signaling the same thing. The order also revealed a bitterly divided Court. In a dissent for herself and the Court's other two female members, Justice Sonia Sotomayor directly accused the majority of bad faith: "Those who are bound by our decisions usually believe they can take us at our word," she wrote. "Not so today."

Less than a week after it left town, the Court had found new fissures within itself; those fissures had spawned fissures within the country. As a result of *Hobby Lobby,* the nation would no longer simply be divided into red and blue states. Now, increasingly, Americans would work for red or blue companies.

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In fact, it seemed, America now has red and blue justices on its highest court.

Hobby Lobby may have been about religious belief, but it was also very much about politics, about the bitterest divide between the parties. *Hobby Lobby* was a challenge to the Affordable Care Act. The ACA is Barack Obama's signature achievement. It also represents the fondest wish of the Democratic Party. Democratic presidents since Harry Truman have sought to extend medical coverage to the nation as a whole. Republicans had bitterly fought this—even in the limited form of Medicare—as "socialism."

In applying the Religious Freedom Restoration Act broadly to the ACA, the *Hobby Lobby* majority did just what it had done two years before in *National Federation of Independent Business v. Sebelius*. Without striking the ACA down, it weakened it, hollowed it out, and suggested that in some way it was less legitimate, less worthy of respect, than other laws. In 2012, the Court had let stand the "individual mandate," but only as a tax, not (as most scholars had expected) as a regulation of commerce. At the same time, it had allowed the expansion of Medicaid but had empowered individual states to close their borders to federal health policy.

Now, it has empowered individual employers to thwart national health policy and deprive their female employees of health benefits the law said they had earned. Properly read, the opinion said that the contraceptive-coverage mandate might—or might not—survive the next case. After the *Wheaton College* order, it is hard not to suspect that the *Hobby Lobby* majority may, in fact, simply be setting that provision of the act up for a knockout blow.

On the Roberts Court, for the first time, the party identity of the justices seems to be the single most important determinant of their votes. The five Republican justices sometimes divide in cases (such as the scope of the federal Treaty Power or the validity of "buffer zones" around abortion clinics) that spawn purely ideological debate. But they are united and relentless in pushing for victory in cases that have a partisan valence.

In the autumn of 2005, John Roberts had hoped to lead a court that would unite the nation and burnish the Court's legitimacy. In retrospect, that wish seems as admirable and as vain as Obama's hope that his election in 2008 would usher in a new era when Americans would not be divided by party and mutual suspicion—the stuff that dreams are made of.

For both men, by June 2014, that dream had melted into air, into thin air.

This post has been adapted from Garrett Epps's forthcoming book, American Justice 2014: Nine Clashing Visions on the Supreme Court.