

U.S.

# ‘Politicians in Robes’? Not Exactly, But . . .

Sidebar

By ADAM LIPTAK   NOV. 26, 2012

WASHINGTON — A couple of weeks ago, a federal appeals court ruled that voters in Michigan could not ban racial preferences in admissions to the state’s public universities. The ruling struck some people as curious (“a state does not deny equal treatment by mandating it,” a dissenting judge wrote), but that is not today’s topic.

This column is about whether it was worth noting the partisan affiliations of the judges on the two sides of that 8-to-7 decision.

In his report on the decision for Scotusblog, Lyle Denniston, who has covered the Supreme Court for more than half a century, added a “note to readers” that made the case for omitting such information.

“Readers will find, in some news accounts about this decision, references to the political party affiliation of the presidents who named the judges to the bench, referring to them as Republican or Democratic appointees,” Mr. Denniston wrote.

“The author of this blog,” he said, referring to himself, “will provide that information only when it is clearly demonstrated that the political source of a judge’s selection had a direct bearing upon how that judge voted — admittedly, a very difficult thing to prove. Otherwise, the use of such references invites the reader to draw such a conclusion about partisan influence, without proof.”

For purposes of discussion only, let me describe how the vote broke down.

Every one of the eight judges in the majority was nominated by a Democratic president. Every one of the seven judges in dissent was nominated by a Republican president. (There was a wrinkle, but it was a small one: Judge Helene N. White, who was in the majority, was initially nominated by President Bill Clinton and was later renominated by President George W. Bush as part of a compromise involving several nominations.)

Many judges hate it when news reports note this sort of thing, saying it undermines public trust in the courts by painting them as political actors rather than how they like to see themselves — as disinterested guardians of neutral legal principles.

But there is a lot of evidence that the party of the president who appointed a judge is a significant guide to how that judge will vote on politically charged issues like affirmative action.

A book scheduled to be published in January by Harvard University Press provides the most comprehensive and detailed empirical analysis yet of the role played by ideology and political affiliation in judicial decision making. It is called “The Behavior of Federal Judges,” and it collects and analyzes a daunting amount of data.

Its authors are Lee Epstein, who teaches law and political science at the University of Southern California; William M. Landes, who teaches law and economics at the University of Chicago; and Judge Richard A. Posner of the federal appeals court in Chicago. They conclude that “federal judges are not just politicians in robes, though that is part of what they are.”

The book’s broadest findings are unsurprising but worth stating for those in denial about such things.

“Justices appointed by Republican presidents vote more conservatively on average than justices appointed by Democratic ones, with the difference being most pronounced in civil rights cases,” the three authors write.

That correlation has become more pronounced since the retirements of Justices John Paul Stevens and David H. Souter, who were appointed by Republican

presidents but were members of the court's liberal wing. These days, for the first time in many decades, all of the court's more liberal members were appointed by Democrats and all of its more conservative ones by Republicans.

"Like Supreme Court justices," the three authors add, "court of appeals judges appointed by Republican presidents are more likely, other things being equal, to vote for conservative than for liberal outcomes."

In 2006, Cass R. Sunstein, now a law professor at Harvard, considered the question in the context of affirmative action. He and several colleagues analyzed federal appeals court decisions on the subject, collecting their findings in a book called "Are Judges Political?" They concluded that there was "striking evidence of ideological voting."

"From 1978 to 2004, Republican appointees cast 275 total votes, with 129, or 47 percent, in favor of upholding an affirmative action program," they wrote. "By contrast, Democratic appointees cast 208 votes, with 156, or 75 percent, in favor of upholding an affirmative action program."

The authors of the new book updated those results for a more recent period, 1995 through 2008. They found that judges appointed by Republicans voted to uphold affirmative action programs 41 percent of the time. Ones appointed by Democrats voted that way 66 percent of the time.

You can look at that glass as half full: in lots of cases, the two sets of judges agreed on what the law required.

In the more recent period, moreover, both groups voted to uphold programs slightly less often, which is probably a consequence of conservative decisions from the Supreme Court. That general downward trend also seems to demonstrate that law (at least in the limited sense of obeying Supreme Court precedent) plays a significant role in deciding cases.

But law does not explain the continuing gap between the two groups of judges. Ideology does.

The point is not lost on anyone who cares to think about it, Professor Epstein

said.

“I think voters — not to mention senators, presidents and the judges themselves — understand that there’s a difference between judges appointed by Republican and Democratic presidents,” she said. “If they didn’t, we wouldn’t have confirmation battles.”

The case from Michigan, which is in conflict with another federal appeals court decision, is probably headed to the Supreme Court. It would join a case argued in October, which challenged an affirmative action program at the University of Texas.

The justices’ votes in the Texas case are as yet unknown. But here is a good bet: every vote to strike down the program will come from a justice appointed by a Republican president, and every vote to uphold it will come from a justice appointed by a Democratic one.

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