Benched

Why the Supreme Court is irrelevant.

The most-watched case of the Supreme Court's last term, which ended in June, invited the justices to hold unconstitutional a key provision of the Voting Rights Act. The law required certain jurisdictions—largely in the Old South—to "pre-clear" any changes in their electoral systems with the Department of Justice. It was intended to prevent states with poor civil rights histories from changing their voting systems in ways that would keep blacks from voting. From the questions asked by the justices at the oral argument, the betting among the cognoscenti was that the Court's five-person conservative majority would strike down the law on the notion that things had changed and federal supervision was no longer necessary.

Instead, in a surprise 8-1 opinion authored by Chief Justice John Roberts, the Court decided that it didn't have to address the constitutional question at all. The Court said the district that brought the suit could simply go to federal court and get permission to "bail out" from the pre-clearance provision. No one but the justices thought this argument held water: The bailout provision they cited applied only to counties and parishes, neither of which the district was. The Court's conservatives had ducked the trouble that invalidating the law would have brought them.

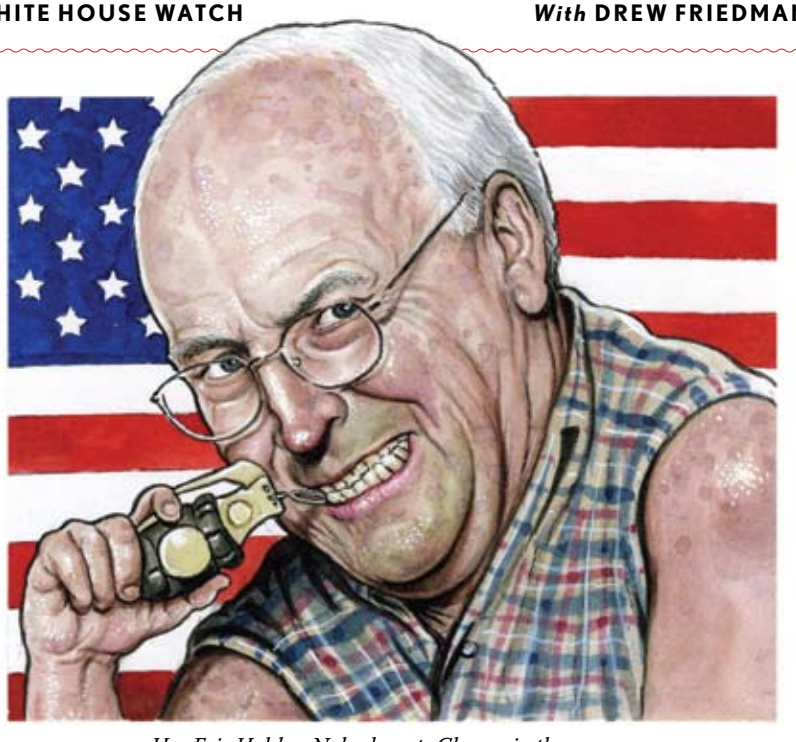
Explaining the departure from the plain language of the law, the chief justice acknowledged, "this is an unusual case." But, in a broader sense, perhaps not. At least since its 1954 decision in *Brown* v. *Board of Education*, desegregating the nation's schools, the Court has weighed in regularly with dramatic pronouncements on some of the most challenging issues the country faces. As late as 2003, the Court handed down mega-decisions on controversial issues such as gay rights and affirmative action. However, major decisions like those are becoming few and far between. The firecracker-turned-fizzle of the voting rights case is an increasingly typical outcome from a Supreme Court that appears to be receding from its central role in American politics.

As the justices prepare to take their seats for the start of the new term on the first Monday of October, it's worth examining why the big news at the end of the last term was what the Court *didn't* do. At the start of the term, Court-watchers were decrying the lack of any big cases; by the end, the story was how the justices ducked even in the ones they had. And, despite some October promise, don't expect a blockbuster term this year either. The situation is structural and unlikely to change anytime soon.

Though the big 2003 term was toward the end of William Rehnquist's tenure as chief justice, the Roberts Court has hardly lain dormant since. That all changed this year. As the last term got under way, Adam Liptak, who covers the Court at *The New York Times*, called the docket a "buffet without entrees." And what's hot on the menu right now? *Arbitration* cases. The Court had three last term, and it has more to come this term. It's particularly revealing that in two of the three arbitration cases decided last term, liberals and conservatives joined hands on both sides of the decision: That's how you know something *isn't* a hot-button.

Since its inception, the Roberts Court has looked to avoid trouble. In the 2006 term, the Court's center actually stopped short of overruling past decisions in at least four big cases, despite heckling from Justices Antonin Scalia and Clarence

WHITE HOUSE WATCH ***With*** **DREW FRIEDMAN**



Hey Eric Holder: Nobody puts Cheney in the corner.

Thomas on the far right. This approach has prompted some to label Roberts a judicial "minimalist." In the voting rights case itself, the chief justice delivered a stern lecture to Congress about how the provisions of the law "raise serious constitutional questions"—but then he walked away from the brink using that most hoary of judicial cop-outs, the "avoidance canon": "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of a case."

Just why does the Court seem to be avoiding bold moves? To begin with, despite their reputation, the justices of the Supreme Court do not sit above politics. Time and again throughout history, when the Court has run afoul of popular politics and the political branches, the justices have paid a price. One need only recall Franklin Roosevelt's 1937 move to pack the Court when it balked repeatedly at his New Deal measures. That was a long time ago, but the successors of those justices have not forgotten the bold public challenge to their authority. When the Rehnquist Court launched its "federalism revolution," Justice Souter sought to warn the majority away, alluding to 1937 when he said, "We know what happened." Controversial from the start, that revolution came to an abrupt halt. Then there was *Planned Parenthood* v. *Casey*, the decision that *didn't* overrule *Roe* v. *Wade*. Why not? It was hard to follow the plurality's convoluted explanation, but looming large was anxiety about the Court's public "legitimacy," as the opinion noted, if the justices were to overturn *Roe* with no reason other than changed membership on the bench.

Consider, then, the situation facing the conservative justices in the voting rights case. The 1965 law had just been reauthorized in 2006, passing the Senate 98-0 and the House with an overwhelming majority. In the interim, the country had elected its first African American president and put Congress in heavily Democratic hands. Had the justices overturned the challenged provision, they could have expected enough criticism that the controversies over, say, flag-burning or school prayer would have looked like a picnic by comparison. It is no accident that the avoidance canon gets pulled out in the salient case. By contrast, this term, the conservative justices eagerly overruled a prior decision protecting criminal suspects represented by counsel from police questioning. No modesty or gradualism here; in fact, the government hadn't even asked for that result. The difference? No one was watching the case.

Under John Roberts, the Supreme Court has lost its mojo.

A looming restraint on the current justices is the risk that, should they read a statute in a conservative way, the Democratic Congress will simply rewrite the law to set matters straight. Is it a coincidence that the first bill Barack Obama signed into law was the Lilly Ledbetter Fair Pay Act of 2009? Lilly Ledbetter was the lead player in *Ledbetter* v. *Goodyear Tire and Rubber Co.*, a 2007 Roberts Court decision that adopted a stingy interpretation of when cases could be brought under the equal-pay provisions of federal law. Congress tried immediately to overturn the decision; when Republicans blocked the effort, it became an issue in the 2008 campaign. Adoption of the Ledbetter law reminds the conservative justices that they are being watched. (At least twice this past term, Justice Ruth Bader Ginsburg overtly appealed to Congress to undo what her conservative colleagues were doing; dissenting in another voting rights case, she pointedly noted, "Today's decision returns the ball to Congress' court.")

A final risk for the conservative Court majority is that the conservative coalition itself seems so weak. This weakness has led to a number of cases in which wayward conservatives voted in ways that gave the Court's liberals the upper hand, as happened in the 2008 decision in *Boumediene* v. *Bush*, when Justice Anthony Kennedy joined the liberals to overturn the Bush administration's plans for trying Guantánamo detainees before military commissions. Kennedy clearly holds the power on the Court when it comes to deciding cases; 23 of the Court's 79 cases this past term were resolved by a 5-4 vote, and, in 18 of them, Kennedy was in the majority. But he is hardly alone in breaking ranks. This past term, for reasons we can only speculate, both Justices Scalia and Thomas helped deliver some surprising liberal victories, particularly in cases involving the question of whether congressional statues preempt state lawmaking.

Even when the conservatives hang together on the outcome, they often insist on going their own ways in writing opinions. The importance of fractured majority opinions often gets lost, but it is key: What the justices say in their opinions is what sets law for the future. And, when it comes to opinion-writing, it takes five united votes to really win.

This past term's screamer was *Federal Communications Commission* v. *Fox Television Stations*, not the most momentous of cases but infinitely revealing

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of the problem. Starting in 1978, and for years after, the FCC would only punish repeated vulgarity, or a single use of "indecent" language, if it was used in a literal (i.e. sexual or excretory) sense. But, when Bono said, during the 2003 Golden Globes, "This is really, really fucking brilliant," the FCC decided that a single, non-literal use of such words was verboten. The questions in *Fox* were whether the FCC had adequately explained the reasons for its switch in policy, and, if so, whether the new policy was consistent with the First Amendment?

In what looked to be a 5-4 conservative win, Chief Justice Roberts upheld the FCC's decision. He found the FCC's explanation sufficient and "decline[d] to address the constitutional questions at this time" because the lower courts had not yet spoken to them. (Sound like a familiar tactic?) But watch as even that weak opinion fizzles away: First, though Justice Thomas joined the majority, he wrote separately to express his view that the 1978 decision was probably wrong, in that it gave the FCC too much power in the first place, signaling the possibility that there may well be five votes to overturn the FCC policy on constitutional grounds. Then, Justice Kennedy (who also joined the majority), wrote his own opinion to "agree with the dissenting opinion of Justice Breyer that the agency must explain why 'it now reject[s] the considerations that led it to adopt the initial policy.'" Whoops. Apparently Kennedy thought the FCC's explanation in *this* case was okay, but, on the broader administrative law issues, the dissenters now prevail, 5-4. Enough wins like this and the conservatives will be in a good position to declare defeat.

Of course, predicting the Court's demise is chancy business—there's always a potential big moment just around the corner. Still, don't expect much in the way of blockbusters from the Roberts Court anytime soon. Stuck between political forces on the left and conservative disarray on the right, the Court will most likely continue to creep rightward with no bold agenda.

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