The Supreme Court in a Time of Transition: A Fragile Balance as its New Term Begins

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Every four years, the first Monday in October brings fresh predictions that the outcome of the presidential election will tip the balance on the Supreme Court.

This time, that prediction almost certainly will come true.

Why is this year different? One reason is obvious: the next president can be expected to make at least one, and quite possibly more, appointments to the Court. Although that same statement was made four (and eight) years ago, the actuarial pressures for change on the Court are becoming irresistible. It has been 10 years since anyone left the Court, and the current group soon will have served together for a longer period than any nine justices in the nation's history. While members of the Court are noted for their longevity, Justice John Paul Stevens is now 84; Chief Justice William Rehnquist just turned 80; retirement rumors have long swirled around Justice Sandra Day O'Connor; and Justice Ruth Bader Ginsburg, while seemingly in fine fettle, has had well-publicized health problems.

But there is another, more surprising reason for anticipating a change in the Court's direction. Perhaps because of *Bush v. Gore*, or because Republican presidents appointed seven of the nine sitting justices, the current Court often is described as one that is dominated by conservatives. But that is not really so. In fact, there is a remarkable balance between the Court's conservative and progressive wings – which means that, depending on who is appointing the replacements, *any* change in the Court's composition will give it a substantial push in one direction or the other. Two departures from the same wing of the Court would cause a profound shift in the Court's center of gravity.

To see where the Court may go, it is useful to start with a look at where it is now. Begin by disregarding the bulk of the Court's cases, which are not controversial; each year, 40 percent or more of the decisions are unanimous. Instead, focus on the 5-4 and 6-3 decisions, where the outcome really is debatable and ideological differences in approach come to the fore. In these cases, the balance on the Court is striking.

Last year, the Court issued 17 5-4 decisions, 16 of which can fairly, if a bit arbitrarily, be characterized as reflecting a conservative-progressive split. (These numbers disregard concurring opinions, which often hedge the result and can make reading Supreme Court decisions a bit like making sense of Nordic runes). In those closely fought cases, the Court split right down the middle: the conservatives and the progressives each won eight.

The 6-3 decisions reflected a similar balance. There were eight such decisions, in seven of which the Court broke along ideological lines. The progressives won four of these, the conservatives three.

The balance characterizing the Court's last term was not an aberration. The year before, during the Court's 2002-2003 term, there were 14 5-4 decisions, in 12 of which there was an ideological split; the progressives won seven of these and the conservatives five. That year, there also were 13 6-3 decisions, 11 of which reflected a conservative-progressive division. Of these, the progressive side prevailed in six, the conservative in five.

These results are largely attributable to the cohesion of the Court's progressives – and to the more-than-occasional willingness of O'Connor to join them. Last year, progressives Stevens, Ginsburg, David Souter, and Stephen Breyer voted together in all but one of the 16 "ideological" 5-4 decisions. In contrast, Rehnquist, O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, usually identified as the Court's conservative bloc, voted together in only eight of those cases. O'Connor defected to the progressives in five of the 5-4 cases, and Kennedy and Thomas did twice. Rehnquist and Scalia never voted with the progressives to form a 5-4 majority.

The same pattern was almost as starkly visible the year before. In the 12 5-4 cases breaking along ideological lines in 2002-2003, the progressives voted together 10 times. O'Connor voted with them in four of those cases.

Despite occasional complaints that the strings on the Court are pulled by Scalia, the ideological anchor on the Court's right wing, the numbers show that this is not his Court. Last year, he dissented 17 times, more than any other justice. His counterpart on the Court's far left, Stevens, cast 16 dissenting votes.

While the Court is in a delicate balance overall, its two wings tended to dominate different areas of the law. The conservatives prevailed in most close criminal cases, winning six of the eight 5-4 decisions involving the rights of criminal defendants. O'Connor voted with the majority in each of those cases. The progressives, meanwhile, prevailed in most of the close civil cases, winning six of those eight 5-4 decisions. O'Connor voted with the majority in four of these cases.

With the Court so closely divided, replacement of even a single justice by his or her ideological opposite – and replacement of Justice O'Connor by almost anyone – could tip the balance in the most controversial areas of the law. These include:

Reproductive freedom. The hottest of hot button issues at the Court involves abortion. Six of the current justices, including conservatives O'Connor and Kennedy, support the basic right to reproductive choice recognized in *Roe v. Wade*, although the Court has somewhat watered down the strength of the test used to assess the constitutionality of abortion restrictions. The Court is closely divided, however, on the propriety of particular state limits on access to abortion. In its most recent decision in this area, *Stenberg v. Carhart*, a 5-4 majority invalidated Nebraska's ban on so-called "partial-birth" abortions." O'Connor provided the fifth vote to strike down the ban.

The addition of one conservative vote almost certainly would have a significant effect on abortion-related decisions. The Court would be much more likely to uphold rules that impose substantial practical burdens on access to abortion, perhaps including consent laws and restrictions on specified abortion methods. The addition of two conservatives could threaten *Roe v. Wade* itself.

Affirmative action. After remaining silent on affirmative action for more than two decades following its famous *Bakke* decision, the Court resolved two affirmative action cases in 2003. By a vote of 6-3, the Court in *Gratz v. Bollinger* struck down the numerical racial formulas used in

admissions decisions by the University of Michigan's undergraduate school. But in the more important of the Court's rulings, *Grutter v. Bollinger*, a 5-4 majority upheld the race-conscious, "finger-on-the-scale" admissions policy of Michigan's law school. Again, O'Connor's vote determined the outcome.

Here, too, the addition of a single conservative justice could make a decisive difference. It is not unrealistic to think that *Grutter* could be overruled. Even if the Court did not take that step, *Grutter* leaves innumerable practical questions to be answered about how to draw the line between acceptable and unconstitutional affirmative action programs; a Court that is hostile to affirmative action could establish rules that make race-conscious programs unworkable as a practical matter.

Gay rights. Two years ago, in *Lawrence v. Texas*, the Court held it unconstitutional for a state to criminalize sexual contact between persons of the same sex. The vote was 6-3, with Kennedy and O'Connor joining the four progressives in striking down the state law, although O'Connor concurred on narrow grounds and left open whether she would condemn other laws that burden gays and lesbians.

Despite O'Connor's reluctance to take a broad approach, it is doubtful that the addition of a single conservative vote would threaten the right recognized in *Lawrence*. But the scope of that right will have to be fleshed out by additional litigation. The *Lawrence* majority recognized – and Scalia's dissent stressed – that future cases are likely to address the constitutionality of limits on same-sex marriage. And *Lawrence*'s impact on rules governing same-sex adoptions or other limits on the rights of same-sex couples has yet to be tested. The replacement of one of the majority votes in *Lawrence* by a conservative could dictate the outcome in future cases raising these issues; the addition of two conservative votes could lead to *Lawrence* being substantially narrowed, or even overruled.

Governmental power and the war on terrorism. In the landmark decision *Hamdi v. Rumsfeld*, the Court last year overwhelmingly rejected the Bush administration's argument that U.S. citizens designated "enemy combatants" could be detained indefinitely without any meaningful judicial oversight. But the justices took very different paths to that result. O'Connor, Rehnquist, Kennedy, and Breyer concluded that Congress had authorized such detentions, but that detainees are constitutionally entitled to judicial review of the factual basis for their confinement. Two other justices – the unlikely pair of Scalia and Stevens – argued that such detentions are wholly impermissible unless Congress takes the extraordinary step of suspending the writ of habeas corpus, which entitles all prisoners to contest the legality of their confinement. Souter and Ginsburg took a middle course, avoiding the constitutional question by finding that the indefinite detention of U.S. citizens as enemy combatants has not been authorized by Congress. Only Thomas would have upheld the administration's position.

Although the Court had no patience for the administration's absolutist approach, the various opinions in *Hamdi* suggest that there may be significant disagreements and close divisions when the justices are asked to assess more nuanced terrorism-related restrictions on civil liberties.

Another vote with Thomas could give the government significantly more leeway to limit traditional legal protections in this area.

Federalism. Through the 1990s, a 5 to 4 conservative majority of the Court, led by Rehnquist and O'Connor, conducted a "federalism revolution," issuing decisions that made it virtually impossible for plaintiffs to sue states. In the last few years, however, the Court – again with O'Connor's participation – has put the brakes on this movement. Two years ago, in *Nevada Department of Human Resources v. Hibbs*, a 6-3 majority (including Rehnquist and O'Connor) held that states may be sued under the Family and Medical Leave Act. And last year, O'Connor joined the 5-4 majority in *Tennessee v. Lane*, holding that lawsuits challenging denial of access to the courts may proceed against states pursuant to the Americans With Disabilities Act. O'Connor also cast the fifth vote in *Hibbs v. Winn* last year to limit the scope of the Tax Injunction Act, a statute that restricts the ability of federal courts to interfere with the collection of state taxes; although the act may seem technical, it has almost mystical importance for proponents of state sovereignty.

This is an area where the Court is deciding how far to push its doctrine, and the change of a single vote could determine the Court's direction. Another conservative vote could lead to the imposition of significant limits on the ability of Congress to create rights that are enforceable against the states; another progressive vote could substantially limit state sovereign immunity.

Campaign finance and free speech. The First Amendment is an area where the justices sometimes vote against type. Progressives generally favor expansive interpretations of constitutional provisions securing individual rights, while conservatives prefer deferring to legislative judgments. But in one of the Court's most important decisions last year, the progressives – joined by O'Connor – upheld the central provisions of the McCain-Feingold campaign finance legislation, rejecting a First Amendment challenge to the law. The other four conservatives dissented, arguing for a broader reading of the First Amendment. As the Federal Election Commission elaborates on the meaning of McCain-Feingold, the addition of another conservative vote would make the Court much less willing to approve "good government" limits on campaign expenditures.

Other First Amendment cases have occasioned unlikely alliances. In a series of 5-4 decisions that have invalidated Congress's attempts to regulate speech on the Internet, Kennedy and Thomas have joined progressives Stevens, Souter, and Ginsburg in the majority, while O'Connor and Breyer voted in dissent with Rehnquist and Scalia to uphold restrictions on speech. That was the lineup last year in *Ashcroft v. ACLU*, which struck down Congress's latest attempt to restrict children's exposure to on-line pornography. The addition of a vote that is reliably conservative in this area likely would greatly increase the Court's tolerance for government restrictions on speech.

Religion. Leaving aside the constitutionality of the Pledge of Allegiance – an issue that the Court managed to duck last term when it invoked jurisdictional grounds to dismiss a challenge to the Pledge in *Elk Grove Unified School District v. Newdow* – the most difficult questions facing the Court in this area involve when the federal or state governments may (or must) provide

assistance to religious programs. Two years ago, in *Zelman v. Simmons-Harris*, a 5-4 conservative majority upheld a Cleveland school voucher program in which religious schools were allowed to participate. Last year, however, a 7-2 majority of the Court, in *Locke v. Davey*, backed away from the broader implications of the voucher decision, holding that general state scholarship programs are not obligated to assist students pursuing degrees in "devotional theology." Only Scalia and Thomas dissented.

Where the line should be drawn between these two holdings remains very much in dispute. While *Locke* makes it unlikely that governments will be *forced* to aid religious programs, there is sure to be considerable litigation about when governments *may* provide assistance to such programs. The change of a single vote will determine the outcome in many of these cases: another progressive will increase the Court's skepticism about state entanglement with religious entities, while another conservative will greatly increase the likelihood that such programs will be upheld.

The death penalty and criminal law. This is the one area where conservatives generally have done well, prevailing last year in six of the 5-4 criminal-law cases. Two of these decisions limited the retroactive effect of prior holdings that tightened procedures governing the administration of the death penalty; the cases were *Schriro v. Summerlin* and *Beard v. Banks*. Two other decisions limited the scope of *Miranda* protections, holding that a failure to give *Miranda* warnings does not require suppression of evidence discovered as a result of the defendant's statements and that the youth or inexperience of the defendant does not require special application of the *Miranda* rule; the cases were *United States v. Patane* and *Yarborough v. Alvarado*. The Court also held, for the first time, that states may require people who are stopped by law enforcement personnel to identify themselves; the case was *Hiibel v. Sixth Judicial District Court*. And in *Holland v. Jackson*, the Court tightened the rules governing habeas corpus relief.

While usually on the losing end, the progressives have managed to pick up the occasional criminal-law victory. They prevailed by 5-to-4 last year in *Missouri v. Seibert*, ruling that policemen may not intentionally withhold *Miranda* warnings, elicit a confession, and then use that information to obtain the same confession again after giving the warnings to the defendant. And more significantly, the progressives scored a notable win two years ago in *Atkins v. Virginia*, when O'Connor and Kennedy joined a 6-to-3 majority in holding it unconstitutional for states to execute mentally retarded defendants. The Court will decide in its coming term whether the *Atkins* rule should be extended to preclude the execution of defendants who were minors when they committed their crimes.

The voting on one important criminal-law issue has fallen outside the usual lines. Last year, in *Blakely v. Washington*, the Court held it unconstitutional for judges rather than juries to make factual findings that lead to the enhancement of criminal sentences. It is not obvious which end of this dispute is conservative and which progressive. On the one hand, the *Blakely* rule eliminates constraints on judicial sentencing discretion, an outcome that often is thought to be favorable to defendants; on the other, legislatures are likely to react to *Blakely* by imposing harsh mandatory minimum sentences. Perhaps for this reason, the voting line-up in *Blakely* scrambled

the familiar pattern: Scalia and Thomas joined Stevens, Souter, and Ginsburg in finding the judicial sentencing role unconstitutional, while Rehnquist, O'Conner, Kennedy, and Breyer dissented. If the votes of the *Blakely* dissenters were prompted by concerns about the enactment of rigid sentencing requirements – an approach that Kennedy has criticized in a series of off-the-bench comments – their fears are likely to be prescient. *Blakely* threw application of the federal sentencing guidelines into confusion, leading the Court to expedite its consideration of two cases challenging the guidelines' constitutionality. The Court heard arguments in those cases on the first day of its current term and gave every indication that it is going to strike the guidelines down.

Although it is hard to predict how a change in the Court's composition would affect the rule of *Blakely*, it could have a significant impact across the rest of the criminal law. An additional progressive vote almost certainly would not result in wholesale invalidation of the death penalty. But it probably would lead to relaxation of procedural limits on the ability of defendants to challenge capital convictions and sentences, and could chip away at the circumstances in which the death penalty may constitutionally be imposed. It also could lead to a more expansive interpretation of constitutional protections involving search and seizure, self-incrimination, and other constitutional protections for the accused.

Of course, it is famously difficult to predict how a new justice will vote in any given case: when they were appointed by President Reagan and the first President Bush, no one would have expected that O'Connor, Kennedy, and Souter would cast groundbreaking votes in favor of gay rights – or, for that matter, that Scalia would express the Court's most expansive view on the rights of defendants in terrorism cases. But the philosophy and worldview of a justice inevitably expresses itself in generally predictable ways across the range of important issues that come before the Court. Given the Court's current close balance, the philosophy of the next justice to be appointed may very well dictate not only his or her vote, but the direction of the Court as a whole.

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