

The Court on Balance

BY CHARLES ROTHFELD

At the close of this year's Supreme Court term, there can be no denying that Justice Sandra Day O'Connor is Solomonian in at least one respect: She is adept at splitting the baby.

Over time, O'Connor has moved from her beginnings on the Court's right wing firmly into the center—and maybe this term, sometimes even a little beyond. As a result, the outcomes of the close cases this year showed a striking balance between the Court's conservative and liberal wings.

First, a caveat: The bulk of the Court's decisions this term did not reveal dramatic divisions between the justices. As is true every year, most of the cases were not enormously controversial, except to the parties litigating them. This term, 33 of the 73 signed decisions that the Court issued after hearing argument were substantially unanimous. Even some of the most significant decisions of the year, including the more important of the term-ending terrorism rulings, were decided by super-majorities.

Those decisions are interesting, but by definition they do not reveal much about the Court's ideological balance—or the impact that a retirement might have on the Court's direction. For that, it is necessary to look at 5-4 decisions, where the outcome

is truly debatable and the justices have greater room to express their individual predilections. And it is here that O'Connor's mark is most evident.

This year the Court decided 17 of the argued cases by 5-4 votes. For the most part, the voting in these cases fell along predictable lines, with most of the Court's so-called conservatives on one side and the ostensible liberals on the other. (Here, another caveat: Court

purists sometimes object to the use of these political labels, but as a shorthand it is safe to say, with Potter Stewart, that most people know a liberal or conservative justice when they see one.)

There were only two cases where the voting was scrambled, with as many as two justices from the conservative bloc joining three liberals: *Blakely v. Washington*, which held it unconstitutional for judges to enhance criminal sentences, and *Ashcroft v. American Civil Liberties Union*, which invalidated Congress' latest attempt to shield children from online pornography.

Of the 17 decisions, O'Connor was in the majority in 13. In fact, in a remarkable demonstration of the extent to which she occupies the Court's center, O'Connor dissented in only five cases over the course of the entire year. The justice who was second on the list of least-frequent dissenters, Anthony Kennedy, was in the minority more than twice as often.

In these 17 decisions, liberals John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer voted as a block 15 times. Chief Justice William Rehnquist and Justices O'Connor, Kennedy, Antonin Scalia, and Clarence Thomas, the Court's conservatives, voted together in only eight cases.

That disparity is largely attrib-

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utable to O'Connor. She voted against the other conservatives in five cases. In contrast, Kennedy, who often is grouped with O'Connor as a swing vote, departed from the conservative line only twice—as did Thomas. Neither Rehnquist nor Scalia ever voted with the four liberals to form a 5-4 majority.

The result was a Court that split right down the middle. Of the 17 decisions, the liberals won eight. The conservatives won eight. And one, the sentencing decision where the voting lineup was muddled and the ideological rooting interest unclear, can be counted as a wash.

Another telling sign of the balance between the justices: in a Court often labeled conservative, the anchor of the Court's right wing, Justice Scalia, dissented 17 times. The dean of the Court's liberals, Justice Stevens, cast 16 dissenting votes.

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These overall figures obscure particular areas of the law where one side or the other dominated. The conservatives did well in criminal cases, winning six of the eight 5-4 decisions involving the rights of criminal defendants. O'Connor voted with the conservative majority in all six of these cases.

The liberals, on the other hand, dominated in the eight civil cases decided by 5-4 votes, winning six of them. O'Connor voted with the liberal majority in four of these cases.

In part, these votes reflected O'Connor's long-time predilection for pragmatism and the balancing of competing interests, which she borrowed from her mentor on the Court, the late Justice Lewis Powell Jr. That impulse may be most visible in her vote to uphold the central portions of the McCain-Feingold campaign finance legislation in *McConnell v. Federal Election Commission*. The majority opinion in *McConnell*, the most important sections of which O'Connor co-wrote with Stevens, plainly was motivated by the unnerving practical implications of striking down the law, which would have made it impossible for Congress to address well-documented abuses of the political process.

But some of O'Connor's votes this year were more surprising and seem to suggest incremental inching to the left. In past years, for example, O'Connor was in the forefront of the Court's movement to reassert the sovereignty of the states, supporting or writing a series of decisions that insulated state governments against private lawsuits. This year, however, she joined the majority in two 5-4 decisions that approved litigation against state defendants.

The more publicized of these was *Tennessee v. Lane*, which authorized suits against states under the Americans With Disabilities Act to challenge the denial of access to the courts. The dissenters argued that the case was controlled by a 2001 decision precluding ADA employment discrimination suits

against states. Although O'Connor had joined the majority in the prior decision, this year she cast the decisive vote allowing the ADA suit to proceed.

O'Connor also voted with the majority in *Hibbs v. Winn*, which held that the Tax Injunction Act, barring federal courts from hearing suits that would interfere with the collection of state taxes, does not apply to cases challenging the constitutionality of state tax exemptions. Although the issue seems a bit obscure, it has great emotional resonance with proponents of state sovereignty, who vigorously protest use of the federal courts to meddle with state taxation. In the past, disputes over the Tax Injunction Act have prompted surprisingly emotional disagreements on the Court. It is hard to imagine that the O'Connor of, say, 1983 would have favored a restrictive interpretation of the statute. But she did just that in *Hibbs*.

A BENCH OF STABILITY

This year's results reveal a Court that, so long as its membership does not change, is unlikely to move the law terribly far in any direction. Of course, unexpected zingers are always possible—as with the *Blakely* sentencing decision, the only really significant case that O'Connor lost. But the current Court generally will go no further in a close case than O'Connor wants, and her instinct is not to rock the boat excessively.

It will be a different story when a justice leaves the Court—a point that we are likely to hear repeatedly during the coming presidential campaign.

Despite the divisions revealed by this term's 5-4 votes, there is a surprising degree of agreement on some of the Court's most contentious issues. Although he didn't have much of a chance to show it this year, in the past Justice Kennedy has been as (and sometimes more) willing than O'Connor to join the liberals on questions of religion, free speech, gay rights, and abortion.

On a range of issues, however, some big and some small, this year's votes reveal a Court that is in exquisite balance. Replacement of a liberal by a conservative likely would tip the Court to the right on questions involving the law of federalism, discrimination, the First Amendment, and a variety of other subjects where plaintiffs are asserting statutory or constitutional rights. Replacement of a conservative by a liberal could lead to a more expansive interpretation of constitutional protections involving search and seizure, self-incrimination, the death penalty, and procedural rights to challenge criminal convictions.

And replacement of Justice O'Connor by almost anyone would give the Supreme Court a hard push one way or the other—depending, of course, on who is doing the replacing.

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