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High Court's Recent Changes May Be Just First Act

A More Striking Shift Could Ensue If Any of the Court's Four Liberal Justices Depart on Bush's Watch

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WASHINGTON -- If there's one person grateful that Justice Samuel Alito didn't succeed Sandra Day O'Connor a year ago, it's likely Ronald Rompilla, who then sat on Pennsylvania's death row for the 1988 robbery and murder of an Allentown bar owner.

In June, Justice O'Connor provided the crucial fifth vote to vacate Mr. Rompilla's death sentence. The judge she overturned? Justice Alito, then of the Third U.S. Circuit Court of Appeals in Philadelphia. The differences turned on how hard each judge believed defense attorneys must work to ensure that their clients receive the fair trial guaranteed by the Sixth Amendment. Justice Alito found the Constitution didn't require the public defender to do as much for his client as did Justice O'Connor.

The Rompilla case symbolizes the changes ahead for the Supreme Court, whose membership held stable from the 1994 appointment of Justice Stephen Breyer through last year, which brought Justice O'Connor's announced retirement and the death of Chief Justice William Rehnquist.

President Bush, a conservative Republican, has filled the two vacancies with jurists from the conservative legal community, who likely will nudge the court to the right. But for all the ideological fireworks over Alito, a look at the court's record over the past decade and the current lineup of justices suggests the change now won't be as pronounced as the one that would follow if one of the four liberal associate justices departs on Mr. Bush's watch. They range in age from David Souter, 66 years old, to John Paul Stevens, 85.

In his first four months, the new chief justice, John Roberts, has voted with the court's conservative stalwarts, Justices Antonin Scalia and Clarence Thomas, except for the single case where the latter two split and the chief justice joined Justice Scalia. Justice Alito, with a solid conservative record as a Reagan Justice Department official and circuit judge, may follow suit.

Justice Alito succeeds a woman who emerged over her 25-year tenure as the fulcrum. According to a

statistical analysis published in the North Carolina Law Review, Justice O'Connor has been the "median justice" since 1999 -- the midpoint between Justices Stevens, Souter, Ruth Bader Ginsburg and Breyer on her left and Chief Justice Rehnquist and Justices Scalia, Anthony Kennedy and Thomas to the right.

Justice O'Connor, a Reagan appointee was, more often than not, a conservative vote. She was lionized by Democratic senators for opinions that, in some instances, upheld abortion rights and affirmative action. But from 1994 to 2004, she most frequently agreed with Chief Justice Rehnquist, in 84.2% of cases, and least often with Justice Stevens, in 66.6% of cases, says Andrew Martin, a political scientist at Washington University in St. Louis and a co-author of the study.

If Chief Justice Roberts and Justice Alito remain consistent conservatives, Justice Kennedy would become the court's new fulcrum -- and move the median to the right, Prof. Martin says. But Justice Kennedy, like Justice O'Connor, has parted ways with Justices Scalia and Thomas on such issues as sexual privacy and the death penalty, suggesting a reliable conservative majority may remain elusive. Still, in several issues that the court is scheduled to consider this year, Justice Alito stands poised to make an immediate mark.

ELECTION LAW: In arguments scheduled for Feb. 28, Vermont Republicans, joined by groups ranging from the American Civil Liberties Union to the Vermont Right to Life Committee, are challenging a state law that restricts political contributions and expenditures.

In 1976, the Supreme Court upheld federal limits on campaign contributions, but struck down limits on campaign expenditures as restricting free speech. In later years, Justice O'Connor joined a majority that increasingly deferred to legislative judgments that promoting clean elections can outweigh the rights of political donors.

Only four justices -- Stevens, Souter, Ginsburg and Breyer -- consistently have backed that view, with Justices Scalia, Kennedy and Thomas holding that campaign regulations be scrutinized for infringing on the First Amendment. Chief Justice Rehnquist tended to side with that bloc.

In a separate case, the court on March 1 hears a challenge to the Texas congressional redistricting that Rep. Tom DeLay orchestrated in 2003 after his Republican Party won control of the state legislature, a move that boosted the number of Republican seats. Voter groups claim that the DeLay plan diluted minority voting strength.

In 2004, Justice O'Connor joined Chief Justice Rehnquist in a Justice Scalia plurality opinion that the court lacked authority to consider a challenge to the heavily partisan redistricting plan approved by Pennsylvania's Republican-controlled Legislature.

Justice Alito also has taken a dim view of courts reviewing legislative decisions on reapportionment. That likely leaves the key vote to Justice Kennedy, who concurred in the Pennsylvania case but suggested that courts could hear gerrymandering claims if "workable standards" could be found for them.

A Scalia-Thomas Court?

Justices Antonin Scalia and Clarence Thomas have voted consistently on the high court. From October 1994 through June 2005, they agreed 92.4% of the time, or on 787 cases. Here's how often the other justices agreed with the Scalia-Thomas bloc on those cases:


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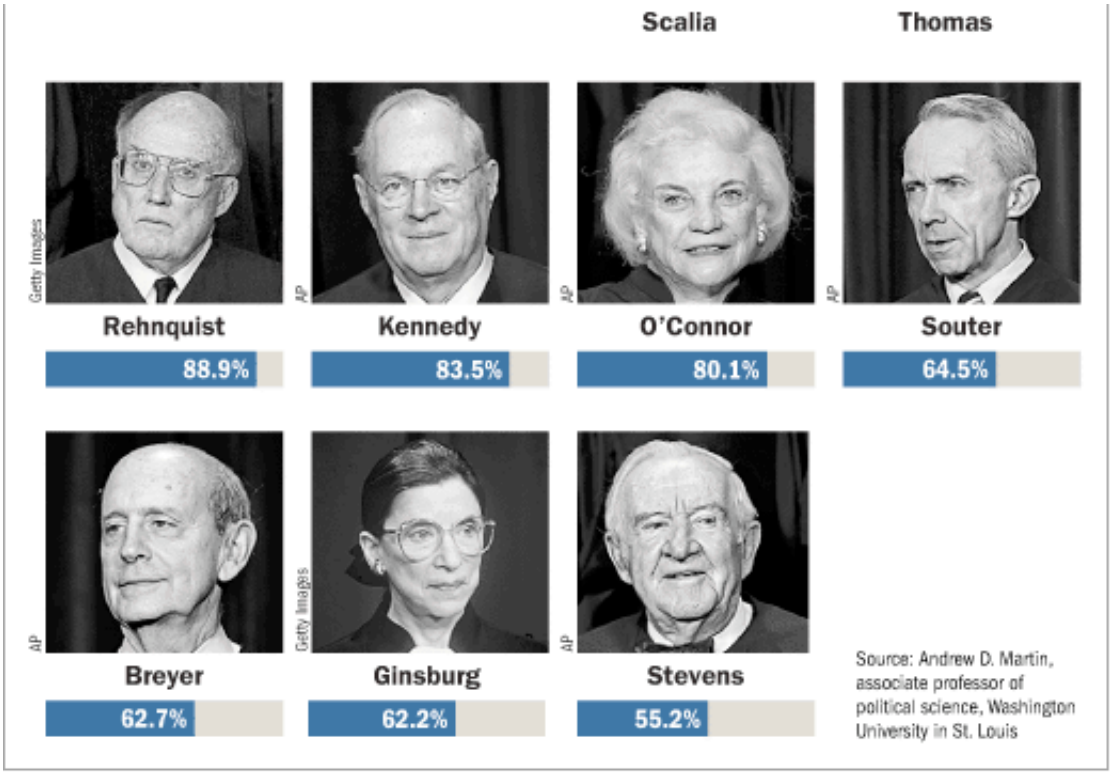
CRIMINAL JUSTICE: On Jan. 25, the Supreme Court agreed to consider whether a condemned inmate can challenge lethal injection as contrary to the Eighth



Amendment prohibition of "cruel and unusual punishments." If the inmate prevails, at some point the high court likely will confront the underlying constitutional question -- and with it, the continued viability of the court's Eighth Amendment doctrine.

In a 1958 case, Chief Justice Earl Warren wrote that "the words of the amendment are not precise and that their scope is not static" and so draw their "meaning from the evolving standards of decency that mark the progress of a maturing society." In a hotly debated decision last year, the court cited that test to rule unconstitutional the execution of juvenile offenders.

Writing for a five-member majority, Justice Kennedy observed that "the United States now stands alone in a world that has turned its face against the juvenile death penalty." Justice Scalia, in a dissent joined by Chief Justice Rehnquist and Justice Thomas, reiterated his rejection of the test, which he wrote amounted to "the subjective views of five members of this court and like-minded foreigners." Justice O'Connor also dissented but specifically endorsed the evolving standards approach. She concluded, however, that there was no national consensus against executing 17-year-olds.

At Senate hearings, Justice Alito spoke dismissively of citing international standards in constitutional law.

COMMERCE CLAUSE: On his first day on the bench, Feb. 21, Justice Alito will hear a landowner's challenge to federal regulations that extend the Clean Water Act to bodies of water situated within a single state. Justice O'Connor usually sided with Chief Justice Rehnquist to limit federal power in favor of state governments. But not always; in 2004, she was part of a five-member majority that forced Tennessee to make its courtrooms accessible to the physically handicapped, under the federal Americans with Disabilities Act. Justice Alito has been skeptical of broad congressional powers under the Commerce Clause. But the Clean Water Act case may prove vexing even for an adherent of states' rights. That is because states themselves are siding with the federal government.

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