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## The Bush Court

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## THE BUSH COURT

Predicting the Supreme Court's path is always difficult. Who would have thought that so little judicial doctrine would have changed after eight years of the Reagan presidency? For that matter, who would have thought that Reagan would have so few chances to increase the conservative faction on the Court? And even after years on the bench, the Justices can still surprise us. Who would have expected Chief Justice Rehnquist, of all people, to write a trail-blazing decision in the special prosecutor case, going beyond the specific facts of the case to write a broad opinion restricting the President's removal power?

Still, it's hard to avoid the temptation to speculate about the Court's future. Let me restrict myself to the most plausible scenario. Suppose George Bush gets to replace one centrist or liberal with a moderate conservative (as opposed to a Bork). This would give the conservatives five Justices: Rehnquist, O'Connor, Scalia, Kennedy, and Justice X. Even if one of the conservatives defects in a given case, the conservatives can still win by picking up one of the remaining voters. The odds become quite high in favor of a conservative result in any given case.

The long-term results are harder to predict, even putting aside the uncertainties of new appointments. There is always the possibility that some member of the conservative block will have second thoughts. Justice O'Connor, for example, has given some signs of moving toward the center. As Justice O'Connor's recent health problem illustrates, there is also always the possibility of an unexpected vacancy.

The dynamics are also complicated by two countervailing forces. First, judicial doctrines have a momentum of their own. Decisions that would have been unthinkable in the early years of the Warren Court became legally plausible after the groundwork had been laid by other decisions. The issues that a lawyer thinks are genuinely disputable are in part determined by existing precedent: as that precedent shifts to the right, so does the area of reasonable legal dispute. This momentum factor tends to move the Court farther and farther away from center.

There is, however, a counter factor. The Court will tend to move in a given direction until it gets to the point where the initially dominant coalition begins to split. Once the coalition has consoli-

dated its position in the areas in which its members agree, the judicial "action" will shift to their areas of disagreement. At this point, conservative results will be less predictable because the more moderate conservatives will begin defecting. Moreover, new issues are also likely to arise, on which the dominant block has no consensus, and these will tend to become focal points of legal dispute.

A similar dynamic could be seen after FDR transformed the Court in the 1930s. The areas in which the liberal Justices agreed were swiftly laid to rest. The Court began to become activist in the civil liberties area, but after a few years, the liberal coalition began to split in these cases, as the most moderate members like Frankfurter began to defect.

The upshot is that predicting the future of the Court is about like predicting the weather. Let's put aside any question of the long term future of the Court, then, and focus on the near future. What might an increasingly conservative Court be likely to do on some key issues?

*Abortion.* There is no doubt that abortion is the most controversial subject before the Court these days. Is the new conservative Court likely to overrule *Roe v. Wade*?

One reason this question is hard to answer is that it's not clear what it means to "overrule *Roe*." The Supreme Court decided several key issues in *Roe*. Which one are we talking about here?

The first holding in *Roe* was that the fetus is not a "person" under the fourteenth amendment and therefore doesn't have any constitutional rights of its own. A contrary ruling would mean that fetuses do have constitutional rights, and would therefore make any law permitting abortion constitutionally suspect, if not clearly invalid. It seems very unlikely that the Court will take this tack. The result of this kind of decision "overruling *Roe*" would be to keep control over abortion policy in the federal courts rather than the state legislatures. The conservatives have spent too long complaining of the liberal activism of *Roe* to turn around and force anti-abortion views on the state legislatures. None of the current opponents of *Roe* on the Court has ever given any indication of a desire to adopt this course. This part of the *Roe* holding seems safe.

The second holding in *Roe* is that abortions have *some* constitutional protection, so that states may not completely prohibit them. This aspect of *Roe* has been harshly criticized on theoretical grounds by several scholars, including liberals such as John Hart Ely. Still, it seems unlikely that it will be overruled. For one thing, the best theoretical arguments against this aspect of *Roe* attack the whole concept of a constitutional right to privacy. These arguments

apply equally to *Griswold*. But the Bork hearings have made *Griswold* practically sacrosanct, since Bork came under heavier fire on this issue than almost anything else. Also, polls show that only a small portion of the public, roughly 15%, would favor blanket bans on abortion. Notice how quickly George Bush backed away during the campaign from the suggestion that women could be punished for having abortions. Logically, of course, public opinion has nothing to do with the constitutional issue. It seems less probable, however, that the Court would be willing to take a position which is *both* inconsistent with precedent *and* highly unpopular with the public. Justice O'Connor, who seems to be a key vote on this question, has eschewed this position, a further sign about the Court's future direction.

The third holding in *Roe* is the elaborate "trimester system" the Court established, in which the degree of state regulation becomes progressively greater as the pregnancy advances. Justice O'Connor has directed most of her fire at this system, and it's hard to avoid the perception that there is something a bit arbitrary about these detailed rules. It is here, I think, that a conservative majority is most likely to take action. Since *Roe*, the Court has decided a whole string of decisions, many of them by narrow margins, dealing with the precise contours of the trimester system: what abortions are permissible under what circumstances. It would not be difficult to revamp these decisions under the guise of a "reasonableness" test of the kind O'Connor has proposed.

My prediction, then, is that the Court will not overturn the basic holding of *Roe* prohibiting blanket bans on abortion. Rather, the Justice will purport to be fine-tuning *Roe* in the interest of reasonableness. The net effect will be to allow much more state regulation, short of a complete ban.

*Affirmative action.* Like abortion, affirmative action is a sharply divisive issue. Several Justices, including Scalia and at one time Rehnquist, have argued in favor of a strict color blindness standard, which would prohibit all affirmative action. There are two reasons for doubting that the Court will go this far.

The first is that complete color blindness makes it more difficult to enforce anti-discrimination laws. Suppose you work in the central office of some big corporation like General Motors. You want to ensure that none of your branches are engaging in racial or gender discrimination. How do you go about achieving this? One possibility is to review every file individually, to make sure that every prospective applicant is being fairly treated. This is plainly impractical. Another possibility is to investigate complaints but

otherwise remain passive. This strategy will identify blatant individual cases. The problem is that discrimination may take more subtle forms. The local branch may be able to give a plausible explanation of each individual hiring decision—but the individual decisions always seem to come out in favor of white males. Investigating individual cases will miss systematic patterns of discrimination.

The final possibility is to monitor hiring on a statistical basis. If a branch seems to be hiring a reasonable percentage of blacks or women in comparison with their share of qualified applicants, everything seems to be fine. On the other hand, if they are hiring below that level, further investigation is called for. This seems perfectly reasonable. Of course, the same reasoning applies to anyone else who wants to police for discriminatory hiring, including civil rights agencies and the courts.

Once we allow the use of statistics for monitoring purposes, however, some degree of affirmative action is inevitable. If you are the local hiring officer, naturally you will want to keep your statistics at the right level, so as to avoid litigation, unpleasant inquiries from the home office, or just bad publicity. If you haven't hired any blacks for a few weeks, there's some extra incentive to give the next black applicant the benefit of the doubt.

The alternative is to get rid of statistical measures of discrimination, by making them inadmissible in court or even forbidding employers to keep such records. But this would severely impair implementation of the civil rights statutes. It would also require overruling a host of Supreme Court decisions dealing with subjects such as racial discrimination in jury selection and other forms of racial discrimination. This seems quite unlikely.

The upshot, then, is that some forms of affirmative action are probably here to stay. A conservative majority might well want to trim back somewhat. As Justice O'Connor has suggested, affirmative action could be limited to cases in which there is specific evidence of past discrimination. Thus, the Court could forbid the use of affirmative action to remedy "societal discrimination" or to achieve diversity. In fact, while this was in press, the Court took a major step in this direction in *City of Richmond V. J.A. Croson*. A complete ban on affirmative action, however, could not be imposed without greatly damaging efforts to halt discrimination against racial minorities. As *Richmond* confirms, the Court does not seem to be contemplating such a drastic move.

*School prayer.* The school prayer decisions are quite unpopular. Most people endorse the idea of "voluntary school prayer."

Nevertheless, here too, I think changes in legal doctrine will be quite limited.

As the Senate discovered a few years ago in the course of debating a constitutional amendment on the subject, it is one thing to be in favor of voluntary prayer, but it is quite another to draft rules permitting it. There are several fairly intractable problems.

First, what kinds of prayers would be permitted? It seems improbable that the Court would allow every kind of prayer, however sectarian. Could the public schools sponsor student recitals about the evils of Catholicism, Judaism, or other religions? If not, could they sponsor prayers that violate the views of specific religious groups? Affirmative answers to these questions seem quite unlikely, which means that some limits have to be put on what is allowed in the way of school prayer.

Second, who would write the prayer? If the prayer is written by some government body, the result is likely to be unacceptable to at least some religious groups. There is also something a bit hard to swallow about the idea of political debate on these issues. What should be the official religious position of the State of Minnesota? Deism? Christianity? Fundamentalism? Bad as political campaigns have become in recent years, it would be far worse if candidates were expected to take positions on such matters. But if a government agency doesn't write the prayer, where does it come from? Do students bring their own prayers for "show and tell?" What do we do about student contributions that are highly offensive to other groups? Can you pray for anything you want (e.g., a revival of the Democratic party? A good grade in math?) Or will the schools have to set up guidelines for student prayer?

Third, what about voluntariness? Do teachers have to lead school prayers even if their own religious views forbid them from doing so? What about students with minority religious views? Presumably there has to be some mechanism for excusing conscientious objectors, but it's not clear how it should work.

For all these reasons, overruling all of the school prayer decisions would create a terrible legal mess. School prayer continues to take place in many communities, according to studies by political scientists, because those communities are religiously homogeneous and nobody objects. But much of our nation does not fit this description. If the Court opened the door to school prayer, it would be inviting years of litigation on the limits of its decision.

Before the school prayer decision, there wasn't much controversy about these issues because school prayers were pretty well accepted. But in a sense the school prayer decision was irreversible.

It legalized the issue, forcing future courts to confront the problems and establish legal guidelines rather than just ignoring the whole situation. Once the issue had been legalized, school prayer became untenable, because there just isn't any satisfactory way to write legal rules allowing it.

There's an easy way to avoid these problems. Keep the ban on prayer—but make an exception for silent prayer. You don't have to write silent prayers; you don't have to worry about their contents; and any kid who doesn't want to pray can think about the World Series instead. First amendment purists would be appalled, but the religious right would be mollified, and relatively little harm would be done. It's wrong in principle for the schools to set aside time for silent prayer, but as a practical matter, it wouldn't do much harm. Even this, however, might require more than one additional conservative vote.

Even on intensely controversial issues like school prayer, affirmative action, and abortion, it seems likely that the Bush Court will take a moderate stand, trimming back but not overruling key liberal decisions. There's an even more basic question, however: how much does it matter?

Lawyers sometimes seem to think that the sun rises and sets on the Supreme Court. In the real world, it's not clear how dramatic a difference Supreme Court decisions make. Although *Roe* has obviously made abortions more accessible, the effect was gradual. Studies show that there were about as many abortions the year before the Supreme Court decided *Roe* as there were the following year. School prayers continued in many places despite the Supreme Court's edict. In affirmative action, the *Bakke* case bans quotas in favor of making race "a factor to be taken into account," but it is an open secret (in the law school world, anyway) that quotas exist all the same. Of course, the Court is not an irrelevancy: ask all the urban children who now ride school buses every day. But the Court doesn't run the country either, even on the constitutional issues where it speaks with the greatest authority. Those who are seeking basic social change, in either direction, might do better to look elsewhere.

D.A.F.