

THE FUTURE OF CONSTITUTIONAL LAW

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Now is the time for conservatives to rejoice. Since Ronald Reagan's election as President in November 1980, conservatives have sought control of the federal courts. There is now a solid conservative majority for most constitutional issues on the Supreme Court and by the end of the Bush presidency, the overwhelming majority of lower federal court judges will have been appointed by Republican presidents. For liberals, it is again a time to be angry at Ralph Nader and at the butterfly ballot which meant that errors in voting decided the November 2000 election. But for these events, it would have been Al Gore, not George Bush, who would have picked the replacements for Chief Justice William Rehnquist and Justice Sandra Day O'Connor.

After eleven years without vacancies on the Supreme Court, the second longest stretch in American history and the longest since early in the nineteenth century, two seats have changed. What will this mean for constitutional law? The change from William Rehnquist to John Roberts as Chief Justice is unlikely to change results. Having read dozens of memos, judicial opinions, and other writings by John Roberts, I see little difference between Roberts and Rehnquist. Both are solid conservatives across all issues of constitutional law. The importance of this change is long-term: John Roberts is fifty years old and if he remains on the Court until he is eighty-six years old, the current age of Justice John Paul Stevens, he will be on the Court until the year 2040.

The changes in constitutional law will be the result of replacing Sandra Day O'Connor with Samuel Alito. Justice O'Connor has been in the majority in 5-4 decisions in countless areas of constitutional law where Justice Alito is likely to vote differently. This Article will discuss these changes and identify areas where change is unlikely in doctrine as a result of the shift in the membership of the Court. There are areas where Justice Anthony Kennedy, not Sandra Day O'Connor, has been the fifth vote in 5-4 decisions.

A few disclaimers are in order at the outset. First, this Article assumes that there will be no other vacancies in the short-term. It is impossible to speculate as to the timing of the next vacancy or which President will fill it. For example, if Justices John Paul Stevens or Ruth Bader Ginsburg leave the Court and are replaced by President Bush, there will be a number of additional areas where the Court will move further to the right. On the other hand, if a Democratic President gets to pick a replacement for

Antonin Scalia or Anthony Kennedy, there would be a number of areas where the Court will move further to the left. (Obviously, a Democratic President replacing Justice Stevens or Justice Ginsburg, or a Republican President replacing Justice Scalia or Justice Kennedy, will not likely change the Court's ideological composition.) But it is safe to assume, given the ages of the Justices, that there will be at least five conservative Justices—Roberts, Scalia, Kennedy, Thomas, and Alito—for years to come. This Article will explore what this means for the future of constitutional law.

Second, this Article assumes that the voting patterns of Chief Justice Roberts and Justice Alito can be predicted. During the time of their confirmation fights, I heard many suggest that it is impossible to forecast what a person will do as a Justice and that individuals often change in unpredictable ways once on the bench. I think this is just wrong and that it was a convenient way for Republicans to divert attention from the hard-core conservatism of Roberts and Alito.

The reality is that few individuals behave differently on the bench than would have been predicted from their prior records. Rarely do the ideologies of Justices change significantly while they are on the Supreme Court. This is not surprising; few people undergo major ideological transformations in their fifties and sixties. There are a few notable examples of individuals who changed while on the Court. Felix Frankfurter was a liberal law professor, but became a conservative Justice.¹ Harry Blackmun unquestionably moved from the right to the left over the course of his time on the high Court.²

But it is difficult to think of other Justices who changed significantly while on the Court. William Rehnquist was conservative when he clerked for Robert Jackson in the early 1950s and wrote memos urging the Justice to vote to affirm “separate but equal.”³ Rehnquist was conservative when

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¹ See generally H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981) (describing and explaining Frankfurter's ideological transformation).

² Morton J. Horwitz, *Changed by the Court: The Evolving Jurisprudence of Justice Blackmun and the Supreme Court*, *HARV. MAG.*, July–Aug. 2005, at 19, 21, available at <http://harvardmagazine.com/on-line/070579.html>; see generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005) (describing Justice Blackmun's ideological transformation).

³ See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION, THE EPOCHAL SUPREME COURT DECISION THAT OUTLAWED SEGREGATION, AND* (continued)

he was nominated to the Supreme Court by Richard Nixon in 1971 and when he was elevated to Chief Justice by Ronald Reagan in 1986.⁴ He was just as conservative when he left the Court in September 2005.⁵

I have heard some point to Sandra Day O'Connor and David Souter as examples of Justices who significantly changed their ideologies while on the Court. I think this is incorrect. Justice O'Connor's views on issues changed remarkably little over the time she was on the Court. For example, on abortion, the only opposition to her nomination to the Supreme Court came from anti-abortion groups.⁶ In her first abortion case, she opposed strict scrutiny for abortion rights and urged that laws regulating pre-viability abortions be allowed unless they imposed an undue burden on women seeking abortions.⁷ She continued to adhere to this view throughout her time on the Court.⁸ In her first case on the Establishment Clause, she articulated the view that the government acts unconstitutionally if it symbolically endorses religion.⁹ She never deviated from this view.¹⁰

There is no indication that Justice Souter has changed significantly while on the Supreme Court. There just was very little known about his

OF BLACK AMERICA'S CENTURY-LONG STRUGGLE FOR EQUALITY UNDER LAW 605-07 (1977) (describing the memo Rehnquist wrote to Justice Jackson).

⁴ Joan Biskupic, *Rehnquist Left Supreme Court with Conservative Legacy*, USA Today.com, Sept. 29, 2005, http://www.usatoday.com/news/washington/judicial/supreme-courtjustices/2005-09-04-rehnquist-legacy_x.htm.

⁵ *Id.*

⁶ See JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 78-80 (2005).

⁷ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁸ See, e.g., *Casey*, 505 U.S. at 878-79.

⁹ *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (upholding a nativity scene on public property as not symbolically endorsing religion).

¹⁰ For example, in June 2005, she voted to invalidate two Ten Commandments displays on the grounds that they were impermissible symbolic endorsements of religion. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring) (determining that the posting of the Ten Commandments in government buildings for the purpose of advancing religion violates the Establishment Clause); *Van Orden v. Perry*, 125 S. Ct. 2854, 2891 (2005) (O'Connor, J., dissenting) (determining that a six feet high, three feet wide, Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court does not violate the Establishment Clause).

ideology based on his prior service as a justice on the New Hampshire Supreme Court.¹¹

What is striking about Chief Justice Roberts and Justice Alito is that everything in their records points in only one direction—the right. Each has a paper trail on almost every hot-button issue that indicates that they will be solid conservatives. Predictions are thus possible as to what their presence on the Court will mean. That is the focus of this Article. Part I offers these predictions. I intend for it to be entirely descriptive and I believe that both liberals and conservatives will agree with this description. Part II offers thoughts about what this will likely mean for political and academic discourse in the years ahead.

I. PREDICTING THE FUTURE: WHERE WILL REPLACING O’CONNOR WITH ALITO MAKE A DIFFERENCE?

It is possible to identify a number of areas where Justice O’Connor was in the majority in 5–4 decisions and replacing Justice O’Connor with Samuel Alito is likely to make a significant difference in constitutional law.

A. *Abortion Rights*

Abortion rights now depend on two factors: a Justice who previously has voted to overrule *Roe v. Wade*¹² and the longevity of a Justice who is eighty-six years old.

On the current Court there are only four solid votes to uphold *Roe* and strike down most restrictions on abortion: Justices Stevens, Souter, Ginsburg, and Breyer. At the same time, there are likely four solid votes to overrule *Roe*: Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justices Scalia and Thomas, of course, have consistently voted to overrule *Roe*.¹³ Chief Justice Roberts, as Deputy Solicitor General, authored briefs urging the courts to overrule *Roe*.¹⁴ I find it hard to believe that someone would sign such a brief, on such an important issue, without believing that conclusion. Having read countless memos, briefs, and

¹¹ OYEZ: U.S. Supreme Court Multimedia, David H. Souter: Biography, http://www.oyez.org/oyez/resource/legal_entity/105/biography (last visited Apr. 2, 2006).

¹² 410 U.S. 113 (1973).

¹³ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part).

¹⁴ See, e.g., Brief for the Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392), 1990 WL 505725.

articles written by John Roberts, I could not find a single instance in which he ever supported constitutional protection for reproductive freedom.

There is even less doubt about Justice Alito's views on abortion. In applying for a position in the Department of Justice in 1985, Alito wrote:

[I]t has been an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion.¹⁵

He urged the Reagan administration to devise a legal strategy to pursue "the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigatingg [sic] its effects."¹⁶ Justice Alito's record as a judge on the United States Court of Appeals for the Third Circuit reveals that his judicial approach to abortion was consistent with the positions he urged as a lawyer in the Justice Department. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷ Judge Alito voted to uphold provisions of a Pennsylvania law that restricted abortion, including a requirement for spousal notification for married women's abortions,¹⁸ which the Supreme Court later invalidated.¹⁹ The case offers a clear contrast between Justices Alito and O'Connor because they came to opposite conclusions on this issue.²⁰ Even where Judge Alito voted to strike down laws restricting abortions, he wrote separate concurring opinions to make clear that he was doing so just because it was required by Supreme Court precedent.²¹

¹⁵ Ronald Regan Presidential Library, National Archives and Records Administration, <http://www.reagan.utexas.edu/alito> (last visited Apr. 2, 2006) (click on "Alito, Samuel A. OA 18576 Presidential Personnel Office of: Records Series XIII: SKC/SES Clearance Files" link) [hereinafter Alito Application].

¹⁶ Memorandum from Samuel A. Alito to The Solicitor General 8 (May 30, 1985) (on file with the Capital University Law Review).

¹⁷ 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

¹⁸ *See id.* at 719–27 (Alito, J., concurring in part and dissenting in part).

¹⁹ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁰ *Compare Casey*, 947 F.2d at 720–25 (Alito, J., concurring in part and dissenting in part), *with Casey*, 505 U.S. at 844–69, 879–80.

²¹ *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 152 (3d Cir. 2000) (Alito, J., concurring).

Thus, if confronted with the issue of whether to overrule *Roe v. Wade*, the current Court has four Justices who line up on each side. That leaves Justice Anthony Kennedy. When he first voted on an abortion case, in *Webster v. Reproductive Health Services*,²² Kennedy joined in a plurality opinion by Chief Justice Rehnquist that urged rational basis review for laws restricting abortion and thus effectively would have overruled *Roe*.²³ It is notable that the other two Justices who joined this opinion, besides Justice Kennedy, were Chief Justice Rehnquist and Justice Byron White,²⁴ the two dissenters in *Roe*²⁵ and consistent opponents of constitutional protection for abortion rights.

In 1992, when the Court considered overruling *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Kennedy apparently initially voted to join with Chief Justice Rehnquist, and Justices White, Scalia, and Thomas, but then changed his mind and cast the fifth vote to uphold *Roe*.²⁶ But in his most recent abortion opinion, *Stenberg v. Carhart*,²⁷ Justice Kennedy joined Chief Justice Rehnquist, and Justices Scalia, and Thomas in dissent and wrote an opinion with an angry, even bitter, tone lamenting the Court's striking down a law restricting abortion.²⁸

So where is the current Court on abortion? Assuming that Justice Kennedy will not abandon his vote in *Casey*, there are five Justices to uphold *Roe v. Wade*: Justices Stevens, Souter, Ginsburg, Breyer, and Kennedy. But there are five votes to allow much more in the way of government restrictions of abortion: Chief Justice Roberts, and Justices Scalia, Thomas, Alito, and Kennedy. For example, *Stenberg v. Carhart* was 5–4, with Justice O'Connor in the majority,²⁹ in striking down a Nebraska law prohibiting certain abortion procedures.³⁰ It is likely that the Court will come to the opposite conclusion now.

²² 492 U.S. 490 (1989).

²³ See *id.* at 513–22.

²⁴ See *id.* at 498–99.

²⁵ *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting).

²⁶ See GREENHOUSE, *supra* note 2, at 200–06.

²⁷ 530 U.S. 914 (2000).

²⁸ See *id.* at 956–79 (Kennedy, J., dissenting); *id.* at 980 (Thomas, J., dissenting).

²⁹ See *id.* at 947 (O'Connor, J., concurring).

³⁰ *Id.* at 921–22 (plurality opinion).

B. Affirmative Action

In *Grutter v. Bollinger*,³¹ a 5–4 decision with Justice O’Connor writing for the majority,³² the Court ruled that colleges and universities have a compelling interest in creating a diverse student body and that they may use race as one factor, among many, to benefit minorities and enhance diversity.³³ The Court said that the “benefits [of diversity] are substantial” and diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”³⁴

There is every reason to believe that Justice Alito will come to an opposite conclusion on this issue. As an attorney in the Justice Department, Alito expressed disagreement with affirmative action and, in fact, even for civil rights protection in the form of the reapportionment decisions.³⁵ Alito wrote, for example, that he was “particularly proud” of his “contributions in recent cases in which the government has argued . . . that racial and ethnic quotas should not be allowed.”³⁶ The cases to which Alito was referring did not involve “quotas” or “numerical set-asides,” but various other forms of affirmative action.³⁷ As a judge on the Third Circuit, Judge Alito had a consistent record of voting against civil rights plaintiffs. A group of Yale Law School professors and students who reviewed all of Judge Alito’s decisions concluded that “[i]n the area of civil rights law, Judge Alito consistently has used procedural and evidentiary standards to rule against female, minority, age, and disability claimants.”³⁸ In twenty divided civil rights cases in which he participated as a judge on the Third Circuit, Judge Alito voted against civil rights

³¹ 539 U.S. 306 (2003).

³² *Id.* at 311.

³³ *Id.* at 328, 343–44.

³⁴ *Id.* at 330.

³⁵ Eva Paterson & Kimberly Thomas Rapp, *Alito Nomination Endangers Civil-Rights Legacy*, S.F. CHRON., Dec. 1, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=chronicle/archive/2005/12/01/EDGSTG04S91.DTL>.

³⁶ Alito Application, *supra* note 15.

³⁷ See generally *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986) (holding that numerical goals for hiring are permissible); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 276 (1986) (holding that seniority systems should not be disrupted for affirmative action).

³⁸ ALITO PROJECT, YALE LAW SCHOOL, *THE ALITO OPINIONS 3* (2005), available at http://www.law.yale.edu/document/pdf/YLS_Alito_Project_Final_Report.pdf.

protections in seventeen, or 85%.³⁹ Indeed, apart from affirmative action, the shift from Justice O'Connor to Justice Alito is likely to make a major difference in sex discrimination cases, where Justice O'Connor overwhelmingly sided with plaintiffs alleging discrimination and Judge Alito with the defendants.

Few, I think, would disagree that there are now five votes on the Court—Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito—to overrule *Grutter* and abolish affirmative action in higher education. Lest there be doubts about Justice Kennedy here, it must be remembered that he has voted against affirmative action in every case raising the issue since he joined the Supreme Court.⁴⁰

C. Death Penalty

In recent years, the Court has overturned death sentences for ineffective assistance of counsel. Justice O'Connor played a crucial role in these decisions.

In *Wiggins v. Smith*,⁴¹ the Court found that the failure of the defense attorneys to investigate or present evidence of the defendant's mistreatment as a child constituted ineffective assistance of counsel.⁴² In a 7–2 decision, with Justice O'Connor writing for the Court and only Justices Scalia and Thomas dissenting,⁴³ the Court held that the American Bar Association standards for the defense function and for handling capital cases reflect the minimum requirements for defense lawyers.⁴⁴ The Court noted the requirement for investigating a capital defendant's childhood for possible mitigating evidence and concluded that the failure to do so was ineffective assistance of counsel.⁴⁵

³⁹ PEOPLE FOR THE AMERICAN WAY, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO: "NO ONE TO THE RIGHT OF SAM ALITO ON THIS COURT" 40 (2006), <http://media.pfaw.org/stc/alito-final.pdf>.

⁴⁰ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam); *Metro Broad, Inc. v. FCC*, 497 U.S. 547, 631–38 (1990) (Kennedy, J., dissenting), *overruled by* *Adrand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518–20 (1989) (Kennedy, J., concurring).

⁴¹ 539 U.S. 510 (2003).

⁴² *See id.* at 535.

⁴³ *Id.* at 513.

⁴⁴ *Id.* at 524 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

⁴⁵ *See id.* at 535–36.

Most recently, in *Rompilla v. Beard*,⁴⁶ the Court held that the failure of the defense attorneys to read the files from the defendant's prior conviction and to investigate possible abuse and mental retardation of the defendant also amounted to ineffective assistance of counsel.⁴⁷ Justice Souter wrote the opinion for the Court, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer.⁴⁸ The case reinforced the Court's holding two years ago in *Wiggins* that courts must closely examine the performance of defense counsel in capital cases. *Rompilla* did not involve incompetent attorneys who slept through the trial. The lawyers had provided a diligent defense, including interviews of family members.⁴⁹ But the Court stressed that the attorneys knew that the prosecutor would rely on the prior conviction as an aggravating factor in sentencing and that the failure to read that file, and thus to gain crucial rebuttal evidence, was ineffective assistance of counsel.⁵⁰

Rompilla provides an easy way to compare Justice O'Connor and Judge Alito because Judge Alito wrote the opinion for the Third Circuit that the Supreme Court reversed.⁵¹ The difference reflects a significant divergence in their attitudes toward finding ineffective assistance of counsel in capital cases and reversing death sentences.

In July 2001, Justice O'Connor gave a speech in which she declared: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."⁵² She stated: "Serious questions are being raised about whether the death penalty is being fairly administered in this country."⁵³ She noted that in the prior year, "six death row inmates were exonerated, bringing the total to 90 since 1973."⁵⁴ Justice O'Connor criticized the fact that "only nine of the 40 states with the death penalty have systems to allow for DNA testing after conviction."⁵⁵ She noted that in Texas in the prior year, "those who were represented by appointed defense attorneys were 28 percent more likely to be convicted than . . .

⁴⁶ 545 U.S. 374 (2005).

⁴⁷ *See id.* at 381–82, 390–93.

⁴⁸ *Id.* at 376.

⁴⁹ *See id.* at 381–82.

⁵⁰ *See id.* at 389.

⁵¹ *Rompilla v. Horn*, 355 F.3d 233, 233 (3d Cir. 2004), *rev'd*, 545 U.S. 374 (2005).

⁵² Editorial, *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Maria Elena Baca, *O'Connor Critical of Death Penalty*, MINNEAPOLIS STAR TRIB., July 3, 2001, at A1.

those who had retained their own attorneys; if convicted, they also were 44 percent more likely to be sentenced to death.”⁵⁶ She stated: “Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”⁵⁷

After Justice O’Connor gave this speech, she was in the majority in *Wiggins v. Smith* and *Rompilla v. Beard* in finding ineffective assistance of counsel in capital cases. She was in the majority in *Atkins v. Virginia*,⁵⁸ where the Court invalidated the death penalty for the mentally retarded, in part because of concerns over the risk of executing innocent individuals.⁵⁹

Undoubtedly, these views reflect Justice O’Connor’s experience as a Justice dealing with death penalty cases. Contrary to what I stated earlier about Justices rarely changing while on the bench, the death penalty may be one area where there is a transformation as Justices see case after case where there was grossly deficient performance by counsel. Justice Blackmun expressed this most forcefully when, near the end of his time on the Court, he wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.⁶⁰

At the very least, John Roberts and Samuel Alito do not have the experience with death penalty cases that would lead them to have the understanding that Justices O’Connor and Blackmun came to acquire. Nor is there anything in their records to predict that they will gain this perspective.

⁵⁶ *Id.*

⁵⁷ *Justice O’Connor on Executions*, *supra* note 52.

⁵⁸ 536 U.S. 304 (2002).

⁵⁹ *See id.* at 320–21.

⁶⁰ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (footnote omitted).

It should be noted that there are areas where the shift from Justice O'Connor to Justice Alito will not change results in the death penalty area. For example, in *Roper v. Simmons*,⁶¹ the Court ruled 5–4 that the death penalty for crimes committed by juveniles is cruel and unusual punishment.⁶² But Justice Kennedy, not Justice O'Connor, was the fifth vote with Justices Stevens, Souter, Ginsburg, and Breyer.⁶³ Thus, the recent changes in the Court do not put this ruling in jeopardy.

D. Federalism

When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism. Over the past decade, the Supreme Court has limited the scope of Congress's powers and has greatly expanded the protection of state sovereign immunity. Virtually all of these decisions were by a 5–4 margin, with the majority comprised of Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. If John Kerry had won in November 2004 and had appointed the replacements for Chief Justice Rehnquist and Justice O'Connor, these federalism decisions likely would have been overruled. But with two Bush picks for the high Court, these doctrines almost certainly will remain and expand in the years to come.

Justice O'Connor was in the majority in virtually every federalism case limiting Congress's powers and protecting state sovereignty.⁶⁴ However, in recent years, she joined with Justices Stevens, Souter, Ginsburg, and Breyer in holding that Congress could authorize suits against state governments under some important federal civil rights statutes. In its most recent sovereign immunity decisions, the Court allowed suits against states under federal laws. In *Nevada Department of Human Resources v. Hibbs*,⁶⁵ the Court allowed suits against states for violations of the family

⁶¹ 543 U.S. 551 (2005).

⁶² *Id.*

⁶³ *Id.* at 554.

⁶⁴ *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 600 (2000) (invalidating a provision of the Violence Against Women Act that allowed victims of gender-motivated violence to sue in federal court); *Printz v. United States*, 521 U.S. 898, 900 (1997) (declaring unconstitutional a federal law that required state and local law enforcement personnel to conduct background checks before issuing permits for firearms); *United States v. Lopez*, 514 U.S. 549, 550 (1995) (striking down a federal law that prohibited guns within 1,000 feet of schools); *New York v. United States*, 505 U.S. 144, 146–47 (1992) (striking down a federal law that required states to clean up their low-level nuclear wastes).

⁶⁵ 538 U.S. 721 (2003).

leave provisions of the Family and Medical Leave Act.⁶⁶ In *Tennessee v. Lane*,⁶⁷ the Court held that states may be sued pursuant to Title II of the Americans with Disabilities Act for discriminating against people with disabilities with respect to access to the courts.⁶⁸ Whether these decisions will survive is uncertain. *Hibbs* was a 6–3 decision, with Justices Rehnquist and O’Connor in the majority;⁶⁹ *Lane* was 5–4, with Justice O’Connor in the majority.⁷⁰ In *Central Virginia Community College v. Katz*,⁷¹ the Court held 5–4 that Congress constitutionally authorizes suits against states in bankruptcy court.⁷² Again, Justice O’Connor was in the majority.⁷³

There is every reason to believe that Justice Alito will be much more conservative than Justice O’Connor with respect to issues of federalism. As an attorney in the Justice Department, Alito expressed very narrow views about Congress’s ability to adopt legislation to protect health and safety. For example, in 1986, Congress passed the Truth in Mileage Act,⁷⁴ which protected consumers who buy used cars by making odometer fraud by dishonest car dealers more difficult.⁷⁵ Alito, as an attorney in the Justice Department, urged President Reagan to veto the bill “because it violates principles of federalism.”⁷⁶ He said that “it is the States, and not the federal government, that are charged with protecting the health, safety, and welfare of their citizens.”⁷⁷ President Reagan rejected this advice and signed the bill. Even the most restrictive Supreme Court decisions concerning Congress’s power to regulate commerce allow for regulating the instrumentalities of interstate commerce.⁷⁸

On the Third Circuit, Judge Alito’s opinions reflect these strong federalist views. For example, in *Chittister v. Department of Community*

⁶⁶ *See id.* at 740.

⁶⁷ 541 U.S. 509 (2004).

⁶⁸ *See id.* at 533–34.

⁶⁹ *Hibbs*, 538 U.S. at 723.

⁷⁰ *Lane*, 541 U.S. at 512.

⁷¹ 126 S. Ct. 990 (2006).

⁷² *Id.* at 994.

⁷³ *Id.* at 993.

⁷⁴ Truth in Mileage Act of 1986, Pub. L. No. 99-579, 100 Stat. 3309 (repealed 1994).

⁷⁵ *Id.* § 2(a).

⁷⁶ Memorandum from Samuel A. Alito, Jr. to Peter J. Wallison, Counsel to the President (Oct. 27, 1986), available at <http://www.reagan.utexas.edu/alito/8097.pdf>.

⁷⁷ *Id.*

⁷⁸ *E.g.*, *United States v. Lopez*, 514 U.S. 549, 558 (1995).

and Economic Development,⁷⁹ Judge Alito wrote the opinion holding that state governments cannot be sued for violating the Family and Medical Leave Act.⁸⁰ Justice O'Connor was in the majority in *Hibbs*, which came to the opposite conclusion. In *United States v. Rybar*,⁸¹ Judge Alito dissented and argued that a federal law that banned the transfer of machine guns was unconstitutional.⁸² The majority on Judge Alito's court,⁸³ and other Circuits across the country, upheld the law.⁸⁴

Samuel Alito is thus much more likely than Justice O'Connor to restrict Congress's ability to authorize suits against state governments and to enact regulatory laws. Because Justice O'Connor was the fifth vote in recent cases rejecting limits on Congress's power, this is an area where major changes in the law are likely.⁸⁵

E. Presidential Power

In January 2006, I was invited by the Democratic staff to the Senate Judiciary Committee to testify against Samuel Alito. I decided to focus on one area: separation of powers and specifically checks and balances on executive power. No area of constitutional law is likely to be more important in the years ahead than constitutional challenges to claims of broad executive authority. In recent years, the Bush administration has claimed unprecedented executive power, including the authority to detain American citizens apprehended in the United States as enemy combatants;⁸⁶ the power to engage in warrantless eavesdropping of conversations and electronic communications by American citizens with

⁷⁹ 226 F.3d 223 (3d Cir. 2000).

⁸⁰ *Id.* at 229.

⁸¹ 103 F.3d 273 (3d Cir. 1996).

⁸² *Id.* at 286–87 (Alito, J., dissenting).

⁸³ *Id.* at 286.

⁸⁴ See, e.g., *United States v. Beuckelaere*, 91 F.3d 781, 784 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1996); *United States v. Kirk*, 70 F.3d 791, 795–96 (5th Cir. 1995), *aff'd by an equally divided court*, 105 F.3d 997 (5th Cir. 1997) (en banc) (per curiam); *United States v. Wilks*, 58 F.3d 1518, 1522 (10th Cir. 1995).

⁸⁵ It should be noted that there have been federalism cases where it was Justice Kennedy, not Justice O'Connor, who was the fifth vote to uphold federal power. See *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (holding that the federal Controlled Substances Act does not exceed the scope of Congress's authority under the Commerce Clause when it is applied to marijuana grown within a state for personal medicinal use or distribution without charge).

⁸⁶ E.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004).

those in foreign countries;⁸⁷ the ability to detain enemy combatants indefinitely in Guantanamo Bay, Cuba without due process;⁸⁸ and the power to authorize torture of individuals.⁸⁹

I explained that the crucial issue was whether Samuel Alito is likely to examine the claims of executive power critically or whether he is likely to be a virtual rubber stamp approving executive actions. What is striking about Justice Alito's record is that every available indication of his views—his memos as a Justice Department lawyer, his speeches, and his judicial opinions—points in one direction: Justice Alito is likely to be extremely deferential to claims of executive power and very unlikely to enforce needed checks and balances. I carefully reviewed Justice Alito's record and I could find no indication where he wrote a memo, gave a speech, or authored a judicial opinion favoring limits on executive power.

Justice Alito's writings, speeches, and opinions indicate that his confirmation to the Supreme Court will shift the Court's balance toward potentially dangerous deference to executive power. In this, like every area, the contrast to Justice O'Connor is crucial in assessing the impact of Justice Alito's confirmation. Justice O'Connor, for example, in rejecting the Bush administration's position that it could detain enemy combatants without due process, declared that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁹⁰ Similarly, Justice O'Connor voted with the majority in holding that federal courts had jurisdiction to hear the habeas corpus petitions brought by detainees held in Guantanamo Bay, Cuba.⁹¹

But there is nothing in Justice Alito's record to suggest his recognition of the need for limits on executive power. Prior to becoming a judge, Justice Alito worked exclusively in the executive branch of government, in the United States Department of Justice: as an Assistant United States Attorney, as Assistant Solicitor General, as Deputy Assistant Attorney General in the Office of Legal Counsel, and as a United States Attorney. In these capacities, he repeatedly expressed the need for expansive, unchecked executive power.

⁸⁷ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

⁸⁸ *E.g.*, *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004).

⁸⁹ See Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1.

⁹⁰ *Hamdi*, 542 U.S. at 536.

⁹¹ See *Rasul*, 542 U.S. at 468.

For example, as an Assistant Solicitor General, Alito addressed the question whether high-ranking executive officials should have absolute immunity from lawsuits claiming that they authorized the illegal, warrantless wiretapping of American citizens thought to present domestic threats to national security. In 1972, the United States Supreme Court unanimously ruled that the President could not authorize such warrantless electronic surveillance.⁹² After this decision, individuals who were subjected to illegal wiretapping sued the Attorney General and other executive branch officials.⁹³ Alito, who was working in the Justice Department at the time, wrote a memo saying that he believed that those responsible were protected by absolute immunity.⁹⁴ He declared: "I do not question that the Attorney General should have this [absolute] immunity . . ."⁹⁵ The United States Supreme Court rejected this position and declared in words that seem quite important today: "The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity."⁹⁶

Justice Alito's views about executive power are reflected in other writings from his time at the Justice Department. For instance, he wrote a memorandum urging that the President issue statements when signing bills so that presidential views, and not legislative history, could be used in interpreting statutes.⁹⁷ Alito's clearly stated objective was to shift power from the legislature, whose legislative history often guides statutory interpretation, to the executive branch.⁹⁸ He said that his goal was to give the Executive "the last word" on issues of statutory interpretation and to "increase the power of the Executive to shape the law."⁹⁹

Alito has given a number of speeches in which he advocated expansive executive powers. For example, in a 1989 speech, Alito sharply criticized

⁹² *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 320 (1972).

⁹³ *Burkhart v. Saxbe*, 448 F. Supp. 588, 591-92 (E.D. Pa. 1978), *aff'd*, *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979).

⁹⁴ Memorandum from Samuel A. Alito to the Solicitor General 5 (June 12, 1984), available at <http://www.archives.gov/news/samuel-alito/accession-060-88-258/Acc060-88-258-box5-memoAlitotoSolGen-1984.pdf>.

⁹⁵ *Id.*

⁹⁶ *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985).

⁹⁷ Memorandum from Samuel A. Alito, Jr. to the Litigation Strategy Working Group 1 (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2.

the Supreme Court's decision in *Morrison v. Olson*,¹⁰⁰ upholding the constitutionality of the federal law providing for an independent counsel.¹⁰¹ The Supreme Court, in a 7–1 decision, recognized the need for Congress to create an independent counsel to investigate wrong-doing by the President and high level executive officials.¹⁰² Alito, in his speech, strongly disagreed and characterized Justice Scalia's lone dissent as "brilliant."¹⁰³ In other words, Alito rejected the need for checks and balances and sided with Justice Scalia's dissent that favored broad executive power.

In a speech to the Federalist Society in 2001, Judge Alito expressed his view that "the theory of the unitary executive . . . best captures the meaning of the Constitution's text and structure."¹⁰⁴ He explained that under this theory, "all federal executive power is vested . . . in the President" and "a vigorous executive is needed."¹⁰⁵ This theory would significantly increase presidential power and greatly limit the ability of Congress to impose checks on it. As its advocates explain, "The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."¹⁰⁶ This theory requires all executive tasks to be under presidential control and rejects most limits on presidential power.¹⁰⁷ The fact that Justice Alito champions the unitary executive theory is a strong indication that as a Justice he will be a consistent vote for executive power.

On the Third Circuit, Judge Alito did not have the occasion to deal directly with issues of presidential power. But Judge Alito repeatedly had to deal with cases involving the conflict between executive, law enforcement power and individual rights. Judge Alito consistently ruled against individuals and in favor of government powers. For example, in *Doe v. Groody*,¹⁰⁸ Judge Alito dissented from a decision that allowed a

¹⁰⁰ 487 U.S. 654 (1988).

¹⁰¹ *Id.* at 696–97.

¹⁰² *See id.* at 693–97.

¹⁰³ Samuel A. Alito, Jr., *Introduction to After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 AM. CRIM. L. REV. 1667, 1667 (1989).

¹⁰⁴ Samuel Alito, Circuit Judge, U.S. Court of Appeals for the Third Circuit, Speech at the Federalist Society's 2000 National Lawyer's Convention, in ENGAGE, Nov. 2001, at 11, 12.

¹⁰⁵ *Id.*

¹⁰⁶ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992).

¹⁰⁷ *Id.* at 1165.

¹⁰⁸ 361 F.3d 232 (3d Cir. 2004).

woman and her ten-year-old daughter to receive money damages after they were strip-searched by police who were executing a search warrant unrelated to these two individuals.¹⁰⁹ Judge Alito sided with the police and would have precluded any recovery for the injured individuals.¹¹⁰

On some occasions, Judge Alito dissented from en banc decisions on his court protecting individual freedoms from government power. For example, Judge Alito dissented from a 9–2 decision of the Third Circuit holding that notice must be sent by mail to the place where a person is being held¹¹¹ and from a 10–1 decision determining that notice must be reasonably calculated to actually reach the person whose property is being seized.¹¹²

F. Separation of Church and State

The Establishment Clause of the First Amendment and its separation of church and state doctrine is the area where change is most certain. For many years, the Court has been divided 5–4 as to the meaning of the First Amendment’s prohibition against the government enacting laws respecting the establishment of religion. For over three decades, the majority of the Court has applied the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*,¹¹³ which provides that the government violates the Establishment Clause if it acts with the purpose of advancing religion, if its actions have the effect of advancing or inhibiting religion, or if there is excessive government entanglement with religion.¹¹⁴ Using this test, the Court has limited government aid to parochial schools,¹¹⁵ prohibited government-sponsored prayers in public schools,¹¹⁶ and prevented government endorsement of religion.¹¹⁷ As recently as June 2005, the Court, in a 5–4 decision, reaffirmed this test and used it to declare unconstitutional a Ten Commandments display that was motivated by a government’s desire to advance religion.¹¹⁸

¹⁰⁹ *Id.* at 235.

¹¹⁰ *Id.* at 244–49 (Alito, J., dissenting).

¹¹¹ *United States v. McGlory*, 202 F.3d 664, 674 (3d Cir. 2000) (Alito, J., dissenting).

¹¹² *United States v. One Toshiba Color Television*, 213 F.3d 147, 155, 159 (3d Cir. 2000) (Alito, J., concurring in part and dissenting in part).

¹¹³ 403 U.S. 602 (1971).

¹¹⁴ *Id.* at 612–13.

¹¹⁵ *E.g., id.* at 625.

¹¹⁶ *E.g., Wallace v. Jaffree*, 472 U.S. 38, 59–61 (1985).

¹¹⁷ *E.g., Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987).

¹¹⁸ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

Conservative Justices, however, have repeatedly urged the overruling of the *Lemon* test in favor of allowing far more government support for religion. Justice Scalia, for example, has been particularly emphatic in urging the overruling of *Lemon*. Over a decade ago, he objected to the Court using the *Lemon* test and wrote: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”¹¹⁹

Justice Thomas would go even further. He has argued that the Establishment Clause of the First Amendment should not be applied to state and local governments at all.¹²⁰ Almost sixty years ago, the Supreme Court unanimously held that the Establishment Clause, like almost all of the other provisions in the Bill of Rights, applies to state and local governments.¹²¹ Justice Thomas is the only Justice in all of this time to disagree.

On several occasions in recent years, Justice Thomas has urged the Court to overrule *Everson v. Board of Education* and hold that the Establishment Clause does not apply to state and local governments.¹²² From this perspective, a state could declare itself to have an official religion. A cross could be placed atop a state capitol or a city hall. Schools could institute official prayer and Bible reading in their schools and give unlimited aid to parochial schools.

Although the Court had nowhere near a majority to take this view, there were four Justices—Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas—who would overrule the *Lemon* test and replace it with an approach where the government would violate the Establishment Clause only if it literally established a church or coerced religious behavior. The implications of this can be seen in positions that these four Justices have taken in cases in which Justice O’Connor was the fifth vote for the majority coming to a contrary result.

For example, these four Justices have taken the view that the government should be able to give aid to parochial schools *even if it is used*

¹¹⁹ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

¹²⁰ *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

¹²¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

¹²² *E.g.*, *Newdow*, 542 U.S. at 45–46; *Zelman*, 536 U.S. at 678.

for religious instruction, so long as the government does not discriminate among religions. In *Mitchell v. Helms*,¹²³ Justice Thomas wrote a plurality opinion joined by Rehnquist, Scalia, and Kennedy, stating that the government should be able to give aid to parochial schools that may be used for religious education.¹²⁴ The other five Justices rejected this position and the conclusion that emerged was that the government may give instructional equipment to parochial schools so long as it is not used for religious instruction.¹²⁵

Another example concerns religious symbols on government property. Five Justices—Stevens, O'Connor, Souter, Ginsburg, and Breyer—take the view that the government may not place symbols on government property if the reasonable observer would see the government action as a symbolic endorsement of religion.¹²⁶ Most recently, these five Justices were the majority in a 5–4 decision to declare unconstitutional a display of the Ten Commandments in county buildings that was clearly motivated by a desire to advance religion.¹²⁷ But four Justices—Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas—would not limit the government's ability to display profoundly religious symbols even in a manner that clearly endorses religion. This was clearly expressed in Chief Justice Rehnquist's plurality opinion in *Van Orden v. Perry*,¹²⁸ which was joined by Justices Scalia, Kennedy, and Thomas.¹²⁹

Simply stated, Justice O'Connor was the consistent fifth vote to continue an approach to the Establishment Clause of the First Amendment that has been followed for over a half century. But both Chief Justice Roberts and Justice Alito are very likely votes to overrule the *Lemon* test and join with Justices Scalia, Kennedy, and Thomas in adopting a view that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.

¹²³ 530 U.S. 793 (2000).

¹²⁴ *Id.* at 820.

¹²⁵ *Id.* at 837–38 (O'Connor, J., concurring); *id.* at 868 (Souter, J., dissenting).

¹²⁶ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring); *id.* at 784–87 (Souter, J., concurring); *id.* at 799 (Stevens, J., dissenting); *id.* at 817 (Ginsberg, J., dissenting).

¹²⁷ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2745 (2005).

¹²⁸ 125 S. Ct. 2854, 2864 (2005).

¹²⁹ *Id.* at 2858.

As Deputy Solicitor General, John Roberts co-authored two briefs urging the overruling of *Lemon v. Kurtzman*.¹³⁰ There is no indication that these briefs do not also reflect his personal views. Both briefs expressly urged the overruling of the *Lemon* test and that the Court adopt the view that a violation of the Establishment Clause occurs only if a government literally establishes a church or coerces religious participation.¹³¹

There is every reason to believe that Justice Alito takes the same view. As a judge on the Third Circuit, he consistently voted in favor of greatly relaxing the Establishment Clause. For instance, in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,¹³² Justice Alito dissented and would have allowed student-delivered prayers at public school graduations.¹³³ Similarly, he consistently voted to allow religious symbols on government property.¹³⁴ Thus, there clearly seems to be five votes to overrule the *Lemon* test and five votes to defer to governments' ability to advance religion through religious symbols on government property, aid to religious schools, and practices such as prayers in schools.

II. WHAT NOW?

If you are conservative and reading this article, you probably feel triumphant. The conservative revolution is about to happen in all of these areas, the places where conservatives care the most about constitutional change. If you are liberal and reading this article, it confirms a depressing reality: we are on the verge of a major change to the right by the Supreme Court. And it is not as if the Rehnquist Court was progressive.¹³⁵

Where do liberals go from here? I have no good answers. I think now is the time for careful thought about a strategy. Republicans did a

¹³⁰ Brief for the United States as Amicus Curiae Supporting Petitioners at 12, 30–33, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), 1991 U.S. S. Ct. Briefs LEXIS 308 [hereinafter *Lee* Brief]; Brief for the United States as Amicus Curiae, at 31–34, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597), 1989 WL 1127408 [hereinafter *Mergens* Brief].

¹³¹ See *Lee* Brief, *supra* note 130, at 12, 30–33; *Mergens* Brief, *supra* note 130, at 31–34.

¹³² 84 F.3d 1471 (3d Cir. 1996).

¹³³ *Id.* at 1489 (Mansmann, J., dissenting).

¹³⁴ *E.g.*, *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001); *ACLU of N.J. v. Schundler*, 168 F.3d 92, 107–08 (3d Cir. 1999).

¹³⁵ For a description of the conservatism of the Rehnquist Court, see MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* (2002) and DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992).

masterful job of planning a long-term strategy for capturing the federal courts and they have succeeded. Progressives need to do the same. There need to be conferences and conversations to get this started.

Some components of this must be the following. First, there must be attention to those areas where a conservative Court might be sympathetic to protection of rights and those where it will be hostile. For example, in recent years, conservatives often have been more protective of free speech rights than liberals.¹³⁶ Thus, one area pointedly omitted from the above list of likely changes is freedom of speech. Perhaps other constitutional claims might be reconceived as speech issues to have a greater chance of success.

Second, there must be even more attention to which cases are worth taking to the Supreme Court given its ideological composition. Of course, though, often it is not the lawyer's choice. In criminal cases, for example, losing criminal defendants understandably want to try to have their case heard. Even in civil cases, clients may want to try for Supreme Court review even if the odds of success are low.

Third, there must be attention to looking to other forums for success. State courts will need to be the focus in many areas of constitutional law. The problem, of course, is that it is far more inefficient to litigate in fifty states than in the federal system. Also, many state courts are just as conservative, if not more so, than the federal courts.

Fourth, there must be attention to looking to legislatures—to Congress and to state legislatures. Here, too, it is important not to overstate. Protection of minorities, prisoners, and criminal defendants is unlikely to come through the legislative process.

Fifth, professors must write scholarship criticizing Supreme Court decisions and justifying the legitimacy of more liberal outcomes. This scholarship is the essential foundation for a future more progressive Supreme Court. There is no doubt that the conservative scholarship of the 1970s has been the intellectual foundation for the conservative Court of today.

Sixth, Democrats must win elections. I end where I began: imagine if Al Gore had been elected in 2000 or John Kerry in 2004, and one of these two Democrats had selected the replacements for Chief Justice Rehnquist

¹³⁶ *E.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (invalidating a state law prohibiting candidates for elected judicial office from making statements about disputed legal or political issues). Justice Scalia wrote for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, while Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.* at 766.

and Justice O'Connor. Think how different constitutional law would be for decades to come.