



A McCain Supreme Court

Seven Ways It Could Change America

The Supreme Court's apparent "year of good feelings" does not change the court's deep, 5-4 divisions on many critical questions. In even one term as president, Sen. John McCain (R-AZ) would likely push the Supreme Court further right than President Bush has managed in two terms. In 2000, Justice O'Connor was the court's swing vote. Today, with two Bush appointees, Justice Kennedy is the key fifth vote. He usually votes with conservatives, but not always.

Over the next four years, the likeliest retirements will be liberals. Sen. McCain has said he would use Chief Justice John Roberts and Justice Samuel Alito as the "model" for his appointments. Replacing even one liberal justice with another such conservative would make five votes to Kennedy's right (Chief Justice Roberts and Justices Antonin Scalia, Clarence Thomas, Alito, and the new appointee). On the most controversial issues, which break down on predictably ideological lines, progressives and moderates would no longer have a shot.

Over the last two years, the court has already sharply narrowed or quietly overruled precedents on the right to choose, voluntary desegregation, and campaign finance reform. Other cases have also undermined a woman's right to equal pay, and an individual's right to a day in court.

What more could a McCain court do? Here are seven areas where the court is now narrowly divided, and where a new appointee could make a big difference:

- 1. Taking Away the Right to Choose.** Last year, in *Gonzales v. Carhart*, the court upheld a prohibition on abortion procedures even when they are necessary to avoid serious harm to a mother. Justice Kennedy wrote that opinion. But Kennedy is also one of the co-authors of the central opinion in *Planned Parenthood v. Casey*, the key case reaffirming the main idea in *Roe v. Wade*. Kennedy may hesitate to abandon his own handiwork entirely. With another conservative appointee, there will be five conservative appointees with no stake in *Casey* or *Roe*.
- 2. Slowing the Fight Against Global Warming.** Justice Kennedy was the fifth vote in the Supreme Court's decision last year requiring the Bush administration to reconsider regulation of greenhouse gas emissions under the Clean Air Act. The dissenters favorably cited statements by the Environmental Protection Agency questioning whether global warming is caused by human activity and greenhouse gases. Research by Cass Sunstein and Richard Revesz shows that ideology matters enormously in environmental law cases, even on the circuit courts. A fifth solid conservative would provide a majority that is friendlier to industry claims and more skeptical about a national response to global warming.

3. Reducing Government's Ability to Protect Our Water and Air. Congress generally protects the environment under its authority to regulate interstate commerce, but conservatives want to cut back that power. In two decisions over the last eight years, a court majority has read the Clean Water Act narrowly, citing "constitutional doubt" about Congress' power. Four Justices, but not Kennedy, would limit federal regulation only to those lakes, rivers, streams, and wetlands where water is "relatively permanent." This would shield from federal authority polluters that dump sewage and chemical waste into thousands of miles of streams and wetlands that regularly go dry. The same reasoning would undermine other critical environmental laws as well, such as the Endangered Species Act.

Conservative interpretations of property rights would have a similar effect. The takings clause is an important constitutional rule that the government cannot confiscate private property without paying for it. In recent years, however, property rights advocates have pushed aggressive interpretations of the provision that would require the government to pay for any reduction in the value of property caused by regulation. These interpretations would make many key environmental protections prohibitively expensive and complicated to administer, threatening the health and well-being of many Americans. The court has recently turned away two broad claims under the takings clause. In one of those decisions, Justices Kennedy and O'Connor provided the majority; in the other, more recent decision, it was Kennedy alone. With a fifth highly conservative justice, the takings movement would surely pick up steam again, and could even take on limits on use of carbon-based fuels. (Justice Alito gave the first indication of his readiness to take up this cause just this week.)

4. Eroding Voting Rights. This year, the Supreme Court rejected a challenge to Indiana's "voter identification" law, upholding a statute that is likely to depress turnout among minority, low-income, and aging citizens. The court's opinion, written by Justice Stevens, left open the possibility that future challenges to similar laws could prevail based on stronger evidence of undue burdens on voters. Already, however, three justices have indicated that they would reject these claims as a class, and Chief Justice Roberts seems unlikely to view them favorably. Additional conservative appointees could quickly create a majority for upholding voter-identification laws, regardless of how onerous.

5. Undermining Civil Rights. Justice Kennedy wrote the opinions for the court in two cases honoring the liberty and equal citizenship of gay and lesbian Americans, but a fifth Justice to his right could quickly create a majority opposed to these rights. And Justice Kennedy has rarely been a friend of other discrimination victims. Last year, in Ledbetter v. Goodyear Tire Co., he voted to block a woman who had received unequal pay for decades from getting her day in court. When Justice O'Connor was on the court, Kennedy opposed decisions to protect Americans from state discrimination under the Americans with Disabilities Act and the Family and Medical Leave Act. He was also in the minority in critical decisions construing Title IX's prohibition on discrimination in federally funded education programs. Already, the replacement of O'Connor with Roberts puts these decisions at risk. This shift might not be immediate, as Kennedy, Roberts, and Alito are often hesitant to overturn precedents, and shifting majorities can preserve civil rights protections, as in decisions this year. The addition of a sixth justice inclined to construe civil rights statutes narrowly is extremely likely, over time, to lead to more outcomes like *Ledbetter*.

6. Reducing Access to the Courts and Undermining the Rule of Law. Under the Constitution, an individual must claim to have been injured before filing a lawsuit. Conservatives often throw out cases by interpreting this “standing” requirement narrowly. Four justices would have thrown out the global warming case on these standing grounds, and just this week, four justices would have rejected another case by construing standing narrowly and ahistorically. In the recent case brought by Guantánamo detainees, four justices also would have allowed the government to continue indefinitely detaining individuals without access to the courts to determine whether they should continue to be held. With a fifth conservative to Justice Kennedy’s right, a majority of justices would likely erect new “standing” barriers that not only keep Americans from getting their day in court to protect their rights, but also liberate the executive to act without any kind of court review.

7. Allowing Extreme Applications of the Death Penalty. All of the current Supreme Court Justices have voted to allow dozens of executions to proceed. Justice Kennedy has, however, voted against the most glaring excesses in the death penalty’s implementation. He has joined narrow majorities blocking the execution of individuals who were under 18 at the time of their crimes, or mentally retarded, or demonstrably insane. The replacement of Justice Kennedy by another justice in the Roberts-Alito mold would likely lift even such modest brakes on the most extreme executions.

It is impossible to predict when these transitions could occur. In fact, one hallmark of Roberts and Alito on display this week is their desire to move incrementally toward conservative outcomes. But in all of the areas above, the long-term direction of a new conservative majority is not hard to see. Giving Sen. McCain the opportunity to appoint just one Supreme Court Justice would hasten the court’s rightward march.