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Benchmarks

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It's widely agreed that the product of the 1992-1993 term of the U.S. Supreme Court was routine and unexciting. The Court's 1993-1994 term does not promise a great deal more—at least, as judged by the 46 "carryover cases" that are already on the argument docket as the term begins.

There is a sprinkling of interesting constitutional issues presented by these cases, ranging from whether procedural due process safeguards in criminal contempt proceedings apply to a civil contempt that results in a noncompensatory fine of $52 million (United Mine Workers v. Bagwell) to whether a state's attorney's use in a paternity suit of peremptory strikes to exclude jurors based on their gender violates the equal protection clause (J.E.B. v. T.B.).

Tellingly, however, the cases carrying the strongest constitutional overtones and significance for individual rights actually turn on the interpretation of federal statutes. Among these are two racial reapportionment cases presenting highly charged issues under the Voting Rights Act. The first is Holder v. Hall, which questions whether a single-commissioner form of government in a Georgia county violates the act when blacks are sufficiently numerous and cohesive to elect one of multiple commissioners if single-member districts were created.

Then, there are the companion cases of DeGrandy v. Johnson and United States v. Florida, involving the conflicting demands of black and Hispanic minority groups in the redistricting of the Florida legislatures. They also ask whether the act requires maximizing electoral opportunities for minorities beyond a plan that reflects their percentage of the population.

Another case involves the question of whether the Racketeer Influenced and Corrupt Organizations Act (RICO) applies to persons who block access to abortion clinics. National Organization for Women v. Scheidler.

Of course, it is entirely possible that the docket already contains some disguised constitutional blockbusters similar to the Court's decision last term in Shaw v. Reno, in which the Court held that the equal protection clause was violated by the creation of two North Carolina congressional districts whose shapes were so extremely irregular that they could only be explained as racially based.

Or more likely, it is possible that the additional cases to be granted review for resolution next term (approximately twice as many as are already there) will generate significant or controversial results. The greater likelihood, though, is that the object of keener interest to Supreme Court watchers will be the performance of the newest member of the Court, Justice Ruth Bader Ginsburg.

There has been no paucity of extravagant predictions in the national media concerning the significance of Justice Ginsburg replacing retired Justice Byron White. Three of the country's most prominent newspapers have expressed views such as: "Without White's vote, Chief Justice Rehnquist will have difficulty finding a majority for conservative rulings"; a "liberal appointment... could break the conservative grip" presently held by a group of the justices; and "Ginsburg could be the swing vote of the Supreme Court."

In my judgment, the press has greatly overplayed the consequences of President Clinton's first nomination to the High Court. It is simply not true that this one appointment promises to make a substantial difference with respect to virtually any important area of constitutional doctrine, even on those subjects specifi-
cally mentioned in many reports on the Court's new composition.

For example, the matter of reproductive rights was settled last term—at least for the time being—in the celebrated decision of Planned Parenthood of Southeastern Pennsylvania v. Casey. The Court deliberately declined to overrule Roe v. Wade and expressly preserved Roe's refusal to overrule Roe, nonetheless modified it significantly. The Court's reasoning upholds government regulations of the abortion decision that do not impose a direct prohibition unless they place an "undue burden" on, or constitute a "substantial obstacle" to, the fundamental right. This is a much "softer" protection than that articulated in Roe, which held that any regulation of the abortion decision would be unconstitutional unless it survived strict scrutiny, i.e., unless the government regulation was shown to be necessary to serve a compelling interest.

In Casey, there were only two members of the Court who were still willing to subscribe to Roe's strict safeguards—Justices Blackmun and Stevens. Therefore, Justice White's replacement cannot produce any change in respect to this matter, either.

The most "scientific" approach to analyzing the potential consequences for adjudication of constitutional rights by Justice Ginsburg's appointment is to identify 5-4 decisions of the Supreme Court that reached "conservative" results in which Justice White was one of the five members of the majority. In cases such as these, a "liberal" vote in place of his "conservative" one would make a real difference. (This assumes agreement on the meaning of the terms "conservative" and "liberal," which, although by no means

Ruth Bader Ginsburg

"core"—the constitutional right of women to have an abortion without the imposition of "undue burdens" or "substantial obstacles" by the state.

The ruling was accomplished when Justices O'Connor, Kennedy and Souter joined forces with the Court's two remaining faithful adherents to Roe, Justice Blackmun (Roe's author) and Justice Stevens.

It is true that four members of the Court in Casey voted formally to overrule Roe v. Wade. Had President Bush been re-elected, he might well have had the opportunity to replace one of Roe's supporters and thereby appoint a justice who would constitute a fifth vote to repudiate Roe.

President Clinton's election, however, virtually assured that no such change would be made. And, in any event, since Justice White (an original dissenter in Roe) was one of the four who voted to overturn the Court's recognition of a constitutional right to an abortion, his replacement could have no relevance whatever in changing the line-up to make a new majority on this point.

The Casey decision, although...
The national media, using this technique, found a number of cases—many of which are very important—that fit the description. These include:

- **Bowers v. Hardwick** (1986), rejecting the right to engage in homosexual sodomy;
- **Cruzan v. Director, Missouri Department of Health** (1990), declining to establish a specially protected constitutional "right to die," although five justices (four dissenting and one concurring) did recognize such a right of a mentally competent adult to refuse lifesaving treatment;
- **Wygant v. Jackson Board of Education** (1986), invalidating a race-based affirmative action plan for laying off teachers;
- **Employment Division v. Smith** (1990), holding that the free exercise clause does not ordinarily grant an exemption for religion from a generally applicable government regulation of conduct;
- **And Mueller v. Allen** (1953), ruling that the establishment clause does not prohibit tax benefits to all parents for expenses in connection with education of their children, including those who attend parochial schools.

If a more “liberal” Justice Ginsburg would cast her vote so as to produce different results in these cases, then there would be a great deal to say for the momentous judgments articulated by the press on the “new” Court.

There is a fatal flaw, however, in this line of reasoning. The difficulty is that a different vote now by Justice White’s successor will not alter the result in any of these cases because, in all of them, both Justices Brennan and Marshall were among the four “liberal” dissenters. There is no good reason to believe that both of their successors, Justices Souter and Thomas, are likely to reflect the votes of their predecessors. Indeed, most plainly in the case of Justice Thomas, there is every reason to believe that this would not be true.

This is not to say that a more “liberal” Justice Ginsburg for a more “conservative” Justice White will make no difference at all. In fact, there were five cases last term in which Justice White was the crucial fifth "conservative" vote.

Of these, the most prominent constitutional ruling was **Alexander v. United States**. In that case, the Court held that an adult book store chain, which had been convicted for selling certain obscene books, was not protected by the free speech clause from having its entire inventory of books and films (at least some of which were not obscene) destroyed because of a RICO violation.

The other cases were:

- **Bray v. Alexandria Women’s Health Clinic**, last term’s most publicized statutory interpretation decision, holding that 42 U.S.C. 1985 (3) does not authorize injunctions against blockades of abortion clinics;
- **Heller v. Doe**, holding that Kentucky’s imposition of a lower burden of proof for the civil commitment of the mentally retarded than for the mentally ill did not violate the equal protection clause;
- **Johnson v. Texas**, holding that a capital sentence proceeding had allowed adequate consideration of the defendant’s youth;
- **And Graham v. Collins**, holding that a constitutionally invalid Texas jury instruction in a capital case involved a “new” rule that was therefore not subject to retroactive application in a federal habeas corpus proceeding.

Even if Justice Ginsburg’s vote would have produced a different result in each of these cases, however, the consequences would not be of major doctrinal significance.

On the other hand, it was clear to many church-state aficionados, including this writer, after the Court’s decision a year ago in **Lee v. Weisman** (involving a clergyman’s invocation at a junior high school graduation), that there were then five justices on the Supreme Court who were prepared to abandon the Lemon test—the three-pronged rule announced in **Lemon v. Kurtzman** two decades ago for adjudicating establishment clause issues. (Indeed, there may have been as many as nine justices for that position.) But this five-justice majority was also ready to replace the Lemon test’s emphasis on the purpose, effect and potential church-state entanglement of the challenged government action with the approach advanced by Justice Kennedy several years earlier.

His test, which focused on whether the state was directly or indirectly coercing anyone to support or participate in any religion, would permit increased government acknowledgment and accommodation of religion.

It was obviously this opportunity to substitute Justice Kennedy’s “coercion” rule for the much-maligned Lemon test that prompted the colorful concurring opinion of Justice Scalia in **Lamb’s Chapel v. Center Moriches Union Free School District**, first describing the Lemon test as being “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,” and then vigorously objecting to continued reliance on Lemon in the majority of opinions written by Justice White.

It was quite surprising that Justice White, who was the lone dissenter in the Lemon case and one of the test’s most vocal critics, chose not to join with Chief Justice Rehnquist and Justice Scalia, Kennedy and Thomas to formally inter the Lemon approach. Apparently, Justice White thought he should not do so with one foot out the door, and instead left the final decision to his successor.

There is very little in her record on the D.C. Circuit on which to base a prediction of what Justice Ginsburg’s position will be on the establishment clause. Still, although it has been accurately observed that “those who live by the crystal ball must quickly learn to eat glass,” my hunch is that her general background points to her being much more a church-state “separationist” than Justice White, and much less likely to align herself with Justice Kennedy’s more “accommodationist” coercion approach.

Here, in my view, is the only big constitutional issue on which Justice Ginsburg will make an immediate difference.
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