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The Supreme Court, Post-Election

A. Gail Prudenti, New York Law Journal

November 3, 2016

Widespread speculation over the impact of the presidential election on the U.S. Supreme Court brings to mind an old tale of two judicial giants, Oliver Wendell Holmes and Learned Hand.

Legend has it that after dining together, Judge Hand parted with these words to his friend: "Do justice sir, do justice!" Justice Holmes replied sharply: "It is not my job to do justice! It is my job to apply the law!"

I agree that the 2016 election has the potential to impact future generations in a way not seen since conservative Richard Nixon appointed four justices after his 1968 election, sending the court on a right-ward trajectory for first time since liberal Franklin D. Roosevelt packed the court with eight appointees in the 1930s and 1940s. A Hillary Clinton presidency could reverse that trend; a Donald Trump victory could keep the Supreme Court on its conservative trail for another 25 years.

But I am not so sure that a liberal majority would overturn *Citizens United v. Federal Election Commission*, which struck down restrictions on corporate and union campaign contributions, or roll back Second Amendment rights recently recognized by the court. Nor am I persuaded that a newly solidified conservative majority would reverse *Roe v. Wade*, the 1973 decision recognizing abortion rights.

In my experience as an appellate court judge, courts are extremely reluctant to reverse settled precedents, hesitant to supplant established law with their own cosmic notion of justice and much more inclined, as Justice Holmes said, to "apply the law," even when they don't like it, even when it offends their sense of justice.

There were many, many occasions when I applied precedents I disagreed with, and I know that virtually every other appellate judge, state and federal, regularly does exactly the same. The law needs to be stable and settled and predictable, and not susceptible to subtle shifts in the wind, political or otherwise. Judges, by and large, accept and respect that premise.

That said, while I would be surprised if a new majority explicitly abandoned precedents wholesale, I predict that the court—whether Clinton or Trump prevail—will veer subtly in a different direction and gradually set the tribunal on a different course.

Keep in mind that since the death of Antonin Scalia in February a court that had pretty much leaned to the right or center-right for the past 50 years is now evenly split between justices who usually cast a "conservative" vote (that is, they tend to favor the government and institutions, including corporations, over individuals) and those who tend to vote "liberal" (or in favor of individuals in disputes with the government and institutions).

And keep in mind that in addition to the Scalia seat that is now open, there are three other positions held by justices between the ages of 78 and 83: two consistently reliable liberal votes—Justice Ruth Bader Ginsburg and Justice Stephen Breyer are 83 and 78, respectively—and Justice Anthony Kennedy, a centrist and frequent swing-vote, is 79.

Just consider some of the 53 5-4 opinions during the Obama years where Scalia was in the majority, where just a single vote swing would have resulted in a different decision: *Citizens United*, which said corporations and unions could spend unlimited sums to promote or oppose political candidates; *Burwell v. Hobby Lobby*, where the court said family-owned and closely held companies could opt out of the "Obama Care" contraception mandate because of religious objections; *Town of Greece v. Galloway*, which held that an upstate New York town board could open its meetings with a prayer; and *Walmart Stores Inc. v. Dukes*, where the court tossed out the largest sex discrimination case in American history. It is likely that an even slightly different court would have decided all of those cases differently or reached the same result in a significantly different way.

Still, I do not think a new majority will rush in to reverse those cases, even though they were obviously a very, very close call—a legal toss-up—and even if five or more judges on a newly configured court abhor those decisions. But the new judges may well adjust prior landmarks, slowly limiting or expanding previous landmarks and applying those preceding rulings either more broadly or more narrowly.

It is understandable that those on both sides of the political spectrum hope/fear that a Hillary Clinton/Donald Trump Supreme Court would change course, and I too am fascinated by the potential historic implications. But I am not fearful.

Historically, the Supreme Court has tended to reflect contemporary mores, for better (*Brown v. Board of Education*, 1954, which at long last put a legal end to the segregationist "Jim Crow" laws) and for worse (*Plessy v. Ferguson*, 1896, which upheld "separate but equal" accommodations for blacks and whites). The court generally will not attempt to take the country where it is not ready or willing to go (and, sadly, I do not think the country as whole was ready for racial integration in the late 19th century) or stray too far from contemporary cultural moorings.

I view the coming years, especially with a Clinton presidency, as transformative, but not radically so. Over the past 228 years, the Supreme Court has undergone countless ideological shifts and house cleanings, usually quite incrementally and rarely in a way that was far removed from contemporary values. I have every confidence that a new majority would follow the history of the institution and the legends who preceded them in a cherished and time-honored quest to apply the law while achieving justice.

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