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1994-1995 Supreme Court Preview: Overview

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FIERCE COMBAT ON FEWER BATTLEFIELDS

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Linda Greenhouse

THE Supreme Court term that ended Thursday was a struggle: While the Justices decided fewer cases than in any term since 1955, many of the decisions they produced revealed deep divisions and some bore the marks of raw ideological combat. On a Court largely without a prevailing ideology, cases have to be won and coalitions built case by case.

The fleeting promise of unanimity that an early ruling in a sexual harassment case appeared to offer back in November faded quickly once the Court began to wrestle with private-property rights, redistricting, religion and public schools, and the free-speech rights of abortion protesters.

Two voting-rights cases that disappeared from view after they were argued on Oct. 4, the first day of the term, finally emerged on the last day, and it only then became apparent what had taken so long.

Justice Clarence Thomas, in his most revealing personal statement since joining the Court three years ago, produced a 59-page attack on what he described as the "disastrous misadventure" of 30 years of judicial interpretation of the Voting Rights Act.

Writing a separate opinion in a Georgia voting-rights case, Justice Thomas said judges had mistakenly assumed power under the law to draw district lines on the basis of race. In doing so, he said, the judiciary had "given credence to the view that race defines political interest" and that "members of racial and ethnic groups must all think alike."

Only Justice Antonin Scalia joined his opinion. Four other Justices -- John Paul Stevens, Harry A. Blackmun, David H. Souter, and Ruth Bader Ginsburg -- attacked it as a "radical" attempt to argue policy rather than law.

While Justice Thomas's view has no chance of prevailing, the exchange itself highlighted the Court's current dynamic: Justices Thomas and Scalia at the extreme conservative end of the Court's spectrum, and Justices Blackmun, Stevens, Souter and Ginsburg occupying a place that, while certainly not classically liberal, can be defined as liberal relative to where the Court is today.

These four voted together in many of the term's closely divided and most important cases. They were on the same side in 11 of the term's 14 rulings that were decided by 5-to-4 votes, a group that included major rulings on property rights and criminal law as well as voting rights. In eight of those 11 cases, the four Justices were the dissenters. They prevailed as a group only in the three criminal-law rulings in which Justice Anthony M. Kennedy joined them.

Neither Justices Thomas, Scalia, Sandra Day O'Connor or Chief Justice William H. Rehnquist ever joined the four in a 5-to-4 decision. However, several of the term's most important decisions were 6-to-3 rulings, with a majority composed of Justices Kennedy, O'Connor, Blackmun, Stevens, Souter and Ginsburg. These included a decision that a public school district that New York State created for a village of Hasidic Jews was unconstitutional, and another decision barring jury selection on the basis of sex.

Justice Kennedy occupied the gravitational center of the Court. He was never on the losing side in a 5-to-4 decision, and he dissented in only five of the term's 84 cases. His most notable dissent came on Thursday, when he broke with the Chief Justice and joined Justices Scalia and Thomas in their view that an injunction against disruptive demonstrations at a Florida abortion clinic was unconstitutional.

Justice O'Connor dissented 10 times, the next-lowest number. The most frequent dissenter was Justice Blackmun, who differed 28 times. Justice Blackmun is retiring after a dramatic 24-year tenure that saw him traverse the Court's ideological spectrum to end his career as the Court's most liberal member.

President Clinton's nominee to succeed him, Judge Stephen G. Breyer, whose all-but-certain confirmation will follow hearings that begin July 12, will almost surely fit comfortably with Justice Blackmun's three allies. Just as surely, he will not be in a position to change the direction of the Court even if he were so inclined.

Justice Ginsburg, President Clinton's first Supreme Court nominee, made a vigorous debut that reflected her long experience on a Federal appeals court and her familiarity with many of the issues on

the Court's docket. Of the four Justices in her wing of the Court, she was the closest to the Court's center.

In the 35 decisions that found Justice Blackmun and Chief Justice Rehnquist on opposite sides, Justice Ginsburg voted 19 times with Justice Blackmun and 16 times with the Chief Justice.

By contrast, Justice Souter voted 24 times with Justice Blackmun and 11 with the Chief Justice. Justice Stevens voted 30 times with Justice Blackmun and 5 with the Chief Justice.

This is a rough and mechanistic measure of a Justice's views; admittedly, cases are not fungible, and not all votes are equally weighty. But imprecise as they are, such statistics do give at least a snapshot of the Court's polarity at a given moment. In the 35 cases, Justice O'Connor voted 7 times with Justice Blackmun and 27 times with the Chief Justice. Justice Thomas voted 3 times with Justice Blackmun and 32 times with the Chief Justice.

Justice Souter's emergence during his fourth year on the Court as an anchor of the relatively liberal wing was one of the term's notable developments, although it was foreshadowed during the previous two terms.

While Justice Souter is in no way a liberal in the mold of Justice William J. Brennan Jr., whom he succeeded, his brand of moderate pragmatism and his willingness to engage Justice Scalia in direct intellectual combat is probably as responsible as any single factor for the failure of the conservative revolution that finally appeared on the verge of success with Justice Brennan's retirement.

Only one case this year could be counted as a significant victory for the conservative agenda: a 5-to-4 ruling that limited the ability of governments to place conditions on the use of private property.

The term's 84 cases marked a low point after several years of marked decline in the Court's argument docket. More cases than ever are reaching the Court -- more than 7,700 new appeals were filed this term, a record -- but the Justices are growing increasingly selective about the ones they hear.

In the early to mid-1980's, the Court commonly issued more than 140 decisions each term. The number this year was the fewest since the 82 decisions of the 1955-56 term. The Court actually heard 90 arguments this year, but six cases were dismissed after argument or decided without full opinions.

Following are summaries of the major rulings of the term.

Abortion
A Buffer Zone To Protect Clinics Is Upheld, 6-3

The Justices did not revisit the question of the fundamental right to abortion, nor are they likely to in the foreseeable future. But cases spawned by the controversy over abortion continue to reach the Court; by a vote of 6 to 3, the Court upheld use of a 36-foot buffer zone, the core of an injunction a Florida state court issued to protect an abortion clinic against disruptive protest. Chief Justice Rehnquist's majority opinion, Madsen v. Women's Health Center, No. 93-880, found the injunction consistent with the First Amendment; Justices Scalia, Thomas and Kennedy dissented.

In a second-clinic protest case, the Court was unanimous in ruling that abortion clinics can invoke the Federal racketeering law to sue violent anti-abortion protest groups for damages. In an opinion by Chief Justice Rehnquist, the Court rejected a lower court's conclusion that the Racketeer-Influenced and Corrupt Organizations Act (RICO) applies only to activity motivated by a desire for economic gain. (National Organization for Women v. Scheidler, No. 92-780.)

Criminal Law
Tough Tactics To Fight Drugs Are Viewed Skeptically

In a term that was generally conservative on issues of criminal law, the Court nonetheless displayed some skepticism toward the aggressive tactics of state and Federal governments in combatting drugs.

The Court ruled, 5 to 4, that the Government may not seize a house or other real estate that it suspects of having been used in a drug transaction without giving the owner notice and a chance to contest the seizure at a hearing. This case, U.S. v. Good, No. 92-1180, involved a Federal forfeiture law; many states have similar laws. Justice Kennedy's majority opinion, based on the constitutional guarantee of due process of law, was joined by Justices Blackmun, Stevens, Souter and Ginsburg.

In a second 5-to-4 decision, with the same lineup of Justices, the Court ruled that states may not follow up a narcotics conviction by imposing a special tax on the illegal drugs. The majority opinion by Justice Stevens held that Montana's "dangerous drug tax," similar to laws in about half the states, violated the constitutional prohibition against double jeopardy when applied to drugs that had already

formed the basis of a criminal prosecution. (Montana v. Kurth Ranch, No. 93-144.)

In a death penalty case, the Court ruled that if the state seeks the death penalty on the ground that the defendant will be dangerous in the future, jurors must be told if the alternative to a death sentence is life without parole, meaning that the defendant would never in fact be released. The 7-to-2 decision, with a plurality opinion by Justice Blackmun, overturned a South Carolina death sentence reached under a state law that forbids informing the jury that a life sentence means life without parole. Justice Scalia and Thomas dissented in Simmons v. S.C., No. 92-9059. By an 8-to-1 vote, with Justice Blackmun dissenting, the Court turned back a constitutional challenge to California's death penalty law. (Tuileapa v. Calif., No. 93-5131.)

The Court ruled, 9 to 0, that prison officials can be found liable for failing to protect an inmate from violence at the hands of fellow prisoners if the officials knew of but ignored a "substantial risk of serious harm." The case, Farmer v. Brennan, No. 92-7242, involved the rape of a transsexual prisoner whom officials had placed in the general population at a Federal penitentiary. Justice Souter wrote the opinion for the Court. Justice Thomas concurred separately while reiterating his view that the Eighth Amendment's prohibition against cruel and unusual punishment has no application to prison conditions.

Ruling, 5 to 4, the Court held that the police are not obliged to stop questioning a suspect who makes an ambiguous request to have a lawyer present. Justice O'Connor wrote the majority opinion, Davis v. U.S., No. 92-1949. The dissenters, Justices Souter, Blackmun, Stevens and Ginsburg, said the police had to stop long enough to clarify the suspect's wishes.

By a 5-to-4 vote, the Court ruled that Federal judges may grant a stay of execution to permit a state death row inmate to find lawyer to prepare a Federal court petition for a writ of habeas corpus. Justice Blackmun's opinion, McFarland v. Scott, No. 93-6497, was joined by Justices Stevens, Souter, Ginsburg and Kennedy.

Religion
Hasidic District Is at the Center Of Church-State Case

In the term's only church-state case, the Court declared by a vote of 6 to 3 that a public school district created by New York State for the benefit of a village of Satmar Hasidim amounted to favoritism on behalf of religion and violated the neutrality required by the First Amendment's establishment clause. Justice Souter wrote for the Court; Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented. (Board of Education of Kiryas Joel v. Grumet, No. 93-517.)

Individual Rights
Less Proof Is Required To Show Sexual Harassment In the Workplace

The Court was unanimous in announcing a wide definition of sexual harassment in the workplace, rejecting the standard set by several lower courts that required plaintiffs to show that harassment had caused them "severe psychological injury."

Writing for the Court, Justice O'Connor said "no single factor is required" to prove to win a sexual harassment case under Title VII of the Civil Rights Act of 1964, the law at issue. Invoking what she called the "broad rule of workplace equality," Justice O'Connor said the law was violated when the work environment "would reasonably be perceived, and is perceived, as hostile or abusive." The case was Harris v. Forklift Systems, No. 92-1168.

The Court completed a revolution in jury selection by ruling that the Constitution's guarantee of equal protection bars the exclusion of potential jurors on the basis of their sex. In a 6-to-3 decision by Justice Blackmun, the Court extended to gender the analysis it had previously applied to prohibit the use of peremptory challenges to weed out jurors on the basis of race. The Chief Justice and Justices Scalia and Thomas dissented. The case was J.E.B. v. T.B., No. 92-1239. The Justices later declined to hear a case from Minnesota that posed the question of whether the same principle should also be extended to religion.

The Court ruled that the Civil Rights Act of 1991, in which Congress restored and expanded remedies for job discrimination in response to a series of restrictive Supreme Court rulings two years earlier, did not apply retroactively to the thousands of cases that were pending when the law was passed. The Court addressed different aspects of the law in a pair of 8-to-1 decisions, with Justice Stevens writing the majority opinions and Justice Blackmun dissenting. The cases were Landgraf v. USI Film Products, No. 92-757, and Rivers v. Roadway Express, No. 92-938.

In an important voting-rights case from Florida, the Court ruled that the Federal Voting Rights Act does not necessarily require creating the maximum number of legislative districts in which minority-group voters make up a majority. Justice Souter wrote an opinion for seven Justices while the other two, Justices Thomas and Scalia, said the

Voting Rights Act does not apply to challenges to district lines. (Johnson v. DeGrandy, No. 92-519.)

By a 5-to-4 vote in a Georgia case, the Court ruled that the Voting Rights Act could not be used to challenge the size of a governmental body, in that case a single-member commission that runs rural Bleckley County. There was no majority rationale; separate opinions by Justice Kennedy, joined by the Chief Justice; Justice O'Connor; and Justice Thomas joined by Justice Scalia made up the majority. (Holder v. Hall, No. 91-2012.)

Government Authority
Developers Get A Break on The Environment

In an important property-rights case, the Court set new limits on the ability of governments to require developers to set aside part of their land for environmental or other public uses. Under Chief Justice Rehnquist's 5-to-4 majority opinion, the Government has the burden of showing a "rough proportionality" between the required set-aside and the harm, such as flooding or increased traffic, to be caused by the new development.

The decision, Dolan v. City of Tigard, No. 93-518, was based on the Fifth Amendment's prohibition against a governmental "taking" of private property without compensation; Chief Justice Rehnquist said the takings clause should no longer be "relegated to the status of a poor relation" within the Bill of Rights. The dissenters were Justices Stevens, Blackmun, Ginsburg and Souter.

The Court ruled unanimously that the Government's choice of which military bases to close is not subject to challenge in Federal court. Elected officials from Pennsylvania and New Jersey had gone to court to try to stop the scheduled closing of the Philadelphia Naval Shipyard. Chief Justice Rehnquist wrote for the Court in Dalton v. Specter, No. 93-289.

By a vote of 9 to 0, the Court overturned a $52 million civil contempt fine a Virginia state court had issued against the mine workers' union in connection with a violent strike, ruling that such a fine could not be imposed without giving the union the procedural protections of a criminal trial. Justice Blackmun wrote the opinion, Mine Workers v. Bagwell, No. 92-1625.

Speech
Home Is Castle When It Comes To Posting Signs

The Court ruled unanimously that cities may not bar residents from posting signs on their own property. The decision, City of Ladue v. Gilleo, No. 92-1856, struck down an ordinance that banned all but "for sale" and "sold" signs from the homes and lawns of a wealthy St. Louis suburb. Justice Stevens wrote for the Court.

In an important cable television case, a 5-to-4 majority endorsed a broad constitutional framework for Federal regulation of cable television while, at the same time, telling a lower court to reconsider its ruling that upheld a Federal law that requires cable systems to retransmit local broadcast signals. The Court will inevitably revisit the issue when the case, Turner v. Federal Communications Commission, No. 93-44, comes back after further proceedings. Justice Kennedy wrote for the Court while the dissenters -- Justices O'Connor, Scalia, Thomas and Ginsburg -- said the "must carry" law violates the cable operators' editorial freedom under the First Amendment.

In a high-profile copyright case, the Court ruled unanimously that parody -- in this case, the rap group 2 Live Crew's raunchy version of the rock classic "Oh Pretty Woman" -- is not necessarily copyright infringement but may be protected under the Federal copyright law as "fair use." Justice Souter wrote the opinion, Campbell v. Acuff-Rose, No. 92-1292.

The Environment
Steering the Flow Of Garbage Grows Complicated

The Court decided an unusual number and variety of controversies over waste disposal and regulation. The most important ruling threatened an increasingly popular approach to waste disposal known as flow control, in which local governments try to make expensive recycling or incineration plants economical by insisting that all trash generated within their borders be sent to the designated facility.

The Constitution's protection against state interference with interstate commerce does not permit local governments to "hoard a local resource," the Court ruled in a 6-to-3 decision by Justice Kennedy. The Chief Justice and Justices Souter and Blackmun dissented in C. & A. Carbone v. Clarkstown, No. 92-1402.

The Court also rejected, as another protectionist offense against interstate commerce, Oregon's imposition of an extra dumping fee for solid waste brought in from another state. Justice Thomas wrote the 7-to-2 decision, Ore. Waste Systems v. Dept. of Environmental Quality, No. 93-70. The Chief Justice and Justice Blackmun dissented.

In another 7-to-2 ruling, the Court held that any toxic residue created by burning household and industrial waste in municipal incinerators must be

treated as hazardous waste and not dumped in ordinary landfills. The decision, Chicago v. Environmental Defense Fund, No. 92-1639, interpreting a Federal environmental law, could substantially increase the costs of municipal waste disposal. Justice Scalia wrote the majority opinion and Justices Stevens and O'Connor dissented.

Upholding state authority in an environmental case, the Court ruled, 7 to 2, that states have broad authority under the Federal Clean Water Act to protect not only the quality of their water but also the quantity that flows through hydroelectric projects. Water must flow at certain levels to make it possible for salmon, trout and other fish to survive. Justice O'Connor wrote for the Court in Jefferson County v. Washington, No. 92-1911. Justices Thomas and Scalia dissented.

Business, Taxes
Juries That Grant Huge Damages Can Be Reined In

In one of its clearest rulings on the contentious subject of punitive damages, the Court held that as a matter of constitutional due process, states must make some form of judicial review available as a check on the amount of punitive damages awarded by a jury. While only Oregon now fails to provide such review, the broad tone of the decision, Honda Motor Co. v. Obert, No. 93-644, is likely to invite more challenges to punitive damages. Justice Stevens wrote the majority opinion and Justice Ginsburg and Chief Justice Rehnquist dissented.

Sweeping aside years of lower court precedents, as well as Securities and Exchange Commission policy, the Court barred a common type of securities-fraud action under which accountants and other outside professionals could be sued for "aiding and abetting" a securities fraud. The 5-to-4 opinion, Central Bank v. First Interstate Bank, No. 92-854, was by Justice Kennedy.

The Court ruled, 9 to 0, that Congress did not violate the constitutional guarantee of due process when it amended a 1986 tax law retroactively to close an unintended loophole. Justice Blackmun wrote for the Court in U.S. v. Carlton, No. 92-1941.

The Court unanimously validated New York State's effort to curb tax evasion in the sale of cigarettes at stores located on Indian reservations, ruling that the coupon system New York plans to use to limit the availability of cigarettes to non-Indians does not conflict with Federal law. Justice Stevens wrote for the Court in New York v. Milhelm Attea, No. 93-377.

The Court upheld California's former approach to taxing the income of foreign-based multinational corporations. California has changed its law to conform to the rest of the country, but had the 7-to-2 decision in Barclays Bank v. Franchise Tax Board, No. 92-1384, gone the other way, California might have faced a $4 billion retroactive liability for refunds. Justice Ginsburg wrote for the Court and Justices O'Connor and Thomas dissented.

COURT MOVES BACK TO LEGAL MIDDLE

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Tony Mauro

Supreme Court Justice Antonin Scalia said in a recent lecture that the time-honored tradition of dissenting from court rulings gives him "unparalleled pleasure."

If that's true, the court's conservative leader had the time of his life this week by authoring a pair of angry dissents that show just how isolated he is, and how moderate the court has become.

The term that began last October and ended Thursday was not a good one for Scalia or for conservatives generally, particularly in the civil rights and liberties area.

For eight remarkable minutes Thursday, Scalia read from a dissent that attacked the court majority for giving judges the power to limit protests around abortion clinics.

"The court is making new law and bad law," he said.

On Monday, Scalia offered another bitter dissent, this time attacking the court for striking down a New York school district that accommodated the needs of Hasidic Jews. He said the decision showed the court's intolerance for religion.

During the Reagan and Bush administrations, Scalia was designated the court's intellectual magnet to draw the justices to the right.

Instead, Scalia often finds himself in the role of angry dissenter - joined almost always by Clarence Thomas and less often by Chief Justice William Rehnquist.

The emergence of Justice David Souter as moderate leader of the court, bolstered by the addition this term of Ruth Bader Ginsburg, has moved the court back toward the legal middle.

Clinton nominee Stephen Breyer, whose confirmation hearings start July 12, is likely to bolster the trend.

Souter, 54, was appointed by President Bush in 1990 as a justice who gave conservatives hope. "He had the image of a real tough hanging judge," says Alan Slobodin of the Washington Legal Foundation. "That clearly hasn't been the case."

Souter authored this week's ruling on the religious school district. He dismissed Scalia as a gladiator who "thrusts at lions of his own imagining."

The court this term was still sharply conservative on most criminal law issues, including the death penalty. And the justices made business happy last week with rulings limiting punitive damages and strengthening property rights.

But in a number of First Amendment and civil rights rulings, the court was sympathetic to liberal points of view.

-- The court granted the cable industry increased First Amendment protection.

-- A Ladue, Mo., sign ordinance that was used to keep resident Margaret Gilleo from placing an anti-war sign on her front lawn was struck down.

-- The justices strengthened the protection for commercial speech or advertising.

-- The court made it easier to win sexual-harassment lawsuits and barred gender discrimination in jury selection.

"The center of the court is beginning to look like an ACLU boardroom," says New York University law professor Burt Neuborne.

American Civil Liberties Union legal director Steve Shapiro didn't go that far, but said: "This no longer looks like a court that seems intent on dismantling the Bill of Rights."

A DIFFERENT SORT OF COURT AWAITS BLACKMUN SUCCESSOR
Recent Terms Marked By Aversion to Change

The Washington Post
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Joan Biskupic, Washington Post Staff Writer

The Supreme Court that Justice Harry A. Blackmun joined in 1970 had been fanning the fires of social revolution for more than a decade.

Under Chief Justice Earl Warren, who retired in 1969, the court struck down segregation, ordered voting districts redrawn, made police go easier on criminal suspects and prohibited states from regulating birth control.

The court that Blackmun's successor will join, in contrast, has been in a holding pattern.

Controlled by cautious conservatives, the court in recent terms has reversed few precedents and broken little ground. Instead, it has tinkered at the margins of the law in criminal cases, religion disputes and civil rights.

The court's aversion to change is matched by a dramatic drop in its opinions.

In the 1970s, the court handed down an average of 130 rulings per term. In the 1980s, it issued about 140 opinions each term. But in recent years, the court has been taking fewer and fewer cases. This term, based on the cases the justices have agreed to review, the court is expected to issue 85 rulings.

That would be the fewest rulings since 1961 -- a time when society was far less litigious. In 1961, about 2,000 appeals came to the court; last term, about 6,000.

"My theory is that the court has made a semiconscious judgment that it had been occupying too much public attention," said Georgetown law professor Mark V. Tushnet. "They are trying to play down their role in government."

Other theories on why the court is deciding fewer cases include: that the conservative justices are in sync with the conservative-dominated lower courts, so they are simply allowing more lower court rulings to stand; and that the justices think social problems are the province of elected lawmakers. Some court observers speculate that the justices, concerned about quality control, want to give more attention to fewer cases. Others say that the number of unanswered legal questions is diminishing.

"The Casey term took a lot out of all of us," said one recent former clerk, referring to the 1991-92 term in which the justices narrowly upheld the right to abortion in Planned Parenthood of Southeastern Pennsylvania v. Casey. "No one wanted to handle any more controversy after that."

But the current shifting alliances on the court also may prevent any real movement on big issues. It takes four of the nine justices to agree for any case to be heard. Secret voting takes place at a conference each Friday.

"There's no real faction in control that has an agenda," said another former clerk. "If someone like [Antonin] Scalia felt he had five votes to do something, he would vote to take more cases. But there's not a united five-vote bloc to change the law in any given way."

One consequence of the court's reduction in cases and narrow rulings has been that groups with large social concerns have been turning to state courts or elected lawmakers.

"Twenty years ago, the Supreme Court was virtually the only game in town for people seeking to vindicate their civil and constitutional rights," said Steven Shapiro, legal director for the American Civil Liberties Union. "Increasingly, the state courts are becoming as important as the Supreme Court as engines for social change."

Barbara Sinclair, a political science professor at the University of California at Riverside, said, "If the chances of even getting heard at the court are down, that puts additional pressure on the other branches" of the federal government.

Johnny Killian, a legal scholar at the Library of Congress, said that when the court pulls back, the executive branch typically gets the last word on how legislation should be interpreted.

When Blackmun came onto the high court, he joined several legal giants. The other justices were Hugo F. Black, William O. Douglas, John

Marshall Harlan, William J. Brennan Jr., Potter Stewart, Byron R. White, Thurgood Marshall and newly named chief Warren E. Burger.

The court had had its fingers in everything: police powers, school policy, contraceptives. President Richard M. Nixon, who appointed Burger, Blackmun, Lewis F. Powell Jr. and William H. Rehnquist, had said he wanted to end the court's "activist" approach.

But the expected counterrevolution never happened. The court continued to issue rulings that provoked the public. The justices barred states from outlawing abortion. They endorsed affirmative action and said employers could be sued for discrimination based on statistics that showed blacks were disproportionately excluded from good jobs.

So by 1980, when Ronald Reagan was running for president, he spoke to people who wanted the court out of their lives and businesses. He promised to appoint justices who would not "legislate" from the bench.

And after Reagan elevated Rehnquist to chief justice in 1986, things began to change. He was assisted by other Reagan appointees, Sandra Day O'Connor in 1981, Scalia in 1986, and Anthony M. Kennedy in 1988. President George Bush added David H. Souter in 1990 and Clarence Thomas in 1991.

By the late 1980s, it was plain that the court was not going to read into legislation what elected lawmakers had failed to write into it. Some professors have argued that restraint actually produces a reverse "activism." When the Rehnquist court in 1989 upheld a restrictive Missouri abortion law and narrowly interpreted job-bias laws, making it harder for workers to sue, some members of Congress accused the court of actively carrying out a politically conservative agenda.

But the lunge to the right was short-lived, and the swing votes at the center, O'Connor, Kennedy and Souter, have blocked any move to either extreme.

While few court scholars would say it is necessarily good or bad that the court decides fewer cases -- so much depends on what they are -- many observers agree that conflicting rulings have been allowed to stand.

For example, the court in 1992 prohibited prayer at public school graduation ceremonies. But one year later it refused to intervene when an appeals court, covering Texas, Louisiana and Mississippi, permitted prayer at a public school graduation. As a result, nationwide organizations for, and against, prayer in schools have bombarded educators with literature promoting, or decrying, student prayer.

Before Justice White retired last year, he routinely complained that the justices were bypassing important cases. He wrote that the court was allowing federal law to be "administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to."

White has declined to be interviewed since his retirement and did not respond to several recent inquiries to his office.

A new generation of disputes will face Blackmun's successor -- on gay rights, congressional term limits and physician-assisted suicide, to name a few. How large a role the court takes on those issues and older ones, like abortion, voting rights and the death penalty, will be up to the successor and the other justices.

"Here's how history plays funny tricks: When Nixon put his justices on the court, he was concerned above all about activism on law and order," said University of Virginia law professor A.E. Dick Howard, referring to the GOP belief that the court was meddling in police procedure. In the well-known 1966 decision Miranda v. Arizona, for example, the court ruled that police officers were required to tell suspects they have the right to remain silent.

But then, said Howard, the court went on a liberal spree in other areas: making abortion legal nationwide, allowing mandatory school busing for desegregation and striking down the death penalty as it was administered in the early 1970s. He said that the social dilemmas of the future, as well as a new justice, could again revolutionize the court.

TAKING RESPONSIBILITY FOR UNCLE SAM

The Guardian
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Martin Walker

THE importance of the US Supreme Court rises in precise proportion to the cowardice of America's politicians, or at least their reluctance to assume the responsibility for enacting overdue social reforms.

When Congress and President shrank from offending the electorate by enacting the right of black citizens to equal and public education, or protecting the right of a woman to decide her own procreative destiny, they thrust forward the nine unelected lawyers of the Supreme Court to do the job.

Sometimes, the court can do real dirty work. The Supreme Court helped plunge the young nation into its civil war, with its 1857 decision in the Dred Scott case that blacks were not and could not become US citizens. It justified the prosecution of a real war in a most unpleasant way in 1944, upholding the right of the government to incarcerate US citizens of Japanese ancestry in concentration camps.

The court's sweeping legal powers in this most legalistic of nations explains the extraordinary interest which America takes in the coming and going of its justices. The decision last week of an 85-year-old lawyer, Harry Blackmun, finally to announce his retirement, was treated in the American media with the reverence usually accorded the passing of a major statesman.

Quite right too. Harry Blackmun, of Harvard College and Harvard Law School, and then house lawyer to the Mayo Clinic, took credit in his years on the bench for a series of social reforms and enactments which most countries would have reserved for elected politicians.

In 1973 he authored the court's judgement in the case of Roe versus Wade which established a woman's constitutional right to an abortion. It stretched the vague right of privacy in the Constitution (Fourth Amendment: "The right of the people to be secure in their persons . . . shall not be violated") to protect a woman's right to choose in what conservatives have since denounced as judicial activism which invented, rather than simply interpreted the law.

The 1977 decision, which Justice Blackmun wrote, striking down state attempts to ban lawyers' advertisements on the grounds that it violated the right to free speech, has similarly far reaching implications. It stands like a giant roadblock in the path of any attempt to reform America's ridiculous and inherently corrupt way of financing their political system.

Any suggestion that candidates' air time should be limited, or of a curb on the power of moneybags to swamp the voters with as much political publicity as the candidate can buy, must first deal with Justice Blackmun's decision.

His abortion judgement and his recently announced conversion against the death penalty, helped inspire a flood of liberal nostalgia this week.

In fact, he was appointed by Richard Nixon as a conservative but turned against his president to vote with the verdict during the Watergate affair that the President did not have the right to withhold evidence needed in a criminal trial.

In an America of politicians who fear the vengeance of the voters and the lobbies, Justice Blackmun and his fellows have taken over that role Shelley defined for the poets as "the unacknowledged legislators".

The court's prerogatives range far beyond the workings of the judicial system. The right of an employer, or of a university, to give preference to women and ethnic minorities in hiring and promotion, was established in two landmark cases in 1978 and 1979.

But those were the years of the broadly liberal court, the result of the long years of the Democratic party's control of White House in the 1930s, 1940s and 1960s. Because Supreme Court justices sit for life, they continue to exert the political influence of the administration which picked them for decades thereafter.

The conservative court of the 1990s was the result of the Republican years of the 1980s and earlier, and America will reckon with the Reagan-Bush appointments of Justices William Rehnquist (a Nixon choice), Antonin Scalia

(Reagan's pick) and the black Justice Clarence Thomas (Bush's man) for years to come.

Indeed, the long years of Republican dominance of the White House would have installed a solidly conservative court - and allowed the individual states to outlaw abortion - save for the readiness of justices to confound all expectations.

President Ford's choice, John Paul Stevens, and two of Reagan's nominees, Sandra Day O'Connor (the first woman) and Anthony Kennedy, have become moderates, refusing to reverse that landmark decision on abortion which has wracked America for two decades.

And Justice David Souter of New Hampshire, another Bush choice, has joined O'Connor and Kennedy in a centrist group which now holds the balance in the court.

Since the court rules by majority vote, and its politicisation has led to a spate of 5-4 decisions of late, this balance - and thus President Clinton's choice of replacement for Harry Blackmun is crucial.

There are three main issues which the court will probably soon face, since the politicians are likely to duck them. The first is the death penalty, outlawed briefly by the court in 1972 at the end of the liberal area. Justice O'Connor opposed it before she joined the Supreme Court, and the vote is now finely balanced. The second and third are sexual discrimination against women and against gays.

Here again, Justice O'Connor may hold the key. This tennis-mad fitness fanatic from an Arizona ranch, who recalls sleeping on cases of dynamite in the back of her daddy's old jalopy, electrified a women's conference recently by blaming the lack of women in power on "blatant sex discrimination - we have a long way to go before women are on an equal footing with men".

If a new liberal majority is emerging, it will require emollient leadership, which explains why the current front runner is the outgoing Senate Majority leader, George Mitchell. He knows something about rallying prickly egos into line.

With President Clinton beset by Whitewater, he cannot afford a bruising confirmation battle in the Senate, and Mitchell could expect an easy ride from his Senate colleagues. And although the New York Times sniffs that yet another white male justice would hardly fulfill the Clinton promise to make the institutions of state "look like America", Mitchell is of Lebanese ancestry.

The risk remains that justices can change in office. Clinton's only selection so far, Ruth Bader Ginsburg, is already looking rather less liberal than expected. But America could be heading for a Supreme Court which will finally outlaw the death penalty. Ironically, that was the tough-on-crime credential which helped Bill Clinton get elected.

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You May Not Understand What We Say, But That's the Way We Like It. We're Mysterious. We're the Supreme Court. And We're Here for Life.

Washingtonian
February, 1994

Andrew Ferguson

WHY IS IT that Supreme Court justices hardly ever appear in Washington novels? Consider the stock characters: the dipso Southern senator, the avuncular secretary of state, the right-wing general, the hormonally supercharged congressman, the network-news twinkie. . . not a Supreme Court justice in the bunch.

In 1981, a movie starring Walter Matthau and Jill Clayburgh tried to correct the deficiency. First Monday in October is the best movie ever made about the Supreme Court. It is, in fact, the only movie ever made about the Supreme Court. The producers did strive to convey the court's grandeur: Handel's Water Music washes over the audience whenever the screen shows the court's temple on First Street, Northeast. But when the camera moves inside, all efforts at verisi-mulitude drop away. Walter mugs and Jill looks implausibly thoughtful. The movie bombed. Not even Miss Clayburgh's performance -- as the first female justice of the Supreme Court to do a shower scene -- could redeem its dramatic shortcomings.

The title First Monday in October refers to the opening date of the court's annual term. When it convened last October, it did at last promise some real-life drama. The occasion marked the first appearance of Justice Ruth Bader Ginsburg, the second woman appointed to the court and the first Democratic appointee in 25 years. Unfortunately, her star appeal more closely resembles Imogene Coca's than Jill Clayburgh's. In her debut, even Justice Ginsburg was unable to overcome the tedium.

The justices like it that way. Which is why they're so dangerous. In his book, The Supreme Court: How It Was, How It Is, Chief Justice William Rehnquist called the court "one of the best tourist sights in Washington." No one will confuse it with the National Museum of Air and Space, but unsuspecting tourists come by the bus-load anyway. On days the court is in session, the queue snakes across the plaza and down the block.

As the crowds wait to enter, the temple looms above them as a mood-setter, a symbol of ageless power and indestructibility meant to suggest the Parthenon, which was blown up by Turks. The court does only a small portion of its business in public: during oral arguments, held Mondays, Tuesdays, and Wednesdays of the first two weeks of every month from October through April, and on days when its opinions are handed down, through June. Cameras and recording devices are not allowed, in keeping with the cloistered professional lives the justices otherwise lead. They never hold press conferences, rarely give speeches, and seldom, during business hours, venture out of the sealed-off corridors of the temple, which they reach through an underground parking garage and private elevator.

The conceit is that justices are removed from the whirlwinds and tidal waves of democratic government, a rare breed whose eyes rise above popular passion, elevated always to the Law.

The opening ceremony is meant to augment this sense of mystery and majesty. The unwashed pass through metal detectors and massive bronze doors to the chamber itself, a marble room built to the dimensions of a college gym, but with worse acoustics and no cheerleaders. Impossibly tall curtains of red plush fall between twin columns of white marble. A frieze depicting lawgivers through the ages adorns the upper walls. There is much brass and gold brocade. It looks like a set from Samson and Delilah.

In the center of the chamber is a large area for lawyers of the bar; the press sits in an apse to one side. Spectators are rotated in and out in small groups every few minutes as the session progresses. Their seating area, farthest from the bench, holds about 200. Guards circumnavigate it with the bullying air of hall monitors.

With a whap of the gavel, the curtains part behind the bench, and the justices enter in groups of three. The clerk hollers: "Oyez, oyez, oyez! [legalese for "Soup's on!"] The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. All persons having business before this Honorable Court are admonished to draw nigh and give their attention, for the court is

now sitting. God save the United States and this Honorable Court."

By the time the clerk finishes, the justices are seated, and the tourists have their first good look at them. "I know of no other regularly scheduled occasion," the chief justice wrote in his book, "on which strangers to the Nation's Capital can be guaranteed a view of so many persons responsible for the functioning of one of the three branches of the United States government." It is a salutary guarantee, but ironic: As you watch the faces of these assembled Americans, fresh off the tour bus, it is clear that not one of them has the slightest idea who these nine people are. Most consult seating charts provided by the court. Not even Clarence Thomas, star of one of the highest-rated shows in television history, seems to rouse a flicker of recognition. I noticed a frission pass through the crowd only once, when Nina Totenberg came in late. You can't fault the public for its ignorance. The justices are not a particularly noteworthy bunch. Their black robes are another suggestion of majestic imperturbability, creating the illusion that beneath each austere cloak beats the heart of a legal giant. The illusion is crucial, for without the robes most of the justices look as if they were gathered at random from the nearest shuffleboard court.

In fact, they were recruited from the swamps of American politics -- either electoral politics or, what is even less promising, the politics of the American legal establishment.

By tradition, an appointment to the Supreme Court rewards a long career of bar-association schmoozing, political hack work, and assiduous bum-bussing. The only current exceptions to the rule are Justices Ginsburg and Antonin Scalia. Both had distinguished legal careers before coming to the court -- Scalia as a scholar and Ginsburg as a skilled and creative litigator.

A quick glance at their colleagues shows less-impressive qualifications.

At the far end of the bench sits Justice Thomas, perhaps the most famous person in the court after Nina Totenberg. The politics of his appointment to succeed the court's first black justice, Thurgood Marshall, need little elaboration -- it was, said the press and others, selection by quota, which Thomas opposes on constitutional grounds.

Next to Thomas is Anthony Kennedy, who came to the court after a languid career as a law professor at a third-tier law school and several years on a federal appeals court, where his tough-on-crime opinions drew the attention of Reaganites. He was President Reagan's third choice to fill the seat.

As a presidential candidate hungry for women's votes in 1980 Reagan pledged that his first Supreme Court appointment would be a woman. When the chance came, he reached deep into the nation's judiciary, all the way down to an intermediate state court of appeals in Arizona, to find Sandra Day O'Connor, an old friend of Rehnquist's, an acolyte of Reagan's mentor Barry Goldwater, and a good soldier in the state's right-wing politics.

Next to her sits the court's oldest justice, Nixon appointee Harry Blackmum, who came to the court as a close friend of then-Chief Justice Warren Burger. President Nixon knew Burger, in turn, because Burger was once Harold Stassen's campaign manager. Of all the credentials that have ensured justices a place on the Supreme Court, Blackmun's may be the most dubious: the friend of a friend of Harold Stassen's.

In the center sits Chief Justice Rehnquist, appointed to the court by Nixon after a long career as a lawyer-political activist in Arizona and a briefer career in John Mitchell's Justice Department, which eventually gave us Watergate. Reagan made him chief justice.

Next is Justice John Paul Stevens, brought to President Ford's attention by then-Attorney General Ed Levi, who had enjoyed many pleasant bar-association conventions with Stevens.

Justice David Souter, to Scalia's left, was plucked from obscurity by John Sununu. As governor of New Hampshire, Sununu had appointed Souter to the state Supreme Court in return for Souter's lengthy servitude at the feet of New Hampshire's Republican pols. He may be the only man in Washington who doesn't regret sucking up to Sununu; at least he still has a job.

Next to Souter, at the far end of the bench, sits Justice Ginsburg, but it is Souter who embodies the modern Court. Beyond his experience as a political coat-holder, his chief qualification was that no one could tell whether he was qualified or not. Some eynies dubbed him the "Stealth nominee."

Before settling on Souter, the Bush administration did consider nominating judges and scholars of distinction. But the idea was quickly dismissed. Their paper trails -- articles and written opinions that indicate an intellectual engagement with constitutional issues -- disqualified them as "too controversial," particularly for confirmation in a Democratic-controlled Senate. With his brief career on the state bench, Souter was, like most of his colleagues, blessedly unburdened by any evidence of distinction.

Even better, he had for years lived in a cabin in the woods, far from the fleshpots where even the most timid lawyers can sometimes be lured into indiscretions that might haunt them as nominees. Phlegmatic, average, politically well-connected: Souter comfortably took a place among his peers.

After brief formalities, oral arguments begin. The court receives petitions to hear more than 6,000 cases a year but agrees to hear arguments in fewer than 150. An hour is set aside for each case, with the time split between the two sides. The lawyers already have filed their briefs, which the justices are presumed to have read. In these the arguments are presented entire; the oral presentations make the lawyers available for grilling by the justices.

The degree of interest each justice displays varies from case to case. Thomas is famously silent; since he's been on the court, he has asked only a handful of questions during oral arguments. He leans far back in his chair, folds his hands in front of his face, occasionally makes notes, and sometimes consults law books he keeps on the bench. Harry Blackmun is almost as quiet; his frequent yawns -- great, languorous yawns that cause every feature on his face to recede into invisibility -- have become the stuff of legend.

The chatterboxes are justices Souter and Scalia. Souter's face is long and drawn, Scalia's round and puckish. Both have 5 o'clock shadows, and side by side they look like the bad guys in a Dick Tracy cartoon. Scalia's manner is ferocious. He seems the sort of fellow who would snap "Buy a paper!" if you asked him for a football score. He commonly begins a question with the pitiless formulation: "You aren't really trying to argue that . . ."

Souter, with his courtly New Hampshire manner and accent to match -- "lawr" for law, "ahgument" for argument -- is more decorous but less intelligible. He favors colloquialisms that can only confuse the attorneys before him: "I see you've put all your eggs in the warrant basket," he told one lawyer. "You're now in the non-negotiable driver's seat," he knowingly told another, who looked as though he'd never dreamed he was in any such place.

To this short list of talkers, we may now add Justice Ginsburg. In a speech this summer, she warned of her fondness for questions. "I will have to be more restrained," she promised, "I'll have to do some self-censorship." Too late. She censored herself for precisely 9 minutes in her debut, then uncorked 17 questions, many of them lengthy, in the next 51 minutes, for an average of one every 180 seconds -- impressive considering that there were at least seven other justices trying to get a word in edgewise.

Souter's dithering, Scalia's law-professor peevishness, and Ginsburg's motor-mouth peppering combine to create a fearsome fusillade. Lawyers have been known to wither -- even those who prepare several hundred hours for just this moment, as most do. A lawyer is lucky to get an uninterrupted minute before a justice prods him for clarification or amplification. Thereafter he answers questions without letup. Seeing one of these poor fellows melt before the bench in a heap of humiliation can be a painful experience -- until you remember he's a lawyer.

IN THEORY an oral argument sounds like a dramatic occasion, but for the layman it's more like a foreign movie without subtitles. The participants speak in a language unknown to ordinary Americans -- the code of a cult, crafted over centuries to obscure the obvious and thereby preserve the exclusivity of the legal profession and guarantee its enormous fees. After awhile it all begins to take on a dreamlike quality:

> JUSTICE GINSBURG (intensely): Would any cognizable analogue to the Croson test still have a demonstrable impact on the federal fise?
>
> LAWYER: Well, Your Honor, the scope of remedies available is incorporated, if only by inference, into the de jure duplicative burdens that fall on respondent.
>
> JUSTICE SOUTER (airily): But -- hmmm -- if you've met those Jingles preconditions -- maybe I'm wrong -- while ignoring your own Zimmer affirmations, then you've only proved cohesion and not compactness. Haven't you? Or am I wrong?
>
> LAWYER: I agree, Your Honor. The vacature case depends on whether a non-mutual collateral estoppel is adduceable from the retroactivity claim.
>
> JUSTICE SCALIA (peeved): You're joking! How do you apply a GELA remedy if those conditions obtain? You act as if this is a maximilization case!!

For all the spectators know, by the time everybody's through the justices have made Urdu circumcision rites mandatory in public schools. When you watch the Supreme Court, much has to be taken on faith. This is by design. Like a filibustering senator, the justices have learned the tactical uses of boredom.

Sooner or later, in every book written about the Supreme Court, you come across a quote from Alexander Hamilton: The Court, he said, is "the least dangerous branch of government." Lawyers press the theme in articles for the popular press: "The Least Dangerous Branch: Nothing to Worry About." "It's No Big Deal, Honest: Reflections on Hamilton's 'Least Dangerous Branch.'" And so on. But lawyers are as contentious as they are sneaky. When they all start assuring us of the same thing, we're entitled to grow suspicious.

Though it nurtures an image of otherworldliness, the Supreme Court is a Washington political institution, smaller and less bureaucratic than most but sharing with all such institutions a thirst for aggrandizement and power.

It was not always so. In the beginning, the justices resembled a band of itincrants. They rode circuit in fall, winter, and spring, visited Washington for two sessions of two or three weeks' duration in August and February, and retired to their homes for the balance of the year.

For most of the court's life, it even lacked its own building. The justices were shunted from room to room in the Capitol and even met occasionally in a friendly tavern. They seemed not to mind. When Congress, in 1896, offered to move them to a permanent court in the newly completed Library of Congress building, they unanimously rejected the invitation.

Then came Chief Justice (and former president) William Howard Taft, whose conception of the court's grandeur and importance was as vast as . . . William Howard Taft. The pompous temple on First Street was his idea, though its construction proceeded under his successor, Charles Evans Hughes. The court took up residence there in 1935. When the sculptor Robert Aitken was commissioned to design the frieze above the entryway, he made sure its giant, mythic figures bore the likenesses of Hughes, the architect Cass Gilbert (who had hired him), and himself. As it turns out, they all look like Hulk Hogan. But it was a fittingly vain gesture for a building that is, at bottom, a monument to institutional vanity.

The Court's intellectual history shows the same relentless aggrandizement. Spending so much time on a set from Samson and Delilah, the justices begin to think of themselves as Victor Mature (or Hedy Lamarr).

For most of this century, the court has removed ever larger areas of American life from the discretion of elected representatives and the public, substituting its own preferences for theirs. As former politicians, justices cannot resist the temptation to make policy.

The most obvious examples came in the 1950s and '60s. The Warren Court's hunger for power was breathtaking. It refashioned American culture according to the whims of its justices, and in ways that no elected representative, having to face the electorate, would dare propose. Some of these were changes for the better, some weren't; but whether the court -- unelected, unaccountable, and irreversible -- had the right to make them was highly dubious.

The justices redrafted welfare-eligibility requirements, redrew congressional districts, rewrote the lesson plans of public-school teachers. And much, much else. They took care to swaddle their power grabs in constitutional finery, discovering rationales in the founding document's unwritten "spirit" or "evolution," the details of which seemed discernible only to those blessed with a law degree.

The Rehnquist Court is slightly more modest. It makes the most of the boredom it induces in laymen, usually avoiding a sweeping Warren-like decision in favor of incremental reform. But it, too, fiddles with any public policy it wants, from the shape of congressional districts to smoking restrictions in penitentiaries.

In the words of one scholar, "its reaction to nearly any problem is to enhance its own policy discretion . . . case by case to achieve what it believes to be desirable social results." Achieving "desirable social results," of course, is supposed to be the business of elected representatives. If they achieve an undesirable social result, we can vote them out of office. That's democracy. But we can't get rid of Supreme Court justices. The constitution grants them life tenure -- one of the few constitutional provisions they take literally.

It is a dilemma as old as democracy itself: What to do when a branch of government runs amok? Normally the press acts as a check on the power-crazed. Not in this instance. Perhaps reporters are blinded by the court's hauteur, or thrilled by its spirit of social reform; perhaps the unceasing boredom has done them in. Whatever the reason, Supreme Court reporters are remarkably uncritical when the justices grab more power. And any relinquishing of power, conversely, is condemned as an abdication of responsibility.

Two cases illustrate the tendency. In 1992 the court ruled that the beating of a prisoner by guards violated the constitution's stricture against "cruel and unusual punishment." Justice Thomas dissented. He noted that the beating was

contemptible but pointed out that there were other legal remedies available, civil and criminal. The case did not raise a constitutional question, in Thomas's view, and thus was beyond the court's jurisdiction. The majority ruling, he wrote, "was yet another manifestation of the pervasive view that the Federal Constitution" -- hence the court -- "must address all ills in our society."

Right or wrong, the intellectual distinction Thomas drew wasn't hard to comprehend. It was a rare decision -a justice admitting that the court could not assume control of every social question by claiming a constitutional prerogative. Press accounts suggested that Thomas was now in favor of beating convicts. For this the New York Times called him "the youngest, cruelest Justice."

Thomas may yet learn from Anthony Kennedy, whom the press hailed a year later for his very different kind of decision in Lee v. Weisman. In it the court ruled that non-sectarian prayers would be banned from public-school graduation ceremonies. Lee was a classic court power grab: From its temple in Washington it reached uninvited into every high school gym and assembly hall in America and wagged its big finger like a two-by-four. Why? Kennedy offered an almost untraceable line of constitutional and psychological reasoning, which culminated in the unspoken words: Because I say so.

It mattered not at all that the court itself opens with a kind of prayer, beseeching God to save it. Or that Congress does the same thing. Justice Kennedy had torn off the straitjacket of judicial restraint, and Legal Times praised his newly discovered "hankering to be fair."

Of course, reporters do not react to the Supreme Court with identical biases: if they did, readers might find their stories easier to follow. When last year's term drew to a close, several newspapers surveyed the court's decisions. HIGH COURT'S TERM SHOWS NO DRIFT TO CENTER, headlined the St. Louis Post-Dispatch. FOR HIGH COURT, A TERM OF MOVING TO MIDDLE, responded USA Today. And the New York Times had it both ways: COURT'S COUNTERREVOLUTION COMES IN FITS AND STARTS. If the press can't control the court, who will? Reformers have suggested opening up its processes to public scrutiny. They point to Congress, with its C-SPAN-monitored deliberations, as an exemplar. The idea should give pause. Congress is in many ways a model of openness, but at a cost. You have only to see Bob Dorman bellowing before the cameras on the floor of the House, or watch congressmen prostrate themselves before a piece of sitcom cheesecake testifying on the destruction of the rainforest, to measure the price of openness. A showboating congressman is just an annoyance; a showboating justice can be dangerous.

In fact, the Supreme Court cocoon is quite permeable as it is. One former Supreme Court clerk speaks of the concentric circles that surround the court. The inner circle is the court itself, peopled exclusively by lawyers. Every term a justice hires four clerks (Stevens makes do with three) to research cases and draft opinions. The clerks are freshly graduated from the nation's top law schools, where, following the fashions of law professors, they have learned that justices are most ennobled when they take up the work of social reform that the lumbering public ignores.

Their power is by all accounts enormous. Although gossip routinely circulates about the influence of one clerk or another on individual justices, it is hard to know which stories to credit, since most of them originate with the clerks themselves. But clerks do decide, with minimal supervision, which cases the justices will hear among the thousands of petitions they receive. As a result, the court's docket fills with flashy cases involving sexual harassment, pornography, and racial discrimination, while less colorful, though arguably more consequential issues in antitrust or trademark law go unheard. Few of the clerks have yet practiced law or even slaved at a real job, where they might learn the complications of workaday life. They thus bring to the court the grad student's air of intellectualism and the twentysomething's taste for remaking the world. Neither trait is appropriate for the court of last appeal, but both influence its opinions.

Beyond this circle is the press. Their constant goading to judicial activism rivals that of the clerks, and has similar if less direct effects -- at least one justice, Anthony Kennedy, reportedly has his clerks keep a scrapbook of his press clippings.

Then there is official Washington. The obsessions with politics and policy, celebrity and gossip, the imperiousness and elitism that detach Washington from the rest of the country become the ether in which the justices live and breathe. Though unrecognizable to most Americans, they are transformed by Washington alchemy into local celebrities. Dinner with Kay Graham, drinks with George Mitchell, racquetball with Ted Koppel: It is a long, inexorable seduction, an endless process of self-inflation, for which we all pay the price in the end.

One modest proposal suggests removing them from the Washington swamp altogether, by transplanting the Court -- justices and clerks, law books and Xerox machines, the works -- to Kansas

City, say, or Billings, Montana, where they might reestablish contact with the public whose desires they routinely second-guess or override. The Supreme Court building itself could stand empty for awhile, as a kind of monument to the perils of overweening government, and then be handed over to a local high school for basketball games.

But this proposal, while sound, is probably unworkable. The only antidote to a power-hungry Supreme Court, if there is one, will come from a different kind of justice -- secure enough in his beliefs to resist the lure of Washington elitism, respectful enough of democratic process to keep her hands to herself.

Such justices would be even more nondescript than the ones we have, and the Supreme Court, having relinquished its self-imposed role as policy-maker, would become even more boring than it is. It would risk forgoing its status as "one of the best tourist sights in Washington," but no great loss: If the tourists wanted to see where policy is made, they could cross the street and watch congressmen bellow on the floor of the House -- undignified and earthy, lacking robes and brocade, a spectacle, for better or worse, of democracy revived.

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IF THERE IS BLOOD ON AN OPINION, WE KNOW WHO WROTE IT

The Supreme Court Justices (And Their Clerks) Stamp Prose With Quirky Flair

The Wall Street Journal

Monday, October 4, 1993

Paul M. Barrett, Staff Reporter of The Wall Street Journal

WASHINGTON -- Supreme Court justices -- and their clerks -- sometimes write the darnedest things.

If a Supreme Court opinion is laden with antiquated words, it's a safe bet it came from Justice David Souter's chambers. After a lawyer used the obsolete noun "aught," meaning "anything" or "all," in an oral argument last term, Justice Antonin Scalia offered Justice Souter $2 if he could work it into an opinion.

"For aught we can see . . .," Justice Souter stated in a case involving an American citizen's right to sue a foreign country. He collected his money -- though perhaps he should have shared the bounty with his law clerk. In truth, the clerk cranked out the rough draft of the opinion, with Mr. Souter editing in his personal flourishes.

Louis Brandeis, who served on the high court from 1916 to 1939, quipped that the justices are about the only people in Washington who "do their own work." In reality, most court members these days edit their law clerks' work, content to insert their own little touches while assuring that the opinions accurately reflect their views on the issues.

No member of the court, which opens its fall term today, uses the facts of a crime more graphically to make his point than Chief Justice William Rehnquist. In a 1991 opinion upholding a death sentence, he described a fleeing murderer as "sweating blood," noting that the victim's wounds were "caused by 41 separate thrusts of a butcher knife." If an opinion scoffs that opposing viewpoints "cannot possibly be taken seriously," it's likely that it came from Justice Scalia, the court's king of sarcasm. Sentimentality, on the other hand, is Justice Harry Blackmun's specialty: "Poor Joshua!" he exclaimed in a dissent from a 1989 ruling that went against a child-beating victim.

Only Justice John Paul Stevens, at age 73 the court's second-oldest member, regularly composes his own first drafts of opinions. His approach couldn't be called old-fashioned, though. A tennis fanatic, he often writes his opinions on a word processor at his Ft. Lauderdale, Fla., condo, and then faxes them to the court.

Justice Souter joined the court in 1990 also determined to do his own writing. His hero, Oliver Wendell Holmes, dispatched decisions in a pithy few pages. But Justice Souter immediately fell behind and now only occasionally takes up pen and yellow legal pad to compose an opinion from scratch.

In fairness, the court faces increasingly complex legal issues while juggling an ever-growing body of precedents and statutes. To research and help write the opinions, most justices employ four clerks for one-year terms. Owing to court secrecy, the public hears little of the clerks, who typically are recent law-school honors graduates.

Eager to prove their mettle, these young lawyers often produce Promethean recitations of court precedent, bundled together with relevant public documents -- wordy excerpts from congressional committee reports, for example.

Some critics contend that too often the justices edit too lightly, letting lengthy passages of clerk-speak slide into the official law books. "It's not just that it offends aesthetic sensibilities," says Bryan Garner, a Dallas legal lexicographer and writing consultant. "The words of the Supreme Court have a significance unlike almost any other words."

Justice Scalia, who argues that explorations of "legislative history" are usually contradictory and irrelevant to court decisions, tried to prove his point by presenting a healthy dose of the stuff in an opinion last March on tax breaks for soldiers. With frankness rarely found in high court pronouncements, he conceded that the material had actually been cobbled together by the "hapless law clerk to whom I assigned the task."

The process can create the illusion that the brainy clerks, not the justices, are deciding cases. Puffed-up former law clerks contribute to the false perception. Some court veterans tell the story of the time the late Justice Thurgood Marshall made only a single change in a clerk's draft. The first sentence read, "We took this case to consider . . ." Justice Marshall crossed out "consider," telling his clerk, "I take cases to decide them." (And he did make the ultimate decisions, even in his last frail years.)

Marshall crossed out "consider," telling his clerk, "I take cases to decide them." (And he did make the ultimate decisions, even in his last frail years.)

Among current justices, there is a spectrum of opinion-generating techniques. Justices Scalia and Souter edit and rewrite substantially. Justice Stevens, while writing his own opinions, does permit his clerks to handle footnotes. This results in some of the most arcane marginalia in lawyerdom. In a Stevens majority opinion last June upholding the tough U.S. policy on Haitian refugees, footnote No. 37 (out of 44) offered a 23-line meditation on the verb "return," and its French cousins.

Justices Blackmun, Sandra Day O'Connor and Clarence Thomas mainly edit. Justice Thomas, for example, got the headlines for his most controversial opinion: a fiery February 1992 dissent asserting that beating a prisoner isn't "cruel and unusual" punishment unless guards inflict a "serious" injury. But the person who actually wrote most of the dissent was Christopher Landau, then a 28-year-old Thomas law clerk.

This sort of ghostwriting has caused critics to whisper about Justice Thomas being a puppet of conservative clerks, who, in turn, are under the spell of Justice Scalia. But while Justice Thomas has shown a strong affinity for Justice Scalia's thinking, he calls his own shots.

In the prisoner-beating case, Justice Scalia actually thought the Thomas dissent was too extreme, but reluctantly signed it anyway to try to shield his then-rookie ally from criticism. (Mr. Landau declines comment.)

Chief Justice Rehnquist gives his clerks only 10 days to submit drafts, then pares them to a minimum. Unpretentious about his august role, the chief has said that he does some of his best thinking while shaving in the morning. He rewrites by dictation, producing opinions that are short if sometimes cryptic.

The newest justice, Ruth Bader Ginsburg, is expected to fit somewhere in the middle of all this. While serving as a Washington federal appeals court judge, she said of her clerks: "I encourage their comments and attempts to influence or change my mind."

Justice Blackmun breakfasts with his clerks in the high court's public cafeteria, but when it comes to business, he communicates almost entirely on paper. Like his clerks' memos, which run to 60 single-spaced pages -- "We're showing how smart we are," admits one Blackmun alumna -- Blackmun opinions tend to sprawl a bit.

The court's oldest member, 84-year-old Justice Blackmun is the only justice who double-checks by hand every citation and quotation in his opinions. In 1990, his clerks pointed out that a new computer program could do the drudge work automatically. He just "shook his head and walked away," says a former clerk who was there.

JUSTICES FOLLOW A MOSTLY CONSERVATIVE COURSE
Kennedy Assuming Pivotal Role on a Supreme Court That Continues to Redefine Itself

The Washington Post
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Joan Biskupic, Washington Post Staff Writer

Lawyers arguing cases in the Supreme Court's grand, marble-columned courtroom last term were drawn to the right side of the bench, where the most vocal justices, Ruth Bader Ginsburg, Antonin Scalia and David H. Souter, sat together.

But the critical vote came from the other side.

As the court term ended last week, it was clear that Anthony M. Kennedy, a Ronald Reagan appointee, was decisive in the closest, most controversial cases. His vote kept the court on a mostly conservative track, culminating in a 5 to 4 opinion giving new constitutional protection to property owners in the face of government regulation on development of their land. The majority said property ownership should be as protected as free speech and family privacy.

Meanwhile, Ginsburg, President Clinton's appointee and the first Democratic justice in 26 years, positioned herself only slightly to the ideological left of center of the court.

Souter, President George Bush's 1990 appointee, voted more with the court's liberal wing (Harry A. Blackmun and John Paul Stevens) than did Ginsburg. Each year Souter separates himself more from Chief Justice William H. Rehnquist and increasingly has taken on the intellectual powerhouse of the right wing, Scalia. Last week, Souter scoffed at a Scalia opinion, calling it "the work of a gladiator, but he thrusts at lions of his own imagining."

This term also will be remembered as Blackmun's last. The 85-year-old justice, the court's liberal pole, was in the majority least this term. He managed to pull out a final victory (with Kennedy's vote) on the last day to ensure that federal judges can stop the execution of a state prisoner so the inmate can get help filing an appeal. Earlier this year, Blackmun denounced capital punishment, saying he no longer would "tinker with the machinery of death."

In a number of key cases, Blackmun, Stevens, Souter and Ginsburg joined together. But except when they picked up fifth-vote Kennedy, they were relegated to the dissent.

Kennedy broke with conservatives to rule that criminal suspects must be given a hearing before U.S. marshals can seize their property. "Although Congress designed the drug forfeiture statute to be a powerful instrument of the drug laws," Kennedy wrote, "it did not intend to deprive innocent owners of their property."

Kennedy also was the fifth vote to strike down a state tax on marijuana when levied against people already convicted of drug crimes. The court said that violated the constitutional guarantee against double jeopardy.

Yet Kennedy, a pragmatist who goes case-by-case, was more likely to give conservatives the win, as when he ruled that lawyers and accountants who may have aided in securities fraud cannot be sued by investors. Rejecting decades of lower court rulings to the contrary, Kennedy said Congress did not clearly write such liability into law.

All told, the ideological spectrum of the 1993-94 court appeared this way: from conservative to liberal, Scalia, Clarence Thomas, Rehnquist, Sandra Day O'Connor, Kennedy, Ginsburg, Souter, Stevens and Blackmun.

"It's nice to see the dance cards shifting a little," University of Chicago law professor Michael W. McConnell said of the justices' alliances. "I think this is better than [in the late 1980s] when you had a well-defined conservative bloc and a well-defined liberal bloc" at loggerheads.

Generally speaking, a "conservative" justice believes that the courts should not become involved in social problems that are the domain of elected legislators. Conservatism also suggests a tendency toward social conservatism, such as support for the death penalty and opposition to abortion. Judicial "liberals" go the opposite way and are more apt to

broadly interpret the Constitution irrespective of the will of legislatures.

The current court defies real labeling because it keeps changing. Kennedy came on the bench in 1988, Souter in 1990, Thomas in 1991 and Ginsburg in 1993. A single new justice alters the dynamic among all the justices, changing the tug-and-pull on difficult issues.

Stephen G. Breyer, the federal appellate judge whom Clinton has nominated to replace Blackmun, is himself a pragmatic centrist. His confirmation hearings begin July 12.

Harvard law professor Laurence H. Tribe, who says the court is in "disarray," predicts that Breyer would be a steady hand and voice of clarity. Tribe, a longtime friend and colleague of Breyer, said the former professor and Judiciary Committee counsel would be able to build a clearer consensus among the justices. Breyer has a reputation for being able to get to the heart of a dispute, no matter how complex, and bring people at the extremes together.

What that will do for the direction of the law is uncertain. Breyer's opinions during the past 14 years as a federal appellate judge in Boston emphasize rules and balancing tests rather than ideology.

Not everyone can crowd in the center, and the combination of a Breyer appointment and more tenure for Souter and Ginsburg could bring new definition to the liberal side. Stevens will be the most senior of the liberal-leaning justices, but his legal reasoning is often idiosyncratic.

For the just-completed term, a lack of an overarching court philosophy, combined with the court's general inclination to hear fewer cases (the fewest in three decades), led to few groundbreaking rulings. The justices handed down 84 signed opinions; by comparison, in the 1980s, the court averaged 140 opinions each term.

The court, expanding on prohibitions against race discrimination in jury selection, ruled for the first time that lawyers could not eliminate people from a jury pool based on their sex and stereotypes about how men and women decide cases.

In an affirmation of separation between church and state, the court said that the New York legislature went too far beyond the "neutrality" that government must show religion when it created a special school district for the disabled children of an Orthodox Jewish village.

The high court also said, with consequences for the "Information Superhighway," that cable television operators and other wire-based electronic communications are entitled to more free speech protection than television and radio broadcasters, who operate on scarce airwaves. Also of interest to business, the court ruled that judges must be able to reduce excessive jury awards in personal injury cases and said a major anti-job-discrimination law did not apply to cases that were pending before the law was adopted in November 1991.

But it ruled unanimously that a worker who claims she was sexually harassed need not show psychological injury to win her case. The court defined unlawful harassment as creating a work environment that a reasonable person would find hostile or abusive. In that early case, Ginsburg showed that she would be as blunt in opinions as she was on the bench: "The critical issue," she said in a concurring statement, "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Big winners this term were Mark Russell, the Capitol Steps and others who make their living by setting political criticism to well-known melodies. In a case involving a 2 Live Crew rap version of the rock hit, "Oh, Pretty Woman," the court said parody can be exempted from copyright law.

One of the more high-profile losers was Sen. Arlen Specter (R-Pa.), who has been crusading to keep open the 193-year-old Naval Shipyard in Philadelphia. The justices were unanimous in ruling that courts may not intervene in the politically sensitive process by which the president and a special commission have decided which unnecessary bases to close.

In a brief exchange of remarks between Rehnquist and Blackmun last Thursday, Blackmun's last day on the bench, the retiring justice noted the "weight" that this one "small organization" carries.

"Let us hope that, in the years far down the line, when history eventually places us in such perspective as we deserve, it at least will be able to say: 'They did their best and did acceptably well.'"

EMERGING AS THE LIBERAL LEADER
The Call's in Souter's Court

The Record
July 4, 1994; Monday; All Editions

David G. Savage, Special from the Los Angeles Times

Supreme Court Justice David H. Souter, nearing the end of his court opinion that struck down a New York law carving out a separate school district for the Hasidic sect of Judaism, paused to reply to a ferocious dissent filed by his more conservative colleague, Antonin Scalia.

"Justice Cardozo once cast the dissenter as the gladiator making a last stand against the lions. Justice Scalia's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining," Souter said dryly.

It may be hard to imagine the soft-spoken New Hampshire jurist as a lion-tamer, but perhaps the most significant trend in the court term that ended last week was Souter's rise to challenge the hard-charging conservatives on his right and his success in pushing them aside in most of the key cases.

The result was a court increasingly likely to fashion moderate-to-liberal rulings, with Souter quietly emerging as its new leader.

Lawyers on both sides of the ideological spectrum point to Souter as a growing force, a surprise for a little-known judge who was derided as the "stealth candidate" when President George Bush selected him in 1990.

"Souter is emerging as the liberal leader in the post-Blackmun era," said Clint Bolick, counsel to the conservative Institute of Justice.

"His stature, competence, and confidence seem to grow from term to term. He is becoming a real leader," said Steven R. Shapiro, national legal director for the American Civil Liberties Union. Thanks in large part to Souter, the just-completed term was a "surprisingly successful" one for civil liberties, Shapiro said.

In the term that ended Thursday, the justices interpreted the Constitution to say that religious groups may not be given political power, that potential jurors may be not be excluded because of their gender, that the government cannot seize a home in a drug case without a hearing, that cities cannot bar a homeowner's display of a protest sign, and that prison officials can be forced to pay damages if they deliberately ignore a clear risk to the health of their inmates.

In cases involving federal laws, the justices made it easier for victims of sexual harassment to win damages from their employers, said abortion protesters who use violence can be sued under the anti-racketeering law, and ruled that the Civil Rights Act of 1991 does not apply to cases that were pending before it was enacted.

For conservatives, the biggest victories came in the area of property rights. The Constitution does not allow officials to demand a piece of property in exchange for a building permit, the court said on a 5-4 vote, unless they can prove this exaction is closely linked to the burden imposed by the expanded development. In addition, the court insisted that state judges examine a jury's punitive damage verdict to make sure the amount is not excessive.

Souter's growing strength may be especially important as the court undergoes transition. Thursday marked the last day for 85-year-old Justice Harry A. Blackmun, who retired after 24 years on the high court.

If all goes as expected, he will be replaced in October by President Clinton's second nominee, Judge Stephen Breyer of Boston. In May, White House counsel Lloyd Cutler boasted that Breyer had the experience and skill to be a coalition-builder on the high court. But privately, some administration attorneys admit that Souter is likely to be a stronger, more effective voice on behalf of civil rights and individual liberties.

In her first term, Justice Ruth Bader Ginsburg followed a moderate-to-liberal approach similar to Souter's. With Breyer and veteran John Paul Stevens, the four could form a solid coalition.

Just a few years ago, it looked as though the rapid succession of new conservative appointees could push the law sharply to the right.

Presidents Reagan and Bush said they wanted to see the court reject the right to abortion, permit prayer in schools, and cut back on the rights of criminal defendants. In William H. Rehnquist, they had a chief justice committed to those goals.

But several Reagan-Bush appointees have disappointed conservatives, Souter in particular and Anthony M. Kennedy to some degree. In June 1992, they stunned their conservative colleagues by joining with Justice Sandra Day O'Connor to strongly reaffirm the Roe vs. Wade ruling and to strike down a public school graduation prayer which was led by a cleric.

Since then, the court has steered a mostly centrist course, if anything moving slightly left. More often than not, the strict conservatives, Scalia, Rehnquist, and Clarence Thomas, find themselves in dissent.

There are no sound bites in a typical Souter opinion. He can be a turgid writer, and sometimes both sides claim victory after reading his decision.

But his careful approach also draws the support and respect of his fellow justices.

At 55, Souter is just coming into his prime years on the Supreme Court. But already, he has proven to be far more than first advertised.

Said Carter Phillips, a Washington attorney who practices before the court: "This was a guy who came in as an unknown from nowhere. But ultimately, I think he will prove to be the most important one up there."

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SOUTER'S DECISIONS SHOW LIBERAL TREND
Bush Appointee Dismays Conservatives

The Washington Times
July 4, 1994, Monday, Final Edition

Nancy E. Roman; The Washington Times

The Supreme Court term that just ended, which produced 82 opinions, revealed a liberal streak in Justice David Souter.

Justice Souter wrote the majority opinion striking down a special school district created for disabled Hasidic Jews, holding the line on separation of church and state.

And he voted with the five-justice majority that overturned the death sentence of a confessed murderer-rapist on the grounds that the jury did not have full sentencing information. Jurors were not told he could be sentenced to life in prison without parole.

Bruce Shapiro, head of Supreme Court Watch, a civil rights watchdog group, praised Justice Souter's role in making it easier to review death sentences. "A development that is not a surprise, but that is historically important, is Souter's emergence as a voice in civil rights."

Thomas Jipping, director for the Center of Law and Democracy at the Free Congress Foundation, said conservatives are dismayed at the record of the George Bush appointee.

"John Sununu told me directly that Souter would be a 'home run for conservatives,' " Mr. Jipping recalled. "The first term, I thought he might be a blooper single. After last year I thought he was a foul ball. Now I think he's a strikeout." He said Justice Souter often joins Justices Harry A. Blackmun, John Paul Stevens and Ruth Bader Ginsburg in dissenting. Last week he dissented from a major victory for property rights advocates.

The court ruled 5-4 that government may not make building permits contingent upon property improvements unless it shows a direct link between the two. They sided with an Oregon woman who was required to build a bike path and to donate property for a public greenway in order to expand her plumbing store.

Justice Stevens wrote a dissent joined by Justices Blackmun and Ginsburg. Justice Souter dissented separately, saying "the common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion."

In the 1992 term he upheld a fundamental right to abortion. His 1993 decisions showed that he:

* Is uncomfortable with the death penalty and ready to overturn it on almost any procedural grounds.

* Favors the use of an anti-discrimination law to sue abortion-clinic blockaders in federal court.

* Is against state provision of a sign-language interpreter for a deaf student who elected to attend Catholic school.

* Espouses congressional districts designed to elect blacks to Congress. The majority said such oddly shaped districts drawn solely on the basis of race were unconstitutional. But Justice Souter was among four dissenters who said the creation of such districts was permissible to remedy violations of the Voting Rights Act of 1965.

On Thursday, Justice Souter dissented in a voting rights case in Georgia. The court ruled, 5-4, that black voters could not challenge a single-commissioner government under the Voting Rights Act, even though they made up 20 percent of the voting population but never elected a black commissioner.

Once again, the dissenters were Justices Souter, Ginsburg, Blackmun and Stevens.

Constitutional scholar Bruce Fein said Justice Souter most resembles Justice Ginsburg in both style and substance.

"Souter clearly falls into the liberal liturgy of the court," he said. "He's not quite as extravagant as Harry Blackmun - he's like Ginsburg."

Justice Ginsburg, who served her first term on the court this year after being appointed by President Clinton, generally takes a liberal view of the Constitution but joins with conservatives in chiding Congress for drafting sloppy laws.

History has shown that justices often disappoint the presidents who put them on the court. For example, Justice Blackmun, the court's most noted liberal and the author of Roe vs. Wade, was appointed by President Nixon. Justice Byron White, who often joined the court's conservatives, was appointed by President Kennedy.

Mr. Jipping said Justice Souter's alliance with Justices Blackmun, Stevens and Ginsburg creates a liberal bloc only one vote short of a majority.

However, that may change as Justice Blackmun steps down and Stephen Breyer joins the court.

Judge Breyer, expected to win easy confirmation this month, is conservative on economic issues and might side with the five-justice majority in cases that ask when government regulation or requirements constitute a "taking" of property under the Fifth Amendment.

It remains to be seen where he stands on the Establishment Clause, the death penalty and homosexual rights - key areas that come before the court.

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THOMAS
The High Court's Contrarian

USA Today
June 27, 1994, Monday, Final Edition

Tony Mauro

Show Supreme Court Justice Clarence Thomas the expected path, and he'll walk the other way.

Tell him justices should steer clear of controversial figures, and Thomas will host conservative talk show host Rush Limbaugh's wedding, as he did last month.

Tell him he'd be wise to cozy up to the media establishment, and Thomas will state, as he did to a book author recently, that The Washington Post and The New York Times "can say absolutely anything they want about me. I will never read them again to see it."

Tell him to take up the late Thurgood Marshall's liberal mantle, and he'll speak out against prisoners' rights, as he did in a ruling just three weeks ago. Brutality in prisons, he shrugged, is inevitable: "Prisons are necessarily dangerous places."

It has been nearly three years since Thomas, 46, burst onto the national scene with confirmation hearings that featured sensational sexual harassment charges by former employee Anita Hill.

Since then, Thomas has stayed largely out of the public eye. He almost never speaks from the bench. He sometimes goes weeks without seeing another justice. And, after work he almost always retreats to his suburban home with his wife and best friend, Virginia Lamp Thomas.

But in rare public sightings - often before conservative groups that supported him - Thomas has charted a distinctive course, like no other justice in recent memory.

Some say his solitary journey is a thumb-in-your-eye campaign to avenge the confirmation ordeal he faced at age 43. That theory is fueled by a comment he has made more than once: "The next 43 years will be my answer to what happened."

The Rev. Jesse Jackson criticized Thomas' hosting of Limbaugh's wedding as "a contemptuous, in-your-face political act, quite improper in the political sense."

Jackson also said Thomas' rulings have been "quite blatant in their contempt for our progress, even though he's been a prime beneficiary of the civil rights struggle."

But others see Thomas' path in less confrontational terms. He is a private man, friends say, who was overwhelmed by sudden notoriety, and still is regaining his composure.

Hosting and presiding at Limbaugh's wedding, they say, is a symbol of Thomas' loyalty, not his politics. Limbaugh supported him early and often in the face of Hill's charges, and they became close.

"With Justice Thomas, friendships are unconditional," says longtime friend Armstrong Williams, publisher of The Right Side newsletter and a radio talk-show host. "You tell him you need him and he'll be there."

But more than loyalty is at work in Thomas' approach to life and work.

In many of his public talks, Thomas conveys a view of the world borrowed from the Catholic seminaries he attended for four years: Life is a test, a burden, full of obligations and trials that must be dealt with alone.

"The dirty little secret of freedom is that you are on your own," he told an Ohio university audience in April. "It certainly is more attractive to expect nothing from a person and never hold him accountable. But nature is far more exacting than that."

He also tells of his grandfather's admonition: "If you make your bed hard, you lay in it hard." Thomas says he never quite understood what that meant literally, but the message was clear: Don't blame anyone else for the messes you find yourself in.

That doesn't mean Thomas holds himself responsible for the Anita Hill debacle. He still views that as the modern equivalent of a lynching.

But it does mean that in putting the Hill episode behind him, Thomas seeks neither forgiveness nor approval from Washington's elite.

"When we demand something from our oppressors - more lenient standards of conduct, for example - are we going from a state of slavery to a more deceptive, but equally destructive state of dependency?" Thomas told a Federalist Society audience last month.

"Learning the lessons that we must learn cannot forever be avoided by sweeping our difficulties under the rug of societal blame," Thomas said at Mercer University last year.

In that world view, minorities deserve no special favors, and no one - not pregnant women, not death row inmates - deserves a whit more protection from the Constitution than it explicitly gives.

Only once has Thomas expressed regret that, in his view, the Constitution sharply limits his ability as a judge to right the wrongs of society.

In the Ohio speech in April, he said his votes often run counter to his own sympathies. "It tears at you. It's like watching someone drown."

That regret comes as a surprise to some court-watchers, who cite the unsympathetic tone in his opinions.

Two years ago, Thomas declared in a dissent that when guards beat a prisoner, they are not violating the constitutional ban on "cruel and unusual punishment" because "judges or juries - but not jailers - impose 'punishment.' "

That dissent and others earned Thomas widespread criticism. Emerge magazine depicted him as a "handkerchief head" - a derisive term to describe subservient blacks.

None of that has silenced Thomas: Earlier this month, he went out of his way in another prison case to repeat his views on punishment.

Thomas votes almost all the time with conservative Justice Antonin Scalia - a higher affinity than any two other justices, a Howard University Law Review study found.

But it still is difficult to gauge his views on some major legal issues. The opinions Thomas has been assigned to write, mainly by the chief justice, have usually been technical, exploring the far corners of bankruptcy, commercial law or the like.

That could change this week.

Before the court adjourns for the summer, it is expected to hand down a half-dozen or more decisions with headline-making potential, and Thomas could author some.

And Clarence Thomas may be loosening up. He is just now beginning to laugh at himself in public, joking about his efforts to keep his weight down, and telling audiences what his brother told him when he first became a judge: "They finally figured out a way to shut you up."

Within the marble walls of the court, Thomas is friendly and accessible to court employees, especially his law clerks.

In fact, Thomas already has started an annual tradition - and a contrary one at that.

When the clerks of other justices hold yearly reunions, some are fairly formal, even black-tie affairs.

When Thomas' current clerks get together in September, it is expected to take the same form as last year's: a cookout in Thomas' backyard.

INDEPENDENT SPIRIT
Justice Ginsburg Steers Middle Course in 1st Year

NEWSDAY

July 5, 1994 Tuesday, City Edition

By Timothy M. Phelps, Washington Bureau

Justice Ruth Bader Ginsburg did something in her first year at the Supreme Court that no other justice in history has ever done.

She moved upstairs.

Ginsburg, who has sometimes been accused of being intellectually and personally aloof, turned up her nose at the small chambers being vacated by Justice Clarence Thomas on the marble-lined first-floor hallway, traditionally occupied by the junior justice.

Instead, Ginsburg moved into modest but more spacious chambers for retired justices upstairs, a flight away from her eight colleagues. The 61-year-old, New York-born jurist displayed the same kind of independence in her rulings, which were neither as liberal as White House officials expected nor as conservative as many liberals had feared.

Shortly after Ginsburg was confirmed, 96-3, by the Senate, a White House official bragged of having put one over on conservatives. He predicted Ginsburg would be more liberal than Justice Harry Blackmun. But in the term that just ended, Ginsburg was almost as likely to vote to the right of Blackmun as to vote with him on cases that had a discernible liberal-conservative divide. In fact, in 54 of the 84 cases decided during the term, some of which had no clear ideological bent, she voted with the court's most conservative member, Thomas.

Although Ginsburg's place in the dead center on a generally conservative court may have surprised some in the White House, liberals concerned that she would ally herself more with conservatives are so far breathing a sigh of relief. "She has been somewhat more liberal than some of us feared," said Herman Schwartz, a law professor at American University in Washington. But Schwartz said Ginsburg has yet to be tested on some key issues, such as state regulation of abortion rights.

The court in the term just past managed to please civil libertarians as well as pro-business conservatives while deciding fewer cases than any court in 40 years. But the expected replacement of Blackmun with a somewhat more conservative Stephen Breyer could mean different results in the term that begins in October. Breyer's confirmation hearings begin Tuesday.

Ginsburg voted the liberal side of several key issues. In perhaps the court's most important ruling, she voted with Blackmun, John Paul Stevens and David Souter against a majority decision granting broad new rights to property owners against zoning or environmental regulations that require them to give up land or money.

The court said property rights will be accorded the same deference as any other fundamental liberty protected in the Constitution, a pronouncement that the dissenters said could lead to a wholesale redefinition of government's right to regulate the economy.

She took a strong stand against mixing church and state, joining a concurring opinion by Stevens likening New York's creation of a special school district allowing Hasidic Jews to run their own public school in Kiryas Joel, N.Y., to government-backed "segregation." The court ruled 6-3 that the special district was unconstitutional.

But in other areas, conservatives were more likely to be pleased with Ginsburg's record. She voted against organized labor in two important decisions, one saying that government employers can under some circumstances fire employees simply for expressing opinions, and another reversing a 50-year-old Department of Labor rule that gave longshoremen and mineworkers the benefit of doubt in disability cases. But she voted on the other side in two other labor cases, dissenting from decisions that staff nurses are supervisors under the labor laws and that railroad employees could not collect damages for negligent infliction of emotional distress.

In civil rights, Ginsburg's voting was also mixed, despite her history of crusading for the legal rights of women. She voted with the majority against a requirement that Florida maximize the number of seats for Latinos in the state Legislature, but

dissented when the court ruled that a Georgia county's single (and always white) commissioner form of government was legal.

She signed the court's unanimous decision making it easier for women to sue their employers for sexual harassment, but she agreed with the majority that the 1991 Civil Rights Act protecting women and minorities should not be applied retroactively. She was in the majority that ruled that people could not be kept off a jury just because of their gender.

Ginsburg disappointed those liberals who had predicted she would oppose capital punishment. For example, she voted to uphold the California death penalty and to affirm the death sentences. But she joined in a broad ruling by the court that said condemned prisoners have a right to a stay of execution and a lawyer while they appeal their state convictions in federal court.

In other criminal cases Ginsburg was very difficult to predict, voting as often with the prosecution as with defendants.

In several major cases this term, liberals and conservatives united to produce unanimous decisions. All the justices agreed that a suburb of St. Louis had violated the First Amendment right of free speech when it prohibited signs in residential neighborhoods. They also united to hold that abortion clinics could sue Operation Rescue and other anti-abortion groups using obstructionist tactics for damages under the racketeering laws.

Ginsburg now is faced with another precedent-setting decision during the court's three-month summer recess. Will she move back downstairs to occupy the spacious chambers of the retiring Blackmun, a prime location overlooking the Capitol?

Or will she continue to work one level above her colleagues?

A GENTLER COURT CONFIRMATION PROCESS EMERGES
Low-Key Hearings for Clinton Nominees Could Change Public Attitudes, Scholars Suggest

The Washington Post
July 18, 1994, Monday, Final Edition

Joan Biskupic, Washington Post Staff Writer

It was Stephen G. Breyer at the witness table last week, portraying himself as a judicial pragmatist and offering occasional bits of whimsy.

But also under the lights was a new kind of Supreme Court confirmation process. One that has become depoliticized, or rather, pre-politicized.

President Clinton made sure before he announced a successor to retiring Justice Harry A. Blackmun that he had a nominee who was competent, noncontroversial, and -- in case trouble arose -- practically pre-approved. Breyer was the consensus candidate of the White House and Senate Judiciary Committee. (When the flap over Breyer's Lloyd's of London investments came up, it was in the committee's interest, too, for its former chief counsel to successfully defend himself.)

It wasn't just that Clinton had greased the skids. His choice of a mild-mannered moderate virtually precluded the sort of showdown that presidents since Lyndon B. Johnson have had over at least one nomination.

Ronald Reagan sought to remake the court, and when he chose Robert H. Bork in 1987, for example, he was primed for a confrontation with liberals. Clinton, conversely, doesn't view the court as an engine of social change and is spending his political capital on other battles.

The result of Clinton's approach was a low-key confirmation hearing that departed radically from the controversial hearings for Bork, who was defeated, and Clarence Thomas, a George Bush nominee who prevailed after a circus-like airing of sexual harassment charges. Last week, there was half the media, few lobbying groups and little national interest.

And Clinton is likely to go two for two on Supreme Court nominations. His first appointee, Ruth Bader Ginsburg, sailed through last year. A committee vote on Breyer, a federal appeals judge, is expected this week.

Some scholars suggest that the loss of spectacle might mean more public confidence in the nomination process and increased regard for the court.

"We, the people of America, care deeply about the court's results, its output," said Yale University law professor Stephen L. Carter, "but we focus on the nominations, the input."

Carter, who has written a book about the nomination process, said Friday that "a series of placid confirmations" might raise people's understanding of the real work of the court. He has written that strategy has become more important than issues in confirmation hearings.

In a briefing with reporters before the hearings began, Vice President Gore said the White House is ending "the days in which Supreme Court nominees were used as wedges to divide the country and to promote political agendas." While GOP presidents said they were merely seeking to undo what liberal justices had wrought, the Clinton White House did not choose Breyer or Ginsburg, both moderates, to steer the court dramatically in any direction.

Breyer's replacement of Blackmun, now the most liberal justice, might actually move the court a bit to the ideological right.

"It says something about the relative differences in how Republicans and Democrats" view the court, said Harvard University law professor Laurence H. Tribe. "It was important to the Reagan Revolution that efforts be made to capture the court," he said, referring to Reagan's desire to appoint conservatives who opposed abortion and affirmative action and wanted prayer in the public schools.

"Judicial revolution" will not drive the Democratic health care and welfare reform priorities, Tribe said. He added that if health care or welfare legislation ends up being challenged before the court, Clinton will be best served by jurists who, like Breyer, believe in great deference to Congress.

Breyer presented himself over three days of hearings as a man with no judicial agenda. Asked about the hot issues of the day, he took refuge in decided cases, telling senators what the law was, not whether he wanted it otherwise.

He appeared to endorse abortion rights and support capital punishment. He took a generous view toward affirmative action and repeatedly talked about America's melting pot of religions and the need to keep government neutral toward all.

The Constitution, he repeated often, is "a document ... guaranteeing people rights that will enable them to lead lives of dignity." In one of his most enthusiastic moments, Breyer called the Constitution "a miracle."

He occasionally digressed to show that despite his Stanford-Oxford-Harvard background he is a regular guy. When Sen. Strom Thurmond (R-S.C.) asked about professional baseball's antitrust exemption, Breyer first answered: "I've always thought baseball was special ever since my grandfather used to take me to [a] stadium where we'd pay 50 cents for the bleachers or $ 2.50 for a box seat." (The antitrust rules are Congress's domain, Breyer said.)

The stickiest moments concerned Breyer's rulings on toxic waste cases that might have financially benefited his Lloyd's of London insurance syndicate. But he convinced senators that he could not have known of any connections between his rulings in pollution cases and the liability of the syndicate, which underwrote insurance for corporations facing pollution cleanup costs. Breyer's chief benefactor on the committee, Sen. Edward M. Kennedy (D-Mass.), hailed Breyer's integrity and kept senators from too harshly questioning the nominee.

In the end, Chairman Joseph R. Biden Jr. (D-Del.) said he was starting to have "fun" again at confirmation hearings. Ranking Republican Orrin G. Hatch (Utah) complimented fellow senators for their "sincerity and dedication."

PORTRAIT OF A PRAGMATIST
Confirmation Hearing for Breyer Elicits His Emphasis on Rulings' Lasting Effects

The New York Times
July 14, 1994, Thursday, Late Edition - Final

Linda Greenhouse, Special to The New York Times

From his 13 years on a Federal appeals court, it is apparent that Stephen G. Breyer is a judge of moderate leanings, a self-described pragmatist interested more in solutions than in theories. Judge Breyer has said nothing to dislodge that image during two days of testimony before the Senate Judiciary Committee. To that extent, his Supreme Court confirmation hearing has produced little news.

What the hearing has accomplished, through the nominee's responses to the friendly, open-ended questions of admiring senators, is to construct a portrait of what it means to be a judicial pragmatist.

It is a label open to easy caricature as an ad hoc, small-bore, Mr. Fix-It of the law -- the passionless technocrat, as Judge Breyer has himself been caricatured at times.

But he has made clear during the hearing that his form of pragmatism encompasses not only a case-by-case approach to solving particular legal problems but also a coherent vision of constitutional and statutory interpretation, about which he has spoken with considerable eloquence and even a hint of passion.

At the heart of his approach is a view of the Constitution as a "practical document" to be understood not solely in light of its history but in terms of "what life is like at the present," as Judge Breyer explained today. Discussing how to interpret the constitutional concept of liberty, he said, "One tries to use a bit of understanding as to what a holding one way or the other will mean for the future."

"Law is not theoretical," he said at one point. And at another: "Beware of fixed rules" that look appealing on the surface but that can be a trap rather than an aid for judges.

The dimensions of Judge Breyer's judicial philosophy are important given the nature of the Court he is about to join. The Supreme Court today often appears miscast as the theater of a conventional liberal-versus-conservative drama; with the retirement of Justice Harry A. Blackmun, whom Judge Breyer has been named to succeed, there is no old-fashioned liberal remaining.

Rather, the fault line that often seems to matter most on the Court today is the line that separates the formalists who are drawn to rules and categories, exemplified by Justice Antonin Scalia, from Justices like John Paul Stevens who consider themselves free -- or even bound -- to consider the practical effect of their rulings.

Some of the major debates on the Court are conducted along this fault line. Judge Breyer and Justice Scalia, friendly sparring partners in many a legal forum who have agreed to disagree on the question, have conducted several witty but nonetheless serious public debates on one of the most disputed subjects: how to interpret statutes.

Law's Language, and Purpose

Justice Scalia, whose scorn for Congress is often evident, believes in holding Congress to the language it enacts into law, without recourse to context or legislative history that could shed light on the meaning of obtuse or inconsistent provisions.

By contrast, Judge Breyer, who as chief counsel of the Senate Judiciary Committee drafted statutes before he assumed the job of interpreting them, believes strongly in using any materials at hand to try to figure out what Congress wanted to achieve, and to interpret the law in a way that harmonizes with its underlying purpose.

"I do think that laws are supposed to, when fitted together, work according to their purposes," he said today. "I don't think a court can know whether an interpretation is correct until it understands both the purpose and how the interpretation is likely, in light of that purpose, to work out in the world. In the actual world."

In the constitutional arena, one of the most important debates on the Court is how to interpret the 14th Amendment's due process guarantee in deciding what protections a Government owes its

citizens. In Justice Scalia's view, the due process clause must be interpreted in light of the most specific level of protection that history and tradition have treated as appropriate.

For example, in a case several years ago Justice Scalia considered an unwed father's constitutional claim to continued contact with his daughter and rejected it on the ground that an "adulterous natural father," as Justice Scalia put it, had no historically protected legal interests. He dismissed the argument of Justice William J. Brennan Jr., who has since retired, that the inquiry should be at the more general level of whether "parenthood" itself has traditionally enjoyed legal protection.

'A Heart and a Head'

Although Judge Breyer has not addressed himself to any specific case during his confirmation hearing, it is abundantly clear that he rejects Justice Scalia's method. Speaking generally today, he said that while knowledge of the past is valuable, so is knowledge of what a legal opinion will mean for the present and the future.

"Law requires both a heart and a head," he said. "If you don't have a heart, it becomes a sterile set of rules removed from human problems, and it won't help. If you don't have a head, there's the risk that in trying to decide a particular person's problem in a case that may look fine for that person, you cause trouble for a lot of other people, making their lives yet worse."

"It's a question of balance," he concluded.

His avoidance of any single approach to legal interpretation places Judge Breyer squarely within the tradition of legal pragmatism that, on the Supreme Court, has included Justices like Oliver Wendell Holmes and Benjamin N. Cardozo. He has paid homage to Holmes throughout the hearing, beginning with his opening statement, in which he said that "everything in the law is related to every other thing, and always, as Holmes pointed out, that whole law reflects not so much logic as history and experience."

A 'Relentless Optimist'

Despite his evident sophistication about the ways of Washington, Judge Breyer has displayed a marked absence of cynicism. "He really thinks you can usually harmonize the legal constraints with what makes good sense," Paul Gewirtz, a Yale Law School professor, said today.

Professor Gewirtz, who serves as director of a task force on racial and sex bias that Judge Breyer set up for his appeals court, said in an interview that such a goal "sounds modest until you realize how many people are uncomfortable talking about the general purposes of our legal institutions." Calling Judge Breyer a "relentless optimist," Professor Gewirtz said, "Always, at the end of the day, his question is, Is this an interpretation that makes sense?"

As the Supreme Court's junior Justice, Judge Breyer may not have much chance to use the management skills he has practiced as chief judge of his present court, the United States Court of Appeals for the First Circuit, in Boston. In the Justices' conferences, the junior member speaks last and often has no substantial role other than to be the designated note-taker.

But it is at least possible that he can lead by example, if not by official position, on the subject of how to minimize dissent and persuade Justices to sign one another's opinions.

"It is a question on our court of each judge listening to the other," he said today. He added that if there is an area of disagreement that is "so much more important to another person, you listen to the argument, and even if you say in the opinion, 'It might be argued that, but we reject that,' the other judge is much happier because the point of view is taken into account, and that tends to draw people together."

"When the different judges understand that their own ego is less at stake," he said, "you don't stick on every little minor thing."

BREYER GIVES VIEW OF HOW HE 'JUDGES'
Justice Requires 'Heart and a Head'

The Washington Post
July 14, 1994, Thursday, Final Edition

Joan Biskupic, Washington Post Staff Writer

Supreme Court nominee Stephen G. Breyer yesterday espoused views that would put him comfortably near the ideological center of the current court and offered senators a rare window into how he "judges."

During a second day of testimony before the Senate Judiciary Committee, a relaxed Breyer said judges should not always check their own beliefs at the courtroom door: "After all, if you think there's some terrible injustice, maybe there is."

Breyer continued to try to dispel the view of some critics that he is more interested in institutions than individuals. He said the law requires both a "heart and a head."

"If you don't have a heart," Breyer said, "it becomes a sterile set of rules removed from human problems, and it won't help. If you don't have a head, there's the risk that in trying to decide a particular person's problem ... you cause trouble for a lot of other people.... So it's a question of balance."

Overall, seven hours of testimony yesterday suggested that Breyer would align himself on the court with President Clinton's first nominee, Ruth Bader Ginsburg.

In a notable departure from the views of the more conservative court majority, Breyer said property rights should not get the same constitutional protections as speech rights and privacy interests. He distanced himself from a recent ruling in which the court strengthened constitutional protections for property owners.

The court ruled last month that the "takings clause" of the Constitution, which bars government taking of private property without just compensation, prohibited the increasingly common local government practice of requiring property owners seeking building and zoning permits to donate part of their land for community use. The court said that the "takings clause" should not be "relegated to the status of a poor relation" in comparison to individual rights such as free speech and privacy.

Breyer rejected that argument. He said that while the Constitution puts a high value on speech and privacy, it did not enact a "specific kind of economic theory" that could guide the nation over time.

Throughout yesterday's session, Clinton's nominee to succeed retiring Justice Harry A. Blackmun continued to face generally kid-glove treatment as the 14-year federal appeals court veteran gave the committee a seminar on judging.

He detailed his method for balancing constitutional dilemmas, explained that consensus is important because it leads to more understandable opinions and even got down to the nitty-gritty of decision writing.

He said he writes his at a computer. And he said he follows the advice of federal appeals Judge John Minor Wisdom: "If you want to write a purple passage because you feel so strongly, write it and don't use it, because people want your result and are not necessarily interested in your feelings."

Breyer also for the first time specifically answered senators' questions about a potential conflict of interest arising from his rulings in several toxic-waste cases and his relationship with a Lloyd's of London insurance syndicate. He said he now accepts the view of a University of Pennsylvania law professor who said it was "possibly imprudent" for a judge to have such an investment.

Although the hearings were reminiscent of law school classes, popular legal issues crept in. Sen. Herb Kohl (D-Wis.) asked whether Breyer thought the pretrial publicity in the O.J. Simpson murder case would prejudice potential members of a jury. He refused to answer specifically but said, "You're worried about the fairness of the trial, you're worried about the maintenance of a free press, and somehow the balancing of those things is terribly important and isn't necessarily just for judges."

Breyer also dodged a question from Sen. Hank Brown (R-Colo.) on whether presidents are immune under the Constitution from lawsuits for

actions not related to their official duties. The subtext was a pending lawsuit against Clinton alleging sexual harassment.

Through the gentle give-and-take, Breyer repeated his firm views about the separation of church and state and said that judges, when considering the fate of defendants, should be aware of how violent crime has gotten out of control. He nodded when Sen. Dianne Feinstein (D-Calif.) suggested courts should balance concern about defendants' rights with the threat of crime to the general public.

Today is expected to be Breyer's last before the committee. Outside witnesses for and against the nominee would testify Friday.

In response to questions from Sen. Arlen Specter (R-Pa.) about the social role of judges, Breyer said, "Everyone is against judges legislating" from the bench. "But how do you know whether what you are doing is improperly legislating, improperly putting in your own subjective views?" Breyer asked.

Breyer said that while a judge should look at the text of a law at the core of a dispute and earlier rulings interpreting it, the judge should also rely on his knowledge of history and present needs. "The present and past traditions of our people are important because they can show how past language reflecting past values ... apply in present circumstances," he said.

Breyer, who kept a pocket-size edition of the Constitution in front of him as he spoke, often cited -- as tools for judging the text of a law -- its history, legal precedent, the conditions of life in the past, the present and "a little bit of projection into the future."

When Clinton nominated Breyer, he emphasized his ability to build consensus among the justices. "Consensus is important," Breyer said yesterday to Sen. Howell T. Heflin (D-Ala.) "because ... eventually the labor union, the big business, small business, everyone else in the country has to understand how they are supposed to act or not act according to the law. And consensus helps produce the simplicity that will enable the law to be effective."

But Breyer refused to join Brown's view that the Supreme Court had gone too far in some of its church-state cases, "to the point," according to the senator, "of protecting people from religion, that is, restricting their ability to give a prayer at a commencement and so on."

Breyer said the court should be careful how much religion it allows in secular institutions.

Breyer on Tuesday endorsed current abortion rights rulings. Yesterday, answering Sen. Carol Moseley-Braun (D-Ill.), Breyer said the right to privacy stems from the constitutional guarantee of liberty. He said that the notion of liberty embodied in the 14th Amendment goes beyond rights specifically listed in the Constitution.

Staff researcher Ann O'Hanlon contributed to this report.

GROUP CONTENDS BREYER INVENTED PRIVACY RIGHT
Did Nominee Pave Way for Abortion?

The Legal Intelligencer
June 16, 1994, Thursday

Richard Carelli, Associated Press

AGAIN, ABORTION looms as an issue in a Supreme Court confirmation. This time it's Judge Stephen Breyer, accused by conservatives of helping invent the concept of a constitutional right of privacy that paved the way for legalized abortion nationwide.

But Harvard law professor Alan Dershowitz, a longtime Breyer friend, says the group's fact-finding is "just wrong."

The controversy, focusing on Breyer's year of service in 1964-65 as a law clerk for then-Supreme Court Justice Arthur Goldberg, likely will spark some questions when Breyer appears before the Senate Judiciary Committee beginning July 12.

LITTLE RESISTANCE

All signs point to no serious Senate resistance to Breyer becoming the nation's 108th high court justice. But questions about the right of privacy have played a part in all Supreme Court confirmations since the Senate rejected President Reagan's nomination of Robert H. Bork in 1987.

Angela "Bay" Buchanan, president of American Cause, the conservative group chaired by her brother, commentator and former presidential candidate Patrick Buchanan, said Breyer's performance as a law clerk 30 years ago indicates "he will legislate from the bench."

She noted historical references to Breyer's drafting of Goldberg's concurring opinion in a landmark 1965 decision in which the court struck down a Connecticut law that made it a crime to use contraceptives.

MARITAL PRIVACY

The then-liberal court ruled, in an opinion by Justice William O. Douglas, that the law wrongly interfered with marital privacy.

Never before had the high court recognized a personal right of privacy outside of the constitutional protection against unreasonable police searches.

The Constitution does not mention the word "privacy," but Douglas wrote: "Specific guarantees in the Bill of Rights have penumbras (shadows), formed by emanations from those guarantees that help give them life and substance. Various guarantees (in various amendments) create zones of privacy."

The Douglas opinion, viewed as a prime example of judicial activism, is often ridiculed by conservatives.

Justice Clarence Thomas, one of the high court's most conservative members, displays a sign in his chambers that declares: "Please don't emanate in the penumbras."

Goldberg agreed with Douglas in the 1965 case, but wrote separately to emphasize his view that the little-used Ninth Amendment is a source of personal privacy.

The amendment says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

NINTH AMENDMENT

Goldberg's opinion said marital privacy is "a personal right 'retained by the people' within the meaning of the Ninth Amendment."

The court relied on the 1965 decision in Griswold v. Connecticut eight years later when it ruled in Roe v. Wade that women have a constitutional right to abortion.

"Mr. Breyer is credited with drafting the . . . decision that created the so-called right to privacy," Bay Buchanan said. "For almost 200 years, the presence of this right in the Constitution had escaped the notice of Supreme Court justices -- until the young Mr. Breyer suddenly found it."

That's not the way it happened, Dershowitz said in an interview.

"Anyone who knew Goldberg knew he was a very opinionated guy," said Dershowitz, who clerked for the justice a year before Breyer.

"This is how Goldberg worked -- after a case was argued, he'd call both law clerks and the secretary into his office. He's say, 'This is how I'm going to decide this case,' and start dictating off the top of his head," Dershowitz said.

"We'd take notes like crazy because he would tell one of the clerks, 'I want you to draft an opinion saying that.' The Ninth Amendment was something Goldberg was talking about the year I clerked for him," Dershowitz said. "He would ask, 'Why doesn't anybody quote the Ninth Amendment?' He has a passion for it. It wasn't Steve's brainchild."

Dershowitz, a liberal, said he wishes Buchanan's view of Breyer were correct. "I hope she's right, but she's not," he said.

"Steve's not a liberal, but a pragmatist. The Buchanan statement is just wrong."

REHNQUIST NOMINATION

The last time a Supreme Court nominee's service as a Supreme Court clerk played any role in his confirmation was when liberal critics of then-Justice William H. Rehnquist opposed his 1986 elevation to chief justice.

They noted that as a law clerk for Justice Robert Jackson, Rehnquist in 1952 drafted an opinion that argued against racially integrating America's public schools.

In its landmark Brown v. Board of Education case decided in 1954, the court ruled unanimously that segregated education of white and black children was unconstitutional.

Rehnquist said later that the draft opinion did not reflect his views, but had been requested by Jackson.

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The Legal Intelligencer

PLAUDITS DROWN OUT CRITICS AS SENATE CONFIRMS BREYER

The New York Times
July 30, 1994, Saturday, Late Edition Final

By Linda Greenhouse, Special to The New York Times

The Senate today confirmed Judge Stephen G. Breyer as the nation's 108th Supreme Court Justice by a vote of 87 to 9.

The vote, which followed unanimous approval last week in the Senate Judiciary Committee, came after more than five hours of scripted debate on the Senate floor. With confirmation a foregone conclusion, senators took to the floor one at a time to state their views about the nominee to a largely empty chamber.

Praise for President Clinton's second Supreme Court nominee was bipartisan. Senator Edward M. Kennedy, the Massachusetts Democrat who was Judge Breyer's principal sponsor, said the California-born Boston judge would bring "a New Englander's common sense" to the Court as well as a "needed and practical perspective." Senator Alan K. Simpson, Republican of Wyoming, said Judge Breyer would be "a superb addition to the High Court."

Judge Breyer, who was named to succeed Justice Harry A. Blackmun, will probably be sworn in next week in a private ceremony either at the Court or at the White House. That will enable him to get to work on the Court's docket for the next term. The Court will hold a public investiture in late September, before the new term opens on Oct. 3.

9 Republicans in Opposition

The nine votes against confirmation came from Republicans, who cited various reasons for opposing it. Senator Richard G. Lugar of Indiana, who had emerged in the last week as Judge Breyer's leading critic, said the nominee had displayed "extraordinarily bad judgment" by investing in a Lloyd's of London insurance syndicate that has suffered heavy losses.

Senator Lugar said Judge Breyer was "trapped" in the investment, despite his stated desire to extricate himself, and was "unlikely to escape for a long time." Because the syndicate in which Judge Breyer invested has insured companies that are facing the possibility of legal action over pollution, Judge Breyer will have to recuse himself from "a long string of cases," Senator Lugar said. "Another candidate who has equal qualifications and is free of Judge Breyer's personal predicament should be nominated."

While the 55-year-old Judge Breyer has the qualifications for "significant public service," Senator Lugar said, his poor judgment means that he is not entitled to confirmation to a lifetime job that will place him "beyond re-evaluation" in the future.

Senator Howard M. Metzenbaum, the Ohio Democrat who was Judge Breyer's chief critic during the Judiciary Committee hearing, said he agreed with Senator Lugar but was nonetheless voting for confirmation "with serious reservations and a heavy heart." He said that because he had voted for Republican Supreme Court nominees, including Justice Antonin Scalia, he felt obliged this time to support President Clinton's choice.

'Man of Integrity,' Hatch Says

Other senators said the focus on Judge Breyer's investment was unfair, given the Judiciary Committee's determination that he had not improperly participated in any cases that might have affected his financial interests. "We cannot impose a standard that people cannot make bad investments," said Senator Orrin G. Hatch of Utah. "People do."

Senator Hatch, the ranking Republican on the Judiciary Committee, was a strong supporter of Judge Breyer, the committee's former chief counsel. "We know him," the Senator said. "He's a man of integrity, a man of exceptional legal ability."

The Republican senators who voted against confirmation, in addition to Senator Lugar, were Conrad Burns of Montana, Daniel R. Coats of Indiana, Paul Coverdell of Georgia, Jesse Helms of North Carolina, Trent Lott of Mississippi, Frank H. Murkowski of Alaska, Don Nickles of Oklahoma and Robert C. Smith of New Hampshire.

A number of these opponents are among the Senate's most conservative members. While some in addition to Senator Lugar mentioned the Lloyd's investment, the more important reason for their opposition appeared to be their objection to Judge Breyer's views.

"I just don't feel he's the right man," Senator Lott said. He said Judge Breyer lacked a commitment to "fundamental rights such as private property" and had presided over the design of a "lavish" new Federal courthouse in Boston, where Judge Breyer is the chief judge of the United States Court of Appeals for the First Circuit.

Four senators were absent for the vote today: Dave Durenberger, Republican of Minnesota; Bob Graham, Democrat of Florida; Claiborne Pell, Democrat of Rhode Island, and Malcolm Wallop, Republican of Wyoming.

Praise for Mitchell

One of the few spontaneous moments occurred just before the vote, after Senator George J. Mitchell, the majority leader, delivered the final speech, praising Judge Breyer as an "excellent choice" who "brings compassion and intellect to the Federal bench." Senator Joseph R. Biden Jr., the Delaware Democrat who heads the Judiciary Committee, appeared to take Senator Mitchell by surprise when he said he regretted that the majority leader had taken himself out of contention for the Supreme Court vacancy.

Mr. Mitchell, a Maine Democrat who is leaving the Senate this year, was the early favorite for the vacancy until he surprised the White House by withdrawing his name. "I hope the opportunity will come again," Senator Biden said.

'LITTLE PEOPLE' LOSE A VOICE
Blackmun Put People Over Precedents

Chicago Sun-Times
April 10, 1994, Sunday, Late Sports Final Edition

Lyle Denniston

Justice Harry A. Blackmun's retirement this summer will leave the Supreme Court with an obvious gap: It will have no judge willing to keep a thumb on the scale of the law to make it weigh in favor of "the little people."

That is how Blackmun has seen his job for years, that is what has led most court observers to label him a "liberal," and that is why he sometimes is criticized for appearing to opt for results more than for legal principle.

Without a justice inclined that way, the court after Blackmun is likely to be seen as moving even further toward the center of the judicial spectrum -- which revolves around the idea that the law is not an engine of social reform. Reform, in that view, is primarily for legislatures, not courts.

Blackmun's presence on the Supreme Court, and his view of the law as a safeguard for hapless individuals who get caught up in government rules or prohibitions, has been far more pleasing to liberals on the left than to conservatives on the right.

After the Supreme Court's self-proclaimed liberals -- Justices William J. Brennan Jr., William O. Douglas and Thurgood Marshall -- departed, Blackmun remained the one justice who could be counted on to speak out and write vigorously to promote the same kinds of results.

Now, none of the potential nominees figuring in speculation about a new justice, would be likely to approach the task of judging according to what might be called "Blackmun's law."

Although Blackmun has been considered a legal scholar who is good at employing the language and the logic of the law, he has been stirred more often -- in cases he thinks will affect the powerless or the deprived or the needy -- by broad notions such as "decency and human dignity" or "the precepts of civilization we profess." Those are social or even moral value phrases more than they are legal, and they are phrases that Blackmun has used to describe his view of law's highest function.

And, as his most predictable adversary within the Supreme Court, Justice Antonin Scalia, has complained, such phrases are so open-ended that they let justices create, rather than follow, the law.

Those sweeping phrases do not show up routinely in the writing of the other liberal-oriented justice, John Paul Stevens. He votes often with Blackmun, but the law according to Stevens is far more disciplined, less expansive and more traditional.

The Blackmun approach is one that frequently finds government power to control individuals' lives to be wrong or even excessive, and leads more often to a kind of "loose construction" of the law.

It has gotten Blackmun into trouble with critics for the way it led him to view a right of privacy, loosely anchored to actual words in the Constitution, as the basis for a woman's right to seek an abortion with only her doctor's consent. The abortion decision, Roe vs. Wade, did not start out in Blackmun's contemplation as a profound act of constitutional creation, and he never saw it as that. His first drafts were narrow applications of past precedent.

But as he looked into the elemental bond between a woman and her obstetrician, he saw that relationship as a social equation demanding privacy against government control.

Roe vs. Wade, and the sequel he wrote in 1986 obviously were not all that Blackmun has written in his 24 years as a justice. But no other opinions display as clearly his way of deciding.

The justice believes, as he said Wednesday, that he has not changed over the years. Noting that he and Stevens recently joked about how they were considered the remaining liberals, he said they agreed that "neither of us has changed; the court has changed under us."

Whether the most famous of Blackmun's judicial writings show a change or merely a progression, there is something they do not show:

how caught up he is in the plight of what he called -- meaning no insult -- "the little people."

He would try to see through legalisms to human detail, to the pain, the loss, the denial that he could trace to legal commands or even to legal neutrality. At those times, he would seem far more sentimental than judicial.

He would interrupt a lawyer to ask what a scene really looked like, or how the people involved had reacted. He even asked one lawyer if she had read a particular novel that would have given human meaning to her legal points.

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AN IDEOLOGICAL ODYSSEY NEARS END
Jurist Says He Was Not Transformed: 'The Court Has Changed'

The Washington Post
April 7, 1994, Thursday, Final Edition
Correction Appended

Joan Biskupic, Washington Post Staff Writer

Supreme Court Justice Harry A. Blackmun was occasionally spotted standing alone at the top of the court's marble steps, lost in the shadows of the structure's massive pillars, watching the demonstrations below or observing the lines forming to attend one of the court's public sessions.

From time to time, he would comb through the thousands of letters his chambers received each year, to see what people were thinking and saying about him and the court. And in each case the court considered, Blackmun would make a point of knowing who the individuals involved were, and where they lived -- not just the law at issue.

Blackmun changed a lot during his 24 years on the court, more so than most justices. In fact, he is famous for his ideological odyssey, starting as a judicial conservative in alliance with Chief Justice Warren E. Burger and ending two decades later as the most liberal member of the court.

While he does not acknowledge his transformation (he says the court changed more than he did), his comments in opinions, speeches and interviews suggest that his personal experiences as a justice, the things he observed, and his interest in the lives of the "little people," as he once called them, all played a role in it.

Blackmun, 85, refused to accept the notion that a judge should be removed from the real world. "He asked, 'What does this mean in real life?' " said Beth Heifetz, a law clerk to Blackmun in 1985-86. "That outlook necessarily means that you will consider and reconsider" the legal dilemmas of the day.

Most recently, for example, he broke with his past opinions and decided that the death penalty was unconstitutional. The reason: He had observed the system of capital punishment, he said, and it was fraught with discrimination and mistakes. "From this day forward," he wrote in February, "I no longer shall tinker with the machinery of death."

While Blackmun's impassioned approach is lauded by some, respect among legal scholars has been limited. Critics said his approach has been too emotional and that he has turned his back on court precedent and failed to provide guiding principles to lower courts and those who would live under the law.

Blackmun, a 1970 appointee of President Richard M. Nixon, has resisted the popular opinion that he changed during his tenure. At a news conference yesterday, he said that he and Justice John Paul Stevens, who was named by President Gerald R. Ford in 1975, "were joking the other day, in a coffee break somewhere" about how the two are now considered the court's liberals.

"And each of us has steadfastly adhered to the proposition that neither of us changed. The court has changed under us."

But when Nixon appointed Blackmun to succeed Abe Fortas 24 years ago -- after the president's first two choices (Clement Haynsworth Jr. and G. Harrold Carswell) were rejected by the Senate -- Blackmun had a reputation as a judicial conservative. A 1932 Harvard law graduate and former resident counsel for the Mayo Clinic (1950-59), Blackmun had spent 11 years on the 8th U.S. Circuit Court of Appeals, which covers seven states in the center of the country, from Minnesota to Arkansas.

In early high-court cases, Blackmun was so aligned in his voting pattern with conservative Chief Justice Burger, a childhood chum from St. Paul, that the two were dubbed "The Minnesota Twins."

Yet, within three years, Blackmun wrote arguably the most significant and "liberal activist" opinion of the post-Warren era, Roe v. Wade, making abortion legal nationwide. He said women had a fundamental right to abortion, arising from a constitutional right of privacy embodied primarily in the 14th Amendment's guarantee of personal liberty.

Relying on his own legal-medical background at the Mayo Clinic, Blackmun included in his opinion a long analysis of the state of obstetrics in America.

To many court scholars, Roe marked a change in Blackmun's overall approach. "As if stung by the attacks, including consistent charges of having created 'ambiguous and uncertain' rights out of whole cloth, Blackmun's jurisprudence appeared to begin actively to change," Henry J. Abraham wrote in his book, "Justices & Presidents."

Blackmun became an ally of liberal stalwart Justice William J. Brennan Jr., who retired in 1990. Blackmun now is the court's most liberal justice, apt to broadly interpret constitutional guarantees and read into federal statutes rights that may not be explicitly written in.

"This is a guy who came to the court thinking it was the role of the court to defer to government," said Yale University law professor Harold Koh, who clerked for Blackmun in 1981-82. "But as he read the cases, he realized that all government wasn't good and there was a lot of suffering. In a series of cases, he began siding with the outsiders: women facing tough choices on abortion, the gays, the aliens."

Blackmun's evolution from a restrained and formal interpreter of the law to a man who would write emotionally about the plight of victims in America captures the competing judicial philosophies of the era. Blackmun, however, was more of a conservative when the liberals still held sway in the 1970s, and revealed his most liberal voice after William H. Rehnquist took over as chief justice in 1986.

Blackmun yinged when the majority yanged. As a result, aside from Roe, his legacy is embodied in a select number of majority opinions.

After Roe, he continued to take the lead on questions of personal privacy. In a separate area of the law, Blackmun was at the fore of developing the court's view that commercial speech is entitled to First Amendment protection close to that traditionally allowed political speech.

Overall, Blackmun adopted a broad reading of anti-discrimination law and supported a high wall of separation between church and state. When Brennan and other liberals had control in these areas, Blackmun typically signed onto an opinion by Brennan, the more senior justice.

As the liberals lost ground, Blackmun's most passionate writing was in dissents and concurring statements. Reacting to a 1989 ruling that made it harder for workers to sue for job discrimination, Blackmun wrote, "One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against non-whites -- is a problem in our society, or even remembers that it ever was."

When the Supreme Court narrowly upheld the right to abortion in 1992, yet cut back on the underpinnings of his legacy, he said in a dissenting statement: "For today, the women of this nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

Yesterday, when President Clinton praised Blackmun's record, he cited the justice's dissenting statement to a 1989 ruling that the injuries of an abused Wisconsin boy, Joshua DeShaney, could not be redressed by suing an allegedly neglectful social services agency. Many other lawyers have ridiculed Blackmun's drama.

"Poor Joshua!" Blackmun said. "Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the social services workers] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing... .It is a sad commentary upon American life."

Blackmun, who was born in Nashville, Ill., on Nov. 12, 1908, and moved soon after to St. Paul, where his father ran a grocery store, is likely to be remembered as a loner more than a leader. Garrison Keillor once dubbed him "the shy person's justice."

At the court, Blackmun spent long hours alone in the library. "I think this is a lonely job, despite the fact that we sit as a group of nine," Blackmun said last year in an interview with "Nightline." "When it comes down to it, we have to make our individual answers to every issue, and I've found that the loneliness does not decrease by the fact of a multiple-judge court."

Former law clerk Heifetz, who now works for a Washington firm, said that the routine and pace of his schedule at the court reveals his approach to judging:

"It is ordered and it is balanced. He says you have to look at all the parts of life. He takes time to exercise and read the newspapers, especially the sports."

Former clerks said Blackmun's bookish demeanor conceals a sense of humor. Each week after the justices finished voting in secret on the cases, Blackmun would convene his four clerks to tell them how the sessions went. Recalled one former clerk, "He would do this by impersonating each justice. And he does a very good Justice [Sandra Day] O'Connor."

He tweaked his colleagues in person, too. Blackmun revealed in a 1982 television interview that the year before, some justices had heard a faint electronic ringing sound in their secret conference room and thought the room was bugged. Blackmun knew it was the sound of his hearing aid but, "feeling mischievous," waited a few days to tell the others.

Dan Coenen, a 1979-80 law clerk and now professor at the University of Georgia Law School, said, "I was struck from day one that he never displayed any haughtiness.

"He is a humble person. And an organizing principle of Justice Blackmun's work in recent years is concern for the little person, the poor, African Americans, people who have had to struggle."

When a court majority in 1986 rejected arguments about homosexual rights and upheld a Georgia law making sodomy a crime, Blackmun said in a dissent that individuals should have the freedom "to choose the form and nature of ... intensely personal bonds."

"It's been a great privilege, really, to be here for these many years," Blackmun said at the news conference yesterday in one of the court's ornate reception rooms. "And I don't want to set any records" for longevity.

He said that while "the tensions built up" on various legal disputes, he enjoyed his colleagues and his job. And while no other justice joined him earlier this year in denouncing capital punishment, Blackmun said that one justice, a man, had told him, "I'm very proud of you for taking that position."

After a few minutes of light questioning, a public information officer motioned for an end. He seemed a bit reluctant to relinquish the moment in the spotlight, and just as he was at the door of the room, Blackmun abruptly turned back.

With a wide grin, he held up his arms, almost as if he were declaring victory. With the sleeves of his blue suit up to his elbows, Blackmun looked less the modest, unassuming justice, than a politician acknowledging a place in history and bidding farewell.

Staff researcher Ann O'Hanlon contributed to this report.

JUSTICES SAY FAREWELL

Los Angeles Times
April 7, 1994, Thursday, Home Edition

Associated Press

Here are reactions from some of Supreme Court Justice Harry A. Blackmun's colleagues to his announcement that he will retire:

* Justice David H. Souter: "I dissent."

* Justice Sandra Day O'Connor: "With Justice Blackmun's retirement, following so soon that of Justice (Byron R.) White, we will have lost much of the institutional memory of the court. His presence here for 24 years has been marked by compassion for individual litigants and by careful attention to detail. We will miss him."

* Justice John Paul Stevens: "Justice Blackmun is the quintessential gentleman and scholar. His judicial work combines meticulous accuracy and sensitive awareness of the impact of our decisions on the real world. Far more than most of us, he has labored to make the law the servant of justice and decency. I am honored by his friendship and shall miss his wise counsel."

* Justice Clarence Thomas: "It was an honor to have worked with Justice Blackmun, and I am saddened to see him retire; he will be deeply missed. He is a friend and colleague, and it has been a pleasure to work with him."

* Chief Justice William H. Rehnquist: "Justice Blackmun has made significant contributions to the court's jurisprudence . . . . On a personal note, he was the only member of the court whom I knew when I came 22 years ago and I shall miss him."

* Justice Ruth Bader Ginsburg, in a note to Blackmun: "You have shown us all that it is possible constantly to grow in wisdom and in humanity. And when you ask questions, they are the best. A sample from 20 years ago is enclosed. You helped me to end on a high note that day." She enclosed part of the transcript of a 1974 case that she argued as an attorney before the high court.

* Retired Justice William J. Brennan: "Justice Harry Blackmun has served with enormous distinction during 24 terms on the court and throughout his career. The combination of abiding humility, deep compassion, formidable legal insight and a tireless work ethic have made Justice Blackmun a magnificent jurist, an admirable human being and a wonderful friend."

* Retired Justice Byron R. White: "Justice Blackmun has left many important and meaningful tracts on the federal law throughout his 34 years as a jurist. He was a very satisfactory colleague and has had a great career."