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Section 3: Town Meeting: The Supreme Court and the Contract with America -- What Role for the Court in Changing Political Times?

Institute of Bill of Rights Law, William & Mary Law School

A RIGHT TURN AT THE SUPREME COURT
Fall Schedule Will Be a Test of Conservatism
Voting Rights, Desegregation, Term Limits Among Decisions

USA Today Monday July 3, 1995

Tony Mauro

The Supreme Court's conservative majority, which emerged with consistent strength in the term that ended last week, will have the chance to test its vitality again in the fall with a new crop of controversial cases.

Cases involving gay rights, race-based redistricting and product liability dominate the docket of cases carried over to the court's next term, beginning Oct. 2.

Many of the key cases from last term were decided by 5-4 victories in which conservatives carried the day.

The three core conservatives are Chief Justice William Rehnquist, Antonin Scalia and Clarence Thomas. More often than not, they were joined by Anthony Kennedy and Sandra Day O'Connor.

Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer form the moderate wing of the court, with none of them qualifying for the "liberal" label.

"This term saw a dramatic shift with the conservatives not only exerting more control, but also engaging in judicial activism by striking down laws and policies," said Georgetown University law professor Louis Michael Seidman.

The narrow margins point up the importance of future vacancies, adds Seidman: "A lot turns on future appointees and the 1996 election." Rumors circulated of a justice retiring last week, but the term ended with all nine still there.

The Supreme Court has already agreed to consider 33 new cases in the fall term, including:

-- Gay rights: Colorado is seeking to revive its Amendment 2, passed by voters in 1992, which invalidates any state or local law prohibiting discrimination against lesbians, gay men and bisexuals. The amendment was struck down as a violation of the constitutional rights of gays.

-- Redistricting: Following up on its decision Thursday, the Supreme Court will scrutinize redistricting in Texas and North Carolina to determine if they amount to racial gerrymandering.

-- Punitive damages: The court will consider imposing limits on punitive damages in product liability lawsuits in an Alabama case. A Birmingham doctor won $4 million in punitive damages from BMW after claiming that the new car he purchased in 1990 had actually been damaged and refinished before it was sold as new.

-- Liquor ads. A Rhode Island law that bars the advertising of liquor prices will be scrutinized to see if it violates the First Amendment rights of advertisers.

-- Agent Orange. The court will decide if private companies that manufactured Agent Orange defoliant for the government are immune from being held liable for injuries suffered by Vietnam veterans. In addition to these, cases involving gays in the military, all-male military schools and affirmative action may be added in the fall.

Key rulings from the Supreme Court term that ended Thursday:

VOTING RIGHTS: Race cannot be the primary factor in redrawing congressional districts, the court ruled on June 29. The justices struck down majority-minority districts in Georgia, a decision that could affect many black Congress members.

AFFIRMATIVE ACTION: Federal programs giving preference to minorities in hiring and contracts will be scrutinized under a new standard that makes them harder to enact and maintain because of a June 12 ruling.

ADVERTISING: On April 19, the court struck down a federal rule that barred brewers from displaying the alcohol strength of their beers on labels.

Two months later, the court went in a different direction in the case of lawyers, upholding a Florida restriction on lawyer solicitation of accident victims.

TERM LIMITS: The grass-roots movement to limit the terms of Congress members through state ballot initiatives came to a halt May 22, when the court said that could only be done through a constitutional amendment.

CHURCH-STATE: The University of Virginia violated the free speech rights of students when it denied funding for a Christian student newspaper. The court ruled June 29 in a case filed by student Ronald Rosenberger.

A similar ruling, on the 29th, said Ohio could not prevent the Ku Klux Klan from erecting a cross in a park near the state Capitol.

ENDANGERED SPECIES: The Interior Department has broad power to protect the habitats of endangered species, even on private property, the Supreme Court ruled June 29.

DRUG-TESTING: School programs that require student athletes to be tested for drug use are constitutional, the court said on June 26. The testing had been challenged as warrantless searches, barred by the Bill of Rights.

DESEGREGATION: States and local governments will have an easier time ending court-ordered school desegregation efforts as a result of a June 12 ruling involving Kansas City, Mo.

CONGRESS: A federal law barring the possession of firearms near schools was struck down April 26.

The decision was the first time in more than 50 years that the court struck down a federal law that had been justified as an exercise of congressional power to regulate interstate commerce.

PRISONS: Lawsuits filed by prisoners protesting prison conditions were restricted in a June 19 ruling.

GAYS/PARADE: Organizers have a right to exclude homosexuals from Boston's St. Patrick's Day parade in a June 19 ruling.

ANONYMOUS SPEECH: The rights of individuals to speak anonymously, which could have implications on cyberspace speech, was upheld by the court April 19, when it struck down an Ohio law barring anonymous campaign leaflets.

HONORARIA: A law that barred federal employees from accepting honoraria for speeches and articles was struck down Feb. 22 on First Amendmentgrounds.

'94-'95 TERM

-- Signed opinions: 82 - the fewest since the early 1950s

-- Unanimous votes: 34

-- 5-4 votes: 16

-- Only case with a 9-0 and a 5-4 vote: Court said states cannot impose excise tax on an Indian tribe's on-reservation gasoline sales, but states can impose income tax on tribal members who work for the tribe on its reservation but live elsewhere.

-- Most majority opinions written: William Rehnquist, 11

-- Most dissenting opinions written: John Paul Stevens, 16

-- Most likely allies: Justices Antonin Scalia and Clarence Thomas voted together in 83% of signed decisions that split the court.

-- Least likely allies: Stevens and Thomas voted together in 11% of split decisions.

VOTING CONTROL SHIFTS TO RIGHT ON HIGH COURT

The Baltimore Sun

Sunday, July 2, 1995

Lyle Denniston
Washington Bureau of The Sun

Washington -- With a combination of power and solidarity seldom seen on the modern Supreme Court, the five most conservative justices swept through the just-ended term, leaving in their wake a major overhaul of the nation's law.

In nine months of activity rivaling the conservative intensity shown since January by the Republican-led Congress just across the street, the five justices who held voting control at the court chose to exercise it often, freely and boldly.

Dramatic constitutional change came regularly, right up through Thursday, when the court finished in a flourish and left town for the summer. This was the work primarily of Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Sandra Day O'Connor, Antonin Scalia and Clarence Thomas.

Just as conservatives in Congress this year have moved energetically to roll back decades of liberal social legislation, the court's conservatives frequently cast their votes together to roll back and even to cast aside liberal constitutional precedents.

Mark Tushnet, a Georgetown University law professor, said the court's term amounted to "a repudiation of post-New Deal constitutional law: that it is constitutionally permissible for government to act to alter background social conditions. There is a lot to indicate that the majority doesn't agree with that anymore."

The effect of the conservative trends during the term: a major curtailment of civil rights precedents, especially those in favor of "affirmative action" programs and race-based legislative redistricting.

Holding together on the other side of the high court, with equal fervor and commitment, were its more liberal members -- Justices Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens.

To some observers, the conservatives' solidarity -- unusual in a court that often scatters in varied ideological positions -- was a reaction to the firmness of the liberal bloc's unity.

Paul Cappuccio, a former law clerk to Justices Kennedy and Scalia and now a Washington lawyer, suggested last week that "it took all five of the conservatives to do anything" because they had to contend with "a solid liberal bloc." When staying together to counter the liberals, the conservatives "tended to be more forceful," he said.

COURT'S DYNAMICS

The liberal bloc gained a more or less committed member this past term with the arrival of Justice Breyer, President Clinton's second appointee. Justice Ginsburg, another liberal-leaning Clinton choice, showed a year earlier that the bloc had "the intellectual power to mix it up" with the conservatives, as Mr. Cappuccio saw the court's dynamics developing. The conservatives had a stronger sense "of what they were voting against," he said.

Liberal advocacy groups noticed, with some anxiety, the same conservative solidarity. The People for the American Way's legal director, Elliot Mincberg, for example, said the just-completed term "was marked by conservative judicial activism."

For liberal observers, in fact, the term's overall results had a distinctly threatening tone. "All in all," said the American Civil Liberties Union's legal director, Steven R. Shapiro, "it's been a disappointing year that ended on an extremely ominous note."

He was referring to the court's final day, when the justices imposed strict new limits on the creation of black-dominated election districts and eased considerably the long-standing ban on government support of religion.

Conservative organizations, by contrast, appeared to be largely pleased with the results. Mathew D. Staver, president and general counsel of Liberty Counsel, a legal advocacy group based in Orlando, Fla., said: "I think it's a distinctly more conservative court . . . a little bit more traditionally conservative."

He noted with approval the court's growing skepticism about "federal government involvement in state and local issues."

But, he cautioned, conservatives cannot rely heavily upon the trends of last term, "because the decisions are so close: the votes are just one vote apart."

SAME LINEUP LIKELY

As the term ended, there was no sign that any justice, from either the court's left or right, would retire this summer. Another term is likely with the same lineup as the court faces new appeals dealing with gay rights, women's rights and voters' rights.

Should there be a vacancy on the court next year, late in the term or after it concludes next summer, it is doubtful that the Republican-controlled Senate would

approve a new Clinton nominee. The Senate could leave the vacancy to be filled after a new presidential election in November 1996.

There is clear precedent for that: Republican senators filibustered into extinction President Lyndon B. Johnson's attempt in 1968 to name a replacement for retiring Chief Justice Earl Warren. They saved the chief justiceship for newly elected President Richard M. Nixon to fill in 1969 with Warren E. Burger.

While the term just closed did illustrate the conservative justices' power, it also showed the narrowness with which those five hold command -- and thus signaled the importance of the court's future as an issue in the presidential campaign.

Of 84 votes cast to decide cases in the term, 16 were by 5-4 votes, according to a statistical study of the term by David F. Pike, Supreme Court analyst for a lawyers' newspaper, the Los Angeles Daily Journal.

KENNEDY AND O'CONNOR

A significant element in those 5-4 votes was the influence of two justices who tended to vote more conservatively during the term: Justices Kennedy and O'Connor, who are considered to be the most moderate within the conservative bloc.

Those two voted together in the majority in 11 of the 16 decisions settled by 5-4 votes. One or the other of them was in the majority in all 16 -- a clear indication that, no matter who the other four making up a majority were, either Justice Kennedy or Justice O'Connor was necessary to make a fifth.

And, usually, the five-justice majorities that formed in the most important decisions included both of them. That was true of the affirmative action ruling, the decision limiting the use of race in drawing congressional districts, and the most important ruling on the subject of government subsidies for religion.

Those two helped form the thin majority in one of the most conservative decisions of the term, striking down a federal law that outlawed carrying a gun in or near a school -- a warning to Congress that the court may curb social legislation that interfered with states' rights.

And Justices Kennedy and O'Connor were among the five who voted to put strict new limits on federal judges' power to act boldly to try to end lingering racial segregation in public schools.

Only one of the court's major 5-4 rulings could be described as having a liberal result: the decision to bar the states, Congress and the people as voters from limiting congressional terms. Justice Kennedy joined the four liberals in that case; Justice O'Connor dissented with the conservatives.

Overall, however, Justice Kennedy appeared to be moving noticeably toward the conservative side during the term. And, as Professor Tushnet remarked recently, it seems that "the Constitution is what Anthony Kennedy says."

The Daily Journal's Mr. Pike found in the voting patterns a sign of Justice Kennedy's more conservative leanings: His most common pairing was with Justice Thomas, who votes consistently as the court's most conservative member. They were together in 73 out of the 84 total votes, according to the Daily Journal figures.

A MORE CENTRIST POSITION

Justice O'Connor was less an ally of Justice Thomas' in the voting, an indication that she maintained a somewhat more centrist position. She voted most often -- 64 times -- with Justice Kennedy and Justice Souter. Her fewest vote pairings were with Justice Thomas (59) and Justice Stevens (51) -- notably, the most conservative and the most liberal justices.

Either Justice Kennedy or Justice O'Connor was available as an ally when the court's liberals were able to form a majority of five or more in major cases: Justice Kennedy on the 5-4 vote against term limits; both of them on a 6-3 vote to nullify a federal ban on honorariums for rank-and-file government employees; both on a 7-2 decision to strike down a state ban on anonymous political literature; both in the unanimous ruling to allow parade organizers to keep out marchers with views the organizers oppose; and both in the 6-3 decision allowing the government to outlaw private actions that disturb the habitat of wildlife on the government's endangered species list.

In addition, Justices Kennedy and O'Connor joined with a unanimous court in one significant liberal decision written by Justice Thomas: a requirement that police must knock and announce themselves before entering a home to carry out a search.

THE CONSERVATIVE SWEEP

The Supreme Court's most important decisions of the term with conservative outcomes, showing the vote split:

* Black-dominated election districts are unconstitutional if they were formed mainly to promote racial gerrymandering (5-4).

* Federal affirmative action plans are to be struck down if they cannot satisfy the strictest constitutional limits on the use of race as a decisive factor (5-4).

* State universities act unconstitutionally if they allow some student publications to share in student activity fees but deny those fees to religious publications (5-4).

* Congress exceeded its constitutional powers when it passed a law making it a crime to possess a gun at a school or nearby (5-4).

* Public schools may order the surprise drug testing of student athletes, even those not suspected of using drugs, if the school seems to have a drug problem (6-3).

* State and local governments may not bar religious holiday displays from public property that is open to other displays, unless a display suggests that the government endorses the religious symbolism (7-2).

* Federal judges overseeing the desegregation of a formerly segregated public school system must strictly limit the remedies they impose to schools in the city, and not reach out to the suburbs to draw in whites (5-4).

* States may put strict limits on "ambulance chasing" by lawyers seeking to drum up business from accident or disaster victims (5-4).

* Prison inmates can go to court to challenge the warden's rules on such things as solitary confinement only in rare situations (5-4).

SUPREME COURT RULINGS HERALD REHNQUIST ERA

Los Angeles Times

Sunday, July 2, 1995

David G. Savage
Times Staff Writer

By sad coincidence, the Supreme Court announced the final rulings of this year's term on the day that former Chief Justice Warren E. Burger was laid to rest in Arlington National Cemetery.

But the ceremony in a sense could also have symbolized the passing of the torch to his successor, because more than ever, this was the year of the Rehnquist Court.

In 1972, when then-Justice William H. Rehnquist joined the high court, both friends and critics marveled at how the 47-year-old jurist's conservative principles were fixed in his mind.

Alone on the high court, he championed "federalism"-the theory that the Constitution reserves most power for state and local governments and not Congress and the federal agencies.

He scoffed at "affirmative action," believing it was nothing more than illegal reverse discrimination. And he mocked as wrongheaded Thomas Jefferson's comment that the Constitution demands "a wall of separation between church and state."

In his early years, Rehnquist was dubbed the court's "Lone Ranger"-personally charming, a brilliant lawyer, but decidedly out of touch with contemporary legal thinking.

But in the 1994-95 term that ended on Thursday, the Rehnquist Court moved dramatically to imprint in law his once-out-of-date notions.

Controlling the 5-4 majority, the chief justice undercut the power of Congress to meddle in local affairs, dealt a crippling blow to government affirmative action and opened the door for religious-rights activists to get public funding on the same basis as other groups.

On matters both large and small, the conservative coalition held together this term. The justices gave states leeway to reduce welfare payments to large households, made it harder for prison inmates to file lawsuits, said wardens could revoke annual parole hearings for long-term inmates and dismantled an innovative but costly desegregation program in Kansas City.

They gave school officials the power to impose drug tests on their students, but crippled the authority of lawmakers to create black-majority electoral districts.

They strengthened the free-speech rights of Christian legal activists who want to display religious symbols on public property, but they cut back the free-speech rights of "ambulance chasing" lawyers who want to send solicitation letters to accident victims.

"There's no question this is really the 'Rehnquist Court' at work," said USC law professor Erwin Chemerinsky. "It is a conservative court following an activist agenda."

Added Stanford University law professor Kathleen Sullivan: "This year will be remembered for the sharp turn to the right on race and religion. The court's own language was often quite dramatic and quite sweeping," and its rulings "roll back the use of race in all three branches of government."

For liberals, this term offered only two significant victories, but neither is likely to chart a direction for the future.

On a 5-4 vote, the court struck down state laws that set term limits for congressional representatives. Abandoning his conservative colleagues, Justice Anthony M. Kennedy said he believed strongly in "federalism," but insisted that terms for members of Congress must be set at the national level, not by each state.

And on Thursday, the court on a 6-3 vote rejected the timber industry's claim that the Endangered Species Act was not intended to limit development on private land.

This rather startling contention, raised more than 20 years after the law's passage, was too extreme for the court's moderate conservatives, Kennedy and Sandra Day O'Connor.

Still, the Republican-controlled Congress can certainly overturn that decision by revising the law, and it may well do so.

By contrast, the court's rulings on affirmative action, desegregation, redistricting, religion and drug testing, are based on the Constitution and cannot be altered by lawmakers.

Civil rights lawyers say they are stunned at the sweep of this term's rulings, but no one can be surprised at the direction of the court under Rehnquist's leadership.

In April, Rehnquist took a seemingly minor case involving a gun found near a school and used it to

announce a landmark ruling on the power of Congress.

Speaking for the 5-4 majority, he struck down the federal Gun-Free School Zones Act of 1990 on the grounds that Congress did not have constitutional power to enact such a law. The Constitution says Congress may "regulate commerce . . among the several states," he said, but this power does not give federal lawmakers the authority to meddle in local matters, such as a gun crime near a school.

The ruling in United States vs. Lopez marked the first time in 60 years that the high court threw out a federal law as exceeding Congress' power. It last happened the year the court's so-called "Nine Old Men" threw out the minimum-wage laws and invalidated much of President Franklin D. Roosevelt's New Deal.

While no one knows whether Rehnquist's opinion in the Lopez case is the beginning of a states-rights trend or a one-time reminder that Congress' power has limits, constitutional scholars say it has shaken up the traditional thinking.

In recent decades, many constitutional law classes do not even teach about the "commerce clause" because it has been a settled issue since 1937. Congress, it was said, could regulate any aspect of American life if it believed that doing so was in the national interest. Suddenly, that legal truism is no longer true.

"Rehnquist wrote a classic opinion for the court. It is clear, broad and speaks with authority," Yale University law professor Akhil Amar said of the ruling in the Lopez case. "When you're a law professor, the first thing you think of is: 'Will this be a good case to teach?' The answer is definitely yes for Lopez."

On a practical level, the ruling is already setting off sparks in the lower courts. Some legal experts say they think that recent federal laws on drug possession and protecting abortion clinics are in danger because they may exceed Congress' power.

Said Eliot Mincberg, legal director for the civil-liberties group People for the American Way: "The conservative activist majority on the court is more willing to limit congressional power than any court we've seen since the New Deal."

The rulings on affirmative action, racial gerrymandering and religion are also sure to reverberate in the lower courts.

In Adarand vs. Pena, Rehnquist assigned the majority opinion to his Stanford Law School classmate, O'Connor, who said "all racial classifications" by the government are highly suspect and generally unconstitutional.

Her opinion puts in jeopardy every federal program that explicitly uses race as a criterion for awarding contracts or jobs.

While the court did not finally close the door to federal affirmative action, it came close. "The best you can say is that the door is slightly ajar," Sullivan said.

On Thursday, the same five-member conservative majority united to strike a blow at "racial gerrymandering." In Miller vs. Johnson, the court struck down a Georgia district drawn to create a black majority and ruled that lawmakers may not use race as "the predominant factor" in drawing district lines.

Over the years, Rehnquist has consistently disputed the view that the First Amendment's ban on an "establishment of religion" means that the government must keep church and state entirely separate. While he agrees that the government cannot fund a state church or favor one religion over another, he has also argued that religious groups can receive public funds if the program is "neutral" toward religion. For example, if a state gives "vouchers" to children to enroll in private schools, that money could be used for parochial schools.

Thursday's 5-4 ruling in Rosenberger vs. University of Virginia marked the first time the court upheld the use of state funds to promote religious expression, in this case a student magazine that espoused "a Christian perspective" on contemporary life.

Not surprisingly, religious-rights advocates were delighted. The ruling finally "repudiates the popular misconception that treating religious groups equally violates" the First Amendment, said Steven McFarland, a lawyer for the Christian Legal Society.

In its term-end summary, People for the American Way faulted the court for "chipping away at the separation of church and state."

For his part, the chief justice did not stay around Washington to hear the applause or the criticism. As usual, he goes his own way.

On the last day of the term, he headed off to Britain to teach at Cambridge University. A fan of the World War I poet Rupert Brooke, Rehnquist says he will be taking the time to "explore some of his old haunts" around the ancient university town.

LINEUP ON KEY DECISIONS

How the nine justices voted on seven of the biggest decisions of the term:

Issue: Affirmative action
William Rehnquist: Sided with majority
John Paul Stevens: Sided with dissent*
Sandra Day O'Connor: Sided with majority *
Antonin Scalia: Sided with majority
Anthony Kennedy: Sided with majority

David Souter: Sided with dissent
Clarence Thomas: Sided with majority
Ruth Bader Ginsburg: Sided with dissent
Stephen Breyer: Sided with dissent

Issue: School desegregation
William Rehnquist: Sided with majority*
John Paul Stevens: Sided with dissent
Sandra Day O'Connor: Sided with majority
Antonin Scalia: Sided with majority
Anthony Kennedy: Sided with majority
David Souter: Sided with dissent*
Clarence Thomas: Sided with majority
Ruth Bader Ginsburg: Sided with dissent
Stephen Breyer: Sided with dissent

Issue: Endangered species
William Rehnquist: Sided with dissent
John Paul Stevens: Sided with majority *
Sandra Day O'Connor: Sided with majority
Antonin Scalia: Sided with dissent*
Anthony Kennedy: Sided with majority
David Souter: Sided with majority
Clarence Thomas: Sided with dissent
Ruth Bader Ginsburg: Sided with majority
Stephen Breyer: Sided with majority

Issue: Limiting Congress' power
William Rehnquist: Sided with majority *
John Paul Stevens: Sided with dissent
Sandra Day O'Connor: Sided with majority
Antonin Scalia: Sided with majority
Anthony Kennedy: Sided with majority
David Souter: Sided with dissent
Clarence Thomas: Sided with majority
Ruth Bader Ginsburg: Sided with dissent
Stephen Breyer: Sided with dissent*

Issue: Racial gerrymandering
William Rehnquist: Sided with majority
John Paul Stevens: Sided with dissent
Sandra Day O'Connor: Sided with majority
Antonin Scalia: Sided with majority
Anthony Kennedy: Sided with majority*
David Souter: Sided with dissent
Clarence Thomas: Sided with majority
Ruth Bader Ginsburg: Sided with dissent*
Stephen Breyer: Sided with dissent

Issue: Term limits
William Rehnquist: Sided with dissent
John Paul Stevens: Sided with majority *
Sandra Day O'Connor: Sided with dissent
Antonin Scalia: Sided with dissent
Anthony Kennedy: Sided with majority
David Souter: Sided with majority
Clarence Thomas: Sided with dissent*
Ruth Bader Ginsburg: Sided with majority
Stephen Breyer: Sided with majority

Issue: Religion
William Rehnquist: Sided with majority
John Paul Stevens: Sided with dissent
Sandra Day O'Connor: Sided with majority
Antonin Scalia: Sided with majority
Anthony Kennedy: Sided with majority*
David Souter: Sided with dissent*
Clarence Thomas: Sided with majority
Ruth Bader Ginsburg: Sided with dissent
Stephen Breyer: Sided with dissent

* Indicates author of opinion. Both sides, majority and dissent, issue written opinions.

Source: The Times Washington Bureau

MAJOR DECISIONS

This term, the Supreme Court decided that:

FIRST AMENDMENT

* Child pornography law is constitutional because it requires that sellers know if actors ere minors. (U.S. vs. X-Citement Video)

* Congress violated the free-speech rights of federal workers by barring them from making money writing articles or giving speeches in their spare time. (U.S. vs. NTEU)

* People have a free-speech right to pass out anonymous leaflets on political topics. (McIntyre vs. Ohio)

* State bars may keep lawyers from sending solicitations to accident victims for 30 days. (Florida Bar vs. Went for It Inc.)

* Private sponsors of a parade cannot be forced to include marchers, such as gays and lesbians, whose message conflicts with theirs. (Hurley vs. Irish American Gays)

* A state university may not refuse to subsidize a student magazine simply because it offers a Christian perspective. (Rosenberger vs. University of Virginia)

* State officials may not exclude the display of a cross in a public park if they permit other symbols. (Capitol Square vs. Pinette)

FEDERAL VS. STATE

* Congress exceeded its power by passing a law that makes it a crime to have a gun near a school. (Lopez vs. U.S.)

* States may not limit the terms of members of Congress. (U.S. Term Limits vs. Thornton)

* States can revoke the right to annual parole hearings for long-term inmates. (California vs. Morales)

* States may limit welfare benefits for large households. (Anderson vs. Edwards)

* Congress intended to protect the habitat of animals on the verge of extinction when it passed the Endangered Species Act. (Babbitt vs. Sweet Home Chapter)

CIVIL RIGHTS

* Federal programs that set "racial classifications" for awarding contracts or jobs are generally unconstitutional. (Adarand vs. Pena)

* A federal judge in Kansas City exceeded his power by ordering costly upgrades in the quality of the city schools as part of a desegregation plan. (Missouri vs. Jenkins)

* Employers cannot block job discrimination lawsuits by dredging up old evidence that shows the worker violated some job rules. (McKennon vs. Nashville Banner)

* Electoral districts are unconstitutional if race was the "predominant factor" in their design. (Miller vs. Johnson)

* Cities may not zone out group homes for alcoholics and former drug abusers. (Edmonds vs. Oxford House)

CRIME AND PUNISHMENT

* The exclusionary rule does not demand the suppression of evidence found when police, because of a computer error, wrongly arrested a suspect. (Arizona vs. Evans)

* The Fourth Amendment does not bar school officials from forcing students to undergo regular drug tests. (Vernonia vs. Acton)

* Judges should generally dismiss lawsuits filed by prisoners who say their rights were violated by extra punishments imposed on them. (Sandin vs. Conner)

* Prison inmates who cite new evidence that would likely convince a reasonable juror that they are innocent deserve another chance to appeal in federal court. (Schlup vs. Missouri)

* The federal law against false statements applies only to the executive branch and does not cover lies told to Congress or in judicial proceedings. (Hubbard vs. U.S.)

* The Fourth Amendment usually requires police with a search warrant to "knock and announce" their presence before they enter a residence. (Wilson vs. Arkansas)

* An official who discloses the existence of a wiretap violates the law, even if the tap has expired. (U.S. vs. Aguilar)

Source: The Times Washington Bureau

FAREWELL TO THE OLD ORDER IN THE COURT

The New York Times

July 2, 1995, Sunday

Linda Greenhouse

Washington -- The birth struggle of a new era is not a pretty sight. It is messy, it is unstable, it is riveting. It was the Supreme Court during the 1994-95 term that ended on Thursday.

An ascendant bloc of three conservative Justices with an appetite for fundamental, even radical change drove the Court on a re-examination of basic Constitutional principles. Long-held assumptions about the authority of the national government, the relationship between Washington and the states, and the ability of the Federal Government to take race into account in making public policy were all placed on the table for dissection. Some precedents were overruled, others sharply limited in a gaudy show of zero-based jurisprudence.

These three Justices -- Chief Justice William H. Rehnquist along with Justices Antonin Scalia and Clarence Thomas -- could usually count on Justice Anthony M. Kennedy to join them, and in nearly all the term's most important contested cases had the support of Justice Sandra Day O'Connor as well.

When their reach exceeded their grasp, in fact, it was usually not because they lacked the five votes needed to make a majority but because the fifth vote, Justice O'Connor's, carried with it a note of equivocation or compromise that muddied the message of the other four.

On the term's final day, for example, Justice O'Connor wrote separately to explain her votes concurring with Justice Kennedy's majority opinions in two 5-to-4 decisions.

One was a decision invalidating a majority-black congressional district in Georgia as an unconstitutional racial gerrymander, and the other required the University of Virginia to subsidize an on-campus student religious magazine on the same basis as other student publications. In both instances, the wary tone of Justice O'Connor's separate opinions raised substantial questions about whether the definitively stated conclusions in the majority opinions, which she also signed, could actually be taken at face value.

The center all but disappeared from the Court this term. That was surprising, given the arrival of President Clinton's two nominees, Ruth Bader Ginsburg and Stephen G. Breyer, both pragmatic moderates who easily won confirmation with strong bipartisan support and who were widely expected to help anchor a strong central bloc.

But there turned out to be virtually no center for these two experienced Federal judges to anchor. They joined a Court that, far from converging toward the center, was driven by competing visions of the Constitution and the country. Justices Ginsburg and Breyer have clearly staked their ground on one side of the divide along with John Paul Stevens, the 75-year-old senior Associate Justice, and David H. Souter, the New Hampshire Republican whose emergence as a liberal within the Court's current spectrum is one of the more interesting developments of the last few years.

The old labels have little relevance on the Court today. There is no liberal in the mold of Justices Thurgood Marshall and William J. Brennan Jr., who both retired in the early 1990's and who sought to use the Court as an engine of social change.

The current bloc of Justices Ginsburg, Breyer, Stevens and Souter might more properly be called conservatives. They are the ones now arguing for adherence to precedent, as for example in their votes dissenting from Justice O'Connor's majority opinion in Adarand Constructors v. Pena, which held that Federal affirmative action programs are unconstitutional unless they can survive the most rigorous judicial scrutiny. That decision overturned a 1990 opinion of Justice Brennan's that had given the Federal Government more leeway to devise programs designed to benefit members of racial minorities.

And it is this group of Justices who now argue on behalf of that one time conservative shibboleth, judicial restraint, and against reaching out to decide cases that are, arguably, not properly before the Court.

Justice Souter made that argument in dissent from Chief Justice Rehnquist's 5-to-4 opinion in a case from Kansas City, Mo., that curbed judicial oversight of long-running school desegregation programs. Justice Stevens argued, also in dissent, that the white voters who challenged the majority-black Georgia congressional district had suffered no harm and should not have been accorded standing to bring the case.

By the same token, judicial activism, a phrase that conservatives once hurled as an epithet, easily fits Chief Justice Rehnquist's 5-to-4 majority opinion striking down a Federal law that made it a crime to carry a gun near a school. It was the first time in 60 years that the Court had invalidated a Federal law on the ground that Congress had exceeded its constitutional authority to regulate interstate commerce.

A deep skepticism about Federal power was a theme that ran through the term.The decision on the gun law, United States v. Lopez, was only one example. Another was the 5-to-4 decision that rejected state-imposed term limits for members of Congress. The dissenters -- Justice Thomas joined by Chief Justice Rehnquist and Justices Scalia and O'Connor -- argued for a vision of federalism in which the Federal Government operates essentially at the sufferance of the sovereign states.

The term's two most important rulings about race, Justice O'Connor's affirmative action decision and Justice Kennedy's opinion in the redistricting case, rejected the Court's long-held view that the Government has a special institutional role in addressing racial discrimination. Justice Kennedy's opinion said it would be "inappropriate" for the Court to "accord deference" to the Justice Department's view of its mandate to enforce the Voting Rights Act.

The Court declared four Federal laws unconstitutional during the term, an unusually high number given that the Court had invalidated only 129 laws in its previous 205-year history. In addition to the Gun-Free School Zones Act of 1990, the Court struck down two laws on First Amendment grounds: a 1935 law that prohibited beer labels from displaying alcohol content and a 1989 Federal ethics law that prohibited Federal civil servants from accepting money for extracurricular writing and speaking. The Court also overturned, on separation-of-powers grounds, a 1991 law that revived a group of securities lawsuits.

During the term that began last Oct. 3 and ended June 29, the Court issued opinions in only 82 cases. That was the lowest number since the 82 opinions issued during the 1955-56 term. In the early 1980's, the Court was deciding nearly twice the number of cases.

Thirty-five of the cases this term, or 43 percent, were decided by 9-to-0 votes. One of the most notable was Justice Souter's opinion that the organizers of the Boston St. Patrick's Day parade could not be required by state law to include marchers seeking to identify themselves as gay and lesbian.

Sixteen of the cases, or 20 percent, were decided by 5-to-4 votes, and these were often the ideological battlegrounds. Justices Kennedy and O'Connor, whose participation was usually the key to victory in these cases, were in the majority more than any other Justice: 13 out of the 16 cases for Justice Kennedy and 11 cases for Justice O'Connor. The Stevens-Souter-Ginsburg- Breyer group voted together 10 times in these cases: four times in the majority, when they gained the support of either Justice Kennedy or Justice O'Connor, and six times in dissent.

Taking as a rough measure of the Court's ideological polarities the 35 cases in which Chief Justice Rehnquist and Justice Stevens were on opposite sides, the alliances of the other Justices were as follows: Justice Thomas, 33 times with the Chief Justice and twice with Justice Stevens; Justice Scalia, 31 times with the Chief Justices and four times with Justice Stevens; Justices O'Connor and Kennedy, both 24 times with the Chief Justice and 10 times with Justice Stevens; Justice Breyer, 16 times with the Chief Justice and 18 times with Justice Stevens; Justice Souter, 14 times with the Chief Justice and 20 times with Justice Stevens; and Justice Ginsburg, 11 times with the Chief Justice and 23 times with Justice Stevens. (Not all Justices voted in all the cases).

Justices Thomas and Scalia voted often together, 40 times in 46 non-unanimous cases, and so did Justices Ginsburg and Breyer: 36 of the 45 non-unanimous cases in which both voted.

The Court's struggle resumes Oct. 2, when the Justices will confront old battles -- further redistricting cases -- and new, most notably, a Colorado case on whether voters can prohibit the adoption of measures to protect homosexuals against discrimination.

Below, summaries of the term's major rulings.

FEDERAL POWERS: REVOKING GUN-FREE ZONES AND TERM LIMITS

One of the Court's most striking departures was the invalidation, for the first time in 60 years, of a Federal law on the ground that Congress had exceeded its constitutional authority to regulate interstate commerce. The 5-to-4 decision in U.S. v. Lopez, No. 93-1260, struck down the Gun-Free School Zones Act of 1990, which made it a crime to carry a gun within 1,000 feet of a school. Chief Justice Rehnquist's majority opinion said that the law had "nothing to do with commerce or any sort of economic enterprise," instead amounted to a Federal intrusion on the states' general police powers.

This bitterly contested decision left open the question of how the Court intends to apply its newly limited view of Federal authority, and how aggressively it intends to police the Federal-state border. The dissenters were Justices Souter, Stevens, Ginsburg and Breyer.

The Court's ruling in the term-limits case a month later made clear that the Court is engaged in a profound debate over the nature and sources of legitimacy of the national Government. By a 5-to-4 margin, the Court ruled that in the absence of a constitutional amendment, states may not limit the number of terms that members of Congress may serve. The decision, U.S. Term Limits v. Thornton, No. 93-1456, had the effect of wiping off the books term-limits measures that 23 states had adopted for their congressional delegations.

The debate within the Court was over the meaning of national citizenship and over state autonomy within the Federal system. Writing for the

majority, Justice Stevens said members of Congress "occupy offices that are integral and essential components of a single national Government," the requirements for which are set out on the Constitution and cannot be further restricted by the states. The majority was composed of the dissenters in the Lopez case with the addition of Justice Kennedy, a member of the Lopez majority.

In the dissenting opinion, Justice Thomas said that the individual states, rather than the "undifferentiated people of the national as a whole," remained the source of the Federal Government's authority and, as such, retained the right to add further qualifications to membership in Congress.

The Court also issued one of its infrequent opinions on the constitutional separation of powers. It ruled that Congress stepped impermissibly out of its legislative role by passing a 1991 law that directed Federal courts to reopen a group of securities lawsuits that a Supreme Court decision had effectively killed six months earlier. Congress may not exercise judicial power, Justice Scalia said for the Court in striking down the provision, an amendment to the Securities Exchange Act. The vote in Plaut v. Spendthrift Farm, No. 93-1121, was 7 to 2, with Justices Ginsburg and Stevens dissenting.

In its most important ruling of the term on the validity of a Government regulation, the Court upheld the Interior Department's broad view of its authority to protect the habitat of endangered species on privately owned land. Justice Stevens wrote the 6-to-3 decision in Babbitt v. Sweet Home, No. 94-859. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

DISCRIMINATION: A STRICTER STANDARD FOR AFFIRMATIVE ACTION

The Court ruled, 5 to 4, that the Federal Government's affirmative action programs must be able to meet the same strict constitutional review to which the Court had already subjected state and local programs that classify people by race. The decision, Adarand Constructors v. Pena, No. 93-1841, will inevitably curtail programs designed to convey special Federal benefits to members of minority groups, but is unlikely to end such programs entirely. In her majority opinion, Justice O'Connor noted the country's legacy of racial discrimination and said "the Government is not disqualified from acting in response to it."

The ruling, in a challenge brought by a white contractor to a minority-preference provision in a Federal highway construction program, was based on the Court's understanding of the constitutional guarantee of equal protection. The Constitution protects "persons, not groups," Justice O'Connor said. The dissenters were Justices Stevens, Souter, Ginsburg and Breyer.

On the same day and with the same division on the Court, the Justices ruled that the lower Federal courts in Missouri had improperly ordered the state to help pay for a showcase desegregation plan for the Kansas City schools. Chief Justice Rehnquist's majority opinion, Missouri v. Jenkins, No. 93-1823, cast doubt on the continued viability of the plan, which features magnet schools intended in part to lure students from the surrounding, mostly white suburbs. The decision also underscored the majority's impatience with continued Federal court involvement in school desegregation.

The Court injected further turmoil into the already unsettled redistricting picture with its final day, 5-to-4 ruling that the use of race as a "predominant factor" in drawing district lines makes the districts presumptively unconstitutional. Justice Kennedy's majority decision, Miller v. Johnson, No. 94-631, invalidated a Georgia's 11th Congressional district, drawn by the state legislature at the Justice Department's prodding to provide a third majority-black district for the state. The 14th Amendment's equal protection guarantee does not permit the state to separate citizens into districts on the basis of race without compelling justification, Justice Kennedy said.

At the same time, the Court agreed to review two new cases involving majority-black districts in North Carolina and Texas, an action that made clear that the Court is still in the midst of grappling with the issue. The dissenters in the Georgia case were Justices Ginsburg, Stevens, Souter and Breyer.

In an important job discrimination case, the Court ruled unanimously that employees who lose their jobs because of discrimination are still entitled to back pay, even if the employer later discovers misconduct that would have justified dismissal had it been known at the time. Justice Kennedy's opinion, McKennon v. Nashville Banner, No. 93-1543, rejected an increasingly popular defense tool in job discrimination cases known as "after-acquired evidence." A growing number of lower Federal courts had ruled that employers could establish a complete defense to a discrimination claim if they learned, often belatedly through pre-trial discovery, that they employee had exaggerated a resume or committed some other infraction that would have merited dismissal.

RELIGION: SEPARATION OF CHURCH, STATE AND MESSAGE

Two religion cases opened the door to greater government accommodation of religious speech in the public marketplace. The Court ruled, 5 to 4, that the University of Virginia must provide a financial subsidy to a student religious publication on the same basis as other student publications. Justice Kennedy's majority opinion rejected the university's argument that discrimination against religious speech was required to maintain the separation between church and state. Justices Stevens, Souter, Ginsburg and Breyer dissented in Rosenberger v. University of Virginia, No. 94-329.

The Court ruled that the Ku Klux Klan had a free-speech right to erect across in a state park in Columbus, Ohio, finding on a 7-to-2 vote that the state could not exclude the Klan's religious message from a public forum that was open to other private speakers. Justice Scalia wrote the opinion in Capitol Square Review Board v. Pinette, No. 94-780.

SPEECH: NO RAINING ON SOMEBODY'S PRIVATE PARADE

The Court ruled unanimously that the private sponsors of Boston's St. Patrick's Day parade have a constitutional right to exclude marchers who seek to identify themselves as gay. A parade is a form of private expression, albeit in a public place, that may not be forced by the government to carry an unwanted message, Justice Souter said in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, No. 94-749.

In an important ruling on the free speech rights of public employees, the Court struck down a Federal law that barred Federal civil servants from accepting pay for speeches and articles, even for those without any connection to their public jobs. Justice Stevens wrote the 6-to-3 opinion in U.S. v. National Treasury Employees Union, No. 93-1170. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

The Court ruled that the First Amendment protects the right to distribute anonymous campaign literature. The 7-to-2 decision, with a majority opinion by Justice Stevens and dissenting votes from Justice Scalia and Chief Justice Rehnquist, raised questions about the validity of election laws in most states, which requires people who put out campaign literature or political advertisements to identify themselves. "Anonymity is a shield from the tyranny of the majority," Justice Stevens wrote in McIntyre v. Ohio Elections Commission, No. 93-986.

The Court veered sharply from its precedents protecting the constitutional right of lawyers to advertise. In a 5-to-4 decision, the Court upheld a Florida rule that lawyers must wait at least 30 days after an accident before writing to solicit the victim's business. Justice O'Connor's opinion, Florida Bar v. Went for It, Inc., No. 94-226, said the rule served the valid purpose of protecting accident victims' privacy and the bar's reputation. She was joined by Chief Justice Rehnquist and by Justices Scalia, Thomas and Breyer.

CRIMINAL LAW: FREEING PUBLIC SCHOOLS TO TEST FOR DRUG USE

The question of whether public schools can require student athletes to submit to random drug-testing did not reach the Court as a criminal case, but it did require the Justices to interpret the Fourth Amendment's prohibition against unreasonable search and seizure, a provision common to many criminal cases on the docket.

The Court ruled, 6 to 3, that testing of student athletes was reasonable, leaving open the question of whether other students might also be tested. Justice Scalia wrote the opinion, Vernonia School District v. Acton, No. 94-590; Justices O'Connor, Stevens and Souter dissented.

In an important prison ruling, the Court made it substantially more difficult for inmates to bring constitutional lawsuits, under the 14th Amendment's guarantee of due process, to challenge actions by prison officials.

This 5-to-4 decision, Sandin v. Conner, No. 93-1911, was written by Chief Justice Rehnquist, who has long sought to curb Federal court involvement in state prison affairs. While not directly overruling any precedents, the decision repudiated an analysis that the court has used in its recent prisoners' rights cases under which prisoners could establish the right to be free of various types of restrictions, unless particular prison policies are followed. The dissenters were Justices Ginsburg, Breyer, Stevens and Souter.

Resolving a decades-old constitutional debate, the Court ruled unanimously that the police are ordinarily required to knock and announce their presence before entering a house to execute a search warrant. But there may be "reasonable" exceptions to the rule to account for a likelihood of violence or imminent destruction of evidence, Justice Thomas said in his opinion for the Court, Wilson v. Arkansas, No. 94-5707.

The Court ventured for the first time into the world of computerized law enforcement. The Justices ruled, 7 to 2, that evidence seized by police on the basis of an erroneous computer report of a valid warrant could be used in court, as long as the error was made by a court employee and not by a law enforcement official. Three members of Chief Justice Rehnquist's majority opinion -- Justices O'Connor, Souter and Breyer -- saw dangers ahead in this area and suggested that the police would be held accountable for their own errors in a future case. This case was Arizona v. Evans, No. 93-1660.

The Court salvaged the Federal law against child pornography by editing it to make clear that the Government must prove that a defendant knew that the performers in sexually explicit photographs or films were under the age of 18.

The poorly drafted Protection of Children Against Sexual Exploitation Act makes it a crime to distribute or receive "knowingly" a sexually explicit "visual depiction" of a child. The question was whether the Court should hold Congress to what it said, which could make it a crime for an innocent person to send or receive an unidentified package that later turned out to contain child pornography, or whether to read the law as Congress evidently meant to write it and to require the Government to prove that a defendant knew that a performer was under age. In U.S. v. X-Citement Video, No. 93-723, the vote was 7 to 2 to

modify the law's clumsy construction, with Justices Scalia and Thomas objecting to Chief Justice Rehnquist's editorial efforts.

The Federal sentencing guidelines instruct judges to consider all "relevant conduct" in setting the sentence. Since sentences in narcotics cases depend on the weight of the illegal drugs, evidence of other drug transactions that the Government has not yet taken to trial can be used to boost a sentence and, under this ruling, can then be used as the basis for a separate prosecution. Justice O'Connor wrote the 8-to-1 opinion, Witte v. U.S., No. 94-6187, with Justice Stevens the lone dissenter.

In an important ruling on the obligation of Federal judges to review state prisoners' petitions for writs of habeas corpus, the Court ruled that a judge who is in "grave doubt" about whether a constitutional error affected the outcome of the state-court trial should assume that it did and must order a new trial. Justice Breyer wrote the 6-to-3 majority opinion, O'Neal v. McAninch, No. 93-7407; Justices Thomas and Scalia and Chief Justice Rehnquist dissented.

The Court ruled in favor of state death-row inmates in two other habeas corpus cases, both by the same 5-to-4 lineup with the majority comprised of Justices Stevens, O'Connor, Souter, Ginsburg and Breyer. In one case, Schlup v. Delo, No. 93-7901, the Court gave a Missouri death row inmate, Lloyd Schlup, a second chance to persuade the lower Federal courts that his execution would be a "miscarriage of justice." The majority opinion by Justice Stevens said the lower Federal courts had set too exacting a standard for Mr. Schlup to meet before being allowed to present evidence -- a prison videotape -- that he says shows he could not have been at the scene of a cell-block murder.

In the second case, Kyles v. Whitley, No. 93-7927, the Court ordered a new trial for a condemned Louisiana murderer, Curtis Lee Kyles, on the ground that the prosecution had withheld important evidence favorable to the defense.

BUSINESS, TAXES: FREQUENT FLIER CONTRACT GETS CLEARED FOR TAKEOFF

The term's most important consumer case permitted members of airline frequent-flier plans, in this case the AAdvantage program of American Airlines, to sue an airline in state court for breach of contract over retroactive changes in frequent flier benefits. Justice Ginsburg's opinion, American Airlines v. Wolens, No. 93-1286, rejected the argument that the lawsuit was preempted by Federal law. The vote was 6 to 2, with Justices O'Connor and Thomas dissenting and Justice Scalia not participating.

The Court settled an old dispute in trademark law by ruling unanimously that color can be registered as a trademark when it distinguishes a particular product and serves no other function. Justice Breyer wrote the opinion, Qualitex v. Jacobson Products, No. 93-1577.

In a major victory for banks in their competition with the insurance industry, the Court unanimously upheld the Comptroller of the Currency's policy of permitting national banks to sell annuities. Justice Ginsburg's opinion, Nationsbank of North Carolina v. Variable Annuity Life Insurance Co., No. 93-1612, strongly endorsed the Comptroller's regulatory authority.

COURT'S CONSERVATIVES MAKE PRESENCE FELT
Reagan Appointees Lead Move Rightward

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Joan Biskupic
Washington Post Staff Writer

This is the Supreme Court that Ronald Reagan wanted but didn't get.

Reagan, when he was president, opposed affirmative action and argued against redrawing voting districts to ensure the election of minorities. He sought a lower wall of separation between church and state and thought Washington had usurped some of the states' power.

This term the court -- led by a core of Reagan appointees -- finally delivered.

"It has been one of the finest terms in generations," said Clint Bolick, a former Reagan Justice Department lawyer and now litigation director at the Institute for Justice. "What is especially bright from our perspective is the cohesiveness of the five-member majority."

The same five justices -- Chief William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas -- voted together in the biggest, most controversial cases of the term. Reagan elevated Rehnquist to chief in 1986 and appointed O'Connor, Scalia and Kennedy. Thomas was put on the court by George Bush.

As a bloc, the five justices struck down a "black majority" voting district, set in motion a rollback of federal affirmative action programs and rejected a Kansas City school desegregation plan. Their message to the nation: It is time to put race aside.

They also allowed for the first time government funding of a religious activity, a student-run Christian journal at the University of Virginia. And in striking down a congressional ban on guns near local schools, the majority signaled its distaste for federal intervention in state and local affairs.

All told, this term marked the first time in the post-Warren era that five conservatives held together and spoke boldly on a range of constitutional questions. "What we're seeing is the payoff from the Reagan-Bush years," said Georgetown University law professor David Cole. "It is a 1980s court, politically."

"They have taken a sharp turn to the right on race and religion," agreed Stanford University law professor Kathleen Sullivan. But, she added, at least in terms of limiting congressional power, "their bark is probably worse than their bite."

The change was abrupt. The early 1990s, with the same five conservative justices in place, were marked by sleepy terms, with the court for the most part refraining from bold initiatives. In the most fractious conflicts, on abortion and school prayer, O'Connor and Kennedy voted in ways that ensured the court did not measurably move the law.

Now a plain fault line exists, with John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer on the left, and often on the losing side. The court has revved up the nation's social policy agenda, particularly on race, and the overriding question as the court finished its term Thursday was: Why this boldness now?

One answer may lie in O'Connor, in recent years a moderate influence but this term largely in the conservative camp.

"Maybe in the immediate aftermath of [William J.] Brennan's and [Thurgood] Marshall's departures, O'Connor wanted to provide some of the ballast on the court," said Yale University law professor Paul Gewirtz.

With Stevens, Souter, Ginsburg and Breyer voting together and representing a liberal wing, Gewirtz observed, "it may have released her sense of being a balance wheel."

At the same time, court experts noted that Rehnquist, Scalia and Thomas -- the core conservatives -- were speaking with stronger, clearer voices this term on the proper balance of state and national powers and on the Constitution's prohibition, in their view, of government's use of race classifications, even to right past wrongs.

Thomas, the court's only black justice, has been particularly energized.

"Government cannot make us equal," Thomas wrote in the affirmative action case, Adarand v. Pena, "it can only recognize, respect, and protect us as equal before the law. . . . [G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."

When the court struck down a federal judge's school desegregation plan for Kansas City, Mo., Thomas wrote, "It never ceases to amaze me that the

courts are so willing to assume that anything that is predominantly black must be inferior."

O'Connor, and to a greater degree Kennedy, have long been troubled by government classifications based on race. As a result, this term's cases played to these key justices's conservative sides.

When Kennedy wrote the Miller v. Johnson opinion last week striking down a Georgia redistricting plan, he adopted earlier words from O'Connor about affirmative action: Racial classifications "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the government by history and the Constitution."

Bolick noted that other government officials and the country as a whole have a "greater sense of urgency" now to resolve old dilemmas of race. Even before the court reviewed a federal contracting program that favored firms owned by racial minorities, members of the new Republican Congress called for an end to policies that give special advantage to racial minorities.

Donald B. Ayer, a former Reagan administration lawyer who was a law clerk to Rehnquist, said the court's "straightforward" view of the constitutional guarantee of equal protection of the laws was its boldest stroke this term.

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class," the majority said.

Ayer, who became a deputy attorney general in the Bush administration and is now in private practice, said the court's resistance to race-conscious decision-making "raises an interesting issue of where America is now and to what degree race is a real-life consideration."

In other words, are Americans ready for the "colorblind" ideal the majority seeks? "If the law chooses to almost completely read it out of relevancy," Ayer said, "then you have to watch how . . . the law and society" keep up with each other.

Civil rights leaders respond that in this case the law -- or at least the court -- is out of touch with society.

"There is a strong argument that this court is at war with minority rights," asserted Frank R. Parker, a professor at the District of Columbia School of Law. "The court's decisions are seriously damaging minorities' ability to gain equality in the economic and political life of the country."

Still, the real impact of the rulings is uncertain.

Sullivan referred to the court's 1978 ruling rejecting racial quotas in school admissions but allowing some consideration of an applicant's race, in University of California Regents v. Bakke.

"Just as the Bakke struck down quotas and left the door open for some [race] preferences, Adarand leaves the door slightly ajar for affirmative action and Miller leaves the door slightly open" for use of "majority minority" voting districts, Sullivan said.

O'Connor wrote in Adarand v. Pena that the court's new standard for federal affirmative action need not be "fatal" to such programs. But she did not make clear what could justify them, beyond possible evidence of "pervasive, systematic, and obstinate discriminatory conduct" by government against blacks or other minorities.

In the voting rights case, O'Connor said in a concurring statement that the new standard for the constitutionality of "majority minority" voting districts "does not throw into doubt the vast majority of the nation's 435 congressional districts." She said race still can be a consideration in redistricting, as long as the state has not "relied on race in substantial disregard of customary and traditional districting practices."

The standard the court used for Georgia's black majority district and the federal affirmative action plan is known as judicial "strict scrutiny." That means, to pass constitutional muster, government must prove that it had a "compelling interest" in adopting a race-based program and that the program or policy was "narrowly tailored" to that compelling interest.

Left for lower courts and eventual high court review is what sort of evidence of past discrimination and racial remedies will pass that test, if any. Clinton administration officials have said that although the hurdle is high, it is not insurmountable.

But Scalia wrote that nothing can justify affirmative action: "[U]nder our Constitution there can be no such thing as either a creditor or a debtor race."

Scalia's sentiment recalls Reagan's admonition in 1986, a few months before he nominated Scalia to the high court: "We want a colorblind society. The ideal will be when we have achieved the moment when nothing is done to or for anyone because of race . . . but in spite of" the person's race.

1994-1995 SUPREME COURT HIGHLIGHTS

INDIVIDUAL RIGHTS

Adarand v. Pena, 5-4. Federal programs designed to benefit minorities are unconstitutional unless they serve a compelling government interest and are narrowly tailored to address past bias.

Missouri v. Jenkins, 5-4. A federal judge may not try to integrate a city's school system by ordering extra spending to attract suburban students; desegregation remedies should be tailored to a district.

Miller v. Johnson, 5-4. A judge should strictly scrutinize a redistricting map when legislatures have used race as a predominant factor in drawing boundaries, to ensure that equal protection rights are not violated.

City of Edmonds v. Oxford House, 6-3. Cities may not use zoning ordinances to exclude group homes for recovering alcoholics or other disabled people from residential neighborhoods.

McKennon v. Nashville Banner, 9-0. A worker who sues for job discrimination still has a case even if the employer discovers in preparing for the case that the worker lied to get hired.

STUDENT DRUG TESTING

Vernonia School District 47J v. Acton, 6-3. A school district may require that all students take drug tests as a condition of playing sports, without violating privacy rights.

GOVERNMENT POWER

U.S. Term Limits Inc. v. Thornton, 5-4. States cannot set term limits for members of Congress, because the Constitution lists the exclusive qualifications, relating to age, citizenship and residency.

United States v. Lopez, 5-4. Congress exceeded its authority to intervene in local affairs when it passed a law intended to keep firearms out of schoolyards. For the first time in 60 years, the court limited Congress's power to regulate interstate commerce.

ENVIRONMENT

Babbitt v. Sweet Home Chapter, 6-3. Federal regulators may stop private landowners from developing their property in ways that could destroy the habitat of endangered wildlife species.

FREEDOM OF RELIGION

Rosenberger v. Rector and Visitors of University of Virginia, 5-4. The university violated the speech rights of a student group by refusing to provide funds for its Christian magazine while subsidizing nonreligious publications.

Capitol Square Review v. Pinette, 7-2. Ohio was wrong to bar the Ku Klux Klan from putting up a large wooden cross in front of the Capitol. The court said a privately sponsored cross in a public forum does not breach the constitutional requirement for separation of church and state.

FREEDOM OF SPEECH

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 9-0. The organizers of Boston's St. Patrick's Day parade should have been allowed to exclude gay marchers because a parade is a form of expression.

McIntyre v. Ohio Elections Commission, 7-2. States cannot ban anonymous leafleting.

United States v. National Treasury Employees Union, 6-3. A law that bars executive branch workers from earning outside income from speeches and articles even when they are unrelated to their work is unconstitutional.

Florida Bar Association v. Went For It Inc., 5-4. A state may forbid lawyers from soliciting accident victims and their relatives within 30 days of an accident.

CRIMINAL LAW

Arizona v. Evans, 7-2. When a person is wrongly arrested based on a computer error, illegal drugs or any other evidence police fortuitously find on the individual need not be suppressed at trial.

Wilson v. Arkansas, 9-0. Police generally must knock and announce themselves before entering a home with a valid search warrant.

Schlup v. Delo, 5-4. A state prisoner who says he has new evidence of innocence should get a federal hearing if he shows that a reasonable juror would have found him not guilty based on that evidence.

WASHINGTON GETS AMENDMENT FEVER
The 'New Federalism' Has Congress and the Supreme Court Debating First Principles

The National Law Journal

Monday, June 5, 1995

Marcia Coyle
National Law Journal Staff Reporter

Washington-In the bubbling bouillabaisse of federal lawmaking, the Republican-controlled Congress is mixing ingredients that could alter in the next 100 days fundamental relationships set out in the nation's charter, the U.S. Constitution.

Whether this untested recipe results in a palatable specialty or a dicey potluck stew, say constitutional scholars and historians, is too difficult to predict. But there is agreement, within vast areas of disagreement among those who study the founding charter, that the nation is firmly embarked on one of its periodic and great constitutional journeys.

Even as Congress wrestles to redefine the federal government's role in relation to the states and its role in relation to the other branches, the U.S. Supreme Court is drawing constitutional lines of its own. Two recent and remarkable decisions-one involving state-imposed congressional term limits and the other, federally imposed restrictions on guns near schools-reflect the high court's vision of the responsibilities outlined in the Constitution. Its members are as sharply divided as are the lawmakers debating across the street on Capitol Hill.

And the American people, who last November sent a strong message of discontent with the federal government, may be re-evaluating their attitudes in the wake of the Oklahoma bombing. The disaster humanized a faceless bureaucracy and exposed, as never before, the deadly extreme of anti-government sentiments.

"I think what we've got is a very vibrant national discourse going on which, more than we saw in the '80s, is involving all the federal players as well as the states," says Prof. Michael J. Gerhardt of the College of William and Mary, Marshall-Wythe School of Law.

From now until the end of the year, the constitutional framework may be stretched, shrunk or dramatically changed in basically three ways:

-- By direct amendment through congressional action and state ratification- witness the arrival of the religious right's social-moral agenda, which includes school prayer, abortion and other proposals.

-- By legislative initiatives, such as the line-item veto and foreign policy changes, that affect the allocation of power among the federal branches.

-- By so-called devolution, such as welfare and regulatory reform, which shifts large blocks of federal responsibilities to the states.

From a historian's perspective, much of the federalism debate on Capitol Hill is "very creaky stuff," says Prof. R.B. Bernstein of New York Law School, author of "Amending America" and other books on American constitutional history. But, he adds, this year, unlike in similar periods in the Constitution's life, something is "qualitatively different" about the degree of commitment to rewriting the rules from the ground up.

'COMPOUND REPUBLIC'

"We're seeing the most remarkable shift in public thinking about government and where governmental responsibilities should be placed since FDR," says Professor Bernstein. "If may be the most remarkable shift because we're seeing it throughout the culture; we're hearing it everywhere."

The Constitution can be "changed" in basically three ways: through Art. 5, by adding provisions in a demanding amendment process; through judicial interpretation; and by custom and usage (for example, the recognition of executive privilege). Today, political scientists also talk about devolution, a reordering and shifting of federal responsibilities, in a debate over who should do what and who gets what that implicates fundamental questions about federalism.

The federalism debate is literally as old as the Republic itself, or the "compound republic," as James Madison described it in the Federalist Papers. And it's unlikely to be resolved because, as Woodrow Wilson said, "It is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."

During the presidential campaign and first term of Richard M. Nixon, says Professor Bernstein, the seeds emerged of what some called the new federalism- the shifting of federal responsibilities to the states.

"That theme has been with us ever since," he explains. "Substantively, this has always been extraordinarily important, but now the people are starting to get it. They also are reacting in almost unthinking revulsion against the federal government." Previously unassailable incumbents were falling in

elections; it was easier than ever to run against the government. Even the popular culture reflected these sentiments, he says; for example, the hit television show "The X-Files" conveys the message that the government is bad and manipulative.

Constitutional law, he says he has learned, does not develop in a vacuum: "If people think of the federal government as the enemy and that becomes the consensus, that consensus has the power to reshape the workings of the constitutional system."

Until the April 19 bombing of the federal building in Oklahoma City, the populace was close to that anti-government consensus, Professor Bernstein and some other scholars believe.

The bombing may not have turned that thinking around, says Professor Bernstein, but it seems to have given many people pause: "We saw people just like us killed; people doing their jobs, jobs we used to think were a good idea."

The bombing also turned the public eye to the views of the militia movement and other fringe groups, such as the county supremacy movement. "Perhaps when folks hear those views, they'll say, 'The Constitution doesn't mean that. I was upset, but I'm not going that far,"' says Professor Bernstein.

ROLE REVERSALS

The bombing also seems to have realigned the political players, with implications as well for the federalism debate, notes Professor Gerhardt. In a role reversal, Clinton administration officials are voicing the need for expansive anti-terrorist legislation that could infringe on civil liberties, while Republicans, such as House Speaker Newt Gingrich, are reacting with concern for the Fourth Amendment's protection against unreasonable search and seizure.

The federalism debate itself is different this year, he adds, because there is also an institutional reversal at the national level. In the early 1980s, when the debate was last heard, he explains, it was the executive branch, led by President Ronald Reagan, that was calling for a smaller federal government and more state responsibility. Today, the legislative branch is initiating the shift away from federal power.

Republicans have a "rather coherent view" of federal power, says Professor Gerhardt, but the Republican-led Congress is inconsistent on the division of federal-state responsibilities: While moving to federalize tort law and many crimes, areas generally considered the province of the states, Congress is also trying to reduce longtime federal responsibilities for welfare, the environment and other matters.

The Supreme Court, too, is "mirroring to some degree the political debate; it is nowhere near a coherent view of federalism," says court scholar Douglas Kmiec of Notre Dame Law School. In two recent decisions, 5-4 majorities said that Congress exceeded its lawmaking power when it enacted a law banning guns within 1,000 feet of a school-U.S. v. Lopez, 93-1260-and that the states have no power to impose term limits on members of Congress-U.S. Term Limits v. Thornton, 93-1456.

Justice Clarence Thomas, writing for the dissenters in the term limits case, articulates a fairly formal, structural approach to federalism in which the Constitution has enumerated powers, denials of power and reservations of powers, Professor Kmiec notes. "If it's not enumerated or denied, it's reserved to the states," he says of that approach.

On the other hand, Justice John Paul Stevens, who led the majority, was more case-specific but also evoked a contrasting vision of the constitutional framework, drawn from the concept of a unified national government.

The high court is likely to face additional federalism questions in the near future, predicts Professor Kmiec, as the justices are drawn into the constitutional fallout of what is now under way in Congress and what has already passed. For example, challenges to the federal mandate in the motor voter registration law and to the Brady gun control law are making their way to the court.

BRANCH WARS

A more subtle and less sexy shift in constitutional relationships is also under way, one that could affect the allocation of powers among the federal branches.

"On the one hand, it's clear a lot of high-profile activity has implications for the allocation of powers, but it's not at all clear that all of the legislation points in the same direction," says separation-of-powers expert Peter M. Shane, dean of the University of Pittsburgh School of Law.

For example, he explains, Senate Majority leader Robert Dole's proposed replacement for the War Powers Resolution removes, in one part, substantive controls the resolution puts on the president. "It looks like a presidential liberation act," Dean Shane says. But the remainder of the proposal, he adds, can be read as a more specific restriction of the president's use of military force than ever has been enacted. For example, it includes restrictions on the president's commitment of U.S. troops to U.N. command in peacekeeping efforts.

Both the balanced budget amendment and legislation giving the president the line-item veto, says Dean Shane, arguably point in the direction of a stronger executive, but their long-term effect on the balance of powers is unpredictable.

The balanced budget amendment's impact, he explains, depends on its enforceability-a major sticking point in the congressional debate. The line-item veto, rather than discouraging pork-barrel legislation because the president stands ready with veto pen in hand, may encourage it because the onus

is on the president. And, the president, he says, must weigh the knowledge that each time he exercises the veto, he will pay the price in some congressional district.

The Judicial Conference of the United States has opposed the line-item veto because it fears the judiciary's independence could be threatened if its budget is at the mercy of the executive branch.

Legislation that would revise regulatory procedures substantially by adding layers of decision-making and review also implicate the allocation of powers, says Dean Shane, as could Congress' decision to apply civil rights and employment laws to itself.

"The thing I find most troubling is, there is not much serious discussion about allocation-of-power issues," says Dean Shane. "If the framers were around today and laws like these were being proposed, they would insist the most important thing to focus on would be the distribution-of-power implications. The idea they would make changes in substantive policy without being attentive to allocation of power is very strange."

AMENDMENT FEVER

The final, most direct and most visible way to alter constitutional relationships is the Art. 5 amendment process. In the first two months of the new congressional session, nearly 100 amendments were proposed, many concerning a balanced federal budget, term limits, line-item vetoes or abortion.

In the Constitution's lifetime, roughly 11,000 amendments have been proposed, a full third in the past 26 years, says amendment scholar Professor Bernstein. But no new amendment has emerged from Congress since the Washington, D.C., statehood proposal in 1978, and no amendment has emerged and been ratified by the states since the 26th Amendment-lowering the voting age to 18-in 1971. The last amendment to be ratified-the 27th Amendment, barring Congress from changing its salary in the term in which it sits-was proposed in 1789 and ratified in 1992, he notes.

Other periods in American history have produced "amendment spasms" but, Professor Bernstein explains, there is a difference in the current Congress. Many proposed amendments go to core constitutional principles, he says, and are backed by lawmakers who are not grandstanding for political purposes: "These guys have been waiting on the margins for more than 40 years, but no more."

Some of the amendments-those involving flag burning and school prayer, for instance-respond to what their proponents see as direct challenges to a traditional understanding of what it means to be Americans and are an effort to end those debates by writing their understanding into the Constitution, he and other constitutional scholars say. Proponents see Art. 5 as their trump card.

History proves Art. 5 can be exactly that, says Professor Bernstein, if amendment proponents have three things: a national consensus there is a serious problem beyond the power of ordinary political processes to solve; a national consensus that solution X is the solution to that big problem; and the political will, savvy and commitment to get it through both houses of Congress by a two-thirds vote and ratified by three-fourths of the states.

WON'T BE EASY

But translating a perceived consensus into an amendment was not designed to be easy. If Congress' failure to pass the balanced budget amendment-which enjoyed much support-is any indication, other proposed amendments are doomed, predicts Professor Gerhardt.

Despite the appearance of a blizzard of congressional action in the past six months, he adds, not much of substance has reached the president's desk; Congress still seems far from sending radical budget reform, welfare reform and crime legislation to Mr. Clinton.

"Ironically, we thought 1992 was to be the year of change; the focus was on health care and welfare reform," recalls Professor Gerhardt. "But lurking within those issues were more fundamental ones: Do we want to change not only existing laws but also existing responsibilities at the federal level and between federal institutions? We had been on the edge of those issues, but now we're wrestling more frontally with them."

CONGRESS SEEKS WAY AROUND THE COURT

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Frank J. Murray

With the Supreme Court gone for summer recess, Congress is moving to repair two key tools damaged by its rulings.

Judiciary committees in both houses are considering bills that declare "commerce clause" authority to throw a federal net over guns in school zones and to again make it illegal to lie to Congress when not under oath.

The court's false-statement decision erased a rule covering financial disclosures by senators, representatives and staff members as well as statements to congressional investigators by targets of their probe. It is easily changed.

But the Constitution's commerce clause has been a riddle since John Marshall headed the Supreme Court.

The legendary chief justice - who defined interstate commerce as that "which concerns more states than one" - could not have expected the clause to cost Ohio farmer Roscoe Filburn $117.11 for growing 239 extra bushels of winter wheat to feed his livestock.

Nor could the Constitution's framers anticipate it would virtually nullify the 10th Amendment and become "a blank check" for Congress, as Justice Clarence Thomas termed it when the high court's conservative wing sharply curbed the legislative tool in the term that just ended by striking down the gun-free school zones law 5-4.

Current bills, all filed before the opinion cast doubt on how the commerce clause may be used, invoke it to justify controlling torts, trash, television and terror.

With the vote of Justice Anthony M. Kennedy swinging the other way, the court also thwarted 10th Amendment advocates by overturning 23 state laws limiting congressional terms.

The Supreme Court first told Congress it stretched the commerce clause too far in 1870, when it overturned a federal law banning sales of naphtha and oils for lamps.

Then and now, courts debated - and disagreed - over when power to regulate commerce allows the national government to pre-empt matters that federalism advocates argue were reserved under the 10th Amendment.

The commerce clause has been invoked by Congress over the years to authorize food stamps, control wages, punish cross-country sexual adventurers and bar racial discrimination. Dozens of pending bills cite it to justify laws that would limit garbage shipments, curb punitive damages, forbid abortion, promote kiwi fruit, control weeds and limit violence on television.

"Congress has thought they could basically legislate anywhere. Now, there is a limit," said Josh Horowitz, legal counsel for the Coalition to Stop Gun Violence. That group sees the ruling as a key states' rights decision despite the incidental setback to gun control.

Although a new gun-zone bill would require prosecutors to prove a gun moved in interstate commerce, many analysts believe the high court ruled that out as well. A Senate aide said the Judicary Committee and the Justice Department office of legal counsel believe the rewrite will stand the test while fulfilling President Clinton's promise to try reversing the court on the symbolic issue.

While state protests have little practical effect beyond signaling discontent, Colorado's legislature formally complained about a new federal law barring the state from regulating trucks operating solely inside Oklahoma.

California cited the 10th Amendment in resisting the federal voter-registration mandate for motor-vehicle registrants. New York cited it in winning limited Supreme Court relief from a law on disposal of low-level nuclear waste.

The court had firmly extended the commerce clause power to actions within one state if they affect commerce across state lines or limit congressional power to govern commerce. In a 1941 wheat case, the court decided Congress' power was undermined when Mr. Filburn, the farmer, avoided buying 239 bushels on the open market, jeopardizing the scheme to boost wheat prices nationwide.

Although disputed decisions date to a case involving Robert Fulton's steamboat, analysts see the situation as an outgrowth of New Deal judicial and legislative zeal to repair the economy.

"If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze," the Supreme Court said in 1949.

ENUMERATED POWERS

Article I, Section 8 of the Constitution delegates specific powers to Congress. The Tenth Amendment

reserves all other powers "to the States, respectively, or to the people." The so-called enumerated powers authorize Congress to:

* Levy and collect taxes, borrow money and provide for a common defense.

* Regulate commerce with foreign nations and commerce among the states.

* Regulate naturalization and bankruptcy.

* Coin money, punish counterfeiters, and set standards of weights and measures.

* Establish post offices and "post roads."

* Protect intellectual property with copyrights and patents.

* Establisdh courts inferior to the Supreme Court.

* Define and punis piracy, other felonies on the high seas, and violation of international law.

* Declare war set up an army and navy, prescribe military law, and provide for using state militias to enforce federal law, suppress insurrections and repel invasions.

* Govern the federal district as a seat of government as well as federal properties elsewhere.

PRAYER AMENDMENT UNLIKELY DESPITE PUSH FROM RIGHT

Congressional Quarterly Weekly Report

Monday, July 10, 1995

Robert Marshall Wells

When 10-year-old Joshua Burton brought a Bible to his Orange County, Fla., elementary school last March, a teacher told him he had violated the Constitution's provisions on the separation of church and state.

The school's principal told the fourth-grader that he could bring his Bible to school if he read it silently and did not discuss it with anyone. But two days later, he was expelled after two other students complained that he had been reading his Bible before school.

"All I could think of doing was just to sit at my desk and cry," Joshua said during a June 23 House Judiciary subcommittee hearing in Tampa, Fla.

Citing a long list of similar incidents around the country, a growing chorus of conservatives is calling for a constitutional amendment to allow free religious expression at schools, the display of religious symbols and student-initiated group prayer during sports contests, graduation ceremonies and other events.

With Republicans controlling Congress, proponents of school prayer believe they have their best chance ever of returning organized religious expression to public places. Prominent GOP House members such as Majority Leader Dick Armey of Texas and Judiciary Committee Chairman Henry J. Hyde of Illinois have expressed support for the cause.

But despite the momentum provided by the GOP electoral sweep in November, an effort to promote school prayer through a constitutional amendment is still a long shot.

Working against it is a calendar crowded with other measures that are higher congressional priorities. And, for all the high- profile advocates, support for a constitutional amendment to restore school prayer does not run very deep among members.

Democrats are nearly unanimous in opposition to an amendment, contending that it is unnecessary at best and could discourage the expression of minority religions. President Clinton also is opposed.

And many Republicans are ambivalent, questioning either the need for an amendment or the potential risks in alienating moderates in their party.

"Congress reacts to complaints that are brought to us by our constituents around the country," Rep. F. James Sensenbrenner Jr., R-Wis., said during the hearing in Tampa. But "I sure would like to have the solution fall short of a constitutional amendment," he added

LEGISLATIVE OUTLOOK

Several drafts of a proposed amendment encouraging school prayer are circulating on Capitol Hill. The most prominent are two almost identical drafts proposed by the Traditional Values Coalition, a grass-roots church lobbying organization based in Anaheim, Calif., and by Focus on the Family, a media ministry based in Colorado Springs, Colo., would state that religious expression in schools or other public places could not be abridged by states or the federal government.

The drafts also state that the free exercise of religion under an amended Constitution would not constitute establishment of an official religion.

Adopting a constitutional amendment requires a two-thirds vote of the House and Senate and approval by three-quarters, or 38, of the states.

Michael W. McConnell, a University of Chicago law professor who helped draft the Focus on the Family proposal, said in an interview that an amendment is needed because religion has been incrementally squeezed out of public life as the government's influence has increased over time. Ultimately, he said, "that area of life that had been pluralistic, all of a sudden it becomes secularized," McConnell said.

GOP conservative Rep. Ernest Jim Istook Jr. of Oklahoma plans to propose a measure similar to the amendment he introduced just before the 1994 elections. That bill stated that nothing in the Constitution could be construed to prohibit individual or group prayer in schools and other public institutions. The amendment also said that no person would be required to participate in prayer and that neither the states nor the federal government would compose any prayers said in public schools. (1994 Weekly Report, p. 3353)

"We are talking about permitting religious expression, not compelling it," Istook said at a June 8 hearing in Washington of the House Judiciary Subcommittee on the Constitution. "Why can students not do voluntarily what adults can do?"

Subcommittee Chairman Charles T. Canady, R-Fla., said he is not leaning toward any of the drafts in particular at this point. "We are in the process of trying to get a full understanding of the problem," he

said in an interview. "I think we need to listen to everybody on this issue."

In addition to the hearings in Washington and Tampa - and one held June 10 in Harrisonburg, Va. - the subcommittee is planning sessions in New York City, Los Angeles and Oklahoma City.

Opponents as well as supporters are testifying, occasionally producing lively exchanges that underscore the difficulties facing the proposals. In Tampa, for example, Canady had to appeal for order several times from a crowd that was largely opposed to amending the Constitution. The crowd at the Harrisonburg hearing was largely supportive of an amendment.

At the Washington hearing, committee Democrats, including Melvin Watt of North Carolina, contended that expressions of minority and majority religions are already protected under current law. "What you are saying is that you want to amend the federal Constitution to give that control to the majority," he said. "If everything that was in the Constitution was done by a simple majority, then I guess you would have a Constitution that was based on protecting the rights of the majority."

Canady conceded that the path to a constitutional amendment would be arduous and said other options may have to be considered. These include attaching, to unrelated legislation, language that would promote school prayer but fall short of a constitutional amendment. Such statutory language, if upheld by the Court, could remain in effect until enactment of a more specific constitutional amendment.

"We have to recognize that we might fail," Canady said. "I don't know if a statutory approach could successfully address the problem. But that is something that should not be rejected out of hand."

One likely avenue for such an approach would be the fiscal 1996 appropriations bill that is scheduled to be marked up by the Appropriations Labor, HHS, and Education Subcommittee on July 11. "There will be some legislating on the bill," Chairman John Edward Porter, R-Ill., predicted in an interview. But he also suggested that a school prayer provision may ultimately get lost among more pressing fiscal concerns.

"I think there's going to be so much going on," Porter said, "people won't be able to focus on things like this."

In the Senate, where hearings are not yet under way on school prayer, a constitutional amendment would be a harder sell than in the House.

There, "religious equality" language would probably face a filibuster from nearly all Democrats and several Republicans, including Mark O. Hatfield of Oregon, Arlen Specter of Pennsylvania, James M. Jeffords of Vermont and Orrin G. Hatch of Utah.

"A PLACE AT THE TABLE"

Much of the driving force behind the effort to amend the Constitution comes from Christian conservatives, who played an influential role in the 1994 elections.

A "religious equality" amendment was the first item in the "Contract With the American Family," which Ralph Reed, executive director of the Christian Coalition, unveiled on Capitol Hill on May 17. The document, patterned after the House GOP's "Contract With America," drew praise from Republican Party leaders. House Speaker Newt Gingrich of Georgia and Majority Whip Tom DeLay of Texas also spoke at the news conference. (1995 Weekly Report, p. 1448)

Later, in a June 11 appearance on ABC-TV's "This Week With David Brinkley," Gingrich said, "We have to bring God and the concept of a creator back more into the public square than it has been in recent years."

But Gingrich says he is not convinced a constitutional amendment is required, and he is exploring the feasibility of a statute that could withstand a court challenge.

Senate Majority Leader Bob Dole of Kansas, a candidate for the GOP presidential nomination in 1996, has also praised the concept. But it remains unclear whether Dole would prefer an amendment or a statutory approach.

Reed's announcement also served to rally opponents, however. The newly formed Coalition to Preserve Religious Liberty, which consists of numerous mainstream religious organizations and interest groups such as the American Civil Liberties Union and liberal People for the American Way, held their own news conference the same day to underscore their opposition.

The Rev. J. Brent Walker, general counsel for the Baptist Joint Committee on Public Affairs in Washington and chairman of the coalition, conceded that religious expression is sometimes stifled in school settings through unwitting ignorance or neglect. But Walker said the answer should not be amending the Bill of Rights for the first time in more than 200 years.

"We need to educate our educators, teach our teachers and inform our students" about what is permissible under current law, Walker said. "I don't think a constitutional amendment is going to make the line any brighter."

Jesse Choper, a professor of law at the University of California at Berkeley, said prayer in schools "wouldn't be the end of the world," but would have a coercive effect on some students, especially young children who are members of religious minorities. "Sometimes majorities succumb to the passions of the moment," Choper said, but "majorities don't need

constitutional rights to protect them. They have the political process to protect them."

FEASIBILITY DOUBTED

Others have questioned the practicality of a school prayer amendment. Jorge Osterling, director of community services for the Arlington County, Va., public schools, said an amendment could complicate the already difficult job of educating in diverse areas such as Arlington, where students come from more than 50 countries and represent nearly 20 religions.

"The fact is, we cannot facilitate any public place to pray, because if we do it for one, we have to do it for everybody," Osterling said in an interview. "We cannot paralyze the school by turning it into a temple."

Still, for dedicated advocates of school prayer nothing short of an amendment will do. "We need to have something definitive," said Beverly LaHaye, president of the conservative Concerned Women for America in Washington. "The underlying conflict is basically hostility toward religion."

In Tampa, Joshua Burton and his family are not waiting for a constitutional amendment. With the help of an Orlando law firm specializing in religious liberty cases, the family has sued the school in federal district court.

Joshua's father, Mark Burton, who also testified at the Tampa hearing, said that parents need help raising their children in a socially fraying society that seems increasingly hostile toward religion.

"It seems to me," he said, "that in this age where children are taught by the state school system that they must be tolerant of racial differences, tolerant of homosexuality, tolerant of political differences and tolerant of cultural and language diversity, that this same system should be tolerant when it comes to religious freedom."

HOUSE APPROVES AMENDMENT ON FLAG DESECRATION
Measure Would Override High Court Rulings, Let States and Congress Outlaw the Act

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Kenneth J. Cooper
Washington Post Staff Writer

The House yesterday endorsed for the first time a proposed constitutional amendment that would permit Congress and the states to outlaw "physical desecration" of the U.S. flag.

Citing strong support in state legislatures and public opinion polls, lawmakers backed the so-called flag-burning amendment, 312 to 120, surpassing by 24 votes the two-thirds majority needed to approve a constitutional amendment. A floor vote has not been scheduled in the Senate, where preliminary counts show support falling short of the supermajority required to send the issue to the states.

The proposed amendment, sponsored in the House by Rules Committee Chairman Gerald B.H. Solomon (R-N.Y.), would overturn a pair of Supreme Court rulings in 1989 and 1990 that struck down flag desecration laws as unconstitutional violations of individual rights to free speech.

Approval of the amendment in the Republican-controlled House shows how much sentiment has changed since the identical amendment was rejected in 1990 by 34 votes, 254 to 177. That vote in a Democratic-controlled House effectively killed any congressional movement to outlaw flag desecration until this year.

On a vote that House GOP leaders timed to come a week before the Fourth of July recess, the amendment was supported by 219 Republicans and 93 Democrats but opposed by 107 Democrats, 12 Republicans and one independent. Three lawmakers did not vote.

The amendment reads: "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."

Yesterday's debate, less dramatic and half as long as the seven-hour debate in 1990, saw both sides invoke patriotic symbols with references to military service or immigrant heritage and displays of copies of the Constitution and images of the flag.

Supporters emphasized that 49 states, every one but Vermont, have passed resolutions calling for Congress to approve a constitutional amendment, which has about 75 percent support in polls. If the amendment is also passed in the Senate, it would have to be ratified by 38 states to become part of the Constitution.

In keeping with the argument they have made on other legislation, Republicans maintained that the question of whether to outlaw flag desecration should be left to the states, not the unelected justices of the Supreme Court in this instance. "Let the states decide," freshman Rep. David Funderburk (R-N.C.) urged.

"We are responding to the will of the overwhelming majority of the American people by restoring to the states and the Congress the power to protect the flag of this nation," Solomon said. "The flag of the United States is the most important symbol that we have. It is what makes us all Americans, regardless of where we came from."

Freshman Rep. Lindsey Graham (R-S.C.) suggested an alternate object for antigovernment ire. "If you feel the need to burn something, burn your congressman in effigy. Burn me," he said.

House Judiciary Chairman Henry J. Hyde (R-Ill.) compared a ban on flag-burning to limits on speech based on obscenity, libel, perjury and other laws. "Somebody tell me why it's a federal crime to burn a $20 bill, but it's okay to burn a flag?" he said.

But opponents including the administration argued that the amendment would restrict political speech protected by the First Amendment and make the first revision in the Bill of Rights since it was adopted in 1792. Of flag-burning, Rep. Anthony C. Beilenson (D-Calif.) said: "This is unpopular expression. But it deserves protection no matter how much we may deplore it." Rep. Wayne T. Gilchrest (R-Md.) accused the House of "confusing the flag with what it symbolizes" because "the flag isn't more important than the Constitution."

Critics also cited data compiled by the Congressional Research Service that show flag-burning to be infrequent, with three incidents reported last year and none in 1993. Beilenson urged that "misfits who desecrate our flag remain in obscurity, where they deserve to be."

Reps. Jose E. Serrano (D-N.Y.) and Gary L. Ackerman (D-N.Y.) used items bearing flag designs

as props in questioning the definition of "flag" and "desecration" under the amendment.

"How about flag napkins?" Ackerman asked, pulling a handful from a cardboard box. "You blow your nose in one, have you broken the law?"

Serrano, after asking whether the amendment would cover "cake made out to look like the American flag" or a sweaty soccer T-shirt with a flag pictured on it, concluded: "If this flag could speak to us, it probably would tell us to stop this silly debate and to do what it stands for," like feed hungry children, care for the elderly and abandon racial prejudice.

In the Senate, Judiciary Chairman Orrin G. Hatch (R-Utah) said the amendment has 56 cosponsors and stands a "reasonable chance" of gaining the needed support from 67 senators when a vote is taken "probably next year." Congressional Quarterly recently counted 63 supporters in the Senate but also 34 opponents -- enough to block passage.

Majority Whip Trent Lott (R-Míss.) suggested it would be tough to pass the amendment, saying, "That's a big day's work in the Senate."

THE AMENDMENT

The one-sentence amendment approved by the House yesterday reads:

> "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."

WHAT'S CONSERVATIVE ABOUT AMENDING THE BILL OF RIGHTS?

The News & Observer Raleigh, NC, Monday, June 12, 1995

Edwin M. Yoder Jr.

Washington -- A brother columnist, Robert Samuelson of Newsweek, recently resurrected the useful old term "pseudo-conservative" from a slumber that has lasted nearly as long as Rip Van Winkle's.

But the timing is excellent, for pseudo-conservatism is again on the march. When last revived in the early 1950s by the historian Richard Hofstadter, "pseudo-conservatism" signified populistic restlessness of a radical tenor. Among its symptoms, Hofstadter noted, was "a flood of proposals to write drastic changes into the body of our fundamental law"--to amend the Constitution.

Well, welcome to pseudo-conservatism, 1995 vintage. The amendment craze is astir again. Proposed constitutional improvements to soothe this or that current political grievance abound. Some are too silly to be taken seriously. But at least three -- to impose federal legislative term limits; to permit prayer in schools; and to protect the American flag against "desecration" -- are getting serious attention in this Congress.

A good constitutionalist, I guess, can take or leave a congressional term-limits amendment, which differs little in principle from the 22nd Amendment limiting presidents to two terms.

But tampering with the First Amendment is another story, and that is what school prayer and flag-burning amendments would entail. The First Amendment is the foundation stone of both church-state separation and of free speech. Just how drastically the suggested amendments would affect the First Amendment is uncertain.

Assistant Attorney General Walter Dellinger, formerly of Duke University and now head of the Justice Department's Office of Legal Counsel, in June 6 testimony to the Senate Judiciary subcommittee on the Constitution, cautioned that this "first-time edit" of the Bill of Rights would carry us into "uncharted territory," with incalculable effect on fundamental personal liberties.

Dellinger, in observing that the Bill of Rights has never been amended in the 202 years of its history, added: "This is no historical accident ... Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles."

James Madison, father of the Bill of Rights, thought that constitutional amendment should be limited to "great and extraordinary occasions." Scattered abuse of the flag in the name of political protest offers no such occasion, Dellinger argued; and he is right.

The Supreme Court's 1989 decision in a flag-burning case known as Texas vs. Johnson left the impression that it was novel judicial doctrine to permit the flag to be used -- or abused -- in political contexts. But it wasn't. The 1989 decision built upon a line of prior decisions in which the court, without directly reaching the First Amendment issue, found fault with a variety of laws and ordinances prohibiting the use of the flag in symbolic expression. The Texas supreme court, incidentally, was of the same view.

It is ironic that self-styled conservatives should be leading the movement to reverse the court in these delicate areas of personal liberty. In the English-speaking world, conservatism was classically defined by the 18th-century statesman Edmund Burke, whose fundamental teaching was that sound societies should evolve incrementally and organically. Hence the true conservative abhors sudden or radical change, above all in basic constitutional practices.

And other procedural issues are implicated too. For two centuries, the meaning of the First Amendment has been exclusively decided by jurists protected by life tenure from raw political passions. That insulation is of the essence of American constitutionalism, especially when ultra-sensitive issues of free speech and religious preference are concerned. Tinkering with the First Amendment isn't conservatism, whatever values are invoked in its defense. It is pseudo-conservatism -- in the pure state.

At any given hour, scores of shortsighted constitutional amendments are waiting in the wings. Amendment on the scale proposed by some eminent pseudo-conservatives today could become habit-forming, transforming the Constitution from an anchor of stability into a patchwork of this generation's impulsive grievances.