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Section 1: Profiles of the Supreme Court

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

HIGH COURT CUTS CASES

Conservative Tide a Factor

USA Today

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Tony Mauro

The Supreme Court appears to be doing its part to reduce the role of government.

The nation's highest court, which returns to the bench today, is on course to end its term in June with the fewest number of decisions in 42 years.

The court, which has stopped accepting cases this term, will issue at most 77 opinions. Ten years ago the court issued 145 decisions.

"At this rate, they'll be out of business by the year 2049," joked Northwestern University law professor Dan Polsby.

The court used to schedule four oral arguments a day; now, most days, it hears only two cases and is done by noon.

"Guidance from the court is going to be less than we've had in a generation," said University of Pittsburgh law professor Arthur Hellman.

But University of Virginia professor David O'Brien said the court isn't shirking its duty. "They're still dealing with very major issues."

The Supreme Court hasn't given a reason for the decline.

Some believe the conservative court sees fewer decisions it wants to reverse.

Today, 12 of the 13 federal appeals courts are dominated by Reagan-Bush appointees.

Justice Byron White's retirement in 1993 may be a factor, too. He was an advocate for taking more cases and resolving all conflicts between lower federal courts.

Now some minor conflicts may go unresolved.

Or like factory managers slowing down an assembly line, the justices may want to do a better job on fewer cases.

"It's clearly a conscious, institutional decision that the quality of their work was suffering," said lawyer David Stewart, who worked as a clerk at the court during its high output years.

"They looked around and said, 'This isn't working.'"

THE SHRINKING DOCKET

Attorneys Try to Make an Issue out of the Dramatic Decline In High Court Rulings

The Washington Post
Monday, March 18, 1996
Joan Biskupic

Lawyers who want the Supreme Court to hear a particular case usually tell the justices how important the issue is or how much lower courts need their guidance. Now comes a new rationale: The justices have nothing else to do.

Nothing else to do?

The steady drop in the court's caseload has come to this: Lawyers trying to get the court to review a difficult business case have argued for what appears to be the first time that their case should be heard partly because the justices simply have the time.

"We are not here arguing that the court's relatively lighter work load justifies granting a petition that does not otherwise warrant the court's review," said the amicus curiae filing by General Motors Corp., written by lawyer Paul Cappuccio. "Rather, our point is that the clear absence of a crushing workload for the next term eliminates any need to pass over a petition . . . that raises important and recurring issues of constitutional law."

Cappuccio, who clerked for Justices Antonin Scalia and Anthony M. Kennedy back in the flush 1980s, reminds the court of the numbers: In the 1985-86 term, 171 cases were argued before the court. In this 1995-96 term, the number will be about half that.

The court's argument calendar and the number of signed rulings have continued to drop since the 1980s. Last term the court issued only 82 decisions, and this year it is expected to issue 74 (some of the cases argued are combined for purposes of a ruling). This compares with the early 1980s, when the court handed down about 150 rulings a term, and the late 1980s, when it issued 130 a term.

The importance of the court, of course, is not in its numbers. It is in the court having the last word. The justices are the final arbiter of what is in the Constitution.

Just one Supreme Court ruling can tear apart the nation, whether it be by perpetuating slavery (in 1857), striking down New Deal programs (in the 1930s), ordering school desegregation (in 1954) or legalizing abortion nationwide (1973). And with the cases this term alone, the court could change the legal landscape for gay rights, black-majority voting districts and male-only military schools.

Still, the drop in cases has been so dramatic that it demands attention.

"They're engaging in their own mini-shutdown of the government," said Kenneth S. Geller, a former deputy U.S. solicitor general who still specializes in appellate work.

"It is important in a system of checks and balances that the court be perceived by the public as a force comparable to the force of Congress and to the executive branch," added Bruce Ennis, a prominent member of the Supreme Court bar. "If the court reduces its workload to the point where its decisions rarely impact the lives of individuals or the activities of business, the court risks losing the institutional credibility it may need when a true conflict between the [branches] emerges." Ennis does not think the court has reached that point.

There is no single theory from anyone, including the justices, about why the court is accepting fewer cases. And whether the consequences for the country are good or bad is in dispute, too, given that the rulings -- not the numbers -- are what matters. In some disputes over social policy, for example, liberals would be happy not to have this conservative court intervene.

Chief Justice William H. Rehnquist has attributed the drop from 150 cases heard in the early 1980s to about 130 by the end of the decade to 1988 legislation lifting virtually all mandates that the court hear certain cases. The justices now have nearly complete discretion over their docket. Rehnquist has speculated that the decrease continued because the lower federal courts now are generally in sync with the high court. A majority of the lower court judges also are Ronald Reagan and George Bush appointees.

For his part, the chief justice, who has been on the bench for 25 years, has said he no longer votes to take a case just because it is "interesting." Rather, Rehnquist is more inclined to let an issue "percolate" and let other lower courts examine the matter before the high court weighs in.

Four votes are needed to grant a petition and schedule oral arguments. Five votes are needed to win a case. With the court narrowly divided on many social issues, some justices who do not agree with a lower-court ruling may not vote to hear an appeal because of the risk that five justices may affirm the

lower-court decision and impose it as a national rule.

Other justices refer to the shrinking docket, mostly to assert that they are not lazy. Justice Sandra Day O'Connor, for instance, has observed that the justices still must pour through hundreds and hundreds of requests for review. Indeed, while the justices have become more selective in recent years, petitions have been steadily climbing to about 7,000 a term.

Recent high-profile cases turned down -- without comment or explanation, as is the rule -- include one testing whether automakers can be sued for failing to install air bags before federal law required it; another testing the constitutionality of a federal ban on sexually frank broadcasts; and another on the liability of a mother who refused to seek proper medical care for her dying son because of religious beliefs.

Some lawyers complain that the lack of high court review can lead to legal uncertainty and inefficiency and forum shopping -- that is, a quest by complainants to find the jurisdiction where the law will be interpreted most favorably.

Justice Byron R. White, who retired in 1993, believed the court had a responsibility to resolve conflicts between the regional circuit courts as quickly as possible. White regularly dissented from denial of review, asserting that the court's refusal to hear certain cases leads to federal law being carried out in different ways in different parts of the country. Since his departure, no justice has voiced similar concerns.

"If you're a national business and an important legal rule is being interpreted one way in the South and one way in New England, you have a hard time figuring out what to do," said John Roberts, another former deputy solicitor general who often argues at the court. "It can lead to a Balkanization of the national economy at a time when the drive is to be more international."

Roberts, who is a former law clerk to Rehnquist, adds that the court may be more tentative about which disputes to take on because it has newer and comparatively younger members than in the 1980s.

Chief Justice Rehnquist, who is hardly tentative, once said that if he were embarrassed by the court's drop in cases, he would simply vote to take more. That was almost two years ago -- when the court was handling about 10 more cases than it is now.

LEGACY OF A TERM -- A SPECIAL REPORT

In Supreme Court's Decisions, A Clear Voice, And A Murmur

The New York Times
July 3, 1996
Linda Greenhouse

WASHINGTON: The Supreme Court brought a long and difficult term to an end on Monday, leaving behind rulings rich in symbolic significance for women and homosexuals while at the same time providing abundant evidence of the extent to which the Court's discourse has shifted to the right.

This was a term with not one theme, but many. The Court spoke sometimes with surprising clarity, as in the 7-to-1 decision that invalidated the men-only admissions policy at the Virginia Military Institute. But it sometimes spoke in multiple voices so muddled as to be barely comprehensible, as in the six separate opinions that roamed over the First Amendment landscape in an inconclusive effort to decide whether the Government can regulate indecent programming.

The Court displayed a deep mistrust of Government efforts to classify people -- whether by race, for the purpose of drawing district lines, as shown in two decisions that invalidated majority-black Congressional districts, or by sexual preference, as seen in the 6-to-3 ruling that struck down a Colorado provision that barred the adoption of state or local laws to protect homosexuals.

But in a series of criminal-law decisions, the Court showed substantial deference to Government law-enforcement policies. Most notably, the Court shifted course after several years of questioning the Government's aggressive use of its forfeiture authority. The Justices overturned rulings by two lower courts who said forfeitures of convicted drug dealers' assets violated the constitutional protection against double jeopardy.

The Court also turned back a challenge to the Federal Government's priorities in crack-cocaine prosecutions, rejecting a lower court's conclusion that statistics showing most defendants were black were so suggestive of selective prosecution as to require the Government to explain itself.

On such central questions as race and Federalism, the term's end brought not closure, but only a temporary interruption of ongoing conversations within the Court. Dealing with its third set of redistricting cases in four years, and with Justice Sandra Day O'Connor retaining her equivocal role at the center of the debate over the meaning of the equal-protection guarantee, the Court has not yet settled clearly on a standard for evaluating the use of race in drawing district lines. The Court has already accepted new voting-rights cases for its next term, indicating that this debate will continue.

The debate will also continue over state prerogatives within the Federal system, a question on which the Court is also sharply divided. In a landmark decision interpreting state immunity under the 11th Amendment, the Court ruled that Congress lacked the authority to exercise its jurisdiction over interstate commerce in a way that made states liable to lawsuits in Federal Courts.

While the full implications of that 5-to-4 ruling may not be apparent for years, the Justices have a number of new cases on their docket for the next term that will further explore the line between Federal and state authority. The most prominent of these is an appeal challenging the Brady handgun-control law on the ground that Congress cannot constitutionally require local sheriffs to conduct background checks of prospective handgun buyers.

Chief Justice William H. Rehnquist has led the Court in its re-examination of long-settled principles of Federalism. Completing his 10th year as Chief Justice, he stamped his vision on the term in many ways. He wrote not only the 11th Amendment decision, in *Seminole Tribe v. Florida*, but also a number of the most important rulings in the criminal-law area as well.

The lopsided majorities in favor of the Government in criminal cases -- as always, the single biggest category on the Court's docket -- were a striking reminder of how much the Court has changed since the retirement in the early 1990's of Justices William J. Brennan Jr. and Thurgood Marshall.

The decisions in the forfeiture and selective-prosecution cases produced solitary dissents by Justice John Paul Stevens, but other decisions, including one that validated the use of routine traffic stops by the police as pretexts for drug investigations, were unanimous. A set of arguments that would have had to have been accounted for by the majority in the past, although they would probably not have prevailed, were simply absent from the Court's consideration of these cases.

Along with Justice Stevens and Justice David H. Souter, President Clinton's two appointees, Justices

Ruth Bader Ginsburg and Stephen G. Breyer, form what can be described as the liberal wing of the Court, but the term is relative and the four do not always vote as a bloc. For example, Justice Ginsburg left the other three behind when she joined the majority in a forfeiture case that permitted the State of Michigan to seize a car that a man had used while soliciting a prostitute. The wife argued that because she was an "innocent owner," she should not have to lose her interest in the car.

Justices Antonin Scalia and Clarence Thomas and Chief Justice Rehnquist are the Court's predictable conservatives, although the Chief Justice joined Justice Ginsburg's majority opinion in the V.M.I. case over Justice Scalia's impassioned dissent.

As has been true for the last several years, the Court's center of gravity is occupied by two moderate conservatives, Justices O'Connor and Anthony M. Kennedy, as the term's statistics show. They dissented the least of any Justices, only five times for Justice Kennedy and six for Justice O'Connor. Justice Stevens cast 19 dissenting votes in the 75 cases the Court decided. With 34 of those cases, or 45 percent, having been decided by 9-to-0 votes, Justice Stevens dissented in nearly half of the contested cases.

Where Justices Kennedy and O'Connor were, the Court was. Of the dozen cases decided by 5-to-4 votes, they were each in the majority nine times, more than any other Justices.

The extent to which Justice Scalia was marginalized this term was notable. His vote counted in close cases, of course, but his most prominent role was as the author of vitriolic dissents that appeared more likely to offend than to persuade. He said the Court's 7-to-2 decision that public contractors have First Amendment rights protecting them against patronage dismissal was "astonishing," adding: "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

The term, which began Oct. 2 and ended July 1, was the longest in seven years. The 75 decisions, barely half the number the Court was issuing in the early 1980's, made this the lightest term since 1953-54, Earl Warren's first term as Chief Justice. Next year's schedule is likely to be heavier; the Court has already selected four dozen cases for decisions in the term that begins Oct. 7.

Below are summaries of the term's major rulings:

DISCRIMINATION: A WIDE RANGE OF BIAS CASES

The Supreme Court struck down a Colorado state constitutional amendment that nullified existing civil rights protections for homosexuals and barred the passage of any new laws protecting them at the state or local level. "A state cannot so deem a class of persons a stranger to its laws," Justice Kennedy said in a forceful opinion based on the 14th Amendment's guarantee of equal protection. Chief Justice Rehnquist and Justice Thomas joined in Justice Scalia's equally forceful dissent, which accused the 6-to-3 majority of taking sides in "the culture wars" through "an act not of judicial judgment but of political will."

The decision, *Romer v. Evans*, No. 94-1039, left many questions unanswered about the scope of gay rights; the majority avoided any reference to the Court's ruling 10 years ago that the constitutional right to privacy does not extend to sex between consenting homosexual adults. But the Court's tone indicated that the earlier decision, *Bowers v. Hardwick*, might soon be a dead letter -- functionally, if not through being formally overruled.

In its most important sex-discrimination case in years, the Court ruled 7 to 1 that the men-only admissions policy at V.M.I., a state-supported college, was unconstitutional and that the alternative program the state had devised for women was an inadequate substitute for admitting women to the military college, which is 157 years old. The Court applied a searching standard that Justice Ginsburg called "skeptical scrutiny" in deciding the case.

Justice Ginsburg wrote the majority opinion, which got six votes, and Chief Justice Rehnquist concurred in a separate opinion. Justice Scalia dissented. Justice Thomas's son attends V.M.I., so he did not participate in the case, *United States v. Virginia*, No. 94-1941.

These two cases overshadowed the Court's other decisions in cases dealing with discrimination, but there were other important developments. In a pair of redistricting cases, a 5-to-4 majority made it clear that it meant what it had been saying about the illegitimacy of using race as a dominant factor in drawing district lines.

The Court declared unconstitutional four Congressional districts that legislators had drawn in Texas and North Carolina after the 1990 census to give minority voters more electoral influence. The outcome was less than crystal clear, however; Justice O'Connor's plurality opinion in the Texas case, *Bush v. Vera*, No. 94-805, joined by the Chief Justice and Justice Kennedy, appeared to leave some room for considering race among other factors; the concurring opinion by Justices Scalia and Thomas emphatically ruled it out. Chief Justice Rehnquist wrote for the majority in the North Carolina case,

Shaw v. Hunt, No. 94-923. With new voting rights cases already on the docket for the next term, the Court is evidently prepared to keep trying to clarify this difficult area.

A unanimous statutory decision strengthened the Age Discrimination in Employment Act of 1967. The Court held that a lawsuit for age discrimination can succeed even if the worker bringing the suit has been replaced by someone older than age 40, the age at which the law's protections begin to apply. Justice Scalia's opinion, *O'Connor v. Consolidated Coin Caterers*, No. 95-354, rejected a lower court's analysis that said it could not be age discrimination to be replaced by someone else who is within the law's "protected class."

CRIMINAL LAW: SEVERAL VICTORIES FOR THE GOVERNMENT

The Supreme Court unanimously upheld provisions of a new Federal law setting strict limits on the ability of Federal courts to hear appeals from state prison inmates who have previously filed at least one habeas corpus petition, challenging the constitutionality of their conviction or sentence. In an opinion by Chief Justice Rehnquist, the Court found that because Congress had not closed off the Supreme Court's own jurisdiction to hear such cases, the statute avoided the constitutional problems that a complete denial of Federal court review might have posed. The case was *Felker v. Turpin*, No. 95-8836.

As usual, the Federal Government's policies on narcotics prosecutions produced important rulings. Most significantly, the Court ruled 8 to 1 that it did not violate the constitutional protection against double jeopardy for the Government to use both the criminal law to prosecute someone and the law of civil forfeiture to seize the defendant's property.

This double-barreled strategy, a cornerstone of the Government's war on drugs, does not amount to an impermissible double punishment for a single offense, Chief Justice Rehnquist said in the majority opinion, because civil forfeiture is not a punishment. The decision, *United States v. Ursery*, No. 95-345, cut back substantially on recent Supreme Court decisions that had placed constitutional constraints on the Government's use of civil-forfeiture proceedings. Justice Stevens dissented.

The Government also won a second forfeiture case. The Court ruled 5 to 4 that there was no constitutional barrier against the Government seizing property that was used to commit a crime, even the property of an "innocent owner" who had no connection with the criminal activity. The decision, by Chief Justice Rehnquist, rejected a claim to compensation by a Michigan woman whose half-interest in the family car was forfeited under a state nuisance statute after her husband used it to solicit a prostitute. Justices Ginsburg, O'Connor, Scalia, and Thomas joined the opinion, *Bennis v. Michigan*, No. 94-8729.

The Court held that statistics showing that the overwhelming number of Federal crack-cocaine defendants are black were not sufficient to support a defense argument that the Government is engaged in selective prosecution.

The 8-to-1 decision, with a majority opinion by Chief Justice Rehnquist and a dissent by Justice Stevens, overturned a Federal appeals court's ruling that the statistical disparity was troubling enough to require the Government to explain itself in pretrial discovery, as sought by five black defendants. Some 90 percent of those convicted of Federal crimes involving crack are black; for crimes with powdered cocaine, which carry much lighter sentences, about 30 percent of the defendants are black.

To get discovery, Chief Justice Rehnquist said, the defendants first had to show there were "similarly situated" whites whom the Government could have prosecuted on crack-cocaine charges. The case was *United States v. Armstrong*, No. 95-157.

The Court ruled unanimously that even if the police used a minor traffic infraction as a pretext to stop a car and look for drugs, the detention was still valid because an officer's motive was irrelevant. As long as a reasonable officer could have stopped the car under the circumstances, the stop meets the Fourth Amendment's reasonableness requirement, Justice Scalia said for the Court in *Whren v. United States*, No. 95-5841.

The Justices came down unanimously on the side of judicial discretion in applying the Federal sentencing guidelines, ruling that a Federal district judge had been justified in giving sentences lower than those provided by the guidelines to the two Los Angeles police officers convicted of Federal offenses in the beating of Rodney G. King. Justice Kennedy wrote the decision, *Koon v. United States*, No. 94-1664.

The Court ruled that a Federal law requiring a mandatory five-year sentence for anyone who "uses or carries a firearm" while committing a drug offense applied only if the gun was used in an active fashion to injure or threaten someone. Justice O'Connor's wrote the unanimous opinion, *Bailey v. United States*, No. 94-7448, rejecting the Government's argument that even a gun that is kept out of sight can embolden a drug dealer and thus come under the statute.

The Court ruled 5 to 4 that defendants who are prosecuted in a single case for more than one petty offense did not have a constitutional right to a jury

trial. The Sixth Amendment's right to a jury trial extends only to prosecutions for serious offenses, those carrying sentences of more than six months, the Court has long held. In this case, *Lewis v. United States*, No. 95-6465, the Court said that a petty offense did not become a serious offense simply because several such charges had been combined, raising the possibility of a combined sentence of more than six months. Justice O'Connor wrote the majority opinion; Justices Breyer, Ginsburg, Kennedy and Stevens dissented.

Establishing a new rule of evidence that applies to both the Federal criminal and civil courts, the Court created an evidentiary privilege permitting psychotherapists and other mental health professionals to refuse to disclose patient records in judicial proceedings. The privilege brings the Federal courts into line with the prevailing approach in the states. Justice Stevens wrote the decision, *Jaffee v. Redmond*, No. 95-266, for a 7-to-2 majority, with Justice Scalia dissenting; Chief Justice Rehnquist dissented from the Court's specific holding, which applied the privilege to testimony by a clinical social worker.

SPEECH: POLITICS, ADS AND INDECENCY

In an important case about political speech, the Supreme Court ruled that political parties could not be limited in the amount of money they spend on behalf of their candidates as long as the expenditures are "independent" and not coordinated with the candidate. Justice Breyer's plurality opinion, joined by Justices O'Connor and Souter, held open the possibility that in a future case, the Court would find that parties have a First Amendment right to make coordinated expenditures as well.

Four other Justices -- Justices Kennedy, Scalia and Thomas and Chief Justice Rehnquist -- would have gone further and permitted coordinated expenditures. The two dissenters, Justices Ginsburg and Stevens, said the limits on party spending imposed by the Federal Election Campaign Act of 1974 were constitutional.

An even more splintered Court tried to assess, in light of the First Amendment, the Government's interest in shielding children from indecent programming on cable television. With Justice Breyer writing, sometimes for a majority and sometimes for only a plurality, the Court reviewed a 1992 Federal law. It struck down a section permitting cable television systems to ban indecent programming from channels made available to community groups, while upholding a provision permitting cable systems to ban the programs from channels leased for a fee to commercial programmers.

A 6-to-3 majority struck down a third section of the law that required cable systems choosing to offer indecent programming to scramble the signal reaching any subscriber who had not made a written request to receive the indecent material. Justices Ginsburg and Kennedy would have invalidated all of the three-part law. Chief Justice Rehnquist and Justices Scalia and Thomas would have upheld all of it. The case was *Denver Area Consortium v. Federal Communications Commission*, No. 95-124.

A pair of decisions greatly strengthened the First Amendment protections afforded independent government contractors to keep them from losing their contracts in retaliation for criticizing government or backing the wrong candidate in an election. Voting 7 to 2, the Court extended to outside contractors the constitutional protection already available to government employees. Justice O'Connor wrote the majority opinion in Board of County Commissioners v. Umbehr, No. 94-1654, and Justice Kennedy wrote for the majority in *O'Hare Truck Service v. City of Northlake*, No. 95-191. Justices Scalia and Thomas dissented in both decisions.

Strengthening free-speech protection for advertisers, the Court struck down a ban by the state of Rhode Island on advertising liquor prices. The decision, *44 Liquormart v. Rhode Island*, No. 94-1140, cast constitutional doubt on the Clinton Administration's proposed restrictions on cigarette promotions. All nine Justices agreed with the result, but there was no majority opinion, reflecting divisions within the Court over how to analyze commercial speech.

FEDERAL AUTHORITY: DEFINING RIGHTS OF THE STATES

Continuing a searching, and divisive, re-examination of the allocation of Federal and state power that it began the previous year, the Supreme Court sharply curbed the authority of Congress to subject states to lawsuits in Federal courts.

The 5-to-4 decision invalidated a portion of a 1988 Federal law on procedures for setting up gambling casinos on Indian reservations; it was based on the 11th Amendment, which grants states a measure of immunity from suits in Federal courts. The Court overruled an earlier decision by which Congress, in the exercise of its power to regulate interstate commerce, could authorize suits against states as part of Federal regulatory programs. The new ruling, *Seminole Tribe v. Florida*, No. 94-12, held unconstitutional a provision of the Indian Gaming Regulatory Act of 1988 that permitted Indian tribes to sue states to bring them to the bargaining table over terms for opening casinos.

Chief Justice Rehnquist wrote the majority opinion, joined by Justices Kennedy, O'Connor, Scalia and Thomas.

The Court was unanimous in ruling that the Census Bureau was under no constitutional obligation to adjust the results of the 1990 census to correct an acknowledged undercount in big cities and among minorities. New York and a coalition of other big cities had sued to force the statistical adjustment. Chief Justice Rehnquist wrote the opinion, *Wisconsin v. New York*, No. 94-1614.

In an important product-liability case, the Court ruled that consumers injured by faulty medical devices, like cardiac pacemakers, could seek damages under state law against the manufacturers even if the devices comply with Federal regulations. In an opinion by Justice Stevens, all nine Justices rejected the broad claims of Federal pre-emption put forward by the manufacturer, but the Court was divided, 5 to 4, in some sections of the opinion, *Medtronic v. Lohr*, No. 95-754.

WORKPLACE: PENSION ISSUES AND LABOR LAW

An unusual number of decisions this term dealt with issues in the workplace. The Supreme Court ruled 6 to 3 that workers whose employers trick them into giving up their benefits could sue to have the coverage restored. The decision, written by Justice Breyer, gave new teeth to the Federal law that protects employee pensions and other job-related benefits, which some lower courts had interpreted as permitting only suits filed on behalf of the benefit plan rather than, as in this case, suits filed by employees on their own behalf. Justices O'Connor, Thomas and Scalia cast the dissenting votes in the case, *Varity Corporation v. Howe*, No. 94-1471.

A second case interpreting the same law, the Employee Retirement Income Security Act of 1974, called ERISA, resulted in a victory for the employer. The Court ruled that management could require employees to give up various legal claims as the price for getting an early-retirement buyout with enhanced pension benefits. Justice Thomas wrote the opinion, which was unanimous with respect to the company's position, although not on a subsidiary question in the case, *Lockheed v. Spink*, No. 95-809.

The Court ruled unanimously that paid union organizers who take jobs in nonunion companies with the goal of persuading co-workers to join the union were entitled to the full protection of Federal labor law. Justice Breyer wrote the opinion, *National Labor Relations Board v. Town and Country Electric*, No. 94-947.

Clarifying the relationship between labor and antitrust law, the Court ruled that it was not an antitrust violation for employers within an industry to decide jointly to impose new contract terms on their unionized employees after the breakdown of labor negotiations. The 8-to-1 decision was a victory for the National Football League in a dispute over salary caps for rookie players. Justice Breyer wrote the decision, *Brown v. Pro Football Inc.*, No. 95-388; Justice Stevens dissented.

BUSINESS, BANKING: SAVINGS AND LOANS COULD GET BILLIONS

In a case growing out of the savings and loan crisis of the 1980's, the Supreme Court ruled 7 to 2 that the Government had breached its contracts with three savings and loans and was liable for damages to them because of the losses they had incurred under a 1989 Federal law. The cost to the Government of the ruling in the case, *United States v. Winstar*, No. 95-865, could be in the billions. Justice Souter wrote a plurality opinion. The Chief Justice and Justice Ginsburg dissented.

In another case, the Court overturned a punitive damage award, ruling that the $2 million an Alabama jury gave to a man whose new BMW had undisclosed paint damage was so "grossly excessive" as to violate due process. The 5-to-4 decision, the latest in a long effort by the Court to define the constitutional contours of punitive damages, left much to be decided in future rulings. Justice Stevens wrote the majority opinion, *BMW v. Gore*, No. 94-896, joined by Justices Breyer, Kennedy, O'Connor and Souter.

In a shareholder dispute, the Court ruled that state courts could approve global settlements in class-action cases, even when those cases involved issues of Federal securities law that were beyond the jurisdiction of the states. Justice Thomas wrote the majority opinion, *Matsushita v. Epstein*, No. 94-1809, with Justices Ginsburg, Souter and Stevens filing partial dissents.

In two cases, the Court gave unanimous approval to the Comptroller of the Currency's broad view of the powers of national banks. The Court ruled that banks could sell insurance from branch offices in small towns, despite any state laws to the contrary. Justice Breyer wrote that opinion, Barnett Bank v. Nelson, No. 94-1837. In the second case, the Court held that national banks with interstate credit card operations could charge their customers throughout the country any late-payment fee permitted by their home states. Justice Scalia wrote that opinion, *Smiley v. Citicorp*, No. 95-860.

A "PATH-BREAKING" TERM?

Decisions Make Court an Issue in Presidential Election

The Courier-Journal Louisville, KY
Sunday, July 7, 1996
Lyle Denniston (Baltimore Sun)

The Supreme Court has left town for the summer after looking into what the constitutional future might hold, and deciding to turn some of it into reality now.

The term that ended last Monday was marked by the lowest output of rulings in 42 years, but also by two "path-breaking opinions" - in the words of Justice Antonin Scalia, who did not like either of them - that suggested new law in the making.

Those rulings - one on gay rights, the other on women's rights - started the Court down a path toward limited protection for homosexuals, and perhaps considerably more assurance of equality of the sexes. Each is likely to produce sequels, testing how far the Supreme Court meant to go.

Whether those decisions foretold the future, however, could depend on who is elected president Nov. 5. The occupant of the White House over the next four years may be able to select up to three new justices, and no one doubts that a re-elected President Clinton would choose more liberal justices than would a newly elected President Dole.

None of the current justices is known to have made definite plans to retire. But there is active speculation among lawyers and academics who watch the Supreme Court closely that there will be retirements fairly soon, perhaps beginning after one more term.

The names figuring in that speculation primarily are Chief Justice William H. Rehnquist, who will be 72 on the eve of the Supreme Court's new term in October, and Justice John Paul Stevens, who is 76. To a lesser degree, there has been speculation about the retirement of Justice Sandra Day O'Connor, who is 66.

As a result, activist groups are seeking to make a campaign issue out of the Supreme Court's future.

Elliot Mincberg, legal director of the liberal People for the American Way, said last week: "This term emphasizes that the November elections are crucial to the future composition of the Court. The number of close decisions and the critical role played by Justices O'Connor and (Anthony M.) Kennedy show that a new justice or two could tip the ideological balance."

Ralph Reed, executive director of the conservative Christian Coalition, thinks so, too. Last month on a Public Broadcasting System program, he praised Bob Dole's promise to appoint justices who "are not going to legislate a liberal agenda from the bench." By contrast, Reed said, a re-elected Clinton would "probably appoint at least two, maybe three Supreme Court justices" who would not satisfy conservative Christians.

The Supreme Court's balance of ideologies is close: Neither the more conservative justices nor the more liberal ones could produce a majority in 5-4 rulings without attracting "centrist" justices' support - meaning O'Connor or Kennedy.

Thomas C. Goldstein, a law lecturer at American University, noted in his annual compilation of term data: "No 5-4 majority came together this year without one or both of them." He noted that the Supreme Court split 5-4 in 16 rulings and that, while those decisions brought eight different combinations of justices together in a majority, one or both of the centrist justices joined in every one.

"While Justice O'Connor has been the Court's key swing vote for several terms," he said, "this year we saw Justice Kennedy continue his move to the Court's center."

By contrast, Goldstein said, the Supreme Court's most liberal and most conservative members have been left to dissent, largely in isolation. Stevens, perhaps the most liberal, dissented alone five times, and the two most conservative, Justices Scalia and Clarence Thomas, each filed solitary dissents twice; no other justice dissented alone.

He also noted that O'Connor and Kennedy helped bolster the majorities in the two most visible landmark rulings. They were part of a 6-3 majority that struck down a Colorado state constitutional amendment that barred legal protection for homosexuals. They also joined a 7-1 majority that nullified the decades-long tradition of excluding women from the Virginia Military Institute.

Liberal observers took some comfort from those margins. The American Civil Liberties Union's legal director, Steven R. Shapiro, said: "The fact that both these cases were won with solid majorities represents one of the most significant developments in equal protection law in many years." The term, he said, would "likely be most remembered" for those two decisions.

But Shapiro also lamented that the just-ended term showed the Supreme Court growing more skeptical of using race as a deciding factor in drawing up voting districts, continuing a trend that began in 1993.

He also complained that the Supreme Court took a stricter approach to drug crimes, upholding broad government powers to seize property related to drug offenses, and showing little interest in arguments that drug laws are enforced in a discriminatory way against black suspects.

Scalia, one of the Supreme Court's most conservative members and a strong internal critic of what he takes to be its current trend, warned last week that "the people should not be deceived" by the majority's assurances in the gay rights and women's rights cases that the majority was taking merely limited new steps.

Scalia remarked bitterly in one of his final dissents: "While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress. Day-by-day, case-by-case, (the Court) is busy designing a Constitution for a country I do not recognize."

If Scalia is right, and the Supreme Court has grown more activist in creating new law where none existed, it seemed less active in arranging its own workload. It finished the term with only 75 rulings - the fewest since the term that ended in 1954, when there were 65. The Supreme Court itself controls how many cases it agrees to decide.

But this term, the Supreme Court appeared to take longer to reach its end. For only the second time in Rehnquist's decade as chief justice, the Supreme Court sat beyond the end of June. The only other time it did that in the past 10 terms was in 1989, when it had a total of 133 decisions.

Typically, the Supreme Court holds its most significant cases until the final weeks. This year, more than two-thirds of the major rulings were issued in the final six weeks.

Among the justices, there have been private discussions about the declining workload, which has fallen steadily since 1986, with some justices wanting to hear more. Others fear that a resumption of growth in the docket could not be held in check. Already, the number of cases it has agreed to consider next term has gone up from a year ago.

When the Supreme Court reassembles on Oct. 7, it could gain a higher visibility a month before the election because its docket already contains echoes of politically sensitive issues, including a case that will be a reminder of Clinton's legal problems from his pre-presidential past: the Paula Jones sexual misconduct lawsuit.

Just as presidential candidates will be debating one of the core issues that divide them - abortion - the Supreme Court will be confronting that issue anew. It has promised to review a case testing further the rights of clinic blockaders to try to get their anti-abortion message to patients and doctors.

It also will be preparing to rule on the authority of states to make English the official language of government operations, and on Congress' power to control handguns - two more volatile issues with political repercussions.

The Supreme Court may decide in the new term to take up other heated constitutional issues: the rights of terminally ill people to "assisted suicide," and the right of gay people to serve in the U. S. military.

(The writer covers the U. S. Supreme Court for the Baltimore Sun.)

TO SCALIA'S DISMAY, THE "REAGAN-BUSH" COURT PROVES TO BE FEISTILY INDEPENDENT

The News Tribune, Tacoma, WA
Sunday, July 7, 1996
Aaron Epstein

WASHINGTON - Gay Rights Upheld. Women Break All-Male Barricades. Free Speech Rights Extended -Is this the Rehnquist Court that liberals feared, the court on which six of the nine justices are appointees of presidents Reagan and Bush?

It is a question that Justice Antonin Scalia, the sharp-witted right-wing intellectual, must have asked himself repeatedly as he completed his first decade on the nation's highest court.

He expressed astonishment when his colleagues scuttled Colorado's constitutional amendment barring gay-rights laws, ended the historic exclusion of women at all-male military colleges and protected government contractors from retaliation for their political views.

Fuming and scolding more stridently than ever, Scalia accused his colleagues of betraying American traditions that deplored homosexuality, believed military schools were only for boys and thought it natural for politicians to reward their friends and punish their enemies.

"The people should not be deceived," he wrote in Cassandra tones shortly before the term ended Monday. "While the present court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress. . . . Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

Scalia's unleashed fury, though exaggerated, is an accurate measure of the current court's strong commitment to free speech and association, and its conviction that "equal protection of the laws" protects people against laws or government policies based on irrational prejudice or obsolete stereotypes.

But the court majority's view of equal protection is a strict one, cutting across ideological lines and often producing results that please conservatives.

The court's concept of equality casts doubt on government benefits based on race or gender, such as affirmative action and minority-dominated voting districts. In most areas of the law, in fact, the present court remains a conservative-to-moderate institution.

In their just-completed term, the justices again exhibited a distaste for race-based government policies, handed major victories to business, helped the states at the expense of Congress, limited prisoners' access to federal courts and resumed a longtime trend of favoring police and prosecutors.

And because the justices are narrowly split over such volatile issues as race, religion, abortion, states' rights and regulation of sexually offensive materials, the Supreme Court could become an issue in the 1996 presidential race.

One or more vacancies are likely to occur between 1997 and 2001 (conservative Chief Justice William H. Rehnquist, 71, and liberal Justice John Paul Stevens, 76, are considered most likely to depart), and some activist organizations already are urging voters to think about whether those openings should be filled by Bill Clinton or Bob Dole.

"A new justice or two could tip the ideological balance," noted Elliot Mincberg, legal director of the People for the American Way, a liberal group.

Pat Robertson, president of the conservative Christian Coalition, recently said putting conservatives on the court "could indeed reverse *Roe v. Wade* (the 1973 abortion rights landmark)" and perhaps "allow prayer in the public schools."

The court as a campaign issue may be of particular importance to civil rights groups. They have been major losers in recent Supreme Court cases.

A year ago the justices jeopardized election districts drawn to create black or Hispanic majorities, restricted federal affirmative action programs and limited remedies for school segregation. This year they struck down minority-dominated congressional districts in Texas and North Carolina, made it difficult for blacks to prove they were singled out for criminal prosecutions and rejected pleas that the 1990 census be adjusted upward to make up for the government's admitted undercounting of minorities.

Minority activists were especially incensed by the ruling on racial gerrymandering, and wondered whether any predominantly minority voting districts could pass muster at today's Supreme Court.

However, some groups generally opposed to government use of racial criteria also began to worry about the court's voting rights decisions.

The danger, warned the American Jewish Congress, is that "the nation will retreat into an era when minorities were not seen in the nation's

legislative bodies" and that minorities will see the rulings "as a sign that they are not welcome in the political process."

But if civil rights groups were gloomy, business (especially banks and thrifts) had cause to celebrate a banner year at the high court.

The court allowed greater free speech in the business world, invalidating state laws that banned liquor price advertising. It was a ruling that some observers thought could spell legal trouble for the Clinton administration's proposed crackdown on cigarette ads aimed at children.

And for the first time, the court found a state punitive damage award to be unconstitutionally excessive.

An Alabama doctor unhappy with the undisclosed repainting job on his new $40,000 BMW sedan did not deserve a $2 million punitive award that was 500 times the value of the actual damages, the court said.

But it appeared doubtful that the impact of the decision in that unusual case would extend to punitive damages awarded to people who were seriously injured by a defective product.

The court allowed banks to sell insurance in small towns despite contrary state laws and permitted banks to collect various fees from credit-card holders even if the consumer's home state forbids it.

And about 100 savings and loan firms hit the jackpot when the justices found the federal government liable for breach-of-contract damages that could pay the thrifts billions of taxpayer dollars in damages.

Consumers won a victory, though, when the court allowed state personal-injury suits against manufacturers of allegedly defective medical devices, such as heart pacemakers and silicon breast implants. Consumer advocates said the decision also would help people hurt by pesticides, automobile air bags and a host of other regulated products.

The controversial use of property forfeitures to enforce the criminal laws produced two surprises of the term.

First, the court bolstered the government's power to seize property linked to a crime - even though one of the property's owners was blameless. Tina Bennis, a Michigan mother of five, lost a family car after her husband used the front seat to engage in oral sex with a prostitute in a vice-infested neighborhood of Detroit.

Then the court endorsed a major weapon in the war on drugs. It allowed the government to prosecute individuals for crimes - and also seize their homes, bank accounts or other crime-related property. That law-enforcement strategy did not place defendants in double jeopardy, the justices said.

"Observers of earlier cases thought the court was going to circumscribe the promiscuous use of forfeitures," said Laurence Tribe, a liberal professor at Harvard Law School. "But the decisions this term suggest an almost instinctive tendency to rule for law enforcement."

The court also upheld the military death penalty, allowed police officers to make traffic stops as a pretext to look for drugs or other evidence, and permitted states to bar criminal defendants from using their drunkenness as evidence that they did not act deliberately.

During the 1995-96 term, the Supreme Court justices wrote signed opinions in only 82 disputes, the lowest amount in more than 30 years and far below the 140-per-year average of the 1980s.

On most days, the court's business was so dull that a case about railroad coupling sounded sexy (a railroad is not liable for injuries suffered by a railroad worker trying to straighten a misaligned drawbar) - and even the justices began to apologize.

One Monday in June, Clarence Thomas announced three cases. At the end of the first one, about taxes and the Export Clause, he looked down at the bored audience and said sarcastically: "I know that was scintillating."

Swiftly, Chief Justice Rehnquist observed: "Wait 'til you hear the next one."

But the term set to begin on the first Monday in October is shaping up as a more productive and newsworthy one.

The court plans to tackle issues involving cable television, abortion protests, English as an official language, sexual predator laws, federal gun control - and, perhaps, doctor-assisted suicide and indecency on the Internet.

(Aaron Epstein covers the Supreme Court for the Washington Bureau of Knight-Ridder Newspapers.)

HIGH COURT'S JUSTICE WITH A CAUSE

Bench Position Amplifies Ginsburg's Lifelong Feminist Message

The Washington Post
Monday, April 17, 1995
Joan Biskupic

In her 20 months on the Supreme Court, Justice Ruth Bader Ginsburg's frank and revealingly personal accounts of the obstacles facing women have established her as one of the nation's most prominent feminist voices.

Not since the appointment of Thurgood Marshall has a justice been so identified with a cause as Ginsburg. But while Marshall, once he joined the court, expressed his commitment to civil rights privately or through his written opinions, Ginsburg has taken her advocacy of women's rights public in a way that is unusual for a member of the court, speaking on college campuses, to women's groups and at occasions honoring other female officials.

Appearing at Columbia Law School a few months after her appointment, Ginsburg evoked what is by now a familiar response.

"If it's possible to have love at first sight with someone you don't know," a young woman told Ginsburg, to loud applause from the predominantly female audience, "I'm feeling a little bit of that with you now."

Yet, little of the passion that inspired such enthusiasm at Columbia has been evident in her record on the court. Since President Clinton appointed her in 1993, her opinions have been consistent with the middle-of-the-road approach that characterized her tenure as a judge on the court of appeals for the District of Columbia Circuit. Last term, in fact, she sided more often with conservative Antonin Scalia than with Harry A. Blackmun, the court's most consistent liberal until his retirement.

Moreover, while Ginsburg is clearly energized by her public role, she remains shy and awkward in one-on-one conversations, often avoiding direct eye contact. She also is unusually prickly about public and press scrutiny. She declined to be interviewed or photographed for this story.

And despite her calls for sexual equality and frequent references on the bench to gender -- she has made a point during oral arguments, for example, of referring to hypothetical judges as "she" -- Ginsburg rejects the notion women bring a different approach, or "voice," to the court.

Ginsburg's views are rooted in personal experience as a working mother and as a victim of discrimination -- discrimination, she has not been reluctant to declare, that continues today.

Women will not be truly liberated, she says, until men take equal care of children: "If I had an affirmative action program to design," she said at one Brooklyn appearance, "it would be to give men every incentive to be concerned about the rearing of children."

In a California appearance last fall, she recalled her distress at being phoned regularly by her then-young son's school principal, who wanted to discuss his behavior. "This child has two parents," Ginsburg told the principal. "Please alternate calls for conferences."

And as for her widely reported tendency to interrupt her colleagues during oral arguments, including Justice Sandra Day O'Connor in one particular incident, Ginsburg told Diane Sawyer in an unusual television appearance on ABC's "PrimeTime Live": "Diane, that never would have been noticed if it were two guys."

SHARING THE SPOTLIGHT

"I can't think of any justice who is like Ginsburg in using the court as a bully pulpit," said University of Minnesota law professor Suzanna Sherry.

"Given that she had to fight the fight, she now doesn't want to stand in anyone's shadow," added Columbia University law professor Vivian Berger.

Ginsburg's use of her position for a feminist message began the June day in 1993 when Clinton presented her in the Rose Garden and she paid tribute to her mother: "I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve, and daughters are cherished as much as sons."

Many women in the audience had tears in their eyes. And the reaction to her more recent appearances has been just as fervent.

Georgetown University law professor Chai Feldblum said she was enthralled by Ginsburg at a Harvard event celebrating female graduates last year: It "was moving at times in its rendition of the challenges women have faced. . . . The integrity was palpable."

Ginsburg's outspokenness presents a sharp contrast to O'Connor, who made history in 1981 by becoming the first woman appointed to the court. O'Connor has her own personal experiences to draw

on -- she was offered a secretarial job when she graduated from Stanford University law school in 1952 -- but she does not dwell on societal inequities the way Ginsburg does. The differences may be of style, degrees of activism or even roots.

O'Connor, 65, was born into a land-owning family. She became an Arizona state senator and judge and bested the system from within. Ginsburg, 62, was born in Brooklyn to a family of modest means and fought sexism from the outside.

When she graduated from Columbia Law School in 1959, Ginsburg said, "I struck out on three grounds -- I was Jewish, a woman, and a mother. The first raised one eyebrow; the second, two; the third made me indubitably inadmissible."

Ginsburg is also bolder in pointing a finger at the failings of men who "remain reluctant to share the joys and burdens of bringing up children."

"One truth must be told," she said last year in a New York appearance, "motherly love ain't everything it has been cracked up to be. To some extent, it's a myth that men have created to make women think that they do this job to perfection." Ginsburg said she believes that as many children are battered by women as by men.

'SOCIAL JUSTICE' ADVOCATE

The message of sexual equality is not new for an advocate who argued six cases before the Supreme Court and won new legal protection from sex discrimination. The opportunities to spread it are.

"My guess about Ruth is that she had her eye on this job for a while," said Kathleen Peratis Frank, a former colleague at the ACLU Women's Rights Project, "and she has now become the advocate for social justice in all corners of her life."

In the past, justices have struggled with how much they should expose themselves to the public, or interact with officials from other branches of government, or even voice strong opinions unrelated to cases.

"The speeches the justices give, particularly to educated opinion leaders, are invaluable as public education," said political science professor Gayle Binion of the University of California, Santa Barbara. "Some justices don't like to do it because they are concerned about expressing personal views."

Mark V. Tushnet, a Marshall biographer and Georgetown law professor, said Marshall "didn't give speeches. Until the very end of his career, he didn't appear on TV. He didn't think that it was appropriate. He was a judge."

"But judges make their own decisions about that," Tushnet continued, and "the public persona of the justice contributes to the impact of that justice's work."

Most of the justices today attend legal conferences, making interesting but unprovocative remarks about court activities. Chief Justice William H. Rehnquist often works his great interest in history into his comments. Similarly, Scalia and Stephen G. Breyer are passionate about the fairly arcane topic of legislative history and will make it a focus from their opposing points of view.

Ginsburg is alone in her call to arms on social policy. But her fervor is rarely expressed in her opinions -- on equal rights or any other issue. Ginsburg's decisions stick close to the facts of a case and she avoids broad pronouncements of law. Her style is efficient and bland.

Since Ginsburg became a justice, the court has reviewed six cases especially important to women. In only one of those cases did Ginsburg write a separate statement.

When Ginsburg did assert herself, in a case involving sexual harassment, she appeared to try to lay the groundwork for the court to find that the Constitution guarantees equality between the sexes as strongly as it does racial equality.

The full court ruled that a worker who claims she was sexually harassed need not prove she was psychologically injured to win money damages. In a concurring opinion, Ginsburg wrote that "the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Then, in a footnote that got special attention from lawyers, she wrote that the court has left open whether government classifications that put one sex at an advantage over another should be as closely scrutinized as racial classifications. If this higher standard were adopted, it would become the government's burden to prove the fairness of a classification that gives one sex an advantage -- a difficult burden to meet.

That was "a very rousing start" said University of Chicago law professor Cass Sunstein, for someone "who is not an adventurous justice."

Before she became a judge in 1980, Ginsburg had devoted her professional life to trying to win that tough standard for sex discrimination. Not only did she represent men and women who had been victims of bias, but she wrote numerous articles that she hoped would convince the legal community of her position.

Whether Ginsburg makes inroads over time depends on what cases come to the court and the membership of the bench. Her belief in the breadth of the guarantee of equal protection of the laws could end up influencing the court when it considers

the constitutionality of all-male schools, such as Virginia Military Institute, or more broadly, discrimination based on sexual orientation.

Some scholars have suggested that women bring a distinct perspective to judicial roles, not just in opinions, but in their overall public persona. Sherry has written that there is a "feminine" approach to judging, for example, that offers more flexibility in solving problems.

To O'Connor, the idea of a female difference raises problems. "This so-called new feminism is interesting but troubling," O'Connor said recently, suggesting that such arguments recall the days when people thought female judges were more suited to handle child custody cases and not up to tough, criminal law jobs.

Ginsburg appears to agree. "Theoretical discussions are ongoing today -- particularly in academic circles -- about differences in the voices women and men hear, or in their moral perceptions," she said last fall. "When asked about such things, I usually abstain. Generalizations about the way women or men are -- my life's experience bears out -- cannot guide me reliably in making decisions about particular individuals."

Her husband, Martin D. Ginsburg, wrote in a letter to *The Washington Post* that his wife does not think women speak in a different "voice." "I am sure she believes quite the opposite," he said.

Martin Ginsburg, a tax attorney and Georgetown law professor, often serves as a spokesman for his wife, as well as playing the role of "campaign manager for life," as friend and Georgetown colleague Susan Low Bloch described it.

CRITICAL OF COURT COVERAGE

Despite -- or perhaps because of -- such image consciousness, Ginsburg has been publicly critical of court coverage. In an appearance before the American Bar Foundation in February, she said reporters often exaggerate justices' orders and too often look for the practical effects of rulings. She said she was preparing a research paper on the coverage and told a reporter, "Some of your colleagues won't appreciate the footnotes" referring to their individual stories.

Such meticulousness is nothing new. As an appeals court judge, Ginsburg was known for treating most of her clerks with great warmth but a handful of others with contempt, presumably because they were not up to her standards.

While Ginsburg is respected among her colleagues, her fussiness has mildly offended some of them, according to law clerks who worked at the court during her first term. She focuses on misspellings, omissions of case law and other small details in their draft opinions. Last term, when Blackmun began writing an opinion concerning sex discrimination, Ginsburg responded in a memo circulated to justices that he had overlooked some prior cases relevant to the situation. Such particulars are usually left to law clerks.

Ginsburg's rigidity with people and the law may undermine her ultimate influence on the court, say some scholars. Her rulings on the appeals court rarely drew the special attention in the legal community that the writings of some high-profile appeals judges garner.

Yet Ginsburg is smart, shrewd and persistent. People close to her say she never does anything without thinking it through and that she can quietly take on projects that do not bear fruit for several years.

Whether Ginsburg, who is using the force of her life to inspire people off the court, will be able to inspire her colleagues remains an open question.

"I feel pretty good when I'm the fifth vote to decide the case," she told a group in Brooklyn last year. "I feel even better if I'm the fourth and I pick up a fifth vote based on the writing."

Staff researcher Ann O'Hanlon contributed to this report.

JUSTICE KENNEDY'S INFLUENCE

Ex Corporate Lawyer Is High Court's Key Vote on Wide Range of Issues

Rocky Mountain News
May 27, 1996, Monday
Linda Greenhouse, The New York Times

WASHINGTON: When a lawyer for Colorado began his Supreme Court argument defending a state constitutional provision that bans anti-discrimination laws for homosexuals, he was interrupted almost immediately by a justice who was clearly troubled by the state's position.

"I've never seen a case like this," the justice said. "Is there any precedent that you can cite to the court where we've upheld a law such as this?"

The lawyer never quite regained his stride, and the justice who asked that question Oct. 10, Anthony M. Kennedy, went on to write the forceful opinion for a 6-3 majority that last week struck down Colorado's Amendment 2 as a violation of the constitutional guarantee of equal protection.

Declaring that a state may not "deem a class of persons a stranger to its laws," Kennedy said, "It is not within our constitutional tradition to enact laws of this sort."

The decision in *Romer vs. Evans* underscored the crucial - and in some respects ambiguous - role its author has come to play since he arrived at the court in early 1988 to fill the seat the Reagan administration had intended for Robert Bork.

On a sharply polarized court, Kennedy's is most often the pivotal vote. Last term he voted with the majority in 5-4 cases more than any other justice: 13 times in 16 cases. During the term before that, he was never in dissent in the 14 cases decided by 5-4 votes.

That means Kennedy's responses have become the court's responses and his view has become law, across a remarkable range of issues:

* Cases involving race, in which he has consistently voted to strike down affirmative action and race-conscious redistricting.

* Abortion, where he wrote part of an unusual joint opinion four years ago that reaffirmed *Roe vs. Wade*.

* Free speech, where he joined a 5-4 opinion in 1989 holding that the First Amendment protects burning an American flag as a political protest.

A year ago, Kennedy cast the deciding votes in two important federalism cases, one on each side of the federal-state divide.

He first joined one bloc of four justices to place a limit, for the first time in 60 years, on Congress' assertion of authority over interstate commerce, and then joined the other four justices in rejecting state-imposed term limits for members of Congress.

This justice - who could fairly be said, through force of circumstance, to hold the modern course of constitutional law in his hands - is a most unlikely field marshal in the "culture wars" Justice Antonin Scalia referred to in his dissent in the Colorado case.

Fifty-nine years old, a one-time corporate lawyer and lobbyist on business issues before the California state legislature, Kennedy is conservative in style and outlook.

He has core beliefs, notably among them that it is constitutionally wrong for the government to classify people, by race or any other characteristic, a view that helps explain the apparent anomaly of his "conservative" votes in affirmative action cases and his "liberal" view in the Colorado case.

His dislike of state policies that classify people by group faces another test this term when the court decides whether Virginia may exclude women from the state-supported Virginia Military Institute.

He also has as protective a view of free speech as any member of the court.

"He doesn't have an agenda," David M. O'Brien, a Supreme Court scholar at the University of Virginia, said last week. "That's why he's hard to peg. He does try to arrive at a principled, rather than a compromise or pragmatic, position - and that can make him rather politically incorrect."

The stakes could not have been higher when Kennedy arrived in Washington after 12 years on the federal appeals court in California.

The administration's first choice for the seat, Bork, had gone down to bitter defeat after a titanic, months-long confirmation battle.

From the very first, conservatives mistrusted Kennedy because he was not Bork, one of the judicial right wing's leading theorists and polemicists, and liberals feared that he was simply "Bork without the bite," in the phrase of the time.

As it became clear how unlike Bork he was, Kennedy was subject to intense, often-belittling

criticism from conservatives. In an op-ed article in *The New York Times* days after the 1992 abortion decision, Bork himself said sarcastically that the joint opinion was "intensely popular" with the media, law school faculties and "at least 90% of the people justices may meet at Washington dinner parties."

Respect has come slowly and grudgingly, but it is coming. "In a very thoughtful and principled way, Kennedy is quietly constructing a libertarian jurisprudence on the court," said Clint Bolick, vice president of the Institute for Justice, a conservative think tank and law firm here. He said Kennedy's skepticism of government explains many of his votes, on issues as diverse as abortion, property rights, the First Amendment and federalism.

While conservatives would not always be happy with Kennedy, Bolick said, "This is emphatically not a squishy moderate."

To some liberals, the Colorado case showed that Kennedy's vote in the 1992 abortion case was no anomaly. "When it's really mattered, he has stepped up to bat, stood up to Scalia, and voted to preserve and protect human dignity," said Peter J. Rubin, a lawyer who clerked on the court in the early 1990s.

Laurence Tribe, a professor at Harvard law school who drew the ire of many fellow liberals when he testified in support of Kennedy's nomination, has watched him closely. "He's stuck to his guns, whether they point right or left," Tribe said, adding that he sometimes stops to think "how dramatically different the constitutional history of the country has been" with Kennedy rather than Bork on the court.

TAKING STATES SERIOUSLY

The New York Times
April 14, 1996
Linda Greenhouse

WASHINGTON : For much of his nearly quarter century on the Supreme Court, William H. Rehnquist was the outrider. Often in dissent, he traveled far from the pack, tracing a singular path across a constitutional landscape that in his view was strewn with monuments to the modern Court's errors. Prominent among these were the Court's precedents elevating the power of the Federal Government at the expense of the individual states.

Now approaching his 10th anniversary as Chief Justice, Mr. Rehnquist began to put his years as a lone dissenter behind as Presidents Reagan and Bush reshaped the Court around him. These days, he is the general in charge of a constitutional war along the Federal-state frontier. Aided by timing, patience and, to no small extent, the good luck of having colleagues who agree with him that the states' interests have been submerged for too long, he is conducting this high-stakes war along several fronts of distinct but interrelated constitutional doctrine.

And he is winning. When the Rehnquist Court passes into history -- the 71-year-old Chief Justice is widely expected to retire within the next few years -- a reshaping of the Federal-state balance may prove his most enduring legacy. He has been frustrated in other areas where he lacks a working majority -- the right to abortion is still the law of the land, and organized prayer is not back in public schools. But for Federal-state relations, his tenure could mark a historic shift.

STATES' RIGHTS

Last month, Chief Justice Rehnquist wrote an opinion for a 5-to-4 majority in a case that gave new teeth to one of the Constitution's more obscure and ambiguous provisions, the 11th Amendment. The amendment, adopted in 1795 in response to the states' fears of being sued for Revolutionary War debts, shields a state from being sued in Federal court by a citizen of another state. The Court subsequently interpreted the 11th Amendment to bar suits by a state's own citizens as well in an 1890 decision that Chief Justice Rehnquist's opinion last week in *Seminole Tribe v. Florida* essentially revised and placed on firmer constitutional footing than ever before.

The *Seminole Tribe* decision struck down a portion of the Indian Gaming Regulatory Act, a Federal law governing the terms by which Indian tribes can conduct gambling on their reservations. The Court held that, despite Congress's virtually complete constitutional authority to legislate in the area of Indian affairs and the states' lack of any such authority, the law's provision permitting tribes to sue a state to bring it to the bargaining table violated the 11th Amendment.

The decision contained several loopholes; people can still sue states on equal protection grounds and seek injunctions to keep individual state officials from violating Federal law. But it calls into question the authority of Congress to insure that people can vindicate their Federally guaranteed rights in Federal court.

The 11th Amendment case followed by less than a year an important victory by the Chief Justice on another front: Congress's authority to regulate interstate commerce. In United States v. Lopez, the Court found for the first time in 60 years that Congress had exceeded its authority by making it a Federal crime to carry a gun within 1,000 feet of a school. Such an act, the Chief Justice said, was simply not commerce.

As with the *Seminole Tribe* case, the significance of *United States v. Lopez* lay in its implications, in its turning away from the prevailing notion that Congress knew best and that the authentic vision of American history was "the steady and inevitable triumph of nationalism," as Wilfred M. McClay, a historian at Tulane University, wrote recently in Commentary.

A Rehnquist opinion rings no such rhetorical bells. The Lopez opinion was typically dry and to the point. To agree with the Government that Congress had the power it claimed would require the Court to conclude "that there never will be a distinction between what is truly national and what is truly local," the Chief Justice said. "This," he added, "we are unwilling to do."

Federal courts have since struck down a Federal arson law as applied to a private home -- seen as insufficiently connected to interstate commerce -- and the Child Support Recovery Act, which brings some "deadbeat dad" cases within Federal jurisdiction.

The mightiest constitutional engine of all for returning power to the states may be the 10th Amendment, which has been absent from the

Court's docket for the last few years but may soon return in force.

The 10th Amendment provides that powers not delegated by the Constitution to the Federal Government are reserved to the states. Its history as a charter of state sovereignty has been fitful, with the Chief Justice its most ardent modern champion on the Court.

Four years ago, he joined an opinion by Justice Sandra Day O'Connor that invoked the 10th Amendment to strike down a Federal law that required the states to take responsibility for disposing of the low-level radioactive waste generated within their borders. Referring to the Constitution as dividing power "among sovereigns," Justice O'Connor said the Federal Government could not "commandeer" the states "into the service of Federal regulatory purposes."

TICKING DECISIONS

For several years, the decision, *New York v. United States*, sat quietly ticking. But last month, the United States Court of Appeals for the Fifth Circuit relied heavily on it to strike down a section of the 1994 Brady Handgun Violence Protection Act that requires local sheriffs to make background checks of handgun purchasers. The Brady law makes states the "victims of impermissible Federal coercion," the appeals court said. Two other appeals courts had upheld the law, so Supreme Court review is all but inevitable.

In addition to Justice O'Connor, a former state legislator and judge in Arizona who came to the Court as a passionate advocate for state interests, the Chief Justice's allies are Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. (It is an interesting twist that the only other Justice with state government experience, David H. Souter, a former New Hampshire attorney general and state court judge, has brought equal passion to dissenting opinions that have made the argument for Federal authority.)

While solid for now, the Chief Justice's margin is thin enough to make it likely that hearings for his successor -- or for any Justice -- will spend substantial time on the nominee's views on federalism. After years of controversy over race, sex, religion and abortion, who could have predicted that the 10th Amendment, the 11th Amendment and the Commerce Clause would hold center stage? But if the confirmation process is a window into what people hope for and fear from the Court at any given moment, they just might.

THOMAS CAUGHT UP IN CONFLICT

Jurist's Court Rulings, Life Experience Are At Odds, Many Blacks Say

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Joan Biskupic

What is it about Supreme Court Justice Clarence Thomas that provokes such profound ambivalence, and often animosity, among African Americans?

The answer lies in the contrast between Thomas's personal experience as a victim of discrimination in the deep South and his current rejection of traditional remedies for such bias. He is a powerful symbol of black achievement who declares that one important avenue for minority achievement -- affirmative action -- is "poisonous and pernicious."

He has incited conflict from the moment President George Bush nominated him in 1991. The NAACP, the nation's oldest and largest civil rights group, struggled for weeks over Thomas's nomination and in the end opposed the man who would be the court's second black justice. Similar conflict is evident today in majority-black Prince George's County, Md., where school officials first invited the justice to speak, disinvited him, then awkwardly invited him again.

The debate among blacks over whether Thomas should be revered or reviled is compounded by larger America's struggle with how to give past victims of discrimination their due without exacerbating bias based on skin color.

"He provokes a really visceral reaction," said Yale University law professor Stephen L. Carter, who is black. "The Supreme Court had been the ultimate place that black people had been able to go to vindicate their rights. . . . That is not the case anymore, and that the most prominent conservative voice on the court is a black hurts people."

Carter, who has written about the successes and failures of affirmative action, said yesterday, "My own view is that I think Thomas is wrong about an awful lot of stuff, but that doesn't mean he's a traitor."

Barbara Arnwine, executive director of the Lawyers Committee for Civil Rights Under Law, thinks it does. While she acknowledged that many blacks are pleased to see a black person ascend to the highest court, she is with those who "see all these accomplishments and also see him slamming the door on others. . . . He is an anti-role model."

Last year, when Thomas voted against affirmative action, he said programs entitled to benefit blacks and Hispanics are "just as noxious as discrimination inspired by malicious prejudice." He believes race-based remedies for discrimination violate the constitutional principle of equal protection of the laws and that it is not up to government to create equality. "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law," he said.

"So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence," Thomas wrote in a concurring statement in *Adarand v. Pena*, a case that limited federal affirmative action programs. "Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."

Thomas has taken a similar approach in rejecting remedial efforts for the vestiges of school segregation. When he voted against a Kansas City school desegregation plan last year, he criticized a lower court judge for accepting "the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development."

"This approach . . . relies upon questionable social science research rather than constitutional principle," Thomas said.

He also has voted to strike down legislative redistricting plans intended to ensure political representation by minorities by creating districts in which they were a majority of the voters. In the 1994 case *Holder v. Hall*, he said, "As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions."

As some blacks see it, Thomas benefited from affirmative action policies only to turn his back on them. During his 1991 confirmation, Yale

University officials said Thomas was admitted to the law school in 1971 through a program that sought 10 percent minority enrollment. In a 1983 speech Thomas gave at the federal Equal Employment Opportunities Commission, he praised affirmative action policies as critical to the advancement of minorities and women.

"But for them, God only knows where I would be today," said Thomas, who was EEOC chairman from 1982 to 1990. "These laws and their proper application are all that stand between the first 17 years of my life and the second 17."

Last month, he told a Texas audience that affirmative action policies did not exist when he was in college.

"When I went to Yale Law School, they had reduced black admissions from 40 to 12. We were all there on our own merit. In subsequent years, that's a fact that's been clouded," he said, according to a Dallas Morning News account of the speech.

Retired federal appellate Judge A. Leon Higginbotham Jr., who was one of the first blacks to become a federal appeals judge and who is a vocal Thomas critic, said in a speech to the American Bar Association last year:

"Since by his own admission he was the beneficiary of affirmative action programs, what does his conscience say when he rejects affirmative action programs that would give to future generations the same type of opportunities he received?"

Higginbotham asserted in the same speech that Thurgood Marshall, whom Thomas replaced and who died in 1993, would be dismayed at Thomas's record.

But law professor Carter, a former law clerk to Marshall, said Thomas was never going to be able to fill the shoes of the distinguished civil rights lawyer and no one should have such expectation.

"Clarence Thomas is neither a hero or a monster," Carter said in an interview yesterday. "But many people still will not forgive him for not being Thurgood Marshall.

"A lot of black Americans took it as a deliberate slight when Bush nominated Clarence Thomas to succeed Thurgood Marshall because his views were the opposite of Marshall's. It was seen as a cynical act. And there is no way that he could live that down. The fact of the matter is that there are white justices as conservative as Thomas: Scalia and Rehnquist. They don't generate anything like the kind of animosity that Thomas does."

But Justice Antonin Scalia and Chief Justice William H. Rehnquist never raised expectations among blacks that they would take a broad view of civil rights and remedies.

"People had hoped against hope that if nothing else, his experience and his background would make him see the light" about the legal needs of racial minorities, said George E. Curry, editor of *Emerge*, a black news magazine that published a story in 1994 about Thomas called "The House Negro."

ONE ANGRY MAN

Even on a Conservative Court, Antonin Scalia Manages To Seem Embattled

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James S. Kunen

King Solomon, in his wisdom, would listen to the details of each dispute, carefully weigh the competing interests and then render a decision perfectly tailored to the circumstances. Great king. Lousy judge--at least by the lights of Justice Antonin Scalia.

The term that ends this month marks Scalia's 10th year on the Supreme Court. He has tirelessly argued that case-by-case, seat-of-the-pants jurisprudence turns judges into illicit legislators who substitute their policy preferences for those of the people's democratically elected officials. Last week, for example, he refused to join the rest of the court in holding that the tax-supported, men-only Virginia Military Institute violated women's right to equal protection of the laws. A democratic system, Scalia wrote, "is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution."

Judges--not all of whom have the wisdom of Solomon--should apply general, unvarying rules to every case, Scalia says. And the Constitution, he maintains, consists of just such rules. Where others see highly abstract terms, intentionally written to evolve with the nation they're meant to govern, Scalia--who describes himself as a textualist and originalist--sees a text of fixed and narrow meaning: in the Bill of Rights, "liberty" cannot comprise the privacy and personal autonomy to choose to have an abortion or to engage in homosexual relations because it did not in 1791. The 14th Amendment's "equal protection" cannot overrule the decision by the people of a state that a single-sex public college is a good idea. The Constitution, wrote Scalia, "takes no sides in this educational debate." Only by such a literal reading can the Constitution's protections be preserved, Scalia insists, because if judges can add rights, they can also take them away. "The Constitution is not an empty bottle," he tells his frequent lecture audiences. "It is like a statute, and the meaning doesn't change."

Along with his philosophy of judicial restraint, Scalia boasts a resume bursting with brilliance (valedictorian at Georgetown, a Law Review editor at Harvard, esteemed law professor at the University of Chicago) and a reputation for gregariousness and charm. So in 1986 the Reagan Administration believed that the 50-year-old circuit court of appeals judge was the perfect candidate to lead a new conservative majority on the high court into the 21st century. That he was an Italian-American father of nine whose appointment would please an ethnic constituency was a bonus. At the time, Chicago law professor Geoffrey Stone predicted in the ABA Journal that his former associate's collegial spirit would help build consensus among the Justices: "He has the personal skills, intelligence, patience and manner to work out compromises and find common ground."

It hasn't worked out that way. When fellow Reagan appointee Anthony Kennedy wrote, for the 6-to-3 majority in *Romer v. Evans* in May, that a state constitutional amendment denying legal redress for discrimination based on homosexuality violated the equal-protection clause, Scalia wrote a withering dissent. He scoffed at the majority opinion's "grim, disapproving hints that Coloradans have been guilty of animus or animosity toward homosexuality, as though that has been established as un-American" and derided Kennedy's reasoning as "preposterous" and "comical," then dismissed the holding as "terminal silliness."

Such insulting language has become Scalia's signature style. It does not win friends or influence jurists--except perhaps to move them off the fence into alignment against him. Georgetown University law professor Mark Tushnet, who has studied the personal papers of the late Justice Thurgood Marshall, says Scalia "annoyed everybody at one time or another . . . They'd get over it and say, 'That's just how Nino is,' and then he'd do something else. It has to have left some residue of unwillingness to accommodate him."

In fact, a decade of exertions has not won a single Justice to Scalia's originalist point of view; his only dependable ally is Clarence Thomas, who shared his philosophy in the first place. On the nine-seat court, Scalia is one of seven Justices chosen by Republican Presidents. Yet "he has this view of himself as embattled," observes Yale law professor Robert Burt, "always fighting the desperate fight."

Scalia's siege mentality was manifest in his speech this spring at a Mississippi prayer breakfast. "We are fools for Christ's sake . . . We must pray for the courage to endure the scorn of the sophisticated world," he declared, explaining that in educated

circles Christians are regarded as "simpleminded." The speech echoed one he gave last year at Princeton University, where he maintained that his views on the proper role of judges were regarded as "simpleminded" in "sophisticated circles."

Despite his self-image as a member of a beleaguered group, Scalia, as a matter of judicial principle, consistently leaves minorities, including religious minorities, at the mercy of majority rule. Only when the majority's duly passed laws contravene an explicit provision of the Constitution does Scalia believe he must step in--sometimes against his own political preferences: he cast the fifth vote to overturn laws prohibiting flag burning because they violated freedom of speech ("A result that I'm quite sure in his heart of hearts he hated," says Chicago's Stone).

In the absence of a clear constitutional imperative, however, he is willing to grant broad powers to the majority and demonstrates, as George Kannar, a law professor who has written extensively on Scalia, has noted, "an affection for established norms, and for 'normalcy' in general, extending to the most private part of private life." Therefore it was not surprising when, dissenting from the court's holding last month that psychotherapists should have a privilege against disclosing their clients' confidences in court proceedings, Scalia wrote, "Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege."

On the highly contentious issue of affirmative action, however, Scalia has been accused of abandoning both his fidelity to original intent and his habitual deference to the legislature. He argues that the 14th Amendment's equal-protection clause forbids virtually any racial classifications in law despite the fact that the very Congress that passed the 14th Amendment went on to pass laws using just such classifications.

Scalia's objections to set asides and preferential treatment run deep. "My father came to this country when he was a teenager," he once wrote. "Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man." The only child of an Italian-immigrant father who became a professor of Romance languages at Brooklyn College and of an Italian-American mother who taught public school, Scalia remains determinedly anti-elitist--he dines in a downtown pizza joint and keeps his name listed in the phone book. He can be a forceful advocate for those working-class white males he described in one gender-based case as affirmative action's "losers . . .unknown, unaffluent, unorganized."

But to other "losers" in life, the poor, Scalia appears less sympathetic, consistently voting against claimants to government aid. Because welfare comes without the efforts at moral uplift that accompanied religious charity, he told an audience in May, "the result is often the elimination of poverty without the elimination of the vices that produce the poverty."

Though he sometimes sounds like a champion of the status quo, with all its inequities, Scalia points out that it is not the court's job to decide what is right, only what is constitutional. When his fellow Justices cast themselves as moral arbiters, as he insisted they did in the V.M.I. case, their enterprise, he wrote, "is not the interpretation of a Constitution, but the creation of one." The one we have suits Scalia just fine.

Quote: "This most illiberal court . . . has embarked on a course of inscribing one after another of the current preferences of the society . . . into our Basic Law." --Scalia on single-sex education

(With reporting by Viveca Novak/Washington)