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Section 2: The Direction of the Court

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

THE DIRECTION OF THE COURT

In This Section:

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Reflections on the Recent Past and Implications for the Future

Matthew Curtis *

The Supreme Court issued 75 decisions this past term and carried two cases over for decision during the Fall term: *Reno v. Bossier Parish School Board* and *Price v. Bossier Parish School Board.* First Amendment rights were reinforced by two Supreme Court decisions, but were limited by a third. The Court issued several rulings on civil rights, and in one of the cases, *Saenz v. Roe*, the Court resurrected the long dead "privileges or immunities" clause of the Fourteenth Amendment. Businesses saw the Court modify trial procedure regarding expert testimony and class action suits, and the Court also upheld the FCC's authority to regulate the local telephone industry. And, in several criminal cases, the Court both expanded and limited police power. But most significantly, the Court took what appeared to be three rather lackluster cases, dusted off the theories of state and dual sovereignty, and finished the term with some real fireworks in the area of federalism.

During the upcoming term, the Court will have the opportunity to expand its federalism jurisprudence in four upcoming cases (previewed in Section III): *Reno v. Condon*; *Kimel v. Florida Board of Regents* and its companion case, *United States v. Florida Board of Regents*; and *Vermont Agency of Natural Resources v. United States.*

The Court will also hear several significant First Amendment cases: aid to private parochial schools (*Mitchell v. Helms*); compulsory funding of political speech (*Board of Regents v. Southworth*); campaign finance reform (*Nixon v. SHRINK*); regulation of pornography on cable televsision (*United States v. Playboy*); nude dancing (*Erie, Pa. v. Pap's A.M.*); and the media's access to criminal files (*LAPD v. United Reporting*). It will also hear a Fourteenth and Fifteenth Amendment challenge to a Hawaii law that restricts the right to vote in a special election to only "native Hawaiians" (*Rice v. Cayetano*). A federal regulatory case will certainly draw substantial attention: can the FDA regulate tobacco/nicotine as a drug? (*Food and Drug Administration v. Brown & Williamson Tobacco*). And the Court will determine whether the standard set by *Terry v. Ohio* in 1968 permits police to stop and search someone who merely runs from an identifiable police officer.

Few trends can be identified from the past term. One trend appears to simply be that federalism cases have received a consistent majority of the same five justices – Rehnquist, O'Connor, Scalia, Kennedy and Thomas – without any defections. And, recognizing such labels are of limited value, the five "conservatives" generally seem to uphold conservative values, while the four "liberals" generally favor liberal values, but there were significant crossovers among the justices on several cases – notably Justice O'Connor's opinion in *Davis v. Monroe County* permitting school liability for student-on-student sexual harassment, Justice Scalia in *Saenz v. Roe* rejecting California's graduated welfare scheme, and Justice Breyer's joining of the majority in permitting the search of passenger's belongings even when the

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passenger is not suspected of a crime – *Wyoming v. Houghton*. What does that mean for the upcoming term?

The upcoming federalism cases raise some Fourteenth Amendment concerns not addressed in this past term's cases. Thus, it is not clear that the previous alliance between the five conservatives will last. Even should the alliance hold, what the impact will be is still uncertain.

Because of what appear to be conflicting values internal to the positions of both the liberals and conservatives on the Court, the outcome of the remaining cases seems equally uncertain. The only thing that is certain, is that the docket of cases for the upcoming term ensures an exciting term and some potentially impassioned opinions and dissents.

LEAN, MEAN HIGH COURT MACHINE

Court's Finishing Date is Earliest in 30 Years

Texas Lawyer

Monday, July 19, 1999

Tony Mauro

The U.S. Supreme Court's final day on the bench was dramatic, no question about it: three decisions on federalism, three dissents read from the bench, each one more bitter than the last.

Almost as dramatic as the court's final session itself was the day it occurred: Wednesday, June 23, the earliest finishing date in 30 years. No more dawdling right up to, or even past, the July 4th weekend as the court has done in recent years.

Rehnquist must have been doubly pleased that day. The federalism opinions, giving states new leverage in their tectonic battles with the federal government, represented a triumph for a position he has espoused for decades. Yet the early end of the term represented, in a small way, another sort of personal triumph: 13 years after becoming chief justice, Rehnquist has finally wrested the docket of the court away from the ghost of Warren Burger, who exalted administration but never managed to get the docket under control. It is no accident, perhaps, that the last time the court ended this early was Earl Warren's last year as chief justice, before Burger took the helm in 1969.

Summer Vacation

The end of the term came early enough this year that the law clerks, with their decision writing finished, could put on their annual top-secret skits for the justices that Tuesday. And early enough that Rehnquist could more leisurely make his way down to Hot Springs, Va., in time to lead the Thursday night sing-along at the annual 4th U.S. Circuit Court of Appeals' conference. Rehnquist stayed through Saturday, giving his annual review of Supreme Court "dogs" the obscure decisions that Rehnquist poetically described as cases that "were born to blush unseen and waste their sweetness on desert air were I not to talk about them." (Who else but the chief justice could get away with a speech on the most insignificant cases of the term?)

The term ended early enough also for the justices to wrap things up in their chambers before dashing off to their far-flung summer teaching gigs. Salzburg, Austria, draws Anthony Kennedy and Stephen Breyer, while Rehnquist heads to Montreal; Antonin Scalia to Nice, France; and Ruth Bader Ginsburg to the isle of Crete, in Greece. Summer school beckons this crowd, not the more personal retreats like Goose Prairie, Wash., or Nantucket, Mass., which lured the likes of William Douglas and William Brennan Jr., respectively. As David Garrow recounts in his book "Liberty & Sexuality," Douglas used to extol Chief Justice Charles Evans Hughes for getting the court to wrap up its work by Memorial Day each year. "Now, there was a chief justice!" Douglas would say.

Rehnquist may not be a Charles Evans Hughes, but he's doing something to get the court out of town so early. Theories abound. The most obvious answer is the

low number of signed opinions, 75, that the court turned out. But that's not all of it; the court had the same number of cases in the 1995 term and ended July 1.

Myriad other factors may have contributed. By the Associated Press' reckoning, David Souter, reputed to be the court's slowpoke writer, was the least prolific justice this term 14 separate majorities, dissents and concurrences while John Paul Stevens, a lean, efficient machine at age 79, cranked out 29 separate pieces of writing. This term, there were also several groupings of cases, three on federalism and three on the workplace provisions of the Americans With Disabilities Act, possibly cutting down on research time. Maybe that's the way to get the court's attention these days: hit the justices with three related conundrums at the same time, and the economies of scale will appeal to them.

Another small factor may have been the court's decision to schedule two cases for reargument next term Reno v. Bossier Parish School Board and Price v. Bossier Parish School Board something the court has not done since 1991. The court sometimes punts in this way if the decision "won't write" or if the court is so tangled up over it that it can't get untangled in the final blur before adjournment.

Other than those two cases, this term's cases may have generally been cleaner, more straightforward and less argument-provoking than in the past (except for the federalism trio and a few others). That may have helped move things along as well. The court's no-nonsense approach to telling the other branches of government when to back off may have reduced some of the court's usual hand-wringing in some cases. But most of all, the early finish is probably a tribute to Rehnquist, who has gradually gotten the court to become more efficient as its docket shrinks.

Other justices speak about the memos from the chief that make it obvious who has fallen behind in writing. Subtle threats of withholding future opinion assignments until the justices get caught up provide a considerable incentive to write more quickly. That's also easier, of course, if the cases are less contentious. Warren, the legendary "super chief," had a similar touch.

In 1963, the Warren court issued 110 opinions and still completed its work by June 15. But Burger, for all his efforts to professionalize the judiciary, was not a master of efficiency in running the Supreme Court. The late court scholar Bernard Schwartz described Burger as a "failure" as chief justice, in no small part because of "the manner in which he presided at conferences and assigned opinions."

The current justices could use the extra week of recess to gather strength for the fall term. The federalism wars will continue, and issues that the court has not dealt with in a while - aid to parochial schools and campaign finance reform, for example - await their return on the First Monday in October.

HIGH COURT'S CONSERVATIVES CHANGE BALANCE OF POWER

Five Justices Steadily Shift Federal Government Might to the States It's Unclear How Far Pendulum Will Swing

Los Angeles Times

Saturday, June 26, 1999

David G. Savage, Times *Staff Writer*

Few Americans wake up in the morning worried about threats to their state's "sovereignty" or the fate of "federalism," the balance of power between national and state authorities.

Yet five justices of the Supreme Court have made these issues their cause, and this week's final round of rulings for the term showed them determined to return American law to an earlier era.

Beginning four years ago, the court's conservatives have steadily stripped away power from Congress and federal judges and given the states a new shield of immunity. It is unclear, though, where they are headed. Back to the 1950s, before the expansion of federal civil rights protection? Or to the 1920s, before the New Deal era and federal intervention in the economy?

The court's four liberal dissenters fear their colleagues are looking to the 1780s, when a weak national government held little sway over the states.

"This is the first time in more than 60 years where we see an aggressive, conservative activism" from the Supreme Court, said Louis M. Seidman, a liberal law professor at Georgetown University. "They have shown themselves willing to overturn decisions made by the democratic process, and they are prepared to do it without any basis in the text of the Constitution."

Despite their fervor for federalism, however, the court's conservatives do not always stick together, and this term also saw liberal triumphs in the areas of sexual harassment and welfare benefits.

For example, Justice Sandra Day O'Connor, a champion of states' rights, is also a historic figure in women's rights and supplied the decisive fifth vote to rule that schools can be held liable if they ignore the repeated sexual harassment of one student by another.

And sometimes precedent still prevails, conservative activism notwithstanding: In the 1960s, the court ruled that states may not discriminate between new and old residents. This year, a 7-2 majority stuck to that principle and struck down California's plan to pay lower welfare benefits to newcomers.

But those are the exceptions in a court where states' rights conservatism remains the driving force.

On Wednesday, the 5-4 majority ruled that the principle of "state sovereign immunity" shielded states from having to pay overtime wages to their workers, as required by federal law. Justice Anthony M. Kennedy admitted the Constitution said nothing about the states having a special exemption from valid federal laws. Nonetheless, he concluded that the "founders' silence" shows the notion of state immunity was understood and

accepted in 1787, when the Constitution was written.

The resurgence of states' rights has been called the third wave of Supreme Court activism during this century.

Pro-business conservatives controlled the court during the first decades of the 20th century. They regularly struck down state and federal laws that, for example, sought to halt child labor or ensure minimum wages and maximum hours for workers. They said the Constitution did not allow the government to regulate business, although they could point to no provision that said so.

This is known as the "Lochner era" among lawyers, which refers to a 1905 ruling that threw out a New York law that set a maximum 10-hour day for workers.

This era came to an end in 1936, after the conservative court and President Franklin D. Roosevelt came into open conflict. On a series of 5-4 votes, the court struck down several New Deal laws, and FDR wanted revenge.

A year later, the court reversed itself, as Roosevelt replaced the "nine old men" with liberal appointees.

The next wave of activism was liberal. Under Chief Justice Earl Warren, the court wielded its power to strike down racial segregation laws, to throw out official prayers in schools and to expand the rights of criminal defendants. This era peaked with the 1973 Roe vs. Wade ruling, which struck down laws banning abortion.

In that case, the liberals were unable to point to a constitutional provision that created a right to abortion. A few years before, when striking down an archaic state law that barred the sale of contraceptives, Justice William O. Douglas said a right to privacy was contained in the Bill of Rights. Those words were not mentioned, he said, but privacy could be found "emanating" from the "penumbras" around the individual rights.

Even since, those words are an inside joke among conservatives who mock liberals for inventing new rights. According to friends, Justice Clarence Thomas keeps a sign in his office that says, "Don't water the penumbras."

The latest wave of conservative activism began in 1995, and its unquestioned leader is Chief Justice William H. Rehnquist.

As a young Arizona lawyer, he got a start in politics as a legal advisor to Sen. Barry Goldwater, who captured the Republican presidential nomination in 1964. Goldwater, too, preached states' rights and opposed the Civil Rights Act of 1964, which outlawed racial segregation in hotels, restaurants and other public businesses and made it illegal for employers to discriminate based on race. Goldwater maintained Congress had no power under the Constitution to pass such a law.

Though Goldwater was soundly defeated in the general election by Lyndon B. Johnson, Rehnquist later came to Washington to work for President Nixon and was sent to the court in 1971. President Reagan named him chief justice in 1986.

Four years ago, Rehnquist put together a 5-4 majority to strike down a new federal law that outlawed guns near schools. The ruling marked the first time since 1936 that the court had thrown out a federal law on the ground that Congress did not have the power to enact it.

A year later, the same 5-4 majority struck down part of the Brady Act on handgun sales, then overturned a new

federal law to protect religious liberty. A third decision declared states had a "sovereign immunity" and generally could not be sued in federal court.

This week's rulings pressed forward the trend in three important ways. Before, state courts were still open to those who said their federal rights had been violated by a state agency. The 5-4 ruling in Alden vs. Maine closed that door. The decision appears to leave 4.7 million state employees with no practical way to enforce their rights under federal law.

Second, the justices made clear they would not protect private businesses when state agencies stole their property. The Constitution gives Congress the power to protect patents and copyrights, and laws were passed to enforce those property rights. But in College Savings Bank vs. Florida Prepaid, Rehnquist said those laws cannot be enforced against states.

And, third, the court made clear Congress had no power to remedy the matter.

The next test will come in the fall when the court considers whether federal antidiscrimination laws protect state workers. Several professors and librarians at Florida State University say they were victims of age discrimination. At issue, however, is whether the law covers a state university (U.S. vs. Kimel).

Harvard law professor Laurence H. Tribe says he fears basic civil rights protections could be in jeopardy if the trend continues.

"Activism doesn't even describe these holdings. They are extraordinary," he said.

State experts and conservative scholars, however, say the court is simply upholding the Constitution's separation of powers.

"This is not a revolution," said Richard Ruda, counsel for the State and Local Legal Center in Washington. "This reaffirms the system of dual sovereignty of the states and the federal government."

For this term, the last words from the court on this subject were spoken from the bench by dissenters, who took turns jabbing back at the conservatives.

Justice John Paul Stevens accused the Rehnquist majority of finding the notion of state sovereign immunity in the "penumbras" of the Constitution.

Justices David H. Souter and Stephen G. Breyer spoke of the Lochner era and its now-repudiated decisions.

"The resemblance of today's state sovereign immunity decision to the Lochner era . . . is striking," Souter said. Then, an out-of-touch court created a "fictional" world in which individual factory workers were free to negotiate over their wages, he said.

Now, today's court has created an idealized but fictional world of state governments that are more attuned to the people, he said.

"I expect the court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire," Souter said, "the one being as unrealistic as the other, as indefensible and probably as fleeting."

On that note, the justices adjourned for the summer.

REHNQUIST COURT TAKING STAND FOR STATES

5-4 Rulings Increasingly Cut Into Congress' Power

***Austin* American-Statesman**

Sunday, July 4, 1999

Aaron Epstein

WASHINGTON – Chief Justice William Rehnquist's Supreme Court , now 13 years old, is assured of a prominent place in American legal history. It has emerged as a potent check on the power of the national government.

Just before slipping away early for a summer rest, Rehnquist and his four conservative allies on the Supreme Court showed what they care most passionately about, what they want to be most remembered for -- not so much for how they have changed the law on such hot-button issues as race or religion, but for their powerful, if still incomplete, impact on the fundamental design of government itself. They are forcing a dramatic shift in the balance of state and federal power -- away from Washington and toward the capitals of the 50 states.

Walter Dellinger, a liberal constitutional law professor at Duke University and former acting solicitor general for the Clinton administration, said the Rehnquist court is now supremely confident in its willingness to use its gavel against Congress.

"By my count, the court has invalidated 11 acts of Congress in the last three years. We've seen nothing like this since the 1930s," Dellinger said.

The court's doctrinal realignment of the federal-state structure is of little interest to most Americans. It recalls memories of dreary high school civics classes, and fascinates mostly legal scholars, who regularly churn out a welter of arcane, impenetrable tomes on the subject, which they call federalism. But the Supreme Court's constitutional reconstruction has practical consequences for real people that will have an even greater impact in the future, unless a presidential appointment robs the conservatives of its pivotal fifth vote.

In three ideologically identical 5-4 votes announced late last month at the end of a generally dull term, the court allowed the states to ignore provisions in labor, patent and unfair-competition laws enacted by Congress.

The conservative majority held that without the consent of the states, the nation's 4.7 million state employees cannot sue when they are underpaid in violation of federal minimum-wage or overtime requirements. And without the consent of the states, businesses and patent holders cannot sue state universities or agencies that enter the marketplace and infringe on private patents or compete unfairly in violation of federal laws.

Why? The states have "sovereign immunity" from private lawsuits.

Those words cannot be found in the text of the Constitution. But, the court's conservatives said, the concept is embedded in the design of the nation's governmental structure, making it an essential, inviolable element of the

division of power between Washington and the state capitals.

A clear split

And it is on this closely divided issue, and no other, that the Supreme Court's five conservative justices invariably stick together, leaving the four moderate-liberals feeling helpless and unreconciled, and hoping that this slenderest of majorities will dissolve with the next presidential appointment, or the one after that.

On other close questions, the shifting votes of the two centrist justices, Anthony Kennedy and Sandra Day O'Connor, usually prove decisive. But in the states' rights cases, there have been no swing voters. The majority consists of Rehnquist, Kennedy, O'Connor, Antonin Scalia and Clarence Thomas.

All but Thomas were appointed by President Reagan, a champion of curbing national power. President Bush, Reagan's fellow Republican, nominated Thomas.

The consistent dissenters in the states' rights cases are John Paul Stevens and David Souter and Clinton appointees Ruth Bader Ginsburg and Steven Breyer.

The flavor of this intense debate is apparent in capsule views of two of the opposing justices. One focuses on the state's problem, the other on the individual's dilemma.

Kennedy: To give Congress the power to authorize a private citizen to sue an unwilling state for money damages "could create staggering burdens, giving Congress a power and a leverage over the states that is not contemplated by our constitutional design. Congress must accord states the esteem due to them as joint participants in a federal system."

Souter: The creditor in question is not a mere bill collector out to dun the state, "but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the states has substituted politesse in place of respect for the rule of law."

How long will the thin conservative majority endure?

At least for the remainder of this administration. Republicans controlling the Senate would be unlikely to confirm another nominee of President Clinton, especially with only 18 months left in his term.

How long will the thin conservative majority endure? It could disappear if another Democratic president fills a vacancy caused by the departure of a conservative justice -- most likely Rehnquist, who turns 75 on Oct. 1, or O'Connor, 69. On the other hand, the election of a Republican president and the departure of the oldest justice from the liberal side of the court -- Stevens, 79 -- could strengthen the conservative margin.

Meanwhile, more states' rights cases have arrived in the court's mail, each carrying repercussions for millions of Americans.

The justices have already agreed to decide whether state employees in Florida can sue the state for violating the federal law against age discrimination, and whether a federal privacy law can stop states from collecting millions of dollars in revenues on the sales of personal information submitted on driver's license applications.

Yet another case could stop victims of sexual assault from suing states under the Violence Against Women Act, and underpaid women from suing states under the Equal Pay Act.

The rest of the record

The Rehnquist court's legacy must also include its repeated condemnation of government policies that treated people based on their race. In its apparent effort to move the nation toward a colorblind legal landscape, this court has struck down black voting districts, restricted federal affirmative action programs, limited school desegregation programs and permitted minority preferences to be barred in university admissions. It has also drilled new holes in Thomas Jefferson's metaphorical wall preventing government and religion from intruding on each other.

Its impact has been felt, too, on religious questions. It has altered earlier notions of church-state separation, drilling new holes in Thomas Jefferson's metaphorical wall preventing government and religion from intruding on each other.

It would be wrong to conclude that the current court always minimizes the legal weight of personal liberties. The court this term barred police from taking reporters and photographers into suspects' homes, struck down a federal law prohibiting casino advertising, knocked out a state law restricting solicitations of signatures on petitions and nullified a city ordinance that gave the police broad leeway to arrest loiterers in gang-infested neighborhoods.

"It's widely perceived that this is a conservative Supreme Court (but) I think this term suggested something to the contrary -- that it is very much civil-libertarian-oriented," said Theodore Olson, a former official in the Reagan administration's Justice Department who analyzes Supreme Court developments.

In earlier years, the Rehnquist court invalidated state laws that crippled abortion rights, struck down a state referendum that denied legal protections to homosexuals and forced President Clinton to face a woman's sexual-harassment suit.

Struggling to find a unifying theme for the court's seemingly disparate impulses, Dellinger mused, "This is a court that doesn't defer to any government. That may be the heart of it."

SOME TARGETS WERE LARGER THAN OTHERS

The Washington Post

Sunday, July 4, 1999

Suzanna Sherry

By many measures, it was an unusual term. The Supreme Court ruled on only 75 cases, the smallest number in the modern era--and only half as many as it routinely decided a decade ago. The justices finished their work earlier than they have in 30 years. There were no blockbuster social policy cases sparked by what have been called "the culture wars": no abortion, no affirmative action, no gay rights, no major free speech or religion cases.

So what did the Supreme Court do? Rather than striking down state legislation violating the rights of individuals, it invalidated federal legislation violating the "rights" of states. And when it came to enforcing other federal statutes, the court interpreted ambiguous federal laws very narrowly, further limiting Congress's reach.

In the core areas of constitutional law and the rights of criminal defendants, long the mainstay of the docket, this term's court merely tinkered at the margins, striking down a statute here or upholding a police practice there. But none of the cases involved broad constitutional doctrines, and all were so narrowly written as to have almost no application beyond the particular case.

Take for example Saenz v. Roe, a California case testing limits on welfare for new residents. The court held that it was unconstitutional for California to discriminate against individuals based on how long they had been in the state (or where they came from). But it was careful to leave intact earlier holdings that allow states to set lower fees for in-state residents who attend their public universities, or lower in-state fees for certain types of licenses. So the California ruling isn't likely to have much impact on anything beyond welfare.

Or consider the court's invalidation of a Chicago ordinance banning loitering by gang members. The majority opinion in Chicago v. Morales did not tackle the hard questions about whether citizens have a constitutional right to congregate on public streets, or whether imposing special restrictions on people because they are suspected to be members of an organization (a "gang")--even if they cannot be shown to have committed any otherwise illegal acts--is constitutional. Instead, the court simply held that the particular ordinance gave too much discretion to police officers, and thus virtually invited Chicago to rewrite its ordinance with slightly more precision.

But this court, while apparently reluctant to write broad decisions condemning state and local actions, was only too happy to cabin Congress's power. The bulk of this term's cases fell into one of two categories: Either the court interpreted badly drafted and confusing federal statutes, or it policed the litigation process itself--often in the name of federalism.

And although those categories sound narrow and lawyerly, in fact many of the court's decisions in those areas will likely have broad ramifications. They are also

evidence of both the dramatic expansion in the number of federal laws and the court's hostility toward Congress's increasing activity.

That hostility was most evident in the cases decided on the last day of the term (June 23), striking down parts of several congressional statutes as infringing upon the sovereignty of the states. These federalism cases were the latest examples of a trend that began in 1992. After first invalidating congressional attempts to deal with nuclear waste (in New York v. United States) and with guns in schoolyards (in United States v. Lopez), the court three years ago turned its attention to Congress's power to subject states to federal lawsuits.

Under a long-standing interpretation of the Constitution, states are immune from suit in federal court unless Congress expressly revokes their immunity. In Seminole Tribe v. Florida, a 1996 case involving Indian casinos, the court for the first time limited Congress's broad power to revoke states' immunity from suit. Congress is now permitted to subject the states to suit only when it passes a statute designed to enforce constitutional rights--enforcing mere federal statutory rights won't do. A year later, in City of Boerne v. Flores, the case striking down the Religious Freedom Restoration Act (RFRA), the court narrowed the scope of Congress's authority to determine what laws might be necessary to enforce constitutional rights.

Together, Seminole Tribe and City of Boerne jeopardized many federal statutes that purport to govern the states in their capacity as employers, as market participants and as service providers.

That possibility began to be realized this term. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, the court held that Congress has no power to subject the states to suit for patent infringement. This ruling is likely to have serious repercussions in such areas as copyright law, where state universities--now chafing under expanded copyright protection--might decide to copy and distribute to students whatever literature they wish, ignoring the copyright laws but safe in the knowledge that they cannot be sued.

An even more serious implication of the court's ruling in the patent case is the signal it sends about other federal statutes. The court has already implicitly held that states cannot be sued for violations of the Fair Labor Standards Act--which sets the minimum wage and governs things like overtime pay. And the court has agreed to hear a case next term about the validity of Congress's attempt to make states liable for violating the Age Discrimination in Employment Act. Cases challenging the application to the states of the Americans With Disabilities Act (ADA), the Family and Medical Leave Act and other federal laws are now working their way through the federal courts. All of these laws are in danger after this term, because the court has indicated that it will allow Congress little leeway in claims that the various statutes are necessary to enforce constitutional rights.

Thus it is quite likely that states can violate federal law with impunity, because their employees cannot bring suit in federal court. Which takes us to the last federalism case of the term, where the court dropped the other shoe. What about bringing suit in state court? In Alden v. Maine, the court held that Congress has no power to subject states to suits in their own courts, either.

So state employees who have been paid less than minimum wage--and maybe those who have been discriminated against because of their age or their

disability--have no recourse. They have a federal right, but no remedy, because they cannot sue their employers anywhere at all.

In keeping with its decisions limiting Congress's power under the Constitution, the court also generally interpreted Congress's handiwork as narrowly as possible. The cases arising under the ADA offer an example. In the "Tuesday Trilogy" (three separate ADA cases decided on June 22), the court held that people whose disabilities can be corrected--by wearing eyeglasses or taking medication, for example--are not "disabled" within the meaning of the statute. Thus an employer can refuse to hire someone because he or she wears glasses.

There were exceptions to the trend toward narrow interpretation, of course, but even they are not likely to have significant impact. For example, despite all the hype surrounding the court's decision (in Davis v. Monroe County Board of Education) that victims of student-to-student sexual harassment can in some cases bring suit--and despite the dissent's insistence that the sky is falling--almost no lawsuits will satisfy the very high hurdles the court set for such cases: The harassment has to be so egregious and pervasive that it interferes with education, and the school has to ignore complaints about it.

The very fact that the bulk of the court's docket involved the interpretation of federal statutes rather than broad constitutional questions tells us something interesting. The court only interprets federal statutes, not state statutes, and it generally will only hear cases raising serious disputes about the statutory language. Too many statutes written with too little care have meant that the courts must resolve the ambiguities.

And perhaps those careless congressional tentacles regulating more aspects of life with greater detail have contributed to the court's hostility toward even justifiable congressional enactments. Perhaps Congress's eagerness to enact popular statutes without much concern about either their clarity or their constitutionality has increased the court's mistrust of the federal legislature. Not since the New Deal has the Supreme Court confronted so many newly minted federal statutes--and not since the New Deal has the Supreme Court so consistently set itself, and the Constitution, against Congress.

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SUPREME COURT
The Justices Decide Who's in Charge

The New York Times

Sunday, June 27, 1999

Linda Greenhouse

THE Supreme Court rules.

That was the message of a term in which the Court asserted its power over every branch and level of government, few of which emerged unchanged from the encounter.

Most dramatically, the Court reconfigured the Federal-state balance of power in three decisions that carved out a broad sphere of immunity for the states from the reach of Federal law. Those decisions had a subtext with even more far-reaching implications, indicating the Court's unwillingness to credit Congress's own view not only of the way legislation should be written but even of the justification for Federal legislation at all in areas where Congress has deemed it preferable to stitch the states into a uniform, nationwide rule of law.

Nor was the Court any more solicitous of the executive branch, rejecting the Clinton Administration's plan for conducting the 2000 Census and insisting that there was no alternative to the traditional head count for apportioning seats in the House of Representatives. Looking to the states, the Court invalidated California's two-tiered welfare policy that disadvantaged new arrivals, a policy the new Federal welfare law had authorized. On the local level, the Justices rejected Chicago's approach to preventing gangs from taking over neighborhoods.

"This is a Court that doesn't defer to government at any level," Walter Dellinger, an Acting Solicitor General earlier in the Clinton Administration, said the other day. "The Court is confident it can come up with the right decisions, and it believes it is constitutionally charged with doing so."

It was the Court's lack of deference to its ostensibly co-equal branches that was most notable. In fact, at a time when Congress and the executive branch have appeared nearly paralyzed by partisan stalemate and by their own internal weaknesses, one could almost feel governmental power in Washington flowing in the Court's direction.

"The Court makes decisions," one Federal judge, surveying the scene from a courthouse far from Washington, observed recently, "and a willingness to actually make decisions puts you in stark contrast with all the people who just talk about it."

The Court did not make many decisions: only 75, half the number of cases decided each term in the mid-1980's, and the June 23 end of the term was the earliest closing date in 30 years. But the cases the Justices did choose from among some 7,000 petitions for review were arrayed along society's pressure points, from police authority to questions of discrimination, citizenship and disability rights. The term that begins next October promises, if anything, to be even more intense, with a resumption of the

federalism debate in at least three new cases and with religion also added to the mix in the form of a case on aid to parochial schools. There will also be a major test of the Court's willingness to defer to the executive branch when it decides whether the Food and Drug Administration has authority to regulate tobacco products.

The term was a triumph for Chief Justice William H. Rehnquist, who after 27 years on the Court, 13 of those as Chief Justice, is stamping his deeply held vision of state sovereignty on the Court's jurisprudence. As the federalism debate has waxed and waned over the years, he has never diverted his attention from his goal of curtailing the national Government's authority over the states, and he appears on the verge of succeeding to a degree that would have seemed implausible only a few years ago.

Of the three federalism decisions handed down on the term's final day, the Chief Justice's majority opinion holding states immune from suits for patent infringement was the most blandly written and appeared narrowly cast. But beneath its mild tone, it was aggressively far-reaching. In rejecting Congress's factual premises for having made states liable for patent infringement in the first place, the opinion assumed for the Court a veto power beyond any it has exercised in modern times. The Court flatly declared that Congress lacked a sufficient reason for enacting the patent law.

"The Court is telling Congress, 'We think it's not as necessary as you apparently do, so you lose,' " Professor Laurence H. Tribe of Harvard Law School said in an interview. "It's a complete lack of deference."

The only shadow over the ascendant states'-rights majority is the narrowness of its hold on the Court. The three cases were all decided by 5-to-4 votes, an alignment that now seems to admit of no compromise or middle ground. Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas joined the Chief Justice's majority, while Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer made up the dissent. Strikingly, the dissenters vowed never to yield -- as Chief Justice Rehnquist did himself when he was on the losing end of the same debate half a generation ago.

The alignment reflected in the federalism cases held true in most of the Court's closely fought cases -- actually, and typically, a rather small subset of the docket. Thirty-four of the term's cases, or 45 percent, were decided by 9-0 votes, unanimous in outcome if not always in reasoning. Only 16 -- 21 percent -- were decided by votes of 5 to 4, a group that included some important civil rights and criminal procedure cases as well as the decision barring statistical sampling for the Census.

Of those 16 cases, 14 found the four most liberal Justices -- Stevens, Souter, Ginsburg and Breyer -- arrayed against the three most conservative, the Chief Justice and Justices Scalia and Thomas. That left the outcome up to Justices O'Connor and Kennedy, the Justices statistically in the middle of the Court (as indicated by the fact that over the course of the term, each dissented only 8 times, the fewest of any Justice, compared with 14 dissenting votes by Justice Thomas, to their right, and 20 dissenting votes by Justice Stevens, to their left.)

In the 5-to-4 cases, Justice O'Connor voted with the conservative bloc 10 times and the more liberal group 4 times; Justice Kennedy's split was 12 to 2. The conservative group prevailed in 8 of the

14 cases that reflected a clear ideological split.

Ideological labels on this Court can be quite misleading. Liberalism on the Court is a relative concept, as demonstrated by the Court's decision during the term that the Government may select aliens for deportation on the basis of their political views. While the vote was 6 to 3, with Justices Ginsburg, Souter and Breyer dissenting, their dissents were aimed not at the constitutional merits of the Court's rejection of the selective-enforcement claim but rather at the narrower issue of whether the Court should have addressed that part of the case at all after earlier indicating that it would not do so. Immigration law, in fact, is one area where the Court retains a posture of deference toward administrative enforcement decisions.

And Justices across the spectrum remain committed to free speech principles. A First Amendment decision striking down a Federal prohibition of broadcast advertising for casino gambling was unanimous.

Five cases under the Americans With Disabilities Act illustrated the Court's role in construing acts of Congress, a job the Justices view as distinct from interpreting the Constitution. Reading the disabilities law narrowly to exclude coverage of people with correctable impairments like nearsightedness and high blood pressure, the 7-to-2 majority put great weight on Congress's calculation that 43 million Americans have disabilities. In the majority opinion , Justice O'Connor noted that 160 million people have disabilities, most of them correctable, so Congress could not have meant to include them all. Justices Stevens and Breyer said in dissent that Congress's figure should be taken as illustrative of the problem the statute was supposed to address rather than a limitation on its scope.

There was a reminder at the end of the term that for all the Court's activism, it is no more than the passive recipient of the problems and issues that people bring to its door.

For years now, the Court has been trying to decide whether Section 1981, one of the Reconstruction-era civil rights laws, prohibits discrimination against aliens in the making of private contracts. A case the Justices granted five years ago to resolve the question had to be dismissed when the lawsuit was settled. Two months ago, after weeks of internal debate over the constitutional ramifications of this issue, the Court selected another case and scheduled it for argument in October. But the parties in that case, United Brotherhood of Carpenters v. Anderson, then settled their dispute, and as its final act before beginning the summer recess, the Court announced that this case had been dismissed as well.

Following are summaries of the major cases.

States Get Protection From an Array of Lawsuits

In a trio of decisions, all by the same 5-to-4 vote, the Court invoked a broad principle of sovereign immunity to shield states from suit for violations of Federal law. The Court struck down two Federal laws, both enacted in 1992 to authorize suits against states for violations of Federal patent and trademark laws. The Justices also overturned a 35-year-old precedent under which states that entered the commercial marketplace – in that case, by running a railroad – were regarded as having waived their immunity from suit for their activities there.

In each of the three cases, those in the majority were Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas. The dissenters were Justices Stevens, Souter, Ginsburg and Breyer.

One of the cases, Alden v. Maine, No. 98-436, held in an opinion by Justice Kennedy that states could not be sued in their own courts by state employees for violations of the Fair Labor Standards Act. Since the Justices had made it clear in a 1996 decision, Seminole Tribe v. Florida, that such suits could not be brought in Federal court, the decision left state employees without recourse when they believe their rights under Federal labor law have been violated. The Federal Government itself can still sue on a state employee's behalf, but the Department of Labor is not equipped to bring more than a token number of such lawsuits on behalf of the 4.7 million people in the country who work for state governments.

The other two federalism cases grew out of lawsuits by the College Savings Bank, based in Princeton, N.J., against the state of Florida, a competitor in the marketplace for investment funds for college tuition. The College Savings Bank charged Florida with false advertising of the state program, in violation of Federal trademark law, and with infringing its patent on its investment program. An opinion by Chief Justice Rehnquist, Florida Prepaid v. College Savings Bank, No. 98-531, held that the states are immune from patent infringement suits, while Justice Scalia wrote for the majority in College Savings Bank v. Florida Prepaid, No. 98-149, that states are also immune from trademark suits.

Clinton Administration Loses on Census

Rejecting the Clinton Administration's plan to conduct the 2000 Census with the help of statistical sampling, the Court ruled by a 5-to-4 vote that the Census Act made the traditional head count mandatory for the figures that will be used to apportion the House of Representatives. The Court indicated that statistical adjustments may be made for the other purposes of the Census, including state redistricting and the distribution of Federal money.

Justice O'Connor wrote for the majority in Department of Commerce v. U.S. House of Representatives, No. 98-404. The dissenters were Justices Stevens, Souter, Ginsburg and Breyer.

On Criminal Law Issues, Some Reining In of Authority

The Court struck down a Chicago anti-loitering ordinance that was aimed at preventing gang members from controlling neighborhood streets. The law authorized the police to arrest anyone who, refusing a police order to move on, remained "in one place with no apparent purpose" in the presence of a suspected gang member. Voting 6 to 3 in Chicago v. Morales, No. 97-1121, the Court said the ordinance gave too much discretion to the police to target innocent people. Justice Stevens wrote the majority opinion. Justice Scalia dissented, along with Chief Justice Rehnquist and Justice Thomas.

In a case growing out of an independent counsel's prosecution of Mike Espy, the Clinton Administration's former Secretary of Agriculture, the Court ruled unanimously that giving gifts to a Federal official does not violate the law against illegal gratuities unless there is a demonstrated connection between the gifts and the official's actions. Justice Scalia wrote the opinion in United States v. Sun-diamond, No. 98-131, which

rejected the independent counsel's expansive theory of the gratuity statute.

There were several cases dealing with police behavior and raising questions of privacy under the Fourth Amendment's prohibition against unreasonable searches. Among these was the Court's unanimous ruling that the police violate "the right of residential privacy at the core of the Fourth Amendment" when they take journalists and photographers into people's homes to witness searches or arrests. Chief Justice Rehnquist wrote the opinion in Wilson v. Layne, No. 98-83.

In another search case, the Court ruled, 5 to 4, that people who are temporarily in a private home to conduct business there may not challenge the validity of a search of the home, because they themselves have no "legitimate expectation of privacy" there. Chief Justice Rehnquist wrote the majority opinion in Minnesota v. Carter, No. 97-1147. Justice Ginsburg dissented, along with Justices Stevens, Souter and Breyer. A concurring opinion by Justice Kennedy suggested that a social guest, rather than someone doing business, would be able to challenge a search.

Two search cases concerned automobiles. The Court ruled unanimously, in another opinion by Chief Justice Rehnquist, that issuing a speeding ticket does not automatically give the police the authority to search the car. The case was Knowles v. Iowa, No. 97-7597. At the same time, the Court also ruled that once the police do have probable cause to search a car, they can search the personal belongings -- in this case, a pocketbook -- of passengers who are themselves under no suspicion of illegal activity. The vote in Wyoming v. Houghton, No. 98-184, was 6 to 3. Justice Scalia wrote the majority opinion, and Justices Stevens, Souter and Ginsburg dissented.

Voting 5 to 4, the Court upheld the first death sentence to come before it under the new, greatly expanded Federal death penalty law, rejecting a challenge to the jury instructions along with other issues. Justice Thomas wrote the majority opinion in Jones v. U.S., No. 97-9361, with dissenting votes by Justices Stevens, Souter, Ginsburg and Breyer.

In Disability Cases, A Narrower Definition

In a series of three cases, all decided by the same 7-to-2 vote, the Court took a restrictive view of the definition of disability under the Americans With Disabilities Act. People whose impairments can be alleviated by medication, glasses or other devices are generally not disabled and so do not come under the law's protection against employment discrimination, the Court said.

In two of the cases, the disability claims the Court rejected were based on vision problems. Justice O'Connor wrote the majority opinion in Sutton v. United Air Lines, No. 97-1943, finding that two nearsighted sisters, with vision correctable to 20/20, were not disabled despite the airline's refusal to hire them because of their vision. In Albertsons Inc. v. Kirkingburg, No. 98-591, Justice Souter wrote for the majority, rejecting a discrimination claim by a truck driver who was dismissed because he was functionally blind in one eye. In Murphy v. United Parcel Service, No. 97-1992, Justice O'Connor wrote for the majority that an employer did not discriminate by dismissing a truck driver whose high blood pressure prevented him from obtaining Federal certification to drive a

truck. Justice Stevens and Breyer dissented in these cases.

Resolving a separate issue under the Americans With Disabilities Act, the Court ruled, 6 to 3, that isolating people with disabilities in big state institutions when there is no medical reason for their confinement is a form of discrimination. This decision, Olmstead v. L.C., No. 98-536, did not require states to move patients en masse into group homes, but said that states should have a plan for doing so at a "reasonable pace" when medically appropriate and not unduly disruptive to the state's budget. Justice Ginsburg wrote the majority opinion, with Justice Thomas, Justice Scalia and Chief Justice Rehnquist voting in dissent.

Interpreting another Federal law, the Individuals With Disabilities Education Act, the Court ruled that students with disabilities who require special care during the school day are entitled to the care at public expense, as long as a doctor is not required to deliver the necessary services. The vote in Cedar Rapids v. Garrett F., No. 96-1793, was 7 to 2. Justice Stevens wrote the majority opinion. Justices Thomas and Kennedy dissented.

The Court ruled unanimously that a worker who has applied for or received disability benefits under Social Security is not barred by that fact from suing an employer for discrimination under the Americans With Disabilities Act. Justice Breyer wrote the opinion in Cleveland v. Policy Management Systems, No. 97-1008, which reconciled an apparent conflict in the two laws: Social Security, which provides benefits to those too disabled to work, and the disabilities law, which protects those who can work if provided with reasonable accommodations.

For the Harassed and the Poor, A Strengthening of Rights

Interpreting the Federal law that bars sex discrimination in schools, the Court ruled 5 to 4 that school districts can be liable for damages for failing to stop one student from subjecting another to severe and pervasive sexual harassment. Justice O'Connor wrote the majority opinion in Davis v. Monroe County, No. 97-843. Justice Kennedy dissented, along with Chief Justice Rehnquist and Justices Scalia and Thomas.

The Court ruled that state welfare programs may not restrict new residents to the welfare benefits they would have received in their home states. The 7-to-2 decision, Saenz v. Roe, No. 98-97, had the effect of overturning a portion of the new Federal welfare law, which authorized states to set up two-tiered benefit systems. The opinion, written by Justice Stevens, was also significant for its reliance on the long-ignored Privileges or Immunities Clause of the 14th Amendment, a possible signal that this provision, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," could become a new source of protection for individual rights. Chief Justice Rehnquist and Justice Thomas dissented.

A unanimous opinion, the latest to examine a much-disputed Congressional district in North Carolina, held that district lines drawn primarily for political reasons are not invalid simply because they are drawn with a consciousness of the district's racial composition. The decision, Hunt v. Cromartie, No. 98-85, overturned a judgment that North Carolina's 12th Congressional District, which is heavily Democratic and 47 percent black, was an unconstitutional racial gerrymander. Justice Thomas's

majority opinion appeared to give the states some breathing room as they prepare for the post-2000 round of redistricting.

In a 5-to-4 decision, the Court held that companies making "good faith efforts" to comply with Federal anti-discrimination laws will not be liable for punitive damages, even if a senior official intentionally violates company policy and the law. The decision, Kolstad v. American Dental Association, No. 98-208, interpreted a 1991 amendment to the Civil Rights Act of 1964, which for the first time authorized awards of punitive damages for intentional job discrimination. Justice O'Connor wrote the majority opinion, from which Justices Stevens, Souter, Ginsburg and Breyer dissented.

Casinos and, Voter Initiatives Win on Free Speech Grounds

The Justices unanimously struck down a 65-year-old Federal ban on broadcast advertising of casino gambling. Writing for the Court in Greater New Orleans Broadcasting Assoc. v. U.S., No. 98-387, Justice Stevens said the law "sacrifices an intolerable amount of truthful speech about lawful conduct."

In a 6-to-3 decision extolling the First Amendment value of uninhibited "communication with voters," the Court struck down Colorado's restrictions on the process of getting initiatives on the ballot. Justice Ginsburg wrote the majority opinion in Buckley v. American Constitutional Law Foundation, No. 97-930, while Chief Justice Rehnquist and Justices O'Connor and Breyer dissented. Among the regulations the decision invalidated were requirements that people circulating petitions be registered Colorado voters and wear badges identifying themselves by name.

Immigration Cases Mean More Authority for Government

An area in which the Court gave considerable deference to the Government was immigration law, with the Court sharing Congress's and the Administration's narrow view of the rights of non-citizens. The Court ruled, 6 to 3, in a deportation case involving a group of Palestinians in Los Angeles, that the Government does not violate the Constitution by selecting aliens for deportation based on their political views and associations. Justice Scalia wrote the majority opinion in Reno v. American-Arab Anti-Discrimination Committee, No. 97-1252, with Justices Ginsburg, Souter and Breyer dissenting.

In a second deportation case the Court ruled unanimously that foreigners who have committed serious crimes in their home countries are ineligible for refugee status here regardless of the risk of persecution they face if deported. Justice Kennedy's opinion in Immigration and Naturalization Service v. Aguirre, No. 97-1754, upheld the Clinton Administration's view of how a would-be refugee's criminal past should be evaluated.

In Business-Consumer Cases Rulings for Both Sides

Among a number of important business cases, the Court limited much of the Federal Communications Commission's authority to supervise telephone deregulation under the Telecommunications Act of 1996. Justice Scalia wrote the majority opinion in AT&T Corp. v. Iowa Utilities Board, No.

97-826. The vote was 5 to 3, with Justices Souter, Thomas and Breyer dissenting and Justice O'Connor not participating.

A unanimous opinion on the use of expert testimony was a substantial victory for defendants in product liability suits. In Kumho Tire v. Carmichael, No. 97-1709, the Court gave Federal judges new authority to keep expert testimony of questionable reliability away from juries. Justice Breyer wrote the opinion.

In an important ruling on how the judicial system should handle class action lawsuits in mass tort cases, the Court set aside a $1.5-billion settlement in an asbestos suit, covering some 186,000 claims, on the ground that it was unfair to other asbestos victims, and was the product of a possible conflict of interest on the part of the lawyers who designed and settled the case. The vote in Ortiz v. Fibreboard Corp., No. 97-1704, was 7 to 2. Justice Souter wrote the majority opinion, and Justices Breyer and Stevens dissented.

CORRECTION-DATE: July 4, 1999, Sunday

CORRECTION:

Because of an editing error, an article last Sunday about the Supreme Court term that ended in June characterized one Court opinion incorrectly. In a case involving the Federal Communications Commission, AT&T Corp. v. Iowa Utilities Board, the Court upheld the F.C.C.'s authority to supervise telephone deregulation under a 1996 Federal law. It limited the agency's authority in some other respects.

COURT'S QUARTET OF DISSENT

Justices Favor Pragmatism Over Liberalism

The Washington Post

Sunday, June 27, 1999

Joan Biskupic, Washington Post *Staff Reporter*

One of the most important rituals in the grand white marble and red velvet setting of the Supreme Court is the announcement of a decision and naming of the justices who agree with it—and those who don't. As the Supreme Court term ended last week, four names were a refrain of dissent, often recited with a hint of weariness at their recurrence: "Stevens, Souter, Ginsburg and Breyer."

This is the foursome fighting the bold conservatism of the Rehnquist majority. These are the liberal stalwarts of the bench.

Except they're not.

Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer are Exhibit A for the changing face of liberalism in America. The term that ended last week showed more than ever that while these three men and one woman stand to the left of the potent majority bloc, they do not stand for judicial liberalism as it was known even a decade ago, when the justices trying to block the newly consolidated Rehnquist majority were William J. Brennan Jr., Harry A. Blackmun, Thurgood Marshall, and Stevens—then the most conservative of the four.

"This is a court without any liberals," said University of Chicago law professor Cass Sunstein, adding that, for better or worse, "no one believes in using the Constitution as a weapon for social reform."

The changes in the court mirror the broader changes in American politics over the last two decades. The wave of public dissatisfaction that brought Ronald Reagan to the presidency in 1980 trickled down to the judiciary through 12 years of GOP appointments. By the time Bill Clinton was elected in 1992, the Democratic Party had responded to the national move to the right by divesting itself of many of its more liberal elements. Accordingly, Clinton's appointees have hewed to a moderate path.

This reality is reflected in the justices' bottom-line rulings, as well as in the principles they articulate and the rhetoric they employ—which today rarely dwells on the plight of the weak, poor or socially scorned of America.

These four justices are concerned with legal authority, rather than social ideals. They have a broader vision of the Constitution and federal law than the Rehnquist conservatives, to be sure, but rather than expressing an overarching judicial philosophy, they tend to take cases as they come. Pragmatism is their watchword. And unlike both yesterday's liberals—who believed the court should intervene in society's most pressing dilemmas—and today's conservatives—who would consistently prefer to scale back government—these justices generally take the path of least intervention, deciding cases narrowly and avoiding broad mandates.

The actual votes of Stevens, Souter, Ginsburg and Breyer in recent cases tell much of the story: When the court

upheld the death penalty for a Virginia killer, despite the prosecution's holding back key evidence that the court acknowledged might have spared the man, Stevens wrote the opinion and Ginsburg and Breyer joined it.

When the justices curtailed the scope of federal law protecting disabled workers from discrimination, Souter and Ginsburg signed on. And when the majority limited the First Amendment rights of illegal aliens, Stevens, Ginsburg and Breyer were with them to a considerable degree. Only Souter dissented.

Even when the four justices did band together to vote against the conservative majority's judgment, they were heavy on legal precedent, light on overarching principle or moral outrage.

Last week, for example, the conservative majority of Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas declared that a company sued for sex or race discrimination because of a manager's misconduct doesn't have to pay punitive damages if the company had made a "good faith" effort to follow civil rights laws. The ruling came out of the blue: The case in question hadn't focused on that particular issue and neither side in the job-bias fight had been asked to present arguments on it.

Stevens, Souter, Ginsburg and Breyer complained that the standard was "ill-advised," but on procedural grounds—they were unhappy the question hadn't been covered in legal briefs. It was in decided contrast to the passion of dissenting justices exactly 10 years ago when a narrow majority similarly restricted the reach of civil rights job protections, and Blackmun let loose an emotional tirade questioning whether the majority even realized race discrimination still existed.

Also last week, the five-justice majority upheld the death sentence of a Texas murderer despite mistakes in the judge's instructions to the jury. The four-justice dissent copiously detailed the procedural flaws in the case. But reflecting the reality that not a single member of this bench disapproves of capital punishment, the dissent was devoid of outrage at the ultimate penalty.

The contrast of then-and-now liberalism was especially obvious this term because the court revisited legal disputes from prior decades.

When all four on the left voted, with O'Connor and Kennedy, to strike down a Chicago ordinance against loitering by suspected gang members, the straightforward opinion by Stevens emphasized that the law lacked adequate guidance for police officers. Absent were the lofty social ideals of Justice William O. Douglas, who in a 1972 opinion striking down a Jacksonville, Fla., vagrancy ordinance, quoted Walt Whitman on the value of "wandering or strolling."

In 1969, when the court struck down state laws and a District statute setting residence requirements for welfare families, the majority relied on a loosely defined "right to travel" and an open-ended constitutional analysis favoring individual rights.

Ringing with concern for the human needs of food and shelter, the opinion by Brennan stated, "[W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a state's public assistance."

This year, by contrast, when the court threw out a California law that stopped new residents from getting full welfare benefits for a year, the majority opinion—written by Stevens and joined by Souter, Ginsburg and Breyer, as well as O'Connor, Scalia and Kennedy—spurned Brennan's expansive reasoning, grounding the ruling instead in a specific provision of the 14th Amendment supported by those across the ideological landscape: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

One need not reach back a quarter-century to see change in the tenor of the court. Just 10 years ago, the court's minority bloc of Brennan, Blackmun, Marshall and Stevens vigorously promoted a liberal, interventionist agenda. Brennan and Marshall in particular embraced the idea that constitutional rights expanded with the years. They were driven by an activist vision that judges could correct society's ills.

Brennan, who joined the court in 1956 and was both the pen and the persuasive force behind the Warren Court ideals, retired in 1990, replaced by the low-key intellectual Souter. Marshall, the nation's first black justice, stepped down in 1991, succeeded by Thomas, the nation's second.

Blackmun left the court in 1994, and President Clinton replaced him with Breyer, a moderate. A year earlier, when right-leaning Justice Byron R. White had retired, Clinton had appointed Ginsburg, a centrist on the D.C. Circuit Court of Appeals.

As much as Stevens, Souter, Breyer and Ginsburg might want the nation to address the plight of the poor and disenfranchised, as a group they believe that mission rests with the legislature, not the bench.

Where the four do show their teeth is in the fight over the structure of government. When the five conservatives gave more power to the states at the expense of Congress last week, the four dissenters criticized the majority in exceptionally strong language, describing the ruling as "indefensible" and destined to be "fleeting." But the evident source of their outrage was not that the decision would have terrible consequences for Americans, but rather that it was lacking in constitutional authority.

"Liberals are a vanishing breed in American life generally," asserted Columbia University law professor Michael Dorf. "The Clinton justices represent the liberal left of the Rehnquist Court, just as they represent the liberal left of American politics."

Dorf, who served as a law clerk to Kennedy, and Sunstein, who once clerked for Marshall, say the absence of a strong liberal voice is a loss for constitutional debate.

"Even for those like me who don't agree with [old-fashioned liberalism]," Sunstein said, "having a liberal voice would illuminate the issues, see them sharply defined. When Brennan or Marshall would lose a case, they would write and stake out the boundary."

The Court Makes Its Mark

The following are among the major cases from the 1998-99 term.

Disabilities Law

* Sutton v. United Airlines

The Americans with Disabilities Act does not cover people whose disabilities can be sufficiently corrected with medicine, eyeglasses or other measures. (also, Murphy v. United Parcel Service)

* Albertsons v. Kirkingburg

Employers who set job qualifications based on federal safety standards are not required to dispense

with those standards when a worker obtains a waiver from the federal agency.

* Olmstead v. L.C.

States must place certain mentally disabled people in community homes rather than hospitals; it is illegal discrimination to segregate the mentally ill simply because of their disabilities.

Schools

* Davis v. Monroe County School Board

Schools that receive federal funds may be held liable and forced to pay damages for student sexual harassment.

* Cedar Rapids School District v. Garret F.

Public schools must provide a wide array of medical care for disabled children attending classes, under a federal law intended to improve the educational prospects for the disabled.

State and Federal Governments

* Alden v. Maine

Individuals cannot sue states for violating rights guaranteed them by federal law; the Constitution's history and structure shields states from lawsuits in both state and federal courts. (also, College Savings Bank v. Florida Prepaid Postsecondary Education; Florida Prepaid Postsecondary Education v. College Savings Bank)

* Saenz v. Roe

States may not limit welfare benefits for new residents; the justices struck down a California law that restricted newcomers' welfare checks for one year to the amount they had collected in their previous state.

* Department of Commerce v. U.S. House of Representatives

Federal law prevents the Census Bureau from supplementing its traditional procedure for trying to reach every household with statistical estimates that would be used to determine the nation's population and divide seats in Congress among the states.

First Amendment

* Buckley v. American Constitutional Law Foundation

A state may not require people who circulate petitions for ballot initiatives to wear identification badges, be registered voters in the state or be subject to requirements on how much they were paid to collect signatures.

* Greater New Orleans Broadcasting v. United States

A federal law restricting broadcast advertising by casinos, riddled with exceptions for other gambling enterprises, violates the First Amendment.

* Reno v. American-Arab Anti-Discrimination Committee

People here unlawfully cannot shield themselves from deportation by claiming the government is trying to banish them simply because of their controversial political views.

Criminal Law

* Chicago v. Morales

Cities cannot arbitrarily prevent people suspected of being gang members from loitering in public; a Chicago anti-loitering ordinance unconstitutionally failed to draw a line between innocent and harmful hanging-out.

* United States v. Sun-Diamond Growers of California

It is not a crime to provide public officials with gifts or free meals unless they are aimed at rewarding a specific action by the official.

* Jones v. United States

Under the new federal death penalty, jurors considering punishment for a murderer need not be told that if they fail to agree on a death sentence or life imprisonment, the judge will mandate a life sentence rather than some lesser penalty.

Business

* Kumho Tire Co. v. Carmichael

Trial judges must ensure that testimony from all experts is relevant and reliable before it reaches a jury, enhancing the power of judges to screen out dubious expert testimony.

* AT&T Corp. v. Iowa Utilities Board

The Federal Communications Commission has authority to set pricing rules for opening local telephone markets to competition.

THE CONSERVATIVES

* William H. Rehnquist, 74

Appointed in 1971 by Nixon

* Sandra Day O'Connor, 69

Appointed in 1981 by Reagan

* Antonin Scalia, 63

Appointed in 1986 by Reagan

* Anthony M. Kennedy, 62

Appointed in 1988 by Reagan

* Clarence Thomas, 51

Appointed in 1991 by Bush

THE 'LIBERALS'

* John Paul Stevens, 79

Appointed in 1975 by Ford

* David H. Souter, 59

Appointed in 1990 by Bush

* Ruth Bader Ginsburg, 66

Appointed in 1993 by Clinton

* Stephen G. Breyer, 60

Appointed in 1994 by Clinton

PARTY OF NINE

The Best Show in America, Comedy or Drama, Plays at the Supreme Court

The Wall Street Journal

Friday, July 2, 1999

David Andrew Price

Under the Supreme Court's red-and-blue coffered ceiling, a young lawyer is defending a client on death row. The lawyer maintains that the defendant, convicted of killing a woman with a 69-pound boulder, was deprived of due process.

Justice Antonin Scalia, sounding unpersuaded, asks the lawyer whether the inmate's arguments should have been presented to the state courts first. The lawyer begins to answer formally, "With all due respect, that is not actually correct. It was a claim " Justice Scalia then jumps in. "You don't have to give me any respect. I just want an answer to my question!"

With the recent end of the Supreme Court's latest term, the venue of the best tax-funded public entertainment in Washington has closed for the summer. Fourteen weeks a year, three mornings a week, the justices hear oral arguments from the country's great and less-than-great attorneys. From the moment the justices enter from behind the curtain, the sessions take on the atmosphere of great theater.

Or maybe great situation comedy. Where a stage play typically ends with its characters transformed (Hamlet is alive in Act I, dead in Act V), the characters in a sitcom stay much the same from week to week. Supreme Court arguments are like that, too. Rarely does a week go by without a joking reference to Justice Scalia's distaste for legislative history. Also routine are sly allusions to the monthly poker game in which Chief Justice William Rehnquist and Justice Scalia participate.

And unlike the stages of New York and London's West End -- but as at the TV studios of Burbank and Culver City -- the Supreme Court's arguments are timed down to the second. The lawyer who misses the red light on the lectern when his 30 minutes are up gets a crisp "thank you" from Chief Justice Rehnquist. (For the rare bird who tries to keep going even after that, the chief justice is ready with a gruff "your time has expired.")

On the whole, the justices function as an ensemble cast. They may have banned TV cameras from the courtroom, but you can still get a good idea of their roles by watching the right network shows.

Justice Scalia, the court's resident cutup, is Bart Simpson without the skateboard. To the lawyer who's reluctant to suggest a precise legal test, he exclaims, "Make us an offer!" In a case on junk expert testimony, he posits a jury instruction: "Ladies and gentlemen, this is an expert. He has this cockamamie theory that contradicts common sense." As the court mulls a vague international treaty, Justice Scalia asks: "How many smart people from how many countries came up with this formulation?" When a lawyer can't get through the four points of his argument, thanks to interruptions from the bench, Justice Scalia explains, "Our

attention span is really not that long."

There's Justice John Paul Stevens, a genial Ford appointee, who tends to perceive horizontal at about a 15-degree tilt from everyone else: He's Cosmo Kramer. Pondering a First Amendment lawsuit against a public TV station, brought by a minor candidate who had been excluded from a debate, Justice Stevens asks about the "format" of the debate and inquires, "How many journalists were there?" Interesting questions, perhaps, but Kramerian all the same.

Justice Sandra Day O'Connor may be a cheery soul in her chambers, but on the bench she's the easily annoyed Ling Woo of "Ally McBeal." Her questions and comments are served with a side dish of steamed asperity. "Well, don't complicate it," she chides a lawyer in a patent case. Soon after, she complains, "I thought you had told me earlier that the on-sale provision requires a delivery. Now you're telling me it can be something else. You need to settle on something, probably."

"Well, Your Honor – " the lawyer begins.

"Consistently," Justice O'Connor adds, landing hard on the second syllable.

"I did not mean to say 'on sale' required delivery," the lawyer says, meekly.

"I thought that's what you did tell me," Justice O'Connor answers, her pique mounting. "We talked about that."

The bookish Justice Ruth Bader Ginsburg plays Lisa Simpson to Justice Scalia's bad-boy Bart, regularly taking the role of truth cop with the Clinton Justice Department. In one case, a government lawyer told the justices that President Zachary Taylor couldn't have meant to revoke part of an 1837 Indian treaty because the tribe wouldn't have been able to hunt and fish. "In the brief twice, I noticed," Justice Ginsburg says pointedly, "you said that would be taking away their sustenance -- but that's wrong, isn't it?" When the lawyer responds that the Indians' rights were unclear, she shoots back: "You didn't say anything about it not being clear. You said the Chippewa could not have survived."

Justices Anthony Kennedy and Stephen Breyer, meanwhile, are the Bob Newharts of the court, regular guys trying to make their way through a crazy world.

Then there are the lawyers -- the guest stars. It's fun to see them adroitly field the justices' questions, and even more fun to watch them crash and burn. Gilbert Davis, representing Paula Jones in her fateful lawsuit, puzzled the court by conceding much of what President Clinton wanted: According to Mr. Davis, Mr. Clinton could suspend the lawsuit just by saying he was too busy. "It seems to me you give away most of your case," Justice Kennedy observed. (As history records, Jones won 9-0 anyway.)

Questions usually come fast and furious, and the justices do not accept facile soundbite answers. In politics, a zero-content statement may pass for an argument. ("It's all about our children.") Any lawyer who tried that in the Supreme Court would soon become Twinkies flambee.

For the justices, a lack of preparation and a lack of clear thinking on the lawyer's part is a form of disrespect for the court -- a mortal sin. That attitude is heartening: It shows that the justices, although sometimes self- indulgent on the bench, still know that the late-20th-century cults of informality, celebrity and hollow posturing would degrade the court if they got a foothold there.

And oral arguments do serve worthwhile purposes, even if they seldom sway the ultimate ruling. They force the justices to spend an hour focusing on just one case, whether its philosophical stakes are high or not. What's more, the face-to-face sessions let the justices and the lawyers engage one another in a way that briefs alone never could. And most important, the sessions remind the justices that their job isn't to reshape society wisely: It's to decide disputes between litigants who have a beef with each other. That alone makes oral arguments invaluable, no matter how much they resemble a sitcom.

Mr. Price, a legal writer in Washington, attended 18 arguments during the court's latest term.

VOICING SUPREME DISSENT
Rare, Loud and Clear

The Washington Post

Monday, July 5, 1999

Joan Biskupic, Washington Post *Staff Writer*

Justice Benjamin Cardozo once compared a judge who dissents in a case to a gladiator making a last stand against the lions. At the Supreme Court, where voices are rarely raised and restraint is the norm, a fierce dissent can be a mighty sword. The more so when done from the court's elevated mahogany bench.

Six times this term, various justices disagreed with the majority so strongly that they chose to make their points out loud, in public and with flourish.

When the court struck down a Chicago ordinance prohibiting gang loitering, Justice Antonin Scalia said in a scalding dissent: "I would trade my right to loiter . . . in return for the liberation of my neighborhood in an instant."

On the last day of the 1998-99 term, when a majority said private individuals couldn't sue states over violations of federal rights, Justice John Paul Stevens accused the court of crafting a doctrine "much like a mindless dragon that indiscriminately chews gaping holes" in federal laws. That last morning of the term, June 23, produced an extraordinary hour of statements from the bench, including dissents by Justices David H. Souter and Stephen G. Breyer.

Traditionally only the author of the majority opinion delivers excerpts and a dissenting justice leaves his or her remarks for the written documents. But increasingly justices have been voicing their contrary views. Because it's a break from the usual pattern and a demand for special attention, it is not a path for the timid.

MAKE IT DRAMATIC: A decade ago when the justices by one vote struck down a Texas statute against flag burning, Stevens, a Navy veteran and Bronze star winner, dissented, evoking memories of "the soldiers who scaled the bluff at Omaha Beach."

The year before, in 1988, when Scalia was the only dissent against upholding the independent counsel law, he spoke passionately for 10 minutes. "By its shortsighted action today, I fear the court has permanently encumbered the Republic with an institution that will do it great harm," he declared.

When the majority ruled this past May that students can sue schools for sexual harassment, Justice Anthony M. Kennedy predicted that schools would be hit by an "avalanche" of lawsuits and said the ruling would teach "little Johnny" a bad lesson. Justice Sandra Day O'Connor, the author of the majority opinion, had offered a preemptive rejoinder: No, the ruling would make sure "that little Mary may attend class."

Harry A. Blackmun was one justice who did not shy from revealing his emotions, and in 1993 he declared, "The execution of a person who can show that he is innocent comes perilously close to simple murder" when the majority ruled federal judges are not

required to halt the executions of Death Row inmates who've exhausted their appeals and then claim new evidence of innocence.

INVOKE HISTORY: "The court today holds for the first time since the founding of the Republic . . ." Souter proclaimed in the 1996 case that was a prelude to this term's states' rights cases. This time around, when Souter dissented, his distinct Yankee voice could not have been firmer when he declared the majority flat wrong.

In 1991, when the majority said criminal defendants may sometimes be convicted even if their confessions were coerced, Justice Byron R. White proclaimed, "Today, a majority of the court, without any justification, overrules . . . vast body of precedent." White's thunder was especially remarkable because he had a reputation for the tersest announcements even on majority opinions.

PREDICT DIRE CONSEQUENCES: In 1994, when the majority ruled that judges could stop demonstrators from closely approaching abortion clinics on public sidewalks, Scalia angrily asserted that the court "has left a powerful loaded weapon lying about today" to suppress all sorts of important protest.

When the court invalidated a Georgia redistricting plan in 1995, Justice Ruth Bader Ginsburg said from the bench it would create endless litigation and perilous results. Two years later, when O'Connor dissented out loud from a ruling striking down the Religious Freedom Restoration Act, she emphasized how an earlier ruling—which the 1993 act was intended to reverse—was an affront to those who wanted to freely exercise their religious faith.

WHY DO THEY DO IT? Justice Stevens once said he read a dissent from the bench because he didn't want his views to get lost in the shuffle of the day's news.

Sometimes a dissent is simply the best way to have one's say, despite the loss. "The right to dissent," Justice William O. Douglas once said, "is the only thing that makes life tolerable."

THE COURT'S ALLIANCES

The Washington Post

Friday, July 2, 1999

Joan Biskupic, Washington Post *Staff Writer*

Much has been made about the Supreme Court's critical 5 to 4 split and how the next president likely will be able to name new justices who could tip that balance of power. While that's true, one can't always judge an appointee by the president who chooses him. Witness the differences in President George Bush's two high court appointments: David H. Souter (1990) ended up more liberal than predicted and Clarence Thomas (1991) has become in many ways the most conservative. President Clinton's two appointees, Ruth Bader Ginsburg (1993) and Stephen G. Breyer (1994), are in the centrist mode of the man who brought them to the bench, but they have distinct differences and have often voted on opposing sides.

Following are some of the important alliances that have emerged during the past five years. Thomas and Ronald Reagan appointee Antonin Scalia (1986) remain the strongest union among the nine justices, although they have increasingly diverged in their legal reasoning. During the past half decade, since these particular nine have been together, Souter has voted most often with Ginsburg.

During the past five years, Anthony M. Kennedy has been on the winning side most often, 86 percent, followed by Sandra Day O'Connor at 80 percent. John Paul Stevens has been a dissenter most often, at 48 percent.

During the past term there were 16 decisions with 5 to 4 votes, of a total of 75 signed opinions. As is typically the case, about 40 percent of the cases were decided unanimously.

The five-justice bloc that prevailed most was Chief Justice William H. Rehnquist, O'Connor, Kennedy, Scalia and Thomas.

Data analysis by Sarah Cohen.

FROM THE HIGH COURT, A VOICE QUITE DISTINCTLY A WOMAN'S

The New York Times

Wednesday, May 26, 1999

Linda Greenhouse

During her 18 years as a member, Sandra Day O'Connor has often been the Justice in the middle of a sharply divided Supreme Court. On Monday, in the 5-to-4 decision on sexual harassment in the schools, she was, perhaps more clearly than ever before, the woman in the middle as well.

There was a memorable scene, lasting no more than 10 minutes, as Justice O'Connor and Justice Anthony M. Kennedy summarized their respective majority and dissenting opinions for a courtroom audience of lawyers and tourists. The two Justices, both Westerners in their 60's, both Stanford University graduates, both appointees of President Ronald Reagan, each the parent of three grown children, might have been speaking from different planets.

For Justice O'Connor, explaining the majority's view that public school districts can be held accountable for one student's flagrant sexual harassment of another, the case was about sex discrimination so severe as to destroy the learning environment in the classroom.

For Justice Kennedy, speaking for the four dissenters, the case was about Federal intrusion into a place where the Federal Government has no business.

That Justice O'Connor and Justice Kennedy are longtime allies in the cause of states' rights made this non-meeting of the minds all the more striking. Ever since Sandra O'Connor arrived on the Court as the F.W.O.T.S.C., as the First Woman on the Supreme Court has dryly referred to herself, the obvious question has been, Does it make a difference? The decision on Monday—indeed, Justice O'Connor's entire Supreme Court career when viewed through the lens of gender—suggests that it does.

That is not a notion completely foreign to Justice O'Connor herself, who, concurring in a 1994 decision that made it unconstitutional to remove prospective jurors on the basis of sex, wrote that although there were no "definitive studies" on how jurors behaved in cases of sexual harassment, child custody or domestic abuse, "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."

Justice O'Connor usually votes with the Court's conservative bloc on other issues, including race discrimination and criminal law questions as well as federalism. That makes her votes on issues of special interest to women—most notably abortion, on which she broke with the conservatives in voting to uphold Roe v. Wade in 1992—all the more distinctive a part of her jurisprudence, a distinction that dates from her earliest days on the Court.

Her more liberal and more overtly feminist colleague Ruth Bader Ginsburg recounted in a 1997 speech to the Women's Bar Association here that a year earlier, as she announced her opinion declaring unconstitutional the all-male admissions policy at the Virginia Military Institute, she looked across the bench at Justice O'Connor and thought of the legacy they were building together.

Justice Ginsburg's opinion in the Virginia case cited one of Justice O'Connor's earliest majority opinions for the Court, a 1982 decision called Mississippi University for Women v. Hogan that declared unconstitutional the exclusion of male students from a state-supported nursing school. Justice O'Connor, warning against using "archaic and stereotypic notions" about the roles of men and women, herself cited in that opinion some of the Supreme Court cases that Ruth Ginsburg, who was not to join the Court for another 11 years, had argued and won as a noted women's rights advocate during the1970's.

Addressing the women's bar group, Justice Ginsburg noted that the vote in Justice O'Connor's 1982 opinion was 5 to 4, while the vote to strike down men-only admissions in Virginia 14 years later was 7 to 1.

"What occurred in the intervening years in the Court, as elsewhere in society?" Justice Ginsburg asked.

The answer, she continued, lay in a line from Shakespeare that Justice O'Connor had recently spoken in the character of Isabel, Queen of France, in a local production of "Henry V": "Haply a woman's voice may do some good."

"I don't like the argument that we have to have women or else nobody will listen, but it does seem to be making a difference," Suzanna Sherry, a law professor at the University of Minnesota, said in an interview today. Professor Sherry said that while it had always been clear that Justice O'Connor had firsthand experience with the classic model of sex discrimination, "the question has been whether she would recognize the changing face of discrimination, and it looks like she can."

Another scholar of the Court, Nancy Maveety, a political scientist at Tulane University who wrote a book about Justice O'Connor, "Strategist of the Supreme Court" (Rowman Littlefield, 1996), also said she found Justice O'Connor's vote on Monday, in Davis v. Monroe County Board of Education, to have been notable.

"I would have expected a fence-straddling concurrence," said Professor Maveety, to whom the outcome was an important indication of the relative weight Justice O'Connor gave the discrimination arguments as opposed to the federalism concerns of the dissenters. "For something to trump federalism for her, that's a big deal," Professor Maveety said.

A top graduate of Stanford Law School in 1952 (her classmate William H. Rehnquist went on to a Supreme Court clerkship, an opportunity not then open to women), Sandra O'Connor applied to law firms only to receive job offers as a secretary. The experience led her into the public sector and eventually to elective politics. She served as majority leader of the Arizona State Senate in the early 1970's, the first woman in the country to hold so high a state legislative office, and from there became a state court judge.

Ruth Bader Ginsburg, a top graduate of Harvard and Columbia Law Schools, also found doors closed to her that should have been open, although her career led her to law school teaching and advocacy, for some years under the aegis of the American Civil Liberties Union.

While there are significant differences in their politics and their views on many issues, perhaps most notably the appropriate role of race in political districting and government contracting, there is also clearly a bond between the two Justices. They laugh about the fact that some of the most experienced lawyers in the country mix up their names when addressing them during argument sessions.

Some Court observers think the presence of two women on the Court is substantially greater than the sum of one plus one. "Having two makes a huge difference," said Peter J. Rubin, a law professor at Georgetown University who clerked on the Court in the early 1990's, just before Justice Ginsburg's arrival.

"It just makes it a lot easier," he said. "It's only human nature. You're in an insulated environment. You're not out there on the ground. When two colleagues who have had different experiences say that here is a problem to be taken very seriously, it's bound to have an impact."

AFTER A QUIET SPELL, JUSTICE FINDS VOICE

Conservative Thomas Emerges from the Shadow of Scalia

The Washington Post

May 24, 1999, Monday, Final Edition

Joan Biskupic, Washington Post *Staff Writer*

He's been known by the company he's kept.

For the past eight years, Supreme Court Justice Clarence Thomas has walked in the shadow of Justice Antonin Scalia. The pair have voted together more than any other two justices, staking out the court's conservative flank but also inspiring criticism that Thomas is simply a "clone" or "puppet" of the forceful, fiery-tempered Scalia.

But increasingly, Thomas has been breaking from Scalia, taking pains to elaborate his own views and securing his position as the most conservative justice on the court.

So far this term, Thomas has more than doubled the number of opinions he has written to explain his individual rationale, compared with the two previous terms. And even though the most controversial, divisive cases of the term are yet to be announced, Thomas already has voted differently from Scalia in several significant disputes, including last week's case on welfare payments for residents new to a state and an earlier case on how public schools must treat disabled children. Through these and other opinions, a more complex portrait is emerging of the court's second black justice, who had been best known among the public for the sexual harassment accusations made against him during his 1991 confirmation hearings.

"I think Thomas has turned out to be a much more interesting justice than his critics and probably even his supporters expected," said Cass R. Sunstein, a University of Chicago law professor. "He is the strongest originalist on the court, more willing to go back to history and 'first principles' of the Constitution."

"People in conservative legal circles are definitely noticing that Thomas has found his voice," said Daniel E. Troy, a District lawyer and protege of former conservative judge Robert H. Bork. "He is more willing to strike out on his own."

This term offers new evidence of Thomas's independent thinking. Of the 45 decisions handed down so far (31 still remain), Thomas has differed from Scalia in the bottom-line ruling of five, and in five other cases he has been on the same side as Scalia but has offered a separate rationale. It's a substantial departure from their previous pattern: Since 1991, Thomas and Scalia have voted together about 90 percent of the time. As recently as two years ago, the two voted together in all but one case.

For years, the reputations and practices of the two men have helped feed the widespread impression that Thomas was content to follow Scalia's lead. Scalia, a former law professor at the University of Chicago and a longtime judge, was already known for his narrow textualist reading of the Constitution and federal statutes when he joined the high court in 1986. His creative, aggressive approach

inspired an admiring appeals court judge to call Scalia a "giant flywheel in the great judicial machine."

Thomas, meanwhile, had little reputation as a scholar when he joined the court in 1991. He had worked in the federal bureaucracy for nearly a decade, becoming prominent as chairman of the Equal Employment Opportunity Commission. His conservatism, which included opposition to affirmative action programs, was viewed mostly in political terms.

These impressions were reinforced by the two justices' behavior at the high court. Scalia, the first Italian American justice, is a stylist of the first order, with a sharp, sardonic edge. Last year, for example, when he rejected a legal standard used by the majority, he took a page from Cole Porter, saying: "Today's opinion resuscitates the ne plus ultra, the Napoleon Brandy, the Mahatma Ghandi, the Celophane of subjectivity, th' ol' 'shocks-the-conscience' test." In another case, he said, "I join the opinion of the court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court."

Thomas, by contrast, was quiet in his early years, rarely speaking during oral arguments and writing few of his own concurring or dissenting opinions. He let Scalia hold the pen: Whatever their joint views, Scalia, 63, tended to write them up. Thomas, 50, merely signed on. Legal scholars on both the right and left publicly criticized Thomas as a pawn.

Now, however, Thomas is showing an increased willingness to express himself, speaking before broader audiences and writing more of his own opinions.

Thomas and Scalia are still very like-minded justices. More than the other conservative members of the Rehnquist Court, they believe the Constitution should be interpreted by looking at its exact words and establishing the intentions of the men who wrote it. They are unwilling to read into a statute anything not explicitly stated. They want the government—particularly the federal government—to get out of people's lives.

But Thomas is becoming the more consistent standard-bearer of this brand of conservatism. He would go further than Scalia in overturning past court rulings that he believes conflict with the Constitution. And he is more likely than Scalia to delve into legal history predating the writing of the Constitution in 1787 and more inclined to reject recent case law.

In last week's welfare case, for example, Thomas began by tracing a core constitutional provision from the 1606 Charter of Virginia: "Unlike the majority, I would look to history to ascertain the original meaning of the Clause," he wrote. While Scalia signed onto the majority opinion striking down limited welfare benefits for residents newly arrived in a state, Thomas and Chief Justice William H. Rehnquist dissented. Thomas wrote that the majority was wrongly interpreting the 14th Amendment's Privileges or Immunities Clause, raising "the specter that the . . . Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be members of this court."

Thomas has also distinguished himself from Scalia by seeking more strongly to buttress state authority. He has emphasized that the Constitution's authority flows from "the consent of the people of each individual state, not the consent of the undifferentiated people of the nation as a whole."

This accent on states' rights was evident in a case earlier this term when only Thomas fully dissented from a voting rights decision that he believed too broadly interpreted a federal law targeting discrimination at the polls. "The section's interference with state sovereignty is quite drastic," he complained.

In another example of Thomas's narrower reading of federal law, he and Scalia were on opposite sides when the court interpreted a statute intended to guarantee equal educational opportunities for disabled schoolchildren. Scalia voted with the majority in the March case to find that the federal disabilities law requires public schools to provide a wide variety of medical care for children with severe handicaps.

Thomas dissented with Justice Anthony M. Kennedy. "Congress enacted [the law] to increase the educational opportunities available to disabled children, not to provide medical care for them," Thomas wrote. "[W]e must . . . avoid saddling the states with obligations that they did not anticipate."

Because Scalia did not write separately in any of those three recent cases—on welfare, voting rights and disabled children—it is impossible to compare directly his thinking with Thomas's. But differences between the two were visible when they both dissented from an April ruling that said defendants who plead guilty do not lose their right to remain silent during a sentencing hearing and that judges cannot use their silence against them. Scalia wrote the main opinion for the four dissenting justices, attempting to discredit the case law on which the majority relied. But Thomas also wrote a separate opinion that went still further, suggesting that an earlier case should be overturned altogether. The "so-called penalty" of having one's silence used adversely, Thomas wrote, "lacks any constitutional significance."

Some legal experts observe that Thomas's willingness to give voice to his solitary views recalls Rehnquist's position on the court in the 1970s and Scalia's in the late 1980s, before Thomas came on. He's at a point, said Troy and other observers, where he is comfortable enough to express his singular views but not so frustrated with writing alone that he is prepared to compromise.

"Thomas comes to it more as an outsider," said Alan Meese, a William and Mary law professor, who has followed the writings of Scalia and Thomas. "He probably says when he looks at [an earlier ruling], 'My God, we said that? That's loony.' "

In Supreme Court, a More Vocal Conservative

Justice Clarence Thomas has broken from Justice Antonin Scalia in several cases this term. With 45 rulings handed down and 31 expected in the next six weeks, they have voted differently in five cases and were on the same side but with a different rationale in five others. At this point last year, Thomas and Scalia had voted on different sides in only two cases; the term before, in only one case. In those prior terms, Thomas also wrote fewer opinions explaining his rationale.

Cases in which the two voted differently:

Lopez v. Monterey County (voting rights)

AT&T Corp. v. Iowa Utilities Board (telecommunications law)

Cedar Rapids Community School District v. Garret F. (disabled students)

United States v. Rodriguez-Moreno (firearms prosecution)

Saenz v. Roe (new resident welfare)

In these cases, they were on the same side but Thomas wrote separately to elaborate his rationale:

Buckley v. American Constitutional Law Foundation (restrictions on ballot initiatives)

Holloway v. United States (carjacking)

South Central Bell Telephone Co. v. Alabama (state taxation)

Minnesota v. Mille Lacs Band (Indian treaty rights)

Mitchell v. United States (self-incrimination)

Selected Thomas Quotes:

Saenz v. Roe

"[The majority opinion] raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be members of this court."

Cedar Rapids Community School District v. Garrett F.

"Congress enacted [disabilities education law] to increase the educational opportunities available to disabled children, not to provide medical care for them. ... [W]e must interpret Spending Clause legislation narrowly, in order to avoid saddling the states with obligations that they did not anticipate."

Lopez v. Monterey County

"There has been no legislative finding that the State of California has ever intentionally discriminated on the basis of race, color, or ethnicity with respect to voting. ... I do not see any reason to think that ... the state's laws will be anything but constitutional."

FULL COURT PRESS

The Washington Post

Monday, August 2, 1999

Joan Biskupic, Washington Post *Staff Writer*

Who would have thought there would be more to say about Clarence Thomas's tumultuous confirmation to the Supreme Court? Countless words have been spent in newspapers, books and films on his nomination and the rowdy Senate hearings that captivated the nation in 1991.

But the man himself has something to add.

Last month at a speech in Kansas City, Thomas chronicled what happened in the days leading up to President George Bush's announcement that he wanted Thomas to succeed Thurgood Marshall. The nation's first black justice had announced on June 27 that he was going to retire after 24 years on the bench.

"That afternoon at about 4 o'clock, I was spirited to the situation room at the Justice Department," Thomas recalled to the group of federal judges and lawyers who gathered for an annual 8th Circuit judicial conference. "It is a soundproof room, a secure room and it is a bizarre feeling. . . ."

"I was asked perfunctory questions. And when I say perfunctory questions, I mean perfunctory. 'Has anyone criticized you and your wife because of interracial marriage?' "

Thomas said he didn't want to reveal the answer he gave, but said it was "prescient," suggesting he continues to believe the criticism he endured during the ensuing hearings was motivated by racism. After Anita Hill accused the nominee of sexual harassment, Thomas denied the charges and called the Senate hearing "a high-tech lynching for uppity blacks."

Thomas, whose speech was televised on C-SPAN, said he wanted to "clarify" the process that led up to his nomination, then talked about what happened the next day, Friday, June 28: "I was spirited to the White House, by way of a tunnel from the Treasury building."

"It was kind of clandestine, surreptitious. I kind of liked that. Sort of like a James Bond movie. I don't know why. I've never seen a James Bond movie. The movies were still segregated when James Bond came out. So I'm still protesting the James Bond movies."

Thomas laughed a bit, as did his audience. He then recalled the seemingly interminable wait at the White House.

"I sat there for a number of hours," Thomas said. "And I was told that if I wasn't appointed that day I wouldn't be nominated. So I kept my fingers crossed that I wouldn't be nominated."

And, indeed, Thomas wasn't nominated that day. He said he heard the nominee might be Emilio Garza, a judge in Texas who had been named to a federal trial court by Ronald Reagan and then elevated to the 5th Circuit appeals court by Bush in early 1991. "Better him than me," Thomas said he thought.

"On Saturday, my wife and I went to Annapolis to celebrate my not being nominated," he said, and joked that he

was "off the hook." The next day, Sunday, he went to his office at the D.C. Circuit appeals court, a post that Bush had named him to a year earlier, to catch up on some work. One of his law clerks barged in and said, "Kennebunkport is on the line," referring to Bush's Maine vacation home.

When Thomas picked up the line, Bush said, "Can you come to Kennebunkport to have lunch with me tomorrow to discuss that Supreme Court thing?" Thomas's recounting of Bush's characteristically casual way with words drew chuckles from his audience.

The next day, July 1, Thomas flew out of Andrews Air Force Base and was spirited into Bush's compound. Thomas said that when he first saw Barbara Bush, she said "Congratulations." "And my heart sank. And from then on, it was surreal. . . . It was an out-of-body experience."

Of his meeting with the president, Thomas said, "He asked me a couple of questions. 'Can you and your family survive the confirmation?' Cavalierly, I said yes." Then Thomas paused and said with a sigh to his Kansas City audience, "I was lucky to get through that one."

Bush had a second question: " 'If you are nominated to the court, can you call them as you see them?' To that, I answered yes. Then he said, 'If you go on the Supreme Court, I will never publicly criticize you for any decision you ever make. And I mean no decision.' He repeated that several times.

And then he said, 'At 2 p.m. I will appoint you to the Supreme Court of the United States. Let's go have lunch.' "

And so history was made. That afternoon of July 1, eight years ago, Bush announced to the nation that he was selecting "the best person at the right time."

PUTTING SCALIA'S 'TEXTUALIST' VIEWS IN CONTEXT

Chicago Daily Law Bulletin

Friday, July 10, 1998

Timothy P. O'Neill

Statutory construction, like politics, makes strange bedfellows. Consider the recent U.S. Supreme Court case of Muscarello v. U.S., 1998 LEXIS 3879 (June 8). There the court had to decide whether a federal statute prohibiting a person from "carrying a firearm" during and in relation to a drug-trafficking crime covered situations in which firearms were located in a locked glove compartment or a car trunk.

The court, in a 5-4 decision, held that the statute covered this activity. The dissenters were Chief Justice William H. Rehnquist and Justices Ruth Bader Ginsburg, Antonin Scalia, and David H. Souter -- four people you could not imagine in a bridge foursome, much less on the same side of a criminal case.

Similarly, in Bryan v. U.S., 1998 U.S. LEXIS 4011 (June 15), the top court had to determine the meaning of the word "willfully" as used in the Firearms Owners' Protection Act. Sillasse Bryan was charged with "willfully" violating a statute providing that dealers in firearms had to have a federal license. The evidence showed that Bryan dealt in firearms and generally knew that his conduct was illegal; however, there was no evidence that he was specifically aware of a federal licensing requirement.

The Supreme Court held, by a 6-3 vote, that "willfully" merely meant that the prosecution had to prove that Bryan generally knew his conduct was illegal; it did not have to prove that Bryan was actually aware of the federal licensing requirement. The dissenters, siding with the defense, were Scalia, Ginsburg and Rehnquist.

Why this confusion? One of the difficulties is that American law does not have a generally agreed-upon method for construing statutes.

Think back to your first year in law school. The emphasis was on learning the common-law method of interpreting, glossing and distinguishing case law. Perhaps the only course with any statutory construction was criminal law.

Yet the practice of law today is largely concerned with the geometrically increasing body of laws, statutes and regulations that governments churn out. First-year law school taught you the skills to be a really fine common-law judge in 18th century England. But reading statutes requires different skills. This problem was neatly summed up in the title of Judge Guido Calabresi's book "A Common Law for the Age of Statutes."

One of the key battles in statutory construction today concerns what role -- if any – "legislative history" should play.

The standard view can be seen in a recent 3d District Appellate Court case, People v. Davis, 1998 Ill.App. LEXIS 358 (June 4). The court said the primary rule in construing a statute is to reflect the intent of the legislature. This is accomplished by examining the language of the statute. However, when

the language is ambiguous, the court may look to the legislative history: committee reports, floor debates and prior statutory drafts.

Thus, in Davis, the court examined a section of the Illinois Vehicle Code. The court first concluded that the statute governing the "preliminary breath-screening test" was ambiguous. It then turned to evidence such as speeches the bill's sponsors made on the floor of the House to reach its decision. (The majority concluded that the results of breath tests are admissible by the state at a hearing to suppress evidence and quash arrest for driving under the influence of alcohol.)

Justice William E. Holdridge dissented. He found the language of the statute to be unambiguous. Thus, he came to a different conclusion by relying solely on the language of the statute and by pointedly ignoring all legislative history.

The use of legislative history in Davis reflects the mainstream view of American courts. Yet this position has been completely rejected by Justice Scalia. During his tenure on the Supreme Court, he was regularly refused to consult legislative history as an aid to interpreting statutes. Scalia's adamant rejection of legislative history is a distinctly minority position among American judges. Even so, he has had a profound effect on the Supreme Court.

One study has shown that during the 1981 term -- before Scalia joined the court -- legislative history was used in every one of the court's statutory construction cases. Yet in the 1992 term -- several years into Scalia's tenure on the court -- legislative history was used in only 18 percent of those cases. Thomas W. Merrill, "Textualism and the Future of the Chevron Doctrine," 72 Wash. U. L. Q. 351, 355 (1994).

Scalia offered a formal defense of his position in the Tanner Lectures at Princeton in 1995. Both his lecture and responses to it from eminent legal scholars were published as a book in 1997, "A Matter of Interpretation."

Briefly, Scalia describes his method of interpretation as "textualism." He contends that the evil of going beyond the text and into legislative history is that it is too tempting for judges to pick and choose only those committee reports and floor speeches that support the interpretation the judges wish to reach. He argues that textualism is a way of preventing activist judges from engaging in "judicial lawmaking."

His position is spritedly attacked by both Ronald Dworkin and Laurence Tribe, who question even the possibility of interpreting texts without considering context. For example, to understand what a speaker means by "That's a beautiful diamond," it is important to know whether those words were spoken at Wrigley Field or in Tiffany's. (For a concise -- and critical -- review of Scalia's position, see Robert Post, "Justice for Scalia," New York Review of Books, June 11, 1998.)

Let's put aside for the moment whether Scalia is right or wrong. Consider the fact that of the three justices who held for the defense in both Muscarello and Bryan, two of them were Scalia and Rehnquist.

Why are they such friends of the accused?

Consider this. When the mainstream American judge is faced with an ambiguous criminal statute, legislative history will "break the tie." Thus, the result can go either way. Yet when a textualist like Scalia faces the same

ambiguous criminal statute, there is always the same winner: the defendant. This is because the textualist breaks ties with the "rule of lenity," which holds that all doubts are resolved in favor of the criminal defendant. And indeed the pro-defense dissents in both Muscarello and Bryan -- each joined by Scalia and Rehnquist -- invoked the rule of lenity to side with the defense.

Defense attorneys should think twice before rolling out the legislative history to interpret ambiguous statutes. If you follow Scalia's textualism, statutory ambiguity leads directly to acquittals and defense reversals.

Strange bedfellows indeed.

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FALL DOCKET ALREADY PRESENTS A WIDE VARIETY OF HOT-BUTTON ISSUES

Legal Times

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Stephen J. Wermiel

Questions of federalism and the limits of congressional power have been a hallmark of the Supreme Court under Chief Justice William Rehnquist. They deeply divided the justices on the final day of the last term, and they already promise to bedevil the justices this fall.

A major regulatory battle, First Amendment issues, and an unusual race bias appeal also highlight the docket next term. While the cases accepted thus far represent only a small portion of all the decisions the Court will hand down by June 2000, we can safely predict that, starting Oct. 4, the justices will once again be thrust into the thicket of public debate.

Two cases granted for next term will put the justices squarely back in the fight over federalism. In Reno v. Condon, No. 98-1464, the Court will consider whether Congress had the constitutional authority to pass the Driver's Privacy Protection Act. The 1994 law prohibits states from disclosing personal information submitted to state motor vehicle departments. But many states have their own laws permitting motor vehicle bureaus to sell lists that include names, addresses, phone numbers, and identification numbers. And sales of these lists can generate substantial revenue.

In a challenge to the federal law mounted by the state of South Carolina, the U.S. Court of Appeals for the 4th Circuit ruled that Congress could not justify passage of the law through either its power to regulate interstate commerce or its authority to enforce the provisions of the 14th Amendment. The appeals court relied on recent Supreme Court precedents interpreting the 10th Amendment to mean that Congress may not compel the states to carry out federal regulatory schemes and narrowing the scope of congressional power under Section 5 of the 14th Amendment. In the process, the 4th Circuit ended up disagreeing with two of its sister circuits.

The issue of sovereign immunity split the justices 5-4 three times at the close of this term and should be equally divisive next fall in the cases of Kimel v. Florida Board of Regents, No. 98-791, and United States v. Florida Board of Regents, No. 98-796. (*See* "The Quiet Revolution," Page S23.) These companion cases ask whether states are entitled to sovereign immunity from lawsuits in federal court under the federal Age Discrimination in Employment Act. Congress passed the ADEA in 1967 to prohibit employment discrimination based on age and extended it in 1974 to apply to state employment practices.

A Supreme Court decision three years ago, *Seminole Tribe v. Florida, 517 U.S. 44 (1996),* spawned challenges to the ADEA--and led to a high-court-tempting split among the federal courts of appeals. In Seminole, the Supreme Court had ruled that Congress may not void the states' 11th Amendment immunity from citizen suits in federal court unless the law expressly overrides sovereign immunity

and unless the law is passed under Section 5 of the 14th Amendment. Now the justices will review a decision by the 11th Circuit that Congress, in barring age discrimination in state employment, neither made clear its intent to overcome state sovereign immunity nor relied on the 14th Amendment to justify the statute.

Perhaps no case will draw more attention than the already much-publicized Food and Drug Administration v. Brown & Williamson Tobacco Corp., No. 98-1152. Are tobacco products subject to regulation by the FDA? The Food, Drug & Cosmetic Act gives the agency authority to regulate "drugs" or "devices" that are "intended to affect the structure or any function of the body." The FDA says that cigarettes and other tobacco products fall within this regulatory mandate because of the addictive effects of nicotine. Accordingly, the agency issued regulations for the sale and marketing of cigarettes and smokeless tobacco products. But the 4th Circuit ruled that the FDA has no jurisdiction over tobacco.

School Supplies

The Court has several important First Amendment issues awaiting decision next term. One case, Mitchell v. Helms, No. 98-1648, raises the question of whether federal aid to education may be used to provide computers, software, and library books to parochial schools. The 5th Circuit ruled that the federal aid law and its Louisiana counterpart violate the establishment clause as applied (in Jefferson Parish, just south of New Orleans).

The case involves Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, which makes block grants to state and local education programs to assist in innovation. Under federal and state law, the funds are to be used for public and private schools, which in many cities include large numbers of parochial schools. Mitchell v. Helms gives the justices an opportunity to reconsider just how strictly to maintain the separation between church and state. It could shed significant light on the propriety of publicly funded vouchers to pay tuition at religious schools.

The most closely watched among free speech cases may be Nixon v. Shrink Missouri Government PAC, No. 98-963, which involves the constitutionality of Missouri's campaign contribution limits. The 8th Circuit declared unconstitutional the 1994 state law capping contributions from an individual to a candidate for statewide office at $1, 075. The appeals court said that the contribution limits interfered with free speech rights and that the state's wish to reduce the corrupting influence of large donations was inadequate.

This case has generated extraordinary interest among campaign finance reform groups. Some are urging the Court to reconsider its landmark decision, *Buckley v. Valeo, 424 U.S. 1 (1976),* which upheld contribution limits to federal campaigns, but invalidated spending limits. Other groups and 30 states have filed amicus briefs arguing for First Amendment flexibility so that states can usefully regulate campaign contributions.

The Supreme Court is never far removed from disputes about indecency or sexually explicit activity, and next term is no exception. In Erie, Pa. v. Pap's A.M., No. 98-1161, the justices will review a Pennsylvania Supreme Court ruling striking down a local ordinance that prohibited nudity in public places, including bars and dance clubs. The state court said that the Erie ordinance violated the First Amendment guarantee of

freedom of speech. In addition, the Pennsylvania court said that it could glean no useful guidance from a U.S. Supreme Court decision upholding a similar Indiana law because the Court was "hopelessly fragmented" in *Barnes v. Glen Theatre, 501 U.S. 560 (1991).*

In United States v. Playboy Entertainment Group, No. 98-1682, the justices will decide whether part of the Telecommunications Act of 1996 violates the free speech rights of cable television operators and subscribers. Section 505 of the sweeping federal law requires that cable operators providing indecent or sexually explicit programming either must fully scramble or block their signal so that only subscribers can receive it or must restrict their programming to "safe harbor" hours (between 10 p.m. and 6 a.m.). A special three-judge panel in Delaware held the provision unconstitutional because it essentially forced cable operators to reduce their program hours; technical solutions to the problem of "signal bleed" were too expensive.

Yet another First Amendment case asks whether a public university may use mandatory student fees to fund organizations engaging in political and ideological activities when students object to this allocation of their cash. In Board of Regents v. Southworth, No. 98-1189, the 7th Circuit concluded that the University of Wisconsin violated the free speech rights of students who objected to fees being used to fund a campus women's center that lobbied against anti-abortion laws and an environmental group that lobbied against mining and supported a presidential bid by Ralph Nader.

An unusual Hawaii voting rights case, Rice v. Cayetano, No. 98-818, gives the Court another chance to rule on when and how race may be used as a factor in government decisions. Hawaiian law permits only persons descended from the original residents of the Hawaiian Islands to vote in special elections for an office that administers a public trust fund for the benefit of those native Hawaiians. The 9th Circuit upheld this restriction under the 14th and 15th amendments. Although the Hawaiian law is unique, the Supreme Court's decision could affect other voting rights cases and affirmative action programs.

On the criminal docket, the case of Illinois v. Wardlow, No. 98-1036, asks the Court to decide whether police on patrol in a high-crime area may stop a person because he fled when he saw the police approaching. The Illinois Supreme Court ruled that Chicago police did not have a sufficient basis to suspect and stop an individual who ran when he saw a police car driving down the street.

So far, the Supreme Court has agreed to review 28 cases for the next term and has carried over one other case for reargument. Based on their total of 75 decisions in the term just ended, the justices have already filled slightly more than one-third of their upcoming docket. If these cases are any indication, the October 1999 term should be an interesting ride.

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Assessing the 1999-2000 Docket

Top 10 So Far

* Board of Regents v. Southworth, No. 98-1189. Does it violate the free speech

rights of students to use mandatory activity fees to fund ideological groups to which those students are opposed?

* Erie, Pa. v. Pap's A.M., No. 98-1161. Does a state ordinance prohibiting nudity in bars and dance clubs survive First Amendment scrutiny?

* Food and Drug Administration v. Brown & Williamson Tobacco Corp., No. 98- 1152. Does the FDA have the authority under the Food, Drug, and Cosmetic Act to regulate cigarettes and other tobacco products?

* Illinois v. Wardlow, No. 98-1036. Do the police have sufficient suspicion to stop a person simply because he flees at the approach of the police?

* Kimel v. Florida Board of Regents, United States v. Florida Board of Regents, Nos. 98-791, 98-796. Do states have sovereign immunity from claims under the federal Age Discrimination in Employment Act?

* Mitchell v. Helms, No. 98-1648. Does it violate church-state separation for states to direct federal education aid toward providing parochial schools with computers and library books?

* Nixon v. Shrink Missouri Government PAC, No. 98-963. Does a Missouri law limiting state campaign contributions to $1, 075 violate the First Amendment?

* Reno v. Condon, No. 98-1464. Does Congress have the power to bar states from releasing state driver's registration information?

* Rice v. Cayetano, No. 98-818. Is a Hawaiian law that restricts certain voting rights based on race constitutional?

* United States v. Playboy Entertainment Group, No. 98-1682. Does the Telecommunications Act of 1996 violate the free speech rights of cable operators by inappropriately restricting indecent programming?

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