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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:

A COURT NOT EASY TO CLASSIFY

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You would think that in an election year, the Supreme Court justices might cooperate with popular efforts to label them liberal or conservative, lining up the big decisions on a political scorecard. After all, the next president may get to appoint one or more new members to the court -- three justices are over 70, four have fought serious illnesses and some might welcome the chance to retire if the new president were likely to appoint a sympathetic successor.

But in the rich and important term that they finished yesterday, the justices defied any simple political typecasting, proving once again that the court does not simply follow the election returns, and that court-packing is harder than it looks.

To be sure, there are several areas -- such as the separation of church and state and the scope of federal power -- where the court did divide rigidly into two camps, and in which future outcomes do hang by one vote.

For instance, will the court uphold voucher programs that give tax money to parochial schools, deciding that they are not, as some claim, an unconstitutional "establishment" of religion in violation of the First Amendment? A clue came in a 6-to-3 ruling yesterday holding that the government may grant computers and other teaching aids to religious schools. Four justices -- Chief Justice William Rehnquist and Justices Clarence Thomas, Antonin Scalia and Anthony Kennedy -- indicated a likely willingness to uphold voucher schemes, reasoning in an opinion by Justice Thomas that it is "bigotry" to exclude "pervasively sectarian schools from otherwise permissible aid programs."

But these four justices do not yet have a clear fifth vote for the constitutionality of vouchers. Justice Sandra Day O'Connor went to great lengths in a separate, but concurring opinion, joined by Justice Stephen Breyer, to caution that the court must still review aid programs carefully to make sure they do not support too much religious indoctrination.

The power of Congress to enact broad civil rights laws also hangs in a 5-to-4 balance. Earlier this year, the court threw out both a federal lawsuit by a young woman claiming damages after date rape by football players at a state university and a lawsuit by employees claiming age discrimination by a state employer, reasoning in each case that Congress had overstepped its authority in allowing such suits.

Five members of the court -- Justices Rehnquist, Scalia, O'Connor, Kennedy and Thomas -- have consistently voted for such restrictions of federal power; four -- Justices Stevens, Souter, Ginsburg and Breyer -- would give more latitude to Congress. The presidential election could tip this balance.

But in a wide range of other decisions this term, the justices declined to march in neat political lockstep. If the court had voted according to the popular stereotypes of "liberal" and "conservative" judges, Justices Ginsburg and Breyer, who were appointed by President Clinton, would not have disagreed on whether the Constitution's prohibition on retroactive laws required the court to overturn the conviction of a child molester.

Nor would Justice Scalia, a "conservative," have had occasion on Monday to lecture the more "liberal" Justice Breyer on the importance of an undiminished right to trial by jury for a defendant accused of a hate crime.

The fact that the justices do not vote along simple ideological lines results in unexpected coalitions. For instance, Justices Stevens, Kennedy, Souter and Thomas, all appointed by Republican presidents, and Justice Ginsburg struck down a law requiring television cable companies either to completely scramble, or to take off the air, sexually explicit broadcasts during waking hours. The only other Democratic appointee, Justice Breyer, joined Justices Rehnquist, O'Connor and Scalia in arguing that the restrictions were proper.

And dissenting in another case, Justices Scalia and Breyer agreed that the Constitution allows a federal agent to squeeze bus passengers' carry-on bags looking for drugs; the other seven justices were convinced this was an illegal search.

The court's judicial activism last term was also bipartisan. It ruled two federal laws that might be viewed as conservative to be unconstitutional: one limiting smut on cable television and the other giving police more leeway to interrogate suspects without the straitjacket of Miranda warnings. But it also struck down federal laws against gender-motivated violence and age discrimination by the states -- both likely to be favored by liberal constituencies.

Ruling on state laws, the court struck down "conservative" measures that authorized student-led prayers at public high school football games, gave grandparents broad access to their grandchildren over a parent's objection and banned so-called partial-birth abortions. But it also invalidated "liberal" state laws forcing the Boy Scouts to admit a gay scoutmaster and giving native Hawaiians preferences in voting for officials in charge of native Hawaiian affairs. And this week, it invalidated the California primary system, which allowed votes across party lines, reasoning that a measure favored by political moderates like Democratic Gov. Gray Davis and Republican Representative Tom Campbell in fact violated political parties' freedom of association.

The court's influence over the allocation of power and rights in our society is profound, and its power well worth reckoning in the coming election. The president holds sway over not one but two branches of government -- the executive and the judiciary. But this term's decisions should make politicians wary of simple ideological labels.

THE NATION: SPLIT DECISIONS
The Court Rules, America Changes

The New York Times

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Linda Greenhouse

It was a Supreme Court term of surpassing interest, rich in symbol and substance, a vivid reminder of the court's power to scramble settled expectations, put old questions to rest and, ultimately, to have the last word.

The justices stood by some precedents and repudiated others. They invalidated four federal laws, continuing on the path of subjecting the exercise of congressional authority to close and skeptical scrutiny.

During the term that began last Oct. 4 and ended June 28, the court decided only 73 cases, the fewest number of any term since the early 1950's. Although small, the docket ranged over almost the entire constitutional landscape. The First Amendment alone, with its provisions governing association, religion and free speech, injected the justices into state electoral systems, high school football games and sexually explicit cable television programming.

In addition, some of the court's most important rulings were statutory: the invalidation of the Food and Drug Administration's regulation of tobacco and a decision keeping many medical malpractice cases against health maintenance organizations out of federal court.

The H.M.O. decision was unanimous, as were more than a third of the court's rulings. But the court was more sharply divided than usual, with the middle ground often seeming to disappear. Twenty cases were decided by 5 to 4 votes, a higher proportion than in most recent years. A solid conservative bloc consisting of Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas hung together and prevailed in 13 of the 20.

The four more liberal justices -- John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer -- voted as a group in the majority in only one 5-to-4 case, the decision striking down Nebraska's abortion law, where they were joined by Justice O'Connor. The six remaining close cases were scrambled: for example, in the case striking down a federal regulation on sexually explicit programming on cable television, Justice Thomas, who often displays a libertarian bent on free speech issues, and Justice Kennedy, who almost always adopts the free speech position, were in the majority to strike down the regulation, while Justice Breyer, often sympathetic to government interests in speech cases, voted in dissent.

At the center of the court this term were Justice O'Connor, who cast only five dissenting votes; Chief Justice Rehnquist, who cast eight; and Justice Kennedy, who dissented nine times. Chief Justice Rehnquist's position at the center of the court is itself a measure of how conservative the court has become; Associate Justice Rehnquist had been the court's most frequent lone dissenter when President Reagan chose him 14 years ago to succeed Chief Justice Warren E. Burger.

Now, for example, on criminal law, Chief Justice Rehnquist's vote is a fair indicator of the court's center of gravity. To his right, Justice Scalia, who dissented 15 times this term, and Justice Thomas, who dissented 12 times, were the two dissenters from the chief justice's

decision that reaffirmed the Miranda ruling. To the chief justice's left, Justice Stevens dissented 28 times and Justice Ginsburg 23, on cases ranging from equal protection to congressional authority to prisoners' rights.

Yet the labels conservative and liberal do not fully capture this court. "Which cases were most visible to the public this year?" John G. Roberts Jr., a Supreme Court practitioner and and former deputy solicitor general during the Bush administration, asked rhetorically the other day. "Probably school prayer, abortion, and Miranda, and the conservatives lost all three," Mr. Roberts said. "The conventional wisdom needs to be taken skeptically."

The key to this court's mysteries may lie in examining where the justices commit their energy. Questions of individual rights, such as race and due process, are not the front-burner issues at the court that they were a few years ago, perhaps because the justices have reached a kind of settlement: affirmative action has been sharply limited, while at the same time the due process guarantee is alive and well.

Instead, what animates the justices are questions of the court's own institutional turf in particular and the allocation of governmental power in general, both among the branches of the federal government and between Washington and the states.

"The court is reflecting in a bunch of different doctrines the general sense that the federal government is too big, too powerful, too incompetent," said Professor Christopher H. Schroeder of Duke University Law School. Cases this year in which the court struck down state incursions into the federal government's authority in foreign affairs were not the contrary, he said, reflecting instead "the classic 18th-century notion that where we need the federal government, we need it internationally."

The lines in the court's federalism debate have been clearly drawn, with the open question being where the court plans to take it next. One logical path, Professor Schroeder said, would be in the libertarian direction of giving individual citizens more ammunition against government authority through strengthening the Fifth Amendment doctrine against the uncompensated "taking" of private property, for example. But Justice Scalia has pushed the takings argument as far as his current colleagues seem willing to follow, trying but not quite succeeding in making much land-use regulation constitutionally questionable as a "regulatory taking" for which landowners must be compensated.

So, like questions that this election-year term has raised about the court's future, this is one that does not have a clear answer. Even a casual look at the term's 5-to-4 decisions shows what could lie ahead, depending on which president gets to fill which vacancies, if any. The four liberal dissenters from the decisions curbing federal authority would move quickly to overturn those precedents if they gained another vote, while at the same time, Justice Thomas and three other conservative justices -- minus Justice O'Connor -- who came up one vote short of dramatically lowering the barrier to public aid to parochial schools would not hesitate to move quickly in that direction. To that degree, the term that ended last week is as much prologue as last word.

Following are summaries of the term's most important decisions.

Abortion

The court ruled that because the procedure that abortion opponents call partial-birth abortion may be the most medically appropriate way of terminating some pregnancies, it cannot constitutionally be banned. The 5-to-4 decision, Stenberg v. Carhart, No. 99-830, invalidated a Nebraska law while rendering the laws of 30 other states unconstitutional as well. Justice Breyer wrote the majority opinion; the dissenters were Chief Justice Rehnquist, Justices Scalia and Thomas and, surprisingly in light of

his earlier support for abortion rights, Justice Kennedy.

By a 6-to-3 vote, the court ruled that a Colorado law creating a "no-approach" zone outside medical offices did not violate the free speech rights of abortion protesters seeking to urge women not to go through with their abortions. Justice Stevens wrote the opinion in Hill v. Colorado, No. 98-1856. Justices Scalia, Thomas and Kennedy dissented.

Federalism

By the 5-to-4 vote that has become familiar from the court's increasingly bitter debate over the proper allocation of federal and state authority, the court struck down a central provision of one federal law, the Violence Against Women Act, and invalidated the application of the federal age discrimination law to the states.

On the other hand, when the justices saw a case as presenting a straightforward issue of the supremacy of federal law -- as opposed to a federal incursion into a traditional area of state authority -- the court was most often unanimous in upholding the federal law.

Chief Justice Rehnquist's majority opinion in the Violence Against Women Act case, United States v. Morrison, No. 99-5, declared that "the Constitution requires a distinction between what is truly national and what is truly local." The decision invalidated the law's civil damages provision, which permitted suits in federal court by victims of crimes "motivated by gender." The dissenters were Justices Stevens, Souter, Ginsburg and Breyer.

By the same 5-to-4 lineup, the court ruled in Kimel v. Florida Board of Regents, No. 98-791, that Congress lacked authority to make the states, as employers, liable to suit under the federal Age Discrimination in Employment Act. Writing for the majority, Justice O'Connor said the government's interest in eradicating age discrimination on the job yielded to the states' sovereign immunity.

In another case involving state immunity, the court avoided the Constitution and looked only to Congress's intent in ruling that Congress did not mean to make states liable to suit under the False Claims Act for defrauding the federal government. Justice Scalia wrote the opinion in Vermont Agency of Natural Resources v. Stevens, No. 98-1828, with Justices Stevens and Souter dissenting.

In a unanimous decision, the court rejected a states' rights challenge to the Drivers Privacy Protection Act, a federal law that bars states from selling personal information about licensed drives and automobile owners. Chief Justice Rehnquist wrote the opinion in Reno v. Condon, No. 98-1464.

The court was also unanimous in upholding the supremacy of federal law in two cases with foreign policy implications. In one, Crosby v. National Foreign Trade Council, No. 99-474, an opinion by Justice Souter held that a federal law placing sanctions on Myanmar, the former Burma, pre-empted a Massachusetts law that withheld state business from companies that do business with that nation's repressive military regime.

In the second case, the court invalidated Washington State's safety and environmental regulations for tanker traffic along its coast. Justice Kennedy wrote the opinion in United States v. Locke, No. 98-1701.

Due Process

In a case about the right of parents to resist interference in their children's lives from grandparents and others, the court ruled 6 to 3 that a Washington State law went too far in permitting a judge to order grandparents' visiting rights over a mother's objection. The splintered opinions in Troxel v. Granville, No. 99-138, invoked the Constitution's due process protection for parental child-rearing decisions,

but failed to agree on a definitive approach. Justice O'Connor wrote a plurality opinion that Chief Justice Rehnquist and Justices Breyer and Ginsburg joined. Justices Souter and Thomas provided additional votes on the parents' side. Justices Kennedy, Stevens and Scalia dissented.

Criminal Law

The court's 7-to-2 reaffirmation of Miranda v. Arizona, in an opinion by Chief Justice Rehnquist, was the leading criminal law case. The court said in Dickerson v. United States, No. 99-5525, that because Miranda "announced a constitutional rule," Congress was not free to replace the famous Miranda warnings with a case-by-case test of whether a confession was voluntary. The decision invalidated a 1968 law, known as Section 3501, by which Congress had purported to overrule Miranda. Justices Scalia and Thomas dissented.

The court struck down New Jersey's hate crime law, ruling 5 to 4 that the Constitution requires the jury to make the central finding, beyond a reasonable doubt, of whether a crime was motivated by bias. The New Jersey law left this job to the judge. The decision, Apprendi v. New Jersey, No. 99-478, cast doubt on federal and state laws in which judges make the crucial findings that determine sentences. Justice Stevens wrote the majority opinion; the dissenters were Justices O'Connor, Breyer and Kennedy, along with Chief Justice Rehnquist.

The court's other criminal law cases were a mix of search-and-seizure issues and cases interpreting a 1996 law restricting state inmates' access to federal court. The outcome was mixed as well.

The court ruled, 5 to 4, that flight at the mere sight of a police officer can often -- although not always -- be suspicious enough to justify the police in conducting a stop-and-frisk search. Chief Justice Rehnquist wrote for the majority in Illinois v. Wardlow, No. 98-1036, upholding the search of a man who bolted from the sight of police cars converging on a Chicago street. Justice Stevens dissented, joined by Justices Souter, Ginsburg and Breyer.

Criminal defendants prevailed in two other search cases. Justice Ginsburg wrote for a unanimous court that an anonymous tip that a person is carrying a gun is not enough to justify a stop-and-frisk search in the absence of some indication that the information is reliable. The case was Florida v. J.L., No. 98-1993. And the court ruled 7 to 2 that, without some particular suspicion of wrongdoing, law enforcement agents cannot walk down the aisle of a bus squeezing passengers' overhead carry-on bags to see if any might contain contraband. Chief Justice Rehnquist wrote the majority opinion, in Bond v. U.S., No. 98-9349, while Justices Breyer and Scalia dissented.

In interpreting the Antiterrorism and Effective Death Penalty Act, a 1996 law in which Congress limited the rights of state inmates to challenge their convictions in federal court by means of petitions for writs of habeas corpus, the court made clear that federal judges still have an important role to play despite the new law's limitations. Applying the new law, the court overturned death sentences in two cases.

In the first, the court was unanimous in ruling that a Virginia death row inmate, Michael Williams, should not have been penalized by the state's failure to provide needed evidence. Justice Kennedy wrote for the court in Williams v. Taylor, No. 99-6615.

A second ruling under the 1996 law, also confusingly called Williams v. Taylor, No. 98-8384, was more convoluted, producing two controlling opinions. First, the court interpreted a provision barring federal courts from setting aside a state court decision unless the state ruling was an "unreasonable" application of federal law. The question was the meaning of "unreasonable."

Just because a decision was wrong did not make it necessarily unreasonable, Justice O'Connor wrote in a 5-to-4 portion of the ruling that was joined by Chief Justice

Rehnquist and Justices Kennedy, Scalia and Thomas. In dissent, Justices Stevens, Souter, Ginsburg and Breyer said federal judges should not have to defer to state court decisions they regarded as incorrect, even if plausible.

But by a 6-to-3 vote, in a portion of the opinion by Justice Stevens, the court then granted relief to the inmate in this case, Terry Williams, on the ground that he had not received effective assistance of counsel. Chief Justice Rehnquist and Justices Thomas and Scalia dissented.

In an 8-to-1 decision, the court ruled that documents produced in response to a broad subpoena under a grant of immunity cannot be used as evidence if the prosecutor did not previously know of the documents' existence. The case, United States v. Hubbell, No. 99-166, grew out of Kenneth W. Starr's prosecution of Webster L. Hubbell, the former associate attorney general, on tax evasion charges. In an opinion by Justice Stevens, the court ruled that Mr. Hubbell's production of thousands of personal financial records was a "testimonial act" that was shielded by his immunity agreement. Chief Justice Rehnquist dissented.

First Amendment: Free Speech

In an important campaign finance case, the court voted 6 to 3 to reaffirm the constitutionality of low limits on campaign contributions and rejected the argument that such limits can be valid only if aimed at documented instances of corruption. The case, Nixon v. Shrink Missouri Government PAC, No. 98-963, was from Missouri, where a $1,000 contribution limit mirrors that of federal campaign law. Justice Souter wrote the opinion, joined by Chief Justice Rehnquist and by Justices O'Connor, Breyer, Ginsburg and Stevens. Justices Kennedy, Scalia and Thomas dissented. Several justices, although not a majority, wrote separately to suggest that beyond this case, the court's entire approach to campaign finance might have to be reconsidered in the future.

The court ruled unanimously that public universities can collect student activity fees even from students who object to particular activities, as long as the policy is neutral as to the student organizations' viewpoints. Justice Kennedy wrote the opinion in Board of Regents v. Southworth, No. 98-1189, a case from the University of Wisconsin that was followed closely throughout the higher education world.

Sexually explicit expression was at issue in two cases. By a 6-to-3 vote, the court upheld a nude dancing ordinance from Erie, Pa., that requires dancers to wear at least pasties and a G-string. Justice O'Connor wrote a plurality opinion for herself, Chief Justice Rehnquist and Justices Kennedy and Breyer, while Justices Scalia and Thomas voted separately to uphold the ordinance. Justices Stevens, Ginsburg and Souter dissented in City of Erie v. Pap's A.M., No. 98-1161.

In the second case, the court voted 5 to 4 to strike down a federal law that required many cable television systems to limit sexually explicit channels to late-night hours. Justice Kennedy's majority opinion, U.S. v. Playboy Entertainment Group, No. 98-1682, was joined by Justices Stevens, Thomas, Souter and Ginsburg. Chief Justice Rehnquist and Justices Breyer, Scalia and O'Connor dissented.

First Amendment: Association

The court ruled by a 5-to-4 vote that the Boy Scouts can ban gay members because opposition to homosexuality is part of the organization's expressive message. Application of New Jersey's anti-discrimination law violated the Boy Scouts' right to freedom of association, Chief Justice Rehnquist said for the court in Boy Scouts of America v. Dale, No. 99-699. The dissenters were Justices Stevens, Souter, Ginsburg and Breyer.

The court struck down California's blanket primary, under which all voters get a single ballot from which they can choose candidates of any party affiliation. The system stripped parties of their right to political association, Justice Scalia said for the 7-to-2 majority in California Democratic Party v. Jones, No. 99-401. Justices Stevens and Ginsburg dissented.

First Amendment: Religion

The court ruled 6 to 3 that the practice of organized, student-led prayer at public high school football games amounted to an unconstitutional establishment of religion. Justice Stevens wrote the majority opinion in Santa Fe Independent School District v. Doe, No. 99-62. The dissenters were Chief Justice Rehnquist and Justices Scalia and Thomas.

At the same time, the court lowered the barriers against public aid to religious schools, upholding a federal program that places computers and other equipment in parochial school classrooms. The vote in Mitchell v. Helms, No. 98-1648, was 6 to 3, but the majority splintered over how far to go. Justice Thomas wrote a plurality opinion for himself, Chief Justice Rehnquist and Justices Scalia and Kennedy, with a narrower concurring opinion by Justices O'Connor and Breyer declined to go so far.

Civil Rights

In an employment discrimination case, the court ruled unanimously that even in the absence of smoking-gun evidence of discrimination, a plaintiff can prevail by showing that an employer's innocent-sounding explanation for its action was a lie. Justice O'Connor wrote the opinion in Reeves v. Sanderson Plumbing Products, No. 99-536.

The court overturned a provision of Hawaii's constitution under which only descendants of the native Hawaiians can vote in elections for trustees of the state's Office of Hawaiian Affairs. Voting 7 to 2 in Rice v. Cayetano, No. 98-818, the court found the provision to violate the 15th Amendment, which provides that the right to vote shall not be denied on account of race. Justice Kennedy wrote the majority opinion. Justices Stevens and Ginsburg dissented.

In an important voting rights case, the court ruled by a 5-to-4 vote that the Justice Department must approve districting changes -- even those adopted with a discriminatory purpose -- as long as the changes leave minority voters no worse off than before. Prevention of backsliding is the only test for Justice Department "preclearance" under the Voting Rights Act of 1965, the court said in Reno v. Bossier Parish, No. 98-405. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas. Justice Souter wrote a dissenting opinion joined by Justices Stevens, Ginsburg and Breyer.

Federal Law and Regulation

The court ruled 5 to 4 that the Food and Drug Administration never received authority from Congress to regulate tobacco products. The court's interpretation of the Federal Food, Drug and Cosmetic Act was a blow to the Clinton administration's anti-smoking policy; the invalidated rules restricted the marketing of cigarettes to children and teenagers. Justice O'Connor wrote the court's opinion in F.D.A. v. Brown & Williamson, No. 98-1152, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas. Justice Breyer dissented, joined by Justices Stevens, Souter and Ginsburg.

Interpreting the federal law that governs employee health benefits, the court ruled unanimously that the financial incentives that health maintenance organizations give doctors to hold down costs do not amount to a violation of the federal duty to put patients' interests first. The decision, Pegram v.

Herdrich, No. 98-1949, handed the patients' rights debate back to Congress. Justice Souter wrote the opinion.

Voting 5 to 4, the court upheld a provision of a recent federal law, the Prison Litigation Reform Act, that restricts the authority of federal judges to keep in place court orders governing the operation of state and local prison systems. Justice O'Connor wrote the majority opinion in Miller v. French, No. 99-224, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas. Justices Souter, Stevens, Breyer and Ginsburg dissented.

In an important environmental case, the court upheld the ability of private plaintiffs to invoke so-called citizen suit provisions of federal environmental law and bring lawsuits to stop pollution. Justice Ginsburg wrote the 7-to-2 opinion in Friends of the Earth v. Laidlaw, No. 98-822. Justices Scalia and Thomas dissented.

Chart: "Supreme Court Scorecard"
The Supreme Court concluded a session of blockbuster cases last week. A look at some of the most important:

ISSUE AND CASE

ABORTION -- Steinberg v. Carhart
States cannot ban partial birth abortions. Ruled with the majority: O'Connor, Souter, Stevens, Breyer, Ginsburg

FEDERALISM -- United States v. Morrison
Victims of private acts of discrimination cannot seek damages in federal court. Ruled with the majority: Rhenquist, Thomas, Kennedy, O'Connor, Scalia

DUE PROCESS -- Troxel v. Granville
Parents have the right to resist interference in their children's lives from grandparents and others. Ruled with majority: Rhenquist, Thomas, O'Connor, Souter, Breyer, Ginsburg

CRIMINAL LAW -- Dickerson v. United States
Congress cannot overrule the requirement that Miranda rights be read to criminal suspects. Ruled with the majority: Rhenquist, Kennedy, O'Connor, Souter, Stevens, Breyer, Ginsburg

RELIGION -- Santa Fe Independent School District v. Doe
Organized, student-led prayer at public high school football games is unconstitutional. Ruled with the majority: Kennedy, O'Connor, Souter, Stevens, Breyer, Ginsburg

ASSOCIATION -- Boy Scouts of America v. Dale
A group can ban gay members if homosexuality is against its expressive message.Ruled with the majority: Rhenquist, Thomas, Kennedy, O'Connor, Scalia

A COURT REVOLUTION BREWING?

Justices Tinker with Federalism Trend, but Watch Out Next Term

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Marcia Coyle and Harvey Berkman

Despite the high drama inherent in rulings that strike down socially conscious federal legislation, the U.S. Supreme Court's latest round of federalism activity indicates that the court's majority is still tinkering at the margins of a major constitutional shift.

"Nothing this term is dramatic in itself, but it adds to the cumulative direction in which at least a five-person majority is going," says constitutional law scholar Stephen Gardbaum, of the University of California at Los Angeles School of Law. "It's sort of adding at the edges, clarifying some of the details."

But as the equally reliable four-person dissenters indicate, the court's decisions aren't exactly inconsequential. And four cases already slotted for review next term could well provide the key to whether the court remains at the margins or engages in a revolution that the dissenters warn would create a federal government not merely of limited but of actually enervated powers.

At the top of the list is a challenge involving the government's authority under the Constitution's commerce clause to regulate intrastate waters that are potential habitats for migratory birds. The case, *Solid Waste Agency v. U.S. Army Corps of Engineers,* No. 99-1178, will build on this term's key commerce clause case, in which the justices struck down a civil damages remedy in the federal Violence Against Women Act because it lacked a strong enough connection to interstate commerce. *U.S. v. Morrison,* nos. 99-5 and 99-29.

The justices also will explore what it means to be a worker "engaged in foreign or interstate commerce" in the context of how the Federal Arbitration Act affects a job bias suit brought under state law in state court.

And in two other strands of the high court's federalism push -- challenges under the 11th Amendment's sovereign immunity provision and Sec. 5 of the 14th Amendment -- the justices will decide whether Congress had the power to subject states to suits under the Americans With Disabilities Act. (This term, the court concluded that federal authority under Sec. 5 does not allow employees to sue state entities for age discrimination.)

Finally, in an entirely new and potentially far-reaching front in the court's recalibration of national power, the justices will examine how much authority Congress can delegate to a federal agency -- in this case, the Environmental Protection Agency's broad statutory authority to promulgate clean air standards "requisite to protect the public health."

Not just states' rights

The justices on May 22 issued the final two of their five federalism-related challenges in the current term. Unlike last term's federalism rulings -- which used the 11th Amendment to bar private damages suits against states under federal patent, trademark and wage-and-hour laws -- this term's quintet involved all three active areas of the court's federalism jurisprudence: the 11th Amendment, the commerce clause and Sec. 5 of the 14th

Amendment. And they dispelled any remaining notion that the Rehnquist majority was simply interested in protecting "states' rights."

"The issue, in short, is enumerated powers," says Roger Pilon, vice president for legal affairs at the libertarian Cato Institute. "The point is, quite simply, the court is moving toward determining whether Congress or the executive branch has the power at issue, quite apart from whether that power may or may not trample on a state power."

If this were a court out solely to guard "states' rights," its 9-0 decision to uphold a federal law forbidding states from selling their drivers' license data would have gone the other way, 5-4. *Reno v. Condon,* No. 98-1464. Instead, the court had little difficulty declaring that the statute was a legitimate expression of congressional power to regulate interstate commerce.

Similarly, an activist states'-rights majority would not have restrained itself from using the 11th Amendment to block suits brought by individual whistleblowers charging state entities with defrauding the federal government or from striking a federal arson statute on the grounds that private residences are not interstate commerce.

Instead, in both cases, the court stuck to a more mundane statutory approach. In the first case -- *Vermont Agency of Natural Resources v. U.S.,* No. 98-1828 -- the court declared that the provision of the federal False Claims Act allowing whistleblowers to sue "any person" who defrauds the federal government was not meant to cover states. And in the second -- *Jones v. U.S.,* No. 99-5739 -- the court unanimously concluded that the federal statute at issue, which made it a crime to burn any property "used in interstate commerce . . . or in any activity affecting interstate . . . commerce," did not cover private residences because the function of such residences is not "use" in interstate commerce.

And even in the court's most important commerce clause case to date -- the Violence Against Women Act decision in *Morrison* -- Chief Justice William H. Rehnquist insisted that the prior court cases upholding the nation's core federal civil-rights laws -- all enacted under the commerce clause -- remain viable.

"Conservatives can read too much into these decisions -- they don't backtrack from decades of law. And liberals too easily cry Chicken Little [in this area], suggesting that the sky's going to collapse," says Ronald Rotunda, a professor at the University of Illinois School of Law who last year issued the third edition of his five-volume *Treatise on Constitutional Law,* co-authored with fellow Illinois professor, John Nowak.

As a point of comparison, one court member *is* calling for a radical revision in the court's commerce clause jurisprudence. In his *Morrison* concurrence, Justice Clarence Thomas reiterated his earlier call to eliminate one of the court's three tests for whether a federal statute passes commerce clause muster.

But it is worth noting, says Bruce Fein, a Reagan-era Justice Department official who now writes a column for the conservative *Washington Times,* that Justice Thomas' suggestion remains "a soliloquy. It isn't even a duet yet."

Advancing the ball

Even if the court is operating at the margins, it's still operating, with ramifications for Congress -- and the lower courts. And there is no denying that the court did advance the federalism ball regarding the commerce clause and Sec. 5 of the 14th Amendment.

In *Kimel v. Florida Board of Regents,* nos. 98-791 and 98-796, a 5-4 court held that Congress lacked authority under Sec. 5 to apply the federal Age Discrimination in Employment Act to the states. The imposition of the act on the states, wrote Justice Sandra Day O'Connor, was

"disproportionate to any unconstitutional conduct that conceivably could be targeted by the act."

The court's ruling builds on its landmark decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), in which it struck down the Religious Freedom Restoration Act on the ground that it usurped the court's role in defining the limits of constitutional rights.

"In *Boerne,* the court said Congress can't redefine rights, it can only enact remedial measures," says Professor Larry Kramer, of New York University School of Law. "That decision wouldn't matter so much as long as sufficient leeway is given to Congress in shaping remedies. But the court in *Kimel* is saying, 'We're going to reserve authority to say whether the means/ends connection is good enough.'"

Agreeing, Professor Douglas Kmiec, of Pepperdine University School of Law, adds, "We still don't know the meaning of what is proportional. I see that as a question of deference to Congress. But it's clear the conservative members do not. They're going to place the court's conception of constitutional rights against created statutory rights side-by-side. And to the extent the statutory right is more protective -- as one could argue protection for the disabled under the [Americans With Disabilities Act] is -- they will set one congressional statute aside after another on those grounds."

The Sec. 5 power, he says, has become "very, very tiny, and a backup role to the court's own definition of constitutional claims."

The *Morrison* decision also answered a question that was raised by the court's landmark decision in *U.S. v. Lopez,* 514 U.S. 549 (1995), when the court for the first time in 60 years invalidated a federal law -- the Gun-Free School Zone Act -- on commerce clause grounds.

Lopez seemed to indicate that a federal law supported by careful congressional findings about the national economic aspect of the regulated activity -- findings that the gun law lacked -- would be constitutional. But in *Morrison,* the court said that the mountain of evidence Congress compiled, which found a nexus between violence against women and interstate commerce, was irrelevant because the underlying activity lacked any significant commercial element.

That's why the upcoming wetlands case is so important. Like violence against women, it involves activity that is fundamentally noneconomic: the condition and existence of intrastate bodies of water. Also like the Violence Against Women Act, the wetlands law is supported on the ground that certain noneconomic activity affects interstate commerce when aggregated. Specifically, the U.S. Court of Appeals for the 7th Circuit found that the destruction of the birds' natural habitats, in the aggregate, substantially affects interstate commerce because many people spend billions of dollars on hunting, trapping and observing birds.

"It's one thing to say you've got a bench with a group of justices who share a kind of general predisposition on a big topic like federalism, and a whole other thing to say they have a coherent, thought-out plan as to what to do across that doctrinal area," says Prof. Kramer. "They can be lumped together on that first level, but not on the specific doctrinal level."

Prof. Kmiec agrees:

"There's no question that the thing that unites them all is a constitutional vision that sees individual rights as better protected when power is divided between the federal and state governments. How that underlying constitutional theory gets elaborated in each of these separate contexts is where there's still a bit of sketchiness."

COURT'S IMPERIAL DIRECTION

The Denver Post

Friday, July 14, 2000

E.J. Dionne

Attacks on 'the imperial judiciary' were once the stuff of conservative polemics against a 'liberal activist' Supreme Court. That is about to change.

In a shift that is momentous in both historical and political terms, liberals are beginning to sound alarms about conservative justices using states' rights and other doctrines to void environmental, economic and social legislation. The liberal fear is that the Supreme Court is marching back to its pre-New Deal days when justices relied on strict interpretations of property and contract rights - and narrow interpretations of governmental authority - to strike down laws on wages, hours and other forms of business regulation.

The first signs of the new disposition have come on relatively narrow issues. This year, the court struck down a law that allowed the victims of rape and domestic violence to sue their attackers in federal court. The court said this was a state issue. It also said state employees couldn't use federal laws to bring age discrimination suits against their state governments. A lower court has put environmental regulations into question, saying Congress had delegated too much power to the Environmental Protection Agency.

What these actions have in common is a direct challenge by the Supreme Court to the power of Congress. 'The court has imposed by fiat limitations on the exercise of federal power,' says Sen. Joseph Biden, the former Judiciary Committee chairman who is planning to give two speeches in the next month challenging the court's 'imperial' direction.

'The Supreme Court, in case after case, is freely imposing its own view of sound public policy - not constitutional law, but public policy,' Biden said in an interview this week. 'What is at issue here is a question of power, whether power will be exercised by an insulated judiciary or by the elected representatives of the people.'

Biden, a Delaware Democrat, acknowledges that the phrase 'judicial activism' has 'often been used by conservatives to criticize liberal judges.' But 'under this Supreme Court, the shoe is plainly on the other foot: It is now conservative judges who are supplanting the judgment of the people's representatives and substituting their own.'

Biden's argument is important because he is speaking not just for himself, but for an entire school of judges and legal scholars who fear that the court may be on the road to invalidating many years of regulatory legislation. On the court itself, Justices David Souter, Stephen Breyer and John Paul Stevens have raised questions about the trend. Souter, for example, has warned of 'a return to the untenable jurisprudence from which the court extricated itself almost 60 years ago.'

David Strauss, a law professor at the University of Chicago, argues that what unites many of the recent decisions and arguments is a desire to undermine regulation, whether enacted by Congress, state legislatures or voter referenda. The trend, he says, involves 'aggressive interpretation of federal statutes where they pre-empt state regulation,' and 'narrow interpretation' of federal regulatory statutes.

'I don't think they care about the states, they want to get rid of regulation,' Strauss says. He argues that many judicial conservatives are more interested in advancing a stronger interpretation of property rights, than in safeguarding states' rights.

Rep. Henry Waxman, a California Democrat who is a supporter of federal environmental and health rules, says the same inconsistency on states' rights doctrines is not confined to the courts. He points to recent efforts to pass federal laws pre-empting state food safety regulations, such as California's Proposition 65. The 1986 initiative requires warning labels disclosing whether products contain chemicals that cause cancer or birth defects.

Supporters of federal pre-emption are normally states' rights advocates in other areas, Waxman says. But in this case, they 'want to deny states the ability to act in their traditional spheres of authority, which is to protect the public health and safety.'

But the biggest fights will be in the courts, and future Supreme Court appointments could prove decisive in this ongoing struggle. Many of the recent decisions overturning congressional enactments were on 5-to-4 votes. That raises the stakes in the debate between Al Gore and George W. Bush over the differences in the Supreme Court appointments each would make.

The public argument between Gore and Bush focuses largely on the abortion issue and whether Roe vs. Wade - seen by conservatives as a case of liberal overreach - will be retained or overturned. But Biden says for the long run, the more important argument will be over the new conservative judicial activism.

The outcome of that debate will shape federal policies for decades to come.

SUPREME COURT TO AMERICA: LET FREEDOM RING

Chicago Tribune

Thursday, July 20, 2000

Steve Chapman

William Rehnquist is such an imp. The chief justice had a little fun the day the Supreme Court announced its verdict in a case asking it to junk the Miranda warning. Rehnquist is a longtime critic of the 1966 Miranda decision. So when he began to read from the opinion he had written for the court, those in the audience assumed the justices were about to overturn it. Wrong. He and his colleagues were upholding Miranda.

This Supreme Court seems to get a kick out of surprising people. It's regarded as pro-law enforcement, but it upheld Miranda and favored criminal defendants in 6 of 8 constitutional cases this term. It vindicated the American Civil Liberties Union by banning public-address prayers before high school football games--then dismayed the ACLU by allowing federal aid to parochial schools. A court dominated by Republican appointees didn't mind siding with the hedonists at the Playboy Channel to deep-six a federal law restricting pornography on cable TV.

Both sides of the political divide can find reasons to love and hate the Rehnquist court. But that doesn't mean it has been making decisions by flipping a coin. The court is not consistently liberal or conservative, but it is pretty consistently libertarian. When it rules, you can generally bet it will rule in favor of protecting individual freedom.

That means keeping our leaders from getting carried away. This term, the court emphasized its view that some powers belong to state governments, some powers belong to the federal government and some powers belong to no government. And when any government tries to exercise a power it is not granted under the Constitution, the justices waste no time putting a stop to it.

Massachusetts, for example, levied economic sanctions against Burma to protest human-rights abuses--sanctions that conflicted with a federal law. The court said the state couldn't legislate on that subject because Congress had pre-empted the field. It reached a similar conclusion in throwing out Washington state's attempt to impose its own safety and environmental regulations on ocean-going tankers.

More often, though, the court was busy rescuing the states from federal encroachments rather than the other way around. It struck down the Violence Against Women Act because Congress lacks the authority to regulate on that subject. It overturned the conviction of a man federally prosecuted for arson of a private home because the crime was beyond the scope of federal law.

The court used these opportunities to reaffirm what Rehnquist said in the landmark 1995 Lopez case: "The Constitution creates a federal government of enumerated powers." If a power is not mentioned or implied in the Constitution, the federal government can't exercise it.

Keeping lawmaking institutions in their proper spheres is necessary because it safeguards liberty and democracy. As the court said in the Lopez decision, "A healthy balance of power between the states and the federal

government will reduce the risk of tyranny and abuse from either front."

In many cases, though, the court is not protecting the federal government from the states or the states from the federal government but shielding the individual from either. This year, it blocked New Jersey's attempt to force the Boy Scouts to accept gays and struck down California's "open primary" because they violated freedom of association. It invalidated a federal law regulating sexually oriented cable TV channels because it infringed on freedom of expression.

It said a state law mandating visitation rights for grandparents abridged the right of parents to direct their children's upbringing. It said the Miranda warnings were needed to protect criminal suspects from police abuse.

The libertarian Institute for Justice in Washington recently reported that in the last eight years, "The court has been quite reliable in protecting individual liberties. Out of 45 cases examined, 35 (or 78 percent) resulted in a pro-liberty decision."

The religion cases illuminate the court's approach. It banned a pre-game prayer at Texas high school football games because the practice forced the unwilling to take part in an officially prescribed religious ritual. But it said schools that teach religion may get the same federal aid as schools that don't.

These rulings might be portrayed as contradictory, since one infuriated conservatives and the other offended liberals. But both decisions are rooted in a fundamental respect for the choices individuals make about faith.

The debate over the Constitution was once described as a dispute between those who think it creates islands of freedom in a sea of government powers and those who think it creates islands of government powers in a sea of freedom. For a long time, the Supreme Court was in the first camp. Not anymore.

JUDICIAL SUPREMACY

Rehnquist Court Understands Its Authority in the Same Terms Warren Court Did

Dallas Morning News

Sunday, July 23, 2000

Terry Eastland

The Supreme Court recently finished another term, and in plowing through the key opinions, one finds some revealing text. It is a footnote (yes, the notes do matter) in U.S. vs. Morrison.

Morrison involved the constitutionality of a federal law providing a civil remedy for victims of gender-motivated violence. The court, with Chief Justice William Rehnquist writing for a majority of five, found that the Constitution doesn't allow Congress to pass such a law.

That wasn't a surprising result, given the court's views of congressional power and federalism. But in declaring what the Constitution requires in those areas, the chief justice emphasized in a footnote that in this business of constitutional interpretation the Supreme Court is, well, supreme:

It is, he wrote, a permanent and indispensable feature of our constitutional system that the Supreme Court is "supreme in the exposition of the law of the Constitution."

The quoted passage came from Cooper vs. Aaron, a unanimous 1958 decision by the Warren Court. In condemning attempts by state and local officials in Arkansas to frustrate a Little Rock school desegregation plan, the justices said that the Supreme Court is "supreme in the exposition of the law of the Constitution" and that its interpretations of the Constitution are binding on all government officials.

The justices joining Mr. Rehnquist in Morrison were Antonin Scalia and Clarence Thomas, who together with the chief justice are regarded in press accounts as "conservatives," and Justices Anthony Kennedy and Sandra Day O'Connor, the so-called moderates. That quintet controlled the outcomes of 14 of the 21 five-to-four decisions this term (out of 74 in all). Seen as a "conservative" majority, it is more or less what is meant by "the Rehnquist Court."

That this "conservative" court understands its authority in the same terms as the Warren Court did hasn't made headlines. But it is a fact - an important one.

Until the first decades of this century, the court understood its power to interpret the Constitution in decidedly more humble terms: Our job is deciding cases, and if we are asked to resolve a conflict between a statute, say, and a claim based on the Constitution, then we have to interpret the Constitution to decide the case. That understanding of judicial review, as University of California-Berkeley law professor John Yoo writes in a forthcoming issue of the Michigan Law Review, "left ample room for the other branches to engage in constitutional interpretation while performing their own constitutional duties."

Judicial review didn't mean judicial supremacy - until the Warren Court. The Warren Court's pretensions, explicitly confirmed by Cooper, drew academic criticism. And eventually, the court's decisions provoked political response. Starting with Richard Nixon, Republican presidents sought to counter the

Warren Court and the revolutionary change it had effected, often in behalf of liberal causes, by choosing conservative justices. But this promise wasn't necessarily a promise to pick justices opposed to judicial supremacy.

And now the results are in. Presidents Nixon, Gerald Ford, Ronald Reagan and George Bush appointed eight of the last 10 justices. And so we have had the Burger Court and now the Rehnquist Court. In some respects, those courts have proved more restrained than the Warren Court. And certainly, they have had different preoccupations, such as the Rehnquist Court's concern for federalism. But the Burger Court saw itself as "supreme in the exposition" of the Constitution. And so has the Rehnquist Court.

Morrison is only one example. Another is Boerne vs. Flores (1997), in which the court rejected any congressional role in interpreting the Bill of Rights that might produce results at odds with its own decisions.

Still another, from the term just past, is Dickerson vs. U.S., in which the court struck down a federal law responding to the (Warren) Court's notorious Miranda rules, even though a majority couldn't say the Constitution compelled those rules and, therefore, nullification of the statute at issue in the case. Here - talk about supreme! - the court placed itself over the Constitution.

There are many good arguments to be made for a humbler court, chief among them that it would be better for us if we the people, ostensibly a self-governing people, were able to promote our constitutional understandings through the ordinary political process. But survey data show that among the three branches of government, the Supreme Court is the one we the people most highly regard. Apparently, we don't mind our supreme Supreme Court. And no one in the other branches wants to make it an issue. Nor do certain presidential aspirants in Nashville and Austin.

But should we be so complacent? Lincoln in his time thought not, and his warning shouldn't be forgotten: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

AN ACTIVIST COURT MIXES ITS HIGH-PROFILE MESSAGES

The Washington Post

Sunday, July 2, 2000

Edward Walsh

When the Supreme Court convened last October for its final term of the 20th century, there was widespread agreement that it would be a particularly important, perhaps historic, session. Even at the outset of the term, there were enough high-profile, contentious issues on the docket to ensure more than the usual share of close votes and significant decisions.

Nine months later, as the justices wrapped up their work for the term, the court had more than met those lofty expectations. It considered and ruled on cases touching on some of the most controversial issues of modern American life--abortion, school prayer, gay rights, aid to parochial schools, tobacco regulation and the rights of criminal defendants.

Less clear was whether any overriding theme or message emanated from the court in its 14th year under the stewardship of Chief Justice William H. Rehnquist, the conservative Arizonan who is one of seven justices appointed by Republican presidents.

"It is still a conservative court that also has become one of the most activist courts in American history," said Steven R. Shapiro, national legal director for the American Civil Liberties Union.

Yet, Shapiro acknowledged, during this term the court also delivered a number of "significant victories for civil liberties," among them the emphatic reaffirmation of its landmark 1966 Miranda decision, which requires police to inform criminal suspects of their rights to remain silent and be represented by an attorney during interrogation.

"I think this term forced us to make a much more nuanced appraisal of the Rehnquist court," said Erwin Chemerinsky, a University of Southern California law school professor. "In some areas it remains a very activist, conservative court. In other areas, it was a court that was bitterly disappointing to conservatives."

The same court that struck down restrictions on cable television providers of sexually explicit material in the name of free speech was also kind to the business community and treated criminal defendants well this term, several experts noted.

The court's mixed record is certain to galvanize activists on both sides of the political spectrum during this year's presidential campaign as they make the case that the next president could determine the ideological balance of power on the closely divided court for a generation to come.

John G. Roberts Jr., an appellate lawyer with the Washington law firm of Hogan & Hartson, believes conservatives may have the easier time doing that, if only because they suffered setbacks in some of the most celebrated cases of the term.

Indeed, the court's nominal five-justice conservative majority splintered enough to produce outcomes that dismayed conservatives in three of the most closely watched cases of the term.

In Dickerson v. United States, the justices voted 7 to 2 to reaffirm the Miranda ruling.

Rehnquist, a frequent and vocal critic of the Miranda decision, wrote the majority opinion. In Santa Fe Independent School District v. Doe, the court ruled 6 to 3 that a school-sponsored method of allowing students to lead prayers before high school football games in a Texas school district violated the constitutional prohibition against establishment of religion.

And in probably the most emotional case of the term, the court, in a 5 to 4 decision in Stenberg v. Carhart, struck down a Nebraska law banning the controversial procedure known to opponents as "partial birth" abortion.

But in decisions that balanced those conservative disappointments, the court also said that the Boy Scouts of America had the right to expel an adult Scout leader because he is gay; that the Food and Drug Administration does not have authority to regulate the tobacco industry; and that government money can be used to provide computers and other modern instructional materials to religious schools.

In many of these high-profile cases, the court did not veer from well-established paths. Dickerson ratified a law enforcement practice that has become ingrained in American culture. Abortion rights advocates expressed alarm over the narrow vote that struck down the Nebraska law, but there was no sign in the opinion of a threat to the underlying right to abortion, established 27 years ago in Roe v. Wade. The school prayer decision was in line with similar restrictions on state-sponsored prayer that stretch back to 1962.

Legal scholars differed over whether the 6 to 3 ruling in the school aid case, Mitchell v. Helms, signaled a willingness by the court to approve school voucher programs, a fervent conservative hope. But that is an issue that will have to be decided in the future. On the immediate issue before the justices--whether government funds could be used for computers and computer software in religious schools--the court ruled as it had in 1968, when it was asked the same question about textbooks.

"I don't think the outcomes of the cases are particularly jarring," said Douglas W. Kmiec, a law school professor at Pepperdine University in California. "There were both liberal and conservative victories, but they were not so much in either direction that they were profoundly out of the mainstream.

"They kind of confirmed a contemporary sense of justice. A nonlawyer or the man on the street would say the results were within the range of reasonableness."

According to several legal experts, the term once again demonstrated the hallmark of the Rehnquist court. "There is a label you can put on this term and that is 'judicial supremacy,' " said Susan Low Bloch, a Georgetown University Law School professor. " 'We are going to tell you. We are going to tell you, the Congress, you, the states.'

"It's striking the number of conservative justices who don't like Miranda, but they like even less having Congress trying to modify what the Supreme Court has done."

According to Walter Dellinger, a former solicitor general in the Clinton administration and a lawyer with the Washington firm of O'Melveny & Myers, the Rehnquist court has invalidated 24 acts of Congress in the past five years. "If that's not a record, it's close to it," he said.

Added Akil Amar, a Yale Law School professor: "The biggest theme is that this is a very assertive court that is not afraid of invalidating everyone else. The only thing it's afraid of is admitting it made a mistake."

Two cases showed the court's leanings toward enhancing state prerogatives at the expense of the federal government. The court struck down a section of the Violence Against Women Act that allowed female victims of violence to sue their attackers in federal court, and held that state workers cannot sue their employers under the federal Age Discrimination in Employment Act.

But in some cases, the states fared no better, especially when the issue involved traditional federal responsibilities. The court ruled that federal law preempted an attempt by Massachusetts to deny state contracts to companies that do business with Burma and Washington state's effort to regulate oil tankers in its coastal waters.

In another case, the justices ruled that it was not California lawmakers, but the people of California, who erred when they approved a ballot measure instituting a new "blanket" primary election system that allowed voters to pick candidates from any political party. The court said the system violated the free association rights of political parties to choose their own nominees.

"This is a court that is confident of its capacity to make decisions and, when it comes to interpreting the Constitution, this is a court that believes state governments, Congress, the lower courts should take a back seat to its interpretations," Dellinger said.

He added: "I think John Marshall, who established the tradition of judicial review in Marbury v. Madison, would be proud of this court, even if he disagreed with some of its . . . decisions."

HIGHLIGHTS OF THE TERM

The Supreme Court this session ruled on cases that touched on some of the most controversial issues of modern American life -- abortion, school prayer, gay rights, aid to religious schools and tobacco legislation. These are among the most significant rulings:

CASE: Stenberg v. Carhart

DECISION: Nebraska's "partial birth" abortion law -- which is similar to 30 other state laws -- places an "undue burden" on a woman's right to end her pregnancy.

X--JUSTICES IN THE MAJORITY:

Rehnquist

X--Stevens

X--O'Connor

Scalia

Kennedy

X--Souter

Thomas

X--Ginsburg

X--Breyer

CASE: Boy Scouts of America v. Dale

DECISION: The Boys Scouts of America can legally expel a Scout leader because he is gay.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

CASE: Troxel v. Granville

DECISION: A law allowing visitation rights for grandparents and others infringes on parents' "fundamental right" to make decisions about their children.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

Scalia

Kennedy

X--Souter

X--Thomas

X--Ginsburg

X--Breyer

CASE: Santa Fe Independent School District v. Doe

DECISION: Prayers led by students at Texas high school football games violate constitutional prohibitions.

X--JUSTICES IN THE MAJORITY:

Rehnquist

X--Stevens

X--O'Connor

Scalia

X--Kennedy

X--Souter

Thomas

X--Ginsburg

X--Breyer

CASE: Mitchell v. Helms

DECISION: Governments can distribute computers and other instructional gear to private schools without violating constitutional church-state prohibitions.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

X--Breyer

CASE: Dickerson v. United States

DECISION: Congress cannot overturn the 34-year-old Miranda warnings that police must give suspects because the advisories are rooted in the Constitution.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

X--Stevens

X--O'Connor

Scalia

X--Kennedy

X--Souter

Thomas

X--Ginsburg

X--Breyer

CASE: Florida v. J.L.

DECISION: Police may not stop and frisk someone based merely on an anonymous tip that he is carrying a gun.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

X--Stevens

X--O'Connor

X--Scalia

X--Kennedy

X--Souter

X--Thomas

X--Ginsburg

X--Breyer

CASE: Illinois v. Wardlow

DECISION: Police generally may stop and frisk someone who runs at the mere site of an officer.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

CASE: Williams v. Taylor

DECISION: A federal judge's authority to overrule a state court decision in certain death penalty cases is limited.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

CASE: Pegram v. Herdrich

DECISION: HMOs cannot be sued in federal court for offering bonuses to doctors who hold down costs.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

X--Stevens

X--O'Connor

X--Scalia

X--Kennedy

X--Souter

X--Thomas

X--Ginsburg

X--Breyer

CASE: FDA v. Brown & Williamson

DECISION: The Food and Drug Administration does not have the power to regulate tobacco.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

CASE: Crosby v. National Foreign Trade Council

DECISION: Federal law preempts a Massachusetts statute that penalized companies doing business with Burma.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

X--Stevens

X--O'Connor

X--Scalia

X--Kennedy

X--Souter

X--Thomas

X--Ginsburg

X--Breyer

CASE: California Democratic Party v. Jones

DECISION: California's "blanket" primary infringes on political parties' rights to free association.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

X--Souter

X--Thomas

Ginsburg

X--Breyer

CASE: Nixon v. Shrink Missouri PAC

DECISION: A Missouri law that imposes strict dollar limits on political contributions does not impinge on free speech.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

X--Stevens

X--O'Connor

Scalia

Kennedy

X--Souter

Thomas

X--Ginsburg

X--Breyer

CASE: United States v. Playboy Entertainment Group

DECISION: A law requiring cable providers of sexually explicit material to "fully scramble" their signals violates consitutional free speech guarantees.

X--JUSTICES IN THE MAJORITY:

Rehnquist

X--Stevens

O'Connor

Scalia

X--Kennedy

X--Souter

X--Thomas

X--Ginsburg

Breyer

CASE: Erie v. Pap's A.M.

DECISION: Cities have the authority to ban nude dancing when they can show harmful "secondary effects" on a community.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

X--Breyer

CASE: United States v. Morrison

DECISION: Congress overstepped its authority in the Violence Against Women Act when it gave women the right to sue attackers in federal court.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

CASE: Kimel v. Florida Board of Regents

DECISION: State workers who were discriminated against because of their age cannot sue under federal law.

X--JUSTICES IN THE MAJORITY:

X--Rehnquist

Stevens

X--O'Connor

X--Scalia

X--Kennedy

Souter

X--Thomas

Ginsburg

Breyer

O'CONNOR, THE 'GO-TO' JUSTICE

USA Today

Wednesday, July 12, 2000

Joan Biskupic

WASHINGTON -- It was the Supreme Court's annual spring musicale, and Justice Sandra Day O'Connor was presiding. The 200 guests sat erect and knee-to-knee as O'Connor introduced the artists, among them a string quartet with 300-year-old Stradivarius violins.

The May event was vintage O'Connor: scripted and perfectly timed, her opening remarks charming but succinct. After the concert, but before a private dinner with the musicians, the efficient justice didn't waste a minute. Back she went to her chambers to sneak in some work.

By the end of the term June 28, O'Connor would write the court's ruling that Washington state violated parents' rights by giving grandparents broad visiting privileges to grandchildren. She also would solidify the court's majority in rejecting Nebraska's ban on "partial-birth" abortions and would outline the court's standard for deciding when public aid to parochial schools is constitutional.

On a divided court that took on its most significant agenda in a decade, no one shaped the law as much as O'Connor. It reflected a simple truth about today's Supreme Court: 19 years after her appointment as the high court's first female justice, O'Connor has become, in today's vernacular, "The Man."

In the 1999-2000 term, O'Connor compiled the best "win-loss" record among the nine justices: She voted in the majority in all but four of the 73 cases the court decided. Her values, conservative but flexible on social issues, are close to those of America's political center and have made her a bridge between the court's left and right wings. She is the "go-to" justice when the bench is split and looking for compromise reasoning.

Her place at the center of the court, alongside Justice Anthony Kennedy, has long been recognized, particularly since a 1992 decision in which the two provided key votes in upholding abortion rights.

More recently, O'Connor has solidified her leading role in many more areas of law. What is the Supreme Court's view on affirmative action? Read O'Connor's opinion. On voting rights? Read O'Connor. Sexual harassment? O'Connor. States' rights? O'Connor.

Off the bench, too, she is at the center of the social events that foster collegiality on the court. If there is a party to be organized, a bridge game to be arranged or an official trip to be taken by the justices, O'Connor is probably in charge. She was with Justice Harry Blackmun when he obtained a grand piano for the court and began the spring musicale 12 years ago. After he retired in 1994, she took it over.

Her self-discipline and drive are legendary, in work and play. She skis and plays golf and tennis.

"I used to say that whatever she did, she did to perfection," says Alan Day, her younger brother. "If you told her, 'The job is to wash dishes well,' she would do even that better than anyone."

At the court, she is a centrist in the mold of the late Lewis Powell and a charmer in the tradition of the late William Brennan. As the only former elected politician on today's court -- in Arizona, she was the first woman to be

majority leader of the state Senate -- O'Connor stands out among the justices in her ability to work a room.

"There's no question in my mind that she set out to become a central, pivotal figure" on the court, says lawyer David Stewart, a former clerk for Powell who has followed O'Connor's record closely. She "shies away from broad doctrine and partisan political approaches."

O'Connor's style is to carve out legal rules incrementally. She's building a body of law one case at a time rather than basing decisions on overall ideology, as conservative Justice Antonin Scalia does. O'Connor's decisions rarely stray beyond the specific disputes before her.

Her approach suits moderates and those who want the court to play a minimal role in American society, but it often confounds lower courts, which have had trouble applying her narrow rulings. It also has drawn the wrath of conservatives and liberals alike; both say her middle-of-the-road course doesn't offer the legal leadership that the Supreme Court should provide. In one abortion case, Scalia, who frequently pecks at O'Connor's reasoning, called her view "irrational" and said it could "not be taken seriously."

"The problem is that we look to the Supreme Court to tell us what the Constitution means," says Neal Devins, a professor at the College of William & Mary School of Law in Virginia who has written about O'Connor. Her "parsing of the law creates confusion and opportunities for lower courts to use her language to suit their personal preferences."

Yet the tall, tanned O'Connor, who at 70 shows no sign of slowing down and no apparent effects of the breast cancer that sapped her energy during the 1980s, is often the voice of today's Supreme Court.

"She knows her mind," says University of Virginia law professor John Jeffries, a Powell biographer and longtime court observer. "Sometimes people think that being in the middle is being wishy-washy. She is anything but."

O'Connor declined to be interviewed for this story; as with all the justices, she avoids publicity and prefers to have her court opinions speak for themselves. But through the years O'Connor has opened up about the discipline and drive with which she approaches her work.

"When I'm faced with a case, I do as much research as I possibly can," she told a group of fellow cancer survivors in 1994. "Then I make my decision, and I don't look back."

A daughter of the West

The first of three children of Harry and Ada Mae Day, O'Connor grew up with the frontier spirit of the American West as a backdrop. Her grandfather, Henry Clay Day, moved from Vermont in the late 1800s and began ranching on harsh terrain that eventually became part of the state of Arizona. By 1930, the Lazy B ranch was still far from any town or hospital, so Ada Mae Day went to her mother's home in El Paso to stay before giving birth to the future justice.

As a child, O'Connor divided her life between the Lazy B, where she learned to ride horses and handle tractors, and El Paso, where she was sent for school.

O'Connor has invoked the words of author Wallace Stegner to describe her feelings for the West: "There is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him *who* he is."

A serious and high-achieving student, she skipped two grades and graduated from high school at 16. She then went to Stanford University, where she earned economics and law degrees. There she met John O'Connor, a fellow law student whom she would marry, and William Rehnquist, with whom she later would share a seat on the nation's highest court.

As a woman in a male-dominated profession, O'Connor initially had a hard time finding work as a lawyer. She eventually took a job as deputy county attorney in San Mateo, Calif., a fortuitous stroke that put her on a path of public service and politics. In 1957, the family settled in Phoenix, and she took a break from the law to stay home with the couple's three boys.

O'Connor returned to work as soon as they all were in school. "I just never thought about living my life without being in the workforce," she said in the mid-1980s.

In 1965, she became an assistant state attorney general and took an interest in politics. Four years later, running as a Republican, she won a state Senate seat. Unlike some feminists of her generation -- and, to some extent, fellow Justice Ruth Bader Ginsburg -- O'Connor didn't challenge the status quo as an outsider. She learned to best it as an insider, and after four years in the Arizona Senate, O'Connor became majority leader.

In 1974, she ran for a post as a county judge. She won, and in 1979 she was appointed to the Arizona Court of Appeals. O'Connor's reputation as a meticulous jurist spread, and in 1981, President Reagan made good on a campaign promise to appoint a woman to the Supreme Court by picking her.

Reagan biographer Lou Cannon wrote that Reagan was immediately charmed by O'Connor as they talked about their mutual love of horseback riding before moving on to judicial issues. Reagan didn't interview anyone else, though many in what was then the "New Right" objected. They feared that O'Connor wouldn't oppose abortion.

From the start of her tenure on the court, O'Connor aligned herself with conservative bulwark Rehnquist. However, she was more moderate on divisive social issues such as sex discrimination, religious freedom and personal liberties.

She made a mark on women's rights while rejecting the notion that there was a "woman's" approach to judging. "I think the important fact about my appointment is not that I will decide cases as a woman," she said just after joining the court, "but that I am a woman who will get to decide cases."

She has seemed especially sensitive to the prejudice women face and what the law can do about it. In 1982, O'Connor wrote an opinion invalidating a women-only enrollment policy at a Mississippi state nursing school, saying it "tends to perpetuate the stereotyped view of nursing as an exclusively women's job."

Last year, O'Connor played a key role in a ruling that public schools could be held liable for failing to stop student sexual harassment.

In a stinging dissent, Kennedy said O'Connor was ignoring the facts of school life and inviting federal interference in local matters. He wrote that the majority opinion offered "little Johnny a perverse lesson in federalism." O'Connor countered tersely from the bench that her view would make sure "that little Mary may attend class."

This term, O'Connor and Kennedy disagreed in a 5-4 decision that struck down state laws banning a medical procedure that critics call "partial-birth" abortion. O'Connor was a key vote for the majority, but then offered a blueprint for states that still want to ban the controversial procedure. It was typical O'Connor: She steered a course down the middle of the court's ideological spectrum but kept the door open for a similar case to come out differently.

Her opinions on government's race-based policies, which take her well beyond any traditional women's issues, are similarly cast.

She has authored the court's rulings restricting affirmative action policies and voting districts that are drawn to boost the political power of blacks and Hispanics. Her view is that programs designed to boost opportunities for

minorities often are just as unacceptable as poll taxes and other practices that were designed to keep blacks down.

O'Connor also has said, however, that some state action to help minorities might be upheld. It's not clear under what circumstances.

'Sandra forced my hand'

O'Connor's control over important cases reflects not only her centrist views, but also her engaging personal style.

She has kept her close ties with Rehnquist, plays bridge with Kennedy and Justice Stephen Breyer and shares an interest in international legal affairs with those two and Ginsburg. Though Ginsburg and O'Connor are not especially close, there is a mutual appreciation. Ginsburg, who joined the court in 1993, has called O'Connor "the most helpful big sister anyone could have."

Justice Brennan, a liberal known for coaxing his colleagues toward his view, met his match in the late 1980s, when conservatives were gaining influence on the court.

"Sandra forced my hand by threatening to lead the revolution," Brennan wrote to Justice Thurgood Marshall to explain why he had compromised with her in one case. A few years after O'Connor joined the court, Brennan said that "Sandra fit in so quickly. She ceased immediately to be 'the first woman justice' and became just another justice, and a quite fine one. Moreover, she is delightful."

Now, O'Connor's influence is stronger than ever. But instead of undermining any agenda of the left, she more often limits the reach of the court's right wing, namely Rehnquist, Scalia and Clarence Thomas.

How long O'Connor will control the center depends on any new presidential appointments and O'Connor herself. Despite the grueling travel, social and athletic schedule she maintains, rumors persist about her health and potential retirement. But she gives no indication of retiring. For now, the court usually does things her way.

Stephen Strickland of the National Peace Foundation, who works with O'Connor on the spring concerts, found her touch with demanding musicians instructive.

"She charms the socks off those artists," Strickland says, referring to one singer-songwriter in particular. "I remember when she invited Michael Feinstein to her chambers. He came out a pussycat."

IT'S ALL ABOUT O'CONNOR

Los Angeles Times

Sunday, July 9, 2000

Edward P. Lazarus

According to conventional wisdom, the current U.S. Supreme Court is highly unpredictable. It lurches without consistency from politically liberal decisions, like the ruling that Nebraska's ban on partial-birth abortions violated a woman's right to choose, to politically conservative ones, like the ruling striking down the Violence Against Women Act as an intrusion on state's rights.

This is half-right. The court does lurch across the political spectrum. But in at least one important sense, the court is predictable: As Justice Sandra Day O'Connor votes, so goes the court.

During the just-completed term, the court issued full-blown opinions in 74 cases. O'Connor voted in dissent only four times, tying the modern record for fewest votes in the minority. (By contrast, Justice John Paul Stevens dissented in 27.) O'Connor's feat is all the more remarkable when one considers the justices split 5-4 in 21 of the 74 decided cases, the highest percentage of 5-4 splits in a decade. Simply put, though the justices are closely divided on many issues, O'Connor holds the balance of power and wields it to uncommon effect.

Yet, these impressive statistics do not fully capture the enormity of O'Connor's swing-voting influence. In many of the most fiercely contested and vital areas of law, she is not merely one undifferentiated member of a narrow five-justice majority. Instead, O'Connor seems to purposefully write separately from the majority, knowing that, because her vote is essential to that side, she can bend the court--and the law--to her will.

Take the issue of abortion. Through separate writings in 5-4 cases, O'Connor has forced on the court her test for determining the legality of restrictions: They are legal unless a restriction imposes an "undue burden" on a woman's right to choose. O'Connor, moreover, is adamant about having her personal view of what constitutes an "undue burden" prevail at the court. In the recent partial-birth abortion case, for example, she wrote separately from the other four members of the majority to signal that in her almost surely controlling view that a more carefully crafted ban would be constitutional.

O'Connor is similarly in charge in the many cases defining the constitutionally mandated separation of church and state. Through separate concurrences, O'Connor created her own idiosyncratic test for deciding whether a challenged state action constitutes an impermissible establishment of religion. In her view, the Constitution precludes government-sponsored activity that appears to "endorse" religion.

Because of the deep split at the court in cases involving religion--whether the issue is school prayer, a holiday display or government subsidies for sectarian schools--O'Connor's test holds sway. Indeed, O'Connor worked hard this term to preserve her pivotal role in the religion case and already seems to have positioned herself between the court's rival factions on the issue of school vouchers, the next likely landmark challenge in this field.

Ditto in the area of affirmative action. The court is split 4-4 between those justices (William H. Rehnquist, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas)

who would end affirmative action entirely and those (Stevens, David A. Souter, Ruth Bader Ginsburg, and Stephen Breyer) who would permit it fairly liberally. At the center again, O'Connor dominated every affirmation-action case in the last decade with her not-never-but-almost-never approach. That influence shows no signs of waning.

All told, it does not seem too much to say that O'Connor is probably the most powerful woman in the world. The Supreme Court is unsurpassed among Western judicial institutions in the reach of its authority. On the current court, which shows an eagerness to flex its muscles, O'Connor not only dictates on matters of race, religion and the right to privacy, she is the leading force behind the court's dramatic revival of the doctrine of state's rights as a curb on the federal government.

This concentration of authority is regrettable. Part of the problem is institutional. When a court consistently decides its most important cases by a 5-4 division, it is deeply unsettling, especially when, as with this Supreme Court, its rulings frequently strike down major legislation or overturn long-standing precedents. So much the worse when the huge legal issues of the day are controlled not by five justices, but one.

Of course, this predicament is not entirely O'Connor's fault. Her position as the swing vote is dictated significantly by the court's deep and unbridgeable division and O'Connor's efforts to moderate the persistent radicalism of her supposedly more "conservative" brethren.

But identifying the reasons for O'Connor's influence does not change the damage done when the Supreme Court is effectively reduced from a body of nine to a body of one. That damage is heightened by the highly personalized nature of O'Connor's jurisprudence.

What is an "undue burden" on the right to abortion except what O'Connor says it is? What is an "endorsement" of religion? Such standards are either inherently circular or of a purely I-know-it-when-I-see-it variety. Personalized judgment has a place in the law and may, at times, be inescapable, as with such matters as pornography, which many view as being in the eye of the beholder. But O'Connor's constant resort to self-referential formulas when deciding fundamental issues of civil liberty fuels the idea corrosive to the rule of law that our rights are creatures of an individual justice's personal preferences.

Certainly, the way O'Connor applies her own standards encourages this view. In her 20 years on the court, O'Connor has consistently struck down race-based affirmative-action plans. Yet, in a landmark case, she cast the decisive vote approving such a plan for women. Similarly, this term, O'Connor provided the crucial fifth vote for permitting the Boy Scouts of America to exclude gays. In the majority view that O'Connor joined, the Boy Scouts' right to freedom of association trumped the right of gays not to be discriminated against. How is it, then, that a few years before, in a case raising a nearly identical clash of rights, O'Connor wrote the majority opinion forcing the Jaycees to admit women.

Liberals have come to celebrate the role O'Connor plays, despite her basic conservatism. As they see it, O'Connor saved Roe vs. Wade (sort of) and, as far as the left is concerned, is all that stands between this court and a legal abyss of Rehnquist's and Scalia's design.

But the cost to the law is great. For lower-court judges, prospective litigants and the lay public as a whole, O'Connor's wholesale dominance of the law is a formula for uncertainty, confusion and a sickly dependence. Unfortunately, that is the real legacy of the court's recently completed term.

ANTONIN SCALIA: REVOLUTIONARY IN A BLACK ROBE

News & Record (Greensboro, NC)

Sunday, July 2, 2000

David Dubuisson

If Antonin Scalia had his way, the July 4 holiday might be celebrated with armed takeovers of certain government buildings. In fact, he would probably applaud if the first target were the Supreme Court itself. He is the supreme self-styled "originalist." He thinks the Constitution should be interpreted in the context of 1787, when it was drafted.

The context of 1787 was, after all, very much in the vein of the Declaration of Independence of 11 years earlier. That document said, among other things, that revolution was a God-given right:

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.

The Declaration of 1776 spoke of "a long train of abuses and usurpations" by the British crown. A survey of Justice Scalia's 14 years on the Supreme Court would yield an even longer list of abuses and usurpations that, in his view, have been committed by the court itself. The latest indictment is found in Scalia's seething dissent delivered last Monday as a solid majority of seven of his colleagues calmly reaffirmed the landmark Miranda decision.

The latest decision, according to Scalia, involved the exercise by the court of "an immense and frightening anti-democratic power, and it does not exist."

Chief Justice William Rehnquist's reasoning in declaring the familiar Miranda warnings to be required by the Constitution was, in Scalia's word, "preposterous." He said the court "flagrantly offends fundamental principles of separation of powers and arrogates to itself prerogatives reserved to the representatives of the people."

Wrapping up his screed, Scalia accuses Rehnquist, his friend and frequent soul mate on the court, of converting the Miranda "milestone of judicial overreaching into the very Cheops' Pyramid ... of judicial arrogance."

Scalia had one co-signer on his dissent, Justice Clarence Thomas.

This case - Dickerson vs. U.S. - offers interesting raw material for those who insist that the Supreme Court be viewed on an ideological spectrum. In reaffirming Miranda, the quintessential Warren Court assertion of criminals' rights, the court fielded a majority ranging from David Souter (a Republican Bush appointee) on the left to Rehnquist (the arch-conservative Nixon appointee) on the right. And where are Scalia and Thomas? Perhaps not on the spectrum at all. Unless there is some uncharted territory to the right of Rehnquist (Mars?).

I would suggest that they're not on the liberal-conservative spectrum as such but that they exist in a sort of parallel universe. It is one that exists beyond the edge of the political atmosphere.

Scalia is, by anybody's definition, brilliant. He is also every inch the law professor, which is not of itself a bad thing. At their best, law professors are constantly questioning authority, challenging intellectual laziness and exposing the connecting tissue of little fictions that

enable most of us to live reasonably honest lives and still sleep at night.

I don't mean to imply that the Supreme Court is just a game for Scalia, although I don't know that it isn't. He professes deep loyalty to certain basic principles, but at the same time his manner of discourse - both in court and on paper - suggests someone whose deepest loyalty is to the sound of his own voice.

The Miranda issue, for example, really amounts to nothing more than whether the principles of fairness and government restraint embodied in the Fifth, Sixth and 14th amendments can be summarized in the warnings read to every suspect: the right not to answer police questions, knowledge that anything you say can become evidence against you and the right to the help of a lawyer, whether or not you can afford to hire one. The alternative to the standard warning is to have a trial-within-a-trial in each case examining how police obtained a statement.

Arguably, either approach would satisfy the Constitution, but the Supreme Court in 1966 chose the standard warning while Congress in 1968 opted for the full inquiry. Over the next 30 years, the nation has endorsed the court's approach. Why change it now just to scratch some obscure academic itch over separation of powers?

To Scalia, the answer is obvious. The itch cannot go unscratched. Either the court hews strictly to the literal text as written, or it is invading the province of Congress. Although the court may declare an act of Congress unconstitutional, it must invoke specific constitutional language to do so.

While Scalia often is on the losing side, there's no question that his skillful advocacy has pushed the rest of the court toward his view. All the justices have become more scrupulous about discussing constitutional language during his tenure. But at the same time his manner and his tongue almost certainly have lost him a few rounds.

The irony is that if the other justices should suddenly be reborn as Scalia disciples and begin viewing the Constitution through his eyes, the work of the court would be so much less challenging, so mechanical, that Scalia himself would probably be bored to tears with it.

The genius of the Founders was to create a Constitution capable of constantly adapting to new challenges through a continuing debate and intellectual struggle within the Supreme Court. Scalia, with his rigid and pedantic approach, is a vital part of that process. Without the likes of his verbal warfare within the four walls of the court, the nation might well be more vulnerable to the kind of violent overthrow alluded to in the Declaration of Independence but fortunately no longer celebrated on Independence Day.

THOMAS AND SCALIA: 2 JUSTICES, 2 VIEWPOINTS

Their Records Show Conservatives Not Always in Lockstep

Chicago Tribune

Wednesday, June 7, 2000

Jan Crawford Greenburg

Their names, uttered condescendingly in one breath, may well become a campaign catchphrase, the latest rallying cry for Democrats seeking to energize their troops.

"Scalia-Thomas."

If Texas Gov. George W. Bush gets to the White House, the thinking goes, chances are he would appoint justices cut from the same cloth as its two most visible conservatives, Antonin Scalia and Clarence Thomas.

Such moves would create an "out-of-control court" that would "endanger our rights and freedoms," reversing decades of rulings in civil rights and liberties, a liberal advocacy group proclaimed ominously as it kicked off a "massive national public education campaign."

But those dire predictions, prominent Supreme Court lawyers and scholars say, are overblown and present a simplistic view of the two justices and their environs--and illustrate how difficult it is to reduce the court to a sound bite.

The Supreme Court, long a staple of presidential campaigns, has particular force this election year. It is widely assumed the next president will appoint one or two justices to a court that now decides controversial issues by one vote--leaving a lasting legacy with sweeping implications for American life.

Enter "Scalia-Thomas" and the argument, made most recently by People for the American Way, that "as a country, we are courting constitutional disaster."

Those turbo-charged arguments not only gloss over the process by which the court works, observers say, but also miss real differences between the two acknowledged conservatives. Monday's high-profile decision in a so-called grandparents' rights case was only the latest example.

"The idea that Antonin Scalia and Clarence Thomas are completely out of control and cutting a swath through civil liberties and civil rights, with no concern for the individual, is crazy," said Roy Englert Jr., a frequent advocate before the Supreme Court who argued a case over federal court jurisdiction several years ago in which Scalia and Thomas came down on opposite sides.

For one thing, the court moves incrementally. The justices must depend on earlier rulings when they approach a case and, while Thomas has shown a willingness to rethink some areas, they still operate under agreed-upon constraints, largely leaving their personal ideologies aside.

More importantly, observers say, viewing Scalia and Thomas as a single entity is misleading because the two can and do see things differently, as the grandparents' rights case showed.

There, Thomas joined more liberal colleagues, such as Ruth Bader Ginsburg, in finding parents have certain constitutional rights to raise their children without state interference. Scalia, however, was in the minority, writing a dissent in which he said states should have the final say.

Scalia and Thomas vote together about 80 percent of the time, but other justices--such as David Souter (chosen by President George

Bush) and Ginsburg (chosen by President Clinton)--pair up about as often.

That said, some critics still think of Thomas, who was appointed by Bush, as the intellectual understudy of Scalia, appointed by President Ronald Reagan, even though Thomas often is boldly independent. After almost a decade on the court, Thomas' voice is clear and passionate, and he frequently offers distinct views on race, religion, free speech and the structure of government.

"The jurisprudence of both Justices Scalia and Thomas is more sophisticated and nuanced than these broad sweeping generalizations would allow," said John Roberts Jr., a Washington lawyer who closely follows the Supreme Court. "It's a gross oversimplification, and it's misleading and inaccurate, to reflexively link the two of them together."

They do see eye to eye on several high-profile issues. They would leave it to the states to decide whether to legalize abortion, for instance, and they would end racial preferences in contracting and school admissions. And as the court finishes this term by handing down rulings in an array of contentious cases--from whether states can ban certain controversial abortions to whether the Boy Scouts can exclude gays--they are certain to be together again.

"From the perspective of the left, they're the two most dangerous justices, because they're two young and strong critics of Roe vs. Wade," said Yale Law School professor Akhil Amar. "But they don't always agree, and, in 5-4 cases, they have divided. And they're not always predictable votes for conservatives."

Two weeks ago, Thomas sided with his more liberal colleagues in two opinions. He joined the majority to strike down government restrictions on adult cable television programming, and he dissented from a ruling that blocked some lawsuits against automakers for failing to install air bags.

Scalia took the opposite view.

That the two have their differences should be obvious, but it often is overlooked. The recent case on cable television programming, for instance, isn't the first time they parted ways on the 1st Amendment. There also was a case involving Margie McIntyre, an Ohio woman who wanted to pass out anonymous leaflets criticizing a local tax levy.

In its report two weeks ago, People for the American Way said dissents by Scalia and Thomas on free speech would "allow more direct government restrictions on political expression."

They then refer to Scalia's dissent in the McIntyre case, in which he said the government could ban her leaflets. That thinking, the group's report said, would have banned Thomas Paine's "Common Sense" and other important political speech.

The report doesn't mention, however, that Thomas made that point first--when he sided with McIntyre in the 1995 case and voted to allow her anonymous leaflets.

Thomas almost always writes for himself in the civil liberties area, where speech, the press, religion and criminal justice are at stake, according to Scott Douglas Gerber in "First Principles," a recent book on Thomas' jurisprudence.

Thomas has urged a "dramatic rethinking" of the court's views in some of those areas, particularly in calling for greater protection of commercial speech, Gerber notes.

In the area of civil rights, Thomas has drawn on his experiences to issue some of his most eloquent and personal concurring opinions.

He insists the Constitution is colorblind and therefore prohibits the government from treating people differently because of their skin color. That includes racial-preference programs, which, he says, stamp minorities "with a badge

of inferiority," making them dependent on the system and prompting whites to have either "attitudes of superiority" or resentment.

In voting rights, as well, Thomas has argued that drawing legislative districts to elect minorities has resulted in racial polarization that destroys "any need for voters or candidates to build bridges between racial groups."

Thomas and Scalia are what legal experts call originalists. They believe the Constitution should be narrowly interpreted as the framers intended. Under that view, courts should not intervene to create new rights or strike down state laws where the Constitution is silent.

"Imaginative efforts to assert constitutional protections would not be much favored in a Scalia-Thomas world," said Carter Phillips, a court advocate.

Unlike Scalia, however, Thomas is more willing to go beyond the Constitution. He refers to a "higher law," such as the Declaration of Independence, which provides that "all men are created equal, that they are endowed by their Creator with certain unalienable rights." On Monday, in the grandparents' rights case, Scalia pointedly refused to rely on such a rationale.

Legal observers point to many decisions in which Thomas and Scalia depart, raising the question of why they remain so inextricably linked in the public mind.

Scalia is certainly a dominant force on the court, a pure intellectual whose quick wit, theatrical tone and piercing questions at argument often steal the show.

Thomas is far more reserved on the bench. Some observers say it may stem from first impressions. The public met Thomas during the rancorous Senate confirmation hearings that aired Anita Hill's sexual harassment allegations.

"A lot of this is lingering hangover from the confirmation battle," said attorney Roberts. "The people who opposed his confirmation are determined to be proven right, despite what the record and the evidence shows."

THE LIBERAL REPUBLICAN

For A Decade, Justice David Souter Has Led a Rear-Guard Attack on the Rehnquist Court's States' Rights Philosophy. Who Would Have Dreamed It?

Los Angeles Times

Sunday, July 2, 2000

David M. O'Brien

Last week, the U.S. Supreme Court ended another contentious term with the justices splitting 5-4 roughly a third of the time. It also marked a decade on the high bench for Justice David H. Souter, who has emerged as one of the sharpest critics of the conservative majority and a leader of the court's liberals.

Souter is rallying dissenters in a relentless battle against a bare majority, commanded by Chief Justice William H. Rehnquist, over states rights and the power of Congress to enact anti-discrimination and other laws. Invariably, Justice John Paul Stevens, named by Republican President Gerald R. Ford, and President Bill Clinton's two court appointees, Justices Ruth Bader Ginsburg and Stephen G. Breyer, join Souter's dissents.

Make no mistake. With the court so bitterly divided, the stakes in the coming presidential election are high for Souter. Depending on who is elected and fills future vacancies, the balance on the court is certain to shift. Either Souter's dissents will become opinions of the court, or his struggle will drag on for 20 years or more.

Last week, Souter was in the bare majority that struck down Nebraska's broad ban on partial-birth abortions, just as he was in stopping the court from overruling its 1973 Roe vs. Wade decision in Planned Parenthood vs. Casey in 1992. Writing for the court in Casey, Souter compared the abortion controversy to the 1937 constitutional crisis over the court and to its overruling the doctrine of separate but equal in education in Brown vs. Board of Education in 1954. The court correctly abandoned precedents in those instances, Souter stressed, but Roe is different and overturning it would badly damage the court's prestige and the public's faith in constitutional principles.

Earlier this term, Souter again led the charge in blasting the other appointees of Republican Presidents Ronald Reagan and George Bush, this time for striking down the Violence Against Women Act. He attacked them for limiting congressional power and for second-guessing the reasonableness of federal legislation addressing violence against women, which costs the national economy $ 3 billion annually.

Similarly, Souter challenged the court's conservative majority when it invalidated the Brady Handgun Violence Prevention Act and the Religious Freedom Restoration Act in 1997, the Gun-Free School Zones Act in 1995 and other laws. In its haste to prop up states' rights, the majority dismissed the social and economic consequences of guns in schools. But Souter countered with a one-two punch, underscoring the power of Congress to respond to national problems and its need to combat the effects of gun violence on the economy.

No one predicted the role Souter now plays. When Bush nominated him July 23, 1990, legal analysts predicted he would solidify a conservative court, instead of carrying on the tradition of liberal Justice William J. Brennan

Jr., whose seat he fills and who was also named by a Republican president, Dwight D. Eisenhower (who later regretted his selection). How wrong Souter has proved them.

Labeled the stealth candidate, Souter was a mystery man, little known outside New Hampshire. At the urging of Bush's chief of staff, former New Hampshire Gov. John H. Sununu, and Sen. Warren B. Rudman (R-N.H.), he had been seated on a federal appellate court three months earlier but had yet to decide a case. Before that, he spent seven years on the state supreme court, after serving on a superior court and as state attorney general.

Nonetheless, Souter offered candid insights during his two days of confirmation hearings before the Senate Judiciary Committee. Unlike Judge Robert H. Bork, whose 1987 nomination was defeated, Souter was congenial, wry and, as he put it, open-minded: not wedded to a rigid judicial philosophy but concerned with history and tradition.

Most revealing, Souter declared that the Constitution's majestic clauses--the due-process and equal-protection clauses--are broad and demand attention to evolving precedents. He also declined to embrace the hard-line states' rights position of conservative senators like Strom Thurmond (R-S.C). So, not surprisingly, he now fights with the standard-bearers of that position, Rehnquist and Justices Antonin Scalia and Clarence Thomas.

Actually, Souter's dogged stance should come as no surprise. It is rooted in his family heritage of Yankee Republicanism. His great-great-grandfather played a role in securing Abraham Lincoln's presidential nomination in 1860. Other relatives worked in the Underground Railroad, helping escaped slaves to freedom. Throughout U.S. history, Yankee Republicans have defended the will of the nation and championed freedom for all in standing up to states' rights advocates, who preached parochialism and often harbored racism.

Unquestionably, Souter considers himself engaged in an epic struggle comparable to the judicial controversy of the 1930s. Then, a conservative majority of the court struck down early New Deal legislation. In 1937, Democratic President Franklin D. Roosevelt retaliated by proposing to increase the number of justices from nine to 15, thereby securing a favorable majority. The court, in turn, backed down with its switch-in-time-that-saved-nine decisions, and Roosevelt's court-packing scheme was defeated.

For more than 50 years after the 1937 constitutional crisis, the court deferred to the exercise of congressional power in passing the Civil Rights Act of 1964 and most other laws. But Rehnquist's bare majority appears bent on turning back the clock, even drawing into question the constitutionality of the Civil Rights Act.

Repeatedly, Souter skillfully reminds the court and the country how disastrous--"tragic" is his word--conservative judicial activism was in the 1930s and at present. Then and now, he emphasizes, the court's decisions rest on nothing more than empty formalistic distinctions. Back in the 1930s, they were contrived to preserve the late-19th-century philosophy of laissez-faire economics. Now, they aim to advance what he considers to be an intellectually indefensible conception of states' rights. Like the pre-1937 court, the Rehnquist court thwarts the operation of the national democratic process in disregard of our nation's history and the world economy.

Again, last week, Souter led the dissenters in fighting the conservative majority's chipping away at the high wall of separation of church and state. When the majority overturned two precedents in upholding direct government aid to religious schools, Souter passionately defended principle and displayed a keen knowledge of history, just as he did when the court struck down affirmative-action programs and signaled an end to efforts to achieve integrated schools.

Souter's oak-paneled, spartan chamber offers another clue to his emergence as an eloquent, scholarly advocate of both federalism and individual rights. Above the desk where Souter works--without a computer, unlike other justices--hangs a portrait of Chief Justice Harlan F. Stone. Both justices share roots in New Hampshire and Massachusetts, and Stone was known as a "New England woodcarver" for his carefully crafted opinions. Appointed by Republican President Calvin Coolidge in 1925, Stone was elevated to chief justice by Roosevelt, in 1941, because he championed the court's deference to Congress and its protection of fundamental rights and minorities.

Souter also frequently cites another Republican justice, John M. Harlan, who was appointed by Eisenhower. Harlan was the grandson and namesake of Justice John Marshall Harlan (1877-1911), who coined the phrase "the Constitution is colorblind" in his dissent in Plessy vs. Ferguson in 1896. The second Harlan (1955-71) continued Stone's combination of judicial self-restraint and ardent defense of individual rights. Like Harlan, Souter was a Rhodes scholar at Oxford University before he went to Harvard Law School. His intellectual kinship with Harlan is evident in his opinions defending the right of privacy, the separation of church and state and evolving standards of due process and equal protection.

Like Stone and Harlan, Souter is a Republican in the tradition of Lincoln and the Reconstruction Congress. Remaining true to principles, with a grand view of history, Souter wages war with Reagan's and Bush's appointees over their judicial activism and social conservatism. Asked about his stance, he might wryly reply he is a Republican from a Republican state, who just happens to make a living writing liberal dissents.

4TH CIRCUIT JUDGES STEERING TO THE RIGHT

Supreme Court Likes Appeals Panel's Direction but Keeps it From Pushing Too Far, Experts Say

The Washington Post

Wednesday, July 5, 2000

Brooke A. Masters

The U.S. Court of Appeals for the 4th Circuit has called into question things many Americans take for granted: congressional power to help rape victims and protect privacy, environmentalists' right to sue polluters, and--most dramatically--the 34-year-old requirement that police tell criminal suspects they have the right to remain silent.

Each time, the Richmond-based court, which oversees Maryland, Virginia and three other states, sought to move the country to the right. The decisions were so controversial and full of national import that the U.S. Supreme Court took nine 4th Circuit cases this term--up from four the year before.

Now that the high court session is over, legal experts say the Supreme Court majority has sent a clear signal to the appellate court: We like what you are doing, but sometimes you go too far. That means the conservative 4th Circuit majority is unlikely to shift direction, analysts said.

"The message the high court is sending is not that the ship is heading in the wrong direction, but that the engines are going too fast," said John C. Yoo, a law professor at the University of California at Berkeley. "They misjudged how aggressive the Supreme Court wanted to be."

The high court overwhelmingly rejected the challenges to Miranda warnings, environmentalists and a federal law preventing states from selling driver's license information. But a 5 to 4 majority upheld the 4th Circuit on two high-profile cases--one that struck down a law allowing rape victims to sue their attackers in federal court and another declaring that the Food and Drug Administration cannot regulate tobacco.

In the major death penalty case of the term, the justices ruled that the appeals court was too skeptical of prisoners' claims, but it agreed with the 4th Circuit in two of three other capital cases.

"They pushed pretty far, and in some cases, the Supreme Court left them hanging," said Yale University law professor Akhil R. Amar. "There was no harm in asking, but the Supreme Court said no more often than it said yes. . . . The not-so-subtle message is: We lead, you follow."

Even so, the 4th Circuit's 55 percent reversal rate was better than three other circuits with high-profile cases--the famously liberal 9th Circuit was reversed in nine of 10 cases. Overall, the Supreme Court reversed 58 percent of the 76 cases that came from lower courts.

"The 4th Circuit is right on the mark," said University of Virginia law professor John C. Jeffries. "Issues such as federalism are going to involve a lot of line-drawing. But in concept, [the Supreme Court] and the 4th Circuit are in line."

Most of the 4th Circuit judges contacted for this article declined to comment or did not return phone calls. But Paul V. Niemeyer, a Baltimore-based member of the court, said he

tries not to worry about the circuit's batting average.

"As you decide cases, you call them as you see them. And what happens afterward happens," he said. "I don't think you can foresee these things while you're writing."

The 4th Circuit's biggest loss came in the case where the judges took the biggest risk. In the case of Charles Dickerson, who was accused of robbing several Washington area banks, the appeals court focused on an issue that neither party--nor any law enforcement agency--had raised. Led by Judge Karen J. Williams, the court declared that Miranda warnings were not constitutionally based and had been overruled by a long-overlooked 1968 law.

Last week, the U.S. Supreme Court shot down the appellate court, 7 to 2. Chief Justice William H. Rehnquist, who has praised the 4th Circuit for its low reversal rate, wrote the majority opinion. Although the language was polite, even gentle, the message was clear:

"Miranda announced a constitutional rule that Congress may not supersede . . . [and] we decline to overrule Miranda ourselves," Rehnquist wrote.

The 4th Circuit did better on cases involving federal power, a hotbed of legal change. Over the past five years, a five-member majority of the Supreme Court has sought to curb federal efforts to regulate and legislate in new areas, and the 4th Circuit has followed its lead.

The high court agreed with the 4th Circuit that the 1994 Violence Against Women Act was unconstitutional and that Congress had not given the Food and Drug Administration the power to regulate tobacco as a drug. But in a landmark privacy case, the justices voted 9 to 0 that Congress has the power to prevent states from selling driver's license information.

"The 4th Circuit enables the Supreme Court to look more moderate on federalism issues," said Yale law professor Judith Resnik. "The Supreme Court majority is working a substantial revolution, but it is not going quite as far the 4th Circuit wants to go."

A South Carolina environmental case demonstrated how the high court recoiled this year from some of the 4th Circuit's conclusions.

In that case and several others, the lower court used earlier Supreme Court opinions by Justice Antonin Scalia to sharply limit the ability of citizen groups to sue polluters and win civil penalties. But a 7 to 2 high court reversed that case in January.

The 4th Circuit "followed Scalia's logic to its absurd result, and the Supreme Court slapped them down," said Georgetown University law professor Richard J. Lazarus. "What happened is that the justices who had signed onto what Scalia had written in the earlier cases didn't buy into the result."

Similarly, the high court found that the 4th Circuit had gone too far in death penalty cases.

In the case of Terry Williams, who has been on Virginia's death row for 14 years for killing a Danville man, the entire court rejected the 4th Circuit's toughest-in-the-nation standard for reviewing capital cases. The justices also unanimously rejected a death penalty ruling in the case of Virginia inmate Michael Williams.

Yet the Terry Williams opinion makes it difficult for death row prisoners to get new hearings, law professors said, and the high court upheld two other Virginia death sentences this year.

"The Supreme Court is just a step more moderate than the 4th Circuit" in death penalty appeals, said University of Virginia law professor George A. Rutherglen.

Court observers and several recent opinions from the 4th Circuit suggest that the judges are listening to the Supreme Court's criticism.

After learning that it was 1 to 1 in federalism cases, the 4th Circuit announced another major decision last month.

North Carolina officials had argued that the federal government did not have the power to ban the hunting of an endangered species--red wolves--because they were not part of interstate commerce. That kind of argument had swayed the Richmond court in two earlier cases. But this time, the 4th Circuit upheld the federal regulation.

"It is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives," Chief Justice J. Harvie Wilkinson wrote for a 2 to 1 majority.

But that moderation is unlikely to extend to death penalty cases and others involving criminal rights, analysts said.

"It's hard to be optimistic," said Stephen Bright, of the Southern Center for Human Rights. "There are a lot of judges on the 4th Circuit who have a clear agenda, and I don't think the Supreme Court reversing them is going to slow them down."

HIGH COURT'S UNCOMMON BOND DESPITE CONFLICTS, SUPREME GOAL UNITES THE NINE JUSTICES

USA TODAY

Friday, June 30, 2000

Joan Biskupic

WASHINGTON -- On paper, where opinions give life to law, the Supreme Court's nine justices can seem like a family that is constantly bickering. During the term that ended Wednesday, they accused each other of hypocrisy, hostility and flat-out stupidity. Twenty rulings came down to a single vote, the most 5-4's in nearly a decade.

But a look behind America's most mysterious branch of government as it concluded its most consequential term in years reveals a decorous rhythm, borne of the familiarity and routines that have developed on a court that has been together a near-record six terms. While the secretive court rushed to produce polarized rulings on abortion, gay rights and a range of other divisive issues, there also were parties to attend and rituals to maintain.

On the day last week that they split 5-4 on a decision that sent Texas inmate Gary Graham to his execution, the justices lunched together in their private dining room and later feasted on barbecued ribs and fried chicken at a farewell party for a court official. And even as they frantically circulated fractious opinions over the past several weeks, they made speeches together and joined in a videotaped gag for Chief Justice William Rehnquist that was organized by his clerks.

The justices never begin private conference or take the bench without handshakes all around. That was the situation on Wednesday, just before they issued caustic 5-4 opinions that buttressed abortion rights and dealt a setback to gay rights.

"No one's not going to go to the sing-along because of someone else's opinion," said one justice, referring to the end-of-term party for the court's clerks that culminates with the chief justice leading the staff in patriotic song.

Such are the dual orbits of the justices on a court where members are appointed for life, virtually all arguments take place on paper and a grudge gets you nowhere.

"I can think of few times over the years when a wound continued to draw blood after an incident between justices," said University of Chicago law professor Dennis Hutchinson, who follows the court closely. "When the term ends, they go to Europe and elsewhere together, and when they return, they start all over again. Their loyalty is to the institution."

Each justice an island . . .

There is a natural distance among the nine justices that helps to diffuse personal conflict.

In the vast marble court building, the justices hole up with their clerks in individually decorated offices: Arizona's Sandra Day O'Connor amid Navajo rugs and art from the Southwest; California's Anthony Kennedy with paintings reflecting 19th-century realism; New Hampshire's David Souter beneath New England landscapes; and New York's Ruth Bader Ginsburg surrounded by 20th-century modernist art. Many of the pieces are on loan from the National Gallery of Art or the National Museum of American Art.

Some justices and their clerks toiled well into the night in the last weeks of the 1999-2000 term, scarfing vending-machine snacks or

calling out for pizza and subs. The clerks for Stephen Breyer, the justice who wrote the majority opinion striking down Nebraska's ban on a mid-term abortion procedure, figured out how to order Krispy Kreme donuts online. They also figured out that the sweets are better when warm.

The justices also kept up their individual passions: John Paul Stevens, at 80 the court's oldest member, played tennis; Breyer, 61, kept biking and O'Connor, 70, dutifully attended her aerobics class in the court's top-floor gym. Clarence Thomas, 52, talked up his new recreational vehicle, practically the size of a school bus. Rehnquist, 75, kept to the morning walks that help his bad back.

The conservative chief justice, the longest-serving member of the current court with 28 years on the bench, also interviewed potential clerks for the 2001-2002 term, two years away. That is a sign that Rehnquist, who was appointed by President Nixon and elevated to the center seat by President Reagan, won't be retiring soon.

Some court observers have speculated that Rehnquist might step down during the next president's term, along with the liberal Stevens and possibly O'Connor, who straddles the center but votes with the liberal wing on some social issues such as abortion.

. . . but also part of the main

Each case that comes before the court is first subject to oral arguments in the white marble and red velvet courtroom. After one of those public sessions and then a private vote, the chief justice (or, if he is in dissent, the most senior justice in the majority) decides who gets to write the opinion.

Rehnquist, a big-shouldered man with a brusque style, has a reputation among his colleagues for even-handedness. It's the product of 14 years as a sometimes-frustrated associate justice on a more liberal Supreme Court where he lacked seniority.

Around the conference table, no one is allowed to talk twice until each justice has spoken once. Usually, every justice gets at least one majority opinion from each two-week session of oral arguments.

Tension begins to rise when the justices, hoping to retain majorities and prevent defections, start exchanging written drafts of their opinions.

By this term's end, poker buddies and fellow conservatives Rehnquist and Antonin Scalia, 64, were in disagreement on several cases, notably over the Miranda warnings that police give to crime suspects and a Colorado law keeping anti-abortion protesters at least 8 feet away from people entering clinics.

The chief justice angered Scalia by ruling that the Miranda requirement could not be weakened by Congress and by backing the majority's decision to uphold the Colorado law.

Meanwhile, Breyer and the conservative Thomas, usually affable seatmates on the bench, drew back from each other as they read aloud their conflicting opinions on what opponents call "partial birth" abortion during Wednesday's court session. And Kennedy, the mild-mannered 63-year-old who this term was on the losing side more than usual, wound up feeling wronged by most everyone.

The tension built gradually this term.

Majority and dissenting opinions circulated for weeks, and the justices sometimes took each other on paragraph-by-paragraph, footnote-by-footnote.

"Obvious hyperbole!" the bow-tied Stevens retorted in the tit-for-tat he and Rehnquist exchanged as the Stevens' majority struck down prayer at public school football games in a Texas case.

Stevens, a Chicago native who now spends considerable time at his Florida home, is indicative of the court's shift to the right. The 1975 Ford appointee now is among the court's most liberal members.

When Rehnquist was in the majority in upholding the Miranda warnings, Scalia accused him of playing "word games."

Divisions were unusually sharp at the end of the term between Rehnquist and Scalia, who was appointed to the court by Reagan in 1986, the same year Reagan moved Rehnquist up to chief. But perhaps symbolic of their enduring friendship was a scene Tuesday when Rehnquist turned the baton over to Scalia during the sing-along. He warned his pal "Nino," he'd have to give it back.

Work together, stay together

No one on the bench escapes Scalia's piercing put-downs. He has called his colleagues' approaches radical, dishonest, even laughable. However, Scalia's fellow justices seem to shake it off, chalking it up to an argumentative nature that was stoked during his time as a law professor.

Eleven years ago, after saying that O'Connor's rationale in an abortion case could "not be taken seriously," the buzz around the court was that the first woman justice was fuming. That appears to be history, particularly because O'Connor often controls the outcome of close cases.

Approaching two decades on the court, O'Connor was in the majority this term more than any other justice. She crafted the prevailing rationale in many of the key disputes. On Wednesday, she provided decisive votes against the Nebraska ban on "partial birth" abortion and in favor of federal aid to parochial schools.

Among her regular bridge pals are Kennedy, who like O'Connor is at the center of the court's political spectrum, and Breyer, who is further to the left.

The silver-haired Breyer, whom President Clinton appointed in 1994 to succeed Harry Blackmun, held onto O'Connor's vote in orchestrating the court's rejection of the Nebraska statute.

Surprisingly, Kennedy, who had provided a critical vote in a 1992 case in which the court affirmed abortion rights, sided with the court's anti-abortion faction this time. He cited the "moral difference" between the "partial birth" technique and other methods used for mid-term abortions.

From the bench, Kennedy expressed a sense of betrayal at how the abortion ruling he had supported in 1992 was being cited by the court to justify allowing the "partial birth" abortion procedure that he finds reprehensible. He called the majority's view in the Nebraska case as a "dispiriting disclosure of the illogic and illegitimacy of the court's approach."

But that won't stop Kennedy from spending part of his summer recess with O'Connor, Breyer and Ginsburg, with whom he also differed in the Nebraska case. They'll go to London for a series of American Bar Association events.

Ginsburg, Clinton's first appointee to the court, votes consistently on the left and is most aligned with Souter, the 1990 Bush appointee whose liberal record indicates that a president can never be certain how an appointee will rule once on the bench.

Off the bench, the globetrotting, opera-loving Ginsburg couldn't be more different from Souter, a bachelor who likes to eat alone and, as soon as the term ends, drives back to his beloved New Hampshire for the summer.

Just weeks before the 1999-2000 term began, Ginsburg learned she had colon cancer and had emergency surgery. Although she underwent

chemotherapy treatment for the entire term, she missed no work and kept up her social schedule.

She and Scalia, her ideological opposite, are longtime chums. Her prized photos include one of the pair on an elephant during a mission to India (Scalia on the front; Ginsburg on the back) and another of them in white-powdered wigs and 18th-century costume for their roles as extras in a Washington Opera performance.

On most decisions, Scalia is closely aligned with Thomas, a fellow conservative.

In the years immediately after his appointment in 1991, Thomas was in virtual lockstep with Scalia. But now, as he approaches his 10-year anniversary, Thomas has developed a distinct voice: more conservative than Scalia, more prone to reverse court precedent and more apt to rely on legal history predating the Constitution.

The youngest member of the bench, Thomas turned 52 last Friday and broke from his routine for a luncheon party with his clerks at a Morton's of Chicago steakhouse in Washington. Much of the talk around the table was of the new RV Thomas bought for travels with his wife, Virginia, and Mark, the great-nephew he adopted. Thomas, a car enthusiast who last year was grand marshal for the Daytona 500, keeps a model of the RV in his chambers.

Thomas is grayer and heavier than the man millions of Americans saw nine years ago in a sensational Senate confirmation hearings in which he was accused of sexual harassment. Despite the enduring fallout from that ordeal and the ongoing divisions on the court, Thomas never misses a chance to declare how good the relations are among the justices.

"I sit between Justices Ginsburg and Souter at our conferences," he told an audience in Oklahoma City recently. "I sit between Justices Kennedy and Breyer on the bench. You can add up the times that we agree. Yet, never in the nine terms has one unkind word been spoken . . . and there have been days when many of us have been seething about one opinion or another."

FIRST MONDAY

When They Hear These Nine Disputes Next Fall, the Justices May Be Sitting in the Glare of the Electoral Spotlight.

Legal Times

Monday, July 10, 2000

Stephen J. Wermiel

The highly emotional social issues-abortion, gay rights, and church-state separation-that so deeply divided the Supreme Court on the final day of this term are absent so far from the justices' fall schedule. But the upcoming docket poses other difficult questions. In particular, the Court has found some puzzling new problems involving the limits on congressional power, the scope of free speech, and the practices of the police.

For several months to come, the Court will be making news for reasons other than jurisprudence. The next term begins Oct. 2, just five weeks before the presidential election. Although the justices are unlikely to issue any major new decisions before Election Day, the future direction of the Court is already becoming a campaign issue. The quadrennial political spotlight may well pause on the 2000-2001 docket.

Among cases already granted review, some sound familiar themes for the Court, which will enter its 15th year of stewardship under Chief Justice William Rehnquist. Once again, the justices will debate the Constitution's limits on the long arm of Washington.

The scope of state sovereign immunity and the authority of Congress to make states subject to lawsuits are issues that have deeply divided the justices in recent years. In University of Alabama Board of Trustees v. Garrett, No. 99-1240, the Court will decide whether, in passing the Americans With Disabilities Act (ADA) in 1990, Congress had the authority under '5 of the 14th Amendment to abrogate the sovereign immunity of states under the 11th Amendment.

Back in January, the Court had ruled 5-4 that Congress did not validly waive state sovereign immunity under the federal Age Discrimination in Employment Act. Less than two weeks after that ruling (in Kimel v. Florida Board of Regents), the Court agreed to hear two cases examining state liability under the ADA. But those cases settled at the urging of disability rights advocates, who feared a loss in the high court.

Since the issue of state liability for violating the rights of disabled people under the ADA has arisen with some frequency in federal appeals courts, the justices had no difficulty finding another vehicle. This case comes from the U.S. Court of Appeals for the 11th Circuit, which reversed a grant of summary judgment for the University of Alabama.

Constitutional limits on the power of both Congress and the executive branch are at issue in Browner v. American Trucking Associations, No. 99-1257. The case involves the important, but rarely cited, nondelegation principle that Congress cannot confer its own legislative authority on executive agencies. The D.C. Circuit ruled that the Environmental Protection Agency improperly exercised legislative power when it adopted tough new regulations for ozone and soot under the Clean Air Act. The court said that the EPA's interpretation of its authority under the act was so broad that it was as if Congress had delegated its lawmaking function. The case is generating enormous

interest because it could scale back the entire federal regulatory system.

Even if the case were only an environmental dispute, the issues would be of great importance to industry, which is seeking eased air quality standards, and environmentalists, who are concerned that pollution levels will be allowed to rise. Indeed, the high court raised the environmental stakes by later agreeing to hear the related appeal of American Trucking Associations v. Browner, No. 99-1426, which addresses the role of cost-benefit analysis in setting Clean Air Act standards. The Court will hear arguments that the EPA has considered only the benefits to public health, not the costs of implementation.

In yet another regulatory dispute, the Court will look once again at the reach of the federal power to regulate interstate commerce. The issue comes up in an unusual setting-an assertion by the U.S. Army Corps of Engineers that it has jurisdiction over a proposed landfill outside Chicago. The site, where some local communities want to dump solid waste, contains inland waters that have become home to migratory birds. The 7th Circuit ruled that the Clean Water Act gives the Corps authority over intrastate waters where migratory birds are present and that this is a proper exercise of Congress' power to regulate interstate commerce. The case is Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, No. 99-1178.

YOU TALKIN' TO ME?

In another area of ongoing concern, the applications of federal and state statutes raise significant First Amendment issues for the Court next term.

In Bartnicki v. Vopper, No. 99-1687, and United States v. Vopper, No. 99- 1728, the justices face the question of whether individuals can be sued for damages for revealing the contents of telephone calls that were illegally overheard and recorded by other individuals. The 3rd Circuit ruled that federal and Pennsylvania wiretapping laws violate the free speech guarantee of the First Amendment when used to impose liability on people who did not themselves illegally intercept phone conversations.

The case is of particular importance to the news media, which sometimes receive and disseminate information that may have been obtained by third parties through questionable means. The 3rd Circuit relied on a line of Supreme Court decisions refusing to punish the publication of truthful material that was not illegally obtained by the publisher. But the D.C. Circuit reached the opposite result in a similar case. Now the Supreme Court will try to resolve the conflict.

The high court will also decide whether Congress may prohibit the use of Legal Services Corp. funds to try to change existing welfare rules. The 2nd Circuit held that Congress violated the First Amendment in 1996 when it barred LSC lawyers from taking on welfare clients to challenge welfare rules. The court said that this provision-which was part of a larger set of restrictions, most of which were upheld-was unconstitutional viewpoint discrimination because it singled out those who argued against the status quo. The related cases are LSC v. Velazquez, No. 99-603, and United States v. Velazquez, No. 99-960.

Another case with First Amendment implications plunges the Court into the political thicket and indirectly back into the debate over term limits. In Cook v. Gralike, No. 99-929, the justices will examine a voter-initiated amendment to the Missouri Constitution that required the state's congressional delegation to either support a term-limits amendment to the U.S. Constitution or be labeled on future ballots as having "disregarded voters' instruction on term limits." The 8th Circuit ruled that the Missouri amendment violated the First Amendment, as well as the Article I protection for legislative "speech and debate" and other provisions.

SEARCHING LOOKS

On the criminal side of the docket, the justices also have a number of interesting disputes. Once again, the spotlight is on the Fourth Amendment.

In Indianapolis v. Edmond, No. 99-1030, the Court will look at police roadblocks on city streets. The 7th Circuit suggested that such roadblocks might be valid if justified to promote traffic and highway safety. But Indianapolis used the roadblocks to try to find evidence of criminal drug use. Because it was not based on any individualized suspicion, this practice violated the Fourth Amendment protection from unreasonable search and seizure, said the 7th Circuit.

In Ferguson v. Charleston, No. 99-936, the high court will step into the emotional debate over prosecuting pregnant women who use drugs or engage in other practices that might endanger their babies. The Court will review the practice at a Charleston public hospital of testing pregnant patients suspected of cocaine use and then turning the results over to police if the test comes back positive. The 4th Circuit upheld the practice, finding the tests justified under the Fourth Amendment.

Finally, the Court will decide, in Atwater v. Lago Vista, Texas, No. 99- 1408, whether the Fourth Amendment limits police authority to arrest people and take them into custody for offenses that are punishable only by fines. In this case, the person was arrested for failure to wear a seat belt. The 5th Circuit found that the arrest was not an unreasonable seizure under the Fourth Amendment.

That's nine interesting cases to begin observing the 2000-2001 term. The justices have actually granted review in some 34 cases so far. As they add more, possibly during the summer, or more likely in September, the political process will surely be ratcheting up its scrutiny of the Supreme Court.