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Section 3: The 2000 Election and the Supreme Court

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THE 2000 ELECTION AND THE SUPREME COURT

In This Section:

THE TIPPING POINT

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Justice Antonin Scalia's demeanor was charming, his delivery witty. But his message was serious, and some of his words were blunt. Scalia's subject at an April 18 symposium hosted by Michigan State University in a Washington hotel was "judicial activism." The 64-year-old Reagan appointee's main targets were "the liberal (Supreme) Court of the '60s and '70s"-which he said sometimes used "phony and disreputable" reasoning to distort the meaning of laws-and the U.S. Congress of more recent years, which he accused of "legislative activism." And his conclusions went to the fundament of our constitutional system.

Countering academic critics who have turned the old imprecation of activism against Scalia and his conservative colleagues, Scalia said that "the current Court is considerably less activist ... than the Court of a few decades ago." He acknowledged that "conservatives are just as willing to play this game as liberals are now," and that "we are striking down as many federal statutes from year to year as the Warren Court at its peak." But he noted that the Court has been voiding fewer state and local statutes than it did in previous decades. And he stressed that most federal and state laws that have fallen lately have "involved attempts by a legislature to do something quite novel and often even downright bizarre." He lingered on "bizarre."

As one example Scalia (a devout Catholic) cited Congress's Religious Freedom Restoration Act of 1993, which sought to force the Court to require governments to provide more accommodations to religion than the Justices (in a 1990 opinion by Scalia) had found required by the First Amendment's guarantee of freedom of religion. This act was, Scalia said, the only statute he had ever seen in which Congress had "purported to direct the Supreme Court to interpret the Constitution in a certain way." The Court struck that law down in 1997 in a 6-3 vote. Scalia blasted another law as a "congressional search for some patsy to pay the welfare benefits that it was unwilling to appropriate out of public funds." That one, which the Court struck down 5-4 in 1998, was a 1992 statute retroactively assessing companies that had left the coal business as long ago as 1965 for the cost of health benefits for miners, their widows, and children. And he assailed a provision of the Communications Decency Act that had effectively barred Internet transmission of sexually explicit materials protected by the First Amendment. The Court voided that law unanimously in 1997. Laws such as these are so clearly unconstitutional, Scalia suggested, that judicial decisions striking them down are "more an indication of legislative activism than of judicial activism."

"Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution," Scalia asserted. "My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality.... But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution ... then perhaps that presumption is unwarranted."

In the works at the time, as Scalia knew, was a 5-4 decision in which he and his fellow conservatives had voted to strike down part of the Violence Against Women Act of 1994, which had swept through Congress by wide bipartisan majorities, as an invasion of the

traditional domain of the states. When that decision (U.S. vs. Morrison) came down on May 15, Chief Justice William H. Rehnquist's majority opinion gave lip service to the familiar "presumption of constitutionality." But the Court's bold action-lopping off a provision that had authorized victims of rape, domestic violence, and other "crimes of violence motivated by gender" to file federal civil rights lawsuits against their suspected assailants-spoke louder than Rehnquist's typically bland words.

It was only the second decision since 1935 holding that some crimes and other matters are so clearly noncommercial and so clearly within the domain of the states that Congress lacks the power to punish them by invoking its power to protect interstate commerce. It was also the 22nd congressional enactment that the Rehnquist Court has struck down in the past five years-a near- record pace. The 23rd came a week later, when a 5-4 majority invoked the First Amendment to void a law that had effectively required many cable television systems to limit sexually explicit programming to late-night hours. The Court will resolve challenges to several more acts of Congress in the next two or three weeks.

Justice David Souter warned in his opinion for the dissenters in Morrison that by intruding into Congress's domain, the majority had taken what "can only be seen as a step toward recapturing the prior mistakes" that had "in large measure provoked the judicial crisis of 1937." The Bush-appointed Souter, who has proved to be fairly liberal, was alluding to the long-discredited line of Supreme Court decisions striking down a succession of federal regulatory laws passed before and during the New Deal. These decisions inspired President Franklin D. Roosevelt's court-packing plan of 1937, which in turn helped prompt the Court to back down. For the next 55 years, it virtually abandoned any pretense of curbing the reach of congressional power, while gradually expanding its protection of civil liberties, especially in cases pitting individuals against states. Joseph R. Biden Jr., D-Del., the main Senate sponsor of the Violence Against Women Act, was more blunt than Souter in his criticism of Morrison in an interview with The Los Angeles Times: "These folks are judicial activists."

Perhaps so. But the same can be (and has been) said of the Court's four liberals, who see the Constitution as a tool to push for social reform. The activist label is apt for all nine Justices to the extent that judicial activism includes invoking novel or debatable interpretations of the Constitution to strike down democratically adopted state or federal laws and practices that offend one's moral or political beliefs, while showing relatively little deference to the other branches of government and the voters. Among the cases in which the Court's liberals (joined by one or both of the centrist conservatives, Sandra Day O'Connor and Anthony M. Kennedy) have done this are a 1999 decision striking down state and federal laws limiting new residents of California to the welfare benefits they would have received in their home states; another voiding a Chicago ordinance that gave police broad powers of arrest to sweep suspected gang members and those who associate with them from neighborhood streets; two 1996 decisions expanding gay rights and casting a shadow of doubt over the constitutionality of all single-sex education; a 1995 decision sweeping away all laws limiting the terms of members of Congress; and a 1992 decision barring public schools from sponsoring prayers (even nonsectarian, nondenominational ones) at public school graduations.

One paradox behind all the finger-pointing about judicial activism is that the Supreme Court-nine unelected, life-tenured, black-robed lawyers who keep striking down popular laws adopted by the people's elected representatives-has always fared far better than Congress and substantially better than the executive branch in polls measuring public confidence in the three branches ever since such polls began in 1966. And the gap has been widening in recent years.

The recent go-rounds in the Justices' battle over the direction of American law came during the run-up to a presidential election that may well-should one or more Justices retire-have a dramatic impact on the Court's ideological balance, perhaps for decades to come. Even a single strategic appointment (a liberal replacing a conservative or vice versa) could tip the Court decisively to the liberal or conservative side on issues such as affirmative action, racial gerrymandering, public aid (including vouchers) for religious schools and their students, and the battle over federalism-based curbs on congressional power that has produced identical 5-4 splits in Morrison and nine other decisions since 1992.

By the end of June, the Justices are expected to underscore how large a role they play in governing the nation, and how big the stakes in this election could be, by issuing decisions on a bunch of major issues: whether to strike down some or all of the 30 state laws banning "partial-birth" abortion; whether the Boy Scouts of America must admit gay members and scoutmasters; whether the Constitution bars student-led prayers at high school football games; whether to strike down California's open primary system; whether to overturn the Warren Court's most famous precedent, the 1966 decision in Miranda vs. Arizona; and more.

Already this year O'Connor and Kennedy have teamed with the Court's three most conservative members-Rehnquist, Scalia, and Clarence Thomas-in 5-4 decisions barring Congress from subjecting state governments to the federal law that bars discrimination against older employees; voiding the Clinton Administration's efforts to regulate tobacco; making it harder for the Justice Department to require that election districts be redrawn to help elect black and Hispanic candidates; making it easier for police to stop and frisk people who flee when approached; and voiding the Violence Against Women Act. Liberal-leaning John Paul Stevens, Souter, Ruth Bader Ginsburg, and Stephen G. Breyer (the latter two are Clinton appointees) have dissented from all these decisions. The same was true of, for example, the Court's 1997 decisions striking down a portion of the Brady gun control act and overruling a 1985 precedent that had barred public school teachers from teaching federally financed remedial classes at religious schools, and its 1995 decision curbing federal affirmative action preferences.

Two June 5 decisions, on the other hand, illustrate how simplistic it is to see the Justices solely as two undifferentiated ideological blocs. In the first case, an eclectic majority-O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas-held that a Washington state law took too little account of the constitutional rights of parents in permitting a judge to order visiting rights for grandparents over a mother's objection, while splintering as to the constitutional rationale; Stevens, Scalia, and Kennedy dissented for very diverse reasons. In the second case, an 8-1 majority (with only Rehnquist dissenting) ruled that Kenneth W. Starr, then the Whitewater independent counsel, had violated a plea agreement with Webster L. Hubbell by indicting him for tax evasion on the basis of thousands of pages of personal financial records Hubbell had produced under a grant of immunity.

For its next term, which begins in October, the Court has already scheduled a major test of the sweeping, open-ended powers that Congress has for decades delegated to agencies such as the Environmental Protection Agency under various regulatory laws. One issue in that case (American Trucking Associations vs. Browner) is whether to reinterpret the Clean Air Act to require the government to weigh the economic costs against the public health benefits of proposed regulations mandating reductions in air pollution. In another case (University of Alabama vs. Garrett), the Court will consider whether states are constitutionally immune from suit under the Americans With Disabilities Act. In a third (Solid Waste Agency

vs. U.S. Army Corps of Engineers), the issue is whether to curb federal power over matters such as a local government's plan to fill (for use as a waste-disposal site) an isolated intrastate wetland that could provide habitat for migratory birds. These are big, important issues.

And in the next few years, the Court is likely to decide the fate of the thousands of federal, state, and local race and gender preferences and racial gerrymanders of election districts. Despite a succession of 5-4 decisions curbing (but not flatly barring) use of such racial classifications, many such programs have survived the cautiously worded majority opinions and concurrences of the often-ambivalent O'Connor. Also in the pipeline are cases in which the Justices will be asked to rule on tuition vouchers for religious schools, various campaign finance restrictions, gay rights issues, the parameters of "right to die," privacy, crime, freedom of speech, property rights, and more-and on now-unforeseen issues that will become important as technology races ahead.

What the Election Could Do

The outcomes of many such future cases will probably depend on who appoints the Court's next one, two, or three members. Any or all of the three oldest Justices-Stevens (80), Rehnquist (75), and O'Connor (70)-might well retire in the next four to eight years. It's also possible that others will step down. If Al Gore wins the election and Rehnquist or O'Connor retires, or if George W. Bush wins and Stevens or O'Connor retires, the new President would be presented with an opportunity to engineer the kind of sharp shift in the Court's balance that President Reagan attempted in 1987 when he nominated then-Judge Robert H. Bork to replace the moderate Lewis F. Powell Jr.

A one-vote swing to the liberal side would change the law most dramatically. A liberal Gore appointee replacing a conservative could help entrench race and gender preferences and abortion rights for decades to come; doom tuition vouchers and other government aid to private and religious schools; and join the four who have openly suggested that if they get a fifth vote, they will deep-six Rehnquist's pet project: the line of 5-4 federalism rulings since 1992 that have curbed the federal government's powers to regulate either the states or matters traditionally within their domain.

On the other had, a conservative Bush Justice replacing a liberal-or O'Connor-could wipe out most or all preference programs maintained by federal, state, and local governments; loosen restrictions on church-state links, including aid to religious schools; and move the Court further down the states' rights road. A one-vote swing to the conservative side might also lead to approval of incremental restrictions on abortion procedures. But President Clinton overstated the Bush threat to abortion rights when he said at a Democratic fund-raiser in January: "There is absolutely no question in my mind that whether Roe vs. Wade is preserved or scrapped depends on what happens in the presidential vote." In fact, the basic right to have an abortion seems a strong bet to survive a one-term Bush presidency and a reasonably good bet to survive two terms. That's because six of the current Justices-O'Connor, Kennedy, and the four liberals-support Roe vs. Wade. It would fall only if two of these six were to retire, if Bush were to nominate replacements bent on overruling Roe, and if both were to survive what would most likely be Senate confirmation battles of unparalleled ferocity.

A conservative nominee seen as a likely balance-tipping vote to junk Roe would face an assault by Democrats at least as intense as the one that ended in the 58-42 Senate vote rejecting Bork in 1987. And although the Senate has since moved from Democratic to Republican control, it voted 51-47 in October to endorse Roe as "an important constitutional right" that should not be overturned. Would Bush invite two successive Bork-like brawls? Or might he turn instead to someone whose views are less hard-edged or unknown? That's

what Reagan did in appointing the more moderate Kennedy after Bork went down, and what President Bush did in choosing Souter, the so-called stealth nominee, in 1990; his votes and opinions have appalled conservatives and delighted liberals ever since. In all, two of the three Justices added by Reagan (Kennedy and O'Connor) and one of the two added by Bush (Souter) voted in 1992 to uphold Roe vs. Wade.

Other caveats are also in order when speculating about how a new President might change the Court. One is that none of the Justices has signaled plans to retire, and none seems too old or sick to stay until 2004. It's conceivable that all nine will stay, even though actuarial tables and aspirations for a life after the Court do suggest that one, two, or more are likely to leave by then. Harry A. Blackmun and Hugo L. Black were 85 when they retired, William J. Brennan Jr. was 84, Thurgood Marshall was 83, and Oliver Wendell Holmes Jr. was 90. A second caveat is that Gore or Bush might well give priority to considerations other than ideology; both, for example, would like to name the first Hispanic Justice, which would help court an increasingly important bloc of voters and would make a mark in history. A third is that new Justices sometimes surprise, as Blackmun did by moving from the conservative to the liberal side early in his 14 years on the Court, and that they sometimes adhere to precedents that they would not have joined in the first place, as O'Connor did when she voted in 1992 against overruling the "core holding" of Roe vs. Wade. And a fourth is that veteran Justices sometimes move toward the center to offset any attempts by newcomers to engineer sudden shifts in the law.

The Supreme Court issue has not yet emerged as a major motivator for most voters. But it is important to many. And Gore may have an edge in the sense that polls suggest that a majority of the centrists who are up for grabs would prefer a more liberal Court to a more conservative one, at least on abortion. Accordingly, Democrats are seeking both to scare abortion-rights moderates and to rally their base-especially racial minorities and liberal feminists-by exploiting concerns about who will be appointing the next few Justices. Gore, who has pledged to choose supporters of abortion rights, frequently warns that Bush would fill any vacancies with anti-abortion extremists pre-screened for their acceptability to religious conservatives such as Pat Robertson and Jerry Falwell. "Many of our personal liberties are at stake," he declares. Liberal groups are pounding on the same theme by claiming that a Bush Court would threaten "the right to privacy, reproductive choice, civil rights, affirmative action, separation of church and state, environmental protection, and worker and consumer rights," as People for the American Way put it in a 79-page alarum on May 25.

For his part, Bush has said that Roe "usurped the right of legislatures," and he has vowed to name "strict constructionists" such as Scalia and Thomas. But the presumptive Republican nominee has disavowed any anti-abortion "litmus test" and downplayed any plan he may have to move the Court to the right-as his conservative base would surely demand-on other issues such as affirmative action. Nine Judicial Activists The Justices' eagerness to remain above (or at least outside) the world of politics was one reason for their nine empty front-row seats at President Clinton's final State of the Union address on Jan. 27. Some had medical excuses or pressing family business, and others have skipped such speeches for years. But this was the first time in memory that not one had showed up, excepting 1986, when the speech was postponed because of the disastrous explosion of the space shuttle Challenger. This year's absences were not a gesture of disrespect for President Clinton, one Justice explained privately. Rather, some of the Court's members have for years felt uncomfortable sitting silent and immobile in their black robes at what has increasingly become a made-for-television political show, with Democrats applauding one line and

Republicans the next as the President makes a speech exuding thinly veiled partisanship.

But it's difficult to decide so many politically charged cases and to strike down so many democratically adopted laws without being accused of politically motivated judicial activism by someone. All nine members of the current Court have been so labeled-sometimes by one another, as in Stevens' dissent from the age discrimination ruling handed down on Jan. 11. Stevens accused he five conservatives of engaging in "judicial activism" by substituting their will for that of Congress.

"Judicial activism" has long served as a campaign slogan for Republicans railing against the Warren Court, the 1973 ruling in Roe vs. Wade-which was seen at the time as a usurpation of legislative power even by many liberal scholars-and many other decisions during the years after Warren E. Burger succeeded Earl Warren as Chief Justice in 1969. Many of these critics were more unhappy with the political results of the Court's decisions than with its aggressive use of judicial power per se, and thus have welcomed the conservative judicial activism of more recent years.

Activism is contagious. It would take more self-restraint than most judges have to watch their ideological adversaries pursue politically tinged agendas without responding in kind. So it has become fashionable for liberals in Congress (such as Biden), the media, and academia-many of whom find judicial activism congenial when it produces results they like-to join Stevens in turning the old charge of activism against the conservatives themselves. Such charges have become a staple of liberal professors and publications such as The New York Times, which blasted the Court the day after Morrison for "weakening civil rights" in an editorial headlined "Violence Against the Constitution." Some moderates also assail Morrison as "an unwarranted interference by the Court with ordinary democratic politics," as professor Larry Kramer of New York University puts it. "The kind of role the Court is creating for itself is one in which it sets itself up as the final arbiter of how necessary or expedient federal legislation is, a kind of judgment they have no business making for the rest of us," Kramer adds.

While avoiding overt criticisms, Clinton-appointed Solicitor General Seth P. Waxman stressed in a May 1 speech that "the extraordinary act of one branch of government declaring that the other two branches have violated the Constitution has become almost a commonplace." Recalling "the New Deal's head-on collision with the Supreme Court in the tumultuous '30s," Waxman noted that in the succeeding decades the Court had "reiterated time and again that 'the judicial power to hold an act unconstitutional is an awesome responsibility calling for the utmost circumspection in its exercise.' " The Justices struck down only 128 federal laws during the Court's first two centuries, he observed; the current Court has struck down 21 in the past five years. (Two more have fallen since his speech.)

Some critics fault the Court's liberals and conservatives alike for overextending their powers. One such critic is Jeffrey Rosen, a law professor at George Washington University who also writes for The New Republic and other magazines. Last June, he criticized as "judicial legislation of the most sweeping kind" a 5-4 decision in which the liberals (plus O'Connor) opened the way for students of all ages to bring federal lawsuits against their schools for possible sexual harassment by other students. In January, Rosen asserted that "the five conservative Justices have ... turned themselves into the mirror image of the judicial activists whom they have spent their careers attacking" in their push to revive federalism-based limitations on congressional power. "This Court is activist in all areas, across the board," adds Kramer.

But judicial activism "means many things to many people," as Scalia noted in his April 18

speech. The phrase has become so protean in its connotations as to be an all-purpose label for decisions one does not like. Thus, some critics call it activism to depart from precedents, while others call it activism to adhere to precedents that are clearly inconsistent with the text or original meaning of the Constitution. In abortion-rights cases, therefore, the charge is hurled both at the Justices who would overrule Roe vs. Wade and at those who seek to preserve it.

Definitions of unwarranted judicial activism tend to fit the patterns of results that are politically congenial to the person doing the defining. Scalia, for example, defines judicial activism as including "decisions that hold unconstitutional practices that were not only approved at the framing but that were continuously viewed as constitutional by at least a substantial portion of the American people," down to the present day. Scalia is honest enough to denounce some decisions even when the results are politically congenial. His dissent in the parents' rights case, for example, stressed that although he agreed that the visitation statute was a bad law, nothing in the Constitution empowered the Court to strike it down. But on most issues, Scalia's judicial philosophy appears to align with his conservative political and moral beliefs: He has evinced deep moral disapproval of abortion and affirmative action preferences; he is skeptical of the need for more federal regulation; he approves of the death penalty and other tough-on-crime measures; he is a practicing Catholic who disapproves of homosexual conduct and supports federal aid to religious and other private schools; and he has assailed as unwarranted judicial activism a variety of decisions that happen to be offensive to those who hold such beliefs.

Almost all liberal Justices since the 1960s, on the other hand, have argued that the Court should construe and update the Constitution to serve (their own) evolving notions of human decency, and to give federal civil rights laws and regulatory statutes favored by liberals a sweeping interpretation to serve their "remedial purposes."

Perhaps the most ideologically neutral, and least pejorative, definition is the rather elastic one suggested above: Judicial activism involves invoking novel or debatable interpretations of the Constitution to strike down democratically adopted state or federal laws and practices that offend one's moral or political beliefs, while showing relatively little deference to the other branches of government and the voters. By that standard, all nine Justices are indeed activists at least some of the time. Former Acting Solicitor General Walter Dellinger, who teaches at Duke University Law School and practices law in Washington, puts it this way: "This is a very confident Court." Confident that it knows best. Confident that its rulings will be enforced, not defied. Confident enough to sweep away laws so popular that hardly anybody in Congress would dare vote against them. The Popularity Gap Despite-or perhaps sometimes because of-judicial activism, people seem to have far more confidence in the Supreme Court than in Congress, and substantially more confidence in the Court than in the executive branch. That is what poll data have consistently indicated since 1966, when the Harris Poll started asking people how much confidence they had in the three branches.

What explains this seeming paradox? Why would the unelected, life-tenured, relatively unknown Justices, who purport to ignore public opinion and regularly strike down laws so popular that they pass Congress by big bipartisan majorities, so consistently out-poll the people's elected representatives, who seek so assiduously to please their constituents and even advertise their own virtues on TV? Academic experts have suggested a number of reasons, although there is no consensus on which is most important:

Invisibility. "The public simply likes its politics to be out of public view," says John R. Hibbing, a professor of political science at the

University of Nebraska and co-author (with Elizabeth Theiss-Morse) of a 1995 book, Congress as Public Enemy: Public Attitudes Toward American Political Institutions. "Whenever Congress is in the news," he adds, "its popularity tends to go down." Thus, the Court is relatively popular in part because its members and its internal processes are rarely mentioned and never shown on TV.

Disinterestedness. Voters also want their public servants to be uninfluenced by self-interest, adds Hibbing. Even the purest elected officials often fail that test in the voters' eyes because they raise millions in campaign money to get elected and have to keep raising millions to get reelected. Members of Congress also get widely publicized perks such as the use of athletic facilities and free trips to cushy resorts. The Justices, on the other hand, raise no money, don't pander for anyone's support, don't cut grubby deals, don't lust after higher office, don't get highly visible perks, and don't consult pollsters on how to vote.

Wisdom. Scalia scornfully suggested in a 1990 opinion that the Justices are no more qualified to make law for the nation on issues such as the "right to die" than "nine people picked at random from the Kansas City telephone directory." But most of the people listed in that directory would probably disagree. All nine Justices appear to be-and in fact are-unusually smart, conscientious, hard-working, principled, dedicated, dignified public servants. That may not add up to wisdom. But it's a start.

In tune with the zeitgeist. In the view of professor Barry Friedman of New York University Law School, a big reason for the Court's popularity is that it "is much more majoritarian" in the real world than it is portrayed as being in civics lessons. Elected officials choose Justices through an intensely political process, and "by and large (their choices) tend to share the views of a broad swath of public opinion.... At some level they live in our world and read our newspapers." In addition, "when you look at the detail of how constitutional law works, most of it is with a thumb on the scale to take into account public opinion," says Friedman, such as when the Court considers "evolving standards of decency" in deciding what amounts to "cruel and unusual punishment," and consults "reasonable expectations of privacy" in interpreting the Fourth Amendment.

This is not to say that the Court panders to transitory public opinion, or that it should, or that the public would want it to, Friedman stresses. Indeed, "Every now and then the Court stands tough" and bucks majority opinion on big, controversial issues. But it has known better than to set itself against a broad, sustained, social consensus, except in a few episodes such as the early New Deal, when the Court stood in the way of national economic regulations demanded by most voters. So it should be no surprise, Friedman says, that the Court often "mirrors public opinion fairly well." In addition, notes Walter Dellinger, because some of the current Court's big decisions (on abortion, for example) please liberals and some (on federalism and property rights, for example) please conservatives, "everybody's a stakeholder in judicial activism now. Across the political spectrum, people have issues they really care about where the Court has come through for them."

Not So Conservative

If the Court often mirrors public opinion, why has it been so widely characterized in the media, for so many years, as getting more and more conservative? The reason is that from the perspectives of the mostly liberal journalists and law professors who closely follow its work and help shape its public image, the Court is conservative: It's more conservative than they want it to be, and it seems more conservative than it was during the good old days of Earl Warren. "Liberal law professors came to have ... a 'religious and mystical' view of the Warren Court," writes Lucas A. Powe Jr. in a new book, The Warren Court and American Politics. And the journalistic need to attach to each individual

Justice a brief ideological label that is reasonably consistent with general usage leads many journalists (including this one, in this very article) to sometimes put the "conservative" label on Justices O'Connor and Kennedy even though they might more accurately be called centrists who lean a bit to the right on some issues and a bit to the left on others. (The need for journalistic shorthand also means affixing the "liberal" label to Justices Stevens, Souter, Ginsburg, and Breyer, who are all far less liberal than were the late William J. Brennan Jr. and Thurgood Marshall.)

But if measured against poll data indicating the views of the broad American public on the big issues, the current Court is about as centrist as it could be. The Court's balance of power is held not by its three solid conservatives (Scalia, Thomas, and Rehnquist), but by O'Connor and Kennedy. On ideologically polarizing cases, the three conservatives need both of their votes to win. And those votes often come with a hedge, because if O'Connor or Kennedy doesn't want to go as far as the three, then the reach of the decision can be limited. Here's how it has worked out on some of the most controversial issues:

Abortion. The Court's jurisprudence seems very much in sync with public opinion, perhaps a bit to the left of center. There is clear majority support for the basic right of an adult woman to have an abortion. But the public doesn't want to go so far as to use tax dollars for Medicaid abortions, to allow abortion on demand for minors, or to say that anything goes as far as late-term abortion procedures are concerned. That's about where the Justices have come down-although they have probably made minors' access to abortion easier than most voters would like-with O'Connor and Kennedy joining the four liberals in protecting the basic abortion right and parting company with them on how broad that right should be.

Affirmative action preferences. Polls show that solid majorities like "affirmative action" and dislike race and gender "preferences." This reflects both the broader, vaguer, and more inclusive connotation of "affirmative action" and a considerable degree of public ambivalence. This ambivalence is mirrored on the Court. The three conservatives and perhaps Kennedy would apparently like to abolish racial preferences, or come close to doing so. The four liberals would open the door wide to such preferences. O'Connor, who holds the balance of power, is keeping her options open, which helps explain why the Court has not taken up a major affirmative action case since 1995. And although the 1995 decision and resulting media coverage gave "the surface impression of an attack on race-based classifications even for affirmative action purposes," says Harvard Law professor Laurence Tribe, such a view "seems misleading" because O'Connor's mushy, deliberately ambiguous majority opinion left officials and lower courts considerable latitude to keep preference programs.

Religion in schools. On issues such as school prayer, the Court seems to be to the left of public opinion, which has long supported the kinds of organized school prayer that the Justices have barred. The public also wants the Ten Commandments posted on classroom walls, which the Court has also barred. As for tuition vouchers for religious schools, which the Court's conservatives seem likely to approve and the liberals seem likely to find unconstitutional, they are not unambiguously conservative: Black and Hispanic people seem to lopsidedly support them while teachers' unions fervently oppose them. And what was so "conservative" about the 5-4 decision in 1997 to reinstate a federal program designed to help disadvantaged children by sending public school teachers into religious schools to provide remedial services?

Federalism. Even on this front, where the five more-conservative Justices vote as a cohesive bloc, the Court seems to be moving in the same general direction as public opinion. Friedman stresses that the Republican sweep in the 1994 elections, and the accompanying

enthusiasm for devolution of power to the states, indicated that the voters were becoming more skeptical of big government in Washington. So did the laws limiting the terms of members of Congress-which the Court struck down, putting itself to the left of public opinion on that issue.

So we really have a centrist, activist Court-one that is too liberal for most Republicans, too conservative for most Democrats, and too eclectic to outrage most of the people much of the time. The next President might (or might not) have an opportunity to change this balance in a big way, as Franklin Roosevelt did by appointing eight of his supporters between 1937 and 1943. Or he might go the way of Harry S. Truman, who named four Justices between 1945 and 1949, only to end up complaining: "Packing the Supreme Court simply can't be done.... I've tried it and it won't work.... Whenever you put a man on the Supreme Court, he ceases to be your friend."

2000 ELECTION LIKELY TO TIP COURT BALANCE

The Boston Globe

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Mary Leonard

WASHINGTON - For voters who need a reminder of the central role that the Supreme Court plays in political life, the next few weeks could be a wake-up call.

Just consider the hot-button issues the justices are about to rule on: Should so-called partial-birth abortion be banned? Can gays be barred from the Boy Scouts? What are the constitutional limits on public-school prayer, on police authority, on aid to parochial schools, and on patients' power to sue health maintenance organizations?

Each of the rulings, expected by the end of June, is likely to come down to a close, controversial vote - the nine-justice court consistently splits 5-4. Together the cases promise to increase the pressure on presidential candidates, jostled by groups on the right and the left, to pledge themselves to future nominees who will swiftly shift the court's ideological tilt.

It is not automatic that the next president will get to change the court's makeup, since Supreme Court justices can serve for life. But because three of the nine are 70 or older (John Paul Stevens is 80) and none has retired for six years, the odds are high that either Al Gore or George W. Bush will have the opportunity to appoint one or more justices and reshape the court for years to come.

"For those who are feeling this election doesn't much matter, who think it's a choice between Tweedledum and Tweedledee, the court is the reason to care," said Lois Williams, senior counsel for litigation at the Washington Lawyers Committee for Civil Rights, a liberal advocacy group.

Gore, saying that the next president could nominate three members of the court, has pledged to choose justices who believe the Constitution is a "living and breathing document" that the court can and should adapt to changing times, and who will uphold Roe v. Wade, the 1973 landmark ruling that legalized abortion.

The Texas governor, pressed by some of his GOP primary opponents to reject any court prospect who would not overturn Roe, has said he would not apply an antiabortion litmus test. But he has told Republicans that they can rest assured he will appoint justices who "will strictly interpret the Constitution" and model themselves after conservative Justices Antonin Scalia and Clarence Thomas.

For most Americans, debates about judicial philosophy often seem esoteric. Most do not follow the court closely, recognize the Supreme Court justices' names, or even know how many there are.

But for religious conservatives who want the federal courts to be on the front line of the culture wars, or for liberal activists who believe the courts should be the fulcrum of social change, the nominees of the next man in the White House make a huge difference.

By the time he leaves office, President Clinton will have appointed two Supreme Court justices, which is the average, and will have filled about half of the rest of the federal judiciary, the US district and appeals courts, where 99 percent of all cases are decided. The other half are almost all Republican appointees, setting the stage for the next president to tip the balance on those courts, too.

On the campaign trail, Gore often brings up the Supreme Court as he speaks of the need to protect abortion rights as he woos undecided women voters.

Bush, who wants to win over the same women while not alienating conservatives, rarely volunteers his views on Roe or on remaking the high court.

Abortion is just one of the major issues the court inevitably will visit in terms ahead. Also on the near agenda are same-sex marriage and domestic-partnership benefits, bioethics, gun control, school vouchers, and privacy and intellectual property on the Internet.

The court has seemed ready to tackle the tough issues. The current term has been unusually full of politically sensitive cases. Since January, the Supreme Court has affirmed the rights of parents over grandparents, lifted restraints against sexually explicit programming on cable TV, and rejected the Food and Drug Administration's effort to regulate tobacco.

In two states-rights cases, the court barred state employees from suing for age discrimination and threw out part of the 1994 Violence Against Women Act that allowed rape victims to sue attackers in federal court.

In all but the parents' rights case, which was decided by a majority of six justices, the court split 5-4.

Generally, the justices align like this: Thomas and Scalia anchor the conservative wing and are often joined by Chief Justice William H. Rehnquist. Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer typically vote together as the liberal-moderate bloc, and are frequently joined by Justice David H. Souter. The centrist conservatives who tend to tip the balance are Sandra Day O'Connor and Anthony M. Kennedy.

"If we get another Scalia or Thomas, we are courting disaster," said Ralph Neas, president of People for the American Way, a liberal civil rights group that will hold debates and town meetings this fall to raise awareness of the Supreme Court. "We are just one election away, and one or two new justices away, from the civil and constitutional rights we take for granted being eroded or eliminated overnight."

The National Abortion and Reproductive Rights Action League, which has endorsed Gore, is planning a nationwide radio and television advertising campaign, plus get-out-the-vote drives in 15 states, including Massachusetts, to warn of the threat to Roe if the country elects an antiabortion president.

Conservative groups are energized, too, particularly the Christian right, which looks to the Supreme Court for social policy on school prayer and religious-school vouchers. The National Right to Life Committee is so intent on overturning Roe by getting a Republican in the White House that it has enthusiastically endorsed Bush, despite his refusal to impose an abortion litmus test on judges.

Former GOP presidential candidate Gary Bauer says that without that commitment, he cannot be sure about Bush. Bauer notes that Bush's father appointed Souter, the New Hampshire judge who served on the US Court of Appeals in Boston and who turned out to be a bitter disappointment to social conservatives.

"There is not one judicial appointment the Democrats have to apologize for, but - oops! - it happens in my party all the time," said Bauer, who, as head of the Campaign for Working Families, sends out 10,000 e-mails to conservative activists every day, often on the subject of abortion. "If George Bush nominates three Scalias, he will have an honored place in the great conservative history book. If he nominates a couple of Souters, he will guarantee the culture will move against us."

The judicial appointments by Bush as Texas governor and by the Clinton-Gore administration show some similarities: They are characterized by gender and racial diversity and moderate ideology.

At the end of 1999, Clinton had appointed 339 federal judges; 100 of them were women, representing 49 percent of all females on the federal bench, and 105 were black, Hispanic, or Asian-American, making up 48 percent of all nonwhite federal judges.

Bush, who named a woman, a Hispanic, and a disabled lawyer to the Texas Supreme Court, has generally won praise at home for high-caliber, moderate-conservative appointees. But Anthony Champagne, a professor of government and politics at the University of Texas at Dallas, says one should not assume the same pattern would prevail if Bush becomes president.

"The political pressures and media attention on him will be so much different on the national level," Champagne said. "There will be so many more people he has to please."

With their views at odds on a host of issues, Bush and Gore would certainly be philosophically inclined - and lobbied by polar-opposite interest groups - to appoint very different kinds of judges to the federal bench.

The reality, however, is that to avoid a partisan confirmation brawl in the Senate, presidents are tempted to pick judges with little or no record to attack, and once on the bench, their views can be a big surprise. And, judges grow and change on the job.

The late Justice William J. Brennan, a leading liberal on the court, was appointed by President Eisenhower, a Republican. The late Justice Harry A. Blackmun, who wrote the Roe opinion, was appointed by President Nixon. Souter, who came to President Bush's attention via John Sununu, the former Republican governor of New Hampshire, chose an independent path very soon after he was confirmed.

"Personally, I think [Souter] was cleverly deceptive," said David O'Steen, executive director of the National Right to Life Committee. "I believe he held himself forward to be a conservative jurist, which he has proven not to be."

A RETIREMENT REVOLUTION?
Next President Could Appoint Supreme Court Majority

ABCNews.com

June 21, 2000

Geraldine Sealey

While the Supreme Court is traditionally distant from all things political, speculation about retirements from the bench is threatening to land it squarely in the path of this year's presidential campaign.

While no justices have announced their intentions, as many as five could pack in their black robes after the November elections. Several sitting justices are getting up there in years and known to be considering stepping down, including John Paul Stevens, 80, William Rehnquist, 75, and Sandra Day O'Connor, 70.

Ruth Bader Ginsburg, 67, recently underwent surgery for colon cancer and can't be ruled out as a possible retirement. And speculation swirls around the plans of Antonin Scalia, 64, who is reportedly considering leaving the high court despite his relative youthfulness.

The possibility of high court openings usually does not rank high on the list of voters' concerns in elections. However, the lineup of blockbuster cases this term, from "partial-birth" abortion to grandparents' rights to gay Boy Scouts, illuminates just how instrumental the court is in shaping hot-button issues.

While a recent ABCNEWS poll showed that fewer than half of Americans are following the campaign closely, the possibility that the next president could appoint a majority of the court could force some voters to pay attention.

Candidates Look Ahead

Out on the trail, the presidential candidates have hinted at what they would look for in a Supreme Court nominee. Republican Gov. George W. Bush of Texas voiced disappointment earlier this week after the court voted 6-3 to ban student-led prayer before high school football games. His Democratic opponent, Vice President Al Gore, said he agreed with the decision, although he supports voluntary prayer in school.

In the past, Bush has said he would name "strict constructionists" to the court, while Gore has said he wants justices who view the Constitution as "a living and breathing document." But just how much of a difference would it make who selects the next batch of Supreme Court nominees?

In a recent interview, President Clinton went so far to say that if Republicans "get two to four appointments on the Supreme Court ... *Roe vs. Wade* (the 1973 decision that legalized abortion) will be repealed and a lot of other things that have been a part of the fabric of our constitutional life will be gone."

Indeed, a major game of musical chairs on the high court in the next few years could disrupt critical voting blocs on the court.

Take federalism, for example. Although the issue could turn some eyes glassy, a series of recent 5-4 decisions trimming the power of the federal government have made history. But a

change in the court's makeup could shift the balance in those cases.

"This also holds true for issues such as race, affirmative action, majority-minority districts, abortion, as well as the always contentious area of religion," says Barbara Perry, a government professor at Sweet Briar College in Virginia. But Perry warns against "inflated rhetoric" that suggests retirements would cause a constitutional revolution.

Don't Believe the Hype

After all, history provides several examples of justices who did not perform on the bench exactly as the presidents who nominated them expected. For example, Republican President Richard Nixon nominated Justice Harry Blackmun, who went on to write the majority opinion in the landmark abortion case *Roe vs. Wade.*

"Trying to predict how a Supreme Court nominee will vote is a tricky business," says Lane Sunderland, a political science professor at Knox College in Illinois.

Further, observers say, the Supreme Court as an institution takes precedent seriously, and new justices would not be likely to reverse critical decisions that have stood for decades. For example, only three sitting justices — Rehnquist, Scalia and Clarence Thomas — are considered opponents to abortion rights. It would take several new like-minded justices to shift the balance in their favor.

And, it's important to note, while retirements after the election should come as no surprise, they are far from a sure thing. The court has a tradition of holding onto justices well into their golden years.

The Search Is On

Despite the speculation over impending retirements, court watchers say justices do not consider politics in making such a critical life decision as when to step down from the bench. But some say it is near impossible for the justices to block out the events in the political arena.

"I think it would be naive to think they don't consider these things," says Perry. "Although they are not elected, they are involved in issues in the political arena. They have ideology and are involved in issues that become political hot potatoes."

For their part, the candidates are already said to be scouting out potential nominees in the event of retirements, observers say. For Bush, Judge J. Michael Luttig and Chief Judge J. Harvie Wilkinson III in the conservative 4th Circuit Court of Appeals have been mentioned as possible nominees.

From Texas' 5th Circuit, Edith H. Jones and Emilio M. Garza could also be tapped.

Gore would also likely seek to appoint the first Hispanic judge to the high court, some say, and could look to Jose A. Cabranes of the 2nd appellate circuit. Yale law professor Drew S. Days III and Kathleen M. Sullivan, dean of Stanford Law School, are other possible Gore nominees.

SUPREME COURT ENDS TERM WITH EYE ON NOVEMBER

Los Angeles Times

Sunday, July 2, 2000

David G. Savage

As if to get voters' attention, the Supreme Court term that ended last week demonstrated again how one justice can make all the difference.

On issues ranging from the death penalty and abortion to affirmative action and aid to religious schools, the court was divided, 5 to 4.

And on major points of dispute, no justice is inclined to budge. The result is that the justices, perhaps more than anyone, realize that the balance will tip left or right only when the next president has a chance to name a new member of the court.

"There's a sense of everyone around the building holding his breath," awaiting the outcome of the November election, one justice said earlier this year.

The term's final day Wednesday dramatically showed the divide.

A state law prohibiting so-called partial-birth abortion was struck down on a 5-4 vote, when Justice Sandra Day O'Connor joined with four liberal-leaning justices.

The same day, O'Connor joined a 5-4 conservative majority to rule that the Boy Scouts have a right to bar openly gay men from its leadership ranks.

In a third decision announced Wednesday, O'Connor split the middle. She voted with the conservative bloc to allow the use of federal funds to buy computers for use in parochial schools. However, she pointedly refused to sign the opinion written by Justice Clarence Thomas that would have allowed public aid to flow freely to religious schools.

In his opinion, Thomas accused the court's liberals of defending anti-Catholic "bigotry." Responding in a tone of dismay, Justice David H. Souter said that the Constitution simply forbids the government to subsidize "a religious mission."

A few days before the court's final decisions of the session, lawyers for Texas inmate Gary Graham had urged the justices to halt the pending execution so that a hearing might take place to consider new evidence that might call his guilt into doubt. On a 5-4 vote, the emergency appeal was denied, and Graham was executed.

A single new liberal justice could tip the balance against the death penalty; a single conservative could tip it against abortion.

Lest anyone miss what is at stake, Justice Antonin Scalia, the voice of the conservative right, took the opportunity Wednesday to lambaste the court as dangerously elitist, liberal and meddlesome. What began as judicial dissent ended as a call to arms. The current court is "aggressively pro-abortion," he complained, as his black-robed colleagues listened impassively. He said that their ruling striking down the partial-birth abortion law would be viewed by historians as a blunder equivalent to the Dred Scott decision of 1857, which upheld slavery and triggered the Civil War.

The week before, Scalia had dissented when the majority rejected student-led prayers in public schools. And when his colleagues voted

to uphold the Miranda decision that requires police to warn suspects of their rights, he thundered: "Judicial arrogance!"

Still, the last day was the worst in his view. The court had struck down a Nebraska anti-abortion law but upheld a Colorado law that prevented abortion protesters from confronting pregnant women face-to-face on sidewalks.

"Does the deck seem stacked? You bet!" he exclaimed, his words echoing in the courtroom. The right to abortion "must be overruled," he concluded.

For a decade, the 64-year-old former law professor has denounced the court for being on the wrong side of the culture wars. "Day after day, in case after case, the court is busy designing a Constitution for a country I do not recognize," he wrote in one dissent.

It is clear too that Scalia is speaking to a larger audience--the American voters who will go to the polls in the fall. By choosing the president, who in turn will select new justices, the voters have the ultimate power to change the direction of the Supreme Court. Texas Gov. George W. Bush, the Republican candidate, has described Scalia as his favorite justice. And the speculation among lawyers is that, if Bush is elected president, he will choose Scalia as chief justice, given the opportunity.

That prospect sends shudders through liberal groups. People for the American Way, the civil liberties lobby group, recently issued a report titled "Courting Disaster" that looks at the possibility of a Scalia-dominated court. It would mean a "radical, reactionary shift in American law," said Ralph Neas, the group's president. For his part, Vice President Al Gore, the Democratic candidate, has promised to nominate to the court a traditional liberal in the mold of the late Justices Thurgood Marshall and William J. Brennan.

None of the justices has expressed plans to retire in the next four years, but their ages alone would suggest that the next president will fill one or more vacancies. Chief Justice William H. Rehnquist, who was first appointed in 1972 by President Nixon, will turn 76 in October. The senior liberal is 80-year-old Justice John Paul Stevens, an appointee of President Ford.

O'Connor, President Reagan's first appointee, stands at the center of the court's divide and recently turned 70. To her left on the court are Stevens; Souter, 60, a George Bush appointee; Ruth Bader Ginsburg, 67, a Clinton appointee; and Stephen G. Breyer, 61, also a Clinton appointee. On her right are Rehnquist; Scalia, 64, a Reagan appointee; Thomas, 52, a Bush appointee; and, more often than not, Anthony M. Kennedy, 63, a Reagan appointee.

In the future, the court's majority will belong to the president who names one or two new justices. This term, the conservative bloc failed again to muster a majority for overruling liberal precedents.

This comes as a mild surprise because seven of the nine justices are Republican appointees, and none of them is a solid liberal like Marshall or William O. Douglas. For example, none of the current justices says that the death penalty is flatly unconstitutional. But some of the conservatives--other than Scalia--voted to stand by precedents from the 1960s and '70s.

Last fall, the Republican National Committee urged the court to allow unlimited contributions to candidates for federal office. The majority, including O'Connor and Rehnquist, refused. Scalia, Thomas and Kennedy dissented. Scalia is determined to cut back on federal environmental laws. At issue last fall was whether citizens who are affected by polluted water or air can sue the polluters in federal court. In January, the majority upheld the federal law giving citizens a right to sue, over strong dissents from Scalia and Thomas.

In the spring, the court was faced with the question of whether to overrule or cut back on its decisions on school prayer, the Miranda warnings and the right to abortion. Again, the

majority refused, over dissents by Scalia and Thomas.

In January, a 5-4 majority ruled that the nation's 5 million state employees cannot sue if they are subject to discrimination because of their age. The majority--Rehnquist, O'Connor, Scalia, Kennedy and Thomas--said that states have a "sovereign immunity" from being sued in federal court. The dissenters pointed out that the U.S. Constitution says nothing of the sort.

In March, the Clinton administration's plan to regulate tobacco products through the Food and Drug Administration also fell on a 5-4 vote. In May, the same 5-4 conservative majority struck down a federal law that gave victims of sexual assaults a right to sue their attackers.

Despite the conservatives' support for states' rights, the states are sometimes rebuffed when they take up liberal ideas. Speaking through Scalia, the court last week invalidated California's policy of opening its primary elections to all voters, whether or not they have registered with a party. On occasion, liberal causes cannot muster a single vote. The case of an Illinois woman who nearly died of a burst appendix raised the question of whether an HMO can be sued for shoddy medical practices. No, the court said unanimously.

Highlights of 1999-2000 Term

Freedom of Speech

* A California law that forbids companies to sell public information about those who have been arrested does not violate the 1st Amendment. (Los Angeles Police Department vs. United Reporting, 7-2 vote)

* States may limit campaign contributions to $ 1,000 without violating the 1st Amendment. (Nixon vs. Shrink Missouri PAC, 6-3)

* State university students can be required to pay fees that subsidize activist groups on campus. (University of Wisconsin vs. Southworth, 9-0)

* Congress cannot bar cable TV operators from carrying sexually explicit channels during daytime hours to prevent children from observing the scrambled signals. (U.S. vs. Playboy Entertainment Group, 5-4)

* California violated the 1st Amendment rights of political parties to choose their own nominees by allowing primary election voters to cast ballots for candidates of any party. (California Democratic Party vs. Jones, 7-2)

* Abortion protesters can be barred from coming within 8 feet of patients and doctors on the sidewalks in front of a medical facility. (Hill vs. Colorado, 6-3)

* The Boy Scouts have a 1st Amendment right to exclude openly gay men as adult leaders. (Boy Scouts vs. Dale, 5-4)

Federal vs. State Power

* State employees who suffer age bias may not sue a state agency for discrimination. (Kimel vs. Florida Board of Regents, 5-4)

* Congress can prevent states from disclosing personal information from driver's license records. (Reno vs. Condon, 9-0)

* Congress exceeded its power when it gave rape victims the right to sue their attackers in federal court under the Violence Against . Women Act. (U.S. vs. Morrison, 5-4)

* Whistle-blowers cannot bring fraud suits against state agencies. (Vermont vs. Stevens, 7-2)

Social and Family Law

* Judges cannot order grandchildren to visit their grandparents unless they first weigh the parents' right to decide what is best for their children. (Troxel vs. Granville, 6-3)

* States may not ban doctors from performing an abortion procedure that opponents call "partial-birth" abortion. (Stenberg vs. Carhart, 5-4)

Religion

* School officials cannot sponsor student-led prayer at football games and other school events. (Santa Fe Independent School District vs. Doe, 6-3)

* Public funds can be used to pay for computers and other instructional equipment for use in parochial schools. (Mitchell vs. Helms, 6-3)

Crime and Law Enforcement

* A police officer who sees a person flee may pursue and detain him, even if the officer has no evidence of a crime. (Illinois vs. Wardlow, 5-4)

* Police cannot stop and frisk a pedestrian based solely on an anonymous tip that may not be reliable. (Florida vs. J.L., 9-0)

* Officers looking for drugs cannot squeeze and feel a bus passenger's personal bags. (Bond vs. U.S., 7-2)

* Officers must give suspects "Miranda warnings" before questioning them. (Dickerson vs. U.S., 7-2)

* Juries, not judges, must decide whether a defendant receives a sentence beyond the maximum sentence for a crime because he was motivated by race or other biases. (Apprendi vs. New Jersey, 5-4)

Business

* The Food and Drug Administration does not have the authority to regulate cigarettes or tobacco products. (FDA vs. Brown & Williamson, 5-4)

* "Knock-off" products do not violate the Trademark Act. (Wal-Mart Stores vs. Samara Brothers, 9-0)

* Auto makers cannot be sued for having failed to install air bags in cars built during the 1980s. (Geier vs. American Honda, 5-4)

* Polluters can be sued by private citizens and forced to pay for environmental cleanups. (Friends of the Earth vs. Laidlaw, 7-2)

* Employees cannot sue their HMOs for putting profits ahead of the quality of their medical care. (Pegram vs. Hedrich, 9-0)

* States and cities cannot refuse to buy products from multinational firms that do business with Myanmar. (Crosby vs. National Foreign Trade Council, 9-0)

RULING GALVANIZES ANTIABORTION FORCES TO PRESS ON FOR BAN

The Boston Globe

Friday, June 30, 2000

Mary Leonard

WASHINGTON - Wounded but unbowed by a blow from the US Supreme Court, antiabortion leaders yesterday vowed to press on for a federal ban on late-term abortions, to insist the GOP not waver on an antiabortion stand in its platform, and to defeat Al Gore in the presidential election in November.

If anything, Wednesday's ruling that struck down Nebraska's ban on certain abortion procedures energized the activists to demand that Texas Governor George W. Bush make abortion politics a more prominent part of his presidential campaign - a commitment he has been trying to avoid.

"I don't think Governor Bush is where he needs to be on abortion, and we have a responsibility to get him there," said Judie Brown, president of the American Life League, an antiabortion advocacy group. Brown said her phones have been "ringing off the hook" since the ruling. "Our people want to know what it means, why did it happen, and what can they do."

Bush, who opposes abortion rights and who pledged Wednesday to fight for a ban on what he called "the brutal practice of partial-birth abortion," has nonetheless been criticized by social conservatives for refusing to apply an antiabortion litmus test for his vice presidential choice or for nominees for the Supreme Court. To prove he is a "compassionate conservative" and to woo women who support the right to choose, Bush rarely brings up the abortion issue as he campaigns.

"Bush has tried to be open and down the middle about abortion, but now it is going to be much more difficult to be in the middle," said Susan Cullman, a leader of the Republican Pro-Choice Coalition. "The Supreme Court decision will arouse the right wing and encourage them to be stronger. That is good news for the prochoice people, but it is not good news for our candidate."

But Ralph Reed, a consultant to Bush and a former executive director of the Christian Coalition schooled in grass-roots abortion politics, said he did not expect the ruling to have much impact on the centrist course of the Bush campaign.

"It's important for Bush to remain true to his conservative principles, but you win elections by talking about the issues on which voters in the middle are turning, and that's education, expanding the circle of prosperity, and Social Security," Reed said.

Gore, who supports abortion rights and frequently talks about it in campaign speeches, praised the court's decision, while his campaign delighted in the news that the high court was stirring up passions over abortion again.

"This decision brings the issue closer to home for more voters, and by virtue of that, it will loom larger in our campaign," said Douglas Hattaway, a Gore spokesman.

There was no disagreement between advocates and foes on the stakes in this election: The Supreme Court, which split 5-4 in its latest abortion ruling, is more closely divided

than ever on the issue that continues to polarize the country. With three of the justices at least 70 years old, the probability is high that the next president will get the opportunity to tip the court's balance.

"When two candidates are absolutely and diametrically opposed to each other on a woman's right to choose, it is our challenge to repeat over and over again to American voters that the Supreme Court is at risk," said Alice Germond, executive vice president of the National Abortion and Reproductive Rights Action League.

League officials have told Warren Christopher, the former secretary of state who is leading Gore's search for a running mate, that the choice of Indiana Senator Evan Bayh would be "very problematic" because last year he voted in favor of legislation to ban what opponents call partial-birth abortions, a procedure in which doctors partially extract a fetus feet first and then collapse the skull.

"We believe there is a clear difference between Bush and Gore, and to confuse that in any way would make it more difficult to mobilize activists and voters," Germond said.

Gary Bauer, who opposed Bush in the GOP primaries, said the governor has to learn from Democrats that you need to secure your core supporters, in his case, conservatives, before veering to the center. "Prolife people are pretty depressed and are looking for more reassurance that a Bush presidency would matter," Bauer said. "In the wake of the Supreme Court decision, it would be a political mistake for him to pick a prochoice running mate, water down the GOP platform, or avoid the abortion issue."

Bauer and representatives of conservative groups were on Capitol Hill yesterday pressing the GOP to keep a strong antiabortion plank in its platform. Others in the Capitol were poring over the Supreme Court's ruling, trying to determine how a late-term abortion bill that has passed the House and awaits Senate action could be modified to pass constitutional muster.

"Lawmakers are going to want to study the opinion carefully and decide how to respond," Douglas Johnson, legislative director for the National Right to Life Committee, said, predicting the bill would pass and be sent to President Clinton, who has twice vetoed similar measures.

On the heels of its ruling, the Supreme Court yesterday ordered lower courts to review their decisions upholding bans on certain abortion procedures in Illinois and Washington state.

A SUPREME CONCERN, FOR BOTH PARTIES

The Times Union (Albany, NY)

Thursday, July 20, 2000

Howard Brock

"It's the Supreme Court, stupid."

That should be the cry of the Democrats, the unofficial slogan of the election 2000 -- a constant reminder to the American people of the profound and long-term effects that potentially hang in the balance in this year's presidential campaign.

Excluding the issues of peace or war and the possibility of foreign terrorism on American soil, the composition of the highest tribunal should be a matter of greatest concern to the nation's voters. Presidential and congressional action can, at least theoretically, be overturned in a relatively short time at the ballot box. Conversely, Supreme Court decisions can stand for decades, resulting in protracted civil strife or relative tranquility.

Consensus has it the next President will have an extraordinary opportunity to alter the ideological balance of the court. Because of the ill-health or advanced age of several members, it is believed that from three to five vacancies will occur.

Democrats may enjoy a decided advantage in bringing the Supreme Court to the fore of issues. A national poll shows that voters already consider the court a major factor in their determinations.

Vice President Al Gore has happily, if belatedly, recognized the major significance of the court in the election.

In his appointments to the new court, Gore will almost certainly avoid "flaming" liberals and concentrate on moderates, first, because of his natural political tendencies and, second, because he will be unable to get the former past a Republican-controlled Senate.

Texas Gov. George W. Bush seems reluctant to discuss the issue. But he has stated he admires Justices Antonin Scalia and Clarence Thomas -- who comprise the strongly conservative or ultra-right faction on the court -- and indicates he will make appointments compatible with them.

What kind of court and what kind of decisions can be expected with a majority of justices sharing the same general philosophy as Scalia and Thomas?

In an interview on the Joe Parisi program on WROW-AM in March, the host and I sought the opinions of Edward Lazarus, a former clerk on the Supreme Court and the author of "Closed Chamber: A Comprehensive and Intensive Analysis of the Contemporary Tribunal." He said a shift toward Scalia and Thomas would mean profound changes, reflecting a return to a legal philosophy that dominated in the 1920s and earlier.

Previous decisions on women's reproductive rights, police power, civil liberties, economic, social and environmental laws and federal-state relations would likely be overturned. New decisions would probably mandate a radical departure from policies followed by both Democratic and Republican administrations under the approval of earlier courts.

The supreme importance of the court should figure prominently in virtually all political calculations and analysis. As can be expected, that is not the case.

For instance, though it recognized the importance of the Supreme Court as an election issue in a previous editorial, the Times Union did not even mention it as a factor in its generally positive evaluation of Ralph Nader's presidential candidacy on the Green Party ticket.

Nader has been unsparing of Gore as the standard bearer of a party that, in his view, has given over a large chunk of its integrity to corporate influence.

Although a rather humorless fellow, he nevertheless can hardly suppress his glee at the thought of upsetting Gore's chances of carrying states vital to his victory. (A recent poll in Michigan, for example, showed Gore's strength slipping precipitously when Nader was figured in the mix.)

A defeat of Gore, Nader claims, will require the Democrats taking a brief "cold shower" until they clean up their act and become deserving of a return to power. However, in reality, it may be the American people at large -- not only Democrats, but independents and even some conservatives -- who may suffer a prolonged dunking if the Republicans win the presidency at this point in history. A recent national survey reveals a majority of voters have conservative leanings, but recoil from the ultra-right positions as reflected in the writings of Justices Scalia and Thomas.

When confronted with this, Nader contends that court appointments don't always work out as planned by Presidents. That's true, but most do. At any rate, that argument is a slim reed on which to depend when there is so much at stake.

That the court has a greater lasting influence on our lives than the people we elect may be lamentable in a democracy, but it is a fact of life. It behooves us to face it and deal with it.

The presidential race is not about saving Medicare, Social Security or the greed of pharmaceutical companies -- important as those issues are. It's not about Bush's lack of gravitas or Gore's character flaws. It's not about the minority party candidates no matter how much we agree with their views.

This time, it's mainly about "the Supreme Court, stupid."

NAMING JUSTICES: MORE IS AT STAKE THAN ROE VS. WADE

Los Angeles Times

Sunday, July 9, 2000

Vikram Amar and Alan Brownstein

The U.S. Supreme Court is emerging as a major issue in this presidential campaign because the next president could have as many as three, perhaps even four court vacancies to fill. But, so far, discussion of the court and potential justices has largely fixated on the matter of abortion and the future of Roe vs. Wade. This is understandable, given the real and symbolic importance of the Roe decision over the past quarter-century. But such a focus is far too narrow.

First, the abortion debate has already been taken into account in the current alignment of voters. Pro-choice has been a central plank of the Democratic platform for some time, and will remain so; the same is true for anti-abortion and the GOP. Thus, if someone cares deeply about preserving or undoing abortion rights, that person is already inclined to the Democratic or GOP candidate.

Second, abortion is no longer where the major action is at the Supreme Court. The GOP-appointed majority on the Rehnquist court is making its mark on jurisprudential history not so much by reining in individual rights (though there is some of that), but rather by reining in federal governmental power vis-a-vis the states. And, most interestingly, the groups hurt by limiting federal power do not fall neatly into either political party. For this reason, discussion by the candidates of the court's new vision of federal-state relations will be politically important. Times have changed and so, too, must political discourse about the court.

For about a decade, a five-justice majority (Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Anthony M. Kennedy, Antonin Scalia and Clarence Thomas) has been handing down decisions that limit federal authority in the name of preserving state sovereignty. To be sure, these cases don't always involve the same lineup of justices. And the legal doctrinal categories used to organize them can be quite technical, if not downright tedious. But all these decisions share a vision of federalism in which it is the court's role to shield state governmental prerogatives from federal interference.

This new vision of federalism may be constitutionally correct. Some scholars argue that it is long overdue. But other equally reputable scholars and judges challenge the court's approach. Because these decisions are being issued over sharp dissenting opinions, a new president's judicial appointments may determine their future course. Thus, public discussion of this jurisprudence and the candidates' views on it is clearly warranted.

In addition, and perhaps more interesting as a political matter, the groups hurt by these rulings do not necessarily prefer the candidate most likely to undo these decisions: Democrat Al Gore.

Some examples help illustrate this. Consider women and men concerned about reducing criminal assaults. In a highly publicized case during the term that just ended, the court struck down the Violence Against Women Act, a congressional attempt to protect victimized women by providing recourse in federal courts to supplement inadequate state court remedies. In striking down the federal law, the court made clear that the undeniable cumulative

impact of crime and violence on the national economy could not justify federal legislation in an area traditionally the domain of states.

Next consider religiously observant persons and the Religious Freedom Restoration Act, a federal law that required state governments to grant limited exceptions from generally applicable state laws to persons violating these laws because of religious convictions. Under this law, houses of worship might be exempt from burdensome regulations that interfere with a congregation's right of religious assembly. But the court invalidated the law in 1997, saying it infringed on state governmental freedom from federal domination. Congress' current efforts to enact a revised law under the federal government's authority to regulate commerce (a basis not used in the first one) will likely be foreclosed by the reasoning of the violence-against-women case.

Now turn to the elderly. They were hurt by a case involving the Age Discrimination in Employment Act, a federal statute preventing employer discrimination against persons over 40 on the basis of age. The court held in January that the statute could not be used to sue a state employer for money damages in federal court, even if the illegally terminated elderly employee lost thousands of dollars in wages and was forced to deplete his retirement savings as a result of the state employer's unlawful actions. If the state refuses to submit to such a suit for redress, its refusal will be upheld out of respect for state governments and their coffers.

Finally, think about holders of intellectual property rights. Last term, the court held that state entities, such as public universities, cannot be sued for damages in federal court even when they intentionally and egregiously usurp federal patents owned by individuals, causing millions of dollars of harm. Once again, the court said that protecting treasuries of state governments from unanticipated depletions trumps any federal interest in compensating victims of property deprivations.

The groups hurt by these decisions--persons affected by violence, the religiously observant, elderly employees and patent holders--do not fall neatly within either the Democratic or Republican Party. Just like the constitutional rulings affecting their interests, these groups are in play, so to speak, and would presumably be interested in the candidates' views on the trends reflected in the court's recent decisions.

Nor does it help to point out that, over the past 20 years, the Republican Party has been committed to the principle of shifting authority from Washington back to the states. This approach has focused on whether it is good policy for Congress to enact certain kinds of laws or whether it makes sense to leave certain areas to state regulation. Yet, the question the court has been answering is quite different: namely, whether the federal government has the power to act, even if the policy wisdom of federal action is plain. In fact, many Republicans in Congress voted for the federal laws that the court struck down. On this latter question--of federal constitutional authority--neither the parties nor their leading candidates have expressed any clear views.

Sooner or later, they will have to. The Constitution does far more than protect the reproductive rights of women. Presidential candidates should recognize this and begin to address what the other 99% of the Constitution would mean if they are given the power to replace one-third or more of the court.