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## DIRECTION OF THE COURT

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## Unlikely Alliance Keeps Court Centered, Civility Counts for O'Connor and Breyer

*USA Today*

Thursday, June 21, 2001

Joan Biskupic

A black-tie dinner at the University Club here in February was to feature Supreme Court Justice Sandra Day O'Connor as keynote speaker, with the introduction by another conservative justice, Antonin Scalia.

But sometime between cocktails and the appetizer, the organizers realized that Scalia wasn't there. Because of a miscommunication, he had never been officially invited. Justice Stephen Breyer happened to be in attendance, and the master of ceremonies sheepishly asked him to fill in for Scalia.

Before long, Breyer, a liberal who was named to the court by Bill Clinton, was telling the audience about his warm relationship with O'Connor, a Ronald Reagan appointee. Calling O'Connor "a colleague and a friend," Breyer told of their travels together to legal conferences and spoke glowingly of her work on and off the bench.

For a few moments, the audience got a glimpse of a friendship that has fostered a key alliance on a divided, conservative-led court that is still mindful of the rancor it went through before its 5-4 ruling last December in the Florida election case. O'Connor and Breyer were on opposite sides in that ruling, which gave the presidency to George W. Bush.

But the two justices have teamed up in several major rulings over the past two years. It is a developing partnership that

helps explain why the court, in cases involving issues such as voting rights, abortion and public funding of parochial schools, has adopted a more moderate tone than the stance its majority took in *Bush vs. Gore*.

O'Connor remains part of the court's conservative wing, which includes Chief Justice William Rehnquist and Justices Anthony Kennedy, Clarence Thomas and Scalia. But she is most often the court's swing vote and for years has been the most influential justice.

That often puts her in alignment with Breyer, who often is more moderate than the court's other liberals: John Paul Stevens, David Souter and Ruth Bader Ginsburg.

"He's the least liberal of the liberals, and she's the least conservative of the conservatives," says Georgetown University law professor Mark Tushnet, a former Supreme Court clerk who has written several books about the court.

Breyer has not replaced Kennedy, who like O'Connor has been a critical swing vote. Those two Reagan appointees are on the same side about 90% of the time. But Breyer's alliance with O'Connor is distinct because they are from opposite sides of the ideological divide and yet find common ground -- on and off the bench -- that often keeps the court from tilting very far to the right.

The Breyer-O'Connor alliance also reflects other behind-the-scenes factors that help shape some of the decisions of the current court, which is likely to wrap up its term next week:

\* Breyer's emergence as an effective conciliator, even though the 1994 appointee has the least tenure on the court and is in the liberal minority.

\* O'Connor's sometimes-cool relationship with the court's most conservative justices, Scalia and Thomas.

Even when Scalia and Thomas agree with O'Connor, they -- or she -- often will write a separate opinion using a different rationale. Scalia has belittled O'Connor's legal reasoning when disagreeing with her. Breyer, meanwhile, seems to go out of his way to be respectful of O'Connor in his writings, even when they disagree.

\* O'Connor and Breyer's strong desire -- shared by some other justices -- that *Bush vs. Gore* not continue to cast the court as a panel driven by partisan politics.

Socially gregarious, O'Connor, 71, and Breyer, 62, have tried to improve personal relations among the justices after the tumultuous ruling in December.

In that decision, the court's conservatives, including O'Connor, used an "equal protection of the law" rationale they had rejected in cases involving minority rights to back Bush's claim that continuing to recount presidential ballots would be unconstitutional. The court was widely accused of letting politics dictate its ruling.

Breyer said at the time, in dissent, that the ruling could "harm not just the court,

but the nation" because the majority intervened in a "highly political matter" that should have been left to Florida courts.

O'Connor and Breyer were plainly disturbed by how the ruling deepened existing divisions among the justices and made the court vulnerable to accusations that it was just another political body.

Soon after the ruling, the two made a point of lunching together and talking to court clerks who were disenchanted by the decision.

#### Different styles, similar views

More than their colleagues, O'Connor and Breyer came to the bench with experience in building consensus -- O'Connor as a former Arizona state senator and majority leader, Breyer as a former top aide to the Senate Judiciary Committee.

Their styles are quite different: The tall, stately O'Connor appears focused and unflappable. The slightly ruffled Breyer exudes the air of an absent-minded professor (in fact, he taught at Harvard Law School). His self-deprecating manner contrasts with O'Connor's voice of certainty. Among the least-known justices, Breyer often jokes about being mistaken for Souter.

But when they join forces, O'Connor and Breyer forge rulings that reinforce the court's center, typically settling a specific dispute at hand while leaving broader legal issues to be resolved another day.

It's an indication of how similarly they view their roles as jurists: Both see the law as something that is built and

defined incrementally; neither looks to make sweeping legal pronouncements unless a case absolutely demands it.

O'Connor said in a statement that Breyer "is exceedingly able and has a practical approach to problem-solving." Breyer echoes such sentiment when referring to her.

Analysts say theirs is an approach that can mute the influence of ideology in certain cases.

"I think Americans generally have more confidence in judges who do not reach too broadly," says John Jeffries, dean of the University of Virginia law school.

"Justice O'Connor is a bottom-up judge. She comes to a decision by studying the facts of each case. And even though Justice Breyer is more of a systematic thinker, his opinions are quite particular."

### Off the bench

O'Connor and Breyer also have teamed up outside the court.

They are strong supporters of the American Bar Association's efforts to provide guidance to nations with evolving legal systems, such as the former states of the Soviet Union. This summer, they will take part in a legal education program on American Indian reservations.

Their teamwork on the law has been more consequential.

A few weeks ago, Breyer persuaded O'Connor to side with the court's liberal wing in a key voting rights decision that upheld a heavily black congressional district in North Carolina.

Breyer wrote the court's opinion rejecting a complaint by white voters that the oddly shaped district was an unconstitutional racial gerrymander. It was a precisely worded decision that addressed O'Connor's worries about racial preferences and quoted heavily from her earlier opinions on redistricting.

Voting rights and congressional redistricting are among the most contentious areas of the law, and such cases typically are decided by one vote: O'Connor's. The fact that she didn't write an opinion indicated a level of confidence in Breyer's approach. His opinion showed that, as a practical matter, districts that consolidate blacks or Hispanics to boost their political power can be constitutional.

The ruling was reminiscent of one of Breyer's opinions last year in which he secured O'Connor's vote to strike down Nebraska's ban on a type of abortion that involves removing an intact fetus.

His majority opinion borrowed many of O'Connor's words from previous abortion cases. It found Nebraska's ban on such abortions unconstitutional because the law lacked any "exception for the preservation of the . . . health of the mother" and imposed "an undue burden on a woman's ability" to end a pregnancy with what might be the most appropriate method.

The court's liberal foursome needed O'Connor's vote to strike down Nebraska's law. Breyer's approach ensured her vote.

The North Carolina and Nebraska decisions were coups for the junior justice. But they were made possible only because O'Connor was

predisposed toward the bottom-line judgments and because Breyer used a carefully calibrated rationale that did not turn her off.

O'Connor often may agree with Scalia, for example. But she clearly has been displeased by some of his sweeping declarations when they are on the same side and by his sometimes sarcastic approach when they differ.

Scalia's ridicule of O'Connor's reasoning in past abortion cases is well known -- he once said her rationale "cannot be taken seriously"-- but even in lesser cases he often cannot resist a jab. Last year, when O'Connor wrote an opinion allowing a city's ban on nude dancing, Scalia criticized the reasoning for offering not even "a fig leaf" from precedent and performing a "neat trick" to justify its conclusion.

When O'Connor joins Breyer, it's because he avoids broad decrees.

In May, when the court ruled that the media could not be held liable for broadcasting an illegally taped private conversation, the decisive concurring opinion (written by Breyer and joined by O'Connor) put some checks on the media.

That collaboration recalled an opinion last June in which O'Connor and Breyer teamed up to limit the consequences of a ruling on federal aid to parochial schools.

O'Connor and Breyer sided with the court's conservatives in upholding a program that gives computers and other instructional equipment to religious schools. But their votes came with a catch: O'Connor, joined by Breyer, rejected Justice Thomas' push for a majority ruling that would have allowed

more direct public aid for such schools.

This month, Breyer appeared to try to win O'Connor's support in another case involving the separation of church and state, when the court ruled that public schools cannot deny religious groups the use of their facilities after-hours.

Breyer's opinion quoted extensively from her past writings to try to limit the breadth of the majority opinion, again penned by Thomas. But O'Connor went with Thomas and his endorsement of Bible classes on school grounds for children as young as 6.

O'Connor and Breyer "have a shared sensibility of deciding issues narrowly, rather than wanting to lay down broad rules," says Richard Fallon, a Harvard University law professor.

Jeffries agrees. The religious schools case last year, he says, was "a perfect example of O'Connor saying, 'This is a very large issue. Let's not try to do it all at once.' "

O'Connor and Breyer, Jeffries says, have a "modesty" about judging. "They do not believe all questions can be answered all at once."

### **In praise of O'Connor**

A little false modesty is just what Breyer showed at the University Club that evening in February when he was asked to introduce O'Connor.

He first engaged in some exaggerated dithering, asked people at his table what he should say, then scribbled some notes on a scrap of paper.

But when he rose to speak, the words seemed to come easily. He recounted

how attending conferences with O'Connor had taken him around the world, referring to recent trips to Belgium, Germany and beyond.

"Yes," Breyer said, relating a remark from a mutual friend: "You can't go wrong following Justice O'Connor."

### **The two justices' backgrounds**

Sandra Day O'Connor

- Appointed: 1981, by Ronald Reagan
- Age: 71
- Birthplace: El Paso
- Education: Stanford University, B.A., 1950; Stanford University, L.L.B., 1952
- Career highlights: Majority leader, Arizona Senate; judge, Arizona Court of Appeals

Stephen Breyer

- Appointed: 1994, by Bill Clinton
- Age: 62
- Birthplace: San Francisco
- Education: Stanford University, B.A., 1959; Oxford University, B.A., 1961; Harvard Law, L.L.B., 1964
- Career highlights: Chief counsel, Senate Judiciary Committee; judge, U.S. Court of Appeals for 1st Circuit

### **Cases illustrate team's moderating influence on court**

Justice Sandra Day O'Connor, a Reagan appointee, and Justice Stephen Breyer, a Clinton appointee, are on different sides of the nine-member court's ideological divide. But in several key cases recently, they have been a moderating force on the conservative-led court:

\* *Mitchell vs. Helms*, June 2000 -- O'Connor's and Breyer's votes are critical in upholding a federal program that provides computers and other teaching materials to religious schools.

But they refuse to join a plurality opinion by conservatives that could have permitted direct public aid to parochial schools.

\* *Stenberg vs. Carhart*, June 2000 -- Breyer, with the help of O'Connor's key fifth vote, writes the majority opinion striking down a Nebraska ban on a controversial abortion procedure. The cautiously worded opinion acknowledges that abortion sharply divides the nation.

\* *Hunt vs. Cromartie*, April 2001 -- Breyer, with O'Connor as the fifth vote, writes the majority opinion upholding a heavily black North Carolina congressional district that white voters claimed was unconstitutional.

\* *Bartnicki vs. Vopper*, May 2001 -- O'Connor and Breyer are key to the six-justice majority that says the media cannot be sued for broadcasting cellphone or other private electronic conversations that someone else illegally intercepted. Breyer, joined by O'Connor, writes a separate statement saying the opinion should be interpreted narrowly.

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## Fla. Recount Dominated High Court's Term; Historic Ruling in Presidential Race Reflected Divisions, New Boldness Among Justices

*USA Today*

Friday, June 29, 2001

Joan Biskupic

At a benefit dinner a few weeks ago, Supreme Court Justices Anthony Kennedy and Sandra Day O'Connor took part in a mock trial of Shakespeare's King Lear.

As O'Connor was announcing the verdict, she teased that "it was suggested that we (turn over) the case to the Florida Supreme Court."

There it was: another reminder, however lighthearted, of how deeply the high court continues to be touched by Bush vs. Gore, the divisive 5-4 ruling that settled the presidential election and turned a routine court term into one of the most significant in decades.

The conservative-led court's decision Dec. 12 to stop the recounting of presidential ballots in Florida reversed that state's high court and ensured George W. Bush the presidency. It was just one of 80 rulings during the nine-month session that ended Thursday, but it was the case that eclipsed all others, and it shadowed the justices through the term's end.

An appearance by conservative Justice Antonin Scalia in Fort Lauderdale last month drew protesters. And at the court this week, the law clerks' annual skit spoofed Bush vs. Gore by comparing it with an episode of TV's Survivor.

More important, the ruling put a spotlight on the increasing boldness of a

court that only a few years ago seemed reluctant to enter the political fray or play a significant role on the public stage.

Through the mid-1990s, Chief Justice William Rehnquist's court was defined by a focus on the narrowest contours of legal disputes. It reversed few precedents, rarely broke new ground and routinely left social problems to be resolved by elected legislators.

The Bush vs. Gore ruling was something of an anomaly for a court that has spent more recent years boosting state authority at the federal government's expense. Marching into what many analysts viewed as a state matter, the court's five most conservative justices stopped the recounts favored by Democrat Al Gore in a ruling that critics said was dripping with partisan politics.

Viewed another way, however, the decision -- or at least the court's willingness to make it -- fell in line with its recent tendency to take longer strides in the law, and therefore be more of a player in national affairs.

"The biggest thing about Bush vs. Gore," says Harvard University law professor Richard Fallon, "is that this is a court that regards itself as the most indispensable institution" of government.

"It used to be that conservatism corresponded to a position of judicial

restraint," says Robert Schapiro, a law professor at Emory University in Atlanta. "But the court has become less deferential to other branches of government, and Bush vs. Gore reflects that."

On Capitol Hill this spring, Kennedy told members of a House committee that despite concerns over whether the Supreme Court should inject itself into the matter, the justices believed that "it was our responsibility" to decide the high-stakes Florida case.

Those sentiments were echoed by Justice Clarence Thomas during the committee hearing on the court's budget: "I was only interested in discharging my responsibility, as opposed to avoiding it and playing it safe."

### Notable trends

Among the trends that marked this term:

\* The continued dominance of the five most conservative justices. Prevailing most often in the cases that were decided by a single vote and had the broadest impact were Rehnquist, O'Connor, Scalia, Kennedy and Thomas.

That bloc repeatedly provided rulings that curtailed federal power in favor of the states. It went further than ever in limiting Congress' ability to protect civil rights, ruling in separate cases that states could not be sued for discriminating against disabled workers or for regulations that disproportionately hurt ethnic or racial minorities, such as "English only" policies.

In the disabled workers' case, the court's conservative majority wrote off congressional findings attempting to show widespread bias against the

disabled. That decision in an Alabama case could affect millions of public workers, but another ruling concerning the disabled might be better known: The court ruled, 7-2, that disabled pro golfer Casey Martin has a right to use a cart in competitions.

The conservatives also rejected federal regulators' attempt to preserve isolated wetlands that harbor migratory birds.

"It's not that the court loves the states," Yale University law professor Akhil Amar says in assessing the conservatives' moves against federal authority. "It's that the justices hate Congress and love themselves even more. To them, the court really is supreme."

\* Despite the solidarity on the right, alliances shifted enough to give the left-leaning justices some victories. The more liberal justices -- John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer -- were relegated to dissenting opinions in many of the most significant cases. But the liberals did lead the way in some key rulings, courtesy of support from swing votes O'Connor and Kennedy.

One factor was an emerging partnership between O'Connor, a Reagan appointee who hits her 20th anniversary this year, and Breyer, a 1994 appointee of Bill Clinton. Another factor was Kennedy's concern about free-speech protections, which put him in league with the liberals in a decision that Congress violated free-speech guarantees when it prevented legal aid lawyers from challenging welfare restrictions on behalf of indigent clients.

On Monday, the liberals prevailed in a ruling that upheld a federal limit on how much political parties can spend when

they work with a congressional candidate's campaign. The decision in a Colorado case, backed by O'Connor, gave a boost to current campaign-finance reform efforts by emphasizing Congress' ability to crack down on wealthy interests looking for loopholes so they can give more money to candidates.

But generally, when the liberal justices prevail, it is not in any broad area of the law. There is no ground the left can claim as its own, as the right so dominates in questions of states' power.

Debate on Rehnquist's court "takes place on right-wing turf," Fallon says. "This court doesn't talk very much about human dignity as a ground for rights any more. The cases are focused on technical arguments."

An example was a ruling in which the liberals, with O'Connor's help, upheld a heavily black North Carolina voting district challenged by white voters as a racial gerrymander. The court said the state could take race into account -- just a little -- to preserve a Democratic power base. But the starting point was a framework established by conservatives that makes it difficult for state lawmakers to consider race in redistricting and to consolidate minorities to enhance their political power.

### **An air of anxiety**

Beyond the meat of the term, an air of unpredictability and anxiety hung over the court, triggered by the politically volatile Florida election case that so many legal analysts had predicted the court would refuse to hear.

After the court heard the case and ruled for Bush, justices struggled with the fallout. They were weary and tense with

each other, and as they returned to the regular business of their term they were flooded with thousands of angry letters. Polls showed the nation was split over whether the justices should have gotten involved. Rumors circulated that one or more justices might retire.

But for all the criticism, the court did end the election deadlock and, federal judge Richard Posner says in a new book, averted a potential catastrophe. "What exactly is the Supreme Court good for," Posner asks, "if it refuses to examine a likely constitutional error (by the Florida judges) that if uncorrected may engender a national crisis?"

### **Conservatives rule, liberals win a few**

Beyond the bitterly divided ruling that decided the presidency, the Supreme Court's 2000-01 term that ended Thursday was guided largely by the conservative majority, which led rulings that cut back on the authority of Congress and eased the line separating church and state. But the court's four liberals, with help from conservatives Sandra Day O'Connor and Anthony Kennedy, did prevail on a few significant cases. Among other things, they reined in some police powers and confirmed Congress' right to limit some spending by political parties.

### **Major rulings**

--Individual rights

\* Bush vs. Gore, 5-4

\* Hunt vs. Cromartie, 5-4

\* PGA Tour vs. Martin, 7-2

- \* Cook vs. Gralike, 9-0
- Criminal law
  - \* Arwater vs. City of Lago Vista, 5-4
  - \* Kyllo vs. United States, 5-4
  - \* Ferguson vs. City of Charleston, 6-3
  - \* United States vs. Oakland Cannabis Buyers' Cooperative, 8-0
  - \* City of Indianapolis vs. Edmond, 6-3
  - \* Penry vs. Johnson, 6-3
- First Amendment
  - \* Good News Club vs. Milford Central School, 6-3
  - \*Bartnicki vs. Vopper, 6-3
  - \* Legal Services Corp. vs. Velazquez, 5-4
  - \* Federal Election Commission vs. Colorado Republican Federal Campaign Committee, 5-4
  - \* Lorrillard Tobacco vs. Reilly, 5-4
- Federal regulation
  - \* Alexander vs. Sandoval, 5-4
  - \* University of Alabama vs. Garrett, 5-4
- Business law
  - \* Cooper industries vs. Leatherman Tool Group, 8-1
  - \* Circuit City Stores vs. Adams, 5-4
  - \* Eastern Associated Coal Corp. vs. United Mine Workers of America, 9-0
- \* New York Times vs. Tasini, 7-2
- Environment
  - \* Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers, 5-4
  - \* Whitman vs. American Trucking Assns., 9-0
- Immigration
  - \* Immigration and Naturalization Service vs. St. Cyr, 5-4
  - \* Zadvydas vs. Davis, 5-4

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## Laying Down the Law, Justices Ruled With Confidence; From Bush v. Gore Onward, Activism Marked Past Term

*The Washington Post*

Sunday, July 1, 2001

Charles Lane

The 85 cases decided by the Supreme Court in the term that concluded last week can be neatly divided into two categories: Bush v. Gore and everything else.

The court, displaying an increasingly evident confidence about its capacity and authority to settle issues it might once have left to other branches of government or to the states, produced important rulings on matters ranging from campaign finance regulation to immigrants' rights.

But when the history of the term is written, all of that is certain to be overshadowed by the justices' intervention in the deadlocked 2000 presidential election, culminating in the Dec. 12 decision that, in effect, handed the race to then-Texas Gov. George W. Bush.

Bush v. Gore split the court along ideological lines, with the court's five most conservative Republican appointees -- Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas -- voting for Bush and the more liberal justices -- John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer -- issuing sharply worded dissents in which they accused the majority of endangering the court's legitimacy by dragging it into a partisan political dispute.

The conservatives appear to have had the last laugh on that issue. Public approval of the Supreme Court, as measured by polls, was not dented by the election case. About 72 percent of the public expressed a favorable view of the court in a March poll conducted by Princeton Survey Research Associates.

Although the liberals may have been defeated in Bush v. Gore, they scored significant victories in other cases: The court expanded immigrants' rights to resist deportation, shored up the Environmental Protection Agency's authority to enforce the Clean Air Act, upheld federal campaign finance regulations, permitted states to draw congressional districts in a way that would encourage the election of minorities, and affirmed that federal disability rights laws entitle disabled golfer Casey Martin to ride a golf cart in professional tournaments.

Those victories were usually made possible by the support of O'Connor or Kennedy -- the two more moderate members of the court's conservative wing, who are the perennial swing votes on the court. They teamed up to join 5 to 4 conservative majorities 14 times. But in eight other 5 to 4 cases, a winning vote from either O'Connor or Kennedy went for the liberals.

By contrast, the liberals attracted one of

the two swing justices to their side in a 5 to 4 case only once in the term that began in October 1999, according to figures compiled by Washington lawyer Tom Goldstein.

"The term could have been much worse," said Elliot Minberg, vice president and legal director of the liberal People for the American Way.

"There were some disappointments," said Todd Gaziano, director of the Center for Legal and Judicial Studies at the Heritage Foundation, a conservative think tank.

One of the court's decisions this term even raised the intriguing possibility that next term could bring a victory for opponents of capital punishment so substantial that most anti-death penalty activists once considered it unimaginable: The court agreed to consider whether the Constitution prohibits the execution of mentally retarded criminals, an issue the court had apparently settled, in the affirmative, 12 years ago.

A well-publicized story last term was one that, so far at least, hasn't happened: a retirement by one or more justices. Frequent and feverish rumors notwithstanding, the court's lineup remained unchanged, with O'Connor, 71, issuing an unusual public denial of speculation that she would leave the court.

Still, the frequency with which the court decided cases by narrow margins this term -- there was a higher rate of 5 to 4 opinions, 33 percent, this term than in any other term for the past decade, according to Goldstein -- underscored for liberal and conservative activists the importance of any future appointments President Bush might be called upon to make if one of the justices leaves.

For the most part, the court's criminal cases went against law enforcement authorities. The justices, demonstrating skepticism about government methods in the war on drugs, invalidated an Indiana program under which police set up roadblocks and randomly searched drivers' cars for drugs; struck down a South Carolina program under which pregnant mothers were tested for drugs at a public hospital, with positive results forwarded to the police; and said police must get a warrant before using a thermal imaging device to detect heat emanating from a marijuana-growing operation inside a house.

To be sure, the conservatives continued to successfully pursue their effort to enhance states' rights vis-a-vis the federal government. The most clearly conservative result this term was the court's holding that states are immune from discrimination suits for damages in federal court by their disabled employees. It was important not only for its direct impact on state workers, but also for the fact that the court brushed aside detailed findings by Congress supporting the need for such a provision in federal law.

"Here you have this huge congressional record, and the court still struck it down," said Steven Shapiro, national legal director of the American Civil Liberties Union. "It really left people in a quandary as to what means there are for federal civil rights enforcement against state defendants."

The court also eliminated the legal basis for a whole category of anti-discrimination lawsuits that minority groups had used to challenge allegedly biased state actions ranging from certain admissions requirements at

universities to the placement of polluting factories near minority neighborhoods.

Another far-reaching conservative result emerged in a Texas case involving a mother who was arrested and briefly jailed by police for not buckling her children's seat belts while driving through her suburban neighborhood. The court, by another 5 to 4 vote, held that the Constitution permits full custodial arrests for offenses that are normally punishable only by a fine.

The majority in that case was an unusual one, with Souter joining Rehnquist, Scalia, Kennedy and Thomas and O'Connor joining the court's other liberals in a dissenting opinion. The dissenters said the ruling could weaken the public's protections against police abuses such as racial profiling.

And the court said employers may require employees to submit their discrimination complaints to an arbitrator rather than sue in court.

On the environment, the conservatives also trimmed the scope of protection. They held that the Clean Water Act does not authorize the federal government to regulate self-contained ponds located within a single state and not clearly linked to the country's broader network of streams and lakes. They also granted property owners greater latitude to sue for damages when they claim that state environmental regulation has reduced the value of their property.

But in at least the clean water case, the court declined to adopt a broader proposed view of the case that would have held that Congress lacked constitutional authority to regulate such water generally.

Then, in the Clean Air Act case, the court's liberals and conservatives united to ward off an ambitious business-led attack that sought to overturn the EPA's authority to regulate certain air pollutants on the grounds that the agency had not been specifically authorized to do so by Congress. Scalia wrote the opinion.

However, in one respect that case may have been the exception that proves an increasingly evident rule about the court.

Liberal and conservative justices share a propensity to substitute their judgment for that of Congress, lower courts, federal agencies and state governments.

Even when a conservative majority dismissed Congress's findings about state discrimination against the disabled in deciding that the disability rights law did not overcome states' sovereign immunity to discrimination suits, the effect was as much to aggrandize the court's power vis-a-vis that of Congress as it was to enhance state power against the federal government.

And just as the conservatives trumped Congress in that case, liberals ruled in crucial immigration cases that laws written by Congress that were ambiguous but seemed to preclude federal court intervention on behalf of deportable aliens did not, in fact, do so.

As a result, immigrants may now have access to federal courts to dispute their deportation orders, and the Immigration and Naturalization Service has lost the authority to detain certain aliens indefinitely pending their deportation to countries that resist taking them back.

Instead, the immigrants can seek release in court, according to a new set of rules,

drawn up by the justices, that tend to favor immigrants more than the earlier rules.

In the *Casey Martin* case, an ambitious opinion written by Stevens dismissed the professional golf tour's claim that it should be able to decide all the rules of its tournaments, asserting instead that federal courts could evaluate when an accommodation for a disabled athlete might or might not constitute a "fundamental" change in the game.

Thus, the common element linking *Bush v. Gore* to many other cases this term was that it, too, amounted to a declaration by the court that it was better positioned than a lower state court or Congress to decide how -- or if -- ballots in Florida should be counted.

"The court assumes that it is more qualified than Congress to resolve disputed electoral votes, more entitled than the president's agencies to fill gaps in federal law and better equipped than the professional golf association to determine the rules of golf," said Walter Dellinger, a Washington lawyer who served as solicitor general under President Bill Clinton.

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## High Court's Term Much More Than "Bush v. Gore"

*American Lawyer*

July 2, 2001

Tony Mauro

At the end of a long and pleasant lunch at the Supreme Court recently, Justice David Souter paused and told an old friend: "I'm very grateful that we didn't talk about *Bush v. Gore*."

Souter's comment, recounted by the justice's lunch companion on the condition of anonymity, offers a glimpse into the Supreme Court's term that ended last week. There was *Bush v. Gore* -- the Dec. 12 opinion that resolved the Florida post-election recount dispute in favor of George W. Bush -- and then there was everything else.

The justices would just as soon not think or talk about *Bush v. Gore* anymore, though they have apparently reached the stage where they can laugh about it. At the law clerks' annual invitation-only show for the justices on June 26, the case was the target of several send-ups.

"After *Bush v. Gore*, they rolled up their sleeves and worked hard to put it behind them," says Drake University law Professor Thomas Baker, once an aide to Chief Justice William Rehnquist. "Now, I think there's a surreality to the case in their eyes. It's almost like it wasn't this term, not even this Court."

Like it or not, however, *Bush v. Gore*, No. 00-949, did emanate from this Court this term. The first wave of book-length analyses of the case has emerged, with Alan Dershowitz and Vincent Bugliosi portraying it as a lawless and aberrant decision that runs contrary to the Court's

recent jurisprudence on federalism and equal protection.

But, at the same time, other scholars and analysts are trying to stitch *Bush v. Gore* back into the fabric of the Rehnquist Court -- to see how it fits in with the Court's overall direction.

What's emerging is a consensus: *Bush v. Gore* does fit into the broader patterns -- but only if the Court is viewed, not as a states' rights Court, or a Court that takes a narrow view of constitutional rights, but as a judicial supremacy Court, a Court that takes no guff from the other branches. It's a Court, in other words, bold enough to intervene in the messes the other institutions of government get themselves into, and self-confident enough to think it knows best how to fix them.

"This is the least deferential Supreme Court in American history," says former acting Solicitor General Walter Dellinger, now national chairman of the appellate practice at O'Melveny & Myers. "The theme of the last five years is not federalism but judicial supremacy."

Adds University of Virginia law professor A.E. Dick Howard: "I continue to be awed at the willingness of the Supreme Court to step into matters that Felix Frankfurter would never have gotten into. This term shows that to be conservative is not to be lacking in self-confidence." Frankfurter was a leading proponent of judicial restraint.

## THE RULE OF LAW

Whether this boldness looks good or bad depends on the beholder's political bent.

Douglas Kmiec, a former Reagan Justice Department aide and incoming dean of Catholic University of America's Columbus School of Law, sees the Court's term, including *Bush v Gore*, as a "triumph of law over politics." He explains, "It nourishes the notion of a rule of law, because it says there are some things best resolved by a group of people who are independent, with life tenure and undiminished salaries."

Kmiec also thinks the Court did not make a power grab in the election case, but accepted the "unsought responsibility" of resolving the mess. But to Erwin Chemerinsky, law professor at the University of Southern California, the Court's assertiveness heralds "a new era of the imperial judiciary."

That new era may have reached its apex in *Bush v Gore*, but it actually got started several years ago.

A Supreme Court that once touted its desire to recede from the spotlight began grabbing it with its cases cutting back congressional commerce clause power in *United States v Lopez*, the 1995 ruling that rejected the Gun-Free School Zones Act, and continuing through last year's *United States v Morrison*, striking down parts of the Violence Against Women Act. In *City of Boerne v Flores*, the Court in 1997 said Congress had no business passing laws -- in that case, the Religious Freedom Restoration Act -- that interpret the Constitution.

Drake's Baker calls it "judicial hubris, something they have in common with the

Warren Court -- an abiding belief that they know better."

Whatever you call it, the trend appears to have blossomed across the landscape this term. The same Court that made short shrift of the ability of the Florida Supreme Court -- or Congress for that matter -- to resolve the 2000 presidential election has elbowed aside a wide range of institutions in other decisions this term.

Those that bore the brunt of the Court's power display this term included:

- the voters of California, who decided by a 56 percent majority that seriously ill people who would benefit from using marijuana for medicinal purposes should be allowed to do so (*United States v Oakland Cannabis Buyers' Cooperative*, No. 00-151);
- administrative agencies, whose low-level decisions, such as classification rulings by the U.S. Customs Service, were once accorded so-called *Chevron* deference (*United States v Mead Corp.*, No. 99-1434);
- jurors who return big punitive damages verdicts (*Cooper Industries Inc. v Leatherman Tool Group Inc.*, No. 99-2035);
- political parties that want to coordinate their spending with their candidates (*Federal Election Commission v Colorado Republican Federal Campaign Committee*, No. 00-191);
- and even the Professional Golfers Association, on the nature of the game (*PGA Tour v Martin*, No. 00-24).

Of course, it was Congress that ended up on the receiving end with great frequency. The justices struck down laws that tried to restrict immigrants rights (*Ashcroft v Ma*, No. 00-38, and *Zadvydas v Davis*, No. 99-

7791, and *Calcano-Martinez v Immigration and Naturalization Service*, No. 00-1011, and *Immigration and Naturalization Service v St. Cyr*, No. 00-767); muzzle legal services lawyers (*Legal Services Corp. v Velazquez*, No. 99-603); punish the disclosure of eavesdropped telephone conversations (*Bartricki v Vopper*, No. 99-1687); protect disabled state workers (*Board of Trustees of the University of Alabama v Garrett*, No. 99-1240); and promote the cleanliness of ponds (*Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*, No. 99-1178.)

The Court was not in a defiant mood in every decision this term. The case involving the Federal Election Commission can be viewed as a bow to congressional campaign finance reform efforts. In another case involving government rules, *Whitman v American Trucking Associations*, No. 99-1257, Congress and the Environmental Protection Agency won at least a partial victory on setting air quality standards. The North Carolina legislature also finally won some respect for its redistricting efforts (*Hunt v Cromartie*, No. 99-1864).

The Supreme Court also did not step up to the plate every time its intervention was sought. It passed on the Microsoft antitrust litigation, though it could find its way back. And just last week it declined to hear *Hopwood v Texas*, the long-running case on affirmative action in higher education -- though that issue, too, will be hard for the Supreme Court to avoid in other cases next term.

The justices also made a mark by siding with criminal defendants in a spate of cases upholding the search warrant requirement of the Fourth Amendment. In *Kyllo v United States*, No. 99-8508, the Court drew a technological line against thermal imaging devices and other police

tools that pierce the privacy of a home. In *Indianapolis v Edmond*, No. 99-1030, and *Ferguson v City of Charleston*, No. 99-936, the Court disapproved of police programs that searched cars and pregnant women, respectively, for illegal drugs.

An expansive view of the Fourth Amendment did not extend, however, to *Atrwater v Lago Vista*, No. 99-1408, in which the Court said people could be arrested for minor offenses that are punished with only a fine.

In five separate decisions, the Supreme Court also continued its embrace of arbitration as an alternative to litigation. And in its most important church-state case of the term, *Good News Club v Milford Central School*, No. 99-2036, the Court said a Bible club could not be deemed too religious to meet on public school grounds. It could bode well for the Bush administration in future battles over school vouchers and faith-based initiatives.

The Court continued to be sharply divided, voting 5-4 in 26 of 85 cases during the term, with Justices Anthony Kennedy and Sandra Day O'Connor playing their usual role as crucial swing votes.

That closeness and unpredictability made it hard for practitioners and scholars to see consistent themes this term.

"There are no principles, no trends, just ad hoc opinions," says Michael Carvin, a partner in the Washington, D.C., office of Jones, Day, Reavis & Pogue.

Carvin cited the *FEC* case, *Bartricki*, and *United States v United Foods*, No. 00-276, which struck down a federal program that compelled mushroom growers to pay for generic advertising.

"The Court is protecting mushroom growers' speech in *United Foods*, and stolen speech in *Bartricki*, but not the core speech of political parties in *FEC*," says Carvin.

## A CASE FOR THE AGES

But no matter what else the Court did in the term that ended on June 28, *Bush v Gore* will dominate the history books. But for now, the justices are doing all they can to discourage discussion of what went on inside the building during the post-election litigation. Nonetheless, stories are seeping out. One involves a clerk, his wife, and basketball at the nation's highest court.

Jonathan Cohn, a clerk to Justice Clarence Thomas, might have felt like the only person in Washington not consumed by the case. His wife, Rachel Brand, now an assistant White House counsel, was then a lawyer at Cooper, Carvin & Rosenthal and part of the Bush legal team in the Florida courts.

Because of her role in the litigation, Cohn recused himself from any involvement in the intense research and opinion-writing at the Court for the Florida cases. On the day *Bush v Gore* was handed down, the story goes, Cohn sent an e-mail to fellow clerks to see if anyone wanted to play basketball on the court inside the Supreme Court building. Cohn couldn't find any takers among exhausted clerks, who razzed him in a flurry of e-mails.

Contacted last week, Brand said she and her husband were "very careful" to avoid conflicts by staying away from all aspects of the Supreme Court litigation. She would not confirm the basketball story, but did allow that Cohn "may have been twiddling his thumbs" that fateful day.

## The Separation of Justice and State

*The New York Times*

Sunday, July 1, 2001

Linda Greenhouse

There is a paradox that the recent Supreme Court term the term that saw the court decide a presidential election -- cast into high relief: rarely has the Supreme Court been as deeply embroiled in the political life of the country and rarely, if ever, have the justices themselves been so removed from the craft of politics.

From its earliest days, the court included members of Congress, cabinet officers and others drawn from the front ranks of public life. Consider that 80 years ago, a former president, William Howard Taft, began a tenure as chief justice. But though Justice Sandra Day O'Connor is a former state legislator, no current justice has held elective federal office or even a high appointed one.

Conversely, prior judicial experience was long considered irrelevant for service on the Supreme Court. For example, the early Warren Court included three former senators, two former attorneys general and Earl Warren himself, three-time governor of California and the Republican's vice presidential nominee in 1948. But all the current justices were judges when appointed, except Chief Justice William H. Rehnquist, who was an assistant attorney general in the Nixon administration.

The result has been to transform the court from an institution that once drew on the collective experience of people who had lived both sides of the vital intersection of law and politics -- where the most

important cases arise -- to one staffed by a smart, highly professional cadre of academic judges who often appear disconnected from the practical implications of the court's work.

Something has been gained, certainly: a fluidity with legal doctrine in its many nuances. But something vital has been lost -- a framework for seeing the world in all its gritty reality from inside the marble cocoon. It is hard to imagine, for example, that justices with substantial political experience would blithely assume that defending against the Paula Corbin Jones sexual harassment suit would not be a burden for Bill Clinton.

What is the current court missing without political biographies? Some justices today see Congress as alien if not enemy territory. A former member of Congress could be a useful translator of the Congressional mind, much as Justice O'Connor, who served in the Arizona State Senate, has been for the states' interests.

To cite an example from the term just over, justices with political experience might not have declared, as the majority did in a decision limiting the states' exposure to suits under the Americans With Disabilities Act, that despite holding 12 hearings over three years Congress had failed to prove state governments had a history of discriminating against people with disabilities.

The absence of any retirement announcements as the court recessed Thursday means the bitter ideological debate certain to surround President Bush's effort to fill the next vacancy is some months or years away. So it is a good time to step back and consider the court from the perspective not of ideology but biography.

From any angle, this is a far different court from the one filled by the politicians of a generation ago, whose judicial horizons stretched as far as those of the postwar country itself. The leading members of the Warren Court were "larger than life," said Lucas A. Powe Jr., a law professor at the University of Texas and the author of the recent book, "The Warren Court and American Politics" (Belknap, 2000), and they regarded the court as a canvas on which to paint on a grand scale. Not only Warren but William O. Douglas, a key member of President Franklin D. Roosevelt's brain trust and the head of his Securities and Exchange Commission, and Hugo L. Black, the Senate floor manager for much of the New Deal, had been considered as potential presidential candidates. "It mattered a lot that these were savvy politicians," Professor Powe said.

Professor Powe said that while the Warren Court is often characterized as having been "counter-majoritarian," forcing on a reluctant public its own vision of what was right but unachievable through democratic politics, this is a misunderstanding. "It was actually very majoritarian," he said. "They removed the blocks to majority rule that were lurking within the system," like the malapportioned legislatures that fell to the Warren Court's one-person, one-vote decisions. "They knew what was majority sentiment and what wasn't."

But indisputably, the Warren era provoked a strong reaction. "The technocrats we've acquired since then are somewhat a reaction to what the Warren Court did, and to the feeling that if we can just pick very safe people, they won't do it," Professor Powe said.

THERE are more generous ways to characterize the current justices than as technocrats. No one could doubt their intelligence or legal skills. "The Warren Court needed legal craftsmen and the present court is far more adept at legal craftsmanship," said Walter E. Dellinger, a law professor now in private practice who served as acting solicitor general during the Clinton administration. He was one of several advisers who urged President Clinton to resurrect the tradition of picking justices from public life. The president did consider Mario M. Cuomo, the former New York governor; George J. Mitchell, the former Senate majority leader; and Bruce Babbitt, a former Arizona governor then in the cabinet, for the vacancies that went to Ruth Bader Ginsburg and Stephen Breyer.

"I said when Thurgood Marshall retired that the court had lost its only -- " Mr. Dellinger said, "and people expected me to say 'black justice.' But what I said was 'national figure.' The present court could use one, someone with real-life experience."

Justice Lewis F. Powell Jr., who had headed the Richmond, Va., school board during the tense years of desegregation, was one example Mr. Dellinger cited. "Powell had a real sense of the way the world works," he said. "The court needs a mix of pragmatists and of those moved by abstract principle. The biggest mistake a president can make is to name the same kind of person over and over."

Diversity in the broadest sense is a goal often cited by those who study the court. "It was great to have one Bill Douglas on the court, but you wouldn't want nine of them," said Dennis J. Hutchinson, a law professor at the University of Chicago and a former law clerk to both Justice Douglas and Justice Byron R. White. Justice Douglas's "mercurial intelligence was better suited to starting an argument," Mr. Hutchinson said, "than to doing the tough day-to-day work of the institution."

Having veterans of high elective office on the court, he said in an interview, "would give texture to what are otherwise some rather flat and sterile academic debates" over questions like what use to make of legislative history in interpreting statutes. A former legislator "could bring a perspective on what often looks to the court like the irrational nature of legislation," Mr. Hutchinson said.

Justices with broad previous experience have often emerged as influential members of the court. Consider the great chief justice John Marshall, who served in Congress and was secretary of state under John Adams; and Charles Evans Hughes, who twice moved from electoral politics to the court. He was a two-term governor of New York when he was named to the court in 1910, left to run for president on the Republican ticket and rejoined as chief justice in 1930.

The effect of a skilled politician on the court can be powerful. *Brown v. Board of Education* had originally been argued in 1953, but the justices were deeply divided and could not coalesce around a decision. The case was scheduled for a second argument just as Earl Warren was named chief justice. The former governor was able to draw on his arsenal of political skills, largely reframing the argument so that other justices would agree on it, until

he achieved unanimity for the decision.

PEOPLE who say the court is seriously out of touch with the real world invariably cite *Clinton v. Jones*, the 1997 decision in which all nine justices rejected President Clinton's request for temporary immunity from the Paula Jones lawsuit. The justices' confidence that the case could be easily managed by a sitting president now seems cavalier, even ludicrous. Even those who see it as legally correct -- and many do -- think that justices with government experience would have been less dismissive of the president's concerns.

On the other hand, times have changed in the law as in the country, and real-world experience may not be the talisman it once was. "The law has gotten so complicated that it's a more theoretical and complex job than it used to be," Mr. Hutchinson said.

Inevitably, any justice is the product of past experience, which may reveal itself in surprising ways. Before he joined the court in 1962, Byron White worked in Robert F. Kennedy's Justice Department as deputy attorney general, and he went to Alabama to deploy federal marshals to protect the Freedom Riders. It proved a formative experience for the crusty conservative, who in his 31 years on the court was never to forsake his commitment to civil rights nor his view that a strong national government was essential, positions struggling to hold their own on the current court. Justice White dissented from both *Miranda v. Arizona* and *Roe v. Wade*, but on federal authority he was with the liberals, Mr. Dellinger noted: "When he thought of states' rights, he saw George Wallace in the schoolhouse door."

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## Disrobed! Actually, They Think for Themselves

*The Washington Post*

Sunday, July 1, 2001

Richard W. Garnett

It's probably unavoidable that the Supreme Court term that ended last week will be defined in most people's minds by a single dominant image. Who could ever forget the surreal scene that unfolded simultaneously on the court steps and on millions of TV screens a little after 10 p.m. last Dec. 12, when the justices released their decision in *Bush v. Gore*?

But the danger is that the focus on that decision -- so frequently derided as partisan -- raises another, cartoon-like image of the court: that of a marble facade behind which disciplined factions of squishy liberals and hardhearted conservatives wage war over hot-button issues, while a handful of thoughtful moderates anguishes over which side to join.

Cases would be simple in a cartoon court like that. But real cases, like real life, are more complicated.

This Supreme Court term revealed that our justices are neither easy to pigeonhole nor easy to predict. Their dispositions are not merely "restrained" or "activist." Their decisions aren't predetermined by the ideological labels slapped on by partisan animators. Over this past year, they did what they always do: They worked hard to decide difficult cases. And in numerous instances, the results were far removed from what the "law and order versus bleeding heart" paradigm would lead us to expect.

This reality came through clearly in cases involving the justices' application of judicial tools, methods and dispositions sometimes labeled "conservative" by politicians and commentators: a focus on the Framers' intent, an effort to identify the original meaning of the Constitution's text and a respect for deeply rooted legal traditions. In *Kyllo v. United States*, for instance, a sharply divided court held 5 to 4 that a police practice of using a "thermal-imaging device" to detect heat emanating from a suspect's house in order to determine whether marijuana was being grown inside was a "search" of that person's home within the meaning of the Fourth Amendment and therefore almost certainly required a warrant.

It should be easy to predict the votes of the cartoon court in a case like this: The lock-'em-up "conservatives" (Chief Justice William Rehnquist joined by Justices Antonin Scalia and Clarence Thomas) would vote to smooth the way for government drug warriors, while the soft-on-crime "liberals" (Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and David Souter) would take a stand for privacy, liberty and maybe even a little personal experimentation. In fact, though, the arch-conservative cartoon villain Scalia, joined by Thomas and liberals Ginsburg and Souter, wrote the majority opinion upholding the sanctity and privacy of the home and protecting it from high-tech government snooping, over the dissent of the often



lonely liberal Justice Stevens, who was joined by the "swing" justices, Anthony Kennedy and Sandra Day O'Connor.

So what happened? Did Justices Scalia and Thomas lose the script?

No. The same judicial tools and philosophical commitments that so often attract knee-jerk labels like "conservative" compelled Scalia and Thomas to the "liberal" result in *Kyllo*. The text of the Constitution, after all, clearly guarantees the right to "be secure in [our] houses" from "unreasonable searches and seizures." This, for a conservative like Scalia, is not a right that should wax and wane with the times and technology. Scalia was not out to unearth new rights in a "living" Constitution. It is a deeply rooted principle of Anglo-American law and tradition that the privacy of the home is protected against government intrusion. Scalia's purpose was, as he put it, to preserve "that degree of privacy against government that existed when the Fourth Amendment was adopted."

*Rogers v. Tennessee* was another surprise to those who subscribe to the image of the cartoon court. Wilbert Rogers had been convicted of murder when the man he had stabbed died after 15 months in a coma. As Rogers's lawyers pointed out to the Tennessee courts, however, the traditional criminal-law rule -- and the rule in Tennessee at the time -- was that no one could be convicted of murder unless his victim died within "a year and a day." (This rule made sense when life was precarious, medical care spotty at best and forensic pathology little more than guesswork.) The Tennessee court acknowledged the rule but then discarded it as outdated (as most states had already done), and affirmed Rogers's murder conviction.

Again, we might have expected in *Rogers* a typecast 5 to 4 split between left and right. Instead, Justices Souter and Ginsburg joined with Rehnquist, Kennedy and O'Connor to affirm the conviction. Scalia, on the other hand -- again joined by Thomas, but also by the more liberal justices Breyer and Stevens -- insisted that the Constitution did not permit, because the Framers would not have permitted, the Tennessee courts to so dramatically change the rules of the game in the course of a criminal case. It is, Scalia wrote, one of the most "widely held value-judgment[s] in the entire history of human thought" -- and one incorporated into our Constitution at the founding -- that a court "cannot make murder what was not murder when the act was committed."

Another noteworthy instance of a justice throwing out the cartoon court's ideological playbook was Breyer's vote in *Good News Club v. Milford Central School*, a First Amendment case. As he had in last year's *Mitchell v. Helms* -- where the court held that the First Amendment's Establishment Clause permitted governments to help students by loaning educational materials and equipment to private and religious schools -- Breyer again parted company with his liberal strict separationist colleagues. He joined Thomas's majority opinion stating that the First Amendment does not permit a public school to discriminate against a student group on the basis of its religious activities and expression. If other private groups are permitted to meet after hours on school grounds, these two supposed opponents agreed, then the Constitution neither requires nor permits government officials to single out religious groups for unfavorable treatment.

The Good News decision not only takes us beyond the caricatures, like *Kyllo* and *Rogers*. It also provides additional support for efforts to increase parental choice in education by allowing low-income parents in failing districts to choose religious schools for their children and for proposals to better serve people in need of social and other services by permitting religious groups to provide government-funded assistance. More generally, Breyer's votes in *Mitchell* and *Good News* illustrate the growing acceptance of the view -- one the partisan cartoon would tag as "conservative" -- that the Constitution prohibits government establishment of religion in order to protect religious freedom, but does not require government to sweep religious expression and activity from public life.

Finally, probably no justice has been more often caricatured -- whether out of cruelty, condescension, ignorance or good-faith disagreement -- than Clarence Thomas. More and more, though, thoughtful observers and scholars of all political stripes are taking notice of his well-crafted, rigorous and challenging opinions. Not only did he author the lead opinions in *Mitchell* and *Good News Club*, he also issued provocative separate opinions in a number of other First Amendment cases.

In *FEC v. Colorado Republican*, he led the four dissenters, arguing powerfully that however you dress them up, restrictions on political parties' efforts to support their preferred candidates cut to the heart of the rights guaranteed by the First Amendment. Along the way, he got in one of the term's best lines, expressing "baffle[ment]" that "this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core

speech and associational rights that our Founders sought to defend."

And in a concurring opinion in *Lorillard Tobacco v. Reilly*, the tobacco-advertising case decided on the last day of the term, he continued his efforts to afford commercial speech the full protection that, in his view, the First Amendment requires. (It's worth noting, as long as we're debunking stereotypes, that Thomas has frequently been joined in this effort by "liberal" Justices Ginsburg and Stevens.)

Now, there's no denying that stories of partisan justices, scheming law clerks and a court ripped apart by culture wars make for good copy. And like any caricature, the cartoon that results is not entirely inaccurate: Roadrunners don't actually burn up desert highways, either, chased by coyotes on Acme rockets, but they are pretty speedy little birds. It's true that the court decides many close and difficult cases -- if they were easy, after all, they would not end up in the Supreme Court. It's true that one can identify "blocs" of philosophically simpatico justices; that some lean left while others lean right; and that, in many close cases, the swing votes of Justices O'Connor or Kennedy determine the outcome. It's also true, though, that the court is unanimous, or nearly so, far more often than it is ideologically splintered.

In the end, *Bush v. Gore* notwithstanding, the court is more of a good-faith intellectual community than a fever swamp of ideological intrigue. That's the image -- not the cartoon -- we should keep in mind

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## With Conservative Edge, High Court Cuts a Wide Swath Law: Justices End Term Highlighted by Bush v. Gore but Sprinkled with Far-reaching Decisions

*Los Angeles Times*

Sunday, July 1, 2001

David G. Savage

The Supreme Court term that ended last week showed again that the justices are not shy about imposing their will—whether it is deciding a presidential election, managing the use of public school buildings or even determining the rules of professional golf.

They are known as the "Supremes" in Washington, and for good reason. Confident of their abilities and determined to have the last word on the law, the justices rarely defer to the decisions of others.

Their boldness and decisiveness was on display in this term's most memorable case, Bush vs. Gore.

On a Saturday in mid-December, the court on a 5-4 vote issued an emergency order to stop a statewide hand recount of presidential votes in Florida. And late the following Tuesday, the court issued an unsigned opinion, accompanied by four dissents, that said the recount was unconstitutional and could not continue, effectively making George W. Bush the presidential winner over Al Gore.

While these decisions will be long debated, the court's handling of the case highlights two trends on display throughout the year.

One is judicial assertiveness, a willingness to intervene and reverse decisions made at other levels of government.

The second is ideological. On matters that divide liberals and conservatives, Chief Justice William H. Rehnquist continues to be able to muster a narrow conservative majority. He can almost always rely on Justices Antonin Scalia and Clarence Thomas, and usually on Justices Sandra Day O'Connor and Anthony M. Kennedy.

Besides the Florida case, these justices voted together in 14 other disputes that ended in 5-4 decisions. In these rulings, for example, the court declared that:

\* Congress cannot protect state employees with disabilities from job discrimination. The decision in *Alabama vs. Garrett* rejected a discrimination claim brought by a nursing supervisor who was demoted after she was treated for breast cancer. States have a "sovereign immunity" that shields them from suits, the court said.

\* Federal environmental regulators cannot protect isolated wetlands and ponds. The Clean Water Act does not reach these inland waters, it said.

\* The Civil Rights Act of 1964 does not authorize lawsuits from blacks, Latinos or minorities over policies of states, schools, colleges or the police that have a discriminatory effect on them. The law covers only claims of intentional discrimination, it said.

\* Local school officials cannot close their buildings to Bible study groups if others are allowed to meet there. Religious groups have a free speech right to be included, it said.

\* State and local officials may not restrict the advertising of cigarettes to shield children. The 1st Amendment protects the right to advertise, it said.

Years ago, conservatives complained about the court's liberal activism and its willingness to oversee how police questioned suspects, how schools dealt with prayer and how states administered the death penalty.

These days, the court has become more conservative, but several of these rulings suggest that judicial activism has not waned.

"It's true across the board. [The justices] don't defer to anyone," said former U.S. Solicitor General Walter E. Dellinger.

The court's more liberal members did score some important victories during the term. Indeed, the court turned an increasingly skeptical eye on several laws that had been passed by a Republican-controlled Congress.

In 1996, GOP-backed legislation barred legal aid lawyers from going to court to challenge welfare reform laws. But on a 5-4 vote this year, the court tossed out this restriction as unconstitutional. Kennedy cast the key vote by joining the

liberal coalition of John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

O'Connor joined this bloc in a North Carolina case to give states more leeway to cluster black voters in Democratic-leaning electoral districts. So long as districts are redrawn for political reasons, not racial ones, they are constitutional, the court said.

And on a 6-3 decision--with O'Connor, Kennedy, Stevens, Souter, Ginsburg and Breyer in the majority--the court limited the power of police in the war on drugs, striking down the use of roadblocks aimed solely at searching for narcotics.

Even the rule makers in pro sports were not beyond the court's reach. On a 7-2 vote, the justices told PGA Tour Inc. that it must allow disabled golfer Casey Martin to ride in a cart so that he can compete in a tournament.

Last week, the immigration reform laws of 1996 came under attack.

Kennedy joined with the liberal group to rule that the courthouse is not closed to legal immigrants facing deportation because of a criminal record. The Republican Congress had voted to make such deportations virtually automatic, even for those immigrants whose crime was a minor theft or the sale of a small amount of drugs.

Two principles were at issue in the immigration cases. First, federal officials have broad authority over the immigrants. But second, the federal judiciary--and ultimately the Supreme Court--has the power to decide matters concerning constitutional rights.

The Republican Congress went a bit too far, even for a conservative-leaning court, by declaring that "no court shall have the jurisdiction to review any final order of removal" for an immigrant criminal.

This declaration waved a red flag in front of the justices, who think they have the final word on the law. And not surprisingly, they struck it down.

Still, the practical effect of the immigration ruling is likely to be limited.

In its ruling, the high court said that immigrants whose crimes occurred before 1996 can still seek a waiver of deportation from the Immigration and Naturalization Service. But this ruling did not alter the law for those who committed crimes since 1996. They may file a writ of habeas corpus in a federal court, but they have little grounds for winning their claims.

Some immigrant rights lawyers said they feared the high court's rulings would be seen wrongly as major victories.

"This decision was great for a limited class of people, those who pleaded guilty before 1996. It doesn't really do anything for those whose cases came after 1996," said Manuel Vargas, who heads the immigrant rights project for the New York State Defenders Assn. "The law is very harsh for those people, and this doesn't change it. Only new legislation can change it."

Three rulings last week on advertising and free speech left 1st Amendment scholars perplexed.

"They don't know how to deal with the role of money and speech, and the decisions are incoherent," said

Northwestern University law professor Martin Redish.

The advertising disputes involved cigarette makers, mushroom growers and political parties.

The cigarette makers won a free-speech ruling that knocks down local and state advertising restrictions, and the mushroom growers won the right to refuse to pay for generic ads promoting the virtues of their product.

But the political parties lost their claimed 1st Amendment right to spend freely to advertise the virtues of their candidates.

Inconsistency aside, the conservative justices these days vote more often in favor of free speech claims, said UCLA law professor Eugene Volokh. He has tracked 1st Amendment cases for seven years, and he said Kennedy, an appointee of President Reagan, votes most often for free speech. Next in line are Thomas and Souter.

Breyer, a Clinton appointee, votes least often in support of free speech.

Also unpredictable is the court's lineup on cases involving the 4th Amendment and its ban on "unreasonable searches and seizures."

In May, Souter allied himself with the conservative bloc in a decision that explored the "nightwalker" statutes of the Middle Ages, as well as the "vagabond" laws brought to the American Colonies from England. In writing the majority opinion, Souter concluded that the 4th Amendment was not intended to restrict the power of authorities to arrest a person who was seen committing an offense in public, no matter how minor. Therefore, a Texas

police officer did not violate the 4th Amendment when he arrested a mother and took her to jail for not wearing her seat belt.

But a few weeks ago, Scalia wrote a liberal-sounding majority opinion joined by Souter. They concluded the 4th Amendment as originally written was intended to protect the privacy of homes. And therefore it was unconstitutional for the police to scan a home with a heat detector in search of a hothouse for growing marijuana.

In dissent, Stevens and O'Connor wondered how it could be reasonable to seize a person for not wearing a seat belt but unreasonable to use a scanner on a public street.

O'Connor's dissents are rare, however, and she figures to hold the key vote on three major issues coming before the court next term.

The justices will decide whether mentally retarded defendants can be executed and whether the federal government can use affirmative action policies when awarding contracts. The third case, pending appeal, will test whether states can give tax-funded vouchers to parents to send their children to religious schools.

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## In Year of Florida Vote, Supreme Court Also Did Much Other Work

*The New York Times*

Monday, July 2, 2001

Linda Greenhouse

The year the court picked the president: the Supreme Court's 2000-2001 term will always be known as that, and undoubtedly, in the view of many people, it will be remembered for that extraordinary event alone.

But there were many other elements to the term, and many lenses through which to view the 79 decisions the court issued.

Through one lens, the term was a fascinating report card of sorts on how the two elected branches of government behaved during a previous election year, 1996, when conservatives in Congress were in the ascendancy and Democrats were on the defensive on a range of issues bearing on crime, immigration and social policy. Bills passed that year and signed into law by President Bill Clinton have spawned a great deal of litigation, with several cases reaching the court this term.

Over the last several years, including this term, the court has upheld most restrictions the 1996 Congress placed on the ability of prison inmates to gain access to court. That is not surprising, because the 1996 legislation in effect codified a number of the Rehnquist Court's own initiatives, which reduced federal court jurisdiction over cases brought by state prisoners.

But the justices' response to the 1996 immigration laws was different, significantly so. In two decisions this term,

a narrow majority viewed laws that cut back on immigrants' ability to challenge deportation and detention policies as a threat to the principle that the Constitution protects noncitizens as well as citizens. The court curbed the reach of the 1996 legislation and refused to give the traditional judicial deference to immigration policies adopted by the executive branch.

Examining another portion of the 1996 legacy, new restrictions on the ability of lawyers paid with federal money to provide legal services to poor clients, the court ruled that restrictions on the type of arguments that the lawyers could make in welfare cases violated the First Amendment.

Through another lens, the term was a continuation of the Supreme Court's federalism revolution, arguably the most consequential development in constitutional law of the last decade. By the same 5-to-4 vote by which it has decided half a dozen related cases, the court ruled that Congress did not have the constitutional authority to open state governments to lawsuits by their employees for violations of the Americans With Disabilities Act.

The decision in *Board of Trustees of the University of Alabama v. Garrett* reflected a sharply narrowed view of Congress's power to enact legislation to enforce the 14th Amendment's guarantee of equal

protection. Even more than the earlier decisions, it raised the question of how far the court was prepared to go in curtailing the authority of Congress to make national policy binding on the states.

As it has every term since the mid-1990's, the court invalidated at least parts of several federal statutes. This term, it rejected the provision of the disability law the court addressed in the Garrett case; the restriction on welfare suits in the legal services law; a law requiring mushroom producers to pay for a government-sponsored program that advertises mushrooms; and a provision of the federal wiretap law under which the press could be found liable for publishing intercepted material.

Through still another lens, the term offered evidence that even some of the more conservative justices were beginning to share the public's discomfort with the privacy implications of some current law enforcement strategies. The court found unconstitutional the warrantless use of thermal imaging devices that can detect patterns of heat emerging from private homes; police roadblocks that use trained dogs to sniff cars for illegal drugs; and secret drug tests on unconsenting pregnant women seeking care at a public hospital.

On the other hand, the court gave the police broad discretion to make full custodial arrests, with the consequent power to conduct searches, for minor offenses.

The term was also notable for what did not happen. In a campaign finance case from Colorado, the court did not repudiate its long-held view that tight limits on campaign contributions do not violate the First Amendment. In a tobacco advertising case from Massachusetts, the

court invalidated the advertising restrictions while finding no need to revisit its longstanding approach to commercial speech.

The court turned down two cases raising constitutional questions about affirmative action in public university admissions -- an issue that nonetheless appears to be heading inexorably for a place on the court's docket within the next term or two.

Despite seven years without a change of membership on the court -- the longest such period since the 1820's -- and despite feverish speculation, no one retired.

During the term that began last Oct. 2 and concluded on June 28, the court received about 7,700 new cases and agreed to decide 99. It issued 79 decisions (with the remaining cases to be argued and decided in the next term), up slightly from the 73 decisions in the previous term but many fewer than the 150 or so that the court routinely decided in the 1980's.

Voting statistics provide a window on the court's divisions, which are at once more stark and more malleable than they might appear. Twenty-six of the 79 cases, or 33 percent, were decided by votes of 5 to 4, the highest proportion of such votes since the current justices began serving together in the 1994-95 term.

In 1999-2000, 20 out of 73 decisions, or 27 percent, were by 5-to-4 votes. The statistics for the previous five years are: 1998-99, 16 out of 75, 21 percent; 1997-98, 15 out of 91, 16 percent; 1996-97, 17 out of 80, 21 percent; 1995-96, 12 out of 75, 16 percent; and 1994, 16 out of 82, 20 percent.

The cases on which the court divided 5 to 4 ranged from the monumental, like Bush



v. Gore, to the more routine or obscure, like a dispute between the United States and Idaho over title to submerged lands under Lake Coeur d'Alene. Six out of nine civil rights cases were decided by 5-to-4 votes.

As in the past, the bloc of Chief Justice William H. Rehnquist and Justices Antonin Scalia, Clarence Thomas, Anthony M. Kennedy and Sandra Day O'Connor dominated in the closely divided cases, prevailing in 14 of the 26. The four more liberal justices -- John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer -- prevailed in eight. (The remaining four cases did not conform to either pattern.)

Last year the division was even sharper, with the more liberal justices prevailing in only one of the 5-to-4 cases, when Justice O'Connor joined them to invalidate a Nebraska abortion ban. This term, Justice O'Connor joined them five times and Justice Kennedy joined them in three other cases.

Justices Kennedy and O'Connor continued to hold the balance of power on the court. They were the only two justices to dissent fewer than 10 times during the term: Justice O'Connor dissented nine times and Justice Kennedy seven times. In six of those cases, he signed another justice's dissenting opinion. He felt moved to write his own dissenting opinion only once, in an immigration case decided on the term's final day. In the 5-to-4 cases, each voted in the majority 20 times, more than any other justice.

During the term as a whole, Justice Stevens dissented most often, 25 times, followed by Justice Breyer with 23 dissents and Justice Ginsburg with 21. On the right, Justices Scalia and Thomas were

also frequent dissenters, with 19 and 18 dissents, respectively. Justice Souter had 16 and Chief Justice Rehnquist had 14.

Following is a summary of the term's most important decisions:

### The Presidential Election

In its quest to preserve an infinitesimal margin in Florida and win the state's decisive 25 electoral votes, the Bush campaign brought two cases to the court, which decided them over an intense 18-day period culminating with the 5-to-4 ruling that determined the outcome of the election.

The first case, *Bush v. Palm Beach County Canvassing Board*, No. 00-836, was an appeal from the Florida Supreme Court's Nov. 21 decision that added 12 days to the deadline for certifying the vote. Argued on Dec. 1, this case resulted on Dec. 4 in a unanimous, unsigned and opaque opinion vacating the state court's decision and requesting clarification of the basis for it.

Without answering the justices' questions, the Florida Supreme Court then turned to the Gore campaign's contest of the newly certified results and ordered a statewide manual recount of ballots that when counted by machine had not indicated a choice for president. The Bush campaign appealed immediately and, as the recount got under way, won a stay from the justices by a vote of 5 to 4.

The court then heard the case, *Bush v. Gore*, No. 00-949, on Dec. 11 and decided it the next day in an unsigned opinion that contained two conclusions: that the lack of uniform standards for the recount violated the 14th Amendment guarantee of equal protection, and that there was no time for the state to fix the

problem and keep the recount going. Thirty-six days after election day, the 2000 election, and the Supreme Court's role in it, were history. The election was over. The five in the majority were Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia and Thomas.

### **Criminal Law**

Three decisions interpreting the Fourth Amendment's prohibition against unreasonable searches indicated that the court shared the country's concern about the impact of some modern law enforcement strategies on personal privacy.

In *Indianapolis v. Edmund*, No. 99-1030, the court ruled 6 to 3 that police roadblocks aimed at discovering drugs in cars through the use of trained dogs are unconstitutional. Justice O'Connor said in her majority opinion that unlike drunken driving roadblocks, which the court has upheld on public safety grounds, narcotics roadblocks serve a general law enforcement purpose and so cannot escape the Fourth Amendment's requirement that searches be based on suspicion of individual wrongdoing. Chief Justice Rehnquist dissented, along with Justices Scalia and Thomas.

By the same 6-to-3 vote, the court ruled that a public hospital cannot constitutionally test maternity patients for illegal drug use without their consent if the purpose is to alert the police to a crime. Justice Stevens wrote the opinion in *Ferguson v. Charleston*, No. 99-936, a challenge to a drug-testing program the city of Charleston, S.C., put in place at its public hospital at the height of concern over so-called crack babies a decade ago.

In the third case, the court ruled 5 to 4 that the police may not use a thermal

imaging device, which can detect suspicious patterns of heat emerging from a private home, without obtaining a warrant. Justice Scalia said in his majority opinion that the Constitution's framers would have regarded such technology as sufficiently intrusive to require the same warrant they demanded for physical entry into a private home. Justices Souter, Thomas, Ginsburg and Breyer joined the majority in *Kyllo v. United States*, No. 99-8508.

But in a fourth case, the court upheld broad discretion for the police by ruling 5 to 4 that an officer who observes even a minor infraction, like not wearing a seat belt, may make a full custodial arrest even if the maximum penalty for the offense is a fine without jail time. The decision in *Atwater v. City of Lago Vista*, No. 99-1408, upheld the arrest of a Texas woman who was driving her children home from soccer practice without seat belts when she was taken in handcuffs and placed in a jail cell until she posted a \$310 bond for the \$50 offense. Justice Souter wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas.

The court overturned the death sentence of a retarded man, Johnny Paul Penry, on the ground that the instructions given to the Texas jury that sentenced him did not meet the standards the justices set when they previously considered his case in a 1989 decision. The flawed instructions did not guarantee that the jury would be able to weigh Mr. Penry's retardation and childhood experience of abuse as factors in their decision, Justice O'Connor said for the 6-to-3 majority in *Penry v. Johnson*, No. 00-6677. Chief Justice Rehnquist and Justices Scalia and Thomas dissented. Next term, the court will consider the deeper question that this case

did not pose: whether the Constitution bars executing the retarded.

### Federal Authority

The court's federalism revolution, which over the last six years has resulted in new constraints on Congressional authority and a corresponding expansion of the states' immunity from federal power, continued with a 5-to-4 ruling that state employees cannot sue for damages for violations of the Americans With Disabilities Act.

Chief Justice Rehnquist's majority opinion in *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240, held that while Congress intended to open the states to such lawsuits, it had not validly done so, for two reasons.

First, the court said, the 1990 law lacked an adequate legislative record showing that discrimination by the states themselves, as opposed to society in general, against people with disabilities was a problem of sufficient dimension to justify Congressional intervention. Second, the court said, Congress cannot place burdens on the states that go beyond the Constitution itself, and discrimination against employees with disabilities, while violating federal policy, does not violate the Constitution. The others in the majority were Justices O'Connor, Scalia, Kennedy and Thomas.

In the term's most important regulatory ruling, the court unanimously rejected an industry attack on the Clean Air Act and ruled that in setting air quality standards, the Environmental Protection Agency is to consider only public health rather than the cost-benefit analysis proposed by the industry challengers. The broad discretion Congress gave the agency did not amount to an unconstitutional delegation of

legislative authority, Justice Scalia said for the court in *Whitman v. American Trucking Associations*, No. 99-1257.

Interpreting the Clean Water Act, the court overturned a 15-year-old Army Corps of Engineers regulation and held that the law does not authorize the government to regulate the dredging and filling of isolated ponds and wetlands. The vote in *Solid Waste Agency v. United States Army Corps of Engineers*, No. 99-1178, was 5 to 4, with a majority opinion by Chief Justice Rehnquist joined by Justices O'Connor, Scalia, Kennedy and Thomas.

Ruling on the scope of federal drug laws, the court held 8 to 0 that Congress has not recognized a "medical necessity" exception to the prohibition on distributing marijuana. The decision, upholding a federal court injunction, was a blow to the marijuana-distribution co-ops that have grown up in California and other states where state law authorizes the use of marijuana to relieve symptoms of various medical conditions. But the decision, *United States v. Oakland Cannabis Buyers' Cooperative*, No. 00-151, did not directly address the state laws and left many questions unanswered. Justice Thomas wrote the opinion. Justice Breyer -- whose younger brother, Charles, ruled on the case as a federal district judge in San Francisco -- did not participate.

### Speech and Press

The court ruled 5 to 4 that Congress violated the free speech rights of lawyers in the federally financed legal services program when it barred them from going to court on behalf of indigent clients to challenge the validity of welfare laws and regulations. The 1996 law was an effort to insulate the new federal welfare law from legal attack. But the law "distorts the legal

system," Justice Kennedy said for the majority in *Legal Services Corporation v. Velazquez*, No. 99-603. Justices Stevens, Souter, Ginsburg and Breyer joined the majority.

Giving the edge to the public's right to know over claims of personal privacy, the court ruled 6 to 3 that the press may not be held liable for publishing illegally intercepted information if the subject is of "public importance" and the press did not participate in the interception. The majority opinion by Justice Stevens thus created a narrowly defined First Amendment exception to the federal wiretap law, which imposes liability on anyone who discloses the contents of illegally intercepted communications. Justices Kennedy, Souter, Ginsburg, Breyer and O'Connor joined the majority opinion in *Bartnicki v. Vopper*, No. 99-1687.

The court ruled 6 to 3 that as a matter of free speech, public schools must open their doors to after-hours religious activities on the same basis as any other after-school activity. The decision, *Good News Club v. Milford Central School*, No. 99-2036, was a victory for a nationwide evangelical Christian organization that seeks to operate after-school Bible clubs for young children. To exclude this activity while permitting others would be unconstitutional viewpoint discrimination, Justice Thomas said for the majority. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Breyer were also in the majority.

The court reiterated its view of the potentially corrupting influence of money in politics, upholding a federal limit on the amount parties may spend in coordination with their own candidates. To exempt parties from the limits, as the Colorado Republican Party requested, would be to

invite circumvention of other limits, Justice Souter said in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, No. 00-191. Justices Thomas, Kennedy and Scalia and Chief Justice Rehnquist dissented.

The court upheld the right of the tobacco industry to advertise its products to adult consumers, striking down a far-reaching advertising ban in Massachusetts. While taking different approaches to the case, all nine justices basically agreed in *Lorillard Tobacco v. Reilly*, No. 00-596, that the ban violated the tobacco advertisers' First Amendment rights. The court also found the state restrictions on advertising for cigarettes, as opposed to cigars and smokeless tobacco, to be pre-empted by federal law. The pre-emption analysis was 5 to 4. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and by Justices Scalia, Thomas and Kennedy.

The court ruled that an assessment on mushroom growers to pay for generic mushroom advertising under a federal agricultural program violated the First Amendment right against compelled speech. Justice Kennedy wrote the opinion in *United States v. United Foods*, No. 00-276. Justices Breyer, Ginsburg and O'Connor dissented.

Finally, there was a statutory rather than constitutional decision that involved the press. In *New York Times v. Tasini*, No. 00-201, the court ruled that a group of publishers, including *The Times*, infringed the copyrights of freelance contributors by making the freelancers' work accessible without permission on electronic databases after publication. The court did not decide what remedy the freelance writers should receive. Justice Ginsburg wrote the 7-to-2 decision, with Justices Stevens and Breyer dissenting.

## Civil Rights

The court looked in both directions in civil rights cases, indicating a deep split that may play out in future cases.

A 5-to-4 decision upheld the latest boundaries of North Carolina's long-disputed 12th Congressional District, ruling that the circuitous 47 percent black district was the permissible result of partisan considerations rather than an unconstitutional racial gerrymander. Justice Breyer's majority opinion in *Easley v. Cromartie*, No. 99-1864, introduced some pragmatic flexibility into the court's treatment of legislative districts drawn with an eye toward racial composition as one of several factors. Justice O'Connor, who had previously led the court in striking down race-conscious districts, joined the majority, as did Justices Stevens, Souter and Ginsburg.

Another 5-to-4 decision substantially limited the effectiveness of one of the most important civil rights laws, Title VI of the Civil Rights Act of 1964, which bars discrimination in programs that receive federal money. In an opinion by Justice Scalia, the court ruled that Congress did not intend private individuals to be able to bring suits under Title VI except for intentional discrimination. Federal regulations barring actions that have a discriminatory impact, regardless of intent, could not provide a basis for private lawsuits, he said. Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas joined the opinion in *Alexander v. Sandoval*, No. 99-1908.

In an interpretation of the Americans With Disabilities Act, the court ruled 7 to 2 that Casey Martin, a golfer with a disability that prevented him from walking the course, was entitled to use a golf cart during tournament play despite the

opposition of the P.G.A. Tour. Writing for the majority in *P.G.A. Tour v. Martin*, No. 00-24, Justice Stevens said the cart would not fundamentally alter the game, the essence of which is shot-making, and was the kind of reasonable accommodation the law required. Justices Scalia and Thomas dissented.

## Immigration

By a 5-to-4 vote, the court rejected the White House view that Congress in 1996 had stripped federal judges of the authority to hear challenges to deportation policies. Reviewing one such policy, the court said deportation was not automatic for immigrants who had pleaded guilty to crimes before Congress changed the law and barred administrative waivers of deportation for "criminal aliens." To give harsh new consequences to old plea bargains made the law impermissibly retroactive, Justice Stevens said for the court in *Immigration and Naturalization Service v. St. Cyr*, No. 00-767. Chief Justice Rehnquist and Justices Scalia, O'Connor and Thomas dissented.

The court ruled that the government cannot keep a deportable alien in indefinite detention for lack of a country willing to receive him. *Zadvydas v. Davis*, No. 99-7791, was another 5-to-4 decision. This time, Justice O'Connor voted with Justices Stevens, Breyer, Souter and Ginsburg, while Justice Kennedy dissented along with Justices Scalia and Thomas and Chief Justice Rehnquist.

By a 5-to-4 vote, the court rejected a constitutional challenge to an immigration law provision that makes it easier for a child born to unwed parents overseas to be deemed an American citizen if the mother rather than the father is an American. The American father of a son born in Vietnam to a Vietnamese mother

challenged the law as violating his equal protection rights. But Justice Kennedy said for the majority that the law properly reflected "basic biological differences" between men and women, with mothers' identity not needing further proof because they are inevitably present at birth. Chief Justice Rehnquist and Justices Stevens, Scalia and Thomas were the others in the majority in *Nguyen v. Immigration and Naturalization Service*, No. 99-2071.

### Labor

A 5-to-4 decision gave employers a major victory by holding that companies can enforce agreements to submit all workplace disputes to binding arbitration rather than litigation. Justice Kennedy wrote the decision in *Circuit City Stores v. Adams*, No. 99-1379, which resolved a dispute over whether the Federal Arbitration Act applies to ordinary contracts of employment. Chief Justice Rehnquist joined the majority opinion, along with Justices O'Connor, Scalia, Kennedy and Thomas.

### Property Rights

The court ruled 5 to 4 that someone who bought property after restrictions on development were in place could still challenge the restrictions as an unconstitutional "taking" of private property. The court reinstated a lawsuit by a waterfront landowner in Rhode Island who acquired his 20 acres after the state put landfill restrictions in place. The question for future cases is what weight courts will give to the date of ownership in weighing the reasonableness of a landowner's development expectations. Justice Kennedy wrote the opinion in *Palazzolo v. Rhode Island*, No. 99-2047, with Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas voting in the majority.

### Federalism

*Board of Trustees v. Garrett*  
States are immune from job discrimination suits under the Americans With Disabilities Act.

### Free Speech

*Good News Club v. Milford Central School*  
Equal access for after school religious clubs.

### Seat belt arrest

*Atwater v. Lago Vista*  
Police can make custodial arrests for minor offenses.

### Illegal search

*Kyllo v. United States*  
Use of thermal imaging devices is a search requiring a warrant.

### Campaign finance

*Federal Election Commission v. Colorado Republicans*  
Upheld limits on party spending in coordination with candidates.

### Voting rights

*Easley v. Cromartie*  
Upheld North Carolina's 12th Congressional District against racial gerrymander challenge.

### Immigration

*Immigration and Naturalization Service v. St. Cyr*  
Federal courts keep jurisdiction over deportation policies.

### Illegal search

*Ferguson v. Charleston*  
Testing pregnant women's urine for drugs without consent is unconstitutional.

### Illegal search

*Indianapolis v Edmund*

Roadblocks where trained dogs sniff cars for drugs are unconstitutional.

Clean Air Act  
Whitman v. Amer. Trucking Assns.  
E.P.A. may consider only public health

and not cost in setting new clean air standards.

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## “Rehnquist Court” Sets Term Record Chief Justice Leaves His Mark on Decisions

*The Washington Times*

Monday, July 23, 2001

Frank J. Murray

The current Supreme Court has completed a historic seven terms and, despite internal frictions and speculation about retirement, the "Rehnquist court" continues to flex its muscles.

Chief Justice William H. Rehnquist makes his own impact felt mainly by exercising the prerogative of the senior justice in the majority to assign himself or a kindred colleague to write the opinion that goes into the lawbooks and governs future cases.

Over the past seven terms - the longest period without a vacancy since the court was increased to nine justices - the chief justice has voted with the majority in 476 of the 553 cases decided. He thereby had the last word in choosing an author to carry out the high court's "province and duty . . . to say what the law is."

Fully 44.5 percent of the current court's cases (246) were decided unanimously while votes on the other 307 split, 116 of them 5-4.

The four liberal justices haven't fared well in the close votes. On the 116 appeals decided by a single vote since October 1994, Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer were in the majority only 40 percent of the time. If court competition were a sport, those four wouldn't make the playoffs.

If it were a beauty contest, Justice Anthony M. Kennedy would be Mr. Congeniality for being most agreeable. He voted with the majority 92.4 percent overall and a stunning 86 percent of split decisions.

Court analysts believed that some Rehnquist votes that appeared to go against the chief justice's own conservative grain likely were cast for lost causes so that he, and not Justice Stevens, would decide who wrote for history.

When stakes were highest and the vote closest at 5-4, the one member of the current court whom both sides were likely to skip over most often was Justice Ginsburg.

She hasn't written the opinion in any 5-4 case for more than five years.

Overall, Justice Ginsburg wrote only four of the 116 opinions that were decided by 5-4 vote since Stephen G. Breyer replaced Harry A. Blackmun on Aug. 3, 1994.

One of those four opinions was assigned to Justice Ginsburg when Justice Sandra Day O'Connor was the senior justice in the majority. Justice O'Connor could have named herself but has not done so on either occasion when she was senior.

In the only other case in which Justice O'Connor was senior justice in the



majority of the present court - a 6-3 ruling on civil procedure - Justice Ginsburg also wrote the opinion for the court.

Justice Ginsburg's other two 5-4 assignments on the present court were during the 1994 term, her second as a justice. One case dealing with a motor fuel tax was assigned by the chief justice, and Justice John Paul Stevens assigned the other, which involved a worker injury.

Over the same period, the court's most junior member, Justice Breyer, has written three 5-4 opinions assigned by the chief justice and eight assigned by Justice Stevens when the chief voted the other way.

Justice Clarence Thomas wrote 10 and Justices Souter and Antonin Scalia each had nine. Seven of those written by Justice Souter were assigned by Justice Stevens, while Justice Scalia's nine 5-4 opinions for the current court all were assigned by his voting ally, the chief justice.

Justice Scalia also had the opportunity this term to assign one opinion to himself when the chief justice and Justices Stevens and O'Connor voted no. Justice Scalia startled court watchers by writing an opinion ruling that barred police use of a device that detected heat on walls and roof to indicate use of high-intensity lighting at an indoor marijuana farm.

When the vote is close on a major case, Chief Justice Rehnquist typically writes the opinion himself or turns to Justices Sandra Day O'Connor or Anthony M.

Kennedy. Justice O'Connor has written 17 of the 116 cases with 5-4 votes by this court while Justice Kennedy authored 14 and is believed also to have written the unsigned per curiam opinion in *Bush v. Gore*.

## HIGH COURT'S SEVEN TERMS

On Aug. 3, the Supreme Court will have completed seven full years without a vacancy, its most stable period since membership was increased to nine in 1837. Since October 1994, the present court has decided 553 cases. Some related numbers:

- \* Median age of present justices - 65
- \* Median age of all court retirees - 78
- \* Oldest current justice - 81
- \* Youngest current justice - 53
- \* Unanimous opinions - 246
- \* Cases decided 5-4 - 116
- \* Clarence Thomas-Antonin Scalia agreement in split cases - 263
- \* Stephen Breyer-Ruth Bader Ginsburg agreement in split cases - 219
- \* Wrote most dissents (John Paul Stevens) - 110
- \* Wrote fewest dissents (Anthony M. Kennedy) - 17
- \* Most abstentions (Justice Breyer) - 6

\* Most opinions (William H. Rehnquist)  
- 70

\* Fewest opinions (Justice Stevens-  
Justice Thomas tie) - 57

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## A Majority of One

*The New York Times*

June 3, 2001

Jeffrey Rosen

We are all living now in Sandra Day O'Connor's America. Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf. The Supreme Court may tell us soon whether affirmative action in public universities is permissible, and if it does, O'Connor is likely to cast the deciding vote. The court is divided about school vouchers too; O'Connor's views will probably tip the scales.

Voting districts drawn for the benefit of minorities have to be submitted for O'Connor's approval and stand or fall on whether she finds their shapes bizarre. *Roe v. Wade* has been tailored according to O'Connor's specifications, and judges and legislators have to scrutinize all abortion restrictions in an effort to predict whether O'Connor might consider them an "undue burden" on the right to choose. And in December O'Connor helped to decide the presidential election, joining the 5-4 vote to stop the Florida recount and delivering the White House to George W. Bush.

Now, 20 years after she took her seat as the first woman on the court, O'Connor may see her power grow greater still. After one television network prematurely called Florida for Al Gore on election night, John O'Connor, the justice's husband, was reported to have expressed distress, lamenting that O'Connor wanted to retire and that Gore's victory

would make this impossible. The Bush victory, presumably, cleared the way for a smooth exit: O'Connor, who is 71, could step down knowing her replacement would be a Republican nominee. Last month, however, O'Connor announced that she had "no present plans to retire." Speculation has since focused on whether Chief Justice William Rehnquist might resign. And if he does, there are already Republicans and even a few Democrats who have in mind a natural successor: Rehnquist's Stanford Law School classmate and fellow Arizonan, Sandra Day O'Connor.

Whether she becomes the first woman to serve as chief justice, O'Connor is already the most powerful woman in America. How did she achieve this formidable distinction? Part of the explanation is the coincidence of her position at the center of a divided court. The Rehnquist court frequently decides its most important cases by a single vote, with the three conservatives (Rehnquist, Antonin Scalia and Clarence Thomas), joined by the two moderate conservatives (Anthony Kennedy and O'Connor), in the majority and the four liberals (John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer) in dissent. Kennedy and O'Connor have long been competing for the role of decisive swing vote: from 1994 to 2000, each was on the winning side of the same number of 5-4 cases. Last term, O'Connor wrote only one dissenting opinion, approaching Justice

William Brennan's record of zero dissents in 1967 at the height of the Warren era.

But there have been many swing votes in the history of the court. O'Connor is arguably the most powerful of all of them because of the distinctive way she approaches her job. In case after case, she will join the majority and then write a concurring opinion that seems designed to drain her colleagues' reasoning of its more general implications. She has a habit of confining her vote to the case at hand. Her views are so exquisitely calibrated that once in a voting rights case she wrote a separate concurrence to her own opinion, prompting Pam Karlan, a voting rights scholar at Stanford Law School, to say, "At last, O'Connor has found someone she can agree with: herself."

O'Connor's narrow opinions have the effect of preserving her ability to change her mind in future cases. It is not that O'Connor is easily swayed by the lobbying of her fellow justices: there is little lobbying or horse-trading on the Rehnquist court. (Indeed, the justices rarely have substantive discussions.) It is that she approaches her job less like a typical justice than like the state legislator she once was. O'Connor, who prefers vague standards to clear rules, does not derive her opinions from consistent principles that guide her from case to case. Her pragmatic approach allows her to remain not only at the center of the court but also at the center of American politics.

Antonin Scalia, O'Connor's frequent sparring partner, has noted that deciding cases according to principle is the way that judges restrain themselves. "When, in writing for the majority of the court, I adopt a general rule and say, 'This is the

basis of our decision,' I not only constrain lower courts, I constrain myself as well," Scalia declared in his Holmes Lecture at Harvard in 1989. "If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle." Scalia sometimes betrays his own principles -- ignoring the original understanding of the Constitution in voting rights cases, for example -- but he reminds us how important it is for judges to have principles to betray.

By her refusal to commit herself to consistent principles, O'Connor forces the court and those who follow it to engage in a guessing game about her wishes in case after case. Each of her decisions is a ticket for one train only. This is not to say, however, that there are no consistencies that mark her tenure. Over the years she has emerged as the leader of the federalism revolution that may be the Rehnquist court's most distinctive legacy, returning power from Washington to the states. And although she is not a committed social conservative, she is a committed antigovernment conservative -- a justice eager to second-guess the judgments of state and federal lawmakers and executives. By refusing to defer to Congress and the president, she has enhanced not only her own power but also the power of the court itself. If she is, in fact, nominated as the next chief justice, her generally moderate votes should give less pause than her view that no branch of government is entitled to respect except the one to which she belongs.

O'Connor was the first woman to be elected majority leader of any state

senate in the nation, and her experience as an Arizona legislator continues to influence the way she approaches her job. Most Saturdays when the court is in session, she and her clerks meet in chambers to discuss the cases that she will consider during oral arguments in the week to follow. "She makes lunch for everybody -- Tex-Mex, Southwestern fare," says Marci Hamilton, a former clerk who is now a professor at Cardozo Law School in New York. "She cooks it up and brings it from home. Then we would sit down and talk about the cases and eat."

There are justices -- Scalia and Thomas, for example -- who conduct their discussions with clerks as freewheeling debates about the law. O'Connor's discussions are more formal, like a senator's receiving briefings from her staff. She is unusual among justices in requiring her clerks to write extensive memorandums about a case before any discussion. During the Saturday meetings, a clerk who has prepared a memorandum will give a brief presentation; then O'Connor will ask the other clerks to make short presentations of their own.

After hearing her clerks' views and reviewing the briefs, O'Connor sometimes announces her vote or suggests that she has not yet made up her mind. At oral arguments, she is an active questioner and often makes little effort to conceal her views, confessing her ambivalence or revealing her skepticism about one side or the other. She is genuinely open-minded in many cases, especially those involving race and religion, and -- like a legislator -- is especially moved by arguments about the practical effects of a decision.

Once she makes up her mind, however, O'Connor continues to try to keep her options open. Like a politician, she is careful not to tie herself down in the future, instructing her clerks to write majority opinions as narrowly as possible. "She tries very hard to avoid broad rules, for fear that if you speak too broadly, you might bind yourself down the road," says one former clerk, who, like most of O'Connor's former clerks I spoke with, asked not to be identified. (The justice was said to be infuriated a few years ago by Edward Lazarus's "Closed Chambers," a tell-all book about the court.) Another former clerk says: "She's very careful to write minimalist opinions, taking each case one at a time and trying not to decide too much that's not before the court. She really has no grand constitutional theory. But that's a different sense of calculatedness than the idea that she holds out in order to dictate what the court says, which I didn't see at all."

In a C-Span profile broadcast last December, O'Connor described her typical day. "I'm a fan of reading a newspaper in the morning," she said. "By 5:30 or so I'm awake and ready to get up and get going, and I'm usually outside . . . looking for the newspaper before it's even arrived. And once it does, we have a little breakfast and read the paper and I go down to the court. . . . I try to leave the house around 7:15 to go downtown and beat some of the traffic. And the first thing I do at the court is have an hour of exercise." Since her first days on the bench, O'Connor has organized a morning aerobics and yoga class for female clerks and employees on the Supreme Court basketball court, known as the highest court in the land.

More than some of her colleagues, O'Connor enjoys the ceremonial aspects of her job and has handled the public scrutiny that accompanies being the first female justice with poise and confidence. According to Ruth McGregor, who clerked for O'Connor in 1981 and now sits on the Arizona Supreme Court, O'Connor received more than 500 letters a week during her first term, and she tried to answer all of them. "The thing I noticed was how personal the communications were, partly because her hearings had been televised and perhaps people related more easily to a woman," McGregor says. "People sent hand-knit socks and homemade fudge and pictures of their grandchildren."

The mail has tapered off a little over the years, but O'Connor continues to travel the world like a head of state, giving worthy speeches at law-school dedications and international events about the importance of federalism and hard work. She is a fixture on the Georgetown party circuit, where her husband, John, a Washington lawyer, is popular for telling humorous stories in Scottish and Irish dialect. She is also attentive to her press clippings. "Charles Barkley came to the court one day with Justice Thomas, and Thomas, being the way he is, he doesn't tell anybody about it," recalls a former clerk for another of the justices. When O'Connor learned that Barkley was in the building, she had him photographed for *The Washington Post Style* section putting an ornament on the Christmas tree in her chambers.

In addition to cultivating her public persona, O'Connor takes a warm interest in her clerks' welfare and goes out of her way to organize events and outings for their amusement and instruction. Clerks recall excursions to see the cherry blossoms, a tour of Washington by a

Civil War historian and outings with the justice for white-water rafting, fly fishing and hiking in the Blue Ridge Mountains. "She loves to hike, she loves skiing, she loves tennis, she loves golf," says her brother, H. Alan Day. A few days after deciding *Bush v. Gore*, she scored her first hole in one.

Early in her tenure, several commentators suggested that O'Connor's opinions were written in a distinctively feminine voice. In 1986, Suzanna Sherry, then a law professor at the University of Minnesota, cited the works of Carol Gilligan on behalf of the proposition that "while women emphasize connection, subjectivity and responsibility, men emphasize autonomy, objectivity and rights." Painting O'Connor as the apotheosis of "difference" feminism, Sherry ventured that the justice's preference for moderation over confrontation -- and community over individualism -- was attributable to her sex. O'Connor herself has little patience for these stereotypes, and in a speech at N.Y.U. in 1991, she strenuously rejected Sherry's thesis. "This 'New Feminism' is interesting but troubling, precisely because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long," O'Connor declared. "Asking whether women attorneys speak with a 'different voice' than men do is a question that is both dangerous and unanswerable."

According to Marci Hamilton, the former O'Connor clerk: "When you grow up riding wild horses -- Western women tend not to buy that different voices stuff. They tend to be pretty much in the camp of 'Annie Get Your Gun': Anything he can do, I can do better."

Being a woman has shaped O'Connor's work far less, it would seem, than being a legislator. O'Connor's service as majority leader of the Arizona State Senate was one of the formative experiences of her life, and it is remarkable how much her approach as majority leader anticipates the role that she would come to play on the Supreme Court. In the 1970's, the Arizona Senate was almost evenly divided: 16 Republicans and 14 Democrats. Most of the issues that O'Connor faced were practical challenges -- like the effort to divert water from the Colorado River to Arizona as part of the Central Arizona Project -- and her tendency was to confront them in a bipartisan spirit. "I can't remember a damn thing we ever came to blows over really," recalls Bob Stump, who was the Democratic minority leader during O'Connor's years as majority leader and is now a Republican congressman from Arizona, having switched parties in 1982. At the end of each session, Stump says, O'Connor would invite Democrats and Republicans over to her house for a bipartisan party, where she would cook burritos and tortillas.

According to Stump, O'Connor's chief opposition came not primarily from Democrats but from the John Birch wing of her own party, which was clamoring to abolish the income tax and investigate the United Nations. "It was more moderating them than it was bringing our side around," he says. As majority leader, O'Connor viewed it as her mandate to rein in the conservative extremists. And she was independent-minded enough to break ranks with her party on issues she cared deeply about. Stump says that the Senate, with overwhelming Democratic and Republican support, passed a law giving direct financial aid to parochial schools.

Insisting that the bill was unconstitutional, O'Connor was the only Republican to join three Democrats in opposing it. "In those days, that was a very unpopular thing to do," Stump says. Later the Arizona Supreme Court agreed with O'Connor's position and struck down the law.

O'Connor has shown similar independence on the Supreme Court, suggesting that the Constitution permits some aid to religious schools and some race consciousness, but not too much -- which is more or less the view of the majority of American voters. A few weeks ago, for example, after voting repeatedly to strike down voting districts drawn for the benefit of minorities, O'Connor broke rank with her conservative colleagues and decided that she could live with a redrawn North Carolina voting district that she had first expressed concern about in 1993.

I called David Garrow, the Pulitzer Prize-winning author and a Supreme Court historian at Emory Law School, to ask what he made of her apparent change of heart. "Is there an extensive, deep-seated indecisiveness to her?" Garrow asked. "And is there something wrong about using 'indecisive' to characterize a female justice?" Garrow posed some more blunt questions. "Does she at some deep level doubt her own ability? Is that the way to understand this two-steps-forward, two-steps-back quality to her decision making, that she's not at all certain about her own judgment? If she doesn't lack the courage of her convictions, she lacks the clarity of her convictions."

These are strong sentiments -- and I have expressed similar sentiments in the past. But those who have worked with O'Connor insist that she is anything but

indecisive, as does O'Connor herself. "When I'm at the court faced with a case, I try to find out everything about that case I can," O'Connor told the National Coalition of Cancer Survivorship in 1996. "Then I make my decision, and I don't look back. I do not look back and say, 'Oh, what if I had done the other thing,' or 'Oh, I should have done something else.'"

Deborah Jones Merritt, another of O'Connor's former clerks -- she is now the director of the John Glenn Institute at Ohio State -- says: "Indecisive is probably the last word I would ever choose to describe Justice O'Connor. She would listen to all the arguments, get the answers and then be very decisive about her view in the case."

In her decisiveness about the bottom line, O'Connor operates in marked contrast to her fellow swing justice, Anthony Kennedy. "I'm more of an agonizer than many of our colleagues," Kennedy told me five years ago. In his meetings with clerks, Kennedy experiments with different opinions. He sketches out various arguments on a white board in his chambers, often announcing that he is persuaded by one position only to return the next morning to declare that he has been thinking about the case overnight and now is inclined to take the opposite view. Once Kennedy makes up his mind, however, he is far more willing than O'Connor to embrace broad principles that constrain his discretion in future cases.

During a recent visit to O'Connor's office, I found a bit more evidence of her decisiveness. She declined to grant an interview for this article but kindly agreed to show me around her chambers. At the front of the Supreme Court Building, her airy inner office,

painted in Southwestern earth tones, has a spectacular view of the Capitol and the court steps, where there were protesters demonstrating against *Roe v. Wade* and *Bush v. Gore*. Her inner office is decorated with Zuni drums, a Carl Oscar Borg landscape of the Grand Canyon and George Catlin paintings of a buffalo hunt in the Rocky Mountains. With her steady gaze and beige suit, O'Connor seemed like a formidable C.E.O. of the most powerful corporation in America, but she was also gracious and candid, although understandably wary. (I've written critically about several of her decisions.) She came to life when I produced a copy of "Where the Bluebird Sings to the Lemonade Springs," a collection of essays by her favorite author, Wallace Stegner. And she talked with warmth and enthusiasm about Stegner, the great chronicler of the West who was also her creative-writing teacher at Stanford.

Soon, it was time for our tour. By her large desk, there was a cartoon of O'Connor on a swing being pushed by Jerry Falwell. Above it was a framed front page from *Newsday* celebrating her confirmation in 1981 with the headline "Her Honor." There were photographs of O'Connor's three sons and her grandchildren. As I tried to take it all in, she hustled me along to the outer office, past a signed basketball from the U.S. Women's Olympic team. Suddenly, the tour was over. Realizing that I had left the Stegner book on the couch in her inner chambers, I went back to retrieve it. On the chair where the justice had been sitting, I noticed a hand-stitched pillow, embroidered with the motto: "Maybe in error but never in doubt."

By her own account, the roots of O'Connor's self-confidence came from her upbringing riding horses and roping



steers on the Lazy B cattle ranch, a 250-square-mile tract on the Arizona-New Mexico border that is 35 miles from the nearest town and 12 miles from the nearest neighbor. During the C-Span biography, O'Connor quoted Wallace Stegner's description of growing up in the West: "There is something about living in big empty space, where people are few and distant, under a great sky that is alternately serene and furious, exposed to sun from 4 in the morning until 9 at night, and to a wind that never seems to rest -- 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." O'Connor continued with a vivid recollection of driving around the ranch in a pickup truck with her father, waiting for the rain that the grass and the cattle needed to survive. "Rain was our life's blood . . . the essential element, the most treasured event, prayed for, hoped for, anticipated, savored when it came . . . celebrated and enjoyed -- every drop," she recalled. "Joy, wonder, incredible gift from above."

O'Connor and her 61-year-old brother, Alan Day, have been writing a memoir about growing up on the ranch, which is scheduled for publication early next year. "A lot of people have asked Sandra through the years how someone from a rural, humble, agricultural background could have achieved what she's achieved, and maybe this book is a long answer to that question," Day says. Day, who ran the family ranch for many years, says that his sister's upbringing as a rancher made her independent and self-reliant. "You would be out on the ranch in a pickup or on horseback, or whatever," he relates, "when you would come upon a situation that needed a response: a broken fence or a windmill or a sick cow or a flat tire or a broken fan belt. There wasn't

anybody to call and there wasn't anybody to take care of you. You very quickly learned that you're responsible for yourself." In deliberate Western cadences very similar to his sister's, Day expresses moving, brotherly admiration for her impressive example: "The essence of Sandra is that if you're around her very much, the bar is raised in your life. You just feel like doing better things and being a better person."

After attending school in El Paso, where she lived during the school year with her grandmother, O'Connor enrolled at Stanford at 16 and then after graduating attended Stanford Law School. At law school, she dated her classmate William Rehnquist and met her future husband and fellow law-review editor, John O'Connor.

The story of her progress after law school has been told often. Because of her sex, she was unable to get a job in a law firm; instead, she became a deputy county attorney in San Mateo, Calif., in 1952. After spending several years in Germany, where John served in the Army, the couple moved to Arizona, where O'Connor set up a private practice in a shopping mall. After taking some time off to have three sons, she returned to full-time work when her youngest boy began school. She spent four years as an assistant attorney general in Arizona, where she developed a reputation for attention to detail. In 1964, she served as a precinct captain for Barry Goldwater, who remained a close friend until his death. (A picture of both of them hangs in her chambers, inscribed, "Hi Sandy -- Love, Barry.") Appointed in 1969 to fill a vacancy as an Arizona state senator, she was elected on her own the following year, and in 1973 she became majority leader.

In the Arizona Senate, O'Connor was less socially conservative than some of her Republican colleagues, not only opposing aid to religious schools but also staking out a moderate position on abortion. In 1970, three years before Roe was decided, O'Connor voted to repeal Arizona's draconian anti-abortion law, and the year after Roe came down, she voted against a petition asking Congress to pass a human life amendment to the Constitution. In her interview with President Reagan before he nominated her to the court -- she was by then a judge on the Arizona Court of Appeals -- O'Connor emphasized her personal opposition to abortion but did not commit herself one way or the other on the subject of Roe. During her confirmation hearings, her fiercest opposition came from anti-abortion conservatives who felt that her moderate record on abortion in the Arizona Legislature meant that she could not be counted on to overturn Roe. As it turned out, O'Connor's conservative critics were right to worry. O'Connor staked out her ambivalent position in the very first abortion case she heard, in 1983, in which she denounced Roe without explicitly calling for it to be overturned. Instead, she proposed her own test for evaluating restrictions on a woman seeking an abortion -- whether the restriction "unduly burdened" the right to choose. By adopting the vague "undue burden" language, O'Connor gave herself lots of discretion to decide, from case to case, whether or not she considered a particular abortion restriction permissible.

Between 1983 and 1992, O'Connor upheld every abortion restriction she confronted. According to Lazarus's "Closed Chambers," liberal clerks were so concerned that O'Connor would overturn Roe that a few female clerks

toyed with the idea of having one of them fake an unwanted pregnancy and break down while discussing it in the locker room after O'Connor's morning aerobics class, so that the justice was certain to overhear. But these theatrics were unnecessary: in 1989, despite strong pressure from conservatives, O'Connor refused to provide the fifth vote to overturn Roe itself. And three years later in *Planned Parenthood v. Casey*, a case involving a Pennsylvania anti-abortion law, she joined Souter and Kennedy in upholding what they called the core holding of Roe: namely, that states may not place serious restrictions on abortion before fetal viability.

O'Connor's performance in *Casey* was characteristically self-assured and judicially aggressive. According to a former clerk involved with the decision, she was most offended by the provisions of the Pennsylvania law requiring wives to notify their husbands before having an abortion. Having decided to strike that down, she was amenable to Souter's suggestion that they write an opinion that would preserve the core of Roe. She and Souter then approached Kennedy, who agreed to adopt O'Connor's "undue burden" standard as the new test for evaluating all abortion restrictions. While Kennedy agonized endlessly about the decision -- wavering until the final days before the opinion circulated and musing openly about writing a brief opinion that would sidestep the question of whether abortion is a fundamental right -- O'Connor made her decision and never looked back. Using the same reasoning that she would turn to in *Bush v. Gore*, the majority opinion justified the decision to short-circuit the political debate about abortion on the grounds that the court had to save the country from legislative battles that could only polarize and divide Americans.

Last summer, when it came time to evaluate the constitutionality of so-called partial-birth abortion laws, O'Connor provided a fifth vote for Stephen Breyer's expansive 5-4 decision striking down 31 state laws that restrict late-term abortions. Kennedy, by contrast, wrote an angry dissent, suggesting that he had been duped in 1992 into supporting a malleable legal standard that O'Connor and the liberal justices were invoking to strike down abortion restrictions far later in pregnancy than he had anticipated -- restrictions supported by George W. Bush, Al Gore and two-thirds of the American people.

O'Connor's conservatism is found less in her views about social issues than in her views about where political power rests. She is adamantly anti-Washington. She is not alone, of course. In its view toward federal power, the Rehnquist court is the least deferential court in American history. Seth Waxman, who served as solicitor general in the Clinton administration, notes that in the first 200 years after the Constitution was ratified, the Supreme Court struck down only 127 federal laws. In the past six years alone, the Rehnquist court has struck down 28 federal laws. O'Connor joined all but six of these decisions. (The most restrained justices are Breyer and Ginsburg, who dissented in half the cases.)

Her attachment to states' rights seems to have stemmed from her upbringing on the Lazy B ranch, where her father was an opponent of Franklin D. Roosevelt and the New Deal. Today, less than 15 percent of the land is privately owned in Arizona, and federal land and water regulations are a constant source of frustration to ranchers like her brother. "I got really discouraged with the way the federal government leases their land

for grazing," Alan Day says. "Sandra is very much a federalist, which is saying the states should be able to solve more of their problems and the federal government should stick their nose in as little as possible. I think that certainly comes from her heritage in the West."

But during the past few years, it has become increasingly clear that the federalism revolution that O'Connor has led is not only about states' rights. It is also about the growing determination of O'Connor and her conservative colleagues to reserve for themselves the exclusive authority to decide what counts as illegal and impermissible in America. Last year, for example, O'Connor and the four conservative justices held that private individuals could not sue the states for violating the federal age discrimination act. O'Connor did not think that age discrimination was a national problem, even though Congress thought otherwise when it passed the Age Discrimination in Employment Act.

Later that same year, O'Connor joined the four conservatives in striking down part of the Violence Against Women Act. They dismissed the voluminous evidence that had led Congress to conclude that the states were failing to respond adequately to gender-motivated violence. In this and other cases, O'Connor's experience as a state legislator seems to have given her a robust skepticism about the state and federal legislative process. "Somebody was making the case about a state legislature, and the gist of her comment was, 'I was in a state legislature -- I know how foolishly they can act,'" a former clerk remembers. "Having been there, she understood that these were not such wise deliberative bodies."

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## Refusing to Court Favor: Youngest Justice Accepts Being “Thorn in the Side of Those Who Villify Him”

*The Atlanta Constitution*

Tuesday, July 3, 2001

Ken Foscett

Part 3 of a series about Clarence Thomas running Sunday 7/1, Monday 7/ 2, Tuesday 7/3/2001.

### JUSTICE THOMAS: IN HIS WORDS

Clarence Thomas of Georgia has written opinions on a wide variety of topics since taking his seat on the Supreme Court of the United States in 1991. Here are excerpts from some of his opinions:

#### > Anti-gang, anti-loitering laws

Chicago v. Morales (1999)

In a 6-3 decision, the Supreme Court agreed with Illinois courts that Chicago's anti-gang ordinance violated due process and was an arbitrary restriction on personal liberties. Thomas dissented.

"Today, the court focuses extensively on the 'rights' of gang members and their companions. It can safely do so --- the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are . . . people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in

order to raise their families, earn a living, and remain good citizens. . . . By focusing exclusively on the imagined 'rights' of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice (John Paul) Stevens elevates above all else --- the 'freedom of movement.' And that is a shame."

#### > Freedom of religion

Rosenberger v. University of Virginia (1995)

The university allowed its student activities fund to pay printing costs for various student groups, but withheld payment for a Christian group, saying its newspaper violated school prohibitions against promoting a particular belief. Lower courts sided with the university, but the Supreme Court voted 5-4 to reverse their decision. Thomas concurred.

"This case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The (Establishment) Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants . . . If the Establishment Clause is offended when religious adherents

benefit from neutral programs such as the University of Virginia's Student Activities Fund, it must also be offended when they receive the same benefits in the form of in-kind subsidies."

#### > **Affirmative action**

Adarand Constructors Inc. v. Peña (1995)

The Supreme Court ruled 6-3 for Adarand Constructors Inc., which said the federal practice of encouraging government contractors to hire subcontractors controlled by "disadvantaged individuals" --- and its use of race to identify them --- was unconstitutional. Thomas concurred.

"That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."

#### > **Voting rights**

Holder v. Hall (1994)

In the mid-1980s, black voters in Bleckley County, Ga., challenged the county's single-commissioner

government, saying it limited the political influence of black voters. They won at the appellate court level, but the Supreme Court reversed the decision on a 5-4 vote. Thomas concurred.

"The system we have instituted affirmatively encourages a racially based understanding of the representative function. The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race."

#### > **Cruel and unusual punishment**

Hudson v. McMillian (1992)

The Supreme Court ruled 7-2 that excessive force against a prisoner may be considered cruel and unusual punishment even though the inmate is not seriously injured. Thomas dissented.

"In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.' In concluding to the contrary, the Court today goes far beyond our precedents."

#### > **Free speech**

McIntyre v. Ohio Elections Commission (1995)

In 1989, Margaret McIntyre was fined \$100 for distributing unsigned political leaflets against a school tax referendum the previous year. In a 7-2 decision, the

Supreme Court overturned the Ohio courts. Thomas concurred.

"After reviewing the weight of the historical evidence, it seems that the framers (of the U.S. Constitution) understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion."

### > **Commerce clause**

United States v. Lopez (1995)

The Supreme Court voted 5-4 to strike down the Gun Free School Zones Act of 1990, saying the law exceeded the authority of Congress to "regulate commerce ... among the several states." The case involved a Texas 12th-grader who was arrested for carrying a concealed weapon to school. Thomas concurred.

"It seems to me that the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the federal government to regulate marriage, littering, or cruelty to animals, throughout the 50 states. Our Constitution quite properly leaves such matters to the individual states, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of re-examination."

### > **Federalism**

U.S. Term Limits Inc. v. Thornton (1995)

In a 5-4 decision, the Supreme Court upheld lower court decisions declaring a term limits amendment in Arkansas unconstitutional. The amendment limited the state's members of the U.S. House to three terms and its U.S. senators to two terms. Thomas dissented.

"Nothing in the Constitution deprives the people of each state of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the states or the people. ... Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so."

### > **School desegregation**

Missouri v. Jenkins (1995)

In a long-running school desegregation case, a federal court ordered Missouri to give salary increases to virtually all instructional and non-instructional staff within the Kansas City School District and to continue to fund remedial "quality education" programs. The Supreme Court overturned a lower court in a 5-4 decision. Thomas concurred. "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. Instead of focusing on remedying the harm done to those black schoolchildren injured by segregation, the District Court here sought to convert the Kansas City, Missouri, School District into a 'magnet district' that would reverse the 'white

flight' caused by de jure segregation. . . . Two threads in our jurisprudence have produced this unfortunate situation. . . . First, the court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies on questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority. Second, we have permitted the federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation. The exercise of this authority has trampled upon principles of federalism and the separation of powers."

On the Web: The full text of the opinions by Thomas and other members of the Supreme Court are available at Cornell University's Legal Information Institute Web site at: <http://supct.law.cornell.edu/supct/>

In the court's last full term (1999-2000), here's how often Clarence Thomas --- in non-unanimous decisions --- agreed with each of these justices:

Scalia.....82%  
 Rehnquist.....64%  
 Kennedy.....62%  
 O'Connor.....58%  
 Souter.....30%  
 Ginsburg.....26%  
 Breyer.....24%

Stevens.....20%

### THE WINNING TEAM

Thomas was on the prevailing side in three of every four non- unanimous decisions. Here's how often each justice was on the winning side in the 1999-2000 term:

O'Connor.....92%  
 Rehnquist.....84%  
 Kennedy.....80%  
 Thomas.....76%  
 Scalia.....70%  
 Breyer.....66%  
 Souter.....60%  
 Ginsburg.....54%  
 Stevens.....46%

### WRITING OPINIONS

Thomas writes an average of 21 court opinions a year, which is in line with the number of opinions written by most of the justices.

Stevens.....36.3  
 Scalia.....30.8  
 O'Connor.....23.2  
 Breyer.....22.3  
 Thomas.....21



Ginsburg.....20.3  
 Kennedy.....20.1  
 Souter.....20.1  
 Rehnquist.....17.2  
 Average.....24.6

**DISSENTS**

Only John Paul Stevens has cast more dissenting votes since Thomas joined the court in 1991. But several justices have cast more dissents in recent years.

Stevens.....30.4  
 Thomas.....18.1  
 Breyer.....17.8  
 Scalia.....17.4  
 Ginsburg.....17  
 Souter.....14.7  
 Rehnquist.....14  
 O'Connor.....12  
 Kennedy.....8.5

Source: Harvard Law Review

Last September, as Clarence Thomas fielded questions at the University of Louisville, a student wanted to know: Does the Supreme Court justice write all his own opinions?

Thomas' deadpan rejoinder jolted the audience: "No, Justice Scalia does." The students laughed nervously.

The brief stab at humor was the second time in 30 minutes that Thomas confronted a perception that has dogged him for 10 years: Justice Antonin Scalia, a white man of Italian descent, is the puppeteer who guides his votes and crafts his judicial opinions.

"Because I am black, it is said that Justice Scalia has to do my work for me," Thomas said earlier. "He must somehow have a chip in my brain and controls me that way."

In fact, Thomas has authored dozens of provocative opinions and dissents --- none that rank as landmark legal cases -- - but brick by brick he is building a judicial legacy that could affect the nation for decades to come.

Thomas has spent his entire public life seeking to distinguish himself as an independent thinker who transcends skin color. But not even the white marble walls of the Supreme Court, hewn from the hills of his native Georgia, have insulated him from racial stereotyping.

Thomas' race played a powerful role in shaping his political beliefs, and it continues to shape his judicial philosophy. Of the nearly 1,000 cases that he has voted on, decisions dealing with affirmative action, school desegregation and voting rights have won the most attention.

Thomas' mere presence on the Supreme Court has emboldened black conservatives around the country. But his race and political views continue to make him a lightning rod for criticism.

"I don't see an overwhelming amount of compassion for people less well off in

our society," American University law professor Stephen Wermiel said. "I see somebody who seems to care more deeply about the text of the Constitution and the process of reading it than its beneficiaries."

Thomas is an integral part of the conservative faction that has steered the court back from the perceived excesses of the Warren and Burger courts.

But, perhaps because he has spent less time as a judge, Thomas is more willing than his colleagues to overturn well-established precedents, according to Scott Gerber, an Ohio Northern University law professor who wrote "First Principles: The Jurisprudence of Clarence Thomas."

"He's more bold and adventurous," said Gerber.

Thomas anchors his judicial thinking in the promise of equality spelled out in the Declaration of Independence and the notion of ordered liberty embodied in the Constitution. But echoes of Thomas' experiences with segregation and affirmative action ring throughout his legal writings.

A beneficiary of affirmative action, Thomas nonetheless concluded that affirmative action stigmatizes blacks in ways that are ultimately destructive.

As both black and conservative, he grew to detest the expectation that, because of his skin color, he should be liberal. That mind-set drives his decisions on voting rights and redistricting cases affecting racial minorities.

At his core, Thomas believes passionately that God created the races equally, and he loathes laws and programs that, however subtly, assume otherwise. Thomas rejects government paternalism in any form.

He believes in rules --- the fewer the better, and the same ones for everybody, no matter what their skin color. As he told students in Louisville, Ky., he grew up under a system with two sets of books: one for whites and one for blacks. "I'm not going back to two sets of books," he said firmly.

"I don't need people to agree with me," he added a few moments later. "I'm very comfortable being alone in my views."

### **Turning right from left**

Thomas' evolution into a conservative Republican was remarkably quick. When he left Savannah in 1968 to attend Holy Cross College in Massachusetts, Thomas by his own admission was an angry and confused young man.

Assassins had killed the Rev. Martin Luther King Jr. and Robert F. Kennedy that year. Blacks across America were protesting and rioting over the lingering injustices of racism and inequality.

Thomas, one of only 25 blacks at Holy Cross, helped start the Black Student Union. He grew an Afro. He wore military fatigues and combat boots. Thomas distributed the Black Panthers' literature and helped with their breakfast program for the poor. Later, he characterized his politics at the time as "radical left."

But Thomas developed second thoughts toward the end of his three years at Holy Cross. He told Patrick O'Daniel, a former clerk, that a turning point came when he went to the Panthers' headquarters and found crates of rotting eggs intended for the breakfast program.

The Panthers were just a front, not really interested in helping black people, he concluded.

"He became very disillusioned by that," O'Daniel said.

Another defining moment, Thomas said in one speech, came in 1970 when he participated in a student protest to "free the political prisoners."

"Why was I doing this rather than using my intellect?" Thomas asked members of the National Bar Association, a mostly black legal group. "It was intoxicating to act upon one's rage, to wear it on one's shoulder, to be defined by it. Yet, ultimately, it was destructive."

In fact, Thomas' radicalism, much like his short-lived Afro, never suited him. Thomas' new activism ran counter to the discipline and order instilled years earlier by his grandfather, and his leftist politics alienated the two men.

At Holy Cross, Thomas also developed deep reservations about affirmative action, feeling that people assumed because he was black that he was not qualified to be there, he told others later. The self-consciousness intensified when Thomas was admitted under Yale's affirmative action program as one of 12 blacks in a class of 165.

Years later, Thomas expressed his concerns about affirmative action to Allen Moore, Missouri Sen. John Danforth's legislative director in Washington.

"He said, 'Imagine how it feels if you are a black who feels you deserve to be there, you carried your load --- maybe more than your load --- and then you leave with a . . . degree that the world then discounts.'"

At Yale, Thomas chose a different career track than other black law students. Rather than civil rights, he focused on business and tax law, some of the most arcane and difficult courses at Yale.

He thought he could earn more money in business law. But when the big law firms interviewed him, Thomas said later, they seemed mostly interested in him because he was black.

"Prospective employers dismissed our grades and diplomas, assuming we got both primarily because of preferential treatment," Thomas told biographer Norman L. Macht.

Thomas later told his friend Chris Brewster, a Washington lawyer, about a black friend who had been hired by a big law firm.

"It was some fancy-schmancy building with glass walls, and they put him in an office where he was very prominent, where you could see him," said Brewster. The lesson for Thomas was simple: "I don't want to be that guy."

Danforth, as attorney general of Missouri, initially hired Thomas in 1974 because he was looking for qualified minorities to work for him. When

Thomas took the job, he made one request: He would not work on civil rights cases.

"He wanted to be competing with people and dealing with people on a whole range of issues," said Danforth.

### **A crucial step**

Escaping racial stereotyping, however, proved difficult in Washington, where there were few black Republicans. So when the Reagan administration cast about for a conservative to oversee civil rights at the Department of Education, Thomas seemed the perfect fit.

Only Thomas didn't want the job. "He came to me and said, 'I have resisted all of my life going into the track of the black, to work on civil rights discrimination,' " recalled Moore. "That was the 'marginalize-them track.' "

Thomas took the Reagan administration job anyway, against his principles, because it gave him more responsibility and more money. But it proved a crucial step in his path to the Supreme Court. Less than a year later, he was named chairman of the Equal Employment Opportunity Commission, where chance connections again played a decisive role in his career.

Thomas' vice chairwoman at the EEOC was married to Laurence Silberman, a judge on the U.S. Court of Appeals for the District of Columbia Circuit and a veteran of three Republican administrations.

Silberman recommended Thomas years later to the Bush administration for consideration as a judge.

Eager to advance black Republicans in the judiciary, Bush named Thomas to the D.C. Circuit in 1989, and followed up with a nomination to the Supreme Court on July 1, 1991, 16 months after he was confirmed to the D.C. Circuit.

### **Battle-scarred and weary**

When he arrived on the court in October 1991, Thomas was a physical and emotional wreck after a 107-day confirmation battle. Thomas felt constantly fatigued, and he told his law clerks that he couldn't stay focused. At the end of his first term, Thomas collapsed with exhaustion and was sick for two months.

But the Supreme Court was the perfect place for Thomas. The insulation and seclusion of the court gave him time to recuperate from his confirmation ordeal. Thomas' worst fear --- that his new colleagues would shun him --- never materialized. His colleagues embraced him, an act of kindness that Thomas never fails to mention.

Ten years later, Thomas speaks with a reverence for the court that suggests there is no other place he'd rather be.

From the beginning, Thomas was different from the other justices. He was only 43, barely half the age of some of his colleagues. He was less formal than they were, and he took time to chat with all the court employees, from cafeteria workers to police officers.

He prevailed on court administrators to update the exercise equipment so he could keep up his regular workout. He played basketball with employees at the

court's private gym, dubbed "the highest court in the land."

Thomas' youth subtly affected the court in other ways. More savvy about technology than the other justices, Thomas pushed the court to update its computer infrastructure, get wired to the Internet, and develop secure systems so justices could access records from their home computers.

He took an interest in administration and was made a member of the Supreme Court's budget committee, appearing before Congress every year for the past few years to explain the court's budget needs.

Outspoken and political in both the legislative and executive branches of government, Thomas hasn't tempered his political activism in the judicial branch, and this frankness has made him a conservative icon. In February, at an American Enterprise Institute dinner honoring Thomas, a long line of GOP luminaries lined up to shake his hand, including former independent counsel Kenneth Starr, noted Clinton antagonist Barbara Olsen and former GOP vice presidential nominee Jack Kemp.

He has spoken at most of the nation's major conservative organizations and think tanks, including the Federalist Society, the Hudson Institute and Phyllis Schlafly's Eagle Forum. He has chosen some of these venues to deliver pointed remarks. In 1999, he charged that special interest groups, which played a huge role in his own nomination battle, have corrupted the judicial confirmation process.

Two years ago, he accused the American

Bar Association of bias in its evaluation of presidential appointees to the federal bench. In March, the Bush administration stopped giving the ABA advance notice of appointments for their review.

### **Some of his arguments ring hollow.**

Thomas has complained about the treatment he received during his confirmation. Yet when Republicans attacked President Clinton's judicial nominees for judicial activism, Thomas defended their right to do so.

"Judges simply do not need protection from the slings and arrows of mere words," Thomas said in a 1999 speech. "We are not that fragile."

### **The science of law**

In his 10 years on the court, Thomas has developed a highly methodical and disciplined approach to deciding cases. Thomas believes the law is a science, and that standardized procedures will invariably lead to the correct outcome.

The work habits he learned from his grandfather have stayed with him. He comes to work early, often before 6 a.m. He spends hours reading and studying the briefs --- often at home in the middle of the night. He says he's always thinking about cases, even while mowing the lawn.

Justice Anthony Kennedy, who sits next to Thomas on the bench, said recently he frequently relies on Thomas during oral arguments to tell him where he can find certain facts in the case briefs. Thomas' memory for details, he said, is "photographic."

Thomas' opinions are not flowery or given to esoteric wanderings. He writes simply and plainly, seeking to make every opinion understood to both lawyers and "gas station attendants," as he said recently.

Before every oral argument, Thomas sits down with his four clerks to discuss the cases on the docket. Sometimes, these sessions last four or five hours and become quite animated.

"His main instruction to us was that he didn't want to hear an issue or a question in oral argument that he had not already heard about or thought about himself," said Greg Coleman, who worked for Thomas in 1995 and 1996.

Thomas' clerks play a central role in his preparations. He hires only those who have clerked in the federal court system, and only those who finished in the top 10 percent of their law school class.

Thomas also chooses clerks who mirror his own conservative views and outspokenness.

"He wants free thinkers," said John Yoo, who clerked for Thomas in 1994 and 1995. "He wants people to speak up with views that may be wacky or that haven't been argued for 100 years, but he wants to hear the whole range of views."

At the beginning of each term, Thomas gives his clerks two guidelines: They are never to bargain points of law to secure the votes of other justices, and they are never to write opinions that criticize another justice.

"Ideas are open for attack, but the people never are," said Coleman. "He would never permit a draft to come to his desk that had a disparaging remark about another justice."

### **The quiet man**

On a recent April morning, the Supreme Court sat for oral arguments. Thomas listened to the lawyers, shared private words with Justice Stephen Breyer, who sits on his left, and stared at the ceiling, reclining so steeply in his black, leather chair that it seemed he might tip over.

All eight of his colleagues asked questions during the two one-hour sessions, even though the cases were routine. Thomas did not.

It's not true that Thomas never asks questions during oral arguments, as is commonly believed, but he rarely does.

Thomas' silence is one of the few things people seem to know about him. Even his colleagues in the federal judiciary find it curious; a federal judge from Augusta asked him point blank about his reticence at a judicial conference in Savannah this May.

Thomas has offered various explanations for his quietness. He has said he believes oral arguments are meant for the lawyers arguing their cases. He's said that most questions get asked anyway, so there is no need for him to ask one. He has suggested that his colleagues ask too many questions, and that some are just for show.

In some of these explanations, Thomas has suggested that his mind is already

made up, implying that oral arguments are more of a formality.

"Remember, you've already read the briefs," Thomas said in Savannah. "So you have an idea where you are going to come out."

He's also cited more personal reasons, such as his struggles to learn standard English as a child after growing up around coastal black dialects.

Several of Thomas' friends have urged him to ask more questions so people don't infer he's less knowledgeable than his colleagues. But Thomas refuses.

"His feeling is, what does he care?" said Kansas University law professor Steve McAllister, one of Thomas' first clerks.

### **A true originalist**

After 10 years on the court, some analysts regard Thomas as the most conservative justice.

In legal terms, Thomas is an originalist, meaning he believes in deciding cases based on the original meaning of the Constitution. He views the Constitution as a contract that was entered into by the framers, and he sees his role as enforcing the original terms of the bargain.

He's established himself as an ardent supporter of states' rights and he's deeply hostile to what he perceives as the encroaching power of the federal government.

More recently, Chief Justice William Rehnquist appears to be giving Thomas the lead in articulating the court's more tolerant position on the separation

between church and state. Several majority opinions by Thomas have established that government aid may flow to religious groups provided it is equally available to other groups, a shift from earlier rulings that tended to subject religious organizations to a different standard.

Thomas' concurring opinion in a 1995 case, *Rosenberger v. University of Virginia*, argued that government aid may flow to religious groups provided the government is neutral in how it distributes the money. The opinion has become the legal foundation for the school voucher movement, according to Pepperdine University School of Law professor Douglas Kmiec.

Justices are assigned majority opinions by the senior judge in the majority, often Rehnquist. Thomas has assiduously worked around this limitation by writing concurring opinions that speak only for himself. Thomas uses some of these opinions to throw down markers that go far beyond what even his conservative colleagues might consider.

A 1995 concurrence by Thomas, now required reading in some law school courses, suggested the court should overturn six decades of interstate commerce law. Thomas' position, if ultimately adopted, would drastically limit the power of the federal government to regulate issues such as gun ownership and working conditions.

Thomas, a target of women's groups during his confirmation, has not written much on women's rights. He has voted to overturn *Roe v. Wade* guaranteeing a woman's constitutional right to an abortion, taking the conservative view

that the right to privacy articulated in Roe does not exist in the Constitution.

He has sided with victims of sexual harassment in cases where the court is unanimous. But on closely divided rulings, Thomas tends to side with fellow conservatives and take a more restrictive view of when harassment claims can be brought and how victims should be compensated.

Some of his votes break the conservative stereotype. He has been one of the most liberal justices on the First Amendment, a fact often overlooked by his critics. One study found that only Justice Kennedy took a stronger stance on free speech rights, although some of these votes reflect the view that campaign contributions are a form of speech and cannot be regulated.

Thomas' biggest legacy on the court, however, has been his insistence on a "colorblind" reading of the Constitution in matters of race, taking particular aim at affirmative action and preferential treatment of minorities, according to Gerber, his judicial biographer.

Over the years, Thomas has voted with the court's majority, holding that race cannot be used as the predominant factor in drawing political districts.

In several key decisions, Thomas has also been sharply critical of the 1965 Voting Rights Act, which Congress enacted to stop mostly Southern states from throwing up barriers to black voter registration and voting.

Thomas employed some of his harshest criticism of the Voting Rights Act in a 1994 Georgia case. The suit, brought by

black voters in Bleckley County, argued that the county's system of electing a single county commissioner discriminated against racial minorities. They argued instead for a five-member board that would allow blacks to elect a black representative from majority-black districts.

Thomas evoked the language of South African apartheid in his opinion, concurring with the court majority, which rejected the plaintiff's claims.

"We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines -- an enterprise of segregating the races into political homelands," Thomas wrote.

"Our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups," he continued.

The following year, Thomas drew a broadside from the civil rights community when he voted to strike down an affirmative-action contracting program in Denver. The ruling forced governments across the country to drastically scale back set-aside programs for minorities.

"So called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence," Thomas wrote in *Adarand Constructors Inc. v. Pena*.



Thomas has even taken on some of the legal reasoning behind *Brown v. Board of Education* (1954), the landmark civil rights case that ended segregation in public schools.

In a Missouri case, in which black parents challenged lingering inequalities in Kansas City's school system, Thomas scolded those who wrote the *Brown* decision for relying, in part, on the idea that segregated schools led blacks to feel inferior.

"Segregation was not unconstitutional because it might have caused psychological feelings of inferiority," Thomas wrote.

And then, in language harkening back to his own experience in segregated, Catholic schools, Thomas said: "Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."

In 1998, a college student in New York asked Thomas to rate his impact on the court so far. "Not much," was the reply, according to Alfred University professor Robert Heineman.

But Heineman also recalled a caveat: "He said, 'I'm a young guy. I'm going to be on the court another two decades or so. I think by the time I leave, I'll have some impact.' "

### **Contradictory signals**

Over the years, Thomas has sent contradictory signals in how he reacts to his detractors.

He affects indifference, yet he can't seem to stop talking back to them. Some of the more pointed criticisms appear to goad him into more open defiance.

Just this year, Thomas complained again about the interpretation of his 1992 dissent involving an Alabama prisoner who had been beaten by prison guards. Seven of Thomas' colleagues said the prisoner was entitled to a claim of cruel and unusual punishment.

Thomas argued that the Eighth Amendment was intended to cover cruel and unusual punishment in sentencing, not whatever prison conditions might arise later, which led *The New York Times* to label him the "youngest, cruelest justice."

"I was widely denounced for advocating the beating of prisoners, which is ridiculous," Thomas said in February. "The critics weren't content to argue that I was analytically wrong --- that I had misinterpreted the law in making my decision --- rather they sought my conformity, or, in the alternative, my silence."

Thomas has also sought out opportunities to answer his critics. In 1998, he accepted an invitation to speak to the National Bar Association, representing most of the nation's black lawyers and judges.

"It pains me deeply --- more deeply than any of you can imagine -- - to be perceived by so many members of my race as doing them harm," Thomas said.

"I come here today not in anger or to anger," he said. "Nor have I come to defend my views, but rather to assert my right to think for myself, to refuse to have my ideas assigned to me as though I was an intellectual slave because I'm black.

"I come to state that I am a man, free to think for myself and do as I please. I've come to assert that I am a judge, and I will not be consigned to the unquestioned opinions of others. But even more than that I have come to say that, isn't it time to move on? Isn't it time to realize that being angry with me solves no problems?"

Yet these sentiments tend to mask how much Thomas relishes being the contrarian --- the man who says no when everyone else says yes.

In May, Thomas came home to Savannah to address members of the local bar association. Surrounded by old friends and family, he reflected on his early dreams of returning to Savannah to practice law.

"I don't know whether or not I would be any more popular if I had come home," said Thomas, chuckling. "I think there is a certain pleasure you get from being a thorn in the side of people."

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## Divided They Stand; The High Court and the Triumph of Discord

*The New York Times*

Sunday, July 15, 2001

Linda Greenhouse

TWO federal courthouses here provided scenes of stark contrast on the last Thursday in June. At the Supreme Court, the justices concluded their term by announcing decisions in four cases, all by votes of 5 to 4, while almost simultaneously, less than a mile down Constitution Avenue, the United States Court of Appeals for the District of Columbia Circuit announced its unanimous decision in the Microsoft case.

There was nothing predictable about the unanimity of the complex 125-page Microsoft decision. The seven judges who sat on the case have very different views of the law in general, and of antitrust law in particular. But Chief Judge Harry T. Edwards placed a high priority on the court speaking with one voice, and by all accounts worked energetically to accomplish that goal.

On the other hand, at the Supreme Court last term, "5 to 4" became a judicial way of life. From the presidential election -- destined to be among the most conspicuous and contentious decisions in American history -- to workplace arbitration to tobacco advertising to the ownership of the land under an Idaho lake, the justices were deeply, irrevocably divided.

One-third of the term's 79 cases were decided by 5-to-4 votes -- often but not always the same 5 and the same 4 -- a higher proportion than any time in

memory. By the time the term ended, the announcement of a split decision had become routine, a familiar reminder of how much the next appointment to the court will matter. That appointment, when it comes, could change the court's, and hence the nation's, course on nearly every important constitutional question currently in debate.

But familiarity should not obscure the fact that such a deeply divided Supreme Court is not, historically, at all routine. While the culture of dissent that now prevails is not a Rehnquist Court invention, it is a surprisingly recent development that illuminates not only this court's approach to its work but also the modern Supreme Court's changing relationship to the country and to the concept of law itself.

Not so long ago, it was considered ethically dubious for a judge of a high court even to cast a dissenting vote. "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion" ran a rule that from 1924 until 1972 was part of the American Bar Association's code of judicial conduct. Known as Canon 19, it warned judges not to "yield to pride of opinion" and provided that "except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged."

CANON 19 reflected the spirit of the times when the bar association adopted it. During the 1920's, the Supreme Court under the leadership of Chief Justice -- and former President -- William Howard Taft decided more than 80 percent of all its cases unanimously. Most dissents "are a form of egotism," the chief justice wrote in a letter to Justice Willis Van Devanter, adding: "They don't do any good, and only weaken the prestige of the court. It is much more important what the court thinks than what any one thinks."

The quotation from Justice Van Devanter's unpublished papers is in an article by Robert C. Post, a law professor at the University of California at Berkeley, published in the May issue of the *Minnesota Law Review*. The article examines what Professor Post calls the "norm of acquiescence" of the Taft era and traces its subsequent demise.

Dissent existed in ample measure on the court of the 1920's, Professor Post demonstrates through internal court documents, but the justices suppressed its public expression for what they saw as the institution's collective good. By maintaining a united front, the justices sought to avoid giving ammunition to the court's political enemies, who could be expected to seize on a divided opinion as evidence that the court was making policy rather than discovering the one true answer to a legal question.

But the norm of acquiescence did not last, and by the 1940's Justice William O. Douglas declared in an article, "It is the democratic way to express dissident views." Only fascist and Communist systems insist on "certainty and unanimity in the law," he said.

The culture of dissent was well entrenched by the time Justice Antonin

Scalia, who cast 19 dissenting votes in the last term, wrote in a 1994 article: "Dissents are simply the normal course of things. Indeed, if one's opinions were never dissented from, he would begin to suspect that his colleagues considered him insipid, or simply not worthy of contradiction."

What accounted for the change? Professor Post argues that the court's own role in the legal system changed in 1925, when it gained from Congress the discretion to pick and choose its own cases. The Supreme Court was no longer the court of last resort for private disputes; the justices could turn down those cases to concentrate on legal issues with broad national implications.

WITH the grant of Supreme Court review a scarce resource -- today the court decides only about 1 percent of the cases brought to it -- the stakes for each carefully chosen case grew higher. The justices were not simply resolving particular disputes but superintending the development of the legal system as a whole. This new focus in turn bolstered the concept of law as an evolutionary process rather than a static set of rules to be applied to particular facts and, according to Professor Post, made it less likely for justices to acquiesce in decisions with which they did not agree.

According to David M. O'Brien, a professor of government at the University of Virginia and the author of several books on the Supreme Court, the major turning point came with the approach that President Franklin D. Roosevelt's appointees brought to the court.

"The battle over the New Deal taught that judges make law," he said. "If judges makes law, they'd better rationalize it" by explaining themselves fully, separately if

necessary.

From that perspective, the court's performance in the last term represented the playing out of a powerful historical trend. But it was something else as well. There is a revolution in progress at the court, with Chief Justice William H. Rehnquist and Justices Scalia, Sandra Day O'Connor, Anthony M. Kennedy and Clarence Thomas challenging long-settled doctrines governing state-federal relations, the separation of powers, property rights and religion.

These five justices are "interested in making as much law as they can, sooner rather than later," said Richard J. Lazarus, a professor at the Georgetown University Law Center and director of its Supreme Court Institute. "They are trying to move the law," he said, and are "out there looking for cases" rather than for allies among the other four justices.

DOES it matter for the stability of the law or the authority of the court to have so many cases resolved by such close votes? There is not much evidence that it does. The concern that animated the earlier justices -- that divided decisions might call into question the legitimacy of judicial review itself -- now seems quaint. The country's thinking about the court has long since incorporated the understanding that, as Professor Post put it in an interview, "the court is speaking not from outside the system, but from inside, as a player."

In any event, there seems to be not much correlation between the vote in a case and its public reception. Many people probably assume that the vote in *Roe v. Wade*, one of the most disputed of modern Supreme Court decisions, was 5 to 4; it was 7 to 2. *Miranda v. Arizona*, a 1966 product of the Warren Court, was a

5-to-4 decision that became so ingrained in the law that a much more conservative court reaffirmed it last year 7 to 2.

And the notion that justices should bite their tongues for the collective good is probably no more realistic for them than for anyone else in a self-absorbed, celebrity-obsessed society.

Justices are remembered not for their silent votes but for what they write, Professor O'Brien said. "It's the decade, the culture of the individual voice," he said. We look at the Supreme Court, in all its jagged and vocal discord, and see ourselves.

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# The Future of the Establishment Clause

## *Human Rights*

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Erwin Chemerinsky

President George W. Bush's nominations to the Supreme Court are likely to change dramatically the law of the Establishment Clause. Conservatives on the Supreme Court such as Justices Antonin Scalia and Clarence Thomas have repeatedly urged overruling precedents limiting aid to parochial schools and prohibiting school prayer. (See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-99 (1993).) Currently, as evidenced by the Court's June 2000 decision in *Mitche v. Helms* (120 S. Ct. 2530) (2000)), there are four Justices—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—who desire a radical change in the law of the Establishment Clause. Thus, even one appointment to the Court could bring about this shift.

There is every reason to believe that a Bush nominee would provide the needed fifth vote for a dramatic change in Establishment Clause jurisprudence. During his candidacy, Bush explicitly stated he wanted to appoint justices like Scalia and Thomas. More importantly, Bush clearly cares deeply about allowing more government aid to religion. In one of his first acts as president, he created an office for faith-based programs in the White House to facilitate granting government money to religious groups for social services. Bush strongly favors expansion of such programs and also endorses school vouchers and tax credits that can be used for parochial schools. Additionally, Bush has expressed a desire

for the Court to sanction prayer in public schools.

This article describes the likely impact of Bush's appointments to the Court on the Establishment Clause of the First Amendment. The first section discusses the test used in Establishment Clause cases and its likelihood of being overruled by a Bush Supreme Court. The second section focuses on aid to religion and the dramatic impact that even one appointment could have on the outcome of key issues such as vouchers and charitable choice. The final section examines school prayer, suggesting that more than one replacement among Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer would be necessary to change the law in this area. Because there is some chance that both Stevens, the eldest on the current Court, and O'Connor might retire in the next four years, this also is quite possible. (Chief Justice William Rehnquist is rumored to be likely to retire during the next four years, but even if President Bush appointed an individual with a similar conservative philosophy, it would not alter the outcome in Establishment Clause cases.)

### The Establishment Clause Test

When the Supreme Court first considered the issue of aid to religion in 1947, it echoed the words of Thomas Jefferson in declaring that "[t]he First Amendment has erected a wall between church and state.

That wall must be kept high and impregnable." (*Everson v. Board of Education*, 330 U.S. 1, 18 (1947).) For several decades after this, a majority of the Court unquestionably was committed to strict separation of religion and government. (Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).) The Court thus developed Establishment Clause doctrines that limited religion in government, such as forbidding prayer in public schools (*Sæ, eg, Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962)) and government presence in religion, such as limiting aid to parochial schools. (*Sæ, eg, Lemon v. Kurtzman*, 403 U.S. 602 (1971).)

**Bush clearly cares deeply  
about allowing more  
government aid to religion.**

For the past thirty years, the Court has followed a test in Establishment Clause cases that was announced in *Lemon v. Kurtzman*. (*Id.*) In *Lemon* the Court declared: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." (*Id.* at 612.) A law is unconstitutional if it fails any prong of the *Lemon* test.

Although there have been many cases in which the Court decided Establishment Clause cases without applying this test (*Sæ, eg, Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481 (1994); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983)), it has been used frequently. Several justices have criticized the test and called for its overrule, but this has not occurred. (*Sæ, eg, Lamb's Chapel*

*v. Center Moriches Union Free School District*, 508 U.S. 384, 399 (1993); *Lee v. Weisman*, 505 U.S. 577, 644 (1992).) Indeed, Justice Scalia, the primary advocate of overruling the *Lemon* test, colorfully lamented its survival and analogized it to

a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. [It] is there to scare us [when] we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely. (*Lamb's Chapel*, 508 U.S., at 398-99 (1993).)

Four justices have indicated that they want to overrule the *Lemon* test—Rehnquist, Scalia, Kennedy, and Thomas. (*Sæ, eg, Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 660-74 (1989).) They have expressed a desire for a new test that allows much more government aid to religion and much more of a religious presence in government. They call for an "accommodationist" approach in which the government would violate the Establishment Clause only if it literally created a church, favored one religion over others, or coerced religious participation. Very little would violate the Establishment Clause under this approach, which would emphasize judicial deference to the government in its choices concerning religion. Replacing any of the other five justices could result in this dramatic change to the law.

**Aid to Religious Institutions**

In *Mitchell v. Helms* (120 S. Ct. 2530 (2000)), four justices called for altering the Establishment Clause to allow much more aid to parochial schools. In an opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, Justice Thomas argued that the clause is violated by aid to religion only if the government favors some religions over others. This radical change in interpretation would allow unprecedented aid to religious schools. The only limitation would be that the government could not discriminate among religions.

Justice Thomas, though, went even further and suggested that precluding parochial schools from receiving aid is impermissible:

[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. . . . [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." (*Id.* at 2551.)

Following this approach would mean that denying religious schools funding that is available to other schools, as has always been the law, violates the Constitution.

The issue in *Mitchell* is whether the government violated the Establishment Clause by providing instructional

equipment to religious schools. In earlier cases, the Court had ruled that the government cannot give instructional equipment to parochial institutions if the equipment could be used for religious instruction. (*See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittinger*, 421 U.S. 349 (1975).) In *Mitchell*, six justices rejected this limitation, though they did not agree on an alternative test.

**Never before has a justice suggested, let alone a plurality endorsed, such a radical change in the law of the Establishment Clause,**

Justice Thomas's plurality opinion, joined by Rehnquist, Scalia, and Kennedy, could not be clearer in its call to allow aid to parochial schools so long as the government is evenhanded among religions. Justice Thomas wrote: "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." (*Id.* at 2552.)

The majority rejected this approach and explicitly recognized that it would be a radical and unprecedented shift in the law of the Establishment Clause. Justice O'Connor, in an opinion concurring in the judgment, observed, "[W]e have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid." (*Id.* at 2557.) Similarly, Justice Souter in dissent wrote, "The insufficiency of evenhanded neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretative efforts." (*Id.* at 2581.)



Never has a majority of the Supreme Court held that neutrality is the sole test for government aid to religions, as justice Thomas argued for in *Mitshell*. Such an approach would profoundly change the law because the clause no longer would be a barrier to government aid to religion or religious presence in government. For at least a half-century, the Court regarded the Establishment Clause as an affirmative limit on what the government may do, even if it is acting neutrally among religions. Justice Thomas would reject that entirely.

Even more significantly, justice Thomas's approach indicates that the government *must* fund parochial school education to the extent that it provides aid to private secular schools. This clearly implies that excluding religion is not neutral and constitutes impermissible discrimination under the clause.

Justice Thomas argued that it is offensive for the government even to consider whether an organization is religious in character: "The inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." (*Id.* at 2551.) But if the government cannot consider religious in distributing money, it will be *required* to subsidize religious schools on the same terms that it funds non-religious ones. Justice Thomas acknowledges and endorses this: "The religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." (*Id.*)

Justice Thomas' equality approach would not simply allow but would mandate

massive government aid to religious institutions. Never before has a justice suggested, let alone a plurality endorsed, such a radical change in the law of the Establishment Clause.

In the near future, the Supreme Court will likely face major issues concerning aid to religion, including the constitutionality of school voucher programs and charitable choice programs that allow faith-based groups to receive government money to provide social services. Based on *Mitshell v Helms*, it is clear that four justices—Rehnquist, Scalia, Kennedy, and Thomas—are willing to allow such aid so long as it does not discriminate among religious. President Bush's addition of one more justice who shares this philosophy would ensure that these and other programs aiding religion would be permitted.

### Prayer in Schools

For nearly forty years, the Supreme Court has held that even prayer in public schools is unconstitutional. (See, e.g., *Abbington School Dist. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962).) In June 2000, the Supreme Court declared unconstitutional student-delivered prayers at high school football games. *Santa Fe Independent School District Doe*, 120 S. Ct. 2266 (2000). This case was decided by a six to three margin, with Rehnquist, Scalia, and Thomas dissenting. Chief Justice Rehnquist, writing for the dissent saw the majority's opinion as unjustified "hostility" to religion. (*Id.* at 2283.)

Significantly, Justice Kennedy has been unwilling to join the three most conservative justices on the issue of school prayer. In addition to deciding with the majority in *Santa Fe*, Justice Kennedy wrote the opinion for the Court in *Lee v*

*Weisman* (505 U.S. 577 (1992)), which declared unconstitutional clergy-delivered prayers at public school graduations. In *Lee*, Justice Kennedy emphasized the inherent coercion to such prayers. He did not join Justice Scalia's biting dissent that stressed accommodating those who desired to pray. (*Id.* at 645.)

Therefore, Bush would likely have to replace two justices from among Stevens, O'Connor, Kennedy, Souter, Breyer, and Ginsburg to overrule the many precedents limiting prayer in public schools. It is possible that two of these justices might retire in the next four years, and there is no doubt that conservatives will push for replacements who would vote to overrule the precedents prohibiting prayer in public schools.

## Conclusion

Conservatives long have lamented Supreme Court decisions that interpret the Establishment Clause to limit aid to parochial schools and prohibit prayer in public schools. The Bush presidency and anticipated vacancies on the Supreme Court create the likelihood that conservatives might get their wish to overrule these decisions. Of course, it all depends on who leaves the Court, who is appointed, and how newly appointed justices ultimately vote. But one thing is fairly certain we can expect to see major shifts in Establishment Clause jurisprudence in the years to come.

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## Be Advised: 'Adarand' and Affirmative Action Will be Back on the Docket

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To lawyers throughout the land, the name Adarand Constructors is already synonymous with the movement to limit affirmative action in the public sector. Be advised: When the Supreme Court returns next October, Adarand, and affirmative action, will be back on the docket. This latest challenge to affirmative action in government contracts is just one of some 40 cases that the high court has agreed to hear next term. As the justices recessed last week, they left behind a fall agenda that includes free speech, the death penalty, the Americans With Disabilities Act, and the ongoing battle over telecommunications regulation. Here are a dozen of the most challenging cases:

**Affirmative Action.** No case is likely to divide the justices more deeply than *Adarand Constructors Inc. v Mineta*, No. 00-730. In 1995, in an earlier incarnation of the same case, the Court ruled 5-4 that all racial classifications by any level of government--local, state, or federal--must be subjected to the highest level of scrutiny under the equal protection guarantee implied in the Fifth Amendment and spelled out in the 14th Amendment. The standard applied in *Adarand Constructors v Peña* means that government programs using race as a basis for decision making must be "narrowly tailored" to advance a "compelling interest."

Now Adarand contends that the 10th U.S. Circuit Court of Appeals erred last September when it upheld the U.S. Department of Transportation's Disadvantaged Business Enterprise program. The program in its current form gives a competitive contracting advantage to economically disadvantaged businesses and then makes it easier for minority-owned firms to claim disadvantaged status. The 10th Circuit ruled that Congress, which authorized the program, was justified in trying to eliminate the effects of past discrimination, even under the most exacting form of constitutional scrutiny. Adarand argues that the Court's scrutiny of the use of race was too lenient. The Bush administration hasn't filed its brief yet and faces the dilemma of whether to defend a federal program that appears inconsistent with the previously expressed views of the president, Attorney General John Ashcroft, and Solicitor General Theodore Olson.

**Pornography.** Two separate appeals by the Justice Department address the touchy question of regulating pornography online. *Ashcroft v American Civil Liberties Union*, No. 00-1293, challenges a 1998 federal law that makes it a crime for commercial Web sites to display pornography without safeguards designed to restrict access by minors. The Child Online Protection Act was passed after

the Supreme Court struck down Congress' first attempt to shield minors from Internet porn.

Last June, the 3rd Circuit blocked the 1998 law from taking effect. The court said that the law's determination of what is "harmful to minors" based on "contemporary community standards" was unworkable for Web sites, which, of course, operate nationally with no control over the location of individual visitors. In *Ashcroft v Free Speech Coalition*, No. 00-795, the justices will review a ruling by the 9th Circuit striking down part of a 1996 federal law that prohibits computer-generated child pornography. The Child Pornography Prevention Act expanded the definition of child porn to include a "visual depiction" that "appears to be" a minor engaging in sexual activity. The court said that since no actual children were involved, Congress was simply trying to censor "evil ideas" in violation of the First Amendment.

**Adult Bookstores.** *City of Los Angeles v Alameda Books*, No. 00-799, will test the power of cities under the First Amendment to restrict the number of adult businesses at a single location. The 9th Circuit struck down a Los Angeles ordinance that barred operation of more than one adult business in a building and defined a combined bookstore and video arcade as two separate businesses. While zoning laws have been an important means of regulating the sex industry, the appeals court said Los Angeles failed to show that having two related businesses at one location would increase the harmful effects.

**Public Protest.** In *Thomas v Chicago Park District*, No. 00-1249, the justices will decide whether a local ordinance must guarantee a quick court ruling on any decision to deny a permit for a public

rally. The 7th Circuit found that the ordinance provided adequate access to the courts for those challenging denial of a permit for a 1997 rally in favor of legalizing marijuana. But federal appeals courts are divided on what kind of court review is required under First Amendment standards.

**Death Penalty.** One of the most closely watched cases of the next term will be *McCarter v North Carolina*, No. 00-8727. Does executing convicted murderers who are mentally retarded violate the Eighth Amendment prohibition of cruel and usual punishment? The answer will turn on the Supreme Court's view of whether society's "evolving standards of decency" reflect a consensus against executing the mentally retarded. At least 15 death penalty states have specifically barred executing the mentally retarded, but many capital punishment states still permit it.

**Privatization.** In *Correctional Services Corp. v Malesko*, No. 00-860, a private company performing government tasks is being sued for allegedly violating the constitutional rights of an individual. The Supreme Court has allowed these suits against federal agents who violate individual rights, but ruled in 1994 that such suits weren't allowed against federal agencies. The 2nd Circuit said that this constitutional rights suit could be filed against a company that ran a halfway house for the Federal Bureau of Prisons. The high court's ruling would likely apply to many other private companies that now administer a broad range of government functions.

**Disabilities.** Two cases will provide guidance on the scope of the Americans With Disabilities Act. In *Toyota Motor Manufacturing Kentucky Inc. v Williams*, No. 00-1089, the issue is whether repetitive stress injuries are a disability under the

1990 federal law. The 6th Circuit ruled that a worker with carpal tunnel syndrome was covered.

In *US Airways Inc. v Barnett*, No. 00-1250, the question is whether the ADA requirement that an employer make a "reasonable accommodation" for disabled workers can require the employer to override its seniority system. The 9th Circuit said yes.

**Telecommunications.** The justices have also taken on some highly complex regulatory disputes. One set of cases -- *National Cable TV Association v Gulf Power Co* and *Federal Communications Commission v Gulf Power Co*, Nos. 00-832 and 00-843 - - asks whether the FCC may regulate the rates that utility companies charge cable operators for using utility poles and underground facilities to provide high-speed Internet access.

Another set of five cases addresses the FCC's regulation of the fees that local telephone companies charge new rivals for use of their existing networks. The cases are: *Verizon Communications Inc. v FCC*, No. 00-511; *Worldcom v Verizon Communications Inc.*, No. 00-555; *FCC v Iowa Utilities Board*, No. 00-587; *AT&T Corp. v Iowa Utilities Board*, No. 00-590; and *General Communications Inc. v Iowa Utilities Board*, No. 00-602.

Finally, the justices will rule on whether the decisions of state regulators under the 1996 Telecommunications Act may be challenged in federal court. The combined cases are: *Mathias v Worldcom Technologies Inc.*, No. 00-878; *Verizon MD, Inc. v Public Service Commission of MD*, No. 00-1531; and *United States v Public Service Commission of MD*, No. 00-1711.

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