Section 10: Miscellaneous

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MISCELLANEOUS

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01-188 Pharmaceutical Research v. Concannon


The court held that the state prescription drug-pricing program was not an unconstitutional violation of the commerce clause.

Questions Presented: (1) Does a state pricing program for prescription drugs conflict with the federal Medicaid statute? (2) May a state require an out-of-state manufacturer who sells to an out-of-state wholesaler to pay the state each time a retailer in the state sells one of the manufacturer's products?

01-270 Yellow Transportation, Inc. v. Michigan


The Intermodal Surface Transportation Efficiency Act (ISTEA) froze the amount of money states could charge trucking companies at the fee the state collected or charged as of Nov. 15, 1991. It also established the Single State Registration System, by which each company only had to register its vehicles with one state and that state would collect fees and distribute them to states through which the company's vehicles passed. The court held that any reciprocal agreements that the state had which might have reduced the economic impact of the generic fee were irrelevant. The plain meaning of the ISTEA was applicable.

Question Presented: Whether the Michigan Supreme Court erred in holding that only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991" under Congress's Intermodal Surface Transportation Efficiency Act (ISTEA)?

01-593 Dole Food Co. v. Patrickson
01-594 Dead Sea Co. v. Patrickson


The court held that it did not have jurisdiction over the issue as framed by the plaintiffs.

Question Presented: Whether federal courts have jurisdiction under the Foreign Sovereign Immunities Act over a class action by foreign workers, who have allegedly been exposed to toxic pesticides, against multinational companies?
01-704 United States v. Bean

Ruling Below: (Bean v. BATF, 5th Cir., 253 F.3d 234, 2001 U.S. App. LEXIS 13804)

The court held that because the plaintiff's administrative options had been exhausted, regardless of the reasons, the trial court had jurisdiction to hear the appeal. The trial court did not abuse its discretion in granting relief to the plaintiff.

Question Presented: Whether a federal district court (which normally handles appeals from the ATF) has authority to exempt a convicted felon from the prohibition against possessing firearms in light of annual appropriations limitations from Congress that keep the Bureau of Alcohol, Tobacco, and Firearms (ATF) from having funds to process applications for such exemptions?

01-705 Barnhart, Social Security Admin. Commissioner v. Peabody Coal Co.


The court granted summary judgment for the coal companies in both cases because the commissioner lacked the authority to make assignments after October 1, 1993.

Question Presented: Whether the failure of the Commissioner of Social Security to assign responsibility as of October 1, 1993, as required by legislation, for each eligible retired coal miner to the signatory operator that employed the miner (or to a "related person" of the signatory operator) voids the benefits?

01-757 Syngenta Crop Protection Inc. v. Henson


The court held that the action before that state lacked any issue of original jurisdiction for a federal court, and that the federal district court did not gain removal jurisdiction simply because the state action was inconsistent with a federal settlement.

Question Presented: Whether the federal district court had removal jurisdiction under 28 U.S.C. § 1441 and the All Writs Act over a later action solely because prosecuting that action violated a settlement stipulation in an earlier action already before the court?
01-800 Howsam v. Dean Witter Reynolds, Inc.


The court held that the arbitrability of issues in a service agreement is to be decided the courts, not the arbitrators of the National Association of Securities Dealers (NASD). The court should decide whether an issue is time-barred under the NASD rules unless there is clear and unmistakable evidence that the parties intended otherwise.

Question Presented: Whether the court has the jurisdiction to decide issues of arbitrability as set forth under the NASD rules of arbitration?

01-896 Ford Motor Co. v. McCauley


Credit cardholders claimed the issuers wrongly terminated the ability to accrue rebates towards purchasing vehicles. The court found no jurisdiction because the claims of the class could not be aggregated nor could the cost of reinstating the program for all cardholders could not be used to establish the amount in controversy.

Question Presented: May the cost to a defendant of complying with an injunction sought by a plaintiffs' class satisfy the amount-in-controversy requirement of the federal diversity statute, when such compliance would cost the defendant more than the $75,000 minimum whether it covered the entire class or any single member of class?

01-1015 Moseley v. V. Secret Catalogue, Inc.


Defendant marketed adult products under the name Victor's Little Secret. Plaintiff's Victoria's Secret catalogue marketed women's lingerie and clothing. The court held the Federal Trademark Dilution Act requires only an inference of likely harm, not a showing of actual harm. Similarities between the marks in this case supported a finding of dilution.

Question Presented: Does the plain meaning of the operative phrase "causes dilution of the distinctive quality of the mark," read in conjunction with the definition of dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods and services," require objective proof of actual injury to economic value of the famous mark (as opposed to a presumption of harm arising from subjective "likelihood of dilution" standard) as a precondition to any and all relief under the Federal Trademark Dilution Act?

The court held that the Treasury Regulation was permissible under the Internal Revenue Code, and that Boeing’s allocation of costs was in violation of the regulation.

Questions Presented: (1) Whether the Treas. Reg. § 1.861-8(e)(3) of the Internal Revenue Code, which governs the allocation of research & development costs between foreign and domestic income, may be applied to the computation of taxable income for export subsidiaries entitled to special tax treatment under the Code?
(2) If certiorari is granted and judgment is reversed in Case No. 01-1209, should the judgment of the appeals court in favor of the cross-respondent then also be reversed?


The court denied summary judgment for the municipality because it found there was sufficient evidence to raise factual issues about racial bias in the municipality’s actions.

Questions Presented: (1) In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, whether the court may inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?
(2) Whether a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?
(3) Whether the due process clause requires a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation’s withholding of the permits is required by the judgments of state courts of competent jurisdiction?
The creditors filed suit against the debtors and a settlement was reached with no mention of bankruptcy. The debtors defaulted on the promissory note from the settlement, and declared bankruptcy. The creditors sought determination that the debt was non-dischargeable based on the same alleged wrong-doings that led to the settlement of the first suit. The court held that the settlement created a dischargeable contract debt in place of a fraud-based tort claim.

Question Presented: Whether a promissory note given in settlement of pending litigation can constitute a nondischareable debt "for money, or an extension, renewal, or refinancing of credit, obtained by false pretenses, a false representation, or actual fraud," within the meaning of the Bankruptcy Code., where the parties execute a settlement agreement and general release of all claims of fraud or misrepresentation underlying the litigation and all future claims arising from the same facts, where the debtor has neither admitted nor been found to have engaged in fraud or misrepresentation underlying the litigation, and where the creditor has failed to allege fraud in connection with the procurement of the settlement?

The court held that the unavailability of bail for lawful permanent resident aliens was unconstitutional. The court did not declare this section of the Immigration and Nationality Act unconstitutional on its face.

Question Presented: Whether respondent's mandatory detention without bail under Immigration and Nationality Act, which requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony, violates the 5th Amendment's Due Process Clause, where the respondent was convicted of an aggravated felony after his admission into the United States?
01-1500 Clay v. United States


The court held that the prisoner’s petition for review by the Supreme Court was time-barred by 28 U.S.C.S § 2255.

Question Presented: Whether the period of limitations for petition for certiorari to the Supreme Court begins to run on the date the appellate court issued its mandate in a direct criminal appeal?

01-1572 Cook County v. United States

Ruling Below: (U.S. v. Cook County, 7th Cir., 277 F.3d 969, 2002 U.S. App. Lexis 847, 18 BNA IER CAS 512)

The court held that the county was a person within the meaning of the False Claims Act, and thus not immune from punitive damages.

Question Presented: Whether local governmental entities are immune from punitive damages under the False Claims Act?

01-7574 Sattazahn v. Pennsylvania


The court held that the conviction and sentence was constitutional because the first jury had not made a decision on the merits regarding an appropriate penalty, so the statutorily imposed life sentence was not an acquittal.

Question Presented: (1) Does the double jeopardy clause of the 5th Amendment bar the imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?
(2) Is a capital defendant’s life and liberty interest in the imposition of a life sentence by operation of state law, following a capital sentencing hearing in which the sentencing jury fails to reach a unanimous verdict, violated when his first conviction is later overturned and the state seeks and obtains a death sentence on retrial?

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Byron R. White, the football legend who became one of the longest serving justices of the United States Supreme Court, died yesterday in Denver. He was 84, and the only living former Supreme Court justice.

The cause was complications from pneumonia, a statement from the Supreme Court said. When Justice White stepped down nine years ago after 31 years on the court, he was the last veteran of the liberal era of Chief Justice Earl Warren. Though he was then the court's sole remaining Democrat, he was in many ways more at home in the conservative era of Chief Justice William H. Rehnquist.

Joining the court in 1962 at the height of its liberal activism under Chief Justice Warren, Justice White was often in dissent during his early years as a justice and assumed a position of influence only after a series of appointments by Republican presidents shifted the court in a more conservative direction.

"Eventually, the court changed, society changed, the issues changed," Kate Stith Cabranes, a Yale Law School professor and one of his former law clerks, said after his retirement. "Byron White didn't change."

He cast dissenting votes in Miranda v. Arizona, the 1966 landmark decision that required a police officer to inform a suspect of his right to remain silent and to consult with a lawyer, and in Roe v. Wade, the 1973 decision that established a constitutional right to abortion. Although he gradually came to accept the Miranda doctrine, Justice White never reconciled himself to Roe v. Wade and continued to dissent as the court applied and affirmed that decision over the years.

He found himself much more at home in the conservative 1980's and 1990's, writing majority opinions that cut back on the scope of federal civil rights laws, that upheld state laws prohibiting homosexual sex between consenting adults, and that permitted the use of evidence obtained with defective search warrants.

But no ideological label ever fit Justice White comfortably. Committed to the use of federal power to eradicate the legacy of school segregation, he wrote majority opinions upholding wide-ranging desegregation orders for Northern school districts and affirming the power of federal judges to order a school district to increase taxes to pay for the school improvements necessary to make an integration plan work.

He also believed that with power came accountability, filing a strong dissent from a 1982 decision that gave presidents absolute immunity from suits for damages for their official actions. He dissented from the court's 1983 decision in the Chadha case, which invalidated the legislative veto, a device widely used by Congress to block executive branch
actions. "The history of separation-of-powers doctrine is also a history of accommodation and practicality," he wrote, objecting to the majority's insistence on maintaining the barrier between legislative and executive power.

After his retirement, Justice White sat occasionally as a visiting judge on federal appeals courts and served in 1998 as the chairman of a special commission that studied the structure of the federal appellate system. Last year, in failing health, he closed his chambers in Washington and moved with his wife, Marion, to their native Colorado.

A sports hero, Rhodes scholar, successful lawyer, triumphant political organizer and director of Robert F. Kennedy's Justice Department -- Byron R. White had been all of these before his friend John F. Kennedy named him to the Supreme Court in 1962.

Only 44 at the time of his appointment, Justice White was one of the youngest people ever named to the court, and his 31-year tenure was one of the longest in the court's history; among 20th-century justices, only Hugo L. Black, William O. Douglas and William J. Brennan Jr. served longer.

President Kennedy, calling his nominee "the ideal New Frontier judge," said Byron White "excelled in everything he has attempted." That was an understatement about a life that had a storybook quality -- so much so that his decades on the court sometimes appeared more an anticlimax than a crowning achievement.

Juggling Athletic and Legal Worlds

Raised in a small Colorado town by parents who never graduated from high school, Justice White was educated on scholarships, a gifted scholar-athlete who outshone the competition in both fields. He was the only person to become both a member of the College Football Hall of Fame, to which he was elected in 1954, and a law clerk to the Chief Justice of the United States.

In the full glare of national publicity, he juggled his two worlds to a degree that would be inconceivable today. In 1938, having deferred his Rhodes Scholarship for a semester to play a season of professional football with the Pittsburgh Pirates (later called the Steelers), he received the National Football League's highest-ever salary, $15,800, and led the league in rushing, a feat he duplicated two years later, when he took a semester off from Yale Law School to play for the Detroit Lions.

A stellar law school career, interrupted by Navy service in World War II as well as by football, was capped by a year as a law clerk to Chief Justice Fred M. Vinson during the court's 1946 to 1947 term. Only 15 years later, Byron White became the first Supreme Court law clerk to return as a justice.

His own judicial legacy remained a complex and somewhat ambiguous one. He never achieved the stardom or public recognition on the Supreme Court that he had received earlier, not that he sought either at any point in his life. An authentic, if reluctant, celebrity in an era before fame became an everyday commodity, he viewed with intense distaste, for the rest of his life, the media speculation that attended his every move as a young man. His dislike of the
nickname Whizzer, which the sportswriters had bestowed on him and which he could never quite manage to shake, was legendary.

"Byron would have been just as happy, I think he might have preferred -- if he played with 21 other players in an empty stadium," one of his University of Colorado teammates commented many years later to Justice White's biographer, Prof. Dennis J. Hutchinson of the University of Chicago Law School.

A thesis of the biography, "The Man Who Once Was Whizzer White" (The Free Press, 1998), was that a driving force of Justice White's adult life was the effort to "seal off his athletic past" and to be accepted on his chosen terms, as a lawyer. The book's title referred to an incident early in 1961, when Mr. White, the deputy attorney general in the new Kennedy administration, was having lunch in a restaurant near the Department of Justice. "Say, aren't you Whizzer White?" the waitress asked. After a moment, he replied in a soft voice, "I was."

The difficulty in categorizing him came in part from the fact that Justice White was motivated not by ideology but by a multifaceted vision of the American system that included a strong yet politically accountable federal government and, a Supreme Court that deferred to judgments reached by Congress and the executive branch. "Judges have an exaggerated view of their role in our polity," he said once.

Nicholas DeB. Katzenbach, a Yale Law School classmate who later served with him in the Justice Department, recalled in an article marking the justice's 25th anniversary on the court that his friend's hallmark both as a student and as a judge was "a healthy skepticism -- a probing questioning of premises and an insistence on conclusions reached by small and visible steps in a rational process as opposed to giant leaps of faith."

Mr. Katzenbach wrote that Justice White's work on the court reflected his "belief that hard work and determination can lead to success, and a lack of sympathy for those who abuse power and privilege as well as for those who whine about bad luck."

Justice White's own luck was splendid. As a young man, he encountered John Kennedy twice within a few years: once [on the Riviera were bother were vacationing in the spring of 1939] just before World War II, and again in the Pacific in 1942, where both were Navy lieutenants. It was Lieutenant White, an intelligence officer, who was assigned to write the official report of the sinking of Kennedy's torpedo boat, PT-109, by a Japanese destroyer. The two men established a bond that eventually resulted in Mr. White's Supreme Court appointment.

Byron Raymond White was born on June 8, 1917, in Fort Collins, Colo., and grew up in Wellington in northern Colorado. His father, Albert White, was a branch manager for a lumber supply company and also served as mayor. As a child, Byron worked in the nearby sugar beet fields.

"There was very little money around Wellington," Mr. White said at the time of his Supreme Court appointment. "Everybody worked for a living. Everybody."

The University of Colorado offered a scholarship to the top student in the graduating class of every high school in the state, and Mr. White was first in his five-member senior class.
At the university, he excelled both in class, where he was elected to Phi Beta Kappa in his junior year, and in sports, where he starred in basketball and baseball as well as football, winning a total of seven letters as well as all-conference honors in every sport he played. The Colorado football team was undefeated in his final season, and Mr. White, who was a star punter and passer as well as a halfback, led the nation in scoring, rushing and total offense. By the time he graduated, as valedictorian of the class of 1938, the national press had long since discovered Whizzer White and was filled with speculation about his prospects.

To Oxford and Back

Awarded a Rhodes Scholarship for study at Oxford, he deferred until the spring semester to play a season with the Pittsburgh Pirates. He led the National Football League in rushing, with 567 yards in 11 games.

He began studying law at Oxford in January 1939 but returned to the United States soon after the war began in September. He entered Yale Law School that fall and earned the highest grades in the first-year class, but he turned down an editorship of The Yale Law Journal and took a leave of absence to play football with the Detroit Lions. He played for two seasons, and again led the league in rushing in 1940.

Returning to Yale Law School after the war, he received his degree in 1946 and moved to Washington to begin his year as a law clerk. John Kennedy was also a new arrival to Washington in 1946, beginning his career in Congress, and the two men were soon reunited.

Also that year, he married Marion Stearns, his college sweetheart. She was the granddaughter of a Colorado governor and the daughter of Robert L. Stearns, the dean of the law school at the University of Colorado and later the university's president. Mrs. White survives him, as do their children, Charles Byron White and Nancy White Lippe, and six grandchildren.

In 1947, the Whites returned to Colorado. He joined a Denver law firm, Lewis, Grant, Newton, Davis & Henry (now known as Davis, Graham & Stubbs), remaining there for 14 years and thriving in a general commercial practice. His clients ranged from individuals with zoning disputes to IBM, and other major corporations.

His partners liked to tell about Mr. White's first criminal case, in which he successfully defended a man charged with passing a bad check. He then accepted the client's thanks and his check, which was worthless.

Mr. White resisted serious involvement in politics until Kennedy, now a senator, asked him for help in the early stages of his campaign for the White House in 1960. Mr. White organized Colorado-for-Kennedy clubs and brought the state's delegation to the Democratic National Convention into the Kennedy column. At the request of Kennedy's brother Robert, he then took charge of the national Citizens for Kennedy organization during the general election campaign.

President-elect Kennedy offered Mr. White the job of deputy attorney general, the No. 2 position in the Justice Department that Robert Kennedy would head as attorney general. Mr. White was in charge of the day-to-day administration, recruiting lawyers for top positions, overseeing the department's initiatives in Congress, and taking an active hand in
selecting nominees for 70 new federal judgeships.

With the civil rights struggle accelerating in the South, Mr. White monitored federal efforts to quell the growing violence that accompanied the freedom rides, sit-ins and marches. He went to Alabama to supervise 400 federal marshals and deputies sent to restore order in the state in May 1961.

When President Kennedy learned in March 1962 that Justice Charles E. Whittaker was about to leave the court, Byron White was his top choice as a nominee. Mr. White expressed little enthusiasm when first Mr. Katzenbach and then Robert Kennedy called him to test his interest, but he agreed.

The Senate quickly confirmed the nomination and on April 16, Mr. White took his seat as an associate justice. When he retired 31 years later, he was the only remaining justice to have been appointed by a Democratic president.

The change from his active life in the world of law and politics was abrupt. In a 1988 speech, Justice White said somewhat plaintively that life on the court had its "excruciating" aspects. "Where else can one be so isolated and alone, yet turn from hero to heel or from heel to hero in just 10 pages or so?" he asked. "Where else does the telephone ring so seldom?"

It took him barely two months to file his first dissenting opinion, in which he struck a tone and expressed a viewpoint from which he would hardly ever waver. The case was Robinson v. California, in which a 6-to-2 majority declared unconstitutional a California law that made it a crime for a person to be a narcotics addict, even in the absence of proof of the sale or possession of illegal drugs. Making the "status" of addiction itself a crime violated the Eighth Amendment's prohibition against cruel and unusual punishment, the majority ruled.

It was the first time the court had used the Eighth Amendment to overturn a state criminal conviction. Justice White's dissenting opinion said, in part: "I fail to see why the court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding."

Justice White was often inclined to support the prosecution in criminal cases, but that was only one theme to emerge in this early opinion. The other was the court's duty to defer, except in the face of an express constitutional provision to the contrary, to the policy judgments reached by institutions of government that were directly responsive to majority will. At most, in his view, the court's job was to ensure that the rest of government functioned as it was intended to.

A Warning in Dissenting Opinions

In dissenting opinions, he often warned the court against "the unrestrained imposition of its own, extraconstitutional value preferences," as he said in dissent in a 1986 case that reaffirmed the right to abortion. His original dissenting opinion in Roe v. Wade said: "As an exercise of raw judicial power, the court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this court." If he had any personal views on the abortion question, he never expressed them.
In contests between federal authority and state power, he almost always voted for the federal side, perhaps applying lessons learned in the Justice Department dealing with recalcitrant Southern governors.

In disputes between the government and the press, he took the government's side, writing a series of majority opinions in the 1970's that rejected any argument by the press of the need for special treatment. His opinion in Brandenburg v. Hayes in 1972 rejected the argument that the First Amendment shielded journalists from having to disclose their confidential sources to a grand jury. A majority of the states subsequently passed laws providing such protection.

Although he joined the majority opinion in New York Times v. Sullivan, the 1964 decision that created a First Amendment shield for the press against libel suits by public officials, he later said he regretted his vote. "It is difficult to argue that the United States did not have a free and vigorous press before the rule in New York Times was announced," he wrote in a 1985 opinion.

At the same time, he disagreed with the majority in a 1991 case, Barnes v. Glen Theatre, which upheld an Indiana law that banned nude dancing. In Justice White's view, the performances were a form of expression deserving of First Amendment protection. "That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the court, is hardly an excuse for distorting and ignoring settled doctrine," he wrote in a dissent. "The court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case."

The impatience that Justice White expressed in that opinion with efforts by the government to control private behavior was not apparent in his majority opinion in Bowers v. Hardwick, the 1986 decision that rejected a claim of constitutional protection for consensual homosexual acts. The 5-to-4 decision upheld a Georgia law making homosexual sodomy a crime. Given that half the states maintained similar criminal prohibitions, Justice White wrote, the argument for a fundamental constitutional right to engage in homosexual sex "is, at best, facetious."

His opinion continued: "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

Bowers v. Hardwick was probably the one opinion of Justice White's that was best known to the general public. An opinion that was less well known, but that many scholars regarded as his most important in terms of the subsequent development of legal doctrine, came in 1976 in a racial discrimination case called Washington v. Davis.

That case was a challenge to a standardized examination used by the District of Columbia Police Department for recruiting and promoting police officers. While there was no proof that the department intended to screen out black candidates, the test had a discriminatory effect, with blacks failing it at four times the rate of whites.

The question for the court was whether this discriminatory impact violated the Constitution's guarantee of equal protection. The answer, provided in
Justice White's majority opinion, was no; proof that the government was intentionally discriminating, not just taking action that happened to have a discriminatory effect, was an essential element of a violation of the Constitution's equal protection guarantee, the court said. Washington v. Davis was sharply criticized by civil-rights advocates. It proved to be an influential opinion in a variety of contexts, shifting the focus of the court's scrutiny of government behavior to the government's purpose rather than the ultimate result.

A Presence on the Bench

Justice White wrote important decisions in criminal law throughout his tenure on the court. He joined the majority in 1972 that invalidated the nation's death penalty laws, as well as the majority opinions four years later that permitted capital punishment to resume under state laws restructured to overcome the court's objections. In 1977, he wrote the majority opinion in Coker v. Georgia, holding that the death penalty was an unconstitutional penalty for rape.

His majority opinion in United States v. Leon in 1984, permitting prosecutors to use some evidence that was obtained illegally but in "good faith," accomplished a major objective of the Justice Department under President Ronald Reagan. But he also voted against the federal government often enough that his position could not be taken for granted. He wrote the majority opinion in a 1992 case, Jacobson v. United States, overturning a child pornography conviction on the ground that the government had induced the defendant into buying material that he would not have bought on his own.

Justice White completed his opinion-writing assignments quickly and usually carried more than his share of the workload during a Supreme Court term. His majority opinions tended to be spare to the point of obscurity, devoid of the rhetorical flourishes that he seemed to save for his dissents.

Virtually alone among the justices, he frequently dissented in writing from a decision not to hear a case. In another singular practice, he refused to read portions of his opinions from the bench, announcing only the result but sharing none of the rationale. Asked why he did not participate with the other justices in the public opinion-reading ceremony, he once replied that he considered it a "waste of time."

He could be gruff and intimidating on the bench, asking probing and sometimes disconcerting questions of lawyers, and rarely tipping his hand on how he thought the case should come out. He often tried to help inexperienced lawyers focus their argument, but he could be exasperated if they did not even know enough to grasp his helping hand, swiveling in his chair to turn his back on the floundering lawyer. But a clever parry to one of his questions could bring an appreciative grin.

Well into his 60's, he played basketball with his law clerks in the Supreme Court gym, and they described him as an aggressive and competitive player.

Those very traits linked the justice that Byron White became to the athlete he had been, in the view of Prof. John C. Jeffries Jr. of the University of Virginia Law School. Writing in 1999, Professor Jeffries remarked on "how closely White's strengths and weaknesses as a judge echoed his talents as an athlete." "A keen sense of contest dominated both contexts," he maintained. "In both, White was tough, hard-driving, and utterly
purposive. In both, he shunned doubt. The openness, unguardedness, and sympathy for opposing concerns that were missing from White the judge would have disadvantaged White the athlete. The frank admissions of uncertainty or indecision so rarely encountered in White's opinions would have been seen as weakness in football -- or worse, as whining excuses for poor performance."

Justice White announced his retirement on March 19, 1993, choosing early spring rather than the traditional end-of-term announcement in late June to provide time for a successor to be comfortably seated in time for the next court term.

Justice White broke with tradition in declining to hold a farewell news conference. Instead, he made public a letter to his colleagues, in which he thanked them for their friendship and announced his intent to sit from time to time on federal appeals courts. "Hence, like any other Court of Appeals judge," he said, "I hope the court's mandates will be clear, crisp, and leave those of us below with as little room as possible for disagreement about their meaning."

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The death last week of former Justice Byron White, who served 31 years on the bench, brought comments from all nine sitting justices. Chief Justice William Rehnquist's remarks were made from the bench on April 16; the others came in written statements released by the Supreme Court.

Chief Justice William Rehnquist: Before we begin this morning, I want to pay tribute to our friend and colleague Byron R. White, a retired Justice of this Court, who died yesterday morning in Colorado. Byron White was nominated to the Court by President Kennedy on April 3, 1962, and was confirmed by the Senate eight days later. He took the oath of office forty years ago today, on April 16, 1962. He was the 93rd Justice to serve on this Court. Justice White was born and raised in Colorado. He was a rare combination of brilliant scholar and gifted athlete. He attended the University of Colorado, earning ten varsity letters and winning a Rhodes scholarship to Oxford. Before attending Oxford, Justice White played professional football for the old Pittsburgh Pirates. When he returned from Oxford, Justice White attended Yale Law School while playing football for the Detroit Lions on weekends. He served as an intelligence officer for the Navy during WWII.

Justice White was graduated from Yale Law School, earning the Cullen Prize for high academic grades. He clerked for Chief Justice Vinson and then returned home to Colorado where he practiced law for fourteen years, before joining the Justice Department as deputy attorney general to Robert Kennedy. Less than a year later, President Kennedy named Justice White to the Court.

Justice White was an able colleague and a good friend. He came as close as any of us to merits Matthew Arnold's encomium: he "saw life steadily and saw it whole." All of us who served with him feel a sense of personal loss. Our condolences go out to his wife, Marion, his two children and their families.

At an appropriate time in the fall, the traditional memorial observance of the Court and the Bar will be held in this Courtroom.

Justice John Paul Stevens: Byron White was already a national hero to sports fans when I first met him in Pearl Harbor during World War II. I knew immediately that he was the kind of person that I would want as a friend. One of the great blessings of my appointment to this Court was the fruition of that wish. His friendship is one of the treasures of this tour of duty. He was the kind of person for whom respect, admiration and affection continue to increase as you learn more about him. He was a true hero during his naval service, a brilliant student and law clerk, and outstanding member of the profession, both in private practice and as a public servant, and a great judge. He was also blessed with an exceptionally loving bride and a fine family of which he was justly proud. I miss him.

Justice Sandra Day O'Connor: Justice White was an extraordinary man. His intellect and contributions as a Justice of the Supreme Court spanned 31 years, and
his careful imprint will be felt for a great many more years. He was as skilled in public service as in professional football. The people who reach the top in several fields are few, indeed. Justice White was one of the few and was an American original.

Justice Antonin Scalia: Anyone who ever met Byron White will recall his painfully firm handshake: you had to squeeze back hard or he would hurt you. I always thought that was an apt symbol for his role on the Court: he worked hard and well, and by doing so forced you to do the same. If there is one adjective that never could, never would, be applied to Byron White, it is wishy-washy. You always knew where he stood; knew that he was not likely to be moved; and hoped he was lining up on your side of scrimmage. His former colleagues have missed him since his retirement nine years ago; we will miss him more now. May he rest in peace.

Justice Anthony Kennedy: The Court must strive in all it is and all it does to reflect the integrity and the strength of a Nation dedicated to the cause of freedom. Byron White was himself a remarkable personification of these values and this purpose. His physical strength and stature were powerful reminders of an even greater strength of character, character marked even from his youth by an unyielding dedication to America and its historic mission. Byron White honored the Court and the law by his service here. He honored the United States and its people by his splendid, vibrant human spirit.

Justice David Souter: Justice White was a welcoming colleague and a solid friend. Like the others here, I will miss him.

Justice Clarence Thomas: I am deeply saddened to learn of the death of Justice White. He was a great man, an outstanding member of the Court, and a wonderful friend. Virginia and I extend our heartfelt sympathy to Marion and her family. We will keep them in our thoughts and in our prayers.

Justice Ruth Bader Ginsburg: At the hearings on my nomination in July 1993, a senator asked: "In what ways do you think you might be like or different from Justice White?" I answered: "The differences are obvious; he is very tall and I am rather small and surely I do not have his athletic prowess." But "I hope I am like him in dedication to the job and readiness to work hard at it." I hold that hope high to this very day.

I have a special fondness for and appreciation of Justice White for another reason. In my days as an advocate of equal rights for men and women, I argued six cases in the Supreme Court and prevailed in five. If it had been up to Justice White, I would have prevailed in all six. He voted for the precise position I advocated every time. He was the only Justice who did.

Justice Stephen Breyer: I was lucky to have come to know Justice White in his later years. Justice White was a great judge and a thoroughly decent man-forceful, engaging and strongly committed to public service.

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Nick Lowery was having a tough time of it. He had been a fine place-kicker in college, at Dartmouth, and expected a career booting balls in the National Football League.

Not so quick. Lowery was cut 11 times from eight N.F.L. teams before catching on with the Kansas City Chiefs in 1980. He beat out, of all people, Jan Stenerud, who to this day is the only place-kicker in the Pro Football Hall of Fame. And things hardly got better for Lowery in his first training camp with the Chiefs. He was the butt of numerous pranks; he was not only a rookie but a rookie from the Ivy League, which carried with it a special kind of contempt in that bruising environment. One evening in training camp, for example, he found fresh cow manure in his bed.

He tried to talk to his new teammates, to be one of the guys, but he encountered resistance. Shortly after that, he went home to McLean, Va., and sought out his next-door neighbor on Hampshire Road, who had become a friend and mentor.

The neighbor was Justice Byron R. White of the United States Supreme Court. White had also been a football player, a 6-foot-1, 195-pound all-purpose all-American back at Colorado. He picked up the nickname Whizzer while leading the nation in rushing, in scoring and in total offense. He was also a star basketball player, and led Colorado to a National Invitation Tournament final at Madison Square Garden. And he was a standout baseball player and the valedictorian of his graduating class.

He went to Yale Law School and to Oxford as a Rhodes scholar. In between he played football for one season with the Pittsburgh Pirates (later the Steelers), in 1938, and two seasons with the Detroit Lions, in 1939 and 1940. He led the N.F.L. in rushing in 1938 and 1940. Then he joined the Navy and went off to fight in World War II.

So not only did Justice White know something of the athletic world, he knew something of the world.

"Nick," Lowery said White told him, his strong bearing carrying a sense of gentle strength, "the only way you are going to get respect from those fellows is not by anything you say, but what you can deliver, how you perform on the field."

It was a simple piece of advice, but when you are foundering, when emotions cloud your perspective, it is such advice, and coming from someone like Justice White, that will make an impact. It did make one on Nick Lowery.

That and other thoughts about Justice White came back to Lowery upon learning of the death Monday of his neighbor of 40 years. White, who served 31 years on the Supreme Court, was 84.

Lowery recalled the first full year he spent with Kansas City. He had a string of 11 field goals in 12 attempts, then kicked a
game-winning field goal against the Lions. The guys who had been most vicious in riding him hugged him with tears in their eyes, he recalled.

"It was exactly what Justice White had been talking about," Lowery said.

Lowery said Justice White was reluctant to talk about his athletic career -- "He would always change the subject" -- and was perhaps happiest discussing history and people like Abraham Lincoln and Chief Justice John Marshall.

"I was curious to see what kind of football player he was," Lowery said, "and I was able to get a film of a game he played against Utah, my father's alma mater. It was amazing. There was this one kickoff return in which he almost ran backward in the end zone, then cut straight upfield -- he cut like a knife -- and broke about three tackles and completely faked out four or five other players and raced in for a touchdown. He was so fast, it looked like the other players were moving in slow motion."

He remembers Justice White talking about Bill Bradley a few years after Bradley became a senator. He said he admired Bradley because it was important to have balance in life, and not enough athletes do. Bradley had achieved balance as a student and an athlete, and he taught English in a Harlem school before getting involved in public service in government.

Lowery, now 45 and retired from football since 1997 after a superb 17-year career that included seasons with the Jets and the Patriots, has taken that advice from White to heart, too. He is a research fellow at the Harvard Project on American Indian Economic Development, and the first professional athlete to graduate from the Kennedy School of Government at Harvard.

On occasion, Lowery saw glimpses of the competitiveness that made White such a great athlete. About 1977 Lowery was playing basketball in the driveway with his two brothers -- all of the Lowerys are over 6 feet -- and White's daughter, Nancy, who was a field hockey star at Stanford.

"Justice White came by and we asked him to play," Lowery said. "He said O.K. He took off his tie and rolled up the sleeves of his white shirt and played in his black dress shoes. He was about 60 years old. We played for over an hour, the justice and me against the three of them. He was tough, and we killed 'em. But we all had fun. The next morning I saw Justice White go to his car on crutches.

"I went over to him. What happened? He said, 'Oh, I hurt my feet a little bit, but I'll be all right.' And he was. A few days later I saw him out in his yard mowing his lawn in his shorts."

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To those who knew Byron White, who died last week two months before his 85th birthday, the obituary accounts of what the Associated Press called his storybook life were accurate without being true. The facts were all there—multiple valedictorianships, Kennedys, independent voting on the Supreme Court—but in many respects, the man was missing. Or he was reduced to a cartoon character: athletic, physically menacing until almost the end (a "crushing handshake," declared Justice Antonin Scalia), and a demeanor variously tagged "gruff," "brusque," "abrupt," or "terse."

Yet, as I discovered when I began researching a book-length portrait of him almost 10 years ago, those who were closest to him routinely summoned a different descriptive inventory—"tender," "generous," "empathetic," "patient," "kind," "ironic." None of the words, or the incidents to back them up, were offered defensively. In fact, most of those I interviewed seemed puzzled that the public man was viewed otherwise.

Public and Private

Perhaps more than any other prominent official of the day, Byron White maintained an impregnable wall between his public and private life. In an age of celebrity, where even judges and chefs have star quality approaching that of actors and musicians, White was old school with a vengeance. Having been thrust into the limelight as a college athlete and made a household name before he turned 21, he knew the emptiness of the limelight and the triviality of those who tend to cast it. Public acclaim, from early on, was not an achievement for White, but a distraction at best and a burden at worst.

Hardened against the expectations of the public spotlight from a young age, he organized his early career to avoid it. When he left his clerkship with Chief Justice Fred Vinson in 1947, he told friends he was returning to Colorado to "practice law, start a family, and keep my name out of the goddamn newspapers." He accomplished all three, although he devoted enormous amounts of time to charity work, community service, and low-level political work, usually at the precinct level.

When the fledgling "John Kennedy for President" campaign came calling in 1959, White was a reluctant recruit. He had two young children, a legal practice that was successful but only just beginning to flourish, and, still, no taste for public life. But he believed profoundly in public service, came to believe in Kennedy, and sacrificed his privacy for the sake of the candidate and the campaign. After serving as the No. 2 man in the Department of Justice (and often the de facto attorney general when Robert Kennedy was at the White House counseling his brother), White was named to the Supreme Court in 1962 at the age of 44. Again, he hesitated when destiny called: The
position would guarantee self-regulated privacy, but judges play reactive roles in government, and White later worried to friends that he could have contributed more to public service in an administrative or executive position.

He nevertheless stayed on the bench for 31 years, longer than all but eight other justices in the Court's history. Protected by the Court's traditional self-enforced isolation from press conferences and other events not of his choosing, the public perception of Byron White was shaped by his aggressive questioning during oral arguments and occasional appearances at university events and moot courts. Within the Court's private precincts, and especially with family and lifelong friends, there was the other White who was warm, playful and, according to one niece, "wickedly funny."

I enjoyed a glimpse of White's posture toward negotiating the public-private line five years ago at a reunion of former law clerks in Denver. My daughter, then 17, accompanied me, and during an informal conversation with a few of the other attendees, she asked White for advice on where to purchase a genuine Western Stetson hat. He provided two well-informed recommendations. She confessed that she was afraid that her high school classmates might ridicule her if she wore the hat to her suburban Chicago high school.

He looked at her warmly, saying with an almost intimate, conspiratorial tone, "If you want to wear the hat, wear the hat. If you don't want to wear it to school, then you can drive there and leave it in your car. And if someone asks you about it, tell them it's none of their goddamn business!" The final sentence was made adamantly, but with a twinkle in the eye.

Judicious Irony

White enjoyed a sense of humor that was ironic, often deadpan, and sometimes offbeat. In the mid-1970s, as part of the relentless celebration of the bicentennial of the Constitution, Chief Justice Warren Burger conceived the idea of a series of short dramatic films to illustrate famous Supreme Court cases. Congress appropriated the money, the Judicial Conference of the United States underwrote the scheme, and numerous federal judges were recruited to Washington as historical advisers, script consultants, and previewers of rough cuts. Burger was especially concerned with the narration. He summoned White to his chambers to discuss the voice-over.

Burger wanted a voice of "great dignity and authority," perhaps like Gregory Peck. He asked White for suggestions. "What about Archie Bunker?" White replied, referring to the Carroll O'Connor television character who defined blue-collar Queens, N.Y., to viewers of the day. Burger replied earnestly, "Who's he? Do you think we could get him?" Burger's attending staff desperately tried to avoid exploding in laughter as White looked without expression at his nominal boss.

White's humor was probably displayed more often and more robustly with family, with his annual fishing party, and with lifelong friends. But there was another side of the private Byron White that touched many. In times of personal crisis, especially involving health, White was constantly on the phone providing encouragement, sending flowers, or jotting personal notes. Rex Lee, who clerked for White from 1963 to 1964 and later became solicitor general, told me that during his two bouts with cancer White was a daily source of support and strength.
"Justice White had a hard side—everybody knows about that," Lee said before he died. "But you don't know him unless you know the other side, and he works pretty hard to conceal it."

Acts of Kindness

White also concealed small acts of compassion in connection with his work, the best example of which I know involved Herman Lodge, the lead plaintiff in the important voting rights case, Rogers v. Lodge (1982). A few days before the oral argument, Lodge telephoned the marshal's office at the Supreme Court to ensure that he and his busload of supporters (many of them fellow plaintiffs) would have seats in the courtroom. He was told curtly that there were no reserved seats. Distraught, he then called Nina Totenberg, a reporter who had covered his case for months, and asked her for help. She telephoned White (her husband, former Sen. Floyd Haskell, was a friend from Colorado) and explained Lodge's plight. "He listened, and sort of grunted, but was noncommittal," Totenberg later recalled. When Lodge contacted the Court again, he was advised that space had been allotted to his group, but there was no explanation for the change in policy or its application.

Many of White's acts of kindness reside with his family, where they belong, especially at this moment. But I have interviewed many who knew him closely and who have their own testimony, although, out of respect for his privacy and their own, the incidents remain shielded from public view. There is one final story that reveals a kindness, delivered without soft soap to be sure, and that shows a slice of the man and his self-perspective.

Thinking Back

In early spring of 1993, I made an appointment to visit White in Washington to pay him the courtesy of letting him know that I had signed a contract to write a book about him. As soon as I revealed my treachery, he slammed his massive right hand down on his desk and bellowed, "The hell you say!" Pause. "Well," he went on, still a bit hot, "You're on your own. I won't help. But I won't get in the way either." He then seemed to realize that he was overreacting—however authentically—for someone who purports not to care what anyone says about him.

The conversation shifted to chit-chat about a recent meeting he had had with "What's that little fella's name, you know, the White House counsel?" (Only later in the afternoon did I begin to suspect why he met with someone in the White House—a suspicion confirmed when White announced his resignation from the Supreme Court soon after.) "Bernard Nussbaum," I answered.

"Yeah, that's it," he said. "Well, I was talking to him, and he says, very proudly, 'Mr. Justice, we're putting together the best Department of Justice in the history of the United States.'" White paused long enough for me to engage in the same, silent mental checklist that he had: Nicholas Katzenbach, Burke Marshall, Louis Oberdorfer, William Orrick, Herbert "Jack" Miller, and other assistant attorneys general recruited by White in the spring of 1961—a dream team that even the Kennedy skeptic Alexander Bickel later called "the most brilliantly staffed department in a long time."

White allowed the silent comparison to sink in, leaned forward, and said in mock astonishment, "Yes, he said that to me!"
Another pause, then a broad, mutually self-mocking smile: "Well, Dennis, so much for history."
REFLECTIONS AT THE END OF THE 2001-2002 TERM

Retirement Rumors Swirl Around 3 Senior Justices

Houston Chronicle

July 7, 2002

Mark Helm

With the Supreme Court term ended, rumors are swirling around the possibility that one of the nine justices might retire.

Leading in the speculation are the court’s three most senior members, Chief Justice William Rehnquist, 77, and Justices Sandra Day O’Connor, 72, and John Paul Stevens, 82.

"Many of these justices have been around for a long time, so any year could be their last," says Elliot Mincberg, a Supreme Court expert for People for the American Way, a liberal legal group.

Although Mincberg and other experts say none of the justices has signaled any intention of being ready to leave the court, speculation surrounding the possible retirement of the three has picked up recently.

Last month, the Arizona Republic Web site reported that Rehnquist might step down "as early as summer."

Because Rehnquist calls Arizona home, many politicians and interest groups took the report seriously and immediately began speculating on who might replace the chief justice, who was appointed by former President Nixon in 1972.

Some Senate Republicans worried that President Bush fearing a tough nomination battle in the Democratic-controlled Senate might replace Rehnquist, a strong conservative, with a more moderate justice.

But less than 24 hours later, the rumor ran out of steam when congressional sources said the report resulted from a misunderstanding between reporters and officials from the office of Sen. Jon Kyl, R-Ariz.

Rehnquist, who has been chief justice since 1986 and has hinted in the past that he might want to spend more time with his family, did not comment on the report. However, the court recently announced that Rehnquist’s administrative assistant, Sally Rider, will continue in her position for one more year, which would not likely happen if he were leaving.

In January, O’Connor, whose moderate vote often proves pivotal in a court evenly divided between liberals and conservatives, felt the need to end speculation that she might be appointed chief justice if Rehnquist were to retire.

"It’s nonsense," she said, noting that she was then 71. "That ought to quiet that talk." O’Connor was appointed to the court in 1981 by President Reagan. As for retiring, O’Connor said, "I haven’t made that decision. Someday, somehow,
somewhere. Nobody lives forever, for God's sake."

The other justice often mentioned as a possible retirement candidate is Stevens, who was named by Gerald Ford in 1975. At 82, Stevens is the oldest member of the court and one of the most liberal. With no apparent medical problems and great enthusiasm for his job, Stevens has given no hints he wants to leave.

"You have to remember that most Supreme Court justices throughout history have only retired when their bodies force them to," Mincberg says.

But court watchers say political calculations and court traditions may force one of the justices to retire within the next year.

David Garrow, a law professor at Emory University in Atlanta, says an unwritten rule in the Supreme Court is that two justices don't retire in the same year, since replacing both at the same time would be a difficult task for the president and the Senate.

Another unwritten rule is that justices don't retire during presidential election years, Garrow says. That leaves only this year and next year for a justice to retire if he or she doesn't want to wait until 2005 or 2006.

Court watchers also say that Rehnquist may wait until after November's midterm elections to announce his retirement, hoping the Republicans will take back control of the Senate, where the Democrats now have a one-vote margin.

"The justices like people to think that politics never plays a part in their decisions to retire or not to retire, but the truth is that often it's a major consideration," says Mark Tushnet, a constitutional law professor at Georgetown University.

With the presidential election another year away, Bush would have the time and political backing to appoint a solid conservative to replace Rehnquist if the GOP is in charge of the Senate.

Among the top contenders for appointment to the high court are White House Counsel Alberto Gonzales and Miguel Estrada, a former staff attorney in the Office of the Solicitor General. Estrada is awaiting confirmation by the Senate to the U.S. Court of Appeals for the District of Columbia Circuit.

Since many important cases are decided on a 5-4 vote, both Republicans and Democrats are anxiously awaiting the next retirement.

"By changing one person, whether that person be Rehnquist, O'Connor or Stevens, the ideology of the court could be completely transformed, and everybody, including the justices, knows it," Mincberg says.

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Judicial Intent; The Competing Visions of the Role of the Court

The New York Times

July 7, 2002

Linda Greenhouse

LABELS that once comfortably described the range of views on the Supreme Court don't work so well these days. "Liberal" versus "conservative" means less than it did back when old-fashioned liberals sat on the court. And the new judicial "activism" on the right has stripped much usefulness from a handy insult once flung exclusively at liberal judges.

Yet with the court deeply divided, there remains a need to identify and analyze its current dichotomies. In fact, two justices, Antonin Scalia and Stephen G. Breyer, spent much of the term just ended engaged in a debate about how the court should approach its work. It is in terms of that debate, and in the competing visions of the judicial role emerging from it, that one of the most interesting and potentially important fault lines on the current Supreme Court can be understood. It is a debate over text versus context. For Justice Scalia, who focuses on text, language is supreme, and the court's job is to derive and apply rules from the words chosen by the Constitution's framers or a statute's drafters. For Justice Breyer, who looks to context, language is only a starting point to an inquiry in which a law's purpose and a decision's likely consequence are the more important elements.

This debate is taking place not only in the court's opinions but, significantly, in the two justices' outside writing and speaking. Not since the Roosevelt era, when Justice Hugo L. Black (text) and Justice Felix Frankfurter (context) battled over the meaning of the Bill of Rights, has the court had two justices willing to engage each other -- and the public -- in a debate over basic principles.

Justice Scalia's vision is the more familiar, pungently expressed in 16 years of Supreme Court opinions and through much speaking and writing off the bench; his 1995 Tanner Lectures at Princeton became a book, "A Matter of Interpretation." He is a seeker of bright lines and boundaries, a transmitter of rules, whether derived from the framers' original understanding or from the unannotated text of federal statutes.

For Justice Scalia, constitutional principles are fixed, not evolving -- "The Constitution that I interpret and apply is not living, but dead," he declared at a conference earlier this year -- and Congress needs to be held to the words it wrote, not to interpretations written by committee aides or judges. "Our first responsibility is not to make sense of the law -- our first responsibility is to follow the text of the law," he said from the bench. In his view, the Supreme Court's job is to give lower court judges not factors to weigh, but rules to apply.

For much of Justice Breyer's eight years on the court, his premises were not equally clear, though it was obvious that context, for him, counted far more than rules. His tone was often diffident, his doubts openly acknowledged.
It was during the past term that Justice Breyer presented an integrated theory of the role he sees for the court in society and for himself as a justice. Delivering New York University Law School's James Madison Lecture last October, he said three principles should guide the court's decision-making.

First was the purpose (as opposed to text) of the constitutional provision or law under review. Second was the likely consequence of a decision, which he contrasted to "a more 'legalistic' approach that places too much weight upon language, history, tradition and precedent alone." Without mentioning Justice Scalia by name, he said the "literalist" approach leads to a result "no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms."

Third, Justice Breyer said, the court should bear in mind the Constitution's overall objective, that of fostering "participatory democratic self-government." The court should be wary, he said, about preempting a "national conversation" in which new legal understanding "bubbles up from below."

JUSTICE BREYER'S lecture did more than clarify his own approach. It meant that Justice Scalia was no longer the solitary voice framing the debate on the role of the court.

In an influential Harvard Law Review article 10 years ago, Kathleen M. Sullivan described "The Justices of Rules and Standards." Justice Scalia was the quintessential and self-defined justice of rules. Justice Breyer was not on the court then, but Professor Sullivan, now dean of Stanford Law School, agreed last week that he is the quintessential justice of standards, an approach she defined as "evolutionary, pragmatic, always asking what makes sense, what would serve the purpose of the law."

Neither approach carries an ideological guarantee. Justice Black's rules (text) led him to the liberal side of the spectrum, while Justice Frankfurter's use of standards (context) had a conservative tilt. In recent cases, Justice Scalia's rules led him to write -- over a dissent by Chief Justice William H. Rehnquist -- that for the police to aim a thermal imaging device at a home was a search for which the framers would have required a warrant, while Justice Breyer's satisfaction that a school district's broad drug-testing policy was the product of an authentically democratic community debate led him to align with the four more conservative justices to uphold the policy.

Cases from last term illustrate the Breyer versus Scalia debate in action. In US Airways v. Barnett, a statutory case under the Americans With Disabilities Act, for example, the question was whether seniority systems trump a disabled worker's right to the "reasonable accommodation" of transferring to a less physically demanding job. Justice Breyer, writing for the 5-to-4 majority, said the answer was yes -- "ordinarily" (his italics). There may be special circumstances that make a disabled worker's requested reassignment "reasonable" despite a more senior employee's right to the position, he said.

In dissenting, Justice Scalia said the majority, "indulging its penchant for eschewing clear rules that might avoid litigation," had turned the disability act's accommodation provision into a "standardless grab bag." A seniority system should always prevail, he said.
The "penchant" Justice Scalia mentioned was a reference to a case earlier in the term. The question was what test a state had to meet -- how dangerous a sexual predator had to be -- to justify prolonged civil confinement past the end of a criminal sentence.

Because "an absolutist approach is unworkable," the court should proceed "deliberately and contextually," Justice Breyer wrote for the 7-to-2 majority in Kansas v. Crane. There must be "proof of serious difficulty in controlling behavior" on the part of the offender, he said, adding that the court was not in a position to define that mental state "with mathematical precision."

"It is irresponsible to leave the law in such a state of utter indeterminacy," Justice Scalia said in dissent, adding that while the majority "displays an elegant subtlety of mind," the decision left trial judges "without a clue as to how they are supposed to charge the jury!"

On the first Monday of October, the debate resumes.

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Rehnquist

USA Today

June 28, 2002

Joan Biskupic

When a Supreme Court justice is particularly incensed about the majority's decision, he or she might decide to upset the court's usual decorum and read a dissent from the raised mahogany bench. At one time or another, most of the nine justices have tried to grab attention this way.

Not William Rehnquist.

The nation's chief justice, who marks 30 years on the court this year, puts his dissents on paper and leaves it at that: no railing, no personal attacks, no effort to draw the limelight.

Why should he do differently? Since joining the court in 1972, the gruff aide to President Nixon has seen Republican presidents make appointments that gradually made a liberal Supreme Court more conservative, like him. Even as his tenure on the bench appears to be winding down, Rehnquist, 77, seems comfortable that the legal and political winds that shape social policy are blowing his way.

The court term that ended Thursday offered evidence of that. Rehnquist dissented in some key cases in which the court's middle-ground coalition, usually led by Sandra Day O'Connor, carried the day. But he got his way in areas that matter most to him: The court endorsed more public funding of religious institutions, expanded states' immunity from citizen lawsuits, and enhanced government powers for more searches on mass transportation and in public schools.

It also narrowly interpreted the legal rights of disabled people in a series of rulings that contrast with the interpretation of civil rights under Chief Justices Earl Warren (1953-69) and Warren Burger (1969-86). Rehnquist, a tall, broad-shouldered Wisconsin native who disdains grand legal theories, has presided over a remarkable shift in U.S. law. After several years in which he was on the court's fringe, many of his ideas now are reflected in its conservative majority. It’s not so much that he has been a great persuader; it’s been more a case of perfect timing. His 30 years have coincided with a national political turn toward the right and have produced a clear break from a time when the court was an engine of social change.

"He is not the radical outsider he once was," says Richard Fallon, a law professor at Harvard University. "He leads a conservative court in a conservative political age."

Rehnquist has suggested that he will remain on the court for at least another year, but he also has dropped hints that he is unlikely to stay beyond the 2004 presidential election, meaning that President Bush could get to choose the chief's successor. Rehnquist -- along with O'Connor, 72, and John Paul Stevens, 82 -- are most often mentioned as potential retirees. None of them, however, has

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indicated any plans to retire before the 2002-03 term.

But with Rehnquist's tenure likely winding down, scholars are beginning to assess his legacy. Several rulings this term highlight the areas in which Rehnquist has seen or guided a transformation during the past 30 years:

* States' rights. Rehnquist once was a lonely dissenter in trying to protect states from being sued when they violated people's federal rights. Today, the majority consistently overturns congressional legislation that it believes treads on the states. That was the case this term in a ruling that said regulators cannot intervene in cruise ship complaints against state ports.

* Public funding of religious activities and groups. In the early 1970s, over Rehnquist's dissent, the court erected significant limits on when public money could be spent at private religious schools. Those restrictions have been eased through the years. Now the court's majority, as was the case in Thursday's ruling that supported school voucher programs, says government can provide money for religious schools on the same basis as secular schools. This decision's author: Rehnquist.

* The death penalty. Five months after Rehnquist joined the court, the majority struck down all state capital punishment laws, saying they were being imposed arbitrarily. He dissented. Today the court, like Rehnquist, firmly backs the constitutionality of the death penalty.

But several justices, breaking with Rehnquist, have shown concern about the fairness of state procedures and who is subject to the ultimate penalty. The court ruled this term that the mentally retarded should be exempt from execution and that juries, not judges, should decide whether the aggravating factors of a crime warrant the death penalty. Rehnquist was the only justice to disagree with both rulings. The number of death-row inmates who take advantage of the recent rulings will depend on how courts interpret a 1989 decision backed by Rehnquist that limits prisoners' ability to appeal, based on new high court rulings.

* Defendants' appeals. In the 1970s and '80s, the majority routinely let condemned prisoners challenge the constitutionality of their cases in federal court. Rehnquist said this undermined the finality of state sentences and thwarted justice. His view that prisoners should be limited in their federal appeals now prevails.

That was reinforced this term by the court's decision in the case of a Virginia murderer who claimed that he had received inadequate counsel because his lawyer previously represented the murder victim. The conservative justices -- Rehnquist, O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas -- formed the majority that said such a conflict of interest is permissible as long as there is no evidence that it harmed the lawyer's representation.

There are areas in which Rehnquist has remained in the minority, notably on privacy and personal liberties. In 1973, he was one of two justices who dissented in Roe vs. Wade, which established a constitutional right to abortion. Rehnquist has continued to protest that decision and others that have struck down state's abortion restrictions. In recent years, he has been joined consistently by Scalia and Thomas.

Those three also dissented from the 1996 decision that invalidated an amendment to
the Colorado Constitution prohibiting local laws that protected gay men and lesbians from discrimination. They disagreed with the majority's view that the Colorado amendment seemed only the product of animus toward gay people.

Privacy law has been the overriding area in which Rehnquist has been unsuccessful, legal analysts say. "In other cases, he has had a quiet sense of confidence," says Kevin Worthen, a law professor at Brigham Young University. "He seemed to know it was going his way." Rehnquist appeared to reflect that self-assurance in 1985, when he dissented in a ruling that allowed Congress to impose minimum-wage laws on states. He said his federalism principles would, in time, "command the support of a majority."

Rehnquist was an assistant attorney general in Nixon's Justice Department when John Marshall Harlan retired from the court in 1971. Rehnquist was part of the team charged with helping to find a successor for Harlan and Justice Hugo Black, who also was retiring.

As nominees were vetted and political complications arose with some, Rehnquist himself came under consideration. Former Nixon aides have recounted how the president initially was wary of the blunt Midwesterner who wore Hush Puppies and bushy sideburns. Nixon mistakenly called him "Renchburg." But Nixon was impressed by his credentials -- Rehnquist had graduated first in his class from Stanford's law school in 1952 and had clerked for Justice Robert Jackson -- and his law-and-order reputation.

The president wound up naming Rehnquist and Lewis Powell (who retired in 1987) to fill the seats. The Senate approved Rehnquist 68-26. He took his oath Jan. 7, 1972.

Fourteen years later, President Reagan promoted him to chief justice, and Rehnquist became only the third sitting associate justice in U.S. history to be elevated to the center chair.

At the time, Reagan was stocking the court with other conservatives, beginning with O'Connor in 1981. The first female justice was a classmate of Rehnquist's at Stanford and became a frequent ally. Reagan named Scalia to the court in 1986 and Kennedy in 1988. The first President Bush appointed Thomas in 1991, ensuring Rehnquist a majority in many cases.

"The influence of one justice on the others is never as important as the identities of all nine justices. But, that said, Rehnquist has been very influential," says John Jeffries, dean of the University of Virginia's law school. "He was willing . . . to stake out strong positions and confidently defend them." Jeffries, a former clerk to Powell who has written about the court, says as far as he knows, Rehnquist "never burned a bridge, no matter how much he disagreed with another justice."

That has set Rehnquist apart from his predecessor as chief, Burger, who had a reputation as petty and constantly at odds with some colleagues. In their conferences, Rehnquist lets each justice speak once on a case before anyone speaks a second time, and he tries to evenly distribute the opinion-writing.

He is as predictable in his personal business as he is in his rulings. Each morning, he walks around the exterior of the court to exercise his bad back, usually unrecognized by tourists. When the justices temporarily had to move last fall because of the anthrax scare, he had his driver take him to the Supreme Court every day for his walk.
The chief was squarely with the majority in the court’s biggest decision in recent years: *Bush v. Gore*, the December 2000 ruling that stopped recounts of presidential ballots in Florida and gave George W. Bush the White House. Analysts say the ruling reflected a bold assertion: that in its view, the court was the government’s most indispensable institution.

But more than anything, Rehnquist’s court is characterized by its zeal to curb federal power and to leave the problems of society — its poor, weak and disadvantaged — to the states. In a 1995 opinion, Rehnquist said the court had deferred more to Congress. But unless it drew the line, "there will never be a distinction between what is truly national and what is truly local."

Biography

Age: 77, born Oct. 1, 1924.


Family: Married Natalie Cornell, Aug. 29, 1953; she died in 1991. One son, two daughters.

Source: U.S. Supreme Court

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Clarence Thomas After Ten Years: Some Reflections

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Introduction

When Justice Clarence Thomas was nominated in 1991 to the United States Supreme Court by the first President George Bush, even sophisticated observers of the judiciary knew relatively little about him beyond the line items on his resume. He had progressed rapidly in conservative political circles, but the details of his thinking on legal issues of the day were not widely known.

My memory is still fresh of how little Thomas revealed of himself in his confirmation hearings before the Senate Judiciary Committee ten years ago. This was even the case in the first phase, before the surfacing of sexual harassment allegations. My recollection is so vivid I

The clarity of my memory is due to personal circumstances. As the Supreme Court correspondent for the Wall Street Journal, I covered every confirmation from Justice Sandra Day O'Connor through Justice David H. Souter. When Justice Thomas was nominated, I wrote a profile of him, and then left the Journal to take a teaching position as a visiting professor at William and Mary Law School. My first class was a seminar on the Supreme Court, which I began with a focus on the nomination and confirmation process. The hearings on the Thomas nomination fit perfectly into my own professional transition.

2 See Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate, 102d Cong. (1991) [hereinafter Nomination of Judge Clarence Thomas]. The initial hearings on the nomination were held by the Senate Judiciary Committee with Thomas testifying on September 10-13, 1991. The

hearings were resumed on October 11-13, 1991, after allegations surfaced that Thomas engaged in sexual harassment of Anita Hill.

3 See Richard Carelli, Thomas' Decisions Show Archconservative Bent, St. Louis Post-Dispatch, Feb. 27, 1992, at 1C (quoting New York lawyer Cameron Clark, "It looks to me as if he's going to become a clone of Justice Scalia, confirming the worst fears of those who tend to be more liberal"); see also Aaron Epstein, Conservatives Unhappy with Souter; Bush's Appointee Helped Produce Defeats for President, Orange County Reg., July 1, 1992, at A12 (quoting then University of Minnesota Law School Professor Suzanna Sherry).
No question exists that the two men see eye-to-eye quite frequently in Supreme Court decisions. For their first nine years together, the Harvard Law Review calculated that Scalia and Thomas agreed in 89.5% of the cases they decided. The total for the decade may be even a bit higher, since the National Law Journal puts their agreement at 96% during the last term, which was not included in the Harvard Law Review calculation.

These numbers, however, are meaningless when considered in isolation. While the total is the highest level of agreement on the current Court, it is not significantly greater than its closest competitors. Consider that the same Harvard Law Review study shows 84.3% agreement between Justice David H. Souter and Justice Stephen Breyer during their first six terms together, and 83.9% between Justice Souter and Justice Ruth Bader Ginsburg in their first seven terms. No one has suggested that these Justices are simply marching in lockstep together and not thinking for themselves. Additionally, there is an even more telling comparison. During their last decade on the Supreme Court together, Justices William J. Brennan, Jr. and Thurgood Marshall voted together in 94.3% of cases. Yet, liberal admirers of the two men would surely be appalled at, and quick to reject, suggestions that Marshall was just a Brennan clone.

This essay will discuss that there are numerous constitutional questions on which Thomas has expressed his own views, or at least views in which he was speaking for himself rather than simply following the lead of Justice Scalia.

II.

After ten years, it is only fair to examine Justice Thomas as an independent thinker by looking at the jurisprudential territory he has staked out for himself. Several themes emerge when Justice Thomas is analyzed in this manner.

A.

First, Clarence Thomas would have been more comfortable as a justice nominated in 1791 or 1891, instead of 1991. What he seems to hold most dear is the original intent of the Framers of the Constitution. He seems most comfortable quoting Alexander Hamilton and James Madison, rather than the decisions that have shaped the modern jurisprudence of the Supreme Court in the last fifty years. He seems like a man out of place in many ways who would have fit better into the doctrine of another time.

However, there is more to Justice Thomas than a compulsive devotion to the original intent of the Constitution. His opinions reflect a strong respect for the organizational order that the Constitution created, which leads him to be concerned—perhaps more than anything else—with maintaining and preserving the power and

4 See The Supreme Court, 1999 Term: The Statistics, Table II(B), 114 Harv. L. Rev. 390, 406 (Table II(B)) (2000) [hereinafter 1999 Term].


6 See 1999 Term, supra note 4, at 406.

7 See The Supreme Court 1989 Term: Leading Cases: The Supreme Court in the Eighties: A Statistical Retrospective, 104 Harv. L. Rev. 367, 370 (Table II(B)) (1990).

8 See discussion infra Part II.A-C (discussing Thomas' views on federalism, abortion and state's rights).

authority of the States. His view emphasizes the theory of Federalism, that all powers were intended to be given to the States by the Constitution, unless expressly given to the Federal government. Thomas writes about these views repeatedly, mostly as concurring or dissenting opinions.

A major example of Thomas' belief in the preeminence of the States is his stance on the term limits debate. In United States Term Limits v. Thornton, where the Court held that the States could not impose term limits on Congressional members, Thomas dissented. Thomas argued that where the Constitution is textually silent on an issue, it does not bar action by the States or the people, since all power comes from the States unless it is expressly given to the Federal Government. Thomas wrote:

As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: where the Constitution is silent about the exercise of a particular power that is, where the Constitution does not speak either expressly or by necessary implication the Federal Government lacks that power and the States enjoy it.

In Missouri v. Jenkins, Thomas, in a concurring opinion, criticized Federal courts for overreaching in their use of equitable powers to remedy desegregation. He cited The Federalist Papers and the nation's early history for his reasoning. He also defended the Constitutional prerogatives of the States by arguing that local government is the best way to defeat institutionalized desegregation:

Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution.

Sometimes, Justice Thomas rises to the defense of the States in strange contexts, where one might not expect this to be the principal argument. He raised the state authority argument in his dissent from the Court's decision in Hudson v. McMillian that certain beatings of prison inmates amounted to a violation of the Eighth Amendment's "cruel and unusual punishment" clause. Thomas argued that the "Eighth Amendment is not, and

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10 See id. at 131 (arguing that federal courts should first examine their role before infringing on state powers).
13 See id. at 837-38 (Thomas, J., dissenting) (finding that allowing states to adopt term limits for Members of Congress would "erode the structure envisioned by the Framers.").
14 See id. at 845-46 (noting that the majority "fundamentally misunderstands the notion of "reserved powers").
15 Id. at 847-48.
17 See id. at 114.
18 See id. at 129-31 (Thomas, J., concurring) (arguing that federal powers were never meant to infringe upon state sovereignty).
19 Id. at 131-32.
21 Id. at 9-11.
should not be turned into a National Code of Prison Regulation," and maintained that the Court failed "to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution, but with the laws and regulations of the various States."  

B.

As the aforementioned examples illustrate, there is little evidence that Justice Thomas is concerned about the jurisprudence of the last fifty years, which has elevated the importance of humanity and individual dignity as constitutional values. His concern for the prerogatives of the States often leaves little room to be solicitous of the rights of individuals.

One example of Thomas' concern for the prerogatives of the States is his dissenting opinion in the "partial-birth" abortion case, Stenberg v. Carhart. In his dissent, Thomas went into graphic and gruesome detail, describing so-called "partial-birth" abortion procedures with the effect, and perhaps intent, to shock the reader. His opinion reflects concern for the fetus, for possible health risks to the woman having the abortion, and for the States.

Nowhere in his discussion did Thomas pay attention to the impact of an unwanted pregnancy on the mother, who might not be able to get the late-term abortion. He described abortion simply as a matter to be regulated by the States and argued that courts should not be second-guessing the value judgments of state legislatures. He wrote, "the question whether States have a legitimate interest in banning the procedure does not require additional authority. In a civilized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion."  

The dissenting opinion in Stenberg was the first time Thomas expressed his own views on abortion. However, in Planned Parenthood v. Casey, he joined the partial dissenting opinions of Chief Justice William H. Rehnquist and Justice Antonin Scalia. The stridency of Thomas' rejection of a constitutional right to abortion should not be overlooked, recalling that he told the Senate Judiciary Committee during his confirmation hearing in 1991, that "I did not and do not

22 Id. at 28 (Thomas, J., dissenting) (arguing that the Federal government does not have the authority to set standards for the beatings of prison inmates).
23 530 U.S. 914 (2000) (holding a Nebraska statute banning partial birth abortions unconstitutional because it failed to consider the mother's individual health).
24 Id. at 984-89 (Thomas, J., dissenting) (providing graphic details of three different late-term abortion procedures).
25 See id. at 983-90 (describing the harm to the fetus).
26 See id. at 1015-18 (discussing the detrimental effects to a woman's health)
27 See id. at 1006-08 (noting possible problems for the States).
28 Id. at 1007.
29 Stenberg, 530 U.S. at 1007-08.
30 See id. at 983 (describing "partial-birth" abortions as "gruesome," "traumatic," and "border(ing) infanticide"); see also Nomination of Judge Clarence Thomas, supra note 2, at Part I, 222-23 (responding to questions noting that Thomas has never debated the issues and merits of Roe v. Wade).
32 Id. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that Roe was decided wrongly according to stare decisis).
33 Id. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that although the States are constitutionally allowed to permit abortions whenever a citizen so chooses, each state is not constitutionally required to provide such abortions to its citizens).
have a position on the outcome of Roe v. Wade, the original decision recognizing a right to abortion. In his dissenting opinion in Stenberg, Thomas made clear what he really thought of the abortion right:

Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.

In cases where there is a claim of individual rights, a plea for the Constitution to recognize the individual dignity of all, Thomas' view of the Constitution is just plain stingy. Consistently, his passion is on the side of Federalism, and any sign of compassion, as a prism through which to read and interpret the Constitution, is lacking.

There is another hallmark of Thomas' tenure on the Supreme Court. He is engaging in his own brand of judicial activism. Thomas is gradually building up, in concurring and dissenting opinions, an impressive array of invitations to litigants to bring cases to the Supreme Court and raise specific Constitutional issues he would like an opportunity to decide. Typically, these invitations raise issues that would allow Thomas to advance his belief in Federalism and the power of the States.

Thomas hardly promotes the image of a classic conservative justice who sticks to the issues raised in the cases before him and does not go roaming over the landscape of the Constitution. Of course, Thomas is not the first justice to give in to the temptation of wanderlust. However, it is somewhat surprising to see Thomas profess a form of constitutional restraint, through Federalism limitations on the power of Congress and the courts, and meanwhile, reach out beyond the issues presented to the Supreme Court for opportunities to advance his views of the Constitution.

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34 Nomination of Judge Clarence Thomas, supra note 2, at Part I, 223 (answering questions about his actions indicating disagreement with the Court's ruling in Roe including contributing articles, columns, and workgroups). See also Anton Bell, Clarence Thomas: Evasive or Deceptive, 21 N.C. Cent. L.J. 194, 207 (1995) (commenting that Thomas refused to give a definitive answer on abortion).


36 Stenberg, 530 U.S. at 980 (Thomas, J., dissenting).


40 See Till, supra note 37, at 588-90 (explaining that Thomas' opinions advocate returning power to the States).


42 See, e.g., United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (stating that in a future case the Supreme Court should temper its Commerce Clause jurisprudence in a way that is
The Commerce Clause is a favorite target for these Thomas excursions. In the Gun-Free Schools Zone Act case, United States v. Lopez, where the Court struck down a Federal law penalizing possession of a handgun within one thousand feet of a school, Thomas wrote the lone concurring opinion. He put the Court and future litigants on notice that he is ready, given the right case, to reconsider the "substantial effects" test under the Commerce Clause because it is inconsistent with the original intent of the Framers.

Similarly, in the Violence Against Women Act case, United States v. Morrison, Thomas concurred briefly, stating that he had no quarrel with the decision invalidating the part of the federal statute that gave victims of gender-motivated violence the right to sue for damages. This, Thomas noted, was a correct application of existing precedent. However, Thomas again invited litigants to bring forth actions to abandon the "substantial effects" test and return to the Framers' original intent when dealing with the Commerce Clause. If he could find more faithful to the original understanding of the Commerce Clause.

Traditional notions of Federalism are not the only fare promised in Thomas' invitations. In the "Brady Act" (Handgun Violence Protection Act) case, Printz v. United States, Thomas accepted the Court's decision to strike down the obligation of local law enforcement officials to conduct background checks on handgun purchases, based on Federalism. In his brief concurring opinion, however, he expressed the hope that the Court will have a chance to discourse on the meaning of the Second Amendment as a separate and untapped source of limitation on the power of Congress. Thomas even used the occasion to join in the contemporary debate among legal historians and constitutional theorists over the meaning of the Second Amendment.

Thomas has outlined an ambitious agenda for himself and the Court. It is a strange trademark for a Justice who consistently tells audiences that an important limitation generally Christopher E. Smith & Joyce A. Baugh, The Real Clarence Thomas 186-88 (2000) (noting that Thomas is the sole justice to reject the "substantial effects" test).

See id. at 936-37 (Thomas, J., concurring) (noting specifically the limited powers of the Federal government).

53 U.S. Const. amend. II (stating "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

See Printz, 521 U.S. at 938-39 (Thomas, J., concurring) (welcoming a discussion on the breadth of the Second Amendment limiting Congressional action on the matter).

55 See id. at 938 n.2 (citing numerous authors and sources that have analyzed and critiqued the application of the Second Amendment).
on the power of the Supreme Court is that it cannot reach out to decide issues not properly presented before the Court.\textsuperscript{56}

III.

There are more curious aspects of Justice Thomas' tenure that stand out. It has long occupied the attention of lawyers and journalists watching the Supreme Court that Thomas almost never asks questions during oral argument, even though he sits among colleagues who are very active questioners.\textsuperscript{57} This is not, in itself, remarkable. Justice Brennan rarely asked questions in his later years on the bench, and he was never criticized or ridiculed for it.\textsuperscript{58}

What is curious is that after saying little about the matter for years, Thomas gave a rather strange explanation to a group of high school students in December 2000.\textsuperscript{59} He explained that when he was growing up, he spoke a dialect called "Geechee," or "Gullah," which comes from the area of southeast Georgia where he was born.\textsuperscript{60} He said he developed the habit of listening in school, rather than asking questions, because he had a hard time mixing standard English with the dialect.\textsuperscript{61}

Though this is a moving story, it is an odd explanation for a person who has been in public life almost continuously since 1974, including: giving many public speeches, some broadcast live on C-SPAN; testifying on live television and radio for days before the Senate Judiciary Committee; presiding over public meetings of government agencies; and engaging in a variety of public speaking opportunities.\textsuperscript{62} Indeed, it is hard to imagine a more commanding voice than the deep baritone of Thomas. Perhaps it would have been better to leave his reasoning a mystery, rather than to explain it.

The speeches delivered by Thomas can also be curious at times, especially when they fail to acknowledge that they contradict each other. In February 1998, he spoke at a meeting of the American Inns of Court in Houston, Texas, and allowed the South Texas Law Review to publish a copy of his remarks, titled Civility.\textsuperscript{63} The speech addressed the problems caused by the decline of civility in public discourse in American life, and particularly how the loss of civility makes self-governance more difficult.\textsuperscript{64} This is certainly a much-discussed topic and one that seems a safe ground for a Supreme Court Justice seeking to avoid speaking on contemporary political or legal controversies.

\textsuperscript{56} See Address by Justice Clarence Thomas, Fifteenth Annual Ashbrook Memorial Dinner 4, 11 (Feb. 5, 1999) (commenting on Article III restraints on his power as a Justice), available at http://www.ashbrook.org/events/memdin/thomas/speech.html.

\textsuperscript{57} See generally Ken Foskett, Thomas Building Conservative Judicial Legacy, Palm Beach Post, July 6, 2001, at 1A (remarking that Thomas is the only one of the nine justices that does not ask questions from the bench); David G. Savage, Say the Right Thing, 83 A.B.A. J. 54, 55-56 (1997) (asserting that Thomas' silence prompts a good amount of speculation, especially in comparison to his engaged colleagues); Calvin Trillin, Doubting Thomas, Time, Jan. 8, 2001, at 16 (questioning whether Thomas' silence is an admirable value).

\textsuperscript{58} Savage, supra note 57, at 55.


\textsuperscript{60} Id.

\textsuperscript{61} Id.


\textsuperscript{63} See Clarence Thomas, Civility, 39 S. Tex. L. Rev. 655 (1998) (critiquing America for its modern day lack of civility).

\textsuperscript{64} Id. at 658-59.
Remarkably, however, in February 2001, Thomas delivered the important Francis Boyer lecture at the American Enterprise Institute in Washington, D.C., decrying the failure of many people to stand up for important principles and defend their beliefs. Without any reference to the earlier speech, he blamed this failure on "an overemphasis on civility" and claimed that "the insistence on civility in the form of our debates has the perverse effect of cannibalizing our principles, the very essence of a civil society." To be sure, in the Boyer Lecture, he was warning that too much civility can lead to political correctness and excessive self-censorship, which are not virtues Thomas values. It is bizarre that Thomas gave the second speech without some acknowledgment that it takes a somewhat different tack than the first, or at least that it seeks to build on views he has already expressed.

IV.

Justice Clarence Thomas reached the milestone of ten years on the Supreme Court at a comparatively young age. Born on July 28, 1948, he passed the ten year mark at only fifty-three years old. He is likely to have a long, record-breaking tenure on the Court. There will be many more opportunities to assess his performance in the years ahead and to look back at the durability of these preliminary observations.

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66 Id. at 5.
67 Id. at 6.
68 See Smith & Baugh, supra note 50, at 15-18 (describing Clarence Thomas' background).