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THE U.S. HIGH COURT THEN AND NOW: Federalism center stage as justices reconvene

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Monday morning marks the beginning of the U.S. Supreme Court's annual October- to-June work year. Expect no big surprises --- no retirements that would create the court's first vacancy since Stephen Breyer replaced the late Harry Blackmun five years ago; no landmark decisions reaching beyond Chief Justice William Rehn-quist's increasingly successful crusade for a "back to the states" form of federalism, whereby the court assertively limits Congress' authority to enact expansive federal laws.

Indeed, "stability" and "predictability" are good watchwords for the

Rehnquist court. Barring any medical emergencies, no membership changes are anticipated until 2001, when whoever wins the presidency in November 2000 will have taken office. But Rehnquist, who has presided over the court since 1986, is 75 years old, Justice John Paul Stevens is 79 and Justice Sandra Day O'Connor is 69.

Whoever does succeed Bill Clinton may very well have the opportunity to nominate all their replacements during his --- or her --- four-year term of office. The selection of replacements for Rehnquist, Stevens and O'Connor could push the court in one direction or another.

Nowadays O'Connor's and Anthony Kennedy's votes usually determine whether the consistently conservative trio of Rehnquist, Antonin Scalia and Clarence Thomas, or the more liberal foursome of Stevens, David Souter, Ruth Bader Ginsburg and Breyer come out on top in ideologically divided cases.

The person taking the oath of office in January 2001, however, will have a remarkable opportunity to shape a new Supreme Court for a new century. Whether the next president is Republican or Democrat, one political certainty is that the court will get its first Hispanic justice sometime early in the 21st century. Federal appellate judges Fortunato "Pete" Benavides of Austin, Texas, Sonia Sotomayor of New York City and Jose Cabranes of New Haven, Conn., are three names to keep in mind.

But the even bigger symbolic prize will be deciding who succeeds Rehnquist as chief justice. President George W. Bush might well be tempted to promote Souter, whom his father in 1990 chose for the court. Rehnquist's promotion-from-within was internally popular in 1986 (even liberal Justices William Brennan Jr. and Thurgood Marshall praised Rehnquist's personal qualities), but a President Bill Bradley or a President Al Gore would more likely look outside the court for a new chief justice.

Once upon a time senators and governors were regularly named to the court (Republican Earl Warren was governor of California when Dwight Eisenhower chose him as chief justice), but for the past 30 years lesser-known federal or state appellate judges have received virtually every nomination. Neither Bradley nor Gore would likely reach beyond such politically safe waters.

Power to the states

The federalism battles that divide the Rehnquist court into its "conservative" and "liberal" wings generate none of the popular controversy that abortion or school prayer cases create. The Rehnquist court said its last word on abortion seven years ago. But this year a Louisiana case involving government provision of computers to parochial as well as public schools may lead to an important loosening of strictures on the separation of church and state.

What may be the most newsworthy case raises the purely statutory question of whether tobacco is subject to government regulation as a "drug" (a lower court said "no"). But a series of less celebrated cases will say much more about the constitutional agenda that the Rehnquist court's conservative majority has been pursuing for more than a decade. The constitutional issues are often abstract --- can Congress authorize private lawsuits against the states; what limits are there on Congress' authority to legislate under the "commerce power" --- but the real-life implications of the court's rulings are tangible and immediate.

One such decision last June (Alden v. Maine) effectively stripped every state employee in the United States of the federal labor law protections that cover private-sector employment. Two new cases the court will hear on Oct. 13 offer the conservative majority a similar opportunity to exempt state employees from coverage by the Age Discrimination in Employment Act. The theoretical justification for removing this protection is what school books call "dual federalism," the belief that the federal government and the states are co-equal partners, not parent and child. As Justice Kennedy declared in Alden, "Congress must accord states the esteem due to them as joint participants in a Federal system." If public employees lose out as a result, too bad.

Laws sent to grave yard

A similar result is expected this year in a case where South Carolina's exceptionally conservative state attorney general, Charles Condon, has challenged the federal Driver's Privacy Protection Act of 1994. That law prohibits states from publicly disseminating personal information such as drivers' home addresses and was passed by Congress after a California stalker murdered a young actress, Rebecca Schaeffer, whose address he had obtained from state motor vehicles records. Conservative theorists believe that Congress should not be able to exercise such intrusive control over state governments' behavior, and a Supreme Court majority probably will agree.

Another case that the court has just accepted for review may likewise result in another well-known federal law, the Violence Against Women Act of 1994, being struck down by the court. Under it, Virginia Tech student Christy Brzonkala sued two former college football players whom she alleges raped her. The defendants argue that Congress' constitutional authority to regulate interstate commerce, under which VAWA was enacted, is not so far-reaching as to allow for federal damage suits for such a "private" act as rape.

In the 1960s, Congress' commerce power supplied the constitutional basis for outlawing racial discrimination in public accommodations (since such discrimination of course harmed the commerce which Congress was authorized to protect), but in 1995 the court voided the federal Gun-Free School Zones Act on the grounds that "local" possession of a gun did not affect interstate commerce. If O'Connor's strongly conservative federalism views trump whatever special solicitude she may have as a woman, the Violence Against Women Act could well become another casualty of the court's conservatives.

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