INTRODUCTION

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The papers which follow grew out of a one-day conference entitled "The Supreme Court and Daily Life: Who Will the Court Protect in the 1990's?" which was held on October 21, 1989. This event, co-sponsored by The Nation Institute and The New School, was held at a time of increasing national concern about the conservative direction of the Supreme Court.

As Justice Thurgood Marshall said in a September 1989 speech to federal judges from the Northeast, recent Supreme Court decisions have "put at risk not only the civil rights of minorities but the civil rights of all citizens."[1] In order to take appropriate actions to protect these rights, we must become more aware of Supreme Court decisions and their impact on our lives.

Founded in 1966, The Nation Institute promotes and supports progressive journalism, civil liberties, social justice, and peace. It also strongly advocates and works to protect the rights of free speech, a free press, and free assembly as guaranteed by the first amendment. To help achieve this end, The Nation Institute founded Supreme Court Watch. Since 1981, Supreme Court Watch has been carefully evaluating the civil rights and civil liberties judicial records of potential and actual nominees to the Supreme Court. It has issued major analytical reports on the judicial records of Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Supreme Court nominee Robert Bork. This information was and is always shared with hundreds of public interest organizations, the national media, and the public.

During the Scalia, Rehnquist, Kennedy, and Souter confirmation hearings, Supreme Court Watch gave extensive testimony to the Senate Judiciary Committee. In the case of William Rehnquist's nomination for Chief Justice, Supreme Court Watch discovered many new witnesses who saw William Rehnquist challenge and harass black and Hispanic voters in the early 1960s in Phoenix, Arizona when he was a Republican party worker. Ten of these witnesses came forward and testified to the Senate Judiciary Committee which led to a much more complete public debate about his qualifications.

In addition, Supreme Court Watch's report on David Souter highlighted the fact that the newest justice, who had been called a "mystery man" and a "blank slate," did in reality have a record of curtailing rights during his years on the New Hampshire bench.[2] The report explained that his decisions on abortion, criminal procedure, due process, equal protection, freedom of

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1. Greenhouse, *Marshall Says Court's Rulings Imperil Rights*, N.Y. Times, Sept. 9, 1989, at A6, col. 3.

2. SUPREME COURT WATCH, JUDGE DAVID H. SOUTER, WHERE DOES HE STAND?: A PRELIMINARY REVIEW OF HIS JUDICIAL RECORD (1990).

speech, and the rights of lesbians and gay men indicate his very narrow construction of constitutional protections for individual rights.

We must maintain a public vigilance, and a greater scrutiny, over the selection of Supreme Court Justices as well as appointments to other levels of the federal judiciary. During their Administrations, Ronald Reagan and George Bush have appointed five Supreme Court Justices and an expanding majority of federal district and circuit court judges.[3] The Republican right-wing agenda has sought to have Supreme Court Justices appointed who would overrule those Court decisions creating a broad constitutional right to abortion, prohibiting voluntary prayer in public schools, endorsing affirmative action in the workplace, mandating busing to achieve integration in classrooms, and sharply curbing police interrogation of suspects and the use of reliable but illegally seized evidence in criminal proceedings.[4]

The civil rights and civil liberties decisions of the United States Supreme Court in recent Terms demonstrate a conservative tilt, with a particularly clear loss for women, people of color, people under the age of majority, and lesbians and gay men. A majority of Justices, which William Kunstler refers to in his remarks as the "gang of five" has coalesced to curtail rights in a number of areas of law which affect members of these groups. Currently, this "gang of five" consists of the four Reagan appointees, Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, as well as Justice White, who has become increasingly less sympathetic to civil rights claims. Justice Souter appears likely to increase the Court's majority from five to six, and provide the necessary fifth vote in those cases where Justice White does not join with the conservative coalition.

The Rehnquist Court's relentless chipping away at individual liberties has been as frightening as it is consistent. In several much-awaited abortion cases, the majority of the Court restricted rights to abortion. The Court permitted states to refuse public funding for abortions and to prohibit public facilities from performing abortions in most cases.[5] In addition, the right of a woman under the age of eighteen to choose to terminate her pregnancy was seriously limited in a ruling permitting states to require parental notification in some situations.[6] These decisions indicate that the Court will be more disposed to sustain burdensome anti-abortion regulations in the future, and may very well consider modifying the landmark *Roe v. Wade*[7] decision. Privacy rights in

3. D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE xi (2d ed. 1990).

4. *See generally* 1984 Republican Platform, reprinted in CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 153-59 (J. Moore 2d ed. 1985); Kaufman, *Keeping Politics Out of the Court*, N.Y. Times, Dec. 9, 1984, § 6 (Magazine), at 72, col. 1 (effect of Republican party platform on the Supreme Court); Taylor, *Whoever Is Elected, Potential Is Great for Change in High Court's Course*, N.Y. Times, Oct. 21, 1984, § 1, at 30, col. 1 (potential effect of presidential election on the Supreme Court).

5. Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

6. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990).

7. 410 U.S. 113 (1973).

other areas have also been limited in recent years. In *Bowers v. Hardwick*,[8] the Court announced that the Constitution does not protect a "fundamental right" to engage in homosexual conduct, and thus failed to hold unconstitutional a statute making "consensual sodomy" a felony.

In addition, the Court limited fourth amendment protections against invasive searches and seizures. It permitted states to establish roadblocks for the purpose of administering sobriety tests without individual suspicion based on the conduct of the driver,[9] and allowed drug testing of government workers who handle drug interdiction, carry firearms, view "classified material," or perform "safety sensitive" tasks.[10]

In a number of cases, the Court gave restrictive interpretations to federal anti-discrimination laws, making it more difficult for racial minorities and women to prevail.[11] However, since these cases involved federal statutes and not constitutional questions, the Court's decisions can be overturned by Congress.[12] The majority of the Supreme Court also dealt a blow to affirmative action by sharply limiting the ability of state and local governments to adopt procurement policies expressly favoring racial minorities.[13] The Court struck down a set-aside law because proof of past discrimination by the city against minorities had not been shown. Affirmative action programs were even further undermined when the Court stated that white men who were not involved in litigation leading to a court-approved plan could subsequently attack the plan in a collateral action.[14] While these decisions do not overrule the Court's prior decisions permitting affirmative action plans in employment and education, they signal an unwillingness on the part of the Court to extend affirmative action any further.

In recent years, the Court has indicated an unwillingness to rescind death sentences on constitutional grounds. In *McCleskey v. Kemp*,[15] the Court rejected a claim, which was based on statistics, that the Georgia death penalty system was unconstitutional because African-American defendants who kill

8. 478 U.S. 186 (1986).

9. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990).

10. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); *see also* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989) (upholding regulations for drug testing of railway employees).

11. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (holding that the Civil Rights Act, 42 U.S.C. § 1981 (1988), could not be invoked to sue over alleged on-the-job racial harassment); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (holding that gross racial differences among disparate job classifications were not sufficient to make out a *prima facie* case of employment discrimination).

12. Both houses of Congress passed legislation in 1990 designed to negate the impact of these and other recent Supreme Court decisions. Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990). President Bush, however, vetoed the legislation, and the Senate sustained his veto by one vote. Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3.

13. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989).

14. Martin v. Wilks, 109 S. Ct. 2180 (1989).

15. 481 U.S. 279 (1987), *writ proc. McCleskey v. Zant*, 820 F.2d 342 (1989), *cert. granted*, 110 S. Ct. 2585 (1990).

white victims are more likely to be sentenced to death than other defendants. The Court also rejected the last broad-based challenge to the imposition of the death penalty when it held that it was not "cruel and unusual punishment" for the state to execute persons who were sixteen or seventeen years old when they committed a crime[16] or who were suffering from mental retardation.[17]

It must also be noted that almost one-third of the non-unanimous cases have been decided recently by a 5-4 vote.[18] The appointment of Justice David Souter could therefore swing the Court in an even more conservative direction profoundly affecting the future of affirmative action, reproductive rights, individual rights, and our right to privacy.

The Articles published here discuss a wide range of issues which the Court will face into the 1990s and beyond. Veteran activist and lawyer in the struggle for civil liberties, William Kunstler, takes an historical look at the Bill of Rights in order to put the current Court's attack on the first ten amendments in perspective. Professor Rhonda Copelon argues for a more comprehensive conception of the right to privacy in the wake of the restrictive *Webster* and *Bowers* decisions. Professor Shanara Gilbert presents one of the many problems with the administration of the death penalty, specifically, the blight of racism in death sentencing. Finally, Frank Deale of the Center for Constitutional Rights and Judith Reed of the NAACP Legal Defense and Educational Fund discuss the future of affirmative action and employment discrimination cases.

There are a number of individuals and organizations to thank for making this conference a reality. First, we extend our deepest gratitude to all of the conference participants. Our distinguished guests represent organizations that have given a great deal of support to this event. These organizations are the National Lawyers Guild, the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, the Lambda Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Center for Constitutional Rights, and the National Conference of Black Lawyers. Special mention must also be given to The New School. Without The New School's unfaltering support, this conference would not have been possible.

16. Stanford v. Kentucky, 109 S. Ct. 2969 (1989).

17. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

18. In the 1988-89 Term, 33 cases were decided by 5-4 votes and 39 cases were decided unanimously out of a total of 143 opinions. *The Supreme Court, 1988 Term - Leading Cases*, 103 HARV. L. REV. 137, 396-97 (1989).