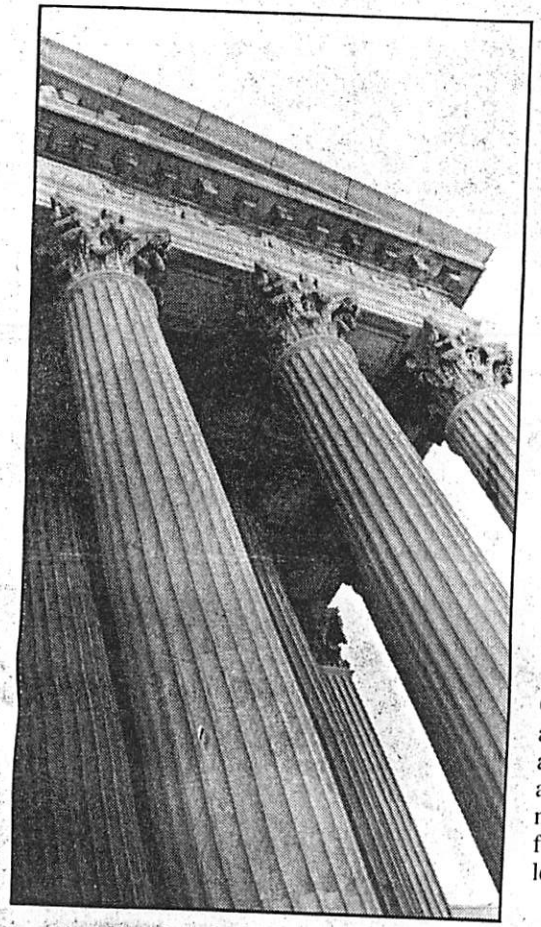
July 21, 1995 • Vol. 26, No. 29

The Washington Blade

THE GAY WEEKLY OF THE NATION'S CAPITAL

Court 'hostile' to civil rights

But Gay legal activists believe it might have a heart



by Lisa Keen

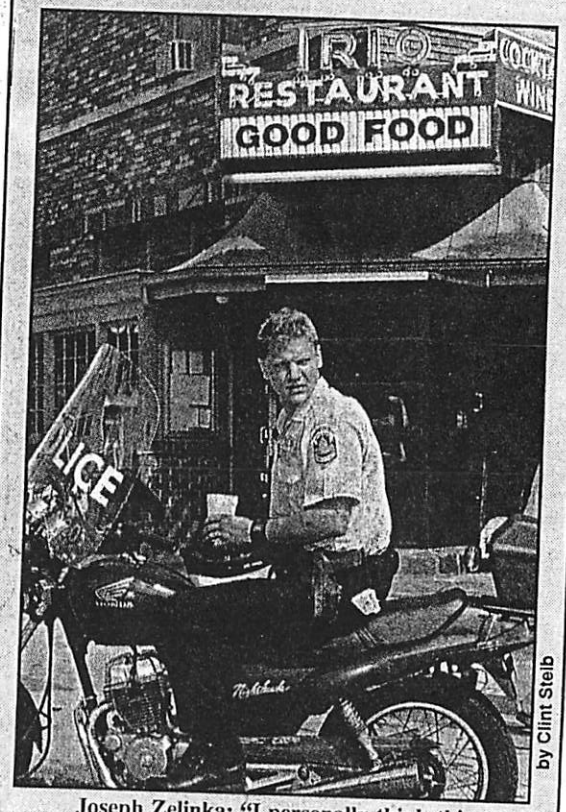
On his most fateful day, Julius Caesar asked his priests for advice. They dutifully sacrificed some poor sweet animal, cut out its guts, studied the mess, and — at least in Shakespeare's version — came back with a warning that they "could not find a heart within the beast." This, they cautioned the newly annointed "dictator for life," meant Caesar had much to fear from the future and that he should stay home. But Caesar, not wishing to offend his "friends" in the senate, accepted another, more pleasant interpretation of nature's omens that day, ventured out, and had his own guts spilled.

Matt Coles, executive director of the ACLU's National Lesbian and Gay Rights Project, doesn't put much stock in the study of entrails. But that is the image that comes to his mind when thinking about the 1994-95 U.S. Supreme Court session.

"I think reading Supreme Court opinions from one term and trying to guess and predict what they'll do is kind of like the ancient Roman practice of reading entrails — killing the chicken and spreading out its entrails to decide how the battle's going to go," said Coles. "It's all just the wildest kind of speculation, but when you've got something important coming up — like just before going into some big battle — the priests would do that to try to tell how things would turn out."

Gay legal activists face a really big battle in the Supreme Court next year. That's when the court is set to decide whether anti-Gay initiatives, like the ones approved by voters in Colorado and Cincinnati, pass constitutional muster. Next session could also determine the constitutionality of the military's so-called new policy banning Gays. So even though nobody puts much faith in looking for the future in the "entrails" of the present, Gay legal activists have spent some time picking through the guts of

Continued on page 21



by Clint Stelb

Joseph Zelinka: "I personally think this community is the best in the whole bloody city. It makes me want to protect everyone here."

On the beat

Joseph Zelinka, walking

Supreme Court cases of interest to Gays

The following is a summary of cases, with either direct or indirect implications for Gays, which the U.S. Supreme Court acted on during its 1994-95 term:

* **EDMONDS V. OXFORD HOUSE**—The case involved a halfway house for people recovering from substance abuse, but it could have implications for homes for people with AIDS. In dispute were regulations which said that, in a neighborhood zoned for single-families, dwellings could be occupied by any number of persons related by "genetics, adoption, or marriage" but by only five or fewer persons who were unrelated.

In a decision penned by Justice Ruth Bader Ginsburg (Clinton appointee), an unusual 6-3 majority said that zoning regulations could not set one limit on unrelated people and another on related people. Any such attempt to define the relationships of the people in particular households, it held, violates the federal Fair Housing Act's prohibition on discrimination based on "familial status."

"We're very pleased with the decision," said Troy Petenbrink, spokesperson for the National Association of People with AIDS which filed a brief in the case. Marc Elovitz of the ACLU National Lesbian and Gay Rights Project said the decision is important for people with HIV "because a growing number" are living in similar group homes in the face of "continuing attempts by localities to use restrictive zoning laws to keep them out."

* **LONG ISLAND RAILROAD V. MARCHICA**—In the only case this term to involve AIDS explicitly, the court in January refused to review a lower court decision which required a company to pay damages for an employee's emotional distress over *possibly* contracting HIV. The case involved a rail worker who was accidentally stuck by a discarded syringe needle while cleaning out an abandoned rail workroom which had been broken into by drug abusers and prostitutes. His doctor advised him to stop having sex with his wife and to have repeated HIV antibody tests. Although the man did not test positive over the course of the next two years, a district court judge ordered the rail company to pay the employee $126,000 for the emotional distress he suffered, including future fear. Catherine Hanssens of Lambda Legal Defense and Education Fund said that the trend in most courts on these fear of AIDS cases has been to require the person suing to show some kind of actual infection. But Hanssens was not upset the high court didn't take the case because, she said, given its more conservative leanings, it may have been inclined to uphold the lower court decision for the entire country.

* **McINTYRE V. OHIO**—In this case, the Supreme Court said citizens have a right to distribute political literature anonymously.

In recent years, distribution and posting of anonymous leaflets has been a common practice employed by some groups within in the Gay community — sometimes related to an election; sometimes, to "out" a famous personality or elected official. In a 7 to 2 vote, the Supreme Court said that libel and defamation laws can take care of instances where anonymous flyers engage in defamation. Otherwise, it said, the constitution must look after the need for anonymity in the political arena by those who might fear "social ostracism" or who merely have a "desire to preserve as much of one's privacy as possible."

But some Gay activists have seen merit in the Ohio law. Mary Bonauto of Gay & Lesbian Advocates & Defenders said the decision is "not a helpful one for us because we're outfinanced" by groups opposing equal rights for Gays who can and have used this tactic more frequently.

* **ROSENBERGER V. UVA**—Gay student groups have lost funding at a number of universities around the country because their views have been unpopular with other students, particularly those who say their religion teaches them that homosexuality is a sin. But in this case, the tables were turned. A student newspaper with a Christian point of view — including a view that homosexuality is a sin — was rejected for funding by the University of Virginia, a state-funded institution. The newspaper, *Wide Awake*, argued that it should get university funding like other campus papers. UVa contended the publication was denied funding because it was "proselytizing" its religious views and that a state-funded university could not, by virtue of the constitutional separation of church and state, fund religious activity. In a 5 to 4 decision, the Supreme Court ruled that because *Wide Awake* is a "student publication," UVa.'s denial of funding violated the newspaper's First Amendment right to freedom of speech. In rejecting UVa.'s position, the majority specifically dismissed one of the University's arguments that hinged on the scarcity of student funding. A similar "scarcity of resources" argument was made by the state of Colorado as one of the reasons behind an anti-Gay initiative which repealed and blocked prohibition of discrimination against Gays and bisexuals. In that case, Colorado argued that the state has only limited funds by which to enforce state non-discrimination laws. The majority's response in *Rosenberger* to that sort of argument, said Beatrice Dohrn of Lambda Legal Defense, suggests the high court may not look favorably on that sort of justification.

* **HURLEY V. GLIB**—A unanimous court ruled that the Boston St. Patrick's Day parade, organized by a group of war veterans, is a "private" event and a form of "expression" protected by the First Amendment. As such, said the court, the veterans group could exclude any contingent that presented a message contrary to the one they wanted to express. The Gay group said it wasn't presenting a "message;" it simply identified itself as a contingent of Gays by carrying a banner. But the court ruled that simply by identifying itself as Gay was expressing a message — a message of pride. Therefore, by excluding the Gay contingent from the parade, the veterans were not discriminating against the contingent based on sexual orientation, but rather were exercising their own right to freedom of expression. While the outcome was considered a loss, several aspects of the decision were considered very useful to future Gay-related cases. By saying that simply identifying oneself as Gay constitutes a "message," the court's ruling is expected to strengthen a number of Gay legal positions — including those challenging the military's policy which, in essence, calls for

Continued on page 22

If Supreme Court has a heart, then it's Souter

Continued from page 1

this year's decisions for any presage to tomorrow.

The belly of the beast

The most notable extractions from this session of the court spilled out in its final few weeks — three major decisions which many interpret as "hostile" signs for civil rights supporters in general:

* The court ruled that the government, in implementing any affirmative action program which favors "socially and economically disadvantaged people" over those who are not disadvantaged must demonstrate a compelling reason to do so. This "compelling" demonstration — known as strict scrutiny — is considered "fatal" to most such laws and policies. Thus, the decision in *Adarand v. Pena*, written by Justice Sandra Day O'Connor, makes it very, very difficult for the government to continue programs which seek to remedy the effect of a long history of racial discrimination in this country which left racial minorities at considerable disadvantage socially and economically.

* The court ruled, in *Miller v. Johnson*, that a voter redistricting plan which sought to assure that black voters were adequately represented violated the constitutional guarantee of equal protection because its overriding purpose was race-related. Twenty-seven percent of Georgia voters are black, and under the new redistricting plan, 27 percent of its members of Congress are also black. But the court ruled that the new district created under the plan — and which is represented by a black member of Congress — was improperly drawn because it was drawn specifically to address the issue of race. The majority decision, penned by Justice Anthony Kennedy, complained that the new district "tells a tale of disparity, not community." It said that it is illogical and "demeaning" to suggest that "individuals of the same race share a single political interest." And, as it did on affirmative action, the court, on redistricting, said that any governmental action based on race has to address a "compelling" need. While eradicating the effects of past racial discrimination is a compelling need, said the court, that was not the motive behind this plan. "[C]ompliance with federal antidiscrimination laws cannot justify race-based districting" in all cases, said the court. "...When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis of evidence of the harm being remedied."

* The court ruled that there are "practicable" limits to the actions a judge can order a state to take in order to remedy the negative effect of past segregation on current school facilities. "The ultimate inquiry," wrote Chief Justice William Rehnquist for the majority in *Missouri v. Jenkins*, "is 'whether the [state] has complied in good faith with the desegregation decree ... and whether the vestiges of past discrimination have been eliminated to the extent practicable.'" That, said Rehnquist, means that a judge does not need to make sure that one school is "equal to" another, but that it restores the "victims of discriminatory conduct to the position they would have occupied in the absence of that conduct ...."

In all three of these cases, the vote was 5 to 4. On the conservative majority side each time was Chief Justice William Rehnquist (a Nixon and Reagan appointee), Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy (all Reagan appointees), and Clarence Thomas (a Bush appointee).

by Clint Stelb

Mary Bonauto: The court's decision in the parade case "seemed to understand more about the reality of Gay existence" than ever before.

Coles, of the ACLU, said these three decisions are "fairly hostile" to civil rights claims in general.

"A court that treats these very traditional civil rights claims in a fairly hostile manner," said Coles, "is less likely to be open to new civil rights claims — which are the kinds we're going to be presenting. This court looks hostile to civil rights, and that's not good."

Coles said he was also disturbed by what he called an "ivory tower" perception from the majority that "rests on the assumption that we have, as a society, reached a point in which we can talk intelligently about being near race-neutrality."

"That's totally unreal," said Coles. "The fact that the court could become that detached from reality as those decisions suggest makes me worry about the Colorado [initiative] case."

Beatrice Dohrn, legal director for Lambda Legal Defense and Education Fund, said the three decisions "reflect a social tide, a social movement, that our society has reached a point of in-

Cases of interest for Gays

Continued from page 21

discharging anyone who identifies as Gay.

*** SWANNER V. ANCHORAGE**—The court refused to review an Alaska supreme court decision which ruled that a landlord could not justify discriminating against an unmarried heterosexual couple because of his religious beliefs opposing fornication. The case was of strong interest to Gays because of its potential application to housing laws protecting Gays from discrimination. By refusing to hear the case, the Supreme Court left intact a decision which said that the landlord's desire to exercise his religious beliefs in the commercial arena of property rental does not outweigh the local government's interest in prohibiting discrimination based on marital status.

*** VERNON V. LOS ANGELES**—The Supreme Court refused to hear the appeal of a police officer who said he was unfairly investigated after a magazine reported on his religious views that the Bible condemns Gays. The case originated when the *Los Angeles Magazine* reported in May 1991 that Robert Vernon, assistant chief of the Los Angeles Police Department "condemns homosexuality, depicts cops as 'ministers of God,' and instructs churchgoers that 'the woman is to be submissive to the man,' among other things. A Los Angeles City Councilmember expressed concern that the views might affect Vernon's decisions concerning police department promotions and asked the police commission to investigate whether Vernon's religious views might affect his "hiring and treatment of gays and lesbians," as well as other groups. Then Police Chief Darryl Gates said the investigation turned up no wrongdoing. But Vernon filed suit arguing that the investigation violated his constitutional right to free exercise of religion and the constitution's mandate for separation of church and state.

*** REGALDO V. TEXAS**— This case challenged the validity of a Texas criminal law which prohibits the possession with the intent to use, sell, or "promote an obscene device," including vibrators and artificial vaginas. The Texas Court of Criminal Appeals said that the constitution's right to privacy does not protect "the use of or possession with intent to promote obscene devices." In refusing to review the case, the Supreme Court leaves the law intact.

*** GIDDENS V. SHELL OIL**—A male employee of a Shell Oil refinery sued the company for failing to correct a hostile work environment in which he was sexually assaulted and harassed by two male supervisors. The Fifth Circuit U.S. Court of Appeals ruled that "Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones." In refusing to review the case, the Supreme Court action leaves that opinion intact for the Fifth Circuit.

*** JACKSON V. BRIGLE**—Air Force officials discharged Lt. Col. Kenneth Jackson after civilian police who were investigating his civilian roommate found information identifying Jackson as Gay and turned it over to Air Force officials. Jackson sued, charging that his Fourth Amendment constitutional right to be free from unreasonable searches had been violated. But the Ninth Circuit U.S. Court of Appeals said that a U.S. Supreme Court ruling gave the government immunity for injuries that "arise out of or are in the course of activity incident to [military] service" and said such was the case here. Michelle Benecke, co-executive director of Servicemembers Legal Defense Network, said the Supreme Court's refusal to review the case will make it "much more difficult to challenge off-base searches."

*** ANDREWS V. U.S.**— In this case, a heterosexual man in the Navy was accused of rape but convicted, instead, on a charge of consensual sodomy, which is prohibited by the Uniform Code of Military Justice. The man argued that, although the Supreme Court has ruled that homosexual sodomy is not protected by the constitutional right to privacy, heterosexual sodomy should be. By refusing to review the case, the Supreme Court left the conviction intact.

*** U.S. TERM LIMITS V. THORNTON**—In a 5 to 4 decision, the Supreme Court struck down term limits which some states have adopted for Congressional seats. Term limits, it said, would make it more difficult for some candidates (incumbents) and not others to run for office. By forcing incumbents to run as write-ins, the term limits restriction "has the same practical effect as an absolute bar." Suzanne Goldberg of Lambda Legal Defense said that aspect of the ruling could have implications in the Colorado Amendment 2 case where the state argues that its anti-Gay initiative is not an absolute bar to the ability of Gays to gain access to various political remedies available to heterosexual citizens.

*** VERNONIA SCHOOL V. ACTON**— In a 6 to 3 decision, the court said schools may require student athletes to undergo random drug testing. Matt Coles of the ACLU said he found the decision particularly "worrisome" because "it treats a fairly traditional privacy claim very dismissively."

*** ADARAND V. COLORADO**— In a 5 to 4 split, the high court ruled that the government must demonstrate a compelling reason behind affirmative action programs which favor racial minorities. By requiring a compelling reason — strict scrutiny — the ruling is expected to undo most affirmative action programs. The decision is seen by activists as a sign of the current Supreme Court's general "hostility" to civil rights.

*** MISSOURI V. JENKINS**— In another 5 to 4 split, the court ruled that there are "practicable" limits to what actions judges can order to remedy the effects of past segregation in schools. Like *Adarand*, this case is seen as a sign that the majority is "hostile" to civil rights claims in general.

*** MILLER V. JOHNSON**— In its third 5 to 4 split on a general civil rights case, the Supreme Court ruled that race may not, in most instances, be used as a grounds for drawing Congressional district boundaries.

*** McKENNON V. NASHVILLE**— In this case, the court ruled that in most instances an employer may not fire an employee for a discriminatory reason and then justify the firing later for some other nondiscriminatory reason. The case involved age discrimination, but GLAD's Mary Bonauto said the tactic is used by many employers against Gay employees. "Gay people are often fired and then the employer cooks up some kind of alleged misconduct that the employee participated in which they discovered after termination," said Bonauto. "Gay people are pretty easy prey for this kind of thing." She said the McKennon decision "didn't take care of the problem" because it still allows employers some leeway in finding evidence after the termination.

—Lisa Keen

St. Patrick's loss carried both portent and promise

Continued from page 21

tolerance in dealing with our racial history."

"That doesn't bode well for Gay people where we're just trying to get people to recognize that there is discrimination, that it affects our participation in society; and it is not a good thing that society is saying 'I've had enough of that'," said Dohrn. "Our fate is very linked with the national sentiment toward minorities and eradicating discrimination. If the country wants to put its head in the sand — that's not good for Gay people."

Has the beast a heart?

So, with its head in the sand and its 1994-95 decisions spilled out for examination, does this Supreme Court have a heart? Most Gay legal activists would probably say they're still looking; but if it does, most would probably see it in Justice David Souter (a Bush appointee) and in the opinion he wrote on the St. Patrick's Day parade case, *Hurley v. GLIB*.

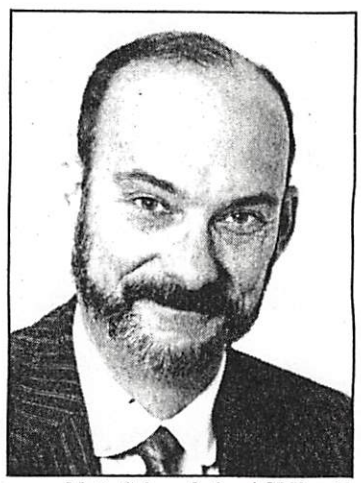
Although there were other cases involving Gays this term — both directly and implicitly — this was the only one for which the court issued an opinion. And that opinion turned out to be unique in the court's history. It was the first to use the terms "gay, lesbian, and bisexual" people to refer to Gay people; all earlier decisions had used the term "homosexuals." It was also unmatched, said activists, in the level of "respect" it accorded the Gay civil rights movement and laws which prohibit discrimination based on sexual orientation. The opinion said such laws are "well within" a state's "usual power to enact when a legislature has reason to believe that a given group is the target of discrimination ...." And it characterized as "fact" that "some Irish are gay, lesbian, or bisexual," and that openly Gay marchers "suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals ...."

Mary Bonauto of Gay & Lesbian Advocates & Defenders (GLAD), which took the case up for the Irish Gay group which wanted to march in Boston's annual parade, said "the court seemed to understand more about the reality of Gay, Lesbian, and bisexual existence" and that it has "grown up more in the past 10 years" since the 1986 decision, *Bowers v. Hardwick* upholding sodomy laws.

In *Hardwick*, the Supreme Court referred to Gays exclusively as "homosexuals," said there was no connection between homosexuals and the concepts of family and marriage, and compared homosexual activity to "victimless crimes" such as illegal drug use.

Without a doubt, the *Hurley* decision represented a significant loss, too: The Supreme Court said that the annual St. Patrick's Day parade is a "private" event and, as such, the content of the "message" it conveys is protected by the First Amendment right to freedom of expression. Translation: Organizers can keep out a Gay contingent. But in reaching that conclusion, the court had to also reach the conclusion that the Gay contingent, simply by identifying itself as Gay, conveyed a "message." And that, too, seems to portend good things for the Colorado case.

"Any time we're trying to get protection for someone who has come out as Gay and we want to invoke First Amendment protection," the *Hurley* decision will help, said Chai Feldblum, a law professor at Georgetown University. That will be especially helpful in the cases challenging the military's policy banning Gays, said Feldblum. And, she added, "*Hurley* illustrates the distance we have traveled, so it is certainly better to be bringing Colorado now than 10 years ago."



Matt Coles of the ACLU said this Supreme Court "looks hostile to civil rights, and that's not good."

And the wishbone?

Hurley was a unanimous decision, too, and given that the court's most conservative members could easily have written their own concurring opinions instead of joining Souter's friendly one, was both surprising and heartening.

What is not heartening, however, is the court's wishbone voting pattern — the 5 to 4 breakdown in the race-related civil rights cases. In contemplating the fate of the Colorado and military cases for next term — and expecting, at best, to squeeze out a 5 to 4 victory — most have counted on either Kennedy or O'Connor to join with the four justices who formed the dissent on the three civil rights cases: Justices John Paul Stevens (Ford appointee), David Souter (Bush), and Ruth Bader Ginsburg and Stephen Breyer (both Clinton appointees). Though not guaranteed by any means, these four relative moderates are considered the most likely votes — if any — to strike down the Colorado initiative.

But more times than not, Kennedy

National News

Conservative claw nabbed Kennedy, O'Connor

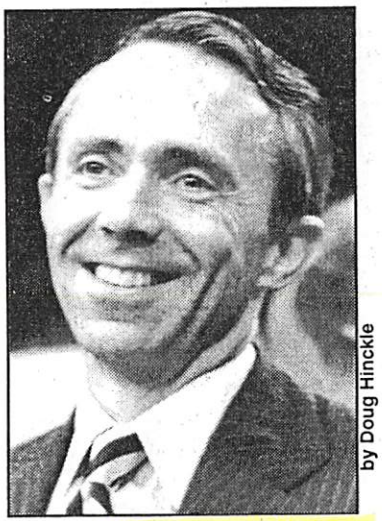
and O'Connor were in step with the court's strong conservative claw: Rehnquist, Scalia, and Thomas. Both joined these three in the "race cases" and both joined in a ruling that a state-run university had to provide financial support to a student newspaper promoting Christian, and anti-Gay, viewpoints.

"In virtually all the analyses," said GLAD's Bonauto, "we've looked at Kennedy and O'Connor. It seems we can't count on either of them."

"The conservative bloc really solidified itself," said Art Leonard, a professor at New York Law Center and author of the monthly *Lesbian and Gay Law Notes*. To Leonard, the court's "three in the middle" — Souter, Kennedy, and O'Connor — have "drifted" noticeably: Souter, to the left; Kennedy and O'Connor to the right.

Dohrn would agree: "It's not good news that, at the end of this term, the clearest indication is that the formation is going more conservative."

Yet no one's given up hope of holding the long end of the bone once the break is made on Colorado, and there were some signs that Kennedy or O'Connor might still be persuaded. For instance, in a case determining the right of a halfway house for people recovering from substance abuse to locate in a "single-family" neighborhood, O'Connor joined the more moderate four (so did Rehnquist). The decision, in *Edmonds v. Washington*, was considered a victory for people with AIDS who sometimes require group housing to alleviate financial burdens associated with their illness. In a case striking down term limit laws, *U.S. Term Limits v. Thornton*, Kennedy joined the moderate four. That opinion could be an important barometer for Colorado, said Lambda's Suzanne Goldberg, because the majority "recognized that a serious obstruction to political participation violates the constitution as much as an absolute bar to participation."



by Doug Hinckle

David Souter wrote the first U.S. Supreme Court opinion to use the terms "gay, lesbian, and bisexual."

Gay legal activists opposing Colorado's Amendment 2 submit, as their key argument, that the initiative bars Gay and bisexual citizens from using the same political avenues that heterosexual citizens have in seeking redress from the government. Colorado, and others defending the initiatives, have argued that Gays have an alternative — they can seek redress through ballot initiatives.

In the *Term Limits* case, the state of Arkansas argued that incumbent candidates have an alternative, too. While barred from having their names placed on the ballot, they could still win election by running for office as write-in candidates. But the Supreme Court majority, with Kennedy, said that this alternative — a considerably more difficult one — "has the same practical effect as an absolute bar."

Even in his opinion striking down the redistricting plan, Kennedy offered at least one sign of hope for Gays in the Colorado case. In the *Miller* opinion, Kennedy quoted an earlier decision, noting that:

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as individuals, 'not as simply components of a racial, religious, sexual or national class'."

The Colorado initiative, and others like it, single out citizens based on "homosexual, lesbian, or bisexual orientation."

But nobody dares to put much faith in this indicator or any other; each good sign seems countered by a bad one or worse — as in Caesar's case — a bad sign interpreted as a good sign might actually render a calamitous result.

"I look at this term and I mainly think about Colorado," said the ACLU's Coles, "but the bottom line is, you really can't tell much."

Leonard, at the New York Law Center, would certainly agree there's no science to this Supreme Court augury.

"Anyone who thinks they can predict this court — it's totally unpredictable," said Leonard. "We've got to just keep our fingers and toes crossed."▼