I. INTRODUCTION

The Supreme Court’s 2002-2003 term provided a watershed on several crucial issues, most notably their unanticipated decisions about the nature of human sexuality in the context of gay rights, the moral imperative of racial diversity, the support for federal power to eliminate the last vestiges of sex discrimination in the workplace, and the limits on the power of juries to assess punitive damages. This term’s decisions made clear that the Court, whose membership has not changed for a modern record of nine years, can still surprise.

For the past several terms, this conservative Court, led by a conservative Chief Justice, has led the law and the country to the right. This term, however, the Court’s centrist members prevailed and produced moderate decisions of breathtaking language and scope.

A. THE STATISTICS

First, the statistics—there were seventy-one signed opinions, which is five fewer than last term,¹ and less than half the number of cases decided by the Court in the 1970s and 1980s. Of the seventy-one decisions, thirty were unanimous,

leaving forty-one contested cases. In these cases, Justices Scalia and Thomas dissented most often with sixteen and twenty-one opinions respectively. This was a change from recent terms in which Justice Stevens was usually the most frequent dissenter.

B. THE THEMES

What themes emerge from this term of Court? First, the moderation of this conservative Court can be seen in the context of its four star cases—gay rights, affirmative action, federalism and punitive damages. As the Washington Post editorialized:


3. Id.

4. Id.

5. See Lawrence v. Tex, 123 S. Ct. 2472 (2003) (holding that a statute prohibiting two persons of the same sex from engaging in certain intimate sexual conduct violates the Constitution); Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (stating there is a compelling interest in attaining a diverse student body, and race and ethnicity may be used as a factor in higher education admission); Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (finding a university’s admission policy was not narrowly tailored when additional points were automatically awarded to
Justice Sandra Day O’Connor writes paens to diversity in higher education. Chief Justice William H. Rehnquist, sounding like a sensitive New Age guy, upholds the federal power to impose family leave rights on states in order to protect women in the workforce. Justice Anthony M. Kennedy insists upon the rights of gays “to respect for their private lives.” These are the dangerous ideologues of the extremist Rehnquist Court?

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The advantage of the ideological diversity the Court has demonstrated is that its majorities can draw from a variety of intellectual currents that offer useful strategies for interpreting the Constitution. This Court still has its pathologies: a certain grandiosity, and an imperial attitude toward the other branches of government. But with the Court’s current composition—which now appears likely to remain unchanged for at least

underrepresented minorities); *Nev. Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) (allowing state employees to recover money damages for the state’s failure to comply with the Family and Medical Leave Act); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (holding that a punitive damage award of 145 million dollars was neither reasonable nor proportionate when the compensatory damage award was one million dollars).
another year—a majority for any kind of radical conservatism seems a fading risk.  

As the Court’s center has prevailed, there has been a noticeable marginalization of Justice Scalia. These days, he rarely writes an important opinion even when the conservatives are in the majority. This term his most significant majority opinion was probably *Sattazahn v. Pennsylvania.* While not a trivial issue, it is certainly not among the Court’s important decisions this term.

As one commentator from the *Los Angeles Times* noted:

> Although Scalia’s views resonate with a large segment of the public, his influence within the [C]ourt appears to be minimal.

... 

Without question, he is smart, quick, witty and devoted to the law. He is considered the [C]ourt’s most gifted writer, and he often dominates the oral arguments. Yet he rarely writes an important opinion for the [C]ourt. Even when there is a conservative majority, Rehnquist assigns the [C]ourt’s opinion elsewhere, such as to Justices O’Connor and Kennedy.

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Scalia has a rigidity and an abrasiveness that drives away the others. He is known for his sharply worded dissents—but little else.  

The second theme is the pivotal importance of Justice O’Connor. She was in the majority in all but two of the fourteen 5-4 decisions this term. Very often in closely contested cases, where Justice O’Connor is—this Court is.

Third is the legacy of Justice Lewis F. Powell, Jr. He left the Court fifteen years ago but his influence was felt in two of the four star cases this term. His position that promoting racial diversity in universities is a compelling state interest sufficient to overcome an equal protection challenge to affirmative action expressed in Bakke twenty-five years ago is now the law of the land after Justice O’Connor’s opinion in this term’s affirmative action case. 

11. Grutter, 123 S. Ct. at 2336 (stating that “[s]ince this Court’s splintered
Further, Justice Powell said that he made a mistake in voting in the majority in the 1986 anti-gay rights decision *Bowers v. Hardwick*. Justice Powell had said to one of his clerks, “I don’t believe I have ever met a homosexual.” However, it is unlikely that Justice Powell was being honest with himself. Even before the *Lawrence* opinion held that “*Bowers* was not correct when it was decided, and it is not correct today,” and that its continuance as precedent demeans the lives of homosexual persons, all members of the Supreme Court knew gay and lesbian individuals, often their own clerks.

Fourth, this term of the U.S. Supreme Court had several important, but no landmark criminal cases. The Court continued to favor law enforcement. One decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.

12. 478 U.S. 186 (1986) (Powell, J. concurring) (agreeing with the majority that there is no fundamental right for homosexuals to engage in sodomy); John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 530 (Charles Scribner’s Sons 1994).


14. *Id.*


significant development was the substantial impact Section 2254(d) of the Antiterrorism and Effective Death Penalty Act,\textsuperscript{18} (AEDPA) is having in closing the door of federal courts to state prisoners petitioning for the writ of habeas corpus.\textsuperscript{19}

Fifth, it was a rough term for the First Amendment with all major free speech challenges rebuffed, which is quite unusual from this generally speech-protective Court.\textsuperscript{20}

Sixth, the Court’s u-turn in its federalism revolution was dramatic. For several terms since 1995, the five conservative members of the Court have issued opinions restrictive of congressional power to enforce federal civil rights acts against non-consenting states in federal court.\textsuperscript{21} The Court has relied on the compulsive questioning may impair a criminal defendant’s Fifth Amendment right, however, a constitutional violation only occurs at trial); \textit{Sell v. U.S.}, 123 S. Ct. 2174, 2184 (2003) (stating that the government may involuntarily administer medication to a mentally ill criminal defendant to render him competent to stand trial).


\textsuperscript{20} Greenhouse, \textit{supra} n. 2, at A1.

\textsuperscript{21} \textit{Alden v. Me.}, 527 U.S. 706, 748 (1999) (stating that Congress lacks the power to subject the states to private suits in federal court); \textit{Seminole Tribe of Fla.
concept of sovereign immunity—found nowhere in the Constitution itself—to support this states’ rights revolution. However, this term the principal architect of the federalism revolution, Chief Justice William H. Rehnquist, authored a strong opinion allowing non-consenting states to be sued for violation of their employees’ federally guaranteed rights to take time off for family emergencies under the Federal Family and Medical Leave Act.

Seventh, as Robert S. Greenberger asserted in the title of his *Wall Street Journal* article, there was victory for business among the losses in the Court’s rulings this term. But, what a victory it was! Business was delighted when the Court placed strict limitations on the powers of juries to assess punitive damages.

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Finally, in what may be the sleeper theme of this term that is going unnoticed because of the flamboyance and notoriety of the four star cases, is the clear trend toward concern for the position of United States law in the world legal community. Justice Kennedy’s citation of a 1981 gay rights opinion by the European Court of Human Rights was the first time a decision of that court has been cited as authority in a Supreme Court majority opinion. Over Justice Scalia’s strenuous objection, it appears that other members of the Court are.


27. Lawrence, 123 S. Ct. at 2474.

28. Justice Scalia called Kennedy’s citation of the European Court of Human Rights opinion “meaningless” and “dangerous.” Id. at 2495. Further, Justice Stevens cited foreign law in his opinion for the Court in Atkins v. Va., 536 U.S. 304, 316, n. 21 (2002) (noting that “within the world community, . . . the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”). That citation drew the ire of Justice Scalia who wrote, “[t]he views of other nations, however enlightened the Justice of this Court may think them to
likely to show increasing concern for the place of American law in the global legal
community.\textsuperscript{29}

In addition to the four star cases, many other decisions are noteworthy. The
following are synopses of the important cases of the 2002-2003 Supreme Court
Term.

\textsuperscript{29} See Greenhouse, \textit{supra} n. 2, at A1.