

KEYNOTE ADDRESSES

ASSESSING CHIEF JUSTICE WILLIAM REHNQUIST

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How should a Chief Justice be assessed? This conference provides the occasion for considering this question as part of looking at the role of Chief Justice on the Supreme Court and in the American legal system. Rather than examining the office generally, I want to focus on assessing William Rehnquist as Chief Justice. One way of assessing any Chief Justice is in terms of her ability to achieve a substantive vision of the law. In this sense, few would disagree that John Marshall and Earl Warren were enormously successful in having their substantive visions reflected in the decisions of their Courts. Marshall's visions of judicial review and federalism, among other crucial issues, were embodied in decisions like *Marbury v. Madison*¹ and *McCulloch v. Maryland*,² which provided a framework for government that lasts to this day. Earl Warren's visions of a more equal society better protecting the dignity of individuals were reflected in the desegregation cases,³ the rulings incorporating the Bill of Rights,⁴ and the decisions requiring reapportionment of state legislatures.⁵ Writings on the Warren Court, both by

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¹ 5 U.S. (1 Cranch) 137, 180 (1803) (providing that the Supreme Court can review and invalidate laws that are unconstitutional).

² 17 U.S. (4 Wheat.) 316, 436-37 (1819) (establishing that states cannot tax an "instrument employed by the government of the Union to carry its powers into execution").

³ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that segregating students based on race deprived children of educational opportunities and was therefore illegal).

⁴ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (incorporating the Sixth Amendment trial-by-jury right to apply in all criminal cases, including those at the state level); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (concluding that the Sixth Amendment right to counsel is a fundamental right that applies to states); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment exclusionary rule applies to state searches as well as federal searches).

⁵ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (articulating the requirement for "one person, one vote" in drawing election districts).

historians and other Justices, leave no doubt as to the profound effect of Earl Warren in bringing about these results.⁶

How should William Rehnquist be assessed as Chief Justice? More specifically, to what extent did the decisions of the Rehnquist Court reflect the views of its Chief Justice? That is the focus of this Article.

At the outset, I need to admit to all of the problems in even engaging in this inquiry. First, it is problematic to assess history that is so recent. The last Term of the Rehnquist Court ended on June 27, 2005, and an academic conference in November 2005 provides only the chance for immediate reflections on an era that has just ended. Certainly, one measure of effectiveness is in bringing about enduring changes in the law. At this point, there can be nothing except guesses and speculation as to which aspects of the Rehnquist Court's decisions will survive and provide a framework for future rulings and which will be overruled or relegated to constitutional footnotes.⁷

Second, focusing on the Court's decisions does not assess all of the other ways in which a Chief Justice influences the Court and the judicial system. For example, a key role of the Chief is in the operation of the Supreme Court, including its efficiency and its collegiality. From everything that is known so far, William Rehnquist likely will be regarded as an excellent Chief in these tasks.⁸ One of the most important developments during the time Rehnquist was Chief Justice was a dramatic decrease in the size of the Supreme Court's docket. The Court handed down 164 written opinions in Rehnquist's first year as

⁶ See WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 114-15 (1980) (discussing Warren's influence on the Court in deciding *Brown*); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 682-86 (1977) (providing a historical account of how Warren helped to unite the Supreme Court in *Brown*).

⁷ There already are several excellent books on the Rehnquist Court and the impact of its decisions. See, e.g., MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* 1 (2002) (noting that the Rehnquist court has radically changed American law); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 9-10 (2005) (listing the implications of the Supreme Court's decisions on different social and political issues); Martin H. Belsky, *The Rehnquist Court: A Review at the End of the Millennium*, in *THE REHNQUIST COURT: A RETROSPECTIVE* 3 (Martin H. Belsky ed., 2002) ("Chief Justice Rehnquist has been able to witness and even shape a dramatic change in constitutional jurisprudence . . .").

⁸ His predecessor, Warren Burger, has been much criticized in these regards. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 174 (1979) (discussing Burger's problems in administering the Supreme Court and noting that he spread himself too thin with non-Court business).

an Associate Justice,⁹ but only seventy-nine opinions in his last Term.¹⁰ I doubt that anyone would deny that this reflects Rehnquist's influence.¹¹

The Chief Justice also is responsible for overseeing the Judicial Conference of the United States, the important rules committees, and other aspects of the federal judiciary, including making appointments to some specialized courts and committees. Although all of this is important, none of it is my focus.

Third, it must be recognized that the success, or lack of it, in implementing a substantive vision may have nothing to do with the Chief Justice's effectiveness. Imagine that Michael Dukakis had won the 1988 presidential election and had appointed the successors to William Brennan and Thurgood Marshall. Without Clarence Thomas as a fifth vote in so many cases, countless decisions implementing Rehnquist's views almost surely would have come out differently.¹² Rehnquist likely would have been far less successful substantively, but not because of anything to do with his skills or effectiveness.

Fourth, the quantity of cases makes overall assessments inherently questionable. Rehnquist served as Chief Justice from 1986 to 2005. Over those nineteen Terms, the Supreme Court decided thousands of cases. It is possible to find examples to support any conclusion. Care must be taken to avoid "law-office history"—picking cases from the historical record to support preconceived conclusions.¹³

⁹ *The Supreme Court, 1972 Term: The Statistics*, 87 HARV. L. REV. 303, 303 tbl.1a (1973).

¹⁰ *The Supreme Court, 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 420 tbl.1a (2005).

¹¹ Whether this reduction is desirable, of course, is a different question and one beyond the scope of this Article.

¹² See, e.g., *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (resolving the 2000 presidential election by reversing the judgment of the Supreme Court of Florida); *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (upholding the ability of the Boy Scouts to exclude homosexuals on freedom of association grounds); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (limiting Congress's power to authorize suits against state governments); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (declaring unconstitutional a federal statute for exceeding the scope of Congress's Commerce Clause authority).

¹³ See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (speaking of "law-office history" and its dangers when examining a historical record).

Although I admit to all of these problems,¹⁴ I still believe it is worth offering an initial assessment of William Rehnquist's substantive success as Chief Justice. My overall conclusion is that Rehnquist was enormously successful in that the Supreme Court during his tenure accepted his views in almost every area of law. In some high profile areas, the Court did not go as far as Rehnquist wanted. The Court did not overrule abortion rights, but it did abandon the use of strict scrutiny and provided more deference to government regulation of abortions.¹⁵ The Court did not eliminate all affirmative action,¹⁶ but it did adopt strict scrutiny as the test for racial classifications benefiting minorities.¹⁷ The Rehnquist Court did not overrule the test for the Establishment Clause put forth in *Lemon v. Kurtzman*,¹⁸ but it did allow much more government aid to parochial schools.¹⁹

In explaining my assessment of the Rehnquist Court, this Article is divided into two parts. Part I argues that it is a mistake to think of the Rehnquist Court as if it were the same throughout the tenure of the Chief Justice. Rather, I believe that there were three distinct phases of the Rehnquist Court and that Rehnquist's success in achieving his substantive vision varied over time. Part II then looks at the specific areas of constitutional law and suggests that in every major area,

¹⁴ Yet another problem is in determining the vision of the Chief Justice. Although a Chief Justice's views can be determined from her opinions, there is no way to know the priorities that a Chief Justice placed on the various areas of law.

¹⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878-79 (1992) (allowing legislation mandating waiting periods for abortions that previously had been invalidated in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983)).

¹⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (allowing colleges and universities to use race as one factor in admissions decisions to benefit minorities and enhance diversity).

¹⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that any racial classifications by federal or local actors must be given strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (upholding strict scrutiny for racial classifications even when the classifications benefit minorities).

¹⁸ 403 U.S. 602, 612-13 (1971) (stating that a statute "must have a secular legislative purpose," that its "primary effect must be one that neither advances nor inhibits religion" and that it does not "foster an excessive government entanglement with religion" (internal quotation marks omitted)).

¹⁹ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (approving an Ohio program that provides assistance to children in "failed school district[s]" to attend any other school in the area, including religious schools); *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) ("[N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . ."); *Agostini v. Felton*, 521 U.S. 203, 208 (1997) (allowing public school teachers to go to "parochial schools to provide remedial education to disadvantaged children").

Rehnquist was very successful in that the Court adopted and reflected his views and visions.

This Article is meant to be descriptive, not normative. My goal is to describe the Rehnquist Court and assess the extent to which its decisions reflected the substantive values of its Chief Justice. Although my descriptions are undoubtedly influenced by my quite different normative vision, I do not seek to evaluate or criticize the desirability of the Rehnquist Court's decisions and doctrines. Quite the contrary, my hope is that both liberals and conservatives will agree with the descriptions I provide below of the Rehnquist Court and my assessment of the substantive success of William Rehnquist as Chief Justice.

I. THE ERAS OF THE REHNQUIST COURT

It is tempting to speak of the Rehnquist Court as if it were a single entity and the same throughout the tenure of William Rehnquist as Chief Justice. In an obvious way, this is incorrect because the Court's membership changed over Rehnquist's nineteen years as Chief Justice. In 1987, Lewis Powell was replaced by Anthony Kennedy. In 1990, William Brennan was replaced by David Souter. In 1991, Thurgood Marshall was replaced by Clarence Thomas. In 1993, Byron White was replaced by Ruth Bader Ginsburg. In 1994, Harry Blackmun was replaced by Stephen Breyer. In other words, five of the other eight Justices were replaced during Rehnquist's time as Chief Justice. Or put another way, only three Justices—John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia—were present for all of the Rehnquist Court. Interestingly, all of the changes in personnel occurred in the first eight years of the Rehnquist Court; there were no vacancies during the last eleven years.

Professor Thomas W. Merrill suggested that there were two Rehnquist Courts: one from October 1986 until July 1994, and one after that time period.²⁰ Professor Merrill suggested, among other conclusions, that in its second phase, the Rehnquist Court was “increasingly dominated by a single bloc of five Justices” and that “[s]ocial issues like abortion, affirmative action, and school prayer have significantly receded from the scene.”²¹ Although I think that Professor Merrill's analysis can be criticized for giving too little atten-

²⁰ Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *ST. LOUIS U. L.J.* 569, 569-70 (2003).

²¹ *Id.* at 570.

tion to cases that were inconsistent with his thesis,²² developments since his article undermine his view that there were just two eras of the Rehnquist Court. Between 2002, the last Term that Professor Merrill considered, and the end of June 2005, the Court very much turned to the social agenda which Professor Merrill saw the Court as eschewing. Subsequent to Professor Merrill's article, the Court upheld affirmative action in colleges and universities,²³ invalidated laws criminalizing private consensual homosexual activity,²⁴ struck down a federal law regulating child pornography,²⁵ and found a Ten Commandments display on government property to be unconstitutional.²⁶ By any measure, including Professor Merrill's own definition, these are "social issues," and they by no means retreated from the scene during the last years of the Rehnquist Court.

Moreover, the five-Justice bloc that Professor Merrill identified was much less cohesive during the last years of the Rehnquist Court. For example, of the seventy-six decisions in October Term 2004, nineteen were decided by a five-to-four margin, and in only four of these closely divided decisions was the majority comprised of Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. Thus, while I agree very much with Professor Merrill's premise that the Rehnquist Court changed over time, I see the phases of the Rehnquist Court quite differently from Professor Merrill's description. I believe that there were three distinct phases of the Rehnquist Court since William Rehnquist

²² See Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659, 670-74 (2003) (arguing that the second Rehnquist Court addressed the same number of cases, or more, involving social issues as compared to the first Rehnquist Court).

²³ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("The Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

²⁴ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating that a Texas statute criminalizing private, consensual homosexual conduct is not furthered by a legitimate state interest).

²⁵ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 257-58 (2002) (holding that the prohibitions against material appearing to be child pornography or promoted as child pornography are overbroad and unconstitutional).

²⁶ See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2738-41 (2005) (finding that the posting of the Ten Commandments in government buildings for the purpose of advancing religion violates the Establishment Clause). But on the same day the Court upheld another Ten Commandments display. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2858-59 (2005) (holding that a six-foot-high, three-foot-wide Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court does not violate the Establishment Clause).

was elevated to Chief Justice in 1986. The first phase, from 1986 to about 1992, was characterized by great deference to the elected branches of government. Rarely during this time did the Court invalidate federal, state, or local laws,²⁷ and the Court frequently proclaimed the need for great judicial deference to the elected branches of government.²⁸

To select one Term as an example, October Term 1988 was marked by an exceptional number of significant rulings, such as narrowing abortion rights,²⁹ limiting affirmative action,³⁰ striking down laws prohibiting flag burning,³¹ and curtailing the availability of habeas corpus.³² It also was an important Term in that it was the first full year on the Court for Anthony Kennedy, who often joined with Rehnquist, White, O'Connor, and Scalia, providing the fifth vote for conservative five-to-four decisions. In describing that Term soon after its completion, I wrote:

The Court's desire to avoid judicial value impositions combined with its commitment to deferring to majoritarian decisionmaking produces a sweeping judicial deference. The Court's inability to develop a theory of interpretation consistent with its premises—a theory for when it should accept constitutional claims and hold against the government—leaves the Court in a very deferential posture.

Thus, one obvious consequence of the Court's jurisprudence is that the government generally wins constitutional cases.³³

Statistics from October Term 1988 supported this conclusion of a highly deferential Court, and especially that the conservative Justices were particularly loathe to strike down actions taken by the elected branches of government.

²⁷ See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 56-59 (1989) (describing judicial deference during October Term 1988).

²⁸ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 131-32 (1989) (upholding a state law that denied unmarried fathers all parental rights based on deference to a legislative policy of maintaining the integrity of the marital union).

²⁹ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518, 532 (1989) (upholding Missouri's regulation of abortions with four Justices strongly indicating a desire to overrule *Roe v. Wade*).

³⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989) (invalidating a city's set-aside of thirty percent of its public works' money for contracts with minority-owned businesses).

³¹ See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (invalidating a state law prohibiting flag burning).

³² See *Teague v. Lane*, 489 U.S. 288, 316 (1989) (holding that a habeas petition may rely on a new rule of constitutional law only if it is applied retroactively).

³³ Chemerinsky, *supra* note 27, at 56-57.

For example, in forty-seven non-unanimous decisions in constitutional cases during the 1988[] Term, Chief Justice Rehnquist voted against the government only twice. Similarly, in non-unanimous cases, Justice Kennedy voted against the government only five times. The government prevailed in seventy-nine percent of the non-unanimous decisions in constitutional cases before the Supreme Court [that] Term.³⁴

If all constitutional decisions, both unanimous and nonunanimous, are examined, “the government won sixty-six percent of the constitutional cases [in the 1988] Term.”³⁵ By contrast, twenty years earlier, in the 1968 Term—the last year of the Warren Court—“the government prevailed in only twenty-three percent of the constitutional decisions.”³⁶

Nor was this judicial deference a one-year phenomenon. A year later, for example, the Supreme Court, in *Employment Division v. Smith*, tremendously limited the scope of the Free Exercise Clause of the First Amendment and provided for great judicial deference to government actions burdening religion.³⁷ The second phase of the Rehnquist Court was from 1992 through about 2002.³⁸ This era was marked by a dramatic lack of deference to Congress and the states. Former Solicitor General Seth P. Waxman observed that

[d]uring the entire first 200 years following ratification of the Constitution, only 127 federal laws were struck down—even accounting for the many laws that fell victim to the New Deal’s head-on collision with the Supreme Court in the tumultuous 1930s.

These days, however, the extraordinary act of one branch of government declaring that the other two branches have violated the Constitution has become almost commonplace. Since 1995, the Court has invalidated twenty-six different federal enactments³⁹

³⁴ *Id.* at 57-58 (internal citation omitted).

³⁵ *Id.* at 58.

³⁶ *Id.*

³⁷ 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause is not violated by neutral laws of general applicability); *see also infra* notes 113-14 and accompanying text (discussing the Court’s unprecedented restriction of the Free Exercise Clause in *Smith*).

³⁸ In this way, I am disagreeing with Professor Merrill, who puts the second phase of the Court as beginning in 1994, characterized by an emphasis on federalism and a deemphasis on social issues. Merrill, *supra* note 20, at 570. I choose 1992 because that was the first year in which the Rehnquist Court, in *New York v. United States*, 505 U.S. 144, 149, 161-66 (1992), invalidated a federal law on federalism grounds.

³⁹ Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001) (internal citations omitted).

The Court's lack of deference to Congress was most evident in the federalism decisions, where the Court invalidated laws as exceeding the scope of the Commerce Clause,⁴⁰ narrowed the scope of Congress's power under Section 5 of the Fourteenth Amendment,⁴¹ revived the Tenth Amendment as a constraint on federal power,⁴² and expanded the scope of sovereign immunity to limit the enforcement of federal statutes.⁴³

Nor was the Rehnquist Court during this time one that deferred to state legislatures; as Professor Merrill has noted, the Court frequently found state laws preempted by federal law during this time.⁴⁴ One would imagine that a Court committed to states' rights would narrow the preemptive scope of federal law,⁴⁵ but this was not the case

⁴⁰ See, e.g., *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (invalidating the civil damages provision of the Violence Against Women Act of 1994 as exceeding the scope of Congress's commerce power); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act of 1990 on the grounds that it "neither regulates a commercial activity nor contains a requirement that the possession [of a firearm in a manner prohibited by the Act] be connected in any way to interstate commerce").

⁴¹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (invalidating the Religious Freedom Restoration Act of 1993).

⁴² See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating a provision of federal law requiring that state and local law enforcement perform background checks before issuing permits for firearms); *New York v. United States*, 505 U.S. at 149, 161-66 (invalidating a key provision of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 as impermissibly commandeering the states and violating the Tenth Amendment).

⁴³ See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment protects state governments from suit for alleged violations of Title I of the Americans with Disabilities Act of 1990); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that state governments could not be sued for violating the Age Discrimination in Employment Act of 1967).

⁴⁴ Merrill, *supra* note 20, at 571 (commenting upon "the continued willingness of the Court to find state laws preempted by federal regulation"); see also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1314 (2004) (describing Rehnquist Court decisions finding preemption).

⁴⁵ As Professor Merrill observes,

A true believer in states' rights presumably would want to see greater power devolve from the federal government to the states. Such a sincere federalist would not only support formal limits on congressional power and immunities for states from suits by private citizens grounded in federal law, but he or she would also want to interpret the preemptive effect of federal statutes narrowly, so as to leave as large an ambit of state regulatory authority as possible.

Merrill, *supra* note 20, at 611; see also Chemerinsky, *supra* note 44, at 1313 ("One would expect that a Court concerned with federalism and states' rights also would be narrowing the scope of federal preemption of state laws.").

for the Rehnquist Court.⁴⁶ Also, the Court invalidated many state laws as violating the First Amendment's protection of freedom of speech and association.⁴⁷ Indeed, in cases striking down restrictions on speech by judicial candidates and ruling in favor of the Boy Scouts' ability to exclude gays despite a state law prohibiting such discrimination, the Court was split five to four with the five most conservative Justices ruling against the state law. Nor after *Bush v. Gore*⁴⁸ can it be credibly claimed that the five most conservative Justices always showed deference to state courts.

But in the last few years of its existence, the Rehnquist Court was decidedly more moderate. There was a third distinct phase of the Rehnquist Court, from 2002 through June 2005. In 2003, for example, the Court upheld a law school's affirmative action plan⁴⁹ and invalidated a state law prohibiting private consensual homosexual activity.⁵⁰ Every federalism case in the last few years of the Rehnquist Court was resolved in favor of federal power and against states' rights.⁵¹ The last year of the Rehnquist Court—October Term 2004—continued this pattern. Many of the most significant cases were re-

⁴⁶ See Merrill, *supra* note 20, at 611-12 (noting the paradoxical support for preemption by Scalia, Rehnquist, and Thomas).

⁴⁷ See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (invalidating a state law prohibiting judicial candidates from expressing views about disputed legal or political issues as a violation of the First Amendment); *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (invalidating the application of a state public accommodation law compelling the Boy Scouts to accept a homosexual as a scout leader on the grounds that the law violated First Amendment association rights).

⁴⁸ 531 U.S. 98, 110 (2000) (holding that the Florida Supreme Court's demand of a statewide recount of voter ballots would violate the Equal Protection Clause of the Fourteenth Amendment).

⁴⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”). But see *Gratz v. Bollinger*, 539 U.S. 244, 249-51 (2003) (striking down the University of Michigan’s undergraduate affirmative action program as violating the Equal Protection Clause).

⁵⁰ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

⁵¹ See, e.g., *Sabri v. United States*, 541 U.S. 600, 602 (2004) (upholding federal legislation “proscribing bribery of state, local, and tribal officials of entities that receive at least \$10,000 in federal funds, [as] a valid exercise of congressional authority under Article I of the Constitution”); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (upholding Title II of the Americans with Disabilities Act of 1990 as a constitutional use of Congress’s power under Section 5 of the Fourteenth Amendment); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 724-25 (2003) (permitting a private right of action for Nevada state employees under the Family and Medical Leave Act of 1993).

solved in a way that progressives, not conservatives, would prefer. For example, the Court invalidated the death penalty for crimes committed by juveniles,⁵² refused to provide more protection for property owners,⁵³ and expanded the protections of federal civil rights statutes.⁵⁴

I do not want to overstate the significance of this phenomenon or to portray the Rehnquist Court as being overly liberal in its last few years. There certainly have been many instances, especially in the area of criminal justice, where the Rehnquist Court has ruled as one would predict a conservative Court to act. In 2003, the Court upheld life sentences for shoplifters under California's three strikes law.⁵⁵ In October Terms 2003 and 2004 there were ten Fourth Amendment cases, of which nine were decided in favor of law enforcement and against criminal defendants.⁵⁶

⁵² See *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (barring the death penalty under the Eighth and Fourteenth Amendments for those under eighteen years of age at the time of the commission of their crimes).

⁵³ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2666 (2005) (holding that a private corporation's use of the government's eminent domain power can fulfill "public use" within the meaning of the Takings Clause); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531-32 (2005) (holding that a government regulation need not be shown to "substantially advance legitimate state interests" in order to avoid being a taking).

⁵⁴ See *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (allowing disparate impact employment discrimination claims to be brought under the Age Discrimination in Employment Act of 1967); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (holding that claims of retaliation for sex discrimination complaints are actionable under Title IX of the Education Amendments of 1972).

⁵⁵ See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) ("[I]t was not an unreasonable application of our clearly established law for [a state court] to affirm [the defendant's] sentence of two consecutive terms of 25 years to life in prison."); *Ewing v. California*, 538 U.S. 11, 30 (2003) (holding that defendant's "sentence of 25 years to life in person . . . is not grossly disproportionate and therefore does not violate the Eighth Amendment[.]").

⁵⁶ See, e.g., *Muehler v. Mena*, 544 U.S. 93, 95-96 (2005) (holding that the police may detain and question a person who is not suspected of any crime, but happens to be in the house of someone else that is being searched, and holding that additional questioning beyond the scope of the search does not violate the Fourth Amendment); *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (holding that the Fourth Amendment does not require "reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop"); *Devenpeck v. Alford*, 543 U.S. 146, 152-56 (2004) (holding that a warrantless arrest is valid so long as there was probable cause at the time of the arrest, regardless of whether the offense was "closely related" to the offense the arresting officer identified as the reason for arrest). The only exception in the last two years was *Groh v. Ramirez*, 540 U.S. 551, 551 (2004), which held that a warrant must specify with particularity that which is to be searched or seized.

Overall, then, in assessing the Rehnquist Court, Professor Merrill is correct in separating its differing phases. I, however, disagree with his description. In assessing the substantive success of William Rehnquist as a Chief Justice, an obvious conclusion emerges: Rehnquist was far more successful in the first two phases, from 1986 to 2002, than in the last phase. Both in his Court's initial deferential phase and in its subsequent more activist phase, Rehnquist was consistently in the majority in all of the areas described above. In fact, in every single case cited above from 1986 to 2002, Rehnquist was in the majority and wrote most of the majority opinions. But from 2002 to 2005, Rehnquist was hardly in the majority at all in any of the decisions coming to the more progressive results mentioned above.⁵⁷

Of course, it is tempting to speculate as to why the shift in the Rehnquist Court occurred, especially as to the change in its last few years. After giving this great reflection, I do not have a persuasive answer. Ultimately, the answer may be a straightforward one: in the last few years of the Rehnquist Court, the more moderate group of Justices (Stevens, Souter, Ginsburg, and Breyer) were more successful in many key cases at getting either O'Connor or Kennedy than the most conservative Justices (Rehnquist, Scalia, and Thomas) were at getting both. This is an accurate account of the decisions, but it still does not explain why O'Connor and Kennedy were more likely to vote with the moderate group in the last few years than they were to do so prior to then.

II. THE THEMES OF THE REHNQUIST COURT

The prior section offered one way of looking at assessing the success of Chief Justice Rehnquist: temporally, by focusing on specific time periods. Another way of examining and assessing Rehnquist's tenure as Chief Justice is more thematic, looking at the specific doctrinal themes of the Rehnquist Court and considering the extent to which each reflects Rehnquist's views.

Although any examination is inherently incomplete, I identify six major themes of the Rehnquist Court and suggest that all very much reflect the views of its Chief Justice:

- (1) No new suspect classifications were found, and remedies for consti-

⁵⁷ The only exception where Rehnquist was in the majority for what would be regarded as a progressive result was *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003), which permitted a private right of action to Nevada state employees under the Family and Medical Leave Act of 1993.

tutional violations were limited.

(2) No new fundamental rights were recognized during the Rehnquist Court, and many already existing rights were narrowed.

(3) The protections accorded criminal defendants were significantly narrowed.

(4) The limits imposed on the government by the Establishment Clause were relaxed.

(5) Access to federal courts to hear civil rights claims was significantly limited.

(6) The powers of Congress were restricted for the first time in almost sixty years: new limits were imposed on Congress's commerce power and authority under Section 5 of the Fourteenth Amendment, the Tenth Amendment was revived as a constraint on federal power, and state sovereign immunity was significantly expanded.

I list these together at the outset because this is a place where the whole is more than the sum of the parts; taken together, these themes show a Court that, overall, moved the law significantly to the right.⁵⁸ Taken together, the themes show a Court that, overall, reflected the ideology and positions of its Chief Justice.

To explain, I will consider each of these six themes individually.

A. No New Suspect Classifications Were Found, and Remedies for Constitutional Violations Were Limited

At the inception of the Rehnquist Court in 1986, it was clearly established that strict scrutiny was used for discrimination based on race and national origin,⁵⁹ and also generally for discrimination against

⁵⁸ This obviously does not reflect all of the areas of constitutional law. One obvious omission is freedom of speech under the First Amendment. Here, the record is much more mixed as to whether the Rehnquist Court followed the views of the Chief Justice. For example, although Rehnquist was a consistent advocate for empowering the government to regulate sexual speech, sometimes he was in the majority in this effort, but sometimes in dissent. *Compare* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000) (upholding regulations of sexual speech with Rehnquist in the majority), *Alexander v. United States*, 509 U.S. 544, 546-47 (1993) (same), *and* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991) (same), *with* *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (limiting federal laws regulating sexual speech on First Amendment grounds with Rehnquist dissenting), *and* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (same).

⁵⁹ Ironically, the first case to label discrimination based on race or national origin as "suspect" was *Korematsu v. United States*, 323 U.S. 214, 217 (1944) (upholding the evacuation of Japanese Americans from the West Coast during World War II).

noncitizens.⁶⁰ Intermediate scrutiny was used under equal protection for gender discrimination⁶¹ and for discrimination against non-marital children.⁶² All other types of discrimination received only rational basis review under equal protection.

This did not change at all in the nineteen years of the Rehnquist Court. In fact, the only major case finding an equal protection violation outside of these areas—*Romer v. Evans*—expressly used rational basis review in declaring unconstitutional discrimination based on sexual orientation.⁶³

The most important victory by a plaintiff asserting an equal protection violation was *Bush v. Gore*,⁶⁴ in which Chief Justice Rehnquist was in the majority.

The Rehnquist Court consistently limited remedies for violations of civil rights. This was evident in the area of school desegregation. In *Board of Education v. Dowell*, the issue was whether a desegregation order should continue when its end would mean a resegregation of the public schools.⁶⁵ Oklahoma schools had been segregated under a state law mandating separation of the races.⁶⁶ A federal court order was successful in desegregating the Oklahoma City public schools.⁶⁷ Evidence proved that ending the desegregation order would result in resegregation.⁶⁸ Nonetheless, the Supreme Court held that once a “unitary” school system had been achieved, a federal court’s desegre-

⁶⁰ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (using strict scrutiny to invalidate a state law denying welfare benefits to noncitizens). But in some instances, only rational basis review is used for discrimination against non-citizens, such as where the alienage classification relates to self-government and the democratic process. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 296-300 (1978) (upholding a statute preventing noncitizens from being police officers as meeting rational basis review).

⁶¹ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (articulating intermediate scrutiny as the test for gender discrimination).

⁶² See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978) (applying intermediate scrutiny as the test for determining the rights of illegitimate children whose fathers died intestate); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (same).

⁶³ 517 U.S. 620, 623 (1996) (invalidating a state initiative that repealed all laws protecting gays and lesbians from discrimination and precluded the enactment of new antidiscrimination laws).

⁶⁴ 531 U.S. 98, 109 (2000) (per curiam) (finding that Florida’s recount procedures in the 2000 presidential election violated the fundamental right to vote).

⁶⁵ 498 U.S. 237, 248-50 (1991).

⁶⁶ *Id.* at 240.

⁶⁷ *Id.* at 241-42.

⁶⁸ *Id.* at 242.

gation order should end even if it would mean resegregation of the schools.⁶⁹

The Court did not define “unitary system” with any specificity. It simply said that the desegregation decree should be ended if the board “ha[s] complied in good faith” and “the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.”⁷⁰ The Court said that in evaluating this, “the District Court should look not only at student assignments, but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.”⁷¹

In *Freeman v. Pitts*, the Supreme Court held that a federal court desegregation order should end when it is complied with, even if other desegregation orders for the same school system remain in place.⁷² A federal district court ordered desegregation of various aspects of a school system in Georgia that previously had been segregated by law.⁷³ Part of the desegregation plan had been met; the school system had achieved desegregation in pupil assignment and in facilities.⁷⁴ Another aspect of the desegregation order, concerning assignment of teachers, had not yet been fulfilled.⁷⁵ The Court said that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and remain involved only as to those aspects of the plan that have not been achieved.⁷⁶

In 1995, in *Missouri v. Jenkins (Jenkins II)*, the Court ordered an end to a school desegregation order for Kansas City schools.⁷⁷ Missouri law once required the racial segregation of all public schools.⁷⁸ It was not until 1985 that a federal district court ordered the desegregation of the Kansas City, Missouri, public schools.⁷⁹ The federal court’s desegregation effort made a difference. In 1983, twenty-four

⁶⁹ *Id.* at 248-50.

⁷⁰ *Id.* at 249-50.

⁷¹ *Id.* at 250 (internal quotation marks omitted).

⁷² 503 U.S. 467, 471 (1992).

⁷³ *Id.*

⁷⁴ *Id.* at 474.

⁷⁵ *Id.* at 481.

⁷⁶ *Id.* at 491.

⁷⁷ 515 U.S. 70, 102 (1995). Earlier in the life of the case, the Supreme Court had ruled that a federal district court could order a local taxing body to increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes. *Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33, 57-58 (1990).

⁷⁸ *Jenkins I*, 495 U.S. at 37.

⁷⁹ *Id.* at 37-38.

schools in the district had an African American enrollment of 90% or more.⁸⁰ By 1993, no elementary-level student attended a school with an enrollment that was 90% or more African American.⁸¹ At the middle school and high school levels, the percentage of students attending schools with an African American enrollment of 90% or more declined from about 45% to 22%.⁸²

The Court, in an opinion by Chief Justice Rehnquist, ruled in favor of the state on every issue. The Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order.⁸³ The Court concluded that the Constitution requires equal opportunity, not any particular result, and that therefore disparities between African American and white students on standardized tests were not a sufficient basis for concluding that desegregation had not been achieved.⁸⁴ The Supreme Court held that once a desegregation order is complied with in good faith, the federal court effort should end.⁸⁵ Disparity in test scores is not a basis for continued federal court involvement.⁸⁶

These Rehnquist Court decisions have led to a large number of lower court cases ending desegregation orders.⁸⁷ The result has been the substantial resegregation of American public schools.

Harvard Professor Gary Orfield has shown that, nationally, the percentage of African American students attending majority black schools and schools where over 90% of the students are black also has

⁸⁰ *Jenkins II*, 515 U.S. at 115 (Thomas, J., concurring).

⁸¹ *Jenkins v. Missouri*, 959 F. Supp. 1151, 1165 (W.D. Mo. 1997).

⁸² *Id.*

⁸³ *Jenkins II*, 515 U.S. at 101.

⁸⁴ *Id.* at 100-01.

⁸⁵ *Id.* at 89.

⁸⁶ *Id.* at 101.

⁸⁷ *See, e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 335 (4th Cir. 2001) (en banc) (ending the desegregation order for the Charlotte-Mecklenburg schools); *NAACP v. Duval County Sch.*, 273 F.3d 960, 962 (11th Cir. 2001) (ending the desegregation order for the Tampa schools); *Berry v. Sch. Dist.*, 195 F. Supp. 2d 971, 999-1001 (W.D. Mich. 2002) (ending the desegregation efforts for the Benton Harbor public schools); *Lee v. Butler County Bd. of Educ.*, 183 F. Supp. 2d 1359, 1368-69 (M.D. Ala. 2002) (ending the desegregation order for the Butler County schools); *Lee v. Opelika City Bd. of Educ.*, No. 70-T-853-E, 2002 U.S. Dist. LEXIS 2513, at *28-29 (M.D. Ala. Feb. 13, 2002) (ending the desegregation order for the Opelika schools); *Davis v. Sch. Dist.*, 95 F. Supp. 2d 688, 698 (E.D. Mich. 2000) (ending desegregation order for the Pontiac public schools).

increased in the last fifteen years.⁸⁸ In 1986-1987, 63.3% of black students attended schools that were comprised of 50% to 100% minority students; by 1998-1999, this composition had increased to 70.2%.⁸⁹

In North Carolina, for example, the same pattern exists. Between 1993 and 2000, the number of black students attending schools with minority enrollments of 80% or more doubled.⁹⁰ In Charlotte, fewer than 60% of the schools meet the standard definition of “diverse”; this is down from 85% in the 1980s.⁹¹

A second way in which the Rehnquist Court has limited remedies for discrimination is by restricting affirmative action. The Rehnquist Court will be most remembered for its one decision upholding affirmative action: *Grutter v. Bollinger*.⁹² Although this is an enormously important ruling, it must be remembered that this was the *only* Rehnquist Court decision upholding affirmative action. When Rehnquist became Chief Justice, the level of scrutiny to be used for racial classifications benefiting minorities was uncertain.⁹³ But the Rehnquist Court decisively adopted strict scrutiny review for affirmative action programs, concluding that benign racial classifications benefiting minorities should be treated in the same way as invidious ones disadvantaging racial minorities.⁹⁴ The Court repeatedly held that strict scrutiny review would be applied when the government used race as a factor in drawing election districts to benefit minorities.⁹⁵

⁸⁸ GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 32 (Harv. Univ. Civil Rights Project, 2001), available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

⁸⁹ *Id.* at 31.

⁹⁰ Tim Simmons & Susan Ebbs, *Separate and Unequal, Again*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 18, 2001, at A1.

⁹¹ *Id.*

⁹² 539 U.S. 306, 343 (2003) (holding that the University of Michigan Law School's race-conscious admissions program did not violate the Equal Protection Clause).

⁹³ *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 491-92 (1980) (upholding affirmative action program without adopting a level of scrutiny).

⁹⁴ *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995) (adopting strict scrutiny for benign classifications); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506-07 (1989) (requiring a compelling interest and narrow tailoring for benign racial classifications).

⁹⁵ *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920-21 (1995) (analyzing the creation of a majority black election district using strict scrutiny); Shaw v. Reno, 509 U.S. 630, 653 (1993) (using strict scrutiny to analyze racial gerrymandering allegations). The Court, however, did hold that race could be used if the reason was political, such as in allocating individuals likely to vote for Democrats. Easley v. Cromartie, 532 U.S. 234, 258 (2001).

Finally, it should be noted that the Rehnquist Court also consistently interpreted civil rights statutes narrowly. For example, in 1989, a series of Supreme Court decisions very narrowly interpreting federal civil rights statutes prompted the Civil Rights Act of 1991, which overruled these decisions by revising the federal civil rights laws.⁹⁶ In *Wards Cove Packing Co. v. Atonio*, the Court made it much more difficult for a plaintiff to recover in an employment discrimination case by requiring that the plaintiff prove a racially disparate impact.⁹⁷ In *Patterson v. McLean Credit Union*, the Court held that the federal prohibition of race discrimination in contracting, found in 42 U.S.C. § 1981, applies only to the formation of contracts, and that racial harassment after hiring is not actionable under that law.⁹⁸

I doubt anyone would challenge that the Court's approach to civil rights in the constitutional and statutory areas reflected the views of Chief Justice Rehnquist. He was in the majority in every one of the cases mentioned. From the time he was nominated to the Supreme Court, there was concern over his views concerning civil rights, especially because of a memorandum he wrote as a law clerk to Justice Robert Jackson urging the affirmance of *Plessy v. Ferguson*.⁹⁹ The Rehnquist Court succeeded in implementing the visions of its Chief in the area of equal protection and civil rights.

B. *No New Fundamental Rights Were Recognized During the Rehnquist Court, and Many Already Existing Rights Were Narrowed*

With regard to individual rights, the Rehnquist Court always will be remembered most for not overruling *Roe v. Wade*.¹⁰⁰ Rehnquist dissented in *Roe*, along with Justice Byron White, and afterwards consistently urged that the Court overrule *Roe*.¹⁰¹ The Rehnquist Court lessened constitutional protection for abortion rights by replacing strict

⁹⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

⁹⁷ 490 U.S. 642, 648 (1989) (noting that employment claims are treated as disparate impact cases).

⁹⁸ 491 U.S. 164, 176 (1989) (noting that the relief available under § 1981 is limited to making and enforcing contracts and does not address problems after hiring); *see also* 42 U.S.C. § 1981(a)-(b) (2000) (requiring that all persons have equal rights to "make and enforce contracts").

⁹⁹ This memo is discussed in detail in KLUGER, *supra* note 6, at 609-15.

¹⁰⁰ 410 U.S. 113, 153 (1973) ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

¹⁰¹ *See, e.g.,* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . .").

scrutiny with the “undue burden” test to evaluate the constitutionality of government regulation of previability abortions.¹⁰² But this action obviously did not go nearly as far as Rehnquist would have liked, and Rehnquist consistently dissented in cases protecting abortion rights.¹⁰³

Overall, though, Rehnquist’s views with regard to individual rights largely prevailed during his time as Chief Justice. Most notably, not once did the Rehnquist Court recognize any new fundamental rights. The list of fundamental rights under the Constitution—claims of liberties that trigger strict scrutiny—is exactly the same in 2006 as it was in 1986 when Rehnquist became Chief.

There were only two instances in which the Rehnquist Court recognized new rights, and strikingly in each the Court did not use the language of fundamental rights or apply strict scrutiny. In *Cruzan v. Director, Missouri Department of Health*, the Court held that competent adults have the right to refuse medical treatment, that a state may require clear and convincing evidence that a person wanted the treatment to end, and that a state may prevent family members from terminating treatment for another.¹⁰⁴ Rehnquist wrote the opinion for the Court and though it assumed a right to refuse medical care, it clearly did not find a fundamental right or use strict scrutiny. This was especially clear when, in *Washington v. Glucksberg*¹⁰⁵ and *Vacco v. Quill*,¹⁰⁶ the Supreme Court held that there is not a constitutional right to physician-assisted suicide. Rehnquist wrote the Court’s opinions in both of these cases.

The other instance in which the Rehnquist Court recognized a new right was *Lawrence v. Texas*, which held that states may not criminally prohibit private, consensual same-sex sexual activity.¹⁰⁷ Over Rehnquist’s dissenting vote, the Court overruled *Bowers v. Hardwick*.¹⁰⁸ Although *Lawrence* is an enormously important decision protecting individual rights, it is significant that Justice Kennedy’s majority opinion did not use the language of fundamental rights or strict scrutiny.

¹⁰² *Id.* at 878 (opinion of O’Connor, Kennedy, & Souter, JJ.).

¹⁰³ *See, e.g.,* *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (invalidating, over Rehnquist’s dissent, a state law prohibiting certain abortion procedures).

¹⁰⁴ 497 U.S. 261, 280 (1990).

¹⁰⁵ 521 U.S. 702, 728 (1997).

¹⁰⁶ 521 U.S. 793, 808-09 (1997).

¹⁰⁷ 539 U.S. 558, 578 (2003).

¹⁰⁸ 478 U.S. 186, 196 (1986) (holding that the Constitution does not protect private, consensual homosexual activity).

As a result, lower courts have read the case as endorsing only rational basis review.¹⁰⁹

In many other areas, the Rehnquist Court significantly constricted individual rights compared to what they had been when Rehnquist became Chief in 1986. Rehnquist was in the majority in all of these areas. For example, in 1989, in *Michael H. v. Gerald D.*, the Supreme Court significantly limited the rights of unmarried fathers.¹¹⁰ The Supreme Court held that even an unmarried father who participates actively in the child's life is not entitled to due process if the mother is married to someone else.¹¹¹ Specifically, the Supreme Court ruled that a state may create an irrebuttable presumption that a married woman's husband is the father of her child even though it negates all of the biological father's rights.¹¹² Rehnquist joined Justice Scalia's majority opinion.

Another particularly important example of the narrowing of constitutional protections was *Employment Division v. Smith*, which greatly limited the protections of the Free Exercise Clause of the First Amendment.¹¹³ Chief Justice Rehnquist joined Justice Scalia's majority opinion holding that the Free Exercise Clause is not violated by a neutral law of general applicability, no matter how much the law burdens religion.¹¹⁴ Never before had the Court articulated this restrictive view of the Constitution's protections for free exercise of religion.

Thus, the overall record of the Rehnquist Court in following the views of the Chief Justice was more mixed with regard to fundamental rights than with regard to equal protection. No new fundamental rights were recognized and some existing rights were narrowed, but the Court did not go as far in this direction as Rehnquist urged.

¹⁰⁹ See, e.g., *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004) (“[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny.”).

¹¹⁰ 491 U.S. 110, 129 (1989) (“[T]he absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims may otherwise exist.” (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))).

¹¹¹ *Id.*

¹¹² *Id.* at 129-30.

¹¹³ 494 U.S. 872, 878-79 (1990).

¹¹⁴ *Id.* at 882.

C. *The Protections Accorded Criminal Defendants
Were Significantly Narrowed*

Another consistent feature of the Rehnquist Court has been its strong likelihood of ruling in favor of the government in criminal procedure cases. Generally, criminal defendants have lost before the Rehnquist Court in all three of its phases. Rehnquist has been in the majority in all of these efforts.

For example, the Court constantly has sought to narrow the availability of habeas corpus for prisoners. In 1989, in *Teague v. Lane*, the Court imposed a significant new limit on the availability of relief under habeas corpus: habeas petitions could be heard only if they relied on already existing constitutional principles, and “new rules” could be raised on habeas corpus only in the rare circumstances that they would apply retroactively.¹¹⁵ In *McCleskey v. Zant*, the Court ruled that successive habeas petitions were not allowed unless the petitioner could demonstrate either cause and prejudice or actual innocence.¹¹⁶

In 1996, Congress greatly restricted the availability of habeas corpus in the Antiterrorism and Effective Death Penalty Act of 1996.¹¹⁷ Since then, the Supreme Court has interpreted the statute expansively to limit habeas corpus. For example, in *Tyler v. Cain*, the Court held that a habeas petition cannot be heard, even if a person was clearly unconstitutionally convicted, unless the *Supreme Court* holds that its prior decision applies retroactively.¹¹⁸

The Fourth Amendment is another area in which criminal defendants have lost throughout the Rehnquist Court. In 1989, for instance, the Court upheld drug-courier profiling¹¹⁹ and ground searches by airplanes flying within permissible limits.¹²⁰ In the early 1990s, the Court upheld the constitutionality of arresting a person for a traffic violation that carries no possibility of a prison sentence,¹²¹

¹¹⁵ 489 U.S. 288, 316 (1989).

¹¹⁶ 499 U.S. 467, 493-94 (1991).

¹¹⁷ Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214, 1217-26 (amending certain habeas corpus procedures).

¹¹⁸ 533 U.S. 656, 662 (2001).

¹¹⁹ See *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (noting that the evidentiary value of factors leading to a conclusion of reasonable suspicion is not lessened by their inclusion in a “drug courier profile”).

¹²⁰ See *Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (holding that, since the police helicopter was legally flying in public airspace when the defendant’s property was observed, his Fourth Amendment rights were not violated).

¹²¹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (addressing the constitutionality of arrests for minor crimes).

stops of motorists based on only innocuous factors,¹²² and searches of bus passengers without meaningful consent.¹²³ These, of course, are only a few examples of Fourth Amendment rulings. In the last three years of the Rehnquist Court, there were fourteen Fourth Amendment cases, and the police won in thirteen of them.¹²⁴

But especially in the last few years of the Rehnquist Court, there were some notable triumphs by criminal defendants. In *Dickerson v. United States*,¹²⁵ the Court, in an opinion by Chief Justice Rehnquist, reaffirmed *Miranda v. Arizona*.¹²⁶

Perhaps most dramatically, in *Apprendi v. New Jersey*, the Court protected the right to trial by jury by holding that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven beyond a reasonable doubt to the jury.¹²⁷ *Apprendi* has brought about an enormous amount of litigation and unquestionably is one of the most important developments during the Rehnquist years. Rehnquist was in the dissent in *Apprendi* and *Blakely v. Washington*,¹²⁸ though in the majority in *United States v. Booker's*¹²⁹ conclusion that the Federal Sentencing Guidelines are constitutional so long as they are advisory and not mandatory.

¹²² See *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (upholding a traffic stop based on the border patrol agent's "observations, his registration check, and his experience").

¹²³ See *United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (declining to hold the search in question an illegal seizure).

¹²⁴ The Fourth Amendment cases from Rehnquist's last Term all were won by law enforcement. See *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that the officer's detainment of the defendant was reasonable in spite of the lack of independent reasonable suspicion about the defendant's immigration status); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (characterizing the police conduct in question as not infringing the defendant's Fourth Amendment Rights); *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004) (upholding an arrest as supported by probable cause, even though the offense was not closely related to the reasons stated for the arrest). The only exception in the last two years was *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (requiring that the warrant must specify with particularity that which is to be searched or seized).

¹²⁵ 530 U.S. 428, 444 (2000).

¹²⁶ 384 U.S. 436 (1966).

¹²⁷ 530 U.S. 466, 476 (2000).

¹²⁸ 542 U.S. 297, 301 (2004) (applying the *Apprendi* rule that any factor, other than a prior conviction, that provides for a penalty greater than that which could be imposed based on the jury's verdict or what the defendant admitted, must be proven to the jury beyond a reasonable doubt).

¹²⁹ 543 U.S. 220, 233-34, 260-63 (2005) (applying the principles of *Apprendi* and *Blakely* to the Federal Sentencing Guidelines, requiring the guidelines to be advisory, not mandatory, and holding that appellate review should be to determine whether a sentence is unreasonable).

There were other notable victories for criminal defendants, particularly during the third phase of the Rehnquist Court. In *Crawford v. Washington*, the Court changed the law, overruled precedent, and provided more protections under the Confrontation Clause of the Sixth Amendment by limiting hearsay testimony that could be used against criminal defendants.¹³⁰ In *Atkins v. Virginia*, the Supreme Court invalidated the death penalty for the mentally retarded.¹³¹ In a six-to-three decision, with Justice Stevens writing for the Court and Rehnquist, Scalia, and Thomas dissenting, the Court reaffirmed that “evolving standards of decency” are to be used to determine what is cruel and unusual punishment under the Eighth Amendment.¹³² The Court looked to the trend among the states as well as international practice in determining “evolving standards of decency.”¹³³ The Court pointed to the number of states that have eliminated the death penalty for crimes committed by the mentally retarded and how few foreign countries permit the practice.¹³⁴ Quite importantly, the Court stressed that there is a significant risk of executing innocent individuals because those with mental disabilities are more likely to make false confessions and are less likely to be able to work with counsel.¹³⁵

In *Roper v. Simmons*, the Court ruled that it was cruel and unusual punishment to impose the death penalty for crimes committed by juveniles.¹³⁶ In the five-to-four decision, Justice Kennedy wrote the opinion for the Court, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer.¹³⁷ Once more, the Court rested its decision on the premise that “evolving standards of decency” are to be used to determine what is cruel and unusual punishment. The Court explained: “To implement this framework we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and un-

¹³⁰ 541 U.S. 36, 68 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), and holding that using out-of-court, testimonial statements without providing the criminal defendant an opportunity to cross-examine the witness violates the Confrontation Clause of the Sixth Amendment).

¹³¹ 536 U.S. 304, 321 (2002).

¹³² *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹³³ *Id.* at 314-17.

¹³⁴ *Id.*

¹³⁵ *Id.* at 320-21.

¹³⁶ 543 U.S. 551, 578 (2005).

¹³⁷ *Id.* at 554.

usual.”¹³⁸ As in *Atkins*, the Court again looked to the trend among the states and international practice in determining “evolving standards of decency.”¹³⁹

Overall though, surely no one would disagree that the Rehnquist Court, throughout its existence, overwhelmingly has sided with the government and ruled against criminal defendants in criminal procedure cases. This is an area where the Supreme Court was generally quite in accord with the views of its Chief Justice.

D. *The Limits Imposed on the Government by the Establishment Clause Were Relaxed*

In important ways, this is an area where Chief Justice Rehnquist did not succeed; the Rehnquist Court did not go nearly as far as Rehnquist would have liked in changing the law regarding the Establishment Clause. Although Rehnquist clearly favored overruling the test for the Establishment Clause articulated by the Supreme Court in *Lemon v. Kurtzman*,¹⁴⁰ there never were five votes in favor of this view.¹⁴¹ Rehnquist’s position—that the Establishment Clause is violated only if the government establishes a church, coerces religious participation, or favors some religions over others¹⁴²—never was adopted by a majority of the Court. To be more specific, Rehnquist consistently dissented in cases limiting prayers in public schools.¹⁴³

But the Rehnquist Court did follow Rehnquist’s views of the Establishment Clause in one key area: the Court allowed significantly more

¹³⁸ *Id.* at 560-61 (quoting *Trop*, 356 U.S. at 101).

¹³⁹ *Id.* at 563-65, 575-78.

¹⁴⁰ 403 U.S. 602, 612-13 (1971) (explaining that the government violates the Establishment Clause if it acts with the purpose of advancing religion, or if the primary effect of its act is to advance or inhibit religion, or if there is excessive government entanglement with religion).

¹⁴¹ *See, e.g.*, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting) (describing the view of four Justices, including Rehnquist, that the majority’s interpretation of the Establishment Clause is incorrect); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (demonstrating that four Justices, including Rehnquist, urged changes in the law of the Establishment Clause).

¹⁴² For an articulation of this view set out in a concurring opinion that Rehnquist joined, *see County of Allegheny v. ACLU*, 492 U.S. 573, 656-58 (1989) (Kennedy, J., concurring in part and dissenting in part).

¹⁴³ *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315-16 (2000) (deciding that student-delivered prayers at high school football games violate the Establishment Clause); *Lee*, 505 U.S. at 599 (holding that prayers delivered by members of the clergy at public school graduations over student objection violate the Establishment Clause).

government aid to religious schools. In 1997, in *Agostini v. Felton*, the Court reversed a decade-old precedent and held that public school special education teachers may provide services in parochial schools.¹⁴⁴

In *Mitchell v. Helms*, decided in June 2000, the Court reversed two precedents and allowed the government to lend instructional equipment to parochial schools.¹⁴⁵ Two years later, in *Zelman v. Simmons-Harris*, the Court upheld a voucher program for the Cleveland schools even though 96% of the vouchers went to parochial schools.¹⁴⁶ In an opinion by Chief Justice Rehnquist, the Court, five to four, concluded that this did not violate the Establishment Clause because all schools, including all religious schools, could receive money and because the government was acting with the permissible purpose of improving education for children.¹⁴⁷

Thus, with respect to the Establishment Clause, Rehnquist's success was more mixed. This, however, may be an area where Rehnquist's vision ultimately will triumph. If the two new Justices—John Roberts and Samuel Alito—take the Rehnquist approach, there will be five votes to overrule the *Lemon* test and bring about the dramatic change long sought by Rehnquist.

E. *Access to Federal Courts to Hear Civil Rights Claims
Was Significantly Limited*

One of the most overlooked consequences of the Rehnquist Court's jurisprudence has been a significant restriction of access to the courthouse. In a series of cases interpreting federal civil rights statutes, the Court consistently has limited the ability of civil rights plaintiffs to sue. In every one of these cases, Chief Justice Rehnquist was in the majority and almost all were decided five to four.

For example, in *Alexander v. Sandoval*, the Court held, five to four, that there is no private right of action to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964.¹⁴⁸ Title VI prevents recipients of federal money from discriminating based on race

¹⁴⁴ 521 U.S. 203, 234-35 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

¹⁴⁵ 530 U.S. 793, 835 (2000) (overruling, to the extent they conflict with the *Mitchell* holding, *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)).

¹⁴⁶ 536 U.S. 639, 644, 647 (2002).

¹⁴⁷ *Id.* at 649, 653.

¹⁴⁸ 532 U.S. 275, 293 (2001).

and from engaging in practices that have a racially discriminatory impact.¹⁴⁹ The importance of these regulations cannot be overstated. The Supreme Court has held that violations of the Equal Protection Clause and equal protection components of the Due Process Clause of the Fifth Amendment require proof of discriminatory purpose, which may be difficult to show.¹⁵⁰ Therefore, Title VI regulations are the key method of challenging actions that disadvantage racial minorities when discriminatory purpose cannot be proven. Since it is so difficult to prove discriminatory intent, Title VI has been an enormously important weapon in civil rights litigation.¹⁵¹ But the Supreme Court's ruling in *Alexander* that no lawsuits can be brought under these regulations means that civil rights plaintiffs have lost a key weapon for challenging practices that have a racially discriminatory impact.

Notably, the Court, in Justice Scalia's majority opinion, did not invalidate the Title VI regulations. The Court did say, however, that their validity was an open question to be considered on another occasion.¹⁵² Instead, the Court assumed the validity of the regulations and ruled that no lawsuits can be brought to enforce them. How, then, are the Title VI regulations to be enforced? They only can be enforced if the political branches of government are willing to cut off funds to recipients who engage in practices with a racially disparate impact. Once more, the Court has denied access to the judiciary and left enforcement of civil rights to the political branches of government.

Another example of the Court's restriction of access to the judiciary is the imposition of limits on the use of 42 U.S.C. § 1983 to enforce other federal civil rights laws. Some federal civil rights laws, like other federal statutes, do not authorize a private right of action. Section 1983 is the crucial vehicle for enforcement of these laws in courts.¹⁵³ But in *Gonzaga University v. Doe*, the Court held that the provisions of the Family Educational Rights and Privacy Act that restrict educational institutions from releasing information about their students cannot be enforced through a private right of action as a § 1983

¹⁴⁹ See *id.* at 279-81 (describing aspects of Title VI that "must be taken as given").

¹⁵⁰ See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disproportionate impact alone is not enough to invalidate a statute).

¹⁵¹ See, e.g., *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (considering a disparate impact claim under Title VI in an environmental racism case).

¹⁵² *Alexander*, 532 U.S. at 279.

¹⁵³ See 42 U.S.C. § 1983 (2000) (providing for the liability of anyone who, under color of law, deprives another of her constitutional rights).

suit.¹⁵⁴ Chief Justice Rehnquist's majority opinion held that since the law was adopted by Congress under its spending power and did not unambiguously confer individual rights, it could not be enforced through litigation.¹⁵⁵ As in *Alexander*, compliance will depend on the willingness of the political branches to enforce the law's requirements by cutting off funds to offending institutions. The unquestionable value of litigation in deterring violations and providing a remedy to victims was never recognized by the Court.

Yet another example of the closing of the courthouse doors has been the aggressive enforcement of arbitration clauses. There has been an important trend in recent years towards businesses insisting on arbitration clauses in contracts. This is common in many areas, such as employment and health care. Frequently, these clauses are written in broad terms and leave the other party to the contract no alternative but to forego access to the courts.

Circuit City Stores, Inc. v. Adams involved an employee of a Circuit City store in California who sued the company in state court under state antidiscrimination laws.¹⁵⁶ His employment application included a clause providing for arbitration of employment-related disputes.¹⁵⁷ Circuit City filed a lawsuit in federal district court, pursuant to the Federal Arbitration Act (FAA) of 1925,¹⁵⁸ to compel arbitration.¹⁵⁹ The FAA has an exception for maritime and other employment contracts in interstate commerce.¹⁶⁰ Nonetheless, the Supreme Court, in a five-to-four decision, ruled that the state law discrimination claims had to go to arbitration and could not be litigated in court.¹⁶¹ The Court broadly construed the FAA and narrowly interpreted its exception to apply only to "employment of transportation workers."¹⁶² The Court did not discuss, or even acknowledge, the compelling public purpose of allowing victims of discrimination to have access to the courts.¹⁶³

¹⁵⁴ 536 U.S. 273, 276 (2002).

¹⁵⁵ *Id.* at 279.

¹⁵⁶ 532 U.S. 105, 110 (2001).

¹⁵⁷ *Id.* at 109-10.

¹⁵⁸ 9 U.S.C. §§ 1-14 (2000).

¹⁵⁹ 532 U.S. at 110.

¹⁶⁰ 9 U.S.C. § 1.

¹⁶¹ 532 U.S. at 124.

¹⁶² *Id.* at 119.

¹⁶³ It should be noted, though, that in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002), the Court held that an arbitration clause does not preclude the Equal Employment Opportunity Commission (EEOC) from

The above techniques of closing the courthouse door have involved the Supreme Court directly precluding all access by civil rights plaintiffs. The Court also ruled against civil rights plaintiffs by eliminating incentives to litigate and creating obstacles which are disincentives to suits.

The Supreme Court's important ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, provides an example of the former approach, where the Court made it much more difficult for successful plaintiffs to recover attorneys' fees.¹⁶⁴ The availability of attorneys' fees under civil rights statutes is a major incentive for suits. The reality is that without this incentive, it would be far more difficult to enforce civil rights laws. *Buckhannon* involved a challenge to state regulations under several federal statutes, including the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990.¹⁶⁵ There was protracted litigation and ultimately the state voluntarily changed its policy and adopted what the plaintiffs had been seeking through their suit.¹⁶⁶ The plaintiffs then sought attorneys' fees on the grounds that they had been the catalyst for the changes. The Supreme Court, in a five-to-four decision, rejected their position and held that a plaintiff is not deemed to "prevail" just because her lawsuit is the "catalyst" for the government to change its policy.¹⁶⁷ Attorneys' fees are to be awarded only when there is a judicial action—a judgment or consent decree—in favor of the plaintiff.¹⁶⁸

The result is that a defendant can preclude a deserving plaintiff from recovering attorneys' fees simply by changing policies before a verdict. Reducing the chances of attorneys' fees in this way will often remove a crucial incentive to litigate and effectively close the courthouse door in many civil rights cases.

bringing a discrimination claim on behalf of an individual. The Court explained that an individual, via an arbitration clause, waives her right to sue, but the person cannot waive the government's authority to bring an enforcement action. *Id.* at 286-88. This is a significant ruling, but it does relatively little to undercut the effect of *Circuit City*. The EEOC's ability to sue on behalf of individuals is inherently limited by scarce resources. The vast majority of employees with arbitration clauses in their contracts will not have any meaningful access to the courts when they are subjected to discrimination.

¹⁶⁴ 532 U.S. 598, 605-06 (2001).

¹⁶⁵ *Id.* at 601.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 605-06.

¹⁶⁸ *Id.* at 603.

Cumulatively, these decisions make it much harder for civil rights plaintiffs to be heard in federal court or to gain relief. Since Rehnquist was in the majority of all of these cases and wrote several of the opinions, there is no doubt that the Court was in accord with his substantive vision.

F. *The Powers of Congress Were Restricted for the First Time in Almost Sixty Years: New Limits Were Imposed on Congress's Commerce Power and Its Authority Under Section 5 of the Fourteenth Amendment, the Tenth Amendment Was Revived as a Constraint on Federal Power, and There Was a Significant Expansion of State Sovereign Immunity*

I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that its greatest changes in constitutional law were in the area of federalism. Especially here, there is no doubt that Rehnquist had a definite substantive vision, and the Rehnquist Court, except in the last few years, acted in accordance with his views.

In the first third of the twentieth century, the Supreme Court used concern over states' rights and federalism as the basis for limiting the scope of Congress's commerce power and also held that the Tenth Amendment reserves a zone of activities for exclusive state control. For example, in *Hammer v. Dagenhart*, the Court struck down a federal law prohibiting child labor on the ground that it violated the Tenth Amendment.¹⁶⁹ After 1937, however, the Court rejected this view and no longer saw the Tenth Amendment as a limit on federal power; it was just a reminder that Congress could not act unless there was express or implied constitutional authority.¹⁷⁰

In 1976, the Court appeared to revive federalism as a limit on congressional powers in *National League of Cities v. Usery*, in which the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage.¹⁷¹ The Court, in an opinion by then-Justice Rehnquist, held that Congress could not regulate states in areas of "traditional" or "integral" state responsibility.¹⁷² This was a dramatic decision, as it was the first instance of the Supreme Court striking a law down on federalism grounds in forty years.

¹⁶⁹ 241 U.S. 251, 274, 276-77 (1918) ("The grant of authority over a purely federal matter was not intended to destroy the local power always reserved to the states in the Tenth Amendment to the Constitution.").

¹⁷⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 310-11 (2d ed. 2002).

¹⁷¹ 426 U.S. 833, 852 (1976).

¹⁷² *Id.* at 851-52.

Rehnquist's strong support for states' rights, especially as a limit on federal power, was noted before he became Chief Justice.¹⁷³ Only after he became Chief Justice, however, was Rehnquist's vision realized. Nine years after *National League of Cities* was decided, it was expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁷⁴ Justice Rehnquist, in a short dissent, said that he believed that his view would again triumph on the Court.¹⁷⁵

Subsequently, after he became Chief Justice, the Court endorsed Rehnquist's views and revived the Tenth Amendment as a constraint on Congress's authority. In *New York v. United States*, the Court—for only the second time in fifty-five years and the first time since the overruled *National League of Cities* decision—invalidated a federal law as violating the Tenth Amendment.¹⁷⁶ A federal law, the Low-Level Radioactive Waste Policy Amendments Act of 1985, created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.¹⁷⁷ In an opinion by Justice O'Connor, the Court held that forcing states to accept ownership of radioactive wastes would impermissibly “commandeer” state governments.¹⁷⁸ The Court concluded that it was “clear” that because of the Tenth Amendment, “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁷⁹

A few years later, in *Printz v. United States*, the Court applied and extended *New York v. United States*.¹⁸⁰ *Printz* involved a challenge to the federal Brady Handgun Violence Prevention Act of 1993.¹⁸¹ The law required that the “chief law enforcement officer” of each local jurisdiction conduct background checks before issuing permits for fire-

¹⁷³ For an excellent description of Rehnquist's federalism vision, written before Rehnquist became Chief, see Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1363-70 (1982).

¹⁷⁴ 469 U.S. 528, 531 (1985).

¹⁷⁵ *Id.* at 579-80 (Rehnquist, J., dissenting).

¹⁷⁶ 505 U.S. 144, 188 (1992).

¹⁷⁷ 42 U.S.C. § 2021e(d)(2)(C) (1988) (requiring states to either “provide for the disposal of all [radioactive] waste” created within their borders or take title to and accept possession of the waste).

¹⁷⁸ 505 U.S. at 188.

¹⁷⁹ *Id.*

¹⁸⁰ 521 U.S. 898, 933 (1997).

¹⁸¹ 18 U.S.C. § 922 (1994).

arms.¹⁸² The Court, in a five-to-four decision, found that the law violated the Tenth Amendment.¹⁸³

The Rehnquist Court revived federalism as a limit on Congress's powers in another way: It restricted the scope of Congress's commerce power. In *United States v. Lopez*,¹⁸⁴ the Supreme Court, with the majority opinion written by Chief Justice Rehnquist, declared unconstitutional the federal Gun-Free School Zones Act of 1990, a federal law that made it a crime to have a firearm within one thousand feet of a school.¹⁸⁵

In *United States v. Morrison*,¹⁸⁶ the Court followed *Lopez* and declared unconstitutional the civil damages provision of the Violence Against Women Act of 1994.¹⁸⁷ The provision created a federal cause of action for victims of gender-motivated violence. In enacting the Violence Against Women Act, Congress held lengthy hearings and found that gender-motivated violence cost the American economy billions of dollars a year.¹⁸⁸ Most importantly, Congress found that state courts often insufficiently dealt with violence against women.¹⁸⁹ But the Supreme Court nonetheless invalidated the law in an opinion by Chief Justice Rehnquist.¹⁹⁰

Rehnquist also was instrumental in advancing states' rights through the expansion of the scope of state sovereign immunity. In *Seminole Tribe v. Florida*, a 1996 opinion written by Chief Justice Rehnquist, the Court held that Congress may authorize suits against states only pursuant to laws enacted under Section 5 of the Fourteenth Amendment.¹⁹¹ Based on this finding, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court, again in opinion by Chief Justice Rehnquist, held that state governments cannot be sued for patent infringement.¹⁹² In *Kimel v. Florida Board of Regents*, the Court decided that state governments may not be sued for violating the Age Discrimination in Employment Act of

¹⁸² *Id.* § 922(s)(2).

¹⁸³ 521 U.S. at 933.

¹⁸⁴ 514 U.S. 549, 567-68 (1995).

¹⁸⁵ 18 U.S.C. § 922(q) (1994).

¹⁸⁶ 529 U.S. 598, 627 (2000).

¹⁸⁷ 42 U.S.C. § 13981(c) (1994).

¹⁸⁸ *Morrison*, 529 U.S. at 632 (Souter, J., dissenting).

¹⁸⁹ *Id.* at 619-20 (majority opinion).

¹⁹⁰ *Id.* at 627.

¹⁹¹ 517 U.S. 44, 65-66 (1996).

¹⁹² 527 U.S. 627, 647-68 (1999).

1967.¹⁹³ In *Board of Trustees v. Garrett*, the Court, in an opinion by Chief Justice Rehnquist, ruled that state governments may not be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act of 1990.¹⁹⁴ In each case, the Court, in a five-to-four decision, concluded that Congress was expanding the scope of rights and that the laws could not be justified as narrowly tailored to preventing or remedying constitutional violations.¹⁹⁵

The Court also expanded the situations in which sovereign immunity could be asserted. In another five-to-four decision, *Alden v. Maine*, the Court held that sovereign immunity protects state governments from being sued in state court without their consent, even to enforce federal laws.¹⁹⁶ At oral argument in *Alden*, Solicitor General Seth Waxman quoted to the Court from the Supremacy Clause of Article VI and contended that suits against states are essential to assure the supremacy of federal law.¹⁹⁷ Justice Kennedy's response to this argument in the *Alden* opinion is enormously revealing of the Rehnquist Court's attitude towards federalism. He stated:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."¹⁹⁸

What, then, is the assurance that state governments will comply with federal law? Trust in the good faith of state governments? Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law?

¹⁹³ 528 U.S. 62, 91 (2000).

¹⁹⁴ 531 U.S. 356, 374 (2001).

¹⁹⁵ *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91; *Florida Prepaid*, 527 U.S. at 646; *Seminole Tribe*, 517 U.S. at 72-73.

¹⁹⁶ 527 U.S. 706, 759-60 (1999).

¹⁹⁷ Transcript of Oral Argument, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436), 1999 WL 216178 at *12.

¹⁹⁸ 527 U.S. at 754-55 (quoting U.S. CONST. art. VI).

Interestingly, the most recent federalism decisions of the Rehnquist Court were in favor of federal power. In *Nevada Department of Human Resources v. Hibbs*, the Court allowed suits against states for violations of the family leave provisions of the Family and Medical Leave Act of 1993.¹⁹⁹ Chief Justice Rehnquist was in the majority in the six-to-three decision. In *Tennessee v. Lane*, the Court held that states may be sued pursuant to Title II of the Americans with Disabilities Act of 1990 for discriminating against people with disabilities with regard to access to the courts.²⁰⁰ Here, Rehnquist dissented in a five-to-four decision. Finally, in his last Term, in *Gonzales v. Raich*, the Court, over Rehnquist's dissent, upheld the constitutionality of a federal law prohibiting cultivation and possession of small amounts of marijuana for medicinal purposes.²⁰¹ Rehnquist wrote the opinion in *Hibbs*, but dissented in *Lane* and *Raich*.

Overall, the Rehnquist Court's federalism decisions are a dramatic departure in the law from what it was before William Rehnquist became Chief Justice. In every case limiting federal power, Rehnquist was in the majority, and in many he wrote the Court's decision. The only deviation was in the third phase of the Rehnquist Court described above. But there can be little dispute that federalism was one of Rehnquist's great triumphs in bringing his conservative vision to constitutional doctrine.

CONCLUSION

There are many ways in which a Chief Justice can influence the substantive decision making of the Court. The Chief plays a key role in leading the conferences that determine which cases will be heard. The Chief leads the discussions at conferences where the cases are decided. The Chief assigns the majority opinion when in the majority, and this often can be important in keeping the majority. In all of these ways, and others, a Chief can have a significant effect on the decisions. All of these forms of influence are invisible outside the Court, except by looking at the results and the decisions themselves.

Yet, it is possible to assess the success of a Chief Justice by looking at whether that individual's views were followed by the Court. My conclusion is that William Rehnquist was a tremendously successful Chief Justice, especially in his first sixteen years as Chief, in having his

¹⁹⁹ 538 U.S. 721, 725 (2003).

²⁰⁰ 541 U.S. 509, 533-54 (2004).

²⁰¹ 125 S. Ct. 2195, 2201 (2005).

views accepted by a majority and reflected in the decisions of his Court.