IS THE REHNQUIST COURT REALLY THAT CONSERVATIVE?: AN ANALYSIS OF THE 1991-92 TERM

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Media accounts of the 1991-92 United States Supreme Court Term have focused on the surprising decisions reaffirming the right to abortion[1] and the ban on school prayer.[2] Countless articles have observed that a moderate middle has emerged on the Court consisting of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter and that they are in control of the future of constitutional law. Liberals are widely quoted as giving a collective sigh of relief and expressing hope that maybe the Rehnquist Court might not be so bad after all; conservatives are expressing their disappointment that a Court with five Reagan and Bush appointees is still producing unacceptable results.

This account, however, is far too simplistic and focuses too much on a few highly publicized cases. A review of the 1991-92 Term's entire docket shows a Court that consistently accepts and endorses conservative views. Indeed, the Court advanced key aspects of the conservative agenda, including resurrecting federalism as a limit on congressional power,[3] expanding the protection of property rights through the Takings Clause,[4] deferring to executive power,[5] narrowing the rights of criminal defendants,[6] and restricting access to the federal courts.[7] In fact, even the apparent liberal victories in areas such as abortion and school prayer were by narrow five to four margins and produced majority opinions that were quite limited in their constitutional protection.

The simple reality is that there are seven conservative Justices on the Court and that much more often than not there are at least five votes for a conservative result. Justices O'Connor, Kennedy, and Souter demonstrated an unexpected independence in a few key cases, and this may mean that in some areas dramatic changes in the law

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1. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).
2. Lee v. Weisman, 112 S. Ct. 2649 (1992).
3. New York v. United States, 112 S. Ct. 2408 (1992).
4. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).
5. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).
6. *See, e.g.*, United States v. Williams, 112 S. Ct. 1735 (1992); Foucha v. Louisiana, 112 S. Ct. 1780 (1992).
7. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

are less likely than had been feared by liberals and hoped for by conservatives. But there should be no mistake: the Rehnquist Court is, and will continue to be, a very conservative Court.

My goal in this Essay is simple: to refute the popular misconception that the 1991-92 Term demonstrates that the Rehnquist Court is not all that conservative. Quite the contrary, I believe that a review of the key areas of decisions shows a Court that time and again advanced key aspects of the conservative agenda. In this Essay, I examine, in turn, the areas of federalism, property rights, executive power, the rights of criminal defendants, and access to the courts. I hope to show that in each area, the Rehnquist Court remains solidly conservative. Finally, in the conclusion, I look to the future and the likely effects of the Clinton presidency on the direction of constitutional law.

I. FEDERALISM

Since the earliest days of the nation, conservatives have championed states' rights. The emphasis on federalism in conservative political and judicial rhetoric likely reflects both a belief in the value of local governance and a powerful tool for opposing federal action.[8] This year, for only the second time in the last fifty-five years, the Court used the Tenth Amendment and federalism as the basis for declaring a federal law unconstitutional. In doing this, the Court opened the door to countless future challenges to federal laws on the grounds that they infringe on state sovereignty.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."[9] Earlier in this century, before 1937, the Supreme Court held that the Tenth Amendment reserves a zone of activities for exclusive state regulation and control. During this time, the Court invalidated federal laws, such as those limiting child labor and requiring a minimum wage, as infringing on state sovereignty.[10]

But after 1937, the law changed dramatically and the Court no longer viewed the Tenth Amendment as a basis for declaring federal laws unconstitutional. In 1941, in *United States v. Darby*,[11] the Supreme Court declared that the Tenth Amendment states "but a

8. For a conservative defense of federalism, see *The Status of Federalism in America: A Report of the Domestic Policy Working Group on Federalism* (1986).

9. U.S. CONST. amend. X.

10. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

11. 312 U.S. 100 (1941).

truism" that Congress can act only if it has express or implied authority.[12] In part, the view that federalism is not a judicially enforced limit on congressional powers reflected a political reality. Justices appointed by Democratic President Franklin Roosevelt came to the bench with the goal of upholding New Deal programs and federal regulations. In part, too, there was an intellectual foundation to the Court's deference to Congress. Herbert Wechsler, in a famous and influential article, argued that the interests of the states are represented in Congress and thus adequately protected by the political process, making judicial safeguards unnecessary.[13]

Between 1937 and 1992, the Supreme Court used the Tenth Amendment only once to invalidate a federal law. In *National League of Cities v. Usery*,[14] the Supreme Court held that the Tenth Amendment ahd been violated by a federal law requiring state and local governments to pay the minimum wage to their employees.

However, less than a decade later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[15] the Court explicitly overruled *National League of Cities*. The Court explained that it had been unable to define standards for when federal laws impermissibly usurped state functions and concluded that it was for Congress, not the judiciary, to safeguard state sovereignty. In a short dissenting opinion, then-Justice William Rehnquist predicted that "in time again [judicial enforcement of the Tenth Amendment will] command the support of a majority of the Court."[16]

That time arrived this year in the Court's decision in *New York v. United States*.[17] A federal law, the 1985 Low-Level Radioactive Waste Policy Amendments Act,[18] created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders. The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states. Additionally, and most controversially, to ensure effective state government action, the law provided that states would "take title" to any wastes within their bor-

12. United States v. Darby, 312 U.S. 100, 124 (1941).

13. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

14. 426 U.S. 833 (1976).

15. 469 U.S. 528 (1985). For prominent commentary on *Garcia*, see William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

16. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

17. 112 S. Ct. 2408 (1992).

18. 42 U.S.C. § 2021b-j (1988).

ders that were not properly disposed of by January 1, 1996, and then would "be liable for all damages directly or indirectly incurred."[19]

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes. However, by a six to three margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."[20] Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation. 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."[21]

Although the Court said that it was not revisiting the holdings of earlier cases, such as *Garcia*, the Court clearly overruled the conclusion in *Garcia* that the federal judiciary would not use the Tenth Amendment to invalidate federal laws.[22] After *New York*, lawyers can use the Tenth Amendment to challenge federal laws that regulate state governments by forcing either state administrative or legislative action. Federal energy and environmental laws, which often rely on state government implementation, are especially vulnerable. The Court's failure to adopt a clear standard to guide courts applying the Tenth Amendment will lead to numerous challenges to federal laws and will make federalism claims a growth industry for future litigation. Although federalism decisions — even in the environmental area — do not usually capture the attention of the popular press media, there is no doubt that the decision in *New York* is a very significant conservative victory with potentially enormous future consequences.

II. PROPERTY RIGHTS

Another key aspect of the conservative agenda is to increase judicial protection of property rights. This partially reflects a view that property rights are important and that they have been inadequately safeguarded since 1937. Also, those who generally dislike govern-

19. *Id.* § 2021e(d)(2)(C).
20. New York v. United States, 112 S. Ct. 2408, 2428 (1992).
21. *Id.* at 2435.
22. *Id.* at 2420.

ment regulation see greater court protection of property rights as a way of limiting the scope of government actions.[23]

During the 1991-92 Term, the Supreme Court granted certiorari in five cases dealing with economic liberties, causing predictions of a rebirth of judicial protection of economic rights. To a large extent, this did not happen. One of the cases, *PFZ Properties, Inc. v. Rodriguez*,[24] was dismissed, after oral argument, as certiorari having been improvidently granted. Three of the four other cases were decided in favor of the government by unanimous, or nearly unanimous, Courts. In *General Motors v. Romein*,[25] the Court held that the State of Michigan had not violated the Contracts Clause by adopting a law requiring retroactive payment of workers' compensation benefits. The Court unanimously concluded that no contract had been impaired by the state law. In *Yee v. City of Escondido*,[26] the Court concluded that an Escondido, California, rent control ordinance for a mobile home park was not a taking because the government had not taken physical possession of the property and because there had not been lower court consideration of whether the regulation prevented virtually all economically viable use of the property. In *Nordlinger v. Hahn*,[27] the Court rejected an equal protection challenge to California's Proposition 13, despite great inequities in its property tax system. The court applied the rational basis test and concluded that the tax system, although often inequitable, was rationally related to a legitimate government purpose.

Perhaps the failure to revive economic rights in these decisions simply reflected the facts and procedural posture of these particular cases. In *Romein*, for example, the Court concluded that no contract had been impaired, thus making it an inappropriate vehicle for reinvigorating the Contracts Clause as a limit on state and local regulations. In *Yee*, there were not adequate lower court findings as to whether there had been a regulatory taking. Or maybe these decisions show that the Rehnquist Court will disappoint conservative activists who hope for a resurrection of economic liberties. Perhaps the deference to government which generally has characterized the Rehnquist Court's approach to civil liberties will extend to economic rights as well.[28]

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23. For a defense of the view that property rights protections should be increased, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

24. 112 S. Ct. 1151 (1992) (mem.).

25. 112 S. Ct. 1105 (1992).

26. 112 S. Ct. 1522 (1992).

27. 112 S. Ct. 2326 (1992).

28. For a discussion of deference to government as the central theme in Rehn-

However, on the last day of the Term, the Court's decision in *Lucas v. South Carolina Coastal Council*[29] provided new hope for greater constitutional protection of property rights. After David Lucas bought two residential lots on the South Carolina coast for $975,000, the State adopted a coastal preservation law that barred him from building homes on his property. The South Carolina Supreme Court ruled that the State was not required to pay just compensation because the State was acting "to prevent a serious public harm" and thus was protected under the so-called "nuisance exception" to the Takings Clause.[30]

The Supreme Court, in a majority opinion written by Justice Antonin Scalia, reversed. The Court reaffirmed well-established law that takings occur either if the government physically possesses property or if a government regulation denies all economically beneficial or productive use of land. The South Carolina law prevented Lucas from using or benefiting from his property in any way, thus seeming to be a regulatory taking.

Significantly, the Court said that governmental regulations that prevent economically viable use of property are takings regardless of the government's justification or the public's gain. Landmark cases such as *Mugler v. Kansas*[31] and *Miller v. Schoene*,[32] have long been understood as holding that governmental regulation is not a taking if it is supported by an important public purpose. In *Lucas*, the Supreme Court rejected the view that there is a "nuisance exception" to the Takings Clause and concluded that no matter how great the need for the government's action, there is a taking if the regulation leaves no reasonable economically viable use of property.

Although the Court observed that regulatory takings are rare, it is possible to imagine a wide range of environmental regulations that prevent development of property. For example, the Endangered Species Act,[33] wetlands preservation laws, and coastal protection laws might be vulnerable after *Lucas*. Each type of law effectively prevents any development of specific property. If the government must compensate in these areas, such regulations likely will end.

Moreover, in a cryptic footnote, Justice Scalia said that a law

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quist Court jurisprudence, see Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44 (1989).

29. 112 S. Ct. 2886 (1992).

30. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992) (citations omitted).

31. 123 U.S. 623 (1887).

32. 276 U.S. 272 (1928).

33. 16 U.S.C. § 1531 *et seq.* (1988).

need not eliminate all economically viable use to be taking.[34] For example, Justice Scalia noted that a law which extinguishes ninety percent of value is likely also a taking. The line where regulation becomes a taking is vague, but according to the Court it is crossed when reasonable expectations for use of the property are denied. This footnote potentially expands the concept of regulatory takings because no longer would the government need to prevent all economically viable use to take property.

The Court qualified its holding by noting that a person's property interests are limited by the law as of the time the property is acquired. For example, a person who purchases property that is heavily regulated at the time of acquisition cannot challenge those regulations as a taking. But does this create differences in legal claims based solely on the time of acquisition? Can earlier owners assign their Takings Clause claims to purchasers or join in law suits to preserve takings claims? While all of this is left to future litigation to resolve, it is clear that the decision in *Lucas* expands the judicial protection of property through the Takings Clause.

III. EXECUTIVE POWER

Conservatives on the Supreme Court have consistently deferred to and affirmed the exercise of executive power. A striking example of this was the decision in *United States v. Alvarez-Machain*.[35] The United States Drug Enforcement Agency ("DEA") believed that Dr. Humberto Alvarez-Machain had participated in the torture of its agent, Enrique Camarena-Salazar. After Alvarez-Machain was indicted by a federal grand jury, an informal request was made to the Mexican government for Alvarez-Machain to be turned over to United States authorities. Mexico asked for additional time for its own investigation and requested that the extradition treaty be followed. At this point, the DEA had Alvarez-Machain kidnapped and forcibly brought into this country.

Alvarez-Machain maintained that the federal district court lacked jurisdiction, in part, because the United States government had acted in violation of the extradition treaty with Mexico. Article IX of the treaty specifically provides that if the United States requests extradition of a Mexican national, Mexico either can extradite the person or submit the matter to Mexico's courts for a resolution.

The Supreme Court, by a six to three margin, held that although a defendant cannot be prosecuted in violation of an extradition

34. *Lucas*, 112 S. Ct. at 2894 n.7.

35. 112 S. Ct. 2188 (1992). It should be disclosed that I served as co-counsel on this case before the Supreme Court on behalf of Humberto Alvarez-Machain.

treaty, the treaty with Mexico did not forbid abductions. Chief Justice Rehnquist, writing for the Court, flatly declared: "[T]he language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms."[36] Because there was no specific provison in the treaty outlawing kidnapping, the Court concluded that the government's action was lawful.

Justice John Paul Stevens wrote a forceful dissent, joined by Justices Harry Blackmun and Sandra Day O'Connor, calling the Court's holding "monstrous."[37] The clear intent of the extradition treaty was that Mexico and the United States would acquire custody of people in the other country through specified procedures. As Justice Stevens explained, extradition treaties also do not prohibit the government from going into another country and committing murder or administering torture, but surely that does not mean that such practices are permissible. In fact, the majority's view means that the treaty does not prohibit Mexico from coming into this country and kidnapping an American citizen.

Although the *Alvarez-Machain* case has unique facts, it reveals the Court's broad deference to the President, even when faced with outrageous executive action. The decision in *Alvarez-Machain* reflects the Court's increased conservatism because, like so many cases, it almost certainly would have been decided differently if Justices William Brennan and Thurgood Marshall were still on the Court.

Following the Supreme Court's decision, the case against Alvarez-Machain proceeded to trial in the United States District Court for the Central District of California. After the government presented its case against Alvarez-Machain, the judge ordered that all charges against him be dropped. The judge concluded that there was no evidence showing that Alvarez-Machain had administered drugs or had participated in the torture of the DEA agent.

IV. RIGHTS OF CRIMINAL DEFENDANTS

Perhaps the most consistent theme of the Rehnquist Court has been the narrowing of the rights of criminal defendants. In past Terms, the Supreme Court has considerably restricted the protections of the Fourth and Fifth Amendments. Indeed, the Burger and Rehnquist Courts' greatest deference to the government consistently has been in the area of criminal procedure.[38] Surprisingly, during

36. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195 (1992).

37. *Id.* at 2206 (Stevens, J., dissenting).

38. For a discussion of this deference, see CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 4-5 (3d ed. 1992).

the 1991-92 Term, there were no cases posing issues under the Fourth and Fifth Amendments.

However, in other areas, the Court continued to restrict criminal procedure protections and give law enforcement greater powers. For example, in *Williams v. United States*,[39] the Court held that prosecutors do not have a duty to disclose exculpatory evidence to a grand jury. Although the government had substantial exculpatory evidence, it did not present the material to the grand jury that indicted John H. Williams, Jr. The Supreme Court upheld this action, holding that the grand jury only needs to examine the evidence supporting an indictment, not all available information. But surely if the criminal justice system is to be fair, especially to innocent individuals, the grand jury must evaluate all of the evidence — including exculpatory material — in deciding whether to indict.

Another important criminal procedure case was *Foucha v. Louisiana*,[40] where the Court held unconstitutional Louisiana's practice of indefinitely confining an individual who has been found not guilty by reason of insanity until the person proves that he or she is not dangerous. At first blush, the decision in *Foucha* appears to be protective of individual rights. Justice Byron White's opinion strongly rejects the commitment of sane individuals without clear and convincing proof of their dangerousness.

However, a careful counting of votes reveals that the *Foucha* decision appears to authorize unprecedented deprivations of liberty in the future. The four dissenting Justices — Chief Justice William Rehnquist and Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas — would allow the detention of individuals, even after a determination that they were sane, without government proof of their dangerousness. Justice O'Connor, in an opinion concurring in part and concurring in the judgment, stated that she would have invalidated only the Louisiana law, but would have allowed confinement of insanity acquittees who have regained sanity if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[41] In other words, there were five votes for allowing states to indefinitely confine individuals they believe to be dangerous without having to prove their dangerousness with at least clear and convincing evidence. The decision in *Foucha* thus could open the door to much broader preventative detention and civil commitment.

39. 112 S. Ct. 1112 (1992).

40. 112 S. Ct. 1780 (1992).

41. Foucha v. Louisiana, 112 S. Ct. 1780, 1789 (1992) (O'Connor, J., concurring).

V. NARROWING ACCESS TO THE FEDERAL COURTS

Liberals and conservatives have long disagreed about the importance of access to the federal courts. Conservatives have sought to constrict access to the federal judiciary both to advance federalism concerns and also as a way of decreasing protection of constitutional rights. Liberals want to ensure access to the federal courts to protect individual liberties and civil rights.

For example, whereas the liberal Warren Court expanded who has standing to sue in federal court,[42] the Burger and Rehnquist Courts have greatly narrowed standing.[43] The decision this Term in *Lujan v. Defenders of Wildlife*[44] is an important new restriction on standing with potentially far reaching implications for environmental litigation. In *Lujan*, the Court considered a challenge to a federal regulation which limited the application of the Endangered Species Act to federal government actions within the United States and on the high seas.

The plaintiffs contended that the government's failure to comply with the Act outside the country would increase the destruction of species. The plaintiffs claimed that they were injured because they had previously traveled abroad to see these animals and they planned to do so again in the future. Additionally, they asserted that they had standing under a provision in the Endangered Species Act which allows "citizen suits" to enforce the Act.

The Supreme Court held that the plaintiffs lacked standing under both theories. The Court said that the fact that the plaintiffs had visited the areas in the past "proves nothing" and their desire to return in the future, "some day," is insufficient for standing "without any description of concrete plans, or indeed any specification of when the some day will be."[45] Moreover, the Court concluded that the statutory authorization for citizen suits was insufficient because Article III precludes citizens from asserting "generalized grievances."[46]

Both aspects of the holding are disturbing. As to the former, the Court now requires for standing not only that a person have been to the specific area, and not only that a person intends to return, but also that a person have definite plans to go back at an arranged time.

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42. *See* Flast v. Cohen, 392 U.S. 83 (1968).

43. *See* Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); United States v. Richardson, 418 U.S. 166 (1974).

44. 112 S. Ct. 2130 (1992). For an excellent analysis of *Lujan* and its potential impact, see Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

45. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).

46. *See id.* at 2144.

From a practical perspective, this creates obvious additional hurdles for a plaintiff seeking to sue in federal court. From a policy perspective, the additional restriction makes little sense. The plaintiffs had been to the areas in question previously and had every intention of returning. They had not bought plane tickets for a specific flight, but surely that should not be the measure of standing under Article III.

Additionally, the Court's ruling raises serious doubts about the continued validity of authorizations for citizen suits that exist in many environmental laws and that have been an important tool for enforcing these statutes. Virtually every major environmental law has a citizen suit provision. After *Lujan*, it is questionable whether any of these provisions can be the basis for standing in federal court.

Another major way in which conservatives have sought to narrow access to federal courts is by limiting the availability of federal habeas corpus review for state prisoners. The narrowing of habeas corpus review, which has occurred over the past several years, continued this Term. In *Keeney v. Tamayo-Reyes*,[47] the Supreme Court substantially changed the law concerning the availability of factual hearings for habeas petitioners. Under 28 U.S.C. § 2254(d) and *Townsend v. Sain*,[48] a federal court will conduct a factual hearing on a habeas corpus petition when one of several enumerated circumstances is present, such as where the "merits of the factual dispute were not resolved in the state hearing" or where the "state factual determination is not fairly supported by the record as a whole."[49]

But in *Keeney*, the Supreme Court held that a habeas petitioner generally cannot obtain a factual hearing in federal court — even if one of the circumstances specified in section 2254(d) and *Townsend* is present — if the matter was not raised in state court. For issues not litigated in the state trial, a factual hearing will be available in federal court only if a person can show either "actual innocence" or "cause" for not having proceeded in state court and "prejudice" to not having a federal court hearing.

Strikingly, the decision in *Keeney* was a five to four decision, with Justices O'Connor and Kennedy — who have frequently authored majority opinions limiting the availability of habeas corpus[50] — writing dissenting opinions, joined by Justices Blackmun and Stevens. The dissents criticized the majority for adding a new limit on habeas corpus review that is not authorized under the specific statu-

47. 112 S. Ct. 1715 (1992).

48. 372 U.S. 293 (1963).

49. Townsend v. Sain, 372 U.S. 293, 313 (1963).

50. *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991) (Kennedy, J.); Teague v. Lane, 489 U.S. 288 (1989) (O'Connor, J.).

tory provision providing for factual hearings. Section 2254(d) is quite clear about when factual hearings are available in federal court. The decision in *Keeney* adds a new requirement that has no authorization in the statutory language.

The Court imposed another important restriction on habeas corpus in *Sawyer v. Whitely*,[51] by adopting a very restrictive definition of "actual innocence" in death penalty cases. In earlier cases, the Supreme Court had held that habeas petitioners could raise arguments not presented in state court or in earlier habeas petitions if either they demonstrated "cause and prejudice" or "actual innocence."[52] The decision in *Sawyer* focused on the meaning of actual innocence when a capital defendant is challenging his or her sentence.

In an opinion by Chief Justice Rehnquist, the Court stated that a habeas petitioner can show actual innocence only by presenting "clear and convincing evidence that but for constitutional error, no reasonable juror would have found him eligible for the death penalty under [the applicable state] law."[53]

This is a deeply troubling opinion because it imposes such a heavy burden on those seeking to challenge capital sentences. As Justice Stevens remarked:

> While a defendant raising defaulted claims in a non-capital case must show that constitutional error "probably resulted" in a miscarriage of justice, a capital defendant must present "clear and convincing evidence" that no reasonable juror would find him eligible for the death penalty. It is heartlessly perverse to impose a more stringent standard of proof to avoid a miscarriage of justice in a capital case than in a non-capital case.[54]

The decision in *Sawyer* reflects the Rehnquist Court's strong desire to see that executions go forward and not be obstructed by federal court judges. This philosophy was most vividly demonstrated this Term in connection with the Robert Alton Harris execution.[55] After several judges on the United States Court of Appeals for the Ninth Circuit had issued stays of the execution to permit possible en

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51. 112 S. Ct. 2514 (1992).

52. *See McCleskey*, 111 S. Ct. at 1470; Murray v. Carrier, 477 U.S. 478, 496 (1986).

53. Sawyer v. Whitley, 112 S. Ct. 2514, 2523 (1992).

54. *Id.* at 2533 (Stevens, J., concurring).

55. For a detailed analysis of the legal proceedings in connection with the Harris execution, see Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255 (1992); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205 (1992).

banc review of a panel opinion which was issued less than nine hours before the scheduled execution, the Supreme Court — in the middle of the night — lifted the stays.[56] The Supreme Court's brief opinion stated two grounds for lifting the stay. One was that it was a repetitive habeas corpus petition and was thereby precluded by *McCleskey v. Zant*.[57] However, the pending case was not a habeas corpus petition at all; it was a suit filed under 42 U.S.C. § 1983 contending that death in the gas chamber is cruel and unusual punishment in violation of the Eighth Amendment.[58]

The Court's second ground for overturning the stays was based on equity: in essence, because Harris had waited too long to present his Eighth Amendment claim, he was barred by laches. However, the problem with this argument is that this seems to be a perverse balancing of the interests. On one side of the equation is the risk that a person will be put to death in violation of the Constitution. On the other side of the equation is a short delay before a state can carry out an execution.[59]

Harris's execution was originally scheduled for 12:00 midnight on April 21, 1992. The Supreme Court lifted the stay of execution in the middle of the night, and Harris was taken to the gas chamber. As Harris was being strapped in, another judge issued a stay of execution apparently to permit state court consideration of the constitutional claim that death in the gas chamber is cruel and unusual punishment. The Supreme Court immediately vacated the stay and further declared: "No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."[60]

It is highly questionable whether the Supreme Court has the authority to issue such an order.[61] No statutory provision authorizes such Supreme Court orders. Nor does the Supreme Court have common-law supervisory power to suspend the statutory authority federal courts possess to issue injunctions and stays.

The cases from this Term show that the Rehnquist Court is aggressively narrowing access to federal courts, especially for criminal defendants and particularly in death penalty cases. The Court appears very much to be animated by a philosophy that there have been

56. Gomez v. United States Dist. Court, 112 S. Ct. 1652 (1992).

57. 111 S. Ct. 1454 (1991).

58. Caminker & Chemerinsky, 102 YALE L.J. at 227.

59. For a more detailed consideration of the competing interests, see Caminker & Chemerinsky, 102 YALE L.J. at 239-46.

60. Vasquez v. Harris, 112 S. Ct. 1713, 1714 (1992).

61. This issue is analyzed more fully in Caminker & Chemerinsky, 102 YALE L.J. at 246-52.

far too many delays in death penalty cases and that the established procedural protections are technicalities that should not stand in the way of executions. Justice Blackmun powerfully expressed this view in his concurrence in *Sawyer*. Justice Blackmun explained that he had previously ruled that capital punishment is constitutional, despite "deep moral reservations," because of "an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed."[62] But Justice Blackmun stated, "Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty."[63]

VI. CASES PROTECTING INDIVIDUAL RIGHTS

The response to this description of the many conservative decisions this Term might be to point to dramatic, unexpected rulings such as those protecting abortion rights (*Planned Parenthood v. Casey*[64]), invalidating permit fees for demonstrations (*Forsyth County v. Nationalist Movement*[65]), and holding invocations by clergy at public school graduations unconstitutional (*Lee v. Weisman*[66]). In each of these cases, a majority composed of Justices Blackmun, Kennedy, O'Connor, Souter, and Stevens ruled against the government, at least in part, and safeguarded individual liberties.

These rulings protecting fundamental rights are important reaffirmations of precedents. The Solicitor General's office had filed briefs in *Casey* and *Lee* urging the Court to use those cases as the occasion for overruling well-established law concerning abortion rights and the Establishment Clause, respectively. The Court's decisions were significant both for the specific rights protected and for the message about the future. These rulings provide hope that the Rehnquist Court might be more complex and, at times, more protective of individual rights than previously thought.

Yet, it would be wrong to read too much into these decisions. In each instance, the protection of rights was narrow. In *Casey*, for example, the rule that emerges is that state regulations of abortions will be allowed unless they are an "undue burden" on the right.[67] Although the Court did not define "undue burden" with precision, it

62. *Sawyer*, 112 S. Ct. at 2529 (Blackmun, J., concurring).
63. *Id.*
64. 112 S. Ct. 2791 (1992).
65. 112 S. Ct. 2395 (1992).
66. 112 S. Ct. 2649 (1992).
67. *Casey*, 112 S. Ct. at 2821.

is clear that the Supreme Court will defer to most regulations of abortion, as long as they do not prohibit the procedure. The crucial joint opinion by Justices O'Connor, Kennedy, and Souter declared that states may act with the "purpose [of persuading women] to choose childbirth over abortion."[68] In *Casey*, the Court reversed two earlier decisions and upheld a requirement that women must wait twenty-four hours before obtaining an abortion after requesting one. The Court, however, did invalidate a requirement that a married woman's spouse be notified before she has an abortion.

The decision in *Casey* certainly was an unexpected victory for pro-choice forces. In *Webster v. Reproductive Health Services*,[69] four Justices — Chief Justice Rehnquist and Justices White, Scalia, and Kennedy — appeared ready to overturn *Roe v. Wade*[70] as soon as there was a fifth vote. With the subsequent resignations of Justices Brennan and Marshall and their replacements by Justice Souter and especially Justice Thomas, it appeared virtually certain that there would be a fifth vote to overturn *Roe*. To the surprise of many, Justices Souter and Kennedy joined with Justices Blackmun, Stevens, and O'Connor to reaffirm *Roe*. Even though states will have some latitude — maybe even great latitude — in regulating abortions, there still is a great difference between laws prohibiting abortion and those regulating the practice.

But it also would be a mistake to ignore the Court's lukewarm support for abortion rights. Just a year earlier, in *Rust v. Sullivan*,[71] the Court upheld a federal regulation that prevented planned parenthood claims receiving federal funds from providing abortion counseling or referrals. And more recently, in January of 1993, the Court held that Operation Rescue's blockading of abortion clinics was not a violation of federal civil rights laws, in part, because the Court felt that the motive of the demonstrators was to protect the innocent victims of abortion.[72]

In *Forsyth County*, the Court did not invalidate all permit fees for demonstrations. Instead, the Court held only that fees are unconstitutional when the government has discretion to set the amount. In that case, the city could set any fee up to $1,000 — discretion that the Court found impermissible. It is quite likely, given the narrow scope of the majority opinion and the four dissenting Justices, that the Court will uphold permit-fee requirements in the future as long as there is no discretion in setting the amount.

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68. *Id.* at 2821.
69. 492 U.S. 490 (1989).
70. 410 U.S. 113 (1973).
71. 111 S. Ct. 1759 (1991).
72. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

In *Lee*, the Court held only that nonsectarian prayers by clergy at public school graduations are unconstitutional. Justice Kennedy, writing for the Court, stressed the inherent coercion because of the importance of graduation in students' lives. Justice Kennedy, however, did not indicate a willingness to find a violation of the Establishment Clause without coercion; nor did he reaffirm the test that has been used for the Establishment Clause for many years.

A few years earlier, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,[73] Justice Kennedy wrote an opinion — joined by Chief Justice Rehnquist and Justices White and Scalia — calling for much greater deference to government support of religion. Justice Kennedy's opinion said that governmental action violates the Establishment Clause only if it creates a church or coerces religious participation. It is notable that, in *Lee*, Justice Kennedy did not repudiate this position and Justice Thomas embraced it. Thus, it is quite possible that Justice Kennedy could be a fifth vote, along with the four dissenting Justices, to allow much more government involvement with religion outside the school context.

CONCLUSION

Without a doubt, the 1991-92 Supreme Court Term produced unexpected results. But it would be a mistake to form an impression about the Rehnquist Court solely from a few highly publicized decisions. The overall pattern of cases, from this year and the past several, shows a Supreme Court that is very likely to side with the government and is usually unwilling to protect constitutional liberties and civil rights.

What will the future hold in light of President Clinton's election? On the one hand, there will be a dramatic difference compared to what would have occurred had President Bush been reelected. The prediction is that Justice Blackmun is the most likely to resign, and had President Bush picked the replacement, the result would have been an almost sure fifth vote to overrule *Roe*. With President Clinton in the White House, the Court's decision in *Roe* seems secure for the foreseeable future.

On the other hand, there is a limit to the impact President Clinton is likely to have on the Supreme Court given the dominance of conservatives appointed by Presidents Reagan and Bush. Justices Scalia, Kennedy, Souter, and Thomas are all under sixty years of age and are likely to remain on the Court for decades to come.

The most optimistic prediction is that Justices O'Connor, Ken-

73. 492 U.S. 573 (1989).

nedy, and Souter will continue to show independence and that they might increasingly form a coalition with the moderate and liberal members of the Court. Certainly, cases like *Casey* and *Lee* provide some cause for optimism. But caution is imperative in generalizing from a few cases in a single Term. So far, much more often than not, the Rehnquist court has proven to be a very conservative Court that rules in a conservative fashion.