

UNDERSTANDING THE REHNQUIST COURT: AN ADMIRING REPLY TO PROFESSOR MERRILL

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I. INTRODUCTION

Professor Thomas W. Merrill's stunning article does a masterful job of summarizing the last sixteen years of constitutional law. His analysis is both provocative and convincing. He successfully demonstrates that there have been shifts in the Supreme Court's approach over the course of Chief Justice Rehnquist's tenure and applies various theories developed by political scientists to explain the decisions of the Rehnquist Court.

While I disagree with little in Professor Merrill's paper, I think it is incomplete in a few important respects. First, although Professor Merrill is certainly correct that there have been two Rehnquist Courts, he fails to acknowledge that a key difference between the two has been the shift from a Court that professed deference to the elected branches of government to one that shows little such deference. In its first years, the Rehnquist Court invalidated few laws and professed an approach to constitutional law that exalted majoritarianism. In the last decade, however, the Court has invalidated statutes at an unprecedented rate and has rarely deferred to Congress, to the Executive, to state legislatures or to state courts.

This shift has important implications for how academics and the public think and talk about the Court. Although conservative politicians still rail against liberal activism, the reality is that the recent and current activism—as measured by invalidated laws and overruling precedent—is all in a conservative direction. A crucial question for the coming years will be how academics and politicians respond to this. Will liberals become the advocates of judicial restraint? Will conservatives develop a new rhetoric defending activist judges?

Second, Professor Merrill fails to recognize areas in which the Rehnquist Court has been consistent. In describing "two Rehnquist Courts," Professor Merrill overlooks important areas in which there have not been shifts in decisions or ideology. From its inception, the Rehnquist Court has consistently

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been hostile to civil rights plaintiffs. In the early years of the Rehnquist Court—most notably in decisions from October Term 1988—there were many rulings that greatly narrowed the scope of civil rights laws.¹ In the last few years, there similarly has been a series of important decisions restricting the protections of civil rights laws.² Furthermore, throughout its existence, the Rehnquist Court has consistently ruled against criminal defendants and in favor of the government. Yet, quite strikingly, Professor Merrill omits criminal procedure cases from his analysis.

Lastly, my one area of disagreement with Professor Merrill is in his claim that the Rehnquist Court has addressed fewer “social” issues in its second phase. Certainly, Professor Merrill is correct that the latter era of the Rehnquist Court is most notable for the many federalism decisions narrowing the scope of Congress’s powers and expanding the protections of state sovereign immunity. It is incorrect, however, to imply that constitutional social issues—such as abortion, affirmative action, the death penalty, gay rights, school desegregation, and aid to religion—have receded during the second Rehnquist Court.

Coherently describing sixteen years of Supreme Court decisions is an inherently elusive, if not impossible, task.³ Any pattern that can be identified has notable exceptions. Yet, overall, there can be no doubt that the sixteen

1. *See, e.g.*, *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (limiting the ability to prove disparate impact in employment discrimination cases); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the protections of 42 U.S.C. § 1981). These, and other decisions, were overruled by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

2. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding there to be no private right of action to enforce regulations under Title VI of the 1964 Civil Rights Act that prohibit recipients of federal funds from engaging in practices with a racially discriminatory impact); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding the Federal Arbitration Act to require arbitration of state law employment discrimination claims); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) (holding that to be a “prevailing party” under an attorney’s fees statute, it is not sufficient that the plaintiff in a lawsuit is a catalyst for legislative action; there must be court-ordered relief, via a judgment or consent decree).

3. Professor Merrill’s lecture is descriptive rather than normative, and that is my focus as well. My goal in this essay is to supplement Professor Merrill’s description, not to criticize normatively the Rehnquist Court’s decisions. For example, in my first point—that the Rehnquist Court has shifted away from deference to the other branches of government—I do not mean to imply that this shift is inherently good or bad. Likewise, in my third point—that the Rehnquist Court has not lessened its attention to constitutional social issues—I intend no implication as to whether this is normatively desirable. My second point—that the Court has been consistently hostile to civil rights plaintiffs and to criminal defendants—obviously implies more of a normative judgment. Yet, in this response, I simply hope to show that the Rehnquist Court has been quite consistent in its rulings against civil rights plaintiffs and in favor of the government in criminal cases. I do not criticize the decisions, but instead seek to describe their orientation.

years of the Rehnquist Court have seen the substantial triumph of conservative ideology in constitutional law. When William Rehnquist joined the Supreme Court in 1971, he was a fierce advocate for restricting Congress's powers, for limiting the rights of criminal defendants (especially by narrowing the availability of the writ of habeas corpus), and for allowing much greater aid to religion. In all of these areas, and many more, Rehnquist's philosophy has prevailed. As the Rehnquist era nears its completion, there can be little doubt that William Rehnquist was enormously successful—perhaps as much as any Chief Justice in history—in shaping constitutional law to his ideological vision.

II. THE SHIFT FROM JUDICIAL DEFERENCE TO JUDICIAL ACTIVISM

Thirteen years ago, I was invited to write the Foreword to the November 1989 Harvard Law Review.⁴ October Term 1988, the focus of my Foreword, was marked by an exceptional number of important rulings, such as those narrowing abortion rights,⁵ limiting affirmative action,⁶ striking down laws prohibiting flag burning,⁷ and curtailing the availability of habeas corpus relief.⁸ In reading the decisions of that Term, I was struck by the Court's overwhelming deference to the elected branches of government. 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.⁹

Statistics 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:

4. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

5. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding Missouri's regulation of abortions with four Justices strongly indicating a desire to overrule *Roe v. Wade*, 410 U.S. 113 (1973)).

6. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating a city's plan requiring contractors to subcontract at least 30% of its public works' money for minority owned businesses).

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

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

9. Chemerinsky, *supra* note 4, at 56-57.

For example, in forty-seven non-unanimous decisions in constitutional cases during the 1988-1989 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.¹⁰

Examining all constitutional decisions, both unanimous and non-unanimous, the government won 66% of the constitutional cases in the 1988-1989 Term.¹¹ In contrast, twenty years earlier, in the 1968-1969 Term—the last year of the Warren Court—the government prevailed in only 23% of constitutional decisions.¹²

My Foreword described how a majoritarian paradigm had come to dominate constitutional law and lamented what this meant for the protection of individual liberties and the advancement of equality. Nor was this judicial deference a one-year phenomenon. A year later, for example, the Supreme Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*,¹³ tremendously limited the scope of the Free Exercise Clause of the First Amendment and provided for great judicial deference to government actions burdening religion.

The second Rehnquist Court—as Professor Merrill calls it—has been marked by a dramatic lack of deference to Congress or the states. Former Solicitor General Seth Waxman observed that:

During 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 enactments . . .¹⁴

The Court's lack of deference to Congress is most evident in the federalism decisions, in which the Court has invalidated laws as exceeding the scope of the Commerce Clause,¹⁵ narrowed the scope of Congress's power

10. *Id.* at 57-58 (citations omitted).

11. *Id.*

12. *Id.*

13. 494 U.S. 872 (1990) (holding that the Free Exercise Clause is not violated by neutral laws of general applicability).

14. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001).

15. *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil damages provision of the Violence Against Women Act as exceeding the scope of the commerce power); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zone Act).

under Section 5 of the Fourteenth Amendment,¹⁶ revived the Tenth Amendment as a constraint on federal power,¹⁷ and expanded the scope of sovereign immunity to limit the enforcement of federal statutes.¹⁸

Nor is the current Rehnquist Court one that defers to state legislatures. As Professor Merrill notes, the Court frequently finds state laws preempted by federal law.¹⁹ One would imagine that a Court committed to states' rights would narrow the preemptive scope of federal law, but this has not been the case for the Rehnquist Court. Also, the Court has recently invalidated many state laws as violating the First Amendment's protection of freedom of speech and association.²⁰ Indeed, in recent 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-four with the five most conservative Justices ruling against the state law. Nor after *Bush v. Gore*²¹ can it credibly be claimed that the five most conservative Justices show deference to state courts.

My point here is simply that Professor Merrill is correct that there have been two Rehnquist Courts, but he omits a key way in which they have been different: the first Rehnquist Court stressed deference to the elected branches of government; the subsequent Rehnquist Court shows little such deference. In the first Rehnquist Court, relatively few federal or state laws were struck down. Now, it is far more likely that the Court will invalidate such statutes.

This is important because of its significance for academic and political rhetoric about the Court. For a half-century, conservatives have argued for judicial restraint—defined as judicial deference to the majoritarian branches. Now, however, the judicial activism—defined as a willingness to invalidate laws—is all from the right. By any measure, the Court's federalism decisions constitute judicial activism. Sixty years of precedent broadly interpreting the

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

17. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the provision of a 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. 144 (1992) (invalidating a federal law requiring that states clean up their nuclear wastes).

18. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that state governments cannot be sued for violating Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that state governments cannot be sued for violating the Age Discrimination in Employment Act).

19. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 612 n.159 (2003).

20. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (invalidating a state law prohibiting judicial candidates from expressing views about disputed legal or political issues); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (invalidating the application of a state public accommodation law to force the Boy Scouts to accept a gay man as a scout leader).

21. 531 U.S. 98 (2000).

commerce power has been discarded in favor of a much narrower approach. The Court's sovereign immunity decisions—affording broad protection for state governments from being sued in state court or in federal agency proceedings—have no support based on the text of the Constitution or judicial precedent.²²

In light of this shift, it is interesting to speculate as to whether there will be a major shift in academic and political discourse about the courts. Will progressives turn against the courts and argue against judicial review? Mark Tushnet's provocative book, *Taking the Constitution Away from the Courts*,²³ and the "popular constitutionalism" scholarship²⁴ are indications that this may be happening and that liberals are losing faith in judicial review. Perhaps this is part of a major shift that will see a return to the rhetoric of the first third of the twentieth century, when during the *Lochner* era it was conservatives who defended aggressive judicial review and liberals who proclaimed the need for judicial deference and restraint.

Such a shift, though, poses difficult choices for each side of the debate. For progressives, the reality is that courts are the only institution likely to uphold civil rights claims by unpopular individuals, such as prisoners. Turning against the courts leaves little hope for many of those whose rights progressives have long sought to protect. For conservatives, however, embracing judicial review robs them of their arguments against Court decisions protecting non-textual constitutional rights, such as abortion. The traditional conservative approach of challenging the legitimacy of non-originalist judicial review is far more difficult when conservative judges regularly engage in the practice.

This is the landscape for the debate over the courts in election campaigns, in judicial confirmation fights, and in scholarly literature. Professor Merrill omits an important distinction between the first and the second Rehnquist Courts by not addressing this difference.

III. THE CONSISTENCY OF THE REHNQUIST COURT

The central thesis of Professor Merrill's article is that there have been two Rehnquist Courts or, in other words, that the Rehnquist Court from 1986 to 1994 often acted differently than the Rehnquist Court from 1994 to the present. I agree with this observation, but I believe it is an overgeneralization that masks areas in which the Rehnquist Court has been quite consistent throughout its history. Most notably, the Rehnquist Court, from its inception to the

22. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state governments cannot be sued in state court, even on federal claims, without their consent).

23. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

24. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Forward: We the Court*, 115 HARV. L. REV. 4 (2001).

present, has been quite hostile to civil rights plaintiffs and strongly inclined to rule in favor of the government in criminal cases. Although in some important areas—such as federalism and the degree of judicial deference—there have been important shifts, it is important to note the ways in which the Rehnquist Court has been very consistent in key areas such as civil rights and criminal law.

A. *Civil Rights*

One of the most important and consistent themes about the Rehnquist Court has been its continual hostility to civil rights claims. Simply put, one of the best predictors of the Rehnquist Court since its inception is that civil rights plaintiffs lose. This is true in both constitutional and statutory civil rights cases.

For example, during both time periods that Professor Merrill identifies, the Rehnquist Court has sought to end federal school desegregation orders. In *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell*,²⁵ the issue was whether a desegregation order should continue when its end would mean a resegregation of the public schools. In *Dowell*, Oklahoma schools had once been segregated under a state law mandating separation of the races.²⁶ A federal court order, however, had successfully desegregated the Oklahoma City public schools.²⁷ Yet, despite the fact that evidence presented in the case showed that ending the desegregation order would result in resegregation,²⁸ the Supreme Court held that once a “unitary” school system had been achieved, a federal court’s desegregation order should end even if it would mean resegregation of the schools.²⁹

The Court did not define “unitary system” with any specificity. Instead, the Court simply stated that the desegregation decree should be ended if the board “had complied in good faith” and “the vestiges of past discrimination had been eliminated to the extent practicable.”³⁰ In evaluating this, the Court indicated that “the District Court should look not only at student assignments, but ‘to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.’”³¹

25. 498 U.S. 237 (1991).

26. *Id.* at 240.

27. *Id.* at 241.

28. *See id.* at 262-63 (Marshall, J., dissenting).

29. *Dowell*, 498 U.S. at 249-50.

30. *Id.* at 249-50.

31. *Id.* at 250 (quoting *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 435 (1968)).

In *Freeman v. Pitts*,³² the Supreme Court held that a federal court desegregation order may end when it is complied with, even if other desegregation orders for the same school system remain in place. As in *Dowell*, a federal district court had ordered desegregation of various aspects of a Georgia school system that previously had been segregated by law.³³ Part of the desegregation plan had been met—the school system had achieved desegregation in pupil assignment and in facilities.³⁴ Another aspect of the desegregation order, however, which concerned teacher and principal assignments, had not yet been fulfilled.³⁵ Nevertheless, the Court held that once a portion of a desegregation order has been met, the federal court may cease its efforts as to that part and remain involved only as to those aspects of the plan that have not yet been achieved.³⁶

Dowell and *Freeman* were decided in 1991 and 1992 respectively, during the era that Professor Merrill describes as the first Rehnquist Court. The Court's desire to end desegregation orders continued during the second Rehnquist Court. In 1995, in *Missouri v. Jenkins*,³⁷ the Court ordered an end to a school desegregation order for the Kansas City, Missouri schools. In an opinion by Chief Justice Rehnquist, the Court ruled in favor of the state on every issue. The Court held that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order.³⁸ The Court concluded that the Constitution requires equal opportunity, not any particular result; therefore, disparity between African-American and white students on standardized tests was not a sufficient basis for concluding that desegregation had not been achieved.³⁹ The Supreme Court held that once a desegregation order is complied with, the federal court effort should be ended.⁴⁰ Disparity in test scores was not a basis for continued federal court involvement.⁴¹

32. 503 U.S. 467 (1992).

33. *Id.* at 472-73.

34. *Id.* at 474.

35. *Id.*

36. *Id.* at 490-91; *see also id.* at 497-98.

37. 515 U.S. 70 (1995). Earlier, in *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Supreme Court ruled that a federal district court could order that a local taxing body increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes.

38. *Jenkins*, 515 U.S. at 100.

39. *Id.* at 101.

40. *Id.*

41. *Id.* at 101-02.

These Rehnquist Court decisions have led to a large number of lower court cases ending desegregation orders.⁴² The result has been a profound resegregation of public schools, especially in the South.⁴³

The Rehnquist Court's hostility to civil rights claims has been especially evident with regard to its approach to civil rights statutes. As Professor Merrill notes, in 1989, there was a series of Supreme Court decisions very narrowly interpreting federal civil rights statutes.⁴⁴ These decisions prompted the Civil Rights Act of 1991,⁴⁵ which overruled the Court's interpretations by revising the civil rights laws. For example, in *Wards Cove Packing Co. v. Atonio*,⁴⁶ the Court made it much more difficult for a plaintiff to recover in an employment discrimination case by proving racially disparate impact. In *Patterson v. McLean Credit Union*,⁴⁷ the Court held that the prohibition of race discrimination in contracting, found in 42 U.S.C. § 1981, applied only to the formation of contracts; racial harassment after hiring was not deemed actionable under the law.

The Court's hostility to statutory civil rights claims have continued unabated through the Rehnquist Court's second phase. Consider, for example, the decisions of the last two years concerning statutory civil rights claims. In October Term 2000, in *Board of Trustees of the University of Alabama v. Garrett*,⁴⁸ the Court held that state governments cannot be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act. In *Alexander v. Sandoval*,⁴⁹ the Court ruled that there is not a private right of action to enforce the regulations to Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from engaging in practices that have a racially discriminatory impact. *Circuit City Stores, Inc. v. Adams*⁵⁰ declared that the Federal Arbitration Act requires arbitration of state law discrimination claims when there are contractual provisions calling for arbitration of employment related disputes. In *Booth v. Churner*,⁵¹ the Court

42. See, e.g., NAACP, Jacksonville Branch v. Duval County Sch., 273 F.3d 960 (11th Cir. 2001); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001).

43. Erwin Chemerinsky, *Segregation and Resegregation of American Public Schools: The Court's Role*, 81 N.C. L. REV. 1597 (2003); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (July 2001), at http://www.civilrightsproject.harvard.edu/research/deseg/separate_schools01.php (last visited March 12, 2003).

44. Merrill, *supra* note 19, at 626 n.221.

45. Pub. L. No. 102-166, 105 Stat. 1071.

46. 490 U.S. 642 (1989).

47. 491 U.S. 164 (1989).

48. 531 U.S. 356 (2001).

49. 532 U.S. 275 (2001).

50. 532 U.S. 105 (2001).

51. 532 U.S. 731 (2001) (holding that the Prison Litigation Reform Act requirement for exhaustion of administrative remedies applies when a prisoner is seeking monetary relief and the

held that the Prison Litigation Reform Act requires that a prisoner seeking money damages exhaust prison administrative remedies, even if they cannot provide such a remedy, so long as they can offer the prisoner something of value. *Saucier v. Katz*⁵² held that a police officer can be deemed protected by qualified immunity, even where there is a jury finding that the officer used excessive force.

Quite significantly, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁵³ the Court made it much more difficult for successful plaintiffs to recover attorneys' fees. The Court held that a plaintiff is not deemed to "prevail" just because his or her lawsuit is the "catalyst" for the government to change its policy.⁵⁴ Attorneys' fees are to be awarded only when there is a judicial action—a judgment or consent decree—in favor of the plaintiff.⁵⁵

Individually, each of these rulings is likely to be important in civil rights litigation. Cumulatively, they are an astounding number of anti-civil rights rulings for a single Term. Yet, it was not an aberrational year. In October Term 2001, the Court held that § 1983 cannot be used to enforce the Federal Educational Records and Privacy Act;⁵⁶ that punitive damages are not available in actions under Title VI, the Rehabilitation Act, or the Americans with Disabilities Act;⁵⁷ that individual prisoners must exhaust administrative remedies when complaining of the use of excessive force by prison guards;⁵⁸ and that state governments cannot be sued in federal agency proceedings.⁵⁹

I do not want to overstate this; there have been some victories for civil rights plaintiffs, such as in *Easley v. Cromartie*,⁶⁰ which made it easier for the government to use race in drawing election districts to benefit minorities, and

grievance procedure does not permit recovery of money, as long as the grievance process can provide some responsive action).

52. 533 U.S. 194 (2001) (holding that in a civil rights case alleging constitutionally excessive force the tests for qualified immunity and reasonableness are distinct; a finding of excessive force does not preclude a finding of qualified immunity).

53. 532 U.S. 598 (2001).

54. *Id.* at 605-06.

55. *Id.* at 604.

56. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

57. *Barnes v. Gorman*, 536 U.S. 181 (2002).

58. *Porter v. Nussle*, 534 U.S. 516 (2002) (holding that the exhaustion provision of the Prison Litigation Reform Act requires inmates to exhaust available administrative remedies before filing action alleging use of excessive force by corrections officer).

59. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (finding that Congress, by statute, may not authorize the Federal Maritime Commission to adjudicate complaints filed by a private person against state-run ports; statutory provision permitting adjudication of such complaints is barred by the Eleventh Amendment.).

60. 532 U.S. 234 (2001). The district court in *Easley* was clearly erroneous in finding that voting district lines were drawn primarily based on race. Drawing lines primarily for political purposes, even if it correlates with race, does not trigger strict scrutiny.

again in *Hope v. Pelzer*,⁶¹ which held that there need not be a case on point to deny a government officer qualified immunity. In the overwhelming majority of civil rights cases, however, the Rehnquist Court—in both its first and its second phases—has ruled against civil rights plaintiffs. Professor Merrill's insights about the two phases of the Rehnquist Court should not obscure this crucial, consistent characteristic of Chief Justice Rehnquist's tenure.

B. Criminal Procedure

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 both the first and second Rehnquist Courts. For example, the Court has consistently sought to narrow the availability of habeas corpus relief for prisoners. In 1989, in *Teague v. Lane*,⁶² 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; "new rules" could be raised on habeas corpus only in the rare circumstances that they would apply retroactively. Furthermore, in *McCleskey v. Zant*,⁶³ the Court ruled that successive habeas petitions were not allowed unless the petitioner could demonstrate either cause and prejudice or actual innocence.

In 1996, Congress greatly restricted the availability of habeas corpus relief in the Antiterrorism and Effective Death Penalty Act of 1996.⁶⁴ Since then, the Supreme Court has interpreted the statute expansively to limit habeas corpus relief. For example, in *Tyler v. Cain*,⁶⁵ 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.

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 profiles⁶⁶ and searches by airplanes flying below permissible limits.⁶⁷ In the last couple of years, the Court has upheld the constitutionality of arresting a person for a traffic violation that has no possibility of a prison sentence,⁶⁸ stops of motorists based only on innocuous factors,⁶⁹ and searches

61. 536 U.S. 730 (2002) (holding that police officers are not protected by qualified immunity when they tie a prisoner to a hitching post because officers should have been on notice that this conduct was unconstitutional, even though there were no cases on point finding it to be such).

62. 489 U.S. 288 (1989).

63. 499 U.S. 467 (1991).

64. Pub. L. No. 104-132, 110 Stat. 1214.

65. 533 U.S. 656 (2001).

66. *United States v. Sokolow*, 490 U.S. 1 (1989).

67. *Florida v. Riley*, 488 U.S. 445 (1989).

68. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

69. *United States v. Arvizu*, 534 U.S. 266 (2002).

of bus passengers without meaningful consent.⁷⁰ These, of course, are only a few examples of Fourth Amendment rulings. Numerous other Fourth Amendment cases from both phases of the Rehnquist Court could be identified, as could rulings involving other constitutional rights in which criminal defendants have lost. Again, I do not want to overstate this. In *Dickerson v. United States*,⁷¹ the Court did not overrule *Miranda v. Arizona*,⁷² and in *Apprendi v. New Jersey*,⁷³ 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. Overall, though, no one would disagree that the Rehnquist Court throughout its existence has overwhelmingly sided with the government and ruled against criminal defendants in criminal procedure cases.

IV. HAS THE REHNQUIST COURT SHIFTED AWAY FROM SOCIAL ISSUES?

I disagree with one claim that Professor Merrill makes: that the “second” Rehnquist Court has focused less on social issues than did the first era of the Rehnquist Court. Professor Merrill writes that during the second Rehnquist Court:

Social issues like abortion, affirmative action, and school prayer have significantly receded from the scene. Instead, the dominant theme of the second Rehnquist Court has been constitutional federalism, including the scope of federal power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Tenth Amendment limitations on federal power, and state sovereign immunity from private lawsuits reflected in the Eleventh Amendment.⁷⁴

I do not dispute the importance of the federalism decisions of the last seven years, but I do disagree with his claim that social issues have receded.

Professor Merrill spends several pages developing this conclusion.⁷⁵ He defines social issues cases as:

[those] involving constitutional protection of abortion, other privacy rights such as parental rights and the right to die, affirmative action, gay rights, and government speech on religious topics (for example, school prayer and crèches in city hall). These are the “culture war” issues that sharply divide liberal urban elites and the predominately rural and suburban religious right.⁷⁶

70. *United States v. Drayton*, 536 U.S. 194 (2002).

71. 530 U.S. 428 (2000).

72. 384 U.S. 436 (1966).

73. 530 U.S. 466 (2000).

74. Merrill, *supra* note 19, at 570.

75. *Id.* at 580-87.

76. *Id.* at 580.

Is Professor Merrill correct that the first Rehnquist Court focused on these issues more than the second? Examining each of the areas he lists reveals that the shift that Professor Merrill describes has not happened. I consider below each area individually, leaving abortion for last.

Privacy rights such as parental rights and the right to die. It is interesting to note that the Court decided one important parental rights case and one significant right to die case during what Professor Merrill labels as the first Rehnquist Court and did exactly the same during the second Rehnquist Court. With regard to parental rights, in 1989, in *Michael H. v. Gerald D.*,⁷⁷ the Supreme Court significantly limited the rights of non-married fathers. The Supreme Court held that even an unmarried father who participated actively in the child's life is not entitled to due process if the mother was married to someone else.⁷⁸ 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.⁷⁹

The Rehnquist Court's only other decision with regard to parental rights was not until 2000—clearly within Professor Merrill's second Rehnquist Court era. In *Troxel v. Granville*,⁸⁰ the Supreme Court declared unconstitutional a Washington state statute that protected grandparents' rights. The Court held that a court order for grandparent visitation over a competent mother's objection violated the parent's right to control the upbringing of her children.⁸¹

Likewise, the Rehnquist Court has spoken on two occasions about the right to die—once in 1990 and again in 1997—spanning the two eras of the Rehnquist Court that Professor Merrill identifies. In *Cruzan v. Director, Missouri Department of Health*,⁸² 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 life-sustaining treatment ended, and that a state may prevent family members from terminating treatment for another.

In the 1997 decisions of *Washington v. Glucksberg*⁸³ and *Vacco v. Quill*,⁸⁴ the Supreme Court held that there is not a constitutional right to physician-assisted suicide. In other words, the frequency of decisions concerning privacy rights has been identical in the two phases of the Rehnquist Court.

Affirmative action. Similarly, there has been no decrease in affirmative action cases during the second Rehnquist Court compared to the first. There

77. 491 U.S. 110 (1989).

78. *Id.* at 129.

79. *Id.* at 129-30.

80. 530 U.S. 57 (2000).

81. *Id.* at 75.

82. 497 U.S. 261 (1990).

83. 521 U.S. 702 (1997).

84. 521 U.S. 793 (1997).

were a number of major affirmative action cases during the first phase of the Rehnquist Court, including: *City of Richmond v. J.A. Croson Co.*,⁸⁵ *Metro Broadcasting, Inc. v. FCC*,⁸⁶ and *Shaw v. Reno*.⁸⁷

However, there have been even more affirmative action cases during the second Rehnquist Court. For example, there have been a large number of cases applying and clarifying when race may be used in drawing election districts: *Miller v. Johnson*,⁸⁸ *Shaw v. Hunt*,⁸⁹ *Bush v. Vera*,⁹⁰ and *Easley v. Cromartie*.⁹¹ Additionally, the second Rehnquist Court decided a major case concerning the appropriate level of scrutiny for federal affirmative action—*Adarand Constructors, Inc. v. Peña*.⁹² Moreover, in December 2002, the Supreme Court granted certiorari in two cases involving the permissibility of affirmative action in college and law school admissions.⁹³ Thus, there is no basis for concluding that affirmative action cases are less frequent during the second Rehnquist Court.

Gay rights. There were no gay rights cases during the first Rehnquist Court. *Bowers v. Hardwick*⁹⁴ was decided in 1986—the last year of the Burger Court. In contrast, there have been two major gay rights cases during the second era of the Rehnquist Court and another is pending this Term. In 1996, in *Romer v. Evans*,⁹⁵ the Court struck down a Colorado initiative that repealed all laws in the state protecting gays and lesbians from discrimination and that prohibited the enactment of any new anti-discrimination statutes and ordinances. In 2000, in *Boy Scouts of America v. Dale*,⁹⁶ the Court ruled that the Boy Scouts had a constitutional right to exclude a gay scout leader even though it violated a state law prohibiting sexual orientation discrimination by private entities.

In December 2002, the Court granted certiorari in *Lawrence v. Texas*.⁹⁷ The issue is whether a state law prohibiting oral and anal sex between same

85. 488 U.S. 469 (1989) (invalidating a city's plan requiring contractors to subcontract at least 30% of its public works' money for minority owned businesses).

86. 497 U.S. 547 (1990) (upholding a preference for minority owned businesses in federal broadcast licensing).

87. 509 U.S. 630 (1993) (holding that the use of race in drawing election districts so as to benefit historical minorities must meet strict scrutiny).

88. 515 U.S. 900 (1995).

89. 517 U.S. 899 (1996).

90. 517 U.S. 952 (1996).

91. 532 U.S. 234 (2001).

92. 515 U.S. 200 (1995).

93. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), cert. granted, 123 S. Ct. 617 (2002); *Gratz v. Bollinger*, cert. granted, 123 S. Ct. 602 (2002).

94. 478 U.S. 186 (1986).

95. 517 U.S. 620 (1996).

96. 530 U.S. 640 (2000).

97. 41 S.W.3d 349 (Tex. Crim. App. 2001) (en banc), cert. granted, 123 S. Ct. 661 (2002).

sex couples is constitutional. The Court is being asked to consider whether this violates equal protection and whether *Bowers v. Hardwick* should be overruled. Obviously, gay rights have been much more important during the second phase of the Rehnquist Court.

Religion. Professor Merrill only mentions religious speech, such as prayers and nativity scenes. It is unclear why he excludes aid to religion from his list of social issues; this clearly would fit within that list. One of the most important developments in constitutional law during the second Rehnquist Court era has been a substantial relaxation of the rules on the government's ability to give aid to parochial schools. In *Agostini v. Felton*,⁹⁸ *Mitchell v. Helms*,⁹⁹ and, most recently, *Zelman v. Simmons-Harris*,¹⁰⁰ the Court has allowed public school teachers to provide instruction in parochial schools, the government to supply instructional equipment to parochial schools, and vouchers to be used in parochial schools. In contrast, there was only one decision concerning aid to parochial schools during the first Rehnquist Court era: *Zobrest v. Catalina Foothills School District*,¹⁰¹ which allowed the government to provide sign-language interpreters for hearing impaired students in parochial schools.

Nor is Professor Merrill correct if the focus is on school prayer and religious symbols on government property. There was one major school prayer case during the first Rehnquist Court era, *Lee v. Weisman*,¹⁰² and one during the second Rehnquist Court, *Santa Fe Independent School District v. Doe*.¹⁰³ Similarly, there was one major decision concerning religious symbols on government property during the first Rehnquist Court, *County of Allegheny v. ACLU*,¹⁰⁴ and one in the second phase, *Capitol Square Review & Advisory Board v. Pinette*.¹⁰⁵

Abortion rights. The one area in which Professor Merrill is correct that there have been fewer Supreme Court decisions is abortion rights. Even here, though, it is not a significant difference. In the first phase of the Rehnquist Court, there were two high profile abortion decisions: *Webster v. Reproductive Health Services*¹⁰⁶ and *Planned Parenthood of Southeastern Pennsylvania v.*

98. 521 U.S. 203 (1997).

99. 530 U.S. 793 (2000).

100. 536 U.S. 639 (2002).

101. 509 U.S. 1 (1993).

102. 505 U.S. 577 (1992) (prohibiting clergy-delivered prayers at public middle-school graduations).

103. 530 U.S. 290 (2000) (prohibiting student-delivered prayers prior to public high school football games).

104. 492 U.S. 573 (1989) (requiring that religious symbols be accompanied by symbols from more than one religion and secular symbols).

105. 515 U.S. 753 (1995).

106. 492 U.S. 490 (1989).

Casey.¹⁰⁷ There also were significant rulings affecting aspects of abortion rights, such as restrictions on recipients of federal funds to provide abortion counseling and referrals¹⁰⁸ and requirements for parental notice and consent for unmarried minors' abortions.¹⁰⁹

During the second Rehnquist Court, there has been only one major abortion decision: *Stenberg v. Carhart*,¹¹⁰ which declared unconstitutional a state law prohibiting so-called "partial birth abortions." There have been, however, several Supreme Court decisions during this latter time period considering restrictions of speech outside abortion clinics.¹¹¹ There also have been several Supreme Court rulings on the ability of states to regulate how abortions are performed.¹¹²

Thus, there has not been a significant drop-off in the number of abortion cases over the two eras of the Rehnquist Court. Yet, Professor Merrill is surely correct that abortion was a much more salient constitutional issue for the Rehnquist Court in its first phase. *Webster*, in 1989, suggested a Court on the verge of overruling *Roe v. Wade*,¹¹³ and *Casey*, in 1992, surprised many by reaffirming the basic holding of *Roe*. Once *Casey* affirmed the right to abortion, the issue seemed to be resolved for the Court, at least until there is a change in the Court's membership. As Professor Merrill points out, the continuity on the Court lessens the need for judicial review on an issue such as abortion because each Justice's views are known to the others and there is no uncertainty about the likely outcome.¹¹⁴

It is wrong, however, to infer that the Rehnquist Court has shied away from social issues because it is deciding fewer abortion cases. Indeed, I believe that one of the misconceptions about the Rehnquist Court generally is to see it as less conservative than it actually is because the Court has not overruled *Roe v. Wade* or the school prayer decisions. Looking at civil rights cases, criminal procedural decisions, affirmative action rulings, and aid to religion decisions shows that, overall, the Rehnquist Court, in both its first and second phases, has been very conservative.

107. 505 U.S. 833 (1992).

108. *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding restrictions on recipients of federal funds).

109. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

110. 530 U.S. 914 (2000).

111. *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997).

112. *See, e.g., Lambert v. Wicklund*, 520 U.S. 292 (1997) (providing summary reversal of a decision invalidating a state's parental consent law); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (providing summary reversal of a court of appeals decision invalidating a state law requiring that a physician be present when an abortion is performed).

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

114. Merrill, *supra* note 19, at 645-48.

V. CONCLUSION

With the resignation of Chief Justice Rehnquist expected within the next year or two, the Rehnquist Court is nearing its completion. Overall, the Rehnquist Court has seen the triumph of conservative ideology in most areas of constitutional law. Relying on theories developed by political scientists, Professor Merrill offers a compelling explanation for the Rehnquist Court's decisions. In the end, however, the best explanation is the simplest: the Rehnquist Court has had a consistent majority of conservative Justices, and with overwhelming frequency they have ruled in a conservative direction.

