

POLITICS, NOT HISTORY, EXPLAINS THE REHNQUIST COURT

by ERWIN CHEMERINSKY*

The October 2002 Term of the Supreme Court was both thrilling and devastating for progressives. In the last week of June, the Supreme Court upheld affirmative action programs by colleges and universities;¹ invalidated a state law prohibiting private consensual homosexual activity;² overturned a death sentence because of ineffective assistance of counsel;³ and declared unconstitutional a California law that retroactively extended the statute of limitations for sex offenders.⁴ It likely has been decades since progressives had such a successful week in the United States Supreme Court.

But it would be a mistake to generalize from these cases and to conclude that the Rehnquist Court has become the reincarnation of the Warren Court. For example, earlier in the Term, in *Lockyer v. Andrade*⁵ and *Ewing v. California*,⁶ the Court upheld life sentences imposed on shoplifters pursuant to California's Three Strikes law.⁷ Leandro Andrade was sentenced to life in prison, with no possibility of parole for fifty years, for stealing \$153 worth of videotapes from K-Mart stores.⁸ Gary Ewing was sentenced to life in prison, with no possibility of parole for twenty-five years for stealing three golf clubs worth \$1,200.⁹ In two five-four decisions, with Justice O'Connor writing for the majority, the Court stressed the need to defer to state governments when they impose harsh sentences on recidivists.¹⁰

I represented Leandro Andrade in both the Court of Appeals and the Supreme Court and still feel devastated by the decision. If one Justice in the majority had voted the other way, Andrade would be a free man today. He already had served seven years for shoplifting and the state was not going to resentence him if the Supreme Court ruled in his favor. Now he must go forty-three more years, when he will be eighty-seven years old, before he is even eligible for consideration for parole.

Is it possible to make sense of the Rehnquist Court, especially in light of such divergent rulings? I want to make three points about the Rehnquist Court, particularly with regard to its Fourteenth Amendment decisions. First, the

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1. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337 (2003) (upholding an affirmative action program by a university that considers race as one factor in admissions decisions).

2. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

3. *Wiggins v. Smith*, 123 S. Ct. 2527, 2542-44 (2003).

4. *Stogner v. California* 123 S. Ct. 2446, 2448-49 (2003).

5. 123 S. Ct. 1166 (2003).

6. 123 S. Ct. 1179 (2003).

7. *Lockyer*, 123 S. Ct. at 1172, 1175; *Ewing*, 123 S. Ct. at 1189-90.

8. *Lockyer*, 123 S. Ct. at 1169, 1175.

9. *Ewing*, 123 S. Ct. at 1190.

10. *Lockyer*, 123 S. Ct. at 1173; *Ewing*, 123 S. Ct. at 1189-90.

Rehnquist Court is profoundly ahistorical and its rulings cannot be explained by history. Second, more often than not, the Rehnquist Court's decisions can be explained by traditional conservative political ideology. Third, in the most controversial areas of constitutional law—abortion rights, affirmative action, gay and lesbian rights—Justices O'Connor and Kennedy have steered the Court to a middle course.

I. HISTORY AND THE REHNQUIST COURT

Probably no Supreme Court ever has purported to rely more on history than the Rehnquist Court. I have not done the computer search, but I'd bet that the Supreme Court has cited to the Federalist Papers more in the last fifteen years than ever before. This is not surprising; for the last quarter of a century, conservatives have stressed that constitutional interpretation should be based on the Framers' intent and historical understandings.¹¹

But history does not explain the Rehnquist Court's decisions. In fact, history does not even explain how Justices Scalia and Thomas—the Justices who most profess a need to rely on history in constitutional decision-making—have voted in key cases. Consider several examples:

First, the Supreme Court's decisions restricting affirmative action are very much at odds with the history surrounding the Fourteenth Amendment. Although in *Grutter* the Supreme Court upheld colleges and universities considering race as one factor in admissions decisions to benefit minorities,¹² overall the Rehnquist Court has been very hostile to affirmative action programs. In cases such as *J.A. Croson v. City of Richmond*,¹³ *Shaw v. Reno*,¹⁴ and *Adarand Constructors, Inc. v. Pena*,¹⁵ the Court has required that affirmative action programs be subjected to the same strict scrutiny that is used for invidious racial discrimination disadvantaging minorities.¹⁶

Moreover, the most conservative members of the Court—Chief Justice Rehnquist and Justices Scalia and Thomas—have voted against every affirmative action program that they have considered. These are the Justices who most stress the importance of judicial deference to democratic decision-making.¹⁷ Yet, in the area of affirmative action, these Justices show no deference to majoritarian decision-making; they consistently vote to strike down affirmative action even

11. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (Amy Gutmann ed., 1997) (advocating judicial review based on original meaning).

12. *Grutter*, 123 S. Ct. at 2337.

13. 488 U.S. 469, 492-93 (1989) (applying strict scrutiny to state and local affirmative action programs).

14. 509 U.S. 630, 657 (1993) (applying strict scrutiny when race is used in drawing election districts to benefit minorities).

15. 515 U.S. 200, 235 (1995) (applying strict scrutiny to federal affirmative action programs).

16. *J.A. Croson v. City of Richmond*, 488 U.S. 469, 492 (1989); *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

17. See, e.g., SCALIA, *supra* note 11, at 44-46; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) (criticizing judges who impose their own personal moral beliefs upon their analysis of the law).

when it is approved by popularly elected legislatures.¹⁸ But they do not justify this, and cannot justify it, based on the Framers' original intent or the original meaning surrounding the adoption of the Fourteenth Amendment. No one would doubt that the original meaning of the Equal Protection Clause was to benefit African Americans, not white males, and there is overwhelming historical evidence that affirmative action was widespread around the time that the Fourteenth Amendment was adopted.¹⁹ Yet here, where history does not support their conclusions, the conservative Justices on the Rehnquist Court ignore it. Instead, they simply impose their conservative ideology which opposes affirmative action to strike down acts of the democratic process.

Another example of the Rehnquist Court's ahistorical approach is in its interpretation of section five of the Fourteenth Amendment. In *City of Boerne v. Flores*,²⁰ the Supreme Court narrowly interpreted Congress' powers under section five.²¹ This provision states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."²² In *City of Boerne v. Flores*, the Supreme Court held that Congress, acting under section five, cannot create new rights or expand the scope of rights, but instead can act only to prevent or remedy violations of rights recognized by the courts and that such laws must be narrowly tailored; they must be proportionate and congruent to solving proven constitutional violations.²³ The Court implicitly overruled *Katzenbach v. Morgan*,²⁴ where the Court held that Congress, under section five of the Fourteenth Amendment, can expand, but not dilute, rights.²⁵

The Supreme Court in *Boerne* based its decision on the text and history of the Fourteenth Amendment; but close examination shows that these originalist sources don't support its conclusions. The Court claimed that the word "enforce" in section five necessarily means that Congress only can remedy and that Congress cannot determine the substantive meaning of rights.²⁶ Justice Kennedy, writing for the majority, stated:

Congress' power under § 5, however, extends only to 'enforc[ing] the provisions of the Fourteenth Amendment. . . . [T]he design of the Fourteenth Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. *Legislation which alters the meaning of the Free Exercise Clause cannot be said to be*

18. *Metro Broadcasting v. Fed. Communications Comm'n.*, 497 U.S. 547, 554-55 (1990); *Crosby*, 488 U.S. at 478-79.

19. For an excellent detailing of the extent of affirmative action at this time, see Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 494-528 (1998) (providing historical analysis of America's first affirmative action laws from an originalist viewpoint).

20. 521 U.S. 507 (1997).

21. *Id.* at 519.

22. U.S. CONST. amend. XIV, § 5.

23. *Boerne*, 521 U.S. at 519-20.

24. 348 U.S. 641 (1966).

25. *Id.* at 648-51.

26. *Boerne*, 521 U.S. at 519.

*enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.*²⁷

But this begs the key question of what “enforce” means. One dictionary defines “enforce” as: “Urge, press home (argument, demand); impose (action, conduct upon person); compel observance of.”²⁸ Another dictionary defines “enforce” as: “1. to give force to: strengthen; 2. to urge with energy; 3. constrain, compel; 4. to effect or gain by force; 5. to execute vigorously.”²⁹ From the perspective of these definitions, Congress very much is “enforcing” the Fourteenth Amendment when it expands the scope of liberty under the due process clause or increases the protections of equal protection. In this sense, Congressional expansion of rights is enforcing by strengthening the Fourteenth Amendment.

Dictionaries, of course, do not determine the meaning of the words in the Constitution. My point is simply that there is nothing certain about the meaning of the word “enforce” that supports Justice Kennedy’s claim that it precludes Congress from using it to expand the scope of constitutional rights.

Nor does the Framers’ intent behind the Fourteenth Amendment answer the issue. Even assuming that Framers’ intent should be controlling in constitutional interpretation, there is no indication that the issue was ever considered when the Fourteenth Amendment was drafted and ratified. Justice Kennedy’s opinion in *Boerne* argues that the legislative history of section five resolves the issue.³⁰ Justice Kennedy declares: “The Fourteenth Amendment’s history confirms the remedial, rather than substantive, nature of the Enforcement Clause.”³¹

Justice Kennedy says that the rejection of the Bingham Amendment shows that Congress meant section five power solely to be remedial.³² Specifically, Representative John Bingham had introduced a draft amendment which would have provided: “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”³³ Justice Kennedy says that there was strong opposition to this provision and that the revised provision, section five, was not opposed in the same manner.³⁴

There is no doubt that the revised section five has less sweeping sounding language than the Bingham proposal. Yet, there is not a word in the debates quoted by Justice Kennedy that concerns whether Congress’ power should be only to remedy what the Court determines to be a constitutional violation or whether it includes Congressional authority to expand rights. All that Justice Kennedy shows

27. *Id.* (emphasis added).

28. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 375 (Richard E. Allen ed., 8th ed. 1990) (1976).

29. MERRIAM-WEBSTER’S NEW COLLEGIATE DICTIONARY 275 (Merriam-Webster staff ed., 7th ed. 1970).

30. *Boerne*, 521 U.S. at 520-21.

31. *Id.* at 520.

32. *Id.* at 520-23.

33. *Id.* at 520.

34. *Id.* at 520-21.

is that language with a narrower phrasing was enacted. The substantive difference in the phrasing is completely assumed by Justice Kennedy.

In fact, the quotations used by Justice Kennedy do not support his position that section five was intended to be only remedial in scope. Justice Kennedy quotes Representative Bingham saying that the new draft would give Congress “the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State.”³⁵ Justice Kennedy next quotes Representative Stevens that the new draft amendment “allow[s] Congress to correct the unjust legislation of the States.”³⁶ Finally, Justice Kennedy quotes Senator Howard as saying that section five “enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct the legislation by a formal congressional enactment.”³⁷

None of these quotations support the view that Congress’ power is solely to remedy violations of rights found by the Court, and not to expand rights safeguarded by the Fourteenth Amendment. Surely, the Religious Freedom Restoration Act can be seen, in Representative Bingham’s words, as “protecting” rights or as “correcting unjust state practices,” in Representative Stevens’ language. Laws expanding the scope of rights are very much in accord with Senator Howard’s goal of advancing the principles of the amendment. A careful reading of the very legislative history that Justice Kennedy invokes shows that it could be used equally persuasively to support either view.

Indeed, there is no doubt that Congress had broad goals for the Fourteenth Amendment and all of its provisions, including section five. The Rehnquist Court’s extremely narrow reading abandons this history.

One final example of the Rehnquist Court’s ahistoricism is its school desegregation rulings. Here, the point is not that the Rehnquist Court abandoned the Framers’ intent, but rather that its decisions ignored American history. It wasn’t until 1954³⁸ that the Supreme Court struck down laws requiring separation of the races, and it wasn’t until many years later that desegregation orders were finally in place in many school systems. Yet, the Rehnquist Court has ignored this history and in every case concerning the issue, has ordered an end to desegregation orders.

In *Board of Education of Oklahoma City v. Dowell*, the issue was whether a desegregation order should continue when its end would mean a resegregation of the public schools.³⁹ Oklahoma schools had been segregated under a state law mandating separation of the races.⁴⁰ It was not until 1972—eighteen years after *Brown*—that desegregation was ordered.⁴¹ A federal court order was successful in

35. *Id.*

36. *Boerne*, 521 U.S. at 522.

37. *Id.* at 522-23.

38. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

39. *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 240-41 (1991).

40. *Id.* at 241.

41. *Id.*

desegregating the Oklahoma City public schools.⁴² Evidence proved that ending the desegregation order would result in dramatic resegregation.⁴³ Nonetheless, the Supreme Court held that once a “unitary” school system had been achieved, a federal court’s desegregation order should end even if it will mean resegregation of the schools.⁴⁴

The Court did not define “unitary system” with any specificity. The Court simply said that the desegregation decree should be ended if the board “has complied in good faith” and “the vestiges of past discrimination have been eliminated to the extent practicable.”⁴⁵ 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, extra-curricular activities and facilities.”⁴⁶

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.⁴⁷ A federal district court ordered desegregation of various aspects of a school system in Georgia that previously had been segregated by law.⁴⁸ Part of the desegregation plan had been met; the school system had achieved desegregation in pupil assignment and in facilities.⁴⁹ Another aspect of the desegregation order, concerning assignment of teachers, had not yet been fulfilled.⁵⁰ The school system planned to construct a facility that likely would benefit whites more than blacks.⁵¹ Nonetheless, the Supreme Court held that the federal court could not review the discriminatory effects of the new construction because the part of the desegregation order concerning facilities had already been met.⁵² 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.⁵³

Finally, in *Missouri v. Jenkins*, the Court ordered an end to a school desegregation order for the Kansas City schools.⁵⁴ Missouri law once required the racial segregation of all public schools.⁵⁵ It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri public schools.⁵⁶ The

42. *Id.* at 241-42.

43. *Id.* at 242.

44. *Id.* at 246-47.

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

46. *Id.* at 250 (citations omitted).

47. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

48. *Id.* at 472-73.

49. *Id.* at 476-81.

50. *Id.* at 481-82.

51. *Id.* at 479.

52. *Id.* at 492.

53. *Freeman*, 503 U.S. at 489-99.

54. *Missouri v. Jenkins*, 515 U.S. 70, 92, 101 (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 its taxes to pay for compliance with a desegregation order. *Jenkins*, 495 U.S. at 57. However, the federal court should not itself order an increase in the taxes. *Id.* at 55.

55. *Jenkins*, 515 U.S. at 74.

56. *Id.*

federal court's desegregation effort made a difference.⁵⁷ In 1983, twenty-four schools in the district had an African American enrollment of more than ninety percent.⁵⁸ By 1993, no elementary-level student attended a school with an enrollment that was ninety percent or more African American.⁵⁹ At the middle school and high school levels, the percentage of students attending schools with an African American enrollment of ninety percent or more declined from about forty-five percent to twenty-two percent.⁶⁰

The Court, in an opinion by Chief Justice Rehnquist, ruled in favor of the state on every issue.⁶¹ There were three parts to the Court's holding. First, the Court ruled that the district court's order that attempted to attract non-minority students from outside the district was impermissible because there was no proof of an inter-district violation.⁶² The social reality is that many city school systems are now primarily comprised of minority students, while surrounding suburban school districts are almost all white. Effective desegregation requires an inter-district remedy. Chief Justice Rehnquist, however, applied *Milliken v. Bradley* to conclude that the inter-district remedy—incentives to attract students from outside the district into the Kansas City schools—was impermissible because there only was proof of an intra-district violation.⁶³

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries.⁶⁴ Although the district court believed that an across-the-board salary increase to attract teachers was essential for desegregation, the Supreme Court concluded that it was not necessary as a remedy.⁶⁵

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order.⁶⁶ The Court concluded that the Constitution requires equal opportunity and not any specific result and that therefore, disparities between African American and white students on standardized tests was not a sufficient basis for concluding that desegregation had not been achieved.⁶⁷ The Supreme Court held that once a desegregation order is complied with, the federal court effort should be ended.⁶⁸ Disparity in test scores is not a basis for continued federal court involvement.

The three cases together have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect will be resegregation. The Rehnquist Court paid little attention to the long history of segregated schools in these states in bringing an end to the desegregation efforts.

57. *Id.* at 74-75.

58. *Id.*

59. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1466 (2003).

60. *Id.*

61. *Jenkins*, 515 U.S. at 84-103.

62. *Id.* at 92-93.

63. *Id.* at 93-94.

64. *Id.* at 84-92.

65. *Id.* at 88-90.

66. *Id.* at 100-01.

67. *Jenkins*, 515 U.S. at 100-01.

68. *Id.* at 101-02.

II. CONSERVATIVE POLITICS, NOT HISTORY OR INTERPRETIVE METHODOLOGY, EXPLAINS THE REHNQUIST COURT

What then explains the Rehnquist Court and especially its approach to the Fourteenth Amendment? Of course, no single explanation can account for all of the more than 1,500 decisions by the Rehnquist Court since 1986, nor even all the decisions in a year. But a consistent explanation is that traditional conservative politics provide the best explanation for the Rehnquist Court's rulings.

Consider two examples. First, the Supreme Court's federalism decisions reflect not a concern about states' rights, but conservative politics. In the last decade, the Court has limited the scope of Congress' power under the commerce clause and section five of the Fourteenth Amendment;⁶⁹ revived the Tenth Amendment as a constraint on federal power;⁷⁰ and greatly expanded the scope of state sovereign immunity.⁷¹

One would expect that a Court concerned with federalism and states' rights would also be narrowing the scope of federal preemption of state laws. Narrowing the circumstances of federal preemption leaves more room for state and local governments to act. Quite the opposite, though, over the last several years, the Supreme Court repeatedly has found preemption of important state laws, even when federal law was silent about preemption or explicitly preserved state laws.

For example, in *Geier v. American Honda Motor Co.*,⁷² the Court found preemption of a state products liability lawsuit for an unsafe vehicle notwithstanding a statutory provision which expressly provided that "[c]ompliance with" a federal safety standard does "not exempt any person from any liability under the common law."⁷³ In *Lorillard Tobacco Co. v. Reilly*,⁷⁴ the Court found that federal law preempted state regulation of outdoor billboards and signs in stores advertising cigarettes.⁷⁵ In *Crosby v. National Foreign Trade Council*,⁷⁶ the Court invalidated a Massachusetts law which restricted the ability of the State and its agency to purchase goods and services from companies that did business with Burma.⁷⁷ Most recently, in *American Insurance Association v. Garamendi*,⁷⁸ the

69. See, e.g., *United States v. Lopez*, 514 U.S. 548, 551 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress's commerce power); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating the civil damages provision in the Violence Against Women Act); *Boerne*, 521 U.S. at 519-20 (invalidating the Religious Freedom Restoration Act as exceeding the scope of Congress's section five powers).

70. See, e.g., *New York v. United States*, 505 U.S. 144, 149, 154 (1992) (invalidating provisions of the Low-Level Radioactive Waste Act as violating the Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 902, 934-35 (1997) (invalidating the Brady Handgun Control Act as violating the Tenth Amendment).

71. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (invalidating Indian Gaming Regulatory Act as exceeding the exercise of power Congress was granted in the Indian Commerce Clause); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646-48 (1999) (limiting Congress' power to authorize suits against state governments).

72. 529 U.S. 862 (2000).

73. 15 U.S.C. § 1397(k) (1988); *Geier*, 529 U.S. at 865-68.

74. 533 U.S. 525 (2001).

75. *Id.* at 550.

76. 530 U.S. 363 (2000).

77. *Id.* at 365.

Supreme Court found preemption of a California law requiring that insurance companies doing business in that state disclose Holocaust-era insurance policies.⁷⁹ The Court invalidated the California statute, despite the absence of any federal law expressing an intent to preempt state law, based on the “dormant foreign affairs”⁸⁰ power of the President.⁸¹

The Court’s recent decisions finding preemption expose the political content of its federalism rulings. The Court has eagerly found preemption of state laws regulating business, such as tobacco companies, the auto industry, and insurance companies. On the other hand, most of the Supreme Court’s federalism decisions invalidating federal laws have struck down civil rights laws—such as the Violence Against Women Act,⁸² the Religious Freedom Restoration Act,⁸³ the Age Discrimination in Employment Act,⁸⁴ and the Americans with Disabilities Act.⁸⁵ This comparison undermines the view that the Rehnquist Court’s decisions limiting federal power are animated by a concern over states’ rights or by a neutral methodology. Instead, they reflect traditional conservative value choices to limit civil rights and to protect business.

A second revealing comparison comes from contrasting the Supreme Court’s decision last Term upholding life sentences for shoplifters under California’s Three Strikes law, with the Court’s ruling limiting punitive damages. In *Lockyer v. Andrade* and *Ewing v. California*, the Court upheld life sentences imposed on shoplifters pursuant to California’s Three Strikes law.⁸⁶ Leandro Andrade was sentenced to life in prison, with no possibility of parole for fifty years, for stealing \$153 worth of videotapes from K-Mart stores.⁸⁷ Gary Ewing was sentenced to life in prison, with no possibility of parole for twenty-five years for stealing three golf clubs worth \$1,200.⁸⁸

In two five-four decisions, with Justice O’Connor writing for the Court in each, these sentences were upheld.⁸⁹ The Court rejected the argument that the sentences were grossly disproportionate and thus cruel and unusual punishment in violation of the Eighth Amendment.⁹⁰

For almost a century, the Supreme Court has held that grossly disproportionate sentences are cruel and unusual punishment in violation of the Eighth Amendment.⁹¹ In *Solem v. Helm*,⁹² the Supreme Court announced a three-part test

78. 123 S. Ct. 2374 (2003).

79. *Id.* at 2385.

80. *Id.* at 2400.

81. *Id.*

82. 42 U.S.C. § 13981 (2003).

83. 42 U.S.C. § 20066.

84. 29 U.S.C. § 623 (2004).

85. 42 U.S.C. § 12202 (2003).

86. *Lockyer*, 123 S. Ct. at 1167-68; *Ewing*, 123 S. Ct. at 1180.

87. *Lockyer*, 123 S. Ct. at 1167.

88. *Ewing*, 123 S. Ct. at 1180.

89. *Lockyer*, 123 S. Ct. at 1167-68.

90. *Ewing*, 123 S. Ct. at 1180.

91. *See, e.g., Weems v. United States*, 217 U.S. 349, 349 (1910) (holding that a 15 year prison sentence for falsifying public documents constituted cruel and unusual punishment).

92. 463 U.S. 277 (1983).

for determining whether a sentence is grossly disproportionate and thus cruel and unusual punishment.⁹³ Under this analysis a court is to: 1) compare the gravity of the offense and the harshness of the punishment; 2) examine the punishments for other crimes in the same jurisdiction; and 3) consider the punishments in other states for the same crime.⁹⁴ In *Harmelin v. Michigan*,⁹⁵ seven Justices reaffirmed this test.⁹⁶ On many occasions, the Supreme Court has approvingly cited to this test.⁹⁷

But in *Ewing*, the Court found that states may impose a life sentence on recidivists, even if the last crime triggering the punishment is shoplifting.⁹⁸ Justice O'Connor, writing for the Court, said that in comparing the gravity of the offense to the harshness of the punishment, a court should compare all of the defendant's prior crimes and not just the last offense.⁹⁹ The Court stressed the need for deference to state governments in deciding appropriate punishments for recidivists and determined that states may impose life sentences on repeat offenders.¹⁰⁰ Justice Breyer, in a dissenting opinion, noted that prior to California's Three Strikes law, no one in the history of the United States had received a life sentence for shoplifting.¹⁰¹

Lockyer involved the availability of habeas corpus relief,¹⁰² which requires that the state court decision be "contrary to," or an "unreasonable application" of, clearly established federal law.¹⁰³ The Supreme Court held that Andrade was not entitled to habeas corpus relief because first, there was no clearly established law; and second, the state court decision was not contrary to or an unreasonable application of federal law.¹⁰⁴

Yet, Justice O'Connor concluded that there was no clearly established law in this area without mentioning the three-part test from *Solem* and *Harmelin*, let alone explaining why it was not controlling. Moreover, under § 2254(d), a federal court can grant habeas corpus if the state court decides a case differently than the Supreme Court has done on a materially indistinguishable set of facts.¹⁰⁵ The factual similarities between *Lockyer* and *Solem* are striking. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison.¹⁰⁶ Both had

93. *Id.* at 305.

94. *Id.*

95. 501 U.S. 957 (1991).

96. *Id.* at 1019.

97. See, e.g., *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (holding that the issue of whether a fine was constitutionally excessive called for applying constitutional standards to the facts and that a de novo review of that issue was appropriate); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that full forfeiture of \$357,144 for failing to declare that amount would be grossly disproportionate to the gravity of the offense).

98. *Ewing*, 123 S. Ct. at 1180.

99. *Id.* at 1181.

100. *Id.*

101. *Id.* at 1197 (Breyer, J., dissenting).

102. *Lockyer*, 123 S. Ct. at 1167.

103. 28 U.S.C. 2254(d) (2004).

104. *Lockyer*, 123 S. Ct. at 1172-73.

105. 28 U.S.C. § 2254(d) (2004); *Lockyer*, 123 S. Ct. at 1169.

106. *Lockyer*, 123 S. Ct. at 1170; *Solem*, 463 U.S. at 279-81.

received their first felony convictions approximately fifteen years earlier, each for residential burglary.¹⁰⁷ Both had purely non-violent prior records, principally financial and property crimes.¹⁰⁸ Both received life sentences, under state recidivist statutes for minor offenses: Helm for issuing a no account check worth approximately \$100; Andrade for shoplifting \$153 worth of videotapes.¹⁰⁹

Justice O'Connor said that the difference between *Lockyer* and *Solem* is that Andrade was eligible for parole in fifty years, whereas Helm was sentenced to life in prison without the possibility of parole.¹¹⁰ Justice O'Connor thus concluded that *Andrade* was similar to *Rummel v. Estelle*,¹¹¹ where the defendant was sentenced to life in prison for misappropriating approximately \$100 worth of property, but was eligible for parole in twelve years.¹¹² Justice O'Connor's analysis means that a sentence is immune from Eighth Amendment attack so long as there is the theoretical possibility of parole at some point. Realistically, an indeterminate life sentence with no possibility of parole for fifty years is the same as a life sentence with no chance of parole. After Justice O'Connor's opinion, a state can immunize its sentences from Eighth Amendment analysis just by setting parole in seventy-five or one hundred years.

But it is revealing to compare these decisions to the Supreme Court's ruling just a month later limiting punitive damages. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹¹³ the Court found a large punitive damage award to be grossly excessive and a violation of due process.¹¹⁴ A jury in Utah awarded one million dollars in compensatory damages and one hundred forty-five million in punitive damages against an insurance company for bad faith in refusing to pay and settle a claim.¹¹⁵ The Supreme Court, in a six-three decision, found this award unconstitutional.¹¹⁶ Justice Kennedy, writing for the Court, applied the three-part test which the Court had announced in *BMW v. Gore*¹¹⁷ in 1996. First, the Court looked to the "reprehensibility" of the defendant's conduct and noted that State Farm's fraudulent behavior did not involve death or seriously bodily injury and emphasized that the jury in Utah had impermissibly considered other misconduct by State Farm occurring elsewhere in the country.¹¹⁸ Second, the Court considered the ratio between the punitive and the compensatory damages.¹¹⁹ The Court said that any ratio greater than single digits is suspect and that the ratio of 145 to 1 was excessive.¹²⁰ Finally, the Court looked to other possible sanctions against State

107. *Lockyer*, 123 S. Ct. at 1170; *Solem*, 463 U.S. at 279-81.

108. *Lockyer*, 123 S. Ct. at 1170; *Solem*, 463 U.S. at 279-81.

109. *Lockyer*, 123 S. Ct. at 1170; *Solem*, 463 U.S. at 279-81.

110. *Lockyer*, 123 S. Ct. at 1173.

111. 445 U.S. 263 (1980).

112. *Id.* at 266-67.

113. 123 S. Ct. 1513 (2003).

114. *Id.* at 1526.

115. *Id.* at 1516.

116. *Id.* at 1526.

117. 517 U.S. 559 (1996).

118. *State Farm*, 123 S. Ct. at 1521.

119. *Id.* at 1524.

120. *Id.*

Farm in Utah for the conduct and explained that the potential criminal nature of State Farm's conduct was not enough to justify a large punitive damage award.¹²¹

The Court's political choices are evident in comparing this case to the decisions in the three strikes cases. The Court in these decisions ruled that too many years in prison for shoplifting does not violate the Constitution, but too much money from a business in punitive damages is unconstitutional. It is hard to imagine a clearer indication of a Court animated not by history or interpretive principles, but by conservative ideology.

III. IN THE MOST CONTROVERSIAL AREAS OF CONSTITUTIONAL LAW, JUSTICES O'CONNOR AND KENNEDY HAVE STEERED THE COURT TO A MIDDLE COURSE

The above explanations for the Rehnquist Court work for many areas of constitutional law but not for the most controversial issues: abortion, affirmative action, and gay rights. Here, the Rehnquist Court has rejected the conservative position. The Rehnquist Court has profoundly disappointed conservatives in its rulings in these areas by not overruling *Roe v. Wade*;¹²² not ending affirmative action; and by protecting a right to private consensual homosexual behavior.

What explains these decisions? There is a simple and pragmatic explanation: Justices O'Connor and Kennedy have steered the Court to a middle course. In each of these areas, the most conservative Justices—Chief Justice Rehnquist and Justices Scalia and Thomas—would have taken the hard-line conservative position. The more liberal Justices likely would have gone further in protecting rights. But Justices O'Connor and Kennedy took a centrist approach and determined the outcomes.

For example, with regard to abortion rights, in *Planned Parenthood v. Casey*,¹²³ the Supreme Court rejected a request by the first Bush administration to overrule *Roe v. Wade*.¹²⁴ But the Court did not simply reaffirm *Roe* either. By a five-four margin, the Supreme Court reaffirmed that states cannot prohibit abortion prior to viability.¹²⁵ However, the plurality opinion by Justices O'Connor, Kennedy, and Souter overruled the trimester distinctions used in *Roe* and also the use of strict scrutiny for evaluating government regulation of abortions.¹²⁶ Instead, the plurality said that government regulation of abortions prior to viability should be allowed unless there is an "undue burden" on access to abortion.¹²⁷ The joint opinion stated:

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. . . . The trimester framework suffers from these basic flaws in its formulation; it misconceives the nature of

121. *Id.* at 1526.

122. 410 U.S. 113 (1973).

123. 505 U.S. 833 (1992).

124. *Id.* at 833-34.

125. *Id.* at 837.

126. *Id.*

127. *Id.*

the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.¹²⁸

More generally, the joint opinion said that the test for evaluating the constitutionality of a state regulation of abortion is whether it places an "undue burden" on access to abortion.¹²⁹ The joint opinion explained:

[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. . . . A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.¹³⁰

Thus, the approach taken by Justices O'Connor, Kennedy, and Souter took a middle course with regard to abortion. They reaffirmed and did not overrule *Roe*. But they did overrule the use of strict scrutiny and the trimester framework that *Roe* adopted. The bottom line was that they gave states more latitude to regulate abortion, but did not allow the prohibition of abortion.

In the area of affirmative action, too, the Rehnquist Court took a middle course, here because of the vote of Justice O'Connor. In *Grutter v. Bollinger*,¹³¹ a five-four decision, with Justice O'Connor writing for the majority, the Court upheld the University of Michigan Law School's affirmative action program.¹³² The Court ruled that colleges and universities have a compelling interest in creating a diverse student body and that they may use race as one factor, among many, to benefit minorities and enhance diversity.¹³³ In a companion case, *Gratz v. Bollinger*,¹³⁴ the Court, six-three, invalidated an affirmative action program for undergraduate admissions, which added twenty points to the applications for minority students.¹³⁵ In an opinion by Chief Justice William Rehnquist, the Court ruled that the undergraduate program was not sufficiently "narrowly tailored" to meet the strict scrutiny used for government racial classifications.¹³⁶

Thus, the Court rejected the conservative position to eliminate all affirmative action by colleges and universities. But it also rejected the liberal position to allow both programs. The Court has struck a middle course: diversity is a compelling interest in education and universities may use race as a factor to ensure diversity, but quotas or numerical quantification of benefits is impermissible. Interestingly, seven of the nine Justices on the Court disagree with this conclusion; four Justices would have invalidated both programs and three Justices would have upheld both. But two Justices—Justices O'Connor and Breyer—determined the outcome and the

128. *Id.* at 873.

129. *Planned Parenthood*, 505 U.S. at 876-77.

130. *Id.*

131. 123 S. Ct. 2325 (2003).

132. *Id.* at 2347.

133. *Id.* at 2328.

134. 123 S. Ct. 2411 (2003).

135. *Id.* at 2414-16.

136. *Id.* at 2415.

more centrist course.

One final example is the Supreme Court's recent decision concerning gay and lesbian rights, *Lawrence v. Texas*.¹³⁷ In *Lawrence*, the Court held that states may not prohibit private consensual sexual activity between consenting adults of the same sex.¹³⁸ Police in Texas received an anonymous tip of a disturbance in an apartment.¹³⁹ They went to investigate and entered the apartment; they found two men engaged in sexual activity.¹⁴⁰ The men were convicted and fined \$200 under a Texas law prohibiting "deviate sexual intercourse," defined as sexual activity between same sex couples.¹⁴¹ Seventeen years ago, in *Bowers v. Hardwick*,¹⁴² the Court ruled that the right to privacy does not protect a right to engage in private consensual homosexual activity.¹⁴³ In a forceful opinion in *Lawrence*, Justice Kennedy, writing for the Court, expressly overruled *Bowers* and spoke of constitutional protection for all individuals in the most intimate and private aspects of their lives.¹⁴⁴

Although *Lawrence* is unquestionably a victory for progressives and a defeat for conservatives, it is more centrist than it might at first appear. The Court pointedly did not articulate a level of scrutiny. The Court did not say that there is a fundamental right or that strict scrutiny should be used. Lower courts trying to apply *Lawrence* undoubtedly will struggle with the lack of guidance in the ruling. I believe that the better argument is that *Lawrence* implicitly found a fundamental right to exist. The Court relied on earlier decisions concerning privacy where strict scrutiny had been applied. Also, the Court rejected Texas' argument that advancing public morality was a sufficient basis for the law; traditionally an argument based on public morality is sufficient to meet rational basis review. But the Court's failure to expressly label this a fundamental right or to use strict scrutiny indicates the Court taking a middle course.

CONCLUSION

For the last thirty years, there have been heated debates among academics concerning how courts should interpret the Constitution. Dozens of articles have been written debating interpretive methodology. It is striking how little this debate seems to matter for the Supreme Court in its decision-making. Neither interpretive philosophy nor historical research explains the Rehnquist Court.

Ultimately, constitutional law requires that the Supreme Court make value choices. Do too many years in prison constitute cruel and unusual punishment? Is

137. 123 S. Ct. 2472 (2003).

138. *Id.* at 2484.

139. *Id.* at 2473.

140. *Id.*

141. *Id.* at 2476.

142. 478 U.S. 186 (1986).

143. *Id.* at 189.

144. *Lawrence*, 123 S. Ct. at 2475. Justice O'Connor concurred in the judgment and would have invalidated the Texas law based on equal protection, holding the law unconstitutional because it prohibited sex acts between same sex couples that were allowed between opposite sex couples. She would not have overruled *Bowers*.

diversity in the classroom a compelling interest? Should the right to privacy include a right to private, consensual same-sex activity? The answers to these questions cannot be found in historical materials or interpretive theory. They are value choices that depend entirely on the views of the Justices on the Court. This always has been, and always will be, what constitutional law is about.

