The Rehnquist Legacy

During the thirty-three years William Rehnquist has been on the Supreme Court, nineteen as Chief Justice, significant developments have defined the American legal landscape. This book is a legal biography of Chief Justice William Rehnquist of the United States Supreme Court and the legacy he created. It is an intensive examination of his thirty-three-year legacy as a Supreme Court Justice based on his Court opinions, primarily in the area of constitutional law. It is written by a group of legal scholars each of whom is a specialist in the area covered by his or her chapter. The focus of the book is on Rehnquist’s own legacy, not necessarily that of the Court that he headed. Thus emphasis is placed not only on the goals that he achieved, but also on those that he failed to achieve.

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THE REHNQUIST LEGACY

Edited by
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Indiana University
For Cindy, Derek, Kathleen, Snowy, and Wicca
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Two years ago, Professor Thomas Merrill published an influential article, based on his 2002 Childress Lecture at St. Louis University School of Law, entitled “The Making of the Second Rehnquist Court.”¹ His starting premise was that the Supreme Court under the leadership of Chief Justice Rehnquist, then in its sixteenth year, could be divided into periods of roughly equal duration. From the beginning of the 1986 term until the end of October Term 1993, the Court experienced frequent changes in its membership and spent much of its time and energy spinning its wheels on hot-button social issues without being able, despite what appeared to be a conservative majority, to make much progress toward advancing the conservative agenda on such issues as abortion and school prayer. That was the first Rehnquist Court. Then, beginning with the summer of 1994, the Court experienced no turnover. The emphasis of the docket – a shrinking docket – shifted from the social issues to the structural, most notably to questions related to federalism, on which the conservative majority enjoyed striking – some might say startling – success. That was the second Rehnquist Court, and the Chief Justice appeared to be leading it with a sure hand.

I will leave the explanations to Professor Merrill, who has some very interesting ones (and to whom I apologize for having given such a superficial introduction to his complex and original argument), as well as to those who have drawn from his work, including Mark Tushnet’s new book on the impact of the divisions within the Court’s majority.² My point here is a different one. It is to suggest that we have passed from the second Rehnquist Court to a third, a Court that in fact came into being at just about the time Professor Merrill’s article was at the printer’s. In other words, rather than endeavor to explain what I view as the past, I will attempt first to describe the present, the current and in some ways quite surprising Rehnquist Court, and then to offer a possible explanation for

what may be driving the Court in directions that were not readily foreseeable as recently as two years ago.

This third and, undoubtedly, final phase of the Rehnquist Court has several characteristics that make it distinct. One is a reengagement with divisive social issues, including affirmative action, religion, and gay rights. Another is the suggestion that the much-vaunted federalism revolution may have run its course. And finally, there was the unmistakable indication in the Court’s last term, carried forward into this one, that Chief Justice Rehnquist no longer speaks for a majority of the Court on many of the docket’s most important issues. The Court’s membership has not changed, but its dynamic evidently has, as it has been drawn inexorably back to the themes that preoccupied the members of the first Rehnquist Court. Professor Merrill’s assertion in the introduction to his article that “The second Rehnquist Court started in October 1994 and is still with us” appears to have been overtaken by events.

Let me start by simply listing some of the decisions of the Court from which Chief Justice Rehnquist has dissented in the past two years: *Rasul v. Bush,* asserting federal jurisdiction over the detainees at the Guantanamo Bay naval base; *Tennessee v. Lane,* rejecting a state claim of Eleventh Amendment immunity from application of the Americans with Disabilities Act to courthouses; *Lawrence v. Texas,* overturning state criminal sodomy laws and repudiating *Bowers v. Hardwick;* *Grutter v. Bollinger,* upholding affirmative action in higher education; *Blakely v. Washington,* striking down state criminal-sentencing guidelines – the Chief Justice’s dissenting vote there was of course essentially foreordained by the dissenting position he’d taken five years ago in *Apprendi* and had maintained thereafter; *McConnell v. Federal Election Commission,* upholding the McCain–Feingold federal campaign finance statute; *Newdow,* the Pledge of Allegiance

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6 Merrill, *supra* note 1, at 569.
case,\textsuperscript{15} in which the Chief Justice would have found “under God” constitutional but the majority refused to reach the merits; \textit{Brown v. Legal Foundation of Washington},\textsuperscript{16} in which the majority refused to characterize the operation of state IOLTA programs\textsuperscript{17} as an unconstitutional taking; and \textit{Sosa v. Alvarez-Machain},\textsuperscript{18} in which the majority kept the federal courthouse doors open to human rights claims by foreigners under the Alien Tort Statute. In last term’s political gerrymandering case, \textit{Vieth v. Jubelirer},\textsuperscript{19} the Chief Justice wanted to eliminate political gerrymandering as a justiciable claim, and thus to overrule \textit{Davis v. Bandemer},\textsuperscript{20} but came up short. This term, of course, has found him in dissent in the juvenile death penalty case \textit{Roper v. Simmons}.\textsuperscript{21} And he was on the losing side in a major civil rights case, the Title IX retaliation decision \textit{Jackson v. Birmingham Board of Education},\textsuperscript{22} in the medical marijuana case \textit{Gonzales v. Raich},\textsuperscript{23} and in the eminent domain case \textit{Kelo v. City of New London}.\textsuperscript{24}

My list of Rehnquist dissenting votes is by no means complete; I simply listed cases that I thought were of special significance and that helped to define the terms during which they were decided. On a purely statistical measure, it is worth noting that of eighteen cases last term that were decided by five-Justice majorities, the Chief Justice was in the majority in only eight. Clearly, the Court’s center of gravity lies where it so often has; Justice O’Connor was in the majority in thirteen of the eighteen.

But of course, that’s not the whole story; if it were, the challenge of understanding, or even simply describing, the Rehnquist Court would not be nearly as interesting. Two of the most surprising decisions since Professor Merrill’s article was published were \textit{Nevada Department of Human Resources v. Hibbs},\textsuperscript{25} rejecting a state claim of Eleventh Amendment immunity from suit by its employees under the Family and Medical Leave Act of 1993, and \textit{Locke v. Davey},\textsuperscript{26} rejecting a claim under the Free Exercise Clause that a state that provides tuition assistance for needy and worthy students to pursue a post–high school course of study must also subsidize those who wish to study for the ministry.

It is difficult to overstate the significance of these decisions. \textit{Hibbs}, by characterizing the Family and Medical Leave Act (which obliges employers to grant up

\begin{itemize}
  \item \textsuperscript{16} Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).
  \item \textsuperscript{17} Interest on Lawyers Trust Accounts (IOLTA).
  \item \textsuperscript{18} Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).
  \item \textsuperscript{19} Vieth v. Jubelirer, 541 U.S. 267 (2004).
  \item \textsuperscript{20} Davis v. Bandemer, 478 U.S. 109 (1986).
  \item \textsuperscript{21} Roper v. Simmons, 125 S. Ct. 1183 (March 1, 2005).
  \item \textsuperscript{22} Jackson v. Birmingham Board of Education, No. 02-1672, decided March 29, 2005.
  \item \textsuperscript{23} Gonzales v. Raich, 125 S. Ct. 2195 (2005).
  \item \textsuperscript{24} Kelo v. City of New London, No. 04-108, decided June 23, 2005.
  \item \textsuperscript{25} Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).
  \item \textsuperscript{26} Locke v. Davey, 540 U.S. 712 (2004).
\end{itemize}
to twelve weeks of unpaid leave to enable employees to take care of family emergencies) as an exercise of Congress’s power under Section 5 of the Fourteenth Amendment to enforce constitutional protection against sex discrimination, effectively announced that state sovereignty would not, after all, trump Congress’s authority to legislate on behalf of classifications that receive heightened scrutiny under traditional equal protection analysis. *Locke v. Davey* answered the question left open two terms earlier by the Ohio voucher case,\(^2\) in which the Court, in a Rehnquist opinion, had invoked the principles of government neutrality and private choice to reject an Establishment Clause challenge to the use of taxpayer money for parochial school tuition.\(^2\) If vouchers were constitutionally permissible, could they be constitutionally required? That was the logical next question that *Locke v. Davey* raised. In answering in the negative, the Court in effect remitted the voucher debate to the political process, where the “school choice” movement faces very substantial obstacles and has made little headway.

The path from the Ohio voucher case in 2002 to *Locke v. Davey* in 2004 was by no means obvious. In fact, in a commentary published along with Professor Merrill’s article in 2003, Professor John McGinnis characterized the Ohio case as “surely one of the most important social issue decisions for our generation,” one that “changes the balance of power between secular and religious educational institutions.”\(^2\) While that claim could perhaps still be maintained as a doctrinal matter after *Locke v. Davey*, as a practical matter it almost certainly could not be.

Both *Hibbs* and *Locke v. Davey* were Rehnquist opinions, and that, of course, is my point in dwelling on them. Both were issued over the dissent of Justices Scalia and Thomas; *Hibbs* drew an additional dissenting vote from Justice Kennedy. The author of *Hibbs*, in other words, was the very Justice who had been leading the federalism charge for more than twenty-five years, since the long-ago dissent in *Fry v. United States*\(^3\) in which he first staked his ground. The author of *Locke v. Davey* was the author of the opinion that only two years earlier had seemed to promise so much to adherents of the school choice movement that more than one advocate had compared it to *Brown v. Board of Education*.\(^4\)

**WHAT GOT INTO WILLIAM REHNQUIST?**

What *Hibbs* and *Locke v. Davey* had in common, it seems to me, is that both cases invited the Court to follow its recent precedents to their logical conclusions. Un-

der Rehnquist’s leadership, the Court declined the invitation in both cases. You can almost picture the majority peering over the cliff and deciding not to jump.

Doctrinally, jumping off the cliff would have been quite plausible, even principled. By the time Hibbs arrived at the Court, after all, Section 5 of the Fourteenth Amendment – which under Chief Justice Rehnquist’s 1996 opinion for the Court in Seminole Tribe v. Florida\(^{32}\) had become the only means by which Congress could abrogate the immunity of unconsenting states against private suits seeking damages in federal court – had acquired a new significance and quite a lot of fresh baggage.\(^{33}\) In 1997, City of Boerne v. Flores\(^{34}\) instructed that Section 5 legislation must show “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”\(^{35}\) During the following four years, in Kimel v. Florida Board of Regents\(^{36}\) and again in Board of Trustees of the University of Alabama v. Garrett,\(^{37}\) the Court applied this test to hold that Congress lacked the power to abrogate state immunity from suit under provisions of the Age Discrimination in Employment Act and the Americans with Disabilities Act. The Chief Justice’s opinion for the Court in Garrett insisted that as the predicate for the exercise of Section 5 power, Congress had to have acquired a documented record that the states themselves were violating the judicially protected right to which the legislation was addressed – in all these cases, the right not to be discriminated against on the job.

If the ten years of hearings leading up to passage of the Americans with Disabilities Act could not provide Congress with enough of a record to meet that test in Garrett, then the Family and Medical Leave Act claim in Hibbs indeed appeared doomed. What saved it was the majority’s interpretation of the Family and Medical Leave Act as an exercise of Congress’s power under Section 5 to enforce the constitutional proscription against sex discrimination. By requiring employers to give time off to both men and women to deal with family emergencies, the Chief Justice explained, in words that Ruth Bader Ginsburg herself could not have written more forcefully, Congress was doing its part to eradicate the “pervasive sex-role stereotype that caring for family members is women’s work.” This, in turn, caused women to be perceived as less valuable employees or job seekers. This was, I should point out, not the only way to look at the Family and Medical Leave Act, which was, after all, a labor regulation and could well have been seen as a garden-variety Commerce Clause enactment. By treating the law as a Section 5, anti–sex discrimination enactment, the Hibbs opinion therefore stands for the proposition that when Congress acts within its core Section 5 authority to


\(^{33}\) See generally Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943 (2003).

\(^{34}\) City of Boerne v. Flores, 521 U.S. 507 (1997).

\(^{35}\) Id. at 520.


combat discrimination that receives heightened scrutiny – not age, not disability, but in this instance sex – the Court will accede. As Robert Post pointed out in his analysis of Hibbs in his Harvard Law Review “Foreword,”38 the decision to draw this line protected Title VII of the 1964 Civil Rights Act, thus avoiding the “major political confrontation”39 with the ensuing damage to the Court that could otherwise have resulted had the majority exported the newly muscular Eleventh Amendment from rational basis territory into the land of heightened scrutiny.

If a contrary result in Hibbs would have been destabilizing, acceptance of the free exercise claim in Locke v. Davey to public tuition assistance for religious education might have been even more so. The Chief Justice’s cryptic seventeen-paragraph majority opinion is not long on legal analysis, but its point is clear: “If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area. . . .”40 The majority looked down from the cliff, and decided not to jump.

I’d like to propose that the third Rehnquist Court has been shaped by how its members have responded to the challenge of deciding whether to follow the precedents they established during the first two Rehnquist Courts to their logical conclusions. Clearly, Justices who made up the second Rehnquist Court’s majority have found different stopping points, reflecting their different comfort levels as they balance the twin imperatives of consistency and pragmatism. Of course, pragmatism is not necessarily a positive value for all these Justices, and pragmatism does not have a single accepted meaning in any event. To borrow again from Robert Post, I suppose what I really mean here is that different Justices have different felt needs for the Court to engage in dialogue with the surrounding constitutional culture.41

And to take Professor Post’s point perhaps beyond his comfort level, different Justices, sometimes implicitly and sometimes in terms of formal doctrine, appear to be defining constitutional culture differently. Clearly, in such decisions as Lawrence v. Texas, Roper v. Simmons, Rasul v. Bush, and, to a lesser extent, Grutter v. Bollinger, the majority envisioned itself in a dialogue with the wider world beyond the country’s borders and cared a fair amount about how the Court, and through it, the country, looked to that world.

It is no accident that the Chief Justice dissented in each of those cases. That is not a dialogue that appears to matter to him. One might argue that a global constitutional culture is taking shape, or already exists, whether or not the Supreme Court of the United States chooses to acknowledge or engage with it. But I don’t

39 Id. at 22.
40 Locke, 540 U.S. at 725.
41 Post, supra note 38, at 8–9.
mean to join the current debate over the Court’s increasing acknowledgment of foreign sources. I offer these cases only as examples of instances when the majority responded to cues that the Chief Justice thought irrelevant or inappropriate. By perceptions of constitutional culture, I mean not a formal stance toward foreign law or any source of law in particular, but rather something much less formal, a more personal orientation on the part of individual Justices. Amid the cacophony of commentary, which voices – present or anticipated, formally expressed or simply part of the background music, within our borders or without – are most salient? At which point do various Justices decide that it is necessary in the Court’s interest, or the country’s, to subordinate “craft to outcome” and engage in “the sacrifice of cogency for wisdom,” to borrow from John Jeffries’s recent reappraisal of Justice Powell’s performance in Bakke.

By a large majority, which included the Chief Justice, the Court decided that such a point had been reached in Hibbs and Locke. But in last term’s Tennessee v. Lane, another Eleventh Amendment state immunity case, the Chief Justice went one way and his Hibbs majority went the other. So it is worth pausing over Tennessee v. Lane for what it demonstrates about the third Rehnquist Court. Like Garrett, Lane presented a question of state immunity under the Americans with Disabilities Act, this time under Title II of the act, the public services provision, rather than Title I, which bars discrimination in employment. The issue was whether Congress’s abrogation of state immunity from suit under Title II was a valid exercise of its Section 5 enforcement authority. With disability being subject only to rational basis analysis under the Equal Protection Clause, a point Garrett had reemphasized, the difficulty of the plaintiffs’ task was obvious. The facts, however, were very much in their favor even if the law was not. The plaintiffs were two wheelchair users who had been unable to climb the stairs to reach courtrooms in Tennessee county courthouses that were not in compliance with the ADA. One of the plaintiffs, George Lane, had crawled up two flights of stairs the first time he needed to go to court. On his second visit, he refused to crawl or allow himself to be carried, and was arrested and jailed for “failure to appear” when he remained seated in his wheelchair in the lobby, asserting his legal right to an accessible courtroom.

The Sixth Circuit, affirming the District Court’s denial of the state’s motion to dismiss, threaded the needle by avoiding equal protection analysis entirely. It held that in making states liable to suit under Title II of the ADA, Congress had appropriately exercised its power to enforce a due process right of access to court.

The Supreme Court affirmed, with a majority opinion by Justice Stevens that essentially limited the case to its facts:

Whatever might be said about Title II’s other applications, the question presented in this case is not whether Congress can validly subject the states to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.

Clearly, this was a majority mortified at the prospect of leaving Mr. Lane at the bottom of the courthouse stairs, without a remedy under what was arguably the most important federal civil rights enactment of the last quarter of the twentieth century. Crucially, that majority included Justice O’Connor, who had not previously departed from the Chief Justice’s position in any of the state immunity or other federalism cases. This case challenged her comfort level. It did not challenge his.

Chief Justice Rehnquist’s dissenting opinion objected to the majority’s methodology as well as its conclusion:

. . . the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. . . . [T]he majority’s approach is not really an assessment of whether Title II is “appropriate legislation” at all. . . . but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

In other words, the fact that the majority had decided the case narrowly and saved the harder issues for another day bought it no credit with the Chief Justice; to the contrary, he stops just short of accusing the majority of having pulled off an intellectually dishonest trick. In the balance between pragmatism and consistency, which for him had tilted toward pragmatism a year earlier in Hibbs, consistency was the stronger value for the Chief Justice in Tennessee v. Lane.

So this is the third Rehnquist Court: a majority that has fractured over how far to go – over “when to hold ’em and when to fold ’em,” in the words of the Kenny Rogers song,46 over when to stop at the edge of the cliff and when to jump. This development should not, after all, surprise us. The second Rehnquist Court moved far and fast, reopening fundamental debates that had been settled for more than half a century. A pause to take stock, if not a regression to the mean, is quite natural. William Rehnquist has pushed, prodded, and questioned the received wisdom for all his years on the Court, so it is also quite natural that he is less ready to pause than some of those who have usually been his allies.

I know I’ve offered more questions than answers. I look forward to the scholarship that will come out of this period, one chapter among so many in a fascinating and consequential career. History will evaluate the Rehnquist Court in all its phases, and I would be very surprised if the ambiguity of this final phase serves to cast doubt on the effectiveness or impact of a man who is already being proclaimed as one of the great Chief Justices. If anything, the emergence of the third Rehnquist Court makes the first and especially the second all the more interesting. It challenges our understanding of the Supreme Court itself. What are we to make, after all, of a Court that changes even as its membership remains the same? As of Wednesday, April 6, it had been eleven years since Harry Blackmun, the last Justice to leave the Court, announced his retirement. We look at a Court that we think we know, and then we have to blink and look again. The only sure thing is that one of these days, we will find a new Justice, or two, or three, in place of those that have been so familiar—or so we thought—for so long, and the Court will move into still another cycle of continuity and change.