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## VIII. THE REHNQUIST COURT

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## **“Fall Cases on Hot-Button Issues May Hinge on the New Justice”**

*Washington Post*

July 5, 2005

Charles Lane

Abortion. Physician-assisted suicide. Gay rights. How will the Supreme Court handle those issues without Justice Sandra Day O'Connor, the centrist swing voter who announced her retirement from the court last week after a 24-year tenure?

Actually, it probably won't take long to find out. The abortion rights of teenagers, administration efforts to override a state right-to-die law, and the military's "don't ask, don't tell" policy are all on the docket for the court term that begins Oct. 3.

O'Connor's past opinions show that she would have played a pivotal role in these cases. Now, their outcome may hinge on the views of her successor. Learning those views may prove challenging to senators, if a nominee adheres to the practice of not answering questions about matters that are, or soon will be, before the court.

"One of the fascinating dances in the confirmation process is going to be how much you can get a nominee to answer, even about relatively recent precedents, when the issues are presented in cases that are pending on the docket," said Douglas W. Kmiec, a professor of constitutional law at Pepperdine University.

The retirement of O'Connor, who often cast the deciding vote in the court's cases, could portend great change at the court, especially if President Bush replaces her with a steadfastly conservative nominee, as many expect.

If O'Connor's career teaches anything, it is

that a justice's initial votes on the court are not necessarily a reliable guide to what that justice will do in the course of a long, life-tenured career. In her first years, she leaned heavily against abortion and affirmative action, only to tack in the other direction later.

Even if O'Connor were replaced by a conservative opponent of *Roe v. Wade*, the 1973 ruling recognizing a right to abortion, *Roe* would still have the support of a five-justice majority. Any challenge to its core holding would take years to bubble up from lower courts.

Still, next term will present O'Connor's successor with a chance to answer important questions about the scope of *Roe* as well as other precedents.

For example, a 1992 Supreme Court decision, co-written by O'Connor, set forth a test for the constitutionality of state abortion regulations, saying they must not impose an "undue burden" on exercising the right to abortion.

The court defined an undue burden as a law that "in a large fraction of cases" puts a "substantial obstacle" in the way of someone seeking an abortion.

At the same time, the court has said that states may pass laws requiring minors to notify their parents of plans to terminate a pregnancy, as long as they permit minors to

seek a court's permission when informing

their parents is impossible or dangerous.

The court has never clarified whether O'Connor's "undue burden" test means that parental-notification laws, which are on the books in 33 states, must include an explicit exception for cases in which the pregnant girl's health is at risk.

But in *Ayotte v. Planned Parenthood*, No. 04-1144, which is to be argued in December and decided by mid-2006, the court will rule on a New Hampshire law that has no health exception. The U.S. Court of Appeals for the 1st Circuit, based in Boston, ruled last year that the New Hampshire law is unconstitutional and cannot go into effect.

In its appeal, however, New Hampshire said the 1st Circuit applied the wrong legal standard. It cited a 1987 Supreme Court ruling that suggests opponents of the law must show that the law would limit abortion rights not just in some or most cases but in all cases.

If the justices affirm the ruling of the 1st Circuit, striking down the law, the effect will be to fortify and entrench Supreme Court precedents on abortion rights. If the court rules in favor of New Hampshire law, it will open the door to other states to adopt similar legislation.

Any elucidation of the court's view of its doctrine of a health exception could also affect the federal ban on the procedure critics call "partial birth" abortion. Enacted by Congress with Bush's support in 2003, it included no exception to protect the woman's health. But three district courts have found it unconstitutional under a 5 to 4 Supreme Court ruling in 2000, joined by O'Connor, that said such bans must include a health exception.

The government's appeals are pending, and conflicting decisions by appeals courts could lead to a Supreme Court case in the early years of O'Connor's successor.

In October, physician-assisted suicide will be before the court in *Gonzales v. Oregon*, No. 04-623. The administration has appealed a lower court's order barring the Justice Department from taking away the prescribing rights of Oregon doctors who prescribe lethal doses of drugs to terminally ill patients who have chosen to die under that state's 11-year-old Death With Dignity Act.

Assisted suicide is an intensely emotional issue, both for advocates of a "right to die," who see it as many people's only means of a dignified death, and for conservative Christians, who see it as a form of murder.

Opposition to laws such as Oregon's was a favorite cause of former attorney general John D. Ashcroft, who issued a November 2001 directive determining that assisting suicide is not a "legitimate medical purpose" under federal drug-control law—and that the Drug Enforcement Administration could act against any physician who authorized drugs to help someone die.

The directive overturned a 1998 decision by President Bill Clinton's attorney general, Janet Reno, that permitted Oregon doctors to assist in suicides.

Strictly speaking, the case does not involve any assertion of a constitutionally protected right to die. The court unanimously refused to recognize such a right in 1997, ruling that it should be left to the states to determine whether legalized assisted suicide is wise policy.

Rather, the case is framed by the parties as a clash between federal power to regulate drugs and states' power to regulate the practice of medicine.

But the practical effect of the Ashcroft directive is to make Oregon's law a dead letter—and O'Connor might have been sympathetic to Oregon. She vigorously dissented from the court's 6 to 3 ruling last month in which it upheld a federal override of California's medical marijuana law. In the 1997 case, *Washington v. Glucksberg*, the court was ruling on state bans on assisted suicide. O'Connor was one of five justices who wrote or signed concurring opinions implying that they might not strike down a state law such as the Oregon one that permits assisted suicide.

"Death will be different for each of us," she wrote. "For many the last days will be spent in physical pain . . . some will seek

medication to alleviate that pain and other symptoms."

In *Rumsfeld v. FAIR*, No. 04-1152, to be argued in November, the question is whether some law schools may curb military recruiters' access to their students in protest of the U.S. armed forces' ban on openly gay members.

The court is being asked to rule on the constitutionality of the Solomon Amendment, a federal law that requires universities to give military recruiters equal access or risk millions of dollars in federal funding.

Legal analysts generally expect a win for the government, but the case will create a high-profile forum in which both opponents and supporters of the "don't ask, don't tell" policy can fight out this particular battle of the culture wars.

## “Supreme Modesty”

*New York Times*

July 24, 2005

Jeffrey Rosen

At the moment, liberals are afraid, very afraid. They fear that two Supreme Court appointments by President Bush could transform America for decades to come. And they fear that President Bush will accomplish this transformation by replacing Sandra Day O'Connor and, eventually, William Rehnquist with hard-core conservatives in the mode of Antonin Scalia and Clarence Thomas. A hypothetical worst case for liberals might be a multicultural twofer: the appointment of Judge Janice Rogers Brown, an African-American libertarian who makes Thomas look mild, and Attorney General Alberto Gonzales, who may well surprise his right-wing critics by becoming a reliable conservative on the bench.

But even if the court is, in fact, transformed, the consequences might be far less severe than liberals imagine. To begin with, most of America's legal business does not involve the court at all. The justices decide very few cases—an average of only 82 a year during the past 10 years—and most of them are not politically divisive. Between 1994 and 2003, 36 percent of the court's opinions were unanimous, as opposed to only 21 percent that were decided by a 5-4 vote. What's more, if the Supreme Court overruled *Roe v. Wade* or its school-prayer decisions tomorrow, abortion wouldn't become illegal across America, and prayer wouldn't become mandatory. Instead, the states and Congress would have the power to regulate abortion or to allow prayer if they chose to do so. That means that the most controversial questions in American

life would ultimately be settled in the court of public opinion, regardless of what the Supreme Court says.

Of course, some of the court's closest decisions involve hot-button issues, and they could indeed go the other way if the new justices follow in the path of Scalia and Thomas. The most immediate change might involve affirmative action: two years ago, O'Connor wrote a 5-4 majority opinion upholding affirmative action in law-school admissions; her successor might tilt the court in the opposite direction. But even if the court voted to strike down affirmative action in higher education, it is hardly obvious that affirmative action would end in a dramatic stroke. When the court, with O'Connor's blessing, questioned the constitutionality of affirmative action in public contracting in 1995, political support for affirmative action in the Clinton and Bush administrations and in Congress ensured that many federal contracting set-asides continued anyway, with only slight revisions.

The ultimate liberal nightmare is that the new Bush court might overturn *Roe v. Wade*. But if Rehnquist retires next, Bush will need three Supreme Court appointments, not two, to overturn *Roe*. For the sake of playing out the liberal nightmare, however, imagine that *Roe*, in fact, was overturned. The world still wouldn't come to an end for liberals. Since two-thirds of Americans in polls have long said that abortion should be legal during the first three months of pregnancy, only the most

conservative states—Louisiana and Utah, for example—might try to pass new restrictions on early-term abortions. And in the event that a handful of states succeed in passing new early-term bans, or reviving old ones, the national backlash could split the G.O.P. apart at the seams, causing sizable numbers of pro-choice Republicans to desert their party. Karl Rove understands this, and when asked whether *Roe* should be overturned, he has dodged the question.

The fact that Bush may need three Supreme Court appointments to overturn *Roe* (and to resurrect school prayer) suggests that liberals should keep some of their powder dry for the truly defining battle over the court, which will occur if and when a liberal justice retires. But what if Bush gets three retirements and manages to appoint three Clarence Thomas epigones to the court? Thomas is the court's most radical justice, and if his views prevailed, environmental laws might be struck down, and the states, no longer bound by the First Amendment's prohibition on establishment of religion, might be free to re-establish congregationalism as an official religion. (I'm not making this up.) But of course, the chances that any state would actually try to re-establish the Congregational Church are nil. And if the court tried to dismantle the Environmental Protection Agency, even a Republican Congress might rise up in protest, prompting an eventual judicial retreat. Throughout American history, the court has been notoriously ineffective when

it has tried to impose the views of a minority over the determined objections of a national majority.

I don't mean to minimize the importance of the immediate Supreme Court nomination on the horizon, which may indeed transform the law on everything from campaign finance to the detention of immigrants. But nightmares aside, the most immediate effect of two more conservative appointments may be to make Anthony Kennedy the new swing justice, and like a polarized molecule, he might react to his new colleagues by moving a little further to the left. On the new Bush court, though, it's unlikely that Kennedy would be able to satisfy liberals by creating new rights, even if he wanted to.

But that may be yet another blessing in disguise for liberals. After all, Kennedy's decision striking down sodomy laws in the name of sexual freedom angered and alienated social conservatives and may have increased their political clout. The court is far from all-powerful and all-determining. And for this reason, it may be unwise for liberals to spend tens of millions of dollars to fight largely symbolic Supreme Court confirmation battles that they will probably lose in the end. Instead, they should be preparing legislative campaigns to protect abortion rights and religious neutrality and devoting their energies to recapturing the two branches that really govern America: namely, the White House and Congress.

## **“Court's Term a Turn Back to the Center”**

*New York Times*

July 4, 2005

Linda Greenhouse

Justice Sandra Day O'Connor's unexpected retirement announcement last week shifted public attention toward her legacy and the Supreme Court's future and away from the term that just concluded. But the term—apparently not the Rehnquist Court's last, after all—contained its share of notable developments that, taken together, cast a shadow of ambiguity over Chief Justice William H. Rehnquist's legacy.

The court's federalism revolution stalled, while the revival of property rights, which appeared to be taking off not long ago, crashed and burned on a riverbank in New London, Conn.

The court displayed a growing concern about the death penalty, with the majority suggesting that lower courts had taken the Supreme Court's impatience with prolonged appeals too far toward short-circuiting defendants' rights. The justices also gave broad interpretations to three federal anti-discrimination laws.

Justice Stephen G. Breyer displaced Justice O'Connor at the court's center of gravity, casting the fewest dissenting votes—10, to Justice O'Connor's 11—in the 74 cases that were decided with full opinions.

As the Rehnquist Court ended a 19th year and appeared poised, unexpectedly, to begin a 20th, it was almost as if a constitutional centripetal force had been at work in recent years, pulling the court back toward the middle in many areas of its docket, including federalism, affirmative action, religion and abortion. The result frustrated

conservatives and raised the stakes for the appointment of Justice O'Connor's successor.

The court's six discrimination cases from this past term provide an example. Three were brought under the Constitution's guarantee of equal protection, and the others required an interpretation of three different federal statutes.

In all six cases, with Justice O'Connor in the majority in four, the court adopted a broader reading of the relevant provision, not necessarily handing victory to the particular individuals but keeping avenues of legal redress open for the future.

Beyond these case-specific trends, the voting patterns this term were unusual.

In recent terms, the five most conservative members of the court, Chief Justice Rehnquist, Justice O'Connor, and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas, displayed a striking degree of cohesion. They voted together, for example, in half of the 18 5-to-4 decisions in the 2003-2004 term. In the past five terms, their alliance in the most closely divided cases ranged from a low of just over one-third of the cases in one term to a high of 70 percent of them in another.

But in the latest term, which began Oct. 4 and ended June 27, the five voted together in only 18 percent of the cases decided by five-member majorities, 4 out of 22. (Four of the 22 cases were decided by votes of 5 to 3, with the chief justice not participating.)



Although theories were available to explain votes that looked anomalous, some of the alignments turned heads. For example, Justices Scalia and Kennedy joined Justice Breyer and Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg to reject the states' rights position in the California medical marijuana case. Justice Breyer provided the crucial fifth vote for Chief Justice Rehnquist's opinion upholding the Ten Commandments monument on the grounds of the Texas State Capitol.

In 48 split decisions this past term, Justices Ginsburg and Breyer, President Bill Clinton's two Supreme Court appointments (and the only two current justices to have been appointed by a Democratic president), were on opposite sides in 11. Justices Scalia and Thomas, who are often mistakenly viewed as ideologically inseparable, were on opposite sides in 12.

After their 11 years together, what has gotten into these nine justices?

Nelson Lund of the George Mason University School of Law, who was a law clerk for Justice O'Connor during the court's 1987 term, said in an interview that there was a tendency to blame her for outcomes that have disappointed Professor Lund's fellow conservatives. "But the easy explanations are not quite adequate," he said.

Pointing out that courts proceed incrementally, informed by precedent and by the facts of each case, Professor Lund continued: "There is a deep current of common-law thinking that pervades our legal system. Our courts rarely make a lot of big lurches. Usually when they make a big step, it's because people didn't realize how big a step it was, and then they pull back."

Kathleen M. Sullivan, a liberal legal scholar and former dean of Stanford Law School, offered a similar observation. The court's recent behavior may be "as much psychological as jurisprudential," she said in an interview.

Professor Sullivan said some of the term's more surprising outcomes may reflect the fact that the Supreme Court, its membership stable while the lower federal courts have had considerable turnover, is now by some measures to the left of some of the federal appeals courts.

She said some justices may have been alarmed to find that the appeals courts were carrying their opinions further than intended or were applying them in unanticipated ways. This, in turn, may explain why in several decisions this year, including rulings for defendants in death penalty cases, the Supreme Court did not articulate new legal principles so much as correct what it saw as erroneous lower court opinions, a role it usually avoids. "The middle justices have seen themselves as guardians of the court's integrity even at the price of inconsistency," Professor Sullivan said.

The term was something of a triumph for Justice Stevens, the longest-serving associate justice and a vigorous 85-year-old who has no plans to retire; in fact, this week he is interviewing applicants for clerkships for the court's term that begins in October 2006.

Of his several major opinions, by far the sweetest for him must have been his majority opinion in *Gonzales v. Raich*, declaring that federal authority trumped California's medical marijuana initiative. Justice Stevens, a Republican named to the court by President Gerald Ford and now arguably the most liberal justice, has been

adamant in resisting the states' rights tilt of the court in a series of federalism cases. He also wrote for the majority in the eminent domain case, *Kelo v. City of New London*, and in an important age discrimination case, *Smith v. City of Jackson*.

Justice Stevens filed one particularly notable dissenting opinion during the term, in a case that prohibited states from discriminating against out-of-state wineries. In Justice Stevens' view, the intent of the 21st Amendment, adopted in 1933, was to give states free rein in regulating alcohol use and commerce within their borders. To support his argument, he drew on a resource no other justice had available: a memory of the repeal of Prohibition. "My understanding (and recollection) of the historical context reinforces my conviction" about the meaning of the amendment, he said.

Course corrections were made by justices across the ideological spectrum, even in areas of the docket not usually seen as lightning rods. For example, the court upheld the federal beef marketing program that finances the "Beef, it's what's for dinner" advertising campaign through assessments on cattle producers, even on those who object to paying.

A Supreme Court decision four years earlier had found that a similar program amounted to compelled speech in violation of the First Amendment. The decision used language that, if taken to a logical conclusion, suggested a new constitutional basis for attacking a range of government programs, even taxation.

So in an opinion by Justice Scalia, who had joined the earlier decision, the court tacked back, shutting the door on that First Amendment theory before it could gain

momentum. Chief Justice Rehnquist also changed sides.

In the constant dynamic of stability and change inside the court, justices find different comfort levels. With Justice O'Connor's departure, change will now come, for the first time in 11 years, from outside the court as well.

### **Criminal Law and Sentencing**

The court's continuing re-examination of the respective roles of judges and juries in criminal sentencing produced a transformation in federal guidelines.

The decision in *United States v. Booker*, No. 04-104, was really two separate 5-to-4 opinions supported by two different coalitions of justices. First, Justices Stevens, Scalia, Souter, Thomas and Ginsburg held that the federal sentencing guidelines were unconstitutional because they gave judges power that, under the Sixth Amendment's right to a trial by jury, belonged to the jurors—namely, the power to make the factual findings that determine the sentence.

A second coalition, composed of Chief Justice Rehnquist and Justices Breyer, Kennedy, O'Connor and Ginsburg, then ruled that the problem could be fixed by making the guidelines advisory rather than mandatory, restoring to federal judges some of the discretion that Congress had taken away 21 years earlier.

In another case, the court ruled 5 to 4 that the Constitution categorically bars capital punishment for crimes committed before the age of 18. Justice Kennedy's opinion in the case, *Roper v. Simmons*, No. 03-633, overturned a 1989 precedent that had set the

age at 16. The *Roper* decision also concluded that the American public, as well as the world, had turned against the death penalty for juveniles. Justices Scalia, Thomas and O'Connor dissented, along with Chief Justice Rehnquist.

For only the third time in 20 years, the court overturned a death sentence on the ground that the defendant had received a constitutionally inadequate defense. Justice Souter's 5-to-4 opinion in *Rompilla v. Beard*, No. 04-5462, was joined by Justices Stevens, Ginsburg, Breyer and O'Connor.

In *Deck v. Missouri*, No. 04-5293, the court ruled 7 to 2 that it is unconstitutional to use shackles to restrain a prisoner during a death penalty sentencing hearing unless there is a particular reason for doing so. Justice Breyer said for the majority that shackling was inherently prejudicial and required "adequate justification." Justices Thomas and Scalia dissented.

The court also ruled that in making a routine traffic stop, the police can allow a trained dog to sniff the car for drugs without the need for any particular suspicion of a narcotics violation. Justices Souter and Ginsburg dissented in the case, *Illinois v. Caballes*, No. 03-923, and the chief justice did not vote.

In *Castle Rock v. Gonzales*, No. 04-278, the court held that the police do not have a constitutional duty to enforce a court-issued domestic order of protection. The 7-to-2 decision overturned an appeals court ruling that allowed a woman to sue a Colorado police department for failing to take action after her estranged husband violated a restraining order by kidnapping their three daughters, whom he then murdered.

The mandatory arrest language on the order could not displace the police department's

ordinary exercise of discretion, the court held in an opinion by Justice Scalia, over the dissenting votes of Justices Stevens and Ginsburg.

## **Property Rights**

In what was perhaps the term's most disputed decision, the court ruled that fostering economic development is an appropriate use of the government's power of eminent domain. The 5-to-4 decision in *Kelo v. City of New London*, No. 04-108, upheld a plan in the economically depressed Connecticut city to replace an old residential neighborhood with office space and a conference hotel. The majority opinion by Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg and Breyer.

The court also unanimously upheld Hawaii's rent-control law for gasoline stations, rejecting the oil companies' argument that limiting their rate of return amounted to an unconstitutional "taking" of private property. The case was *Lingle v. Chevron U.S.A. Inc.*, No. 04-163.

## **Religion**

Two decisions on government display of the Ten Commandments looked in opposite directions, with only Justice Breyer joining the majority in each of the 5-to-4 rulings.

In *Van Orden v. Perry*, No. 03-1500, the court found that the display of a six-foot-high Ten Commandments monument on the grounds of the Texas State Capitol did not amount to an unconstitutional "establishment" of religion. Chief Justice Rehnquist wrote the opinion, joined by Justices Breyer, Kennedy, Scalia and Thomas.

In *McCreary County v. American Civil Liberties Union*, No. 03-1693, the court held

that the framed display of the Ten Commandments on the walls of two Kentucky county courthouses, although surrounded by other texts of historical interest and secular content, was unconstitutional. Justices Souter, O'Connor, Ginsburg and Stevens, along with Justice Breyer, voted in the majority.

Also, the court ruled unanimously that a new federal law, the Religious Land Use and Institutionalized Persons Act, does not violate the separation of church and state in requiring prison officials to meet inmates' religious needs. Justice Ginsburg's opinion in *Cutter v. Wilkinson*, No. 03-9877, warned, however, that prison security remained a "compelling state interest" and that demonstrated problems in accommodating inmates' requests would be resolved in favor of prison officials.

### **Discrimination**

The federal law that bars sex discrimination in schools and colleges also prohibits school officials from retaliating against those who bring complaints of such discrimination, the court ruled in *Jackson v. Birmingham Board of Education*, No. 02-1672. The 5-to-4 decision expanded the scope of the law known as Title IX to include protection for whistle-blowers. Justice O'Connor's majority opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer.

Also, employees who sue for age discrimination do not have to prove that the discrimination was intentional, the court ruled. The 5-to-3 decision in *Smith v. City of Jackson*, No. 03-1160, applied to the Age Discrimination in Employment Act, the "disparate impact" theory of liability long familiar under the laws against race and sex discrimination. Employees need not produce a smoking gun, but can win by showing that a policy has the effect of

discriminating against older workers, regardless of an employer's motivation. The dissenters were Justices Thomas, Kennedy, and O'Connor. Chief Justice Rehnquist did not participate.

In *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, the court ruled 6 to 3 that the Americans With Disabilities Act protects the rights of passengers who sail on cruise ships that call at American ports, even ships that fly under foreign flags, as most do. However, ships will not be required to make major structural alterations. The dissenters were Justices Scalia and O'Connor and Chief Justice Rehnquist.

The court also overturned a 20-year-old murder conviction in Texas on the ground that the jury selection had been infected by racial discrimination. The 6-to-3 decision in *Miller-El v. Dretke*, No. 03-9659, was the court's second ruling on behalf of the death row inmate, Thomas Miller-El. The dissenters were Justices Thomas and Scalia and Chief Justice Rehnquist.

In another case, the court ruled that a California prison policy that temporarily segregates new or newly transferred inmates by race, for the stated purpose of preventing gang violence, was constitutionally suspect and not entitled to the judicial deference that is usually accorded to prison administration policies. The vote in *Johnson v. California*, No. 03-636, was 5 to 3, with Chief Justice Rehnquist not participating. Justice Stevens said in his dissent that the policy was flatly unconstitutional. Justices Scalia and Thomas, dissenting on different grounds, said the court should have deferred to prison officials.

### **Federalism**

Reasserting federal authority, the court upheld the power of Congress to prohibit

and prosecute the possession and use of marijuana, even in California and the 10 other states that allowed it for medical purposes. A federal appeals court had ruled that the noncommercial cultivation and use of marijuana that did not cross state lines fell outside Congress's constitutional authority to regulate interstate commerce.

The vote in *Gonzales v. Raich*, No. 03-1454, was 6 to 3. The surprise was not that Justices Stevens, Ginsburg, Souter, and Breyer voted with the majority, but that Justices Kennedy and Scalia defected from their usual states' rights allies to vote to uphold federal power.

Rejecting state protectionism in the national wine market, the court overturned liquor laws in New York and Michigan and ruled that states that allow in-state wineries to ship directly to consumers must give the same privilege to out-of-state wineries. The vote in *Granholm v. Heald*, No. 03-1116, was 5 to 4, with Justices Kennedy, Scalia, Souter, Ginsburg and Breyer in the majority.

The court rejected a claim of federal preemption and allowed suits to go forward in state court claiming negligence in the design and manufacture of pesticides and herbicides. These products are regulated under a federal law, the Federal Insecticide, Fungicide and Rodenticide Act, and the Bush administration had argued that this statute, which does not allow private lawsuits in federal court, also implicitly blocked the states from opening their courts to such suits. The vote in *Bates v. Dow AgroSciences L.L.C.*, No. 03-388, was 7 to 2, with Justices Thomas and Scalia dissenting.

### **Immigration**

The court ruled unanimously that driving under the influence of alcohol, even when

serious injury results, is not a "crime of violence" for which an immigrant should face automatic deportation. Chief Justice Rehnquist wrote the opinion in *Leocal v. Ashcroft*, No. 03-583, which rejected the Bush administration's interpretation of federal immigration law.

Meanwhile, Cubans who entered the United States during the Mariel boatlift in 1980 and subsequently committed crimes cannot be subjected to open-ended detention, the court ruled in a 7-to-2 decision. Although these Cubans, as many as 1,000 of the 125,000 who arrived in the boatlift, are now deportable, Cuba will not take them back. They may not be held for more than six months without a special reason, Justice Scalia said for the court in *Clark v. Martinez*, No. 03-878. Justice Thomas and Chief Justice Rehnquist dissented.

Immigrants from Somalia may be deported despite the lack of a centrally functioning government in Somalia to receive them, the court ruled 5 to 4 in *Jama v. Immigration and Customs Enforcement*, No. 03-674. The dissenters were Justices Souter, Stevens, Ginsburg and Breyer.

### **Business**

The court unanimously overturned the criminal conviction of the accounting firm Arthur Andersen for shredding documents related to its work for Enron as that company was collapsing in 2001. Chief Justice Rehnquist said for the majority in *Arthur Andersen v. United States*, No. 04-368, that the judge's instructions to the jury failed to require the necessary proof that the firm knew its actions were wrong. The victory came too late for Andersen, which lost its clients and its licenses and now has 200 employees, down from 28,000, wrapping up the firm's affairs.

In another unanimous opinion, the court reinstated a copyright-infringement suit by Hollywood studios and the music industry against two file-sharing services whose software enables users to download copyrighted movies and songs.

Overturning an appeals court ruling in favor of the services, Grokster and StreamCast Networks, the court held that a company shown to induce copyright infringement can be liable even if its products also have lawful uses. While sending the case, *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, No. 04-480, back to the lower courts, the justices made it clear that they believed the plaintiffs had presented ample evidence of inducement.

Upholding an interpretation by the Federal Communications Commission, the court ruled that cable companies do not have to allow rivals to offer high-speed Internet access over their systems. The 6-to-3 decision in *National Cable &*

*Telecommunications Association v. Brand X Internet Services*, No. 04-277, was a victory for cable in the competition to provide broadband service. Justices Scalia, Souter and Ginsburg dissented.

In another case, the court ruled unanimously that federal bankruptcy law shields individual retirement accounts from creditors. The decision in *Rousey v. Jacoway*, No. 03-1407, extended the protection already provided to 401(k) accounts and company pension plans.

The court also raised the bar for investors bringing securities fraud cases. The mere accusation that a company's misrepresentations inflated the stock price is an insufficient basis for a suit, the court ruled unanimously in *Dura Pharmaceuticals Inc. v. Broudo*, No. 03-932. Instead, investors must claim at the outset that it was the artificially high stock price that actually caused their losses.

## **“A Season of Dissent for the Chief Justice”**

*USA Today*  
June 29, 2005  
Joan Biskupic

WASHINGTON—For Chief Justice William Rehnquist, it was a Supreme Court term that began with a battle with thyroid cancer that left his body frail and his voice raspy. By the end of the 2004-05 term Monday, it also was clear that Rehnquist's voice had been diminished on some of the nation's most contentious issues.

In a dozen key rulings during the term, the conservative chief justice voted in the minority.

When five of the nine justices voted to ban executions of defendants who were juveniles at the time of their crimes, Rehnquist dissented. In a ruling that allowed governments to use their eminent domain powers to seize homes for private development, he dissented.

The decision that said state "medical marijuana" laws don't protect users from federal prosecution? Rehnquist dissented. The ruling that expanded the types of lawsuits that may be filed under the Title IX law that bars sex discrimination in school programs? Rehnquist dissented. The decision that states could not stop their residents from receiving direct shipments of wine from out-of-state vineyards? Another dissent by Rehnquist.

When Rehnquist disagreed with the majority, he did not level any fiery dissents, as he had done in the past. He wrote only one dissent all term, in a tax law case. Otherwise, when he disagreed with the majority he simply signed on to another dissenting justice's statement.

That was particularly evident last week, when he disagreed with the court's ruling in *Kelo v. City of New London*, the Connecticut property rights case that tested governments' powers of eminent domain.

In prior terms, Rehnquist had taken the lead in trying to boost legal protections for property owners, saying that governments increasingly were encroaching on their rights. Rather than write up such sentiment, Rehnquist joined an opinion by Sandra Day O'Connor. Her dissent was uncharacteristically biting. She warned that "under the banner of economic development, all private property is now vulnerable to being taken" by local governments.

"That's a case that will be remembered by the average person on the street," says Theodore Olson, a former U.S. solicitor general.

The ruling is drawing fire on Capitol Hill. House Majority Leader Tom DeLay, R-Texas, harshly criticized it Tuesday during a session with reporters. He accused the court's majority of "shredding private property rights."

### **Still a conservative court**

The Rehnquist court remains generally cautious and conservative, however, and Rehnquist's recent losses do not significantly diminish the overall legacy he has built in 33 years on the court, 19 of them as chief justice. He had a leading role in the move away from the lingering liberalism of the

court led by Earl Warren from 1953 to 1969.

Nowadays, the court is holding steady, rather than accelerating the march to the right that Rehnquist led in the 1990s. In a few significant areas this term, it even moved to the left. The new ban on executions for defendants who were under 18 at the time of their crimes reversed a court stance from 1989.

In all, the justices invalidated five death sentences. For only the third time in 20 years, the court reversed a death sentence because a defendant had an incompetent lawyer. The actions on the death penalty indicated a desire among several justices to ensure that capital punishment is reserved for defendants who have had sufficient counsel and been guaranteed due process.

Monday's rulings regarding government displays of the Ten Commandments marked a more subtle shift to the left. In one ruling, Justice David Souter said the Commandments could be posted in certain settings. But the liberal-leaning majority—Souter, John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and O'Connor—put a new emphasis on the motives of local officials who want to exhibit religious symbols. That's likely to make it more difficult in the future for local officials to respond to constituent pleas for Ten Commandments displays on public property.

The court resolved several business cases, including a 9-0 ruling Monday that said Internet file-sharing services can be held liable if they encourage their customers to swap songs and movies illegally. In a unanimous opinion written by Rehnquist, the court also threw out an obstruction-of-justice conviction against Arthur Andersen, the accounting firm that kept the books for the failed energy trader Enron. The court said the instructions to the jury were flawed.

By a closer vote, 5-3, the justices said older workers may sue employers over pay or benefit plans that favor younger employees, even if no evidence of deliberate age bias exists. Rehnquist did not participate in the case while he was being treated for cancer in November. He sat out of 11 of the court's 80 decisions this term.

"On the whole, business interests did not fare as well as they usually do this term," said Maureen Mahoney, who represented Arthur Andersen. She called the Andersen ruling a "bright spot" but said that "elsewhere, the court increased the cost of doing business by expanding the availability of damage remedies in some closely divided opinions under the civil rights laws."

### **Health questions**

Questions about Rehnquist's health—and whether he would retire to create the first opening on the bench in 11 years—hung over the court throughout the term. Rehnquist has not said whether he is leaving, but the Bush administration already has interviewed several potential successors.

Rehnquist, who underwent chemotherapy and the insertion of a tracheotomy tube to ease his breathing, missed four months of oral arguments but participated by reading briefs and reviewing transcripts of the oral arguments. When he returned to the bench in March, he appeared weak and his breathing was labored.

It's likely a coincidence that Rehnquist's illness occurred during a term in which he dissented so frequently in major cases. In recent years, the liberal wing led by Stevens has won a few key cases, on affirmative action and gay rights, for example. Further, O'Connor and Justice Anthony Kennedy have for several terms proven to be less reliably conservative than they were in the



late 1980s and 1990s.

On Monday, Rehnquist closed the session by announcing that the court would be in recess until Oct.3. In his last remarks from the bench—perhaps just for the term, perhaps forever—Rehnquist expressed his appreciation to the court staff. He said it had been an unusual term, and then he noted that the court's marble building is undergoing a renovation. That has caused

some justices' offices to be moved and landed court staff members in trailers.

Rehnquist did not mention his own situation. He got out of his black leather chair and—with O'Connor and Stevens at his side, watching to see if he needed a hand—he slowly made his way through the crimson velvet drapes, and out of public view.

*Contributing: Jim Drinkard*

## **“In Other News from the Middle, Some Shifts by Justice Kennedy”**

*Washington Post*  
July 4, 2005  
Charles Lane

All eyes were on Justice Sandra Day O'Connor after the Supreme Court wrapped up its term this week.

But while O'Connor and her centrist legacy may have been at the center of attention because of her surprise retirement announcement Friday, the center of power during the term was one chair to her left, where Justice Anthony M. Kennedy—the court's other center-right swing voter—sits.

In three crucial cases this term, Kennedy, a 1988 appointee of President Ronald Reagan, defected from the five-member right-of-center bloc that Chief Justice William H. Rehnquist nominally leads.

Kennedy joined with the court's liberals to abolish the death penalty for juvenile offenders, to give local governments a green light to take private property for economic development and to endorse a broad theory of federal regulatory power that denied states the right to override a federal law against homegrown medical marijuana.

O'Connor actually found herself in dissent in most of the court's big cases last term, voting to uphold the juvenile death penalty, to strike down Texas's display of the Ten Commandments, to forbid takings of private property for economic development and to uphold California's right to pass a medical marijuana law.

And she expressed that dissent in what was, for her, an unusually uncompromising tone; she seemed uninterested in keeping her

options open for future cases, as she often did in the past.

In the marijuana case, for example, she accused the majority of "threaten[ing] to sweep all of productive human activity into federal regulatory reach."

In hindsight, this may have been a clue to her plans to retire. Referring to the property rights case, Richard J. Lazarus, a professor of law at Georgetown University, noted that it was very uncharacteristic of O'Connor. "It didn't read like an O'Connor opinion," he said. "It made me think she was in a different frame of mind."

For Kennedy's part, not only did he desert the conservative camp on crucial issues, he did so in spite of his past votes and writings on the court, which suggested that he might have come out the other way each time.

"What's up with Justice Kennedy?" Boston University law professor Randy Barnett asked at a forum on the recently concluded term sponsored by the American Constitution Society last week. "He's clearly crossed some kind of a Rubicon. That's the big news of this term."

Kennedy's rulings further angered conservative activists who were already upset with him because of his authorship of the court's opinion last year abolishing state laws against same-sex sodomy.

In a generally disappointing term for the right, some conservatives said the only

bright spot in the court's Kennedy-supported leftward movement was that it will help them rally their base to urge President Bush to put a committed conservative on the court.

"As grievous as some of the rulings are," said Jan LaRue, chief counsel of Concerned Women for America, a conservative group that focuses on social issues, "they have the good effect of awakening more Americans to how important each vote on the court is."

There could be two vacancies to fill if Rehnquist, 80 and suffering from thyroid cancer, follows his old friend O'Connor into retirement.

Rehnquist seemed frail last Monday and struggled to speak clearly through a special valve in his throat where doctors performed surgery in October to help him breathe. He seemed in good spirits, however, cracking a joke about the lengthy list of dissenting and concurring opinions in one case.

Rehnquist was being a good sport at the end of a term in which his influence seemed to ebb along with his physical health.

Of the 24 cases decided by a vote of 5 to 4, the conservative coalition of Rehnquist, O'Connor, Kennedy, Antonin Scalia and Clarence Thomas held together in only five, according to statistics compiled by the law firm Goldstein & Howe.

In the previous two terms, the conservative majority had held together in almost half of the 5 to 4 cases, the firm said.

Capital punishment, property rights, state sovereignty and more latitude for official expressions of religious sentiment have all been pet causes of the chief justice in his 33

years on the court. He has helped move the court to the right on each of these issues during the past decade—but found himself mostly in dissent on them this term.

Kennedy was the difference-maker in the death penalty case, writing the opinion for a five-member majority that found the country had formed a "national consensus" against executing offenders who were younger than 18 at the time of their crimes.

This implicitly repudiated a position Kennedy had taken in 1989, when he joined the court in upholding the practice. As recently as 2003, he had voted to reinstate a juvenile's death sentence that had been put on hold by an appeals court.

This time, he buttressed his argument with references to other countries' opposition to the juvenile death penalty, drawing fire from conservatives who saw him importing foreign law into the interpretation of the Constitution—as he had previously done in striking down the sodomy laws.

Notably, Kennedy could have reached the same result in the death penalty case without making such references. "To add that separate section is an example of Kennedy's really declaring his independence from the conservative orthodoxy of originalism," Supreme Court litigator Paul Smith said at the American Constitution Society forum.

On property rights, Kennedy supplied a fifth vote to a four-member liberal bloc to uphold local governments' right to buy out private property when deemed necessary to promote broader economic development.

The property rights activists who brought the case had expected Kennedy's support, based in part on his generally pro-property-

rights record on the court.

And in the medical marijuana case, Kennedy joined Scalia in breaking with a recent string of cases in which they and the court's other conservatives had struck down federal laws on the grounds that they exceeded Congress's power to regulate interstate commerce.

But whereas Scalia supplied a separate opinion explaining how his positions then and now could be reconciled, Kennedy simply cast his vote without further comment.

Even when Rehnquist had a majority including Kennedy—as he did in upholding a six-foot stone monument of the Ten Commandments on the Texas Capitol grounds—it was a shallow victory.

The fifth vote in his coalition came not from someone who agreed with his long-standing view that the commandments are generally permissible on government property, but from Justice Stephen G. Breyer, who accepted the monument on the much narrower basis that it had not aroused much controversy during its four-decade stay in Austin.

## **“Under the Microscope Longer than Most”**

*New York Times*  
July 10, 2005  
Linda Greenhouse

The period during which a court's membership remains unchanged is known to political scientists as a natural court. It is useful as a kind of controlled experiment that permits study of the institution itself without the distraction of judges coming and going. Or so the theory goes.

With Justice Sandra Day O'Connor's announced retirement, one particular natural court, an unusually long-lived one, is coming to an end. The experiment has run its course: put nine justices together, add a healthy mix of some of the most challenging and contested issues of the day, and wait 11 years. Glance inside occasionally and find various revolutions in progress, portending major changes in federalism, religion and property rights.

But what finally emerged was something quite different: not revolutionary change but, in the end, continuity. In the interim, the period was dynamic, even tumultuous, but by the time it was over, the revolutions had fizzled or run their course, and the fervor appeared to have died. To the extent that there was basic change, it was to the left rather than the right: a firmer foundation for affirmative action, a constitutional framework for gay rights.

The challenge is to understand what happened. To the degree that it can be explained, the experience of this natural court might prove useful in predicting the nature of the next one, or at least in suggesting those attributes in a new justice that might be most likely to change the closely divided court, or to keep it running

on the same course.

Many factors influence the court at any given moment. One is the quality of interaction among justices on a court where little can be accomplished without five votes. Another is the flow of cases and the issues they bring to the court's door. Still another, often too little appreciated, is the reality check the court receives from the lower courts that have to interpret and apply its decisions.

But the essential building blocks remain the individual justices themselves: not their résumés or even necessarily their records, but their own sense of identity and place in the mix of law, history and politics that is always swirling around the court.

"Sandra O'Connor temperamentally came out of the mainstream of American society, and that's true of this court as a whole," Paul Gewirtz, a professor at Yale Law School, said the other day. "This court has seen itself as not basically challenging American society as it found it."

Professor Gewirtz said that candidates for the court who "self-identify as critics of the court" are least likely to be changed by the experience of serving there, while "those who feel themselves connected to the basic trajectory of American law remain open to observing changes in society."

The first category is exemplified by Justices Antonin Scalia and Clarence Thomas as well as by Robert H. Bork, whose failed Supreme Court nomination in 1987 was a watershed

event from which the political system has yet to recover. Their "originalist" jurisprudence starts from the premise that in the hands of the modern Supreme Court, the world has fallen away from the ideal—the Constitution as written by its framers—and their mission is to recover that world to the extent possible.

The Supreme Court's "combination of absolute power, disdain for the historic Constitution and philosophical incompetence is lethal," Mr. Bork wrote last week in *The Wall Street Journal*.

On the other hand, a brief essay that Justice O'Connor wrote in 1992, on the threshold of the period just ended, offers dramatic evidence of how service on the court can change another kind of judge. It was a tribute to Justice Thurgood Marshall, who had retired the previous year. During their 10 years of service together, Justice Marshall had influenced her "profoundly," Justice O'Connor wrote in *The Stanford Law Review*. The stories he told from his life spoke to her of "the power of moral truth" and had the capacity to "perhaps change the way I see the world."

These were surprising words from a conservative justice whose jurisprudence, at the time, showed few traces of Justice Marshall's influence. Nor did she necessarily offer her words as prophecy. But to a degree that few would have predicted at the time, they came true. Thurgood Marshall had been dead more than 10 years by the time a noticeably different Sandra Day O'Connor wrote the court's majority opinion in 2003 upholding affirmative action in university admissions.

The discomfort on the right with the prospect that President Bush might name his attorney general, Alberto R. Gonzales, to

succeed Justice O'Connor stems from the fear that he, too, fits in the second category rather than the first. "The impression many conservatives have is that Gonzales is conventional in his legal thinking and unlikely to repair to first principles were he on the court," Terry Eastland wrote last week in the conservative *Weekly Standard*, calling for the attorney general to "take his name off the list for the Supreme Court."

Scholars looking for explanations for the last 11 years point as well to the influence that the lower federal courts exert on the Supreme Court. It is the lower courts that have to make sense of the Supreme Court's opinions and to apply them in new factual contexts. "It's a feedback loop," said Suzanna Sherry, a professor at Vanderbilt University Law School. "You see how your opinions are actually working. You see the problems they create. This court has signaled very clearly that it wanted to move in particular directions. Some of the lower courts took those directions and went further."

The feedback process may account for the Supreme Court's tacking back to the center in death penalty cases in the last several years. For example, a majority of the court had indicated quite forcefully that in evaluating habeas corpus petitions from death row inmates, federal judges should grant more deference to the conclusions of the state courts. But "deference does not imply abandonment or abdication of judicial review," Justice Anthony M. Kennedy said for the court in a 2003 case that ordered a hearing for a Texas death row inmate whose petition a federal appeals court had dismissed. Eight justices joined that majority opinion, with Justice Thomas the only dissenter.

"People have agendas, but one of the

beauties of the court is that it has to shape itself around a set of facts in each case," said James J. Brudney, a law professor at Ohio State University.

Even if Chief Justice Rehnquist, 80 years old and ill with thyroid cancer, is on the bench when the next term begins, it would be no surprise if President Bush soon had

another vacancy to fill. Far from lasting 11 years, the next natural court would then be measured in months, hardly long enough to solve the mysteries of the last one. The new court, too, will have its mysteries. "Every time a new justice comes to the Supreme Court, it's a different court," Justice Byron R. White, who served 31 years, liked to say. "It's a new instrument."

## **“Center Court”**

*New York Times*

June 12, 2005

Jeffrey Rosen

Within hours of the compromise reached by a bipartisan group of senators last month that defused, or at least delayed, a showdown on judicial filibusters, interest groups on the right and the left were denouncing the deal in the most aggrieved terms. "Is there anybody on our side who is happy?" Nan Aron, president of the liberal Alliance for Justice, told *The Times*. Paul Weyrich, founder of the conservative Free Congress Foundation, was even angrier about the deal. "Conservatives are going to be outraged over it," he predicted.

Yet even as interest groups were bemoaning the fact that a handful of centrists had narrowly prevented the Senate from blowing itself up, the country as a whole was applauding the compromise. An independent poll conducted by Quinnipiac University found that 55 percent of respondents thought the filibuster should be used to keep unfit judges off the bench, as opposed to 36 percent who thought it should not. Moreover, the country seemed less worried about partisan judges than about partisan senators and representatives. In the days before the deal, a CBS News poll found that 68 percent of respondents said that Congress "does not have the same priorities for the country" as they do. By contrast, the Quinnipiac poll found that a 44 percent plurality approved of the way the Supreme Court is handling its job.

Put another way, it would seem that, on balance, the views of a majority of Americans are more accurately represented by the moderate majority on the Supreme Court, led in recent years by Justice Sandra

Day O'Connor, than by the polarized party leadership in the Senate, led by Bill Frist and Harry Reid. Congressional Republicans and Democrats are pandering to their bases, wooing conservative or liberal interest groups that care intensely about judicial nominations because they're upset about the current direction of the Supreme Court. Meanwhile, the country as a whole seems to be relatively happy with the court and appears to have no interest in paralyzing the federal government over a confirmation battle that would do little to affect the court's overall balance—a battle that is likely to take place this summer if Chief Justice William Rehnquist steps down.

How did we get to this odd moment in American history, when unelected Supreme Court justices are expressing the views of popular majorities more faithfully than the people's elected representatives? The most obvious culprit is partisan gerrymandering. In the 2000 elections, 98.5 percent of Congressional incumbents won their races definitively (75 percent of them by more than 20 percentage points), thanks to increasingly sophisticated computer technology that makes it possible to draw House districts in which incumbents are guaranteed easy re-election simply by catering to their ideological bases. As a result, Democrats and Republicans in Congress no longer have an incentive to court the moderate center in general elections. This, in turn, has created parties that are more polarized than at any other point in the past 50 years. And since more than half of the current senators previously served as representatives, the radically



partisan culture of the House is now contaminating the Senate.

In the 90's, around the same time that partisan gerrymandering began to divide Congress into armed camps, the Supreme Court moved in a different direction. Under O'Connor's moderate leadership, the court became increasingly adept at representing the more accommodating center of American politics. O'Connor, a former Arizona state legislator, has contributed to a series of compromise opinions in cases involving affirmative action, indirect government aid to religion, gay rights and abortion—all of which, in one way or another, seemed to split the difference between right and left. In reaffirming *Roe v. Wade* in 1992, for instance, the court emphasized that early-term abortions had to be protected but that late-term ones could be restricted—a position embraced by two-thirds of the country but rejected by interest groups on both the left and right.

This isn't to say that the court is always in lockstep with public opinion: sometimes the court ratifies a strong national sentiment (striking down an obsolete state ban on contraceptives), and sometimes it stakes out a position that the public subsequently embraces (striking down school segregation). But whether the moderate justices on the Rehnquist court are self-consciously reading the polls, neutrally interpreting the Constitution or trying to compensate for other polarities in the political system, their high-profile decisions have been consistently popular with majorities (or at least pluralities) of the American public.

In other words, the conservative interest groups have it exactly backward. Their standard charge is that unelected judges are thwarting the will of the people by

overturning laws passed by elected representatives. But in our new topsy-turvy world, it's the elected representatives who are thwarting the will of the people, which is being channeled instead by unelected judges.

Clearly, this is not an ideal situation. If O'Connor were still a legislator, she could be applauded for her moderation and political savvy, but Supreme Court justices are not supposed to align with the opinion polls more reliably than the Senate majority leader. Since judges are increasingly acting as political representatives of the people, it's not surprising that they are increasingly attacked in political terms. Consider the recent wave of judge bashing by Congressional Republicans, who accused judges of impeding the will of the people in the Terri Schiavo case. Never mind that in that case, it was actually the state and federal judges, rather than Congressional Republicans, whose decisions comported with the views of a majority of the public. The fact that politicians now feel emboldened to attack judges with whom they disagree suggests that the polarization in Congress may be threatening the public's respect for judges as neutral arbiters of the law.

Is there any way out of this mess? The filibuster deal is only a stopgap solution that may briefly calm, but can't change, the political dynamics that have radicalized Congress. And of course Congress is unlikely to eliminate partisan gerrymandering on its own, since incumbents will go to great lengths to preserve the partisan districting schemes that guarantee their re-elections.

The only institution that might, in theory, save American democracy from its most polarizing and antidemocratic tendencies

is—paradoxically enough—the Supreme Court. Some scholars have urged the court to impose on the nation a system in which electoral districts are drawn by nonpartisan commissions rather than partisan state legislators. But last year, the Supreme Court rejected the invitation because the justices couldn't agree on how much political competition the Constitution requires. (And just as well, too: the court's ill-advised intervention in *Bush v. Gore* shows the dangers of judicial efforts to save the nation from intractable political disputes. When judges invent novel constitutional principles to remove politics from the democratic process, half the country is likely to suspect them as a pretext for partisanship.)

One way to forestall a potential crisis of democracy is the kind of compromise represented by the filibuster deal, which might produce the more centrist Supreme Court nominees that the public generally prefers. But this won't cure the polarization of politics that has inflated the Supreme Court's importance in the first place. Moreover, the filibuster deal could well collapse, in which case the president and Congress may try to push the courts toward the extreme right to please their base. If they succeed, the Supreme Court, over the long term, could become just as much in the thrall of ideological extremists as the White House and Congress. And then the views of

a majority of the American public might not be represented by any of the three branches of the United States government—an alarming prospect for the world's leading democracy.

If Rehnquist retires later this month, the character of the court is unlikely to change significantly; his replacement will probably be about as conservative as he is. But if and when O'Connor or a more liberal justice retires, the stakes will be far greater. The fact that the center in American politics has to look to Justice O'Connor rather than to Congress to represent its views suggests dangers for both parties down the road. If Congressional Republicans and Democrats repeatedly put the wishes of their bases above the wishes of the public, a provoked national majority may eventually try to throw them out. And if unable to do so because of gerrymandered districts, that majority may be mobilized to elect more moderate politicians by popular initiative, as California voters essentially did in choosing Gov. Arnold Schwarzenegger. Indeed, Schwarzenegger is now trying to ensure that other moderates like himself can be elected. In January, he proposed to replace California's partisan districting system with nonpartisan districting by retired judges. Maybe what's happened in California is the only way to empower the silent majority of Americans to take back their country.

## **“The Year Rehnquist May Have Lost His Court”**

*New York Times*  
July 5, 2004  
Linda Greenhouse

Although it has been 10 years since its membership last changed, the Supreme Court that concluded its term last week was, surprisingly and in important ways, a new court.

It is too soon to say for sure, but it is possible that the 2003-4 term may go down in history as the one when Chief Justice William H. Rehnquist lost his court.

The cases decided in the term's closing days on the rights of the detainees labeled "enemy combatants" by the Bush administration provided striking evidence for this appraisal. The court ruled that foreigners imprisoned at Guantanamo Bay, Cuba, as well as American citizens held in the United States are entitled to contest their classification before an impartial judge.

The surprise lay not in the outcome: it was scarcely a great shock, except perhaps to the administration, that a court preoccupied in recent years with preserving judicial authority would reject the bold claim of unreviewable executive power at the core of the administration's legal arguments. Rather, what was most unexpected about the outcome of the cases was the invisibility of Chief Justice Rehnquist.

It is a remarkable development. Since his promotion to chief justice 18 years ago, his tenure has been notable for the sure hand with which he has led the court, marshaling fractious colleagues not only to advance his own agenda but also to protect the court's institutional prerogatives.

Four years ago, for example, the court reviewed a law by which Congress had purported to overrule the *Miranda* decision, a precedent Chief Justice Rehnquist disliked and had criticized for years. But in the face of Congress's defiance, he wrote a cryptic opinion for a 7-to-2 majority that said no more than necessary about *Miranda* itself but found common ground in making clear that it was the court, not Congress, that has the last word on what the Constitution means.

This year, there was every reason to suppose the chief justice would want to shape the court's response to the war on terrorism. His 1998 book on the history of civil liberties in wartime reflected his extensive knowledge and evident fascination with the subject by which the term, if not his entire tenure, was likely to be known. If there was a message to be delivered from one branch of government to another, Chief Justice Rehnquist figured to be the one to deliver it.

Yet the Guantanamo case found him silently joining Justice Antonin Scalia's dissenting opinion as Justice John Paul Stevens explained for the 6-to-3 majority why the federal courts have jurisdiction to review the status of the hundreds of foreigners detained there.

In the case of Yaser Esam Hamdi, the American-born Saudi taken from the battlefield in Afghanistan and held since 2002 in a military prison, Chief Justice Rehnquist was among the eight justices who found the open-ended detention improper

for either constitutional or statutory reasons. But his was not among the several voices with which the court spoke. He was a silent member—perhaps even a late-arriving one—of Justice Sandra Day O'Connor's plurality opinion.

The implication is not that Chief Justice Rehnquist, who turns 80 on Oct. 1, has lost a step. Nor does he show any interest in leaving the court, which he joined in 1972 at the age of 47. A few days ago, in fact, he hired law clerks for the term beginning in October 2005, and some people believe he is aiming to top the record of 36 years set by Justice William O. Douglas, or at least to equal the 34-year tenure of his judicial hero, Chief Justice John Marshall.

Rather, it appears that while he has stood still, the court's center of gravity has moved away from him. One statistic is particularly telling. There were 18 cases this term decided by five-member majorities (17 were 5-to-4 decisions and one, the Pledge of Allegiance case, was 5 to 3 but would surely have been 5 to 4 had Justice Scalia participated; he would certainly have agreed with Chief Justice Rehnquist, in the minority, that the court should rule that "under God" posed no constitutional problem). Of the 18 cases, Chief Justice Rehnquist was in the majority in only eight.

That contrasts sharply with the chief justice's notably successful term two years ago, when he was in the majority in 15 of 21 5-to-4 decisions. A year ago, he was in the majority half the time, in 7 of 14 cases with 5-to-4 votes, and was on the losing side in the most important of those cases, the decision that upheld affirmative action at the University of Michigan. He was also on the losing side in the Texas gay rights case, in which the court voted 6 to 3 to overturn the state's criminal sodomy law.

Those were the first stirrings of what accelerated during the term that began Oct. 6. The chief justice was in dissent in most major cases, from the expedited ruling in December that upheld major provisions of the new campaign finance law, until the two decisions last Tuesday, the term's final day, blocking enforcement of an Internet pornography law and taking a generous view of federal court jurisdiction under the Alien Tort Statute to hear foreign human rights cases. Also last week, he dissented from the court's refusal to authorize a police interrogation tactic designed to induce suspects to confess despite receiving their Miranda warnings.

Further, the Rehnquist court's federalism revolution, with its expansive approach to state sovereignty and correspondingly limited view of Congressional power, appeared this term to stall in its tracks. The chief justice was on the losing side in the term's major federalism case, the 5-to-4 decision in *Tennessee v. Lane* rejecting state immunity from suit under a provision of the Americans With Disabilities Act.

A number of other cases had federalism overtones that a majority of the court either rejected or ignored. In the case that struck down the sentencing guidelines in the state of Washington, Justice Anthony M. Kennedy objected in dissent that the court was failing to give the states proper respect for their legislative choices on criminal justice. Chief Justice Rehnquist also dissented in that case, which although just over a week old has already left criminal sentencing in turmoil around the country.

Opponents of the McCain-Feingold campaign finance law objected on state's rights grounds to limits on the fund-raising abilities of political parties at the state level. In upholding the law, over Chief Justice

Rehnquist's dissent, the court barely acknowledged the federalism argument.

The chief justice tried and failed to use a Pennsylvania redistricting case this term to overturn a 1986 precedent, to which he had strongly objected at the time, that gave courts authority to review claims of partisan gerrymandering. While there were five votes to reject the particular gerrymander complaint, one of the five, Justice Kennedy, refused to go along completely, instead writing a concurring opinion that kept the prospect of a successful gerrymander suit alive for future cases.

The court decided 73 cases with full opinions during the term. Of the major cases, Chief Justice Rehnquist wrote the majority opinion in two. One was the third of the terrorism detainee cases, that of Jose Padilla, an American arrested at O'Hare International Airport in Chicago on suspicion of being part of a terrorist plot, who has been held in a military prison for the last two years without access to court. The decision postponed resolution of the case by holding that Mr. Padilla's lawyer should have filed his habeas corpus petition in South Carolina rather than in New York.

The second of the chief justice's major opinions came in an important church-state case, *Locke v. Davey*. The question was whether a state that underwrites college scholarships for secular study must also subsidize students who want to study for the ministry. The argument for the religious subsidies built on Chief Justice Rehnquist's opinion for the court two years ago in a school voucher case from Ohio, holding that it did not violate the Constitution for states to give parents vouchers for religious school tuition as part of a general "school choice" plan.

As a practical matter, the future of the school-choice movement depended on the answer to the question *Locke v. Davey* brought to the court: if vouchers were permissible, were they also constitutionally required? Writing for a 7-to-2 majority, the chief justice's answer was no. "The state has merely chosen not to fund a distinct category of instruction," one that was "not fungible" with ordinary secular studies, he said over biting dissents from Justices Scalia and Clarence Thomas.

Largely overlooked in the drama of the term's higher-profile cases, *Locke v. Davey* was an important decision, indicative of the struggle now going on within the court over how far to push some of the principles that the conservative majority has established over the last 10 years or so.

In this instance, although the consequences of turning permissible vouchers into required vouchers would have been profoundly unsettling, the court's recent insistence on an equal place for religion at the public table provided at least a plausible basis for that outcome. Instead, the majority looked at the consequences of carrying the recent precedents to their logical conclusion, and stopped short.

In fact, as *Locke v. Davey* demonstrates, the most consequential debate on the court today may be not so much over first principles, but over how far to carry those principles. That the chief justice was so often on the losing side this term may not mean that those who once agreed with him have changed their minds, but that they disagree over what to do next.

In *Locke v. Davey*, the stopping point appeared clear to a broad majority of the court. In the Tennessee federalism case, by

contrast, while the chief justice wanted to continue pressing the boundaries of state sovereignty to immunize the state from a lawsuit by a man who could not reach a second-floor county courtroom in his wheelchair, Justice O'Connor decided that *Tennessee v. Lane* was not the case in which to push sovereign immunity to its logical conclusion.

The outcome was reminiscent of the court's decision a year ago in the Michigan affirmative action case. Justice O'Connor, long skeptical of all official policies that take account of race, joined Justices Stevens, Ruth Bader Ginsburg, David H. Souter and Stephen G. Breyer to uphold the law school's admissions plan, essentially on the ground that diversity was good for the country.

Pragmatism rather than doctrine seems to be the order of the day at the court now. Justice O'Connor, perhaps the court's leading pragmatist, cast only five dissenting votes in the entire term, far fewer than anyone else, and was in the majority in 13 of the 18 most closely decided cases, more often than any other justice. She formed strategic alliances with other justices, for

example writing an unusual joint opinion with Justice Stevens that upheld the central portions of the campaign finance law.

Justice Stevens displayed his own strategic skills, finely honed during a 29-year tenure that has made him the senior associate justice, in a position to assign the majority opinion in all cases where the chief justice is in dissent. He tailored his majority opinion in *Tennessee v. Lane* to Justice O'Connor's comfort level, for example, and crafted a procedural opinion that removed the highly sensitive Pledge of Allegiance case from the court's docket with surgical precision, leaving no precedent behind. At 84, his intellectual energy appears undimmed, and he told a gathering of his former law clerks a few weeks ago that he has no retirement plans.

So when the new term begins on Oct. 4, the same justices will reassemble for a highly unusual 11th year together. The juvenile death penalty and medical marijuana are among the cases already on a docket that may continue pushing these nine people, so familiar to each other, in new directions.

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## "The Rehnquist Court"

*National Journal*

May 21, 2005

Stuart Taylor, Jr.

Justice William Brennan Jr. was in an animated mood, even for him. It was May 27, 1987, toward the end of the Supreme Court's first term since Justice William Rehnquist's 1986 promotion to chief justice. The Senate vote had been 65-33, amid bitter attacks—even charges of perjury—from liberal groups.

Long the Court's leading liberal, Brennan was sharing with this reporter his assessment (confidential, until now) of the new chief justice, who had long been its leading conservative.

"He's the reason the opinions are coming down faster," enthused Brennan. "He's just been a breath of fresh air. He's so damned personable. No more listening to long harangues in criminal cases [during the Court's private conferences]. He lays his position out, casts his vote. You know exactly where he stands in every god damned case. And he's meticulously fair in assigning opinions. I can't begin to tell you how much better all of us feel . . . and how fond all of us are of him personally."

Rehnquist's predecessor, Warren Burger—known for long harangues and a less-than-fair approach to assigning opinions—had been an easy act to follow. ("If one's in the doghouse with the chief," Justice Harry Blackmun once said of his former best friend Burger, "he gets the crud.") But the affection and respect for Rehnquist among his colleagues, then and now, is nonetheless striking.

Echoing Brennan's praise of Rehnquist to

this reporter a few weeks later, Justice Lewis Powell Jr. added: "In many ways, he's the best-educated person I've ever worked with, very familiar with the classics. He'll quote them at conference. Everybody agrees generally, I suppose, that he's brilliant, but he has a good sense of humor, and he's very generous, and he is principled."

Thurgood Marshall, Brennan's liberal ally on the Court, later called Rehnquist "a great chief justice." This from the man who had been the NAACP's lead lawyer in *Brown v. Board of Education*—and about the man once assailed by liberals for having written in 1952 that the Court should uphold segregated schools and a few months later that it was "about time that the Court faced the fact that the white people in the South don't like the colored people." Not to mention Rehnquist's subsequent advice to Sen. Barry Goldwater to vote against the 1964 Civil Rights Act.

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. . . "[T]he legacy of the Rehnquist Court," Walter Dellinger, a leading scholar who was acting solicitor general in the Clinton administration, has said, "is going to be judicial supremacy and a willingness to set aside the judgments of the other branches of government."

### How Good a Chief Justice?

How will history rate Rehnquist? Putting aside what one thinks of his brand of conservatism, the question can be divided into five categories:

1. Has he persuaded his fractious colleagues to come together in the big cases in ways that enhance public understanding of and respect for the Court?

2. Has he persuaded any of them to move closer to his own brand of conservatism?

3. How impressive are his opinions, dissents, and concurrences as a body of work?

4. Has he led the justices to work hard and effectively at their often unglamorous job of resolving conflicts among lower courts and of fostering clarity and consistency in the law?

5. Has he succeeded in his modest aspiration, voiced in his 1986 confirmation hearing, to foster a "smoothly functioning Court?"

"No chief justice in history has ever gone down as a great one who didn't succeed in massing the Court," Justice Brennan told this reporter in July 1988, in another conversation about Rehnquist.

"Massing the Court," Brennan had previously explained, refers to "the extraordinary responsibility that falls on the shoulders of the chief justice to come as close as we can to unanimity," so that the Court's decrees will be "more readily accepted." The leading example is Earl Warren's successful campaign to win over doubtful colleagues to make unanimous his ground-shaking 1954 ruling against school segregation in *Brown*.

During Rehnquist's second term as chief justice, which had ended a few days before this reporter's July 1988 conversation with Brennan, Rehnquist had written two quite

surprising opinions for the Court, both of them applauded by liberals, and both of them textbook examples of "massing the Court."

In *Hustler v. Falwell*, a unanimous Court reversed a \$200,000 jury award for "intentional infliction of emotional distress" to television evangelist Jerry Falwell against *Hustler* magazine, which had run a savage, ribald parody of him and his mother. Rehnquist endorsed and extended a line of decisions—beginning with Brennan's own landmark 1964 opinion in *New York Times v. Sullivan*—designed to give "breathing space" to First Amendment freedoms by curbing libel suits. This from the same Rehnquist who had consistently rejected such First Amendment defenses in the past and had said that *Sullivan* "should be reconsidered."

In *Morrison v. Olson*, Rehnquist wrote a landmark decision for a 7-1 majority (with Scalia dissenting) upholding the now-lapsed federal law providing for judicial appointment of independent counsels to investigate possible high-level crimes. This was a stunning rebuff to the Reagan administration and its claim of exclusive presidential power over prosecutions.

Brennan was especially enthusiastic, and not only because he strongly agreed with these two opinions. Brennan was also "anxious for [Rehnquist] to have a career ranking with [the] great chief justices," he said. And he was cautiously hopeful that Rehnquist might be on his way. "His votes and opinions in [those] cases are not the way you would have expected him to vote, and not the kind of opinions you would have expected him to write a couple years ago," Brennan said. "He senses . . . that he, as chief justice, has an obligation to accommodate his views to those of the



majority when he can. And if that's what's happening, it's terribly important."

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### A Chief With No Followers

For the most part, however, Rehnquist has voted with Scalia and Thomas, often in dissent. And the Rehnquist Court has been known less for "massing" than for deep liberal-conservative divisions and for splintering, in many cases, into three or four camps.

The paradigm of a splintered, badly written decision that fostered public confusion and disrespect for the Court was *Bush v. Gore*, which spurred a storm of charges that the justices had let partisan politics trump their own legal principles.

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In short, regardless of whether the outcome was correct, the opinions were a mess. But in fairness, it's unclear whether anyone could have done what Rehnquist failed to do: unite more than a bare majority of the justices behind a clear and credible opinion. And, in what was widely seen as an implicit defense of the decision on pragmatic grounds, Rehnquist said in a speech less than a month after the decision that sometimes "there is a national crisis, and only you can avert it."

Other conspicuous examples of Rehnquist's inability to mass the Court were last June's decisions rejecting two sweeping Bush administration claims of wartime executive power. . . .

Surely Rehnquist, who had written a 1998 book on the history of civil liberties in wartime, must have wanted a central role in

these, the biggest wartime civil-liberties cases in more than 50 years. Yet he wrote nothing. He joined O'Connor's plurality opinion in *Hamdi*, which produced four opinions, none for a majority, that raised more questions than they answered. And he was simply a name on Scalia's dissent in the Guantanamo case, in which Stevens wrote a majority opinion so cryptic as to mystify lower courts about what to do next.

None of this necessarily proves that Rehnquist's powers of persuasion are inferior to Warren's. *Brown*, in which unanimity was far more critical to the Court's credibility than in any decision since, was highly exceptional. The vast majority of the justices in recent history have been "as independent as hogs on ice," as Rehnquist once said. And it would be hard to identify many (if any) big cases in the past 50 years in which Rehnquist or any other chief justice has successfully "massed the Court" in the same way that Warren did in *Brown*: not by modifying his own views, but by persuading doubtful colleagues to modify theirs.

In this sense, the symbolic prominence of Rehnquist or any other chief justice is vastly out of proportion to his actual power. The chief has only one vote. That's why the liberals and conservatives preparing for the mother of all confirmation battles (sooner or later) know that the Court's future will depend much less on who becomes the next chief justice than on who comes in from the outside.

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### Doing Less Justice

Rehnquist—or, at least, the Rehnquist Court—gets low marks from some critics on the subject of fostering consistency and

clarity in the law. The main reason is that the Court has slashed the number of cases it decides.

The number of signed opinions has plunged from 147 in the 1985-86 term to 73 in the 2003-04 term. The Court now grants review in only a fraction of 1 percent of its annual flood of some 8,000 petitions for certiorari. ("Cert petitions" are requests that the Court hear and decide appeals on the merits; they include roughly 6,000 almost invariably frivolous petitions prepared by indigents.) This trend has left more conflicts among lower courts unresolved. Experts disagree on whether that is a bad thing.

"The justices inexplicably have decided not to do as much as the taxpayers pay them to do," wrote Philip A. Lacovara, a prominent lawyer who has argued 17 cases before the Court, in a statistic-laden December 2003 commentary in *The American Lawyer*. "This is a shockingly low-performance record. . . . Throughout most of its history, the Court addressed important issues of federal commercial law. . . . Now [it] disdains ordinary commercial law issues as unworthy of the justices' time."

But a longtime observer of the Court's work (who requests anonymity) disputes the notion that the justices are passing over lots of cases that they should review. "The Court doesn't have to decide every case about spitting on the sidewalk," this observer says. He adds that much of the drop in signed opinions since 1986 is attributable to a 1988 law abolishing the requirement that the Court hear "mandatory appeals" in certain classes of cases, most of which the justices considered a waste of their time.

The decline in signed opinions is also related to the Court's ever more cursory

review of each cert petition. Brennan used to read them all personally, and other justices would at least assign a law clerk to summarize each petition. But over the past 15 years, all but Justice John Paul Stevens have joined the so-called "cert pool." This pool delegates to a single, shared clerk the duties of eight justices to evaluate each petition.

"Eight of the justices rely primarily on that single pool memorandum in deciding whether to grant review," Lacovara explained. This helps shrink the Court's docket. Twenty-something clerks may not be captivated by important but unsexy commercial or regulatory disputes. They may also err on the side of recommending denial of review, because they risk serious embarrassment if they suggest a full review of a case that the justices later decide was inconsequential.

Does the Court use the time saved by deciding fewer cases to improve its opinions in those few? No, wrote Lacovara, and many other Court-watchers would agree. Indeed, many decisions have been muddled by increasing prolixity and by the proliferation of separate concurring, dissenting, and mixed concurring-and-dissenting opinions.

How hard do the justices work, now that their caseload is smaller—and now that the eight oldest range in age from 65 to 85?

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### **The Judgment of History**

Is Rehnquist a great chief justice? That depends on what the meaning of "great" is.

He has zealously guarded the Court's prerogatives in his push for judicial

enforcement of states' rights against Congress, in *Dickerson*, in *Bush v. Gore*, and in some other cases. Perhaps that's part of a chief justice's job. But in the process, the Rehnquist Court has carried on the relentless expansion of judicial power that has spawned so many conservative attacks since the 1950s, including Rehnquist's own early criticisms of the Warren Court.

At the same time, the Rehnquist Court has not come close to speaking with a clear or cogent voice—let alone with unanimity or near-unanimity—in many of the biggest cases. But it's doubtful that any chief justice could have done much better on that score, given the independence and fractiousness of the other justices and the unheroic, polarized temper of the times.

The justices' dramatic cutbacks in the time that they (and their clerks) spend screening cert petitions, and in the number of full decisions that they issue, have made life easier for them. But such reductions have also left the law less clear than it could be and lower courts with less guidance than

before Rehnquist became chief justice.

On balance, a mixed record. Perhaps, however, Rehnquist should be assessed primarily in terms of the criteria most within the chief justice's control: his own opinions and dissents; his success in winning the esteem of colleagues; his efficiency in administering the Court's business; his effectiveness in presiding over oral arguments and other public sessions; his expediting of discussion in the Court's conferences; and his assigning of opinions fairly.

Rehnquist's opinions don't draw praise from scholars as models of judicial craftsmanship, consistency, or candor. But neither did Earl Warren's. Or Warren Burger's. As to the other criteria, Rehnquist has led the Court (as he presided over the Clinton impeachment trial) with efficiency, dignity, and appropriate seriousness, punctuated by dollops of his humor. He is "a regular guy," in the words of his former clerk Charles Cooper, "in addition to being a damned genius."

## **"The Rehnquist Revolution"**

*The New Republic*

January 10, 2005

Cass R. Sunstein

A review of: *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, by Mark Tushnet (W.W. Norton, 384 pp., \$27.95).

. . . In its first seventy-five years, the Supreme Court struck down only two acts of Congress. In the eighteen years since Ronald Reagan nominated William H. Rehnquist as chief justice, the Court has invalidated more than three dozen. Under Rehnquist, the Court has compiled a record of judicial activism that is, in some ways, without parallel in the nation's history. Its most controversial majority opinions have usually been produced by its two moderate conservatives, Sandra Day O'Connor and Anthony Kennedy, and its three more extreme conservatives, Rehnquist, Antonin Scalia, and Clarence Thomas.

Rehnquist is now extremely ill, and it is widely rumored that he will be leaving the Supreme Court soon. An unfailingly gracious and generous man, Rehnquist must be counted as one of the giants of American law, because he has presided over and greatly contributed to a Supreme Court that has radically revised previous understandings of the Constitution. Since joining the Court as associate justice in 1971, Rehnquist has had a clear agenda for constitutional interpretation: to renew limits on Congress's power under the commerce clause, to increase the protection of private property, to strike down affirmative action programs, to scale back the use of the Constitution to protect those accused of crime, to reduce the protection of privacy, to stop the use of the equal protection clause to

assist members of disadvantaged groups (disabled people, the elderly, illegitimate children, women), and much more. The Rehnquist Court has not always acted in accordance with the views of William Rehnquist, but it has moved dramatically in his preferred directions. What complicates the picture is that O'Connor and Kennedy have frequently insisted on caution. In some cases, the result has been to lead the Rehnquist Court to respect for precedent, to restraint, and to a modest but unmistakable degree of continuity with the rights-protecting decisions of the Warren Court.

In Mark Tushnet's account, the division between the two sets of conservatives on the Court corresponds to a deeper division, one that has played a large role in modern American politics. O'Connor and Kennedy represent the older and more traditional wing of the Republican Party, and Scalia, Thomas, and Rehnquist represent the modern Republican Party as it has been transformed by Barry Goldwater and Ronald Reagan. The latter side of the party is far more radical, for it rejects "the principles that animated our government from the New Deal through the Great Society." Tushnet thinks that we have an emphatically Republican Supreme Court whose majority is split between the party's two wings.

In his view, the old Republicans on the Supreme Court have worked with the new ones to produce significant constitutional change, above all by limiting the power of the national government. But the new Republicans, including the chief justice, have been abandoned by the older ones on

the social issues: thus the Court has refused to move in radically conservative directions on such issues as abortion, affirmative action, gay rights, and the separation of church and state. Tushnet's conclusion is that "the Court's economic conservatives won and its cultural conservatives lost." And the reason is that in politics, too, economic conservatives have been winning and cultural conservatives have been losing. The outcomes on the Rehnquist Court reproduce the outcomes in the American political process.

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My own view is that the real divisions in the Rehnquist Court involve two radically different approaches to constitutional law. In a nutshell: O'Connor and Kennedy are incrementalists, reluctant to make large-scale changes in existing understandings of the law. Scalia, Thomas, and (to a lesser extent) Rehnquist are legal fundamentalists, or "movement judges," eager to insist on the supremacy of their own view of the Constitution, whatever the precedents say.

Most of the time, O'Connor and Kennedy are certainly conservatives. But they tend to decide cases one at a time. They respect precedent, even when they disagree with it. They do not want to revolutionize the law by reference to first principles. They also show some interest in public opinion, or in what Kennedy has called "evolving social values." Apparently they believe that the Constitution's meaning changes over time; and they think that evolving values play a legitimate role in the interpretive process. Hence, perhaps, their willingness to invalidate laws that interfere with sexual privacy and that discriminate against women. In all these ways, O'Connor and Kennedy are quintessential common-law judges, distrustful of general theories and

broad rules, and willing to adjust the law to new conditions and emerging principles.

Scalia and Thomas are altogether different. (Rehnquist is generally with them, but he is somewhat more cautious. In his early days on the Court, he was a bit of a firebrand, carrying out the role now associated with Scalia; but as chief justice he has seemed more moderate, perhaps because of the requirements of his new role, perhaps because the Court as a whole has moved far to the right, and thus has often joined him.) Scalia and Thomas are radicals, seeking to make large-scale changes in constitutional law. They are angry about existing law in a way that O'Connor and Kennedy are not. . . .

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. . . For many admirers of Scalia and Thomas, the real target now is Franklin Delano Roosevelt, not Earl Warren. There is increasing talk of restoring what is being called the Constitution in Exile—the Constitution as of 1932, Herbert Hoover's Constitution, before Roosevelt's New Deal. This was a period in which the Supreme Court's understanding of the Constitution, obviously rooted in the justices' political convictions, jeopardized maximum-hour legislation, minimum-wage legislation, the National Labor Relations Act, the Fair Labor Standards Act, and the Social Security Act—and would certainly have forbidden the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. This was also a period in which racial segregation was constitutionally fine, and in which it would have been ludicrous to say that the Constitution banned sex discrimination or protected a right to sexual and reproductive privacy.

The Bush administration does not lack

sympathy for the Constitution in Exile, and President Bush has nominated judges who appear to believe that it should be restored. Conservatives speak of "strict construction," but most of them do not practice it. Few are willing to argue that judges should stay out of the democratic arena. *Bush v. Gore* was a far more radical intervention into political processes than anything dared by the Warren Court, and it is celebrated rather than reviled. And *Bush v. Gore* is merely the most visible of a long line of cases in which the Rehnquist Court has seized on ambiguous constitutional provisions to invalidate decisions of Congress and state governments.

Even in its aggressive moments, the Rehnquist Court has not suggested that the Constitution was properly understood by the Supreme Court in 1932. But in limiting national authority to protect disadvantaged groups and in protecting property rights, it has shown unmistakable sympathy for the pre-New Deal Constitution. This is a political program in legal dress. The harsh irony is that the program has been advanced especially aggressively by those members of the Rehnquist Court who contend, and even appear to believe, that they are speaking neutrally for the Constitution.

## **“A Look at a Rehnquist Legacy”**

*Washington Post*

June 6, 2005

Charles Lane

Will the chief justice of the United States, William H. Rehnquist, retire when the Supreme Court's term concludes at the end of this month? Rehnquist's advanced age, 80, and recent treatments for thyroid cancer make it seem more than likely that he will. Yet, if anything, the chief justice seems to have rallied in recent months, returning to the bench to conduct oral arguments, writing opinions and even reading some from the bench, albeit with difficulty.

Whether Rehnquist leaves the court now or later, he is probably in the twilight of a remarkable and lengthy career. The assessment of his impact on the law during 33 years on the court (more than 18 of them as chief justice) has begun.

And though it is perhaps not the most cheerful of subjects, one clear legacy of the Rehnquist court is its contribution to accelerating the pace of executions in the United States.

The Rehnquist court, in tandem with Congress, took some key steps during the 1980s and 1990s to reduce time-consuming death row appeals. These appeals had generally taken the form of petitions in federal court for writs of habeas corpus, based on alleged constitutional defects in a particular defendant's trial.

Partly as a result, the number of executions in the United States reached a modern annual peak of 98 in 1999—before declining to last year's total of 59.

Reducing death row litigation was

"something he cared about as much as anything else," George Kendall, a longtime capital defense lawyer based in New York, said of Rehnquist. "He never thought the federal courts should have this kind of authority."

Indeed, when he was a law clerk for Justice Robert H. Jackson in the early 1950s, Rehnquist wrote disparaging memos about what he saw as the overuse of federal habeas corpus. Referring to the last-ditch appeals of the convicted Soviet atomic spies, Julius and Ethel Rosenberg, he wondered why "the highest court of the nation must behave like a bunch of old women every time they encounter the death penalty."

But the Warren court of the 1950s and 1960s, concerned about the violations of defendants' rights in the southern states' courts, opened the door to fairly wide use of federal habeas corpus by death row prisoners. This contributed to a de facto end of executions by 1967, even though juries continued to sentence convicted murderers to death. "Appeals, not public opinion, put a temporary end to capital punishment in the United States," University of California at Los Angeles law professor Stuart Banner observes in his book, *The Death Penalty: An American History*.

The Supreme Court ended capital punishment in 1972, only to approve its reinstatement in 1976. But habeas corpus appeals continued to stall executions—excessively so in the view of Rehnquist.

"Of the hundreds of prisoners condemned to

die who languish on the various 'death rows,' few of them appear to face any imminent prospect of their sentence being executed. Indeed, in the five years since [capital punishment's reinstatement] there has been only one execution of a defendant who has persisted in his attack upon his sentence," Rehnquist, then an associate justice, wrote in a dissenting opinion. "I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system."

In 1988, the recently confirmed Chief Justice Rehnquist formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, and appointed retired justice Lewis F. Powell Jr. as its chair. The committee's 1989 report noted that "society is rightfully entitled to have the penalty prescribed by law carried out without unreasonable delay."

In two subsequent decisions that Rehnquist supported, 1989's *Teague v. Lane*, written by Justice Sandra Day O'Connor and 1991's *McCleskey v. Zant*, written by Justice Anthony M. Kennedy, the court sharply restricted the rights of death row inmates to ask federal courts for habeas corpus relief.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act. Signed by President Bill Clinton, it incorporated the principles of the Powell

committee and the Rehnquist court's decisions, and further tightened the limits on multiple death row appeals. Rehnquist and his fellow conservatives on the court expedited constitutional review of the new law. It was upheld in a unanimous ruling, written by Rehnquist.

In his Jan. 1, 1998, annual report on the federal judiciary, Rehnquist noted approvingly: "As of June 1997, the number of habeas corpus applications has fallen well below the average number of monthly filings during the 15 months prior to the law's enactment in April 1996."

The debate over this aspect of Rehnquist's record has already begun, and will undoubtedly continue long after he has left the scene.

Kendall said the chief justice would be remembered for rolling back much-needed "criminal justice reforms" of the Warren court.

But Charles L. Hobson, a lawyer with the Sacramento-based Criminal Justice Legal Foundation, which backs prosecutors and police in constitutional cases, praised Rehnquist for helping put the will of pro-death penalty voters and state legislators into effect. "If you don't have executions, you don't have capital punishment," Hobson said.