J. Byron McCormick Lecture

THE LAST DAYS OF THE REHNQUIST COURT: THE REWARDS OF PATIENCE AND POWER

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I. A SURPRISING ANNOUNCEMENT

You have the right to remain silent.

Anything you say can be used against you in a court of law.

You have the right to the presence of an attorney.

If you cannot afford an attorney, one will be appointed to you prior to any questioning if you so desire.[1]

I heard these words intoned from the bench as I sat in the courtroom of the United States Supreme Court on the morning of June 26, 2000.[2] Anomalously, they were coming from the center of the bench, from the lips of Chief Justice William H. Rehnquist, who had just told the courtroom audience that he was the author of the Court's opinion in *Dickerson v. United States*[3] and that he was about to announce the holding.

Dickerson, as nearly everyone in the courtroom that morning knew, was the case that asked the Court to overturn *Miranda v. Arizona*, the 1966 landmark case that required the police, before interrogating a suspect in custody, to give the

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1. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (emphasis added).

2. Linda Greenhouse, *Justices Reaffirm Miranda Rule, 7-2; A Part of 'Culture,'* N.Y. TIMES, June 27, 2000, at A1.

3. Dickerson v. United States, 530 U.S. 428 (2000).

specific advice, the so-called Miranda warnings, that the Chief Justice had just read.[4] The question in *Dickerson* was the constitutionality of a federal law, known generally as § 3501,[5] by which Congress, two years after the decision in *Miranda*, sought to restore the case-by-case test of a confession's voluntariness, the very test the Supreme Court had rejected in *Miranda*.[6]

The history of how § 3501 had lain dormant for thirty years, only to spring to life in the closing months of the Clinton Administration, is not relevant here. Suffice it to say that *Dickerson*'s sudden progress through the federal courts and its arrival on the Supreme Court's doorstep was a matter of considerable public fascination and enormous controversy within the criminal justice establishment. It is hard to overstate either the degree to which the *Miranda* decision had for a generation stood as the symbol of the Warren Court's criminal justice revolution or the fervor with which those who deplored the legacy of that era in the Court's history had kept *Miranda* in their sights.

It was clear to many in the courtroom on that June day three years ago that Chief Justice Rehnquist had been prominent among the decision's critics. Only two years after joining the Court, for example, he wrote in *Michigan v. Tucker*,[7] which held that the Constitution did not require excluding the "fruits" of a *Miranda* violation,[8] that *Miranda*'s required warnings "were not themselves rights protected by the Constitution"[9] but were merely "prophylactic"[10] and "procedural" devices, in the nature of guidelines for the police.[11]

When the author of a Supreme Court opinion begins the oral announcement from the bench, the audience does not yet know the bottom line. So when Chief Justice Rehnquist said that he had the Court's opinion to announce in *Dickerson v. United States*, it is safe to assume nearly everyone in the courtroom believed they were about to hear the explanation for a decision upholding § 3501 and in effect overruling *Miranda*. Only if *Miranda* had announced a constitutional rule, after all, would the Court have a basis for declaring that Congress's legislative tinkering had itself been unconstitutional. As the Chief Justice intoned the Miranda warnings, I wondered whether, as the law of the land—as opposed to an old movie or late-night rerun—I was hearing them for the last time.

And so it was a surprise, to say the least, when the Chief Justice, who turned out to be speaking for a seven-to-two Court, declared that not only had *Miranda* and its warnings "become part of our national culture"[12] but that the decision had indeed "announced a constitutional rule" that could not be overturned

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4. *Miranda*, 384 U.S. at 478–79.
5. 18 U.S.C. § 3501 (2000) (held unconstitutional by *Dickerson v. United States*, 530 U.S. 428 (2000)).
6. *Dickerson*, 530 U.S. at 432.
7. Michigan v. Tucker, 417 U.S. 433, 439, 444 (1974).
8. *Id.* at 453 (Brennan, J., concurring).
9. *Id.* at 444.
10. *Id.* at 439.
11. *Id.* at 445.
12. *Dickerson*, 530 U.S. at 443.

by an act of Congress.[13] In his written opinion, he elaborated: "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. But Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[14] Although "we concede that there is language in some of our opinions" supporting a different view, he continued, "*Miranda* is a constitutional decision."[15]

The decision in *Dickerson* dismayed many admirers of the Rehnquist Court. In his recent book on the Supreme Court, Kenneth W. Starr, the former solicitor general, writes that "[o]f course, overruling *Miranda* would have been the best result"[16] and basically accuses the majority of wimping out through a misplaced attachment to *stare decisis* and a "natural defense mechanism on the part of the judiciary" against the storm of protest that would have ensued.[17] *Dickerson* offered a golden opportunity to correct a famous mistake, the disappointed Starr tells us, "but the court, dominated by the moderates and joined by the Chief Justice, was unwilling to change course."[18]

I have a different explanation for what happened in *Dickerson*, one that puts the case in a broader context, namely the jurisprudence of William H. Rehnquist and of the Court he has served for thirty-one years and led for the last seventeen.

The title of my lecture promises something that in fact I do not plan to deliver. I have no idea whether these are, literally, "the last days of the Rehnquist Court." That they are is perhaps more likely now, following the November elections and the return of the Senate to Republican control, than it was last summer when I had to submit a title for this talk. I really don't know. But clearly the Rehnquist Court is in its final *phase* if not its final days, and so my real intention has from the beginning been to use this opportunity to reflect on the extraordinary trajectory of a man whom you in this state and at this law school know very well. It has occurred to me that perhaps it's presumptuous of me to come here to Tucson to talk about him at all. Yet how could someone with my vantage point, twenty-five years of observing the day to day operations of the Supreme Court, not want to talk about William Rehnquist? The Court is in an enormously interesting and consequential period, and to a degree that few would have predicted when he became Chief Justice in 1986, the Court at this moment is his reflection. I feel certain that when his tenure does end, he will be judged to have been one of the most successful and significant Chief Justices in the Court's history. So I would like to use my time with you this morning to offer a qualified and preliminary assessment of the Rehnquist years.

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13. *Id.* at 444; *see also Miranda*, 384 U.S. at 445 (indicating the Court thought it was announcing a constitutional rule).

14. *Dickerson*, 530 U.S. at 437.

15. *Id.* at 438.

16. KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 207 (2002).

17. *Id.* at 206.

18. *Id.*

Let me first explain the qualifications. I don't plan to be comprehensive: time does not permit it, and you would not want to sit through such an inventory. Neither do I plan to be especially judgmental; it's not my role as a journalist to give grades to the public figures I cover. I define "success" not necessarily as progress, by my or any particular observer's measure, but as the accomplishment of defined objectives. I want to focus on some of the characteristics of his work on the Court that strike me as the most salient and potentially useful for the comprehensive assessments that are sure to come.

Even the most cursory review of William Rehnquist's judicial career suggests the roots of his success: the unusual qualities of sustained focus and consistency of vision that he has brought to his job, both with respect to the Supreme Court's role in the American system and to particular areas of the Court's jurisprudence. I will suggest an explanation for his willingness to invoke, and even to enhance, the Court's power, and will then examine his substantial accomplishments in areas as disparate as federalism, capital punishment, religion, and race.

II. IN THE SHADOW OF JOHN MARSHALL

As my launching pad for this enterprise, let me offer another courtroom scene. February 4, 2001 marked the bicentennial of John Marshall's swearing-in as the fourth Chief Justice. The Court was in recess on that day two years ago, so Chief Justice Rehnquist had to wait until later that month, on February 20th, to engage in a rare departure from his usual formulaic convening of a morning argument session of the Court. He began by noting the anniversary that had so recently passed. Then he said:

> I am quite convinced that Marshall deserves to be recognized along with George Washington, Alexander Hamilton, and Thomas Jefferson as one of the "founding fathers" of this country. Marshall served as Chief Justice from 1801 until 1835 . . . and authored more than 500 opinions, including most of the important cases the Court decided during his tenure. Using his remarkable ability to reason from general principles to conclusions based on those principles, he derived from the Constitution a roadmap of how its checks and balances should be enforced in practice. I do not think I am overstating the case to say that it is in large part because of Marshall's tenure on the Supreme Court that the Third Branch of our government occupies the co-equal position it does today.[19]

The Supreme Court today was "the lengthened shadow" of John Marshall, he concluded.[20]

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19. William H. Rehnquist, *Remarks from the Bench on the Occasion of the 200th Anniversary of John Marshall's Swearing-In as Chief Justice*, Feb. 20, 2001, J. SUPREME CT. U.S., Feb. 20, 2001, at 549, *available at* http://www.supremecourtus.gov/orders/journal.html

20. *Id.*

Parenthetically, this was not the only, let alone inevitable assessment of Marshall's role in Supreme Court history. On a similar occasion one hundred years earlier, Oliver Wendell Holmes, then Chief Justice of the Massachusetts Supreme Court, marked the centennial of John Marshall's swearing-in with a somewhat more skeptical, or at least less worshipful, appraisal of his claim to greatness: "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*."[21]

Passing over the historic debate over whether the Judicial Branch should in fact occupy the powerful position that Chief Justice Rehnquist praised his predecessor for having bestowed upon the Court,[22] two points are clear. One is that John Marshall, whose seated bronze figure, bigger than life and notably handsome, occupies a prominent position in the Court's ground-floor public hallway, is Chief Justice Rehnquist's judicial hero.[23] The second is that the Supreme Court, in his view, properly expresses its assigned role not only by a muscular exercise of the power of judicial review but by repeated assertion of a claim to unique ownership of the task of constitutional interpretation. We have grown so accustomed to watching the Court act on this understanding of its role in the last few years that this definition may appear self-evident. But such a role for the Court in a system in which all public officials swear to uphold the Constitution is neither self-evident nor beyond debate.[24]

This brings us back to *Dickerson*. It is significant that the single case the opinion cited for the absence of congressional authority to "supersede our decisions interpreting and applying the Constitution"[25] was a 1997 decision of the Court, *City of Boerne v. Flores*.[26] This was the decision that invalidated the Religious Freedom Restoration Act,[27] Congress's expression of dissent from the holding in *Employment Division, Oregon Department of Human Resources v. Smith*[28] that states do not need any special justification for rejecting Free Exercise-based claims to exemption from neutral laws of general applicability. Under the

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21. Oliver Wendell Holmes, *John Marshall*, *in* THE ESSENTIAL HOLMES 207 (Richard A. Posner ed., 1992).

22. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

23. *See* Linda Greenhouse, *Thinking About the Supreme Court After* Bush v. Gore, 35 IND. L. REV. 435, 438 (2002).

24. Robert Post and Reva Siegel have offered trenchant criticism of what they call the "juricentric" vision of the separation of powers that assigns solely to the courts the role of interpreting the Constitution. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1 (2003).

25. *Dickerson*, 530 U.S. at 437.

26. City of Boerne v. Flores, 521 U.S. 507, 517–21 (1997) (discussing the scope of Congressional authority).

27. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 (1994)) (held unconstitutional by *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

28. Employment Div., Ore. Dep't. of Human Res. v. Smith, 494 U.S. 872 (1990).

Religious Freedom Restoration Act (RFRA), by contrast, the government would need to show a compelling state interest before it could permit any such law—a zoning or licensing law, for example—to trump a claim under the Free Exercise Clause.[29]

In striking down the RFRA, the Court held that Congress lacked authority, under its Section 5 power to enforce the Fourteenth Amendment, to give substantive content to the Constitution. Congress could not be more protective of constitutional rights than the Court itself. *City of Boerne* was at least implicitly a rejection of the vision of shared constitutional interpretation expressed a generation earlier in *Katzenbach v. Morgan*,[30] in which the Court upheld a provision of the Voting Rights Act, a Section 5 enactment, that prohibited English-literacy tests for voting eligibility even though the Court itself had ruled that literacy tests were not unconstitutional.[31] The Court in *Katzenbach* interpreted Section 5 as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[32]

Of course § 3501, the anti-*Miranda* statute the Court struck down in *Dickerson*, was a congressional constriction, not expansion, of a constitutional right. The Chief Justice's citation of *City of Boerne* was arguably an exercise in over-pleading: to show that Congress may not interpret the Constitution more narrowly than the Court, a self-evident constitutional proposition if there ever was one, you hardly need to invoke the much more problematic proposition that Congress may not interpret the Constitution more broadly, either. But the point is that in Chief Justice Rehnquist's view, Congress may not interpret the Constitution *at all*. It may enforce the Constitution, through legislation that is congruent and proportional, as specified in *City of Boerne*,[33] but it may not give the Constitution substantive content.

That was the message of *Dickerson*.[34] What Kenneth Starr interpreted as a sign of the majority's weakness was actually simply one more in a series of stunning declarations of judicial supremacy, of which *Bush v. Gore*[35] is the most notable but not the last example. While the current federalism cases beginning in 1995 with *United States v. Lopez*,[36] the first Supreme Court decision since the New Deal to invalidate a federal law as having exceeded congressional authority under the Commerce Clause, are usually depicted as states-rights cases, they are perhaps more accurately seen as cases about the role of the Supreme Court.

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29. 107 Stat. 1488.

30. Katzenbach v. Morgan, 384 U.S. 641 (1966).

31. *Id.* at 648.

32. *Id.* at 651.

33. *City of Boerne*, 521 U.S. at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

34. *See* Linda Greenhouse, *A Turf Battle's Unlikely Victim*, N.Y. TIMES, June 28, 2000, at A20.

35. Bush v. Gore, 531 U.S. 98 (2000).

36. United States v. Lopez, 514 U.S. 549 (1995).

III. THE SOURCES OF SUPREMACY

To label Chief Justice Rehnquist as perhaps the leading modern expositor of judicial supremacy begs the question of how this lifelong conservative came to hold such an exalted view of the Court's power. Perhaps it was his heady experience as Justice Robert H. Jackson's law clerk for eighteen months in 1952–53. In a brief personal memoir that he included in the book of Supreme Court history he published in 1987,[37] he vividly described driving from his parents' home in Milwaukee to Washington, D.C. for the mid-winter beginning of his clerkship, navigating an unnerving snowstorm in his ten-year-old unheated Studebaker and battling some self-doubt over his qualifications for the job. Arriving for the first time in his life at the Supreme Court building, he was invited by his co-clerk to sit in on the argument session that was about to begin. The Marshal's opening cry, "God save the United States and this honorable Court," "moved me deeply," he wrote, adding that regular exposure both as a law clerk and member of the Court had not dimmed his enthusiasm for the "stirring ceremony."[38] His lifelong institutional respect and affection for the Court is evident.

That description, of course, would fit many members of the Court, and does not explain why William Rehnquist, of all these Justices, would have committed his tenure to the maximum exercise of the Supreme Court's power. One possible explanation is that unlike most people who have served on the Court, coming to it in mid-life through a confluence of politics and of being in the right place at the right time, Rehnquist has had the Court at the center of his consciousness since his formative years as a young lawyer and, further, that he has been deeply persuaded for all that time that the modern Supreme Court has been in many ways and quite seriously on the wrong track. It is clear that during his clerkship he felt himself to be an odd man out, a mature conservative among jejune liberals. He was twenty-seven years old, a World War II veteran and the holder of two master's degrees as well as the Stanford law degree he earned while the top student in his class. In his memorandum to Justice Jackson in 1952, discussing the pending decision in *Brown v. Board of Education*[39] and arguing the position that *Plessy v. Ferguson*'s[40] doctrine of "separate but equal" should be reaffirmed, he wrote that "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues. . . ."[41]

And a few years after his clerkship, he wrote an article in *U.S. News & World Report* complaining that Supreme Court law clerks as a group had a "liberal" bias that led to "extreme solicitude for the claims of Communists and

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37. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (Alfred A. Knopf 2001) (1987).

38. *Id.* at 13.

39. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

40. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

41. This memorandum came to light during WHR's first confirmation hearing in 1971 and has been included in many published accounts of his career. *See, e.g.*, TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 2 (2000).

other criminal defendants, expansion of federal power at the expense of State power, [and] great sympathy toward any government regulation of business."[42]

The source of such convictions is beyond the scope of this inquiry. But whatever their source, the strength with which the young Rehnquist held them is unmistakable. I'm reminded of Proust's character, the actor at the Palais-Royal, "who, when asked where on earth he managed to find his astounding hats, answered, 'I do not find my hats. I keep them.'"[43] In any event, it was only a dozen years after that 1957 article, years that he spent practicing law and working in Republican politics in Phoenix, that William Rehnquist returned to Washington and to the Supreme Court's outer orbit as assistant attorney general in charge of the Office of Legal Counsel—the Justice Department's constitutional law policy shop—in the Nixon Administration. It is plausible to assume that at the age of forty-five, this new political appointee was no *tabula rasa*, but that he arrived back in Washington with a set of firmly held views on the constitutional issues of the day. And a person in his position, and with his views, could easily conclude that since the Supreme Court had spent years misusing its power and wrenching constitutional law off its proper foundations, the appropriate strategy was to harness that same power to set things right. A diffident Supreme Court with a passive jurisprudence could never accomplish that goal: fight power with power. Within three years of his return to Washington, William Rehnquist was on the Supreme Court.

IV. THE REHNQUIST LEGACY

Any survey of Chief Justice Rehnquist's subsequent career on the Court will yield two immediate observations: the consistency of his views, and his success over time in translating those views into majority opinions. The early scholarship on the Rehnquist tenure has proven amazingly prescient, and it takes nothing away from the scholars to suggest that their subject assisted them greatly by never shifting course in a way that could make the early-published work obsolete. This is no Harry Blackmun, a life-long supporter of the death penalty, changing his mind at the age of eighty-five and suddenly offering the startling pledge that "[f]rom this day forward, I no longer shall tinker with the machinery of death."[44]

Perhaps the most famous early assessment was that proposed by David L. Shapiro in the December 1976 *Harvard Law Review*, *Mr. Justice Rehnquist: A Preliminary View*,[45] published four years after Justice Rehnquist took his seat. Based on a body of work that by then included 164 signed opinions and

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42. William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74–75, *quoted in* YARBROUGH, *supra* note 41, at 5, 46.

43. MARCEL PROUST, WITHIN A BUDDING GROVE 10 (C.K. Scott Moncleff trans., The Modern Library 1924).

44. Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari).

45. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

participation in disposing of hundreds of other cases, this was an unflattering appraisal that accused Justice Rehnquist of distorting the Court's precedents in service of the "unyielding character of his ideology."[46] The article is known for its summary of three propositions that Professor Shapiro identified as guiding Justice Rehnquist's approach to his work:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
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> (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
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> (3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.[47]

A. Federalism

Sue Davis, a political scientist at the University of Delaware, had another thirteen years of raw material available when she published *Justice Rehnquist and the Constitution*, a comprehensive study of his entire service as Associate Justice, ending with the 1985-86 term.[48] She examined his "particular ordering of judicial values," with federalism at the top and individual rights at the bottom.[49] Her comments on his federalism jurisprudence have proven particularly astute as the years have passed.

Davis writes:

> The federalism that Rehnquist places at the apex of his hierarchy of values entails a vision of the relationship between the federal government and the states that is fundamentally at odds with the view that prevailed on the Court from the late 1930s until the mid-1970s. A commitment to shift power away from the federal government toward more extensive, independent authority for the states underlies Rehnquist's decision making. . . . Not only has he interpreted Congress's enumerated power in a restricted way, but he has also maintained that even when Congress acts pursuant to its enumerated powers, it transgresses its constitutional limits when it infringes on state autonomy.[50]

Davis finds the source of Rehnquist's federalism not in a literal or historical reading of the Constitution, but rather in a blend of what she identifies as his "democratic model"—a commitment to majority rule—and "moral relativism," which "holds that no value is more legitimate than any other until it is enacted into the positive law."[51] Federalism protects both these values by empowering those

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46. *Id.* at 293.
47. *Id.* at 294.
48. SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989).
49. *Id.* at 18–19.
50. *Id.* at 149.
51. *Id.* at 152.

units of government that are closest to the people and most likely to reflect their will.[52]

Davis is not an admirer of the Rehnquist jurisprudence. One scholar who is, John O. McGinnis of Cardozo Law School, proposes more recently in an article entitled *Reviving Tocqueville's America* that the Rehnquist Court, particularly in its approach to federalism, offers a return to the socially invigorating, grass-roots democracy that Tocqueville so admired in the young United States. McGinnis discerns a coherent jurisprudence of "decentralization and private ordering of social norms"[53] "reflecting a more skeptical view of centralized democracy in an era"[54] less hopeful about the prospects of centralized social reform.

My effort here is not to rehearse the lively academic debate over the substance of the federalism revolution now in progress, but rather to underscore how early in Chief Justice Rehnquist's career his commitment to reorienting the Court on this issue manifested itself. In May 1975, the Court handed down the decision in *Fry v. United States*,[55] upholding the authority of the federal government, through the Economic Stabilization Act of 1970, to apply caps on wage increases for state employees. Justice Marshall's opinion for seven Justices took all of eight paragraphs, including a recitation of the facts of the case. Justice Marshall said that Ohio's argument that the commerce authority should not be read to permit Congress to regulate state employees in a manner that "interferes with sovereign state functions"[56] was "foreclosed by our decision in *Maryland v. Wirtz*,"[57] a decision from seven years earlier that upheld application of the Fair Labor Standards Act to state employees. There was, in other words, almost nothing to discuss.

Justice Douglas filed a separate statement arguing that the writ should have been dismissed as improvidently granted. The lone dissenter on the merits was, of course, the Junior Justice. *Maryland v. Wirtz* should be reconsidered, Justice Rehnquist wrote. *Stare decisis* should not stand in the way. "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."[58]

The fascinating aspect of the Rehnquist dissent in *Fry* is not so much its conclusion but its analysis, frankly unmoored from the Constitution's text. It was a case not about Congress's enumerated powers but about the states' entitlement as separate sovereigns to trump those powers: "the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such

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52. *Id.*

53. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*. 90 CAL. L. REV. 485, 487 (2002).

54. *Id.* at 490.

55. Fry v. United States, 421 U.S. 542 (1975).

56. *Id.* at 547.

57. *Id.* at 548–49 (citing Maryland v. Wirtz, 392 U.S. 183, 196–97 (1968)).

58. *Id.* at 559.

congressionally asserted authority."[59] Then came the magic bullet, the obscure Tenth Amendment,[60] invoked as a powerful check on federal interference with the states' policy-making and self-governance. The dissent reasoned by analogy to the Court's 1890 decision in *Hans v. Louisiana*,[61] which left the Eleventh Amendment unmoored from a text that spoke only of depriving the federal courts of jurisdiction to hear suits by citizens of one state against another state. *Hans* was a bold judicial gloss on that text, creating a broader sphere of immunity from suit by a state's own citizens as well.[62] In his *Fry* dissent, Justice Rehnquist picked up *Hans* and ran with it:

> As it was not the Eleventh Amendment by its terms which justified the result in Hans, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.[63]

From here, the path was clear, if not straight. *National League of Cities v. Usery*[64] the next year, overturning *Maryland v. Wirtz* on Tenth Amendment grounds, was the first Rehnquist majority opinion of the federalism revolution. It was nearly twenty years ahead of its time, an opinion for an unstable five-to-four majority that was quickly disavowed in *Garcia v. San Antonio Metropolitan Transit Authority*.[65] But Justice Rehnquist's dissenting opinion in *Garcia* offered a better assessment than did the majority opinion of what lay ahead. It was only four sentences long and said no more than necessary: a vow to stay the course and a prediction of ultimate victory. "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this court."[66]

While *Garcia* itself has not been overruled, such a formality has been rendered unnecessary by the decisions of the last few years, particularly *Alden v. Maine*[67] in 1999. In *Alden*, with a majority opinion by Justice Kennedy, the Court held that the background principle of the Eleventh Amendment also immunized unconsenting states from suit in their own courts on a claim based on Congress's

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59. *Id.* at 553.

60. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

61. Hans v. Louisiana, 134 U.S. 1 (1890).

62. *Id.* at 10.

63. *Fry*, 421 U.S. at 557.

64. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

65. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

66. *Id.* at 580.

67. Alden v. Maine, 527 U.S. 706 (1999).

exercise of the commerce power, in this instance the Fair Labor Standards Act.[68] And it was only a short hop from *Alden* to last term's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*,[69] in which the Court held in an opinion by Justice Thomas that the Eleventh Amendment also immunized states from having to submit to adjudication of private complaints before federal administrative agencies—executive branch agencies, that is, not the Article III courts to which the Eleventh Amendment is addressed.[70]

In reviewing the trajectory of the state immunity cases, from *Fry* through *Federal Maritime Commission*, two points are worth noting. The first is the degree to which Chief Justice Rehnquist is no textualist. He is interested in structure, not text. And he is not particularly interested in detail, as the *Garcia* dissent indicates. Rather, his method is to state the principle at a fairly high level of generality, confident that the right case, when it comes along—and it will—will provide the details. The second point here is that he spreads the work around and is more interested in the result than in taking the credit. For that reason, I think he often fails to get full credit for the careful management and nurturing he has applied to bring his ideas to fruition. I am surprised at how often educated observers of the Court refer to Justice Scalia as its moving force.[71] Ronald Reagan kept a sign on his desk in the Oval Office: "There is no limit to what a man can do or where he can go if he doesn't mind who gets the credit."[72] To my knowledge, there is no such sign in the Chief Justice's chambers, but there might well be.

I have devoted most of this lecture to the federalism cases because they are both so significant and so illustrative. But an examination of nearly any area of the Court's docket would yield similar observations. Let me mention just a few others.

B. Capital Punishment

On April 27, 1981, a solitary opinion by Justice Rehnquist dissenting from the denial of certiorari in a routine death penalty appeal had the effect of opening a new front in the Court's long-running debate over capital punishment.[73] In the context of its time, the rather placid period following *Gregg v. Georgia*[74] when only one unwilling prisoner had been executed and the legal system was still trying to accommodate to the new death penalty regime, the dissenting opinion in

68. *Id.* at 712.

69. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002).

70. *Id.* at 1874–76.

71. *But see* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

72. PETER J. WALLISON, RONALD REAGAN: THE POWER OF CONVICTION AND THE SUCCESS OF HIS PRESIDENCY xi (2003).

73. Coleman v. Balkcom, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from denial of certiorari).

74. Gregg v. Georgia, 428 U.S. 153 (1976).

Coleman v. Balkcom[75] was a startling document. I vividly recall being at the Supreme Court the day it was issued.[76]

The petitioner was a Georgia murderer who had exhausted his state appeals and was seeking direct review in the Supreme Court. By denying the petition, Justice Rehnquist argued, the Court was simply inviting a new round of collateral appeals and perpetuating "a stalemate in the administration of federal constitutional law."[77] It was time for the Court to cut short the *habeas corpus* process by asserting jurisdiction over this and similar appeals and rejecting them on the merits.

Rehnquist complained that although more than thirty states had accepted the Court's invitation to reinstitute the death penalty, "the existence of the death penalty in this country is virtually an illusion,"[78] adding:

> I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system. . . .[79] What troubles me is that this Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976, together with the natural reluctance of state and federal *habeas* judges to rule against an inmate on death row, has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. . . .[80] If capital punishment is indeed constitutional when imposed for the taking of the life of another human being, we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.[81]

While the tone of this opinion was highly discordant for its time, it was not too many years before constrictions on *habeas corpus*, both through Supreme Court case law and congressional action, became a familiar occurrence.[82] (Nor, I should point out, were these developments unrelated to the Court's federalism concerns. "This is a case about federalism," Justice O'Connor famously declared in the opening sentence of *Coleman v. Thompson*,[83] one of the early *habeas*-constricting decisions.) Particularly interesting was the Chief Justice's role, as chairman of the Judicial Conference of the United States, in lobbying publicly for

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75. *Coleman*, 451 U.S. at 956 (Rehnquist, J., dissenting from denial of certiorari).

76. *See Rehnquist Assails Court for Delays and Litigation of Death Sentences*, N.Y. TIMES, Apr. 28, 1981, at D23.

77. Coleman, 451 U.S. at 957 (Rehnquist, J., dissenting from denial of certiorari).

78. *Id.* at 957–58.

79. *Id.* at 958.

80. *Id.* at 959.

81. *Id.* at 963.

82. *See* Linda Greenhouse, *Rehnquist Renews Request to Senate*, N.Y. TIMES, Oct. 13, 1989, at A21; Linda Greenhouse, *Of Rehnquist's Mission, and Patience to Match*, N.Y. TIMES, May 1, 1991, at A18; *see generally* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001).

83. Coleman v. Thompson, 501 U.S. 722 (1991).

restrictions on the federal courts' *habeas corpus* jurisdiction.[84] Many of the intervening steps were incremental, but within fifteen years after Justice Rehnquist's opinion dissenting from the denial of certiorari in *Balkcom*, the jurisdiction of the federal courts to supervise the quality of justice being meted out by the state courts was much shrunken and executions had become commonplace.

C. Religion

The Rehnquist years have seen major doctrinal developments under both the Establishment and Free Exercise Clauses of the First Amendment, a rich subject that is beyond my scope here. So in the interests of time, I will limit myself to one connection, that between Justice Rehnquist's opinion for the Court in *Mueller v. Allen*,[85] a 1983 decision that upheld a Minnesota state tax deduction of up to $700 for tuition, textbook, and transportation expenses incurred by parents of children in public and private schools, and his opinion for the Court last term in *Zelman v. Simmons-Harris*,[86] which upheld Ohio's voucher program for private school tuition. One striking feature of both these programs was that the benefit was enjoyed almost entirely by users of the parochial schools. In Minnesota, there were almost no secular private schools, and very few of the covered expenses were incurred by parents of public school students.[87] In Cleveland, ninety-six percent of the recipients used their vouchers for religious school tuition.[88] The argument in both cases was that the program impermissibly advanced religion in violation of the Establishment Clause.[89]

For the five-to-four majority in *Mueller*, two features of Minnesota's tax deduction overcame the constitutional objection: facial neutrality and private choice. Acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," the public funds in the Minnesota program "become available only as a result of numerous, private choices of individual parents of school-age children."[90]

Nineteen years later, the four dissenters in the *Zelman* Ohio voucher case saw dispositive differences between the Minnesota program endorsed in *Mueller* and the tuition grants at issue in Ohio. The *Zelman* decision represented not an incremental step but a radical shift, they said. It was not "a free and genuine choice"[91] that led nearly all the families fleeing the Cleveland public schools to choose religious education, Justice Souter wrote in dissent, but rather the design of the program, it's the $2,250 tuition cap and the lack of available options. "*Mueller*

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84. *See* Judith Resnik, *The Federal Courts and Congress: Additional Sources of Alternative Texts, and Altered Aspirations*. 82 GEO. L.J. 2589 (1998) (note the text accompanying nn.192–94, referring to WHR's 1997 Year-End Report).

85. Mueller v. Allen, 463 U.S. 388 (1983).

86. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

87. *Mueller*, 463 U.S. 391.

88. *Zelman*, 122 S. Ct. at 2464.

89. Lemon v. Kurtzman, 403 U.S. 602 (1971).

90. *Mueller*, 463 U.S. at 399.

91. *Zelman*, 122 S. Ct. at 2498 (Souter, J., dissenting).

started down the road from realism to formalism,"[92] he said, but the Court was now, under the patina of neutrality and private choice, endorsing something it had never before sanctioned: "[r]eligious teaching at taxpayer expense."[93]

For Chief Justice Rehnquist, the matter had been decided long ago. "The Ohio program is entirely neutral with respect to religion,"[94] he said, providing aid to "a broad class of individual recipients defined without regard to religion."[95] And it permitted "individuals to exercise genuine choice among options public and private, secular and religious," making the program one of "true private choice."[96] Cases in "an unbroken line of decisions" since *Mueller* made it clear that such a program gave no offense to the Establishment Clause, he said.[97]

D. Race

Then there is race. Once again, we are confronted with a rich and varied doctrinal landscape. Recognizing that there is almost no neutral place to stand when viewing the record of the Rehnquist Court on race, I think Judge J. Harvie Wilkinson III is correct to identify "a unitary nondiscrimination principle"[98] under which "[a]ll racial classifications, no matter which race is burdened or benefited, are presumptively unconstitutional," as the organizing theory of the Rehnquist Court on this subject.[99] The nondiscrimination principle was far from the prevailing norm when William Rehnquist joined a Court that was in many ways still working out the full implications of *Brown v. Board of Education.*[100] Remediation of both victim-specific and societal discrimination was still the order of the day. The regime of *City of Richmond v. J. A. Croson Co.*,[101] *Shaw v. Reno*,[102] *Adarand Constructors, Inc. v. Pena*,[103] and—time will tell—the University of Michigan affirmative action cases[104] stood on a distant horizon.

With that horizon in mind, Justice Rehnquist's thirty-six-page dissenting opinion in an early affirmative action case, *United Steelworkers of America v.*

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92. *Zelman*, 122 S. Ct. at 2487 (Souter, J., dissenting).
93. *Id.* at 2501 (Souter, J., dissenting).
94. *Id.* at 2473.
95. *Id.* at 2468
96. *Id.* at 2473.
97. *Id.*
98. J. Harvie Wilkinson III, *The Rehnquist Court and the Search for Equal Justice, in* MARTIN H. BELSKY, THE REHNQUIST COURT: A RETROSPECTIVE 44–45 (2002).
99. *Id.* at 44–45.
100. *Brown*, 347 U.S. 483. It might be useful to note that he has now been on the Supreme Court nearly twice as long as the interval from *Brown* to his initial swearing-in.
101. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).
102. Shaw v. Reno, 509 U.S. 630 (1993).
103. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
104. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) *cert. granted*, 71 U.S.L.W. 3154 (U.S. Dec. 2, 2002) (No. 02-241); Gratz v. Bollinger, 309 F.3d 329 (6th Cir. 2001), *cert. granted*, 71 U.S.L.W. 3379 (U.S. Dec. 2, 2002) (No. 02-241). The arguments are scheduled for April 1, 2003.

Weber,[105] sounds quite different than it did when it was issued in 1979. The dominant impression then was its tone, angry and sarcastic. He began by declaring that the Court's opinion was five years ahead of its time: it belonged in Orwell's *1984*, from which Justice Rehnquist then quoted. Rereading the opinion today, it sounds like a prophecy.

Weber was not a constitutional case. It was a case interpreting Title VII of the Civil Rights Act of 1964,[106] the basic federal statute barring racial discrimination in employment. A white steelworker complained that black workers with less seniority were being selected for a special training program under a fifty-fifty quota that was designed to increase the number of black skilled workers. The company and the union had negotiated this program, notwithstanding section 703 of the Act, which made it an unlawful employment practice to discriminate on the basis of race "in admission to, or employment in, any program established to provide apprenticeship or training."[107] Weber complained that the program did exactly that.

In an opinion for five Justices, Justice Brennan said the program was permissible in light of the overall purposes of Title VII and the desire of Congress to expand employment opportunities for black workers. "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans" because this one "falls on the permissible side of the line," Justice Brennan wrote.[108] The purposes of the plan "mirror those of the statute."[109] He noted that no white workers were discharged or barred from eventual advancement.

In a dissent that Chief Justice Burger joined, Justice Rehnquist said that in Orwellian fashion, the holding validated action that the statute expressly prohibited. To that extent, this was simply a debate over statutory construction. It was with the final paragraph of his dissenting opinion—still expressed in terms of a statutory debate but with a deeper resonance—that he laid down his marker for great debates that were to come:

> There is perhaps no device more destructive to the notion of equality than the *numerus clauses*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be . . . . By

105. United Steelworkers of Am. v. Weber, 443 U.S. 193, 219–56 (Rehnquist, J., dissenting).

106. 42 U.S.C. § 2000e (2003).

107. 42 U.S.C. § 2000e-2(d) (2003).

108. *Weber*, 443 U.S. at 208.

109. *Id.*

> going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.[110]

V. CONCLUSION

William Rehnquist has been a lucky man. Eight Justices have joined the Court since he took his seat on January 7, 1972. Four of those eight—Justices O'Connor, Kennedy, Scalia, and Thomas—have provided him with a working majority on many issues.[111] Substitute for any of those a Justice more in tune with the other four appointees, Justices Stevens, Souter, Ginsburg, or Breyer, and the Supreme Court today would be a very different place. In addition, of course, he has had the gift of time—thirty-one years and, as of this moment, still counting. Some might be tempted to stop there and say that luck explains his success.

But people make their own luck.[112] It is a necessary but not a sufficient condition. Success over time on a collegial Court depends in no small measure on vision—the ability to keep the goal in mind while patiently filling in the blanks of a big picture that has yet to emerge. It depends on craft—the skill to frame issues in a manner that makes sense of messy facts and inchoate law, compelling attention even from those not yet committed to the outcome. It depends on tenacity—the will to stick to the plan despite the distractions of a given day or month or term. William Rehnquist has enjoyed the gift of patience and the gift of power, and he has made the most of both.

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110. *Id.* at 254–55.

111. *But see* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

112. MARC MYERS, HOW TO MAKE LUCK: THE SEVEN SECRETS LUCKY PEOPLE USE TO SUCCEED (1999).

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