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The Rehnquist Court and the First Amendment

Foreword

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It is customary among lawyers to divide the history of constitutional law at the Supreme Court into chapters defined by the serving Chief Justice. We refer, of course, to the Marshall Court, the Warren Court, and, more recently to the Rehnquist Court, which began with the elevation of William Hubbs Rehnquist from Associate Justice to Chief Justice in 1986 and ended with his death on September 3, 2005. The late Chief's death marks the end of such a twenty-year chapter. It also marks the end of the longest-serving Court in modern times. From August 1994, when Justice Stephen Breyer joined the Court, until the death of Chief Justice Rehnquist eleven years later, the nine-Justice membership of the so-called "Second Rehnquist Court" remained stable. Although often deeply

* Associate Professor of Law, Washington University School of Law. I would like to thank the symposium participants for a deeply stimulating day of engagement. In addition to the scholars whose work is published in this volume, special thanks are due to the other participants who served as moderators, commentators, and/or provocateurs: Jack Balkin, David Bernstein, Dan Mandelker, Martin Redish, Jennifer Rothman, and Jonathan Zittrain. Thanks also to two former deans of our law school, Joel Seligman and Dan Keating, for providing institutional support for this conference, and to the student editors of this journal, especially Heather Buethe, for their tireless hard work and enthusiasm.

Finally, I owe a personal debt of gratitude to the late Chief Justice, William Hubbs Rehnquist, that goes far beyond the present endeavor. This was never conceived as a memorial symposium, and ended up being unfortunate in its timing. Those of us who knew and worked with the late Chief will miss his warmth, his intellect, and his sense of humor. Our lives and our profession are diminished by his absence.

divided on important questions of constitutional and federal law, this Court had a unique opportunity to place its distinctive stamp on American law. With the departure of Justice Sandra Day O'Connor, and with other retirements likely over the next few years, it is not overly dramatic to suggest that we are witnessing the end of an important era.

What, then, will be the legacy of the Rehnquist Court? Although it is too early to say with certainty, it is safe to hazard a guess that it will be remembered as a relatively conservative Court, particularly interested in policing the lines between federal and state power in areas such as the federal commerce power, state sovereign immunity, and criminal procedure. Indeed, it is in these areas that the "Rehnquist Court" is most aptly named, for William Rehnquist was a leader of the Court's doctrinal evolution in these areas in a number of ways.[1] Despite the Court's emphasis on federalism and constitutional criminal law, issues of First Amendment law remained consistently at the top of the docket in terms of importance. Over its two decades, the Rehnquist Court grappled with a host of fundamental First Amendment issues, involving a panoply of questions basic to any free society. Among many others, it addressed questions of flag burning,[2] hate speech,[3] sexually-explicit speech,[4] speech in the digital environment,[5] free speech versus the right to privacy,[6] free speech and the regulation of intellectual property,[7] the scope of the rights of expressive association[8] and religious free exercise,[9] and the prohibition on the establishment of religion.[10]

The papers collected in this volume represent an attempt to take stock of developments in these and other areas of First Amendment

1. *See, e.g.*, THE REHNQUIST LEGACY (Craig Bradley ed., 2005).
2. Texas v. Johnson, 497 U.S. 397 (1989).
3. Wisconsin v. Mitchell, 508 U.S. 476 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
4. City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
5. Reno v. ACLU, 521 U.S. 844 (1997).
6. Bartnicki v. Vopper, 532 U.S. 514 (2001).
7. Eldred v. Ashcroft, 537 U.S. 186 (2003).
8. Boy Scouts v. Dale, 528 U.S. 1109 (2000).
9. Employment Div. v. Smith, 494 U.S. 872 (1990).
10. Locke v. Davey, 540 U.S. 712 (2004); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Agostini v. Felton, 521 U.S. 203 (1997).

law over the past two decades from a variety of methodological and ideological perspectives. They are the product of a symposium held at the Washington University School of Law on November 18, 2005. The live conference took the form of a series of principal papers, followed in many cases by discussion of the papers by assigned commentators. This symposium volume follows a similar organization.

The first group of symposium papers addresses the particular problems for free speech theory and doctrine posed by technological change. The last two decades have seen rapid and unprecedented developments in electronic communications technologies, which have become increasingly important media by which individuals exercise their First Amendment rights of speech and press. At the same time, this information revolution has posed new and important questions about what legal rules apply to electronic information flows such as web sites and web logs, wireless telephony, peer-to-peer file sharing, or the sale of customer data. Unsurprisingly, the Rehnquist Court confronted these issues in a number of important cases, addressing such critical questions as the relationship between free speech and intellectual property[11] and the power of Congress to regulate the content of speech on the new medium of the Internet.[12]

A number of symposium papers survey and challenge these developments. Mark McKenna assesses the role that the First Amendment played in the Rehnquist Court's intellectual property cases.[13] McKenna suggests that although the Rehnquist Court attempted to reconcile IP with the First Amendment, the way it did so has ironically set the stage for greater First Amendment scrutiny of IP in the future.

John Palfrey and Robert Rogoyski examine the Internet technical principle of "end-to-end design," whereby regulation of information flow occurs at the "ends" of the network—i.e., the senders and recipients of information—rather than in the "middle," with Internet

11. *Eldred*, 537 U.S. 186.

12. Reno v. ACLU, 521 U.S. 844 (1997).

13. Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 WASH. U. J.L. & POL'Y 11 (2006).

Service Providers and other technical intermediaries.[14] Palfrey and Rogoyski contend that the end-to-end principle favored by technologists and democratic activists is threatened by the needs of law enforcement in regulating "harmful" speech. They argue that this threat is harmful to both the technical and democratic values that the end-to-end principle embodies. Moreover, they claim, the "move to the middle" has resulted in intermediary corporations that might not always hold the most progressive views on expressive liberties becoming deputized as the state's enforcers of information flows.

Commenting on Palfrey and Rogoyski, Thomas Nachbar argues that some regulation of the human-created digital world is inevitable, and that the end-to-end principle, rather than being a democratic design choice, is instead the product of an unaccountable institutional consensus by Internet engineers.[15] This technical choice itself has political ramifications, and Nachbar contends that institutions as well as outcomes should be taken into account when making regulatory choices. He suggests that the Rehnquist Court's First Amendment jurisprudence, which itself recognized the institutional dimensions of speech regulation, points the way for more effective regulation of digital information flows in the future.

Other symposium papers examining issues of freedom of expression assess Rehnquist Court free speech jurisprudence from a variety of methodological approaches, and reach divergent conclusions regarding the role of ideology in First Amendment jurisprudence. Leading political scientists Lee Epstein and Jeffrey Segal present an empirical analysis of the entirety of modern free speech jurisprudence.[16] They conclude that although most accounts of First Amendment jurisprudence explicitly link support for First Amendment claimants of speech, press, or associational rights with ideological "liberalism," the Rehnquist Court First Amendment cases cast some doubt upon this conclusion. Epstein and Segal argue that data drawn from 1953 through 2004 show that, in general, the more

14. John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of "Harmful" Speech to the End-to End Principle*, 21 WASH. U. J.L. & POL'Y 31 (2006).

15. Thomas B. Nachbar, *Speech and Institutional Choice*, 21 WASH. U. J.L. & POL'Y 67 (2006).

16. Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81 (2006).

liberal a Justice's ideology, the more likely that the Justice would vote for a First Amendment claimant. However, in cases in which free speech was in conflict with another value, such as privacy or equality, liberal Justices were no more likely than conservative Justices to vote in favor of free speech claims. In fact, Epstein and Segal suggest that in such "value-conflict" cases, it appears to be liberals who tend to favor regulation and conservatives who support First Amendment claimants. Epstein and Segal argue that First Amendment commitments are thus no longer synonymous with ideological liberalism, a finding that unsettles much of the political science work in this area.

Using wholly different methodology, Robert Sedler assesses First Amendment jurisprudence's uneasy relationship between constitutional and property rights from the perspective of a trial litigator.[17] Sedler argues that First Amendment law in this area has two effects: it allows speakers to interfere with property rights on the one hand, and allows property owners to claim a First Amendment-based immunity from some forms of otherwise valid regulation on the other. Sedler claims, in sharp contrast to Epstein and Segal, that "in the area of the First Amendment, the so-called 'liberal-conservative' divisions that may appear in other areas are generally absent."[18]

Shelley Ross Saxer critiques Sedler's argument from the perspective of land use law.[19] Saxer suggests that Sedler's analysis, rather than showing the strength of the First Amendment, reveals instead the weakened state of contemporary property rights and the difficulties faced by private land owners seeking to exclude trespassers and others who interfere with their land use by claiming an expressive privilege.

Property rights, though, are but one of several lenses we can use to think about the places where we speak and express ourselves. In a provocative essay, Timothy Zick argues that free expression demands a breathing space that can be constrained by narrow conceptions of

17. Robert A. Sedler, *Property and Speech*, 21 WASH. U. J.L. & POL'Y 123 (2006).

18. *Id.* at 125.

19. Shelley Ross Saxer, *A Property Rights View: Commentary on* Property and Speech *by Robert A. Sedler*, 21 WASH. U. J.L. & POL'Y 155 (2006).

place, property, or other architectural concepts that structure our communicative environment.[20] Zick suggests that the Rehnquist Court free speech decisions left what he calls our "expressive topography" markedly worse than they found it, by allowing new kinds of content-based regulation of speech on streets and sidewalks and by permitting new anti-speech government tactics such as "expressive zoning" of adult businesses. In a society in which traditional public spaces are being privatized or moved into new contexts entirely, Zick urges us to broaden our notions of speech and space so that public discourse can be preserved in both public and private places.

Of course, issues of free expression are only one side of First Amendment law, which also protects both the right to the free exercise of religion as well as the right of the people to be free from government establishment of religion. If the story of the Rehnquist Court's free speech jurisprudence was characterized by the application of established theory, norms and doctrinal categories to new contexts, its Free Exercise and Establishment Clause jurisprudence was quite different. In its religion cases, the Rehnquist Court showed a much greater willingness to re-examine existing law from first (often originalist) principles, and effected a marked change in both areas of the law. On the Free Exercise side, the Court made clear that religious liberty did not include the right to be exempt from neutral and generally-applicable laws, even when those laws prohibited activities central to a religious faith.[21] And on the Establishment Clause side, the Court cut back on earlier doctrinal and theoretical understandings that the First Amendment mandated a strict separation between church and state.[22] Although it remained superficially faithful to the doctrinal mechanism inherited from *Lemon v. Kurtzman*[23] for policing the Establishment Clause's boundaries from state overreaching, the Court increasingly came to adopt Justice O'Connor's view that church and state need not be

20. Timothy Zick, *Property, Place, and Public Discourse*, 21 WASH. U. J.L. & POL'Y 173 (2006).
21. Employment Div. v. Smith, 494 U.S. 872 (1990).
22. *See, e.g.*, cases cited *supra* note 10.
23. 411 U.S. 192 (1973).

strictly separate as long as the government did not go so far as to endorse one religion over others.[24]

Reflecting the deep ideological disagreement that frequently characterized the Rehnquist Court's religion clause cases, the symposium papers dealing with these issues generate a lively and spirited debate. Abner Greene provides a helpful point of departure for this discussion by surveying the religion clause case law.[25] Greene notes that the Rehnquist Court religion clause cases reflect an "apparent consistency" insofar as they stand for the principle that government can benefit or burden religion, at least as long as the government acts in a general manner and does not single out a particular religion (or religion in general) for special benefits or burdens. Despite this apparent consistency, Greene contends that there are outlier cases in which the Court upheld special burdens or special benefits for religion. These outlier cases, he argues, reveal a deep inconsistency in religion clause doctrine caused in part by the fact that religion is distinctive; a fact that the government needs to take into account in order to allow all people to participate in government as full citizens regardless of their religious beliefs.

Jay Wexler ruminates on what he calls "the Endorsement Court," a reference to Justice O'Connor's reformulation of Establishment Clause doctrine that has generated extensive critical scholarly commentary.[26] Wexler agrees with two dimensions of the critical literature: first, that the endorsement test favors more established religious traditions over minority ones; and second, that its indeterminacy and manipulability threaten the integrity of the federal judiciary. To answer these two critiques, Wexler proposes the avowedly radical solution that Congress create a true "Endorsement Court": an Article I tribunal staffed by experts in a variety of religious traditions that could decide endorsement challenges to

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24. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 627–32 (1989) (O'Connor, J., concurring in part and concurring in the judgment). The test itself was first propounded by Justice O'Connor in *Lynch v. Donnelly*, the Pawtucket case involving a crèche surrounded by more secular winter holiday imagery. *See* 465 U.S. 668, 671 (1984) (O'Connor, J., concurring).

25. Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL'Y 225 (2006).

26. Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263 (2006).

public religious displays subject only to review by the Supreme Court on writ of certiorari.

Responding to Wexler's arguments, Thomas Berg is sympathetic to the advantages of having educated arbiters deciding endorsement questions, but is skeptical of the proposal, both in terms of logistics and the "no-endorsement" test it would be charged with applying.[27]

The final pair of papers assess the very legitimacy of the changes wrought by the Rehnquist Court in the religion cases. Arguing that the Rehnquist Court's religion clause case law embodies a vision of the law at odds with previously settled law, Garrett Epps presents a deeply critical analysis of that vision.[28] Epps notes:

> [T]he Court has used the ambiguous idea of equality to create a remarkable shift—one that is not even remotely tied to the text or history of the Religion Clauses. Though the shift relies on dribs and drabs of judicial rhetoric in earlier cases, it is resolutely scornful of precedent. It is not an evolution, or a refinement, or a correction. It is, or aspires to be, transformative: it is something brand new.[29]

Responding to Epps' paper, Eric Claeys agrees that the Rehnquist Court effected a transformation in religion clause jurisprudence, but disagrees with Epps' normative and positive characterizations of the transformation.[30] Claeys observes that much of Establishment Clause jurisprudence and scholarship depends upon prior commitments about the nature of law, society, and the judicial interpretive role. Claeys critiques Epps from the perspective of an avowed "religionist" (who believes that the First Amendment does not compel strict separation between religious beliefs and public institutions) and originalist (who believes that the historical record should inform and constrain constitutional interpretation). In Claeys' view, the original intent of the religion clauses affords legal legitimacy to a far more

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27. Thomas C. Berg, *What's Right and Wrong with "No Endorsement,"* 21 WASH. U. J.L. & POL'Y 307 (2006).

28. Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion,"* 21 WASH. U. J.L. & POL'Y 323 (2006).

29. *Id.* at 325.

30. Eric R. Claeys, *Justice Scalia and the Religion Clauses: A Comment on Professor Epps*, 21 WASH. U. J.L. & POL'Y 349 (2006).

integrated relationship between church and state than Epps' separationist account would permit. Moreover, this competing originalist vision has much to commend it as a matter of policy.

Taken together, the symposium papers collected in this volume have much to say about the role of law, technology, history, and social norms in the development of modern First Amendment law. The diversity of ideological and methodological perspectives offered reveals that the lively debate in these areas of Constitutional law shows no signs of abating. This should, of course, be no surprise. The issues raised by the First Amendment are those of the highest importance and complexity, and they are ones with which every democratic society must inevitably and continually struggle. It is a fitting irony that the legal commitments to free speech, thought, belief, and inquiry protected by the First Amendment are the same ones we must use to answer the critical questions it forces us to confront.