

## The Rehnquist Court & Justice: An Oxymoron?

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From the perspective of public interest law, the Rehnquist Court, simply put, is a disaster. One might think that is terribly harsh, but I seek to show its accuracy and explain that the Rehnquist Court is an activist, conservative Court. It is activist in the sense that it shows little deference to the majoritarian branches of government and in the sense that it has little respect for precedent. It is conservative, not in the sense that it is following conservative judicial principles, but rather it is conservative in the sense that it is animated by the right-wing political agenda. In order to demonstrate this, I will describe five principles, which I believe account for the vast majority of the Rehnquist Court's decisions. Certainly, these five statements cannot explain all of the Court's constitutional law decisions, but I would suggest that it can explain most.

The first principle that explains many of the Rehnquist Court's decisions is that in conflicts between the federal and state governments, state governments win. When constitutional historians look back at the Rehnquist Court, they will say that its most dramatic contribution to constitutional law was in the area of federalism. There are three main examples of how the Rehnquist Court has accomplished what I believe is truly a revolution in constitutional jurisprudence. First, the Court has greatly narrowed the scope of Congress' powers,

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and it has done so in the name of federalism. For example, in *United States v. Lopez*<sup>1</sup> in 1995, for the first time in sixty years, the Supreme Court struck down a federal law as exceeding the scope of Congress' powers under the Commerce Clause. In *Lopez* the Court declared unconstitutional the Gun-Free School Zones Act<sup>2</sup> by saying it exceeded the scope of Congress' authority to regulate interstate commerce. It is notable that the decision, like so many others I will talk about, was five-four. Chief Justice Rehnquist wrote the opinion for the Court, joined by Justice O'Connor, Scalia, Kennedy, and Thomas.

The Court has not only narrowed Congress' power under the Commerce Clause, but it has done so in other areas as well. Consider the decision from June 1997 in *City of Boerne v. Flores*.<sup>3</sup> The Supreme Court declared unconstitutional the Religious Freedom Restoration Act,<sup>4</sup> an important federal statute that safeguarded the free exercise of religion. The Supreme Court said that Congress, when it acts under Section Five of the Fourteenth Amendment, may not expand the scope of rights or create new rights. It may only provide remedies for the rights recognized by the courts.

In 1966 in *Katzenbach v. Morgan*<sup>5</sup> the Supreme Court came to the opposite conclusion. In *Katzenbach* the Supreme Court said Section Five empowers Congress to enforce the Fourteenth Amendment. Justice Brennan, writing for the Court, said that so long as Congress is expanding rights and not diluting rights it is within Congress' authority to act. *City of Boerne v. Flores*, however, implicitly overrules *Katzenbach*. *Boerne* also puts in jeopardy major federal statutes, like the Americans with Disabilities Act<sup>6</sup> and the 1982 Amendments of the Voting Rights Act<sup>7</sup> that also expand the scope of rights.

A second way in which the Supreme Court has protected

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1. 514 U.S. 549 (1995).

2. 18 U.S.C. § 922.

3. 521 U.S. 507 (1997).

4. 42 U.S.C. § 2000bb et seq.

5. 384 U.S. 641 (1966).

6. 42 U.S.C. § 12101 et seq.

7. 42 U.S.C. § 1973aa-b.

federalism is by using the Tenth Amendment. In the first third of this century, the Supreme Court interpreted the Tenth Amendment as reserving a zone of activities for state governments, and the Court struck down federal laws that were seen as usurping state prerogatives. Yet, from 1937 until 1992 there was only one Supreme Court case invalidating a statute for violating the Tenth Amendment, and that Supreme Court decision was later expressly overruled. In 1992 in *New York v. United States*,<sup>8</sup> the Supreme Court declared unconstitutional the federal Low-Level Radioactive Waste Policy Act<sup>9</sup> on the grounds that it forced states to clean up their nuclear waste and conscripted the states in violation of the Tenth Amendment.

The Supreme Court declared unconstitutional the federal Brady Act<sup>10</sup> in 1997 with *Printz v. United States*.<sup>11</sup> The Brady Bill requires that state and local law enforcement personnel do background checks before issuing permits for firearms. In a five-four decision the Supreme Court said that this is conscripting state and local law enforcement personnel and violates the Tenth Amendment. Justice Scalia wrote the majority opinion and Rehnquist, O'Connor, Kennedy, and Thomas joined his opinion.

There is a third way in which the Supreme Court has used federalism to protect states and limit federal power. The Eleventh Amendment says that the judicial power of the United States shall not extend to suits against the state brought by citizens of other states or citizens of foreign countries. In 1989 in *Pennsylvania v. Union Gas*,<sup>12</sup> the Supreme Court said that Congress may override by statute the Eleventh Amendment and may authorize suits against states so long as the law, in its text, is clear in authorizing such litigation. The Supreme Court overruled *Pennsylvania v. Union Gas*, however, in 1996 with *Seminole Tribe of Florida v. Florida*.<sup>13</sup> The Court said that Congress

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8. 505 U.S. 144 (1992).

9. 42 U.S.C. § 2021b-2021j (1999).

10. Brady Handgun Violence Prevention Act, 18 U.S.C. § 921 et seq.

11. 521 U.S. 98 (1997).

12. 491 U.S. 1 (1989).

13. 517 U.S. 44 (1996) (finding unconstitutional the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721 (1988)). In June 1999, after this Article went to press, the Court decided *Alder v. Maine*, 119 S. Ct. 2240 (1999), *Florida Prepaid Postsecondary v. College Savings Bank*, 119

may not use its Commerce Clause authority to override the Eleventh Amendment and authorize suits against the states. All of these decisions were decisions about protecting states from federal power.

My goal is not to critique these decisions; time does not allow it. Rather, I want to use these decisions to show you that the Rehnquist Court is activist and conservative. It is activist in the sense that all of these decisions invalidate federal statutes. These cases were not about deference to the majority; they invalidated popular federal laws: the Gun-Free School Zones Act,<sup>14</sup> the Religious Freedom Restoration Act,<sup>15</sup> the Low Level Radioactive Waste Policy Act,<sup>16</sup> the Brady Bill,<sup>17</sup> and the Indian Gaming Regulatory Act.<sup>18</sup> Congress passed most of these statutes overwhelmingly and sometimes almost unanimously.

These decisions also are all about overruling or ignoring precedent. *Lopez* was the first time in sixty years that the Court found a federal statute to exceed the scope of Congress' commerce power. The Tenth Amendment cases were virtually unprecedented in the previous sixty years. *Seminole Tribe* overruled a prior case that was only seven years old. What was the difference between 1989 when *Pennsylvania v. Union Gas* was decided and 1996 when *Seminole Tribe* was decided? Was it that the Supreme Court found a musty, long lost history of the Eleventh Amendment? Was it that *Pennsylvania v. Union Gas* proved unworkable? No, it was simply the change in the composition of the Court. *Pennsylvania v. Union Gas* was a five-four decision. Brennan, Marshall, Blackmun, White, and Stevens supported the majority judgment, while Rehnquist, O'Connor, Scalia, and Kennedy dissented. Four of the five supporting the majority judgment had left the Court by 1996. All four of the dissenters remained, and Justice Thomas joined them; now they had five votes. *Stare decisis*, a principle of restraint, did not get in their way. Notice that these decisions are politically conservative rulings. As I said virtually every one of them

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S. Ct. 2199 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary*, 119 S. Ct. 2219 (1999), which further expanded states' sovereign immunity.

14. 514 U.S. 549.

15. 521 U.S. 507.

16. 42 U.S.C. § 2021b.

17. *Id.*

18. 517 U.S. 44 (1996).

was five-four, and the most conservative Justices were in the majority. These rulings were animated by the long-standing conservative commitment to federalism. Throughout American history it generally has been conservatives who tried to use federalism to frustrate federal efforts, and that is what happened in all of these cases.

A second statement that explains many of the Rehnquist Court's decisions is that it upholds conservative moral legislation, especially laws concerning sex, drugs, and gambling. If nothing else, this is a predictor of what the Rehnquist Court is likely to do in many cases, but I also think it shows how much it is animated by conservative philosophy.

Consider each of these areas, starting with sex, and a Supreme Court case, *Bennis v. Michigan*,<sup>19</sup> from a couple of years ago. A man in Michigan stopped and picked up a prostitute. A police officer saw them and arrested them for lewd and indecent behavior and for prostitution. The State of Michigan, pursuant to its nuisance law, seized the automobile to abate a public nuisance. However, his wife, Tina Bennis, jointly owned the car. She said, "I am an innocent owner. The government should not be able to take away my property when I did nothing wrong." In a five-four decision the Supreme Court ruled against Tina Bennis and upheld the ability of the government to seize the automobile, although the automobile was, at best, incidental to the crime committed.

Another example regarding sex is a case from 1993 called *Alexander v. United States*.<sup>20</sup> Ferris Alexander owned a chain of adult bookstores and movie theaters in Minnesota. The government prosecuted him for selling fifteen obscene items. The jury concluded that seven of the items were obscene. He was sentenced to six years in prison, and he was fined a hundred thousand dollars. If the story stopped here, one might say this is a very substantial penalty for violating obscenity laws, but it does not end here. The federal government, pursuant to the federal RICO law,<sup>21</sup> seized the entire

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19. 516 U.S. 442 (1996).

20. 509 U.S. 544 (1993).

21. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1963 (1988 ed. and Supp. III).

contents of all of his stores. The federal government then literally burned all of the books and magazines and crushed all of the videotapes. According to Alexander the merchandise was worth twenty-five million dollars; the federal government said it was only worth nine million dollars. The Supreme Court accepted the nine-million-dollar figure.

Ferris Alexander sued and said this violates the First Amendment. What is a clearer prior restraint (one of the most egregious infringements on First Amendment rights) than this? The jury deemed only seven of the items obscene, but the government destroyed at least nine million dollars worth of merchandise. In a five-four decision the United States Supreme Court ruled in favor of the federal government and ruled against Ferris Alexander. It is hard to explain the decision under First Amendment doctrine. To me, the only explanation is that the case was about sex and the conservative moral condemnation of obscenity.

With regard to drugs, many commentators have said that the Rehnquist Court has essentially carved a drug exception to the Fourth Amendment. If the case involves drugs and there is a Fourth Amendment claim, the government virtually always wins, especially if the case involves cars. The most conservative Justices on the Rehnquist Court proclaim the need to follow the framers' intent. I am skeptical that one can ever know the framers' intent, but if ever one can, it is with the Fourth Amendment. Specifically, the framers of the Fourth Amendment wanted there to be individualized suspicion before a person is searched. There must be reason to believe that a particular person committed a crime or has evidence of a crime before there may be a search. For the first time, the Rehnquist Court has authorized broad, warrantless searches without any individualized suspicion.

Consider the random drug testing cases. In 1989 in *Von Rahb v. National Treasury Employees Union*,<sup>22</sup> the Supreme Court upheld random drug testing for those applying for jobs or promotions within the Customs Service. The Solicitor General's Office, appearing before the Supreme Court during oral arguments, conceded that there was no

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22. 489 U.S. 656 (1989).

evidence of a drug problem in the Customs Service. Nonetheless, the Supreme Court upheld the warrantless random searches five-four.

Also consider *Vernonia School District v. Acton*<sup>23</sup> from three years ago. This case involved a high school that required all student athletes to submit to random, warrantless searches. This is the antithesis of the individualized suspicion that the framers had in mind. In fact, this is equivalent to the general warrant that the framers were reacting against, yet the Rehnquist Court has approved it.

In 1989 with *United States v. Sokolow*<sup>24</sup> the Supreme Court approved searches based on drug courier profiles. The drug courier profiles use such general language that almost anyone could fit within them. If someone looks particularly nervous or particularly relaxed, either would be enough to trigger part of the drug courier profile. There is not enough for individualized suspicion there, yet the Supreme Court approved this in its effort to enable the government to combat drugs.

So far I have talked about sex and drugs; gambling is another example of a conservative moral judgment. Generally, the Rehnquist Court has been protective of commercial speech. Consider the case of *United States v. Edge Broadcasting*<sup>25</sup> from 1993, however. It involved a radio station near the southern end of Virginia. Ninety-five percent of its listeners were in North Carolina. North Carolina has a lottery; Virginia does not. The North Carolina lottery wanted to advertise on this Virginia radio station. There is a federal law that says that there may be advertising for a lottery only if it is in a state that has a lottery. Since Virginia does not and North Carolina does, the radio station could not play the advertisement. This would seem to be an easy First Amendment case. It is commercial speech. It is not misleading. It concerns legal activities in North Carolina. What could be the problem? It is even legal for somebody to go from Virginia to North Carolina to buy a lottery ticket. The Supreme Court upheld the federal law. It said that the government has an important interest in

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23. 515 U.S. 646 (1995).

24. 490 U.S. 1 (1989).

25. 509 U.S. 418 (1993).

discouraging gambling and that prohibiting the advertising is substantially related to that goal.

The third statement that explains much of what the Rehnquist Court has done is that no new fundamental rights have been recognized, and many existing constitutional rights have been greatly narrowed. The Rehnquist Court has existed now for twelve years. There is not a single example where the Rehnquist Court has recognized a new right that would trigger heightened scrutiny. For example, in 1997 in *Washington v. Glucksberg*<sup>26</sup> and in *Vacco v. Quill*,<sup>27</sup> the Supreme Court unanimously rejected the contention that there should be a right to physician-assisted suicide.

Unfortunately, it is not just the failure to recognize new rights; it is a substantial narrowing of existing rights. It is true the Rehnquist Court did not overrule *Roe v. Wade*,<sup>28</sup> but I think many people draw from that the wrong conclusion—that the Rehnquist Court overall has not narrowed rights. Such a conclusion is false. Consider a couple of examples of rights that were well established before the Rehnquist Court but subsequently were narrowed dramatically, such as the Free Exercise Clause and *Employment Division v. Smith*<sup>29</sup> from 1990. For over three decades it was clear when a person claims that a government law substantially burdens religion, the government would have the obligation to justify the law by meeting strict scrutiny—showing that the law was necessary to achieve a compelling state purpose. This changed in 1990, however, when the Court decided *Employment Division v. Smith*, often referred to as the Native American Peyote case. Oregon law prohibited the consumption of peyote, a hallucinogenic substance. Native Americans argued that their religious rituals required the use of peyote, and they brought a challenge based on the Free Exercise Clause.

If the Supreme Court wanted to rule in favor of the State and against the Native Americans, it could have done so under strict scrutiny. It could have said that stopping the use of hallucinogenic

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26. 521 U.S. 702 (1997).

27. 521 U.S. 793 (1997).

28. 410 U.S. 113 (1973).

29. 494 U.S. 872 (1990).



substances is a compelling state interest, but that is not what the Supreme Court did. Writing for the majority, Justice Scalia fashioned a new test for the Free Exercise Clause. The Court said that neutral laws of general applicability do not violate the Free Exercise Clause, so long as the law was not motivated by a desire to interfere with religion and so long as it applies to everyone. Since the Oregon law prohibiting consumption of peyote met these new criteria there is no basis for a Free Exercise Challenge.

To get a sense of how radical this is in changing the law, think of a county that prohibits all consumption of alcohol. There are a few in the United States. Imagine that a priest wants to use wine in communion or a Jewish family wants to use wine in a Sabbath or Seder at a dinner. Before *Smith* it is clear that the priest or the Jewish family would win. Now it is clear that they would lose. The law prohibiting consumption of alcohol was not motivated by a desire to interfere with religion; it applies to everyone. Therefore, it is constitutional.

If one looks at both the Supreme Court and the lower court cases dealing with the Free Exercise Clause for the last several decades, virtually all of them involved challenges to neutral laws of general applicability that substantially burden religion. *Smith* means that now all such challenges lose; the Free Exercise Clause has essentially vanished from the Constitution. Congress tried to overturn this with the Religious Freedom Restoration Act, yet the Supreme Court declared that unconstitutional in *City of Boerne v. Flores*.<sup>30</sup>

With regard to the narrowing of rights, another example concerns the parental right to custody or at least to visitation of one's children, such as in the case called *Michael H. v. Gerald D.*<sup>31</sup> from 1989. This case involved a married woman who had an affair and conceived a child as a result of the affair. She did not divorce her husband, but she moved in with the child and the biological father for a year and a half. After this time, she and the child rejoined her husband. The biological father sued for visitation rights. However, California had a law that

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30. 521 U.S. 507 (1997).

31. 491 U.S. 110 (1989).

said if a married woman has a child, there was an irrebuttable presumption that her husband was the father of the child.

It has long been established by the Supreme Court that the right to custody, at least the right to visitation, is a fundamental right. In *Stanley v. Illinois*<sup>32</sup> in 1972 the Supreme Court declared that unmarried fathers have a fundamental right to custody of their children. *Stanley* involved an Illinois law that said if an unmarried mother died or gave up custody, the child would automatically be put up for adoption. The Supreme Court declared the Illinois law unconstitutional, proclaiming the fundamental right of unmarried fathers.

The Rehnquist Court in a five-four decision ruled against the unmarried father in *Michael H. v. Gerald D.* by upholding the California law. Writing both for the majority and in part for plurality, Justice Scalia said that there is no tradition of protecting unmarried fathers when the mother is married to someone else. Therefore, there is no constitutional right in this instance for the unmarried father, even to visitation. This decision is a substantial and dramatic narrowing of this parental right.

A fourth statement that explains much of what the Rehnquist Court has done is that no new suspect classifications have been recognized, and the Court has been consistently hostile to currently existing suspect classifications when such involves affirmative action efforts and school desegregation efforts. In the entire twelve-year history of the Rehnquist Court, it has not found any additional types of discrimination to warrant intermediate or strict scrutiny. The categories or types of discrimination that get heightened scrutiny are the same in 1998 as they were in 1986 when the Rehnquist Court began. For example, in *Heller v. Doe*<sup>33</sup> the Supreme Court said that discrimination based on disability gets only rational basis review. In *Romer v. Evans*<sup>34</sup> the Court used only rational basis review in striking down blatant discrimination based on sexual orientation.

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32. 405 U.S. 645 (1972).

33. 509 U.S. 312 (1993).

34. 517 U.S. 620 (1996).

In addition to its refusal to recognize new suspect classifications, the Court has been very hostile to efforts to remedy past discrimination, such as affirmative action. The Rehnquist Court repeatedly has proclaimed that affirmative action efforts should receive the same level of scrutiny as invidious discrimination against racial minorities. It is also interesting here to look at the progression of the Rehnquist Court's decisions. In 1989 in *J.A. Croson v. City of Richmond*,<sup>35</sup> the Supreme Court said state and local affirmative action efforts must meet strict scrutiny. In 1990 in *Metro Broadcasting v. FCC*,<sup>36</sup> the Supreme Court said if Congress approves the affirmative action effort, intermediate scrutiny should be used. The Court stated that Congress has special powers under Section Five of the Fourteenth Amendment to remedy past discrimination. However, in 1995 the Supreme Court overruled *Metro Broadcasting* with *Adarand Constructors v. Peña*.<sup>37</sup> The Court said strict scrutiny applies to all affirmative action efforts.

What was the difference between 1990 when the Court decided *Metro Broadcasting* and 1995 when *Adarand* came down? Did they discover a new history of the Fourteenth Amendment or Article I powers? Was it that *Metro Broadcasting* proved unworkable? No, again it is that four Justices in the majority left the Court from 1990 to 1995, and the four dissenters remained and were joined by Justice Thomas. Even though the precedent was just five years old, they now had the votes and they overruled it.

The other thing that is notable about affirmative action efforts is the lack of deference that the Court shows to democratic, majoritarian processes. All of the affirmative action cases concerned voluntary efforts by the government to achieve racial equality. Ironically, a Court that so often proclaims the need to defer to the majority struck them down.

It is interesting that the most conservative Justices on the Rehnquist Court say that the original meaning of constitutional provisions should

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35. 488 U.S. 469 (1989).

36. 497 U.S. 547 (1990).

37. 515 U.S. 200 (1995).

guide the Court in its decision making. For example, Justice Scalia writes in both his academic writings and in his opinions that the Court should look for original intent or original meaning behind the constitutional margins. Scalia maintains that one finds original meaning from the contemporaneous practices at the time a constitutional provision or amendment was adopted.

For instance, when the Court in *Wilson v. Arkansas*<sup>38</sup> decided whether the police must knock and announce before searching a dwelling, the Court looked to police practices in 1791. When the Court decided in *McIntyre v. Ohio*<sup>39</sup> whether it was a First Amendment right to circulate anonymous literature, the Court looked to the practices in 1791. Therefore, one would think that Scalia and Thomas, who proclaim fidelity to originality, would look to the racially-based, remedial practices around the time the Fourteenth Amendment was adopted. What is striking in the period from 1865 to 1875 is the extent of what we now call affirmative action, the extent to which the federal government was adopting race-conscious programs to help minorities, especially in the South. Scalia and Thomas' opinions do not include a word about original meaning or even acknowledge the affirmative action that occurred after the Civil War.

The same hostility that the Supreme Court has shown to affirmative action is also evidenced in school desegregation efforts. There have been three major Rehnquist Court decisions concerning school desegregation. The first, *Board of Education of Oklahoma City Public Schools v. Dowell*,<sup>40</sup> is from the early 1990s. Oklahoma was a state that had segregated schools mandated by law until 1971. Oklahoma City was also a city with a very successful busing program. The result of busing was that there were virtually no majority black schools. However, a federal district court found that since the busing effort had been in place for a long period of time, the school system was now unitary and the busing efforts should cease.<sup>41</sup> The result of the end to busing in Oklahoma City was that more than half of the

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38. 514 U.S. 927 (1995).

39. 514 U.S. 334 (1995).

40. 498 U.S. 237 (1991).

41. 606 F. Supp. 1548 (W.D. Okla. 1985).

black students would attend schools that were more than ninety-percent black. The end of busing effectively meant the re-segregation of the schools. Nonetheless, the Supreme Court said that once a school system is “unitary” all desegregation efforts should end, even if it would mean the re-segregation of the schools.

The Court next decided *Freeman v. Pitts*,<sup>42</sup> which involved a public school system in Georgia. The system was segregated in every respect, and the federal court issued a five-point plan for desegregation. The school district met only part of the plan. The school wanted to build a brand new facility in a white area of town. A black plaintiff class sought to enjoin construction of the facility. The Rehnquist Court held that once a school district meets a portion of a desegregation order, court supervision of that part of the plan should cease, even if in other respects it is still a segregated system.

Finally, the Court decided *Missouri v. Jenkins*,<sup>43</sup> which concerned the desegregation of Kansas City schools. A district court judge found that because there was continued tremendous disparity between the test scores of black and white students the district had not achieved a unitary system. The Supreme Court said that disparities in performance are irrelevant. Once a desegregation order has been in place for a period of time and there is a unitary school system, that should be the end of federal court supervision in desegregation efforts.

During the Vietnam War, Vermont Senator George Aiken said the United States should declare victory in Vietnam and withdraw. The Rehnquist Court is saying something very similar; it is declaring victory over the problem of school segregation and having the federal courts withdraw. They are saying this even though public schools in the United States are more segregated today than any other time since 1954 and even though today much less is spent, on average, on a black child’s elementary and secondary education than on a white child’s education in the United States.

There is a fifth and final statement that I am offering to explain what the Rehnquist Court has done, and that is that criminal

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42. 503 U.S. 467 (1992).

43. 515 U.S. 70 (1995).

defendants virtually always lose and especially so in capital cases. The Rehnquist Court's attitude towards capital punishment has simply been to speed up the executions, even if it means ignoring the law. One example involves a man by the name of Robert Alton Harris. The Wednesday before Good Friday in 1992, the governor of California denied Robert Alton Harris' petition for clemency. The execution was scheduled for the following Tuesday (actually Monday night at midnight). On Friday, which was both Good Friday and the first Seder of Passover, Robert Alton Harris' lawyers filed a lawsuit in federal district court in San Francisco pursuant to Section 1983<sup>44</sup> and alleged civil rights violations.

The lawsuit said that execution in the gas chamber—then the sole means prescribed for execution in California—was cruel and unusual punishment. There was much evidence to support this, such as scientific evidence of the effects of the cyanide gas on the human body. There were descriptions of the suffering that people went through when they died in this way. There was also the fact that most states in the United States had abandoned the gas chamber, but not California.

After a lengthy hearing, the federal district court issued a temporary restraining order<sup>45</sup> on Friday against the use of the gas chamber in California, the effect of which would be to stop Harris' execution that was scheduled for Monday night. The State's attorneys filed an immediate appeal to the Ninth Circuit. On Sunday evening the three judges decided to have an immediate telephone oral argument, although only the government had filed its brief. Harris' lawyer did not have a chance to file a brief, and the judges gave no prior notice that they were going to hold oral arguments that night. On Monday—this is the day for which the execution was scheduled—the panel issued its decision overturning the district judge's temporary restraining order.<sup>46</sup> Under Ninth Circuit precedents, an appellate court should rarely overturn a temporary restraining order; there must be a showing of abuse of discretion by the district court.

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44. 42 U.S.C. § 1983 (1999).

45. *Fierro v. Gomez*, 790 F. Supp. 966 (N.D. Cal. 1992).

46. *Gomez v. U.S. District Court for the N.D. of Cal.*, 966 F.2d 460 (9th Cir. 1992).

The panel decision was at best curious, but actually clearly wrong as to the law. The panel decision said that the federal district court erred based on *Younger v. Harris*<sup>47</sup> abstention. *Younger v. Harris* held that a federal court should not enjoin pending state court proceedings. If there is a case ongoing in state court, the federal court may not issue an order to enjoin it. Based on this the court of appeals said that the district court erred in issuing its temporary restraining order. There is one problem though; there was no pending state court proceeding. *Younger v. Harris* was completely inapplicable. The court was simply wrong.

That afternoon ten judges on the Ninth Circuit issued a stay of the panel's order. This had the effect of stopping the execution to allow time for the entire Ninth Circuit to vote as to whether or not to grant *en banc* review. That night, shortly after midnight, the Supreme Court lifted the ten judges' stay.<sup>48</sup> The Supreme Court said that this case was barred as a successive habeas corpus petition. A year earlier the Supreme Court ruled that individuals could bring one, and only one, habeas corpus petition unless they could show cause and prejudice, or actual innocence.

There is a huge problem with what the Supreme Court said here. Robert Alton Harris' did not file his suit as a habeas corpus petition. He filed it as a Section 1983 suit, and thus the bar against successive habeas corpus petitions was not relevant. The second paragraph of the three-paragraph Supreme Court opinion said that principles of equity counsel against hearing this suit because he waited too long before filing it. Equity requires that a court balance the hardships to the parties involved. What was the hardship to the State of California in waiting a month or two before putting Robert Alton Harris to death? Of course, on the other hand, the hardship to Robert Alton Harris was an unconstitutional execution. At that point a single judge of the Ninth Circuit issued yet another stay of execution. This judge said that if the Supreme Court wants to treat this as a habeas corpus petition, there is a rule that says a petitioner must exhaust state remedies before coming

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47. 401 U.S. 37 (1971).

48. *Gomez v. U.S. District Court for the N.D. of Cal.*, 503 U.S. 653 (1992).

to the federal courts with a habeas corpus petition. Harris, then, should have a chance to go to state court and raise this.

The Supreme Court then overturned that stay of execution and issued an order of no further stays of execution. The Supreme Court has no authority under any statute or precedent to stop federal courts from issuing stays. To me, what the Robert Alton Harris case was all about is that the Supreme Court has simply concluded that there are too many delays concerning executions and it should make sure the trains run on time. The state executed Robert Alton Harris at six o'clock that morning, just six hours behind schedule.

There are other more systematic examples concerning the death penalty; consider the case of *Collins v. Herrera*.<sup>49</sup> An individual brought a successive habeas corpus petition and claimed that there was substantial evidence that he was actually innocent. Earlier, the Court had indicated if a person is able to produce evidence of actual innocence, it would allow another habeas petition. The Supreme Court still ruled against him five-four, in an opinion by Chief Justice Rehnquist. He said actual innocence is *not* sufficient. There must also be an allegation of a constitutional violation.

Notice what Rehnquist's opinion means. Even if a person can prove that he or she is innocent of the crime, that is not enough to stop the execution unless there is proof of a constitutional violation. To me, executing an innocent person is the most profound of all constitutional violations, but apparently a majority of the Supreme Court disagrees.

Hopefully, I have successfully shown what I said when I started: the Rehnquist Court is an activist, conservative Court. I said I wanted to say that it is activist in the sense that it is not deferring to the majority, and it is not following precedent. I said I wanted to show that it is conservative, that it is very much animated by conservative, Republican values and not in adherence to consistent constitutional philosophy or principles. I said that I also wanted to talk about the Rehnquist Court in the perspective of public interest law. To me, public interest law is ultimately about compassion and caring. To me, the Jewish phrase and tradition "Tikkun Olem"—to heal a broken

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49. 506 U.S. 390 (1992).



world—best describes public interest law. That is what I hope my students will aspire to, to use their legal training in their law careers to heal a broken world.

Yet, when you look at the Rehnquist Court, where do you see any evidence of compassion and caring? Where do you see any evidence of a commitment to healing a broken world? Although it may be harsh, when we talk about the Rehnquist Court and justice, it really is an oxymoron.