

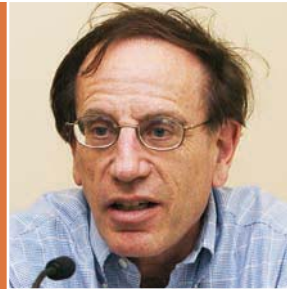
THE REHNQUIST COURT

A roundtable discussion on William H. Rehnquist's '52 tenure as chief justice of the United States, featuring five constitutional scholars and Supreme Court practitioners.

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William H. Rehnquist has had a long association with Stanford University. He received his bachelor's and master's degrees from Stanford in 1948, and his bachelor of laws degree from the law school in 1952 (along with classmate Sandra Day O'Connor). Despite Rehnquist's affiliation with the law school, we don't have any inside knowledge of the chief's plans. However, it is widely believed that he will step down this summer after the current term comes to a close. Even if Rehnquist stays on, the flurry of debate over the role of the judiciary and the direction of the Supreme Court makes this an opportune time to examine his legacy.

Stanford Lawyer gathered an esteemed group of constitutional scholars and Supreme Court practitioners to discuss Rehnquist's 33-year tenure on the Supreme Court, especially his last 19 years as chief. The popular perception is that the Court has moved decidedly to the right under Rehnquist. But the actual record is more mixed.

As this edited transcript of that discussion shows, the chief justice was able to bring his colleagues to his vision of the Constitution in some areas, most notably federalism, but was unable to command a majority of the Court on others, such as affirmative action and gay rights. The panel was moderated by Alan B. Morrison and included Larry Kramer, Kathleen M. Sullivan, Robert Weisberg '79, and Eugene Volokh. (The discussion was held in March at the law school, with Volokh participating by telephone.)

FEDERALISM

MORRISON: There is one area where there can be little doubt of the influence of William Rehnquist on the court, and that is federalism, in particular areas relating to the Commerce Clause, the Tenth Amendment, and Section Five of the Fourteenth Amendment. Larry, can you give us some background about his views both as an associate justice and how he's seen the court change since he became the chief?

KRAMER: I think his views on federalism and the proper role of Congress vis-à-vis the states were fully developed when he went on the bench, and I don't think they ever changed a whole lot. It was the Court that changed around him. What changes appear in his ideas were small and were mostly a product of getting other justices to join his opinions. So when *Garcia* overturned *National League of Cities*, he wrote a dissent in effect saying: "Time will tell. It's so obvious that this is wrong." He did everything but attach an actuarial table to say how long Brennan and Marshall were going to still be there.

Similarly, his Eleventh Amendment jurisprudence is pretty much the same today as it was in the beginning. He went to the bench in '72 and wrote *Edelman* in '74. So all that happened was that, eventually, he found other justices on the Court who agreed with his positions. This itself was a reflection of a significant change that occurred in national politics between 1972 and 1994, as the country shifted to the right and became more conservative.

VOLOKH: I agree. There's been something of a sea change in the country related to federalism. For me, the best example of that is the Schoolhouse Rock cartoon from the '70s that's become something of a cult item recently—the one about legislation, in which the congressional bill sings "I'm only a bill." I think most people don't focus on what the bill was, which was a requirement that all school buses stop at railroad crossings. It was given as an example of something uncontroversial as a proper federal bill in the '70s, because after all, who's against school buses stopping at railroad crossings?

Today, I think many more people would say "Wait a minute, should Congress be telling local school buses what rules of the road they should be following?" Even if the bill might be constitutional post-*Lopez*, people would at least think more about the federalism issues the bill raises.

I do think there's been something of a change, but I wonder to what extent the decisions of the Rehnquist Court have fostered it, except purely symbolically. I really don't see virtually any of the decisions, with the likely exception of *City of Boerne v. Flores*, having that much of a substantive impact. I think that's true even with regard to the Violence Against Women Act decision. My understanding is that the Violence Against Women Act was not a heavily litigated statute; even with the Violence Against Women Act struck down, all that has changed is who does the prosecution, and who hears any civil tort law claims.

Likewise with the state sovereign immunity cases: they do affect some litigants, but not in a huge way. If you put together *Lopez*, *Morrison*, and *Boerne*, they've cut back federal power from say 100 percent to 95 percent, just to choose some arbitrary numbers. There's been a lot of sound and fury, but I don't know how much direct practical effect it has had.

SULLIVAN: Undoubtedly, Chief Justice Rehnquist's federalism revolution will be remembered as one of his great legacies. It used to be thought after the New Deal that Congress could regulate anything it wanted that had any conceivable connection to interstate commerce, and that it could make civil rights laws that regulated far more broadly than simply protecting people against actual violations of civil rights by the states. And it used to be thought that courts should defer to Congress pretty substantially on civil rights matters and anything tied to commerce. And the Court under Rehnquist said, "No, we're going to impose real judicial review."

That's a real change. It used to be that the Court struck down an act of Congress as rarely as once every several terms. Now it's striking down acts of Congress up to five times a term. The Court is standing up to Congress and restraining its powers on the ground that it has exceeded its powers under the Commerce Clause, or exceeded its powers under Section Five of the Fourteenth Amendment, or interfered with reserved state autonomy by commandeering the states.

I agree with Eugene that such review might not have as much effect on litigation as some people make out, but it might also function as a reminder to Congress that it shouldn't willy-nilly pass, for example, a local crime bill just because it is popular in an election year. If it's harder to get a bill to stand up in court, it makes that bill harder to pass, and so greater review in the name of federalism may have

had some restraining effect on Congress. So I do think it's been a significant revolution.

What's more, the Court under Rehnquist's leadership has rolled back habeas corpus petitions, in which prisoners

Lopez and *Morrison* and a suggestion in *Morrison* that maybe the Court will draw a bright line and say that noncommercial activity can't be aggregated for purposes of federal regulation. If and when they take that step, whole areas of federal



could appeal to federal courts to overturn state criminal convictions, and has gotten the federal courts largely out of the business of running the public schools in the desegregation cases. Those decisions may have an even bigger effect in getting the federal government out of state life in the long run.

On the other hand, the interesting thing is, why hasn't the Rehnquist Court gone even further to resurrect states' rights and restrain the overweening power of the federal government? Despite Larry's correct reference to Rehnquist's promise that time would kill off the liberal justices and states' rights would come back—his promise in 1986 that the Court would bring back *National League of Cities* and overrule *Garcia*—they haven't done that.

The justices haven't brought back an affirmative defense of state autonomy that can trump a congressional statute even if it's within the commerce power because it's connected to interstate economic effects. They also have not overruled *South Dakota v. Dole*, which allowed Congress to issue funds with strings attached, such as conditioning highway money on raising the drinking age.

And they haven't overruled *Ex Parte Young*, which allows people to go into court and at least sue state officials, if not sue the states, to at least obtain injunctive relief against state violations of civil rights. What ought to have been the three biggest marks for the Court to shoot at if they were aiming at a federalism revolution, *Garcia*, *South Dakota v. Dole*, and *Ex Parte Young*, they haven't overturned any of them yet.

KRAMER: I would qualify Kathleen's comments with "yet." When we look at things historically, we tend to telescope, to forget that it takes years for the Court to produce serious change. Take the *Lochner* era. It began a good 10 or 15 years earlier than the *Lochner* decision itself. And *Lochner* didn't have any real bite until after 1919—that's a 20- or 30-year period. The Rehnquist Court has been at this for less than a decade. It's wrong to think they are done.

Take the recent Commerce Clause cases. We've got

law could become unconstitutional—including, for example, many environmental laws.

Plus, the Court hasn't needed to limit federal power on constitutional grounds. Instead, what they've done is use their constitutional cases to create a rule for interpreting statutes narrowly that effectively undoes federal power. Both *Jones* and *SWANCC* are cases in which the Supreme Court used *Lopez* to say we won't read these statutes to do something that *might* be unconstitutional, and they cut federal power back—especially in *SWANCC*.

With respect to the Tenth Amendment, they didn't really need to overrule *Garcia*. When Rehnquist wrote *National League of Cities*, I suspect he thought the prospects of cutting back the commerce power directly were pretty close to nil. So while *Garcia* overturned *National League of Cities*, *Lopez* and *Morrison* accomplished to a larger extent what Rehnquist was hoping to do in *National League of Cities* in the first place.

SULLIVAN: What's striking about the Rehnquist Court's approach to states' rights is that it's really a structural reading of the Constitution, which more often has been associated with liberals. There is nothing in the original text of the Eleventh Amendment that speaks directly to the principle of federalism that is being articulated by the Court. It's really a structural principle that says the federal government shouldn't be able to bankrupt the states.

The Court came clean on this when they held that federal agency adjudications can be reached under the same principles, a situation never contemplated by the framers. It's really an unenumerated "Eleventeenth Amendment," as former acting solicitor general Walter Dellinger has called it. It's fascinating to see that some justices are labeled "judicial activists" for finding an unenumerated right to privacy, but it is rarely observed that finding an implied state sovereign immunity principle to limit federal power, as the Rehnquist Court has, is just as much judicial activism in defense of states' rights.

VOLOKH: Just a couple of words of caution. There were 32 cases striking down federal statutes in the first 14 years of the Rehnquist Court. Of those, half were on Bill of Rights grounds. Eleven of these were free speech clause cases, and another five related to the takings clause, the Seventh Amendment, the self-incrimination clause, and such. Of the remaining 16, 11 were about federalism and five were non-federalism cases, involving things like separation of powers and the export-import clause.

Note, by the way, that there are a lot of liberals voting to strike down federal statutes as well. The idea that “the federal government is our protector against state overreaching,”

before Rehnquist became chief it became something of a cliché, at least among American academics, that this hadn’t happened. Indeed, the perfectly titled book on this subject is *Burger Court: The Counter-Revolution That Wasn’t*.

Essentially none of the big Warren Court criminal law decisions has been overturned. At the same time, there has been a fair amount of chipping away at them—most obviously *Miranda*. The decision that captures these currents is *Dickerson v. United States* in 2000, where the Court was presented at least the opportunity to flat-out overrule *Miranda*. *Dickerson* is a rare instance of Rehnquist voting with the defendant in a criminal case.



which may have been something of the sense in the ’60s, has lost a lot of credibility. So to say that the conservative revolution is leading to federal statutes being struck down several times a term may be something of an overstatement.

KRAMER: From 1994 to 2004 the Rehnquist Court struck down 30 federal statutes. That’s 10 more than the Warren Court did during its most activist decade, and more than the *Lochner* Court did as well. If the Rehnquist Court struck down 11 statutes on federalism grounds, that’s compared with none for the six decades prior to that. Striking down that many laws in so short a period has a tremendous effect throughout the political system—in terms of how Congress reacts, how the states react, how politicians campaign, and so forth. That’s where the real effect is.

CRIMINAL LAW

MORRISON: Let’s turn to another area where, when he was associate justice, William Rehnquist was often in dissent, and that’s criminal law. Bob, how successful has he been at moving the Court’s criminal law decisions in a different direction from the way they were under the Warren Court, to take an extreme example?

WEISBERG: If anything in the public mind captured the image, particularly the negative image, of the Warren Court, it was criminal law, particularly *Mapp* and *Miranda*. It was expected that ultimately the Burger Court, and then the Rehnquist Court, would undo the Warren Court. But even

His decision to affirm—if I may put it that way—*Miranda* has the kind of tone that you’d associate with somebody holding a horrible dead fish at some distance and saying “Well, it’s not the worst dead fish I’ve ever seen.” It’s basically a begrudging acknowledgement that the relatively strict criteria that must be met for violating *stare decisis* aren’t quite met here. It contains a side argument that enough limitations have been placed on *Miranda* that it’s not so harmful a decision anymore, and that in fact the police can deal with it pretty easily.

So *Dickerson* captures a lot of things. The big decisions basically still stand, most obviously *Mapp* and *Miranda*. It’s a reminder that the supposed bifurcation between the Warren and Burger/Rehnquist Courts on criminal law is somewhat exaggerated.

Now, switching to Rehnquist himself, in a way the pattern is simple and rather odd at the same time. It’s simple in the following sense: William Rehnquist virtually never votes for the defendant in a criminal case—I’m defining criminal case here to exclude Commerce Clause cases and the like, or even free speech cases that happen to involve criminal statutes. I’m talking about cases about constitutional criminal procedure, under the Fourth, Fifth, and Sixth Amendments, along with Eighth Amendment cases about the meaning of “cruel and unusual punishments.”

But he doesn’t have a particularly interesting methodology or jurisprudence of criminal law independent of the outcome. You can’t find a philosophical jurisprudence of the kind you would associate with Justice Scalia, which has

caused Scalia to vote for the defense in some criminal cases, like *Blakeley* and *Booker*, and leads him in a kind of libertarian direction in some search and seizure cases.

Rehnquist seems to be just checking in on criminal cases, rather laconically voting with the state or with the federal government, writing the opinions in some cases, though they're not terribly important opinions in terms of wider methodology. Either he thinks he can't win at a higher level of generality, or he's simply unconcerned with criminal law as a distinctly important area philosophically.

KRAMER: What that points out is that there is a big change in Rehnquist once he becomes chief. This goes back to something Kathleen said, which is his sense of the role of the chief justice and of the Court. When he was an associate justice he would go off on his own, and his most extreme views emerged, because he was willing to express them. Once he becomes chief, you see a tempering. There are a lot more cases in which the result may be something he agrees with, but he writes an opinion that's less extreme than he would have written as an associate justice. I think that's part of what's going on in some of the cases Bob refers to.

MORRISON: When he was an associate justice, he wrote an average of 16.6 majority opinions a year, and 16.3 dissents a year. He dissented in about one out of every 8.5 cases. Now that he's become the chief, and particularly in the last 11 terms, he's dissenting much less—less than four times a term. The numbers are something in the order of one in 20 that he's dissenting in. His concurring opinions, which is the other point you made, have dropped off also, suggesting maybe that he views his role as the chief differently.

decision, in which he carried eight justices and left Justice Scalia alone in dissent, is a perfect example of his trying to set a statesmanlike leadership tone once he became chief that he didn't show when he was an associate justice.

On rare occasions, the old tone resurfaces, for example in his 1992 dissent from the Court's refusal to overrule *Roe v. Wade*, which said in unusually bitter terms that the Court had overruled important post-*Roe* cases while purportedly upholding *Roe*, leaving *Roe* just a "judicial Potemkin Village."

SOCIAL ISSUES

MORRISON: Let's turn to the area that Kathleen just got us into, the so-called hot button social issues—abortion, affirmative action, sodomy laws, religion, women's rights, and other equal protection claims. Has Chief Justice Rehnquist been able to lead the Court on those issues, Kathleen?

SULLIVAN: No. The chief's most dramatic area of failure to lead the Court in his direction is in the unenumerated right to privacy, under which the Rehnquist Court has struck down a criminal ban on consensual sexual practices, just as the Court had earlier struck down bans on access to abortion and access to contraception. Rehnquist has been very consistent in opposing that entire line of cases. He was one of only two justices to dissent in 1973 in *Roe*, and has maintained his opposition to *Roe* and to any analogue to *Roe* ever since.

He has failed to keep the Court from extending the right of privacy one more level, from control over reproduction to sex itself in *Lawrence v. Texas*, which in 2003 struck down a law against sodomy. Likewise, he was unsuccessful in leading the Court to announce an equal protection principle that would stop affirmative action, or the use of race prefer-



WEISBERG: He's written relatively few dissents in the criminal cases that his side has lost. He tends to let somebody else write a dissent, like Scalia or Thomas.

SULLIVAN: A dramatic example of that is the decision he wrote for the Court during his first term as chief, upholding the independent counsel statute against a separation of powers challenge, under a loose totality of the circumstances test, that doesn't sound like the old Rehnquist at all. That

ences to include traditionally excluded minorities in public programs. If he wanted to lead the Court to get rid of *Roe v. Wade* and affirmative action—two important planks of the Republican Party platform—he did not deliver on those two ideological goals.

Religion is the one social area where you have to say that he has had major success. In the '70s, the Court struck down most forms of financial aid to parochial schools. In *Mueller v. Allen*, in 1983, as associate justice, he led a bare

majority to say that public subsidies to religious schools can pass Establishment Clause muster because a public subsidy to religion that is included in a general program of public subsidies for a purpose like education is not a preference for religion, it's just an equal treatment of religion. As chief he later drove that home by a series of cases culminating in *Zelman v. Simmons-Harris*, the Ohio case upholding school vouchers, in which he delivered the opinion of the Court limiting the Establishment Clause as a barrier to the inclusion of religion in public programs. His position, which was once the loner position, now becomes the Court's position. That has to be counted as a major success on his part.

KRAMER: The way the initial question was framed is a little unfair to Rehnquist, in the sense that chief justices don't lead Courts. That has never been the case. Consider the Marshall Court. Marshall didn't lead that Court in the sense that it did what he wanted and followed his preferences. Marshall wrote all of the constitutional opinions, so his is the voice that we are familiar with, but what went on internally was more complex.

There were other very strong personalities on that Court, and they had their own views, and Marshall accommodated them as best he could. The question is what kind of coalitions formed, and whether there was a coalition of

a far-right conservative. But in a sense he was ahead of his time, because conservatism was very much moving in his direction. Today, Scalia and Thomas are much more conservative than Rehnquist. I think Rehnquist's position has remained roughly the same. A lot of what looks to us like tempering is simply that others on the Court are willing to take positions that make Rehnquist look less conservative.

MORRISON: If we shouldn't hold him accountable for not having moved the Court on social issues, then perhaps we should not give him as much credit for having moved the Court on other issues.

KRAMER: I agree. Why does *Lopez* happen? It's not because of Rehnquist. It's because other people are appointed to the Court who actually agree with him, and suddenly he goes from one to five votes.

FIRST AMENDMENT

MORRISON: Eugene, can we turn now to the last major grouping, the First Amendment issues?

VOLOKH: Rehnquist has been identified with three broad positions on the First Amendment. It looks like he's pretty



people in significant enough agreement about important issues to carry something along over time. The same thing is true for the Warren Court.

So on the hot button social issues of abortion, sexual orientation, and such, Rehnquist failed. The problem is simply that the Reagan/Bush presidents haven't quite gotten their coalition all the way there. It hangs by a narrow thread. *Lawrence* comes out the way it does only because of a weird quirk in Justice Kennedy's jurisprudence, which they probably weren't aware of when they appointed him. So, too, with *Roe v. Wade*. It's too soon to say what will happen in these areas, on the one hand, and too much to ask Rehnquist to have been the person to single-handedly have moved the Court to overturn these decisions, on the other.

Much that has gone on can be understood and explained by thinking about how the country has shifted politically over time. When Rehnquist was appointed in 1971, he was

much won one and one-half of them. On the Establishment Clause he has taken two views—actually he's taken many views, and some of the early ones were quite theoretically interesting. But one thing with which he has been strongly identified is the view that generally available subsidies can include religious people and institutions within them.

So the GI Bill, which allowed returning soldiers to get a higher education at any university, whether secular or religious, public or private, would be perfectly constitutional. Rehnquist would use that as a classic example of where the subsidy—being a broad, evenhanded subsidy—is not to be treated as a subsidy to religion, but rather a subsidy for education, which includes religion. He's won on that; he's won by only one vote, so who knows what will happen with a change in personnel, but at least for now he has won.

The second aspect of the Establishment Clause for which he has fought, and generally lost, is government

religious speech, things like the Ten Commandments postings which are now before the Court. There, the liberals, plus O'Connor and occasionally Kennedy, have generally prevailed. Rehnquist has come close, but he has ultimately failed. My guess is when he looks back on it, he'll probably say, "Look, I'll gladly sacrifice religious symbolism in favor of the more substantive questions related to the participation of religious institutions in evenhanded funding programs."

As to free exercise, Rehnquist was the first modern voice against the compelled constitutional exemption regime of *Sherbert* and *Yoder*. He was the one who first argued in the *Thomas* case that nondiscriminatory laws should be constitutionally applicable even to religious objectors. And he worked his way up from one vote, to two votes when Justice Stevens adopted this view a few years later, and then ultimately to a majority in *Employment Division v. Smith*.

On the free speech side, I'm not sure it was a failure of Rehnquist's, but he has lost. I think he has reconciled himself to losing. In the '70s he fought quite tirelessly in favor of a less speech-protective viewpoint on a wide range of subjects, including government speech subsidies, commercial advertising, and a variety of other things. And there, the Court has moved, if anything, into a more speech-protective position with the votes of Kennedy, Thomas, and Scalia. Justice Kennedy has taken the most broadly speech-protective view of any of the justices. Interestingly, the one justice who has a quantitatively similarly speech-restrictive perspective to Rehnquist—he doesn't necessarily vote the same way in every case, but if you count the number of cases he's voted against the free speech claimants, it's roughly the same number as Rehnquist—is Justice Breyer.

Up until the late '80s, I don't think there was a single nonunanimous free speech case in which Justice Rehnquist voted for the free speech claimant, except for campaign finance cases, where he has long taken a moderate libertarian viewpoint. But since then there have been quite a few cases in which it looks like Justice Rehnquist has reconciled himself to broad free speech protection.

So a loss for him on free speech, a win on free exercise and on the generally available funding program side of the Establishment Clause, and a loss on the government speech side of the Establishment Clause. Does he think the glass is half full or half empty? You'll have to ask him.

SULLIVAN: Eugene's wonderful summary of the First Amendment cases reveals the limits of Rehnquist's conservatism. While he is willing to strike down a number of congressional statutes, whether for federalism reasons or for rights-related reasons, he's much more deferential to the decisions of the states, sometimes even if they might seem somewhat liberal. For example, he writes *Madsen v. Women's*

Health Center upholding at least some of the restrictions on abortion protests outside an abortion clinic, even though he's a dissenter from *Roe* itself.

If you think back to the young man who supported Barry Goldwater, it's interesting that he picked up on the idea of federalism and deference to the states as useful devices in democracy and checks on the overwhelming power of the national government. But he doesn't pick up on the libertarian strand of Goldwater republicanism which might have been reflected in the opposite view on anything from abortion to gay rights, as well as school vouchers. So he may be a little bit libertarian, as Eugene implies, when it comes to access to school vouchers, but he's not libertarian or Goldwateresque on a whole lot of other things.

MORRISON: Listening to Eugene reminded me that even when you try to enunciate the chief's position, you get a decision like *Locke* from the state of Washington last year in which he said that the person who wanted to get a free religious education had gone too far, and the state was not obligated to give him one just because it's obligated to give him a scholarship to do other things. Similarly, in the Medical Leave Act case where he wrote the opinion saying that it wasn't a violation of the Eleventh Amendment. So in some sense he's temporizing his position and kind of ending up in the middle.

WEISBERG: His work is not done yet, though.

SULLIVAN: We should not forget Rehnquist the person in this discussion. Although he can be a fierce presence on the bench, and can intimidate advocates who stand before him by cutting them off in the middle of a "the" if they hit the red light on their oral argument time, he is an immensely genial person in the private life of the Court. He's a raconteur, he has a great sense of humor, he loves to tell jokes. The force of his personality as chief is probably a factor in the leadership he has shown on the Court, and that's a side that the public doesn't see very often. They see the public person who forced himself to show up on the Capitol steps for the second inauguration of President Bush, who has a tremendous pride in national institutions—the pride that led him to sew four gold stripes onto his chief justice's robe—but also a tremendously informal, genial, and almost raffish sense of fun outside the Court. I think that private personality is a big part of his public success.

WEISBERG: Kathleen used the terms "force of his personality," but in fact it's the nonforce of his personality. He's a disarmingly affable and unaggressive personality, and this surely must have served him well in managing the Court. ■