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Selected Opinions of Chief Justice Rehnquist

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Abstract. William H. Justice Rehnquist, appointed to the Supreme Court by President Richard M. Nixon, joined the United States Supreme Court as an associate Justice in 1972. In 1986, President Ronald Reagan nominated him to replace Chief Justice Warren Burger, a position to which he was confirmed by the Senate by a vote of 65 to 33. When Chief Justice Rehnquist died on September 3, 2005, he had served 33 years on the Court. William H. Rehnquist had a significant influence over a number of issues during his years on the Supreme Court. While he is most often associated with the Court's renewed interest in federalism, he also made significant contributions in a number of other areas, including separation of powers, church-state, criminal law, equal protection and due process. While he was often a lone dissenter early in his career, his influence grew as the composition of the Court changed, and as he persuaded other Justices of the merits of his position, many of his views gained ascendancy.

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Summary

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Federalism

During Chief Justice Rehnquist's early years on the Court in the 1970s, there were growing conflicts between state governments and the federal government. The federal government was expanding in size, while imposing new mandates on states. Because of these new responsibilities, state governments developed increased administrative capacities, and were soon arguing for greater control over many of state/federal programs. However, this was also a time of increasing federal controls over states.

For instance, the Economic Stabilization Act of 1970 was used by President Nixon to reduce a raise that had been promised to Ohio state employees. This action was challenged in the case of *Fry v. United States.*[1] In *Fry*, the Supreme Court considered the argument that the states should be immune from federal regulation. In a brief opinion, the majority reasserted, based on prior case law, that states are not immune from federal regulation under the Commerce Clause merely because of their sovereign status.

[1] 421 U.S. 542 (1975).

Justice Rehnquist, who was then new to the bench, wrote a dissent in this case.[2] He argued that, while the Commerce Clause might apply to the states, the states should also have a positive constitutional defense against such regulation. Under Justice Rehnquist's reasoning, if the federal government was allowed to impose any type of regulation on a state, this would eliminate the sovereignty of the state. Although he did not fully articulate the limits which were suggested by state sovereignty, he did argue that there had to be a logical limit to how far the federal government could go. No other Justice, however, joined his dissent.

However, this soon changed. In 1976, the Court decided the case of *National League of Cities v Usery*,[3] which dealt with the Fair Labor Standards Act and the question of whether the federal government could impose minimum wage and overtime requirements for state employees. Justice Rehnquist managed to attract four more votes to his position by distinguishing the temporary freeze on state employee wages in *Fry* from the long-term reordering of the economic priorities of the states in *National League of Cities*. Justice Rehnquist's opinion carefully considered the economic impact of the minimum wage and overtime requirements, and made the case that the intrusion on the state was far greater than was the case in *Fry*.

The coalition assembled by Chief Justice Rehnquist crumbled, however, when Justice Blackmun (who in a concurrence in *National League of Cities* had advocated a balancing approach to federal-state relations),[4] reversed his position. In 1985, Justice Blackmun authored an opinion in *Garcia v. San Antonio Metropolitan Transit Authority*[5] which overruled *National League of Cities*. *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that federalism disputes were to be considered political questions.

Consequently, for the next 10 years, Justice Rehnquist had to make his federalism arguments from dissent. For instance, in *Nevada v. Hall*,[6] the Court considered whether one state could be sued in the courts of another state. While the Court allowed such suits, Justice Rehnquist suggested that previous case law supported the concept that "unconsenting states are not subject to the jurisdiction of the courts of other States."[7] This was the beginning of a line of reasoning that led to the rebirth of 11th Amendment state sovereign immunity. In *Hall*, Justice Rehnquist based his dissent on "the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter."[8]

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[2] 421 U.S. at 551-559

[3] 426 U.S. 833 (1976).

[4] 426 U.S. at 856.

[5] 469 U.S. 528 (1985).

[6] 440 U.S. 410 (1979).

[7] 440 U.S. at 437.

[8] 440 U.S. at 433.

By 1995, however, the Court's configuration that was to last until 2005 was in place. In that year, Chief Justice Rehnquist authored the Court's opinion in *United States v. Lopez*,[9] which brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal legislation. Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[10] In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. The *Lopez* case was significant in that it was the first time since 1937 (with the possible exception of *Usery*) that the Supreme Court struck down a federal statute purely based on a finding that the Congress had exceeded its powers under the Commerce Clause.

The five justices who decided *Lopez* (Chief Justice Rehnquist, Justices Scalia, Thomas, Kennedy and O'Connor) became instrumental in a number of other federalism cases.[11] For instance, these four associate Justices joined an opinion authored by Chief Justice Rehnquist in *United States v. Morrison*[12] which invalidated a portion of the Violence Against Women Act allowing a party to obtain damages from a person who commits a gender-motivated crime.[13] Applying its holding in *Lopez*, the Court concluded that the activity regulated by the act could not be classified as "economic activity," and consequently was not amenable to federal regulation under the Commerce Clause.

Of particular note was that in *Morrison*, unlike in *Lopez*, there were numerous congressional findings as to the effect of gender-motivated crime on commerce. Again writing for the Court, Chief Justice Rehnquist stressed that although findings by the legislative branch can serve to illuminate the relationship between the regulation and interstate commerce, constitutionality is for the Court to decide. In this case, the Court determined that the legislative findings detailing the effects on interstate commerce by gender motivated violence were based in large part on the "costs of crime," which was nearly identical to reasoning expressly rejected by the

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[9] 514 U.S. 549 (1995).

[10] 18 U.S.C. §922(q)(1)A).

[11] This was the voting configuration for the majority opinions in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers such as the power to regulate commerce are insufficient to abrogate Eleventh Amendment immunity); University of Alabama v. Garrett, 531 U.S. 356 (2000) (no authority to enforce Title I of the Americans with Disabilities Act against states as no pattern of unconstitutional state discrimination was established); Alden v. Maine, 527 U.S. 706, 2248 (1999) (sovereign immunity can prevent Congress from authorizing a state to be sued in its own courts without state's permission); Federal Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) (sovereign immunity can prevent Congress from authorizing a state to be sued in an quasi-judicial proceeding before a federal agency without the state's permission).

[12] United States v. Morrison, 529 U.S. 598 (2000).

[13] 42 U.S.C. § 13981 (2000).

Court in *Lopez*.[14] This ruling seemed to reaffirm a trend in the Court to show less deference to Congress in establishing the constitutional basis of legislation.[15]

However, Chief Justice Rehnquist was also the author of an opinion which appeared to show the limits of the Court's emphasis on federalism. *Nevada Department of Human Resources v. Hibbs*,[16] a 6-3 decision, involved the question of whether the Family and Medical Leave Act of 1993 (FMLA) could be applied to the states. In *Hibbs*, the Court held that Congress could use its enforcement authority under the 14th Amendment[17] to abrogate state sovereign immunity, based on a history of state discrimination against women in employment.

Previously, the Court had been reluctant to find such an abrogation. For instance, in *Kimel v. Florida Board of Regents*,[18] which evaluated the application of the Age Discrimination in Employment Act of 1967 against the states, the Court noted that age discrimination was evaluated under a rational basis test. Consequently, it was difficult for the Congress to show a pattern of unconstitutional age discrimination by the states. Similarly, in the case of *Board of Trustees v. Garrett*,[19] which dealt with the American with Disabilities Act, the Court found no pattern of unconstitutional discrimination against the disabled by the states.

In *Hibbs*, however, the Court held that Congress had the power to abrogate a state's Eleventh Amendment immunity under the FMLA, so that a state employee could recover money damages. The difference here is that the Court has found that legislation which makes gender-based classifications is subject to a higher level of scrutiny than the classifications made in *Kimel* and *Garrett.* Consequently, it was easier for Congress to show a pattern of state constitutional violations regarding women and employment, and the Court appeared to be more lenient in the types of evidence it would consider to establish this. Justice Rehnquist's opinion found that Congress had established significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the states, and that history was sufficient to justify the enactment of the legislation under the 14th Amendment. Still, by assigning the opinion to himself, Justice Rehnquist may have sought to limit the scope of the decision.[20]

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[14] 529 U.S. at 615 (stating that the reasoning of Congress would supply it with the power to "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption").

[15] But see *Gonzales v. Raich*, ___ U.S. ___, 125 S. Ct. 2195 (2005) (holding that prohibition on possession of medicinal marijuana was a "necessary and proper" component of larger regulatory scheme to contain the flow of controlled substances in interstate commerce).

[16] 538 U.S. 721 (2003).

[17] Section 5 of the 14th Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[18] 528 U.S. 62 (2000).

[19] 531 U.S. 356 (2001).

[20] *But see* Tennessee v. Lane, 541 U.S. 509 (2004) (upholding abrogation of state sovereign (continued...)

Separation of Powers

Chief Justice Rehnquist participated in several major cases in this area, often, though not exclusively, appearing to align himself with what might be considered a "formalistic view" of separation of powers.[21] Justice Rehnquist joined with the formalists in *Buckley v. Valeo*,[22] which held that Congress could not appoint officials to any executive agency; *INS v. Chadha*,[23] which struck down Congress's use of the one-house legislative veto; and *Bowsher v. Synar*,[24] which held that Congress had unconstitutionally usurped executive branch functions by assigning executive duties to the Comptroller General, a legislative branch officer. Similarly, Justice Rehnquist had dissented from the Court's holding *Nixon v. Administrator of General Services*,[25] in which the majority rejected the "'archaic view of separation of powers as requiring three airtight compartments of government.'"[26]

Justice Rehnquist, however, joined the majority's opinion in *Commodities Futures Trading Commission v. Schor*, which held that Congress's grant of authority to the CFTC to entertain state law counterclaims in reparation proceedings did not violate Article III of the Constitution.[27] The majority opinion expressly rejected the formalistic approach to separation of powers in favor of what has been characterized by some scholars as a more functional or flexible approach.[28]

In 1988, in the case of *Morrison v. Olsen*,[29] the Court was presented with a series of constitutional issues surrounding the Independent Counsel provisions of the

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[20] (...continued)
immunity by Title II of the ADA based on a fundamental right of access to the courts).

[21] A "formalist" approach to separation of powers focuses upon the text of the Constitution in an effort to ascertain to what degree branch powers and functions may be intermingled. *See* Peter R. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 489 (1987) [hereinafter Strauss]. The arguable effect of this approach is to ascertain whether the activity in question is judicial, executive, or legislative in nature and to circumscribe power that extends beyond the constitutionally assigned functions of a particular branch. *See id.*

[22] 424 US 1 (1976).

[23] 462 US 919 (1983).

[24] 478 U.S. 714 (1986).

[25] 433 U.S. 425 (1977).

[26] *Id.* at 443 (*quoting Nixon v. Administrator of General Services*, 408 F. Supp 321, 342 (D.D.C. 1976)).

[27] 478 U.S. 833 (1986).

[28] "Functionalism," generally argues that precise definitional boundaries cannot serve as a basis for the resolution of separation of powers issues. Thus, a functionalist approach permits the sharing of power between branches, and concerns itself mainly with the preservation of the core function of a particular branch. *See* Strauss, *supra* note 21 at 489.

[29] 487 U.S. 654 (1988).

Ethics in Government Act.[30] Congress provided for the appointment of an independent counsel, charged with the investigation of government officials suspected of illegal activity, as well as for their subsequent prosecution. The statute further provided that the independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[31] By the time the case reached the Supreme Court it contained not only separation of powers questions, but also questions arising under both the Appointments Clause[32] and Article III of the Constitution.

The Court, in a groundbreaking opinion by Chief Justice Rehnquist, again departed from its previous formalistic approach in favor of a more functional position, holding that the independent counsel statute was a valid exercise of Congress's power. In reaching his conclusions, Chief Justice Rehnquist distinguished *Morrison* from previous decisions in both *Bowsher v. Synar*[33] and *Myers v. Untied States*[34] on the basis that the independent counsel statute before the Court "does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction."[35] The Court found that removal authority was vested not in the Congress, but rather in the Attorney General, an executive branch official who answers directly to the President, subject only to the requirement that "good cause" be shown. The Court could find no reason why "the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[36]

Chief Justice Rehnquist's opinion again focused on the fact that Congress did not attempt to increase its own powers with respect to the removal of officers of the United States in concluding that "this case simply does not pose a 'danger of congressional usurpation of Executive Branch functions."[37] Moreover, the Court noted that the statute did not impermissibly grant the judiciary powers that could be

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[30] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1982 ed., Supp. V)).

[31] *Morrison*, 487 U.S. at 683.

[32] U.S. CONST. Art. II, § 2, cl. 2 (stating that " [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments").

[33] 478 U.S. 714 (1986).

[34] 272 U.S. 52 (1926).

[35] *Morrison*, 487 U.S. at 686.

[36] *Id.* at 691-92.

[37] *Id.* at 694 (*quoting Bowsher v. Synar*, 478 U.S. at 727).

considered a usurpation of Executive functions because the judiciary could not have acted independently of a request from the Attorney General. The extensive role that the Attorney General, and by extension the President, possesses within the statute's framework provided, in the Court's opinion, "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[38]

The Right To Privacy

Chief Justice Rehnquist was an early skeptic of cases regarding the constitutional right to privacy. For instance, he was one of only two dissenters to the Court's opinion in *Roe v. Wade*,[39] finding that the right to an abortion did not fit comfortably into either the text of the Constitution or the kind of "privacy" protections which had previously been found protected under the Constitution. Considering the specificity of the decision's mandate, which divided pregnancy into trimesters and treated regulation of each stage differently, Justice Rehnquist dissent questioned whether the Court was undertaking a role more appropriately left to legislatures.[40]

Justice Rehnquist's skepticism regarding *Roe* can be further seen in his opinion, concurring in part and dissenting in part, in the case of *Planned Parenthood v. Casey*.[41] In that opinion, joined by Justices White, Scalia and Thomas, the Chief Justice concluded that *Roe v. Wade* had been incorrectly decided and that its subsequent interpretation had been increasingly confused and uncertain. Instead of the standard adopted by the plurality in *Casey*, which allowed for restrictions that were not "unduly burdensome," the Chief Justice would have upheld restrictions on abortion where such procedures are rationally related to a legitimate state interest.[42]

However, Justice Rehnquist also had a part in the recognition of an arguably new privacy right, the right to terminate medical treatment. In the case of *Cruzan v. Missouri Department of Health*,[43] the Court considered two legal issues novel to the Supreme Court: first, whether an incompetent patient had the constitutional right, even absent legislative approval, to consent to the withdrawal of nutrition and hydration; second, whether this right could be exercised by a guardian, and what standard of proof would be required to show that such a course of action was the intent of the patient. In an opinion by Chief Justice Rehnquist, the Supreme Court ultimately decided that the state may require clear and convincing evidence of a patient's wishes, and if the guardians of the patient did not have sufficient proof,

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[38] *Id.* at 696.

[39] 410 U.S. 113 (1973).

[40] *Id*. at 173.

[41] 505 U.S. 833 (1992).

[42] *Id*. at 966.

[43] 497 U.S. 261 (1990).

nutrition and hydration could not be withdrawn.[44] Perhaps reluctant to establish a new constitutional right, Justice Rehnquist declined to explicitly endorse a "right to die," instead "presuming" the existence of such a right in order to reach the issue of standard of proof. Regardless, this case is generally cited as the basis for the establishment of this right, and has been central to other cases, such as the recent litigation regarding Theresa Schiavo.[45]

Church-State

Since joining the Court in 1971, Chief Justice Rehnquist has played a major role in developing the Court's Establishment Clause jurisprudence.[46] The three-part test established by the Court's 1971 decision in *Lemon v Kurtzman*[47] has, in one form or another dominated this area. Justice Rehnquist, however, has consistently advocated a narrow interpretation of the Establishment Clause, one which has found constitutional many of the more controversial practices to come before the Court in recent years. Justice Rehnquist's views are reflected in numerous cases concerning the establishment of religion. The three cases highlighted here, however – involving school vouchers, the pledge of allegiance, and public display of the Ten Commandments – best reflect his overall view of a narrow conception of the Establishment Clause's prohibition on recognition of religion by government.[48]

In the case of *Zelman v. Simons-Harris*,[49] the Court addressed the constitutionality of the Ohio Pilot Scholarship Program, which was created as a partial response to a 1995 court decision that directed Ohio to take control of Cleveland's failing public schools. The program, which permitted voucher funds to be used to pay parochial school tuition, was challenged as a violation of the Establishment Clause. Chief Justice Rehnquist, writing for the Court's majority, employed a version of the *Lemon* test, finding that there was no dispute that the

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[44] The Court found that it was not constitutionally required that guardians or family be allowed to effectuate such a decision. *Cruzan*, 497 U.S. at 284. Rather, the Court determined that not only could a state require that a patient's own personal wishes be examined, but that absent clear and convincing evidence of such wishes, a state could decline to allow withdrawal of treatment.

[45] *See* CRS Report RL32830 (pdf): "The Schiavo Case: Legal Issues;" CRS Report 97-244 (pdf): "The 'Right to Die': Constitutional and Statutory Analysis."

[46] *See* U.S. CONST., Amend. 1 (stating that "Congress shall make no law respecting an establishment of religion...").

[47] 403 U.S. 602 (1971) (stating that for a law or practice to be constitutional under the Establishment Clause it must: (1) have a secular purpose; (2) not have a primary effect of advancing or inhibiting religion and; (3) not unduly entangle the state with religion).

[48] For an academic overview of the Rehnquist Court's impact on the First Amendment's Religion Clauses, *see* Kent Greenawalt, *The Rehnquist Court: Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145 (2004).

[49] 536 U.S. 639 (2002).

program served the "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[50]

According to the Chief Justice, however, the central question was not whether the program had a secular purpose, but rather whether it had an unconstitutional effect of advancing or inhibiting religion. To determine this, the Chief Justice relied on three prior cases involving indirect assistance to sectarian schools, namely, *Mueller v. Allen*,[51] *Witters v. Washington Department of Services for the Blind*,[52] and *Zobrest v. Catalina Foothills School District*.[53] In each of these cases, the central question for the Court was whether the aid was distributed on a religion-neutral basis and whether the beneficiaries had a "true private choice" about whether to use the aid at religious or secular schools.[54]

Applying the precedent to the Cleveland program, the Court held that Ohio's program provided "educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland School District"[55] and, therefore, according to the Chief Justice, was consistent with the previous cases as a program of true private choice.

In *Elk Grove Unified School District v. Newdow*,[56] commonly referred to as the "Pledge of Allegiance" case, the Court's majority opinion did not directly address the merits of the case, choosing instead to focus on Mr. Newdow's standing to challenge the school district's policy in federal court.[57] The Chief Justice along with Justices O'Connor and Thomas, however, concurred in the judgment reversing the Ninth Circuit's decision, but did so based upon findings that the phrase "under God" did not violate the Establishment Clause of the First Amendment.

Relying on historical invocations of God, such as George Washington's first inaugural address, President Lincoln's Gettysburg Address, and Woodrow Wilson's declaration of war against Germany, the Chief Justice concluded that "our national

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[50] *Id.* at 650.

[51] 463 U.S. 388 (1983).

[52] 474 U.S. 481 (1986).

[53] 509 U.S. 1 (1993).

[54] *Zelman*, 536 U.S. at 652 (stating that "*Mueller, Witters, and Zobrest* ... make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.")

[55] *Id.* at 653. The Court rejected as irrelevant the statistics that 96% of scholarship recipients enrolled in religious schools.

[56] 542 U.S. 1 (2004).

[57] *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S. Ct 2301, 2312 (holding it was "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.").

culture allows public recognition of our Nation's religious history and character."[58] Given the long history of public recognition of God, for the Chief Justice the only remaining question was whether the recitation on the pledge impermissibly coerced a religious act.[59] Important to this point is the fact that under the challenged California state law the recitation remained voluntary, and therefore, could not be considered a coercive religious act such as was found in *Lee v. Weisman*. The Chief Justice was unwilling to find that the phrase "under God" could be reasonably seen as a religious act, thus, according to his opinion, it "cannot possibly lead to the establishment of a religion or anything like it."[60]

In *Van Orden v. Perry*,[61] the Court was presented with a monument of the Ten Commandments displayed on the grounds of the Texas State Capitol. An Establishment Clause challenge seeking removal of the monument was brought by an attorney who frequently encountered it as he was traveling to and from the Capitol grounds. The Chief Justice, writing for himself and three other Justices, began his analysis, as in *Newdow*, by citing numerous examples of "official acknowledgment by all three branches of government of the role of religion in American life," and noting that "recognition of the role of God in our Nation's heritage has also been reflected in [its] decisions."[62]

The Chief Justice's opinion found that "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America," and cited numerous places where the Commandments can be found on government buildings throughout Washington, DC.[63] While he acknowledged that the Ten Commandments are and remain inherently religious, the Chief Justice noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[64]

Chief Justice Rehnquist distinguished this case from *Stone v. Graham*,[65] which struck down a Kentucky statute requiring the posting of a privately purchased copy of the Ten Commandments on the wall of each public school classroom in the state, by making a distinction between religious displays in a classroom context and the "more passive" display of the Commandments at issue on the grounds of the Texas

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[58] *Id.* at 2319.

[59] *See Lee v. Weisman*, 505 U.S. 577 (1992).

[60] *Newdow*, 124 S. Ct. at 2320.

[61] 125 S. Ct. 2854 (2005).

[62] *Id.* at 2861.

[63] *Id.* at 2862-2863 (noting that the Ten Commandments are depicted in the United States Supreme Court building, the Library of Congress, the National Archives, the Department of Justice, the Ronald Reagan Building, both the Court of Appeals and the District Court for the District of Columbia, and the Chamber of the United States House of Representatives.)

[64] *Id.* at 2863.

[65] 449 U.S. 39 (1980).

State Capitol.[66] Noting the absence of the "particular concerns that arise in the context of public elementary and secondary schools," coupled with the fact that the petitioner had walked past the monument for a number of years before bringing the lawsuit, the Chief Justice determined that the monument in question was different from the texts that confronted elementary school students every day in *Stone*.[67] Thus the Chief Justice held that the monument in question had a "dual significance, partaking of both religion and government," and, therefore, its inclusion among the monuments on the Capitol grounds did not violate the Establishment Clause.[68]

Chief Justice Rehnquist also joined a dissent in the other Ten Commandments case of his final Term, *McCreary County v. ACLU of Kentucky*.[69] In *McCreary*, the Court held that displays of the Ten Commandments in Kentucky county courthouses violated the Establishment Clause. This dissent, authored by Justice Scalia,[70] was a broad-based attack on the Court's Establishment Clause jurisprudence, challenging the principle that government must be neutral between religion and "irreligion," asserting that government may favor monotheism in public displays and observances, and criticizing the *Lemon* test and its applications.

Criminal Law

One of the mainstays of criminal procedure is the provision of *Miranda* rights to criminal defendants. Recognizing that custodial interrogations are inherently intimidating, the Supreme Court in *Miranda v. Arizona*[71] set constitutional guidelines for law enforcement agencies to use when conducting custodial interrogations, so as to protect constitutional rights. These rights, including the Fifth Amendment right to remain silent and the Sixth Amendment right to an attorney, must be verbally explained to defendants who are taken into custody, in order to ensure that if such rights are waived, that it is done voluntarily. This case was decided before Chief Justice Rehnquist arrived on the Court.

Miranda has been the focus of significant criticisms, and it is not clear that, absent *stare decisis*,[72] Chief Justice Rehnquist would have supported the original

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[66] *Van Orden*, 125 S. Ct. at 2863-2864.

[67] *Id.* at 2864.

[68] *Id.*

[69] 125 S. Ct. 2722 (2005).

[70] 125 S. Ct. at 2748.

[71] 384 U.S. 436 (1966).

[72] *Stare decisis* is the policy of courts to follow case law precedent. The Court is less reluctant to overrule constitutional decisions than decisions interpreting statutes. Nonetheless, the Court generally requires strong justification for overruling its earlier constitutional decisions, looking to such factors as whether the rule of the earlier case has been found "unworkable" or anachronistic due to other changes in the law, and whether the rule can be removed "without serious inequity to those who have relied upon it." Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

decision.[73] Further, as the verbal requirements of Miranda may not have been constitutionally required, but were rather a "prophylactic" measure to protect underlying rights, an argument could be made that Congress had the authority to amend the requirements. Nonetheless, in *Dickerson v United States*,[74] when the Court considered the constitutionality of 18 U.S.C. § 3501, a statute which in essence reversed *Miranda* and made the admissibility of confessions turn solely on whether they were made voluntarily, Chief Justice Rehnquist wrote an opinion invalidating the statute. In the opinion, he noted that despite the invitation of the Court in *Miranda* for the legislature to develop other methods of ensuring the voluntariness of confessions, that the Congress had merely sought to overturn the original ruling, which was held to be beyond the power of Congress to accomplish.[75]

Chief Justice Rehnquist also dissented from the Court's major decisions limiting application of capital punishment for persons of diminished capacity. The Chief Justice consistently favored reliance on two categories of objective criteria ("the work product of legislatures and sentencing jury determinations")[76] to determine what is "cruel and unusual," and disfavored reliance on foreign law or the Justices own views. In *Ford v. Wainwright*,[77] which held that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits a state from executing someone who is insane and that Florida's procedures authorizing the governor to make the determination fell short of due process, Justice Rehnquist dissented on the basis that there was a common law tradition of leaving such issues to executive clemency.[78] A few years later, Chief Justice Rehnquist voted with the majority in holding that the Eighth Amendment does not prohibit execution of the mentally retarded,[79] and that states likewise are not prohibited from executing persons who were 16 or 17 years of age at the time they committed their offenses.[80]

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[73] Dickerson v. United States, 530 U.S. 428, 443 (2000).

[74] 530 U.S. 428 (2000).

[75] *Id*. at 440.

[76] Atkins v. Virginia, 536 U.S. 304, 324 (2002) (dissenting).

[77] 477 U.S. 399 (1986).

[78] 477 U.S. at 431. The Justice pointed out that Florida, like all other states in the Union, prohibited execution of the insane, and devoted his dissent to arguing that Florida's procedures for determining whether a condemned prisoner is insane were also consistent with common law traditions.

[79] Penry v. Lynaugh, 492 U.S. 302 (1989). Chief Justice Rehnquist joined a concurring and dissenting opinion by Justice Scalia arguing that, because execution of the mentally retarded was not "unusual" (an insufficient number of states prohibited the practice), there was no need to consider whether it was in accord "with the theories of penology favored by the Justices of this Court." 492 U.S. at 351.

[80] Stanford v. Kentucky, 492 U.S. 361 (1989). The Chief Justice joined Justice Scalia's opinion, part of which was opinion of the Court and part of which was not, holding that the pattern of state and federal laws did not establish a national consensus against executing 16 and 17-year-olds , and arguing against reliance on indicia of consensus other than statutes and the behavior of prosecutors and juries.

When the Court reversed its field, holding in 2002 in *Atkins v. Virginia* that a national consensus had developed against execution of the mentally retarded, and holding in 2005 in *Roper v. Simmons* that such a consensus had developed against execution of juveniles under the age of 18, Chief Justice Rehnquist maintained his position in dissent. Each time he joined broad-based dissents by Justice Scalia challenging the Court's "own evaluation of the issue" as well as its finding that a national consensus had developed,[81] and in *Atkins* he added his own dissent. Writing separately to object to the Court's reliance on "foreign laws, the views of professional and religious organizations, and opinion polls,"[82] the Chief Justice explained that statutes and sentencing jury determinations "are the only objective indicia of contemporary values firmly supported by our precedents, but "more importantly," that these democratic institutions "are better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."[83]

Property Rights and Fifth Amendment "Takings"

Chief Justice Rehnquist frequently favored the side of the property owner in the Fifth Amendment "takings" cases[84] decided by the Court, most often joined by Justices Scalia and Thomas. In the seminal case of *First English Evangelical Lutheran Church v. County of Los Angeles*,[85] for example, he wrote for the majority that when the government is found by a court to have taken property through severe regulation of its use, the government has the option of rescinding the regulation, but must still pay for the temporary taking while the regulation was in effect. And in *Dolan v. City of Tigard*,[86] he wrote for the majority that to avoid being a taking, an exaction condition on a development permit must display a "rough proportionality" between the burden imposed on the land owner and the impact of the proposed development on the community.

Most recently, Chief Justice Rehnquist joined a four-person dissent authored by Justice O'Connor in the high-profile decision in *Kelo v. City of New London.*[87] The majority opinion held that the city's condemnation of private property, to implement

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[81] Justice Scalia's dissent in *Atkins* objected to the "arrogance" he viewed as underlying the Court's assertion that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty." 536 U.S. at 348. Justice Scalia was again vehement on the subject in *Simmons*: "the real driving force" of the decision is the Court's "own judgment"; if the Court is going to rely on "evolving standards of decency," it should not "prescribe" those standards but instead should "discern them from the practices of our people". 125 S. Ct. at 1221, 1222.

[82] 536 U.S. at 322.

[83] 536 U.S. at 324.

[84] The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."

[85] 482 U.S. 304 (1987).

[86] 512 U.S. 374 (1994).

[87] 125 S. Ct. 2655 (2005).

its area redevelopment plan aimed at invigorating a depressed economy, was a "public use" satisfying the Takings Clause – even though the property might be turned over to private developers. The majority opinion was based on a century of Supreme Court decisions holding that the term "public use" in the Takings Clause must be read broadly to mean "for a public purpose" – in this instance, revitalization of the local economy. The dissenters, however, argued that even a broad reading of "public use" does not extend to private-to-private transfers solely to improve the tax base and create jobs. In strong language, Justice O'Connor, joined by Rehnquist and others, declared that "[u]nder the banner of economic development," the majority opinion makes "all private property ... vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." The *Kelo* decision has triggered legislative proposals in most of the state legislatures and in Congress aimed at discouraging or prohibiting the use of condemnation solely for economic development.

Affirmative Action

One of the most contentious areas of affirmative action has been in the area of preference in admissions of educational institutions. Over a quarter century ago, the Supreme Court issued an opinion in the case of *Regents of the University of California v. Bakke*.[88] A controlling concurrence by Justice Powell in that case concluded that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body."[89] Subsequently, many colleges and universities established affirmative action policies. In *Grutter v. Bollinger*,[90] a five Justice majority of the Justices held that the University of Michigan Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students.

However, in the companion case of *Gratz v. Bollinger*,[91] authored by Chief Justice Rehnquist, six Justices decided that the University's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny. Chief Justice Rehnquist noted that Justice Powell's opinion called for evaluating an individual's ability to contribute to a student body in the unique setting of higher education. Chief Justice Rehnquist interpreted this to mean that individualized consideration of diverse characteristics was permissible, but that automatic assignment of points to members of an "underrepresented minority" group was not. Of particular concern was that the number of points assigned would ensure that virtually every minimally qualified minority applicant would be admitted.

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[88] University of California Regents v. Bakke, 438 U.S. 265 (1978).

[89] 438 U.S. at 311.

[90] 539 U.S. 306 (2003).

[91] 539 U.S. 244 (2003).

Ultimately, the Court concluded that there were limits on what procedures a university could employ to achieve its desired goal of diversity.

Fourteenth Amendment

Over the years, the Supreme Court has recognized increased responsibilities of the state governments to protect certain of their citizens. For instance, in *Youngberg v. Romeo*,[92] the Supreme Court held that an individual who was involuntarily committed to a state institution for the mentally retarded had a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution, and that the state was, within limits, required to protect such rights. Similarly, the Court has noted that a prisoner has a liberty interest in receiving medical care, since it is the only entity in a position to provide those services.[93]

In the case of *Deshaney v. Winnebago County Department of Social Service*,[94] a child who had been the subject of numerous investigations by a local Department of Social Service because of suspicions that he had been abused was severely beaten by his father. A suit was brought against the Department alleging that since the state had undertaken to protect Joshua from this danger, the state acquired an affirmative "duty," enforceable through the Due Process Clause. The argument was made that, based on this “special relationship,”failure to discharge this duty was actionable.

The Supreme Court took the case to resolve a split in the circuits. Chief Justice Rehnquist wrote an opinion noting that previous findings of “special relationships” had been based on the state having confined or otherwise restricted the actions of an individual. However, the harm suffered by this child occurred not while he was in the state's custody, but while he was in the custody of his natural father. The state played no part in the creation of the danger, nor did it do anything to render the child more vulnerable to them. Consequently, Chief Justice Rehnquist found that the state had no constitutional duty to protect Joshua.[95]

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[92] 457 U.S. 307 (1982).

[93] Estelle v Gamble, 429 U.S. 97, 103 (1976).

[94] 489 U.S. 189 (1989).

[95] This cases is now settled law, as illustrated by the Court’s opinion in Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005).