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Alan J. Howard
Saint Louis University School of Law, alan.howard@slu.edu

CONTINUITY ON THE COURT: THE REHNQUIST COURT'S FREE SPEECH CASES

ALAN J. HOWARD*

I. INTRODUCTION

In his Childress Lecture,[1] Professor Thomas Merrill bases his claim that there have been two Rehnquist Courts in part on what he sees as a dramatic change in the Court's legal agenda between its first and second eight years. He grounds his findings on what he concedes is a "relatively thin slice of constitutional cases"[2]—sixty-four cases—which he groups into two important categories: constitutional federalism[3] and social issues.[4] Combined these two categories make up around 4% of the Court's decided cases during the past sixteen years.[5]

* Professor of Law, Saint Louis University School of Law. I am grateful to my colleague, Dennis Tuchler, and my brother, Bruce Howard, for their helpful comments. Special thanks goes to Steve Wilke, my faculty fellow, for excellent research and editorial assistance. Steve also deserves credit for preparing the charts.

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

2. *Id.* at 580.

3. Professor Merrill defines "constitutional federalism" cases as those involving "the scope of federal power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Tenth Amendment limitations on federal power, and state sovereign immunity from private lawsuits reflected in the Eleventh Amendment." *Id.* at 570.

4. Professor Merrill defines "social issues" as "the 'culture war' issues that sharply divide liberal urban elites and the predominantly rural and suburban religious right." *Id.* at 580. He classifies "social issues cases" into five subcategories: "abortion," "affirmative action," government speech on religious topics" (for example, school prayer and crèches in city hall), "gay rights" and "other privacy rights" (for example, parental rights and the right to die). *Id.* at 654-56 app.A. Admitting this category is subjective at its root, he specifically excludes cases involving obscenity, death penalty, the Establishment Clause, and legislative redistricting because, in his judgment, they "do not pose the same sharp cleavage along 'culture war' lines as do the issues [he has] included." *Id.* at 580 n.23.

5. Like Professor Merrill's lecture, the numbers used for this paper are also taken from the statistics compiled in the annual Supreme Court volume of the *Harvard Law Review*. *See, e.g.*, *The Supreme Court, 2000 Term—The Statistics*, 115 HARV. L. REV. 539 (2001). For the 2001 Term, see Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 1, 2002, at A1. Similar to Professor Merrill, my numbers include some per curiam opinions, and exclude some cases that were dismissed after argument without a decision. Over

His focus on 4% of the Court's decisions raises the obvious question: What about the other 96%? Do his claims about changes in legal agenda—as reflected in the two categories—extend to other areas of the Court's work product, including other areas of constitutional law? That is, does Professor Merrill's analysis support a two-Court theory in general, or is it merely an interesting way of organizing 4% of the Court's decisions?

My brief contribution to the symposium on Professor Merrill's lecture looks at the Rehnquist Court's free speech cases—a species of cases that Professor Merrill does not include among his "social issues." The question I seek to answer is whether one can find similar patterns of distinctive behavior by the Rehnquist Court in the area of free speech in the same two periods. From reviewing the Rehnquist Court's hundred plus free speech decisions[6]—over 6% of the Court's cases—I conclude that there has not been any similar kind of legal agenda change, although there may be some faint signs of other kinds of changes that have materialized in the last few terms. My claim therefore is that *continuity*—not *change*—best describes the Court's free speech jurisprudence throughout the period of the Rehnquist Court. My plan here is to sketch a portrait of one Rehnquist Court, as opposed to the two Rehnquist Courts portrait depicted by Professor Merrill. Before painting my picture, however, I will first describe the one drawn by Professor Merrill in order to provide the necessary frame of reference.

II. PROFESSOR MERRILL'S PORTRAIT OF TWO COURTS

Professor Merrill bases his argument that there have been two Rehnquist Courts on what he sees as differences in both the Court's characteristics and behavior between its first and second eight years. Among the differences he advances:

1. He states that the Rehnquist Court in its first eight years experienced substantial turnover among the Justices but that since the October 1994 Term there have been no membership changes on the Court.[7]

2. He states that the Rehnquist Court's agenda in its first eight years emphasized certain "hot button" social issues such as affirmative action, abortion, and gay rights, but that since the October 1994 Term the Court largely has abstained from looking at such cases.[8]

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the past sixteen years, the Supreme Court has decided 1670 cases. Professor Merrill has identified sixty-four cases that fall under either his "federalism" or "social issues" categories. Merrill, *supra* note 1, at 580. That puts the scope of his analysis at 4% of the Court's docket.

6. *See* Appendix *infra*.

7. Merrill, *supra* note 1, at 577 ("[T]he first Rehnquist court was characterized by a fairly steady rate of turnover in personnel . . . whereas the second Rehnquist Court has been characterized by nearly unprecedented stability in membership . . . ."). *See also id.* at 578 fig.1.

8. *Id.* at 580. From the first period to the second period, the number of social issue cases has dropped from seventeen to nine. *Id.* at 581; *see also id*. at 581 fig.3. Professor Merrill's data,

3. He states that in its first eight years the Rehnquist Court reviewed comparatively fewer constitutional federalism issues[9] than it has looked at during the subsequent eight years.[10]

4. He states that the first Rehnquist Court began a process of cutting in half its docket, from 150 cases in the October 1986 Term to approximately 85 cases in the October 1993 Term, but that the second Rehnquist Court on average has kept its docket per Term at between 75 and 85 cases.[11]

5. He states that as between the two periods, the second Rehnquist Court has split 5-4 in more cases,[12] but it has decided fewer cases by plurality.[13]

6. He states that in its first eight years ever-changing majority coalitions formed in most of the Rehnquist Court's 5-4 decisions,[14] but that in the second eight years one particular conservative five-Justice coalition has emerged—an alliance made up of Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor and Kennedy (collectively known in recent years as the "Bush

however, do not show that cases he places in any of his subcategories have receded entirely from the scene in the second period. His data indicate that the Court has been more reticent in looking at "affirmative action" and "abortion" cases in the second period, but as to his other subcategories, his data paint a different picture. For example, a statistical analysis of his data show that the Court has reviewed the same percentage of "other privacy rights" cases (.5%) and "government speech on religious topics" cases (.3%) in both periods. *See id.* at 654 app.A. As for the subcategory of "gay rights" cases, his data actually contradict his claim since both cases he identifies as gay right cases were decided by the Court in the second period. *Id.*

9. *See supra* note 3.

10. Merrill, *supra* note 1, at 581 (noting that the number of constitutional federalism case increased from thirteen in first period to twenty-five in second period); *see also id.* at 581 fig.3. Again Professor Merrill's data both support and contradict his claim. He is on firmest ground when he asserts that the first Rehnquist Court abstained from deciding cases about the scope of congressional power. His research shows that the first Rehnquist Court decided no cases construing the scope of Congress's Commerce Clause power, but in the past eight years the Court has decided four such cases. Identically, his data indicate that the Court did not decide any Section 5 cases in the first period, but decided five such cases in the second period. *See id.* at 585 n.44. On the other hand, his list of cases indicate that the first Rehnquist Court decided almost as many Tenth Amendment cases in period one (two cases) as it did in period two (three cases). *See id.* at 655 app.A. Likewise his list of Eleventh Amendment cases shows the Rehnquist Court was active in both periods (eleven cases in the first period and sixteen cases in the second period). *Id.*

11. *See id.* at 579 fig.2.

12. *See id.* at 638 ("[A] distinguishing attribute[] of the second Rehnquist Court . . . [is] the increase in 5-4 decisions . . . ."); *see also id.* at 576 ("increasing numbers of 5-4 decisions on the second Rehnquist Court"). However, Professor Merrill's findings show that two of the highest percentages of 5-4 decisions by term occurred in the first Rehnquist Court, in the October 1986 and 1989 terms. *See id.* at 588 fig.4.

13. *See id.* at 589 (noting that in period one plurality opinions made up 9% of decided cases, but in period two the number has fallen to 6% of decided cases); *see also id.* at 590 fig.5.

14. *See id.* at 588 ("[T]he 5-4 conservative majorities in [the first period] do not have the same monolithic quality as the 5-4 conservative majorities during the second Rehnquist Court"); *see also id.* at 588 fig.4.

Five")[15]—and has become a predictable and reliable conservative voice principally in the constitutional federalism cases, where the coalition has fashioned an "aggressively conservative [state's rights] jurisprudence."[16] Additionally, he states that there are signs that the same five-Justice coalition has begun to branch out into other areas producing similar right-wing results.[17]

Having drawn this portrait of two Courts in the first part of his lecture, Professor Merrill devotes the second half of his lecture to identifying factors that he believes may explain the reason for the existence of the two Courts. Among the reasons he gives are the following:

1. The emergence in the second Rehnquist Court of a "states' rights" jurisprudence in constitutional federalism cases is best explained by the change of membership on the Court in the two periods, particularly by the substitution of Justice Thomas for Justice White.[18] Assessing their approach to deciding issues of constitutional federalism, Professor Merrill sees Justices Thomas and White to be "conservatives of a different stripe,"[19] largely because when it came to questions over the respective allocation of power between the federal government and the states, Professor Merrill concludes that Justice White, in fact, was not a conservative but, rather, was an "old fashioned New Deal liberal."[20] In contrast, Professor Merrill describes Justice Thomas as having consistently taken conservative positions in all areas,[21] including questions of

15. The coalition made up of these particular five Justices is sometimes referred to (in some circles) as the "Bush Five" because of the votes they cast in *Bush v. Gore*, 531 U.S. 98 (2000). *See*, *e.g.*, Jamin B. Raskin, *What's Wrong With* Bush v. Gore *and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652 (2002); Laurence H. Tribe, eroG .v hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001). It was the votes by these five Justices that caused an ending to the recount in Florida—the effect of which went far to hand over the 2000 Presidential election to George W. Bush. *See* Law Professors for the Rule of Law, Law Professors' Statement on *Bush v. Gore*, *at* http://www.the-rule-of-law.com (last visited Feb. 13, 2003).

16. Merrill, *supra* note 1, at 574. Professor Merrill also notes that "[t]he Court has generated a number of important innovations in the interpretation of these provisions, nearly always in decisions in which the controlling opinion garners exactly five votes." *Id.* at 570.

17. *See id.* at 589 ("conservative majority is in fact becoming stronger and is controlling an increasing percentage of the decisions on the Court's docket"); *see also id.* at 588 fig.4.

18. *Id.* at 574 ("[T]he emergence of an aggressively conservative jurisprudence in the area of constitutional federalism can be explained . . . in part by the substitution of Thomas for White . . . ."). As Professor Merrill points out, the substitution of Thomas for White was roundabout. *Id.* at n.16.

19. *Id.* at 597.

20. *Id.* at 574. In defining Justice White as a "New Deal liberal," Professor Merrill claims that White was a proponent of broad national powers and not of expansive notions of states' rights. *Id.*

21. Merrill, *supra* note 1, at 595 ("In contrast to White, Clarence Thomas can only be described as conservative thorough-and-through.").

constitutional federalism.[22] He identifies thirteen constitutional federalism decisions—where he sees the majority conservative bloc as having pushed through its conservative states' rights agenda—as cases where he believes the outcome would have been the opposite if Justice White, not Justice Thomas, had cast the fifth vote.[23]

2. The second Rehnquist Court's substitution of constitutional federalism cases for those dealing with social issues[24] is the result of what Professor Merrill calls "strategic behavior"[25] by three Justices—Justices Scalia, O'Connor and Kennedy. Professor Merrill sees Justice Scalia's complicity with the other two Justices in, first, having the second Rehnquist Court avoid looking at social issues cases and, second, having the Court shift its attention towards deciding constitutional federalism cases as "strategic" because Justice Scalia's backing of these developments appears to be based neither in a sudden lack of interest in social issues cases, nor in some newly acquired interest or desire to review constitutional federalism cases, nor in any enthusiasm he shares with his four conservative brethren for the states' rights doctrine that the five of them have fashioned in these cases.[26] Instead, Professor Merrill

22. *Id.* at 596 ("[Thomas] has developed a compact theory of federalism based on the idea that the Constitution was ratified by the States as opposed to the people, and he has adopted narrow interpretations of federal statutes in order to preserve traditional state prerogatives.") (footnote omitted).

23. In his lecture, Professor Merrill lists the thirteen federalism cases where he sees Justice Thomas as having cast the deciding vote. *Id.* at 598 n.102. He then goes on to surmise that there cannot be much doubt that "if Justice White had remained on the Court he would have disavowed these innovations." *Id.* at 598. However, as to one of the cases Professor Merrill lists, *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), regardless of whether or not Justices White and Thomas would have voted differently in the case, it is inaccurate for Professor Merrill to characterize Justice Thomas's vote (or for that matter the vote of any one of the other four conservative Justices) as indispensable to Court's finding of Eleventh Amendment immunity for the state university since the vote in favor of the state was actually six-three, and not 5-4. Justice Ginsburg joined the Bush Five with an opinion concurring in part and concurring in the judgment. *Id*. at 548.

24. *But see supra* notes 8 and 10 (close inspection of his data denotes that the shift in emphasis that Professor Merrill claims to have occurred is not as dramatic as he suggests).

25. Professor Merrill makes a distinction between "reflexive" and "strategic" judicial behavior. *See* Merrill, *supra* note 1, at 591-92. The Justices' votes were reflexive when "their votes [were] based solely on their individual reactions to the facts and legal issues presented." *Id.* at 591. In contrast, "strategic" voting involved the Justices considering "how other judges or institutions [or the public] are likely to react to the decision." *Id.* Professor Merrill views strategic voting as constituting "insincere" behavior by judges who "censure the impulse to embrace the outcome they prefer most and, instead, support outcomes they regard as less desirable or second best because of their perceptions of the values embraced by other actors who have the power to block the realization of the judge's first preference." *Id.* at 602.

26. Professor Merrill offers the following circumstantial evidence in support of his claim that Justice Scalia's endorsement of the Court's states' rights agenda has been largely strategic: (1) Justice Scalia's pro-national government statements before joining the Court; (2) his

surmises that Justice Scalia's strategic decision to participate in these developments is based on his conclusion that it is wiser for him to be part of a winning team and to have allies on the Court than it is for him to continue in the role of a loner writing "principled,"[27] yet dissenting, opinions.[28] Professor

indecision in supporting states' rights principles during his early years on the Court; (3) his consistent pro-federal government position in preemption cases; (4) his relative silence in federalism cases, that is, he has not assisted in the Court's defense and development of its states' rights jurisprudence by writing separate concurrences expounding on federalism principles, a role he typically plays in those areas he cares about; and (5) his authorship of federalism opinions that can best be described as perfunctory and that show a lack of passion for the states' rights agenda. *Id.* at 609-17. Professor Merrill concedes that there is some circumstantial evidence that cuts in the other direction, *see id.* at 617-19, but on balance he concludes that the evidence in support of strategic behavior outweighs that on the other side of the scale. *Id.* at 620.

27. By "principled," I mean that which Professor Merrill terms judicial "reflexive" behavior. *See supra* note 25. Professor Merrill sees Justice Scalia as having the choice between voting reflexively and being in the minority or acting strategically and making concessions where he could join forces with the other conservatives in obtaining conservative victories against the opposing liberals on the Court. Merrill, *supra* note 1, at 606.

28. Professor Merrill argues that by 1993 Justice Scalia concluded that he was unlikely to get a majority of the Court to endorse his conservative substantive agenda in social issue cases (for example, overturning *Roe v. Wade*, 410 U.S. 113 (1973), or getting the Court to be more accommodating with respect to school-sponsored prayer in public schools). Accordingly, he was left with two options: either to persist in his substantive agenda knowing that he would more often than not find himself on the short end and accept the role of "chronic dissenter," or, strategically, to get the Court to abandon, or at least to put to the side, social issues cases and instead to have the Court concentrate in other areas where he could be part of a conservative majority coalition. *See* Merrill, *supra* note 1, at 606. For various reasons—those being his legacy, influencing majority opinions, potential reciprocity, and pleasing the Chief—Professor Merrill believes that Justice Scalia chose the second option. *Id.* at 606-07.

Once again, a closer look at the Professor Merrill's data raises substantial questions as to the accuracy of his empirical claims. He clearly is correct in noting that Justice Scalia did suffer setbacks in the first period in some of his attempts to get the majority to endorse at least part of his conservative social agenda, most notably in the areas of abortion and prayer in public schools. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting); Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting). His effort in *Casey* to get the Court to remove abortion from the list of unenumerated rights failed as did his effort in *Lee* to get the Court to lower the wall of separation between church and state to accommodate some types of school-sponsored prayer in public schools. There is also some basis for Professor Merrill's conjecture that after the addition to the Court of Justices Ginsburg and Breyer that Justice Scalia would have concluded that his prospects of getting the Court after 1993 to come around to his position in these two areas became even bleaker and, thus, as a matter of damage control, Justice Scalia might have decided that it was best to keep these kinds of cases away from the Court. Based on these disappointments, Professor Merrill concludes that "[b]y 1993 . . . Justice Scalia's substantive agenda lay in shambles." Merrill, *supra* note 1, at 605.

Professor Merrill's conclusion, however, seems overstated considering the results the first Rehnquist Court reached in the cases that fall within other of his social issues subcategories. For example, the Court's decisions in the "other privacy rights" cases indicate that Justice Scalia was largely successful in getting part of his conservative social agenda adopted in the first period.

Merrill surmises that Justice Scalia—as a matter of strategy—also came to this conclusion because he harbored a concern that were the Court to continue focusing on social issues cases there was a substantial risk that the Court would reaffirm or, even worse, expand particular doctrines that he abhors in areas he cares passionately about, such as abortion and government-sponsored prayer in

In addition to his plan to have the Court eliminate unenumerated rights he opposes (for example, abortion), Justice Scalia also sought to get the Court to forego adding new rights to the list of unenumerated rights that qualify for substantive due process protection. *See* Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) ("I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."). In period one, Justice Scalia succeeded every time in getting the Court to resist attempts to have it recognize new unenumerated rights. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (Scalia, J.). Justice Scalia was with the majority in all five of the cases Professor Merrill includes in his category of "other privacy rights" in this period. In light of these successes, Professor Merrill is hard pressed to make the categorical claim that by 1993 Justice Scalia would have seen his substantive agenda in social issues cases "in shambles" and, accordingly, would have adopted a strategy of seeking to get the Court from that time forward to avoid reviewing social issues cases (including all cases concerning privacy rights). His track record in the first period in getting the Court to refrain from establishing new nontextual rights was perfect and there existed no reason for him to believe that were he to continue to push this part of his agenda, his record of success might come to an end. As previously noted, the Court in the second period did not abstain from reviewing other privacy cases. It reviewed three such cases. *See* Merrill, *supra* note 1, at 654 app.A; *see also supra* note 8. Moreover, there has been a replication of the pattern seen in period one. Again Justice Scalia was no more successful in the second period than he was in the first in getting the Court to roll back previously established rights that he opposes. *See Troxel*, 530 U.S. 57; M.L.B. v. S.L.J., 519 U.S. 102 (1996). He continued, however, to be successful in getting the Court to refrain from adding new unenumerated rights to the list of previously established ones. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997).

Similarly, Professor Merrill's findings in the area of affirmative action do not appear to support his claim that by 1993 Justice Scalia wanted to get such cases off of the Court's docket because his win/loss record up to this time was poor and the prospects of his record improving in the future was equally meager. *See* Merrill, *supra* note 1, at 608. It is true that in period one Justice Scalia dissented in three of the Court's four affirmative action decisions. In the fourth case, however, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice Scalia concurred in the judgment and, no doubt, was pleased not only with the result (striking down the Richmond affirmative action plan), but also with the Court's movement towards adopting his color-blind principle by its adoption of strict scrutiny review. *See id.* at 521 (Scalia, J., concurring) ("[T]he principle embodied in the Fourteenth Amendment [is] that 'our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))). While Professor Merrill is correct in noting that in the second period the Court decided only one additional affirmative action decision, it should be pointed out that the result the majority reached in the case was one with which Justice Scalia agreed and that moved the Court closer toward his color-blindness principle (that is, extending strict scrutiny review to federal affirmative action programs and overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), from which Justice Scalia had dissented).

public schools.[29] In reliance on what he sees as Justice Scalia's strategic behavior both in his efforts to get the Court to substitute constitutional federalism cases for social issues cases and in his willingness—albeit while holding his nose—to join in the development of a states' rights jurisprudence, Professor Merrill generalizes that Justice Scalia's transformation from a "reflexive judge" to a "strategic judge" has become so complete that Justice Scalia has behaved strategically in seeking to influence "the entire course of the Rehnquist Court over the last eight years."[30]

No less strategic are the decisions by Justices O'Connor and Kennedy to join with Justice Scalia in getting the Rehnquist Court to substitute constitutional federalism cases for social issues cases.[31] He also characterizes as "strategic" certain votes the two have taken, which Professor Merrill views as "switches."[32] His best guess as to what motivated the two Justices to act strategically—both in their support of the legal agenda shift and in their later switching sides to join the liberal Justices in social issues cases—was their coming to the conclusion that they would rather be popular[33] than principled. That is, they decided that were the Court to continue reviewing social issues cases and were the two of them to continue supporting conservative rulings in such cases (as would be their true judgments were they to decide the cases reflectively),[34] that such behavior on their part would not have been a formula

29. Again Professor Merrill argues that Justice Scalia saw the Court's results in cases like *Casey* and *Lee* as disastrous and was concerned that were the Court to continue to review such cases, it would only compound its mistakes. *See* Merrill, *supra* note 1, at 605-06. *But cf. supra* note 28 (arguing that Justice Scalia had substantial success in getting the Court to adopt parts of his conservative social agenda in period one, which success has carried over into period two).

30. Merrill, *supra* note 1, at 604.

31. As evidence of Justices O'Connor and Kennedy acting strategically in their support of the Court's shifting of its legal agenda from social issues cases to constitutional federalism cases, Professor Merrill points to the consistent refusal by both Justices to vote to grant cert. in social issues cases. *Id.* at 637.

32. The votes that Professor Merrill sees as "switches" are Justice Kennedy's pro-abortion vote in *Casey*, the votes by Justices O'Connor and Kennedy in *Lee* (supporting the more "liberal separationist" approach to establishment clause issues, as opposed to the more "conservative accomodationist" stance with which they previously had aligned), and their votes in support of the Clinton administration's liberal interpretations of civil rights laws. *Id.* at 633-36.

33. Professor Merrill believes there are several reasons why a Justice would like to be popular: approval of the other branches maximizes their policy preferences, a good reputation will lead to tangible benefits such as awards, honors, praise from academics, and a legacy that will be looked upon kindly. Merrill, *supra* note 1, at 628-29.

34. Professor Merrill believes that Justices O'Connor and Kennedy, if acting reflexively, would, among other things, prefer to overrule *Roe*, allow school-sponsored prayer in public schools, and outlaw affirmative action. He bases this belief on what he sees as the decision of the second Rehnquist court to generally deny cert. in social issues cases. The unavailability of four Justices to vote to grant cert. in social issues cases is because: (1) the four liberal Justices are unsure as to how Justices O'Connor and Kennedy would vote, whether reflexively with the other conservatives or strategically with the four liberals; (2) the three staunch conservatives are one

for either of them to make anyone's list of most admired Americans.[35] Thus, Professor Merrill concludes that while both Justices O'Connor and Kennedy's reasons for supporting the shift in the Court's legal agenda are different from those that motivated Justice Scalia, they are similarly strategic.

3. Finally, Professor Merrill argues that the change from a Court in constant flux to one whose membership has remained constant explains either directly or indirectly the three other differences he sees between the two Courts: (1) the shrinkage in the Court's docket;[36] (2) the increase in the percentage of 5-4 decisions; and (3) the reduction in the number of plurality decisions—all three of which Professor Merrill observes as having occurred in the second period.[37] More importantly, the change from "membership flux" to "membership stasis" also explains the formation in the second period of a cohesive coalition made up of the five most conservative Justices whose cooperation and collaboration while most evident in the constitutional federalism cases is also becoming apparent in other areas as well.[38]

vote shy of the necessary four votes to do so; (3) Justices O'Connor or Kennedy refuse to provide the fourth vote because they do not want to be put in what they see as a no-win situation. Therefore, "hot button" social issues that could hurt the reputation of Justices O'Connor or Kennedy are put on the back burner, and constitutional federalism issues, largely seen as technical and non-controversial, get the lion's share of the Court's time. *Id.* at 637-38.

35. Professor Merrill identifies four events that, in combination, might have convinced Justices O'Connor and Kennedy to jump off the Scalia conservative agenda in social issues and to have the Court eschew from continuing to review such cases before their popularity was irrevocably tarnished: (1) Justice Thomas' shabby treatment during his confirmation hearing; (2) President Bush I's capitulation on signing the Civil Rights Act of 1991; (3) the situation surrounding the *Casey* decision; and (4) the unprecedented number of women elected to Congress in 1992. Merrill, *supra* note 1, at 630-33.

36. *Id.* at 639-44. Professor Merrill believes that a court in flux will be more open to changes in institutional norms which in the case of the first Rehnquist Court resulted in its adoption of a more rigorous standard of review in granting cert. petitions. It was this change by the Court in its standard for reviewing cert. petitions, so Professor Merrill argues, that best explains the reduction in the number of cases the Court now reviews per Term. He credits Justice Scalia for propounding the new norm and believes a big reason for Scalia's success in getting the Court to adopt the different standard was that he acted at a time when the Court was in flux and where recently appointed Justices—more open to changes than those who had served on the Court for a longer time—would be more amenable to going along with adjustments in institutional norms.

37. *Id.* at 646-48. Professor Merrill postulates that Justices on a Court in flux will lack the necessary information to gage other members' inclinations in any given case. Without knowing how their brethren will vote, the Court will have a harder time reaching a majority, and, thus, the result will be more plurality opinions. In contrast, Justices on a stable Court will have a better grasp of their colleagues' predilections and preferences, which should allow them more easily to reach agreements or compromises resulting in fewer plurality opinions.

38. *Id.* at 648-51. According to Professor Merrill's game theory analysis, stability spawns cooperation and compromise so that there is a greater likelihood on a stable Court as opposed to one in flux for five Justices (the number needed to obtain a majority) to turn into a stable alliance

III. THE REHNQUIST COURT'S FREE SPEECH JURISPRUDENCE: A PORTRAIT OF ONE COURT

In contrast to Professor Merrill's portrait, I now want to draw a different portrait of the Rehnquist Court's approach to free speech issues—a portrait of a single Court that has behaved consistently throughout the entirety of the Rehnquist Court.

A. Evidence of Continuity

My review of the Rehnquist Court's free speech decisions shows little evidence between the two periods of such differences as:

1. A greater reticence by the Court to decide free speech cases;
2. A change in the kinds and concentration of free speech cases that the Court has decided;
3. A shift in the Court's overall hostility or hospitality towards free speech claims (although there is some evidence of the Court's greater willingness to invalidate congressional efforts at regulating speech in the second period);[39] and
4. An emergence of a particular conservative five-Justice majority that is calling the shots in free speech cases (although more recently there is some evidence of this happening).[40]

1. Decline in Free Speech cases in the Second Rehnquist Court?

As previously noted, Professor Merrill offers as partial evidence of two distinct Rehnquist Courts what he sees as the Rehnquist Court's shift in emphasis from deciding social issues cases to deciding cases presenting issues of constitutional federalism.[41] A review of the Court's free speech cases, however, uncovers no evidence of any similar shift in emphasis by the Court in the area of free speech over the same two periods. More precisely, there is no evidence of the Court shunning free speech cases in the past eight years, similar to that which Professor Merrill argues has occurred with respect to cases falling into his social issues basket. Figure 1, which plots the number of free speech cases decided by the Rehnquist Court from its first Term up to the October 2001 Term,[42] helps illustrate this point. While the actual numbers of free speech cases dropped in the second period with the rest of the Court's

that will become stronger and branch out over time. Professor Merrill argues that this has occurred on the second Rehnquist Court with the establishment of the Bush Five, *see supra* note 15, which Professor Merrill sees as one manifestation of the stability of the second Rehnquist Court.

39. *See infra* note 58.

40. *See infra* notes 63-64 and accompanying text.

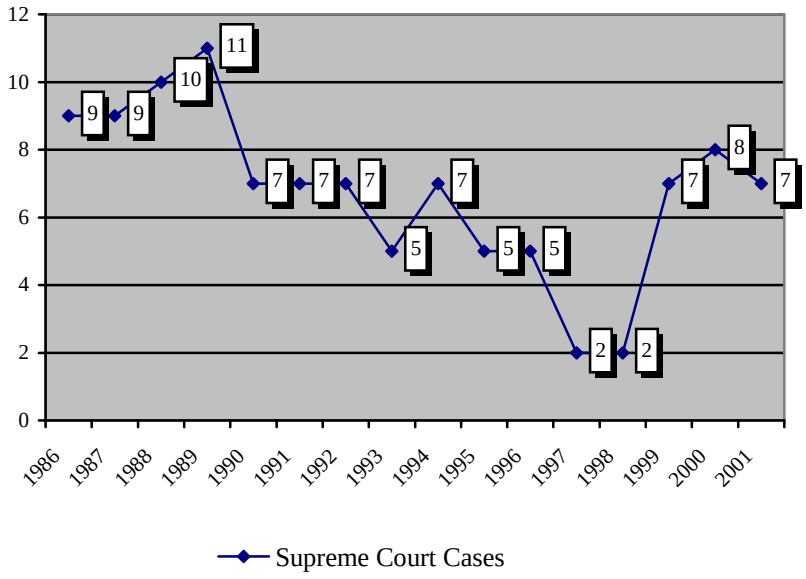
41. *See supra* notes 7, 8, and 10.

42. For the cases used to generate Figure 1 and the associated statistics, see Appendix *infra*.

docket, the percentage of free speech cases decided in each period has remained constant. In every year of the Rehnquist Court, the Court has decided on average slightly more than six free speech cases per Term, and never less than two in any Term. During its first eight years, the Rehnquist Court decided a total of 1011 cases, 65 of which were free speech cases. This is a percentage of 6.4%. In its second eight years, the Court decided a total of 659 cases, 43 of which were free speech cases. That is a percentage of 6.5%. In fact, during the past two Terms, the percentage of free speech cases has increased to over 9% of the Court's argued cases.[43] If this trend continues, free speech cases will become proportionally a larger part of the Court's docket than in the past.

FIGURE 1

Number of Free Speech Cases Decided by the Rehnquist Court



2. Change in Free Speech Agenda in the Second Rehnquist Court?

The data also show that there have not been any significant shift in the *kinds* of free speech cases the Rehnquist Court decided in the two periods.

43. The 2000 Term heard eighty-six cases, eight of which were Free Speech cases (9%). *See* Appendix *infra*. The 2001 Term heard seventy-five cases, seven of which were Free Speech cases (9%). *See* Appendix *infra*.

While, in both periods, the Court decided an eclectic group of free speech cases, there is a substantial overlap in the kinds of cases the Court reviewed. In both periods, the Court adjudged "commercial speech" cases,[44] "campaign finance" cases,[45] "religious speech" cases,[46] "sexually explicit speech" cases,[47] "cable regulation" cases,[48] "campaign speech" cases,[49] "abortion clinic protest" cases,[50] and so forth. The Court even reviewed nude dancing cases in both periods.[51] In fact, there are few, if any, free speech cases from one period that cannot be paired with a case decided in the second period.

The data also show an overlap in the *concentrations* of types of cases. In both periods, the Court's preoccupation has been the same: money and sex. In each period, the two largest categories of cases have been commercial speech cases and sexually explicit speech cases. Between 1987 and 1994, the Court decided eight commercial speech cases[52] (about 12% of the total free speech cases decided during that period). Between 1995 and 2002, the Court reviewed nine commercial speech cases[53] (approximately 21% of its free speech docket). Sexually explicit speech cases—a category including

44. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418 (1993) (from the first period); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (from the second period).

45. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (from the first period); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (from the second period).

46. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (from the first period); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (from the second period).

47. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (from the first period); Reno v. ACLU, 521 U.S. 844 (1997) (from the second period).

48. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (from the first period); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (from the second period).

49. *See, e.g.*, Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989) (from the first period); Republican Party of Minn. v. White, 536 U.S. 765 (2002) (from the second period).

50. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (from the first period); Hill v. Colorado, 530 U.S. 703 (2000) (from the second period).

51. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (from the first period); City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (from the second period).

52. *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994); United States v. Edge Broad. Co., 509 U.S. 418 (1993); Edenfield v. Fane, 507 U.S. 761 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

53. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); United States v. United Foods, Inc., 533 U.S. 405 (2001); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

obscenity, near obscene speech, child pornography, and sexually explicit speech deemed harmful to children—was also well represented in both periods. Between 1987 and 1994, the Rehnquist Court decided eight cases dealing with sexually explicit speech[54] (about 12% of the total free speech cases decided during that period). Between 1995 and 2002, the Court decided seven such cases[55] (approximately 16% of its free speech docket).

3. Less Hospitable to Free Speech Claims in the Second Rehnquist Court?

Another indicator of continuity throughout the duration of the Rehnquist Court is the pro-free speech results seen in both periods. Figure 2 displays these results graphically by comparing the records of success of the free speech claimants and the government in both periods.[56] Putting to the side the handful of cases where both the free speech claimant and the government won,[57] in the first eight years, the free speech proponent prevailed thirty-four times with the government victorious twenty-five times, a winning percentage for the free speech advocate of 58%. In the second period, the free speech supporter succeeded in twenty-six cases with the government triumphant in fifteen cases, a win/loss percentage for the free speech partisan of over 60%. Whatever differences exist in the Court's makeup between the two periods, as well as the changes from fluctuation to that of stability, the fact remains that in both periods the party championing free speech rights found the Court more hospitable than hostile.[58]

54. *See* Alexander v. United States, 509 U.S. 544 (1993); *Barnes*, 501 U.S. 560; Osborne v. Ohio, 495 U.S. 103 (1990); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989); Massachusetts v. Oakes, 491 U.S. 576 (1989); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); City of Newport v. Iacobucci, 479 U.S. 92 (1986).

55. *See* Ashcroft v. ACLU, 535 U.S. 564 (2002); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); *City of Erie*, 529 U.S. 277; NEA v. Finley, 524 U.S. 569 (1998); Reno v. ACLU, 521 U.S. 844 (1997); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

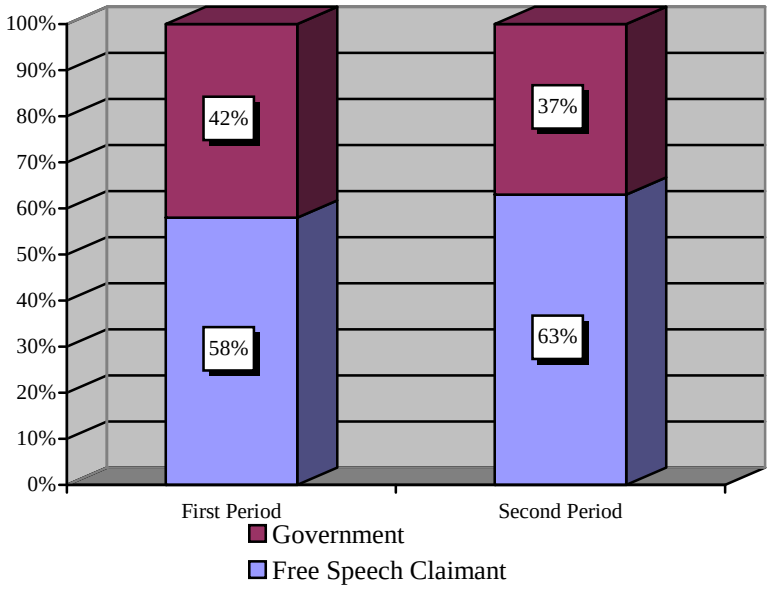
56. For the cases used to generate Figure 2, see Appendix *infra*.

57. *See* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. 727; Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); *FW/PBS, Inc.*, 493 U.S. 215; *Fort Wayne Books, Inc.*, 489 U.S. 46; *Sable Communications of Cal., Inc.*, 492 U.S. 115; Boos v. Berry, 485 U.S. 312 (1988).

58. The federal government has an especially bad record against the free speech claimant in the second period, having lost in eleven of fifteen cases. In comparison, the federal government won nine, lost two, and tied two in the first period.

FIGURE 2

Success Record in Free Speech Cases



4. Signs of an Increase in 5-4 Free Speech Decisions in the Second Rehnquist Court and the Emergence of a Conservative Bloc?

Professor Merrill points to an increase in the percentage of 5-4 decisions in the past eight years as further evidence of the existence of two different Courts.[59] Moreover, he sees one particular five-Justice conservative coalition as having emerged in the second period and as having been calling the tune—a conservative sounding one—that has been heard most clearly in the Court's constitutional federalism cases, but whose melody has also been detectable in other areas as well.[60]

Turning to the free speech cases, one does not see a similar increase in the absolute numbers of 5-4 decisions from the first to the second periods. Between 1986 and 1994, the Court voted 5-4 in seventeen of its free speech cases.[61] Between 1995 and 2002, the Court split 5-4 in thirteen cases.[62] On

59. *See* Merrill, *supra* note 1, at 587-89.

60. See *id.* at 650-51.

61. *See Madsen*, 512 U.S. 753; Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Int'l Soc'y For Krishna Consciousness, Inc. v. Lee (II), 505 U.S. 672 (1992); Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992); Gentile v. State Bar of Nev., 501 U.S. 1030 (1991);

the other hand, the percentage of 5-4 decisions has increased slightly, going from 26% in the former period to 30% in the latter period. Perhaps of greater saliency to Professor Merrill's thesis is that the Bush Five accounts for five of the thirteen 5-4 decisions in the second period, which constitutes 38% of the total.[63] Moreover, four of the five Bush Five decisions have occurred in the past three Terms, and two of the four occurred this past Term.[64]

Whereas Professor Merrill's findings support his claim that the Court had divided into federalist and anti-federalist camps in its constitutional federalism cases,[65] the evidence of any similar dichotomy having formed in the free speech area is less evident.[66] Moreover, there is no support for any claim that the Bush Five in those free speech cases whose outcome the coalition has controlled can be seen as having struck conservative notes. In four of the 5-4 decisions where the coalition dictated the results, the prevailing party was the free speech advocate.[67] If there is now emerging in the area of free speech the same five-Justice bloc that is calling the tunes for the Court in its constitutional federalism cases, then it should be noted that the tune they are playing has been largely pleasant to the ears of free speech claimants.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Rust v. Sullivan, 500 U.S. 173 (1991); United States v. Kokinda, 497 U.S. 720 (1990); Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); United States v. Eichman, 496 U.S. 310 (1990); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); *FW/PBS, Inc.*, 493 U.S. 215; Texas v. Johnson, 491 U.S. 397 (1989); *Fort Wayne Books, Inc.*, 489 U.S. 46; Rankin v. McPherson, 483 U.S. 378 (1987).

62. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002); W. States Med. Ctr. v. Thompson, 535 U.S. 357 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); *Turner Broad. Sys., Inc*., 520 U.S. 180; *Schenck*, 519 U.S. 537; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).

63. *See Republican Party of Minn*., 536 U.S. 765; *Alameda Books, Inc*., 535 U.S. 425; *Lorillard Tobacco Co*., 533 U.S. 525; *Dale*, 530 U.S. 640; *Rosenberger*, 515 U.S. 819.

64. *See* cases cited *supra* note 63.

65. *See supra* note 23 (listing cases where the court divided into the same two camps); *see generally* Kathleen Sullivan, *Dueling Sovereignties:* U.S. Terms Limits, Inc. v. Thornton, 109 HARV. L. REV. 78 (1995).

66. *See supra* notes 56-58 and accompanying text.

67. The free speech claimant prevailed in *Republican Party of Minn*., 536 U.S. 765; *Lorillard Tobacco Co*., 533 U.S. 525; *Dale*, 530 U.S. 640; and *Rosenberger*, 515 U.S. 819.

5. Changes in Winning/Losing Percentages in Free Speech Cases of Those Five Justices Whose Careers Have Spanned the Entire Period of the Rehnquist Court

Professor Merrill notes that four of the current Justices—Justices Scalia, O'Connor, Stevens and Kennedy[68]—have served alongside William Rehnquist throughout the entirety of his tenure as Chief Justice. Again, Professor Merrill views as one consequence of the decision of three of the four—Justices Scalia, O'Connor and Kennedy—to have engaged in strategic behavior during the past eight years[69] to be the impressive win/loss record the three have achieved along with that of Justice Thomas and the Chief Justice in the second period in the Court's constitutional federalism cases.[70] Generalizing from the successes Chief Justice Rehnquist and the other members of the Bush Five have had in the area of constitutional federalism, Professor Merrill characterizes the second Rehnquist Court as not only distinct from the Court that sat from 1986 until 1994, but also as one that is '"disciplined"' and "well-oiled"—a Court that smoothly and almost effortlessly has and continues to spew out legal rules that the Chief Justice and the other conservative Justices have found largely to their liking.[71]

If Professor Merrill's assessment of the Second Rehnquist Court as an efficient machine that consistently has been cranking out a steady stream of conservative decisions is correct, it should follow that a comparison of the win/loss records of the nine Justices in free speech decisions in the second period would show the conservative Justices to have better records than that of their more liberal colleagues. One should also expect to see Justice Scalia's win/loss record in free speech cases to have improved in the second period in light of his transformation from a "reflexive" judge to a "strategic" one, a change after all that Justice Scalia has made—or so Professor Merrill claims—at least in part for the purpose of improving his win/loss record generally. Moreover, for the same reason, his ratio of wins to losses in free speech cases

68. *See* Merrill, *supra* note 1, at 593 n.75. Kennedy replaced Powell one year into the Rehnquist Court. "[F]or practicable purposes Justice Kennedy has been a fixture of the Court throughout its duration." *Id.*

69. *See id.* at 601 (discussing Justice Scalia); *id.* at 628-38 (discussing Justices Kennedy and O'Connor).

70. *See id.* at 597 n.98. Although the Bush Five has racked up an impressive number of victories in the second period in those cases that Professor Merrill includes within the category of constitutional federalism cases, the coalition's batting average is not 1.000. For example, four of the Bush Five were in dissent in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799 (1995). In that case, Justice Kennedy switched over to join the four more liberal Justices in rejecting the states' right position offered by Arkansas. Likewise, in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), Justice Kennedy again abandoned the other four conservative Justices in joining with the liberals in rejecting the Eleventh Amendment immunity claim.

71. Merrill, *supra* note 1, at 590.

in the second period should be better than that of his four more liberal colleagues. Similarly, Professor Merrill's claim that Chief Justice Rehnquist finds the overall work product of the second Rehnquist Court to be largely compatible with his jurisprudential views[72] should also be reflected in an improvement in the Chief Justice's win/loss record in free speech cases in the second period. In contrast, Justice Stevens, the one liberal Justice whose tenure has extended over both periods of the Rehnquist Court, should have seen his record decline, as the bonds of reciprocity among the conservative Justices that Professor Merrill sees as having strengthened and deepened begin to impact on all areas of the Court's docket including its free speech cases.

The data, however, do not support such findings. Figure 3A, which compares the winning percentages of Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy, and Stevens in free speech cases in both periods, and Figure 3B, which shows the winning percentages in free speech cases of all of the Justices currently serving on the second Rehnquist Court, tell a different story than the one suggested above.[73] During the first eight years of the Rehnquist Court, Justice Scalia was with the majority in free speech cases an impressive 78% of the time. In the last eight years, his winning percentage in free speech cases fell to 65%. In his first eight years as Chief Justice, William Rehnquist voted with the majority 71% of the time in free speech cases. Since then his winning percentage has fallen to 67%. While Justice Scalia and the Chief Justice have won more free speech cases than they have lost (as is true for all of the Justices), the fact remains that their win/loss records have fallen, not risen, during the second Rehnquist Court. On the other hand, Justice Stevens' record in free speech cases has actually improved between the two periods.

72. *See id.*

73. For the cases used to generate Figures 3A and 3B, see Appendix *infra*.

FIGURE 3A

Winning Percentage of Justices (Both Periods)

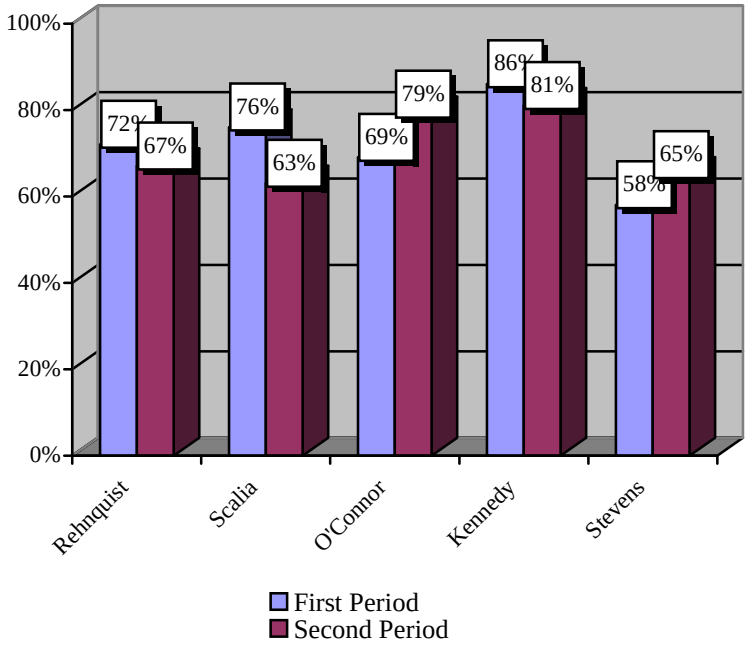
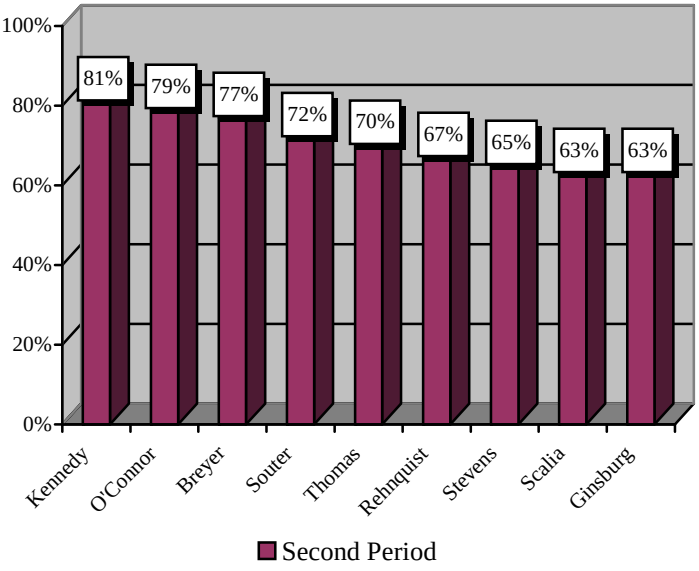


FIGURE 3B

Win Percentage in Free Speech Cases



6. Drop in the Number of Plurality Opinions in Free Speech Cases in the Second Rehnquist Court?

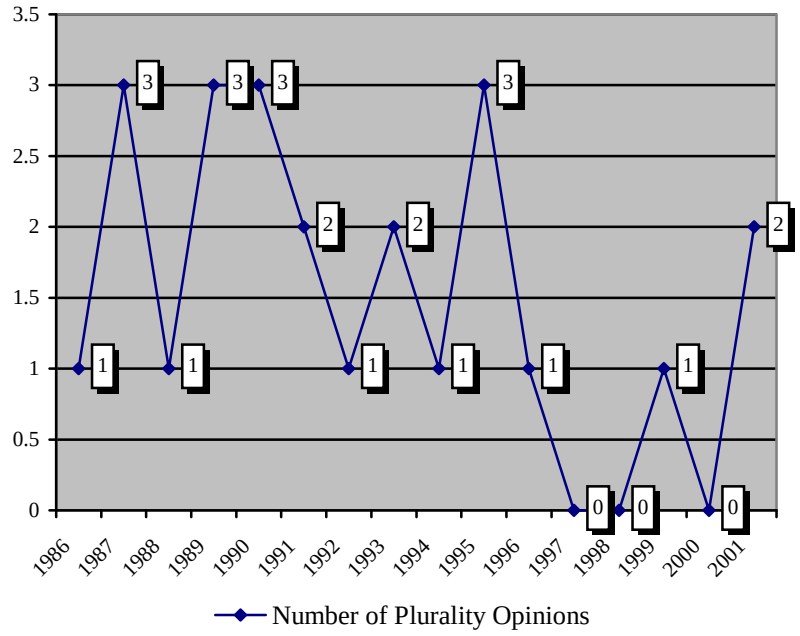
The final difference that Professor Merrill identifies for distinguishing between the first and second Rehnquist Courts is a decline in the number of plurality opinions in the second period.[74] Along with social issues cases, Professor Merrill argues that plurality opinions have largely receded from the scene during the second Rehnquist Court. Here, the evidence in the free speech area corresponds somewhat, but not entirely, with what Professor Merrill's claims to be the almost total demise of plurality opinions during the second period of the Rehnquist Court. Figure 4 plots the number of plurality opinions in free speech cases per Term from the beginning of the Rehnquist Court through the October 2001 Term.[75] As the chart shows, in the first period, there were sixteen free speech cases where a majority was unable to join one opinion. The number of plurality opinions has dropped to eight in the second period. Percentage-wise, however, the decline has been less dramatic, going from 25% to 19%. In looking at the number and percentage of plurality decisions in free speech cases in the second period, however, one can not assert, as Professor Merrill does, that such opinions are close to becoming extinct in the second Rehnquist Court. In the area of free speech, it seems inaccurate even to characterize plurality opinions as having become an endangered species in the second Rehnquist Court.

74. *See supra* note 37.

75. For the cases used to generate Figure 4, see Appendix *infra*.

FIGURE 4

Number of Plurality Opinions in Free Speech Cases



III. SO WHAT DOES MY PORTRAIT SAY ABOUT PROFESSOR MERRILL'S PORTRAIT?

The question remains: What do my findings tell us about Professor Merrill's thesis. In particular what do they tell us about the importance and/or universality of the causal factors that he points to as explaining the differences he sees, especially the differences in the shift from social issues cases to constitutional federalism issues cases? I see three possible answers:

First, perhaps there is something special about free speech cases so that Professor Merrill is right not to include them in his basket of social issues cases. Therefore, one should not expect any—much less all—of the political science models he uses to provide explanations for the Court's behavior. Free speech cases can be seen as an outlier of the Court's legal jurisprudence. Why, however, should that be the case? Surely issues such as child pornography, restrictions on cigarette advertising directed at children, and sexually explicit speech on the Internet, to name three free speech issues with which the second

Rehnquist Court has grappled,[76] are no less "social" and no less "hot button" issues than those Professor Merrill has defined as falling within his basket of social issues.[77]

76. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (child pornography); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (cigarette advertising directed at children); Reno v. ACLU, 521 U.S. 844 (1997) (sexually explicit speech on the Internet).

77. As noted earlier, *see supra* note 4, Professor Merrill offers a rebuttal to criticisms about how he created his "social issues" category. Essentially, he argues that he only wanted to include cases where liberals and conservatives are starkly divided—like abortion and affirmative action. *See* Merrill, *supra* note 1, at 580 n.23. In doing so, he is able to exclude free speech (for example, obscenity cases) because such cases do not polarize the right and the left. Rather, most Americans, wherever they fall on the political spectrum, for the most part see eye-to-eye on most free speech issues (for example, they favor government regulation of obscenity, child pornography and false and misleading advertising, and they oppose government regulation of political speech).

My response to this rebuttal is that even accepting the reluctance of his criterion ("cultural war"), it is not clear it serves to distinguish several, if not most, of the cases he includes in his social issues basket from the vast majority of free speech cases that he excludes. For example, while it is true that most Americans support government regulation of child pornography and oppose government regulation of political speech, it is also the case that most Americans oppose physician-assisted suicide and support parental rights. Accordingly, it is difficult to distinguish Professor Merrill's "other privacy cases" from free speech cases.

There is, however, a second response that is more fundamental: how appropriate is his "culture war" criterion in the first place? Professor Merrill uses it to identify cases that he believes Justices O'Connor and Kennedy for strategic reasons wanted to avoid deciding because if they decided these issues reflexively (that is, supported conservative results) they would have risked losing popularity with the political (liberal) elite. This is something Professor Merrill surmises that they want to avoid, especially if the shabby way the liberal elite treated Justice Thomas during his confirmation hearings is any indication of their wrath. *See* Merrill, *supra* note 1, at 630-31 (noting that the inclusion into Thomas's confirmation hearing of Anita Hill's allegations of sexual impropriety by the nominee served as "a warning to the sitting Justices that if they persisted down the path of seeking to overturn *Roe* and securing other conservative objectives, they could expect equivalent retaliation of an unspecified nature")

The "culture war" criterion, even if valid, cannot explain the behavior of either Justice O'Connor or Justice Kennedy in their approach to free speech cases. If Professor Merrill is correct that Justices O'Connor and Kennedy wanted to avoid cases (that is, cases Professor Merrill places in his social issues basket) that if they voted "conservative" they would get in trouble with powerful (liberal) forces with whom they do not want to quarrel, it should also follow that the two of them would want to avoid deciding cases that would get everyone angry at them—liberals and conservatives alike. Moreover, if Professor Merrill is right that both liberals and conservatives are pretty much on the same page when it comes to regulation of speech and if conservatives and liberals alike have no problem with government regulation of obscenity and sexually-explicit speech generally, then Justices O'Connor and Kennedy—consistent with Professor Merrill's thesis—would avoid casting votes that would upset everyone. Yet, both Justices O'Connor and Kennedy voted to strike down the Communications Decency Act, *see* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which was popular legislation, and they both voted to strike down government attempts to shield children from tobacco advertising, which is also popular legislation. Moreover, Justice Kennedy (although not Justice O'Connor) twice

A second possibility is that maybe there is something special and unique about the sixty-four cases to which Professor Merrill has confined his analysis, so that the models apply to them, but not to other areas of the Court's docket. If that is the case[78]—and putting to the side what that tells us about the universality of the factors—is it still accurate to talk about two distinct courts where the significant shifts in legal agenda on which Professor Merrill focuses in distinguishing the two Courts are confined to such a small portion of the Court's caseload?

Whereas these first two arguments question the size of Professor Merrill's thesis (that is, are we talking about a pattern in 4% of the cases, 100%, or something in between?), the third criticism is more fundamental. Professor Merrill's thesis does not just describe an empirical pattern of "two Courts" over a sixteen year period. It also suggests a causal explanation for the two-Court pattern. If, however, this causal analysis is correct, then the same causes should have created the same two-Court pattern in the free speech cases, unless such cases are materially distinguishable from the other social issues cases Professor Merrill includes in his 4% sample. The simple fact that there is no such pattern in these free speech cases forces us to question the validity of the causal analysis at the heart of his thesis. When an expanded study of relevant cases finds that exceptions to a theory far outnumber the relatively small number of cases that originally suggested the theory, the theory has problems.

voted to strike down laws banning flag burning, which were also popular laws. *See*, United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

My point is that in the free speech area both Justices have shown no reluctance to vote in ways that have been unpopular in both periods. Why should we accept Professor Merrill's thesis that they have conspired to get the Court to avoid (other) cases *because* they wanted to protect their reputations when they have not behaved that way in the free speech area?

78. Again, I am not persuaded that Professor Merrill's social issues cases are distinguishable from free speech cases or that his political science models explain those differences that do exist between the two periods. *See supra* notes 8 and 10.

APPENDIX

Rehnquist Court Free Speech Cases
1986-2002

KEY:
F: First Amendment Claimant was the victor
G: Government entity was the victor
D: Draw—both the First Amendment Claimant and Government entity won on at least one issue

1986-87 Term	1994-95 Term
S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987). (G)	Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995). (F)
Rankin v. McPherson, 483 U.S. 378 (1987). (F)	Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). (F)
City of Houston v. Hill, 482 U.S. 451 (1987). (F)	Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995). (G)
Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987). (F)	Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). (F)
Meese v. Keene, 481 U.S. 465 (1987). (G)	Rubin v. Coors Brewing Co., 514 U.S. 476 (1995). (F)
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