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## ***REHNQUIST'S COURT***

RICHARD J. LAZARUS\*

### I. INTRODUCTION

Professor Tom Merrill is, without a doubt, one of the keenest academic observers of the Supreme Court. Merrill's scholarly analysis of the Court is invariably insightful, accurately spotting long term implications of the Court's decisions long before they are readily apparent, even perhaps to the Justices who produced them.<sup>1</sup> His Childress Lecture, is not surprisingly, therefore, a tour de force in its thoughtful assessment of various political science theories of judicial decision making to explain the ways in which the Rehnquist Court's jurisprudential focus has shifted over time.<sup>2</sup> Merrill's thesis that there have been two Rehnquist Courts and that the current stability of the Court's membership may have played a role in both the Court's shift away from social issues and towards a federalism agenda is characteristically original, creative, and provocative.

At the end of the day, however, I find Merrill's thesis unpersuasive. I do not share his view that it is especially enlightening to treat the current Chief Justice's tenure as divided into two distinct Rehnquist Courts: one before and one after the stabilization that has occurred in the Court's membership since 1994. Nor do I believe that the remarkable stability in the membership of the current Court, while certainly significant in other ways, has played any special role in shifting the Court's agenda away from social issues and towards a greater focus on federalism matters. In fact, I am not even persuaded that such a meaningful shift in focus has occurred. Finally, I likewise question the validity of Merrill's claim that any such shift resulted because of a strategic decision by Justice Scalia to steer the Court towards topics on which a

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\* Professor of Law, Georgetown University Law Center. Thanks are owed to Dalena Marcott and Kelly Moser, both Georgetown University Law Center Class of 2004, for their excellent research assistance, and to Mark Tushnet who commented on an earlier draft.

1. See generally Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

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

conservative majority could more consistently prevail. Indeed, Justice Scalia's conduct on the Court is more remarkable for the lack of the kind of strategic behavior that might have fostered the stability of a conservative majority on the Court. Rather than strengthen the reciprocal relations between those Justices, Justice Scalia has weakened them, thereby undermining the kind of trust necessary to forge enduring coalitions in a multi-member court.

This commentary on Professor Merrill's Childress Lecture, accordingly, takes issue with three of his primary arguments. Part II considers the accuracy of Merrill's assertion that the Rehnquist Court can be meaningfully divided into his proffered two periods based on the stability of the Court's membership. Part III questions Merrill's contention that the Court made a concerted move away from social issues in the so-called second Rehnquist Court. Finally, Part IV contests Merrill's claim that Justice Scalia is somehow responsible, based on his strategic behavior, for the success that the current five-Justice majority is having on the Court on matters relating to structural issues, such as federalism.

## II. THE ONE AND ONLY REHNQUIST

The Court's shift to structural issues in recent years is not so much evidence of the existence of *two* distinct "Rehnquist Courts" as it is the evidence of the even more remarkable fact that, for more than three decades, there has been only *one* Rehnquist. First Justice, now Chief Justice Rehnquist has proven to be the counterexample to the oft-repeated lore that one cannot accurately predict how any person, once on the Court, will actually evolve in his or her views over time.<sup>3</sup> History is notoriously littered with Presidents who have been unpleasantly surprised by the subsequent votes of Justices whom they nominated for the Court. Liberal Presidents nominate reputed liberal jurists and lawyers, who seem to evolve into judicial conservatives over time. Likewise, more conservative Presidents nominate conservative jurists and lawyers who, upon their ascension, vote in ways wholly antithetical to "their" President. Frequently-cited examples in recent decades include President Eisenhower and both Chief Justice Warren and Justice Brennan; President Kennedy and Justice White; President Nixon and Justice Blackmun; President Ford and Justice Stevens; and, more recently, President George H. W. Bush and Justice Souter.

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3. See, e.g., Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB. POL'Y 531, 536-38 (2001) ("picking Justices based on politics alone can cause problems—many Justices who were nominated for political reasons eventually harmed the presidents who nominated them"); Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 258 (2001) ("predictions of what people will do when they ascend the bench are notoriously inaccurate").

With Chief Justice Rehnquist, by contrast, President Nixon obtained just what he wanted: a stalwart, reliable, no-nonsense vote on the Court that reflected both the President's views on criminal justice as well as his views on federalism. The President generally favored a smaller federal government, returning much of the authority of the ever-expanding federal bureaucracy over social programs to the States.<sup>4</sup> As well chronicled, Nixon nominated Rehnquist to the Court in the fall of 1971 only after several other better known candidates failed to garner sufficient support either from key members of Congress or within the President's own circle of advisors;<sup>5</sup> other candidates, like then-Senator Howard Baker of Tennessee, simply delayed too long in responding to the President's early entreaties.<sup>6</sup> Nixon ultimately opted in favor of the then-virtually unknown Rehnquist, who was serving as an Assistant Attorney General under Attorney General John Mitchell, because he was impressed by Rehnquist's staunch constitutional conservatism and outstanding academic credentials.<sup>7</sup> Also very important to Nixon was Rehnquist's youthfulness: He was only forty-seven years old. As Nixon presciently observed at the time, "he was appointing 'a guy who's there 30 years. And who, also, if a Republican is around, is a potential candidate for chief justice.'" <sup>8</sup> President Nixon also plainly enjoyed the sheer surprise of the Rehnquist choice.<sup>9</sup>

Soon after joining the Court, moreover, then-Justice Rehnquist left little doubt that structural and federalism issues were high on his personal agenda.<sup>10</sup> He authored the Court's opinion in *National League of Cities v. Usery*,<sup>11</sup> which elevated the Tenth Amendment as a primary constitutional basis for limiting the federal government's authority to intrude upon state sovereignty. Even though overruled a few years later in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>12</sup> *National League of Cities* has remained strikingly influential. At the very least, notwithstanding its formal overruling, *National*

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4. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 288 (1996) ("It is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people." (quoting President Richard Nixon)); see generally TIMOTHY CONLAN, *NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN* (1988).

5. See generally JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001); Fred P. Graham, *Nixon's Choices: Why He Apparently Made a Last-Minute Switch*, N.Y. TIMES, Oct. 24, 1971, § 4, at 1.

6. DEAN, *supra* note 5, at 221-40, 246.

7. *Id.* at 228-34, 245-46.

8. *Id.* at 265 (quoting President Richard Nixon).

9. *Id.* at 250-51, 264.

10. See SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 135-88 (1989).

11. 426 U.S. 833 (1976).

12. 469 U.S. 528 (1985).

*League of Cities* plainly invigorated the Tenth Amendment by prompting academics, the legal profession, and, ultimately, the Court to reconsider and reassert federalism issues in a host of subsequent rulings.<sup>13</sup>

Rehnquist, similarly, early on made clear his view that congressional authority under the Commerce Clause should be more narrowly construed than had been the Court's practice.<sup>14</sup> In *Hodel v. Virginia Surface Mining Control & Reclamation Ass'n, Inc.*,<sup>15</sup> he filed a concurring opinion that presaged by nearly two decades the Court's 1995 opinion in *United States v. Lopez*.<sup>16</sup> Rehnquist took issue with the majority opinion, contending that congressional Commerce Clause authority existed only if there was a *substantial* effect on interstate commerce.<sup>17</sup> After describing the Court's recent Commerce Clause precedent, Rehnquist further cautioned that "[d]espite the holdings of these cases, and the broad dicta often contained therein, there *are* constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause."<sup>18</sup> The Justice expressly cautioned against undue deference to congressional determinations that a particular subject was sufficiently linked to interstate commerce to fall within the legislature's Commerce Clause authority: "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>19</sup>

Rehnquist's early Eleventh Amendment precedent similarly laid the groundwork for the Court's dramatic resurgence of that Amendment during the past few years. Soon after joining the Court, a then-very junior Justice Rehnquist took a leadership role by authoring the Court's significant Eleventh Amendment ruling in *Edelman v. Jordan*.<sup>20</sup> The *Edelman* Court ruled that, absent state consent, the Eleventh Amendment barred a suit by private parties seeking to impose liability payable from public funds in the state treasury based upon the state's violation of a federal assistance program for the aged, blind, and disabled.<sup>21</sup> Even two years later, in writing the opinion for the Court in *Fitzpatrick v. Bitzer*,<sup>22</sup> which upheld congressional authority to abrogate a state's Eleventh Amendment immunity when Congress enacts legislation

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13. Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 503 (2001).

14. Rehnquist also argued, albeit in dissent, that the Court should be less ready to invoke the dormant Commerce Clause as a constitutional ground for overturning state regulations and taxes based on their purported adverse impact on interstate commerce. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (Rehnquist, J., dissenting).

15. 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring).

16. 514 U.S. 549 (1995).

17. *Hodel*, 452 U.S. at 310-11 (Rehnquist, J., concurring).

18. *Id.* at 309.

19. *Id.* at 311.

20. 415 U.S. 651 (1974).

21. *Id.* at 662-63.

22. 427 U.S. 445 (1976).

pursuant to its Section 5 enforcement authority under the Fourteenth Amendment, Rehnquist was careful not to endorse the broader view that Congress possessed such abrogation authority under the Commerce Clause. The negative implication of that narrow opinion was realized twenty years later in *Seminole Tribe of Florida v. Florida*,<sup>23</sup> when the Court held that Congress lacked such authority under the Commerce Clause, overruling prior precedent from which Rehnquist had dissented.<sup>24</sup> Not surprisingly, Chief Justice Rehnquist wrote the Court's opinion in *Seminole Tribe*. Since then, he has also written opinions for the Court rejecting arguments that specific federal laws constitute valid exercises of congressional authority to abrogate state Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.<sup>25</sup>

The Court's recent shift, if any, to structural issues simply reflects the longstanding interests of the Chief Justice. It was not prompted, moreover, by the stability of the Court's membership since Justice Breyer joined the Court in 1994 or even, as Professor Merrill alternatively dates it, "the replacement of Justice White by Justice Thomas, which was completed when White retired in 1993."<sup>26</sup> Instead, it can be far more easily dated to the time that Justice Thomas replaced Justice Marshall on the Court. As soon as Justice Thomas joined the Court in 1991, the Chief Justice had, for the first time since he joined the Court in 1971, a five-Justice majority on many of the structural issues that had long been one of his primary concerns. Merrill is correct that the Chief had been denied that majority before then because of Justice White; Justice White's conservative tendencies on law and order and some social issues did not extend to those structural issues, because White favored a strong federal government.<sup>27</sup> Justice White had not been the Chief's ally on structural matters such as the scope of congressional Commerce Clause authority, Tenth Amendment limitations on federal interference with state sovereignty, or State Eleventh Amendment immunity. With Justice Marshall's departure, however, the Chief no longer needed Justice White's vote.

For that same reason, the relative stability of the Court since Justice Breyer's appointment has been largely beside the point.<sup>28</sup> What has mattered

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23. 517 U.S. 44 (1996).

24. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

25. *See, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

26. Merrill, *supra* note 2, at 593.

27. *See generally* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998); Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 *YALE L. J.* 19, 21-22 (1993).

28. The impact on the Court's decision making of any stabilization of its membership could not, in any event, fairly be measured by the Court's precedent immediately after Breyer joined the Court in 1994. Presumably, it takes at least four to five years for the Justices to realize that their membership has stabilized. If so, it is only during just the past two or three years and in the future that any such stabilization effect could be observed.

for the Chief has been the stability of the *five* Justices that comprise his conservative majority; that the other four have also been stable since 1994 is neither here nor there. There is no reason to suppose, for instance, that the Court's decisions would have been any different had Justice Stevens retired from the Court after 1994 and been replaced by a Justice named by President Clinton.

In sum, the Court's resurgent focus on structural issues is most likely simply an expression of the longstanding interest of the current Chief, rather than any strategic calculation by Justice Scalia. The reason, moreover, that the Chief has been so successful in recent years is not because the Court as a whole has been stable, but because the Chief's five-Justice majority has been stable ever since Justice Thomas joined the Court. The Chief may well be one of the relatively few Justices who is, in fact, best explained by the more often than not dubious "attitudinal model," described in Merrill's article.<sup>29</sup> The Chief has his own unique, sometimes quite blunt style.<sup>30</sup> He perceives answers to legal issues clearly and quickly, as evidenced by his "ten-day rule," which requires his law clerks to provide him with a draft opinion within ten days of the opinion assignment.<sup>31</sup> For Rehnquist, there is no particular moment for angst or the wringing of hands in judicial decision making. Nor is there anything remotely Machiavellian about him. He is straightforward and direct in his analysis and in his dealings with others. The Chief knows what he believes the law is (or should be) and steadfastly seeks to move the Court's precedent in that direction.

The key to understanding the Court's seeming shift towards structural issues, therefore, lies largely in Rehnquist's sheer, unbending persistence in pursuing those issues for over thirty years. As described by one interviewer, Rehnquist "is directed in his opinions not so much by *stare decisis*, past judicial decisions, as by an inner compass that almost unfailingly evolved from a moral vision developed long ago."<sup>32</sup> Or as my colleague, Mark Tushnet, even more succinctly put it: Rehnquist has been "an almost perfect Republican Chief Justice."<sup>33</sup>

### III. THE ABSENCE OF ANY SHIFT AWAY FROM SOCIAL ISSUES

Even more questionable, however, is Professor Merrill's premise that the Rehnquist Court has undertaken a "shift away from . . . high-profile social

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29. Merrill, *supra* note 2, at 590-91.

30. See Linda Greenhouse, *Supremely Sheltered*, N.Y. TIMES, Mar. 7, 1993, § 6 (Magazine), at 84.

31. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 298 (1987).

32. John A. Jenkins, *The Partisan: A Talk With Justice Rehnquist*, N.Y. TIMES, Mar. 3, 1985, § 6 (Magazine), at 31.

33. Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1334 (1990) (reviewing SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* (1989)).

issues,”<sup>34</sup> as well as his accompanying explanation that the “hazing” suffered by Justice Thomas during his Senate confirmation may have caused the Justices to worry about the adverse impacts of being too much in the public eye.<sup>35</sup> Merrill’s mistake lies in too narrowly defining what constitutes a high-profile social issue, placing too much emphasis on the abortion and affirmative action issues as bellwethers of the Court’s willingness to take on such issues notwithstanding their associated political controversy. Merrill also relies unduly on *quantitative* rather than *qualitative* analysis in considering the character of the Court’s docket. Indeed, a both broader and more qualitative analysis of the Court’s docket suggests that the current Court has been anything but shy in its willingness to take on social controversy. The Court has been ever ready and willing (whether or not able) to address some of the most politically controversial social issues of the day.

The Court’s docket has, for instance, recently included a series of high-profile controversies associated with the Religion Clauses. The Court’s decision last Term in the school voucher case, *Zelman v. Simmons-Harris*,<sup>36</sup> put the Court at the fulcrum of one of the nation’s most contentious social debates. So, too, did the Court’s ruling a few years ago in *Santa Fe Independent School District v. Doe*,<sup>37</sup> involving the constitutionality of student-led prayer during half-time at a public school football game in Texas.

These are not isolated counterexamples. The Court has recently considered the validity of federal tobacco regulation,<sup>38</sup> the constitutionality of drug testing in public high schools,<sup>39</sup> government classifications based on sexual orientation,<sup>40</sup> prohibitions on child pornography,<sup>41</sup> restrictions on cross burning,<sup>42</sup> and limitations on grandparent visitation rights,<sup>43</sup> all of which similarly involved high-profile social issues that placed the Court directly in the political spotlight.

The Court’s death penalty cases are to similar effect. Next to abortion and affirmative action, perhaps no issue has so divided public opinion as has the death penalty; yet the Supreme Court has here too repeatedly displayed its willingness to consider a host of death penalty issues, most recently the

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34. Merrill, *supra* note 2, at 576.

35. *Id.* at 630-31.

36. 536 U.S. 639 (2002).

37. 530 U.S. 290 (2000).

38. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

39. *See* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

40. *See* *Romer v. Evans*, 517 U.S. 620 (1996).

41. *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Reno v. ACLU*, 521 U.S. 844 (1997); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

42. *See* *Virginia v. Black*, 533 S.E.2d 738 (Va. 2001), *cert. granted*, 122 S. Ct. 2288 (2002) (mem.).

43. *See* *Troxel v. Granville*, 530 U.S. 57 (2000).

constitutionality of its application to the mentally retarded.<sup>44</sup> Another case, raising the question of the constitutionality of the electric chair, was before the Court, but not decided on the merits only because the State of Florida rendered the case moot by changing its own law.<sup>45</sup> For the purposes of considering Merrill's thesis, it is significant that the Court voluntarily accepted review of that legal issue, notwithstanding its clear tendency to inject the Court in the midst of a hot topic of ongoing public debate.

While Merrill is certainly correct that the Court had, until recently, displayed surprising reticence to grant review of certain high-profile affirmative action cases, most notably those arising out of the admissions policies of public universities,<sup>46</sup> the Court's reluctance in that respect is ultimately fairly narrowly drawn. During this same time-frame, the Court had entertained a strikingly high number of high-profile civil rights issues involving the disabled,<sup>47</sup> closely supervised the constitutionality of state congressional redistricting,<sup>48</sup> considered the constitutionality of a state ban on physician-assisted suicide,<sup>49</sup> and willingly entered the fray by considering the constitutionality of the Commonwealth of Virginia's refusal to admit women to the Virginia Military Institute.<sup>50</sup> Similarly, on the abortion issue, the Court did not shy away from considering the constitutionality of Nebraska's restriction on so-called "partial birth abortions," notwithstanding its potential to create deep emotional wounds on the Court in the full glare of the national news media.<sup>51</sup> Also, any relative aversion to the abortion issue that the current Court may harbor has not prevented it from considering a host of claims relating to the legality of restrictions placed on abortion protestors.<sup>52</sup>

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44. *See Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

45. *See Bryan v. Moore*, 528 U.S. 1133 (2000).

46. *See Smith v. Univ. of Wash. Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). However, the Court granted review in a Sixth Circuit case presenting just such contentious affirmative action issues arising out of a challenge to the University of Michigan's admissions policies. *See Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (2002).

47. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

48. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Easley v. Cromartie*, 532 U.S. 234 (2001).

49. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

50. *United States v. Virginia*, 518 U.S. 515 (1996).

51. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

52. *See Hill v. Colorado*, 530 U.S. 703 (2000); *Scheidler v. NOW, Inc.*, 535 U.S. 1016 (2002) (mem.) (consolidated for oral argument); *Operation Rescue v. NOW, Inc.*, 535 U.S. 1016 (2002) (mem.) (consolidated for oral argument).

Finally, one would seem hard-pressed to characterize as shy in any respect a Court that voluntarily entered into the political imbroglio arising out of the Florida vote-counting debacle in the 2000 Presidential election. As described by Professor Laurence Tribe, “not one major constitutional scholar . . . predicted before the Court granted certiorari on November 24 that it would intervene. We were all *positive* that the Court would sit this one out. . . . [T]he Justices took their ‘unsought responsibility’ to a new level . . . .”<sup>53</sup>

In sum, a qualitative assessment of the Court’s docket since its membership has stabilized casts significant doubt on the accuracy of Merrill’s premise that a more stable Court has moved away from high-profile, socially controversial issues. Not only has the Court exhibited no such tendencies, but it might even be more accurate to contend that the Court has been more willing than ever to take on such issues. Whatever hazing individual members of the Court may or may not feel Justice Thomas received during his confirmation, they have since shown little reluctance to subject themselves to political debate and discussion, at least on topics related to their work on the Court.

#### IV. SCALIA’S JUDICIAL REACTANCE

Finally, Professor Merrill suggests that the Court’s agenda shift may have resulted from a strategic decision by Justice Scalia to steer the Court away from social issues, about which the conservative majority could not agree, to structural issues, about which a more enduring majority could persist.<sup>54</sup> Having already questioned above the accuracy of Merrill’s premise, I now want to question the accuracy of his speculation that Justice Scalia may have served such a strategic function in any event. For those academic observers of the Court and legal practitioners before the Court who are fans of Justice Scalia, many favorable adjectives would come to mind in describing Justice Scalia’s performance on the Court, including brilliant, clever, quick, rigorous, demanding, principled and eloquent. “Strategic,” however, could not fairly be among those adjectives.

The essence of a strategic Justice is one who is capable of forging majority coalitions, especially those that can endure over time and, therefore, of producing a coherent body of jurisprudence rather than an isolated ruling that is more susceptible to subsequent diminishment. Justices Black and Brennan are two frequently cited examples of Justices known for such majority coalition-building skills.<sup>55</sup> Scalia, in contrast, could be more accurately characterized as the paradigmatic example of the *anti*-strategic Justice.

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53. Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 299 (2001) (emphasis added).

54. Merrill, *supra* note 2, at 604-09.

55. See Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1241 (2002); Michael J. Gerhardt, *The Art of Judicial Biography*, 80 CORNELL L. REV. 1595, 1611

To be sure, Professor Merrill is certainly correct that “stability over a long period of time” can mean a “majority coalition enjoys stronger cohesion than one would expect” than if there were instead turnover in membership.<sup>56</sup> He is further correct in contending that such stability in membership can promote the formation of “[d]ense bonds of reciprocity” among the conservative Justices on the Court.<sup>57</sup> However, what Merrill has not paid adequate attention to is the possibility for just the opposite to occur over time. People in small, stable groups engaged in collaborative decision making can also grow apart, undermining cooperation and eroding reciprocity.

Trust does not necessarily build over time. Scholars expert on the psychology of group decision making instead recognize that “trust between two or more interdependent actors thickens *or* thins as a function of their cumulative interaction. Interactional histories give decision makers information that is useful in assessing others’ dispositions, intentions, and motives.”<sup>58</sup> Thus, while Merrill is right that reciprocity can build trust, it is equally true that “the absence or violation of reciprocity erodes it.”<sup>59</sup> Indeed, trust is particularly difficult to maintain over time because trust is easier to destroy than it is to build. This is both because “negative (trust destroying) events are more visible and noticeable than positive (trust building) events” and because “trust-destroying events carry more weight in judgment than trust-building events of comparable magnitude.”<sup>60</sup>

As applied to collaborative judicial decision making, the formal psychological phenomenon is termed *reactance*, which finds its roots in physics, where reactance refers to an oppositional force that electronic components exhibit to the passage of alternating current. In psychology, reactance refers to the phenomenon of someone reacting so negatively to external pressure to act in a certain way that he or she may tend to do the opposite.<sup>61</sup> For instance, such a “boomerang effect” may occur “when a clumsy attempt to pressure an individual into adopting a particular behavior

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(1995) (reviewing ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994)); HUNTER R. CLARK, *JUSTICE BRENNAN: THE GREAT CONCILIATOR* (1995).

56. Merrill, *supra* note 2, at 649.

57. *Id.* at 651.

58. Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCH. 569, 575 (1999) (emphasis added).

59. *Id.* at 575-76 (citing Morton Deutsch, *Trust and Suspicion*, 2 J. CONFLICT RESOL. 265 (1958)); see also IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 263 (2d ed. 1982) (describing adverse effects on group consensus decision-making of open criticism of group members).

60. Kramer, *supra* note 58, at 593 (citing Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 RISK ANALYSIS 675 (1993)).

61. See generally JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (Leon Festinger & Stanley Schachter eds., 1966); ROBERT A. WICKLUND, *FREEDOM AND REACTANCE* (1974).

leads him to choose the opposite course.”<sup>62</sup> Some studies even suggest that a boomerang effect is significantly more pronounced when the individual who is the intended object of influence was initially in agreement rather than in disagreement with the position being communicated.<sup>63</sup>

In the current Supreme Court, there is more basis for speculating that Justice Scalia has undermined the stability of the Court's conservative majority than there is reason to suppose (as Professor Merrill does) the converse. Justice Scalia writes passionately, artfully, and sharply. His wit is often barbed and his criticism scathing. He also tends to aim his sharpest and most vocal denunciations not at those more liberal members on the Court with whom he disagrees routinely, but instead at those more conservative members of the Court whenever they fail to live up to Scalia's own conservative standards. He openly ridicules their legal reasoning, casts doubt on their morality, and even sometimes appears to call into question both their intellectual capacity and personal integrity.<sup>64</sup> Supreme Court Justices must, of course, have thick skins

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62. IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* 256-57 (1985); see WICKLUND, *supra* note 61, at 4 (“The more a person feels pushed in a given direction, the more reactance will move him in the opposite direction.”); Carl I. Hovland, et al., *Assimilation and Contrast Effects in Reactions to Communication and Attitude Change*, 55 J. ABNORMAL & SOC. PSYCHOL. 244, 244 (1957) (“Attempts to change attitudes in the direction advocated by communication on a social issue at times produce shifts in the direction opposite to that intended—the ‘boomerang effect.’”).

63. Stephen Worchel & Jack W. Brehm, *Effect of Threats to Attitudinal Freedom as a Function of Agreement with the Communicator*, 14 J. PERSONALITY & SOC. PSYCHOL. 18, 20-22 (1970).

64. See, e.g., *Atkins v. Virginia*, 122 S. Ct. 2242, 2263 (2002) (Scalia, J., dissenting) (sarcastically referring to language of a prior Justice O'Connor opinion as “eloquent[.]” and then using it against her vote in this case: “In any event, reliance upon ‘trends,’ even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as JUSTICE O’CONNOR eloquently explained in *Thompson v. Oklahoma*, 487 U.S. 815 (1988)[]”); *id.* at 2263 (“embarrassingly feeble evidence of ‘consensus’”); *id.* at 2259 (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”); *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (“JUSTICE O’CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the ‘unjust profit to the thief.’”); *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (“I cannot understand why those who *acknowledge* that, in the opening words of JUSTICE O’CONNOR’s concurrence, ‘the issue of abortion is one of the most contentious and controversial in contemporary American society,’ persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it.”) (citation omitted); *id.* at 953 (“The notion that the Constitution of the United States, designed, among other things, ‘to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,’ prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.”) (alteration in original); *id.* at 954-55 (“It is a value judgment, dependent upon how much one

and criticism is often an essential part of sound decision-making over time. As one of the “nine scorpions in the bottle”—Justice Holmes’ evocative description of the life on the Supreme Court<sup>65</sup>—each Justice well appreciates that public criticism is a normal part of the job, including criticism originating from the written opinions of their colleagues on the bench. Even so, however, Justice Scalia’s withering rhetoric is far more damning than the norm and cannot fairly be expected to promote the formation of the kind of “dense bonds of reciprocity” among the five more conservative Justices that Professor Merrill envisions Scalia strategically to be fostering. Quite the opposite is the far more likely result.<sup>66</sup>

By contrast, Chief Justice Rehnquist’s style is far more likely to generate cohesiveness and enduring majority coalitions. He writes matter-of-factly and directly. There is little hyperbole and few gratuitous barbs. Moreover, because the Chief, unlike Justice Scalia, regularly has responsibility for delegating opinion assignments to his colleagues, he is far more ready to offer the very kind of positive reciprocities—choice opinion writing assignments—that can forge stronger working relationships.

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respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today’s majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed.”); *Romer v. Evans*, 517 U.S. 620, 638 (1996) (Scalia, J., dissenting) (“hand wringing”); *id.* at 639 (“terminal silliness”); *id.* at 645 (“The Court’s portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ is so false as to be comical.”); *id.* at 652 (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) (“The Imperial Judiciary lives.”); *Thompson v. Oklahoma*, 487 U.S. 815, 876-77 (1988) (Scalia, J., dissenting) (“I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content. We have in the past studiously avoided that sort of interference in the States’ legislative processes, the heart of their sovereignty. . . . Thus, while the concurrence [by JUSTICE O’CONNOR] purports to be adopting an approach more respectful of States’ rights than the plurality, in principle it seems to me much more disdainful.”).

65. Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990).

66. This is not to suggest that the lack of enduring cohesiveness is necessarily a bad thing. To the contrary, one reason why the Court may be less likely to reach extreme results over time is that the structure of its decision making process, including the opportunity for open debate and for heated criticism, makes less likely both enclave deliberation and, therefore, polarization in the Court’s decisions. *Cf.* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85-89 (2000).

V. CONCLUSION

Courts are regularly named after the Chief Justice that leads them. Hence, in recent years, one hears of the “Warren Court,” “Burger Court,” and now the “Rehnquist Court.” Quite often, those titles are misleading because the Chief Justice may, in fact, play no dominating role in fashioning either the Court’s agenda or resulting jurisprudence. While, as described above, I believe that the thesis of Tom Merrill’s outstanding Childress Lecture is incorrect for several reasons, the central reason lies in his under-appreciation that the current Court warrants its label. This is, indeed, *Rehnquist’s* Court.

