THE MORALITY OF THE REHNQUIST COURT

Prepared for presentation at the 2001 Annual Meeting of the American Political Science Association San Francisco, CA

August 30, 2001, Panel 27-6, 10:45 a.m. - 12:30 p.m.

In the perennial discussion of the extent to which judges and justices decide cases in accordance with their own preexisting philosophy of law, it is useful to try to identify the specific philosophical assumptions that might account for their decisions, follow them to their conclusions and reach some evaluation of those various approaches to the law. This is particularly true if you believe, as I do, that all judges and justices necessarily import their own philosophy of law into their decisions. If it is not something that jurists can avoid, how do these issues apply to the Rehnquist Court?1

Step one is to identify the philosophical assumptions of this Court. Step two is to identify the consequences of the Court’s position. Step three is to examine the quality of their philosophical stances.

By contrast to the Rehnquist Court, the Supreme Court for the previous half century had been consequentialist in approach, utilitarian and egalitarian in its values. Its consequentialist approach is evident in its treatment of free speech, for example, as important to protect social decisionmaking.2 Similarly, the exclusionary rule was important not because of an individual right but to restructure police practices.3 The Court’s egalitarianism is evident in cases as diverse as the right to vote4 and the right to a transcript.5

In contrast, the Rehnquist Court treats the work of prior courts as moral relativism and has itself taken a more absolutist position about constitutional rules. Their philosophical position has led to radical revisions in constitutional law from voting rights to criminal rights. In turn those judgments are in considerable tension with the conservative majority’s claim to the primacy of an interpretive stance.

Aside from the conservative majority’s positions on homosexuality,6 abortion,7 religion8 and nudity,9 any claim to a moral position also needs to be tested against their definitions of substantive and procedural justice. In fact this Court has pursued goals in considerable tension with its ideological claims. Its work cannot be described as utilitarian, libertarian, democratic or neutral.

Scalia, characteristically, put his pen right on the fault line, writing:

Perhaps the dissenters believe that "offense to others" ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau idea – much less for thinking that it was written into the Constitution.10

In other words, according to Scalia, government has every right to interfere with us even when we are not bothering anyone else.

That position has some obvious consequences with respect to privacy. Almost by definition, the claims for a fundamental privacy right are about things that presumably hurt no one else – private sexual encounters between consenting adults, use of contraceptives, etc. I say presumably because it might not be so that others are unaffected even by these private encounters between consenting adults. But certainly that is a major argument.
For Scalia, and the conservatives who agree with him, Chief Justice Rehnquist and, with some qualifications, Justice Thomas, it does not matter that no one is injured. Society has the right to regulate the behavior for any reasons it chooses. With some significant qualifications, O’Connor and Kennedy are generally in the same camp.

In Barnes v. Glen Theatre, the state had banned nude dancing on moral grounds. In keeping with Scalia’s rejection of this moral freedom, Rehnquist treated the state’s moral objections as sufficient justification for restraint. In other words, the state was allowed to treat traditional values as more important than its overriding the First Amendment privilege. He was joined by O’Connor and Kennedy. Scalia concurred in the judgment. The group of conservatives, joined shortly by Thomas, treated moral relativism as the evil to be opposed – most clearly in Scalia’s opinion but just as surely the basis of Rehnquist’s. Rehnquist described the state interest in the ban on nudity: "Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places." He then traced the history of such statutes and concluded: "Thus, the public indecency statute furthers a substantial government interest in protecting order and morality." And that substantial government interest was sufficient, in the view of the plurality, to justify the statutory limitation on free expression. In other words, for Rehnquist, O’Connor and Kennedy, there was no First Amendment right to immoral expression.

That attack on expression deemed immoral fits quite well the hostility toward moral relativism that is very much a part of contemporary conservative thought. While economics is based on relativism, much modern conservative thought is much more "moralistic" – rejecting individual moral autonomy in favor of more absolute definitions of moral truth. At the same time Rehnquist’s position is quite surprising because he has argued exactly the opposite:

"Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments."

Because of that, Rehnquist argues, the justices have no business basing their judgments on their own views.

But the cases don’t sustain his explanation for his votes. His and the conservative majority’s hostility toward "relativism" are evident in the cases involving abortion, homosexuality, nudity and religion. With a different group of justices, it might be possible to argue that the conservative majority on the Court have been behaving as restrained judges obeying the democratically expressed wishes of the people. But as will be discussed below, that doesn’t fit this group’s votes on the issues of rights to democratic governance and procedures. Scalia’s explanation works much better.

The conservative majority has argued repeatedly that judges should stick to the text and to a relatively narrow and unchanging version of specific history because, so they argue, any other approach would substitute the views of the judges for the decisions of the people. That argument seems to be based in democratic values. Nevertheless, conservative philosophy doesn’t support democratic values well. The conservative majority’s hostility to relativism is in fact closely related to their treatment of democracy. The reason is very straightforward. What the conservatives call relativism is about trusting or respecting individual choice. Democracy is about individual choice summed up in elections and enacted through representatives. Conservative hostility to relativism is in fact a reflection of their belief that the people cannot be
trusted at least in certain morally significant areas. That is reflected in conservative views about democracy. Simply put, democracy is far less sacrosanct to conservatives, far less important than whatever they believe should happen. The decisions of the conservative justices make the democracy gap clear. The conservatives backed off the one person-one vote rule to the point that three to one now satisfies them. They refuse to deal with gerrymandering cases despite the enormous political consequences of gerrymandering. They have stripped the Voting Rights Act of its teeth. They have not addressed discrimination against minorities. They have not found any violation of law when a county rewrote its rules at the point when blacks threatened to gain representation so that blacks who were elected could not exercise the powers that their white counterparts had. White objections to black majority districts are the only kind of "democratic" claim this bloc supports.

Shortly after they were appointed, Justices Rehnquist and O’Connor went well beyond malapportionment and supported measures which confined the franchise for water and power districts to landowners in proportion to the land they owned. Landowners might pollute the water you drink but you’d have no vote if you rented. They could starve the schools your children attend, but you’d have no say – even though your rents reflect the tax rate. Justices Thomas and Scalia have argued a kind of super-majority point of view – dividing the population by race, despite their claims that districting should be colorblind, they argue that whites are in the majority so they should take all the districts. Black majority districts in rough proportion to the population are not required by the statute and, for Scalia and Thomas, that kind of districting is prohibited. But at the same time that they argue for racial majoritarianism (regardless of what the state or national majority may seek), Scalia and Thomas, argue that democracy itself is undefinable. There is no theory, in their view, that could answer such questions as how to do districting. They are accurate to the extent that there are many problems about democracy and representation which currently have no solution. With one exception, however, they have not found any problems involving democracy or representation which do have a practical or theoretical solution. The lone exception is their objection to districting in which black voters are a majority in a number of districts roughly equal to their proportion of the population. Scalia commented in a recent book that he is at least as concerned about tyranny of the majority as tyranny of the elite. If democracy has no real meaning, and there are no problems for which it is part of the solution, what does it mean to say that Scalia or Thomas believe in it? When they claim that their version of judicial restraint is in deference to democratic decision-making, it is no longer clear that they have a concept that coincides with what they claim to respect.

Rehnquist, O’Connor and Kennedy have been less explicit about their thinking. Their argument in the current series of cases has been about a definition of impermissible racial line-drawing and therefore the types of majority-minority districts that cannot be drawn. It is at least curious, that their only solution to the problems presented by the Voting Rights Act has not been driven by democratic concerns, but is defined instead by the concept of segregation or intention to district according to race. They have not been able to identify any democratic objectives or standards that should pertain to the districting, gerrymandering, Voting Rights or franchise issues that arrive at their courthouse door.

We should note that even on their terms, it is difficult to understand what they mean by segregation or by the intent to district by race for four reasons. First, the districts about which
they complained have not been racially homogeneous. Second, they have made it clear that they understand the impossibility of districting without awareness of race. Third, Justice O'Connor, at least, has explicitly refused to find that fairness to blacks is an unconstitutional objective of the Voting Rights Act. Fourth, they have not suggested that districting cannot follow the lines of other suspect classes – indeed they recognize that is done all the time. And fifth, the implications of homogeneity in districting are quite different from the implications of homogeneity in education or housing because it can be empowering rather than invidious.

Now look back at the question whether the source of the Rehnquist Court’s decisions lies in the rejection of relativism or the adoption of a democratic framework. The privacy cases, including Barnes, could be defended on the ground that the people, through their representatives, wanted to accomplish those restrictions. But that explanation is not available to this Court. It never defers to democracy and democratic rights. If Bush v. Gore didn’t make that clear by itself, consider it in light of the Court’s decisions sustaining malapportioned and gerrymandered election districts, or in light of the opinions of Rehnquist and O’Connor that renters could be excluded from the vote. Or think of it in light of the Court’s treatment of the Voting Rights Act which has blocked efforts to remove the impediments to black voting power alone of all the types of power that can be expressed through districting. There are no voting rights that this Court respects except the rights of white voters who, though more than proportionally represented, yet wanted to take away what little power had been left to black voters.

Instead of basing its conclusions in the highly contested areas of abortion, sexuality, nudity, and religious establishment on deference to the popular majority, or to democratic processes, the conservative majority bases its thinking on precisely the opposite assumption, the rejection of democratic rights and the respect for individual moral judgments that goes with it. In its view we should not allow abortions, homosexuality, or nudity and we should support religion. Each of those areas represents an area where adult decisions about their own lives have been rejected by law and by the Court. That would be hard to do for a Court which respected individual moral choices.

In other words the only way that a liberal Court could reach this Court’s privacy decisions would be through the route chosen by Justice White – respect for democratic judgments. But this Court gets there by a different route – rejection of individual judgment and concomitant rights of privacy. If individual judgment is not respected, there is little reason to respect collective judgment either.

Recent campaign rhetoric aside, trusting the people and individual choice is essentially a liberal idea and implies letting them choose what they think best for themselves. Extended to the society at large, that means considerable support for democracy. By contrast, distrust of individual choice is essentially a conservative idea and allows conservatives to prefer order, finality and other conservative values to individual choices in such areas as privacy rights, where they consider much of the behavior immoral. More important, conservative distrust of individual choice supports their distrust of democracy because democracy is about choosing what people like. In fact, many conservatives fear the mob more than they fear the establishment.

A second consequence deals with the issue of judicial restraint. Commentators have increasingly noticed that this is not a restrained Court. It is instead one of the most activist Courts in American history. In fact its treatment of judicial restraint is very closely tied to its rejection of moral autonomy and its rejection of democratic rights.

Judicial restraint can have its source in respect for democratic institutions, in respect for tradition,
or in substantive agreement with the decisions being made. And each version of judicial restraint will result in a Court which chooses a different group of cases about which to be restrained.34 Beginning in 1937, the Court chose a democratic model for judicial restraint. That meant that the Court would actively protect democratic institutions, rights to the franchise, and the rights of individuals who had been denied access to the democratic system.35 Those concepts are not self-defining of course,36 but a clear pattern emerged from the Hughes Court in the 1930s to the end of the Warren Court in 1969. The Court brought the First Amendment to bear on the states and developed extensive rights to free expression, arguably a major building block of a democratic system.37 It ended the White Primary38 and attacked malapportioned legislative seats.39 It overturned the system of segregation that excluded blacks from all aspects of the political, economic and social society.40 And it defended individuals who were treated by the state in ways the majority would not accept for itself.41

A model depending on substantive agreement with the decisions of the other branches more closely characterizes the half century before the Hughes Court. The Court decided what was reasonable in its own thinking, rather than, as Holmes would have had it, whether reasonable men could think the legislature wise.42

The Burger Court made some feints in the direction of tradition, describing fundamental rights in those terms rather than in terms of the functions of those rights in protecting the democratic system, etc.43

The Rehnquist Court has abandoned the democratic model.44 It shows restraint with respect to rights to vote, and to have the vote counted equally. But it has become quite active with respect to regulation aimed at large groups of people, with no lack of democratic input. The consequences are becoming clear. The Rehnquist Court has become much more aggressive in overturning legislation than prior courts both in quantity and in kind. It has used the commerce clause,45 the takings clause,46 the Eleventh47 and Fourteenth Amendments48 and other sources of law49 to redraw the legal map regarding the powers of Congress,50 local control over land use51 and the Civil Rights Acts of 196452 and 1965,53 and has fired a shot across the bow of the way legal services programs are funded in 49 states.54 None of that activism can be described as traditional either.

The spokesmen for the Court argue about interpretivism, literalism, historicism, but their decisions don’t follow any such pattern and they have on occasion admitted that their opinions have no such support.55 If the Court is moving to a treatment of judicial restraint based on what seems reasonable to it, the applicable model is Muller v. Oregon.56 The Court in Muller thought special protections for working women reasonable though similar protections for men were not. I have argued in my book that Bowers v. Hardwick, 57 is the model of restraint for the conservative justices. White’s opinion was about respect for democratic decision making. Justice White was perfectly prepared to defend rights to participate in democratic institutions and to be respected by those institutions. But Bowers necessarily has a different meaning for the conservative justices on the Rehnquist Court. For them, Bowers was simply a reasonable judgment. And for the most conservative members of this Court, the majority’s decision in Romer v. Evans was not.58

With the change in philosophy, judicial restraint has been turned on its head. Where democratic rights and personal liberty were the proper sphere for activism, now they are the proper sphere for restraint. Where economic rights and federal relations were the proper spheres for restraint, they are now treated as proper spheres for activism.
The third issue I propose to discuss is the quality of their philosophical stances. Aside from the conservative majority’s positions on homosexuality, abortion, religion and nudity, any claim to a moral position also needs to be tested against their definitions of substantive and procedural justice. It also needs to be tested against their moral claims. The rejection of democratic principles must be included in any tally. Having rejected both moral autonomy and the democratic rights that come from it, the conservative majority has substituted its own judgments about what is important in many areas and has rejected the concern for individuals and individual justice that is the touchstone of the humanistic philosophy it disowns. No area of law presents that contrast as starkly as the majority’s treatment of the prospect of executing the innocent.

In the habeas corpus cases, the conservatives on the Court first argued for the substitution of substantive justice for procedural rules designed to protect the accused from miscarriages of justice, and then when faced with the claim that substantive justice was being denied, substituted the finality of judgments and bid the inmates die regardless of the evidence. Habeas corpus was available where a prisoner claimed to be held in violation of a constitutional right. At issue in one large group of cases were convictions, often in racially charged situations, in the context of mob violence and threatened Lynchings, with little or no benefit of counsel. At issue in another large group of cases were police tactics that forced confessions by methods collectively described as the "third degree" but which had little likelihood of getting at the truth.

Over a period of several decades, the Supreme Court had developed the writ of habeas corpus as a tool to reform procedures which had the effect of railroading defendants into guilty pleas and convictions without regard to their responsibility for the alleged crimes. This came to include a right to appointed counsel and other protections for fair and reliable verdicts. But in a series of death penalty cases beginning in the last term of the Burger Court, the Court largely jettisoned concerns about how the police behave and the likelihood of error resulting from those practices. Instead, with an emphasis on substantive justice, the Court announced that hence forth it would address only those cases in which innocent people may have been convicted.

The exclusionary rule has been under sustained attack on the assumption that it caused the release of people who were in fact criminals and who had committed serious, often heinous, crimes. That attack, however, is premised on the reliability of the evidence excluded. The actual innocence rulings seemed designed to separate those procedural objections from the issue of guilt and innocence. One would expect that those concerned with the right to life, as the conservative justices appear to be in their rulings on abortion issues, would be concerned about the execution of innocent men for crimes they did not convict.

But the Court’s response to Angel Herrera’s petition is flatly inconsistent with that distinction. Herrera had been convicted for the murder of two policemen. The trial itself was conducted in the most prejudicial circumstances, with, for example, at least one member of the police force on the jury itself. That relationship could have been quite serious because Herrera’s attorneys, in their brief, suggested reasons to believe that Herrera was in fact framed for a drug-related murder to protect other policemen in a department corrupted by traffic in narcotics. Among other evidence, they brought to the Court two sworn affidavits, one by the son of the probable killer, and the other by a former Texas judge who had been his attorney. The killer’s son explained that as a small boy he had been in the car with his father during the killings. The judge explained that the actual killer confessed to him in the course of representation for another crime. That man had
since died. Together with the various records of the proceedings that showed the unreliability of
the atmosphere of the trial itself, that evidence was strong.
Texas however had a rule which barred courts from considering evidence acquired after trial if
more than thirty days had passed after sentencing.64 Both the Texas courts and the lower federal
courts denied that they had jurisdiction to consider the evidence. Meanwhile, Herrera was on
death row awaiting execution.
The Court did not have to rule on his innocence or guilt. It could simply have ruled that Texas’s
thirty-day rule risked the lives of innocent people and as such conflicted with the guarantee of
due process.65 But in an opinion written by Chief Justice Rehnquist, the Court denied all relief.
It concluded that the Court’s only job is to review procedural violations,66 that the Texas statute
that barred courts from looking at evidence discovered more than thirty days after trial was not a
procedural violation, and that Herrera had all the constitutional guarantees he was entitled to.
Since the form of the proceedings satisfied the Court, nothing more was required by the
additional evidence.67
Rehnquist wrote, in an opinion, joined by O’Connor, Scalia, Kennedy, and Thomas, that "At
some point in time, the State's interest in finality must outweigh the prisoner's interest in yet
another round of litigation. In this case, that point was well short of eight years."68 In effect their
claim is that finality was more important than the possibility an innocent person was about to be
executed.
In a dissenting opinion, Blackmun, Stevens, and Souter urged that in the event that a man were
"probably" innocent he should be given a hearing.69 But the majority rejected that standard and
concluded that even if they assumed arguendo that a claim of actual innocence could support a
claim for a hearing on new evidence, that would not be in cases where the defendants were
"probably" innocent but only in those cases where the defendants met the much more difficult
burden of presenting a "truly persuasive" demonstration of innocence.70 The majority then
proceeded to make such a showing impossible, presenting defendants with a "Catch-22" of
needling to present testimony under cross examination rather than affidavits but being denied a
forum to acquire such evidence.71
So the first important aspect of its turn toward traditional morality that must be noted is that it is
selective - the conservative majority’s moral compass is broken.
The conservative majority has not ignored the equal protection clause. Here again the
conservative majority has claimed the moral high ground of a colorblind constitution and then
refused all claims that real people were denying that right. They have attacked segregation by
race in districting, but not in employment. They have attacked any racially linked intentions in
drawing district lines but have refused to entertain the possibility that prosecutors had race in
mind when they excluded bilingual jurors or charged defendants in strongly patterned ways. They
have rejected racial considerations in remediation of racial patterns in society and the economy,
but have not been able to find that anyone intended the patterns. Somehow their concern with
colorblindness always favors whites and hurts blacks whether in education, employment or in
districting. Rehnquist, who has served the longest, has voted against desegregation and
integration in all its forms.73
Scalia, as always, expressed views that his colleagues would not. He made some very interesting
statements about race and about discrimination. Scalia denied that society has any responsibility
for racial injustice or that it has the right to make amends.74
Blacks must just learn to accept their fate. In a private memo circulated among the Justices in a
case involving the discriminatory infliction of capital punishment, Scalia applied that to the death penalty. He acknowledged that "the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones], is real, acknowledged by the [cases] of this court and ineradicable."75

The result, for Scalia, was not to conclude that the death penalty was being unconstitutionally applied but that racial discrimination in sentencing gave rise to no rights.76 Rehnquist, Scalia and Thomas have all joined a number of opinions refusing relief even where discrimination was clear.77

His views on the meaning of discrimination and favoritism are similarly comforting to those who would deny any responsibility. In a case dealing with discrimination against gays and lesbians, Scalia, writing also for Rehnquist and Thomas, equated protection against any form of discrimination with favoritism. People have all sorts of irrational prejudices – about fat, hair, manners, etc. – which result in discrimination by society. But no law protects the objects of those prejudices. Therefore no law should protect gays and lesbians from discrimination. In other words, for many of us, treating people without regard to irrelevant characteristics is the very definition of equal and fair treatment; for Scalia, Rehnquist and Thomas, that kind of treatment is favoritism.78 According to Scalia, Rehnquist and Thomas, prohibiting discrimination is the same thing as "preferential treatment."79 And Rehnquist, Scalia and Thomas have consistently opposed any protection for gays and lesbians.80

Along with his agreement that people should get no favors, Thomas has invited some doubt about whether he objects to segregation so long as it is not mandatory.81 In other words a form of freedom of association seems to dominate his thinking in this area, and may, if limited to the rights of whites, affect the thinking of Rehnquist and Scalia as well.

If the conservative justices accepted the notion of moral autonomy, they might try to justify their views on the basis of a right of association, despite Herbert Wechler’s famous failure in that regard.82 But then why only rights of association and property and no other liberties? They clearly are not starting from libertarian premises. If they accepted democratic rights, then they might have accepted Congress’ power to define and attack discrimination under the Fourteenth Amendment §1, but just as clearly they do not. Instead this rejection of equal rights is an orphan, which fits their assumption of the right to define American society, but is otherwise not part of a consistent set of moral principles.

The conservative majority has rejected individual moral autonomy and feels free to substitute its own ethical notions. Along with that rejection, it has also rejected democracy as a guiding principle. Liberty, democracy and judicial restraint are all losers from this rejection of moral autonomy. But the majority has not substituted a coherent moral notion. Its moral notions are themselves inconsistent and ad hoc. They have made the right to life cause their own in the context of abortion but not capital punishment. They claim respect for democracy but do not practice it. Their version of equality makes whites "more equal" than blacks. This Court has no moral compass.