

ASSESSING CHIEF JUSTICE WILLIAM REHNQUIST'S COURT

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In response to Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006).

Professor Chemerinsky's interesting article¹ shows—sometimes expressly, more often indirectly—why periodization is one of the recurrent issues in historiography. His article blends an evaluation of Chief Justice Rehnquist's contributions to constitutional law with a more extended discussion of the changes in constitutional law that occurred during William Rehnquist's tenure as Chief Justice. In this comment I want to focus primarily on the second theme, though with some attention to the first.

I begin with a question: why should we think that “the Rehnquist Court” identifies an analytically significant period in constitutional history?² In the course of addressing that question, I will agree with Professor Chemerinsky's comment that constitutional law as of 2005 was substantially more conservative than it was in 1986, but raise some questions about exactly *how* conservative the law became, and about exactly how it became conservative—that is, the extent to which the change can be attributed to Chief Justice Rehnquist.

Taking “the Rehnquist Court” as our initial periodization, we might develop a more finely grained analysis or a less finely grained one. Professor Chemerinsky elaborates on Professor Merrill's more finely grained “two Rehnquist Courts” thesis by adding a third Rehnquist Court, which occupied the final years of Rehnquist's tenure. The “three Rehnquist Courts” thesis faces a problem that Professor Merrill's does not. Professor Merrill divides the Rehnquist Court

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¹ Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006).

² As does Professor Chemerinsky, I put aside the contributions Chief Justice Rehnquist made to the administration of the Supreme Court and the federal judiciary. On those matters, I do think that “the Rehnquist Court” identifies a period distinct from that of his immediate predecessor, who was a notoriously bad administrator who thought he was a good one.

into two periods measured, roughly but accurately enough, by changes in personnel in the early 1990s.³ But, as Professor Chemerinsky observes, the Court's composition did not change between Justice Breyer's appointment and the Chief Justice's death. What then accounts for the emergence of a third Rehnquist Court?

Professor Chemerinsky suggests that the Court's liberals simply became more persuasive to the Court's centrists. That strikes me as implausible, if only because that account contains nothing to explain the timing of the third Rehnquist Court's emergence: why and how did the liberals become more persuasive in 2003 than they had been in 1998? One possibility is that the issues the third Rehnquist Court faced—or, given the Justices' power to control their docket, the issues it chose to face—were simply different from those the earlier Rehnquist Courts had faced. That is certainly what the Court says when, for example, it distinguishes congressional regulation of marijuana in *Gonzalez v. Raich*⁴ from congressional regulation of guns near schools in *United States v. Lopez*.⁵ Still, the “new issues” explanation is not completely satisfying when we have to deal with cases overruling earlier decisions. The Court did treat *Roper v. Simmons* as involving new facts that justified the invalidation of the imposition of the death penalty on offenders who committed their crimes as juveniles.⁶ But in *Lawrence v. Texas*, the Court said that the decision *it* overruled was wrong at the moment it was decided, and so cannot readily be fit into a “new issues” account.⁷

There is one thing that might explain why there was a third Rehnquist Court: *Bush v. Gore*.⁸ The argument would be that Justices O'Connor and Kennedy came to believe that what they had done in *Bush v. Gore* threatened the Court institutionally by sapping the support the Court had built up among liberals (and that such support was necessary, perhaps because it was unlikely to be replaced by new support from conservatives).⁹ Arguably, Justices O'Connor and Kennedy

³ Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569-70 (2003) (dividing the Rehnquist Court into two periods: first, from October 1986 to July 1994, and second, from October 1994 and continuing through the date of the article).

⁴ 545 U.S. 1 (2005).

⁵ 514 U.S. 549 (1995).

⁶ 543 U.S. 551, 574 (2005).

⁷ 539 U.S. 558, 578 (2003).

⁸ 531 U.S. 98 (2000).

⁹ One possibility here is this: Justices know that they will want to invalidate some statutes. Some invalidations will be unpopular with liberals, some with conservatives.

could begin the process of rebuilding that support by joining the Court's liberals more frequently.

The "three Rehnquist Courts" argument is problematic for another reason: the third Rehnquist Court, if it existed, did so—*qua* Rehnquist Court—for only a very short time. In the scope of constitutional history, the third Rehnquist Court might turn out to be just a hiccup.

Or perhaps not, if we move in the opposite direction, away from more finely grained periodizations and toward less finely grained ones. Doing so, though, will mean that we have to abandon the practice of marking out periods in the Court's history with the names of Chief Justices.¹⁰ Consider "the Warren Court." The usage of that term is so embedded that no one is likely to displace it. But, it is pretty clearly an inaccurate way of identifying a significant period in constitutional history. With respect to "the Warren Court," too, we might become more finely grained, distinguishing between the early Warren Court, from 1954 to around 1962, and what Professor Powe calls "history's Warren Court," which came into existence with the appointments of Byron White and Arthur Goldberg.¹¹ Or, as I would prefer, we could note that Warren Court liberalism persisted after Warren's retirement. So, for example, *Roe v. Wade*¹² is a "Warren Court"-like decision even though it was decided several years after Warren left the Court.

Perhaps, as some have suggested, we ought to talk about a "Brennan Court" to capture the persistence of Warren Court liberalism into the 1970s and even the 1980s.¹³ The difficulty here is that, if Chief Justice Warren did not serve through the entire period of what we try to describe as the Warren Court, Justice Brennan served too long, into a period plainly different from the one in which he and his vision flourished.

A better approach, I believe, lies in abandoning the practice of identifying "Courts" with individual Justices. The periodization that

Justices might think it sensible to maintain a portfolio of supporters from across the political spectrum, and so might seek to rebuild support lost by a particular decision.

¹⁰ For an earlier discussion of the problem of the "Chief Justice synthesis," see Mark Tushnet, *Pragmatism and Judgment: A Comment on Lund*, 99 NW. U. L. REV. 289, 289 (2004).

¹¹ See LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 209-11 (2000) (describing the effect of the deaths of two liberal justices and the subsequent appointment of Justices White and Goldberg).

¹² 410 U.S. 113 (1973).

¹³ POWE, *supra* note 11, at 499 (noting that some scholars have answered in the affirmative the question "Wasn't it really the Brennan Court?").

best captures what happened to constitutional law during much of the second half of the twentieth century yields the label, “the New Deal/Great Society Court.” That label captures the large sweep of liberal constitutionalism from the early 1940s through the mid-1980s, a period that includes the dominance in the political branches first of the Democratic Party’s coalition of northern liberals and southern conservatives, then of the liberal Democratic Party, and finally the Democratic Party’s decline. Of course liberalism itself changed during this long period, but, roughly speaking, at each point the Supreme Court carried out the political agenda of important segments of the Democratic coalition.

In this light, we might see the Supreme Court in the late twentieth century as the “Conservative Movement Court.”¹⁴ The resurgence of political conservatism starting with Barry Goldwater, and moving through Richard Nixon to Ronald Reagan, Newt Gingrich, and George W. Bush, eventually created a conservative movement that dominated the political branches. As had the New Deal/Great Society Court for liberalism, the Conservative Movement Court articulated—in constitutional law—policies that mattered to important components of the conservative political coalition.¹⁵

This perspective helps us understand, too, the individual contribution Chief Justice Rehnquist made to constitutional law. In my view, the best analyses make the simple point that constitutional law changed but Chief Justice Rehnquist did not change it.¹⁶ He started out conservative, and did not, by the force of his arguments or personality, change anyone’s mind. The Court moved to the right, but Chief Justice Rehnquist contributed only a single vote to pulling it in that direction. Rehnquist was joined on the Court by Justices who—antecedently, and for reasons largely independent of Rehnquist’s own articulation of a conservative view of constitutional law—agreed with him.

¹⁴ An alternative would be to call it “the Reagan Court,” but, for reasons I discuss below, doing so might mistakenly truncate the period we are attempting to describe (just as giving the mid-twentieth century Court the label “the Roosevelt Court” would).

¹⁵ I emphasize that the conservative movement was, as the Democratic Party had been, a coalition, so that we can avoid the mistake of thinking that the Supreme Court deviates from a unified conservative agenda when it articulates doctrines appealing to, say, the libertarian elements in the conservative movement and then articulates doctrines anathema to those elements but appealing to social conservatives. (I have in mind here the combination of *Lawrence v. Texas* with *Gonzalez v. Raich*.)

¹⁶ For a useful collection of essays about Chief Justice Rehnquist’s tenure on the Court, see *THE REHNQUIST LEGACY* (Craig M. Bradley ed., 2006).

Although the shift was largely independent of Chief Justice Rehnquist, it was not completely independent of him. What Rehnquist contributed to the transformation of constitutional law—more as an Associate Justice than as Chief Justice—was that he gave conservative legal thinkers someone to point to when they argued that the positions they advanced were what the Constitution really meant. Absent an articulate voice for such positions on the Supreme Court, such arguments might have floated free from any connection to actual constitutional law.

To this extent, then, my analysis is consistent with Professor Chemerinsky's: constitutional law after Chief Justice Rehnquist was more conservative than it had been before. And no surprise: we cannot expect conservative domination of the political branches to go unrecognized in constitutional law, if only because of the effects of new appointments. But there remains a question of exactly how conservative constitutional law has become.

In my book *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* I argue that constitutional law has not yet been revolutionized.¹⁷ I do not deny that contemporary constitutional law is *different* from the constitutional law created by the New Deal/Great Society Court, but I do claim that contemporary constitutional law has modified the law it inherited around the edges, while preserving its central legacy, most notably a national government with expansive (albeit not unlimited) power to regulate economic matters. It is one thing to observe that the Rehnquist Court invalidated national legislation on Commerce Clause grounds for the first time in nearly sixty years, as Professor Chemerinsky rightly does; it is another to suggest, as he does not, that *United States v. Lopez*¹⁸ and *United States v. Morrison*¹⁹ have dramatically reduced the national government's regulatory authority. *A Court Divided* argues that we can see the same pattern across the Rehnquist Court's decisions: bold thrusts and rapid withdrawals, leaving New Deal/Great Society constitutionalism nicked and bleeding a little, but still standing reasonably firm.

I do not mean that description to suggest that the "Conservative

¹⁷ See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 12 (2005) (arguing that Rehnquist "laid the groundwork" for a revolution that "has not yet occurred").

¹⁸ 514 U.S. 549, 567 (1995) (holding that the Commerce Clause does not give the federal government power to regulate intrastate activity lacking a substantial effect on interstate commerce).

¹⁹ 529 U.S. 598, 618 (2000) (restricting the power of the federal government to regulate, under the Commerce Clause, intrastate violence).

Movement Court” label is inaccurate, though. My point in *A Court Divided* is that it was then, and still is (in my view), too early to come to a firm judgment on what happened to constitutional law in the late twentieth century. It might be that the Conservative Movement Court placed constitutional law on a trajectory that will transform the law dramatically over the next decade or two. Justice Souter ended his dissent in *Lopez* with a description of how early New Deal decisions might not have seemed so dramatic at the time, and closed with the understated, “But we know what happened.”²⁰ That might be true of the decisions of the 1990s, in which case we will be able to say with confidence that the Supreme Court from the mid-1980s was the Conservative Movement Court—nascent in the last decades of the twentieth century, triumphant in the first decades of the twenty-first.

My argument so far is that the last chapter of the story about contemporary constitutional law has not yet been written, which implies that we cannot yet be sure what the correct large-grained periodization is. In work written before *A Court Divided*, and even more obviously captive to the future, I basically suggested that what you see is what you get.²¹ That is, the “Conservative Movement Court” label treats the period from 1980 to now as the first years of a long transition from liberal to conservative constitutional law, and suggests that the gradual nature of this transformation is simply a distraction from the main story. “What you see is what you get” suggests, in contrast, that there has not been—and, again projecting into the future, will not be—the kind of transformation that the “Conservative Movement Court” label suggests.

Rather, I argued, we had—and on this view still have, and will have—a Supreme Court that reflected the divided nature of our overall political order. Of course the Court drifted to the right as unified Democratic control of the government was replaced first by divided government and then by unified Republican control. But, on this version of the story, there is no strong reason to think that unified Republican control will persist. And, if divided government is restored (and even if unified Democratic government returns briefly), the Supreme Court will drift to the left.

I described the Court of the 1990s as one of chastened constitutional ambitions, born out of the divided government in which it was inserted. Professor Sunstein gives a more normative spin to that

²⁰ 514 U.S. at 615 (Souter, J., dissenting).

²¹ See MARK TUSHNET, *A NEW CONSTITUTIONAL ORDER* (2003).

Court's description, praising the Court for its minimalist decisions.²² Consistent with my interest in attaching labels that indicate the relationship between the Supreme Court and the larger political order, I now think a good label would be "the Court of Divided Government."

I have indicated throughout that labels help us think about the claims underlying our periodizations. What label, then, should be used if the story I have just told turns out to be the correct one? I suspect that people will be tempted again to use Justices' names as labels. So, for example, we might want to say that the Brennan Court was replaced by the Stevens Court, or even that the Roberts Court turned out to reflect Chief Justice Roberts's (imputedly) more moderate conservatism. We should resist those temptations, I believe. The best candidates for an accurate periodization are these: either (1) The New Deal/Great Society Court was followed by the Conservative Movement Court, or (2) the New Deal/Great Society Court was followed by the Court of Divided Government. Those of us who live long enough will know which it is (or was).

²² See *id.* at 130-38 (discussing Professor Sunstein's approach).