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CHIEF JUSTICE WILLIAM REHNQUIST: HIS LAW-AND-ORDER LEGACY AND IMPACT ON CRIMINAL JUSTICE

*Madhavi M. McCall** and *Michael A. McCall***

I. INTRODUCTION

With the death of Chief Justice William Rehnquist on September 3, 2005, an important chapter closed in American constitutional law. Although the retirement of Associate Justice Sandra Day O'Connor announced early in the summer of 2005 ensured that the 2005-2006 U.S. Supreme Court Term would differ from those before, the loss of the Chief and the close of the Rehnquist Court further distinguishes this time as an end of an era.¹

Given his 19-year tenure as Chief Justice and 33-year career on the Court, Justice Rehnquist left a profound mark on the Court and on American politics more generally. In the months and years ahead, scholars inevitably will employ various perspectives from which to assess Rehnquist's legacy. Some likely will focus on his affable style and skills as a social leader on the Court,² others may examine his curious place in history as having presided over the impeachment of one President³ while having helped another get elected by voting to halt a

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1. We recognize the dangers of depicting any Court, including the Rehnquist Court, as a single, coherent era. *See, e.g.*, Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The 'Rehnquist' Court (?)*, 15 LAW AND COURTS 18 (2005). Indeed, changes over time are of considerable importance in various places in this study.

2. *See, e.g.*, David G. Savage, *Former Rehnquist Clerks Recall His Wit, Warmth*, L.A. TIMES, Sept. 7, 2005, at A13.

3. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 644 (5th ed. 2004) ("Rehnquist's research and writing on federal impeachments proved propitious when he was called upon to preside over the

recount of Florida ballots;⁴ and almost assuredly others will analyze the impact of the Chief Justice in ways that perhaps are not yet fully conceptualized. Whether these influences are cast as positive or negative will continue, of course, to be the subject of much debate and may, at times, depend to a considerable degree on one's political views. What is beyond most debates, however, is that Chief Justice Rehnquist was a staunch conservative who cast votes and marshaled majorities for decisions that reduced constitutional protections for the criminally accused, rolled back federal powers, and streamlined federal appeals.⁵ It seems an appropriate time to carefully and systematically analyze his influence in such areas.

In terms of criminal justice issues, many undoubtedly will assess Rehnquist's tenure as a pendulum swing away from the more liberal rulings of the Warren Court.⁶ Such evaluations might characterize Rehnquist, and perhaps the Court more generally, as reflecting a broader political movement toward a "law and order" or social control posture.⁷ This study is designed, in part, to measure the accuracy of such a portrayal of Justice Rehnquist and to present some of the issue areas that might prove particularly fruitful and appropriate for this type of evaluation.

Regardless of the analytic approach, it would be unwise to assume that Rehnquist's effect was without limit. Ironically, and perhaps in part a result of his battle with thyroid cancer at least in the last term, Chief Justice Rehnquist's influence may have weakened substantially near the end of his career. For instance, long time Court watcher Linda Greenhouse has described the 2003-2004 Supreme Court Term as the year that Chief Justice Rehnquist "may have lost his court."⁸ Indeed, in the 2003-2004 Term, Chief Justice Rehnquist was in the minority in a

1999 Senate impeachment trial of President Bill Clinton.").

4. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (Rehnquist, C.J., concurring). The Court decided this controversial case 5-to-4. *Id.*

5. On rights of the accused, see EPSTEIN & WALKER, *supra* note 3; on federalism, see EPSTEIN & WALKER, *supra* note 3; on habeas corpus petitions, see VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* (1994).

6. For a quantitative summary of changes in decisions supporting the accused after the Warren Court, see LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 166-68 (1994).

7. On the classic distinction and tension between the crime control/social order model and the due process model of criminal justice (which are often held as reflecting the varying tendencies in the Warren and Rehnquist Courts), see HERBERT S. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

8. Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*. N.Y. TIMES, July 5, 2004, at A1.

variety of high profile cases and his inability to muster a majority for these cases in part prompted Greenhouse's comments. Greenhouse notes, for instance, that Rehnquist was unable to persuade a majority of the other members that the President's conduct during the war on terrorism was constitutionally protected.⁹ Moreover, while Chief Justice Rehnquist in prior terms repeatedly found his state's rights position garnering a majority ruling in federalism cases, in more recent years, Justice O'Connor at times has voted against the Chief Justice.¹⁰ The 2003-2004 Term aside, Chief Justice Rehnquist was on the losing side in some of the most controversial decisions of late including *Lawrence v. Texas*,¹¹ granting sexual rights to same-sex couples, *Atkins v. Virginia*,¹² stating that the execution of mentally retarded individuals constitutes cruel and unusual punishment, *Grutter v. Bollinger*,¹³ upholding a continued need for affirmative action, *Roper v. Simmons*,¹⁴ finding that the execution of individuals who commit capital offenses under the age of 18 years constitutes cruel and unusual punishment, and *Rompilla v. Beard*,¹⁵ holding for only the third time in 20 years that a capital defendant had received constitutionally deficient assistance of counsel.

Although Rehnquist found himself in the minority in some high profile recent cases, his general federalism revolution and determination to garner additional power for the federal courts have been relatively successful.¹⁶ That is, while Rehnquist's influence on the Court may have declined in recent years, a broader review of cases from his tenure spanning more than thirty years provides a more accurate picture of his impact as both an Associate and Chief Justice.

In this article, we explore Chief Justice Rehnquist's criminal justice decisions through an empirical analysis of the Court's decision-making tendencies for the most recent natural court and a review of selected criminal justice decisions written by Justice Rehnquist throughout his career. To start, we limit the analysis, with only two exceptions, to decisions actually written by Justice Rehnquist. Although Chief Justice Rehnquist, in that position, had an important role in leading other

9. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004).

10. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004).

11. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

12. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

13. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

14. *See Roper v. Simmons*, 543 U.S. 551 (2005).

15. *See Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

16. *See Linda Greenhouse, The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251 (2003).

justices to agree with him by assigning cases, we gleaned a substantial amount of information regarding his decisional patterns and policy preferences by analyzing the opinions he personally authored. The focus of this inquiry, then, is Justice Rehnquist's actual opinions and not his votes in other cases. This empirical analysis is complemented and given context by a discussion of the overall thrust of criminal justice cases decided by the Court in the last decade.

A preliminary search of the Lexis/Nexis database indicates that over his career, Justice Rehnquist wrote more than 250 decisions¹⁷

17. A Lexis/Nexis search originally produced a list of over 250 cases. We found that a criminal justice issue was not central to some of the generated cases. In order to conduct this analysis, we first read each case and determined which cases were principally related to a criminal justice issue. While ultimately we did not include a specific discussion of many of the remaining cases, we nevertheless created an initial list of criminal justice cases written by Justice Rehnquist and used these cases in forming assessments and identifying the patterns suggested in this paper. That list is: *Schneble v. Florida*, 405 U.S. 427 (1972); *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742 (1972); *Adams v. Williams*, 407 U.S. 143 (1972); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Tollett v. Henderson*, 411 U.S. 258 (1973); *United States v. Russell*, 411 U.S. 423 (1973); *Cupp v. Naughten*, 414 U.S. 141 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Maze*, 414 U.S. 395 (1974); *California Bankers v. Shultz*, 416 U.S. 430 (1974); *Gooding v. United States*, 416 U.S. 430 (1974); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Richardson v. Ramirez*, 418 U.S. 24 (1974); *United States v. Jenkins*, 420 U.S. 358 (1975), overruled by *United States v. Scott*, 437 U.S. 82 (1978); *United States v. Peltier*, 422 U.S. 531 (1975); *Middendorf v. Henry*, 425 U.S. 25 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Ramsey*, 431 U.S. 606 (1977); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119 (1977); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *United States v. Ceccolini*, 435 U.S. 268 (1978); *United States v. Scott*, 437 U.S. 82 (1978); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Scott v. Illinois*, 440 U.S. 367 (1979); *Burch v. Louisiana*, 441 U.S. 130 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979); *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Apfelbaum*, 445 U.S. 115 (1980); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 242 (1980); *Albernaz v. United States*, 450 U.S. 333 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled by *Daniels v. Williams*, 474 U.S. 327 (1986); *Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Valenzuela-bernal*, 458 U.S. 858 (1982); *Hewill v. Helms*, 459 U.S. 460 (1983), overruled by *Sandin v. Conner*, 515 U.S. 472 (1995); *United States v. Knotts*, 460 U.S. 276 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *INS v. Delgado*, 466 U.S. 210 (1984); *United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Gouveia*, 467 U.S. 180 (1984); *Schall v. Martin*, 467 U.S. 253 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Richardson v. United States*, 468 U.S. 317 (1984); *United States v. Abel*, 469 U.S. 45 (1984); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Ponte v. Real*, 471 U.S. 491 (1985); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Garrett v. United States*, 471 U.S. 773 (1985); *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *United States v. Mechanik*, 475 U.S. 66 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. P.J. Video*, 475 U.S. 868 (1986); *Lockhart v. McCree*, 476 U.S. 162 (1986); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Allen v. Illinois*, 478 U.S. 364 (1986); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Colorado v. Bertine*, 479 U.S. 367 (1987); *California v.*

dealing with criminal justices issues. In order to provide some meaningful analysis, we examine only cases that deal with the Fourth Amendment's protection against illegal search and seizure, the Fifth Amendment's protection against self-incrimination, federalism as related to criminal justice issues, and federal habeas corpus.¹⁸ Following this

Brown, 479 U.S. 538 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *United States v. Salerno*, 481 U.S. 739 (1987); *Bourjaily v. United States*, 483 U.S. 171 (1987); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Mathews v. United States*, 485 U.S. 58 (1988); *United States v. Robinson*, 485 U.S. 25 (1988); *Huddleston v. United States*, 485 U.S. 681 (1988); *Wheat v. United States*, 486 U.S. 153 (1988); *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Braswell v. United States*, 487 U.S. 99 (1988); *Lockhard v. Nelson*, 488 U.S. 33 (1988); *Arizona v. Youngblood*, 488 U.S. 51 (1988); *United States v. Sokolow*, 490 U.S. 1 (1989); *Graham v. Connor*, 490 U.S. 386 (1989); *Alabama v. Smith*, 490 U.S. 794 (1989); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Boyd v. California*, 494 U.S. 370 (1990); *Florida v. Wells*, 495 U.S. 110 (1990); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Florida v. Jimeno*, 500 U.S. 248 (1991); *Mu'Mi v. Virginia*, 500 U.S. 415 (1991); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Estelle v. McGuire*, 502 U.S. 62 (1991); *White v. Illinois*, 502 U.S. 346 (1992); *Dawson v. Delaware*, 503 U.S. 159 (1992); *United States v. Felix*, 503 U.S. 378 (1992); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Herrera v. Collins*, 506 U.S. 390 (1993); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *Nat'l Org. For Women v. Scheidler*, 510 U.S. 249 (1994); *Custis v. United States*, 511 U.S. 485 (1994); *Nichols v. United States*, 511 U.S. 738 (1994); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *Arizona v. Evans*, 514 U.S. 1 (1995); *United States v. Lopez*, 514 U.S. 549 (1995); *Reno v. Koray*, 515 U.S. 50 (1995); *Sandin v. Conner*, 515 U.S. 472 (1995); *Ornelas v. United States*, 517 U.S. 690 (1996); *Gray v. Netherland*, 518 U.S. 152 (1996); *Felker v. Turpin*, 518 U.S. 651 (1996); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Hyde*, 520 U.S. 670 (1997); *McMillian v. Monroe County*, 520 U.S. 781 (1997); *Bracy v. Granley*, 520 U.S. 899 (1997); *Buchanan v. Angelone*, 522 U.S. 269 (1998); *United States v. Ramirez*, 523 U.S. 65 (1998); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Bousley v. United States*, 523 U.S. 614 (1998); *Calderon v. Ashmus*, 523 U.S. 740 (1998); *Minnesota v. Carter*, 525 U.S. 83 (1998); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Wilson v. Layne*, 526 U.S. 603 (1999); *Neder v. United States*, 527 U.S. 1 (1999); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Bond v. United States*, 529 U.S. 334 (2000); *Ohler v. United States*, 529 U.S. 753 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Texas v. Cobb*, 532 U.S. 162 (2001); *Florida v. Thomas*, 532 U.S. 774 (2001); *Corr. Servs. Corps v. Malesko*, 534 U.S. 61 (2001); *United States v. Knights*, 534 U.S. 112 (2001); *Dusenbery v. United States*, 534 U.S. 161 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Bell v. Cone*, 535 U.S. 685 (2002); *Scheidler v. NOW*, 537 U.S. 393 (2003); *Conn. Dept of Public Safety v. Doe*, 538 U.S. 1 (2003); *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003); *Price v. Vincent*, 538 U.S. 634 (2003); *Maryland v. Pringle*, 540 U.S. 366 (2003); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Thornton v. United States*, 541 U.S. 615 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Muehler v. Mena*, 544 U.S. 93 (2005); *Arthur Anderson v. United States*, 125 S.Ct. 2129 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Kowalski v. Tesmer*, 543 U.S. 125 (2004); and *Pace v. Diguglielmo*, 125 S.Ct. 1807 (2005).

18. Although not detailed in this examination, Rehnquist also wrote a number of interesting double jeopardy and prisoner's rights opinions. Consistent with his conservative leanings, most of these cases were decided in a conservative manner. Indeed, we did not locate a single prisoner's rights case in which Rehnquist handed down a liberal decision.

introduction, in Section II we provide a brief biographical sketch of Justice Rehnquist's education and career. We then analyze the criminal justice decisions of the most recent Rehnquist Court using cases from 1995-2005 in Section III. This time frame captures Rehnquist's last natural court¹⁹ with the exception of the first term. Although Justice Breyer—the last member to join the Court of interest here—served a full term in 1994, we do not include the 1994-1995 Term to avoid the risk that Breyer's performance (and the Court's more general decision patterns) might have been distorted by the “freshman effect.”²⁰ In Section IV we extend the period under review and examine some of Justice Rehnquist's written opinions, both as an Associate Justice and as Chief Justice. In the final section, we discuss the overall impact of Justice Rehnquist's decisions on criminal justice issues and revisit the characterization of Rehnquist as central to a “law and order” shift.

II. BIOGRAPHY

Originally appointed by President Nixon in 1971 to replace Justice John Harlan, Chief Justice William Hubbs Rehnquist served longer than any other member of the current Court.²¹ Born in a suburb of Milwaukee in 1924, Rehnquist was raised in Wisconsin and stayed there until completing high school.²² After high school, Rehnquist entered Kenyon College in Ohio²³ for his Bachelor's Degree, but World War II interrupted his college years.²⁴ He joined the Army Air Corps and later

19. EPSTEIN & WALKER, *supra* note 3, at 689 (“The term *natural court* refers to a period of time during which the membership of the Court remains stable.”). There were six natural courts (identified as Rehnquist 1 through Rehnquist 6) under Chief Rehnquist. *Id.* These are: the Court as of September 26, 1986 when Rehnquist took the oath to be Chief Justice (Justices Rehnquist, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, and Scalia), Rehnquist 2 (Kennedy replacing Powell), Rehnquist 3 (Souter replacing Brennan), Rehnquist 4 (Thomas replacing Marshall), Rehnquist 5 (Ginsburg replacing White), and Rehnquist 6 (Breyer replacing Blackmun). EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 6.

20. For a discussion of this phenomenon, see Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161 (2003).

21. Of current members, Justice Stevens has served the longest; Stevens came onto the Court nearly four years after Rehnquist. EPSTEIN & WALKER, *supra* note 3. Justice Powell took his oath to sit on the High Court the same day as Rehnquist (January 7, 1972). *Id.* Powell retired 18 years before Rehnquist's death. *Id.*

22. CHRISTOPHER E. SMITH, MADHAVI MCCALL & CYNTHIA PEREZ MCCLUSKEY, LAW AND CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 12 (2005).

23. Perhaps surprisingly, this small Ohio college also helped shape the minds of two other Supreme Court justices, David Davis and Stanley Matthews. Both served on the Court during the latter half of the 19th century. See EPSTEIN & WALKER, *supra* note 3, at 678-83.

24. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

used his GI bill to enter Stanford University to complete his Bachelors.²⁵ Upon finishing his BA, Rehnquist earned masters degrees at both Harvard University and Stanford University before enrolling in Stanford Law School where he graduated first in his class in 1952 at the age of twenty-seven.²⁶ With an impressive law school career behind him, Rehnquist garnered a prestigious clerkship for United States Supreme Court Justice Robert Jackson.²⁷ Rehnquist's preference for conservative rulings during his time with Justice Jackson is quite clear. At one point, in a memo to Justice Jackson regarding the Supreme Court's pending decision in *Brown v. Board of Education*,²⁸ Rehnquist argued that the Court's doctrine of "separate but equal" as articulated in the infamous case of *Plessey v. Ferguson*²⁹ should be upheld.³⁰ It is a controversial position,³¹ but illuminates Rehnquist's beliefs on the role of government, and potentially his opposition³² to certain liberal ideals. Indeed, as one author notes,³³ a few years after Rehnquist finished his clerkship, he wrote an article for the U.S. News and World Report complaining that Supreme Court clerks were predominantly liberal. This, according to Rehnquist, often resulted in rulings that showed "extreme solitude for the claims of Communists and other criminal defendants, expansion of

25. *Id.*

26. *Id.*

27. *Id.* The achievement is particularly impressive in that Rehnquist was a Stanford graduate and the "coveted clerkships at the Supreme Court were then the province of the Ivy League law schools." David G. Savage, *Chief Justice, 80, Led Court on a Conservative Path*, L.A. TIMES, Sept. 4, 2005, at A21. Moreover, of the nine justices on the Court when Rehnquist joined, he was the only one from a West coast law school. See EPSTEIN & WALKER, *supra* note 3, at 678-83. All the others were from Ivy League and/or eastern schools except for Chief Justice Burger, who was from the University of Minnesota. *Id.* After Rehnquist's death, Professor Richard Epstein reflected that Rehnquist "was innately suspicious of the Ivy League mode of analysis that so often drives modern constitutional scholarship." Richard Epstein, *Sidebar on Rehnquist and Roberts*, L.A. TIMES, Sept. 11, 2005, at M3.

28. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

29. *Plessey v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

30. The memo became public during Rehnquist's first confirmation hearing. Greenhouse, *supra* note 16, at n. 41.

31. *Id.* at 257-58.

32. Before his confirmation, Rehnquist informed the Senate that he wrote the memo from what he perceived to be Justice Jackson's point of view. For a brief discussion of this and other allegations then facing Rehnquist, see Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES, Sept. 11, 2005, at 5. Interesting parallels exist with the confirmation hearings of John Roberts, Rehnquist's successor. Roberts too felt obliged to state that arguments he made in memos and elsewhere reflected the opinions of the administration he represented rather than his own. See, e.g., Linda Greenhouse, *By Invoking a Former Justice, the Nominee Says Much But Gives Away Little*, N.Y. TIMES, Sept. 14, 2005, at 24.

33. Greenhouse, *supra* note 16, at 257-58.

federal power at the expense of State power, and great sympathy toward any government regulation of business.”³⁴ After completion of his prestigious position as a Supreme Court clerk, Rehnquist went into private practice in Phoenix, Arizona.³⁵

While working in the private sector, Rehnquist became involved in local politics and, specifically, in the workings of the Republican Party.³⁶ Rehnquist’s role in the political party expanded just as the message of “law and order” began to emerge as a major theme in national elections.³⁷ In 1964, Rehnquist served as a legal advisor to the then ultra-conservative Arizona Senator and Republican presidential nominee, Barry Goldwater.³⁸ Prompted by urban rioting and other social unrest, and finding himself far behind Lyndon Johnson in the polls, Goldwater began to focus on a social order message that tapped the concerns of many regarding crime and an expanding federal government.³⁹

Although Goldwater lost by one of the largest electoral margins in presidential history,⁴⁰ the “law and order” theme would continue as a major electoral strategy. In 1968, and again in 1972, Nixon trumpeted the need for crime control, the restoration of order, and changes in policies that he saw as handcuffing the police and coddling prisoners.⁴¹ Nixon was especially critical of the judiciary, noting, “Some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces.”⁴²

Nixon culled Goldwater’s earlier campaign staff and, after the

34. Originally located in William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS AND WORLD REPORT, Dec. 13, 1957, at 74-75.

35. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

36. *Id.*

37. On the emergence of the “law and order” theme, see Michael McCall, *Policing Levels and Law and Order* (2004) (unpublished Ph.D. dissertation, Washington University in St. Louis) (on file with Author); see generally ERIKA FAIRCHILD & VINCENT WEBB, *THE POLITICS OF CRIME AND CRIMINAL JUSTICE* (1985).

38. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

39. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983); SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 43-53; THEODORE WHITE, *THE MAKING OF THE PRESIDENT 1964* (1965). Interestingly, in this position of campaign advisor, Rehnquist revealed another tendency that would come to characterize his tenure on the Court—giving primacy to states’ rights. Rehnquist “urged Goldwater to oppose the landmark civil rights bill before Congress, saying it marked an unwise expansion of federal authority over local matters.” Savage, *supra* note 27, at A21.

40. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 97.

41. MCCALL 2004, *supra* note 37, at 54-58.

42. Richard M. Nixon, 1968 Presidential Nominee Acceptance Speech, Republican Convention, Miami Beach, transcribed into pamphlet by the Nixon-Agnew Campaign Committee (Aug. 8, 1968).

election, appointed Rehnquist to serve as an Assistant Attorney General, placing him in charge of the Justice Department's Office of Legal Counsel—the constitutional law arm of the Justice Department.⁴³ As a member of the Justice Department, Rehnquist was often called upon to defend the Nixon Administration in court.⁴⁴ During these years Rehnquist, like Nixon, was very vocal in his criticism of the Warren Court's liberal decisions, arguing that the Warren Court had overstepped its bounds and had engaged in judicial activism beyond constitutional mandate.⁴⁵ Rehnquist's work for the Justice Department and his support of conservative philosophies eventually led to his nomination by President Nixon to the High Court in 1971.⁴⁶ As Nixon's fourth and final Supreme Court appointment,⁴⁷ Rehnquist was also considered "the one who best lived up to Nixon's pledge to name "law and order" conservatives to the bench."⁴⁸ The Senate confirmed Rehnquist in a 68-26 vote as the 100th jurist to sit on the U.S. Supreme Court.⁴⁹

When Justice Warren Burger retired in 1986 from the Chief Justice position, President Ronald Reagan nominated Rehnquist to the position of Chief.⁵⁰ The proposed elevation forced another Senate confirmation, and although Rehnquist was confirmed, his Senate confirmation vote was the closest in American history for an individual nominated to the position of Chief Justice.⁵¹ Civil rights and civil liberties groups heavily opposed Rehnquist.⁵² President Reagan submitted Rehnquist's nomination for the Chief Justice position simultaneously with that of Justice Antonin Scalia for the Associate Justice position.⁵³ The timing of the two nominations proved advantageous for President Reagan. Rehnquist's controversial nomination for Chief Justice took so much of

43. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

44. *Id.*

45. While it is beyond the scope of this inquiry to determine how Rehnquist came to form his viewpoints, it is clear that throughout his career as a lawyer and as a member of the Republican Party he tended to hold strongly conservative convictions. *See generally* Greenhouse, *supra* note 16.

46. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

47. Justices Burger, Blackmun, and Powell were also appointed by Nixon. *See* EPSTEIN & WALKER, *supra* note 3, at 678-83.

48. Savage, *supra* note 27, at A20.

49. The number of justices to this point is calculated from data in Epstein & Walker, *supra* note 3, at 678-83, and Savage, *supra* note 27.

50. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12.

51. Rehnquist was confirmed as Chief Justice by a 65-33 vote. EPSTEIN & WALKER, *supra* note 3, at 681.

52. *See id.* at 678-83; MCCALL 2005, *supra* note 22, at 12.

53. SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 14.

the Senate's time that it made Scalia's confirmation hearings relatively quick and smooth. Consequently, Reagan was able to elevate Rehnquist with some difficulty, but also was able to place the extremely conservative Justice Scalia on the Court against surprisingly limited objections.⁵⁴

III. DECISION TRENDS ON THE REHNQUIST COURT, 1995-2005

A member of the High Court since 1971, Chief Justice Rehnquist sat on the Court longer than almost any other member in history⁵⁵ and served as Chief Justice longer than anyone in about a century.⁵⁶ His lengthy tenure allowed him to see the Court's majority adopt many of his preferences limiting the Warren Court's decisions.

To evaluate and make meaningful generalizations regarding the decision-making tendencies of the most recent natural court, we present in this section, an empirical analysis of criminal justice cases decided by the Rehnquist Court during the 1995-2005 Terms. We use the label "liberal" to describe a philosophy that favors expanding rights for individuals in a criminal justice context and "conservative" to describe decisions in criminal justice that tend to prefer the government's position related to prosecuting and punishing offenders over the recognition and/or expansion of individual rights for the criminally accused.⁵⁷ Since Rehnquist's appointment to the Chief position in 1986, the Court consistently has been labeled a conservative court, and it held generally that most of the Rehnquist Court justices are conservative and rule for

54. See, e.g., accounts available at <http://www.oyez.org> (Scalia Biography) and www.pbs.org (Newshour, Supreme Court Watch, Scalia).

55. William Douglas served longer (36 years, 7 months) than any other Justice in history. See EPSTEIN & WALKER, *supra* note 3, at 678-83. Other leaders in this category include, in order of length of service, Stephen Field (34 years, 7 months), John Marshall (34 years, 5 months), Hugo Black (34 years, 1 month), John Harlan I (33 years, 10 months), William Brennan (33 years, 9 months), and William Rehnquist (33 years, 8 months). *Id.* Brennan's actual service was slightly longer than indicated because he received a recess appointment.

56. At 19 years, the Rehnquist Court (1986-2005) is the fourth longest in Supreme Court history. The longest tenures of a Chief Justice are John Marshall (1801-1835), Roger Taney (1836-1864), and Melville Fuller (1888-1910). See EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 6, at Table 5-2.

57. Here, we use the definitions advanced in the Supreme Court Judicial Database in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy." Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

law enforcement on criminal justice issues.⁵⁸ Unlike the earlier liberal decisions of the Warren Court, the Rehnquist Court has been “active in narrowing or overturning many Warren and Burger Court precedents that were favorable to the rights” of the criminally accused.⁵⁹ Here, we conduct only a broad analysis of the Court’s decisional tendencies.⁶⁰ The examination confirms that the Court indeed rendered conservative decisions in a wide-range of criminal justice issues,⁶¹ although we note that liberal decisions are also evident.⁶²

First, we found that a large portion of the Court’s docket concerned issues related to the criminal justice system. Generally, for the time frame of this analysis, thirty to forty percent of the Court’s full decisions each term were cases dealing with criminal justice issues.⁶³ Although judicial scholars tend to focus on the Court’s rulings dealing with broad, constitutional principles, we find that the Court handed down almost as many statutory decisions during this time frame as constitutional ones. From 1995-2005, the Court decided 151 criminal justice cases primarily raising a constitutional issue and 130 cases raising a nonconstitutional (statutory or other) issue.⁶⁴ Despite the image of the Court as the ultimate protectors of constitutional rights, in the last decade the Supreme Court has heard only a relatively modest number of criminal justice constitutional cases. Among these constitutional cases, we find that the Court was most likely to choose and decide Fourth Amendment cases between 1995-2005. Among statutory issues, the Court was most active in cases involving habeas corpus relief. This emphasis, as discussed later, is not surprising given the efforts by Justice Rehnquist to lead the Court in a direction that would limit opportunities for convicted

58. In the Court of interest here, the conservatives are Rehnquist, Scalia, Thomas, Kennedy, and O’Connor, while the liberals are Ginsburg, Breyer, Stevens, and Souter.

59. See JOHN A. FLITER, PRISONERS’ RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 183 (2001). While a conservative, Burger is most likely included in this quote because he led a fractured Court that produce some famous, liberal decisions.

60. Regarding the analysis and discussion of case distribution by vote, see *infra* note 66 and Table 1, we code those criminal justice cases previously identified. See Smith, *supra* note 20, at 161. Then, we update that analysis for the final years under review here from 2000-2005.

61. Criminal justice-related cases are broadly defined for the purposes of this analysis, including cases concerning statutory and constitutional interpretations of laws and cases dealing with civil rights litigation affecting individuals working in the criminal justice system. Each case outcome is then classified as liberal or conservative.

62. For related analyses, see Smith, *supra* note 20, at 161.

63. See *id.* (explaining why the Court takes and decides such a large number of criminal justice cases in any given year).

64. The ratio of cases raising constitutional to nonconstitutional issues varies considerably from term to term. Christopher E. Smith, Michael McCall, & Madhavi McCall, *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 128-130 (2005).

offenders to use the federal judiciary to challenge their convictions.⁶⁵

Second, consistent with conventional wisdom, we find that indeed Rehnquist's Court generated a large number of conservative decisions. As depicted in Table 1, the Court handed down considerably more conservative decisions in this time frame than it did liberal ones.

TABLE 1

Case Distribution by Vote and Liberal-Conservative Outcome in U. S. Supreme Court Criminal Justice Decisions, 1995-2005

<i>Vote</i> ⁶⁶	<i>Liberal</i>	<i>Conservative</i>	<i>Total</i>
9-to-0 and 8-to-1 decisions	47	78	125
7-to-2 decisions	15	22	37
6-to-3 and 5-to-4 decisions	47	72	119
Total	109 (38.8%)	172 (61.2%)	281

Such figures strongly justify the Court's reputation for ruling in a conservative manner. The Court ruled against the interest of the accused in more than three of every five criminal justice cases it decided since 1995. However, the Court also handed down a significant number of liberal decisions. Indeed, 38% of the cases that were either unanimous or had only one dissenter were decided in a liberal manner (47 of 125 cases). Moreover, of those closely divided and heavily contested cases with either three or four dissenters, the Court also rendered liberal decisions nearly 40% of the time (47 of 119 cases).⁶⁷ While the conservative tendencies of the Court remain unmistakable, it is not the case that the Court only handed down liberal decisions in relatively

65. See *infra* Section IV(D) (discussing the Rehnquist Court's habeas corpus jurisprudence).

66. Because Chief Rehnquist did not participate in some cases in the 2004-2005 Term, some categories include decisions with the indicated number of dissents but one less in the majority. For instance, a 7-to-1 vote would be included with 8-to-1 cases for purposes of the table. See also Smith, *supra* note 20 at 170 (detailing comparable statistics for the 1995 through 2000 term of the Supreme Court).

67. In the most recent terms, this figure is higher still. Combining the 2003-2004 and 2004-2005 Terms, the Court delivered 32 criminal justice decisions with either 3 or 4 dissenters each. Half of these cases were decided with a conservative opinion, while in the other 16 cases the Court's opinion is categorized as liberal.

controversy-free cases.

Given the presence of four justices on this Court widely believed to hold a liberal orientation (Justices Breyer, Souter, Stevens and Ginsburg), it is obvious that to produce a liberal majority one of the conservative justices must provide a swing vote to the liberal bloc. Interestingly, especially given the emphasis of this paper, those liberal swing votes have been provided by all members of the conservative bloc except Chief Justice Rehnquist.⁶⁸ In thirteen 5-to-4 criminal justice cases from 1995-2000 with a liberal outcome, Justice O'Connor provided a liberal vote in four cases, Justice Kennedy provided a liberal vote in four cases, Justice Scalia provided a liberal vote in four cases and Justice Thomas provided a liberal vote in five cases.⁶⁹ Our updated analysis shows that this unique characteristic of Rehnquist continues for all ten terms under consideration here. While Justices O'Connor and Kennedy are often considered to be potential swing voters, the fact that even Justices Thomas and Scalia could be counted as having provided liberal votes in such divided cases but Justice Rehnquist could not is noteworthy. This is especially interesting given that Justices Scalia, Thomas and Rehnquist supported liberal claims in criminal justice cases at fairly similar rates.⁷⁰ Examining votes in all criminal justice cases⁷¹ decided (1995 Term through the 2005 Term), Rehnquist voted conservatively 75.2% of the time—slightly more often than Thomas (74.4%) and Scalia (71.5%).⁷² This ranking of conservative tendencies is rather consistent across the period.⁷³ Overall, the Court's voting patterns in criminal justice cases from 1995-2005 indicate that, while the Court tended to render conservative decisions, the justices also handed down liberal decisions.⁷⁴ However, in the most contested liberal

68. See Smith, *supra* note 20.

69. These votes do not add up to 13 because in some cases, a "liberal" justice voted conservative. A liberal decision in such cases required more than one conservative justice to vote in a liberal direction.

70. Smith, *supra* note 20 at 171.

71. Because Chief Justice Rehnquist did not participate in certain criminal justice cases during the 2004-2005 Term, his total number of criminal justice cases (274) is slightly lower than the 281 votes cast by both Scalia and Thomas.

72. Smith, *supra* note 20 at 170. Smith's results were updated by the authors for the Court's most recent term.

73. For example, Smith finds that Justice Rehnquist supported liberal claims in 26.1% of criminal justice cases between 1995-2000; Justice Thomas supported liberal claims in 27.9% of criminal cases; and Justice Scalia supported liberal claims in 30.9% of criminal cases. Smith, *supra* note 20. Stevens ruled liberal in 69% of these cases - more often than any other Justice, followed by Ginsburg. *Id.* at 171.

74. See Table 1 *supra*.

decisions, Rehnquist did not play the critical swing role that other conservative justices did.⁷⁵

IV. SUPREME COURT OPINIONS WRITTEN BY JUSTICE REHNQUIST

A. Fourth Amendment Protection From Illegal Search and Seizure

Given the frequency of Fourth Amendment cases before the Court in recent decades⁷⁶ and in most terms,⁷⁷ Rehnquist had numerous opportunities to affect the proscribed limits on police behavior. In many of these instances, as both Chief Justice and as an Associate Justice, Rehnquist actively restricted the reach of the Fourth Amendment protection from illegal search and seizure and created exceptions to the Exclusionary Rule.⁷⁸ While it is not surprising given his ideological tendencies that he ruled conservatively in most Fourth Amendment cases, it is interesting to note that in recent years, Rehnquist was unable to bring along the rest of the conservatives in certain significant cases.⁷⁹ As some Court observers note, while Rehnquist voted the majority in all but five Fourth Amendment cases heard by the recent natural court (1994-2004), four of those cases the Court were sharply divided and handed down liberal decisions.⁸⁰ Chief Justice Rehnquist cast dissenting votes in each of these four cases.⁸¹ Some report that Rehnquist had moved so far to the right⁸² in recent years that his influence on the

75. Information compiled by authors and, for all Court terms except the cases litigated during the 2004-2005 Term, verified through data found in SMITH, MCCALL & MCCLUSKEY, 2005, *supra* note 22, at 29; and Smith, McCall and McCall 2005, *supra* note 64, at 151-159.

76. See Smith, *supra* note 20, at 166 (noting the extent to which the Court hears search and seizure cases, and why the Court is inclined to rule in this area).

77. Of recent terms, the 2002-2003 Term is somewhat unusual for the absence of a Supreme Court decision on a major search and seizure issue. See Smith & McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859 (2004).

78. See Paula C. Arledge & Edward V. Heck, *Votes and Opinions in Fourth Amendment Cases, 1994-2004: Is it Rehnquist's Court?*, Paper prepared for the Southwestern Political Science Association Annual Meetings, New Orleans, Louisiana (Mar. 23-26, 2005) (unpublished manuscript, on file with authors). Note that this study includes the first term of the natural court but does not include data regarding the Court's last term. Our update reveals that Rehnquist continued to be absent from a 5-4 liberal majority in 2004-2005.

79. *Id.*

80. *Id.*

81. The cases are *Indianapolis v. Edmund*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Kyllo v. United States*, 533 U.S. 27 (2001); and *Groh v. Ramirez*, 540 U.S. 551 (2004).

82. Of course, it is possible that Rehnquist did not "move to the right" but rather that others, such as Justice O'Connor, moved to the left. See, e.g., Andrew D. Martin, Kevin M. Quinn, & Lee Epstein, *A Multidisciplinary Exploration: The Median Justice on the U.S. Supreme Court*, 83 N.C.

moderate conservatives had waned.⁸³ In this section and in part to assess his influence, we review some of the major Fourth Amendment cases written by Justice Rehnquist over his career.⁸⁴

1. Decisions Written While Associate Justice

Very early in Rehnquist's career on the High Court, Justice Rehnquist handed down a Fourth Amendment opinion that would predict fairly well his views on the Fourth Amendment for the rest of his career. In *United States v. Robinson* (1973),⁸⁵ a six-member Court majority concluded that a warrantless search incident to a lawful, custodial arrest and consistent with established department policy did not violate the Fourth Amendment warrant requirement.⁸⁶ Rehnquist held that even absent concern for personal safety, and officer could conduct a full search of the individual pursuant to a lawful arrest, including traffic arrests.⁸⁷ Rehnquist noted that police were not bound by the stop-and-frisk standards used when the police stop merely an individual for investigative purposes.⁸⁸ The arrest itself established the officer's authority to search the defendant, discovering the heroin concealed in his pocket. Consequently, the Court created an exception to the warrant requirement of the Fourth Amendment for a search incident to a lawful, custodial arrest.⁸⁹

In a companion case, *Gustafson v. Florida*,⁹⁰ Rehnquist and the majority extended the logic of *Robinson* to cases where there was no

L. REV. 1275 (2005). Of importance is the apparent gap between Rehnquist and other conservatives on the Court and how this gap seemed to widen in recent years.

83. See Greenhouse, *supra* note 8.

84. Beyond those cases covered here, Rehnquist also authored Fourth Amendment opinions in *New York v. P.J. Video*, 475 U.S. 868 (1986); *Immigration and Naturalization Service et al. v. Delgado*, 466 U.S. 210 (1984); *United States v. Villamonte-Marquez et al.*, 462 U.S. 579 (1983); *Rakas v. Illinois*, 439 U.S. 128 (1978); *California Bankers Association v. Schultz*, 416 U.S. 21 (1974); *Gooding v. United States*, 416 U.S. 430 (1974); *Scott et al. v. United States*, 436 U.S. 128 (1978); *United States v. Salvucci*, 448 U.S. 83 (1980); *Graham v. Connor*, 490 U.S. 386 (1989); *Ornelas and Ornelas-Ledesma v. United States*, 517 U.S. 690 (1996) and *United States v. Hernan Ramirez*, 523 U.S. 65 (1998).

85. *United States v. Robinson*, 414 U.S. 218 (1973).

86. *Id.* at 236-37. Defendant Robinson was under a lawful, custodial arrest when the arresting officer conducted a full search of Robinson's person and found heroin capsules in his coat pocket. *Id.* at 221. The officer did not indicate that he was conducting a safety search and did not indicate any belief that Robinson was carrying a weapon. *Id.* at 222.

87. *Id.* at 224.

88. *Id.* at 227.

89. *Id.* at 225.

90. *Gustafson v. Florida*, 414 U.S. 260 (1973).

existing department policy regarding searches pursuant to an arrest.⁹¹ The rulings indicate Rehnquist's proclivity to reduce limits on police authority. Although he would not further the reach of *Robinson* several years later to warrantless searches of cars pursuant to an arrest in *Knowles v. Iowa*,⁹² *Robinson* is an early indication of Rehnquist's conservative philosophies that continued throughout his career.

Shortly following the decision in *Robinson*, Rehnquist again displayed his preference for reducing limits on police activity in his majority opinion in *Adams v. Williams* (1972).⁹³ The Supreme Court upheld the validity of this informant—prompted search despite the dissenters asserting that the state had not shown a sufficient cause to justify the stop in the first place.⁹⁴ Rehnquist's majority opinion instead held that the informant's tip was sufficiently reliable to justify the stop, that the officer's subsequent actions were justifiable to ensure his safety, and that probable cause existed for the arrest.⁹⁵ Interestingly, Rehnquist would also write the Court's opinion in *Illinois v. Gates*⁹⁶ several years later in which the Court articulated a "totality of circumstances" argument that increased police flexibility in the use of tips.⁹⁷

Rehnquist's preference for expanding police discretion and limiting the reach of the exclusionary rule is further evident in *United States v. Peltier* (1975).⁹⁸ Peltier appealed for the exclusion of the marijuana found in his vehicle because the officers did not have probable cause to stop him.⁹⁹ While *Peltier* was pending, the Supreme Court held in *Almeida-Sanchez v. United States* (1973)¹⁰⁰ that warrantless searches of vehicles conducted near the border without probable cause were unconstitutional.¹⁰¹ Rehnquist concluded that *Almeida-Sanchez* would

91. *See id.*

92. *Knowles v. Iowa*, 525 U.S. 113 (1998).

93. *Adams v. Williams*, 407 U.S. 143 (1972). Based on a tip by a person familiar to a police officer, the officer approached a parked car and uncovered a loaded gun upon reaching inside the open window. *Id.* at 148-49. The officer arrested Williams for carrying a concealed a weapon, even though the weapon had not been visible from outside the car.

94. *See id.* (upholding validity of a search).

95. *Id.* at 148.

96. *Illinois v. Gates*, 462 U.S. 213 (1982).

97. *See infra* notes 143-147 and accompanying text (discussing in detail this "totality of the circumstances" standard).

98. *United States v. Peltier*, 422 U.S. 531 (1975). The border patrol stopped Peltier and searched his vehicle. *Id.* at 532. During the search, border patrol agents found hundreds of pounds of marijuana. *Id.*

99. *Id.*

100. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

101. Rehnquist dissented from the majority holding in *Almeida-Sanchez*. *Id.* at 287-99 (Rehnquist, J., dissenting).

not be applied retroactively to Peltier's appeal because the agents were acting in accordance with then—current federal statutes.¹⁰² The purpose of the exclusionary rule as Rehnquist interpreted it—to discourage unlawful police conduct—did not apply here because the police, to the best of their knowledge, had acted lawfully.¹⁰³ Consistent with most of his exclusionary rule decisions, Rehnquist found that the provision is necessary if the police have acted improperly, but not if a defendant's constitutional rights have been violated in the absence of police misconduct.¹⁰⁴ That is, it is not the violation of a person's constitutional rights that triggers the exclusionary rule, but rather the police activity that leads to the constitutional violation.¹⁰⁵ This police activity can be misconduct or the result of a lack of explicit department procedures regulating police activity.¹⁰⁶ Indeed, Rehnquist's majority opinion in *United States v. Ceccolini* (1977)¹⁰⁷ supports this conclusion. In *Ceccolini*, the Court concluded that illegally obtained evidence was admissible during a defendant's perjury trial in part because the application of the exclusionary rule would not deter police behavior.¹⁰⁸

Further indication of Rehnquist's predilection to allow greater police discretion is evident in *United States v. Santana* (1976).¹⁰⁹ In *Santana*, the police attempted a warrantless arrest of defendant Santana because they had probable cause to believe that she had committed a drug offense.¹¹⁰ Santana moved to have the drugs and money that police found in a search of her home suppressed as evidence.¹¹¹ Writing for the majority, Rehnquist found that because probable cause existed to make a warrantless arrest and because Santana was in a public place—the doorway of her residence—when the police first attempted to arrest her, the police did not violate the Fourth Amendment when they made the warrantless search in her home.¹¹² Moreover, although the actual arrest and subsequent search occurred in Santana's home, a private place, the

102. *Peltier*, 422 U.S. at 532, 537.

103. *Id.*

104. *Id.* at 537-38.

105. *Id.* at 539.

106. Compare *Colorado v. Bertine*, 479 U.S. 367 (1987) with *Florida v. Wells*, 495 U.S. 1 (1990).

107. See *United States v. Ceccolini*, 435 U.S. 268 (1977).

108. *Id.* at 280.

109. *United States v. Santana*, 427 U.S. 38 (1976).

110. *Id.* at 39-40. Santana stood in the doorway of her home and, upon police confrontation, retreated to inside the vestibule of her home. *Id.* at 40. The police followed and seized money and drugs that Santana was carrying. *Id.* at 41.

111. *Id.*

112. *Id.* at 43.

police were in “hot pursuit” and thus could enter her home to make the arrest without a warrant.¹¹³ As such, the arrest and search were legal under the Fourth Amendment, justified ultimately because the police were in “hot pursuit.”

In 1977, Rehnquist and the majority allowed the warrantless search of international mail in *United States v. Ramsey* (1977).¹¹⁴ In *Ramsey*, a U.S. customs official opened suspicious envelopes originating in Thailand without a warrant and found heroine.¹¹⁵ Some of the individuals connected to the mail were apprehended, prosecuted, and convicted for drug offenses.¹¹⁶ A U.S. Appeals Court suppressed the evidence and reversed the convictions, arguing that the Fourth Amendment did not allow the search of international mail without probable cause and without a search warrant.¹¹⁷ Rehnquist reversed, holding principally that the search of international mail fell under the border exception to the Fourth Amendment and thus searches absent probable cause or a warrant were nevertheless constitutional.¹¹⁸ The search was also legal under U.S. laws governing the conduct of customs officials that authorize an official to act on reasonable suspicion of illegal activity.¹¹⁹

In addition to limiting the scope of the exclusionary rule and favoring increases in police discretion, Justice Rehnquist’s decisions also tend to reveal a preference for limited privacy rights under the Fourth Amendment. For instance, Rehnquist’s opinion in *United States v. Knotts* (1982)¹²⁰ found that law enforcement officials do not violate individuals’ constitutional rights when they plant radio transmitters in containers and track the movements of those containers.¹²¹ In *Knotts*, Government officials placed radio transmitters inside a chloroform container.¹²² When the container was purchased, law enforcement

113. *Id.*

114. *United States v. Ramsey*, 431 U.S. 606 (1977). Rehnquist also found that reasonable suspicion is sufficient to stop for investigatory purposes suspected couriers at airports in *United States v. Sokolow*, 490 U.S. 1 (1989).

115. *Ramsey*, 431 U.S. at 609. A United States custom official at a New York post office noticed eight bulky envelopes from Thailand addressed to Washington D.C. *Id.* The official was aware that Thailand is a frequent source of illegal narcotics and the envelopes felt heavier than regular airmail. *Id.*

116. *Id.* at 610.

117. *Id.* at 611.

118. *Id.* at 617.

119. *Id.* at 614.

120. *See United States v. Knotts*, 460 U.S. 276 (1982).

121. *Id.* at 277.

122. *Id.* at 278.

followed the radio transmissions to a cabin and upon securing a search warrant, discovered a drug laboratory.¹²³ The defendants sought to have the evidence suppressed, arguing that the government had violated their Fourth Amendment rights.¹²⁴ The defendants asserted that they had a reasonable expectation of privacy, and the warrantless monitoring of the chloroform container violated that privacy expectation.¹²⁵ Rehnquist, writing for the majority, concluded that in fact the placement of monitoring devices in the container did not constitute a search, and therefore, Fourth Amendment protections did not apply.¹²⁶ Moreover, the defendants did not have a reasonable expectation of privacy because the government surveillance resulted in nothing more than the police following a car on the public streets.¹²⁷ There is no expectation of privacy that police will not observe a vehicle when traveling on public roads.¹²⁸ The majority found no difference between visual surveillance and the police's use of audio monitoring devices here.¹²⁹ Clearly, Justice Rehnquist believed that individuals have no privacy expectation from government use of electronic surveillance¹³⁰ to monitor the movement of items, at least in these circumstances and with this technology.¹³¹ Justice Rehnquist authored an opinion in an earlier privacy ruling in 1980, holding that individuals have no expectation of privacy regarding their personal property in the purse of another individual.¹³² With the consent of the purse owner, a warrantless search did not violate the Fourth Amendment.¹³³

123. *Id.* at 279-80.

124. *Id.* at 279.

125. *Id.*

126. *Id.* at 284-85.

127. *Id.*

128. *Id.* at 285.

129. *Id.* at 284-85.

130. Rehnquist's dissenting vote in *Kyllo v. United States*, 533 U.S. 27 (2001) shows similar logic, as he voted to find that the use of thermal imagers do not constitute a violation of the Fourth Amendment because individuals have no reasonable expectation of privacy regarding the heat emanating from their home. The rulings in *United States v. Knotts* and much more recently in *Kyllo* are important indicators of his views on technological surveillance. These decisions suggest that Rehnquist was quite willing to apply advanced technologies to the monitoring of criminal activities. *Kyllo* is one of five close Fourth Amendment cases ending in a liberal outcome and decided by the last Rehnquist natural court (1994-2005). Rehnquist dissented in *Kyllo* and in each of the remaining four cases.

131. For more discussion on the application of the Fourth Amendment to technological advancements and the impact of technology on criminal justice, see SMITH, MCCALL & MCCCLUSKEY 2005, *supra* note 22, at 12; Christopher E. Smith and Madhavi McCall, *Constitutional Rights and Technological Innovations in Criminal Justice*, 27 S. ILL. U. L.J. 103 (2002).

132. *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

133. *Id.* at 98.

As noted earlier, Rehnquist wrote the opinion in a major Fourth Amendment case, *Illinois v. Gates* (1983).¹³⁴ This opinion articulated a new standard for determining the appropriateness of police use of an anonymous tip.¹³⁵ Acting on an anonymous tip, the police chief, in concert with the Drug Enforcement Agency, arranged surveillance of the Gates as they made an alleged drug run.¹³⁶ The police eventually obtained a search warrant for the Gates' possession and found hundreds of pounds of drugs.¹³⁷ The state appellate courts suppressed the evidence, holding that the anonymous tip did not pass the two-prong test established in *Aguilar v. Texas* (1964)¹³⁸ and *Spinelli v. United States* (1969)¹³⁹ for the use of information from an anonymous source.¹⁴⁰

The United States Supreme Court reversed, with Rehnquist concluding for the majority that the two-prong test established in *Aguilar*¹⁴¹ and *Spinelli*¹⁴² was unworkable and replacing it with a "totality of circumstances" test.¹⁴³ In *Aguilar* and *Spinelli*, the High Court had determined that an anonymous tip was usable if the police could verify the informant's "basis of knowledge" and if the informant could provide sufficient facts to establish the "veracity" or the "reliability" of the informant's information.¹⁴⁴ Rehnquist and the majority determined that the two-prong test was too restrictive and rigid and that it unnecessarily limited the police's ability to apprehend criminals.¹⁴⁵ By replacing this with a totality of circumstances test, the Court held that the officer is constitutionally able to use an anonymous tip if he or she finds that the sum total of the informant's information is reliable, even if specific elements as required in *Aguilar* and *Spinelli* are

134. *Illinois v. Gates*, 462 U.S. 213 (1982).

135. *Id.*

136. *Id.* at 226. The case started in 1978 after the Bloomingdale (Illinois) Police Department received an anonymous tip asserting that Lance and Susan Gates were drug dealers. *Id.* at 225. The letter continued with a description of the Gates' drug dealing activities, including where they obtained their drugs and how they transported those items. *Id.* The police chief then confirmed certain elements of the tip including that persons by the name of Gates resided at the stated address. *Id.* at 226.

137. *Id.*

138. *Aguilar v. Texas*, 378 U.S. 108 (1964), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983).

139. *Spinelli v. United States*, 393 U.S. 410 (1969), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983).

140. *Illinois v. Gates*, 462 U.S. 213, 227-29 (1983).

141. *Aguilar*, 378 U.S. at 108.

142. *Spinelli*, 393 U.S. at 410.

143. *Gates*, 462 U.S. at 231-32.

144. *Id.* at 232-34.

145. *Id.* at 233-38.

not present.¹⁴⁶ The case represents another move by Rehnquist and the conservative majority to allow greater police discretion in the apprehension of criminals. Chief Justice Rehnquist's early views on the Fourth Amendment are clear: while search and seizure rights are protected by the Constitution, the protections should not deter "legitimate" police work.¹⁴⁷

2. Decisions written while Chief Justice

As Chief Justice, Rehnquist's preference for increasing police power and discretion continues to be evident in several of his written opinions. Indeed, a reading of these cases reveals that the Chief Justice's personal preferences tend to fall on the far side of the conservative spectrum. This pattern is so strong that, during the most recent natural court, Chief Justice Rehnquist did not provide the swing vote in a single criminal justice case much less a Fourth Amendment case.¹⁴⁸ The four liberal members of this natural court—Justices Ginsburg, Breyer, Souter, and Stevens—could rely on one of the other conservative justices (Thomas, Scalia, Kennedy, and O'Connor) to provide an occasional liberal vote to create a liberal majority decision. Only Chief Justice Rehnquist, during this natural court, failed to provide a single liberal vote in a close criminal justice case.

We start the discussion of the Chief Justice's Fourth Amendment cases with *Colorado v. Bertine* (1987),¹⁴⁹ one of Chief Justice Rehnquist's many car search opinions. *Bertine* addressed the constitutionality of searching, without a warrant, a closed backpack during an inventory search of an impounded vehicle.¹⁵⁰ Bertine argued that the court should suppress the narcotics found in his backpack

146. *Id.* at 237-38.

147. Rehnquist's definition of legitimate police work tended to be broader than that envisioned by the earlier Warren Court. CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 7 (1997). For example, six of the nine justices serving on the Warren Court in 1968 decided in favor of individuals in at least seventy percent of criminal justice cases. *Id.* For some basic comparisons of case law and general tendencies of the two Courts, see OTIS H. STEPHENS & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* Chapter 10 (2nd ed. 1999).

148. Smith, *supra* note 20. Smith's data has been updated by the Authors to include the Supreme Court's statistics through 2005.

149. *Colorado v. Bertine*, 479 U.S. 367 (1987).

150. *Id.* at 368. Police arrested Bertine for driving under the influence and impounded his van. *Id.* During the course of an inventory search, the police opened a closed backpack and several other closed containers consistent with department policy requiring that they open closed containers and list the contents. *Id.* at 369-70. The police found drugs in the backpack and prosecuted Bertine on narcotics charges. *Id.* at 370.

because the warrantless inventory search violated the Fourth Amendment.¹⁵¹ Bertine contended that the police simply should have noted the closed backpack on the vehicle inventory.¹⁵² Rehnquist's majority opinion held that reasonable police inventory procedures conducted in good faith satisfied the Fourth Amendment.¹⁵³ Moreover, the majority noted that there was no evidence of bad faith or intention to investigate the backpack and the police had adhered to department policy.¹⁵⁴ Again Chief Justice Rehnquist appears to discount the possibility of violations of individual rights provided there is no evidence of police misconduct.

The ruling in *Bertine* turns on the fact that the police department had specific policies in place regulating the treatment of closed containers during an inventory search. In contrast, the Court identified a Fourth Amendment violation in *Florida v. Wells*.¹⁵⁵ Wells moved to suppress the evidence police found during a warrantless inventory search of his vehicle, and the Supreme Court agreed.¹⁵⁶ Writing for the majority, Rehnquist found that because there was a lack of any policy regarding the treatment of closed containers during an inventory search of a car, the search was not sufficiently regulated to satisfy the Fourth Amendment.¹⁵⁷ Again, the emphasis is on the regulation (or lack thereof) of police activity and not simply whether a search inherently violates the defendant's rights. Here, the lack of department procedures resulted in an unconstitutional search, suggesting that merely having police procedures in place might satisfy constitutional standards. The fact that the search itself was conducted without a warrant is less relevant.

The concentration on the reasonableness of police action is evident in the Court's conservative decision in *Ohio v. Robinette* (1996).¹⁵⁸ Reviewing a consensual search of a stopped vehicle, the Ohio Supreme

151. *Id.* at 369.

152. *Id.*

153. *Id.* at 376-77.

154. *Id.* at 372.

155. *Florida v. Wells*, 495 U.S. 1 (1990). Police stopped Wells for speeding and after the officer smelled alcohol on the defendant's breath, arrested Wells for driving under the influence. *Id.* at 2. Wells agreed to go with the trooper to the station for a Breathalyzer test and also allowed the trooper to open the trunk of the car. *Id.* The car was impounded. *Id.* During a warrantless inventory search, the trooper directed that a locked suitcase found in the trunk be forcefully opened, though no departmental policy compelled the trooper to take such action. *Id.* at 2-3. Police found a substantial quantity of marijuana in the suitcase. *Id.* at 2.

156. *Id.* at 3.

157. *Id.* at 5.

158. *Ohio v. Robinette*, 519 U.S. 33 (1996).

Court overturned the related conviction, arguing that officers must inform suspects that they have a right to leave before conducting a search.¹⁵⁹ The United States Supreme Court reversed with Chief Justice Rehnquist's majority opinion rejecting an absolute requirement that individuals be told they have a right to leave.¹⁶⁰ The measure of importance was not whether or not a suspect knew he or she had a right to leave, but rather if the officer's actions were reasonable.¹⁶¹ Similarly, the Court ruled in *Arizona v. Evans* (1995)¹⁶² that the Fourth Amendment did not require the suppression of evidence found when the police base their actions on a clerical mistake by court employees.¹⁶³

In yet another case dealing with the scope of police searches in the context of a traffic violation, the majority found in *Florida v. Jimeno*¹⁶⁴ that a police officer's opening of a closed paper bag during a consent search of a defendant's car did not violate the Fourth Amendment.¹⁶⁵ The defendant argued to suppress the evidence because, while he consented to a search of the car, he did not consent to a search of the closed bag.¹⁶⁶ The High Court disagreed, finding the search permissible under the Fourth Amendment.¹⁶⁷ Writing for the majority, Justice Rehnquist concluded that the defendant's rights were not violated because he gave consent to search the car and reasonably should have expected the officer to look in containers that might contain drugs, especially after being told of the officer's suspicions.¹⁶⁸ Moreover, the officer was within his right to conclude that the consent to search had extended to the bag because narcotics generally are transported in some

159. *Id.* at 36. An officer caught Robert Robinette driving 69 miles per hour in a 45 MPH zone. *Id.* Upon stopping Robinette and running his license, the officer found no citations or outstanding warrants. *Id.* The officer first issued a verbal warning, returned Robinette's license, and then asked if Robinette had any illegal drugs or weapons in the car. *Id.* Robinette answered "no," and the officer asked to conduct a search, to which Robinette agreed. *Id.* The officer found a small amount of narcotics, and Robinette eventually did not contest the charges and was found guilty. *Id.*

160. *Id.*

161. *Id.* at 39-40.

162. *Arizona v. Evans*, 514 U.S. 1 (1995).

163. *Id.*

164. *Florida v. Jimeno*, 500 U.S. 248 (1991).

165. *Id.* at 249. Upon stopping defendant Jimeno for a traffic violation, the officer told Jimeno that the officer believed that Jimeno was carrying drugs and asked to search the car. *Id.* Jimeno agreed to a search of the car, and the officer found a closed paper bag on the floor of the car. *Id.* The officer opened the bag and found cocaine. *Id.*

166. *Id.*

167. *Id.* at 249.

168. *Id.* at 252.

sort of container.¹⁶⁹

Rehnquist, of course, did not endorse unrestricted search discretion for police. In *Knowles v. Iowa* (1998),¹⁷⁰ Rehnquist and a unanimous court refused to extend the logic of his decision in *United States v. Robinson* (1973)¹⁷¹ to full car searches absent consent and an arrest warrant.¹⁷² In *Knowles*,¹⁷³ Rehnquist held that a police officer could not conduct a full search of the car under the “search incident to arrest” exception because neither of the two historical justifications—the need to disarm a suspect in order to take the suspect into custody and the need to preserve evidence—existed in this case.¹⁷⁴ The case is a rare instance in which Rehnquist wrote a relatively major liberal decision.¹⁷⁵ Rehnquist and the unanimous Court were unwilling to allow police discretion to conduct full auto searches following mere traffic citations.¹⁷⁶

Rehnquist authored the majority opinion in another traffic-stop Fourth Amendment case, *Maryland v. Pringle*.¹⁷⁷ The Court held that a police officer had probable cause to arrest all persons in a car in which drugs and money had been found.¹⁷⁸ Individualized suspicion regarding which of the occupants owned the money and drugs was not necessary.¹⁷⁹ Justice Rehnquist found that the police had probable cause to stop the car and to believe a crime had or was being committed.¹⁸⁰ Given this and the large quantity of narcotics and cash, it was reasonable for the officer to conclude that any or all of the car’s occupants knew of

169. *Id.*

170. *Knowles v. Iowa*, 525 U.S. 113 (1998).

171. *United States v. Robinson*, 414 U.S. 218 (1973).

172. *See Knowles*, 525 U.S. at 113. In *Robinson*, the Chief Justice had concluded that searches of persons upon a custodial arrest were constitutionally permissible. *See Robinson*, 414 U.S. at 218.

173. Here, an Iowa police officer issued a traffic citation to Knowles. *Knowles*, 525 U.S. at 114. Although the Iowa law allowed the officer to also arrest Knowles, he only gave Knowles a citation. *Id.* Without probable cause and Knowles’ consent, the officer proceeded to conduct a full search of the car and found a bag of marijuana and a “pot pipe.” *Id.*

174. *Id.* at 116-17.

175. *Id.* at 113.

176. The only other liberal Fourth Amendment decision written by Rehnquist after becoming Chief Justice, and discussed later, is *Bond v. United States*, 529 U.S. 334 (2000).

177. *Maryland v. Pringle*, 540 U.S. 366 (2003).

178. *Id.* at 374. The defendant, Joseph Pringle, was riding in the backseat when the car he was in was pulled over for speeding during the early morning hours. *Id.* at 368. The officer noticed a wad of money when the driver opened the glove compartment for the car’s registration. *Id.* The officer ordered a full search and found cocaine. *Id.* The officer then informed the individuals in the car that he would arrest all of them if no one admitted to owning the drugs; no one confessed, and all were arrested. *Id.* At the police station, and after waiving *Miranda*, Pringle confessed ownership of the narcotics but later asserted that police lacked probable cause to arrest him. *Id.* at 369.

179. *Id.* at 374.

180. *Id.*

the drugs.¹⁸¹ Thus, according to Rehnquist and the Court's majority, the police had probable cause to believe Pringle himself had committed a crime.¹⁸²

In the 2003-2004 Term, Chief Justice Rehnquist wrote the opinion in the car search case of *Thornton v. United States* (2004).¹⁸³ The Court held that a police officer could search a car incident to a valid arrest even if the officer makes contact with the car's occupant after the person has exited the car.¹⁸⁴ Extending the logic of *New York v. Belton*,¹⁸⁵ the majority held that search of the car under these conditions is still permissible under the Fourth Amendment.¹⁸⁶ Rehnquist was persuaded that the officer was concerned for his safety and needed to preserve evidence, satisfying the historical criteria of the "search incident to a valid arrest" exception to the warrant requirement.¹⁸⁷ While Rehnquist maintained that a traffic citation as precedent to a warrantless search in *Knowles v. Iowa* was unconstitutional, the arrest in *Thornton* preserved the warrantless search as constitutional.

It is not our intent to minimize that distinction, yet it is difficult to reconcile fully the logic of the two cases. If concern for officer safety and preservation of evidence are the principle justifications for an exception to the search warrant requirement, it should follow that when an individual remains in his car, arrested or not, and is arguably just as or more capable of harming an officer and destroying evidence than an individual who has left his car, the same warrant exception should apply. Despite this logic, Rehnquist and the majority in *Thornton* expressed concern that an individual who is not near his car may obtain weapons from the car or destroy evidence in the car justifying a full warrantless search of the car. Lastly, in *Maryland v. Wilson*, the Court allowed police officers to order passengers to exit the vehicle during traffic stops until the completion of the search.¹⁸⁸

The possible access to weapons again in part prompted the Chief Justice's opinion for the Court in *Muehler v. Mena*.¹⁸⁹ Here, Mena

181. *Id.* at 373.

182. *Id.* at 374.

183. *Thornton v. United States*, 541 U.S. 615 (2004).

184. *Id.* at 619.

185. *New York v. Belton*, 453 U.S. 454 (1981). There the Court articulated the position that upon making a valid arrest of a car's occupant a police officer may search the passenger compartment of the car. *Id.* at 462-63.

186. *Thornton*, 541 U.S. at 616.

187. *Id.* at 622-24.

188. *Maryland v. Pringle*, 519 U.S. 408 (1997).

189. *Muehler v. Mena*, 125 S. Ct. 1465 (2005). In *Muehler v. Mena*, police officers obtained a

argued that his detention during the execution of a search warrant was unconstitutional.¹⁹⁰ The officers' presumption that weapons were on the premises was a factor in the Court's rejection of Mena's Fourth Amendment claim.¹⁹¹ While no justice dissented, the concurring opinions expose the justices' concerns regarding police tactics.¹⁹²

The Court handed down a number of rulings dealing with the constitutional limitations placed on customs officials and border patrol. As noted, before becoming Chief Justice, Rehnquist wrote the decision in *United States v. Peltier* (1975),¹⁹³ which held that a court ruling requiring probable cause before a border search would not apply retroactively.¹⁹⁴ As Associate Justice, he also authored the Court's decision in *United States v. Ramsey* (1977)¹⁹⁵ finding as constitutional the warrantless search of international mail by customs officials.¹⁹⁶ Once Chief Justice, Rehnquist's decisions regarding border stops and the activities of customs officials continued to limit the reach and scope of the Fourth Amendment.

Following the terrorist attacks of September 11, 2001, Chief Justice Rehnquist's decisions appear to be more restrictive of Fourth Amendment rights. In one post-September 11th case, *United States v. Flores-Montano*,¹⁹⁷ the Court ruled that border patrol can constitutionally conduct routine searches even absent reasonable suspicion.¹⁹⁸ Writing for the majority, Rehnquist found that a routine stop encompassed the removal and search of a gas tank.¹⁹⁹ The defendant argued that the Fourth Amendment requires the presence of reasonable suspicion for a border patrol search.²⁰⁰ Making note of the

warrant to look for weapons and gang related material in the home where Iris Mena resided. *Id.* at 1468. While executing the warrant, police handcuffed the residents and detained them in the garage; Mena was handcuffed for two to three hours. *Id.* at 1468-71.

190. *Id.* at 1470-71.

191. *Id.* at 1469.

192. *See id.* at 1472-73 (Kennedy, J., concurring); *id.* at 1473-77 (Stevens, J., concurring). Justice Kennedy expressed his worry that police might interpret this as encouraging the routine practice of handcuffing during searches. *See id.* at 1472 (Kennedy, J., concurring). Justices Stevens, Souter, Ginsburg, and Breyer preferred that the lower courts determine the appropriateness of the length of time that Mena was handcuffed. *Id.* at 1477 (Stevens, J., concurring).

193. *United States v. Peltier*, 422 U.S. 531 (1975). *See also supra* notes 98-105 and accompanying text (examining this decision).

194. *Id.* at 542.

195. *See United States v. Ramsey*, 431 U.S. 606 (1977).

196. *Id.* at 624-25.

197. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

198. *Id.* at 155-56.

199. *Id.* at 155-56.

200. *Id.* at 151.

lower expectation of privacy at the borders, Rehnquist found most border searches to be constitutional.²⁰¹ Consequently, the dismantling and reassembling of a gas tank in *Flores-Montano* did not constitute a significant deprivation of property.²⁰² The Court and Rehnquist found that suspicion-less, routine searches at the border are constitutional.²⁰³

Other cases support the assessment that Rehnquist regarded border searches to be less constitutionally protected than other types of searches. In *United States v. Arvizu* (2002),²⁰⁴ Rehnquist and the majority upheld the reasonable suspicion requirement for investigatory stops and warrantless searches of vehicles at the borders, but held the reasonable suspicion may arise from the “totality of the circumstances.”²⁰⁵ The Ninth Circuit held that border patrol lacked reasonable suspicion to stop the vehicle and overturned the defendant’s conviction.²⁰⁶ Reversing the Ninth Circuit’s decision,²⁰⁷ Rehnquist argued that the Ninth Circuit had erroneously considered the circumstances triggering the search as individual factors; examining all the circumstances together the High Court determined that the totality of the circumstances justified the search.²⁰⁸ The Court also found reasonable suspicion under a totality of circumstances approach to uphold the constitutionality of airport searches in *United States v. Sokolow*.²⁰⁹ Finally, in *United States v. Verdugo-Urquidez* (1990), Chief Justice Rehnquist’s majority opinion declined to apply the Fourth Amendment to searches of property owned by individuals who are not U.S. citizens and located in another country.²¹⁰

The Court again examined reasonable suspicion under a totality of circumstances analysis to uphold the search of the possessions of an individual on probation in *United States v. Knights* (2001).²¹¹ Justice

201. *Id.* at 155-56.

202. *Id.*

203. *Id.*

204. *United States v. Arvizu*, 534 U.S. 266 (2002). Here, the border patrol stopped Ralph Arvizu by the border patrol and found with substantial quantities of marijuana. *Id.* at 272.

205. *Id.* at 277-78.

206. *Id.* at 272-73.

207. *Id.* at 278.

208. *Id.* at 273-74.

209. *United States v. Sokolow*, 490 U.S. 1 (1989).

210. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). However, the limitations discussed in *Verdugo-Urquidez* did not pertain to border patrol searches. *Id.*

211. *United States v. Knights*, 534 U.S. 112 (2001). Mark Knights had agreed, as a condition of probation, to submit to warrantless searches of his residence if officers had reasonable suspicion to believe Knights engaged in illegal activity. *Id.* at 114. During probation, Knights came under suspicion for vandalism, and consequently, the police searched his home without a warrant but

Rehnquist's majority opinion held the search in *Knights* to be constitutionally permissible under the Fourth Amendment because reasonable suspicion balanced with the probation condition was sufficient to justify the police action.²¹²

The Court defined the privacy rights of individuals who are visiting another's home in *Minnesota v. Carter* (1998),²¹³ brief presence in another's home does not create the same privacy expectations as would an overnight stay or residence.²¹⁴ Although Rehnquist acknowledged that residents and overnight visitors of a home have some privacy expectations, he held that the defendants here did not have privacy expectations because they were present with the consent of the home's resident.²¹⁵ Moreover, because the men were involved in commercial activity, the Constitution reduced the level of privacy afforded to them.²¹⁶ In short, Rehnquist and the majority concluded that temporary guests do not have the same privacy expectations as the homeowners.²¹⁷

We end this section with *Bond v. United States* (2000),²¹⁸ perhaps the most surprising Rehnquist decision dealing with the Fourth Amendment. The defendant here moved to have evidence suppressed arguing that the border patrol officer violated his Fourth Amendment rights during a routine bus search by "squeeze[ing] the soft luggage" without reasonable suspicion.²¹⁹ That is, Bond claimed that the random, physical manipulation of luggage by agents without any individualized suspicion constituted an unreasonable search.²²⁰ Writing for the majority, Rehnquist agreed,²²¹ handing down a surprisingly liberal ruling. Rehnquist found that Bond had a reasonable expectation of

supported by the probation agreement. *Id.* Upon finding bomb-making materials, the police arrested Knights, who subsequently moved to suppress the evidence. *Id.* at 115-16.

212. *Id.* at 121-22.

213. *Minnesota v. Carter*, 525 U.S. 83 (1998). Here, a police officer looking through a gap in the window blinds observed Wayne Carter and Melvin Johns dividing up cocaine and placing the drugs into bags. *Id.* at 85. After their arrest, the defendants attempted to have the evidence against them suppressed, arguing that their Fourth Amendment rights had been violated. *Id.* at 86.

214. *Id.* at 91.

215. *Id.* at 89-91.

216. *Id.* at 90-91.

217. *Id.*

218. *Bond v. United States*, 529 U.S. 334 (2000). In *Bond*, U.S. Border Patrol boarded a Greyhound bus and squeezed soft (e.g., canvassed) luggage located in the overhead rack above the passengers. *Id.* at 336. In one duffle bag, the officer felt a brick-like object. *Id.* The owner of the duffle bag, Steven Bond, consented to a search of the bag in which the officer found methamphetamine. *Id.*

219. *Id.* at 335, 336-37.

220. *Id.* at 336.

221. *Id.*

privacy when he placed his luggage in the overhead rack, and thus, the officer had violated his Fourth Amendment rights.²²² In the opinion, Rehnquist conceded that passengers who place luggage in an overhead compartment expect that others will touch and perhaps even move the luggage, but held that the officer's physical manipulation of the luggage was more intrusive than simply moving the luggage and thus violated Bond's right to privacy.²²³ Bond's use of an opaque bag indicates that he did intend to keep the contents of his luggage private and expected that others would not feel his bag in an "exploratory" matter.²²⁴ The decision seems to run counter to most of the other outcomes chronicled here. Others have noted that the Rehnquist Court "has placed the Fourth Amendment's ban on unreasonable searches and seizures at the bottom"²²⁵ of its list of priorities. Such an assessment holds here even in this limited analysis reaching only those Fourth Amendment opinions written by the Chief Justice. Especially in the context of stops by Border Patrol, the Court and Rehnquist have repeatedly favored the ability of law enforcement to search without probable cause and have consistently identified reasonable suspicion based on a totality of the circumstances. The *Bond* outcome, then, is highly unusual and was unanticipated by many Court watchers.²²⁶

B. Fifth Amendment Right Against Self Incrimination

Chief Justice Rehnquist's majority opinion in *Dickerson v. United States*²²⁷ also surprised many²²⁸ by upholding the necessity for the police to inform suspects of their *Miranda*²²⁹ rights. For most of his career, Rehnquist voted relatively consistently to increase law enforcement's

222. *Id.* at 337-38.

223. *Id.*

224. *Id.* at 339.

225. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 4 (3rd ed. 1993).

226. Christopher Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D.L. REV. 1, 18-19 (2001).

227. *Dickerson v. United States*, 530 U.S. 428 (2000).

228. As discussed *infra*, *Dickerson* involves the constitutionality of a congressional attempt to restore the case-by-case analysis of a confession's voluntariness following the Court's rejection of this approach with *Miranda* two years earlier. See *Greenhouse*, *supra* note 16, at 251-52. While this case stands out as contrary to most of Rehnquist's decisions and votes regarding *Miranda*, the decision is consistent with Rehnquist's view that Congress may not interpret the Constitution. See *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997). As such, the ruling in *Dickerson* may well be more about maintaining absolute judicial supremacy and less about upholding *Miranda*. *Greenhouse*, *supra* note 16, at 256.

229. *Miranda v. Arizona*, 384 U.S. 436 (1966).

ability to question and search suspects. While a member of the Court, under both Chief Justice Burger and during his years as Chief Justice, Rehnquist contributed to the creation of numerous exceptions to *Miranda* rights such that some claim that *Miranda* rights now serve only as “hollow symbols” of prior Court doctrine.²³⁰ In this section, we chronicle Rehnquist’s major protection against self-incrimination opinions²³¹ and in so doing, we further illustrate the uniqueness of *Dickerson*.

1. Decisions Written While Associate Justice

Justice Rehnquist’s views on the importance of *Miranda* became fairly clear in a majority opinion he wrote very early in his career.²³² In *Michigan v. Tucker*, police questioned a rape suspect after providing the suspect with an incomplete *Miranda* warning.²³³ On appeal, the defendant argued that his Fifth Amendment rights had been violated by the inclusion of the statements from an alibi witness identified by the suspect during his questioning and, thus, these statements should be excluded.²³⁴ In an opinion written by Rehnquist, the High Court disagreed and upheld Tucker’s conviction.²³⁵ The Court ruled that, while the application of *Miranda* at the trial was appropriate, police conduct during the actual questioning did not violate Tucker’s self incrimination

230. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 211-12 (2nd ed. 1990).

231. To clarify, in this section we cover *only* *Miranda* rights and the Fifth Amendment right against self incrimination. We do not, for instance, cover basic due process questions or questions regarding the double jeopardy clause of the Fifth Amendment. Rehnquist has written a substantial number of opinions in double jeopardy cases. See *United States v. Scott*, 437 U.S. 82 (1978); *Garrett v. United States*, 471 U.S. 773 (1985); *Richardson v. United States*, 468 U.S. 317 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Oregon v. Kennedy*, 456 U.S. 667 (1982); *Albernaz v. United States*, 450 U.S. 333 (1981); *United States v. Jenkins*, 420 U.S. 358 (1975), *overruled by* *United States v. Scott*, 437 U.S. 82 (1978); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Felix*, 503 U.S. 378 (1992); and *Lockhart v. Nelson*, 488 U.S. 33 (1988).

232. *Michigan v. Tucker*, 417 U.S. 433 (1974).

233. *Id.* at 436. The case involved an indigent offender suspected of rape. *Id.* During police questioning and upon informing police that he did not want an attorney present, defendant Tucker answered several of the police’s questions and named an alibi witness. *Id.* at 436-37. Police informed Tucker that his answers could be used against him in a court of law, but police did not inform him that he was entitled to an attorney at trial even if he could not pay for one. *Id.* at 436. The alibi witness provided by Tucker contradicted his story, and police charged Tucker with rape. *Id.* The initial police questioning occurred before the Supreme Court decided *Miranda v. Arizona*, but his trial occurred post-*Miranda*. *Id.* at 437. At trial, while the trial judge excluded Tucker’s own confession, he allowed the alibi witness to testify against Tucker and Tucker was found guilty. *Id.*

234. *Id.* at 437-39.

235. *Id.* at 452.

rights because the police only departed from the “prophylactic standards later laid down in *Miranda* to safeguard that privilege.”²³⁶ Therefore, the fruits of an interrogation absent *Miranda* need not be suppressed.²³⁷

The decision in *Tucker* indicates an early attempt by Rehnquist and the majority to limit the reach of the *Miranda* ruling. Perhaps the language and discussion of the reach and impact of *Miranda* are the most interesting aspects of the case and Rehnquist’s decision in *Tucker*. Rehnquist argued that *Miranda* did not establish any Constitutional rules and that the Constitution did not protect the warnings themselves.²³⁸ Rather, the *Miranda* warnings were merely judicially constructed methods to guide the police during the interrogation process.²³⁹ According to Rehnquist’s reading of *Miranda*, “these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against self-incrimination was protected.”²⁴⁰

The second major case limiting the scope of *Miranda* written by Justice Rehnquist before his elevation to Chief comes in *New York v. Quarles*²⁴¹ in 1984. In *New York v. Quarles*, the Court articulated the “public safety” exception to *Miranda*.²⁴² Recovering a gun from the location indicated by a rape suspect, the police arrested the suspect, and *Mirandized* him; after receiving the *Miranda* warnings, the defendant admitted ownership of the gun.²⁴³ Quarles argued at trial that because he made his original statement that the “gun was over there” without the benefit of *Miranda* and because the subsequent statement were tainted by the original statement, both statements should be excluded.²⁴⁴ The trial court agreed and excluded both statements in a ruling upheld by the New York Court of Appeals.²⁴⁵ The United States Supreme Court

236. *Id.* at 446.

237. *Id.* at 452.

238. *Id.* at 444.

239. *Id.* at 443.

240. *Id.* at 444.

241. *New York v. Quarles*, 467 U.S. 649 (1984).

242. *Id.* at 655-56. Here, a woman claiming to have just been raped approached police. *Id.* at 651. One of the officers spotted Benjamin Quarles and because Quarles matched the description given by the alleged rape victim, the officer approached Quarles. *Id.* at 652. Quarles ran but was apprehended quickly by the officer. *Id.* When the officer frisked Quarles, he noted an empty gun holster and asked Quarles about the location of the gun. *Id.* Quarles replied, “The gun is over there” and pointed in the direction of the gun. *Id.*

243. *Id.*

244. *Id.* at 652-53.

245. *Id.* at 653.

reversed.²⁴⁶

In the opinion, Rehnquist created a “public safety” exception to *Miranda*.²⁴⁷ He noted that concern for the public safety must supersede the prophylactic rules established by *Miranda*.²⁴⁸ Rehnquist noted that police officers can distinguish between situations in which the *Miranda* rights can be read and those situations creating emergencies that must be addressed, and, thus, can be addressed, without the benefit of *Miranda*.²⁴⁹ In the case at hand, Rehnquist noted that the officers were reasonably concerned that the abandoned gun might have been used by an accomplice and thus the concern for the public safety was more vital than a reading of *Miranda* in these types of cases.²⁵⁰ Rehnquist seems to have viewed *Miranda* as a procedure that can be ignored or at least delayed based on circumstances and not as a broad, constitutional right that always warrants primacy. Rehnquist stated in the opinion,

[W]e conclude today that there are limited circumstances where the judicially imposed strictures of *Miranda* are inapplicable.

...

Today, we merely reject the only argument that the respondent has raised to support the exclusion of his statement, that the statement must be *presumed* compelled because of Officer Kraft’s failure to read him his *Miranda* warnings.²⁵¹

Rehnquist’s opinions in *Tucker* and *Quarles* illustrate his preference for limiting the scope of *Miranda* and/or the Fifth Amendment. While these are two major ‘pre-Chief Justice’ cases, they are not his only decisions to expand law enforcement abilities under the Fifth Amendment. For instance, specific to *Miranda* and writing for the majority, Rehnquist concluded in *Wainwright v. Sykes*²⁵² that defendants may not claim for the first time in post-conviction proceedings that they had not understood the *Miranda* warnings.²⁵³ Rehnquist also wrote several opinions for cases dealing with interpretations of the self-incrimination clause in general and repeatedly held for law enforcement

246. *Id.* at 659-60.

247. *Id.* at 655-56.

248. *Id.* at 653.

249. *Id.* at 655-56.

250. *Id.*

251. *Id.* at 653 n.3 and 655 n.5.

252. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

253. *Id.* at 84.

officials and for an interpretation that eased constitutional restrictions posed by the Fifth Amendment. For a five-member majority in *Allen v. Illinois*,²⁵⁴ Rehnquist held that the testimony of psychiatrists made during a person's involuntary commitment proceedings did not violate the Fifth Amendment.²⁵⁵ The case involved the confinement of sexual predators in Illinois.²⁵⁶ The High Court ruled that the proceedings were civil and not criminal and that the state's purpose for commitment was treatment and not punishment.²⁵⁷ Thus, the privilege against self-incrimination does not apply in civil confinement proceedings.²⁵⁸ Similarly, in *United States v. Ward*,²⁵⁹ Rehnquist wrote that the use of reports to assess monetary civil penalties does not violate the Fifth Amendment's self-incrimination clause because the case did not involve a criminal prosecution.²⁶⁰ Finally, in *United States v. Apfelbaum*,²⁶¹ Rehnquist concluded that the Fifth Amendment does not prevent the use of statements made under immunity to a grand jury in a subsequent prosecution for providing false testimony to the grand jury.²⁶² Again, the pattern is strong; in these cases Rehnquist limited the scope of the Fifth Amendment and increased the ability of law enforcement and judicial officers to arrest and convict suspected criminals.²⁶³

2. Decisions Written While Chief Justice

As Chief Justice, Rehnquist's commitment to limiting the applicability of the Fifth Amendment is equally clear in spite of his opinion in *Dickerson v. U.S.*²⁶⁴ (detailed later). A few months after becoming Chief Justice, Rehnquist wrote the opinion in *Colorado v. Connelly*.²⁶⁵ The majority ruled in *Connelly* that, absent evidence of police misconduct, a mentally ill person's confession can be deemed

254. *Allen v. Illinois*, 478 U.S. 364 (1986).

255. *Id.* at 372-73.

256. *Id.* at 365-66.

257. *Id.* at 373.

258. The dissenters note that the civil confinement and criminal prosecution procedures were virtually identical and that civil confinement was punitive, and therefore, the Fifth Amendment does apply. *Id.* at 375-84 (Stevens, J., dissenting).

259. *United States v. Ward*, 448 U.S. 242 (1980).

260. *Id.* at 248-49.

261. *United States v. Apfelbaum*, 445 U.S. 115 (1979).

262. *Id.* at 131.

263. Rehnquist also wrote the Court's opinions in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), and *Schneble v. Florida*, 405 U.S. 427 (1972). Both cases deal with the Fifth and Sixth Amendments.

264. *Dickerson v. United States*, 530 U.S. 428 (2000).

265. *Colorado v. Connelly*, 479 U.S. 157 (1986).

voluntary.²⁶⁶ At trial a mentally ill defendant sought to have his initial statements suppressed.²⁶⁷ The psychiatrist who examined Connelly informed the trial court that, while Connelly was experiencing a psychotic breach, he was able to understand and waive his *Miranda* rights.²⁶⁸ However, the psychiatrist further testified that Connelly's psychosis most likely motivated him to confess.²⁶⁹ Given this testimony, the court ruled that Connelly's mental condition precluded his ability to voluntarily waive his *Miranda* rights and his statements were excluded.²⁷⁰

Writing for the majority, Rehnquist reversed, noting that proof of police coercion is necessary to determine that a confession was not voluntary and that the mere taking of a statement from a defendant does not constitute a violation of due process.²⁷¹ Arguing that the historical basis for excluding involuntary statements was to prohibit police misconduct, Rehnquist concluded that, "Absent police conduct casually related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."²⁷² He goes on to note: "Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crimes only when totally rational and properly motivated—could respondent's present claim be sustained."²⁷³ It is clear from *Connelly* that Rehnquist viewed the exclusionary rule as applied to the Fifth Amendment as only relevant when the police actively participate in getting the defendant to confess, and, it is rather limited absent a finding of police misconduct. Police action does not lead necessarily to the exclusion of evidence. Rather, Rehnquist states that, "Even where there is a causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been a violation of the Due Process Clause."²⁷⁴ This interpretation nearly parallels Rehnquist's views on search and seizure protections.

266. *Id.* at 159.

267. *Id.* at 161. Francis Connelly approached a police officer in Denver and immediately began confessing to murder. *Id.* at 160. The morning after being taken to police headquarters and detailing several elements of the crime, Connelly claimed that "voices" in his head had made him confess. *Id.* at 161.

268. *Id.*

269. *Id.* at 162.

270. *Id.*

271. *Id.* at 171.

272. *Id.* at 164.

273. *Id.* at 166.

274. *Id.* at 164.

Regarding the Fourth Amendment, as noted *supra*, Rehnquist saw the exclusion of evidence as a measure to ensure proper police conduct rather than a constitutional right or guaranteed remedy.

A series of cases in the 1980s and early 1990s further indicates Rehnquist's preference for the expansion of police authority over civil liberties and individual rights. For instance, in *Connecticut v. Barrett*,²⁷⁵ the majority held that the Fifth Amendment allowed a defendant's post-*Miranda* statements asserting that he would speak about a crime, but not make a written statement outside the presence of an attorney.²⁷⁶ There, the state Supreme Court ruled that, by refusing to make a written statement, the defendant had invoked his right to an attorney.²⁷⁷ Consequently, and although the defendant had agreed to make verbal statements without an attorney present, the statements were inadmissible.²⁷⁸ Rehnquist, in reversing, found that the defendant knowingly waived his right against self-incrimination and the police had simply honored the defendant's intention to speak.²⁷⁹

In *Duckworth v. Eagan*,²⁸⁰ Rehnquist and the majority held that police do not have to give the *Miranda* warnings exactly as stated in the *Miranda* decision.²⁸¹ Instead, the Illinois police did not err when they informed a suspect that a lawyer would be appointed to him "if and when you go to court" even though this statement does not make it clear to defendants that they have a right to an attorney during questioning as well.²⁸² Consistent with Rehnquist's other statements regarding *Miranda*, he again noted that the warnings were nothing more than procedural safeguards.²⁸³

Finally, in *Brecht v. Abrahamson*,²⁸⁴ the Court held, in another decision written by Chief Justice Rehnquist, that an individual's silence post-*Miranda* can be used to impeach the defendant's statements during trial.²⁸⁵ The High Court found the prosecution's use of the defendant's

275. *Connecticut v. Barrett*, 479 U.S. 523 (1987).

276. *Id.* at 530.

277. *Id.* at 526-27.

278. *Id.*

279. *Id.* at 530.

280. *Duckworth v. Eagan*, 492 U.S. 195 (1989).

281. *Id.* at 200-01.

282. *Id.*

283. *Id.* at 202-03.

284. *Brecht v. Gordon*, 507 U.S. 619 (1992).

285. *Id.* at 639. The defendant, Todd Brecht, was accused of first-degree murder and made no statements to explain his actions during post-*Miranda* questioning, but claimed during the trial that the shooting was an accident. *Id.* at 624-25. The prosecution noted on a number of occasions that the defendant had made no reference to this accident during pretrial statements, effectively arguing

silence as evidence of guilt error harmless and denied the defendant federal habeas relief.²⁸⁶

The unmistakable pattern emerging from these cases and from several other votes by Rehnquist during his years on the Court is one of a consistently conservative posture when dealing with the rights of the criminally accused. Thus, Chief Justice Rehnquist's opinion in *Dickerson v. U.S.*²⁸⁷ is both surprising and interesting. Many observers did not predict the outcome in *Dickerson*. One reporter recalls that she was convinced she had heard the *Miranda* rights for the last time when Rehnquist announced that he was handing down the Court's majority decision.²⁸⁸ *Dickerson* addressed a 1968 congressional attempt to limit the reach of the *Miranda v. Arizona*²⁸⁹ decision arrived at by the Warren Court two years earlier. Following *Miranda*, Congress enacted 18 U.S.C. § 3501,²⁹⁰ which mandated that, in federal criminal prosecutions, the admissibility of a suspect's confession would turn on whether the confession was given voluntarily, considering the totality of the circumstances under which the suspect confessed.²⁹¹ The federal law did not mandate any pre-interrogation, *Miranda*-type warnings and, thus, it effectively sought to overturn the *Miranda* ruling as applied to federal prosecutions.²⁹²

In *Dickerson*, the defendant sought to have a statement he made to the Federal Bureau of Investigation suppressed because he had not been *Mirandized*.²⁹³ Reviewing Dickerson's conviction for bank robbery, the District Court suppressed the statement; the Appeals Court reversed, arguing that because *Miranda* was not a constitutional holding, but rather a set of procedural guidelines aimed at directing police behavior, Congress could alter the reach of the ruling by statute.²⁹⁴

In the Court's strong 7-to-2 opinion, Rehnquist reversed the Appeals Court, invalidating Section 3501.²⁹⁵ Rehnquist began by noting that *Miranda* was a constitutional decision,²⁹⁶ a position contrary to

that the defendant's silence was evidence of his guilt. *Id.* at 625.

286. *Id.* at 639.

287. *Dickerson v. United States*, 530 U.S. 428 (2000).

288. *Greenhouse*, *supra* note 16, at 251-52.

289. *Miranda v. Arizona*, 384 U.S. 436 (1966).

290. 18 U.S.C. § 3501 (1968).

291. *Dickerson*, 530 U.S. at 432.

292. 18 USCS § 3501(1968).

293. *Dickerson*, 530 U.S. at 432.

294. *Id.*

295. *Id.*

296. *Id.* at 438.

many of his written statements regarding *Miranda* over the years.²⁹⁷ Rehnquist held that Congress may not attempt to overturn the Court's constitutional decision by mere statute.²⁹⁸ Rather, Congress may engage in legislative action to protect an individual's right against coercive self-incrimination, but in so doing it must guarantee that any legislative action be at least as effective in informing individuals of their rights as *Miranda*. Congress essentially overturned the *Miranda* requirement through Section 3501 by allowing for voluntary confessions absent *Miranda* if the totality of the circumstances indicated that the person's confession was voluntary. The Court ruled the legislative end-run to circumvent the protections in federal court to be unconstitutional.²⁹⁹

Dickerson appears to be another case in which Rehnquist felt a need to rein in Congress and to reassert judicial authority. Perhaps his desire to protect the institutional security of the Court surpassed his possible desire to overturn *Miranda*. Regardless, the presumed need to redefine *Miranda* lessened over time. While Rehnquist had long disagreed with the *Miranda* decision, the protections it afforded had become so diluted by exceptions generated by both the Burger and Rehnquist Courts that they no longer restricted police to the extent originally envisioned. Rehnquist also pointed to *stare decisis* for not overturning *Miranda* itself.³⁰⁰ Acknowledging that while some members of the Court may question the wisdom of *Miranda* or would have decided it differently, Rehnquist asserted that the principle of *stare decisis* cautioned strongly against overturning it.³⁰¹ *Dickerson* stands as the only major decision dealing with the Fifth Amendment written by Rehnquist that results in a liberal outcome, albeit based on motivations

297. *Id.* at 432. One could fairly surmise from the cases cited previously that Rehnquist viewed the *Miranda* warnings simply as procedural devices used by police to help ensure the mandates of the Fifth Amendment had not been violated. Thus, his initial statement that *Miranda* was a constitutional decision is surprising if considered alone, but not if evaluated in the context of the full opinion.

298. *Id.* at 437.

299. Rehnquist pointed to another recent Court case, *City of Boerne v. Flores* that intended to keep Congress in check. *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997). *Flores* overruled Religious Freedom Restoration Act, Congress' response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In order to provide a higher level of protection for religious freedoms, Congress passed the Act, lowering the standard of review for religious freedom from strict scrutiny to intermediate scrutiny. The Supreme Court rejected Congress' attempt to legislate the Court's standard of review in *Flores*, noting strongly that the Supreme Court had the right to "say what the law is." *Flores*, 521 U.S. at 536 (quoting *Marbury v. Madison*, 1 Cranch at 177).

300. *Dickerson*, 530 U.S. at 443.

301. *Id.*

other than a singular desire to protect individual rights and liberties.³⁰²

Although this discussion focuses on the actual opinions of Chief Justice Rehnquist, he also had considerable influence on other conservative members of the Court.³⁰³ While his impact is most clear in federalism cases,³⁰⁴ the Chief Justice's conservative positions likely drive the Court's general support of police policies and narrowing of individual rights. Rehnquist's influence over the moderate justices seems to have waned in his last few years, with his own philosophies at times too conservative to garner support from a majority of the Court. For example, during the 2003-2004 and 2004-2005 Terms collectively, Justice Rehnquist was in the majority in all eleven criminal justice 5-to-4 decisions resulting in a conservative outcome but was in the minority in all nine of the 5-to-4 cases that ended in liberal decisions.³⁰⁵

C. Cases Limiting Congressional Control Over Criminal Justice Issues

The revival of federalism cases, and especially outcomes favoring states' rights, promises to be one of the major legacies of the Rehnquist Court and the leadership of Chief Justice Rehnquist.³⁰⁶ Because we only concentrate on criminal justice cases here, we will not chronicle all of the decisions that attempt to limit Congressional power, either through invalidating Congress's use of the Commerce Clause or through

302. Rehnquist also wrote several other decisions dealing with the Fifth Amendment's protection against self incrimination and due process clause. See *United States v. Robinson*, 485 U.S. 25 (1988); *Braswell v. United States*, 487 U.S. 99 (1988); *Butler v. McKellar*, 494 U.S. 407 (1990); *Michigan v. Harvey*, 494 U.S. 370 (1990); *DeMore v. Kim*, 538 U.S. 510 (2003).

303. Judicial scholars commonly hold that a justice's decision on how to vote is affected by his or her values, attitudes and the strategic choices the justice makes in attempts to persuade colleagues or to otherwise advance a particular interpretation or doctrine. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICE JUSTICES MAKE* (1998).

304. Greenhouse, *supra* note 16, at 251-52.

305. See also Smith, McCall & McCall, *supra* note 64, at 123.

306. Political scientist Sue Davis writes that federalism is at the top of Rehnquist's judicial values. Davis writes:

The federalism that Rehnquist places at the apex of his hierarchy of values entails a vision of the relationship between the federal government and the states that is fundamentally at odds with the view that prevailed on the Court from the late 1930s until the mid-1970s. A commitment to shift power away from the federal government toward more extensive, independent authority for the states underlies Rehnquist's decision making. . . Not only has he interpreted Congress's enumerated power in a restricted way, but he has also maintained that even when Congress acts pursuant to its enumerated powers, it transgresses its constitutional limits when it infringes on state autonomy.

SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 149 (1989) (quoted in Greenhouse, *supra* note 16, at 259). What is interesting to note here is that Professor Davis comes to this conclusion before recent, major federalism decisions like those in *Lopez* and *Morrison*.

application of the Tenth or Eleventh³⁰⁷ Amendments.³⁰⁸ In this section we analyze only those cases written by Rehnquist that limit congressional control in criminal justice cases.

As previously discussed, *Dickerson v. United States*³⁰⁹ provides us with a good understanding of Rehnquist's view of the role of Congress in relationship to the judiciary. His views on the proper role of the national government in the federalism system as related strictly to criminal justice cases is evident in his opinions in *U.S. v. Lopez* (1995)³¹⁰ and *U.S. v. Morrison* (2000),³¹¹ and in his votes in *U.S. v. Printz*³¹² and *Gonzales v. Raich* (2005).³¹³ Perhaps the most interesting of these is *U.S. v. Lopez* because the case marked the first time in fifty years that the Court asserted that Congress had exceeded its powers under the Commerce Clause of the Constitution.³¹⁴

Alfonso Lopez was a 12th-grade student when he knowingly brought a firearm to school.³¹⁵ Lopez was charged with violating the Gun-Free School Zones Act³¹⁶ of 1990, a federal statute making it a crime to carry a gun within 1000 feet of a school.³¹⁷ Congress passed the statute under its powers to regulate interstate commerce.³¹⁸ However, as the majority noted, Congress did not indicate in the legislative record how and why guns in schools affect interstate commerce.³¹⁹ Writing for a five-member majority in what would be the first major case in a long line of 5-to-4 conservative federalism decisions,³²⁰ Rehnquist declared

307. For instance, Rehnquist writes for the majority in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 72.

308. Rehnquist's dedication to the principle of states' rights has been clear since the beginning of his years on the Court, and as Chief Justice, he was able to guide the Court through a period of time in which states won many of the federalism cases before the Bench. See discussion in EPSTEIN & WALKER, *supra* note 3, at 319-447 (2004).

309. *Dickerson v. United States*, 530 U.S. 428 (2000).

310. *United States v. Lopez*, 514 U.S. 549 (1995).

311. *United States v. Morrison*, 529 U.S. 598 (2000).

312. *Printz v. United States*, 521 U.S. 898 (1997).

313. *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).

314. See *Lopez*, 514 U.S. at 549.

315. *Id.* at 551.

316. 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988).

317. *Lopez*, 514 U.S. at 551.

318. 18 U.S.C. § 922(q)(1)(A).

319. *Lopez*, 514 U.S. at 552.

320. As suggested earlier, there are several interesting cases that indicate Rehnquist's early commitment to states' rights, articulated first in *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit*, 469 U.S. 528 (1985), and in his dissent in *Garcia v. San Antonio Metropolitan Transit*, 469 U.S. 528 (1985), continues throughout

the Gun-Free School Zones Act unconstitutional because Congress exceeded its powers under the Interstate Commerce Clause.³²¹ In the opinion Rehnquist held that the Gun-Free School Zones Act addresses criminal behaviors that are unrelated to either commerce or economic activity.³²² Moreover, although, or perhaps, because Congress failed in its briefs to the Court to make any specific finding regarding what influence guns in school have on commerce,³²³ government attorneys orally argued that the cost of violent crimes was substantial, that violent crime might reduce individuals' willingness to travel to areas perceived unsafe, and that guns at school would threaten the educational progress and create a less productive work force.³²⁴ Rehnquist found none of these arguments convincing, stating that, if Congress were allowed to regulate guns in schools, Congress would be able to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."³²⁵ Finally, in a rather harsh statement, Rehnquist wrote that, in order for the Supreme Court to find the Gun-Free School Zones Act constitutional, they would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the commerce clause to a general police power of the sort retained by the States."³²⁶ If the Court were to do this, Rehnquist warned, "there will never be a distinction between what is truly national and what is truly local."³²⁷

The case represents a substantial departure from a long line of Court doctrine stemming from the New Deal era and *Wickard v. Filburn*³²⁸ to uphold congressional action.³²⁹ The Court had for fifty years adopted a much lower standard that tended to defer to congressional judgment as to whether significant or substantial influence

his career. Most of the federalism cases decided post-*Lopez* are 5-to-4 conservative outcomes, with the majority consisting of Rehnquist, Scalia, Thomas, Kennedy, and O'Connor and the minority consisting of Ginsburg, Breyer, Souter, and Stevens. The Court's recent decision in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), varies considerably from the pattern. See *infra* notes 355-60 (discussing this analysis in *Gonzales*).

321. *Lopez*, 514 U.S. at 551.

322. *Id.*

323. *Id.* at 553.

324. *Id.* at 563.

325. *Id.* at 564.

326. *Id.* at 567.

327. *Id.* at 567-68.

328. *Wickard v. Filburn*, 317 U.S. 111 (1942).

329. See Lee Epstein & Thomas Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, CONGRESSIONAL QUARTERLY 319-447 (2004).

on commerce existed.³³⁰ As the dissenters noted, the ruling threatened legal doctrine that had seemed settled.³³¹ While certainly *Lopez* came as a surprise to many Court observers, the ruling in *Lopez* is consistent with Rehnquist's views of states' rights first articulated in a majority opinion in *National League of Cities v. Usery*.³³² When *Garcia v. San Antonio Metropolitan Transit Authority*³³³ overturned *Usery* nine years later, Rehnquist predicted correctly that his view of federalism and preference for state's rights would "again command the support of a majority of this court."³³⁴

Initially, observers argued that perhaps *Lopez* represented an attempt by Rehnquist and the majority to chastise Congress for not articulating the link between commerce and their statutory activities,³³⁵ and thus, when Congress properly explicated the rationale for the legislation, the Court would reverse course. Chief Justice Rehnquist's decision in *U.S. v. Morrison* (2000),³³⁶ would quickly dispel any belief that the principles articulated in *Lopez* were so limited.³³⁷ In *Morrison*, the Court reviewed the Violence Against Women Act of 1994 (VAWA).³³⁸ Congress passed VAWA under its power to regulate

330. *Wickard*, 317 U.S. at 137.

331. *Id.*

332. *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit*, 469 U.S. 528 (1985). *National League of Cities* and *Garcia* are both decided on Tenth Amendment grounds and not commerce. Nevertheless, Rehnquist's views on the importance of states' rights are clear.

333. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

334. *Id.* at 580.

335. EPSTEIN & WALKER 2004, *supra* note 3, at 453.

336. *United States v. Morrison*, 529 U.S. 598 (2000).

337. Although *Morrison* is not a criminal justice case, but rather concerns an attempt by Congress to allow for civil prosecutions of criminal actions, it is included here as an excellent example of Rehnquist's decision making tendencies. While Rehnquist's commitment to the principles of states' rights is evident, Greenhouse notes that one of his major accomplishments is the molding of other Court members to his position. See Greenhouse, *supra* note 16. Greenhouse argues that by allowing others to write the opinions in federalism cases, Rehnquist served as a mentor, a role for which he often is not credited. See *id.* Because he tended to parcel out the authorship duties in federalism cases, he wrote the opinion in a limited number of such cases. This underscores the importance of *Morrison* and further warrants the case's inclusion here.

338. *Morrison*, 529 U.S. 598. In the fall of 1994, Antonio Morrison and James Crawford allegedly raped Christy Brzonkala, then a student at Virginia Polytechnic Institute. *Id.* at 602. Later, Brzonkala was unable to attend classes despite having sought professional help and withdrew from the university. *Id.* at 602-03. Brzonkala filed a complaint against both Morrison and Crawford under the university's sexual assault policy. *Id.* at 603. The university found insufficient evidence against Crawford but found Morrison guilty and suspended him for two semesters. *Id.* Upon appeal, Morrison's suspension was dropped and he returned to the university in the Fall of 1995. *Id.* at 603-04. Brzonkala dropped out of the university and filed a civil rights suit under the federal Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981(b), against Morrison, Crawford and

interstate commerce,³³⁹ but unlike the situation in *Lopez*, Congress documented at length the relationship between interstate commerce and gender-motivated violence.³⁴⁰ The question for the Court in *Morrison* was the constitutionality of VAWA.

Writing for the five-person majority, Chief Justice Rehnquist used the same logic he used in *Lopez* to invalidate the VAWA.³⁴¹ Rehnquist stated that gender-motivated crimes are not economic and dismissed Congress's documented evidence that these crimes can have a substantial effect on commerce.³⁴² Rehnquist acknowledged that congressional studies present numerous reports that document the serious impact gender-motivated crime has on victims, but asserted that even these findings were not sufficient to uphold the legislation.³⁴³ Rehnquist chose not to defer to congressional findings and charged that just because Congress said that gender-motivated violence is related to interstate commerce did not make it so.³⁴⁴ Rehnquist maintained that it is the Court's responsibility to determine if certain activities have a substantial effect on commerce.³⁴⁵ Consistent with his views in *Lopez*, Rehnquist further wrote that if Congress were allowed to use the Interstate Commerce Clause to regulate gender-motivated violence,³⁴⁶ Congress would be able to use the Commerce Clause to "completely obliterate the Constitution's distinction between national and local authority."³⁴⁷ In Rehnquist's views, upholding the VAWA would mean

Virginia Tech. *Morrison*, 529 U.S. at 604-05. The Violence Against Women Act stated that individuals have the right to be free of gender-motivated violent crimes and that victims of such crimes have the right to sue their attackers in federal civil court for monetary compensation. *Id.* at 605.

339. Rehnquist also finds that the Violence Against Women Act is unconstitutional under Section 5 of the Fourteenth Amendment. *Id.* at 627.

340. *Id.* at 614.

341. *Id.* at 606-08.

342. *Id.* at 608-09.

343. *Id.* at 614.

344. Clearly many in Congress have taken issue with such decisions, and some Senators have expressed these concerns while questioning John Roberts during his confirmation hearings. For instance, referring to *Morrison* and other recent instances in which the Court declared acts of Congress unconstitutional, Senator Specter told Judge Roberts, "I take umbrage at what the court has said, and so do my colleagues." Linda Greenhouse, *In Roberts Hearing, Specter Assails Court*, N.Y. TIMES, Sept. 15, 2005, at A1.

345. *Morrison*, 529 U.S. at 613.

346. Congress found that violence against women affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615.

347. *Id.*

that Congress could regulate any crime and violent activity even though the regulation of violence and crime is a state issue.³⁴⁸ Citing again the power of the judiciary to interpret the Constitution and to determine what the law is, Rehnquist clearly expressed his philosophical belief that Congress and congressional powers needed to be reined by a more supreme judiciary.³⁴⁹

Finally, although not written by Rehnquist, the Court's disposition of *Printz v. United States*³⁵⁰ and Rehnquist's vote in the case further reveal his states' rights views. *Printz* involved the constitutionality of the federal Brady Handgun Violence Prevention Act.³⁵¹ The Court, through an opinion by Justice Scalia and joined by Justice Rehnquist, overturned the provisions of the Brady Act which required states to implement federal law.³⁵² Although the dissenters argued that the legislation was constitutionally based on provisions of the Interstate Commerce Clause, the majority disagreed and again limited congressional control over issues in criminal justice.³⁵³

While, as some suggest, such cases might illustrate Rehnquist's influence over other Court members and his willingness to allow colleagues to write major federalism decisions,³⁵⁴ the Chief Justice's reach was limited at times. *Gonzales v. Raich* illustrates this limitation.³⁵⁵ Here, the Court upheld Congress's power to regulate the production and use of medicinal marijuana under the Controlled Substance Act.³⁵⁶ Justice Stevens, writing for the majority, held that Congress can regulate such production even if the production is intended for private consumption and consistent with the Court's previous recognition of congressional power regarding the production of wheat.³⁵⁷ Rehnquist was in the three-member minority which, through O'Connor's

348. *Id.* at 613.

349. *See* Greenhouse, *supra* note 16.

350. *Printz v. United States*, 521 U.S. 898 (1997).

351. 18 U.S.C. § 922. The Brady Bill mandated national criminal background checks for handguns. *Printz*, 521 U.S. at 899-904. The law also required that until the national system of checks could be established fully, state officials would conduct the background checks. *Id.* at 899.

352. *Id.* at 935.

353. *Id.*

354. *See* Greenhouse, *supra* note 16.

355. *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).

356. *See id.* A federal (DEA) raid leading to the destruction of cannabis plants grown for personal consumption was valid despite a state law permitting the use of marijuana for medicinal purposes. *Id.* In 1996, California voters passed the Compassionate Use Act allowing ill Californians to use marijuana for medicinal purposes. Jeff McDonald, *Supreme Court Decision Trumps California Law*, THE SAN DIEGO TRIBUNE, June 7, 2005, at A1.

357. The case held to be controlling is *Wickard v. Filburn*, 317 U.S. 111 (1942).

dissenting opinion, asserting that the majority opinion violated the principles of federalism, was inconsistent with *Lopez*³⁵⁸ and *Morrison*,³⁵⁹ and had not demonstrated that the activity (i.e., growing of marijuana for personal use) is economic in nature or that it has a substantial effect on interstate commerce.³⁶⁰

D. Cases Limiting Federal Habeas Corpus

One of Justice Rehnquist's lasting legacies will be his dedication to limiting the number of cases that qualify for federal habeas corpus review and relief. Very early in his career, in an opinion dissenting from the decision to grant certiorari,³⁶¹ Rehnquist clarified his view that the Supreme Court and other federal courts had allowed death row inmates to lengthen the appeals process improperly and prolong their stay on death row. In a strongly worded opinion, Rehnquist noted that:

I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system . . . What troubles me is that this Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976, together with the natural reluctance of state and federal habeas judges to rule against an inmate on death row, had made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes.³⁶²

Supported by the appointment of other like-minded jurists (Justices O'Connor, Scalia, and Thomas, in particular)³⁶³ and through a series of cases over the next several years, Rehnquist and the conservative majority became very successful in severely limiting access to the federal courts for those seeking federal habeas review.³⁶⁴ Absent a few

358. *United States v. Lopez*, 514 U.S. 549 (1995).

359. *United States v. Morrison*, 529 U.S. 654 (2000).

360. *Gonzales v. Raich*, 125 S.Ct. 2195, 2221 (2005) (O'Connor, J., dissenting).

361. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, C.J., dissenting).

362. *Id.* at 958-59.

363. Early in his career Rehnquist, of course, lacked these supporting members. For instance, just after joining the Court, Rehnquist (and others) dissented in the landmark death penalty case, *Furman v. Georgia*, 408 U.S. 238 (1972). Justices Brennan and Marshall, both in the majority in *Furman*, would continue to vote predominantly in favor of individuals' claims in a range of issue areas until they left the Court in 1990 and 1991, respectively. *See, e.g.*, THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 57, 61 (1997).

364. An early memorial review commemorating Rehnquist's influence, for instance, recalls that Rehnquist "strengthened property rights and . . . [t]he Rehnquist court also made it harder for civil rights plaintiffs, prisoners and Death Row inmates to win claims in federal courts." Savage,

recent rulings dealing with the quality of justice meted out specifically by the Texas courts,³⁶⁵ the Court followed Chief Justice Rehnquist's lead.³⁶⁶

One of the best examples of the extent to which Justice Rehnquist preferred to close off the federal courts to death penalty³⁶⁷ habeas appeals is *Herrera v. Collins* (1993).³⁶⁸ The case dealt with an individual convicted of the second-degree murder of two police officers.³⁶⁹ Following several years of review, the defendant filed for federal habeas relief on a claim of "actual innocence."³⁷⁰ In his petition for review, the defendant supplied the Court with two affidavits by individuals who claimed that the defendant's dead brother had confessed to committing the murders.³⁷¹ The federal appeals court denied the petition for habeas relief arguing that the existence of new evidence related to the question of the defendant's actual guilt was not grounds itself for federal review.³⁷² On appeal, the United States Supreme Court agreed with the appeals court.³⁷³ Writing for the majority, Chief Justice Rehnquist stated that the refusal of the state courts to entertain claims of

supra note 27.

365. *Tennard v. Dretke*, 542 U.S. 274 (2004); *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005). See Smith, McCall & McCall, *supra* note 64 (discussing *Tennard* decision).

366. Habeas relief aside, in recent years Chief Justice Rehnquist was on the dissenting end of several high profile death penalty cases including *Atkins v. Virginia*, 536 U.S. 304 (2003), in which the Court held the imposition of the death penalty for the mentally retarded to be cruel and unusual punishment; *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court held that the imposition of death for juvenile offenders violated the Eighth Amendment; *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court held that juries, not judges, must decide the aggravating factors necessary for imposition of the death penalty; and *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), in which the Court ruled that the defendant in this particular case received ineffective assistance of counsel.

367. We do not cover Justice Rehnquist's Eighth Amendment cases in this article, although he has written many. Justice Rehnquist, for instance, authored opinions dealing with capital jury instructions. See *Weeks v. Angelone*, 528 U.S. 225 (2000); *Buchanan v. Angelone*, 522 U.S. 269 (1998); *Dawson v. Delaware*, 503 U.S. 159 (1992); *Boyde v. California*, 494 U.S. 370 (1990); *Ross v. Oklahoma*, 487 U.S. 81 (1988); *California v. Brown*, 479 U.S. 538 (1987); and *Wainwright v. Witt*, 469 U.S. 412 (1985). Although these are not the only cases dealing with the Eighth Amendment written by Justice Rehnquist, all of these cases deal with jury instructions in capital cases. Last term, Chief Rehnquist wrote the Court's opinion in *Arthur Anderson v. United States*, 125 S.Ct. 2129 (2005). See *id.* While not involving a capital charge, the case involves jury instructions used to convict the Anderson account firm of wrongdoing as related to the downfall of energy giant Enron. Rehnquist and the Court find that the trial judge erred in failing to convey to the jury criteria for determining guilt. *Id.*

368. *Herrera v. Collins*, 506 U.S. 390 (1993).

369. *Id.* at 393-95.

370. *Id.* at 400.

371. *Id.* at 395-97.

372. *Id.* at 396-98.

373. *Id.* at 419.

actual innocence did not violate notions of fundamental fairness rooted in the traditions of the American criminal justice system.³⁷⁴ Rehnquist claimed that the ten years between the trial and the habeas petition reduced the defendant's right to federal habeas review.³⁷⁵ Finally, according to the Chief Justice, the federal courts could not and should not force state courts to evaluate claims of actual innocence.³⁷⁶ The case illustrates Rehnquist's beliefs that the appeals process for death row inmates was far too long and that the federal courts, where possible, should shorten the process of review.

Herrera is only one of many cases written by Chief Justice Rehnquist that limited access to the federal courts or that placed limits on the extent of the federal hearings by the federal courts. In the 2004-2005 Term, for instance, the Chief wrote for a bare majority in *Pace v. Diguglielmo*.³⁷⁷ There the Court held that the petitioner filed for habeas relief beyond the statute of limitations and did not show due diligence in filing for state post-conviction relief,³⁷⁸ therefore time-barring federal habeas relief.³⁷⁹ In *Hill v. Lockhart* (1985),³⁸⁰ Rehnquist wrote that state prisoners are not entitled to evidentiary hearings regarding a claim of ineffective assistance of counsel in federal habeas corpus proceedings. In *Donnelly v. DeChristoforo*,³⁸¹ the majority held that improper remarks made by the prosecutor in a murder trial did not constitute cause for habeas relief.³⁸² In *Price v. Vincent*,³⁸³ the Court held that an individual convicted of first-degree murder after his counsel had moved for a directed verdict was not entitled to federal relief based on a double jeopardy claim.³⁸⁴ The Court also restricted habeas relief in a major, early habeas petition case written by Justice O'Connor (*Coleman v. Thompson*).³⁸⁵ Rehnquist's views on this point were so strong that he publicly lobbied to limit the extent of death row appeals in his 1997 Year-End Report on the state of the federal judiciary.³⁸⁶ In part

374. *Id.* at 400-03.

375. *Id.* at 403.

376. *Id.* at 405.

377. *Pace v. Diguglielmo*, 125 S.Ct. 1807 (2005) (five-to-four decision).

378. *Id.* at 1810-11.

379. *Id.* at 1814.

380. *Hill v. Lockhart*, 474 U.S. 52 (1985).

381. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

382. *Id.*

383. *Price v. Vincent*, 538 U.S. 634 (2003).

384. *Id.*

385. *Coleman v. Thompson*, 501 U.S. 722 (1991).

386. See Judith Resnick, *The Federal Courts and Congress: Additional Sources of Alternative*

reflecting these views, the Court has been very active in recent years in limiting federal habeas relief and shortening the death row appeals process.³⁸⁷

V. CONCLUSION

As the longest serving member of his Court and as the Chief Justice for almost two decades, Chief Justice Rehnquist had a considerable amount of influence on the direction of the law and the outcome of Supreme Court decisions. Rehnquist provided a strong and consistent voice in support of conservative ideologies and successfully marshaled Court majorities for these policy preferences in numerous instances. While his influence in federalism cases is perhaps the most notable, over time the standards from many of Rehnquist's earlier dissenting opinions in criminal justice cases became the law.

Early in his career, Rehnquist made arguments suggesting that the Supreme Court limit *Miranda* and exclude evidence only when police misconduct is clear. Years later many Court decisions came to reflect this view. The Supreme Court majority also implemented the Chief Justice's preference for limiting access to the federal courts. In general, while Rehnquist was unable to have his preferences prevail in many of the Court's recent, most controversial decisions, his steady influence over criminal justice cases is evident. The Court's death penalty opinions regarding the execution of juvenile offenders and the mentally retarded stand out not only because they are liberal rulings on a conservative court but also because they are among only a handful of high profile criminal justice cases in which Rehnquist was in the minority.

This brief review of Chief Justice Rehnquist's decision—making tendencies also reveals an aspect of the Chief's voting patterns during this latest natural court: he was unlikely to provide a fifth liberal vote to the four person liberal bloc. While Justices Scalia, Thomas, O'Connor, and Kennedy all provided swing votes in criminal justice cases litigated before the Court since 1995, Justice Rehnquist did not do so a single time. We find this pattern to be a very intriguing one, but we leave it to others to speculate as to the specific reasons for this pattern. Here, we merely note that the liberal bloc was wholly unsuccessful in obtaining

Texts, and Altered Aspirations, 82 GEO. L.J. 2589 (1998).

387. Other related cases include *Calderon v. Ashmus*, 523 U.S. 740 (1998), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), *Felker v. Turpin*, 518 U.S. 651 (1996), and *Gilmore v. Taylor*, 508 U.S. 333 (1993).

any support from Rehnquist in the closest of cases. While many believe Justices Scalia and Thomas to be the Court's more staunch conservatives, Rehnquist was the justice least likely to rule in a liberal manner in criminal justice cases decided since 1995.

Throughout his career in the issue areas addressed in this analysis, Rehnquist may have been the quintessential "law and order" justice. This seems to be true at least in terms of how Republican presidential candidates first defined the "law and order" theme.³⁸⁸ Others followed Goldwater and Nixon in calling for policies that would more aggressively pursue and punish criminals, and for judges that would reduce the perceived constraints on police. President Ronald Reagan blamed increasing crime rates on "years of liberal leniency" in the judiciary and elsewhere.³⁸⁹ The message continued, for instance, as 1996 GOP presidential nominee Robert Dole frequently bemoaned that President William Clinton's judicial appointees, in Dole's opinion, were too eager to use technicalities to overturn the convictions of murderers.³⁹⁰ As some scholars have observed, such critiques of the judiciary became "rather standard election-year political fare. Ever since Richard M. Nixon's 1968 presidential campaign, Republican candidates have attacked Democrats for appointing judges who are 'soft on criminals.'"³⁹¹

In this sense, the "law and order" label seems to befit Justice Rehnquist. As examined here, Rehnquist repeatedly voted to weaken or rescind restrictions on police, to limit the scope of double jeopardy protections and to reduce the accessibility of the federal courts to prisoners seeking habeas corpus review and relief.

The "get-tough" posture was only one of at least two main themes emerging in conservative presidential campaigns after the early 1960s. The rhetoric of Goldwater, Nixon, and others was characterized perhaps even more by the call for a "devolution" of federalism that would reduce federal and enhance state powers.³⁹² Here, too, Chief Justice Rehnquist's voting record conforms rather well to these early, electoral messages. His commitment to shift criminal justice and other powers

388. See, e.g., SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22.

389. David Hoffman, *Reagan Stumps with Tough Line on Crime, Drunk Driving*, WASHINGTON POST, June 21, 1984, at 7.

390. Michael Tackett, *Dole Fires a Salvo at Clinton, Judges: GOP Hopeful Blames Jurists for Crime*, CHICAGO TRIBUNE, Apr. 20, 1996, at 1.

391. STEPHAN WAYNE, G. CALVIN MACKENZIE, DAVID M. O'BRIEN, & RICHARD L. COLE, *THE POLITICS OF AMERICAN GOVERNMENT* 566 (2nd ed.1997).

392. See SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 45-55 (noting the attention that Goldwater and Nixon gave to these issue areas).

away from the federal government and to broaden the powers enjoyed by state governments is unmistakable.³⁹³ Perhaps Rehnquist writing the decision in *Dickerson*,³⁹⁴ that not only upheld the *Miranda* warnings but also labeled *Miranda* as a constitutional decision, is not as surprising as it might have seemed at the time. Rehnquist's motives easily could be viewed to include the desire to reaffirm judicial supremacy in interpreting constitutional requirements in light of a Congress that was perceived to be encroaching on the Court's authority. Similarly, while Rehnquist's decision might have allowed for guns near schools³⁹⁵ or while his vote could have made it easier for felons to purchase guns,³⁹⁶ his actions were hardly intended to primarily favor criminal defendants. Rather, the broader thrust of these and similar opinions as in *Morrison*³⁹⁷ was to rein in perceived intrusions by Congress into a states' area of influence.

We found Chief Justice Rehnquist held consistently conservative viewpoints throughout his career in the issue areas addressed here and was relatively successful in implementing his policy preferences. Instances in which Rehnquist appears, at first blush, to have deviated from this course often fit the larger pattern upon closer scrutiny. Thus, his vote in *Dickerson* is consistent with his views on congressional power within the realm of criminal justice. Whether one agrees with the Chief Justice's preferences or not, this analysis suggests that over the course of his career he saw many of his preferences enacted into law and reshaped judicial doctrine in several important areas of criminal justice. He leaves behind a potent legacy of conservative criminal justice decisions that in many ways marries the values of crime control and states' rights and that almost assuredly will leave a long-lasting imprint on the Court.

It is difficult to predict, at this point, whether Rehnquist's legacy will be embodied directly by an heir on the Court. While the jurisprudence of his successor, John Roberts,³⁹⁸ has been likened to that

393. See, e.g., EPSTEIN & WALKER, *supra* note 3, at 319-447 (2004); SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989).

394. *Dickerson v. United States* 530 U.S. 428, 438 (2000).

395. *United States v. Lopez*, 514 U.S. 549 (1995).

396. *Printz v. United States*, 521 U.S. 898 (1997).

397. *United States v. Morrison*, 539 U.S. 654 (2000).

398. Roberts was approved by the Senate Judiciary Committee on September 22, 2005 by a vote of 13-5. See *Roberts Nomination Advances*, CNN NEWS (Sept. 22, 2005), available at <http://www.cnn.com>. He was then confirmed by the full Senate on Sept. 29, 2005 by a vote of 78-22. See *Roberts Confirmed as Chief Justice*, CNN NEWS (Sept. 29, 2005), available at <http://www.cnn.com>.

of Rehnquist,³⁹⁹ - Roberts clerked for Rehnquist⁴⁰⁰ - and although in his confirmation hearings Roberts suggested that observers should not be surprised if they find his interpretations to be similar to those Rehnquist championed,⁴⁰¹ Roberts also insisted before Senate that he was “his own man.”⁴⁰² To date, Roberts’s views on federalism⁴⁰³ appear to approximate the opinions by Rehnquist favoring states’ rights, though less has been discussed during the confirmation hearings and elsewhere of Roberts’s specific interpretations of restrictions on law enforcement and other criminal justice issues. While the consistency and quantity of Rehnquist’s opinions in criminal justice cases indicate that the influence of the late Chief Justice will continue to shape law in these areas, it is unclear for how long precisely this will be true. The arrival of newly-appointed Chief Justice Roberts and Associate Justice Samuel Alito at the retirement of Justice O’Connor, who frequently proved critical in determining whether Rehnquist would be in the Court’s majority or minority,⁴⁰⁴ require that the writing of Chief Justice William Hubbs Rehnquist’s legacy remains a work in progress.

399. For instance, Walter Dellinger, a former U.S. solicitor general, states, “It’s hard to imagine a choice more similar to Chief Justice Rehnquist than John Roberts.” Joan Biskupic, *Roberts, Rehnquist compel comparisons*, USA TODAY, Sept. 7, 2005, at 12A.

400. For a perspective outside the United States of the nomination, certain similarities between Rehnquist and Roberts, and Roberts’s credentials, see *Bush Names Roberts Top US Judge*, BBC NEWS (Sept. 5, 2005), available at <http://www.news.bbc.co.uk>.

401. *Senate Confirmation Hearings on the Nomination of John Roberts to the Position of Chief Justice, U.S. Supreme Court*, Washington Post (2005), available at <http://www.washingtonpost.com>. See also Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005.

402. Stolberg & Liptak, *supra* note 399.

403. Most have held that little is yet known of Roberts’s views on a range of issues. Jonathan Turley writes that “John Roberts may be the ultimate example of the judicial blind date.” Jonathan Turley, *Roberts: The Before and After*, USA TODAY (Aug. 30, 2005), available at <http://www.USATODAY.com>. That aside, Turley offers some brief insights into Roberts’s most likely leanings in the areas, among others, of federalism and criminal law and procedure. *Id.*

404. Several assessments of the Court have noted the often centrist and critical role played by Justice O’Connor, especially in sharply divided cases. Among the more recent scholarship, see SMITH, MCCALL & MCCLUSKEY 2005, *supra* note 22, at 12; Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275 (2005).