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WILLIAM H. REHNQUIST IN THE MIRROR OF JUSTICES

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I

Once again it was a great honor to be back here at the University of Tulsa College of Law for the Rehnquist Conference. Cumulatively perhaps it is the nicest honor of all to have been invited to be part of all three of these sequential Supreme Court symposia, beginning with the Warren Court conference in 1994 and then followed by the Burger Court conference in 1996.[1] The other participants in this symposia have perhaps said somewhat less than one might expect about both William H. Rehnquist as an individual jurist and about the eight Justices with whom he currently serves. Thus my remarks here are going to focus both on William H. Rehnquist's individual judicial voice since 1972 and on William Rehnquist's service as Chief Justice since 1986.

When I was invited, Professor Schwartz asked me to use this talk to speak evaluatively about how William H. Rehnquist compares to the previous Chief Justices of this century. The first thing for us to remember when considering William H. Rehnquist's now twenty-six years of service on the United States Supreme Court is that back in 1952–53 the Chief Justice spent eighteen months at the Court as a law clerk to Justice Robert H. Jackson.[2] As some of you who are familiar with the historical literature on the Court at that time will certainly remember, there are a number of case memos which the future Chief Justice prepared for Justice Jackson in 1952–53 which survive in Justice Jackson's papers.[3] The best known and most controversial of these memos, of course, is one which appears to articulate Rehnquist's opposition to the Court's forthcoming decision in *Brown v. Board of Education*.[4]

But there are also other forty-five-year-old memos in the Jackson papers which give voice to future Chief Justice Rehnquist's views on issues such as federalism and federal habeas corpus. When one looks at the judicial track record that Justice Rehnquist has accumulated over these last twenty-six years, those long-forgotten, early 1950s memos concerning relatively little-remembered cases such as *Brown v. Allen*[5] and *Stein v. New York*[6] give us the richest possible context for appreciating the extent to which William H. Rehnquist has had remarkably consistent legal

views not only since his own elevation to the Court in 1972 but indeed ever since he first served there as a clerk in 1952–53.

As many scholars full well appreciate, during his first fourteen years on the Burger Court, Justice Rehnquist oftentimes served as a conservative "Lone Ranger" voice of dissent,[7] particularly in cases involving federal habeas.[8] Nowadays it often seems to be forgotten that even at the time of his promotion to Chief Justice in 1986, Justice Rehnquist remained a fairly controversial jurisprudential presence. In 1971 the Senate's confirmation vote on Justice Rehnquist was sixty-eight votes in the affirmative and twenty-six in the negative,[9] but all the more strikingly, when the vote for confirmation as Chief Justice took place in the summer of 1986, only sixty-five Senators voted yes and thirty-three voted no—thirty-three votes cast against someone who already had served on the Court for more than fourteen years.[10]

That extent of political opposition to William Rehnquist's presence on the Supreme Court stemmed in significant part from the controversy over whether the Jackson memorandum concerning *Brown v. Board of Education* did indeed indicate that Rehnquist had at that time opposed ending racially segregated public schooling. However, that significant degree of senatorial apprehension about Rehnquist stood in remarkably stark contrast to the strongly unanimous respect and support which Justice Rehnquist enjoyed—both in 1986 and in the years that have followed—within the Court's own conference and indeed throughout the entire Court building.[11] Many students of the Court who are well familiar with the literature on the Burger Court already appreciate just how much personal dislike, and how many doubts about his professional competence, other justices had come to have regarding Warren Burger.[12] Thus when William H. Rehnquist was nominated by President Reagan to succeed Burger as Chief Justice, there was tremendous enthusiasm for Rehnquist's selection among his colleagues and perhaps most notably or most surprisingly on the part of Justices William J. Brennan and Thurgood Marshall in particular.[13]

II

Especially in 1986 and perhaps also to an unfortunate extent even today, many casual observers of the Court fail to appreciate not only the personal popularity but also the doctrinal and jurisprudential success that William Rehnquist has managed to attain during his years as a Justice. Two cases which date from the Burger Court era illuminate the way in which Rehnquist as Chief Justice has enjoyed judicial success to a degree that was all but unimaginable in the years preceding his promotion. Both *Fry v. United States*,[14] a commerce power case, and *Coleman v. Balkcom*,[15] involving a federal habeas question, featured solo dissents by then-Justice Rehnquist[16] which exemplified the so-called Lone Ranger period of Rehnquist's jurisprudence. *Balkcom* will be discussed again later in this chapter, but it is important to appreciate that once Justice Rehnquist became Chief Justice in 1986, the "Lone Ranger" moniker became a thing of the past and three significant new patterns began to emerge.

The first pattern, as commentators discussed quite extensively in the late 1980s, was the surprising degree to which Chief Justice Rehnquist appeared to be moder-

ating the tone and demeanor of his written opinions.[17] An early and highly visible example involved some of the First Amendment questions that Burt Neuborne impressively addresses in chapter 2 (this volume). The second important pattern, and one which should not be overshadowed or forgotten in light of the first, concerned the intensity with which Chief Justice Rehnquist continued to pursue the devolutionary federalism agenda to which he had remained consistently loyal ever since 1952 and 1953.[18] Most notable of all was the sustained energy with which Chief Justice Rehnquist continued to pursue his long-standing commitment to an almost revolutionary degree of change or reform concerning capital habeas cases.[19] Third, and this has perhaps received too little comment or attention in the presentations included in this volume, personnel changes on the Court from 1986 up through the present have brought about a dramatic transformation of the Rehnquist Court's internal world, and I want to take some time to underscore this point in particular.

When Rehnquist became Chief Justice, Warren Burger's seat was of course filled by Antonin Scalia, and as a number of people have noted the past few days, there was a widespread expectation that Scalia would become an extremely influential presence on the Rehnquist Court, perhaps succeeding to the "Lone Ranger" role that the new Chief Justice himself had previously played. But far more important is the fact that the Court through 1990–91, and in one instance even until 1994, continued to have Thurgood Marshall, William Brennan, and Harry Blackmun among its members.

I think it is incumbent upon us to draw some very clear distinctions between what on the one hand might be called the early Rehnquist Court, which one might say stretched from 1986 through June 1992, and the late or mature Rehnquist Court, which has existed from 1992—and even more so since 1994—to the present. Too often, people put forward characterizations of what in reality was the "early" Rehnquist Court, emphasizing the intensity of conflict, division, and fragmentation that was highly visible in the late 1980s and early 1990s, as also applying to the "later" Rehnquist Court of the last half dozen or so terms.[20] This is misleadingly simplistic and in some instances almost wholly erroneous, and students of the Court need to correct this misimpression whenever it innocently or not so innocently is put forward.

III

In his last "on the record interview" more than thirteen years ago, in 1985, then-Justice Rehnquist expressed ambivalence about whether a Court should ever have a sense of mission or missions.[21] He also at that time volunteered very straightforwardly, and quite accurately, that the Burger Court was a Court without any sense of mission.[22] However, William Rehnquist as Chief Justice has certainly had one, and perhaps arguably two, explicit missions, notwithstanding the degree to which he has forsaken his previous "Lone Ranger" role. The first of those concerns is that devolutionary federalism agenda that reaches all the way back to Rehnquist's clerkship with Justice Jackson and particularly to *Brown v. Allen* and *Stein v. New York*.[23] In a number of instances, particularly in 1989–90, Rehnquist's pursuit of his federal habeas corpus reform agenda was a pursuit that he undertook with such intensity

that he manifested some "bull in the China shop" qualities during his unsuccessful effort to win the endorsement of the Judicial Conference of the United States for his position.[24]

Rehnquist's commitment to federal habeas reform was not only the most pronounced element of his early agenda as Chief Justice but also eventually turned out to be far and away the greatest and most important victory that he has achieved as Chief Justice. That victory was initially signaled and affirmed in the 1991 case of *McClesky v. Zant*,[25] and it was then further ratified by Congress and by President Clinton with the passage and signing of the Anti-Terrorism and Effective Death Penalty Act of 1996.[26] What the *McClesky* victory in 1991 and the 1996 passage of the death penalty statute both ratified was not only precisely the position that then-Justice Rehnquist had advocated in his solo opinion in *Coleman v. Balkcom* in 1981 but also precisely the position that the young William Rehnquist had advocated in his 1953 clerkship memos to Justice Jackson.

Similarly, but in a much more widely known context, the other primary portion of the Chief Justice's very successful sense of mission with regard to federalism can be seen in decisions such as *United States v. Lopez*,[27] striking down the Gun Free School Zones Act as an unconstitutional abuse of Congress's commerce power, *Printz v. United States*,[28] voiding a major provision of the congressionally approved Brady Handgun Violence Prevention Act, and, perhaps most important of all, the Eleventh Amendment case of *Seminole Tribe of Florida v. Florida*.[29] All in all, the degree to which Chief Justice Rehnquist has brought about a dramatic revolution in the Supreme Court's basic jurisprudence concerning federalism has to be acknowledged as far and away his most important substantive legacy.

If Chief Justice Rehnquist and at least a narrow majority of the Rehnquist Court have more than just one single sense of mission, then their second consciously held mission involves what was articulated so impressively by Judge Wilkinson of the Fourth Circuit in chapter 4 (this volume) where he addresses the topic of the Rehnquist Court and race. Perhaps less on account of the Chief Justice than because of Justice Kennedy and to some significant extent Justice O'Connor, the Rehnquist Court has without a doubt extensively altered American law concerning race in the direction of what can accurately be termed a nondiscrimination principle. *Adarand Constructors v. Pen*[30] is, of course, the leading and best known case in this area, and there is no need for me to repeat or recapitulate what can be found in chapter 4. However, there can be no denying that from the vantage point of the Chief Justice himself, the changes that have taken place since *City of Richmond v. J.A. Croson Co.*[31] in 1989 and *Metro Broadcasting v. Federal Communications Commission* [32] would be among the most important victorious elements of the Rehnquist Court's legacy.

IV

Several years ago, Prof. Erwin Chemerinsky published an article in the *Creighton Law Review* titled "Is the Rehnquist Court Really That Conservative?"[33] Now with a bit of poetic excess and with the purpose of being intentionally provocative, one can argue quite credibly that notwithstanding how dramatically transformative the

Rehnquist Court's federalism revolution has been with regard both to criminal cases and more broadly with regard to state sovereignty or autonomy, on a number of notable occasions the Rehnquist Court has actually rendered decisions that are actually quite surprisingly liberal.

If, for example, one looks at what are arguably the five best known and most widely remembered decisions of the Rehnquist Court, there is no escaping the fact that the same moniker that scholars have already applied to the Burger Court—"the counter-revolution that wasn't"[34]—can likewise also be applied to the Rehnquist Court as well. First was *Texas v. Johnson*,[35] the flag-burning case which was decided, as Burt Neuborne emphasizes in chapter 2, five to four in favor of free expression. Second was *Lee v. Weisman*,[36] in 1992, also a five to four decision concerning religious observance in a public school context. Third, of course, was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[37] also in 1992, involving abortion and the Court's dramatic reaffirmation of the constitutional core of *Roe v. Wade*.[38] Fourth, and perhaps most surprising of all, in 1996 was *Romer v. Evans*,[39] the gay rights ruling which struck down a homophobic Colorado state constitutional amendment.

In all four of those historic cases Chief Justice Rehnquist himself ended up on the losing side. In the fifth, *United States v. Virginia*,[40] the Virginia Military Institute gender discrimination case, Chief Justice Rehnquist concurred with the majority in what many people might rightly view as the most striking example of the sometimes notably moderate votes he on occasion has been casting ever since his two surprising 1988 votes in the cases of *Hustler Magazine v. Falwell*[41] and *Pennell v. City of San Jose*.[42]

In light of the "time lag" that often seems to leave at least some people still looking at the Rehnquist Court through a lens that dates from 1989 or 1990, it is important both for the sake of argument and for the sake of understanding to stress the degree to which this Court has handed down important decisions that are neither reactionary nor even conservative.

If, for example, one looks in a First Amendment context, both *O'Hare Truck Service v. City of Northlake*[43] and *Reno v. American Civil Liberties Union*[44] are additional recent decisions of a nonconservative and arguably "progressive" nature that readily come to mind. Similarly, one can likewise note the quite striking degree of consensus the Court manifested during October Term 1997 with regard to a quartet of sexual harassment cases.[45] Thus everyone should be on notice that the Rehnquist Court in a very significant number of important instances has not been any sort of counter-revolutionary or conservatively activist court.

There are several explanations or partial explanations for why this aspect of the Rehnquist Court's record usually receives significantly less attention than it merits. Some of these are probably quite well appreciated by most serious observers of the Court, and ergo require only brief notation. First, as at least one or two other contributors to this volume have noted, one can quite respectably argue that the present-day Supreme Court ought to be spoken of as the Kennedy Court rather than the Rehnquist Court. This of course echoes the contentions that we similarly should speak of the Powell Court rather than the Burger Court and the Brennan Court rather than Warren Court.

As a result, Justices Scalia and Thomas and, to some extent, the Chief Justice have been fundamentally constrained in what they have been able to pursue because of the balance wheel roll that Justice Kennedy—and to a somewhat lesser degree Justice O'Connor—has consistently played. When one combines the relative moderation of Justices Kennedy and O'Connor with the even more constraining influence of Justice David H. Souter, the impact of those three Justices has gone a long way toward explaining why the Rehnquist Court since 1991 has been measurably more moderate than the earlier Rehnquist Court of 1986 through 1991.

Interestingly enough, this Court in its last few terms has manifested dramatically less fragmentation and division than the Rehnquist Court of a decade ago. Over the past five terms a cumulative average of fully 45 percent of the cases that have reached full plenary decision have come down unanimously. Most important, and perhaps most tellingly of all, the Justices' actual voting patterns in nonunanimous cases has also, in a significant number of instances, contradicted the simple "pigeon-holing" of factional alliances that many of us have employed in recent years when we have repeatedly spoken of a tripartite four–two–three division among the justices featuring Stevens, Souter, Ginsburg, and Breyer on one wing, Justices Kennedy and O'Connor as the duo in the middle, and the conservative trio of Scalia, Thomas, and Rehnquist on the other wing. But when one looks carefully at the voting patterns for the last few terms, particularly this most recent term, that categorization scheme proves inaccurate more often than we might assume, for what we have instead witnessed, which is of tremendous importance, is that the Chief Justice is actually now more often aligned with Justices Kennedy and O'Connor in the middle and relatively less attached to Justices Scalia and Thomas than our inherited wisdom leads us to presume.

During the 1997–98 term, when the Court issued plenary decisions in ninety-one cases, Justice Kennedy was in dissent only five times. Tied for second with regard to the fewest dissents were Justice O'Connor and the Chief Justice, each with ten. Hence what we are seeing here is not simply the control of divided cases by Justice O'Connor and even more often Justice Kennedy but also, especially during the three most recent terms, even if we fail to recognize it, is a dramatic decline in the intensity or heartfeltness of division within the Court. There are two crucial elements to this. First, the evidence suggests that the Chief Justice is no longer anywhere near as invested in some issues as was he was eight or ten years ago.

Look for example at such recent Rehnquist opinions as his dissent in *Lindh v. Murphy*,[46] concerning retroactivity with regard to noncapital habeas corpus, and the majority opinions that he wrote this past May in *Stewart v. Martinez-Villareal*[47] involving capital habeas and in *Bousley v. United States*[48] involving collateral relief. These are not "sexy" or well-known decisions that have received front-page news coverage, but these opinions may well reflect both how Chief Justice Rehnquist rightly believes that he now has won almost all of his federal habeas corpus reform agenda *and*, indirectly, how he also is no longer as intensely invested in some of the more dramatic questions that come before the Court, such as abortion, gay rights, or flag burning, as he was in the years before he was named Chief Justice in 1986.

A second reason this decline in the Court's intensity of division has occurred is

that in all honesty Justice Scalia has become increasingly irrelevant to debate and discussion within the Court. All of us who regularly read the Court's opinions may remember many of the rhetorical hand grenades that Justice Scalia has lobbed at his colleagues. His name calling with regard to Justice O'Connor in *Webster v. Reproductive Health Services*[49] in 1989 may be the most infamous or the most widely remembered, but the aspersions that Justice Scalia cast upon the Chief Justice in his highly splenetic dissent in the Virginia Military Institute case, *United States v. Virginia*,[50] are probably even more remarkable. Many students of the Court can also no doubt recall some phrases from Justice Scalia's equally energized dissent in *Romer v. Evans*,[51] the Colorado gay rights case, as well as some of his comments in his 1994 dissent in the well-known establishment case of *Kiryas Joel*.[52]

All in all, there is now good reason to believe that even Justice Scalia himself realizes that he has lost such significant influence within the Court—and lost it in a way that he is not going to be able to recompense or repair—that he is thus relatively freer to give vent to angry emotions in a way that he otherwise would not if he were still truly seeking to persuade his colleagues of the attractiveness of his interpretive stances.[53]

V

In conclusion, let me underscore several points about how we should understand the evolution of this Court over the past twelve years. First, if we look at William H. Rehnquist within a longer term comparative context encompassing the last seventy or eighty years, much to many people's surprise perhaps the most inescapable historical conclusion of all is that Chief Justice Rehnquist is someone who in the longer run of history will be evaluated as having been a very good Chief Justice of the United States. In part, that very positive evaluation is a result of how very negative an evaluation his immediate predecessor, Warren Burger, is inevitably and appropriately going to receive.

Now one can argue quite seriously about whether Earl Warren's historical reputation is perhaps somewhat better than is truly merited, but second only to Warren, Rehnquist will probably go down in history as one of the two best Chief Justices of this century, or at least run neck and neck for second and third with Charles Evans Hughes. Warren Burger, Fred M. Vinson, Harlan Fiske Stone, and even William Howard Taft inescapably rank well below Rehnquist, and there is no doubt that both within the Supreme Court itself as well as within the parameters of the larger role of Chief Justice of the United States that William Rehnquist has been extremely successful Chief Justice. It again bears repeating that today's Court, just as has also been true of the Court ever since 1986, is a generally friendly and pleasant place where even those justices who disagree most often with Rehnquist on the merits of hard-fought cases nonetheless—such as Thurgood Marshall and William J. Brennan, Jr., before them—speak most positively about the Chief Justice.

Many observers now believe that the Rehnquist Court probably has just three more years to run and that this present Chief Justiceship will most likely come to an end in the summer of 2001, especially if come that time the United States is in the first year of the second Bush administration. There are, of course, reasons to doubt

that William H. Rehnquist will necessarily retire at the first politically appropriate opportunity, even though he will be seventy-seven years old by the end of October Term 2000. But this is a Court which, barring unexpected medical events, is no doubt going to remain intact until June 2001.

However, today's Rehnquist Court is a Court which almost unanimously, with perhaps only the exception of Justices Scalia and Thomas, wants to have and believes that it should have a smaller role in American life than the Court traditionally has played throughout almost all of this century. This is perhaps the single most important reason why during the past five or so terms we have been seen less division and more unanimity within this Court. It is important to appreciate that not only is this relatively happy and relatively unified Court, especially in comparison to other Courts of the last seventy years, but it also is a Court that is actively implementing its belief that the federal judiciary is not supposed to have as large presence in American life as has been the case for the past half century. This belief is shared even by some if not all of the Rehnquist Court's relative liberals—and certainly by Justices Souter and Ginsburg—so once again it is incumbent upon us to realize and acknowledge that there are far fewer truly fundamental disagreements inside the Rehnquist Court than the day-to-day news coverage of newly decided cases leads almost all of us to believe. Irrespective of whether the Rehnquist Court comes to an end in 2001 or only in some subsequent year, its most important historical legacy—just like the long-term individual judicial legacy of William H. Rehnquist—will be remembered as the championing of a measurably smaller role for the Supreme Court itself in life in the United States.

Notes

1. See Garrow, "What the Warren Court Has Meant to America," in *The Warren Court: A Retrospective* 390–97 (Bernard Schwartz ed., 1996); Garrow, "Liberty and Sexuality," in *The Burger Court: Counter-Revolution or Confirmation?* 83–92 (Bernard Schwartz, ed., 1998).

2. See Rehnquist, *The Supreme Court: How It Was, How It Is* 17–98 (1987).

3. See Brenner, "The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of His Justice's Mind?," 76 *Judicature* 77–81 (Aug.–Sept. 1992).

4. 347 U.S. 483 (1954).

5. 344 U.S. 443 (1953).

6. 346 U.S. 156 (1953).

7. On the origin and subsequent repeated usage of the "Lone Ranger" nickname, see Jenkins, "The Partisan: A Talk With Justice Rehnquist," N.Y. *Times* (Magazine), March 3, 1985, pp, 28, 34; Savage, "14 Years on Court; Rehnquist's Conservatism Remains Firm," *L.A. Times*, June 18, 1986, at 1; Saperstein and Lardner, Jr., "Rehnquist: Nixon's Long Shot for a 'Law and Order' Court; On the Bench, a Confirmed Lone Ranger," *Wash. Post*, July 7, 1986, at. A1; Elsasser, "Order in the Court: Once the Words of Dissent, Chief Justice's Views Now Predominate," *Chi. Trib.*, July 9, 1989, at. P1.

8. For early evaluations of Rehnquist's judicial service, see Shapiro, "Mr. Justice Rehnquist: A Preliminary View," 90 *Har. L. Rev.* 393–57 (Dec. 1976); Denvir, "Justice Rehnquist and Constitutional Interpretation," 34 *Hastings L.J.* 1011–53 (May–July 1983); Riggs and Proffitt, "The Judicial Philosophy of Justice Rehnquist," 16 *Akron L. Rev.* 555–604 (Spring 1983); and especially Powell, "The Compleat Jeffersonian: Justice Rehnquist and Federalism," 91 *Yale L. J.* 1317–70 (June 1982).

9. See N. Y. *Times*, Dec. 11, 1971, at 1.

10. See Greenhouse, "Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice," *N.Y. Times*, Sept. 18, 1986, at. A1.

11. See Garrow, "The Rehnquist Years," *N.Y. Times* (Magazine), Oct. 6, 1996, at 65, 67.

12. See Woodward and Armstrong, *The Brethren: Inside the Supreme Court* (1979); Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 1–39 (1990).

13. See Garrow, "The Rehnquist Years," supra note 11, at 67.

14. 421 U.S. 542 (1975).

15. 451 U.S. 949 (1981).

16. See Fry, 421 U.S. at 549, Coleman, 451 U.S. at 956.

17. See Taylor Jr., "A Pair of Rehnquist Opinions Set Legal Experts Buzzing," *N.Y. Times*, Feb. 28, 1988, at. IV-1; Kamen, "Rehnquist, Moving to Center, Gains More Control of Court," *Wash. Post*, July 3, 1988, at. A4.

18. See especially Powell, supra note 8.

19. See Garrow, "The Rehnquist Years," supra note 11.

20. See, e.g., Lazarus, *Closed Chambers* 8, 262 (1998). See also Garrow, "Dissenting Opinion," N.Y. *Times* (Book Review), April 19, 1998, at. 26; Garrow, " 'The Lowest Form of Animal Life?': Supreme Court Clerks and Supreme Court History," 84 *Cornell L. Rev.* 855, 876 (March 1999).

21. See Jenkins, supra note 7, at 35.

22. Id.

23. See Greenhouse, "Of Rehnquist's Mission, And Patience to Match," *N.Y. Times*, May 1, 1991, at. A18. See also Savage, "Rehnquist Wins Confession Battle," *L.A. Times*, March 30, 1991, at A2.

24. See Greenhouse, "Judicial Panel Urges Limit on Appeals by Death Row Inmates," *N.Y. Times*, Sept. 22, 1989, at. B20; Greenhouse, "Judges Challenge Rehnquist's Role on Death Penalty," *N.Y. Times*, Oct. 6, 1989, at. A1; Greenhouse, "Rehnquist Renews Request to Senate," *N.Y. Times*, Oct. 13,1989, at. A21; Greenhouse, "Vote is a Rebuff for Chief Justice," *N.Y. Times*, March 15, 1990, at A16; Greenhouse, "Rehnquist Urges Curb on Appeals of Death Penalty," *N. Y. Times*, May 16, 1990, at. A1.

25. 499 U.S. 467 (1991).

26. See Mitchell, "Clinton Signs Measure on Terrorism and Death Penalty Appeals," *N.Y. Times*, April 25, 1996, at A18.

27. 514 U.S. 549 (1995).

28. 521 U.S. 898 (1997).

29. 517 U.S. 44 (1996).

30. 515 U.S. 200 (1995).

31. 488 U.S. 469 (1989).

32. 497 U.S. 547 (1990).

33. See Chemerinsky, "Is the Rehnquist Court Really That Conservative? An Analysis of the 1991–92 Term," 26 *Creighton L. Rev.* 987–1003 (June 1993).

34. See *The Burger Court: The Counter-Revolution That Wasn't* (Vincent Blasi ed. 1983).

35. 491 U.S. 397 (1989).

36. 505 U.S. 577 (1992).

37. 505 U.S. 833 (1992).

38. 410 U.S. 113 (1973).

39. 517 U.S. 620 (1996).

40. 518 U.S. 515 (1996).

41. 485 U.S. 46 (1988).

42. 485 U.S. 1 (1988).

43. 518 U.S. 712 (1996).

44. 521 U.S. 844 (1997).

45. See Oncale v. Sundowner Offshore Serv., 523 U.S. 75 (1998); Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274 (1998); Burlington Indust. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

46. 521 U.S. 320 (1997).

47. 523 U.S. 637 (1998).

48. 523 U.S. 614 (1998).

49. 492 U.S. 490 (1989).

50. 518 U.S. 515 (1996).

51. 517 U.S. 620 (1996).

52. Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

53. See Garrow, "One Angry Man—Antonin's Scalia's Decade," *N.Y. Times* (Magazine), Oct. 6, 1996, at 68–69.