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William Hubbs Rehnquist

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WILLIAM HUBBS REHNQUIST

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We will be debating the legacy of Chief Justice William Hubbs Rehnquist as long as there is a Supreme Court. At the heart of that debate is a puzzle: How could a man so staunchly committed to judicial restraint preside over a Court that became during his tenure on the bench a more powerful actor in American political life than it was when he was appointed?

Chief Justice Rehnquist's commitment to judicial restraint manifested itself in many ways. With respect to social issues like abortion, the death penalty, and the right to die, he consistently took the position that these issues should be decided by elected officials, not by unelected Article III courts.[1] With respect to questions about access to courts, whether it be citizen groups seeking to change the status quo or prisoners seeking to challenge their convictions, he consistently sought to limit the frequency of federal court interventions.[2] Even his signature issue—federalism—can be seen as an effort to enhance the autonomy of states relative to the federal government, and hence to limit the occasions for federal courts to order states to conform to federal mandates.[3]

Yet at the end of William Rehnquist's nineteen-year tenure as Chief Justice, the Court enjoys a degree of influence in American society unequaled at any time in its history. The Rehnquist Court has invalidated more federal statutes than any previous Supreme Court.[4] The sphere of judicial oversight over controversial social policy issues has continued to expand unabated. In addition to being in charge of policy on abortion, the death penalty, and religious expression in public places, the Court is now also in charge of policy on gay rights, affirmative action, pornography on the internet, the regulation of advertising, the use of political patronage in local government, the structure of state primary elections[5]—the list goes on and on.

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1. See, e.g., Atkins v. Virginia, 536 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting); Washington v. Glucksberg, 521 U.S. 702 (1997); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (plurality opinion).

2. See, e.g., Kowalski v. Tesmer, 543 U.S. 125, 134 (2004) (denying third-party standing to attorneys on behalf of clients); Felker v. Turpin, 518 U.S. 651, 654 (1996) (upholding restrictions on Court's ability to review denials of habeas corpus).

3. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting).

4. See Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 163–66 tbl.2-15 (3d ed. 2003).

5. See, e.g., Ashcroft v. ACLU, 542 U.S. 656, 659–61 (2004) (internet pornography); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (gay rights); Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (affirmative action); Cal. Democratic Party v. Jones, 530 U.S. 567, 569 (2000) (state primary elections); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S.

Perhaps most tellingly, as the Court has expanded its reach, there has been no pushback from other political institutions.[6] When a presidential election resulted in a stalemate in 2000, the Court stepped in and resolved it;[7] no political body challenged its authority to do so. When the President's war on terror adopted controversial measures for confining suspects, the Court stepped in and set limits;[8] no one questioned its authority to do so. Even on those increasingly rare occasions when the Court has declined to intervene—as when it recently ruled that it is up to local communities to decide whether to condemn property for economic development[9]—the response has often been widespread agitation for more direction from the Court.

Hence the puzzle: How could such an advocate of judicial restraint preside over the continued expansion of federal judicial power?

The answer no doubt involves cultural and political factors only dimly perceived at the moment. William Rehnquist's years on the Court have witnessed a growth in judicial power relative to elected legislatures throughout the democratic world. Countries as far-flung as Canada, Israel, New Zealand, and South Africa have embraced judicial review for the first time.[10] Even Great Britain, the original bastion of judicial restraint, has begun experimenting with certain forms of judicial review of legislation.[11] So William Rehnquist may have been struggling against an historical sea change in the nature of democratic government simply beyond his control.

The answer also undoubtedly involves the other personnel on the Court. Looking back, we can see that the Chief Justice achieved significant successes in areas of relatively low public visibility—for example, questions about access to federal courts or federalism—often leading the Court to narrow 5-4 victories in these areas. But on higher profile issues, whether it be abortion, religious expression in public places, or gay rights, he was in the end unable to persuade a majority to join him in restricting the judicial role. Justices O'Connor, Kennedy, and Souter in

712, 714–15 (1996) (local patronage); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (advertising regulation).

6. See Neal Devins, Congress as Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade, 51 Duke L.J. 435, 436 (2001).

7. See Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).

8. See Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that enemy combatants have due process right to challenge their enemy combatant status).

9. See Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

10. See Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 1–2 (2004).

11. See Human Rights Act, 1998, c. 42 (Eng.), available at http://www.hmso.gov.uk/acts/acts1998/19980042.htm#aofs (on file with the *Columbia Law Review*) (incorporating judicial review powers of European Convention on Human Rights).

particular proved unwilling to go along with retrenchments from rulings like *Roe v. Wade* that enjoy intense support among elites.[12]

Another aspect of the answer must be that the Chief Justice was not completely consistent in his commitment to judicial restraint. Notable here are questions about property rights and affirmative action. The Chief Justice supported enhanced judicial protection of property rights and judicial restrictions on the use of affirmative action by government actors.[13] Neither of these positions is restrained, however, either in the sense that it enjoys clear support in the original understanding of the Constitution, or in the sense that it entails deference to elected branches of government. It is interesting to speculate whether the Chief Justice would have commanded greater support from his colleagues for judicial restraint on issues like abortion if he had been willing to show more self-restraint himself on these other issues.

But there is a final answer to the puzzle that warrants special emphasis as we honor this man. William Rehnquist was a masterful Chief Justice who enhanced the collective performance of the institution he headed in many ways large and small. By all accounts, the Court's conferences were punctual and conducted with civility. Little time was wasted on debate that might give rise to aggravation. He was unfailingly fair in the assignment of opinions. He never sought to manipulate his own position in order to block the assignment of an opinion by someone else.

As a consequence of his sure-handed leadership, the Court became a more effective institution. The number of cases the Court decided on the merits each year dramatically declined, giving Justices more time to resolve their differences in the cases they did decide.[14] The percentage of cases resulting in dismissals as improvidently granted fell, as did the percentage of cases resulting in plurality opinions that did not command a majority of the Court.[15] Visible rancor among the Justices was virtually nil. Job satisfaction—as measured by the nearly unprecedented span of twelve years with no retirements—was clearly high, which in turn produced a Court with a very high level of collective proficiency.

Yet the very effectiveness of the Court increased the appeal of turning to the Court for answers to social and political problems, in comparison to the relative ineffectiveness of the legislative and executive branches during the same time period. At least the Rehnquist Court could be counted on to produce clear answers in a relatively short period

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12. See Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 St. Louis U. L.J. 569, 573 (2003).

13. See, e.g., San Remo Hotel, L.P. v. City of S.F., 125 S. Ct. 2491, 2510 (2005) (Rehnquist, C.J., concurring) (suggesting need to reconsider rules requiring exhaustion of state remedies before bringing federal takings claim); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995) (joining 5-4 majority applying strict scrutiny to affirmative action program).

14. See Richard A. Posner, The Supreme Court 2004 Term, Foreword: A Political Court, 119 Harv. L. Rev. 31, 67 fig.2 (2005).

15. Merrill, supra note 12, at 590 fig.5.

of time. Need to know who was elected President in 2000 before inauguration day? Who knows whether the House and Senate were up to the task? At least the Court was ready to supply a quick and clear answer. The same logic applies to innumerable other vexing questions.

In short, Chief Justice Rehnquist failed to produce a more restrained Court in part because he was so skilled at leading the Court. His leadership made the Court effective in a way that enhanced its power relative to the other branches of government. The effectiveness of the Court increased the clamor for it to decide more and more issues. It also reinforced the tendency of the other branches to defer to its decisions. Power often flows to those who are competent to wield it. When it does, the temptation to exercise power is usually too great to resist.

So the paradox of William Rehnquist can be resolved, in significant part, by recognizing the outsized nature of his abilities. He was astute enough to perceive that it is not healthy for American democracy to hand over its most vexing social and political problems to judges. But he was also an astute leader of the nation's judiciary, and his leadership increased the payoffs of going to the courts for answers to those problems, rather than relying on the messy processes of elections and legislative compromise. Surely we do not wish his successors will prove less able in guiding the Supreme Court in the years ahead. But we should hope that they, more consistently than the colleagues with whom he served, share William Rehnquist's abiding appreciation of the dangers of an all-powerful judiciary.