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THE CONSTITUTIONAL PHILOSOPHY OF JUSTICE WILLIAM H. REHNQUIST

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INTRODUCTION

William H. Rehnquist is popularly portrayed as the most conservative justice now sitting on the Supreme Court.¹ If this is true, and if President Reagan has the opportunity to fill several Supreme Court vacancies with appointees of similar views, it is possible that Justice Rehnquist's philosophy may predominate in the coming years. By examining Justice Rehnquist's judicial opinions dealing with individual rights and federalism,² this article will address the extent to which ideological conservatism does influence his constitutional philosophy. It will also discuss the more general issues of what a conservative approach to constitutional adjudication entails and whether such an approach is appropriate for the Supreme Court.³

I. JUDICIAL PHILOSOPHIES: AN ANALYTICAL OVERVIEW

In order to critique Justice Rehnquist's constitutional philoso-

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1. Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC 14, MARCH 10, 1982; Barbash, *Rehnquist's and GOP Platform's Voices in Close Harmony*, The Washington Post, Sept. 2, 1980, at A-2, col. 1.

2. The analysis of individual rights is limited to Justice Rehnquist's opinions relating to free speech, free press, and to the due process and equal protection clauses. Notably excluded are his opinions dealing with the rights of criminal defendants, an area in which Justice Rehnquist has been most prolific. Those cases have been excluded both in the interest of making the article manageable and because I think the cases I cover are sufficient to make my point.

3. This article includes Justice Rehnquist's opinions through the 1981-82 term, his eleventh on the Court. For an earlier examination of Justice Rehnquist's constitutional philosophy, written after his fifth term on the Court, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). I share many of Professor Shapiro's conclusions and hope to elaborate on some of them. In addition, I will add insights of my own based on the further development of Justice Rehnquist's philosophy since that time.

phy and to contrast it with others, it is necessary to develop an analytical framework.⁴ In that regard, in addition to Justice Rehnquist's judicial opinions, we are fortunate also to have an address he delivered several years ago in which he discussed his conception of the proper role of the courts.⁵

A. *Modes of Judicial Review: Deference versus Activism*⁶

One way of analyzing judges relates to modes of judicial review. A deferential judge is one who believes the court's responsibility is to defer to the judgments of other branches of government. To the extent that a judge is prepared to override the judgments of other governmental branches, he or she is an activist. No judge, of course, is perfectly deferential or activist. All defer in some cases and override in others, so the issue of deference versus activism is one of degree. Judges do differ, however, in their propensities to be deferential or activist, and one can learn much about a judge's philosophy by assessing his or her willingness to intervene.

Deference flows from a judge's view of the role of courts in relation to other branches of government. At one extreme, a judge could take the perspective that a court should decide anew the wisdom or correctness of every governmental action coming before it. This extreme, however, would be inconsistent with the way in which issues are ordinarily resolved in a democratic society. As Justice Rehnquist has said:

Representative government is predicated upon the idea that one who feels deeply upon a question as a matter of conscience will seek out others of like view or will attempt to persuade others who do not initially share that view. When adherents to the belief become sufficiently numerous, he will have the necessary armaments required in a democratic society to press his views upon the elected representatives of the people, and to have them embodied into positive law.

4. The analysis contained in this section draws heavily on the work of other legal scholars. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). This author hopes to make some small contribution to the further development of their ideas.

5. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1967).

6. For the origin of the concepts developed in this subsection, see B. ACKERMAN, *supra* note 4, at 31-39, and R. DWORKIN, *supra* note 4, at 131-50.

Should a person fail to persuade the legislature, or should he feel that a legislative victory would be insufficient because of its potential for future reversal, he may seek to run the more difficult gauntlet of amending the Constitution to embody the view that he espouses

I know of no other method compatible with political theory basic to democratic society by which one's own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society.⁷

A deferential approach depends, then, on a commitment to democracy—whether it be the judge's personal commitment or merely his or her view of a judge's constitutionally prescribed role—and consequently on the resolution of issues through a responsive political process. Justice Rehnquist's commitment to democracy seems based on the premise that there are no "correct" or "best" answers to most (if not all) social issues, from which he concludes that the people should decide:

There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.⁸

But why should the people decide when there are no clear-cut right answers? One reason might be the belief that democratic responsiveness promotes a more stable society. Or one might believe democratic responsiveness to be the most procedurally fair decision-making method—procedurally fair in that if everyone's interests cannot be served, the most ethically satisfying approach may be to try to achieve the greatest good for the greatest number, democratic responsiveness being the best test of whether people feel their interests are served; or procedurally fair in that when the need for collective action is debated, democratic responsiveness may be the best means of assuring people the greatest possible control over their own destinies.

7. Rehnquist, *supra* note 5, at 705. Even one who believes the democratic process is more a matter of competition among professional politicians for support of their views than of direct expression of the will of the people would disfavor having courts decide all matters anew. Determining which of the competing views is to hold sway depends every bit as much on a responsive political process as does determining what is the will of the people.

8. *Id.* at 704.

In contrast, a judge could go to the opposite extreme and totally defer to all decisions made by other branches of government. That few, if any, judges take that approach illustrates a degree of activism in virtually all judges. Various factors might impel a judge to activism. First, the Constitution limits the powers of government—either by failing to grant certain powers or by specifically prohibiting their exercise. When the popular branches of government overstep these limits, judges become, in Justice Rehnquist's words, "the keepers of the covenant"⁹ and "must prefer the Constitution to the government acts."¹⁰ The highest responsibility of a deferential judge is deference to the Constitution.

Second, the basic premise underlying deference is a commitment to democratic responsiveness. Therefore, to the extent that a judge has doubts about the viability of responsive government, that judge is more likely to be an activist. Doubts might arise in at least two areas. First, a judge might feel that a decision which purports to be the product of a responsive political process, in fact, is not. Segments of the population might, for example, be denied the right to vote. Or a judge might believe that some voters have greater influence than others by virtue of their wealth or education, so that a facially open decision-making process does not accurately reflect people's preferences. Second, a judge might doubt the justice or wisdom of particular decisions flowing from a responsive political process. Such a view posits that there are "correct" or "best" answers to social issues and that in some cases a court is better able to identify those answers than are the political branches, or at least that by deciding some cases contrary to popular will a court makes a positive contribution toward the search for answers.

The cases in which a judge feels the judiciary is more competent or has a contribution to make are likely to raise questions whose correct resolutions are thought to require a detached intellectual reasoning process. Since even the most activist judge will rely on the Constitution as the source of law for his or her decisions, this activist rationale is similar to Justice Rehnquist's "keepers of the covenant" approach. But since it depends more on an affirmative belief in the ability of judges to reach correct results or in the efficacy of judicial participation in the debate, it is likely to

9. *Id.* at 698.

10. *Id.* at 696.

be more interventionist, particularly when the meaning of the Constitution is unclear.

B. *Methods of Construing the Constitution: Strict Construction versus Evolutionism*¹¹

A second way of analyzing judges relates to methods of construing the Constitution. All judges, even the most activist, rely on the Constitution to support rulings upholding or overriding other branches of government, if only to rationalize decisions based on personal moral preferences. Yet judges differ not only as to the meaning of constitutional provisions but also as to the interpretive approaches they deem proper.

Under strict constructionism, a judge's responsibility is to construe the Constitution in accordance with the express intent of its framers. In the extreme this approach would apply constitutional provisions only to those fact situations and would reach only those results which the framers had in mind. Justice Rehnquist clearly places himself toward this end of the spectrum when he says: "A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution."¹² Likewise, he criticizes an attempt to base a lawsuit attacking prison conditions on the Constitution as advocating "the substitution of some other set of values for those which may be derived from the language and intent of the framers."¹³

Evolutionism, on the other hand, permits change in the scope of constitutional provisions as contemporary thinking and social conditions shed new light on constitutionally expressed norms. Under this approach what was constitutional in one era may become unconstitutional in the next, and vice versa. Under strict constructionism, however, the meaning of the Constitution is fixed—at least when the intent of the framers is discoverable.¹⁴ Ev-

11. For the origin of the concepts of strict constructionism and evolutionism, which Professor Ely labels interpretivism and noninterpretivism respectively, see J. ELY, *supra* note 4, at 1-43.

12. Rehnquist, *supra* note 5, at 696-97.

13. *Id.* at 695.

14. To a strict constructionist, for instance, capital punishment either is or is not constitutional once and for all time depending on the intent of the framers. An evolutionist, on the other hand, might depart from the framers' original intent if persuaded that contemporary social factors and morality warrant a different interpretation.

olutionism thus departs, in varying degrees, from the specific intent of the framers; but it is not fair to say that evolutionist decisions are in no way "tied to the language of the Constitution."¹⁵ Like the Bible, the language of the Constitution is sufficiently varied and its underlying principles sufficiently abstract to support almost any decision a judge might want to reach. This is not to say that evolutionism is necessarily the better approach, but merely that its adherents can claim it to be derived from the Constitution. As with the deference-activism continuum, strict constructionism and evolutionism are really opposite ends of the same spectrum. Virtually all judges fall somewhere in between, though differing in their propensities to follow a strict constructionist or evolutionist approach.¹⁶

In order to assess the theoretical underpinnings and the extent of Justice Rehnquist's commitment to strict constructionism, it is helpful to examine some of the practical and philosophical problems associated with the two interpretive approaches. With respect to strict constructionism, an initial question is where to look for the framers' intent. The obvious starting point is the Constitution itself. But many constitutional provisions are drafted in such general terms that it is not possible to garner from the text alone the specific practices intended to be covered.¹⁷ To apply such provisions a judge must look behind them to relevant historical evidence. But what evidence is relevant to identifying the framers' intent? Statements by the drafters of specific provisions or by participants in the debates are significant, but these invariably reflect differences of opinion as to the intended meaning and coverage

15. Rehnquist, *supra* note 5, at 698.

16. Professor Ely distinguishes interpretivism from noninterpretivism in that the former confines itself to enforcing norms that are "stated or clearly implicit" or are "fairly discoverable" in the Constitution, whereas the latter countenances the enforcement of norms "that cannot be discovered within the four corners of the document." J. ELY, *supra* note 4, at 1-2. Whether a norm is or is not "fairly discoverable" in the document is, I would assert, almost always debatable. Professor Ely's formulation thus draws a greater distinction between the two methods of construing the Constitution than in fact exists. Both in my view are grounded in the Constitution.

17. I have in mind such general terms as due process, equal protection, and cruel and unusual. The more specific provisions of the Constitution present similar difficulties—for example, the first amendment. One strict constructionist approach to the command that Congress make "no law" abridging free speech is to interpret the provision literally and strike down all such laws. But there is much (if not conclusive) historical evidence that the first amendment's coverage was not intended to be so absolutist as it sounds. See O. ROGGE, *THE FIRST AND THE FIFTH 12-34* (1971); L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

and are far from conclusive evidence of the understanding of the many nonparticipants who voted to adopt and ratify.

Nonetheless a strict constructionist may believe, in many instances, that the background evidence is sufficient to identify a consensus among the framers as to the intended meaning and coverage of constitutional provisions, and that it is reasonable to infer that those who did not speak out were in agreement. However, once the necessity of making inferences as to the framers' intent from background evidence is acknowledged, strict constructionism tends toward a moderately evolutionary approach. Suppose, as will frequently be the case, that it is difficult to determine with any certainty from the text or background evidence how the framers would have applied a constitutional provision to a particular fact situation—either because the text and background evidence do not speak in clear-cut terms or because the situation was not anticipated by the framers. According to Justice Rehnquist:

Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases the framers might not have foreseen.¹⁸

But how is a strict constructionist to go about making constitutional language applicable to unforeseen cases without assessing the implications of constitutionally expressed norms in light of contemporary thinking and social conditions—in short without engaging in an evolutionary approach?¹⁹ The point is not that there are not differences between strict constructionism and evolutionism, but that the differences are of degree. Admitting the difficulty

18. Rehnquist, *supra* note 5, at 694.

19. Assume, for example, that at the time of the eighth amendment's adoption capital punishment was not practiced, and that the background evidence is inconclusive as to how the framers felt about it. In order to compare capital punishment to practices which the framers did have in mind, would not a strict constructionist judging the constitutionality of capital punishment today have to rely on contemporary social science data concerning its deterrent impact and on contemporary moral views about cruelty? If so, an evolutionist might contend, there is little difference between this and my reliance on contemporary thinking when judging capital punishment cruel and unusual, though it was not so perceived by the framers.

in many instances of ascertaining the framers' specific intent and the inevitability of judges being influenced by contemporary thought, a strict constructionist might assert that a judge's responsibility in interpreting the Constitution is to stick as closely as possible to the concerns which seem to have prompted those who participated in the adoption-ratification process. An evolutionist, on the other hand, will be more free wheeling in exploring the modern day implications of some of the more nebulous values implicit in the Constitution.²⁰ Justice Rehnquist has stated his disapproval of such wide-ranging evolutionism as follows: "Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."²¹

A major task facing evolutionism, then, is to explain how as a practical matter decisions are reached, if not by resort to the specific intent of the framers. One argument might be that the living law approach which evolutionism entails is similar to common law adjudication, where courts have traditionally been responsible for resolving disputes in accordance with contemporary society's principles of justice; and that despite its uncertainties evolutionism requires no more herculean an effort than a strict constructionist must face in discovering the framers' intent.²² To the charge that evolutionism is undemocratic, an evolutionist might respond that democracy is at least in part a means to the end of achieving a just society, that the limitations on democracy set forth in the Constitution are proof that the framers understood this, and that the disinterested detachment which is possible to some degree for a judge is an important and necessary counterweight to the self-interest

20. The abortion decisions are the best recent example of how the two approaches differ. See *Roe v. Wade*, 410 U.S. 113 (1973). In an era of increasing sexual liberation and sensitivity to the treatment of women as second-class citizens, an evolutionist judge might well find support for protecting the right to choose abortion in the privacy and liberty interests underlying several amendments. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). A strict constructionist, while perhaps acknowledging the privacy and liberty interests, would view that as an unwarranted extension of constitutional provisions designed to deal with entirely different problems.

21. Rehnquist, *supra* note 5, at 698. Thus at the heart of strict constructionism is the same philosophical commitment to democratic responsiveness which underlies the deferential theory of judicial review. A strict constructionist may well be activist at times in overriding other branches of government, but in so doing will claim deference to the will of the people on a higher level, that is, the intent of the framers as set forth in the Constitution.

22. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); R. DWORIN, *supra* note 4, at 81-130.

which prevails in the political process.²³

How then is a judge to choose between strict constructionism and evolutionism or between a deferential and activist theory of judicial review? Though all approaches may lay claim to being based upon the Constitution, the text and historical evidence do not clearly vindicate any.²⁴ Furthermore, it cannot be conclusively demonstrated that our society is or would be better off by following one or another approach. Ultimately, therefore, a judge's approach to judicial review or constitutional construction—including Justice Rehnquist's asserted commitment to deferential strict constructionism—must be based on a belief in the efficacy of one's approach as an article of faith.

C. *Ideological Underpinnings: Conservatism versus Liberalism*

A final way of analyzing judges relates to the political ideologies which underlie their decisions. Realistically, judges will often be influenced by their political perspectives in deciding cases. Many, after all, obtain their appointments to the bench as a result of their political connections. Moreover, the temptation to use one's judicial power to foster strongly held beliefs must be great. We should thus expect to learn much about a judge's philosophy by examining the often unstated ideological underpinnings of his or her decisions.

Conservatism and liberalism are the labels usually applied to the dominant political ideologies in our society. Today's conservatism can be described as antifederal government, pro states' rights (if not against government intervention generally) on issues of social welfare and racial discrimination, as disfavoring governmental interference with the private market, but as supportive of the use

23. Thus a philosophical commitment to evolutionism derives from considerations similar to those which underlie judicial activism—namely a belief that the courts have a role to play in keeping the political process responsive to the public, and that because of its detachment the judiciary can make a positive contribution to the search for solutions to complex social problems.

24. Even though the Constitution does not expressly authorize judicial review of the acts of other branches of government for conformity with the Constitution, some commentators think the framers provided for it inferentially in article III and the supremacy clause. R. BERGER, *GOVERNMENT BY JUDICIARY* 351-62 (1977). Others think judicial review supportable only by historical precedent or institutional arguments as to the appropriate role of the judiciary. A. BICKEL, *supra* note 4, at 1-33. Either way, even so basic a constitutional function as judicial review can be viewed as more or less an evolutionist doctrine. See also L. POLLACK, *THE CONSTITUTION AND THE SUPREME COURT—A DOCUMENTARY HISTORY* 75-84, 95, 153-58, 169-70 (1966).

of government to foster such traditional values as the family, religion and law-and-order. Liberalism, on the other hand, supports the federal welfare state and direct federal efforts to combat racism, favors governmental regulation of the private market, but disfavors governmental involvement in issues of sexual and religious preference and focuses more on rehabilitation and the social causes of crime than on the punitive aspects. Again, the question of where an individual is located on the spectrum is one of degree, most people and most judges expressing more or less conservatism or liberalism depending on the issue.

What is troublesome about a judge being influenced by his or her ideological perspective is that it may lead to a departure from the principle of neutrality which is at the heart of the rationale for a judicial branch of government.²⁵ The concept of neutrality, however, demands a closer look.²⁶

On one level neutrality means that courts should decide cases in accordance with principles uniformly applied to all like cases, irrespective of the fact that expediency may dictate departure from principled decision-making in a given instance. While the matter is not free from doubt, it is commonly thought that courts, being somewhat insulated from the political process, are better able and more likely to adhere to principled decision-making than are legislative or executive bodies, which respond more quickly to the exigencies of the moment. Rarely, of course, are two cases alike in all respects, and thus factual differences can form a basis for distinguishing one case from another. This is consistent with neutral application so long as the factual differences implicate competing principles which are thought to outweigh the dispositive principle in the earlier case.²⁷ Hard cases entail judgments and legitimate

25. While it is customarily thought improper for a judge to foster a particular ideology, one can find support in the Constitution for the conservative or liberal position in most cases.

26. For the origin of the concept of neutrality see Bork, *supra* note 4; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

27. The principle of free speech, for example, is supposed to protect both popular and unpopular points of view, and in fact there are many instances when courts have protected speech which the political branches of government have sought to suppress for one reason or another. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*Pentagon Papers Case*); *Cohen v. California*, 403 U.S. 15 (1971) (jacket bearing words "Fuck the Draft"). However, some speech might be deemed so potentially harmful to the social order or so close to admittedly proscribable action—such as advocacy of violent overthrow of the government—as to lead a judge to feel the community should be allowed to regulate it in the name of self-preservation. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D.

disagreements about which of the competing principles should be applied to the facts. It is at this point that a judge's ideology is likely to influence his or her decision.

The principle of neutral application, however, does not mean that the principles to be applied must themselves be neutral in content—not favoring one philosophical point of view over another. This would require principles to be valueless, whereas the essence of a principle is that it sets forth a value which (at least in the case of a constitutional principle) is to take priority over contrary points of view.²⁸ There is a second level, though, on which neutrality does address the content of the principles to be applied. Admitting that principles are by nature value-laden, they must be framed in terms broad enough to encompass all cases which cannot be distinguished on principle. Again, however, there is frequently room for legitimate disagreement on this score and thus for a judge's ideology to influence the outcome.²⁹

On a third level the principle of neutrality addresses the sources of principles. Even though a principle is generally framed and uniformly applied, neutrality is violated when a judge bases a decision solely on his or her personal values. Yet there is again room for disagreement as to where a judge should look to find constitutional principles. To a strict constructionist neutrality means identifying the specific intent of the framers from the text and background history of the Constitution. To an evolutionist it means examining the implications of constitutional norms in light of natural law or contemporary morality. Thus, as long as consistently followed, both strict constructionism and evolutionism are

Wis. 1979), *mandamus denied sub nom. Morland v. Sprecher*, 443 U.S. 709 (1979) (injunction issued to prevent publication of article explaining how to make a hydrogen bomb).

28. The principle of free speech is hardly valueless when it prohibits those who do not favor free speech from infringing it.

29. For instance, a plausible principle emanating from the equal protection clause is that states may not discriminate against black people. Since orientals are substantially similarly situated to blacks, not to draw the principle to include them would contravene the principle of neutrality. On the other hand, while I have argued elsewhere that the poor are similarly situated to blacks and that the Supreme Court should therefore define equal protection in terms broad enough to protect them, Kleven, *The Supreme Court, Race and the Class Struggle*, 9 *HOFSTRA L. REV.* 795 (1981), there are distinguishable factors which could lead a judge to feel otherwise. The status of being poor is not, as is race, an inherent characteristic; and can be seen as resulting from lack of incentive or merit or from private causes, rather than from governmental discrimination. If that view is valid, there is a principled basis for distinguishing the cases. To the extent, however, that poverty results from systemic factors which trap people in poverty generation after generation, a principled distinction is more difficult.

neutral approaches to constitutional construction as here defined. Were a judge's approach to vary in different cases, he or she could then be charged with deciding cases on ideological grounds. Indeed a judge's choice of an approach, even if consistently followed, is itself likely to be influenced by his or her ideology. With this discussion in mind, let us examine the ideological underpinnings of Justice Rehnquist's constitutional philosophy.

II. JUSTICE REHNQUIST'S JUDICIAL OPINIONS

As this section will show, Justice Rehnquist is unquestionably the most deferential judge currently serving on the Supreme Court and perhaps one of the most deferential of this century—at least when it comes to individual rights. Where the issue, however, is one of federalism, he becomes highly interventionist. Is that difference consistent with the principled commitment to democracy which in theory underlies the deferential approach, or is it the result of Justice Rehnquist's allegedly conservative political ideology?

Furthermore, Justice Rehnquist is not quite the strict constructionist he purports to be. While strict constructionists can legitimately disagree over the meaning of the Constitution, what is most striking about Justice Rehnquist's approach is that in cases involving individual rights he interprets the Constitution very narrowly, whereas in cases raising issues of federalism he frequently adopts a broad construction. Is that because the framers so intended, or is it again the result of Justice Rehnquist's allegedly conservative political ideology?

The thesis advanced here is that the unifying theme explaining Justice Rehnquist's decisions is less a commitment to democracy and the intent of the framers—though they may still be influential factors—than a desire to use his judicial position as a means of fostering states' rights. This leads to the question addressed in the next section of the appropriateness of that value as a ground for constitutional decision-making.

A. *Individual Rights*

Justice Rehnquist is at his most deferential and interprets the Constitution most narrowly when individual rights are at issue. This subsection will illustrate that point by examining his decisions in the areas of free speech and press, and of due process and

equal protection.

1. *Free Speech and Press.* Justice Rehnquist's decisions in free speech and press cases certainly qualify as deferential. Of forty-seven opinions he has authored in this area through the 1981-82 term, only eleven override decisions of other branches of government, and several of those opinions are noteworthy for the restrained nature of his interventionism.³⁰ In addition, his first amendment opinions are replete with deferential language. When considering the validity of a North Carolina prison regulation prohibiting inmates from soliciting other inmates to join a prisoners' labor union, and barring union meetings and bulk mailings to inmates concerning the union, Justice Rehnquist, writing for the majority, upheld the regulation based on "the wide-ranging deference to be accorded the decisions of prison administrators" and particularly of state prison officials.³¹ Similarly, in dissenting from a decision striking down a Massachusetts statute which prohibited business corporations from making contributions and expenditures intended to influence the outcome of most public referenda, Justice Rehnquist, after noting that thirty-one other states and Congress had enacted similar laws, wrote: "The judgment of such a broad consensus of governmental bodies expressed over a period of

30. Several of Justice Rehnquist's activist decisions are concurring opinions which emphasize the limits he would impose on the reach of the majority decisions. For example, in an otherwise unanimous decision striking down the prosecution of a newspaper which published the lawfully obtained name of a person charged as a juvenile offender, without the written approval of the juvenile court as required by a West Virginia statute, Justice Rehnquist indicated he would allow the prohibition provided the other details of the alleged offense were publishable and the prohibition applied to all communications media. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106-10 (1979) (Rehnquist, J., concurring). See also *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in the result, joined by Burger, C.J., and Stewart, J.) (overthrowing injunction enjoining petitioners from acting as delegates to Democratic National Convention where Convention seated them rather than delegates who were elected under an Illinois law found inconsistent with party guidelines); *Healy v. James*, 408 U.S. 169, 201-03 (1972) (Rehnquist, J., concurring in the result) (Central Connecticut State College may not deny recognition to local chapter of SDS based solely on affiliation with national SDS which advocated disruption and violence).

In several other cases Justice Rehnquist's activism imposes procedural safeguards which are often narrowly drawn. For instance, when teachers are fired based in part on protected speech and in part on other grounds, Justice Rehnquist, writing for a unanimous Court, would uphold the firings if school authorities prove, by a preponderance of the evidence, that they would have taken the same action had protected speech not been involved. *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 416-17 (1979); *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977). See also *McKinney v. Alabama*, 424 U.S. 669, 674 (1976) (procedural safeguards on determinations of obscenity). For Justice Rehnquist's other activist decisions, see *infra* notes 41 and 53 and accompanying text.

31. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977).

many decades is entitled to considerable deference from this Court."³² And as the sole dissenter from a judgment overturning a regulation of New York State's Public Service Commission barring electric utilities from advertising to promote the use of electricity, Justice Rehnquist argued that the regulation of commercial speech is due "virtually complete deference" by the Court.³³

The foregoing are just a few examples of the deferential tone which pervades Justice Rehnquist's first amendment jurisprudence. He is able to achieve his deferential approach by narrowly interpreting the scope of the amendment. In the first place, there are certain types of speech—obscenity, libel, commercial, corporate, symbolic or expressive conduct, the solicitation of money—which he views as unprotected or as deserving minimal court protection. Thus, dissenting from a decision overthrowing an Arizona State Bar rule prohibiting attorneys from advertising the prices of routine services, he said:

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.³⁴

And as the lone dissenter from a decision striking down a municipal ordinance prohibiting door-to-door or on-street solicitation by certain charitable organizations, Justice Rehnquist wrote:

32. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).

33. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 591 (1980) (Rehnquist, J., dissenting).

34. *Bates v. State Bar*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting in part). Regarding Justice Rehnquist's position against first amendment protection for commercial speech, see also *In re Primus*, 436 U.S. 412, 440-46 (1978) (Rehnquist, J., dissenting) (attorney's solicitation of business); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 477 (1978) (Rehnquist, J., concurring) (same); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 787-90 (1976) (Rehnquist, J., dissenting) (pharmacist's advertising price of prescription drugs); *Bigelow v. Virginia*, 421 U.S. 809, 829-36 (1975) (Rehnquist, J., dissenting, joined by White, J.) (newspaper ad regarding legal abortion services). Regarding Justice Rehnquist's related position against first amendment protection for corporate speech, whether commercial or political in content, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 583 (1980) (Rehnquist, J., dissenting) (advertising to promote the use of electricity); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (lobbying regarding referenda).

I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted [N]othing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door-to-door while at the same time insulating themselves against panhandlers, profiteers, and peddlers.³⁵

Secondly, there are certain contexts in which Justice Rehnquist views otherwise protected first amendment rights to be less extensive. In order to ensure the efficient administration of public undertakings "[t]he government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens."³⁶ Thus Justice Rehnquist would allow the expulsion of a college student for distributing on campus a publication containing profanity, although the first amendment might ordinarily prohibit the state from regulating such behavior.³⁷ And an Air Force doctor who publicly urged enlisted personnel to refuse to obey orders sending them to Vietnam may be punished because "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermis-

35. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 644 (1980) (Rehnquist, J., dissenting); see also *Hynes v. Mayor*, 425 U.S. 610, 630-36 (1976) (Rehnquist, J., dissenting) (would uphold requirement, found unconstitutionally vague by majority, of written notice to police prior to door-to-door solicitation for recognized charitable or political causes).

Regarding obscenity, Justice Rehnquist has written: "Although First Amendment protection is not limited to the 'exposition of ideas' on public issues—both because the line between the informing and the entertaining is elusive and because art, literature, and the like may contribute to important First Amendment interests of the individual in freedom of speech—it is well established that the government may regulate obscenity even though it does not present a clear and present danger." *Central Hudson*, 447 U.S. at 596 (Rehnquist, J., dissenting).

36. *Healy v. James*, 408 U.S. 169, 203 (1972) (Rehnquist, J., concurring).

37. *Papish v. Board of Curators*, 410 U.S. 667, 673 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., and Blackmun, J.). Similarly, Justice Rehnquist would allow local school boards virtually unfettered discretion to remove books which they find distasteful from school libraries, though the government could not prohibit their sale generally, because "elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas." *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 102 S.Ct. 2799, 2832 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.).

sible outside it."³⁸ Deference is also due to prison regulations which limit free speech rights because "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration."³⁹

Thirdly, Justice Rehnquist recognizes a variety of governmental objectives which justify overriding first amendment values: "The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests."⁴⁰ Thus, in the interest of protecting the primary election process against interparty raiding, Justice Rehnquist would uphold an Illinois statute barring from voting in a primary an individual who had voted in any other party's primary within the preceding twenty-three months, despite the fact that people who honestly wished to change their party affiliation would thereby be prevented from doing so.⁴¹ Similarly, in the interest of preserving the flag as a "symbol of nationhood and unity," he would uphold a conviction under a Washington improper use of the flag statute for displaying an American flag outside an apartment window upside down with a peace symbol taped thereon as a protest against the bombing of Cambodia and the shootings at Kent State. Despite the obvious

38. *Parker v. Levy*, 417 U.S. 733, 758 (1974).

39. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); see also *Bell v. Wolfish*, 441 U.S. 520 (1979) (same approach as to a facility housing pretrial detainees).

40. *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting).

41. *Kusper v. Pontikes*, 414 U.S. 51, 65 (1973) (Rehnquist, J., dissenting, joined by Blackmun, J.). Cf. *Clements v. Fashing*, 102 S.Ct. 2836, 2848 (1982), upholding, as "*de minimis* interference with appellees' interests in candidacy," Texas' constitutional provisions rendering ineligible for the Texas Legislature holders of other offices whose current terms do not expire until after the applicable legislative term begins, and automatically canceling the terms of certain officeholders who announce candidacy for other offices when their unexpired terms exceed one year. In other instances Justice Rehnquist has supported the protection of political speech and association, which obviously lie at the core of the first amendment, though frequently indicating his willingness to countenance properly framed restrictions. Cf. *Brown v. Hartlage*, 456 U.S. 45, 62 (1982) (Rehnquist, J., concurring) (state may not apply corrupt practices act to deprive of election victory a candidate who pledged to reduce his salary if elected); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1982) (Rehnquist, J., concurring) (city may not impose limitation on contributions to committees formed to support or oppose ballot measures submitted to popular vote); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 242 (1977) (Rehnquist, J., concurring) (compulsory union fees of nonmember public employees may not be used to support ideological causes opposed by required contributors and not germane to collective bargaining issues); *Buckley v. Valeo*, 424 U.S. 1, 290 (1976) (Rehnquist, J., concurring and dissenting) (would strike down provisions of Federal Election Campaign Act of 1971 imposing more stringent funding requirements on minor parties than on the two major parties).

communicative value of the flag, Justice Rehnquist characterized the statute as one which "simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications."⁴² In another context, he would allow a city to deny on grounds of obscenity the use of its municipal auditorium for showing the musical *Hair*, despite the absence of procedural safeguards in making that determination, because "if it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described as arbitrary or unreasonable."⁴³ Finally, he would uphold the application of an Illinois statute prohibiting the picketing of residences to protect a mayor who failed to support busing as a means of achieving school integration, since "[a]n absolute ban on picketing at residences . . . permissibly furthers the state interest in protecting residential privacy"⁴⁴ and since the state has a legitimate interest "in preventing residential picketing of their officials where the result might be influence through the harassment of the official's family."⁴⁵

42. *Spence v. Washington*, 418 U.S. 405, 423 (1974) (Rehnquist, J., dissenting, joined by Burger, C.J., and White, J.); see also *Smith v. Goguen*, 415 U.S. 566, 591 (1974) (Rehnquist, J., dissenting, joined by Burger, C.J.) (would uphold Massachusetts conviction for publicly treating flag contemptuously of individual who wore flag sewn to seat of trousers). See also *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting, joined by Blackmun, J.) (would uphold New Hampshire criminal statute prohibiting obscuring of words "Live Free or Die" on license plates); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (California constitutional provision interpreted by state courts to protect a reasonably exercised right to petition on privately owned shopping center does not infringe property owner's first amendment rights).

43. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 572 (1975) (Rehnquist, J., dissenting). Justice Rehnquist would also allow communities wide discretion to regulate billboards, despite their communicative potential and the difficulty some communicators might face in expressing their messages if that avenue were foreclosed, because "[i]n my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 290, 300 (1981) (Rehnquist, J., dissenting).

44. *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting, joined by Burger, C.J., and Blackmun, J.). See also *United States Postal Service v. Council of Greenburg Civic Ass'n*, 453 U.S. 114 (1981), in which Justice Rehnquist, writing for the majority, upheld a Postal Service regulation prohibiting the deposit of unstamped mailable matter in a Postal Service approved letter box in the interest of protecting the privacy of mail patrons and the efficiency of postal delivery.

45. 447 U.S. at 485. See also *American Radio Ass'n v. Mobile Steamship Ass'n, Inc.*, 419 U.S. 215 (1974), in which Justice Rehnquist, writing for the majority, upheld an Alabama court injunction against peaceful union picketing of a foreign flagship to protest substandard wages paid to foreign crewmen to the detriment of American workers in light of

Justice Rehnquist's approach in most of his first amendment opinions is tantamount to a rational basis test, which in the extreme upholds the acts of other branches of government when there is any conceivable basis for viewing them as rationally related to a legitimate governmental objective. This may be appropriate when the competing values are of comparable weight, in which case there is a strong argument for resolving social policy disagreements through bodies which are more politically responsive and may have greater expertise than courts. But more justification is needed when one of the competing values, like free speech and freedom of the press, is expressly protected by the Constitution.

One justification might be the intent of the framers, and Justice Rehnquist does occasionally invoke the framers' intent to bolster his decisions. As support for a university's right to expel a student for distributing on campus a publication containing profanity, he wrote:

The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment.⁴⁶

Similarly, in support of his position against according first amendment protection to commercial speech, he has written:

Nor do I think those who won our independence, while declining to exalt "order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.⁴⁷

Justice Rehnquist, however, has offered no historical evidence as to the framers' specific intent regarding those issues, and his

the "broad field in which a State, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Id.* at 230.

46. *Papish v. Board of Curators*, 410 U.S. 667, 677 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., and Blackmun, J.).

47. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 595 (1980) (Rehnquist, J., dissenting).

claim is therefore open to doubt. Even commentators who advocate a narrow reading of the first amendment recognize the difficulty of attempting to discover the specific intent of the framers.⁴⁸ Nonetheless, a more principled narrow interpretation might be derived from what is known about the framers' general intent, as well as from the logic of the first amendment. Despite its absolute language, there is evidence that not all speech or speech related activities were deemed worthy of first amendment protection at the time of its adoption.⁴⁹ This, coupled with the Constitution's overall objective of establishing a democratic form of government, might lead one to conclude that only political speech deserves protection;⁵⁰ and that even political speech may be regulated so long as the regulations protect other legitimate governmental interests, do not discriminate against particular points of view, and leave open ample opportunities for effective presentation of one's position.

Somewhat more broadly, Justice Rehnquist has concluded that the first amendment is intended only to protect "expressions of public importance or intellectual interest."⁵¹ In the sense that it purports to be a statement of the general principle of free speech and press based on an interpretation of the intent of the framers, Justice Rehnquist's formulation ostensibly qualifies as neutrally derived, neutrally defined, and strict constructionist. In its application, however, Justice Rehnquist is decidedly evolutionist. Despite his occasional attempts to invoke the framers' intent in support of particular decisions, what counts is not the framers' views but rather the views of contemporary society. The most clear-cut indication of this is the high degree of deference Justice Rehnquist accords the judgments of the more politically responsive branches of government regarding the scope of protected expression. Contemporary values will obviously form the basis of those judgments.

Contemporary values are also evident in Justice Rehnquist's handling of obscenity, where he favors the prevailing approach of allowing juries on the local level to determine what is obscene in accordance with "community standards."⁵² In what is among his

48. Bork, *supra* note 4, at 22.

49. See *supra* note 17.

50. Bork, *supra* note 4, at 20; A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

51. *Bates v. State Bar*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting in part).

52. *Hamling v. United States*, 418 U.S. 87 (1974); see also *Splawn v. California*, 431 U.S. 595 (1977).

most significant activist decisions regarding first amendment rights, Justice Rehnquist, writing for the majority, struck down the finding of a Georgia jury that the movie *Carnal Knowledge* was obscene, on the ground that it was not patently offensive, despite occasional nudity and a theme of adultery, since it did not depict sexual acts.⁵³ It was not, however, the values of the framers which guided this judicial oversight, but some vague national standard derived from contemporary values beyond which localities may not go in attacking obscenity.⁵⁴

Justice Rehnquist's evolutionist approach to the first amendment is further manifested by his willingness to apply it at all to the states. Despite the broadness of its language, the first amendment by its terms applies only to Congress; and it is unlikely that the framers of the fourteenth amendment intended to make the first amendment applicable to the states.⁵⁵ Its applicability is the result, rather, of judicial incorporation. Some support for incorporation can be derived from the structure of the Constitution as a whole. Democratic values were a basic premise underlying the Constitution when it was adopted, and the framers of the first amendment clearly felt free speech essential to democracy. Moreover, the subsequent adoption of the Civil War Amendments,⁵⁶ and of the seventeenth, nineteenth, twenty-fourth, and twenty-sixth amendments,⁵⁷ are indications of the intent of later generations to nationalize democratic, as well as other, federal values. Absent the specific intent of the framers, however, judicial incorporation of the first amendment into the fourteenth is a clearly evolutionist step.⁵⁸

53. *Jenkins v. Georgia*, 418 U.S. 153 (1974).

54. Contemporary values also form the basis of Justice Rehnquist's, as well as the other Court members', approach to libel. Accepting the fact that the framers may have intended to exclude libel from the first amendment's protection, the issues with which the Court has wrestled in drawing the line between protected and unprotected speech are distinctly evolutionistic attempts to balance contemporary free speech and privacy concerns. See *Wolston v. Readers Digest Ass'n. Inc.*, 443 U.S. 157 (1979), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), where Justice Rehnquist wrote the majority opinions. Justice Rehnquist's evolutionist approach to obscenity and libel contrasts with his apparently strict constructionist perspective on cruel and unusual punishment: "As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment, and made applicable to the States by the Fourteenth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights." *Woodson v. North Carolina*, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting) (would uphold mandatory death sentence for first-degree murder).

55. R. BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977).

56. U.S. CONST. amends. XIII, XIV, and XV.

57. U.S. CONST. amends. XVII, XIX, XXIV and XXVI.

58. Yet another example of Justice Rehnquist's departure from strict constructionism is

Despite his willingness to go along with incorporation, it is nevertheless evident that Justice Rehnquist desires to limit the first amendment's impact on the states. Most free speech and press cases challenge state action, and Justice Rehnquist's deferential and narrow reading of the amendment well serves a policy of limiting federal power over the states. This design is indicated by his contentions that the amendment has "limited application . . . to the States,"⁵⁹ and that "not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather it is only the general principle of free speech . . . that the latter incorporates."⁶⁰ As evidence that this perspective is based less on a strict constructionist interpretation of the Constitution than on his conservative ideology, consider his argument, as lone dissenter, against overturning on free speech and press grounds a state trial judge's closing of a criminal trial to the public at the request of the defendant and without objection from the prosecution:

[I]t is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury v. Madison* . . . requires that this Court through ever-broadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 states.⁶¹

2. *Due Process and Equal Protection.* Justice Rehnquist's handling of due process-equal protection issues is even more defer-

his majority opinion in *California v. LaRue*, 409 U.S. 109 (1972), which upheld a California Department of Alcoholic Beverage Control regulation prohibiting sexually oriented live entertainment and films in establishments licensed to sell drinks, though such activities might otherwise be protected by the first amendment, on the ground that the twenty-first amendment, which abolished prohibition, confers plenary power on the states to regulate all aspects of the sale of liquor. Justice Marshall's dissent argues quite persuasively, however, that neither its language nor legislative history supports Justice Rehnquist's reading, certainly not a truly strict constructionist reading, of the amendment. *Id.* at 134 (Marshall, J., dissenting).

59. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).

60. *Buckley v. Valeo*, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring and dissenting).

61. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 606 (1980) (Rehnquist, J., dissenting). See also *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 403 (1979) (Rehnquist, J., concurring) (trial judge may exclude public from pretrial hearing of motion to suppress evidence to prevent interference with right to fair trial): "[I]t is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings." *Id.* at 404.

ential,⁶² and his interpretation of these provisions is even narrower, than his posture toward the first amendment. This is consistent with the strict constructionism Justice Rehnquist espouses. The due process and equal protection clauses, though broadly framed, contain somewhat vague language, which makes it difficult to ascertain their intended scope. A strict constructionist is likely to pass up the opportunity to construe broadly such constitutional provisions and to defer to legislative judgments. Justice Rehnquist's approach, however, is better explained by the states' rights perspective which underlies his first amendment jurisprudence and which I shall attempt to show has also influenced his due process-equal protection analysis.

Justice Rehnquist's approach to due process-equal protection issues is best understood in contrast to the prevailing evolutionist approach.⁶³ Due process has two components: procedural and substantive. Procedural due process imposes procedural safeguards when the government deprives individuals of life, liberty, or property; while substantive due process reviews such actions on the merits. Substantive due process review was employed in the early part of this century to strike down governmental regulation of the economy. Later the Supreme Court discarded substantive due process and developed the rational basis test. Under this test, governmental action is upheld if shown to be rationally related to a legitimate governmental objective, the purpose being to give substantial deference to the judgments of the more politically responsive branches of government. Recently there has been a revival of a

62. In only five of the sixty-two opinions he wrote through the 1981-82 term did or would Justice Rehnquist override the acts of other branches of government, and all of those opinions are narrow in scope. See, e.g., *Mills v. Habluetzel*, 456 U.S. 91 (1982) (invalidating Texas statute imposing one year statute of limitations on proof of paternity suits on behalf of illegitimate children, though would uphold longer time period in interest of preventing stale or fraudulent claims); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (Rehnquist, J., concurring) (concurrs in invalidation of Massachusetts abortion statute dealing with minors, despite opposition to earlier abortion rulings, in order to prevent fragmented holding); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (invalidating Pennsylvania statute requiring private clubs holding liquor licenses to adhere to by-laws which discriminate based on race, though no state action in granting of license). Cf. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 190 (1979) (Rehnquist, J., concurring in the judgment) (invalidating Illinois law regulating access to ballot); *Weinberger v. Weisenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result) (invalidating Social Security Act's provision of deceased wife benefits only to children while providing deceased husband benefits both to children and surviving spouse).

63. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501-63, 737-811, 886-1136 (1978) for cases relating to the discussion in this and the next two paragraphs.

more intensive substantive due process review in connection with rights—notably the rights of liberty and privacy—which the Supreme Court labels as fundamental.

The prevailing equal protection approach is similar. When the political branches accord disparate treatment to groups which the Court identifies as suspect or quasi-suspect—such as blacks, aliens, illegitimate children, and women—or make distinctions among people with respect to fundamental rights—such as the rights to vote and travel—a more intensive review—sometimes strict, sometimes middle-level scrutiny—is undertaken. Otherwise, the rational basis test applies.

The effect of heightened scrutiny in suspect class and fundamental rights cases is to require the political branches to make a stronger justification for the disparate treatment or for preferring some other interest over a fundamental right. This approach is evolutionary because many of the suspect classes and fundamental rights which the Court has identified are not explicitly set forth in the Constitution, and are derived from an evolving philosophical and logical conception of a just democratic society. Moreover, since disagreements frequently result over which groups deserve suspect class treatment, what rights are fundamental, and whether the political branches have made sufficient showings to justify their actions, it tends to be unpredictable.

Justice Rehnquist eschews the suspect class-fundamental right approach to due process-equal protection in favor of a far more deferential, far narrower, and consequently more predictable reading of those clauses. First, he rejects the propriety of using the equal protection clause to protect suspect classes in contexts other than race. Dissenting from decisions striking down a New York law limiting permanent positions in competitive civil service to United States citizens and a Connecticut state court rule limiting the bar exam to citizens, he wrote:

The principal purpose of those who drafted and adopted the [Fourteenth] Amendment was to prohibit the States from invidiously discriminating by reason of race, . . . and, because of this plainly manifested intent, classifications based on race have rightly been held "suspect" under the Amendment. But there is no language used in the Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a "suspect" classification, that it was designed in any way to

protect "discrete and insular minorities" other than racial minorities, or that it would in any way justify the result reached by the Court in these two cases.⁶⁴

Secondly, Justice Rehnquist rejects the protection of fundamental rights as an appropriate basis for judicial intervention, except for rights expressly set forth in the Constitution. Thus, he criticized the Court's invalidation of Texas' and Georgia's anti-abortion legislation as creating "a right that was apparently completely unknown to the drafters of the [Fourteenth] Amendment."⁶⁵ And he characterized the majority opinion holding that "meaningful access to the courts" requires state prison authorities to provide either adequate law libraries or legal assistance to prisoners in preparing and filing legal papers as creating a right "virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."⁶⁶ Finally, in dissenting from a decision invalidating Louisiana's practice of denying death benefits under its workmen's compensation law to unacknowledged illegitimate children, he wrote:

Those who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action through legislation or otherwise. While the determination of the extent to which a right is protected may result in the drawing of fine lines, the fundamental sanction of the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of "fundamental personal rights." This body of doctrine can . . . only be described as a judicial superstructure, awkwardly grafted upon the Constitution itself.⁶⁷

Lastly, Justice Rehnquist criticizes the suspect class-fundamental right approach as an improper judicial function which is essentially unprincipled. It constitutes "an invitation for judicial exegesis over and above the commands of the Constitution, in

64. *Sugarman v. Dougall*, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting). This same dissent also applies to *In re Griffiths*, 413 U.S. 717, 729 (1973). 413 U.S. at 649.

65. *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

66. *Bounds v. Smith*, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting, joined by Burger, C.J.). Regarding prisoners' rights see also Justice Rehnquist's majority opinion in *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding double bunking of pretrial detainees in a federally operated, short-term custodial facility and upholding the prohibition of receipt of packages of food and personal items from the outside).

67. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 179 (1972) (Rehnquist, J., dissenting).

which values that cannot possibly have their source in that instrument are invoked to either validate or condemn the countless laws enacted by the various States."⁶⁸ It entails "the conscious weighing of competing factors that . . . is far more appropriate to a legislative judgment than to a judicial one."⁶⁹ And it results in "subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or whether the relationship to those objectives is 'substantial' enough."⁷⁰

In contrast to the heightened scrutiny of the suspect class-fundamental right approach, Justice Rehnquist's approach to almost all due process-equal protection cases is rational basis with a vengeance. State, and particularly legislative, action is to be accorded "extremely great"⁷¹ deference and "extraordinarily wide latitude;"⁷² and it is to be upheld if supported by "some conceivable set of facts"⁷³ or by "any rational justification"⁷⁴ or by "plausible reasons,"⁷⁵ even if only by *post hoc* rationalizations unarticulated at the time of the governmental action.⁷⁶ Thus, he would allow differential treatment of illegitimate children under social welfare programs and inheritance laws for the purposes of discouraging illicit relationships, encouraging traditional family units, and preventing spurious claims.⁷⁷ He would also allow aliens to be de-

68. *Id.* at 182.

69. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

70. *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

71. *Nyquist v. Mauclet*, 432 U.S. 1, 22 (1977) (Rehnquist, J., dissenting).

72. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

73. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 183 (1972) (Rehnquist, J., dissenting).

74. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973) (Rehnquist, J., dissenting).

75. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

76. "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Id.* Compare the positions of Justices Stevens and Brennan: "I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Id.* at 180-81 (Stevens, J., concurring in the judgment). "Over the past 10 years, this Court has frequently recognized that the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational basis test." *Id.* at 465 (Brennan, J., dissenting, joined by Marshall, J.).

77. *Califano v. Bales*, 443 U.S. 282 (1979) (upholding Social Security Act provision restricting mother's insurance benefits to widows and divorced wives of deceased wage earners and thereby excluding unwed mothers); *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (would uphold Illinois law allowing legitimate children to inherit from

nied government employment, private professional licensing, and higher education benefits in order to promote administrative efficiency and to preserve the goods of society for those who have fully integrated into the social system.⁷⁸ And he would allow a variety of gender based classifications as "realistically reflect[ing] the fact that the sexes are not similarly situated in certain circumstances."⁷⁹ Such reasoning allows little or no judicial inquiry into whether such practices are the product of invidious historical prejudice against illegitimate children and aliens, or are designed to perpetuate the paternalistic stereotyping of women. Furthermore, Justice Rehnquist would uphold governmental action which

both parents but illegitimates only from mother); *Jiminez v. Weinberger*, 417 U.S. 628, 638 (1974) (Rehnquist, J., dissenting) (would uphold Social Security Act's exclusion from survivor's benefits of nonlegitimated afterborn children); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (Rehnquist, J., dissenting) (would uphold New Jersey's withholding of benefits under the Assistance to Families of the Working Poor program from families with illegitimate children); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting) (would uphold Louisiana's denial of dependent death benefits under workmen's compensation law to unacknowledged illegitimate children where legitimate children have exhausted maximum benefits). *Contra Mills v. Habluetzel*, 102 S. Ct. 1549 (1982) (invalidating Texas statute imposing one year statute of limitation on paternity suits on behalf of illegitimate children).

78. *Toll v. Moreno*, 102 S. Ct. 2977, 2990 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J.) (would uphold University of Maryland's exclusion of certain nonimmigrant aliens legally domiciled in state from instate tuition status); *Elkins v. Moreno*, 435 U.S. 647, 669 (1978) (Rehnquist, J., dissenting, joined by Burger, C.J.) (same); *Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting, joined by Burger, C.J.) (would uphold New York law barring certain resident aliens from state financial assistance for higher education); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976) (Rehnquist, J., dissenting in part) (would uphold Puerto Rico law permitting only United States citizens to practice as civil engineers); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 117 (1976) (Rehnquist, J., dissenting, joined by Burger, C.J., and White and Blackmun, J.J.) (would uphold federal Civil Service Commission regulation barring noncitizens from employment under competitive civil service); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting) (would uphold New York law limiting permanent positions in competitive civil service to United States citizens).

79. *Michael M. v. Superior Court*, 450 U.S. 464, 469-70 (1981) (upholding California statutory rape law applicable only to males on ground that young girls need more protection); see also *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981) (upholding Military Selective Service Act provision authorizing President to require males only to register for draft on grounds of greater likelihood of shortage of male recruits and that Constitution does not require Congress to engage in "gestures of superficial equality"); *Califano v. Goldfarb*, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, J.J.) (would uphold Social Security Act's provision of survivor's benefits to husband only if wife provided at least half his support, while not so conditioning payments to wife, on ground of greater likelihood of dependency and therefore of need in case of surviving wife); *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (would uphold Oklahoma law prohibiting sale of nonintoxicating beer to males under twenty-one and females under eighteen because of higher incidence of arrest of males for traffic offenses).

impinges upon a variety of important individual interests—privacy,⁸⁰ access to the political process,⁸¹ mobility,⁸² employment,⁸³ education,⁸⁴ government largesse⁸⁵—with minimal ju-

80. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J., and White and O'Connor, J.J.) (would allow New York to terminate irrevocably parental rights for neglect of child by means of a "fair preponderance of the evidence" standard rather than a "clear and convincing evidence" standard); *Zablocki v. Redhail*, 434 U.S. 374, 407 (1978) (Rehnquist, J., dissenting) (would uphold Wisconsin statute prohibiting a resident, noncustodial parent under a court order to support from marrying without court approval, which approval may be granted only upon a showing that support obligations have been met and that the children are not then nor likely to become public charges); *Carey v. Population Services Int'l*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting) (would uphold New York law prohibiting distribution of contraceptives to anyone under sixteen and regulating sale and distribution to adults); *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (upholding regulation of Suffolk County, New York Police Department limiting length of male policemen's hair); *Paul v. Davis*, 424 U.S. 693, 713-14 (1976) (no constitutional violation for police to distribute flyer containing photos of active shoplifters including individual who had been arrested at time of distribution and whose charge was subsequently dropped); *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 77 (1974) (upholding recordkeeping disclosure requirements of federal Bank Secrecy Act of 1970); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 657 (1974) (Rehnquist, J., dissenting, joined by Burger, C.J.) (would uphold requirements of school boards of Cleveland, Ohio and Chesterfield County, Virginia of mandatory unpaid maternity leave for public school teachers as of beginning of fifth and fourth months, respectively); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting) (would uphold Texas' anti-abortion law.)

81. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) (upholding Alabama statute extending a city's jurisdiction concerning police and sanitary regulations, criminal jurisdiction, and business licensing to territories within three miles of city limits); *Hill v. Stone*, 421 U.S. 289, 302 (1975) (Rehnquist, J., dissenting, joined by Burger, C.J. and Stewart, J.) (would uphold Texas statute limiting the right to vote in city bond elections to persons who have rendered property for taxation); *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding California statute disenfranchising persons convicted of infamous crimes); *Saylor Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 734-35 (1973) (upholding California statute limiting election of district's board of directors to landowners with votes apportioned according to assessed values); *Mahan v. Howell*, 410 U.S. 315, 328 (1973) (upholding reapportionment of Virginia's House of Delegates in face of maximum variation of 16.4% from ideal of one person-one vote).

82. *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding Iowa divorce law requiring that petitioner be a state resident for one year prior to filing when spouse is a nonresident); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 277 (1973) (Rehnquist, J., dissenting) (would uphold Arizona's requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county expense); *Vlandis v. Kline*, 412 U.S. 441, 463 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., and Douglas, J.) (would uphold Connecticut's irrebutable presumption, regarding eligibility for in-state tuition, that nonresidency at time of application for admission to state university if then married, or if then single at any time during preceding year, continues during enrollment).

83. *Arnette v. Kennedy*, 416 U.S. 134, 163 (1974) (hearing not required prior to discharge of Office of Economic Opportunity employee for cause where other procedural safeguards—including notice, opportunity to respond, and post termination appeal and hearing—were afforded).

84. *Board of Curators v. Horowitz*, 435 U.S. 78, 85 (1978) (prior hearing not required

dicial oversight.⁸⁶

Justice Rehnquist's narrow, deferential approach is, however, less strict constructionist than it might appear to be. It is undoubtedly true, for instance, that the "principal purpose" of the framers of the fourteenth amendment was "to prohibit the States from invidiously discriminating by reason of race,"⁸⁷ but it was not necessarily their only purpose. The amendment is not expressly limited to racial discrimination,⁸⁸ and the general language of the equal protection clause arguably invites application to similar situations. Justice Rehnquist, however, argues against any wider application:

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that

for dismissal of medical student for academic reasons where less formal procedural safeguards were afforded); *Vlandis*, 412 U.S. at 463.

85. *Zobel v. Williams*, 102 S. Ct. 2309, 2323 (1982) (Rehnquist, J., dissenting) (would uphold Alaska's distribution of profits from Permanent Fund to adult residents, with longer term residents receiving higher dividends); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (upholding provision of 1974 Railroad Retirement Act eliminating dual railroad retirement-social security benefits for vested noncareer employees, while preserving dual benefits for career employees who also worked for nonrailroad employers); *Weinberger v. Salfi*, 422 U.S. 749, 752 (1975) (upholding provision of Social Security Act requiring nine-month duration of marital relationship to receive widow and stepchildren benefits); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 522 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.) (would uphold provision of Food Stamp Act denying aid to households which include member who has reached eighteen and is claimed as dependent for income tax purposes by nonmember taxpayer for tax period during which dependency claimed and for one year thereafter); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding Texas' provision of 75% of standard of need under Aid to Families with Dependent Children while providing 95% under Aid to the Blind and Disabled and 100% under Old Age Assistance).

86. See also Justice Rehnquist's majority opinions in *Blum v. Yaretsky*, 102 S. Ct. 2777, 2786 (1982) (private nursing home's decision to transfer Medicaid patient to lower level of care, though care fully financed by government which regulated home's operations, involved no state action); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (warehouseman's private sale of stored goods under the self-help provisions of New York's Uniform Commercial Code involved no state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (no state action when private utility holding certificate of public convenience from Pennsylvania Utility Commission terminates electric service for alleged nonpayment).

87. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting).

88. Compare the fifteenth amendment's proscription against denial or abridgement of the right to vote on account of race—thereby indicating that the framers knew how to limit the coverage of an amendment to racial matters.

the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority." I cannot find, and the Court does not cite, any constitutional authority for such a "ward of the Court" approach to equal protection.⁸⁹

Discrete and insular minorities may be a dime a dozen, but this is not a convincing reason for refusing to invoke the principle of equal protection on behalf of groups which are in fact situated similarly to racial minorities. The status of illegitimate children, aliens, and women, for example, is in many ways analogous to that of blacks in terms of the factors which have led to heightened scrutiny of governmental action singling out the latter for disparate treatment—historical bias, inability to change status, and lack of access to the political process.

Justice Rehnquist claims that his reluctance even to examine the closeness of the analogy flows from the intent of the framers to limit the equal protection clause to racial discrimination. But this claim is inconsistent with his own willingness to depart from the framers' intent. For instance, two examples illustrate Justice Rehnquist's readiness to read into the equal protection clause a mandate of color-blindness. He has argued in dissent that the prohibition of Title VII of the 1964 Civil Rights Act⁹⁰ against employment discrimination "based on race" should be interpreted literally to ban a race-conscious affirmative action plan agreed to between employer and union.⁹¹ He also joined Justice Stewart's activist dissent which argued that the minority set-aside provision of

89. *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

90. 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1976 & Supp. IV 1980).

91. *United Steelworkers of America v. Weber*, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting, joined by Burger, C.J.). The majority supported its departure from a literal reading by analyzing the legislative history and historical context of the statute. It concluded that Congress' purpose was "to eliminate traditional patterns of racial segregation," *id.* at 201, a purpose it found served by an affirmative action plan reserving 50% of the openings in inplant craft-training programs for black employees until the percentage of black craft workers in a plant is commensurate with the percentage of blacks in the local labor force. Justice Rehnquist's response was:

There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. . . . With today's holding, the Court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate

Id. at 254-55.

the federal Public Works Employment Act of 1977⁹² violates the equal protection component of the fifth amendment's due process clause.⁹³ Color-blindness may be an appropriate evolutionist interpretation of the equal protection clause, but it was not the intent of the framers. Eminent scholars of varying persuasions have concluded otherwise;⁹⁴ as did the Supreme Court when, twenty-eight years after the fourteenth amendment's ratification, it established the separate but equal doctrine.⁹⁵ Moreover, espousing color-blindness in racial matters is inconsistent with Justice Rehnquist's reluctance to accept gender-blindness in sex discrimination matters, as shown by his argument against invoking the equal protection clause to protect men because they have not historically been discriminated against.⁹⁶ In addition, he has argued that federal statutes according favored treatment to Indians do not invidiously discriminate against non-Indians in light of Congress' "solemn commitment" and "unique obligation" to Indians.⁹⁷ Similar arguments could be advanced to justify affirmative action for blacks.

While Justice Rehnquist's interpretation of the due process and equal protection clauses may be defensible, to assert that it represents the intent of the framers does not withstand analysis. Rather, as with the first amendment, fostering states' rights is his evident objective. Justice Rehnquist's generally narrow interpretation of the fourteenth amendment serves that end by limiting judicial interference with state action. More explicitly, he has argued in school segregation cases for a highly restrictive improper motive or purpose test which will make it very difficult to prove segregative intent, and for carefully tailoring the remedy to the violation, because "local autonomy of school districts is a vital national tradition."⁹⁸ Likewise, he based his majority decision upholding an Iowa

92. Pub. L. No. 95-28, 91 Stat. 116 (1977).

93. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting, joined by Rehnquist, J.). This is an evolutionist reading of the fifth amendment which, having been adopted during the slavery era, was clearly not intended by its framers to outlaw racial discrimination.

94. *E.g.*, R. BERGER, *supra* note 55, at 117-31; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-65 (1955).

95. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

96. *Michael M. v. Superior Court*, 450 U.S. 464, 475-76 (1981); *Craig v. Boren*, 429 U.S. 190, 217-21 (1976) (Rehnquist, J., dissenting).

97. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974)).

98. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977). *See also* *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 489 (1979) (Rehnquist, J., dissenting, joined by Powell, J.): "The fundamental mission of [desegregation] remedies is to restore those integrated educa-

requirement that a petitioner in a divorce action must have resided in the state for at least one year prior to filing for divorce from a nonresident respondent in part on the ground that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States."⁹⁹ And he supported his dissent from a decision striking down a New York statute regulating the distribution of contraceptives by the argument that "[t]he majority of New York's citizens are in effect told that however deeply they may be concerned about the problem of promiscuous sex and intercourse among unmarried teenagers, they may not adopt this means of dealing with it."¹⁰⁰ Finally, in arguing against a decision striking down an Illinois intestate succession law which allowed legitimate children to inherit from both parents but illegitimate children to inherit only from their mothers, he wrote: "The Civil War Amendments did not make this Court into a council of revision, and they did not confer upon this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest."¹⁰¹

B. Federalism

Justice Rehnquist's states' rights perspective becomes even more apparent in cases involving federalism. When the issue is the source and reach of federal authority—as in the scope of Congress' power under the commerce clause and the enforcement sections of the Civil War Amendments, or the extent of federal preemption of a field under the supremacy clause—he construes constitutional

tional opportunities that would now exist but for purposefully discriminatory school board conduct." *Id.* at 524. In *Penick* Justice Rehnquist criticized the majority opinion upholding a finding of purposeful segregation and the granting of a systemwide remedy. Factually, the school board had operated a de facto dual system when *Brown* was decided in 1954, had failed subsequently to comply with its continuing affirmative duty to desegregate, and had engaged in the intervening years in actions intentionally aggravating the situation. The decision, according to Justice Rehnquist, constitutes "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system," *id.* at 489, and imposes a policy of "integration über alles." *Id.* at 513. See also *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (abuse of discretion for trial judge to order annual adjustments in desegregation plan after compliance was achieved in order to remedy subsequent segregation which was not shown to be caused by state action and which "apparently resulted from people randomly moving." *Id.* at 435); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 254 (1973) (Rehnquist, J., dissenting) (must show racial gerrymandering for each school to be included in desegregation plan).

99. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

100. *Carey v. Population Services Int'l*, 431 U.S. 678, 719 (1977) (Rehnquist, J., dissenting).

101. *Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

provisions and federal statutes narrowly. But when the issue is the limitation of federal power—as in tenth and eleventh amendment cases or under the abstention and improper delegation doctrines—he shifts to a broad construction of the Constitution. As a result, he becomes highly activist at times in curtailing federal authority to the advantage of states' rights. In fact, of the fifty opinions Justice Rehnquist has written in federalism cases through the 1981-82 term, as many as twenty can be viewed as activist¹⁰²—a sharp contrast to his deferential approach to individual rights. Moreover, while occasionally resorting to the framers' intent to buttress his decisions, for the most part he engages in a clearly evolutionist interpretation of the Constitution, again contrary to his purported approach to individual rights.

The federal government, being a government of granted powers, must of course rely on specific provisions of the Constitution as authority for its acts. When those provisions are narrowly construed, as they frequently are by Justice Rehnquist, federal authority is limited in ways which often aid states' rights. For example, Justice Rehnquist has argued that since section one of the fifteenth amendment¹⁰³ proscribes only purposeful denial or abridgement of the right to vote on account of race, Congress may not, pursuant to section two, outlaw municipal voting practices which merely have a discriminatory effect.¹⁰⁴ The fifteenth amendment, however, is not on its face limited to purposeful discrimination, and Justice Rehnquist does not cite any historical evidence to show that such was the framers' intent.¹⁰⁵ In light of this uncertainty regarding the framers' intent, a narrow reading of the fifteenth amendment in cases of judicial enforcement is fully consistent with strict constructionism. That same uncertainty, however, should lead a strict constructionist to defer to Congress' reading when it acts pursuant to the enforcement powers which the amendment specifically confers upon it. The Court could easily in-

102. See cases cited *infra* notes 104, 109, 116, 119, 129, 133, 136, 140-43, 146, 147, 152.

103. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

104. *City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting, joined by Stewart, J.).

105. Nor did the plurality opinion (in which Justice Rehnquist joined) in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), cite any evidence of the framers' intent when it upheld Mobile's at-large system of electing its City Commission against fourteenth and fifteenth amendment challenges alleging racial discrimination on the ground that there was no showing of a discriminatory purpose as required by those amendments.

terpret the amendment to require a showing of purposeful discrimination before striking down state action, while allowing Congress greater latitude to address effectual discrimination. Justice Rehnquist's activist-evolutionist approach is inescapably the product of his states' rights perspective: "The facts of this case signal the necessity for this Court to carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States."¹⁰⁶

Similarly, Justice Rehnquist has indicated his readiness to narrow the broad interpretation of congressional authority to regulate interstate commerce pursuant to the commerce clause. The prevailing approach accords virtually total deference to Congress' determination that a matter it wishes to regulate affects interstate commerce.¹⁰⁷ Yet while concurring in decisions upholding the federal Surface Mining Control and Reclamation Act of 1977,¹⁰⁸ which induces states to regulate the adverse environmental effects of surface coal mining in accordance with minimum federal standards, he argued that "there are constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause"¹⁰⁹ and that to be regulated an activity must not just have "some nexus with" but rather a "substantial effect" on interstate commerce.¹¹⁰ Again, however, the commerce clause is not so limited on its face,

106. *City of Mobile v. Bolden*, 446 U.S. at 209. Compare the minimal scrutiny Justice Rehnquist advocates in individual rights cases, *supra* notes 31-33 and 71-86 and accompanying text. Justice Rehnquist further criticized the majority opinion in *City of Rome*, which upheld the district court's finding that the city had failed to prove, pursuant to the Act's bail-out provision, that certain annexations and electoral changes (including the substitution of multimember for single member districts and of a majority-win for a plurality-win requirement for the City Commission) did not effectively dilute the minority vote. He argued that "[the] only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process." *Id.* at 221. This may be true when the Court itself directly enforces the fifteenth amendment against the states, but why should they not be left to the national political process when Congress exercises its granted power to enforce the amendment?

107. See L. TRIBE, *supra* note 63, at 232-37 (1978).

108. 30 U.S.C. §§ 1201-1328 (Supp. V. 1981).

109. *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981) (Rehnquist, J., concurring in the judgment).

110. *Id.* at 310-11. But compare Justice Rehnquist's criticism of the suspect class-fundamental rights approach to due process-equal protection for its use of substantiality tests to mask "subjective judicial preferences or prejudices relating to particular types of legislation . . ." *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting). See *supra*, notes 68-70 and accompanying text. Could not the same criticism be leveled at his approach in *Hodel*?

and Justice Rehnquist has cited no historical evidence that the framers so intended. While it logically follows from the commerce clause that Congress does not have the power to regulate purely intrastate commerce, the framers may well have intended to leave it exclusively to Congress to determine whether an activity has a sufficient impact on interstate commerce to warrant federal intervention. Justice Rehnquist's interpretation, though it may be intellectually defensible, is clearly evolutionist, tends to activism, and has obviously been influenced by his states' rights perspective:

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce . . . among the several states," [U.S. Const. art. I, § 8] one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.¹¹¹

Turning to the issue of federal preemption under the supremacy clause, Justice Rehnquist, in the name of states' rights, switches back to the deferential strict constructionism characteristic of his approach to individual rights. Preemption can occur in two ways: by virtue of the Constitution itself through provisions which reserve powers exclusively to the federal government or which have been held by implication to preclude state action; or by virtue of federal laws or treaties which expressly or by implication preempt the field.¹¹² Justice Rehnquist has consistently pushed for a narrowing of the scope of federal preemption by implication. For instance, he has argued against the Court's use of the commerce clause, which in form is a grant of power to Congress, to strike down state regulations which discriminate against interstate commerce. He would uphold discriminatory regulations if supported by some valid state objective. Thus, he would allow New Jersey to prohibit the importation of solid or liquid wastes generated outside the state because "[t]he physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it

111. 452 U.S. at 307-08.

112. See L. TRIBE, *supra* note 63, at 319-404 (1978).

must serve as a depository for those of every other State."¹¹³ He would also allow Oklahoma to prohibit the exportation of natural minnows procured from state waters since

[u]nless the regulation directly conflicts with a federal statute or treaty . . . , allocates access in a manner that violates the Fourteenth Amendment . . . , or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation . . . the State's special interest in preserving its wildlife should prevail.¹¹⁴

Finally, Justice Rehnquist argued that a Court decision striking down an Iowa law barring the use of trucks longer than 60 feet on its interstate highways—the impact being to ban 65 foot doubles commonly used and permitted by other states—"seriously intrudes upon the fundamental right of the States to pass laws to secure the safety of their citizens"¹¹⁵ and entails a balancing of federal versus state interests which would "arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures."¹¹⁶

113. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 632 (1978) (Rehnquist, J. dissenting, joined by Burger, C.J.).

114. *Hughes v. Oklahoma*, 441 U.S. 322, 342-43 (1979) (Rehnquist, J., dissenting, joined by Burger, C.J.).

115. *Kassel v. Consolidated Freight Corp.*, 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart, J.).

116. *Id.* at 1326. See also *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456, 3467 (1982) (Rehnquist, J., dissenting, joined by O'Connor, J.) (would uphold Nebraska statute prohibiting withdrawal of groundwater for transportation to adjoining state unless such state grants reciprocal rights); *Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 34 (1974) (Rehnquist, J., dissenting) (would uphold Mississippi statute prohibiting foreign corporation transacting interstate business in state without certificate of authorization from suing in state courts). Likewise, Justice Rehnquist advocates a narrow scope of federal preemption by statute. The prevailing approach when Congress and a state are operating in the same field is to find preemption if (1) Congress expressly preempts the field, (2) state action directly conflicts with federal statutory objectives, or (3) Congress occupies the field, either by acting so comprehensively as implicitly to preclude state action or because the area is one which demands uniform treatment. See L. TRIBE, *supra* note 63, at 376-86. Justice Rehnquist would severely restrict the latter two tests in favor of requiring a clear-cut indication of congressional preemption: "[T]he authority of the States should not be displaced except pursuant to the clearest direction from Congress." *McCarty v. McCarty*, 453 U.S. 210, 237-38 (1981) (Rehnquist, J., dissenting, joined by Brennan and Stewart, J.J.).

For recent examples of Justice Rehnquist's views opposing preemption, see *Ramah Navaho School Bd. v. Bureau of Revenue*, 102 S. Ct. 3394, 3402 (1982) (Rehnquist, J., dissenting, joined by White and Stevens, J.J.); *Rice v. Norman Williams Co.*, 102 S. Ct. 3294 (1982); *Toll v. Moreno*, 102 S. Ct. 2977, 2990 (1982); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J.,

But balancing of interests is precisely the role Justice Rehnquist would have the Court play in determining whether an activity has enough of an effect on interstate commerce to be regulable by Congress.¹¹⁷ The difference is that there balancing of interests serves states' rights by limiting the reach of Congress' power under the commerce clause, whereas in the preemption context states' rights are served by eschewing a balancing test in favor of deference to state action.¹¹⁸

Justice Rehnquist again departs from deferential strict constructionism when the issue involves constitutional limitations on affirmative grants of federal power. This enables him to interpret broadly power-limiting provisions which are then actively used to curtail federal authority. The foremost example of this is his use of the tenth amendment to overturn federal regulation of the minimum wages paid to and maximum hours worked by state and local government employees.¹¹⁹ Since the federal government can only exercise granted powers, the tenth amendment, which by its terms reserves to the states powers not granted to the federal government by the Constitution, is literally a tautology.¹²⁰ Narrowly con-

and O'Connor, J.).

For his opinions supporting preemption, see *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 151 (1979) (Rehnquist, J., concurring in judgment, joined by White, J.); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 287 (1977) (Rehnquist, J., concurring in judgment and concurring in part and dissenting in part, joined by Powell, J.); *Philbrook v. Glodgett*, 421 U.S. 707 (1975).

117. See *supra* notes 109-10 and accompanying text.

118. Likewise Justice Rehnquist's deferential strict constructionist approach to due process-equal protection is designed to avoid the "weighing of competing factors," *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). We shall, however, find Justice Rehnquist himself weighing competing factors in order to advance states' rights. See *infra* notes 122 and 143 and accompanying text.

119. *National League of Cities v. Usery*, 426 U.S. 833 (1976). See also *Fry v. United States*, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting) (would strike down as violating tenth amendment Economic Stabilization Act of 1970 as applied to prevent Ohio from paying wage increases to state employees above amounts authorized by pay board). The decision in *National League* is apparently limited to direct federal regulation of the states. Justice Rehnquist indicated the result might be different were Congress attempting to control state behavior through strings attached to programs enacted under the spending power. 426 U.S. at 852 n.17. And by concurring in *Hodel*, 452 U.S. at 307, he implicitly accepted the majority's holding that *National League* is so limited and that inducing state regulation of private activity by threatening federal intervention in default thereof does not (assuming the activity falls within the commerce power) violate the tenth amendment. See *Hodel*, 452 U.S. at 283-93.

120. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X. See *United States v. Darby*, 312, U.S. 100, 124 (1941) ("the [tenth] amendment states but a truism . . .").

strued, therefore, if the federal government would have the power to engage in an activity absent the tenth amendment, then it has the power even in the face of it. Since wage and hour regulations admittedly fall within the commerce clause, they would thus not run afoul of the tenth amendment. However, Justice Rehnquist forsakes the narrow interpretation for one which enables states to invoke the tenth amendment to avoid federal intervention "that would impair the States' 'ability to function effectively [within] a federal system.'" ¹²¹ He found the wage and hour provisions to violate this principle in that they would "impermissibly interfere with the integral governmental functions" of the states and their political subdivisions. ¹²²

Justice Rehnquist has cited no historical evidence that the framers intended so broad an interpretation and so activist a use of the tenth amendment. The dominant view is that the framers simply wanted to make it clear that the federal government could exercise only affirmatively granted powers. ¹²³ Absent evidence to the contrary, and since the dominant view is most compatible with the narrow, literal reading of the amendment, a true deferential strict constructionist should construe the tenth amendment narrowly.

A second example of Justice Rehnquist's broad reading of power-limiting provisions is his interpretation of the eleventh amendment, which on its face closes the federal courts to suits brought against a state by citizens of other states or of foreign countries. ¹²⁴ Longstanding precedents have held that the eleventh amendment also bars federal suits against a state by its own citizens, an interpretation Justice Rehnquist has affirmed. ¹²⁵ Since the

121. *National League*, 426 U.S. at 852 (quoting *Fry*, 421 U.S. at 547 n.7).

122. *National League*, 426 U.S. at 851. The application of these tests will necessarily entail a balancing test similar to that which Justice Rehnquist rejects in the individual rights and preemption contexts. See *supra* text accompanying notes 68-70. See *supra* notes 117-18 and accompanying text. The difference, of course, is that states' rights are fostered by the more expansive reading of the tenth amendment which a balancing test allows.

123. See *United States v. Darby*, 312 U.S. 100, 124 (1941).

124. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

125. "While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Immunity also extends to state officials where the action is in substance against the state, as in suits seeking the recovery of state

argument for closing the federal courts is even stronger when a dispute is between a state and its own citizens than in a diversity case,¹²⁶ it is understandable that the Court would extend immunity to the former. But since the plain language of the eleventh amendment cannot be read to cover intrastate disputes, it seems preferable to view this immunity as flowing from a constitutionally implied doctrine of sovereign immunity.¹²⁷ Either way, while there is historical evidence that the framers intended immunity for intrastate disputes,¹²⁸ it is clearly an evolutionist step to interpret a constitutional provision contrary to its plain meaning or to read into the Constitution a doctrine which is not there.¹²⁹ Justice Rehnquist's willingness to do so contrasts markedly with his narrow reading of broadly framed provisions protecting individual rights—for example, under the equal protection clause, when he opposes extending its coverage to groups whose claim for court protection against discriminatory treatment may be equally as strong as that of blacks.¹³⁰

Most of Justice Rehnquist's sovereign immunity opinions deal with the judicially developed exceptions to immunity. One exception is when a state waives immunity;¹³¹ another is when Congress abrogates it.¹³² Justice Rehnquist adopts a narrow view of these

funds. *Id.* at 663 (quoting *Ford Motor Co. v. Department of Treasury*, 322 U.S. 459, 464 (1945)).

126. Citizens are arguably more likely to get a fair hearing than noncitizens since they can presumably bring more political pressure to bear in order to combat prejudicial treatment, although in any given instance a state could obviously be biased against a segment of its own citizenry.

127. See Justice Brennan's dissent in *Edelman*. 415 U.S. at 687.

128. See *THE FEDERALIST* No. 81 at 511-12 (A. Hamilton) (B. Wright, ed. 1961); 3 *ELIOT'S DEBATES* 533 (2d ed. 1901) (J. Madison). But see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (in which Chief Justice Marshall suggested the eleventh amendment is inapplicable to cases arising under the Constitution or under federal laws).

129. For another example of Justice Rehnquist's willingness to read the Constitution in an even more expansive and evolutionist fashion in order to foster states' rights, see *Nevada v. Hall*, 440 U.S. 410, 432-33 (1979) (Rehnquist, J., dissenting, joined by Burger, C.J.) (would hold Nevada immune from private tort suit in California courts on basis of sovereign immunity doctrine implicit in "the logic of the constitutional plan itself."). "The Eleventh Amendment is thus built on the postulate that the States are not, absent their consent, amenable to suit in the courts of sister States." *Id.* at 437.

130. See *supra* text accompanying notes 64, 87-89.

131. Technically speaking, to the extent immunity derives from the eleventh amendment a state should not be able to waive it, jurisdictional prerequisites not being waivable; whereas sovereign immunity, being an affirmative defense, would be waivable. See *supra* note 127 and accompanying text.

132. In addition, state officials may be prospectively enjoined from carrying out unconstitutional state laws. *Ex parte Young*, 209 U.S. 123, 155-60 (1907). This can be viewed as

exceptions, thus preserving the broad reach of the immunity doctrine. Writing for the majority, for instance, he held that Illinois' voluntary participation in the partially federally funded Aid to the Aged, Blind, and Disabled program was insufficient to constitute a constructive waiver of immunity, despite the fact that recipients deprived of aid by state officials were thereby barred from an award of retroactive benefits to which they were entitled.¹³³ Furthermore, while recognizing Congress' power to abrogate eleventh amendment immunity in enforcing fourteenth amendment rights,¹³⁴ Justice Rehnquist argued in dissent that the Civil Rights Attorney's Fee Awards Act of 1976¹³⁵ may not constitutionally be invoked against the Arkansas Department of Corrections in connection with a prisoner's suit for violation of eighth amendment rights.¹³⁶ His reasoning was based in part on the absence of a clear statement of abrogation in the text of the Act, despite the fact that the legislative history explicitly expressed that intent;¹³⁷ and in

an exception to immunity designed to accommodate both the states' sovereignty interests and the federal government's interest in upholding the Constitution. Or it can be viewed as not falling within the immunity doctrine at all, the judgment running not against the state but against its agents, as distinguished from retroactive relief where the state is in effect being asked to pay. See *supra* note 125.

133. *Edelman v. Jordan*, 415 U.S. 651, 671-74 (1974). The state officials followed procedures not in compliance with federal regulations. However, Justice Rehnquist did indicate that ordering state officials to comply with federal regulations in the future was valid, though compliance would have an impact on the state treasury which he characterized as an "ancillary effect" of permissible prospective relief per *Ex parte Young*, 415 U.S. at 668. See also *Quern v. Jordan*, 440 U.S. 332 (1979) (upholding an order in *Edelman* on remand to notify deprived recipients of state administrative procedures for determining eligibility for retroactive benefits).

134. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Writing for the Court, Justice Rehnquist upheld the award of retroactive retirement benefits and attorneys fees in suit holding Connecticut's statutory retirement plan discriminatory based on sex in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 448, 457. Implicit in *Fitzpatrick* is that Congress may attack sex discrimination pursuant to the fourteenth amendment. But how can that be if the amendment was intended only to prohibit racial discrimination? See *supra* text accompanying note 64. And is that not inconsistent with Justice Rehnquist's position in *City of Rome* that Congress may not attack effectual discrimination pursuant to the fifteenth amendment? See *supra* text accompanying note 104.

135. 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

136. *Hutto v. Finney*, 437 U.S. 678, 710 (1978) (Rehnquist, J., dissenting, joined in part by White, J.).

137. Justice Rehnquist expressly agreed with Justice Powell's view, *Hutto*, 437 U.S. at 717, that abrogation requires a clear statement of congressional intent which he found lacking here, despite a reference to abrogation in the Senate and House committee reports, because "in this sensitive area of conflicting interests . . . we should not permit items of legislative history to substitute for explicit statutory language." *Id.* at 706-07 (Powell, J.,

part on the ground that

it is not at all clear to me that it follows that Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially "incorporated" into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.¹³⁸

Despite its passive appearance in withholding federal intervention, sovereign immunity is in fact an activist doctrine because it invokes the Constitution to override acts of Congress which might otherwise afford litigants access to the federal courts. Justice Rehnquist's expansive interpretation of the reach of sovereign immunity, coupled with his restrictive interpretation of its exceptions, thus leans in the direction of greater activism—again in contrast to his narrow reading of provisions protecting individual rights in the name of deference to democratic decision making.¹³⁹ The advancement of states' rights is the most plausible explanation for this divergent treatment.

Lastly, Justice Rehnquist also advances states' rights through the judicially created doctrine of abstention, which limits federal court interference with state proceedings even where constitutional

concurring in part and dissenting in part, joined by Burger, C.J., and joined in dissent by White and Rehnquist, J.J.). Evidently Justices Rehnquist and Powell want the statement of abrogation on the face of the statute itself, presumably to ensure it is knowingly done. Whether such a statement would bring the issue to the attention of more legislators is, however, highly debatable. See *infra* text accompanying note 169.

Justice Rehnquist also held immunity not to have been abrogated in *Edelman*, 415 U.S. 651 (1974), see *supra* note 133, because of the absence of a clear-cut statement of congressional intent to allow suits against states under 42 U.S.C. § 1983 which creates a cause of action against "every person" who under color of state law deprives someone of federal rights. The Court had previously held a local government not to be a "person" within the meaning of section 1983, *Monroe v. Pape*, 365 U.S. 167 (1961), a decision which was reversed in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), from which Justice Rehnquist dissented on *stare decisis* grounds. *Id.* at 714 (Rehnquist, J., dissenting, joined by Burger, C.J.). (Contrast Justice Rehnquist's apparent readiness to cut back on *Monroe*'s other prong: that litigants need not exhaust state remedies before bringing a section 1983 action. See *infra* notes 144-47 and accompanying text. States' rights is the only plausible explanation of this divergent treatment.) Subsequently, Justice Rehnquist has reaffirmed the fact that section 1983 does not abrogate state immunity, which in effect means that a state is not a "person" thereunder. *Quern v. Jordan*, 440 U.S. 332, 355-66 (1979).

138. *Hutto*, 437 U.S. at 717-18.

139. See *supra* text accompanying notes 30-45 and 64-86. *But cf.* *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977) (opinion by Justice Rehnquist holding Board not entitled to immunity since not arm of state but more like political subdivision to which eleventh amendment does not extend).

issues are involved. One line of cases relates to on-going state litigation. Originally the doctrine was developed to prevent state criminal defendants from frustrating their prosecutions by repairing to federal courts.¹⁴⁰ Though denying an intent to make abstention applicable to all pending civil cases, Justice Rehnquist has consistently pushed in that direction. Writing for the majority, he held abstention to prevent a federal injunction against allegedly unconstitutional proceedings under Ohio's public nuisance statute.¹⁴¹ Similarly, he held an injunction improper against threatened imprisonment pursuant to an allegedly unconstitutional contempt citation issued against judgment debtors in a private New York litigation for failure to pay a default judgment.¹⁴² Finally, he invoked abstention to deny a federal injunction against state court proceedings brought to remove children from their parents' custody by the Texas Department of Human Resources pursuant to an allegedly unconstitutional statute.¹⁴³

Under a second line of cases, certain litigants must exhaust state remedies before proceeding to the federal courts. While historically the Court had held exhaustion not generally required,¹⁴⁴

140. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (injunction will not lie against pending state criminal proceedings absent showing of bad faith and irreparable injury); *Samuels v. Mackell*, 401 U.S. 66 (1971) (abstention applicable to declaratory judgment). Concurring in *Steffel v. Thompson*, 415 U.S. 452, 484-85 (1974) (Rehnquist, J., concurring, joined by Burger, C.J.), Justice Rehnquist agreed that abstention is inapplicable to federal declaratory judgment suits challenging allegedly unconstitutional state criminal statutes under which prosecutions have been threatened but not yet commenced. Writing for the Court in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975), he upheld preliminary injunctive relief against future prosecution pending the outcome of a declaratory judgment suit. However, in *Doran* Justice Rehnquist also noted that *Younger* and *Samuels* would deny relief to a party against whom a state criminal prosecution was begun for violations allegedly occurring after the filing of a federal complaint and before a federal hearing on the merits. 422 U.S. at 929.

141. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). In expanding the doctrine beyond its criminal antecedents, Justice Rehnquist opined that this proceeding was "more akin to a criminal prosecution than are most civil cases." *Id.* at 604.

142. *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977).

143. *Moore v. Sims*, 442 U.S. 415 (1979). The case involved child-custody proceedings, which Justice Rehnquist reasoned raised the issue of parental abuse related to criminal statutes. "[T]he basic concern—that threat to our federal system posed by displacement of state courts by those of the National Government—is also fully applicable to civil proceedings in which important state interests are involved." *Id.* at 423. To the extent that abstention is not to apply to all state civil proceedings but only to those involving "important state interests," we have yet another example of Justice Rehnquist's willingness to engage in substantiality or balancing tests to limit federal power to the benefit of states' rights, as against his reluctance to do so when it would expand individual rights against the states. See *supra* text accompanying notes 68-70, notes 117-18 and accompanying text. See *supra* note 122.

144. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

Justice Rehnquist has consistently pushed to narrow the scope of those rulings. Thus, he held abstention applicable regarding an allegedly unconstitutional Ohio public nuisance action to a defendant who sought federal relief without first appealing to a higher state court the trial court's decree which had already become final at the time of the federal suit.¹⁴⁶ Justice Rehnquist also inferred that he would require fired Ohio policemen who sought and lost Police Hearing Board review to appeal to the state courts before initiating a federal action alleging due process violations.¹⁴⁶ Finally, he has held that the "principle of comity," which underlies abstention, bars a federal damage suit attacking the constitutionality of a Missouri county's administration of its property tax,¹⁴⁷ thereby limiting the complainants to federal appeal only after raising the issue in state court.

Valid policy arguments can be advanced both in support of and against the abstention doctrine. It respects the integrity of state courts in deciding constitutional issues, reduces the federal workload, avoids duplication, defers to state court interpretation of state law, and still provides for federal court review on appeal or in subsequent collateral attack.¹⁴⁸ On the other hand, to the extent that state courts are not as likely to be protective of federal rights as are federal courts, abstention allows federal rights to be held in

145. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975). This deprives the defendant of the opportunity for any federal review either directly or on appeal.

146. *City of Columbus v. Leonard*, cert. denied, 443 U.S. 905 (1979) (Rehnquist, J., dissenting, joined by Burger, C.J. and Blackmun, J.). Justice Rehnquist would have granted certiorari to consider the Fifth Circuit Court of Appeals' reversal of District Court dismissal on abstention grounds. *Id.* at 907. However, Justice Rehnquist is evidently not quite ready to require claimants to pursue available administrative relief in the first instance as a prerequisite to a federal civil rights suit. See *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2568 (1982) (O'Connor, J., concurring, joined by Rehnquist, J.) (applicant for employment alleging discrimination by state university need not pursue state administrative remedies before commencing federal action). Paradoxically, the impact of invoking abstention only after the initiation of state administrative proceedings might be to impel claimants to by-pass state fora entirely.

147. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). The rationale was "the important and sensitive nature of state tax systems and the need for federal court restraint when deciding cases that affect such systems." *Id.* at 179. Whether there is any intent to extend the principle of comity to bar federal suits challenging state activities other than taxation, with which the federal courts have traditionally been reluctant to interfere, remains to be seen.

148. Justice Rehnquist has gone so far as to imply that federal review may not even be necessary. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975). "We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues." *Id.* at 606.

abeyance pending the outcome of state proceedings. This may lead to a less thorough airing or even a total thwarting of these rights. For example, following abstention the Supreme Court might summarily affirm an adverse state court judgment, or defer to a state court's determination of a federal issue; or a party might run out of money in losing a state court battle. In any event, abstention is a decidedly evolutionist doctrine, deriving not from the express intent of the framers but from judicial conceptions of the proper role of federal courts.¹⁴⁹ And despite its passive appearance, the abstention doctrine is actually highly activist in that it overrides congressional statutes which literally authorize such suits and whose very purpose is to provide access to federal courts to vindicate federal rights threatened by state action.¹⁵⁰ Once again, Justice Rehnquist's states' rights perspective is unmistakable.¹⁵¹

149. Support for the abstention doctrine with respect to on-going state litigation might be derived from the federal anti-injunction statute, 28 U.S.C. § 2283 (1976) (originally enacted in 1793), which prohibits federal courts from staying state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.* Justice Rehnquist's abstention opinions, however, are not based directly on section 2283, but on the judicially-created abstention doctrine. This is perhaps to avoid assessing whether any of the statutory exceptions are met or perhaps because section 2283 applies only to injunctive but not to other types of relief (e.g. declaratory judgments). Nor could section 2283 be used to require the exhaustion of state remedies before seeking federal relief, since it applies only to pending state judicial proceedings.

150. Most of the suits decided on abstention grounds seek relief under either 42 U.S.C. § 1983 (Supp. IV 1980), which creates a cause of action at law and in equity for individuals deprived of federal rights by persons acting under color of state law, or 28 U.S.C. §§ 2201-2202 (1976 & Supp. V 1981) (the federal declaratory judgment act). With respect to on-going state litigation, section 1983 literally includes state judges within its coverage. Moreover, although section 1983 does not specifically refer to state judicial proceedings, the Court has held them to fall within the "expressly authorized" exception of section 2283. *Mitchum v. Foster*, 407 U.S. 225 (1972); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 556 (1972). The practical effect of abstention, therefore, is to render section 1983 unconstitutional to the extent that it confers power on federal courts to entertain suits relating to pending state litigation. As Professor Whitten has pointed out, however, once section 1983 has been interpreted as an expressly authorized exception to section 2283, the noninterference policy underlying the anti-injunction statute cannot possibly support abstention in section 1983 cases. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N. CAL. L. REV. 591, 651 (1975). One might contend that the expressly-authorized-exception criterion demands a more clear-cut statement of congressional intent to interfere with state court proceedings than exists on the face of section 1983. See *infra* note 178. But in light of *Mitchum* do not Justice Rehnquist's abstention opinions imply that even a clear statement by Congress would not be enough to override abstention?

151. Another example of Justice Rehnquist's restrictive approach to section 1983 in the name of states' rights is his majority opinion in *Rizzo v. Goode*, 423 U.S. 362 (1976), which struck down a district court order that the Philadelphia Police Department institute "a comprehensive program for improving the handling of citizen complaints alleging police

The main point of this section has been to illustrate Justice Rehnquist's departure, in issues of federalism, from the deferential strict constructionism which characterized his approach to individual rights. The switch to a more evolutionist and activist approach is unquestionably a product of his states' rights philosophy and begs an analysis of the validity of states' rights as a ground for constitutional adjudication.¹⁵²

III. STATES RIGHTS AND THE CONSTITUTION

As the preceding section demonstrates, Justice Rehnquist is not the deferential strict constructionist he claims to be. Rather, the overriding theme of his constitutional jurisprudence is states' rights. Thus, when states' rights vie with federal authority, he interprets grants of federal power narrowly and limitations on federal power broadly. When, however, states' rights compete with individual rights, he narrowly interprets limitations on state power. As a result, he is far more protective of state than of federal action.¹⁵³ In so doing he switches between strict constructionism and

misconduct," *id.* at 365, based on findings of an "unacceptably high" number of instances of constitutional violations and of the existence of departmental procedures tending to discourage complaints and to minimize the consequences of misconduct. The decision was based in part on "considerations of federalism," *id.* at 378, which militate against federal injunctive relief "except in the most extraordinary circumstances," *id.* at 379, despite the fact that section 1983 specifically authorizes equitable relief.

152. Still another example of Justice Rehnquist's resort to activism to check federal power is his attempt to revive the improper delegation doctrine to strike down acts of Congress. He would overturn provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. V 1981), which requires employers to eliminate occupational health hazards "to the extent feasible" pursuant to standards developed by the Occupational Safety and Health Administration. *Id.* § 655(b)(5) (1976). His rationale was that "the Act exceeds Congress' power to delegate legislative authority to nonelected officials." *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.). See also *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in the judgment). While there may be valid arguments for reinstating it, see J. ELY, *supra* note 4, at 131-34, the improper delegation doctrine is a far cry from the deference Justice Rehnquist accords state legislation and threatens to impede significantly congressional decision-making. Perhaps, for instance, Congress wanted the benefit of administrative experimentation by OSHA before making certain policy choices. Moreover, deriving not from any specific provision of the Constitution but rather from conceptions of the proper role of the judiciary in maintaining the separation of powers, it is hardly consistent with Justice Rehnquist's professed strict constructionism. Finally, while the improper delegation doctrine might not directly benefit states' rights, it would do so indirectly by leaving unregulated activities which in the absence of federal action could more easily be regulated by the states and by setting the stage for striking down federal regulation of the states on the same grounds.

153. If anything, however, the case for federal court superintendance of the states for conformity with the Constitution is stronger than for superintendance of Congress. This was

evolutionism, and between deference and activism, depending on which best serves the end of states' rights. While any particular opinion, viewed in isolation, may or may not have merit, relying upon states' rights as a foundation for constitutional jurisprudence demands justification.

A. *States' Rights versus Individual Rights*

Where the Constitution specifically protects individual rights, it is the Court's responsibility to enforce those rights. Where the scope of a constitutional provision protecting individual rights is debatable, as is usually the case, a judge must decide how expansively or narrowly to construe it. The broader the interpretation, the more interventionist a judge will be. Justice Rehnquist opts for a narrow interpretation of provisions involving individual rights,¹⁵⁴ and consequently for a less interventionist approach to individual rights than to the protection of states' rights against federal power. If anything, however, the case for court activism is stronger in the former instance. While the electorate can adequately assert state concerns through the political process, individual rights are often

the view of both Professors Thayer and Wechsler, hardly the foremost advocates of judicial activism, as well as of Justice Holmes:

The prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils. [T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

H. WECHSLER, *THE POLITICAL SAFEGUARDS OF FEDERALISM, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 80-81 (1961).

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

O. HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920).

If a State legislature passes a law which is impeached in due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a coordinate department The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 154-55 (1893).

154. See *supra* text accompanying notes 30-101.

raised by minorities—such as racial minorities or the proponents of unpopular views—who may lack the political power to protect their interests. Nonetheless, it is possible to articulate a principled basis for a narrow approach to individual rights.

One basis might be the specific intent of the framers that constitutional provisions protecting individual rights be narrowly construed. In light of their expansive language, it would be difficult to derive such an intent from the face of provisions like the first and fourteenth amendments. Broad language, if anything, is more consistent with an invitation to broad interpretation. Historical evidence might, nevertheless, lead one to conclude that the framers intended a narrower scope than the language conveys. In any event, the specific intent of the framers is not the basis of Justice Rehnquist's approach to individual rights.

A more plausible basis for a narrow reading of the first amendment and due process-equal protection clauses can be derived from the Constitution's overriding purpose of establishing a democratic form of government. From that purpose, and despite the Constitution's obvious intent also to protect individual rights, one might conclude that the proper role of the judiciary is to give great deference to the determinations of the more politically responsive branches of government. Narrowly construing limitations on governmental power, and intervening only in the face of blatant violations of the Constitution, achieves that end by allowing greater latitude to contemporary majorities. At the same time, it respects the competence of other branches of government to enforce the Constitution. Nor would such a deferential posture necessarily accord individual rights less protection than a more activist judicial approach, although historically this would seem to be the case. However, as is most clearly shown by his lack of deference to Congress in federalism cases, the real basis of Justice Rehnquist's constitutional jurisprudence is not a commitment to democracy but to states' rights. This ground is difficult to justify as deriving from neutral principles.

B. *States' Rights versus Federal Power*

Where provisions of the Constitution, by specific terms or as supported by evidence of the framers' intent, expressly favor states' rights over federal authority, it is the Court's responsibility to enforce them. This seldom explains, however, Justice Rehnquist's approach to issues of federalism: as when he argued against

Congress' power under the fifteenth amendment to proscribe effectual as well as intentional abridgement of the right to vote on account of race;¹⁵⁵ when he advocated closer court scrutiny of congressional regulation under the commerce clause for a substantial effect on interstate commerce;¹⁵⁶ and when he held that the tenth amendment bars Congress from regulating the employment practices of state and local governments.¹⁵⁷ If these rulings are to be justified, some basis other than the specific intent of the framers must be advanced.

Arguable bases supporting Justice Rehnquist's approach might be the structure of the Constitution as a whole, to the extent it evinces an intent to protect states' rights, or judicial conceptions of the need for court protection of states' rights. Either ground could support a principled rule of construction that in case of doubt federal power-granting provisions are to be interpreted narrowly while power-limiting provisions are to be interpreted broadly.¹⁵⁸ Neither, however, is in my view valid.

The Constitution clearly contemplates a federal system in which states will have some degree of autonomy and independence from the federal government. The tenth and eleventh amendments reflect that notion. So do the facts that Congress' power under the commerce clause is limited to interstate commerce, that the states are authorized in the first instance to regulate the procedure and voter qualifications for congressional elections,¹⁵⁹ and that the Bill of Rights was originally intended to apply only to the federal government.¹⁶⁰ At the same time, while many who participated in

155. See *supra* notes 103-06 and accompanying text.

156. See *supra* notes 107-11 and accompanying text.

157. See *supra* notes 119-22 and accompanying text.

158. Compare Dillon's Rule, at one time widely used to constrain the powers of local governments under state constitutions and statutes:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 J. DILLON, MUNICIPAL CORPORATIONS 448 (5th ed. 1911).

159. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. Art. I, § 4.

160. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

framing the Constitution had strong states' rights sentiments, the very purpose of the Constitution was to enhance federal power in relation to the states beyond what it had been under the Articles of Confederation.¹⁶¹ This purpose is reflected in the breadth of such provisions as the commerce and spending powers, the necessary and proper clause, and the supremacy clause. Also noteworthy are the subsequent inroads on states' rights wrought by the Civil War Amendments. While the framers would undoubtedly be surprised, perhaps even shocked, at the expansion of federal power over our history, this is by no means inconsistent with their having drafted a document designed to make such growth possible if deemed appropriate by later generations.

Moreover, although in the face of conflict federal power is pre-eminent, court intervention is not needed to safeguard states' rights. Behind the claim for court protection must be some notion of the big, bad federal government continually usurping power from states which lack the means to protect themselves. But this is not an accurate portrayal. Both federal and state governments are responsible to the people, who can change their representatives if they become unhappy with the balance struck between federal and state power. The elections of 1980 and the new federalism which has followed is a case in point. In fact, because state officials are politically accountable only to state residents, it is far more likely that they would disregard federal interests than that federal officials would disregard state interests.¹⁶²

Thus, absent a clear-cut violation of the Constitution, the neutral, principled judicial approach in cases raising issues of federalism demands deference to Congress' determinations, so long as state interests have been taken into account. This will channel ob-

161. See L. POLLACK, *supra* note 24, at 46-48, 91-94.

162. Both Madison and Professor Wechsler support this perspective:

A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. THE FEDERALIST, No. 46 at 331 (B. Wright ed., 1961) (Madison).

To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress

Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states.

H. WECHSLER, *supra* note 153, at 56, 78.

jections into the political process and to the level of government most likely to consider both federal and state interests. That, at least, is what a true deferential strict constructionist would do. Because Congress will almost always take state interests into account when it regulates the states directly or when it regulates interstate commerce, a high degree of judicial deference is proper in such cases—far more than Justice Rehnquist has been willing to accord.¹⁶³

It is a different matter, however, when Congress has not clearly indicated its intent to override states' rights. Preemption cases are an example.¹⁶⁴ For instance, since the commerce clause does not on its face limit state autonomy, and since there are many legitimate state interests supportive of regulations which undeniably impinge on interstate commerce, courts should allow states substantial freedom to pursue their own interests when Congress has not spoken to an issue. At the same time, even Justice Rehnquist recognizes that implicit in the commerce clause is a line the states may not cross. However, his states' rights bias leads him to draw that line so as to shelter almost all state actions: only "a naked attempt to discriminate against out-of-state enterprises" unrelated to any legitimate state interest is impermissible.¹⁶⁵

The above discussion regarding the structure of the Constitution and the role of federal courts in protecting states' rights calls instead for a more neutral judicial posture, one that would balance the adverse impact on interstate commerce against the importance

163. Conceivably there may be situations justifying Court intervention even when Congress has clearly indicated its intent to override states' rights, although examples must usually be theoretical. Thus, in the unlikely event that Congress were to try to legislate the states out of existence, Court intervention would be appropriate either on tenth amendment grounds or because the Constitution obviously contemplates the continued existence of the states. A more realistic example might be a statute arbitrarily discriminating against one or a few states to the advantage of others, although the facts would have to be very persuasive in light of the many valid situations which could lead Congress to single out states for separate treatment. See *L. TRIBE, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065, 1070-72 (1977). On the other hand, it is conceivable that Congress could enact a regulation which inadvertently includes states within its coverage. In this instance, in order to ensure that Congress has acted knowingly against the states, it may be appropriate for the Court to demand a clear-cut indication of Congress' intent before so construing such a regulation. See *L. TRIBE, supra* note 63, at 242-44, advocating that approach. Compare the clear statement rule Justice Rehnquist advocates for similar reasons in statutory preemption and eleventh amendment abrogation cases, *supra* notes 116 and 135-37 and accompanying text.

164. See *supra* notes 112-16 and accompanying text.

165. See *supra* note 114 and accompanying text.

of a state's concern. Admittedly, the courts may not be best suited to balance these interests, since balancing entails value judgments which are more appropriately resolved through a responsive political process. But a state, when pursuing its own interests, is not likely to give due consideration to the interstate spillovers resulting from its actions. While Congress can override state regulations it finds overly intrusive,¹⁶⁶ it can just as well override court decisions which it feels are overly protective of interstate commerce. So when Congress is silent, a judicial balancing approach is the best means of assuring fair consideration of both federal and state interests.¹⁶⁷

A more neutral stance than that taken by Justice Rehnquist is also proper regarding the judicially created sovereign immunity and abstention doctrines. Both the eleventh amendment and considerations of comity justify sovereign immunity in cases in which a state is sued by its own citizens. Yet all the Justices recognize Congress' right to abrogate immunity in order to enforce constitutional rights, the real issue being what constitutes a sufficient indication of congressional intent. The possibility that Congress might unwittingly abrogate immunity, as by enacting a law creating a cause of action against parties which literally but unintentionally includes states, lends support to the clear statement rule Justice Rehnquist advocates.¹⁶⁸ However, when a statute's legislative history explicitly establishes Congress' intent to abrogate sovereign immunity, as it did in the Civil Rights Attorney's Fee Awards Act

166. This assumes, of course, that there is a sufficient nexus with interstate commerce and no violation of the tenth amendment. See *supra* notes 108-10 and 119-22 and accompanying text.

167. Likewise, a judicial balancing approach is appropriate in statutory preemption cases, absent express preemption or irreconcilable conflict between federal and state statutes. See *supra* note 116. The clear statement rule advocated by Justice Rehnquist in such cases would impose an intolerable burden on Congress to survey a whole range of state laws which may or may not be incompatible with the federal regulatory approach although there is no direct conflict. Federal court intervention is needed in just such situations to weigh the competing interests in particularized disputes until Congress decides to address the matter.

168. See *supra* note 137 and accompanying text. Professor Tribe also supports the clear statement rule. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-99 (1976). Baker, on the other hand, favors a balancing test under which the federal courts would weigh the competing federal and state interests even when Congress has clearly spoken. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977). Whichever view is taken, Justice Rehnquist's finding of no abrogation in *Edelman*, *supra* note 139 and accompanying text, may be appropriate in light of uncertainty as to whether Congress intended to include states within the coverage of section 1983.

of 1976,¹⁶⁹ it seems frivolous to insist that intent appear on the face of the statute. Legislators are no more likely to read and understand a proposed statute than the committee reports. If abrogation is a controversial issue in any proposed legislation, it will probably be brought to the attention of the full body or the party leadership by someone who participated in the committee process and objects to the federal intrusion on the states. Moreover, if one of the Bill of Rights, such as the eighth amendment, has been deemed important enough by the Court to be made applicable to the states by incorporation under the fourteenth amendment, there is no reason why the Court should block Congress from enforcing it through its enforcement powers. If the public is upset at the intrusion on states' rights, it can always press for repeal.

Nor is there reason not to allow a state to waive immunity,¹⁷⁰ the critical issue being how clear-cut an indication of waiver should be required. One approach might be a clear statement rule. However, when a state voluntarily participates in a federal program, accepts federal monies, and agrees to spend it (along with state monies) in accordance with federal guidelines, its claim not thereby to have waived immunity in order to avoid paying retroactive benefits to needy recipients wrongly denied aid is extremely weak. Accordingly, the neutral judicial approach in such cases would again be a balancing test based on such factors as whether state participation is voluntary or mandatory, whether federal monies are involved, and how severely people have been injured by the offending state action.

Similar considerations apply to the abstention doctrine.¹⁷¹ As a coordinate branch of the federal government, the judiciary has a legitimate interest in establishing a relationship with state courts based on mutual respect—a goal the abstention doctrine well serves. Congress is, however, empowered to regulate that relationship, as by allowing the removal to federal courts of suits commenced in state courts.¹⁷² The question, again, is how clearly Congress must speak before the Court will not abstain. It is not certain, however, that Justice Rehnquist would refrain from abstaining even in the face of a clear statement by Congress.¹⁷³ If not,

169. See *supra* notes 135-37 and accompanying text.

170. See *supra* note 133 and accompanying text.

171. See *supra* notes 140-51 and accompanying text.

172. 28 U.S.C. § 1446 (1976 & Supp. V 1981).

173. See *supra* note 150.

his approach makes a political solution to the issue impossible, short of a constitutional amendment. This is hardly consistent with his professed adherence to deferential strict constructionism, and seems quite contrary to the intent of the framers and the design of our federal system.¹⁷⁴ If Justice Rehnquist would refrain from abstaining, it might be contended that a clear statement rule forces proponents of federal intervention to bring the matter squarely before Congress. But advocates of limiting federal intervention could likewise petition Congress were the Court to narrow the scope of the abstention doctrine and thereby intrude more often on state court proceedings. Moreover, while a clear statement is being sought, abstention could result in little or no federal review of state proceedings adversely impacting federal rights.¹⁷⁵

Ultimately, one's approach to abstention depends upon one's confidence in the ability or willingness of state courts to safeguard federal rights. If a claimant is able to show bad faith on the part of the state or the unavailability of state procedural remedies, for example anticipatory injunctive or declaratory relief, the case for federal abstention is weakened whether or not there has been a clear statement by Congress.¹⁷⁶ Even absent such a showing, there is reason to think that state courts will give more credence to state than to federal interests and consequently will not guard federal rights as zealously as will the federal courts.¹⁷⁷ Thus, absent a clear statement of congressional intent to countenance federal interference with state judicial proceedings, the principle of neutrality requires the Court to balance the nature of the state proceeding, and how far it has progressed, as against the extent of the threatened interference with the federal right involved and the strength of

174. See *supra* note 153.

175. See *supra* note 154 and accompanying text.

176. See Whitten, *supra* note 150, at 683-94. Absent bad faith or the unavailability of comparable state remedies, Professor Whitten would have the federal courts abstain in connection with pending or prospective state court actions of all types so as to "insure that there is a minimum of federal interference with the operation of the state judiciaries in our unique dual system of courts." *Id.* at 687. For the reasons which follow, I think he strikes the balance too much in favor of states' rights.

177. See *infra* note 162 and accompanying text. See Newborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). There are some notable exceptions to the point made here. Compare the California Supreme Court's striking down of the state's school financing system on equal protection grounds in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) with the Supreme Court's subsequent rejection of that argument regarding Texas' financing system in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Compare Brennan, *State Constitutions and the Protection of Judicial Rights*, 90 HARV. L. REV. 489 (1977).

Congress' concern.¹⁷⁸

In this regard, that Congress, in enacting section 1983,¹⁷⁹ has clearly expressed its intent to authorize federal suits to enforce federal rights against state officials is a factor entitled to substantial weight, even though the statute does not directly refer to judicial proceedings. While room for maneuvering exists here, depending on whether one is more of a "federalist" or "states' rightist", Justice Rehnquist's push to extend abstention to all pending civil cases, to require in some instances the exhaustion of state remedies, and to bar some federal suits altogether, gives little consideration to the concerns underlying section 1983. This amounts to judicial evisceration of a statute whose wisdom is more properly debated in the political arena.

CONCLUSION

The structure of the Constitution and considerations of the proper role of the judiciary demand substantial court deference to congressional actions which impinge upon states' rights. Court intervention is justified only when Congress clearly violates the Constitution, has not taken state interests into account, or has failed to address the issue. Justice Rehnquist, to the contrary, has chosen to pursue a highly activist course in defense of states' rights against federal power, while at the same time taking a highly deferential posture toward state action impinging on individual rights. This course is supported neither by the intent of the framers nor by principled adjudication, but is based instead on his ideological commitment to decentralization and pluralism. While these may be worthwhile values, their establishment should be left to the political process and not to the Supreme Court.

A particularly troubling aspect of Justice Rehnquist's states' rights approach is its tendency to preclude both the federal courts and Congress as avenues for protecting individual rights. When reviewing substantive rights in free speech and due process-equal

178. The argument for a clear statement rule may be stronger in connection with the "expressly authorized" exception to the federal anti-injunction statute, in light of Congress' express intent to protect states' rights. See *supra* note 149. But even when Congress' intent is not crystal clear the neutral judicial approach would seem to be to balance the strength of the policies underlying the anti-injunction statute against those being pursued by some intersecting law. That was evidently the Court's approach in *Mitchum*, 407 U.S. at 225, when it held section 1983 to fall within the "expressly authorized" exception. See *supra* note 150.

179. 42 U.S.C. § 1983 (Supp. IV 1980).

protection cases, he defers to the states. Procedurally, his sovereign immunity and abstention rulings make it difficult even to obtain access to the federal courts. Finally, when Congress affirmatively acts to advance individual rights—as through its attempts to increase black participation in the political process and the economy¹⁸⁰—Justice Rehnquist would stand in the way. Plausible arguments can be advanced that our society should rely less heavily on the courts for the protection of individual rights and more on the legislative process, as in the English parliamentary tradition. To that end, Justice Rehnquist's efforts to curtail the power of the federal courts may be defensible, but tying the hands of Congress most certainly is not.

180. See *supra* notes 90-93, 103-04 and accompanying text. See also *supra* text accompanying notes 134-38.