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Staci Rosche

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Cover Page Footnote

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HOW CONSERVATIVE IS THE REHNQUIST COURT? THREE ISSUES, ONE ANSWER

*Staci Rosche**

INTRODUCTION

In the years following the appointment of William Rehnquist as Chief Justice of the United States Supreme Court, many commentators predicted a significant conservative shift by the Court.[1] Particularly in light of subsequent Reagan and Bush appointees, the Court appeared poised to mount a counter-revolution against the precedents of the Warren and, to a lesser extent, the Burger Courts.[2] But the 1992 election of President Bill Clinton resulted in two moderate appointments[3] which left the leanings of the Court uncertain.

This Note presents a comparative study of the Supreme Court's decisions from 1981-1985 ("the Burger Court") and from 1991-1995 ("the Rehnquist Court") in order to determine what, if any, shift in the Court's agenda can be demonstrated statistically.[4] After all the data were compiled, three areas were selected for further analysis: discrimination, free expression, and criminal law. As this Note reveals below, this study provided particularly interesting data in the area of civil rights. At first glance, a comparison of all discrimination decisions, including race and nationality, gender, age, and disability-based

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1. *See* David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court 453 (1992) [hereinafter Savage, Turning Right] ("With the change in membership, the [liberal] old agenda has been pronounced dead."); Bernard Schwartz, A History of the Supreme Court 364 (1993) [hereinafter Schwartz, A History] ("Nor can it be doubted that the line is being drawn farther to the right by the Rehnquist Court than it was by its immediate predecessors."); Harold J. Spaeth, *The Attitudinal Model*, *in* Contemplating Courts 296, 304 (Lee Epstein ed., 1995) (classifying the Burger and Rehnquist Courts as conservative); D.F.B. Tucker, The Rehnquist Court and Civil Rights 211 (1995) (referring to both the Burger and Rehnquist Courts as conservative); Christopher E. Smith & Avis A. Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 Conn. L. Rev. 53, 53-54 (1993) (stating that the emerging conservative majority would control the outcome of most decisions).

2. Savage, *supra* note 1, at 453-58.

3. Until Chief Justice Burger retired, President Reagan had appointed only one Justice, Sandra Day O'Connor. Savage, *supra* note 1, at 5. New Justices since Rehnquist's appointment as Chief Justice include Reagan appointees Antonin Scalia and Anthony Kennedy, Bush appointees David Souter and Clarence Thomas, and Clinton appointees Ruth Bader Ginsburg and Stephen Breyer. Notably, while the Burger Court era studied here experienced only the addition of Justice O'Connor, the Rehnquist Court underwent significant changes during the period studied here with the additions of Thomas, Ginsburg, and Breyer. But there have been no changes in membership since the period studied here.

4. Although such designations are generally used to refer to all terms during the tenure of a Chief Justice, "the Burger Court" and "the Rehnquist Court" will be used herein to refer to the two five-year periods studied in this Note.

claims, demonstrates little change in decisions between the Burger and Rehnquist Courts: The Rehnquist Court found for the minority-plaintiff 68% of the time as compared to 71% of the time by the Burger Court.[5] A closer examination demonstrates, however, that while overall, decisions in favor of alleged victims of discrimination remained consistent over time, the Rehnquist Court reversed the trend with respect to race-based claims. While 64% of Burger Court decisions favored racial minorities, only 25% of the Rehnquist Court's decisions benefited alleged victims of racial discrimination.[6] A comparison of voting rights decisions during these two eras further supports the conclusion that the Rehnquist Court was particularly austere with race-based claims, but otherwise supported plaintiffs who have alleged non-racially-based discrimination claims, even finding in favor of civil rights challenges by and for prisoners more often than those posed by and for racial minorities.[7]

In contrast, however, the Rehnquist Court appeared more protective than the Burger Court of the First Amendment freedom of expression. While the Burger Court protected the right only 52% of the time, the Rehnquist Court did so 79% of the time.[8] Closer examination of these cases indicates that the Rehnquist Court actively expanded the scope of First Amendment protections, extending protection to areas as diverse as hate speech and commercial speech.[9] Finally, the Rehnquist Court seemingly demonstrated a slightly increased sympathy for criminal defendants than the Burger Court evinced, finding for the defendant 33% of the time in criminal law cases versus 27% under the Burger Court.[10] This Note argues, however, that these statistics reflect the stabilization of a conservative criminal law jurisprudence rather than a reversal of the Burger Court's conservative trend.[11]

Part I of this Note describes the methods used to collect data and the outcome of that effort. Part II addresses the implications of the Rehnquist Court's reversal of the Burger Court's pattern of favoring plaintiffs in race-based discrimination claims. Part III analyzes the Rehnquist Court's increased support of First Amendment freedom of expression as compared with the Burger Court. Part IV details the differences between the Burger and Rehnquist Courts' criminal law agendas, arguing that the Rehnquist Court's emphasis on sentencing, rules, and statutory interpretation questions indicates that it is solidifying pro-prosecution criminal procedure precedents of the Burger

5. *See infra* app. at tbl. 2-a.
6. *See infra* app. at tbl. 2-b.
7. *See infra* note 33 and accompanying text.
8. *See infra* app. at tbl. 2-c.
9. *See infra* part III.
10. *See infra* app. at tbl. 2-d.
11. *See infra* part IV.

and early Rehnquist Courts. This Note concludes that although the Rehnquist Court's discrimination and First Amendment decisions appear inconsistent when viewed as a question of liberal or conservative doctrine, upon closer examination, these decisions are in fact consistent with the Rehnquist Court's emphasis on protecting the rights of the majority. In particular, the Court demonstrated its fundamental philosophy by rejecting affirmative action and minority-majority voting districts while simultaneously protecting hate speech. In practice, this preference for the majority did not lead the Rehnquist Court to defer to legislative decisions. Instead, the Rehnquist Court protected the majority as a class from government intrusions or limitations created to redress racial inequities. While this simple majoritarianism resulted in greater protections for the freedom of expression, it also all but banished the interests of racial minorities from the nation's highest Court.

I. METHODS

Data was gathered from the Supreme Court Reporter for the terms 1981-1985 and 1991-1995. The period from 1981-1985 was chosen because it was the end of the Burger Court and preceded significant changes in the membership of the Court. Only full, signed decisions were considered from each term.[12] Each full decision was placed in one or two of forty-five categories. Unlike other studies which have focused on sweeping issues such as due process or civil liberties,[13] the categories in this study were based on the specific issue addressed, ranging from abortion to arbitration, federal regulation of private entities to discrimination claims, labor to separation of powers. After

12. The Rehnquist Court produced 448 such opinions, and the Burger Court rendered 728 such opinions. It should be noted that in the interim between the periods studied here, Congress ended the requirement that the Supreme Court automatically review a decision of the highest State court in which that court held a federal law to be invalid. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified at 28 U.S.C. § 1257 (1994)). The previously automatic appeals were converted to petitions for certiorari. H.R. Rep. No. 100-660, 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 776, 778. However, this change was not treated as significant for purposes of this study because the change was made to eliminate a line of cases regarding "arcane and technical provisions of its jurisdiction," the majority of which were disposed of without briefing or oral argument, and resulted in "murky precedential value." *Id.* at 776. The Supreme Court itself claimed that while such automatic appeals accounted for 36% of the cases it decided in the 1980 term, most were issues of little significance that resulted in summary decisions without written opinions. *Id.* at 781-82. Therefore, although the elimination of automatic appeal may have contributed to the reduction in the total number of decisions issued by the Court, it was unlikely to have had a significant effect on the full, signed opinions that were the focus of this study.

13. *See, e.g.*, Richard L. Pacelle, Jr., The Transformation of the Supreme Court's Agenda from the New Deal to the Reagan Administration 203 (1991) [hereinafter Pacelle, Transformation]; Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 Judicature 83, 85 (1993).

being categorized, each case was assigned a beneficiary.[14] In the criminal law category, for example, each case was marked as a decision benefiting the government or the defendant. Once compiled, the data were arranged in a database and the percent of decisions benefiting each side was determined. Four hundred forty-eight cases were categorized from the Rehnquist Court, while 728 decisions were categorized from the Burger Court.[15] Because some cases qualified in more than one category, however, the adjusted total of cases per five year interval—counting each time a decision appeared in a category—was 511 and 806 decisions, respectively. Furthermore, because the Court dramatically reduced the number of full opinions issued,[16] the total number of cases in each category always appears substantially different between eras. But this gulf is misleading. To provide proportional data, the total number of decisions was converted into a percent of total cases decided, e.g., seventy Rehnquist Court and 115 Burger Court criminal justice decisions accounted for 13.7% and 14.3% of the adjusted total number of decisions, respectively.[17] Several related categories were then arranged in groups to provide a greater range of data for comparison.[18] Based on the outcome, three of these categories were chosen for analysis in this Note: racial discrimination, freedom of expression, and criminal law.[19]

II. THE SUPREME COURT AND RACE

As already noted, the sum of all discrimination claims[20] indicates that the Rehnquist Court's record was virtually identical to its predecessor. The data demonstrate that the Burger Court rendered decisions beneficial to the minority-plaintiff 70.8% of the time as

14. The beneficiary was the party whose interests were advanced by the decision, not necessarily an outright winner or loser. Where the decision favored both sides equally, the beneficiary was a split.

15. The decrease in the number of full decisions has "occurred despite increasing record numbers of case filings." Richard L. Pacelle, Jr., *The Dynamics and Determinants of Agenda Change in the Rehnquist Court*, *in* Contemplating Courts, *supra* note 1 at 251, 267 [hereinafter Pacelle, *Dynamics*].

16. The Burger Court averaged just over 145 signed decisions per term, while the Rehnquist Court averaged only 90 signed decisions per term.

17. *See infra* app. at tbl. 2-d.

18. These categories included federal and state law, criminal cases (composed of habeas and criminal law decisions), civil rights (including race and nationality, gender, age, disability, and other discrimination claims, § 1983 cases, and voting rights claims), First Amendment decisions, and labor decisions (including NLRA and ERISA claims).

19. Interestingly, these issues were not the anticipated focal points when this project was begun. In fact, issues concerning federalism were expected to be the eventual focus of this Note when the data were assembled. While the data did indicate a shift in decisions regarding federal, state, and local regulations, as well as in cases of conflicts between federal and state law, the categories addressed in this Note proved unexpectedly compelling.

20. For a list of all cases placed in the discrimination category, see *infra* app. at tbl. 1-a.

compared to 68.3% of the time by the Rehnquist Court.[21] But when the decisions are divided into subcategories of age, race and nationality, gender, and "other" discrimination[22] claims, it becomes clear that the Rehnquist Court was far more likely to find against a racial minority than the Burger Court, favoring the racial minority only 25% of the time, down from 64% of the time under the Burger Court. In contrast, the Court is equally as likely or more likely to find in favor of the minority-plaintiff in the remaining types of claims.[23] Moreover, the Rehnquist Court dedicated only 5.1% of its adjusted total decisions to discrimination claims, a sharp decrease from the 7.1% of the Burger Court's adjusted total cases.[24] This change was accounted for almost entirely by a drop in the number of race-based claims heard as a percentage of total discrimination cases.[25]

A. *Expectations of the Rehnquist Court*

Although a complete reversal of the Burger Court's restrained civil rights policy was generally not expected,[26] many observers were apprehensive, conceding that the "logical implication" of the Court's philosophy foreshadowed significant change.[27] The conservative views of Chief Justice Rehnquist and Justice Scalia in particular were said to portend "a diminished concept of rights and, even where those rights are present, a diminished capacity to enforce them."[28] But as late as 1992, the Court was described as having compiled a "mixed" record on affirmative action.[29] Similarly, empirical studies of the early Rehnquist Court indicated that it had been more liberal on civil liberties issues than expected.[30] As the Rehnquist Court's racial discrimi-

21. *See infra* app. at tbl. 2-a.

22. The "other" discrimination category includes claims by the disabled, homosexuals, institutionalized individuals, parents and children, and government entitlement recipients, as well as prisoners' *Bivens* claims, and intimidation claims.

23. *See infra* app. at tbl. 2-b. The apparently large decrease in support for age-based claims from 100% during the Burger Court to 66.7% during the Rehnquist Court actually only reflects a tiny number of cases: four of four decisions for the age-based plaintiff in the Burger Court, two of three decisions in the Rehnquist Court.

24. *See infra* app. at tbl. 2-a.

25. *See id.*; *infra* app. at tbl. 3-a.

26. *See* Pacelle, Transformation, *supra* note 13, at 203.

27. *Id.*; *see also* Stanley H. Friedelbaum, The Rehnquist Court: In Pursuit of Judicial Conservatism 119 (1994) [hereinafter Friedelbaum, The Rehnquist Court] (stating that the return to strict scrutiny for all race-based classifications "augurs a period of moderation, if not cessation, in the development of programs explicitly designed to assist minorities").

28. Haywood Burns, *The Activism Is Not Affirmative*, *in* The Burger Years 95, 107 (Herman Schwartz ed., 1987).

29. Michael Comiskey, *The Rehnquist Court and American Values*, 77 Judicature 261, 263 (1994).

30. *See* Smith & Hensley, *supra* note 13, at 85.

nation doctrine emerged, however, its "eroding support" for raced-based remedies of *de facto* discrimination became apparent.[31]

And as this agenda change became evident over the last five years, the Rehnquist Court's racial discrimination policy was called unrealistic or worse:

> [T]he Court was suggesting that if we pretend that race and racism don't exist, and if we just ignore race, eliminate laws that acknowledge racism and attempt to correct it, and just act as if things are the way we want them to be, someday we'll somehow evolve into this picture-perfect color-blind society with one race—the American race.
>
> Give me a break.[32]

Other commentators have expressed similar dissatisfaction with the Rehnquist Court's decisions, describing its assumptions about racism as "implausible,"[33] and criticizing it as "increasingly less responsive to the interests and rights of African Americans and other minorities."[34] Unfortunately, these later criticisms appear to accurately reflect a withdrawal of Supreme Court support for government-sponsored redress of racial discrimination.

B. *The Data*

Race-based claims accounted for 43.9% of all Burger Court discrimination claims but only 30.8% of Rehnquist Court discrimination claims.[35] Moreover, a compilation of prisoners' § 1983 and "other" claims demonstrates that, at the same time that the Rehnquist Court withdrew support from racial minorities, it increased the percentage of decisions benefiting prisoners posing civil rights challenges.[36]

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31. *See* Comiskey, *supra* note 29, at 264; Smith & Hensley, *supra* note 13, at 85.

32. Angela Davis, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 Am. U. L. Rev. 567, 637 (1996) [hereinafter Davis, *The American Dilemma*].

33. Sameer M. Ashar & Lisa F. Opoku, Recent Developments, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence*—Adarand Constructors, Inc. v. Pena, *115 S. Ct. 2097 (1995)*, 31 Harv. C.R.-C.L. L. Rev. 223, 223-24 (1996).

34. Michael W. Combs, *The Supreme Court and African Americans: Personnel and Policy Transformations*, 36 How. L.J. 139, 182 (1993).

35. *See infra* app. at tbl. 2-b. Viewed another way, race-based discrimination claims dropped from 3.10% (25 cases) of the Burger Court's adjusted total decisions to 1.57% (8 cases) of the Rehnquist Court's adjusted total decisions.

36. Decisions favorable to prisoners increased from only 14% under the Burger Court to 67% under the Rehnquist Court. *Compare* Whitley v. Albers, 475 U.S. 312, 325-26 (1986) (holding that shooting prisoner-plaintiff during attempt to rescue prison guard in riot did not constitute cruel and unusual punishment); Daniels v. Williams, 474 U.S. 327, 332-33 (1986) (denying cause of action under § 1983 for negligence); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986)(denying cause of action under § 1983 for lack of due care in injury to prisoner); Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding that because prisoner has no expectation of privacy in his cell, a shake down search did not constitute illegal search and seizure); Smith v. Wade, 461 U.S. 30, 56 (1983) (allowing punitive damages against prison found culpable for sexual assault

These data seem to support the contention of Rehnquist Court critics who claimed that "given the legal philosophy of the Rehnquist Court, the intent doctrine and the case law . . . will certainly be employed to retreat from *Brown* and its symbolism."[37] Indeed, the statistics compiled here demonstrate a disturbing trend of shielding the majority from any disadvantage stemming from societal attempts to compensate for racial discrimination. The majoritarian agenda suggested by this data is the effective equivalent of closing the doors of the Court to the nation's minorities, transforming that institution into an instrument of the status quo.

But in determining whether the bias against race-based claims is as strong as the statistics indicated, it is important to consider what issues the Burger and Rehnquist Courts addressed in the two eras. First, the racial discrimination claims may be broken into four subcategories to illustrate the basic issues the Courts addressed.[38] A comparison of cases falling in the same subcategory may demonstrate the substance

on youth offender); Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983) (rejecting cause of action for criminal defendant against police officer who perjured himself during trial); *and* Hewitt v. Helms, 459 U.S. 460, 476-77 (1983) (holding that prison's evidentiary review satisfied due process for prisoner confined to administrative segregation) *with* Lewis v. Casey, 116 S. Ct. 2174, 2182-84 (1996) (holding that showing of isolated actual injury was insufficient to sustain class action on behalf of prisoners); Sandin v. Conner, 115 S. Ct. 2293, 2302 (1995) (holding that refusal to allow witness at a disciplinary hearing did not violate due process); Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that prisoner-plaintiff may state a claim asserting prison liability for deliberate indifference to inmate safety); Helling v. McKinney, 509 U.S. 25, 35 (1993) (allowing claim for involuntary exposure to second-hand cigarette smoke); Hudson v. McMillan, 503 U.S. 1, 4 (1992) (holding that physical force resulting in injury may constitute a violation of inmate's rights); *and* McCarthy v. Madigan, 503 U.S. 140, 149 (1992) (holding that prisoner-plaintiff need not exhaust state administrative procedures before filing a Bivens Action). It is also interesting to note that prisoners are beneficiaries of favorable decisions more often than minorities in light of the current Court's unsympathetic disposition toward the rights of criminal defendants. *See infra* part IV.

37. Combs, *supra* note 34, at 182.

38. *See infra* app. at tbl. 3-a. The subcategories were determined by compiling the cases by type of discrimination alleged, and then grouping them based on the similarity of the claims made. For example, the racial classification subcategory encompasses both formal racial classifications and *de facto* classifications resulting from unequal application of the law. Therefore, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995), which involved a challenge to a government affirmative action program, was placed in the racial classification category. But a strikingly different case, Hunter v. Underwood, 471 U.S. 222, 232 (1985), was included in this category as an instance of *de facto* classification because the claimant alleged discriminatory application of a criminal statute—i.e., the law was selectively used to punish minorities. United States v. Armstrong, 116 S. Ct. 1480 (1996), was placed in this category for largely the same reasons—unequal prosecution on the basis of race. The institutional racism category is composed of discrimination claims lodged against non-governmental entities. For example, Bob Jones Univ. v. United States, 461 U.S. 574, 577, 605 (1983), concerning whether the I.R.S. could deny tax exempt status on the basis of discriminatory admission standards, was placed in this category because the alleged racial discrimination was committed by a private institution.

behind the statistics. As these data indicate, the Rehnquist Court was unsympathetic to most racial discrimination claims.

C. *Discussion*

Examination of both Courts' desegregation decisions alone indicates that the Rehnquist Court was somewhat uncomfortable with government intervention in such cases. When racial classification, institutional racism, and discrimination are also considered, however, a pattern of finding against racial minorities becomes increasingly evident. Moreover, the Rehnquist Court's voting rights decisions further support the implication that it treated racial minorities not as a class that required the Court's guardianship but, instead, as a class wielding inordinate political influence from which the majority had to be protected.

1. School Desegregation

While the Burger Court's school desegregation decisions rendered somewhat equivocal results, a comparison of the desegregation decisions from both periods demonstrates the Rehnquist Court's relative discomfort with court-ordered solutions to *de facto* segregation. Indeed, although the Burger Court backed away from support of busing, it was still unwilling to allow state residents, much less courts, to impede a city's busing plans.[39] In contrast, the Rehnquist Court appeared unwilling to support continuation of integration efforts.[40] As indicated in Table 3-a,[41] the Court heard two school desegregation cases in each era and found for the minority once in each era.[42]

The Burger Court struggled with race-neutral classifications and came to opposite conclusions regarding two seemingly similar state constitutional amendments. In *Washington v. Seattle School District No. 1*,[43] the Court was faced with what it considered an "extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State."[44] In that instance, the city devised an extensive busing plan after a magnet program designed to draw white students to inner-city schools failed to desegregate Seattle schools.[45] In response, Seattle citizens who disagreed with the plan developed and pushed through a statewide constitutional initiative which effec-

39. *See infra* text accompanying notes 43-47.
40. *See infra* notes 53-57 and accompanying text.
41. *See infra* app. at tbl. 3-a.
42. *See* Missouri v. Jenkins, 115 S. Ct. 2038 (1995); United States v. Fordice, 505 U.S. 717 (1992); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Crawford v. Board of Educ., 458 U.S. 527 (1982).
43. 458 U.S. 457 (1982).
44. *Id.* at 459.
45. *Id.* at 461.

tively outlawed all busing schemes.[46] The Court held that the initiative "use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities."[47] The Court therefore struck Washington's amendment. On the other hand, in *Crawford v. Board of Education*,[48] the Court upheld a similar California constitutional amendment prohibiting the state from ordering busing, absent a federal court's finding that busing was required to remedy an equal protection violation.[49] The Court concluded that California voters had "adopted" the Fourteenth Amendment by allowing court-ordered or other busing if required by the Federal Constitution, and, further, that states were not required to furnish greater protection than provided by the U.S. Constitution.[50] The Court further held that the California amendment did not "embody a racial classification. . . . It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation."[51] In his concurrence, Justice Blackmun distinguished the Seattle case from the California case:

> [T]he people of California—the same "entity" that put in place the State Constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to address racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment."[52]

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46. *Id.* at 461-63.
47. *Id.* at 470.
48. 458 U.S. 527 (1982).
49. *Id.* at 529, 545.
50. *See id.* at 535.
51. *Id.* at 537. The Court ultimately concluded:
> Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities. Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.

Id. at 539.
52. *Id.* at 547 (Blackmun, J., concurring) (emphasis omitted) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982)). But, in his dissent, Justice Marshall countered:
> In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the schoolhouse door to comply voluntarily with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proved effective—the full remedial powers of the state judiciary.

Id. at 562 (Marshall, J., dissenting).

By comparison, the two desegregation cases heard by the Rehnquist Court did not address race-neutral classifications, but rather the ongoing desegregation efforts themselves. In *United States v. Fordice*,[53] the Rehnquist Court returned to the more familiar ground of desegregation enforcement, here, in the Mississippi university system. The Court outlined Mississippi's history of racially segregated post-secondary education and the series of court orders attempting to enforce desegregation.[54] The Court repeatedly harkened back to *Brown v. Board of Education*,[55] noting that more than thirty years after that decision, Mississippi's state-supported universities remained almost entirely segregated.[56] The Supreme Court remanded the case and ordered the district court to find that Mississippi had violated the Constitution to the extent that the state had failed to dismantle its dual system (and the Court hinted strongly throughout that the state had indeed failed).[57] More recently, in *Missouri v. Jenkins*,[58] the Court faced a more difficult question: not whether racial desegregation continued but whether the court-ordered remedies in an eighteen-year long Missouri case had exceeded that court's authority.[59] There, although Missouri had a similarly extensive history of resisting integration, the Court balked at allowing the district court to order the state to increase teachers' salaries and fund remedial programs to combat the continuing inequity in minority student performance, holding that such orders were the equivalent of trying to solve an "intradistrict" violation with an "interdistrict" solution.[60]

The Rehnquist Court thus seemed comfortable finding discriminatory intent when the issue could be related back to the days of *Brown*; the majority made this direct connection numerous times in its discussion in *Fordice*.[61] But, when the issue was how to remedy ongoing

53. 505 U.S. 717 (1992).

54. *Id.* at 722-24.

55. 347 U.S. 483 (1954).

56. *Fordice*, 505 U.S. at 724-25. The Court noted:

> By the mid-1980's . . . more than 99 percent of Mississippi's white students were enrolled at University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women. The student bodies at these universities remained predominantly white, averaging between 80 and 91 percent white students. Seventy-one percent of the State's black students attended Jackson State, Alcorn State, and Mississippi Valley State, where the racial composition ranged from 92 to 99 percent black.

Id.

57. *Id.* at 743.

58. 115 S. Ct. 2038 (1995).

59. *Id.* at 2042, 2046.

60. *Id.* at 2053-54 ("This conclusion follows directly from *Milliken II*, decided one year after *Gautreaux*, where we reaffirmed the bedrock principle that 'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation'" (quoting Milliken v. Bradley, 433 U.S. 267, 282 (1922)).

61. *Fordice*, 505 U.S. at 734 ("Obviously, this midpassage justification for perpetuating a policy enacted originally to discriminate against black students does not make

inequities, the Rehnquist Court seemed tentative, unwilling to require state action. Moreover, not all commentators are convinced that the *Fordice* decision benefited minorities. A major impact of this decision could be to pose "a serious threat to the continued viability of state-supported, predominantly black universities in the formerly segregated states."[62] This outcome is linked to the Court's "integrationist" view that fails to distinguish between racial segregation by choice from segregation by policy.[63] This criticism aside, however, the Rehnquist Court's desegregation decisions demonstrate its reluctance to use the Court's authority to redress *de facto* segregation.

2. Racial Classifications and Institutional Racism

A more obvious contrast between the Burger and Rehnquist Courts, however, exists in the subcategories of racial classifications and institutional racism.[64] These two subcategories are considered together due to the absence of any institutional racism decisions by the Rehnquist Court. Further, including the Burger Court's institutional racism decisions underscores the Rehnquist Court's withdrawn support for minority claims, depicting a Court that preferred instead to protect the majority's interest.

The Burger Court, unlike its successor, demonstrated a somewhat limited interest in using the power of the court to provide narrow protection of minorities from *de facto* discrimination. For example, in *Hunter v. Underwood*,[65] the Burger Court held that a facially race-neutral Alabama law disenfranchising anyone convicted of a crime of "moral turpitude" nevertheless violated the Fourteenth Amendment

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the present admissions standards any less constitutionally suspect."); *id.* at 739 ("*Brown* and its progeny, however, established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.").

62. *The Supreme Court, 1991 Term: Constitutional Law, Part I*, 106 Harv. L. Rev. 163, 235 (1992).

63. *Id.* at 236. *But see* Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 Det. C.L. Rev. 1, 42 (describing *Fordice* as an instance in which the Rehnquist Court strengthened key equal protection principles).

64. Six Burger Court cases were placed in the racial classification category. *See* Batson v. Kentucky, 476 U.S. 79 (1986); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Hunter v. Underwood, 471 U.S. 222 (1985); Allen v. Wright, 468 U.S. 737 (1984); Palmore v. Sidoti, 466 U.S. 429 (1984); Plyler v. Doe, 457 U.S. 202 (1982). Four Rehnquist Court cases were placed in this category. *See* United States v. Armstrong, 116 S. Ct. 1480 (1996); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993); Georgia v. McCollum, 505 U.S. 42 (1992). There were three institutional racism cases under the Burger Court. *See* Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669 (1983); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

65. 471 U.S. 222 (1985).

due to its discriminatory intent and impact:[66] "[B]oth . . . discrimination against blacks, as well as against poor whites, was a motivating factor for the provision and [the law] certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation."[67] The Court went on to say that "whether or not intentional disenfranchisement of poor whites would qualify as a 'permissible motive' . . . it is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis."[68]

In contrast, the Rehnquist Court rejected a request for discovery by black criminal defendants who claimed they were subject to selective prosecution due to their race, stating that the defendants "failed to show that the Government declined to prosecute similarly situated suspects of other races."[69] The Court repudiated the respondents' reliance on *Hunter*, citing the statistics demonstrating the discriminatory effect of application of the moral turpitude law in that case.[70] Yet Justice Stevens in dissent cited statistics demonstrating that while 65% of crack-users are white, only four percent of federal offenders convicted of trafficking in the drug are white,[71] and lamented that "I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery."[72]

On the whole, however, the Burger and Rehnquist Courts have addressed significantly different issues. The Burger Court considered whether racial classifications disadvantaged minorities, while the Rehnquist Court examined whether government programs designed to redress the effects of racial discrimination burdened the majority. For example, the Burger Court "slam[med] the courthouse door" on plaintiffs by denying them standing to bring their claim that the Internal Revenue Service was violating the Constitution and federal law in failing to deny tax-exempt status to racially discriminatory private schools.[73] But the Court had previously upheld that agency's authority to deny tax-exempt status to discriminatory schools.[74] In the latter instance, the Court stated that "[g]iven the stress and anguish of the history of efforts to escape from the shackles of the 'separate but

66. *Id.* at 232-33.

67. *Id.* at 231.

68. *Id.* at 232.

69. United States v. Armstrong, 116 S. Ct. 1480, 1483 (1996).

70. *Id.* at 1487 (stating that, in *Hunter*, minorities were 1.7 times more likely to suffer disenfranchisement under the law).

71. *Id.* at 1493 (Stevens, J., dissenting).

72. *Id.* at 1494 (Stevens, J., dissenting).

73. Allen v. Wright, 468 U.S. 737, 766-68 (1984) (Brennan, J., dissenting) (citations omitted).

74. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

equal' doctrine . . . it cannot be said that educational institutions that . . . practice racial discrimination" should be subsidized by taxpayers.[75]

Furthermore, in *Plyler v. Doe*,[76] the Burger Court protected the children of illegal aliens from a Texas law that denied public education to undocumented children.[77] There, the Court reasoned that "the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State,"[78] and ultimately concluded that there was no justification for a law "that impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control."[79]

In contrast, the Rehnquist Court focused not on whether a racial classification unfairly burdened a minority, but rather on whether it disadvantaged the majority. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[80] the Court held that a construction guild need not show that one of its members would have received a contract absent a local affirmative action ordinance.[81] The Court cited *Allen v. Wright*[82] in its analysis of the standing doctrine, yet came to the opposite conclusion: Where the Burger Court had denied standing to minority plaintiffs challenging tax practices because they could allege no specific injury, the Rehnquist Court allowed a group representing white contractors to proceed, reasoning that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."[83] The difference between *Allen* and *Northeastern Florida* was that, in the former case, the plaintiffs sought to force the government to deny a benefit to discriminatory groups; in the latter case, plaintiffs sought to force the government to discontinue a program designed to rectify past discrimination. Similarly, in *Adarand Constructors, Inc. v. Pena*,[84] the Rehnquist Court's decision favored the majority group challenging a government affirmative action program.[85] The Court remanded the case for application of a strict scrutiny test, reasoning that "strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed

75. *Id.* at 595 (citations omitted).
76. 457 U.S. 202 (1982).
77. *Id.* at 230.
78. *Id.* at 215 (emphasis omitted).
79. *Id.* at 220.
80. 508 U.S. 656 (1993).
81. *Id.* at 658.
82. 468 U.S. 737 (1984).
83. *Northeast Florida*, 508 U.S. at 663-64, 666.
84. 115 S. Ct. 2097 (1995).
85. *Id.* at 2113.

examination, both as to ends and as to means."[86] Despite being chided by the dissent,[87] the majority stated that "[c]onsistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[88] These two decisions expressing concern that the majority might be burdened by affirmative action[89] stand in stark relief to the Burger Court's concern with whether racial minorities were being disadvantaged by government action and/or inaction.

3. Employment Discrimination

While the Rehnquist Court actively constructed a racial classification doctrine hostile to government affirmative action, it all but abandoned race-based employment discrimination issues. Table 3-a[90] demonstrates that a reduction in the number of employment discrimination claims heard accounts for a large part of the drop-off in total race-discrimination cases heard by the Rehnquist Court as compared to the Burger Court.[91]

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86. *Id.* at 2117.

87. *Id.* at 2120 (Stevens, J., dissenting) (admonishing the court for failing to distinguish between "a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority").

88. *Id.* at 2114. While the Supreme Court had previously recognized that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986), that principle had been applied to redress discrimination against the plaintiff, not to assist a plaintiff seeking to prevent government-sponsored redress of discrimination. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731-33 (1982) (holding that single-sex admissions policy of a state supported university cannot be justified on the ground that it compensates for discrimination against women).

89. *See* David M. O'Brien, *Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. Sch. L. Rev. 981, 986 (1996) ("A majority of the Rehnquist Court turned the corner on affirmative action in *Richmond v. J.A. Croson*, making it much more difficult for states and localities to defend such programs, and in *Northeastern Florida Contractors v. Jacksonville* making it easier for white-owned businesses to attack the constitutionality of such programs." (footnotes omitted)).

90. *See infra* app. at tbl. 3-a.

91. Sixteen cases were included in the employment discrimination subcategory. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Burnett v. Gratton, 468 U.S. 42 (1984); Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); EEOC v. Shell Oil Co., 466 U.S. 54 (1984); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 56 (1984); American Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Patsy v. Board of Regents, 457 U.S. 496 (1982); Pullman-Standard v. Swint, 456 U.S. 273 (1982); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Connecticut v. Teal, 457 U.S. 440 (1982).

Although the Burger Court appeared generally sympathetic to employment discrimination claims, finding for the plaintiff in seven out of thirteen such cases, it did not hold minority claimants to a low burden of proof. For example, in *General Building Contractors Association v. Pennsylvania*,[92] the Court held that, to establish liability for damages under federal law, a minority plaintiff had to show that employers and contractors who made use of a union hiring hall system were aware of the union's discriminatory intent.[93] But in *Connecticut v. Teal*,[94] the Court found that the disparate impact of a facially neutral standardized test was sufficient to establish a prima facie case under Title VII.[95] The Court focused on preventing "employment and promotion requirements that create a discriminatory bar to *opportunities*," not "on the overall number of minority or female applicants actually hired or promoted."[96] Further, in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[97] the Burger Court upheld a lower court's decision which had established a 29% minority membership goal and assessing fines against a New York union that had ignored that court's earlier orders to integrate.[98] The Court held that Title VII

> does not prohibit a court from ordering . . . affirmative race-conscious relief as a remedy for past discrimination. Specifically, we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.[99]

While the Burger Court held minority claimants to a high evidentiary standard, it accepted affirmative action as a tool to redress racial discrimination.

While the Rehnquist Court actively undercut affirmative action in government classification cases, it did not directly address affirmative action in its employment discrimination cases; rather, the Court con-

92. 458 U.S. 375 (1982).

93. *Id.* at 391-97. The plaintiffs had sued under 42 U.S.C. § 1981, which the Court traced to the Civil Rights Act of 1866 in concluding that the statute was only meant to reach intentional discrimination. *Id.* at 396. For additional examples of the Burger Court's imposition of high evidentiary burdens on minority claimants, see *Patterson*, 456 U.S. at 77 (holding that a Title VII exemption for seniority systems applies to systems implemented before, as well as after, the passage of Title VII); *Wygant*, 476 U.S. at 283-84 (holding that a layoff policy giving preference to minority employees must be narrowly tailored).

94. 457 U.S. 440 (1982).

95. *Id.* at 448-49.

96. *Id.* at 450 (emphasis omitted).

97. 478 U.S. 421 (1986).

98. *Id.* at 443-44.

99. *Id.* at 445.

sidered issues of proof[100] and the retroactive application of statutory amendments.[101] In *St. Mary's Honor Center v. Hicks*,[102] the Court held that the trier of fact's rejection of the employer's explanation for the charged discrimination does not mandate a finding for the plaintiff, stating that regardless of the credibility of its statements, by simply proffering an explanation, the defendant had met its burden of production.[103] Despite the unlikelihood of the employer's explanation, the burden of proving discriminatory intent remained with the plaintiff.[104] The dissent accused the majority of abandoning twenty years of framework established to handle employment discrimination claims:

> [T]he Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove.[105]

The majority acknowledged that not all employers would provide truthful answers to such claims, but distinguished a dishonest answer from proof of discriminatory intent, dismissing the assumption that perjured testimony was proffered to hide discriminatory intent: "[E]ven if we could readily identify these perjurers, what an extraordinary notion, that we 'exempt them from responsibility for their lies' unless we enter Title VII judgments for the plaintiffs! Title VII is not a cause of action for perjury."[106]

The Rehnquist Court even resisted congressional criticism of its discrimination decisions. In *Rivers v. Roadway Express, Inc.*,[107] a race-based employment discrimination case, the Court held that an amendment to 42 U.S.C. § 1981 did not retroactively apply to employers,

100. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-12 (1993) (holding that showing that the defendant-employer provided an untruthful explanation for its alleged discrimination was insufficient to shift the burden of proof to the employer).

101. *See, e.g.*, Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994) (holding that a Congressional amendment to employment discrimination law was not retroactive).

102. 509 U.S. 502 (1993).

103. *Id.* at 509-10.

104. *Id.* at 510-11. The Court went on to say that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-15.

105. *Id.* at 525 (Souter, J., dissenting).

106. *Id.* at 521. In contrast, the Rehnquist Court eased the burden for gender-based employment discrimination claims in Harris v. Forklift System, Inc., 510 U.S. 17, 21-23 (1993). The Court held that demonstration of a "discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being" was sufficient to state a claim under Title VII. *Id.* at 22.

107. 511 U.S. 298 (1994).

despite the fact that the amendment was Congress's attempt to legislatively overrule a previous Supreme Court decision.[108] The Court's rejection of retroactive application of the amended statute hinged on the fact that the new law "enlarged the category of conduct that is subject to § 1981 liability."[109] Justice Blackmun dissented, arguing that the Court was "prolong[ing] the life of that congressionally repudiated decision."[110] This resistance to legislative rejection of the Rehnquist Court's racial discrimination doctrine is ironic in light of the Rehnquist Court's apparent preference for protecting the majority,[111] in this case apparently from itself. Moreover, the Court's abandonment of employment discrimination claims demonstrates its reluctance to support government attempts to combat subtle forms of racism.[112]

4. Voting Rights

Finally, an examination of the Rehnquist Court's voting rights decisions accentuates the Court's withdrawal of support of race-based claims. Overall, findings favorable to the party challenging voting rights restrictions fell from 75% in the Burger Court to only 36% in the Rehnquist Court.[113] But these figures alone do not clearly demonstrate any animus toward racial claims for two reasons: First, this category includes all challenges to restrictions of voting rights, including such non-race-based issues as write-in votes and political gerrymandering; and, second, the challengers in some cases are whites challenging majority-minority districts.[114] An analysis of the Rehnquist Court's race-based voting rights cases, however, supports the conclusion that, while this Court was unsympathetic to racial discrimination claims brought by minorities, it favored majority claims of reverse-discrimination.[115]

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108. *Id.* at 304, 313. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court had held that 42 U.S.C. § 1981 no longer applied after a contract had been formed, effectively ending the *Rivers* plaintiff's § 1981 claim in the lower court. *Rivers*, 511 U.S. at 301-03. While the *Rivers* plaintiff's appeal was pending, Congress amended § 1981, effectively overruling the *Patterson* decision. *Id.* at 302.

109. *Id.* The Court relied on a similar case in which a gender-based employment discrimination claim failed because the Court refused to retroactively apply another amendment to 42 U.S.C. § 1981. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994). *Landgraf* was the only decision of five regarding gender discrimination rendered against the plaintiff by the Rehnquist Court. *See infra* app. at tbl. 2-b.

110. *Rivers*, 511 U.S. at 315 (Blackmun, J., dissenting).

111. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 96 (1989).

112. *See* Pacelle, *Dynamics*, *supra* note 15, at 265 (noting the Court's growing "willingness to defer to Congress and the executive branch in civil liberties and civil rights issues").

113. *See infra* app. at tbl. 2-a.

114. *See infra* note 121 and accompanying text.

115. An interesting corollary to the apparent shift in race-based claims are the tribal rights cases. Although these cases tend to focus on land disputes, tribal autonomy

Once the race-based voting rights claims are distilled from the category, it becomes clear that only two of ten Rehnquist Court decisions benefited minorities.[116] In *Morse v. Republican Party*,[117] the plurality held that a Virginia Republican Party plan to charge a fee to participate in its U.S. Senate nomination process violated the Voting Rights Act.[118] But the beneficiary of the Court's decision in *United States v. Hays*[119] provides little evidence of any support for minority voting rights. There, the Court denied standing to white plaintiffs challenging a majority-minority district because they did not live in the relevant district.[120]

In fact, six of the eight remaining Rehnquist Court decisions regarding race-based voting rights claims also involve proportional representation and/or majority-minority districts. In the four cases of this group in which the decision benefited the challenger, the plaintiff was a member of the majority challenging a majority-minority district.[121]

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from state regulation, and law suit jurisdiction rather than directly addressing civil rights issues, it is interesting to note that while the Burger Court found in favor of tribes 61% of the time, the Rehnquist Court found for tribes only 25% of the time. *See infra* app. at tbl. 2-a. This reversal in decisions favoring tribal interests is almost exactly the same as the reversal in decisions favoring racial minorities in discrimination cases. *Cf. id.* at tbl. 2-a *and* tbl. 2-b.

116. Two Rehnquist Court voting rights cases were classified as favoring minorities. *See* United States v. Hays, 115 S. Ct. 2431 (1995); Morse v. Republican Party of Va., 116 S. Ct. 1186 (1996). Eight Rehnquist Court voting rights cases were decided against minority interests. *See* Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996); Miller v. Johnson, 115 S. Ct. 2475 (1995); Holder v. Hall, 512 U.S. 874 (1994); Johnson v. De Grandy, 512 U.S. 997 (1994); Shaw v. Reno, 509 U.S. 630 (1993); Growe v. Emison, 507 U.S. 25 (1993); Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

117. 116 S. Ct. 1186 (1996).

118. *Id.* at 1191-92, 1213. Two Justices found that the fee required preclearance and was also banned as equivalent to a poll tax. *Id.* at 1198-99, 1213. Three other Justices found the tax unconstitutional under the Twenty-fourth Amendment ban on poll tax. *Id.* at 1215.

119. 115 S. Ct. 2431 (1995).

120. *Id.* at 2437.

121. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993) (holding that the plaintiff had standing to challenge the majority-minority congressional districts in North Carolina). The Court based its decision on the suspect nature of any racial classification, stating:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the live—think alike, share the same political interests, and will prefer the same candidates at the polls.

Id. at 647.

The Court went on to invalidate those congressional districts in Shaw v. Hunt, 116 S. Ct. 1894, 1905 (1996). Similarly, the Court upheld a challenge to Georgia's majority-minority districts in Miller v. Johnson, 115 S. Ct. 2475, 2493-94 (1995), and held in Bush v. Vera that Texas's minority-majority congressional must be districts subject to strict scrutiny, stating that "to the extent that race is used as a proxy for political

In the four cases involving minority allegations of vote and power dilution, the Court found for the government and against the minority.[122] Indeed, the Court's voting rights decisions have "sent tremors through the emerging minority political establishment."[123] The Rehnquist Court's distrust of government affirmative action programs could lead to a chilling effect on minority influence on American politics. In combination with the Rehnquist Court's resistance to recognizing subtle forms of discrimination, its lack of support for minority voting rights claims could systematically eliminate minority voices from the public discourse.

D. *Summary*

Alone, the statistics support commentators who decry a disturbing trend toward denying government protection to minorities. As critics have noted, the Court's "misguided" assumptions that racial discrimination is a remnant of the past and that group rights cannot be advanced over individual rights to redress centuries of discrimination "warrant skepticism about the good faith desire of the [majority of the Court] to promote equality of opportunity for those who have suffered and continue to suffer from discrimination and oppression on the basis of race and ethnicity."[124] And, it is important that, at least with regard to employment discrimination and desegregation cases, the Rehnquist Court is hearing somewhat different issues than its predecessor.[125] This change in focus could be interpreted as an acceptance of the Burger Court's narrow concept of civil rights.[126] But, in combination with its voting rights decisions and the shift toward finding all racial classifications suspect, regardless of the underlying

characteristics, a racial stereotype requiring strict scrutiny is in operation." 116 S. Ct. 1941, 1956 (1996).

122. *See* Johnson v. De Grandy, 512 U.S. 997, 1024 (1994) (rejecting Hispanic and black voter challenge to Florida redistricting plan, finding insufficient evidence of vote dilution in majority districts where minorities receive proportional representation through majority-minority voting districts); Holder v. Hall, 512 U.S. 874, 885 (1994) (rejecting black plaintiff's challenge to county's single-member board of commissioners on the basis that the number of members in the governing body is not subject to a vote dilution claim); Growe v. Emison, 507 U.S. 25, 42 (1993) (holding that the district court erred in requiring Minnesota to establish a majority-minority district because there was insufficient evidence of vote dilution); Presley v. Etowah County Comm'n, 502 U.S. 491, 509-510 (1992) (holding that county commissioners' action diluting their own power just after black resident was elected to the commission was not actionable).

123. Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 Sup. Ct. Rev. 45, 69.

124. Ashar & Opoku, *supra* note 33, at 223.

125. *See supra* notes 65-97 and accompanying text.

126. *See* Burns, *supra* note 28, at 106-07 ("The constricted vision of the Burger Court where the rights of racial minorities are concerned has resulted in a narrower concept of what these rights are, and a restricted ability on the part of minorities to enforce them.").

reasons for those classifications, it seems evident that the Rehnquist Court, while otherwise sympathetic to non-race-based discrimination and civil right claims, rejected the need for protection of minorities suffering from subtle forms of discrimination. As a plurality of the Court explained, "Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes," including affirmative action and majority-minority districts.[127] The Court's shift in agenda has been described as "strikingly remindful of *Plessy*[*v. Ferguson*] [in that t]he Court did not consider the overall impact of the decision upon the principles of anti-discrimination and equality or the eradication of racism."[128] As Justice Stevens concluded in his dissent in *Adarand*,[129] the Court's rejection of all race-based classifications could

> produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.[130]

In this context, the Court's majoritarian impulses are undercutting those Americans whose birth places them outside the majority, freeing the political branches to ignore racial minority interests.[131] It seems clear that in seeking to establish a color-blind doctrine in a nation in which majority membership is defined by race, the Rehnquist Court has all but banished the unique complaints of racial minorities from its hallowed halls.

III. THE SUPREME COURT AND FREE SPEECH

Although the Rehnquist Court had a conservative record with regard to racial discrimination claims, the statistics indicate that it em-

127. Bush v. Vera, 116 S. Ct. 1941, 1964 (1996).

128. Combs, *supra* note 34, at 177. The Rehnquist Court's affirmative action decisions have also been described as obstructionist:

> Just as it did more than a century ago in overseeing the demise of Reconstruction, the Supreme Court is obstructing yet another national consensus supporting affirmative measures to eliminate systemic discrimination from American society. By narrow majorities, the Court has meticulously laid the groundwork for a new and untested colorblind jurisprudence, with the ultimate aim of invalidating government use of race-conscious affirmative action as an instrument of public policy in dismantling entrenched patterns of systemic discrimination against minorities and women.

Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 Mich. J. Race & L. 51, 52-53 (1996).

129. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

130. *Id.* at 2122 (Stevens, J., dissenting).

131. *See* Lynne Henderson, Note, *Authoritarianism and the Rule of Law*, 66 Ind. L.J. 379, 435-36 (1991) (arguing that the Rehnquist Court's majoritarian jurisprudence is actually authoritarian, serving to suppress the minority rather than defer to the majority).

braced the First Amendment right to freedom of expression.[132] While the Burger Court upheld that right only 52% of the time, the Rehnquist Court did so 79% of the time.[133] That the Rehnquist Court has narrowed the protections of racial minorities while broadening the right to freedom of speech and expression appears, at first, incongruous. This apparent incongruence can be considered as such only when the status of the Court is posed as a question of liberal or conservative leanings. The simultaneous support of the freedom of expression and rejection of affirmative action are consistent, however, in that they reflect the Rehnquist Court's focus on protecting the majority's right to be free from government intrusion.[134] But regardless of its motivation, it is clear that the Rehnquist Court has provided far greater First Amendment protection than did its predecessor.

A. *Expectations and Critiques of the Rehnquist Court's First Amendment Decisions*

The Burger Court was accused of having "forgotten or ignored the most fundamental tenet of First Amendment theory, namely, that freedom of expression occupies a special status in our constitutional structure."[135] A continued apathy for the freedom of expression was likewise expected from the nascent Rehnquist Court,[136] prompting one commentator to lament that "critics of the Burger Court may come to look back upon its receding period with more than a little nostalgia."[137] Others anticipated the "post-Burger era [of First Amendment jurisprudence] with the deepest foreboding."[138] There was particular concern for the new commercial speech doctrine, prompting predictions of "poor prospects for its survival in the Rehnquist Court."[139] These fears were founded both on the growing conservative composition of the early Rehnquist Court and on experience with the Burger Court, which, at least in its waning years, often found the freedom of expression to be "subordinate" to other important social issues.[140]

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132. *See infra* app. at tbl. 2-c.

133. *See infra* app. at tbl. 2-c.

134. *See* Mark Tushnet, *The Supreme Court and Its First Amendment Constituency*, 44 Hastings L.J. 881, 898-99 (1993) (indicating that the Rehnquist Court's First Amendment decisions are a logical result of its policy inclinations).

135. Thomas I. Emerson, *Freedom of the Press Under the Burger Court*, *in* The Burger Court: The Counter-Revolution That Wasn't 1, 26 (Vincent Blasi ed., 1983).

136. *See* Lyle Denniston, *The Burger Court and the Press in* The Burger Years 23, 44 (Herman Schwartz ed., 1987); Friedelbaum, *supra* note 27, at 64; William C. Louthan, The United States Supreme Court: Lawmaking in the Third Branch of Government 224 (1991).

137. Schwartz, A History, *supra* note 1, at 375.

138. Denniston, *supra* note 136, at 44.

139. Friedelbaum, *supra* note 27, at 64.

140. *See* Emerson, *supra* note 135, at 24-26.

The early Rehnquist Court "shocked" its conservative supporters when it seemed to embrace the First Amendment freedom of expression.[141] Indeed, many of the Court's early First Amendment decisions were deemed surprising or anomalous for the conservative Court.[142] As late as 1993, one judge commented that he found it "difficult to understand the basis for the growing myth that the Court is a pro-First Amendment institution," suggesting that any apparently favorable decisions were not the norm.[143] He said he found the four vote minority dissent in positive First Amendment decisions to be ominous, an indication of reversals to come.[144] But as the Rehnquist Court continued to render decisions protecting the freedom of speech, other observers began to take note. Eventually, commentators shifted their focus, attempting to explain why the Rehnquist Court embraced the First Amendment, positing that "the court [was] in the happy situation, . . . in which its policy inclinations coincide[d] with an important constituency's interests."[145]

B. *The Data*

The dire predictions for First Amendment jurisprudence in the Rehnquist Court have thus far proved dead wrong. As indicated in Table 2-c,[146] the Rehnquist Court "regularly upholds First Amendment claims."[147] The Rehnquist Court rendered 79% of its First Amendment decisions in favor of the freedom of speech, a sharp increase from the Burger Court's 52% rate of favorable decisions.[148] As with discrimination cases, the First Amendment decisions were broken down into subcategories for further comparison.[149] An examination of these subcategories demonstrates that the Burger Court was willing to subordinate First Amendment free expression to social concerns such as controlling pornography. In fact, in every case posing a First Amendment challenge to a government restriction of pornogra-

141. Louthan, *supra* note 136, at 224 ("Rehnquist shocked his conservative supporters off the Court with his opinion holding that the Rev. Jerry Falwell could not collect damages for emotional distress imposed on him by a parody in Larry Flynt's *Hustler Magazine* that portrayed Falwell as an incestuous drunk.").

142. *See* Tushnet, *supra* note 134, at 891-92.

143. Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 Hastings L.J. 809, 818 (1994).

144. *Id.*

145. Tushnet, *supra* note 134, at 898.

146. *See infra* app. at tbl. 2-c.

147. Tushnet, *supra* note 134, at 899.

148. *See infra* app. at tbl. 2-c.

149. *See infra* app. at tbl. 3-b. The cases were placed in a subcategory based on the type of speech restriction challenged: cable television, campaign activities, commercial speech, forum, intragovernmental restrictions, press access, protest, and content. For example, cases in which the government tried to impose restrictions on its employees or recipients of government funding were labeled intragovernmental, while cases in which a government restriction was placed on the display of certain symbols was placed in the content subcategory.

phy, the Burger Court upheld the restriction.[150] On the other hand, the Burger Court was not particularly tolerant of campaign regulations or restrictions on press access to court documents.[151] In contrast, the Rehnquist Court increased protections against intergovernmental restrictions, and, most dramatically, against government regulation by content.

In fact, despite the low expectations, the Rehnquist Court has rendered decisions in favor of free expression almost across the board. In particular, the Rehnquist Court made an apparent effort to broaden and define the commercial speech doctrine, the area that seemed most vulnerable to many observers. Indeed, First Amendment free expression cases occupied 5.1% percent of the Rehnquist Court's adjusted total number of cases, a significant increase from the 3.3% of the Burger Court's adjusted total decisions.[152] Furthermore, the commercial speech doctrine accounted for 26.9% of the Rehnquist Court's free expression decisions, but represented only 11.1% of the Burger Court's free expression decisions.[153] These figures indicate that the Rehnquist Court built an active, volitional First Amendment agenda, expanding and revising the existing doctrine.[154] An examination of the cases supports this supposition.

C. *Discussion*

It is difficult to understand the doom predicted for the First Amendment doctrine outside the context of the Burger Court's apparent ambivalence toward freedom of expression. Generally, the Burger Court permitted regulation of expression when "important" or socially favored forms of expression were not at issue.[155] Yet, while the data and cases suggest that the Burger Court's freedom of expression record was somewhat equivocal,[156] it has been suggested that, in combi-

150. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); New York v. Ferber, 458 U.S. 747 (1982).

151. *See infra* app. at tbl. 3-b.

152. *See infra* app. at tbl. 2-c.

153. *See infra* app. at tbl. 3-b.

154. *See* Pacelle, Transformation, *supra* note 13, at 198-203 (discussing volitional and exigent agendas); *see also infra* text accompanying notes 279-73 (indicating that with regard to criminal justice cases, the Court appears to be constructing an exigent agenda, maintaining rather than expanding existing doctrine).

155. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686-87 (1986) (limiting expression in a school setting); Cornelius v. NAACP Nat'l Defense & Educ. Fund, 473 U.S. 788, 808 (1985) (limiting access to a government charitable scheme); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) (holding Longshoremen liable for damages resulting from refusal to unload Russian vessel in protest of the invasion of Afghanistan).

156. *See* David G. Savage, *Rulings Displeased Both Left and Right: Burger Court Leaves Unclear Legacy*, L.A. Times, July 7, 1986, at A8 [hereinafter Savage, *Legacy*]. The Burger Court's First Amendment decisions

> led University of Chicago law professor Geoffrey Stone to denounce the Burger court, in a recent issue of the ABA Journal, for "selective activism."

nation with the Warren Court, the Burger Court managed to expand freedom of expression in important ways, including providing limited protection to commercial speech.[157] These were the expansions many observers feared would be curtailed. Instead, the Rehnquist Court made the Burger Court seem tentative by comparison. The following sections will address related subtopics of free expression decisions: commercial speech and cable television, public and nonpublic forum, and content.

1. Commercial Speech

The Burger Court heard three commercial speech cases and rendered decisions protecting commercial speech twice.[158] As previously noted, this area of the Burger Court's First Amendment jurisprudence was widely applauded. And, despite commentators' worst fears,[159] the Rehnquist Court increased the number of cases dedicated to commercial speech, allowing commercial speech restrictions to stand in only two of seven cases.[160] In one such decision, *Florida Bar v. Went for It, Inc.*,[161] the Rehnquist Court upheld a thirty-day ban on attorney solicitation of families whose loved ones had been the victims of accidents, reasoning that other advertising options were available to attorneys.[162] Similarly, in *United States v. Edge Broadcasting Co.*,[163] the Court upheld a federal government regulation preventing lottery advertisements from being broadcast in or into states in which lotteries are illegal.[164] There, the Rehnquist Court reasoned that allowing der-

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> The court, while upholding a corporate right to free speech, he wrote, "Seems unable to grasp the fact that there are groups and individuals in our society who do not have large amounts of cash to spend on political campaigns and do not have ready access to television, radio, newspapers and other mainstream means of communication."

Id.

157. Schwartz, A History, *supra* note 1, at 327.

158. *See In re* R.M.J., 455 U.S. 191, 206-07 (1982) (finding law restricting lawyer's non-misleading advertising in violation of the First Amendment); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (holding Postal Service regulation prohibiting the unsolicited mailing of contraceptives ads to be in violation of the First Amendment); Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328, 348 (1986) (holding that Puerto Rico law prohibiting advertisement of tourist casinos to residents was narrowly tailored enough to survive First Amendment challenge).

159. *See supra* notes 135-36 and accompanying text.

160. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1994); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994); United States v. Edge Broadcasting, 509 U.S. 418 (1993); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Edenfield v. Fane, 507 U.S. 761 (1993).

161. 115 S. Ct. 2371 (1995).

162. *Id.* at 2380-81.

163. 509 U.S. 418 (1993).

164. *Id.* at 436. The challenging broadcaster operated in Virginia where lotteries are legal, but 7.8% percent of its audience lived in North Carolina, which prohibits lotteries. *Id.* at 423-24. This decision also correlates to the Rehnquist Court's more

ogation of the federal statute in an instance in which less than ten percent of the station's audience resided in a non-lottery state would be a slippery slope leading to the erosion of federal support of state efforts to ban lotteries.[165] Both of these cases involved targeted restrictions intended to protect consumers from very specific commercial intrusions. In the majority of cases, however, the Rehnquist Court has struck down state and local efforts to curb commercial speech, holding that the First Amendment protects handbill distribution,[166] advertisements describing licensed accounting skills,[167] beer labels specifying alcohol content,[168] and advertisements containing liquor prices.[169]

But, the Court has not clearly defined the parameters of its commercial speech doctrine. For instance, in *44 Liquormart, Inc. v. Rhode Island*,[170] the Court stated that "when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[171] The Court concluded that "[p]recisely because bans against truthful, non-misleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."[172] But the Rehnquist Court disagreed about how strictly to interpret the Burger Court's 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[173] Four Justices held that *Central Hudson* meant that the state had the burden of showing that the commercial

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sympathetic stance toward government regulation of cable television. *See infra* note 176 and accompanying text.

165. *Edge Broadcasting*, 509 U.S. at 435.

166. City of Cincinnati v. Discovery Network, 507 U.S. 410, 419-20 (1993).

167. Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 148-49 (1994).

168. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1594 (1995).

169. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996).

170. 116 S. Ct. 1495 (1996).

171. *Id.* at 1507 (citations omitted) ("The special dangers that attend complete bans on truthful, non-misleading commercial speech cannot be explained away by 'common-sense distinctions' . . . between commercial and non-commercial speech.").

172. *Id.* at 1508. Although Justice Scalia seemed to agree in his dissent that most restrictions on truthful advertisements are "paternalistic," he seemed uncomfortable with assigning constitutional protection to commercial speech:

> On the other hand, it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them. I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of "the freedom of speech," and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people.

Id. at 1515 (Scalia, J., dissenting).

173. 447 U.S. 557 (1980).

speech restriction would advance its interest to a "material degree,"[174] while four other Justices felt that *Hudson Gas* required not only advancement of the state's interest, but that the restriction also be sufficiently narrowly tailored to target the harm intended to be regulated.[175] Additionally, the Rehnquist Court seemed uncertain regarding the related issue of regulation of cable television, rendering split decisions in each of the two cases it heard in that area.[176] This apparent indecisiveness, when combined with the split among the Justices regarding the limits of commercial speech, have left the scope of commercial speech protections uncertain. But such indecision appears to be a question of degree rather than an indication that the Rehnquist Court is wavering from its unexpected commitment to upholding and expanding—rather than undermining—commercial speech.

2. Public and Nonpublic Forum Questions

The issue of restrictions of expression in public and nonpublic fora resulted in exactly the same number of cases and decisions favoring free expression in both the Burger and Rehnquist Courts.[177] Nonpublic forum cases are somewhat unique in that they often involve a conflict between two party's First Amendment rights: a group that wants to spread its message through a nonpublic forum and a group that claims it cannot be forced to disseminate a message with which it disagrees. For example, the Burger Court allowed the exclusion of the NAACP from the federal government's Combined Federal Campaign fund-raising scheme on the basis that the program was run by a pri-

174. *44 Liquormart*, 116 S. Ct. at 1509.

175. *Id.* at 1521. These Justices further stated that the State's regulation must represent a cost-benefit analysis that weighs the gains of such restrictions against the burden on free speech. *Id.*

176. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Denver Area Educ. Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996). For example, in *Turner*, the Court remanded a case challenging the federal government's content-neutral regulation requiring cable companies to carry local stations, with instructions that such a restriction be subjected to intermediate rather than strict First Amendment scrutiny, but went on to say that the regulations could be sustained only if the government demonstrated that it was protecting an important interest. *Turner*, 512 U.S. at 664 (requiring that the government show that "the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way").

177. Two decisions were classified as public forum cases. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (holding that a county could not charge a variable, discretionary public grounds use fee based on the content of the message of the applying organization); United States v. Grace, 461 U.S. 171 (1983) (finding a law prohibiting the display of signs, banners, or other symbols around the Supreme Court building to be unconstitutional). Four decisions were classified as nonpublic forum cases. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338 (1995); International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985).

vate entity which could control access to the program.[178] But in *Pacific Gas & Electric Co. v. Public Utilities Commission*,[179] the Burger Court ruled that the private entity's right to freedom of expression was violated by a California statute requiring that it include an environmental newsletter with power bills.[180]

Similarly, Rehnquist Court decisions, categorized here as prohibiting a restriction on free speech, also allowed the exclusion of one type of speech in the nonpublic forum. In doing so, the Rehnquist Court reasoned that forcing the dissemination of messages in a nonpublic forum was a violation of the private group's First Amendment rights. For instance, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,[181] the Court held that a homosexual organization could be excluded from the Boston St. Patrick's Day Parade because the parade organizer was a private entity whose right to free speech was violated by an injunction requiring it to allow the gay group to take part in the parade.[182] The Court reasoned that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[183] In *International Society for Krishna Consciousness, Inc. v. Lee*,[184] the Court used a related theory to allow the operators of New York area airports to forbid repetitive solicitation of money in its airport terminals, holding that the plaintiff's First Amendment rights were not violated because a private entity could reasonably restrict speech on its nonpublic property.[185]

Although questions of forum comprise a small percentage of both Courts' total First Amendment decisions, it is in this area that the Rehnquist Court's apparent support for the freedom of expression may be most easily called into question. Indeed, while the First Amendment rights of nonpublic entities are being protected in these cases, it is at the cost of preventing the distribution of another, frequently minority group's message. And it is significant that in the nonpublic forum cases, the organizations the Rehnquist Court protected from forced dissemination of unwanted messages were an airport and a city parade organization, both of which operated with significant support of the government. In allowing suppression of nonmainstream speech in these near-public fora cases, the Rehnquist Court carved an exception to its otherwise stringent First Amendment

178. *Cornelius*, 473 U.S. at 868.
179. 475 U.S. 1 (1986).
180. *Id.* at 20-21.
181. 115 S. Ct. 2338 (1995).
182. *Id.* at 2343.
183. *Id.* at 2350.
184. 505 U.S. 672 (1992).
185. *See id.* at 674-77, 685.

doctrine. This small group of cases indicates that the Rehnquist Court's support of First Amendment rights is a result of the confluence of policy inclination and an interest in protecting majority interests.[186]

3. Content

Restrictions of noncommercial expression on the basis of content represent a positive reversal of fortune for freedom of expression under the Rehnquist Court: Where the Burger Court allowed such restrictions 85.7% of the time, the Rehnquist Court permitted such restrictions only 16.7% of the time.[187] In the only instance in which the Burger Court struck such a restriction, it prevented a local school board from removing books it deemed "objectionable" from public school libraries.[188] In keeping with its tendency to uphold restrictions of relatively unimportant forms of expression, however, the Burger Court allowed a school to punish a student for use of prohibited language at a school assembly,[189] and permitted local governments to use zoning ordinances to restrict both pornographic business[190] and the placement of signs on public property.[191]

In contrast, the Rehnquist Court has not been receptive to state or local restrictions of the freedom on expression based on content.[192] In

186. *See supra* text accompanying note 145.

187. *See infra* app. at tbl. 3-b. Six Burger Court cases were placed in the content subcategory. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Board of Educ. v. Pico, 457 U.S. 853 (1982); New York v. Ferber, 458 U.S. 747 (1982). Seven Rehnquist Court cases were placed in this subcategory. *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995); City of Ladue v. Gilleo, 512 U.S. 43 (1994); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Wisconsin v. Mitchell, 508 U.S. 476 (1993); Dawson v. Delaware, 503 U.S. 159 (1992); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

188. *Pico*, 457 U.S. at 856, 882.

189. *Bethel Sch. Dist.*, 478 U.S. at 686. The Court noted that the student was informed in advance by teachers that he should not deliver his inappropriate, sexually graphic speech. *Id.* at 678.

190. *See Arcara*, 478 U.S. at 707 (holding that the First Amendment does not prohibit closing of pornographic book store on suspicion of prostitution); *Playtime Theatres*, 475 U.S. at 54 (finding ordinance limiting location of adult theaters did not contravene the First Amendment); *Ferber*, 458 U.S. at 764 (holding that child pornography does not enjoy First Amendment protection).

191. *See Taxpayers for Vincent*, 466 U.S. at 817 (upholding city ordinance restricting placement of signs on public property).

192. This change of policy also explains a related reversal in Court decisions: While the Burger Court rendered decisions favoring local regulations 64% of the time, the Rehnquist Court has done so only 10% of the time, due in large part to its deference to freedom of expression. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 137 (1992) (striking a city ordinance which allowed the government to vary use fees for parade grounds based on the projected cost of maintaining public order in light of the content of the demonstration).

comparison to the Burger Court's refusal to protect pornography from government restriction, the Rehnquist Court evinced a willingness to safeguard some pornographic television broadcasts, although that decision was in the context of cable regulation.[193] The Rehnquist Court, however, protected other forms of expression that the Burger Court was likely to have considered similarly unimportant, including hate speech.

In *R.A.V. v. City of St. Paul*,[194] the Rehnquist Court struck a local crime ordinance that prohibited the display of symbols—such as a burning cross in a black family's yard in this instance—which a person knew would arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[195] The Court found that the ordinance was a preemptively invalid content-based proscription, and provided examples to distinguish how the government may or may not restrict speech:

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. . . . [A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. . . . [S]exually, derogatory "fighting words," among other words, may produce a violation of Title VII[ ]. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.[196]

Under this construction, the Court ruled that the local ordinance amounted to viewpoint discrimination, and that the First Amendment

193. *See* Denver Area Educ. Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996). There, the Court held that a portion of a regulation giving local cable operators the choice to prohibit leasing channels for use for broadcasting sexually explicit materials in order to protect children was constitutional as an important government interest, but that two other provisions of the law, requiring (1) that cable operators segregate and block off sexually explicit leased channels, providing those channels only to consumers who contacted the cable company and requested the channels, and (2) that they prohibit patently offensive programming on public access stations, were in violation of the First Amendment. *Id.* at 2381-82, 2394-97. The Court reasoned that the part of the law allowing cable companies to choose whether or not to restrict leased channels was constitutional because it was permissive, but that regulations requiring segregation and blocking of explicit channels and prohibition of sexually explicit programs on public access would "greatly increase the risk that certain categories of programming (say, borderline offensive programs) [would] not appear." *Id.* at 2397.

194. 505 U.S. 377 (1992).

195. *Id.* at 380 (citations omitted).

196. *Id.* at 388-90 (citations omitted).

did not "permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[197]

Similarly, in *Dawson v. Delaware*,[198] the Court held that presenting evidence of a convicted murderer's tattoo of the symbol for and membership in the Aryan Brotherhood was a violation of his right to free expression because that membership was unrelated to the crime charged.[199] But in the Court's only decision upholding a government regulation based on the content of expression, *Wisconsin v. Mitchell*,[200] it allowed an upward departure in sentencing for a black man convicted of inciting and participating in an attack on a white youth because the victim was chosen on the basis of his race.[201] The defense argued that a law providing for an enhanced sentence for racially-motivated crimes violated the First Amendment by punishing the offenders' bigoted beliefs.[202] The Court responded that *R.A.V.* did not support the defendant, however, because assault, unlike cross-burning, is not a protected form of expression.[203] Moreover, the Court defended the race-motivation sentence enhancement law on the basis that the "State's desire to redress these perceived harms [the likelihood of retaliatory crimes and emotional harms associated with hate crime] provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[204] These cases demonstrate the breadth of the Rehnquist Court's protection of the content of speech, providing latitude to parties asserting First Amendment freedom of expression until their ideas are expressed through physical violence against another person.

The boundaries of doctrine were even more clearly demonstrated in an abortion protest case, *Madsen v. Women's Health Center*.[205] There, the Court upheld a court-ordered thirty-six foot protection zone around women's health clinics[206] which was designed to stop abortion opponents from preventing patient access to those clinics, but found a second, 300 foot injunction to be in violation of the protester's right to

197. *Id.* at 391. The Court, however, was apparently concerned with being accused of condoning a racist action: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 396; *see also* Schwartz, A History, *supra* note 1, at 375 (explaining the *R.A.V.* decision as a result of the theory that "conservative thought encompasses a libertarian strain").

198. 503 U.S. 159 (1992).

199. *Id.* at 165.

200. 508 U.S. 476 (1993).

201. *Id.* at 479. The assailiant had been watching the film "Mississippi Burning" and apparently emerged so enraged that he engaged in the attack. *Id.* at 479-80.

202. *Id.* at 483-84.

203. *Id.*

204. *Id.* at 488.

205. 512 U.S. 753 (1994).

206. The zone was approved except as to areas in which it encompassed private property which did not have to be crossed to reach the clinic. *Id.* at 771.

free expression.[207] Moreover, the Rehnquist Court has applied this doctrine to disallow a number of other government restrictions, including striking New York's "Son-of-Sam" law preventing a criminal from profiting from his story;[208] disallowing a local ordinance limiting the types of signs that could be erected in residential areas;[209] finding a First Amendment violation in denying use of school facilities to a group on the basis of the religious content of their presentation;[210] and disallowing a local government rejection of a KKK request to display a cross on public grounds.[211]

These decisions represent the magnitude of the Rehnquist Court's commitment to free expression and demonstrate the broad scope of the protections it extended to the content of such expression. The same decisions, however, also demonstrate a limit to those protections when the expression is not representative of the majority.

D. *Summary*

As this section demonstrates, the Rehnquist Court defied expectations in amassing an active First Amendment agenda and expanding the scope of protection of free expression.[212] By comparison, the Burger Court appears tentative. While the totality of the Rehnquist Court's First Amendment decisions indicate strong support for the right to freedom of expression, it should be noted that, when the Court does uphold restrictions on speech, the groups that tend to be on the losing end are not members of the mainstream majority, including Hari Krishnas in *Krishna Consciousness* and homosexuals in *Hurley*. Furthermore, the Court protected Ku Klux Klan ("KKK")

207. *Id.* at 774. ("Absent evidence that the protesters' speech is independently proscribable . . . or is so infused with violence as to be indistinguishable from a threat of physical harm . . . this provision cannot stand.")

208. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991).

209. City of Ladue v. Gilleo, 512 U.S. 43, 58-59 (1994).

210. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993).

211. Capital Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446, 2450 (1995).

212. It should be noted, however, that a strong correlation exists between the Rehnquist Court's sympathetic freedom of speech decisions and a similar increase in the number of First Amendment Establishment Clause decisions favoring religious expression. The Burger Court found in favor of religious expression (or, in other words, found no excessive entanglement between church and state) in only 42% of its Establishment Clause cases, while the Rehnquist Court rendered decisions benefiting religious expression 71% of the time. *See infra* app. at tbl. 2-c. Three of the Rehnquist Court's freedom of speech decisions intersected with the Establishment Clause, and in each case, the Court upheld the right to free expression while finding no impermissible involvement between church and state. *See Pinette*, 115 S. Ct. at 2447; Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2524-25 (1995); *Lambs Chapel*, 508 U.S. at 394-95. Here, as in its discrimination cases, the Rehnquist Court will not defer to government regulation that might obstruct the activities of the majority.

cross burning intended to intimidate a black family in *R.A.V.*,[213] KKK requests to erect a cross on public grounds for Christmas in *Pinette*,[214] and membership in the Aryan Brotherhood unconnected to a capital murder in *Dawson*,[215] but allowed heightened sentencing in the case of an African American offender who chose his victim on the basis of race.[216] One observer claimed the distinctions between *R.A.V.* and *Mitchell* were so slight that the opposite decisions led to a disturbing conclusion: "The hate speech cases provide yet another basis for suspecting that the Court was engaged in intentional discrimination when it issued its racially correlated pattern of standing decisions."[217] But other motives have been suggested, including one more closely related to the Court's goal of upholding criminal adjudications.[218] Whatever the Rehnquist Court's motives in its First Amendment jurisprudence, while the overall picture for freedom of speech appears relatively healthy, if unsettled as to the ultimate scope, even in this area the prospects for minorities before the Court remains bleak.

IV. The Supreme Court and Criminal Law

Criminal law and habeas corpus decisions combine to account for about one-fifth of the adjusted total decisions for both the Burger and Rehnquist Courts.[219] Here, as with the freedom of expression cases, the Rehnquist Court appeared somewhat more liberal than was the Burger Court in rendering decisions favoring criminal defendants. But defining how liberal the Rehnquist Court's decisions are as compared to the Burger Court may be deceiving. Most commentators have described the Burger Court's criminal law decisions as an about-face from the permissive Warren Court, shifting focus from individual rights to accurate adjudication.[220] Moreover, the Rehnquist Court dedicated 35.7% of its decisions to questions of capital and noncapital sentencing—an increase from 13.1% under the Burger Court[221]—in-

213. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
214. *Pinette*, 115 S. Ct. at 2446, 2450.
215. Dawson v. Delaware, 503 U.S. 159, 165 (1992).
216. Wisconsin v. Mitchell, 508 U.S. 476, 488-89 (1993).
217. Girardeau A. Spann, *Color-Coded Standing*, 80 Cornell L. Rev. 1422, 1484 (1995).
218. *See* William J. Burnett, Wisconsin v. Mitchell: *First Amendment Fast-Food Style*, 4 Temp. Pol. & Civ. Rts. L. Rev. 385, 386-89 (1995) (arguing that the Supreme Court had sacrificed the First Amendment in order to address hate crime).
219. *See infra* app. at tbl. 2-d.
220. *See* Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 Am. J. Crim. L. 99, 100-01 (1995) ("Where once the emphasis was on vindicating individual constitutional rights, [under the Rehnquist and Burger Courts] it is on federalism, finality, factual innocence, and negotiation of a dazzling and dizzying array of technical hoops."); Tom Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369, 1372 (1991) ("The theme of accurate adjudication lies at the very heart of the Burger and Rehnquist Courts' vision of constitutional criminal procedure.").
221. *See infra* app. at tbl. 3-d.

dicating that the Rehnquist Court is content to defer to Burger Court precedents, continuing that Court's emphasis on regulating the guilty. This trend is also consistent with the Rehnquist Court's focus on protecting the interests of the majority, favoring accurate adjudication over individual criminal rights.

A. *Expectations and Critiques of the Rehnquist Court's Criminal Justice Decisions*

It seemed at times that the Burger Court "mounted the expected attack on the Warren Court's criminal procedure cases," particularly with regard to search and seizure.[222] Strangely, however, the Burger Court was most sympathetic to criminal defendants, deciding 71.4% of its cases in their favor,[223] when questions were posed regarding arrest, an issue closely tied to search and seizure.[224] But, on the whole, the Burger Court was simply unsympathetic to criminal defendants, granting defendants' habeas petitions slightly less frequently than it decided in favor of the defendant in criminal claims, generally 25%.[225] Chief Justice Burger himself declared that the multiple trial and appeal cases allowed the accused to continue "his warfare with society."[226] He identified "two basic purposes of any system of justice: to protect society, and to identify and try to correct the wrongdoer."[227] One commentator proclaimed that the Burger Court's criminal law decisions "impaired what may be the most important goal of American criminal justice, protection of the innocent."[228] But those criminal law

222. Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* The Burger Years 143, 144-45 (Herman Schwartz ed., 1987) ("[P]erhaps because the Court had become convinced that more law-enforcement tools were needed to combat drug traffic, during the 1982-83 term the government gained complete or partial victory in all nine search-and-seizure cases decided that term (all involving drugs).").

223. *See infra* app. at tbl. 3-c.

224. *See* Welsh v. Wisconsin, 466 U.S. 740, 754-55 (1984) (holding that warrantless night-time entry into home to arrest man suspected of a nonjailable offense was prohibited); United States v. Johnson, 457 U.S. 537, 562 (1982) (retroactively applying previous Court decision prohibiting warrantless, nonconsensual arrest in suspect's home to declare arrest illegal); *see also* Schwartz, A History, *supra* note 1, at 329 ("[T]he anticipated reversals of the key Warren Court precedents did not materialize. Instead, the essentials of the Warren jurisprudential edifice were preserved. . . . [But t]o be sure, they were modified, even narrowed and blunted in some ways."). *But see* United States v. Hensley, 469 U.S. 221, 232 (1985) (finding sufficient reasonable suspicion in memory of another department's wanted flyer to support stop to check identification and ensuing arrest).

225. *See infra* app. at tbl. 2-d; *see also* Pacelle, *Dynamics*, *supra* note 15, at 262-63 ("In other areas, such as criminal procedure, the Burger Court was significantly more conservative than its predecessor.").

226. Warren E. Burger, *For Whom the Bell Tolls*, Remarks to the Association of the Bar of the City of New York (Feb. 17, 1970), *in* Delivery of Justice 314, 315 (1990).

227. *Id.* at 316.

228. Stephen A. Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151, 155 (1980).

decisions have also been characterized as an attempt to uphold accurate convictions, in other words, to prevent the release of guilty parties on the basis of technicalities.[229] In either event, most observers agree that criminal law was one area in which the Burger Court did indeed retreat from the decisions of the Warren Court,[230] regularly "vot[ing] against the rights of accused criminals and in favor of police and prosecutors."[231] One commentator summed up the legacy of the Burger Court's crime control ideology as including

> judicial deregulation of state and federal criminal justice officials, hostility to fair process norms that impair the state's capacity to detect and punish the factually guilty, and a pronounced tendency to view individual rights from a utilitarian perspective that defines their content in light of their functional impact on the system's capacity to promote social control.[232]

The end of the Burger Court era prompted suggestions that the Rehnquist Court would be worse for criminal defendants than its predecessor.[233] Such critics claimed that the Rehnquist Court was continuing to "undo" the criminal rights forged by the Warren Court, and that "the 1990-1991 term of the Supreme Court revealed a more decided anti-defendant animus than any that had manifested itself during the Burger years."[234] The number of criminal law challenges brought by the government was also pointed to as an example of the prosecutorial preference of the early Rehnquist Court: "Where the Warren Court gave a second chance to convicted criminals, the Rehnquist Court gave prosecutors a second chance to affirm convic-

229. *See* Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. Rev. 518, 590 (1977).

230. *See* Rosenberg, *supra* note 220, at 99-100 (noting that both the Burger and Rehnquist Courts were "less than kind to Warren Court criminal procedure precedents"); Savage, *Legacy*, *supra* note 156, at 8 ("The Burger court [sic] undermined the rights of the accused."). *But see* Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?) and Police Investigatory Practices*, *in* The Burger Court: The Counter-Revolution That Wasn't 62, 62-63, 90-91 (Vincent Blasi ed., 1983) (suggesting that the distinctions between the Warren and Burger Courts were based more on fear of what might happen than on the more moderate changes the Burger Court actually made).

231. Savage, *Legacy*, *supra* note 156, at 8.

232. Peter Arenella, *Foreword: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 247 (1983).

233. *See* Savage, Turning Right, *supra* note 1, at 317-18 ("When prosecutors lost a case in the lower courts, the Rehnquist Court could be counted on to hear the appeal."); Friedelbaum, The Rehnquist Court, *supra* note 27, at 129 (describing the Rehnquist Court as eager to erode the value of Warren Court criminal justice precedents).

234. Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long-Term Prospects*, 19 Fla. St. U. L. Rev. 1053, 1076 (1992) [hereinafter Friedelbaum, *Federalism*]; *see* Pacelle, *Transformation*, *supra* note 13, at 193 (suggesting of the Rehnquist Court in the late eighties that "conservatives on the Court are reaching a critical mass").

tions."[235] At the very least, the criminal law doctrines of both the Burger and Rehnquist Courts seemed indistinguishable.[236] Like its predecessor, the Rehnquist Court was accused of continuing to marginalize important rights by narrowing them.[237] For example, while it was the Burger Court that "halted and in some cases effectively reversed the expansion of the rights of the accused[, t]he Rehnquist Court has continued this trend."[238]

These latter critiques appear to be somewhat more accurate. Despite assertions that during the 1989 and 1990 terms the Rehnquist Court was particularly unsympathetic to criminal defendants,[239] the Rehnquist Court apparently entered a period of transition in the 1990s in which its criminal law decisions have comparatively moderated.[240] In combination with the understanding of the Burger Court as a conservative criminal law Court, however, the early Rehnquist Court's actively conservative criminal law jurisprudence[241] indicates that the slightly higher percent of decisions favoring the defendant from 1991-1995 did not represent a liberal criminal law trend, but instead reflects the Rehnquist Court's efforts to refine its established conservative criminal justice doctrine. This apparent shift from expanding conservative criminal justice doctrine to defining its boundaries may have been obviated by the increasingly conservative lower courts, and solidified by the appointment of Justice Ginsburg, who joined a moderate bloc including Justices O'Connor, Kennedy, and Souter, which resists overturning Warren Court criminal justice precedents.[242] Despite these changes, however, the Rehnquist Court re-

235. Savage, Turning Right, *supra* note 1, at 318.

236. *See* Louthan, *supra* note 136, at 222 (noting that the early Rehnquist Court was not "dramatically different" from the Burger Court, remaining conservative in the area of criminal justice); Stacy, *supra* note 220, at 1370-73 (analyzing the Burger and Rehnquist Courts' criminal justice decisions as a single, continuous jurisprudence).

237. O'Brien, *supra* note 89, at 995-97.

238. Pacelle, Transformation, *supra* note 13, at 200.

239. Louthan, *supra* note 136, at 230-31.

240. *See id.* at 231 ("The Supreme Court of the 1990s is a Court in transition."); Pacelle, *Dynamics*, *supra* note 15, at 272-73 (suggesting that the conservative bloc of the Court would have to moderate its views to woo the emerging moderate bloc). The decisions of the late eighties have been described as decidedly pro-prosecution:

> A solid conservative majority . . . has given constitutional endorsement to more aggressive police work against criminal suspects . . . . In limited cases . . . sanctioned admission into evidence of coerced confessions and . . . systematically blocked off the federal courts from most constitutional claims of convicted criminals in state prisons.

James Simon, The Center Holds: The Power Struggle Inside the Rehnquist Court 172 (1994).

241. *See* Friedelbaum, *The Rehnquist Court*, *supra* note 27, at 129 (describing the 1990 term as reflecting a conservative "activist impetus" calculated to undermine Warren Court criminal law precedents).

242. *See* Schwartz, A History, *supra* note 1, at 375.

mained committed to protecting the majority's interest in law and order at the expense of criminal rights.

B. *The Data*

As with the civil rights cases, a division of the criminal law cases into subcategories illuminates the different issues pursued by the Rehnquist and Burger Courts.[243] A decision considered equally favorable to both sides was awarded .5 for each side. As indicated in Table 3-c, while a major focus of the Burger Court was search and seizure questions, accounting for 21.7% of its total criminal law decisions, the Rehnquist Court dedicated a similar share of its criminal decisions, 21.4%, to noncapital sentencing questions. In both instances, the focus on these issues corresponded with a disposition to find against the criminal defendant, particularly when compared with the small number of decisions in that subcategory during the other era.[244]

A striking difference between the two eras is the Rehnquist Court's sharp reduction of cases based on such issues as Fifth Amendment rights and search and seizure. For example, while the Burger Court dedicated 4.3% of its criminal law decisions to questions of the Fifth Amendment privilege against self-incrimination, the Rehnquist Court decided no criminal cases on this basis.[245] Moreover, the Rehnquist Court dedicated only 5.7% of its total criminal law decisions to questions of search and seizure, the issue that dominated the Burger Court's criminal law decisions.[246] These differences may be better understood when the above subgroups are classified into three related subjects: sentencing cases, including capital and noncapital sentencing; substantive cases, including arrest, confrontation clause, double jeopardy, fair trial, fifth amendment, *Miranda* rights, right to counsel, search and seizure, and speedy trial; and rules and interpretation cases, composed of definition, disclosure, hearsay, indictment, jury instruction, miscellaneous, and proof.[247]

243. *See infra* app. at tbl. 3-c. The cases were placed in subcategories based on the major challenge brought by the criminal defendant. The miscellaneous subcategory includes more technical questions such as joinder and evidentiary questions where such issues accounted for two or fewer cases in both eras. For a list of cases organized by subcategory, see *infra* app. at tbl. 1-d.

244. *See infra* app. at tbl. 3-c. In sentencing cases, the Rehnquist Court found for the defendant only 16.7% of the time, versus the Burger Court who found for the defendant 37.5% of the time. In search and seizure cases, the Burger Court found for defendant only *six percent* of the time, versus the Rehnquist Court who found for the defendant 37.5% of the time.

245. *See infra* app. at tbl. 3-c.

246. *See infra* app. at tbl. 3-c.

247. *See infra* app. at tbl. 3-d.

C. *Discussion*

An examination of the Court's decisions when classified as sentencing, substantive, or rules and interpretation cases reveals that while the Rehnquist Court was hearing fewer substantive criminal cases, it was more moderate than the Burger Court in those instances. Once a defendant was convicted and sentenced, however, the Rehnquist Court had little sympathy for that defendant's legal challenge. Finally, this grouping also suggests that, as some observers have noted, the Rehnquist Court focused on resolving the narrow, technical issues concentrated in the sentencing and rules and interpretation groups, rather than rendering sweeping, substantive decisions.[248] But, when comparing the criminal procedure philosophies of different Courts, "[t]he issue is not simply which side wins more frequently but whether any distinctive pattern emerges as to how the two Courts view the functions served by American criminal procedure."[249]

1. Sentencing Cases

The Rehnquist Court's focus on sentencing and rules and interpretation issues appears to indicate a Court defining the boundaries of its criminal justice doctrine.[250] But the sharp increase in noncapital sentencing cases probably resulted from the implementation of new federal sentencing guidelines for which there was no existing jurisprudence. Even these decisions, however, generally centered on narrow, technical questions rather than broader issues of the constitutionality of the sentencing scheme. Moreover, these decisions almost always ended in the highest available sentence, keeping the majority protected from convicted criminals for as long as possible. For example, the Rehnquist Court ruled that a sentencing court had to take into account the weight of blotter paper used to distribute LSD as defined in the relevant criminal statute rather than use the lesser weight requirement prescribed by the Sentencing Guidelines;[251] held that a convicted criminal could receive an enhanced sentence for multiple convictions reached in a single proceeding;[252] held that trading a firearm for drugs constituted use of a weapon for purposes of sentenc-

248. *See infra* app. at tbl. 3-d. As a percent of all criminal law cases, rules and interpretation issues accounted for 42.9% of the Rehnquist Court decisions, but only 30.4% of Burger Court decisions. *See infra* app. at tbl. 3-d; *see also* Simon, *supra* note 240, at 303 ("[T]he Rehnquist Court has heard progressively fewer cases, and in many of their recent decisions the language of the Court majorities has tended to be more technical and less sweeping than in the past.").

249. *Id.* at 195.

250. For a list of cases by category, see *infra* app. at tbl. 1-d.

251. Neal v. United States, 116 S. Ct. 763, 769 (1996).

252. Deal v. United States, 508 U.S. 129, 137 (1993).

ing;[253] and held that the Attorney General had authority to compute credit toward a criminal's sentence.[254]

But while the Rehnquist Court rendered decisions favoring the criminal defendant in noncapital sentencing cases only 16.7% of the time,[255] it favored the defendant in 50.0% of its capital sentencing cases.[256] Not coincidentally, decisions favoring death row inmates were unlikely to result in the release of a convicted criminal, thus relieving the Rehnquist Court of its need to protect society. Moreover, this increase in decisions favoring the defendant coincided with an increase of decisions made on constitutional rather than technical grounds. For instance, one of its capital sentencing decisions favoring the defendant, *Dawson v. Delaware*,[257] intersected with the First Amendment freedom of speech.[258] In that case, the Court held that the introduction of the defendant's membership in the Aryan Brothers at his sentencing violated the First Amendment.[259] The majority opinion seemed to suggest that the lower court could determine whether the admission of the information, though violative of the First Amendment, was nonetheless harmless error.[260] But Justice Blackmun wrote his concurrence specifically to inform the lower court that such a determination was not required, and that the First Amendment, unlike constitutionally guaranteed criminal rights, should *not* be subject to harmless error review.[261] This distinction between criminal and free speech rights demonstrates the Rehnquist Court's primary concern with protecting the majority's constitutional rights from government intrusion, while simultaneously sacrificing criminal constitutional rights to the majority's interest in law and order.

On the other hand, another capital punishment decision favoring the defendant, *Morgan v. Illinois*,[262] was heard largely to end the

253. Smith v. United States, 508 U.S. 223, 225-27 (1993).

254. United States v. Wilson, 503 U.S. 329, 334-35 (1992).

255. *See infra* app. at tbl. 3-c. As indicated, the Rehnquist Court rendered a judgment fully favoring the defendant in only two of fifteen decisions. *See* Rutledge v. United States, 116 S. Ct. 1241, 1250-51 (1996) (holding that sentence amounted to an improper, cumulative punishment for the same crime); Stinson v. United States, 508 U.S. 36, 47-48 (1993) (holding that the Sentencing Commission commentary is binding in some instances, in this case excluding the defendant's act from its definition of a "crime of violence"). In Koon v. United States, 116 S. Ct. 2035 (1996), the Court reversed in part the lower court's decision overruling downward departure for Stacy Koon, the officer convicted in the beating of Rodney King. *Id.* at 2054.

256. *See infra* app. at tbl. 3-c. *But see* Friedelbaum, *The Rehnquist Court*, *supra* note 27, at 141 ("Apart from capital punishment sentencing cases, the future of defendant rights appears to be bleak but not necessarily as disheartening. . . .").

257. 503 U.S. 159 (1992).

258. *Id.* at 160. For a full discussion of the First Amendment aspects of this case, see *supra* text accompanying notes 198-98.

259. *Id.* at 167.

260. *Id.* at 168-69.

261. *Id.* at 169 (Blackmun, J., concurring) (indicating that harmless error review would have a "potential chilling effect" on the freedom of speech).

262. 504 U.S. 719 (1992).

"considerable disagreement among courts of last resort" as to whether a trial court could refuse a request for inquiry into whether a juror would automatically impose the death penalty upon conviction.[263] Over strenuous objections from dissent, the Court held that courts could not reject such a request, and that if even "one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."[264] Similarly, in *Simmons v. South Carolina*,[265] the Court found a due process violation where a trial judge refused to instruct the jury that a life sentence would be without parole.[266] The Rehnquist Court also held that both reweighing a mitigating factor at sentencing,[267] and forcing a defendant to prove his incompetence by clear and convincing evidence[268] violated constitutionally protected rights.[269] But, as previously noted, these decisions did not affect the criminal defendant's conviction, only his sentence. When a decision favoring the defendant would have meant a shorter sentence or an overturned conviction, the Rehnquist Court was far less likely to render such a decision.[270]

2. Rules and Interpretation Cases

Like the noncapital sentencing decisions, the rules and interpretation cases resulted in few decisions for the defendant (28.3%).[271] The Rehnquist Court used these types of cases to delimit specific issues. For example, in two of its four jury instruction cases,[272] the Court attempted to define a constitutionally acceptable reasonable doubt instruction, allowing each of the instructions before it.[273] The Court also required that the question of materiality be submitted to the jury,[274] but held that a jury need not be instructed of the civil commitment consequences of a "not guilty only by reason of insanity" verdict.[275] And decisions favoring the defendant did not always result in an overturned conviction. For example, the Rehnquist Court heard *Bailey v. United States*[276] to resolve a circuit conflict, holding that pos-

263. *Id.* at 725-26.
264. *Id.* at 729. Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent, arguing that there should be no restriction against empanelling a juror who would automatically vote for the death penalty on conviction. *Id.* at 740-43.
265. 512 U.S. 154 (1994).
266. *Id.* at 156.
267. Sochor v. Florida, 504 U.S. 527, 529 (1992).
268. Cooper v. Oklahoma, 116 S. Ct. 1373, 1384 (1996).
269. *Id.* at 1384; *Sochor*, 504 U.S. at 540-41.
270. *See supra* notes 250-56 and accompanying text; *infra* part IV.C.2.
271. *See infra* app. at tbl. 3-d.
272. *See* United States v. Gaudin, 115 S. Ct. 2310, 2313 (1995); Shannon v. United States, 512 U.S. 573, 578-79 (1994); Victor v. Nebraska, 511 U.S. 1, 5 (1994); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).
273. *See Victor*, 511 U.S. at 22-23; *Sullivan*, 508 U.S. at 281.
274. *Gaudin*, 115 S. Ct. at 2310.
275. *Shannon*, 512 U.S. at 584-87.
276. 116 S. Ct. 501 (1995).

session of a gun in a locked trunk was insufficient to support a conviction for use of the weapon in a drug offense.[277] But despite its holding that the defendants were improperly convicted, the Court did not overturn those convictions, but instead remanded the case with instructions to reconsider the convictions under a prong of the law outlawing carrying a weapon.[278] The continued concern that the guilty not benefit from a technicality, when combined with the narrow focus of such decisions, indicates that the Rehnquist Court was more concerned with refining its existing doctrine and protecting society from criminals than with developing new, wide-ranging criminal law jurisprudence.

Thus, by deciding a reduced percentage of the substantive issues that the Burger Court concentrated on, the Rehnquist Court generally seemed to be deferring to the Burger Court's and its own earlier reversals of criminal defendant protections.[279] This case distribution coincides with the Rehnquist Court's interest in protecting the majority at the expense of criminal rights. Moreover, the reduction in substantive cases and increase in cases selected to clarify a lower court conflict has been described as a sign that the Court was "reducing the volitional portion of its agenda and expanding the exigent agenda space."[280] This conception is supported by the concentration on sentencing and rules and interpretation cases which seem well suited to a Court interested in maintenance of criminal law doctrine rather than in instituting sweeping changes.[281] Further, after engaging in two particularly conservative terms with regard to criminal justice in 1989 and 1990,[282] the Rehnquist Court had firmly established its preference for sacrificing criminal rights to the majority's interest in law and order, and may have been "forced to reign in lower court judges whose decisions [were] too conservative."[283]

277. *Id.* at 504, 509.

278. *Id.*

279. *See* Pacelle, *Dynamics*, *supra* note 15, at 254 ("Indeed, there is widespread perception that the Rehnquist Court is interested in reversing or limiting the decisions of the Warren Court."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 205-07 (1993) (arguing that with a few liberal exceptions, the Rehnquist Court will continue to follow the rational basis model established by Burger Court precedent).

280. Pacelle, Transformation, *supra* note 13, at 198.

281. *See* Pacelle, *Dynamics*, *supra* note 15, at 266 ("The raw numbers mask the substantive nature of [the decline of agenda space allocated to civil liberties], particularly in the Due Process area, in which cases concerned with the rights of prisoners have increased during the past two decades to offset partially the large-scale declines in criminal procedure cases.").

282. *See* Comiskey, *supra* note 29, at 262.

283. Smith & Hensley, *supra* note 13, at 87.

3. Substantive Cases

Interpreting the Rehnquist Court's criminal law agenda as reactive might also explain why the Rehnquist Court found for criminal defendants in over 50% of its substantive criminal law decisions:[284] no rediscovered sympathy for the accused, but rather a need to establish the boundaries of its conservative criminal justice doctrine. This conception of the Rehnquist Court's criminal law decisions would also account for the difficulties numerous Rehnquist Court critics have had in explaining away seemingly anomalous cases favorable to the accused in what is an otherwise relentlessly conservative criminal justice Court.[285]

For example, while the Fourth Amendment search and seizure decisions have been cited as evidence of the early Rehnquist Court's conservative shift,[286] two of the four search and seizure cases the Rehnquist Court decided produced decisions favoring the defendant, at least in part.[287] In *Minnesota v. Dickerson*,[288] the Rehnquist Court found unconstitutional a continued search of a suspect on the basis of a lump in his pocket that was determined not to be a weapon.[289] Although the search yielded a bag of cocaine, because the officer was uncertain of what the lump was after the initial pat-down, the Court held that the officers did not have probable cause to reach into the suspect's pocket to determine what the object was.[290] Notably, this decision provided a "strict conception"[291] of the latitude police officers have under the reasonable search rule laid down by the Warren Court in *Terry v. Ohio*.[292]

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284. *See infra* app. at tbl. 3-d. The Rehnquist Court Justices have evinced discomfort with an apparent overreaction to some of its holdings, prompting Justice O'Connor to issue a warning to lower court judges not to be "too hasty in rejecting capital cases" based on Supreme Court rulings. Similarly, Justices Scalia and Kennedy were reportedly clearly disturbed by an argument before them that the Constitution would permit state-sponsored religion as long as no one was coerced into joining. *Id.*

285. *See, e.g.*, Jennifer L. Hurley, *Has the Supreme Court "Wrench[ed] the Sixth Amendment from Its Proper Context?"*, 24 U. Tol. L. Rev. 967, 991-94 (1993) (describing one Rehnquist Court decision as "the most liberal speedy trial decision to date").

286. *See* Friedelbaum, The Rehnquist Court, *supra* note 27, at 133-37 ("Fourth Amendment rights, long objects of controversy and travail in the evolution of criminal law, have been further eroded by a [Rehnquist] Court inclined to read the rights of the accused in austere and unsympathetically literal terms.").

287. *See* Wilson v. Arkansas, 115 S. Ct. 1914, 1916, 1919 (1995) (requiring consideration of the "knock and announce" rule to determine the reasonableness of the police search under the Fourth Amendment); Minnesota v. Dickerson, 508 U.S. 366, 379 (1993).

288. 508 U.S. 366 (1993).

289. *Id.* at 379.

290. *Id.* at 378-79.

291. James B. Zagel, *Drug Rhetoric, Courts, and the Law: A Response to Professor Rudovsky*, 1994 U. Chi. Legal F. 275, 280.

292. 392 U.S. 1 (1968).

This decision is not necessarily a retreat from conservative criminal jurisprudence, but may be instead an instance of defining the limits of the conservative "peak" in criminal justice decisions in the 1990 term.[293] Indeed, the Rehnquist Court refused to suppress evidence improperly seized due to a clerical error,[294] and allowed temporary detention and search of an individual based on suspicion of a civil traffic violation.[295] Similarly, in its only *Miranda* case, the Rehnquist Court stressed that "we must consider the other side of the Miranda equation: The need for effective law enforcement."[296] Hence, the Rehnquist Court remained concerned with protecting the safety of the community, stating in *United States v. Hensley*,[297] that "[r]estraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim."[298] In short, the Rehnquist Court did not abandon its commitment to law and order. Instead, the Rehnquist Court established the limits of its criminal justice precedents, providing form to the conservative substance of its criminal law jurisprudence, and continuing to subjugate criminal rights to the majority's interest in effective law enforcement.

D. *Summary*

The Rehnquist Court, which otherwise increased protection of the majority from government intrusion,[299] apparently entered a period of defining the boundaries of rather than expanding upon the basis of its conservative criminal justice doctrine. Such moderation was absent from the earlier Rehnquist Court terms[300] because the early Rehnquist Court had not yet laid the foundation of its criminal law jurisprudence. But the marked decrease in substantive criminal cases as a

293. *See* Comiskey, *supra* note 29, at 262 (noting that there were at least 12 decisions in which the defendant prevailed in the 1991 and 1992 terms after the Rehnquist Court's conservatism "may have peaked in the 1990-91 term").

294. Arizona v. Evans, 115 S. Ct. 1185, 1194-95 (1995).

295. Whren v. United States, 116 S. Ct. 1769, 1777 (1996).

296. Davis v. United States, 512 U.S. 452, 461 (1994).

297. 469 U.S. 221 (1985).

298. *Id.* at 229.

299. For example, the Rehnquist Court rendered decisions favoring the Federal government in 64% of federal regulation and 69% of taxation cases, a significant decrease from the Burger Court's 78% favorable rate of decision in federal regulation cases and 88% favorable rate of decision in taxation cases. Similarly, the Rehnquist Court markedly decreased the percent of decisions favoring state and local governments, finding for state regulations of individuals only 38% of the time and for local ordinances only 10% of the time. In contrast, the Burger Court ruled in favor of state regulation of individuals 46% of the time and for in local ordinance cases 71% of the time.

300. *See* Friedelbaum, *The Rehnquist Court*, *supra* note 27, at 129 ("Noticeably missing was any effort to pursue a course of moderation and restraint which had served to guide many Burger Court decisions in an era when adherence to the doctrine of stare decisis generally prevailed.").

percentage of all criminal law decisions, combined with the sharp increase in sentencing and rule and interpretation cases,[301] depicts a Court that constructed a reactive rather than revolutionary criminal law agenda. Indeed, the Rehnquist Court seemingly moved into a period of equilibrium, considering narrow issues and providing clarification of the extent of Burger Court and early Rehnquist Court decisions. Criminal rights were not improved under the Rehnquist Court, but instead remained subject to the majority's desire for law and order.

CONCLUSION

At first blush, empirical data suggest that the Rehnquist Court is not as conservative as is generally believed. Indeed, other observers have reached this same conclusion, noting that the Rehnquist Court "may be no more conservative than the Burger Court, which preserved and extended many of the liberal doctrines developed during the Warren era."[302] One study indicated that, with regard to civil liberties decisions, the Rehnquist Court had rendered essentially the same percent of liberal decisions to that point (42.8%) as had the Burger Court.[303] But as the authors of that study noted, "apparent liberalism may be overstated if analysts do not consider the kinds of issues addressed."[304]

Additionally, as demonstrated here, it is important that the larger categories be broken down into their component parts. For, while the Rehnquist Court seemed to have a record similar to that of its predecessor in civil rights cases,[305] this grouping is deceptive, masking a sharp change in how the Court treated minorities. While the courts were for a short time considered a "haven" for minorities seeking redress of racial injustice, this Note supports observers who now complain that the Rehnquist Court "uses the very principles for which so many people fought and died, against the very people whom they were established to protect."[306] Moreover, the number of First Amendment decisions that work against minority parties supports the notion that the pattern seen in civil rights claims may not be the simple result of a rejection of affirmative action. Indeed, the "permissibility of race-conscious state action is an area where the realignment

301. Sentencing cases accounted for 36% of Rehnquist Court and 13% of Burger Court total criminal law cases, while rules and interpretation cases accounted for 43% of Rehnquist Court and 31% of Burger Court total criminal law cases. *See infra* app. at tbl. 3-d.

302. Smith & Hensley, *supra* note 13, at 89.

303. *Id.* at 85. The Warren Court was credited with a 71.4% liberal decision rate. *Id.*

304. *Id.* at 89.

305. See supra part II.B.

306. Davis, *The American Dilemma*, *supra* note 32, at 640-41.

of the Supreme Court is most directly evident."[307] If the Rehnquist Court's only motive is to eliminate the harmful impact of using any race-based classifications, even at the cost of losing worthwhile affirmative action programs, the "question that the Court has not yet fully answered is why these costs should be incurred in this area but in so few others."[308] Instead, the current Court has appeared most concerned with preventing minority groups from exerting pressure to disadvantage the majority. Under this system, hate speech laws and affirmative action programs are equally suspect;[309] criminal rights "must yield to majoritarian preferences."[310] In light of this pattern of decisions, the question when assessing the Rehnquist Court is not whether its decisions are liberal or conservative, nor whether it is hearing a Due Process or Equal Protection case. Instead, the simplest question seems to yield the clearest response: Whose rights are at stake? For minorities who reply "mine," there are few positive answers.

307. Issacharoff, *supra* note 123, at 53.

308. David A. Strauss, *Affirmative Action and the Public Interest*, 1995 Sup. Ct. Rev. 1, 42.

309. *See supra* parts III.C.2-3.

310. Ed Aro, Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. Rev. 111, 121 n.70 (1990).

APPENDIX

TABLE 1-a
DISCRIMINATION CASES

Case Name	Cite
1981-1985 Terms	
Havens Realty Corp. v. Coleman	455 U.S. 363 (1982)
Logan v. Zimmerman Brush Co.	455 U.S. 422 (1982)
Santosky v. Kramer	455 U.S. 745 (1982)
Weinberger v. Rossi	456 U.S. 25 (1982)
American Tobacco Co. v. Patterson	456 U.S. 63 (1982)
Mills v. Habluetzel	456 U.S. 91 (1982)
Pullman-Standard v. Swint	456 U.S. 273 (1982)
Kremer v. Chemical Constr. Corp.	456 U.S. 461 (1982)
North Haven Bd. of Educ. v. Bell	456 U.S. 512 (1982)
Sumitomo Shoji Am., Inc. v. Avagliano	457 U.S. 176 (1982)
Plyler v. Doe	457 U.S. 202 (1982)
Connecticut v. Teal	457 U.S. 440 (1982)
Patsy v. Board of Regents of Fla.	457 U.S. 496 (1982)
Schweiker v. Hogan	457 U.S. 569 (1982)
Blum v. Yaretsky	457 U.S. 991 (1982)
Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley	458 U.S. 176 (1982)
Ford Motor Co. v. EEOC	458 U.S. 219 (1982)
General Bldg. Contractors Ass'n v. Pennsylvania	458 U.S. 375 (1982)
Washington v. Seattle Sch. Dist.	458 U.S. 457 (1982)
Crawford v. Board of Educ. of Los Angeles	458 U.S. 527 (1982)
Mississippi Univ. for Women v. Hogan	458 U.S. 718 (1982)
Hewitt v. Helms	459 U.S. 460 (1983)
Community Television of S. Cal. v. Gottfried	459 U.S. 498 (1983)
EEOC v. Wyoming	460 U.S. 226 (1983)
United States Postal Serv. v. Aikens	460 U.S. 711 (1983)
Kush v. Rutledge	460 U.S. 719 (1983)
Bob Jones Univ. v. United States	461 U.S. 574 (1983)
Chappell v. Wallace	462 U.S. 296 (1983)
Newport News Shipbuilding & Dry Dock Co. v. EEOC	462 U.S. 669 (1983)
Lehr v. Robertson	463 U.S. 248 (1983)
Jones v. United States	463 U.S. 354 (1983)
United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott	463 U.S. 825 (1983)
United Bldg. and Constr. Trades Council v. Mayor of Camden	465 U.S. 208 (1984)
Consolidated Rail Corp. v. Darrone	465 U.S. 624 (1984)
Heckler v. Mathews	465 U.S. 728 (1984)
EEOC v. Shell Oil Co.	466 U.S. 54 (1984)
Palmore v. Sidoti	466 U.S. 429 (1984)
Hishon v. King & Spalding	467 U.S. 69 (1984)
Firefighters Local Union No. 1784 v. Stotts	467 U.S. 561 (1984)
Cooper v. Federal Reserve Bank	467 U.S. 867 (1984)
Burnett v. Grattan	468 U.S. 42 (1984)
Roberts v. United States Jaycees	468 U.S. 609 (1984)
Allen v. Wright	468 U.S. 737 (1984)
Trans World Airlines, Inc. v. Thurston	469 U.S. 111 (1985)
Andersen v. City of Bessemer	470 U.S. 564 (1985)
Hunter v. Underwood	471 U.S. 222 (1985)
Johnson v. Mayor of Baltimore	472 U.S. 353 (1985)
Western Air Lines, Inc. v. Criswell	472 U.S. 400 (1985)
Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.	473 U.S. 788 (1985)
Batson v. Kentucky	476 U.S. 79 (1986)
Wygant v. Jackson Bd. of Educ.	476 U.S. 267 (1986)
Meritor Sav. Bank v. Vinson	477 U.S. 57 (1986)

Case Name	Cite
United States Dept. of Transp. v. Paralyzed Veterans of Am.	477 U.S. 597 (1986)
Bowers v. Hardwick	478 U.S. 186 (1986)
Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC	478 U.S. 421 (1986)
Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland	478 U.S. 501 (1986)
1991-1995 Terms	
Franklin v. Gwinnett County Pub. Sch.	503 U.S. 60 (1992)
McCarthy v. Madigan	503 U.S. 140 (1992)
Foucha v. Louisiana	504 U.S. 71 (1992)
Georgia v. McCullom	505 U.S. 42 (1992)
United States v. Fordice	505 U.S. 717 (1992)
Bray v. Alexandria Women's Health Clinic	506 U.S. 263 (1993)
Hazen Paper Co. v. Biggins	507 U.S. 604 (1993)
Northeastern Florida Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville	508 U.S. 656 (1993)
Heller v. Doe	509 U.S. 312 (1993)
St. Mary's Honor Center v. Hicks	509 U.S. 502 (1993)
Harris v. Forklift Sys., Inc.	510 U.S. 17 (1993)
Weiss v. United States	510 U.S. 163 (1994)
J.E.B. v. Alabama *ex rel* T.B.	511 U.S. 127 (1994)
Landgraf v. USI Film Products	511 U.S. 244 (1994)
Rivers v. Roadway Express, Inc.	511 U.S. 298 (1994)
Farmer v. Brennan	511 U.S. 825 (1994)
City of Edmonds v. Oxford House, Inc.	115 S. Ct. 1776 (1995)
Missouri v. Jenkins	115 S. Ct. 2038 (1995)
Adarand Constructors, Inc. v. Pena	115 S. Ct. 2097 (1995)
Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston	115 S. Ct. 2338 (1995)
McKennon v. Nashville Banner Publ'g Co.	115 S. Ct. 879 (1995)
O'Connor v. Consolidated Coin Caterers Corp.	116 S. Ct. 1307 (1996)
United States v. Armstrong	116 S. Ct. 1480 (1996)
Romer v. Evans	116 S. Ct. 1620 (1996)
Lewis v. Casey	116 S. Ct. 2174 (1996)
United States v. Virginia	116 S. Ct. 2264 (1996)

TABLE 1-b
FREEDOM OF SPEECH CASES

Case Name	Cite
1981-1985 Terms	
Citizens Against Rent Control v. City of Berkeley	454 U.S. 290 (1981)
In re R. M. J.	455 U.S. 191 (1982)
Brown v. Hartlage	456 U.S. 45 (1982)
International Longshoremen's Ass'n v. Allied Int'l, Inc.	456 U.S. 212 (1982)
Board of Educ., Island Trees Union Free Sch. Dist. v. Pico	457 U.S. 853 (1982)
Globe Newspaper Co. v. Superior Court of Norfolk	457 U.S. 596 (1982)
Clements v. Fashing	457 U.S. 957 (1982)
New York v. Ferber	458 U.S. 747 (1982)
NAACP v. Claiborne Hardware Co.	458 U.S. 886 (1982)
Brown v. Socialist Workers' 74 Campaign Comm.	459 U.S. 87 (1982)
FEC v. National Right to Work	459 U.S. 197 (1982)
Connick v. Meyers	461 U.S. 138 (1983)
United States v. Grace	461 U.S. 171 (1983)
Regan v. Taxation with Representation of Washington	461 U.S. 540 (1983)
Bolger v. Youngs Drugs Prods. Corp.	463 U.S. 60 (1983)
City Council of Los Angeles v. Taxpayers for Vincent	466 U.S. 789 (1984)
FCC v. League of Women Voters	468 U.S. 364 (1984)
FEC v. National Conservative Political Action Comm.	470 U.S. 480 (1985)
Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.	473 U.S. 788 (1985)
Pacific Gas & Elec. Co. v. Public Util. Comm'n	475 U.S. 1 (1986)
City of Renton v. Playtime Theatres, Inc.	475 U.S. 41 (1986)
City of Los Angeles v. Preferred Communications, Inc.	476 U.S. 488 (1986)
Press-Enterprise Co. v. Superior Court of California	478 U.S. 1 (1986)
Bethel Sch. Dist. No. 403 v. Fraser	478 U.S. 675 (1986)
Arcara v. Cloud Books, Inc.	478 U.S. 697 (1986)
Posadas de Puerto Rico Assocs. v. Tourism Co.	478 U.S. 328 (1986)
Perry Educ. Ass'n v. Perry Local Educ. Ass'n	460 U.S. 37 (1983)
1991-1995 Terms	
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.	502 U.S. 105 (1991)
Dawson v. Delaware	503 U.S. 159 (1992)
Forsyth County v. Nationalist Movement	505 U.S. 123 (1992)
R.A.V. v. City of St. Paul	505 U.S. 377 (1992)
City of Cincinnati v. Discovery Network	507 U.S. 410 (1993)
International Soc'y for Krishna Consciousness, Inc. v. Lee	505 U.S. 672 (1992)
Edenfield v. Fane	507 U.S. 761 (1993)
Lamb's Chapel v. Center Moriches Union Free Sch. Dist.	508 U.S. 384 (1993)
Wisconsin v. Mitchell	508 U.S. 476 (1993)
United States v. Edge Broadcasting Co.	509 U.S. 418 (1993)
City of Ladue v. Gilleo	512 U.S. 43 (1994)
Ibanez v. Florida Dep't. of Bus. & Prof'l Regulation	512 U.S. 136 (1994)
Turner Broadcasting Sys., Inc. v. FCC	512 U.S. 622 (1994)
Madsen v. Women's Health Ctr., Inc.	512 U.S. 753 (1994)
United States v. National Treasury Employees Union	115 S. Ct. 1003 (1995)
McIntyre v. Ohio Elections Comm'n	115 S. Ct. 1511 (1995)
Rubin v. Coors Brewing Co.	115 S. Ct. 1585 (1995)
Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston	115 S. Ct. 2338 (1995)
Florida Bar v. Went For It, Inc.	115 S. Ct. 2371 (1995)
Capitol Square Review and Advisory Bd. v. Pinette	115 S. Ct. 2440 (1995)
Rosenberger v. Rector and Visitors of Univ. of Va.	115 S. Ct. 2510 (1995)
44 Liquormart v. Rhode Island	116 S. Ct. 1495 (1996)
Colorado Republican Fed. Campaign Comm. v. FEC	116 S. Ct. 2309 (1996)
Board of County Comm'rs v. Umbehr	116 S. Ct. 2342 (1996)
O'Hare Truck Serv., Inc. v. City of Northlake	116 S. Ct. 2353 (1996)
Denver Area Educ. Telecommunications Consortium v. FCC	116 S. Ct. 2374 (1996)

TABLE 1-c
CRIMINAL JUSTICE CASES

Case Name	Cite
1981-1985 Terms	
Washington v. Chrisman	455 U.S. 1 (1982)
Eddings v. Oklahoma	455 U.S. 104 (1982)
McElroy v. United States	455 U.S. 642 (1982)
United States v. MacDonald	456 U.S. 1 (1982)
United States v. Frady	456 U.S. 152 (1982)
Oregon v. Kennedy	456 U.S. 667 (1982)
United States v. Ross	456 U.S. 798 (1982)
Tibbs v. Florida	457 U.S. 31 (1982)
United States v. Goodwin	457 U.S. 368 (1982)
United States v. Johnson	457 U.S. 537 (1982)
Taylor v. Alabama	457 U.S. 687 (1982)
Williams v. United States	458 U.S. 279 (1982)
New York v. Ferber	458 U.S. 747 (1982)
Enmund v. Florida	458 U.S. 782 (1982)
United States v. Valenzuela-Bernal	458 U.S. 858 (1982)
Pillsbury Co. v. Conboy	459 U.S. 248 (1983)
Missouri v. Hunter	459 U.S. 359 (1983)
South Dakota v. Neville	459 U.S. 553 (1983)
Connecticut v. Johnson	460 U.S. 73 (1983)
United States v. Knotts	460 U.S. 276 (1983)
Florida v. Royer	460 U.S. 491 (1983)
Tuten v. United States	460 U.S. 660 (1983)
Texas v. Brown	460 U.S. 730 (1983)
United States v. Hasting	461 U.S. 499 (1983)
Bearden v. Georgia	461 U.S. 660 (1983)
Illinois v. Gates	462 U.S. 213 (1983)
Bell v. United States	462 U.S. 356 (1983)
United States v. Villamonte-Marquez	462 U.S. 579 (1983)
Illinois v. Lafayette	462 U.S. 640 (1983)
United States v. Place	462 U.S. 696 (1983)
Oregon v. Bradshaw	462 U.S. 1039 (1983)
United States v. Sells Eng'g, Inc.	463 U.S. 418 (1983)
United States v. Baggot	463 U.S. 476 (1983)
Illinois v. Andreas	463 U.S. 765 (1983)
Barclay v. Florida	463 U.S. 939 (1983)
California v. Ramos	463 U.S. 992 (1983)
Michigan v. Long	463 U.S. 1032 (1983)
Russello v. United States	464 U.S. 16 (1983)
Michigan v. Clifford	464 U.S. 287 (1984)
Minnesota v. Murphy	465 U.S. 420 (1984)
Dixson v. United States	465 U.S. 482 (1984)
United States v. Doe	465 U.S. 605 (1984)
United States v. Jacobsen	466 U.S. 109 (1984)
Oliver v. United States	466 U.S. 170 (1984)
James v. Kentucky	466 U.S. 341 (1984)
Florida v. Meyers	466 U.S. 380 (1984)
United States v. Rodgers	466 U.S. 475 (1984)
United States v. Cronic	466 U.S. 648 (1984)
Welsh v. Wisconsin	466 U.S. 740 (1984)
Waller v. Georgia	467 U.S. 39 (1984)
United States v. Gouveia	467 U.S. 180 (1984)
Arizona v. Rumsey	467 U.S. 203 (1984)
California v. Trombetta	467 U.S. 479 (1984)
Ohio v. Johnson	467 U.S. 493 (1984)
New York v. Quarles	467 U.S. 649 (1984)

Case Name	Cite
United States v. Yermian	468 U.S. 63 (1984)
Richardson v. United States	468 U.S. 317 (1984)
Hobby v. United States	468 U.S. 339 (1984)
Spaziano v. Florida	468 U.S. 447 (1984)
Wasman v. United States	468 U.S. 559 (1984)
United States v. Karo	468 U.S. 705 (1984)
Segura v. United States	468 U.S. 796 (1984)
United States v. Leon	468 U.S. 897 (1984)
Massachusetts v. Sheppard	468 U.S. 981 (1984)
Luce v. United States	469 U.S. 38 (1984)
United States v. Abel	469 U.S. 45 (1984)
United States v. Powell	469 U.S. 57 (1984)
Garcia v. United States	469 U.S. 70 (1984)
United States v. Hensley	469 U.S. 221 (1985)
United States v. Johns	469 U.S. 478 (1985)
United States v. Young	470 U.S. 1 (1985)
Shea v. Louisiana	470 U.S. 51 (1985)
Ake v. Oklahoma	470 U.S. 68 (1985)
Oregon v. Elstad	470 U.S. 298 (1985)
United States v. Gagnon	470 U.S. 522 (1985)
Wayte v. United States	470 U.S. 598 (1985)
United States v. Sharpe	470 U.S. 675 (1985)
Hayes v. Florida	470 U.S. 811 (1985)
Ball v. United States	470 U.S. 856 (1985)
United States v. Miller	471 U.S. 130 (1985)
California v. Carney	471 U.S. 386 (1985)
Tennessee v. Street	471 U.S. 409 (1985)
Liparota v. United States	471 U.S. 419 (1985)
Garrett v. United States	471 U.S. 773 (1985)
Caldwell v. Mississippi	472 U.S. 320 (1985)
Baldwin v. Alabama	472 U.S. 372 (1985)
Superintendent, Massachusetts Correctional Inst. v. Hill	472 U.S. 445 (1985)
Maryland v. Macon	472 U.S. 463 (1985)
United States v. Albertini	472 U.S. 675 (1985)
Dowling v. United States	473 U.S. 207 (1985)
United States v. Montoya de Hernandez	473 U.S. 531 (1985)
United States v. Bagley	473 U.S. 667 (1985)
Heath v. Alabama	474 U.S. 82 (1985)
Maine v. Moulton	474 U.S. 159 (1985)
United States v. Rojas-Contreras	474 U.S. 231 (1985)
United States v. Loud Hawk	474 U.S. 302 (1986)
United States v. Lane	474 U.S. 438 (1986)
United States v. Mechanik	475 U.S. 66 (1986)
New York v. Class	475 U.S. 106 (1986)
Texas v. McCullough	475 U.S. 134 (1986)
United States v. Inadi	475 U.S. 387 (1986)
Michigan v. Jackson	475 U.S. 625 (1986)
Delaware v. Van Arsdall	475 U.S. 673 (1986)
New York v. P.J. Video, Inc.	475 U.S. 868 (1986)
Skipper v. South Carolina	476 U.S. 1 (1986)
McLaughlin v. United States	476 U.S. 16 (1986)
Batson v. Kentucky	476 U.S. 79 (1986)
Smalis v. Pennsylvania	476 U.S. 140 (1986)
Poland v. Arizona	476 U.S. 147 (1986)
California v. Ciraolo	476 U.S. 207 (1986)
Henderson v. United States	476 U.S. 321 (1986)
Lee v. Illinois	476 U.S. 530 (1986)
Crane v. Kentucky	476 U.S. 683 (1986)

Case Name	Cite
McMillan v. Pennsylvania	477 U.S. 79 (1986)
Allen v. Illinois	478 U.S. 364 (1986)
1991-1995 Terms	
Griffin v. United States	502 U.S. 46 (1991)
White v. Illinois	502 U.S. 346 (1992)
Dawson v. Delaware	503 U.S. 159 (1992)
Williams v. United States	503 U.S. 193 (1992)
United States v. Wilson	503 U.S. 329 (1992)
United States v. Felix	503 U.S. 378 (1992)
Jacobson v. United States	503 U.S. 540 (1992)
United States v. Williams	504 U.S. 36 (1992)
Riggins v. Nevada	504 U.S. 127 (1992)
Evans v. United States	504 U.S. 255 (1992)
Sochor v. Florida	504 U.S. 527 (1992)
Morgan v. Illinois	504 U.S. 719 (1992)
Georgia v. McCollum	505 U.S. 42 (1992)
United States v. Salerno	505 U.S. 317 (1992)
Medina v. California	505 U.S. 437 (1992)
Doggett v. United States	505 U.S. 647 (1992)
Crosby v. United States	506 U.S. 255 (1993)
Lockhardt v. Fretwell	506 U.S. 364 (1993)
Zafiro v. United States	506 U.S. 534 (1993)
Fex v. Michigan	507 U.S. 43 (1993)
United States v. Dunnigan	507 U.S. 87 (1993)
Ortega-Rodriguez v. United States	507 U.S. 234 (1993)
United States v. Olano	507 U.S. 725 (1993)
Stinson v. United States	508 U.S. 36 (1993)
Deal v. United States	508 U.S. 129 (1993)
Smith v. United States	508 U.S. 223 (1993)
Sullivan v. Louisiana	508 U.S. 275 (1993)
Minnesota v. Dickerson	508 U.S. 366 (1993)
Wisconsin v. Mitchell	508 U.S. 476 (1993)
Johnson v. Texas	509 U.S. 350 (1993)
United States v. Dixon	509 U.S. 688 (1993)
Ratzlaf v. United States	510 U.S. 135 (1994)
Victor v. Nebraska	511 U.S. 1 (1994)
United States v. Granderson	511 U.S. 39 (1994)
Powell v. Nevada	511 U.S. 79 (1994)
United States v. Alvarez-Sanchez	511 U.S. 350 (1994)
Beecham v. United States	511 U.S. 368 (1994)
Custis v. United States	511 U.S. 485 (1994)
Posters 'N' Things, Ltd. v. United States	511 U.S. 513 (1994)
Staples v. United States	511 U.S. 600 (1994)
Nichols v. United States	511 U.S. 738 (1994)
Dept. of Revenue v. Kurth Ranch	511 U.S. 767 (1994)
Romano v. Oklahoma	512 U.S. 1 (1994)
Simmons v. South Carolina	512 U.S. 154 (1994)
Davis v. United States	512 U.S. 452 (1994)
Shannon v. United States	512 U.S. 573 (1994)
Williamson v. United States	512 U.S. 594 (1994)
Tuilaepa v. California	512 U.S. 967 (1994)
United States v. Shabani	115 S. Ct. 382 (1994)
Tome v. United States	115 S. Ct. 696 (1995)
United States v. Mezzanatto	115 S. Ct. 797 (1995)
Harris v. Alabama	115 S. Ct. 1031 (1995)
Arizona v. Evans	115 S. Ct. 1185 (1995)
Hubbard v. United States	115 S. Ct. 1754 (1995)
Wilson v. Arkansas	115 S. Ct. 1914 (1995)
Ryder v. United States	115 S. Ct. 2031 (1995)

Case Name	Cite
Witte v. United States	115 S. Ct. 2199 (1995)
United States v. Gaudin	115 S. Ct. 2310 (1995)
United States v. Aguilar	115 S. Ct. 2357 (1995)
Bailey v. United States	116 S. Ct. 501 (1995)
Neal v. United States	116 S. Ct. 763 (1996)
Rutledge v. United States	116 S. Ct. 1241 (1996)
Cooper v. Oklahoma	116 S. Ct. 1373 (1996)
Carlisle v. United States	116 S. Ct. 1460 (1996)
Ornelas v. United States	116 S. Ct. 1657 (1996)
Loving v. United States	116 S. Ct. 1737 (1996)
Whren v. United States	116 S. Ct. 1769 (1996)
Koon v. United States	116 S. Ct. 2035 (1996)
Melendez v. United States	116 S. Ct. 2057 (1996)
Lewis v. United States	116 S. Ct. 2163 (1996)

TABLE 1-d
CRIMINAL JUSTICE CASES (BY SUBCATEGORY)

Case Name	Cite	Subcategory
1981-1985 Terms		
United States v. Johnson	457 U.S. 537 (1982)	arrest
Taylor v. Alabama	457 U.S. 687 (1982)	arrest
Florida v. Royer	460 U.S. 491 (1983)	arrest
Welsh v. Wisconsin	466 U.S. 740 (1984)	arrest
United States v. Hensley	469 U.S. 221 (1985)	arrest
United States v. Sharpe	470 U.S. 675 (1985)	arrest
Hayes v. Florida	470 U.S. 811 (1985)	arrest
Eddings v. Oklahoma	455 U.S. 104 (1982)	capital sent.
Enmund v. Florida	458 U.S. 782 (1982)	capital sent.
Barclay v. Florida	463 U.S. 939 (1983)	capital sent.
Spaziano v. Florida	468 U.S. 447 (1984)	capital sent.
Caldwell v. Mississippi	472 U.S. 320 (1985)	capital sent.
Baldwin v. Alabama	472 U.S. 372 (1985)	capital sent.
Poland v. Arizona	476 U.S. 147 (1986)	capital sent.
United States v. Valenzuela-Bernal	458 U.S. 858 (1982)	confrontation cl.
Delaware v. Van Arsdall	475 U.S. 673 (1986)	confrontation cl.
Williams v. United States	458 U.S. 279 (1982)	definition
New York v. Ferber	458 U.S. 747 (1982)	definition
Bell v. United States	462 U.S. 356 (1983)	definition
Dixson v. United States	465 U.S. 482 (1984)	definition
United States v. Rodgers	466 U.S. 475 (1984)	definition
Garcia v. United States	469 U.S. 70 (1984)	definition
United States v. Albertini	472 U.S. 675 (1985)	definition
Dowling v. United States	473 U.S. 207 (1985)	definition
McLaughlin v. United States	476 U.S. 16 (1986)	definition
Lee v. Illinois	476 U.S. 530 (1986)	definition
United States v. Sells Eng'g, Inc.	463 U.S. 418 (1983)	disclosure
United States v. Baggot	463 U.S. 476 (1983)	disclosure
United States v. Bagley	473 U.S. 667 (1985)	disclosure
Oregon v. Kennedy	456 U.S. 667 (1982)	double jeopardy
Tibbs v. Florida	457 U.S. 31 (1982)	double jeopardy
Arizona v. Rumsey	467 U.S. 203 (1984)	double jeopardy
Ohio v. Johnson	467 U.S. 493 (1984)	double jeopardy
Richardson v. United States	468 U.S. 317 (1984)	double jeopardy
Garrett v. United States	471 U.S. 773 (1985)	double jeopardy
Heath v. Alabama	474 U.S. 82 (1985)	double jeopardy
Smalis v. Pennsylvania	476 U.S. 140 (1986)	double jeopardy
Waller v. Georgia	467 U.S. 39 (1984)	fair trial
United States v. Young	470 U.S. 1 (1985)	fair trial
Ake v. Oklahoma	470 U.S. 68 (1985)	fair trial
United States v. Gagnon	470 U.S. 522 (1985)	fair trial
Crane v. Kentucky	476 U.S. 683 (1986)	fair trial
Pillsbury Co. v. Conboy	459 U.S. 248 (1983)	Fifth Am.
South Dakota v. Neville	459 U.S. 553 (1983)	Fifth Am.
Minnesota v. Murphy	465 U.S. 420 (1984)	Fifth Am.
United States v. Doe	465 U.S. 605 (1984)	Fifth Am.
Allen v. Illinois	478 U.S. 364 (1986)	Fifth Am.
Luce v. United States	469 U.S. 38 (1984)	hearsay
Tennessee v. Street	471 U.S. 409 (1985)	hearsay
United States v. Inadi	475 U.S. 387 (1986)	hearsay
Hobby v. United States	468 U.S. 339 (1984)	indictment
United States v. Miller	471 U.S. 130 (1985)	indictment
United States v. Mechanik	475 U.S. 66 (1986)	indictment
United States v. Frady	456 U.S. 152 (1982)	jury instruction
Connecticut v. Johnson	460 U.S. 73 (1983)	jury instruction

Case Name	Cite	Subcategory
California v. Ramos	463 U.S. 992 (1983)	jury instruction
James v. Kentucky	466 U.S. 341 (1984)	jury instruction
New York v. Quarles	467 U.S. 649 (1984)	miranda
Shea v. Louisiana	470 U.S. 51 (1985)	miranda
Oregon v. Elstad	470 U.S. 298 (1985)	miranda
United States v. Goodwin	457 U.S. 368 (1982)	miscellaneous
United States v. Hasting	461 U.S. 499 (1983)	miscellaneous
Russello v. United States	464 U.S. 16 (1983)	miscellaneous
California v. Trombetta	467 U.S. 479 (1984)	miscellaneous
United States v. Abel	469 U.S. 45 (1984)	miscellaneous
United States v. Powell	469 U.S. 57 (1984)	miscellaneous
Wayte v. United States	470 U.S. 598 (1985)	miscellaneous
United States v. Lane	474 U.S. 438 (1986)	miscellaneous
Batson v. Kentucky	476 U.S. 79 (1986)	miscellaneous
McElroy v. United States	455 U.S. 642 (1982)	proof
United States v. Yermian	468 U.S. 63 (1984)	proof
Liparota v. United States	471 U.S. 419 (1985)	proof
Superintendent, Massachusetts Correctional Inst. v. Hill	472 U.S. 445 (1985)	proof
Oregon v. Bradshaw	462 U.S. 1039 (1983)	right to counsel
United States v. Cronic	466 U.S. 648 (1984)	right to counsel
United States v. Gouveia	467 U.S. 180 (1984)	right to counsel
Maine v. Moulton	474 U.S. 159 (1985)	right to counsel
Michigan v. Jackson	475 U.S. 625 (1986)	right to counsel
Washington v. Chrisman	455 U.S. 1 (1982)	search & seizure
United States v. Ross	456 U.S. 798 (1982)	search & seizure
United States v. Knotts	460 U.S. 276 (1983)	search & seizure
Texas v. Brown	460 U.S. 730 (1983)	search & seizure
Illinois v. Gates	462 U.S. 213 (1983)	search & seizure
United States v. Villamonte-Marquez	462 U.S. 579 (1983)	search & seizure
Illinois v. Lafayette	462 U.S. 640 (1983)	search & seizure
United States v. Place	462 U.S. 696 (1983)	search & seizure
Illinois v. Andreas	463 U.S. 765 (1983)	search & seizure
Michigan v. Long	463 U.S. 1032 (1983)	search & seizure
Michigan v. Clifford	464 U.S. 287 (1984)	search & seizure
United States v. Jacobsen	466 U.S. 109 (1984)	search & seizure
Oliver v. United States	466 U.S. 170 (1984)	search & seizure
Florida v. Meyers	466 U.S. 380 (1984)	search & seizure
United States v. Karo	468 U.S. 705 (1984)	search & seizure
Segura v. United States	468 U.S. 796 (1984)	search & seizure
United States v. Leon	468 U.S. 897 (1984)	search & seizure
Massachusetts v. Sheppard	468 U.S. 981 (1984)	search & seizure
United States v. Johns	469 U.S. 478 (1985)	search & seizure
California v. Carney	471 U.S. 386 (1985)	search & seizure
Maryland v. Macon	472 U.S. 463 (1985)	search & seizure
United States v. Montoya de Hernandez	473 U.S. 531 (1985)	search & seizure
New York v. Class	475 U.S. 106 (1986)	search & seizure
New York v. P.J. Video, Inc.	475 U.S. 868 (1986)	search & seizure
California v. Ciraolo	476 U.S. 207 (1986)	search & seizure
Missouri v. Hunter	459 U.S. 359 (1983)	sentencing
Tuten v. United States	460 U.S. 660 (1983)	sentencing
Bearden v. Georgia	461 U.S. 660 (1983)	sentencing
Wasman v. United States	468 U.S. 559 (1984)	sentencing
Ball v. United States	470 U.S. 856 (1985)	sentencing
Texas v. McCullough	475 U.S. 134 (1986)	sentencing
Skipper v. South Carolina	476 U.S. 1 (1986)	sentencing
McMillan v. Pennsylvania	477 U.S. 79 (1986)	sentencing
United States v. MacDonald	456 U.S. 1 (1982)	speedy trial
United States v. Rojas-Contreras	474 U.S. 231 (1985)	speedy trial

Case Name	Cite	Subcategory
United States v. Loud Hawk	474 U.S. 302 (1986)	speedy trial
Henderson v. United States	476 U.S. 321 (1986)	speedy trial
1991-1995 Terms		
Powell v. Nevada	511 U.S. 79 (1994)	arrest
United States v. Alvarez-Sanchez	511 U.S. 350 (1994)	arrest
Dawson v. Delaware	503 U.S. 159 (1992)	capital sent.
Sochor v. Florida	504 U.S. 527 (1992)	capital sent.
Morgan v. Illinois	504 U.S. 719 (1992)	capital sent.
Johnson v. Texas	509 U.S. 350 (1993)	capital sent.
Romano v. Oklahoma	512 U.S. 1 (1994)	capital sent.
Simmons v. South Carolina	512 U.S. 154 (1994)	capital sent.
Tuilaepa v. California	512 U.S. 967 (1994)	capital sent.
Harris v. Alabama	115 S. Ct. 1031 (1995)	capital sent.
Cooper v. Oklahoma	116 S. Ct. 1373 (1996)	capital sent.
Loving v. United States	116 S. Ct. 1737 (1996)	capital sent.
Hubbard v. United States	115 S. Ct. 1754 (1995)	definition
Bailey v. United States	116 S. Ct. 501 (1995)	definition
United States v. Williams	504 U.S. 36 (1992)	disclosure
United States v. Felix	503 U.S. 378 (1992)	double jeopardy
Witte v. United States	115 S. Ct. 2199 (1995)	double jeopardy
Ornelas v. United States	116 S. Ct. 1657 (1996)	double jeopardy
United States v. Dixon	509 U.S. 688 (1993)	double jeopardy
Riggins v. Nevada	504 U.S. 127 (1992)	fair trial
Ryder v. United States	115 S. Ct. 2031 (1995)	fair trial
White v. Illinois	502 U.S. 346 (1992)	hearsay
Medina v. California	505 U.S. 437 (1992)	hearsay
Williamson v. United States	512 U.S. 594 (1994)	hearsay
Tome v. United States	115 S. Ct. 696 (1995)	hearsay
United States v. Mezzanatto	115 S. Ct. 797 (1995)	hearsay
Carlisle v. United States	116 S. Ct. 1460 (1996)	judgment
Sullivan v. Louisiana	508 U.S. 275 (1993)	jury instruction
Victor v. Nebraska	511 U.S. 1 (1994)	jury instruction
Shannon v. United States	512 U.S. 573 (1994)	jury instruction
United States v. Gaudin	115 S. Ct. 2310 (1995)	jury instruction
Davis v. United States	512 U.S. 452 (1994)	miranda
Griffin v. United States	502 U.S. 46 (1991)	miscellaneous
Jacobson v. United States	503 U.S. 540 (1992)	miscellaneous
Evans v. United States	504 U.S. 255 (1992)	miscellaneous
Georgia v. McCollum	505 U.S. 42 (1992)	miscellaneous
United States v. Salerno	505 U.S. 317 (1992)	miscellaneous
Crosby v. United States	506 U.S. 255 (1993)	miscellaneous
Zafiro v. United States	506 U.S. 534 (1993)	miscellaneous
Fex v. Michigan	507 U.S. 43 (1993)	miscellaneous
Ortega-Rodriguez v. United States	507 U.S. 234 (1993)	miscellaneous
United States v. Olano	507 U.S. 725 (1993)	miscellaneous
Dept. of Revenue v. Kurth Ranch	511 U.S. 767 (1994)	miscellaneous
Lewis v. United States	116 S. Ct. 2163 (1996)	miscellaneous
Ratzlaf v. United States	510 U.S. 135 (1994)	proof
Posters 'N' Things, Ltd. v. United States	511 U.S. 513 (1994)	proof
Staples v. United States	511 U.S. 600 (1994)	proof
United States v. Shabani	115 S. Ct. 382 (1994)	proof
United States v. Aguilar	115 S. Ct. 2357 (1995)	proof
Lockhardt v. Fretwell	506 U.S. 364 (1993)	right to counsel
Minnesota v. Dickerson	508 U.S. 366 (1993)	search & seizure
Arizona v. Evans	115 S. Ct. 1185 (1995)	search & seizure
Wilson v. Arkansas	115 S. Ct. 1914 (1995)	search & seizure
Whren v. United States	116 S. Ct. 1769 (1996)	search & seizure
Williams v. United States	503 U.S. 193 (1992)	sentencing
United States v. Wilson	503 U.S. 329 (1992)	sentencing

Case Name	Cite	Subcategory
United States v. Dunnigan	507 U.S. 87 (1993)	sentencing
Stinson v. United States	508 U.S. 36 (1993)	sentencing
Deal v. United States	508 U.S. 129 (1993)	sentencing
Smith v. United States	508 U.S. 223 (1993)	sentencing
Wisconsin v. Mitchell	508 U.S. 476 (1993)	sentencing
United States v. Granderson	511 U.S. 39 (1994)	sentencing
Beecham v. United States	511 U.S. 368 (1994)	sentencing
Custis v. United States	511 U.S. 485 (1994)	sentencing
Nichols v. United States	511 U.S. 738 (1994)	sentencing
Neal v. United States	116 S. Ct. 763 (1996)	sentencing
Rutledge v. United States	116 S. Ct. 1241 (1996)	sentencing
Koon v. United States	116 S. Ct. 2035 (1996)	sentencing
Melendez v. United States	116 S. Ct. 2057 (1996)	sentencing
Doggett v. United States	505 U.S. 647 (1992)	speedy trial

TABLE 2-a
ALL CIVIL RIGHTS CASES

Discrimination Claims	**1991-1995**	**% Total***	**1981-1985**	**% Total***
for Accused Discriminator	31.7%	5.1%	29.2%	7.1%
for Minority	68.3%		70.8%	
Voting Right Claims				
for Government	64%	2.7%	25%	1.2%
for Challenger	36%		75%	
42 U.S.C. 1983 Claims				
for Government	47%	2.9%	65%	3.0%
for Plaintiff	53%		35%	
Tribal Rights Claims				
for Government	75%	1.6%	39%	2.2%
for Tribe	25%		61%	

* Percent of Adjusted Total Decisions

TABLE 2-b
DISCRIMINATION CLAIMS ONLY

Race-based Claims	**1991-1995**	**% Total***	**1981-1985**	**% Total***
for Accused Discriminator	75%	30.8%	36%	43.9%
for Minority	25%		64%	
Gender-based Claims				
for Accused Discriminator	20%	19.2%	25%	21.1%
for Minority	80%		75%	
Age-based Claims				
for Accused Discriminator	33%	11.5%	0%	7.0%
for Minority	67%		100%	
Other Discrimination Claims				
for Accused Discriminator	50%	38.5%	66%	28.1%
for Minority	50%		34%	

* Percent of all Discrimination Decisions

TABLE 2-c
FIRST AMENDMENT CASES

Expression	**1991-1995**	**% Total***	**1981-1985**	**% Total***
for Freedom of Expression	79%	5.1%	52%	3.3%
for Restriction of Expression	21%		48%	
Establishment				
for Religious Expression	71%	1.4%	42%	1.5%
for Restriction of Expression	29%		58%	

* Percent of Adjusted Total Decisions

TABLE 2-d
ALL CRIMINAL JUSTICE CASES

Criminal Justice	1991-1995	% Total*	1981-1985	% Total*
for Government	66%	13.7%	73%	14.3%
for Defendant	34%		27%	
Habeas Corpus				
for Government	63%	5.3%	75%	6.8%
for Defendant	37%		25%	

* Percent of Adjusted Total Decisions

TABLE 3-a
RACIAL DISCRIMINATION

Sub-Category	1981-1985				1991-1995			
	Total Cases		For Minority		Total Cases		For Minority	
	#	%*	#	%**	#	%*	#	%**
Desegregation	2.0	8.0%	1.0	50.0%	2.0	25.0%	1.0	50.0%
Racial Classification	6.0	24.0%	4.0	66.7%	4.0	50.0%	1.0	25.0%
Job Discrimination	14.0	56.0%	9.0	64.3%	2.0	25.0%	0.0	0.0%
Institutional Racism	3.0	12.0%	2.0	66.7%	0.0	0.0%	0.0	0.0%
TOTAL	25.0		16.0	64.0%	8.0		2.0	25.0%

* Percent of total racial discrmination decisions.
** Percent for minorities.

TABLE 3-b
FREEDOM OF EXPRESSION

Sub-Topic	1981-1985				1991-1995			
	Total Cases		For Expression		Total Cases		For Expression	
	#	%*	#	%**	#	%*	#	%**
Cable Regulation	1.0	3.7%	1.0	100.0%	2.0	7.7%	1.0	50.0%
Campaign Regulation	6.0	22.2%	4.0	66.7%	3.0	11.5%	3.0	100.0%
Commercial Speech	3.0	11.1%	2.0	66.7%	7.0	26.9%	5.0	71.4%
Content	6.0	22.2%	1.0	16.7%	7.0	26.9%	6.0	85.7%
Intragovernmental	4.0	14.8%	1.0	25.0%	3.0	11.5%	3.0	100.0%
Public/Non-Public Forum	3.0	11.1%	2.0	66.7%	3.0	11.5%	2.0	66.7%
Press Access	2.0	7.4%	2.0	100.0%	0.0	0.0%	n/a	n/a
Protest	2.0	7.4%	1.0	50.0%	1.0	3.8%	0.5	50.0%
TOTALS	27.0		14.0	51.9%	26.0		20.5	78.8%

* Percent of total free speech decisions.
** Percent favoring free speech.

TABLE 3-c
CRIMINAL LAW

Sub-Category	1981-1985				1991-1995			
	Total Cases		For Defendant		Total Cases		For Defendant	
	#	%*	#	%**	#	%*	#	%**
Arrest	7.0	6.1%	5.0	71.4%	2.0	2.9%	1.0	50.0%
Capital Sentencing	7.0	6.1%	3.0	42.9%	10.0	14.3%	5.0	50.0%
Confrontation Clause	3.0	2.6%	1.5	50.0%	0.0	0.0%	n/a	n/a
Definition	9.0	7.8%	2.0	22.2%	2.0	2.9%	2.0	100.0%
Disclosure	3.0	2.6%	2.0	66.7%	1.0	1.4%	0.0	0.0%
Double Jeopardy	8.0	7.0%	2.0	25.0%	4.0	5.7%	1.5	37.5%
Fair Trial	5.0	4.3%	3.0	60.0%	2.0	2.9%	2.0	100.0%
Fifth Amendment	5.0	4.3%	1.5	30.0%	0.0	0.0%	n/a	n/a
Hearsay	3.0	2.6%	0.0	0.0%	5.0	7.1%	1.0	20.0%
Indictment	3.0	2.6%	0.0	0.0%	0.0	0.0%	n/a	n/a
Jury Instruction	4.0	3.5%	1.0	25.0%	4.0	5.7%	1.0	25.0%
Miranda Rights	3.0	2.6%	1.0	33.3%	1.0	1.4%	0.0	0.0%
Proof	4.0	3.5%	1.0	25.0%	5.0	7.1%	2.5	50.0%
Right to Counsel	5.0	4.3%	2.0	40.0%	1.0	1.4%	0.0	0.0%
Search & Seizure	25.0	21.7%	1.5	6.0%	4.0	5.7%	1.5	37.5%
Sentencing	8.0	7.0%	3.0	37.5%	15.0	21.4%	2.5	16.7%
Speedy Trial	4.0	3.5%	0.0	0.0%	1.0	1.4%	1.0	100.0%
Miscellaneous	9.0	7.8%	1.0	11.1%	13.0	18.6%	2.0	15.4%
TOTAL	115.0		30.5	26.5%	70.0		23.0	32.9%

* Percent of total criminal law decisions.
** Percent for defendants.

TABLE 3-d
CRIMINAL LAW

Subjects	1981-1985				1991-1995			
	Total Cases		For Defendant		Total Cases		For Defendant	
	#	%*	#	%**	#	%*	#	%**
Substantive	65.0	56.5%	17.5	26.9%	15.0	21.4%	8.0	53.3%
Sentencing	15.0	13.1%	6.0	40.0%	25.0	35.7%	7.5	30.0%
Rules & Interpretation	35.0	30.4%	7.0	20.0%	30.0	42.9%	8.5	28.3%
	115.0		30.5	26.5%	70.0		24.0	34.3%

* Percent of total criminal law decisions.
** Percent for defendants.