

# MAJORITARIAN DEMOCRACY IN A FEDERALIST SYSTEM: THE LATE CHIEF JUSTICE REHNQUIST AND THE FIRST AMENDMENT

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## INTRODUCTION

To some, linking the late Chief Justice William H. Rehnquist and the First Amendment smacks of paradox.<sup>1</sup> Known throughout the entirety of his thirty-three years on the Supreme Court for his judicial conservatism,<sup>2</sup> Chief Justice Rehnquist is probably best remembered in the First Amendment arena for the many opinions in which he found no protection afforded by the First Amendment.<sup>3</sup> Rehnquist is also well-known for opinions holding that, if

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1. See, e.g., Jamin B. Raskin, *The First Amendment: The High Ground and the Low Road*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 115, 116 (Herman Schwartz ed., 2002) (noting that Chief Justice Rehnquist wrote “curmudgeonly dissents” when the Court’s majority upheld First Amendment rights); Geoffrey R. Stone, *The Hustler: Justice Rehnquist and “The Freedom of Speech, or of the Press,”* in *THE REHNQUIST LEGACY* 11, 12 (Craig M. Bradley ed., 2006) (“[R]elative to his colleagues, Rehnquist was no friend of the First Amendment.”); *id.* at 13 (noting that throughout his lengthy service on the Supreme Court, Rehnquist was by far the Justice least likely to vote to sustain a First Amendment claim).

2. See, e.g., FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT* 92 (2005); JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 129–30, 265 (2001); LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 84 (2005); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 6 (1992).

3. See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 806 (1988) (Rehnquist, C.J., dissenting) (arguing that the First Amendment does not preclude regulation of “charitable solicitation” by professional fundraisers); cf. ABRAMS, *supra* note 2, at 68.

the First Amendment conferred any rights, they were overborne by government interests that the Chief Justice found weightier and more imperative.<sup>4</sup> One noteworthy example is *Texas v. Johnson*,<sup>5</sup> a 1989 case in which Chief Justice Rehnquist dissented from the majority's holding that a Texas statute criminalizing public flag burning was unconstitutional.<sup>6</sup> It is, therefore, no surprise that some scholars and commentators have criticized the late Chief Justice's First Amendment jurisprudence as meager, unprincipled, or indifferent.<sup>7</sup>

But Rehnquist did not find against the advocates of free speech in every First Amendment case,<sup>8</sup> so a closer examination of his jurisprudence in this area holds some intrigue.<sup>9</sup> In par-

4. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566–68 (1991) (plurality opinion) (writing that, although nude dancing constitutes expressive conduct protected by the “expressive conduct within the outer perimeters of the First Amendment,” Indiana’s statute banning public nudity withstood constitutional challenge because the law furthered a substantial government interest in protecting order and morality).

5. 491 U.S. 397 (1989).

6. *Id.* at 421–35 (Rehnquist, C.J., dissenting) (emotionally extolling the singular role of the flag in United States history).

7. *See, e.g.*, Stone, *supra* note 1, at 21 (“[Rehnquist’s First Amendment jurisprudence] cannot be defended as principled, coherent, or even-handed . . . [and] belies any plausible theory of originalism, judicial restraint, or principled constitutional interpretation.”); *id.* at 17 (“A cynic might say that Rehnquist’s First Amendment reads, ‘Congress shall make no law abridging the freedom of speech of corporations, the wealthy, or the church.’”).

8. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (denying recovery under the tort of intentional infliction of emotional distress to a public figure who was the subject of an intentionally derogatory sexually explicit parody). Chief Justice Rehnquist reviewed the centuries-old arts of political cartooning and satire, which hold their subjects up to disparagement and ridicule, and the need to protect such core political speech.

The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided . . . .

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate . . . . From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

*Id.* at 54–55.

9. *See* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 178 (1998) (“[I]f freedom of speech is to be meaningful, strong criticism of government policy must be permitted even in wartime. . . . Advocacy which

ticular, how did Rehnquist determine what protections he understood the First Amendment to afford, and what was his approach to resolving conflicts between acknowledged First Amendment rights and government restrictions impinging on those rights?

An examination of every case in which Rehnquist authored an opinion that treated an issue of freedom of speech, press, or association, addresses these interesting questions.<sup>10</sup> All told, these cases comprise a universe of more than seventy opinions. The late Chief Justice obviously participated in many more than seventy cases involving claims of freedom of speech, press, or association during more than three decades on the Supreme Court.<sup>11</sup> But focusing on that subset of cases where Rehnquist penned his own opinion provides insight into his particular views on the extent of First Amendment protection.<sup>12</sup> Speech cases in which Rehnquist merely joined the opinions of other Justices might indicate generally the doctrines to which he did or did not subscribe,<sup>13</sup> or perhaps more accurately, the outcomes with which he agreed.<sup>14</sup> The opinions of the other Justices, however, do not reveal how Chief Justice Rehnquist's philosophy of protected expression differed from theirs.

Underlying Rehnquist's opinions are two important principles that help explain his approach to speech-related constitutional issues. The first principle is the protection of majoritarian democracy, which entails the protection of democratic values

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persuades citizens that a law is unjust is not the same as advocacy that preaches disobedience to it.”).

10. For a list of these cases, see Appendix *infra*.

11. Stone, *supra* note 1, at 11 (noting that Chief Justice Rehnquist participated in 259 decisions regarding freedom of speech or of the press).

12. Bell used a similar approach to evaluate Justice Byron White's First Amendment jurisprudence, focusing on the body of opinions that Justice White authored in media cases during his tenure on the Supreme Court. See Bernard W. Bell, *The Populism of Justice Byron R. White: Media Cases and Beyond*, 74 U. COLO. L. REV. 1425 (2003).

13. For example, in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), Rehnquist joined in Justice O'Connor's unanimous opinion for the Court, which held unconstitutional a ban on "First Amendment activities" within an airport terminal, but he also joined Justice White's concurring opinion, which stated that the Court's opinion "should not be taken as indicating that a majority of the Court considers the . . . [a]irport to be a traditional public forum." *Id.* at 577 (White, J., concurring).

14. See, e.g., *FEC v. Pacifica Found.*, 438 U.S. 726 (1978) (Stevens, J., in an opinion joined by Rehnquist, J.) (upholding FCC order sanctioning radio station for broadcasting content deemed indecent though not obscene).

in two different contexts. First, Rehnquist recognized the importance of protecting certain core political speech rights under the First Amendment that he believed essential to maintaining the “majority rule” ideal on which our democracy is premised. Second, he sought to avoid judicial trampling on laws enacted by legislative bodies elected by the democratic majority.<sup>15</sup> These two democratic ideals are somewhat in tension because as the “territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically by the people and their representatives . . . .”<sup>16</sup> The Rehnquist speech cases reveal his efforts to balance these two ideals. The weaker the assertion that the expression at issue was core political speech that enhanced citizens’ participation in our democratic system, the greater the likelihood that Rehnquist would find to be more weighty the democratic values inherent in the elected legislature’s enactment of the regulation restricting speech, press, or association.

The second principle that helps explain the late Chief Justice’s approach to First Amendment problems—and probably of equal importance to his desire to protect democratic ideals—was his zeal for our federalist system. The Rehnquist speech cases demonstrate that he treated federal restrictions on speech with less deference than similar restrictions on speech imposed by the states. Rehnquist took special care to narrowly interpret state and local laws restricting speech, and he deferred to state court interpretations of such legislation whenever possible.<sup>17</sup> In his view, the First Amendment imposed weaker constraints on

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15. Rehnquist’s constitutional jurisprudence emphasized judicial restraint as a means of protecting majoritarian democracy. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976), reprinted in 29 HARV. J.L. & PUB. POL’Y 401, 414–15 (2006) (“[T]he living Constitution . . . is a formula for an end run around popular government. . . . [It is] genuinely corrosive of the fundamental values of our democratic society.”). *But see* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986) (“Faith in democracy is one thing, blind faith quite another.”).

16. Richard W. Garnett, *Less Is More: Justice Rehnquist, the Freedom of Speech, and Democracy*, in THE REHNQUIST LEGACY, *supra* note 1, at 26, 28.

17. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 830 (1975) (Rehnquist, J., dissenting) (deferring to the Virginia state court’s interpretation of a Virginia statute); Craig M. Bradley, *Introduction to THE REHNQUIST LEGACY*, *supra* note 1, at 1, 5 (“[Chief Justice Rehnquist’s] vision of the Constitution was based on three principles: strict construction, judicial restraint, and federalism.”).

the power of the states to regulate speech than it did on the powers of Congress and the federal government.<sup>18</sup>

Both of these principles, majoritarian democracy and federalism, are structural elements of our nation's system of government enshrined in the Constitution. Our Constitution established a federalist system with fifty states retaining partial sovereignty under a federal government of limited powers. The U.S. Constitution and the constitutions of the fifty states have made majoritarian democracy the engine to run both state and federal systems. Rehnquist frequently invoked this structural perspective in examining First Amendment speech issues and in opining how such constitutional conflicts should be resolved.

### I. CHIEF JUSTICE REHNQUIST'S BACKGROUND

How did William Rehnquist arrive at his approach? He certainly did not come to the Supreme Court as a blank slate. Before turning to the cases that best exemplify the principles of majoritarian democracy and federalism in the late Chief Justice's jurisprudence, it is useful to understand something of his background.

William Rehnquist grew up in suburban Milwaukee in a Republican household.<sup>19</sup> After serving in World War II, he used the GI Bill to attend college at Stanford.<sup>20</sup> As an undergraduate, he majored in political science. He continued on to earn a masters degree, also at Stanford, in political science.<sup>21</sup> He then attended Harvard, where he received another masters degree, this time in government.<sup>22</sup> He returned to Stanford, where he attended law school, graduating first in his class.<sup>23</sup>

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18. See *infra* Part II.B.

19. Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC MONTHLY, Apr. 1, 2005, at 79, 82, available at <http://www.theatlantic.com/doc/200504/rosen>; Oyez U.S. Supreme Court Media, Biography of William H. Rehnquist, [http://www.oyez.org/oyez/resource/legal\\_entity/100/biography](http://www.oyez.org/oyez/resource/legal_entity/100/biography) (last visited Nov. 2, 2006).

20. Rosen, *supra* note 19, at 82.

21. Bradley, *supra* note 17, at 1.

22. Oyez, *supra* note 19; see also Bradley, *supra* note 17, at 1 (noting that Rehnquist had attended Harvard as a graduate student with the objective, later abandoned, of pursuing a career as an academic in political science).

23. Bradley, *supra* note 17, at 1.

During the year and a half following law school, he clerked for Supreme Court Justice Robert Jackson.<sup>24</sup> After his clerkship, he took the Arizona Bar and spent sixteen years in private practice as a civil litigator in Phoenix.<sup>25</sup> While in practice, he was active in the Republican Party in Arizona.<sup>26</sup> Then, in 1969, he left private practice to take a job in the Nixon administration as Assistant Attorney General in the Office of Legal Counsel, working under another former Phoenix lawyer Richard Kleindienst.<sup>27</sup> In 1972, Nixon nominated and, by a 68 to 26 vote, the Senate confirmed Rehnquist as Associate Justice of the Supreme Court.<sup>28</sup> He was forty-seven years old.

For the first three years, between 1972 and 1975, then-Justice Rehnquist shared the Supreme Court bench with Justice William O. Douglas,<sup>29</sup> a vigorous advocate of First Amendment rights throughout his tenure on the Court. During those three years, Rehnquist and Douglas saw eye-to-eye on virtually nothing in the First Amendment field. As a “zealous defender of civil liberties,”<sup>30</sup> Justice Douglas viewed First Amendment

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24. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 3–20 (new ed. 2001).

25. Bradley, *supra* note 17, at 1; SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 6 (1989).

26. Bradley, *supra* note 17, at 1 (noting that Rehnquist was well-connected politically with the Republican party in Arizona, serving as a speechwriter for Barry Goldwater’s 1964 presidential campaign); DAVIS, *supra* note 25, at 5 (noting that early in his practice, Rehnquist was known for his “active and outspoken” conservatism).

27. Bradley, *supra* note 17, at 1.

28. DEAN, *supra* note 2, at 278. Rehnquist’s confirmation as Associate Justice was not without controversy. While clerking for Justice Jackson and working on *Brown v. Board of Education*, 347 U.S. 483 (1954), Rehnquist authored a memorandum suggesting that the claims of Brown and the other African-American plaintiffs be rejected, and that the “separate but equal” rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), be affirmed. TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 1–5 (2000); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 19 (2005). During his confirmation hearings, Rehnquist told the Senate Judiciary Committee that the views expressed in the memo were those of Justice Jackson, not his own, an assertion questioned by scholars and some who knew Justice Jackson. TUSHNET, *supra*, at 19.

29. REHNQUIST, *supra* note 24, at 225.

30. *Id.* at 137; see also J. Harvie Wilkinson III, *Oversimplifying the Supreme Court*, 31 J. SUP. CT. HIST. 81, 86 (2006) (calling Justice Douglas “an indefatigable champion of the dispossessed”); cf. REHNQUIST, *supra* note 9, at 194 (calling Justice Douglas a “bastion of [the] liberal wing” of the Supreme Court); YARBROUGH, *supra* note 28, at 6 (noting that Rehnquist denounced Justice Douglas in a 1957 speech for being “left wing”).

claims from a rights-based perspective, a point of view in serious conflict with the structural approach that underlies Rehnquist's First Amendment jurisprudence.

Even in *Jenkins v. Georgia*,<sup>31</sup> a 9-0 decision, Justice Douglas did not join the majority opinion authored by then-Justice Rehnquist. The Court in *Jenkins* struck down the defendant's obscenity conviction for showing the Oscar-winning movie *Carnal Knowledge* on the ground that the movie was not obscene as a matter of law.<sup>32</sup> Justice Douglas concurred separately and argued that no ban on obscenity is constitutional under the First and Fourteenth Amendments,<sup>33</sup> an absolutist position that Rehnquist would never embrace.

Justice Douglas, who served on the Court for more than thirty-six years,<sup>34</sup> wrote more dissents than any other Justice<sup>35</sup> and was even described as "The Great Dissenter,"<sup>36</sup> a title previously given to Justice Holmes.<sup>37</sup> As the Rehnquist speech cases reveal, however, Rehnquist was a prolific dissenter, especially during the period between his appointment in 1972 and Justice Scalia's appointment to the Court in 1986, authoring many solo dissents during that period.<sup>38</sup>

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31. 418 U.S. 153 (1974).

32. See *id.* at 160-61. To reach this result, then-Justice Rehnquist turned to the obscenity standards enunciated by the Court in *Miller v. California*, 413 U.S. 15 (1973), which proscribe prosecutions for obscenity unless inter alia the materials at issue "depict or describe patently offensive 'hard core' sexual conduct." *Id.* at 27. Based on the Court's viewing of the film *Carnal Knowledge*, then-Justice Rehnquist concluded that "occasional scenes of nudity" without any exhibition of actors' genitals could not be held to depict sexual conduct in a patently offensive way as required under *Miller*, and the Court overturned the jury verdict to the contrary. *Jenkins*, 418 U.S. at 160-61.

33. *Jenkins*, 418 U.S. at 162 (Douglas, J., dissenting) ("[A]ny ban on obscenity is prohibited by the First [and Fourteenth] Amendment[s].").

34. REHNQUIST, *supra* note 24, at 137.

35. BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 513 (2003).

36. Mary E. Fairhurst & Andrew T. Braff, *William O. Douglas: The Gadfly of Washington*, 40 GONZ. L. REV. 259, 266-67 (2005) (noting that Justice Douglas authored 486 dissents during his tenure on the Supreme Court).

37. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986); Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 325 (2005).

38. See John M. Nannes, *The "Lone Dissenter"*, 31 J. SUP. CT. HIST. 1 (2006) (recalling that in his early days on the Supreme Court, then-Justice Rehnquist dissented alone in so many cases that he "came to be known as the 'Lone Dissenter'"); Cliff Sloan, *Whatever Happened to the Lone Ranger?*, NEWSWEEK.COM, Nov. 15, 2004, <http://www.msnbc.msn.com/id/6495396/site/newsweek> ("[Rehnquist] became a

Rehnquist served as Associate Justice until 1986 when, after Chief Justice Warren Burger retired, President Ronald Reagan nominated and the Senate confirmed Rehnquist as Chief Justice by a vote of 65 to 33.<sup>39</sup> He led the Court as Chief Justice for nearly nineteen years, until his death in 2005. In total, he served on the Court for thirty-three and a half years.

William Rehnquist came to the Supreme Court with a background as a political scientist, lawyer, and executive branch official. Even before joining the Court, while a young lawyer in Phoenix, Rehnquist revealed himself to be a strong federalist. Shortly after his clerkship for Justice Jackson ended, he published an op-ed piece in *U.S. News & World Report* criticizing his fellow former Supreme Court clerks for what he viewed as their leftist philosophy of “expansion of federal power at the expense of State power.”<sup>40</sup> Given his training in the fields of political science and government, it should not be surprising that Rehnquist used such structural principles as democracy and federalism as guideposts in his First Amendment jurisprudence.

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bomb-thrower on the court, launching provocative dissents and staking out solitary terrain on the court’s right wing.”). All told, during his tenure as an Associate Justice between 1972 and 1986, then-Justice Rehnquist authored 240 majority opinions, 89 concurrences, and 245 dissents. DAVIS, *supra* note 25, at 211–27. Rehnquist’s dissents in the First Amendment arena were also more frequent when he was an Associate Justice. During those nearly fifteen years, Rehnquist wrote 28 dissents, 12 majority opinions, and 6 concurrences in speech-related cases. While Chief Justice for almost nineteen years, Rehnquist authored 12 dissents, 14 majority opinions, and 3 concurrences in such cases. See Appendix *infra*.

39. YARBROUGH, *supra* note 28, at 11. When then-Justice Rehnquist was nominated for the position of Chief Justice, the controversy over his memo to Justice Jackson that suggested affirmance of *Plessy*’s doctrine of “separate but equal” erupted again. *Id.* at 1–6. Those who opposed Rehnquist’s confirmation were better prepared in 1986 than in 1971 when he had been confirmed as an Associate Justice, and supplied additional evidence to the Senate Judiciary Committee suggesting that the views expressed in the memo were in fact Rehnquist’s, and that he had been untruthful in 1971 in denying this. *Id.* at 3–6; see also TUSHNET, *supra* note 28, at 18–21. The Committee also heard testimony from witnesses who complained that while in private practice in Phoenix, Rehnquist had harassed minority voters at polling places in that city. YARBROUGH, *supra* note 28, at 7–8. A Harris poll taken at the time suggested that the public opposed his confirmation as Chief Justice “58 to 30 percent nation-wide.” *Id.* at 10. Despite such objections, he was confirmed by the Senate, but received more negative votes than any previously confirmed Justice. *Id.* at 11.

40. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74, 75.

## II. DEMOCRACY AND FEDERALISM

Rehnquist's opinions addressing two particular First Amendment topics, commercial speech and election-campaign law, illustrate how he applied the principles of democracy and federalism in his decisions. Commercial speech and election-campaign law come from opposite ends of the First Amendment spectrum. Commercial speech has traditionally resided at the periphery of protected speech, if it is protected at all.<sup>41</sup> Conversely, speech and associational rights relating to elections and political campaigns are indisputably political speech within the core of First Amendment protection.<sup>42</sup> Rehnquist's opinions on commercial speech and election-campaign law say much about his views on democracy and federalism, and how those two factors should shape interpretation of the First Amendment.<sup>43</sup>

A. *Commercial Speech*

Until 1975, it was generally understood from the Supreme Court's decision in *Valentine v. Chrestensen*<sup>44</sup> that commercial speech was minimally, if at all, protected by the First Amendment.<sup>45</sup> Such speech merely proposed a commercial transac-

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41. See *infra* Part II.A.

42. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (describing advocacy of a "politically controversial viewpoint" as "the essence of First Amendment expression"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (describing the connection between a political organization's ability to solicit contributions and the ability of that organization "to engage in core political speech").

43. There may be some conflict between what the late Chief Justice wrote in his own opinions in these two areas and the opinions in which he merely joined. As explained *infra* Part II.B, Rehnquist wrote much more protectively of core political speech in the campaign-election area than he did in the area of commercial speech. But see *Stone*, *supra* note 1, at 16-17 (asserting that the only three kinds of expression that Rehnquist showed any vigor at all in protecting were commercial speech, campaign finance, and religious expression). By *Stone's* count, Rehnquist sustained commercial speech claims in ten of the twenty-seven decisions in which he participated, and upheld expression-based challenges to campaign finance restrictions in eight of the twelve cases in which he voted. *Id.*

44. 316 U.S. 52 (1942). In *Chrestensen*, the Court unanimously upheld a New York law banning the dissemination of handbills "solely devoted to 'information or a public protest.'" *Id.* at 53-54. "[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising," but instead leaves the "matter[] for legislative judgment." *Id.* at 54.

45. See, e.g., STANLEY H. FRIEDELBAUM, *THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM* 61 (1994) (explaining that commercial speech "was not

tion—“Buy this!”—and was therefore thought to contribute nothing to the exposition of ideas enjoying constitutional protection.<sup>46</sup> That situation changed with *Bigelow v. Virginia*, in which the Supreme Court reversed the conviction of the editor of a Virginia newspaper for publishing an advertisement for abortion services placed by an abortion provider located in New York City, where abortion was at that time legal.<sup>47</sup> The Court’s decision rested in part on the content of the advertisement<sup>48</sup>—abortion procedures to which there was a constitutional right after *Roe v. Wade*<sup>49</sup>—and the ad’s “not unnewsworthy” quality, namely the offering of services not available at that time in Virginia.<sup>50</sup> It was a 7-2 vote, with then-Justice Rehnquist leading the charge in dissent.<sup>51</sup>

In Rehnquist’s view, commercial speech was “entitled to little constitutional protection.”<sup>52</sup> It was not the kind of speech that promotes our democratic values, which the First Amendment was adopted to protect:

[T]he advertisement appears to me . . . to be a classic commercial proposition directed toward the exchange of ser-

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accorded any appreciable degree of First Amendment protection” until the mid-1970s); GREENHOUSE, *supra* note 2, at 117 (“Under the Court’s precedents . . . commercial speech clearly did occupy a lowly rung in the hierarchy of First Amendment protection.”); Earl M. Maltz, “I Give Up!”: William Rehnquist and Commercial Speech, in THE REHNQUIST LEGACY, *supra* note 1, at 43 (“*Valentine v. Chrestensen* was generally viewed as having established the rule that the First Amendment did not impose any significant restrictions on government regulation of purely commercial speech.”).

46. *Cf.* *In re Primus*, 436 U.S. 412, 437 (1978); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

47. *Bigelow v. Virginia*, 421 U.S. 809, 811–12, 829 (1975).

48. *See id.* at 821–22 (noting that the advertisement at issue “did more than simply propose a commercial transaction” and “conveyed information of potential interest and value to a diverse audience”).

49. 410 U.S. 113 (1973).

50. *See Bigelow*, 421 U.S. at 822. Then-Justice Rehnquist thought the subject of the ad—New York abortion services—was irrelevant. *Id.* at 831 (Rehnquist, J., dissenting). But *Roe* had been decided just two years earlier, and Justice Blackmun, who had authored *Roe*, also authored *Bigelow*. Justice Blackmun viewed the newspaper ads at issue in *Bigelow* as part and parcel to the abortion rights arising out of his opinion in *Roe*. *See id.* at 822 (majority op.) (“[T]he activity advertised pertained to constitutional interests,” and “appellant’s First Amendment interests coincided with the constitutional interests of the general public”); *see also* GREENHOUSE, *supra* note 2, at 119 (“There seems little doubt that [Justice] Blackmun was initially animated in *Bigelow v. Virginia* by its connection to abortion.”).

51. *Bigelow*, 421 U.S. at 810, 829 (Rehnquist, J., dissenting).

52. *Id.* at 832.

vices rather than the exchange of ideas. . . . Whatever slight factual content the advertisement may contain and whatever expression of opinion may be laboriously drawn from it does not alter its predominantly commercial content.<sup>53</sup>

He also criticized the majority for encroaching on Virginia's state powers, which he believed unquestionably included the authority to regulate commercial advertising to its citizens, regardless of the topic of the advertisements.<sup>54</sup> "It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder."<sup>55</sup>

At the end of his dissent, Rehnquist asserted that *Bigelow* should be limited to its context: the advertisement of constitutionally-protected abortion services. He stated, "Since the Court saves harmless from its present opinion our prior cases in this area, it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion."<sup>56</sup>

A year later, the Court proved Rehnquist wrong in *Virginia State Board of Pharmacy v. Citizens Consumer Council*,<sup>57</sup> where the Court extended its holding in *Bigelow* to apply to commercial advertising generally,<sup>58</sup> thus putting *Chrestensen* to rest. In *Virginia Pharmacy*, the Court struck down another Virginia statute, this time a law subjecting pharmacists to civil penalties, including suspension and revocation of their professional licenses, if they advertised the prices of the prescription drugs they sold.<sup>59</sup> The vote was 7-1; Rehnquist was the sole dissenter.<sup>60</sup>

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53. *Id.* at 831-32.

54. *See id.* at 832-36.

55. *Id.* at 832-33 (quoting *Bigelow v. Virginia*, 191 S.E.2d 173, 176 (Va. 1972)).

56. *Bigelow*, 421 U.S. at 836 (internal citation omitted).

57. 425 U.S. 748 (1976).

58. *See id.* at 759-61, 770.

59. *See id.* at 749-50, 752.

60. *See id.* at 749; *id.* at 781-90 (Rehnquist, J., dissenting). Two months before the opinion issued, then-Justice Rehnquist advised Justice Blackmun, the assigned author of the majority opinion, of his intent to dissent, but praised Justice Blackmun's work: "I didn't think as good an opinion could be written in support of your result as you have written." GREENHOUSE, *supra* note 2, at 120.

Rehnquist's dissent in *Virginia Pharmacy* relies on democratic values and federalism, the two guiding principles identified earlier, to explain why commercial speech is unprotected under his First Amendment jurisprudence. Rehnquist again criticized the Court's holding that commercial speech, which was once thought "beyond the pale" of the First Amendment, merited constitutional protection.<sup>61</sup> In his view, commercial speech, even when advertising matters important to consumers, lacks the "ideological content" necessary to promote the democratic and political ideas that the First Amendment is designed to protect.<sup>62</sup> The "free trade in ideas"<sup>63</sup> that Rehnquist would have protected under the First Amendment involves political, social, and other public issues but not consumption decisions.

[T]he Court's decision in this case . . . elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas . . . .

. . . .

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.<sup>64</sup>

But beyond explaining that the First Amendment is intended to protect speech necessary to enlighten voters about "political, social, and other public issues," Rehnquist did not define what constitutes the requisite ideological content necessary for First Amendment protection. In the commercial speech opinions he wrote after *Virginia Pharmacy*, he offered little more to explain how he would define speech warranting constitutional protec-

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61. *Virginia Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting).

62. *See id.* at 790.

63. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

64. *Virginia Pharmacy*, 425 U.S. at 781, 787 (Rehnquist, J., dissenting).

tion.<sup>65</sup> Rehnquist even went so far as to reject the “marketplace of ideas” metaphor so often used to characterize speech protected by the First Amendment:

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a “marketplace of ideas.” There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.<sup>66</sup>

Although he did not lay out precisely what kinds of speech content merit protection, Rehnquist explicitly explained why he perceived the majority’s decision in *Virginia Pharmacy* to be incorrect. The decision was yet another unwarranted incursion on power belonging to the state—a distortion of the federalist system prescribed in the Constitution:

[The consumer’s and society’s] interest in the free flow of commercial information . . . should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. . . . While there is . . . much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.<sup>67</sup>

In addition to setting forth both prongs of his First Amendment jurisprudence—democratic values as a necessary ideological component of protected speech and federalism—Rehnquist’s dissent in *Virginia Pharmacy* makes two additional, prescient points. First, despite the majority’s closing denial that its opinion would open the constitutional floodgates for attorney and doctor advertising,<sup>68</sup> Rehnquist predicted that the

65. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 583–606 (1980) (Rehnquist, J., dissenting).

66. *Id.* at 592.

67. *Virginia Pharmacy*, 425 U.S. at 783–84 (Rehnquist, J., dissenting) (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws.” (quoting *Ferguson v. Skupra*, 372 U.S. 726, 730 (1963))).

68. See *id.* at 773 n.25. Although Justice Blackmun wrote the majority opinion in *Virginia Pharmacy*, it was Justice Powell—former ABA president during 1964–

rationale of *Virginia Pharmacy* would leave no room for drawing a line between drug prices on the one hand and legal or medical services on the other:

[T]he Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions.<sup>69</sup>

A year later, he was proven correct in *Bates v. State Bar of Arizona*.<sup>70</sup> There, three Justices who had joined the majority in *Virginia Pharmacy* were horrified by the prospect of lawyers advertising their services and prices. These three Justices joined Rehnquist in dissenting from the extension of *Virginia Pharmacy's* protection for commercial speech to lawyer advertising.<sup>71</sup> In his dissent in *Bates*, Rehnquist reiterated his view that commercial speech does not promote the democratic values that he thought were a prerequisite to First Amendment protection:

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.<sup>72</sup>

In Rehnquist's view, the Court first erred when it overruled the broad language of *Chrestensen* that excepted commercial speech from the protection of the First Amendment entirely.

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1965—who supplied the text of footnote 25, out of concern about how the case would square with advertising by lawyers. GREENHOUSE, *supra* note 2, at 119–20.

69. *Virginia Pharmacy*, 425 U.S. at 783 (Rehnquist, J., dissenting). Rehnquist dismissed the majority's suggestion that the services versus goods distinction is of a constitutional dimension, stating that such a difference "can be only one of degree and not of kind." *Id.* at 785.

70. 433 U.S. 350 (1977).

71. *Bates*, 433 U.S. at 386–88 (Burger, C.J., concurring in part and dissenting in part); *id.* at 389–404 (Powell, J., concurring in part and dissenting in part, joined by Stewart, J.); *id.* at 404–05 (Rehnquist, J., dissenting in part); see also GREENHOUSE, *supra* note 2, at 119–21. Unsurprisingly, Justice Powell was distressed that the footnote he had supplied Justice Blackmun for insertion into the *Virginia Pharmacy* opinion did not hold sway. See *id.* at 120–21. *Bates'* extension of First Amendment protection to commercial advertising by attorneys proved to be a source of continuing irritation to Chief Justice Burger for many years. See *id.* at 127.

72. *Bates*, 433 U.S. at 404 (Rehnquist, J., dissenting in part).

Each commercial speech decision after *Virginia Pharmacy* then represented a slide down the constitutional slippery slope that only a return to *Chrestensen's* bright line test could rectify.<sup>73</sup> Though the three other dissenters in *Bates* may have objected to the specter of television commercials by attorneys, they, unlike Rehnquist, were unprepared to overrule *Virginia Pharmacy's* protection of commercial speech.<sup>74</sup>

Rehnquist's second accurate prediction in his *Virginia Pharmacy* dissent was that the majority's opinion would open the door, not only to advertising of prescription drug prices, but also to tasteless promotion of prescription drugs for every condition.

[A Virginia] pharmacist might [now] run any of the following representative advertisements in a local newspaper:

"Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."

"Can't shake the flu? Get a prescription for Tetracycline from your doctor today."

"Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."<sup>75</sup>

Today we are inundated by advertising of this ilk on television, in magazines and newspapers, and in the spam that clogs our e-mail accounts. At the same time, consumers might properly ask where they can find the comparative price advertising for prescription drugs that, according to the majority in *Virginia Pharmacy*, was at stake.

Despite the tackiness of some such ads, hindsight leads one to question Rehnquist's conclusion that commercial advertising about prescription drugs and their prices lacks the ideological content necessary to be categorized as protected speech under the First Amendment. The availability of af-

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73. *See id.* at 404–05.

74. *See id.* at 386 (Burger, C.J., concurring in part and dissenting in part) (distinguishing protected commercial speech regarding prescription drug prices from attorney advertising that should be regulated by the state bars); *id.* at 391 (Powell, J., concurring in part and dissenting in part) (distinguishing professional services such as those rendered by attorneys from tangible products such as prescription drugs).

75. *Virginia Pharmacy*, 425 U.S. at 788 (Rehnquist, J., dissenting).

fordable health care, especially prescription drugs, is a critical public policy issue in this country today. Similarly, the aging Baby-Boomer population is enormously interested in the availability of a wide variety of treatment alternatives in the form of prescription drugs for conditions once thought minimally treatable, if at all. The miles of newsprint devoted to the safety, efficacy, risks, and benefits of prescription drugs also strongly suggest that advertisements for prescription drugs fall among the important “political, social and other public issues” of the day.<sup>76</sup> Arguably, telling consumers that “Drug X is available to dispel Symptom Y; consult your doctor to find out more,” constitutes expression “of public importance,” the category of speech for which Rehnquist said the First Amendment was intended to serve as a sanctuary.<sup>77</sup> In today’s environment, the bright line that Rehnquist thought *Chrestensen* drew is considerably fuzzier.

Rehnquist never wrote an opinion that suggested that a regulation of commercial speech be struck down as unconstitutional under the First Amendment.<sup>78</sup> Rather, he consistently argued that commercial speech stands outside the protective umbrella of the First Amendment. In all but two commercial speech

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76. *Id.* at 787.

77. *Bates*, 433 U.S. at 404 (Rehnquist, J., dissenting in part).

78. See Maltz, *supra* note 45, at 50. What Rehnquist said in the opinions differed, however, from the way he voted. Rehnquist concurred in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (protecting commercial speech). He also joined the majority opinions in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), both of which protected commercial speech. By 1995, after twenty years of constitutional cases affording First Amendment protection, albeit with intermediate scrutiny, to commercial speech, Chief Justice Rehnquist was apparently prepared to follow that body of precedent in his voting, even if he was not prepared to announce such a doctrine in his own opinions.

What explains this contradiction? Maltz suggests that Rehnquist ultimately determined that “resistance was futile.” Maltz, *supra* note 45, at 52. Rehnquist’s passive acquiescence to the precedents protecting commercial speech after years of active opposition helps explain the statistics Geoffrey Stone points to for the proposition that Rehnquist was more solicitous of commercial speech than of other forms of expression. See, Stone, *supra* note 1, at 16–17; see also Garnett, *supra* note 16, at 41 (“Rehnquist has substantially retreated from—if not abandoned entirely—his strong position against First Amendment protection for commercial advertising.”). Perhaps Rehnquist believed that adhering to the by-then long-standing body of precedent was warranted after a decade or more in his role as Chief Justice of the Court.

cases<sup>79</sup> for which he authored an opinion after *Virginia Pharmacy*, he voted to uphold the restriction on commercial speech, guided in doing so by the principles of democracy and federalism. For example, Rehnquist dissented in *Central Hudson*, in which the Court's majority laid out the now reasonably well-established four-part test for assessing the constitutionality of a government restriction on commercial speech.<sup>80</sup> Referencing *Lochner v. New York*, Rehnquist emphasized his federalism concerns:

The Court . . . returns to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations.<sup>81</sup>

He made his democracy point by contrasting the limited democratic value of commercial speech with the weightier democratic value of deferring to the judgment of elected representatives:

I . . . disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regu-

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79. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 76–79 (1983) (Rehnquist, J., concurring in judgment) (applying *Central Hudson* test for commercial speech and agreeing that the United States Postal Service ban on advertising of contraceptives violated the First Amendment because its overbreadth prevents parents from obtaining “information about birth control that might help them make informed decisions” in guiding their children); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 196–97 (1999) (Rehnquist, C.J., concurring) (citing *Central Hudson* test for commercial speech and agreeing that seemingly irrational federal ban on broadcast advertising for lotteries and casino gambling violates First Amendment). Both cases involved federal laws restricting commercial speech, which in Rehnquist's federalist scheme warranted greater scrutiny than comparable restrictions by state and local government. See *infra* Part II.B.

80. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). *Central Hudson* established a tiered analysis for determining the constitutionality of restrictions on commercial speech. First, the speech at issue “must concern lawful activity and not be misleading.” *Id.* at 566. If that standard is satisfied, it must be determined whether the asserted government interest purportedly served by the restriction is “substantial.” *Id.* If so, two further requirements must be met: the regulation must “directly advance[] the government interest asserted,” and the restriction must not be “more extensive than necessary to serve that interest.” *Id.*

81. *Id.* at 589 (Rehnquist, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

late promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish “society” from the state legislature and the Public Service Commission.<sup>82</sup>

In rejecting First Amendment protection for commercial speech, Rehnquist relied not only on its asserted lack of ideological content, but in some cases, on the additional fact that the commercial expression at issue was that of a corporation.<sup>83</sup> Reasoning that corporations cannot vote, Rehnquist believed that corporations, as political eunuchs, deserved no constitutional speech protection.<sup>84</sup>

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. . . . [I]t might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal governments remain open to protect the corporation’s interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection.<sup>85</sup>

This statement begs the question whether, despite their inability to vote, corporations have a constitutional right to express viewpoints that would enlighten voters on issues of public concern, an issue Rehnquist never addressed in the commercial speech context. Corporate speech did, however, feature in his First Amendment jurisprudence in the area of election and campaign finance law.

### B. Election & Campaign Speech

What is often termed “core political speech” is at the opposite end of the spectrum from commercial speech.<sup>86</sup> Unlike

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82. *Id.* at 593.

83. *See, e.g., id.* at 584–87; *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 825 (1978) (Rehnquist, J., dissenting).

84. *See Bellotti*, 435 U.S. at 825–26 (Rehnquist, J. dissenting).

85. *Id.* (footnote omitted).

86. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part and dissenting in part) (describing core political speech as the “primary object of First Amendment protection,” which “has its fullest and most urgent application” to speech uttered during a campaign for political office” (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) and *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989))); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (describing expression concerning political change as core political speech for which First Amend-

commercial speech, expression relating to candidacy for office, political campaigns, ballot measures, and the like relates directly to the democratic values that Rehnquist saw as the core of the First Amendment's protections. As one would expect, when the government attempted to regulate such speech, Rehnquist was far more protective of the speech interests at stake. Even then, however, he sometimes held against the political speaker who challenged the government's restriction. In those cases, the competing interests of democracy and federalism came to the fore.

Rehnquist's starting point was *Buckley v. Valeo*,<sup>87</sup> the Supreme Court's seminal case regarding campaign financing laws. In a complicated set of rulings in *Buckley*, the Court largely upheld federal restrictions on campaign contributions, which it found only marginally affected the speech interests of the contributors.<sup>88</sup> The Court largely struck down as unconstitutional the restrictions on campaign expenditures, however, which it determined to be equivalent to direct restrictions on the amount of speech in which candidates or their campaigns could engage.<sup>89</sup>

Although then-Justice Rehnquist joined in this holding, he wrote separately to explain his view of First Amendment federalism and why it supported invalidating the federal statute restricting campaign expenditures:

For the reasons stated in the dissenting opinion of Mr. Justice Jackson in *Beauharnais v. Illinois*, . . . I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech that the latter incorporates.

Given this view, cases which deal with state restrictions on First Amendment freedoms are not fungible with those

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ment protection is at its zenith); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (describing advocacy of candidates and political viewpoints as core political speech at the heart of First Amendment protection).

87. 424 U.S. 1 (1976) (per curiam).

88. *See id.* at 20–21, 26–29 (holding that contribution restrictions are appropriate weapons against the reality or appearance of influence-peddling and that they safeguard the integrity of electoral process without impinging on First Amendment rights of citizens and candidates to engage in political debate).

89. *See id.* at 19–20, 47–60 (holding that expenditure limits substantially and directly restrict the ability of citizens, candidates, and associations to engage in political debate, in violation of the First Amendment).

which deal with restrictions imposed by the Federal Government . . . . The statute before us was enacted by Congress . . . with a view to the regulation of the citizenry as a whole. The case for me, then, presents the First Amendment interests of the appellants at their strongest, and the legislative authority of Congress in the position where it is most vulnerable to First Amendment attacks.<sup>90</sup>

Furthermore, although Rehnquist may have agreed with the majority's rulings on campaign contributions and expenditure restrictions, he vehemently disagreed with the majority's validation of disparate government funding of major and minor parties under the statute, again out of concern for democratic values.<sup>91</sup>

Congress, of course, does have an interest in not "funding hopeless candidacies with large sums of public money," and may for that purpose legitimately require "'some preliminary showing of a significant modicum of support,' as an eligibility requirement for public funds." But Congress in this legislation has done a good deal more than that. It has enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject.

. . . Congress has not merely treated the two major parties differently from minor parties and independents, but has discriminated in favor of the former in such a way as to run afoul of the Fifth and First Amendments to the United States Constitution.<sup>92</sup>

But the federalist prong of Rehnquist's First Amendment jurisprudence sometimes led him in the opposite direction. In *First National Bank of Boston v. Bellotti*, the Court's majority held unconstitutional a Massachusetts statute that barred business corporations from contributing or spending money to influence the outcome of referenda unless the issues involved in the referenda materially affected the corporation's property, business,

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90. *Id.* at 291 (Rehnquist, J., concurring in part and dissenting in part) (internal citations omitted) (citing *Beauharnais v. Illinois*, 343 U.S. 250, 288–95 (1952) (Jackson, J., dissenting)).

91. *See id.* at 293–94.

92. *Buckley*, 424 U.S. at 293–94 (Rehnquist, J., concurring in part and dissenting in part) (internal citations omitted) (quoting *id.* at 96 (per curiam) and *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

or assets.<sup>93</sup> Then-Justice Rehnquist, however, rejected the claim that business corporations enjoyed First Amendment speech rights and pointed to the long-standing exercise of state power in this area:

[T]he General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court.<sup>94</sup>

Rehnquist also reiterated his view that the First Amendment imposed fewer restrictions on the States' ability to regulate speech than it did on Congress.

I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.<sup>95</sup>

As Rehnquist acknowledged, his colleagues on the Court did not share his view, a point that Justice Powell, the author of the *Bellotti* majority opinion, drove home.

The dissenting opinion of Mr. Justice Rehnquist is predicated on the view that the First Amendment has only a "limited application . . . to the States." Although advanced forcefully by Mr. Justice Jackson in 1952 [in *Beauharnais*], and repeated by Mr. Justice Harlan in 1957 [in *Roth*] this view has never been accepted by any majority of this Court.<sup>96</sup>

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93. 435 U.S. 765, 767 (1978).

94. *Id.* at 822–23 (Rehnquist, J., dissenting).

95. *Id.* at 823 (referring to Justices Jackson and Harlan).

96. *Id.* at 780–81 n.16 (citations omitted) (referencing Justice Jackson's dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 287–95 (1952), and Justice Harlan's dissent in *Roth v. United States*, 354 U.S. 476, 476, 500–03 (1957)). Justice Powell's remark in *Bellotti* was apparently the proverbial stake through the heart of Justice Jackson's *Beauharnais* dissent. Since *Bellotti*, the only member of the Supreme Court to cite Justice Jackson's dissent in *Beauharnais* is Justice Thomas, who, in his concurrence in *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.3 (2002), relied on *Beauharnais* as support for a different federalism contention, namely that the Establishment Clause of the First Amendment does not bind the states.

It is noteworthy that Justice Jackson wrote his dissent in *Beauharnais* setting out his theory of First Amendment federalism<sup>97</sup> when Rehnquist was his law clerk.<sup>98</sup> Although Supreme Court historians and biographers claim that Justice Jackson had no significant effect on Rehnquist's judicial philosophy,<sup>99</sup> it seems clear that Justice Jackson's First Amendment federalism at least captured Rehnquist's admiration.

Rehnquist especially supported government restrictions on speech and association—both state and federal—that targeted threats to the democratic process such as corruption and loss of public confidence in the integrity of the electoral process. For example, when the National Right to Work Committee challenged restrictions on corporate fundraising in the Federal Election Campaign Act (FECA), Rehnquist wrote a unanimous opinion upholding the restrictions.<sup>100</sup> Rehnquist's opinion upheld Congress's judgment that corporations might pose a threat to the democratic process and may be treated differently from natural persons for that reason.<sup>101</sup>

The first purpose of [the restriction], petitioners state, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions.

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... [Buckley v. Valeo] specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."<sup>102</sup>

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97. *Beauharnais*, 343 U.S. at 287–99 (Jackson, J., dissenting).

98. Rehnquist clerked for Justice Jackson from February 1952 through June 1953. See REHNQUIST, *supra* note 24, at 5. *Beauharnais* was decided April 28, 1952. 343 U.S. at 250.

99. Supreme Court Historical Society Biographical Information about William H. Rehnquist, <http://www.supremecourthistory.org/myweb/justice/rehnquist.htm> (last visited July 12, 2006); Oyez, *supra* note 19.

100. *FEC v. Nat'l Right to Work Comm'n*, 459 U.S. 197 (1982).

101. *See id.* at 207–11.

102. *Id.* at 207–08 (citations omitted) (citing *United States v. Auto. Workers*, 352 U.S. 567, 570 (1957)).

Federal election restrictions were challenged again in *FEC v. National Conservative PAC*.<sup>103</sup> This time the challenger was another corporation—a nonprofit, nonmembership corporation that had registered with the FEC as a political action committee and whose purpose was to re-elect President Ronald Reagan.<sup>104</sup> The challenged restrictions, however, limited the expenditures of every political committee, regardless of the group’s potential to corrupt the electoral process.<sup>105</sup> Rehnquist saw the democratic interests at stake in this form of regulation very differently; the restricted expression went to the heart of democratic values. Writing for a bare majority, Rehnquist held the federal law to be unconstitutionally overbroad.<sup>106</sup>

There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment . . . . “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>107</sup>

For Rehnquist, overbreadth was a likely rationale for striking down federal legislation, perhaps because the federalist prong of his First Amendment jurisprudence failed to come into play.<sup>108</sup> Federal power to regulate speech largely involved a balance between the democratic value inherent in the expression at issue and the democratic value of upholding the legisla-

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103. 470 U.S. 480 (1985).

104. *See id.* at 490–91.

105. *See id.* at 491–92, 496. The statute barred aggregate expenditures in excess of \$1,000 by independent “political committees” on behalf of candidates for the Presidency and Vice-Presidency. “Political committees” was defined to include “any committee, association, or organization (*whether or not incorporated*) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.” *Id.* at 491–92 (citing 26 U.S.C. § 9002(9) (1982)) (emphasis added). The average NCPAC contributor donated \$75 to the organization. *Id.* at 494.

106. *Nat’l Conservative PAC*, 470 U.S. at 498.

107. *Id.* at 493 (brackets in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

108. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 78–80 (1983) (Rehnquist, J., concurring in judgment) (concluding that the federal restriction on commercial speech “is somewhat more extensive than is necessary” and “has not been adequately justified.”).

tion adopted by an elected Congress.<sup>109</sup> But in the context of judicial review of state legislation, Rehnquist thought the overbreadth doctrine an inappropriate vehicle for striking down state laws that restricted speech—“strong medicine” to be used only as a “last resort”<sup>110</sup>—and objected when his brethren on the Court struck down state laws for being constitutionally overbroad.<sup>111</sup>

Rehnquist returned to First Amendment federalism in two later cases where he found the States’ broad power to regulate controlling. In *Anderson v. Celebrezze*,<sup>112</sup> he dissented from the majority’s holding that Ohio’s so-called early filing deadline for nonparty candidates for the office of President of the United States violated the First Amendment.<sup>113</sup> He found adequate authority for Ohio’s election regulations in Article II of the Constitution to sustain them against anything but minimal judicial scrutiny.

Article II of the Constitution provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who shall select the President of the United States. This provision, one of few in the Constitution that grants an express plenary power to the States, conveys “the broadest power of determination” and “[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.”<sup>114</sup>

Rehnquist’s examination of Ohio’s ballot procedures satisfied him that the filing deadline did not “deny[] the franchise to

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109. See REHNQUIST, *supra* note 24, at 279 (“Every time an individual or a group asserts a claim of constitutional right against a legislative act, the principle of majority rule and self-government is placed on one side of the judicial scale, and the principle of the individual right is placed on the other side of the scale.”).

110. *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39–40 (1999) (Rehnquist, C.J., writing for majority) (upholding a California statute limiting dissemination of arrestee addresses against First Amendment challenge).

111. *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 975 (1984) (Rehnquist, J., dissenting from majority opinion striking down Maryland’s percentage restriction on charitable solicitations).

112. 460 U.S. 780 (1983).

113. *Anderson*, 460 U.S. at 808 (Rehnquist, J., dissenting) (“[S]o long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere . . .”).

114. *Id.* at 806–07 (citations omitted; brackets in original) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

citizens,"<sup>115</sup> or make it "'virtually impossible' for new-party candidates or nonparty candidates to qualify for the ballot . . ." <sup>116</sup> For Rehnquist, this was enough to satisfy the States' First Amendment duty to provide reasonable ballot access.<sup>117</sup>

In *Timmons v. Twin Cities Area New Party*,<sup>118</sup> Chief Justice Rehnquist, writing for the majority, denied a minor party candidate's First Amendment challenge to Minnesota's anti-fusion law.<sup>119</sup> Minnesota, like most states, had enacted an anti-fusion statute that prohibited an individual from listing her name on the general election ballot as a candidate of more than one party.<sup>120</sup> In disposing of the constitutional challenge to this prohibition, Chief Justice Rehnquist weighed the political expression that is at the core of our democratic system against the federalist interests of the States.

The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas. . . . As a result, political parties' government, structure, and activities enjoy constitutional protection.

On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. . . . The Constitution grants States "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices."<sup>121</sup>

Chief Justice Rehnquist, addressing elements of the case involving democratic values, noted the anti-fusion provision posed no significant barrier to the formation of political parties<sup>122</sup> and imposed only a limited burden on associational interests.<sup>123</sup> Furthermore, the State's interests, in addition to im-

115. *Id.* at 812 (quoting *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 626 (1969)).

116. *Id.* at 812 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

117. *See id.* at 808.

118. 520 U.S. 351 (1997).

119. *See id.* at 353–54.

120. *See id.*

121. *Id.* at 357–58 (citations omitted) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)).

122. *See id.* at 361.

123. *Timmons*, 520 U.S. at 361–63 (pointing out that "[m]any [constitutionally permitted] features of our political system . . . make it difficult for third parties to succeed in American politics").

plicating federalism concerns, also promoted such important democratic values as protecting the integrity, fairness, and efficiency of elections.<sup>124</sup> Given these “weighty state interests,” the Court upheld the fusion ban, holding that Minnesota need not make it easier for new political parties to succeed.<sup>125</sup>

Rehnquist’s opinions in the state election and campaign law cases pose the most direct conflict between the values of democracy and federalism because deference to state power might require sacrificing democratic values. But where state regulations could be validly construed as facilitating democratic values, speech proponents were rarely successful in persuading Rehnquist to strike down the challenged state laws. On the other hand, when Congress regulated political speech through election and campaign finance statutes, federalism dropped out of the picture, and Rehnquist explicitly balanced the democratic interests served by the speech against the democratic values that Congress’s legislation allegedly sought to protect.

#### CONCLUSION

It can be difficult not to greet the topic of the late Chief Justice Rehnquist and the First Amendment with a certain degree of skepticism. Some scholars have criticized Rehnquist for being a results-oriented pragmatist whose constitutional jurisprudence lacks principled underpinnings<sup>126</sup>—a jurist whose first rule of decision was that, in a contest between an individual and the government, the government wins.<sup>127</sup>

But the Rehnquist speech cases reveal that far more was at work in the late Chief Justice’s First Amendment jurisprudence. His opinions in cases regarding speech, press, and associational freedoms consistently relied on the structural rationales of majoritarian democratic values and federalism. Furthermore, Rehnquist’s self-stated judicial philosophy of the

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124. *Id.* at 364.

125. *Id.* at 369–70.

126. See, e.g., Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990) (reviewing SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* (1989)) (“One could account for perhaps ninety percent of Chief Justice Rehnquist’s bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party.”).

127. See DEAN, *supra* note 2, at 267–70 (identifying smoking gun memos Rehnquist wrote prior to his appointment to the Supreme Court in which he “brushed aside” civil liberties and First Amendment protections of the press).

First Amendment remained relatively constant over his thirty-three years on the Court. As a young Justice—and the most conservative jurist on the Court at the time—Rehnquist dissented alone, again and again, in First Amendment cases. As Chief Justice, he saw the Court’s composition change around him over time and become increasingly conservative—in some cases more conservative than he was<sup>128</sup>—and his dissents became increasingly infrequent.<sup>129</sup>

Given the First Amendment philosophy described in this Article, it is unsurprising that just a few years after joining the Supreme Court, then-Justice Rehnquist summarized his vision of our country’s constitutional structure in the following way:

[I]t is almost impossible . . . to conclude that [the Framers] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations. The Constitution that they drafted was indeed intended to endure indefinitely, but the reason for this very well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to furnish the motive power within the federal system, which was in turn to coex-

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128. For an example in the First Amendment context, see *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–72 (1991), in which Chief Justice Rehnquist, writing for the plurality, applied intermediate scrutiny, the standard of review applicable to restrictions on expressive conduct. Justice Scalia concurred in the result but believed that rational review was more appropriate because he found that nude conduct lacked expressive content. *Id.* at 572–80; see also Maltz, *supra* note 45, at 52 (noting that when Justice Scalia was appointed to the Court, he “quickly replaced Rehnquist as the darling of conservatives,” and that Justice Thomas is “an even more activist conservative” than either Chief Justice Rehnquist or Justice Scalia).

The occasionally more pronounced conservatism of some of the late Chief Justice Rehnquist’s brethren extends to constitutional fields beyond the First Amendment as well. See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004) (majority opinion by Chief Justice Rehnquist rejecting a Free Exercise claim challenging the exclusion of ministry degrees from funding by a state scholarship program, over dissenting views of Justices Scalia and Thomas); *Nev. Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (Chief Justice Rehnquist, writing for the majority and rejecting Nevada’s claim of Eleventh Amendment immunity from suit by employees under the Family and Medical Leave Act of 1993, while Justices Scalia, Thomas, and Kennedy dissented).

129. During the October 1974 Term of the Court, then-Justice Rehnquist dissented in fourteen cases, seven of which were solo dissents. Nannes, *supra* note 38, at 3. By the end of the 1970s, then-Justice Rehnquist averaged four lone dissents per term, a rate that declined to two per term during the 1980s and less than one per term in the 1990s and beyond. *Id.* at 4 n.9; cf. Sloan, *supra* note 38 (questioning Rehnquist’s long-term impact after his early years of conservative activism on the Court).

ist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring.<sup>130</sup>

Rehnquist rejected the notion that, via the practice of judicial review, federal judges had “a role of their own, quite independent of popular will, to play in solving society’s problems.”<sup>131</sup> He was even more unforgiving of federal judges reviewing on policy grounds the laws enacted by the democratically elected legislatures of the States.<sup>132</sup> To the contrary, if federal courts insist on acting as a “third legislative branch,” he thought they at least ought to be elected just as the other branches of government are.<sup>133</sup> For Rehnquist, democratic values reliant on majoritarian political principles and federalism form the core of the Constitution and the First Amendment.

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130. Rehnquist, *supra* note 15, at 699.

131. *Id.* at 698.

132. *Id.*

133. *Id.*

THE REHNQUIST SPEECH CASES:  
AN APPENDIX OF OPINIONS WRITTEN BY THE LATE  
CHIEF JUSTICE IN CASES INVOLVING FREE SPEECH

*Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977) (Rehnquist, J., concurring).

*Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Rehnquist, J., dissenting).

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (Rehnquist, J., dissenting).

*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (Rehnquist, C.J., dissenting).

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Rehnquist, C.J., plurality opinion).

*Bartnicki v. Vopper*, 532 U.S. 514 (2001) (Rehnquist, C.J., dissenting).

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

*Bigelow v. Virginia*, 421 U.S. 809 (1975) (Rehnquist, J., dissenting).

*Board of Education v. Pico*, 457 U.S. 853 (1982) (Rehnquist, J., dissenting).

*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (Rehnquist, J., concurring).

*Boos v. Barry*, 485 U.S. 312 (1988) (Rehnquist, C.J., concurring in part and dissenting in part).

*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (Rehnquist, J., dissenting).

*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Rehnquist, C.J., majority opinion).

*Brown v. Hartlage*, 456 U.S. 45 (1982) (Rehnquist, J., concurring).

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

*Carey v. Brown*, 447 U.S. 455 (1980) (Rehnquist, J., dissenting).

*Carey v. Population Services International*, 431 U.S. 678 (1977) (Rehnquist, J., dissenting).

*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (Rehnquist, J., dissenting).

*Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (Rehnquist, J., concurring).

*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Rehnquist, C.J., dissenting).

*City of Houston v. Hill*, 482 U.S. 451 (1987) (Rehnquist, C.J., dissenting).

*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Rehnquist, J., majority opinion).

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Rehnquist, J., dissenting).

*FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (Rehnquist, J., dissenting).

*FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (Rehnquist, C.J., concurring and dissenting in part).

*FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (Rehnquist, J., majority opinion).

*FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (Rehnquist, J., majority opinion).

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

*Flower v. United States*, 407 U.S. 197 (1972) (Rehnquist, J., dissenting).

*Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992) (Rehnquist, C.J., dissenting).

*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (Rehnquist, J., concurring).

*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (Rehnquist, J., majority opinion).

*Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999) (Rehnquist, C.J., concurring).

*Hamling v. United States*, 418 U.S. 87 (1974) (Rehnquist, J., majority opinion).

*Hess v. Indiana*, 414 U.S. 105 (1973) (Rehnquist, J., dissenting).

*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (Rehnquist, C.J., majority opinion).

*Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976) (Rehnquist, J., dissenting).

*In re Primus*, 436 U.S. 412 (1978) (Rehnquist, J., dissenting).

*International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (Rehnquist, C.J., majority opinion).

*Jenkins v. Georgia*, 418 U.S. 153 (1974) (Rehnquist, J., majority opinion).

*Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (Rehnquist, C.J., dissenting).

*Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (Rehnquist, C.J., majority opinion).

*Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (Rehnquist, C.J., majority opinion).

*McConnell v. FEC*, 540 U.S. 93 (2003) (Rehnquist, C.J., majority opinion and dissenting in part).

*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (Rehnquist, J., dissenting).

*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (Rehnquist, C.J., majority opinion).

*Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (Rehnquist, J., dissenting).

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (Rehnquist, J., concurring).

*Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (Rehnquist, J., dissenting).

*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (Rehnquist, J., majority opinion).

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (Rehnquist, J., majority opinion).

*Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (Rehnquist, J., majority opinion).

*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (Rehnquist, J., dissenting).

*Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (Rehnquist, C.J., dissenting).

*Rust v. Sullivan*, 500 U.S. 173 (1991) (Rehnquist, C.J., majority opinion).

*Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (Rehnquist, C.J., majority opinion).

*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (Rehnquist, J., dissenting).

*Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (Rehnquist, J., dissenting).

*Smith v. Goguen*, 415 U.S. 566 (1974) (Rehnquist, J., dissenting).

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

*Texas v. Johnson*, 491 U.S. 397 (1989) (Rehnquist, C.J., dissenting).

*Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (Rehnquist, J., majority opinion).

*Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (Rehnquist, C.J., majority opinion).

*United States v. American Library Ass'n*, 539 U.S. 194 (2003) (Rehnquist, C.J., plurality opinion).

*United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (Rehnquist, C.J., dissenting).

*United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (Rehnquist, J., majority opinion).

*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (Rehnquist, J., dissenting).

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (Rehnquist, J., dissenting).

*Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (Rehnquist, C.J., dissenting).

*Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (Rehnquist, C.J., majority opinion).

*Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979) (Rehnquist, J., majority opinion).

*Wooley v. Maynard*, 430 U.S. 705 (1977) (Rehnquist, J., dissenting).