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"Arrogance Cloaked as Humility" and the Majoritarian First Amendment: The Free Speech Legacy of Chief Justice William H. Rehnquist

By Edward L. Carter and Brad Clark

In his nineteen years as chief justice of the United States, William H. Rehnquist voted in favor of the individual expression interest asserted in approximately one-fifth of the Speech Clause cases heard by the Supreme Court. Meanwhile, he opposed protecting those constitutional interests in approximately two-thirds of the speech cases during that time. (His votes evidenced both speech-protective and non-protective elements just more than 10% of the time). This analysis compares Rehnquist's jurisprudence with that of his two immediate predecessors, Chief Justices Warren Burger and Earl Warren. Rehnquist's deference to government, reliance on history, and formalist categorization of cases represented a shift of focus from the First Amendment as protector of minority views to the First Amendment as bastion of majoritarianism.

Supreme Court Chief Justice William H. Rehnquist would hardly be called a champion of the First Amendment. In his nineteen years as chief—from his appointment September 26, 1986, to his death September 3, 2005—Rehnquist voted in favor of the individual or minority expression interest asserted in just 22% of the Speech Clause cases heard by the Court. He opposed protecting those constitutional interests in 67% of the speech cases during that time, and he split his vote 11% of the time (see Figure 1).[1] The Rehnquist Court as a whole has been credited with stemming the tide of newly recognized fundamental rights that rose steadily during the generally pro-First Amendment tenures of the two prior chief justices, Earl Warren and Warren E. Burger.[2]

In Speech Clause cases, Chief Justice Rehnquist personally wrote some nineteen majority opinions or portions thereof, eleven dissenting opinions, one concurring opinion, and one opinion concurring in part and dissenting in part. Close analysis reveals first that he did not uniformly reject speech claims; some of his most speech-favorable language came in cases involving news media. Second, analyzing his opinions also makes clear a counter-intuitive reality that will be an important part of his free speech legacy. Although he only infrequently protected indi-

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vidual or minority expression rights, Rehnquist frequently cast himself as protector of other speech. His opinions often favored the right of the majority or the dominant entity to send a message contrary to that of the minority. Most prominently, he suggested this majoritarian speech right should be afforded to government, but he would also extend it to, among others, large quasi-public associations and even inanimate objects with widespread symbolic significance.

For example, Rehnquist's majoritarian First Amendment would protect the right of the U.S. flag to send a symbolic message of patriotism, but not the right of a match-wielding protester to send a conflicting message.[3] For Rehnquist, the government's right not to be associated with certain messages trumped an individual government employee's right to speak his or her mind freely in exchange for a fee.[4] In his view, government interest in preventing ballot confusion prevailed over the right of minor political party candidates to appear on the ballot for more than one party.[5] Among other examples, Rehnquist would have allowed a majority-backed local government to impose a permit scheme on door-to-door canvassing in order to serve the asserted local majoritarian interests in preventing crime and fraud and protecting privacy.[6]

Given the length of his tenure on the Court and as chief, Rehnquist stands as a significant figure in the history of the U.S. judiciary. Born in 1924 in Milwaukee, Rehnquist served in the World War II Army Air Corps. He earned bachelor's, master's, and law degrees from Stanford and a master's from Harvard. He clerked for Supreme Court Justice Robert H. Jackson in 1951-52 and practiced law in Arizona for sixteen years. He worked in the Department of Justice for two years before President Richard Nixon appointed him associate justice in 1972 and was elevated to chief justice in 1986 by Ronald Reagan.[7]

This research analyzes the First Amendment jurisprudence of the Rehnquist Court, focusing on the opinions written by Rehnquist, and compares his approach to constitutional interpretation to the approaches of Warren and Burger. The objective is to analyze the effect of Rehnquist's majoritarianism on First Amendment speech protections in general and, specifically, for mass communications media. We acknowledge that societal events and attitudes during the tenures of Warren, Burger, and Rehnquist varied widely; still, we believe comparison of jurisprudential approaches and, to an extent, results can be useful.

Chief Justice Rehnquist's View of the First Amendment

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ."[8] Scholars observe that one function of the Speech Clause is to "protect[] individual members of minority groups against repression by a powerful majority."[9] Some have pointed to James Madison's Federalist, No. 51, published in February 1788, as evidence that one of the primary writers of the First Amendment held a particularly strong view of the dangers of majority oppression of minority opinions.[10] Others assert that while the Speech Clause may not have focused originally on preserving minority speech,

it became so after adoption of the Fourteenth Amendment (with its concern for equality for racial minorities) and incorporation against the states.[11]

The function of the First Amendment in protecting individuals against government abuses has spawned some of the most well-known language in all of constitutional law jurisprudence. Justice Oliver Wendell Holmes dissented in the World War I *Abrams v. United States* case, in which the Court affirmed convictions of five Russian revolutionaries for producing and distributing flyers critical of the U.S. government: "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death. . . ."[12] Ten years later he wrote in a dissent that the Speech Clause imperative was to protect "not free thought for those who agree with us but freedom for the thought that we hate."[13]

Justice Louis Brandeis' well-known concurring opinion in *Whitney v. California*[14] stated in part that the Framers "eschewed silence coerced by law—the argument of force in its worst form" and that, "[r]ecognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[15] Thus Holmes and Brandeis sketched out a vision of broad fundamental values that the Constitution, as enforced by the judiciary, would protect, even if a political majority tried to curtail the rights of an individual or minority belief group.

By the early 1950s, this view of the Speech Clause's role in protecting minority speakers had become part of the Court's accepted interpretation of the First Amendment.[16] By 1964, during the tenure of Chief Justice Warren, the Court had come to see the protection of minority views against majority and government suppression as a key purpose of the Speech Clause: "[W]e consider this case [*New York Times Co. v. Sullivan*] against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[17]

Less than a decade after that statement by Justice William Brennan, Rehnquist joined the Court, first as an associate justice in 1972 and then as chief justice in 1986. Although his Speech Clause opinions have not attracted the popular attention of some of his other opinions, such as those on federalism[18] and abortion,[19] Rehnquist nevertheless exerted a significant influence on the Court's free speech jurisprudence in the latter quarter of the twentieth century. Given his impact not only in writing majority opinions, concurrences, and dissents, but also in assigning opinion writers on the Court when he was in the majority, Chief Justice Rehnquist established, in a series of cases primarily from 1986 to 2005, a set of precedents and principles that would curtail minority free speech protections while expanding a majoritarian speech right.

To understand this, one must examine Rehnquist's approach to constitutional interpretation, which many scholars have done.

Additionally, Rehnquist revealed his views of constitutional interpretation in books, law review articles, speeches, and congressional testimony.[20] Although a somewhat simplistic summary, it can be said that three principles describe Rehnquist's view of constitutional interpretation. First and foremost, he believed fervently that judges should defer to the majority will as expressed through the political process, primarily in the choices of elected legislators.[21] Second, he was a formalist who believed constitutional cases could and should be sorted in discrete categories that carried fixed and determinative rules.[22] Finally, he believed that the text of the Constitution was to be read literally but that an understanding of history could inform a jurist's interpretation of the text.[23]

As "the Court's foremost proponent of judicial deference to the majoritarian will. . . . [Rehnquist] vigorously endorsed the 'moral goodness' of laws produced by political struggle."[24] He deferred to the political majority even when it elected to stifle certain civil rights[25] in part because, for him, the only fundamental values in society were those chosen by the majority.[26] Thus it has been suggested that Rehnquist's virtually absolute endorsement of majority rule in the democratic process necessarily coincided with moral relativism.[27] Given the antimajoritarian nature of judicial review,[28] Rehnquist did not believe judges should be overly concerned with protecting minority civil rights, including speech rights:

> The premise of a thoroughgoing majoritarianism is that its operation does not pose a serious threat even to systemic minorities. In this view, political mechanisms of checks and balances and rights of participation can generally be entrusted to shield a minority from majority hostility. Indeed, the very idea of dangerous hostility is regarded dubiously, and asserted injuries to minorities accordingly discounted.[29]

Rehnquist's First Amendment jurisprudence has been marked by deference to the majority (as often represented by government) and other factors common to legal positivism.[30] His strong bias in favor of judicial restraint and deference in First Amendment cases was borne of three key beliefs.[31] First, he held a utilitarian rather than human rights view of expression, focusing little on the role of speech in facilitating autonomy and self-development. Second, he viewed First Amendment speech protection as appropriately applied in full only when regulation threatened those speaking on political matters and issues of public concern. Finally, in line with his strong view of states' rights in a system of federalism, he harbored doubts about the incorporation of the First Amendment against the states.[32]

Other aspects of Rehnquist's approach to constitutional interpretation are also relevant to his free speech jurisprudence. Primary among these are formalism and reliance on history. One scholar termed these principles "the constitutional fundamentals of text and intent."[33] Rehnquist's constitutional jurisprudence is marked by efforts to under-

stand "contemporary practice at the time the constitutional provision was approved."[34] Thus, portions of Rehnquist's opinions read like history lessons. These historical descriptions, in the view of one writer, "impose a load that holds in place the products of majoritarian machinery."[35] Meanwhile, Rehnquist's formalism essentially consisted of "the idea that the Constitution has a fixed meaning [and] the view that it comprises a set of rules to be strictly followed."[36]

Contrasted with Rehnquist's narrow view of the Speech Clause are the more expansive views of his predecessors, Warren and Burger. Chief Justice Warren's Speech Clause adjudication—and that of the Court on which he sat—could be characterized as giving the freedom of speech and press a "preferred position" among fundamental rights spelled out in the Constitution.[37] Thus individual or minority speech claims presumptively prevailed against government interests. Meanwhile, the speech cases of Burger and the Court on which he sat were characterized by balancing of interests.[38] Although simplistic, these descriptions illustrate clear differences with Rehnquist's majoritarianism.

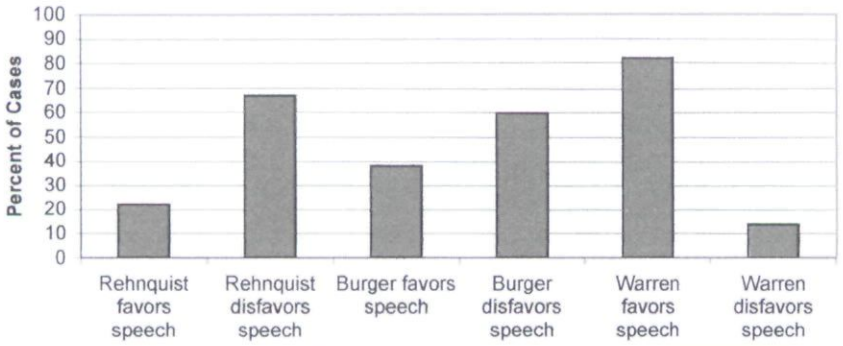
While the focus here is on Rehnquist, Warren, and Burger, it should be noted that perhaps no fellow justice provided as great a contrast to Rehnquist as Justice William J. Brennan, the intellectual force behind many of the most important Speech Clause opinions of the Warren and Burger years. Rehnquist once noted frankly: "Justice Brennan. . . frequently disagrees with me (and also disagreed with Chief Justice Burger) in important constitutional cases. . . ."[39] One scholar called Brennan "the Court's liberal counterweight to the chief justice [Rehnquist] in the First Amendment cases. . . ."[40]

A brief examination of Brennan's philosophy of constitutional interpretation thus provides context and contrast to analysis of Rehnquist's approach. In 1985, Brennan critiqued the originalist method of constitutional interpretation, stating that neither deference to majority will nor reversion to the intent of the Framers could provide legitimacy for judicial review.[41] Simply deferring to majorities might allow individual rights to be stripped, and preventing that from happening was the entire purpose behind the Constitution, Brennan said, while appealing to the intent of the Framers was futile because that intent was essentially unknowable, and any attempt to ascertain such intent was merely "arrogance cloaked as humility."[42]

Instead, Brennan said, judges should identify fundamental values protected in the Constitution—values such as liberty and justice for all, human dignity,[43] and rights spelled out in the Bill of Rights—and then do their best to apply those values to contemporary disputes. Brennan believed judges must do this as contemporaries, not wearing their Framers' hats. He contended that judges must account for the "transformative purpose of the text" of the Constitution; the Framers put in place a government that had not existed before, and the central idea was to preserve human dignity. For Brennan, minority speech protections preserved human dignity both by facilitating self-governance and by fostering individual development.[44]

FIGURE 1

Speech Protectiveness of Chiefs: Rehnquist, Warren, Burger



Rehnquist in Historical Perspective

Some scholars have attempted to quantify the Rehnquist Court's opinions on Speech Clause cases as either speech-protective or not speech-protective. For example, one writer conducted an "unscientific count" and found that the Rehnquist Court had protected speech in fifty of eighty-two cases between 1986 and 1998.[45] That research, however, did not measure the speech protectiveness of Rehnquist's individual votes on the Court. Another scholar, without counting opinions, argued that the Rehnquist Court had not cut back on speech protection precedents established in the tenures of Chief Justices Warren and Burger.[46]

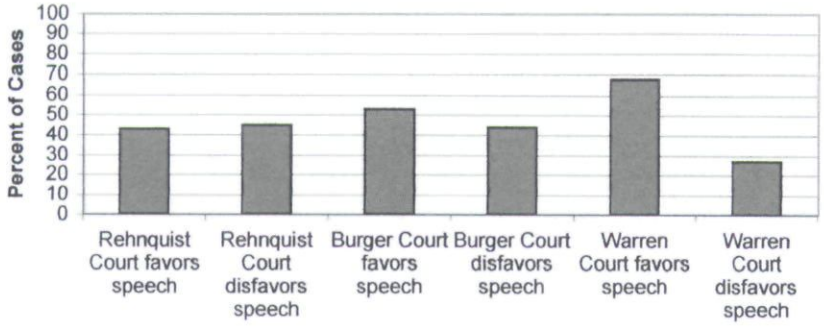
The present research sought to categorize the Speech Clause opinions during the tenure of Chief Justice Rehnquist, grouping 131 Speech Clause opinions during the Rehnquist era (September 26, 1986, to September 3, 2005) as either speech-protective or not, based on whether the majority Court favored individual or minority speech interests asserted in the cases.[47] Limitations are inherent in any attempt to categorize judicial opinions; facts, issues, and results of the opinions are obviously richer and more nuanced. Still, this research combines elements of quantitative evaluation with a more traditional legal research approach of examining the reasoning of key cases.

The cases were listed online by the First Amendment Library of the First Amendment Center,[48] a self-described nonpartisan educational organization. The library includes links to published U.S. Supreme Court opinions on freedom of expression, but was updated only partially through 2004; thus for the 2003-04 and 2004-05 Court terms, cases were located on the American Bar Association's summary of First Amendment opinions.[49] Orders merely granting or denying certiorari were excluded. The list of cases was then cross-checked with results of a Westlaw electronic database search.[50] Cases were read and information about each was entered in Microsoft Excel, from which PivotTable Reports were used to analyze the results (see Figure 1).

Overall, the Court with Chief Justice Rehnquist at the helm was split almost evenly between speech-protective opinions (56 of 131, or

FIGURE 2

Speech Protectiveness of Supreme Court during Tenures of Rehnquist, Burger, Warren



43%) and non-protective opinions (45%; see Figure 2).[51] The remaining 12% of judgments—partially speech-protective and partially not—were placed in a third category. Rehnquist himself, however, was much less likely to favor speech interests than the Court as a whole during his nineteen terms as chief. Rehnquist voted for speech-protectiveness 28 of 128 times (22%),[52] non-speech-protectiveness 86 times (67%), and split his vote 14 times (11%).

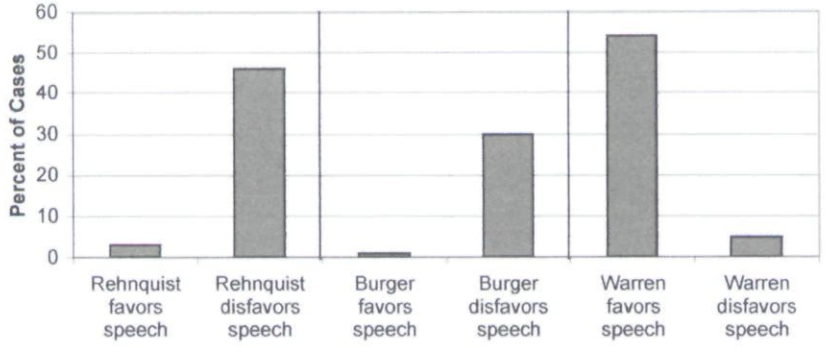
The data show that both the Rehnquist Court and Rehnquist himself were less vigorous protectors of speech than the Court under Chief Justice Warren, a conclusion reached after similar grouping of 90 Speech Clause cases from the Warren era (October 5, 1953, to June 23, 1969) and 169 Speech Clause cases from the Burger era (June 23, 1969, to September 26, 1986).

During his time as chief, Warren was highly protective of speech interests, favoring such interests 72 of 88 times (82%).[53] The Warren Court was also very protective of speech. In 61 of 90 opinions (68%) the Court protected speech interests, while in 24 cases (27%) it did not. Again there were some cases in which the result was split, so the total is less than 100%. Based on these results, the Warren Court could be called the most speech-protective of the three most recent Court eras and Warren himself the most individually speech-protective chief justice.

Meanwhile, the Burger Court was less protective of speech than the Warren Court but more protective than the Rehnquist Court. Burger himself voted to protect speech 64 of 168 times (38%) during his years as chief while he voted against speech interests 100 times (60%).[54] Overall, however, the Burger Court was more speech-protective than not. The majority Court protected speech rights 89 of 169 times (53%) and declined to do so 75 times (44%). By this measure, then, the order of most to least protective of individual and minority speech interests, for both chiefs and their Courts as a whole, is (1) Warren, (2) Burger, and (3) Rehnquist.

FIGURE 3

When Chiefs Buck the Court



Another measure of a chief justice's attitude toward Speech Clause claims was the extent to which he bucked the majority Court position to protect or not protect individual or minority speech. Rehnquist was not prone to favor First Amendment interests when the majority Court did not; Figure 3 shows that of the 59 of 131 cases that the majority Court during his era did not favor speech interests, Rehnquist also did not favor speech interests 57 of those times (97%). In other words, he joined a dissent in favor of speech from a non-speech-protective Court opinion only two times in nineteen years as chief. Rehnquist himself did not write either of those dissents.

On the other hand, he was relatively likely to disfavor First Amendment interests even when the Court favored them; of the 56 of 131 cases that the majority Court during his era as chief did favor speech interests, Rehnquist did not favor those interests 25 of 54 (or 46%) times (he did not participate in two cases). Of those 25 times, he personally wrote a dissent 10 times, perhaps indicating his strong opposition.

By comparison, Warren was much more likely to go against the majority Court of the 1950s and 1960s to vote for protection of speech interests. Warren himself voted in favor of speech interests even more than the majority Court did during this pro-First Amendment time period. When the majority Court voted against speech interests, Warren wrote 4 dissents and joined dissents 9 other times. So, in all, he bucked the majority to favor speech 13 of 24 times (54%). When the Court did protect speech, Warren dissented or joined a dissent only 3 of 60 times (5%); he did not participate in one case. Burger, meanwhile, was not inclined to go against the majority to protect speech but he did go against the majority relatively frequently to disfavor speech. When the majority voted against speech interests, Burger dissented only one of 74 times (1%), with one case in which he did not participate. When the majority voted in favor of speech, Burger did not favor speech 27 of 89 times (30%).

Rehnquist News Media Cases

During his tenure as chief, Rehnquist wrote three majority opinions and one dissent in cases involving news media, and his votes were split evenly in those cases between protecting and not protecting news media speech. Unlike some scholars and justices, Rehnquist did not make an attempt to distinguish between the Speech and Press clauses of the First Amendment and contend, for example, that the Press Clause gave news media rights citizens did not enjoy under the Speech Clause.[55] Still, his treatment of speech rights asserted by news media organizations merits particular attention because it raises the question of whether he viewed the news media as a majoritarian institution.

In *Hustler Magazine v. Falwell*[56] Rehnquist wrote a speech-protective, unanimous majority opinion shielding a magazine from liability for intentional infliction of emotional distress stemming from an ad parody about nationally known minister Jerry Falwell. In *Butterworth v. Smith*,[57] a relatively obscure case but perhaps Chief Justice Rehnquist's single-most speech-favorable opinion, Rehnquist wrote for the majority that Florida could not require a journalist who testified before a grand jury to remain silent about his testimony indefinitely.

Meanwhile Rehnquist's other two opinions in news media cases both disfavored the speech interest asserted. In *Milkovich v. Lorain Journal*,[58] Chief Justice Rehnquist wrote for the majority that a newspaper columnist's assertion, in an opinion column, that a high school wrestling coach lied at a disciplinary hearing was a statement of fact rather than opinion and thus could be susceptible to liability for defamation. In *City of Cincinnati v. Discovery Network*,[59] Chief Justice Rehnquist dissented from a majority opinion holding that a municipality had infringed the First Amendment rights of a publisher by ordering newsracks removed from city sidewalks.

As evidenced in these cases, Rehnquist's First Amendment was not focused on facilitating individual autonomy or protecting minority views for the sake of fundamental individual rights. Rather, it was a mechanism to allow the political process to function and ultimately produce a majority will, and he largely viewed the news media as part of that majoritarian mechanism. In *Hustler*, Rehnquist's majority opinion cited a statement from a prior Supreme Court case to the effect that "the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself. . . ."[60] Still, what seemed to concern him most was the societal benefit of expression, seen as "essential to the common quest for truth and the vitality of society as a whole."[61] Thus even false attacks on public officials and public figures—as long as not made with actual malice as required by *New York Times v. Sullivan*[62]—must be protected in order not to inhibit the societal goal of reaching consensus.[63]

In addition to their majoritarian elements, the Rehnquist news media opinions are marked by Rehnquist's use of history. In the *Butterworth* case he discussed historical practices surrounding grand juries in England and America,[64] and in *Milkovich* he led readers on a historical defamation law tour that began in sixteenth-century England and ended in present-day America, with a detour through Shakespeare.[65] In

Hustler Rehnquist compared the Falwell ad parody to political cartoons throughout history:

> Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.[66]

Meanwhile, formalism was prominent in *Milkovich*. Rehnquist spent the bulk of the majority opinion attempting to categorize defamation law cases and distinguish between fact and opinion.[67] Ultimately, he and the majority summarized the rule that where statements of opinion on matters of public concern and about public officials or public figures are reasonably capable of implying fact, those statements are susceptible to defamation liability if false.[68]

Rehnquist's dissent in *Discovery Network* also demonstrated his commitment to categorizing cases, although he is certainly not unique among jurists in doing so. In contrast with the majority, Rehnquist would have allowed the City of Cincinnati, under an ordinance prohibiting distribution of handbills, to order removal from city sidewalks of racks used to distribute a free newspaper consisting mostly of advertisements.[69] Once he classified the advertisement-filled newspaper as commercial speech rather than political or editorial speech, Rehnquist proceeded to sketch out a formulaic application of the *Central Hudson* test for commercial speech.[70] In applying the *Central Hudson* rule that commercial speech regulation is permissible if it reasonably advances a substantial state interest, Rehnquist concluded that the interest in preventing trash would have been sufficiently advanced by elimination of one newsprint publication's racks.[71]

Other Rehnquist First Amendment Jurisprudence

In First Amendment Speech Clause cases not involving news media, Rehnquist, when he took the opportunity to write, continued to develop themes of majoritarianism, reliance on history, and formalism. For example, his opinion for the majority in *Alexander v. United States*[72] relied on historical appeal and formalism to justify the judgment to affirm the conviction of a Minnesota man for distribution of obscenity. Rehnquist took great pains to contend that forfeiture, under the Racketeer Influenced and Corrupt Organizations Act (RICO), of the man's businesses and $9 million in revenues did not constitute prior restraint on future speech.[73]

Adhering to a technical definition of prior restraint, Rehnquist disregarded the man's argument that the government's purpose in bringing the RICO claims was to inhibit future distribution of adult-oriented materials. Noting that the man did not challenge his six-year prison sentence or $100,000 fine, four dissenting justices stridently attacked

Rehnquist's majority opinion for failing to see the effect of RICO on constitutionally protected speech.[74] The dissenters commented that Rehnquist failed to understand that "the First Amendment has adjusted to meet new threats to speech" and that "[t]he First Amendment is a rule of substantive protection, not an artifice of categories."[75]

Rehnquist's majoritarian First Amendment was displayed in other well-known opinions on First Amendment speech issues. His dissent in *Texas v. Johnson*, in which the majority Court held flag burning was protected by the Constitution, is a fervent defense of the symbolism of the American flag. He spent much of the dissent establishing the message the flag has sent throughout American history, appealing to majoritarianism with statements like "[n]o other American symbol has been as universally honored as the flag"[76] and "[m]illions and millions of Americans regard it with an almost mystical reverence."[77]

His dissent in *Riley v. National Federation of Blind* asserts that the government may impose economic regulation on charity fundraisers to prevent fraud and overcharging of charities.[78] At bottom, though, Rehnquist advances the idea that government should be allowed to send a message to charities and solicitors that unreasonable fundraising fees are not appropriate. This concern for the government's speech right was again hinted at in *Lee v. International Society for Krishna Consciousness*, in which Rehnquist dissented and wrote that the state should be able to prevent leafletters from harassing travelers in airport terminals.[79]

The majoritarian speech right took shape in earnest in *Keller v. State Bar of California*, in which Rehnquist wrote for the Court that the California bar association, a governmental entity under state law, could gather and expend money for lobbying and political speech purposes, even if individual dues-paying lawyers disagreed with the messages being sent.[80] The only restriction Rehnquist would have placed on such majoritarian speech activities was that they could not be too outrageously unrelated to the state bar's purpose—he gave as examples expenditure of state bar funds on gun-control lobbying or weapons freeze initiatives.[81]

Similarly, in *Rust v. Sullivan* Rehnquist wrote for the majority that Congress had the right to express its nonsupport for abortion by restricting family-planning funds to clinics that did not offer abortion services.[82] In rejecting a facial challenge brought by clinics and doctors, Rehnquist wrote that "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program."[83] Rehnquist would afford the government virtually free rein under the Spending Clause to define the purpose for which monies may be spent[84] and would defer to government when it speaks through funding choices, even if minority views are suppressed or drowned out in the process.

Later Rehnquist relied on *Rust* to write for the Court in *United States v. American Library Association* that the federal government could condition public libraries' acceptance of federal funds on the libraries' willingness to filter sexually oriented content from Internet browsers.[85]

Just as Rehnquist afforded deference to the message the government wanted to send by its conduct in *Rust* and *American Library Association*, he also deferred to the Boy Scouts of America's description of its anti-homosexual message in *Boy Scouts of America v. Dale*.[86] Although it was unclear that the Boy Scouts had anti-homosexuality as a core belief, Rehnquist nevertheless wrote that application of New Jersey's public accommodations law to require the Scouts to accept gay leaders would violate the Boy Scouts' First Amendment expressive association right.[87]

Although he did not write the opinion, a case during Rehnquist's final term on the Court provided a fitting crown for his majoritarian First Amendment jurisprudence. In *Johanns v. Livestock Marketing Association*, the Court (in an opinion written by Justice Antonin Scalia) held explicitly for the first time that the government's right to speak could not be challenged on grounds that it violated the First Amendment rights of individual or minority speakers.[88] Thus the Court allowed the government to collect mandatory fees from beef producers—some of whom protested—and use the money for a generic advertising campaign.

The impact of *Johanns* remains to be seen, and perhaps future applications of its holding will be limited. Still, if the precedent is applied more broadly, the case will be significant as the first explicit recognition of an absolute government speech right. In either case, the opinion is in line with other cases during the Rehnquist era protecting not individual or minority speech rights but rather preventing individuals from thwarting the government or majoritarian speech right.

Discussion and Conclusion

Several scholars have argued that the Rehnquist Court did not undercut minority speech rights but rather continued, for the most part, the speech-protective direction established by the Warren and Burger Courts.[89] This view holds that the Rehnquist Court did not effect permanent change on the First Amendment; one writer asserted that at least "press freedom[s] remain secure and beyond reproof in a constitutional sense."[90] There is some support for this position, even in the results of this study. In all, the Rehnquist Court as a whole sided with the parties asserting minority speech interests about half the time during Rehnquist's tenure as chief.

Certainly much remains to be researched and written about the jurisprudence of Chief Justice Rehnquist. Whether or not his approach to deciding constitutional questions will have a lasting impact remains to be seen. Over time, future research could track whether his opinions retain precedential force in the Supreme Court and whether they are well-received in lower federal and state courts. This could be accomplished through citation analyses of Rehnquist opinions discussed in this manuscript. Further research might include in-depth analysis of the Rehnquist speech cases in discrete areas—obscenity, commercial speech, campaign finance, and electronic speech regulation, to name a few.

While acknowledging the limitations inherent in any effort to predict the lasting effect of an individual Supreme Court justice's jurisprudence, this study has concluded that Chief Justice Rehnquist was the

least protective of individual or minority speech of the last three Supreme Court chief justices. Rehnquist's view that jurists should defer to the majoritarian will resulted in a series of opinions disfavoring individual and minority speech rights. In contrast with justices like Brandeis, Holmes, Warren, and Brennan, Rehnquist did not generally apply the First Amendment to prevent majority suppression of speech or government abuses against individuals. In thirty-two majority, concurring, and dissenting opinions authored by Rehnquist in Speech Clause cases from 1986 to 2005, he voted against individual or minority speech interests in all but four cases[91] and portions of three other cases.[92]

By favoring majoritarian over minority speech rights, Rehnquist set a course the Court seems inclined to follow in the foreseeable future. Thus far the Roberts Court[93] has had few occasions to reexamine or apply significant Rehnquist-era precedents. Roberts' two years on the U.S. Court of Appeals for the D.C. Circuit and his first term on the Supreme Court provide little opportunity to analyze his approach to resolving First Amendment questions. But in the relatively few relevant cases so far, Roberts' opinions give no reason to believe his approach will differ significantly from that of Rehnquist, the justice for whom he clerked on the Supreme Court in the 1980 term. In just two relevant published D.C. Circuit opinions[94] and a lone Supreme Court opinion[95] thus far, Roberts has yet to write an opinion favoring individual or minority speech rights. Like Rehnquist, Roberts appears willing to defer to government and majoritarian will.[96]

Justice Brennan described a historical, or intent-of-the-Framers, approach to interpreting the Constitution as "arrogance cloaked as humility." But this might well apply not only to ascertaining the intent of the Framers but also majoritarianism in general. The Rehnquist Speech Clause opinions deferred to the result of political processes but, in reality, a rigid adherence to one method of deciding cases and applying determinative rules may fail to account for situations in which unique facts cry out for minority or individual protection.

NOTES

1. The figures referred to in this article include only data for cases in which an individual justice or the Court as a whole came down clearly in favor of or against the minority or individual speech right asserted. Thus the figures do not represent cases in which a justice or the Court may have written in favor of individual speech rights in one respect but against them in another. It is acknowledged that quantifying judicial opinions in this way and attempting to represent their outcomes numerically does not represent a full picture of the facts, issues, or outcomes of the individual cases. The attempt here is to reach admittedly limited but nevertheless useful conclusions about votes, in the aggregate, of individual justices and the Court as a whole with respect to minority or individual speech rights.

2. Herman Schwartz, "Introduction," in *The Rehnquist Court: Judicial Activism on the Right*, ed. Herman Schwartz (New York: Hill and Wang, 2002), 13; Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (New York: Oxford University Press, 2000), 179.

3. Texas v. Johnson, 491 U.S. 397, 421-35 (1989) (Rehnquist, C.J., dissenting).

4. United States v. National Treasury Employees Union, 513 U.S. 454, 489 (1995) (Rehnquist, C.J., dissenting).

5. Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

6. Watchtower Bible & Tract Soc'y of New York v. Village of Stratton, 536 U.S. 150, 172 (2002) (Rehnquist, C.J., dissenting).

7. *See* Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton & Co., 2005), 14.

8. U.S., *Constitution*. Amendment I.

9. Jason Mazzone, "Speech and Reciprocity: A Theory of the First Amendment," *University of Connecticut Law Review* 34 (2002): 409-10 (citations omitted).

10. Mazzone, "Speech and Reciprocity," 410 (citing authorities). James Madison did not write explicitly of expression, but his comments express a more general concern with civil liberties: "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves. . . ." Federalist, No. 51 (1788).

11. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998), 24.

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

13. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

14. 274 U.S. 357 (1927).

15. 274 U.S. at 375-76 (Brandeis, J., concurring).

16. *See* Dennis v. United States, 341 U.S. 494, 507 (1951) ("there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale").

17. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

18. United States v. Lopez, 514 U.S. 549 (1995).

19. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

20. After reviewing much of this evidence early in Rehnquist's tenure on the Court, one scholar labeled Rehnquist "an authoritarian activist" who held a "consistent stance that when conflicts arise between government authority and individual rights, the government must always prevail." Donald E. Boles, *Mr. Justice Rehnquist, Judicial Activist: The Early Years* (Ames, IA: Iowa State University Press, 1987), 73.

21. Nat Stern, "State Action, Establishment Clause and Defamation: Blueprints for Civil Liberties in the Rehnquist Court," *University of Cincinnati Law Review* 57 (1989): 1175.

22. Stern, "State Action," 1211; Gregory P. Magarian, "The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence," *Fordham Law Review* 74 (2006): 2222.

23. Stern, "State Action," 1226.

24. Stern, "State Action," 1226. Rehnquist himself famously wrote that statutes "take on a form of moral goodness because they have been enacted into positive law." William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 704.

25. John Denvir, "Justice Brennan, Justice Rehnquist, and Free Speech," *Northwestern University Law Review* 80 (1985): 292-94.

26. Sue Davis, *Justice Rehnquist and the Constitution* (Princeton, NJ: Princeton University Press, 1989), 21-22.

27. John Denvir, "Justice Rehnquist and Constitutional Interpretation," *Hastings Law Journal* 34 (1983): 1036.

28. *See* David L. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," *Harvard Law Review* 90 (1976): 300; D.F.B. Tucker, *The Rehnquist Court and Civil Rights* (Brookfield, VT: Dartmouth Publishing Co., 1995), 218.

29. Stern, "State Action," 1198-99 (internal footnotes omitted).

30. Davis, *Justice Rehnquist*, 21-32. Essentially equivalent terms used to describe Justice Rehnquist's constitutional adjudication are interpretivism, originalism, and strict constructionism. *See* Robert E. Riggs and Thomas D. Proffitt, "The Judicial Philosophy of Justice Rehnquist," *Akron Law Review* 16 (4, 1983): 582, footnote 166.

31. Denvir, "Justice Rehnquist," 1011.

32. Denvir, "Justice Rehnquist," 1022; Keith E. Whittington, "William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz (Lawrence, KS: University Press of Kansas, 2003), 16.

33. Whittington, "William H. Rehnquist," 17.

34. Erwin Chemerinsky, "The Constitutional Jurisprudence of the Rehnquist Court," in *The Rehnquist Court: A Retrospective*, ed. Martin H. Belsky (New York: Oxford University Press, 2002), 205.

35. Stern, "State Action," 1226.

36. Davis, *Justice Rehnquist*, 28.

37. See, e.g., Gerald Gunther, "In Search of Judicial Quality on a Changing Court: The Case of Justice Powell," *Stanford Law Review* 24 (1972): 1005-06.

38. Thomas I. Emerson, "First Amendment Doctrine and the Burger Court," *California Law Review* 68 (1980): 442.

39. William H. Rehnquist, *The Supreme Court* (New York: William Morrow & Co., 1987), 290.

40. James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995), 239.

41. William J. Brennan, "The Constitution of the United States: Contemporary Ratification," lecture presented at the Text and Teaching Symposium, Georgetown University, October 12, 1985, at http://www.politics.pomona.edu/dml/labbrennan.htm.

42. Brennan, "The Constitution of the United States." In context,

Justice Brennan stated, "It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."

Justice Brennan repeated the "arrogance cloaked as humility" quote, which apparently was first directed not at Rehnquist but rather at then-Attorney General Edwin Meese, in the *Harvard Law Review*. William J. Brennan, "Constitutional Adjudication and the Death Penalty: A View From the Court," *Harvard Law Review* 100 (1986): 325.

43. See Peter Irons, *Brennan vs. Rehnquist* (New York: Alfred A. Knopf, 1994), 34-37.

44. Brennan, "The Constitution of the United States."

45. Burt Neuborne, "Free Expression and the Rehnquist Court," *Practicing Law Institute Patents, Copyrights, Trademarks and Literary Property Course Handbook Series* 538 (1998): 1277.

46. Tim O'Brien, "The Rehnquist Court: Holding Steady on Freedom of Speech, *Nova Law Review* 22 (1998): 711. But see, e.g., Tushnet, *A Court Divided*, 155 ("[T]he First Amendment enforced by the Rehnquist Court gave more protection to the status quo than the First Amendment the Warren Court had enforced.").

47. Coding and describing the cases in this way does not mean "speech protectiveness" is a moral judgment, nor do the authors assert that speech interests should have prevailed in every case. "Speech protectiveness" is merely a descriptive term for whether the individual or minority First Amendment claim—whatever it was—prevailed or not. Some cases—those in which the result was both speech-protective and not protective—were placed in a third category.

48. http://www.firstamendmentcenter.org.

49. http://www.abanet.org/publiced/preview/summary/home.html.

50. The Westlaw search used the string "first amendment" /s speech & da(aft 9/1986 & bef 9/2005) in the database "sct." This was done in an attempt to identify First Amendment speech cases during the term of Chief Justice Rehnquist, and the search produced 169 documents. By comparison, the First Amendment Center and ABA lists resulted in a total of 131 cases. A look at the additional cases produced in the Westlaw search, however, indicated that the overwhelming majority appeared to be unrelated to the research question raised in this article. For example, the Westlaw search produced *Dickerson v. United States*, 530 U.S. 428 (2000), a Fourth Amendment case in which the Court at one point refers to First Amendment precedent for analogy purposes. Other documents produced in the Westlaw search included dissents from denials of certiorari, *see Avis Rent A Car System, Inc. v. Aguilar*, 529 U.S. 1138 (2000), and those were excluded because they do not reflect the votes of all members of the Court on the merits of First Amendment issues. Even conceding that some of the additional cases produced in Westlaw might be relevant to the research question, the lists produced by the First Amendment

Center and the American Bar Association nevertheless represent those respected organizations' views on the most important First Amendment cases during the Rehnquist, Burger, and Warren eras, respectively.

51. Although there may be no generally accepted definition of what constitutes a "speech-protective" opinion, the term as used throughout this article refers to whether a particular justice or the Court ultimately sided with the individual or minority right being asserted to engage in expression free from government regulation. As described herein, Rehnquist may have viewed himself as being "speech-protective" when he favored the government's right of regulation (through its own expression) at the expense of an individual or minority interest, but such a result was not categorized as speech-protective for the purpose of this article's analysis.

52. There were three speech cases decided by the Court in which Rehnquist did not participate.

53. There were two speech cases decided by the Court in which Warren did not participate.

54. There was one speech case decided by the Court in which Burger did not participate.

55. For a discussion of the distinction between the Speech Clause and Press Clause, see Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* (Eagan, MN: Thomson/West, 2006), §§ 22:1-22:4.

56. 485 U.S. 46 (1988).

57. 494 U.S. 624 (1990).

58. 497 U.S. 1 (1990).

59. 507 U.S. 410, 438 (1993) (Rehnquist, C.J., dissenting).

60. 485 U.S. at 50-51 (quoting Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 503-04 (1984)).

61. 485 U.S. at 51 (quoting 466 U.S. at 503-04).

62. 376 U.S. 254 (1964).

63. *See* 485 U.S. at 51-53.

64. 494 U.S. at 629-31.

65. 497 U.S. at 11-18.

66. 485 U.S. at 55.

67. 497 U.S. at 18-23.

68. 497 U.S. at 19-21.

69. 507 U.S. at 438 (Rehnquist, C.J., dissenting).

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

71. 507 U.S. at 441-42 (Rehnquist, C.J., dissenting).

72. 509 U.S. 544 (1993).

73. 509 U.S. at 549-55.

74. 509 U.S. at 560 (Kennedy, J., dissenting).

75. 509 U.S. at 565 (Kennedy, J., dissenting).

76. 491 U.S. at 427 (Rehnquist, C.J., dissenting).

77. 491 U.S. at 429 (Rehnquist, C.J., dissenting).

78. 487 U.S. 781, 809 (1988) (Rehnquist, C.J., dissenting).

79. 505 U.S. 830, 831-33 (1992) (per curiam) (Rehnquist, C.J., dissenting).

80. 496 U.S. 1 (1990).

81. 496 U.S. at 15-16.

82. 500 U.S. 173 (1991).

83. 500 U.S. at 194.

84. 500 U.S. at 196 ("here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized").

85. 539 U.S. 194, 196 (2003) ("Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs.").

86. 530 U.S. 640 (2000).

87. 530 U.S. at 647-59.

88. 544 U.S. 550 (2005).

89. O'Brien, "The Rehnquist Court," 715; Neuborne, "Free Expression," 1277.

90. Stanley H. Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (Westport, CT: Greenwood Press, 1994), 89.

91. Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (see description above in text); Butterworth v. Smith, 494 U.S. 624 (1990) (see description above in text); Dawson v. Delaware, 503 U.S. 159 (1992) (Rehnquist wrote for majority Court that murder defendant's First Amendment rights were violated at sentencing by introduction of his association with and belief in Aryan Brotherhood); Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999) (Rehnquist concurred with holding that FCC ban on broadcast ads for casinos would violate First Amendment in Louisiana, where gambling was legal).

92. Madsen v. Women's Health Center, 512 U.S. 753 (1994) (Rehnquist wrote for majority Court that injunction against anti-abortion protestors was constitutional in part and unconstitutional in part); Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) (Rehnquist wrote in dissent that he would have struck down as unconstitutional all but one of Colorado's regulations on ballot initiative signature collectors); McConnell v. FEC, 540 U.S. 93 (2003) (Rehnquist wrote portion of majority opinion upholding most but not all portions of the Bipartisan Campaign Reform Act of 2002).

93. In addition to Chief Justice John G. Roberts, who took the oath to replace Rehnquist on 29 September 2005, the new Court makeup includes Justice Samuel A. Alito, another President George W. Bush appointee who took the oath of office to replace the retired Justice Sandra Day O'Connor on 31 January 2006.

94. A search in the Westlaw database for D.C. Circuit opinions, using the search string AU(Roberts) & "First Amendment" discovered two relevant published Speech Clause opinions written by Roberts. He voted against individual or minority speech rights once and declined to pass judgment once. Koszola v. FDIC, 393 F.3d 1294 (D.C. Cir. 2005) (rejecting claim by former employee of the predecessor of the Federal Deposit Insurance Corporation that he was fired in retaliation for whistleblowing); United States v. Stanfield, 360 F.3d 1346 (D.C. Cir. 2004) (declining to

render judgment in the first instance on whether an Internet-use restriction on a probationer violated the First Amendment and remanding the case to the district court).

95. Rumsfeld v. Forum for Academic and Institutional Rights, 126 S.Ct. 1297 (2006) (Roberts, writing for a unanimous Court, rejected First Amendment claims by law schools against the government for mandating inclusion of military recruiters on law school campuses in exchange for federal funds).

96. 126 S.Ct. 1297.