

3-1-1992

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Recommended Citation

William E. Hellerstein, *BOOK REVIEW: Turning Right: The Making of the Rehnquist Supreme Court*, 58 Brook. L. Rev. 913 (1992).
Available at: <http://brooklynworks.brooklaw.edu/blr/vol58/iss3/6>

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BOOK REVIEW

David G. Savage, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* (John Wiley & Sons, Inc. 1992)

*Reviewed by William E. Hellerstein**

Diagnosing United States Supreme Court trends, most would agree, is less than a precise science. Nonetheless, in *Turning Right: The Making of the Rehnquist Court*,¹ David Savage, the Los Angeles Times Supreme Court correspondent, has made a highly respectable effort at it. For the time span covered by his book, his analysis of the Rehnquist Court's turn to the right is largely accurate. Only the surprises in several of the Court's decisions at the end of the 1991-92 term, a period not covered by the book, have the potential to displace some of the trends identified by Savage, and for that he cannot be faulted; many experienced Court-watchers were caught off balance by the Court's surprising finish.² Rather than diminish the value of *Turning Right*, however, these recent developments actually serve to enhance it. That is because one can conclude that several of the tensions between the Justices and certain decisional drifts that

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¹ DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* (John Wiley & Sons, Inc. 1992) [hereinafter *TURNING RIGHT*].

² By wide acclaim, the decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), and *Lee v. Weisman*, 112 S. Ct. 2649 (1992), which struck down as an Establishment Clause violation school prayers at a high school graduation ceremony, were significant alterations of the Rehnquist Court's previous direction as to these issues. See Ronald M. Dworkin, *The Center Holds!*, N.Y. REV. OF BOOKS, Aug. 13, 1992, at 29; Al Kamen, *Center-Right Coalition Asserts Itself*, WASH. POST, June 30, 1992, at A1; Marcia Coyle, *The Court Confounds Observers*, NAT'L L.J., July 13, 1992, at 1. Also not to be discounted are the *habeas corpus* rulings in *Wright v. West*, 112 S. Ct. 2482 (1992), and *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992), in which Justices O'Connor and Kennedy had some surprising things to say about the Court's rush to dismantle the Great Writ.

Savage highlights foretold, perhaps only slightly and probably unwittingly, that something was afoot.

Turning Right is a well-written, intriguing, indeed entertaining account of the Rehnquist Court that begins in the summer of 1986 with the ascension of William Hubbs Rehnquist as the sixteenth Chief Justice of the United States. It does not purport to be a scholarly work (there are no footnotes: *mirabile dictu!*), but it is not a book for only the lay reader; serious students of the Court should not ignore it. Savage's synthesis of the Court's major decisions each term is accurate in the main and is thus helpful even to the scholar who focuses in sophisticated depth on major doctrinal trends. Beyond that, there is suspenseful writing, an abundance of personality vignettes of the Justices, perceptive ironies, delightful turns of phrase and yes, some good (though not *Brethren*-abundant) gossip.³

Most enjoyable is the manner in which Mr. Savage has chosen to recount the story of the first five terms of the Rehnquist era. In addition to organizing the material on a term-by-term basis, he succeeds in creating great suspense (even for those of us who know) as to the outcome of many significant cases. This he accomplishes by proceeding not in a direct line from a description of the case to the decision, but by interspersing the backgrounds and personalities of the Justices and their prior approaches to the issues in question. Some, possibly those unfamiliar with the final result of a case, might find this method irritating. For those who remember the endings, Savage's manner of presentation allows, in a goodly number of cases, for the brief but enjoyable indulgence of thinking the result could actually have turned out differently than it did. This sensation is enhanced by Savage's capacity to describe succinctly the background of a case and by his able use of oral argument excerpts.

Any attempt to understand the Rehnquist Court must begin with an appreciation of the personalities that comprise it. In this regard, there are no major surprises as to any of the Justices, most of whom were subjected to intense scrutiny at their confirmations and have been ever since. But Savage gives us some facts about the Justices that are less well-known and some personality shadings that are intriguing.

³ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* (1979).

One would be hard pressed to dispute Savage's claim that Chief Justice Rehnquist "stands as the unquestioned leader of the Supreme Court and the most powerful American jurist since Earl E. Warren retired in 1969."⁴ Unquestionably, Rehnquist stands in stark contrast with his predecessor, Warren E. Burger, both in terms of the strength of his intellect and his firmly rooted ideology. What continues to distress is the unmitigated depth of Rehnquist's hostility to civil rights, a hostility that Savage reminds us was formed early in Rehnquist's life.

Although Savage recounts that the Chief Justice is considered by many of his colleagues, including Justice Brennan, as charming and self-effacing, he provides some less familiar facts about Rehnquist's antipathy to civil rights progress in his earlier years. For example, when *Terry v. Adams*,⁵ the Texas White primary case, was before the Court, Rehnquist, then a clerk to Justice Jackson, wrote in one memo to the Justice that "I take a dim view of this pathological search for discrimination . . . and as a result I now have a mental block against the case."⁶ In a second memo he wrote: "It is about time the Court faced the fact that the white people of the South don't like the colored people: the constitution restrains them from effecting this dislike thru [sic] state action but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head."⁷ Fortunately, Savage reminds us, "Justice Jackson ignored the advice."⁸

Savage also describes how, in the early 1960s, when Rehnquist's adopted city of Phoenix was considering passage of a public accommodations anti-discrimination ordinance (having suffered embarrassment by the exclusion of Jews from one of its premier hotels), twenty-six speakers appeared before the City Council in favor of the ordinance and three opposed to it—the first of whom was a self-described "lawyer without a client to-night"⁹—William Rehnquist. Thus, as one of Savage's sources opined, the Chief Justice's basic views were "flash frozen during

⁴ TURNING RIGHT, *supra* note 1, at 300.

⁵ 345 U.S. 461 (1953).

⁶ TURNING RIGHT, *supra* note 1, at 37.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 31.

his younger days and have remained unchanged since then."¹⁰

Justice John Paul Stevens is described as an "iconoclastic, intellectually superior jurist who has shunned the role of a power broker,"¹¹ an image that is generally accepted. Less well-known is what Savage describes as Justice Stevens's mild disappointment with the Court because he "expected his colleagues to engage in an intellectual and principled search for the right solution in each case. Instead, they seemed to be more interested in fitting cases into a liberal or conservative box."¹²

Justice Byron R. White, the only Democratic appointee still on the Court, is portrayed as aggressive in demeanor but bland in his writing: "Lawyers who have closely followed White's career over nearly three decades are hard-pressed to recall one line from any of his hundreds of opinions."¹³ While this description is not a surprise, Savage proffers a few items (and here one perhaps would appreciate knowing the sources) that are not common knowledge. For example, in explaining Justice White's hostility to the press, as manifested in cases such as *Branzburg v. Hayes*¹⁴ and *Zurcher v. Stanford Daily*,¹⁵ Savage suggests that it can be traced back to the Justice's days "as a college football star when a Denver Post sports writer stuck him with the name 'Whizzer White'."¹⁶ Indeed White, Savage tells us, hates any reference to his days as a football star (an important bit of knowledge for one arguing before the Court or even meeting the Justice socially). Relatedly, Savage also suggests that White was so troubled by Bob Woodward's *The Brethren*,¹⁷ believing it to have contained leaked information, that while normally reserved

¹⁰ *Id.* at 38.

¹¹ *Id.* at 62.

¹² *Id.* at 63-64.

¹³ *Id.* at 93.

¹⁴ 408 U.S. 665 (1972). The Court held that requiring reporters to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment.

¹⁵ 436 U.S. 547 (1978). The Court upheld an *ex parte* warrant authorizing a search of a campus newspaper office for photographs of a violent demonstration. Justice White rejected the paper's argument that the police decision to undertake a search rather than proceed by subpoena violated the First Amendment. As Professor Gunther has noted, Justice White's "opinion in *Zurcher* was as skeptical as that in *Branzburg* about press allegations of chilling effects and risks to confidential sources." GERALD GUNTHER, CONSTITUTIONAL LAW 1477 (12th ed. 1991).

¹⁶ TURNING RIGHT, *supra* note 1, at 157.

¹⁷ WOODWARD & ARMSTRONG, *supra* note 3.

with his law clerks, he became "sphinx-like" with them.¹⁸

Justice Sandra Day O'Connor is described as possessed neither of a "quick mind [n]or the verbal agility of Stevens or Scalia,"¹⁹ but as "a hard worker, like White and Blackmun devoted to detail and intensely committed to the job,"²⁰ with whom there is "no 'Miller Time'" as one source put it.²¹ She is also a Justice who "avoids the ideological extremes of either the right or the left."²²

After *Roe v. Wade*,²³ Justice Harry A. Blackmun, according to Savage, "appeared to undergo one of the great transformations in Supreme Court history."²⁴ Although the Justice himself, as do some of his clerks, maintains that the Court, and not he, has changed, the record gives strong evidence to the contrary. Savage's picture of the Justice is not an uncommon one: a hard-working but not great legal theorist who has "certainly lived up to his pledge to be a protector of the little people whose cases come before the Court."²⁵

The picture of Justice Thurgood Marshall traced by Savage is bittersweet. He reminds us of the Justice's enormous achievements and the uniqueness of the background that he brought to the Court as the country's first African-American Justice. But the description of the Justice's last years on the Court is a disturbing one for those who hold him in high esteem. He is described as rude and abrupt and as a Justice who distanced himself from the writing of his opinions. I do not know if this portrait is accurate. If it is, one wishes it were otherwise.

Perhaps because so much has been written about Justice William Brennan, Savage offers less here than about any other Justice. Yet his description of the friendship between Brennan and Rehnquist is an eye-opener. Justice Brennan is quoted as saying about Rehnquist: "I liked him the first day I met him, and we have been friends ever since."²⁶ Savage also recounts

¹⁸ TURNING RIGHT, *supra* note 1, at 87.

¹⁹ *Id.* at 111.

²⁰ *Id.*

²¹ *Id.* at 115.

²² *Id.* at 116.

²³ 410 U.S. 113 (1973).

²⁴ TURNING RIGHT, *supra* note 1, at 233.

²⁵ *Id.* at 234.

²⁶ *Id.* at 362.

that, according to Brennan, when Brennan's first wife was dying of cancer, Rehnquist always offered words of kindness and support. The warm relationship between the two men is important not only in understanding the Court as an institution, but as an object lesson as to how individuals, despite deep professional disagreements, should behave toward one another.

The chapter that introduces Justice Anthony M. Kennedy is entitled "Mr. Clean."²⁷ But it contains little about the Justice's background or personality that did not appear during his confirmation proceedings. This is a profile yet to emerge. The same is true with respect to Justice David Souter, whose recent arrival precluded Savage from telling us much, and with Justice Clarence Thomas, who makes his entrance as the book ends.

Not so with Justice Antonin Scalia. The Scalia presence dominates the book. The strength of his intellect, his energy, his irrepressible personality, his impatience with existing precedents as well as with his colleagues, combine to make him both the "enfant terrible" of the Court and the book's unwitting centerpiece. Scalia is portrayed as the ultimate literalist, a jurist for whom "the law was an intellectual exercise, requiring him to figure out what the words meant or how conflicting provisions should be reconciled. A sense of justice had almost nothing to do with it."²⁸ Thus, Savage informs us, Scalia "was surprised that the old liberals such as Brennan and Marshall still talked of being deeply troubled over cases. Sometimes the justice received a late-night phone call asking whether the Court would agree to allow a pending execution to proceed. None of this fazed Scalia. His business was the law, not justice. He boasted to friends that he never had problems sleeping at night."²⁹ A juicy tidbit this. And a troublesome one.

Among the book's most savory segments are those which focus on the developing tensions among various Justices—the lightning rod for which is, you guessed it—Justice Scalia.

In *Johnson v. Transportation Agency of Santa Clara County*,³⁰ in which the Court upheld a voluntary affirmative action plan designed to increase the number of women working in

²⁷ *Id.* at 167.

²⁸ *Id.* at 106-07.

²⁹ *Id.*

³⁰ 480 U.S. 616 (1987).

traditionally male positions in the county's transit system, Scalia began the first of a series of severe contretemps with Justice O'Connor. Scalia, who has not been ambiguous about his hatred of affirmative action, dissented and called for the overruling of *United Steelworkers v. Weber*.³¹ O'Connor, whose vote was crucial, but who did not share Justice Brennan's view that actual discrimination was not required to legitimate preferential hiring, took the narrower position that such hiring was licit if employers had a "firm basis" for believing that discrimination against women and minorities had occurred. She characterized Scalia's dissent as nothing more than "a useful point of academic discussion."³² Scalia retaliated by denouncing O'Connor's "firm basis" criterion, calling it "something of a half-way house between leaving employers scot-free to discriminate against disfavored groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII."³³

The Scalia-O'Connor antagonism again surfaced in *Thompson v. Oklahoma*,³⁴ which involved the execution of a fifteen-year-old. Only Rehnquist, White, and Scalia voted to uphold the sentence. O'Connor wrote a narrow concurrence for reversal, holding that because the Oklahoma legislature had not made clear that it intended the death penalty to be inflicted on juveniles as young as fifteen, the sentence could not stand. Savage tells us that Scalia, for whom the case was "easy," not only "fumed" and attacked her opinion, but was also "irked at the fact that it took O'Connor months to decide."³⁵

The combat between Scalia and O'Connor surfaces in a goodly number of other cases as well. For example, in *Webster v. Reproductive Health Services*³⁶ Scalia's anti-abortion wishes were not entirely fulfilled; O'Connor's refusal to join Rehnquist's broad opinion reduced significantly the importance of the case. Savage recounts: "Scalia was furious. O'Connor had done it again. Just like the year before with the fifteen-year-old murderer, she had delayed and delayed, tested the political wind

³¹ 443 U.S. 193 (1979). The Court held that not all "voluntary" affirmative action programs violate title VII of the 1964 Civil Rights Act.

³² *Johnson*, 480 U.S. at 65.

³³ *Id.* at 66.

³⁴ 487 U.S. 1230 (1988).

³⁵ TURNING RIGHT, *supra* note 1, at 204.

³⁶ 492 U.S. 490 (1989).

and then refused to decide."³⁷ Scalia denounced "O'Connor's refusal to decide the broader issues [as] 'perverse' and 'irrational' and said her reasons for sticking to a narrow decision 'cannot be taken seriously'."³⁸ So too in *Employment Division, Oregon Department of Human Resources v. Smith*.³⁹ Scalia's majority opinion held that religion-based conduct is not entitled to any Free Exercise Clause exemption from general regulations and that the government need not meet the compelling interest test of *Sherbert v. Verner*.⁴⁰ O'Connor refused to join Scalia's broadly sweeping opinion, an opinion that appeared to be a real sea-change in free exercise jurisprudence. She concurred in the result, having concluded that Oregon's drug laws had met the "compelling interest" standard. Yet she attacked Scalia's opinion for having virtually removed the religious liberty clause from the Constitution.

To conclude that the relationship between Justices Scalia and O'Connor suffers some strain, therefore, is not without foundation. Personalities aside, Savage attributes the stress to different approaches to constitutional adjudication: "Where law for Scalia was an intellectual exercise, O'Connor worried about the impact of a decision on real people. He sought decisions that were intellectually consistent; she tried to be fair."⁴¹

Somewhat more puzzling than the Scalia-O'Connor relationship are the fissures that have appeared in the relationship between the Chief Justice and Justice Scalia. One would have assumed that here were two almost identical intellectual soulmates who would march in virtual lockstep with one another. And the fact remains that Scalia and Rehnquist do vote with each other most of the time. But here is where Savage alerts us to a significant and much less obvious development.

In *Morrison v. Olson*,⁴² for example, Rehnquist authored the Court's opinion that upheld the "independent counsel" provision of the Ethics of Government Act⁴³ against claims that it violated the Appointments Clause and the principle of separa-

³⁷ TURNING RIGHT, *supra* note 1, at 292.

³⁸ *Id.* at 293.

³⁹ 494 U.S. 872 (1990).

⁴⁰ 374 U.S. 398 (1963).

⁴¹ TURNING RIGHT, *supra* note 1, at 204.

⁴² 487 U.S. 654 (1988).

⁴³ 28 U.S.C. §§ 591-98 (1978).

tion of powers. Savage tells us that Scalia was so "livid" at the outcome that in addition to penning a vehement dissent, he announced "that he intended to read much of it from the bench."⁴⁴ Scalia, Savage recounts, "was also upset with the way conferences were run," often displaying vexation with "Rehnquist's obsession with efficiency."⁴⁵ Apparently, Rehnquist in turn had problems with Scalia: "Just as in their poker games, Rehnquist cast a frown on anyone who talked too much. The frowns were often directed at Scalia."⁴⁶

Savage also excels at highlighting ironies that surface when two independent principles of constitutional adjudication, to which particular Justices subscribe, collide. For example, in *California Federal Savings and Loan Association v. Guerra*⁴⁷ the Court had to decide whether title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act ("PDA") of 1978, preempted a California law that required employers to provide leave and reinstatement to employees disabled by pregnancy. Over the dissents of Justices White, Rehnquist and Powell, who maintained that the PDA language left no room for preferential treatment of pregnant workers, the Court held that the California law was not preempted and that it did not violate the PDA. Savage neatly posed the irony: "how would a conservative Court grapple with a liberal state law?"⁴⁸ The conservative litany was to defer to the popular will reflected in state legislatures. The Chief Justice, more than any other Justice, preached deference to the people's elected representatives. On the other hand, some conservative Justices were not taken with what they perceived as preferential treatment in employment.

Savage is also adept at crystalizing a case or a particular

⁴⁴ TURNING RIGHT, *supra* note 1, at 201.

⁴⁵ *Id.* at 203.

⁴⁶ *Id.* at 202. Rehnquist, according to Savage, was not the only Justice irked by Scalia's loquaciousness:

Scalia's show did not always play well with the other justices. Several said they wished he would be quiet for a change. On occasion, Byron White would glare down the bench with a look that suggested he would like to put the newest justice in a headlock if it would shut him up. Sandra O'Connor would harumph slightly when he interrupted one of her questions.

Id. at 119.

⁴⁷ 479 U.S. 272 (1987).

⁴⁸ TURNING RIGHT, *supra* note 1, at 70.

Justice's approach. A gem occurs in his discussion of *McCleskey v. Kemp*,⁴⁹ in which the Court was confronted with perhaps the most controversial issue in capital punishment cases—does evidence of racial disparity in implementation of the death penalty invalidate it? By a 5-4 vote, the Court held that there was neither an Eighth Amendment violation nor a denial of equal protection in Georgia's enforcement of the death penalty, even assuming a comprehensive study of racial discrimination in capital sentencing in Georgia to be valid. Justice Powell wrote the Court's opinion, reasoning that the statistics did not prove any discrimination in *McCleskey's* case. He observed that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion had been abused."⁵⁰ Savage concisely sights the dilemma of the case: "For Powell, it was the worst sort of murder: an unprovoked and deliberate killing of a police officer. If the justices looked at Georgia's capital punishment system as a whole, the case was a difficult one. The evidence of discrimination, even if unintended, was overwhelming. However, if they cast their eyes only at Warren *McCleskey*, the case was easy."⁵¹

Savage's treatment of the first five years of the Rehnquist Court is very satisfying. He covers the Court's major decisions on civil rights, abortion, free speech, and religion. If he comes up at all short, it is with criminal procedure, where the coverage is less extensive. Savage also is light-handed in describing the Court's right-wing shift. Through deft assemblage of material, he allows the Justices to speak for themselves and the reader to feel the shifting of the ground beneath. His most opinionated feelings emerge in the chapter detailing the defeat of Robert H. Bork's nomination ("Robert Bork and the Intellectual Feast").⁵² At one point Savage describes Bork as having done "little scholarly writing," notwithstanding Bork's "public reputation as a constitutional scholar."⁵³ But, even here, the presentation cannot be said to be terribly unbalanced.

Savage's final chapter, "A Court Transformed," is a skillful

⁴⁹ 481 U.S. 279 (1987).

⁵⁰ *Id.* at 297.

⁵¹ TURNING RIGHT, *supra* note 1, at 95.

⁵² *Id.* at 133.

⁵³ *Id.* at 134.

summary of the ground previously covered, but it provides little uplift to a civil libertarian.⁵⁴ Savage dismisses that constituency with the reminder that “[u]nder the edicts of the Rehnquist Court, the Bill of Rights is shrinking in significance,”⁵⁵ and that “[t]he protection of civil rights and civil liberties seemed to have moved, at least for the time being, across First Street, from the Supreme Court to Congress, just as William Rehnquist and his Court had intended.”⁵⁶

If you fashion yourself a civil libertarian, your understanding of the Rehnquist Court’s first five years will be enhanced by reading *Turning Right* and you may even be the better for having read it. That you will be happier, I doubt sincerely. On the other hand, if you are one who cuts the government greater slack when it comes to the rights of individuals, you are, with some slight interruption, in for a good ol’ chop-lickin time. In light of several recent developments, however, your enjoyment of the landscape portrayed in *Turning Right* may be short-lived.

At the end of the 1991 term, several of the Court’s most important decisions signaled the emergence of a potentially centrist coalition consisting of Justices O’Connor, Kennedy and Souter. If this proves true, the three Justices, along with Justices Blackmun and Stevens (and occasionally Justice White), will give the Court a working majority that is positioned to apply the brakes to any movement toward radical departures from established precedents, especially those that are protective of individual rights and liberties.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁷ the Court, by a 5-4 vote, reaffirmed the “essential holding” of *Roe v. Wade*:⁵⁸ that a woman has a constitutional right to an abortion before the fetus reaches viability. A joint opinion, a rare event in itself, authored by Justices O’Connor, Kennedy, and Souter, stated that the right to an abortion was part of the concept of liberty that the Due Process Clause of the Fourteenth Amendment protects.⁵⁹ To abandon *Roe* “under fire,” said the opinion, would hurt both the Court and “the nation’s commit-

⁵⁴ *Id.* at 451.

⁵⁵ *Id.* at 454.

⁵⁶ *Id.* at 458.

⁵⁷ 112 S. Ct. 2791 (1992).

⁵⁸ 403 U.S. 113 (1973).

⁵⁹ 112 S. Ct. at 2797.

ment to the rule of law."⁶⁰ Thus, with Justices Blackmun and Stevens in accord, the joint opinion preserved the core of *Roe* for the foreseeable future.

In *Lee v. Weisman*⁶¹ the Court reaffirmed its view that state-sponsored prayer in public schools is prohibited, holding that a prayer at a Rhode Island public high school graduation exercise violated the Establishment Clause. The case was a great surprise because recent decisions had led one to believe that the Court was ready to lower the wall of separation between church and state.⁶² Indeed, the Bush Administration's position that coercion should be a required element for an Establishment Clause violation appeared to be a direct response to an invitation extended by Justice Kennedy in his dissenting opinion in the Pittsburgh Christmas display case.⁶³

In *Allegheny County v. Greater Pittsburgh ACLU*⁶⁴ Kennedy, joined by Chief Justice Rehnquist, and Justices Scalia and White, strongly criticized the Court's religion rulings as manifesting an "unjustified hostility to religion."⁶⁵ Indeed, he argued for an overruling of those precedents and for permitting government sponsorship of religious observance as long as no one was forced to participate and no "establishment" of a state religion occurred.⁶⁶ Not only did Justice Kennedy provide the key vote in *Lee*, but he wrote the opinion that rejected the Administration's "coercion" argument.

In two *habeas corpus* cases, Justices O'Connor and Kennedy both took highly uncharacteristic positions that evinced further resentment of their more conservative colleagues' desire to make short shrift of the remains of the Great Writ, an interment process to which both O'Connor and Kennedy had previ-

⁶⁰ *Id.* at 2798.

⁶¹ 112 S. Ct. 2649 (1992).

⁶² See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding a municipality's inclusion of a nativity scene in its Christmas display as not violative of the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state).

⁶³ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (holding unconstitutional a freestanding display of a nativity scene on the main staircase of a county courthouse, but upholding the display of a Jewish Chanukah menorah placed next to a Christmas tree and a sign saluting liberty).

⁶⁴ 492 U.S. 573 (1989).

⁶⁵ *Id.* at 602.

⁶⁶ *Id.* at 655-67.

ously made more than substantial contributions.

In *Keeney v. Tamayo-Reyes*⁶⁷ the majority held that the court of appeals had erred in applying the "deliberate bypass" standard, rather than the "cause and prejudice" standard, to excuse a state criminal defendant's failure to develop his claim at a state court hearing. The defendant argued that he had not entered a knowing and intelligent plea of guilty to manslaughter because the court interpreter had not properly translated the *mens rea* element of the crime. Justice White's opinion stated that, in light of prior decisions which held that the "cause and prejudice" standard was applicable to the failure of a state defendant to appeal his conviction entirely, it was irrational to apply a less stringent standard to excuse the failure to develop his claim factually in a state court hearing. Therefore, even though a federal district court had deemed it appropriate to hear the petitioner's claim, it was without power, White held, to conduct a fact-finding hearing unless the petitioner could meet the cause and prejudice standard.

Justice O'Connor, who consistently had been a major force in the evisceration of federal *habeas corpus*, accused the majority of changing *habeas* law in a "fundamental way." She argued that "the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot simply be lifted and transposed to the different question whether, once the court will consider the claim, it should hold an evidentiary hearing."⁶⁸ Justice Kennedy also dissented, arguing that the Court should not take steps that would reduce the chance that a federal *habeas* court will have accurate facts upon which to base its decision.

Similarly, in *Wright v. West*⁶⁹ Justices O'Connor and Kennedy again turned a harsh pen against further demolition of the habeas writ. This time it was directed at Justice Thomas's concurring opinion (joined by Chief Justice Rehnquist and Justice Scalia), which articulated the newest Justice's desire to perform further major surgery on the Great Writ.

The case had the potential to be a virtual *coup de grace* for federal *habeas corpus*. The original issue was a narrow one:

⁶⁷ 112 S. Ct. 1715 (1992).

⁶⁸ *Id.* at 1721.

⁶⁹ 112 S. Ct. 2482 (1992).

whether under *Jackson v. Virginia*⁷⁰ the evidence was sufficient to sustain the petitioner's larceny conviction. Subsequent to the granting of *certiorari*, however, the Court also asked the parties to brief another issue: should a federal district court continue to give *de novo* review to a state court's application of law to specific facts—or, instead, should the rules be changed to allow a district court to honor a state court's reasonable decision regarding mixed questions of law and fact? The implications of an affirmative answer to the second clause would mean a virtual death sentence for *habeas* petitioners on such questions as whether their confessions were coerced or their guilty pleas were unknowingly entered; it would mean that federal judges would have to defer to state courts on federal constitutional applications to mixed questions of law and fact, even when they believed that the state court had misapplied constitutional principles.

What could have been a blockbuster case, however, ended with a whimper because a majority of the Court (when its fragmented opinions were tallied) decided nothing more than the original narrow question and held that under *Jackson v. Virginia* the evidence to convict was sufficient. Nonetheless, Justice Thomas's concurring opinion called for an affirmative answer to the broader question and he wrote extensively about his understanding of the Court's prior decisions, criticizing the Court severely for having misread its own seminal decision in *Brown v. Allen*.⁷¹ For this he was strenuously denounced by Justice O'Connor. She disputed Thomas's analysis of the Court's precedents and lectured him on his misunderstanding of the Court's entire approach to the issue in question. Justice Kennedy also challenged not only the soundness of Thomas's reasoning but the logic of the result that Thomas sought. Irrespective of the doctrinal aspects of the two *habeas* decisions, the strength of the language employed by Justice O'Connor and to a lesser extent by Justice Kennedy appears to denote more than just a disagreement on the discrete issues in the cases themselves.

The views expressed by Justices O'Connor, Kennedy and

⁷⁰ 443 U.S. 307 (1979) (holding that the Due Process Clause precludes a conviction that no rational trier of fact could conclude established guilt).

⁷¹ 344 U.S. 443 (1953) (establishing the proposition that federal constitutional questions litigated in state criminal cases may be relitigated on *habeas corpus*).

Souter in the abortion, graduation prayer and *habeas* cases, appear to disclose, in varying degrees, their distancing of themselves from their more conservative colleagues, Chief Justice Rehnquist, and Justices Scalia and Thomas, from especially the quest of the latter three for further dismantling of precedents they dislike. Although, as discussed earlier, some evidence of these tensions surfaced in *Turning Right*, the degree of substantive displacement manifest in these decisions of the final days of the 1991 term did not. One can only speculate as to whether Justice Thomas's arrival and lack of "rookie" reticence has served as a catalyst, whether the spirit of Justice Harlan has, particularly in Justice Souter's case, acquired great strength, or whether, indeed, Justices O'Connor, Kennedy, and Souter have been affected by the continuing influence of Justices Brennan and Marshall.⁷² No matter what speculation one indulges in, the Court is not quite the same as it was for the period encompassed by *Turning Right*. As the 1991 term ended, Savage may well have been within his rights to consider a sequel entitled *Turning to the Center*. With the arrival of the Clinton Administration, Savage may yet write a different sequel—*Turning Left (Again)*.

⁷² Linda Greenhouse, *Liberal Giants Inspire Three Centrist Justices*, N.Y. TIMES, Oct. 25, 1992, at A1.

