

The Rehnquist Court's Ideological Revolution in Substantive Rights and Remedies

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- I. Introduction
 - A. EJS vision of the Courts
 1. Brown's legacy and the federal courts as an anti-majoritarian check
 - B. Gap between rights and remedies must be understood in light of the gap between discrimination and what the courts recognize as discrimination
 - C. Together this creates a huge chasm between racial inequality and the ability of courts to address this inequality
 - D. This is a result of a concerted, ideologically driven effort to undermine the courts as a vehicle for remedying racial inequity
- II. Ideological underpinnings of the "Rehnquist revolution"
 - A. Rehnquist's documented hostility to civil rights
 1. Rehnquist's "Random Thought on the Segregation Cases"
 2. Hostility to civil rights generally prior to judicial nomination
 - B. Dawn Johnsen has analyzed the Reagan Justice Department's agenda for the dismantling of civil rights law
 1. DOJ "Guidelines on Constitutional Litigation" – encouraged a narrowing in several areas of constitutional jurisprudence
 - a. Expansive Commerce Clause powers
 - b. Limitations on state sovereignty
 - c. Congressional power under the Reconstruction Amendments
 - d. Scope of substantive rights – stating that a disparate impact standard was inconsistent with their conception of discrimination

2. DOJ Office of Legal Policy Report to the Attorney General, “The Constitution in the Year 2000”
 - a. Was meant as a tool to ideologically reshape the judiciary.
 - b. Warned about the relation between the disparate impact standard and affirmative action
 - c. Took a dim view of the expansive powers of federal courts

III. Jurisprudential Legacy of the Rehnquist Court

- A. Erwin Chemerinsky has argued that impact is one “where the whole is more than the sum of the parts”
- B. Decisions closely track the ideological underpinnings
 1. No new suspect classifications were found, and remedies for constitutional violations were limited
 2. No new fundamental rights were recognized during the Rehnquist Court, and many already existing rights were narrowed
 3. Access to federal courts to hear civil rights claims was significantly limited
 4. The powers of Congress were restricted for the first time in almost sixty years: new limits were imposed on Congress's commerce power and authority under Section 5 of the Fourteenth Amendment, the Tenth Amendment was revived as a constraint on federal power, and state sovereign immunity was significantly expanded
- C. To this list, we must add the entrenchment of the intent doctrine and the ideology of colorblindness
 1. The EPC now hinders the ability to get race-conscious remedies eg. *Shaw*, *Miller*, etc
 2. Interplay between Intent Doctrine and Section 5 power

- a. Any federal law that attempts to remedy discrimination based on disparate impact requires findings of “congruence and proportionality”
- b. Title VII bifurcation between remedies available for intentional and disparate impact violations of Title VII

IV. Litigation Career of Retrenchment

A. Litigation in the era of Retrenchment - examples

1. Washington v. Davis (1976)
2. Regents v. Bakke (1978)
3. Evens v. Jeff D. (1986)
4. City of Richmond v. J. A. Croson (1989)
5. Ward’s Cove v. Atonio; Patterson v. Mclean Credit Union; Price Waterhouse v. Hopkins; Martin v. Wilks (1989) – overturned by Civil Rights Act of 1991
6. Missouri v, Jenkins (1995); Freeman v. Pitts (1992); Bd. of Educ. of Oklahoma v. Dowell (1991) – striking down desegregation orders as part of the Reagan administration campaign to end desegregation orders
 - a. The school assignment cases in Seattle and Louisville – what the courts can’t provide as a remedy, is now subject to constitutional challenge when done voluntarily

B. Where Congress reacts, the Court finds new avenues to limit rights/remedies

1. Civil Rights Act of 1991 addressed some retrenchment
 - a. Intent once again comes back into play –this time as a limit to congressional power through the narrow reading of Section 5 powers
2. Novel reading of statutes - Alexander v. Sandoval and the end of the ability to challenge systemic inequality
 - a. Ended the challenge to Proposition 209