

Measuring Judicial Success: Interpersonal Intelligence and Commitment to Enduring Values

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In the recent Foulston Siefkin lecture series at Washburn University School of Law, Professor Jeffery Rosen from George Washington University raised questions about how we should assess Supreme Court Justices. Does temperament matter? Is it more important for successful judges to defer to the legislature rather than to promote fundamental values? Underlying these questions, how should we measure judicial success? The continued discussion of these issues proves the obvious success of Professor Rosen's presentation. It is my pleasure to accept an invitation to respond to the questions he raised.

In this response, I do not necessarily disagree with Professor Rosen's assessments. Instead, my comments focus on alternative means of viewing some of the issues he brought to our attention. First, I question whether references to "temperament" adequately capture the characteristic that distinguishes the Justices described by Professor Rosen. Second, I question the interplay between democratic deference and fundamental values. Finally, I address the problems of measuring judicial success. If Professor Rosen believes that we should have equally high regard for Supreme Court Justices, whether they use their power to protect the indigent or unpopular, or use the same power to reinforce established power elites, then we likely part company. Hopefully, however, our points of disagreement will foster additional debate.

I. TEMPERAMENT AND HUMILITY, OR INTERPERSONAL INTELLIGENCE AND SELF-ASSURANCE?

Is judicial temperament the best description of a personal quality that trumps philosophical brilliance? Professor Rosen argues that Supreme Court Justices who get along well with their colleagues may also be more successful in forming alliances and moving the Court towards shared or even unanimous opinions.¹ While the concept seems reasonable, I would suggest an alternative label for the quality that Professor

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1. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1 (2007).

Rosen describes. John Marshall and William Rehnquist were not simply jovial or even-tempered. Based on reports from Professor Rosen and others,² the Justices understood how to interact in ways that encouraged positive responses from co-workers. Beyond conviviality, they displayed an “interpersonal intelligence,”³ which may have been just as important to their effective performance as the cognitive skills displayed in the well-crafted opinions these Justices delivered.

In addition to suggesting an alternative to Professor Rosen’s references to temperament, I also question whether he focuses on the most salient personal characteristic of successful judges when he emphasizes humility. John Marshall may not have used his status or power to force subservience from others. He may not have looked down on or degraded those with fewer skills and lesser talent. While the story of his disheveled clothes and his willingness to play the part of the servant provides us with the image of a person we admire,⁴ the picture of a convivial and charismatic man suggests a different set of personal characteristics.⁵ Consistent with the more detailed descriptions by both Rosen and biographer Jean Edward Smith, I would emphasize Marshall’s quality of self-assurance that did not depend on external recognition or approval, and did not easily bend to the values or persuasions of others.

I would not use the term humility to characterize Justice Marshall’s judicial opinions. In his best-known opinions, he wrote in a grand style, suggesting that his views were definitive and leaving little room for opinions to the contrary. In *Marbury v. Madison*,⁶ both the executive and legislative branches acted unlawfully. The judges’ oath to uphold the

2. See generally, *id.*; JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996).

3. See HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* 22-24 (1993). Gardner summarized his description of interpersonal intelligence as “a person’s capacity to understand the intentions, motivations, and desires of other people and, consequently, to work effectively with others.” HOWARD GARDNER, *INTELLIGENCE REFRAMED* 43 (1999). See also Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795 (2005) (advocating “intellectual versatility”).

4. See Rosen, *supra* note 1.

5. Similar stories could be told of other Justices, including Chief Justice Rehnquist. During his visit to Washburn University School of Law, then Justice Rehnquist arrived wearing a rumpled trench coat, Hush Puppies, and an old fishing hat, and was not even recognized by the law journal editor who waited for him to depart the plane. While here, he related the events of his evening at a local bar where he engaged in lengthy discussion about sports and politics with a typical group of locals. At the end of the evening, a truck driver named Gary said: “Bill, we have all told you about our jobs, where do you work?” Rehnquist stated that he worked in Washington. After a number of comments from others about friends and relatives they all had in Seattle and Spokane, Rehnquist corrected them: “No, I work in Washington, D.C.” When then asked, “What do you do there, are you a fed?” Rehnquist replied: “Well, I kind of am. I am a Justice on the Supreme Court.” At that point, all erupted in laughter and slapped him on the back saying: “Right, ole man! Admit it; you’re just a darn clerk in the Ag Department out here to check out our farmers.” Rehnquist reportedly left it at that, and enjoyed the general laughter. Michael C. Manning, *Rehnquist: Big Day for Law Student*, THE ARIZ. REPUBLIC, Sept. 18, 2005, at v1, v3, available at <http://www.azcentral.com/arizonarepublic/viewpoints/articles/0918manning0918new0.html>.

6. 5 U.S. (1 Cranch) 137 (1803).

Constitution was the only oath that mattered when assigning responsibility to measure constitutional boundaries. Justice Marshall's opinion in *McCulloch v. Maryland*⁷ again suggested the same sense of certainty; taking up one argument after another, he reached what appeared to be certain and unerring conclusions.

I would also not equate Justice Marshall's good tactical sense with a lack of commitment to fundamental values. The opinion in *Marbury* illustrates this distinction. Justice Marshall asserted authority over both the executive and the legislative branch and did so in a manner that neither could challenge. Marshall used the same kind of political calculus near the end of his career in the *Cherokee Nation v. Georgia*⁸ opinion, again asserting his moral superiority without opening the door for defiance from President Jackson. In both cases, Marshall openly chastised the executive in a manner suggesting moral certainty rather than humility. Justice Marshall's opinions demonstrate both an extraordinary tactical sense and an unquestionable commitment to the values he supported.

My focus on characteristics of interpersonal intelligence and self-assurance stems from broader concerns about law and legal education. In his presentation and in his book, Professor Rosen distinguishes the role of judge from the role of the professor. He attributes to successful judges the characteristics of even-tempered democratic constitutionalists, while inferring that successful professors behave as individualistic self-promoters.⁹ The qualities Professor Rosen associates with great judges also show up in his description of great lawyers.¹⁰ Should great law professors model similar behavior, with the goal of producing litigants and judges who will be able to demonstrate such skills? By defining these qualities in terms of "interpersonal intelligence," rather than simply temperament, we can begin to think of them as proper goals for education. Learning how to respect and relate to others within the practice of law becomes a part of the mission of legal education.¹¹

Gaining self-assurance based on intrinsic rather than extrinsic measures of satisfaction might also become a goal that we set for ourselves as legal educators. A great law school should reinforce personal

7. 17 U.S. (4 Wheat.) 316 (1819).

8. 30 U.S. (5 Pet.) 1 (1831).

9. See, e.g., JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 235 (2007) (noting that Chief Justice Roberts also "objected to justices who act more like law professors than members of a collegial court").

10. See, e.g., *id.* at 222 (describing the reputation of Roberts as a "widely respected . . . legal craftsman" who "treats litigants with even-handed courtesy").

11. See Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 *CLINICAL L. REV.* 15, 40 (2004) (noting the relational aspect of legal work); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 *HARV. NEGOT. L. REV.* 97 (2001) (linking work on creativity, multiple intelligences and problem solving to goals of legal education).

characteristics that cause students to gain the self-confidence they need to interact well with others, rather than having to put down adversaries to score personal public triumphs. Unfortunately, the message conveyed to law students often turns on success as measured by class rank, coveted clerkships, and interviews with prestigious law firms. Students, who enter law school with a strong sense of self and an interest in practicing law based on a desire to make social contributions and to meet personal challenges, all too often leave school with the sense that money and power will be the keys to career satisfaction despite plentiful evidence to the contrary.¹²

In other words, when Professor Rosen emphasizes the value of “judicial temperament,” we should at least consider implications of his assessment for the broader context of legal education. By slightly shifting the focus to concepts of interpersonal intelligence and goals of building intrinsic motivation, we might link Professor Rosen’s comments to qualities of great law professors as well as great judges and lawyers. We might also reassess what it means to be a great law school.

II. DEMOCRATIC DEFERENCE OR PROMOTION OF ENDURING VALUES?

The second element of my response addresses Professor Rosen’s claim that the most “successful” Supreme Court Justices adhere to the fundamental democratic values accepted by the majority and do not play a strong “counter-majoritarian” role.¹³ Professor Rosen’s approach to measuring adherence to democratic values, however, rests on a perceived link between judicial deference and democratic constitutionalism. I question that correlation. Rather, I suggest that faithfulness to fundamental democratic values is more consistent with a counter-majoritarian role—unprincipled judicial deference directly conflicts with that role.

In simplest terms, I argue that values matter and that we should discard the pretense that “neutral” measures of judicial deference will guide us to a meaningful measure of judicial success. I do not question the claim that the values on which the Justices rely should, in general terms, be described as both enduring and broadly supported by the public. Americans boast of our liberty as linked to speech, religion, and at

12. See Kenneth M. Sheldon & Lawrence S. Krieger, *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004) (discussing negative affects of law school on student well-being, values, and motivation); Kenneth M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 2007 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007) (describing prior findings and demonstrating relative success of law students who perceive autonomy support from faculty).

13. Rosen, *supra* note 1, at 1.

least some measure of autonomy. We also champion the principle of equality, and when the Court decided *Brown v. Board of Education*,¹⁴ a majority of Americans linked that principle to ending racial discrimination. In that sense, I agree with Professor Rosen that the *Brown* decision rested on majoritarian values.

At the same time, however, the Supreme Court's role in *Brown* ran counter to the localized or temporary majorities, which embraced segregationist attitudes of the era. The angry mobs at Little Rock's Central High School presumably represented the majority view in that community at that time. The counter-majoritarian role of the Court includes checking local majorities or temporary passions of the majority at large. In reaching such socially charged decisions, the Justices are not seeking to substitute personal values for those of the majority nor should they be characterized as opponents of the majority. Rather, the Justices are preserving faithful adherence to the enduring values of the majority while checking deviations that arose through the democratic process. Although the Justices were not *anti* majoritarian, they played a crucial counter-majoritarian role.

Chief Justice Marshall modeled the same role in his most noteworthy decisions. In *McCulloch*, he deferred to the majority in Congress while upholding national power to establish a bank, and in doing so, wrote memorably about the importance of judicial deference: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁵

In the same opinion, however, the Chief Justice also set the stage for countering a majority when those affected lack "confidence" in the outcome of the political process.¹⁶ By striking down the Maryland law taxing the national bank, Chief Justice Marshall established an approach to federalism that continues today. He later applied a similar approach in *Gibbons v. Ogden*.¹⁷ In both cases, it would have been possible to uphold both the federal and state laws at issue,¹⁸ but Justice Marshall took what Professor Rosen apparently describes as an "activist" approach by countering the state majorities in order to protect fundamental values that he adhered to throughout his career.

14. 347 U.S. 483 (1954).

15. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

16. *Id.* at 431. It took the better part of two centuries for John Hart Ely to come up with the label, "representation reinforcement," for the concept, which Chief Justice Marshall demonstrated in 1819. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 84-86 (1980).

17. 22 U.S. (9 Wheat.) 1 (1824) (upholding federal power to regulate "navigation," while invalidating a state awarded monopoly to engage in the steamboat trade in New York harbor).

18. For example, the Supreme Court could have ruled in *McCulloch* that states may tax national banks (at least in absence of federal law forbidding such taxes), and issuance of a federal license to navigate in *Gibbons* does not necessarily preclude state regulation of the use of harbors.

Because of the distinction I am making, I accept Professor Rosen's objection to "unilateralist decisions," while rejecting his argument for "democratic constitutionalism" or his measure for grading Justices who adhere to that model. Thus, when Rosen measures judicial activists by whether a judge votes to strike down a federal or state law,¹⁹ and then disparages such decisions, he fails to produce an acceptable qualitative assessment. *Brown* may be the most visible of the cases that struck down state laws while adhering to the enduring and fundamental values of the majority. I know that Professor Rosen does not mean to suggest that Justices who support the legacy of *Brown* deserve less respect than those who would uphold segregation,²⁰ but I would prefer to see him measure the success of Justices by factoring this distinction into his analysis.

I fail to see the attraction Professor Rosen finds in the use of a "neutral" measure of "judicial activism." He uses this measure to identify the most "restrained or deferential" Justices²¹ who may therefore deserve a democratic constitutionalist label. It enables Professor Rosen to elevate Chief Justice Rehnquist into that category. However, that approach also equates those who impose checks on government to protect the poor and the powerless with those who would use the power of the Supreme Court to safeguard corporate wealth and influence of a wealthy elite. When Rehnquist voted against the government, he did so because he did not want Lake Tahoe landowners to have to wait for environmental studies before developing their property,²² and opposed forcing state governments to pay monetary damages to persons with disabilities²³ or victims of age discrimination.²⁴

Counting judicial decisions that overturn acts of the legislature highlights popular misconceptions of judicial activism,²⁵ and for that reason, may be viewed as a useful exercise. The public should recognize Justices Kennedy, Scalia, and Thomas as members of the Court most likely to substitute their views for the views of a legislative majority. That measure, however, fails miserably as a guide to judicial success except for those who would equate protecting juveniles²⁶ or the mentally

19. See Rosen, *supra* note 1, at 10.

20. In his oral presentation at Washburn, Rosen referred to Rehnquist's views on this issue as a "moral blind spot."

21. Rosen, *supra* note 1, at 10.

22. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 343-44 (2002) (Rehnquist, C.J., dissenting).

23. See *generally* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (ruling that the Eleventh Amendment over-rides federal law providing monetary damages for violations of the Americans with Disabilities Act).

24. See *generally* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down federal law providing monetary damages for victims of age discrimination by states).

25. See *generally* Mark A. Graber, *Does it Really Matter? Conservative Courts in a Conservative Era*, 75 *FORDHAM L. REV.* 675 (2006).

26. See *generally* *Roper v. Simmons*, 543 U.S. 551 (2005) (striking down state law applying the

retarded²⁷ from execution with protecting wealthy landowners from having to let people walk across their property.²⁸

By focusing on invalidation of state or federal laws, Professor Rosen's measure also leaves out a major element of the judicial counter-majoritarian role. Like the legislature, the executive branch of government is subject to ultimate democratic control. Judicial decisions that override the executive, thus, also represent checks on a "democratic" branch of government. By including cases in which Justices use their authority to check the executive branch in our assessment of the judicial role, a different picture of judicial activism emerges and the hierarchy of the Justices that Professor Rosen describes becomes less clear.²⁹

Although Professor Rosen describes Justices Ginsburg and Breyer as the "least activist" Justices on the current Court, neither should be categorized as unwilling to block the "majority." When the clash is between individual liberty and a localized majority or an abusive executive, both of these Justices are more likely to rise to the challenge than their more conservative colleagues. Standing up to the executive may usefully symbolize judicial protection for individual liberty. Chief Justice Rehnquist rarely sided with the individual in such circumstances, and for that reason, could be described by Professor Rosen as a democratic constitutionalist. I am not convinced, however, that his decisions protected our most fundamental and enduring constitutional values.³⁰

A series of Supreme Court decisions published after Professor Rosen's visit to Washburn provides us with added examples we might use to assess the Justices. In the long term, the new Chief Justice may have the right temperament to unite the Court. In the short term, however, the Court appears even more polarized than during the term of Chief Justice Rehnquist. As Professor Rosen notes,³¹ Chief Justice Roberts's attempt to take incremental steps rather than imposing broad new principles does not seem to have attracted admirers within the Court.³²

death penalty to juveniles, with Chief Justice Rehnquist dissenting).

27. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting execution of the mentally retarded with Chief Justice Rehnquist dissenting).

28. See generally *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (prohibiting the State from conditioning a permit to rebuild a house on granting a public easement across the owner's beachfront property with Chief Justice Rehnquist joining the majority).

29. This fact helps to illustrate a separate question about Rosen's definition of judicial activism, which may fall short of his claims to "neutrality." A decision to limit activism to cases in which the Justices invalidated legislation, and to ignore cases involving limits on the executive, will lead to a hierarchy of substantive values. That will vary from one political era to another.

30. See, for example, Rehnquist's explanation for not invalidating criminal convictions in cases marked by constitutional violations: "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (finding that violations of the Confrontation Clause are subject to harmless error analysis).

31. See generally Rosen, *supra* note 1.

32. See, e.g., *FEC v. Wis. Right to Life Inc.*, 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concur-

There are also signs of inconsistency in the new Chief Justice's approach. In striking down Seattle and Louisville policies, where the Court considered race in an effort to prevent resegregation of public schools, Roberts abandoned incrementalism, siding with those who appear to equate Jim Crow with affirmative action to increase diversity, and who reject the democratically supported policies of elected school boards.³³ Chief Justice Roberts rejected extensive precedent, dating back at least to the opinion of Justice Lewis Powell in *Board of Regents of the University of California v. Bakke*,³⁴ and refused to accept the more moderate approach of Justice Kennedy, which would have, at least, left the door open for possible consideration of race as a factor in achieving diversity.³⁵ Presumably, Professor Rosen will agree the decision represents unilateralism at its worst, in some respects reminiscent of Chief Justice Taney's approach to "solving" a divisive national issue by substituting his own values for those of an elected body.³⁶ In yet another case, the new Chief Justice followed the course of judicial deference, but violated my sense of judicial obligation to protect fundamental values by voting to allow the execution of a person with severe mental illness.³⁷

Although Professor Rosen initially questions all judicial decisions that invalidate legislative action, he subsequently qualifies his criticism of a counter-majoritarian role by asserting that "the Court should avoid unilateralism by not imposing constitutional visions that are actively and intensely contested by a majority of the American people."³⁸ Expressed in those terms, I have little disagreement. Along with Professor Rosen, I believe that such decisions are rare, and agree that *Brown* does not fit into that category. I also believe that in *Roe v. Wade*,³⁹ the Court's brief stand against the death penalty,⁴⁰ or opinions upholding affirmative action,⁴¹ should not be characterized as intensely opposed by a majority.

ring) (labeling Chief Justice Roberts's "faux judicial restraint" as "judicial obfuscation").

33. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

34. 438 U.S. 265 (1978) (Powell, J., concurring).

35. *Parents Involved*, 127 S. Ct. at 2788-800 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

36. For a comparison of contemporary Supreme Court opinions with Chief Justice Taney's opinion in *Dred Scott*, see William J. Rich, *Betrayal of the Children with Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 CORNELL L. REV. 419, 439-40 (2005) (noting that "[w]hen the current Court blocks the majority from addressing the racism that permeates our society, it returns to the same path [as *Dred Scott*]").

37. See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2863-74 (2007) (Thomas, J., with whom Roberts, C.J., Scalia and Alito, JJ. join, dissenting).

38. Rosen, *supra* note 1, at 6.

39. 410 U.S. 113 (1973) (establishing a right to choose to have an abortion).

40. See *generally* *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that the death penalty violated the Eighth Amendment). While opinion polls show that a majority of Americans support the death penalty, that should not be equated with intense opposition to the Court's decision, especially in light of international standards and contemporary evidence of conviction of innocent defendants. See Barry C. Scheck, *Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 602-03 (2006).

41. While the majority in Michigan over-rode the Supreme Court decision in *Grutter v. Bollin-*

The standard that Professor Rosen uses to limit the Court should not mean the Court needs to constantly align its decisions with public opinion.

Criticism limited to “intensely counter-majoritarian” decisions provides little helpful guidance to an assessment of judicial success. It means that Justices should almost never worry about decisions to protect unpopular groups. Decisions to limit the rights of criminal defendants will be unlikely to trigger intense majority opposition. The same is true of decisions protecting immigrants or communists (especially in the 1950s) or sexual minorities. *Plessy v. Ferguson*⁴² and *Buck v. Bell*⁴³ both easily survive the test of conformity that Professor Rosen provides. If none of these cases or categories fail Professor Rosen’s test for acceptable judicial action, however, what remains of his standard for measuring judicial success?

III. DEFINING JUDICIAL SUCCESS?

While clearly Professor Rosen prefers some Justices to others, his focus on temperament and democratic values lacks a coherent measure of success. At times, it appears the Professor is referring to success in forming a majority or even a consensus within the Supreme Court. Chief Justice Marshall was lauded for that achievement and presumably, Chief Justice Roberts will also be judged by that standard.

At other times, Professor Rosen measures success in terms of judicial leadership as exercised in particular by the respective Chief Justices. Justice Story gushed over Chief Justice Marshall,⁴⁴ and Chief Justice Rehnquist was Justice Ginsburg’s favorite boss.⁴⁵ These descriptions explain Professor Rosen’s point about temperament, but it is unclear whether the same qualities contribute to something that could be called success. While Justice Marshall consistently persuaded Story to join in his opinions, the same could not be said of Rehnquist’s affects on Ginsburg.

Professor Rosen also appears to define success in terms of the values he personally shares with the Justices he prefers. Successful judges are those who act with humility and defer to the political branches in the face of constitutional uncertainty. When measured in these terms, prophesy of success becomes self-fulfilling. The mere fact that Chief Justice Rehnquist often deferred to the majority, combined with the fact that his colleagues liked him, marks him as a success. Still missing, how-

ger, 539 U.S. 306 (2003), that did not necessarily reflect “intense” majority opposition.

42. 163 U.S. 537 (1896) (establishing the “separate but equal” standard).

43. 274 U.S. 200 (1927) (upholding state sterilization of “defective people”).

44. Rosen, *supra* note 1, at 2.

45. See Ruth Bader Ginsburg, In Memoriam, *William H. Rehnquist*, 119 HARV. L. REV. 6, 6 (2005).

ever, is a measure of success independent of these values.

As an alternative, I suggest measuring the success of Supreme Court Justices by their ability to identify and adhere to enduring values that guide subsequent generations. This alternative measure captures some of the same figures identified by Professor Rosen, while providing a distinctly different assessment of others. Chief Justice John Marshall again rises to the top. Marshall's decision in *Marbury* continues to be the measure of the judicial role in constitutional democracies.⁴⁶ The approach to federalism Marshall endorsed in *McCulloch* and *Gibbons* continues to attract majority support.⁴⁷ The values that Marshall voiced in cases like *Cherokee Nation* continue to mark the qualities of a progressive country.⁴⁸

What enduring democratic values did Chief Justice Rehnquist protect and promote? In his book, Professor Rosen asserts that Rehnquist "embraced the *Brown* decision" and "made no attempt to dismantle the civil rights revolution."⁴⁹ I read that history differently. Rehnquist was the first judge to break with the other eight Justices by opposing orders to desegregate Denver schools.⁵⁰ Chief Justice Rehnquist led the way to dismantling judicial oversight of school districts with histories of intentional discrimination⁵¹ and provided the framework for the recent decision to bar democratically elected majorities from addressing racial segregation within their communities even when the origins of segregation may be traced to prior acts of intentional racial discrimination.⁵² Chief Justice Rehnquist helped to turn the Equal Protection Clause into a weapon for the white majority to use against government efforts to aid minorities.⁵³ Furthermore, with few exceptions,⁵⁴ Rehnquist opposed

46. See James Crawford, *Marbury v. Madison at the International Level*, 36 GEO. WASH. INT'L L. REV. 505, 505-06 (2004).

47. See, e.g., *United Haulers Ass'n. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797 n.7 (2007) (noting congressional power to limit state exclusive franchises); *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1566 (2007) (referencing the *McCulloch* Court's support of a national banking system); *Gonzales v. Raich*, 545 U.S. 1, 29 n.38 (2004) (rejecting arguments of Justice Thomas that would limit deference to congressional power).

48. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993) (concluding that "the interpretive legacy of John Marshall better resonates with the fundamental normative and institutional problems of federal Indian law today than does the current Court's considerably more grudging approach").

49. ROSEN, *supra* note 2, at 187.

50. *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 254 (1973) (Rehnquist, J., dissenting).

51. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992) (limiting judicial oversight).

52. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

53. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (striking down city policies that favored minority contractors in a context where they were under-represented); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (protecting white teachers with seniority in a five to four decision).

54. Rehnquist sided several times with more liberal Justices in cases involving employment rights of women. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

broad statutory interpretations intended to protect civil rights.⁵⁵

As Professor Rosen notes, Chief Justice Rehnquist enthusiastically defended executive power,⁵⁶ and throughout his career promoted “core conservative values”—“states’ rights and convicting criminals.”⁵⁷ In the context of states’ rights, the Chief Justice consistently asserted his authority against the majority in Congress,⁵⁸ and attempted to shape the law to conform to his vision, denying compensation to victims of unlawful state actions.⁵⁹ I have yet to be convinced, however, that this legacy belongs on a par with those of our great Supreme Court Justices.⁶⁰

IV. CONCLUSION

I appreciate Professor Rosen’s efforts to link temperament to judicial success; my primary hesitation lies with the implication that this quality should be more closely tied to judges than to effective performance by others and in particular to the performance of lawyers and law professors. Increased awareness to interpersonal intelligence and intrinsic motivation may help us better understand important components of success that the legal academy often ignores.

I agree with the link that Professor Rosen draws between “democratic constitutionalists” and judicial success, but reject the proposition that judicial deference is necessarily a meaningful measure of the former. Even as “democratic constitutionalists,” Supreme Court Justices play a critical counter-majoritarian role, curbing the isolated or temporary passions of a majority that turns its back on enduring constitutional values.

Finally, I am left searching for Professor Rosen’s measure of judicial success and must question any measure of success that claims to be “neutral” or that disregards commitment to my understanding of enduring constitutional values. Our Constitution is better than that, and we should expect more from our judges.

55. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 657 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (seeking to limit Americans with Disabilities Act coverage for individuals with HIV); *Wards Cove Packing Co., v. Antonio*, 490 U.S. 642 (1989) (narrowly construing Title VII of the Civil Rights Act of 1964); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (finding no sex discrimination in employee insurance plans that denied coverage for pregnancy related disabilities).

56. ROSEN, *supra* note 2, at 188.

57. *Id.* at 193.

58. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting) (seeking to block application of the Fair Labor Standards Act to state employees).

59. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (finding states immune from Americans with Disabilities Act claims).

60. In his book, Rosen pairs Chief Justice Rehnquist with Justice Scalia as “two faces of conservatism.” ROSEN, *supra* note 2, at 179-220. Where that is the comparison, it becomes easier to accept a relative description of Rehnquist as the more successful of the two. It still fails, however, to provide us with a broader measure of success.