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THE PARTISAN

A Talk With Justice Rehnquist

By John A. Jenkins 128P

WILLIAM HUBBS REHNQUIST, THE 89th Associate Justice of the United States Supreme Court, sits in his ornate office within the marble-halled Court, and ponders briefly whether he would consider himself a "partisan."

"In this sense: I have written opinions and joined opinions that have said that the Fourth Amendment* should be construed in this way. I've written opinions and joined opinions that say the establishment clause† of the Constitution should be construed in this way. Now, I've thought those things through. I think those opinions are right. And I want to see that version of the law applied when the case comes up. If that makes me a partisan, certainly I'm a partisan. But I don't think that distinguishes me from most of my colleagues."

Yet, on a Court that has lacked powerful personalities and a firm sense of direction, Justice Rehnquist stands out. For a decade, the Court's majority had appeared unsympathetic to Justice Rehnquist's entreaties from the right. Recently, a new, more conservative majority has begun to emerge, with the Justice at its ideological center. The conservative bloc is composed of Justices Rehnquist and Sandra Day O'Connor and Chief Justice Warren E. Burger, but two other Justices, Byron R. White and Lewis F. Powell Jr., considered moderates, frequently provide the crucial fourth and fifth votes. In a relatively short span of time, their majority decisions have curbed civil liberties, the authority of the Federal Government and the rights of accused criminals.

Justice Rehnquist has perhaps delivered more speeches than any of his brethren except for Chief Justice Burger, and he has written more than his share of biting dissents. But aside from a small interview for a recent ABC-TV documentary on the Supreme Court (for which, unlike this article, he was allowed to approve the answers), Justice Rehnquist had never granted an interview in which he has talked about his own judicial philosophy and his tenure on the Court.

"I just wanted a chance to put my two cents in," he said, explaining his decision to be interviewed for this article. Justice Rehnquist spoke to me for nearly three hours in his office in two separate sessions and later by phone. In breaking his silence, he emerged by his statements as a Justice who is directed in his opinions not so much by *stare decisis*, past judicial decisions, as by an inner compass that almost unfailingly evolved from a moral vision developed long ago.

In a wide-ranging discussion, Justice Rehnquist talked about the President's prerogative to remake the Court and the Republican Party platform on the criteria for Court selections. He described his relationship with his colleagues and taunted his critics within academia and the press. Moreover, Justice Rehnquist affirmed his viewpoint that the Court's role should be circumscribed.

Justice Rehnquist's role as the Court's conservative conscience has taken on new importance during a term when the Court will decide at least 15 important First Amendment cases. Also at issue, among other things, is the constitutionality of an Alabama law mandating a moment of silence in the public schools and a Connecticut law requiring that employees be given a day off for their sabbath. Warren Court precedents could fall, as they did last term when Justice Rehnquist wrote the 5-to-4 decision in *New York v. Quarles*, weakening the 1966 *Miranda* ruling by permitting a public-safety exception to the rule that suspected criminals be read their rights before questioning.

This term, Justice Rehnquist and the Court's increasingly conservative nature continue to have an impact. Justice Rehnquist voted with the majority in a 6-to-3 decision in *New Jersey v. T.L.O.*, holding that Fourth Amendment requirements for search warrants do not apply to searches of students by school officials. His 7-to-2 opinion in *Wainwright v. Witt* will make it easier for prosecutors to exclude from capital cases prospective jurors who oppose the death penalty.

However, a recent important case upset his 1976 opinion upholding state's rights in *National League of Cities v. Usery*. Justice Rehnquist, who dissented with Justices Powell and O'Connor, and Chief Justice Burger, stated he was "confident" the principle will "in time again command the support of a majority of this Court."

"He's the one with the agenda," asserts A. E. Dick Howard, a law professor at the University of Virginia. "He has claim to the leadership role on the court."

Lawrence H. Tribe, a law professor at the Harvard Law School, is more speculative. "As he moves closer to the center as the Court moves right, his voice could become weaker against equally strong intellects," he says. "On the other hand, he could have an enormous impact, particularly if he were elevated to Chief Justice. That has happened rarely because it can cause terrible friction with the other Justices."

If, as Justice Rehnquist insists, he has not changed since he was appointed to the Court in 1971, then the new working majority appears to have moved more closely into line with a national mood embodying his views and those of President Reagan, who likely will have a historic opportunity to shift the Court further right during the next four years. Five of the Court's members — Justices Powell, William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun, and Chief Justice Burger — are 76 and older.

"If the President wanted to convert it into a thoroughbred conservative Court — it's the same President appointing five people — he could certainly do that," Justice Rehnquist observes dryly.

HIS THREE LAW CLERKS CALL HIM "THE Boss." He is a bit heavier, his hair thinner and

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* The Fourth Amendment guarantees the right from unlawful searches and seizures.
† The First Amendment guarantees freedom of religion, speech, press and right of petition.

grayer, the brown eyeglasses thicker than when he first arrived. The smile is quick and genuine and often followed by a wry comment or clever rejoinder. He speaks slowly and with a hint of a stammer, choosing his words carefully, occasionally pausing 15 seconds or more to ponder a question before answering.

Though Justice Rehnquist granted these interviews, he said he was doing so "under duress." His answers revealed much about his personality and philosophy, but they were also reflective of a cagey lawyer's literalism and shrewdness. Replies were confined to the specific question; information was seldom volunteered. Sometimes he feinted with a plea that he simply didn't understand the question. The Justice was particularly reticent about matters he considered personal — names of the judges he plays poker with, details about his family. "I'm not going to write your story for you," he said.

Asked if he feels he had changed, growing any in his 13 years on the Court, Justice Rehnquist is characteristically precise. "You equate change with growth, then," he says. "I think in a sense there has been, and maybe this is something that all members of collegiate courts go through, but when I first came here I had a feeling that these were kind of very critical jurisprudential battles in many of these cases. And, you know, I would get very kind of blue if I was in the minority a good deal, and feel very pleased if I was in the majority.

"I think I see it quite differently now from the perspective of 13 years. That I used to think, you know, if there were an expression in a footnote in an opinion that I disagreed with, that we're going to be stuck with that footnote for years. Well, it turns out that any time five people decide that we're not stuck with the footnote, we're not stuck with the footnote! And things have a way of evolving on much more of a common-sense reaction to things than a strictly doctrinal approach, where A follows from B from C.

"I think I tend to view the process now as more of an institutional one, that there probably are things to be said on both sides of issues that perhaps I didn't always think there were. And a feeling that the institution has produced pretty well for 200 years, and it's undoubtedly going to survive very well without me or any of my colleagues in the future."

In his early years on the Court, he often stood alone as a dissenter. While the other Justices imposed their will, Justice Rehnquist established himself as a counterweight to judicial activism.

"If you think of a judicial conservative as one who generally inclines against broad interpretations of constitutional provisions, I think I am a judicial conservative," he explains.

"I'm a strong believer in pluralism," says Justice Rehnquist, when pressed to classify himself politically. "Don't concentrate all the power in one place. And, you know, this is partly, I think, what the framers also conceived. So, it kind of is the line where political philosophy joins or at least borders judicial philosophy. You don't want all the power in the Government as opposed to the people. You don't want all the power in the Federal Government as opposed to the states."

Justice Rehnquist professes not to know the origins of his conservatism. "It may have something to do with my childhood," he says sarcastically. It is a defensive jibe at any who might comb his past seeking insight to the present.

The clues are there. He and his sister, Jean, were raised in Shorewood, Wis., a peaceful, upscale well-to-do Milwaukee suburb. In constrast to the mansions bordering Lake Michigan, the William B. Rehnquists lived in a modest tan brick house. His father, a first-generation American born of Swedish parents, was a wholesale paper salesman who had not attended college. His mother, Margery, a housewife and civic activist, was proud of her University of Wisconsin degree and her fluency in five foreign language. She earned money as a freelance translator for local companies.

Dinner in the Rehnquist household was a time for spirited political discussions, and the children learned respect for the Republican views of Alf Landon and Wendell Willkie, Herbert Hoover and Robert A. Taft. Young Bill became the feature editor of the all-white Shorewood high school paper and soon used his new forum on the editorial page to make the trenchant observation that "the recent windy weather may not have been due entirely to weather conditions. Some of the self-styled news 'interpreters' have been doing a little too much spouting of their own. There is no fault to be found with straight news broadcasts; they perform a valuable public service. But thorns to the 'commentators,' the overly dramatic Gabriel Heatter, the pompous H.V. Kaltenborn, and Walter Winchell with his corps of tattlers."

World War II loomed large — Pearl Harbor had just been bombed — and so young Rehnquist volunteered to be a civil-defense officer in his neighborhood and was given responsibility for a network of block captains who were to report to the local police chief any crimes, draft dodging or, according to his school paper, "subversive activities which might lead to the sabotaging of our national unity." He was all of 17.

Later, he won a scholarship to Kenyon College in Ohio, but attended for just one year before joining the Army air corps as a weather observer in 1943. Hostilities had ended by the time he was sent to the North African stations of Cairo, Tunis, Tripoli and Casablanca. When he returned from Africa, he knew he didn't want to suffer through any more frigid winters. "I wanted to find someplace like North Africa to go to school," he recalls. He used his G.I. Bill benefits to attend Stanford, in Palo Alto, Calif., and when they ended, he ran the breakfast program in the university dining hall. "I had so many other part-time jobs, I can't remember them all." He majored in political science and graduated Phi Beta Kappa in 1948.

In the next two years, he received master's degrees from Stanford and Harvard in political science, returning to Stanford for his law degree and graduating first in his class in 1952. Such impressive credentials earned him a Supreme Court clerkship with Associate Justice Robert H. Jackson, a conservative.

"How do you get your views?" he muses. "I don't think anybody has any idea. Obviously, there was a long part of my life when I was in high school and in the Army that I just simply didn't give any thought to those things. But I can remember arguments we would get in as law clerks in the early 50's. And I don't know that my views have changed much from that time."

During his 18-month clerkship, the Court, which had legitimized "separate but equal" public education for black children with *Plessy v. Ferguson* in 1896, confronted anew the issue of racial segregation. The 28-year-old clerk wrote a memo to Justice Jackson in 1952 declaring that separate but equal schools for whites and blacks, still legal then, were "right and should be affirmed." He wrote: "To the argument made by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are." In 1954, with the landmark *Brown v. Board of Education* decision, the Court would rule that segregated public schools were unconstitutional.

Years later, when that memo was made public shortly before the 68-to-26 Senate vote on his confirmation to the Court, Justice Rehnquist, then head of the Office of Legal Counsel of the Justice Department under President Nixon, maintained that the views were Justice Jackson's, not his own.

New evidence discovered by Justice Jackson's biographer, Prof. Dennis J. Hutchinson of the University of Chicago, appears to contradict that explanation. Professor Hutchinson, after inspecting all of the Justice's papers from the Court — "every box, every detail" — says he found no other instance during Justice Jackson's 13 years on the Court when, as Mr. Rehnquist the Court nominee insisted happened, he asked a law clerk to prepare a memo for conference discussion summarizing the Justice's views. "An absurd explanation," Professor Hutchinson concludes.

Professor Hutchinson also discovered two additional Rehnquist memos on race relations. In one, the law clerk endorses as being "right to a lawyer, rather than a crusader," an appeals-court ruling in *Terry v. Adams* that effectively denied blacks the right to vote in a Texas Democratic club election that had determined every countywide race since 1889. (The issue was whether the club was purposefully designed to exclude blacks from voting; registered white voters were automatically members.)

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In the other memo, written after the Court had agreed to hear *Terry v. Adams*, Mr. Rehnquist told Justice Jackson: "The Constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time the Court faced the fact that the white people in the South don't like the colored people; the Constitution restrains them from effecting this dislike through 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. To the extent that this decision advances the frontier of state action and 'social gain,' it pushes back the frontier of freedom of association and majority rule. Liberals should be the first to realize, after the past 20 years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally desirable values that are being trampled on in the process."

Justice Jackson rejected that argument and joined seven other Justices in finding that blacks had been unconstitutionally denied voting rights; in 1954, he also joined the *Brown* ruling.

Asked if his views on *Brown* have changed since that time, Justice Rehnquist replies, "I think they probably have." He says he now accept *Brown* as the law of the land, yet he still maintains: "I think there was a perfectly reasonable argument the other way." As to the memos discovered by Professor Hutchinson, he demurs, refusing to say whether he agrees today with what he wrote then. "Whatever I wrote for Justice Jackson was obviously a long time ago, and to kind of integrate it into something I'm telling you now, I find rather difficult."

AFTER HIS CLERKSHIP, William Rehnquist set up a law practice in Phoenix. On his way west from Washington, he stopped in Fort Smith, Ark., to examine old court records and newspaper clippings on an apparently favorite historical figure, Isaac C. Parker, the notorious "hanging judge" who meted out 164 death sentences as a Federal judge in the Western District of Arkansas from 1875 until 1896. For 15 of those years, until an Act of Congress in 1891, no right of appeal was authorized.

"I gathered some fascinating minutiae with a view to eventually writing a biography," recalled Justice Rehnquist in a speech two years ago at the University of Arkansas. "Judge Parker's trials were swift, and there was no appeal, but the fundamentals of due process were undoubtedly present."

He has high praise for the English practice of allowing few appeals from trial-court judgments in criminal cases, and of punishing those whose appeals are later deemed frivolous. Due process is important, he says, but society's "moral judgments of its members" must also be vindicated. He chafes at the delays in executions caused by what he views as excessive appeals. Last year, he made the bold suggestion that the automatic right of appeal be ended in Federal civil cases.

As a lawyer in Phoenix, he continued his conservative activism. In 1964, he opposed a local public-accommodations law ("You are talking about a man's private property," he stated, testifying as a private citizen) and, in 1967, an integration plan for the Phoenix public schools. He became friendly with another politically active Arizonan, Richard G. Kleindienst, and when President Nixon appointed Mr. Kleindienst Deputy Attorney General, Mr. Rehnquist was hired as head of the Office of Legal Counsel. The future Justice screened the President's Supreme Court nominees — including Justices Burger and Blackmun, as well as Clement F. Haynsworth and G. Harrold Carswell, who were rejected amid some notoriety. In 1971, he himself was nominated.

"I came to the court sensing, without really having followed it terribly closely, that there were some excesses in terms of constitutional adjudication during the era of the so-called Warren Court," Justice Rehnquist says. "And I felt that I probably would disagree with some of those decisions. I was in private practice; I didn't pay a lot of attention to these things. But the couple of cases I did pay some attention seemed to me to be hard to justify in terms of constitutional adjudication.

"So I felt that at the time I came on the Court, the boat was kind of heeling over in one direction. Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way."

The result in those early years was a plethora of acerbic one-man dissents — in cases where he opposed school desegregation, women's rights, civil-service jobs for aliens and health care for the poor, among other issues. So frequently was he the *only* dissenter among the nine Justices that his law clerks in 1974 presented him with a small Lone Ranger doll that a decade later remains proudly on the mantel above his office fireplace. "They referred to me as the 'lone dissenter,'" he chuckles.

"Even in lone dissent," observes Professor Tribe of Harvard, "he has helped to define a new range of what is possible."

An example of that occurred in Justice Rehnquist's 1976 *National League of Cities* case, generally considered to be the high-water mark of his efforts to judicially limit Federal power over the states. However, the decision was overturned last month with the 5-to-4 *Garcia v. San Antonio Metropolitan Transit Authority* ruling, effectively enhancing Federal power over the states. The issue in *National League of Cities* was whether the Federal minimum-wage law applied to all state and local government employees. During the prior term, a similar wage issue had been decided in favor of the Federal Government. Justice Rehnquist had been the sole dissenter, arguing the decision violated state sovereignty — a view of federalism repudiated by the Court decades earlier during the New Deal. Revisiting the issue the following year, four other Justices accepted this time the reasoning of his earlier dissent and agreed with his arguably disingenuous conclusion that "this Court has never doubted that there are limits upon the power of Congress to override state sovereignty."

His many critics in academia often accuse Justice Rehnquist of being disingenuous in his opinion writing. Indeed, in more than a few instances, Justice Rehnquist has buttressed an opinion or a dissent with his own perception of the Constitution's "tacit postulates," or with a version of history "too well known to warrant more than brief mention."

"If I thought it well founded in the sense that I do things in a more disingenuous way than other appellate judges, it would bother me," Justice Rehnquist says, referring to his critics. "But I really don't, to the extent I understand it. I don't think it is well founded.

"In a dissenting opinion, that's really the purpose of a dissent: to lay the seeds for, hopefully, a change of doctrine."

To Justice's Rehnquist's mind, "The suggestion that I am disingenuous in going about the process of adjudication could be made equally well about my colleague Bill Brennan. But I think there's a great deal more sympathy in the law-school faculties for the results he reaches than for the results I reach.

"On occasion, they write somewhat disingenuously about *me!* As I recall, there was a poll taken of law-school faculty members in the 1972 election. And 85 percent of them were going to vote for George McGovern, in an election in which he carried one state! You have to say that, based on the law of averages, the author is going to start with something of a predisposition against a lot of my ideas. Because I do think that the political carries over some to the judicial philosophy."

IF JUSTICE REHNQUIST seems far less shrill in his writing today, it is because he has been finding himself far more frequently in the majority. In part, it is because Justice O'Connor, President Reagan's first appointee to the Court and an old friend and Stanford law-school classmate of Justice Rehnquist, quickly became a reliable third vote for the conservative bloc. Justice White, a Kennedy appointee, "now joins the right often enough to be a predictable fourth," comments Professor Howard of Virgina. "When you have four solid votes, it's fairly easy to pick up the fifth," and Justice Powell often provides that crucial vote.

Of 28 cases decided last term by a vote of 5 to 4, Justices Powell and White and the three conservative Justices comprised the majority on nine occasions. Justice Rehnquist was in the majority in 17 of the 28 of those close cases, joined by Chief Justice Burger in all but one of them and by Justice O'Connor in all but two.

In Justice Rehnquist's view, the Court now "may be heeling partly because of my own votes. I think the law dealing with the constitutional rights of accused criminal defendants seems to me to be more evenhanded now than it was when I came on the Court. On the other hand, other people may feel, 'Well, it was fine when you came on the Court and now it's heeling the other way.' But, you know, you can't get

the subjective out of those perceptions."

Although his critics argue that he is a judicial activist, but with a conservative agenda, Justice Rehnquist says his legacy on the Court is "a sense of judicial restraint, for want of a better word.

"We're carrying out a constitutional function that is a very delicate one. Every time we say that a law of Congress is unconstitutional, that a state law is unconstitutional, we are overriding a democratically reached decision. Now, the Constitution requires us to do that, but it requires us to do it only with great caution and circumspection."

Because the Supreme Court is so "thoroughly *undemocratic*," says Justice Rehnquist, he believes its role should be circumscribed. In a view as much idealistic as partisan, he says that although he would want to affect the course of history, that it is only a "little stream of history that flows by this court. It's not a main channel at all."

At a later point, he returned to this philosophy: "Who was it, Oliver Goldsmith, who said, 'How small, of all the ills that human hearts endure, that part that laws or kings can cause or cure.'? I think that's just very, very true."

Comparing the Supreme Court under Chief Justice Burger with Chief Justice Warren's Court, Justice Rehnquist believes its impact today has been diminished. "I don't think that the Burger Court has as wide a sense of mission. Perhaps it doesn't have any sense of mission at all. In the area of constitutional rights of accused criminal defendants, the Court has called a halt to a number of the sweeping rulings that were made in the days of the Warren Court. I don't know if you can describe that as a sense of mission or not.

"Some of the religion clause decisions and some of the equal-protection clause decisions of the Warren Court went quite far, and I think that the Burger Court really comes up with mixed results in that area.

"I don't know that a court should really have a sense of mission. I think the sense of mission comes best from the President or the House of Representatives or the Senate. They're supposed to be the motive force in our Government. The Supreme Court and the Federal judiciary are more the brakes that say, 'You're trying to do this, but you can't do it that way.' The idea that the Court should be way out in front saying, 'Look, this is the way the country ought to go,' I don't think that was ever the purpose of the Court." Decisions like *Brown*, *Miranda* and *Roe v. Wade* (legalizing abortion by upholding a woman's right to privacy) Justice Rehnquist says, are exceptions that simply prove the rule.

The judicial litmus test embodied in the 1984 Republican Party platform is a response to the activism Justice Rehnquist claims to eschew. The platform assails the "elitist and unresponsive Federal judiciary" and establishes a moral imperative for new Federal judges: They must support "traditional family values" and oppose abortion.

"If the President thinks that an appointee ought to have particular views, I think that's the President's prerogative," Justice Rehnquist says. "You know, the Presidents who've tried to appoint people with a particular point of view — people like Lincoln" — who made five appointments — "or Franklin Roosevelt" — who made nine — "have often only been partly successful, because the judge is apt to sit long beyond the tenure of the President and to be deciding questions that really were never even thought of at the time he was appointed."

Justice Rehnquist, an American history buff, has studied past Presidential attempts to pack the Supreme Court. Just three weeks before President Reagan's re-election, Justice Rehnquist spoke at the University of Minnesota Law School, downplaying the success any President can have in remaking the Court. When a justice "puts on the robe," he contended, he puts aside partisanship. The theme, nothing new for him, had surfaced in a speech nine years earlier. Yet, there was more than a little irony in Justice Rehnquist's pre-election timing of his speech, and he inadvertently made the point he was trying to disprove: Even 13 years after his appointment, a Supreme Court Justice explicitly chosen for his doctrinaire conservatism was still a partisan, still sensitive to the political fray.

"Contrary to what he said on the eve of the election, the President can strongly influence the direction of the Court, and the appointment of Justice Rehnquist is in itself an example of that," Professor Tribe observes.

According to Professor Howard of Virginia, Justice Rehnquist's thesis that Presidents are often disappointed in their nominees loses its validity in the contemporary context. "Eisenhower was disappointed with Earl Warren, and White certainly bears little ideological similarity to Kennedy," Professor Tribe says. "But since the nomination of Abe Fortas to be Chief Justice, Congress and the White House have been much more sensitive to the ideology of a nominee.

"We're moving from a period where politics is no longer the name of the game, and ideology is what's important in a judicial nominee. We're seeing this in the people that are mentioned most frequently as candidates for the next Supreme Court vacancy: Robert H. Bork and Antonin Scalia" — judges on the United States Court of Appeals in Washington — "and Richard A. Posner" — a judge on the United States Court of Appeals in Chicago. "They aren't politicians whose views might change when they put on the robe. They are people who already have very well-defined ideologies."

All three judges are former law-school professors (Judge Bork taught at Yale, Judges Scalia and Posner at the University of Chicago) who are forceful advocates of judicial restraint and laissez-faire government. All were given appeals-court judgeships by President Reagan "so he could have one last look," asserts Yale Kamisar, a professor at the University of Michigan law school. "They would be much less unpredictable than Supreme Court nominees historically have been. They're established conservative voices who've already demonstrated, as lower court judges, how they'll decide certain cases."

Justice Rehnquist says he sees virtue in diversity and would be loath to have eight colleagues who marched in lock step with him. "Anything like a one-man or, I suppose in this day, a one-person Supreme Court would be an incredibly tyrannical thing," he remarks.

"Obviously, I don't have any clones around. As Bill Douglas used to say, 'The person I want appointed is someone who thinks just like me!' You don't want eight of those people appointed, but, like all of my colleagues, I would welcome two or three! If there were two or three people like me — I've been in dissent in a number of cases — perhaps some of those dissents would then become court opinions. That's a very iffy business, though."

Despite the likelihood of substantial turnover on the Court, Justice Rehnquist says he gives little thought to the prospect for change. "My nature is, I live one day at a time and don't look far into the future. I just kind of wrestle with what's at the front door now and don't worry a lot about what's going to show up tomorrow."

To live in the present means "there's literally no time for thinking about past decisions: 'Was I right or was I wrong?' You'd simply go nuts if you did that." No opinion he has written stands out to him as being particularly noteworthy or memorable — "they're all kind of a long, gray line."

JUSTICE REHNQUIST IS A quick worker who shuns the customary long, bench memos from his clerks in favor of short, brisk walks where cases can be discussed and issues pinpointed, and he demands the same measure of alacrity from his clerks: first drafts of opinions must be completed in 10 days. "He likes to get his work done and get home," explains a former clerk, Ronald L. Blunt, now counselor to the Attorney General. The Justice drives a blue Volkswagen Rabbit to the Court from his Arlington, Va., town house (a large home in suburban McLean was recently sold), arriving by 9 A.M. and leaving most days by 3 P.M.

For work, he prefers split-leather desert boots, casual slacks and a tweed sport coat to more formal attire. He smokes an occasional low-tar cigarette. He is a trivia buff who often matches wits with other Justices by passing questions through the interoffice mail.

In 1983, Justice Rehnquist, laying claim to his reputation as the Court's resident practical joker, decided to tweak his brethren by circulating a mock attack on a lone dissent prepared by Justice Marshall. Already

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alerted by Justice Rehnquist to the joke, Justice Marshall played along, feigning displeasure.

When the Rehnquist memo hit the other chambers, the first reaction was puzzlement, then anger among some clerks when Justice Rehnquist's minions assured them "The Boss" was, indeed, serious about publishing his criticism of Justice Marshall in the official United States Reports, the bound volume of Court decisions. From the clerks of Chief Justice Burger and Justice Blackmun came word that their superiors were discussing ways to head him off. Justice Rehnquist decided the joke had gone far enough, and he circulated a "Dear Thurgood" letter. The occasion for his magnanimity in withdrawing his statement, he wrote with mock seriousness, was an obscure Swedish holiday that he, a Swedish-American, celebrated each year by doing a good deed.

In his office, surrounded with portraits of Justices Jackson, John Marshall, Oliver Wendell Holmes and Chief Justice Charles Evans Hughes and a photograph of his former boss in the Nixon Administration, Attorney General John N. Mitchell, Justice Rehnquist recalls his first impression of the Court. "I can remember the day I moved over here from the Justice Department. I think it was three or four days before Christmas in 1971. And I brought my secretary and one of my special assistants from Justice who was going to be a law clerk.

"We came over here, and it was kind of a gray afternoon, and everyone had left for Christmas. And I just felt, literally, like I'd entered a monastery when I came over. There was nobody around these long corridors, and there was some sort of an energy crisis and only a couple of lights were on.

"Everybody who comes here probably feels the constraints of the place," he says. "I think the Court is remote. I have my own ways of trying to get away from the monasticism. I'm sure my colleagues have theirs. The ways probably aren't adequate. I visit law schools and make speeches and go to classes and have question-and-answer sessions. I will occasionally give a speech to a bar association. I take a painting class at night school, where I mix with lots of people who are totally different from the kind of people I mix with regularly. And I'm thinking about maybe writing a book about the Court.

"You just have to keep anchors to the outside world, because a Justice of this Court could do all of the work he has to do in discharge of his oath of office without ever having to leave this building. The chambers are here, the courtroom is here, the library is here, the cafeteria is here. There's a gym and an exercise room. And, you know, it's just a two-dimensional world if you let that happen to you."

Last year, he traveled unannounced to Richmond, Va., to preside over a two-day trial — the first time in this century that a sitting Justice had done so. "To refresh myself," he explains. The case had been filed by two police officers who claimed their rights were violated when they were suspended from the force following their testimony about alleged police brutality. A six-person jury awarded the two damages totaling $26,500.

"It reinforced my perspective that I had a little bit from my days as a trial lawyer," Justice Rehnquist says, "and that was the very three-dimensional world in which trial lawyers and trial judges live."

When Justice Rehnquist arrived at the Court, Justice William O. Douglas encouraged him to maintain an active life outside the Court. Ideologically, the two men were at polar extremes: Douglas the iconoclastic liberal, Rehnquist the unreconstructed conservative. Yet each in his own way exemplified the Western ethic of rugged individualism, and there was a personal bond during their time together on the Court — from Justice Rehnquist's swearing in on Jan. 7, 1972, until Justice Douglas's retirement on Nov. 12, 1975. Justice Douglas died in 1980.

"I would be flattered in many respects if I thought there was a comparison, because I think Justice Douglas was a remarkably able and interesting person," he says. "Maybe it's just my own image of myself, but I think of Justice Douglas in his last 10, perhaps 15 years here as being very much of an iconoclast. You know, really not caring a great deal whether anybody else agreed with him or not. In fact, sometimes we used to say at conference that we thought he was disappointed if he was in the majority, because then he would have to write something that he would have to get other people's agreement with, whereas if he were all by himself he could say exactly what he wanted!

"I don't think of myself as being that way. I still think that one's major contribution comes by putting something together yourself or joining something someone else puts together that commands a court opinion."

Justice Douglas was 40 when President Roosevelt appointed him in 1939; Justice Rehnquist was 47 when he came to the Court. "Bill mentioned to me that when he looked at Rehnquist he saw himself," recalls Cathleen Douglas Stone, the widow of Justice Douglas and now a Boston lawyer. "He felt very sympathetic to Rehnquist, encouraged him to take up hobbies, and spent a lot of time with him, giving him the observation of Bill's own life and what it was like being a young man on the Supreme Court. When you come to the Supreme Court, the door closes. That has a different impact on a young man as opposed to, say, a man of 65. Bill said, 'You can become a dry husk of a man.' "

"It suits me better at age 60 than it did at 47," Justice Rehnquist says of the Court. "At age 60, the life tenure looks good, and I know that if I were a senior partner in a law firm, with a nice corner office and views out both windows, a bunch of young people would be walking by wondering when I was going to go on semiretired status so they could have the office."

He spoke of the possibility of retirement at 65. "I would love to get a new job when I am age 65 and could retire," says Justice Rehnquist, who earns $100,600 a year and whose net worth is less than $150,000, aside from real estate. "But those things just don't come along very often. I don't have any very good prospects except for staying here until I retire, and then probably doing a little judging, and a little teaching, or something like that."

The Justice's interests include oil painting; stamp collecting; vacationing, occasionally with his three grown children and their spouses at his second home in Greensboro, Vt., and reading aloud with his wife, Natalie ("We've covered probably 20 books in the last year and a half or so; we're just finishing up William Dean Howells's 'The Rise of Silas Lapham' ").

Once a week, he plays tennis with his law clerks. He once had to give up the game several years ago because of a back problem that only became known to the outside world when he was hospitalized after becoming addicted to the powerful pain-killing drug Placidyl. Although his back still bothers him — during our interview the condition prevented him from moving a coffee table — he will discuss neither that episode nor the present state of his health, except to testily say: "I'm perfectly satisfied I can do my job. I suppose lots of unhealthy people are also perfectly satisfied they can do their jobs. But I'm going to stick by what I said." He also allows that he was bothered "a little bit" by the publicity that attended his illness: the descriptions of his slurred speech on the bench, the awkward slowness with which he sometimes spoke. "But if you're bothered by what the press says about you, you're just not cut out for this job."

Of the newspaper editorials that have been critical of him, Justice Rehnquist observes: "They've bought the newspapers. They're entitled to express their views." He adds a pungent coda about The New York Times and The Washington Post: "They have a particular point of view. If they want to be a house organ for the A.C.L.U., that's their privilege."

What qualities should a Supreme Court Justice possess — what should a President look for? "I think you have to be interested in the law, as kind of a discipline," Justice Rehnquist says. "I think you can be a successful lawyer without having any great interest in the law. I'm not sure that you could be a successful appellate judge without having an interest in the law. I think you also have to enjoy writing. And you have to enjoy analyzing things.

"But, over and above that, you have to be able to stand on your own two feet. I think it was Cicero who said about someone, 'He saw life cleary and he saw it whole.' And you have to have a little bit of that in you. Not being bamboozled by currents, trendy ideas, that sort of thing. . . . It just captures something. Not easily conned. Not awash in current trends of public opinion." ■

Has the 'Era of Moderation' Returned?

The Supreme Court Slows Its Conservative Shift

By David Lauter
National Law Journal Staff Reporter

WASHINGTON — For the Reagan administration and its conservative allies at the Supreme Court, this was the year that wasn't.

The term began to a chorus of predictions that, on the evidence of the prior year's decisions, the long-anticipated consolidation of the court's conservative majority finally had been accomplished.

Inside The Supreme Court

The solid bloc of conservative votes that had supplied the administration with so many victories in the 1983-'84 term would do even more this year, conservative commentators predicted. It didn't happen.

There is no way to know why the high court's tone and actions were so different from last year, why this term the justices tended to follow the unpredictable moderate conservatism that has been the Burger Court's hallmark for more than a decade.

"It is possible," said former Solicitor General Rex E. Lee, that "there was some reaction" by some justices against the perception that the court had adopted a firm conservative agenda. On the other hand, Mr. Lee and other lawyers familiar with the court suggested, the shift may simply have been a matter of the "luck of the draw."

But while the "whys" of the court's apparent shift are unknown, the "who" is clear: Justices Harry A. Blackmun and Lewis F. Powell Jr., the court's two men in the middle.

Swing Vote

Justice Powell, who missed 54 cases last winter while recuperating from prostate-cancer surgery, cast only six dissenting votes all term. He was in the majority in 14 of the court's 18 decisions by 5-4 votes, and in eight cases he missed, the remaining justices deadlocked 4-4.

"I cannot think of a term in which Justice Powell's role as a swing was more evident and more central," commented Prof. A.E. Dick Howard of the University of Virginia School of Law.

Last term, when he also provided the key vote on many 5-4 decisions, Justice Powell joined Chief Justice Warren E. Burger in nearly every opportunity he had, 89 percent of the opinions in cases they both heard. He joined Justice William J. Brennan Jr., the court's leading liberal, only 59 percent of the time.

This term, Justice Powell joined Chief Justice Burger far less often, only 77 percent of the time, and joined Justice Brennan 64 percent of the time — more often than in any other year since he joined the bench.

Justice Blackmun shifted his votes to the liberal side even more strongly. Last year, he voted with Chief Justice Burger more often than any other year since his early days on the bench, when the two were nicknamed the "Minnesota twins."

This term, his voting with the Chief Justice dropped off markedly, and Justice Blackmun returned to voting more often with Justice Brennan than with the chief justice, a pattern he first set in the 1981-'82 term, when Justice Sandra Day O'Connor joined the court.

'Radically Misguided'

The votes of those two justices establish, as Harvard Law Prof. Laurence H. Tribe says, that "all of the suggestions to the effect that we already have a Reagan court are radically misguided." The court, says Professor Tribe, is engaged in an effort at "centrist preservation."

At the same time, as litigants and court watchers begin to think about next fall's cases, the record of Justice Powell's key position, together with his health problems during the term, likely will heighten the speculation about the impact another Reagan-administration appointee could have. The last two weeks of the term, as is typical, saw a flurry of 5-4 votes, each one potentially reversible should death or resignation bring a new member to the high court.

The most dramatic of the 5-4 votes came in the field of religion. The Reagan administration ambitiously had asked the court in a series of four major cases to rethink its establishment clause precedents and adopt a new theory legitimizing government programs that "accommodate" majority religious beliefs. The cases were argued in the fall, and the court kept observers waiting anxiously until mid-June for a response to the new conservative theory.

When the response came, it was a resounding "no."

In all four cases, the justices not only rejected the accommodation position, they largely ignored it. The majority reaffirmed precedents that had seemed to be wobbling. The justices in the minority largely based their dissents on arguments other than those advanced by the administration.

At the same time, in an unusually public rebuff, four justices formally voted against allowing the solicitor general to participate in oral argument in a major religion case the justices will hear next fall.

Parochiaid Cases

Two of the key religion cases, *Agui lar v. Felton*, 84-237, and *Grand Rapid v. Ball*, 83-990, involved state aid to parochial schools. And in both, the cour on 5-4 votes in opinions by Justic Brennan, struck down the aid programs

The opinions strongly reaffirmed the three-part test for establishmen clause violations that the court firs set out in 1972 in *Lemon v. Kurtzman* 403 U.S. 602. They marked the third an fourth times in a month that the justices had reaffirmed the Lemon test quashing widespread speculation tha the court was about to adopt some nev standard.

Continued on page 17

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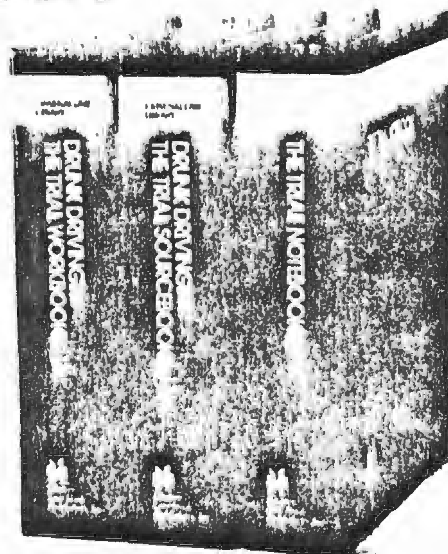

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A Reagan High Court Fails to Coalesce in '84-'85

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The author of *Lemon*, Chief Justice urger, dissented in three of the four eligion cases. In his dissent in *Aguilar*, e complained of the court's "obses-ion" with *Lemon*'s criteria. "Our re-ponsibility is not to apply tidy ormulas by rote," he objected.

Nor was religion the only area in which the court confounded the predic-ions of those who had seen last term s a new beginning.

"The big story," said Burt Neuborne, egal director of the American Civil iberties Union, "is what didn't happen."

The justices rejected several oppor-unities to broaden last term's decision that created a "good faith" exception to the Fourth Amendment exclusion-ary rule. They turned down a request to clarify another controversial ruling that appeared to reduce government ability to use affirmative action pro-grams to help racial minorities.

While the justices continued general-ly to side with prosecutors in criminal law cases, they issued two major rul-ings that expanded the rights of crimi-nal defendants.

Last term, the court upheld govern-ment actions in 81 percent of the cases raising claims based on the Bill of Rights and the 14th Amendment. That figure, a string of civil liberties losses not equaled since the 1930s, led Univer-sity of Chicago Law Prof. Geoffrey R. Stone, who compiled the statistics, to declare "the era of moderation is over."

Now, the era of moderation seems to have returned. This term, the court up-held individuals' constitutional claims against government actions in nearly half the civil liberties cases it faced, a figure similar to its record in the late 1970s.

Civil libertarians suffered one major loss when the justices, voting 6-3, al-lowed prosecutors to use a confession that originally was obtained without giving the suspect a Miranda warning. The suspect later was advised of his rights and repeated his confession; the earlier failure to read him his rights did not taint the later confession, the court held. *Oregon v. Elstad*, 53 U.S.L.W. 4244.

But, on the other side of the ledger, the court ruled 8-1 in *Ake v. Oklahoma*, 53 U.S.L.W. 4179, that an indigent de-fendant who pleads insanity must be given a psychiatrist if he cannot afford one. The ruling was a major expansion of the state's obligation to help poor defendants pay for a full trial.

The justices also ruled that the Con-stitution puts limits on police power to shoot fleeing felons, and that the right to effective assistance of counsel ex-tends to a defendant's appeal. *Tennes-see v. Garner*, 53 U.S.L.W. 4410, and *Evitts v. Lucey*, 53 U.S.L.W. 4101.

Even in criminal cases that defen-dants lost, the court's words often were milder than the language civil liber-tarians last year had learned to expect.

A prime example was the court's de-cision allowing school officials to search students without the restrictions that apply to police searches of adults. *T.L.O. v. New Jersey*, 53 U.S.L.W. 4083.

The court rejected the state's argu-ments that it should hold either that the Fourth Amendment does not apply in schools at all or that the exclusion-ary rule should not apply. Instead, the justices adopted the standard of rea-sonableness that had been chosen by most courts that examined the issue, including the New Jersey Supreme Court — whose ultimate application of that standard they reversed.

Last week, the justices — in one of the court's major 5-4 decisions — up-held a broad reading of the civil liabil-ity provisions of the Racketeer Influ-enced and Corrupt Organizations Act (RICO). The statute originally was written to serve as a tool against orga-nized crime, but RICO's civil provi-sions increasingly have been used against long-established, legitimate businesses. Such uses of the law have led to widespread criticism from ap-pellate courts.

RICO allows recovery of treble dam-ages and attorney fees against defen-dants who engage in a "pattern" of "racketeering." The act defines racke-teering as the commission of any two of a list of "predicate offenses" that include such broadly defined crimes as securities fraud and mail fraud. Be-cause of the breadth of its definitions and its generous recovery provisions, civil RICO litigation has accelerated dramatically in recent years.

Of the 270 civil RICO decisions in federal district courts before this year, only 3 percent were issued throughout the 1970s, with 2 percent in 1980, 7 per-cent in 1981, 13 percent in 1982, 33 per-cent in 1983 and 43 percent in 1984, according to a recent report by an ad hoc task force of the American Bar As-sociation's Section of Corporation, Banking and Business Law.

"In its private civil version, RICO is evolving into something quite different from the original conception of its en-actors," Justice White wrote for the majority. But while the justices "shar[e] the doubts of the Court of Ap-peals about this increasing diver-gence," he added, "correction must lie with Congress."

Limits Rejected

The decision totally rejected two limiting constructions of RICO that had been urged by lower courts, partic-ularly the 2d U.S. Circuit Court of Ap-peals. One would have required that a person actually be convicted of one of the predicate offenses before he could be found civilly liable under RICO. The other would have required that RICO plaintiffs prove some special "RICO in-jury" in addition to the injuries caused by the predicate offenses before being able to recover under the statute. *Se-dima, S.P.R.L. v. Imrex Co. Inc.*, 84-648.

"For the most part, the floodgates are open," Andrew B. Weissman of Washington, D.C.'s Wilmer, Cutler & Pickering said of the opinion. He helped write the ABA task force report.

The only part of the opinion avail-able for defense attorneys to "latch onto," he added, was a comment by Justice White, repeated by Justice Powell in his dissent, that lower courts could narrow the statute's reach by more carefully construing RICO's "pattern" requirement. Two predicate offenses "are necessary" to prove a pattern, but they "may not be suffi-cient," Justice White wrote.

But while defense lawyers can be ex-pected to try quickly to expand on that language, the focus of efforts to rein in RICO will now shift to Congress, said

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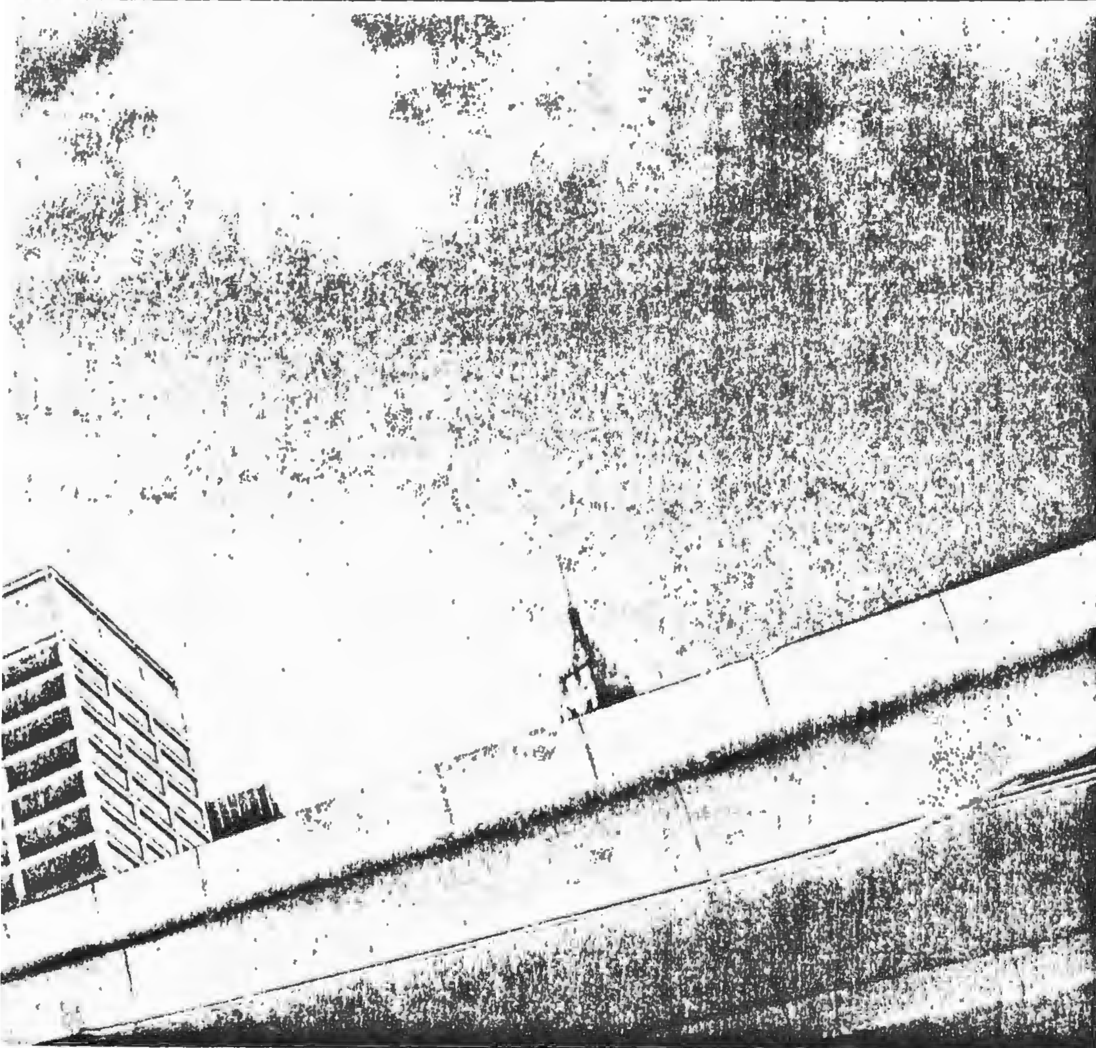

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...owell, Blackmun Pivotal in High Court's Term

...ntinued from page 17

...idah Best of Washington, D.C.'s Step...e & Johnson, Chartered, a member of ...e ad hoc task force.

Hearings on RICO have been sched...ed in both the House and Senate, and ...onsiderable support exists for modifi...ations. Those could include codifica...on of one or the other of the restrictions ...at the high court declined to read ...to the law last week or some restric...ons on the list of predicate offenses.

...ecurities Cases

Critics have focused particularly on ...ICO claims based on securities fraud ...nd mail fraud. Mail fraud, Mr. Best ...aid, has been so broadly defined over ...he years that it now covers almost ...nything.

And RICO securities cases, with ...heir promise of treble damages, could soon totally eliminate the use of traditional securities law remedies, said Stephen M. Shapiro, a partner at Chicago's Mayer, Brown & Platt.

'All the suggestions that we already have a Reagan court are radically misguided,' says Harvard Law Prof. Laurence Tribe, who calls the 1984-'85 term proof of the court's move to 'centrist preservation.'

Ironically, traditional securities law was an area in which the high court was quite active this term. In general, in a term that was short on high-profile criminal cases and almost totally devoid of major civil rights issues, business cases bulked unusually large on the docket.

In the securities area, the justices accepted defense arguments that disclosure is a complete defense against fraud claims under the Williams Act. *Schreiber v. Burlington Northern*, 53 U.S.L.W. 4655.

They also clarified the scope of the securities laws in two cases on the "sale of business doctrine," *Landreth Timber v. Landreth*, 53 U.S.L.W. 4602, and *Gould v. Ruefenacht*, 53 U.S.L.W. 4607, and on the application of the in pari delicto defense in *Eichler v. Berner*, 53 U.S.L.W. 4737.

In a major defeat for the Securities and Exchange Commission, the justices rejected SEC arguments that the Investment Advisors Act allows regulation of financial publishers. *Lowe v. SEC*, 53 U.S.L.W. 4705.

In antitrust law, the court continued the trend of replacing per se rules with rules of reason, abandoning the per se approach to group boycotts in *Northwest Wholesale Stationers v. Pacific Stationery*, 53 U.S.L.W. 4733, and adopting a rule-of-reason approach to a monopolist's duty to cooperate with competitors in *Aspen Skiing Co. v. Aspen Highland Skiing Co.*, 53 U.S.L.W. 4818.

Business groups generally were unsuccessful, however, in challenging state economic regulations. In a series of cases this term, the court showed great deference to the states in areas ranging from banking policy to health insurance, notes Philip A. Lacovara of the Washington, D.C., office of New York's Hughes Hubbard & Reed

Accused Spies Plead Guilty In Calif. Case

By Ken Hoover
Special to The National Law Journal

LOS ANGELES — The espionage trial of Svetlana and Nikolai Ogorodnikov ended suddenly June 26 after 32 days when the defendants pleaded guilty to a single count of conspiracy to commit espionage.

As part of a plea agreement worked out by prosecutors with the concurrence of U.S. District Judge David V. Kenyon, Ms. Ogorodnikov, 35, a Soviet emigre living in West Hollywood, Calif., will be sentenced to 18 years in prison by the judge at a hearing scheduled for July 15.

Her 52-year-old husband waived his right to a presentence probation report and was immediately sentenced to eight years in prison. Over prosecution opposition, Judge Kenyon made him eligible for parole after serving one-third of his time.

In exchange for the pleas to the conspiracy charge, which carries a maximum penalty of life in prison, the government agreed to seek the dismissal of three additional bribery counts.

The agreement does not require either defendant to testify at the upcoming trial of former FBI agent Richard W. Miller, 48, who was indicted along with the Ogorodnikovs.

However, Mr. Miller's attorneys and prosecutors said they are likely to be called as witnesses.

The Ogorodnikovs were arrested Oct. 2, 1984, and charged with using sex and bribes to lure Mr. Miller, a 20-year bureau veteran working in foreign counterintelligence, into a conspiracy to sell classified FBI documents to Soviet agents. *U.S. v. Ogorodnikov*, Cr 84-972-Kn. (NLJ, June 10.)

Mr. Miller testified under a grant of immunity, saying he was hoping to recruit Ms. Ogorodnikov, who had contacts at the Soviet consulate in San Francisco, as an FBI informant and "come out a hero" to save his flagging career.

A date has yet to be set for his trial. Asst. U.S. Attorneys Richard B. Kendall and Bruce G. Merritt of Los Angeles were the prosecutors in the Ogorodnikov case. Brad D. Brian and Gregory P. Stone of Los Angeles' Munger, Tolles & Rickershauser were the appointed defense attorneys for Ms. Ogorodnikov. Her husband was represented by Deputy Federal Public Defender Randy Sue Pollock.

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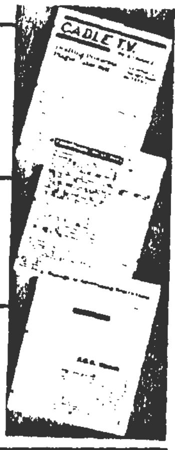

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THE JUDICIAL PHILOSOPHY OF JUSTICE REHNQUIST

by

ROBERT E. RIGGS* AND THOMAS D. PROFFITT**

IN JANUARY 1983, Justice Rehnquist completed his eleventh year as an Associate Justice of the United States Supreme Court. The record of more than a decade is extensive enough to permit serious appraisal of his work, and his distinctive impact on the Court clearly justifies the undertaking. This article will identify some of the values underlying his judicial decision-making which, in the aggregate, may be said to constitute a philosophy of constitutional adjudication. Although the range of possibly relevant values is very broad, this article will focus on Justice Rehnquist's concept of the judicial review function, his perception of certain fundamental constitutional norms, and, to a lesser extent, his ideological orientations.

In defining the contours of the Rehnquist judicial philosophy, this article will examine three sources: (1) ideas articulated by Justice Rehnquist in opinions and other writings, (2) values implicit in his pattern of decision-making as distilled from the decided cases, and (3) ideas attributed to him by others. Information from each source will be examined separately for light it sheds on the Rehnquist judicial philosophy, and each is assigned its own label. Thus, this article will refer to the *self-articulated* philosophy (as reflected in the Justice's writings), the *attributed* philosophy (as reflected in the writings of others), and the *operative* philosophy (as reflected in the decision record). Value patterns revealed by the three sources will, of course, overlap substantially, and one important focus of inquiry is the congruence between the self-articulated notions of constitutional adjudication and the values implicit in the case decisions. In all of this information this article will look for a pattern which may appropriately be labeled Justice Rehnquist's judicial philosophy.

I. THE REHNQUIST APPOINTMENT

At the time of his nomination to the Supreme Court, Justice Rehnquist had no judicial track record and had articulated little in the way of judicial philosophy. The press[1] and those who testified in the hearings on his nomination[2]

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**Law Clerk to Judge Aldon J. Anderson, United States District Court for the District of Utah. B.A., MA., J.D., Brigham Young University.

[1]*See, e.g., Rehnquist: A Lawyer's Lawyer,* NEWSWEEK, Nov. 1, 1971, at 18; Sperling, *Law, Order — and Prestige — For Court,* Christian Science Monitor, Oct. 23, 1971, at 1, col. 3; Rosenbaum, *William Hubbs Rehnquist,* N.Y. Times, Oct. 22, 1971, at 25, col. 7; Clawson, *William H. Rehnquist,* Washington Post, Oct. 22, 1971, at A8, col. 6.

... and Lewis F. Powell, Jr., of Virginia, to be Associate

depicted him as a political conservative with excellent legal credentials. Both characterizations were accurate. His academic record had been distinguished in every respect. He graduated Phi Beta Kappa in political science from Stanford University in 1948 and earned a Stanford M.A. in 1949. The following year he took a second M.A. in government from Harvard University. In 1952, he graduated first in his class from Stanford Law School, where he served as a Law Review editor and was named to the Order of the Coif. As a law student he was subsequently described by one of his professors as "nothing short of brilliant."[3] Upon graduation from law school he was honored by appointment as clerk to Supreme Court Justice Robert H. Jackson. Although born in Milwaukee (1924), he chose to enter practice in Phoenix, Arizona. During sixteen years of practice in Phoenix with four different law firms, he gained a reputation for integrity, diligence, high professional competence, and unusual intellectual capacity.[4] In February 1969, he received a Nixon appointment as Assistant Attorney General in the Office of Legal Counsel, United States Department of Justice, where he served until his confirmation as a member of the United States Supreme Court.

Despite his good record and recognized legal abilities, his nomination to the Supreme Court was not uniformly greeted with enthusiasm. Those who questioned or opposed the nomination were mainly civil libertarians concerned about his past support of various conservative causes and principles. He had been an active supporter of the Goldwater presidential candidacy in 1964. He was on record as a vocal critic of the liberal Warren Court.[5] He had resisted efforts to eliminate "de facto" school desegregation in Phoenix and had actively urged rejection of a Phoenix city ordinance prohibiting discrimination in public accommodations.[6] He also opposed portions of a Model State Anti-

Justices of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, United States Senate, 92d Cong., 1st Sess. (1971) [hereinafter cited as *Nomination Hearings*]. *See, e.g., id.* at 198 (statement of Howard Karman, President, Arizona State Bar Association); *id.* at 441 (statement of the Hon. Paul N. McCloskey, Jr., Congressman from California).

[3]Letter from John B. Hurlbut, Eli Reynolds Professor of Law, Emeritus, Stanford Law School, to Senator James O. Eastland (Oct. 28, 1971), *reprinted in Nomination Hearings, supra* note 2, at 19. Another teacher stated:

> Rehnquist was a student of mine at Stanford Law School. He was not only the top student in his class but one of the best students in the School over a number of years. He has remained in my mind as one of the most impressive students I have had in some twenty-two years of teaching.

Letter from Phil C. Neal to Senator James O. Eastland (Nov. 10, 1971), *reprinted in Nomination Hearings, supra* note 2, at 11.

[4]*See Nomination Hearings, supra* note 2, at 1-16 (numerous testimonials). One enthusiastic endorsement came from a former Stanford Law School classmate, then Arizona State Senator, Sandra D. O'Connor, who attested that "he has the potential to become one of the greatest jurists of our highest court . . . he . . . was head and shoulders above all the rest of us in terms of sheer legal talent and ability." *Id.* at 12 (testimony of Sandra D. O'Connor).

[5]Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74, 75; N.Y. Times, Oct. 28, 1971, at 26, col. 1.

[6]N.Y. Times, Nov. 7, 1971, at E4, col. 4. His more fair-minded critics conceded that his opposition to the equal public accommodations measure was based on "philosophical grounds and concerned only the merits of pending legislation." Letter from Lawrence E. Walsh, Chairman, American Bar Association Standing Committee on Federal Judiciary to Senator James O. Eastland (Nov. 2, 1971), *reprinted in Nomination Hearings, supra* note 2, at 1, 4.

iscrimination Act while a representative to the National Conference of Com-issioners on Uniform State Laws.[7] While assistant attorney general he spoke ut vigorously in support of the administration's law-and-order position on iretaps, pretrail detention, summary arrest procedures, obscenity, and civil lisobedience — positions almost uniformly anathema to the liberal stablishment.[8] Largely because of this record, twenty-six senators voted against confirmation.[9] A number of Senators who disagreed strongly with his political views voted for confirmation because they were unwilling to reject on ideological grounds a candidate who was otherwise obviously qualified.[10]

During the Hearing process Justice Rehnquist was himself subjected to extensive questioning, and his comments did little to dispel the image of political conservatism. While he denied the more extreme charges of insensitivity to individual rights[11] and indicated a change of heart on the Phoenix public accommodations ordinance which he had opposed in 1964,[12] his opinions still came through with a very conservative cast. When questioned about his personal views, he frequently found some reason not to respond. As a judicial nominee he could not make predictions about "what he would do on a specific fact

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Nomination of William H. Rehnquist, S. REP. NO. 16, 92d Cong., 1st Sess. 34-36 (1971). This report includes a 30-page memorandum by dissenting members of the Judiciary Committee stating the case against confirmation of the appointment. *Id.* at 26.

Nomination Hearings, supra note 2, at 137-96; Rehnquist, *The Old Order Changeth: The Department of Justice under John Mitchell*, 12 ARIZ. L. REV. 251 (1970); Shannon, *A Question or Three for Nominee Rehnquist*, N.Y. Times, Nov. 7, 1971, at E4, col. 1.

The vote was 68-26, contrasting with the 89-1 endorsement of Lewis F. Powell, Jr., nominated at the same time to fill a second vacancy on the Court. N.Y. Times, Dec. 11, 1971, at 1, col. 3; *id.*, Dec. 7, 1971, at 1, col. 4.

By a 9-3 vote the ABA Standing Committee on Federal Judiciary gave Rehnquist the highest possible endorsement, based on "professional competence, judicial temperament, and integrity." The minority of three found him qualified but were unwilling to express the same high degree of support. *Nomination Hearings, supra* note 2, at 4. Justice Powell, by contrast, received the highest endorsement by a unanimous vote. The dilemma of conscientious liberals is well expressed in a statement issued by Arizona Representative Morris K. Udall:

> It's natural to feel some pride when a man from one's own state and one's own professional group is nominated for a position carrying the awesome responsibility of the U.S. Supreme Court.
>
> Thus, the President's selection of William Rehnquist stirs such pride.
>
> At the same time, I must acknowledge that I would not have nominated Mr. Rehnquist had the choice been mine.
>
> I say this though I can attest to his complete integrity and adherence to the highest ethical standards. In addition he has excellent legal training and experience and possesses a clearly superior legal mind. He certainly meets the demanding professional standards for and would bring intellectual distinction to the Supreme Court.
>
> Having said that, however, I must register my strong disagreement with Mr. Rehnquist's philosophy. I consider many of his publicly expressed views to be misguided and wrong.
>
> Yet I believe that a President has the right to appoint judges of his own political and judicial philosophy and that his nominees should generally be confirmed when they meet ethical and professional standards, as Mr. Rehnquist obviously does.
>
> Furthermore, we have learned that it is risky business to predict the course a lawyer will take when he leaves the political arena and begins a lifetime judicial appointment. And so I can be hopeful that as a Supreme Court justice, Mr. Rehnquist will acquire different perspectives.

Nomination Hearings, supra note 2, at 15 (statement of Morris K. Udall).

[11] *E.g.*, *Nomination Hearings, supra* note 2, at 71-72, 77.

[12] *Id.* at 70, 77.

situation or a particular doctrine after it reaches the court."[13] He could not properly express a view "on the constitutionality of a measure pending in Congress."[14] As a former "advocate and spokesman" for the Justice Department, "it would be inappropriate" for him to give a personal view on matters he had handled in that capacity.[15] Nevertheless, his remarks, though guarded, reflected a continuing sympathy for the politically conservative positions he had previously espoused.[16] At one point in the hearings, he tacitly assented when Senator Mathias referred to his political views as "conservative."[17]

The hearings also gave some clues to his judicial philosophy, as distinguished from his political ideology. While he did not attach the label of "conservative" to his views, his comments left no doubt that he thought the label was appropriate. "I subscribe unreservedly," he said:

> to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.[18]

The resemblance between this statement of philosophy and his definition of judicial conservatism is obviously more than coincidental. As he subsequently said in the same interchange with Senator Mathias:

> I think . . . there has been a tendency to equate conservatism of judicial philosophy not with a conservative political bias, but with a tendency to want to assure one's self that the Constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that . . . the person tends to read his own views into the Constitution.[19]

In elaborating his own position, he referred more than once to the importance

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[13]*Id.* at 26. *Cf. id.* at 141, 157.

[14]*Id.* at 33.

[15]*Id.* at 51. *See also, id.* at 142.

[16]*See, e.g., Nomination Hearings, supra* note 2, at 139-40 (comments on electronic surveillance); *id.* at 43-45 (summary arrest procedures); *id.* at 166 (civil disobedience); *id.* at 41 (suppression of the Pentagon Papers); *id.* at 70, 156 (school busing).

[17]*Id.* at 156. The relevant exchange ran as follows:

> Senator MATHIAS. It has been said here and elsewhere that your political views tend to be conservative. What effect, assuming this is the case, will this have on you as a judge and, consequently, as a man who should be able to decide cases impartially?
>
> Mr. REHNQUIST. I would hope none. I realize that that is the same question I would be asking a nominee if I were a member of the Senate Judiciary Committee, and I cast about for some way of perhaps giving some objective evidence of the fact, rather than simply asking you to rely on my assurance.

Id. Subsequently Rehnquist observed that it was "difficult to pin down the terms 'liberal' and 'conservative,' " and that "they may mean something different when one is talking about a political alinement [sic.] as opposed to a judicial philosophy of the Supreme Court." *Id.*

[18]*Id.* at 156.

[19]*Id.* at 157.

of construing constitutional language in light of the framers' intent as determined from historical materials[20] regardless of any personal inclination to keep the Constitution "in step with the times."[21] Though such remarks certainly revealed no detailed, coherent judicial philosophy, they suggest an orientation that places greater emphasis on the language of the original document and the circumstances surrounding its adoption than upon current societal needs and values. This is a position commonly identified with judicial conservatism.

The senatorial inquisitors specifically sought the nominee's views on the importance of prior judicial interpretation of constitutional provisions, and here Justice Rehnquist was more equivocal. While precedent should, in general, be accorded "great weight,"[22] it should receive "somewhat less weight in the field of constitutional law" than in other areas of the law, and less weight in a case decided by a narrow majority than one decided unanimously.[23] Recent precedents, likewise, are entitled to less respect than more venerable decisions that have stood the test of reexamination by numerous judges over a longer period of time.[24] Such readiness to reexamine precedent is not often identified with the conservative judicial temperament.[25]

II. THE ATTRIBUTED PHILOSOPHY: REHNQUIST AND THE COMMENTATORS SINCE 1972

In the years since Justice Rehnquist joined the Court, commentators have continued to echo the two themes that pervaded the debate over his nomination: his legal acumen and his ideological conservatism. An early appraisal by journalist Warren Weaver is typical:

> In two-and-a-half terms on the high tribunal, Associate Justice Rehnquist has established himself firmly as a one-man strong right wing, a constructionist so strict as to make Chief Justice Warren Burger look permissive on occasion, a man seemingly dedicated to cleansing singlehandedly if necessary, the Augean stable that conservative dogma percieves as the Supreme Court of the nineteen-fifties and nineteen-sixties.[26]

Regarding his abilities, Weaver stated, "Rehnquist's youthfulness has hardly impeded the growth of his reputation for intellect . . . While lawyers hesitate to make invidious comparisons among the learned justices, a sizeable number regard Rehnquist as having the best mind on the Court."[27] More recent journalistic comment continues to emphasize both the intellect and the

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[20] *E.g.*, *id.* at 55, 81-82, 138, 167. *See also id.* at 19.

[21] *Id.* at 81.

[22] *Id.* at 19.

[23] *Id. See also id.* at 138.

[24] *Id.* at 19, 55.

[25] Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875, 913-14 (1975).

[26] Weaver, *Mr. Justice Rehnquist, Dissenting*, N.Y. Times, Oct. 13, 1974, § 6 (Magazine), at 36.

conservatism.[28]

Such observations are illustrative of a fairly broad consensus and are not limited to journalists. Comment by lawyers, professors and other students of the court has run along much the same lines. A sampling of studies dealing with the Supreme Court as a whole, or its members generally, produces such qualitative appraisals as "astoundingly conservative" but a "first-rate independent intellect";[29] a "brilliant ideological conservative";[30] a man of "powerful intellectual ability";[31] "the philosopher" of the Burger Court;[32] a person of "superior intellect and formidable legal skills," but also a "zealot" who favors "construing the Constitution as an activist devoted to achieving the supremacy of political conservatism."[33] Statistical studies have generally omitted reference to the intellect but have carefully documented Justice Rehnquist's place on the ideological right-wing of the Court by reference to his voting position on such broad issues as the rights of the criminal defendant, other individual rights, and issues of "New Deal economics."[34]

Most of the preceding evaluations are drawn from general analyses which deal with Justice Rehnquist as but one of nine members of the Court. A few published articles focussing exclusively on the Rehnquist record have attempted to explain his judicial behavior in more detail. One early law review comment, based largely on cases decided during the 1971-72 term, placed Justice Rehnquist at mid-spectrum "between the Court's classic conservatives and its vigorous liberals."[35] The center position was attributed to a balance of two, often conflicting, elements in Justice Rehnquist's judicial philosophy: a belief in "maximum freedom of conduct in personal affairs" tempered by deference to societal interests "where conflict existed between societal and individual interest."[36]

[28] *See, e.g.*, B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979). The authors characterize the Justice as "very bright and extremely conservative." *Id.* at 161.

[29] J. SIMON, IN HIS OWN IMAGE 240-41 (1973).

[30] H. ABRAHAM, JUSTICES AND PRESIDENTS 11-12 (1974).

[31] C. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 129 (1978).

[32] Frank, *The Burger Court — The First Ten Years*, 43 LAW & CONTEMP. PROBS. 101, 125 (1980).

[33] "He gave every indication of being a zealot who favored construing the Constitution as an activist devoted to achieving the supremacy of political conservatism." L. LEVY, AGAINST THE LAW 54, 57-58 (1974). *See also e.g.*, L. BAUM, THE SUPREME COURT 126-27 (1981); A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES 70-71 (1978).

[34] For a discussion of "New Deal economics" as an issue category, *see* H. SPAETH, SUPREME COURT POLICY MAKING 130-31 & *passim* (1979). The category includes cases dealing with such matters as antitrust, worker's compensation, state regulation of business, public utilities, securities regulation, natural resources, rights of unions, and rights of Indians. The grouping of cases in this (and other Spaeth categories) was accomplished by a statistical clustering process, and the "New Dealism" label was applied subsequently as a term broadly descriptive of the cases that statistically had clustered in this group. *See also* S. GOLDMAN & A. SARAT, AMERICAN COURT SYSTEMS 420 (1978); Spaeth & Teger, *Activism and Restraint: A Cloak for Justices' Policy References*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb ed. 1982); Schultz & Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. REV. 798 (1975); Ulmer & Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U.L. REV. 331 (1975).

[35] Reimenschneider, *The Judicial Philosophy of William H. Rehnquist*, 45 MISS. L.J. 224, 244 (1974).

[36] *Id.* at 228.

Subsequent appraisals of Rehnquist's judicial behavior have tended to assume his political conservatism but have differed on his status as a judicial conservative. From a reading of cases dealing with civil liberties during the first three Rehnquist terms, Rydell was convinced that the Rehnquist opinions embodied a philosophy of "judicial conservatism" or "judicial self-restraint."[37] This appeared mainly in extreme deference to legislative determinations at the expense of individual liberties and in a tendency to avoid deciding constitutional issues by "narrowing the concept of justiciability . . . ."[38] A more recent evaluation by Lind, relying primarily upon Justice Rehnquist's labor opinions, avoids the use of the "conservative" label but nevertheless identifies aspects of his judicial orientation that are commonly associated with judicial conservatism.[39] Lind found "the most important elements of Justice Rehnquist's jurisprudence" to be "his consistent focus on federalism, his belief in textual interpretation, and his utilitarian application of the First Amendment in specific contexts."[40] By "focus on federalism," Lind meant deference to state power which, in the labor context, reflected a tendency to limit the authority of the National Labor Relations Board.[41] The second element, "belief in textual interpretation," refers to Justice Rehnquist's insistence that "[s]pecific text within the Constitution and its amendments must be given the full force of its language as understood by the Framers,"[42] and that general language must be interpreted to correspond with the Framers' intent where ascertainable. In first amendment analysis, however, Lind perceived the Justice as shifting from a textual to a "contextual"[43] approach, that is, going out of his way to find contextual factors (frequently the property rights of employers) that might justify governmental restrictions upon speech in derogation of the first amendment's textually broad guarantee.[44]

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[37] Rydell, *supra* note 25, at 875.

[38] *Id.* at 911. Rydell recognized that Justice Rehnquist's behavior did not satisfy a third element of judicial self-restraint, i.e., respect for *stare decisis.* He explained this by observing that prior precedent "may dictate intervention," in which case the cause of judicial restraint, defined as "reducing the Court's role in society," may be served only by ignoring prior interventionist precedent. *Id.* at 913.

[39] Lind, *Justice Rehnquist: First Amendment Speech in the Labor Context,* 8 HASTINGS CONST. L.Q. 93 (1980).

[40] *Id.* at 94.

[41] *Id.* at 94, 97-102.

[42] *Id.* at 103.

[43] *Id.* at 108.

[44] For a third commentary on the Rehnquist judicial philosophy, also with a limited substantive focus, *see* Justice, *A Relativistic Constitution,* 52 U. COLO. L. REV. 19 (1980). The author, William W. Justice, a United States district court judge, makes a somewhat tedentious attack on Justice Rehnquist's philosophy as "moral relativism" that recognizes no value as intrinsically "better or worse than any others," and implies "that any law more permanent than what a given majority favors is unwarranted." *Id.* 24, 27.

See also, Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist,* 57 N.Y.U. L. REV. 1 (1982). Weisberg analogizes Justice Rehnquist's majority opinion in Paul v. Davis, 424 U.S. 396 (1976), to Captain Vere's trial and execution of Billy Budd in the Melville novel. Weisberg's rhetorical analysis of Vere's comments during the course of the trial illustrates how "the verbally and hierarchically superior adjudicator can give the force of seeming legality to drastic decisions the law does not support," Weisberg at 37-8, and how legal argument can be used "to distort the law to further purely subjective ends." *Id.* at 38. Weisberg finds *Paul v. Davis*

Other recent analyses have vigorously challenged the characterization of Rehnquist as a "judicial conservative." In a brief sketch prepared for a special Supreme Court issue of *The National Law Journal,* Professor Soifer concluded that Justice Rehnquist virtually defied classification in "a general taxonomy of the court, or . . . in an intellectual or political tradition . . . ."[45] The Justice was "neither libertarian, strict constructionist nor conservative."[46] On the other hand, Soifer attributed to Rehnquist a number of specific attitudes that are commonly identified with today's *political* conservative — solicitude for property rights, distrust of big federal government, a belief in states' rights, and a concern for law and order.[47] Perhaps, as Soifer suggests, Justice Rehnquist's outspoken disregard of strict *stare decisis* may disqualify him as an "institutional conservative,"[48] but the article does little to dispel the image of the Justice as a political conservative.

This is essentially the same dichotomy posed by Yale Law Professor Owen Fiss and *New Republic* editor Charles Krauthammer in a recent article bemoaning the advent of the "Rehnquist Court."[49] Rehnquist, they argue, has emerged as unmistakable leader of a "so-called" " 'conservative' " bloc on the Supreme Court.[50] Qualified for this role by both intellect and ideology,[51] he has become "a hero to the conservatives" through his judicial championing of state autonomy.[52] Nevertheless, he is not a "conservative," as that term is ordinarily "understood in the law, but a revisionist of a particular ideological bent. He repudiates precedents; he shows no deference to the legislative branch [Congress?]; and he is unable to ground state autonomy in any textual provision of the Constitution."[53] Instead of conservatism, his judicial orientation merely reflects a single-minded pursuit of state autonomy in the interests of private property, at the expense of liberty and equality.[54] Fiss and Krauthammer thus appear to be making a distinction between political and judicial conservatism. Justice Rehnquist may be politically conservative, but he is definitely not a *judicial* conservative.[55]

"a remarkable analogue to Melville's novella," *id.* at 43, and a contemporary illustration of how claims may be denied, "perhaps wrongly, with the help of the crafty use of language and form . . . ." *Id.* at 58. Most of the article is a highly fascinating analysis of Captain Vere's rhetoric and motivations in the Billy Budd trial, but in a 16-page application of his methods to *Paul v. Davis,* Weisberg brilliantly does a job on Justice Rehnquist.

[45] Soifer, *Rehnquist: Trying to Recapture an Imaginary, Idyllic Past,* NAT'L L.J., Feb. 18, 1980, at 21.

[46] *Id.* at 28.

[47] *Id.* at 21, 28.

[48] *Id.* at 21.

[49] Fiss & Krauthammer, *The Rehnquist Court,* THE NEW REPUBLIC, March 10, 1982, at 14.

[50] *Id.*

[51] "Long before he joined the Court, Rehnquist ardently and aggressively fought against the liberal ideas that were to find their deepest expression in the Warren Court." *Id.*

[52] *Id.* at 18.

[53] *Id.* at 18, 20.

[54] *Id.* at 21.

[55] The authors stop short of labeling Justice Rehnquist either a political or judicial "conservative." Nevertheless, it is difficult to escape the implication that a person who is an ardent [illegible]

This conclusion is also endorsed by Jeff Powell, a student of Fiss, in an insightful study of Justice Rehnquist's concept of federalism.[56] Although somewhat tentative about attributing Rehnquist's judicial behavior to *political* conservatism, Powell nevertheless accepts "for the purpose of discussion the standard liberal view of Justice Rehnquist as a right-wing ideologue, unsympathetic to claims based on individual liberties," and concedes "that most of Rehnquist's federalism positions dovetail nicely with conservative politics . . . ."[57] On the question of *judicial* conservatism, Powell is not in the least tentative: "Justice Rehnquist is clearly and consciously, *not* a strict constructionist and *not* a practitioner of judicial restraint."[58] Quite the contrary, in the implementation of his views on federalism the justice has adopted "an extremely aggressive and activist role," refusing "to be bound by text or precedent" and frequently invoking principles "only loosely connected to specific constitutional provisions . . . ."[59] Despite pretensions to a theory of constitutional interpretation tied closely to the Framers' original understanding, Rehnquist in fact falls victim to the cardinal sin of the judicial activist — "the erection of a judge's personal values and opinions into constitutional norms."[60]

Less current, but still an important treatment of Justice Rehnquist, is the judicial profile published by Harvard law professor, David L. Shapiro in December 1976.[61] The original article was based on cases decided through the

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ideas," a leader of the Court's "conservative" bloc, and a "hero to the conservatives" must be in some sense a conservative.

[56] Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

[57] *Id.* at 1362, 1363. The characterization is tentative because "it still must be said that at times 'his federalism' leads Justice Rehnquist to reach 'liberal' results." *Id.* at 1363. Thus,

> *PruneYard Shopping Center v. Robins* [447 U.S. 74 (1980)] permitted the California Supreme Court to expand the concept of a public forum for free speech purposes in that state. *Moore v. Sims* [442 U.S. 415 (1979)] may have resulted in greater protection for Texas children who are abused by their parents. If the Court had adopted Rehnquist's position in *Ray v. Atlantic Richfield Co.* [435 U.S. 151 (1978)], that case would have increased the environmental safety of Washington's sounds and coasts. *Hughes v. Oklahoma* [441 U.S. 322 (1979)] invalidated an attempt by Oklahoma to conserve its wildlife, but only over Rehnquist's protests, just as *Kassel v. Consolidated Freightways Corp.* [450 U.S. 662 (1981)] prevented Iowa from protecting its motorists from the danger and annoyance posed by double-trailer trucks despite Rehnquist's arguments. If the Court had followed Justice Rehnquist's analysis in *First National Bank v. Bellotti* [435 U.S. 765 (1978)], Massachusetts would have been allowed to take a very reasonable step to ensure that big business and its money would not drown out other voices in a political controversy. Such decisions suggest that, at least sometimes, the Justice is willing to follow his federalism principles wherever they may lead.

Id.

[58] *Id.* at 1359 (emphasis in original).

[59] *Id.* at 1360.

[60] *Id.* at 1370. The Powell study is far more than a critique of Justice Rehnquist's judicial activism. It undertakes a thorough canvass of relevant opinions designed to show how a Jeffersonian theory of federalism, emphasizing values of state sovereignty and autonomy, "emerges from Justice Rehnquist's work on the Court," *Id.* at 1320. As applied, the theory is evident in Rehnquist's efforts to preserve state legislative freedom of action, his deference to state court jurisdiction, and his readiness to find limits upon the powers of the national government where it might otherwise encroach upon state autonomy. Powell finds the theory to be internally consistent and, for the most part, consistently applied, even when it occasionally leads to liberal substantive results. The theory fails, as "an objective first principle" (*id.* at 1363), however, because it is at odds with history and the Framers' intent which the Justice so frequently — but mistakenly — invokes. *Id.* at 1363-70.

[61] Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

1975 Supreme Court term. A subsequent much abbreviated version extended the case coverage to the close of the 1976 term without necessitating any significant revision in its conclusions.[62] Shapiro characterized the Justice as "a man of considerable intellectual power" whose judicial product had been adversely affected by "the unyielding character of his ideology."[63] The reference to intellect and ideology parallels observations made by others; but, in contrast to most of the others, Shapiro does not use the word "conservative" at any place in the 65-page article.[64] Instead, he defines the Rehnquist ideology as embodying the following three propositions:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual.
>
> (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
>
> (3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.[65]

This approach adds precision to his analysis by substituting propositions of readily ascertainable content for a label whose meaning may differ from one context to another. The propositions represent categories empirically derived from an examination of the cases[66] rather than categories based on political, economic, or social values that people commonly associate with a conservative political philosophy. Nevertheless, the analysis does lose something by refusing to identify Rehnquist with an intellectual and political tradition which has meaning and significance, however ill-defined its contours. Few would deny that Shapiro's three propositions are more congenial to a modern-day conservative than a liberal viewpoint.

Having identified at the outset the essential elements of the Rehnquist "ideology," Shapiro devotes the greater part of his analysis to demonstrating how a rigid adherence to the ideology has substantially reduced the quality of Justice Rehnquist's judicial product.[67] The critique is essentially three-pronged.

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[62]The shortened version appears in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 109 (L. Friedman ed. 1978) [hereinafter cited as *Friedman*].

[63]Shapiro, *supra* note 61, at 293.

[64]The shortened version uses the term only once, in the introductory paragraph: "But young as he was, his ideology was clear to his supporters and opponents alike — an ideology that President Richard M. Nixon, who appointed him, described somewhat imperfectly as that of a 'judicial conservative.' " *Friedman, supra* note 62, at 109.

[65]Shapiro, *supra* note 61, at 294 (footnotes omitted).

[66]In Shapiro's words, "A review of all the cases in which Justice Rehnquist has taken part indicates that his votes are guided by these three basic propositions." *Id.* at 294.

[67]In keeping with his generally negative appraisal of the Rehnquist performance, Shapiro digresses briefly from his central theme (the harmful impact of ideology on judicial output) in order to criticize the justice in another context — the failure to practice what he preaches about the importance of ascertaining the Framers' intent and staying close to the text of the Constitution. To show the gap between theory and practice, Shapiro discusses three cases in which the justice "appears to have reached his conclusion by

First, in a number of important areas of constitutional adjudication, ideology has led Justice Rehnquist to "develop and pursue doctrine which is unsound and poorly grounded in reason and precedent."[68] This is especially true of his narrowing interpretations of the equal protection clause, the role of federal courts in vindicating federal rights, and the reach of procedural due process. Second, the Justice has frequently sacrificed high standards of judicial craftsmanship out of zeal to implement his ideological commitment. Specifically, he has avoided reasoned elaboration when careful analysis might lead to an undesired result;[69] he has "ignored important jurisdictional issues" and "made assertions of facts unsupported by the record";[70] and he has shown no hesitation in deciding controversial questions not presented or not necessary to the disposition of the case "when doing so would have precluded full explication of his ideology."[71] Finally, according to Shapiro, Justice Rehnquist has occasionally been less than candid in the use of precedent. Instead of openly admitting the inconsistency of his result with the result or rationale of a prior case, he has misrepresented some aspect of the prior case and, in effect, changed the law "without the acknowledgment that candor would demand."[72] Some of Shapiro's conclusions, particularly the three propositions characterized as the Rehnquist "ideology," are capable of empirical demonstration. Most of the others are matters of judgment and interpretation based upon more or less ambiguous facts. But even on the judgment calls, Shapiro is at great pains to identify and describe the relevant decided cases so that readers have a basis for evaluating his conclusions.[73]

III. THE ATTRIBUTED PHILOSOPHY: IS REHNQUIST A "CONSERVATIVE"?

Most of the writings examined above, in one way or another, identify political conservatism as an ideological component of Justice Rehnquist's value system. Shapiro avoids labels and gives to the Rehnquist ideology an empirical content derived from the cases, but the affinity of his three propositions with political conservatism seems apparent enough. The socio-political views

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drawing broad, unwarranted inferences from the provisions of the Constitution, by paying little or no attention to the intent of the framers, or both." Shapiro, *supra* note 61, at 302. The cases are: Richardson v. Ramirez, 418 U.S. 24 (1974); California v. LaRue, 409 U.S. 109 (1972); National League of Cities v. Usery, 426 U.S. 833 (1976).

[68] Shapiro, *supra* note 61, at 307.

[69] *E.g.*, "One is left with the indelible impression [referring to Hamling v. United States, 418 U.S. 87 (1974)] that Justice Rehnquist sacrificed reasoned analysis to his determination that the conviction for mailing obscene and manifestly distasteful materials be affirmed." *Id.* at 332.

[70] *Id.* at 334.

[71] *Id.* at 341-42.

[72] *Id.* at 350.

[73] For a contrasting viewpoint, differing markedly from Shapiro in style and emphasis, *see* Anderson, *The Jurisprudence of Justice Rehnquist: Government by Constitution and Consensus*, 17 INTERCOLLEGIATE REV. 17 (1981). Anderson presents a gracefully written distillation of Justice Rehnquist's views on constitutional interpretation, focussing primarily on his equal protection opinions and his ideas about the democratic basis of constitutional government. Anderson sees "government by consensus" as the central value of the Rehnquist philosophy, with the Constitution serving as "the fundamental consensus upon which all legislative and executive actions and policies, themselves the beings of consensus, must depend." [illegible] sympathetic interpretive essay, leaning primarily to exposition rather than critique.

attributed to Justice Rehnquist include such values as respect for private property, willingness to limit individual rights in conflict with government authority, a preference for societal interests over the rights of the criminally accused, and great deference to the principle of state autonomy. These positions fall well within the range of preferences commonly associated with political conservatism in American society.[74]

Whether political ideology has any place in judicial decision making is another question. Ideology speaks to results or outcomes, not to legal principles or process. Arguably, it is an illegitimate if not irrelevant influence upon judicial behavior. Indeed, it woulid be irrelevant if decisions always were grounded in "neutral" constitutional principles, i.e., "reasons that in their generality and their neutrality transcend any immediate result that is involved."[75] But most of the writings on Justice Rehnquist have assumed that judges do not live by neutral principles alone and have been quite willing to find ideological motivations in his judicial decision making. At the very least, the term may appropriately describe the product if not the motivation for his judicial decisions.

If there is fair consensus that Justice Rehnquist's result-oriented values reflect political conservatism, there is less consensus on his status as a "judicial conservative," a concept more strictly related to constitutional adjudication in its narrow definition. As identified in the writings about Rehnquist, the elements of judicial conservatism (sometimes called judicial restraint) include: (1) deference to legislative determinations, (2) deciding cases on the narrowest possible grounds, including the avoidance of constitutional decisions when possible, (3) respect for precedent, and (4) concern that decisions be grounded in textual provisions of the Constitution.[76] Fiss and Krauthammer, Soifer, and

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[74]According to the leading dictionary of American public affairs the "conservative position on issues" in American politics

> has been fairly consistently opposed to governmental regulation of the economy, heavy government spending, and civil rights legislation. Conservatives tend to favor state over federal action, fiscal responsibility, decreased governmental spending, supply-side economics, the outlawing of abortion, more effective crime control, and lower taxes.

J. PLANO & M. GREENBERG, THE AMERICAN POLITICAL DICTIONARY 6 (6th ed. 1982).

Spaeth's study of the Supreme Court describes the Liberal-Conservative dichotomy in comparable terms:

> Liberals support the exercise of civil liberties and an expansion of the rights of persons accused of crime; they also support the demise of racial, social, and political discrimination, and improvement of the economic status of the poor. Liberals also support New Deal economics; that is, they are pro-union, antibusiness, and procompetition, and they favor compensation for injured persons.

Spaeth, *supra* note 33, at 133-34. Spaeth posits three dimensions of a Liberal-Conservative continuum which he labels "freedom," "equality," and "New Dealism." Of eighteen justices serving on the United States Supreme Court, 1958-1977, Justice Rehnquist is ranked as the most extreme conservative on the freedom and equality dimensions and second only to Justice Harlan on the conservative end of the "New Deal" dimension. The ratings are based on Spaeth's appraisal of voting on decided cases. *Id.* at 135.

[75]H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 27 (1961). Although Wechsler was first to expound the concept of "neutral principles," the term is widely associated with its subsequent elaboration in Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[76]*See* Fiss & Krauthammer, *supra* note 49, at 19-20; Lind, *supra* note 39, at 102-08; Riemenschneider, *supra* note 35, at 230-34; Rydell, *supra* note 25, at 908-15. For an extensive discussion of the meaning of judicial restraint *see* Lamb, *Judicial Restraint on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb ed. 1982) [hereinafter cited as Lamb]. According to Lamb the term

> embodies at least six fundamental notions: 1. that the justices abide by the intent of the framers

Shapiro regard him as more in the judicial activist mold, not highly respectful of precedent and inclined to reach out beyond the necessary holding in a case to decide or make pronouncements on matters to which he is ideologically committed. They find him very deferential to state legislatures but less so to the United States Congress. They recognize that he often grounds decisions in the text of the Constitution, but find that he is willing to ignore the need for specific constitutional moorings in particular cases. Rydell, on the other hand, while recognizing the willingness to overturn precedent, is inclined nevertheless to ascribe a philosophy of judicial conservatism to Justice Rehnquist. Lind also emphasizes the strong element of textualism in Justice Rehnquist's opinions, except in first amendment cases, and the consistent deference to state governments, a position consistent with a philosophy of judicial restraint.

IV. THE SELF-ARTICULATED PHILOSOPHY

Justice Rehnquist has been unusually explicit in articulating his own ideas about constitutional interpretation, and his views have much in common with generally accepted notions of judicial restraint. But, initially at least, his philosophy ought to be examined on its own terms. If we look at his judicial opinions[77] and published addresses[78], the principal source materials for the self-articulated philosophy, three dominant themes emerge. First, the Constitution is a governmental charter which prescribes a distinctive federal structure, distributes certain powers among the various parts of the structure, and places important limitations upon the exercise of governmental powers. Second, the foundation principle of that government is majority rule, with all ultimate political authority vested in the people, by whose authority the Constitution was originally established. Third, the judicial review function can be performed consistently with the democratic concept of government only if the Court objectively interprets the Constitution according to the framers' intent as derived from the constitutional text, the historical record, and necessary implications

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> of the Constitution and statutes, and that the justices not read their own personal preferences into the law; 2. that the justices pay deference to the legislative and executive branches of the federal and state governments by seldom overruling their policies, and then only on strictly "legal" grounds; 3. that the justices rely upon statutory rather than constitutional construction wherever possible; 4. that the justices accept for decision only "cases and controversies" where the litigants have standing to sue in live issues; and 5. that the justices neither issue advisory opinions nor 6. answer political questions.

Lamb, *supra*, at 8. And for a review of the literature on judicial activism and restraint, *see* Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraint Debate*, 40 U. PITT. L. REV. 169 (1979).

[77] Elaboration of his personal philosophy has, for understandable reasons, been more common in his dissents than in opinions written for the Court. *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting); United Steelworkers v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); Nevada v. Hall, 440 U.S. 410, 432 (1979) (Rehnquist, J., dissenting); Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting); Fry v. United States, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting); Furman v. Georgia, 408 U.S. 238, 465 (1972) (Rehnquist, J., dissenting).

[78] Rehnquist, *Act Well Your Part, Therein All Honor Lies*, 9 HUM. RTS. 42 (1980) [hereinafter cited as *Act Well Your Part*]; Rehnquist, *Government by Cliche*, 45 MO. L. REV. 379 (1980) [hereinafter cited as *Government by Cliche*]; Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) [hereinafter cited as *Living Constitution*]; Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835 (1975) [hereinafter cited as *Political Battles*].

from the constitutional plan. This section will discuss each of these themes under separate headings.

A. *The Constitution as Government Charter*

For Justice Rehnquist the notion of the Constitution as a "fundamental charter"[79] is closely identified with the structure of the government created by the Constitution and the distribution of powers among its various entities. His perception of the intended distribution is closely wedded to views expressed by John Marshall in *Marbury v. Madison*[80] and is perhaps the central element of his philosophy of constitutional adjudication. Most fundamentally, the various organs of government possess authority only to the extent that it was "parceled out" to them by the adoption of the Constitution and its subsequent amendments.[81] Justic Rehnquist describes that distribution in quite prosaic terms:

> They [the people] have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually. As between the branches of the federal government, the people have given certain authority to the President, certain authority to the Congress, and certain authority to the federal judiciary. In the Bill of Rights they have erected protections for specified individual rights against the actions of the federal government. From today's perspective we might add that they have placed restrictions on the authority of the state governments in the thirteenth, fourteenth, and fifteenth amendments.[82]

This structural analysis of the Constitution is not unique to Justice Rehnquist, even in modern times,[83] and the use of structural implications in the Constitution to decide lawsuits traces its roots at least back to *McCulloch v. Maryland*.[84] But among current members of the Supreme Court, he is clearly

[79] *Living Constitution, supra* note 78, at 697; *Government by Cliche, supra* note 78, at 381.

[80] U.S. (1 Cranch) 137 (1803).

[81] *Living Constitution, supra* note 78, at 696; *Government by Cliche, supra* note 78, at 381.

[82] *Living Constitution, supra* note 78, at 696.

[83] For example, Professor Ely claims that the Constitution, as a government charter, is overwhelmingly concerned with process and structure, and not with specific substantive values. J. ELY, DEMOCRACY AND DISTRUST 92 (1980). Most of the amendments also deal with such structural and procedural matters as the franchise, executive and judicial procedures, and the structure and limitation of the branches of government. *Id.* at 92-99. Indeed, according to Professor Ely, prescribing the processes and structures of government is the proper function of a Constitution. *Id.* at 101.

Professor Charles L. Black also advocates constitutional interpretation through inferences drawn from governmental structure (though his inferences are much broader than Justice Rehnquist would be inclined to draw, *e.g.*, Professor Black would infer from the structure evident in the Constitution the necessity to apply the Bill of Rights to the states, even without the fourteenth amendment. Justice Rehnquist would not feel compelled to draw such an inference). C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39 (1969).

[84] 17 U.S. (4 Wheat.) 316 (1819). The first part of the opinion addresses the question whether Congress could create national banks. Although this part of the opinion is sometimes treated as resting on the "necessary and proper" clause, a more careful reading shows that Marshall decided the case on the basis of more general implications from the Constitution. He discussed the necessary and proper clause only in response to counsel's argument regarding its restrictive force. The second part of the opinion addresses the question whether a state can tax the national bank. Although Marshall's opinion may seem to some to rest on the Supremacy Clause of article VI, the opinion is essentially a structural analysis. Article VI merely declares the supremacy of whatever the national law may be and does not give content to the law.

the most prone to use structural considerations as a basis for judicial decision and to justify this position as consistent with past precedent. "[The] Court," he contends, "has often relied on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision the full effect intended by the Framers."[85] Moreover, this "implicit ordering" is apparently an adequate substitute for explicit constitutional text: "The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning."[86] Indeed, "there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."[87]

Although Justice Rehnquist has not systematically spelled out all of the legal implications arising from the structure of the Constitution, his concept of structure emphasizes the importance of state sovereignty in the original scheme of things. In dissenting from a Supreme Court decision upholding a federal law temporarily freezing the wages of state employees, he laid great stress upon the law's undue interference with "the State's performance of its sovereign functions of government."[88] As he perceived constitutional history, "the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty . . . ."[89] This was particularly evident in the tenth and eleventh amendments, which are prime

> examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.[90]

Undoubtedly the most striking application of Justice Rehnquist's structural analysis as a bulwark of state sovereignty is *National League of Cities v. Usery*,[91] which invalidated a federal law extending minimum wage and maximum hours provisions to state and local governmental employees. Speaking for the Court, he found that such an "exercise of congressional authority does

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[85]Nevada v. Hall, 440 U.S. 410, 433-34 (1979) (Rehnquist, J., dissenting). As authority for this statement he cites McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and his own opinion in National League of Cities v. Usery, 426 U.S. 833 (1976). *Id.*

[86]Nevada v. Hall, 440 U.S. at 433 (Rehnquist, J., dissenting).

[87]Fry v. United States, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting).

[88]*Id.* at 556 (Rehnquist, J., dissenting) (quoting New York v. United States, 326 U.S. 572, 587 (1946) (Stone, C.J., concurring)).

[89]*Id.* (Rehnquist, J., dissenting).

[90]*Id.* at 557 (Rehnquist, J., dissenting).

[91]426 U.S. 833 (1976).

not comport with the federal system of government embodied in the Constitution."[92] The doctrine of structural limitations implicit in the constitutional ordering of relationships was not as fully developed in *National League of Cities* as in his earlier dissent in *Fry v. United States,*[93] but the same rationale is there. As in the *Fry* dissent, he alluded to the tenth amendment as an affirmative limitation upon the exercise of Congressional power *vis a vis* the states,[94] but the weight of the analysis obviously rested upon his conception of the framer's understanding of the proper ordering of relationships between the central government and the states, rather than the explicit terms of the amendment.[95]

The same principle of state autonomy, derived from the "implicit ordering of relationships," also protects the states from one another's encroachment. This view was made clear in his dissent from the Court's decision in *Nevada v. Hall,*[96] which permitted the state of Nevada to be sued in the courts of California. By a literal reading of the constitutional text, the Court concluded that the eleventh amendment foreclosed only *federal* court jurisdiction of unconsenting state defendants; hence a state could be made a defendant in the courts of *other states.* In a strong dissent to this anomalous but textually plausible interpretation of the amendment, Justice Rehnquist took occasion to elaborate his concept of the "constitutional plan" which underlies and gives meaning to the express provisions of the Constitution.[97] His exploration of "the understanding of the Framers and the consequent doctrinal evolution of concepts of state sovereignty"[98] led him to the conclusion that the Court's decision in the present case could not possibly be correct.

> [T]he States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions, for, as Mr. Justice Blackmun notes, they would have otherwise perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States. The Eleventh Amendment is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States.[99]

The constitutional plan as he saw it accorded a high degree of sovereign separateness to the states not only in their relationships with the national govern-

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[92] *Id.* at 852.

[93] 421 U.S. at 549 (Rehnquist, J., dissenting). Nor was the doctrine as explicit as the analysis in Nevada v. Hall, 440 U.S. 410, 432 (1979) (Rehnquist, J., dissenting). Undoubtedly he feels freer to adumbrate his own philosophy in dissents than in opinions which must command the support of a majority.

[94] National League of Cities v. Usery, 426 U.S. at 842-43.

[95] The point had already been made explicit in his *Fry* dissent where he noted that "the Tenth Amendment by its terms" did not prohibit "congressional action which sets a mandatory ceiling on the wages of all state employees," but insisted that such a limitation nevertheless inhered in "the understanding of those who drafted and ratified the Constitution . . ." Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).

[96] 440 U.S. 410 (1979).

[97] *Id.* at 433 (Rehnquist, J., dissenting).

[98] *Id.* at 434 (Rehnquist, J., dissenting).

[99] *Id.* at 437 (Rehnquist, J., dissenting).

ment but also in their relationships with other states.

In theory, and occasionally in practice, the Justice has recognized that "the Thirteenth, Fourteenth, and Fifteenth Amendments . . . sharply altered the balance of power between the Federal and State governments."[100] In *Fitzpatrick v. Bitzer*,[101] for example, Justice Rehnquist held that the eleventh amendment did not bar an award of retroactive damages against a state for employment discrimination violating Title VII of the Civil Rights Act of 1964. He concluded that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[102] Nevertheless, he has argued that the core prohibitions of the equal protection clause are aimed at discrimination based on race and national origin[103] and that all other classifications are to be judged by the "rational basis" standard.[104] The application of strict judicial scrutiny to other "suspect classifications" or to classifications involving "fundamental rights" simply has no place in constitutional adjudication because it cannot be justified from the intent of those who adopted the fourteenth amendment. Justice Rehnquist thus recognizes the existence of limits on state sovereignty imposed by the Civil War amendments but construes the limits narrowly.

The concept of the Constitution as "government Charter" is not exhausted with the analysis of relationships among the states and between the states and the federal government. The constitutional allocation of powers was also intended to create a *balance* between two important and complementary *principles:* order and liberty.[105] Because of its emphasis on balance, the Constitution is not correctly described as "a charter which guarantees rights to individuals against the government."[106] Rather it creates, in the words of Justice Cardozo, "a scheme of ordered liberty."[107] This means, says Justice Rehnquist, "Not order at the expense of liberty, and not liberty at the expense of order, but as large a measure of each as may be had without sacrificing the other . . . ."[108] The Bill of Rights, of course, was drafted "as a bulwark of individual freedom

Trimble v. Gordon, 430 U.S. 762, 778 (1976) (Rehnquist, J., dissenting). In this case the reference to the Civil War amendments affected only the theory and not the practice, since his dissent would have upheld an Illinois probate law that discriminated on the basis of illegitimacy. For a similar admission of the limiting effect of the amendments, *see Living Constitution, supra* note 78, at 696.

427 U.S. 445 (1976).

Id. at 456.

Trimble v. Gordon, 430 U.S. at 780 (Rehnquist, J., dissenting).

In *Trimble,* Justice Rehnquist explained that classifications based on alienage have been considered "suspect" by the Court because "they are enough like [race and national origin classifications] to warrant similar treatment." 430 U.S. at 780 (Rehnquist, J., dissenting). However, he dissented in Sugarman v. Dougall, 413 U.S. 634 (1973), because he felt that there was no historical indication that the framers of the fourteenth amendment intended to render alienage a suspect classification or to protect "discrete and insular minorities" other than racial minorities. 413 U.S. at 650 (Rehnquist, J., dissenting).

This aspect of the "constitutional plan" is most fully elaborated in a public address delivered in 1980 at the University of Missouri Law School. *Government by Cliche, supra* note 78, *passim.*

Id. at 381.

Palko v. Connecticut, 302 U.S. 319, 325 (1937).

Government by Cliche, supra note 78, at 386.

against government tyranny," but "it is a gross mischaracterization to describe the entire Constitution in these terms. The original Constitution was adopted not to enshrine *states'* rights or to guarantee *individual* freedom, but to create a limited *national* government which was empowered to *curtail* both *states'* rights and *individual* freedom."[109]

In most of this analysis Justice Rehnquist speaks of a "balance" between order and liberty, but, in context, his argument is intended to provide a counterweight to (he says to "debunk")[110] the popular notion that the Constitution exists primarily to protect individual liberties against government intrusion. While decrying the notion that the balance should be tilted in favor either of individual rights or of governmental authority,[111] his opinions frequently reflect a very high value placed upon order and governmental authority. A typical example is *Roberts v. Louisiana*[112] in which the Court struck down a Louisiana statute that prescribed a mandatory death sentence for intentional murder of a police officer. The Court found that the failure of the statute to allow consideration of mitigating circumstances was a violation of the eighth amendment proscription of cruel and unusual punishment. In dissent, he perceived in the case "large questions of . . . how liberty and order should be balanced in a civilized society."[113] Policemen, he argued, as the "foot soldiers of society's defense of ordered liberty," should have a special claim on the state's protection. The premeditated murder of a peace office is such a threat to order that no mitigating circumstances whatever could counterbalance the interest in the protection of society. "It is no service to individual rights, or to individual liberty, to undermine what is surely the fundamental right and responsibility of any civilized government: the maintenance of order so that all may enjoy liberty and security."[114]

Justice Rehnquist has made a somewhat similar analysis of the first amendment, contrasting what he terms the "individualist" and the "utilitarian" theories of free speech. The individualist theory justifies the right to speak and

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[109] *Id.* at 387 (emphasis in original).

[110] *Id.* at 381.

[111] Justice Rehnquist observed:

> The Supreme Court of the United States, in deciding a case in which individual rights are pitted against the claim of the national government or of state governments to regulate individual conduct, "upholds" the Constitution by simply holding the balance true to the best of its ability. To suggest that it should "tilt" that balance in favor of individual rights, or in favor of governmental authority, breaches faith with the assumptions upon which the Constitution was adopted and upon which the Supreme Court has to the best of its ability operated for nearly two centuries. It is no more accurate to say of our Court that it is the ultimate guardian of individual rights than it is to say that it is the ultimate guardian of national authority or states' rights. Its function is to decide among these conflicting claims as truly and accurately as it can in accordance with a fundamental charter and later amendments which have been adopted by the source of *all governmental authority* — the people of this country.

Id. at 392-93 (emphasis in original).

[112] 431 U.S. 633 (1977).

[113] *Id.* at 643 (Rehnquist, J., dissenting).

[114] *Id.* at 647 (Rehnquist, J., dissenting).

publish as an end in itself because it "is essential to the individual's integrity and to his claim to be master of his own personal development."[115] The utilitarian theory, on the other hand, would justify free speech

> not by any inherent entitlement in the individual, but rather by the good results which accrue to society at large from recognizing such an entitlement in the individual. Implicit in that criterion is the idea that expression need not be tolerated where it makes no useful contribution to society, or where the contribution which it makes is outweighed by the possible harms which it may bring about.[116]

Although Justice Rehnquist does not explicitly commit himself to either theory, his leaning toward the utilitarian approach is apparent.[117] Just as the Constitution as a whole prescribes a balance between liberty and order, the utilitarian view of the first amendment balances society's interest in controlling speech against the contribution of the speech to informed political judgment or, in a broader utilitarian view, its contribution to the general marketplace of ideas.[118]

Thus, the Constitution is more than a "charter of liberty" or a "bulwark of individual rights." These phrases partly describe it, to be sure. But it is also a charter creating a government with sufficient power allocated among its various branches to maintain order and with sufficient restrictions upon the power of the federal government to preserve a fair amount of state autonomy.

B. *Majority Rule*

The foundation principle underlying the constitutional charter is government by the people. As explained by Justice Rehnquist, the concept is not particularly complicated. It simply means, "[t]he people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and later amending it."[119] But however simple in expression, the concept is of profound significance. The preambular reference to "We the People" reaches to the very heart of the Constitution. It reflects the fundamental notion of popular sovereignty which is the essence of the governmental system the document was intended to establish. The Constitution is the highest law of the land only because the people have willed it so.

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[115] Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 6 (1976). Justice Rehnquist borrowed these concepts from Emerson, *Justice Douglas' Contribution to the Law: The First Amendment*, 74 COLUM. L. REV. 353 (1974).

[116] Rehnquist, *supra* note 109, at 7.

[117] *Id.* In an earlier address utilizing the same concepts his preference for the utilitarian approach is more obvious. *See* Rehnquist, *Civility and Freedom of Speech*, 49 IND. L.J. 1 (1973).

[118] Rehnquist, *Civility and Freedom of Speech*, 49 IND L.J. 1, 4-7 (1973). Lind, commenting on the Rehnquist first amendment philosophy, carries the argument one step farther: "Since societal benefit provides the basis for an individual's rights, the government interest, represting that of society, will generally take precedence." Lind, *supra* note 38, at 109. The Rehnquist analysis does not go this far, but his voting record on first amendment questions suggests that this may be the operative result of his philosophy.

[119] *Living Constitution*, *supra* note 78, at 696. Rehnquist relies heavily on John Marshall's exposition of the concept in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See, id.; Government by Cliche, supra* note 78, at 280.

The system thus established "may loosely be called 'majority rule'."[120] The Constitution itself prescribes what majorities are required to decide what kinds of issues, including the extraordinary majorities needed to approve the Constitution and to change it by amendment. This emphasis upon majority rule in constitutional change is very important to Justice Rehnquist's view of the proper function of judicial review, which is considered in the next section of the paper. The infrequency of constitutional amendment might be cited as evidence of the need for judicial construction as a vehicle of constitutional change.[121] For Rehnquist, however, the experience of ratifying twenty-six amendments indicates that the system is workable, i.e., "when the Nation sees the need for a change, it is willing to alter the fundamental charter of government."[122] The requirement of extraordinary majorities makes amendment more difficult, but that expresses the will of the sovereign people that fundamental constitutional principles should not easily be changed, not even by themselves. As Justice Rehnquist expressed it, "A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution."[123]

His concept of popular sovereignty is also heavy with moral implications. While fundamentally a charter of government, the Constitution also incorporates substantive values, such as freedom of expression and political equality,[124] which were of special importance to the Framers. The inherent nature of these values is less important than the fact of their inclusion in the document, however, because they derive their claim to judicial protection not from any intrinsic "moral rightness" but from their adoption by the people as part of the fundamental charter. The Bill of Rights, for example, embodies guarantees of individual freedom against action by the federal and state governments. The importance of these guarantees has been vastly expanded by the judiciary in recent decades. But if a constitutional majority were to succeed in repealing the first ten amendments, there would be nothing in the Constitution or its underlying

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[120] *Government by Cliche*, *supra* note 78, at 384.

[121] *See, e.g.*, J. ELY, *supra* note 83, at 46 n.115.

[122] *Government by Cliche*, *supra* note 78, at 387.

[123] *Living Constitution*, *supra* note 78, at 696-97.

[124] U.S. CONST amend. I; U.S. CONST. amend XIV. Even these amendments, according to Professor Ely, may be better explained in terms of structure and process than in terms of substantive values. *See.* J. ELY, *supra* note 83, at 93-94, 98 (1980). Similarly, in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 73-74 (1978), Justice Rehnquist responded to appellants' claim that alternative forms of municipal administration would be more "practical" than Alabama's by reference to the principle of popular sovereignty:

> From a political science standpoint, appellants' suggestions may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body.

Id. See also, Living Constitution, *supra* note 78, at 704.

philosophy to "make this an illegal, an immoral, or an improper act."[125] "It might well be an unwise one, but in a system based on 'government of the people, by the people, and for the people,' there is no appeal to any higher forum or court than a forum which properly and accurately reflects their will."[126] This rather startling assertion illustrates the essential difference between "a system based on majority rule" and one arising from a "more elitist or philosophical notion of 'natural law' or 'government by the judiciary . . . .' "[127]

Justice Rehnquist thus rejects natural law, "fundamental rights," and every other standard of politically or judicially enforceable moral rightness independent of the Constitution. Only the sovereign — the people — can confer legitimacy upon rights, liberties, and laws, at least to the extent that such values are judicially cognizable. This is true not only of constitutional principles, but also of enacted laws, which "take on a form of moral goodness because they have been enacted into positive law."[128] On this point he is insistent: "It is the fact of their enactment that gives them whatever moral claim they have upon us as a society . . . and not any independent virtue they may have in any particular citizen's own scale of value."[129]

Justice Rehnquist, of course, recognizes that moral values derived from other sources create imperatives for individual citizens. He does not assert that all morality inheres in majority judgments. Neither the relatively permanent judgments embodied in the Constitution nor the somewhat more transient judgments produced by the shifting popular majorities in national, state, and local legislative bodies have such a monopoly of virtue. Quite the contrary, "individual moral judgments . . . are without doubt the most common and most powerful wellsprings for action when one believes that questions of right and wrong are involved."[130] But values held by an individual, or even by many individuals, have no claim upon the society as a whole until they have been embodied in legislative enactment or constitutional amendment. To this principle to Justice is fully committed: "I know of no other method compatible with political theory basic to democratic society by which one's own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society."[131]

The "majority rule" principle has one obvious implication for judicial decision-making: courts should defer to the decisions of legislatures as the current

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[125] *Government by Cliche, supra* note 78, at 391.

[126] *Id.*

[127] *Id.* at 390-91.

[128] *Living Constitution, supra* note 78, at 704.

[129] *Id.* For a biting attack on this position as "moral relativism," *see* Justice, *supra* note 44, at 19. The critique by Judge William Justice is accurate in the sense that laws (and the Constitution) may be changed and consequently work a change in the substance of the rules having "moral claim . . . upon us as a society." *Id.* at 27. The critique may be a little unfair, however, in some of the more extreme implications it draws.

[130] *Living Constitution, supra* note 78, at 705.

[131] *Id.*

voice of the people except when the legislation clearly runs afoul of a constitutional provision (or perhaps some principle implicit in the "constitutional plan"). The philosophy of deference to majority rule is explicit in Justice Rehnquist's opinions dealing with both state and federal legislation, particularly in cases involving an equal protection challenge. A recent illustration of his deference to congressional enactments is *Railroad Retirement Board v. Fritz,*[132] in which he wrote for the Court upholding a section of the Railroad Retirement Act of 1974 that reduced potential benefits for some members of the system. In a typical Rehnquist equal protection analysis, he observed, "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."[133] Inevitably, when people are classified for benefits, " 'some persons who have an almost equally strong claim to favored treatment [will] be placed on different sides of the line' . . . and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."[134]

More often, principles of deferential scrutiny are enunciated in cases relating to decisions of state and local bodies. For example, his dissent in *Furman v. Georgia*[135] (which invalidated the Georgia death penalty as cruel and unusual punishment) leaned heavily on the majority rule rationale: "The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded."[136] While admitting that "overreaching by the legislative and executive branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State," he insisted that the "judicial overreaching" evident in this decision sacrificed "the equally important right of the people to govern themselves."[137] His dissent in *Trimble v. Gordon*[138] provides another exposition of the same theme in the context of a 5-4 decision invalidating an Illinois law barring intestate inheritance by illegitimate children from their fathers. Policy decisions, the Justice said, are to be made by the people through their elected representatives, and not by judges. The Court has no warrant to second guess legislative decisions or to judge the wisdom or adequacy of the measures enacted by the majority. The "Constitutional Convention in 1787 rejected the idea that members of the federal judiciary should sit on a council of revision and veto laws which it considered unwise,"[139] and the "Civil War Amendments" did not reverse that decision.[140]

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[132]449 U.S. 166 (1980).

[133]*Id.* at 179.

[134]*Id.* at 179 (quoting Matthews v. Diaz, 426 U.S. 67, 83-84 (1976)).

[135]408 U.S. 238 (1972).

[136]*Id.* at 465 (Rehnquist, J., dissenting).

[137]*Id.* at 470 (Rehnquist, J., dissenting).

[138]430 U.S. 762, 777 (1977).

[139]*Id.* at 778 (Rehnquist, J., dissenting).

[140]*Id.* (Rehnquist, J., dissenting). The proposition that policy judgments are for legislatures, not the courts,

Justice Rehnquist's attitude of deference to state legislatures undoubtedly shows through most strongly in his application of the "rational basis" test in equal protection cases such as *Trimble v. Gordon*.[141] By 1976 this tendency had already become so pronounced that Shapiro felt justified in saying Justice Rehnquist was using the rational basis test as "a label to describe a preordained result."[142] However characterized, the equal protection cases clearly reflect Justice Rehnquist's allegiance to sovereignty of the people, exercised through "majority rule," as the foundation principle of the Constitution. Many people have found the equal protection clause of the fourteenth amendment explicit enough to justify a broad range of restrictions on legislatures, but Justice Rehnquist has been unwilling to give it that effect. He finds in the history of the amendment no intent to invalidate state enactments for any reason other than invidious discrimination on the basis of race or similar irrelevant and irrational criteria.[143] The sovereign will of the people, as expressed through their legislative decisions, must be honored unless necessary to prevent the discrimination which the people sought to remedy in ratifying the fourteenth amendment. So long as the legislative judgment is not completely arbitrary or irrational, and the type of invidious discrimination targeted by the amendment does not exist, the Court should not second guess the legislature. Justice Rehnquist has never voted to invalidate a statute after applying the rational basis test, partly because state legislatures, made up of men and women at least clever enough to get themselves elected by popular vote, generally do not make their decisions arbitrarily and irrationally.[144]

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this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles . . . ." *Id.* at 248. In Richardson v. Ramirez, 418 U.S. 24 (1974) Rehnquist stated:

> Pressed upon us by respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that point of view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Id. at 55.

[141] He first articulated his view of the rational basis standard in Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), where he observed that "the Equal Protection Clause of the Fourteenth Amendment requires neither that state enactments be 'logical' nor does it require that they be 'just' in the common meaning of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved." *Id.* at 183 (Rehnquist, J., dissenting). For other examples of his deferential equal protection analysis, *see* Zobel v. Williams, 102 S. Ct. 2309, 2323 (1982) (Rehnquist, J., dissenting); Rostker v. Goldberg, 453 U.S. 57 (1981); Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting); Michael M. v. Superior Court, 450 U.S. 464 (1981); Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting); Kelley v. Johnson, 425 U.S. 238 (1976); Jimenez v. Weinberger, 417 U.S. 628, (1974) (Rehnquist, J., dissenting); Department of Agriculture v. Moreno, 413 U.S. 528, 545 (1978) (Rehnquist, J., dissenting). *But see* Mills v. Habluetzel, 102 S. Ct. 1549 (1982).

[142] Shapiro, *supra* note 40, at 308.

[143] *See, e.g.*, Trimble v. Gordon, 430 U.S. at 779-80 (Rehnquist, J., dissenting).

[144] Justice Rehnquist did suggest in Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting),

Justice Rehnquist's propensity to defer to legislative judgment, then, is grounded in his concept of the sovereignty of the people in the constitutional scheme. Since it is inevitable that the Court will occasionally err, it is better to err in sustaining a state law than in invalidating it. This is true because

> [a]n error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.[145]

C. *The Function of Judicial Review*

Justice Rehnquist's vision of the judicial review function may be better understood if examined with reference to three persisting issues which have troubled the Court almost from the beginning. The first issue is the legitimacy of judicial review itself. From Justice Marshall's opinion in *Marbury v. Madison*[146] and Justice Gibson's dissent in *Eakins v. Raub*[147] to the Hand-Wechsler debate[148] in the mid-twentieth century, commentators have disagreed whether the Constitution grants any authority to the judicial branch to review the constitutional judgments of its coordinate branches.[149] As a practical matter the issue has long since been resolved in favor of judicial review, although challenges to the Supreme Court as the exclusive and ultimate interpreter of the Constitution continue to be raised.[150] Justice Rehnquist's views on this issue

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that a statute prohibiting an abortion even if the mother's life were in danger would be sufficiently irrational to be invalid. Needless to say, such a law did not exist in the statutes of any state.

[145] Furman v. Georgia, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting).

[146] 5 U.S. (1 Cranch) 137 (1803).

[147] 12 Serg. & Rawle 330 (Pa. 1825).

[148] Judge Learned Hand insisted that the Constitution did not give the courts authority to review the decisions of Congress, and indeed that such authority was inconsistent with separation of powers. He found justification for the Supreme Court's assumption of judicial review only in the practical need to keep the new government from foundering. As a result the power should be exercised only when absolutely necessary. L. HAND, THE BILL OF RIGHTS 1-30 (1958). Professor Wechsler replied that the power of judicial review is grounded in the article VI Supremacy Clause and in article III. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[149] Most of the debate has centered around the Court's power to review the actions of a coordinate branch of the federal government. The capacity of the Court to invalidate *state* legislative decisions, a power early recognized in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), has been much less controverted. As one commentator has stated, "[T]here is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal unconstitutionality." C. BLACK, *supra* note 83, at 74 (1969). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 11-13 (1978).

[150] *See, e.g.*, Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30 (1974). Perhaps the most expansive statement by the modern Court in support of its own authority for judicial review is found in *Cooper v. Aaron*, 358 U.S. 1 (1958), a case

will be briefly examined below because they shed light on his attitude toward the proper scope and conduct of judicial review.

The second issue is the alleged conflict between judicial review and the concept of majority rule. This issue raises the question whether the power of non-elected judges to review and invalidate popularly enacted legislation is consistent with our democratic system of government. It also has generated a fair amount of debate in recent years[151] and is closely related to the issue of legitimacy. If judicial review is undemocratic and undercuts popular responsibility, it is inconsistent with the fundamental constitutional principle of majority rule. Could those who framed and ratified the Constitution have intended such an inconsistency?[152] On the other hand, the Constitution contains a number of obvious checks on the power of transient majorities, including the long, staggered terms of Senators, the indirect election of President and Senate, and the oft noted system of checks and balances embodied in the separation of powers.[153] Judicial review could therefore be seen as another bulwark against the tyranny of the majority, and quite consistent with the overall constitutional plan.

The third issue centers on the proper standards of judicial review. Must judges look to the explicit (or at least clearly implicit) values embodied in the Constitution? Or may they go beyond the language and substance of the Constitution to find guidance in such sources as natural law, "general principles of law and reason,"[154] values "implicit in the concept of ordered liberty,"[155] "evolving standards of decency"[156] and "basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution"?[157]

Justice Rehnquist's positions on these three issues form a consistent theory of judicial review. In brief, he believes that judicial review is legitimate, as long

arising out of the attempt by Arkansas governor Orval Faubus to block implementation of a desegregation plan for Little Rock public schools.

[151] *See, e.g.*, JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967) [hereinafter cited as JUDICIAL REVIEW (Levy ed.)]. For statements of the view that judicial review is undemocratic, *see* Commager, *Judicial Review and Democracy*, in JUDICIAL REVIEW (Levy ed.); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in JUDICIAL REVIEW (Levy ed.). For defenses of the democratic nature of judicial review, *see* C. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-10 (1980); J. ELY, *supra* note 83, at 73-104; Rostow, *The Democratic Character of Judicial Review*, in JUDICIAL REVIEW (Levy ed.).

[152] *See* Commager, *supra* note 151, at 64; Thayer, *supra* note 151.

[153] C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 156-64 (1935); *see also*, THE FEDERALIST Nos. 47, 48, 49 (J. Madison) (B. Wright ed. 1961).

[154] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

[155] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[156] Trop v. Dulles, 356 U.S. 86, 101 (1968).

[157] Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975). Some writers have contended that "higher law" concepts are in fact implicit in the Constitution. *See* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29); Grey, *supra*, at 703; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

as the Court confines itself to the language and intent of the Constitution. To that extent it is also democratic, for in preferring the terms of the Constitution over a legislative enactment, the Court is merely giving effect to the highest expression of the people's will. Thus, judicial review is both legitimate and democratic, so long as the standard of that review reflects the true meaning of the Constitution. Each of these positions will be elaborated in the following discussion.

1. Legitimacy of Judicial Review

Justice Rehnquist's justification for judicial review is borrowed directly from the John Marshall rationale in *Marbury v. Madison*.[158] As restated in his University of Texas address, that rationale recognizes the people as the "ultimate source of authority in this Nation."[159] The people have conferred power upon the various governmental entities subject to specified limitations and a reservation of residual powers to themselves. As long as:

> the popular branches of government — state legislatures, the Congress, and the Presidency — are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail. When these branches overstep the authority granted to them by the Constitution, in the case of the President and the Congress, or invade protected individual rights, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the Court must prefer the Constitution to the government acts.[160]

In another address, Justice Rehnquist quoted directly from the Marshall opinion in making a similar point:

> The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.[161]

In sum, the Court is to decide controversies according to law. Since the Constitution is the supreme law of the land, it must take precedence over any other laws, including congressional enactments. Not only is the Court permitted such review, but, in light of its oath to uphold the Constitution, it *must* review

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[158] 5 U.S. (1 Cranch) 137 (1803). Justice Rehnquist refers to the rationale of this opinion in all his addresses on this topic. *See, e.g., Act Well Your Part, supra* note 78, at 47; *Government by Cliche, supra* note 78, at 389; *Living Constitution, supra* note 78, at 696; *Political Battles, supra* note 78, at 835. It also appears in his opinions, *e.g.*, Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).

[159] *Living Constitution, supra* note 78, at 696.

[160] *Id.* Presumably the same rationale would apply to judicial review of state acts, although *Marbury v. Madison* was concerned with an act of Congress.

[161] *Government by Cliche, supra* note 78, at 389 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803)).

the constitutionality of legislative enactments in order to give effect to the limitations on governmental power ordained by the people.

2. The Democratic Nature of Judicial Review

That brief summation of the Marshall-Rehnquist rationale for judicial review provides the core of the argument that judicial review need not conflict with the principle of majority rule. Judicial review is consistent with democratic theory because courts are merely carrying out the will of the people when they declare unconstitutional an Act of Congress or a law passed by a state legislature which violates that Constitution.[162] The people truly established a republican government based on majority rule, but they also recognized the dangers of a potentially tyrannical majority. Hence they placed in the Bill of Rights, and elsewhere in the Constitution, certain safeguards and constraints on the rule of the majority. These constraints, though enforced by the courts through the process of judicial review, have been imposed by the people. Thus the *judges* do not restrain the people (or, more commonly, their chosen representatives); rather, the *Constitution* does. Since the Constitution was ordained by the people, the people are ultimately restraining themselves by institutionalized checks upon the excesses of temporary majorities.[163]

This justification for judicial review in a democratic society has weaknesses to be sure. For one thing, most constitutional provisions represent the voice of people from another century. Their preferences may bear no relationship to the will of the people today, other than the absence of an extraordinary majority sufficiently aroused to comply with the requisites for constitutional amendment. For another, "there is obviously wide room for honest difference of opinion over the meaning of the general phrases in the Constitution."[164] This generality of language virtually requires the Court to provide substantive content to the Constitution. The same is true of changed conditions not contemplated by the framers. Nevertheless, the idea that judicial review should effectuate the will of the people as expressed in the Constitution has a certain compelling logic — a logic recognized even by those who would not limit judicial review to expounding ideals found within the four corners of the written Constitution.[165]

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[162] *Living Constitution, supra* note 78, at 697. *See also, Government by Cliche, supra* note 78, at 391; *Act Well Your Part, supra* note 78, at 47.

[163] *See, e.g., Living Constitution, supra* note 78, at 696.

[164] *Living Constitution, supra* note 78, at 697; *see also, Government by Cliche, supra* note 78, at 391.

[165] Thus, Professor Thomas Grey, an articulate advocate of a more expansive, non-interpretivist approach, has stated:

> The rationale's chief virtue is that it supports judicial review while answering the charge that the practice is undemocratic . . . . [W]hen a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: "We didn't do it — you did." The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.

Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975). *See also*, Berger, [illegible] *Judiciary: John Hart Ely's Invitation*, 54 IND. L.J. 277, 281-82 (1979); Strong, *Bicentennial*

V. STANDARDS OF CONSTITUTIONAL ADJUDICATION: JUSTICE REHNQUIST'S INTERPRETIVISM

To place Justice Rehnquist's approach to constitutional adjudication in perspective, a brief conceptual digression into the recently vigorous debate over "interpretivism" vs. "non-interpretivism" may be helpful.[166] *Interpretivism* is the position that "judges deciding constitutional issues should confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution," while *noninterpretivism* embodies "the contrary view that courts should go beyond that set of references and enforce values or norms that cannot be discovered within the four corners of the document."[167] The non-interpretive view recognizes the importance of constitutional text and historical intentions and generally concedes that explicit constitutional text cannot be nullified by unwritten "higher law" principles or appeals to "fundamental" societal values.[168] But it does insist that constitutional text may be supplemented by unwritten principles — whether denominated higher law, natural law, fundamental values, rights essential to the concept of ordered liberty or something else — as additional sources of constitutional doctrine.[169] The interpretive-noninterpretive distinction is frequently treated as a dichotomy, but most commentators recognize the existence of intermediate positions between

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Benchmark: Two Centuries of Evolution of Constitutional Processes, 55 N.C.L. REV. 1, 114 (1976); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 787-88 (1971).

[166] As John Hart Ely explains, this persisting dichotomy in constitutional theory has undergone name changes through the years. "Strict constructionism" is a term that might be used to designate something like interpretivism, but Ely discards it because of its connotations, especially in the Nixon years, of "judgments that will please political conservatives." J. ELY, *supra* note 83, at 1. The interpretivism-noninterpretivism dichotomy is similar to the one between positivism and natural law; that is, "[i]nterpretivism *is* about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism." *Id.* (emphasis in original). Ely prefers interpretivism and noninterpretivism over these older terms because the older terms "have acquired baggage that can mislead." *Id.*

The end of such terminological evolution is not in sight. At the admitted cost of "proliferating neologisms," Paul Brest has suggested the use of "originalism" and "nonoriginalism" to designate the same two concepts. Brest states: "Virtually all modes of constitutional decisionmaking, including those endorsed by Professor Ely, require interpretation. The differences lie in what is being interpreted, and I use the term 'originalism' to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 n.1 (1980).

[167] J. ELY, *supra* note 83, at 1. *See also* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978). Ely's definition follows that suggested by Grey. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Brest's definition of "originalism" is generally similar. Brest, *supra* note 166, at 204. Lind's "textualism" is also analogous to "interpretivism" and "originalism." Lind, *supra* note 39, at 102.

[168] *See* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 (1978). In support of the noninterpretive position Grey elaborates his thesis of an original understanding prevailing among the framers of the Constitution that "unwritten higher law principles had constitutional status." Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975). For a more extreme version of noninterpretivism which treats the "text and original history as important but not necessarily authoritative," *see* Brest, *supra* note 166, at 228 & *passim*.

[169] For recent expressions of this viewpoint, other than Grey and Brest, *see* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 1, 31-45 (1970); Perry, *Abortion, The Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976). *See also* Peebles, *A Call to High Debate: The Or*[illegible] [illegible] *1860-1920*, 52 U. [illegible] L. REV. 49 (1980).

e most literal, "clause-bound" interpretivism and the forms of noninter-retivism most heavily laden with values extraneous to the Constitution.[170]

Given these definitions we have no hesitation in classifying Justice Rehn-uist as interpretivist. His published comments leave no doubt of his convic-ion that judicial review loses all legitimacy when it departs from the language nd intent of the basic document:

> Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in quite a different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.[171]

For him any right protected by the Court against majority action must be "found in the language of the Constitution and not elsewhere,"[172] and he has frequently expressed concern that judges may too often be looking "elsewhere."[173] The Civil War amendments, with their extremely broad language, have posed a constant temptation for Courts to fill in the details by resort to extra-constitutional values. When "provisions of the Constitution are so broad and so capable of differing interpretation . . . few mortals who occupy the position of judges can be wholly free of the temptation to read into such a document their own personal prejudices and predilections."[174] Too often the broad provisions of these amendments have become a general warrant for social problem-solving by the Court, in which judges simply end up imposing their personal moral and social preferences on others. This, in fact, becomes almost inevitable when the justices loose themselves from the moorings of the language and intent of those who framed the Constitution and its amendments.[175]

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[170] Ely identifies "clause-bound interpretivism" with the extreme view that provisions of the Constitution are self-contained units to be construed without injection of content from outside the provision. Ely had aligned himself with the interpretivists (although not of the extreme variety). Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). By 1978 he had reluctantly moved closer to the noninterpretive position. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, *supra* note 167. For other statements of a noninterpretivist viewpoint, see R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1 (1976).

[171] *Living Constitution, supra* note 78, at 698.

[172] Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 179 (1972) (Rehnquist, J., dissenting).

[173] *See, e.g.*, Carey v. Population Services International, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting); Roberts v. Louisiana, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting); *Act Well Your Part, supra* note 78, at 44, 45, 47; *Government by Cliche, supra* note 78, at 391; *Living Constitution, supra* note 78, at 697-98, 702.

[174] *Government by Cliche, supra* note 78, at 391.

[175] "It should not be easy for any individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed, it should not be easier just because [illegible]ividual in question is a judge." *Living Constitution, supra* note 78, at 705-06.

Although Justice Rehnquist's utterances place him squarely in the "interpretivist" camp, he is not what Ely calls the "clause-bound" interpretivist.[176] Rather his approach, again using Ely's characterization of intepretivism, "might admit that a number of constitutional phrases cannot intelligibly be given content solely on the basis of their language and surrounding legislative history, indeed that certain of them seem on their face to call for an injection of content from some source beyond the provision, but hold nonetheless that the theory one employs to supply that content should be derived from the general themes of the entire constitutional document and not from some source entirely beyond its four corners."[177] This is roughly synonymous with Grey's "pure interpretive" model, which:

> contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationshps, as well as explicit commands . . . .
>
> What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text — that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.[178]

These excerpts from Ely and Grey capsulize remarkably well the tests of constitutionality that Justice Rehnquist has identified. His insistence that judicial review be "somehow tied to the language of the Constitution"[179] and that protected rights be "found in the language of the Constitution and not elsewhere"[180] are the essence of the interpretive model. Taken in isolation, these comments might suggest an affinity with Ely's "clause-bound" interpretivism, or what Grey calls "literalism."[181] That impression is quickly dispelled, however, when his beliefs about the Constitution as a "fundamental charter" are taken into account. Reliance upon an "implicit ordering of relationships within the federal system"[182] which yields "tacit postulates" having as much force as express constitutional provisions[183] is clearly not consistent with the literalist, clause-bound approach to constitutional interpretation. It is, however, quite consistent with

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[176]According to Ely, the "clause-bound" approach suggests "that the various provisions of the Constitution be approached essentially as self-contained units and interpreted on the basis of their language, with whatever interpretive help the legislative history can provide, without significant injection of content from outside the provision." J. ELY, *supra* note 83, at 12-13.

[177]*Id.* at 12. Ely does not attribute this position to Justice Rehnquist, but the authors think it accurately characterizes the Rehnquist approach to constitutional adjudication.

[178]Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 n.9 (1975). Grey would call "literalism" what Ely calls "clause-bound" interpretivism. *Id.*

[179]*Living Constitution, supra* note 78, at 698.

[180]Weber v. Aetna Casualty & Surety Co., 406 U.S. at 179.

[181]*See supra* note 170.

[182]Nevada v. Hall, 440 U.S. 433, 433 (1979) (Rehnquist, J., dissenting).

[183]*Id.*

interpretation that relies upon "general themes of the entire constitutional document"[184] and draws normative inferences "from silences and omissions, from structures and relationships, as well as explicit commands."[185]

It is this structural approach to constitutional analysis that explains, and gives consistency to, Rehnquist's frequently criticized decision in *National League of Cities v. Usery,*[186] which invalidated a federal law extending minimum wage and maximum hours provisions to state and local governmental employees. Professor Shapiro cites this case as the prime example of Justice Rehnquist's failure to follow his own theory of constitutional interpretation.[187] Shapiro, however, construes the theory as requiring that a statute be invalidated only by reference to the language and intent of a particular constitutional text.[188] When the Rehnquist philosophy is construed more broadly to include notions of a constitutional plan, and the concept of state autonomy within that plan, the *National League of Cities* decision appears quite consistent with his self-articulated philosophy of constitutional adjudication. His notions about the place of states in the federal system are in fact reasonably well articulated in the *National League of Cities* opinion. The analysis is not tied to the examination of any particular constitutional provision, except for a reference to the tenth amendment,[189] because none is specifically relevant to the wage and hour question. But his opinion leaves no doubt of the important role assigned to states in the implicit ordering of constitutional relationships.[190] Perhaps the opinion was deficient in not referring specifically to other provisions of the Constitution from which state autonomy might be implied. Reference was made, however, to *Fry v. United States*[191] in which his ideas on the subject were more fully developed.[192] In *Fry* he had cited both the tenth and eleventh amendments as "examples of the understanding of those who drafted and ratified the Con-

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[184] J. ELY, *supra* note 83, at 12.

[185] Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703, 706 n.9 (1975).

[186] 426 U.S. 833 (1976).

[187] Shapiro, *supra* note 61, at 306-07.

[188] *Id.* For a statement of the Rehnquist philosophy he relies primarily on assertions in the Texas Law School address that judicial review must be "somehow tied to the language of the Constitution," *Living Constitution, supra* note 78, at 698, and must not go beyond "a generously fair reading of the language and intent of that document . . ." *Id.* at 704.

[189] The tenth amendment reserves undelegated powers "to the States respectively, or to the people." U.S. CONST amend. X.

[190] Rehnquist states that:

> One undoubted attribute of state sovereignty is the State's power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence" . . . [Coyle v. Smith, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869))] so that Congress may not abrogate the State's otherwise plenary authority to make them.

426 U.S. at 845-46.

[191] 421 U.S. 542 (1975).

[192] 426 U.S. at 843. *See Fry,* 421 U.S. at 549 (Rehnquist, J., dissenting).

stitution that the States were sovereign in many respects."[193] Thus, while the Justice might be faulted for not fully elaborating his rationale within the four corners of the *National League of Cities* opinion, the allegation of failing to follow his own constitutional theory is surely not well taken. The decision is undeniably linked to the language and intent of the Constitution — the intent deducible from the Framers' understanding of state sovereignty, and constitutionally to be implied at least from the tenth and eleventh amendments. One may disagree about the Framers' understanding, or the implications to be drawn from the two amendments, or the propriety of invalidating congressional enactments on the basis of implied notions about the proper ordering of federal relationships. But there is no gainsaying that these concepts are express and integral parts of Justice Rehnquist's theory of constitutional adjudication.

One additional aspect of Justice Rehnquist's philosophy requires mention — his attitude toward *stare decisis*. It is clear that he does not regard *stare decisis* in constitutional cases as a principle of overriding importance. This was readily deducible from his testimony at the time of his nomination,[194] and it has become increasingly apparent ever since. He specifically subscribes to the Brandeis philosophy[195] that precedent need not be accorded as much weight in a constitutional case as in a statutory case. As Justice Rehnquist has repeated the rationale, "[I]f the Court is wrong on a question of constitutional law, Congress can't simply change it by a statute passed by the House and Senate. It requires the process of a constitutional amendment and an extraordinary majority, which is very difficult to do."[196] If the Court makes a mistake on a statutory decision, on the other hand, Congress can correct that mistake with relative ease. In taking this point of view Justice Rehnquist may not be far from the prevailing attitude on the modern Court, although he is more outspoken that the rest in stating his willingness to reconsider and overrule precedent.[197]

VI. REHNQUIST ON POLITICAL IDEOLOGY

Since his appointment to the Supreme Court Justice Rehnquist has not spoken out extra-judicially on the subject of his own political ideology. His pre-appointment utterances, canvassed thoroughly at the nomination hearings, are of course still on the record, and the tenor of those comments is distinctly in the mold of political conservatism. His written opinions since 1972, to the extent they have addressed questions subject to political controversy, have done nothing to dispel the conservative image. Arguments in support of state

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[193]421 U.S. at 557. *See also* Nevada v. Hall, 440 U.S. 433, 439 (1979).

[194]*See Nomination Hearings, supra* note 2, at 16-86.

[195]Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting).

[196]*William H. Rehnquist: A Profile of a Supreme Court Justice*, K.U. LAWS. April 9, 1975, at 11.

[197]*See, e.g.*, Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting); Edelman v. Jordan 415 U.S. 651, 671 (1974); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting).

sovereignty, a denial of most appeals from criminal conviction, and a narrow view of first amendment rights (and of civil liberties generally) have certainly been consistent with his previously expressed political opinions.

While refraining from public discussion of his own ideological leanings, Justice Rehnquist has specifically recognized the relevance of ideology to the judicial function. In a 1975 lecture on the subject of judicial independence, he observed that "most Presidents whom historians regard as 'strong' Presidents considered what political, social and legal philosophy their Supreme Court nominees would follow after donning their judicial robes. The fact that Presidents have frequently been disappointed in their expectations does not detract from the fact that they properly considered the matter."[198] This modest endorsement of ideology as a relevant factor in judicial selection was presumably not intended as carte blanche for a judge to indulge his ideological bent in disregard of all constitutional principle. At the hearings on his nomination, he expressed a hope that he would dissociate his personal preferences "to the greatest extent possible" from his role as a judge.[199] His whole self-articulated judicial philosophy exalts a "neutral principles" approach and denigrates decision rules based on current social values or personal predilections of judges. Nevertheless, his comments about ideology in the judicial selection process plainly registers the practical realization that a judge cannot be expected to divest himself entirely of all ideological baggage as a prerequisite to the proper performance of his judicial function.

VII. THE OPERATIVE PHILOSOPHY: THE REHNQUIST DECISION RECORD

The preceding discussion of Justice Rehnquist's philosophy has quoted excerpts from a number of Rehnquist opinions. The purpose of that analysis was to identify the principles Justice Rehnquist perceives as guiding his judicial decision making. In this section, the article will survey the decided cases more systematically with reference to the results for which Justice Rehnquist voted. From this examination this article will derive some of the operative rules that appear actually to guide his decisions.

The universe of cases initially selected for analysis included all those decided by written opinion during the 1976 through the 1981 terms of the United States Supreme Court, in which Justice Rehnquist participated.[200] From this universe the authors sorted out the cases relevant to this article's analytical categories, and the results are presented in Table 1 (Appendix A) and Table 2 (Appendix B). Table 1 includes all cases in which a governmental unit was a party on one side, the four major categories in Table 1 (state criminal, state civil, federal

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[198] *Political Battles*, *supra* note 78, at 849.

[199] *Nomination Hearings*, *supra* note 2, at 27.

[200] Cases handled by summary disposition or denial of certiorari, though accompanied by written dissents in some instances, were excluded from the survey as not being decided by written opinion. Cases decided by a 4-4 tie vote, and hence resulting in affirmance without written opinion, were also excluded.

criminal, federal civil cases) being mutually exclusive. By contrast, the three principal categories in Table 2 (state acts, federal jurisdiction, freedom of expression) substantially overlap in their case coverage with Table 1 and with each other.

Because the tables compress so much information , they must be examined in detail. Most of the categories are adaptations of the propositions propounded by Shapiro in his 1976 "preliminary view" of Justice Rehnquist.[201] In summary, these are: (1) conflicts between an individual and the government are resolved in favor of the government; (2) conflicts between state and federal authority are resolved in favor of the states; and (3) questions of the exercise of federal jurisdiction are resolved against such exercise.[202] The data in Table 1 pertain solely to the first proposition, but in order to make possible a more discriminating analysis, the cases are further classified by governmental party (state/local or federal) and by criminal or civil subject matter. Of the total universe of cases, only those in which government was a party on *one* side are represented in the Table. If government was a party on *both* sides the case was excluded in order to retain the integrity of the classification of government versus a private party.[203] The reach of this sample is somewhat broader than Shapiro's since he excluded federal tax cases as well as disputes "solely between organizations acting on their own behalf, such as corporations and labor unions, and the government . . . ."[204] We did exclude one other small group of cases, however, because they could not be readily classified with respect to the result for which Justice Rehnquist voted. These were cases having multiple holdings, not all favoring the same party. If the outcome of the vote was obviously more favorable to one side, the case was included in the sample; otherwise it was omitted as not classifiable.

Table 1 supports the proposition that Justice Rehnquist tends to vote for governmental agencies in their disputes with private parties, whether of a criminal or non-criminal nature. He votes to sustain federal criminal prosecutions with somewhat greater frequency than state prosecutions, overall 90.3% to 85.3%, but he supports the state more often in civil cases, 79.6% to 68.3%. The differential with respect to criminal cases probably reflects the fact that federal prosecutions are more carefully conducted, on the average, than state prosecutions. This surmise is strengthened by comparison with the record of the Court as a whole, which sustained the federal government in 69.9% of the criminal cases but upheld the state only 53.8% of the time. The difference between Justice Reunquist and the Court majority — thirty-two percentage points for state criminal cases but only twenty percentage points for federal — may also be

[201]Shapiro, *supra* note 61, at 294.

[202]*Id.* In the original all three propositions are qualified by the phrase "whenever possible." *Id.*

[203]Separate figures for each term are presented in the Table, but the analysis is confined to the Table as a whole because the patterns for each term are similar. The data disclose no significant trends over time, and annual fluctuations appear to be random.

[204]Shapiro, *supra* note 61, at 294 n.3.

some measure of his greater solicitude for state sovereignty and autonomy. The solicitude for state and local prerogative is even more marked in the comparison of governmental support percentages in civil cases. Justice Rehnquist is twenty-six percentage points above the Court majority in favoring state government parties but has a support rate three percentage points below that of the majority for cases involving the federal government.

On close examination, Table 1 probably ought not to be read as evidence of a generalized pro-government bias in Rehnquist decisions. The conclusion reached depends to some extent on the norm utilized. If fifty percent is the norm or standard for absence of bias, the Justice is clearly biased on the pro-government side. If, on the other hand, we take the Court majority position as the norm (which requires an assumption that an unbiased person would hold the federal government to be "right" about seventy percent of the time, while the state government is right less often), Justice Rehnquist exhibits no general bias in favor of the federal government. He is above the norm for criminal cases but slightly below for civil cases. His values thus appear too differentiated for accurate classification on a single pro- or anti-government scale. Rather, he appears to have a preference for state autonomy as reflected in his percentage differences with the majority, and a bias toward *order* when order and liberty are weighed in the balance. The twenty percentage point differential for federal criminal cases, as compared with the absence of significant difference for federal civil cases, measures the bias toward order; the twenty-six percentage point differential for state civil cases, as compared with federal civil cases measures the preference for state autonomy; and the thirty-two percentage point difference for state criminal cases suggests a cumulative impact of both values — state autonomy and social order.

The categories in Table 2 are drawn to reflect Shapiro's second and third propositions — preference for the state in federal/state conflicts and a restrictive view of the exercise of federal court jurisdiction. One additional category — cases involving first amendment freedom of expression and association — is also included in Table 2. It is, for the most part, a specialized subset of the cases pitting government against private parties, and was suggested by the Lind article on Justice Rehnquist and first amendment speech in the labor context.[205] The columns labeled "Votes For or Against Validity of State Acts," speak generally to Shapiro's second proposition, i.e., that conflicts between state and federal authority should be resolved in favor of the state.[206] Here our principal criterion for state-federal conflict is the existence of a challenge to a state law or act on the ground that it conflicts with the United States Constitution, or any federal statute, regulation, executive act or court order.

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[205] Lind, *supra* note 39, at 93. The category does not include cases arising from the religion clauses of the first amendment.

[206] The authors are not sure of the precise correspondence because Shapiro presents only minimal data and does not state very specifically how he identifies cases which reflect conflict "between state and federal authority, whether on an executive, legislative, or judicial level . . . ." Shapiro, *supra* note 61, at 294.

In developing the subset of cases dealing with the exercise of federal jurisdiction we defined "exercise of jurisdiction" very broadly to include virtually any preliminary question that must be resolved before the Court can reach the substance of the controversy or claim. Thus we include issues relating to standing, ripeness, mootness, abstention and justiciability generally, as well as the interpretation of particular statutes and constitutional provisions that may confer jurisdiction upon the courts, expressly or by implication.[207]

Table 2 is subject to the straightforward interpretation that Justice Rehnquist is prone to uphold the validity of state acts against a constitutional attack or other federal challenge, to vote against the exercise of federal jurisdiction, and to limit the scope of first amendment protection. These generalizations reflect not only the relative frequency with which he asserts such positions, but also his voting as compared with the Court majority.[208] All of these positions are consistent with the central value of state sovereignty and autonomy. Negative votes on the exercise of federal jurisdiction more often than not are votes to insulate state laws or acts from federal review, and nearly all of the first amendment cases involve state rather than federal action.

VIII. EXPLAINING THE "UNEXPECTED" VOTES

Some additional light may be shed on the voting record by looking at the cases in which Justice Rehnquist did not vote as expected — when he voted in favor of the individual rather than the government, or in support of a federal challenge to the validity of a state act. In contests between a private party and a *state* agency, the great majority of Rehnquist votes in favor of the private party occurred in cases decided without a dissenting vote, or at least with no vote less favorable to the private party than Justice Rehnquist's.[209] Of twenty state criminal cases in which the Justice favored the defendant over the prosecution, nineteen (95%) were decided without dissent.[210] Of forty-nine state

[207]This seems to comport with the Shapiro approach. He also defines "exercise of jurisdiction" quite broadly, to include such matters as "justiciability, standing, mootness, ripeness, and equitable discretion." *Id.* at 294 n.4.

[208]As in Table 1, no significant trends over time are apparent, although the most recent (1981) term shows a lessened hostility to first amendment values. The Justice supported the first amendment claim in five of 13 cases, as compared with five of 50 cases during the preceding five terms.

[209]In some instances one or more justices did not participate in the decision and the vote of 8-0 or 7-0 was unanimous only as to those participating. In a few cases one or more members of the Court dissented from the position espoused by Justice Rehnquist, but only because they would have given the private party even more favorable treatment. Such cases are considered "unanimous" decisions for purposes of explaining the Rehnquist vote because no one urged less favorable treatment of the private party than Rehnquist.

[210]In Burch v. Louisiana, 441 U.S. 130 (1979), the Court (per Justice Rehnquist) was unanimous in holding that a non-unanimous six-person jury in a state criminal trial for a non-petty offense violated the right to a jury trial guaranteed by the sixth and fourteenth amendments. However, three dissenters would have reversed defendant's conviction outright. *Id.* at 140 (Brennan, Stewart, Marshall, JJ., dissenting). In Wood v. Georgia, 450 U.S. 261 (1981), Justice Rehnquist voted with the Court in remanding a state court decision to revoke defendant's probation for nonpayment of a fine. The four dissenters in the case would have reversed outright. This also is treated as a unanimous decision. Although one of the four dissenters flatly disagreed with the Court's rationale for remand, *id.* at 275 (White, J., dissenting), all four dissenters advocated a position more favorable to the defendants than that taken by the Court. *Id.* at 274 (Brennan, Marshall, JJ., dissenting); *id.* at 275 (Stewart, J., dissenting); *id.* (White, J., dissenting).

civil cases in which Justice Rehnquist supported the private party, thirty-three (67%) were decided without a dissenting vote on the side of the state. The cases involving federal challenge to state acts, which overlap substantially with the preceding two categories, show a similar pattern. Of eighty-two cases in which the Justice voted in favor of the federal challenge, sixty-five (79%) were decided without dissent.[211] The significance of these figures seems obvious. The values that predispose Justice Rehnquist to give great deference to state actions within the federal system are capable of being overridden by facts and law that dictate a contrary result. The predisposition is obviously strong, but it does not give rise to a knee-jerk reaction. When the case for the private party is persuasive enough to convince all of the other members of the Court, it is often good enough to persuade Justice Rehnquist as well.[212]

A. *Votes Against State Government*

This still leaves a number of the Rehnquist votes unexplained. In twenty-one[213] cases in the sample,[214] Justice Rehnquist voted against the state or against the validity of a state act even though one or more of his colleagues took a position more favorable to the state. Such votes could, of course, be written off as unexplained aberrations; after all, no one is wholly consistent. Nevertheless, the cases tend to cluster in ways that suggest some consistency even in the pattern of deviation from the normal posture in favor of state autonomy. Three of the cases raised a due process challenge by a party alleging that his contacts with the forum state were insufficient to sustain state court jurisdiction.[215] A fourth case raised a similar minimum contacts challenge to a state court choice of law decision.[216] Apparently, in such cases, Justice Rehnquist's concern for due process overrides the bias in favor of state authority. Perhaps this is because a finding of insufficient contacts does not pose the same affront to state sovereignty and autonomy as, for example, holding a state law in violation of the equal protection clause. Generally, the denial of jurisdiction to the courts of one state is based on a presumption that another state is the

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[211] By contrast, Justice Rehnquist has been joined by a unanimous (or at least non-dissenting) court in very few of his pro-state government votes — just nine of 115 state criminal cases (8%), 37 of 191 non-criminal cases (19%), and 44 of 332 challenges to the validity of state acts (13%).

[212] But not invariably — Rehnquist was the lone dissenter in 26 of the 883 cases utilized in the analysis.

[213] As discussed in the text, 17 Rehnquist votes against the validity of state acts were non-unamimous decisions, as were 16 votes against the state in non-criminal cases and one vote in a criminal case. Because of the substantial overlap between categories in Table 1 and those in Table 2, the 34 unexplained items in the three categories represent only 21 cases.

[214] In tabulating votes for or against state/local government, and for or against the validity of state acts, eight cases were excluded from the count because the holding supported by Justice Rehnquist ran partly against the state and partly in favor of the state. Five of these were decided by unanimous vote or without dissent. With this exception, and the possibility of some inadvertent omission, the "sample" is the whole universe of cases decided by written opinion in which Justice Rehnquist participated during the 1976-1981 terms.

[215] Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978).

[216] Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

more appropriate forum or, with choice of law rules, that the law of some other state should be applied. To some extent, the intellectual operation involves weighing the claims of one state against those of another; and a generalized deference to state autonomy would not necessarily work in favor of the forum state. In addition these cases pose less of an affront to majority rule because they merely set aside the decisions of state judges, often non-elected, rather than the decisions of popularly elected state legislatures.

Nine decisions in this group of twenty-one share another common characteristic: they construe state rights and obligations under federal legislation rather than reviewing the constitutionality of state acts.[217] The absence of a constitutional question renders values stemming from federalism and state autonomy less relevant and focusses the inquiry instead upon the intent of Congress in enacting the legislation, as ascertained from language and legislative history. A concern for state autonomy might still influence the interpretation of what Congress intended, but the central value to be vindicated is congressional intent, not a constitutionally mandated federalism. Such a focus leaves more room for a holding running contrary to the state claim.

Three other cases raised questions of unlawful taking of private property by state or local government.[218] Unlike the minimum contacts cases noted above, the taking cases pose a direct challenge to state (and local) prerogatives, but in this limited area of the law Justice Rehnquist has recently shown considerable solicitude for private property rights.[219] The same solicitude, reinforced perhaps by the explicit language of the Constitution, may also account for the Rehnquist votes in two cases reviving the Contract clause[220] as a significant limitation upon state action.[221]

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[217] Perhaps not coincidentally, five of the nine cases dealt with alleged racial discrimination, and in each instance Justice Rehnquist voted against the outcome most favorable to racial minorities. *See* General Building Contractors Ass'n. v. Pennsylvania, 102 S. Ct. 3141 (1982); Patsy v. Board of Regents of the State of Florida, 102 S. Ct. 2557 (1982); Hathorn v. Lavorn, 102 S. Ct. 2421 (1982); Gladstone Realtors v. Village of Belwood, 441 U.S. 91 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Two others were brought under the antitrust laws, Arizona v. Maricopa County Medical Society, 102 S. Ct. 2466 (1982); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The remaining two cases construed 43 U.S.C. § 641 (1976) in a manner unfavorable to Idaho claims to federal public lands, Andrus v. Idaho, 445 U.S. 715 (1980), and found an Iowa Medicaid procedure to be in conflict with applicable federal regulations, Herweg v. Roy, 455 U.S. 265 (1982).

[218] Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982); United States v. Clarke, 445 U.S. 253 (1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[219] For other recent cases in which Justice Rehnquist indicated sympathy for a "taking" argument, *see* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633 (1981) (Rehnquist, J., concurring); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1981); Vaughan v. Vermillion Corp., 444 U.S. 206 (1979). *But see* Agins v. Tiburon, 447 U.S. 255 (1980); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (cases in which a unanimous Court found no taking).

[220] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. 1, § 10, cl.1.

[221] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). These two decisions resurrected the Contract clause, which had been virtually read out of the Constitution by a line of cases running from Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), through City of El Paso v. Simmons, 379 U.S. 497 (1965).

For three other cases in which Justice Rehnquist took a position less favorable to state prerogative

B. *Votes Against the Federal Government*

The Rehnquist votes in controversies between private parties and the *federal* government show a similar tendency to favor the government over the individual, highly pronounced in criminal cases, somewhat less so in non-criminal cases. Fewer of the votes for the private party can be explained on the "unanimity" theory, however, since only three of nine Rehnquist votes favoring the criminal defendant, and sixteen of fifty-eight votes favoring private parties in non-criminal matters, occurred in cases decided without dissent.[222] This leaves more cases to be explained by something other than a bias toward government or a set of facts so compelling that no justice can disagree.

With respect to the six unexplained criminal cases, it may be significant that none of them involved violent crime against person or property. Perhaps, in white collar crime, the Justice does not perceive the same grave threat to the functioning of an orderly society.[223]

The civil cases do not cluster quite so neatly, but at least one pattern is clear: when a *constitutional* question is at issue Justice Rehnquist seldom votes in favor of the private party. Of forty-six federal, non-criminal cases that turned at least in part on an issue of constitutional interpretation, only five evoked a Rehnquist vote against the government.[224] In contrast, his votes on 137 civil cases involving interpretation of federal statutes, regulations, and common law are more evenly divided between government and private party — eighty-four for the former and fifty-three for the latter. This might still indicate a significant pro-government bias, since the distribution is sixty-one percent in favor of the

than one or more of his colleagues, *see* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1982); Widmar v. Vincent, 454 U.S. 263 (1982); New Jersey v. Portash, 440 U.S. 450 (1979). The first two cases raised freedom of expression issues. *Portash* raised an issue of self-incrimination.

[222]That is, with no justice taking a position more favorable to the government.

[223]Two raised claims of legislative immunity from criminal prosecution, United States v. Gillock, 445 U.S. 360 (1980); United States v. Helstoski, 442 U.S. 477 (1979). Three others turned on the question whether defendant's conduct was in fact proscribed by the relevant criminal statute. Williams v. United States, 102 S. Ct. 3088 (1982); Chiarella v. United States, 445 U.S. 222 (1980); Adamo Wrecking Co. v. United States, 4343 U.S. 275 (1978). One, Pinkus v. United States, 436 U.S. 293 (1978), reversed an obscenity conviction.

[224]Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982); Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982); Fullilove v. Klutznick, 448 U.S. 448 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nixon v. Administrator, 433 U.S. 425 (1977). *Gibbons* and *Marathon* were unusual cases invalidating congressional bankruptcy legislation; *Kaiser Aetna* involved a "taking" without just compensation; and *Nixon*, dealing with custody of presidential papers, presented a separation of powers issue rather than a typical question of individual rights. *Fullilove* was a classic case of reverse racial discrimination arising from a provision of the Public Works Employment Act of 1977 which required that ten percent of federal funds for local public works be used to procure supplies or services from minority owned businesses.

One other case also falls partly in this category, United States v. Will, 449 U.S. 200 (1980). This was a class action filed by a number of U.S. District Court judges challenging the validity of congressional statutes that in four consecutive years had stopped or reduced previously authorized cost-of-living salary increases for judges (and others). The judges contended that revoking the increases ran afoul of the Compensation clause which provides that the compensation of judges "shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. This case is omitted from the tabulation because the holding was not readily classifiable as a vote "for" or "against" the government. The Court held the revocation valid for two of the years and invalid the other two.

federal government. However, Justice Rehnquist voted for the government *less often* than the Court majority, which support the government position in ninety-four (compared with Rehnquist's eighty-four) of the 137 cases.[225] These figures suggest that the pro-government bias that differentiates Justice Rehnquist from his colleagues in deciding constitutional issues has no application to questions of statutory interpretation. If any bias exists it actuates his colleagues, collectively, more than him. Perhaps a sounder conclusion, with respect to this class of cases, is that no obvious overarching value posture dictates outcomes in one direction or another. If the analysis were extended to additional sub-categories of cases, other biases might of course appear. For example, Spaeth and Teger found that twenty-six of thirty-two Rehnquist votes in non-unanimous cases raising a challenge to decisions of federal regulatory commissions, 1971-1977, could be explained by a pro-business or anti-labor bias.[226] No doubt other specialized groups of cases would justify other hypotheses. For cases that do not conform to a particular explanatory hypothesis we might even find modest relevance in the traditional, pre-realist model of the judge who simply tries to determine the law and apply it evenhandedly on a case-by-case basis. In any event, the federal statutory cases are not as easy to explain in terms of a few central propositions as are the federal criminal cases, or most cases to which states are parties.

C. *Votes Favoring the Exercise of Jurisdiction*

The 159 cases tabulated in the middle columns of Table 2, relating to the exercise of federal court jurisdiction, once more show a clear deviation from the majority. Justice Rehnquist has an unmistakable preference for limiting rather than expanding access to federal courts. Table 2 shows the Justice voting against the exercise of federal jurisdiction in 105 of 159 cases, compared with the majority support for the party seeking access in nearly half the cases. The preference is even more marked when unaminous (or non-dissenting) votes are taken into account. In forty of fifty-four cases in which Justice Rehnquist favored the exercise of jurisdiction, the arguments were so convincing that no member of the Court dissented on the jurisdictional question. Thus, he voted in favor of exercising jurisdiction on just fourteen occasions when any other member of the Court voted in the negative.

In four of the fourteen cases only one justice dissented on the jurisdictional question.[227] Three other Rehnquist votes to exercise jurisdiction may have

[225]Correspondingly, the majority decided in favor of the government less often in the cases raising constitutional issues — 37 of 46 cases as compared with Rehnquist's 41 of 46. Based on cases decided through the 1975 term, Shapiro concluded that "Justice Rehnquist often votes against the government" when "the issue involves the reach of government regulation or control, in antitrust cases or cases involving labor-managment relations, for example . . ." Shapiro, *supra* note 61, at 294 n.3. Shapiro cites four cases as examples, and the authors found at least 25 post-1976 cases that further illustrate the point. Nevertheless, in such cases Justice Rehnquist has voted far more often (the authors found approximately 45 cases) in favor of the government, as have also his fellow justices.

[226]Spaeth & Teger, *supra* note 34, at 278-82.

[227]Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982); Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980); Andrus v. Idaho, 445 U.S. 715 (1980); Craig v. Boren, 429 U.S. 190 (1976)

been rooted in deference to state governmental entities, which were seeking review of lower court decisions.[228] The remaining cases do not fit any identifiable pattern.[229] In three of them Justice Rehnquist virtually apologized for the position he was taking, by indicating a willingness to reconsider previous precedent[230] or urging Congress to change the law.[231] In *Nixon v. Fitzgerald,*[232] the recent presidential immunity case, one can speculate that a desire to reach the substantive issue may have overridden Justice Rehnquist's normal inclination to restrict jurisdiction. A year earlier, in the Kissinger wiretapping case, an evenly divided court was unable to resolve the issue of absolute presidential immunity from civil damages liability for official acts.[233] *Fitzgerald* presented the same claim in a different factual context, loss of government employment and damage to reputation, and Justice Rehnquist joined a 5-4 majority in finding absolute constitutional immunity. Justices Blackmun, Brennan, and Marshall would have dismissed the writ of certiorari as improvidently granted because, before oral argument, the parties had reached an agreement to liquidate damages. Under the agreement the former President paid respondent Fitzgerald $142,000, and agreed to pay an additional $28,000 if the Court held the President was not entitled to absolute immunity. Although the case was not moot, with $28,000 riding on the outcome, the dissenters contended that this was not the type of "case or controversy over which we should exercise our power of discretionary review."[234] Justice Rehnquist apparently was not troubled by such reservations.

Despite these exceptions, Justice Rehnquist's preference for limiting the exercise of federal court jurisdiction is apparent in the decisions, and he has been articulate about stating the preference. Perhaps typical is the following comment on a constitutional challenge to federal limitations on the liability of nuclear power generating facilities:[235]

> I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on District Court jurisdiction as carefully defined in our statutes

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[228] Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 (1981); Arizona v. Manypenny, 451 U.S. 232 (1981); County of Los Angeles v. Davis, 440 U.S. 625 (1979).

[229] Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982); Patsy v. Board of Regents of the State of Florida, 102 S. Ct. 2557 (1982); Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981); Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980); Cannon v. University of Chicago, 441 U.S. 677 (1979); Parklane Hosiery Inc. v. Shore, 439 U.S. 322 (1979); California Dump Truck Owners Ass'n v. Public Utilities Comm'n of California, 434 U.S. 9 (1977).

[230] Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980); Cannon v. University of Chicago, 441 U.S. 677 (1979).

[231] Patsy v. Board of Regents of the State of Florida, 102 S. Ct. 2557 (1982).

[232] 102 S. Ct. 2690 (1982).

[233] Kissinger v. Halperin, 452 U.S. 713 (1981).

[234] 102 S. Ct. at 2727 (Blackmun, J., dissenting). These three justices also joined Justice White in dissenting on the merits.

[235] The statute in question was 42 U.S.C. § 2210 (1976).

> and cases. Because I believe the preservation of these limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court but would do so with instructions to dismiss the complaint for want of jurisdiction.[236]

In *Maryland v. Louisiana,*[237] he made a similar plea for restraint in exercising the Supreme Court's original jurisdiction. While admitting that the case fell within the literal terms of constitutional and statutory grants of original jurisdiction, he nevertheless urged the Court on prudential grounds not to assume jurisdiction: "It has been a consistent and dominant theme in decisions of this Court that our original jurisdiction should be exercised with considerable restraint and only after searching inquiry into the necessity for doing so."[238] This was a case, he concluded, in which no such necessity was shown.[239]

He has urged the same posture of restraint with respect to standing and other questions of justiciability:

> Obedience to the rules of standing . . . is of crucial importance to constitutional adjudication in this Court, for when the parties leave these halls, what is done cannot be undone except by constitutional amendment.
>
> Much as "Caesar had his Brutus; Charles the First his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But the Court has neither a Brutus nor a Cromwell to impose a similar discipline on it. Thus, "the only check upon our own exercise of power is our own sense of self-restraint." . . . I do not think the Court, in deciding the merits of appellant's constitutional claim, has exercised the self-restraint that Art. III requires in this case.[240]

His reluctance to imply private rights of action from statutes has already been noted,[241] and he has been even more adamantly against implying such rights directly from the Constitution: "In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damage remedy from the Eighth Amendment or any other constitutional provision."[242] He also has strongly endorsed the *Younger* doctrine[243] of federal court

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[236]Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 95-96 (1978) (Rehnquist, J., concurring).

[237]451 U.S. 725 (1981).

[238]*Id.* at 761 (Rehnquist, J., dissenting).

[239]*Id.* at 770-71 (Rehnquist, J., dissenting).

[240]Orr v. Orr, 440 U.S. 268, 300 (Rehnquist, J., dissenting). The *Orr* case overturned Alabama's for-wives-only alimony statute on equal protection grounds upon the petition of a former husband who himself made no claim to alimony.

[241]*See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring).

[242]Carlson v. Green, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting).

[243]Younger v. Harris, 401 U.S. 37 (1971).

nonintervention in state court proceedings, as a matter of respect for the proper functioning of states in the federal system.[244] Such expressions leave little doubt that the Rehnquist voting record on questions relating to the exercise of federal court jurisdiction was not achieved through inadvertence.[245]

D. *Votes Favoring Free Speech*

In the last Table 2 category, freedom of expression, the cases in which Justice Rehnquist voted in favor of first amendment rights, contrary to expectations, can be explained largely on the unanimity principle. In seven of the ten cases, the appropriate outcome was obvious enough that no one voted against it,[246] and only one justice dissented from each of the other three decisions.[247]

IX. CONCLUSION

Justice Rehnquist's record as a member of the United States Supreme Court might plausibly be explained as an expression of his leaning toward political conservatism. His support for state sovereignty and autonomy, his manifest reluctance to reverse criminal convictions, his narrow reading of first amendment rights, and his general willingness to subordinate civil liberty claims to

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[244]Juidice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Rehnquist also protested against the Court's "unwarranted assumption of jurisdiction and imposition on state courts." Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 242 (1978) (Rehnquist, J., dissenting). In *Jerome* the Court vacated a Pennsylvania Supreme Court decision denying a mandamus to a newspaper publisher seeking access to a pretrial suppression hearing.

[245]For a more generalized discussion of Supreme Court behavior on access questions, *see* Atkins & Taggart, *Substantive Access Doctrines and Conflict Management in the U.S. Supreme Court: Reflections on Activism and Restraint,* in SUPREME COURT ACTIVISM AND RESTRAINT (S. Halpern & C. Lamb ed. 1982).

[246]NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982); Brown v. Hartlage, 102 S. Ct. 1523 (1982); In the Matter of R__ M. J__, 102 S. Ct. 929 (1982); Givhan v. Western Line Consolidated Schol Dist., 439 U.S. 410 (1979) (private as well as public speech protected); Landmark Communication, Inc., v. Virginia, 435 U.S. 829 (1978) (right to publish information of judicial commission proceedings); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (right to publish name of juvenile obtained in proceeding to which press admitted); Madison School Dist. v. Wisconsin Employment Relations Comm'n., 429 U.S. 167 (1976) (possibility of interference with collective bargaining agreement does not override teacher's right to speak in a public school board meeting). In *Claiborne Hardware* Justice Rehnquist concurred in the result but probably did not endorse the first amendment analysis. 102 S. Ct. at 3437 (Rehnquist, J., concurring).

[247]Of those three, Pinkus v. United States, 436 U.S. 293 (1978), reversed an obscenity conviction because of a jury instruction including "children" as part of the relevant community for the purpose of determining community standards of obscenity. Justice Powell, the lone dissenter, agreed with the Court that the instruction was improper, but nevertheless penned a two-sentence dissent because he held it to be harmless error. *Id.* at 306 (Powell, J., dissenting). Justice White was the sole dissenter in each of the other two cases, both decided during the 1981 term. In Widmar v. Vincent, 454 U.S. 263 (1982), the Court held that a state university's denial of the use of its facilities to a student religious group, when other student groups were permitted to use them, constituted impermissible content-based regulation of speech. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1982), invalidated a Berkeley city ordinance imposing a limit of $250 on contributions to committees formed to support or oppose ballot measures subject to popular vote.

One first amendment case, Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977), is omitted from the tabulation because the Rehnquist position could not be classified as wholly favoring or disfavoring the first amendment claims. Rehnquist joined the Court in holding that the first amendment barred compulsory contributions by public school teachers for ideological union expenditures not directly related to collective bargaining, but did not bar contributions for union expenditures related to collective bargaining. *Id.* at 235-36.

governmental authority are readily identifiable as conservative positions as the term is currently understood. And yet, the notion that Justice Rehnquist takes judicial cues from contemporary currents of political conservatism is not a very satisfying or, in our opinion, a wholly accurate explanation of his judicial behavior. The root motivation is philosophical, not political.[248] The underlying rationale is not directed toward an allocation of power or distribution of rewards that favors certain political groups, although every judicial decision has the effect of favoring one group or another. Rather, his decisions — at least those requiring constitutional interpretation — appear rooted in a philosophy of constitutional adjudication which he has clearly articulated in public addresses and judicial opinions. The key elements of that philosophy have been identified earlier in this article: (1) The fundamental plan of the Constitution places great importance upon state sovereignty and weights order equally with liberty in the balance of social values; (2) Judges should defer to the popular will as expressed by elected representatives in duly enacted laws and in the Constitution itself; (3) Since judicial review is a check upon the will of popular majorities, judges should not invalidate legislation unless they are sure the Constitution requires it. What the Constitution requires must be ascertained from the language of the Constitution, including necessary implications from the constitutional plan, and the framers' intent where that can be determined.

Most of Justice Rehnquist's judicial decision making can be explained by reference to these three broad propositions. The obvious concern for limiting federal encroachment upon state prerogatives, epitomized by *National League of Cities v. Usery* but also evident in many of his votes to limit the exercise of federal court jurisdiction, is fundamental to the "implicit ordering of relationships" that he perceives within the constitutional plan. The special reluctance to overturn a criminal prosecution expresses his notion of the proper constitutional balance between order and liberty. His reluctance to support first amendment claims of free expression evinces a similar balancing of social and individual utilities. The consistent support of state and federal legislation against constitutional challenge reflects the broad deference to majority rule. His relatively few votes against the validity of a legislative act can often be traced to some fairly explicit constitutional provision [249] or to structural implications drawn from the constitutional plan.[250]

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[248] Powell also observes that "Rehnquist's constitutional theory is more complex and less oriented toward particular political goals" than is commonly recognized. Justice Rehnquist's allegiance to his vision of federalism sometimes leads to liberal rather than conservative substantive outcomes. Powell, *supra* note 56, at 1319 n.11. For Powell's comment on such cases, *see supra* note 57.

[249] *E.g.*, United States v. Will, 449 U.S. 200 (1980) (Compensation clause); Fullilove v. Klutznick, 448 U.S. 448 (1980); (Equal Protection clause); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (Contract clause).

[250] *E.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (state sovereignty and autonomy); Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (separation of powers)

The argument that Justice Rehnquist responds to articulated principles of constitutional adjudication, rather than to an ideological preference for governmental authority or for local interests, is strengthened by his decision pattern in cases that do not raise constitutional issues. There the pro-government, pro-state bias is much less pronounced. He votes for states less often, and for the federal government less often, when the issue is one of interpreting or applying federal statutes and regulations. In *constitutional* cases, a decision permitting federal encroachment upon state functions and powers runs counter to the ordering of relationships in the constitutional plan. Likewise, when an individual raises a *constitutional* challenge to state or federal legislation, a decision in favor of the individual must unavoidably derogate from the principle of majority rule by voiding laws duly enacted by popularly chosen legislatures. But questions of *statutory* interpretation pose no threat to any core values in the Rehnquist philosophy. No such imperatives govern when the issue is only the *meaning* rather than the *validity* of the people's legislative mandate. When the philosophy that undergirds constitutional decisions loses its relevance, the Rehnquist decisions become less uniformly pro-state and pro-government.

If "political conservative" has descriptive relevance but little explanatory power, does the label of "judicial conservative" either describe or explain his behavior as a judge? His comments at the Senate hearings on his nomination indicate that he thought of himself as a judicial conservative, defined as a judge who construes the Constitution in light of the Framers' intent rather than reading his own views into the document.[251] His opinions have continued to pay at least lip service to that concern, and he has consistently sought a basis for decision in the Constitution itself rather than in social or jurisprudential values external to it. But interpretivism is only one element of judicial conservatism, and even there his willingness to rely on values implicit in the document as a whole, without specific textual warrant, leaves much room for the influence of personal views. He has shown great deference to legislative determinations, another mark of the judicial conservative; but he has been quite contemptuous of precedent with which he disagrees, clearly not a conservative attribute. His reluctance to exercise federal court jurisdiction in marginal cases is consistent with the judicial conservative's reluctance to decide questions unnecessarily, and he has frequently called for restraint in avoiding constitutional decisions when possible[252] and deciding cases on the narrowest possible grounds.[253] But he has not been consistent in this posture and has sometimes left himself open to charges of reaching out to decide questions wholly unnecessary to the disposition of the case.[254] His behavior is obviously a hybrid, with some characteristics

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[251] *See supra* text accompanying note 19.

[252] *See, e.g.*, Larson v. Valente, 102 S. Ct. 1673 (1981) (Rehnquist, J., dissenting); Regents of the University of California v. Bakke, 438 U.S. 265, 411 (1978) (Stevens, J., concurring and dissenting); Kremens v. Bartley, 431 U.S. 119, 128 (1977).

[253] Dames & Moore v. Regan, 453 U.S. 654 (1981).

[254] *See, e.g.*, Quern v. Jordan, 440 U.S. 332 (1979) (majority opinion by Rehnquist), and the accompanying

of the judicial conservative and others more akin to the judicial activist.

In sum, Justice Rehnquist's performance as a member of the Court is best explained by reference to his own articulated philosophy of constitutional adjudication. This is not unrelated to his political ideology but it is not simply a cover for political conservatism. It calls for judicial restraint in many cases, but it is by no means identical with judicial conservatism. His judicial decision making does indeed fall in generally consistent patterns, but those patterns are less a reflection of political or judicial conservatism than of his notions about majority rule, the Constitution as a government charter, and the function of judicial review.

Brennan concurrence, *id.* at 349 (Brennan, J., concurring in the judgment). Oregon v. Kennedy, 102 S. Ct. 2083 (1982), and the accompanying Stevens concurrence. *See also* Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), in which Justice Rehnquist, in dictum addressed to an unbriefed, unargued issue, and placed unobtrusively in a footnote, *id.* at 397 n.2, approved a significant change in federal law relating to the removal of cases from state courts. The footnote was all the more remarkable because it tended to expand the exercise of federal jurisdiction rather than to limit it.

APPENDIX A

TABLE 1

Rehnquist Votes Compared With Court Majority For Cases In Which Government Was A Party, Decided By The Supreme Court During Its 1976-1981 Terms

	Votes For or Against State/Local Government				**Votes For or Against National Government**			
	Criminal Cases		**Civil Cases**		**Criminal Cases**		**Civil Cases**	
Term	**For %**	**Against**	**For %**	**Against**	**For %**	**Against**	**For %**	**Against**
1976								
Rehnquist	19 (86.4)	3	34 (81.0)	8	21 (95.5)	1	19 (86.4)	3
Court Majority	9 (40.9)	13	26 (61.9)	16	18 (81.8)	4	18 (81.8)	4
% Difference	(45.5)		(19.1)		(13.7)		(4.6)	
1977								
Rehnquist	15 (71.4)	6	32 (82.1)	7	14 (82.4)	3	26 (74.3)	9
Court Majority	8 (38.1)	13	22 (56.4)	17	9 (52.9)	8	25 (71.4)	10
% Difference	(33.3)		(25.7)		(29.5)		(2.9)	
1978								
Rehnquist	22 (81.5)	5	26 (74.3)	9	9 (81.8)	2	15 (53.6)	13
Court Majority	13 (48.1)	14	20 (57.1)	15	8 (72.7)	3	15 (53.6)	13
% Difference	(33.4)		(17.2)		(9.1)		(0.0)	

APPENDIX A (CONTINUED)

TABLE 1 (CONTINUED)

Term	Votes For or Against State/Local Government: Criminal Cases For %	Against	Civil Cases For %	Against	Votes For or Against National Government: Criminal Cases For %	Against	Civil Cases For %	Against
1979								
Rehnquist	19 (95.0)	1	29 (87.9)	4	21 (91.3)	2	27 (64.3)	15
Court Majority	9 (45.0)	11	15 (45.5)	18	14 (60.9)	9	27 (64.3)	15
% Difference	(50.0)		(42.4)		(30.4)		(0.0)	
1980								
Rehnquist	19 (79.2)	5	29 (87.9)	4	10 (100.0)	0	22 (75.9)	7
Court Majority	14 (58.3)	10	21 (63.6)	12	8 (80.0)	2	24 (82.8)	5
% Difference	(20.9)		(24.3)		(20.0)		(−6.9)	
1981								
Rehnquist	22 (100.0)	0	41 (70.7)	17	9 (90.0)	1	16 (59.3)	11
Court Majority	19 (86.4)	3	25 (43.1)	33	8 (80.0)	2	21 (77.8)	6
% Difference	(13.6)		(27.6)		(10.0)		(−18.5)	
Total								
Rehnquist	116 (85.3)	20	191 (79.6)	49	84 (90.3)	9	125 (68.3)	58
Court Majority	72 (52.9)	64	129 (53.8)	111	65 (69.9)	28	130 (71.0)	53
% Difference	(32.4)		(25.8)		(20.4)		(−2.7)	

APPENDIX B

TABLE 2

Rehnquist Votes Compared With Court Majority For Cases Raising Issues Of The Exercise Of Federal Court Jurisdiction, Freedom Of Expression, And The Validity Of State Acts, Decided By The Supreme Court During Its 1976-1981 Terms

Term	Votes For or Against Validity of States Acts		Votes For or Against Federal Jurisdiction		Votes For or Against Freedom of Expression	
	For %	Against	For %	Against	For %	Against
1976						
Rehnquist	58 (85.3)	10	4 (19.0)	17	2 (15.4)	11
Court Majority	38 (55.9)	30	7 (33.3)	14	6 (46.2)	7
% Difference	(29.4)		(−14.3)		(−30.8)	
1977						
Rehnquist	54 (78.3)	15	5 (33.3)	10	2 (18.2)	9
Court Majority	34 (49.3)	35	7 (46.7)	8	4 (36.4)	7
% Difference	(29.0)		(−13.4)		(−18.2)	
1978						
Rehnquist	53 (79.1)	14	10 (40.0)	15	1 (14.3)	6
Court Majority	38 (56.7)	29	11 (44.0)	14	1 (14.3)	6
% Difference	(22.4)		(−4.0)		(0.0)	

APPENDIX B (CONTINUED)

TABLE 2 (CONTINUED)

Term	Votes For or Against Validity of States Acts			Votes For or Against Federal Jurisdiction			Votes For or Against Freedom of Expression		
	For	%	Against	For	%	Against	For	%	Against
1979									
Rehnquist	52	(85.2)	9	13	(50.0)	13	0	(0.0)	12
Court Majority	27	(44.3)	34	22	(84.6)	4	7	(58.3)	5
% Difference		(40.9)			(−34.6)			(−58.3)	
1980									
Rehnquist	52	(77.6)	15	5	(21.7)	18	0	(0.0)	7
Court Majority	38	(56.7)	29	9	(39.1)	14	3	(42.9)	4
% Difference		(20.9)			(−17.4)			(−42.9)	
1981									
Rehnquist	64	(77.1)	19	18	(36.7)	31	5	(38.5)	8
Court Majority	39	(47.0)	44	24	(49.0)	25	7	(53.8)	6
% Difference		(30.1)			(−12.3)			(−15.3)	
Total									
Rehnquist	333	(80.2)	82	55	(34.6)	104	10	(15.9)	53
Court Majority	214	(51.6)	201	80	(50.3)	79	28	(44.4)	35
% Difference		**(28.6)**			**(−15.7)**			**(−28.5)**	