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KICKING THE COCAINE HABIT

Newsweek

REAGAN'S LAW

**By 1988
half of all
federal
judges will
be his
appointees**



**The impact
on abortion,
civil rights
and
crime and
punishment**

Justice Rehnquist





Reagan announcing Burger's resignation, Rehnquist's elevation

Reagan's New Chief

Ronald Reagan moved a long stride closer to completing his most enduring legacy last week: remaking the federal judiciary in his own image. After accepting Warren Burger's resignation, he nominated William Rehnquist to be Chief Justice of the United States

and proposed another imposing conservative, Antonin Scalia, to fill Rehnquist's seat on the Supreme Court. These moves set the stage for long-range changes in judicial attitudes, reaching through the ranks of the federal courts into the next century. **National Affairs: Page 14**

No Time for Power Lunch

Part perk, part serious business function, the power lunch is fast becoming passé. For a variety of reasons, including busy schedules and the increasing cost-consciousness of major corporations, executives are drinking less, eating less and just plain meeting less at midday. Breakfast is the new power meal, but teatime talks are gaining popularity, and the fitness fanatics join business associates for lunch-hour runs or swims. **Business: Page 44**

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The road back: Addict at clinic

Divine Mrs. M

Before last January's box-office smash "Down and Out in Beverly Hills," Bette Midler's movie career seemed to be heading in the same direction. No more. At 40, the Divine Miss M is now a Mrs., with a new movie, a new husband, a baby on the way and her own production company. **The Arts: Page 58**

Botha's '1984'

Like something out of George Orwell, South Africa cracked down with a mixture of repression and double talk last week. P. W. Botha's nationwide state of emergency imposed vague censorship laws that barred firsthand reports and encouraged newsmen to censor themselves. The crackdown seemed to dampen unrest, but in the long run it can only stoke black anger. **International: Page 30**



A Soweto sermon: Bishop Tutu

Coming Back From Crack

The crack epidemic burst on America so quickly that rehabilitation centers are swamped beyond capacity. To complicate matters, there are few data about crack addiction; no one knows whether residential or outpatient care, medication or peer pressure will help addicts kick crack. **Lifestyle: Page 52**



Expanding horizons: Midler

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Cover: Photo by Wally McNamee—NEWSWEEK.

Reagan Justice



Able and affable, the powerful anchor of the court's right wing: *Rehnquist*

The reshaping of the courts may be his most enduring legacy

Ronald Reagan strode into the White House briefing room last week bearing a brief message but a big surprise. Flanked by three white men more customarily seen in black robes, he announced that Chief Justice Warren Burger was stepping down. In his stead, Reagan nominated William Hubbs Rehnquist, the powerful anchor of the U.S. Supreme Court's right wing, to serve as the nation's 16th chief jurist. And, to take Rehnquist's empty chair, Reagan proposed Antonin Scalia, another conservative judge with an imposing intellect. Then Reagan exited smiling. Not only had his administration kept an important secret for three weeks, but he had in one bold move come closer to completing his most enduring legacy: remaking the federal judiciary in his own image.

The unexpected personnel changes do not put the court's liberal social-issue precedents in any immediate danger. But over time, the infusion of fresh conservative firepower (page 20) will inevitably change the court's chemistry—and its conclusions. And, with four justices over 77, and two in failing health, the question is only how soon

Report on the Court

With four remaining members of the Supreme Court 77 years of age or older, it may well be that President Reagan will be able to appoint one or more additional justices before his term of office ends. Justice-designate Antonin Scalia is 50 and in apparently robust health; his relative youth was a key factor in his selection over the 59-year-old Robert H. Bork, a fellow appellate-court judge.

LIBERAL



William Brennan
Age: 80

Suffered a stroke in 1977; now appears strong and energetic. Treated for cancer of the cord in 1978.

PHOTOS © 1986 KEN HEINEN



JOHN FICARA—NEWSWEEK



BRUCE HOERTEL

'Trading for brains, energy and commitment': Burger announcing, Scalia (right)

thenext change will come. "You are trading a vote by Burger for a guy who has a far better brain, endless energy and a total commitment to the job," says Stanford law Prof. Gerald Gunther. "Rehnquist and Scalia write very well, are very likable and are bright as hell. The impact will be considerable."

Lover of tradition: The announcement also marked the end of the Burger court, an inconsistent panel whose epitaph can be found in the subtitle of a 1983 study of its record: "The Counter-Revolution That Wasn't." Four of its members were appointed by Richard Nixon in theory to roll back the "excesses" of the Earl Warren era, yet in practice they were more notable for striking out on their own. During the Burger years, the dominant centrist justices upheld court-ordered busing and affirmative-action plans, left Warren's criminal-law reforms mostly intact and, in their most controversial ruling, created a constitutional right for women to choose abortions. Burger himself is moving on to another challenge: organizing the bicentennial celebration of the U.S. Constitution set for September 1987—

a lighter load for a 78-year-old man whose doctors told him recently that he was exhausted and had to slow down. Still, some Washington cynics suggested that the timing of the resignation was suggested by the approach of congressional elections; if the Democrats regain control of the Senate, Reagan nominees would have rougher sledding. But for Burger, a lover of tradition and ceremony, the explanation was entirely plausible (page 21).

While the administration has waited for a chance to shift the ideological balance on the Supreme Court, it has busily been changing the rest of the federal bench. As the result of a historical accident—or just more of his famous luck—Reagan will have appointed more than half of the 743 federal judges by the time his term ends. For the most part, the White House selected these men—few women are among them—only after close ideological inspection. It has sought candidates who say they know their place—that is, who view judges as tightly constrained interpreters of legislative will and legal precedent. But the administration also wants people who will override

precedents it dislikes, such as those dealing with abortion, aid to parochial schools and affirmative action. Unable to win Congress over to its views on these issues, the administration now looks to judges for the antidote to judge-made law. "It became obvious to us that the courts were the only recourse we have for the issues we care about," one White House official said last week. "Now we have a chance of prevailing."

Disparaging remarks: Judicial nominations are perhaps the one area where Reagan has encountered little resistance on Capitol Hill. The Republican Senate has routinely approved most of them; by tradition, after all, they tend to originate with the senators themselves. Recently, however, Judiciary Committee Democrats have begun to make trouble. Earlier this month they blocked the appointment of Jefferson Beauregard Sessions III, a former U.S. attorney in Alabama who did not convincingly rebut charges that he had made disparaging remarks about blacks and groups like the NAACP.

Another battle resumes this week, when the full Senate considers the nomination of Daniel Manion of Indiana to the Seventh Circuit Court of Appeals. The case against Manion rests in part on charges of inexperience (he's never handled a federal appeal) and incompetence (the sample briefs he submitted to a screening committee were laden with spelling and grammatical errors). Democrats also accuse him of a kind of contempt of court: after the Supreme Court banned religious displays in public schools, for example, Manion, who was a state legislator, introduced a bill to allow posting of the Ten Commandments in Indiana schools. Still, Judiciary chairman Strom Thurmond thinks he has the votes to win a floor fight.

Confirmation for the two Supreme Court

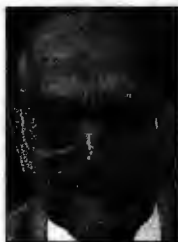
CENTER



Hugo Black
Age: 77
Had a heart attack in 1976. Although not good, associates say he won't resign. The Reagan is sident.



John Paul Stevens
Age: 66
Underwent open-heart surgery in 1974 but has no reported health problems today.



Harry Blackmun
Age: 77
In good health, despite 1977 cancer surgery. Reportedly unwilling to resign if successor is likely to overturn abortion ruling.



Lewis Powell
Age: 78
Had surgery for colon tumor in 1979 and was out for more than two months in 1985 due to surgery for prostate cancer.



Byron White
Age: 69
Former All-America football player, has no reported health problems.



Sandra O'Connor
Age: 56
No reported health problems.



William Rehnquist
Age: 61
Hospitalized in 1981 to be weaned from a drug prescribed for severe and chronic back pain; no reported problems since.

CONSERVATIVE

Inside Their Chambers: The Justices at Work



Independent jurist: John Paul Stevens meets with clerks in his chambers.



Hanging on for life: An ailing Thurgood Marshall tends the liberal flame.

Whizzer at work: Byron White opposes the abortion ruling, otherwise stays in the center.

nominees, on the other hand, is expected to come quickly in July. A few Democrats, such as Sen. Joseph Biden of Delaware, will undoubtedly grill both Rehnquist and Scalia on their ideological views, but no serious opposition is likely to surface. The Senate has collectively taken the position that as long as the president nominates an honest, modestly intelligent candidate, it has no right to object. Harvard law Prof. Laurence Tribe has tried to convince the senators otherwise, arguing that their advise-and-consent powers extend to rejecting even brilliant nominees whose views they find objectionable. But his contention has not taken root.

No reversals: The recent experience of the White House with the Supreme Court has been unhappy. This year its legal strategists chose to assault the Supreme Court on several fronts and failed. In the last six weeks alone, the justices refused to reverse *Roe v. Wade*, the 1973 landmark decision on abortion, refused to limit affirmative-action remedies only to identifiable victims of discrimination and refused to allow government intervention in medical decisions on the care of handicapped newborns.

When Burger asked to meet privately with Reagan last month, the administration was

prepared. With so many septuagenarians on the court, the Justice Department has had a list of potential Supreme Court nominees ready since the early days of the first term. On May 29, two days after seeing Burger, Reagan met with chief of staff Donald Regan, Attorney General Edwin Meese III and new White House counsel Peter Wallison. At the meeting the president told the others that he and Regan had agreed to

consider only sitting judges. That plan eliminated his old California friends from consideration. Strategists hoped it also would signal other aging justices that resignation would not mean an embarrassing successor.

While the advisory troika drew up a list of 15 names, the leading candidates to replace Burger were Rehnquist and fellow Justice Sandra Day O'Connor, the only Reagan appointee on the court. On June 9 they met again with the president and kicked around the various candidacies; the president asked to meet with Rehnquist. Three days later he came to the Oval Office and, after 30 minutes of talk about Rehnquist's health ("good") and philosophy (trustworthy), Reagan offered him the job. Why him over O'Connor? He's more predictable—O'Connor has occasionally disagreed with the administration on religion and affirmative-action cases. Also, he's at least as well liked by the other justices. And, as one White House aide put it, "If you've got a choice between No. 1 and No. 3 in a class at Stanford Law [the respective standings of Rehnquist and O'Connor], whom are you going to choose?"

After Rehnquist left, Reagan and his three aides discussed the new vacancy. The two leading candidates to fill it were

The Rights of Criminals



The option to remain silent: Undercover cop (left) on an arrest

6-3 The Burger court trimmed but never reversed rules protecting suspects. With Rehnquist taking the lead, there are six votes for further cuts—a cause close to Attorney General Edwin Meese's heart.



The Virginia moderate:
Gaunt, frequently ill,
Lewis F. Powell Jr.
holds the key swing vote
in tight cases



Almost a chief justice:
Was Sandra Day
O'Connor a little too
independent?

Scalia and Robert Bork, both Reagan appointees to the U.S. Circuit Court of Appeals for the District of Columbia. Reagan asked to see Scalia, who came over for a 30-minute session of his own. Again, there was no discussion of specific cases, aides say. Instead, the two men talked about the need for judicial restraint—code words for opposition to recent abortion jurisprudence. Satisfied with what he heard, and charmed by Scalia's famed affability, the president offered him the job on the spot.

Coalition builder: Why did Bork, who had long been mentioned as a potential Supreme Court justice, lose out again? First, he's 10 years older than Scalia, who is just 50 and could, if his health and current custom hold, remain on the court beyond the year 2010. Second, Scalia would be the first Italian-American appointed to the high court, a point emphasized by White House political operatives. Third, according to one senior staffer, "Scalia is known to get along better with people," and hence might be more valuable as a coalition builder. On substantive matters, all agreed that there was little to choose between them, and aides insisted Bork would be considered if another vacancy occurred.

At first, the impact on the

court may be slight. Existing alignments have not fundamentally shifted. While all schematic descriptions of the court are oversimplified, on social issues the court tends to break down as follows: on the left, William Brennan and Thurgood Marshall continue to hang on, determined to serve out their appointments-for-life. In the middle, Harry Blackmun, John Paul Stevens, Byron White and Lewis Powell defy easy descrip-

tion except that they are the swing votes out of which majorities are formed. On the right can be found Rehnquist and O'Connor—and now Scalia in place of Burger. "You can go through every 5-4 decision the court has made and you may, with a microscope, find one or two where Scalia would have made a difference, but not much," says Jesse Choper, dean of Boalt Hall Law School at the University of California.

But that is the backward look. The future of Warren-era precedents depends on the vitality of the other justices in the face of Rehnquist's and Scalia's attractive personalities and hard-nosed arguments. "I expect they will have an influence on the moderates and the other conservatives," says A. E. Dick Howard of the University of Virginia law school. "Scalia's style may be particularly attractive because he is very good at laying out reasoned arguments. When Rehnquist first came on the court in 1971, he pushed the boundaries of legitimate debate to the right, moving the center in the process. Scalia's influence should be similar.

In addition, Rehnquist will now be the chief and as such will have the power to assign the writing of the governing opinion whenever he is in the majority. Under Burger, diffi-

Abortion's Narrow Margin



JAMES COLBURN—PHOTO REPORTERS

Pro-lifers at the gates: *Demonstrating before the court*

5-4 Thirteen years after *Roe v. Wade*, the ruling has only five defenders left on the court. If one leaves, the balance will shift, inviting new state restrictions on a woman's right to choose an abortion.

cult assignments often went to Rehnquist, who could be trusted to push his points as far as possible without unravelling the majority coalition. According to Yale law Prof. Owen Fiss, a Rehnquist critic, "Burger recognized that Rehnquist was fully in control of his ideas and was better able to fulfill and express his constitutional vision." Presumably Rehnquist will use Scalia, a very persuasive stylist, to write some important decisions as well.

But the two may differ on a basic approach to deciding cases. University of Chicago law Prof. Michael McConnell was a student of Scalia's and later was a law clerk for Justice Brennan where he watched Rehnquist close up. He says that Scalia is more interested in issues of justiciability: should a court take on an issue? "To Scalia, the most important question often is 'who shall decide?'" McConnell says, whereas "Rehnquist sometimes seems willing to go to the merits of the case and exercise judicial authority when he is more interested in the substance." In other words, Scalia may be more the classic conservative, Rehnquist an activist in conservative cloak. The competing theories, however, will not prevent them from voting for the same result.

Whenever a new candidate is named to the Supreme Court, experts immediately caution that predicting their performance can be misleading at best. History offers many prominent examples of disappointed presidents: Theodore Roosevelt railed at Oliver Wendell Holmes, Dwight Eisenhower called Earl Warren his biggest mistake. And even Rehnquist suggested just before the 1984 election that a president could attempt to shape the high court but could hardly control a nominee's subsequent performance. Still, with Rehnquist and Scalia, the Reaganites have limited the risks.

Rehnquist is a known commodity who sticks to his positions whether as a solitary dissenter or writing for the full court. Nine years ago Harvard law Prof. David L. Shapiro analyzed Rehnquist's work and concluded that he was guided by three basic propositions: conflicts between the individual and the government should be resolved against the individual; conflicts between state and federal authority should be resolved in favor of the states; and questions of the exercise of the jurisdiction of the federal courts should be resolved against such exercise. That's also rote Reagan doctrine; Rehnquist hasn't changed in the intervening years.

As for Scalia, says Jesse Choper, "You

Affirmative Action on Trial



AL STEPHENSON—WOODFIN CAMP & ASSOC.

Where the jobs go: Construction site in Atlanta

6-3 Warren Burger voted in favor of some race-conscious remedies, but Scalia may not. The court has had difficulty articulating broad principles in this area and may respond to a powerful voice for change.

can't get warranties when you appoint someone to the Supreme Court, but he is the closest you can get." Indeed, one of his chief attractions is his long record as an academic and four years on the bench during which he vividly declared his positions on controversial issues. With all proper caveats, this is how he's likely to influence particular issues:

■ **Abortion.** Scalia has never ruled on an abortion case or written any scholarly articles on the subject. However, in a December 1978 debate at the American Enterprise Institute, Scalia said that the courts had "no business" deciding the issue. He said that "in the past [abortion] was considered to be a societal decision that would be made through the democratic process... That is one of the problems; [the courts] are calling rights things which we do not all agree on." Scalia, a strict Roman Catholic with nine children, declines comment on the substance of the issue.

In the current lineup there are five solid votes on the court to uphold *Roe v. Wade* and bar most state regulation of abortion. Two justices, Rehnquist and White, are willing to reverse *Roe* entirely, and one, O'Connor, is willing to permit some state restrictions. Scalia presumably would side with the minority although it is uncertain whether he would vote for a complete reversal or merely more regulation.

■ **Affirmative action.** Again, Scalia has not decided any reverse-discrimination cases. However, in a 1979 Washington University Law Quarterly article he pointedly criticized the Burger court's affirmative-action record. Saying he had "grave doubts" about the justices' split de-

cision in the landmark *Bakke* case, he concluded, "I am, in short, opposed to racial affirmative action for reasons of principle and practicality... I do not, on the other hand, oppose... many types of help for the poor and disadvantaged. It may well be that many, or even most, of those benefited by such programs would be members of minority races that the existing programs exclusively favor. I would not care if all of them were. The unacceptable vice is simply selecting or rejecting them on the basis of their race."

The court has splintered in its reverse-discrimination cases, with Rehnquist usually in the opposition, and Scalia could have considerable influence. Burger, for instance, wrote the 6-3 majority opinion in a 1980 case upholding a mandatory 10 percent job "set-aside" for minority construction firms.

■ **Crime and punishment.** Scalia has not written directly on these issues. The closest he came was voting to reject a claim against the Food and Drug Administration for not adequately testing poisonous drugs that would be used in executions of convicted killers. He suggested that the lawsuit was merely a ploy to delay enforcement of the death sentence. At the moment the Supreme Court seems content to allow states to impose capital punishment, and Scalia would be unlikely to oppose that. Also, if he follows Rehnquist's lead, Scalia could become a reliable vote for limiting the rights of criminal suspects and defendants, perhaps limiting further the reach of the court-made *Miranda* rule requiring that police notify arrestees of their rights.

■ **Free speech.** Unlike Burger, Scalia has consistently expressed a narrow view of the First Amendment. He joined a majority opinion that held that The Washington Post's tradition of investigative reporting could be used as evidence of recklessness in other cases. He found no First Amendment right for reporters to gain access to documents filed in a libel case. And in a biting dissent, he ridiculed the notion that homeless demonstrators who slept in Lafayette Park across from the White House were exercising their right to speak by sleeping. Opposing inclusion of "symbolic speech" within the guarantees of the First Amendment, he wrote that "when the Constitution said 'speech' it meant speech and not all forms of expression."

On appeal of the demonstration case, the U.S. Supreme Court later sided with Scalia although stopping short of embracing his full language and theory. Simi-

larly, the court also followed his view in the death-by-injection drug case. But as it happens, last week Scalia got a taste of what the big leagues might be like when a unanimous Supreme Court upheld a ruling he had dissented from in a sex-discrimination case. The high court's opinion was written by none other than Scalia's putative ally Rehnquist, who declared that on-the-job sexual harassment violates federal anti-bias laws.

Such is life on the lower federal courts: you're always looking over your shoulder. In the culture of the bench, judges fear little so much as the possibility of reversal by a higher court. In fact, the odds are slight: the Supreme Court hears 150 cases a year; the appeals courts more than 30,000. But the conserving traditions of the law remain powerful: precedent restricts new judges; rulings by the U.S. Supreme Court limit the options of those below. For the most part, constitutional law is made from top down, but enforced from the bottom up. Says Burt Neuborne of the American Civil Liberties Union: "Because Reagan has appointed so many judges, the lower courts are ready to follow if the Supreme Court radically shifts. It hasn't yet."

But the emphasis should be on *yet*. The Reagan Justice Department understands all that and continues to prime the pump. "There is a tremendous drag in the response of the courts to political changes," says Richard Collins, a University of Colorado law professor. "Cases take years to develop. The full impact is not likely to be felt until after Reagan leaves office." But some early returns suggest that the administration may be getting some of what it sought. Political scientists Robert A. Carp, C. K. Rowland and Donald Songer studied the records of appeals judges named by Reagan, Jimmy Carter and Richard Nixon. They concluded that the Reagan judges were more likely to be prosecution, anti-government-regulation and anti-"women's issues." Says Carp, "It's in these cases that the values of the judges and of the president will be manifested."

Of course, the bulk of lower-court work tends to be mediation of eye-glazing procedural battles in cases of slight policy significance. And even when an important social-issue case comes along, it's not always clear what the politically correct, not to mention legally correct, position might be. Consider Leonard Wexler, a federal judge in New York. Barely on the bench five months, he

Death by Decree



At the end of the last mile: Gurney in Texas prison

6-3 A barrier to capital punishment fell with a recent ruling that death-penalty foes may be excluded from juries. Only a few procedural questions are unresolved; the pace of executions will likely quicken.

was assigned what became known as the Baby Jane Doe case. The issue was whether the federal government could intervene on behalf of a handicapped newborn whose parents chose not to authorize corrective surgery. Was this a case of discrimination against helpless children or an issue of family privacy? What was the true conservative position? Wexler, in the best tradition of common-law judging, split the difference and sent the case up for appeal. Ultimately

the U.S. Supreme Court ruled against government intrusion, saying that Congress had not authorized it.

Or consider a notorious case the Fifth Circuit Court of Appeals confronted last year, upholding a Texas law that made homosexual acts between consenting adults a crime. By a 9-7 vote, the court upheld the law (with all six Reagan appointees in the majority), saying that the law was not "totally unrelated to the pursuit of... implementing morality, a permissible state goal." That may well be the correct conservative substantive position, but it was reached in a way a conservative should have trouble swallowing. Texas lost the case at the trial level and the state attorney general refused to appeal it. A local district attorney then intervened and was given standing by the federal appeals court over the state's own objections.

This procedural issue is now on appeal to the U.S. Supreme Court; half the states have urged reversal.

'Professional schizophrenia': Another troubling result of the personnel changes is that the law is losing one of its cherished values: predictability. Jimmy Carter also appointed a large number of federal judges, many of whom earned their seats by fulfilling the "BCBC" requirement—"being for Carter before the convention." Clashes often break out between them and Reagan appointees. The result, says Duke University law Prof. William Van Alstyne, is "a deep professional schizophrenia" within the 12 circuits. "We have a contrary matched set of judges," he says. "So it's only natural that you find among them much wider ranges of disagreement, much less consensus in common areas of the federal law. We're getting diverse outcomes depending on who's sitting on the case."

In truth, the legal climate has changed. Federal judges today are less hospitable to imaginative individual-rights claims. Civil libertarians have found that they may be more welcome in state courts, whose rulings can be insulated from federal review. And others have rediscovered the value of legislative lobbying. The rights industry, like other mature American concerns, is shifting with the times. American mythology doesn't have it quite right: ours is a government of laws *and* men. Ronald Reagan has put his men in place. The law awaits.

ARIC PRESS with ANN MCDANIEL and MARGARET GARRARD WARNER in Washington and bureau reports

Reagan's Legacy

With 2½ years still to go, the president has made more lower-court appointments to the federal bench than any of his recent predecessors.

	APPEALS COURT APPOINTMENTS	DISTRICT COURT APPOINTMENTS
Reagan	61	214
Carter	56	206
Ford	12	52
Nixon	45	182
Johnson	41	126
Kennedy	20	102
Eisenhower	45	127

SOURCE: ADMINISTRATIVE OFFICE OF THE U.S. COURTS



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Subdued and canny: *Rehnquist, 61, confers with his law clerks*

A Pair for the Court

Rehnquist and Scalia seem to be two of a tory kind

What does it take to make a good judge? William Rehnquist asked that question in a speech a few years ago, and answered it: a judge should be at least "a pretty good lawyer," with a concern for how people are governed, a feel for legal tradition and a common-sense knowledge of human nature. A judge should also be a good writer, he added, and the chief justice especially should be able "to keep eight prima donnas on some sort of a leash." It remains to be seen whether Rehnquist can perform that trick in his new role, but the rest of the specs clearly describe him—and to a surprising degree, his prospective new colleague, Antonin Scalia, as well. Predictions of Supreme Court votes are notoriously tricky, but students of judicial form charts see the two as remarkably similar in background and temperament, with impressive brains, incisive prose styles and driving but affable personalities.

Both are strivers from immigrant stock. Rehnquist, son of a first-generation Swedish-American salesman from suburban Milwaukee, served in the Army Air Corps in World War II and used his veteran's benefits and part-time jobs to work himself onto the fast track: he graduated first in his class from Stanford Law School, clerked for Supreme Court Justice Robert H. Jackson, set up a law practice in Phoenix and went to Washington as assistant attorney general in the Nixon administration. Richard Nixon himself knew so little of Rehnquist that he was heard on the Watergate tapes referring to "Renchburg" as one of a "group of clowns" in the Justice Department. But after two Nixon nominees for the high

court ran into fire in the Senate, Rehnquist got the job. He was only 47.

Scalia, now 50, son of an Italian-born teacher at Brooklyn College, topped his class at Georgetown University and went on to be a law review editor at Harvard. After a stint in a Cleveland law firm, he too left for the East and eventually a job as the head of Gerald Ford's office of legal counsel. Jimmy Carter's victory sent him to teaching at the University of Chicago for six years before Ronald Reagan named him to the federal appellate court in the District of Columbia Circuit. He was an instant star.

Like other self-made men, both Rehnquist and Scalia have a tory respect for authority and generally vote to defend it; they tend to be impatient with the com-

Intuitive and ebullient: *Scalia*



plaints of those who have failed to match their own achievements. As a clerk, Rehnquist wrote several memos to Jackson arguing for the constitutionality of segregation laws, and he has consistently voted against expanded rights for blacks, women and criminal defendants. Similarly, Scalia conceded in a 1979 article that his views opposing affirmative action could open him to charges of bigotry. But he argued vigorously that the realities of quotas would taint the achievements of truly gifted minorities. He went on to propose his own satiric solution to racial inequities: a "restorative justice handicapping system," under which penalty points would be assigned to U.S. citizens in proportion to their ancestors' date of arrival and their own consequent racial guilt. That would be difficult, he conceded, but he added sarcastically that a Supreme Court that had reached the *Roe v. Wade* abortion decision "would not shrink from the task."

If both men hungered for success, they did not measure it in financial terms. "Bill is astonishingly uninterested in making money," said Rehnquist's former law partner, James Powers, when he was named to the court. These days, top Washington hands who aren't millionaires simply aren't trying. But last year Rehnquist officially disclosed that his net worth, apart from real estate, was still less than \$150,000. Scalia, a devout Catholic, accumulated so little wealth from teaching and government work that when he left Washington, friends say he chose the University of Chicago at least in part because it would pay tuition for his nine children. But he was interested in power and the proximity to it; he turned down an appointment to the Seventh Circuit Court of Appeals, based in Chicago, to hold out for the Washington bench.

Poker games: And while both men are conservative, neither fits the stereotype of the right-wing sourpuss. They are storytellers, kibitzers, outdoorsmen. "Nino" Scalia gets his judicial colleagues to sing along at the piano and shows a relaxed tolerance as a family man. One Chicago dinner partner recalls him joking about his eldest son, who was not following the traditional path to college. In a big family, he said, "The first child is kind of like the first pancake. If it's not perfect, that's okay, there are a lot more coming along." He and Rehnquist both have the gift of persuasion and an unpretentious lifestyle. Justice Sandra Day O'Connor, who sometimes dated Rehnquist at Stanford, has described him piloting an old Studebaker that he had to fix "with chewing gum"; to this day he drives a Volkswagen Rabbit and ambles around the court in slacks, desert boots and a tweed jacket. He and Scalia are regular players in a monthly nickel-and-dime poker game. Rehnquist's style of play was described by The Wall Street Journal last week as subdued and

canny, Scalia's as intuitive and ebullient.

They have a formidable capacity for work. In weighing cases, neither follows the usual practice of ordering clerks to prepare bench summaries of the opposing arguments. Scalia reads all the briefs, engages his clerks in role-playing debates on each case and terrifies lawyers who aren't thoroughly prepared for oral arguments. (A former student at Chicago recalls that his classes were enjoyable, but only when students came prepared; once, when four in a row didn't know an answer, Scalia walked out.) He writes many of his own decisions, on a word processor without preliminary drafts from the clerks. Rehnquist sorts out his arguments in brisk walking debates with his clerks and writes opinions in quick, often pungent prose: the First Amendment, he said once, is not "some sort of constitutional 'sunshine law'." He is so efficient he usually manages to leave the court by 3 p.m.

Each of the two brings a common-sense approach to legal issues. In one scathing

opinion, Scalia dissented from a liberal ruling that lethal injections for condemned prisoners had to meet FDA standards of safety: "The condemned prisoner executed by injection is no more the 'consumer' of the drug than is the prisoner executed by firing squad a consumer of the bullets." Both men are credited with intellectual rigor, but both have been criticized for tempering their views on occasion. Rehnquist, it is said, sometimes even twists facts; a clerk once apologized for participating in writing a decision that Rehnquist refused to revise to reflect the true history of the federal welfare program. And Scalia's professed devotion to judicial restraint sometimes yields to his zeal for a cause. Last February's decision overturning the Gramm-Rudman budget-balancing law, for instance, was assailed by Michael Kinsley in *The Wall Street Journal* as a textbook case of judicial activism that strained logic, went unnecessarily far and opened a Pandora's box of mischievous precedents.

The court will surely change Scalia, as it has changed almost every talented judge in its long history. But nobody can foretell how. As for Rehnquist, he is 14 years into the process. When he came to the court, he told *The New York Times* last year, he thought his job was to counterbalance the liberal trend of the Warren court, "to kind of lean the other way" with a series of fierce dissents. He spoke for himself so often that his clerks presented him with a Lone Ranger doll that still perches on his mantelpiece. Lately, he went on, "I think I see it quite differently . . . there probably are things to be said on both sides of issues that I perhaps didn't always think there were." Rehnquist had been talking in recent months about looking for a new job with new challenges when he reached 65. He has beaten that schedule by four years, and this job looks big enough even for him.

LARRY MARTZ with ANN MCDANIEL
in Washington, MAGGIE MALONE in
Chicago and bureau reports

A Chief in a Time of Transition

With his hoary mane and his Ten Commandments baritone, Warren Burger was always central casting's choice to play Chief Justice. But in 17 years on the job he never did manage to fashion a "Burger court." Despite the presence of three other Richard Nixon appointees by 1971, his stewardship developed none of the momentum it would have needed to roll back the liberal rulings of the Warren court. The result was what one Supreme Court law clerk calls the "Swiss-cheese effect": an ambiguous nibbling at Warren-era decisions in which, for example, civil liberties protections in criminal cases were eroded but never quite overturned.

Prison reform: From the start of his tenure in 1969, when Burger unsuccessfully proposed to Nixon that he deliver an annual "State of Justice" speech to Congress, the chief seemed more interested in a high public profile and judicial administration than in the court's substantive case work. His assertive approach as head of the entire federal judiciary, says former



Ceremony over substance? Outgoing Chief Justice Burger

Solicitor General Rex Lee, will be remembered as of "greater note than anything he has done in an individual case." But Burger's cherished goal—a new intermediate federal court to relieve the Supreme Court's growing caseload—has never been adopted, and his crusade against advertising by lawyers had little effect. Still, the chief frequently spoke forcefully about the shortcomings of lawyers, including frivo-

lous lawsuits and notions and the need for more effort to settle disputes out of court. He also pushed for prison reform.

But as a member of the brethren, Burger left less of a mark. In "The Burger Court: The Counter-Revolution That Wasn't," a book prepared under the sponsorship of the Society of American Law Teachers, the chief is described as authoring opinions "seriously deficient in craftsmanship." Perhaps even more tell-

ing, the book goes on to note that "Within the court, he appears to have remarkably little influence even with justices who share his convictions." Burger, a proud man who loved the personal functions of the job, was once described by the late Justice Potter Stewart as "a show captain," not a "real captain." And fellow justices were sometimes annoyed when he sided with the majority only after a preliminary consensus had emerged, thereby preserving his prerogative of assigning the writing of opinions.

His personal fiefdom: Burger made a priority of refurbishing the Supreme Court building, but in the process he tended to run the court as his personal fiefdom. In recent years, he occasionally offered his law clerks the opportunity to plant trees and shrubs at his suburban home on weekends. Few turned him down.

In some ways, the mixed signals Burger and his court sent were appropriate for the confused times in which he served. He may someday be remembered as a symbol of the gradual transition from a liberal to conservative Supreme Court.

JONATHAN ALTER

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William Rehnquist: Architect Of The Court's Emerging Conservative Consensus

by Clint Bolick

The Supreme Court that William H. Rehnquist joined in 1972 was not a hospitable forum for a principled advocate of judicial restraint and democratic ideals.

Long since abandoned was the vision of a judiciary aggressive in support of constitutional freedoms yet deferential to the will of the people. The Court had committed itself during the previous decades to an ever-increasing accretion of its own power that threatened the precious balance among the branches of government that provides the foundation for our democratic system.

When Rehnquist joined the Court, it was already in transition, abetted by the departure of Chief Justice Earl Warren and the arrivals of Warren Burger and Lewis Powell. The addition of these conservative jurists frequently turned the tide against further unsupportable expansions of the Court's power.

But while his conservative brethren moved somewhat into the Court's mainstream, nibbling here and there at the edges of activist precedent, Rehnquist often remained apart. Far more concerned with consistently advocating a well-developed set of principles than with forging fleeting coalitions that accomplished little of enduring value, Rehnquist often found himself in dissent.

At the outset, Rehnquist's posture was akin to an outside critic of the Court, exposing its logical inconsistencies while decrying both the creation of novel "rights" unknown to the Constitution and the erosion of democratic processes. Rehnquist quickly made it clear that he would not refrain from the harshest of critical commentary, and he unleashes his sharp wit whenever his colleagues depart from reasoned



S.I. Hayakawa

Lincoln Review

analysis. In one recent dissent, for instance, he wryly observed that "[d]issenting opinions in previous cases have commented that 'great' cases, like 'hard' cases, make bad law. . . . Today's opinion suggests that a third class of cases—silly cases—also make bad law."

Rehnquist's steadfast commitment to a coherent ideology has served him well, for the Court is in transition again, with the addition of Justice Sandra Day O'Connor and the prospect of additional appointments during the Reagan Administration. The credibility secured from more than a decade of consistent conservative jurisprudence has poised Rehnquist to assume the mantle of leadership as the Court moves into a new era.

An Exercise in Restraint

Rehnquist is an intellectual heir of Alexander Hamilton, who charted the early course for the Supreme Court in *The Federalist*. Hamilton envisioned a Court that could provide a mighty bulwark against the other branches of government in defense of fundamental liberties, but whose own passions would be tempered by its lack of legislative or executive power. But during the Warren era, the Court assumed the role of a super-legislature, deciding not only what the law is, but what it *should be*.

Justice Rehnquist's tenure is testimony to his strong belief that the most effective deterrent to judicial tyranny is restraint exercised by the Court itself. To this end, Rehnquist consistently champions the decentralized federal framework contemplated by the Framers and defers to the articulated will of the people except when it conflicts with limitations explicitly stated in the Constitution.

On the issue of federalism, Rehnquist has enjoyed only mixed success to date. In 1976, Rehnquist authored the landmark decision in *National League of Cities v. Usery*, which halted the steady erosion of state sovereignty orchestrated by the Court since the 1930's. The Court by a 5-4 majority invalidated Congress' imposition of minimum wages and maximum hours upon state employees, holding that congressional enactments that displace state authority over traditional governmental functions are inconsistent with the federal system of government. Rejecting the notion expressed in previous cases that the Tenth Amendment is merely a "truism," Rehnquist firmly declared that "there are limits upon the power of Congress to override state sovereignty."

Earlier this year, however, Justice Blackmun switched sides on the issue, and the Court overruled *Usery*. Although Justice Powell warned in dissent that "today's decision effectively reduces the Tenth Amend-

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ment to meaningless rhetoric," Rehnquist was more sanguine, confidently predicting that the federalist principles articulated in *Usery* will "in time again command the support of a majority of this Court."

Rehnquist also generated a new majority to reverse years of contrary precedent in *Mueller v. Allen*, another 5-4 decision in which the Court upheld for the first time a state's efforts to lessen the financial burdens of private school parents. Although the Court had repeatedly repudiated such efforts in the past as violating the constitutional separation of church and state, Rehnquist rejected such a mechanistic interpretation of the First Amendment. He focused instead upon the practical and primarily secular effects of the state's program:

The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Rehnquist may be on the verge of leading a new consensus on yet another issue with profound implications—abortion. Viewing the Constitutional issue of abortion as a question of federalism, Rehnquist believes that it is a matter appropriately addressed by the states, where the will of the people is best ascertained.

Consequently, Justice Rehnquist assailed the majority's 1973 decision in *Roe v. Wade* as "judicial legislation," observing that to "reach its result the Court necessarily has had to find . . . a right that was completely unknown to the drafters of the Fourteenth Amendment." Moreover, he predicted that the ruling "will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it."

Although the Court may yet be prepared to overrule *Roe v. Wade*, the twelve years since the decision have painfully borne out Justice Rehnquist's concerns about the inadequacies of a decision grounded not in constitutional principles but in the fleeting state of scientific art. As a result, the Court will once again consider a pair of cases this Term dealing with state authority to regulate abortions. These cases and others that will surely follow will provide Rehnquist with opportunities to form majorities protecting not only state sovereignty but the right to life itself.

Safeguarding Fundamental Freedoms

Although he is unwilling to substitute his judgment for the will of the people in most instances, Justice Rehnquist is generally vigilant in protecting constitutional rights, which are not subject to compromise

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by the majority. For instance, earlier this year in *FEC v. National Conservative Political Action Committee*, he wrote an opinion striking down on First Amendment grounds legislation that made it a crime for independent political action committees to contribute more than \$1000 to certain candidates. Rehnquist declared that,

the expenditures in this case are at the core of the First Amendment. . . . The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold. . . . But for purposes of presenting political views in connection with a Presidential election, allowing the presentation of views while forbidding the expenditure of more than \$1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

Moreover, where legislation impinges upon decisions traditionally left to private individuals, Rehnquist differs from many of his colleagues and recent predecessors by construing the enactment narrowly rather than ascribing hidden motivations to its sponsors. In *County of Washington v. Gunther*, for example, the Court by a 5-4 vote over Rehnquist's dissent broadly interpreted the Civil Rights Act of 1964 far beyond its plain language, leaving the door open to possible future claims of "comparable worth." Rehnquist sharply criticized the opinion, charging that it

does not rely on any reasoned statement of logic or principle. . . .

In reaching its desired result, the Court conveniently and persistently ignores relevant legislative history and instead relies wholly upon what it believes Congress should have enacted.

As Rehnquist's influence on the Court grows, it can be expected that the Court's adventurism in the realm of judicial lawmaking will diminish, thus leaving intact those areas of personal autonomy that have not yet become subjects of legislative action.

Civil Rights: Constitutional Color-Blindness

In the famous *Plessy v. Ferguson* decision in 1896, Justice Harlan issued a vigorous dissent, arguing that the Constitution is color-blind and requires strict governmental neutrality with respect to race. Justice Rehnquist is the only present member of the Court to have taken that same position, despite the passage of nearly a century and the clear language of the Fourteenth Amendment. Rehnquist joined in dissent with former Justice Potter Stewart in *Fullilove v. Klutznick*, declaring that

[a]ny official action that treats a person differently on account of

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his race or ethnic origin is inherently suspect and presumptively invalid. . . . The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each state regardless of the color of his skin.

But it appears that Rehnquist is on the verge of molding a majority on the Court that may stop just short of establishing constitutional color-blindness, embracing a strict standard of judicial review that will circumscribe government's power to draw distinctions based on race.

The key is the apparent conversion of Justice Byron White, who had joined the liberal dissenters in the *Bakke* case in 1978. Last year, however, White authored the Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, which struck down a judicial decree overriding seniority rights in favor of a racial quota for layoffs in the Memphis Fire Department. Justice White's opinion established that under the Civil Rights Act, courts are "not authorized to give preferential treatment to non-victims," but left open the question of whether governmental entities may constitutionally adopt "voluntary" racial preferences. Earlier this year, White joined Rehnquist and Chief Justice Burger in urging the Court to decide this very question. As a result, the Court will hear arguments this Term in *Wygant v. Jackson Board of Education*, in which it will address for the first time since *Bakke* the extent to which municipal governments may discriminate on the basis of race.

Under Justice Rehnquist's leadership, the Court may come closer than ever before to fulfilling the quest for equality under the law—a goal that has eluded it for nearly a century.

Criminal Justice: Attaining a Balance

In perhaps no other area were the rulings of the Warren Court more excessive than in the context of criminal justice, and their deleterious impact on society is immeasurable. To be sure, it is no simple task to attain the ideal balance between the rights of the accused with society's interest in prosecuting criminals. But the Warren Court's unabashed bias in favor of criminal defendants swung the pendulum far away from the balance that justice requires.

During the last Term, the Court made significant strides toward attaining such a balance, establishing clear limits on the rights of criminal defendants. Justice Rehnquist joined in decisions establishing a "good faith" exception to the "exclusionary rule"—an invention of the Court that prevents juries from considering relevant evidence where police officers have departed from the murky and ever-shifting

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procedural rules imposed by the judiciary.

Justice Rehnquist also commanded a majority in articulating a "public safety" exception to the exclusionary rule in *New York v. Quarles*, in which an armed fleeing rape suspect abandoned his gun in a crowded grocery store and divulged its location to police upon apprehension. But because the officers asked about the gun before informing the suspect of his *Miranda* rights, the defendant demanded that the evidence be excluded at trial. Over a strenuous dissent by Justice Thurgood Marshall, Rehnquist repudiated the Warren-era notion that "whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege." Instead, Rehnquist concluded that the facts presented "a situation where concern for public safety must be paramount."

In the area of appeals and sentencing in criminal cases, the Court decided two important issues on the same day, one written by Justice William Brennan, the dean of the Court's liberal wing, with Rehnquist dissenting; the other authored by Rehnquist with Brennan in dissent. In *Evitts v. Lucey*, the Court held that where a defendant's lawyer committed procedural mistakes in an appeal of a conviction, the defendant is entitled to a new appeal with "effective" counsel. Rehnquist criticized the majority for creating "virtually out of whole cloth" another due process right, arguing that,

lawfully convicted criminals who have no meritorious basis for attacking the conduct of their trials will be able to tie up the courts with habeas petitions alleging defective performance by appellate counsel. The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity.

But in *Wainwright v. Witt*, Rehnquist's common sense view that jurors who object to the death penalty may be excluded from juries in capital cases commanded a majority of the Court. In dissent, Justice Brennan charged the majority with acting as an "adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution. . . ." But given the blatant obstruction of these same ends in previous Terms, one can easily excuse Justice Rehnquist if he is not quick to deny this charge.

Justice Brennan has complained that the "Court's victory over the Fourth Amendment is complete." Such rhetoric is far off the mark. Criminal defendants still enjoy the full panoply of protections afforded in the Bill of Rights. But the day when criminals could escape the consequences of their actions on the basis of procedural technicalities is rapidly coming to a close.

William Rehnquist: Architect

The Years Ahead

Much has changed since William Rehnquist's appointment to the Court. No longer can he be considered merely a one-man truth squad. Instead, he has emerged as the intellectual leader of a growing movement on the Court that seeks to fulfill the vision of the Framers: an independent judiciary that is aggressive in support of fundamental freedoms but otherwise deferential to the expressed will of the people.

Conservatives do have some legitimate complaints about Justice Rehnquist's tenure. In close cases, he often sides with the State against the individual, and he has declined to afford judicial protection to vital economic liberties. But despite these disappointments, Justice Rehnquist's impact on society is greater than any other contemporary conservative apart from President Reagan. And with additional appointees who share his judicial philosophy, his impact will surely grow.

Rehnquist's burgeoning leadership is the result not only of his intellect and clear sense of direction, but of his tenacity as well. Rehnquist once described his able adversary, Justice Brennan, as calling to mind "what was once said of the Roman legions: that they may have lost battles, but they never lost a war, since they never ended a war until they won it."

These words just as accurately describe Justice Rehnquist himself. The war is far from over; but for the duration, Justice Rehnquist's sure hand is at the helm.

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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 press¹ and those who testified in the hearings on his nomination²

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¹See, 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.

²*Nominations of William H. Rehnquist, of Arizona, 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).*

³Letter 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.

⁴See *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).

⁵Rehnquist, *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.

⁶N.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.

Discrimination Act while a representative to the National Conference of Commissioners on Uniform State Laws.⁷ While assistant attorney general he spoke out vigorously in support of the administration's law-and-order position on wiretaps, pretrial detention, summary arrest procedures, obscenity, and civil disobedience — positions almost uniformly anathema to the liberal establishment.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 rights¹¹ 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

⁷*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.

⁸*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.

⁹The 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.

¹⁰By 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).

¹¹E.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

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 alignment [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 materials²⁰ 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 perceives 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

²⁰E.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.

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

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

²⁷*Id.*

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

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

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

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

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

³²Frank, *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).

³⁴For 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).

³⁵Reimenschneider, *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

Rydell, *supra* note 25, at 875.

³⁷*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.

³⁸Lind, *Justice Rehnquist: First Amendment Speech in the Labor Context*, 8 HASTINGS CONST. L.Q. 93 (1980).

³⁹*Id.* at 94.

⁴⁰*Id.* at 94, 97-102.

⁴¹*Id.* at 103.

⁴²*Id.* at 108.

⁴³For 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 tendentious 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.

⁴⁴See 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 concludes 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.

⁴⁵Soifer, *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.

⁴⁹Fiss & 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.

⁵⁵The 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 opponent of "liberal

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

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

⁵⁶Powell, *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.

⁶¹Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293 (1976).

1975 Supreme Court term. A subsequent much abbreviated version extends 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 cases⁶⁶ 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.

⁶²The 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*].

⁶³Shapiro, *supra* note 61, at 293.

⁶⁴The 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.

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

⁶⁶In 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.

⁶⁷In 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

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

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).

⁶⁸Shapiro, *supra* note 61, at 307.

⁶⁹E.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.

⁷³For 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." *Id.* at 26. This is a 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 would 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

⁷⁴According 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.

⁷⁵H. 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).

⁷⁶See 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 opinions⁷⁷ and published addresses⁷⁸, 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

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).

⁷⁷Elaboration 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).

⁷⁸Rehnquist, *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 Justice 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.

⁸⁰U.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.

⁸³For 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).

⁸⁴17 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 come 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

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).

⁹¹426 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-

⁹²*Id.* at 852.

⁹³421 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.

⁹⁵The 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).

⁹⁶440 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 origin¹⁰³ 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

¹⁰⁰ *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.

¹⁰¹ 427 U.S. 445 (1976).

¹⁰² *Id.* at 456.

¹⁰³ *Trimble v. Gordon*, 430 U.S. at 780 (Rehnquist, J., dissenting).

¹⁰⁴ 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).

¹⁰⁵ 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*.

¹⁰⁶ *Id.* at 381.

¹⁰⁷ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁰⁸ *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 officer 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

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

¹¹⁰*Id.* at 381.

¹¹¹Justice 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).

¹¹²431 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.

¹¹⁵Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 *CONV. 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).

¹¹⁶Rehnquist, *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).

¹¹⁸Rehnquist, *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, representing 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 389.

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

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.

¹²⁴U.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 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

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

¹³²449 U.S. 166 (1980).

¹³³*Id.* at 179.

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

¹³⁵408 U.S. 238 (1972).

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

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

¹³⁸430 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, is a theme often repeated in his opinions. See, e.g., *Kelley v. Johnson*, 425 U.S. 238 (1976). "Neither

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

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 debate¹⁴⁸ 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

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).

¹⁴⁶5 U.S. (1 Cranch) 137 (1803).

¹⁴⁷12 Serg. & Rawle 330 (Pa. 1825).

¹⁴⁸Judge 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).

¹⁴⁹Most 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).

¹⁵⁰See, 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 years¹⁵¹ 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

¹⁵⁸5 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

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.

¹⁶³See, 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.

¹⁶⁵Thus, 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, *Government by 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

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).

¹⁶⁶As 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).

¹⁶⁷J. 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.

¹⁶⁸See 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*.

¹⁶⁹For 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 Organic Constitution in Its Formative Era, 1890-1920*, 52 U. COLO. L. REV. 49 (1980).

the most literal, "clause-bound" interpretivism and the forms of noninterpretivism most heavily laden with values extraneous to the Constitution.¹⁷⁰

Given these definitions we have no hesitation in classifying Justice Rehnquist as interpretivist. His published comments leave no doubt of his conviction that judicial review loses all legitimacy when it departs from the language and 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

¹⁷⁰Ely 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).

¹⁷³See, 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 the individual 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 interpretivism, "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 relationships, 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 provisions¹⁸³ is clearly not consistent with the literalist, clause-bound approach to constitutional interpretation. It is, however, quite consistent with

¹⁷⁶According 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.

¹⁷⁸Grey, *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-

¹⁸⁴J. Ely, *supra* note 83, at 12.

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

¹⁸⁶426 U.S. 833 (1976).

¹⁸⁷Shapiro, *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.

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

¹⁹⁰Rehnquist 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.

¹⁹¹421 U.S. 542 (1975).

¹⁹²426 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 philosophy¹⁹⁵ 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 than 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

¹⁹³421 U.S. at 557. See also *Nevada v. Hall*, 440 U.S. 433, 439 (1979).

¹⁹⁴See *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.

¹⁹⁷See, 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

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

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

²⁰⁰Cases 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

²⁰¹Shapiro, *supra* note 61, at 294.

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

²⁰³Separate 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.

²⁰⁴Shapiro, *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.

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

²⁰⁶The 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

²⁰⁷This 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.

²⁰⁸As 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.

²⁰⁹In 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.

²¹⁰In *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-one²¹³ 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

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-unanimous 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 clause²²⁰ as a significant limitation upon state action.²²¹

²¹⁷Perhaps 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. Lavern*, 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).

²¹⁹For 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. I, § 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.

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

²²³Two 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*, 434 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 unanimous (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

²²⁵Correspondingly, 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-management 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.

²²⁶Spaeth & 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 precedent²³⁰ 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

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).

²³²102 S. Ct. 2690 (1982).

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

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

²³⁵The 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* doctrine²⁴³ of federal court

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

²³⁷451 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

²⁴⁴*Judice 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.

²⁴⁵For 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).

²⁴⁷Of 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, *Aboud 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 provision²⁴⁹ or to structural implications drawn from the constitutional plan.²⁵⁰

²⁴⁸Powell 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.

²⁴⁹E.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).

²⁵⁰E.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 possible²⁵² 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

²⁵¹See *supra* text accompanying note 19.

²⁵²See, 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).

²⁵⁴See, 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.

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

Term	Criminal Cases		Civil Cases		Criminal Cases		Civil Cases	
	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)

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TABLE 1 (CONTINUED)

Votes For or Against State/Local Government Votes For or Against National Government

Term	Criminal Cases		Civil Cases		Criminal Cases		Civil Cases	
	For %	Against	For %	Against	For %	Against	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)	

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*

Spring, 1983]

REHNQUIST JUDICIAL PHILOSOPHY

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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
1976						
Rehnquist	58	(85.3)	10	4	(19.0)	17
Court Majority	38	(55.9)	30	7	(33.3)	14
% Difference		(29.4)			(- 14.3)	
1977						
Rehnquist	54	(78.3)	15	5	(33.3)	10
Court Majority	34	(49.3)	35	7	(46.7)	8
% Difference		(29.0)			(- 13.4)	
1978						
Rehnquist	53	(79.1)	14	10	(40.0)	15
Court Majority	38	(56.7)	29	11	(44.0)	14
% Difference		(22.4)			(- 4.0)	

APPENDIX B (CONTINUED)

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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)	

Reagan Again Sidesteps Fireworks . . .

With smooth orchestration and an uncanny avoidance of leaks, the White House has deftly negotiated round two of the potentially explosive process of imposing a long-lasting Reagan legacy on the Supreme Court.

President Reagan's unexpected single-shot announcement of Chief Justice Warren E. Burger's retirement from the Court, his nomination of Associate Justice William H. Rehnquist to succeed him and the nomination of federal appeals court Judge Antonin Scalia to fill the vacancy preempted the speculation and competitive stridency that might have been expected on such an occasion.

As in the President's first Supreme Court nomination, the 1981 selection of Sandra Day O'Connor to become the first woman justice, there appears virtually no likelihood of a major battle over Senate confirmation.

While Reagan has not yet been presented with the opportunity to clearly alter the philosophical balance of the Court by naming a conservative of his choosing to replace an avowed liberal, he has nonetheless given a chronological boost to the conservative side.

Rehnquist, 61, survived liberal attacks when named to the Court nearly 15 years ago, and in today's more conservative political climate, a major effort to block his promotion does not seem likely. He is 17 years the junior of Burger. Scalia, who currently sits on the U.S. Court of Appeals for the District of Columbia Circuit, is 50.

As with O'Connor, 56, whose historic nomination to be the first woman on the Court, made the choice all but unassailable, Scalia is regarded as a safe choice for confirmation because he is held in high esteem by his professional peers—even by those who differ strongly with his philosophy.

As a tactical matter, presidential aides were pleased with their ability to carry out the selection process in secret, without generating lobbying pressures or press speculation. Burger, accompanied by former presidential counsel Fred F. Fielding, notified Reagan and chief of staff Donald T. Regan of his intention to retire at an hour-long White House meeting on May 27.

The news was closely held. Rehnquist was the first person whom the President asked to see to discuss becoming the new Chief Justice, and Reagan offered him the job on the spot.

A three-man selection committee of Regan, Attorney General Edwin Meese III and White House counsel Peter J. Wallison reviewed a list of 10-15 potential candidates for the vacant Associate Justice's slot. No further interviews were necessary, said a source, because all of the candidates were

"well-known." That course of action also helped eliminate the prospect of leaks.

Given the Senate's recent balkiness over controversial Reagan candidates for lower court judgeships, the selection process implicitly aimed for a result that would create minimum controversy. After Reagan announced his choices, a White House briefer proclaimed that "we are very pleased with the results."

Favorable reaction from critics added to the White

*White House
Notebook*

BY DICK KIRSCHTEN

House's pleasure. A prominent attorney with strong liberal credentials said of Scalia, "It is hard for me to imagine that fair-minded people of the liberal persuasion and the Democratic Party could have gotten a better justice out of this Administration." The lawyer predicted that Scalia, though conservative, would not automatically fall into line behind Rehnquist's leadership of the Court.

The long-awaited fireworks over Reagan Supreme Court appointments again appear to have been sidestepped.

* * *

As the magnitude and complexity of the problems besetting the nation's space program have become evident to the Reagan White House, one of its largely ignored units, the Office of Science and Technology Policy (OSTP) has suddenly become attractive in the eyes of senior presidential staffers.

And in science adviser-designate William R. Graham, currently the deputy administrator of the National Aeronautics and Space Administration (NASA), chief of staff Regan has apparently found someone who can work compatibly with his closely knit circle of top aides.

Prior to the tragic explosion of the space shuttle *Challenger* last Jan. 28, OSTP did not loom large in Regan's scheme of things. Organizationally, the congressionally mandated office appeared to be a victim of Congress's well-intentioned effort to give it stature by making it an independent entity within the Executive Office of the President.

A Regan aide noted that "in the psychology of White House staffing, independence usually amounts to isolation.



... Over Appointments to High Court

OSTP was always sort of a third cousin." Another staffer observed that the science adviser's office "just hung out there. It just didn't participate in the normal deliberative process in the White House."

In actuality, power and influence in the West Wing hinge as much on personality as on organizational plans. And former Reagan science adviser George A. Keyworth II was not welcomed into the clique of top advisers when Regan took over as chief of staff in early 1985. During the President's first term, Keyworth had fared somewhat better by allying himself with Meese, who was presidential counselor before he moved on last year to become Attorney General.

A Regan adviser dismissed Keyworth, a prominent advocate of the President's Strategic Defense Initiative, as basically "a one-issue guy." The aide said that there were "some very good people" on the OSTP staff, but implied that he knew and cared little about the office's over-all structure.

Not surprisingly, Keyworth opted for private-sector employment a year after Regan took over. The White House Cabinet Affairs Office, under Alfred H. Kingon, was then asked to weigh OSTP's fate. The options, said a party to the review, "were that you ought to either believe in it or try to get rid of it." Noting that Congress had blocked a 1973 attempt by President Nixon to abolish the science adviser's office, the aide asserted, "You know we could just let it languish."

Kingon recommended, and Regan agreed, that OSTP should be brought into the organizational framework of the White House Office of Policy Development. Although the policy office has been regarded as notoriously weak and silent throughout the Reagan years, an aide explained that it at least "has a seat at the table" at White House policy deliberations and senior staff meetings. OSTP ostensibly would be represented by the President's assistant for policy development, John A. Svahn, at councils where it now has no voice.

As the policy office's experience indicates, however, organizational arrangements do not guarantee influence. More frequently, it is the personal connections that count—and that's where Graham appears to have a leg up.

When the *Challenger* catastrophe occurred, Graham, who was then serving as NASA's acting director, was immediately summoned to the White House to huddle with senior presidential aides and interpret information coming in from the scene of the disaster. Later that afternoon, he accompanied Vice President George Bush to the Cape Canaveral

(Fla.) launching site to convey the President's condolences to the families of the seven astronauts who lost their lives.

Like soldiers thrown together in the press of battle, Graham and Reagan's top advisers forged strong personal ties. Although he must be confirmed by the Senate before he can assume his new White House duties, Graham has already been informally contacted by presidential aides, who have given him a list of issues on which his advice will be sought.

"Bill [Graham] is well-regarded, well-respected, has a good rapport with those of us who are here," said W. Dennis Thomas, a top Regan aide. "We worked very closely with him during that difficult time during and immediately after the shuttle accident. I think everybody came away with a feeling that he's handled himself well under very very difficult circumstances. And I think that will bode well for his ability to be a strong influence here."

That apparently holds true for Regan as well as for his lieutenants. When asked if Graham is likely to develop a good personal relationship with the chief of staff, Kingon, a longtime Regan associate, replied, "He has that already."

Although Graham is coming to the White House from NASA, where he has served less than a year, he is by no means regarded as a special pleader for the civilian space agency. In fact, some NASA officials view Graham as more sympathetic to arguments for giving higher priority to military payloads in the national space launching capability.

When appointed as deputy to former NASA administrator James M. Beggs, Graham was the White House's choice for the post, not Beggs's. Shortly thereafter, Beggs was forced to resign after being indicted in a defense contracting case involving his previous employer.

In the immediate aftermath of the *Challenger* explosion, many NASA officials pushed for an internal investigation but were overridden by the White House's insistence on appointing an independent study commission. That decision drew no complaint or appeal from Graham, according to White House sources.

Critical remarks by Beggs apparently derailed Graham's chances to take over the top NASA job but cost him no favor at the White House, where it appears that for the first time, a science adviser will enjoy some clout in the Reagan staff's inner circle.

"He believes he can be [influential]," Kingon said. "I hope he is. Bill is a very cool, careful guy and is very cooperative. He believes in the President and wants to work for him." □



Scalia picked for vacancy

By Jeremiah O'Leary
and Mary Belcher
THE WASHINGTON TIMES

President Reagan yesterday accepted the resignation of Supreme Court Chief Justice Warren Burger, and swiftly named Associate Justice William Rehnquist to replace him and tapped a conservative appellate judge to fill the vacancy on the nation's highest court.

The promotion of Justice Rehnquist and nomination of Judge Antonin Scalia of the U.S. Court of Appeals here is "one of the most significant decisions" of the Reagan presidency, a senior administration official said.

"These appointments are ones
see COURT, page 8A

... continue to adhere to these principles of judicial restraint."

Sen. Alan Cranston, California Democrat, made it clear that Justice Rehnquist will face some tough questions during his confirmation

Judge Scalia had to pass a "litmus test" on abortion or other specific issues of major importance to the administration. Instead, the president was interested in the judge's "overall philosophy," based on the body of his work, according to a

opportunity to place a conservative mark on the court for perhaps 20 years after his second term ends.

The president praised all three judges in the highest terms. He said of Justice Burger, "He has led the Supreme Court for 17 years, a time

... yet a period also
... stability in the
... rt. Under Justice
... the court has re-
... recedent while it
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Scalia picked for vacancy

By Jeremiah O'Leary
and Mary Belcher
THE WASHINGTON TIMES

President Reagan yesterday accepted the resignation of Supreme Court Chief Justice Warren Burger, and swiftly named Associate Justice William Rehnquist to replace him and tapped a conservative appellate judge to fill the vacancy on the nation's highest court.

The promotion of Justice Rehnquist and nomination of Judge Antonin Scalia of the U.S. Court of Appeals here is "one of the most significant decisions" of the Reagan presidency, a senior administration official said.

"These appointments are ones
see COURT, page 8A

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which I think will have enormous influence on the direction of the court over many years," said the official, who spoke on condition that he not be identified.

If the Senate confirms Judge Scalia's nomination, he will, at 50, become the youngest member of the Supreme Court. Mr. Reagan's only other appointment to the court is Sandra Day O'Connor, who is 56.

"We are putting on the court today a judicial philosopher [Mr. Scalia] ... who shares the president's philosophy and is young enough to remain on the court many, many years," the official said.

On Capitol Hill, the new appointments received an endorsement from Sen. Strom Thurmond, the South Carolina Republican who heads the Judiciary Committee.

He called Justice Rehnquist a "logical appointment" — a fairly young man and a "true scholar" who shares the views of the White House.

"He will make an outstanding chief justice," Mr. Thurmond said in a speech on the Senate floor shortly after the announcement.

Mr. Thurmond, 83, later said he "had a feeling" the 78-year-old Justice Burger would resign because he was carrying a heavy load and "looked very tired."

Senate Majority Leader Robert Dole predicted early action on the nominations.

"During his tenure on the Supreme Court, he has helped to define the court's proper role in the federal government," Mr. Dole said of Justice Rehnquist. "And I am confident that in his new position he will continue to adhere to these principles of judicial restraint."

Sen. Alan Cranston, California Democrat, made it clear that Justice Rehnquist will face some tough questions during his confirmation

hearings.

"I have grave doubts whether someone with the extreme right-wing views of Justice Rehnquist can properly manage the court as chief justice," Mr. Cranston said.

The White House began its search for a new chief justice May 27, when Justice Burger told the president in a personal visit that he wanted to devote full time to the Commission on the Bicentennial of the U.S. Constitution.

Administration officials denied that Justice Burger was pressured to resign to allow the president to make a new, younger appointment to the court.

Mr. Reagan on May 29 asked Attorney General Edwin Meese, White House Chief of Staff Donald Regan and White House Counsel Peter Wallison to draw up a list of candidates for the nation's highest judiciary post.

The president asked that the candidates be either Supreme Court associate justices or judges from lower courts. Administration officials refused to discuss other candidates on the list, which included between 10 and 15 names.

Mr. Reagan received synopses of the candidates' legal opinions and other writings reflective of their philosophies.

Justice Rehnquist, who was the president's first choice for the chief justiceship, accepted Mr. Reagan's job offer June 12, according to the administration official.

Judge Scalia also was Mr. Reagan's first choice to fill the court seat Justice Rehnquist will vacate. The president asked Judge Scalia to accept the nomination Monday afternoon, and he did so on the spot.

White House officials denied that Judge Scalia had to pass a "litmus test" on abortion or other specific issues of major importance to the administration. Instead, the president was interested in the judge's "overall philosophy," based on the body of his work, according to a

senior official.

In his four years as a federal appeals judge, Judge Scalia has not had to rule on an abortion case.

Mr. Reagan was especially impressed with Judge Scalia's record on judicial restraint, in which the courts defer to the elected branches of government instead of overturning or modifying laws, the official said.

Judge Scalia called the opportunity to serve on the Supreme Court "the culmination of a dream."

Mr. Reagan entered the White House press room at 2 p.m. yesterday, accompanied by Justices Burger and Rehnquist and Judge Scalia.

Justice Burger said he plans to step down July 10, if Justice Rehnquist has been confirmed by the Senate Judiciary Committee. The Scalia nomination will be forwarded to the Senate after action on the Rehnquist nomination.

Court observers said Mr. Burger will be remembered for his efforts to limit the scope of many of the decisions handed down by the liberal court headed by his predecessor, Earl Warren.

Many of those decisions involved the rights of criminal defendants and latitude allowed to law enforcement.

Mr. Burger sought to impose limits on the power of the judicial branch to legislate through the interpretation of law.

Justice O'Connor, appointed by Mr. Reagan in 1981, is the first woman to serve on the high court. The presence of three Reagan choices on the Supreme Court — with the possibility that three other justices in their 70s might soon retire — has given the president the opportunity to place a conservative mark on the court for perhaps 20 years after his second term ends.

The president praised all three judges in the highest terms. He said of Justice Burger, "He has led the Supreme Court for 17 years, a time

of great change and yet a period also of consolidation and stability in the decisions of the court. Under Justice Burger's guidance, the court has remained faithful to precedent while it sought out the principles that underlay the framer's [of the Constitution] words."

Mr. Reagan said Justice Rehnquist has served with great distinction and skill since 1971. At 61, Justice Rehnquist is the same age Justice Burger was when he was nominated 17 years ago.

"He is noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues," Mr. Reagan said of the man he nominated as chief justice.

Mr. Reagan said Judge Scalia, an appellate judge here since 1982, is noted for the force of his intellect, personal energy and the depth of his understanding of constitutional jurisprudence.

Justice Burger said one thing he did not accomplish was his goal of the creation of a new intermediate court, a measure now before Congress, to take cases from the overloaded calendar of the Supreme Court.

"There are nearly 100 filings a week and we have got to have some relief," Justice Burger said. "I'm surprised someone hasn't fallen down with coronary thrombosis. I have been logging 105 hours a week. I can do 90 hours, but at my age..."

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COURT

From page 1A

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BURGER RETIRING, REHNQUIST NAMED CHIEF; SCALIA, APPEALS JUDGE, CHOSEN FOR COURT



President Reagan with Judge Antonin Scalia, left, Associate Justice William H. Rehnquist, center, and Chief Justice Warren E. Burger.

TENURE OF 17 YEARS

Reagan Acts to Solidify
Bloc That Would Back
His Social Agenda

By BERNARD WEINRAUB
Special to The New York Times

WASHINGTON, June 17— President Reagan today announced the retirement of Warren E. Burger as Chief Justice of the United States after 17 years and the intention to nominate Associate Justice William Hubbs Rehnquist to replace him.

Mr. Reagan also announced that, upon Justice Rehnquist's confirmation

Texts of Reagan and Burger letters
and news session, page A30.

as Chief Justice by the Senate, he would nominate Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia to the Supreme Court.

Republican leaders of the Senate praised the selection of Justice Rehnquist to become Chief Justice, but some Democrats expressed doubts about his record. Lawmakers from both parties said Judge Scalia's reputation as a legal scholar was likely to dissolve opposition to his nomination, and many said he would shift the balance of the Court perceptibly to the right. [Page A32.]

A Decisive Move

With the announcement today, Mr. Reagan moved decisively to insure that on the central issues of his social agenda — civil rights, abortion, church-state relations and the constitutionality of independent Federal agencies — the Supreme Court will include a forceful member and possibly a majority of Justices supporting the President.

The departure of Chief Justice Burger marks an end to the tenure of a Chief Justice whose years heading the Supreme Court were marked by an unexpected activism, even in areas such as civil rights and criminal law. Mr. Burger was appointed by President Nixon in an effort to seek "judicial restraint" in the Court's decisions.

Chief Justice Burger said he was retiring to devote his time entirely to organizing ceremonies surrounding the 200th anniversary of the Constitution in 1987. Chief Justice Burger, 78 years old, who is chairman of the Commission on the Bicentennial of the United States Constitution, denied that he was leaving the Court because of poor health or weariness with the job.

'I Wasn't Weary'

"I wasn't weary of being Chief Justice," he said with a grin. "It's a lot of fun."

Asked if he was leaving for reasons of health, Justice Burger said: "You make the diagnosis. Do I look as though I'm falling apart? I never felt better in my life."

White House and Reagan Administration officials said today that Chief Justice Burger, at a private White House meeting three weeks ago, told

Continued on Page A22, Column 1

Burger Reining, Rehnquist Is Chosen as Chief Justice

Continued From Page 1

the President unequivocally that he wanted to retire.

Mr. Reagan, who made the announcement at 2 P.M. today at the White House before a national television audience, said Judge Scalia was "noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues."

"His great personal energy, the force of his intellect, and the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court," said Mr. Reagan, who stood in the White House beside Justice Burger, Justice Rehnquist and Judge Scalia.

White House officials said they expect no substantive opposition to Judge Scalia in the Senate, where a majority vote is required for his confirmation. He is believed to be the first American of Italian descent to serve on the Supreme Court, and at 56, he is younger than any sitting Justice.

Senator Strom Thurmond, the South Carolina Republican who heads the Senate Judiciary Committee, which has jurisdiction over the nominations, promised to hold hearings quickly. "I expect no problem in having either of the President's nominations confirmed," he said.

Attorney General Edwin Meese 3d, who was involved in the selection process, said the President had adhered to three basic criteria in nominating Justice Rehnquist and Judge Scalia. "One is intellectual and lawyerly capability," he said, "secondly, integrity, and thirdly, a commitment to the interpretation of the law rather than being a lawmaker."

A senior Administration official, also involved in the selection process, said the nominations "will have enormous influence on the direction of the Court for many years."

Republican leaders of the Senate praised Mr. Reagan's selection of Justice Rehnquist, who was named to the Supreme Court in 1971 by President Nixon and has long been the Court's most conservative member. Democrats vowed, however, to examine his record carefully before deciding whether to endorse his nomination as Chief Justice.

The views of Judge Scalia are not widely known. He has criticized the Supreme Court's approval of affirmative action plans that include racial preferences, hinted at disagreement with the Court's broad First Amendment rulings limiting libel suits, questioned the constitutional basis for the independence from the President of such agencies as the Federal Reserve Board and is said to be personally opposed to abortion.

White House officials insisted that "there was no litmus test" for selecting Judge Scalia and that he was not subject to any specific screening for opinions on school prayer, abortion or other issues. Mr. Meese said a principal criterion was seeking two jurists who are "interpreters of the law rather than lawmakers."

The effective date of Chief Justice Burger's departure is July 10, when the Court expects to finish work on its cur-

rent term, although he said he would stay longer if needed until the replacement is complete. A spokesman for the Court said Mr. Burger would draw his full annual salary of \$108,400 in retirement.

Mr. Reagan said Chief Justice Burger informed him three weeks ago of his yearning to leave the Supreme Court to devote full time to the commission.

Chief Justice Burger said today, "It is vastly underfinanced and we're going to have the devil's own time in trying to do the kind of a job that ought to be done for this great event."

White House officials said the disclosure surprised the President and his chief of staff, Donald T. Regan. Also attending the Oval Office meeting was Fred F. Fielding, the former White House counsel.

Chief Justice Burger, in his letter of resignation, said that his work heading the commission on the Constitution was a "full-time enterprise" and was "an enormous and challenging task." The responsibilities of serving as Chief Justice as well as running the commission were far more than he could handle, the Chief Justice indicated.

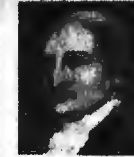
Chief Justice Burger, in a joking mood, was asked by reporters if he would change some of the opinions he had written. "I wish some of them were a little shorter," he said.

Justice Rehnquist, asked if the nomination to replace Chief Justice Burger was the culmination of a dream, said: "I wouldn't call it the culmination of a dream, but it's not every day when you're 61 years old that you get a chance to have a new job."

Chief Justice Burger said: "That strikes me as a perfect parallel. Bill Rehnquist is the same age as I was when I was nominated back in the Garfield Administration, I think it was."

The two Justices and Judge Scalia broke into laughter.

From John Jay to Warren Earl Burger: The 15 Chief Justices



John Jay
Born: Dec. 12, 1745, in New York City. Died: May 17, 1829, in Bedford, N.Y.
College: King's College (Columbia).
Appointed: By Washington in 1789.
Resigned: 1795.

John Rutledge

Born: September 1739, Charleston, S.C. Died: June 21, 1800, in Charleston.
Law school: Inns of Court, London.
Appointed: Pro tem by Washington in 1795 for less than one year.
Served as Associate Justice.

Oliver Ellsworth

Born: April 29, 1745, in Windsor, Conn. Died: Nov. 26, 1807, in Windsor, Conn.
College: Princeton.
Appointed: By Washington in 1798. Resigned: 1800.

John Marshall

Born: Sept. 24, 1755, Germantown, Va. Died: July 8, 1835, Philadelphia, Pa.
Law school: William and Mary.
Appointed: By Adams in 1801. Died in office.

Roger Brooke Taney

Born: March 17, 1777, in Calvert County, Md. Died: Oct. 12, 1884, in Washington, D.C.
College: Dickinson.
Appointed: By Jackson in 1835, confirmed in 1836. Died in office.

Salmon Portland Chase

Born: Jan. 13, 1808, in Cornish, N.H. Died: May 7, 1873, in New York City.
College: Dartmouth.
Appointed: By Lincoln in 1864. Died in office.

Morrison Remick Waite

Born: Nov. 29, 1818, in Lyme, Conn. Died: March 23, 1888, in Washington, D.C.
College: Yale.
Appointed: By Grant in 1874. Died in office.

Melville Weston Fuller

Born: Feb. 11, 1833, in Augusta, Me. Died: July 4, 1910, in Sorrento, Me.
College: Bowdoin. Law school: Harvard.
Appointed: By Cleveland in 1888. Died in office.

Edward Douglas White

Born: Nov. 3, 1845, in Parish of Lafourche, La. Died: May 19, 1921, in Washington, D.C.
College: Mount St. Mary's, Georgetown.
Appointed: By Taft in 1910. Served as Associate Justice.

William Howard Taft

Born: Sept. 15, 1857, in Cincinnati, Ohio. Died: March 8, 1930, in Washington, D.C.
College: Yale. Law school: Cincinnati.
Appointed: By Harding in 1921. Resigned: 1930. Was President of the United States.

Charles Evans Hughes

Born: April 11, 1862, in Glens Falls, N.Y. Died: Aug. 27, 1948, in Osterville, Mass.
College: Madison (Colgate), Brown. Law school: Columbia.
Appointed: By Hoover in 1930. Resigned: 1941. Served as Associate Justice.

Harlan Fiske Stone

Born: Oct. 11, 1872, in Chesterfield, N.H. Died: April 22, 1946, in Washington, D.C.
College: Amherst. Law schools: Columbia, Amherst.
Appointed: By Roosevelt in 1941. Died in office. Served as Associate Justice.

Frederick Moore Vinson

Born: Jan. 22, 1890, in Louisa, Ky. Died: Sept. 8, 1953, in Washington, D.C.
College: Centre. Law school: Centre.
Appointed: By Truman in 1946. Died in office.

Earl Warren

Born: March 19, 1891, in Los Angeles, Calif. Died: July 9, 1974, in Washington, D.C.
College: University of California. Law school: University of California.
Appointed: By Eisenhower in 1953, confirmed in 1954. Resigned: 1969.

Warren Earl Burger

Born: Sept. 17, 1907, in St. Paul, Minn.
College: University of Minnesota. Law school: St. Paul (Mitchell).
Appointed: By Nixon in 1969.



Source: "Guide to the U.S. Supreme Court," © 1979 by Congressional Quarterly Inc.

Meeting 3 Weeks Ago Set Off Search, a Well-Kept Secret

By GERALD M. BOYD

Special to The New York Times

WASHINGTON, June 17 — It was at a White House meeting three weeks ago that Chief Justice Warren E. Burger told President Reagan unequivocally that he wanted to retire. Administration officials said today.

That set off a series of meetings and deliberations that a high-level search committee managed to keep secret until Mr. Reagan announced his choices for the two positions on the Supreme Court this afternoon.

Only Donald T. Regan, the White House chief of staff, and Fred Fielding, a former White House counselor, were present when the Chief Justice told the President that he was ready to end his 17-year career on the Court.

White House officials said that Chief Justice Burger's statement came as a surprise and that he was not encouraged to resign. But they said that neither was there any attempt to dissuade him. The timing means that confirmation hearings can proceed before the 1986 elections, while the Republicans are still assured of a majority in the Senate.

Over the next days three advisers — Attorney General Edwin Meese 3d, Mr. Regan,

and Peter Wallison, the White House counsel — compiled a thick, looseleaf book full of facts about potential candidates for the High Court. But in the end, aides said, Mr. Reagan was swayed as much by personal chemistry.

In the case of Associate Justice William H. Rehnquist, Administration officials said that the President offered him the job of Chief Justice on the spot, in a 30-minute meeting where one of Mr. Reagan's main concerns was the state of the Justice's health. Justice Rehnquist, whose medical problems raised questions a few years ago, assured the President that he had received a clean bill of health in a recent checkup and that he was willing to serve as long as possible.

Mr. Reagan's selection of Antonin Scalia, a judge on the United States Court of Appeals for the District of Columbia, to replace Justice Rehnquist was equally straightforward, the officials said. It came in a similar 30-minute session where Mr. Reagan met the judge for the first time and viewed him as "warm and personable."

He and other officials said that it was at Mr. Regan's suggestion that the President created the three-member search committee,

which met with Mr. Reagan for the first time two days later.

Officials said the President expressed a desire to consider sitting judges for the Chief Justice slot because it would be easier to discern their judicial philosophy, one senior Reagan aide said. At the same time, the aide said, the President voiced a broad preference for a replacement who would exercise judicial restraint.

Mr. Meese said today that there had been three principal criteria: Finding a candidate who was intellectually and lawyerly capable, one with integrity, and one with a commitment to interpreting the law rather than making it from the bench.

"It wasn't a matter of trying to find someone who represents the President's philosophy, because on specific issues, we never use that in any of our Presidential appointments as a test," he said.

White House officials said 10 to 15 people were considered in the search, with Mr. Meese assembling the opinions of judges under consideration while Mr. Wallison did similar research as well as pulling together newspaper, scholarly and law-review writing on the candidates.

According to the officials, Mr. Reagan met with the three aides for the second time on June 9, where they reviewed and pared the list of candidates. It was in that session, the officials said, that Mr. Reagan said he wanted to meet with Justice Rehnquist.

Three days later, Mr. Reagan offered him the job in a meeting in which one official said the Justice had "reinforced" the positive recommendation he had received from the three advisers.

"The President liked the answers that he got," said a ranking Reagan adviser.

Mr. Rehnquist received treatment in 1982 for side effects, including slurred speech, caused by drugs used to relieve severe back pain. Officials said he was no longer taking such drugs.

Weighing a replacement for Justice Rehnquist began immediately. Again, Mr. Reagan chose to meet with one of the candidates, this time Mr. Scalia, they said.

"We didn't tell him the purpose of the call, but he's over 21 and he knows that the President doesn't call you over to talk about nothing," a senior Reagan adviser said. Mr. Reagan offered the appellate judge the job at a meeting Tuesday.

Burger Quits; Rehnquist Chosen to Lead Court

Reagan Relied On His Instincts

By David Hoffman
Washington Post Staff Writer

When Associate Justice William H. Rehnquist arrived at the Oval Office last Thursday for an interview with President Reagan, the team of three top administration officials who had been secretly searching for a new chief justice was uncertain what would happen.

The group consisted of White House chief of staff Donald T. Regan, White House counsel Peter J. Wallison and Attorney General Edwin Meese III. They had come to a "consensus," as one recalled it, that Rehnquist was the best choice to lead the Supreme Court.

Rehnquist was the first candidate Reagan had wanted to interview.

After talking with Rehnquist about his health, about his willingness to serve and about his legal philosophy, but not about specific cases or issues such as abortion, Reagan surprised his advisers by offering Rehnquist the position on the spot. "He liked the answers," recalled a White House official who participated.

Thus Reagan completed the selection of a nominee to be the 16th Chief Justice of the United States in a matter of days by relying on his own broad principles, one interview and a minimum of written material, including a digest of Rehnquist opinions and some newspaper and magazine articles about the court, White House officials said.

In selecting Rehnquist, they added, Reagan's primary goal was a chief jus-

See DECISION, A14, Col. 1

President Relied on Instincts

DECISION, From A1

tice who shares his philosophy of "judicial restraint"—that the courts interpret the law but should leave to the elected politicians as much as possible the business of creating or repealing the laws.

The president then repeated the process to fill the court seat vacated by Rehnquist's elevation. Reagan acted in concert with a consensus of his three advisers. The only candidate he interviewed was Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia. Reagan offered him the job at the end of an Oval Office interview Monday afternoon in which they did not talk about specific cases—just overall philosophy, according to participants.

In making these two nominations aimed at leaving a conservative imprint on the court for many years after his presidency, Reagan appears to have relied on his instincts and philosophy rather than on detailed analysis. He also relied on his advisers to bring him candidates who largely shared his views.

From the beginning of the search, Reagan also made a decision that excluded his longtime adviser, Meese, from becoming a candidate for the second opening on the court during his presidency. Officials said Reagan instructed them to search for candidates among the ranks of sitting Supreme Court justices and judges already on the bench. That stipulation removed Meese from consideration.

The president's decision to narrow the field to judges and justices



Burger leaves White House press room after the announcement of his retirement. Scalia is at left, Rehnquist is at right.

was taken partly because it would be easier to assess the record of the candidates from their written opinions, a White House official said. But another presidential aide said, "It may have also been driven by confirmation politics. Someone who has been confirmed once is going to be almost certain to be confirmed again."

Meese, by contrast, experienced a stormy and difficult Senate confirmation as attorney general.

Meese told reporters yesterday, "I've always consistently said I was never interested. I said definitively,

I think several months ago, it was reported in several of the papers, that I've never had any interest in being a judge and don't have any interest now and don't ever anticipate any interest in the future."

Chief Justice Warren E. Burger's plans to retire came to the attention of the White House late last month when, using former White House counsel Fred F. Fielding, he arranged a meeting with Reagan for May 27, officials said. Burger spent most of the meeting telling Reagan about his concern for the celebration of the 200th anniversary of the Constitution, of which he is chairman, participants said. At the end of the meeting, he announced to Reagan that he wanted to retire after this session of the court is over in July.

Two days later, the officials said, Reagan met with the three advisers who would secretly carry out the search for a replacement. "We didn't discuss candidates with him," said one, but Reagan told them to look at justices on the court and sitting judges.

The group of advisers, using material from the Justice Department, produced a list of 10 or 15 possible candidates for chief justice. For the most part, officials said, these candidates shared Reagan's broad philosophy.

The group then met with Reagan again on June 9. Wallison had prepared digests, about 15 pages long,

of the judicial views of some potential candidates, including Rehnquist.

The president was also provided with newspaper and magazine articles about the court, including essays in the Sept. 29, 1984, edition of The Nation commenting on Burger's tenure as chief justice, officials said.

The opening essay by Herman Schwartz, a professor at American University's Washington College of Law, reported that the court, which Rehnquist joined in 1972, had in recent years taken a conservative turn, particularly in cases involving individual rights.

"Its direction is away from concern for individual liberties and toward the imperial perspective that says, 'Don't question authority,'" Schwartz wrote, attributing the shift in part to the addition of "the rigidly ideological" Justice Sandra Day O'Connor to the conservative Rehnquist.

By the account of those involved, Reagan quickly zeroed in on Rehnquist early last week. On June 9, one participant said, some candidates "clearly stood out in the discussion. The president began to focus on a relatively few" candidates, this official said.

"Reagan liked what he heard" about Rehnquist, another participant said, and a meeting with him was set for last Thursday, with the president, the justice, Meese, Wallison and Reagan in attendance.

CHIEF JUSTICES OF THE UNITED STATES

Name	Served	Appointed by	From
John Jay	1789-1795	Washington	New York
John Rutledge	1795*	Washington	South Carolina
Oliver Ellsworth	1796-1800	Washington	Connecticut
John Marshall	1801-1835	J. Adams	Virginia
Roger B. Taney	1836-1864	Jackson	Maryland
Salmon P. Chase	1864-1873	Lincoln	Ohio
Morrison R. Waite	1874-1888	Grant	Ohio
Melville W. Fuller	1888-1910	Cleveland	Illinois
Edward D. White	1910-1921	Taft	Louisiana
William H. Taft	1921-1930	Harding	Connecticut
Charles E. Hughes	1930-1941	Hoover	New York
Harlan F. Stone	1941-1946	F. Roosevelt	New York
Fred M. Vinson	1946-1953	Truman	Kentucky
Earl Warren	1953-1969	Eisenhower	California
Warren E. Burger	1969-1986	Nixon	Minnesota

*Appointed by Washington but not confirmed by the Senate.

BY JAMES SCHWARTZ—THE WASHINGTON POST

"I didn't know what would happen," recalled one of them, "whether he would decide on Rehnquist or say continue the process. At the meeting he liked Rehnquist a good deal. The president made inquiries generally . . . how he saw the direction of the court, how he felt he could deal with the job."

When Rehnquist accepted the president's offer and left the White House, Reagan then turned to a short list of other candidates to find a successor for him. Again, he settled on one candidate, Scalia, and

invited him to the Oval Office for an interview, at which he offered him the job on the spot. Again, officials said, Reagan was impressed with Scalia's general agreement about a philosophy of "judicial restraint" and did not question him about specific cases or opinions.

In May, Burger told administration officials that he would wait for a White House signal about the announcement. That signal went out yesterday when Reagan telephoned, asking him to come to the White House for the announcement.

MONDAY, JULY 20, 1986

THE WASHINGTON POST

ehnquist's Viewpoints Changed Little Over 3 Decades

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Robert B. Jackson speaks before Senate Judiciary Committee in 1971 at first Supreme Court confirmation hearing.



Justice Robert B. Jackson. Photographed by stock for 1908-51.

PLEASE PRINT NAME ON COPY

son clerk himself. Jackson often visited the West Coast, particularly to attend the meetings of San Francisco's all-male Bohemian Club that were held each summer on the banks of the Russian River. In August 1951, he stopped by Neal's office for a visit.

Jackson, a 1941 appointee of President Franklin D. Roosevelt who grew more conservative in his later years, and Rehnquist, a World War II veteran who was to graduate that winter, hit it off well. By fall, law firms in California, New Mexico and Arizona had offered Rehnquist jobs, but he had his eyes on the court. He wrote Jackson to ask if the justice might make his mind up sooner rather than later.

Jackson offered him the job Dec. 4, 1951. "I felt at our talk at Stanford that you and I would get along pretty well together," Jackson wrote, "and, if we can make proper arrangements, I will be glad to take you on."

After some mixed signals over when he would take his bar exams, Rehnquist began his 18-month stint in January 1952, plunging into the work of doing research for the justice's opinions and writing "cert memos"—summaries of cases for which "certiorari" or Supreme Court review was being sought.

Rehnquist's fellow clerk for much of this period was Donald Cronson, later an international lawyer, who, the Jackson papers suggest, was the in-house liberal while Rehnquist was the resident conservative. Each stated his own views plainly and bluntly. Jackson seems to have welcomed the philosophical debate.

'Separate but Equal' Issue

During the 1971 Senate debate over Rehnquist's confirmation, one of his memos, "A Random Thought on the Segregation Cases," became an issue because of its outspoken support of the old "separate but equal" doctrine. Rehnquist blunted the criticism with a letter to Senate Judiciary Committee Chairman James O. Eastland (D-Miss.). Rehnquist said his best recollection was that the memo was prepared at Jackson's request for a conference with the other justices and that it reflected Jackson's views, not his own.

Rehnquist concluded the letter by stating that while Jackson "did expect his clerks to make recommendations based on their memoranda as to whether certiorari should be granted or denied, he very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided."

Efforts to reach Rehnquist for comment Friday were unsuccessful, but the Jackson papers appear to contradict this. Both Rehnquist and Cronson frequently expressed their own views of a case, without any sign of disapproval from Jackson. Rehnquist's memos, in particular, are full of personal observations and philosophical suggestions as to how a case should be decided.

In 1952, for instance, before the court convened for its new term in October, Cronson sent Jackson a memo concerning the plight of a man who had been imprisoned on Ellis Island for nearly two years without a hearing.

The man, Ignatz Mezei, had lived in the United States for 25 years, but he had gone to Europe to try to visit his dying mother in Romania and was seeking to return to his family in Buffalo when immigration authorities stopped him. The government had classified him as a security risk, but refused to disclose its reasons. It took the position that, as an excludable alien, Mezei had "no rights" and that he could be held in executive custody indefinitely.

applications of the case. He protested that if the government's position were upheld, it would amount to a modern-day version of the "lettre de cachet" whereby the French monarchy imprisoned people without a trial.

Rehnquist countered with a memo to Jackson that began by saying he was submitting "these reflections . . . in great deference, seeing they are contrary to the views of my coworker [Cronson], and also to some of the views which you expressed" in an earlier case involving immigration law.

Seventeen other countries had refused to take Mezei after he was deemed unacceptable here, but Rehnquist saw nothing illegal or even lamentable in the plight of the man facing life on Ellis Island.

"... (W)hen we come to this guy, who seeks entry under the provisions of the general immigration law, I have some trouble crying," Rehnquist wrote. "I think Congress . . . has provided that this man was properly excludable [sic]. That it had the power to do so I have not the slightest doubt . . . If Congress plainly said that all aliens with green hair shall be excluded, I know of nothing in the Constitution which would prevent them . . ."

"This alien is detained on Ellis Island by the government simply because he is unable to go to any other country," Rehnquist concluded. "He is perfectly free to get on the first outbound boat that comes along . . . I think the government is right."

The court, in a 5-to-4 decision, held that Mezei could be detained indefinitely—but there was a blistering dissent from Jackson. Evidently unimpressed by Rehnquist's views, he derided the government's assessment of Mezei, a 56-year-old cabinetmaker, as a grave security risk, "a Hercules who might pull down the pillars of our temple." Mezei, the justice said, "must have been astonished to find himself suddenly putting the government of the United States in such fear that it was afraid to tell him why it was afraid of him."

Moreover, Jackson, who had been chief counsel for the United States at the Nuremberg trials after World War II, said the government's legal arguments reminded him of Nazi Germany.

"Quite unconsciously, I am sure, the government's theory of 'safekeeping' without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining procedure known to the common law," Jackson wrote.

Mezei, who had been temporarily free on bond, was sent back to Ellis Island following the March 16, 1953, ruling, but the Justice Department paroled him in August 1954.

There is no indication that Jackson was displeased with Rehnquist for presenting his opinions—and no indication that the clerk was dissuaded from serving them up.

In a memo commenting on three lawsuits by baseball players against the major leagues for alleged violations of the Sherman Act, Rehnquist made plain that he thought the sport should be exempt from the antitrust laws. "Before making any recommendation," he wrote Jackson, "I feel it is only fair to lay bare my strong personal animus in these cases . . . I feel instinctively that baseball, like other sports, is *sui generis*, and not suitably regulated either by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits."

A case involving federal lobbying law, *U.S. v. Harris*

REHNQUIST COPY

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elicited another tart observation from Rehnquist. U.S. District Court Judge Alexander Holtzoff had held the law unconstitutional, partly on grounds that the penalty, prohibiting convicted offenders from lobbying for three years, violated the First Amendment.

"It strikes me that Judge Holtzoff's holding on the penalty provision is just so much hogwash," Rehnquist asserted. "The government can put men in jail when they are convicted of a crime—a result which the Constitution would surely forbid if they had not been so convicted. I see no reason why by the same token they may not impair a man's right to free speech, if such im-

pairment be shown to be reasonably related to an offense he has committed and been convicted for . . . If the government can take away a man's normal right to freedom of movement upon conviction, I cannot believe that his right to freedom of speech is any more precious."

That view seemed reflected this month when the court, in a 5-to-4 ruling, upheld a prohibition on casino gambling ads in Puerto Rico. Writing for the majority, Rehnquist said that if a legislature could regulate a product or activity, then it could regulate the advertising of it. Dissenters contended that a ban on truthful advertising of a lawful activity (casino gambling is legal in Puerto Rico) raised serious First Amendment problems, but Rehnquist thought otherwise.

"It would . . . surely be strange constitutional doctrine," he said, "which would concede to the legislature the authority to totally ban a product . . . but to deny the legislature the authority" to ban the advertising of it.

As a clerk, Rehnquist also voiced little sympathy for Jehovah's Witnesses who were convicted in New Hampshire and Rhode Island for insisting on making speeches in city parks in violation of local ordinances.

"I personally don't see why a city can't set aside a park for ball games, picnics or other group activities without having some outlandish group like Jehovah's Witnesses commandeer the space and force their message on everyone," Rehnquist said. "Nevertheless, these points raised have not been passed upon by the ct [court], and appellants are certainly entitled to a hearing."

Rehnquist's distaste for lawmaking by the courts stood out sharply in a "cert memo" frowning on the Federal Power Commission's claims of exclusive rate-making jurisdiction in a dispute with California's Public Utility Commission. He said "those who want more federal regulation" would probably agree with the FPC's claims about a key clause in the Federal Power Act, but Rehnquist found the claims painfully strained.

"... (To a devotee of the 'plain meaning' school such as myself—a school to which I think you are sympathetic—this is plain unvarnished judicial legislation," Rehnquist told Jackson.

As his opinions from the bench have shown, Rehnquist cannot resist humorous touches—and he was the same way as a clerk, signing off in one memo as "your obedient servant" and alluding to his fellow clerk in another as "Mr. Justice Cronson." He titled another, recommending tighter rules on petitions for habeas corpus, "Habeas Corpus, Then and Now—Or, 'If I Can Just Find the Right Judge, Over These Prison Walls I Shall

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The Rosenberg case, meanwhile, kept coming back, prolonging the 1953 term until the couple was finally executed. At one point, Rehnquist voiced annoyance with the repeated petitions.

"After the antics that ptra [the petitioners] have been through in the interim between their last petition here and the present time, I think I would recommend a deny if the trial judge had refused them a hearing on allegations that they had been put on the rack before trial," he wrote. "Fortunately for my sense of judicial impartiality, I am not called upon to make a recommendation in such an extreme case; the case which they present is one which even a sympathetic listener would be constrained to deny on the merits."

The Jackson papers have been at the Library of Congress for less than two years. The only Rehnquist memo among them that came to light during his 1971 confirmation proceedings was the one dealing with "separate but equal" doctrine.

Rehnquist authored two others dealing with black voting rights in Texas, one of which said "it is about time the court faced the fact that the white people in the South don't like the colored people." This one, the complete text shows, is identified by Rehnquist as a statement of Jackson's ideas, "the ideas which you expressed last week," but Dennis Hutchinson, a Jackson scholar from the University of Chicago, said he does not think Jackson ever would have made such a remark.

"That's [Rehnquist's] way of casting Jackson's ideas," Hutchinson said in a telephone interview. "I can imagine Jackson saying, 'look, there is just a personal animosity between the races in the South,'" Hutchinson said, "but not, 'It is about time the court faced the fact that the white people in the South don't like the colored people.'"

The Jackson papers offer what may be another insight into the unsettled controversy over the "separate but equal" memo. In 1971, Cronson, by then a lawyer with Mobil Oil, sent a cable saying that the memo had been prepared at Jackson's request as a counter to a Cronson memo contending that the doctrine was wrong. Cronson also said that much of the memo Rehnquist signed was actually "the result of my suggestions" and probably "more mine than" Rehnquist's.

Other memos in the Jackson collection, such as those on the Mezei case, show, however, that Cronson and Rehnquist sometimes submitted competing memos, and when they collaborated, they made their collaboration plain. For example, a memo on an antitrust case involving the New Orleans Times-Picayune was clearly labeled as a joint product, with the section Cronson wrote marked "DC" and the Rehnquist section prefaced, "The next type you see will be that of WHR."

There were no such distinctions in the "separate but equal" memo that Rehnquist initialed.

Rehnquist finished his clerkship with Jackson in July 1953 and went to Arizona to begin private practice. But he still exchanged letters with "the Boss." One of them expressed disappointment with President Dwight D. Eisenhower's 1953 nomination of Earl Warren as chief justice.

"Most everyone here was quite disappointed by the nomination of Warren to the Chief Justiceship," Rehnquist wrote Jackson in the spring of 1954 after Warren had been confirmed. "(P)erhaps this is unfair to the man, since there certainly is no affirmative blot on the record. But I cannot help choking every time I hear the line peddled by, among others, Time magazine, to the effect that 'what the court really needs is not so much a lawyer as an administrator and conciliator.'"

"What the court really needs," Rehnquist declared, "is a chief justice; an ability to handle the administrative side and to compromise dissidence would be an asset to an able, experienced lawyer in the job, but they certainly are no substitute for some experience in the forums whose actions he is called on to review, nor for the ability to think and write about law."

"I think the few opinions of Warren's I have seen have not been very good," Rehnquist added, "but I don't suppose one should hold that against him; maybe writing opinions is an art for which the knack is acquired."

Staff researcher James Schwartz contributed to this report.

Fly" In it and a companion memo, he argued that it had become too easy for prisoners to go to federal court with charges of maltreatment at the hands of the states.

"In the fields of liberty as well as property, the states must be left to work out their destinies within broad limits," Rehnquist said. "If innocent people are regularly sent to jail, this ct or other federal cts may intervene; but subject to that limitation, there is no more reason for making this ct or other federal cts into a 'super legal aid society' than there was for elevating the doctrine of freedom of contract into a constitutional principle."

'Relax the Federal Grip'

His belief that the Supreme Court should "relax the federal grip on state criminal justice" was also evident in *Stein v. New York*, in which a state jury had found three men guilty of murdering a Reader's Digest truck driver during a 1950 robbery. The evidence included written confessions from two of the men, but their attorneys contended that the statements had been beaten out of them.

The defendants did not testify, but the prison doctor who examined them reported that the one who did not confess had a broken rib and bruises and abrasions on his side. Another had "bruises on the chest, stomach, right arm, and both buttocks." The third had a bruise on his right arm. The two who confessed did so after about 12 hours of interrogation over a 32-hour period. All three were sentenced to death.

Cronson said he found it "impossible to reach any other conclusion than that these guys were beat up," but Rehnquist argued that there was plenty of other evidence to sustain the convictions even if the confessions were inadmissible. The rule of "harmless error," he argued, should be applied. The defendants had not taken the stand in their own behalf and almost all their efforts were aimed at showing that the confessions had been coerced.

"On this state of the record," Rehnquist wrote, "the conclusion must be that the admission of the confessions was not prejudicial in any rational meaning of that word The recent eagerness of this court to seize upon coerced confessions is reflected in the trial below. The defendants, instead of attempting to prove their innocence, devoted their time to proving the confessions were coerced. The ivory-tower jurisprudence of the Murphy-Rutledge era [Justices Francis W. Murphy and Wiley B. Rutledge were liberal Roosevelt appointees, both of whom died in 1949] has weakened local law enforcement, and if this case is an indication, has saved few innocent men. It has been a boon to smart criminal lawyers, and has supplied this court with a number of cases. Let's hope it has come to an end."

The court, in an opinion written by Jackson, upheld the convictions.

Is Chosen as Chief Justice

Continued From Page 1

the President unequivocally that he wanted to retire.

Mr. Reagan, who made the announcement at 2 P.M. today at the White House before a national television audience, said Judge Scalia was "noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues."

"His great personal energy, the force of his intellect, and the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court," said Mr. Reagan, who stood in the White House beside Justice Burger, Justice Rehnquist and Judge Scalia.

White House officials said they expect no substantive opposition to Judge Scalia in the Senate, where a majority vote is required for his confirmation. He is believed to be the first American of Italian descent to serve on the Supreme Court, and at 50, he is younger than any sitting Justice.

Senator Strom Thurmond, the South Carolina Republican who heads the Senate Judiciary Committee, which has jurisdiction over the nominations, promised to hold hearings quickly. "I expect no problem in having either of the President's nominations confirmed," he said.

Attorney General Edwin Meese 3d, who was involved in the selection process, said the President had adhered to three basic criteria in nominating Justice Rehnquist and Judge Scalia. "One is intellectual and lawyerly capability," he said, "secondly, integrity, and thirdly, a commitment to the interpretation of the law rather than being a lawmaker."

A senior Administration official, also involved in the selection process, said the nominations "will have enormous influence on the direction of the Court for many years."

Republican leaders of the Senate praised Mr. Reagan's selection of Justice Rehnquist, who was named to the Supreme Court in 1971 by President Nixon and has long been the Court's most conservative member. Democrats vowed, however, to examine his record carefully before deciding whether to endorse his nomination as Chief Justice.

The views of Judge Scalia are not widely known. He has criticized the Supreme Court's approval of affirmative action plans that include racial preferences, hinted at disagreement with the Court's broad First Amendment rulings limiting libel suits, questioned the constitutional basis for the independence from the President of such agencies as the Federal Reserve Board and is said to be personally opposed to abortion.

White House officials insisted that "there was no litmus test" for selecting Judge Scalia and that he was not subject to any specific screening for opinions on school prayer, abortion or other issues. Mr. Meese said a principal criterion was seeking two jurists who are "interpreters of the law rather than lawmakers."

The effective date of Chief Justice Burger's departure is July 10, when the Court expects to finish work on its cur-

rent term, although he said he would stay longer if needed until the replacement is complete. A spokesman for the Court said Mr. Burger would draw his full annual salary of \$108,400 in retirement.

Mr. Reagan said Chief Justice Burger informed him three weeks ago of his yearning to leave the Supreme Court to devote full time to the commission.

Chief Justice Burger said today, "It is vastly underfinanced and we're going to have the devil's own time in trying to do the kind of a job that ought to be done for this great event."

White House officials said the disclosure surprised the President and his chief of staff, Donald T. Regan. Also attending the Oval Office meeting was Fred F. Fielding, the former White House counsel.

Chief Justice Burger, in his letter of resignation, said that his work heading the commission on the Constitution was a "full-time enterprise" and was "an enormous and challenging task." The responsibilities of serving as Chief Justice as well as running the commission were far more than he could handle, the Chief Justice indicated.

Chief Justice Burger, in a joking mood, was asked by reporters if he would change some of the opinions he had written. "I wish some of them were a little shorter," he said.

Justice Rehnquist, asked if the nomination to replace Chief Justice Burger was the culmination of a dream, said: "I wouldn't call it the culmination of a dream, but it's not every day when you're 61 years old that you get a chance to have a new job."

Chief Justice Burger said: "That strikes me as a perfect parallel. Bill Rehnquist is the same age as I was when I was nominated back in the Garfield Administration, I think it was."

The two Justices and Judge Scalia broke into laughter.

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From John Jay to Warren Earl Burger: The 15 Chief Justices



John Jay

Born: Dec. 12, 1745, in New York City. Died: May 17, 1829, in Bedford, N.Y.
College: King's College (Columbia).
Appointed: By Washington in 1789.
Resigned: 1795.

John Rutledge

Born: September 1739, Charleston, S.C. Died: June 21, 1800, in Charleston.
Law school: Inn of Court, London.
Appointed: Pro tem by Washington in 1795 for less than one year.
Served as Associate Justice.

Oliver Ellsworth

Born: April 29, 1745, in Windsor, Conn. Died: Nov. 26, 1807, in Windsor.
College: Princeton.
Appointed: By Washington in 1798. Resigned: 1800.

John Marshall

Born: Sept. 24, 1755, Germantown, Va. Died: July 8, 1835, Philadelphia, Pa.
Law school: William and Mary.
Appointed: By Adams in 1801. Died in office.

Roger Brooke Taney

Born: March 17, 1777, in Calvert County, Md. Died: Oct. 12, 1864, in Washington, D.C.
College: Dickinson.
Appointed: By Jackson in 1835, confirmed in 1836. Died in office.

Salmon Portland Chase

Born: Jan. 13, 1808, in Cornish, N.H. Died: May 7, 1873, in New York City.
College: Dartmouth.
Appointed: By Lincoln in 1864. Died in office.

Morrison Remick Waite

Born: Nov. 29, 1816, in Lyme, Conn. Died: March 23, 1888, in Washington, D.C.
College: Yale.
Appointed: By Grant in 1874. Died in office.

Melville Weston Fuller

Born: Feb. 11, 1833, in Augusta, Me. Died: July 4, 1910, in Sorrento, Me.
College: Bowdoin. Law school: Harvard.
Appointed: By Cleveland in 1888. Died in office.

Edward Douglas White

Born: Nov. 3, 1845, in Parish of Lafourche, La. Died: May 19, 1921, in Washington, D.C.
College: Mount St. Mary's, Georgetown.
Appointed: By Taft in 1910. Died in office. Served as Associate Justice.

William Howard Taft

Born: Sept. 15, 1857, in Cincinnati, Ohio. Died: March 8, 1930, in Washington D.C.
College: Yale. Law school: Cincinnati.
Appointed: By Harding in 1921. Resigned: 1930. Was President of the United States.

Charles Evans Hughes

Born: April 11, 1862, in Glens Falls, N.Y. Died: Aug. 27, 1948, in Oaterville, Mass.
College: Madison (Colgate). Brown. Law school: Columbia.
Appointed: By Hoover in 1930. Resigned: 1941. Served as Associate Justice.

Harlan Fiske Stone

Born: Oct. 11, 1872, in Chesterfield, N.H. Died: April 22, 1946, in Washington, D.C.
College: Amherst. Law schools: Columbia, Amherst.
Appointed: By Roosevelt in 1941. Died in office. Served as Associate Justice.

Frederick Moore Vinson

Born: Jan. 22, 1890, in Louisa, Ky. Died: Sept. 8, 1953, in Washington, D.C.
College: Centre. Law school: Centre.
Appointed: By Truman in 1948. Died in office.

Earl Warren

Born: March 19, 1891, in Los Angeles, Calif. Died: July 9, 1974, in Washington, D.C.
College: University of California. Law school: University of California.
Appointed: By Eisenhower in 1953, confirmed in 1954. Resigned: 1969.

Warren Earl Burger

Born: Sept. 17, 1907, in St. Paul, Minn.
College: University of Minnesota. Law school: St. Paul (Mitchell).
Appointed: By Nixon in 1969.



Sources: "Guide to the U.S. Supreme Court," © 1979 by Congressional Quarterly Inc.

Meeting 3 Weeks Ago Set Off Search, a Well-Kept Secret

By GERALD M. BOYD
Special to The New York Times

WASHINGTON, June 17 — It was at a White House meeting three weeks ago that Chief Justice Warren E. Burger told President Reagan unequivocally that he wanted to retire. Administration officials said today that set off a series of meetings and deliberations that a high-level search committee managed to keep secret until Mr. Reagan announced his choices for the two positions on the Supreme Court this afternoon.

Only Donald T. Regan, the White House chief of staff, and Fred Fielding, a former White House counselor, were present when the Chief Justice told the President that he was ready to end his 17-year career on the Court.

White House officials said that Chief Justice Burger's statement came as a surprise and that he was not encouraged to resign. But they said that neither was there any attempt to dissuade him. The timing means that confirmation hearings can proceed before the 1988 elections, while the Republicans are still assured of a majority in the Senate.

Over the next days three advisers — Attorney General Edwin Meese III, Mr. Regan,

and Peter Wallison, the White House counsel — compiled a thick, looseleaf book full of facts about potential candidates for the High Court. But in the end, aides said, Mr. Reagan was swayed as much by personal chemistry.

In the case of Associate Justice William H. Rehnquist, Administration officials said that the President offered him the job of Chief Justice on the spot, in a 30-minute meeting where one of Mr. Reagan's main concerns was the state of the Justice's health. Justice Rehnquist, whose medical problems raised questions a few years ago, assured the President that he had received a clean bill of health in a recent checkup and that he was willing to serve as long as possible.

Mr. Reagan's selection of Antonin Scalia, a judge on the United States Court of Appeals for the District of Columbia, to replace Justice Rehnquist was equally straightforward, the officials said. It came in a similar 30-minute session where Mr. Reagan met the judge for the first time and viewed him as "warm and personable."

He and other officials said that it was at Mr. Reagan's suggestion that the President created the three-member search commit-

tee, which met with Mr. Reagan for the first time two days later.

Officials said the President expressed a desire to consider sitting judges for the Chief Justice slot because it would be easier to discern their judicial philosophy, one senior Reagan aide said. At the same time, the aide said, the President voiced a broad preference for a replacement who would exercise judicial restraint.

Mr. Meese said today that there had been three principal criteria: Finding a candidate who was intellectually and lawyerly capable, one with integrity, and one with a commitment to interpreting the law rather than making it from the bench.

"It wasn't a matter of trying to find someone who represents the President's philosophy, because on specific issues, we never use that in any of our Presidential appointments as a test," he said.

White House officials said 10 to 15 people were considered in the search, with Mr. Meese assembling the opinions of judges under consideration while Mr. Wallison did similar research as well as pulling together newspaper, scholarly and law-review writing on the candidates.

According to the officials, Mr. Reagan met with the three aides for the second time on June 9, where they reviewed and pared the list of candidates. It was in that session, the officials said, that Mr. Reagan said he wanted to meet with Justice Rehnquist.

Three days later, Mr. Reagan offered him the job in a meeting in which one official said the Justice had "reinforced" the positive recommendation he had received from the three advisers.

"The President liked the answers that he got," said a ranking Reagan adviser.

Mr. Rehnquist received treatment in 1962 for side effects, including slurred speech, caused by drugs used to relieve severe back pain. Officials said he was no longer taking such drugs.

Weighing a replacement for Justice Rehnquist began immediately. Again, Mr. Reagan chose to meet with one of the candidates, this time Mr. Scalia, they said.

"We didn't tell him the purpose of the call, but he's over 21 and he knows that the President doesn't call you over to talk about nothing," a senior Reagan adviser said. Mr. Reagan offered the appellate judge the job at a meeting Tuesday.



Associated Press

WED TO HIGH COURT:
This kid was a conservative
when he was 17 years old."

Judge With Tenacity and Charm

Antonin Scalia

By IRVIN MOLOTSKY

Special to The New York Times

WASHINGTON, June 17 — To Judge Abner J. Mikva, a liberal member of the United States Court of Appeals for the District of Columbia Circuit, his colleague Antonin Scalia is a conservative but not antigovernment.

To Richard W. Pogue, the managing partner of the Cleveland law firm in which Judge Scalia once was a partner, he is a consensus builder despite his strongly held views.

But to Larry L. Simms, who worked for Judge Scalia when he was an Assistant Attorney General in the Justice Department, he can hold to positions on important issues with great tenacity.

These and other views of Judge Scalia emerged today as President

Reagan announced he intended to nominate him as a Justice of the United States Supreme Court. The views came from his colleagues, friends and adversaries, and while they sometimes differed on emphasis, they all predicted that his scholarship and charm would lead to his speedy approval by the Senate.

Tenacious Advocate

Mr. Simms said that once Judge Scalia arrived at a position, he would hold to it, even at the risk of future advancement.

"He was a strident opponent of the legislative veto," Mr. Simms said, referring to a law that permitted Congress to overturn some Presidential decisions. "After he became a private citizen, he testified against it before legislative committees, notwithstanding President Reagan's support

of them at first. He was prepared to express a view of the unconstitutionality of legislation at a time when he had nothing to gain. A lot of people would have kept their mouths shut."

As it turned out, Judge Scalia's view prevailed, with the Supreme Court ruling such legislative vetoes unconstitutional.

William Stern, the former chairman of Urban Development Corporation in New York State, said of Judge Scalia, his former classmate at Xavier High School, a Catholic military academy in Manhattan:

"This kid was a conservative when he was 17 years old. An archconservative Catholic. He could have been a member of the Curia. He was the top student in the class. He was brilliant, way above everybody else."

Antonin Scalia (pronounced AN-tuh-neen Skuh-LEE-yuh) was born March 11, 1936, in Trenton, to Catherine and S. Eugene Scalia, both of whom died in the past year. His mother was born in the United States and his father in Italy, and the White House was careful to include in his official biography today that his father was an immigrant. If confirmed, Judge Scalia would become the first Italian-American to serve on the Supreme Court.

Mr. Scalia graduated summa cum laude from Georgetown University in 1957. He was valedictorian and first in his class. In 1960 he graduated from Harvard Law School, where he had been an editor of the Law Review, and the following year he held a Sheldon Fellowship at Harvard.

He has taught law at the University of Chicago, Stanford University, Georgetown University and the University of Virginia, served as an Assistant Attorney General 1974 to 1977.

In 1982, President Reagan named Judge Scalia to the appeals court, which is second in importance only to the Supreme Court.

Judge Scalia lives with his wife, the former Maureen McCarthy, and the younger of their nine children in the nearby suburb of McLean, Va.

Some Key Court Decisions by Judge Scalia

Here are some important decisions by the United States Court of Appeals for the District of Columbia Circuit in which Judge Antonin Scalia took part:

Budget-Balancing Law — Last February, a three-judge panel ruled unanimously that a key provision of the new law violated the constitutional principle requiring the separation of powers among the branches of Government. The court ruled that it was unconstitutional for Congress to have delegated authority over the budget to the Comptroller General of the United States or anyone else removable by Congress itself. Although the decision was unsigned, it is considered largely Judge Scalia's work.

Trial Documents — Last September, in a 2-to-1 decision written by Judge Scalia, the panel ruled that the public and the press had no constitutional right to the documents in civil trials in which such data were used as evidence. The ruling upheld a decision in the 1982 trial of a libel suit by William P. Tavoulareas, president of the Mobil Oil Company, against The Washington Post.

Nicaraguan Policy — In August 1985, a decision written by Judge Scalia upheld the dismissal of a lawsuit accusing the United States of illegally supporting the Nicaraguan insurgents. In the absence of explicit

Congressional restrictions, the court ruled that it could not entertain a lawsuit challenging the Government's support for rebel attacks even if the plaintiffs were correct in alleging that the support violated the Constitution, acts of Congress and international law.

Libel — In a 2-to-1 decision in April 1985, the panel reinstated a jury's verdict that The Post libeled Mr. Tavoulareas in a 1979 news article. The opinion, written by Judge George E. MacKinnon and joined by Judge Scalia, said, "Evidence that a newspaper followed a sensationalistic policy, because it provides a motive for knowing or reckless falsehood, is evidence of disregard for truth or falsity."

Anti-Reagan Poster — In December 1984, the court held that an artist had a right to lease space in subway stations in the District of Columbia to display a poster critical of the Reagan Administration. The panel said the Metropolitan Transit Authority had violated the First Amendment by barring the poster while allowing other political advertising. Judge Robert H. Bork and Judge Scalia held that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional."

ence on the Court. The Court's decisions on these issues are sex discrimination, in which Chief Justice Burger interpreted the Constitution to strike down some state laws as discriminatory, and freedom of speech, in which Chief Justice Burger has written some opinions applauded by press groups and libertarians.

Another issue on which Judge Scalia might make a difference is affirmative action, on which the Court has been splintered.

Tippling the Balance

If, as some experts speculated, he were to support the Administration's broad attack on affirmative action plans that grant racial preferences, it could tip the balance of the Court in some cases.

Chief Justice Burger has been something of a swing vote in affirmative action cases, expressing concern about broad use of racial preferences but voting to approve such preferences in some cases, including a 1981 decision upholding an act of Congress that required a specific percentage of Federal construction grants to be set aside for minority-owned businesses.

Justice Rehnquist has long been the Court's most conservative member. Although Chief Justice Burger has often been aligned with him, Mr. Tribe and other scholars said Justice Rehnquist was much better equipped to be an intellectual leader.

As Chief Justice, he would still have only one vote in a group that he himself

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