INTRODUCTION

Craig M. Bradley

William Hubbs Rehnquist was born on October 1, 1924, and grew up in Milwaukee, Wisconsin. His father worked as a wholesale paper salesman, and his mother was a homemaker. After briefly attending Kenyon College in Ohio, he joined the Army Air Corps and was stationed in North Africa as a weather observer until the conclusion of World War II. Disdaining the midwestern climate after his experience in North Africa, he attended Stanford University, where he received a bachelor's and a master's degree in Political Science. He moved on to get a master's degree from Harvard, with an eye toward an academic career in Political Science. However, he became disenchanted with academics and decided to become a lawyer instead.

To that end, he returned to Stanford and finished first in his class at Stanford Law School in December of 1951. (Future Justice Sandra Day was third). In those days, a trip to Washington from California to interview for a Supreme Court clerkship was unthinkable, even for someone who was first in his class, and Rehnquist had not received an offer from Justice Douglas, who recruited in the West. However, as luck would have it, Justice Robert Jackson came to Stanford to dedicate a new Law School building. Phillip Neal, a former Jackson clerk who taught at Stanford, asked Rehnquist if he would like to interview with Jackson. Rehnquist readily accepted and was offered the job. He served as Jackson's clerk from February of 1952 through June of 1953.

From there, again influenced by climatic considerations, political as well as meteorological, he moved to Phoenix, where he engaged in private practice for the next sixteen years. He was active in Republican politics, including writing speeches for Barry Goldwater's 1964 presidential campaign. He also played poker with another prominent Arizona Republican, Richard Kleindienst. When Richard Nixon was elected President in 1968, Kleindienst became Deputy Attorney General and invited Rehnquist to become an Assistant Attorney General in charge of the Office of Legal Counsel. This is a highly respected office in the Justice Department that serves as "the President's lawyer" – offering legal opinions to the White

House and the Attorney General. Among Rehnquist's duties was the screening of potential Supreme Court nominees.

When two Supreme Court openings occurred in 1971 with the retirements of Justices Black and Harlan, Nixon was determined to appoint a woman and a southerner. To that end, he proposed Mildred Lillie, a California appellate judge, and Herschel Friday, a lawyer from Little Rock, Arkansas. However, the American Bar Association, which, in those days, had an informal veto power over nominees, rejected both as unqualified. Meanwhile Rehnquist had made a favorable impression on Attorney General Mitchell. Nixon was under pressure from Chief Justice Burger to fill the two vacant slots, so, rather at the last minute, Nixon chose the former Supreme Court clerk Rehnquist and Lewis Powell of Virginia, a onetime President of the ABA, whom they could hardly deem unqualified.[1]

Rehnquist took some heat during his confirmation hearings in the Senate concerning his activities as a Republican poll watcher who allegedly discouraged blacks and Hispanics from voting, and for a memo he wrote to Justice Jackson, while a law clerk, defending the turn-of-the-century case of *Plessy v. Ferguson,* in which the Supreme Court had upheld the "separate but equal" approach to racial segregation that was to be overruled in *Brown v. Board of Education.* (Rehnquist testified that his defense of *Plessy* was in the role of devil's advocate). However, Rehnquist was confirmed by a vote of 68–26 and took his seat in January of 1972. He became Chief Justice in September of 1986.

This book is a "legal biography" of Chief Justice Rehnquist. That is, it attempts to assess his legacy by analyzing his legal writings – mostly majority and dissenting opinions of the Supreme Court. No one book could possibly analyze with any care the hundreds of opinions he has written over his thirty-three-year career. Nor could any one author have the expertise to do so. Consequently this book is a collection of essays by noted law professors, each an expert in his or her field, of those areas of constitutional law in which Rehnquist is thought to have had the greatest impact. Thus it does not include many other areas of the law, such as administrative, military, or Indian law, in which Rehnquist has written key opinions. Nor does it include, for example, death penalty law. In this area, Rehnquist, while on the winning side of the battle over the constitutionality of the death penalty, did not author major decisions, and then was on the losing side in the recent cases striking down the death penalty for the retarded[2] and for juveniles.[3] This therefore would not be considered as one of the most significant parts of his legacy – though, but for constraints of space, it would have been a topic worthy of discussion in this book.

In order to determine Rehnquist's legacy, a reasonable starting point is to consider the goals he set for himself on the Court. He has directly stated only two,

[1] The confirmation process is described in John Dean, *The Rehnquist Choice* (2001).
[2] Atkins v. Virginia, 536 U.S. 304 (2002).
[3] Roper v. Simmons, 543 U.S. (2005).

rather modest, objectives. The first was "to call to a halt a number of the sweeping rulings of the Warren Court" in the area of criminal procedure.[4] As several chapters in this book make clear, he has certainly achieved this goal. Though he fell short of his ambitious desire to overrule both *Mapp v. Ohio*,[5] which required states to exclude evidence seized by police in violation of the Fourth Amendment, and *Miranda v. Arizona*,[6] which imposed the famous warnings requirement on state and local police, he certainly limited the impact of both of those decisions. In addition, his nearly complete reversal of the Warren Court's habeas corpus expansions severely restricted the opportunities for state criminal defendants to litigate violations of their rights in federal court.

The second goal, stated in an interview after he became Chief Justice, was to be remembered as a good administrator, "to run a relatively smoothly functioning Court."[7] In this he has clearly succeeded, being admired even by his political opponents on the Court. Justice Thurgood Marshall deemed him a "Great Chief Justice," and Justice William Brennan described him as "'the most all-around successful' chief he had known – including Earl Warren."[8]

The reasons for his success as Chief relate to his agreeable personality, his fairness in assigning opinions, based primarily on whether a Justice was up-to-date on his last assignment, and to the fact that he ran disciplined oral arguments, not allowing advocates at argument to exceed their allotted time. Likewise, at the conference where the Court meets to discuss recently heard cases, he ran a tight ship, giving each Justice a chance to state his or her views, in order of seniority. He did not allow debate among the Justices, being of the opinion that, since most had already made up their minds, extended discussion was a waste of time.[9]

Since assigning opinions (which he does whenever he votes in the majority at conference) and presiding over the conference and oral argument are the extent of a Chief Justice's formal powers over his fellow Justices, it is understandable that Brennan and Marshall might consider him a "great Chief Justice" while generally condemning his legal positions as misguided and even dangerous.[10] Another attribute that a Chief Justice might possess is the ability to sway fellow Justices toward his (or her) own position. Rehnquist, with his keen intelligence and

[4] Quoted in Craig Bradley, *William Hubbs Rehnquist*, in *The Supreme Court Justices: A Biographical Dictionary* 376 (M. Urofsky ed., 1994).
[5] 367 U.S. 643 (1961).
[6] 384 U.S. 436 (1966).
[7] Jeffrey Rosen, *Rehnquist the Great?*, 295 Atlantic Monthly 79, at 80 (2005).
[8] *Id.* at 80.
[9] *Id.* at 80–81.
[10] *See, e.g.*, Brennan's dissent in *California v. Greenwood*, 486 U.S. 35 (1988), where the majority, including Rehnquist, approved searches of trash without warrants or probable cause: "The Court paints a grim picture of our society. It depicts a society in which local authorities may . . . monitor (citizens) arbitrarily and without judicial oversight – a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects."

personableness, was surely as likely as any Chief Justice could have been to succeed in this endeavor. As I can attest from personal experience as his clerk, he had a knack for explaining his views, with which I often disagreed, in ways that made them seem eminently reasonable. However, he simply didn't believe in politicking his fellow Justices, preferring to confine his arguments to the logic of the opinions he drafted.

The Court has been dominated by his own party during his entire tenure. Justice Powell, who joined the Court the same day as Rehnquist, replacing Justice Black, gave the Republicans a majority that they have never relinquished. Currently, the Republican majority is 7–2. Yet Rehnquist has found himself on the losing side of cases striking down homosexual sodomy laws.[11] upholding the right to abortion,[12] finding affirmative action constitutional,[13] disallowing school prayer,[14] and placing limits on the death penalty, as well as his disappointments in criminal procedure previously mentioned. While some conservatives may feel that "allowing" this to happen was a failure of Rehnquist to lead his fellow Republicans, such a belief misunderstands the nature of the Supreme Court in general, and of the current Court in particular.

As noted above, the Chief Justice has little formal power over his fellow Justices. He may be *primos inter pares,* but the emphasis is on the *pares.* Thus, no Chief Justice is likely to exert much sway over the votes of his or her fellows. Rehnquist certainly didn't drive anybody out of his camp as Chief Justice Burger is widely believed to have driven his fellow Minnesotan Harry Blackmun into the welcoming arms of the liberals.[15] Sometimes, though, a Chief, or another senior Justice, may be able to convince a new Justice, who is inexperienced in matters of constitutional law, to come around to his point of view, as Chief Justice Warren is alleged to have done with Justice Brennan.[16]

But look at the Court Rehnquist had to work with! On the current Court there are three former Supreme Court clerks (Rehnquist, Breyer, and Stevens), three former professors at elite law schools (Ginsburg, Breyer, and Scalia), and a Rhodes Scholar (Souter). Moreover, Justices Thomas and Scalia joined the Court with a conservative agenda to the right of Rehnquist. All the Justices hold law degrees from top law schools, and all but two had had plenty of opportunity to form their views on constitutional issues prior to joining the Court. The only exceptions are O'Connor and Souter, whose prior positions as a state officials would not have exposed them to much federal constitutional litigation.

O'Connor was also a longtime friend of Rehnquist's both from law school and Phoenix. Rehnquist must have been particularly frustrated that she, tapped by

[11] Lawrence v. Texas, 123 S. Ct. 2472 (2003).
[12] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[13] Grutter v. Bollinger, 539 U.S. 982 (2003).
[14] Lee v. Weisman, 505 U.S. 577 (1992).
[15] *See* Linda Greenhouse, *Becoming Justice Blackmun* 185–88 (2005) in this regard.
[16] *See* Kim Isaac Eisler, *A Justice for All* 103, 139–40 (1993).

the Reagan administration as a conservative appointee, did not join him in toeing the conservative line. But her single-mindedness on a number of critical cases have led some to call this "the O'Connor Court."[17] In other major cases, where he has held O'Connor's vote, he has lost Kennedy's. But to blame these defections on Rehnquist in any way would be misguided. Rather, it must be recognized that when someone becomes a Supreme Court Justice, his or her prior views may bend under the weight of the responsibility and the careful consideration of the issues that is part of a Justice's job. Had Rehnquist tried to twist the arms of these independent thinkers, he might have succeeded only in weakening his status as a Chief Justice whose *written* views were highly respected by his colleagues.

Leaving aside Rehnquist's role as Chief Justice (beyond the specific goals he named) and considering him as one of the nine, his vision of the Constitution was based on three principles: strict construction, judicial restraint, and federalism. He summarized this vision in a 1976 speech, "The Notion of a Living Constitution":

> It is almost impossible . . . to conclude that the [Founding Fathers] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations. The Constitution that they drafted was intended to endure indefinitely, but the reason for this well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to furnish the motive power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring.[18]

In other words, as he elaborated in a dissenting opinion in *Trimble v. Gordon*[19] in 1977: Nothing in the Constitution made "this Court (or the federal courts generally) into a council of revision, and they did not confer on this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest."

It is difficult to believe, after all of the acrimony surrounding abortion rights in the past two decades that, in 1973, when *Roe v. Wade*[20] was decided, Rehnquist was (along with the Democrat Justice White), one of only two dissenters. He further elaborated on his constitutional view in that case, noting that the "right to privacy" on which the Court's opinion was based, was nowhere to be found in the Constitution, and, whatever its scope, had certainly never been thought to include a right to abortion. He continued:

> The fact that a majority of the States, reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong

[17] E.g. Michael Rappaport, *It's the O'Connor Court. . . .* 99 Nw. U. L. Rev. 369 (2004).
[18] 54 Tex. L. Rev. 693 (1976).
[19] 430 U.S. 762.
[20] 410 U.S. 113, 174.

> indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

It is ironic then that, as Professor Sunstein has pointed out,

> [I]n its first seventy five years, the Supreme Court struck down only two acts of Congress. In the eighteen years since Ronald Reagan nominated William H. Rehnquist as Chief Justice, the Court has invalidated more than three dozen. Under Rehnquist, the Court has compiled a record of judicial activism that is, in some ways, without parallel in the nation.[21]

Sometimes, as in all of the cases mentioned above, this activism has been over the resistance of Rehnquist and his fellow conservatives. Other times, as in the federalism cases and *Bush v. Gore,*[22] which effectively decided the 2000 election for the Republicans, it has been the conservatives taking the initiative. In the view of Professor Sunstein,

> *Bush v. Gore* was a far more radical intervention into political processes than anything dared by the Warren Court, and it . . . is merely the most visible of a long line of cases in which the Rehnquist Court has seized on ambiguous constitutional provisions to invalidate decisions of Congress and state governments. . . . (I)n limiting national authority to protect disadvantaged groups, and in protecting property rights, it has shown unmistakable sympathy for the pre–New Deal Constitution. This is a political program in legal dress. The harsh irony is that the program has been advanced especially aggressively by those (conservative) members of the Rehnquist Court who contend, and even appear to believe, that they are speaking neutrally for the Constitution.

In fairness to Rehnquist and his fellow conservatives, though, sometimes the goals of deference to the political branches and dedication to principles of strict construction and federalism may clash, as they did in *United States v. Lopez.*[23] There, the Court dealt with Congress's power to regulate commerce among the states in the context of the Gun-Free School Zones Act. This statute prohibited bringing guns near any school without any reference to whether the gun or the school was connected to interstate commerce. Holding that the Commerce Clause was limited to regulating commercial activity, not exercising the "police power" that was reserved to the states, the Court struck down the statute. Thus, principles of federalism and strict construction trumped deference to the legislative branch.

It is also true that Rehnquist has moderated his positions somewhat since he became Chief Justice. For example, in *Dickerson v. United States,* he abandoned his long quest to overrule *Miranda* and authored a majority opinion to uphold it, over an outraged dissent by Justice Scalia. However, this probably had more

[21] Cass R. Sunstein, *The Rehnquist Revolution,* New Republic, December 27, 2004, at 32.
[22] 531 U. S. 98 (2001).
[23] 514 U.S. 549 (1995).

to do with resistance to Congress's attempt to "overrule" *Miranda* than with any newfound fondness for the holding of that case, and he soon agreed with subsequent opinions that significantly limited *Miranda*'s impact.[24] Similarly, in *Nevada Dep't of Human Resources v. Hibbs*[25] he enhanced federal power over the states by authoring an opinion (over the dissents of Justices Scalia, Thomas, and Kennedy) holding that Congress could abrogate states' rights that would otherwise be protected by the Eleventh Amendment by acting under §5 of the Fourteenth Amendment. It cannot be known whether *Dickerson* and *Hibbs* represent Rehnquist's true beliefs, or efforts to limit the damage done by decisions with which he would have preferred to disagree. In any event, his opinions for the majority in both cases show an increased willingness to work toward consensus and compromise.

Nevertheless, as Professor Tushnet has put it, on the Rehnquist Court, "*everyone* has been a judicial activist."[26] Rehnquist, with his ambitious and frequently fulfilled goals of overruling key criminal procedure decisions, as well as *Roe v. Wade,* and of significantly limiting the power of Congress vis-à-vis the states is likewise deserving of that appellation. However, it is fair to say that his activism is generally more closely tied to the terms of the Constitution than are some of the decisions he has railed against.

As this book was going to press in September 2005, the Chief Justice died, and his former law clerk, John Roberts, was named to replace him. It remains to be seen how Rehnquist's legacy will fare in the Roberts Court, but it is unlikely to be diminished.

[24] *United States v. Patane*, 124 S. Ct. 2620 (2004) holding that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations. He joined the dissent in *Missouri v. Seibert,* 124 S. Ct. 2601 (2004) where the majority excluded a confession obtained by police tactics designed to circumvent *Miranda.*

[25] 538 U.S. 721 (2003).

[26] Mark V. Tushnet, *On the Rehnquist Court, Everyone Has Been a Judicial Activist,* Chronicle Rev., November 26, 2004, at A10.

SECTION ONE

THE FIRST AMENDMENT

CHAPTER ONE

THE *HUSTLER:* JUSTICE REHNQUIST AND "THE FREEDOM OF SPEECH, OR OF THE PRESS"

Geoffrey R. Stone*

In his more than thirty years on the Supreme Court, William Rehnquist has participated in 259 decisions involving "the freedom of speech, or of the press."[1] Over the course of his tenure, the jurisprudence of the First Amendment has changed dramatically. When Justice Rehnquist first joined the Court, no one had yet heard of "content-based restrictions," "low" value speech, or "designated" public forums. The Internet did not exist, commercial speech was "unprotected," and money was not "speech." All that has changed, and more.

What are Justice Rehnquist's contributions to the evolution of First Amendment doctrine? To what extent, and in what circumstances, has he protected "the freedom of speech, or of the press"?

I

In the 259 speech or press cases in which Justice Rehnquist has participated, he rejected the First Amendment claim 80% of the time. In only 53 of the 259 cases did he vote to uphold the First Amendment claim. Standing alone, however, this tells us little. We need some base of comparison.

One base of comparison is how other Justices voted. In these 259 decisions, the other Justices (Blackmun, Brennan, Breyer, Burger, Douglas, Ginsburg, Kennedy, Marshall, O'Connor, Powell, Scalia, Souter, Stephens, Stewart, Thomas, and White) voted to uphold the First Amendment claim 53% of the time.[2] Thus, Rehnquist's colleagues on the Court were 2.6 times more likely than Justice Rehnquist to hold a law in violation of "the freedom of speech, or of the press."

* I thank my colleagues Ronald Collins, Cass Sunstein, and Eugene Volokh for their comments on an earlier draft, and Ambika Kumar for her splendid research assistance.

[1] As an obvious caveat, I should note that the counting and classification of decisions always involves an element of judgment and subjectivity. Another person undertaking the same exercise might come up with slightly different results.

[2] In the 259 cases in which Rehnquist participated, the other justices cast 1,118 votes to sustain the First Amendment claim and 986 votes to reject the First Amendment claim.

This suggests that, relative to his colleagues, Rehnquist was no friend of the First Amendment. But this only scratches the surface. Even the Supreme Court has easy cases, and these are best identified by unanimity. If all the Justices agree that a law is constitutional or unconstitutional, an individual Justice's vote does not tell us anything very interesting about his or her views.

Sixty-three of the 259 cases were decided by unanimous vote. If we exclude those "easy" decisions, we find that Justice Rehnquist voted to uphold the First Amendment claim in only 18 of the 196 nonunanimous decisions. In the "hard" cases, he rejected the First Amendment challenge 92% of the time.

How does this compare with his colleagues? In the 196 nonunanimous decisions, the other Justices voted to uphold the First Amendment challenge 55% of the time. Thus, in nonunanimous decisions the other Justices were six times more likely than Justice Rehnquist to find a law in violation of "the freedom of speech, or of the press."[3]

This may be misleading. Perhaps the "liberal" Justices, such as Brennan, Douglas, and Marshall, skewed the data. Before drawing any conclusions, we should compare Rehnquist's voting record with those of his more "conservative" colleagues, such as Burger, White, Scalia, and Thomas.

Rehnquist and Burger sat together on 165 cases involving "the freedom of speech, or of the press." Rehnquist voted to uphold the First Amendment claim in 30 of those cases. Burger voted to sustain the constitutional challenge in 54. Burger was thus 1.8 times more likely than Rehnquist to rule in favor of the First Amendment.[4]

In the 230 cases in which Rehnquist and White both participated, White voted to sustain the First Amendment claim in 88 cases, whereas Rehnquist voted to uphold it in only 46. White was therefore 1.9 times more likely than Rehnquist to support "the freedom of speech, or of the press."[5]

Scalia and Rehnquist sat together in 108 of these decisions. Scalia voted to uphold the First Amendment challenge in 49, Rehnquist in only 31. Scalia was thus 1.6 times more likely than Rehnquist to sustain a First Amendment claim.[6]

Finally, Thomas and Rehnquist participated together in 60 of these cases. Rehnquist voted to sustain the First Amendment claim in 23, Thomas in 35. Thomas was therefore 1.5 times more likely than Rehnquist to rule in favor of the First Amendment.[7]

[3] In the 196 nonunanimous decisions, the other justices cast 854 votes to sustain the First Amendment claim and 701 votes to reject the First Amendment claim.

[4] Rehnquist voted to sustain the First Amendment claim in 18.2% of these cases. Burger voted to sustain the First Amendment claim in 32.7% of these cases.

[5] Rehnquist voted to sustain the First Amendment claim in 20.0% of these cases. White voted to sustain the First Amendment claim in 38.3% of these cases.

[6] Rehnquist voted to sustain the First Amendment claim in 28.7% of these cases. Scalia voted to sustain the First Amendment claim in 45.4% of these cases.

[7] Rehnquist voted to sustain the First Amendment claim in 38.3% of these cases. Thomas voted to sustain the First Amendment claim in 58.3% of these cases.