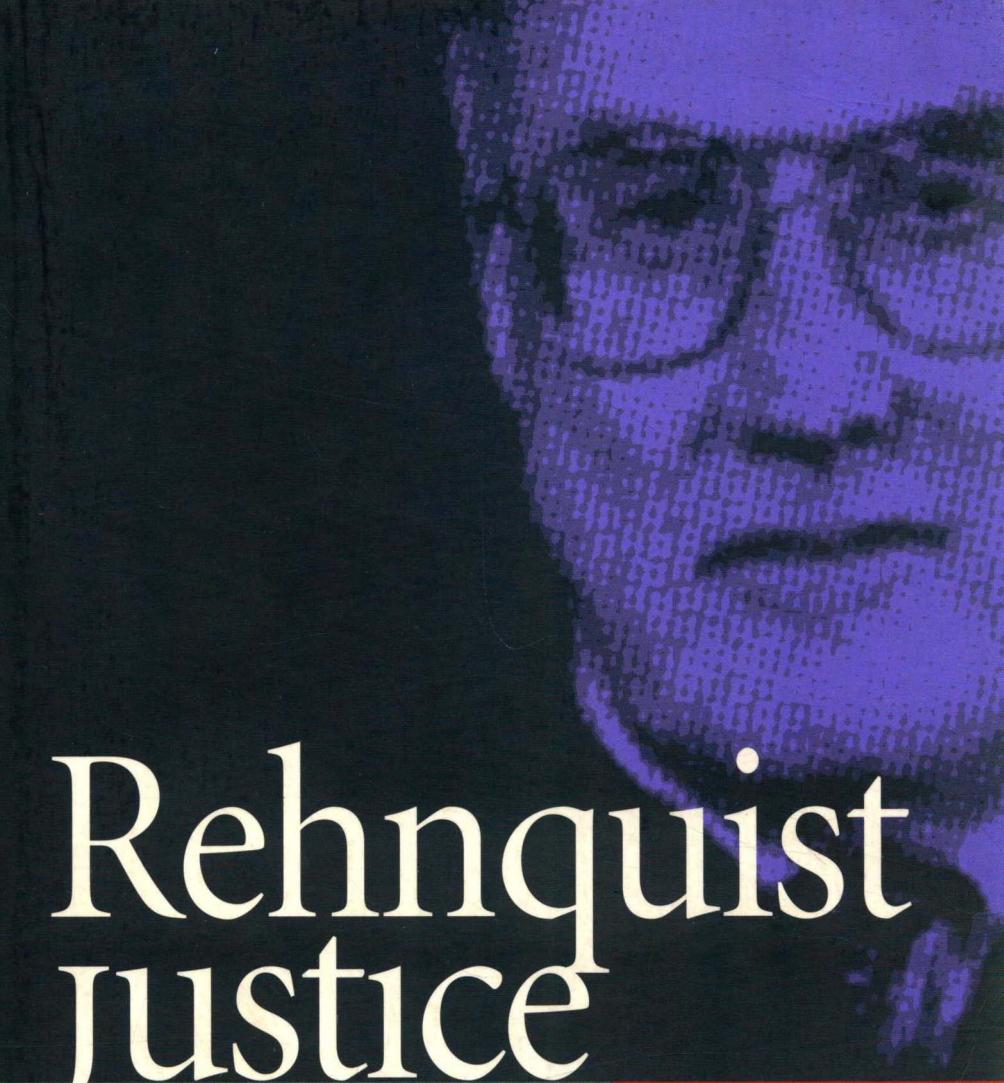

Rehnquist Justice

UNDERSTANDING THE COURT DYNAMIC

EDITED BY EARL M. MALTZ

Rehnquist Justice
Understanding the Court Dynamic

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Contents

Introduction

Earl M. Maltz

Chief Justice William Hubbs Rehnquist has presided over the most conservative Court of the late twentieth century. The Rehnquist Court has moved constitutional jurisprudence substantially to the right in cases related to federalism, economic rights, affirmative action, and a number of other important issues. Given the makeup of the Court, this trend is not surprising; even after the appointments of Ruth Bader Ginsburg and Stephen Breyer, seven of the Rehnquist Court justices were selected by Republican presidents, with six chosen during the administrations of Ronald Reagan and George W. Bush, both of whom were committed to reversing what they saw as the liberal excesses of the Warren and Burger Courts. Against this background, it would have been surprising if the political trajectory of constitutional law had not shifted in a conservative direction.

Particularly in the wake of the Court's controversial decision in *Bush v. Gore,*[1] some liberal scholars have described this shift in almost apocalyptic terms, implicitly or explicitly likening it to the jurisprudential revolutions of 1937 and the Warren era. These commentators argue that the evolving approach of the Rehnquist Court has effectively rejected the basic premises on which post-1937 constitutional law has been based.[2] Such characterizations dramatically overstate the magnitude of the changes wrought during the Rehnquist era. To be sure, the revival of conservative activism—even on a relatively modest scale—is a significant jurisprudential event. However, taken as a whole, the constitutional decisions of the Rehnquist Court present a decidedly mixed picture.

The Rehnquist Court's treatment of the religion clauses of the First Amendment is a microcosm of the overall structure of the Court's constitutional jurisprudence. In the years from 1962 through 1986, the Warren and Burger Courts deployed both the Establishment and Free Exercise Clauses to impose a wide variety of restraints on government action. The process began in the early 1960s with the politically explosive decisions that barred schools from sponsoring both

prayers and readings from the Bible. Soon thereafter, the Warren Court concluded that states must often grant religious exemptions to the requirements of generally applicable statutes. The Burger Court not only reaffirmed these doctrines but also virtually outlawed government aid to church-related elementary and secondary schools.

The conservative justices of the Rehnquist Court have been successful in modifying some of these doctrines. In *Employment Division, Department of Human Resources v. Smith,*[3] the Court categorically rejected the idea that the government was constitutionally required to provide religious exemptions to generally applicable regulatory statutes. Subsequently, Congress sought to impose such a requirement by statute in the Religious Freedom Restoration Act (RFRA). However, in *City of Boerne v. Flores,*[4] the Court found that Congress had no constitutional authority to pass RFRA.

The decisions in *Smith* and *Boerne* clearly rejected significant elements of an approach that is typically associated with liberal constitutional jurisprudence. Nonetheless, in purely political terms, the divisions on the underlying substantive issue cut across traditional liberal/conservative lines. By contrast, the question of the propriety of government aid to parochial schools was one that generally divided liberals from conservatives. Conservatives were victorious in *Agostini v. Felton*[5] and *Zelman v. Simmons-Harris*[6] as the Court rejected challenges to government programs that provided school vouchers and other forms of aid to parochial schools.

However, conservatives have had little reason to be satisfied with the Rehnquist Court's treatment of the issue of school prayer. The decisions in *Engel v. Vitale*[7] and *Abington School District v. Schempp,*[8] which outlawed state-sponsored prayer and Bible reading, had long been a source of conservative dissatisfaction with the Court's interpretation of the religion clauses. The Rehnquist Court rebuffed efforts to overrule *Engel* and *Schempp;* indeed, in *Lee v. Weisman*[9] and *Santa Fe Independent School District v. Doe,*[10] the Court not only reaffirmed the prohibitions but also marginally expanded the restrictions on state action in this area.

The overall structure of Rehnquist Court jurisprudence replicates the pattern of the religion clause decisions. Viewed in standard political terms, the orientation of the Court's decisions has been somewhat uneven. Without question, in some areas doctrine has moved undeniably rightward. However, in many cases this rightward movement has been somewhat muted, and in some situations doctrine has actually moved in the opposite direction.

To many commentators, the Court's treatment of federalism has come to symbolize the resurgence of conservative jurisprudence in the Rehnquist era. Beginning with the decision in *Seminole Tribe of Florida v. Florida,*[11] the Rehnquist Court has greatly limited the ability of Congress to force state governments to submit to federal regulations. Further, in cases such as *United States v. Printz,*[12] the Court held that Congress could not require state officials to be the agents who enforce federal law. Finally, for the first time in the modern era, in *United States v. Lopez*[13] and *United States v. Morrison,*[14] the Court concluded

that Congress had exceeded its enumerated powers in seeking to regulate private activity. Whatever their merits in distinctively legal terms, these decisions clearly advanced the conservative political agenda.

Many of the Court's decisions on race-related issues also reflect the influence of conservative political thought. For example, under Rehnquist's leadership the Court has encouraged lower courts to end judicial supervision of school districts that formerly practiced de jure segregation and for the first time squarely held that race-based affirmative action programs were subject to strict scrutiny. Moreover, the Court has curtailed the states' ability to craft so-called "majority-minority" districts, which are designed to ensure that racial minorities are fairly represented in Congress.[15]

Even in the cases involving federalism and race, however, the Rehnquist Court has not fully vindicated the hopes of many conservatives. For example, none of the federalism cases threatens the authority of the federal government to regulate all private economic activity, even if that activity has no direct connection to interstate commerce. Similarly, in the districting cases, the Court has declined to ban all consideration of race in the districting process. Instead, the justices have held that race may be considered as a factor in drawing congressional districts, so long as it is not the predominant factor in the construction of any district. In addition, the Court has held that race may be used as a proxy for party affiliation in the districting process. Thus, state legislatures exercising a minimum of ingenuity have essentially remained free to craft districts that virtually guarantee the election of members of minority races.[16]

Moreover, in most areas of constitutional jurisprudence, the rightward shift in doctrine has been less pronounced or even nonexistent. The Court's treatment of the abortion issue is typical in this regard. The 1973 decision in *Roe v. Wade*[17] had held that government restrictions on abortions were subject to strict scrutiny and thus were unconstitutional unless necessary to serve a compelling governmental interest. In subsequent cases, this standard proved almost impossible to meet. With the exception of cases involving government funding and parental involvement in the decisions of minors, between 1973 and 1986 the Court struck down almost every government effort to limit or regulate a woman's access to abortions.[18]

Pro-life activists and conservatives generally were outraged by *Roe* and its progeny. They hoped that the justices appointed by Ronald Reagan and George W. Bush would shift the balance of power on the abortion issue and lead to a decision overruling *Roe* outright, leaving the state and federal governments free to outlaw or at least sharply curtail access to abortions. This group was thus sorely disappointed in the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[19] Although *Casey* failed to produce an opinion for the Court, a majority of the justices did reject the strict scrutiny test of *Roe;* however, this test was replaced by a requirement that the government not place an "undue burden" on those choosing to seek abortions. In practice, this test gave the government only slightly more leeway to regulate abortions—a point reinforced

eight years later when the Court struck down a ban on so-called "partial birth" abortions in *Stenberg v. Carhart.*[20]

Despite the decision in *Carhart,* the Rehnquist Court has clearly moved the jurisprudence of abortion at least marginally to the right. In other contexts, liberals have had even less reason to be dissatisfied with the political direction of the Court's decision-making. The case law dealing with sex discrimination is a prime example. Many liberals were no doubt disappointed with the decision in *Nguyen v. Immigration and Naturalization Service,*[21] where the Court refused to invalidate a gender-based provision governing the right of illegitimate children to claim birthright citizenship; however, this holding appeared to rest in part on the deference historically granted to Congress on decisions related to naturalization. In purely domestic cases—most notably *J. E. B. v. Alabama*[22] and *United States v. Virginia*[23]—the Court has shown little patience for classifications based on sex, denying attorneys the right to exclude jurors on the basis of gender and forcing the state of Virginia to allow women to attend the historically all-male Virginia Military Institute.

The political orientation of the Court's sex discrimination jurisprudence is by no means a unique phenomenon during the Rehnquist era; indeed, on issues related to gay rights and the rights of undocumented aliens, the Court has actually moved the law at least marginally to the left. Given this pattern of decisions, the overall tenor of constitutional jurisprudence during the Rehnquist era is by no means as extreme as some have claimed but rather is perhaps best described as moderately conservative.[24]

The religion clause cases also reflect the basic dynamic that has created the pattern of constitutional law in the late twentieth century. The Rehnquist era has witnessed an ongoing struggle between the partisans of two radically different conceptions of the proper role of the Supreme Court in the American political system. Some of the justices are strongly committed to a refined version of the conservative paradigm of constitutional jurisprudence long associated with the chief justice himself. Others, by contrast, have an equally strong commitment to the liberal approach to constitutional analysis that shaped the Court's doctrines during the Warren and Burger eras. The overall pattern of the Rehnquist Court's decisions has been a by-product of the interaction between these two models.

One of the most striking features of the Rehnquist Court dynamic has been the increasing influence of the conservative paradigm on the evolution of constitutional analysis. During the Burger years, Rehnquist himself was viewed as the personification of right-wing constitutionalism. After he became chief justice, Rehnquist was joined by the even more conservative Antonin Scalia and Clarence Thomas. When Thomas and Scalia joined the Court, conservative jurisprudence took on a sharper edge. Nonetheless, conservative theory remains marked by internal tensions that have never been satisfactorily resolved.[25]

The conservative paradigm evolved in response to the liberal activism of the Warren and early Burger eras. Conservatives framed their objections in jurisprudential as well as political terms. Seeking to justify Warren and Burger Court

decisions, liberal justices and theorists had developed a profoundly antiformalist view of constitutional law. They argued that judges were well-positioned to correct legislative "failures" and that the interpretation of the constitutional text should change over time to reflect the evolution of fundamental values in a changing society.[26] Conservatives responded by contending that an activist federal judiciary was usurping the prerogatives of the other branches of government; adopting a formalist approach, they also argued for a jurisprudence based on originalism—the theory that the constitutional text should be seen as having a fixed meaning and that the original understanding of the language should be the touchstone of constitutional interpretation.

Even in theory, originalism is not entirely compatible with a philosophy of judicial restraint. At times the original understanding will mandate a degree of judicial activism that goes well beyond that of the Warren and Burger years. Moreover, in practice the analysis of Rehnquist, Scalia, and Thomas has been further complicated by a preference for conservative political results, even where such results could not plausibly be justified in terms of either originalism or a philosophy of judicial restraint.[27] Indeed, in recent years the conservative justices themselves have implicitly recognized this tension; while formalism remains a significant influence on their approach, deference has become a much less important theme in conservative thought. The conservatives' treatment of *Bush v. Gore* is the most widely discussed example of this phenomenon; *Boerne* illustrates the same point in the context of the religion cases.

In the late Rehnquist era, the conservatives have often been opposed by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer. Each of these justices supports the antiformal approach that marked the jurisprudence of the Warren and Burger era and deploys that approach in support of many of the same causes espoused by liberal politicians in the late twentieth century. Thus, the members of this group have generally opposed both the activist innovations of the conservative justices and the efforts to roll back liberal constitutional doctrine in other areas. In some cases they also have made efforts to move liberal constitutional doctrine beyond the boundaries established by the Warren and Burger Courts.

Most often, the votes of Justices Sandra Day O'Connor and Anthony M. Kennedy have determined the outcome of the ideological struggle between the two opposing factions on the Court. O'Connor and Kennedy are similar in a number of important respects. Both were appointed by President Ronald Reagan, who was committed to reshaping the Court in a conservative image. Moreover, in the case of both justices, the circumstances surrounding their appointments prevented Reagan from selecting the most conservative candidate who was available. O'Connor was chosen to fulfill a campaign pledge to place a woman on the Court, and the Kennedy nomination was made in the wake of the failed effort to place Robert Bork on the Court. Both O'Connor and Kennedy reject the formal, originalist approach that is the jurisprudential benchmark of the conservative paradigm.[28] At

the same time, neither is a centrist in the true sense; instead, each is far more likely to align himself or herself with the conservative bloc than with the more liberal members of the Court. Nonetheless, both Kennedy and O'Connor are more likely than the chief justice and Justices Scalia and Thomas to abandon their conservative allies in the cases that divide the Court along ideological lines. When either O'Connor or Kennedy joins the liberals, they are typically victorious.

The pivotal role played by O'Connor and Kennedy is well illustrated by the religion cases. For example, both have supported the constitutionality of a variety of government aid to parochial schools and the students who attended those schools. Thus, such programs have often survived constitutional challenges during the Rehnquist era. At the same time, the opposition of O'Connor and Kennedy has doomed efforts to reverse the ban on prayers in the public schools.

Some of the religion cases also reflect a further complexity in the pattern of Rehnquist Court decision-making. Although the core liberal and conservative coalitions generally hold together in cases raising politically charged issues, the members of those coalitions do not always move in lockstep. Each member of the Court will at times abandon his or her normal coalition partners on specific issues. Given the fact that the Court is often closely divided, even a single defection can be crucial to the outcome of a case.

Smith provides a classic example. In that case, O'Connor rejected the conservative view that simple neutrality was sufficient to insulate a state statute against a Free Exercise Clause attack. If the standard liberal and conservative coalitions had remained intact, O'Connor's vote would have been sufficient to guarantee rejection of the neutrality standard. However, Stevens abandoned his normal allies and joined the conservatives in *Smith,* providing the indispensable fifth vote that established neutrality as the constitutional norm.

The defection of one or more of the liberal justices is by no means a unique event in the Rehnquist era. Indeed, none of the current justices has demonstrated the unswerving devotion to liberal constitutional theory that marked, for example, the jurisprudence of Justices William J. Brennan and Thurgood Marshall during the Warren and Burger eras. Instead, Stevens, Souter, Ginsburg, and Breyer have all demonstrated that on specific issues they are willing to reject the position that is generally advocated by liberal politicians and scholars and join with the conservative members of the Court. Similar fissures also occasionally appear in the conservative bloc. While the chief justice generally takes traditional conservative positions, Justices Scalia and Thomas have a more libertarian perspective. Even Scalia and Thomas themselves—probably the closest ideological allies on the Court—occasionally take different positions on important issues.

Against this background, the overall pattern of Rehnquist era decision-making cannot be seen as the reflection of any single, unified approach to constitutional analysis. Instead, Rehnquist Court jurisprudence can only be understood as the product of the interaction of the views of nine separate individuals, each of whom has an idiosyncratic view of the proper interpretation of the Constitu-

tion and appropriate role of the Court in the American political system. The chapters of this book are designed to provide the reader with insight into this interaction by focusing on each of the justices as an individual and analyzing his or her unique approach to constitutional adjudication.

NOTES

1. 531 U.S. 98 (2000).
2. See, for example, Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87 (2001): 1034–1110.
3. 494 U.S. 872 (1990).
4. 521 U.S. 507 (1997).
5. 521 U.S. 203 (1997).
6. 122 S.Ct. 2460 (2002).
7. 370 U.S. 421 (1962).
8. 374 U.S. 203 (1963).
9. 505 U.S. 577 (1992).
10. 530 U.S. 290 (2000).
11. 517 U.S. 44 (1996).
12. 521 U.S. 98 (1998).
13. 514 U.S. 99 (1995).
14. 529 U.S. 598 (2000).
15. See, for example, *Missouri v. Jenkins,* 515 U.S. 70 (1995); *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989); *Shaw v. Reno,* 509 U.S. 630 (1993).
16. *Bush v. Vera,* 517 U.S. 952 (1996); *Hunt v. Cromartie,* 526 U.S. 541 (2001).
17. 410 U.S. 113 (1973).
18. See, for example, *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983).
19. 505 U.S. 833 (1992).
20. 530 U.S. 914 (2000).
21. 121 S.Ct. 2053 (2001).
22. 511 U.S. 527 (1994).
23. 518 U.S. 515 (1996).
24. *Romer v. Evans,* 517 U.S. 620 (1996); *Immigration and Naturalization Service v. St. Cyr,* 121 S.Ct. 2271 (2001); *Zadvydas v. Davis,* 121 S.Ct. 2491 (2001).
25. For a concise description of Rehnquist's jurisprudential philosophy in his own words, see William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693–706. Scalia describes and defends his views in Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1999).
26. This point is made explicitly in *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966).
27. See, for example, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).
28. *Michael H. v. Gerald D.,* 491 U.S. 110 (1989).

1

William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice

Keith E. Whittington

On January 7, 2003, William H. Rehnquist celebrated his thirty-first anniversary of taking the oath to be a justice of the U.S. Supreme Court. This is a long tenure for a Supreme Court justice, but not extraordinarily long. It certainly does not match the nearly thirty-seven years that Justice William O. Douglas served on the Court. But it is well above the average of fifteen years of service, and no current justice has served longer.

During his tenure, Rehnquist has made a substantial contribution to the Court and constitutional law. Unlike great iconoclastic justices such as John Marshall Harlan, Oliver Wendell Holmes, or Antonin Scalia, Rehnquist does not generally write the biting and memorable lines in dissent. Unlike some of his predecessors, he has not been able to speak for a united Court in a historically great case such as *McCulloch v. Maryland* or *Brown v. Board of Education.* Nonetheless, Rehnquist has provided a sustained, intellectually serious, and judicially effective voice for the type of conservative constitutional jurisprudence that for much of the middle of the twentieth century appeared to be decisively defeated. During his time on the bench, he has played a significant role in ushering such a constitutional philosophy back into legitimacy and prominence. Rehnquist's constitutional vision has not quite captured the Supreme Court, but over the course of his time on the bench he has moved from being the symbol of impotent conservative protest against judicial liberalism to being the symbol of the preeminence of a revitalized strand of judicial conservatism.

RICHARD NIXON AND THE CRITIQUE OF THE WARREN COURT

The Warren Court came to a close just as Richard Nixon was being elected to the presidency. Within a week of Robert Kennedy's assassination in the summer of

1968 and the apparent implication that Nixon would soon occupy the White House, Chief Justice Earl Warren decided to retire immediately so that Lyndon Johnson could choose his successor. Nixon and Warren had been old adversaries from their days in California politics, and Nixon's presidential campaign was a running critique of the Warren Court. For his part, Johnson welcomed the opportunity to choose the next chief justice and quickly began marshaling support in the Senate for the elevation of his long-time adviser, Associate Justice Abe Fortas. The confirmation hearings were a disaster for Fortas, as senators assailed the justice's continuing relationship with the administration and the Warren Court itself. After the hearings, Fortas wrote dejectedly to Justice William Douglas, "Every decent constitutional decision in the last three years and for some years prior thereto, has been denounced."[1] His supporters in the Senate could not break a filibuster, and his nomination was withdrawn in October. Seven months later, Fortas resigned from the Court under an ethical cloud. The following month, Nixon's choice of Warren Burger was confirmed as the new chief justice of the United States.

An important aspect of Richard Nixon's 1968 campaign was an attack on the Warren Court. During Warren's tenure, the Court had issued a large number of deeply controversial constitutional decisions. Over the course of the 1960s, the Court waded into or initiated debates over religion, obscenity, and criminal justice, among other things. With its liberalizing tendencies in each of these areas, the Court ran against a public that was increasingly concerned about social issues.[2] Less than half of the public rated the Supreme Court as "excellent" or "good" in 1967. At the time of Warren's retirement in the midst of the 1968 presidential campaign, the Court's support had been pushed down to 36 percent, and it remained at such levels until Nixon left office.[3] Nixon recognized a political opportunity and built on Barry Goldwater's 1964 presidential campaign's southern strategy and appeal for "law and order." Though the strategy had won Goldwater nothing but an embarrassing defeat, the message had broader appeal four years later.

Both Richard Nixon and independent candidate George Wallace featured attacks on the Warren Court as part of their campaigns. Although the federal judiciary came in for criticism on busing, school prayer, and obscenity, the Court's decisions expanding the rights of criminal defendants received the most attention. Wallace was the more strident of the two candidates, often declaring that the criminal "is out of jail before the victim is out of the hospital."[4] Similarly, Nixon repeatedly noted that the "courts have gone too far in weakening the peace forces as against the criminal forces." The Court had "encouraged criminals" and had overlooked the "forgotten civil right" of public safety. It was a winning issue, as the public rated crime as one of the most important problems facing the nation in 1968, and a large majority believed that the courts did not deal with criminals "harshly enough."[5]

In the days before the election, Nixon promised that the appointments to the Court would be different in his administration. Nixon's nominees "would be

strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social and political viewpoints on the American people." Although "strict constructionism" was more of a political slogan than a sharply defined analytical concept, both Nixon and his audience understood that it mainly represented an opposition to the innovative judicial decisions of the prior decade, especially those relating to social issues and individual rights. In keeping with this theme, Nixon emphasized that central to the qualifications he would look for in a potential justice would be "experience or great knowledge in the field of criminal justice." He pledged that "any justice I would name would carry to the bench a deep and abiding concern for these forgotten rights" of crime victims.[6] Nixon drew some of his campaign criticisms of the Warren Court's criminal justice rulings from a speech delivered by then judge Warren Burger, who was well known for his support for "the power of law enforcement agencies."[7] Earl Warren himself had guessed that Burger, who had positioned himself as the veritable "anti-Warren," would be his replacement.[8]

Burger may have been a conservative critic of Warren, but like Warren he was not an intellectual leader. In chambers, Burger frequently frustrated his colleagues with his relatively weak understanding of the cases. In public, he was unable to provide deeply reasoned defenses of conservative constitutional understandings.[9] Nixon's next two successful appointments, Harry Blackmun and Lewis Powell, were political compromises, as the president sacrificed ideology for confirmability. After Burger's easy confirmation, Nixon had been determined to find young, conservative, Republican, southern judges to elevate to the Supreme Court and solidify his electoral strategy. Unfortunately, few attractive candidates fit those demanding criteria in the late 1960s, and his selection process was plagued by internal confusion and external embarrassment. Almost by accident, Nixon stumbled on his ideal "strict constructionist" with his final appointment of William H. Rehnquist.

REHNQUIST JOINS THE COURT

Born in 1924, Rehnquist was forty-seven when nominated for the Court. He grew up in a staunchly Republican suburb of Milwaukee. After serving in the Army Air Corps during the Second World War, Rehnquist attended Stanford University on the G.I. Bill. He graduated Phi Beta Kappa in 1948 with a degree in political science, earning an M.A. in the same subject the following year. He received a second master's in government at Harvard University in 1950, before returning to Stanford and graduating first in his class from the law school in December 1951. The following February, he began his sixteen-month service as a clerk for Justice Robert H. Jackson. Afterward, he went back west to practice law in Phoenix, became involved in state and local Republican politics, and