

A LAW CLERK AND HIS JUSTICE: WHAT WILLIAM REHNQUIST DID NOT LEARN FROM ROBERT JACKSON

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INTRODUCTION

When William Rehnquist took his seat on the Supreme Court bench in 1972,¹ he became the second member of a highly select fraternity: former law clerks who returned as Justices. According to the mythology of clerkship on the Court, law clerks are gifted young lawyers who spend a year as apprentices to the giants of the law. The mythmakers are usually the clerks themselves, who—often on the occasion of their Justices' retirement or death—reflect warmly on the professional and personal lessons learned and bonds forged during the clerkship year.² Rehnquist's Justice was Robert H. Jackson, one of the Court's major twentieth century figures and one of its most complicated personalities, but the clerk in this instance has been notably uninterested in tracing his lines of connection with Jackson. Yet the links between the two have much to say about both judicial performance and the role of the Court.

Chief Justice Rehnquist presently sits with two of the Court's four former

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1. Rehnquist joined the Court on January 7, 1972. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 982 (Kermit L. Hall ed. 1992) [hereinafter OXFORD COMPANION TO THE SUPREME COURT].

2. See, e.g., RICHARD N. GOODWIN, REMEMBERING AMERICA 24-42 (1989) (Justice Frankfurter); J. HARVIE WILKINSON, III, SERVING JUSTICE 62-63, 67-78, 91-92, 121 (Justice Powell); SAMUEL WILLISTON, LIFE AND LAW 91-94 (1940) (Justice Gray); Dean Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. L. REV. 355 (1957) (Justice Brandeis); Bennett Boskey, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1200 (1946); Victor Brudney & Richard F. Wolfson, *Mr. Justice Rutledge - Law Clerks' Reflections*, 25 IND. L.J. 455 (1950); William Cohen, *Justice Douglas: A Law Clerk's View*, 26 U. CHI. L. REV. 6 (1958); David M. Ebel, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 8 (1993); Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 ANN. SURV. AM. L. xxix; Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710 (1946) (Chief Justice Stone); Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57 (1962); Martha Minow, *Thurgood Marshall*, 105 HARV. L. REV. 66 (1991); John H. Pickering et al., *Mr. Justice Murphy - A Note of Appreciation*, 48 MICH. L. REV. 742 (1950); Richard A. Posner, *William J. Brennan, Jr.*, 104 HARV. L. REV. 13 (1990); Terrance Sandalow, *Potter Stewart*, 95 HARV. L. REV. 6 (1981); *Chief Justice Vinson and His Law Clerks*, 49 NW. U. L. REV. 26 (1954); Glen M. Darbyshire, *Clerking for Justice Marshall*, A.B.A. J., Sept. 1991, at 48. For a spirited defense of his Justice by a law clerk, see Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109 (1992).

clerks: Justice Stevens clerked for Justice Rutledge, and Justice Breyer clerked for Justice Goldberg. The final member of the group, retired Justice White, clerked for Chief Justice Vinson.³ None of these pairings, however, resonates in quite the way that the Jackson-Rehnquist relationship does. Both Jackson and Rehnquist saw themselves as outsiders when they gained access to the inner sanctum of Washington power. Both earned their Court appointments through loyal service to controversial Presidents, and both became centers of controversy after joining the Court. Both aspired to become Chief Justice, although only Rehnquist succeeded. Both became strong presences in the Court's conservative wing, and both came to care deeply about the Court as an institution, writing for legal and lay audiences about its role in our system of government.

These parallels, while striking, are less significant than the jurisprudential similarities between the two. Both Jackson and Rehnquist became apostles of judicial restraint, preaching a limited role for the Court in resolving the claims of aggrieved litigants; both espoused a vision of federalism that weighed heavily on the side of state prerogatives; both tended to protect the rights of the community against the constitutional claims of disaffected individuals. Finally, both brought to Supreme Court cases poised at the intersection of law and politics the perspective of a lawyer who had built his career in the halls of executive power. It is here, however, that Jackson and Rehnquist part company. While Jackson, when faced with the crucial cases that shape the structure of government and the conscience of the nation, forged a complex legal vision that transcended politics, Rehnquist found a far simpler vision that treated law as easily distinguishable from politics. As law clerk to Jackson while the Court wrestled with two of its monumental cases—*Youngstown Sheet & Tube Co. v. Sawyer*⁴ and *Brown v. Board of Education*⁵—Rehnquist already displayed a cast of mind that prevented him from learning one lesson that his Justice was eminently qualified to teach. An examination of the lives, opinions, and nonjudicial writings of both men will reveal the fundamental divergence in their approaches to the law that was first detectable during Rehnquist's clerkship and emerged with greater clarity over the course of his career.

I. TWO LIVES IN THE LAW

A. Robert H. Jackson

Unlike many members of Franklin Roosevelt's New Deal administration, Robert Jackson came to Washington not from an Ivy League education and big

3. Justice Stevens clerked for Justice Rutledge in 1947-48; Justice Breyer clerked for Justice Goldberg in 1964-65; Justice White clerked for Chief Justice Vinson in 1946-47. Leonard Orland, *John Paul Stevens*, in 5 *THE JUSTICES OF THE UNITED STATES SUPREME COURT* 1691 (Leon Friedman & Fred L. Israel eds., 1995); Leon Friedman, *Stephen G. Breyer*, in 5 *id.* at 1876; Leon Friedman, *Byron R. White*, in 4 *id.* at 1579.

4. 343 U.S. 579 (1952).

5. 347 U.S. 483 (1954).

city practice, but from an established career in western New York as a refined example of a country lawyer.⁶ He was born to a family with deep roots in the area, and until Roosevelt drew him into government Jackson had remained, for practical as well as personal reasons, close to home. Although he did not attend college, he read widely and developed a literary style and eloquence that placed him close to Holmes and Cardozo. Because he could manage only one year at Albany Law School, Jackson's legal education came in large part from apprenticing in his cousin's law office—training far different from that of virtually all his future colleagues on the Court.⁷ He built a thriving and diverse practice in Jamestown, New York, where his clients included corporations and individuals and his cases included civil, administrative, and even a few criminal matters on both the trial and appellate levels.⁸ Jackson carried with him to the Supreme Court the value of self-reliance learned in his early practice years. He carried with him as well an icon of his independence, a magazine photograph of a man working alone at his desk, a laurel wreath above his head, and the caption, quoted from Kipling: "He travels fastest who travels alone."⁹

Jackson enjoyed his practice and intended his first assignment in Washington as general counsel for the Internal Revenue Bureau to be only a brief interlude. The work of a country lawyer offered him both the comfort of a valued role in a well ordered community and the opportunity to use his substantial legal abilities. Jackson celebrated the country lawyer as one who "understands the structure of society and how its groups interlock and interact, because he lives in a community so small that he can keep it all in view."¹⁰ That perspective also teaches the country lawyer "how disordered and hopelessly unstable [society] would be without law" and that "in this country the administration of justice is based on *law practice*."¹¹ Beyond such abstract satisfactions, his practice also offered Jackson what was for him the chief pleasure of lawyering, the act of advocacy,¹² because

6. EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 46 (1958). Gerhart's biography is uncritical, admiring, and at times adulatory. For an admiring assessment of Jackson's career in practice, see Charles S. Desmond, *The Role of the Country Lawyer in the Organized Bar and the Development of the Law*, in *MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR* 16-28 (1969) [hereinafter *MR. JUSTICE JACKSON*].

7. GERHART, *supra* note 6, at 33-34; John L. O'Brian, *Introduction, The Role of the Country Lawyer*, in *MR. JUSTICE JACKSON*, *supra* note 6, at 8.

8. For a discussion of Jackson's legal career in Jamestown, see GERHART, *supra* note 6, at 35-45.

9. *Id.* at 48. The photograph had belonged to Frank Mott, the cousin in whose law office Jackson had apprenticed. *Id.* at 33. When Jackson began his practice, he shared Mott's offices but remained an independent practitioner. *Id.* at 35.

10. Robert H. Jackson, *Tribute to Country Lawyers: A Review*, *A.B.A. J.*, March 1944, at 138.

11. *Id.*

12. Gerhart reports Jackson's comments in an interview with his biographer: "I like the combat. I always liked the underdog's side, but I had no great emotion about it and no conviction that the underdog is always right, like some people think. . . . I was never a crusader. I just liked

the variety of his cases supplied a technical challenge he relished.¹³ In Washington, however, Jackson was compelled to balance advocacy with politics in his work at the Internal Revenue Bureau and subsequently in other posts in the Justice Department with which Roosevelt tempted him to remain with the administration. Jackson performed successfully but left without regret when the President appointed him Solicitor General in 1938.¹⁴

In the post of Solicitor General he found a job which suited his talents and tastes and which Justice Brandeis appreciatively thought he should hold for life.¹⁵ Jackson described his appointment as Solicitor General as a homecoming:

Coming back to the practice of law, which I did in the Solicitor General's office, was like coming home after being out in a bad storm. I was delighted with the work. I cut off other types of things as fast as I could and settled down to the legal work of the Department of Justice in the Supreme Court and other appellate courts. I entered upon the most enjoyable period of my whole official life.¹⁶

As the government's advocate, Jackson had little difficulty in forgoing "the assertion of one's individual eccentricities" and embracing wholeheartedly his

a good fight!" GERHART, *supra* note 6, at 36.

13. Jackson described the work of the country lawyer as tenacious advocacy: Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation—he was no mere hired hand. But he gave every power and resource to the cause. He identified himself with the client's cause fully, sometimes too fully. He would fight the adverse party and fight his counsel, fight every hostile witness, and fight the court, fight public sentiment, fight any obstacle to his client's success. He never quit. . . . The law to him was like a religion, and its practice was more than a means of support; it was a mission.

Jackson, *supra* note 10, at 139.

14. From February 1934 Jackson served for two years as General Counsel of the Bureau of Internal Revenue, then briefly as Assistant Attorney General for the Tax Division, and finally as Assistant Attorney General for the Antitrust Division until his appointment on March 5, 1938 as Solicitor General. Warner W. Gardner, *Government Attorney*, 55 COLUM. L. REV. 438, 440-41 (1955). As counsel to the Bureau of Internal Revenue, he directed the government's civil litigation against Andrew Mellon. Although Jackson had recommended strongly against charging fraud, Roosevelt decided to include the fraud claim to protect the Justice Department, which had failed earlier to secure a criminal fraud indictment against Mellon. See Philip B. Kurland, *Robert H. Jackson*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1287 (Leon Friedman & Fred L. Israel eds., 1995). As Assistant Attorney General, Jackson worked in support of Roosevelt's court packing plan, giving speeches and testifying before the Senate Judiciary Committee. GERHART, *supra* note 6, at 108-15.

15. Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955). See also Kurland, *supra* note 14, at 1299.

16. Kurland, *supra* note 14, at 1296 (quoted from Jackson's taped interviews for the Oral History project of Columbia University).

client's position.¹⁷ Even as a committed advocate Jackson acknowledged his obligation to deal candidly and honorably with the Supreme Court, which traditionally looked to the Solicitor General for an evenhanded assessment of the law.¹⁸ He also, however, approached his government litigation as he had his Jamestown cases, with the practitioner's pragmatic calculation of the votes needed to win.¹⁹ What Jackson seems to have relished in his work as Solicitor General was the chance to serve Roosevelt and at the same time to serve his own conception of the effective advocate. His elevation to Attorney General in 1940 was the natural next step in his progress toward the Supreme Court, but for Jackson it was also a move to a less congenial position. Although as Solicitor General he had continued to advise the President, as Attorney General he was less the government's advocate and more the President's lawyer.²⁰

During the eighteen months that Jackson served as Attorney General, Roosevelt looked to him for political assistance as well as legal counsel.²¹ Although Jackson had occasionally been mentioned as a presidential nominee for the 1940 election, he accepted Roosevelt's decision to run for a third term with equanimity, even when he was passed over in favor of Henry Wallace as the vice presidential candidate.²² Jackson attended the 1940 convention and later campaigned actively for Roosevelt.²³ Jackson's flirtation with national political office was brief and, at least according to Harold Ickes, Roosevelt's Secretary of

17. *Id.* at 1297.

18. *Id.* For an account of the Court's expectations concerning the Solicitor General, see LINCOLN CAPLAN, *THE TENTH JUSTICE 19-32* (1988).

19. "As long as I was Solicitor General, I was dealing with a Court on which most of the members were of the old Court and I needed them to make up a majority." Kurland, *supra* note 14, at 1297.

20. Jackson's work for the President during his time as Solicitor General included reviewing the Neutrality Proclamation of 1939 and suggesting the deletion of Canada; Jackson also participated in studies of the implications of war for the American economy. GERHART, *supra* note 6, at 179-82. See also Kurland, *supra* note 14, at 1298, 1301.

21. Jackson was appointed Attorney General in January 1940 and served until July 1941. GERHART, *supra* note 6, at 193, 231. According to Kurland, "[t]he change in position accentuated rather than diminished Jackson's ties with the President." Kurland, *supra* note 14, at 1299. Kurland quotes Jackson on his new post:

I think the Attorney General has a dual position. He is the lawyer for the President. He is also, in a sense, laying down the law for the government as a judge might. I don't think he is quite as free to advocate an untenable position because it happens to be his client's position as he would if he were in private practice. He has a responsibility to others than the President. He is the legal officer of the United States.

Id. at 1299-1300.

22. GERHART, *supra* note 6, at 199, 200-01, 204. Roosevelt had also apparently spoken to Jackson about running for the governorship of New York in 1938, but the state Democratic party, especially its national party leader, Jim Farley, was not receptive. *Id.* at 122-23, 136-38.

23. *Id.* at 205, 206-08.

the Interior, appropriately so.²⁴ Jackson was more comfortable performing traditional lawyer's tasks. He was instrumental in drafting the lend lease agreement that permitted the President to send obsolete destroyers to Great Britain in exchange for use of British military bases,²⁵ and he formulated the administration's international law position on just and unjust wars.²⁶ Jackson's tenure as Attorney General came to an early end in July of 1941, however, when he took the Supreme Court seat vacated by Justice Stone's elevation to Chief Justice.²⁷

Roosevelt had long dangled before Jackson the prospect of a place on the Court, particularly Chief Justice, and Jackson keenly wanted the center seat.²⁸ At the retirement of Chief Justice Hughes, Roosevelt considered Jackson and Stone for the appointment. Although Roosevelt reportedly favored Jackson, he was persuaded by Justice Frankfurter that, with war imminent, the selection of the Republican Stone would create "confidence in you as a national and not a partisan President."²⁹ Roosevelt's obvious enthusiasm for Jackson gave rise to a rumor that the sixty-eight year old Stone had agreed to step down as Chief Justice at the age of seventy to make way for Jackson. Although the rumor was strongly denied by Stone, who later insisted that had any such deal been proposed "I should have declined the appointment,"³⁰ it nonetheless contributed to a vague sense that Jackson was entitled to the chief justiceship when it next became vacant. It was thus Jackson's fate that, named to the Supreme Court at the age of forty-nine, he seemed somehow to have already lost his chance for the two most prestigious posts in American government and to be still awaiting the call to a higher destiny.

Jackson's career on the Supreme Court is usually divided into two periods separated by his service as the United States' chief prosecutor at the Nuremberg War Crimes Trials. In the first period, he remained recognizable as the New Dealer who had supported Roosevelt's policies for a decade. After his return from Nuremberg, however, Jackson moved farther to the Court's right, finding his

24. After observing Jackson at the convention, Ickes assessed Jackson's political potential with a skeptical eye. Jackson was, he thought, "more of a lawyer than an aggressive leader. If he is ever to become President I hope that he will develop a disposition not only to stand for what is right but to fight for it." 3 HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES* 267 (1955).

25. GERHART, *supra* note 6, at 215-21.

26. *Id.* at 223-27.

27. OXFORD COMPANION TO THE SUPREME COURT, *supra* note 1, at 981.

28. In 1940 Roosevelt appointed Frank Murphy, his attorney general, to the seat created by the death of Justice Pierce Butler. According to Gerhart, Jackson advised Roosevelt that Murphy was ill-suited to the Court because "he was not interested in legal problems . . . nor in the law as a philosophy," but Roosevelt persevered with the appointment, which allowed him to shift Jackson to the post of attorney general. GERHART, *supra* note 6, at 183. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 229 (3d ed. 1992).

29. ALPHEUS MASON, *HARLAN FISK STONE: PILLAR OF THE LAW* 567 (1956). For a discussion of the Stone appointment, see ABRAHAM, *supra* note 28, at 232-34. See also GERHART, *supra* note 6, at 230-31.

30. MASON, *supra* note 29, at 573.

principal ally in another former New Deal advocate, Felix Frankfurter, who counseled the Court to exercise judicial restraint.³¹ This description is far too simple for a complex figure like Jackson, but it does suggest the significant break between the Jackson who left the Court for the prosecutorial challenge of Nuremberg and the Jackson who returned to a Court led by its new Chief Justice, Fred Vinson. Nuremberg itself, although a powerful and consuming experience, does not wholly explain Jackson's transformation.³² His disappointment over his failure to secure the chief justiceship, a disappointment which manifested itself in an episode of remarkable bitterness and indiscretion, also contributed to Jackson's sense that his return to the Court would be less than a triumphant coda to his legal career.

Although there are several interpretations of this episode, some more critical of Jackson than others, the outlines are relatively clear.³³ When Chief Justice Stone died suddenly in April 1946, Jackson was still in Nuremberg and Harry S. Truman had succeeded Roosevelt. Two rumors began circulating in Washington: that Jackson was the likely successor and that Justice Black had notified President Truman that he would resign if Jackson were named Chief Justice. Black and Jackson had been at odds before Jackson's departure over Black's decision to sit in *Jewell Ridge Coal Corp. v. Local No. 6107, United Mine Workers of America*,³⁴ which was argued by his former law partner. Jackson objected and published an opinion obliquely critical of Black's presence.³⁵ Aware of the tension between Black and Jackson, Truman consulted two former members of the Court before selecting Fred Vinson, then his Secretary of the Treasury, to lead the Court and

31. See, e.g., GLENDON SCHUBERT, *DISPASSIONATE JUSTICE* 5-6 (1969). Schubert quotes two other commentators, Alan F. Westin and Max Lerner, who express a similar view of Jackson's career. *Id.* at 6. See also WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 85-86 (1987).

32. There are varying assessments of Jackson's success at Nuremberg, particularly in his cross-examination of Goering, although his opening and closing statements have been widely admired. For a flattering treatment of his work at Nuremberg, see GERHART, *supra* note 6, at 352-454. For a harsher perspective, see, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 335-41 (1992).

33. For an excellent and thorough analysis of the incident, see Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203. For an account favorable to Jackson, see GERHART, *supra* note 6, at 240-88. According to Hutchinson, much of Gerhart's version is an almost verbatim reprinting of Jackson's own 1949 unpublished memorandum. Hutchinson, *supra* at 224-25. For an account favorable to Black, see JOHN P. FRANK, *MR. JUSTICE BLACK* 124-31 (1949).

34. 325 U.S. 161 (1945).

35. Jackson's opinion was a concurrence in the Court's denial of a petition for rehearing based in part on Black's participation in the case. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897 (1945) (Jackson, J., concurring). Jackson noted that questions of recusal could be resolved only by individual Justices and, in a mild barb, that the Court lacked the power "to exclude one of its duly commissioned Justices from sitting or voting in any case." *Id.* According to Hutchinson, the concurrence "looked innocuous on its face but . . . privately enraged Black." Hutchinson, *supra* note 33, at 208.

restore its harmony.³⁶ Jackson responded with an angry cable to Truman that attacked Black's conduct in *Jewell Ridge* and asked the President to release the cable in order to dispel the public impression that "something sinister has been revealed to you which made me unfit for Chief Justice."³⁷ Ignoring Truman's response, which asked him to keep the matter private, Jackson then sent a cable to the House and Senate Judiciary Committees again detailing his charges against Black and followed the cable with a press conference.³⁸ In airing his grievance, he aired as well the confidential exchanges of the Justices' conference room, an infraction rarely committed by members of the Court.

As is often the case with uncharacteristic behavior, this explosion from the usually controlled Jackson fell wide of its mark. Black, who remained silent throughout the controversy, emerged unscathed, while Jackson's reputation suffered.³⁹ Any future prospect of becoming Chief Justice now effectively ended, Jackson returned from Nuremberg to resume his judicial duties.⁴⁰ In later years Jackson insisted that he had not really wanted to be Chief Justice:

Of course, it was the easiest thing in the world for them to say, and the most difficult thing in the world to meet—I never attempted to meet it—that I was personally disappointed and bitter about the appointment.

36. Truman consulted former Chief Justice Hughes and former Associate Justice Owen Roberts, who reportedly advised him not to elevate a member of the Court. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 26 (1948).

37. Hutchinson, *supra* note 33, at 220.

38. *Id.* at 220-21. Even Gerhart concedes that "Jackson may have been imprudent and reckless to issue the statement." GERHART, *supra* note 6, at 267. His account also indicates that "Jackson appears to have consulted no one" before sending his cable. *Id.* at 261.

39. In his account favorable to Justice Black, for whom he clerked, John P. Frank offers these explanations for Jackson's behavior:

Three answers circulated through the legal profession: first, that Jackson was a virtuous man, revealing an evil situation; second, that Jackson sought to wreak personal vengeance on the man he thought responsible for barring his path to the Chief-Justiceship; and third, that the enormous strain of the Nuremberg trial, a serious failure both in publicity and in results from a prosecutor's standpoint, caused an irrational act for which there is no rational explanation.

FRANK, *supra* note 33, at 131. In a magazine article written shortly after the event, Arthur M. Schlesinger, Jr., characterized Jackson's behavior as

the act of a weary and sorely beset man, committed to a harassing task in a remote land, tormented by the certainty that the chief justiceship had now passed forever out of his reach. Only someone who has lived the unreal life of an army of occupation can understand the violence of his response to the fragmentary reports of Washington intrigue; he reacted as a G.I. would to rumors of his wife's infidelity.

The Supreme Court: 1947, FORTUNE, Jan. 1947, at 78, *quoted in* PRITCHETT, *supra* note 36, at 28-29.

40. Schubert refers to the sending of the cable as "political suicide." SCHUBERT, *supra* note 31, at 5.

Unless one knows the inner workings of the court, you can't probably realize that one is really better off as an associate justice of the court in everything except kudos than he is as chief, because the chief has a lot of trivial details to attend to. There was no use in answering that, however.⁴¹

It seems clear, however, that Jackson reacted out of frustration at seeing the long delayed prize lost by a conjunction of unhappy circumstances—Roosevelt's death a year earlier, Jackson's own absence from Washington in an era of limited trans-Atlantic communication, the internal tensions of the Court, the Washington rumor mill. Bruised by his brush with judicial politics, Jackson retreated to the legal fastness of the Supreme Court bench, where he served for the remaining eight years of his life. His work during that final period suggests that he reflected on the entanglements of the Court and the political world and, when the occasion presented itself, found ways to accommodate the separate strands of law and politics.

B. William H. Rehnquist

The facts of William H. Rehnquist's life are fewer and more conventional than those of Jackson's biography. Rehnquist was born a generation later, in 1924, in Milwaukee, Wisconsin, where he grew up in a comfortable suburb. His education was interrupted by World War II. After briefly attending Kenyon College, he enlisted in the Army Air Corps, serving as a weather observer. When the war ended he resumed his studies under the G.I. Bill at Stanford University, majoring in political science and graduating as a member of Phi Beta Kappa. Rehnquist then took two master's degrees in political science, one from Harvard and one from Stanford, before entering law school at Stanford.⁴² In December 1951, he

41. Hutchinson, *supra* note 33, at 226. (quoting VIII COLUMBIA UNIVERSITY ORAL HISTORY PROJECT 527). Hutchinson observes that

Jackson seethed over what he saw as behind-the-scenes efforts to keep him from the center chair of the Court. Those remarks not only belie his denial, but they reveal that by 1952 Jackson had come to believe that Douglas more than Black had been responsible within the Court for his defeat.

Id. Gerhart quotes Jackson as saying somewhat ambiguously, in interviews conducted in 1948 and 1951, that "I'm happier as Associate Justice than I could be as Chief Justice. I don't say that I would have refused it. I couldn't remember anything in my mind that I would rather do than be Chief Justice." GERHART, *supra* note 6, at 287.

42. There is some discrepancy in accounts of Rehnquist's education. According to Sue Davis, he received a master's degree in political science from Stanford in 1949 and a master's degree in government from Harvard in 1950. SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 5 (1989). The biographical sketch that appears in the Senate Judiciary Committee Report prepared in November 1971 omits the master's degree from Stanford and refers to a master's degree from Harvard in history. SENATE JUDICIARY COMM., *NOMINATION OF WILLIAM H. REHNQUIST*, S. EXEC. DOC. NO. 16, 92d Cong., 1st Sess. 2 (1971), *reprinted in* 8 *THE SUPREME COURT OF THE UNITED STATES: HEARING AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-75* (Roy

graduated first in his class and became Justice Jackson's law clerk in the middle of the Court's 1951 Term. He stayed for the 1952 Term before beginning a varied private practice, reminiscent of Jackson's, in Phoenix, Arizona.⁴³ Through his conservative political activities in Phoenix, Rehnquist became acquainted with Richard G. Kleindienst,⁴⁴ who became deputy attorney general in the Nixon administration. In 1969 Rehnquist was named assistant attorney general in charge of the Office of Legal Counsel, the office that provides legal advice to the President. It was from that post, in which his duties included screening potential Supreme Court nominees, that Rehnquist was appointed to the Court in 1971 and in January 1972 took the seat that Jackson had once occupied.

Rehnquist's conservative views expressed during his tenure in the executive branch and in his years in Phoenix made his nomination controversial;⁴⁵ he was ultimately confirmed by a vote of sixty-eight to twenty-six, which reflected the reservations of many Democratic and a few Republican senators about his nomination.⁴⁶ The controversy was renewed in 1986, when President Reagan nominated Rehnquist to replace retiring Chief Justice Burger, with the focus on a memorandum concerning *Brown v. Board of Education*⁴⁷ written by Rehnquist as Jackson's law clerk. Again, following a bitter debate, Rehnquist was confirmed, this time by the smallest margin of any Court appointee to that date.⁴⁸

In some respects, the differences between Rehnquist and Jackson reflect the

M. Mersky & J. Myron Jacobstein eds., 1977) [hereinafter NOMINATIONS OF SUPREME COURT JUSTICES]. See also Chris Henry, *William H. Rehnquist*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1666 (Leon Friedman & Fred L. Israel eds., 1995), which refers only to a master's degree from Harvard in political science. The biographical data sheet available from Chief Justice Rehnquist's chambers lists a 1948 master's degree from Stanford and a 1950 master's degree from Harvard.

43. Rehnquist worked with a succession of Phoenix firms. See NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 2. Rehnquist "joined a small Phoenix law firm and set about pursuing the day-to-day drudgery of wills, estates, real estate closings, and property disputes that are the bread and butter of any small law firm involved in a general practice." Henry, *supra* note 42, at 1668.

44. Rehnquist had opposed the Arizona civil rights bill, a public accommodations ordinance in Phoenix, and integration plans for the Phoenix schools. See DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST 75-77 (1987). For copies of his written statements on some of these issues, see NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 305-07 (public accommodations ordinance), 309 (de facto segregation in the Phoenix schools).

45. For accounts of Rehnquist's activities in Phoenix and in the Office of Legal Counsel, see DAVIS, *supra* note 42, at 6-7; Henry, *supra* note 42, at 1668-70; See generally BOLES, *supra* note 44.

46. ABRAHAM, *supra* note 28, at 321-22. The three Republicans voting against Rehnquist were Senators Clifford P. Case, Jacob K. Javits, and Edward W. Brooke. *Id.*

47. 347 U.S. 483 (1954).

48. Rehnquist was confirmed by a vote of sixty-five to thirty-three; the votes in opposition "constituted the largest number of votes ever cast against a nominee who won confirmation." ABRAHAM, *supra* note 28, at 351.

differences between their generations. Where Jackson was largely self-educated, though among the most erudite of the Court's members, Rehnquist attended some of the country's most distinguished schools. Where Jackson entered practice at the age of 21, Rehnquist was delayed by military service and his clerkship until the age of 29. Notwithstanding their differences, significant similarities exist between Rehnquist and Jackson as well. Both came to the Court not from a lower bench but from the executive branch, where each worked for a President who locked horns with the Court and sought to redirect it through his appointments. More tellingly, each was involved in the judicial selection process, though from rather different perspectives. Jackson was an intimate advisor to Roosevelt and was given to understand early on that a seat on the Court would eventually be forthcoming, while Rehnquist worked on several of Nixon's unsuccessful nominations before he himself was sent with some suddenness to the Court by a President who had difficulty remembering his name.⁴⁹

The most intriguing similarity between the two Justices, however, is their shared sense of themselves as loners within the powerful institutions they served. Jackson characterized himself as "an individualist of the school of Emerson. Self-reliance, self-help and independence of other people I believe to be the basis of character and essential to success."⁵⁰ As the photograph he hung in his Supreme Court chambers suggests, Jackson might advise his clients, including the President, but at times of personal crisis he took no advice himself. When he sent the cable denouncing Justice Black and exposing the internal dissensions of the Court, Jackson apparently consulted no one; according to his own version of events, only slightly altered and presented by Gerhart, "[t]hat he was engaged in preparing such a statement was known only to his son and to his secretary."⁵¹ Gerhart explains this mode of proceeding as Jackson's wish not to seek advice he knew he was unlikely to follow, but the decision seems entirely characteristic of Jackson. Despite his years in the Roosevelt inner circle and on the Court, he still took as his model the independent lawyer who follows his own counsel, on this occasion with unfortunate results. Jackson remained a loner on the Court as well, where his elegant opinions and literary style provided an ironic counterpoint to his

49. In a July 21, 1971 tape of a White House conversation, President Nixon referred to Rehnquist as Renchburg: "You remember that meeting we had when I told that group of clowns we had around there. Renchburg and that group. What's his name?" Nixon's adviser, John Ehrlichman, helpfully supplies "Renchquist," and the President echoes "Yeah, Renchquist." ABRAHAM, *supra* note 28, at 319.

50. GERHART, *supra* note 6, at 62. Felix Frankfurter identified in Jackson "a preference for truculent independence over prudent deference and conformity." Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435, 436 (1955).

51. GERHART, *supra* note 6, at 261. For an account of Jackson's independence as Solicitor General, see E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* 1992 SUP. CT. HIST. SOC'Y Y.B. 75, 77. Prettyman quotes Charles E. Wyzanski, who worked in the Solicitor General's Office: "It may be that a secretary or two moved with him from place to place, but no first-class assistant. He never had a team nor did he ever evoke that kind of team loyalty in spite of the admiration of everybody who played with him had for him as a player." *Id.*

status as, with one brief exception, the only Justice without a university or law degree.⁵² He tended to decide cases with a pragmatic eye, looking less to philosophic consistency than to the practical and commonsensical concerns of a practitioner, and thus to be less predictable than many of his colleagues.

Rehnquist, too, came to the Court as an outsider. Recounting his first approach to the Court, as Jackson's law clerk in 1952, Rehnquist immediately describes himself as "surprised to have been chosen."⁵³ The picture that emerges from his narration is of a young man from the West, neither diffident nor unqualified for his position, but slightly naive and somewhat bemused at finding himself at the Court. Yet even this young Rehnquist quickly showed his independent spirit. In his first encounter with Justice Frankfurter, Rehnquist had what he calls "the temerity to criticize" a recent opinion by Frankfurter and the persistence to meet the Justice's challenge to find case law in support of the law clerk's position.⁵⁴ Returning to the Court twenty years later, Rehnquist remained an independent spirit. As an outspoken conservative on a Court still dominated by liberal colleagues, Rehnquist was frequently a solitary dissenter. In 1974 his law clerks, who called him the "lone dissenter," presented him with a Lone Ranger doll that a decade later still occupied a place of pride on his office mantelpiece, the iconic counterpart to Jackson's solitary traveler.⁵⁵

C. *The Lives Intersect*

Rehnquist served as Jackson's law clerk from February 1952 to June 1953. In his account of their initial interview, Rehnquist expressed surprise that Jackson had merely chatted about his practice experience rather than quizzing the applicant on some legal topic. When they met again at the start of Rehnquist's clerkship, Jackson was both affable and pragmatic, concerned principally with entering his clerk on the government payroll.⁵⁶ What is curious about this account is, to use one of Rehnquist's favorite literary allusions, Sherlock Holmes' dog that didn't bark.⁵⁷ Rehnquist has written relatively little about his clerkship with

52. Of the Justices who served with Jackson, only James Byrnes, who spent just one year on the Court before resigning, had neither an undergraduate nor a law degree. Of the other Justices, Justice Black had a law degree from the University of Alabama but no undergraduate degree, and Justice Reed had undergraduate degrees from Kentucky Wesleyan University and Yale University but no law degree. See CONGRESSIONAL QUARTERLY'S GUIDE TO THE SUPREME COURT 857-70 (Elder Witt ed., 2d ed. 1990).

53. REHNQUIST, *supra* note 31, at 17.

54. *Id.* at 76-77.

55. John A. Jenkins, *The Partisan*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 34.

56. At the first interview, Rehnquist was struck by Jackson's "pleasant and easygoing demeanor," though he left certain that he had lost his chance at the clerkship by failing to make a strong impression. REHNQUIST, *supra* note 31, at 20. When they met again in Washington, Rehnquist remarks that Jackson "greeted me with the affability I remembered." *Id.* at 23.

57. See *Church of Scientology of Cal. v. Internal Revenue Service*, 484 U.S. 9, 17-18 (1987); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). In

Jackson—these two anecdotes are among the few stories about his interactions with the Justice—and what he has written is remarkably detached and cool in tone. The coolness is particularly noticeable in its contrast to Rehnquist's clearly expressed affection for Justice Frankfurter, whom he found engaging and instructive.⁵⁸ Unlike most Supreme Court clerks who revisit their past, Rehnquist had nothing to say of what he learned from Jackson about either the law or the art of judging. In a talk he gave at Albany Law School in the Justice Jackson Lecture Program, Rehnquist recalled Jackson's reflection on life in Washington, but only after prompting from his father.⁵⁹

Rehnquist's talk on Jackson's career is an oddly muted tribute for one Supreme Court Justice to pay another. The talk is peppered with disclaimers: that law clerks do not become the friends of their judges, that others knew Jackson far better than he, that Rehnquist and his fellow clerk received only "courtesy opportunities" to contribute to Jackson's celebrated opinion in *Youngstown Sheet & Tube Co.*, and that Jackson's Christmas gift of an inscribed copy of his book, *The Struggle for Judicial Supremacy*, was most likely "a traditional gift to law clerks so long as the copies supplied by the publisher lasted."⁶⁰ When Rehnquist identifies the hallmarks of Jackson's career, his choices are not unqualified praise. Although he begins by invoking "Robert Jackson's remarkable similarity to Abraham Lincoln,"⁶¹ that similarity is to Lincoln's "rare ability to profit from experience, to accommodate his views when that experience seemed to require accommodation, and yet to maintain throughout his life a sturdy independence of view."⁶² Rehnquist cites Jackson's career as "a living testament to the fact that the legal profession is indeed a career open to the talents."⁶³ Yet here too, the explanation seems to undermine the initial praise. The particular Jacksonian ability Rehnquist singles out is "doggedness," by which he means a combination of analytic ability and common sense, the legacy of Jackson's years in western

the Sherlock Holmes story, *Silver Blaze*, the detective deduces from the dog's failure to bark that it was the trainer who attempted to harm a valuable horse. Sir Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 383, 400 (1953).

58. "I doubt that my fondness for Justice Frankfurter was any different from that of any other law clerk or law student whom he first dazzled and then befriended." REHNQUIST, *supra* note 31, at 78. Even Frankfurter's instructive manner, which at times disturbed his fellow Justices, "made a warm admirer" of Rehnquist. *Id.* at 81.

59. When Rehnquist's parents visited him during his clerkship, Justice Jackson "generously invited the three of us to have lunch with him in his chambers." During that lunch, Jackson observed that "Washington is a bad city for a public official to live in. It takes everything from you, and gives nothing back." William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-five Years Later*, 44 ALB. L. REV. 533, 535 (1980) [hereinafter *Robert H. Jackson*]. Rehnquist recalled the conversation only when "stimulated by my father's recollection" and conceded that "at this point in my life [I] would have to say that there is more than a little truth to them." *Id.*

60. *Id.* at 533, 536-38, 540.

61. *Id.* at 536.

62. *Id.*

63. *Id.*

New York.⁶⁴ Although Rehnquist has some praise for Jackson's intellect and prose,⁶⁵ he seems more interested in the blend of character and experience that shaped Jackson's magnum opus, his *Youngstown Sheet & Tube Co.* concurrence.⁶⁶

Youngstown Sheet & Tube Co. was the most important and controversial case decided during Rehnquist's clerkship. Although Rehnquist disclaimed any role in shaping Jackson's concurrence, he also recalled the excitement among the law clerks as the Supreme Court first granted certiorari and then expedited oral argument to determine whether President Truman had the power to seize the nation's steel mills.⁶⁷ For a young man who had arrived in Washington only three months earlier, the *Youngstown* case was an extraordinary opportunity to watch from a prime vantage point as the Court resolved a power dispute between the executive and legislative branches of government within a few weeks:

Never was a case more made to order for a group of Supreme Court law clerks, all of whom fancied themselves whiz kids, than this one which like Minerva seemed to have sprung full-blown from the Washington environment in which we lived and worked. As I recall, in fact, during one lunch hour we even took a formal vote of the clerks on how the case should be decided. The result was an even division between eighteen law clerks, nine voting for the government and nine voting for the steel companies.⁶⁸

Rehnquist himself favored the steel companies because he believed that "the balance of power within the federal establishment had shifted markedly away from Congress and toward the president in the preceding fifteen years, and that this trend was not a healthy one."⁶⁹ He was therefore doubly proud, as a law clerk and a partisan, to hear Jackson wryly disassociate himself from a prior opinion, written as Roosevelt's Attorney General, confirming the President's power to seize a manufacturing plant.⁷⁰

64. *Id.*

65.

When I say "ability," I do not mean simply analytical ability, although I think he possessed that in great degree. I do not mean ability to charm an audience or to add zest to an otherwise dull opinion by a pithy phrase, although I think he possessed these characteristics to a degree unmatched by his contemporaries or successors.

Id. Elsewhere, Rehnquist observed that "Robert H. Jackson had one of the finest literary gifts in the history of the Supreme Court." *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74 [hereinafter *Who Writes Decisions*].

66. *Robert H. Jackson*, *supra* note 59, at 539-40.

67. REHNQUIST, *supra* note 31, at 93. Rehnquist and his co-clerk "were shown the opinion in draft form, and as I recall, asked to find citations for some of the propositions it contained, but that was about the extent of our participation." *Id.*

68. *Id.* at 61-62.

69. *Id.* at 63.

70.

Jackson commented from the bench that he was afraid that a lot of the basis for the

As an observer of the *Youngstown* case, Rehnquist offered his explanations, past and present, for the Court's determination that the President's seizure of the steel plants was invalid. The young Rehnquist looked to the personal histories of the Justices; because all nine had been appointed by either Roosevelt or Truman, and eight of the nine had been politically active Democrats, he presumed that Truman had an edge.⁷¹ The older Rehnquist, a veteran of two years in the executive branch and sixteen years on the Court, looked instead to external factors to explain Truman's defeat: intense press coverage of the dispute, reaction against the government's original theory of unlimited executive power, the nation's coolness toward the Korean engagement, and Truman's own disfavor with the public.⁷² Even Justices with significant political backgrounds, he concluded, are affected by the currents of public opinion. It is striking that Rehnquist's theories, both as law clerk and as Justice, favor context over jurisprudence. His own Justice produced a concurrence, discussed below, which has come to be regarded as the Court's most valuable distillation of the sharing of power between executive and legislative branches. Yet the lesson Rehnquist seems to have learned from the way that Jackson and four other Democrats separated politics from law is that Justices are unable to "isolate themselves from the tides of public opinion" in resolving public controversies of great magnitude.⁷³

Jackson and Rehnquist faced the same mixture of law and politics from different perspectives in *Brown v. Board of Education*,⁷⁴ which began its passage through the Court during Rehnquist's clerkship. In the conference following the December 1953 reargument, Jackson made it clear to his colleagues that he supported an end to segregation but found it difficult to characterize the Court's

government's seizure was being laid at his doorstep, and [Solicitor General] Perlman agreed. Jackson then responded: "I claimed everything, of course, like every other Attorney General does. It was a custom that didn't leave the Department of Justice when I did."

Every law clerk likes to see his own boss look "sharp" on the bench, as if the justice's performance somehow reflected credit upon the law clerk. I virtually glowed with satisfaction at Justice Jackson's comment, not only because I thought it was both relevant and witty, but because it seemed to me to suggest that he did not agree with the government's position.

Id. at 90-91.

71. *Id.* at 64.

72. *Id.* at 95-98. Rehnquist even flirts with a theory he calls "'geographic determinism,'" because the three dissenters, Chief Justice Vinson and Justices Reed and Minton, "had all grown up in towns along the Ohio River not more than two hundred miles apart." *Id.* at 92.

73. *Id.* at 98. Rehnquist is careful to note that "[n]o judge worthy of his salt would ever cast his vote in a particular case simply because he thought a majority of the public wanted him to vote that way," but he distinguishes that view from "saying that no judge is ever influenced by the great tides of public opinion that run in a country such as ours. Judges are influenced by them, and I think such influence played an appreciable part in causing the Steel Seizure Case to be decided the way it was." *Id.*

74. 347 U.S. 483 (1954).

role in achieving that result as judicial rather than political. Quoting from conference notes kept by Justices Burton and Frankfurter, Bernard Schwartz has described Jackson's presentation:

Jackson started his conference presentation by noting, 'Cardozo said the work of this Court is partly statutory construction and partly politics. This is a question of politics.' What he meant by this is shown by the Jackson gloss on the Cardozo statement in a posthumous work: 'Of course [Cardozo] used 'politics' in no sense of partisanship but in the sense of policy-making.'

In this sense, Jackson told the conference, a decision against segregation would be 'a political decision.' The segregation issue was 'a question of politics.' The Justice also said that the decision 'for me personally is not a problem, but it is difficult to make it other than a political decision. . . . Our problem is to make a judicial decision out of a political conclusion'—and to find 'a judicial basis for a congenial political conclusion.' The clear implication was that he would support a properly written decision striking down segregation. 'As a political decision [I] can go along with it.'⁷⁵

Jackson, then, was wrestling with the dilemma of grounding a desegregation decision in law rather than policy or sociology. He was wary of being led by his personal sympathies toward a result that reflected the Justices' proclivities and not a valid statement of the law.

Jackson's struggle is expressed most distinctly in the draft concurrence he prepared but never filed. In Part I of the draft, he invoked his own education in an integrated school "where Negro pupils were very few" as predisposing him to end segregation, but he immediately dissociated the personal from the legal: "Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so."⁷⁶ Jackson saw segregation as rooted in social custom and in the politics of Reconstruction; its removal would mean "nothing less than a substantial reconstruction of legal institution [sic] and of society."⁷⁷ Although he doubted the Court's power to effect such a drastic change by its decision, he believed that nonjudicial forces would eventually accomplish the same result: "within a generation it will be outlawed by decision of this Court because of the forces of mortality and replacement which operate upon it."⁷⁸ The issue for Jackson had two distinct components. One was whether the law supported a decision declaring segregated education unconstitutional. The other was whether such a decision fell

75. Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245, 253.

76. Robert Jackson, Unfiled Draft Concurrence in *Brown v. Board of Educ.* 1 (March 15, 1994) (on file with the Library of Congress, Manuscript Division, Jackson File).

77. *Id.* at 2.

78. *Id.* at 1.

within "the limitations on responsible use of judicial power in a federal system."⁷⁹

Jackson ultimately answered both questions affirmatively, but only after establishing the difficulties attendant on that outcome. In Part II of his draft Jackson examined the legislative history of the Fourteenth Amendment, subsequent congressional legislation, the conduct of the states in reliance on the Constitution, and judicial precedent. He found nothing in "the conventional material of constitutional interpretation" to support the view that maintenance of segregated schools "up to the date of this decision, . . . had violated the Fourteenth Amendment."⁸⁰ In Part III he explored the limitations inherent in judicial decisionmaking as a means of eliminating segregation.⁸¹ He pointed out that because courts can resolve only specific cases, they are ill suited to sweeping social transformations that traditionally are the prerogative of the legislative branch. Thus, "[a] Court decision striking down state statutes or constitutional provisions which authorize or require segregation will not produce a social transition, nor is the judiciary the agency to which the people should look for that result."⁸² Entrusting the enforcement of a Court decision to the lower courts "does not end but begins the struggle over segregation,"⁸³ and Jackson declined to impose on local courts the difficult burden of "continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist."⁸⁴ Jackson rejected the argument that the Court must act because Congress had failed to do so: "The premise is not a sound basis for judicial action."⁸⁵

Only in the final section of the draft, captioned "The Limits and Basis of Judicial Action," did Jackson find a role for the Court to play. He refused to decide whether the courts that had earlier upheld segregation "were right or wrong in their times."⁸⁶ Instead, he relied on the dramatic changes in the condition of the Negro, together with the effects of racial assimilation and the transformation of education from a privilege for the few to a statutorily enforced right, as the basis for invalidating segregation. "It is," Jackson concluded, "neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions."⁸⁷ He remained, however, cautious about the extent of the Court's role in imposing the new order. It should shape "a reasonably [sic]

79. *Id.* at 4. Jackson makes clear that the related issue of whether the Court's decision will reduce or exacerbate racial tensions "is not my responsibility" but he does express concern that a "Pharisaic and self-righteous approach" by the Court's northern majority would as a practical matter "retard acceptance of this decision." *Id.*

80. *Id.* at 10.

81. *Id.* at 11-23.

82. *Id.* at 14.

83. *Id.*

84. *Id.* at 17.

85. *Id.*

86. *Id.* at 19.

87. *Id.* at 22.

considerate decree" that will take into account "the circumstances under which a large part of the country has grown into the existing system."⁸⁸ He concluded by calling for reargument on the nature of the appropriate decree.⁸⁹

The draft is muted and even grudging for an opinion endorsing a dramatic change in both constitutional law and human rights. Conspicuously absent are the typical moments of Jacksonian eloquence, the elegantly turned phrase or soaring conclusion. Instead, the crucial passage is written in a workmanlike but restrained manner:

I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood.⁹⁰

It is possible that with further revision the draft might have attained Jackson's usual note of conviction, but in its present form it suggests instead his continuing discomfort with the jurisprudential demands imposed by *Brown*.

Jackson's draft was never circulated to the Court, perhaps because barely two weeks after completing it he was hospitalized following a heart attack.⁹¹ Chief Justice Warren, who visited Jackson and discussed the draft with him, had been working tirelessly to secure a unanimous opinion and may also have dissuaded Jackson from attempting to complete his concurring opinion.⁹² Further dissuasion came from E. Barrett Prettyman, Jr., Rehnquist's successor and Jackson's sole clerk in the 1953 Term, who outlined his reservations about the draft in a memo to Jackson.⁹³ Prettyman objected to the organization of the draft, which spent more than twenty pages detailing Jackson's concerns about the Court's role and only two pages supporting its decision.⁹⁴ In a case like *Brown*, Prettyman urged,

88. *Id.*

89. *Id.* at 23.

90. *Id.* at 22.

91. The last of Jackson's drafts is dated March 15, 1954. An accompanying memo by Elsie Douglas, Justice Jackson's secretary, states that the draft "was not circulated to members of the Court or used in any way except in conference with C.J. Warren at Doctors Hospital, where Justice Jackson was a patient from March 30 to May 17, 1954." Additional notes by Douglas in the Jackson file indicate that "Justice Frankfurter asked to see this memo and it was read to him on June 27, 1956" and that the memo was "loaned to Justice Harlan" on June 18, 1959.

92. Jackson asked Warren to add a sentence to his opinion describing the progress of Negroes since the passage of the Fourteenth Amendment, and Warren agreed. The conversation is described in BERNARD SCHWARTZ, *SUPERCHEIF* 98 (1983). For accounts of Warren's strenuous efforts to achieve unanimity, see *id.* at 82-106; RICHARD KLUGER, *SIMPLE JUSTICE* 667-99 (1976). The added sentence reads: "Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." *Brown v. Board of Educ.*, 347 U.S. 483, 490 (1954).

93. KLUGER, *supra* note 92, at 690.

94. *Id.* at 691.

the Court's attitude "should be one of faith rather than futility," and its opinions should reflect that faith.⁹⁵ Whether the cause was Jackson's health, Warren's urging, Prettyman's critique, or some combination thereof, Jackson signed Warren's unanimous opinion for the Court without qualification, even leaving his hospital bed on the day the opinion was delivered from the bench so that the entire Court would be present.⁹⁶

Jackson's performance in the *Brown* saga reveals with unusual clarity a Justice struggling to reconcile his political and judicial visions. Privately convinced of the rightness of desegregation, Jackson worked to ground the Court's result not in his own policy preference but in the terra firma of legal doctrine. His final decision to withhold his concurrence, like his determination to join his brethren for the announcement of the opinion, reflects the resolution of a second conflict, between his natural independence of spirit and his institutional commitment to the Court. Jackson's impulse to explain his own perspective on the Court's collective result is in this instance uncharacteristically restrained in the interest of the Court's authority. Once committed to Warren's opinion, Jackson supported that commitment with his presence as well as his name.

The *Brown* case provided a different test for Rehnquist. As Jackson's law clerk he wrote a six paragraph memo for the Justice captioned "A Random Thought on the Segregation Cases" and signed "whr."⁹⁷ The memo, like Jackson's concurrence, dealt with the relationship of the legal and political aspects of the case. It began by comparing the Court's success in reviewing separation of powers issues with its notable lack of success in reviewing conflicts between the individual and the state, an area in which "it has seldom been out of hot water."⁹⁸ The memo then approved the Court's rejection of the *Lochner*⁹⁹ line of cases: "Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in

95. *Id.* Prettyman's concluding comments suggest that Jackson's candor, though admirable, might undermine the result he was endorsing:

But it seems to me in a case of this magnitude, the very attitude of the Court is important, and that attitude should be one of faith rather than futility. If segregation is no longer legal, *of course* the country will not tolerate it—that would be a much better tone in your opinion. After all, this is a great country, and its people are great, and they will not tolerate lawlessness if they are convinced it *is* real lawlessness. How can you expect them to be convinced if you are not yourself?

Id. For the view that Jackson's approach to *Brown* was in some respects preferable to Warren's, see Jeffrey D. Hockett, *Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action*, 1989 SUP. CT. HIST. SOC'Y Y.B. 52.

96. SCHWARTZ, *supra* note 92, at 102.

97. The text of the memo is included in the confirmation materials for Rehnquist's appointment as Chief Justice. See NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 624-25.

98. *Id.* at 624.

99. *Lochner v. New York*, 198 U.S. 45 (1905).

extreme cases.”¹⁰⁰ Turning to the desegregation cases before the Court, the memo accepted the position of John W. Davis, counsel for South Carolina, that the Court was “being asked to read its own sociological views into the Constitution.”¹⁰¹ Because desegregation was “quite clearly not one of those extreme cases which commands [sic] intervention,” the memo advised that there was no need for the Court to reach the substantive issue:

If this Court, because its members individually are “liberal” and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and kinds of special claims it protects. . . . To the argument made by Thurgood, not John, Marshall, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of the Court to protect minority rights of any kind—whether those of business slaveholders or Jehovah’s Witnesses—have all met with the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.¹⁰²

The most controversial section of Rehnquist’s memo is its final paragraph, which endorses *Plessy v. Ferguson*¹⁰³ and its doctrine of separate but equal:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by “liberal” colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer’s *Social Statics*, it just as surely did not enact Myrdahl’s [sic] *American Dilemma* [sic].¹⁰⁴

This memo surfaced during Rehnquist’s first confirmation hearings in 1971 and again, more prominently, at the time of his nomination as Chief Justice. In response to the attacks of his opponents, who criticized his opposition to the *Brown* decision, Rehnquist responded that the memo reflected Jackson’s views, not his own. Writing to Senator Eastland, Chairman of the Judiciary Committee, in 1971, Rehnquist insisted that the memo “was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views.”¹⁰⁵ He pointed to its informal and imperious tone, its historical and philosophical approaches, and the lack of any legal analysis as indicators that the

100. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 624.

101. *Id.*

102. *Id.* at 624-25.

103. 163 U.S. 537 (1896).

104. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 625.

105. *Id.* at 1505.

memo was “not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it.”¹⁰⁶ Rehnquist asserted that the memo’s acceptance of *Plessy* “is not an accurate statement of my own views at the time” and concluded with a carefully worded statement approving of *Brown*: “I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.”¹⁰⁷

Rehnquist’s version of events received some dubious support in the form of a telegram from Donald Cronson, his co-clerk at the time of the memo who in 1971 was working in London. According to Cronson, he had prepared an earlier memo for Justice Jackson stating that the Court should overrule *Plessy* but leave to Congress the task of desegregating the schools.¹⁰⁸ Jackson then requested a memo arguing that *Plessy* was correctly decided. Addressing Rehnquist, Cronson claimed collaboration on the second memo:

The memorandum supporting *Plessy* was typed by you, but a great deal of its content was the result of my suggestions. A number of the phrases quoted in *Newsweek* I can recognize as having been composed by me, and it is probable that the memorandum is more mine than yours.¹⁰⁹

When questioned about Cronson’s recollection, Rehnquist did not rush to embrace Cronson as his co-author, although this would have furnished a convenient rejoinder to his critics.¹¹⁰ Because Cronson remained abroad and was never questioned by the committee, there was no opportunity to probe further his account.¹¹¹

There is, however, room for considerable skepticism concerning Rehnquist’s claim that the memo reflected Jackson’s views. First, as Richard Kluger points out, it seems highly unlikely that Jackson, a remarkably eloquent speaker and confident advocate, would request from a law clerk a precis of his own position for presentation to the other Justices at conference.¹¹² With the exception of the

106. *Id.* at 1506.

107. *Id.*

108. *Id.* at 1507.

109. *Id.*

110. In response to a question from Senator Hatch at the 1986 confirmation hearing about Cronson’s account, Rehnquist said: “His statement that it embodied a lot of his views, I cannot recall at this time whether it did or not.” *Id.* at 611.

111. Noting that Cronson’s memo was captioned “A Few Expressed Prejudices on the Segregation Cases,” Kluger concludes that the two memos were most likely “invited statements of each clerk’s personal views of the case.” KLUGER, *supra* note 92, at 605. Kluger raises a number of questions concerning Cronson’s account. *Id.* at 606-07.

112. Kluger recounts the objection raised by Elsie Douglas, Jackson’s secretary, that Jackson would have no need of assistance from a law clerk in planning his remarks at conference. She termed Rehnquist’s version “incredible on its face.” *Id.* at 607. At his 1986 hearing, Rehnquist insisted that the use of the pronoun “I” in the memo indicated that it was “[o]bviously something

epigrammatic twist in the final sentence—a favorite rhetorical device of Jackson's—the breezy and assertive voice of the memo bears little relation to Jackson's own more measured style. Although Rehnquist insists in his letter that the informal tone is “not that of a subordinate submitting his own recommendations to his superior (which was the tone used by me, and I believe by the Justice's other clerks),”¹¹³ it is the tone used by Rehnquist in at least one other memo to Jackson. In his certiorari memorandum for *Terry v. Adams*,¹¹⁴ a case challenging the Jaybird system of candidate selection in Texas, Rehnquist gave Jackson a traditional account of the issues raised and the Fifth Circuit's opinion before his final recommendation:

CA 5's distinction may appeal, or it may not. I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that “Now we can show those damn southerners”, etc. I take a dim view of the pathological search for discrimination, a la Walter White, Black, Douglas, Rodell, etc, and as result I now have something of a mental block against the case. For that reason, in spite of doubts about its transcending importance in the absence of a conflict among circuits, and notwithstanding my feeling that the decision is probably right to a lawyer, rather than a crusader, I shall over-compensate and recommen [sic] a grant.¹¹⁵

In tone as well as subject matter, the *Terry* memo resembles the *Brown* memo.¹¹⁶ In the *Brown* memo, the speaker has been “excoriated by ‘liberal’ colleagues” for his support of *Plessy*, on its face a surprisingly harsh phrase for one Justice to use about other members of the Court. In the *Terry* memo, the

for him to say.” NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 633. When asked why a memo containing Jackson's views carried the title “A Random Thought on the Segregation Cases,” Rehnquist responded “I do not know, Senator.” *Id.* at 533.

113. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 1506. Mark Tushnet describes the memos by Rehnquist and Cronson as “written in a relatively informal style that tracked the way in which Jackson expressed himself, and one can see in them efforts by the clerks to turn phrases as Jackson did.” Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1910 (1991). See also MARK TUSHNET, MAKING CIVIL RIGHTS LAW 190 (1994). Tushnet characterizes the sentence referring to “Thurgood, not John, Marshall” as containing “a turn of phrase like Jackson's.” Of course, even if Rehnquist was deliberately imitating Jackson's style, he may simply have been attempting to make his own views more appealing to the Justice.

114. 345 U.S. 461 (1953).

115. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 622. According to handwritten notations on the memorandum, certiorari was granted despite Jackson's vote for denial. *Id.*

116. For a general study of Rehnquist's memoranda, see Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of his Justice's Mind?*, 76 JUDICATURE 77 (1993).

author is again embattled, this time by "several of the Rodell school of thought among the clerks" who "began screaming" about the claim of racial discrimination in the case. The informality of the style includes the curious grouping of two liberal members of the Court, Black and Douglas, with the executive secretary of the NAACP and a legal academic, Walter White and Fred Rodell, in a manner that borders on disrespect.¹¹⁷ This is scarcely the submissive tone that Rehnquist's letter claims for all memos to Justice Jackson.

The content of the *Brown* memo, as distinct from its style, also raises questions. As Kluger has persuasively argued, its substance bears little resemblance to the comments subsequently made by Jackson at conference.¹¹⁸ Further, although Jackson's draft concurrence reveals that he was troubled by the distinction between a political resolution of segregation and a judicial one, he did not reject, as the memo does, any role for the Court in protecting minority rights. The memo states that the Court has been unsuccessful in protecting the rights of all minorities, citing specifically the Jehovah's Witnesses. This would have been a surprising point for Jackson himself to make, because one of his finest hours on the Court was his authorship of the majority opinion in *West Virginia Board of Education v. Barnette*, reversing the Court's prior refusal to protect the right of Jehovah's Witness school children to refuse to salute the flag.¹¹⁹ In his later years Jackson saw a more limited role for the Court than in the Roosevelt era, but he never embraced the severely restricted role that the memo advances. There is some evidence that the position taken in the memo is much closer to Rehnquist's

117. As the executive secretary of the NAACP, Walter White was instrumental in launching its litigation campaign for civil rights. See KLUGER, *supra* note 92, at 139. He also wrote frequently on topics related to race for numerous magazines of general circulation. For an account of his career, see August Meier & Elliott Rudwick, *Walter White*, in *DICTIONARY OF AMERICAN NEGRO BIOGRAPHY* 646 (Rayford W. Logan & Michael R. Winston eds., 1982). Fred Rodell, a professor at Yale Law School with close ties to Justice Douglas, was an advocate of judicial activism and a confirmed legal realist. He wrote admiringly of Douglas and Black but was a harsh critic of Frankfurter, whose doctrine of judicial restraint Rodell attacked. See LAURA KALMAN, *LEGAL REALISM AT YALE* 147, 154-58 (1986). According to Kalman, Rodell and other Yale faculty members "not only taught their students that judicial activism existed but that liberal activism was good." *Id.* at 155. For samples of Rodell's writings on the Court, see, e.g. *Black and Douglas Affirming* and *For Every Justice, Judicial Deference is a Sometime Thing*, in *RODELL REVISITED: SELECTED WRITINGS OF FRED RODELL* 124, 138 (Loren Ghiglione et al., eds., 1994).

118. KLUGER, *supra* note 92, at 607-09. According to Kluger's reading of Justice Burton's notes,

[Jackson] thought the Court might be able to justify the abolition of segregation on political grounds, though he did not see how the Justices could claim a judicial basis for the decision. He would likely go along with such a politically framed decision provided it gave the segregating states 'reasonable time' to adjust to the ruling. But if the Court were to rule that the South had been acting illicitly all along, he would have trouble going along.

Id. at 609. For a discussion of Jackson's conference remarks, see *supra* text at note 75.

119. See KLUGER, *supra* note 92, at 607.

own views at the time it was written. At his 1986 confirmation hearing, Rehnquist equivocated when asked whether as a law clerk he believed that *Plessy* was wrongly decided, noting that "I saw factors on both sides, I think."¹²⁰ He did, however, concede that Cronson's recollection of Rehnquist vigorously defending *Plessy* at the law clerks' lunch table was accurate.¹²¹

Finally, the sense in both the *Brown* and *Terry* memos of a dangerous liberal force at work on the Court echoes another Rehnquist piece, *Who Writes the Decisions of the Supreme Court?*,¹²² written in 1957 for a news magazine. Although in his brief essay Rehnquist rejected the notion of "the law clerk as a legal Rasputin" influencing Court decisions, he did see an invidious role for law clerks in the certiorari process, where they might unconsciously slant the materials presented to their Justices.¹²³ Although he admitted that he too "was not guiltless on this score," he clearly saw the real danger coming from the clerks who shared what he called "the political philosophy now espoused by Chief Justice Earl Warren."¹²⁴ Drawing from his own time on the Court, Rehnquist considered it "fair to say that the political cast of the clerks as a group was to the 'left' of either the nation or the Court."¹²⁵ These liberal extremists, like the screaming clerks of the *Terry* memo and the excoriating liberal colleagues of the *Brown* memo, are denounced by the admittedly conservative Rehnquist as agents of improper Court activism.

On balance, then, it is hard not to agree with Richard Kluger and Bernard Schwartz that Rehnquist was expressing his own views in the *Brown* memo.¹²⁶

120. NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 447.

I thought that—putting myself back in 1952 as best I can—I thought that *Plessey* against *Ferguson* was wrong in saying that when you segregate races by law you are not depriving anybody of equal protection. I also thought that *Plessey* against *Ferguson* had been on the books for 69 years, that the same Congress that promulgated the 14th amendment had required segregated schools in the District. I saw factors on both sides, I think.

Id. at 446-47.

121. Rehnquist responded: "Again, it is hard to remember back, but I think it probably seemed to me at the time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced." *Id.* at 586.

122. *Who Writes Decisions*, *supra* note 65.

123. *Id.* at 75.

124. Rehnquist defines the "tenets" of this philosophy as: "extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business." *Id.* at 75.

125. *Id.*

126. See Schwartz, *supra* note 75, at 247. Mark Tushnet has a kinder interpretation of Rehnquist's authorship of the memorandum, suggesting that the memorandum "catches one side of Jackson's ambivalence, stating it probably more forcefully than Jackson himself would have, but only because Jackson's expression would have been constrained by his ambivalence in a way that Rehnquist's was not." Tushnet & Lezin, *supra* note 113, at 1911. See also, TUSHNET, *supra* note 113, at 190. Tushnet also proposes another explanation: "Jackson may have sent Rehnquist off to

With a seat on the Supreme Court almost in his grasp, Rehnquist may well have retreated from an uncomfortable position taken almost twenty years earlier in the only way that seemed open to him. That such a step might unfairly tarnish the reputation of Justice Jackson years after his death does not seem to have been a concern. In any event, *Brown* provides a touchstone for the careers of the two Justices, one ending and the other just beginning. For Jackson, who wrestled with the moral and jurisprudential problems posed by the case, his presence on the bench for the announcement of the Court's unanimous opinion signifies his commitment to the institutional role of the Court in doing justice. For Rehnquist, who disagreed with the Court's result, his memo and subsequent disowning of it signify a more confidently political attitude toward the work of the Court and his own membership on it.

II. TWO VOICES ON THE BENCH

A. Justice Jackson

In his thirteen years on the Supreme Court, Justice Jackson shaped a canon that defies easy categorization. He was, in Paul Freund's words, "a complex and altogether unmechanical individual,"¹²⁷ a Justice who tended to decide each case on its merits and let the inconsistencies fall where they may. This is not to suggest

write the memorandum in *Brown* as a way of dealing with Rehnquist's enthusiasm, allowing Rehnquist to believe that Jackson took his views seriously when the point of the exercise was actually merely to keep Rehnquist from bothering Jackson." Tushnet & Lezin, *supra* note 113, at 1912 n.191.

127. Paul A. Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 STAN. L. REV. 9, 24 (1955). Walter F. Murphy has called Jackson "an enigma. Brilliant, eloquent, but erratic—this has been the typical judgment on Jackson the Judge." Walter F. Murphy, *Mr. Justice Jackson, Free Speech, and the Judicial Function*, 12 VAND. L. REV. 1019 (1959). For other commentaries on Jackson's career, many written at the time of his death and consequently appreciative rather than critical, see Simon E. Sobeloff, In Memory of Mr. Justice Jackson, Proceedings in the Supreme Court of the United States, 349 U.S. xxvii (1955); GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* (1969); Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445 (1955); Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435 (1955); Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937 (1955) [hereinafter *Mr. Justice Jackson*]; Eugene C. Gerhart, *A Decade of Mr. Justice Jackson*, 28 N.Y.U. L. REV. 927 (1953); Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940 (1955); James A. Nielson, *Robert H. Jackson: The Middle Ground*, 6 LA. L. REV. 381 (1945); Glendon Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis*, 49 AMER. POL. SCI. REV. (1965); James M. Shellow, *An Analysis of Judicial Methodology: Selected Opinions of Justice Robert H. Jackson*, 45 MARQ. L. REV. 103 (1961); Dwight J. Simpson, *Robert H. Jackson and the Doctrine of Judicial Restraint*, 3 UCLA L. REV. 325 (1956); Paul A. Weidner, *Justice Jackson and the Judicial Function*, 53 MICH. L. REV. 567 (1955); Dorothy B. James, *Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas* (1966) (unpublished dissertation).

that Jackson left behind a chaotic body of opinions. There are certain clear themes which emerge with regularity. Jackson believed strongly in the separation of powers among the branches of government, with a limited role for the Court and substantial deference to the legislative and executive branches. He was a strong proponent of federalism, insisting as well on deference to the states. In the area of civil liberties, Jackson, especially after his return from Nuremberg, defended the right of the community to enforce its standards against the disruptive conduct of nonconforming individuals. Yet it was characteristic of Jackson that, on each issue, he authored opinions which came out the other way. He was never doctrinaire in his resolution of cases; the facts of each situation dictated the result, and he brought to each case a lawyer's eye for the point at which the boundaries of doctrine had been crossed.

Jackson's tendency to reexamine and refine doctrine appears in a number of cases arising from the nation's increasing concern, following the start of World War II, with security measures. In 1943 he joined, without separate comment, Chief Justice Stone's opinion for the Court in *Hirabayashi v. United States*¹²⁸ upholding a curfew for American citizens of Japanese ancestry as a valid emergency war measure. Eighteen months later, however, Jackson was one of three dissenters in *Korematsu v. United States*,¹²⁹ when the majority upheld a military order excluding those citizens from a designated military area in the West. Jackson's dissent first distinguishes between the kinds of decisions made by the military and the judiciary. For the military, "the paramount consideration is that its measures be successful, rather than legal."¹³⁰ While Jackson the pragmatist respects that standard, Jackson the jurist rejects it as in any way binding on the Court. Because "[i]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal," the Court cannot evaluate them on their own terms.¹³¹ The Court's standard is not success but constitutionality, and its willingness to accept blindly such military imperatives would, in Jackson's view, be "a far more subtle blow to liberty than the promulgation of the order itself."¹³²

Having established how high the stakes are, Jackson then turns to the jurisprudential issue the case presents. Quoting Cardozo for "the tendency of a principle to expand itself to the limit of its logic,"¹³³ Jackson dismisses the majority's reliance on *Hirabayashi* as authority for upholding the exclusion order. Stone's opinion was carefully crafted to limit its result to the curfew at issue in the earlier case; for Jackson, the "mild and temporary deprivation of liberty" in *Hirabayashi* could not furnish authority for the much broader deprivation imposed by the order in *Korematsu*.¹³⁴ There are two characteristic strains at work in

128. 320 U.S. 81, 92 (1943).

129. 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

130. *Id.* at 244.

131. *Id.* at 245.

132. *Id.* at 245-46.

133. *Id.* at 246.

134. *Id.* at 247.

Jackson's dissent. First, he is at pains to distinguish the Court's role from that of another government entity and to assert judicial independence. Second, he is more comfortable engaging in the delicate art of linedrawing than accepting the cruder and easier distinction offered by *stare decisis*. The case ultimately hinges on its facts—the nature of the deprivation under this military order—rather than on any abstract notion of national security.

Another variation on this theme appears in a later pair of cases concerning national security issues, *Dennis v. United States*¹³⁵ and *American Communications Association v. Douds*;¹³⁶ both cases involved the rights of Communists, and both were decided in the spring of 1950. In *Dennis*, the Court upheld the conviction for contempt of Congress of the General Secretary of the Communist Party over the claim that a jury containing government employees was not impartial under the Sixth Amendment.¹³⁷ Jackson concurred in the result, bound by the Court's earlier decision in *Frazier v. United States*¹³⁸ upholding the constitutionality of a jury composed entirely of government employees.¹³⁹ Despite his dissent in *Frazier*, Jackson voted to uphold the conviction. To do otherwise, he noted, would be to enact "a partial repeal—for Communists only."¹⁴⁰ Jackson ends his concurring opinion by placing the concern about Communists in perspective. They are, he notes, "the current phobia in Washington," but other groups have occupied that position in the past and been tried for various offenses;¹⁴¹ there is no basis in law for exempting Communists from the *Frazier* rule. The point is made with a typical Jackson flourish: "But so long as accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists."¹⁴²

Jackson's insouciance about "the current phobia" should not be read to signal a broader complacency about the Communist threat. In *Douds*, his lengthy separate opinion outlined with great care the arguments supporting Congress' conclusion that "the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."¹⁴³ In light of that evidence, Jackson had no difficulty joining with the majority to uphold the constitutionality of a federal statute requiring union officials to sign affidavits disclosing membership in the Communist Party. Jackson balked, however, at joining the second prong of the Court's opinion, which upheld as well the statutory requirement of an oath by union officials that they did not believe in the forceful overthrow of the United

135. 339 U.S. 162 (1950).

136. 339 U.S. 382 (1950).

137. *Dennis*, 339 U.S. at 172.

138. 335 U.S. 497 (1948) (Jackson, J., dissenting).

139. *Dennis*, 339 U.S. at 174 (Jackson, J., concurring).

140. *Id.*

141. *Id.* at 175.

142. *Id.*

143. *American Communications Ass'n v. Douds*, 339 U.S. 382, 424 (1950) (Jackson, J., concurring and dissenting).

States government. The distinction between action and thought, however distasteful the latter, was crucial to Jackson, who rejected the power of the government to constrain belief disconnected from any overt act.¹⁴⁴ More interestingly, Jackson linked the Communist goal with the sacred history of America's origins, reminding the Court that "we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified."¹⁴⁵ His own political rejection of Communism was for Jackson readily separable from his judicial rejection of government censorship. The point is made with another of Jackson's characteristic inversions: "It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."¹⁴⁶ Once again, Jackson drew a line between appropriate and intrusive extensions of established doctrine.

In these and other opinions Jackson displayed what Paul Freund aptly described as "a dialectical mind—recognizing principles in collision."¹⁴⁷ Writing on issues of individual rights, Jackson frequently identified a collision of two principles he valued highly, liberty and order. He most often struck his balance in favor of order, but it was never without according due respect and serious consideration to the claims of liberty. In several cases Jackson sided with communities affronted by intrusive individuals—Jehovah's Witnesses ringing doorbells,¹⁴⁸ sending a child to sell religious literature to passersby in the streets,¹⁴⁹ or using a loudspeaker to voice religious beliefs,¹⁵⁰ or a hatemongering speaker at a political rally¹⁵¹—though only after weighing "the realities of life in those communities"¹⁵² from a pragmatic perspective. Both his years in Jamestown and his experiences at the Nuremberg trials gave Jackson a powerful appreciation for the right of a community to protect its local interests without interference from the courts.¹⁵³

Yet in one of his most celebrated opinions, *West Virginia State Board of Education v. Barnette*,¹⁵⁴ Jackson struck the balance strongly in favor of liberty by invalidating a resolution requiring Jehovah's Witness schoolchildren to salute the American flag. The elements of his opinion echo the familiar strains of his jurisprudence. First, Jackson defines the conflict in *Barnette* as one between government authority and individual rights; he carefully notes that the right

144. *Id.* at 437.

145. *Id.* at 439.

146. *Id.* at 442-43.

147. Paul A. Freund, *Mr. Justice Jackson and Individual Rights*, in MR. JUSTICE JACKSON, *supra* note 6, at 36.

148. *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring).

149. *Prince v. Massachusetts*, 321 U.S. 158, 176 (1944) (Jackson, J., concurring).

150. *Saia v. New York*, 334 U.S. 558, 566 (1948) (Jackson, J., dissenting).

151. *Terminiello v. Chicago*, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

152. *Douglas*, 319 U.S. at 174.

153. *See, e.g., Saia*, 334 U.S. at 571-72.

154. 319 U.S. 624 (1943).

claimed by the children “does not bring them into collision with rights asserted by any other individual”¹⁵⁵ and thus avoids further complexity. Second, as in *Douds*, the government is compelling the children to make “affirmation of a belief and an attitude of mind,”¹⁵⁶ this time in the interest of national unity. However admirable the goal, especially in the midst of war, Jackson has little patience for governmental coercion toward conformity. His eloquent conclusion cannot be improved by paraphrase: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁵⁷ The rights of the community vindicated in other First Amendment cases here fall before what was for Jackson one of the dominant principles of the Constitution, the individual’s right to freedom of thought and belief.¹⁵⁸

In all of these opinions, Jackson resolves a dialectical tension between rights claimed by an individual under the Constitution and those claimed by the government as an expression of the community’s political choice. This tension between law and politics emerged in a different guise when Jackson faced disputes between branches of the federal government over the limits of executive power. As a former member of Roosevelt’s inner circle of advisers, Jackson was no stranger to the imperatives of the presidential will. As Justice, however, Jackson gave the executive branch no more than its due when he resolved collisions with other branches of government. Writing for the Court to deny judicial review of administrative orders that were subject to presidential approval, Jackson offered a strong but reasoned defense of executive prerogatives.¹⁵⁹ After noting that the President has access to intelligence sources not properly available to others, Jackson defended the political nature of the decisions at issue, grants of permits for air transportation routes abroad:

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people

155. *Id.* at 630.

156. *Id.* at 633.

157. *Id.* at 642.

158. Jackson believed that the strongest protection was owed to individuals rather than to groups. Noting that the Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), had granted administrative hearings to groups designated subversive by the Attorney General but not to individual government employees discharged for membership in those organizations, Jackson commented: “So far as I recall, this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think this is an inverted view of the law—it is justice turned bottom-side up.” *Id.* at 186 (Jackson, J., concurring).

159. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹⁶⁰

Jackson's argument is based not on the inherent power of the executive branch but on the foreign policy implications of the orders and their political consequences. His opinion links together the two political branches, with their direct ties to the people, in opposition to the judicial branch, which lacks both competence and accountability. The four dissenters, in an opinion authored by Justice Douglas, agreed with the majority that the presidential decisions should not be subject to review by the courts;¹⁶¹ they disagreed only as to the propriety of judicial review for orders issued directly by the Civil Aeronautics Board.¹⁶² Jackson's view, therefore, represents the consensus of the Court that the President enjoys substantial discretion in matters of foreign relations.

Jackson revisited the issue of presidential power in *Youngstown Sheet & Tube Co. v. Sawyer*, where his concurrence overshadowed Justice Black's more circumscribed opinion for the Court that ruled President Truman's seizure of the nation's steel mills to be invalid as an unauthorized act of presidential lawmaking.¹⁶³ For Jackson, the issue of presidential power was less easily resolved, perhaps because he self-consciously brought to it his own experience in the executive branch. Rejecting subterfuge, Jackson opened his concurrence with a candid acknowledgment of his past service to Roosevelt and its influence on his present perspective: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."¹⁶⁴ Jackson's service included advising President Roosevelt in June 1941 that seizure of the North American Aviation plant by the government was permissible when an unauthorized strike threatened production. The text of Jackson's statement on North American Aviation reads like a summary of the government's argument in *Youngstown*. Jackson relied first on the constitutional injunction to the President "to take care that the laws be faithfully executed,"

160. *Id.* at 111.

161. *Id.* at 115.

162. *Id.* at 115-16.

163. 343 U.S. 579, 587 (1952).

164. *Id.* at 634 (Jackson, J., concurring). For another example of Jackson's candor in this regard, see *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J., concurring), where Jackson acknowledged that because his position in the case was "contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation." *Id.* His explanation took the form of a critique of his own prior view, which he termed "as foggy as the statute the Attorney General was asked to interpret." *Id.* The opinion is often cited for Jackson's urbane apologia for his prior error, which ended with the following plea: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all." *Id.* at 178. For Rehnquist's citations to this passage, see *infra* note 270.

supported by "the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws."¹⁶⁵ The second source of authority came from the constitutional designation of the President as commander-in-chief, with concomitant powers "placed in his sole command" to ensure "the continued existence of the Nation."¹⁶⁶ After describing the threat created by Communist inspired labor agitation at the plant, Jackson's statement concluded by blending the President's inherent powers into authority sufficient to support the plant seizure: "There can be no doubt that the duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense effort of the United States a going concern."¹⁶⁷ For the presidential adviser, then, the bare constitutional language is transformed, principally by the force of assertion, into a moral mandate to take any steps necessary for the survival of the nation.

When Jackson approached the seizure issue over a decade later as a Justice, the result was a considerably more skeptical account of presidential power. Jackson understood the government's reliance on the North American Aviation seizure as precedent and took pains to distinguish the two episodes on their facts, both at oral argument and in his opinion.¹⁶⁸ When Solicitor General Perlman told Jackson in court that the government did "lay a lot of it at your door,"¹⁶⁹ Jackson was candid in his response. "I claimed everything, of course, like every other Attorney General does," he conceded; "[i]t was a custom that did not leave the Department of Justice when I did."¹⁷⁰ Writing from the bench, however, Jackson was careful to separate the enthusiasm of advocacy from the sober analysis of jurisprudence. He observed that "I do not regard [North American Aviation] as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy."¹⁷¹

In his concurrence Jackson systematically demolished the argument he had made as Attorney General on behalf of the President. The constitutional language vesting executive power in the President was not a grant of power but only "an

165. 89 Cong. Rec. 3992 (May 5, 1943).

166. *Id.*

167. *Id.*

168. Jackson noted that North American Aviation was under contract to the United States government; that Congress had expressly authorized seizure of plants that "refused to comply with Government orders;" that the owners of the plant had acquiesced in the seizure; that labor leaders approved of the seizure because the strike was in violation of collective bargaining agreements; and that the strike was "described as in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 n.17 (1952). In contrast, the steel plant seizure was "only a loyal, lawful, but regrettable economic disagreement between management and labor" involving no government property. *Id.* See also MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* 172 (1977).

169. MARCUS, *supra* note 168, at 172.

170. *Id.*

171. *Youngstown Sheet & Tube Co.*, 343 U.S. at 649 n.17.

allocation to the presidential office of the generic powers thereafter stated."¹⁷² Otherwise, there would have been no need for the Framers to describe specific executive powers. The President's role as commander-in-chief should not be read to usurp Congress' constitutional power to declare war or to provide military forces.¹⁷³ Such an expansion of the President's military role to control civilian matters would carry the gravest danger: "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."¹⁷⁴ Finally, the constitutional language authorizing the President to "take Care that the Laws be faithfully executed" must be balanced against the protections of the Due Process Clause in a government of laws.¹⁷⁵

Jackson was equally severe with the broader argument that the President's inherent powers increase through the conduct of prior administrations, particularly in cases of national emergency. Again, Jackson distinguished the political impulse to claim sweeping presidential power from the judicial response:

The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.¹⁷⁶

Jackson relied on the text of the Constitution, which provides for emergency powers only with regard to the suspension of habeas corpus, as a full response to the government's argument, although he noted that the experience of other nations suggested that wisdom as well as constitutional analysis supported the Court's result.¹⁷⁷

Jackson's concurrence is generally valued less for its critique of the government's position than for its own formulation, which reflects Jackson's executive branch experience in its pragmatic assessment of presidential power.¹⁷⁸ That experience, he reflected, was probably "a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."¹⁷⁹ In his celebrated scheme, Jackson divided presidential acts into three categories: those performed with congressional authorization, those performed in the absence of congressional authorization, and

172. *Id.* at 641.

173. *Id.* at 642-44.

174. *Id.* at 646.

175. *Id.*

176. *Id.* at 647.

177. *Id.* at 650-51.

178. *See, e.g.,* MARCUS, *supra* note 168, at 205-06.

179. *Youngstown Sheet & Tube Co.*, 343 U.S. at 634.

those performed in opposition to the express will of Congress.¹⁸⁰ Although he found that the seizure of the steel mills fell into the third category and thus was clearly invalid, Jackson was most interested in the second category, his “zone of twilight,” where presidential and congressional power may overlap.¹⁸¹ It is here, in Jackson’s view, that questions of power are likely to be resolved by “the imperatives of events and contemporary imponderables rather than on abstract theories of law.”¹⁸² In such situations, the President has a strong advantage, bringing to the contest his singular status as the most prominent figure in government and the additional weight that comes from his role as leader of his political party.¹⁸³ The Court, then, should not further distort the constitutional balance by acting “further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.”¹⁸⁴ Although Jackson had no confidence that Court doctrine could keep power in the hands of an acquiescent Congress, neither was he willing to have the Court assist in the unauthorized transfer of power from the legislative to the executive branch.

The *Youngstown Sheet & Tube Co.* concurrence is the perfect fusion of the two strains in Jackson’s jurisprudence. The pragmatic Jackson, schooled in the politics of the Roosevelt administration, understood the opportunities for enhancement of executive power that the flexibility of the constitutional scheme offers. At the same time, the doctrinal Jackson, schooled as well in the complexities of the Constitution, understood the delicate balance among the branches that the Framers intended. Although Jackson at his most judicial writes that to preserve freedom it is necessary “that the Executive be under the law, and that the law be made by parliamentary deliberations,”¹⁸⁵ the opinion does not end with this noble exhortation. There is a brief coda that puts in perspective both the seriousness of the issue before the Court and its own role in the constitutional design: “Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”¹⁸⁶

B. Chief Justice William Rehnquist

If Justice Jackson had a dialectical cast of mind, then Chief Justice Rehnquist might aptly be described as a monist, someone for whom a single principle controls and resolves a controversy.¹⁸⁷ Nowhere in Rehnquist’s jurisprudence do we see him torn between conflicting beliefs and obligations as Jackson was in

180. *Id.* at 635-38.

181. *Id.* at 637.

182. *Id.*

183. *Id.* at 653-54.

184. *Id.* at 654.

185. *Id.* at 655.

186. *Id.*

187. The *New Shorter Oxford English Dictionary* defines “monism” as “[a] theory or system of thought which recognizes a single ultimate principle, being, force, etc., rather than more than one.” 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1814 (1993).

Brown and Youngstown Sheet & Tube Co. The hallmark of Rehnquist's opinions is their air of certainty, their conviction that the result he endorses is not only correct but inevitable. Other Justices have at times expressed publicly their private anguish at finding that their judicial principles compel a result at variance with their personal convictions: Justice Frankfurter voting to uphold the school board's right to compel the children's flag salute in *West Virginia State Board of Education v. Barnette* despite his membership in "the most vilified and persecuted minority in history,"¹⁸⁸ or Justice Kennedy voting to strike down as unconstitutional a state flag burning statute despite his "keen sense that this case, like others before us from time to time, exacts its personal toll."¹⁸⁹ Rehnquist's opinions are unmarked by such inner tensions. His disquietude is instead directed toward the perversity of his colleagues who reject his carefully considered conclusions.

One consequence of Rehnquist's monism is the predictability of his votes. Mark Tushnet has offered one explanation for this, speculating that "[o]ne could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party."¹⁹⁰ Other Rehnquist scholars have attributed his

188. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting). Frankfurter's solitary dissent sharply delineated the conflict between his personal and judicial beliefs:

Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

Id. at 646-47.

189. *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Kennedy made plain his "distaste" for the result he endorsed:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Id.

190. Mark Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990). Tushnet notes that he does not "mean the reduction of constitutional adjudication to party politics as a criticism of the Chief Justice, for much the same could be said of almost all of his colleagues, with the obvious changes in reference to the platform of the other party in the appropriate cases." *Id.* See also Nicholas S. Zeppos, *Chief Justice Rehnquist, The Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L. J. 679, 679 (1994) (noting that "[a]s much as any other recent or sitting Justice, Chief Justice Rehnquist's votes line up with what are generally considered his policy preferences").

consistency to a core of governing principles that are applied with regularity. In a seminal article that reviewed Rehnquist's first four Terms on the Court, David Shapiro identified three such principles: resolution of conflicts between an individual and the government in favor of the government; resolution of conflicts between state and federal authority in favor of the state; and resolution of questions of federal jurisdiction against the exercise of that jurisdiction.¹⁹¹ Although subsequent scholars have defined these governing principles in slightly different ways,¹⁹² the point has been made with Rehnquistian regularity that the body of Rehnquist's opinions holds few surprises for the experienced reader of his work. In this regard he is again in sharp contrast to Jackson, whose jurisprudential principles, although readily identifiable, were no guarantee of the result in any particular case.

For a dialectical mind like Jackson's, the method for deciding a difficult case involves the comparison of competing positions and their resolution, often by an accommodation, as in *Youngstown Sheet & Tube Co.*, or by a careful act of linedrawing, as in *Korematsu*. For a monistic mind like Rehnquist's, there is no dialogue of plausible but competing views, because only a single principle is acknowledged as relevant and valid. Instead, Rehnquist tends to organize his

191. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976). Shapiro argues that Rehnquist's "unyielding insistence on a particular result" has taken its toll in a flawed jurisprudence, "contribut[ing] to a wide discrepancy between theory and practice in matters of constitutional interpretation, to unwarranted relinquishment of federal responsibilities and deference to state law and institutions, to tacit abandonment of evolving protections of liberty and property, sacrifice of craftsmanship, and to distortion of precedent." *Id.* at 299.

192. For later identifications and analyses of the principles governing Rehnquist's jurisprudence, see, e.g., SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 24-28 (1989) (a democratic model based on majority rule; moral relativism; and a fixed textual meaning for the Constitution); Thomas Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 VT. L. REV. 1, 12 (1983) (the fostering of states' rights); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L. J. 621, 624 (1994) (pluralist political theory); Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555, 567 (1983) (the Constitution as a governmental charter imposing federalism; majority rule; and the Framers' intent as a restraint on the exercise of judicial review); David W. Rohde & Harold J. Spaeth, *Ideology, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 JUDICATURE 247, 250 (1989) (no shift in views upon becoming Chief Justice). For general studies of Rehnquist's jurisprudence, see, e.g., Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L. J. 557 (1994); Jonathan R. Macey, *Chief Justice Rehnquist, Interest Group Theory, and the Founders' Design*, 25 RUTGERS L. J. 577 (1994); Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L. J. 669 (1994); Nancy Maveety, *The Populist of the Adversary Society: The Jurisprudence of Justice Rehnquist*, 13 J. CONTEMP. L. 221 (1987); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L. J. 1317 (1982). For analyses of Rehnquist's methodology, see John Denvir, *Judging Justices: Rehnquist, Brennan, and the Question of Judicial Method*, 22 TOLEDO L. REV. 757 (1991); Mark C. Rahdert, *William Rehnquist's Judicial Craft: A Case Study*, 60 TEMP. L. Q. 841 (1987).

opinions thematically, assembling a cluster of responses that radiate from the controlling principle, usually at a high level of abstraction. Jackson's opinions typically concern themselves with the specific facts of a case, because those facts may determine where a line is to be drawn. Rehnquist's opinions, however, typically show little interest in the facts, because a case is more likely to be viewed as illustrative of a broader problem than as significant for its particularity.

One of Rehnquist's preferred themes is history. He has quoted with appreciation Justice Holmes' observation that "'a page of history is worth a volume of logic,'"¹⁹³ and a number of his opinions are propelled by elaborate descriptions of historical events. These accounts are not merely preliminary to a discussion of doctrine; they are, in Rehnquist's hands, themselves a source of doctrine, because in matters of statutory and constitutional interpretation he views what happened in the past as an irrefutable determinant of present cases. In *Leo Sheep Co. v. United States*,¹⁹⁴ for example, Rehnquist wrote for a unanimous Court to reject the government's claim of an implied easement over land granted to the Union Pacific Railroad by an 1862 statute. Although the decision purports to rest principally on the absence of any reservation of rights in the statute, almost one-half of the opinion is devoted to an account of the opening of the American West by government strategies to encourage the completion of a transcontinental railroad.¹⁹⁵ Rehnquist introduces this narrative as a valuable means of understanding a statute by understanding "'the history of the times when it was passed,'"¹⁹⁶ but it is clear that for him the narrative possesses an independent value as well. Whatever the text of the statute may say, the subtext of this decision is that in granting land in exchange for the building of the railroad, the government has reaped the benefit of its bargain and should not now be permitted to offer technical legal theories to claim an additional advantage. It is not irrelevant that a government victory would come at the expense of private landowners, but Rehnquist treads lightly on that theme.¹⁹⁷ Instead, he allows the sweep of history to argue the landowners' case.

Rehnquist's dissent in *Texas v. Johnson*,¹⁹⁸ the Court's first flag burning case, offers a variant of this method. The first section of his opinion catalogues the appearances of the flag in American history, starting with the Revolutionary War and including sixty lines of "Barbara Frietchie" by John Greenleaf Whittier.¹⁹⁹ When Rehnquist reaches his First Amendment argument, that flag burning is not a form of expression, he spends little time supporting his assertion that "flag

193. *Texas v. Johnson*, 491 U.S. 397, 421-22 (1989) (Rehnquist, C.J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

194. 440 U.S. 668 (1979).

195. *Id.* at 670-77.

196. *Id.* at 669 (quoting *United States v. Union Pacific R. Co.*, 91 U.S. 72, 79 (1875)).

197. At the end of the opinion, Rehnquist notes "the special need for certainty and predictability where land titles are concerned" and the fact that a government easement would provide "public thoroughfares without compensation." *Id.* at 687-88.

198. *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting).

199. *Id.* at 422-28.

burning is the equivalent of an inarticulate grunt or roar."²⁰⁰ He describes the facts surrounding the flag burning only briefly, quoting the slogans chanted by Johnson but devoting only a single sentence to his political message, a protest against nuclear weapons.²⁰¹ Instead, he lets the earlier account of the privileged position accorded the flag over two hundred years refute the Court's contrary decision and support the hyperbole of his own conclusion that "[u]ncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted."²⁰² In methodology, *Johnson* reads in some respects like a parody of *Leo Sheep Co.*, because the historical and literary materials Rehnquist selects have a random quality that is dizzying rather than compelling. Both opinions, however, show Rehnquist using such extralegal materials to advance by indirection a unitary thesis and to foster a sense of inevitability for his conclusion.

Rehnquist's use of history is most frequent in the context of constitutional interpretation, where he has consistently argued that the Constitution must be read according to the intention of its Framers.²⁰³ His dissent in *Wallace v. Jaffree*, a case in which the Court struck down under the Establishment Clause an Alabama statute authorizing a moment of silence in public schools,²⁰⁴ is a remarkably pure use of history as the basis for his position. At no point in his opinion does Rehnquist refute the majority's view that the statute at issue failed the *Lemon* test because it "had *no* secular purpose."²⁰⁵ Instead, Rehnquist selects as his focus what he sees as the Court's longstanding but erroneous reliance on Jefferson's metaphor of the wall of separation between church and state. For sixteen pages Rehnquist describes the drafting of the First Amendment, the passage of the Northwest Ordinance, presidential Thanksgiving proclamations, public funds for religious schools, and the works of nineteenth century legal scholars to support his position that Madison rather than Jefferson is the proper authority to follow and

200. *Id.* at 432.

201. *Id.* at 431. Rehnquist notes only that Johnson "engaged in a 'die-in' to protest nuclear weapons." *Id.* Justice Brennan's majority opinion opens with a more elaborate account of the episode and of Johnson's message: "As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations." *Id.* at 399.

202. *Id.* at 435.

203. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (Rehnquist, C.J., dissenting) ("the statute's purpose of protecting societal order and morality is clear from its text and history"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988) ("From the viewpoint of history it is clear that our political discourse would have been considerably poorer without [political cartoons.]"); *Furman v. Georgia*, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting) ("The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury v. Madison*, 1 Cranch 137 (1803)."). For a strong critique of Rehnquist's use of constitutional history to support his view of federalism, see Powell, *supra* note 192.

204. 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

205. *Id.* at 56.

that Madison's view endorsed prayer within the constitutional framework.²⁰⁶ The final six pages of the opinion attack the usefulness of the *Lemon* test,²⁰⁷ there is only a brief mention, in the opinion's final paragraphs, of the Court's position.²⁰⁸ The dissent contains a substantive position, that Jefferson's wall of separation metaphor is an inaccurate basis for interpreting the Establishment Clause, argued in a manner that renders the specific content of the Alabama statute irrelevant. Even that abstraction, however, is eclipsed by the organizing theme of the opinion: "The true meaning of the Establishment Clause can only be seen in its history."²⁰⁹ If the facts of the case are subordinated to the vanquishing of Jefferson's metaphor, that battle in turn is subordinated to Rehnquist's powerful and recurrent reliance on history as an answer to doctrine.

Rehnquist's tendency to write constitutional opinions at a high level of abstraction allows him to rely less on specific constitutional text than on what he calls "the logic of the constitutional plan."²¹⁰ In a dissent based on his view of federalism, Rehnquist criticized the Court's "literalism" in relying on the text of Article III and the Eleventh Amendment to find no immunity to suit against one state in the court of another state.²¹¹ In another federalism dissent, he identified the source of Ohio's right to be beyond the reach of the Economic Stabilization Act of 1970 as "an affirmative constitutional right, inherent in its capacity as a State,"²¹² that defeats legislation enacted under the Commerce Clause. Writing for the Court in a short-lived moment of victory on this issue, Rehnquist explained Congress' inability to impose wage and hour restrictions on states as employers in similarly abstract terms: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."²¹³ Only in his majority opinion does Rehnquist attempt to flesh out this vague constitutional right through a discussion of the financial consequences to the states of federal guidelines on wages and hours.²¹⁴ The effort is less than persuasive, because he concedes that Congress may regulate to "combat a national emergency"²¹⁵ but offers no test to measure which operations are "integral" and which situations are emergencies.

Rehnquist's reluctance to formulate tests or to draw lines is an offshoot of his preference for abstract organizing principles. Writing in dissent in *Trimble v.*

206. *Id.* at 91-106.

207. *Id.* at 108-12.

208. "The Court strikes down the Alabama statute because the State wished to 'characterize prayer as a favored practice.'" *Id.* at 113.

209. *Id.*

210. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

211. *Id.* at 439.

212. *Fry v. United States*, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting).

213. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (Rehnquist, J., dissenting).

214. *Usery*, 426 U.S. at 846-51.

215. *Id.* at 853.

Gordon about the Equal Protection Clause as “one of the majestic generalities of the Constitution,”²¹⁶ he offers an interpretation that has become one of the hallmarks of his jurisprudence, his view that the Fourteenth Amendment was intended by the Framers to apply only to classifications based on race or national origin.²¹⁷ Rehnquist finds a virtue in his interpretation quite apart from its historical accuracy²¹⁸—its avoidance of any occasion for drawing difficult distinctions. The Court, he argues, has been placed “in the position of Adam in the Garden of Eden”²¹⁹ and has succumbed to the temptation to respond to state legislation according to the Justices’ own preferences. Rehnquist’s description of the Court’s conduct, framed as a mixed metaphor, treats the result as a pathology. The Court’s decisions “have . . . produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o’-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass ‘arbitrary,’ ‘illogical,’ or ‘unreasonable’ laws.”²²⁰ Rehnquist views his own approach, informed by a “central guiding principle”²²¹ derived from the Framers, as providing both truth and certainty.

The note of certainty is characteristic of Rehnquist’s opinions. On those occasions when a line must be drawn, he has little difficulty in drawing it. In *Fry*, for example, where he recognizes that his distinction between traditional and non-traditional state activities “would undoubtedly present gray areas to be marked out on a case-by-case basis,” he finds the federal statute at issue to be “clearly on the forbidden side of that line.”²²² Insisting on a literal reading of a statute that awarded the plaintiff a recovery far in excess of his actual monetary harm, Rehnquist in *Griffin v. Oceanic Contractors, Inc.*²²³ acknowledges that in some instances such literalism might conflict with the intent of the drafters. The case before the Court, however, was “not the exceptional case.”²²⁴

Rehnquist also tends to brush aside with the same assurance the practical difficulties that may accompany his resolutions. In two First Amendment cases that involved the issue of a party’s right to receive information, he proffered alternate access to that information as a simple solution. Thus, a consumer prevented by a state statute from learning a pharmacy’s price for prescription drugs through advertisements was not prevented “from receiving this information

216. *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

217. *Id.*

218. Race and national origin are “the area of the law in which the Framers obviously meant it to apply.” *Id.*

219. *Id.* at 779.

220. *Id.* at 777.

221. *Id.*

222. *Fry v. United States*, 421 U.S. 542, 558 (1975). Writing about another Rehnquist opinion, Rahdert has identified “an aura of ineluctability [sic] that is a hallmark of effective judicial technique,” although he subsequently finds as well “an occasional ‘darkness’ . . . that can perhaps be described as the confusion of craftiness with craft.” Rahdert, *supra* note 192, at 858, 879.

223. 458 U.S. 564 (1982).

224. *Id.* at 571.

either in person or by phone."²²⁵ And a student prevented from finding a book in a school library because the Board of Education had withdrawn it as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy"²²⁶ could obtain the book elsewhere: "The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend."²²⁷ These solutions are unexamined for potential drawbacks such as financial or transportation problems. They are confidently presented as an effective rejoinder to the First Amendment objections of his adversaries.

The note of certainty was present as well when Rehnquist confronted a challenge to his participation in a case that arose during his tenure in the Justice Department. The case, *Laird v. Tatum*,²²⁸ was a suit by opponents of the Vietnam War claiming that a program of military surveillance of political protest groups had a chilling effect on their First Amendment rights. After the Court ruled that the suit failed to raise a justiciable controversy,²²⁹ the petitioners filed a motion, specifically directed to Rehnquist, asking him to recuse himself *nunc pro tunc* because as a government attorney he had testified before a Senate committee against the propriety of the suit, had acquired "intimate knowledge of the evidence," and had spoken publicly about the issues raised by the case.²³⁰

225. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 782 (1976) (Rehnquist, J., dissenting).

226. *Board of Educ. v. Pico*, 457 U.S. 853, 857 (1982).

227. *Id.* at 915 (Rehnquist, J., dissenting).

228. 408 U.S. 1 (1972).

229. *Id.* at 14-15.

230. *Laird v. Tatum*, 409 U.S. 824, 825 (1972). Testifying as an assistant attorney general before the Senate Subcommittee on Constitutional Rights chaired by Senator Ervin, Rehnquist had responded to Ervin's question concerning the right of the military to conduct surveillance of civilians exercising their First Amendment rights by insisting that no action would lie:

My only point of disagreement with you is to say whether as in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

NOMINATIONS OF SUPREME COURT JUSTICES, *supra* note 42, at 534-44. Referring to this statement denying the justiciability of the plaintiffs' case, Senator Kennedy accused Rehnquist of using his position on the Court to secure a political result by judicial means. In response, Rehnquist insisted that his decision to sit on the case was a judicial act and "I ought not to be called upon somewhere else to justify this." *Id.* at 541-42. For a detailed account of this episode and a strong critique of Rehnquist's conduct, see JOHN P. MCKENZIE, *THE APPEARANCE OF JUSTICE* 207-23 (1974). McKenzie concludes that although some ethical problems confronting Supreme Court Justices may be subtle, "there was nothing subtle about the *Tatum* case and Justice Rehnquist's relationship to it. Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights." *Id.* at 222. See also Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *BROOK. L. REV.* 589 (1987); Warren Weaver, Jr., *Mr. Justice Rehnquist, dissenting*, *N.Y. TIMES MAG.*, October 13, 1974, at 98-

Rehnquist took the apparently unprecedented step of appending to his denial of the motion a memorandum of fifteen pages in which he strongly rejected the petitioners' argument that his presence violated both the federal recusal statute and the American Bar Association's Standards of Judicial Conduct.²³¹

In Rehnquist's view, neither his conduct nor his public statements warranted recusal because his Justice Department role was limited to matters of law (his reading of the legal validity of the petitioners' position) rather than direct political action (participation in the litigation itself).²³² The line between law and politics was thus a simple one to locate. Not surprisingly, Rehnquist drew historical support from instances of past Justices, including Jackson, who had heard cases raising issues of which they had prior experience as government attorneys, academics, or judges of other courts, though none of these precedents was comparable to Rehnquist's involvement on behalf of the Nixon administration in *Laird*.²³³ Unlike Jackson, who in *Youngstown Sheet & Tube Co.* had sharply distinguished his role as advocate for the executive branch from that of Supreme Court Justice, Rehnquist transformed the issue into an argument for continuity between a Justice's jurisprudential views before joining the Court and subsequent decisionmaking. Evading the factual elements of the challenge raised against him in favor of a more abstract perspective, Rehnquist concluded that "proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."²³⁴ The point is well taken, but it fails to address the issues in *Laird*, where the complaint is not that a Justice had developed a pre-appointment First Amendment jurisprudence, but rather that specific political activities in the executive branch may preclude neutral judicial resolution of a particular case.

Many of these strands in Rehnquist's jurisprudence come together in one of his best known opinions, his strong dissent in *United Steelworkers of America v. Weber*²³⁵ from the Court's approval of a voluntary affirmative action training program under Title VII of the Civil Rights Act of 1964. Rehnquist, like most Justices, finds his most distinctive voice in dissent, and the fact that in *Weber* he is responding to a majority opinion by Justice Brennan, for many years his opposite number on the Court, seems to sharpen his focus. The dissent opens with a sustained allusion to George Orwell's *Nineteen Eighty-four*.²³⁶ The Court's interpretation of Title VII to permit affirmative action is, Rehnquist asserts,

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231. Rehnquist opened his memorandum by noting that "neither the Court nor any Justice individually appears to have" filed a written response to a motion to recuse in the past. *Laird*, 409 U.S. at 824.

232. *Id.* at 828-29.

233. *Id.* at 831-36. Rehnquist referred to both Jackson's criticism of Black's presence in *Jewell Ridge* and Jackson's own decision to participate in *McGrath v. Kristensen*, a case raising an issue which Jackson had decided, though in the opposite way, as Attorney General. *Id.* at 831-32.

234. *Id.* at 835.

235. 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).

236. *Id.*

comparable to the unacknowledged shift in policy that the government of Oceania accomplishes in the middle of a speech which opens by denouncing one enemy and ends by denouncing another: “[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.”²³⁷ He faults the majority not merely for its inconsistency; the shift, Rehnquist insists, is motivated by the majority’s own policy preference. Thus, “the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions.”²³⁸ By invoking *Nineteen Eighty-four* Rehnquist accuses the Court of sinister motives, the willful substitution of its own views for those of Congress in order to hoodwink the nation and achieve a political result. This is more than a critique of Brennan’s methodology; it is an assault on the majority’s judicial integrity.

From this aggressive opening Rehnquist goes on to offer a more conventional critique as well. As in statutory cases like *Griffin*, Rehnquist argues that Title VII must be read literally, in this case to preclude any preference based on race. He mocks Brennan’s appeal to the “spirit” of the statute by accusing the Court of “a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini.”²³⁹ For Rehnquist, the language of the statute admits to only one reading and those who disagree are not only wrongheaded but disingenuous. In fact, a Congress determined to preclude affirmative action plans “would be hard pressed to draft language better suited to the task” than that contained in the relevant statutory sections.²⁴⁰ The tone of certainty extends into the next section of the opinion, where Rehnquist presents, at great length, the legislative history of the statute. Like his reliance on constitutional history in cases such as *Wallace*, his use of legislative history in *Weber* is thorough and detailed. Only a trickster, an escape artist like Houdini, he suggests, could evade the crushing certainty of the floor debates and committee reports.²⁴¹

The *Weber* dissent reflects Rehnquist’s characteristic methodology in one additional respect: It distills the majority opinion into a single abstraction—the need to interpret Title VII in harmony with its spirit rather than its letter—and declines to engage the specific concerns voiced by Brennan. The majority worries that a prohibition on voluntary affirmative action plans by private employers would undermine what it sees as the fundamental policy motivating members of Congress in passing Title VII, the improvement of the economic position of minority workers.²⁴² Rehnquist does not respond to this concern. He recognizes

237. *Id.* at 220 (quoting GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 181-82 (1949)).

238. *Id.* at 221.

239. *Id.* at 222.

240. *Id.* at 226. One of the key sections of the statute, § 703(d), makes it “an unlawful employment practice . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.” *Id.*

241. *Id.* at 231-51.

242. *Id.* at 202.

that the strength of his position rests on the written record rather than on the potential ambiguities of legislative behavior or the human consequences of his interpretation. If he accuses the majority of evasive tactics, the majority might in turn have questioned his determination to read human behavior with the same devotion to literalness that he brings to the written text. Just as *Youngstown Sheet & Tube Co.* illuminates Jackson's willingness to embrace the ambiguities of the political sphere, *Weber* exemplifies Rehnquist's determination to focus his formidable intellectual energies on a single, carefully framed abstraction that can be most successfully subjected to the pressure of history and textual analysis:

C. Chief Justice Rehnquist Citing Justice Jackson

Though the careers of Jackson and Rehnquist crossed for only the sixteen months of Rehnquist's clerkship, their writings have in some ways crossed for the twenty-four years that Rehnquist has served on the Court. Jackson's body of opinions is of course available to Rehnquist as a source of legal precedent and of felicitous observations about the law, and in a limited way Rehnquist has availed himself of both. Yet, despite the shared preferences of Jackson and Rehnquist for a restricted judicial role, for state prerogatives in a federal system, and for public order, Rehnquist has made only occasional use of Jackson's cases to support his own.

Several of Rehnquist's citations to Jackson on substantive issues indicate their shared assumptions about the Court's role and the Constitution. Dissenting in *Furman v. Georgia*,²⁴³ Rehnquist placed Jackson in the august company of Holmes, quoting passages from both Justices²⁴⁴ to support his view that the Court owes "genuine deference" to state legislation.²⁴⁵ When the Court struck down a Kentucky statute requiring schools to post the Ten Commandments on classroom walls, Rehnquist closed his dissent with a long passage from Jackson considering "whether it is possible, even if desirable . . . to isolate and cast out of secular education all that some people may reasonably regard as religious instruction."²⁴⁶ On the issue of statutory interpretation, Rehnquist quoted Jackson's view that in using legislative history the Court should limit itself to committee reports, "which

243. 408 U.S. 238, 468-69 (1972) (Rehnquist, J., dissenting).

244. Rehnquist quoted the following passage from Jackson: "The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation." *Id.* at 469 (quoting *Ashcraft v. Tennessee*, 322 U.S. 143, 174 (1944) (Jackson, J., dissenting)). The passage from Holmes observes that the Court "should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." *Id.* (quoting *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting)).

245. *Id.* at 468-69.

246. *Stone v. Graham*, 449 U.S. 39, 46 (1980) (Rehnquist, J., dissenting) (quoting *McCullum v. Board of Educ.*, 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring)).

presumably are well considered and carefully prepared."²⁴⁷ There is some irony in Rehnquist's choice of this passage, because Jackson expressed strong skepticism about the value of floor debate,²⁴⁸ precisely the resource Rehnquist had relied on heavily in his *Weber* dissent five years earlier.²⁴⁹ Rehnquist had quoted Jackson on legislative history in *Weber* as well, though not the same passage and not for the same point.²⁵⁰

There are two issues on which Rehnquist goes beyond such discrete selections from Jackson's canon to acknowledge a stronger linkage. The first is Rehnquist's position that, under the Fourteenth Amendment, the First Amendment applies with lesser force to the states than to the federal government. In *Buckley v. Valeo* he cited the reasoning in dissents by Jackson in *Beauharnais v. Illinois* and by Justice Harlan in *Roth v. United States* to support this view.²⁵¹ Two years later Rehnquist made the same point, although this time in a curiously oblique way. Without naming either Jackson or Harlan, he observed in *First National Bank of Boston v. Bellotti* that he shared this reading of the First Amendment "with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues."²⁵² Rehnquist's reticence in naming his two predecessors suggests ambivalence about claiming a direct line of descent from Jackson, a natural mentor in light of the clerkship and the fact that the *Beauharnais* dissent was written while Rehnquist worked for Jackson.²⁵³ The passage also suggests Rehnquist's

247. *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)).

248. "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." *Schwegmann Bros.*, 341 U.S. at 396.

249. *Supra* note 241 and accompanying text.

250. Rehnquist quoted Jackson for the proposition that generally legislative history "'is more vague than the statute we are called upon to interpret.'" *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 230 (1979) (quoting *United States v. Public Utilities Comm'n*, 345 U.S. 295, 320 (1953) (Jackson, J., concurring)). Rehnquist went on to assert that the legislative history for Title VII is as clear as the statutory language and "irrefutably demonstrates that Congress meant precisely what it said." *Id.* at 230.

251. 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part) (citing Jackson's dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 288-95 (1952) and Harlan's dissent in *Roth v. United States*, 354 U.S. 476, 500-03 (1957)).

252. 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).

253. For two occasions on which Rehnquist alluded to Jackson's work without naming him, see William H. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34 VAND. L. REV. 249, 263 (1981) ("what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy'"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) ("what have been aptly described as 'majestic generalities'"). For the latter quote, Jackson is identified in a footnote. Rehnquist has also used that phrase for the language of the Fourteenth Amendment twice in opinions without mentioning Jackson. In one instance, Rehnquist used the phrase without indicating that it was quoted from another source. *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). A year earlier, he had

disaffection from the other members of the Burger Court, a response that may have been heightened in *Bellotti* because Rehnquist found himself in unusual company—Justice White, who wrote his own dissenting opinion, was joined by Justices Brennan and Marshall.

The case in which Rehnquist draws most heavily on Jackson explores the scope of executive power, and the source is of course Jackson's *Youngstown Sheet & Tube Co.* concurrence, which Rehnquist has described as the closest of the *Youngstown* opinions "to being a 'state paper' of the same order as the best of the Federalist Papers, or of John Marshall's opinions for the Court in the early part of the nineteenth century."²⁵⁴ In *Dames & Moore v. Regan*, Rehnquist wrote for a strongly unified Court to uphold the President's settlement of private claims against Iran as part of the agreement for the release of American hostages.²⁵⁵ The opening section of the opinion contains three references to Jackson in as many pages.²⁵⁶ Rehnquist first supports his general observation that "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed"²⁵⁷ with Jackson's note of surprise at "the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."²⁵⁸ Rehnquist then cites Jackson for a disclaimer of judicial expertise, the view that "we decide difficult cases presented to us by virtue of our commissions, not our competence."²⁵⁹ Finally, Rehnquist quotes Jackson's skeptical remark on unlimited executive power, that the criticism of George III in the Declaration of Independence "leads me to doubt that [the forefathers] were creating their new Executive in his image."²⁶⁰ The framework that Rehnquist has constructed from these passages is carefully balanced between a less than omnipotent Executive and a less than

cited it to the majority opinion in *Fay v. New York*, 332 U.S. 261, 282 (1947), authored by Jackson. *Woodson v. North Carolina*, 428 U.S. 280, 324 (1976) (Rehnquist, J., dissenting). Jackson had originally used the phrase in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). When Jackson used the phrase a second time in *Fay*, he did not indicate that he was quoting himself. *Fay*, 332 U.S. at 282.

254. *Robert H. Jackson, supra* note 59, at 539. Rehnquist also said that the opinion "has yet to be surpassed in its statesmanlike and lawyerlike analysis of the executive branch of the federal government." *Id.*

255. 453 U.S. 654 (1981). Justice Powell joined all but note six and Justice Stevens all but Part V of Rehnquist's opinion. Stevens wrote an opinion concurring in part, *id.* at 690, and Powell wrote an opinion concurring in part and dissenting in part. *Id.*

256. *Id.* at 660-62.

257. *Id.* at 660.

258. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

259. *Id.* at 661. Rehnquist is paraphrasing, without citation, language from *West Virginia State Board of Education v. Barnett*: "But we act in these matters not by authority of our competence but by force of our commissions." 319 U.S. 624, 640 (1943).

260. *Dames & Moore*, 453 U.S. at 662 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 641 (Jackson, J., concurring)).

omnicompetent Court. This is, Rehnquist suggests, an area in which there is no simple rule to guide the Court toward an easy resolution.

The body of the opinion makes use of Jackson's tripartite scheme to vindicate several varieties of presidential action.²⁶¹ The Court found executive orders nullifying attachments on Iranian property and transferring Iranian assets to be valid under the first of Jackson's categories, presidential action undertaken with the authorization of Congress.²⁶² On the more difficult question of presidential power to settle claims without express statutory authorization, Rehnquist relied on Jackson's second category, the "zone of twilight," where congressional acquiescence in executive conduct may "sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."²⁶³ Rehnquist carefully edited Jackson's language, removing the original qualifications—sometimes, as a practical matter, if not invite—to assert flatly that acquiescence and related statutes "may be considered to 'invite' 'measures on independent presidential responsibility.'"²⁶⁴ The difference is slight but telling, because it serves to strengthen presidential authority based on congressional inaction. Rehnquist makes one further adjustment to Jackson's scheme. Quoting Jackson as acknowledging that his three categories were "a somewhat oversimplified grouping,"²⁶⁵ Rehnquist insists on greater flexibility for the Court. Executive conduct, he maintains, belongs not in one of Jackson's three categories but "at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."²⁶⁶ It is surprising to see Rehnquist embrace ambiguity, but in the context of executive power he seems more concerned with enlarging the bounds of permissible conduct than with confining the terms of judicial discretion.

Rehnquist also quotes with pleasure some of Jackson's neatly turned comments on the law and the Court. Discussing the discovery process, Rehnquist cites Jackson's caution that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."²⁶⁷ On two occasions Rehnquist invokes Jackson's famous deflation of the Court, that "[w]e are not final because we are infallible, but we are infallible only because we are final."²⁶⁸ On two other occasions Rehnquist accompanies his shifts in position

261. *Id.* at 668. For an additional reference to Jackson's views on executive power in *Youngstown Sheet & Tube Co.*, see Rehnquist's opinion for the Court in *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

262. *Dames & Moore*, 453 U.S. at 674.

263. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637.

264. *Dames & Moore*, 453 U.S. at 678.

265. *Id.* at 669 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

266. *Id.*

267. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

268. *Brown v. Allen*, 344 U.S. 443, 540 (1953), quoted in *Richmond Newspapers, Inc. v.*

with a reference to Jackson's self-mocking admission that as Justice he has abandoned a position previously taken as Attorney General. After noting that "[p]recedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others,"²⁶⁹ Jackson listed his predecessors who had extricated themselves from that situation and concluded with a gracious apology: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."²⁷⁰ These passages have in common a self-deprecating quality that seems to appeal to a whimsical strain in Rehnquist that is more often described by others than demonstrated in his own opinions.²⁷¹

Rehnquist's appreciation of Jackson's literary quality reveals itself in his echoing of Jackson's conversational cadence and use of metaphor as well as in occasional allusions to works of literature, a fairly regular custom of Jackson's.²⁷² A largely self-taught man, Jackson had been introduced to literature by a gifted high school English teacher²⁷³ and carried into his writing both his broad reading and his keen ear.²⁷⁴ His range of literary allusion was impressive: it included Lord Byron,²⁷⁵ John Milton,²⁷⁶ Mark Twain,²⁷⁷ and Gilbert and Sullivan,²⁷⁸ as well as traditional proverbs²⁷⁹ and the writings of William James.²⁸⁰ Rehnquist's choices tend to be somewhat more limited in range and more obvious in content, including

Virginia, 448 U.S. 555, 605 (1980) (Rehnquist, J., dissenting) and *Franks v. Delaware*, 438 U.S. 154, 186 (1978) (Rehnquist, J., dissenting).

269. *McGrath v. Kristensen*, 340 U.S. 162, 177 (1950) (Jackson, J., concurring).

270. *Id.* at 178, cited with approval in *Marek v. Chesny*, 473 U.S. 1, 13 (1985) (Rehnquist, J., concurring) and *Califano v. Boles*, 443 U.S. 282, 294 n.12 (1979).

271. For a discussion of what he calls Rehnquist's "impish irreverence and wit," see BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM* 31-32 (1990). That impishness occasionally includes a taste for practical jokes. See *id.* at 32; Jenkins, *supra* note 55, at 100. See also BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 269-70, 412-13 (1979). For the appearance of his playful streak in opinion writing, see *Corporation Commission of Oklahoma v. Federal Power Commission*, 415 U.S. 961 (1974) (opening his dissent from an affirmance on appeal with a limerick).

272. Felix Frankfurter placed Jackson "in what might be called the naturalistic school. He wrote as he talked, and he talked as he felt." *Mr. Justice Jackson*, *supra* note 127, at 938. Bernard Schwartz found Rehnquist to be "the best legal stylist and phrasemaker on the Burger Court, though too much of his literary ability was overshadowed by the extreme positions which it supported." SCHWARTZ, *supra* note 271, at 30.

273. GERHART, *supra* note 6, at 32-33.

274. See Sobeloff, *supra* note 127, at xxxi.

275. *Everson v. Board of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

276. *Craig v. Harney*, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).

277. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

278. *Ray v. Blair*, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting).

279. *Terminiello v. Chicago*, 337 U.S. 1, 14 (1949) (Jackson, J., dissenting).

280. *United States v. Ballard*, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting).

familiar passages from Shakespeare²⁸¹ and references to Charles Dickens,²⁸² George Orwell,²⁸³ and Sir Arthur Conan Doyle.²⁸⁴ In an unusual echo, both Justices settled on the same biblical metaphor to describe what they considered to be provocative judicial behavior. In his book on the Roosevelt administration's battle with the Court over New Deal legislation, Jackson characterized the granting of injunctions by district courts to block the implementation of federal statutes as a dangerous excess: "District courts were sowing the wind—the Supreme Court would reap the whirlwind."²⁸⁵ Rehnquist saw the majority's decision approving a voluntary affirmative action plan in *Weber* as another excess that would return to haunt the Court, and he ended his dissent with a similar threat of impending doom: "By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind."²⁸⁶ In light of the divergent contexts for the two passages, it seems unlikely that the echo was a deliberate one. The passages do, however, reveal that Jackson's ear was the truer; by domesticating the metaphor and integrating it with the doctrine of statutory interpretation, Rehnquist has lost the ominous power that Jackson's version conveys.²⁸⁷

III. TWO STUDENTS OF THE COURT

A. Justice Jackson

It is rare for a Supreme Court Justice to write about the Court beyond the

281. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) ("Who steals my purse steals trash."); *Dames & Moore v. Regan*, 453 U.S. 654, 675 n.7 (1981) ("What's in a name?"). In one instance, Rehnquist quoted a passage from *Measure for Measure* on the difference between act and intention, but the footnote makes clear that the passage had already been identified as relevant by a legal scholar: "As recognized by one commentator, Shakespeare's lines here express sound legal doctrine." *United States v. Apfelbaum*, 445 U.S. 115, 131 n.13 (1980).

282. *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari) (*Bleak House*); *Codispoti v. Pennsylvania*, 418 U.S. 506, 531 (1974) (Rehnquist, J., dissenting) (*Bleak House*).

283. See *supra* note 236 and accompanying text for a discussion of Rehnquist's use of *Nineteen Eighty-four* in his dissent in *United Steelworkers of America v. Weber*, 443 U.S. 193, 219 (1979).

284. See *supra* note 57.

285. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 123 (reprint 1979) (1941). The biblical metaphor is from *Hosea* 8:7 (King James).

286. *Weber*, 443 U.S. at 255 (Rehnquist, J., dissenting).

287. Rehnquist used the image a second time, in his book on the Court, to end his chapter on the Court's early twentieth century decisions striking down state legislative solutions to problems of the era: "The Court was in the process of sowing a wind, with the whirlwind to be reaped years later." REHNQUIST, *supra* note 31, at 214. The power of the biblical language is again weakened by the addition of two modifying phrases, "in the process" and "years later."

incidental observations that occur naturally in opinions.²⁸⁸ Jackson is distinguished even among that small company because he wrote twice, from very different perspectives, once shortly before joining the Court and again in the final months of his life. He reports that his first book, *The Struggle for Judicial Supremacy*, “was originally written in odd intervals between arguments in Court as Solicitor General.”²⁸⁹ The vantage point is, however, less that of an engaged advocate than that of a political adviser who suffered with Franklin Roosevelt the Court’s assault on the New Deal. The overt theme of the book is the need for judicial self-restraint to maintain balance among the branches of government, but its subtext is a thinly veiled attack on the conservative members of the Court who indulged their own political preferences in striking down congressional legislation.

Jackson’s dialectical approach is clear in his account of the way a democracy functions as a continuous process of conflict and resolution. Jackson argues that the elections which resolve clashes between liberals and conservatives are a safety valve for dissident views, and the resulting government policies should be respected by the Court unless they “violate[] clear and explicit terms of the Constitution”:²⁹⁰

The device of periodic election was chosen to register and remedy discontents and grievances in time to prevent them from growing into underground or violent revolutionary movements. An election that can turn out one regime and install another is a revolution—a peaceful and lawful revolution. By such method we give flexibility and a measure of popular responsibility to our federated system and maintain a continuity of the government, even though the governors be turned out from time to time.²⁹¹

When the Court intervenes by negating the policy choices of the duly elected governors, it puts at risk this peaceful resolution of political conflict. “The vice of judicial supremacy,” Jackson concludes, “as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.”²⁹² By ruling New Deal initiatives unconstitutional under such elusive standards as freedom of contract, the judiciary “jeopardized its essential usefulness” in the American system of government.²⁹³

This theoretical account of the Court’s misguided conduct is occasionally punctuated by more pointed criticism of the conservative Justices who struck down the New Deal statutes, a criticism rendered in terms of another dialectic, that

288. See, e.g., FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928); CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1936).

289. JACKSON, *supra* note 285, at xix.

290. *Id.* at 319.

291. *Id.* at 316.

292. *Id.* at 321.

293. *Id.* at 322.

of law and politics. Jackson notes the coincidence of hostile decisions and the imminent 1936 election, which "left an uneasy suspicion that the law and politics were not as fully separated as juristic tradition would indicate,"²⁹⁴ and calls the Court the "bedfellow" of the Republican Party.²⁹⁵ Court opinions suggest to him that invalidated statutory provisions "were 'obnoxious' not so much to the Constitution as to the judicial sense of what was good for the business community."²⁹⁶ Although Jackson the theorist asserts that "[t]he Court may be, and usually is, above party politics and personal politics,"²⁹⁷ his account of the Court's eventual reversal of its positions following Roosevelt's re-election conveys the opposite view, that the conservative Justices were prompted by their own political preferences to reject the policies supported by a democratic majority.

Jackson's second discussion of the Court came over a decade later, after he agreed in March 1954 to deliver the Godkin Lectures at the Harvard Graduate School of Public Administration the following February.²⁹⁸ According to both his son, William Eldred Jackson, and his former law clerk, E. Barrett Prettyman, Jr., Jackson worked on drafts of his lectures until the day before his death in October 1954.²⁹⁹ The lectures, published posthumously, thus represent Jackson's final perspective on the Court after thirteen years as a Justice. They also represent a more skeptical view of the Court's ability to protect liberty and a more tolerant view of the Justices' struggle to keep on the right side of what he now calls the "thin . . . line that separates law and politics."³⁰⁰

In the first and most polished of the lectures, "The Supreme Court as a Unit of Government," Jackson emphasizes the dependence and passivity of the Court in place of its aggressive claims to supremacy.³⁰¹ He notes the Court's reliance on the political branches for its membership, its jurisdictional reach, its enforcement power, and its funding.³⁰² Further, the Court is "a substantially passive instrument" which can respond only to cases and controversies, and then as a rule only at a slow pace.³⁰³ These weaknesses undermine both its efficacy and its resolve: "I think the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency, especially during war time."³⁰⁴ The Court is less to be blamed than pitied for its occasional lapses, because they are in some measure the result of institutional conditions rather than the willful excesses of overreaching Justices.

294. *Id.* at 124.

295. *Id.* at 177.

296. *Id.* at 164.

297. *Id.* at 287-88.

298. *Foreword* to ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* vii (1955) [hereinafter *AMERICAN SYSTEM*].

299. *Id.* at vii-viii.

300. *Id.* at 31.

301. *Id.* at 10.

302. *Id.* at 10-11.

303. *Id.* at 12, 24.

304. *Id.* at 25.

In the final lecture, "The Supreme Court as a Political Institution," Jackson revisits the dialectic of law and politics, but this time his definition of politics is both broader and less sinister, rendering it more difficult to distinguish politics from its opposite number. Borrowing Cardozo's use of politics to mean "policy-making," Jackson concedes that "[a]ny decision that declares the law under which a people must live or which affects the powers of their institutions is in a very real sense political."³⁰⁵ The Court's constitutional law decisions, especially those allocating power between the branches of government, are thus inherently political and essential to the nation's welfare. They are also, of course, a definitive source of law, and Jackson recognizes the dilemma for a Court which is charged with the duty of resolving political conflicts by means of an inescapably political instrument.

For Jackson, the Court's "political function" is precisely the resolution of a set of opposing principles: to "strive to maintain the great system of balances upon which our free government is based,"³⁰⁶ balances between the executive and legislative branches, between the federal and state governments, between one state and another, and between the majority and the individual. He is not, however, sanguine that even a Court performing that function capably can ensure liberty. Invoking the lessons of history, he concludes that "I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions."³⁰⁷ It may be that Jackson's experience at Nuremberg as well as his experience on the bench diminished his expectation, suggested in *The Struggle for Judicial Supremacy*, that a properly disciplined Court would "strike more telling blows in the cause of a working democracy."³⁰⁸ At the close of his career, Jackson continued to advocate judicial self-restraint, but with less hope that the Court alone could find the proper balance between individual liberty and social order.

B. Chief Justice Rehnquist

Like Jackson, Rehnquist has written extensively about the Court, but his work is less theoretical than descriptive, and his intended audience contains principally lay readers rather than legal cognoscenti. Shortly after his elevation to Chief Justice, Rehnquist published a book entitled *The Supreme Court: How It Was, How It Is*, which he saw as "designed to convey to the interested, informed layman, as well as to lawyers who do not specialize in constitutional law, a better understanding of the role of the Supreme Court in American government."³⁰⁹ If

305. *Id.* at 53-54.

306. *Id.* at 61.

307. *Id.* at 80.

308. JACKSON, *supra* note 285, at 285.

309. REHNQUIST, *supra* note 31, at 7. Rehnquist has published a second book, *GRAND INQUESTS* (1992), which describes the impeachment proceedings against Justice Samuel Chase and President Andrew Johnson.

the title hints at the revelations of an insider, the reality is considerably blander. After briefly recounting his own arrival at the Court as Jackson's clerk, Rehnquist offers a historical survey of many of the Court's most important cases from *Marbury v. Madison*³¹⁰ through 1953, an ending point carefully chosen "to avoid any discussion of the cases and doctrines in which any of my present colleagues have played a part."³¹¹ The same tact is evident in the book's final section, which describes the Court's procedures in selecting its docket, hearing oral argument, and writing opinions without compromising the secrets of the conference room.

Through most of the book Rehnquist does not discuss his own views about the Court and its Justices, but there are moments when he briefly reveals his opinions. Rehnquist attributes John Marshall's effective leadership of the Court in part to "the power of clear statement," which Rehnquist notes that Marshall possessed "in spades"³¹² and which Rehnquist's own style suggests he honors by imitation. Justice Miller's "great gift" was common sense, which pierced both "currently fashionable intellectual dogma" and unquestioned precedent and led him to file a lone dissent later "vindicated by the Court."³¹³ Even Justice Field's dogmatic and combative nature is redeemed by his "lucid style of writing" and his "indomitable will to persevere in declaring what he thought was correct legal doctrine."³¹⁴ Finally, Potter Stewart is singled out from Rehnquist's many colleagues on the Court for praise as "the one least influenced by considerations extraneous to the strictly legal aspects of a case—he was, that is, the quintessential judge."³¹⁵ These fragments suggest that Rehnquist's model of an admirable Justice possesses independence of mind even in the face of unified opposition, an intellectual preference for common sense over abstract theories, and a plain style of writing that persuades by its clarity rather than its subtlety. That model surely informs much of Rehnquist's own work on the Court: his solitary and persistent dissents, his avoidance of elaborate theoretical constructs, and his direct and often conversational style.³¹⁶

At a few points in the book Rehnquist does convey more directly his preference for a mildly confrontational relationship between a Justice and the Court. After a chapter that criticizes Franklin Roosevelt's court packing plan for "attempting to restructure the institution itself,"³¹⁷ Rehnquist offers a candid defense of Roosevelt's intention. Rescuing the word "pack" from its unfortunate associations, Rehnquist insists that "a president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic

310. 1 Cranch 137 (1803).

311. REHNQUIST, *supra* note 31, at 8.

312. *Id.* at 122.

313. *Id.* at 185. Rehnquist also credits the Taney Court with common sense in commercial matters which "show that Court at its best." *Id.* at 133.

314. *Id.* at 185-86.

315. *Id.* at 256.

316. As an Associate Justice, Rehnquist filed 54 solitary dissents, which is "a Court record." SCHWARTZ, *supra* note 271, at 28.

317. REHNQUIST, *supra* note 31, at 234.

to his political or philosophical principles.”³¹⁸ Because the President is elected by the entire nation, his choice of Justices is an appropriate reflection of the popular will.³¹⁹ Rehnquist tempers the ideological implications of this position by illustrating the imperfect results that Presidents have enjoyed and offering an institutional explanation. In a passage that contains terminology used differently by Jackson, Rehnquist “observ[es] that the Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity.”³²⁰ Any single Justice appointed by an ideological President will be liberated immediately by life tenure and encouraged to strike out independently by the culture of “public scrutiny and professional criticism which sets great store by individual performance, and much less store upon the virtue of being a ‘team player.’”³²¹ A strongly individualistic Justice will in turn be institutionally restrained by the presence of eight other Justices, most selected by a President of a different ideology, and all subject to the same pressure for individual performance.³²²

Rehnquist’s frank endorsement of the unmediated expression of individual views by each Justice is in apparent contradiction with one of his consistent themes, the need for a Justice to restrain personal preferences in deciding cases. In the final chapter of his book, Rehnquist returns to that theme without mentioning his prior discussion of judicial individualism. He then counsels against mistaking the collective conscience of the Court for the individual consciences of the Justices. “Many of us,” he notes, “feel strongly and deeply about the judgments of our own consciences, but these remain only personal moral judgments until in some way they are given the sanction of supreme law.”³²³ The two strands in his thought can be harmonized only by assuming that the license he approves for the individual Justice is the freedom to assert not an ideological preference but a judicial interpretation of the Constitution. If that interpretation places its author in solitary disagreement with the rest of the Court, Rehnquist seems to suggest that this is a valid posture, though his chapter on opinion writing omits any discussion of guidelines for dissents. He also declines to indicate how “a disinterested observer” can tell whether the Court is imposing “its own views in the guise of constitutional doctrine,” noting evasively that other commentators have attempted to answer that question “with what success I shall leave it to others to determine.”³²⁴

318. *Id.* at 235.

319. *Id.* at 236.

320. *Id.* at 249. For a discussion of Jackson’s use of the terms “centripetal” and “centrifugal,” see *infra* notes 331-332 and accompanying text. Jackson also observed, in a characteristic inversion, the influence of the Court on its members: “Why is it that the Court influences appointees more consistently than appointees influence the Court?” JACKSON, *supra* note 285, at vii.

321. REHNQUIST, *supra* note 31, at 250.

322. *Id.* at 250-51.

323. *Id.* at 317.

324. *Id.* at 314.

Rehnquist's study of the Court ends with a celebration and a prescription. He celebrates the Court's increase "in prestige and authority throughout the two centuries of its existence,"³²⁵ from John Marshall's early triumphs through its conflicts with the other branches of government to its present position of public respect. He then defines the Court's function as striking "the proper balance between liberty and authority, between the state and the individual."³²⁶ Rehnquist also makes clear, however, that in striking that balance the Court must give substantial weight to the choices made by the majority through the political branches. He repeats the argument he made in *Furman v. Georgia*,³²⁷ that the Court should err on the side of finding duly enacted statutes constitutional, because striking down a statute replaces the democratic choice of the majority with the anti-majoritarian choice of appointed Justices.³²⁸ Finally, he acknowledges the "good judgment and common sense" of the Justices over two centuries who have met their responsibilities and given shape to the Framers' vision.³²⁹

C. *Two Views of the Court*

It is difficult to make a perfect comparison between Jackson's and Rehnquist's commentaries on the Court, because a book directed at a popular audience is understandably different in scope and tone from lectures intended for an academic audience. Further, both authors arrive at similar formulas for the Court's role as an agent of balance between the competing constitutional values of individual liberty and majoritarian social order. Nonetheless, certain areas of contrast do emerge which echo the differences in their jurisprudence.

With his dialectical perspective, Jackson finds conflicting pressures at work not only in the constitutional design but in the shadowy division between law and politics. He sees the Court as an inherently political institution which should exercise self-restraint in its decisionmaking, but he has no expectation that even with the best of intentions it can avoid on occasion crossing the line from acts of pure interpretation to acts of judicial legislation. Jackson's study of history tells him that even a properly restrained Court cannot by itself safeguard the nation if "the political forces at the time" are in opposition.³³⁰ History for Jackson is itself a dialectical process that he describes, in terms borrowed from the constitutional historian James Bryce, as centrifugal and centripetal,³³¹ conflicting forces which alternately draw people together into a political community and cause them to

325. *Id.* at 311.

326. *Id.* at 319.

327. 408 U.S. 238, 465 (1972) (Rehnquist, J., dissenting).

328. REHNQUIST, *supra* note 31, at 318. See *Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting).

329. REHNQUIST, *supra* note 31, at 319.

330. AMERICAN SYSTEM, *supra* note 298, at 81.

331. Attorney General Robert Jackson, 150th Anniversary of the Supreme Court, 309 U.S. v, viii (1940).

divide into smaller groups and disperse.³³² When the Court sets itself against the political forces, it is in Jackson's view unlikely to prevail, and he concludes his study of the Court with an assessment of the limitations of the Court: "[I]t is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."³³³

In such a scheme, each individual Justice must also recognize and deal with the play of opposing forces both inside and outside the Court. Jackson is thus skeptical of the value of dissent, which he considers not an heroic act of self-assertion but "a confession of failure to convince the writer's colleagues."³³⁴ For him, "the true test of a judge is his influence in leading, not in opposing, his court."³³⁵ It is small wonder, then, that the pragmatic Jackson has high praise for John Marshall's opinion in *Marbury v. Madison*, not simply because it established the Court's power of judicial review, but also because it is an exemplar of judicial strategy. By refusing to validate the Federalists' undelivered commission on the grounds that Congress lacked the constitutional power to expand the Court's original jurisdiction, Marshall linked together a victory for the Jeffersonians on the merits with a powerful defeat for them on legal theory. Yet, as Jackson observes, "Jefferson could not defy a decision in his favor; he could make no issue over a legal theory. Judicial supremacy in constitutional interpretation was so snugly anchored in a Jeffersonian victory than it could not well be attacked."³³⁶ This interplay of the legal with the political is for Jackson an inevitable part of the Court's jurisprudence, and he sees no need to isolate doctrine from the play of political forces that allows it to prevail.

Rehnquist's vision of the Court, like his jurisprudence, is monistic, and his book reflects that perspective. Just as constitutional history is a powerful source of doctrine in his opinions, the history of the Court becomes for Rehnquist a sufficient explanation of its present situation. Rehnquist is an enthusiastic amateur

332. See James Bryce, *The Action of Centripetal and Centrifugal Forces on Political Constitutions*, in CONSTITUTIONS 96 (1905). Rehnquist also used the terms in his book, though in a different context and without citing either Bryce or Jackson, when he observed that "the Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity." REHNQUIST, *supra* note 31, at 249. For another use of the term "centripetal," this time by Justice Cardozo to describe the opposing forces in the federal system, see *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring), *quoted in Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring in judgment).

333. AMERICAN SYSTEM, *supra* note 298, at 81.

334. *Id.* at 19.

335. *Id.* Jackson expressed the same ambivalence about the value of dissent in his essay on Justice Brandeis, of whom he wrote: "It is not the number of his dissents, but the quality of his dissenting opinions, that is outstanding." Robert Jackson, *Mr. Justice Brandeis: "Microscope and Telescope,"* in AN AUTOBIOGRAPHY OF THE SUPREME COURT 235 (Alan F. Westin ed. 1963). Jackson himself authored 125 dissents. Sobeloff, *supra* note 127, at xxxiv.

336. JACKSON, *supra* note 285, at 27.

historian, and his work reflects his pleasure in informing his readers.³³⁷ It also reflects his tendency to treat history as proceeding in a single direct line rather than dialectically, and he is most comfortable as the chronicler of the Court, moving systematically through his factual narrative without offering much in the way of praise or blame. Although his account of *Youngstown Sheet & Tube Co.* does present the Court as affected by public opinion in its resolution of the case, Rehnquist generally tends to see the work of the Court in terms of its members rather than in terms of its response to external forces. He calls such challenges to the Court as Roosevelt's court packing plan and the impeachment of Justice Samuel Chase "attempts to bully the Supreme Court on the part of the popularly elected branches,"³³⁸ making clear where his sympathies lie. In Rehnquist's view, such challenges have been met and defeated, and "the Court has grown steadily in prestige and authority throughout the two centuries of its existence."³³⁹ The dangers to the Court's prestige and authority that continue to concern him are the internal pressures on individual Justices.³⁴⁰

The conflict that Rehnquist presents as the crucial determinant of the Court's institutional success is each Justice's effort to discard political preferences in favor of legal interpretation. Where Jackson finds it problematic to distinguish between law and politics, Rehnquist believes that Justices of good will need only discipline themselves to reject the political choices driven by personal belief in favor of a clearly defined judicial response grounded in the certitude of history and text:

In the light of the temptations that naturally beset any human being who becomes a judge of the Supreme Court, the truly remarkable fact is not that its members may have on infrequent occasions succumbed to these temptations, but that they have by and large had the good judgment and common sense to rise above them in the overwhelming majority of the cases they have decided.³⁴¹

It is no wonder that Rehnquist has praise for the solitary dissenter like Justice Miller, because the Court should be seeking in every case not a workable consensus but the single correct resolution.³⁴² Instead of Jackson's pessimistic

337. Rehnquist's lectures are frequently on historical topics, some of them related to or later incorporated into his books. See, e.g., William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161 (1994); William H. Rehnquist, *Thomas Jefferson and his Contemporaries*, 9 J. L. & POL. 595 (1993); William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest,"* 42 U. MIAMI L. REV. 475 (1988); William H. Rehnquist, *Remarks of Chief Justice William H. Rehnquist*, 60 TEMP. L. Q. 829 (1987); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 752 (1986); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986); William H. Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835 (1975).

338. REHNQUIST, *supra* note 31, at 307.

339. *Id.* at 311.

340. *Id.* at 313-14.

341. *Id.* at 319.

342. Rehnquist has asserted that "if dissenting views are strongly held, they should be

vision of a Court vulnerable to the political forces at work in society, Rehnquist offers an optimistic assessment of the Court's future role based on its past record of success. With good judgment and common sense, the Justices will defeat their own lesser selves and continue to strengthen the Court. It is a pleasing prospect, but one that Jackson would most likely have greeted with his characteristic skepticism.

CONCLUSION

It was an accident of history that placed William Rehnquist in the chambers of Robert Jackson when two of the Court's most important twentieth century cases, *Youngstown Sheet & Tube Co.* and *Brown*, appeared on its docket. That accident affords us an unusual opportunity to compare two Justices of conservative views at their point of intersection as Jackson's legal career moved toward its conclusion and Rehnquist's began. Although Jackson and Rehnquist shared conservative positions favoring state over federal power, community order over individual liberty, and judicial deference to legislative bodies, they brought to their decisionmaking significantly disparate perspectives on the transformation of those positions into law.

For Jackson, deciding cases was a dialectical enterprise which required a constant accommodation of opposing principles—of order and liberty, of majoritarian preference and minority right, of law and politics. Determining where to draw the line in each case was never a simple matter; it demanded a careful examination of the facts of each case and a pragmatic assessment of alternative outcomes. Jackson's beliefs, especially after his return to the Court from Nuremberg, were not difficult to ascertain, but his decisions remained difficult to predict. For Rehnquist, deciding cases has always been a straightforward proposition. With his monistic approach, he finds a single controlling principle in each case, generally at a level of abstraction that renders the facts of little interest, and proceeds to an inevitable resolution. Where Jackson was unpredictable, Rehnquist is eminently consistent; where Jackson struggled to see his way through each case, Rehnquist is imperturbably confident of his decision.

The same contrast informs the studies of the Court authored by Jackson and Rehnquist. Although both wrote that the Court's role is to strike a constitutionally valid balance between the opposing forces of order and liberty, their attitudes toward that role reflect their jurisprudential differences. After thirteen years as a Justice, Jackson came to believe that the Court could only struggle with the intractable problem of separating constitutional interpretation from policy preference and that, finally, the Court's best efforts might well be insufficient to preserve liberty in the face of hostile political forces. Writing after fifteen years on the Court, Rehnquist found in the Court's history a generally upward progression in prestige and authority that promised an institution capable of preserving liberty. In Rehnquist's view the principal danger remained the judicial

voiced." William H. Rehnquist, "All Discord, Harmony Not Understood": *The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973, 978 (1980).

tendency to interpret the Constitution in light of political preferences rather than the certainties of history and text. Even that danger, however, could be overcome by Justices of sound judgment and common sense who are properly grounded in constitutional history.

These elements are already detectable in the responses of a seasoned Justice and a young law clerk to the complexities of *Youngstown Sheet & Tube Co.* and *Brown*. Jackson's two concurrences, one published and one suppressed, both reveal his candid efforts to find an accommodation between abstract principle and concrete situation, between individual conscience and institutional performance. His career is as aptly reflected in what he withheld as in what he wrote. In Rehnquist's observations of *Youngstown Sheet & Tube Co.* and his *Brown* memo the seeds of his jurisprudence are already present. He assesses the likely result of *Youngstown Sheet & Tube Co.* in terms of the political histories of the Justices, assuming an ideological consistency that his own career illustrates, and he finds a simple solution to the problem of *Brown* by drawing a sharp line between the Justices' imagined preferences and the Court's restricted role. It is not after all surprising that Rehnquist writes about Jackson with detachment. They represent two divergent judicial casts of mind—dialectical and monistic, skeptical and certain, pessimistic and optimistic—which sixteen months together at the Court could not bridge.