

BOOK REVIEW

A Supreme Court Primer for the Public

THE SUPREME COURT: HOW IT WAS, HOW IT IS. By William H. Rehnquist.* William Morrow & Co., Inc., New York, N.Y., 1987. Pp. 338. \$18.95.

In writing *The Supreme Court: How It Was, How It Is*, William H. Rehnquist becomes the first sitting Chief Justice to author a book that explains the workings of the Supreme Court. *The Supreme Court* is not a treatise on constitutional doctrine; rather, it surveys the "borderland between American history and constitutional law" (p. 8). Chief Justice Rehnquist's book succeeds in providing the "interested, informed layman, as well as . . . lawyers who do not specialize in constitutional law" (p. 7) with a history of the Supreme Court as an institution, a primer on established constitutional law doctrine, and a picture "of how the Court today goes about its business of deciding cases" (p. 8). It profits from the special insight that only a former clerk for and present Chief Justice of the Supreme Court can provide.

The Supreme Court is largely informative; most of the book should provoke little debate. Chief Justice Rehnquist steers the book away from controversy by "avoid[ing] any discussion of the cases and doctrines in which any of my present colleagues have played a part" (p. 8). Moreover, as the title of the book suggests, Rehnquist strives to discuss the Supreme Court in an objective manner—how it was and how it is, not how it should have been or how it should be. Because of this focus, those who disagree with the Chief Justice's judicial ideology will be able to criticize his book only for what it omits¹ or for what it implies.² Nonetheless, even without discussing his ideology Rehnquist provides ample substance: all but the most informed scholars who read this book will increase their knowledge of the Supreme Court.

* Chief Justice, United States Supreme Court.

1. See Adler, *Coup at the Court*, THE NEW REPUBLIC, Sept. 14 & 21, 1987, at 46 (arguing that by omitting much current doctrine Rehnquist's book "turns out to be a work of disinformation").

2. Rehnquist's assertion in chapter 10 that a President cannot achieve complete success in "packing" the Supreme Court has been criticized for the implications it would have on the Senate's "advice and consent" role in the Supreme Court confirmation process. See *infra* notes 38-41 and accompanying text.

In his initial chapter, Rehnquist takes the reader inside the Supreme Court with a charming account of his first day as a Supreme Court clerk for Justice Robert Jackson. In successive chapters, Rehnquist turns his attention to one of the most important cases decided during his clerkship, *Youngstown Sheet & Tube Co. v. Sawyer* (the *Steel Seizure Case*).³ Putting his former vantage point to good use, Rehnquist gives an extended, informative account of the events leading up to the Supreme Court's final resolution of the case, which questioned whether President Truman could seize steel mills and keep them running in order to avoid a strike during the Korean War.

Although he believed that the Court would ultimately uphold the President's action (pp. 63-64), the clerk Rehnquist felt that the steel companies had the more meritorious position (p. 63). To Rehnquist's surprise, the steel companies did prevail by a six to three margin (pp. 94-95). The majority opinion by Justice Black denied the President both constitutional and statutory power to impound the mills. Each Justice in the majority wrote a separate opinion, a phenomenon Rehnquist attributes to a lack of time to form a consensus around one opinion (p. 92).

Of the various *Steel Seizure Case* opinions, Justice Jackson's concurrence⁴ has proven the most useful to courts deciding subsequent cases that involve the scope of executive powers. Indeed, twenty-nine years after the *Steel Seizure Case*, in *Dames & Moore v. Regan*, Justice Rehnquist relied upon Jackson's concurrence in upholding the constitutionality of President Carter's executive agreement with Iran.⁵ (Jackson wrote his *Steel Seizure Case* opinion without input from any of his clerks, including Rehnquist.) In *Dames & Moore*, President Carter's actions, which were a response to an "international crisis the nature of which Congress can hardly have been expected to anticipate in any detail," resisted categorization under Jackson's three-part analysis.⁶ Even so, Rehnquist found Jackson's classification of executive actions "analytically useful," and the Court ultimately held Carter's action to be sanc-

3. 343 U.S. 579 (1952).

4. Justice Jackson argued that the President's power is at its zenith when he is executing a law passed by Congress, in a "zone of twilight" when he attempts to carry out a policy not expressly authorized by congressional legislation, and at a low point when he attempts to carry out a policy inconsistent with congressional legislation. Jackson found President Truman's action to be within the third category. *The Steel Seizure Case*, 343 U.S. at 635-40 (Jackson, J., concurring).

5. 453 U.S. 654 (1981). This decision upheld President Carter's orders suspending U.S. nationals' claims against Iranian assets held in the U.S., nullifying attachments of those assets, and requiring that the assets be transferred to the Federal Reserve Bank of New York for distribution pursuant to binding arbitration proceedings. *See id.* at 686, 674. President Carter issued the orders to fulfill U.S. obligations under the agreement that secured the release of the U.S. hostages held in Iran. *See id.* at 664-66.

6. *Id.* at 669.

tioned either by specific congressional authorization or by implied consent.⁷

The Supreme Court offers an interesting explanation of why the *Steel Seizure Case* went against President Truman despite the Court's Democratic ties and despite contemporary Court decisions that deferred to congressional and presidential power. Rehnquist believes the holding was largely the result of public opinion, which ran strongly against the government (pp. 95-97). Rehnquist's citation of public opinion as a deciding factor in a major Court decision may seem surprising, given the Chief Justice's belief that constitutional decisionmaking should "be derived from the language and intent of the framers."⁸ Such surprise, however, would be misplaced. Rehnquist's book does not *advocate* the use of public opinion as the most important tool for deciding constitutional issues. Rather, it attempts to explain how public sentiment might come to play such a role. Indeed, the Chief Justice has argued elsewhere that while it is understandable in a case such as the *Steel Seizure Case*—a case with no direct precedent supporting either side—that a strong tide of public opinion would affect the outcome, on the whole, Justices need not "tremble before public opinion."⁹

After exploring the *Steel Seizure Case*, Rehnquist takes the reader through a standard constitutional law lesson on "the most famous case ever decided by the United States Supreme Court" (p. 114), *Marbury v. Madison*.¹⁰ *Marbury*, of course, established the Court's authority to review acts of Congress. After quoting Chief Justice Marshall's opinion at length, Rehnquist asserts that the Marshall Court's interpretation of judicial review "was not seriously challenged by contemporary observers" (p. 114). Not everyone agrees with this assertion;¹¹ in fact, some still debate the constitutional legitimacy of judicial review.¹² Today, of course, the debate is purely academic; the Court's authority to invalidate legislation is entrenched in our governmental system and no one argues that it will ever be abandoned.

7. *Id.* at 686-88.

8. Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976).

9. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U.L. REV. 751, 769 (1986).

10. 5 U.S. (1 Cranch) 137 (1803).

11. See, e.g., Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1168 (1972) (The view that judicial review was accepted in the 1780s is overstated since "there was also substantial opposition.").

12. Compare, e.g., L. HAND, THE BILL OF RIGHTS 1-30 (1958) (no language in the Constitution gives courts authority to review congressional legislation) with H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4-10 (1961) ("[T]he power of the courts is grounded in the language of the Constitution and is not a mere interpolation.").

The Supreme Court next turns to *Dred Scott v. Sanford*¹³—the infamous decision that denied Congress the power to control slavery.¹⁴ Although Rehnquist presents an extended analysis of *Dred Scott*, he may oversimplify two points. First, Rehnquist notes that Taney denied Congress its article IV, section 3 power over “the Territory . . . belonging to the United States” without drawing upon *another* clause of the Constitution to negate that power. He does not mention, however, that Taney rejected the notion that article IV, section 3 *itself* gave Congress power over the new territories. Instead, Taney held that the Constitution only empowered Congress to prescribe rules for the territories existing at the time the Constitution was adopted.¹⁵

Second, Rehnquist asserts that Taney was less concerned with viable constitutional issues than he was with “the sense of unfairness to southerners” that would have resulted from allowing Northerners to take all of their property to the new territories while not allowing Southerners to take their slave property (p. 145). Rehnquist fails to mention, however, that Taney attempted to ground his concern with “unfairness” in the fifth amendment’s due process clause.¹⁶ The real problem with *Dred Scott* is that in order to invoke the fifth amendment, Taney first had to find that slaves were “property” rather than “persons.” Even for the time, this finding was a transparent manipulation of the Constitution because, as Justice Curtis pointed out in his dissent, property rights in slaves varied from place to place and were not addressed in the Constitution itself.¹⁷ One commentator, after an exhaustive study of the case, concludes that Taney’s opinion can only be explained by his belief that the constitutional legitimacy of the antislavery position should be put to rest forever.¹⁸

Rehnquist discusses the overall performance of the Taney Court and concludes that despite *Dred Scott*, Taney performed admirably (p. 150).

13. 60 U.S. (19 How.) 393 (1857).

14. Interestingly, Rehnquist believes that the constitutional issue should not have been reached because to do so violated the prudential canon that the Court “should never decide a question of constitutional law unless the resolution of that question is absolutely essential to the resolution of the case” (p. 144). The case, he argues, could have easily been decided on narrower grounds; namely, that the definition of “citizen” did not include slaves for federal jurisdictional purposes. Disposing of the case in this manner would have left the constitutionality of slavery unresolved. Rehnquist mistakenly claims that all nine Justices would have agreed with this disposition (p. 144). It is clear that the two antislavery dissenters, Curtis and McLean, would in any case have reached the constitutional issue and held in favor of congressional power. See D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 308-11 (1978); 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 293 (rev. ed. 1932).

15. 60 U.S. (19 How.) at 441-42.

16. *Id.* at 450.

17. See *id.* at 624-25.

18. D. FEHRENBACHER, *supra* note 14, at 379, 388.

With the benefit of hindsight, many support this view, some placing Taney among the greatest Justices of all time.¹⁹ As a stain on Taney's record, however, *Dred Scott* serves as an important and highly visible reminder that activist judicial review does not always produce the right result.

Following his *Dred Scott* analysis, Rehnquist takes an extended look at five Associate Justices who he believes emerged in leadership roles after the departure of Chief Justices Marshall and Taney. Examination of individual Justices' personal backgrounds is somewhat of a motif in *The Supreme Court*. For instance, Rehnquist speculates that there may have been some sort of "geographical determinism" at work "so far as the votes of the dissenters [in the *Steel Seizure Case* were] concerned" (p. 92), and he examines Justice Reed's background to see what "could be foretold about [Reed's] vote in *The Steel Seizure Case*" (p. 73). He also wonders whether Brandeis, a visionary, and Hohnes, "the ultimate skeptic," "would have voted together had they sat on the Court in a different era" (p. 211). Although part of Rehnquist's focus on individual Justices can be attributed to human interest, some of these detailed descriptions must spring from Rehnquist's belief that "the individuals who comprise the Court at any particular time have a great deal to say about the kind of decisions that the Court makes" (p. 8). Unfortunately, Rehnquist does not explain *to what extent* traits held by individual Justices could affect the outcome of a case, or *what traits* matter most. This omission is unfortunate: an explanation by a sitting Chief Justice of how individual personalities contribute to judicial decisionmaking would be especially provocative.

Rehnquist's use of the personal backgrounds of Justices to explain their decisions may once again surprise those who know Chief Justice Rehnquist as a leading advocate of original intent,²⁰ a doctrine that discounts the role of a judge's personal beliefs and background.²¹ Again, this seeming paradox can be explained by Rehnquist's objective approach to the subject of the Supreme Court. Rehnquist simply notes that per-

19. A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 37 (1978) (reporting 1970 poll of experts showing Taney among twelve greatest Justices).

20. See generally Rehnquist, *supra* note 8, at 694, 704-06 (asserting that judges should not interpret the Constitution according to individual conscience but by the language and intent of the framers).

21. See Address by Edwin Meese III to the Washington, D.C. Federalist Society, Lawyers' Division (Nov. 15, 1985), reprinted in *Addresses: Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 26-29 (1985). At least one believer in original intent, Edwin Meese, may disagree with Rehnquist's observation that decisions are influenced by an individual's personal traits. See Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1287 n.23 (1986) (reviewing L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985)).

sonal traits do influence a Justice's decisionmaking process; he does not say how significant the influence is or should be.

In today's jurisprudence such an observation evokes little protest, even from conservatives. Currently, "[m]ost informed observers no longer believe that the legal universe operates according to enduring, classical, and objectively determinable rules."²² Rather, the debate centers on the extent to which personal experience and philosophy should enter into judicial opinions.²³ Rehnquist leaves no doubt as to his position: the encroachments of personalities into the judicial decisionmaking process should be minimized. "Every judge who has sat on a case involving a constitutional claim must have surely experienced the feeling that the particular law being challenged was either unjust, or silly, or vindictive. It is unfortunately all too easy to translate these visceral reactions into a determination to find some way to hold the law unconstitutional" (p. 316).

In his discussion of *Lochner v. New York*, Rehnquist fully explains his belief in a narrow reading of constitutional prohibitions. He describes *Lochner* as "one of the most ill-starred decisions that [the Supreme Court] ever rendered" (p. 205).²⁴ Focusing on the "dangers" of judicial challenge to legislation that embodies the will of the majority, he concludes that "the laws the Court was thus setting at naught were the response of legislators in countless states to keenly perceived and prominently publicized problems of the day. The Court was in the process of sowing a wind, with the whirlwind to be reaped years later" (p. 214).

The whirlwind materialized, thirty years after *Lochner*, in a standoff between the Court and President Roosevelt. During the first part of the Depression, the Supreme Court continually nullified social legislation and thwarted the New Deal. The invalidation of social legislation climaxed on what New Dealers called "Black Monday," on which the Supreme Court handed down three decisions that adversely affected Roosevelt's administration (pp. 216-18).²⁵

22. Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 675 (1984).

23. *See id.* at 721-22.

24. The Chief Justice is not alone in his sentiments. *See, e.g.,* Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 268-69 (1981) (noting prominent critics of the *Lochner* decision, including Roscoe Pound and Felix Frankfurter).

25. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (holding unconstitutional the National Industrial Recovery Act of 1933); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (holding unconstitutional the Frazier-Lemke Act of 1934, which amended section 75 of the Bankruptcy Act); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that President not empowered to remove member of the Federal Trade Commission).

In a fascinating chapter, *The Supreme Court* describes how Roosevelt reacted to the “Black Monday” decisions with an attempt to “reorganize” the Court through his Court-packing plan. The plan was ultimately defeated, but not before the Court suddenly began to uphold social legislation by giving a broad reading to Congress’s power to regulate commerce and denying that freedom of contract was constitutionally protected.

Though Rehnquist’s section on *Lochner* and the Court-packing plan gives a fine explanation of the relevant questions of constitutional interpretation, it is strangely bereft of any discussion of contributing political or historical factors. The book might have benefited from an explanation of why the Court was rendering opinions so unpopular with the vast majority of Americans, who supported FDR. Rehnquist also fails to mention that the Court’s collective opinion shifted because of the changed votes of just *one* Justice—Owen J. Roberts. Roberts’ turnabout has been called the “switch in time [that] saved Nine.”²⁶ Many have accused Roberts of changing his vote to help avert the Court-packing plan or to appease public opinion. Although this accusation has been rebutted,²⁷ the question of how much influence public opinion had on Roberts remains unanswered.²⁸ Because of the strong implications that Roberts succumbed to public and political pressure, an explanation of Roberts’ switch and the role that public opinion played in it would have been more in keeping with the focus of Rehnquist’s book. This absence becomes all the more apparent when, in a later chapter, Rehnquist states without further analysis that the Court of the 1930s “altered its constitutional doctrine in a way that served to placate its opponents” (p. 307).

While Rehnquist neglects to discuss the influence that public opinion may have had on the Court’s opinions from 1905 to 1936 he does observe that even when the Court was continually handing down unpopular decisions, it retained its support as an institution. Rehnquist thinks it “obvious that a majority of the American public did not want even a very popular president to tamper with the Supreme Court of the United

26. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673 (quoting letter from Edwin Corwin to Homer Cummings (May 19, 1937)).

27. Justice Frankfurter points out that Justice Roberts did not switch his vote on the minimum wage law in response to Roosevelt’s Court-packing plan. See Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-16 (1955). Roberts’ turnabout, however, was a major change and his switch upholding the Wagner Act and the Social Security Act remains unexplained.

28. See Leuchtenburg, *Franklin D. Roosevelt’s Supreme Court “Packing” Plan*, in *ESSAYS ON THE NEW DEAL* 69, 94-96 (H. Hollingsworth & W. Holmes eds. 1969) (speculating on reasons for Roberts’ switch); Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 553 & n.218 (1987) (questioning whether public opinion persuaded court to take “liberties with the Constitution,” and noting that “Justice Roberts himself pointed to the coercive effect of public opinion”).

States. Whatever the shortcomings of [the Court's] doctrine in the public mind, its judgments were not to be reversed by the simple expedient of creating new judgeships and filling them with administration supporters" (p. 234). The Court's continued legitimacy allows it to choose to consider public opinion, as it did in the *Steel Seizure Case*, or to ignore it, as it did in *Dames & Moore*.²⁹

The final chapters of *The Supreme Court* especially benefit from Rehnquist's unique perspective on the Supreme Court. In these chapters Rehnquist discusses and defends the inner workings of the Court at its secret conferences. Rehnquist estimates that between one-fourth and one-half of the certiorari petitions received are completely frivolous (p. 264). Even in the remaining cases, Rehnquist adds, the Court does not have time to hear cases "where the lower court may have reached an incorrect result, but where that result is not apt to have any influence beyond its effect on the parties to the case" (p. 269). While a layperson might regard this practice as unfair to litigants harmed by an erroneous lower court ruling, Rehnquist explains that since the Court is already stretched quite thin in hearing 150 cases per Term, its limited resources must be reserved for cases of general importance and general application.

In the last chapter, the Chief Justice explicates his view of judicial restraint. In several early passages of his book, Rehnquist suggests that judicial activism can have disastrous results. For example, he criticizes Taney's *Dred Scott* decision as based almost "entirely on [Taney's] sense of the unfairness to southerners . . . [b]ut a sense that a law is unfair, however deeply felt, ought not to be itself a ground for declaring an act of Congress void" (p. 145). Moreover, he writes, "the states are themselves sovereign entities with their own systems of laws and courts [Improvidence] alone [does] not warrant the Supreme Court of the United States for simply setting [a state] decision at naught" (p. 175).

Rehnquist believes that the Court should not "mistak[e] its own views of policy for the restrictions contained in the Constitution. The justices of the Supreme Court were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what laws are desirable and what laws are undesirable" (pp. 313-14). Today on the Court, Rehnquist's judicial philosophy collides with that of Justices Brennan and Marshall, who believe that "[t]he view that all matters of substantive policy should be resolved through the majoritarian

29. 453 U.S. 654 (1981). See *supra* note 5 and accompanying text (discussing facts of *Dames & Moore*).

process . . . ultimately will not do.”³⁰ “The genius of the Constitution resides not in any static meaning . . . but in the adaptability of its great principles to cope with current problems and current needs.”³¹ Despite these ideological differences, Rehnquist points out, “the Court is unanimous in a good number of its opinions” (p. 296). This fact is indicative of the Justices’ mutual respect.³²

Throughout *The Supreme Court*, and especially in the book’s last chapter, Rehnquist gives examples of congressional and executive interference with the Court (pp. 305-11). Although Rehnquist’s book attempts to avoid the controversy over the appropriate “advice and consent” role for the Senate, one might conclude Rehnquist’s historical examples evince a belief that politics should play a role in senate consideration of Supreme Court nominees.³³ Such a conclusion, however, would grossly oversimplify the Chief Justice’s view. Although, as an observer, Rehnquist acknowledges the role ideology plays in the confirmation process, nowhere in his book does he condone this state of affairs.³⁴ At his confirmation hearings in 1986, Rehnquist made his views on the role of ideology in the confirmation process clear³⁵ in a colloquy with Senator Paul Simon:

Senator Simon:

Let me pose the fundamental question for me. You have been through the confirmation process, and you have reflected and written upon this subject. Here is my struggle: on the posi-

30. W. Brennan, *The Constitution of the United States: Contemporary Ratification* (address delivered Oct. 12, 1985 at Georgetown Univ. Text and Teaching Symposium), *reprinted in* *Addresses: Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 6 (1986).

31. Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 394 (1981).

32. In fact both Brennan and Marshall think very highly of the Chief Justice. When Rehnquist was nominated for Chief Justice, Justice Brennan stated that Rehnquist would make a splendid Chief Justice. 132 CONG. REC. S12,384 (daily ed. Sept. 11, 1986) (quoted in statement of Senator Hatch). Justice Marshall has stated that Rehnquist is “going to be one of the best” Chief Justices. Hengstler, *Marshalling His Views*, 36 A.B.A. J., Mar. 1988, at 36.

33. See, e.g., *The Right Perspective*, Nat’l L.J., Nov. 30, 1987, at 12 col. 1 (editorial concerning Rehnquist’s address at Columbia Law School, Nov. 19, 1987).

34. A recent speech by Chief Justice Rehnquist at the Columbia Law School further illustrates this point:

[O]n more than one occasion in this country, either Congress or the President has not been satisfied to simply participate in the process of filling vacancies on our Supreme Court and has taken measures which have bidden fair to threaten the independence of the judges, the independence of the Court, and the authority of the Court.

Address by William H. Rehnquist at Columbia Law School (Nov. 19, 1987), *quoted in The Right Perspective*, Nat’l L.J., Nov. 30, 1987, at 12, col. 1.

35. Rehnquist is quoted here with due regard for his admonition that “I do not think my off-the-cuff answers to [impromptu] questions . . . are very profound or even always accurate.” Rehnquist, *supra* note 9, at 751.

tive side, we have a nominee of above-average ability, by any standard.

On the other side, particularly in the areas of race relations, . . . I come down on a different side than you would in these areas. I have great respect for you. If you were Paul Simon faced with that dilemma, how would you vote . . . ?

Justice Rehnquist:

I think that . . . it boils down to . . . what is the confirmation process all about? The President . . . alone nominates, whereas 100 senators [vote] whether or not to confirm. And I suppose the question is how is the Senate's power to be exercised[?]

[I] know a lot of people have spoken on it and written on it. I think you probably have to say that a Senator should not simply say, "This is not the person I would have appointed. I would have rather had someone who felt the religion clause of the First Amendment should be [interpreted] much differently. Therefore, since this nominee does not share my views, I am going to vote against his confirmation.

And yet obviously, the Senate is [not] limited to any particular qualifications. . . . [P]utting myself in your place, which is very, very difficult[, I think the question each senator should ask is:] have I fairly construed the constitution in my 15 years as Associate Justice.³⁶

Rehnquist clearly believes that, in confirming a Supreme Court nominee, a senator should focus primarily on the nominee's competence—not on views that may differ from those held by the senator but that nonetheless reflect a fair construction of the Constitution. This belief in a deferential senate role is consistent with Rehnquist's tenth chapter, which covers presidential selection of Supreme Court Justices. In this chapter, Rehnquist argues that a President can have only "partial success" in picking like-minded nominees—and thus only partial success in packing the Court (pp. 236-37). Rehnquist states that it is "both normal and desirable for presidents to attempt to pack the Court" and notes that many have tried to influence the Court's philosophy through appointments (p. 236). The Chief Justice expresses doubt that such attempts can succeed, naming a number of factors that militate against Court-packing success.³⁷

36. *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 274-75 (1986).

37. The first is that although a President may be able to appoint like-minded Justices "with regard to the problems . . . fores[een] . . . at the time" (p. 241), neither the President nor his nominee can foresee the great issues that will embroil the Court years down the road (pp. 241-42). Second, Rehnquist sees the Court as consisting mainly of "centrifugal forces, pushing toward individuality and independence" (p. 249): each new member of the Court arrives alone, is guaranteed life tenure, and is independent of the President, Congress, and the eight other Justices (p. 249-50). Third, Rehnquist argues that once an appointee "puts on the robe," he or she is subject to public and academic

Because Rehnquist's view would allegedly "lower the public's guard and lessen the Senate's vigilance" in reviewing Supreme Court nominees on ideological grounds, some commentators have disputed the assertion that a nominee's ideology is difficult to predict.³⁸ Professor Laurence Tribe goes so far as to suggest that "a President with any skill and a little luck . . . can, with fair success build the Court of his dreams,"³⁹ and Professor Donald Lively points out that one of the best examples of how a President can predict how a nominee will decide cases is Rehnquist himself.⁴⁰ While each of these commentators seeks to prove his point through historical analysis, a more telling historical review supports Rehnquist's view that "even strong Presidents [are no] more than partially successful in pack[ing] the Supreme Court" (p. 251). After an extended analysis of the postnomination surprises that have befallen Presidents since James Madison, Professor Richard Friedman concludes that "an individual President can nudge the Court, and even achieve dramatic short-term results, but it is difficult for him to fashion the court in his image over the long-term and nearly impossible for him to make the Court extreme."⁴¹

The Supreme Court is a unique and valuable book for those interested in an historical overview of the Court and an insightful explanation of its function in American society. Although the lesson ends at 1953, the book presents more than enough information for the interested reader to digest. The book's section on presidential appointments to the Supreme Court, which has drawn criticism for its implications, is a welcome addition to the ongoing debate over the role ideology should play in the selection of Supreme Court Justices. The first book written by a

scrutiny, which focuses on how the Justice performs as an individual far more than on his or her being a "team player" (p. 250).

Professor Lively disputes the relevance of the long-run unpredictability of Roosevelt's nominees to Rehnquist's thesis, arguing that Roosevelt's "primary objective" was only to ensure the safety of his New Deal legislation. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 560 (1986). Yet, this largely misses the Chief Justice's point: even if Roosevelt desired to place his mark on the Court far into the future, he would have been unable to do so because "[n]either the president nor his appointees can foresee what issues will come before the Court during the tenure of the appointees" (p. 249).

38. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 50 (1985) (For the most part, Justices are "loyal to the ideals and perspectives of the men who have nominated them."); Lively, *supra* note 37, at 554-55, 558 ("Presidents committed to shaping the direction of the Court largely have succeeded.").

39. L. TRIBE, *supra* note 38, at 76.

40. Lively, *supra* note 37, at 578-79.

41. Friedman, *supra* note 21, at 1308.

sitting Supreme Court Chief Justice is a success: *The Supreme Court* is an excellent constitutional law primer.

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