A return to the antebellum Constitution.

THE REHNQUIST COURT

BY OWEN FISS AND CHARLES KRAUTHAMMER

FROM THE MARSHALL COURT to the Warren Court, the role of the Supreme Court in determining the course of American political life has been widely acknowledged. It is harder to see how the Burger Court plays that role today. It appears to be adrift, but that impression is false. There is a vision that informs its work and shapes our politics. The source of that vision, however, is not Warren Burger. It is William Rehnquist.

Justice Rehnquist's leadership results from neither accident nor usurpation. He and Chief Justice Burger were appointed by the same President and have voted together to an astonishing degree—last term in 79.9 percent of all cases in which full opinions were issued. When he is in the majority, the Chief Justice has the privilege of deciding who speaks for the Court, and Burger has consistently chosen Rehnquist. In recent terms Rehnquist has written the opinion for the Court in almost all the important cases in which he was in the majority. Even his dissents set the terms of the debate among the Justices and often determine the evolution of future doctrine. It is not unusual for a Rehnquist dissent to become the majority opinion within a relatively short time.

If the pattern of decisions and the number of times he speaks for the Court are any indication, Rehnquist has considerable influence with the other Justices. Yet he does not have a secure majority. He is struggling for control: he is the leader, but the Court is divided, as is revealed by the striking increase in the number of cases in which no single opinion attains a majority of five. Justices William Brennan and Thurgood Marshall, principal forces on the Warren Court, usually oppose him. Justices John Paul Stevens and Harry Blackmun have increasingly become nonaligned, pulling away from both so-called "liberal" or "conservative" blocs, and often writing separate opinions.

Justice Rehnquist can usually count on the votes of Chief Justice Burger, Justice Lewis Powell, and, to a slightly lesser extent, Justice Byron R. White. When Potter Stewart was on the Court, he tended to be part of the same bloc. The appointment of Sandra Day O'Connor as his replacement is not likely to change the alignments. O'Connor has strong ties to Rehnquist. They were classmates at Stanford; and both she and Rehnquist spent almost all their adult lives in Phoenix, where they were members of the same social circles. Rehnquist has described O'Connor as a close personal friend. Shortly before her nomination, she published a law review article in which she revealed her admiration for Justice Rehnquist, her identification with his general philosophy, and the likelihood that she would move within his orbit of influence.

That orbit is likely to expand, given Rehnquist's energy, his youth (he is only 57), the clarity of his vision, and the likely pattern of future appointments. Under Reagan, Rehnquist's base of power will grow, since his constitutional program bears a remarkable similarity to President Reagan's new federalism. Five Justices, including Marshall and Brennan, are now in their mid-seventies and Reagan appears ready to use his appointment power to further his political views.

Rehnquist's intellectual and ideological qualifications for his leadership role have never been much in doubt. In 1952 he graduated first in his class from Stanford Law School. He then served as law clerk to Justice Robert Jackson before returning to practice in Phoenix in 1954. He spent the next fifteen years in a successful private practice before joining the Justice Department as an assistant attorney general in 1969. Two years later, President Nixon nominated him for the Supreme Court.

Long before he joined the Court, Rehnquist ardently and aggressively fought against the liberal ideas that were to find their deepest expression in the Warren Court. While still a clerk to Justice Jackson, he wrote a memorandum in defense of the *Plessy* v. *Ferguson* decision of 1896, which constitutionally legitimated Jim Crow laws. He wrote,

> To those who would argue that 'personal' rights are more sacrosanct than 'property' rights, the short answer is that the Constitution makes no such distinction. 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

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DRAWING BY VINT LAWRENCE FOR THE NEW REPUBLIC

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.

He continued in this vein in 1958, when he published a sweeping attack upon a series of decisions of the Warren Court that sought to curb the excesses of the McCarthy era. He began his article in a bar association publication this way: "Communists, former communists, and others of like political philosophy scored significant victories during the October, 1956, Term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957." (Included among the so-called "historic decisions" was *Yates* v. *United States*, which set aside the convictions of American Communist leaders and thus sought to protect advocacy of belief. The *Yates* opinion was written by Justice John Harlan, a true conservative and a great judge, whom Rehnquist succeeded and whose name he often invokes to support his positions.) In 1964 Rehnquist stepped forward to register his opposition to a Phoenix ordinance designed to prevent discrimination in public accommodations. The issue, as he saw it, was "whether the freedom of the property owner ought to be sacrificed in order to give to these minorities a chance to have access to integrated eating places at all." Later, Rehnquist actively opposed a proposal by the Phoenix superintendent of schools for a voluntary exchange of students to reduce segregation. "[W]e are no more dedicated to an 'integrated' society," he wrote, "than we are to a 'segregated' society." That was in 1967.

Two years later, he joined John Mitchell's Justice Department. "He did not just work as a quiet drone in the Attorney General's office," Joseph L. Rauh later remarked. "He went out on the hustings as the Administration spokesman." Rehnquist publicly defended the nomination of G. Harrold Carswell to the Supreme Court, the mass arrest of antiwar demonstrators on May Day (as part of a " 'qualified' martial law"—his term), the use of the military to conduct surveillance of American citizens in the years following the Detroit riots, and the Administration's program to impose restrictions on the rights of government employees to criticize government policies. In 1971 President Nixon rewarded him with an appointment to the Supreme Court.

On the Court, Rehnquist's opinions have been clear, lucid, brief, and mercifully free of bureaucratese. He gets to the point quickly and does not decorate his opinions with authorities he has neither read nor understood. On the other hand, his opinions fall radically short of the ideals of the profession. He repudiates precedents frequently and openly, and if that is impossible (because the precedent represents a tradition that neither the Court nor society is prepared to abandon), then he distorts them. For example, we are told by Rehnquist that the *Debs* case, involving one of the great strikes in American history, was simply "an armed conspiracy that threatened the interstate trans-

portation of the mails." He creates his own precedents out of asides: he places apparently inconsequential statements unobtrusively in one opinion, only to use them several opinions later—when he makes them seem of central importance to the earlier case and decisive to the case at hand. He manipulates trial records, as when he tried to discredit the findings of a trial court, affirmed by a court of appeals, that a pattern of police harassment of minorities had occurred in Philadelphia. Rehnquist saw only isolated incidents. He will also occasionally substitute slogans for analysis, as when he dismissed a grievance against overcrowded jails on the grounds that the Constitution does not guarantee "one man, one cell."

These failings of craft have attracted much attention, especially from the bar, preoccupied as it often is with process rather than substance. But the real problem with Rehnquist is substance. Rehnquist has a constitutional program for the nation: he wants to free the states from the restrictions of the national Constitution, particularly those emanating from the Civil War Amendments and the Bill of Rights. His ideal is state autonomy—and for a decade he has been working methodically to make it a reality.

BEFORE THE CIVIL WAR, it was established doctrine that the Bill of Rights limited only the national government, not the states. The Civil War Amendments radically changed that. The Fourteenth Amendment, in particular, placed far-reaching restrictions on the states. It forbade states to "abridge the privileges and immunities of citizens of the United States," to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." These generalities have been construed as "incorporating" almost all of the more specific protections of the Bill of Rights, thus making them applicable to the states. This process of incorporation began at the turn of the century, with the protection against confiscation of property, and reached its fullest expression during the Warren Court.

Rehnquist has denounced the incorporation doctrine. He has, for example, advocated wider latitude for the states than for the federal government in regulating speech. He acknowledges, of course, that states are bound by the generalities of the Fourteenth Amendment, but he insists that the Bill of Rights is not to be used as the measure of compliance. The states are to be held to an indeterminate lesser standard.

In defending this position, Rehnquist often cites Justice Harlan, who also rejected the incorporation doctrine. But though Harlan held the states to a lesser standard, he held the *federal* government to a very high standard indeed, as evidenced by his objection to federal obscenity prosecutions. Rehnquist has yet to follow Harlan's lead of vigorously applying the Bill of Rights against the federal government. His rejection of incorporation works in only one direction—in favor of state autonomy.

With the possible exception of Powell, no Justice on the present Court has so far shown a willingness to follow Rehnquist in his rejection of the incorporation doctrine. But Rehnquist has marshaled a majority of the Court for another strategy to serve his as yet too radical view of state autonomy: imposing strict limits on the powers of the federal courts and Congress.

The decisive turn against the courts came in 1976 in *Rizzo* v. *Goode*, the suit charging a pattern of police abuse of minorities in Philadelphia and seeking structural reform, including an internal disciplinary system, to reduce the likelihood of such abuses. The suit was modeled on the standard school desegregation case, which has almost always been brought in federal courts. Rehnquist dismissed *Rizzo* because the remedy required a federal institution (a federal court) to oversee the operation of a state agency. In this conclusion, he departed radically from the principle, implicit in *Brown* v. *Board of Education* and subsequent cases in the 1960s, that the federal courts are the primary guardians of federal constitutional rights.

The *Rizzo* plaintiffs could still seek redress in the state courts. On the surface, *Rizzo* did no more than shift power from one set of judges to another, both applying the same law. But the consequence of such a reallocation of power is likely to be great. It would be the equivalent of entrusting the implementation of *Brown* to the state courts. By and large, state judges, unlike federal judges, lack the independence that comes with life tenure; they are more subject to the shifting tides of politics. Transferring power to the state courts will reduce the level of enforcement and make more uneven the implementation of Fourteenth Amendment protections.

Rehnquist is not alone in attacking the federal courts for undertaking structural reform of state agencies of the type contemplated in *Rizzo* or *Brown*. But what most critics oppose is judicial activism. They think it inconsistent with our democratic ethos for courts to usurp the power of elected officials and do their work. Rehnquist, on the other hand, is a judicial activist. In his devotion to state autonomy he does not flinch from using the power of the judiciary to restrict the powers of the elected branches, and particularly of Congress.

A MAJOR ASSAULT on Congressional power occurred just last term in *Pennhurst State School* v. *Halderman*. The Court had before it a 1975 Congressional statute that had two objectives: to give money to the states for the mentally retarded and to codify the rights of the institutionalized mentally retarded. In the second aspect, Congress had, in effect, enacted a bill of rights (it was called just that) for the mentally retarded. Writing for the majority, Rehnquist ruled that those rights have no legal force; they are only

advice to the states. The talk of rights for him was only "precatory."

Congress's power to impose on the states a bill of rights for the mentally retarded could easily be derived from Section Five of the Fourteenth Amendment, which allows Congress to enforce by legislation the rights guaranteed in the amendment. (Congress has used Section Five and comparable provisions in the other Civil War Amendments to justify important civil rights legislation like the Voting Rights Act of 1965 and the Civil Rights Act of 1968.) The legislative record makes it clear that the portion of the 1975 statute guaranteeing the rights of the mentally retarded was understood as an exercise of Section Five power.

That was not good enough for Rehnquist. He held that in order for legislation even to be considered an exercise of Section Five power, Congress must *specifically* invoke that power, something it had failed to do in enacting the 1975 law. The stated reason for Rehnquist's rule was, once again, state autonomy: since all Congressional actions under Section Five constrain the power of the states, they necessarily threaten state autonomy and, for that reason, should be disfavored. Rehnquist thus implicitly repudiated the time-honored rule, based on the respect for Congress as a coordinate branch of government, that whenever Congress acts it is assumed to exercise *all* of its powers under the Constitution.

HAVING LIMITED ONE source of Congressional power, Rehnquist then turned in *Pennhurst* to the task of protecting state autonomy from another: Congress's spending power. The 1975 statute could reasonably be understood as an exercise of that power (even if it were not considered an exercise of Section Five power). The Department of Justice argued that because the states were using federal funds in their programs for the mentally retarded, Congress could impose on the states obligations regarding the rights of the mentally retarded, and had in fact done so in the 1975 act. Rehnquist refused to accept that argument. He reduced Congress's power under the Spending Clause to a power to offer the states a contract. For him, "the legitimacy of Congress's power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " Applying the principles of private contract law, he insisted that Congress specify the conditions of this "contract" with the same degree of clarity one would require of a bargain between two farmers over the sale of a cow. Since the provisions in the 1975 legislation protecting the rights of the mentally retarded did not have the requisite clarity, he refused to give them legal effect.

This ruling, like the one disfavoring the use of Section Five, is not an absolute restriction on Congressional power. It is more in the nature of a procedural limitation. Congressional action is still possible, but more difficult. The clarity that Rehnquist demands is an ideal that is largely unrealizable, and probably always variable. Even if Congress can overcome these barriers, Justice Rehnquist will doubtless find others. This suspicion arises from statements in his opinion in the *Pennhurst* case—once again, virtual asides—that reserve his options if, by chance, Congress is able to overcome procedural barriers. It also arises from his willingness to impose more substantive restrictions on Congress in other domains, such as the regulation of commerce.

Though Section Five of the Fourteenth Amendment and the Spending Clause are important contemporary sources of national legislative power, most of the growth of Congressional power in the twentieth century has been under the Commerce Clause. This grants Congress the power to regulate commerce among the states, and it has been construed as a broad grant of authority, subject to little more than the prohibitions of the Bill of Rights. The results have sometimes been momentous. The Civil Rights Act of 1964, for example, was viewed as a proper exercise of the commerce power because it prohibited racial discrimination in public accommodations using goods that moved in interstate commerce.

Rehnquist has refused to accept the accretion of Congressional power that has occurred under the Commerce Clause. Against it he has elevated state autonomy to a constitutional value of the first rank, using it to limit Congressional action as the Warren Court might have used freedom of speech or other values from the Bill of Rights. In *National League of Cities* v. *Usery*, Rehnquist used state autonomy to invalidate a federal statute prescribing minimum wages and maximum hours for employees of states and localities. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest," he wrote, "we think there would be little left of the States' 'separate and independent existence.' "

The doctrine of *Usery*, like the *Pennhurst* rule reducing Congressional legislation to contract, resurrects the notion of "state sovereignty," which sees the states as almost coequal to the nation, and as tied together only by formal compact for limited ends. The reach of this doctrine is considerable. As Archibald Cox once said of equality in the Warren era, the idea of state sovereignty, once loosed, is not easily cabined. In *Usery* it was used to curtail the power of Congress to regulate relations between the states and their employees. It may eventually be used to curtail all exercises of Congressional power affecting the states.

REHNQUIST'S CHAMPIONING of state autonomy may make him a hero to conservatives, but that acclaim would be ill-deserved. He is no conservative, as that term is ordinarily understood in the law, but

rather a revisionist of a particular ideological bent. He repudiates precedents; he shows no deference to the legislative branch; and he is unable to ground state autonomy in any textual provision of the Constitution. On occasion, he invokes the Tenth Amendment, but it cannot carry the full weight of his program. Accordingly, he eschews what he calls "literalism" and speaks instead of the "implicit ordering of relationships within the federal system" and the "tacit postulates yielded by that ordering."

There is a special irony to Rehnquist's repudiation of "strict constructionism" given the rhetoric of the President who appointed him, just as there is irony in his willingness to use the judicial power to invalidate the work of Congress and thus engage in his own brand of judicial activism. But irony is not tantamount to error. After all, the Marshall Court (in its affirmation of nationalism) and the Warren Court (in its affirmation of equality) also repudiated strict constructionism and practiced judicial activism. Both would agree with Rehnquist when he argues that "the tacit postulates . . . are as much engraved in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." They would also agree with him that the task of the judiciary is to give expression to the values embodied in the Constitution, even if that means enforcing those values against the elected branches. The difference among these various Courts lies in the domain of substance. Rehnquist's goal is the affirmation of state autonomy, and the legitimacy of his enterprise will ultimately turn on his capacity to ground that value in the Constitution.

WHEN REHNQUIST speaks of being guided by the "tacit postulates" of the Constitution, he is referring neither to the needs of contemporary society nor to prevailing social morality—which he disparaging calls "the living Constitution." He is talking about the historical Constitution: historical imperatives derived from the understanding at Philadelphia. For Rehnquist the task of the Court is to look back to 1787 and to reconstruct the intent of the drafters of the Constitution. The epistemological and evidentiary problems of such an undertaking are staggering. But those problems do not disqualify Rehnquist's position. He can assert that the duty of the Supreme Court is to interpret the text and that the most authoritative source for such an interpretation, apart from the words on the parchment, is the original intent of the framers.

Admittedly, Rehnquist's historicism seems to operate in a peculiar way, in that he wishes to honor the Constitutional Convention of 1787 but not the judicial precedents that have been set since then. This use of history is at odds with the common law conception of the judicial craft, with its emphasis on precedent. But once again it is not idiosyncratic. The Marshall Court did not have the burden of precedent; the Warren Court often rejected it. The most plausible interpretation of *Brown* is that it simply repudiated *Plessy*, in an attempt to reflect a truer understanding of the Fourteenth Amendment. For the Warren Court, as for Rehnquist, precedent had less force than the framers' original understanding of the text they wrote.

But Rehnquist takes his devotion to history one step further. He is so determined to justify state autonomy that, besides giving a questionable historical reading of 1787 (he seems to confuse the Constitution with the Articles of Confederation), he ignores what has happened since—the Civil War, for example. And for good reason. The Civil War decided the issue of state autonomy. It denied the states what might be regarded as the one essential attribute of sovereignty—the right to withdraw from the Union. It affirmed the organic relationship between the states and the nation; it denied that the states have a "separate" and "independent" existence; it repudiated the doctrine of dual sovereignty, and located sovereignty in the nation. The Civil War Amendments were a codification of these understandings. They were not merely technical modifications to what Rehnquist claims to be the understanding at Philadelphia, corrections that assured all persons formal equality before the law. Rather, these amendments represent a second starting point, a basic change in the postulates of our constitutional system. Any appeal to history which ignores that is a sham.

THERE IS, HOWEVER, another way of understanding the idea of state autonomy, which may be the true source of its appeal. It arises from the romance with Jeffersonianism and the view that state autonomy is not an end in itself, but part of a larger system to protect liberty. (President Reagan also defends the transfer of power to the states, his new federalism, in the name of a higher value—democracy. The slogan is returning power to government that is closest to the people.) If Rehnquist's ideal of state autonomy is indeed in the service of liberty, we might be inclined to accept his revisionist reading of history. But is it?

The argument that it is rests on an identification of liberty with limited government: that which governs best, governs least. State government is assumed to be the best because it is the weakest and most limited. Those threatened by a state, so the argument must continue, always have the option of moving from one state to another. But this assumes that persons or groups threatened by one state can move to another; that other states will not be swept by similar urges of absolutism; and that the idea of the nation can persist in the face of diversity on the fundamental rights of citizens. One would have thought that this country had already learned the dangers of a house divided.

The argument from liberty also ignores the fact that today the states, and not the federal government, pose the greatest danger to liberty. If, as Rehnquist insists,

the agencies of the central government, including Congress and the federal courts, are denied the power to protect basic rights and liberties (such as free speech, the right to be secure in our homes and persons, and the rights involved in *Pennhurst* and *Rizzo*) against threats by the states, then liberty is diminished, not enhanced.

STATE AUTONOMY occasionally produces surprising results. In one case, for example, Justice Rehnquist permitted the California State Supreme Court, acting under the state constitution, to require a shopping center owner to subordinate his property rights and allow leafleting on his property. This decision was an important victory for free speech (if you live in California), and is a credit to the consistency of Rehnquist's commitment to state autonomy. A liberal should be grateful for the result, but careful not to generalize from it. The more likely consequences of state autonomy can be seen in Rehnquist's willingness to sustain state censorship of allegedly obscene material and his refusal to set any limits on the process or substance of the criminal law administered by the states. For example, Rehnquist is not the least troubled by a Texas law that imposed a life sentence on an individual for obtaining $120.75 under false pretenses. (He accepted payment for repairing an air conditioner and never did the job.) True, the individual had been convicted twice before, for frauds of $80 and $28.36. But from the perspective of state autonomy, it is hard to see why these details matter. As Rehnquist noted with icy serenity: "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."

Such cases suggest that with respect to liberty, the value of state autonomy is neither neutrally chosen nor neutral in its likely outcome. On the whole, liberty will not be enhanced—unless liberty is reduced to property. Rehnquist prefers state autonomy because it is more consonant with classical laissez-faire theory which reduces the function of government to protecting private exchanges and the aim of the Constitution to protecting the rights and expectations of property holders. Laissez-faire is predicated on the sharp distinction between private and government actions. And Rehnquist insists in making this distinction, particularly to protect state action from the constraints of the Fourteenth Amendment. He refused to apply the Fourteenth Amendment to a utility company upon which Pennsylvania had conferred a local monopoly—on the theory that the company is not the State. He also refused to apply the amendment when Pennsylvania denied blacks equal protection by conferring a liquor license on a club that excludes blacks. Mere support for private sector discrimination is not enough for Rehnquist; the state must discriminate directly.

Another threat to laissez-faire in Rehnquist's view is the federal regulatory agencies. He has, for example, sought to impede the capacity of Congress to regulate business activities by objecting to its practice of delegating powers to administrative agencies (thus drawing on the expertise those agencies possess). Invoking a doctrine once used to stymie the New Deal, Rehnquist has argued that federal safety legislation is invalid because Congress gave the Secretary of Labor too much discretion. The statute directed the Secretary to make the work place as safe as "feasible," and Rehnquist sees the use of that word—commonplace in all regulatory measures—as excessive delegation.

Rehnquist seeks to transfer power from the federal government to the states because the states are principally concerned with preserving property and public order. But where the states threaten property, Rehnquist sometimes is prepared to sacrifice state autonomy, once again revealing his underlying ideology. He voted to invalidate a Minnesota statute requiring firms leaving the state to contribute to a pension fund for their former employees; he voted to invalidate a New Jersey statute allowing the Port Authority to use funds for purposes other than securing bonds; and he voted against a New York City law requiring that Grand Central Station be maintained as a landmark. The first two he saw as impairing the obligations of contract and the third as breaching the constitutional duty of the state not to take property (from the owners of Grand Central) without just compensation.

REHNQUIST THUS uses state autonomy less to promote liberty than to promote property. He also uses it to repudiate the central value promoted by the Warren Court—equality. The Warren Court's belief in equality led it to take a critical view of the status quo and of existing distinctions of power and privilege. It saw government power not as a necessary evil to be tolerated, but as an important instrument for fully realizing the values embodied in the Constitution. State autonomy was not itself an ideal, but only a technique of administration. The function of government was not to be a night watchman, controlling disruptions of the status quo, but to guarantee the very conditions of freedom, to abolish caste, and to provide equal protection for all citizens.

That vision is receding, most obviously in President Reagan's attempt to dismantle federal institutions and to leave the dispensation of rights and privileges in the hands of the states. Reagan's new federalism will meet stiff opposition, and possibly ultimate defeat, in Congress. But while that epic battle is fought on page one, a somewhat quieter, steadier, and more lasting erosion of federal power and the values it serves is taking place on the Supreme Court. Reagan may be running out of time and prestige to carry out his antebellum vision of federalism. Rehnquist appears to have plenty of both.