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Book Review: The Supreme Court: How It Was, How It Is. by William H. Rehnquist.

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THE SUPREME COURT: HOW IT WAS, HOW IT IS. By William H. Rehnquist.[1] New York: William Morrow & Company. 1987. Pp. 338. $18.95.

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Early in my first year of law school, during one of the first sessions of Criminal Law, one of my classmates said something Insensitive—that is, something vaguely "conservative" with which almost all of his fellow students (but probably few of their parents) disagreed. I do not recall precisely what he said—I think he opined that retribution was a permissible goal of the criminal justice system—but his Insensitive remark brought forth the hisses, catcalls, and groans that greet all such expressions of Insensitivity in the law school classroom. Then a remarkable thing happened: The professor, a person of unquestioned Sensitivity, exploded. She angrily told us that she would not permit the Sensitive Majority to intimidate those with whom it disagreed; that in her class alternative views would be encouraged, not jeered; and that, if one disagreed with an opinion being expressed in class, one should not hiss, but instead attempt to rebut it. True to her word, the professor maintained a hiss-less environment for the rest of the semester, with one exception: At the mention of the word "Rehnquist," Sensitive students could hiss until their mouths went dry and receive nothing more than a sly grin in rebuke from the professor. After all, respect for those with whom one disagrees goes only so far.

No doubt my former professor and her hissing students, if they learned that the very same Rehnquist was writing a book about the Supreme Court, must have expected a work of monumental Insensitivity. This book will disappoint them, however, for it is less ideological than many of the histories and guidebooks sold in the Court's giftshop. Chief Justice Rehnquist's book does not even reveal, much less defend, the judicial philosophy that has earned him the enmity (and admiration) of so many. Thus the book bears little resemblance to Robert Bork's *The Tempting of America*. Nor does it bear the slightest resemblance to *The Brethren*. The most interesting fact we learn about Justice Thurgood Marshall, for example, is that he is "the Court's raconteur" with "a seemingly never-end-

1. Chief Justice of the United States.

2. Attorney, Faegre & Benson, Minneapolis. Although the impressions and opinions expressed in this review were largely formed while I served as a law clerk to Justice Scalia, they are not necessarily shared by him. In fact, in several instances, I am quite certain he would disagree.

ing fund of droll stories." (We also learn that Justice Blackmun shares Rehnquist's "interest in geography trivia.")

The Supreme Court is really three books in one. The first third is autobiographical. The Chief Justice provides a good-natured account of his tenure as a law clerk to Justice Jackson during the 1951 Term. He brings to life the Vinson Court and particularly the Jackson chambers, giving even the lay reader a feel for the workaday lives of the Justices and their law clerks. Rehnquist structures his account around the progression of the Steel Seizure Case, in which Jackson wrote one of his most significant opinions. The narrative is particularly effective in demonstrating how the press can shape a legal dispute as it winds its way to the Supreme Court. Rehnquist makes a strong argument that the Court should not have reached the merits of the Steel Seizure Case and did so only because of the public furor fanned by the press.

The next third of the book is historical. A history of the Supreme Court is necessarily a history of constitutional law, and Rehnquist provides a highly accessible "capsule history" of the development of doctrine between 1789 and 1953. He helps the layperson to understand the importance of such landmarks as *Marbury v. Madison*. Rehnquist also cogently explains how changes in the nation's economy profoundly shaped the Court's business. Throughout this history, he weaves in biographies of many influential Justices (and, for that matter, many lesser lights).

In the final third of the book, Rehnquist turns from *How It Was* to *How It Is*. One would expect to find here the book's most provocative material. After all, it is here that Rehnquist, long one of the Court's most controversial figures, describes the functioning of the institution over which he presides. True, he is limited in what he can say, both by his decision "to avoid any discussion of the cases and doctrines in which any of [his] present colleagues have played a part" and by the vague "code of silence" that is supposed to bind all those who have worked at the Court (about which Rehnquist says not a word). But even those constraints leave Rehnquist much to address, for the Court today is both an extraordinarily powerful and a bewildering institution.

Few today could regard the Court as the "least dangerous branch" of government. It is largely beyond the control of the other branches and the public. The Justices themselves provide the only real limitations on their power and, not surprisingly, they provide few. Jurisdictional and prudential restrictions on the Court's authority are violated with impunity by conservatives and liberals alike to achieve desired substantive results, and virtually every as-

pect of American life has to some degree been "constitutionalized" and thus brought under the Court's sway.

This awesome power is vested in nine Justices who are appointed for life and act like it. They can and (as in the case of Justice Stephen J. Field) sometimes do serve long past the time that they are physically and mentally able to perform their duties. They are isolated to a remarkable degree. They need not read their mail, answer their phones, attend any meetings, or satisfy any constituency. To the press and to the general public, the Court is a mystery and its Justices ciphers.

The workload of the Court is crushing. Even the most energetic and talented Justices must delegate substantial responsibility to their clerks. Most of those clerks are about twenty-six years old and have only recently graduated from law school. Most have never practiced law, worked full-time, or served in another branch of the government. Most come from one of a handful of prestigious law schools, where generally privileged and sheltered students are educated by professors who are overwhelmingly leftist in political orientation and lacking in substantial "real world" legal experience. Not surprisingly, the typical law clerk is liberal, naive, arrogant,[3] and inordinately fond of three prong balancing tests.

Rehnquist takes note of some of these features of the Court's operations, but says little about them. For example, he reports that the number of certiorari petitions filed with the Court has increased from about 1300 per term at the time he clerked to over 4000 per term today. Presumably this dramatic increase has affected the Court significantly, since it still has only nine members. Yet Rehnquist sheds little light on the matter. Concerning law clerks, he notes that "the number . . . has increased with the years" and that "[t]he practice of assigning the task of preparing first drafts of Court opinions to law clerks who are usually just one or two years out of law school may undoubtedly and with some reason cause raised eyebrows in the legal profession and outside of it." But he blithely assures the reader that the Justices "continue to do a great deal more of their 'own work' than do their counterparts in the other branches of the federal government" and that law clerks are "not simply turned loose" but instead perform "highly structured task[s]." These assurances are somewhat discredited by his own observation that, during the 1951 Term, the Justices sometimes

3. Rehnquist accurately reports that "it would be all but impossible to assemble a more hypercritical, not to say arrogant, audience than a group of law clerks criticizing an opinion circulated by one of their employers." He almost surely, and with ample justification, has a similar view of former law clerks critiquing the performance of the institution they served.

drafted their own opinions and, in fact, did so much of their own work that their law clerks were often ignorant of their bosses' views on important cases. Similar comments could be made only rarely today, suggesting that the law clerks' influence has grown.

If anything about the manner in which the Court currently operates disturbs Rehnquist, it is not apparent from his book, with one possible exception: He devotes over one-tenth of his otherwise superficial survey of the current Court to a lively defense of the Court's practice of not discussing the merits of cases at conference. He notes that when he "first went on the Court, [he] was both surprised and disappointed at how little interplay there was between the various Justices during the process of conferring on a case." But, he says, he now realizes "with newfound clarity" that while the idea of the Justices discussing the merits of cases before them "is fine in the abstract," it will not work "in practice." Rehnquist explains that all of the Justices are "working with the same materials, dealing with the same briefs, the same cases [sic], and have heard the same oral argument; unlikely as it may seem to the brand-new justice, the point that he seizes upon has probably been considered by some of the others and they have not found it persuasive." Furthermore, "[e]ach of us soon comes to know the general outlook of his eight colleagues, and on occasion I am sure that each of us feels, listening to the eight others, that he has 'heard it all before.'" Thus, he concludes, there is usually no "real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the Court." Shades of Thurman Arnold![4]

It is curious that Rehnquist devotes so much attention to the superficial aspects of the Court's conferences, while ignoring a serious and fascinating problem of which the stale conferences are simply a manifestation: the striking intellectual sterility of life at the present Court. Discussion of cases among the Justices is frowned upon not only in conference, but at *any* time. Justices rarely engage in substantive discussions with one another, and most of the discussions that do occur involve the same few members of the Court. To an almost absurd degree, communications among the Justices occur by means of written memoranda shuttled among the chambers by messengers. It is generally considered bad form for one Justice to ask another to make changes in a draft opinion. It is even worse form for a Justice who has voted in the majority to await circulation

4. The same argument was made by Arnold, not usually thought of as an intellectual ancestor of the Chief Justice. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1313 (1960).

of the dissent before joining the majority opinion. And it is nearly criminal to change one's mind, particularly after one has already cast one's vote, and particularly if one has voted with a five member majority. Operating together, the Court's informal "rules" protect Justices from having to persuade or resist persuasion, from having to closely scrutinize each other's work, and from having to address or correct deficiencies in their opinions.

This is a relatively new phenomenon. Rehnquist's own account of the 1951 Term and discussions I have had with former law clerks suggest that the sterile environment in which the Justices now function contrasts sharply with the relatively collegial atmosphere in which at least the Vinson and Warren Courts worked. Perhaps the Chief Justice is so accustomed to the present conditions that they no longer trouble him. Perhaps he believes that the situation is not as bleak as I portray. Or perhaps he feels that the Court's workload requires Justices to make up their minds quickly, stick with their decisions, forego trying to persuade their colleagues, and sometimes accept unsatisfactory work. Rehnquist's unusual defense of the Court's insipid conferences suggests that the lack of "interplay" among his colleagues—and what that might reflect—concern him, but his full views remain unknown.

The Supreme Court is a worthwhile book, full of pleasant and interesting anecdotes about the Court and the Chief Justice who now leads it. But it could have been much more. One is left wishing that Rehnquist had not attempted to write three books at once, but had instead devoted his considerable gifts to a serious examination of the way in which the present Court goes about its business.

SPEECH, CRIME, AND THE USES OF LANGUAGE. By Kent Greenawalt.[1] New York and Oxford: Oxford University Press. 1989. Pp. viii, 349. $45.00.

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The power of speech is an essential part of what makes us human: it is the basis of politics and of civilization itself.[3] Through speech, people join together to hunt for food, build houses, farm the

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3. ARISTOTLE, POLITICS, Book 1, sections 9-11, pp. 9-11 (Loeb Classical Library 1944 ed.)