

BOOK REVIEW

WILLIAM REHNQUIST AS HISTORIAN

CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876. By *William H. Rehnquist*. Alfred A. Knopf, 2004. Pp. 288. \$26.00.

ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME. By *William H. Rehnquist*. Alfred A. Knopf, 1998. Pp. 277. \$27.50.

GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON. By *William H. Rehnquist*. Quill William Morrow, New York, 1992. Pp. 303. \$23.00.

Mark Tushnet†

INTRODUCTION

Whenever I see that a federal judge has published a book, I wonder whether we are paying our judges too little or too much: too little, perhaps, because they find it necessary to supplement their incomes with book royalties, such as they are; too much, perhaps, because they plainly do not find that the work we give them fills their time. On reflection, however, I realize that my initial reaction rests on too narrow a view of the job our judges have. They are, of course, adjudicators, law appliers, and lawmakers, but they are also civic educators.¹ The books they write are one of the modes in which they perform the latter aspect of their job.²

But that conclusion leads to another question: How good are federal judges at educating the public through writing books? There are reasons to be skeptical, arising primarily from the strong possibility of sycophantism. One of the perks of being a judge is that people call

† Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

¹ For an analysis of the federal judge's role as civic educator in the early republic, see Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 128.

² This understanding alleviates another concern I have about the propriety of using public resources to support public employees' activities that generate additional personal income. Sometimes public employees donate royalties to charity, which addresses this concern (though not, in my view, completely). Chief Justice Rehnquist indicated that his secretaries assisted in producing his books. I do not know whether he paid them some additional salary to do so, nor do I know whether he donated whatever royalties he received. But to the extent that his books are part of his role as a civic educator, these concerns disappear: He is using public resources to perform part of his public job.

you “Your Honor” and stand up when you enter the room. Books by federal judges are likely to be assigned for review to “interested” parties—lawyers who imagine themselves arguing cases before the judge in question or encountering the judge in a social situation, or journalists who report on the courts and need to maintain access to their sources. This minimizes the possibility of receiving bad reviews, which in turn reduces the incentives a judge has to write a truly good book.

Under the circumstances, then, one might expect extracurricular judicial writing to be something like—to borrow from Samuel Johnson—a dog’s walking on its hind legs; it might not be done well, but one is surprised that it is done at all.³ This Review examines Chief Justice William Rehnquist’s three books of popular history. I do not intend to provide summaries of them, beyond this: *Grand Inquests* is about the impeachments of Justice Samuel Chase in 1804–05 and of President Andrew Johnson in 1867.⁴ *All the Laws But One* explores the nature and consequences of the national government’s response to dissent during the Civil War, with a quick look at similar issues during World Wars I and II.⁵ Finally, *Centennial Crisis* concerns the resolution of the 1876 dispute over who was to become president after the election left uncertain which of the candidates received the majority of the votes in several states.⁶

On a job evaluation form, one would check off the box labeled “Exceeds expectations” if asked about Chief Justice Rehnquist’s books of popular history. They are good, though not exceptionally good. In the remainder of this Review, I comment first on the books *qua* popular history, identifying some of the features of that genre and showing how the Chief Justice’s books fit into it. Then I turn to what I call the sensibility revealed in the books, the general cast of mind, the way the Chief Justice approaches matters, particularly those implicating the courts—before concluding with a discussion of the jurisprudence revealed in the books, that is, the analysis the Chief Justice offers of specific legal propositions.

³ See The Samuel Johnson Sound Bite Page, Women Preaching . . . / Dog Walking . . . , <http://www.samueljohnson.com/dogwalk.html> (last visited Mar. 24, 2006).

⁴ WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

⁵ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

⁶ WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004). Many have observed that the Chief Justice had a talent for selecting topics that became obviously relevant shortly after publication. *Grand Inquests* was published in 1992 (six years before President William Jefferson Clinton was impeached in 1998), and *All the Laws But One* in 1998 (just three years before American military engagement in Afghanistan in 2001). *Centennial Crisis* was published in 2004, so unless the research started long before, it did not anticipate the 2000 election debacle.

I

WILLIAM REHNQUIST AS POPULAR HISTORIAN

Works of popular history usually begin with some striking incident, usually captured in a dramatic anecdote describing an important event in the overall story. Readers know from the outset that the incident and event are significant, but the author assumes that they do not know exactly why. The popular historian moves backward from the opening event to place the event in its historical setting, and then forward from the incident's conclusion to show its contemporary relevance. Along the way, the author gives each new character a short biographical and personality sketch and describes various physical locations to give readers a feel for the "past-ness" of the story. At the end of the tale, the author tells the reader what ultimately becomes of the main characters.

The best popular historians do original research in archives, but many mine published sources—often, of course, old ones not readily available to contemporary readers—and synthesize the available information into a new narrative. The best popular histories subtly make an argument about history; rather than explicitly present a thesis about their subject, the authors use the narrative itself to carry their arguments. Their selection of which incidents to describe and which characters to sketch, as well as the language they use in writing these descriptions and sketches, operates to "make" an argument, the terms of which the writers refrain from spelling out.

Chief Justice Rehnquist's books follow the form of good popular history,⁷ but are not among the best of this genre. His research apparently consists of reading published accounts, some of which—such as the transcripts of the Chase and Johnson impeachments—are original sources. *Grand Inquests* opens with a sketch of the commencement of Justice Chase's impeachment trial.⁸ The obligatory brief biographies are all there—sometimes a bit pedestrian, but never long enough to interfere with the larger story. One distinctive feature of Rehnquist's books is hardly surprising: He periodically gives readers his views on how certain aspects of the historic trials he discusses would be re-

⁷ One gets the sense that the Chief Justice was something of a Civil War buff. The Civil War and its aftermath play a central role in all three books considered here, and one might reasonably think that the discussions of the Chase impeachment in *Grand Inquests* and the restrictions of civil liberties during World Wars I and II in *All the Laws But One* were added to fill out pages in books the Chief Justice wished could solely be about the Civil War.

⁸ See REHNQUIST, *supra* note 4, at 15–16. *All the Laws But One* follows this form, but in a way that indicates some of the Chief Justice's limitations. The opening incident depicts Abraham Lincoln's departure from Springfield, Illinois for his inauguration, but the depiction is in Carl Sandburg's words, not Rehnquist's. See REHNQUIST, *supra* note 5, at 3 (quoting 3 CARL SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS* 195 (1954)).

solved under today's law.⁹ He was, after all, the Chief Justice of the United States.

What makes Rehnquist a good popular historian, but not a distinguished one? First, he occasionally succumbs to the temptations of antiquarianism, recounting stories about the past because they strike him as interesting even though they have little to do with the main story he is presenting. Setting the context for the Civil War treason trials in Ohio, for example, Rehnquist offers an overly extended account of how the Midwest was settled.¹⁰ More significantly, the Chief Justice gives readers too many block quotations. These are visually distracting, of course, but they also signal an author's reluctance to stand behind his story by putting it in his own words.¹¹

Finally, Rehnquist has not mastered the expository techniques needed to connect the "look backward" to the narrative line going forward. What should be a presentation merely setting the stage for the main story is, in all three books, a longer-than-appropriate political history of the Antebellum United States.¹² Rehnquist seems to forget that he should not be giving that history to readers for its own sake, but simply using it to explain why people were doing what they were doing during the events at the center of the story. As a result, a reader may occasionally wonder why she is getting excruciating detail about politics in the 1850s when she picked up a book that was, she thought, about 1867 or 1876.

These are imperfections, not fatal flaws. As I have said, Rehnquist is a good popular historian, and my critical observations should be read with that conclusion in mind.

II

WILLIAM REHNQUIST'S SENSIBILITY

Rehnquist was a popular historian, but of course he was something else as well. One can read books by Doris Kearns Goodwin with-

⁹ See REHNQUIST, *supra* note 5, at 101-02 (describing the evidentiary rules dealing with the admissibility of hearsay testimony in conspiracy trials in his discussion of the testimony in the Indianapolis Treason Trials during the Civil War).

¹⁰ See *id.* at 78-80; see also REHNQUIST, *supra* note 4, at 128-30 (describing the physical space provided to the Supreme Court in its early years, distracting the reader from the main story of what Justice Chase's impeachment and eventual acquittal implied for the Court).

¹¹ See, e.g., REHNQUIST, *supra* note 5, at 15-17, 30-36; REHNQUIST, *supra* note 6, at 23-24, 65-67; REHNQUIST, *supra* note 4, at 51-54, 58-68. A related weakness appears in the account of the trials of those accused of conspiring to assassinate President Lincoln, which is simply an extended and quite tedious witness-by-witness summary of the testimony presented. See REHNQUIST, *supra* note 5, at 155-61.

¹² In *Grand Inquests*, this history is presented in connection with the impeachment of President Andrew Johnson, and comes midway through the book. See REHNQUIST, *supra* note 4, at 151-84.

out thinking too much about what her books reveal about the way she thinks, or what I would call her “sensibility.” The sensibility displayed by an author who was, not incidentally, the Chief Justice of the United States Supreme Court is an entirely different matter.

Any good author, as Rehnquist is, will not display his sensibility too often, for that would intrude on the narrative flow. I have identified, however, two main areas in which Rehnquist does reveal his sensibility in his works of history: his attitude toward the program for reconstruction of the South pursued by the “Radical Republicans” in Congress, and his attitude toward (surprise) the enterprise of judging.¹³

Addressing first the subject of congressional Reconstruction, Rehnquist seems mildly unsympathetic to Congress’s aggressive efforts to remake the defeated South. This attitude is more apparent in word and source choice than in any explicit statement. For example, Rehnquist calls General Stephen Frémont’s order to immediately free all slaves coming into the control of military forces under his command “extravagant and undisciplined.”¹⁴ The characterization of the order as “undisciplined” is certainly apt; having been issued in Missouri in 1861, the order complicated Lincoln’s efforts to retain some hold both there and in other border states where slavery had been legal. Indeed, upon hearing of it, Lincoln directed that the order be rescinded immediately.¹⁵ The term “extravagant,” though, seems to address the substance of Frémont’s order and suggests that immediate emancipation might have been, in Rehnquist’s eyes, something of a bad idea. Similarly, Rehnquist sustains an arguably inappropriate even-handed tone in describing potential electoral fraud in the 1876 elections, treating possible frauds committed by Republicans as roughly equal in severity to those committed by Democrats. In so doing, he makes little of the fact that while Republicans may have stuffed ballot boxes, Democrats terrorized black voters and potential voters in the South.¹⁶

Rehnquist’s account of President Johnson’s impeachment is also mildly anti-Radical in tone.¹⁷ This may reflect the times during which Rehnquist would have initially studied history; the historiography of

¹³ I distinguish between the latter, which I refer to as Rehnquist’s attitude regarding the role of judges, and Rehnquist’s express views on substantive issues of constitutional law, which I refer to as the jurisprudence displayed in his books. See *infra* Part III.

¹⁴ REHNQUIST, *supra* note 5, at 109.

¹⁵ See *id.*

¹⁶ REHNQUIST, *supra* note 6, at 104–109.

¹⁷ See, e.g., REHNQUIST, *supra* note 4, at 245–46 (“It remained for Sumner, who combined near-fanaticism with extraordinary ability, to frankly state the other view. But just as one would not want to see fastened upon parliamentary proceedings, in connection with a vote of confidence in the government, the often tedious and demanding requirements of a judicial trial, it is very difficult to reconcile Sumner’s candidly political approach with the

Reconstruction, as it stood in the 1940s and early 1950s, was dominated by the view that congressional Reconstruction had been misguided. Strikingly, Rehnquist includes a block quotation from James Ford Rhodes—one of the central figures in the dominant historiography of that period—on the electoral crisis of 1876,¹⁸ and Rehnquist's principal secondary source for the story of the electoral commission that resolved the 1876 election dispute is Charles Fairman, who was closely aligned with the anti-Radical historians.¹⁹

While Rehnquist's views on Reconstruction may be of interest to the extent that they shed some light on his views on the proper interpretation of the Radical-inspired Fourteenth Amendment, Rehnquist's books display his sensibilities about judges more openly and extensively.

It should come as no surprise that Rehnquist likes judges.²⁰ Interestingly, however, he does not systematically distinguish the judges as individuals from the courts on which they sit. For example, in describing Congress's reliance on Supreme Court Justices to sit on the 1876 Electoral Commission, he observes that "[i]t was quite natural for Congress to turn to the justices of the Supreme Court"²¹ Rehnquist does not make much of the fact that it was widely anticipated that four of the Justices named to the Commission were predictably going to vote along party lines, and that only Justice David Davis was expected to assess the situation with any degree of independence; Justice Davis, however, never served on the Commission, because he was elected to the Senate before the Commission met.²² He was replaced by Justice Joseph Bradley, an ardent Republican partisan.²³

constitutional provisions dealing with impeachment. This, at any rate, was the view of those recusant Republicans who filed opinions in the case.").

¹⁸ See REHNQUIST, *supra* note 6, at 109.

¹⁹ Rehnquist relies on Fairman's book on the electoral commission, *Five Justices and the Electoral Commission of 1877*, which was published in 1988, the year Fairman died. See *id.* at ix ("I dedicate this book to Charles Fairman, who first introduced me to the Supreme Court in an undergraduate course in Constitutional Law at Stanford University."). Both Pamela Brandwein and Richard Primus have suggested a connection between Fairman's interpretation of Reconstruction and Rehnquist's interpretation of the Fourteenth Amendment. See PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 2–3 (1999) (examining the interactions between competing histories of Reconstruction and the Fourteenth Amendment); Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171 (2006).

²⁰ Mostly. He refers to Justice Frank Murphy as "nearly messianic" and opines that, in contrast, Justice Wiley Rutledge was "less fervent, more scholarly." REHNQUIST, *supra* note 5, at 195. Again, it is Rehnquist's word choices that matter: messianism and fervency counterposed to scholarliness.

²¹ REHNQUIST, *supra* note 6, at 119. Since the limitations imposed by Article III precluded the justices from acting *qua* judges on the Commission, the justices served in their individual capacities. See *id.*

²² See *id.* at 141–42.

²³ See *id.* at 159.

And at that point, at least in the eyes of contemporaries, partisanship fatally infected the Commission, as everyone expected that Justice Bradley would resolve all disputed questions in favor of the Republican candidate, Rutherford B. Hayes. As indeed he did.²⁴

Rehnquist goes to some lengths to defend Justice Bradley against the charge, raised decades after the fact, that he had changed his conclusions favoring Democrat Samuel Tilden to favoring Hayes after a midnight visit from Republican activists.²⁵ Invoking Justice Bradley's reputation for integrity, Rehnquist suggests—but does not explicitly say—that Justice Bradley's factual conclusions were at least defensible.²⁶ Putting aside the problem of Democratic terrorism in South Carolina and Florida, however, the facts seem to be on Tilden's side. What is striking is that Rehnquist, while confronting a *particular* charge of essentially corrupt behavior, makes little of what I would think is the deeper issue of judicial partisanship.

What emerges from Rehnquist's treatment of these issues is the sense that he viewed judges, by virtue of their offices, as presumptively honest and above the fray.²⁷ In subtly communicating this view, Rehnquist often sets up a dichotomy between honest conduct and corrupt conduct so that he can refute the contention that a particular judge acted corruptly on a particular occasion, leaving it to the reader to infer that the judge was basically honest. Rehnquist seems systematically to ignore the possibility that some intermediate position, such as inappropriate partisanship, provides a more accurate assessment. For example, discussing the impeachment charges against Justice Samuel Chase, Rehnquist writes that "the evidence adduced at the trial before the Senate showed that Chase was impatient, overbearing, and at times arrogant, but this falls short of showing that Chase was actually the malevolent figure that [Raoul] Berger makes him out to be."²⁸

In discussing the Court's about-face in the Legal Tender cases, Rehnquist again defends justices against criticism. In that line of cases, a short-handed Court first held, by a four-to-three vote, that Congress lacked the power to make paper money legal tender.²⁹ Following that decision, President Ulysses Grant nominated two justices to fill the existing vacancies.³⁰ The constitutional issue then returned

²⁴ See *id.* at 172–75, 180.

²⁵ See *id.* at 194–200.

²⁶ See *id.*

²⁷ For an important qualification, see *infra* text accompanying notes 59–68, 73–74 (discussing Rehnquist's observation that, as a positive matter, courts are likely to do relatively little to stand in the way of executive initiatives during wartime).

²⁸ REHNQUIST, *supra* note 4, at 88. Rehnquist clearly disapproved of Berger's book, *Impeachment: The Constitutional Problem*, which advocated that the Senate should have convicted Justice Chase and removed him from office. See *id.*

²⁹ See *Hepburn v. Griswold*, 75 U.S. 603, 624–25 (1870).

³⁰ See REHNQUIST, *supra* note 6, at 129–30.

to the Court a year later, but this time the constitutionality of Congress issuing paper money was upheld by a five-to-four vote.³¹ Charles Evans Hughes, who knew something about the Supreme Court, called the reversal of position one of the Supreme Court's "self-inflicted wounds."³² Not so, Rehnquist writes: "There were public complaints that Grant had deliberately named the two new justices in order to reverse the first decision, but this is not borne out by the facts."³³ Rehnquist provides no support for the latter assertion, but the important point is that here too he resorts to dichotomy. He characterizes the popular opinion of Grant's choices as "deliberate" and specifically motivated by knowledge of what the nominees would do. Presumably, this is counterposed to another, polar-opposite motive—"complete indifference," perhaps—without acknowledging that there might be an intermediate position, such as a "confident expectation" of how the nominees would decide the issue, that might have more accurately captured the reality of the events.³⁴

In *Centennial Crisis's* epilogue, Rehnquist discusses the impact of the Hays-Tilden controversy on modern-day developments and presents a mild defense of Justices who serve in a public but nonjudicial capacity.³⁵ In Rehnquist's view, judges are intellectual elites to whom the American people turn when serious problems arise, which is, Rehnquist thinks, basically a good thing. Rehnquist refers to the Supreme Court's "rightful place as the head of the third branch of the federal government,"³⁶ and it is hard to read this as limited to the Court's position vis-à-vis other, lower federal courts. In *All the Laws But One*, he is more explicit. Comparing the treatment of dissent during the Civil War and World War I, he writes, "Though the courts during [World War I] gave little relief to civil liberties claimants, the very fact that the claims were being reviewed by the judiciary was a

³¹ See *Knox v. Lee*, 79 U.S. 457, 569–70 (1871). For a short description of the cases, see Gerald T. Dunne, *Legal Tender Cases*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 575–76 (Kermit L. Hall et al. eds., 2d ed. 2005).

³² CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS—AN INTERPRETATION* 50 (1928).

³³ REHNQUIST, *supra* note 6, at 129–30.

³⁴ Indeed, other presidents have been documented proponents of just such a middle position, as reflected by Abraham Lincoln's statement, widely quoted in the context of modern Supreme Court nominations, that "[w]e cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known." Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1128, 1142 (1941) (citing 2 GEORGE BOUTWELL, *REMINISCENCES OF SIXTY YEARS* 29 (1902)).

³⁵ It is worth noting that that is the topic Rehnquist uses to conclude the book, rather than, for example, a consideration of Congress's enactment of the Electoral Count Act, a statute that the Supreme Court basically ignored in deciding *Bush v. Gore*, 531 U.S. 98 (2000).

³⁶ REHNQUIST, *supra* note 6, at 132.

step in the right direction for proponents of civil liberties during wartime."³⁷ This observation serves as a transition to my consideration of the jurisprudence Rehnquist reveals in his books, because the "rightful place" the courts occupy is, it turns out, rather small in compass.

III

WILLIAM REHNQUIST'S JURISPRUDENCE FOR A POPULAR AUDIENCE

Of course, the place scholars go to find out what a justice thinks about the law is the U.S. Reports, with some visits, perhaps, to the justice's writings for academic audiences. Rehnquist's books could not contain much, and certainly nothing systematic, about his constitutional vision without reducing their quality as popular histories. Even so, and perhaps because Rehnquist does not avoid the risks of self-indulgence I mentioned in the Introduction, one can find some expressions of his constitutional jurisprudence in these books. I found two such expressions particularly striking: Rehnquist's passing comments on one aspect of the Chase impeachment, and his more extended comments on the likely role of judges responding to civil liberties claims during wartime.

Some of the charges against Justice Chase arose from his actions during the treason trial of John Fries, who had assembled an armed force to resist the collection of a federal property tax.³⁸ For all practical purposes, the only issue in the treason trial was the legal question of whether armed resistance to a single federal law constituted "levying war" against the United States, or whether the offense required resistance to such a wide range of laws as to amount to a more general repudiation of the authority of the government.³⁹ The impeachment charges against Justice Chase stemmed from his approach to that issue at trial, both procedurally and substantively, with the House alleging that Justice Chase had predetermined the substantive question before hearing any argument from Fries's lawyers.

Fries had already been tried and convicted of treason, but was granted a new trial when the original conviction was vacated on grounds of potential juror bias.⁴⁰ Upon arriving to preside over the retrial, Justice Chase observed that, in his view, too much time at the first trial had been wasted in arguments over the meaning of the Trea-

³⁷ REHNQUIST, *supra* note 5, at 182.

³⁸ See REHNQUIST, *supra* note 4, at 60.

³⁹ See *id.* at 61.

⁴⁰ See *id.*

son Clause.⁴¹ Accordingly, Justice Chase had prepared and distributed an opinion expressing “the proper definition of treason” to guide the parties during the retrial, which he also used to instruct the jury.⁴² Fries’s lawyers objected vigorously to this “prejudged opinion” and withdrew in protest.⁴³ Faced with the allegation (later echoed in the impeachment proceedings) that he had improperly denied Fries and his lawyers the opportunity to argue for their contrary interpretation of the Treason Clause, Justice Chase retreated.⁴⁴ The next time the court sat, Justice Chase offered to let Fries’s lawyers present their arguments.⁴⁵ Not surprisingly, Fries’s lawyers thought this unlikely to be an adequate remedy for an apparent prejudgment, and declined the invitation.⁴⁶

On this question, Rehnquist is sympathetic to Justice Chase, and concludes that while he made “at most an error of judgment, [it was] . . . surely not a ground for removal from office.”⁴⁷ By summarily exonerating Chase in this manner, however, Rehnquist effectively dismisses the substantive issues that the impeachment charges raised, and thus fails to adequately communicate to his readers what was at stake. As modern scholarship has shown, there was a significant dispute in the early Republic over where the final authority for constitutional interpretation was lodged. Some placed that authority in the courts. Others argued that the people—serving as jurors—had that authority. Advocates for the latter position argued that in order to exercise this interpretive authority successfully, the people should be informed by arguments from the lawyers for the contending parties, and not—at least according to some—by the judges who were their servants.⁴⁸ It was in the context of this national debate that Fries’s lawyers, and later the House, objected to Justice Chase’s initial opinion on two substantive grounds: First, he should not have offered his own interpretation of the Treason Clause in his charge to the jury; second, he improperly precluded Fries’s lawyers from arguing their own interpretation to the jury.

⁴¹ See *id.* at 63 (noting Justice Chase’s opinion that at the first trial “there had been a great waste of time in making long speeches on topics that had nothing to do with the business at hand”).

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 66.

⁴⁶ See *id.* at 64. Obviously unsatisfied, Fries’s lawyers questioned: “You have withdrawn the papers; but can you eradicate from your own mind[] the opinion which you have formed . . . ?” *Id.*

⁴⁷ See *id.* at 73.

⁴⁸ The most important recent exposition of the arguments is LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), but the controversy was laid out in the literature on the early Republic many years before. See, e.g., Lerner, *supra* note 1.

Rehnquist addresses only the second of these objections, concluding that the evidence did not support the charge.⁴⁹ Rehnquist's finding is based largely on one witness's testimony that Justice Chase had stated, with apparent impatience, that Fries's lawyers were "at liberty to proceed as [they thought] proper, [and to] address the jury and lay down the law as [they thought] proper."⁵⁰ Other evidence reported by Rehnquist, however, renders the scenario a bit more ambiguous. For example, Justice Chase also said that the lawyers could "proceed as they chose, . . . 'but it is at the hazard of your characters.'"⁵¹ In light of Justice Chase's reputed temper, arrogance, and heavy-handedness,⁵² the lawyers might well have believed that his invitation to argue the law to the jury was insincere.

The other substantive issue—whether Justice Chase should have offered his interpretation of the Treason Clause to the jury—is more important, and Rehnquist seems not to notice it. After Justice Chase withdrew his initial opinion and indicated that Fries's lawyers could present their arguments on the meaning of the Treason Clause, Fries's lead counsel replied, "I will never address the court on a criminal case on a question of law."⁵³ To the modern ear this is an extremely puzzling statement; yet Rehnquist does not appear to notice its oddity. Instead, Rehnquist proceeds to describe the modern practice for developing jury charges, which of course typically does involve arguments to the court by the defendants' lawyers.⁵⁴ The critical question is therefore left unaddressed: What on earth could Fries's lawyer have meant by saying that he would never argue the law to a judge?

The witness who reported the statement noted that it had been made "with considerable emphasis."⁵⁵ Where might the emphasis have been placed? On the words "the court." Essentially, Fries's counsel declared, "I will never address *the court* on a criminal case on a question of law," because he would have believed that the court itself had no authority to interpret the law. Implicitly, the lawyer was asserting that he would address *the jury*, and only the jury, on such ques-

⁴⁹ See REHNQUIST, *supra* note 4, at 73.

⁵⁰ See *id.* at 66, 73.

⁵¹ *Id.* at 64.

⁵² As one federal district judge paired with Justice Chase observed: "I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble." *Id.* at 21 (citation omitted).

⁵³ *Id.* at 66.

⁵⁴ See *id.* at 69 ("In my own practice of law in Arizona . . . every judge would decide questions of law . . .").

⁵⁵ See *id.* at 66.

tions.⁵⁶ This argument would be mystifying in a modern court, and so Rehnquist's readers would have been better served had he explained or even noted it.

The reason Rehnquist does not do so is, I think, obvious enough: Rehnquist is very much a judicial supremacist. For Rehnquist, *of course* judges, and *only* judges, interpret the law. Rehnquist has repeatedly joined and written opinions defending the supremacy of the judiciary.⁵⁷ That Rehnquist is a judicial supremacist, however, should come as no surprise. What makes the treatment of judicial supremacy in his books so interesting is how unselfconscious his assumption of it is.

Most discussions of *All the Laws But One* usually and understandably focus on Rehnquist's comments on the judicial role during wartime,⁵⁸ but they have overlooked a few of the more interesting points in his treatment of the subject. One is a simple tension between his apparent endorsement of some judicial intervention on behalf of civil liberties and the doubts reflected in his attempts to articulate a doctrinal formulation for that role.⁵⁹ I have already referred to the former, in Rehnquist's mention of the "generally ameliorative trend" in judicial decisions dealing with wartime dissent.⁶⁰ The latter point, however, is more subtle. In discussing the Japanese internment cases, Rehnquist describes the suggestion by Eugene Rostow that the courts examine "the entire question of military necessity" as "an extraordinarily dubious proposition."⁶¹ His reason is the simple proposition that courts are "ill-suited to determine an issue such as 'military necessity.'"⁶²

Unless we put a great deal of weight on the word "entire" in Rostow's proposal, though, Rehnquist's skepticism about judicial capacity undermines the possibility of judicial review fairly substantially. For, in every war-related case implicating civil liberties, the government's claim is, or at least can easily be, that any given restriction on civil

⁵⁶ Indeed, immediately prior to this declaration, Fries's counsel stated that "the prisoner's counsel have a right to make a full defense, and [to] address the *jury* both on the law and on the facts." *See id.* (emphasis added).

⁵⁷ *See, e.g.,* *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.").

⁵⁸ *See, e.g.,* Norman Provizer, *Rehnquist Tackles a Tough Question*, ROCKY MOUNTAIN NEWS (DENVER), Jan. 3, 1999, at 3E (reviewing *All the Laws But One* and noting that Rehnquist advocates a more restricted judicial role during wartime without inquiring exactly what Rehnquist's proposed limitations are).

⁵⁹ *See* REHNQUIST, *supra* note 5, at 221-25.

⁶⁰ *See id.* at 221.

⁶¹ *Id.* at 205.

⁶² *Id.* (citing courts' "restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays").

liberties is justified by military necessity. How can a court that is unable to evaluate claims of military necessity ever decide that such a restriction is unjustified?⁶³

Rehnquist's treatment of the maxim, *Inter arma silent leges* (in times of war, the law falls silent)—also the title of the brief concluding chapter of *All the Laws But One*—has a curiously detached tone.⁶⁴ As previously noted, Rehnquist seems to endorse some degree of judicial intervention on behalf of civil liberties and seems to take comfort in the increasing role played by the courts in that arena from the Civil War through World War II.⁶⁵ However, he also notes, seemingly approvingly, that the courts were truly interventionist *only after* war had ended.⁶⁶ He ultimately appears to say, though only indirectly, that judicial intervention during wartime should be avoided:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail.⁶⁷

Rehnquist seems more committed to a different, and in some ways more interesting, proposition than the one endorsed in that passage, however. This is apparent in his declaration that despite its age, the *Inter arma silent leges* principle “[still] has validity at least in a descrip-

⁶³ I should note, simply for completeness, the possibility that there may be some truly absolute constitutional protections of civil liberties of a sort that no claim of military necessity would be sufficient to override. Until recently, the example would have been a constitutional prohibition on torture, but we have now learned that some lawyers take seriously the contention that torture can sometimes be justified by military necessity. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding that Congress lacks the power to make it a criminal offense for an executive official to torture detainees, and that an official would have a defense of “necessity” in any criminal prosecution for doing so).

It is worth observing that the Supreme Court of Israel, while formally disclaiming the power to reject assertions by military officials that certain actions were required by military necessity, has actually engaged in fairly intrusive examinations of such assertions and has in some instances rejected them. See HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrSC 46(2) 150, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf (requiring the Israeli military to reconsider the proposed route of a separation fence, security considerations notwithstanding).

⁶⁴ See REHNQUIST, *supra* note 5, at 218.

⁶⁵ See *id.* at 221.

⁶⁶ See *id.* at 221–22.

⁶⁷ *Id.* at 222–23. I doubt that anyone has ever seriously contended that “in every conflict” individual liberty should prevail. This is another example of the trope Rehnquist is fond of—the creation of polarities rather than continua.

tive way,"⁶⁸ thus drawing an implicit contrast with its possible invalidity in a normative sense.

A historian or sociologist might, of course, easily say that as a historical or sociological matter the *inter arma* phrase is descriptively accurate. But when a judge says so, even in a work of popular history, the judge's attitude toward his own assertion is more complex. The historian and sociologist, after all, have no professional obligation to *make* the laws. Rehnquist's narrow focus on the descriptive accuracy of the phrase brings to mind Oliver Wendell Holmes's famous descriptive theory of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁶⁹ While such prophecies might be appropriate for lawyers advising their clients, a judge must decide what the law *is*.⁷⁰

Viewed in that light, Rehnquist's claim about the phrase's descriptive accuracy may make sense from a point of view external to the courts, but it cannot be reconciled with the so-called internal point of view of a sitting chief justice. Put simply, Rehnquist seems to be saying that as a matter of brute fact, you cannot expect that he and his colleagues will do the right thing, which is to protect civil liberties during wartime. To which there is an obvious response: The Court will have choices to make when the issues are presented, and what principled reason exists to undermine the public's expectation that the Justices—whom Rehnquist believes are the proper arbiters of at least some contentious societal questions⁷¹—will make the right decisions?

Rehnquist might appear to take at least some of the sting out of his focus on descriptive accuracy in the last sentences of *All the Laws But One*:

[I]t is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.⁷²

Nevertheless, I am not sure that he succeeds in defusing the concern that civil liberties will be ignored in times of war, and not simply because of his previous suggestion that courts cannot assess claims of military necessity.⁷³ To some extent, Rehnquist here relies on the observation that courts are likely to be more aggressive once wars have ended, but in that case he is not truly describing what happens "in

⁶⁸ *Id.* at 224.

⁶⁹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

⁷⁰ The usual observation is that a judge cannot coherently answer the question, "What law is applicable to this case?," by predicting what he or she will do.

⁷¹ See *supra* note 36 and accompanying text.

⁷² REHNQUIST, *supra* note 5, at 225.

⁷³ See *supra* note 62 and accompanying text.

time of war.” As to what happens in wartime, he really does not offer anything to set against the descriptive claims he has made, leaving the normative question about what he and his colleagues *should* do unanswered.

CONCLUSION

William Rehnquist’s works of popular history turn out to be both better and more revealing than I had initially expected. They are workmanlike examples of the genre—what publishers would refer to as “midlist” books had they been written by anyone else—but not truly distinguished ones. They also show something about Rehnquist the jurist. By calling attention to his court-centeredness, his rather undifferentiated defense of judges as such, and, most significantly, his skepticism about both the ability of courts to do much in the way of protecting civil liberties and the desirability of having them do so,⁷⁴ his books provide a valuable insight into an enormously influential judicial philosophy.

⁷⁴ I have in mind both the position taken on civil liberties during wartime in *All the Laws But One* and the skepticism about radical Reconstruction apparent in his other works. See generally REHNQUIST, *supra* note 5 (expressing general doubt concerning dramatic judicial action); REHNQUIST, *supra* note 6 (same); REHNQUIST, *supra* note 4 (same).