

## CHIEF JUSTICE WILLIAM H. REHNQUIST: PRIZING PEOPLE, PLACE, AND HISTORY

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Which two Civil War battles were fought west of the Mississippi River? Chief Justice William Rehnquist knew the answer, as he knew a myriad of often obscure (but never unimportant) historical and geographical facts, salting many of them into his Supreme Court opinions and books and using others in informal wagers with friends, family, and law clerks. The answer, found in the Chief's opinion in *Leo Sheep Co. v. United States*,<sup>1</sup> is the Battle of Glorieta Pass (at a strategic location near Santa Fe, New Mexico, on March 26-28, 1862) and the subsequent Battle of Picacho Pass (fought on April 15, 1862, near Tucson, Arizona). Both battles, as the Chief emphasized, were more skirmishes than full-drawn engagements, but they helped illustrate the value to the United States of building a transcontinental railroad that could transport troops when needed to protect the western states and territories. The Confederate army hoped to create an outlet to the Pacific but was effectively stopped by the Union victory at the Battle of Glorieta Pass.<sup>2</sup> The Confederates, however, did not give up easily. When the Union forces at the Battle of Glorieta Pass asked the Confederates to surrender, one Southern commander responded memorably (and perhaps apocryphally), "We will fight first and surrender afterwards!"<sup>3</sup>

The Chief loved geographic and historical facts. Part of this love was his enjoyment of fact games (which in turn was part of the Chief's love of games in general). The Chief relished matching his own memory against the knowledge of family, friends, and clerks. Any attempt to describe the Chief

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1. 440 U.S. 668, 674-75 (1979).

2. For more on the Battles of Glorieta Pass and Picacho Pass, see Wikipedia, Battle of Glorieta Pass, [http://en.wikipedia.org/wiki/Battle\\_of\\_Glorieta\\_Pass](http://en.wikipedia.org/wiki/Battle_of_Glorieta_Pass) (last visited Apr. 9, 2006), and Wikipedia, Battle of Picacho Pass, [http://en.wikipedia.org/wiki/Battle\\_of\\_Picacho\\_Pass](http://en.wikipedia.org/wiki/Battle_of_Picacho_Pass) (last visited Apr. 9, 2006).

3. *Leo Sheep Co.*, 440 U.S. at 675 n.11 (quoting GERTRUDE HARRIS, A TALE OF MEN WHO KNEW NOT FEAR 18 (1935)).

without mentioning his enthusiasm for fact games would be like trying to describe Babe Ruth without mentioning his skill at hitting home runs. At the Chief's funeral, his younger daughter, Nancy Rehnquist Spears, recounted how, early one summer, the Chief bet her five dollars that she could not name the year when Queen Elizabeth I had died. Having just finished a biography of the "Virgin Queen," Nancy readily spouted off the answer of 1603. The Chief quietly cursed and spent the rest of the summer trying to win back the five dollars. Every year, the Rehnquist clerks would hold a reunion at which the current clerks had to present a skit, focused on the Chief and the Supreme Court Term, for the benefit of their predecessors. The game show "Jeopardy" provided a thematic structure for a number of these skits, with the Chief cast in the role of Art Fleming, trying to stump his fellow Justices or others with oblique questions about the Supreme Court, United States geography, and history.

The Chief's love of geographical and historical facts, however, also had more serious roots. Although the betting was fun, geography and history were critically important to the Chief because of the insight they provided him into people, social issues, and the law. The Chief left both the nation and those who were lucky enough to work for him with many valuable legacies. His Supreme Court opinions and his more than three decades of influence on Supreme Court jurisprudence are the most obvious. The Chief's understanding of the important influence of geography and history on people, events, and attitudes, however, has provided us with an equally valuable legacy.

When I first met the Chief in 1976 to interview for a clerkship in his chambers, the first thing that he wanted to know was where I was from. Where someone grew up provided the Chief with valuable working premises about who the person was—the person's general values, interests, and perspectives on life. He seemed somewhat troubled when I responded that I was from Los Angeles, perhaps because Los Angeles sometimes seems the antithesis of "place," a city that has lost its connection with geography (or perhaps tried to overcome its natural geography through imported water, artificial harbors, and leveled hills) and where history is often irrelevant. When I later was working on a certiorari petition involving a Phoenix socialite who had murdered her husband and jokingly asked the Chief whether lurid crimes were common in that city, he replied that Phoenix had been getting more and more like Los Angeles. In the Chief's view, place made an important imprint on people, and a person who did not have a sense of place was impoverished as a consequence.

The Chief himself was born in Shorewood, Wisconsin, of Swedish stock. (For ten points, where is Shorewood, Wisconsin? What was the city's original name? And identify at least ten famous American Swedes other than Chief Justice Rehnquist?)<sup>4</sup> Although Wisconsin was a progressive state, Shorewood

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4. Originally named East Milwaukee, the community of Shorewood is a suburb of Milwaukee along the shores of Lake Michigan. It grew from a small town of about 1500

April 2006]

PRIZING PEOPLE, PLACE, AND HISTORY

1697

was more conservative than most parts of Wisconsin, and the Chief's family was as conservative as any. Herbert Hoover, who graduated from Stanford as the Chief later would, was a political hero of the household. Place, time, and family forged the blend of social and economic conservatism that would characterize the Chief's later political and legal careers. After law school and a clerkship with Justice Jackson, the Chief chose to settle in Phoenix, Arizona. His years practicing law in the West shaped the Chief no less than his upbringing in Shorewood. The Chief became cognizant of the importance of water and other natural resources to the population and economy of the arid West, and he became even more appreciative of the role of state and local governments in determining the destiny of a region thousands of miles away from Washington, D.C., in geography, needs, and philosophy.

To the Chief, place was important not only in molding people but also in understanding legal disputes and determining their appropriate resolution. In discussing cases that were before the Court, the Chief often wanted to know everything he could about the geography, topography, hydrology, weather, and history of the region in which the case arose. During the time that I clerked for the Chief, I remember many hours kneeling on the floor of the Chief's office scrutinizing U.S. Geological Survey maps that the Chief had ordered from the Library of Congress in order to understand more fully the geographical references in the briefs. The Chief, moreover, often knew locations and natural landmarks on the maps better than the cartographers who put the maps together; his knowledge of the United States landscape was encyclopedic.

In cases dealing with land, borders, water, and other natural resources, the Chief found such physical information indispensable in reaching an appropriate resolution, and his knowledge permitted him to understand the relevance of issues in greater depth than his fellow Justices. In *United States v. New Mexico*,<sup>5</sup> for example, the Court examined whether federal reserved water rights, which implicitly accompany the creation of national parks, national forests, and other public reservations, should be quantified using expansive or narrow standards. Without geographical context, the issue looked to be a fight between farmers and other private water users on the one side and public lands on the other. As the Chief emphasized in his opinion for the Court, however, the vast majority of western rivers begin on federal lands; an expansive reading

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people in the 1910s, when it was the size of the Coney Island Amusement Park, to a medium-sized town of 13,000 by 1930. Famous Swedish Americans have included Buzz Aldrin, Ann-Margret, Candice Bergen, Edgar Bergen, Ray Bradbury, Mamie Eisenhower, Greta Garbo, Melanie Griffith, Susan Hayward, Joe Hill, Kris Kristofferson, Charles Lindbergh, John Nordstrom, Carl Sandburg, and Gloria Swanson. See FED'N OF SWEDISH GENEALOGICAL SOCI'YS, 24 FAMOUS SWEDISH AMERICANS AND THEIR ANCESTORS (1996); see also Federation of Swedish Genealogical Societies Website (describing the book and listing the famous Swedish Americans), available at <http://www.genealogi.se/roots/famous.htm> (last visited Apr. 8, 2006); HistoryLink.org, Nordstrom Department Store, available at [http://www.historylink.org/output.cfm?file\\_id=1677](http://www.historylink.org/output.cfm?file_id=1677) (last visited Apr. 10, 2006).

5. 438 U.S. 696 (1978).

of federal reserved water rights thus posed a broad threat to the security of western water rights in general. (For twenty points, what percentage of the western United States is owned by the federal government? What percentage of its water originates on federal land?)<sup>6</sup> The Chief's opinions frequently illustrated and stressed a critical insight: a strong understanding of geography and place is critical to understanding the relevance and importance of legal, political, and social issues.<sup>7</sup>

The importance of place in formulating legal rules raises serious concerns about how well the Court will address western issues after the Chief's death. The Chief's nuanced understanding of the southwestern United States was invaluable to the resolution of many of the cases that arose in the region—an area that, as the Chief often emphasized, map makers once labeled the “Great American Desert.” One of the Chief's brethren on the Court once told me that, prior to Justice O'Connor's elevation to the Court, he would decide how to vote in a water case by listening to how the Chief and Justice White (who hailed from Colorado) would resolve the case. If the Chief and Justice White voted the same way, so would he. If they disagreed, he was compassless. (For thirty points, name the six Supreme Court Justices from the western United States who preceded the Chief to the bench, as well as the states from which they came, and identify which of those Justices was the only other Swedish American to serve to date on the United States Supreme Court.)<sup>8</sup>

The Chief's western perspective was important, moreover, even in those cases that did not deal with uniquely western problems. In part because of geography, westerners often look at basic political questions very differently than the rest of the United States does. The Chief spent his early career in a

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6. The United States owns about 46% of the land in the western United States, ranging from 29.5% of the land in Washington to 86.5% of the land in Nevada. *Id.* at 699 n.3. “More than 60% of the average annual water yield in the 11 Western States is from federal reservations. The percentages of average annual water yield range from a low of 56% in the Columbia-North Pacific water resource region to a high of 96% in the Upper Colorado region.” *Id.* (citing C. WHEATLEY ET AL., *STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS* 403-06 & tbl.4 (1969)).

7. In addition to *United States v. New Mexico*, see, for example, *Nevada v. United States*, 463 U.S. 110, 113-16 (1983), and *Salzer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 721-23 (1973).

8. The other western Justices (along with the state with which they were most closely associated before joining the Court) were, in chronological order: Associate Justice Stephen Johnson Field (California), Associate Justice Joseph McKenna (California), Associate Justice George Sutherland (Utah), Associate Justice William O. Douglas (Washington), Chief Justice Earl Warren (California), and Associate Justice Byron White (Colorado). See United States Supreme Court, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Apr. 8, 2006); Wikipedia, William O. Douglas, [http://en.wikipedia.org/wiki/Justice\\_Douglas](http://en.wikipedia.org/wiki/Justice_Douglas) (last visited Apr. 24, 2006). Chief Justice Earl Warren was of Norwegian-Swedish descent. See Wikipedia, William Rehnquist, [http://en.wikipedia.org/wiki/William\\_Rehnquist](http://en.wikipedia.org/wiki/William_Rehnquist) (last visited Apr. 8, 2006).

April 2006]

PRIZING PEOPLE, PLACE, AND HISTORY

1699

region that was thousands of miles away from the national capital, that looked quite different, both geographically and economically, from the East, and that faced social issues that were exceptionally dissimilar from those of the eastern United States. With this experience, it is not surprising that the Chief was more skeptical than many of his colleagues of the claimed virtues of a powerful national government and more supportive of states' rights. That two of the Supreme Court Justices most avidly supportive of states' rights in recent years (the Chief and Justice Sandra Day O'Connor) came from the inland Southwest is not surprising, just as it is not surprising that the Southwest gave birth to the "Sagebrush Rebellion."

The Chief's understanding of the West, in short, played a crucial role in shaping Supreme Court jurisprudence at a time when the geographic population center of the United States crossed the Mississippi and continued its apparently inexorable march westward. (For forty points, what was the geographic population center of the United States in longitude and latitude in the year 2000?)<sup>9</sup> With the Chief's death and the retirement of Justice O'Connor, Justice Kennedy becomes the only clear westerner on the current Court.<sup>10</sup> Justice Kennedy, moreover, is from Northern California, which does not count in many westerners' minds as truly part of the West; certainly, he did not share the same experience of place as the Chief and Justice O'Connor. Given the importance of place, one might expect that the Court would have a better geographical balance, yet only nine of the Justices in the history of the Supreme Court have come from the West.<sup>11</sup> That we had the benefit of the Chief's sense of place for over thirty years is thus a particular blessing.

The Chief's fascination with history matched his interest in geography and place. The Chief's early opinions in particular were frequently peppered with historical references. The Chief's knowledge of history permitted him to appreciate the importance of facts that others frequently did not see. Consider, for example, the Chief's opinion for the Court in *Oliphant v. Suquamish Indian Tribe*,<sup>12</sup> which dealt with whether Native American tribes had jurisdiction to try and punish non-Indians for crimes on their reservations. The only federal judge to have expressly addressed the question in a written opinion prior to *Oliphant* had been Judge Isaac C. Parker in *Ex Parte Kenyon*.<sup>13</sup> To the

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9. The mean population center of the United States in 2000 was 37° 41' 49" North, 91° 48' 34" West—2.8 miles east of Edgar Springs, Phelps County, Missouri. See About, Geographic and Population Centers of the United States, <http://geography.about.com/cs/latitude/longitude/a/geocenters.htm> (last visited Apr. 9, 2006).

10. Justice Breyer grew up in San Francisco and went to Stanford as an undergraduate, but to the degree that this early upbringing qualified him as a westerner (doubtful in the eyes of those who view the San Francisco Bay Area as a cosmopolitan enclave), he spent all of his subsequent years at Harvard and in the East. See Wikipedia, Stephen Breyer, <http://en.wikipedia.org/wiki/Breyer> (last visited Apr. 9, 2006).

11. See *supra* note 8.

12. 435 U.S. 191 (1978).

13. 14 F. Cas. 353 (W.D. Ark. 1878).

advocates before the Court, Judge Parker was a just another judge (although perhaps some recalled that he was the Hanging Judge depicted in the novel and movie *True Grit*). The Chief, however, had long been fascinated with Judge Parker (perhaps because of the judge's position on capital punishment); in 1953, he had made a detour to Fort Smith, Arkansas, on his way from his clerkship to his new home in Phoenix, Arizona, in order to do research on Judge Parker, about whom he even contemplated writing a biography. As a result, the Chief knew that Judge Parker had sat on the bench for the Indian Territory and had an especially strong understanding of Indian law as it developed in the nineteenth century; what was a mere precedent to many therefore took on particular relevance to the Chief.<sup>14</sup>

The Chief's enthusiasm for history sometimes threatened to overwhelm some of the opinions that he wrote while still Associate Justice. Although the Chief was never a fan of footnotes, for example, even he could not resist dropping a footnote in *Oliphant* that contained a three-paragraph mini-biography of Judge Isaac C. Parker.<sup>15</sup> (For fifty points, what Creek chief laid a wreath of wild flowers on the grave of Judge Parker at the conclusion of his funeral?)<sup>16</sup> The Chief's dissertation on the history of the transcontinental railroad, including his discussion of the Civil War battles west of the 100th meridian which began this Tribute, consumed as much space as his analysis of the legal issue that was the subject of the Court's decision.<sup>17</sup> None of the Chief's historical discussions, however, was ever irrelevant to the legal issue at hand, and all were fascinating. Perhaps not surprisingly, editors of case books, even those known to be ruthless in their editing of cases, tend to keep in the Chief's historical asides when reproducing excerpts from his opinions.

After becoming Chief Justice of the United States, the Chief found another outlet for his interest in history—popular works of Supreme Court history—

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14. *Oliphant*, 435 U.S. at 200 n.10 (“Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of his court, as well as familiar with the law which governed them.”).

15. *Id.* (citing HOMER CROY, *HE HANGED THEM HIGH* 222 (1952), and *HELL ON THE BORDER* (J. Gregory & R. Strickland eds., 1971)).

16. The answer is Pleasant Porter, who was Principal Chief of the Creek Nation from 1899 until 1907. *See id.* (citing CROY, *supra* note 15, at 222); *see also* Harry P. Daily, *Judge Isaac C. Parker*, *CHRONICLES OF OKLA.*, Mar. 1933, at 673, 689, available at <http://digital.library.okstate.edu/chronicles/v011/v011p0673.html> (last visited Apr. 10, 2006).

17. *See* *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). The Chief left little doubt that he found the history more interesting than the legal issue before the Court.

This is one of those rare cases evoking episodes in this country's history that, if not forgotten, are remembered as dry facts and not as adventure. Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad. But that issue is posed against the backdrop of a fascinating chapter in our history.

*Id.* at 669.

April 2006]

PRIZING PEOPLE, PLACE, AND HISTORY

1701

that permitted him to reach an even broader audience. In his first book, *The Supreme Court: How It Was, How It Is*, the Chief provided a succinct and insightful history of the Supreme Court, as well as a brief description of its current workings.<sup>18</sup> The Chief next looked in 1992 at the impeachment trials of Associate Justice Samuel Chase and President Andrew Jackson in a book that publishers quickly reissued when the Chief presided six years later over the impeachment trial of President Bill Clinton.<sup>19</sup> The Chief's third book again took on a timely topic—the Court's treatment of civil liberties during military conflicts.<sup>20</sup> In his final book just a year before his death, the Chief examined the disputed election of 1876,<sup>21</sup> with its echoes in the Supreme Court's 2000 decision in *Bush v. Gore*.<sup>22</sup>

The popular press, as well as many historians, praised the Chief's books for their perceptiveness and eloquence. The Chief's books brought legal issues to life for the lay public in a way that few legal academics have succeeded in doing. Although the Chief was not the first Justice to write books, he was the first to popularize constitutional law and events. And he illuminated constitutional laws and events not by discussing current disputes, but through history. Although the Chief dealt with history rather than current disputes in part, certainly, to avoid the appearance of impartiality in cases that might come before him on the bench, the Chief also recognized that history could provide an exceptionally revealing window onto current affairs.

The Chief's books again illustrated the importance that he attributed to place and geography. In his discussion of *Marbury v. Madison*,<sup>23</sup> for example, the Chief started with a lengthy description of Washington, D.C., at the time that Thomas Jefferson assumed the presidency, with a particular emphasis on the lowly housing that Congress gave the Supreme Court in a committee room on the first floor of the Capitol building.<sup>24</sup> Through this description, the Chief was able to provide a vivid sense of the tenuous political position of the Supreme Court at the time that *Marbury* came before the Court. The Chief's book on civil liberties similarly began with a detailed description of the route that Lincoln took from Illinois to Washington for his inauguration,<sup>25</sup> and his book on the 1876 election dispute started with a description of Philadelphia and

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18. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987). The Chief published a revised edition of the history in 2001.

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

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

21. WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004).

22. 531 U.S. 98 (2000).

23. 5 U.S. (1 Cranch) 137 (1803).

24. REHNQUIST, *supra* note 18, at 21-26.

25. REHNQUIST, *supra* note 20, at 3-5.

the Philadelphia Centennial Exhibition.<sup>26</sup> To the Chief, place, geography, and history were inseparably linked—each informing the others.

After he began writing his books, the Chief stopped adding lengthy historical discursions to his legal opinions. I personally lamented this change. As a result of this change, the Chief's opinions became a bit drier, deprived of the animation that the history had previously provided. The Chief, however, did not forget or ignore the importance of history to the legal issues that he was deciding. One of the Chief's favorite aphorisms was Justice Holmes's comment that "a page of history is worth a volume of logic."<sup>27</sup> And in opinion after opinion, dealing with a range of subjects, the Chief followed this principle. Thus, in *United States Postal Service v. Council of Greenburgh Civic Associations*,<sup>28</sup> the Chief began an analysis of the constitutionality of the government's ban on placing private notices in mailboxes by examining the history of the postal service.<sup>29</sup> In *Washington v. Glucksberg*,<sup>30</sup> dealing with the constitutionality of Washington State's ban on physician-assisted suicide, the Chief noted at the outset that, "We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices,"<sup>31</sup> and then proceeded to examine the relevant history.

The Chief is now part of the history that he so greatly relished relating. We will miss the Chief for many reasons, including his love, understanding, and appreciation for geography, place, and history. I never saw the Chief without learning something new and (frequently obscurely) important about our nation, its geography, and its history that he had just learned. I will now have to seek this information out on my own rather than relying on the Chief as my tutor. But at least the Chief taught us through his work, jurisprudence, and scholarship that understanding place and history is critical to addressing the problems that the nation, as well as the world, faces. We owe the Chief for this lesson—as we do for so many others.

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26. REHNQUIST, *supra* note 21, at 7-8.

27. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

28. 453 U.S. 114 (1981).

29. *See id.* at 121 ("[O]nly by review of the history of the postal service . . . can the constitutional challenge . . . be placed in its proper context.")

30. 521 U.S. 702 (1997).

31. *Id.* at 710 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), for the "importance of careful respect for the teachings of history") (internal citations omitted).



April 2006]

*PRIZING PEOPLE, PLACE, AND HISTORY*

1703

ON FIRST READING REHNQUIST'S JURISPRUDENCE<sup>32</sup>

Much have I studied in the realms of law,  
And many goodly cases and hornbooks read;  
Round many western law schools have I led  
Discussions on what Athena saw.  
Oft my colleagues have spoken in great awe  
Of the Constitution the founders made,  
Yet did it never glow of gold and jade  
Till I heard it divined from Rehnquist's jaw:  
Then felt I like Judge Isaac C. Parker  
When sentencing another outlaw to die;  
Or like the brave Colorado troopers  
Who at Glorieta Pass met rebs eye to eye  
And sent them packing far past the junipers—  
Victorious, in Sange de Cristo high.

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32. Written by the author in 2002, in honor of William H. Rehnquist's thirtieth anniversary on the bench.

1704

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