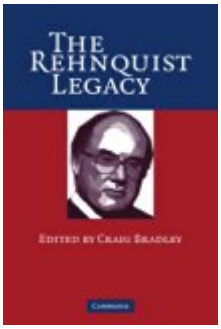
H-Net Reviews
in the Humanities & Social Sciences

Craig M. Bradley, ed. *The Rehnquist Legacy.* New York: Cambridge University Press, 2006. xxi + 392 pp. $84.00 (cloth), ISBN 978-0-521-85919-6; $39.99 (paper), ISBN 978-0-521-68366-1.



Reviewed by Williamjames H. Hoffer (Department of History, Seton Hall University)
Published on H-Law (September, 2006)

Mixed Opinions

Craig M. Bradley's trenchant collection on the judicial opinions of the late chief justice of the United States offers one of the first and most comprehensive overviews since William Hubbs Rehnquist's sudden death from thyroid cancer in September of 2005. A necessarily ambitious and weighty volume (its subject had the fifth longest term on the court, 1972-2005, and the fourth longest stay as Chief, 1986-2005), its contributors are all noted scholars in their respective areas, with one exception from law schools and political science departments. They assay a variety of perspectives on and approaches to their subjects, and unlike much constitutional commentary in these polemical days, write solely to explicate Rehnquist's contribution to American law. In this effort, this book succeeds admirably, though one will need to consult other works to gain an appreciation of the history outside of the Wisconsonian's judicial opinions.

The editor has divided the invited contributions into four sections: "The First Amendment," "Criminal Procedure," "The Structure of Government," and "The Scope of the Fourteenth Amendment," with a forward from Linda Greenhouse and the editor's introduction to the chief justice, for whom he clerked. One could argue that the editor's selection of contributors predetermined the book's overarching consensus on Rehnquist's impact. Or perhaps law professors and political scientists who study the Court are accustomed to write, teach, and think of ways to reconcile disparate judicial opinions.

But for this reviewer, even after carefully reading these fine essays, the Rehnquist legacy remains blurred. In truth, as an associate justice and then a chief frequently in dissent, on a Court notorious for fractiousness and sometimes bitter internal division, it is oftentimes hard to discern Rehnquist's distinctive contribution. Perhaps that is inevitable. The Court's handling of complex legal issues in the last quarter century would have taxed the wisdom of nine Solomons. The politically charged atmosphere in which they arrived at the Court did not make for clear answers to them, and the interaction of the justices did not make the process any tidier.

Still, Rehnquist's conservative philosophy, disregard for liberals' precedents, and his ability as a crafter of judicial structures emerge powerfully in these eighteen chapters. The animus behind this life's work, however, remains largely hidden, hinted at in the essays, and not part of the scope of this review.

The First Amendment section typifies this consensus. Though the authors come to the same conclusions–Rehnquist's fundamental conservatism and its mixed impact–they disagree as to its coherence, merits, and consistency. Geoffrey R. Stone's statistical study and Richard W. Garnett's principles analysis come to the same conclusion with different tools and opposite appreciations. (Stone is critical, Garnett is laudatory.) Earl M. Maltz finds a Rehnquist surrender on commercial speech; and Daniel O. Conkle tells of Rehnquist's hard fought victory in the indirect funding cases. Rehnquist's success depended on his only sporadic ability to capture swing voters, a difficult task when those swing voters made demands that frequently alienated one or more of his erst-

while conservative allies.

The criminal procedure chapters follow a similar pattern. Bradley's tale of Rehnquist's "balanced" (p. 105) guerilla effort against the Warren Court's exclusionary rule contrasts with Yale Kamisar's attempt to explain the surprising holding in *Dickerson* and the confusion that resulted from *Patane* on Miranda warnings, given Rehnquist's distaste for that iconoclastic case. Rehnquist plainly tried to get the Court to reverse course on what he believed to be a wrongheaded assault on the efficiency of law enforcement. James J. Tomkovicz celebrates the limiting of the *Gideon v. Wainwright* initiation of court-provided defense attorneys. In this rendering, the Chief Justice's rise stopped the tide of "sweeping entitlement" (p. 137). Joseph L. Hoffmann's recounting of Rehnquist's similar effort with regards to the availability of federal habeas corpus petitions is more circumspect. Given the fact that those petitions frequently dealt with the death penalty, we can see that Rehnquist's ascendancy in this area perfectly reflected the rightward turn of America's politics during the 1970s and 1980s, especially concerning being "soft on crime."

Though the authors do link these developments with the rise and fall of the Civil Rights Movement, the full thrust of this line of argument becomes abundantly clear when Rehnquist's federalism takes center stage in the third section. While one may without much effort tie states' rights arguments to anti-integration sentiments, the authors do not suggest that Rehnquist's views on federalism fit this model, despite their congruence. Mark Tushnet's chapter makes a strong case for Rehnquist's failure to develop a deep rationale for his federalism jurisprudence besides a form of Originalism. Lynn A. Baker's analysis portrays his inability to forge a consistent coalition on the spending power cases. Daniel A. Farber shows Rehnquist as a functionalist opposed to Antonin Scalia's formalism with respect to the independent counsel law. William P. Marshall explains Rehnquist's desire to redress Justice William Brennan's opinions on federal state relations through the revival of state immunity from civil lawsuits. Philip P. Frickey reveals how Rehnquist's intent-based reading of statutes became more text-based under Scalia's influence. Ruth Colker and Kevin M. Scott statistically demonstrate Rehnquist's firm commitment to federalism over the totality of his tenure on the Court. States' rights formed a prominent part of his judicial philosophy, one pressed as the Court made its uneven shift from a zealous enforcement of civil rights to a restrained, circumspect view.

Bradley has managed to make all of the sections, if not individual topics, inclusive of a broad range of views. In the section on the Fourteenth Amendment, this diversity threatens to burst out from its confines. Dawn Johnsen's take on Rehnquist's inveterate opposition to *Roe v. Wade* clashes with Neal Devins' intelligent, but questionable argument that the Democratic Senate's rejection of Robert Bork in October 1987 was based on Bork's views on abortion ((rather than on, as is equally or more likely, his openly expressed distaste for sections of the Civil Rights Act of 1964, among other possibilities), thereby leading to the Court and Rehnquist's decision in cases like *Glucksberg* (sustaining Washington's ban on physician assisted suicide) and *Lawrence v. Texas* (declaring Texas's sodomy statute unconstitutional). While the idea that justices monitor public acceptance of their decisions is sound, Devins' narrowing of the Bork controversy to just abortion overreaches. David J. Barron's appreciation of Rehnquist's relentless push for "privatizing" constitutional law argues that Rehnquist intended to counter Brennan's activism rather than roll back the civil rights achievements. Earl Maltz's second piece closes out the section with an explicit consideration of Rehnquist's views on race. Maltz is sympathetic to the dilemma of a man who had to deny, during his confirmation hearings, the sentiments on legal segregation he had written as a clerk many years previously. Yet, in a series of cases he heard as a justice, all of his opinions ran against the interests of disadvantaged groups.

Though the book does not have a conclusion, one can draw several from the chapters' varying, but revealing views of one of the most significant justices in the history of the Court. Rehnquist consistently endorsed a conservative, but not fanatical, approach when in the majority that did a great deal to frustrate, neutralize, and, on occasion, roll back the Warren Court's expansive view of national power in service of civil rights. Rehnquist did not regard the history of oppression of minorities, allowed if not sanctioned by earlier courts, as a reason to provide legal assistance to such groups. When in the minority, he chose one of two paths: an opinion he could use later to craft a majority when an opportunity presented itself or a blistering broadside for future generations' use.

Although it is too soon to gain a proper perspective on Rehnquist's permanent impact, Bradley's balanced, expertly edited compendium reveals a judge who put often sophisticated legal reasoning to use for narrowly tailored and partisan purposes. In the process, he neither satisfied his supporters nor completely stifled his opposition–a problem best exemplified in a case to which

this volume should have devoted more attention, *Bush v. Gore*, a case of the greatest importance. A sophisticated reader should have had no difficulty understanding the majority opinion, nor feeling confident that the chief justice led the Court, and, yet, unlike Marshall in *Marbury*, and Warren in *Brown*, Rehnquist's own voice was lost in the babble of concurring and dissenting opinions. Like Bradley's volume, it leaves mixed opinions on Rehnquist's legacy.

If there is additional discussion of this review, you may access it through the network, at:

https://networks.h-net.org/h-law

Citation: Williamjames H. Hoffer. Review of Bradley, Craig M., ed., *The Rehnquist Legacy*. H-Law, H-Net Reviews. September, 2006.

URL: http://www.h-net.org/reviews/showrev.php?id=12203

Copyright © 2006 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.msu.edu.