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JUSTICE REHNQUIST AND THE CONSTITUTION. By *Sue Davis.* Princeton: Princeton University Press. 1989. Pp. x, 247. $19.95.

Sue Davis[1] describes her work as an analysis of Chief Justice William Rehnquist's "legal philosophy by utilizing his judicial opinions . . . with the goal of understanding his methods and values and the way they translate into judicial opinions."[2] Early in the book she unwittingly provides evidence of the hazard of that enterprise. She quotes Chief Justice Rehnquist's response to Senator John Tunney's question about how Rehnquist would apply the due process clause to the issue of whether television should be allowed in the courtroom: "I would be inclined to go back to the debates, the Bingham explanation of what he meant by the 14th amendment, other explanations on the floor . . . ."[3] Knowing that Chief Justice Rehnquist has not often written opinions dealing with the intent of the framers of other provisions of the Constitution, I did a LEXIS search to discover how often Justice Rehnquist had actually "gone back to the Bingham explanation."[4] Taking what I regard to be a generous attitude, I concluded that Chief Justice Rehnquist has written two opinions relying on the Bingham explanation, and that neither used Bingham in a way that would be considered central to the contemporary issues of interpreting the amendment.[5] More striking to me were the cases in which Chief Justice Rehnquist joined or wrote opinions that ignored forceful contrary understandings of what I would suppose most people would think was

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2. P. vii. Davis' study examines the period from 1971 to 1986, when then-Associate Justice Rehnquist was named Chief Justice. For convenience, I use his current title throughout.

3. P. 9 (quoting *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.*, 92d Cong., 1st Sess. 190 (1971)).

4. The search, conducted on September 11, 1989, was on "Bingham and Rehnquist," and yielded about 20 cases in which the right Bingham was mentioned. This proved to be more tricky than I expected, because the search turned up a number of cases involving aspects of the interpretation of two civil rights acts that are related to, but different from, the fourteenth amendment.

5. Richardson v. Ramirez, 418 U.S. 24, 26 (1974), squarely relies on Bingham's discussion of § 2 of the fourteenth amendment; General Bldg. Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) couples recent interpretations of the fourteenth amendment with Bingham's statement that 42 U.S.C. § 1981 does no more than enact constitutional norms in a way that yields the conclusion that § 1981 prohibits only intentional discrimination.

meant by "the Bingham explanation," that is, Representative Bingham's statements about the primary purposes of the fourteenth amendment.[6] Of course, it may be that Chief Justice Rehnquist has not yet confronted a case in which reference to the history of the framing of the fourteenth amendment was relevant.[7] More likely, though, Rehnquist's representations during his confirmation hearings, sincere as they may have been, did not take account of the realities of contemporary constitutional adjudication.

There are two aspects of those realities that deserve mention here. The first is the bureaucratization of the Supreme Court, particularly the increasingly heavy reliance of the Justices on law clerks for the drafting of substantial portions of their opinions. In the nature of things, of course, it is extremely difficult to get accurate information about the drafting process in the chambers of a sitting Justice, but I would be extremely surprised to discover that Chief Justice Rehnquist did much more than supervise — "edit" is the polite term — the work product of his law clerks. I do not intend this as a criticism; Justices of the Supreme Court should now be seen as senior partners in little law firms,[8] and it is the rare senior partner who puts pen to paper (or hand to word processor) these days.

The way in which the Court works today makes it quite hazardous to impute to a Justice very many of the details of the opinions emerging from his or her chambers. The Justice is responsible for the bottom-line result and for the broad contours of positions asserted consistently over the course of his or her career, but not for much more. That makes Davis' enterprise particularly appropriate for a political scientist. Lawyers have professional reasons to pay close attention to the articulated reasoning in judicial opinions, for it is that reasoning that gives us the opportunity to advance our clients' interests within the framework of results reached by the Court. If we can discover an inconsistency, or a clever reading that allows us to limit an adverse precedent or expand a favorable one, we have done our job. That makes us less attentive to patterns of results than political scientists have been. They have been concerned with the many ways in which the Court operates within the overall political system of the United States, and therefore have taken seriously the patterns of results the Court has reached.

The second aspect of the Court's contemporary work that makes it

6. Many of these understandings had been expressed by the Court itself in prior opinions. In addition to *General Building Contractors,* see Briscoe v. LaHue, 460 U.S. 325 (1983); Plyler v. Doe, 457 U.S. 202 (1982); Quern v. Jordan, 440 U.S. 332 (1979).

7. *But see* Roe v. Wade, 410 U.S. 113, 175 (1973) (Rehnquist, J., dissenting) (mentioning legal status of abortion in 1868).

8. *See, e.g.,* D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 122, 127-29 (1986).

hazardous to write about a Justice's legal philosophy is the politicization of constitutional law. One could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party.[9] Making the point precise is, unfortunately, rather difficult. The platform of the Republican Party does not address every issue that comes before the Supreme Court, so one would have to guess what the platform *would* say if it addressed the issues confronting Chief Justice Rehnquist. Further, the Republican Party is not a completely ideological party, which makes predicting a "Republican" position on every issue hazardous. Davis denies that "Rehnquist [is] simply a right-wing ideologue determined to use the Court to further his own political agenda" (p. 21). Even if this denial were true, it does not establish that Rehnquist has some "constitutional philosophy" that is independent of the political agenda of the Republican Party, at least if, as certainly seems to be the case, the Republican Party is not simply a right-wing ideological party.

I do not mean the reduction of constitutional adjudication to party politics as a criticism of the Chief Justice, for much the same could be said of almost all of his colleagues, with the obvious changes in reference to the platform of the other party in the appropriate cases. The point is complicated even more by the fact that, just as constitutional law has been overtly politicized, so too has politics been constitutionalized, in the sense that it is sometimes difficult to distinguish positions taken by the political parties as a matter of political principle from those taken with reference, positive or negative, to constitutional law. The Republican Party position on abortion, for example, is a complex mixture of pure principle (abortion as the taking of innocent life) and constitutional law (*Roe v. Wade* as a judicial usurpation of power properly located in democratic legislatures). Politicians may sometimes have to sort out this mixture; for example, when *Roe* is overruled, Republicans will have to decide whether to support laws adopting the pro-choice position that have majority backing. Judges, happily for them, do not have to make the same distinction. But, the unhappy result for authors of works like Davis' is that there will rarely be evidence to disconfirm the hypothesis that the Justice's opinion is simply a reflection of his political positions.

Davis' primary argument is that that hypothesis is wrong in Chief Justice Rehnquist's case. Davis' argument has two parts. First, she identifies a ranking of values in the Chief Justice's decisions. Second, she seeks to explain the Chief Justice's apparent deviation from this ranking in particular cases. I find the argument unpersuasive.

9. A substantial part of the residue can be accounted for by referring to matters like prudence in expending one's capital within the Supreme Court on lost causes like the independent prosecutor problem. *See* Morrison v. Olsen, 108 S. Ct. 2597 (1989).

In the first part, her analysis of Chief Justice Rehnquist's opinions and votes leads her to conclude that he places the highest value on federalism, somewhat less value on the protection of private property, and even less value on the protection of individual rights other than property. I take it that this is not hot news. Nor, in itself, could it possibly disconfirm the political hypothesis, for that ranking of values is the one contained in Republican party platforms as well. Even more, however, this ranking does not account for at least some important positions that the Chief Justice has taken.

I should begin by acknowledging that the Chief Justice's positions are not always what one would expect of a standard right-wing ideologue. In particular, Davis' explanation of his skepticism about the Court's commercial speech doctrine, and of his refusal to accord the full protection of the first amendment to corporate political activity, is persuasive. She argues that these positions reflect the importance that Chief Justice Rehnquist gives to federalism as compared even to the protection of private property (pp. 82-85). And, she properly notes that in cases involving national regulation of corporate political activity — cases where federalism is not implicated — the Chief Justice has upheld the rights of corporations against *national* regulation.[10] Even here, the crass political account cannot really be rejected, for, at least at the level of generality inherent in Davis' specification of values, it is unclear what the position of the Republican party is on the question of commercial speech; it seems plausible to me that the Republican party of George Bush and of Richard Nixon (perhaps more important because he appointed William Rehnquist to the Supreme Court) might be skeptical about the value of deregulating commercial speech.

There are, however, two areas in which the Chief Justice's positions are inconsistent with the ranking of values Davis offers. The more important area is affirmative action, where the Chief Justice has been enthusiastic about overriding both federalism (voluntary choices made by local jurisdictions to institute affirmative action programs) and private property (voluntary choices made by corporations to institute such programs) in the name of the individual rights of white men to be free of discrimination. Davis manages to avoid discussing this area by treating Chief Justice Rehnquist's positions in affirmative action cases as solely involving questions of statutory interpretation, as in *United Steelworkers of America v. Weber*.[11] Of course, it would be unfair to tax her too severely for failing to make the quite understandable projection of his position into the constitutional arena, as has oc-

10. P. 76. One might make the same point in connection with his widely noted opinion in Pennell v. San Jose, 485 U.S. 1 (1988), which falls outside the period studied by Davis.

11. 443 U.S. 193 (1979) (involving the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982), to a voluntary affirmative action plan).

curred in the case of *City of Richmond v. J.A. Croson Co.*[12] Nonetheless, there is *Fullilove v. Klutznick,*[13] which was decided during the period on which Davis concentrates. I concede immediately that because *Fullilove* involves national legislation that benefits some private property owners and disadvantages others, Rehnquist's vote to hold the statute unconstitutional does not directly demonstrate that in this area he values individual rights over private property and federalism. Surely, though, at some point one could fairly project what his position on the constitutionality of local affirmative action programs would be.

Davis does discuss the second area in which Chief Justice Rehnquist has subordinated federalism to private property rights: constitutional constraints on state legislation in the takings and contracts clauses. The way in which she explains his apparent deviation in this area constitutes the second part of her overall argument. Yet, if the first part cannot help us distinguish between the Chief Justice's ranking of values and the Republican party's ranking of values because the specification occurs at too high a level of generality, the second part of Davis' argument ultimately cannot explain his deviations. It fails for exactly the same reason: the high level of generality on which it operates. These deviations might better be accounted for by looking to the values of the Republican party directly.

In the area of constitutional constraints on state legislation in the takings and contracts clauses, Chief Justice Rehnquist has voted in favor of restricting the authority of states to regulate the consequences of capital relocation,[14] and in favor of restricting the authority of states to condition development of private property on compliance with the state's desired social agenda.[15] Obviously, these positions are not consistent with Davis' hypothesized ranking of Chief Justice Rehnquist's values. She attempts to account for them by referring to the other component of her analysis, in which she identifies three aspects of a general approach to constitutional adjudication that she believes underlie Rehnquist's ranking of values.

This general approach consists of (1) a "democratic model" of government, that is, a fairly strict and simple-minded majoritarianism, (2) moral relativism, and (3) an approach to interpretation that focuses on text and intent (pp. 24-32). It should be immediately apparent that there is going to be trouble with the first two of these aspects. The "democratic model" runs into difficulties from two directions. No serious political theorist defines democracy as simple majoritarianism, but rather treats it as a system in which majority rule is supplemented

12. 109 S. Ct. 706 (1989).

13. 448 U.S. 448 (1980) (joining Stewart, J., dissenting).

14. Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978).

15. Nollan v. California State Coastal Commn., 483 U.S. 825 (1987).

by some notion of individual rights. That notion, it is generally agreed, must be substantive. Yet, in Davis' account, Chief Justice Rehnquist's theory of individual rights resides in his approach to interpretation. Thus, the "democratic model" does no work in explaining his resolution of particular questions of constitutional value. From another direction, there is an obvious tension between majoritarianism and the idea of constitutional limitations on the power of government, which, again, can be resolved only by reference to some substantive theory.

Perhaps this is too abrupt, though, in light of my opening observations about the contemporary conditions of adjudication. That is, even if serious political thinkers know that there is a tension between majoritarianism and constitutionalism, there is no particular reason to think that Justices of the Supreme Court are serious political thinkers. Rough gestures in the appropriate direction — "majority rule" for contemporary conservatives, "individual rights" for contemporary liberals — are all that they need make in order to define for their constituencies what their positions are. It is my experience, for example, that contemporary conservatives feel no cognitive dissonance whatsoever about their simultaneous devotion to federalism and opposition to affirmative action. But this is to say, once again, that, at least to this point, Davis' account of Rehnquist's ranking of values and his approach to adjudication gives us no reason to reject the view that he is, simply, a Republican judge.

The second element in Chief Justice Rehnquist's approach to adjudication, according to Davis, is moral relativism. This seems to me simply wrong, or at least so substantially overstated that the idea of moral relativism can do little work in explaining Rehnquist's judicial performance. Davis confuses a position about the appropriate institutional role of a judge in constitutional cases with a position about moral reality. Chief Justice Rehnquist does appear to believe that, from a judge's point of view, there are no standards other than those adopted by a majority against which the morality of legislation can be assessed,[16] but that is very different from believing, as for example Justice Holmes might have, that one person's assessment of what is moral is just as good as another person's. A moral relativist judge, in the only useful sense of that term, would have to uphold legislation that he or she believed was really *wrong* — not simply erroneous as a matter of public policy, but fundamentally wrong. Yet Davis gives us no evidence, and I doubt there is any, that Chief Justice Rehnquist has ever done that. Indeed, to the extent that the prime anomaly in his behavior, under Davis' account, is his support for private property against federalism in the context of takings and the contracts clause, we ap-

16. *See* pp. 26-27.

pear to have evidence that the Chief Justice is *not* a moral relativist.[17]

With Davis' third element of Chief Justice Rehnquist's approach to constitutional interpretation — a focus on text and intent — we come to her explanation for his deviation from the imputed ranking of values. According to Davis, these deviations are explicable because in these cases — and presumably not in others — the text of the Constitution and the intent of its framers reverse the ordinary hierarchy of values. In the contracts clause, for example, according to Davis, the Chief Justice finds an "express provision" of the Constitution that places private property above federalism. "It is possible that, in his view, the contract clause, which is an express limit on the states, provides a clearer restriction on state action than . . . the due process clause, which is limited to procedural requirements that the states themselves may define" (pp. 129-30). Indeed, according to Davis, we can understand Chief Justice Rehnquist's general ranking of values, and in particular his preference for private property over individual rights, as a reflection of this same understanding of text and intent (pp. 35-36).

Qualified in this way — by the use of the phrase "it is possible that . . ." — it is difficult to disagree with Davis' position. Unfortunately, similarly qualified statements could be made about essentially any position inconsistent with any imputed hierarchy of values, and could explain virtually any hierarchy of values. To make sense of Chief Justice Rehnquist's position as presented by Davis, we would need a fairly precise definition of what an "express limit" is and how it is to be distinguished from a less-than-express limit. What immediately comes to mind is the express limit on national authority in the first amendment, and Justice Black's exhortation that "no law means no law."[18] We can put aside for a moment the difficulties with Chief Justice Rehnquist's reservations about the application of the full Bill of Rights to the states (p. 44), and note simply that he has not taken this express limitation seriously as applied to the national government itself.

In addition, the idea that the Chief Justice is applying the express limitations of the Constitution when they override federalism in aid of private property simply will not account for his behavior in cases involving state actions said to amount to takings of private property. For, after all, there is no takings clause in the fourteenth amendment,

17. I should note another unfortunate aspect of Davis' analysis, which happily plays no important role in her presentation. She appears to believe that there is some conceptual connection between Chief Justice Rehnquist's positivism — his insistence that the only source of property or liberty in cases involving procedural due process is state law — and his majoritarianism. P. 23. At the conceptual level, there is no connection whatever between positivism and majoritarianism; one who believes that the only sources of law must be positive could well believe that, for example, the Constitution is itself a positive law in the required sense despite the anti-majoritarian implications of that document.

18. *See, e.g.*, H. BLACK, A CONSTITUTIONAL FAITH 45 (1968).

only a due process clause, and the Supreme Court at first held that the requirement of compensation was not incorporated into the fourteenth amendment.[19]

There is another difficulty, which Davis herself acknowledges. By her analysis, Chief Justice Rehnquist thinks that federalism is more important than private property except where, in his approach to constitutional interpretation, some provision of the Constitution makes private property more important than federalism. Yet, as Davis points out (pp. 150, 172, 205), *that* ranking of values cannot be derived from the Constitution interpreted according to the Chief Justice's approach. For federalism, in Rehnquist's understanding, is a structural aspect of the Constitution, which can be enforced by the Supreme Court against majoritarian decisions even in the absence of some specific provision in the Constitution defending the principle of federalism. Rehnquist's position in *National League of Cities v. Usery*[20] is, of course, the most notable statement of this view; but his somewhat diffident observation in his dissent to *Garcia v. San Antonio Metropolitan Transit Authority*[21] that, although he wasn't entirely sure what the right doctrine was, he was sure that there was some doctrine that limited congressional authority, is an even better example of his preference for federalism in the face of doctrinal, textual, and other uncertainties.[22]

As Davis notes, "Rehnquist's use of structural analysis to support federalism as a principle that is central to the Constitution . . . brings into question the consistency of his approach to constitutional interpretation" (p. 204). Notice, however, that it was that approach to constitutional interpretation that she offered to explain the apparent reversal of values in the takings and contracts clause cases. If his approach to constitutional interpretation is inconsistent, though, it cannot account for that reversal. In the end, therefore, we are left with a simple statement of value: that Chief Justice Rehnquist values federalism more than private property and individual rights, except when he thinks that private property or individual rights are more important than federalism.

Chief Justice Rehnquist might not be a right-wing ideologue, if by that one means someone fully committed to a consistent program of promoting right-wing principles no matter what the consequences.

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19. *See* Clinton, *Substantive Due Process, Selective Incorporation, and the Late-Nineteenth Century Overthrow of John Marshall's Constitutional Jurisprudence*, 5 J.L. & POLITICS 499, 527-28 (1989).

20. 426 U.S. 833 (1976).

21. 469 U.S. 528 (1985).

22. Davis makes the point effectively in her discussion of Nevada v. Hall, 440 U.S. 410 (1979), where, in the name of federalism, then-Associate Justice Rehnquist would have imposed a limitation on state authority to adjudicate claims against other states. Pp. 204-05. She does not note, but could, that *Hall* is a curious case in which to defend federalism, because it is a case in which there are federalist interests on both sides.

Ideologues like that, of course, rarely if ever become Supreme Court Justices. On Davis' evidence, though, William Rehnquist certainly is an almost perfect Republican Chief Justice. I do wonder whether we need 208 pages to show us that.