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Book Review: Views from the Bench: The Judiciary and Constitutional Politics. by M. Cannon and D. O'Brien.

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VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS. By M. Cannon[1] and D. O'Brien.[2] Chatham, N.J.: Chatham House Publishers, Inc. 1985. Pp. xxii, 330. Cloth, $25.00; paper, $12.95.

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The celebrated advocate John W. Davis, addressing a group of lawyers on the topic of appellate advocacy, compared himself to a fisherman, the judges being the fish.[4] This book is a collection of fish stories. What makes it a bit unusual is that it is written by the fish. Cannon and O'Brien have put together an interesting and informative collection of essays written by judges of various courts, including several essays by present Justices of the United States Supreme Court,[5] past Justices,[6] as well as an essay by one who should have been a Justice,[7] one mentioned prominently for that position,[8] and one who perhaps should be.[9]

The book is divided into six parts, with an introduction to each by the editors. Part I includes two essays that set the historical and political contexts in which the courts operate. The subject of Part II, which I shall explore in greater detail below, is the process of judicial decisionmaking and opinion writing. It is by far the lengthiest and most interesting section of the book, comprising eight essays.[10]

The familiar questions of the appropriate level of judicial activism or restraint are the subject of Part III, "The Judiciary and the Constitution," and Part VI, "The Judicial Role in a Litigious Society." Much of Part IV, "The Judiciary and Federal Regulation:

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4. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (1940).

5. In addition to Chief Justices Burger and Rehnquist, Justices O'Connor, Stevens, Brennan, Powell, and Scalia are represented.

6. Pieces by Justices Black, Jackson, Frankfurter, and the second Justice Harlan are included.

7. Friendly, *The Courts and Social Policy: Substance and Procedure.*

8. Bork, *Tradition and Morality in Constitutional Law.*

9. Linde, *First Things First: Rediscovering the States' Bills of Rights*, in *id.* at 237.

10. There is also a concluding one on judicial administration, using the office of Chief Justice under Warren Burger as a model. Although this last essay has little in common with the others in this section, it is interesting on its own terms, especially as a new Chief is about to take the con.

Line Drawing and Statutory Construction," deals with similar issues in the context of separation of powers. These parts of the book differ more in title than in substance; the major difference between them is that one addresses the question from a constitutional perspective—so that the problem is framed as one of interpretivism versus noninterpretivism as much as in terms of activism versus restraint, another speaks to the judicial role vis-à-vis the legislative branch, and the third speaks a bit more broadly to the judicial role in the absence of any authoritative text.

With the one exception of Justice Scalia's contribution, these sections are perhaps the weakest in the book—not because the issues lack interest or are poorly presented, but because of what is left out and the familiarity of what is included. As might be expected, for example, Justice Rehnquist challenges judicial activism as antidemocratic and hence inconsistent with the basic structure of American governance. Other contributors take a somewhat more activist view. There is nothing startlingly new. What is perhaps worse, much is left out. Of course, the reader ought not expect fully worked out theories of judicial power in essays whose average length is fewer than ten pages. Indeed, such brief excerpts cannot do justice either to the original works or to the complexity of the issues. For example, the selection from Judge Coffin's 273-page book on appellate judging[11] amounts to a mere seven pages, hardly enough to convey even a flavor of the original. Justice Scalia's essay, by contrast, is only slightly reduced from the original source.[12] It is exceptional in this collection for other reasons as well. The topic is the most technical in the book, and its treatment the most scholarly, closely reasoned, and analytically sophisticated.

The debate with which these sections of the book are concerned has gone on as long as the Republic. It is here represented—well represented by respected advocates—only in its most traditional terms. Some schools of jurisprudential thought—critical legal theory and law and economics theory are but two examples—are notably absent. Nevertheless, the positions are clear and understandable, and despite their familiarity, it is a service to have them gathered in one place. One wishes, however, for a more complete discussion.

The emphasis on appellate courts reflects a different sort of incompleteness: the book contains only one brief essay concerned

11. F. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1980).

12. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). The editors mis-cite the source of the essay in their acknowledgements, an irritating error that obviously should not have gone uncorrected.

with trial court adjudication.[13] Although the editors recognize the distinction between trial and appellate courts, not enough is made of the distinction. It should be said, however, that this book is hardly unique in ignoring this aspect of the judicial system. Yet it is in the lower courts (and frequently in lawyers' offices) that much of what we think of as law gets done. It is in the trial courts that most citizens confront the machinery of law. Failure to recognize the importance of lower courts stands in the way of much important progress in understanding and reform of the justice system.[14]

Federalism is the subject of Part V, "Our Dual Constitutional System: The Bill of Rights and the States." Given the title of this part of the book, it is odd that Justice Black's contribution is not an elaboration of his well-known view that the fourteenth amendment incorporates the Bill of Rights. Instead, his essay iterates his literalist view of these constitutional provisions insofar as they limit the federal government. It is only when we get to the essays by Justice Brennan and Justice Linde (of the Oregon Supreme Court) that the nominal subject of this part of the collection is first broached. Both essays address not only the responsibility of the states in safeguarding the rights provided in the federal Constitution but also their role in securing rights through their own constitutions. Justice Linde's hierarchical analysis of the relationship between state and federal law goes a step beyond Justice Brennan's thesis that state law has a significant role to play in safeguarding freedom.[15] The section concludes with an essay by Justice O'Connor addressing a number of issues implicating the relationship between the federal and state courts.

The editors have supplied introductory comments to each part of the book. These introductions are remarkably tedious reading, if blessedly brief. Avoiding the exertion of thought, the editors simply string together long series of quotations. For example, within the first three sentences, their introduction to Part II quotes from Holmes, Cardozo, and Irving Kaufman. Similarly, the editors' introduction to Part III contains almost every bromide about the judicial role. Where there is room for dispute the competing clichés are lined up and quoted—an authority for every cliché and a cliché for every authority. As Chief Justice Rehnquist points out, however, the issues are simply too important to be decided by the weight of clichés or slogans.

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13. Frankel, *The Adversary Judge: The Experience of the Trial Judge*.

14. *See* Hornstein, Book Review, 44 MD. L. REV. 216, 223-24 (1985).

15. *See also* Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563 (1981).

Because of the weakness of these introductory essays, it is difficult to see the audience for this book.[16] Both the foreword by Chief Justice Burger and the editors' own preface suggest that the book is directed at the lay reader. But without editorial help, most lay readers are unlikely to make sense out of this insufficiently connected, not to say disjointed, collection. For the professional, on the other hand, the readings are too superficial.

Perhaps the greatest problem with this collection is that judges are no more qualified to address most of the issues with which the book is concerned than legal philosophers, political scientists, legal academicians, and others. At first glance, of course, one might think that judges have a unique vantage point from which to address the role of the judiciary in the American federal constitutional system. Yet, upon reflection, there is little to suggest that the judicial experience provides such a perspective for treating these issues, with one important exception—the task of judging itself.

The best-seller lists teem with how-to books; it seems that there is an instruction manual for virtually any chore, sport, game, occupation, or other activity in which one might wish to indulge, from repairing one's automobile to managing a multi-million dollar corporation to (of course) fishing. Yet judges have been remarkably reticent about how they go about doing their jobs. Although perhaps this is beginning to change, few governmental or political activities are still so shrouded in mystery as the craft of judging.

The beginning and end of the process are of course public—more public than virtually any other aspect of the political process. Justices Powell and Rehnquist, among others represented here, take pains to point out that the judicial process is, in the main, open and public. Court proceedings themselves are typically public; and no institution in our society is required to justify its decisions in a more public way than through the formal account of decision we demand of the courts. Yet the act, perhaps more precisely the process, of judging, of formulating and writing the opinion that justifies or explains results, remains hidden.

Interestingly, the mystery seems to be shared by the actors themselves. By far the longest and most interesting section of this book is concerned with the craft of judging. What is perhaps most striking about these essays is the lack of any coherent or systematic account by the fish themselves of what it's like to swim. Judge Walter Schaefer put the problem well:

16. These introductions also could have been used to bind together or to fill the gaps left by the selected essays. In Part III, for example, they could have served to provide some of the contemporary views otherwise absent from the book.

> [W]e lack the ability to describe what happens. I have tried to analyze my own reactions to particular cases. When I have tried in retrospect, I have doubted somewhat the result . . . . And, when I have tried to carry on simultaneously the process of decision and of self-analysis, the process of decision has not been natural. I suspect that what is lacking [are] techniques and tools which are sensitive enough . . . .

Judge Coffin's sentiments are similar; even the editors reflect this view. In short, if there is any consensus to be found here, it is that the art of judging is done largely by feel or hunch.[17]

It is surely true that judicial decisions are not made in any precise, geometric, or formulaic way. Indeed attempts at such an approach not only fail to achieve objectivity or certainty, they tend as well to distort the normative voice of the law.[18] One of the things we expect of judges is judgment. But that requires wisdom; and that entails at least two prerequisites: first, that the persons we select to judge be capable of wisdom; and second, that the conditions of the craft permit them to actualize that capacity. Much has been written (and recently) about judicial selection, and it is, in any event, beyond the scope of this review. It is the second problem that I wish to address here. It seems to me that we have begun to value cleverness over wisdom—that the facile disposition of troublesome issues seems to be displacing thoughtful maintenance of the law's integrity.[19] In short, for a number of perfectly understandable reasons, our law is undergoing a disintegration. Rather than the seamless web the law was once thought of as resembling, increasingly it looks like a patchwork quilt. The common threads, the cultural cohesiveness of the law, if you will, are under strains that should make us wary. I do not wish to overstate the problem; but it seems to me a real and serious one. Its symptoms include the dramatic increase in separate opinions that make it difficult to know not merely what the law is, but what values are being protected by the various views of it. The resort to formulaic decisionmaking is another troublesome symptom, as well as a contributing cause of the problem.[20]

Now, to a considerable extent the problem is inevitable. The larger society of which the courts are a partial reflection is itself less cohesive than in the past. As one contributor to this collection puts it, our modern historical circumstance lacks any common religious

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17. Not represented in this collection is Hutcheson who, if not the first, is surely the most well known declarant of the judicial hunch. *See* Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

18. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

19. *Cf.* R. DWORKIN, LAW'S EMPIRE (1986). *See generally* Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

20. Nagel, *supra* note 18.

or moral order. Even if this overstates our current situation, our culture is surely more fragmented than in the past. The typical college curriculum, for example, displays a long list of apparently unconnected offerings—a smorgasbord of more or less nourishing individual items, but rarely anything approaching a planned dinner.[21] One might expect a more integrated, cohesive fabric in a system with one Supreme Court, thirteen states, and four million citizens[22] than in a system with one Supreme Court, fifty states, and 226 million citizens.[23] There are now 652 federal judges,[24] compared with 505 authorized judgeships only ten years ago.[25] One obvious result is that collegiality inevitably suffers, and the decline in collegiality results in a more pluralistic vision.

Not only has the size of courts grown, but there has been a corresponding increase in the size of supporting staff. In the name of efficiency, the craft of judging (like much else in our highly complex technological society) has become more impersonal. If the quality of opinions is more important than their quantity, there is also a felt necessity to move the docket. At least one contributor to this collection of essays has noted as well the onset of "a kind of institutional judging," that relies on support staff to a considerable extent. This growth in supporting personnel was made necessary because the number of filings has multiplied enormously as well. Perhaps even more significant is the increased complexity of the cases, both factually and doctrinally, sometimes involving thousands of pages of records and dozens of issues. Despite the demands of efficiency, the institutionalization of judging has had some unfortunate consequences.

One difficulty aggravated by the growth of supporting personnel is the further atomization of the law. Judges in the federal system have life tenure, and most state court judges have a relatively long tenure. The classical justification is judicial independence. There is, however, another benefit to be derived from extended tenure: continuity, a sense of participation in and commitment to the judicial enterprise that takes time to develop. Surely it does not develop overnight. At least at present, there is little of the fossiliza-

21. *See* M. ADLER, A GUIDEBOOK TO LEARNING: FOR A LIFELONG PURSUIT OF WISDOM (1986).

22. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 (1975).

23. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 5 (106th ed. 1986).

24. THE LAWYER'S ALMANAC 748 (1986).

25. 1983 DIR. AD. OFFICE U.S. CTS. ANN. REP. 3.

tion that can occur without the injection of fresh blood. The danger is rather the opposite.

One manifestation of this danger is the now ubiquitous law clerk. Almost every judge has at least one; many have more. The clerk's role and responsibility is determined almost entirely by her judge. The judge, of course, bears the ultimate responsibility for every opinion leaving her chambers, and it is still true that judges do more of their own work than any comparable group in our political system. Nevertheless, today's law clerk undertakes much that in more leisurely times would have been done by the judge. The problem with this is not so much the lack of accountability; law clerks are probably under sufficiently close supervision and, like judges, must justify what they do through reasoned and written discourse. Nor is the problem lack of ability. If the truth be told, a law clerk may well have more intellectual power than her judge. Most clerks are at or near the top of their classes at fine law schools. Unlike judges, they obtain their positions almost entirely on the basis of their legal abilities.

The problem instead is the diminution in cultural continuity.[26] By and large, clerks are hired immediately out of law school where they have been exposed to the fashionable, avant-garde ideas. They serve for terms of a year or two. Thus there is constant turnover of bright but inexperienced personnel, many of whom are given significant responsibilities. Without experience in the law—sometimes with little significant life experience beyond two decades of schooling—these brilliant tyros may yet have significant impact on doctrinal development. Any single case, even any moderately large sampling of cases may not exhibit the symptoms. Yet the common threads, the philosophical coherence of the law suffers. To my mind much of the indeterminancy to which critical legal theorists attend is symptomatic of this fragmenting of legal culture.

The heavier demands on judges have other consequences. As several of the contributors to this collection point out, judging is often at least in part a matter of hunch or feel. That is one of the reasons judges must be selected with great care. But time to contemplate, as well as a personality disposed to do so, is essential. "Why do we not have more great judges like the mighty jurists of yesteryear? To some degree, perhaps, we are lesser people today. But perhaps another reason is that, to produce great decisions, a judge must have time to think, [to] ponder . . ." More than that, because cases and problems rarely exist in isolation, because law

26. *Cf.* Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986) (problem of lack of acculturation in legal academia).

(life, too) really is a seamless web, judges must understand the larger cultural context of law.[27] All of this is made extremely difficult by the need to move the docket.

Solutions are not easy. Converting law clerk positions to career jobs may help increase continuity but is likely to have unfortunate side effects. The level of ability and intelligence is likely to suffer significantly. These positions will no longer be sought by the best and the brightest of law school graduates. Moreover, the new approaches, the fresh look at problems that new clerks can bring to a judge's chambers will suffer. Other difficulties are likely to arise if more experienced lawyers are sought for these positions. It seems unlikely that those in mid-career will take a year or more to serve as a law clerk. Moreover, older law clerks might feel less willing to defer to the judge. (Query whether the arrogance of youth is less a problem in this regard.)

At the federal level at least, a possible ameliorative might be expansion of the Judicial Fellowship Program, now devoted primarily to court administration and limited to work with the Supreme Court, the Federal Judicial Center, and the Administrative Office of the Courts. Judges with more than one clerk might be invited to replace one of them with a Fellow, who would serve the chambers for two or three years. The Fellows—as a practical matter, probably academics—might offer a fuller vision to the judicial branch while being able to use the experience gained there to enrich the education of their charges upon a return to the academy. Indeed, even established professors might welcome a working sabbatical of service to the courts.[28]

Providing opportunities for judges themselves to regain a deeper understanding of law is also difficult. Fortunately there seems to be a growing awareness of the importance of cultural heri-

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27. Recall the advice Felix Frankfurter wrote to a youngster who had inquired about how to prepare himself for a career at the bar:

> No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.

2 THE WORLD OF LAW 725 (E. London ed. 1960).

28. Such a program ought not be costly. First, a Fellow would serve in lieu of one of a judge's clerks, so no additional salary line would be necessary. Further, at least to the extent Fellows would be recruited from the academy, competitive salaries need not be exorbitant.

tage to the life of the law, and some first few steps are being taken. The Aspen Institute's well-known program for executives is open to judges. Brandeis University has begun a program for judges in Massachusetts that plugs them into the cultural tradition through exploration of certain literary works.[29] The ideas underlying that program have begun to spread. The Judicial Institute of Maryland, for example, is planning a program on "Judging Through the Looking Glass of Literature"; similar programs are being developed elsewhere. The National Center for State Courts, the National Judicial College and similar institutions could render much needed encouragement and support to such efforts. A beginning has been made; much remains to be done.

Another possibility—somewhat more costly, but worth it—would be provision for periodic sabbaticals for judges. Just as scholars require refreshment without the normal demands of teaching or administration, judges would profit enormously from an extended time for reflection and renewal.

The result of the several pressures on the judicial system is that judges have less opportunity to develop the wisdom and the ethical compass they need. The absence of cultural ethos leads ineluctably to the disintegration of law, and ultimately to the fears expressed by Roger Cramton in a slightly different context: "a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism."[30] We must begin to take steps to reawaken judicial awareness of the cultural context in which law plays out, so that we might retain—or regain—our confidence in the cultural and doctrinal integrity of views from the bench.

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29. Garred, *Judges Lit*, NEW AGE J., Oct. 1984, at 27; Touster, *Parables for the Professions*, 5 BRANDEIS REV., Winter 1986, at 2; Touster, *Parables for Judges*, B. B. J., Nov. 1983, at 4.

30. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 262 (1978).