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Book Review: Judicial Conflict and Consensus-Behavioral Studies of American Appellate Courts. Edited by Sheldon Goldman and Charles M. Lamb.

Thomas P. Lewis

"Congress shall make no law . . ." or "nor shall any state . . . deny to any person . . . the equal protection of the laws." In focusing on the question of interpretation, the authors emphasize the ability of our constitutional system to deduce from broad general principles a resolution of issues appropriate to the time and circumstances.

A final segment deals with constitutional law in times of military or foreign crisis, illustrating both the power and the limits of constitutional interpretation. This section emphasizes the constitutional issues of the Civil War and of World War II. One might have wished for a discussion of other, more contemporary crises, in which constitutional interpretation helped to resolve serious political problems—for example, Watergate.

The Constitution will soon be guiding us into a third century of national government. The method of interpretation which has ensured such durability, when constitutions around the world have changed and changed again during that period, is certainly worthy of study. This book centers on that process of interpretation, rather than on particular interpretations present or past, and thus should contribute measurably to the student's knowledge of our governmental system. It is neither a manual for lawyers nor a reference work for historians, but rather an excellent text for students of the art of government.

JUDICIAL CONFLICT AND CONSENSUS—BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS. Edited by Sheldon Goldman[1] and Charles M. Lamb.[2] Lexington, Ky.: The University Press of Kentucky. 1986. Pp. 294. $30.00.

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The political scientists who wrote the twelve essays in this book are justifiably described in the overleaf as "major scholars of judicial behavior." Their contributions, though published here for the first time, do not form a tightly cohesive whole; the thread that holds them together is their common focus on dissenting opinions in cases decided at the appellate level of the federal and state court systems. The editors explain that the book is aimed at a diverse audience of students and scholars in political science, social psy-

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chology, and law; that their purpose is, through quantitative analysis, "to explore the type, frequency, intensity, and especially the causes and phenomena related to conflict and consensus" in the appellate courts; and that their hope is that "the studies on judicial behavior can illuminate both what we know and need to know about how appellate courts function."

When I was invited to review this book it was evident that I had not been chosen for my expertise in quantitative analysis of judicial behavior. I was chosen, I gather, on the theory that sometimes an outsider's perspective is valuable. Unfortunately, my assignment proved to be more difficult than I had expected. I found myself reading and rereading the material. The book had a certain fascination, but for a negative reason. The prologue promised, I thought, some useful insights into the judicial process. As I moved through the essays, however, I was disappointed by what seemed to be their thinness of content. To be fair, information of historical interest is provided in several places, particularly Chapters 1 and 2. In addition, Chapter 12 challenged a belief that I and many practicing lawyers have supposed to be grounded in fact. But overall the collection remains, in my judgment, substantively lean.

I

I confess that I have always doubted the ability of scholars to discover otherwise unobserved large truths about judicial behavior by counting votes. The editors emphasize that the studies rely principally on voting statistics, with no attention given to the content of opinions, or as they put it, to "the logical progression of legal arguments proffered by judges to rationalize the policies they make." Nevertheless, I expected, perhaps unfairly, more than I found. Here I merely highlight the contents of each chapter. For organizational reasons, I will postpone comment on Chapters 1 and 4.

In Chapter 2, S. Sidney Ulmer explores the number of nonunanimous opinions and the incidence of dissent by the Chief Justices in cases decided by the Supreme Court from the tenure of John Marshall through that of Earl Warren. After testing and rejecting a number of hypotheses that might explain different rates of nonunanimity and dissent by the Chiefs (age and experience, congressional attacks on the Court, etc.), Ulmer concludes that the three most important variables are the complexity of the cases, the turnover on the Court, and the number of presidents who appointed the members of the Court. He suggests a host of other interesting hypotheses. The tables provide a convenient and interesting summary of the frequency of dissents during various eras.

In Chapter 3, Edward V. Heck explores *Changing Voting Patterns in the Warren and Burger Courts*. Much of this chapter is descriptive, showing the shifting alignments of the Justices as new appointees tilted the balance from time to time. Heck concludes that the appointment process can be used to change the direction of the Court. As he puts it, the changes that have occurred in voting patterns, such as Justice Brennan's movement from an extraordinarily high majority participation rate to a position of isolation from the mainstream, lend support to the proposition that the Court ultimately reflects the policy preferences of the same dominant national coalitions that elect presidents.

In Chapter 5, Donald R. Songer discusses *Factors Affecting Variation in Rates of Dissent in the U.S. Courts of Appeal*. Focusing on full-opinion labor and criminal cases for about a twenty-year period, Songer tested ten hypotheses. He reports that he found no evidence for any hypothesis that would explain changes in dissent rates over time. Factors he found to have some significance in explaining high rates of dissent included the presence of difficult legal issues, ideological diversity on panels, urbanism, reversals of decisions below, and the policy direction of the decisions. He says he was surprised to find no evidence for the belief expressed by judges that a heavy workload reduces the rate of dissent.

Chapter 6, *Parameters of Dissent*, by Justin V. Green, was written principally for scholars interested in quantitative analysis of judicial behavior. He suggests research models and approaches with special reference to the problems of measuring disagreement among panels of judges in unanimous cases, i.e., intracircuit inconsistency. Green provides a useful summary of staffing and organizational changes in the courts of appeal during the last two decades.

In Chapter 7, Stephen L. Wasby writes *Of Judges, Hobgoblins and Small Minds: Dimensions of Disagreement in the Ninth Circuit*. He discusses inconsistency among circuit panels but mixes in descriptions of previous studies of conflict measured by dissent. He summarizes some conclusions drawn from earlier works: district judges, circuit judges from outside a circuit, and senior circuit judges sitting on courts of appeal panels over a four year period filed substantially fewer dissenting and concurring opinions than a circuit's regular judges, with district judges filing the fewest. Judges sitting by designation were "less for labor, more for the government in tax cases, and less for criminal defendants making a constitutional claim."

In his study of the Ninth Circuit for the present book, Wasby compared dissent rates on panels, making what seems to be every

possible comparison among panels according to their composition (regular judges, visiting judges, senior circuit judges, district and senior district judges). Armed with a computer, he even looked at panels that included circuit judges who were formerly district judges. Wasby concludes that the "overall level of agreement for the six years [studied] was roughly the same for all combinations of judges other than three circuit judges. . . ." It is surprising to me, in light of the earlier conclusions, that Wasby's tables show a slightly higher level of agreement for Ninth Circuit panels consisting of three regular circuit judges than for other combinations.

Chapter 8, by Charles M. Lamb, provides *A Microlevel Analysis of Appeals Court Conflict: Warren Burger and his Colleagues of the D.C. Circuit*. Lamb tests some hypotheses relating to the court of appeal that has had the highest rate of dissent, especially in criminal cases. He also examines some hypotheses concerning Burger's disagreement with various colleagues while Burger sat on that court. Among his findings is confirmation of an "important finding" by others that there is more conflict when a court of appeal reverses a district court than when it affirms.

This was true in the D.C. Circuit, however, only for panel (as distinguished from en banc) decisions. Turning to Burger, Lamb set out to test whether background characteristics of judges affect their decisionmaking. His hypothesis, building from earlier studies showing that judges who are Democrats and either Catholic or Jewish are more liberal than judges who are Republicans and Protestant, was that Burger would be in greatest voting conflict with judges who were Democrats and either Catholic or Jewish. To his surprise, Lamb found that Burger's agreement rate was 53.5 percent with seven other Protestants and 52.1 percent with six Catholic or Jewish judges. Party affiliation was far more important; it linked with agreement rates of 81.5 percent (Republicans) and 47.6 percent (Democrats). Admitting that his focus on these two variables was not "methodologically sophisticated," Lamb considered voting alignments during different time frames and for different criminal law issues. He found that Burger's alignments shifted or evolved over time, and that on certain issues his alignment changed, tending to reverse the order of judges with whom he had high and low rates of conflict.

The remaining chapters deal with voting patterns on state high courts. In Chapter 9, Henry R. Glick and George W. Pruet, Jr. review rates of dissent in all fifty states over a period spanning 65 years. They find that the overall rate of dissent in state high courts has been rising, especially since about 1966, but that very high

levels of dissent are still the exception. In an effort to locate factors affecting dissent, they calculated correlations between dissent rates and a host of variables collected under three major headings: social and economic complexity; political complexity and competition; and complexity of court structure. Among the variables grouped under the first heading are percent nonagricultural employment, percent black population, and median income; among the second heading variables are total state expenditures (1978), percent Democratic vote for governor, and percent majority party lower house (1978). They found that the presence of an intermediate appellate court in the state's system and the level of state expenditures correlated more closely with dissent rates than any other variable. "When all states are examined, total state expenditures is the single best prediction of dissent."

In Chapter 10, Victor E. Flango, Craig R. Ducat and R. Neal McKnight attempt to measure leadership through opinion assignment in the supreme courts of Michigan and Pennsylvania. They chose the periods of 1956-62 for the Michigan court and 1961-71 for Pennsylvania. Sidney Ulmer had studied the Michigan decisions for 1958-62 and concluded that Justice Kavanaugh was the de facto leader of Chief Justice Dethmer's court. In the present study the authors use statistical methods somewhat different from those of Ulmer. They also exclude unanimous opinions, which Ulmer included. They conclude that Justice Smith was the leader after analyzing only cases in which dissents were filed. The figures for Pennsylvania present a less clear picture, but the "Inter-Individual Solidarity Index," suggested by the authors as the best indicator of leadership in the majority, puts Justice Eagen at the top and Justice Musmanno at the bottom. The "Shapley-Shubic Index," on the other hand, would rank Musmanno as the most powerful of the judges.

Chapter 11 is *A Longitudinal Study of the Docket Composition Theory of Conflict and Consensus*, based on the decisions of the Arizona Supreme Court from 1913 to 1976. Author John H. Stookey classified the cases as criminal or civil, private law or public law. He determined that with the exception of two periods, changes in the court's docket have had an impact on dissent rates in Arizona, finding some covariance between dissent rates and percentages of cases containing a public law issue. Of the periods that were exceptions to this conclusion, one is explained by the presence of a maverick judge. The other period may be explained by a change in the court's size.

The final chapter presents an interesting study of the relation-

ship between the California Supreme Court's exercise of discretionary review and its attitude toward the merits of the cases granted review. The author, Robert L. Dudley, concludes that disagreement among the justices is substantially greater when they vote to grant or deny review than when they decide the merits of the reviewed cases. This suggests that linkage between the justices' votes on access and on the merits is weak; votes in favor of access are not generally based on a decision to overturn the case on the merits. There is, however, substantial disagreement among the justices, based on different role perceptions, concerning the appropriate criteria for this decision. These findings relate to the whole sample of cases analyzed and more strongly to those cases, proportionately large in number, where a decision on the merits is unanimous. Dudley finds a significant correlation between the justices' votes on access and on the merits for those cases in which conflict on the merits is evident. As that conflict increases (larger number of dissenting votes on the merits) the correlation grows stronger.

II

In the prologue the editors distinguish the mainstay of the collection—quantitative analysis of voting statistics—from "small group analysis." They define the latter as an approach that "typically involves exploring interpersonal relationships on courts as revealed by such data sources as the private papers of deceased judges." While acknowledging that small group analysis has made "major contributions to the study of judicial conflict," they point out that quantitative analysis has the virtue of being more objective. Moreover, they claim, "the chapters in this volume go beyond questions of judicial interaction and influence."

Despite that introduction, the editors chose for Chapter 1 a piece by David Danelski that relies heavily on the docket books of Justice Douglas during four terms of court and the private papers of eight Justices who served during the same terms. Danelski also analyzed the content of cases in an effort to isolate decisions that in his opinion turned on the Justices' role expectations—activism versus restraint or adherence to precedent. He describes the chapter as an exploratory effort to determine the causes and consequences of conflict and its resolution in the Supreme Court.

Danelski concludes that Supreme Court decisions turn on the interaction of the Justices' values and role expectations and, to a lesser extent, on differences in their perception of issues. Defining leadership as the ability to reconcile these differences, Danelski finds that Justice Black scored the highest (and Frankfurter the

lowest) as a leader, while Chief Justice Hughes was a more able leader than Stone. By a combination of references to private papers, shepardization of cases, and analysis of the content of opinions, Danelski tentatively concludes that concurring opinions have little impact on later constitutional developments, although a concurrence (or a potential concurrence) may influence the content of a majority opinion. Dissenting opinions often have significant policy consequences by affecting the content of majority opinions, and by persuasively calling attention to questionable uses of precedent. The last conclusion is based largely on the extent to which the dissenting opinions surveyed became the articulated bases for later, overruling decisions.

A dissent necessarily reflects disagreement. But not all disagreement results in dissent. Different judges experience different levels of intensity of disagreement, and differing role perceptions affect the level at which each will file dissenting opinions. Professor Danelski's observations about values and role and issue perception have the sound of reality, as do the quotations from Ninth Circuit judges in Chapter 7:

> 'Some judges have higher thresholds of indignation' than others, particularly in the area of search and seizure: 'Some feel all wiretapping is evil and resolve all cases against the government'; others resolve all cases for the government, 'which is trying to protect us . . .' When judges have 'different notions of justice' that 'reflect different approaches in society,' they cannot be convinced to change their minds about such notions, which also serve to color their perceptions about facts and how they apply the law to the facts.

These generalizations are sound, but they can be drawn from reading opinions and listening to judges; they do not require quantitative research. I am not sure how far "beyond questions of judicial interaction and influence" quantitative research that avoids analysis of opinion content can take us. Be that as it may, the present collection did not carry me very far. Moreover, I am confused about the ultimate purpose of the individual chapters and of the collection as a whole.

In the prologue the editors offer several reasons why it is important to study judicial conflict and consensus, but all their citations to support or illustrate their reasons are to existing literature. They do not tie any chapter in the book to any reason for such study. Writing about models for behavioralist study of the judiciary, Professor Charles Sheldon said, "The purpose of models and, for that matter, of scientific inquiry generally, is to organize, ana-

lyze, predict, and explain political phenomena."[4] Organization and analysis are means to the ends of explaining, understanding and predicting. There is an abundance of organization and analysis in this collection, but I found practically nothing that would help explain or predict judicial behavior in a useful way, certainly nothing that could not be gleaned from even a casual reading of opinions.

Consider some examples. Burger often disagreed with Bazelon; but in certain types of cases they often agreed with each other. About what, precisely, could they be counted on to agree? In the Ninth Circuit the disagreement rate does not change much regardless of the combination of judges on panels, if votes over a sufficiently long period of time are considered. A year is certainly not long enough because we learn in Chapter 7 that in 1974 "the combination showing the highest overall disagreement was that of circuit judge, senior circuit judge and senior district judge. . . . That this category of panel registered very little disagreement the following year, 1975, with none in unpublished cases, is illustrative of year-by-year fluctuation."[5] Perhaps it is more useful to know that rates of dissent relate to the presence of public law cases on the docket—if the court is a state court of a certain size and has no mavericks on it—or to the level of state expenditures, than it would be useful to know—if it were true—that they relate to above normal rates of rainfall. Perhaps.

The problems stemming from a complete divorce between consideration of opinion content and research about judicial decision-making are pervasive in this collection of studies. Some authors move beyond rates of dissent to study conflict as a direct means of discovering predictive information. But this requires the identification or creation of surrogates for cause and effect, surrogates that tend to be one-dimensional. If, unlike Danelski, an author ignores what judges say in their opinions, or privately to each other, he must develop some factors to stand in for "liberal" and "conserva-

4. C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES 229 (1974).

5. The data collected for the Ninth Circuit cannot explain the past or predict the future in specific cases and panel combinations. My one experience with the panel combination referred to above (not in the Ninth or my present Sixth Circuit) was a bitter, unlucky one. The regular circuit judge dominated oral argument, though questions put by the senior district judge suggested, with hindsight, that he should have dissented from the decision ultimately authored by the circuit judge. Neither he nor the senior circuit judge dissented from the reversal of the trial judge, a respected, dedicated judge who had worked on the case over a period of six years. Two other circuit judges filed a strong, biting dissent from the whole court's refusal to rehear the case en banc. Two more responded with a brief opinion supporting the refusal to rehear.

tive" outcomes, a judge's values and perceptions, activism and restraint, etc.

Judges are classified according to party and religion, and some correlations are found if enough decisions and enough judges are surveyed. But known alignments—Brennan-Warren, Brennan-Marshall, Frankfurter-Harlan—remind us of the limits of generalizations. In the Arizona study (Chapter 11), the judges of the Arizona Supreme Court over a sixty year period were 95% Democrat and for several "natural courts" looked like clones of one another. The author noted that more sensitive measures of ideology than background analysis and party affiliation are needed. If prediction of a new judge's behavior is the goal, we will need measures sensitive enough to reflect the ways in which judicial experience shapes the values and perceptions that the appointee brings to the bench. If understanding judges while they are on the bench is the goal, the most revealing clues will probably be found in their opinions.

III

Chapter 4 provides a case in point. In this chapter, Harold Spaeth and Michael Atfeld attack (I chose the word carefully) Justice Frankfurter's reputation for judicial restraint. Spaeth's earlier research, in their words, "demonstrated that Frankfurter's restraint was thoroughly subordinated to his substantive attitudes towards business and labor." For this book, they analyze nonunanimous cases dealing with state and federal agency regulation of business and labor during Frankfurter's tenure on the Warren Court. The authors disclaim any "content analysis of the justices' opinions," but they do classify the cases according to outcome. For example, in a state regulation of labor case, any opinion supporting state regulation, whether majority or dissenting, is classified as pro-state and "concomitantly" anti-union. By the same token, opinions opposing state regulation are characterized as pro-union.

With positions thus staked out, the authors count the instances when the Justices voted pro-state/anti-union and vice-versa, NLRB pro-union/anti-union, and so on. They also tabulate interagreement percentages and indices of interagreement among various groups of Justices. They conclude, one could say with a vengeance, that Frankfurter was an activist Justice motivated in his decision-making by pro-business, anti-union values.[6]

The state regulation of labor cases are identified only as twelve

6. Subjectivity crept into Chapter 4. The authors speak of Frankfurter's "apologists"; his "greed" in assigning opinions to himself at every opportunity; the "Pontius Pilate posture adopted" by him in *Lion Oil*; and his "rush-to-judgment activism" in *St. Joe Paper*.

cases, eleven of which involved federal preemption of state court jurisdiction over union conduct. Frankfurter took a position in most of these cases that allowed state court jurisdiction.

The focus on nonunanimous cases in this context is fraught with problems. I for one am not interested in whether Frankfurter or any other Justice is *grossly* characterized as an activist or restraintist. In relation to whom? To what values, grounded in what sources? By ignoring unanimous decisions the authors obscure the fact that Frankfurter often supported federal preemption of state regulation of labor activities, so that by their definition he was often pro-union. Indeed, one of the most sweeping statements of preemption doctrine was authored by Frankfurter in *San Diego Building Trades Council v. Garmon.*[7]

Their focus on nonunanimous cases allowed the authors to posit that in every such case decisional choice was available. They then characterized the choice as one governed by pro- and anti-union values. In the cases surveyed, "Frankfurter was obviously in greatest voting conflict with these three justices. (Douglas, Black and Warren). Only [they] proved to be pro-union." (Did they also prove to be the restraintists on the Court?)

Most of the cases surveyed in this study can be identified by going through the U.S. Reports. They deal with issues that fall beyond or at the outer limits of the boundaries of any federal preemption doctrine that rationally could be attributed to congressional intent or federal statutory policy. One series of cases, generically referred to in later opinions as "the violence cases," dealt with state lawsuits to enjoin or obtain compensatory damages for alleged violence or threats of violence by labor organizations. The conduct generally could have been charged as unfair labor practices under federal law, but the NLRB has limited remedial powers. A majority of the Court ruled that in these cases state remedial powers are not preempted by federal law.[8] Another case in which the key was the limited remedial power of the NLRB is *International Association of Machinists v. Gonzales.*[9] In an opinion by Frankfurter, the Court ruled that a member's wrongful expulsion by his union, for

7. 359 U.S. 236 (1959).

8. United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) (allowing an employee to maintain a state tort action for losses stemming from violence or threats of same by a union; Douglas and Black dissenting); Auto Workers v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956) (same, but remedy of injunction; Warren, Black and Douglas dissenting); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (same as *Auto Workers*; Warren, Black and Douglas dissenting); Automobile Workers v. Russell, 356 U.S. 634 (1958) (allowing employee to bring a state tort action alleging force and threats of violence by union; Warren and Douglas dissenting).

9. 356 U.S. 617 (1958) (Warren and Douglas dissenting).

which federal law provided no remedy, could be the subject of a state contract action.

Three other cases are in a different vein. In *United Mine Workers of America v. Arkansas Oak Flooring Co.*[10] the union had not complied with congressionally imposed filing requirements and was denied recourse to the protections of the federal labor laws. The Court ruled nevertheless that those laws preempted state law. Frankfurter dissented because he was unable to see how state law could conflict with congressionally established labor policy under the circumstances. Two other cases involved state court actions that settled preemption doctrine prohibited. In one, the union sought a federal court injunction against the state court proceeding.[11] In the other, the NLRB, after its remedial machinery was put in motion, sought the injunction in federal court against the state court proceeding.[12] The trouble was that a federal statute on the books since 1793 prohibited a federal court from enjoining state court proceedings.[13] Very limited exceptions to the act were added in 1948. In the NLRB's case Justice Douglas wrote for the Court and upheld the injunction, giving only cursory attention to the Anti-Injunction Act. Justice Black alone dissented. In the union case, Justice Frankfurter wrote for the Court and ruled that the Anti-Injunction Act applied. Warren, Douglas, and Black dissented. (Douglas later developed a broader rationale for cases where the NLRB seeks the injunction, a rationale that even more clearly than his first one would not encompass an injunction sought by a union.[14] He relied on a Frankfurter opinion in a non-labor case.) In three other nonunanimous preemption cases, Frankfurter was in the majority, ruling against the state and for preemption, with Burton and Clark dissenting.[15]

Unanimous decisions do not negate the existence of decisional choice; and nonunanimous decisions do not prove the existence of equally legitimate choices. The cases studied only prove that Frankfurter was unwilling to vote for unions in all cases at all costs. If that is the authors' definition of anti-unionism, they make their point.

An additional problem is due to the authors' choice of preemp-

10. 351 U.S. 62 (1956).

11. Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511 (1955).

12. Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954).

13. 28 U.S.C. § 2283.

14. NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

15. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957) (Garmon I).

tion as a subject matter. With the exception of the Anti-Injunction Act cases, the cases chosen dealt with situations in which plaintiffs were asserting that unions are subject to the same state laws that govern everyone. Paramount federal law can supplant or oust state law, but the Court traditionally looks for congressional intent on the issue; in the absence of any expressed legislative intent the Court turns to an analysis of conflict or the potential for conflict between specific state laws and federal policy. This analysis must include consideration of the interests of the persons affected. Except indirectly in the *Oak Flooring* case, and directly in the Anti-Injunction Act cases, Congress had expressed no intention regarding preemption in the governing laws in force when the above cases were decided. Should the state laws governing the "violence cases" have been preempted? Even the unions have not asserted on a broad front that the states' criminal laws are ousted by federal labor laws. And the local police, not the F.B.I., have generally dealt with violence on the picket line. Unions have not claimed that federal law protects violence. To take extreme cases, an employer that loses its plant and an employee who loses his physical integrity to union violence can obtain, respectively, a cease and desist order and an award of lost wages, if any, from the NLRB. Compensatory remedies are provided by state law. If, in the absence of any legislative guidance, one judge rules that federal law ousts state tort law of general applicability and another rules that it does not, who is the activist? The one judge might be regarded as pro-union. The other judge is not necessarily anti-union; he can ground his opinion in a commitment (activist? restraintist?) to the rule of law. No one doubts that values affect decisions in these kinds of cases. But outcome alone does not reliably isolate the influential values.

The authors give a nod to possible values of federalism in the preemption cases, but move on to bolster their central theme in the business and federal agency cases. Only a handful of these are identified—by name, without citation—and it would be a laborious task to isolate the total samples. But enough case names are provided to show the misleading possibilities of pursuing a one-dimensional, which-party-won style of decision cataloguing.[16]

16. The state regulation of business cases include a large number of commerce clause-state taxation of business cases; the NLRB cases involve a range of issues, including the proper functioning of the Board, giving content to the broadly worded federal labor legislation, and interpreting statutory language that is not substantially ambiguous. An example of the last is Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). Chief Justice Warren wrote the opinion and Frankfurter dissented. One of Warren's most admiring biographers used this case to illustrate how Warren was guided by his polestar of fairness. The biographer agreed with Frankfurter's charge that Warren had substituted his sense of fairness for the legislative

IV

In 1974, Charles H. Sheldon summed up a debate within the political science fraternity between "traditionalists" and "behavioralists." The debate appears to have peaked during the 1960s. He wrote:

> This debate has been leveled at the question of the use of values in research and at the methodologies common to the behavioralists. The dialogue takes a scientific versus non- or antiscientific perspective, with the behavioralist claiming that the traditionalist fails to be scientific enough, and the traditionalist arguing that the behavioralist confuses science with methodology. . . . Robert McCloskey has observed ". . . that the fraternity in general is now receptive to the methods and insights of behavioralism in so far as it finds them *helpful*; . . . and that the discipline is about ready for a new movement. . . ."
>
> The new movement is upon us. . . . The post-behavioral revolution in political science demands that we be concerned for the contemporary world and its problems even if we must sacrifice some of our scientific rigor. In Easton's words, ". . . it is better to be vague than non-relevantly precise." . . . In describing, explaining, and predicting what *is* and eschewing the *ought*, [the behavioralist] tends to support the existing conditions in the world. The realties of the political world tend to be lost in the abstract context of models and data collection.[17]

It is not evident from *Judicial Conflict and Consensus* that its editors and contributors were daunted by Sheldon's last sentence. Because I was perplexed by my own inability to discern the purpose or utility of much of the research reported in the collection, I paid attention to the suggested agendas, in almost every chapter and in an epilogue, for "further research." Suspecting that the studies reported were intended to be incremental, I hoped that the research agendas would help me to see the larger canvas on which they were to be increments. Unfortunately, however, most of the agendas called for more of the same.

JUSTICE AND EQUALITY: HERE AND NOW. Edited by Frank S. Lucash.[1] Cornell University Press. 1986. Pp. 170. Cloth, $22.50, paper, $7.95.

David P. Bryden[2]

Nearly thirty years ago, a biologist of my acquaintance, on learning that I planned to study philosophy, said something that

text. B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 198 (1983).

17. C. SHELDON, *supra* note 4, at 228-29 (emphasis in original).

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