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BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT by Phillip J. Cooper. Lawrence: University Press of Kansas, 1995. 224pp.

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In recent correspondence, Charles Cameron -- a student of the legislative process at Columbia University -- explained to me why scholars working his field find Richard Fenno's work so attractive:

Fenno always has a model in mind when he tells his stories, and he has wonderful, on-point data for his models. Reading his books makes a theorist's fingers itch to write down models, either to formalize his implicit perspective or to explain the fascinating stylized facts' his implicit models allow him to see as important and report. There is a repeated "Ah-ha" effect that has an overwhelming impact on the reader.

I think political scientists who study law and courts would make the same kinds of claims about Walter F. Murphy's ELEMENTS OF JUDICIAL STRATEGY and David J. Danelski's a SUPREME COURT JUSTICE IS APPOINTED. Both books, while chock-full of stylized facts, have a model they seek to develop; and both have that "finger-itching" quality Cameron finds so appealing in Fenno's work.

Judged by these criteria -- criteria reasonable to apply to any scholarly book largely composed of stories -- Cooper's BATTLES ON THE BENCH comes up short. While the volume makes my fingers "itch," it lacks a point. Cooper wanders aimlessly from one story to the next, without offering explanations, morals, or even punch lines -- much less having a model in mind. Worse still, many of his stories are only half stories, some of his claims either lack any sort of empirical basis or are contradicted by existing data, and virtually nothing he writes is informed by modern-day theories of the judicial process.

The trouble starts in the first few pages of the book in which Cooper lays out his key concerns. Primarily, he writes, BATTLES is "about conflict in the United States Supreme Court" (ix). Of course, "conflict" is an interesting subject but some of the reasons he offers for studying it are too simplistic. The first begins with Cooper noting that "The justices continue the ritual of the handshake to this day, but they have also been known, symbolically at least, to shake fists as well....Yet it is hard to think about conflict in the Supreme Court. We have no difficulty discussing clashes between the Court and other levels or branches of government, but within the Court itself? Many Americans would consider the notion tantamount to contemplating fist fights in the College of Cardinals" (p. 1). I had to read these sentences several times. I can't imagine in this day and age -- when the media regularly report on tensions within the Court, when dissents have become an institutionalized feature of Supreme Court decision making, when confirmation proceedings typically focus on candidates' ideological predilections, and when THE BRETHREN (though now quite dated) was a bestseller and continues to be used in classrooms -- that anyone would make this claim or that anyone would buy it.

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Surely Americans (at least the few who think about the Court) don't believe it is the monastery that Felix Frankfurter once so hypocritically deemed it.

A second justification Cooper offers for the study is a void in the literature: "Given the importance of conflict in the history of the Court, it is surprising that so little has been written about the subject and what has been written centers largely on voting alignments in particular cases with a bias by commentators toward reducing fragmentation in opinions" (p. 3). This was another sentence I had to read twice, for it is so stunningly wrong. As virtually all political scientists who study the Court acknowledge, the field of judicial politics owes its origins to C. Herman Pritchett's (1941, 1948) observation that conflict exists on the Court. Prior to Pritchett's writing, many political scientists would have bought Cooper's claim that justices fight about as much as do members of the College of Cardinals. But, as Pritchett so insightfully asked, if this was so, if justices made decisions on the basis of a well-established "canon" of principles, then why do various justices in interpreting the same legal provisions consistently reach different conclusions on important issues of the day? By merely raising this question, Pritchett propelled generations of scholars to study not only Supreme Court votes but to explain trends in conflict over time as well.

So why Cooper makes the claims he does is puzzling. The justifications he offers also bring into question the audience for the book. Most scholars, I believe, would find Chapter 1 just as retrograde as I did and, for that reason, would think twice before assigning it to students to read. I can imagine many readers signing off by page 8. Of course, as a reviewer, I was forced to plunge forward and, in some sense, I'm glad I did.

This is not because the book becomes any more sophisticated or analytical in the ensuing chapters. Indeed, the material forming the heart of the book -- Chapter 2 (Why Do They Fight?), Chapter 3 (How Do They Fight?: The Professional Fights), and Chapter 4 (How Do They Fight: Internal and Personal Battles) -- only serves to shore up my claim that, unlike Fenno, Murphy, or Danelski, Cooper writes with no model or point in mind. Take Chapter 3 in which Cooper provides examples of the ways internal Court conflicts manifest themselves professionally: dissenting opinions and dissents from denials of certiorari, "named attacks in footnotes," presentation of dissents in open court, and clashes over court operations, to name just a few. For each of these, Cooper relies on vignettes that he put together from public case records and the papers of various justices. So we read that Brennan and Marshall "issued increasingly harsh dissents from denials of stays in the death penalty cases...principally because of their fundamental opposition to the death penalty itself, but also because they came to feel that there was a rush to judgment in which important issues and cases were simply ignored;" and that "Chief Justice Warren was generally opposed to dissents from denials, but neither he nor any of his successors have been able to put a stop to the practice or even to curb its expansion... [because] they are a device by which justices can vent their anger at the unwillingness of the Court to undertake critical decisions that are in the dissenters' view essential" (pp. 65-66).

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This is all well and good, but what do we really take away from these observations? Why have dissents from denials increased (if, in fact, they have; the data Cooper offers come from O'Brien [1996, 241-242], which only provides numerical figures for the 1980-81 and 1987-88 terms)? Why are such increases important? I could raise the same sorts of questions about virtually all of Cooper's manifestations of

conflict for, within the substantive chapters, he provides almost no answers. And he doesn't even do so in Chapter 5, though surely with the propitious-sounding title of "What Difference Does It Make?" Cooper fully builds up expectations; finally, I'd get some answers to the very question that had been in the forefront of my mind for the past 122 pages. But such was not to be. Rather than focus on the kinds of answers scholars would find interesting and important (such as, "Conflict has implications for law emanating from the Supreme Court because_____"), Cooper invokes the word "hurt" (and various synonyms) a lot: "Words do HURT and when they come from peers and colleagues with whom one must work every day and on whom one must depend for support, they hurt even more" [emphasis added] (p. 123); Thurgood Marshall, owing to perceived disrespect or attempts at manipulation, felt "what might be called unarticulated injuries, slights that [Marshall] never mentioned but that nonetheless HURT and conditioned his relationships with others" [empasis added] (p. 137).

Not all of the material in this chapter is so trite; indeed, there are a few portions in which Cooper verges on saying something significant but, unfortunately, stops short. Consider a section titled "External Views of the Court Can Be Affected," in which I thought Cooper might invoke data in Eskridge's seminal law review article, showing that Congress is more likely to override fragmented Court decisions than unanimous ones. This would have been a clever way for Cooper to have illustrated the consequences of conflict but, instead, he largely describes how the press chronicles the Court: "The battles of the 1970s over abortion and affirmative action brought a new visibility [to the Court]" (p. 149). Not only does this statement undermine the book's initial contention that Americans view justices as Cardinals, but it and the surrounding material also underscore BATTLES' inability to engage in serious and meaningful analysis.

Why, then, am I glad I read this book? The answer takes me back to my starting point: Despite the fact that Cooper has no "model in mind when he tells his stories," his book made my "fingers itch to write down models, either to formalize his implicit perspective or to explain the fascinating stylized facts'." Let me provide but one illustration. In trying to show why justices fight, Cooper writes that "The ideological premises that motivated Marshall and Powell were too deeply held to be reconciled" (p. 15), with their division over the resolution of BAKKE a case in point. To be sure, as Cooper notes, Marshall was highly critical of Powell's approach, going so far as to craft a rather harshly-worded response to various memoranda Powell and others had circulated prior to opinion assignment. Cooper reproduces Marshall's memorandum but he never finishes the story. A review of Brennan's case files shows that after Powell circulated a draft of his BAKKE opinion, Marshall wrote back that he would "not join

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any part of the opinion" and that he planned to dissent "in toto." This led Brennan to conclude that "with such evident ill-will and sensitivity in the background, it would be difficult to win Marshall's vote." But, at the end of the day, Marshall retreated from his adamant position, and joined part of Powell's judgment.

Why Marshall took this course of action is a fascinating puzzle -- the solution to which probably lies in his goals, his perceptions of the goals of his colleagues, institutions, and so forth. And it is a puzzle just begging for a solution, as are many others that researchers could extract from this book. So, for scholars interested in solving puzzles, in writing down models, I strongly recommend BATTLES; I guarantee that it will make their "fingers itch." For those who want the author to do most of the work -- a not altogether

unreasonable expectation -- I believe that the University of Chicago Press still stocks ELEMENTS OF JUDICIAL STRATEGY.

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