Cardozo and some that examine facets of his career in greater depth, but probably none as consistently stimulating as this one.

THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION. By Bernard Schwartz.[1] Reading, Ma.: Addison-Wesley. 1990. Pp. x, 413. $24.95.

Herbert Hovenkamp[2]

This well organized, instructive volume is sure to be an important addition to anyone's collection of Supreme Court history. Professor Bernard Schwartz seeks to capture the entire constitutional jurisprudence of the Burger Court (1969-1986). In addition to the published record, the book is based on numerous oral interviews with both Justices and former law clerks, conference notes and docket books, correspondence, and earlier drafts of opinions. The result is a great deal of information about the workings of the Supreme Court by a lawyer who has a keen understanding of the Court as an institution, and of the meaning and significance of its internal disputes. This book gives a much more balanced view than earlier books (such as *The Brethren*) based on similar material. It reveals a bitterly divided Court, an ineffectual Chief Justice who inadvertently transferred great power to ideological opponents, such as Justice Brennan, and a gradual change from a cohesive Bench to a group of nine quite independent Justices, working alone to a greater degree than ever before, at least in the twentieth century.

Except for the first two chapters and the last, Professor Schwartz's study is organized entirely by subject matter, with a disproportionately large percentage devoted to the Bill of Rights. For example, there are three chapters, totalling nearly one hundred pages, on the first amendment; but only one chapter of thirty pages on the combined subjects of the new federalism and the commerce clause. Equal protection claims three chapters and criminal procedure two. Separation of powers and presidential power are combined in a single chapter.

President Nixon's appointment of Burger was part of an effort to unravel the jurisprudence of the Warren Court. A theme that runs throughout this book is that Nixon picked the wrong man for the job. Perhaps because of his disdain for the federal judiciary in

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general, Nixon neglected to select a person who had the stature of either Warren or, for that matter, most of the other Justices on the Court.

Schwartz is clearly no admirer of Burger as an intellectual or as a judicial craftsman. He opines that most of Burger's colleagues could run "intellectual rings" around him, and that he was a notoriously bad opinion writer. In some cases he managed to lose his own previously committed majority because those who had voted with him could not agree with his written opinion. In fact, in the *Nixon* case the Chief Justice, who had assigned the opinion to himself, bungled the job so badly that several Justices decided to begin circulating their own drafts of various sections in order to help him out. The result was a rambling, repetitive opinion written by a committee of Justices.

The Burger Court, Schwartz concludes, will be most remembered for Burger's poor intellectual leadership and managerial skills. "It can indeed be said," Schwartz concludes, "that no important Warren Court decision was overruled during the Burger tenure," although a few were narrowed. To the extent it is remembered for its substantive decisions, those who moved the Court to the left are at least as significant as those who moved it to the right. There was, for example, *Roe v. Wade*, which guaranteed a woman's constitutional right to have an abortion; and *Goldberg v. Kelly*, which held that welfare payments could not be terminated without notice and a pre-termination hearing. In the area of freedom of speech, the Burger Court was the first to recognize broad constitutional protection for commercial speech. An important aftermath: the Chief Justice was led kicking and screaming through a decision process that ended up banning most restrictions on truthful lawyer advertising.

Chief Justice Burger, it was widely hoped, would reduce the procedural rights of accused criminals that were so greatly expanded during the Warren period—particularly in *Gideon*, *Mapp*, and *Miranda*. In fact, not only were none of these decisions overruled, they were for the most part expanded during Burger's tenure. Likewise, in the area of race relations, *Brown v. Board of Education* was expanded so as to fashion a remedy of federally enforced school busing in districts where segregation had been enforced by law.

Perhaps the greatest "conservative" success of the Burger Court was *National League of Cities v. Usery*, a model of the new federalism, which exempted local governments from some federal legislation passed under the Commerce power. *National League* itself was a highly creative, noninterpretivist decision which seemed

to run contrary to Burger's own professed principles of judicial restraint. But Burger was never able to form much of a consensus for *National League*, and the Court took every subsequent opportunity to narrow its scope. This great edifice of the new federalism was overruled before Burger's tenure had even come to an end.

A second, more enduring accomplishment was the abolition of an old administrative law distinction between rights and privileges, and the substitution of a doctrine of "entitlement." An entitlement was a statutory right from the government that could not be taken away without a certain amount of due process. However, entitlements were not fundamental constitutional rights, such that any state deprivation was subject to strict judicial scrutiny. *Dandridge v. Williams* (1970) held that there was no fundamental right to welfare payments—although taking welfare payments from someone already receiving them required procedural safeguards. *San Antonio Independent School District v. Rodriguez* (1973) held that there was no fundamental right to an education.

A related accomplishment, to which Schwartz gives short treatment, is the increased use of the language of cost-benefit analysis in determining the minimum scope of due process in administrative hearings. The Warren Court tended to regard any kind of due process protection, once recognized at all, as more nearly absolute. The Burger Court was much more willing to balance costs against benefits. This type of analysis, Schwartz notes, was itself probably necessitated by *Goldberg v. Kelly*, which produced an "explosion" of due process cases involving termination of benefits, public employment, and other areas of public decision making. As Schwartz notes, the number of decisions affecting individual benefits made by regulatory agencies under statutes such as the Social Security Act probably number in the millions. "A full trial in every such case would make the system unworkable." In order to resolve this problem the Court attempted to weigh the anticipated benefits of any additional procedural protection against its anticipated costs. A good example is *Ingraham v. Wright* (1977), which decided that notice and a hearing were not necessary before the imposition of corporal punishment in public schools. The entire line of cases has been attacked by liberals as attempting to quantify something to which such numbers cannot be easily attached. But more than anything else, the decisions reveal the awesome impact of *Goldberg v. Kelly* on our notion of the appropriate scope of procedural due process.

In a way, the title of this book seems inapt. "The Ascent of Pragmatism" suggests a particular view of the role of the Supreme

Court, and someone who was successful in achieving it. What Schwartz ends up describing, however, is a weak, ineffectual Chief Justice, unable to give effect to his own ideological views and, for the most part, unable to ride herd on his Court. As a result, the sharp turn to the right from Warren Era liberalism, which both President Nixon and Burger himself envisioned, never materialized. In many areas the Burger Court kept Warren policies alive through sheer inertia, while in others the Court actually moved further to the left. The turns to the right were haphazard, unpredictable, and reflected no consistent ideology. This was not an ascent of pragmatism; it was a collapse of leadership. "I don't think that the Burger Court has as wide a sense of mission," Schwartz quotes then Associate Justice Rehnquist as saying, in comparing the Burger and Warren Courts. "Perhaps it doesn't have any sense of mission at all." Schwartz concludes that *Roe v. Wade* was the "paradigmatic" Burger Court decision—because it reveals a thrashing group, with even those in agreement as to outcome unable to form a consensus on the reasoning.

CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787. By Calvin C. Jillson.[1] New York: Agathon Press. 1988. Pp. xiv, 242. Hardcover, $30.00; Paperback, $15.00.

Richard S. Kay[2]

In this book Professor Calvin Jillson, a political scientist, has sought to cast new light on the much-studied process of decision-making at the Philadelphia Convention of 1787. It is an interesting attempt to apply modern techniques of quantitative social science research to the archival evidence of the Convention's proceedings. While this is an admirable and promising enterprise, in the end the illumination shed by the data examined proves disappointingly limited.

In one sense, Professor Jillson is attempting to complicate what he takes to be oversimplified explanations in the existing literature. He reads previous analysts as falling into two categories, each concentrating on a limited and partial approach to the Convention. One group (Charles Beard and Forrest McDonald are exemplary)

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