Readings

What's a Judge to Do?

The Art of Judging, by James Bond (Bowling Green University Social Philosophy and Policy Center/Transaction Books, 1987), 319 pp.

The Court and the Constitution, by Archibald Cox (Houghton Mifflin Co., 1987), 434 pp.

The Supreme Court: How It Was, How It Is, by William Rehnquist (William Morrow, 1987), 338 pp.

The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986, ed. Herman Schwartz (Elisabeth Sifton Books/Viking Press, 1987), 293 pp.

The Supreme Court's Constitution: An Inquiry into Judicial Review and its Impact on Society, by Bernard Siegan (Bowling Green University Social Philosophy and Policy Center/Transaction Books, 1987), 215 pp.

Reviewed by Doug Bandow

President Ronald Reagan has worked for seven years to transform the federal judiciary, choosing nominees likely to implement a jurisprudence of "original intent." The Democratic takeover of the Senate in 1986 intensified the struggle for control of the federal bench, as highlighted by the two bitter confirmation battles to replace Supreme Court Justice Lewis Powell. In both cases the nominees' jurisprudential views—particularly on the issue of "judicial restraint"—were at the center of the debate.

What is the proper role of the judiciary in a democratic society? Several new books address this issue, which has been with us since the founding of our republic.

"The only enduring, important question in constitutional law," writes James Bond in his slim volume, *The Art of Judging*, "is how the Court should interpret the Constitution." Though scores of judges and commentators have been unable to agree on an answer to that question, Bond, Dean of the University of Puget Sound Law School, nicely frames the issue. He does so in a way that should appeal to lawyers and non-lawyers alike.

Bond eschews the traditional characterizations of judges used by legal scholars, relying instead on the terms "statesmen" and "craftsmen." In Bond's view, judicial statesmen feel little fidelity to the text; instead they "emphasize the Court's obligation to articulate a general constitutional framework within which sound public policies may triumph." Craftsmen, in contrast, attempt to implement the intent of the framers. They enforce the political compromise that was actually reached, not one they wish had been forged.

Bond strongly favors the craftsmen over the statesmen. Though he concedes that ascertaining the original meaning of constitutional provisions is not always easy, in his view "only judges who act as craftsmen can preserve constitutionalism and insure the triumph of the rule of law." The fundamental problem with statesmen is not that they are "activists" *per se*, but that they have arrogated to themselves the right to determine the substantive rules by which everyone must live, depriving "the people of their ultimate authority to determine the law that governs them."

To the charge that the Constitution is too ambiguous and broad, and the framers' original intent too obscure, to allow for a craftsmanlike jurisprudence, Bond responds: "In the first place, all constitutional cases ultimately raise claims about the nature of man, the role of government, and the appropriate relationship between man and government; and the men who framed the Constitution had definite views on all three kinds of claims. Moreover, the fundamental problem of reconciling governmental power with respect for individual liberty has not changed since 1789." As long as judges look not

Doug Bandow is a senior fellow at the Cato Institute. He is a graduate of Stanford Law School and a member of the California and District of Columbia bars.

only to the subjective intent of the framers on the particular question, but also to the principles embodied in the provision at issue, the craftsmen's goal is ascertainable.

As is obvious from the Senate's defeat of the nomination of Judge Robert Bork to the U.S. Supreme Court, however, activists on the left—who have benefited enormously from the decisions of judicial "statesmen"—do not share Bond's views. The position that courts should adapt the Constitution to new political ideologies underlies two different books, *The Court and the Constitution*, by Archibald Cox, and *The Burger Years*, edited by Herman Schwartz.

Former Solicitor General and Special Prosecutor Archibald Cox explicitly rejects the judge as craftsman. In the case of abortion, for instance, he writes that "as conscientious, open-minded judges we have to reason it out as far as we can, and then decide intuitively where to strike the balance between the values of representative self-government and State autonomy, on the one side, and, on the other side, the values of national protection for individual human rights." Yet if this is the role for the judge, what is the purpose of the Constitution? America's governing document has already struck the balance between competing factors in many, if not most, cases.

Cox's response, of course, is that times change, requiring judges to change the law as well: "Law is a human instrument designed for human needs and aspirations, all subject to change and growth. The judge is bound by law no less than the litigants, but he must also make law upon some occasions, in some ways, and to some degree." True enough, given the frequent ambiguity of language and the lack of clarity over the framers' intentions. But there are cases in which the Constitution's meaning is clear, and judges simply decide to substitute their preferred solution for the original political compromise. Abortion is a good example, which comes back to Bond's argument about constitutionalism—do judges or the people have the final say in altering the fundamental law of the land? The amendment procedure is the prescribed method for changing the Constitution; the fact that reform is difficult to effect does not justify the judiciary's short-circuiting the process.

Schwartz, a law professor at American University, only briefly engages the arguments in favor of an "original intent" or "craftsman" mode of interpretation, but he raises some of the same objections Cox does. In contrast to Cox, however, Schwartz proposes no alternative jurisprudential theory, apparently willing to entrust the protection of basic rights to the zeitgeist of a majority of the men and women who happen to sit on the high court at any one time. Yet if the text does not mean what it was meant to mean, then it ultimately means nothing at all.

Schwartz also criticizes Attorney General Edwin Meese, Chief Justice William Rehnquist, and other supporters of judicial restraint for being inconsistent: "They support judicial restraint when the judiciary is asked to protect civil rights and civil liberties, while they unabashedly favor an energetic activism when it comes to curtailing such rights and liberties, or to promoting business interests." Though his evidence is not entirely persuasive, Schwartz's charge does illustrate an important difference between libertarian and traditional conservatives, particularly over the issue of economic freedom.

In the debate over the Bork nomination the concepts of "judicial restraint" and "original intent" were treated interchangeably, yet, as Bond points out, the issue is really much more complex. The substantive mode of interpretation—"original intent" versus the "living Constitution," for example—is distinct from the procedural question of restraint versus intervention. Though attempting to implement the "original intent" of the framers often requires judicial passivity, that will not always be the case. Bond writes: "Fidelity to the original understanding could dictate liberal results and judicial activism," if a judge concluded that the court was compelled to intervene to uphold a constitutional provision.

Unfortunately many conservatives, including Chief Justice Rehnquist, give far too little weight to the constitutional justification for judicial action to implement, rather than stretch, the document's text. Rehnquist, for instance, devotes most of his book, *The Supreme Court*, to discussing past cases and justices, and the functioning of the Rehnquist Court, but he spends some time advancing the philosophy that has made him the *bête noire* of judicial activists. Overall, Rehnquist appears to value the Constitution more for creating a federal political structure than for protecting individual rights. Therefore, in his view, judges should generally vindicate the majority by refusing to block legislative and executive actions, giving them a "presumption of constitutionality."

But in practice this position makes Rehnquist neither a craftsman nor a statesman, for he consciously favors a procedural stance of judicial restraint over his professed substantive position endorsing original intent. Indeed, Bond provides an example where a true judicial craftsman would also have to be an "activist" willing to void a state law: *Hawaii Housing Authority* v. *Midkiff*. The State of Hawaii seized land to redistribute to tenants, and the Supreme Court, in a 1984 decision joined by Rehnquist, upheld Hawaii's use of eminent domain, ruling that the role for judicial oversight was almost nonexistent. However, Bond reviews the history of the Fifth Amendment's Public Use Clause, concluding that "the right to hold property free from condemnation for nonpublic use purposes is a fundamental right, and a court should protect it as zealously as it protects all other fundamental rights."

This conflict between judicial restraint and original intent comes into even sharper focus in Bernard Siegan's book, *The Supreme Court's Constitution*. Siegan, a law professor at the University of San Diego Law School who has been nominated for a judgeship on the Ninth Circuit Court of Appeals, sparked renewed interest in economic freedom with the 1980 publication of his landmark book, *Economic Liberties and the Constitution*.

Siegan is a judicial craftsman; he reviews the Supreme Court's consistent disregard of both the framers' intent and the philosophical principles embodied in the Constitution. In many cases his analysis differs little from that of traditional conservative scholars. "In the abortion area," he writes, "no constitutional basis exists" for the Supreme Court's activist rulings.

However, from an original intent perspective he advocates judicial intervention to protect economic freedoms. "Failure to implement existing rights is no less an error than enforcing non-existent rights," he contends. In particular, Siegan defends the high court's use of Substantive Due Process—symbolized by the much-reviled *Lochner* v. *New York*, which overturned maximum hour legislation—to strike down state and federal economic regulation before and during the New Deal.

Though it has become an article of faith among many conservatives that the Supreme Court has improperly used the Fourteenth Amendment (upon which the Lochner cases are based) to invalidate state legislation, Siegan makes a powerful case that the framers of that post-Civil War measure did indeed intend to sharply circumscribe state power. And "in the civil area," writes Siegan, economic liberties were "the highest concern to the men responsible for framing Section 1 of the Fourteenth Amendment—a fact that is evident from the views that they expressed, the laws they passed, and the authorities on whom they relied."

The difference between this sort of principled judicial action, which is firmly rooted in the Constitution, and the more subjective activism that simply uses textual ambiguity as an excuse for implementing policies or theories that happen to be popular at the moment, is made evident by comparing Cox's discussion of the doctrine of Substantive Due Process to that of Siegan. Cox criticizes the judges who intervened to preserve property rights because, in his view, they were implementing the wrong principles, lagging "behind the march of change." Nevertheless, Cox seems to understand the constitutional basis of these cases better than do many conservatives. In his view the Supreme Court was seeking "to preserve quite literally, without examining their new consequences, the liberties of an earlier age that had seen the country grow immeasurably in human freedom as well as wealth and power."

Despite the defeat of Robert Bork's nomination, President Reagan will leave office having transformed the federal bench at all levels. But the significance of his legacy will depend largely on the jurisprudence implemented by his appointees. Will they be statesmen, craftsmen, or, like Chief Justice Rehnquist, advocates of judi-

cial deference to the other branches of government? Books like *The Art of Judging* and *The Supreme Court's Constitution* can help us understand the choices that judges face. The ultimate role of the judiciary, however, will depend primarily on the judicial philosophy of the men and women who survive an increasingly political confirmation process.

Fear Itself

Consuming Fears: The Politics of Product Risks, ed. Harvey M. Sapolsky (Basic Books, 1986), 241 pp.

Reviewed by Elizabeth M. Whelan

Americans live in fear. We suffer from a debilitating condition called nosophobia.

Nosophobics are everywhere. They dominate the airwaves and the electronic media. They labor for self-appointed consumer advocacy groups. They have infiltrated high-level government offices and advisory committees.

In case you are having trouble recalling what nosophobia is, it is like hypochondria, but with a difference. Hypochondriacs think they are sick. Nosophobics think they will get sick because of factors lurking in their diet and general environment. For nosophobics, living in the United States in 1988 is inherently hazardous to your health.

A new book, *Consuming Fears: The Politics of Product Risks,* helps us to understand why so many Americans—among the healthiest, most affluent, best-educated people in the world—live in anxiety about the alleged harmful effects of foods and other consumer products.

Consumers have been barraged with "health risks" for the past 20 years. First came Rachel Carson's environmental polemic, *Silent Spring,* followed by warnings about cyclamates, saccharin, nitrite, caffeine, and cholesterol. Each of these, the consumer has been told, can cause cancer, heart disease, or other chronic illnesses. And merely watching what we eat and drink isn't enough—Love Canal and Three Mile Island taught us that. We have been threatened with cancer, miscarriage, and every other illness and misfortune. The final result is that the public cannot distinguish the real risks from the noisy background, and may become completely inured to risk: if everything is dangerous, then nothing seems to be.

Editor Harvey Sapolsky and his contributors sympathize with the bewildered consumer. They recognize that industry is multifaceted, frequently indifferent to what is good science and what is not, and often motivated by one interest: the bottom line. Government agencies and the press often add to the consumer's confusion.

Consuming Fears offers a detailed account of the politics of product risk for six major products: cigarettes, dairy and meat products, salt, artificial sweeteners, tampons, and urea-formaldehyde insulation. Rightly or wrongly, each of these products has been linked in the public eye with serious disease. The authors provide thorough analyses of the scientific evidence on alleged health effects, and thoughtful discussions of the various factors and groups influencing decision making. The book provides an educational journey into the complexities of the politics of consumer safety.

The contributors do an excellent job of political fact-finding. Each of the six chapters could stand alone as an historical record of the events surrounding a number of controversies. Together, they underscore a phenomenon which has received far too little attention: the assault on the consumer's consciousness by a full spectrum of so-called hazards.

While most of the chapters are fair-to-excellent, there are a few serious weaknesses in the book. For one thing, the bewildered consumer cannot use the book to gauge relative risks. In the ordering of the chapters, for example, artificial sweeteners are ranked as more dangerous than tampons. Yet artificial sweeteners have caused no known deaths, while tampons have contributed to about 50 cases of toxic shock syndrome annually—and TSS has a 12 percent death rate.

As a related matter, the book fails to make clear that we *voluntarily* expose ourselves to the majority of the carcinogenic chemical hazards that we encounter in our environment. For example, Sapolsky notes that, "environmental scientists claim that 40 to 80 percent of [cancer] is attributable to chemical hazards, whereas biomedical researchers see lifestyle factors as more important." Unfortunately most people do not realize that the two groups overlap. And it would

Elizabeth M. Whelan is executive director of the American Council on Science and Health.