
BOOK REVIEWS

How Judges Think

BY RICHARD A. POSNER

Constitutional Conscience

BY H. JEFFERSON POWELL

Reviewed by Paul Horwitz*

What do we want of our judges? And what can we reasonably expect from them? However much these questions bedevil us, we rarely ask them so directly. The first question has featured prominently in every contested federal judicial nomination and presidential campaign since Robert Bork, but the public and politicians generally neglect the second question. Constitutional theorists often act as if the role and limitations of judges are a mere nuisance; surely, they will suggest *sotto voce*, the best judge is the one who most closely tracks my own thinking—institutional constraints be damned.

Happily, two recent developments in legal scholarship have led some to consider these questions more closely and more clearly. The ever-widening gyre of law and economics, and its cousin, behavioral law and economics, has led an increasing number of scholars to put the judge, with all his motivations, incentives, and cognitive limitations, in the spotlight. And a small but promising band of legal scholars, influenced by the flourishing study of virtue ethics elsewhere in the academy, has begun to consider the role of virtue in judging.

These contrasting approaches are on vivid display in two rich new books. H. Jefferson Powell's *Constitutional Conscience: The Moral Dimension of Judicial Decision* takes a page from virtue ethics in offering an expansive and ruminative vision of the ethical virtues and vices that characterize the judge in a constitutional case. Judge Richard A. Posner, in *How Judges Think*, brings his economist's toolkit (supplemented, as usual, by a variety of disciplinary adjuncts and a bracing dose of pragmatism) to many of the same questions—although his object is somewhat different from Powell's and his conclusions are strikingly so.

Powell begins his exploration of the role and duty of the constitutional judge in territory that has been oft-explored but still leaves much to be discovered and discussed: John Marshall's opinion in *Marbury v. Madison*. In mustering his arguments for judicial review, Marshall asked of the Constitution:

Why otherwise does it direct the judges to take an oath to support it? ... How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! ...

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? ... If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

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* Paul Horwitz is an Associate Professor of Law at the University of Alabama.

This passage has been criticized and sometimes mocked almost since its inception. In his famous dissent in *Eakin v. Raub* (1825), Judge Gibson wrote that the oath is "taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty." More recently, Judge Posner, who serves as a foil in Powell's book, called the oath "a loyalty oath rather than a direction concerning judicial discretion."

Thankfully, and quite rightly, Powell—reaching through the mists of history to a time in which oaths had far-reaching consequences based on a wider sense of honor and virtue at large in the society—sees something more to it than that. Marshall's appeal to the oath, he writes, suggests a "juxtaposition of the judiciary's governmental role and the judge's personal conscience." Thus, the practice of judicial review is related not only to the broader constitutional structure that demands it but "flows as well from the judge's individual obligations as a moral actor." The inescapable aspect of moral obligation at the center of the judge's duties thus "implies a closer connection than is sometimes acknowledged between how we understand constitutional law and how individual judges understand the moral circumstances in which they carry out their duties."

From this departure point, Powell derives two central themes. The first is that it should be possible to derive a set of standards for evaluating the work of the judge or justice in moral or ethical terms. The second is that we can understand constitutional law from within this ethical perspective as an attempt to establish a fair process of resolving inevitable political and social conflicts without expecting "consensus or even broad agreement on many issues." What we think of as the actual practice of constitutional law—the "game" whose rules, Justice Holmes famously observed, one must "play by," rather than simply "doing justice"—is the suite of acceptable and traditionally well-worn forms of arguments which constitute that practice. These practices involve much that is careful, precise, and "technical" about reading the Constitution; but even a good-faith attempt to reach a constitutional ruling on this basis ultimately may drive us "beyond the realm of professional expertise and algorithmic reasoning" into "a sphere in which intellectual and moral integrity are essential." On this basis, he again presses his central point: the elements of good and bad faith that we can derive from an examination of sound constitutional judging simultaneously make evident that constitutional judges enter "the realm of moral obligation to which Marshall appealed in his discussion of the judicial oath," and provide us with a metric to see how well or poorly they traverse that territory.

What are the virtues that constitute a moral constitutional judge, in Powell's view? It is not unfair to say that they are few, and fairly abstract—although Powell is a skilled exegete and makes the most of them. The first is good faith: the belief that the Constitution has an intelligible meaning, and the will to discern and honor that meaning as best one can. Second, given the open spaces in that document, judges must display candor, by which Powell means a willingness to fully and transparently express in words the judge's sincere effort to grapple with the meaning of the Constitution, and integrity: "the virtue

of seeking in any given situation that interpretation of the Constitution that honestly seems to the interpreter the most plausible resolution of the issues in the light of the text and constitutional tradition.” Powell’s description of the remaining virtues is often more substantive than simply procedural or even ethical as such. He describes humility as being not about the judge’s own frailties, but about the judge’s willingness to accept that the Constitution leaves some divisive issues to be settled by the political process. Moreover, he names “acquiescence” as a constitutional virtue—a judge’s willingness to accede to long-standing precedents of constitutional law and practice even if the judge might not reach those conclusions independently. Without these virtues, Powell bluntly concludes, “American constitutionalism is a fraud.”

Powell concedes, as he must after such a stirring, but distinctly romantic, view of the judge’s task and our own shared duty to “live out in the political and moral life of the Republic at large the virtues which the Constitution expects of its official interpreters,” that his ideals “can be accused of fantasy, a failure to see that the political enjoys priority in a much harsher sense than I have conceded, that there is not and cannot be anything other than the agonistic struggle of political preferences.”

That is as good a place as any to say: “Enter Richard Posner.” Powell would drape the figure of Lady Justice in new and glorious robes, albeit robes of ancient design. Given his druthers, Posner would criticize the cut of Justice’s robes, scoff that they are not warm enough to have any useful function, and digress to note that the taboo against nudity is itself a historically contingent and only locally applicable social norm. (Seriously. Doubters may consult the index entries on “nudity” in Posner’s *Sex and Reason*.)

Posner begins by doubting that most judges themselves are especially reliable authorities on the role of the judge. They are too apt to spout “the loftiest Law Day rhetoric” and be “cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process... , and often to believe it, though it does not describe their actual practices.” Like their brethren in the wider legal profession, they have developed “a mystique” about judging “that exaggerates not only the professional’s skills but also his disinterest. Judges have been doing this for thousands of years and have become quite good at it.”

Posner will have none of this. Judges are not, he says, “moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.” They are not “legalists” in a strict sense, working at formal proofs like so many logicians at a blackboard. Belief in legalism as the solution to the judicial puzzle is “the falsest of false dawns.” Rather, Posner says, judges are “political,” a loaded term by which he simply means that their decisions on divisive moral issues that “cannot be resolved by expert analysis, let alone by conventional reasoning,” perforce must be influenced by a range of factors including ideology, background, personal preference, and so on. They are “occasional legislators” who use these and other factors to reach decisions in the open spaces afforded them by statutes and by a 200-year-old Constitution of broad reach and limited clarity.

Above all, in his view, they are “constrained pragmatists”: “rule pragmatists” who decide cases with regard to their consequences, with all the potentially free-floating policy considerations that entails, but who are subject to a host of internal and external constraints on their decision-making. A constrained pragmatist judge may well decide cases in “legalist” fashion, but she will do so because legalism can have systemic beneficial consequences, not because legalism is compelled in some deeper sense. Like Holmes, Posner’s constrained pragmatist “must play by the rules of the judicial game, just like other judges.”

With barely concealed glee, Posner unapologetically warns readers that they will have to “brace themselves” for such analytic jargon as Bayesian decision theory, “reversal aversion,” “utility function,” and “agency costs.” Although judges might not think in those terms, he emphasizes that “we must consider what judges *want*. I think they want the same basic goods that other people want, such as income, power, reputation, respect, self-respect, and leisure.” Indeed, much of his book is given over to a consideration of the elements that make up the “judicial utility function”—a congeries of personal, psychological, broadly economic, and other factors that influence both the supply and demand curve for judges and the way they work.

He does not disdain the kinds of legal craft constraints that surely form a large part of Powell’s picture of the judge. These craft considerations are an important part of the judge’s makeup and constitute a significant part of his pleasure in the job at hand. Neither, though, does Posner romanticize legal craft or believe that it offers much clarity or direction in difficult cases. The law student, he writes, must learn all the conventional techniques of the lawyer—“en route to transcending them. But transcend them (or at least begin the process of transcending them) he must.” Posner does not mock reason, but he believes firmly in its limits, particularly in constitutional law, whose open-endedness and emotionally charged content can turn reason into a mere patina, providing a gloss on “reasons” that reason knows not: “A Supreme Court Justice—however questionable his position in a particular case might seem to be—can, without lifting a pen or touching the computer keyboard, but merely by whistling for his law clerks, assure himself that he can defend whatever position he wants to take with enough professional panache to keep the critics at bay.”

It is no labor to review a writer as eminently quotable as Judge Posner. Here he is downgrading the “committee of lawyer aristocrats” that make up the Court: “Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character.” He makes similarly short work of both Antonin Scalia and Stephen Breyer, neither of whose apologia for their preferred brands of judging he finds persuasive. He derides Anthony Kennedy—in many respects the acme of a Powellian Justice, obsessed with the moral character of judging—as a mystic and messiah manqué in judge’s robes, and adds, of his opinion in *Gonzales v. Carhart*, “What does it tell us about the commitment to legalism of the four most conservative Justices of the Supreme Court that they should have joined such a wild opinion?” Under his pen fall Henry Hart, Erwin Griswold, the

former President of the Israeli Supreme Court, the liberal law professors who contested the Solomon Amendment in *Rumsfeld v. FAIR*, and legions besides.

The only difficult task for a reviewer is to thread a path through this book, which is strewn with divagations on topics as diverse as the rules of baseball as applied to Chief Justice Roberts's infamous "umpire" metaphor, the citation of foreign law, and the elasticity of salary incentives for judges. Still, Posner's endpoint is clear enough. However much judges and others may wish to deny it, there is an unavoidable personal and political element in their decisions on the most contested areas of law, especially constitutional law. Although even constrained pragmatism is no antidote, it can at least encourage us to reach our decisions—and analyze the virtues of those decisions—in a clear-eyed way that takes into account all of the internal and external factors that drive them.

There is no doubt that Powell and Posner differ in their approaches and at least some of their conclusions. The books' indexes tell the story well. Posner observes early on that a classic text on American judges lacks entries for "politics" or "ideology." Posner's own book likewise lacks entries for words such as "oath," "honor," and "duty," while Powell neglects a raft of social and economic terms that might have added some leavening realism to his rhapsodic account. Surprisingly, both lack an entry for "Weber, Max." This is a shame (and, where Posner is concerned, a shock), because both might have done well to consider the extent to which either the constitutionally virtuous judge or the brilliant and wide-ranging, if constrained, pragmatist judge has much of a role left to play in an increasingly routinized, bureaucratic, and disenchanting age.

However, despite their wildly divergent paths, Posner and Powell in fact share many common ties. Both, for example, share interesting and important views on how we might reform legal education—in Powell's case, to focus more on "how constitutional questions can be resolved with integrity and their resolution expressed with clarity"; in Posner's, to master conventional legal skills and then move beyond them and focus on the actual underpinnings of judicial decision. Although Posner might reject Powell's approach as tending towards the "moral vanguardism" of a Justice Kennedy, he repeatedly emphasizes that some of the most important constraints on the judicial task are, "first, the desire for self-respect and for respect from other judges and legal professionals generally, which a judge earns by being a good judge, and, second (and closely related), the intrinsic satisfactions of judging, which usually are greater for a good judge than for a bad one." So even a Posnerian judge may have recourse to the kinds of quasi-moral constitutional "virtues" that are at the heart of Powell's work.

Both also share some of the same blind spots. Foremost among them is their regrettable focus on federal appellate judges, particularly the Justices of the Supreme Court. To be sure, as Powell writes, the Court "has by a very large margin the loudest institutional voice in constitutional debate," and it often writes in the most open margins of the law, rendering it a fit subject for Posner's thesis. But if we are to take seriously the importance of virtuous judging (in Powell's case), or judging as a mixture of subtle constraints and motivations (in Posner's case), and of good and bad faith judging in both writers' case, perhaps

it would be better to focus on judges whose every action is not in the public spotlight. Those judges may fall prey more easily to the temptation to act in bad faith despite the loose shackle of precedent—especially since, as Posner notes, most lower court decisions are no longer subject to serious review. Both writers, for example, have something to say about race and *Brown v. Board of Education*. But if they are to think seriously about the courts' role and constraints in this area, and to examine whether judges act in good faith in such a controversial field, perhaps they would have been better off examining what the district courts and the old Fifth Circuit did in implementing, extending, and, in the case of many district courts, resisting *Brown*. Powell and Posner's approach is like asking about the honesty of the constabulary by examining the probity of the Chief of Police instead of looking at the lowly, lonely, constantly tempted desk sergeant in the evidence room of the local precinct.

My head is with Posner. Too much is missing from Powell's account. Nowhere in his book do we find a serious treatment of the many real world factors that influence judicial decision making: the role of law clerks as canned reasoners for judges who perforce need do little reasoning of their own; the extent to which judging is a social and collegial process rather than the purely solitary and deliberative act of a cloistered monk in a cell; the host of human motivations and limitations that drive and hem in a judge and impede any effort to set down a reliable instruction manual for any would-be judicial Hercules; and any number of broader institutional factors that might add depth to his romantic view of the judiciary. His constant refrain that his picture of constitutional virtue must be true because "much of what we do and say and do in constitutional interpretation" would otherwise be meaningless (a "solemn mockery") begs the question: What if it is? You cannot prove God's existence by saying that life would be bleak if God did not exist. No more can Powell prove the necessity of his approach by arguing that it would be depressing to think otherwise. Posner writes that "for judges to acknowledge even just to themselves the political dimension of their role would open a psychologically unsettling gap between their official job description and their actual job"; Powell's apparent response is: "So let us then not acknowledge it." But that is not a proof. Powell is mixing his 'is' and his 'ought.'

One might also pick a number of fights with the substantive "virtues" Powell has selected, and some of the vices he deplors. His vision of "acquiescence" is in more tension than he acknowledges with the role of the oath—which requires a judge to exercise in good faith some *independent* judgment about what the Constitution requires. To be sure, precedent plays a part. But a conscientious judge cannot utterly displace his own obligation finally to make a judgment of his own. His privileging of what he calls "the priority of the political"—that is, his view that judges must respect the priority of decision-making in the public and political realm rather than in the courts—may be an unquestionable good as a default position in constitutional judging, but that does not make it a virtue in a deeper ethical sense. Powell's attack on "instrumentalist" judges such as Posner is flatly unconvincing in light of the fuller picture Posner himself paints in *How Judges Think*. As he points out, there is no reason why pragmatism cannot be considerably bounded