One of the most important metrics for evaluating the success of an academic work is the degree to which it sparks further questions. (Consider, for example, the scores of scholarly inquiries inspired by Ronald Coase's articles *The Nature of the Firm* and *The Problem of Social Cost*.) Evaluated along this dimension, *The Law Market* must be deemed a smashing success. Among the many questions it inspires are: To what degree have law markets, like commodity markets, accommodated the needs and desires of niche groups? How have law markets "punished" suppliers of inferior products? By what precise mechanisms are judges, especially those who are not elected, motivated to honor parties' choices of governing law? Can we better articulate substantive criteria for when courts should refuse to apply selected law? Inspired by *The Law Market*, I look forward to pondering those questions as I continue my own exploration of the law.

Judgement Calls: Principle and Politics in Constitutional Law

By Daniel A. Farber & Suzanna Sherry

*Reviewed by Donald A. Daugherty, Jr.**

Although it claims to reject interpretive schools on both the left and the right in favor of a "middle ground," *Judgment Calls* is another effort to propose a way to interpret the Constitution without relying on the publicly-understood meaning of the document's express provisions at the time they became law. The authors, Daniel A. Farber of the University of California-Berkley and Suzanna Sherry of Vanderbilt University, assert that they seek a way between strict constructionist theories, in which judges are wholly constrained by objective criteria, and a cynical legal realism, in which judges act as quasi-legislators reading the founding document in the way that satisfies their political preferences. Although *Judgment Calls* offers some interesting discussion, the book ultimately fails to deliver the promised middle way.

Farber and Sherry attempt to show an approach to constitutional interpretation that is both principled and flexible, and one that reconciles the democratic rule of law with the inevitability that judges will have some discretion. The book offers various examples of the strict, "overly principled" end of the spectrum (e.g., originalism, intratextualism, minimalism), but it is unclear who follows the "overly flexible," political school. In any event, Farber and Sherry explain how they believe judicial discretion can be exercised responsibly in constitutional decisionmaking, they describe the existing constraints that guide and contain such discretion, and recommend various improvements (e.g., favoring foxes on the bench over hedgehogs; enlarging the mandatory jurisdiction of the Supreme Court; emphasizing actual practice experience in hiring law school faculty).

The authors do not review the text of the Constitution in *Judgment Calls*, which could be explained by the fact that the book is an extended essay on the decisionmaking process generally, not a close consideration of what specific portions of the founding document mean as a legal matter. The authors write, however, that the absence of any textual analysis in their book is because the text "usually does not offer much in the way of either guidance or constraint;" this remarkable assertion reveals the authors' bias towards an overly flexible, political approach, undermining their claim of seeking some "middle ground."

A major assumption of *Judgment Calls* is that "[m]any key constitutional cases leave judges with leeway because the results are not clearly dictated by any source of constitutional authority, whether the language of the Constitution, its history or precedent." At the same time, the authors believe that "this leeway does not preclude reasoned decision making."

The authors write that when a constitutional question cannot be answered by the Constitution itself, the process must safeguard against judges "either freely imposing their own values or deciding cases on a purely ad hoc basis." Of course, they do not consider whether the Constitution's silence may mean that the issue is not "constitutional" as a threshold matter, but is left to the political processes and/or states for resolution. Nonetheless, *Judgment Calls* provides a worthwhile review of the constraints on judicial discretion that exist apart from the law itself, such as our hierarchical court structure, the give-and-take among members of appellate courts during the deliberative process, the public and scholarly scrutiny of judicial decisions, and the institutional pressure towards transparency in the reasoning that supports a court's holding. Under an originalist approach, these constraints serve to reinforce the law, which is what judges are supposed to be interpreting in the first place. But the safeguards identified by Farber and Sherry are useful, additional deterrents against judges who would otherwise be prone to follow their personal notions of the best policy.

The authors' thesis is that judicial decisions can be judged on the basis of "[a] standard of reasonableness—whether their readings of text are plausible, whether they consider all of the relevant factors (but not others), whether they acknowledge and adequately account for competing considerations, whether they articulate plausible distinctions and intelligible standards—in short, on the basis of the strength of their legal reasoning." However, the rub is whether that reasoning must adhere to the text's original meaning or, with the help of the many other "tools" purportedly available to the judge, can diverge from that meaning.

Where originalists believe in the primacy of the text as it was generally understood, *Judgment Calls* treats textual meaning as merely another tool in a judge's toolbox. As Justice Breyer has pointed out, he uses the same tools as Justice Scalia to arrive at a decision, but just has some additional ones.[1] Thus, the judge's toolbox may also contain, for example, "'evolving standards of decency,'"[2] rights that migrate into the Constitution without need of the Article V amendment process,[3] empathy for particular categories of litigants over others,[4] or foreign law.[5] Without fail, these extra tools help to construct decisions that happily coincide with the judge's own view of what the Constitution requires.

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The need for a variety of additional tools can be understood when it is considered that the greatest "flexible" decisions—e.g., *Roe, Miranda, Lawrence*—have little or no relation to the language of the Constitution. Thus, a judge must have more tools that he or she can employ to achieve a righteous decision. The text and its original meaning are important tools but in the middle ground of *Judgment Calls*, they are only two of many and, when they are an impediment to the correct result, can be ignored.

Judgment Calls points to "constitutional values" as a source of authority, which seems reasonable enough. Who could argue that "constitutional values" are not relevant to interpreting the Constitution? On closer inspection, however, it appears that the term may be little more than cover for a judge's notions about, for example, contemporary values. To "make value judgments," the book instructs judges to look to constitutional values. But considering "[h]ow... should judges go about identifying constitutional values?," the authors ignore completely the obvious answer: read the Constitution. Rather, *Judgment Calls* invites judges to look elsewhere, allowing that "broad support for a value, even if not consensus," can be enough to elevate it to a constitutional level. Notably, discussion of the use of "constitutional values" follows on the heels of a discussion of "contemporary social values," in which the authors acknowledge that "[e]veryone agrees that the text and original understanding are relevant factors," along with precedent, but that fundamental disagreement remains over contemporary values. Like "judicial activism," tools such as "contemporary values" may not poll well in the public debate over the role of judges, which would explain efforts to find a substitute bottle for old wine.

That "contemporary values" has become pejorative would not be surprising. Besides being an illegitimate method, judicial consideration of current values makes no sense as a practical matter. Assuming that today's values are categorically better than yesterday's, why is it that the Supreme Court justices have a better sense of the values currently held by Americans than the broad cross-section of citizenry represented by democratically elected legislators and executives from all regions of the country at both the state and federal level? The far better, and only legitimate, method for gauging the values held by citizens is through the opinion polls that our democracy conducts regularly at the ballot box. Standards of decency and the like evolve to become firmly implanted among our national values when they are made law through federal statute, Constitutional amendment or by an overwhelming majority of states, not when five to nine lawyers in Washington, D.C., believe that they are there.

Also showing an inclination towards politics over principle, Farber and Sherry sprinkle *Judgment Calls* with unnecessary asides that detract from their credibility. This is most evident in the final chapters, which apply the book's interpretive approach to jurisprudence in three of the most contentious constitutional areas—terrorism, abortion and affirmative action. For example, the authors write, "We are no fans of the Bush Administration's handling of terrorism issues or foreign policy, but [*Hamdi*] obviously presented a very serious and difficult constitutional issue." Similarly, although they recognize that the approach of the *Casey* dissenters to stare decisis was superior to that of the majority, the authors feel compelled to state that "we think they were quite wrong on the merits of the abortion decision." Similarly, the authors note the problematic aspects of *Grutter*, but make certain their readers know that by doing so, they do not mean to suggest "that the Court was necessarily wrong to uphold the law school's affirmative action program, but to show that the Court failed to provide a tenable argument for doing so while striking down the undergraduate admissions program" in the companion case, *Gratz*. This apparent anxiety about potential accusations of political incorrectness is surprising from law professors who in the past have unflinchingly challenged radical multiculturalism in their academy.[6]

In closing, the authors recognize that their "prescription for judges is perhaps deceptively simple: Respect precedent, exercise good judgment, provide reasoned explanations, deliberate with your colleagues, and keep in mind the possible responses of critics." However, their articulation of their prescription reinforces the conclusion that the authors do not achieve what they set out to do. Transparency, peer review, etc., are essential to any defensible, intellectually honest exercise. They are no less important to drafting legislation (or, for that matter, writing a graduate school dissertation or preparing a business plan for potential investors) than they are to constitutional decisionmaking. The authors' prescription applies to so many other activities that it tells little specifically about the very subject of the book.

Although *Judgment Calls* may be a good try, its aim of finding a middle way was doomed from the start. Principle and flexibility are simply not equally important for making legal decisions. Even where the meaning of the Constitution is susceptible to more than one plausible interpretation, constitutional law must always be founded on principles drawn directly from, if not expressly in, the Constitution itself. Constitutional analysis cannot start from (and, ultimately, return to) any place other than the meaning of the text as reasonably understood by the majority that originally consented to elevate it from mere words on paper into governing law. To do otherwise is to "reduce[] to nothing what we have deemed the greatest improvement on political institutions—a written constitution."[7]

Endnotes

1 See "A Conversation on the Constitution: Perspectives from *Active Liberty* and *A Matter of Interpretation,*" ABC (Dec. 5, 2006), *available at* http://www.fed-soc.org/publications/pubID.173/pub_detail.asp.

2 *See* Kennedy v. Louisiana, 554 U.S. ___, 128 S.Ct. 2641, 2649 (2008).

3 *See generally* Cass Sunstein, The Second Bill of Rights (2004).

4 The President's Remarks on Justice Souter, http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/ (May 1, 2009, 04:23 EST).

5 *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003).

6 *See generally* Farber & Sherry, Beyond All Reason (1997).

7 Marbury v. Madison, 5 U.S. 137, 178 (1803).