

# DEMOCRACY

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### Judge Not

*While we battle over who our judges are, what matters most is how they judge.*

Reviewed by Kermit Roosevelt III

**Justice In Robes** By Ronald Dworkin • Belknap/Harvard University Press • 2006 • 352 pages • \$35

**How Judges Think** By Richard Posner • Harvard University Press • 2008 • 408 pages • \$29.95

There is hardly a political question in the United States," Alexis de Tocqueville observed in *Democracy in America*, "which does not sooner or later turn into a judicial one." What was true in the early nineteenth century is eminently true today, and that is why the battles over who sits on the Supreme Court and other courts are so often contentious. But once these important issues arrive in front of a court, how do judges judge? How do they arrive at decisions?

In their recent Supreme Court confirmation hearings, John Roberts and Samuel Alito offered similar answers to this question. Judges, or at least the good judges who are not "activists," apply the law and do not make it. They remember, in Roberts's memorable image, that they are umpires and not players up at the plate. Soothing stuff, but it turned out to be a poor predictor of subsequent behavior. The Court has taken a hard right turn in the past year; if the Justices are umpires, the strike zone seems to have changed. A reasonable observer might conclude that there may be more to judging than the calling of balls and strikes—and also that Senate hearings aren't the best place to get a candid view of the judicial mind.

Coincidentally, two of our most eminent legal thinkers, Ronald Dworkin and Richard Posner, have recently released books on the topic. Each has written more than a dozen books in addition to scores, if not hundreds, of law review and

popular-press articles. Each has deeply influenced legal scholarship and judicial decisions; both have been cited by the Supreme Court in important cases involving issues from physician-assisted suicide to gay rights. Posner is, moreover, a judge himself. Their views on the judiciary will not only be among the most incisive and informative, but they will also likely have the biggest impact on the course of future decision-making. In other words, if you want to know how the courts work and will work, you need to read Dworkin and Posner.

And it is particularly valuable to compare the two because they have built their careers on such different foundations. Posner is a champion of pragmatism; he is an icy rationalist who achieved early notoriety with the suggestion that adoption agencies be allowed to pay women considering abortion to give birth and turn over the baby instead. Dworkin, in contrast, relies on principle, insisting that philosophical reasoning will lead to unique, right answers in even the hardest of cases. Writ large, these positions are the polar opposites of American legal thinking, and the tension between the two has driven much of its recent history. Watching the two men square off is not too far removed from watching American legal theory itself unfold, and the future of American courts as well. But on close examination, their similarities prove much greater than their differences, suggesting that the conventional dichotomy between meek judicial umpires and nefarious judicial activists sets up a fundamentally false choice—and that when it comes to the thorniest judicial issues of our day, like abortion, racial preferences, and gun control, the proper approach may be one that transcends the pragmatic/principled dichotomy that Posner and Dworkin embody.

Posner and Dworkin certainly see themselves as opposites, and as might be expected in academic circles, their differences have not kept them apart but rather pushed them together, in sometimes less-than-friendly circumstances. Posner's 1999 book *The Problematics of Moral and Legal Theory* was described by one reviewer as a "near-hysterical" attack on Dworkin and his philosophical approach to judging. Dworkin's own assessment of the book, in *The New York Review of Books*, denounced it as "triumphal anti-intellectualism" with some arguments that were "very weak" and others "even worse." Posner wrote in to observe that Dworkin's review was "so unmistakably a personal attack that [he] would be poor-spirited not to respond" and served to illustrate his thesis that academic moral philosophizing did not improve one's moral behavior.

In short, the Posner-Dworkin relationship has somewhat the flavor of that between Sherlock Holmes and Professor Moriarty, though it is hard to say who is

who. Posner's hyper-rationality suggests Holmes, but so does Dworkin's ability to extract the right answer to hard cases from the slenderest clues. And neither, to be fair, is a good fit for a criminal mastermind. When they shared the American Law Institute's Henry Friendly Medal for Outstanding Contributions to the Law in 2005, banquet attendees might have feared (or hoped) to see them tumble off the dais locked in a death grip, like Holmes and Moriarty over Reichenbach Falls. Photographs of the event reveal no such occurrence. Still, the two remain frequent presences in each other's work. Posner is one of the primary targets in Dworkin's collection of essays, *Justice in Robes*, while Dworkin haunts Posner's latest, *How Judges Think*, even when he is not explicitly mentioned.

*How Judges Think* is as direct in its goal as its title suggests. Posner was "struck," he reports in the introduction, "by how unrealistic are the conceptions of the judge held by most people, including practicing lawyers and eminent law professors." The book, he continues, "parts the curtains a bit."

Posner's starting point is what should no longer be a controversial claim: In many hard cases, ordinary legal materials like statutes, prior judicial decisions, and the Constitution do not provide a clear answer, forcing judges to go "outside" the law, strictly speaking. Constitutional cases are frequently of this sort, and because of its richer diet of constitutional fare and the paucity of decisions binding it (even its own are only presumptively binding), the Supreme Court often finds itself "awash in an ocean of discretion." Judges have freedom in deciding such cases, an "involuntary freedom," because the law (narrowly defined) does not tell them what to do. Posner's project is to examine the factors that affect the way judges use their involuntary freedom and occasionally to discuss how they should use it.

As law professors Jack Balkin and Sanford Levinson also have done, Posner reminds us that "political" judging may not be as bad as it sounds. "Partisan politics is not the only politics," he writes, "and politics shades into ideology, which in turn shades into common sense, moral insight, notions of sound policy, and other common and ineradicable elements of judicial decision making." He suggests that the demonstrable fact that personal characteristics and ideology affect judging need not be interpreted as supporting the crudely attitudinalist conclusion that judges seek to promote their favored policies. Perhaps it indicates instead merely that judges "lack good information . . . and so are forced to grasp at straws," relying on hunches affected by their backgrounds.

The book also includes discussions of self-selection into the judiciary and the

likely effects of changes in judicial salary or tenure; there are, indeed, a lot of moving parts here. But all, or most, of them come together in Posner's analysis of Supreme Court decision-making. The Court, he writes, is inescapably political; a Justice is faced with a choice "between accepting the political character of constitutional adjudication wholeheartedly and voting in cases much as legislators vote on bills, or, feeling bashful about being a politician in robes, setting for himself a very high threshold for voting to invalidate on constitutional grounds the action of another branch of government." Posner urges the Court to assess constitutional questions pragmatically, by considering consequences rather than straining to find legal answers. That is accepting the political character of such questions. But Posner's ultimate advice is restraint. The Court's response to "the subjective character, the insecure foundations" of its constitutional decisions should be to step back and let the political process run its course.

Dworkin's concern, on the other hand, has always been less how judges do think than how they *should* think, though he also sometimes asserts that his analysis demonstrates how they must think. In *Justice in Robes*, he does a bit of each. Two themes run through the book. One is a response to his critics, and here Posner features prominently; the other, broadly speaking, is the role that morality plays in law. In exploring this latter question, Dworkin starts at the same place as Posner: the plight of a judge for whom orthodox legal materials like precedent have run out when it comes time to make a decision.

What this judge should do, Dworkin argues, is not recognize that he enjoys a quasi-legislative discretion, but rather bring to bear "a vast network of principles of legal derivation or of political morality." "In practice," he writes, "you cannot think about the correct answer to questions of law unless you have thought through or are ready to think through a vast over-arching theoretical system of complex principles." By articulating the deeper principles underlying a body of law, Dworkin claims, a judge can determine which of two possible choices is already immanent. There is always a right answer. It would be hard to get further from the Posnerian worldview. Or so it would seem.

Dworkin believes in right answers and Posner does not; Posner counsels prudence and Dworkin principle. But a stronger light makes the differences fade. Take the question of right answers. Both Posner and Dworkin agree that ordinary legal materials do not decide all cases. "That account of adjudication is a straw man," Dworkin announces. Posner concurs: "[T]he materials of legalist decision making fail to generate acceptable answers." But Posner, arguing against right answers,

does not mean that judges will have no view as to the correct outcome, only that their views will inevitably be colored by ideology and intuition, and other judges with different ideologies and intuitions will disagree. (A pragmatic decision "is the result of a complicated interaction—mysterious, personal to every judge.") And Dworkin, arguing for right answers, does not mean that judges can demonstrate the correctness of a decision with mathematical certitude. A judge's answer will be as objective as any answer to a hard question in moral philosophy. It will seem right to the judge, but she will admit, if honest, that reasonable people can differ, and probably will, based on different ideologies and intuitions: "[T]here are right answers in some ordinary way, [but not] *really* right answers, or *really real* right answers, or right answers *out there*, or something else up the ladder of verbal inflation." [italics in original] In fact, both men are describing the same state of affairs.

Admittedly, the Dworkinian judge reaches her decision through the application of moral philosophy, which Posner thinks is a useless smokescreen. But if Posner is right, that means only that philosophy makes no difference to the outcome—which in turn means that a philosopher-judge will end up in the same place as a hunch-follower, should their ideologies coincide. Indeed, Dworkin's philosophical investigations tend to support what one suspects are his political views, as of course do the originalist excavations of Justices Antonin Scalia and Clarence Thomas. And one of Posner's more interesting observations is that the Justices' tendency to vote with other Justices who share their political ideology is significantly stronger than their tendency to vote with those who share their constitutional methodology.

So Dworkin and Posner both believe that hard cases have answers that will seem right to an individual judge but will not *be* right in any objectively demonstrable way. Their purported difference turns out to be apparent rather than real: Adding philosophical analysis to the judicial process will not make Dworkin's model judge vote differently from Posner's. But if Dworkin's model judge is not as distinctive as he thinks, neither is Posner's.

Posner's signal admonition is to avoid abstract moral inquiry in favor of consequentialist reasoning. But this encounters an obvious problem. A pragmatist judge looks to consequences, but he needs something else to tell him which consequences are desirable, and the natural candidate is a moral principle. Trying to maintain his anti-theory stance, Posner offers consensus as a substitute. That may serve in such fields as contracts or commercial law, about whose purpose

judges generally agree, but it certainly will not help with the controversial questions of constitutional law. Posner knows this, of course, which is why he counsels restraint. But that is not advice on how to judge; rather, it is advice not to judge. The point remains: In deciding what answer is right, even a pragmatist judge must make a moral judgment, regardless of whether he then decides not to enforce his judgment because he recognizes its subjectivity.

One finds other similarities. Posner suggests that advocates confronting open questions should "identify the purpose behind the relevant legal principle and then show how that purpose would be furthered by a decision in favor of the advocate's position." This advice meshes neatly with Dworkin's description of judging, and Posner's hasty qualification that the advocate will not "be arguing that the result for which he is contending is already 'in' the law" is a telling bit of defensiveness that makes no practical difference. Posner and Dworkin both take on originalism, though from different angles. Posner argues that it is not determinative, hence just a mask, while Dworkin claims it errs by focusing on originally expected applications rather than original meanings. And they both scorn intellectuals who "preen and strut until some unexpected event strips away their masks" (Posner) or "drape themselves in epigrams and preen in law journal articles" (Dworkin). That each seems to be thinking of the other does not lessen the resemblance.

There is one difference that will turn out to be more than cosmetic. Dworkin's judge sets out to enforce the law by determining what rights the parties have, and these rights will almost always trump pragmatic concerns, while Posner's pragmatist does not set out to enforce the law but rather to decide the case in a way that will benefit society, even if this is not what he thinks is the legally correct outcome. Ordinarily, this distinction will mean little, since the pragmatic reasons for deciding cases correctly are ordinarily very strong. But in the inescapably political realm of constitutional law, Posner's judge will frequently stay his hand. He might believe a particular state law unconstitutional, but he will recognize the political nature of his belief and hold back in deference to the legislature, especially if this restraint allows states to experiment with different approaches.

Where does this leave us? To the extent that Dworkin and Posner agree—and I claim this is a far greater extent than either would admit—we may be fairly confident they are right. In hard constitutional cases, judges face a degree of uncertainty that makes talk of umpires versus players rather silly. Where they disagree—with respect to how assertive judges should be in enforcing their views

of the Constitution—it might seem we are forced to choose between them. But a moment's reflection should show that, in fact, neither is right. And this is why a careful examination of the two is so important for the larger debate over "activist" versus "restrained" judging: Here the Dworkin-Posner debate has fallen into the conventional cant of activism versus restraint, and neither Dworkin's uniform assertiveness nor Posner's uniform deference is an acceptable answer to the question of how judges should approach constitutional cases.

Posner is correct that the Supreme Court is generally not a better legislator than state legislatures or Congress. The Dworkinian judge handing down solutions to all society's problems is disturbingly, as Posner puts it, "messianic." Dressing those answers up in moral philosophy does not give them firmer roots in the Constitution, and it does not by itself justify judicial assertiveness. Yet Dworkin is also correct in his claim that Posner's restrained Supreme Court risks allowing exactly the oppression that constitutional rights are supposed to prevent. (Consider, for instance, *Plessy v. Ferguson*, which upheld the doctrine of "separate but equal," or *Korematsu*, which allowed the detention of Japanese-Americans during World War II.) A judge who leaves all the hard questions to the political process abandons his role just as much as one who takes them all upon himself to the exclusion of politics.

What this means is that neither deference nor assertiveness is acceptable as a blanket answer. The right question is not *whether* judges should review assertively or deferentially, but *when* they should do each, for different stances will be appropriate in different cases. The obvious (though mostly useless) answer is that judges should be deferential when the legislature is likely to do a better job than the court of discerning and observing constitutional limits, and assertive when it is not.

To make the answer useful, we need to come up with an account of what factors justify deference or assertiveness in particular cases. Perhaps judges should be more assertive when a law burdens members of a minority group (as they have at times been, which explains why "separate but equal" is no longer permissible). Perhaps they should look more closely when the government seeks to place a particularly heavy burden on individuals (again, as they have been at times, which explains the Court's approach to cases involving "fundamental rights" such as abortion). Perhaps they should be deferential when cases involve complicated factual questions (which they usually are; this explains judicial deference to most economic regulation).

There are undoubtedly other factors out there, and merely identifying them will not tell a judge how to decide a hard case. Factors may point in opposite directions, and different judges may give them greater or lesser weight. Judges may disagree about which are worth considering, and even about the application of a particular factor to a particular case. (Women are a majority of voters but severely underrepresented in legislatures; can we consider them a minority?) But the discussion of which factors are important is a useful one to have, with nominees in confirmation hearings and among the American people more broadly. It is more useful, at any rate, than the endless debate over activism and restraint—or even pragmatism and principle. **D**