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The Closing of the Judicial Mind

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Complaints about out of control judges are not new. In 1788, in a newspaper column opposing the proposed new Constitution, a writer with the pen name Brutus charged that:

> those who are to be vested with [the judicial power], are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and of the legislature.... [I]n their decisions they will not confine themselves to any fixed or established rules.... This power in the judicial, will enable them to mould the government into almost any shape they please.

Brutus's denunciation of an unrestrained federal judiciary prompted Alexander Hamilton to reply in *The Federalist*, emphasizing the judiciary's structural weakness. In the Constitution's tripartite division of powers, Hamilton ascribed "FORCE" to the executive, "WILL" to the legislature, and mere "JUDGMENT" to the judiciary. The Supreme Court was made largely independent of external checks (something that the Anti-Federalists perceptively noted) partly to be itself an effective check on the legislative department. But contrary to Brutus's exaggerated fears, Hamilton argued, the judges would be hemmed in by internal constraints, derived from the function of the office itself. Because judges spend their lives studying law, not the desires or interests of constituents, they would possess public virtue sufficient for the people to trust them, and to rely on them to check legislative will.

In their new books, two highly regarded commentators have sought to explain how and why judges act as they do. Both analyses are at odds with Hamilton's. Robert F. Nagel, a professor of constitutional law at the University of Colorado at Boulder, has long worried about the Court's coarsening effect on American moral and civic character. He sees a Court that has abused judicial review and overawed federalism and the democratic process. But it did not have to be so. In *Unrestrained: Judicial Excess and the Mind of the American Lawyer*, Nagel holds that the framers did indeed place external checks on the judiciary, showing that they were not sanguine about the possibility of judicial self-restraint. Judge Richard A. Posner, one of the most influential pragmatic legal theorists and a founder of the law and economics movement, thinks that Hamilton simply missed the point. In *How Judges Think*, Posner argues that judges, particularly Supreme Court justices, are and always have been legislators, and that this is not a bad thing, so long as they legislate for practical objectives and do so reasonably in light of their positions and the particular circumstances of the case. Neither speaks, as Hamilton's generation would have, in terms of virtue. But Nagel's analysis is, in fact, an explanation of why judges no longer practice the restrained virtue the framers trusted they would. Posner would locate virtue not in the office, but in the judge's personal temperament.
Nagel nicely confronts the conservatives' perplexity regarding why, despite the overwhelming number of appointments by Republican presidents, the Supreme Court remains skeptical of the Constitution's structures and eager to revise America's social ethos. He rejects the usual explanations offered by conservatives as either wrong or overly reductionist: the David Souter excuse (the Republicans didn't know enough about what he really thought), the Anthony Kennedy complaint (justices socialize and identify with trendy judges worldwide), and the John Paul Stevens theory (justices follow the tastes of the elite social classes). Nagel also rejects Robert Bork's own explanation, that the American people like what the Court has done.

Nagel's explanation is that Republican-appointed justices did not "change" at all. Rather, they were from the start part of an American legal culture that celebrates and propagates the role of the judge as a leader of moralistic reform. Throughout the book, he gives pointed examples of illogical Court decisions that have reshaped the country based on nothing more than the judges' personal views of what is socially beneficial. His analyses of Planned Parenthood v. Casey (1992) and Grutter v. Bollinger (2003) are particularly withering.

Nagel seems to have accepted as essentially correct the Anti-Federalist position on federal court power. But he thinks that the federal courts were not a practical danger in the early republic. The genie did not escape the bottle until federal law and federal jurisdiction expanded in the late 19th century, followed by the radical restructuring of American legal education in the early 20th century. That restructuring included the case method (treating what the judges say as oracular), putting law schools in universities (turning legal education from a practical to an intellectual pursuit), and the gradual rise of what later came to be called legal realism and the consequent diminution of legal formalism (thus liberating the judge from important internal restraints).

After World War II, the judiciary's moralistic pretensions were enhanced by a widespread increase in the use of the injunctive power, allowing courts to become an administrative regulator of American life. Courts today write opinions in code and indulge myths that their decisions have brought about inestimable goods, such as an end to segregation. (Nagel points out it was the Congress—and the states, one might add—that legislated the end of segregation and state discrimination.) The result has been judicial sovereignty. The Court's actions, Nagel proclaims, have been a body blow to civic republicanism, eroding the people's self-respect and self-confidence as political actors.

Nagel ends on a despondent note. He finds that internal restraints, such as personal and professional modesty, will not work; the legal culture simply overwhelms them. He concludes that external checks need to be crafted to hold back the judges.

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Judge Posner has no problem with the legislative character of judging, particularly in the Supreme Court. As he does in much of his voluminous work, Posner uses a model drawn from economics to describe the constraints on a judge's decision-making: the judge as labor market participant. Under that rubric, Posner makes a detailed and informative analysis of both the internal and external
constraints on the judge. In the end, he finds that most of those restraints are relatively weak, and he relies primarily on the judge's character to keep him playing by "the rules of the game."

In surveying the literature, Posner articulates nine theories of judicial behavior: attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist. He says each has limited merit, and then puts them all into one "eclectic" stew that comes out tasting like pragmatic efficiency, the central theme of much of his jurisprudential analysis. "A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it." A "good" judge, in Posner's eyes, is one who gauges pragmatic considerations (including constraints on his own behavior) efficiently and elegantly in reaching a conclusion beneficial to society. What Nagel finds so morally anomalous in modern judicial behavior, Posner identifies as the norm. But both in this book and elsewhere, Judge Posner does not shy from vigorous criticism of Court decisions that, to his mind, were quite unpragmatic—for example, last year's decision in District of Columbia v. Heller, which struck down Washington, D.C.'s ban on handguns.

If Posner ever invoked the language of the classical virtues, he might very well confess that he wants judges to display the virtue of prudence, but it would be a different kind of prudence from the virtue Hamilton had in mind. Posner roundly disagrees with those who would make "strict construction," "originalism," or "textualism" essential components of a prudential decision to maintain the Constitution of 1787. And he certainly does not think there is a distinction between judicial judgment and legislative will, except perhaps as a contextual nuance. For Posner, both branches are engaged in one form or another of legislation. He does concede that "legal" materials limit a judge's discretion—though in his disparaging description of "legalism," there seem to be few truly objective constraining standards. That which impels a judge, therefore, to respect legal materials is not virtue, but simply a pragmatic personal temperament inclined to pay heed to the decisions of the other political branches.

Through much of the book, Posner seeks to dismiss the legitimacy of many legal standards currently accepted as informing the conclusions of judges. His targets include "legalism" (which he defines in extremely narrow and mechanistic fashion), "originalism" (which has little definable content, he claims), "strict construction" (part of legalism that results in absurd conclusions), "analogy" (hardly an analytic tool), "rules" (of limited and mostly chimerical use), and "textualism" (hobbled by neglecting a statute's purpose). He delights in giving a dope-slap to the academy in a chapter entitled, "Judges are Not Law Professors."

Judge Posner believes a judge should be a "constrained pragmatist." If we look at Posner's actual decisions, we find a jurist who acutely discerns legislators' collective intent, respects precedent (or at least the underlying policy instantiated in the precedent), and creates decisions of such clarity that they (despite himself) form a good legalistic basis for the guidance of other judges. Posner is, as a judge, admirably humble toward what the other political branches have decided. Recently, in a discussion with Judge Michael McConnell at the Annual Federalist Society's Lawyers Convention, Posner said that he had reviewed the 161 federal laws that the Supreme Court had invalidated since Marbury v. Madison (1803). Except for the law mandating segregation in the District of Columbia, voided by Bolling v. Sharpe (1954), he declared that he would have upheld every one of those statutes.

But Judge Posner's theory of "judicial law-making," in the hands of a person with less modest sensibilities, would produce, and has produced, many of the excesses that Brutus predicted so many years ago.
Hamilton believed that the office helped inform the judge's virtue. Nagel, in contrast, argues that the office, created by American legal culture, corrupts the man and makes public virtue impossible. Nagel would not find the alleged "personal" biases of Sonia Sotomayor, President Obama's nominee to the Supreme Court, surprising. He would find her attitude a product of the judicial system itself. Judge Posner comes from the opposite direction. He thinks that only a virtuous person can be a virtuous judge. For him, the man makes the office; the office does not make (or unmake) the man.

But in the end, judicial virtue must be the product of both the man and the office. Referring to the process of judgment, the philosopher Michael Polanyi observed, "The freedom of the subjective person to do as he pleases is overruled by the freedom of the responsible person to act as he must." Only when the learned and modest man prudently weighs text, purpose, history, structure, precedent, and reason, can he exhibit the virtue of a judge. The man magnifies the office, and the office magnifies the man.

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