



WHAT IS OBVIOUSLY WRONG WITH THE FEDERAL JUDICIARY, YET EMINENTLY CURABLE

PART II

Richard A. Posner

THE REALITY OF constitutional decisionmaking is well summarized in – of all places – a brilliant recent law novel in which we hear an imaginary Supreme Court Justice say that if “you’re a buffoon . . . and you think that every dispute should be decided according to the principle of what a bunch of dead guys would have thought about it in the eighteenth century, then yes, we decide cases according to principle. But, you know, judging really involves making the best and most pragmatic decision you can given all the circumstances. Is that a principle? Maybe. But that’s not what I mean when I say that this . . . jerk insists on his principles regardless whether they might ruin some eighteen-year-old girl’s life.”¹ And later in the book he says: “I never liked constitutional law. It’s barely law at all, in my view. It’s just politics, filtered

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¹ Jay Wexler, *Tuttle in the Balance* 66 (2015). Wexler is a law professor at Boston University.

through a few vague phrases in an old document written by people who couldn't possibly fathom what the world looks like today."² Exactly so.

"Interpretation" of ancient texts and decisions is not the answer to the doubts expressed by imaginary Justice Tuttle concerning the possibility of rigorous objective judicial decision making at the appellate level. In a vast number of cases in which the lawyers or the judges appeal to interpretation in an effort to shift responsibility for a decision to legislators, regulators, or constitution makers, interpretation is impossible because the "interpretive" issue had not been foreseen by the authors of the document to be interpreted. It thus is silly to ask whether for example the Fourth Amendment forbids electronic surveillance of suspected crooks or spies. The amendment's authors and ratifiers had no opinion on electronic surveillance because it neither existed nor was foreseen. The Supreme Court treats the Fourth Amendment as an open sesame to judges to create rules regulating anything that could be described as a search or a seizure. The fact that the Fourth Amendment doesn't say or suggest that warrants to search or arrest are *ever* required (all that the amendment says with respect to warrants is that general warrants are forbidden) hasn't stopped the Supreme Court from ruling that a warrant is required to search a person's home or to arrest a person in his home. Which is fine, but illustrates the legislative role of the federal judiciary, and its hypocrisy; for the Court grounds the rule in a constitutional provision that has nothing good to say about warrants.

As in the warrant example, much of what goes by the name of interpretation in law is not an attempt to reconstruct the meaning that the author or authors of the work (the statutory phrase, the regulation, the judicial decision) being "interpreted" intended. A famous brief phrase in Keats's great poem "Ode to a Nightingale" – a phrase that F. Scott Fitzgerald appropriated for the title of one of his novels – is "tender is the night." I don't think anyone can know what Keats meant in calling night "tender," or can much care. What a poem means to a reader two hundred years after it was published depends on the reader more than on the poet. And so it is with the Constitution. And so "originalism" is nonsense, as the evidence

² *Id.* at 183. "Justice Tuttle" is of course not alone in this view; nor am I his only companion in heresy. There is also, for example, the notable recent article by Professor Brian Leiter, "Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature," 66 *Hastings Law Journal* 1601 (2015).

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shows³ and even some leading originalists come close to conceding – William Baude, for example. In a recent article he advocates what he calls “inclusive originalism.”⁴ By this he means that any judicial decision that does not violate the original meaning of the Constitution (or of an amendment to the Constitution) is originalist and therefore lawful. He is thereby enabled to describe the decision holding that there is a constitutional right to same-sex marriage⁵ as an originalist decision,⁶ even though it has no constitutional pedigree.

The Constitution is just the extreme example of the limitations of interpretation as a tool of judicial decision making. The broader problem is that issues of the scope and application of statutes constantly arise that were unforeseen by the statutes’ drafters and enactors, and all a court can do is resolve them in a way that makes sense without doing violence to the legislators’ clear intentions, if any are discernible. I was therefore amazed to learn of a recent talk at the Harvard Law School by Justice Kagan extolling the “interpretive” methodology of Justice Scalia. Here is an account of the talk:

“I’m not sure if somebody said to me ‘statutory interpretation’ I would even quite have known what that meant,” Kagan said, referring to her years as a student at the Law School. “It was not really taught as a discipline.”

Much has changed since that time, [Professor John] Manning noted, and now courts pay far more attention to the text and wording of statutory law than they ever did before. Kagan ascribed much of this change to her colleague, Scalia, whom Kagan said had “more to do with this than anybody.”

“Justice Scalia has taught everybody how to do statutory interpretation differently,” Kagan said. Following Scalia’s example, more legal thinkers consider the meaning, wording, and understanding of statutory texts, in a school of thought known as textualism.

³ See, e.g., Eric J. Segall, “The Constitution According to Justices Scalia and Thomas: Alive and Kickin’,” 91 *Washington University Law Review* 1663 (2014); Segall, “Originalism on the Ground,” in *Dorf on Law*, Nov. 2, 2015, www.dorfonlaw.org/2015/11/originalism-on-ground.html.

⁴ “Is Originalism Our Law?” 115 *Columbia Law Review* 2349 (2015).

⁵ *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

⁶ See “Is Originalism Our Law?,” note 4 above, at 2382-83.

Kagan said she believes that Scalia's part in this change in the role of the judiciary will earn her colleague, with whom she has been known to have ideological disputes, a place in history.

"The fact of the matter is, you wake up in 100 years and most people are not going to know most of our names," Kagan said, referring to herself and her colleagues on the Court. "I think that is really not the case with Justice Scalia, whom I think is [should of course be "who . . . is"] going to go down as one of the most important, most historic figures on the Court."

Audience members who packed into the auditorium in the Wasserstein Campus Center where the talk took place said they were struck by Kagan's candor.

"It was amazing that she described herself as a textualist," said visiting legal researcher Takahiko Iwasaki. "That was an amazing and candid thing to say."⁷

Candid? Did Mr. Iwasaki think that Justice Kagan has been *hiding* the fact that she's a textualist, and only now has she revealed the awful truth – that she is in thrall to Justice Scalia's textualism? Doesn't she have to explain how literal interpretation of a text can reveal its meaning with reference to unforeseen events? How for example an ordinance specifying a maximum speed limit of 50 miles an hour for "vehicles" excepts emergency vehicles even though the ordinance doesn't mention such vehicles? Or how section 1 of the Fourteenth Amendment, which provides that no *state* shall deny to any person within its jurisdiction the equal protection of the laws, can be interpreted to forbid racial discrimination by the District of Columbia?

Judges pay more, and more honest, heed to precedents – earlier judicial decisions of the same or a higher court – than they do to constitutional and legislative text. For precedents tend to be more recent, to deal with issues likely to recur, and, being in judicial language, to be more intelligible to judges. Yet whether a precedent is recent or ancient, it is entitled to weight apart from its intrinsic merit only if ignoring or rejecting it would upset reasonable expectations without generating equivalent or greater benefits. Justice Scalia was mistaken if he thought that by committing him-

⁷ Jonathan G. Adler, "Kagan Discusses Statutory Interpretation at Law School," *Harvard Crimson*, Nov. 18, 2015, www.thecrimson.com/article/2015/11/18/kagan-talk-law-school/.

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self to adherence to precedent he had made himself a more careful judicial voter because he knew that his vote would come back to haunt him should a similar case come before him in the future.⁸ To be the judge he aspired to be, he had to be right the first time. But that would have been possible only if he had been able to predict the future. Since he couldn't, it was reckless of him to assume that a vote in one case would bind him in another case a decade later, when the reasons for the earlier vote might have been universally rejected.

It would enable a more informed critique of the judiciary if appellate judges would be more candid (who are they fooling by their pretenses? one might ask) as well as more thoughtful and more "with it." But that's a quixotic hope. As Max Weber explained a century ago, political officials can't afford to be fully candid,⁹ and I've just said that our federal judges are political officials albeit of a somewhat unconventional sort relative to both elected officials and bureaucrats.¹⁰ Still, without ceasing to maintain the conventional appearance of a judge, our judges could eschew jargon and openly premise their decisions largely on common sense, a practical weighing of the relative costs and benefits of alternative decisions, the relevant scientific and academic literature dealing with issues that arise frequently in federal cases, evidence both judicial and extrajudicial (evidence found in Internet searches for example), and precedent only when departing from precedent would, though otherwise desirable, impose excessive costs by defeating reasonable reliance on what had seemed a settled rule. Judges can do all this without being tarred and feathered.

⁸ I'm not sure he ever said that outright, but I think it consistent with, and maybe even implicit in, his statement that "when, in writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle." Antonin Scalia, "The Rule of Law as a Law of Rules," 56 *University of Chicago Law Review* 1175, 1179 (1989).

⁹ Max Weber, "Politics as a Vocation" (1919), in *From Max Weber: Essays in Sociology* 77 (H.H. Gerth and C. Wright Mills eds. 1991).

¹⁰ See also Richard A. Posner, "What Is Obviously Wrong With the Federal Judiciary, Part I," 19 *Green Bag* 2d 187, 200 (2016).

Every thinking person, or at least every thinking lawyer and judge, should realize that judges *have* to be political animals because they *have* to make moral or pragmatic judgments all the time, owing to the uncertain meaning and frequent obsolescence of statutes and regulations and precedents and other orthodox sources of law. The lack of candor, bordering on hypocrisy, of appellate decisionmaking could be, if not abandoned, at least tamped down a bit, without, I suggest, any costs whatsoever.

I go so far into the realm of unorthodoxy as to suggest that “result-oriented” be retired as an expression of opprobrium. All it means is a judicial focus on outcome rather than process – and outcome *should* be the focus. The judge should decide what is the best outcome for a case and then decide whether that outcome is blocked by some authoritative source of law, such as a clear statute or a binding precedent. The outcome is the end, the process merely the means.

I am reminded of another old saw, “hard cases make bad law”¹¹ – where “hard” means not difficult but tugging at the heartstrings – meaning, in other words, that judges ought to be hard-hearted. But one would think that while sometimes the “soft” outcome – the humane, the sensible, the civilized, the modern – will be blocked, when it isn’t it will usually be the *right* outcome.

I imagine that some of my readers, especially if they’re law professors, will think I’ve misconceived judicial thought processes – that when I explain how judges think I’m really just explaining what I and a few other mavericks think. But I’m not impressed by law professors’ criticisms based on their conception of how judges think, because I don’t see how law professors can know how judges think. They have never attended post-argument conferences among judges, which is where one learns (where I have learned) what interests and motivates judges. One learns for example that even conservative judges sometimes vote for liberal outcomes, and liberals for conservative outcomes, the reason being the variety of needs or pressures that bear on a judge, including desire to maintain good relations with colleagues, to want not to seem rigid, doctrinaire, political, to demonstrate fidelity to doctrine, to extend sympathy to the occasional litigant in an

¹¹ Old, yet still invoked from time to time. See, e.g., J. L. Coté, “A Practical Guide to Appellate Judging,” 16 *Journal of Appellate Practice and Process* 15, 17 (2015).

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extreme case, etc. One doesn't learn these things from reading judicial opinions or hearing speeches by judges or even talking one on one to judges, because judges are secretive except (to a degree) with each other, and self-serving, and self-protective, just like everyone else, and because most of what they produce for public consumption – mainly judicial opinions – is ghostwritten by law clerks sworn to secrecy (“what goes on in chambers stays in chambers” is the rule in almost all judges' offices, though not in mine). The judiciary is a guild, a secret society. Law professors, not knowing how judges think, mistakenly suppose that judges are weak imitators of law professors, their intellectual superiors.

Law professors were more attuned to judges when most of the professors had not only the same legal education as judges but had practical lawyering experience not unlike that of most judges before they had become judges. Increasingly, law professors have little practical experience, law school faculties being top-heavy with professors who earned doctoral degrees in other fields before they entered law school and who never intended to practice law or even defer their academic career for just a few years spent in the practice of law.

I do need to acknowledge however reluctantly the awkwardness of judicial reliance on “independent judicial research” (primarily Internet research by the judge or judges) at the appellate level. At the trial level it is feasible to enable rebuttal by the lawyers to anything that comes up at trial, before the trial ends. But at the appellate level, where the lawyers are onstage only for the time it takes (usually well under an hour) for oral argument, rebuttal would require either reargument or supplementary briefs and either procedure could delay the decision of the appeal significantly. I don't have a solution to this problem.

THE SUPREME COURT

Much of what I have said about the courts of appeals applies equally to the Supreme Court. It was about the Court that “Justice Tuttle” was speaking, though much of what he said was equally applicable to the courts of appeals. Virtually all issues resolved in Supreme Court decisions are first addressed by a state court or a lower federal court, so the opinions at the different appellate levels can be expected to resemble each other. One difference is that Supreme Court opinions tend to be considerably

longer than those of other American courts, which is paradoxical since, having no fear of reversal by a higher court because there is no higher court, the Supreme Court could afford to be blunter and briefer and more candid, but instead it is less blunt, more verbose, and less candid. It is tiresomely insistent that its decisions are the pure product of analysis based on previous decisions and on the interpretation of authoritative legislative sources of law, notably the Constitution. Yet everyone knows that there are conservative and liberal Justices, and that the former tend to cast conservative votes and the latter liberal ones. The different wings of the judiciary pretend to be basing their judicial votes on the same sources, the same documents; yet actually, and whether or not consciously, they are voting their political preferences. Their guiding star is not legislation, or the Constitution, or the precedents; it is the Justices' priors – a mixture of temperament, ideology, ambition, and experience.

Knowing this, conservative Presidents try to appoint conservative Justices, and liberal Presidents liberal Justices, but sometimes they are mistaken about an appointee's political leanings, and sometimes the political leanings of Justices change unpredictably over time. The constant is that the Court's decisions are heavily influenced by those leanings. And that is not going to change just because a number of professors of constitutional law, liberal as well as conservative, profess to believe that constitutional decision making should be guided by what the Constitution was understood to mean when it (or its amendments) was enacted – an impossibility, as I said and as the most intelligent originalists are beginning to realize, causing adjustments such as William Baude is making,¹² because society has changed radically since the eighteenth century and the mid-nineteenth-century amendments in ways unforeseen by the framers and ratifiers of those documents. Originalism has become a mask for deciding cases on ideological grounds, using history as a mirror.

Nevertheless I would not call the Supreme Court a “political court,” as that would imply both that the lower federal courts are not political courts and that a court should not be “political.” And that is not a realistic, or even a desirable, aim if I am right that judges frequently must or should go beyond legal doctrine to decide a case sensibly. (And so it is self-servingly

¹² And others – to the extent of rendering originalism incoherent, as implied in James E. Fleming, “The Inclusiveness of the New Originalism,” 82 *Fordham Law Review* 433 (2013).

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silly for judges to refer to Congress and the President as “the political branches” of the federal government, in supposed contrast to the judiciary conceived of as “apolitical.”) There is abundant evidence not only that some lower-court federal judges are conservative and others liberal but also that these classifications are predictive of their votes in many cases. But what is true is that the Supreme Court behaves that way far more frequently than the lower courts, both because far more of the Court’s docket consists of cases that are toss-ups and because there is no higher court to which its decisions can be appealed – which means that while the lower courts are bound by precedential decisions of the Supreme Court, the Supreme Court can if it wishes reject, ignore, or redefine its decisions and by any of these devices avoid having to follow them.

But the country *needs* a court that is empowered, and willing, to create a degree of uniformity among the nation’s federal courts, to rein in the other branches of the federal government, and also to rein in state governments – just imagine the chaos that would ensue were there no federally enforced limitations on state regulation of personal, political, or commercial behavior. And so there is a difference in degree, as far as the political character of adjudication in the federal judiciary is concerned, between the Supreme Court and the other federal courts – and it’s a substantial difference.¹³ Just not a difference in kind.¹⁴

In the words of Justice Robert Jackson, “We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final.”¹⁵ The cases the Court decides present issues that usually can’t be resolved by reference to prior law, precedent (a form of prior law), the canons of statutory construction (which are a joke), or constitutional theory (another joke). Legal disputes that can be so resolved usually are – at a lower level of the judiciary. Issues that cannot be resolved by the conventional means can be dealt with only by pragmatic, ethical, or if one will

¹³ See, e.g., Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, ch. 4 (2013).

¹⁴ I thus disagree with Professor Segall’s statement that “our Supreme Court is not really a court at all.” Eric Segall, “What would you do if you were a Supreme Court Justice?,” *Dorf on Law*, May 23, 2015, www.dorfonlaw.org/2015/05/what-would-you-do-if-you-were-supreme.html.

¹⁵ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion).

political values. That's the way it is – and the way it has to be and should be and always will be.

What is true is that the power of the Supreme Court and to a lesser extent of the other federal appellate courts is to a significant degree legislative, thus blurring the difference between a legislature and a court. Whenever a court creates a new rule in the course of deciding a case, it is legislating. Our courts resolve disputes but also, at the appellate level, create new rules – which is why our courts are and have to be political.

I have been describing unchangeable features of the Supreme Court. But what could be changed for the better very easily would be the management, the organization, of the Supreme Court, which is inexplicably deficient. Forget the spittoon (“a metal or earthenware pot typically having a funnel-shaped top, used for spitting into” – Google) next to each Justice's seat in the courtroom – sheer antiquarian silliness. Think rather of the five-year interval between the rendering of a decision and its publication in the *U.S. Reports*; of the Court's refusal to disclose the vote (not the voters) in cases in which certiorari is denied (disclosure that would signal the importance of the issue sought to be resolved by the Court, and therefore encourage or discourage future efforts to persuade the Court to hear a case presenting the issue); of Justices' refusal to give reasons for recusing themselves from hearing cases or for refusing to recuse themselves in the face of plausible, responsible, recusal motions; of the bunching of opinions at the end of June, rather than making September the deadline so that cases argued late in the term (April) can receive due consideration rather than being rushed out in time for the summer break; of the inordinate length of opinions; of the unmemorability of most of the concurring and dissenting opinions; of the warring footnotes and occasional lapses into incivility; of the excessive reliance on law clerks. These things could be changed by an aggressive Chief Justice. What cannot be changed is the Justices' pretense that they do not make law but merely apply it.

Although the Justices endeavor to be civil to each other both in their opinions and in person (with the notable recent exception of some of Justice Scalia's dissents, which could be vitriolic), there is plenty of mutual dislike. Holmes's description of the Justices as nine scorpions in a bottle remains apt, owing in part to the fact that the Chief Justice assigns the majority opinion in every case in which he is in the majority. The Court's

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cases differ quite markedly in importance, and a Justice who receives few choice assignments is likely in consequence to be quickly forgotten after he leaves the Court (the fate of Justice Stewart, who used to complain that Chief Justice Burger did not give him good assignments). This problem could be solved by random assignment, among the Justices in the majority in a given case, of responsibility for preparing and circulating the majority opinion.

The most important change that could be made to the Court, one that might seem straightforward but actually is only barely feasible and would take a long time to be effective, would be to improve the quality of the appointees. The President nominates when a vacancy occurs, and the Senate confirms or (rarely) rejects the nominee, both acting on political grounds – that is, on the basis of the conformity of a nominee’s likely political leanings as a Justice to the political leanings of the President and of the Senate majority. And that is not a formula for obtaining top quality. The point is not that the Justices aren’t competent, aren’t fit for the job; they are, after all, screened carefully by both the President (or at least his advisers) and the Senate Judiciary Committee. They are competent. But are they super? No, because quality is only one of the criteria that Presidents and Senators consider. It is not merely nostalgia that reserves the adjective “great” for a bare handful of Justices all dead, all of whom were pragmatic, moral, and in a nonpartisan sense “political”: Marshall, Holmes, Brandeis, Cardozo, Hughes, Jackson, the two Harlans, perhaps a few others (Story? Black? Rehnquist? Frankfurter?).¹⁶ Maybe some members of the current Court, because evaluation should await the completion of their Supreme Court careers.

It shouldn’t be difficult to find prospective Justices among lawyers, law professors, and lower-court judges who are unusually intelligent, well trained, experienced, hard-working, familiar with the workings of government, ethical, fair-minded, broad-gauged, civil. That really isn’t asking a lot, considering that there are a million American lawyers to choose from. One can’t – considering the politics of the appointment process – expect the Justices to be the nine best of the million, but perhaps they could be

¹⁶ And on the lower courts Traynor, Friendly, L. Hand, Kozinski, Boudin, Leval, Wisdom, Leventhal, Wilkinson, Magruder, C. Fried, Wyzanski, Weinstein, Vanderbilt, Becker, Higginbotham, Edwards, Shaw, Liu, Linde, Katzmann, Ambro – and many others.

chosen from among the hundred best or the thousand best. Maybe some of the current incumbents come from those lofty strata, but it is too early to tell.



What I would most like to see would be criticism of the criticisms that I have made of the federal judiciary, and of the American legal culture more broadly, in this two-part article and at much greater length in *Divergent Paths* (and earlier books and articles). The *Bluebook* must have its defenders – let them defend their precious tome from me. And so must the awful legal jargon found in so many judicial opinions, and their verbosity; the superfluous headings and subheadings; the silly flourishes; the paeans to the adversary system; the pattern jury instructions; the standards of review; the dread of the italicized period; the spittoons behind the Supreme Court’s bench. The list goes on and on. One of my suggestions in *Divergent Paths* was that casebooks – which are expensive (the price tag of some exceeds \$200) and their heavy editing of the cases give students a misleading sense of what judicial opinions are really like – be replaced by lists of cases for the students to read (all reported cases being available online to law students free of charge), combined with an online memo consisting of the teacher’s questions and brief comments, and of a bibliography – all free to the students. You would think so radical a suggestion (the *Bluebook* and casebooks make money – who dares question legal money-making in our society?) would elicit criticism both from conventionally minded law professors and from law professors who derive significant income from writing casebooks. But no; it seems I am to remain a voice crying in the wilderness.

Pretty depressing.

