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Book Review: in Pursuit of Justice: Reflections of a State Supreme Court Justice. by Joseph R. Grodin.

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quart, from a period of "repressive" order, through a "legislative" order phase, into a new "bureaucratic" order era. During these stages the relationship between state authorities and the federal district court changed from minimal contact, to adversarial contact, to less adversarial contact, a trend that has also appeared in other states. According to the authors, the most important reason for the current, more congenial relationship, "is that prisons have simply gotten better at operating constitutionally." Administrators in prison systems not directly effected by federal court actions have learned to learn from the experience of their peers. In 1987 Judge Justice commended Texas legislators, the governor, and Department of Corrections administrators for the progress they had made in meeting the conditions of his order.

An Appeal to Justice is a very well written, well documented account of an historic event in American legal and penal history; one which tested the proposition that the requirements of constitutional law can be balanced with the maintenance of order in a penitentiary system.

IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE. By Joseph R. Grodin.[1] Berkeley and Los Angeles, CA.: University of California Press. 1989. Pp. xxi, 208. $20.00.

Mark S. Pulliam[2]

Professor Joseph R. Grodin's breezy account of his odyssey from practicing lawyer (and protege of Matthew Tobriner) to law professor to California Court of Appeal justice, to California Supreme Court justice and back to law professor, is notable, first of all, for what it is not. It is not a philippic against the electoral tide that carried him, Chief Justice Rose Bird, and Associate Justice Cruz Reynoso off the California Supreme Court in 1986. Nor is it a calculatedly provocative statement of judicial philosophy in the vein of Justice Richard Neely of the West Virginia Supreme Court.[3] Nor is it an in-depth analysis of the decisions and internal politics of the court on which he served.[4] Rather, it is a thoughtful and bal-

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2. Member, California Bar.

3. R. NEELY, HOW COURTS GOVERN AMERICA (1981).

4. Professor Preble Stolz wrote such an account of the Bird Court, prior to Grodin's

anced judicial memoir in which Professor Grodin reflects broadly on the law and its meaning with an emphasis on the proper role of judges. The book segues from autobiographical sketches to the history of the California Supreme Court to the origins of the California Constitution, the development of the common law, the evolution of legal theory, the concept of judicial review, and ultimately to the proper role of the judiciary in a democratic society. Given the relative brevity of the book and the number and breadth of the topics it covers, the treatment of each topic is necessarily superficial. This is not intended as a criticism; indeed, the book is styled as the author's "reflections" and Professor Grodin states in the Introduction that he writes for "the intelligent reader who is not a lawyer." He succeeds in distilling sometimes arcane subjects into readable prose, sprinkled with interesting anecdotes.

The intersection of the author's diverse thoughts is in the last full chapter, titled "Elections," where he considers whether appellate judges should be subject to the will of the polity in the form of popular retention elections. One finishes the first nine chapters and heads into the finale wondering how an informed electorate could have voted such a compassionate, erudite, and moderate jurist out of office.[5] This "mood," which of course makes the rhetoric of chapter ten more effective, is a tribute to the subtlety and grace with which Professor Grodin presents his account of the demise of the Bird Court. He warns the reader early on that his "dual status as participant and observer, particularly as regards the 1986 election, may well color [his] outlook," and that the reader should make the "necessary discount for bias," but given the obliqueness of his factual account only readers intimately familiar with the record of the Bird Court and Grodin's role in it will be able to evaluate its accuracy.[6]

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arrival, in JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981).

5. *See* Stolz, Book Review, 41 HASTINGS L.J. 1461, 1464 (1990) ("Justice Grodin's book is calm, balanced, and always careful to be fair, which at times can be a little cloying. . . . [I]n this book he is so determinedly dispassionate, oozing, as it were, judiciousness in every sentence . . . ."); Barnett, Book Review, 78 CALIF. L. REV. 247, 247-48 (1990) ("Grodin's tone throughout is high-minded, scholarly, detached, his spirit generous and free of rancor. . . . Grodin, however, carries his restraint too far. He is sometimes *too* dignified, reticent, and disengaged.").

6. Grodin discusses his record in the death penalty cases—a key issue in the 1986 election—at some length, but only indirectly, in chapters dealing with "Criminal Cases," "Courts and the Initiative Process," and "State Constitutions." This confluence of seemingly unrelated topics is emphasized by former Justice William Brennan's Foreword, which endorses state courts' use of state constitutions to develop "independent state grounds" to protect the rights of individuals against political majorities. The Bird Court was notorious for its reliance on "independent state grounds" to invalidate death penalty verdicts in the face of overwhelming popular support for the death penalty (manifested in part by the passage in

As Grodin describes it, he was the victim of a retention election process that threatens the integrity of the judiciary; he was opposed by "right wing" groups ostensibly concerned with the Court's criminal law and death penalty decisions, but which received financial support from farmers, "oil and gas interests, insurance interests, and real estate interests"; and he was associated in the public's mind with Chief Justice Rose Bird, who had narrowly averted defeat in 1978 in the face of unwarranted opposition that may have been motivated in part by sexism. Having to campaign, engage in political fund-raising, produce thirty-second television spots defending his "voting record," and to participate in an unstructured public referendum that "tends to degenerate into slogans" is, in Grodin's view, destructive of the independence of the judiciary. He proposes several alternatives, including the federal model of lifetime appointments for state court judges.

Most of us, regardless of political persuasion, would agree that the judicial function should not be so politicized that it becomes just another branch of government; to this extent, we can all share Grodin's concern about the "darker side to a judicial election." But judicial autonomy, historically as well as logically, has been a corollary of judicial restraint: if the role of judges basically is to apply law, then the case for their independence is strong, notwithstanding some interstitial lawmaking. If, however, judges are not severely constrained by law, the case for judicial independence becomes much weaker. It is no answer to say that judges have always "made law"; they have been allowed to do so only because most people don't care about such things as the exceptions to the statute of frauds. It is quite a different matter for judges to decide where our children go to school, and whether murderers may ever be executed. Surely democratic principles require *some* constraints on the power of the judiciary.[7]

Let us consider the problem in perspective. The ouster of sitting California Supreme Court justices had not occurred prior to

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1982 of Proposition 8, the Victim's Bill of Rights, which sought to eliminate the use of "independent state grounds" in search and seizure cases). E.g., People v. Ramos, 37 Cal. 3d 136 (1984). Grodin makes clear his personal abhorrence for the death penalty, but insists that "[f]rom what I know of myself, however—and I concede that there are limits to what one may know of oneself—I did not set about to search for ways of overturning death penalty convictions any more than I did with respect to other convictions." This is hardly the resounding denial one would expect given the centrality of the death penalty as an issue in his defeat.

7. Grodin concedes that "judicial elections can serve a useful purpose in maintaining public confidence in the judiciary." Later, however, he argues that the benefits of judicial elections do not justify the potential politicization of the judiciary and the concomitant diminution of judicial independence.

1986, even though the retention election mechanism was instituted way back in 1934, and was thus available during the heyday of Roger Traynor and Matthew Tobriner. The 1986 election, then, was an isolated phenomenon. As such, it should be judged on its individual merits, rather than by worrying about the hypothetical specter of abuse by future voters. What if the voters were right in 1986? What if the Bird Court *had* been guilty of ignoring the statutory and constitutional law its members were sworn to uphold? Wouldn't lifetime appointment have made a temporary problem permanent? Grodin's argument against electoral accountability begs the question whether the Bird Court was acting *legitimately*. His election defeat is lamentable only if he should *not* have been defeated. Otherwise, the system worked. Quite frankly, the prospect of a Bird Court with life tenure sends shivers down my spine.[8]

The contrast of liberal activist Grodin's 1986 rejection by "law and order" voters stymied by the Bird Court's anti-death penalty decisions with Robert Bork's 1987 rejection by liberal interest groups is so rich in irony that one wonders why the book fails to explore the parallels. How can one explain the seemingly irreconcilable phenomena of the unprecedented defeat of three sitting California Supreme Court justices in the election of 1986, in a showdown heralded as "the next thing to a national referendum on the legitimacy of liberal judicial activism,"[9] followed only a year later by the Senate's repudiation of the leading proponent of judicial restraint? What explains the different results? State versus federal forums? Direct popular vote versus filtered (Senate) vote? The existence of single issue politics (the death penalty in the case of the California judicial retention election; the right of "privacy" in the case of Bork's confirmation battle)? Or, are the results really that different? Are both situations indicative of a quest for moderation or maintenance of the status quo?[10] If so, what lessons do the two episodes teach in terms of political theory and judicial philosophy? To address these questions would have made a great book. Instead,

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8. "Any justice who lacks an understanding of the appropriate limits of judicial power is not responsible and ought to be removed." P. JOHNSON, THE COURT ON TRIAL: THE CALIFORNIA JUDICIAL ELECTION OF 1986 14 (1985).

9. *Id.* at 2.

10. Grodin comes close to making this point when he rejects the term "activist" as misleading. Defining "activism" as non-adherence to judicial precedent (as opposed to underlying statutory or constitutional provisions), Grodin asserts that

> [t]he most misleading use of the activist label is to associate it with a particular political philosophy, liberal or conservative. Activism as such is value-neutral. Adherence to precedent can produce consequences approved by liberals or conservatives depending on what the precedent is . . . . The Warren court may have been activist, but the Rehnquist court is activist insofar as it has refused to follow that court's rulings (p. 160).

Grodin has produced a series of chapters—half devoted to personal reminiscences of his career and half to philosophical musings about the law—that lack the cohesiveness or vision of Bork's *The Tempting of America*. According to Bork, "in the larger war for control of the law, there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win."[11] Which side is Professor Grodin on (or, more pertinently, which side was Justice Grodin on)?

To answer this question one must look at the author's current views as well as his opinions as a judge. His current views are summarized in the chapter titled "Do Judges Make Law?" Drawing on the common law tradition that allows state court judges to develop legal rules through application of existing precedents to ever-changing factual circumstances, Grodin favors an expansive role for appellate courts in the formulation of public policy. He justifies the courts' active role in the development of common law, particularly in the areas of tort and product liability,[12] on a variety of grounds, some sound and others not. For instance, he suggests that courts are superior to legislatures in developing public policy because courts' "jurisdiction is invoked not by lobbyists but by litigants in a specific lawsuit"; legislatures "are inclined to listen most carefully to the voices of politically powerful people and groups." This type of rhetoric, which appears throughout the book, displays an elitist contempt for democratic processes in favor of lawmaking by judges. (It is unlikely, however, that Grodin would defend *Lochner* and its progeny on the ground that labor laws are produced by "politically powerful people and groups.")

Grodin goes so far as to assert that judicial activism *aids* the democratic process because it can "provoke the legislature into dialogue . . . that is a healthy aspect of our system of separation of powers." This "dialogue" argument has, unfortunately, become one of the staples of constitutional jurisprudence. It is one of those vacuous theories that no one believes except when it leads to results that he favors. Has anyone ever tried to justify *Dred Scott* on the

11. R. BORK, THE TEMPTING OF AMERICA 2 (1990).

12. Grodin notes with apparent pride that his colleague and mentor Matthew Tobriner—"one of the outstanding state court judges in the country" (p. 8)—wrote decisions while on the California Supreme Court such as *Dillon v. Legg* and *Tarasoff v. Board of Regents* (pp. 8, 75). Other commentators view these precedents less favorably. *See, e.g.*, P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). These critics view such pro-plaintiff decisions as a redistribution of society's resources by judicial fiat rather than a model of the common law method.

ground that it produced a superb dialogue about slavery and the role of the Court?

Although he is careful to distinguish between the development of "common law" and the interpretation of statutes and the Constitution, Grodin's conception of the proper role of judges in the area of common law is illustrated by two of his own decisions. The common law, in practice if not in theory, often involves the interpretation of statutes. Justice Grodin was not hesitant to create new causes of action for wrongful discharge, even in the face of express statutory provisions evidencing the California Legislature's intention that there be no remedy or that there be an exclusive administrative remedy. While he was on the Court of Appeal, he wrote two seminal decisions, *Pugh v. See's Candies, Inc.*,[13] and *Hentzel v. Singer Co.*[14] *Pugh's* holding that employees can assert an implied contractual claim for termination without good cause contravened California Labor Code Section 2922, which states that an employment for no specific term is terminable "at the will of either party, on notice to the other." *Hentzel* was contrary to California Labor Code Section 6312, which prescribes (normally exclusive) administrative remedies for the type of retaliatory conduct the Court of Appeal found was tortious. Grodin repeatedly refers to *Pugh* as an example of the common law at work, and describes *Hentzel* as "the most significant opinion I wrote while in Division Two." He acknowledges that *Pugh* limited the statutory rule of at-will employment, but defends the decision because "the atmosphere of social expectations had changed." If this is the common law method at work, courts are free to ignore statutes. But of course if *that* were generally true, the common law method would not be sacrosanct and could not be used to bolster the case for constitutional activism.

The judicial development of public policy extends outside of the common law, in the areas of statutory and constitutional interpretation. In the context of statutory construction, writes Grodin, this occurs when a judge, "in resolving policy questions not expressly answered by the legislature, [is] expected to bring to bear the standards and values of the community rather than [his] own idiosyncratic judgment."[15] Even this loose limitation is "a matter of degree." Ultimately, courts and legislatures engage in a "dynamic" "dialogue": "when the legislature adopts a statute, it knows it will be subject to judicial interpretation." Even though Grodin con-

13. 116 Cal. App. 3d 311 (1981).

14. 138 Cal. App. 3d 290 (1982).

15. Robert Bork points out that this distinction is illusory. *See* R. BORK, *supra* note 11, at 8-9, 130, 221, 241-50.

cedes that the legislature "has the last word" in the "inevitable" lawmaking through interpretation that courts engage in, he characterizes the judicial role as a "partnership" with the legislature. Thus, whereas the common law method permits judges to be legislators, in the area of statutory construction judges are merely co-legislators.

As Grodin notes, it is in the constitutional arena that the debate over the role of the courts is most intense. He begins by denying that judges can reliably divine the "original intent" of the framers. He then goes further, to suggest that judges are not obligated to apply the original intent, even if it can be ascertained, if that intent is inconsistent with "shared community values." Grodin's discussion deserves quotation at length:

> [I]f we adopt a theory of original intent that limits us to considering what the framers and adopters would have thought about a particular problem such as school prayer or segregated schools (assuming, of course, that we can know such a thing), we run the risk of becoming captives of an earlier age in a way that the framers and adopters may not have intended and in a way that would make decisions like *Brown v. Board of Education* extremely difficult. . . . My own view is that we should look to the attitudes and intentions of the framers and adopters as a guide to interpretation but that it is both naive and misleading to expect that we will find some authoritative criterion that will eliminate the necessity for contemproary judgment. *Indeed, the right and the obligation to make contemporary judgments may be our most valuable—and burdensome—constitutional legacy.* (Emphasis added.)

It is clear from the context that the possessive plural pronoun "our" in the passage quoted above refers to the *judges'* right and obligation. How are these judgments to be made without being completely subjective? "The question is a familiar one—we have grappled with it in the contexts of common law and statutory adjudication." Here the "we" refers to the author and the reader, but the expansive judicial roles Grodin finds appropriate in the common law and for statutory construction now loom large.

The scope of judicial discretion in constitutional interpretation is seemingly limitless. To quote Grodin again at length:

> I do think it is meaningful . . . to speak . . . of shared community values as something that judges should look to and be guided by, as signposts for constitutional adjudication. . . . I think we must acknowledge that much of constitutional adjudication . . . is ultimately quite subjective, *calling for the exercise of greater discretion on the part of the judge than is typical of statutory interpretation.* Discretion is not unlimited, however; it is simply very broad.
>
> There is no doubt that in the exercise of such discretion judges cannot entirely escape their own background and experiences. (Emphasis added.)

Grodin does not say so explicitly, but he intimates that a "perceptible consensus" emerged during the Bork confirmation hearings concerning "shared community values" on the subjects of the first

amendment (it should not be limited to political speech), the equal protection clause (it should not be limited to blacks or ethnic minorities), and the constitutional right of "personal privacy" (it exists, "no matter how difficult that area may be to define").

Grodin does not explain what precisely established this "perceptible consensus," or what it means. Nor does he explain why judicial elections and the initiative process are bad if the ultimate criterion of judicial decisionmaking is whether it is within the mainstream of "popular thought." It is relatively clear that Professor Grodin feels that an appellate judge could interpret the Constitution consistently with the foregoing "shared community values" without exceeding the proper role of the judiciary. Presumably a judge would not need so public an airing of these issues as the Bork hearings to reach a conclusion regarding the principles embodied in the Constitution. An internal "moral dialogue, based on reasoning from accepted value positions . . . is capable at times of producing consensus on moral vlaues." This "moral dialogue" ends up sounding a lot like judges deciding what is "right" in constitutional cases based solely on their personal views. Grodin seems to acknowledge this as an inevitable feature of judging.[16] "The polarities of finding law and making it . . . are like the background and foreground of a single painting."

Whether it is descriptive or prescriptive, Professor Grodin's book obliterates entirely the distinction between law and politics. In Grodin's view, as long as judges are reasonably deliberate and pay lip service to precedent, their decisions are legitimate (except evidently if their views, like those of Robert Bork, are "outside the mainstream" as determined by some unspecified "moral consensus"). To Grodin, statutes and constitutions are malleable texts, not law. With all due respect, the voters in 1986 were justified in concluding that Justice Grodin's views (including his decisions) were not consistent with the law. When a judge accepts (or insists on) an active political role, how can he then complain of political accountability? A judge who makes his decisions by identifying "social expectations," making "contemporary judgments," and engaging in moral dialogues to perceive a "moral-consensus" is kidding himself if he thinks he is doing anything but imposing his personal predilections on society. If judicial decisions should be based on "shared values," didn't Grodin's electoral defeat prove

16. Grodin relates an anecdote about an otherwise conservative justice who wrote a decision prohibiting the warrantless search of a person's garbage can because he had an aging mother whose garbage can contained empty wine bottles. Grodin endorses this "decisional process" (p. 159).

that he was a bad judge? Or don't the people of California know which values they share?

In sum, Grodin's odyssey is a fascinating one, but he does not convince this reader that the voters were wrong.

"RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1968-1972. By Kenneth O'Reilly.[1] New York: Free Press, 1989. Pp. vii, 456. Cloth, $24.95.

Michael R. Belknap[2]

The 1988 movie "Mississippi Burning" depicted the FBI as a protector of blacks. Led by Gene Hackman, its agents streamed into Mississippi to do battle with bigots and the Klan. Although "Mississippi Burning" simply reiterated in a somewhat more fictionalized form the heroic portrayal of the FBI's role in the fight for racial justice already presented by Don Whitehead in his 1970 book *Attack on Terror*[3] and by the 1975 made-for-television movie of the same title, it became the target of vocal critics, such as Coretta Scott King, who complained that, among other things, the film grossly overstated both the FBI's commitment to the cause of civil rights and its contributions to the success of the civil rights movement.[4] Professor Kenneth O'Reilly's compelling account, *Racial Matters*, proves beyond question that the critics were correct. O'Reilly demonstrates that, far from protecting the civil rights movement, for about a decade in the 1960s and early 1970s the FBI waged war on black America. He leaves in doubt only the motivation behind the Bureau's attack.

Racial Matters is the sort of first-rate monograph O'Reilly's earlier writing on the subject would lead one to expect.[5] It is, to be

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3. D. WHITEHEAD, ATTACK ON TERROR (1970).

4. *See*, Champlin, *'Burning' Issue: How Much to Alter Fact to Fuel Drama*, L.A. Times, Jan. 24, 1989, VI, at 1, cols. 4-5.

5. In recent years O'Reilly has focused his critical gaze on the FBI's relations with black America, producing several important articles and papers on that topic. *See, e.g.*, O'Reilly, *The Roosevelt Administration and Black America: Federal Surveillance Policy and Civil Rights During the New Deal and World War II Years*, 48 PHYLON 12 (1987); *The FBI and the Civil Rights Movement During the Kennedy Years—From the Freedom Rides to Albany*, 54 J.S. HIST. 201 (1988) (hereinafter cited as O'Reilly, *Kennedy Years*); *The FBI and the Politics of Riots*, 1964-1968, 75 J. AM. HIST. 91 (1988)((hereinafter cited as O'Reilly, *Riots*); The FBI and the NAACP, paper presented at the Annual Meeting of the Organization of American Historians (Mar. 24, 1990). *See* Belknap, *Above the Law and Beyond its*