

## REVIEW

### **The Judicial Universe of Judge Richard Posner**

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*The Federal Courts: Crisis and Reform.* RICHARD A. POSNER. Harvard University Press, Cambridge, Mass., 1985. Pp. xvii, 365. \$25.00.

#### I.

Richard Posner's *The Federal Courts: Crisis and Reform* is a very good book. It is filled with information and analysis, description and explanation, diagnosis and prescription. Like all good books, it brings us news, too, of a lively, idiosyncratic, original mind. Judge Posner writes as he talks, and the book has, therefore, the style of seeming not to have a "style." Rather, Posner is in the room with you, and, in his distinctive voice—soft, even, a slight sing-song, full of bemused (almost surprised) self-assurance—he is simply telling you, in good spare English, how it is and why it is. The Posnerian manner is that of an interesting, concerned, detached, (now and then) sardonic doctor. He has visited the house; he has, with prodigious intellectual energy and speed, plumbed and poked, listened and sniffed, measured and weighed, read and studied; and now he is delivering a copious and candid report. The report is low-key, matter of fact, "scientific," pedagogical. It assumes that it is interesting and worthwhile to find and report facts and to conjure up and test possible explanations. It is willing to contemplate—and finds pleasure in—explanations that confirm and those that defy the obvious. Skeptical and intellectually worldly, it nevertheless assumes that things can be (more or less) figured out and that it (more or less) makes sense to try to improve them. It is highly intelligent and sophisticated, but its intellectual preoccupations stay within a narrow range and are informed by a set compass. Doctor Posner is very much the plain-spoken, occasionally re-

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ductionist, American social scientist, not the philosopher or social theorist or moralist. He is never romantic or poetic. Even the suggestions most likely to outrage pious wisdom are flattened to *sound* as if they were the most self-evident thing in the world. The book is admirably unfancy, devoid of the intellectual puffing and preening characteristic of current American legal-academic writing. The footnotes report on the state of the literature on a particular subject, rather than on the author's trendy paperback library. The text does not raise its voice or bully you. An occasional sarcasm punctuates the general no-nonsense atmosphere in which is conveyed a remarkable flow of intellectually sparkling common sense and uncommon sense and (only now and again) nonsense.

Judge Posner's book is a set of integrated essays about the federal courts, with heavy emphasis on the United States Courts of Appeals. I will, first, give an account of what it says, and then briefly discuss a few particular themes.

## II.

Part I, called "The Institution," starts with a layman's introduction to the American judicial process: what courts do and how they do it. It reveals Posner's penchant for taxonomy (courts engage in dispute resolution or law creation; the latter is either "formalistic" or "political") (3-4).<sup>1</sup> It shows, too, Posner's interest in economic analysis (an account of "demand" and "supply" of judicial services) (7), and his engaging habit of taking occasional excursions from basics into jurisdictional and arithmetical esoterica (the Supreme Court's practice of "clearing" its docket each year (6-7); the formula governing the links required to connect all members of a set (14)). There follows a brief general section on selecting and "motivating" judges, full of candid insights: "It is a myth that independence guarantees a nonpolitical judiciary. Its tendency, rather, is to make the court system an autonomous center of political power" (16). "[T]he federal courts . . . wield greater political power than any other courts in the world. Judicial independence has not taken our judges out of politics; in our political culture, it has put the judges squarely in politics" (19).

Chapter 2 is a description of "The Federal Court System"—its history, organization, structure, and personnel. (Taxonomy again: judicial selection is of three sorts—merit, patronage or ideology

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<sup>1</sup> All parenthetical page references are to RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

(29-30)). Once in this section Judge Posner's ear fails him: he goes on for more than a dozen pages (32-45), with many learned charts, about federal judicial salaries, and the effect is a bit ludicrous. (Federal judges, as a group, complain more about their pay than any other group I have ever encountered. Judge Posner says that salaries limit the field of federal judicial selection by deterring the top large-firm earners, and thus may have an adverse impact on quality—a point that can be made with equal fervor about virtually every public sector job. He points out, too, that a mere \$35 million of taxpayer funds would add \$50,000 to every federal judge's salary; but what tells us that federal judges, as against assistant secretaries of agriculture (or for that matter deputy solicitors general) are to be the only group in the queue for a raise?) He finishes the chapter with a brief survey of the development of the federal courts' current subject-matter jurisdiction; this is no longer just a layman's primer (it includes an erudite account of *Swift v. Tyson*<sup>2</sup>), and is one of several places in the book where there are quite abrupt shifts in the level of expertise expected of the reader.

Part II is called "The Crisis." Chapter 3 describes the extent and causes of the federal courts' current caseload explosion. The presentation is full of energetic, original, and interesting research and statistics; the picture it paints of "crisis," particularly in the courts of appeals, seems to me overwhelmingly persuasive. Judge Posner is eclectic and cautious when he turns to the question of "causes." Arguing from his beloved economic model, he points out that the "price"—direct and indirect—of federal judicial services has been dropping for 25 years (77-80). He refers summarily—too summarily, I think—to the fact that we have enhanced their value, too, by legislative and judicial multiplication of rights. (Judge Posner does not sufficiently emphasize the promiscuity with which Congress and the courts have vied, in the past 25 years, to make our federal courts into dynamic litigation-attracting engines for the creation and expansion of rights and the redistribution of powers and entitlements in our society. Nor does he sufficiently explore the connection between rising caseloads and the instability, unpredictability, and vagueness of our constitutional, statutory, and judge-made law.) Returning, again, to quantitative analysis, he next examines the categories of federal court business in more detail, speculating on specific subject-matter trends (81-93).

Chapter 4, called "Consequences," follows and is my next-to-

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<sup>2</sup> 41 U.S. (16 Pet.) 1 (1842).

favorite chapter. Judge Posner notes again that we have, for 25 years, allowed the price of access to the federal courts to fall, and that the “usual method of nonprice rationing” (95)—the queue—has not been significantly used either. (Actually the Supreme Court’s certiorari policy is a sort of nonprice rationing, and Judge Posner points out elsewhere (92) that it may explain the fact that rates of certiorari application to the Supreme Court have been dropping recently.) “Thus, without ever clearly acknowledging their policy, the people who control the federal court system . . . have acted consistently over this period as if they had an unshakable commitment to accommodate any increase in the demand for federal judicial services without raising the price of those services” (95). The costs of this are of two sorts: direct monetary costs and—the focus of this chapter—“degradation in quality of the federal courts” (96). Degradation comes about because, for a number of reasons, there does not exist “infinite supply elasticity” in creating new judges (97-102); the “principal method of accommodating the caseload increase has therefore been to increase the number of supporting personnel in the federal court” (97).

Posner’s account of the bureaucratization of the federal judicial process through “the rise of the law clerk” (102) and of central staff is brilliant and brave, too; it should be required reading for every person concerned with the federal courts. As the number of cases, law clerks, and staff attorneys rises, the judge becomes increasingly a staff supervisor and editor of others’ work. Opinions become institutional, opaque, formal, colorless, and euphemistic. They become, also, prolix and intellectually timid. Even the quality of research may have decreased (109); the authority of opinions—and the stability this provides—also decreases. Judge Posner charts the extravagant growth in the length of opinions and in footnotes and citations. He makes the original and witty point that the disease of law-clerkitis may adversely affect the quality of appointments: persons unable or unwilling to write can now accept appointment to the federal courts secure in the knowledge that a cadre of smart young clerks will generate competent opinions without the judge’s personal efforts (116).

A discussion of other consequences of the caseload explosion (difficulty of maintaining uniformity in the law; curtailment of the opportunity for oral argument) follows, and concludes with an extended essay on the impact of the unpublished opinion as “both a consequence of the caseload explosion and a symptom of the effect of the explosion on quality” (120). The entire chapter adds up to a powerful and persuasive statement of the proposition that the

caseload explosion has substantially reduced the quality of federal justice.

Judge Posner brings Part II to a close with a final chapter on "ameliorative proposals" called "Palliatives." I discuss this separately below.

Part III, "Rethinking the Federal Judicial Process," marks a sharp shift from the statistical and structural focus of the book's first half and undertakes "a more general reconsideration of the federal judicial process" (169). I found its first chapter, "The Role of the Federal Courts in a Federal System," the least satisfying portion of the book. In a brief introduction it purports to outline a theory of the advantages and disadvantages of federalism, but the theory is too rudimentary to provide a powerful base for what follows. It suffers, too—and this is uncharacteristic of the rest of the book—from contenting itself too easily with conventional pieties. (For example, it overemphasizes the "independence" of federal judges from politics, forgetting some of the book's own previously quoted wisdom; and its repetition of Madison's dictum that small units are more likely to be dominated by faction than large ones (173) ignores the modern development of virulent interest-group politics at the federal level.) There follows a supposed "optimal" allocation of judicial jurisdiction between state and federal courts. This has an episodic, somewhat slapdash, air; examples (e.g., diversity; Federal Tort Claims Act; federal criminal cases; admiralty) are rather randomly deployed, with emphasis on "interstate externalities" justifying the choice of federal rather than state court. The conclusion reached is that the theory of federalism would suggest a sharp reduction in (but not abolition of) both diversity jurisdiction and the federal courts' jurisdiction in postconviction and civil rights cases, as well as marginal cutbacks elsewhere. It turns out that the "optimal" allocation would result in an approximately 20% reduction in the federal court caseload (189). But the substantive arguments for specific reductions are too sketchy to carry much intellectual or political weight. Similarly, the chapter's conclusion—a brief excursion into the mysteries of "federalism and substantive due process," suggesting a retreat from "incorporation" towards a *Palko*-like standard<sup>3</sup>—is too sketchily presented to be more than suggestive.

Chapter 7, "Judicial Self-Restraint," is reserved for discussion later. Chapter 8—the last in Part III—is called "The Judicial

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<sup>3</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

Craft," and it is my favorite: four cups of candor and a half cup of tact mixed into a brilliantly fresh and pungent account of the problems of institutional responsibility besetting the federal courts. Judge Posner has dropped the other shoe. He has had the courage to say what many of us know: that too many appellate court judges and Supreme Court Justices forget that they are appointed and paid in order to constitute a *court*, and that they consequently bear a serious—albeit, alas, unenforceable—responsibility to make the court into an effective *institution*. Posner gives a devastating account of the "symptoms of institutional irresponsibility" (230) that beset the federal courts. "To put it bluntly, many federal appellate opinions seem to be self-indulgent displays performed with little concern for the interests and needs of the audience for the opinions" (230). The sins are many: excessive length ("a byproduct of the ghost-writing society") (231); excessive footnotes ("a lazy form of writing" leading to "propositions that are superfluous or questionable or both") (232); the practice of abuse, "often shrill, sometimes nasty" (232) of colleagues' opinions, the worst example being abuse of dissents in majority opinions; too easy a recourse to dissenting and (especially) concurring opinions, particularly when the result is a plurality rather than a majority opinion (236-41). (I would add a special complaint against the calibrated dissent or concurrence that is directed to minute parts and subparts of another opinion, so that a computer is needed to figure out who agrees with whom about what.) Posner touches on some interesting theoretical issues related to voting; he notes the courts' excessive love for open-ended standards and multifactored tests which leave the law unstable, inviting further litigation; and ends the chapter with a concise and elegant essay on *stare decisis* and on the associated distinction between holding and dictum (241-47).

I don't think Judge Posner has said much in this chapter that has not previously been remarked on or thought about. But it is bold and important that a sitting federal judge has raised his voice in a strong plea for institutional responsibility. Federal judges never tire of lecturing the legislative and the executive departments on their duties; some of the most assiduous of these lecturers seem never to take thought about what it means, not just to be a judge or Justice, but to be a judge or Justice of a law-making and law-applying institution: *The Court*. Posner's elegant and powerful essay on the judicial craft is the best I have read; one hopes, somewhat skeptically, that it may even improve things.

I will not give a detailed account of Judge Posner's final three

chapters, collected as Part IV. Called, somewhat misleadingly, "Improving Federal Judicial Performance" (presumably to make Part IV seem connected to the rest of the book), Part IV in fact consists of three discrete essays that are only tangentially related to the architectural problems that form the subject of the first eight chapters. Chapter 9 is an essay on legislative and constitutional interpretation; it is full of fresh and intelligent insights, but also contains a few rather wooden taxonomies (such as a set of proposed distinctions between "public interest" and "interest group" legislation) (262-67). I also found its berating of "canons of construction" an exercise in shooting fish in a barrel. Chapter 10 shows that the federal courts often function as common law courts, and argues, more controversially, that their performance in common law adjudication would improve substantially if they used the tools of economic analysis. The final chapter, directed to legal scholarship and legal education, makes a strong plea for a shift towards social science from what Judge Posner calls "doctrinal" research and teaching. (On this I am, of course, an interested party, but I believe the term "doctrinal" misdescribes what is actually taught and underestimates the extent to which institutional questions of the sort addressed in this book are studied.) I should add—having made fun of Judge Posner's elaborate essay about judicial salaries—that at the end of this chapter he is gracious enough to put in a word for professorial salaries too (331).

### III.

I return to Judge Posner's chapter—called "Palliatives"—discussing the changes in the federal court system that are, today, the most commonly talked about responses to the caseload crisis. He discusses five proposals: (1) raising the price of access to the federal courts; (2) limiting or abolishing diversity jurisdiction; (3) creating specialized federal appellate courts; (4) reforming administrative review; and (5) creating what Judge Posner rather tendentiously calls "a kind of junior Supreme Court to assist the Supreme Court" (131). "The first two proposals are demand-limiting; the last three supply-expanding" (131). Judge Posner adds right at the outset, somewhat witheringly, that he calls them all "palliatives" rather than solutions because none is based on "radical rethinking" or can have more than a limited and temporary effect on caseloads (131).

Judge Posner makes a powerful and interesting case in favor of raising the price for using the federal courts and thereby reducing the subsidy society provides for litigation (131). He wants to

increase user fees for non-indigent litigants substantially, preferring them to minimum-amount-in-controversy requirements; he also favors more extensive shifting of legal fees from loser to winner.

Judge Posner's discussion of diversity is cautious and unsurprising. He points out that abolition would have a dramatic effect on the district court caseload; a smaller though still significant effect on that of the courts of appeals; and virtually no effect on the Supreme Court (139). His discussion is balanced and interesting; he comes out in favor of curtailment rather than abolition.

A very brief section endorses a few modest improvements in administrative review (160). Its title, "Rethinking Administrative Review," is, however, a bit of false advertising.

Judge Posner sets his face sternly against the two structural proposals currently being discussed. An elaborate essay denounces the notion that there should be specialized federal courts with nationwide authority to decide cases within a given subject-matter area (a national court of tax or administrative or criminal appeals) (147-60). He concedes in passing that such courts would eliminate the problems associated with multiplying the number of judges within the circuits or multiplying the number of circuits, but he barely acknowledges that creating such courts would also relieve pressure on the Supreme Court, and would significantly enhance the stability of our law—and thus reduce the incentive to litigate—by multiplying our capacity to generate uniform authoritative decisions of national law (147). On the other hand Judge Posner deploys a veritable litany of objections. He asserts that federal judges, unlike practitioners and professors, do have sufficient time to master all the various fields of law (149)—a conclusion that wars with his previous elegant demonstration that the most significant effect of the caseload explosion is to force federal judges to rely for research on an elaborate supporting bureaucracy of clerks and staff. Specialization, he says, would reduce job-satisfaction and thus adversely affect the quality of lawyers who can be persuaded to join the judiciary (150). Many fields of law are riven by ideological and political divisions; specialized courts would become the locus of factions warring for control over a particular field—e.g., the "Harvard" vs. the "Chicago" school in antitrust; "law-and-order" vs. "criminal rights" advocates in criminal law (151-53). Specialized courts are more subject to political control than general courts because it is easier to predict how potential appointees will vote on their specialty than how they will vote across the board (153-54). Court "monopolies" over a subject concentrate power and reduce



geographic diversity and cross-pollination of legal ideas. Specialization creates serious boundary problems; a system of specialized courts cannot cope with unforeseen changes in the caseload (156-57).

A shorter but equally sharp denunciation of proposals for some sort of national court of appeals follows (162-66). It "is not so clear" (163) that the Supreme Court should be resolving more intercircuit conflicts. In fact, maybe it should be resolving fewer; and Judge Posner chortles over an example of a "freakish" pornography case<sup>4</sup> that the Court could have "passed up the chance to wrestle with" (164). Even if the Supreme Court is overloaded, the problem is largely self-created. It is questionable how "good" the proposed intercircuit tribunal would be (165).

Many of Judge Posner's misgivings about these proposals—some going to questions of principle, some to the details of specific plans—deserve to be taken seriously. In totality, however, they seem to me greatly overdrawn and somewhat captious. They exemplify, I fear, the rigid conservatism that infects the federal judiciary when faced with the possibility of structural change. (A parody of Judge Posner's chapter could easily be written consisting of a contemporaneous parade-of-horribles denunciation of the Evarts Act of 1891.)

What is missing here, I think, is a sense of proportion, of context, for evaluating the *importance* of the adumbrated misgivings. We have, today, a federal judicial system administering an enormous and dynamic corpus of national law and adjudicating a rising caseload that already exceeds 300,000 cases a year and that generates over 30,000 appeals a year. Such a system should not operate and certainly cannot operate forever on an appellate capacity that is limited to some 150-200 judicial opinions with nationwide authority—the latter being the capacity of the United States Supreme Court to render judgments on the merits by full opinion. The point is not that a lot of "square" conflicts on issues of cosmic moment are escaping resolution. The point is, rather, that our institutional capacity to stabilize and clarify the national law is seriously impoverished. A legal question need not be cosmic in order to deserve sensible and stable resolution. The law may need clarification even where there is no direct intercircuit conflict. Judge Posner says that "the proposition that federal law ought to be the same everywhere in the country is not persuasive. If uniformity is

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<sup>4</sup> Walter v. United States, 447 U.S. 649 (1980).

desirable (as it is), so is diversity and competition" (163). I find these remarks baffling. If we want "diversity and competition" with respect to a given field of law, our federal system provides an easy and intelligible way to obtain them: we should leave the question to state law. But it is incoherent and unjust to say that questions of tax and antitrust and social security should be governed by federal law but that that federal law should have different meanings in different circuits. I do concede that it is sometimes useful to allow a question to "simmer" before it is authoritatively resolved. But our existing deficient capacity to provide sensible clarifications and resolutions in our national law is a virulent breeder of litigation (and of forum-shopping too).

I believe it is inevitable that we will soon have to augment substantially our institutional capacity for authoritative decisions of national law; the system is choking at the top. There are two ways to achieve this. One is to increase specialization at the court of appeals level. I find Judge Posner's objections to this approach exaggerated. Of course it is somewhat less grand to be the judge of an antitrust or tax court than to be an all-purpose philosopher king. But I doubt the assertion that making the job of federal judge somewhat less grand will harm the country because the job will attract people of lesser abilities. It will attract persons of somewhat *different* abilities. It will attract people who are more deeply interested in particular subjects and less interested in running everything. That, in my opinion, would be good.

As to the objection based on the inevitability of ideological warfare within specialized courts, I am, again, unpersuaded. I think specialized courts—just because they will have a more modest function—will attract more real lawyers and fewer pseudo-politicians, more "substantive" and less "ideological" personalities than the all-purpose courts. In Chapter 1 Judge Posner reminded us that federal judges wield greater and more autonomous political power than courts anywhere else in the world. This is in part because they are in a position to create across-the-board social and economic and political policy for the country. They are independent not only from democratic supervision but also from the kind of intellectual discipline that comes from having to demonstrate detailed substantive mastery over a field. A court of antitrust appeals would be subjected to systematic appraisal and criticism from the antitrust professoriat and antitrust bar of a sort that the courts of appeals never experience. (Its judges would also find it easier to control the stuff that their law clerks put into their opinions.) Specialization—though not an unmixed blessing—would, it

seems to me, give judges a more systematic insight into the impact of their decisions on a field as a whole. It would, therefore, increase the judges' sense of responsibility, a commodity which currently is—as Judge Posner himself avows—in short supply.

A second method of expanding the country's capacity to generate authoritative decisions of national law is to create some sort of non-specialized national court of appeals, which might get its business by reference from the Supreme Court and/or by transfer from the regional courts of appeals. This is a problematical proposal, with much depending on the intelligence and foresight with which the court is designed. Nevertheless, I believe something like it is, again, virtually inevitable. Its existence would greatly expand our ability to stabilize and clarify the national law. It would also relieve the Supreme Court. There is controversy over the extent to which the Supreme Court is overburdened; and I agree with Judge Posner that the Court is author of many of its own woes. Nevertheless, we must remember that the Court is now routinely disposing of over 4000 cases a year (compared to 1200 in 1950). The flow of petitions for certiorari has, momentarily, stabilized at around 4000; but as recently as 1960 there were under 2000, and the figure will not stay at 4000 forever. (Indeed, it seems clear to me that eventually the Court will have to make some adjustment in its screening procedures, perhaps dealing with certiorari petitions in panels.) If we want decisions from the Court that are careful and sensible and coherent—and a product of the Justices' work rather than the product of a bureaucracy—relief must be provided; the problem cannot be dismissed with sarcastic remarks about a “junior” Supreme Court.

History may help here. The federal judicial system seems to operate roughly on 100-year cycles. The structure created by the First Judiciary Act in 1791 was remarkably stable, but became increasingly unwieldy after the Civil War and, by the 1880's, was staggering under an unmanageable overload. Judicial reform is slow, however, and it took some 15 years of pressure before the Evarts Act of 1891<sup>5</sup> established the modern federal judicial system. The Evarts Act, too, created a remarkably stable and successful structure, one that coped successfully with the country's transformations until about 1960. Since then this structure, too, has come under increasing pressure. As always, there is resistance to change—too much of it, alas, from various quarters of the federal

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<sup>5</sup> Act of March 3, 1891, 26 Stat. 826.

judiciary; but, let it be said, too much also from the professoriat. Diminutions in the district courts' jurisdiction, such as an abolition of diversity jurisdiction, would provide some relief; but my own overall appraisal is that architectural revision is now necessary and inevitable. Judge Posner's account of the federal courts provides, it seems to me, powerful evidence of the need for change; it's only the inexorable conclusion that he seems to resist.

#### IV.

I conclude this review with an account of and some comments on Judge Posner's chapter on "Judicial Self-Restraint"—containing some of the most interesting and puzzling ideas in the book. Judge Posner starts out by asking whether judicial self-restraint has "any definite meaning" (which he characteristically equates with the question whether the term is meaningful at all), and then turns to a discussion of what he deems an antecedent issue: what is "'principled' (as distinct from 'result-oriented') adjudication" (199). He points out that Holmes both advocated and thought it inevitable that the judge's views of policy should enter into his decisions, and yet also thought it wrong to interpret the Fourteenth Amendment in accordance with a judge's favorable opinion of *laissez-faire*; "the question is why" (200). A brief account of "formalism" (the judge as passive transmitter) follows. Judge Posner says formalism is still alive as a "judicial defense mechanism" (202), allowing the judge to shift responsibility for unpopular decisions to others, such as the Constitution's framers. He then says that "formalism is also widely believed, especially by good law professors" (203). Surprisingly, he uses as an example of formalism Henry Hart's celebrated *The Time Chart of the Justices*,<sup>6</sup> which argued that Supreme Court Justices would make wiser decisions and, perhaps, disagree less if they had more time for reasoned collegial deliberation; about this Posner says, in a highly misdescriptive reductionist move: "This diagnosis implicitly conceives the process of judicial deliberation as a search for technical answers to technical questions" (203), whereas, says Judge Posner, the truth is that it is "inevitable that judicial decisions will be based, at least in part, on value judgments, rather than wholly on technical, professional judgments. Decisions so made are by definition not scientific, and therefore not readily falsifiable or verifiable either—and as a consequence not always profitably discussable"

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<sup>6</sup> Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

(203). The problem, according to Posner, is that even those who reject formalism—and thus concede that questions of value will to some extent be relevant—will, like Holmes, assert that some sorts of value judgments are illegitimate and out of bounds. Why are some considerations (personal friendship or racial or class bias) extraneous and others (the “felt necessities of the time”) not?

The answer Judge Posner gives is in terms of consensus. Everyone would agree that a judge should not take personal or class preference into account. A decision is result-oriented if it rests on “personal or partisan considerations that are generally agreed to be illegitimate” (204), whereas a decision is “principled if and only if the grounds of decision can be stated truthfully in a form the judge could publicly avow without inviting virtually unanimous condemnation by professional opinion” (205). The further requirement is that the grounds for decision be consistent with the grounds used to decide other cases (205).

Judge Posner states that the “publicity test” he has suggested “does not enable a choice among competing principles” (206). But, he reminds us, it is also not the case that the judge may use any principle he chooses. The language of the statute, or precedent, or other sources of “authoritative guidance” to decisionmaking, may “dictate the application of a particular principle in a particular case” (206). (Apparently it is not only good law professors who believe occasionally in formalism.) But “when the springs of authoritative guidance run dry” we enter the realm of “legitimate judicial discretion” (206). Here “the judge must bring in his own values and preferences,” so long only as he does so in “principled” fashion—that is, with consistency and in a manner evoking “sufficient public approbation that the judge is not afraid to state the principle in his opinions” (207). And it is here that Judge Posner rejoins his central inquiry: activism and self-restraint are “among these principles” (207).

What are “self-restraint” and “activism”? Posner distinguishes various uses of “self-restraint.” He does not mean eliminating the judge’s policy views from the decision, because he is by definition in the “open area of judging” where personal policy preferences are inevitably present (207). He defines “prudential” self-restraint as (1) sensitivity to the “practical political constraints” on the judicial power and (2) sensitivity to the fact that promiscuous judicial creation of rights may swamp the courts and render them ineffective (207). He distinguishes these from “structural” (or separation-of-powers) restraint, which is his principal focus; the latter is animated by the belief that the power of the federal courts

should be reduced relative to other branches of government (federal and state) and leads to a kind of meta-rule of decision: the judge chooses the substantive outcome that is most deferential to “decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government” (208). This “precise” meaning of the term self-restraint is also to be distinguished from general circumspection about introducing the judge’s own policy views, an attitude which in Posner’s terminology identifies the “deferential” rather than the self-restrained judge.

“Activism” in Judge Posner’s usage is simply the opposite of structural self-restraint, and thus must be distinguished from “boldness” and even “intrusiveness” (211). A decision creating new rights of action in private litigation is an example of intrusiveness into private affairs but not judicial self-restraint in the separation-of-powers sense.

Is structural self-restraint a good principle—one the judge *should* adopt? On this Judge Posner more or less punts. “[W]hether history will commend a judge’s choice of where to position himself on the activism-restraint axis will depend on the particular historical situation . . . . If the courts are too miserly in using their power to check the other branches of government, they might as well not be part of the system of checks and balances, though the Constitution meant them to be. . . . [J]udicial self-restraint is a contingent, time-and-place-bound, rather than an absolute good” (211). Judge Posner conducts a somewhat astringent survey of the various arguments for structural self-restraint. The “political capital” argument is belied by the courts’ recent successes in taking power from the other branches—although, Judge Posner cautions, the other branches may be retaliating by not helping the courts to solve their caseload crisis (209-10). Self-restraint does not tell us how to deal with a general concern about the menace of powerful government, because by definition judicial activism decreases the power of the other branches while increasing the power of the courts. The framers could not have foreseen the modern aggressiveness of the federal judiciary, but “neither could they have foreseen the expansion of the executive and legislative powers” against which the “federal courts were intended to be a counterweight” (212). The argument that courts are less democratic than other branches is telling only if one shows “why we should have more democracy than we do” (212). The framers intended the Constitution to be judicially enforceable and must have known that it is not “crystal clear”; yet they “ordained an ap-

pointed federal judiciary with life tenure" (212). As the legislature becomes more democratic—Posner points to the Seventeenth Amendment—the federal judiciary becomes “more anomalous” but is also a “more needed counterweight” since the reason for life tenure was “distrust of a democratic legislature” (213).

Judge Posner is more sympathetic to the argument that decisions by an unrepresentative, isolated, and oligarchical judiciary ranging beyond the confines of authoritative text or clear national consensus will be seen to “lack legitimacy” (213). Further, “judges cannot have confidence that their decisions in these areas are ‘right’ in any ultimate ethical sense. As they cannot claim any special competence, they might as well leave the decisions in such areas to the more overtly political branches” (213). But the related argument, that federal courts are not good at exercising certain functions (e.g., running prisons), often “compares real courts, warts and all, with an ideal vision of other government institutions” (213). (In fact, it seems to me the dominant mistake has been the opposite one: to compare actual “poor performance” by the political system with an idealized court solution.) Finally, says Judge Posner, though self-restraint is a “risk-averse strategy” because courts are so little restrained by other branches, if carried too far the courts will “cease to play their appointed role” in the checks-and-balances system (214).

So where are we? Judge Posner’s conclusion is: “Although self-restraint may not always and everywhere be the right policy for the federal courts, we surely need more of this commodity today” (214). For this, he has two “bits of evidence.” The first is the overload of the federal courts. The second is a passage from a biography of Chief Justice Warren that extols what Judge Posner characterizes as “identify[ing] one’s personal ethical preferences with natural law and natural law with constitutional law” (214-15). This, he says, makes constitutional adjudication a “projection of the judge’s will” (215). “And as the courts move deeper into subjects on which there is no ethical consensus, judicial activism . . . becomes ever more partisan and parochial, lawless, and finally reckless” (215).

Judge Posner concludes his chapter by turning to what he calls an “application of his analysis” (215). The self-restrained (in the structural sense) judge is not necessarily timid or modest or deferential; nor is the activist judge necessarily bold. Self-restraint does not imply *stare decisis* (an important and valuable point). Nor does self-restraint depend on legal formalism; in fact, since formalism describes judging falsely, it is more useful to the activist

than to the self-restrained judge (217-18). Finally, says Judge Posner, self-restraint is only one factor in "responsible judicial decision making" (220). Others are "self-discipline"—which is said to imply "due submission to the authority of statutes, precedents, and other sources of law"—and a list of other judicial attributes to be admired (e.g., thoroughness of research, logical power, worldly knowledge, a sense of justice, good writing style, common sense, openness, intelligence, fairness, a "commitment to reason" [!], etc.) (220).

Of these, says Judge Posner, it is the quality of "self-discipline" that is the "key to the proper role of personal policy preferences in judging" (221). The self-disciplined judge respects controlling decisions by higher courts, and decides the case in accordance with the legislature's purpose where that is discernible; he is the "honest" agent of others "until the will of the principals can no longer be discerned" (221). The element of will in judging is inescapable, but the willful judge "is properly reprobated." "Even in the open area the judge must remain impersonal to the extent of confining his policy choices to values that are widely, though usually they will not be universally, held" (222).

I have given such an extended description of Judge Posner's analysis because it is important that he be heard: it is a significant occurrence when one of our most brilliant and original judges gives his account of the central mysteries of judging. Can judicial decision be objective? Insofar as it is necessarily subjective, how can it be deemed legitimate? What does it *mean*, to be a judge in a court of *law*? To what does a judge really bind himself when he commits himself to fidelity to law? These are the perennial, the great questions. Judge Posner's testimony in answer to them constitutes an event.

But I also want the reader to be in a fair position to evaluate. For I must avow that I find Judge Posner's account a puzzle, a mix of insight and muddle. The trouble, it seems to me, is that Posner is a captive of a thin and unsatisfactory epistemology derived from old-fashioned positivist social science; at the same time he brings to bear a vivid and authentic experience of actual judging. The result suffers from split personality.

The conventional side of the account is that there exist two sorts of questions: those that are "scientific" on the one hand; on the other those that involve "value judgments," where decisions are "not scientific and therefore not readily falsifiable or verifiable" and therefore not "profitably discussable" (203). Human rationality is exhausted when it crosses from the first to the second



sort of question: the realm of reason consists either of empirical verification or mechanical ("formalistic") deduction. Judicial decisions quickly exhaust these activities unless they falsely pretend to be engaging in them; we are then in an "open" area where "will" is inescapable.

Within this open area only two constraints operate. The first is that the judge must be honest in avowing his criteria for decision. Honesty is a constraint because it furnishes a link between "scientific" and "value" judgments through the technique of introducing a verifiable issue of fact *about* values. This is the question of consensus: is the judge's decision based on values that a consensus of society will accept, or on those that will invite "virtually unanimous condemnation" (205)? (Note that this resort to consensus is really a method of finding a mechanical technique even within the open area; "scientific" is Posner's *version* of a formalist jurisprudence. Note, too, that Judge Posner ignores the question of how those on the "outside"—the rest of us whose views *constitute* the consensus—should go about *forming* our opinions about values. His epistemology seems to assume that it is not meaningful for a person to reflect and reason about what values he should possess or aspire to.) The second constraint is that the judge must be consistent. (But note that this requirement injects an unacknowledged difficulty. Consistency requires criteria for identifying like cases. This can be done only by determining what are relevant and irrelevant factors. Formalism will "dictate" a few, but typically not many, answers to this. At the other end, excluding universally condemned factors (race, class bias) will help eliminate a few factors. But in many cases there will, inevitably, be a large space in between.)

It seems to me that there is another part of Judge Posner that knows that this whole account is false, that it is belied by the experience of judging and even by the experience of writing a book about judging. Judge Posner knows that most legal reasoning does not involve either empirical verification or logical deduction, and that a "commitment to reason" (220) is not exhausted as soon as the authoritative texts can no longer "dictate" a result. (He *should* know that it is quite unjust for him to say that Professor Hart's *The Time Chart of the Justices* and Professor Dworkin's *Taking Rights Seriously* (203 n.18) are examples of believing formalism because they conceive judicial deliberation to consist of "technical answers to technical questions") (203). When Judge Posner writes that the judge must have the self-discipline to render "due submission to the authority of statutes, precedents, and other sources of

law” and that the responsible judge “does not try to evade” controlling decisions and is an “honest agent” trying to discern the will of the legislature, he surely is not talking merely about the judge as automaton engaging in a mechanical process of logical entailment. When he suggests that statutes be interpreted through a method of “imaginative reconstruction” of legislative purpose and an attempt to understand what would have seemed reasonable (reasoned?) to the legislators (286-87), he is not talking about mechanical jurisprudence either. When Judge Posner, in what he terms the “open area,” analyzes the arguments for and against the principle of structural self-restraint, he is clearly making an appeal to our reason, not just our will; and he obviously thinks that such questions are “profitably discussable” because he discusses them, and, by discussion, seeks to *persuade* us of his views even though he cannot “prove” their truth either by logical deduction or by empirical verification. And, in making these arguments, he refers constantly to his understanding of the structure and purposes of our Constitution even though he cannot “prove” these by logical entailment.

Ultimately, Judge Posner’s book—and his judicial decisions, too—attest deeply and persuasively to the fact that there are vast areas within which human reason and human language can combine to persuade and be persuaded on reasoned grounds even though no “scientific” or logically entailed answer is available. The fact that interpretation does not admit to some mechanical procedure of validation is not a fatal objection to the concept of interpretation; a profoundly significant and *successful* network of intellectual and linguistic practices enables us to try to understand each other’s meanings, to enter into each other’s purposes, and to understand, interpret, apply, and follow rules, all with no (or only infrequent) resort to mechanical deduction.

And Judge Posner recognizes, too, that to be successful, these practices must be animated by ethics. That is why he says that the judge must have a “due” regard for authority and be an “honest” agent. To be a lawful judge is an ethical as well as an intellectual act.

It is here, it seems to me, that judicial restraint comes in. I think that Judge Posner’s definitional analysis of the content of judicial restraint is clarifying and original. It is helpful and simplifying to think of “structural” self-restraint as being exemplified by decisions that decrease the power of the federal judiciary vis-à-vis other institutions of government. I’m happy to accept the suggestion that we label a judge’s circumspection about imposing his own

policy views as identifying a “deferential” rather than a self-restrained judge (although I am not sure why it is so important to give self-restraint a *precise* meaning). But I think it is a mistake to think of self-restraint as constituting a rule or meta-rule of decision that is simply available to be taken off the shelf when the judge’s will tells him he wants it. Self-restraint and deference represent, it seems to me, *ethical attitudes*; and the judge should always be imbued with them even though in a particular case he is finally persuaded that he should reject a rule that decreases the power of the federal court and adopt one that increases that power. I believe it can be persuasively (though not scientifically) demonstrated, that these attitudes are appropriate—even “required”—ones for a federal judge to possess, and not simply one among many competing principles, just as Judge Posner himself asserts that what he calls “self-discipline” is an ethical attitude that ought always to animate one in the role of a judge. Nor do I think the demonstration depends on a showing that in fact there is a near-unanimous consensus in society in favor of these ethical attitudes.

There are three important reasons why a federal judge should exercise self-restraint and deference. The first is based on the classical argument from the notion that the Constitution is presumptively committed to representative government; trumping the decisions of the society duly enacted by the representative branches is a problematical act that is permissible only when the authoritative text strongly (though not necessarily mechanically) suggests it.

The second reason for structural self-restraint is that the courts’ decisions improperly or erroneously increasing their own power over that of the other branches are hardly at all policed. A strong array of institutions and practices (including the courts) stand on guard to assure that the President and Congress and the states do not unconstitutionally usurp power not belonging to them. But on the question of the power of the judges, the judges themselves decide; they are, in this sense, constantly judges of their own cause, and their mistakes are very difficult to correct. It thus behooves them to lean over backwards to avoid mistaken extensions of their power.

The importance of these two points is, of course, enormously magnified just because our modern jurisprudence is so deeply and derisively committed against the possibility of formalism. Judicial trumping of other governmental branches (or of privately created arrangements) may be legitimate as long as there is a sense in

which one can plausibly say that it is "the Constitution" that is being "enforced." But it is quite another thing to say that life-tenured judges should be free to do this when we also believe that the Constitution is mostly indeterminate—and judicial discretion therefore inevitable—and we also remember that *it is the judges who decide where the "open area" starts*. The question of what ethical attitudes and constraints govern the defining of the open area and decisionmaking within it obviously becomes absolutely critical; self-restraint seems to me inescapably connected to being a responsible and law-abiding ("self-disciplined") judge.

The third reason for an ethical attitude that is imbued with self-restraint and deference is of a different sort, and applies to all courts, not merely the federal courts. Judges should be enormously sensitive to the fact that, in an important sense, they never really know what they are doing. (This is true to some extent of legislatures, too; but the latter are in a better position to get to know more.) Litigation is an episodic and pathological event. Judges cannot know in any systematic or deep way whether the pathology is aberrant or pervasive, isolated or systemic. Correcting the pathology can affect a large body of practice that may be entirely successful and acceptable and that of course is unknown to the judge because it does *not* generate litigation. Changing a rule here may have unanticipated effects over there. Inevitable uncertainty about consequences should, it seems to me, lead the judge to a *heavy general presumption in favor of the status quo*. Intervention to change the status quo—whether with respect to private ordering (general deference) or with respect to arrangements created by other parts of government (structural self-restraint)—is itself an act of coercive governmental power. That is why it is not true (although it is today often said) that a judge's decision not to intervene to change something is "as much" a decision as a decision to change it. The latter entails, the former does not, an (additional) coercive intervention, which enforces the judge's opinion on how things should be. It should not be indulged in unless the relevant authoritative texts strongly support it.

It is not my argument that candor and consistency are unimportant. But an account of the judge's proper role should not stop there. My suggestion is that the federal judge should both define his "open" area and operate within it subject to an ethical obligation to minimize his interventions and to overrule the other branches only when necessary. I do not think Judge Posner would in fact disagree with this, but his preoccupation with social science and "precise" meanings makes him unduly timid about saying so.

## V.

What I have said by way of criticism and disagreement should not mislead the reader about my enthusiastic admiration for Judge Posner and his book. It is my feeling that Judge Posner is occasionally bemused by his preoccupation with social science. His intellectual style is also, I think, a bit too dry to allow him deep intuitive philosophical insight. But none of this should confuse the reader of this review. You should run, not walk, to buy this book. It is a huge treat to have such an intelligent and independent man write such a provocative, sprightly, and interesting book.