Denver Law Review

Volume 91 | Issue 3 Article 2

January 2014

How Do Judges Think

Harris L. Hartz

HOW DO JUDGES THINK?

JUDGE HARRIS L HARTZ[†]

This Essay is a sequel, or perhaps a concurrence, to one by my former colleague Robert Henry with the much more clever title, "Do Judges Think?"[1] That essay was responding to studies by social scientists purporting to show that a judge's decisions could be predicted by demographic data such as age, gender, religion, party affiliation, and law school.

The judges with whom I associate do not believe those studies. The studies are hard to reconcile with the day-to-day experience of changing our minds about how to decide a case. We read a persuasive appellee's brief after being convinced of the need for reversal by the appellant's brief; we read some more case law, a treatise, or even a persuasive law review article (occasionally); and we actually listen to our colleagues.

The image of the judge conveyed by such studies is of a willful, power-seeking person intent on imposing on society the judge's personal view of good policy. My image of my colleagues during my tenure on both a state and a federal intermediate appellate court is quite different. The work of an intermediate appellate judge is a fascinating, challenging task far removed from any sense of power. It would be remarkable if that were not so. After all, what judge is as impotent as an intermediate appellate judge? We cannot find facts, and we are not the last word on the law. Attorneys understand this. One judge I know was nominated for a newly available position on an intermediate appellate court while his trial-court nomination was pending; he told me that the lawyers in his hometown who had been trying to ingratiate themselves after the announcement of the trial-court nomination suddenly lost interest after he was nominated for the appellate court.

I suspect that most intermediate appellate judges enjoy the work primarily because it provides a marvelous opportunity to tackle puzzles and tell stories. I am indebted for this observation to two acquaintances. One is my son Andrew. Not long after I had been appointed to the state court, Andrew, a six-year-old who perhaps had been watching too many detective shows, greeted me on my arrival home by asking, "Did you solve any cases today?" Over the years, the more I have thought about his question, the more I think it captures the essence of my work.

---

† Judge, United States Court of Appeals for the Tenth Circuit.

1. Robert Henry, *Do Judges Think? Comments on Several Papers Presented at the Duke Law Journal's Conference on Measuring Judges and Justice*, 58 DUKE L.J. 1703 (2009).

The other contributor is Ninth Circuit Judge Susan Graber, who has been one of my favorite people ever since we studied together for the New Mexico bar exam. She once told me that her ambition had been to be a novelist, but coming up with plots was too difficult. "Now I have the perfect job," she told me. "All I have to do is write the last chapter."

Perhaps nonjudicial readers are skeptical. The judges they have met have strong personalities; they are not shrinking violets who try to avoid the exercise of power. Repeated judicial expressions of "*Moi*?" will never convince such a reader of my description of judges. So in this Essay I will take a different tack. I will not expound on the superiority of judges as people; only a few of us believe that anyway. I will simply point out that some of the traditions—well-known but little-discussed—that govern how judges go about their work make it much less likely that they will engage in the "policy" maneuvers that characterize what are known as the political branches: the legislature and the executive.

I am not going to try to tell you that judges do not make law. Whenever a court resolves an issue that was up in the air, it makes law. But process is important. And the process by which judges make law is quite unlike how the political branches make law. Judicial decision-making has many components. I will focus on only two: the traditions of consistency and neutral principles.

In the political branches, consistency may be considered a virtue, but it is a minor virtue. What is most important to constituents is that a political figure have the "correct" position *now*. Perhaps they can have more confidence in a candidate who has taken that "correct" position for a long time, but they view a recent switch to that position as a sign of gaining wisdom more than as a failure to play by the rules. A perfect consistency is less likely to be praised than to be condemned as displaying inflexibility and a failure to perceive the new realities.

In particular, consistency in process is not highly valued in the rough-and-tumble of politics. Whether a position is considered correct is almost always solely a function of the ultimate result, not the propriety of the procedure by which it was reached. The public is generally most interested in whose ox is being gored, not what weapon is employed in the goring. Failure to vigorously enforce the law is reprehensible when the failure is by a member of the opposing party but understandable, even laudable, when it is the failure of a member of one's own. Failure to obey procedural niceties is always worse when the failure is by one's political opponents. Consider Senate filibusters. Some would say that a senator's attitude depends largely upon whether the senator's party is in the majority in that body.

I am not saying that the political branches are bad. Results matter. Even highly intelligent, well-informed people are "result oriented." When was the last time you read a newspaper editorial condemning the

result of a judicial opinion but saying that the judges' decision was correct on the law? (I actually recall reading one in the *Albuquerque Journal*, whose editor is a law-school graduate.)

Judges certainly are born with the same instincts. But they perform in a system that frowns on being result-oriented. By tradition, a judge is expected to be consistent. (Note, by the way, that I am distinguishing between a judge and a court. It is more common for a court to be inconsistent than for a judge to be. The court, of course, can change direction as a result of a change in membership, with no individual member having changed his or her mind.)

Look at the ways in which the system encourages judicial consistency. First, the judiciary has a great institutional memory. Judicial decisions are published, and readily accessible, if not widely read. If a judge is inconsistent, the judge has no place to hide. When a judge's rulings on whether a party has standing to sue depends on the judge's sympathy with the party's cause, the world knows. This is less a feature of life for trial judges. I recall one judge who would, for example, overrule an objection to a question posed to a character witness but later in the same trial sustain an objection to the same question posed to a different character witness. We joked that the judge wanted to make sure that he got it right at least once. The judge's inconsistency was buried, though, because few would order a trial transcript and read it. In contrast, it is hard for appellate judges to cover their tracks.

Strengthening this constraint on the exercise of judicial power is the tradition that appellate judges write opinions explaining their decisions. An inconsistent member of the political branches may never be questioned about an inconsistency or, when questioned, may well be able to evade the question, as by changing the subject—instead of explaining her view on filibusters, the Senator may argue the merits of the proposed legislation being filibustered. Judges do not have that luxury. Readers can search the opinions for inconsistencies. And usually such a search is unnecessary. Tradition instructs that an opinion must not only provide the rationale for the result but must also summarize the losing parties' arguments (often at the outset of the discussion), which are likely to rely on any prior decision that appears inconsistent with the opinion. Most people, and that includes judges, care sufficiently about their reputations that they will accept an unpleasant result rather than expose themselves as irrational. We all recognize that any judge of sufficiently long tenure will have said things that others will find irrationally inconsistent; but I submit that the frequency of such irrational inconsistencies is much lower than it would be in the absence of the tradition of written explanatory opinions.

It is easy to overlook the importance of the role of consistency in judicial decision-making. But its application is ubiquitous. Some applications may seem mundane. In deciding whether a party has adequately

preserved an argument for appeal, we need to compare the case to others where we have found or not found preservation. Some are more profound: When is a dispute about official conduct a political question, one beyond the competence of courts to decide? Judges should not examine only the conduct of officials with whom they disagree.

Because of the mandate of consistency, the motives that led to creation of a doctrine are irrelevant when it comes time to apply it. One of my favorite examples is the creation of the legal fiction that a suit for injunctive relief against unconstitutional action by a state official is not a suit against the state itself because if the official was acting unconstitutionally, he or she was not acting for the state.[2] The doctrine is often invoked on behalf of the less fortunate in society. It was enunciated by the Supreme Court, however, to permit a railroad to challenge state regulations.[3]

The mandate of consistency is the source of one of the great challenges in writing opinions. Judges need to speak in terms of general principles, so their decisions do not appear ad hoc. But they do not want to speak with such generality that their words will come back to haunt them when a case arises with a different twist. A judge must balance the need to give principled guidance against the risk of stating a rule so broadly that a future case will compel the judge to write something inconsistent with that rule. One might think that the more experienced the judge, the more comfortable the judge will be in writing broadly. After all, over the course of years the judge will gain expertise in a particular subject matter and can write broadly with confidence. Sometimes that is true. At least equally often, however, experience teaches the judge that it is impossible for the human mind to anticipate all the variety of life and that judges should write with some modesty.

I learned that lesson early in my career. When I joined the New Mexico Court of Appeals, the court had to deal with three significantly different workers' compensation statutes. The old law had been "reformed," and the reform had been significantly revised shortly thereafter. A recurring question was which law applied. I was assigned a case raising the question and resolved to settle the matter once and for all. I read every relevant published opinion in the state and decided that the courts had always applied the law in effect on the date that the worker's cause of action accrued. I circulated an opinion saying so. One of the members of the panel was the senior judge on the court. He insisted that I preface

2. *See Ex parte* Young, 209 U.S. 123, 159–60 (1908) ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.").

3. *See generally* Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURT STORIES 247 (Vicki C. Jackson & Judith Resnik eds., 2010).

this statement of the general rule with the language, "in the absence of . . . compelling reasons to the contrary."[4] I remember thinking what a wimp he was, unwilling to take a firm stand. Although I included in the opinion the reasoning that persuaded me of the correctness of the general rule, I caved and included the escape-hatch language.[5] Lucky for me. Less than two years later I proudly wrote that "compelling reasons" required applying a statute whose effective date was after the worker's cause of action accrued.[6] The senior judge was also on the latter panel, but he was too much of a gentleman to say, "I told you so."

Now to the second constraint on judicial decision-making—the tradition that judges should apply neutral principles. Yes, as conceded above, judges make law. I know of no other way to describe a judicial decision that resolves a previously undecided legal question. But judges are less willful about it than those in the political branches of government. They invest less ego, or at least less policy-making ego.

The reasons for this are subtle. Every judge I have known is quite aware that he or she was not elected or appointed to decide the specific case at issue in a particular way. Maybe those who put the judge in office expected a favorable response on a few issues, but most matters a judge ends up deciding were simply not on the radar screen at the outset of the judge's term. As a result, most judges wonder from time to time what gives them the authority, the power, to determine what the law should be in a particular case. Why should my particular policy preferences be "the law" when there is no reason to believe that the public at large or the people to whom I "owe" my office share those preferences?

To avoid these self-doubts about legitimacy, judges look for neutral principles. I use this term to refer to methods of resolving cases—under the common law, statutes, or the Constitution—that do not require the judge to examine his or her personal preferences about what the best result would be. To some, maybe many or even most, the enterprise of finding such neutral principles may seem doomed to failure. But there has actually been great progress in recent decades.

Take the brilliant little book by Professor Melvin Eisenberg, *The Nature of the Common Law*.[7] This is not the place, and there is insufficient space, to summarize what the book expounds. I know of no judge, however, who has read the book and does not think that it provides the proper methodology for judges to do their common-law work without relying on their personal social-policy preferences. This is not to say that the book makes common law adjudication a mechanical process of applying algorithms. I recall vigorously dissenting from an opinion of a

4. Jojola v. Aetna Life & Cas., 782 P.2d 395, 397 (N.M. Ct. App. 1989).
5. *Id.*
6. *See* Lucero v. Yellow Freight Sys., Inc., 818 P.2d 863, 866 (N.M. Ct. App. 1991).
7. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

colleague of mine on the state court who shared my enthusiasm for the Eisenberg book. But at least we had a common framework to start from. We could debate the issue without resorting to the fallback position of, because "that's the way, uh-huh uh-huh, I like it."[8]

And much of the best work on statutory interpretation has been written since I became a judge. I would not say that there is a consensus on how to construe statutes. But there have certainly been developments that have achieved near-unanimous support. For example, there is much greater care in the use of legislative history, particularly floor debates. And I am optimistic that the recent book by Justice Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*,[9] will lead to more intelligent use of canons of interpretation (I wish the book had been available twenty years ago).

The ongoing debate on the gamut of interpretative issues—from the proper use, if any, of the absurdity doctrine to discerning the purpose of a statute and the propriety of assuming that the purpose has no bounds (is a statute an arrow or a vector?[10])—is all about developing neutral principles, that is, deciding how to read a statute without just saying, "I would like it to mean thus and so." We are improving what I would call the common law of statutory interpretation. Scholars and judges produce new insights that gradually gain traction and eventually are widely recognized as the best interpretative approach. Again, neutral principles will not eliminate the need for discernment and judgment. But they provide judges with a framework for adjudication that bears little resemblance to decision-making within the political branches. No executive or legislator wastes time asking, "Who am I to decide what the law should be?"

Alas, what about constitutional interpretation? There are deep divisions in that area, and cynics (perhaps rightly so, although I dissent on this point) view our highest court as acting pretty much like a political branch. To a large extent, however, differences on the Supreme Court reflect differences on what neutral principles to apply, such as the level of generality with which to read constitutional provisions. Perhaps Justices select their neutral principles with a view to particular results. But once those principles have been selected, the Justice is stuck with them. The principles will regularly, and in important ways (though perhaps not often), demand results from which the Justice would personally recoil.

My purpose here has not been to belittle judges. To say that they do not exercise the sort of raw power exercised by the political branches is not to say that their work is inconsequential. On the contrary. What jus-

8. KC AND THE SUNSHINE BAND, THAT'S THE WAY (I LIKE IT) (TK Records 1975).

9. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

10. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

tice would there be in a society whose members could not resort to the resolution of disputes by a tribunal that must apply neutral principles in a consistent manner? Judges take considerable pride in their work. It's just that they do not see their important work as being of the same nature as the important work of the other branches of government.