Constitutional Conscience

The Moral Dimension of Judicial Decision

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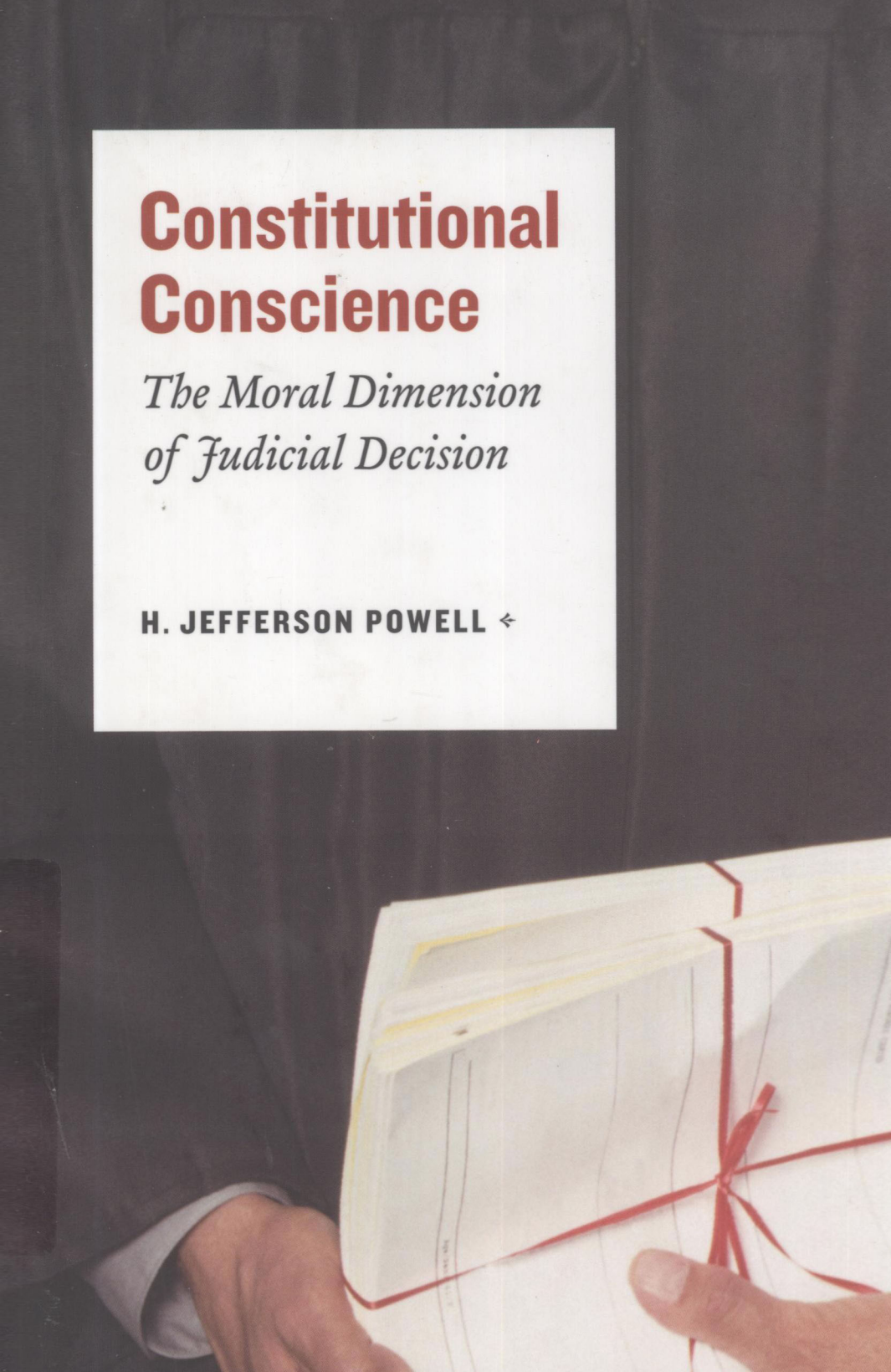

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CONSTITUTIONAL CONSCIENCE

For Sarah, with love
. . . our little book

PREFACE

In many law schools in the United States, constitutional law is a required first-year course. The wisdom of that curricular decision is at least debatable, for regardless of the instructor's intentions, an introductory course in the law of the United States Constitution can easily turn into a sustained lesson in cynicism. Constitutional law, at least much of the time, deals with matters that are clearly of political import, but the language in which we discuss it generally sounds like a form of apolitical law. The justices of the Supreme Court, whose opinions make up the core of most introductory courses, sometimes accuse one another of willful blindness to the Constitution's commands while insisting that their own views are the product of a scrupulous fidelity to those same commands, and it takes little time for the student to realize that the justices' positions generally fall into patterns, both in terms of outcomes and of alliance within the Court, that seem best explained as ideological. It is hardly surprising that some students come to the despairing conclusion that constitutional law is a systematic hypocrisy, and that others happily embrace the same understanding of the law because it seems the product of hard-bitten realism.

I do not believe that constitutional law is, or ought to be, or needs to be, an exercise in hypocrisy. If we (students, their teachers, lawyers, judges, citizens) become cynics about the law of the Constitution, then of course we can make the language of the law hypocritical, and if enough of us do that for long enough, then constitutional law will be a fraud. But that is a choice that we need not make. It is possible to understand the American constitutional tradition in a different light, as

an always fallible, often flawed effort to do what its language implies it to be: the faithful interpretation of a fundamental law that is this republic's chosen means of self-governance. How we can believe that to be so in the face of all the evidence to the contrary is the theme of what follows.

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The debts I have incurred in thinking and writing about this subject go back over many years, and I know I cannot acknowledge them adequately. I want to mention, however, a few specific contributions. Over the years, my own first-year students have been a challenge and an inspiration, and much that is here is the product of our efforts together to understand constitutional law. Much of chapter 4 has its origins in the Sixth Annual Walter F. Murphy Lecture in American Constitutionalism delivered under the auspices of the James Madison Program in American Ideals and Institutions at Princeton University. It was an honor to be invited to deliver the lecture, and to participate in the lively discussion that followed. I am deeply grateful to Joseph Vining, who gave the first draft of the manuscript an extraordinarily close, charitable, and critical reading. I greatly appreciate as well the advice and encouragement that David Lange, Robert Mosteller, Jedediah Purdy, and James Boyd White each gave me at important points. As always, my daughter Sara has provided interest, enthusiasm, and insight. I am indebted as well to John Tryneski for his keen editorial skills, to Erik Carlson for his excellent copyedit of the manuscript, and to the Press's anonymous readers for their comments.

Finally, this little book would not exist except for the numberless conversations I have had about its themes with Sarah Sharp. To those conversations, Sarah brought both her deep moral passion and her keen lawyer's mind, and I have learned more than I can say from her. I hope she will accept the book and its dedication as a sign of our new life together.

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INTRODUCTION

Near the end of his opinion in *Marbury v. Madison*, Chief Justice John Marshall made an interesting suggestion. His topic, at that point in the opinion, was the justification he claimed for the judiciary's exercising the authority to disregard a statutory command when, in the judges' opinion, that command contravenes the Constitution of the United States. Having rested his claim primarily on the nature of a written constitution and the necessities of judicial decision, Marshall added, as an ancillary consideration, the import of the third paragraph of Article VI, which provides that all legislators and executive and "judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." This requirement, Marshall asserted, was evidence that "the framers of the constitution contemplated that instrument, as a rule for the government of courts"—and thus that the courts so governed were empowered to follow the Constitution instead of Congress in the event of conflict, to exercise (in modern language) the power of judicial review:[1]

> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?
>
> The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear

> that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."
>
> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.[2]

Marshall's attempt to support judicial review, even in part, by invoking the Constitution's oath requirement has not fared well among modern scholars, who argue that it begs the real question raised by judicial disregard of a statute (Whose understanding of the Constitution is to prevail, the judges' or Congress's?), or even that the oath requirement actually undercuts Marshall's overall reasoning.[3]

The canon of interpretive charity counsels us to look not so much for the holes we can poke in Marshall's comments as for some sense of why he thought them worth making.[4] Marshall's language clearly suggests that he did not see his discussion of the oath requirement as a lightweight or throwaway argument: the requirement, he insisted, would become "immoral . . . worse than solemn mockery . . . a crime," if judges were obliged in their decisions to follow statutory rules that contradicted what they believed were the commands of the Constitution. This is strong, emotive language, and even if we cannot be sure of Marshall's precise line of thought, I believe that we can discern the general thrust of his words. Marshall believed that the practice of judicial review rests not only on the structural features of the American Constitution that he emphasized earlier in his opinion—the political "theory . . . essentially attached to a written constitution"

and its relationship to the judicial office[5]—but flows as well from the judge's individual obligations as a moral actor. He perceived in the oath requirement a juxtaposition of the judiciary's governmental role and the judge's personal conscience, one that gives moral weight to the individual's exercise of the power of judicial review that the community has entrusted to him.[6]

This implies, in turn, that a judge must take the Constitution—the Constitution itself, the interpretable document that is open to the judge's own "inspection" in the search for its meaning and application—as the ultimate rule governing his official actions. To accept this conclusion is not to decide in advance that the judiciary is the exclusive or (always) the final ordinary interpreter of the Constitution, or that an individual judge is always entitled to follow his own rather than someone else's conscientious view of the Constitution's meaning. (Marshall thought that some constitutional questions were "political" in nature and answerable only by one of the nonjudicial branches of government, and he doubted neither the normative weight of practice and precedent nor the duty of a lower-court judge to obey a superior tribunal.)[7] But Marshall's fierce insistence that judicial review is in some manner a question of, or for, the judge's conscience implies a closer connection than is sometimes acknowledged between how we understand constitutional law and how individual judges understand the moral circumstances in which they carry out their duties. For Marshall, the judicial oath is not, as some of his critics contend, "merely an affirmation of loyalty to the political principles of the nation, [rather than] a promise to judge in a certain way or ways."[8] Instead, it bears directly on how the judge carries out his duties and understands his role in relationship to other governmental officials.

One hundred ninety-nine years after John Marshall wrote *Marbury v. Madison*, one of his most distinguished twenty-first-century colleagues on the federal bench, Richard A. Posner, made a comment in a law review article that is, at first glance anyway, startling. Judge Posner's intent was to rebut the possible charge that his professional beau ideal, "a good pragmatist

judge," would simply ignore the value of "maintain[ing] continuity with established understandings of the law" in his or her search for the best social outcome in a case. Not so, Posner reassured his readers: the pragmatist judge will give full weight to the costs in terms of "uncertainty about legal obligation and . . . cynicism about the judicial process" that unguarded judicial creativity risks. In doing so, however, Posner hastened to disavow a moral reading of his words: "The point is not that the judge has some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent; that would be formalism."[9] Let us put to one side for the moment Posner's assumption that "that would be formalism" is sufficient to condemn an argument about the actions of judges (the issue, though not Posner's views on it, will return),[10] and also the views of statutory construction and stare decisis that his comment implies: I want to focus on his belief, which I shall now put in the form of an assertion rather than a denial, that a judge has no kind of moral or even political duty to abide by constitutional text.

On the face of it, this assertion stands in direct contradiction to Chief Justice Marshall's discussion of the oath in *Marbury*. The 1803 opinion appears to rest the legitimacy of judicial review, in part, on the judge's moral duty to "inspect" the Constitution—surely assumed here as earlier in the opinion to be the written and formally adopted instrument—and accept its commands as the supreme rule of government for judicial action that overrides contrary rules promulgated by Congress. The 2002 article appears to dismiss entirely any link between the judge's moral and political duties (if any) and the written Constitution by expressly assuming that courts should continue to engage in judicial review. The contrast is quite remarkable: *Marbury v. Madison* is, for all the sniping it takes from scholars, *the* canonical enunciation of the power of judicial review in modern American law, and almost all American constitutionalists, now as in Marshall's day, have treated the authority of the Constitution's text as axiomatic.[11] For a sitting federal judge to repudiate both in one fell swoop—without the sky falling, or at least questions

being raised about his fitness for office[12]—strongly suggests that it is time to reexamine the validity of Chief Justice Marshall's assumption that the Constitution, judicial review, and the moral duties of the federal judge are closely linked.

Judge Posner himself has acknowledged the profound issues his 2002 remark raises, without immediate reference to *Marbury*, to be sure, and proposed an answer to the suggestion that his view "counsel[s] disobedience to the oath that Article VI . . . requires":

> This would be so if the oath were interpreted to require obeisance to specific text or precedents, but that would be ridiculous, since precedents are overruled and the text of the Constitution has frequently been rewritten by the Supreme Court in the guise of interpretation. The oath is a loyalty oath rather than a direction concerning judicial discretion. The loyalty demanded is to the United States, its form of government, and its accepted official practices, which include loose judicial interpretation of the constitutional text.[13]

It is wrong, Posner claims, to accuse him of "seem[ing] to make the oath a kind of lark."[14] The constitutional oath pledges those who take it to loyalty to "the accepted official practices" of American government. But Posner clearly does not include among those practices a sense of moral obligation to obey the Constitution's text. Despite his reference to "loose . . . interpretation of the constitutional text" (which might imply in a different context that something resembling interpretation of a document is going on), nothing in the tone of this passage (no "*obeisance* to *specific* text"; the Supreme Court "rewrites" the text "in the guise of interpretation") gives us any reason to think that Posner has rethought his earlier assertion that a judge has no kind of moral or even political duty to abide by constitutional text. Indeed, what he discounted earlier as "formalism" he subsequently dismisses as "ridiculous."

Judge Posner's new formulation sharpens his disagreement with *Marbury*: Posner has expressly adopted the "loyalty test" view of the oath that *Marbury* contradicts, and he now appears to concede that his approach *does* counsel violation of the oath of office if that oath is thought to require adherence to the "specific text" that Marshall wanted judges to interpret. Of course, in itself this disagreement proves nothing, other than Posner's willingness to stake out a position that renders him open to attack from many sides (and that of course can be a sign of the virtue of intellectual courage): perhaps Marshall was wrong and Posner is right.[15] And important as both judges are in the history of American law, my interest in them in this book lies not in resolving their relationship but in the issue their apparent disagreement lays bare.

Let me briefly state the two premises of this book. The first is that in discussing constitutional law we can propose, for public consideration, moral or ethical evaluations meaningfully, if minimally. The issue of how to think about such propositions in a culture such as ours is incredibly difficult, and it will emerge as a central theme of this book. For now, all that I need to ask the reader to entertain is a very thin set of ethical presuppositions. It is generally wrong for human beings, acting as participants in a community or society, to lie about their actions or intentions. There is, as a consequence, a moral difference between making a mistake in acting in relationship to a community or society and acting deceitfully or in bad faith. This difference is especially weighty when the individual is acting for the community—we speak of someone holding an office or position of trust, a phrase that underlines the implicit moral significance of her relationship to the community.[16] Good faith in acting for a community is a necessity if the community is to function successfully, and the community therefore has a moral claim on the person who undertakes to act on its behalf. (We will not stop to consider the possibility that a society can be so morally repugnant that it can make no such claim even on individuals who purport to act on its behalf.) For some people, this moral claim begins and

ends with the value to the community of good-faith action. I think it more congruent with our experience of such matters to see this moral claim as a internal demand about how I should act, even if the demand is triggered by the needs of others. But this is a dispute we need not resolve: the main line of reasoning is one that was familiar to the founding generation and is equally so to twenty-first-century Americans.[17] For anyone who sincerely disagrees with it, I have nothing (in this work) to say. I shall assume, instead, that it makes sense generally in American society to speak of honesty and good faith in dealing with and on behalf of the American political community.

My second premise is that constitutional law's central function is to provide a means of resolving political conflict that accepts the inevitability and persistence of such conflict rather than the possibility of consensus or even broad agreement on many issues. The best statement I know of this assumption was set forth several years ago by the philosopher Stuart Hampshire in a series of lectures entitled Justice Is Conflict. In a complex, heterogeneous society such as the United States, Hampshire argued, moral disagreement over a wide range of social issues is inescapable: political conflict is thus a feature of any free or open society. At the same time, any society must have means for resolving particular controversies, and for those means to serve their social function of conflict resolution they must observe what Hampshire asserted to be the universal claim of procedural justice or fairness that both sides to a controversy will be heard. But procedural justice is never found, outside the theorist's study, in a pure state of abstract rationality: in any given society it will be embedded in "the customary and rule-governed procedures of public argument and decision making appropriate to such cases in this particular society." Even though the "[p]rocedures of conflict resolution within any state are always being criticized and are always changing and are never as fair and as unbiased as they ideally might be," they can play the role of settling controversies because they are "well known and part of a continuous history." Widespread disregard for these society-specific traditions

would undermine—in the end, fatally—their general acceptability as a means of restoring or maintaining social peace: "The institutions and their rituals hold society together, insofar as they are successful and well established in the resolution of moral and political conflicts according to particular local and national conventions."[18]

It is immaterial to the argument of this book whether Hampshire was right in making assertions about all complex societies. Whatever the truth of his universal claims, his argument describes American constitutional law from a useful perspective. Constitutional law is one of the central institutions for conflict resolution in this society; as a formal matter it is, within its substantive boundaries, the most central ("the supreme Law of the Land," as Article VI puts it). Despite the fact that with some frequency particular constitutional decisions (the school desegregation decisions, *Roe v. Wade*, warrantless surveillance in the wake of 9/11) anger this or that part of the American populace, as a general matter it seems clear that most Americans see the overall system of constitutional decision making as legitimate, and despite the constant existence of gaps between constitutional principle and political practice, to a remarkable extent both elected officials and public opinion accept Supreme Court decisions as binding. There can be little doubt, I think, that this is because constitutional argument and Court decisions are "well known and part of the continuous history" of the Republic.

The substantive features of constitutional law, moreover, track Hampshire's analysis.[19] The power of judicial review itself, as *Marbury v. Madison* itself stated, rests on the duty of the federal courts to resolve "Cases and Controversies" in circumstances and between contending parties over whom the courts have jurisdiction. Not all constitutional decisions, to be sure, involve a controversy between different parties. An executive-branch lawyer giving advice to the president about the constitutionality of a certain course of action usually does not do so after the fact, when individuals or institutions are ranged against one another over the results of some action, but in advance of the president's

decision: the controversy in that case is conceptual, a matter of weighing the arguments for and against the proposed decision. In both situations, however, long-established practices of argument and reasoning identify how it is that the constitutional decision maker—whether a judge rendering judgment, a lawyer offering advice, or an elected official making a political determination—is to go about coming to a decision about whatever constitutional issues may be in question, and therefore resolving the interpersonal, institutional, or intellectual conflict. The forms of constitutional argument, the sorts of considerations that a constitutional decision maker can take into account in coming to a decision, are to be found in our actual, traditional practices of constitutional interpretation. A substantial divergence between what constitutional decision makers say they are doing and what they actually are or are perceived to be doing would undermine in the long term the value of constitutional law to American society.[20] Again, if this last assumption seems wrong or wildly implausible to the reader, this book will not attempt to persuade him or her otherwise.

So much for premises: what remains for this introduction is a statement of what I shall argue on their basis. The central claim of this book is that Chief Justice Marshall was right to believe that the exercise of the power of judicial review presents profound moral questions for those who wield it and thus for all of us affected by it. As my contrast between Marshall and Judge Posner is meant to illustrate, this claim is controversial. Posner's view of law as a morally neutral tool for the achievement of goals set by wholly extralegal considerations is widely shared, and not just by those who share his interest in understanding law through the lens of economics. From that perspective, talk about the moral dimension of constitutional interpretation is pointless, because such conversations are in principle irresolvable, expressions of conflicting preferences none of which can be said to be right or wrong, better or worse, unless they are translated into other terms, such as efficiency or social order, at which point they are (it is assumed) no longer moral.[21] A surprisingly similar