

Judging Theory – Abstract

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Judging theory is a conceptual category for the distinctively judicial factors that shape adjudication. This Article identifies constitutional judging theory by highlighting the priority of judicial role in constitutional adjudication. It does so by examining revealing slices of the extrajudicial and judicial output of two distinguished federal judges: Judge Richard Posner and Judge J. Harvie Wilkinson III. Both are prolific scholars and authors of scores of opinions on constitutional questions. And both have presented one another as foils. Posner is a pragmatist; Wilkinson is a legalist. Posner emphasizes the importance of economics and empirical inquiry in the context of “overcoming” law; Wilkinson emphasizes legal materials and judicial restraint in the context of stressing the rule of law. The two appear to come at adjudication guided by directly opposing theories.

Yet beneath these disagreements, a more fundamental harmony of perspective unites them. This Article excavates and describes that perspective, one that leads them to criticize constitutional theories that marginalize the relationship between constitutional interpretation and judicial role in constitutional adjudication. This is the critical dimension of “judging theory”: Posner and Wilkinson are passing judgment on theory. But their writing also reveals a constructive dimension: more than a constitutional theory, what judges bring to constitutional adjudication is a distinctive perspective that arises out of their office. By distinguishing judging theory from other types of constitutional theory, this Article suggests that the best understanding of judging does not sit outside constitutional decisionmaking, but emerges from sustained attention to the practice of judging itself.