Critical Dialogue

Judges and Their Audiences: A Perspective on Judicial Behavior. By Lawrence Baum. Princeton: Princeton University Press, 2006. 231p. $29.95.
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— Mark A. Graber, *University of Maryland*

Fair reviews of this work will highlight its seminal contributions to the study of judicial behavior. In remarkably accessible prose, Lawrence Baum demonstrates that existing models of judicial behavior fail to account for the human factor in judging. Judges, Baum points out, are as interested in being liked and maintaining their self-esteem as other human beings. *Judges and their Audiences* then details the numerous ways in which judicial needs for approval from various audiences may influence judicial practice. While modest in tone, the work sets out a research agenda likely to inspire the next generation of judicial behaviorists.

Baum works from two simple premises. The first is that, contrary to much accepted wisdom in political science, few justices are likely to be motivated exclusively or even primarily by a desire to make good legal policy. He notes how "working to achieve legal and policy goals does not serve judges' self-interest as conventionally defined" (p. 11). Justices rarely obtain any material benefits from their decisions, and the actual impact of most decisions on public policy is not great enough to warrant substantial investments of energy. "Even with their best efforts," he asserts, "judges can exert only limited influence over the choices of other governmental officials" (p. 16). The second premise is that justices are motivated by the same psychic forces that motivate other people. "People want to be liked and respected by others who are important to them," Baum points out, and this "desire to be liked and respected affects people's behavior" (p. 25). Given that "justices are people" (p. 25), scholars should pay more attention to the ways in which this "desire to be liked and respected" influences judicial behavior.

Justices seek approval from various audiences. These include other justices, other governing officials, lawyers, social peers, interest groups, the general public, and the media. Sometimes their desire to be liked and respected influences how they frame their opinions. Baum observes how Justice Antonin Scalia's "style of opinion writing has won him an admiring audience, an audience that he clearly enjoys" (p. 41). When justices conclude that the law requires them to sustain government actions they find distasteful, their opinions often indicate that they would reject the policy under legal attack were they the initial policymaker. More important, the book suggests that judicial desires to be liked and respected may influence judicial rulings. "[J]udges," Baum asserts, "could be expected to depart from their most preferred policies on some occasions in order to appeal to audiences they care about" (p. 44). Legal abortion may have remained the law of the land because "Justice [Sandra Day] O'Connor had an incentive to avoid taking positions that would jeopardize the adulation she received from well-educated women—women who tend to support feminist goals" (p. 71). *Bush v. Gore* (2000) may have been shaped by the personal and policy preferences of more conservative justices. The author notes that "if Justice Scalia and Justice [Clarence] Thomas had taken a position that helped Al Gore become president, they would have been greeted with somewhat less warmth at the next gathering of the Federalist Society" p. 128).

Judges provides a particularly interesting perspective on the so-called Greenhouse Effect, the tendency for conservative justices to become more liberal over time as they allegedly seek approval from liberal elites in the nation's capital. Judicial susceptibility to these blandishments, Baum claims, seems associated with the justice's previous residence. Conservative Supreme Court judicial appointees who have spent little time in the Washington community before joining that bench, most notably Justices O'Connor, Anthony Kennedy, and David Souter, tend to exhibit increased liberal behavior during their judicial tenure. Conservative Supreme Court judicial appointees who have had lengthy experience with the Washington community before joining that bench, by comparison, tend to remain conservative throughout their judicial tenure. These differences suggest that initial exposure to liberal Washington audiences has a distinctive impact on conservative justices from the hinterlands, who must develop new reference groups after moving to the nation's capital.

These claims are as convincing as Baum wants them to be. *Judges* is refreshingly unassuming. The author is more interested in encouraging research on the influence of judicial audiences than in establishing the definitive explanation of judicial decision making. The book is peppered

with statements about "the impact of judges' audiences that are expressed in indefinite terms (e.g., 'may,' 'might')" because such phrases best express "the inherent limits in our understanding of the forces that shape behavior such as judicial decisions" (pp. 173–74). More confident assertions about the impact of judicial audiences, Baum carefully reminds readers, must await more rigorous testing.

Judges better elaborates than offers corrections of existing models of judicial behavior. The judges described in the book rarely seem to choose consciously between their desire to be respected and their desire to make good legal policy. Baum's examples more convincingly indicate that judicial audiences influence what justices think is good legal policy. As he notes in his conclusion, "[j]udges' efforts to appeal to their audiences exert an impact even when those efforts are not fully conscious, as is often—indeed, usually—the case" (p. 158). From this perspective, judges remain primarily interested in making good legal policy, but their thoughts about good legal policy are influenced by their preferred audiences. Judges who identify with labor unions or conservative evangelicals, for example, are likely to look to these audiences for guidance and support as new issues arise.

Judges should be assigned in all core graduate courses on judicial behavior and many undergraduate courses on law and society. This study provides both a good introduction to the literature on judicial decision making and a major challenge to the direction of contemporary scholarship. *Judges* may well be the best book on public law in more than a decade, and it is likely to shape future research on judicial behavior.

Future students of *Judges* might consider whether Baum's analysis explains Baum's scholarship. If "citation[s] of legal materials in court deliberation" are best explained by "judges' interest in the esteem of colleagues" (p. 60), then the citations to other scholarship are probably best explained by Baum's desire for the esteem of his colleagues. Scholars like to be cited and they think more highly of those who cite them. Consider the two citations to Graber in *Judges.* Neither contributed materially to the argument, but both increased the likelihood that Graber would think favorably of Baum, read his book, and, when asked, write what he hopes is a largely positive review.

Such motivational analyses are often linked to normative questions concerning institutional design. The proponents of the "new science of politics" who championed the Constitution of the United States anticipated Baum's work when they recognized that political actors are often motivated by desires for respect and fame. James Madison sought to compensate for the "defect of better motives" by designing institutions that would "attach the interests of the person to the interests of the office." Promotion and hiring practices in academic departments are similarly structured to provide professors with personal incentives to produce rigorous scholarship. That such side payments frequently influence academic work at the margins may be the necessary price for ensuring sound work. We accept that reviews may include gratuitous citations to such mentors, friends, colleagues, and protégés as Rogers Smith, Keith Whittington, Douglas Grob, and Rebecca Thorpe to the extent that we believe reviewers concerned with their reputation will for the most part tend to highlight the best scholarship and recommend only such fine scholarly works as *Judges and Their Audiences.*

The foundational studies of judicial decision-making behavior were originally grounded in these concerns about institutional performance. Charles Grove Haines, Herman Pritchett, and other legal realists did empirical research that was self-consciously directed at important normative problems. They had "ideological axes to grind." Their path-breaking quantitative studies effectively discredited Supreme Court rulings limiting state and federal capacity to regulate the national economy by demonstrating that decisions striking down progressive legislation were rooted in judicial policy preferences rather than law.

The standard humanistic complaint against contemporary students of judicial behavior is that their studies no longer have the same jurisprudential bite. Scholarship seeking to demonstrate with increasing precision and certainty that judicial decisions cannot be explained entirely by text and precedent has suffered from diminishing normative returns for more than a generation. Political scientists of all methodological persuasions have long agreed that judicial values matter. Terri Peretti, James Fleming, and many other constitutionalists writing at the turn of the twenty-first century take value voting for granted when spinning theories of the judicial function. Much judicial behavior scholarship, unfortunately, remains directed at Justice Owen Roberts's infamous claim in United States v. Butler (1936) that justices in constitutional cases do no more than "lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former." More often than not, scholarship inspired by the behavioral revolution appears to lack conscious connection to any political problem. A political science tradition that began by evaluating whether Justices James McReynolds, Pierce Butler, Willis Van Deventer, and George Sutherland were correctly deciding cases is being reduced to commentary on whether Jeffrey Segal, Harold Spaeth, Lee Epstein, and Howard Gillman are correctly explaining cases.

Blaming Baum for the deficiencies of empirical legal scholarship is, however, grossly unfair. The ghost of Justice Roberts still haunts the law reviews and judicial opinions, justifying continued exorcism aimed at reminding citizens that judging entails more than basic legal reading comprehension. Many passages in *Judges* suggest links between the impact of judicial audiences and traditional normative concerns. Baum's observation that most justices

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seek approval from audiences that tend to promote "the values held by elites in American society" (p. 163) provides grist for constitutional populists who see judicial power as structurally biased toward the politically powerful. "If," as Baum suggests, "an orientation toward the legal profession strengthens the legal element in judges' thinking about cases," then those who wish to strengthen "the legal element in judges' thinking" ought to implement the institutional reforms that will encourage justices to orient more toward the legal profession and less toward more partisan interest groups.

Judges is nevertheless not entirely innocent of the charges humanists levy against behavioral research. The work is organized around problems in political science, not problems in the political world. Baum proposes to "improve our collective efforts to gain a better understanding of judicial behavior" and complains that existing "models rest on a conception of judges' aims that does not comport well with what we know about human motivation" (p. 174).

The reasons why we must better explain judicial behavior are taken for granted. Baum rarely distinguishes between judicial practices that seemingly have no normative significance, judicial practices that might have normative significance, and judicial practices that clearly do have normative significance. Most theories of the judicial function are indifferent to the wittiness of judicial opinions. Legal purists who oppose any manifestation of value voting do not care whether judicial value choices are influenced by their social peers. While Baum is well aware of the ongoing normative stakes in positive theories of judicial behavior, the same may not be said for graduate students studying judicial behavior, who are reading less and less legal and democratic theory. They might benefit from more jurisprudential guidance than the book provides. By failing to highlight when the influence of judicial audiences has normatively relevant consequences, *Judges* may generate much scholarship that will not help students and citizens evaluate the functioning of judicial institutions.

Public law scholarship should provide scholars and citizens with tools for assessing judicial performance. Political scientists who do normatively significant empirical work on judicial behavior best contribute to this endeavor when they ask whether actual judicial motivations, including judicial desires to be liked and respected, promote or hinder desirable judicial practice. *Judges* promises to be a classic in this constitutionalist enterprise. Citizens who wish to improve judicial performance must recognize that judges are human beings who respond to the same incentives as other human beings and are not, as Baum points out, "Spocks who lack emotion and eschew self-interest" (p. 174). Future public law scholarship elaborating on this vital insight is likely to better constitutional practice, however, only if the focus is redirected from our models to our politics.

Response to Mark Graber's review of *Judges and Their Audiences*

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— Lawrence Baum

I appreciate Mark Graber's review of *Judges and Their Audiences.* The review is generous, but it is also perceptive about the book's argument and its implications. As the author, I learned from Graber's thoughtful discussion of what I did and did not do in the book.

Graber emphasizes something I did not do: give explicit attention to the normative implications of my depiction of judges. In his view, the normative issues in judging are considerably more important than the issues of explanation on which I focused. Whether or not that view is correct, it may be advisable for those of us who are less qualified to assess normative issues than scholars such as Graber to stick to explanation. Nonetheless, I would like to discuss briefly what I think is the primary normative issue raised by my book.

Legal realists and behavioral scholars strongly challenge the view that judges seek only to interpret the law correctly—that is, to make good law. This challenge, of course, has important normative implications. If judges act on their policy preferences and not just their reading of the law, that fact raises questions about the legitimacy of some roles they play in government and society.

In a sense, however, the belief that judges are committed to achieving good policy is as idealistic as the belief that they want only to make good law. In both conceptions, as developed by scholars, judges act without self-interest or emotion to advance their visions of the public good. The strategic judges who populate the most influential models of judicial behavior today expend great effort to achieve their policy goals, even though they gain no direct benefit by doing so. That depiction of judges may be comforting.

The reality of judicial behavior is more complicated. Judges are human beings, and self-interest and emotion do affect their choices. That is true even of the Supreme Court, despite institutional attributes that reduce the relevance of the justices' self-interest to their work. In my book, I argue that the universal interest in approval exerts a powerful impact on Supreme Court justices, as it does on other judges.

This nonidealistic depiction of judges might be disturbing. Yet recognition that judges have the same motivations as other people should combat a misunderstanding that has unfortunate effects. When we conceptualize judges as either law-oriented or policy-oriented, some people (including some judges) find it easy to conclude that a judge who is sufficiently virtuous and strong-minded will eschew policy considerations for the pursuit of good law. But if we recognize that judges pursue law, policy, or other goals on the basis of motives, such as the need to be liked