

Michigan Law Review

Volume 116 | Issue 6

2018

The Pragmatism of Interpretation: A Review of Richard A. Posner, *The Federal Judiciary*

Amul R. Thapar
United States Court of Appeals for the Sixth Circuit

Benjamin Beaton
Sidley Austin LLP

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 MICH. L. REV. 819 (2018).

Available at: <https://repository.law.umich.edu/mlr/vol116/iss6/2>

<https://doi.org/10.36644/mlr.116.6.pragmatism>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

**THE PRAGMATISM OF INTERPRETATION:
A REVIEW OF RICHARD A. POSNER,
*THE FEDERAL JUDICIARY***

Amul R. Thapar & Benjamin Beaton***

THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES. BY *Richard A. Posner*. Cambridge and London: Harvard University Press. 2017. Pp. xv, 430. \$35.

INTRODUCTION

Just when you thought Richard Posner¹ couldn't write any faster, he managed to squeeze two books into one. The final publication of his judicial career, *The Federal Judiciary: Strengths and Weaknesses*, is a fitting valedictory for America's most prolific judge. It features a robust procedural critique of the operations of the federal courts, alongside an impassioned substantive call for his colleagues to adopt Posner's brand of judicial pragmatism. Those two theses, however, are hopelessly at war with each other: the case-by-case interpretive pragmatism Posner advocates would directly undermine the systemwide pragmatism he claims to prioritize in the courts' operations.

In assessing federal judges' strengths and weaknesses, Posner finds much to critique. His assessments are incendiary, profound, and trivial—often all on the same page. Readers should arrive with an appetite: a single paragraph on page 21, for example, covers the courts' reliance on multifactor tests and canons of construction, lack of candor, verbosity, jargon, pretense of objectivity, inadequate caseload, inadequate argument time, inadequate schedule, and use of the dreaded Bluebook.

Many of these staccato objections echo portions of Posner's past works. This particular book's most sustained and relevant criticism is that the bench and bar are too rigid and reactionary: backward-looking "formalism," focused on dusty precedents and historical meaning, often masks judges'

* Circuit Judge, United States Court of Appeals for the Sixth Circuit (2017–present); District Judge, United States District Court of the Eastern District of Kentucky (2008–2017). Nothing in this piece reflects in any way on any pending or future case that may come before the court.

** Sidley Austin LLP. The authors would like to thank Brian Fitzpatrick, Kurt Johnson, Joe Masterman, Maria Monaghan, Sam Rudman, and Jonathan Urlick for their helpful comments and assistance.

1. Senior Lecturer, University of Chicago Law School. Posner published this book shortly before retiring from the United States Court of Appeals for the Seventh Circuit.

true reasoning.² By elevating form over substance, Posner suspects, advocates and judges apply a veneer of objectivity to half-baked arguments, political preferences, and outcome-oriented decisions.

This first thesis, criticizing legal rigidity, contains a grain of truth. Lawyers and judges can be a stodgy bunch (pp. 4, 50). And that can make the law less accessible and less sensible. Posner highlights many aspects of our system—from the courts' pace to the caselaw's complexity—that could improve with a less formulaic and more plainspoken approach. When briefs and opinions elevate form over substance, they can obscure the governing legal principles and diminish the utility of the judicial process as a whole.

But Posner's second major thesis, advocating consequentialist interpretation, is a strange response to this problem. Posner complains that formalist judges are using interpretive tools to achieve outcomes they like.³ His solution? Replace the formalism that he believes is backward-looking with an aggressive *substantive* pragmatism that eschews traditional limits of judicial restraint and democratic accountability.⁴ But if the problem is masking outcome-driven decisions with legalese, isn't the solution more transparency, sounder reasoning, and greater objectivity? Not according to Posner. Instead of binding policy-driven judges to the rule of law, Posner would liberate them to do justice as they see fit—at least when they can avoid any textual or precedential barriers “by hook or by crook.”⁵

Setting aside problems of popular consent and separation of powers, Posner's version of pragmatic case-by-case judging, when considered in the aggregate, fails even on his own pragmatic terms. Litigants, lawyers, and judges depend on the stability and ascertainability of the law. Yet without an advance commitment to basic interpretive principles (those formal legal texts, precedents, and rules of interpretation this book disparages), who can anticipate how a judiciary of Posnerian pragmatists would articulate and apply that law? Everything is up for grabs when judges opt “not to worry initially about doctrine, precedent, and the other conventional materials of legal analysis, but instead to try to figure out the sensible solution to the problem[s]” before them (p. 80).

This view of the judge's role is fundamentally at odds with our experience litigating and deciding cases in the federal courts. Equally important, “pragmatic” interpretation unleashes great unpredictability outside the courtroom: it becomes hard to advise clients, arrange legal relationships, and plan everyday conduct.

Posner's substitution of forward-looking pragmatism for backward-looking (which is to say, ordinary) tools of legal interpretation, therefore, would only exacerbate the operational shortcomings he critiques. And vice versa: his operational critiques—though often valid—have little to do with his substantive critique of legal formalism. From our perspectives in and

2. See, e.g., pp. 54–55, 80–81.

3. E.g., pp. 385–86.

4. See p. 390.

5. P. 80; see p. 261.

among the federal judiciary, Judge Posner's cure would only worsen the disease.

THE PRAGMATIC JUDICIARY: EFFICIENT, TRANSPARENT, AND INTELLIGIBLE

[T]he sum of the "small matters" discussed . . . is not itself a small matter.
(p. 60)

What did *The Bluebook* ever do to Richard Posner? His scorn for the "Uniform System of Citation" is unrelenting. No subject (save Justice Scalia, and perhaps Justice Kagan's comments *about* Justice Scalia)⁶ comes in for harsher treatment in this book. Yes, we (and countless judges, lawyers, and students) agree that the 500-page ukase is "hate[d] . . . with a passion" (pp. 21, 46–48, 61). The Berkeley Journal of Gender, Law & Justice, whose statement explaining its decision to ditch *The Bluebook* Posner block-quotes, was amply justified in rejecting the "investment of editorial time and effort which is wildly disproportionate to the [Bluebook's] utility" (pp. 46–47). But what does that have to do with the strengths and weaknesses of the federal judiciary?

The same question can be asked of many other Posnerian pet peeves. These command substantial attention in *The Federal Judiciary* (if not the actual federal judiciary). Given the book's ambition, these harangues often border on the trivial. Why does it matter whether law clerks call their boss "Judge," "Your Honor," "Amul," or "Hey you"?⁷ For that matter, why does Posner care whether the judicial workplace is called "chambers" (derived from the Old French *chambre*, he explains) rather than "office" (derived from the Old French *ofice*, Google explains)?⁸

"What does it tell us," Posner asks, "about our judges, and the legal profession more broadly," that "such antiquarian silliness persist[s]?" (p. 7). One could ask the same question about many other objects of his disapproval: the spittoons behind the Supreme Court bench (p. 216), censored curse words (pp. 216, 390–92), untelevised judicial hearings (pp. 13–14, 215), and unpublished bench statements (pp. 215–16). What do *they* tell us about the strengths and weaknesses of the federal judiciary? Candidly, we have no idea.

Other trifles, however, may add up to something more. Though the lead is well buried, "the sum of [at least some of] the 'small matters' discussed" shows how a persistent emphasis on form can diminish the substantive quality of the courts' output.⁹ Posner identifies a number of ways in which

6. Posner's criticism of Justice Kagan's comments about Justice Scalia is befuddling at best. See pp. 66–69. It is hard to doubt the significance of Scalia's contribution to the legal profession, and it is hardly a surprise that Kagan befriended him. Kagan is a lot like Scalia: brilliant and very friendly. If we have lost the ability to praise a departed colleague despite past disagreements, then the federal judiciary is far weaker than even Posner claims.

7. See p. 4.

8. See p. 7.

9. See p. 60.

courts operate less transparently, less efficiently, and less intelligibly—in a word, less *pragmatically*—than they should.

It is true that the federal judiciary is weakened, however indirectly, by law schools' general inattention to legal-writing instruction. So too by the academy's failure to teach procedure and trial practice in a practical manner. Inexperienced law clerks asked to draft their bosses' opinions, Posner observes, may regurgitate their loquacious bench memos inspired by abstract academic writing (p. 59). Wouldn't we be better off if all that time spent Bluebooking was devoted to persuasive writing instead?

Posner is definitely correct that "formulaic" legal writing can lead to verbose and stilted opinions that may shade, rather than illuminate, governing legal principles.¹⁰ Few things are as frustrating as the judicial opinion that spends pages rehashing each side's arguments only to conclude, without elaboration, that "the court is persuaded" by one side or the other. Such rulings have all the explanatory power of *Bartleby the Scrivener*—which is to say, none at all.¹¹ The judge would do better simply to declare which side won; after all, that would save everyone a lot of time.

We agree that our system suffers when rote argumentation, excessive string-citation, and legal jargon dictate, rather than explain, judicial decisions. Muddled multifactor tests, convoluted tiers of deference, and illusory standards of review may prove good fodder for law-review articles; they do markedly less to serve clients' interests in the stability, predictability, and (make no mistake) affordability of the law.¹² Posner is right to target this sort of overly formulaic judging—exemplified by his concerns about deference to the administrative state (p. 30)—because it disserves litigants and sacrifices the legitimacy courts claim from publicly showing their work.¹³ We would have preferred to hear more from him about how these practical ills affected the output of his court during nearly four decades of judging.

So at least some of Posner's smaller procedural points *do* add up to something more: the legal process should highlight rather than obscure the core of judicial decisionmaking. The practical operations of the federal court system Posner envisions are fairly attractive: Law clerks schooled in the actual practice of litigation would support, but never supplant, the reasoning and writing of federal judges. The bench would announce transparent decisions in an accessible manner, with a better appreciation of the law practical

10. See pp. 59–60.

11. Melville's *Bartleby* repeated a simple "explanation" for his refusal to work: "I would prefer not to." *Butte County v. Hogen*, 613 F.3d 190, 195 & n.4 (D.C. Cir. 2010) (quoting HERMAN MELVILLE, *BARTLEBY, THE SCRIVENER: A STORY OF WALL STREET* 10 (Dover 1990) (1853)).

12. See p. 30; see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179, 1182 (1989).

13. See, e.g., *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

effects outside the courtroom. And, in one of Posner's most enticing suggestions, appellate judges, even (especially?) at the Supreme Court, would "ride circuit" in the lower courts. This would require them to apply their tests and precedents in the mine-run of litigated disputes, rather than in their more curated appellate dockets.¹⁴ This, more than anything, could lead judges to prefer bright-line rules to complex opinions, fractured decisions, and multifactor tests, which are time-consuming and costly to litigants and lower-court judges.¹⁵ These steps undoubtedly would improve the intelligibility, predictability, and efficiency—those pragmatic virtues—of the federal judiciary.

THE SELF-DEFEATING CASE FOR JUDICIAL PRAGMATISM

My approach in judging a case is therefore not to worry initially about doctrine, precedent, and the other conventional materials of legal analysis
(p. 80)

Far more problematic is how this critique of the courts' operations sits alongside Posner's preferred interpretive method—judicial pragmatism. Here we definitively part ways with Posner: his substantive prescription simply does not follow from his practical diagnosis. Nothing about how judges manage chambers, cite precedents, or use law clerks suggests courts should—as Posner says—interpret legal texts to produce preferred policy outcomes.

The radical nature of Judge Posner's vision in this book should not be underestimated. This is no mere rehash of familiar economic or common-law theories. The pragmatism advanced by *The Federal Judiciary* is something else entirely: advocating outcome-driven statutory interpretation that is explicitly outcome-driven to achieve "socially beneficial effects" (p. 17); dismissing legal texts as "putty in the hands" of the very judges whom Posner deems lacking (p. 101); and offering those same "deficient" judges a mandate to answer all manner of policy questions, even or especially when no governing legal text supplies an answer (p. 67). Judges should not worry so much about doctrine, precedent, or text, the book contends, and should instead work to improve society by determining the most sensible resolution of a dispute, so long as it's not unavoidably blocked by an authoritative precedent (p. 80). Whereas earlier Posner works may have *criticized* his colleagues for pretextual-textualism or a lack of judicial candor, his latest work *celebrates* a consequentialist liberation from time-worn tools of interpretation (p. 80).

14. See pp. 213–14 (quoting Jonathan Turley, *Battling over Neil Gorsuch Is Beside the Point: The Supreme Court Needs an Institutional Overhaul*, L.A. TIMES (Feb. 1, 2017, 3:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-turley-supreme-court-reform-20170201-story.html> [<https://perma.cc/UBE2-ST2S>]; Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1295–99 (2010) (discussing return of Supreme Court circuit riding).

15. See Scalia, *supra* note 12, at 1175–81.

If we take Posner at his word, the traditional tools of interpretation no longer matter in hard cases. Text, precedent, and doctrine receive attention only after the pragmatic judge has inferred the correct outcome of a particular dispute. The sole remaining question is whether these legal authorities stand squarely in the way of that preferred result. Probably they would not, Posner suggests, because a competent judge can get around most would-be legal constraints “by hook or by crook” (p. 80).

Once they bypass legal constraints, what are pragmatists left with other than their own views for an optimal world? What would a judge consult to determine the optimal outcome? Economics? Sociology? How about physics or moral philosophy? And how would lawyers or lay people know what principles a judge would apply in their case? One could read a statute until blue in the face without understanding how the federal judiciary would apply it. Moreover, the law would be in a constant state of flux. Pragmatists including Posner candidly admit that “current values” may shift a statute’s meaning in either direction based on the judge’s impression of society’s needs at the time.¹⁶

There is much about this approach to trouble those concerned with the institutional legitimacy of the courts in a republic, and those critiques are well-rehearsed elsewhere.¹⁷ The main upshot of the interpretive approach advanced in *The Federal Judiciary*, however, is how poorly it fares on Posner’s own pragmatic terms.

If anything, Posner’s first thesis—his indictment of the aptitudes of the federal bench—cuts against the vast authority pragmatism would grant to judges to decide cases based on factors far beyond the ordinary tools of legal interpretation. Posner never confronts why the judges he criticizes as sorely lacking in technical and scientific training¹⁸ should nevertheless be empowered to displace or update the policy judgments of Congress. If today’s judicial-selection process is as broken as Posner complains (p. 37), why would we expect it to produce lawyer-physicists and lawyer-ethicists superior to the current crop? And even assuming the right set of philosopher kings, there is no reason to expect that a critical mass of courts would settle on a consistent

16. Posner is by no means alone. The modern legal-realist tradition from which pragmatism flows claims an impressive pedigree tracing to Karl Llewellyn and beyond. Dean John Manning has labeled Professors Bill Eskridge and Philip Frickey as the “leading modern pragmatists.” John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1920 (2015). They advocate that “judges in statutory cases should engage in ‘practical reasoning’—a form of pragmatic, dynamic, multifactor analysis that does not depend upon unearthing some decision actually made by the legislature” with respect to statutory interpretation. *Id.*; see, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

17. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

18. See p. 67.

way to deploy the common-lawmaking tools Posner would hand them.¹⁹ Much less reason to suspect they would reach similar results in so doing. Academic studies supply substantial reason to doubt judges' predictive abilities, even on questions much closer to their core judicial competencies.²⁰

More fundamentally, liberating judges to decide cases based on perceived consequences could only make the federal-court system and the corpus of federal law less pragmatic when considered in the aggregate. This book only rarely distinguishes the immediate consequence of resolving a given dispute from the more systemic consequence of arrogating common-lawmaking authority to life-tenured federal judges.²¹ No attention is afforded the effect of pragmatic interpretation on lower-court judges seeking to faithfully apply binding precedent.

We know Posner believes *horizontal* stare decisis is practically meaningless when it comes to prior panels of his court (p. 88). Despite the court of appeals' standard and followed practice of adhering to the "law of the circuit," pragmatists of his stripe appear willing to consider the world anew every day. What does this say to his colleagues? Or to the trial judges, lawyers, and citizens who rely upon those circuit court decisions?²²

And what of *vertical* stare decisis? Presumably Posner is unwilling to subvert Supreme Court decisions on point; unless its precedents were binding, why would he care so much about their purported lack of quality?²³ But may federal district judges in Chicago, Milwaukee, and Evansville revisit—in light of changed circumstances and updated knowledge—Posner's 3,300 written decisions on questions of contract, antitrust, patent, and criminal law? The destabilizing effects of pragmatism are profound, and they extend

19. Pragmatism, Judge Wilkinson explains, "puts great power in judges' hands and tells them precious little about what to do with it." J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHTS TO SELF-GOVERNANCE* 87–88 (2012).

20. See F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 519–20 (1945); Michael J. Klarman, *Brown at 50*, 90 *VA. L. REV.* 1613, 1619–21 (2004).

21. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006). Previous Posner writings gave more weight to these second-order considerations of the law's stability beyond the case at hand. See, e.g., Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1432–33 (1995) (granting "due regard for such systemic constraints on the freewheeling employment of 'reason' as the need to maintain continuity with previous decisions"). By the time Posner published *How Judges Think* in 2008, however, Dean Levi could fault Posner for "pay[ing] so little attention to the average case or to the processes of fair adjudication, including the roles of the advocate and of our procedural rules and practices." David F. Levi, *Autocrat of the Armchair*, 58 *DUKE L.J.* 1791, 1793 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

22. Although Supreme Court justices have different considerations when it comes to *stare decisis*, an appellate judge sitting on a single panel within one of twelve regional circuits cannot circumvent precedent without introducing tremendous uncertainty into the law.

23. See *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1017–18 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems.").

well beyond the courthouse. How would the shrewdest counselor or dealmaker even begin to anticipate the consequentialist caselaw that the next generation of junior Judge Posners might produce? Lawyers and clients crave predictability, which counsels a degree of caution far beyond that Posner seems willing to accept.

Even when a precedent is not on point, consequentialist reasoning threatens the transparency and intelligibility of the law. These pragmatic considerations, which reach beyond the four corners of a particular dispute, ought to counsel judges to limit the information considered and rules announced in adjudication.²⁴ More insidiously, an anything-goes approach to judging destabilizes the courts' authority and the rule of law by raising the baseline level of uncertainty. Does the law bind judges, or do judges use "law" as merely a label to bind the rest of us?

Ceding policymaking authority to federal judges²⁵ may seem attractive to some in the current constitutional moment. But a serious objection to Posner's thesis—looming but largely unaddressed in the book—is how interpretive pragmatism usurps the role of the "other" political branches (for Posner treats the courts as a third policymaking arm of government). Posner fails to stop and ask why the other branches would even listen to the judiciary once judges enter their domain. The legislature and the executive possess a far superior mandate and competence for identifying the "common sense" and "contemporary" policies Posner seeks. Yet Posner accepts that judges, too, may sometimes drift into political debates because "in national emergencies . . . law bends to necessity" (p. 187). But if judges are licensed to bend the law whenever they perceive the exigencies require it, then how can the law possibly hold firm and constrain executive officials and legislators who perceive their own exigencies?²⁶

Why wouldn't Donald Trump or Barack Obama be as entitled as Richard Posner to assess legal texts according to their own common sense or moral intuition? If the social utility of competing constitutional or statutory interpretations is a question in adjudication, it is hard indeed to exclude the political branches from the debate by privileging the courts' interpretive flexibility.

The consequences of consequentialism go further still—and right to the core of the rule of law and its place in our civil society. The respect and deference given judicial decisions in this country is neither automatic nor permanent. Posner's own statistics regarding the diminishing public standing of the courts prove this very point (pp. 124–25). If the federal judiciary

24. VERMEULE, *supra* note 21, at 5.

25. In happier times, Posner described his fellow appellate judges as councils of "wise elders." See Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 959 (2003). Though he appears no longer to hold them in the same esteem, he would nevertheless afford them remarkably broad authority.

26. Remarkably, Posner embraces the Supreme Court's most infamous decisions—*Plessy* and *Korematsu*—as pragmatically correct. P. 51. This shows just how badly pragmatism has served us in the past, and why constraints stouter than prevailing views of what is "right" for its time" are necessary to protect constitutional rights from erosion. P. 51.

embraced atextual pragmatism, the American people would realize it and resent their loss of self-governance—as many perhaps already do.²⁷

This is not a concern limited to those who subscribe to the old chestnuts of the “majesty of the law” and “guardians of liberty”—notions that no doubt turn Judge Posner’s stomach. It is both easy and chilling to consider the damage done if not only 5–4 Supreme Court decisions, but also every-day criminal convictions and civil suits, were viewed as the mere “political” preferences of a “politician in robes,” rather than the dispassionate application of a duly enacted law. The backward-looking nature of the bench that Posner decries (p. 50) is in fact bound up with the most fundamental elements of the rule of law: notice, precedent, fact-finding, and the role of the jury, to name but a few.²⁸ Expanding the social remedies available in adjudication, moreover, teaches partisans of all stripes to demand vindication in court rather than compromise on policy in the political process.²⁹

THE PRAGMATISM OF INTERPRETATION

Whether ideological, heartfelt, or feigned, formalism is a compounding sin (p. 28)

So far we have discussed two versions of Posner’s pragmatism. His “operational” pragmatism, while sometimes trivial, helpfully encourages judges and lawyers to strip away the formalistic trappings of their work to reveal and sharpen their legal reasoning. But his “substantive” pragmatism unhelpfully encourages judges to strip away the disciplining formalism of textual and precedential interpretation to decide cases based on preferred outcomes. In either instance, Posner aims to make the federal judiciary more intelligible, efficient, and uniform—in short, more pragmatic. These are important aims. But when it comes to how we read and apply federal law, the “formal” approach to text and precedent turns out to make the federal judiciary far more pragmatic in the long run.

The tools Posner maligns as backward and ritualistic—the operative text, historical context, and precedential reasoning—are those that best serve the bench and bar’s interest in a stable body of discernible federal caselaw. When that body of law is considered on the whole, particularly from the perspective of the district judges and lawyers who apply it on a daily basis, our shared goals of intelligibility, efficiency, and uniformity require *more*,

27. The loss of Americans’ “inalienable right to self-governance” animates Judge Wilkinson’s critique of Posner and competing theorists in *COSMIC CONSTITUTIONAL THEORY*. WILKINSON, *supra* note 19, at 9.

28. See generally Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

29. Though the pragmatic judge may have a solution for most every contingency, the Constitution—whose flaws pragmatists readily acknowledge—certainly does not. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). Treating the Constitution as a legal Swiss Army knife relieves the healthy pressure on the people to address those constitutional lacunas through legislative compromise. It also dilutes the force of the cardinal rights and principles the Framers *did* choose to enshrine above mere statutes.

not less, emphasis on the constraining principles of traditional interpretation. For the truly pragmatic judge is one whose rulings flow naturally from the governing legal text, the precedents reasonably interpreting that text, and the record of the case in a way that is predictable beforehand and ascertainable thereafter. Requiring lower courts and regulated parties to guess at the meaning of a statute or precedent is hardly efficient or just. Indeed, the most pragmatic aspect of the traditional tools of interpretation is that they limit the number of types of claims that lawyers can plausibly advance in court. Before the pragmatic judge, however, there is almost always an argument to be made—and therefore a good reason for a lawyer to roll the dice.

Is focusing on text and precedent, to the exclusion of policy considerations, formalistic? Perhaps—though we might prefer the term “modest.”³⁰ Is it hard work? Quite often.³¹ Choosing an equitable outcome or a sound policy can be far easier for a given judge in a given case. Certainly it may be far more satisfying. Who wouldn’t enjoy playing king for a day?³²

Even if our constitutional design didn’t demand that judges apply the law as written,³³ doing so would represent the most pragmatic approach for someone with a lifetime commission to serve the United States *under* its Constitution and laws.³⁴ From our perspectives on the law as practiced in and around the federal courts, the ordinary tools of interpretation make for a more intelligible, accessible, and efficient judiciary.

30. What Professor Schauer noted decades ago about the connotation of “formalism” remains true today: “Even a cursory look at the literature reveals scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good.” Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 509–10 (1988). Yet his conception of the essence of formalism also holds fast: “At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to *rule*.” *Id.* at 510; see SCALIA, *supra* note 17, at 25 (“Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule of law is *about* form . . . Long live formalism. It is what makes a government a government of laws and not of men.”).

31. Textualism, Judge Easterbrook explains, is the “tool of the judicial branch” not because the “feats of scholarship and cerebration” it demands are easy, but because those efforts enforce the social contract between the governed and their governors in a way that protects the “exceptionally valuable” “stability in [the] political system.” Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 *HARV. J.L. & PUB. POL’Y* 901, 902–905 (2008); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 *CIN. L. REV.* 849, 856 (1989) (“[I]t is often exceedingly difficult to plumb the original understanding of an ancient text.”); Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 *MICH. L. REV.* 859, 864 (2010) (“That there are close cases, however, does not consign judging to politics. Hard cases do not make political law; they make difficult-to-decide law.”).

32. Cf. Scalia, *supra* note 12, at 1176 (“[I]n absolute governments the king is the law.”) (quoting THOMAS PAINE, *Common Sense*, in *COMMON SENSE AND OTHER POLITICAL WRITINGS* 3, 32 (Nelson F. Adkins ed., 1953)).

33. See, e.g., John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 *HARV. L. REV.* 1161, 1172 (2007) (“[E]ven for an everyday pragmatist like Judge Posner, the judge’s proper role draws content from entrenched presuppositions about the allocation of power in our system of government.”).

34. See 28 U.S.C. § 453 (2012) (providing the “[o]aths of justices and judges”).

Intelligibility

Nothing is more essential to the rule of law than knowing what the law says. This is true for the people governed by that law, the lawyers who advise and advocate for those people, and the judges who apply that law in the ordinary course. And it is especially true for the people, lawyers, and judges whose attention is not principally on the finer and contested points of law, but on the wide variety of legal questions that come across their lives, law offices, and judicial chambers every day.

Thankfully, not every, or even most, legal proposition is seriously contestable; the vast majority are never litigated.³⁵ The small subset of truly difficult questions command a disproportionate amount of the time and candlepower of judges, tall-building lawyers, and law professors. Most judges and lawyers, however, don't have the luxury of scouring the F.3d for circuit splits and clever policy arguments; they are too busy sentencing defendants, developing evidence, and advising clients. They are the ones bearing the brunt of open-ended interpretive pragmatism.

But *The Federal Judiciary* denigrates “the legal profession's current fawning regard for formalism parading under such names as ‘textualism’ and ‘originalism’ ” (p. 28). These are backward-looking heuristics promising false precision in the law, Posner claims, which “means one thing to conservatives, another to liberals,” and “has no fixity.”³⁶ Likewise, Posner rejects any obligation to consistency with “what other [judicial or legislative] officials have done in the past.”³⁷

This view vastly discounts the value of orthodox legal interpretation, in which lawyers and judges engage in a shared enterprise of discerning the familiar guidelines of text, context, and precedent. For that matter, it rejects the two interpretive tools equally accessible and intelligible to judges, lawyers, and clients of all sorts: the statutory and constitutional text set forth in the official laws of the United States, and the binding precedents published in the official reports of the courts of the United States. In a very real and even mundane sense, these represent the “fixed” law that binds the bench and bar. This is our common starting point. Because we all begin at the same place, moreover, people across a vast country can coordinate and organize their lives around shared and certain principles.³⁸ By reducing these

35. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 916–17 (2016).

36. Joel Cohen, Richard A. Posner & Jed S. Rakoff, *Should Judges Use Their Roles to Effect Social Change?*, SLATE (Aug. 24, 2017, 9:00 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/posner_rakoff_dialogue_on_how_judges_should_effect_social_changes.html [<https://perma.cc/67GD-8GXQ>] (“I don't know what ‘existing law’ means except views currently held by many judges, lawyers, and politicians,” which “are likely to be fluid, changeable—in accordance with new social needs, attitudes, and authority”). *But see* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

37. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4 (1996).

38. The “traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy” in the law because “when judges pull from the same toolbox and look to the same materials to answer the same narrow question . . . we confine the range of possible

binding rules to advisory guidelines, Posner's pragmatism forfeits our most valuable tool for ensuring uniform, intelligible law: the legal text itself.

The law can be complex enough without the uncertainty of wondering what judges will think or do, and which judges will decide your case. The book's discussion of "crimes of moral turpitude" (pp. 236–37) shows how significantly judges sometimes disagree even under the normal constraints of the traditional interpretive process—not to mention the pragmatist's license. How could judges ever hold defendants responsible for complying with these legal obligations unless those obligations also bind the judges themselves?

This is why the formal tools of judicial interpretation are such an essential public good.³⁹ If lawmakers and judges can come closer to an agreed-upon method of discerning the meaning of legal text, statutes should become more precise and adjudications more predictable.⁴⁰ Under the disciplining effects of traditional interpretation, moreover, the law becomes more accessible and affordable to people across the country. For most laws and regulations, there should be no need to access the right sorts of "insider" lawyers (former clerks, executive officials, or Hill staffers) who can themselves access legal arcana and influencers inaccessible to most.⁴¹

In this respect, textualism is a particularly egalitarian and democratic approach to the law. When the interpretive task is limited to the statute as written and publicly understood, and as interpreted by courts in subsequent published decisions, this constrains the sources the judge and lawyer (and regulator and regulated) must consult to interpret it. The text is accessible in a way that inside information—particularly about legislative history and judges' predilections—is not. Lest we overstate our case, it is worth reiterating that many questions of interpretation are hard, and may require deep dives into history and usage.⁴² But measured against the uncabined arguments available before a pragmatist judge, a restrained approach to interpretation increases the transparency and accessibility of legal decisionmaking.

outcomes and provide a remarkably stable and predictable set of rules people are able to follow." Gorsuch, *supra* note 35, at 917.

39. And why *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and Bryan Garner's monumental effort to catalogue these tools for more straightforward and accepted application, is such an important project. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Judge Posner famously detested this book and the constraints its approach would place on judges like him. See Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/ZLK9-9KBJ>].

40. But see Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 726 (2014) (challenging "textualism's operating assumption that text is always the best evidence of the legislative bargain").

41. See Manning, *supra* note 16.

42. This is not to say the views of the man on the street are equivalent to those of the legal scholar. If textual analysis were easy, judges and scholars wouldn't be busy, for instance, building historical usage databases to aid the enterprise. See, e.g., James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make*

Efficiency

The uncertainty regarding future judicial decisions that Posner invites reduces the efficiency of the federal judiciary at every level. Though its self-professed mandate is to pursue uniformity of federal law,⁴³ the Supreme Court's own lack of uniformity on the basic question of how to read legal texts causes a cascade of costs and errors. The lack of agreement among nine justices implicitly licenses more than 200 courts of appeals judges to employ an even greater variety of approaches, with the slim prospect of certiorari review representing only a weak tempering force. If these appellate judges are liberated, as Posner proposes, to do justice according to their conception of the public good, then heaven help our 800-plus district judges attempting to follow judge-made decisional law. Not to mention the hundreds of thousands of litigators and counselors who will be hard pressed to confidently predict the contours of federal law.

This level of uncertainty is not just costly, but incompatible with the rule of law.⁴⁴ Even if some pragmatists and purposivists in the academy lag behind, the bench appears to be slowly but surely moving down the path marked by Justice Scalia: According to no less an authority than Justice Kagan—President Obama's first solicitor general and second Supreme Court pick—"we're all textualists now."⁴⁵ "Does anyone," Justice Kagan asks, "now decline to focus first, in reading a statute, on its text in context?"⁴⁶ Certainly not in the briefs submitted to the Supreme Court these days. This represents an interpretive sea change during the tenure of Justice Scalia. And it's a big reason why the Supreme Court and courts of appeals start on the same page today in approaching statutory questions. By narrowing the bounds of potential disagreement and confusion among judges, a focus on the written statutory language offers the least-bad alternative for serving the law's fundamental interests in fair notice.⁴⁷ And it enables judges to render their decisions with relative speed (and fewer concurrences and dissents) thus achieving the efficiency that idiosyncratic pragmatism fails to deliver.

Originalism More Empirical, 126 *YALE L.J.F.* 21, 24, 27–28 (2016), https://www.yalelawjournal.org/pdf/10.Phillips.MACROEDFINAL_izrkk2s8.pdf [<https://perma.cc/YZM6-6QTD>].

43. See, e.g., *SUP. CT. R.* 10.

44. Scalia, *supra* note 12, at 1179.

45. See Justice Elena Kagan, The Scalia Lecture at Harvard Law School (Nov. 25, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> [<https://perma.cc/G6GF-Q2MM>]. Justice Kagan elaborated on Justice Scalia's legacy by asking whether "anyone now decline[s] to focus first, in reading a statute, on its text in context? Does anyone now ignore the Founders' commitments when addressing constitutional meaning — or just as important, dispute the need for a viable theory of constitutional interpretation, even if not Justice Scalia's brand of originalism, to constrain judges from acting on their personal policy preferences? If the answer is no (and the answer is no), Justice Scalia deserves much of the credit." Elena Kagan, *In Memoriam: Justice Antonin Scalia*, 130 *HARV. L. REV.* 5, 9 (2016) [hereinafter Kagan, *In Memoriam*].

46. Kagan, *In Memoriam*, *supra* note 45, at 9.

47. McGinley, *supra* note 28, at 560.

Consider how often a Richard Posner and an Antonin Scalia—despite their shared pedigrees as Harvard-trained, Reagan-appointed, law-professor-turned-judges—would disagree on questions of social, economic, criminal, and foreign policy. Their track records suggest quite a lot. If both set out to apply the traditional tools of legal interpretation, however, they would be far less likely to disagree on how to read a Supreme Court or Seventh Circuit precedent, and less still on how to apply the specific words of the U.S. Code as understood at the time of their enactment. Focusing on the law as written narrows disagreement in the appellate courts, and commensurately limits uncertainty in the trial courts and law offices. Interestingly, the statistics support this view. Judges of very different backgrounds and philosophical views often reach similar results.⁴⁸ Why? Because they accept that they are bound by the law.

The efficiency of interpretive “formalism” also benefits from a feedback loop. When the rules of the game are (more) settled in advance, independent of the particular policy at hand, this facilitates a healthy conversation between courts and Congress. As more judges emphasize the primacy of text over legislative history or unenacted policy considerations, legislative drafters have a greater incentive to specify congressional aims in the statute itself rather than committee reports or insider dialogue. This, of course, only makes it more profitable for future courts to cabin their review to the four corners of the statute. All this stands in contrast to the fracturing effects of pragmatism, with each branch interpreting the law as it sees fit.

Uniformity

The governing text and precedent are the common threads constraining federal judges across the United States to treat like cases alike—no matter judges’ divergent conceptions of the common good. It should be unsurprising that a high degree of structure is necessary to bind a vast nation and unify a far-flung bench with a coherent and consistent body of law. Posner’s allusions to modern management theory ignore the mundane attention to detail required by today’s supply chains or design teams.⁴⁹ Perfect equality of treatment is, sadly, “difficult to demonstrate and . . . impossible to achieve.”⁵⁰ But principled, rule-based decisionmaking, based on factors set forth in advance and independent of a particular judge or litigant, is our best tool for fostering uniformity of the law and equal treatment of litigants over the great mass of cases—if not perfection in each individual case.⁵¹ The text and precedent are what binds judges, and what binds together our legal system.

48. Judges Posner and Easterbrook, for example, agreed nearly 99% of the time between 1985 and 1999. Sutton, *supra* note 31, at 866 (citing Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw. U. L. Rev. 1409, 1432 (2000)).

49. See pp. 8–15.

50. Scalia, *supra* note 12, at 1182.

51. *Id.* at 1178.

These tools are also the stabilizing forces that refresh the courts' legitimacy within a democratic republic—as well as the people's capacity for self-government. When the people gave the government the authority to control their day-to-day activities, the people retained ultimate control over who formed the government. When judges disrespect that bargain by applying their own policy preferences rather than the law as written, they drain the ability of the people, through their elected representatives, to resolve social problems.⁵² Filing a lawsuit is far easier—though far less stable and representative—than enacting legislation or amending the Constitution.

Clearly, a theme of *The Federal Judiciary* is Posner's frustration that our government doesn't update the law fast enough in today's complex and rapidly changing world. To him, and to many others, bicameralism and presentment must seem outmoded.⁵³ But, in a democracy, giving absolute updating power to judges is not the answer and is not allowed. "[I]n a government where life-appointed judges are free to legislate alongside elected representatives," the "very idea of self-government would seem to wither to the point of pointlessness."⁵⁴

CONCLUSION

What is a judge in neutral? (p. 115)

The Federal Judiciary, if nothing else, forces every reader to confront the human element of judging in a democracy. Even the most earnest adherence to neutral principles and governing text, we readily concede, will lead to error and disagreement within the courts. Any approach, including the most objective textualism, will fall short of the constitutional goal. For judges are only human.

The proper reaction to this gap between the practical and the ideal marks our most fundamental departure from Posner's approach. Missing from his prescription is the tradition of humility, even self-doubt, that can be found in the work of the great common-law judges like Hand and Holmes he professes to venerate. Also absent is concern for the errors judges themselves may introduce to the law. Despite his low regard for his fellow judges, he prescribes a thoroughly judge-driven mode of interpretation.⁵⁵

Posner sees the all-too-human composition of the federal bench and surrenders: because they'll never fully escape their personal priors, let's drop the pretense and embrace our personal views, heretofore suppressed (ineffectively) beneath a veneer of legal formalism. At least, Posner contends, we might get some better policy out of this transparently consequentialist approach.

52. Easterbrook, *supra* note 31, at 904–05.

53. *E.g.*, pp. 414–15.

54. Gorsuch, *supra* note 35, at 913.

55. VERMEULE, *supra* note 21, at 56.

We, on the other hand, see the human nature of the federal courts as a reason to strive ever harder for the constitutional ideal of impartial interpretation. A truly “realist” approach to the law, it seems to us, recognizes that human institutions can perform better or worse depending on the tools and—dare we say—*incentives* applied to Judge Posner and his former colleagues on the bench. That judges will fall short, even in an ideal system, is an argument for trying harder to approach the mark, not for abandoning the goal entirely. “Formalism,” notwithstanding Posner’s protests and its undoubted imperfections, constrains judicial decisionmaking.⁵⁶ The whole point is to minimize the role of the particular judge and maximize the rule of law.

Because judges are human, formalism is in a sense aspirational. As Justice Scalia admitted, “the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely.”⁵⁷

But this is no basis for rejecting a formal approach to interpreting legal texts; it only heightens the need to incorporate limits, rather than license, into the judicial system. That textualism will sometimes fail to constrain judges is no reason to surrender to other interpretive approaches that, by their very design, impose fewer and less effective constraints.

56. One need only consider the list of counterintuitive “policy” outcomes Justice Scalia and his colleagues reached—on the First Amendment and criminal procedure, to name the two most prominent subjects—to see these constraints in action. Very few people would question Justice Scalia’s distaste for, say, flag burning or violent video games. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) (violent video games). Yet he and his colleagues protected them because they understood the First Amendment to compel it.

57. Scalia, *supra* note 31, at 863.