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A REVIEW OF RICHARD A. POSNER, HOW JUDGES THINK (2008)

Jeffrey S. Sutton*


INTRODUCTION

I was eager to enter the judiciary. I liked the title: federal judge. I liked the job security: life tenure. And I could tolerate the pay: the same as Richard Posner's. That, indeed, may have been the most flattering part of the opportunity—that I could hold the same title and have the same pay grade as one of America's most stunning legal minds. Don't think I didn't mention it when I had the chance.

There is so much to admire about Judge Posner—his lively pen, his curiosity, his energy, his apparent understanding of: everything. He has written 53 books, more than 168 articles, thousands of opinions and numerous blog entries with Nobel Prize-winning economist Gary Becker. The output is hard to keep up with, as is the dizzying array of topics he covers—everything from economics to the Clinton impeachment to 9/11 to sex to literature to public health to aging—sometimes directly related to the law, sometimes not.

What interests me most about Posner is that he is a judge who has left a deep imprint on American law, frequently including decisions of the United

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* Circuit Judge, United States Court of Appeals for the Sixth Circuit. I thank Douglas Brayley, Jeffrey Garland, Laura Heim, and Jason Wilcox for providing research assistance in connection with the preparation of this Review. Nothing in this piece means to opine on the outcome of any pending or future cases that may come before me.

1. Circuit Judge, United States Court of Appeals for the Seventh Circuit.
States Supreme Court. I often look to him for insights in resolving difficult cases of my own, telling my clerks, “See if Posner has written anything on the topic.” Other judges, I suspect, do the same thing, and if not they should. Few people in Illinois, Indiana, and Wisconsin, I fear, know how lucky they are that President Reagan nominated Posner (and his equally impressive colleague, Frank Easterbrook) to the Seventh Circuit in the early 1980s.

All of this made me look forward to reading Posner’s book with the alluring title, How Judges Think. It was not what I expected, however. One theme of the book admirably covers the topic suggested by its title—how do judges decide cases and what types of things influence them?—and I will offer thoughts of my own on the topic in a few pages. But two other themes run through the book: (1) an account of judging that treats the judicial branch as “politics” by another name; and (2) a plea to embrace Posner’s school of judicial thinking (“pragmatism”) along with a bill of particulars against its rival (“legalism”). I cannot resist saying a few words at the outset about these other themes before turning to my observations about judicial thinking.

I. ARE JUDGES POLITICIANS IN ROBES?

Throughout the book, Posner talks about the political nature of judging and, most unabashedly, about the political nature of judging at the United States Supreme Court. Consider: “judging is ‘political’” (p. 369); “[e]vidence of the powerful influence of politics on constitutional adjudication in the Supreme Court lies everywhere at hand” (pp. 277–78); “the reasons for the legislative character of much American judging lie so deep in our political and legal systems and our culture that no feasible reforms could alter it” (p. 15); “judicial philosophies have little causal efficacy. They do not weaken the force of political preferences” (p. 346); “[j]udges like to refer to [the other two branches] as the ‘political branches,’ as if the federal judiciary itself were not a politically powerful branch of government” (p. 287); “[e]ven if judges wanted to forswear any legislative, any political, role and be merely the ‘oracles’ of the law, transmitting directives rather than directing, they could not do so in the conditions in which they find themselves” (p. 372); and “a more illuminating description of the Justices of the U.S. Supreme Court, particularly when they are deciding issues of constitutional law, is that they are political judges” (p. 269).10

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10. Posner qualifies his description of judging as “political,” recognizing that, despite many broadly phrased statements throughout the book to the contrary, traditional legal reasoning readily resolves many cases without resort to politics. P. 25. He also notes that “political” “is an equivocal term” that covers partisanship, ideology, policy, or strategy, depending on the context, pp. 9–11, up to and including “anything that has the slightest whiff of concern for policy,” p. 13. But Posner surely appreciates that “political judging” is a high-stakes phrase—one for which others may not give the bench the benefit of the doubt. And he does not use the term neutrally himself. As Posner broadly defines it, “political judging” comes perilously close to “pragmatic judging.” Yet he conspicuously calls judging “political” when criticizing certain decisions and “pragmatic” when applauding other decisions. See pp. 311–23.
Those are strong words, bound to provoke a defensive reaction. And they have—by several judges. Add me to the list.

These are uneasy times in the American judiciary. Whether nominated by Republican or Democratic presidents, federal judicial nominees face similar criticisms—that they will impose their political will in deciding cases and that they will do so on the issues that matter most to Americans. State elections for judges have not helped matters, as interest groups have spent millions in advertising dollars to advance similar themes. This feature of the modern judicial-selection process may be an unavoidable response to the role of the judiciary in resolving so many of today’s most pressing debates—and some may even consider it a healthy response. But when these critiques fill the air waves, it is easy to worry about their effect: will they prompt the public to wonder whether this judge or that one is politically motivated or, worse, to wonder whether they all are? The judiciary is not well equipped to respond to these attacks. As every civics student learns, the Third Branch has no purse to sustain itself and no sword to enforce its rulings. Force of reasoning is all there is to preserve the public’s trust in the judiciary, a task made more difficult by two thankless (and wearying) demands of judging: (1) judges often are called upon to issue politically unpopular decisions; and (2) even when that is not the case, judges invariably must allocate disappointment to half of the parties that appear before them. One reason that American citizens nonetheless accept these decisions, even when they disagree with them, is that they perceive judges as being apolitical—as deciding cases based on something beyond themselves and beyond their own policy preferences. The increasingly public nature of the confirmation and selection processes for judges—and the implicit criticisms of the judiciary that come with them—have chipped away at that trust. Posner may be right that some cases test even the most earnest efforts at neutral judging, but loose claims that “judging is ‘political’” (p. 369) add fuel to this fire at a time when the judiciary least can afford it.

This risk goes hand in hand with a similar, though equally misleading, perception left with many students by the end of law school. Professors generally do not teach the 9-0 decisions of the Supreme Court or the 3-0 decisions of the courts of appeals—for the same reason that most authors do not write about conventional people or predictable events. They are less interesting, and division sparks class discussions in a way that unanimity does not. Professors instead teach the 5-4 and 2-1 decisions, which frequently involve the most difficult statutory and constitutional questions, the most indeterminate legal issues, the ones most likely to leave the impression (fair or not) that the policy preferences of the judges—their “politics” (p. 369), as
Posner provocatively puts it—enter the mix, whether consciously or not. After being fed a three-year diet of these cases, earnest and cynical students alike are apt to wonder whether neutral arbiters exist. But these are the rare cases, not the ones judges decide day to day. And students too rarely learn the difference—that the difficulties, even indeterminacy, of such cases are atypical, even at the Supreme Court, where 33% of the cases were decided 9-0 in the October 2008 term and another 18% were decided by lopsided 8-1 or 7-2 margins. Unanimity is even more prevalent at the courts of appeals, where judges dissent in just 3% of the cases.

Is there not a better way to make Posner’s point? Say: that in the most difficult cases it is fair to wonder what influences judges and to worry that policy preferences make a difference? If that is all he is saying, he has a point, though it has been my experience that a series of internal and external judicial constraints go a long way to minimize the risk. To the extent he means to say that politics regularly makes a difference in judicial decisions, he is wrong—and, as Dean Levi (formerly Judge Levi) suggests, he is engaging in “armchair empiricism.” Judge Edwards and Michael A. Livermore have demonstrated that empirical studies “do not show that a substantial percentage of published federal appellate cases are decided on political or ideological grounds (as crudely defined).”

Posner likewise overstates his case in maintaining that it is “naïve” (p. 256) to believe that there are right answers to legal questions. Not only does this risk misleading young judges, law clerks, and advocates, but it also is false in the main. The bench is too diverse, yet its decisions too uniform, to think that judges are ink blotting their way through the docket. This perspective also enables, if not encourages, judges to minimize the task at hand. Why work at answering a difficult legal problem correctly if it is a fool’s errand, doomed to turn on conscious and unconscious policy preferences no matter how much effort the judge brings to the task?

Think of it another way: if there are no such things as right answers, there must be no such things as mistakes. But judges, all judges, make mistakes, and Posner must think so. Else, why has he devoted a career to correcting them? Of all judges who should care about developing neutral answers to legal questions, appellate judges should care the most. Telling a district court judge that her year-long handling of a case was all for naught should turn on more than the political leanings of an appellate judge or the

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15. Edwards & Livermore, supra note 11, at 1941.

composition of the panel. It is no compliment when district court judges or litigants suggest otherwise. The goal is to disprove the suggestion, not to succumb to it.

And what if the American people make a mistake by enacting (through their political representatives) an unconstitutional law? Do we not owe it to them to show that something beyond policy preferences requires the invalidation of the law? A premise of *Marbury v. Madison* is that judges have a comparative advantage in resolving legal disputes, not that they have a comparative advantage in resolving all disputes that arise in American government.

Posner gives Chief Justice Roberts a hard time at various places in the book, but I am not sure why. While Roberts may have legalistic tendencies, Roberts and Posner both agree that Judge Friendly, for whom Roberts clerked, was a model judge. Posner borrows from Judge Boudin, another Friendly clerk, in explaining the qualities that made Friendly so good: “‘his training as a historian and respect for precedent, a dose of legal realism, a pragmatic interest in outcomes, a respect for legal process, an insistence on relative competence, a sense of what is practical, and a concern with judicial overreaching.’” I doubt that Roberts would disagree, and he might even hope that the same could be said of him one day. Roberts also seems in the main to be a minimalist, which ought to warm Posner’s heart because, as Posner sees it, “[j]udicial modesty or self-restraint, understood as the rejection of judicial activism in the sense of judicial aggrandizement at the expense of the other branches of government, is not a legalist idea but a pragmatic one” (pp. 287–88). But elsewhere Posner says that Roberts’ belief in “narrow opinions” is designed only to “buy time” (p. 111). Instead of saying that and instead of claiming that Roberts “aspires to remake significant areas of constitutional law” based on a trajectory apparently premised on one Term of the Court (p. 81), Posner might have given Roberts the benefit of the doubt. Perhaps: “narrow opinions” are more apt to produce unanimity; unanimity limits rather than aggravates the risk of “political” judging by accommodating more rather than fewer perspectives; unanimity enhances the Court’s credibility when it makes difficult decisions about issues that Americans care deeply about; and while narrow decision making assuredly buys time, that time may be well spent in allowing more compelling answers to a difficult problem to emerge.

Having suggested that Posner overstates his case, I do not want to overstate mine. Soon after becoming a judge, I regularly asked prospective law clerks, “Do all cases have a right answer?” “Yes” was the correct response, and the only one I would have given before joining the bench, even when it came to difficult cases. If the case was challenging, the answer was to keep

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17. See 5 U.S. (1 Cranch) 137, 177–78 (1803) (resolving which law applies when two laws conflict “is of the very essence of judicial duty” and “[i]t is emphatically the province and duty of the judicial department to say what the law is”).

working at it until an objectively provable answer emerged, a destined reward for persistent searching. Six years later, I do not ask the question with the same certitude I once did (and I often do not ask the question at all). What initially bothered me as a judge were not the difficult statutory or constitutional questions, but the “material issue of fact” disputes. In a record-laden case, it can be excruciating to pin point the line between a dispute that presents a material issue of fact and one that does not—a question by the way that courts of appeals judges answer every week and that Supreme Court Justices rarely consider. Those questions still bother me, and I lean heavily on the perspectives of my colleagues in deciding them. Six years into the job, I also must acknowledge doubts about some statutory and constitutional cases, not because I regret my vote or opinion in any one case but because a well-reasoned dissent (or majority opinion) can have a chastening effect. 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.

I must make one other nod in Posner’s direction. As an advocate, I regularly made arguments along his lines, not as appeals to the political preferences of the judges but to the innate fairness, justice—desired policy, I suppose—of an outcome in favor of my client. Why make these arguments if I did not think they would influence the court? I thought they did. And I still think so after seeing the process from the other side of the bench. Policy matters in the most difficult cases, and no lawyer should risk his client’s interests by ignoring this aspect of decision making. But the possibility that the various backgrounds and policy perspectives of the bench affect outcomes does not make judging political, either in a partisan or a nonpartisan sense.

II. HOW SHOULD JUDGES THINK? IS PRAGMATISM THE ANSWER?

While Posner primarily describes how judges think, he also talks about how judges should think, which is the closest we get to the question on most readers’ minds: how does Posner decide cases? Perhaps the reason Posner does not mince words in calling judging political is that he does not consider it an insult. Political judging is not the problem, we learn. It is pretending that it does not exist that bothers him—the ultimate example of which is “legalism,” a blend of originalism and textualism, which treats the Constitution like a contract that cannot change from age to age (save by amendment), and which eschews bendable inquiries into the purpose of legislation or the function of constitutional guarantees.

Like one of his favorite judges, Justice Holmes, Posner is a quintessential common law judge, making cost-benefit decisions in each case and developing a reasonable body of law along the way. The first problem for Posner, however, is that he is not a nineteenth-century state court judge, when the common law was a significant (now diminishing) part of the state

court docket. The second problem for Posner is that he is a federal judge, where so many cases turn on statutory interpretation, a task that generally assumes another body (the legislature) has weighed the costs and benefits of an issue on behalf of still another body (the people), leaving to the judiciary the modest role of deciphering the meaning of that work. Nonetheless, Posner says, judges should be pragmatists, and in reality behave as pragmatists, in doing this work (and all the more so in performing judicial review)—by paying attention to the consequences of their rulings for the parties in front of them and to the consequences of their decisions for the legal system.20

By contrast, he says, legalists purport to rely on traditional legal reasoning—definitions of statutory terms, canons of construction, precedents—but in truth are pragmatists in disguise. “[Legalism],” says Posner, “remains the judiciary’s ‘official’ theory of judicial behavior. It is proclaimed most emphatically by Justices of the Supreme Court, since the Court is in fact a political court, especially in regard to constitutional law, and therefore especially in need of protective coloration” (p. 41). “Legalists acknowledge that their methods cannot close the deal every time. That is an understatement. Legalist methods fail in many cases that reach appellate courts, and those are precisely the cases that most influence the further development of the law” (p. 47). Pragmatism, Posner adds, answers questions that legalism cannot, because “legalism so often fails to yield a determinate result” (p. 49), and because, “[a]lthough pragmatic adjudication rarely generates enough information to enable a decision that produces a social optimum, often it produces an approximation that is good enough for the law’s purposes” (p. 241). Whether they know it or not, he concludes, most judges are pragmatists: “The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is ‘pragmatist’ . . .” (p. 230).

This is a long-running debate—featured most recently in Justice Scalia’s A Matter of Interpretation21 and Justice Breyer’s Active Liberty22—one not worth taking sides on today, save to make these points. Posner critiques the pragmatism of Active Liberty (pp. 324–42) in favor of his own “constrained pragmatism[ml]” (pp. 13, 253). “Constrained,” however, by what? The materials upon which legalists rely? One’s good sense? One’s own weighing of the short- and long-term consequences of a decision? Each answer presents a dilemma. But perhaps most importantly, when does “constrained pragmatism” hurt—when does it force the judge faced with a difficult interpretive issue to vote against his policy preferences? If the answer is never, it does not sound constraining, and I doubt it is consistent with the Framers’ vision

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20. P. 40 (“[Pragmatism] refers to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of a syllogism.”).
for the Third Branch—or for that matter with the average American's conception of the role of a judge.\textsuperscript{23}

Posner notes that one failing of legalism is that it does not answer some of the most difficult interpretive questions, pointing out that Scalia himself concedes he is a "‘faint-hearted’ originalist" (p. 193), who has acknowledged he would invalidate flogging as cruel and unusual punishment even though it was permitted in 1791.\textsuperscript{24} But this makes a vice out of the virtue of candor and self-awareness, judicial traits that Posner elsewhere decries the absence of (pp. 120–21). Why send out an invitation, then call it a trespass when the judge accepts? How different, at any rate, are the standards of constrained pragmatism and the exceptions to the rules of legalism? Remember: Posner, the most thorough-going pragmatist, and Easterbrook, "perhaps the least fainthearted judicial defender of legalism" (p. 262 n.72), voted together in all but 1.1 percent of the panel cases from 1985 to 1999 while the expected frequency of disagreement for two-judge pairings on the Seventh Circuit was 2.7 percent during that period.\textsuperscript{25} That suggests one of several possibilities: Posner and Easterbrook are both pragmatists (who share the same world view); they both are legalists; they both are influenced by each school of judging; ideology does not matter; or perhaps something else is at play. (More on this later.)

As another word for common law judging in an age of statutes,\textsuperscript{26} pragmatism helps to explain what judges sometimes do. And it may well influence them, consciously or subconsciously (who can say?), in the hardest cases. But it faces some challenges as a model that judges should consistently aspire to follow. A refrain in the book is that legalism cannot "close the deal" in explaining how judges decide the most difficult, the most indeterminate, cases. Maybe so. But it is hardly an answer to adopt a judicial philosophy that facilitates the creation of more open spaces in the law. If judges have a difficult time consistently applying legalist principles in a way that ensures they are not engaged in political or policy-based judging, how much harder will it be if they are encouraged to conduct their own cost-benefit analyses? Worse is not better.

While pragmatism pays tribute to judges' natural inclination to do what is reasonable, legalism reminds them that not all cases call for that judgment. Not every statute is the Sherman Antitrust Act;\textsuperscript{27} not every

\textsuperscript{23} Posner's disagreement with Breyer suggests another weakness with pragmatism. If these two jurists do not share a proper understanding of pragmatism, who does? There are, indeed, suggestions throughout the book that pragmatism picks up everything: consequences of the case at hand, p. 238; systemic consequences, p. 238; economics, p. 246; judicial attitudes, p. 249; legal realism, pp. 234–36; and legalism itself, p. 262. But a judicial philosophy that endorses everything endorses nothing.


\textsuperscript{25} Farber, supra note 13, at 1432.

\textsuperscript{26} Cf. Guido Calabresi, \textit{A Common Law for the Age of Statutes} (1982).

\textsuperscript{27} 15 U.S.C. § 2 (2006) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade . . . shall be deemed guilty of a felony . . . ."); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911)
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A constitutional question asks whether the government acted "unreasonably." Legalism reminds judges of the separation of powers and competency concerns that legitimize—and confine—their power: judicial respect for the work product of the democratically elected branches and judges' relatively weak skills in weighing legislative policy questions. Pragmatism risks shortchanging both. As Posner rightly acknowledges, common law judging in statutory-interpretation cases, no less than purpose-based judging in this setting, risks undoing the key compromises that underlie the most ardently debated legislation.

Constitutional cases exacerbate these risks, not just because the underlying compromises are more essential or the decisions more difficult to undo. The further judges depart from traditional tools of legal interpretation, the more personal they make their assessments, the more difficult it is to justify judicial review. If, as Posner argues, indeterminate choices cloud many constitutional questions, his choice—between pragmatic answers and legalistic ones—may be a false one. If the matter is sufficiently indeterminate, if judges find themselves unable to justify a decision on nonpersonal grounds, why not defer to the elected branches in making the policy call?

III. How Judges Think and What Constrains Them

While Posner and other commentators often classify judges in binary ways, as foot soldiers in favor of one school of thought over another, that does not square with my sense of what goes on. Call them what you will—pragmatists or legalists, living constitutionalists or originalists, purposivists or textualists—the labels all reduce to a common way of processing facts and a spectrum of ways of processing law. All judges, it seems to me, read the Statement of Facts in a set of briefs in roughly the same manner. They react to the fact pattern as any human being would—by developing intuitions and preferences based on the seeming justice (or unfairness) of one side of the story over another. How could they not? They are sentient beings, not adding machines, and we should be glad for it. In this sense, the pragmatists (and legal realists) have a point: judges' policy preferences, like everything else about their experiences and their outlook on the world, affect how they read the fact section of a brief. A litigant who thinks otherwise makes a serious miscalculation.

But judges do not decide cases based on the facts alone, least of all after reading just one side of the story. They read the Argument section of both briefs. What happens next falls on a spectrum; it is not a set of either-or choices. At one end of the spectrum sits the judge who has never been

28. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ").

constrained by a law or precedent in a way that forced him to separate his initial reaction to the fact pattern from his vote. That judge, it turns out, does not exist. All judges suspend their preferences due to legalistic constraints—and that is the norm. At the other end of the spectrum sits the judge who has never allowed his personal reaction to the facts to interfere with his assessment of the law, no matter how vexing the legal question may be. Though more difficult to prove, that judge also probably does not exist, no matter how hard judges try.

The straw judges at either end of the spectrum tell us little. Not so for the rest of the spectrum, which reveals a range of perspectives that cannot be grouped by the party of the president that nominated the judges or by any one theory of judging. It is a set of influences that weighs more heavily on some than others, that affects some types of cases more than others, and that affects certain stages of the legal process more than others—and probably none uniformly throughout. It is the impact of these constraints that seems to make the biggest difference in why judges see cases differently. More often than not, it has been my experience, judges share similar reactions to the facts and policy of a case, dividing them less often than I thought as an advocate. What more often divides them is the impact of a series of external and internal constraints on judging.

A. External Constraints on Judging

There are several external constraints on judging, which prevent all judges to one degree or another from merely imposing their preferences on the cases before them. First, a judge’s place in the judicial system influences the kinds of constraints he or she has, and these institutional constraints vary from court to court. Posner devotes many pages to the judges at the top of the (federal) system: the Justices of the United States Supreme Court. They are, he says, the most political judges, the ones most likely to be uninhibited in allowing their policy preferences to affect how they decide cases. If power is the authority to get one’s way, the picture may be more complicated.

No doubt: U.S. Supreme Court Justices sit on the court of last resort, have life tenure, set their own docket, have the most prestige of all judges and need not adhere to precedents as meticulously as lower court judges because they always sit en banc and because no other court reviews their work. But they also face unique institutional constraints. Each Justice is one of nine, not one of three or one of one. They thus cannot exercise meaningful authority without garnering at least four other votes. While their jurisdiction extends to a territory large enough to ensure that it is always

30. This reality dooms many studies of judicial behavior because (1) the most important independent variables affecting a judge’s decision are those that are most difficult to code for an empirical study, see Edwards & Livermore, supra note 11, at 1928; and (2) the coding of court opinions reduces the many dimensions of an opinion into a simplistic few, id. at 1925 (“[T]opical or political measures used to describe cases will necessarily simplify a court’s holding and reduce what may be a complex and nuanced decision into an often uninformative binary.”).
that size limits as much as it empowers. All judges worry about the next case—about whether what they are doing today can be squared with what they may be asked to do tomorrow. Yet Supreme Court Justices have far more to worry about than other judges. Their decisions affect three hundred million people and fifty-one jurisdictions, leaving an incalculable number of future disputes that each rule of decision could affect. Even the most self-assured Justice is bound to be affected by this reality, making them all think twice before announcing a new doctrine, before pushing the law in a new direction. Other judges rarely face anything approximating these risks or the constraint that comes with them. Supreme Court decisions also face far more public scrutiny—from the press, the legal academy, the public—than the decisions of other judges in the system, and this makes the Justices more risk averse about entering political thickets from which they cannot easily extract themselves. Here, the standards of pragmatism and the rules of legalism align. Both sets of influences, more often than not, constrain the Justices to exercise power in a minimalist way: (1) to preserve rules, precedents, and ways of doing business rather than upsetting them; and (2) to allow the experiments of the elected branches of government to play out before entering the fray.

Posner is right that the judges of the federal courts of appeals, who must convince just one colleague to decide a case, exercise essentially unreviewed authority over large swaths of cases (pp. 143–44). But their authority, too, faces institutional constraints. Unlike the vast majority of Supreme Court cases, most circuit court cases must be viewed through a highly deferential lens—with deference to jury verdicts and to the ringside procedural and evidentiary rulings of trial judges. Even on issues of law, to which they give fresh review, appellate judges face the prospect of immediate Supreme Court review when they create (or take sides on) a circuit split, decide an important issue of federal law, or invalidate a federal (and sometimes a state) law. Perhaps their greatest authority exists in their fresh review of triable-issue-of-fact disputes, but these cases generally affect the fewest people—often just the parties before them. They also have essentially unconstrained review of state law diversity cases, which the U.S. Supreme Court is unlikely to review and which the state courts may reconsider only in different cases involving different parties. But here again their influence extends just to the parties in the case.

Too little attention is paid to the authority of district court judges. As courts of one, they generally must persuade only themselves before

31. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 403 n.* (1996) (quoting JOSEPH QUINCY, FIGURES OF THE PAST (1883)).

32. I agree with Posner that there are essentially two types of standards of review—deferential and nondeferential—and the courts would do well to recognize as much. P. 114.

33. But see Leavitt v. Jane L., 518 U.S. 137, 144–45 (1996) ("[W]e do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so, and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law." (citations omitted)).
The standards of appellate review give broad discretion to trial judges, heavily inclining appellate courts to affirm rather than correct their handiwork. And even when trial judges run across questions of law (over which they do not have a final say), there are ways to avoid the question. They may rely on an alternative ground for decision. Or they may obtain agreement from the parties to handle the point in another way. But even on issues of law, including the most difficult issues of law, the trial judge shares the most unconstrained—and the most legitimate—authority of the Supreme Court Justice: the power of a useful idea, whether a legalistic or a pragmatic one, to answer a vexing question. No judge has a corner on that market.

Second, the dynamics of a multimember court constrain judges in a way that goes beyond counting to five or counting to two. Most judges prefer to agree. Dissents and concurrences take time away from burgeoning dockets that already leave too little time. And dissents run the risk of straining collegiality. No appellate judge would last long who insisted on deciding every case just so. The search for common ground therefore is a frequent topic at conferences after oral arguments—and usually a productive one. Judges find common ground not by sticking with their personal preferences but by narrowing the grounds of decision, by making less law rather than more. Judge Edwards has gone so far as to say that separate writings for the most part should be eliminated: Save them for law review articles, he suggests, not for concurrences and dissents, which sometimes amount to nothing more than acts of self-indulgence. Rather than critiquing a colleague’s opinion through a dissent, Edwards suggests, the judge should work to improve the colleague’s opinion, narrow the grounds of disagreement and compromise if necessary. By many accounts, the D.C. Circuit became a more collegial and effective court under Edwards’ leadership.

Colleagues constrain in another way. It may be true, as Posner points out, that judges, like all human beings, are prone to “rationalization” (p.

34. Technically speaking, district courts have an en banc process, though I have never seen it used. See 28 U.S.C. § 132(c) (2006).

35. The key distinguishing characteristic of state supreme court justices is the size of their jurisdiction and the reality that most are elected. While the prospect of elections may constrain state judges in some areas—such as criminal law—it may embolden them in others. Compare San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 41 (1973) (finding that education is not a fundamental right under the U.S. Constitution and noting that the creation of a school-funding system required “expertise and . . . familiarity with local problems”), with DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (finding that the state’s school-finance system violated the Ohio Constitution’s guarantee of a “thorough and efficient” education), and Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989) (holding that the Texas school-finance system violated the Texas Constitution). See generally Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez and its Aftermath, 94 Va. L. Rev. 1963 (2008).


37. Advocates also have an interest in unanimous decisions (in their favor): unanimous decisions have more legitimacy and are less likely to be appealed or otherwise challenged. First in crafting the brief, then in reading the verbal and visual cues of the bench at oral argument, the good advocate looks for a theory of the case that can bring the panel together rather than pull it apart.
111), make-weight reasoning, even “self-delusion,” (p. 86), after they make
a decision or cast a vote at conference. But one answer, which I take Posner
to embrace, is to treat colleagues not as votes to garner but as perspectives to
consider—even as second guesses to invite. This may not happen as often as
it should. But that has more to do with the daunting case load of the appel-
late courts than with judicial close-mindedness. Posner is right about the
risks of “confirmation bias—the well-documented tendency, once one has
made up one’s mind, to search harder for evidence that confirms rather than
contradicts one’s initial judgment” (p. 111). Yet group-delusion—
particularly on a diverse appellate bench—is apt to occur less often than
self-delusion, and when the group includes law clerks who worked on the
case, the risk diminishes further.

The hard case, moreover, prompts humility, not certitude. Colleagues
become a helpful source of reassurance or criticism, of ensuring that the
grounds of decision are sound, not makeweights. Collaborative decision
making ought to wash out the “priors” (pp. 66-67)—the individual judges’
predispositions—from the legal system. To illustrate the point: Imagine if
to review articles and all newspaper articles and editorials about the law
were written by panels of three. Imagine further that each panel included at
least one author with a distinct legal ideology from the others. It is not a
stretch to suggest that those articles (this one too, I realize) might be written
differently from articles written by panels of one.

Appellate judges also face the risk of en banc consideration of a panel
decision by the rest of their colleagues. In theory, that prospect too should
constrain judges and panels. But the discretionary nature of en banc review,
like the discretionary nature of certiorari review, may do as much to free
constraints as to impose them. Either way, there is much to be said for Judge
Edwards’ suggestion that en banc review should be used rarely, if at all. The D.C. Circuit engaged in far more en banc review in the 1980s than it
does today. Yet I suspect that, even though the principal function of en
banc review is to keep panels in line by ensuring that they respect circuit
precedent, today’s D.C. Circuit more scrupulously follows its precedents
now than it once did. A firm commitment to circuit precedent, as opposed to
frequent en banc review, may provide the greater institutional constraint.

Third, a wide range of discretion-limiting principles shared to one de-
gree or another by all appellate judges have a further constraining effect:
deerence to the fact finding of federal agencies; respect for the interpretive
authority of federal agencies over statutes Congress has asked them to im-
plement; deference to most trial court rulings on procedure, discovery, and
evidence; judicial tie breakers such as clear-statement rules and burdens of

38. Just as the collective wisdom of markets tends to cancel out individual errors and biases
in securities valuation by investors, see, e.g., BURTON G. MALKIEL, A RANDOM WALK DOWN WALL
STREET (9th ed. 2007), the collective reasoning of appellate panels may help to moderate the predis-
positions and oversights of individual judges.


40. Id. at 1658 n.66.
proof and persuasion; and deference to sentencing decisions. Even when
mistakes are made, doctrines like harmless error, waiver, and forfeiture
make reversals the exception rather than the rule. Other authority-confining
principles—subject matter jurisdiction, standing, ripeness, mootness—limit
litigants in entering federal court and therefore necessarily limit a court’s
capacity to place its policy stamp of approval on one side of a dispute over
another.

Fourth, one of the great influences on appellate judging, and one of the
least appreciated by advocates, is the size of the docket and the breadth of
issues covered by it. Much of Posner’s book focuses on how judges decide
the most complex cases. But in assessing the influences on judicial behavior,
there is much to be learned from considering how judges resolve the run-of-
the-mine cases, not the hardest ones. In the Sixth Circuit, we sit for seven
weeks out of the year, and our oral argument calendar produces 168 cases
for each judge to hear in a three-judge panel setting. Once one accounts for
dissents and concurrences and our separate docket for death-penalty cases,
that leaves roughly 60–70 writing assignments a year for each judge—or
roughly one to two ten-page opinions a week. And that is without consider-
ing the non-oral argument calendar, which contains roughly the same
number of cases for each judge per year, many of which are not straightfor-
ward. Faced with this volume of cases, the first thing the young judge
realizes, whether he came to the bench from the bar or the academy, is that
he will not have as much time as he once did to answer legal questions. All
of this (generally) should incline the judge to say less rather than more—to
write shorter opinions rather than longer ones.

The diversity of the docket has a similar effect. The problem with many
complex statutory cases is not that they have indeterminate answers; it is
that the judge, not steeped say in the Bankruptcy Code or ERISA, does not
know enough to appreciate all of the contextual clues that an expert in the
field would understand—and cannot possibly have that knowledge in all of
the areas his cases will take him. Good advocacy can help. So can useful
law review articles, which I now consult more often as a judge than I ever
did as an advocate. Still, the wide range of cases is apt to incline even the
most self-confident judge toward modest rather than broad rulings.

Fifth, some legal issues place more constraints on judges than others. At
some level, the vast majority of judges are textualists when it comes to most
statutory cases. At another level, most judges are pragmatists when it comes
to the most difficult stare decisis cases, to disputes about the meaning of an
open-ended statute (like the Sherman Act), or perhaps to cases calling for
the interpretations of the civil, criminal, appellate, and other rules—rules
that the federal courts, through the Judicial Conference and the Rules Com-
mittees, initially propose and that Congress can reject or overturn by
statute. Leaving aside the level of difficulty presented by a given case,

41. Levi, supra note 11, at 1801.
42. Compare Joseph P. Bauer, Schiavone, An Un-Fortune-ate Illustration of the Supreme
Court’s Role as Interpreter of the Federal Rules of Civil Procedure, 63 Notre Dame L. Rev. 720
pragmatism may still accurately describe what judges do in some areas more than in others.

B. Internal Constraints on Judging

Just as institutional circumstances curb the risk that appellate judges will impose their policy preferences on the parties before them, so do internal constraints. The judicial oath is a good place to start. An Act of the first Congress, the oath requires all judges to:

[S]olemnly swear (or affirm) 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 and perform all the duties incumbent upon me as . . . under the Constitution and laws of the United States.  

The constitutional oath likewise obligates the judge to interpret the charter in good faith—to "bear true faith and allegiance" and to do so "without any mental reservation or purpose of evasion." Chief Justice Marshall, indeed, invoked the judicial oath in justifying judicial review:

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.

The same might be said about constraints on political judging. Why agree to "administer[] justice without respect to persons," "do equal right to
the poor and to the rich,” and “impartially discharge” one’s duties under the law—to say nothing of taking on the mantle of authority to declare democratically enacted laws unconstitutional—if nothing separates a judge’s personal preferences from his vote in a case? All judges, pragmatists and legalists alike, take the oath seriously, which necessarily limits their capacity to impose their reaction to a set of facts on the parties. “Where there’s a will there’s a way” is not part of the oath, and one should not lightly suggest otherwise.

The opinion-writing process provides another constraint. Unlike the democratically elected branches of the federal government, federal appellate judges must explain their decisions in writing. The process not only improves the decision-making process, but it also disciplines judges to ensure that their votes amount to more than intuition and impulse. No doubt, as Posner rightly points out, this still leaves considerable room for rationalization and “fig-leafing” (p. 350)—giving decisions the veneer, if not the substance, of legal reasoning. I agree with Posner that the courts should be more candid about the key explanations for their decisions. All too often opinions amount to a blurring array of citations, which obscure rather than highlight the critical choices made by the court. Most issues in most cases usually turn on one point, whether a pragmatic or a legalistic one. Posner is right to suggest that judges should feature and develop these points rather than bury them in a haystack of citations. One reason Posner’s opinions are so influential is that they do just that. Others should follow his example.

A preference for clarity and guidance provides a constraint on judging that affects some judges more than others. Posner says that pragmatists have a taste for uncertainty, while legalists have a taste for clarity. It often seems to work out that way, but the picture blurs in some settings. Ask trial and appellate judges whether they liked the pre-Booker Sentencing Guidelines system, and you will get an unpredictable range of answers, unconnected to ideology. Many judges liked the rule-driven nature of the Guidelines—the guidance they provided for an exceedingly difficult task and the equality-in-sentencing outcomes that they produced. Others chafed under the system because it did not allow judges to be judges and because it imperiled the goal of tailoring sentences to the individual circumstances of the defendant before them. One might think that legalists would have preferred the pre-Booker Guidelines regime: As Posner says, “The legalists love rules” because “they curtail judicial discretion” (p. 179). And one might think that pragmatists would have preferred the standards of the post-Booker Guidelines system. It is not that easy. Two of the key players in the Apprendi line of cases were a pragmatic-leaning jurist, Justice Stevens (the author of Apprendi and Booker), and a legalist, Justice Scalia (the author of Blakely). And Posner, the pragmatist, thinks that Booker was wrongly decided.

my experience, it is just as complicated at the courts of appeals and the district courts. Either way, the difference probably has as much to do with judicial personality as with judicial philosophy. To the extent there is a legal philosophy at play when it comes to some judges’ preferences for rules—and the judicial constraints that come with them—it may have less to do with an across-the-board preference for curbing judicial discretion and more to do with delegation—the notion that the law gives certain policy choices to agencies, not courts, to juries, not judges, to district courts, not appellate courts.

A distinction that often separates judges is a focus on the “seen” over the “unseen.” All judges appreciate the consequences of what they are doing when it comes to the parties before them, but some judges may be just as inclined to focus on the impact of a ruling on future litigants or other entities affected by a ruling. The key point is that a consideration of the “unseen” will often, though not invariably, constrain the judge when it comes to acting upon an initial impulse provoked by a fact pattern. Good advocates leave nothing “unseen.”

Temperament, perhaps most critically, affects how judges decide cases. Open-mindedness, not taking oneself too seriously, wit, self-awareness, humility, being a generous and respectful colleague, and being willing to work at getting it right all fall on the asset side of the balance sheet—as Posner (and I) would agree. The perils of willful judging are not lost on judges, as Dean Levi observes, which is why these traits lead judges so often to guard against it. I can think of panel settings, indeed, where I worried that a colleague was mistaken not because he or she succumbed to a policy preference but because they were too vigilant in resisting one. One capacity to change may not hurt either. Evolving judges have been given a good name and a bad one. But it is difficult to believe that good judges do not learn something over time—and change as a result, whether ideologically or not. One of the things I would like to hear most from Posner is how he has changed as a judge. What lessons has he learned? What might he have done differently from the outset had he known then what he knows now? Does he perform best in the areas of the law where he already knows the most but where the risk of overwriting is greatest? Or is it the reverse?

Judicial disposition takes me back to a lingering mystery: Why do Posner and Easterbrook vote so often together when they sit on a panel but

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52. Frédéric Bastiat, That Which Is Seen, And That Which Is Not Seen, in THE BASTIAT COLLECTION 1, 1 (2007) (“[A] law, gives birth not only to an effect, but to a series of effects. Of these effects, the first only is immediate; it manifests itself simultaneously with its cause—it is seen. The others unfold in succession—they are not seen: it is well for us if they are foreseen.”); John Hasnas, Op-Ed., The ‘Unseen’ Deserve Empathy, Too: Judges can do the most good by following the law, WALL ST. J., May 29, 2009, at A15 (“The purpose of the [legal] rules is to enable judges to resist the emotionally engaging temptation to relieve the plight of those they can see and empathize with, even when doing so would be unfair to those they cannot see.”).

53. See p. 120 (“If you do not take yourself very seriously you are unlikely to fool yourself into thinking that you have all the answers.”).

speak so differently about the role of the judge when they write extrajudicially? When Posner says he is a pragmatist, I believe him, and when Easterbrook says he is a textualist, I believe him as well—so it is hard to say that a shared world view explains the pattern. Adding to the conundrum is my hunch that the two of them vote regularly with Judge Wood, another well-respected judge on the Seventh Circuit, who would seem more likely to share the world view of still another former colleague from the University of Chicago law faculty, our current president, than the world views of Posner and Easterbrook.

What the voting pattern shows me is not that ideology does not matter or that Posner and Easterbrook are not who they say they are. It shows me that their philosophies take a back seat to the overriding task at hand: deciding cases, a good many of them, in the way they should be decided—by accounting for different insights, by respecting different perspectives, by searching for common ground, by engaging in a collective, not a singular, enterprise.

The Posner–Easterbrook voting pattern resolves a second mystery. It has never seemed possible that one man could write so many books and so many articles—and still find time to be an overworked (and highly esteemed) court of appeals judge. Given Posner’s output and the quality of the works that go out under his name, I have long suspected that “Richard Posner” was at least two people, not one. I was right, it turns out: There is Richard Posner the author, who worries about “political” judging, and Richard Posner the judge, who proves that it need not be so.