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# How a Judge Thinks

Michael J. Gerhardt

Review Essay

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*How Judges Think.* By Richard A. Posner, Harvard
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## Reviewed by Michael J. Gerhardt[†]

The question of how judges think is surprisingly difficult
and contentious. The question requires defining not only the
essential features of judging but also distinguishing them from
the distinctive aspects of what legislators and executive author-
ities do. The question has long vexed many jurists as well as
laypeople, political leaders, and particularly academics, who
have expended enormous time and energy in trying to figure
out precisely how judges make decisions—in the same way as
politicians do or differently?[1] Scholars extensively explore, in
other words, whether, or to what extent, judges base their deci-
sions strictly on the law and not on political considerations.

1. For a small sampling of the numerous works by legal academics and
social scientists on how judges and Justices decide cases, see LAWRENCE
BAUM, JUDGES AND THEIR AUDIENCES (2006); RONALD DWORKIN, LAW'S EM-
PIRE (1986); MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008); THO-
MAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT IN THE
U.S. SUPREME COURT (2006); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE
SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); SUPREME
COURT DECISION-MAKING (Cornell W. Clayton & Howard Gillman eds., 1999);
Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI.
1018 (1996); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes
in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); Emer-
son H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV.
517 (2006).

The efforts of scholars and others to clarify how judges do their jobs undoubtedly have had some influence on public understanding of judging. The recent presidential election was a dramatic reminder of the efforts of national political leaders to shape the composition and direction of the federal courts, particularly the Supreme Court. The election showcased, inter alia, the major presidential candidates' efforts to talk about judging in ways that were primarily designed to fortify their bases, attract political support, and advance their political agendas, including their plans for (re-)shaping the federal judiciary.[2] For their part, legal scholars have not done as much as they could to edify the public about what judges do. Indeed, they have been frequently chastised for their overly abstract and partisan commentaries on judging.[3] It is thus probably no surprise that law schools have not taught law students as much they could about how judges actually think. Law schools help to train law students to read judicial opinions critically and to construct (and deconstruct) theories of judging, but they rarely instruct their students on how to write judicial opinions (as either trial judges or members of multi-judge tribunals). Legal academics have failed to develop consensus on what judging entails and the criteria for evaluating judicial performance.

Into this thicket of uncertainty and disagreement comes the eminent legal scholar and judge, Richard Posner, to clarify once and for all how judges really think.[4] Posner promises to turn back the curtain to expose what judges do. Posner's views on judging should be of interest to anyone who seeks to understand the judicial function. His book provides an excellent springboard to discuss some of the most important recent efforts to explain and to evaluate judging.

This Essay consists of four parts. In the first Part, I analyze several of the most prominent models produced by scholars to explain judging, each of which Posner analyzes in his book.

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2. *See, e.g.*, Neil A. Lewis, *Stark Contrasts Between McCain and Obama in Judicial Wars*, N.Y. TIMES, May 28, 2008, at A17.

3. *Cf., e.g.*, ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 33–59 (2008) (describing how student-run law reviews and pressure on faculty to publish yield dubious scholarship); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1640–41 (2003) (noting that some academics ignore the importance of collegiality).

4. RICHARD A. POSNER, HOW JUDGES THINK (2008). Although I refer throughout this Essay to the author as Posner, I do so strictly for the sake of brevity. I do not mean to convey any disrespect to Judge Posner by this shorthand.

Like Posner, I find each of these models to be somewhat illuminating but on balance to be incomplete and misleading.

In Part II, I examine Posner's theory of judging (and the principal models on which it draws), which I ultimately find unpersuasive, unrealistic, and unsupported. Posner's account perhaps works best to describe how Posner himself makes decisions as a judge. While I cannot prove this, Posner's account conceivably is his sophisticated effort to defend his conception of himself as a "good judge" in spite of the political-science literature (which he largely accepts) demonstrating the widespread impact of judges' political biases on their decisions. Indeed, the book restates Posner's longstanding (mistaken) belief that other judges are usually nothing more than faint imitations of Posner himself. Moreover, Posner, like many other theorists, mistakenly presumes that that there is, or should be, only one correct way for judges to behave. Yet, the Constitution allows national political leaders to construct a federal judiciary with diverse approaches to construing the Constitution and other laws, and thus the Supreme Court and other courts have been composed of jurists with varying approaches to constitutional interpretation. Since the Constitution vests responsibility over judicial selection in national political authorities, the latter serve as a principal check on the composition and direction of the judiciary and thus help either to keep off the courts, or to maintain on the courts, particular judicial attitudes and methodologies.

In Part III, I examine various constraints on judging. While I agree with Posner that the federal system is not designed to ensure merit appointments (the appointments of the supposedly "best-qualified" people as judges) and that state merit-selection systems are undervalued in the academy, I argue that he has undervalued the significance of judicial precedent, judges' concerns about their reputations, and the filters and incentives within the federal judicial-selection process.

Part IV considers how legal scholars and law schools may better serve as meaningful checks on judicial performance. I agree with Posner that some objective measures of judicial merit might be conceivable, but law schools should do more than what he suggests—offering law students training in social science methodologies. Law schools should also expand their resources for training law students to solve problems in all of the areas in which lawyers function today, including but not limited to the legislative process, administrative agencies, ex-

ecutive offices, banks, and businesses. Law professors, too, could modify or rethink their own professional activities. Perhaps most importantly, they could benefit from some humility. Law professors usually try—or promise—to shift fundamental paradigms in legal (and judicial) thinking, but most do not succeed. I agree with the many other legal scholars who have proclaimed that we should speak truth to power, but the truth we speak to power should not just be a partisan scolding (as it so often is) but useful and meaningful instruction in the skills and the discipline that law students—and lawyers—will need in order to be effective problem solvers as judges, advocates, legislators, or any of the myriad other roles that they are called upon—or take the initiative to perform—in today's society.

## I.  FIVE POPULAR MODELS OF JUDGING

Posner recognizes that, in writing about judging, he is not writing on a blank slate. He is hardly the first jurist or eminent scholar to construct a theory of judging. In this Part, I discuss five models of judging that are particularly popular and influential within the academy. While Posner does not discuss these models in great detail, they are useful for developing an overview of the literature to which Posner's new book attempts to make a contribution,

The first prominent model is attitudinalism, which suggests that judges directly vote their policy preferences.[5] This theory is based on extensive empirical analyses, which measure judicial voting on the basis of whether it affirms a conservative or liberal outcome or policy. Attitudinalists find, inter alia, that judges and Justices primarily ground their decisions not on the law (formally defined as the texts of statutes, the Constitution, and precedent) but rather on the basis of factors external (or exogenous) to the law, such as judges' policy preferences.[6] Hence attitudinalists argue, for instance, that if a judge likes school vouchers then she simply votes to uphold their constitutionality. All the rest is window dressing at best, subterfuge at worst.

While Posner finds that this model has some merit, he suggests that it fails to explain the many nonroutine cases in which legal materials point to relatively clear outcomes and

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5.  *See generally* SEGAL & SPAETH, *supra* note 1 (describing the tenets of the attitudinal model).

6.  *Id.* at 86–96.

thus leave little sway for judges' policy preferences.[7] An additional problem is that, even in the hard cases of constitutional law in which no single source points to an obvious answer, there are many unanimous or nearly unanimous decisions in which the Justices agree in spite of having arguably different policy preferences. Moreover, the hard cases of constitutional law are hard in part because the choices confronting the Justices do not involve easy trade-offs; the cases might involve conflicts not between one value a Justice cherishes and another she does not but rather among several values that the Justice cherishes.[8] Attitudinalism is undercut further by the presumption that the categories of liberal and conservative are fixed over time (they are not) and that judicial attitudes are impervious to change (they may not be). More importantly, attitudinalists do not rule out legal variables as a basis of, or relevant to, judicial decision making; instead, the most that they have shown is the difficulty if not impossibility of ruling out the claim that political preferences play some role in how judges think.

Second, Posner addresses the rational choice model,[9] which is very popular in the social sciences. This model suggests that judges act strategically; they manipulate cases and other legal materials to maximize their personal policy preferences.[10] Posner counters that this model is too simplistic or myopic, and posits that judges might have preferences other than policy or political ones, though he fails to demonstrate, at least empirically, the extent or the nature of these other possible preferences.[11] A more serious problem is that the rational choice model cannot be disproved. Although common sense suggests that judges might vote strategically, the model is completely circular: it presumes that every outcome is strategic and thus treats every outcome as strategic.[12] Even so, this model, like attitudunalism, does not rule out the relevance of legal variables; it suggests, at most, that we cannot yet rule out the possibility

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7. *See* POSNER, *supra* note 4, at 27–28.

8. *Id.*

9. *See id.* at 29–31 (describing the strategic model). For an example of an application of the rational choice model to the impact of precedent in judicial decision making, see Knight & Epstein, *supra* note 1.

10. SEGAL & SPAETH, *supra* note 1, at 97–109 (discussing the rational choice model and its relationship to the attitudinal model).

11. *See* POSNER, *supra* note 4, at 73–76.

12. *Cf.* SEGAL & SPAETH, *supra* note 1, at 97–109.

that strategic considerations are entirely irrelevant in judicial decision making.

The third model is sociological and posits that panel composition influences outcomes.[13] In this theory, a panel consisting of judges who do not all belong to the same party is more likely than a homogenous one to seek compromise among the disparate views of the judges.[14] Posner suggests that one reason for the possible differences between homogenous and diverse panels is the general aversion of judges to dissent.[15] Another problem is that legal disputes are not perfectly fungible; the factual differences between cases are quite pertinent to their disposition. Without the ability to compare how two differently constituted panels vote on the very same case, the sociological model lacks a coherent or sensible measure by which to compare what a homogenous panel does in a particular area of law to what a differently composed court does in a different case in the same area of the law.

Organizational theory is a fourth model, which considers judges to be agents whose function is to serve a principal.[16] This theory posits that as agents judges are obliged to be independent from partisan influences,[17] but this conception of judges is flawed in at least two respects. First, the theory lacks criteria for determining the principal whom judges serve. Posner suggests that one possible principal whom judges serve is the federal government;[18] this is, however, problematic since it would mean that federal judges might have a conflict of interest in every case in which the federal government is a party. A more plausible principal that federal judges serve is the people of the United States or the Constitution,[19] but organizational theory does not tell us how to decide which of these is the cor-

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13. *See, e.g.*, CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17–45 (2006).

14. *Id.* at 22, 23 fig.2-1.

15. *See* POSNER, *supra* note 4, at 32–34, 51 (discussing the various reasons that judges are reluctant to author dissenting opinions).

16. *See generally* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (discussing the relationship of inferior courts as agents of their Supreme Court principal).

17. *Cf.* POSNER, *supra* note 4, at 39; Songer et al., *supra* note 16, at 675 (explaining that a faithful agent-judge would apply the law as interpreted by the Supreme Court unaffected by other considerations).

18. *See* POSNER, *supra* note 4, at 125–26.

19. *See id.* at 126.

rect principal whom judges serve or how judges may properly serve either or both.

Perhaps the most popular model among legal scholars is legalism, the classic view that judges and Justices base their decisions on the law.[20] Posner suggests that legalism is over-rated.[21] He suggests that legal materials are rarely so clear that they provide unobjectionable, easily identifiable solutions to legal disputes.[22] Instead, he suggests, legal materials almost invariably require judges to exercise discretion to interpret them and to apply them to particular disputes.[23] Since the law provides no clear mechanisms for constraining this discretion, it cannot be explained on the basis of legalism. Posner posits that jurists, particularly those on the Supreme Court, are moved less by "the law" and more by their own attitudes about the law.[24] Since law "is suffused with ideology," Posner agrees with Roscoe Pound that "the law" consists of legal doctrines, "techniques for deriving and applying doctrines," and "social and ethical (in a word, policy) views."[25] The Pound view of judging seems closely to approximate that of Posner, though, as we will see, their common view turns out surprisingly to lack empirical verification.

## II.  POSNER ON JUDGING

There are many accounts of judging by prominent judges, of which Richard Posner's is the most recent.[26] Posner's account is nonetheless significant because of his eminence as a jurist and scholar and because he has grounded his theory in several other respectable theories of judging and a distinguished tradition of judging. Indeed, much of what Posner has tried to do in his book (and career) is to "modernize" great jurists such as Benjamin Cardozo and Oliver Wendell Holmes, Jr., to demonstrate a link (albeit a sophisticated one) between their impressions about judging and his particular understanding and exer-

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20.  *See generally* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909 (2004) (analyzing the viability of the view that the law acts as a "limiting principle").

21.  *See* POSNER, *supra* note 4, at 7–9, 41–56.

22.  *Id.* at 47.

23.  *Id.* at 49.

24.  *Id.* at 42–44.

25.  *Id.* at 43 (citing Roscoe Pound, *The Theory of Judicial Decision* (pt. 3), 36 HARV. L. REV. 940, 945–46 (1923)).

26.  *E.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); O.W. HOLMES, JR., THE COMMON LAW (1881).

cise of the judicial function. By relying on other theorists' models of judging and linking himself to a distinguished tradition of judging, Posner attempts to avoid the problem that his account of judging, like that like of other judges, is self-serving and nothing more than self-rationalization. In this, however, he only partially succeeds.

To understand Posner's theory of judging, it helps to know the other theories on which it most heavily relies. The first is psychological, which "focuses on strategies for coping with uncertainty."[27] Posner believes that uncertainty is widespread in the law (in spite of what he has said about the extent of non-routine cases with clear, determinate answers),[28] and so legal disputes allow a wide swath for judges' personal psychologies to influence their decision making. Equally important to Posner's understanding of judging is the economic theory of judging,[29] which is a variation on the rational choice model. It stresses that judges are, like everyone else, utility maximizers; they derive professional satisfaction in many different ways, including but not limited to the prestige of their jobs, their power or influence, and their leisure time.[30] Because Posner further believes that the law eventually runs out—i.e., there is a point at which legal materials simply do not provide the answers to the legal questions confronting the courts—it leaves judges with no alternative but to become pragmatists.[31] But, Posner suggests that once the law runs out, judges and Justices end up deciding cases on the basis of their assessments of the likely consequences of their decisions.[32] As described by Posner, pragmatism, which is the conception of judging he has defended (and practiced) throughout his career, is forward-looking and "local[ized]," meaning that it leads judges to tailor a solution to the problem in front of them.[33] Pragmatism is closely related to the phenomenological model, which stresses the importance of both intuitions and predispositions to judicial decision making.[34] Bayesian decision-making theory emphasizes that "pre-

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27. POSNER, *supra* note 4, at 35.
28. *Id.* (calling uncertainty "a fundamental characteristic of the U.S. legal system").
29. *Id.* at 35–39.
30. *Id.* at 35–36.
31. *Id.* at 231.
32. *Id.* at 40.
33. *Id.* at 241.
34. *Id.* at 40.

conceptions play a role in rational thought,"[35] while phenomenological theory suggests that judging is based on how it must (or does) feel to judges.[36] Posner suggests that many books on judging written by prominent judges describe their impressions of what judging entails and that these impressions illuminate how judges think.

Posner synthesizes these theories into a model that also takes into account the ramifications of the special institutional contexts in which different judges operate. In particular, district and courts of appeals judges are subject to various internal constraints (such as dissent aversion[37] and legalistic techniques)[38] and external constraints (such as appellate review,[39] the norm of following the precedents of higher courts,[40] and judicial elections in states and congressional control over funding and jurisdiction in the federal system).[41] But, Supreme Court Justices are relatively free from all of these constraints to act upon their personal or policy preferences, and so Posner suggests that it is this relative freedom from the usual constraints on judging that leads Justices to make decisions as most political scientists find: on the basis of their political biases more than the law.

In Posner's view, psychological, phenomenological, economic, and pragmatic theories have different explanatory force, depending on whether one is trying to explain lower court or Supreme Court judging. For instance, he suggests:

> [B]ecause an American judge, especially at the appellate level, is an occasional legislator [who has to fill in the gaps and ambiguities of the law,] yet with no constituency to answer to, his judging is likely to be influenced by temperament, emotion, experience, personal background, and ideology (influenced in turn by temperament and experience), as well as by an "objective" understanding of what would be the "best" legislative policy to adopt in order to resolve the issue in the case.[42]

Posner further describes the work product of a judge as "reflect[ing his or her] preferences,"[43] which differ "depending on a

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35. *Id.* at 67.
36. *Id.* at 40.
37. *Id.* at 32−34.
38. *Id.* at 175−202.
39. *Id.* at 142.
40. *Id.* at 135.
41. *Id.* at 156.
42. *Id.* at 174.
43. *See id.* at 253 (comparing judges to legislators while simultaneously distinguishing them).

judge's background, temperament, training, experience, and ideology, which shape his preconceptions and thus his response to arguments and evidence . . . ."[44] In addition, Posner suggests that judges are ultimately "constrained pragmatists" who "acknowledge[] the inevitability that like cases will often be treated inconsistently not only because different judges weigh consequences differently . . . but also because, for the same reasons, different judges *see* different consequences."[45]

Posner's account thus far is, however, unpersuasive for several reasons. First, it seems to boil down to nothing more than the proposition that no two judges are alike. This sounds like common sense, but it is a remarkably anticlimactic insight given the sophisticated theorizing that led up to it. More importantly, it eludes verification, for it posits too many variables that we can never really verify, such as each judge's temperament, psychology, political and other preferences, life experience, and predispositions. It is ultimately a theory that is impossible to disprove.

Second, Posner makes many assertions throughout the book that are in tension with his general description of how judges think. For instance, he maintains, in spite of the account set forth above, that courts of appeals judges "are strongly motivated to adhere to precedent, not only because they want to encourage adherence to the precedents they create, but also— and this is more important to most judges—because they want to limit their workloads."[46] Moreover, Posner has failed to demonstrate the precise circumstances in which—in lower courts— ideology trumps or is trumped by various other factors, including precedent. Indeed, at least one new study suggests, contrary to Posner's suggestion, that ideology is not all that counts in judging even on the Supreme Court.[47] Nor does Posner prove that judges who do not think of themselves as pragmatists really are pragmatists. The fact that these judges are trying, but not succeeding perfectly, to be "legalists" does not transform them into pragmatists; it makes them imperfect legalists.

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44. *Id.* at 249.

45. *Id.*

46. *Id.* at 145.

47. *See* Paul H. Edelman, et al., *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008) (suggesting and applying a method of measuring how far the votes in a given case depart from the pattern one would expect to see if Justices divided strictly along ideological lines and noting nonideological considerations).

Posner simply fails to demolish legalism, something he has tried to do throughout his career. A central feature of legalism that Judge Posner singles out for criticism is reasoning by analogy.[48] But, the fact that Posner demonstrates some logical fallacies in reasoning by analogy does not refute its utility or omnipresence in judicial decision making. The most that Posner has shown is that that *he* has not been persuaded to employ reasoning by analogy, but he has not shown that the late Charles Black was wrong when he asserted more than four decades ago that "the *case* [method] remains paramount in importance and in authority. This is the heart-method of Anglo-American legal reasoning."[49] If the quest is to construct a positive account of what judges do—a principal objective of Posner's book—then reasoning by analogy is what most of them are actually trying to do most of the time. It seems likely that temperament and experience, among other factors, might influence reasoning by analogy, but Posner has not yet proven it.

Third, Posner's own theorizing undercuts his theory of judging. Throughout his career, Posner has insisted that the law is a soft science rather than a hard science, like physics, in which the practitioners agree on the premises and the standards by which their work may be judged. The problem, at least for Posner, is that, in law, judges often operate from different premises (or preconceptions, as Posner would have it).[50] But, if judges operate from different premises and preconceptions, it is unclear on what basis they can be fairly compared with each other. It makes sense to compare their default rules and preconceptions, but when these things are different we are doing nothing more than comparing apples and oranges.

Consider what we can learn from a more sophisticated analogy between legislating and judging than the one suggested by Posner. In theory if not fact, legislators can be described as one of three different kinds: perfect representatives (reflections of their constituents), agents (who follow their constituents' preferences perfectly), or fiduciaries (who try to act in

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48.  *Id.* at 180–91.
49.  CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 4 (1969).
50.  *See, e.g.*, RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 230–40 (1999) (describing different approaches of public intellectuals to the Clinton-Lewinsky investigation and noting that silence "may have been due in part to an internal war between their professed values . . . and their politics").

the best interests of their constituents).[51] Legislators might adhere to one of these models all the time or just some of the time, and on a given piece of legislative business a legislator might try to adhere to some combination or all of these models (in at least some respects). We lack perfect information on which model or models each legislator adheres to (and when). Indeed, it makes little sense to compare how one legislator functions with another without knowing each one's conception of his job. The same, as Posner is wont to say, is true for judges.

## III. POTENTIAL CONSTRAINTS ON JUDGING

Social scientists and legal scholars devote enormous time and energy to pondering whether there are any meaningful constraints on judicial performance.[52] Posner's apparent understanding of these constraints is unorthodox. He describes as "internal" those constraints on judging that naturally originate in or are organically a part of the minds of judges[53] while he describes every other possible constraint as "external."[54] This characterization of constraints is confusing if not confused, since it is the opposite of how social scientists and legal scholars analyze or conceptualize constraints. According to most people who study judging, internal constraints are those endemic to, or part of, the legal process, while external constraints are those supposedly imposed from outside the legal process onto judicial decision making.[55] Social scientists and legal scholars debate whether precedent, as something internal to the law, actually constrains Justices or whether Justices ground their decisions not on the law but rather factors external to the law (such as their own political preferences).

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51. *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 66–76 (4th ed. 2007) (describing theories of the functions performed by legislators).

52. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Stefanie Lindquist & Frank Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005); sources cited *supra* note 1.

53. POSNER, *supra* note 4, at 174–203.

54. *Id.* at 125–57.

55. *See* GERHARDT, *supra* note 1, at 68 (discussing the dominant social-science models of precedent and noting that external constraints are "factors external to the law, such as the justices' personal or policy preferences" while internal constraints are factors "internal to the law, including the Constitution or precedent").

Interestingly, Posner recognizes there are at least two internal constraints on lower court judging that exert no similar binding restraint on Supreme Court Justices. The first is precedent (defined as prior judicial decisions that are arguably on point), which Posner declares that district and particularly courts of appeals judges are "strongly motivated" to follow.[56] Moreover, he describes appellate judges as generally averse to dissenting because they prioritize collegiality.[57] Posner does not, however, believe that precedent strongly constrains Supreme Court Justices, because they are not accountable to any higher tribunal; they are the final authority on their own precedent.[58] Precedent, in other words, operates horizontally on the Supreme Court (as persuasive authority) as opposed to vertically (as an inflexible mandate imposed by a superior court upon an inferior one). Nor does Posner find Justices to be averse to dissent or unusually influenced by collegiality concerns; they are, in his judgment, almost entirely free to vote on the basis of their respective ideologies (theories of the law). Otherwise, the Justices are relatively immune to public opinion, though political checks, including the continued support of both Congress and the President, are instrumental to their stature in the constitutional order.

There are difficulties, however, with Posner's analyses of precedent and collegiality as judicial constraints. First, he understates the importance of precedent as a constraint on the Supreme Court. Posner mistakes the severely limited extent of robust path dependency in constitutional adjudication—conditions under which precedents rigidly mandate particular outcomes—for its complete absence. My own research indicates that, in fact, Supreme Court precedent has limited path dependency horizontally, i.e., constitutional decisions rarely robustly foreclose or compel particular outcomes.[59] I have further found that there is actually substantial stability in constitutional law; the Court rarely overturns itself and, in any given Term, it is rare for more than only a few constitutional doctrines to be in flux.[60] Indeed, most constitutional doctrines—and the Court's

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56.   POSNER, *supra* note 4, at 145.

57.   *Id.* at 32–34.

58.   *See id.* at 51–56, 275–77, 345–46 (discussing recent Supreme Court decisions that have overruled long-standing precedents and concluding that Supreme Court precedent is not constraining Justices).

59.   GERHARDT, *supra* note 1, at 79–110.

60.   *See id.* at 9–46 (analyzing historical patterns of Supreme Court precedent and noting the relatively few instances where prior precedent was

attachment to precedent as a preeminent mode of constitution-
al discourse—are enduring.[61] Moreover, Justices generally rec-
ognize (and exhibit) the need to reconcile their decisions with
earlier precedents.[62] It is a rare (and completely ineffective)
Justice who attempts to build the world anew across the board
in constitutional adjudication.

Second, Posner's account leaves out several significant
findings made by social scientists (besides those I have already
noted). For instance, he does not discuss the importance of Jus-
tices' crafting opinions to appeal to different audiences,[63] even
though such efforts arguably reveal the possibility that con-
cerns about appealing to certain audiences are a plausible ex-
ternal constraint on at least some judges. Nor does Posner dis-
cuss the significant findings that Justices rarely deviate from
the federal government's suggested position or the position that
is supported by most of the amicus briefs in a given case.[64] If
one were interested in illuminating the internal constraints on
judging, these findings cannot be ignored.

Moreover, Posner barely discusses another prominent
model of judging—the institutionalist model.[65] Posner does dis-
cuss the importance of context for understanding judging, but
he tends to discuss each of the features of the institutional con-
text in which judges operate separately rather than as a collec-

overturned); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L.
REV. 1279, 1282 (2008).

61. *See* GERHARDT, *supra* note 1, at 177–98 (discussing the idea of "super
precedents" and their role in constitutional analysis and discourse).

62. *See id.*

63. *See* BAUM, *supra* note 1, at 43–49 (discussing the possibility that
"judges' interest in the esteem of their audiences affects their choices as deci-
sion makers").

64. *See, e.g.*, Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and
Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme
Court?*, 41 LAW & SOC'Y REV. 259, 268–69 (2007) (noting that research has
demonstrated "over and over again that the U.S. government is far more suc-
cessful than any other party or amicus curiae" and that Justices are "reluctant
to make decisions that will disaffect significant numbers of organized inter-
ests").

65. *See, e.g.*, Howard Gillman, *What's Law Got to Do With It?: Judicial
Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW &
SOC. INQUIRY 465, 492–94 (2001) ("[S]cholars . . . have found persuasive evi-
dence in support of the view that the institutional setting within which judges
operate shape their behavior . . . ."); Keith E. Whittington, *Once More Unto the
Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. IN-
QUIRY 601, 608–32 (2000) (discussing the role of institutionalism in thinking
about the law).

tion, aggregation, or system of forces that influence judging.[66] Institutionalists posit, inter alia, that the context in which judges and Justices operate matters: that the thinking and performance of judges and Justices is shaped in part by the complex institutional structures in which they function.[67] By separately assessing a few of the features of the institutional setting in which judges operate, Posner fails to provide a comprehensive account of judging. None of the features of this setting operate apart from the others; together, they exert considerable force on judges and Justices to channel their decision making along certain lines. They are constrained to function within a system in which there are strong pressures for them to forge coalitions to decide cases, to respect the norm of stare decisis, and to conform to the expectations of judges and the legal community about how they should behave as judges. Judges are influenced by what other judges expect from, and of, them. These expectations reinforce various aspects of judging, such as temperament, appreciation for collegiality, and the basic task of judges to decide cases or legal questions on the basis of their best interpretations of the pertinent legal materials, including statutes and precedents. The institutional features of judging might not dictate the answers to particular questions of law, but these features are likely to shape the means or the process by which judges decide those questions. Interestingly, Posner questions many of these well-settled notions and practices, and thus finds himself weaving a theory of judging that ultimately suggests more about Posner than it does about how other judges actually function.

Third, another possible constraint on judging is the judicial selection process. Posner accurately observes that the federal system is not designed to ensure the selection of the best-qualified people to serve as judges; instead, it is designed to keep off the bench people who are unqualified, dishonest, or ideologically outside the mainstream of constitutional law.[68] The process is designed to weed out nominees who lack the temperament, the integrity, the skills, or the outlook (and val-

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66. *See* GERHARDT, *supra* note 1, at 79–82 (providing an overview of institutionalist research on judging).

67. *Id.* at 80.

68. *See* POSNER, *supra* note 4, at 155–56 ("The pool from which our judges are chosen is not homogeneous, though neither is it fully representative; it is limited as a practical matter to upper-echelon lawyers, almost all of whom are well-socialized, well-behaved, conventionally minded members of the upper middle class.").

ues) that we expect federal judges to have and therefore appear to (or actually do) pose threats to our established notions of how judges should act or to too much established law. We can therefore expect the people who become federal judges to come to the bench with notions or attitudes of judging and the law that fit within the mainstream of constitutional jurisprudence. Among the most important of these notions is a healthy respect for precedent and stability and continuity in the law. But, the mainstream in constitutional law is not fixed, so that politicians make the critical decisions about which attitudes regarding precedent (or judging more generally) are outside the mainstream.

There is a lot more to be said about the relevance of federal judicial selection to judging. While judicial selection oftentimes seems to place a premium on ideology, it does not preclude appointments based on merit. It is not, in other words, impossible to emphasize both ideology and strong professional credentials in the selection process (evident, for instance, in the recent appointments of Chief Justice John Roberts and Associate Justice Samuel Alito, Jr.). Indeed, Lee Epstein and Jeffrey Segal have found that impressive professional accomplishments strengthen rather than weaken judicial nominations.[69]

Nevertheless, it is a mistake to impose upon a system a purpose that it has not adopted for itself. If a system is not designed to ensure the selection of judges based on merit, it is of very limited utility to assess that system on how well it selects judges based on merit. If it does, then we might have to acknowledge that the system designed by the framers for judicial selection is not necessarily incompatible with merit-based appointments. But, if, as Posner suggests, the federal system is not designed to select people based on merit, then it should not be surprising—and it is not very illuminating—to find that judges are rarely selected or rejected on the basis of merit. If we want more merit-based appointments, we need to construct consensus on judicial merit and then either to create incentives for political leaders to make judicial appointments on the basis of merit or to redesign the current system to maximize merit-based appointments. Until we rethink or redesign the federal scheme for judicial selection, we should evaluate it on whether it achieves the objectives of the federal officials whom the Constitution charges with its maintenance.

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69. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENT 66–70, 102–06 (2005).

Posner is, however, respectful of the efforts of nearly twenty states to employ mechanisms for selecting judges on the basis of merit (a notion Posner curiously avoids defining).[70] Unlike most other academics, he recognizes that while there may be some politics involved in merit-selection systems, it is a different kind of politics than that which dominates either elections of judges or the federal judicial selection system. Nevertheless, it would be interesting to know how judges chosen through merit selection compare with each other (and with those not chosen through such methods), how lawyers or the bar rate them, and the extent to which ideology plays a role in their decision-making.

## IV. LEGAL EDUCATION AND SCHOLARSHIP AS CONSTRAINTS ON JUDGING

A final possible constraint on judging is legal education and scholarship. Posner recommends in-depth training of law students in social-science methodologies to better equip them to assist judges in appreciating the likely benefits and costs of a given decision.[71] If, as Posner suggests, judges are in the business of weighing the different possible consequences of particular decisions, they need to develop more sophisticated techniques for making such calculations.

But Posner's prescription is problematic for several reasons. First, it derives from his mistaken belief that any deviation from what he regards as the correct methodology or outcome has to be *unprincipled* judging—effectively legislating from the bench. Posner faults law professors for the rigidity with which they hold their positions, but he is prone to the same rigidity. Presumably, pragmatists are influenced or take into account experience, but his own theory of judging has not been influenced, apparently at all, by his own experiences as a judge. He says the same things today about judging that he has been saying for years, even well before he became a judge himself. More importantly, Posner seems not to recognize that the Constitution empowers presidents and senators to decide what kinds of judges to appoint—and thus what kind of judging is permissible in our court system. The courts are what national political leaders have made them. Presidents and senators are the principal checks on the judiciary, and judges' varying atti-

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70.  *See* POSNER, *supra* note 4, at 139.
71.  *See id.* at 204–29.

tudes about the law are a reflection of the choices of the presi-dents and senators who are responsible for their appointments. While neither judges nor Justices vote perfectly in accordance with the preferences of the officials who appointed them, they are rarely appointed—at least for the past few decades—without some ideas of their likely judicial philosophies and con-stitutional commitments. The Constitution does not dictate a particular interpretive approach, but instead authorizes na-tional political leaders to make the critical choices of the range of interpretive approaches that they will allow—or disallow—in the federal system. Thus, the federal judicial-selection process may be used not only to fortify certain constitutional attitudes or commitments within the judiciary but also to filter out the nominees whose records suggest their constitutional opinions are outside the mainstream of contemporary constitutional thought.[72]

Second, not all judges would agree with Posner that they are merely pragmatists. The popularity of reasoning by analogy (or the case method) remains persistent and widespread in ad-judication, and advancing arguments grounded in the social sciences, as Posner is wont to do, will not appeal to any judges except for Posner and the few other jurists who agree with him on both the utility of social science research in the law *and* the absolute futility of reasoning by analogy. Moreover, there are many different modes of constitutional argumentation, and Justices may choose which ones they find most compelling or persuasive. Interestingly, Posner does not measure the kinds of arguments that are popular on the Court, but in fact the most popular mode of argumentation on the Court is precedent.[73] It is practically impossible to find an opinion that does not cite or rely on precedent, whereas other sources, such as original meaning, are rarely mentioned.[74]

Third, Posner discounts one of the most important things law schools could do to train students to better appreciate judg-ing: actually asking them to draft judicial opinions. Law schools are rife with classes that call upon students to criticize judges, but few if any classes are devoted to instructing students in the

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72. *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 74–77, 128–34, 162–79 (rev. ed. 2003) (noting that presidents and senators tend to base their appointment decisions on philosophical and ideological bases).

73. Gerhardt, *supra* note 60, at 1283–84.

74. *See id.* at 1283–86 (noting that the Roberts Court claimed precedent as a basis for every one of its constitutional decisions in its first two Terms).

art of writing judicial opinions or working together on a collegial court. Granted, such training might be premature, but it might be a good start for lawyers to begin to understand the thought processes of judges and the challenges of deciding cases, forging majorities in contentious cases, and crafting judicial opinions.

Fourth, Posner, like many other academics, ignores lawyering outside courts. Law schools are long overdue in recognizing the ramifications of the fact that courts are not the only institutions that routinely confront questions of law. Indeed, teaching students about how institutions other than courts handle legal arguments would help them to understand the ways in which judging differs from legislating or enforcing the law as executive officials are charged to do. Moreover, a central concern of the Carnegie Report[75] is to urge law schools to do more to train law students to be effective problem solvers in all of the areas in which lawyers are called upon to solve problems inside and outside of courts.[76]

Fifth, legal scholars could do a lot more to serve as a meaningful check on the judiciary. Posner is probably right that law professors produce too much scholarship that is either tantamount to a partisan brief or that is designed principally to get attention in the academy than actually to enrich constitutional argumentation or understanding.[77] It is more than ironic that, even though Posner derides the trends in legal scholarship, those trends are clearly moving in the direction that Posner urges. Interdisciplinary scholarship is valuable because it can enrich our understanding of the law's relationship to other fields, but its focus is not on elucidating the law for judges or holding them accountable for their mistakes. It is deliberation disconnected from much of what judges do, which is to decide cases on the basis of reasoning by analogy.

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75.  WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007)

76.  *Id.* at 95–125 (discussing different teaching and learning methods such as the iterative mode, T-funnel technique, and composition theory in legal writing, all of which could be utilized in law school to develop student problem solving skills that "legal professionals must master in order to function well in a variety of legal roles").

77.  *See* POSNER, *supra* note 4, at 211–29 (discussing how the legal academy is separating itself from the judiciary and noting how the Court rebuked the academy for overreaching in its legal analysis in a lawsuit challenging the Solomon Amendment).

To be sure, some empirical scholarship, as Posner notes, does attempt to hold judges accountable by rating their performances.[78] Focusing on citation practices, as Stephen Choi and Mitu Gulati do, for instance, provides one basis on which to determine what judges think of each other's work.[79] But, citation practices are not a perfect measure of quality by any means; they miss many of the things that judges do that fly below the radar, such as asking questions at oral argument; and they punish judges who are good, maybe even very good, but are overshadowed or obscured by the few judges who are perceived, for whatever reason, as the very best in particular fields.

## CONCLUSION

I have long revered Richard Posner as a scholar and judge. I am confident that it would be a pleasure—and an intellectual challenge—to argue a case before him. I am also confident, particularly after reading his book on judging, of the arguments that I would make to him, because he has told his readers the kinds of arguments that would persuade him. The problem is that these arguments are not likely to have much influence on most of Posner's colleagues, and there is the rub: Posner has told us how *he* thinks as a judge, but Posner's matrix of judging does not provide much help or guidance on how judges other than Posner think. Posner's account of judging seems, more than anything else, to be a defense of his own conception of judging and an attempt to distinguish him from the Justices whom political scientists have shown are grounding their decisions primarily in their political biases rather than the law. But, to know how judges other than Posner actually decide cases, we need to know about them. It is not enough to suggest they really are something other than what they purport to be, particularly when so much of what they do and are has not been fully disclosed. Nothing in Posner's book negates that the first and perhaps still best place to look to know how judges generally think is the books and the opinions that they have written as judges.

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78. See POSNER, *supra* note 4, at 146–56 (noting, inter alia, the work of Stephen Choi and Mitu Gulati).

79. *See* Stephen J. Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 305–09 (2004).