

Book Note

HOW JUDGES THINK, by Richard A. Posner¹

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THE CENTRAL THESIS DEVELOPED throughout Justice Richard A. Posner's book is that legal pragmatism is the best way for judges to approach legal problems, especially when compared to legalism (legal formalism, conventionalism), which Posner characterizes as a mythical view of judicial deliberation. Legal pragmatism shifts the focus away from antecedent logic in legal reasoning to a policy-based, consequentialist approach for deciding difficult cases. Judges are occasional legislators and sometimes must reach beyond an impartial application of rules to determine the outcome. However, pragmatism is not, as critics often claim, an "anything goes" approach to judging; Posner describes judicial behaviour as "constrained pragmatism" because of internal and external constraints that limit judicial discretion.

The book is divided into three parts and twelve chapters. In the first part, Posner constructs "The Basic Model" of judicial behaviour. Posner quickly disposes of seven of the "Nine Theories of Judicial Behavior," leaving legalism and pragmatism to battle it out for the rest of the book. He then moves on to develop a framework for his theory around the central figure of "The Judge as a Labor-Market Participant," thereby invoking his law and economics background. Posner lays out a number of internal constraints that bear on a judge's decision making as he or she plays "the judicial game." The primary constraint is the judge's concern for being a "good" judge, both for self-satisfaction and in the eyes of others. "Good" judges do not deviate too far from the norms and usages of the judicial game, and over time, they internalize these norms.

The second part, "The Model Elaborated," discusses external constraints to the judicial game—notably promotion, reputation, and political retribution—but concludes that they have a weak effect at best. Posner finds that, paradoxi-

1. (Cambridge, Mass.: Harvard University Press, 2008) 387 pages.

cally, the biggest external constraint on judges is the idea of judicial independence itself. The attractiveness of maintaining judicial independence results in “an almost monastic isolation from possible temptations to surrender independence for other personal advantages.”²

The third, and most fascinating, part of the book simultaneously broadens the scope of consideration—into politics, constitutionalism, and globalization—while narrowing the focus to the US Supreme Court. In the Supreme Court, a large number of cases are decided on pragmatic grounds, since routine cases have already been resolved by lower courts. The justices face the task of interpreting the dated language of the US Constitution and applying it to contemporary issues. But the Supreme Court is not just a pragmatic court; it is a “political court,” grappling with highly politicized issues that represent deep divides within the community (*e.g.*, freedom of speech, abortion, and the right to bear arms). At the Supreme Court, more than any other court and more often, the pragmatic consequences of judicial decisions overshadow pre-determined rules for explaining outcomes.

By focusing on the Supreme Court, Posner shows how highly experienced appellate judges diverge greatly from the popular myth of legalism. They are not reading “esoteric scholarly articles” and partaking in in-depth debates with their colleagues to understand the case. Rather, they spend little time reading and deliberating, and let their experience, temperament, and other conscious and unconscious personal characteristics guide them to their decision.

How Judges Think is an important and timely addition to the literature on judicial review by a sitting judge and distinguished academic. It provides a detailed exploration of the mind of a judge and deals with issues of jurisprudence and legal theory in a nuanced manner. The book convincingly depicts a non-threatening portrayal of judicial pragmatism as a sensible and human explanation for how judges reach decisions.

2. *Ibid.* at 370.