

RICHARD A.  
POSNER

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HOW  
JUDGES  
THINK

# How Judges Think

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Richard A. Posner

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# Introduction

In my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or “hunching”; and fourth, asinine, of and by an ass; and in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges.<sup>1</sup>

Ivan Karamazov said that if God does not exist everything is permitted, and traditional legal thinkers are likely to say that if legalism (legal formalism, orthodox legal reasoning, a “government of laws not men,” the “rule of law” as celebrated in the loftiest Law Day rhetoric, and so forth) does not exist everything is permitted to judges—so watch out! Legalism does exist, and so not *everything* is permitted. But its kingdom has shrunk and grayed to the point where today it is largely limited to routine cases, and so a great deal is permitted to judges. Just how much is permitted and how they use their freedom are the principal concerns of this book. These concerns have been made especially timely by the startling (to the naïve) right turn by the Supreme Court in its latest term (ending in June 2007).<sup>2</sup> The turn resulted from the replacement of a moderately conservative Justice (O'Connor) by an extremely conservative one (Alito), and so underscores the question of the personal and political elements in judging and thus of the sense in which the nation is ruled by judges rather than by law. If changing judges changes law, it is not even clear what law is.

1. Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision,” 14 *Cornell Law Quarterly* 274, 275–276 (1929).

2. Linda Greenhouse, “In Steps Big and Small, Supreme Court Moved Right: A 5–4 Dynamic, with Kennedy as Linchpin,” *New York Times*, July 1, 2007, § 1, p. 1.

I feel a certain awkwardness in talking about judges, especially appellate judges (my main concern), because I am one. Biographies are more reliable than autobiographies, and cats are not consulted on the principles of feline psychology. At the same time, I am struck by how unrealistic are the conceptions of the judge held by most people, including practicing lawyers and eminent law professors, who have never been judges<sup>3</sup>—and even by some judges. This unrealism is due to a variety of things, including the different perspectives of the different branches of the legal profession—including also a certain want of imagination. It is also due to the fact that most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.<sup>4</sup> There is also the sense that judging really is a different profession from practicing or teaching law, and if you're not in it you can't understand it. I remember when I was appointed receiving a note from a court of appeals judge in another circuit with whom I was acquainted, welcoming me to "the club." This book parts the curtains a bit.

The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret.<sup>5</sup> Judicial deliberation is overrated. English judges traditionally did not deliberate at all, as that would have violated the ruling principle of "orality," whereby everything that judges did had to be done in public so that their behav-

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3. A notable example is Harvard law professor Henry Hart's time-and-motion study of Supreme Court Justices: Henry M. Hart, Jr., "The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices," 73 *Harvard Law Review* 84 (1959), which I discuss in chapter 10.

4. Robert Keeton, a federal district judge and before that a Harvard Law School professor, acknowledged in his treatise on judging that judges make "value-laden" rulings. Robert E. Keeton, *Keeton on Judging in the American Legal System* 15 (1999). But he did not explore the sources of those values. His treatise has no index entry for either "politics" or "ideology."

5. Though a pretty open one. "When I first came on the court [the U.S. Court of Appeals for the District of Columbia Circuit], I imagined that conferences [on cases] would be reflective, refining, analytical, dynamic. Ordinarily they are none of these. We go around the table and each judge, from junior to senior, states his or her bottom line and maybe a brief explanation. Even if the panel is divided, the discussion is exceedingly crisp. The conference changes few minds. Assignments are made, life goes on." Patricia M. Wald, "Some Real-Life Observations about Judging," 26 *Indiana Law Review* 173, 177 (1992). Chief Justice Rehnquist described Supreme Court conferences similarly. See chapter 10.

ior could be monitored;<sup>6</sup> hence those seriatim opinions that baffle the American law student and perhaps the English one as well. In almost all cases a brief discussion among the judges before deciding enables convergence on a single majority opinion in lieu of a separate opinion by each judge.

The confidentiality of the judicial process would not matter greatly to an understanding and evaluation of the legal system if the consequences of judicial behavior could be readily determined. If you can determine the ripeness of a cantaloupe by squeezing or smelling it, you don't have to worry about the produce clerk's mental processes. But the consequences of judicial behavior are often more difficult to determine and evaluate than the consequences even of other professional services, such as medicine. Many of the decisions that constitute the output of a court system cannot be shown to be either "good" or "bad," whether in terms of consequences or of other criteria, so it is natural to ask whether there are grounds for confidence in the design of the institution and in the competence and integrity of the judges who operate it.

The secrecy of judicial deliberations is an example of professional mystification. Professions such as law and medicine provide essential services that are difficult for outsiders to understand and evaluate. Professionals like it that way because it helps them maintain a privileged status. But they know they have to overcome the laity's mistrust, and they do this in part by developing a mystique that exaggerates not only the professional's skills but also his disinterest.<sup>7</sup> Judges have been doing this for thousands of years and have become quite good at it—so good as to have achieved a certain opacity even to their fellow legal professionals, including law professors as well as practicing lawyers. Judges have convinced many people—including themselves—that they use esoteric materials and techniques to build selflessly an edifice of doctrines unmarred by willfulness, politics, or ignorance.

There is nevertheless considerable dissatisfaction with our legal system,<sup>8</sup> as there is with our system of health care. Like health care, law is

6. Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 101–103 (1990).

7. Richard A. Posner, *The Problematics of Moral and Legal Theory*, ch. 3 (1999).

8. See, for example, Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001); Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

said to be too expensive (it certainly costs more per capita than the legal systems of the nations with which we tend to compare the United States), too intrusive into private and commercial life, too prone to error, too uncertain, and simply too large (the nation has a million lawyers). For these reasons it is contended to be a source of immense indirect costs on top of the expenses to the litigants. The accusations may be true, though assessing their truth is not the project of this book and is especially daunting because it is even harder to estimate the benefits of our legal system than its costs. Legal rights are options that may have value even if never exercised, but how to value such options? And legal duties deter harmful conduct—but how effectively is extremely difficult to determine too.

Supposing the criticisms have merit, the question is whom to blame. If all that judges do is apply rules made by legislatures or the framers of the Constitution (or follow precedents, made by current or former judges, that are promptly changed if they prove maladapted to current conditions), then the responsibility for the mess (if it is a mess) must lie with the legislators or the Constitution's framers, or with the political process more generally. But suppose that most rules laid down by legislative bodies are all right and the problem is willful judges—judges who make up their own rules, or perhaps ignore rules altogether, instead dispensing shortsighted justice on the basis of the “equities” of each case, and as a result create enormous legal uncertainty. The policy implications and hence the path of reform would depend on which explanation was correct (both might be). And what if the basic problem is that the structure of American government, and the American political culture more broadly, *compel* judges to make rather than just apply rules of law? What looks to the critics of the judiciary like willfulness might actually be the good-faith performance of a vital judicial role, and if judges refused to play it, insisting instead, as some legal thinkers urge (the “legalists,” of whom more shortly), on limiting themselves to passively applying rules made elsewhere, the legal system might be worse than it is.

The answers are bound up with issues of judicial behavior. To illustrate, everyone will agree that contracts are vital to the operation of markets, and almost everyone will agree that the legal enforcement of contracts is important to the efficacy of contracts. Contract law is administered by judges. (Sometimes they are private judges—arbitrators—



but the effectiveness of arbitration depends on the enforceability of arbitrators' awards.) Being a part of the common law, it is also created by them. The law they create and the way in which they enforce it are deliberate acts, just as business decisions and decisions by legislatures are deliberate acts. Whether judicially made doctrines and decisions are good or bad may depend therefore on the judges' incentives, which may in turn depend on the judges' cognition and psychology, on how persons are selected (including self-selected) to be judges, and on the terms and conditions of judicial employment. Similarly, American antitrust law is far more the creation of judicial decisions than of antitrust legislation: the most important antitrust laws are as skimpy and vague as most provisions of the Bill of Rights. We ought therefore to be interested in how antitrust law has been shaped by the motivations, constraints, and other influences that play on judges. The Supreme Court has actually called the Sherman Act "a common-law statute,"<sup>9</sup> and common law is of course made by judges, not legislators.

The judicial mentality would be of little interest if judges did nothing more than apply clear rules of law created by legislators, administrative agencies, the framers of constitutions, and other extrajudicial sources (including commercial custom) to facts that judges and juries determined without bias or preconceptions. Then judges would be well on the road to being superseded by digitized artificial intelligence programs.<sup>10</sup> But even legal thinkers who believe passionately that judges should be rule appliers and unbiased fact finders and nothing more do not believe that that's how all or even most American judges behave all the time. Our judges have and exercise discretion. Especially if they are appellate judges, even intermediate ones, they are "occasional legislators." To understand their legislative activity, one must understand their motivations, capacities, mode of selection, professional norms, and psychology.

Achieving a sound understanding of judicial behavior is thus of more than merely academic interest; it is a key to legal reform. Yet its academic interest is also considerable because of the unusual incentives and constraints, so unlike those in most jobs, that shape judicial behavior, espe-

9. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007).

10. I do not know why originalists and other legalists are not AI enthusiasts.

cially in the U.S. federal system, and because the analysis of that behavior may offer insights into the general subject of managing uncertainty.<sup>11</sup> Uncertainty is as salient a feature of our legal system as expense is of our medical system, and decision making under uncertainty is a deservedly important topic in economics, organization theory, and other fields.

Like other writing by judges about judging, this book is heavily influenced by my own judicial experience, consisting of more than a quarter century as a federal court of appeals judge (seven years as chief judge of my court), with occasional forays into the district court to preside at trials, mainly civil jury trials. But the mode of the book is scholarly rather than confessional. In this respect it resembles my book on the regulation of sexuality, a subject otherwise remote from the study of judicial behavior. That book was motivated by my “belated discovery that judges know next to nothing about sex beyond their own personal experience, which is limited,” and one of my aims was to “bring to the attention of the legal profession the rich multidisciplinary literature” on the subject.<sup>12</sup> Judges, like other “refined” people in our society, are reticent about talking about sex, but judges are also reticent about talking about judging, especially talking frankly about it, whether to their colleagues or to a larger professional audience. This reticence makes the scholarly study of judicial behavior at once challenging and indispensable.

The book emphasizes positive rather than normative analysis—what judges do, not what they should do—but I do discuss normative issues and propose a few modest reforms, as well as making occasional suggestions for further research. Positive and normative analysis cannot easily be separated when one is dealing with people’s deliberate actions, for unless they are evil or cynical people, the best explanation for their actions is unlikely to be that they are deliberately flouting the norms of their society. If it is deeply wrong for a judge to base a decision on the flip of a coin, an aleatory theory of judicial behavior is unlikely to be sound. The grounds of a judge’s decisions may be wrong, but they are

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11. About which I have written at length in relation to catastrophic risk and also to the reform of the U.S. intelligence system. See my books *Catastrophe: Risk and Response* (2004); *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005); *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (2006); *Countering Terrorism: Blurred Focus, Halting Steps* (2007).

12. Richard A. Posner, *Sex and Reason* 1, 4 (1992).

unlikely to be outside the ballpark of norms and values prevailing in the society.

The book's primary focus is on federal appellate judges, including Supreme Court Justices (the subject of Part Three, though discussed in the other parts as well). But there is some discussion of trial judges, state court judges, judges in foreign nations similar to the United States,<sup>13</sup> and arbitrators (private judges).

I begin with a discussion of the existing theories (attitudinal, strategic, organizational, economic, psychological, sociological, pragmatic, phenomenological, and legalist) of judicial behavior and of the evidence for and against each. These theories are expounded in a rich literature ignored by most academic lawyers (though this is changing<sup>14</sup>) and by virtually all judges.<sup>15</sup> The theories provide background and support to my own analysis, which draws heavily on labor economics and on the psychology of cognition and emotion. It is the stress I lay on psychology that has led me to entitle the book *How Judges Think* rather than *Judicial Behavior*.

My analysis and the studies on which it builds find that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work. American judges, at least, are not formalists, or (the term I prefer, as it carries less baggage) legalists. Legalists decide cases by applying preexisting rules or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as "legal reasoning by analogy." They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and

13. That is, nations that have an independent judiciary, as many do not. See, for example, Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (2005); *Law and Economic Development* (Hans-Bernd Schäfer and Angara V. Raja eds. 2006).

14. See, for example, Gregory C. Sisk and Michael Heise, "Judges and Ideology: Public and Academic Debates about Statistical Measures," 99 *Northwestern University Law Review* 743 (2005).

15. The richness is well illustrated by James L. Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior," 5 *Political Behavior* 7 (1983). As the date of his article shows, the literature has been around for many years. That it has not caught on with the legal professoriat may be in part because of its death of implications for the understanding or reform of legal doctrine and in part because it challenges the mystique of an apolitical judiciary, in which lawyers and law professors are heavily invested.

do not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions)—for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique.<sup>16</sup> Some legalists are even suspicious of precedent as a source of law, because it is infected by judicial creativity.

But if judges are not legalists, what are they? Might they simply be politicians in robes? Empirical scholars have found that many judicial decisions, by no means limited to the Supreme Court, are strongly influenced by a judge's political preferences or by other extralegal factors, such as the judge's personal characteristics and personal and professional experiences, which may shape his political preferences or operate directly on his response to a case. No responsible student of the judicial system supposes that "politics" (in a sense to be explained) or personal idiosyncrasy drives *most* decisions, except in the Supreme Court, which indeed is largely a political court when it is deciding constitutional cases. Legalism drives most judicial decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society.

But one must be careful about dividing judicial decisions (or judges) into legalist and political, or, what is closely related, asserting a Manichaean dualism between law and politics. The dualism works only when "law" is equated to legalism, and that is too narrow. Justice Scalia was not stepping out of his proper role as a judge when he said in *Richardson v. Marsh* that "the rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."<sup>17</sup> This is just as proper a judicial state-

16. "Legal formalists emphasize the specifically legal virtues of the clarity, determinacy, and coherence of law, and try to sharpen the distinction between legislation and adjudication. Roughly, they can be divided into rule-formalists and concept-formalists. The former place more value on determinacy, emphasizing the importance of clear rules and strict interpretation, while the latter emphasize the importance of system and principled coherence throughout the law." Thomas C. Grey, "Judicial Review and Legal Pragmatism," 38 *Wake Forest Law Review* 473, 478 (2003). Modern American formalists—comprising what one might call the School of Scalia—are mainly rule-formalists. *Id.* at 479. "The most important thing [for Scalia] is that law should be put in the form of rules wherever possible." *Id.* at 499.

17. 481 U.S. 200, 211 (1987).

ment as the legalist assertions for which Scalia (he of such pronouncements as that the “rule of law” is the “law of rules”<sup>18</sup>) is more famous. This is so even though the statement has political implications. Criminal defendants are at a disadvantage if a judge’s or prosecutor’s missteps can be forgiven by the judge’s telling the jury to disregard them, for the bell cannot be unrung; the jurors cannot exclude what they should not have heard from their consideration of the defendant’s guilt.

“Law” in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions. Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies. As a result, law is shot through with politics and with much else besides that does not fit a legalist model of decision making.

The decision-making freedom that judges have is an *involuntary* freedom. It is the consequence of legalism’s inability in many cases to decide the outcome (or decide it tolerably, a distinction I shall elaborate), and the related difficulty, often impossibility, of verifying the correctness of the outcome, whether by its consequences or its logic. That inability, and that difficulty or impossibility, create an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by “the law.” How they fill in the open area is the fundamental question that this book addresses, though lurking in the background and occasionally coming to the fore is the question how they *should* fill it in.

Although judges often exercise a political judgment in the open area, “political” is an equivocal term that must be carefully parsed before it can be usefully applied to judicial behavior. It could refer to a judge whose decisions reflect his loyalty to a political party. It could refer to a judge whose decisions faithfully mirror the platform of a political party, though as a matter of conviction rather than of party loyalty. It could refer to a judge whose decisions reflect a consistent political ideology, which might be “liberal” or “conservative” and thus correlated (though

18. Antonin Scalia, “The Rule of Law as a Law of Rules,” 56 *University of Chicago Law Review* 1175 (1989).

imperfectly) with the Democratic or Republican Party platform, but which might instead be an ideology embraced by neither major party, such as libertarianism or socialism. The empirical literature that refutes legalism as a complete or even approximate description of actual judicial behavior does not distinguish among these different gradations of “political.” “Political” could even describe decisions based on purely technical policy judgments, judgments that involve finding the best means to agreed-upon ends; any issue of governmental policy is in that sense “political.” At the opposite extreme, a judge might be “political” in a sense divorced from policy: he might, like a legislator, use charm, guile, vote trading, and flattery to induce other judges to go along with him, though his aim might be to produce legalistic decisions. (He might thus be what is called in a variety of nonpolitical settings “a good politician.”) The strategic theory of judicial behavior, discussed in chapter 1, emphasizes political judging in this “means” rather than “ends” sense. Many legislators have no policy preferences of their own, but are merely political brokers for their constituents. Judges, however, unless elected, do not have constituents.

Ringling changes on the “political” might seem to exhaust the possible nonlegalist factors in adjudication. It does not begin to. The possible other factors (call them “personal”) include personality traits, or temperament (and thus emotionality at one end of the temperament spectrum and emotional detachment at the other end), which are more or less *innate* personal characteristics. They include personal *background* characteristics, such as race and sex, and also personal and professional *experience*. The political or ideological factors that influence adjudication may themselves be by-products of personal factors rather than products of an informed, disinterested, and coolly analytical study of public issues. Also figuring in judicial decisions are *strategic* considerations, already alluded to, which need not be related to either the political views or the personal characteristics of a judge. A judge might join the majority opinion in a case not because he agreed with it but because he thought that dissenting publicly would magnify the effect of the majority opinion by drawing attention to it. (“Dissent aversion” helps to explain, as we shall see in chapter 1, the puzzling effect of panel composition on appellate decisions.) *Institutional* factors—such as how clear or unclear the law is, salary and workload, and the structure of judicial promotion—also influence judicial behavior.

The political and personal factors create *preconceptions*, often unconscious, that a judge brings to a case. This can explain how judges can think their decisions uninflected by political considerations but neutral observers find otherwise. This explanation saves judges from the accusation of pervasive hypocrisy without denying the force of the empirical literature on political judging.

Judicial preconceptions are best understood, we shall see, with the aid of Bayesian decision theory. Not that this is how judges themselves would describe their thought processes. And “Bayes’s theorem” is not the only term I shall be using that is likely to alarm some readers of a book about judges. Nor are “occasional legislators” and “dissent aversion” the only others. Readers will have to brace themselves for “reversal aversion,” “ideology drift,” “tolerable windows,” “utility function,” “Sartrean bad faith,” “option value,” “risk aversion,” “zone of reasonableness,” “monopsony,” “cosmopolitanism,” “authoritarian personality,” “alienation,” “agency costs,” “rule pragmatist,” and “constrained pragmatist.” I do not apologize for these terms or, more generally, for discussing judicial thinking in a vocabulary alien to most judges and lawyers. Judicial behavior cannot be understood in the vocabulary that judges themselves use, sometimes mischievously.

Because behavior is motivated by desire, we must consider what judges want. I think they want the same basic goods that other people want, such as income, power, reputation, respect, self-respect, and leisure. If the typical judicial weighting of the various goods is distinctive, it is because of the incentives and constraints that the office of judge creates, or more broadly the context of judicial action. An important part of that context is legal uncertainty, which creates the open area in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge’s decision.

Among the institutional factors that influence judicial behavior in the open area is the structure of the judicial career, which affects selection and self-selection into the judiciary and the incentives and constraints that click in once a person is inducted into that career. I compare different types of judicial career and different types of judiciary and also examine proposals for modifying the career structure, such as by raising judicial salaries steeply or limiting the length of judicial terms in office.

My analysis of the career structure of federal appellate judges (including Supreme Court Justices) confirms the absence of significant external constraints on their judicial behavior (such as salary, promotion, or removal) and thus the scope of the judges' freedom from efforts by their "principals" (whoever exactly they are—a matter of some uncertainty) to control these their agents.

But I must not ignore the possibility that this freedom is tightly restricted by a range of *internal* constraints, including what I call "judicial method." This consists of analytical tools for managing uncertainty and producing what legalists regard as objective decisions. We shall see that the legalist tools—including those most hallowed ones of reasoning by analogy and strictly interpreting statutes and constitutions—come up short: the first is empty and the second has, despite appearances, a large discretionary element.

I must also not ignore academic criticism of judges as a potential constraint on judicial behavior, since the absence of strong constraints opens a space for the normally weak ones to exert significant influence. But academic criticisms of judges tend to fall on deaf ears these days because of changes in the legal academy that have driven judges and law professors so far apart intellectually that the faculties of the elite law schools are becoming alienated from the judiciary. My complaint is not, as one might think, that academics are too critical of judges; in many respects they are insufficiently critical. My complaint is that the current academic critique of the judiciary is unrealistic about judges, unhelpful to them, and indeed rather uninterested in them unless they happen to be Supreme Court Justices.

The emphasis that I place on the American judge's extensive (though not complete) freedom from internal and external constraints is not intended to suggest that judicial behavior is random, willful, or political in a partisan sense. Most judges, like most serious artists, are trying to do a "good job," with what is "good" being defined by the standards for the "art" in question. The judicial art prominently includes the legalist factors, and so those factors figure prominently in judicial decisions—and rightly so. But innovative judges challenge the accepted standards of their art, just as innovative artists challenge the accepted standards of *their* arts. As there are no fixed, incontestable criteria of artistic excellence, so there are no fixed, incontestable criteria of judicial excellence.



And in law as in art, the innovators have the greater influence on the evolution of their field.

So what exactly are judges doing when they are judging in the open area? If they are not merely applying preexisting rules in a logical or otherwise mechanical fashion, might they not be implementing a consistent judicial philosophy? But no; we shall see that judicial philosophies (such as “formalism,” “originalism,” “textualism,” “representation reinforcement,” “civic republicanism,” or, the newest contenders, “active liberty” and “judicial cosmopolitanism”) are either rationalizations of decisions based on other grounds or rhetorical weapons. None is a politically neutral lodestar guiding judges’ decisions.

What term, then, best describes what most American judges do? Readers of my previous writings on judicial behavior will expect me to say that it is “legal pragmatism,” to divide judges into legalists and pragmatists, and then, by classifying legalism as a pragmatic strategy, to turn all our judges into pragmatists. That would be too facile. But pragmatism is an important component of American judicial behavior and figures importantly in this book. It is widely misunderstood to be an “anything goes” approach to judging, like extreme versions of legal realism. It is not. The pragmatic judge is a *constrained* pragmatist. He is boxed in, as other judges are, by norms that require of judges impartiality, awareness of the importance of the law’s being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes. The box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless “political” is given the broadest of its possible meanings that I reviewed earlier, in which the “political” is anything that has the slightest whiff of concern for policy. A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it. But it need not be policy chosen by him on political grounds as normally understood.

A judge can be political without being pragmatic; an ideologue is not a pragmatist. Most judges who oppose abortion rights do so because of religious belief rather than because of a pragmatic assessment of such rights. (Many who support such rights are ideologically driven as well.) They may offer pragmatic objections to abortion in an effort to enlist the support of judges who are not religious or whose religious beliefs do not