

## PHILOSOPHY AND OPINIONS

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*Law, Pragmatism, and Democracy.* By Richard A. Posner.  
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### I. INTRODUCTION

How are judicial decisions made? What legal foundations do judges rely on? What theories or principles should inform their reasoning? Richard Posner<sup>1</sup> addresses these questions in his new book, *Law, Pragmatism and Democracy*. In addition to his career as a judge, Posner is a prolific author and influential theorist. In the recently decided Supreme Court case *Lawrence v. Texas*,<sup>2</sup> Posner's work was cited by both the majority opinion<sup>3</sup> and the dissent.<sup>4</sup> In his most recent work, Posner has compiled and adapted ideas he

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1. Richard A. Posner is a judge for the United States Court of Appeals for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School. Richard A. Posner, Curriculum Vitae, *available at* <http://www.law.uchicago.edu/faculty/posner-r/cv.html> (last visited Aug. 5, 2003). His publications include RICHARD POSNER & TOMAS J. PHILIPSON, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993); RICHARD POSNER, AGING AND OLD AGE (1995); RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999). Richard A. Posner, Biography, *available at* <http://home.uchicago.edu/~rposner/biography>. Included among the topics of his current research are judicial administration, evidence, intellectual property, health economics and policy, citations analysis, the public intellectual, antitrust, and jurisprudence and moral theory. *Id.*

2. 123 S.Ct. 2472 (2003).

3. *Id.* at 2483.

4. *Id.* at 2489-90.

has developed in lectures, papers, and law review articles<sup>5</sup> advocating for a pragmatic approach to law as well as a pragmatic view of American democracy. As Posner states in the preface, the book “argues for a theory of pragmatic liberalism the twin halves of which are a pragmatic theory of democracy and a pragmatic theory of law.”<sup>6</sup>

## II. OVERVIEW

Posner builds support for his proposition that pragmatism should predominate in law and government by reviewing the background of philosophical pragmatism. From Odysseus, Socrates, and Plato to Wittgenstein, James, and Dewey, Posner traces the historical development of pragmatic theory. In Chapters 1 and 2, Posner explains the distinction between what he views as the two current branches of pragmatism: philosophical, or academic, pragmatism and what Posner refers to as “everyday pragmatism.”<sup>7</sup> Philosophical pragmatism is “academic, subtle, complex and carried on in a forbidding technical vocabulary . . . . It also tends to be contemplative rather than action-oriented.”<sup>8</sup> On the other hand, Posner defines “everyday pragmatism” as “practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers.”<sup>9</sup> As applied to adjudication, everyday pragmatism is “a heightened concern with consequences or . . . ‘a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.’”<sup>10</sup>

Posner begins to link his analysis of philosophical pragmatism with democracy in Chapter 3 by discussing the philosophy of John Dewey.<sup>11</sup> Posner labels Dewey’s theory of democracy “deliberative democracy.”<sup>12</sup> Deliberative democracy is “not . . . a clash of wills

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5. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* x-xii (2003) [hereinafter “POSNER”].

6. *Id.* at ix.

7. *Id.* at 49.

8. *Id.* at 52.

9. *Id.* at 50.

10. *Id.* at 59.

11. John Dewey, along with William James, were primary proponents of the school of thought known as “pragmatism.” *John Dewey*, Internet Encyclopedia of Philosophy 1-3, available at <http://www.utm.edu/research/iep/d/dewey.htm> (last visited Aug. 5, 2003).

12. POSNER at 106.

and interests . . . [but] the pooling of different ideas and approaches and the selection of the best through debate and discussion.”<sup>13</sup>

Posner moves from this discussion to a contrast between concepts of democracy in Chapters 4 and 5. In these chapters, Posner proposes two concepts of democracy—Concept 1 and Concept 2.<sup>14</sup> Concept 1 democracy, similar to Dewey’s deliberative democracy, “is premised on the idea that every adult . . . has a moral right to participate on terms of equality in the governance of the society.”<sup>15</sup> Concept 1 is the ideal of democracy, relying on voters to be “both informed and disinterested and that voting be based on the ideas and opinions that emerge from deliberation among these informed and disinterested citizens.”<sup>16</sup>

While Concept 1 may be what we should aspire to, Posner argues that it is not an accurate depiction of current American democracy.<sup>17</sup> He offers a different conception of democracy modeled on the philosopher Joseph Schumpeter’s theory of “elite democracy,”<sup>18</sup> described as “realistic, cynical and bottom-up.”<sup>19</sup> Posner’s adaptation of that theory, labeled Concept 2 democracy, presents democracy as “a competition among self-interested politicians, constituting a ruling class, for the support of the people, also assumed to be self-interested, and to be none too interested in or well informed about politics.”<sup>20</sup>

Chapters 6, 8, and 9 are the most accessible and, maybe for that reason, the most interesting chapters in the book. Posner applies his pragmatic theories to two of the most publicized United States Supreme Court cases in recent years—*Clinton v. Jones*<sup>21</sup> and *Bush v. Gore*.<sup>22</sup> Posner suggests that *Jones* represents an unpragmatic decision because it overemphasized doctrine at the expense of consequences and “condemned the nation to a political crisis.”<sup>23</sup> Conversely, he argues that *Bush v. Gore* exemplifies everyday pragmatism. Ideology and precedent were overruled, even by

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13. *Id.* at 106-07.

14. *Id.* at 130.

15. *Id.* at 131.

16. *Id.*

17. *Id.* at 158.

18. *Id.* at 130.

19. *Id.*

20. *Id.* at 144.

21. 520 U.S. 681 (1997).

22. 531 U.S. 98 (2000).

23. POSNER at 319.

usually doctrinaire justices, by the need to prevent a presidential succession crisis.<sup>24</sup>

In Chapter 7, Posner discusses and compares the theories relating law and economics of two Austrian philosophers—Hans Kelsen and Friedrich Hayek. This subject is included to encourage pragmatic jurists to incorporate theories that may be considered external to law into their decision-making. This chapter augments material already presented in earlier chapters, but structurally seems out of place at this point in the book. Posner should have placed this chapter before or after the chapter on Dewey because the concepts presented would have flowed more coherently.

The final chapter, Chapter 10, also feels misplaced or tacked on. Slightly outside the framework of the book, yet related, the final chapter presents an analysis of First Amendment cases. Here, Posner argues that First Amendment protections should be relative, not absolute.<sup>25</sup> From the pragmatist viewpoint, especially relevant after September 11, the purpose of a law and its attendant costs and benefits should be considered when determining constitutionality, not simply the effect on the right to free speech.<sup>26</sup>

### III. REVIEW

Posner presents a compelling case in support of basing decisions on pragmatic analysis. He effectively argues that opinions reached through consideration of multiple factors, not just stare decisis or a moral code, result in better decisions with more beneficial consequences. He uses several well-known cases—*Roe v. Wade*, *Clinton v. Jones*, and *Bush v. Gore*—to convincingly illustrate his theory.

While advocating for pragmatism, Posner also addresses other issues, including diversity in the judiciary. His support for a diverse representation of judges is an outgrowth of his pragmatic approach to adjudication. With society becoming increasingly diverse, Posner contends that the most pragmatic way to reach decisions with the best consequences is to have them made by a judiciary that reflects society.<sup>27</sup> “Such a judiciary is more representative, and its decisions will therefore command greater acceptance in a diverse

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24. *Id.* at 331.

25. *Id.* at 357.

26. *Id.* at 362.

27. *Id.* at 119-21.

society than would the decisions of a mandarin court.”<sup>28</sup>

Throughout the book, Posner reveals his sarcastic sense of humor. While criticizing the condescension of some university faculty, he describes their view of the average American voter as “ignorant, philistine, provincial, selfish, excessively materialistic, puritanical . . . superficial, vulgar, insensitive, unimaginative, complacent, chauvinistic, superstitious, uneducable, benighted politically, prone to hysteria, and overweight.”<sup>29</sup> Politicians are also subject to Posner’s barbs. He states that “the average quality, both intellectual and moral, of elected and unelected officials alike has been unimpressive. On the state and local level it has frequently been appalling.”<sup>30</sup> In a book where the writing is challenging, Posner frequently emphasizes a point by lowering the level of discussion. In commenting on a statement that restrictions on civil liberties due to September 11 would cause the country to “lose its democratic soul,” Posner responds by stating, “[t]his is rhetoric to make the pragmatist gag.”<sup>31</sup>

Posner is excellent at anticipating the response his arguments will elicit. Often, as I was reading passages from the book, I would wonder if he had considered an alternative viewpoint. In almost every instance, Posner would address that alternative in the next sentence or paragraph. For example, after reading Posner’s rather grim definition of Concept 2 democracy and his assertion that it describes American democracy,<sup>32</sup> I felt he was being too cynical. But Posner counters by explaining the virtues of the current American democracy, virtues responsible for “reducing the amount and intensity of citizen involvement in politics, freeing up time for other, potentially more rewarding and socially beneficial activities and reducing the temperature of political debate and so the level of social conflict, thus promoting political stability.”<sup>33</sup>

One issue with the book is not a criticism as much as it is a desire for more. While providing a strong argument in favor of pragmatism, Posner does not provide a means to determine if a current decision is pragmatic. As one reviewer wrote, “[i]f pragmatism is merely the effort to do what makes sense, how can

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28. *Id.* at 120.

29. *Id.* at 155-56.

30. *Id.* at 150.

31. *Id.* at 312.

32. *Id.* at 150-54.

33. *Id.* at 175.

we know what makes sense without some overarching set of values or principles by which to judge the consequences of our actions?"<sup>34</sup> For example, Posner criticizes the *Roe v. Wade*<sup>35</sup> decision as being a bad pragmatic decision because of the social turmoil that resulted. This seems slightly unfair coming thirty years after the decision and after being able to observe the controversy surrounding the decision. At the time, perhaps the justices in the majority felt they were considering all relevant factors. As Posner notes in this book, the trend in several states had been to relax abortion laws.<sup>36</sup> The Court may have felt that the majority of the country was moving in the direction of legalizing abortion and may have felt that a decision guaranteeing access to abortion would lessen the remaining controversy.

What would Posner think of the current decision in *Lawrence v. Texas*? The decision protecting the right of consenting adults to engage in sodomy in the privacy of their home stirs some of the same strong emotions, and motivates some of the same opponents, as did *Roe v. Wade*. The portion of the opinion that considers the history of laws against sodomy and reviews the status of current state statutes seems to be adopting a pragmatic approach to reaching a decision.<sup>37</sup> However, if subsequent decisions<sup>38</sup> relying on *Lawrence* lead to legalization of same-sex marriage, resulting in controversy and protest, would Posner judge the decision unpragmatic? How can we determine at the time a decision is made if it is unpragmatic?

A case that demonstrates what might be pragmatism in disguise is *In re Weber v. Bennett*.<sup>39</sup> A textbook description of this case involving a signature on a will states:

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34. Paul Horwitz, *Pragmatism and Its Consequences: A Review of Richard A. Posner's LAW, PRAGMATISM, AND DEMOCRACY*, available at [http://writ.findlaw.com/books/reviews/20030530\\_horwitz.html](http://writ.findlaw.com/books/reviews/20030530_horwitz.html) (May 30, 2003) (last visited Sept. 7, 2003).

35. 410 U.S. 113 (1973).

36. POSNER at 126.

37. *Lawrence v. Texas*, 123 S. Ct. 2472, 2478-81 (2003).

38. The Massachusetts Supreme Judicial Court may rule soon in the case of *Goodridge v. Massachusetts Dept. of Public Health*, 2002 WL 1299135 (May 7, 2002). A suit was filed on behalf of seven same-sex couples seeking to invalidate current Massachusetts law limiting marriage to opposite sex couples. *Goodridge v. Dept. of Public Health*, available at <http://www.marriagewatch.org/cases/ma/goodridge/goodridge.htm> (last visited Sept. 7, 2003). In addition, two men filed suit in Phoenix, Arizona on July 7, 2003, demanding a state marriage license. *Arizona Becomes Site of Next Same-Sex "Marriage" Challenge*, available at <http://www.marriagewatch.org/news/072503a.htm> (July 25, 2003) (last visited Sept. 7, 2003).

39. 387 P.2d 165 (Kan. 1963).

The president [of the bank] signs as a witness in [the testator's] car, then takes the will inside the teller's office where the teller, sitting in the [drive-up] window, signs as a witness and waves to the depositor.<sup>40</sup>

The court held that the will could not be probated because the teller had not signed as a witness in the presence of the testator.<sup>41</sup> Is this an everyday pragmatic decision, or a dogmatically doctrinaire decision? Initially it seems to be strictly a rule-driven decision. However, the will prepared by the president did not reflect the testamentary intentions of the testator because it omitted a bequest to the testator's wife.<sup>42</sup> So by invalidating the will based on the technicality, the court was able to approximate the wishes of the testator by having the wife inherit through the laws of intestacy. But was it for pragmatic reasons that the court came to its decision? Or was the narrow explanation given earlier the real reason? Posner's theories do not help us make a determination.

Posner's book serves best as a general prescriptive theory or approach to law rather than a guide to help judges come to a decision or to assess the pragmatism of decisions. With all the types of factors that Posner would encourage courts to consider—economic, social, legal, long-term, short-term—a judge could feel intimidated. And while Posner's approach would be ideal if all judges were of high caliber, the proficiency and skill of judges range as widely as in any profession. Employing legal pragmatism, as defined by Posner, may be the preferred adjudication method if judges had the time to weigh the varied factors he enumerates. However, given the constrictions of time and the variance in ability, relying on *stare decisis* and adhering to statutory language may provide a modicum of stability and predictability.

Another reason judges may choose not to rely on legal pragmatism is self-interest, or self-protection. Having almost unlimited sources influencing and informing a judge may lead to decisions being viewed as products of an individual judge's predilections, rather than the results of impersonal, objective applications of the law. Posner admits that this might be the case when he states that “[p]ragmatic decisionmaking will inevitably be based to a disquieting extent on hunches and subjective

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40. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 234 (6th ed. 2000).

41. *Id.*

42. *In re Weber*, 387 P.2d at 167.

preferences rather than on hard evidence.”<sup>43</sup> Perhaps judges do not want that level of discretion, with the accompanying responsibility.

For those interested in theories of the law or in reading a book by Posner, but without a familiarity with philosophy, the first few chapters are intimidating, seemingly written for the cognoscenti. Posner refers to many “-isms” and many philosophers, but only briefly and tangentially explaining their theories in understandable terms. For example, when presenting the two concepts of democracy, Posner discusses “abstractness,” or “how closely a theorist models political deliberation on his own academic mode of discussion.”<sup>44</sup> The next sentence states, “Cohen and Richardson, for example, are more abstract than Gutmann and Thompson.”<sup>45</sup> But Posner does not explain who these people are, or why we should care.

This leads to another issue with the book: the structural organization. Posner explains in the preface that the chapters originated as lecture material, law review articles, or papers.<sup>46</sup> This is evident in several passages, such as the one quoted above, where Posner omits contextual information that would make the material meaningful. Also, the inclusion and placement of the chapters on Kelsen and Haydek, and on the First Amendment purposive argument, seem awkward, not fitting in with the other material.

#### IV. CONCLUSION

With this book, Posner is promoting a pragmatic approach to arriving at decisions, especially, as he writes in the conclusion, for “cases that arise out of national emergencies—cases involving war, terrorism, economic depression, a botched national election, a Presidential scandal. Such cases are not infrequent in our dynamic, even turbulent, society, and they are among the most important cases that judges decide.”<sup>47</sup> According to Posner, pragmatism in law depends to a large degree on the pragmatism in society. In his conclusion, Posner presents his vision of the connection between Concept 2 democracy—pragmatic or American democracy—and pragmatic adjudication. He states that

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43. POSNER at 126.

44. *Id.* at 133.

45. *Id.*

46. *Id.* at x-xii.

47. *Id.* at 386.

“[o]ne’s conception of the optimal scope and freedom of judges depends, to a degree largely unrecognized by the legal profession, including its academic and judicial branches, on one’s conception of American democracy.”<sup>48</sup>

As a prescription for adjudication, the book makes a persuasive argument for adopting Posner’s pragmatic approach. But how does one evaluate whether a pragmatic approach has been taken? With the breadth of doctrines and theories that can and should be considered by an everyday pragmatic jurist, how can we determine if the pragmatic approach has been used? Posner acknowledges the limitations in being able to assess decisions, because “[t]here are bad pragmatic decisions as well as good ones.”<sup>49</sup> What would help in identifying pragmatic decisions is to adopt another of Posner’s recommendations: writing opinions with a “certain transparency” in vocabulary.<sup>50</sup> Posner states, “in order to make it easier for people to conform to the rules expressed or implied [in opinions] . . . judicial opinions should be more candid than they typically are about the pragmatic factors that determine the outcome of the most difficult and the most important judicial decisions.”<sup>51</sup>

Perhaps the book is not intended to provide a formal structure to guide decisions or an analytical framework by which to determine if decisions are pragmatic. That may be too ambitious or even unobtainable. Perhaps it is intended as a paean to pragmatic adjudication and American democracy. At that, it succeeds.

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48. *Id.*

49. *Id.* at 125.

50. *Id.* at 55.

51. *Id.*