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**Judges Who Hide Behind the Constitution**

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A judge on the U.S. Circuit Court of Appeals, senior lecturer at the University of Chicago Law School, and the author, among many other books, of *The Economic Analysis of Law* (now in its 9th edition), Richard Posner is our nation’s foremost (and most ferocious) proponent of “legal realism.” Taking aim at “originalism,” the theory associated with Supreme Court Justice Antonin Scalia, Posner claims that instead of “hiding behind the law,” judges should be pragmatists, issuing rulings based on common sense, the fundamental norms of their society, and the likely consequences – as long as those rulings are not inconsistent with statutes or constitutional texts. Convinced that the phrase “result oriented” should be retired as a term of opprobrium for judges, Posner does not shrink for the implication that “the judicial role is to a great extent legislative.” Or from reminding originalists that “it is difficult “to see where you are going if your head is screwed on backward.”

In *The Federal Judiciary*, Posner directs his ire at the Supreme Court, the Court of Appeals, District Courts, civil litigation, and law professors. His critique will be familiar to readers of his previous books, especially *Law, Pragmatism and Democracy* (2003); *Reflections on Judging* (2013); and *Divergent Paths* (2013). But his call to arms against originalism and outdated procedures in the American judicial system are as urgently relevant as they have ever been.

Unfortunately, Posner’s critique of the courts, judges and jurisprudence is marred by spasms of pomposity, pettiness, and pedantry. He quotes himself and individuals who praise him, often at length. He obsesses about misspellings, capitalization errors, grammatical mistakes, and prolixity of law clerks and judges. He returns again and again to his campaign to get rid of the Bluebook, the citation manual assigned in many law schools. He ridicules Justice Elena Kagan for saying that Scalia, her deceased colleague, was “one of our greatest justices...who transformed our legal culture.” As if to burnish his credentials as an iconoclast, he maintains that the best thing to do with a judge’s papers (“documentary junk”) is “to throw them out.”

Whether he is discussing Kagan; the *Bluebook*; his decision to conduct pretrial hearings, settlement negotiations, and civil trials during his tenure on the Court of Appeals; or his views of expert witnesses, *The Federal Judiciary* is numbingly repetitious. No wonder the phrases “as I
have noted,” “as I tried to explain earlier,” and the unintentionally self-incriminating “Brevity I keep saying has no appeal in the legal profession,” keep popping up.

All that said, The Federal Judiciary is very much worth reading. Posner demonstrates beyond a reasonable doubt that originalism is a bankrupt legal philosophy. He reminds us that eighteenth century Americans could not foresee NSA spying, lethal injections, or public sector unions. In any event, he does not believe we should bind ourselves to their values, even if we could divine them with precision. Instead, he advocates using the Constitution’s principles of good government as a starting point, “to be particularized by an evolving political culture.”

Posner demonstrates as well that Justice Scalia, the emperor of originalism, had no clothes. Indeed, Posner cites several cases in which Scalia abandoned originalism when it got in the way of a result he preferred.

Posner also has lots of provocative things to say about the “lower courts.” Two examples. He assails the deference of appellate judges to the rulings of federal agencies. And he notes that studies challenging the reliability of “demeanor cues” and cross-examination cast doubt on the efficacy of our adversarial system of justice.

If he had his druthers, Posner would happily jettison specific and unambiguous provisions of the Constitution he deems outdated. His most obvious example is the Seventh Amendment mandate that parties in a common law federal case involving $20 or more have a right to a jury trial. He would also not grant citizenship to “tourist babies” born in the United States, despite the “birthright” clause of Section One of the Fourteenth Amendment (which, he notes, was designed to protect former slaves).

To discourage readers from dismissing him as a curmudgeon, Posner concludes with a list of qualities that meet the “essential needs of a national court system.” But his heart and mind are not in it.

Posner wants to unsettle Americans, to reduce the authority of our sacred texts, and, in essence, to force us to rely in our legal system on common sense, the values of contemporary society, and a rational calculation of the implications of the case at hand.