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Mohsen Seddigh

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## Book Note

### THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE, by Lee Epstein, William M Landes, and Richard A Posner<sup>1</sup>

MOHSEN SEDDIGH

HOW AND WHY DO judges decide a case one way or another? Three prominent contemporary legal scholars address this puzzling question. The analysis builds upon a strain of legal realism advocated by Judge Posner.<sup>2</sup> He distances himself from both legalism and traditional legal realism. Instead, by drawing upon economics' contribution to the realistic theory of judicial behaviour, Posner seeks to create a model of rational response to preferences and aversions not limited to legalism and ideology.<sup>3</sup> Under this theory, which the authors call "the realist approach,"<sup>4</sup> the judge is viewed as a labour market participant (*i.e.*, a worker or, more precisely, a government employee with self-interested behaviour). Viewing the courtroom as a workplace, the authors step beyond the widely discussed factors of ideology and legalistic analysis to test hypotheses created on elements such as effort aversion, workload, conformity, and group and political polarization. Chapter one elaborates on this theory, while chapter two reviews the existing empirical literature on judicial behaviour.

The bulk of the study is found in chapters three through eight. In chapter three, the authors study the Supreme Court of the United States ("USSC"), and they find confirmation of the general notion that ideology plays a significant

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1. (Cambridge: Harvard University Press, 2013) 422 pages.
  2. *Ibid* at 25-26. See also Richard A Posner, *How Judges Think* (Cambridge: Harvard University Press, 2010); Richard A Posner, "Some Realism about Judges: a Reply to Edwards and Livemore" (2010) 59:6 Duke LJ 1177; and Richard A Posner, "Realism about Judges" (2011) 105:2 Nw UL Rev 577.
  3. *Supra* note 1 at 29.
  4. *Ibid* at 5.

role in the justices' decision making. At the same time, however, the authors suggest that a separate analysis in more than 30 percent of unanimous decisions in the USSC can indicate that, at times, the ideological divide fades in the face of factors such as dissent aversion.

Chapter four analyzes judicial behaviour in courts of appeals, finding that while ideology plays a non-negligible role in decision-making, its effect is more diluted than in the USSC. Effort aversion plays a greater role in these courts because of their heavier workloads. In the same vein, in chapter five, the authors find that ideology plays a yet smaller part in federal district courts than in either courts of appeals or the USSC.

Chapters six, seven, and eight deal with topics that can be extended to judges in all three tiers of the US federal judiciary. These topics are dissent aversion (chapter six), the questioning of lawyers at oral argument (chapter seven), and the federal judges' hopes for higher appointment and promotion (chapter eight).

The book aims to make four contributions: first, empirically test a distinct judicial behaviour theory; second, expand existing American databases; third, use regression analysis rather than simple correlation to be able to separately estimate the effect of different variables such as ideology and workload; and fourth, examine a broader scope of courts than most previous studies. However—as expected, and acknowledged by the authors—the book is far from exhaustive.<sup>5</sup> The authors point at other questions to be put to test, and make various suggestions regarding areas that can be further scrutinized such as courts and tribunals other than those considered in this study.

This is a book from which any legal researcher and student interested in judicial behaviour, litigator, or judge in Canada or elsewhere, would benefit. Not only does its quantitative approach distinguish it from many previous studies, but the questions posited, the underlying theory that gives rise to those questions, and the scope of the analysis make it unique. Whether for research or recreational reading, it prompts stimulating ideas in accessible prose.

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5. *Ibid* at 7.