Richard Posner has been a judge on the United States Court of Appeals for the Seventh Circuit in Chicago for the last thirty years. He is the author of many books including, most recently, The Crisis of Capitalist Democracy. Eric J. Segall is Professor of Law at Georgia State University College of Law. The following discussion took place during the last year.

Eric J. Segall: In your book How Judges Think (2008), you wrote that traditional legal reasoning, meaning reliance on text, precedent, and history, does not resolve difficult appellate cases. If judges are not introspective, their candor will not illuminate the actual springs of their decisions. Can you describe in more detail what you mean by “the actual springs of decision” in hard cases?

Richard Posner: If a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has and is completely inconsistent with the clear text of that amendment, which says that states cannot be sued without their consent. The decisions in those cases are completely inconsistent with the state’s immunity, and which states can be sued by citizens of another state; and yet so-called textualists like Justices Antonin Scalia and Clarence Thomas have supported that countertextual interpretation, holding that even suits by citizens of another state are barred, generated by a precedent or other authoritative text, to every legal question.

ERS: What you said, “fool themselves,” leads me to a follow-up question. In your writings you think you are a little unclear on how much of this “foolishing ourselves,” as you just put it, is intentional and how much is not. For example, the Supreme Court cases interpreting the Eleventh Amendment, which defines when states are immune from being sued. The decisions in those cases are completely inconsistent with the clear text of that amendment, which says that states cannot be sued by citizens of another state; and yet so-called textualists like Justices Antonin Scalia and Clarence Thomas have supported that countertextual interpretation, holding that even suits by citizens of the same state as the state they are suing are barred by the amendment, despite the word “another.”

RP: I don’t think much of it is intentional. People want to avoid what psychologists call “cognitive dissonance,” which means holding inconsistent views simultaneously, such as that one is just applying the law and that one is making up the law as one goes along. It is an actor’s adage that no person is a villain in his own eyes. We were taught in law school what we are supposed to be doing as judges—apply the law, not make it up. So I don’t think that there is a lot of cynicism in judges. In the case of the Eleventh Amendment, for example, I don’t see judges rule such as Justice Scalia honestly think that it has a nonliteral meaning that is implicit in the Constitution. But to treat it as implicit in the Constitution is of course a departure from literalism—from the mechanical application of authoritative text to resolve legal questions. But Justice Scalia has called himself a halfhearted originalist, in recognition that a judge has to make compromises with orthodoxy and be realistic, at least on occasion.

ERS: I find that most law professors are unwilling to acknowledge that the Supreme Court is a political court. Why do you think that is and how can we change it?

RP: I think there are a couple of reasons. In the case of judges, I repeat that people don’t like to think of themselves as hypocrites or villains. But another thing that a judge will say—and I would agree with this to a degree—is that judicial opinions are public documents and public officials can’t be as candid as private persons. There is an accepted reality of judicial expression, and judges have to write that way. They are protecting the authority of the judiciary by avoiding excessive candor. Law professors don’t labor under that constraint. They believe that they are comfortable with discussing is legal doctrine and not judicial psychology or political science.

ERS: I think one idea that Supreme Court justices didn’t always write their own opinions—that often they delegated the opinion writing to their law clerks. I didn’t dream of that because the law professors didn’t give the students the faintest glimpse of the realities of the judicial process. In defense of that they could have said that if they induced premature cynicism on the part of the students, the students wouldn’t learn the tools of their trade and so wouldn’t be effective lawyers. It may be good for the students to believe that these doctrinal niceties are really critical to judicial outcomes. Law professors these days are something more candid about the judicial process and so wouldn’t be effective teachers. It may be good for the students to believe that these doctrinal niceties are really critical to judicial outcomes. Law professors these days are something more candid about the judicial process.

ERS: Can I ask you on this point, how important is transparency to the rule of law? When the Court decides issues that divide the nation, it often comes forward with an opinion that is not transparent at all. I think that is a threat
to the rule of law because government officials are imposing their will in a coercive way without explaining honestly why they are doing it, without being transparent. Do you agree with that?

RP: I agree in part but an example of a necessary hypocrisy is Brown v. Board of Education. The obvious to everybody that what was wrong with public school segregation was that it was an integral part of a system of apartheid. The Supreme Court example I want to say that, I am sure at Justice Black’s urging because he had a sense of how the South would react. So the Court put it in terms of the educational benefits of integration, which was fine—probably it was necessary to achieve unanimity. But the implication was that it might be fine to segregate drinking fountains because segregating fountains are not important like education.

But then the Supreme Court without explaining how one gets from education to drinking fountains declared all of public racial segregation unconstitutional (with a partial exception for prisons) in a series of basically one-word per curiam opinions. The Supreme Court didn’t want to say what the truth was about the South—that its social and political system was a vicious attempt to keep black people in a condition of quasi slavery. Once I said something in an opinion that is obvious and that everybody knows but is never said—namely that the intensity of judicial review of a district court’s decision will depend in part on the respect in which the district judge is held by the appellate judges. That made some of the district judges angry with me. I haven’t repeated it.

EJS: I clerked in 1983 for the Northern District of Georgia and then the Eleventh Circuit. There were twelve district court judges, and most ran their chambers the same way. The law clerks would get the file off the shelf and draft the order granting or denying summary judgment. The judge would review them and more often than not sign them as written.

RP: A lot of law clerks are smarter than their judges, because intellectual ability is a bigger factor in choosing a law clerk than in choosing a judge—judges are chosen by politicians, though the clerk than in choosing a law—judges are chosen by politicians, though the clerks are chosen by the justices. I’m guessing about the clerks, who historically are more brilliant law clerks than in choosing a judge—judges are chosen by politicians, though the clerks are chosen by the justices.

EJS: Speaking of the Supreme Court, I think Justice Anthony Kennedy comes the closest of anyone I’ve seen to actually linking his political preferences and his values to his results. The other justices, like Sandra Day O’Connor before she retired, seem to pretend that text and precedent actually resolve the cases before them. For someone who believes what you and I believe about the Court being political, is it a good thing that Justice Kennedy is up front about his values?

RP: O’Connor was political in the sense that she wanted the Court to be centrist. She didn’t want it to go too far in any direction. I had heard she had a sense that it wouldn’t be uncommon—where she was presented with a draft that all her law clerks had to sign off on before it was presented to her. So one was writing, one editing, and one checking citations; they would discuss and debate the opinion thoroughly, and finally they would produce a consensus document for her to review.

EJS: I disagree with his politics, whether we agree or disagree with his politics, your criticisms of the Roper decision (where the Court held that states could not execute juveniles) are not uncommon—where I think it is wrong to execute people under seventeen, the text is ambiguous, and the precedent goes both ways. We have a degree of discretion in deciding the case and I can’t help but bring my personal values to that, I am in power and I get to say and I think it is wrong to execute juveniles.

RP: That is what Oliver Wendell Holmes said. We have the sovereign prerogative of choice and for me [Holmes] it is worse for the government to violate the law than for a criminal to go free. Holmes could get away with that blunt statement of personal preference but it requires a degree of rhetorical skill that few judges have had. Holmes and Robert Jackson had it, though Jackson was different from Holmes, Holmes, despite his Civil War experience, was rather cloistered, bookish. He wasn’t very practical, but had great rhetorical skills and was a very thoughtful person, alert to big issues in society, though not interested in the nuts and bolts. He was very transparent in his judicial opinions, essays, and of course letters.

EJS: He said during his confirmation hearings that there is a zone of individual privacy which beyond the government cannot get. But given his politics, whether we agree or disagree with his politics, your criticisms of the Roper decision (where the Court held that states could not execute juveniles) are not uncommon—where I think it is wrong to execute people under seventeen, the text is ambiguous, and the precedent goes both ways. We have a degree of discretion in deciding the case and I can’t help but bring my personal values to that, I am in power and I get to say and I think it is wrong to execute juveniles.

RP: Hasn’t the nomination process become a total farce? At her confirmation hearing, Justice Sonia Sotomayor said repeatedly that she would decide hard cases based on the law, and John Roberts had no analogous authority to the judge as an umpire.

EJS: At her confirmation hearing back in 1981, when confirmations were much less controversial (and of course court of appeals nominees don’t get the same scrutiny as Supreme Court justices, though they are very much more controversial than when I was confirmed), Strom Thurmond, the chairman of the Judiciary Committee, asked me, “Do you agree that judges should just apply the law; they shouldn’t make the law?” I said that was usually the case but some cases are inherently political, and to decide them the judge may have to create some law. Sometime later I received the printed report of the confirmation, and my answer—my nuanced answer—had been changed (without notice to me) to yes, judges should just apply the law and not make the law.

EJS: You told the truth. Why can’t they now?

RP: As I said, judicial appointments were less controversial in those days, so Senator Thurmond probably wasn’t paying close attention to my answers. The most famous of the confirmation hearings was the one of Thurgood Marshall. He had no senators—court of appeals judges, like district judges, were basically senatorial appointments, and they tended to be patronage appointments often with little attention to the appointee’s political ideology.

There was a vacancy on the Seventh Circuit, and Senator Charles Percy, the senior senator from Illinois (an influential Republican), had his candidate and it wasn’t me, and the White House decided they would buck Percy, whom they didn’t much like because...
he was a moderate. He was a nice person—he wasn’t a fighter—so they made a deal with him that if he would support me, they would give his candidate the next vacancy. And they did. Anyway this is what I heard had happened; it is hearsay.

EJS: I think you wrote to me that the nominees should have to answer questions about specific issues and that we should do away with the hearings altogether.

RP: The senators do a very poor job at judicial confirmation hearings. It is amazing to me that no senator took Roberts up on his umpire remark. Fifteen of them were sitting there and they let the remark pass unchallenged. I think the problem is that they are given questions to ask by their staff. They read the questions to the nominee but since they don’t really know what is going on they can’t ask a follow-up question.

EJS: How could Justice Thomas get confirmed after he said under oath that he had never discussed Roe v. Wade with anyone is his life?

RP: The problem is that if the nominee says, “I’d be lying to you if I said I didn’t have a preliminary judgment,” he is accusing his predecessors of having lied, right? It is very tricky. The problem is that we have a political system in which the definition of a gaffe is telling the truth.

EJS: Can I ask you a question about a recent book review you wrote in The New Republic where you suggested that maybe it would have been a good thing had President Roosevelt’s Court-packing plan worked? The reasons you gave struck me as all having to do with having a weaker Supreme Court. Can you go into more detail about why you want a weaker Supreme Court?

RP: I don’t think the justices are up to deciding really difficult policy issues. Maybe no one is, so probably the issues should be left to Congress and the president to decide, with very light review by the courts. I think professional judges are particularly not up to the challenge posed by such cases. One of my favorite examples of a—may I say decision is the Paula Jones sexual harassment case against President Clinton, Clinton v. Jones. It was just a few years from the end of Clinton’s term, and the justices could have said that we’ll let him put the lawsuit on hold for those years. You don’t want to have the president deposed about sex, let alone extramarital sex, in a lawsuit in which he’s the defendant. So give him his remaining years; or at least the district judge should consider all possible grounds for dismissing the suit before he has to be deposed (the case in fact was dismissed on grounds unrelated to what he said in his deposition). Instead they decided unanimously to deny him the limited immunity he sought. Justice Breyer, the most politically savvy of the justices at that time, wrote a concurring opinion expressing misgivings but apparently did not have the full courage of his convictions (he was relatively new on the Court). The decision was a very serious mistake; if decided the other way we would have been spared the impeachment, which accomplished nothing. It was not an analytical error, but a lack of political savvy and simple common sense. The Clinton v. Jones fiasco argues for having more worldly justices, as used to be the case, rather than just professional judges.

I didn’t actually realize until I read Jeff Shesol’s book Supreme Power* that the Court-packing plan was rather ingenious. If you get to be seventy-five, the president can appoint another justice, so you can either retire or stay around, but on a bigger court where your influence will be diluted.

Having a fixed retirement age is really harmful to the state courts; that I know. For example, there was a very good judge on the Oregon Supreme Court, Hans Linde. He was excellent, but he was forced to retire in his seventies. He went back into teaching. Charles Fried of Harvard Law School, a former US solicitor general, was appointed to the Supreme Judicial Court of Massachusetts in his sixties and there was compulsory retirement at seventy. He told me that when he was sixty-seven he realized he’d be retiring in three years and it would be a little late to be going back into teaching then, so he quit early. He was a very good judge. And you know it is a geriatric profession. Stevens is remarkable; he is going strong at ninety-one, even in retirement.

I think for anybody in a management job, ten years is the limit; you make enemies, you get stale. But I have been a court of appeals judge for almost thirty years, and the cases keep changing. The district judges tend, some of them anyway, to get tired because there is a lot of repetition in a trial court. But court of appeals judges and Supreme Court justices have the stimulation of constant variety. Holmes retired when he was ninety-two; he was definitely slowing down but he had written some really good opinions in his late eighties. There are other examples. Most judges seem to function quite well to at least eighty.

The justices in the 1930s whom Roosevelt tried to shove off the Court—I don’t think it was so much an age problem, Owen Roberts was young, and switched his views only under pressure from Charles Evans Hughes, who was old. There was a tremendous change in American society and politics between 1929 and 1933, almost a revolution, and anybody who had become a lawyer in the 1920s would have tended to have the same views as the old guys. In fact they weren’t that old. I think their average age was around seventy-two (that’s my age!). So they weren’t really such fossils. If you compare today’s constitutional law with the Constitution of 1787 everything has changed, but it has taken 224 years, so the change has not been abrupt. The Senate started off with twenty-six members who were indirectly elected and were expected to be members of the political and social elite of the country. It was a genuine deliberative body. So you could say that the Supreme Court today is taking the place of what the framers expected the Senate to be.

*Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (Norton, 2010).