

**The Judicial Role**  

---

**Statutory Interpretation  
and the Pragmatic Judicial Partner**

**William D. Popkin**



**CAROLINA ACADEMIC PRESS**

---

Durham, North Carolina

Copyright © 2013  
William D. Popkin  
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Popkin, William D.

The judicial role : statutory interpretation and the pragmatic judicial partner / William D. Popkin.

pages cm

Includes bibliographical references and index.

ISBN 978-1-61163-406-8 (alk. paper)

1. Law--United States--Interpretation and construction. 2. Judicial process--United States. I. Title.

KF425.P6695 2013

347.73'5--dc23

2013004193

Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*To my grandchildren  
André, Jared, Kayla, Kol, and Orlando*



# Contents

|                     |           |
|---------------------|-----------|
| <b>Introduction</b> | <b>xi</b> |
|---------------------|-----------|

## Part I

### The Case for Pragmatic Statutory Interpretation

|  |           |
|--|-----------|
| <b>Chapter 1 • The Pragmatic Perspective</b>                   | <b>3</b>  |
| Case or controversy  | 3         |
| Procedural vs. substantive arguments                           | 5         |
| Pragmatic mindset—Indeterminate judging                        | 5         |
| Strong vs. cautious pragmatism                                 | 5         |
| Judicial restraint?  | 7         |
| Collegial judging  | 7         |
| Legal education  | 8         |
| Common law tradition   | 9         |
| <br>   |           |
| <b>Chapter 2 • Is Pragmatic Partnering Constitutional?</b>     | <b>11</b> |
| A. Constitutional structure                                    | 11        |
| 1. Separation of powers  | 14        |
| 2. Legislative bargaining and compromise                       | 18        |
| B. Political selection process                                 | 20        |
| Conclusion   | 23        |
| <br>   |           |
| <b>Chapter 3 • Pragmatic Judicial Partnering — Descriptive</b> | <b>25</b> |
| A. Political science studies                                   | 26        |
| B. Judicial opinions   | 37        |
| 1. Law review studies  | 37        |
| 2. Specific cases  | 39        |
| Conclusion   | 45        |

|   |    |
|---|----|
| <b>Chapter 4 • Pragmatic Judicial Partnering—</b> |    |
| <b>The Normative Case</b>                         | 47 |
| A. Contributing to good government                | 48 |
| 1. Procedural justice                             | 48 |
| 2. Judicial thought process                       | 49 |
| B. Examples—Ordinary judging                      | 51 |
| Conclusion  | 58 |

|  |    |
|--|----|
| <b>Chapter 5 • Pragmatic Judicial Opinion—</b>     |    |
| <b>The Normative Obligation</b>                    | 59 |
| A. Indeterminacy, creative judging, and persuasion | 59 |
| 1. Indeterminate judging                           | 59 |
| 2. The creative judge                              | 61 |
| 3. Persuasion and the judicial opinion             | 65 |
| B. Four responses                                  | 72 |
| 1. Posner's view?                                  | 73 |
| 2. Dworkin—There is a right answer                 | 75 |
| 3. Scalia—If no right answer, anything goes        | 76 |
| 4. Simon—Judges lack self-awareness                | 79 |
| Conclusion   | 81 |

## Part II

### The Anti-Pragmatists

|   |     |
|---|-----|
| <b>Chapter 6 • Textualism: Manning and Scalia</b>     | 85  |
| A. Introduction                                       | 85  |
| B. Fragility of the text                              | 92  |
| 1. Identifying the author and audience                | 92  |
| 2. Linguistic canons                                  | 104 |
| 3. Holistic interpretation and purposivism            | 121 |
| C. The text and substantive background considerations | 127 |
| 1. Grounding textualism in policy                     | 127 |
| 2. Substantive canons                                 | 132 |
| Conclusion  | 138 |

|  |     |
|--|-----|
| <b>Chapter 7 • Elhaug’s Intentionalism</b>                       | 139 |
| A. Some preliminary matters                                      | 140 |
| 1. Predicates for focusing on legislative intent                 | 140 |
| 2. Relationship between the normative and<br>the descriptive     | 143 |
| 3. Rule-like doctrines   | 144 |
| B. Judicial competence and enactable preferences                 | 145 |
| 1. Introduction  | 145 |
| 2. Identifying enactable preferences—In general                  | 147 |
| 3. Identifying enactable preferences—Specific doctrines          | 149 |
| C. Four responses  | 169 |
| 1. Probabilistic accuracy is good enough                         | 169 |
| 2. Enactable preferences and a judicial-legislative<br>dialogue  | 170 |
| 3. Statutory interpretation codes                                | 173 |
| 4. Preference-eliciting canons                                   | 177 |
| Conclusion   | 178 |
| <br>   |     |
| <b>Chapter 8 • Vermeule’s Institution-Based Literalism</b>       | 179 |
| A. The absence of judging  | 179 |
| B. Getting the right answer is the wrong standard<br>for judging | 184 |
| C. The Vermeulean judge  | 187 |
| 1. Linguistic canons   | 189 |
| 2. Substantive canons  | 193 |
| 3. Holistic interpretation                                       | 194 |
| 4. Deference to an agency  | 195 |
| 5. Legislative history   | 196 |
| D. The implications of Vermeulean judging<br>for the common law  | 199 |
| Conclusion   | 202 |
| <br>   |     |
| <b>Epilogue—The Legal Culture</b>                                | 205 |
| <br>   |     |
| <b>Index</b>   | 209 |





## Introduction

We are at an impasse about statutory interpretation. Despite Justice Scalia's startling assertion that "we ha[ve] adopted a regular method for interpreting the meaning of language in a statute,"<sup>1</sup> there is no agreement. In one camp are the pragmatists who view judging as a lawmaking partnership with the legislature. Judge Posner<sup>2</sup> and Professor Eskridge<sup>3</sup> are the best known advocates of pragmatic judging.<sup>4</sup> There is even a school of thought that we have all become pragmatists<sup>5</sup> and that pragmatist theory has become

---

1. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

2. Richard A. Posner, *Law, Pragmatism, and Democracy* (2003) (hereafter "Posner, *Pragmatism*"). Other books by Posner about legal pragmatism are cited in Posner, *Pragmatism*, pp. 1–2 n.1. See also Richard A. Posner, Foreword: A Political Court, 119 Harv. L. Rev. 31, 90–102 (2005); Posner, Pragmatic Adjudication, in *The Revival of Pragmatism* (Morris Dickstein ed., 1998), p. 235 (hereafter "Posner, Pragmatic Adjudication").

3. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990); William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 Geo. L.J. 319 (1989).

4. See also William D. Popkin, *Statutes in Court*, Ch. 7 (ordinary judging) (1999); *The Revival of Pragmatism* (Morris Dickstein ed., 1998) (hereafter "Dickstein, *Revival*"); Frank B. Cross, *The Theory and Practice of Statutory Interpretation*, Ch. 5 (Pragmatism and Dynamic Statutory Interpretation) (2009); *Pragmatism in Law and Society* (Michael Brint & William Weaver, eds.) (1991); Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331 (1988); Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. Cal. L. Rev. 1569–1928 (1990); Contributions, *The Revival of Pragmatism*, 18 Cardozo L. Rev. 1–180 (1996).

5. Cass R. Sunstein, Justice Breyer's Democratic Pragmatism, 115 Yale L.J. 1719, 1742 (2006) ("Perhaps we are all pragmatists now, in the sense that we

banal.<sup>6</sup> But not everyone has gotten the message. In the other camp are the anti-pragmatists—most recently, three Harvard Law School professors (Manning, Elhauge, and Vermeule) and Justice Scalia (in a recent book co-authored with Bryan Garner), who argue that judges should not interpret legislation as pragmatic judicial partners.

The anti-pragmatists reach their conclusions by very different routes. Scalia and Manning are textualists who rely on various arguments that the Constitution prevents the judge from being a pragmatic lawmaking partner. Elhauge adopts a version of intentionalism—what he calls judicial deference to “enactable preferences,” stressing democratic values. Vermeule is a literalist who does not base his approach on constitutional or democratic values. He instead relies on an institutional model of judging that emphasizes the more or less certain costs and uncertain benefits that judges encounter in trying to find the right answer (whether in the text, intent, or policy consequences). Despite these differences, however, they all agree in rejecting pragmatic judicial partnering and therein lies the broader significance of their message. Something in the legal culture may be driving a convergence of results, whatever method is used to get there. The fact that this unified message comes from the Harvard Law School and an influential Supreme Court Justice calls for a response.

This book argues that pragmatic judicial partnering is both descriptively accurate and normatively desirable. It describes and justifies judging as a creative act of judgment rather than the discovery of the right answer in the text, legislative intent, or in a decision about policy consequences. It may seem that pragmatism does not need my defense. Why would anyone try to do better than

can agree that any theory of interpretation must pay close attention to the outcomes that it produces.”).

6. See Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. Cal. L. Rev. 1811, 1813 (1990) (pragmatism “has gradually been absorbed into American common sense”); David Luban, *What’s Pragmatic about Legal Pragmatism*, in Dickstein, *Revival*, p. 277 (“if legal pragmatism is *only* eclectic, result-oriented, historically minded antiformalism, it turns out to be a remarkably uncontroversial doctrine”; as Thomas Grey says, “legal pragmatist theory is quite banal”). Cf. Laura Kalman, *Legal Realism at Yale, 1927–1960*, p. 229 (1986) (“We are all realists now.”).

Posner? There are three reasons. First, Posner's examples rely heavily on politically controversial cases, such as those dealing with abortion, the election of George W. Bush, and school desegregation.<sup>7</sup> That focus can skew the discussion of judging toward the political controversy rather than to the practice of judging. My argument is that we should focus on ordinary judging in politically uncontroversial cases (primarily in Chapters 3 and 4). That is where we learn about judging and where we find a pervasive practice of pragmatic judicial partnering. When judges consider policy consequences in controversial cases, they are simply applying the practice of ordinary judging to high profile decisions. We should, in other words, work from the "bottom up" to understand why pragmatic judging is descriptively pervasive and normatively attractive.

Second, I pay more attention than Posner does (and, perhaps, than he would prefer) to the pragmatic judicial opinion (in Chapter 5). The pragmatic opinion is the judge's opportunity to *create* a right answer through persuasion rather than to discover the right answer by whatever means might seem appropriate. Third, I mount a sustained response to the anti-pragmatists, which is not something Posner spends much time doing (in Chapter 2 and Part II, Chapters 6–8).

I proceed as follows: Part I makes the case for pragmatic statutory interpretation, based on a judicial lawmaking partnership with the legislature. Part II explains why the anti-pragmatists do not successfully rebut the case for pragmatic judicial partnering. An Epilogue provides some comments on the legal culture.

---

7. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *Harv. L. Rev.* 1637, 1700, 1702, 1703, 1707 (1998) (cases discussed involve euthanasia, abortion, segregation, and the murdering heir); Richard A. Posner, *Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 90–102 (2005) (cases discussed involve school vouchers, display of Ten Commandments, copyright term extension, eminent domain followed by transfer of property to private owners, and a lawsuit against a sitting President).