The Judicial Role

Statutory Interpretation and the Pragmatic Judicial Partner

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

Contents

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,"[1] there is no agreement. In one camp are the pragmatists who view judging as a lawmaking partnership with the legislature. Judge Posner[2] and Professor Eskridge[3] are the best known advocates of pragmatic judging.[4] There is even a school of thought that we have all become pragmatists[5] and that pragmatist theory has become

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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.[6] 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

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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.[7] 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.

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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).