

JUDICIAL PRAGMATISM: A DEFINITION

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judicial, *adj.* 1. of judges, law courts, or their functions. . . .

pragmatism, *n.* . . . 3. a system of or tendency in philosophy which tests the validity of all concepts by their practical results.

activism, *n.* the doctrine or policy of being active or doing things with energy or decision.

—*Webster's New World Dictionary*

Introduction

When I was in law school, the students were constantly being prodded by the professors to take sides between the judiciary and the legislature when the two institutions came into conflict. The judicial activists among us sided with the judiciary, while the judicial passivists among us sided with the legislature. In those days the activists tended to be liberals and the passivists were mainly conservatives, although the *Lochner* decision¹ was effectively used by our professors to confound both the liberal-activists and the conservative-passivists among us. As a person whose primary concern was with protecting the rights of individuals to control the use of their bodies and the use and disposition of their possessions, I was never very comfortable in either camp.

In constitutional matters, where legislative or executive branches of government sought to encroach upon these rights, I usually found myself rooting for the judicial activists—as, for example, when

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¹*Lochner v. New York*, 198 U.S. 45 (1905). This was a decision in which the Supreme Court struck down, as violative of the due process clause of the Fourteenth Amendment, a state statute regulating the maximum hours that a baker may work.

studying the famous cases of *Nebbia v. New York*,² *Griswold v. Connecticut*,³ or *Roe v. Wade*.⁴ In private law matters, where the encroachment most often came from the judiciary, I usually found myself siding with the judicial passivists—as, for example, in such a case as *Williams v. Walker-Thomas Furniture Co.*⁵ So what was I? Was I a judicial activist or a judicial passivist or—worse yet, from my point of view—was I simply an unprincipled vacillator, as in one who “waves to and fro,” shows “indecision,” or is “irresolute”?⁶

In this paper I suggest a third approach to the choice between judiciary and legislature that is no less principled than either pure activism or passivism, but it is principled in a different way. It is a view I call “judicial pragmatism.” *Webster’s New World Dictionary* defines the word “judicial” as an adjective meaning “of judges, law courts, or their functions.”⁷ The third definition of “pragmatism” in *Webster’s* is “a system of or tendency in philosophy which tests the validity of all concepts by their practical results.”⁸ Finally “activism” is defined therein as “the doctrine or policy of being active or doing things with energy or decision.”⁹ Judicial pragmatism, then,

²291 U.S. 502 (1934). In *Nebbia v. New York* the Supreme Court refused to strike down a state statute that attempted to regulate the minimum and maximum retail prices of milk. This case represents the dawn of an era that rejected judicial activism on behalf of “economic liberties” that was associated with the so-called *Lochner* era in favor of extreme deference to the will of the legislature.

³381 U.S. 479 (1965).

⁴410 U.S. 113 (1973). This case and *Griswold v. Connecticut* are taken as representing a renewed interest in protecting so-called fundamental rights from legislative regulation under the due process clause of the Fourteenth Amendment. *Roe v. Wade* concerned a statute making it a crime to procure an abortion; *Griswold v. Connecticut* concerned a statute that criminalized the private use of contraceptives. Both statutes were struck down by the Supreme Court. Thus far, economic liberties have not been considered by the Court to be “fundamental rights” requiring enhanced scrutiny under the due process clause.

⁵350 F.2d 445 (1965). In this case the United States Court of Appeals for the District of Columbia retroactively applied a recently enacted statute, 28 D.C. Code §2–302 (1965), which permitted a court to refuse to enforce an “unconscionable” contract, to a contract made before the enactment of the section.

⁶From the definition of “vacillate” found in *Webster’s New World Dictionary* (1968), p. 1606.

⁷*Ibid.*, p. 792.

⁸*Ibid.*, p. 1146. *The Oxford English Dictionary*, vol. 8 (1970) offers the following helpful definition of pragmatism as its fourth meaning: “the method of testing the value of any assertion that claims to be true, by its consequences, i.e. by its practical bearing upon human interests and purposes” (p. 1225).

⁹*Webster’s*, p. 15.

can be defined as follows:

judicial pragmativism, n. a system of philosophy or jurisprudence that tests the validity of a decision concerning the appropriate sphere of judges or law courts by its tendency to actively achieve a practical result or results.¹⁰

Judicial pragmativism is not to be confused with "moral pragmatism." Pragmatism as a moral philosophy claims insight into the choices among ends. Judicial pragmativism has nothing to say about the ends of law. It applies only to the choice of means to achieve ends that may be established in numerous and nonpragmatic ways, and even then it applies only to the limited choice between the judiciary or the legislature as the appropriate means to these ends. To a judicial pragmatist, neither judicial activism nor judicial passivism is correct all the time. Sometimes activism is justified; at other times passivity is warranted. Which stance is appropriate in what instance must be decided by determining both the likely consequences of each for the parties at hand and the potential effect of this choice on future parties. And how they distinguish good consequences from bad consequences will differentiate pragmatists from each other.

Different Kinds of Pragmatism

A judicial pragmatist favors whichever forum is more likely, in a particular instance, to secure fundamental moral principles. Where the consequences of judicial initiative are more in harmony with a pragmatist's basic principles than the consequences of deferring to the legislature, judicial initiative is favored; where the consequences of deferring to the legislature are more in harmony with the pragmatist's basic principles than judicial initiative, judicial deference is favored. Jurisprudential confusion arises, though, not only from a failure to recognize judicial pragmatism as a respectable and principled view of the relationship between the judiciary and the legislature; it also arises from a failure to adequately acknowledge distinctions among pragmatists.

Judicial pragmatists differ with one another about which principles should be employed to distinguish "good" consequences from "bad" consequences. Some pragmatists seek to advance certain

¹⁰So far as I know, I have coined this term. If it turns out that this expression has already been taken, I stand ready with a substitute: "judicial activism." In fact, let me suggest the following definition for this term: "judicial activism, n. a synonym for judicial pragmatism."

ends that other pragmativists find abhorrent. The principles about which they disagree are usually easily discernible and can be made the subject of rational discourse and sometimes even ultimate resolution. Furthermore, the differing principles of different pragmativists can account for their coming out on different sides of a choice between the judiciary or legislature in a particular case.

For example, one may be an efficiency pragmativist and argue that judges should acquiesce to the legislature when a statute leads to the efficient outcome, but should blaze new creative legal trails when a statute is inefficient. The consequence against which judicial intervention is assessed is whether the goal of efficiency is served or disserved by judicial intervention or by judicial deference. Or one may be an equal-wealth pragmativist favoring only those departures from statutes and precedent that serve to equalize the material possessions of all and favoring passivism where statutes and precedents are having this effect. The consequence against which judicial intervention is assessed is whether the goal of material equality is served or disserved by judicial intervention or by judicial deference.

Lastly, one may be a rights pragmativist. According to this view, judges should passively follow the public and private law when it is in accord with the property rights¹¹ of all persons (as would be the case with much of both the common law and most, if not all, of the rights enumerated by the Constitution of the United States). On the other hand, a judge should "make" new law when the preexisting law inadequately respects or protects these individual rights. In no event where well-defined rights of an individual are at stake should a judge yield in the defense of these rights to the will of the legislature.

A rights pragmativist's view of the judiciary is based on the idea that the courts exist to do justice; that justice is determined by correctly identifying the rights of the parties to a lawsuit; that these rights are determined not solely by reference to the positive or enacted law, but are based on a more fundamental moral status; that because the violation of any person's rights is unjust, when a person has a right, this means that the court should respect that right and enforce

¹¹The term "property rights," as I use it, includes not only the right to use and alienate external possessions but also the right to control the use of one's body or person as well. I explain this usage at greater length in Barnett, "Why We Need Legal Philosophy," *Harvard Journal of Law and Public Policy* 8 (forthcoming). These are rights to which I am referring when the term "individual rights" is used in the following discussion.

it; and that failure by a court to respect and enforce a right is itself an injustice.¹²

In short, unlike those who would favor the legislature as a matter of principle—such as, for example, the principle of “majority rule”—judicial pragmativists assert that when the issue concerns the enforcement of fundamental rights, the choice between the judiciary and the legislature is to be governed by determining which institution will most expediently protect individual rights in a particular case. Whichever branch will best secure individual rights is the branch deserving of deference. Such a decision involves at least two kinds of issues: (1) which institution is likely to achieve the correct outcome in the case at hand, and (2) what effect is this choice likely to have on the ability of others to enforce their rights in the future.

The second of these issues can be affected by the sorts of institutional analysis we are accustomed to in matters of this sort—that is, an analysis that stresses the inherent qualities of the institution. Such phrases as “the least dangerous branch” or “expression of the majority’s will” or “the ability of an institution to engage in fact finding” come to mind. It is here that we must be concerned about minimizing the possible errors in each direction—that is, the errors that will result from judicial activism as compared with the errors that will result from deference to the legislature.¹³

When employing a word whose root is “pragmatic,” it is important to make clear where the assessment of consequences is being made to show that an approach called “rights pragmativism” is not a contradiction in terms. A rights pragmativist does not ask which *outcome* of a particular case has the “best” consequence, as a

¹²Of course, to fully appreciate such a position, much more needs to be said about it than is possible here. Among other things, one would need to know the moral foundations for such rights, their contents, how they comport with a “rule of law” approach to adjudication, the means by which they may be identified, and the type of legal order that is best suited to enforce them.

I discuss each of these issues at greater length elsewhere. See Barnett, “Why We Need Legal Philosophy”; and “Pursuing Justice in a Free Society: Power v. Liberty,” *Criminal Justice Ethics* 4 (Winter/Spring 1985) (forthcoming); and “Pursuing Justice in a Free Society: Crime Prevention and the Legal Order,” *Criminal Justice Ethics* 4 (Summer/Fall 1985) (forthcoming).

The rights-based approach to justice and social order described in the text of this paper has received wide attention in recent years. I summarize recent intellectual developments in this direction and attempt to put them in a historical context in Barnett, “Contract Scholarship and the Reemergence of Legal Philosophy” (review essay), *Harvard Law Review* 97 (March 1984): 1225–36.

¹³See Richard A. Epstein, “Judicial Review: Reckoning on Two Kinds of Error,” *Cato Journal* 4 (Winter 1985): 711–18.

pragmatist would.¹⁴ Rather, he or she asks which *institution*—judiciary or legislature—is more likely to secure the correct outcome, namely, the enforcement of the fundamental rights of the parties and of others in the future. The rights pragmatist then chooses the enforcement mechanism accordingly.

We are pragmatistic in a similar manner when we formulate rules governing the admission of evidence. The rules that make up the law of evidence are not ends in themselves, but are always instrumental in achieving the other more fundamental ends of the judicial process.¹⁵ We know that the enforcement of a rule of evidence will sometimes lead to mistaken outcomes, but we rightly fear that a relaxation of evidentiary rules to permit judicial “discretion” will create more frequent and more serious mistakes.¹⁶ Just as the choice of evidentiary rules is instrumental in achieving the fundamental goals of the judicial process, to a rights pragmatist the choice between the judiciary and the legislature is always to be assessed by its potential effects on the enforcement of individual rights.

Outcomes versus Rationales

The rights of future parties will not only be affected by the outcome of a particular case; they may also be affected by the reasons given

¹⁴Except insofar as consequences enter into determining what rights we have. I have briefly discussed how consequences and rights may fit together in Barnett, “Public Decisions and Private Rights” (review essay), *Criminal Justice Ethics* 3 (Summer/Fall 1984): 50–62. See also John Gray, “Indirect Utility and Fundamental Rights,” *Social and Political Philosophy* 1 (Spring 1984):73–91, which discusses the consequentialist component of the concept of individual rights.

¹⁵At least three ends or functions of the judicial process are needed to explain most of evidence law: (1) the justice function, which is the effort to discover the historical truth about an event that has occurred sometime in the past; (2) the fairness function, which is the effort to satisfy the parties and the community that the truth has been discovered, and therefore that justice has been done; and (3) the adversary function, which is the attempt to harness the self-interest of the parties to a lawsuit to achieve the first two functions.

¹⁶For a brief explanation of the difference between a legal system based on rules and one based on (cost-benefit) balancing, and the advantages of the former, see Mario J. Rizzo, “Rules versus Cost-Benefit Analysis in the Common Law,” *Cato Journal* 4 (Winter 1985), especially pp. 873–83.

It is important to note that the analogy between rights pragmatism and evidence law employed in the text of this paper compares the choice between branches of government with the choice among rules of evidence to show that (1) both types of choices are pragmatic or instrumental in their nature, and (2) a correct choice in either area will minimize, but not eliminate, all error. The analogy is not offered to suggest that the choice between branches of government should be governed by rules of the sort that should govern the law of evidence. Because no workable set of rules could be identified that would indeed minimize rights violations, a rights pragmatist would reject this suggestion.

for that outcome. A rights pragmativist may favor the outcome of judicial activism because it is consistent with and protects individual rights, both of the parties and of others in the future, while still insisting that the rationale proffered by the judge for the outcome is woefully deficient. Therefore, although judicial intervention may be favored on pragmativist grounds to secure an individual's rights, the rationale for a judicial decision may still be criticized because it is an incorrect analysis of the rights in issue.

In the case of *Griswold v. Connecticut*,¹⁷ for example, the United States Supreme Court found that a state statute criminalizing the use of contraceptives infringed upon what the Court said was every citizen's constitutional "right of privacy."¹⁸ A rights pragmativist may strongly deny that any person has a right to privacy as such.¹⁹ Nonetheless, rights pragmativists may still oppose any retreat from *Griswold* if this would mean upholding a statute restricting the right to exercise choice in the area of birth control, even though the articulated rationale for the outcome might in their view be quite wrong.

Similarly, because of what they believe are the rights of women to control their bodies, even at the expense of other human beings who may reside within, rights pragmativists may still embrace the precedent of *Roe v. Wade*²⁰ (which respects and enforces the rights of women to exercise choice in the area of abortion) while always being careful to distance themselves from supporting a putative right to privacy.

A rights pragmativist, on balance, may favor the exercise of judicial "lawmaking" here because it furthers the securement of certain individual rights, even though the court may be stating the wrong reason for its decision. At the same time, it should be stressed, a complete assessment of the consequences of this choice in a

¹⁷381 U.S. 479 (1965).

¹⁸*Id.* at 486: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."

¹⁹As a positive matter, a rights pragmativist may contest the claim that there exists a constitutional right of privacy. The Constitution does not mention any such right, and the argument that it is implicit in the Constitution is belied by the nearly 200 years of constitutional jurisprudence during which some well-respected members of the Supreme Court have managed to overlook its presence.

As a normative matter such a right is extremely problematic in that, if applied broadly, it can undermine other rights, such as property rights, that support free speech and a free press. See, for example, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which struck down a state restriction on the publication of a rape victim's name obtained from public records, but refused to decide whether "the State may ever define and protect an area of privacy free from unwanted publicity in the press" (*id.* at 491).

²⁰410 U.S. 113 (1973).

particular case must take into account the danger to the security of other rights that a decision based on erroneous grounds may create. In rare cases a rights pragmativist may be forced to oppose the "correct" outcome, when a wrong rationale for that outcome places other rights in serious jeopardy. Such a judgment is a matter about which reasonable people are likely to differ.

Pragmativism and the Constitution

Judicial pragmativism also takes a pragmatic approach to the Constitution. It views a constitutional framework as instrumental to other more fundamental principles. How a pragmativist views the deference that a judge should pay to the Constitution of the United States depends, therefore, upon how he views the Constitution. Where the Constitution is viewed as a positive embodiment of the principles of right and wrong held by the pragmativist, then he would be very deferential to the Constitution and would, on normative grounds, argue that others should be as well. Where this is not the case, only small weight would be placed on the words of the Constitution.

In the case of *Hawaii Housing Authority v. Midkiff*,²¹ for example, equal-wealth pragmatists would cheer on the Supreme Court's deference to the state legislature's attempt to take land from some and give it to others, allegedly in contravention of the "takings clause" of the Fifth Amendment.²² Efficiency pragmatists would have to ponder the effects on competition of having so much land in so few hands, balanced against the costs of undercutting the certainty of the landowner's property rights. Rights pragmatists, who view the takings clause as an integral part of the Constitution's protection of property rights,²³ would simply be aghast at the injustice done by the Court's disregard of this constitutional provision.

If a rights pragmatist agreed with such scholars as Richard Epstein that the Constitution is a largely successful enunciation of the requirements of a free society based on individual rights to life, liberty, and property,²⁴ then he or she would favor extreme deference

²¹81 L.Ed.2d 186 (1984).

²²The Fifth Amendment of the Constitution states, in part: "... nor shall private property be taken for public use, without just compensation."

²³See, for example, Richard Epstein, "Not Deference, but Doctrine: The Eminent Domain Clause," *Supreme Court Review* 11 (1983): 351-80.

²⁴This view is suggested by Richard Epstein's analysis of the takings clause (*ibid.*, p. 351):

As a matter of practical politics and high political theory, one of the central functions of government is to create a stable legal order in which all individuals may securely use their talents and possessions. In order to meet this minimum condition of social

to the words and spirit of the Constitution. If one believes that the Constitution does not justify the political power it creates,²⁵ but that, given the necessity of such power, it provides an appropriate framework of limitations on its use, then one would still be quite deferential to the words and spirit of the Constitution.

If, on the other hand, one agreed that political power was evil but disagreed with the frequently made assertion that it is necessary, then much of the political framework provided by the Constitution would be highly suspect. A rights pragmativist who took this approach may still contend that deference to many of the political provisions of the Constitution—the balance of powers framework for example—is prudent in the absence of a politically feasible alternative, but that once that alternative became available, deference to the Constitution should melt away. Still other provisions—for example, those giving Congress the right and obligation to coin money or to establish post offices and roads²⁶—would not be entitled to even this *prima facie* deference.

While I am only defining (and not defending) judicial pragmativism in this paper, there is one concern that is worth considering because it may impede the willingness of some to accept the pragmativist position as a reasonable alternative to passivism or activism. A critic may ask: Do we really want to encourage judges to flout constitutional provisions in pursuit of their vision of rights or justice or whatever? Is not the constitutional *process* a sufficiently important value that we should not permit it to be undermined by a judge's opinion of *substantive* matters?²⁷ It will take but a moment's reflection to realize that this concern depends as much upon a substantive assessment of the Constitution as the assessment called for by judicial pragmativism.

The critic of pragmativism who says a judge should never (or only rarely) sacrifice the constitutional process in pursuit of substantive ends, but should instead urge that the Constitution be changed or perhaps should resign from the bench, can assert this position only on the assumption that the constitutional framework in existence

order, it has been seen necessary, at least in the American constitutional system, to develop a complex system of checks and balances to prevent the aggrandizement and abuse of official power by any single group of individuals.

This theme will be expanded in Epstein's forthcoming book, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press).

²⁵See, for example, Roger Pilon, "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty," *Cato Journal* 4 (Winter 1985): 813–33.

²⁶See U.S. Constitution, art. I, §8.

²⁷I thank Earl Ravenal for stimulating me to respond to this widely held concern.

advances the critic's favored substantive concerns. In other words, the critic is asserting that the Constitution is sufficiently well done and that to let a judge undermine a piece of it here will cost us a lot more elsewhere. On balance, therefore, we will be "worse off" if such meddling is permitted. However, one can make the judgment that the Constitution is well done and that meddling with it will make us better off or worse off only with respect to a substantive standard of good and bad that must be external to the Constitution itself, a standard that the critic does not disclose.

Thus what appears at first glance to be a process-oriented position that eschews substantive judgments conceals what is mainly a substantive assumption about the merits of the Constitution; that is, that the Constitution is too good to let individual judges tamper with it. The critic of pragmativism turns out to be simply taking an extreme pragmativist position: that letting judges intervene to pursue ends will invariably end up defeating the ends we should be seeking. What the critic of pragmativism is not making clear is the extraconstitutional standard of evaluation that led to this conclusion. Once this standard is made explicit, a rational and essentially pragmativist analysis of the critic's position is then possible.

The conclusion that a substantive assumption underlies this facially process-oriented concern can be tested by seeing whether, if the substantive assumption is changed, we feel as confident about the process claim. Suppose we are in a country where a statute that sanctions genocide or apartheid has just been passed in accordance with all constitutional requirements. Do we really think that a judge who is asked to uphold such a statute should put the interest of the "constitutional order" above the fundamental preconstitutional rights of the affected persons? Must a judge in that society "follow" the constitution or resign from the bench when such serious rights violations are at stake? Do we deny to the military officer—a person who is part of a rigid command structure—who transports people to a concentration camp the defense that he was "only following orders," while allowing a judge—our last guardian of justice—to escape responsibility by asserting what amounts to the same thing?

A rights pragmativist answers "no" to each of these questions. A judge has no legal duty to follow orders that are manifestly unjust,²⁸ whether these commands are spoken by a dictator or are written on

²⁸The word "manifestly" is used to rebut any prima facie duty to obey the positive law that may arguably exist. Such a duty can be asserted on the pragmativist grounds that the fallibility and self-interest of individuals require the societal recognition in practice of a (rebuttable) presumption that duly enacted rules of conduct are valid.

a piece of parchment that bears the heading of "constitution." And a judge may have a moral duty to thwart the operation of such orders. If the concept of law includes a duty of obedience, despite the fact that they are sanctioned by a constitution, such unjust "laws" are not truly laws at all.

Therefore, even if the Supreme Court correctly interpreted the Constitution in *Korematsu v. United States*,²⁹ it was wrong nonetheless for the Court to permit the internment of innocent citizens of Japanese descent. When they refused to strike down such a statute, these Supreme Court justices—their titles ringing hollow in this context—may have thought themselves to be acting pragmatically. They may have believed that the executive branch would not have complied with a decision that enforced the rights of the victims of this statute and thwarted the will of the majority. They may even have shared the majority's fears and believed that the preservation of the nation forced them to neglect the rights of the internees. Nevertheless a rights pragmatist would suggest that they had abdicated their judicial responsibility.

Conclusion

This paper defines judicial pragmatism as the jurisprudential mean that lies somewhere between the extremes of judicial activism and passivism. In my view, it is a position that others are attempting to both articulate and defend.³⁰ My purpose here is not to present a systematic defense of this position, but rather to identify it as an alternative position that is both principled and worthy of consideration.

Judicial pragmatists see decisions concerning the allocation of lawmaking responsibility between the courts and the legislature as secondary to more fundamental matters of principle. They see the problem of which institution is to be preferred as one that concerns means and ends in a contest where the ends must take priority over the means.

Pragmatists differ over what principles to adhere to—such as equality of wealth, efficiency, or the protection of individual rights. They also may disagree about how the balance of errors made by either the legislature or the judiciary in pursuit of these principles should be struck. However, they agree that decisions about which

²⁹323 U.S. 214 (1944). This ruling upheld the constitutionality of the internment of United States citizens of Japanese descent.

³⁰See, for example, Epstein, "Not Deference"; Pilon, "Legislative Activism"; and Peter H. Aranson, "Judicial Control of the Political Branches: Public Purpose and Public Law," *Cato Journal* 4 (Winter 1985): 719–82.

branch of government should prevail should not be made without taking account of the consequences of this allocation on the implementation of the principles they view as fundamental.

Finally, the version of pragmativism that elevates the protection of individual rights to a central place in its view of society can be identified as a distinct brand of pragmativism called rights pragmativism. Rights pragmatists stand somewhere between activists and passivists. They are extremely cautious about the creation of new rights or "entitlements" by an activist judiciary seeking ultimately to achieve social policy at the expense of the genuine property rights that secure our liberty. At the same time, however, rights pragmatists are hard-pressed to justify sacrificing these individual rights on the altar of judicial restraint. Their credo is "*judicial activism in pursuit of liberty is no vice; judicial restraint in pursuit of justice is no virtue.*"