
STATUTORY PRAGMATISM AND CONSTITUTIONAL STRUCTURE

*John F. Manning**

Judge Richard Posner's corpus of judicial opinions includes two now-classic defenses of countertextual statutory interpretation — one premised on the “imaginative reconstruction” of legislative designs and the other resting more overtly upon notions of judicial pragmatism. The two defenses are of interest, in part, because they are in some tension. But the very contrast between the two underscores the important proposition that flexible interpretation must rest on a conception of robust *judicial* power rather than an impulse to approximate as closely as possible the (sometimes imprecisely expressed) intentions of legislators operating in a complex but presumptively rational legislative process.

In *Friedrich v. City of Chicago*,¹ a plain vanilla “attorney’s fees” case, Judge Posner justified interpretive flexibility in the traditional terms of “imaginative reconstruction,” a technique that purports to use all available evidence to reconstruct the way Congress would have resolved the precise issue before the court.² Consistent with its origins in the faithful agent theory of judging,³ this approach attempts to justify countertextual flexibility by assuming that if a statute does not seem to make sense as written, this lack of clarity must result from a failure of legislative expression or foresight that could and would have been corrected if it had come to Congress’s attention in time.

On the other hand, in his dissent in *United States v. Marshall*,⁴ an enormously difficult narcotics case, Judge Posner adopted a different — and, I think, more authentic — justification for the same judicial flexibility. Drawing on traditions of pragmatic adjudication, he argued

* Professor of Law, Harvard Law School. I am grateful to Bradford Clark, Richard Fallon, Jack Goldsmith, Frank Michelman, Martha Minow, Henry Monaghan, Eric Rakowski, Fred Schauer, Cass Sunstein, Adrian Vermeule, and Jeremy Waldron for valuable comments on an earlier draft. I thank Jean-Denis Grèze and Mike McGinley for excellent research assistance and wise counsel.

¹ 888 F.2d 511 (7th Cir. 1989), *vacated mem.*, 499 U.S. 933 (1991).

² See *id.* at 514–19; Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

³ A standard definition of the faithful agent theory is found in Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). Under the faithful agent theory, the judge must “discern and apply a judgment made by others, most notably the legislature.” *Id.* at 415.

⁴ 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff’d sub nom.* Chapman v. United States, 500 U.S. 543 (1991).

that a robust conception of judicial power may justify clipping back or stretching the terms of a statutory command when doing so is necessary to avoid unreasonable results.⁵ Although decided only a year apart, these cases appear to capture a similar shift in Judge Posner's academic writings.

The opinions are worth examining because they represent highly cogent (if somewhat distinct) counterarguments to the modern textualist trend in the Supreme Court's case law. In the past two decades, the Court has shown exceptional reluctance to deviate from the clear conventional import of statutory texts, reasoning in part that a bill's final wording may reflect unseen, path-dependent, and often awkward legislative compromise.⁶ The practice of smoothing over a bill's rough edges to make its policy more palatable and coherent evokes fear of displacing an unspoken compromise that may have been essential to the bill's passage.⁷ This impulse to protect compromise, moreover, reflects the structural idea that the Constitution prescribes a carefully designed process for adopting statutes (bicameralism and presentment) and that judges make hash of that process if they do not respect the reach and the limits of the policies to which both houses and the President were able to assent.⁸

Although I tend to agree with the Court's views on this topic,⁹ there is — perhaps ironically — much in Judge Posner's evolution for even a starched textualist like me to admire. First, his recent shift forthrightly and accurately captures the stakes, both positive and negative, of taking a position that permits judges to contradict the plain conventional import of a duly enacted statutory text. For him, judges cannot rest the decision to deviate from the text on the ground that such a course better captures some reconstructed legislative instruction. They do so, instead, as part of a more general adjudicative authority to approach the law pragmatically. Second, despite the overall shift to pragmatism, it is noteworthy that a background feature of his interpretive approach — the apparent recognition that the constitutional structure informs judicial practice concerning statutes — has remained (relatively) constant. Although the constitutional structure plays a more direct role in his earlier writings, even Judge Posner the

⁵ See *id.* at 1331 (Posner, J., dissenting).

⁶ See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (invoking the possibility of compromise as a reason to hew closely to the text); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (same); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (same).

⁷ The most striking example of this concern is found in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

⁸ See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 103–05 (2006) (discussing the relationship between the Constitution's bicameralism and presentment requirement and the modern Court's emphasis on legislative compromise).

⁹ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408–19 (2003).

pragmatist suggests that his approach to statutes is meaningfully shaped by entrenched constitutional understandings and practices regarding the separation of powers. If one believes, as I do, that it is difficult to avoid the relevance of the constitutional structure in evaluating methods of statutory interpretation, it is reassuring to learn that even a fact-bound pragmatist like Judge Posner finds structural inferences hard to avoid in his calculus.¹⁰

I. TWO CONCEPTIONS OF INTERPRETIVE FLEXIBILITY

Friedrich involved the Civil Rights Attorney's Fees Awards Act of 1976,¹¹ which amended 42 U.S.C. § 1988 to authorize a prevailing plaintiff to recover a "reasonable attorney's fee" in specified categories of civil rights cases.¹² The specific question posed was whether, under 42 U.S.C. § 1988, a prevailing plaintiff was entitled to fees paid to an expert for advice provided in preparation for trial and for testimony given at trial.¹³ In everyday English, an expert fee is of course not an attorney's fee. Perhaps in the parlance of the trade, an "attorney's fee" might go beyond the costs of a lawyer's time to include other elements of what an attorney charges to represent a client successfully — fees for photocopying services, messengers, paralegals, and the like¹⁴ — and so Judge Posner did not have a difficult time concluding that fees paid to experts for their assistance in preparing for trial constituted attorney's fees.¹⁵ But expert *witness* fees posed a thornier question, in large part because of federal statutes that provide a set amount of compensation for witnesses and presumably govern unless another statute indicates otherwise.¹⁶ Because those statutes expressly authorize shifting certain expert witness fees but would not cover the request made in *Friedrich*, any attempt to use the inexact language of § 1988 to reach the requested fees risked making an end-run around the more specific statutes.¹⁷ On the other hand, the court noted that a Senate

¹⁰ I am not suggesting, of course, that Judge Posner draws anything close to the structural inferences drawn by modern textualists. My point here is merely that the constitutional structure can and should shape the statutory interpretation debate, and that Judge Posner's work can be read to support that claim.

¹¹ Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

¹² *Friedrich*, 888 F.2d at 513.

¹³ *See id.*

¹⁴ *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989).

¹⁵ *See Friedrich*, 888 F.2d at 514 ("Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise.")

¹⁶ *See id.* at 515-16.

¹⁷ *See id.* at 513-17.

committee report stated that § 1988's purpose was to undo the effects of the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹⁸ which rejected lower court cases recognizing equitable power to shift both attorney's fees and (in some cases, at least) expert witness fees.¹⁹

Judge Posner had little difficulty allowing the recovery of expert witness fees despite the semantic evidence to the contrary. His justification built on premises of imaginative reconstruction:

[J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings.²⁰

Accordingly, if the judge can discern "what Congress probably was driving at," he or she should read the statute "to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words."²¹

Skeptical of "legislative omniscience," Judge Posner started from the assumption that the requisite legislative majority had never consciously confronted the question of expert witness fees.²² For him, what was important was "what meaning would be obvious to one familiar with the circumstances of enactment."²³ Importantly, he saw no evidence in the legislative record of hard-fought compromise that might preclude expert witness fees. Nor could he think of any good reason to do so, given the other nonattorney attorney's fees that the Court had previously allowed.²⁴ Plus, with or without the benefit of legislative history, it was unmistakably clear from the overall political context and timing of the bill that § 1988 reflected a direct reaction against *Alyeska* and thus was best understood as a "shorthand" way to restore the equitable powers that lower federal courts had exercised prior to that decision — powers that included the ability to award expert witness fees.²⁵ On these bases, Judge Posner felt "confident that if someone had told Congress in the deliberations leading up to enactment that it had neglected to say anything about the shifting of expert

¹⁸ 421 U.S. 240 (1975).

¹⁹ See *Friedrich*, 888 F.2d at 516–17.

²⁰ *Id.* at 514.

²¹ *Id.*

²² *Id.* at 517.

²³ *Id.*

²⁴ See *id.* at 517–18.

²⁵ See *id.* at 518.

witness fees, Congress would have added language making clear to the most literal-minded that such fees could be shifted.”²⁶

Whether or not one agrees with it,²⁷ *Friedrich* powerfully expressed the view that judges should attribute to Congress a reasonable intention in relation to background statutory goals. It is Hart and Sacks with a twist.²⁸ In their influential Legal Process materials, Professors Henry Hart and Albert Sacks admonish judges to assume that legislators are “reasonable persons pursuing reasonable purposes reasonably” and to ask what interpretive choices such persons would have made, given the surrounding context.²⁹ Although Judge Posner was more self-consciously on the lookout for evidence of a legislative compromise that might contradict the presumption of reasonableness,³⁰ his early approach to interpretation resonated nicely with that of Hart and Sacks. Writing in their venerable tradition, he was able to rework the law to make it more coherent while attributing the result to a (presumptively rational) legislative principal rather than to his own judicial sense of reasonableness.

The year after *Friedrich*, in a dissent from a textualist opinion by his Chicago School colleague Judge Easterbrook, Judge Posner dispensed with the well-worn fiction that imposing reasonableness on statutes plausibly reflected a legislative rather than a judicial impulse. *United States v. Marshall* posed the question whether for sentencing purposes to count only the weight of pure LSD distilled into blotter paper or to count the weight of the blotter paper as well.³¹ The statute assigns penalties in terms of the weight of the banned substance and provides that the relevant measure is “a mixture or substance containing a detectable amount” of LSD.³² Because an average dose of pure LSD weighs so little (0.05 milligrams), it must be contained in some much heavier medium. Thus, the length of an individual’s sentence turns almost entirely on the weight of the carrier rather than the weight of the active ingredient — that is, if the judge treats the carrier as part of the “mixture or substance containing a detectable amount” of LSD.³³

²⁶ *Id.*

²⁷ The Supreme Court did not. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991).

²⁸ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

²⁹ *Id.*

³⁰ See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986) (discussing the Hart and Sacks framework’s insufficient attention to societal diversity and legislative compromise).

³¹ See *Marshall*, 908 F.2d at 1315.

³² 21 U.S.C. § 841(b)(1)(A)(v), (B)(v) (2000 & Supp. IV 2004).

³³ See *Marshall*, 908 F.2d at 1315–17; *id.* at 1331–33 (Posner, J., dissenting).

Writing for a majority of the en banc court, Judge Easterbrook had little difficulty concluding that the statute requires inclusion of the weight of the carrier. The statute refers to “a mixture or substance containing a *detectable amount*” of LSD³⁴ — hardly a way of instructing sentencers to rest on the weight of the drug alone. An adjacent provision, moreover, prescribes distinct penalties for another drug (PCP) in its pure form and as part of a “mixture or substance.”³⁵ So Congress knew how to express itself when it wished to distinguish the pure form of a drug for sentencing purposes. For LSD distributed on blotter paper, Judge Easterbrook found that the LSD granules interperse with the fibers of the paper, qualifying it as a “mixture” in “[o]rdinary parlance” (although presumably that of the chemist).³⁶

For Judge Posner too, the case was quite easy. Although he had written a panel opinion consistent with Judge Easterbrook’s position in *Marshall*,³⁷ en banc review inspired some soul searching:

Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer’s or legal pragmatist’s view that the practice of interpretation and the general terms of the Constitution (such as “equal protection of the laws”) authorize judges to enrich positive law with the moral values and practical concerns of civilized society. . . . Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches.³⁸

In his view, the pragmatist approach required exclusion of the weight of LSD’s carrier medium. He could imagine no reason for Congress to want to key punishment to “the weight of the carrier” rather than some “reasonable proxy for dosage.”³⁹ Certainly, “[a] person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form,” but the former faces a ten-year mandatory minimum sentence, whereas the latter is “not even subject to the five-year minimum.”⁴⁰ What is more, including the medium meant that those punished for

³⁴ 21 U.S.C. § 841(b)(1)(B)(v) (emphasis added).

³⁵ *Id.* § 841(b)(1)(A)(iv); see also *Marshall*, 908 F.2d at 1317.

³⁶ *Marshall*, 908 F.2d at 1317–18.

³⁷ See *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989).

³⁸ *Marshall*, 908 F.2d at 1334–35 (Posner, J., dissenting).

³⁹ *Id.* at 1333; see also *id.* at 1335.

⁴⁰ *Id.* at 1333.

LSD possession with intent to distribute received a longer sentence for a given dose than those punished for possession with intent to distribute heroin or cocaine.⁴¹ So for Judge Posner the outcomes generated by a conventional reading of the statute produced a “quilt the pattern whereof no one has been able to discern.”⁴²

II. TWO POSNERS?

Friedrich and *Marshall* involve similar analytical moves. First, each treats semantic meaning as only a modest constraint. Second, each shows a strong predisposition to interpret the law to promote a seemingly rational outcome. There is, however, a subtle but important shift between the two cases. In *Friedrich*, Judge Posner purported to act in Congress’s name, doing what the congressional majority surely would have done had it consciously confronted the problem of expert witness fees. In *Marshall*, Judge Posner placed himself amidst the pragmatists and took responsibility for making a policy decision rather than purporting to reconstruct Congress’s directives.

The change in rationale permits a more honest evaluation of what judges do. Federal judges have always felt free to depart from clear text on the asserted ground of fixing imprecisely expressed legislative instructions.⁴³ Judge Posner originally espoused that tradition. In a 1986 article, Judge Posner emphasized that statutory interpreters “de-cod[e]” texts.⁴⁴ “If the orders are clear,” he wrote, “judges must obey them.”⁴⁵ If, however, a text is garbled, the judge must be guided by the premise that “[i]n our system of government the framers of statutes and constitutions are the superiors of the judges.”⁴⁶ And much as a good “platoon commander” must try to figure out what the “company commander” would want him or her to do in the case of a garbled “order[,]” good federal judges must ask “what would the framers have wanted us to do in this case of failed communication?”⁴⁷ Most important, as his opinion in *Friedrich* would soon confirm, Judge Posner viewed the judge who inflexibly adheres to a clear but awkward statutory text as no better than “a platoon commander who . . . , having received an order that is clear, but also clearly erroneous because of a mistake in transmission, nevertheless carries out the order as received, rather than trying to determine what response would advance the

⁴¹ *Id.* at 1334.

⁴² *Id.* at 1333.

⁴³ The leading case, of course, is *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

⁴⁴ Posner, *supra* note 30, at 187.

⁴⁵ *Id.* at 189.

⁴⁶ *Id.*

⁴⁷ *Id.* at 190.

common enterprise.”⁴⁸ The resulting process of “imaginative reconstruction” allowed the judge great flexibility to deviate from a clearly expressed statutory command while attributing his or her decisions to real or imputed legislative preferences.⁴⁹

The new Judge Posner also favors flexibility, but his pragmatism permits him to abandon the pretense that such flexibility entails the reconstruction of legislative preferences.⁵⁰ His views are too complex to summarize fairly, but several considerations appear to influence his new approach to statutory adjudication. First, given the cumbersome nature of our tricameral lawmaking process and the multiplicity of sources of law in our complex system of government, any effort to treat the work of legislatures as *the* source of adjudicative norms “would result in legal gaps and perversities galore.”⁵¹ Second, “when we ask what the *goal* of legal interpretation is,” it becomes apparent that “there is no agreed-upon answer . . . and no rational means of compelling agreement” because the goal depends “on the interpreter’s political theory.”⁵² Hence, the very idea of “interpretation” is “so elastic . . . as to cast the utility of the concept into doubt.”⁵³ Third, the insights of public choice theory suggest that judges cannot actually reconstruct the way in which a complex, path-dependent, interest group-dominated legislature would have resolved a thorny question that a statute itself does not satisfactorily address.⁵⁴ In short, a shift to pragmatism has the virtue of “tak[ing] away from judges the claim to be engaged in a neutral scientific activity of matching facts to law rather than in a basically political activity of formulating and applying public policy called law.”⁵⁵

So federal judges necessarily and quite properly engage in pragmatism. Although Judge Posner elaborates in various writings on the

⁴⁸ *Id.* at 205.

⁴⁹ Posner, *supra* note 2, at 818. As Judge Posner notes, this tradition is associated with such noteworthy figures as Judge Learned Hand, John Chipman Gray, and William Blackstone. *See id.* at 817 n.60.

⁵⁰ The essentials of the new Posner are fully on display in Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989). It is unclear, however, whether Judge Posner would perceive a marked shift in his position on these matters. In his 1990 book *The Problems of Jurisprudence*, Judge Posner declared himself a pragmatist but nonetheless continued to find value in the platoon commander analogy for the judge applying statutes. *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269–78 (1990). Linking the analogy to his new pragmatism, Judge Posner emphasized the forward-looking and creative elements of the platoon commander’s role, explicitly contrasting it with the task of excavating the specific intentions of a statute’s framers. *See id.* at 269–72.

⁵¹ Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM* 235, 250 (Morris Dickstein ed., 1998).

⁵² POSNER, *supra* note 50, at 457.

⁵³ RICHARD A. POSNER, *OVERCOMING LAW* 400 (1995).

⁵⁴ *See* POSNER, *supra* note 50, at 277–78.

⁵⁵ RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 46 (2003).

content of his “everyday” pragmatism,⁵⁶ he makes clear that “[t]he ultimate criterion of pragmatic adjudication is reasonableness.”⁵⁷ The pragmatic judge must try to “make the most reasonable decision [he or she] can, all things considered.”⁵⁸ This process entails “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”⁵⁹

Although some have criticized Judge Posner’s everyday pragmatism as too lacking in content to guide meaningful decisionmaking,⁶⁰ I prefer to emphasize the qualifications that he places upon what a pragmatist judge should do. Judge Posner’s judge does not merely pursue the best result on the facts of a particular case; instead, he or she takes account of systemic values. A pragmatic decision gives “due regard (not exclusive, not precluding tradeoffs) for the political and social value of continuity, coherence, generality, impartiality, and predictability in the definition and administration of legal rights and duties.”⁶¹ In other words, although more willing to “pry open the closed area [of a statute] . . . in order to achieve some immediate practical goal,” the Posnerian pragmatist is not insensitive to “the rule-of-law virtues.”⁶² Indeed, what strikes me as perhaps the most surprising aspect of Judge Posner’s current approach is his continuing sense that the judge — even the pragmatic judge — should heed the entrenched legal practices and expectations associated with the allocation of power implicit in the constitutional structure. Certainly, in his imaginative reconstruction phase, Judge Posner started from the proposition that “[i]n our system of government the framers of statutes and constitutions are the superiors of the judges.”⁶³ Even while rejecting that notion in any strong

⁵⁶ *Id.* at 50. Judge Posner uses the term “pragmatism” in the “everyday” sense of “practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers.” *Id.* As Judge Posner recognizes, his everyday pragmatism does not coincide with the premises of philosophical pragmatism. See Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 714 (2003) (book review) (distinguishing Judge Posner’s everyday pragmatism from the philosophical pragmatism of William James and John Dewey).

⁵⁷ POSNER, *supra* note 55, at 59. In all, he lists eleven criteria that refine that premise. See *id.* at 59–60.

⁵⁸ *Id.* at 64.

⁵⁹ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227 (1999).

⁶⁰ See, e.g., RONALD DWORKIN, *JUSTICE IN ROBES* 24 (2006) (arguing that Judge Posner’s “form of pragmatism comes to nothing, that it is empty, because though he insists that judges should decide cases so as to produce the best consequences he does not specify how judges should decide what the best consequences are”); Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 650 (2004) (book review) (describing Judge Posner’s theory of reasonableness as “contentless”).

⁶¹ POSNER, *supra* note 55, at 61.

⁶² *Id.* at 61, 82.

⁶³ Posner, *supra* note 30, at 189.

form, Judge Posner as pragmatist still accepts that federal judges cannot simply reweigh on a case-by-case basis “the balance of consequences . . . struck by the legislature.”⁶⁴ Rather:

[T]he constitutional and legislative demarcation of the judicial role curtails judicial discretion to weigh consequences; the judge is not to assume jurisdiction over a matter just because he thinks the consequences of his doing so would be on balance good. There is nothing unpragmatic about the division of labor, or about thinking that it would be both infeasible and undemocratic to set judges wholly at large to prescribe the rules of conduct that people are to follow.⁶⁵

If the judge deviates from the “legislative judgment” in anything but “the extreme case,” the ensuing “guerilla warfare” against the legislature would have a “destabilizing” effect and would “in general [be] a bad thing” — although, of course, “not *always* worse than the alternative” of adhering to a profoundly unwise legislative decision simply because it is reflected in the clear import of an adopted statute.⁶⁶

III. A PRELIMINARY EVALUATION OF JUDGE POSNER’S SHIFT

Although it not possible in a brief essay to examine in depth the apparent shift in Judge Posner’s thinking, I close by noting two virtues that even the stodgiest modern textualist should admire (perhaps to Judge Posner’s chagrin).⁶⁷ First, by shifting his justification for judicial flexibility from imaginative reconstruction to everyday pragmatism, Judge Posner has helped to cast the debate in more authentic terms. His evolution from *Friedrich* to *Marshall* makes the important point that strong countertextual interpretive methods must find their grounding, if anywhere, in robust judicial power rather than in a theory of how a judge qua faithful agent properly deciphers the outcomes of the legislative process. Modern textualists should prefer the new approach because it makes the justification for countertextual interpretation more intelligible and defines the stakes more sharply and accurately than unrealistic intentionalist theories of yore. Even if one rejects its most skeptical conclusions, modern public choice theory has demonstrated at least that the legislative process is complex, path-

⁶⁴ POSNER, *supra* note 55, at 70.

⁶⁵ *Id.*

⁶⁶ *Id.* at 71.

⁶⁷ I refer to conventional modern textualists, like Judge Easterbrook and Justice Scalia, who derive their approach from inferences drawn from the constitutional structure. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547–49 (1983); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 32–35 (Amy Gutmann ed., 1997). It bears noting that a consequentialist might also opt for textualism for essentially consequentialist reasons. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

dependent, and, in important senses, quite opaque.⁶⁸ The legislative drafting necessary to achieve even a discrete policy objective — such as adding expert witness fees to § 1988 as in *Friedrich* — is apt to end up encompassing more than the specific goal.⁶⁹ One cannot begin to imagine (realistically) how rewording a general statute to accommodate an extension or exception, however sensible, would have affected the complex bargaining dynamic that produced the final legislation.⁷⁰ Modern textualists thus believe that imaginative reconstruction rests on the impracticable idea that judges can meaningfully identify legislative miscommunications *and* the way they would have been corrected had the matter come to light.⁷¹ By recasting his desired interpretive flexibility as an attribute of the judicial power to say what the law is, Judge Posner has helped to challenge modern textualists and anti-textualists to confront the question of how much power judges do — or should — possess in our system of government.⁷²

The second virtue in his shift relates to a background premise that Judge Posner holds (relatively) constant in his move from faithful agent theory to pragmatism: Judge Posner's work demonstrates that even for a pragmatist, the constitutional structure supplies a crucial frame of reference for evaluating approaches to statutory interpretation. Although Judge Posner underscores that his everyday pragmatism “seems to come down to ‘[j]ust the facts, ma’am,’”⁷³ it is hard to deny that values — even relatively abstract ones — play a role. Certainly, he has made clear that systemic, rule-of-law values — consistency, predictability, impartiality, etc. — bear on the pragmatic judge's determination of the most reasonable results.⁷⁴ But of greater interest is his explicit subscription to the idea that various entrenched legal practices and expectations associated with the structural Constitution should inform our method of reading and applying statutes.

⁶⁸ See Easterbrook, *supra* note 67, at 547–48; Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–44 (1992).

⁶⁹ See Manning, *supra* note 9, at 2409.

⁷⁰ See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (noting that in the context of heated legislative bargaining, “a change in any individual provision could have unraveled the whole”).

⁷¹ Of course, one might charge textualists with unrealistically believing that each detail of a statutory text somehow reflects the deliberate and well-thought-out product of legislative compromise. Textualism, however, need not rest on such a naïve concept of legislation; properly understood, textualism instead reflects the idea that respecting clearly worded texts is essential if legislators are to be able to rely on semantic meaning to express the limits of whatever compromises they wish to strike. See Manning, *supra* note 8, at 103–05 (arguing that semantic meaning represents the most, if not the only, reliable currency of legislative compromise).

⁷² For similar defenses of judicial creativity, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982); RONALD DWORKIN, *LAW'S EMPIRE* 313 (1986); and Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13, 15 (1936).

⁷³ POSNER, *supra* note 55, at 55.

⁷⁴ See *id.* at 71.

When Judge Posner was a faithful agent theorist, the influence of the constitutional structure was front and center; for him, the judge's obligation in our constitutional system was to decode the legislature's output as accurately as possible.⁷⁵ Although his adherence to that constitutional theory did not survive his shift to pragmatism,⁷⁶ the constitutional structure nonetheless continues to have a surprising influence on his conception of appropriate judicial behavior in statutory cases. Judge Posner as pragmatist thus emphasizes that judges cannot assert jurisdiction over matters that the law has not authorized them to regulate.⁷⁷ To do so would contradict the separation of powers.⁷⁸ And such a course would be not only infeasible but also undemocratic.⁷⁹ Even as a pragmatist, Judge Posner therefore operates "within a framework in which the judge is in some sense subordinate to the framers of constitutional statutes and, of course, of the Constitution itself."⁸⁰ For him, "[j]udicial decisions applying statutes are constrained to be purely interpretive when the balance of consequences has been struck by the legislature in enacting the statute."⁸¹ And so how can an everyday pragmatist judge enforce countertextual interpretations of a statute or the Constitution without violating his or her constitutional oath? Judge Posner says that, properly understood, the constitutional oath is "to the United States, its form of government, and its accepted official practices, which include loose judicial interpretation of the constitutional text and occasional overruling of decisions interpreting that text."⁸²

Ultimately, then, even for an everyday pragmatist like Judge Posner, the judge's proper role draws content from entrenched presuppositions about the allocation of power in our system of government. Of course, none of this discussion is meant to imply that Judge Posner's approach even remotely resembles that of modern textualists (like Justice Scalia) who believe that certain norms of statutory interpretation can be rigorously derived from the Constitution's text and history.⁸³ Judge Posner is a pragmatist all the way down the line. But even if Judge Posner's grounds for adhering to the separation of powers are

⁷⁵ See Posner, *supra* note 30, at 189 (noting that the framers of statutes are "the superiors of judges" in our constitutional system).

⁷⁶ See POSNER, *supra* note 50, at 137-42 (rejecting the faithful agent theory).

⁷⁷ See POSNER, *supra* note 55, at 69-70.

⁷⁸ See *id.* at 70.

⁷⁹ See *id.*

⁸⁰ POSNER, *supra* note 50, at 142.

⁸¹ POSNER, *supra* note 55, at 70.

⁸² *Id.* at 73.

⁸³ See Scalia, *supra* note 67, at 32-35. Judge Posner has expressed skepticism about deducing anything determinative from the Constitution's "general terms," emphasizing instead the need to exercise discretion and weigh consequences when choosing among alternative interpretations of such text. POSNER, *supra* note 53, at 233.

themselves ultimately pragmatic, the important point is that the separation-of-powers frame of reference still meaningfully structures his analysis. Presumably, even if there is nothing unpragmatic about the division of governmental labor, a pragmatist starting from scratch would not necessarily arrive at the precise allocation associated with our constitutional tradition. In other words, our structural tradition appears to do real work in Judge Posner's approach. Whether that is because the basic structure has worked well enough so far and would be costly to replace, or for some other reason, the fact remains that our structural constitutional tradition shapes and limits the way Judge Posner's pragmatic judges are supposed to behave.

I find it encouraging that even at his pragmatic best, Judge Posner finds it difficult to avoid the gravitational pull of the constitutional structure when discussing the practice of statutory interpretation. Although others writing in a consequentialist or empirical vein sometimes argue that our constitutional structure has little to say about how to approach statutes,⁸⁴ Judge Posner still treats entrenched structural constitutional practices and understandings as an important frame of reference. I myself find that frame of reference hard to ignore in discussing statutory interpretation.⁸⁵ Because all statutory interpretation involves an "interbranch encounter of sorts,"⁸⁶ basic choices about interpretative method necessarily implicate the institutional allocation of power among the branches. Accordingly, judges should approach the reading of statutes in a way that dovetails with certain well-entrenched practices and expectations concerning who gets to decide what — matters that are taken to reflect the Constitution's provisions on government structure.⁸⁷

Surely, our constitutional traditions leave room to debate whether "the judicial Power of the United States" reflects the stricter faithful agent model or the more pragmatic model that Judge Posner has come to favor.⁸⁸ Whether or not one agrees with his ultimate conclusion, the

⁸⁴ See, e.g., VERMEULE, *supra* note 67, at 32–34 (denying that inferences from the constitutional structure can resolve operational questions about statutory interpretation); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 662–63 (1999) (arguing that the Constitution has little to say about the choice among foundational methodologies).

⁸⁵ See John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 690–92 (1999).

⁸⁶ Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593 (1995).

⁸⁷ See Manning, *supra* note 85, at 690–92; Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

⁸⁸ Compare, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that the history and traditions surrounding "the judicial Power" favor the faithful agent theory), with William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (ar-

significant point is this: despite his growing commitment to pragmatism, Judge Posner has recast the interpretation debate not merely into one about how a judge should read statutes in general, but rather into one about how a judge should read statutes given the frame of reference supplied by our constitutional structure. Whether one is an everyday pragmatist or a starchy textualist, that question, I submit, is the right one to ask.

going that the original meaning of "the judicial Power" is more consistent with flexible techniques of interpretation).