

2005

# Constitutional Law from a Pragmatic Perspective

Richard A. Posner

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Richard A. Posner, "Constitutional Law from a Pragmatic Perspective," 55 University of Toronto Law Journal 299 (2005).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

David Beatty, a Canadian law professor, entitles his audacious study of constitutional law *The Ultimate Rule of Law*, and this raises an immediate question: What does 'rule of law' mean? Traditionally it has meant two distinct, though related, things. The first, which comes down to us from Aristotle's discussion of corrective justice in the *Nicomachean Ethics*, is that legal cases are to be decided according to the legal merits of the case rather than the personal merits or deserts of the litigants; this is law's impersonality. The second sense that the term bears, which became important in the struggle of the English and later the Americans against royal tyranny, is that the officials in a society, the 'rulers,' are subject to law, rather than having unfettered discretionary power. The relation between the two senses lies in the fact that unless the law is reasonably clear, so that it really guides judges in applying it and provides a basis for monitoring judicial behaviour for conformity to law, judges will perforce be deciding cases on something other than strictly legal grounds, and, insofar as they enforce law against other officials, they will be the nation's rulers rather than the law's servants. The threat that unclear law poses to the rule of law is especially acute in the case of constitutional adjudication, in which the highest judges exercise practically final authority without much guidance as to how they are to exercise it. Constitutions tend – partly of necessity, because they are intended to last – to contain many vague terms, terms that concern, or that are susceptible (because of their vagueness) to being made to concern, highly political and emotional subjects. The highest judges charged with interpreting and applying the constitution, unconstrained either by a clear text or by a higher tribunal, become the nation's supreme lawgivers.

Beatty is aware of this problem, but he believes he has solved it and so brought constitutional law into conformity with the precepts of the rule of law. His solution will startle most students of constitutional law. It is an extreme version of legal pragmatism. Judges dealing with constitutional issues are not to attend to the constitutional text, or to precedents ('in constitutional cases, precedents are at best superfluous' [90]) or analo-

\* Judge, US Court of Appeals for the Seventh Circuit; senior lecturer, University of Chicago Law School.

† A review of David M. Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004). Subsequent references appear parenthetically in the text.

gies; they are not to think of their task as interpretive at all; they are to attend exclusively to the facts of the case. 'When judges are prepared to look at all the facts of a case honestly and impartially, they have no difficulty seeing and doing what is right' (112)<sup>1</sup> – and Beatty means legally right. This is pragmatism with a vengeance, though Beatty's preferred word is 'proportionality.' ('Proportionality makes pragmatism the best it can possibly be' [187].) The idea is that, to pass constitutional muster, a law must represent a proportional, rather than an excessive, response to some perceived social need. By carefully studying the facts of the case, judges will be able, Beatty believes, to determine proportionality. And it will be an *objective* determination that they make, unaffected by the vagaries of legal doctrine, constitutional text, precedent, theory, ideology, or the judge's emotions or temperament. 'When judges remain completely detached from the substantive values that are at stake in a case, and take seriously all the evidence that shows what a law really means for those it affects most, the cases show that the right answer is usually pretty clear' (98).

This is an amazing claim, so let us see how Beatty defends it. He begins with a highly critical discussion of efforts to create constitutional theories that will generate substantive results. (His own theory, in contrast, implies no specific case outcomes, though he believes, as we will see, that judges guided solely by facts will converge more or less automatically on outcomes of which he approves.) He discusses such well-known theorists as John Hart Ely, Roger Dworkin, Robert Bork, Cass Sunstein, and Jürgen Habermas. His criticisms are persuasive. About 'originalism,' for example, he comments pungently that 'directing judges to resolve the flash-points of social conflict in their communities against the understandings of people who lived as long as two hundred years ago, leaves them, it turns out, free to come down on whatever side of a case their consciences tell them is right' (9). Another example: the result of adopting Dworkin's moral theory of constitutional interpretation would be that 'the people lose control of the moral development of their communities to a moral elite' (33 [footnote omitted]). By such examples Beatty argues convincingly that constitutional adjudication cannot be made objective, impersonal, and apolitical by means of a demonstration that there is one correct constitutional theory. This is the strongest part of the book.

Beatty argues that judges should take their cue not from theorists – all of whom are easily refuted – but from their own practices. And what they mainly do, he claims, and thus what they should do in constitutional cases as well, is weigh facts. He finds support for this view in the common

1 Or, as he puts it elsewhere, 'everyone's interests are better served when the courts base their decisions on a close and careful evaluation of the facts than when they spend most of their energy trying to divine answers from the words of the text' (57).

law method of rule making. 'The great genius of this ancient legal tradition is its pursuit of theory and overarching principles from the bottom up' (34); it is 'the method of induction' (34). Beatty contends that this is not only how courts should approach constitutional adjudication but how they do approach it. For evidence he takes the reader on a tour of the world's constitutional courts, arguing that, despite differences in the wording of constitutional texts, in legal culture, in doctrine and precedent, and so forth, the courts come up with remarkably uniform results (though the US Supreme Court is a frequent outlier). About all that the cases have in common is similar facts, so it must be, he concludes, the facts that are driving the outcome.

Beatty is mindful of the 'is/ought' problem that his analysis presents. How can a study of facts, however careful and searching, generate a conclusion that the position of one of the parties to a case is right and the position of the other wrong? He never answers this question directly, but he seems to think that 'proportionality' just happens to be the legal norm on which the global judicial community has converged, and that that is good enough. One senses an analogy to how the 'is/ought' gap is closed in the case of a watch that *is* broken and therefore *ought* to be fixed. Everyone agrees that the purpose of a watch is to keep time, and this provides the major premise for a logical demonstration that if a watch is broken, it should be fixed.<sup>2</sup> It is an example of how agreement on a fact (what the purpose of a watch is) can have a normative implication.

The world is a pretty big place, however. Beatty cites decisions from only 15 of its 193 nations (plus decisions of one United Nations and two European tribunals), and 11 of the 15 are former British possessions. His sample of world judicial opinion, therefore, is hardly representative. He has not demonstrated that 'proportionality' is a universal legal norm. Nor is the convergence within his sample on specific case outcomes anywhere near complete. There are also considerable doubts, which he does not explore or even mention, about the appropriateness of thinking of the world's constitutional courts as constituting a unified professional community.<sup>3</sup> One would like to know something about how the judges of the various courts are appointed, what incentives and constraints play upon them, what authority they actually wield, their goals, and so forth before deciding what weight to give to their opinions. On that Beatty says nothing.

2 Actually the analysis is more complex. Were the watch an antique, valued for its antiquity rather than its accuracy as a timepiece, the 'is' of its being broken might not imply that it should be fixed; the same would be true if the cost of fixing the watch were greater than the watch's value.

3 See, e.g., Ruti Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 *Harv.L.Rev.* 2570, reviewing Norman Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: West Group, 2003).

Among other problems with Beatty's thesis is the questionable legitimacy of a purely fact-driven conception of constitutional adjudication. I agree that judges should be highly attentive to facts. But that a careful study of the facts leads a judge to a confident conclusion that some challenged law represents a disproportionate response to a social problem is not an impressive justification for invalidating the law. The solution to the 'is/ought' problem in the watch case required agreement on the purpose of watches. What is the corresponding premise that enables convergence on the legal significance of given facts? Can it really be 'proportionality'? If not (and I'll argue not), it will be no good falling back on 'constitutional supremacy,' as Beatty repeatedly does in denying that constitutional text, history, or precedent should have any weight in the judge's decision and contending that the decision should be entirely forward-looking. If none of these materials is to guide decision, the 'constitution' falls out of the picture. The highest judges are then supreme, engaged not in an interpretive enterprise but in pure policy-making. It is remarkable that Beatty should excoriate interpretive approaches to constitutional adjudication as unconstrained and therefore undemocratic – as when he describes interpretivism as 'profoundly undemocratic' because it 'imposes virtually no constraints – no disciplining rules – on the discretion of judges' (56) – without turning the spotlight on his own unconstrained, undemocratic approach.

Yet, as a descriptive matter, he may be largely correct. Despite their protestations, the highest judges in most countries may be paying little attention to their country's constitution and may instead be engaging in an activity better described as politics than as law. People who think this, however, usually draw from it the corollary that the judges ought to be cautious in the exercise of their power because the judiciary has less democratic legitimacy than the legislative and executive branches of government. Beatty is not bothered by this – he is delighted that, as he states with some exaggeration, 'people all over the world have chosen to put courts at the centre of their systems of government' (35) – because he thinks that careful study of facts will always produce a judicial decision that is invariant to the political preferences of the individual judge. In other words, interpretivism may be unconstrained, but fact-based adjudication is not. The reason it is not unconstrained is that there is always, for Beatty, a fact of the matter. It is a fact that the state should provide financial support for religious schools; a fact that the state must recognize homosexual marriage; and so forth. So, since all that the judges are doing is finding facts, their activity is apolitical; they are not competing with the elected officials whose acts they invalidate in the name – but it is only in the name – of the constitution.

The facts speak to Beatty more clearly than they will to many readers. For example, he commends the German constitutional court for having

ruled that Bavaria 'does no wrong if it allows voluntary prayers to be spoken in its schools but it does if it affixes crucifixes to classroom walls' because 'for non-Christian students, the sectarian nature of the cross and the fact that they could never escape its glare made its force much more powerful than voluntary prayers' (46–7). Without more detail concerning the court's analysis, which Beatty does not give, this sounds like a pretty arbitrary judgment, with much of its force carried by the odd choice of the word 'glare' to describe the appearance of a crucifix.

Elsewhere he applauds a Japanese court for having permitted the government to make a small financial contribution to a Shinto ground-breaking ceremony for a gymnasium. He remarks that 'most people, including those on the city council who voted for the expenditure, regarded it primarily as a secular ritual dedicated to the safe construction of the gymnasium that lacked a religious meaning of any significance' (68). The suggestion is that the court was dismissing the religious significance of the ceremony in much the same way that an American court would be inclined to dismiss the religious significance of the intonation of 'God save the United States and this honorable court' that opens the sessions of my court. Still, it would be remarkable in the American context to authorize public expenditures for religious ceremonies at construction sites. But what is more remarkable is that Beatty should applaud a type of reasoning that disparages the significance of religion, when he excoriates the US Supreme Court for failing to recognize, in its 'wall of separation' jurisprudence, the importance of religious values (see 49–56). I agree with Beatty, by the way, that the Court goes too far in trying to banish religion from American public life by exaggerating the harm inflicted on atheists by such things as voluntary prayers in public schools or the inclusion of 'under God' in the pledge of allegiance. But that is a story for another day.

The Shinto case has another significance. It illustrates the curiously denatured character of Beatty's discussion of cases, which belies his pragmatic claims. I was curious about what on earth a 'Shinto ground-breaking ceremony' might be, and so I looked up the case he discusses.<sup>4</sup> I found myself in a different intellectual world. The ground-breaking ceremony was for a city gymnasium, was sponsored by the city's mayor and subsidized from city funds, was presided over by four Shinto priests, involved a Shinto altar and other sacred Shinto objects and purification rituals involving the spectators, and lasted forty minutes. Shinto was the state religion of Japan until the United States occupied Japan at the end of World War II, and was intolerant of other religions. Despite this

4 *Kagunaga v. Sekiguchi* (1977); see Lawrence W. Beer & Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996) at 478.

history, and the emphatically religious character of the ground-breaking ceremony, the majority of the Japanese supreme court ruled that because 'the average Japanese has little interest in and consciousness of religion' – many of them, indeed, believe in both Shinto and Buddhism, and as a result 'their religious consciousness is somewhat jumbled' – and because Shinto is not a proselytizing religion, 'it is unlikely that a *Shinto* ground-breaking, even when performed by a *Shinto* priest, would raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of *Shinto*.'<sup>5</sup> It would be an impertinence for me to criticize the decision or its reasoning; but it is apparent that the decision depends on particulars of Japanese culture rather than on general principles that an American or Canadian court might draw on. To such cultural differences Beatty is insensitive.

His faith in the objectivity of fact-based adjudication stems from a belief that 'factual claims can be tested for how accurately they conform to an independent empirical world, as it actually exists' (73). But this is rarely done, or doable, in the adjudicative context. One will have sensed already a rather casual attitude on Beatty's part, as on that of the courts whose decisions he discusses, toward empirical testing. He is not above criticizing judges for 'inflating the importance of facts' (107) and 'decreeing what facts mattered' (108) – as if it were possible to conduct fact-based adjudication without making judgements of relevancy. Beatty himself does this, perhaps unconsciously, when he states, in defence of a US Supreme Court decision striking down state residency requirements for entitlement to welfare benefits, that 'need, not length of residence, is the proper criterion for distribution' (142). He neglects to mention that a likely consequence of outlawing such requirements is to induce states that have generous welfare benefits to reduce them, lest those states become magnets for poor people in other states. That is a fact that a court should at least take into account.

Beatty is also not above resolving constitutional issues by such tricks as shifting the burden of proof to the side whose position he doesn't like, as when he notes with approval that 'laws that regulate how people do their work are more likely to be found wanting where it cannot be shown that they advance the well-being of the community in some significant way' (131) or when he says that 'no evidence is ever provided that would support the claim that if gays and lesbians had the same rights and freedoms as heterosexual couples, ... the moral character of the community and especially its young would be threatened in any way' (110).<sup>6</sup> Why is the burden of presenting convincing evidence to be placed on the

5 Ibid. at 483.

6 Incidentally, despite much talk throughout the book of 'rights,' Beatty claims that 'proportionality' 'makes the concept of rights almost irrelevant' (160).

defenders of the challenged marriage laws rather than on the attackers? In discussing a case that invalidated the exclusion of homosexuals from the military, Beatty approvingly remarks that the court ‘noted the lack of “concrete” and “actual or significant” evidence that allowing gay men to enlist in the armed forces would prejudice its morale, fighting power, or operational effectiveness in any way’ (113). He does not require that there be ‘concrete’ and ‘actual or significant’ evidence that homosexuals are harmed by the exclusion. Nor is he bothered by a lack of concreteness when he says that ‘laws that establish a broadcasting system [must] guarantee that the full spectrum of opinion in the community will be heard’ (145 [footnote omitted]). What is ‘the full spectrum’ of opinion, and who is to decide? Must every lunatic have access to a broadcast studio? Beatty contends that government has a constitutional duty to subsidize religious schools but ‘may make funding conditional on religious schools agreeing to teach the same curriculum that is used in state-run schools’ (179). If the curriculum is identical, in what sense is it a religious school? On the next page he says that ‘proportional funding remains scrupulously neutral as between the competing pedagogical philosophies of secular majorities and religious minorities’ (180). How can a religious school implement its pedagogical philosophy if it must teach the curriculum specified for state-run schools?

Beatty argues that ‘there is no legal basis to permit traditional marriage laws [banning homosexual marriage] remaining in force for even one more day,’ since the ‘evidence’ in favour of permitting homosexual marriage is as ‘one-sided’ as the evidence for permitting homosexual sodomy (114–5). But the only ‘evidence’ he gives is that ‘it is no longer possible to argue that allowing [homosexuals] to swear a legal oath of marriage will have a tangible effect on anyone else’s welfare or well-being’ (114). Well, but what about intangible effects? Remember that Beatty insists that judges should decide constitutional cases without regard to substantive values. John Stuart Mill’s philosophy of tolerance for acts that, though they may offend, inflict no tangible harm on third parties is very attractive, but it is thoroughly substantive.

In fact most of Beatty’s assessments of specific case outcomes are generated not by testable (let alone tested) factual claims, but by such ideological assertions as that in law ‘liberty and equality ... mean exactly the same thing. Regardless of whether a law is attacked under the banner of equality or liberty, its legitimacy and its life depend on whether it can pass a rigorous evaluation of its ends, its means, and its effects against the principle of proportionality that connects all three’ (116). (Notice the burden shifting implicit in the word ‘rigorous.’) Indeed, he claims that ‘liberty, equality, and fraternity all mean the same thing’ (158). Within a page of stating that ‘ethical and prudential arguments [in constitutional cases] make no sense,’ Beatty equates ‘proportionality’ to a ‘universal



principle of distributive justice that is controlling in all constitutional democracies and determinative of all human rights' (116–7). Elsewhere he suggests that 'proportionality' means 'entitlements to fair shares of whatever is being legislated' (133; see also 144–58). That sounds awfully substantive, as does his precept that, 'as guardians of the constitution, judges have a duty to ensure the rights and freedoms it guarantees get as much protection as possible' (176), which seems to deny any weight to considerations in favour of limiting such protection for the sake of other values, such as internal and external security. Beatty even makes the remarkable concession that 'what is just, what is in proper proportion, in any case is particular to each community' (167). And hence it is proper to restrict abortion more in Ireland than in Japan (168). Well, then, why isn't it proper to limit homosexual marriage in Alabama, say, though not in Massachusetts?

Beatty gives up too quickly, moreover, on the utility of constitutional text and precedent to cabin judicial discretion. Remember his crack about trying to decide a case on the basis of what framers of a constitution might have said 200 years ago? That is an apt observation if one is talking about the original US Constitution, ratified in 1789, but many of the cases that he discusses involve much more recent constitutions. He never explains why, no matter how recent a constitution is – or how clearly targeted it is on an issue that has come before the court – the court is to disregard the words of the constitution and proceed immediately to application of the norm of proportionality. In a manner consistent with his disdain for interpretation as a judicial technique, he rarely tells the reader what these foreign constitutions say. Acknowledging that the texts of the world's constitutions differ a great deal, he states – as so frequently in this book, hyperbolically – that

none of this rich variation in constitutional texts, however, has had any effect on the way judges think about laws that intentionally provide more training and employment opportunities for men than women. All the details and adornments that are so important to those who negotiate and draft constitutions and international human rights treaties have absolutely no bearing on how these cases are resolved. (81)

The people who write constitutions will be surprised to learn that they are engaged merely in 'adorning' because all a constitution really is, whatever it says, is a blank check written to the nation's highest court.

And if an originally opaque text has been clarified by precedent, and people have come to rely on the precedent as an authoritative statement of legal rights and duties, it is not obvious that the precedent should be given no weight at all. Beatty gives no reason for according zero weight to the reliance interest that precedents can create.

He misses, too, the informational significance of precedent. If a number of judges have come to the same conclusion, this is some evidence, though of course not conclusive evidence, that the conclusion is correct. Beatty himself clearly believes this, because he uses the concordance of different constitutional courts on issues such as homosexual rights as evidence that these rights should be given constitutional status. And he admires the common law method, which may be inductive, but the principal data on which the inductive method of the common law works are not facts but precedents.

There is a certain coarseness in Beatty's analysis. Repeatedly I heard false notes being struck, as when he writes that 'the fact that it [a constitutional right to free legal aid] isn't mentioned in a text doesn't mean it isn't there' (154) or that illiteracy has 'plagued the earth since the beginning of time' (119) or that, for some people, driving a taxicab is a 'fundamental act[ ] of self-expression ... critical to their whole personalities' (131). Or, for that matter, that had the US Supreme Court 'remained faithful to originalism ... many of the rights and freedoms that are cherished by Americans would be lost' (12). What is true is that the Constitution would have been interpreted more narrowly, but there are other sources of rights and freedoms besides constitutions, and it is entirely unclear whether, if *no* justiciable rights had been created by the Constitution, the rights and freedoms of Americans would be fewer or less extensive than they are.<sup>7</sup>

It is also incorrect to say that 'marriage laws that refuse to recognize same-sex conjugal relationships, do so explicitly because of the sex of the people involved. It is legal for David to have sexual relations with and marry Ninette, because she is a woman, but not Michael, because he is a man' (79). It is not the sex of the other person, but the fact that the other person is of the same sex, that triggers the violation of the laws. Nor is it accurate to say that 'the sexist bias of our traditional rules of marriage is precisely the same as the racism that infected the anti-miscegenation laws that were struck down by the U.S. Supreme Court' (106).

Beatty says that originalists such as Bork or Scalia would 'abandon original meanings when the words of the text or even their own moral scruples told them that was the right thing to do' (14). But if words are given their original meaning, how can 'the words of the text' tell the judge to abandon that meaning? And while it is true that Bork and Scalia are willing to allow a small safety valve for cases in which originalism might yield truly abhorrent results, that falls short of a general 'moral scruples' override.

<sup>7</sup> See Richard A. Posner, *Frontiers of Legal Theory* (Cambridge, MA: Harvard University Press, 2001) at 15–27 and references cited there.

Nor is it correct to describe 'bigamy' as the Mormon practice that the US government outlawed (40). That practice is polygamy; 'bigamy' is the name given to the crime of being married to more than one person at a time. These are small mistakes, like the numerous misspellings of names ('Kelson' for 'Kelsen,' 'Seigan' for 'Siegman,' 'Horowitz' for 'Horwitz,' 'Freidrich Hayek' for 'Friedrich Hayek'), or associating Hobbes with a socialist 'right of subsistence' (119), or the misnaming of *Employment Division v. Smith* (a case Beatty discusses at length) as *Oregon v. Smith*,<sup>8</sup> or the term 'Chief Justice of the U.S. Supreme Court' (it should be 'Chief Justice of the United States'); but the cumulative effect is to undermine confidence in the care with which Professor Beatty has propounded his astonishing thesis.

At this point the reader may be expecting that I, as an ardent advocate of a pragmatic approach to law,<sup>9</sup> should be addressing the limits of pragmatism; for do not the criticisms I have made of Beatty's book imply that legal pragmatism indeed has limits that he has exceeded? This depends on what is meant by 'legal pragmatism.' Pragmatism is indeed empiricist, and legal pragmatism, or at least the version of legal pragmatism that I find attractive, insists that consequences should be front and centre in the adjudicative process. But it is not the case, as Beatty seems to believe, that the *only* consequences worth considering are the consequences for the people immediately affected by a judicial decision. There are systemic consequences as well that ought to be considered, and among these are the damage to the democratic process, and to the law's stability, that would be inflicted by a wholehearted embrace of Beatty's program of fact-based constitutional adjudication. The practical effect would be a breathtaking expansion of judicial powers at the expense of the drafters and ratifiers of constitutions, legislatures, and officials, and hence of voters and of the people at large. And because the judges would be constrained only by their commitment to impartial factual inquiry, and not by any text (constitutional, legislative, or judicial); because the practical limits of adjudication prevent a deep judicial engagement with the facts bearing on constitutional controversies; and because those facts will differ unpredictably from case to case, it would be extremely difficult for lawyers and lower court judges to predict from previous decisions how future disputes would be resolved. The law would be thrown into a state of extreme uncertainty. These would be high prices to pay for pragmatism. But, more importantly, they are not entailed by pragmatism.

8 The full name of the case is *Employment Division, Department of Human Resources of Oregon v. Smith*.

9 See, e.g., Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003).

I have made many criticisms of this interesting book. But I do not wish to end on a negative note. Beatty's criticisms of constitutional theorists are spot on. And he vindicates his faith in the power, or at least potential power, of judicial engagement with facts in a number of his discussions of specific cases, such as *Lochner v. New York*,<sup>10</sup> where he points out that the maximum-hours law invalidated there had in fact been intended to put small bakers out of business (135–6), or *Employment Division v. Smith*,<sup>11</sup> where he points out that numerous states had made an exception to their drug laws to permit Indians to use peyote in religious ceremonies, without the sky falling (51). Above all, Beatty's book is both a timely reminder of the importance of pragmatic engagement with reality in constitutional adjudication and a fascinating *tour d'horizon* of an emerging global community of aggressively interventionist constitutional judges. One may applaud or deplore the growing globalization of constitutional law, but one may not ignore.

10 198 U.S. 45 (1905).

11 494 U.S. 872 (1990).

