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The Democratic Constitution: Butler and Posner on Pragmatism, Democracy, and Adjudication

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Abstract

In this review essay, I offer a summary of Brian E. Butler's *The Democratic Constitution: Experimentalism and Interpretation*. Butler's democratic experimentalism offers the thesis that democracy needs to be protected democratically rather than by relying on the judicial supremacy over constitutional interpretation by the Supreme Court. Butler illustrates what democratic experimentalism looks like through a close reading of key cases showing the virtues of an on-going, open-ended, empirical, fallibilist, and collaborative approach to constitutional interpretation against rival formalist and exclusionary theories. Butler relies on Richard Posner's iconoclastic empirical approach to adjudication in advancing his thesis. However, Posner is skeptical of the Deweyan democracy Butler deploys to illustrate the democratic constitution.

Further, Posner dismisses the philosophical pragmatism of Peirce and Dewey that Butler uses to ground his theory. Because of Butler's reliance on Posner's judicial practice and his side-stepping of Posner's views on democracy and philosophical pragmatism, I ask how Butler's proposal stands in relation to the ways it departs from Posner's theory, if not his practice.

Keywords

pragmatism – constitutional law – Posner – democracy – adjudication

Nine years ago, acting upon an intuition that there was something both attractive and wanting in Judge Richard Posner's articulation of pragmatic adjudication, I wrote a dissertation on the subject, attempting to reread Oliver Wendell Holmes Jr.'s legal theory alongside the classical pragmatists, Charles Sanders

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Peirce and John Dewey in an effort to rethink legal pragmatism philosophically.[1] (Vannatta, 2010). I wanted to engage critically what Michael Sullivan called "Posner's unpragmatic pragmatism," and recover a thicker version of pragmatism than Posner's "everyday pragmatism."[2] If there was nascent insight in my attempt, Brian Butler's *The Democratic Constitution: Experimentation and Interpretation* represents the way forward, offering a robust constitutional theory that synthesizes at least three elements: Holmes's anti-formalism, Peirce's and Dewey's theories of inquiry and by extension Dewey's theory of democracy, and Posner's empirical and experimental approach to legal interpretation and adjudication. The book, among other accomplishments, shows the timely and practical effects of my embryonic hunch. Further, Butler illustrates the richness of Posner's pragmatic adjudication, noting that it shares significant virtues with the classical pragmatists' views of inquiry and democracy and their relation to constitutional law and theory. After a summary account of the book, I want to challenge Butler's reliance on Posner, asking a question about the relationship between Posner's political and legal theory and his judicial practice, and the relationship of both to Butler's democratic constitution.

Butler's democratic experimentalism offers the thesis that democracy needs to be protected democratically rather than by relying on the judicial supremacy over constitutional interpretation by nine unelected Supreme Court Justices. Butler illustrates what democratic experimentalism looks like through a close reading of dozens of key cases showing the virtues of an on-going, open-ended, empirical, fallibilist, and collaborative approach to constitutional interpretation against rival formalist and exclusionary theories. The latter include, among others, Antonin Scalia's textual originalism, Ronald Dworkin's vision of Hercules, the ideal moral guardian of the constitution, and Richard Epstein's reliance of a univocal value underlying constitutional interpretation—market competition. Butler critiques a ubiquitous and recurring theme in these constitutional theories, that of "exclude in order to bind," whose aim of conceptual clarity forestalls the democratic means available to an experimentalist judiciary.

Butler is not alone in advancing this project. His book not only deploys the theoretical tools of classical pragmatism and highlights the experimentalism of Posner's practice, it also builds on the work of a host of like-minded critics. Butler references experimental methods by Roberto Unger and Cass Sunstein

1 Vannatta, Seth. *Rethinking Legal Pragmatism: A Philosophical Approach*. Southern Illinois University Carbondale. 2010. UMI 3408654.

2 Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy*, (Bloomington: Indiana University Press, 2007), 48.

but claims they fail to stand up to Dewey's robust democratic demands. Rather, Butler highlights the scholarship of Michael Dorf and Charles Sabel as providing the plausible means of constructing a theory of a democratic constitution that, instead of painting the ever-present picture of "constitutional law as giving final and foundational rules to democracy," offers a "an experimental version of constitutional law that is democratic 'all the way down.'"[3]

Butler's first chapter poses the democratic challenge to constitutional law, and shows the impoverished responses to this challenge in the literature. He begins by illustrating the message of Erwin Chemerinsky's *The Case Against the Supreme Court*, which is that the Supreme Court has failed to fulfill its mission of protecting minorities against the tyranny of the majority. The poverty of Chemerinsky's case is twofold. First, it deploys a contested view of the court's purported end and is inconsistent in assessing the court's success in achieving it. Chemerinksy's view as the Court's role as protector of minorities from popular majorities is the popular one, deployed by Alexander Bickel, John Hart Ely, Richard Epstein, and Ronald Dworkin. Each of their varied constitutional theories share the same unstated premise with regard to judicial review and judicial supremacy—that the court is the sole protector of the constitution against the unruly prejudices of the populace.[4] Second, as Butler points out, Chemerinsky seems to think that justice is served only when racial minorities or progressive legislation for workers is protected. The minority of the extremely wealthy, when protected, seems to count as a failure on his account. But while Chemerinsky's book provides a lengthy list of failures of the court to achieve its end, the underlying premise is never doubted. Butler asks the simple question: if, given this goal, the court fails to achieve it when it is viewed as the supreme last word on the constitution, why should it be viewed as embodying the last word? Butler points out that many of its failures, even on Chemerinksy's account, are instances of democracy being thwarted, as the court held that legislation passed by democratically elected representatives was unconstitutional and void. Thus, Butler's book calls this premise in to question and provides an alternative theory.

Next, Butler presents an economical exposition of Peirce's methods for fixing belief, tenacity, authority, a priori, and science. Theories of constitutional interpretation that strive for formal clarity at the cost of empirical inquiry manifest the methods of tenacity, authority, and the a priori method, while democratic experimentalism exhibits the virtues of the method of science,

3 Brian E. Butler, *The Democratic Constitution: Experimentalism and Interpretation,* (Chicago: University of Chicago Press, 2017), 201.

4 Butler, *The Democratic Constitution*, 9.

which is the only method that can detect its own error and stand the test of the community. Textual originalism, after all, is not itself textual or original, so it must be an a priori method. Butler then couples his preference for the method of science with a conception of Deweyan democracy. For Dewey, democracy is "broadly social before it can be seen more narrowly as a political concept," and "affects all modes of human association" (Butler, 2017, 23). Democracy involves "pluralistic values and a decentered picture of social institutions" (Butler, 2017, 24). Last, democracy involves engaging publics, formed in organic response to social problems, according to the method of experimental intelligence—Peirce's method of science writ large.[5]

In chapter three, Butler praises Posner's adjudicative preference for empirical facts and skepticism of legal formalities. These expository chapters are not left behind; rather, Butler consistently threads these themes of the method of experimental intelligence, Deweyan democracy, and law as information-producing through the cases involving regulatory takings, *Lochner*-style constitutional interpretation, *Citizens United v. FEC*, *Brown v. Board of Education*, and *Obergfell v. Hodges*. I will return to Butler's reliance on Posner in theory and practice below.

Each case-based chapter analyzes the facts of the case, the arguments of the majority and dissenting opinions, the arguments of the scholarly critics of the case, and closes with how the central and pressing issue of each case would be adjudicated via democratic experimentalism. Consider the case of *D.C. v. Heller*, the recent decision overturning a statute in the District of Columbia restricting individuals' ability to carry fire arms. Scalia's majority opinion in *Heller* exemplifies exclusion-based jurisprudence. It excludes the "prefatory clause," "a well-regulated Militia being necessary to the security of a free State," by claiming that the "preexisting right … had nothing whatever to do with the militia."[6] It dismisses the larger context of the case, the legislative record of the statute challenged, changing circumstances, and the social consequences of its decision.[7] It claims to find the original meaning of "people" to refer to individuals, the meaning of "bear" to mean carry, and the meaning of arms to have not changed from the eighteenth century to the twenty-first.

Scalia's public meaning originalism, as an over-arching theory meant to hem in judicial interpretation, represents both a pipe-dream quest for certainty criticized by Dewey, and what Posner criticizes as legalism, which treats the law as "an autonomous discipline running on rules specific to its own internal

5 Butler, *The Democratic Constitution*, 25.

6 Butler, *The Democratic Constitution*, 52.

7 Butler, *The Democratic Constitution*, 67.

logic" and treats the use of extra-legal facts as improper intrusions on the formality of law.[8] Posner and Butler think such meta-theories of constitutional interpretation are disingenuous guises, "either rationalizations or rhetorical weapons."[9] Democratic experimentalism, instead of excluding information, aims to include it and make the court a part of information production.[10] This remedy treats governmental activity as primarily local, and views the function of Congress and administrative agencies as assisting local organizations with information pooling and providing resources to support experimentation (Butler, 2017, 66). Using strategies such as benchmarking and learning by monitoring, democratic experimentalism aims to create an informed and transparent record of the decision making process, with a view of the court as collaborators in the problem-solving process.

Butler contrasts Scalia's exclusionary approach in *Heller* to Posner's information-producing approach in *Moore v. Madigan*, a case similar to *Heller* involving an Illinois ban on carrying ready-to-use guns outside the home. Posner anchors his analysis of the case with benchmarking, asking why other states have not emulated Illinois's approach and asking for empirical evidence of its efficacy. Posner seeks empirical justification for the law and investigates other alternative strategies for maintaining public safety. Posner's opinion "treats the project of gun regulation as a collaborative project and then analyzes the aim functionally."[11] It motivates the legislature to provide "empirical justification for a more effective and less restrictive" means to achieve its aims instead of drawing a "bright-line prohibition" as Scalia's opinion does.[12] (Butler, 2017, 74). The denotative examples Butler uses are quite effective in distinguishing the exclusionary and formal from the empirical and experimental.

Butler's radical proposal, while consistently presented and well-researched, is, however, a performative contradiction of much of Posner's legal and political theory. In what follows, I aim to show why and challenge Butler about the relationship between Posner's theory and his practice. Butler's book leans on the latter and ignores the former.

Posner began writing about pragmatic adjudication and pragmatism's relationship to democracy in the latter part of his career. What is pragmatism according to Posner, what work does it do for him, and in what sense? Posner cites William James to indicate that pragmatism is a mood, which "turns away

8 Butler, *The Democratic Constitution*, 60.

9 Butler, *The Democratic Constitution*, 61.

10 Butler, *The Democratic Constitution*, 65.

11 Butler, *The Democratic Constitution*, 74.

12 Butler, *The Democratic Constitution*, 74.

from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins [...] towards concreteness and adequacy, towards facts, actions, and towards power."[13] The pragmatic mood is falliblistic, experimental, practical, eschewing the project of verifying knowledge claims in the quest for certainty in favor of consequentialist tests for meaning and truth. The pragmatist is generally forward-looking and progressive, without being able to define progress.[14] Pragmatism is skeptical of absolutes, including logical, metaphysical, or moral absolutes, but is not skeptical of using individual and social experience as data on which to base courses of action.[15]

Posner also tells a story of how logical positivism's temporary supersession of pragmatism led to its revival by the likes of W.V.O. Quine and others, whose attack on an analytic method resulted in a fork in the road, between the "orthodox" and the "recusant" pragmatists.[16] "Orthodox" pragmatism focuses on the pragmatic conception of meaning and justification, which has little to do with law, according to Posner. "Recusant" pragmatists, including Dewey, evade questions of epistemology and the traditional ethical questions in favor of those which help us understand and improve the world. Posner seems to have an affinity for these recusants, and we might anticipate that they have something to offer law, as Dewey thought he had a lot to offer other fields. But Posner's argument is that philosophical pragmatism, even of the recusant type, offers no guidance in a theory of adjudication. Posner cites Dewey's "Logical Method and Law" in order to show that even his call for "a logic relative to consequences rather than to antecedents" and his conclusion that this brand of logical method is a social and intellectual need was not implied by his pragmatism.[17] So for Posner, both orthodox and recusant pragmatists are philosophical, and therefore cannot be of help to the law. Butler seems to disagree with Posner here.

So what the law needs, according to Posner, is "everyday pragmatism." Everyday pragmatism demonstrates the traits common to philosophical pragmatism, such as fallibilism, experimentalism, and consequentialism but is independent of them. And the utility of everyday pragmatism is expressive

13 Richard Posner, *Law, Pragmatism, and Democracy*, (Cambridge: Harvard University Press, 2003), 31.

14 Richard Posner, *The Problematics of Moral and Legal Theory*, (Cambridge: Harvard University Press, 1999), 5.

15 Posner, *The Problematics of Moral and Legal Theory*, 5.

16 Posner, *Law, Pragmatism, and Democracy*, 35.

17 Posner, *Law, Pragmatism, and Democracy*, 115–118.

practically in law without remainder. Everyday pragmatism, according to Posner, demonstrates common and valuable features with respect to law. Its legal principles are contingent, contextual, empirical, and situated historically. These beneficial features apply to the judge, who is situated in a specific context and who needs to examine the cultural and consequential features of the case, assembled empirically. Everyday pragmatism is somewhat hard-nosed, somewhat cynical, but thoroughly realistic in its willingness to use rhetoric to decide cases "without taking the rhetoric of legal formalism seriously and without bothering [the judge's head] about pragmatic philosophy either."[18] Posner has accepted the destructive and critical work of philosophical pragmatism, but rejected its claims to have any constructive merit, stating, "There is no longer anything in philosophy to help a judge decide cases."[19] Butler, to its credit, spends a full chapter "bothering his head" about pragmatic philosophy. Butler is not a practicing judge, but his pragmatism aims toward continuity between judicial theory and judicial practice, while Posner drives a wedge between them.

The core of Posner's legal pragmatism hinges on recognition of a certain ambiguity and indeterminacy at work in the law, which usually functions between two poles of "rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systematic and particular, rule and standard."[20] Posner states that there is no precise manner in which to strike a balance between these theoretical poles. Because of this tension Posner falls back on Holmes's early articulation of the "extras" that compose the reasonable decision. They are the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."[21] Now, these extras, which might just be called "culture" or "experience," can be applied to the activity of a Supreme Court judge acting as a supreme arbiter of the meaning of the constitution and checking against democratic tyranny in the process. But the extras say nothing about democracy.

Posner does. As Butler, himself, summarizes:

> Poses [judges who decide based on Posner's theory] see law and democracy largely in terms of limits to the market economy. Poses begin

18 Posner, *Law, Pragmatism, and Democracy*, 55.

19 Posner, *Law, Pragmatism, and Democracy*, 53.

20 Posner, *Law, Pragmatism, and Democracy*, 63.

21 Posner, *Law, Pragmatism, and Democracy*, 64. Posner cites Oliver Wendell Holmes Jr. *The Common Law*, 1995 [1881], 115.

> by dividing all democratic theory into two types: concept 1 democracy, an aspirational, Utopian or deliberative democracy, modeled upon a faculty workshop; and concept 2 democracy which is 'realistic, cynical, and bottom-up,' a democracy based upon the aim of satisfying private interests, and founded upon economic competition.[22] Poses advocate for concept 2 democracy because they think it is constructed upon a 'unillusioned conception of the character, motives, and competence of the participants in the governmental process.'[23] Within concept 2 democracy the private realm of the market is to be left alone as far as possible, and government's limited function is to structure those areas where the price system is seen to be in need of small corrections. Concept 2 democracy sees the democratic process as a competitive power struggle of a political elite for the votes of the masses. This 'realistic' democratic and pragmatic liberalism emphasizes 'the institutional and material constraints on decision making by officials in a democracy.'[24] [...] Under this conception democracy largely functions as a means of protecting the private sphere and enabling the public to create laws to curb the external costs of other people's behavior. This type of democracy is 'nonparticipatory,' because 'the benefit of voting to the individual is negligible.',[25, 26]

So Posner is skeptical of the Deweyan democracy Butler deploys to illustrate the democratic constitution. Further, Posner's concept 2 democracy explicitly offers the judge other norms, such as Pareto efficiency and wealth maximization. Posner's dismissal of philosophical pragmatism invites the norm of wealth maximization into judicial reasoning. Such a norm both presupposes the values resulting from its employment and says nothing of its democratic genesis. It is what is left, or should be left, at work once formalism has been abandoned or shown to be a mere mask. But does it not look like the purported end of adjudication proffered by Richard Epstein, market competition. And if so, is it the product of the method of science, as articulated by Peirce, and deployed by Butler?

Posner holds that philosophical pragmatism has no role to play in legal pragmatism as it manifests itself in the process of adjudication and the process of

22 Posner, *Law, Pragmatism, and Democracy*, 188.

23 Posner, *Law, Pragmatism, and Democracy*, 385.

24 Posner, *Law, Pragmatism, and Democracy*, ix.

25 Posner, *Law, Pragmatism, and Democracy*, 195, 26.

26 Brian E. Butler, "Dews, Dworks, and Poses Decide Lochner." *Contemporary Pragmatism*. Vol. 7, No. 2 (December 2010), 27.

legal scholarship. Posner is skeptical of Deweyan democracy. Butler obviously disagrees on both counts, but does so in silent deference to Posner's iconoclastic empiricism. So, if Butler's admirable proposal for a democratic constitution is the way forward from my tender footed inclination that there was something attractive in Posner's brand of anti-formalism and its inheritance from Holmes, how does Butler's proposal stand in relation to the ways it departs from Posner's theory, if not his practice?

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