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PRAGMATISM AND JUDGMENT: A COMMENT ON LUND

*Mark Tushnet**

Nelson Lund's article is entitled *The Rehnquist Court's Pragmatic Approach to Civil Rights*.¹ I raise three questions about his analysis, two of which take off from the phrasing of his title.

First, calling the present Court the Rehnquist Court is obviously easy, and I do it myself in the subtitle of my forthcoming book.² Professor Lund has of course taken his charge from the conveners of this Symposium, and I do not mean to criticize him for doing so. Still, it may be worth pointing out that convening a symposium that encourages people to think in terms of "the Rehnquist Court" might not be the most intellectually productive approach to understanding the contemporary Supreme Court.

Describing periods by Chief Justices is entirely conventional. The "Chief Justice synthesis" is as pervasive in constitutional law as the "presidential synthesis" is in studies of the presidency.³ Yet, I think, the "Chief Justice synthesis" is often inaccurate. It is reasonably clear now that there is something askew in describing the Burger Court as fundamentally distinct from the Warren Court. From a time shortly after William Brennan arrived at the Court, it was more a Brennan Court than a Warren Court, and throughout Warren Burger's tenure the Court was certainly more a Brennan Court than a Burger Court.

What of the present Court? I think there are several candidates for alternative labels. Taking up a widely noted point that emerges as well in Professor Lund's discussion, we might refer to the present Court as the O'Connor Court, reflecting Justice Sandra Day O'Connor's position as the median Justice, the person whose position on the issues is more likely to determine the outcome than anyone else's.

In addition, Professor Lund's presentation provocatively suggests a great deal of continuity between the so-called Burger Court and the Rehnquist Court. One can read his argument to be that the Burger Court—

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¹ Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249 (2004).

² MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (forthcoming 2005).

³ For an early discussion of the "presidential synthesis," see Thomas C. Cochran, *The "Presidential Synthesis" in American History*, 53 AM. HIST. REV. 748 (1948).

or, pretty clearly in this context, the Brennan Court—adopted approaches to the nation’s civil rights laws that a truly conservative Court would have rejected, and that the Rehnquist Court did not do an entirely satisfactory job of cleaning up the mess that it inherited.⁴ Labeling a Court with a Justice’s name requires that the Justice actually be on the Court, of course, and Justice Brennan himself departed long ago.

There is, though, another candidate. Justice John Paul Stevens served on the Burger (Brennan) Court and on the present Court. Thinking of the present Court as the Stevens Court might capture some of the continuity suggested in Professor Lund’s article. That might seem odd at first because Justice John Paul Stevens is conventionally described as a member of the Court’s liberal wing, and because the Court is commonly described as a conservative Court.⁵ Those descriptions are largely accurate, although as Professor Lund and I both suggest not completely accurate.

Why might it make sense to identify the Court with a member of its minority faction? The reason is this: The Court’s conservatives have been notably fractured, for reasons I discuss later in this comment.⁶ Put another way, no Justice on the conservative side has been able to provide the leadership that would hold the conservatives together. It has gone largely unremarked, though, that the Court’s liberals have presented a far more united front.⁷ But there is little reason to think that this liberal unity is a natural phenomenon.⁸ Rather, it is an accomplishment, facilitated by *someone’s* leadership. We will not know for sure until historians are able to examine the Justices’ papers, but I think there is good reason to conclude, even now, that Justice Stevens has provided that leadership notwithstanding his sometimes idiosyncratic positions on important matters.

Second, I wonder about describing the present Court as pragmatic. The term seems to me to have become an all-purpose and almost meaningless label for quite traditional judicial decisions. One reason is that pragmatism is a *theory*, that is, an account offered by outsiders of a practice they observe. Judges—or perhaps courts as aggregations of judges—are almost

⁴ This point might be supplemented by a more detailed consideration of Congress’s role in perpetuating the Brennan Court’s legacy in the Civil Rights Act of 1991, which itself has become the subject of Brennan-esque interpretations. *See, e.g.,* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

⁵ *See, e.g.,* HERMAN SCHWARTZ, RIGHT WING JUSTICE (2004); MARTIN GARBUS, COURTING DISASTER (2002).

⁶ *See infra* text accompanying notes 18–23.

⁷ The main exception to liberal unity is Justice Stephen Breyer, whose technocratic instincts sometimes put him at odds with the other liberals, who share a late twentieth century liberal skepticism about technology and technocracy. *See, e.g.,* Ashcroft v. ACLU, 124 S. Ct. 2783, 2800–04 (2004) (Breyer, J., dissenting) (discussing technical means of “blocking” access to disfavored websites).

⁸ Liberals in legislative politics have hardly been unified over the past several decades. And, even during the Warren period, there were important tensions among those who identified themselves as liberals. *See, e.g.,* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT (1992) (describing the jurisprudential conflicts between Justices Hugo Black and William O. Douglas in the later years of their tenure).

inevitably pragmatic in the following sense. Judges attempt to develop legal rules that in their judgment will make society and government “work” reasonably well, and revise those rules when things seem not to be working as well as they could. Even the most “theoretical” judges do so, because such judges adopt those theories that, in their view, will make society and government work well overall. Take originalism as an example.⁹ Theorists might defend originalism¹⁰ from the ground up, as, for example, the only account of constitutional or statutory interpretation consistent with constitutionalism’s basis in consent. Judges defend originalism more modestly. Originalist interpretation, they will assert, provides the best guidance to legislators trying to enact laws (because the legislators know precisely what is going to count when the laws they enact get to court for interpretation) and to lower court judges interpreting the laws (because those judges do not have to worry about anticipating the less structured judgments about policy that their judicial superiors might make). These, though, are what might be called systemically pragmatic defenses of originalism. That is, they are defenses that try to show how originalism is defensible as a way of making government work well, without regard to whether it is defensible in “fundamental” terms.

In the context of statutory interpretation, Lund might perhaps more usefully recall the 1950s Legal Process school. According to the famous Legal Process formulation, courts should interpret statutes by assuming that legislators are reasonable people pursuing reasonable goals in a reasonable manner.¹¹ Decades of skeptical scholarship suggest one important supplement to the Legal Process formulation: Judges imbued with the Legal Process ethos surely think of themselves as reasonable people as well.¹² The natural next step is to conclude that the statute, enacted by reasonable legislators, should be interpreted to do what the judge, as a reasonable person, would do were she a legislator.¹³

⁹ The analytic structure I sketch here, connecting a particular interpretive approach to an interest in ensuring that the government be a “workable” one, would apply no matter what interpretive approach one imputed to a judge. That is, the account is one in which the judge adopts the interpretive approach *because* it ensures, better than other interpretive approaches, that the government work well.

¹⁰ In any of its variants—from drafters’ intent to drafters’ understanding to ratifiers’ understanding to public understanding or meaning at the time the provision being interpreted was adopted.

¹¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1125 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (stating that a “statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear”).

¹² For an expression of a contrary view, in a very different context of course, see Joan Biskupic, *Scalia Makes the Case for Christianity: Justice Proclaims Belief in Miracles*, WASH. POST, Apr. 10, 1996, at A-1 (quoting Justice Scalia as saying, “We are fools for Christ’s sake”).

¹³ In this sense, the pragmatism Lund describes does not quite “turn into” “self-indulgent and irresponsible meddling.” Lund, *supra* note 1, at 258. Self-indulgent meddling is inherent in a Legal Process version of pragmatism.

But reasonableness is both an individual and a social phenomenon. That has some implications for understanding the interpretation of the Americans with Disabilities Act. The social dimension of reasonableness means that what a person understands to be a reasonable choice is affected by what the broader society regards as reasonable. Historians of slavery's abolition have identified something they call the expansion of moral horizons to explain the abolition movement's success.¹⁴ That is, for generations slaves were regarded as outside the purview of moral consideration. Abolition took hold when slaves came to be included within the objects of moral concern.¹⁵ Something similar has occurred with respect to persons with disabilities. Compare here the way in which sidewalks were constructed during the suburban expansion of the 1950s and the way they are constructed today. Then, few if any developers included curb-cuts; today, designing sidewalks without curb-cuts would be literally unthinkable, even—I believe—were regulatory requirements to disappear. The reason lies in the expansion of our moral horizons.¹⁶ The enactment of the ADA itself shows that the nation's moral horizons had changed. In light of that expansion, what the Supreme Court might today believe to be reasonable interpretations restricting the ADA's reach might be seen in retrospect as the expression of a morally constricted vision of human possibility.

My third point deals with the tone of Lund's discussion. I characterize it as the expression of unrequited love.¹⁷ That is, people of Lund's general orientation are puzzled and disappointed by the Rehnquist Court's decisions. The presidents who appointed a majority of the Court's members ran on platforms quite critical of the central thrust of judicial decisions under Earl Warren and (a bit less so) Warren Burger. Yet, it seems, those presidents were unable to deliver on their platforms' promises. The reason, which I develop in more detail elsewhere,¹⁸ is that Republican appointees to the Supreme Court fall into two groups: modern Republicans such as Justices Scalia and Thomas, and more traditional Republicans such as Justice O'Connor. In some legal areas, the traditional Republicans are less enthusiastic than the modern Republicans about working dramatic transforma-

¹⁴ For an introduction to the debates, see *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL UNDERSTANDING* (Thomas Bender ed., 1992).

¹⁵ Historians of abolition reached this conclusion after they had addressed and refuted more traditional arguments that material interest somehow led to abolition.

¹⁶ As with slavery's abolition, more materialist explanations for this change seem to me at least incomplete. Of course there were fewer people in wheelchairs during the suburban expansion of the 1950s, but there were some. Similarly, the wheelchairs that people then used were less maneuverable than the ones in use today (which may be a reflection not just of technology but also of the constricted moral horizon of the earlier period). And, there were fewer elderly people using walkers, but again, there were some.

¹⁷ See, e.g., Lund, *supra* note 1, at 283 (referring to the Grutter "majority's rejection of Rehnquist's analysis—or more accurately, his unrebutted demonstration").

¹⁸ TUSHNET, *supra* note 2.

tions. Race, and particularly affirmative action, is one of the areas of division.

Here I want to focus on one small reason for the failure of the modern Republicans to marshal the Court. As I have said, a striking feature on the liberal side has been its relative cohesion, accomplished in part by the leadership of Justices Brennan and Stevens. The modern Republicans have been unable to develop equivalent leadership. Part of the reason may well be a lack of interest in doing so. The Chief Justice may not want to spend time trying to pull together a cohesive majority for the views he holds, for example. Another part of the reason may be a lack of the distinctive, and perhaps not widely distributed, personal skills among the modern Republicans that a leader would need to herd the cats on the Supreme Court, whose positions (and life tenure) may make them relatively unamenable to follower-ship.

Beyond a lack of interest or a lack of ability, there might be an impediment to mustering a modern Republican majority. That impediment might be Justice Scalia. What Lund refers to as Justice Scalia's "characteristic panache"¹⁹ and, more generally, Justice Scalia's approach to the job may drive away potential allies.

Justice Scalia sometimes refers to those with whom he disagrees as fools and liars.²⁰ This is not something likely to generate a reservoir of good feeling among those people, on which Justice Scalia could draw in other cases. Justice O'Connor has been quoted as believing that Justice Scalia was "not a very polite man,"²¹ and I doubt that this was intended as a compliment. Of course, where Justice O'Connor believes strongly in the position that Justice Scalia happens to hold as well, bad feelings among the Justices are not going to deter her from joining him.²² But, on the margins, where Justice O'Connor or other traditional Republicans are less strongly committed to a position in advance, the fact that Justice Scalia has no reserves of good feeling on which to draw might make a difference.²³ Some-

¹⁹ Lund, *supra* note 1, at 257.

²⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("Do not believe it.")

²¹ Kim Isaac Eisler, *Majority of Two*, WASHINGTONIAN MAG., Dec. 1996, at 78.

²² Of course the Justices maintain superficially cordial relations among themselves. Still, one can pick up hints of tensions. In an interview with George Stephanopoulos in 2003, for example, Justice O'Connor said, "When you work in a small group of that size, you have to get along, and so you're not going to let some harsh language, some dissenting opinion affect a personal relationship." Breyer agreed, saying that when he read "rather sharp words about something I've written, perhaps that it's sort of a question of rhetoric, more than it is of actual human feeling . . . [I]t isn't, it doesn't hang on as a personal matter, because we get on quite well, personally." Notably, though, neither one used the name of the only person to whom they could have been referring. Transcript, *This Week with George Stephanopoulos*, July 6, 2003. Justice Scalia's closest friendship on the Court is with Justice Ruth Bader Ginsburg, whom he is unlikely to influence on the matters that he cares most about.

²³ I have looked at a few files in Justice Harry Blackmun's papers, and some suggest that what we see in Justice Scalia's published opinions are sometimes toned-down versions of what he originally

times a Justice's arguments are not quite enough to pull hesitant colleagues into joining an opinion. Justice Scalia's traditional and rather conservative colleagues might be induced to go along with his more hard-edged conservative positions were they well-disposed toward him. Because they are not, he has been unable to round them up—at least not as often as a smoother personality might have been able to do.

Why might Justice Scalia adopt the stance he does? I offer two suggestions, which in turn point toward a more general observation about Justice Scalia. One possibility is that Justice Scalia is frustrated at losing as often as he does and lashes out, which then leads him to lose more often; another is that he *likes* losing, in part because it allows him to write in ways that attract laudatory comments about his dramatic writing style. The more general observation is that both of these possibilities, and Justice Scalia's behavior no matter what its source, suggest that Justice Scalia, smart though he may be, is a person who lacks an important characteristic we want our judges to have: He may not have good judgment.

Justice Scalia arrived at the Supreme Court with an agenda.²⁴ Among the items on it were eliminating race-based affirmative action, overturning *Roe v. Wade*, sharply reducing the scope of or perhaps eliminating entirely the Court's substantive due process doctrine,²⁵ and getting the Court to eschew reliance on legislative history in statutory interpretation. After some apparent successes early on, Justice Scalia's campaign for these items failed. The Court upheld diversity-based affirmative action programs in higher education, with an analysis suggesting that at least some affirmative action programs in public employment might be constitutional as well.²⁶ *Roe* stills stands, albeit modified. Substantive due process has been extended, not limited.²⁷ His colleagues have started to cite legislative history again, and no longer even extend Justice Scalia the courtesy of giving him

wrote. For example, in his initial response to Justice Blackmun's draft dissent in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), Justice Scalia described Justice Blackmun's position as "impertinent," a word he excised in a later draft. Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Box 599, file 91-453 (on file with Northwestern University Law Review). Still, the Justices themselves see Justice Scalia's first impulses as well as his toned-down expressions.

²⁴ To quote Jerry Seinfeld, "Not that there's anything wrong with that."

²⁵ Which was, of course, *Roe*'s doctrinal basis, but which had implications beyond the abortion context.

²⁶ As Justice Scalia pointed out in his opinion in *Grutter v. Bollinger*, 538 U.S. 306, 348 (Scalia, J., concurring in part and dissenting in part), the justifications the Court accepted for affirmative action in higher education were "no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan."

²⁷ See *Lawrence v. Texas*, 539 U.S. 558 (2003). Earlier Justice Scalia had thought that he had won his battle against expansive approaches to substantive due process in *Washington v. Glucksberg*, 521 U.S. 707, 721 (1997) (insisting on a "careful description" of claimed unenumerated rights, which had also be to "deeply rooted in this Nation's history and tradition"), only to discover within a year that the Court was willing to rely on what he regarded as the ill-defined "shocks the conscience" test in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

the opportunity to concur in all but the sections of an opinion relying on legislative history.²⁸ Perhaps Justice Scalia's failures on these matters rankle with him. His response is to turn on the colleagues who disappointed him—that is, the traditional Republicans. Yet, those are his most likely allies in other cases. By criticizing them so severely when they have proven to be “unreliable,” Justice Scalia may increase the chance that they will be unreliable again, on some other issue where, had he developed reserves of good feeling, he might have brought them along.

Another possibility is that Justice Scalia actually prefers to lose.²⁹ It is much easier for Justice Scalia to get off snappy one-liners in sharp dissents that his admirers in the press and in the academy can quote than it is to work them into a majority opinion joined by four other Justices.³⁰ Of course one can write elegant majority opinions, as Justice Benjamin Cardozo showed. But, Justice Scalia's distinctive writing style lacks elegance of the sort other Justices have exhibited; it is more suitable for the shouting matches on talk radio than for a Supreme Court majority opinion. My suggestion is, then, that Justice Scalia's writing style contributes to giving him a preference for losing, at least when winning would require substantial efforts on his part to discipline his writing style.

I doubt that that preference is a good thing for a judge to have, just as I doubt that it is a good thing for a Justice to get frustrated over losing.³¹ Similarly, Justice Scalia unquestionably does not suffer fools gladly, as his interventions in oral arguments often show. But I doubt that it is a good thing for a Justice to display that trait towards his colleagues. Many of them are not fools at all, although they may demonstrate their intelligence in ways different from the ways in which Justice Scalia demonstrates his. In any event most people understand that not suffering fools gladly is an unproductive strategy for dealing with one's peers even if one can get away with it when those fools are in a subordinate position.³²

All of these matters suggest that Justice Scalia's performance as a

²⁸ See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

²⁹ Cf. Thomas Frank, *Failure Is Not an Option, It's Mandatory*, N.Y. TIMES, July 16, 2004, at A-21 (arguing, in the context of legislative politics, that for conservative Republicans, “grand and garish defeat—especially if accompanied by the ridicule of the sophisticated—is the culture warrior's very object”).

³⁰ I have not done a systematic survey, but my sense is that Justice Scalia's sharpest comments in his majority opinions are responses to dissents, which are written after enough other Justices have joined his proposed opinion to assure him a majority (and at a point when, my sense is, Justices who have joined an opinion have relatively little bargaining leverage with respect to the opinion's wording).

³¹ I recall hearing Justice Brennan say (or perhaps I recall being told that Justice Brennan said) in a response to a question about whether he was frustrated, after winning so many cases during the Warren era, at losing after Warren Burger's appointment that he had been there a long time, and knew that sometimes periods of victory were followed by periods of defeat, but that you have to keep trying. (I am sure that Justice Brennan said it better than that.)

³² As are oral advocates at the Court with respect to the Justices.

judge is quite mixed. He is undoubtedly smart,³³ but we do not want our judges only to be smart. We also want them to have good judgment. Justice Scalia comes up short on the latter qualification.³⁴

The Rehnquist Court could have taken a less pragmatic—or, more precisely in my view, a less Legal Process dominated—approach to civil rights. For it to have done so, one of the Court's modern Republicans would have had to provide leadership. My suggestion is that Justice Scalia may have played a small part in preventing either of his other modern Republican colleagues from doing so. Justice Scalia might be the reason that his admirers' love has gone unrequited by the Court as a whole.

³³ Although I think he is not as distinctively smart as he appears to think he is. For a more extended discussion, see TUSHNET, *supra* note 2, at 148–51.

³⁴ Another example is Justice Scalia's decision to go on a duck-hunting trip with Vice President Richard Cheney when an important case with Cheney as the petitioner was pending in the Supreme Court. My view is that Justice Scalia, having gone on the trip, did not have to recuse himself from the case, but also that Justice Scalia did not display good judgment in going on the trip in the first place.