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Legal Sidebar

# The Modes of Constitutional Analysis: Pragmatism (Part 5)

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This Legal Sidebar Post is the fifth in a nine-part series that discusses certain "methods" or "modes" of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*)

In contrast to textualist and some originalist approaches to constitutional interpretation, which generally focus on how the words of the Constitution are understood, pragmatist approaches consider the likely practical consequences of particular interpretations of the Constitution. That is, pragmatist approaches often involve the Court weighing or balancing the probable practical consequences of one interpretation of the Constitution against other interpretations. One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome. For example, in *United States v. Leon*, the majority held that the Fourth Amendment does not necessarily require a court to exclude evidence obtained as a result of law enforcement's good faith reliance on an improperly issued search warrant. Justice Byron White's majority opinion in *Leon* took a pragmatic approach, determining that "the [exclusionary] rule's purposes will only rarely be served" by applying it in the context of a good faith violation of the Fourth Amendment. Notably, the Court determined that adoption of a broader exclusionary rule would result in significant societal costs by undermining the ability of the criminal justice system to obtain convictions of guilty defendants. Such costs, the Court held, outweighed the "marginal or nonexistent benefits."

Using another type of pragmatist approach, a court might consider the extent to which the judiciary could play a constructive role in deciding a question of constitutional law. According to this approach, a judge might observe the "passive virtues" when confronted with constitutional issues in a case by adhering to certain doctrines, including those under which a judge will avoid ruling on political or constitutional questions. This may allow the Court to avoid becoming frequently embroiled in public controversies, thereby preserving the Court's institutional capital for key cases and giving more space for the democratic branches to address the issue and reach accommodations on questions about the Constitution's meaning. The Supreme Court's decision in *Baker v. Carr* illustrates the application of this second type of pragmatism. In that case, Justice William Brennan, writing for the majority, debated a dissenting Justice Felix Frankfurter about whether the Court was the proper actor to review the constitutionality of a state's apportionment of voters among legislative districts, or whether the plaintiffs should have sought remedies

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from the state legislature. Justice Brennan's majority opinion in *Baker* ultimately concluded that a state's apportionment decisions are properly justiciable matters, as an alternative holding would require those harmed by malapportionment to seek redress from a political process that was skewed against such plaintiffs.

Those who support pragmatism in constitutional interpretation argue that such an approach takes into account the "political and economic circumstances" surrounding the legal issue before the Court and seeks to produce the optimal outcome. Such an approach may allow the Court to issue decisions reflecting contemporary values to the extent that the Court considers these values relevant to the costs and benefits of a particular interpretation. On this view, pragmatism posits a view of the Constitution that is adaptable to changing societal circumstances, or that, at least, reflects the proper role of the judiciary.

Critics of pragmatism argue that consideration of costs and benefits unnecessarily injects politics into judicial decisionmaking. They argue that judges are not politicians. Rather, a judge's role is to say what the law is and not what it should be. In addition, some opponents of the pragmatic approach have argued that when the Court observes the "passive virtues" by dismissing a case on jurisdictional grounds, it fails to provide guidance to parties for the future and to fulfill the Court's duty to decide important questions about constitutional rights.

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