

POSNER'S PRAGMATISM AND THE TURN TOWARD FIDELITY

by
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It is no secret that formalist methodologies like originalism are not nearly as scientific as they pretend to be. Banking on this fact, pragmatism offers a prescriptive alternative: instead of expending intellectual energy attempting “fidelity” to antecedent “authority” (precedent, Framers’ intent, etc.), judges should embrace their inevitable roles as de facto policy makers, and focus on producing the best social results they can through the cases they decide. This Article discusses the current state of legal pragmatism, with a focus on the archetypal species espoused by Judge Richard Posner, and asks whether it has proven itself capable of contributing anything useful to modern adjudication. Through a dissection of the essentials of Posner’s pragmatism, the Article demonstrates that pragmatism serves only as a method of justifying outcomes that comport with the personal temperament and intuitions of those applying it. The Article then explores how the increasing obviousness of pragmatism’s failings has renewed interest in a concept central to formalist approaches: “fidelity” to exalted principles of political theory. Thus, the Article concludes that a primary legacy of pragmatism will be its contribution to the advent of “soft formalism,” characterized by an insistence that indeterminacy and subjectivity in law does not excuse the abandonment of fidelity as a central hallmark of legitimate adjudication.

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I. INTRODUCTION

To avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ¹—*Alexander Hamilton*

[A] pragmatist judge[] always tr[ies] to do the best [he] can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past . . . ²—*Richard Posner*

First came the Warren Court decisions with their trademark transcendental phraseology about “human dignity” and the like. In response came the originalists who, beginning in the early 1980s, began emphasizing fidelity to original meaning or intent. Then came the “renaissance” of legal pragmatism in the early 1990s. Central to pragmatism was the realist skepticism about the ability of judges to “find” correct legal answers to indeterminate legal questions in historical evidence or exalted abstraction, free from ideological biases.

Legal pragmatism offers two things. First, a descriptive account of American judging as more results-oriented and value-laden than either judicial opinions reveal, or than legal pedagogy is willing to recognize. Second, given the view that formalist methodologies are intellectual mirages due to both the wiggle room they usually offer and the epistemic limitations in law they usually fail to recognize, pragmatism is offered as a normative approach: judges should reject pious conceptualizations (“fundamental rights,” “democracy,” etc.) and legal “foundationalism”—originalism, “active liberty,” moral philosophy, etc.—in contemplating their proper roles, and instead embrace their inevitable roles as *de facto* policy makers. Pragmatists seek to refocus modern judging away from abstract, high-sounding “distractions” such as “fidelity” and “judicial restraint,” and toward the concrete social consequences of adjudication.

Pragmatism was a breath of fresh air for those who struggled to pedigree their views of substantive justice in conventional legal authority and who viewed the traditional expectation that they do so as nothing more than a fetish within legal culture, a vestige of a naive pre-realism era in legal thought. Indeed, the supple nature of pragmatism makes it the

¹ THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Ian Shapiro ed., 2009).

² RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 241 (1999) [hereinafter PROBLEMATICS].

best catch-all label for the outlook that predominates in modern legal scholarship today; it is what animates virtually all of the normative approaches to law that legal realism has inspired, even though the term is not always used. The value of pragmatism is an implicit premise in, for example, the utilitarianism of law and economics, and in normative critical-legal-studies arguments.³ As such, much of current normative work is heavily characterized by a rejection of the formalist “fidelity” that tends to spring from political theory (for example, the contractual theory of constitutional democracy that drives textualism and originalism) and a focus more on how judges can advance various desirable concrete ends.⁴

Pragmatism is still thriving in its various embodiments, but where does its path lead? In offering an answer to this question, I focus on the most prominent species of pragmatism, that advanced by U.S. Seventh Circuit Judge Richard Posner, who continues his campaign for pragmatism in his latest book *How Judges Think*.⁵ His arguments in favor of prescriptive pragmatism continue to raise the following questions. Where does pragmatism stand as a desirable model? How well has it weathered the numerous attacks mounted against it? Has Posner even convincingly established that pragmatism exists as a distinct approach to adjudication? If so, has the pragmatists’ purported cure to judges’ fidelity obsession proven to be more problematic than the alleged ailment?

This Article submits that although Posner tacitly acknowledges the more serious weaknesses of his approach, he still fails to address them head-on. When pragmatism’s essentials are put to the test, and when specific examples of Posner’s pragmatism are examined critically, it becomes apparent that prescriptive pragmatism is little more than a jurisprudence of intuition. It does not represent a progressive compromise between unforgiving “rule of law” principles and social utility. It embodies neither a gritty “street smarts” that makes the law more practical and realistic nor a spectacled empiricism that makes it more rational and epistemically grounded.

I proceed as follows. Part II briefly describes contemporary legal pragmatism, with a focus on its most prominent specimen, that espoused by Posner. In Part III, I focus on a specific feature of pragmatism, rule utilitarianism, to explain how most, if not all, “formalist” methodologies are most plausibly characterized as forms of pragmatism, thereby rendering as a straw man the formalism that pragmatists rail against: a jurisprudence adherent to pre-ordained abstraction or positive law without any regard to social consequences. In Part IV, I discuss how, in the most controversial types of cases, Posner’s counsel—a greater empiricism in adjudication—would serve no actual purpose except as a

³ See RONALD DWORKIN, *LAW’S EMPIRE* 95 (1986).

⁴ See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2085 (1996).

⁵ RICHARD A. POSNER, *HOW JUDGES THINK* (2008) [hereinafter *HOW JUDGES THINK*].

method of justifying decisions premised on a judge's intuition and personal temperament. In other words, pragmatism amounts to a method of justification for the very type of preordained results that pragmatists claim yield from formalist attempts at "principled" adjudication. The only difference is the pretense: hard-nosed "realism" and "empiricism" versus a humble fidelity to antecedent authority and political morality. In Part V, I link the increasing conspicuousness of pragmatism's failings with the increasing popularity of what I term "soft formalism," which is characterized by an insistence that fidelity to abstractions of political theory is a hallmark of legitimate adjudication. That is, an increasingly prominent common denominator in normative jurisprudence is an emphasis on the importance of fidelity to aspirational abstraction, and dispassionate reason premised thereon.

II. LEGAL PRAGMATISM: A SUMMARY

A. *Pragmatism's Roots*

To understand legal pragmatism, one must first have a basic grasp of its antithesis, formalism. Here, I provide a basic discussion of formalism and the legal realism and pragmatism it inspired.

Prior to the Enlightenment, law was generally thought transcendent through nature or the divine, and thus immanent, timeless, and unmalleable.⁶ But law was not immune from the paradigm shift brought on by the eighteenth-century Enlightenment, with its central tenant that truth in virtually all forms could be discovered via scientificity and reason.⁷ It is easy to take for granted the now uncontroversial notion that many cases pose indeterminate questions—i.e., we're "all legal realists now"—but getting to the point of such widespread resignation didn't come without a fight. The rough consensus not long ago was that quintessentially subjective constructs of the human mind such as morality were actually subject to deductive reasoning, and thus that the answers to difficult legal questions, such as the identification of "natural rights," could be gleaned with enough intellectual effort.⁸ Believing that progress meant throwing off the transcendental yoke, enlightenment philosophers sought to ground law, and the moral principles that inevitably animate it, in rationality; they believed that principles could be demonstrably established as foundational in law.⁹ Blackstone, for example, asserted that

⁶ See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 851–53 (1978); Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456 (1996).

⁷ See Grey, *supra* note 6, at 856–57; Sherry, *supra* note 6, at 456.

⁸ Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1336–37 (1988).

⁹ Hence Thomas Grey's definition of "foundationalism," a term that is used throughout this work, as "the age-old philosopher's dream that knowledge might be

"law is to be considered not only as [a] matter of practice, but also as a rational science."¹⁰

As Dan Farber notes, "[n]atural rights concepts permeated American thought in the revolutionary period."¹¹ So, for example, the Framers drafted the Free Speech Clause with natural rights foundationalism in mind—the notion that individuals, a priori, simply have the fundamental and inalienable rights to say what they want, worship as they wish, and so on.¹² This view prevailed well into the nineteenth century, an oft-noted manifestation of which is the tenure of Christopher Columbus Langdell as Dean of Harvard Law School, who popularized both the deductive caselaw method that characterizes modern legal education, and the general notion that law should be taught as a science. As Neil Duxbury explains, Langdell taught that "the task of the legal scientist is to classify . . . fundamental doctrines so as to demonstrate their logical interconnection."¹³ This conception of law is quintessential formalism. It is characterized by the belief that law consists of a closed system of principles and that the correct answers to tough legal questions can be distilled syllogistically from first principles and/or positive sources.¹⁴ Thus, according to Grant Gilmore, during the early twentieth century, when formalism was still somewhat in vogue, Justice Cardozo's "confession that judges were, on rare occasions, more than simple automata . . . was widely regarded as a legal version of hard-core pornography."¹⁵

As Brian Tamanaha explains, judges stuck to their formalist guns in the face of rapid economic and social change in the early twentieth century. But the "individualist laissez faire common law" that nineteenth-century and early twentieth-century formalism produced "seemed absurd

grounded in a set of fundamental and indubitable beliefs." Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 799 (1989). See also BRIAN Z. TAMANAH, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 3 (1997) (defining "anti-foundationalism" as "the notion that there are no ultimate foundations for knowledge, no absolute truths").

¹⁰ DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 20 (Univ. of Chi. Press 1996) (1941) (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2).

¹¹ Farber, *supra* note 8, at 1350. "To take just a few scattered examples, the most notable embodiment of the natural rights view is the Declaration of Independence itself. . . . Indeed, the existence of fundamental rights was implicit in the Federalist argument against the need for a Bill of Rights. No Bill of Rights was necessary, the Federalists contended, because the federal government had only limited powers. This argument makes no sense if each of the enumerated powers is considered to be free of any implicit limitation." *Id.* at 1350–51.

¹² See 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION* 1371–80 (1910).

¹³ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 15 (1995).

¹⁴ Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 275 (1989).

¹⁵ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 77 (1977).

when measured against the lives of most people” at the turn of the century.¹⁶ In a time when urbanization, the power of large corporations, and sympathy for collective action were on a rapid rise, many legal thinkers began to see law as not the product of scientific discovery but rather a battle between interest groups, one characterized by a “seemingly pervasive influence of economic interests” on government.¹⁷ Some heavy hitters began joining the call for a paradigm shift. Against formalism arose the legal realists in the early twentieth century, among the primary progenitors of which were Oliver Wendell Holmes and Roscoe Pound, Dean of Harvard Law School. Holmes inspired the legal realist movement with his famous article *The Path of the Law*,¹⁸ in which he asserted his belief that responsible adjudication required sensitivity to social needs rather than a fidelity to antecedent authority.¹⁹ Holmes chastised his jurist contemporaries for their failure to “recognize their duty of weighing considerations of social advantage.”²⁰ As a descriptive matter, Holmes labeled a “fallacy” “the notion that the only force at work in the development of the law is logic.”²¹ Rather, Holmes asserted that “if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would . . . see that really they were taking sides upon debatable and often burning questions” of policy.²²

Roscoe Pound contributed to the legal realist movement with his famous article *Mechanical Jurisprudence*, the following passage of which best characterizes the thrust of modern legal realism and its cousin, legal pragmatism:

Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

. . . .

We have to rid ourselves of this sort of legality and . . . attain a pragmatic, a sociological legal science.²³

¹⁶ BRIAN Z. TAMANAH, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 52 (2006).

¹⁷ Herman Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288, 289 (1971).

¹⁸ Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹⁹ *Id.* at 469.

²⁰ *Id.* at 467.

²¹ *Id.* at 465.

²² *Id.* at 468.

²³ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605, 609 (1908).

Pound, then, eschewed what he called a “jurisprudence of conceptions” in favor of “pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human condition[.]”²⁴

Unlike Pound, Holmes did not expressly call for a jurisprudence of “pragmatism”; Richard Posner notes that “Holmes would have shunned the pragmatist label and was by no means a consistent pragmatist.”²⁵ Nevertheless, it is clear that Holmes broke with his predecessors in expressly insisting that judges should consider the social consequences of their decisions in interpreting law and crafting law interstitially, and for this reason it is not unfair to label him an early proponent of pragmatism as a jurisprudential philosophy, even if an inconsistent one.²⁶

Indeed, the principles Holmes is most noted for advocating in *The Path of the Law* are those that most animate modern pragmatism. First was Holmes’ belief that much of law is indeterminate (“The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man.”²⁷). Second was Holmes’ positivism, which took the form of his insistence that judges distinguish morality from law (“[I]t is certain that many laws have been enforced in the past . . . which are condemned by the most enlightened opinion of the time . . . Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”²⁸). Third was Holmes’ belief that, as a corollary of the above, much of what then passed for logical deduction in judicial opinions were really the policy calculations of judges (“Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.”²⁹).

Holmes drew from these observations the lesson that became the ethos of modern legal pragmatism—a de-emphasis of fidelity to first principles and an increased sensitivity to social consequences as an adjudicative priority:

²⁴ *Id.* at 609, 611.

²⁵ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 28 (1990) [hereinafter *REPUTATION*].

²⁶ “There are significant pragmatist strands in Holmes’s thought . . . [b]ut it would be wrong to suppose that every aspect of his thought . . . is pragmatist. Holmes’s Social Darwinism [for example] is not . . .” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 242 (1990) [hereinafter *PROBLEMS*]. Nevertheless, Holmes “may be the founder and greatest exemplar of pragmatic jurisprudence.” *Id.* at 244.

²⁷ Holmes, *supra* note 18, at 465–66.

²⁸ *Id.* at 460.

²⁹ *Id.* at 466.

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics.³⁰

As the last line indicates, Holmes particularly looked to economics as the realm of social study most valuable in gleaning good ends; he later famously repeated “[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”³¹

B. *Legal Pragmatism Today*

Enter Richard Posner. Posner, currently a judge on the U.S. Seventh Circuit, is Holmes’ John Galt. He is the most devoted, recognized, and outspoken proponent of modern legal pragmatism.³² He is most certainly a man of statistics and a master of economics. Posner’s initial prominence came by way of his work in the law and economics realm, a field considered initiated by Ronald Coase³³ and Guido Calabresi³⁴ in the 1960s, but in which Posner is nevertheless considered a pioneer via his seminal *Economic Analysis of Law*, published in 1973.³⁵ The text is devoted to examining how law and economics’ first principles of “wealth maximization” and economic efficiency can be brought to bear on any legal problem, including those not generally thought amenable to cost/benefit analysis.³⁶ Posner even tackles issues of religious freedom³⁷ and sexuality³⁸ with his calculus. Posner no longer presses law and economics as a closed normative theory of adjudication because he recognizes that a fixation on a single set of narrow economic concerns in all types of cases—such as, say, child molestation cases—would obviously

³⁰ *Id.* at 474.

³¹ *Id.* at 469.

³² See Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)).

³³ See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³⁴ See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

³⁵ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973).

³⁶ *Id.* at 7, 325.

³⁷ See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

³⁸ See RICHARD A. POSNER, *OVERCOMING LAW* 21 (1995) [hereinafter *OVERCOMING LAW*] (1995) (“Economic analysis of law can help put better things in its place even when we are dealing with the most emotional, politicized, and taboo subjects that law regulates, such as sexuality.”).

be unfeasible.³⁹ However, Posner's economic concerns are subsumed into his pragmatism.⁴⁰

Posner's pragmatism has three primary features: (1) "a distrust of metaphysical entities ('reality,' 'truth,' 'nature,' etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics"; (2) "an insistence that propositions be tested by their consequences, by the difference they make"; and (3) "an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to 'objective,' 'impersonal' criteria."⁴¹ In his pragmatic ideal, Posner envisages a legal system in which the "sole goal of every legal doctrine and institution [is] a practical [rather than a moral] one."⁴² Under such a regime,

[t]he goal of a new bankruptcy statute, for example, might be to reduce the number of bankruptcies . . . and if the statute failed to fulfill [that goal] it would be repealed. Law really would be a method of social engineering, and its structures and designs would be susceptible of objective evaluation, much like the projects of civil engineers. This would be a triumph of pragmatism.⁴³

Posner's pragmatic premises about the proper aims of law and the general uselessness of moral pontification inspires a pragmatism that rejects judicial humility and consistency with the past (precedent, original intent, etc.) for their own sake, and instead focuses on material social ends. Thus, to Posner, even when judges do in good faith fixate on antecedent authority out of a felt duty to align with the past, they

³⁹ See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 77–78 (2003) [hereinafter LPD] ("[It would be unpragmatic to] attempt to deduce from utilitarianism . . . or some other comprehensive normative theory a duty of judges and legislators to make law conform to the teachings of economics or some other social science. It has been many years since I flirted with such an approach." (citing Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979)); Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1242 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)) ("Posner concedes that until very difficult questions about social practices are answered, 'we should be cautious in pushing wealth maximization; incrementalism should be our watchword.'").

⁴⁰ See Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 685 (2004) [hereinafter Posner, *Legal Pragmatism Defended*] ("[Richard Epstein is mistaken] in thinking that I want to replace economic analysis of tort law with pragmatic analysis of tort law. . . . I continue to believe that deciding common law cases in a way that will promote economic efficiency is the right way for judges to go"); cf. Levinson, *supra* note 39, at 1242 ("[Posner] continues to think well of wealth-maximization as an overall social principle.").

⁴¹ Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1660–61 (1990) [hereinafter Posner, *Offer?*].

⁴² PROBLEMS, *supra* note 26, at 122.

⁴³ *Id.*

unnecessarily sacrifice prospective social benefits at the altar of their fidelity fetish.

Posner is most candid when he offers less essentialist definitions of his pragmatism: “there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered.”⁴⁴ As such, Posner terms his pragmatism an “attitude” and “orientation” that simply rejects the “concept of law as grounded in permanent principles and realized in logical manipulations of those principles,” and he urges the use of adjudication “as an instrument for social ends.”⁴⁵ Given the generality of his directive, Posner’s pragmatism “clears the underbrush; it does not plant the forest.”⁴⁶

The underbrush that Posner seeks to torch is the “idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact.”⁴⁷ Such is Posner’s summation of the contemporary formalism he rails against. Formalism contemplates law as “determined by principles immanent within the law as well as by rules,” rather than shaped by human experience, changing social needs and policy judgments of judges.⁴⁸ According to Posner, formalism exists to “respond[] to the legal profession’s deeply felt need to represent judicial decisions as the product of an objective process of distinctively legal reasoning.”⁴⁹

Unsurprisingly, central to Posner’s pragmatism is his rejection of moral philosophy as a useful expositor of legal truth, and Kantian

⁴⁴ LPD, *supra* note 39, at 64.

⁴⁵ Posner, *Offer?*, *supra* note 41, at 1670. Others have offered their own definitions. For example, Dan Farber defines pragmatism as “essentially mean[ing] solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—[pragmatism] renounces the entire project of providing a theoretical foundation for constitutional law.” Farber, *supra* note 8, at 1332. Susan Haack recites over twenty different contemporary definitions of “pragmatism,” and notes that despite the alleged “renaissance of pragmatism going on among legal scholars” one is “likely to find [oneself] more than a little confused about just what this apparent renaissance is a renaissance of.” Susan Haack, *On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?*, 50 AM. J. JURIS. 71, 71–74 (2005).

⁴⁶ Posner, *Offer?*, *supra* note 41, at 1670.

⁴⁷ *Id.* at 1663.

⁴⁸ LPD, *supra* note 39, at 19. See also PROBLEMS, *supra* note 26, at 40–41 (“Formalism comes in both natural law and legal positivist varieties. The only prerequisite to being a formalist is having supreme confidence in one’s premises and in one’s methods of deriving conclusions from them. The natural law formalist is certain about the principles of justice and the power of logic to derive specific case outcomes from those premises; the positive law formalist is certain that the law consists only of legislative or other official commands that, read carefully, yield demonstrably correct results in all cases.”).

⁴⁹ LPD, *supra* note 39, at 19.

verbiage in caselaw (“fundamental rights,” “personhood,” “human dignity”) as no more than “goody-goody”⁵⁰ devices of formalist rhetoric:

The problem with words like “fairness” and “equality” is that they have no definite meaning. They are words to conjure with rather than to facilitate analysis or decisionmaking; in this they resemble a lot of other pious words and phrases encountered in law talk, such as “no man is above the law”⁵¹

Thus, Posner is impatient with legal dogma that tends toward moral foundationalism or essentialism.⁵² Taking to heart Holmes’ famous quip that the life of the law is not logic but rather experience,⁵³ and Justice Cardozo’s assertion that “[t]he final cause of law is the welfare of society,”⁵⁴ Posner emphasizes greater focus on “practical reason” and social empiricism and less on “pious” moral or political abstraction. The “core of pragmatic adjudication” is “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”⁵⁵

C. *Philosophical Pragmatism Versus Legal Pragmatism: A Crucial Distinction*

The above is a summary of legal pragmatism, with a focus on Posner’s articulation. Importantly, it is not a summary of *philosophical* pragmatism. A very brief discussion of philosophical pragmatism is necessary to make clear why the distinction is important. Considered primarily an American pursuit, philosophical pragmatism is generally traced back to the late nineteenth century; Charles Sanders Peirce, John

⁵⁰ *Id.* at 55. See also Posner, *Legal Pragmatism Defended*, *supra* note 40, at 684 (“Legal pragmatism is merely hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.”); PROBLEMATICS, *supra* note 2, at 3.

⁵¹ LPD, *supra* note 39, at 66–67. In contrast to the vague and metaphysical abstractions like “dignity,” “justice,” and “rights” that characterize formalist rhetoric, consider this defense of pragmatism by Dan Farber, a fellow pragmatist: “[T]he pragmatist seeks to promote an evolving picture of human flourishing. . . . For the pragmatist, then, the question of the advisability of judicial review turns on its usefulness for promoting a flourishing democratic society—democratic not just in the sense of ballot casting but also in the sense that citizens are in charge of the intelligent development of their lives.” Farber, *supra* note 8, at 1347–48.

⁵² Thus, “[t]he rejection of formalism follows (more or less) from the rejection of foundationalism; one would apply formalist deduction to move from the overarching principle to the discrete outcome, by way of a syllogism.” Cotter, *supra* note 4, at 2085.

⁵³ “[Holmes’] famous dictum ‘The life of the law has not been logic: it has been experience’ could be the slogan of legal pragmatism” LPD, *supra* note 39, at 57 (internal footnotes omitted).

⁵⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).

⁵⁵ LPD, *supra* note 39, at 85 (internal quotation marks omitted).

Dewey, and William James⁵⁶ are usually considered its primary progenitors.⁵⁷ This early—now termed, “classical”—pragmatism was most characterized by its insistence on conceptualizing “meaning” in terms of the practical consequences of a concept’s application in the everyday world.⁵⁸ According to classical pragmatists, the worthiness of a philosophical proposition was best gauged not by its correspondence to abstract and eternal “truth,” but rather its ability to produce satisfying results in people’s lives.⁵⁹ “For Dewey, intelligence and values were matters of adaptation to human needs and social circumstances that arise from the particular situations of daily life.”⁶⁰ Thus, as Michael Sullivan and Daniel J. Solove explain, John Dewey criticized his academic contemporaries for creating “pseudoproblems”; that is, “taking problems from general experience and converting them into philosophical puzzles with a life of their own, disconnected from their origins in experience.”⁶¹ As Susan Haack explains, through contemporary pragmatists like Richard Rorty, pragmatism grew into the anti-foundationalism and contextualism that characterizes the current species.⁶² Pragmatism’s more recent proponents are generally said to be personalities such as Rorty,⁶³ Haack, and Hilary Putnam.⁶⁴

The current (and generally healthy) interdisciplinary approach to legal scholarship has produced several decades of work by legal scholars who seemingly advocate, or at least contemplate, legal pragmatism as simply philosophical pragmatism superimposed over legal issues.⁶⁵ But

⁵⁶ See WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 53 (1907) (“Pragmatism unstiffens all our theories, limbers them up and sets each one at work.”).

⁵⁷ See Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner’s and Rorty’s Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 99–100 (1996).

⁵⁸ See Haack, *supra* note 45, at 75.

⁵⁹ See Cotter, *supra* note 4, at 2091.

⁶⁰ Jeff Kelley, *Introduction* to ALLAN KAPROW, ESSAYS ON THE BLURRING OF ART AND LIFE, at xi, xi–xii (Jeff Kelley ed., 2003) (internal quotation marks omitted).

⁶¹ Sullivan & Solove, *supra* note 32, at 698.

⁶² Haack, *supra* note 45, at 75.

⁶³ See, e.g., RICHARD RORTY, CONSEQUENCES OF PRAGMATISM, at xiii (1982) (discussing the “consequences” of “a pragmatist theory about truth”).

⁶⁴ Cf. Urszula M. Zeglen, *Introduction* to HILARY PUTNAM: PRAGMATISM AND REALISM 3, 3 (James Conant & Urszula M. Zeglen eds., 2002) (“While Hilary Putnam does not identify himself as a pragmatist, pragmatism is an important theme in his recent work.”).

⁶⁵ Many “legal pragmatists naturally describe their jurisprudence as simply the application within law of a generally pragmatist approach to inquiry.” Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 22 (1996). See also Cotter, *supra* note 4, at 2074 (“[T]he majority of legal scholars who identify themselves as pragmatists share a distinct philosophical perspective, derived largely from the writings of the original American pragmatists (principally Peirce, James, and Dewey), modern-day neopragmatists such as Richard Rorty and Richard Bernstein, and

judges—rightly or wrongly—generally find the intellectual explorations of academic philosophers to be little more than navel-gazing, and thus find philosophy to be of little use to the effective and timely dispatch of their work.⁶⁶ Resultantly, some scholars, among them Posner, insist on contemplating legal pragmatism as independent of philosophical pragmatism.⁶⁷ As Thomas Grey puts it, legal pragmatism is best viewed as “freestanding” from its philosophical ancestor because “legal theory is necessarily practical in a way philosophy is not. . . . [I]f we look at the concerns of pragmatist legal theorists, we can see that these are quite different from those of pragmatist philosophers.”⁶⁸ Rorty agrees, stating “judges will probably not find pragmatist philosophers—either old or new—useful.”⁶⁹

Thus, the relationship between philosophical and legal pragmatism is ancestral but at once more tenuous than one (including some legal scholars) might assume: rather than providing a detailed blueprint for legal pragmatism, philosophical pragmatism, primarily via its anti-foundationalism, clears the lot of impediments such as the perceived need for consistency between conclusions of substantive justice and an overarching legal theory. Legal pragmatism is left free from “theory-guilt”⁷⁰ to build afresh a “pragmatic” dwelling hospitable to the inevitable

modern Continental philosophers in the tradition of Heidegger, Gadamer, and Habermas.”).

⁶⁶ See Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES, at ix, xvii (Richard A. Posner ed., 1992).

⁶⁷ For example, Posner asks rhetorically, “What are philosophers good for?” and criticizes philosophical pragmatism’s current torchbearer, Richard Rorty, noting that although Rorty’s work is “impressive,” “grave weakness[es]” thereof are “a deficient sense of fact” and a “belief in the plasticity of human nature. [They are] weakness[es] that call[] into question the capacity of modern philosophy to contribute to the solution of concrete problems of law and of public policy generally.” OVERCOMING LAW, *supra* note 38, at 444.

⁶⁸ Grey, *supra* note 65, at 37.

⁶⁹ Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1815 (1990). See also Larry Alexander & Emily Sherwin, *Law and Philosophy at Odds*, in ON PHILOSOPHY IN AMERICAN LAW 241, 241 (Francis J. Mootz, III ed., 2009) (“Philosophy is fine for observers of law but not necessarily good for its participants.”); Rosenfeld, *supra* note 57, at 104 (“[L]aw is a practical endeavor that must aim for workable solutions that make a real difference in the empirical world. Accordingly, there ought to be a clear division of labor between philosophy and law.”). For an example of the kind of attitude that inspires assertions like these, see Brian Leiter, in LEGAL PHILOSOPHY: 5 QUESTIONS 143, 146 (Morten Ebbe Juul Nielsen ed., 2007) (“Most philosophical inquiry aims at truth and understanding, not effect on practice, and it is not obvious why legal philosophy should be any different. . . . If legal philosophy, alone among the branches of philosophy, is supposed to affect the practice about which it philosophizes, then a special reason will need to be supplied.”).

⁷⁰ Thomas C. Grey, *What Good is Legal Pragmatism?*, in PRAGMATISM IN LAW AND SOCIETY 9, 10 (Michael Brint & William Weaver eds., 1991).

interlopers of practicality, empathy, empirical reality, moral intuition, and common-sense.

Posner's pragmatism is one such edifice; it, not philosophical pragmatism, is the focus of this Article. I thus seek not to introduce an esoteric twist heretofore unexamined by philosophers, and perhaps interesting only to them. Rather, taking to heart Dewey's counsel that a legal philosophy "can be discussed only in terms of the social conditions in which it arises and of what it *concretely* does there,"⁷¹ I try to distill from Posner's pragmatism some concrete implications, which in turn can help evaluate whether it is what it purports to be: a practically distinct and superior adjudicatory alternative to formalism. In doing so, I will use the term "pragmatism" to refer to the legal pragmatism that, like Posner's (and, at times, the pragmatism of others, such as Dan Farber) is merely inspired by the general anti-foundationalism of philosophical pragmatism, rather than the less "freestanding" work of philosophical pragmatists in the legal academy.⁷²

So, to return, Posner makes clear what he believes to be the theoretical distinctions between formalism and pragmatism, but what is less clear is the degree to which he, in attacking "formalism," is really attacking the pretenses of traditionally formalistic judicial rhetoric, as opposed to attacking actual methodologies that some judges attempt in good faith to apply. Posner seems to admit this lack of clarity when he states that his anti-formalism "equivocate[s] between saying that formalism produces bad cases and saying that it is a fake, a disguise for political decisionmaking."⁷³ This in fact is one of the first analytical issues to arise when critically examining what Posner, in his prolific efforts on pragmatism, is actually saying, and the problem foreshadows pragmatism's failure as a useful prescription.

On the one hand, "[p]ragmatism applied to law at most takes 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."⁷⁴ Thus, Posner states, "I think that judicial opinions should be more candid than they typically are about the pragmatic factors that determine the outcome[s] of the most difficult and the most important judicial decisions."⁷⁵ On the other

⁷¹ John Dewey, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 73, 77 (Julius Rosenthal Found., Nw. Univ. 1941) (emphasis added).

⁷² See, e.g., Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

⁷³ LPD, *supra* note 39, at 19.

⁷⁴ *Id.* at 46.

⁷⁵ *Id.* at 55. While Posner is presumably sincere in calling for greater honesty in opinions, compare his calls with his belief that pragmatism sometimes requires less than total honesty. See, e.g., *id.* at 343 (Posner unapologetically noting that he sometimes joins opinions with which he does not actually agree for purposes of interpersonal pragmatism with other judges on his circuit); *id.* at 343–46 (noting that

hand, Posner clearly believes that judges actually approach the law with a fidelity (or, at least, what the respective judges *believe*, in their unselfconsciousness, to be fidelity) to neutral principles. He warns that “judges can get into trouble by taking goody-goody slogans, such as ‘no man is above the law’ . . . at face value.”⁷⁶ Where the pragmatist is likely to differ from a formalist “is in believing that there should probably be *some* escape hatch from virtually any rule curtailing judicial discretion.”⁷⁷ And he chides the “influential modern attempts to derive legal outcomes by methods superficially akin to deduction.”⁷⁸ Thus, Posner also complains of a genuine effort by some judges to cabin both their problem-solving creativity, and the breadth of the sources they consult, for the sake of judicial restraint.

Here, we see that describing the distinction between formalism and pragmatism the way Posner does makes sense so long as one doesn’t ponder the alleged distinctions for very long. So, does Posner’s pragmatism represent a wholesale reshuffling of adjudicatory priorities to consequences and satisfaction of concrete social needs, as it claims to? For reasons explained next, the answer is “not in any meaningful sense.”

III. PRAGMATISM’S PRESCRIPTIVE MIRAGE

The primary conceptual problem Posner’s pragmatism suffers is that, when described in fundamental terms, it fails to qualitatively distinguish itself from the methods that are its alleged antitheses. While this problem has not gone unnoticed,⁷⁹ it has received surprisingly little attention in those works otherwise critical of Posner’s ideas. The problem remains, it is becoming increasingly conspicuous, and there are no signs that pragmatists have a convincing solution. The huge conceptual hurdle in the path of Posner’s pragmatism is this: the rule utilitarianism that

the Court, in *Bush v. Gore*, damaged its own prestige via its weak equal protection ruling, and that the more pragmatic approach would have been a judgment in favor of Bush on Article II grounds—granting state legislatures the power to decide how a state’s presidential electors are to be chosen—in part because “[t]he Article II ground, being esoteric, would not have provided a handle for criticisms that the general public could understand”). See also Martha Minow, *Religion and the Burden of Proof: Posner’s Economics and Pragmatism in Metzl v. Leininger*, 120 HARV. L. REV. 1175, 1185 (2007) (“For those who value judicial candor, [Judge Posner’s opinion in] *Metzl* is perplexing. Judge Posner’s opinion remains mum both about what ultimately would count as a secular rationale and about the benefits of ducking that question. Of course, if Judge Posner thinks, prudentially, the federal courts should let debate over the Good Friday school holiday simmer as communities permit local accommodations, silence about his reasons comports with his prudence. Candor while sidestepping a hot issue can be self-defeating.” (footnotes omitted)).

⁷⁶ LPD, *supra* note 39, at 55.

⁷⁷ *Id.* at 70.

⁷⁸ Posner, *Offer?*, *supra* note 41, at 1664.

⁷⁹ See, e.g., Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 424 (1990).

pragmatism subsumes, when consulted purely for the practical consequences it may nurture, demonstrates why formalism is best characterized as a type of pragmatism.

A. *Rule Utilitarianism: A Pragmatic Anti-Pragmatism*

Distilled from pragmatists' various iterations of "formalism" and its alleged weaknesses, the term simply means a relatively rule-centric jurisprudence, if by "rules" we mean generally mechanisms meant to discipline adjudication by grounding its products in antecedent "authority" (stare decisis, textualism, and, to a lesser extent, pre-ordained political morals such as natural rights that, in theory, "control" case outcomes). Here's Frederick Schauer's definition of formalism:

At the heart of the word "formalism," in many of its numerous uses, lies the concept of decisionmaking according to *rule*. Formalism is the way in which rules achieve their "ruleness" precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.⁸⁰

Thus, at heart, pragmatism complains that formalism excessively fixates on rules and lacks the peripheral vision to recognize when rules should give way to social exigency. Pragmatism does not reject outright the value of strict adherence to rules in discrete circumstances; that is, where such strict adherence serves pragmatic purposes. After all, the cardinal sin for a pragmatist is not adherence to rules but adherence for its own sake. A pragmatic adherence to rules is best labeled "rule utilitarianism," which for purposes of pragmatism means case-specific formalism for the sake of big-picture pragmatism, such as maintaining predictability in law or the perceived institutional integrity of the judiciary. "If enough stress is laid on the systemic consequences of adjudication, legal pragmatism merges into legal formalism."⁸¹ Here's Posner's elaboration:

[R]ules truncate inquiry and, specifically, curtail judicial consideration of consequences. . . . Is decision according to rule therefore unpragmatic? No, because the loss from ignoring consequences in the particular case must be balanced against the gain from simplifying inquiry, minimizing judicial discretion, increasing the transparency of law, and making legal obligation more definite.⁸²

Thus, Posner directs that although the purpose of rules is to "truncate inquiry" and "curtail judicial *consideration* of consequences," judges should consider the consequences of not considering consequences before deciding whether or not to consider consequences.

⁸⁰ Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

⁸¹ LPD, *supra* note 39, at 64.

⁸² *Id.* at 69.

Highlighting this oddness is not merely tendentious nit-picking. It highlights a fundamental feature of pragmatism—it doesn't really contemplate anything as an actual rule at all. As Stanley Fish puts it, rules according to Posner, "rather than constraining judges, . . . offer judges the opportunity to engage in temperamentally preferred activities by allowing them either to confine or expand the judicial gaze."⁸³

Further, Posner fails to provide any meaningful guidance to judges in determining whether to follow rules:

There is no algorithm for striking the right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard. In fact, there isn't too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered. . . . "All things" include not only the decision's specific consequences . . . but also the standard legal materials and the desirability of preserving rule-of-law values.⁸⁴

The point is, pragmatism views rules not as truly restraining forces but rather kernels of wisdom to be invoked when doing so helps manifest desired ends. Thus, "[p]ragmatic decisionmaking will inevitably be based to a disquieting extent on hunches and subjective preferences"⁸⁵

So excessive adherence to rules to the exclusion of practical consequences is the best practical definition of the formalism pragmatism rails against. Implicit is that there is a point on the rule-utilitarianism continuum at which an adjudicatory approach becomes excessively rule-bound. It is worth asking, then, at what point on that continuum does increasing rule-adherence merge into formalism? Posner, as he must, essentially replies "who knows?" But he also would likely reply "who cares?" That is, pragmatism does not become formalism merely because it employs formalistic reasoning in some circumstances; rather, the retention of formalism in the pragmatist's toolbox alongside other tools is a quintessential example of how pragmatism remains agile and theoretically uncommitted—sensitive to the lesson that "to everything, there is a season." So long as a judge employs formalist devices only for pragmatic purposes, the directive of pragmatism is satisfied.

At this point it might appear that there is indeed a qualitative distinction between "formalist" judging and pragmatic judging: while pragmatism remains open to exploiting formalist devices, to the formalist judge, in her obsessive fidelity to rules, such devices are the be-all and end-all of proper adjudication. To the pragmatist, however, at least her

⁸³ Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1450 (1990) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

⁸⁴ LPD, *supra* note 39, at 64.

⁸⁵ *Id.* at 126.

formalism, being consequentialist, is in the ultimate service of pragmatism. How tenable is this proposition? And if it's not accurate, what are the implications for pragmatism? If pragmatism, especially Posner's, is to retain its down-to-earth, "practical," and brass-tacks bona fides, it has to be, in a readily accessible and concrete sense, discernible from other adjudicatory approaches that allegedly over-prioritize rule-adherence.

B. The Curse of Banality

Being the biggest kid on the block yields no advantage when you're the *only* kid on the block. When pragmatists like Thomas Grey claim that pragmatism is "the implicit working theory of most good lawyers,"⁸⁶ when pragmatist Richard Rorty terms legal pragmatism "banal,"⁸⁷ and when Posner claims that "pragmatism is the best description of the American judicial ethos" and is thus a "positive theory of the judicial role,"⁸⁸ they prove too much. Pragmatism cannot stand victorious over anything else because it descriptively includes all of its alleged rivals.

As discussed above, pure formalism certainly has a place in a reliable narrative of the intellectual history of American law; it describes the mostly *academic* nineteenth-century conception of law as a science. But the history of actual judging in America has been different. Posner indeed recognizes this: "Although professional discourse has always been predominantly formalist, most American judges have been practicing pragmatists, in part because the materials for decision in American law have always been so various and conflicting that formalism was an unworkable ideal."⁸⁹ But, as the example of Justice Scalia implies, formalism in some sense of the term *has* played a major role in American jurisprudence; not in the pure Langdellian form, but rather as forms of pragmatism under a different name—i.e., as methods situated higher up the rule-utilitarianism continuum due to the belief that rule-centric adjudication yields the best consequences.

To this point, it is ironic that Posner criticizes Justice Scalia's originalism so often, as he is arguably a great example of how contemporary formalism merges into a kind of pragmatism that is qualitatively indistinguishable from Posner's pragmatism when the latter is described in essential terms. Justice Scalia has described himself as a "faint-hearted" originalist;⁹⁰ why? He explains that it might sometimes yield unacceptable results, such as compelling the upholding of flogging

⁸⁶ Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990).

⁸⁷ Rorty, *supra* note 69, at 1811.

⁸⁸ LPD, *supra* note 39, at 1.

⁸⁹ Posner, *Offer?*, *supra* note 41, at 1666.

⁹⁰ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

as constitutionally acceptable punishment.⁹¹ As Cass Sunstein has explained, this reflects Justice Scalia's "unwillingness to use the original understanding as a kind of all-purpose weapon against existing law and practices"⁹² because of the results such a staunch originalism would yield. Thomas Grey has described Justice Scalia's originalism as "distinctly instrumental and functionalist," has described Justice Scalia as being "closer to early twentieth-century pragmatic functionalists like Holmes, Pound, and Cardozo, than to the exponents of nineteenth century formalism,"⁹³ and, most deliciously, has concluded that Justice Scalia's originalism "resembles the approach of Richard Posner."⁹⁴

As another example, consider Chief Justice John Marshall. Posner devotes a section of his book *Law, Pragmatism & Democracy* to the pragmatism of Marshall.⁹⁵ Posner claims that much of the literature on Marshall has neglected his pragmatism.⁹⁶ Interestingly, however, while Posner relies on R. Kent Newmyer's biography of John Marshall⁹⁷ to

⁹¹ *Id.*

⁹² Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 390 (2006).

⁹³ Thomas C. Grey, *The New Formalism* 4 (Stanford Pub. Law and Legal Theory Working Paper Series, Paper No. 4, 1999), available at http://papers.ssrn.com/paper.taf?abstract_id=200732.

⁹⁴ *Id.* at 28. See also Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 644 (1999) ("Some of these pragmatic and empirical points appear, for example, in Justice Scalia's argument on behalf of the original meaning of legal texts."). Interestingly, while originalism is one of Posner's favorite targets, he characterizes judges' attempts to determine the legislative intent behind statutes as pragmatic: "The pragmatic judge is unwilling to throw up his hands and say 'sorry, no law to apply' when confronted with outrageous conduct that the Constitution's framers neglected to foresee and make specific provisions for. Oddly, this basic principle of pragmatic judging has received at least limited recognition by even the most orthodox judges in the case of statutes. It is accepted that if reading a statute the way it is written would produce absurd results, the judges may in effect rewrite it." Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 12–13 (1996) [hereinafter Posner, *Pragmatic Adjudication*]. How is it that when judges dismiss a statute's literal meaning based on an attempt to remain faithful to legislative intent—which is what Posner means in writing that judges "rewrite" the statute—they are acting pragmatically, but when judges attempt to discern the intent behind vague constitutional provisions, or perhaps the original "public meaning" of those provisions (when dealing with a specific scenario the framers did not contemplate), such is excessive formalism? Compare Posner's assertion with Ofer Raban, *Real and Imagined Threats to the Rule of Law: On Brian Tamanaha's Law as a Means to an End*, 15 VA. J. SOC. POL'Y & L. 478, 494–95 (2008) ("[P]rivileging 'legislative intent' over clear textual dictates has been shown to be common judicial practice at least as far back as the Fourteenth Century—that is, when the non-instrumental conception of law stood unchallenged.").

⁹⁵ See LPD, *supra* note 39, at 85–93.

⁹⁶ *Id.* at 86.

⁹⁷ R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001).

describe Marshall as “an exemplar of judicial pragmatism,”⁹⁸ Posner seems to have overlooked those segments of Newmyer’s work that emphasize Marshall’s genuine belief in natural rights to which he held steadfast, often in the face of social change that called for greater flexibility from the Chief Justice. Specifically, Newmyer devotes an entire chapter of his book to discussing how Marshall’s “Lockean liberalism” drove his Contract Clause decisions.⁹⁹ Of course, Lockean natural rights theory is a large pool of “goody-goody” “metaphysicalities” that formalists often tap. Newmyer notes that Marshall “[c]learly in his Contract Clause decisions . . . believed passionately in the Lockean doctrine of possessive individualism rooted in contract.”¹⁰⁰ Thus, although Marshall was not a rigid and consistent formalist by any means, Newmyer notes:

Sometimes people, including judges, actually believe what they say. . . .

. . . When Marshall applied traditional common-law reasoning to settle the matter [the case of *Dartmouth College v. Woodward*¹⁰¹], he was not aiming to disguise the doctrinal constitutional innovations he was about to make but instead was doing what he had done since he began the practice of law in the 1780s and what every other American lawyer of the age regularly did: reasoning by common-law analogy and using common-law definitions and principles to interpret the words of the Constitution.¹⁰²

Marshall “believed, as did others of his age, in *the science of law*.”¹⁰³ Thus, in dissenting in *Ogden v. Saunders*, “Marshall countered the legal positivism and moral relativism of his brethren with an unadulterated dose of moral truth from the heart—and from John Locke’s *Second Treatise*.”¹⁰⁴

So which is it? Was Marshall a pragmatist or formalist?:

[Marshall] was . . . concerned with practical results *and* principled law, just as he looked optimistically to the future without taking his mind off the past. He would also have been mystified by the tendency of some recent scholars to separate liberal capitalism and republican morality. He saw no disjunction between the two. In his mind, republicanism in law boils down to principled adjudication, which was what capitalists needed.¹⁰⁵

⁹⁸ LPD, *supra* note 39, at 13.

⁹⁹ NEWMYER, *supra* note 97, at 210.

¹⁰⁰ *Id.* at 222.

¹⁰¹ Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

¹⁰² NEWMYER, *supra* note 97, at 249–50.

¹⁰³ *Id.* at 209 (emphasis added).

¹⁰⁴ *Id.* at 262.

¹⁰⁵ *Id.* at 253.

In other words, Marshall was *both*: the natural law abstraction that heavily influenced his jurisprudence was, in his view, worth heeding because “republican morality” and social progress went hand in hand.¹⁰⁶

One subscribing to Posner’s views might be tempted to argue that Marshall is merely a good example of how pragmatic judging is sometimes—when practical consequences so counsel—formalistic judging, as pragmatism by definition does not dispense of any tool lest it become useful in some future circumstance. But in order to believe this, we first need a reason to believe there can realistically be a coherent, practical, and unsophistic difference between Marshall’s formalism and the formalism Posner attacks. Can it be said with a straight face that, even at the apex of legal formalism in the nineteenth century, judges willed themselves utterly blind to the consequences of their decisions? Is it fair to characterize early nineteenth-century Supreme Court justices as so unsophisticated that they actually thought they were truly *bound* to adhere to, say, the literal meaning of statutory text regardless of the absurdity of the results that might ensue (“bound” in the literal sense that they believed they truly lacked the discretion to even adopt a jurisprudential approach that counseled in favor of heeding the given authority)?

Formalist recipes generally come from the kitchen of political theory, and a heaping concern for the systemic consequences of adjudication is their primary ingredient. Judges in American history who have adopted formalism have likely done so because such an approach was thought institutionally necessary if courts are to play their role properly in a sometimes precarious constitutional experiment. It is likely that these judges believed that principle-centrism was necessary to further the “rule of law,” such as preserving the integrity of the courts, the role of which must be self-consciously measured should the ideal balance between the branches of government find, and hold steady on, its fulcrum.

For example, a judge who adheres strictly to statutory text likely does so because (among other reasons) to read into the text unwritten nuances and exceptions is to help Congress abdicate its responsibility to

¹⁰⁶ A reverence for allegedly “pragmatic” judges in American history, qualified by repeated surprise at the given judges’ formalistic approaches in specific cases, is a common feature of Posner’s writing. Although he fails to mention Marshall’s formalist leanings in specific contexts, he does mention Justice Jackson’s, another allegedly distinctly pragmatic judge. See PROBLEMS, *supra* note 26, at 146–47 (“The fact that Justice Jackson dissented in *Ray [v. Blair]*, in which the Supreme Court wisely disregarded what Posner claims was “unquestionably” the intention of the Framers] is a bit of a surprise, since he had been the author . . . of one of the greatest pragmatic opinions in the history of the Supreme Court [in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)]”). Justice Jackson surprises us once again in his dissent in *Korematsu*. See LPD, *supra* note 39, at 293 (Posner describing Justice Jackson’s dissent as “surprising” given that he was “one of the greatest pragmatic Justices”).

draft clear laws. Or he might believe that to strictly interpret text fosters a public image of the courts as restrained and deferential to the elected branches, a legitimate goal given the current popularity of bumper-sticker jurisprudence like “strict constructionism” and misinformed populist charges of “judicial activism.” Indeed, Posner, in lamenting what he sees as “renewed interest” in formalism recently, notes that such is the result of a “bout of conspicuous judicial activism that lasted several decades” and that it embraces “continuity with the past” rather than “social engineering of the future.”¹⁰⁷ Hence the textualism of Judge Frank Easterbrook: “[F]or the textualist a theory of political legitimacy comes first The fundamental theory of political legitimacy in the United States is contractarian,” and without textualism, “a pack of lawyers is changing the terms of the deal, renegeing on behalf of a society that did not appoint them for that purpose.”¹⁰⁸

There can hardly be stronger evidence of the pragmatic pedigree of formalist fidelity than the manner in which Dan Farber, a self-avowed pragmatist, takes issue with Posner’s de-emphasis of respect for the past.¹⁰⁹ According to Farber, Posner “goes too far in rejecting respect for the past . . . as an independent factor in decision.”¹¹⁰ Because constitutional law is “an important part of our national identity and culture,” Farber writes, the Court must demonstrate via adjudication that it is “carrying forward the project of American constitutionalism begun by the Framers.”¹¹¹ When pragmatists begin invoking goals such as “national identity” and the “carrying forward” of the “project of American constitutionalism,” the gap between the “concrete” and “practical” aims of pragmatism, and the “law day” rhetoric of formalism, becomes hair thin at best. That a vanguard pragmatist views such concerns as crucial to a jurisprudence sensitive to social and political

¹⁰⁷ Posner, *Offer?*, *supra* note 41, at 1666–67; *See also* REPUTATION, *supra* note 25, at 21 (“The formalist movement against which Cardozo was writing never died; it just went into a hibernation from which it has now awakened, making Cardozo’s strictures against formalism (the judge as a calculating machine) as timely as ever.”) (footnotes omitted). Ironically, however, Posner in other instances discounts the concern about perceived legitimacy by the masses. *See* PROBLEMS, *supra* note 26, at 234 (“[A]s far as anyone knows, it is just a lawyers’ fancy that public respect for courts is a significant influence on the extent to which a society is law-abiding. Most people are uninformed and incurious about courts Compliance with law is more a matter of incentives than of deference or respect.”). Clearly, however, it is not only lawyers who notice the allegedly “conspicuous judicial activism;” see the popular “Impeach Earl Warren” signs of the 1950s and 60s.

¹⁰⁸ Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119, 1121 (1998).

¹⁰⁹ Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 686 (1999) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)).

¹¹⁰ *Id.* at 686.

¹¹¹ *Id.*

needs is the best evidence of how the political theory that inspires most species of formalism is perfectly compatible with the tenets of Posner's pragmatism.

Political scientist Stanley Fish provides one of the best formulations of a political-theory defense of formalism as pragmatism. After describing the assumed goal of law at the heart of Posner's pragmatism, Fish offers his own goal:

At issue here is the nature of the desire to which law is a response. . . . Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures. . . .

. . . .

. . . As Posner correctly observes, "most judges believe, without evidence . . . that the judiciary's effectiveness depends on a belief by the public that judges are finders rather than makers of law." [Posner's] implication is that [this belief] would be better founded if independent evidence of it could be cited; but this particular belief is itself founding, and comprises a kind of contract between the legal institution and the public, each believing in the other's belief about itself and thus creating a world in which expectations and a sense of mutual responsibility confirm one another without any external support.¹¹²

In this sense, one sees that to be a contemporary formalist is not to deny legal realism's descriptive force; it's not to indulge in the mythology of law as an actual science. Indeed, it could be argued that the descriptive force of realism—that our law has historically been greatly influenced by the proclivities and policy judgments of the judges pronouncing it—is a powerful impetus to formalism. Hence Cass Sunstein's assertion that contemporary formalism is "an intriguing blend of realist and formalist arguments. It amounts to an embrace of formalism *because of the good effects that formalism has*."¹¹³ According to Sunstein, today at least, the conceptualistic delivery of formalist arguments, such as claims about "legitimacy," are "really consequentialist claims about what system of interpretation is likely to have good effects" on democratic government.¹¹⁴ Given that the most powerful defenses of modern formalism are that formalism tends to check the vast judicial discretion that legal realism illuminated, "a good defender of formalism . . . had better be a legal realist too."¹¹⁵

¹¹² Fish, *supra* note 83, at 1462–63 (internal citations omitted).

¹¹³ Sunstein, *supra* note 94, at 644 (footnotes omitted).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 641. Again, a good contemporary formalist most prepared to defend normative formalism is a descriptive realist—that is, she appreciates the indeterminacy of certain legal questions, recognizes the epistemic limitations that

So it is difficult to avoid the conclusion that all specimens of “formalism” are really results-oriented at heart, as faithful subscription to the straw-man Langdellian formalism¹¹⁶ that pragmatists invoke seems utterly unrealistic if we are to believe that judges are minimally cognizant of the power they wield via judicial review and life tenure. Formalist judges simply believe that strict adherence to various adjudicatory canons and mores is the most “reasonable” way of doing their jobs. If a judge believes that the most reasonable approach to deciding cases is to pay fidelity to past or principle—because the most reasonable thing to do is to act in a manner that respects the theoretical limitations of “judicial power”—a reasonableness approach it is nonetheless.

This argument is not lost on Posner. It is thus more frustrating that Posner, in his prolific defense of pragmatism, fails to address it fully and head-on. Here is Posner raising the question in a 1996 paper without answering it; in summarizing his jurisprudential pragmatism as distinct from classic philosophical pragmatism, Posner notes:

An initial difficulty is that pragmatic adjudication cannot be derived from pragmatism the philosophical stance. For it would be entirely consistent with pragmatism . . . not to want judges to be pragmatists. . . . [A] pragmatist committed to judging a legal system by the results the system produced might think the best results would be produced if the judges did not make pragmatic judgments but simply applied rules. . . .

So pragmatic adjudication will have to be defended—pragmatically—on its own terms rather than as a corollary of philosophical pragmatism.¹¹⁷

plague law, and understands that judges’ values, despite judges’ best intentions to the contrary, inevitably influence administration of law. She does not, however, adopt the social agenda of many realists who exaggerate the degree of indeterminacy in law, exaggerate the futility of attempting fidelity, and therefore view law as simply politics under another name. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997). Rather, she most likely rejects the extreme positivism of modern realism and holds steadfast to the role of principle and reasoned elaboration in proper adjudication; in this sense, if not an originalist, she probably is a student of the Legal Process School.

¹¹⁶ Which is the type of formalism Posner rails against, at least until he later, in his most recent book, began perhaps giving contemporary formalists more credit and labeling them “legalists.” HOW JUDGES THINK, *supra* note 5, at 370; cf. Smith, *supra* note 79, at 426–27 (“[Posner offers a] loaded definition of formalism Unfortunately, by offering pejorative definitions of formalism, Posner also creates problems for his pragmatist position. In the first place, he deprives himself of the pleasure of having respectable opponents. Does anyone today contend that law is ‘a body of immutable principles’?” (footnotes omitted)).

¹¹⁷ Posner, *Pragmatic Adjudication*, *supra* note 94, at 3. See also Farber, *supra* note 8, at 1349 (“The real test for legal pragmatism—on pragmatist terms!—is not whether it can meet these theoretical objections, but whether it works, in the sense of providing the basis for a persuasive analysis of concrete constitutional problems.”).

In defending his pragmatism “on its own terms,” Posner attempts to narrow the meaning of pragmatism enough to exclude the rule utilitarianism of formalism, but simultaneously fails to explain why he does so. That is, Posner fails to explain why strict rule utilitarianism cannot fit into a definition of pragmatism that he, in almost all contexts, defines with such deliberately forgiving vagueness (“reasonableness,” etc.). What results is the tautological argument that “these types of pragmatisms are not pragmatic under my definition of pragmatism because, well, they’re not pragmatic.”

In his book *How Judges Think*, the following is the entirety of his attempt to deflect the “distinction without a difference” weakness:

In contrast to pragmatists, legalists [Posner’s new term for formalists which, unlike his usual Langdellians, are currently generally of the Legal Process School,] tend (or pretend) to give controlling weight to an arbitrary subset of institutional consequences of judicial decisions. They are hypersensitive to the uncertainty that can result from loose construction of statutes and contracts, from seeking out the purpose of a rule to determine the rule’s scope and application, from salting doctrine with policy, and from aggressive distinguishing and over-ruling of precedents. Pragmatists do not see how so one-sided an emphasis on possible negative consequences of pragmatic judging can be sensible. But more interesting is the fact that contemporary justifications of legalism should rest as heavily as they do on its consequences, rather than on claims of what “law” means or requires. So pervasive is pragmatic thinking in the American political culture that legalists are driven to defend the blinkered results to which their methodology of strict rules and literal interpretations tends as yielding better consequences than a fuller engagement with the facts of a case¹¹⁸

Most conspicuous about this is that Posner no longer describes his antithesis judges as “formalists.” He expressly abandons what has for the last twenty years been his preferred term.¹¹⁹ Thus, Posner now seems to concede that modern formalism is generally inspired by a concern for consequences; albeit systemic ones, but consequences nonetheless. He thus recognizes that the driving distinction between his pragmatism and formalism—a recognition that law must first and foremost meet current human needs versus a naïve belief, and obsession with the idea, that law can be treated as a science—is unrealistic. But Posner sweeps the main problem under the rug: instead of addressing the implication that there is no qualitative difference between his pragmatic approach and legalism,

¹¹⁸ *HOW JUDGES THINK*, *supra* note 5, at 239–40.

¹¹⁹ *Id.* at 370 (“[Most] judicial decisions really are the product of a neutral application of rules not made up for the occasion to facts fairly found. Such decisions exemplify what is commonly called ‘legal formalism,’ though the word I prefer is ‘legalism.’ But they tend to be [only] the decisions in routine cases.”).

he deflects the point by quickly recharacterizing legalists' focus on systemic consequences as their attempt to flee from their unworkable approach and into the arms of pragmatism. "Legalists are closeted pragmatists," Posner writes.¹²⁰ His first point raises the question of whether legalism is inherently less (or non) policy-soaked than pragmatism. His second point is a subtly circular answer: pragmatism is obviously more policy-soaked because, in justifying their legalism with results, legalists are necessarily forced to rely on pragmatism. Posner fails to provide any reason for readers to believe that formalists' relative emphasis on institutional consequences is *less* pragmatic than a pragmatism that focuses less on them. He provides only non-sequiturs that legalists are "hypersensitive" to institutional concerns, and that their emphasis on them is "one-sided."

This sidestepping of the 800-pound gorilla is evident in Posner's discussion of metaphysical abstractions sounding in natural rights:

When the words "fairness" and "equality" as used by lawyers and judges are analyzed carefully, they dissolve into considerations of consequence. A procedure is "fair" if it reasonably balances the risk of error against the cost of reducing error. . . . Like legal formalism, justice talk at the judicial level is mainly rhetoric, usually disguising pragmatic judgments.¹²¹

The assumption being that a consideration of consequences and rights-foundationalism are mutually exclusive, and that entertaining one means pretending to ignore the other. But all such a balancing of consequences amounts to is a recognition on the part of the judge who is "disguising" his pragmatic judgment (and allegedly only feigning formalism) that no right is absolute. While a procedure must be, as a matter of fundamental abstract right, "fair," that term, in turn, is defined with respect to context. The application of abstractions, even to the most formalist judge, always depends on context because hard cases usually involve a tension between "fundamentals" vying for space in a holding: for example, deference to state trial procedures via the abstraction of federalism versus the constitutionally guaranteed right to a "fair" process in state courts, which federal courts must protect. There is no "disguising" of pragmatism here.

The lesson of this might be that pragmatism is not a "mirage," as the title of this Part suggests, because *all* jurists at the end of the day are pragmatists. As the argument would go, pragmatism is obviously real—it's everywhere! But, for *prescriptive* purposes, if pragmatism is everything, then it is perforce nothing. It is only a descriptive abstraction. That is, pragmatism is a relative concept; if pragmatism is inevitable, then nobody is a "pragmatist" in a sense necessary to render "pragmatism" a useful guide for future judging.

¹²⁰ *Id.* at 371.

¹²¹ LPD, *supra* note 39, at 67.

But at the very least might there be discernable differences in *degrees* of pragmatism, such that one could just play with words and argue that a counsel for pragmatism is actually a counsel for *greater* pragmatism? Let us assume, generously, that a relative de-emphasis by judges of the systemic consequences of adjudication is more pragmatic in a conceptually persuasive way. Operating on this assumption, my argument so far—that pragmatism and the formalism it rails against merely fall on a continuum of rule utilitarianism—can be read as a concession on my part: that although formalism and pragmatism are not qualitatively distinct frameworks, the fact that pragmatism nevertheless does de-emphasize rule-adherence illustrates that pragmatism is indeed a distinct “attitude” or “mood” that would make a practical difference in the administration of the law if all American judges eschewed the stricter rule-adherence of formalism. After all, a difference in degree rather than in kind is still a difference.

This question then arises: does pragmatism meaningfully indicate when practical considerations begin to countervail against rule-adherence; e.g., systemic “rule of law” concerns? By asking this question, I mean not to set up a straw man and blow it down. Complaining that a method or theory fails to reduce its program to a “judging kit”—like “paint-by-number” for deciding cases—that rids the world of indeterminacy, is a facile and all too commonplace method of attacking new ideas, and is thus a good example of how the perfect can be the enemy of the good.¹²² Thus, the challenge is not whether pragmatism can offer a formula for translating an infinite array of nuances presented by tough cases into objectively verifiable “pragmatic” results. But it is fair—indeed, necessary—to ask how Posner can articulate his normative pragmatism in a manner that provides sufficient guidance such that other judges can employ it to produce relatively “pragmatic results”—i.e., the kind of results of which Posner believes society is deprived by judges who adjudicate in a “formalist” manner? This is a crucial question, for Posner does not merely endeavor to make judges feel less dirty for peeking behind the social policy curtain. And he does not merely seek to re-conceptualize what judges already do; he seeks to change how they do it, because he thinks such a change will mean a material difference. To determine if he’s right, it is necessary to closely examine several alleged essentials of Posner’s pragmatism and examine whether they would work a practical difference in American judging. Specifically, we must dissect Posner’s claims that pragmatism is a superior approach because of its

¹²² “[N]ot every type of theory can usefully be judged on just any aesthetic criterion. Lack of predictability, for instance, is not necessarily an objection to a theory aimed at interpretation. Likewise, indeterminacy is not necessarily a damning objection to all normative legal theories.” Pierre Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917, 922 (1987) (footnotes omitted).

spirit of experimentalism and its emphasis on intellectual curiosity as a hallmark of a good judicial temperament.

C. *Experimentation*

First, “pragmatists believe that the *experimental* method of inquiry is best,” Posner teaches, and “[e]xperimentalism implies the desirability of a diversity of inquirers.”¹²³

I have said nothing about how the judge is to decide which consequences of the class of consequences that he is authorized and competent to consider are good and which bad No doubt goodness and badness are to be determined by reference to human needs and interests, but how are these to be determined? And if they are not determinable (nothing in consequentialism or pragmatism helps to determine them), then isn’t a directive to judges to consider consequences empty? No. It just means that different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently. That is an argument for a diverse judiciary¹²⁴

Thus Posner might respond that the challenge for practical guidance is preempted by his description of pragmatism as a “mood” rather than a disciplining methodology, and therefore that pragmatism need not offer any guidance beyond “focus more on facts and policy rather than principle and fidelity,” and “make the most reasonable decision you can.” The practically superior results, in turn, would yield in the sheer diversity of cost/benefit calculations by different pragmatic judges. This, in turn, would mean greater social experimentation through law.

But many pragmatic judges already occupy the federal bench. Posner states that “pragmatism is the best description of the American judicial ethos,” and is thus a “positive theory of the judicial role.”¹²⁵ So what diversity of outcomes does pragmatism provide that American judging does not already provide? And if it’s true that formalism does hold sway over a significant portion of American judges, isn’t that a good thing for experimentation? That is, if (a) Posner believes that diversity of views yields a better aggregate of outcomes, (b) most judges are already pragmatists, (c) formalist judges adhere to formalism because of the belief that such yields the best results, and (d) formalist judging yields different outcomes than pragmatic judging, then it seems we already have a treasure-trove of pragmatic decisions, the effects of which can be studied to our hearts’ desire. So what’s the problem?

¹²³ LPD, *supra* note 39, at 9. Cf. Rosenfeld, *supra* note 57, at 111 (“Posner’s brand of pragmatism is scientific in the tradition of Peirce and Dewey.”).

¹²⁴ LPD, *supra* note 39, at 71.

¹²⁵ *Id.* at 1.

Even assuming that the pragmatic “mood” is more characterized by an experimental curiosity, on what bases should we believe that such would inspire more experimental *results* in close cases? Don’t different takes on fidelity give rise to the same variety of results? Doesn’t the answer have to be “yes” given that what has inspired contemporary formalist dogma is a passionate debate over what the constitution means in close cases? Take *Roe v. Wade*.¹²⁶ According to Posner, the Warren Court would have been wise to allow the states to serve as laboratories until the Court was in a better position to compare the long-term social consequences of permissive abortion policies with prohibitions on abortion in states that chose to ban it.¹²⁷ The resulting opinion, then, would have upheld Texas’s law, and the Court would, years later, enjoy the wealth of empiricism that would inform a subsequent reconsideration of the issue.¹²⁸

The *Roe* opinion as written sounds largely (though not completely) in natural-rights foundationalism, a type of formalism. But those most clamoring for *Roe*’s demise are also formalists. When it comes to some of our most controversial cases—the cases that Posner mostly concerns himself with—the ensuing battles are usually between different types of formalists (originalists, textualists, natural-rights proponents, purposivists, “active liberty” adherents, etc.) who seek very different outcomes that would serve (incidentally or intentionally) very different social agendas. The different sorts of formalism, then, seem to offer the same alternative outcomes as would the various approaches offered by a hypothetical group of pragmatist judges who bring to the bench different “empirical” and “factual” premises.

The natural retort to this might be that a pragmatist is not only concerned with the variety of outcomes per se, but with outcomes that are sufficiently informed by “facts” and “empiricism” such that they are worthy components of the aggregate experiment. But recall that Posner does not, and cannot, explain how empirical considerations are to be balanced against one another, or for that matter what considerations are appropriately “pragmatic” ones in the first place. And recall that all formalists have as their focus *the effects* of their decisions anyway. Certainly, then, pragmatic considerations include the “results” that yield from an emphasis on the political theory that inspires a judge’s formalism. Thus, pragmatism’s spirit of experimentation promises no meaningful benefit even were it to inspire all American judges.

¹²⁶ 410 U.S. 113 (1973).

¹²⁷ Posner, *Offer?*, *supra* note 41, at 1668.

¹²⁸ *Id.*

D. A Less Intuitive Intuition

Posner argues that, given the inevitably subjective and intuitive nature of adjudication in close calls, at the very least we can ask judges to inform their intuition with a rigorous focus on facts and social needs before superimposing their intuition over our lives.¹²⁹ Perhaps, then, by way of its call for greater experimentation and empiricism, pragmatism amounts to a directive for greater intellectual curiosity among judges, with the resignation that such is all we can ask for. Posner quips about “the lack of scientific curiosity that is so marked a characteristic of legal thought.”¹³⁰ “Since judges in our system are going to be legislators as well as adjudicators, they ought to take a greater interest in facts”¹³¹ While emotion and moral judgments are inevitable influences on adjudication, “emotion is not pure glandular secretion” but is rather “influenced by experience, information, and imagination, and can thus be disciplined by fact.”¹³² So, “[i]t would be nice . . . if judges and law professors were more knowledgeable practitioners or at least consumers of social science . . . so that their ‘emotional’ judgments were better informed.”¹³³

Intellectual curiosity is good, but would more of it, or even a resulting change in judicial culture, make a meaningful difference? It’s safe to assume that no judge makes an intuitive judgment without believing that she has in her head all of the relevant variables of the external world adequately gauged and balanced. It is also fair to say that when a judge makes an intuitive judgment, she has reached the point where she believes she is operating on sufficient information about social and political reality to exercise that judgment. Pragmatism tells us nothing about when our Renaissance judge is to recognize that she has reached the pragmatic threshold of data saturation.

Further, a primary problem with a call for a more empiricism-infused intuition is the classic fact/value distinction problem. The fact/value distinction represents the notion that when we set out to gather and process empirical “facts” we do so as an activity apart from placing value on those facts. As Felix Cohen argued, “[t]he prospect of determining the consequences of a given rule of law appears to be an infinite task, and is indeed an infinite task unless we approach it with some discriminating criterion of what consequences are important.”¹³⁴ The “discrimination” dissolves the fact/value distinction, and thus introduces invariably

¹²⁹ Posner, *Offer?*, *supra* note 41, at 1657–58, 1670.

¹³⁰ Levinson, *supra* note 39, at 1242 (quoting PROBLEMS, *supra* note 26, at 213).

¹³¹ Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1066 (2006) [hereinafter Posner, *Role of the Judge*].

¹³² PROBLEMATICS, *supra* note 2, at 260 (footnotes omitted).

¹³³ Posner, *Pragmatic Adjudication*, *supra* note 94, at 15.

¹³⁴ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848 (1935) (emphasis omitted).

subjective appraisals of ends.¹³⁵ Thus, an exploration for fact necessarily has a normative impetus, which in turn influences what facts we preordain as important, or which facts we choose to emphasize from a selection. While this may seem borderline sophistic in the science context,¹³⁶ in the legal context it highlights the reality that empiricism may facilitate, rather than tame, judges' intuitive reactions to case issues. Indeed, unless a judge's understanding of some quantifiable aspect of social reality is way off the mark, most judges—like most people—may not be shaken from their initial intuitive views by social science research.

Posner, with his firm grip on epistemology, understands all of this in asserting that “conformity to intuition is the ultimate test of a moral (indeed of any) theory.”¹³⁷ And with regard to being open-minded and integrating the views of other judges, he notes “[j]udicial deliberation is overrated by those (mainly professors) who believe that protracted discussion among judges with strongly differing views is productive,”¹³⁸ and that “we are psychologically predisposed . . . to exaggerated confidence in the soundness and coherence of our beliefs even if we cannot defend them.”¹³⁹ He continues:

An even more important factor at work is simply that emotional commitments are as or more binding than intellectual ones. . . . If you are highly sophisticated intellectually, you may recognize that your conviction, however strong, cannot be shown to be “right,” but (at most) reasonable; and yet that recognition will not weaken your conviction's hold over you or cause you to reject it as a ground of decision.¹⁴⁰

The point that empirical sunlight may be a weak disinfectant for unpragmatic predispositions is confirmed by Dan Kahan and Donald Braman, who in their fascinating article highlight that “cultural commitments are prior to factual beliefs on highly charged political issues. . . . Based on a variety of overlapping psychological mechanisms, individuals accept or reject empirical claims about the consequences of

¹³⁵ A reality that, ironically, pragmatist philosophers themselves recognize. See, e.g., Zeglen, *supra* note 64, at 3 (“[Hilary Putnam] rejects the fact/value dichotomy and argues that facts and values are connected. He describes this connection metaphorically, saying that facts dissolve into values.”) (internal quotation marks omitted). This, in turn, illustrates once again how legal pragmatism does not track its philosophical relative.

¹³⁶ “When physics, chemistry, biology, medicine, contribute to the detection of concrete human woes and to the development of plans for remedying them and relieving the human estate, they become moral; they become part of the apparatus of moral inquiry or science.” JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 173 (The Beacon Press 1948) (1920).

¹³⁷ PROBLEMS, *supra* note 26, at 377.

¹³⁸ Posner, *Role of the Judge*, *supra* note 131, at 1051.

¹³⁹ *Id.* at 1063.

¹⁴⁰ *Id.*

controversial [policies] based on their vision of a good society.”¹⁴¹ The authors explain:

By virtue of the power that cultural cognition exerts over belief formation, public dispute can be expected to persist on [the practical consequences of controversial policies] . . . even after the truth of the matter has been conclusively established.

. . . .

. . . The same psychological and social processes that induce individuals to form factual beliefs consistent with their cultural orientation *will also prevent them from perceiving contrary empirical data to be credible.*¹⁴²

Posner recognizes that such “cultural commitments . . . operate more powerfully the more difficult it is to verify (or falsify) empirical claims by objective data,” and provides as examples of legal problems not lending themselves to empirically verified claims “the deterrent effect of capital punishment or the risk to national security of allowing suspected terrorists to obtain habeas corpus.”¹⁴³ Yet it is in precisely these kinds of cases that Posner suggests formalism wreaks most of its havoc, given that judges’ intuition in such cases purportedly plays a relatively significant role due to problems of indeterminacy.¹⁴⁴ Put differently, it seems the very types of cases in which Posner believes empiricism has been undervalued are those in which cultural commitments are likely to hog the stage, so it is those cases that least lend themselves to empirical illumination in the first place. While it is certainly not inconceivable that an introspective and self-aware judge might change her mind in a case implicating her deep cultural commitments, Posner’s own recognition of the limits of empiricism and the human psyche would likely make the benefits of greater empiricism more isolated than systemic, and more theoretical than real.

To his credit, Posner is, in his moments of contemplative incertitude, very cautious in his faith in greater empiricism:

Maybe what judges need in order to . . . escape being blindsided by considerations that intuition has failed to grasp, is intuition disciplined by algorithms, rather than “legal reasoning.” . . . The danger of blindsiding is thus a further argument for a diverse judiciary. . . .

. . . .

¹⁴¹ Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150 (2006) (emphasis omitted).

¹⁴² *Id.* at 165 (emphasis added).

¹⁴³ Posner, *Role of the Judge*, *supra* note 131, at 1064–65.

¹⁴⁴ *See id.* at 1066 (“The zone of reasonableness is widest in constitutional cases in which the judges’ emotions are engaged, because the constitutional text provides little guidance and emotion opposes dispassionate consideration of the systemic factors that induce judges to rein in their discretion.”).

... [W]e should bow to the inevitable, and thus if troubled by the exercise of a free-wheeling legislative discretion by Supreme Court Justices we should insist on diverse appointments in order to make the Court at once more representative and, because of its diversity, less likely to legislate aggressively.¹⁴⁵

The call for greater diversity in the last line represents what is, in the end, Posner's seeming recognition of the limits of people to question and reconsider their own predispositions, and thus the ability of greater empiricism to make a meaningful difference in many types of close cases. Rather than expect judges to humble themselves, the only solution is to have a greater variety of cultural or intuitive commitments controlling our legal fate. But a call for greater diversity of viewpoints on the federal bench hardly amounts to a normative method and, in any event, is something that formalism is just as prepared to offer as pragmatism, given the various forms of formalism available, and given how hospitable each form is to both liberal and conservative takes on fidelity.¹⁴⁶

IV. "EMPIRICISM": A EUPHEMISM

In one of the most insightful critiques of pragmatism, Stanley Fish concludes that although "most advocates of pragmatism . . . assume that something must follow from the pragmatist argument," "if you take the anti-foundationalism of pragmatism seriously . . . you will see that there is absolutely nothing you can do with it."¹⁴⁷ This is mostly true, but not completely. So far, I've taken all of Posner's premises of pragmatism at face value, and have worked within the conceptual framework pragmatism offers, a key one being that pragmatism prescribes no particular ends. But, once we decide not to take seriously the conceptual problems of pragmatism, we see pragmatism does have a use: through the use of "empiricism," pragmatism seems a method of justification of ends that cannot be rationalized in any principled sense beyond appeals to "common sense" or intuition.

Again, the following discussion entertains the fundamental prescriptive counsel of pragmatism: that judges should focus primarily on consequences in deciding cases, and should engage in greater empirical study to inform their policy calculations. Even assuming that judges can be expected to discipline their proclivities with facts that rub against their cultural commitments, we *still* need a reason to believe that the

¹⁴⁵ *Id.* at 1065–66.

¹⁴⁶ See, e.g., James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1336–37 (1997) (discussing, and identifying the proponents of, "soft" originalism, which is more hospitable to liberal conceptions of fundamental rights because soft originalists contemplate rights "at a considerably higher level of abstraction than do the narrow [conservative] originalists").

¹⁴⁷ Fish, *supra* note 83, at 1464–65.

meaningful difference in results that would presumably yield from a more pragmatic jurisprudence would have genuinely “pragmatic” effects. To understand this, we must first understand how, under Posner’s pragmatism, empiricism specifically operates to influence decisionmaking; we need to know what Posner means by “empiricism.”

The current popularity of empiricism in legal scholarship is a good thing. And, arguably, breaking judges’ fixation on lofty abstraction, and refocusing their attention on more concrete social consequences, offers jurisprudence goals that are more objectively defined, and more clearly recognizable when attained. This, in turn, means ideological decisionmaking would be more easily identifiable (and thus deterred) because, if alleviating a material social problem were the agreed goal of jurisprudence, such would narrow the range of conclusions that a judge could plausibly draw from the type of hard empirical data that the pursuit of such goals tends to generate. The metaphysicalities or political-theory abstractions of formalism, on the other hand, are much more accommodating to a judge who seeks to find a home for his subjective values or intuitions in “the law.”

It should come as no surprise, then, that Posner, before he became the primary champion of legal pragmatism, earned his initial notoriety via his work in the law and economics movement. As Brian Tamanaha explains, because we can all generally agree that “maximizing wealth” is a good thing, law and economics, at the very least, seemed to offer the possibility of circumventing the contentious and intractable questions about the appropriate ends of law that formalism tends to stoke.¹⁴⁸ Because law and economics, if strictly adhered to, tends to pretermit controversies over morality or political theory, and because it drives toward a material end everyone can generally agree is socially constructive, Posner’s law and economics efforts can be seen as an early product of the pragmatic mood that drives his current work, absent the heavy skepticism toward closed normative systems that most characterize his current pragmatism. Having recently entered a somewhat postmodernist phase,¹⁴⁹ Posner now concedes that a pursuit of wealth-maximization cannot be the whole of legal pragmatism “[b]ecause it works well only where there is at least moderate agreement on ends, it cannot answer the question whether [for example] abortion should be restricted.”¹⁵⁰

¹⁴⁸ TAMANAHA, *supra* note 16, at 119. See also Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 196 (1998) (“EAL has generally been conceived as a distinctively modern attempt to render law objective. Economic efficiency, wealth maximization, and similar economic concepts have been offered as a means of ‘solving’ legal dilemmas with reference to well defined external criteria.” (emphasis omitted)).

¹⁴⁹ Though Posner would likely reject this characterization. See PROBLEMATICS, *supra* note 2, at 265 (“Pragmatism and postmodernism are often confused . . .”).

¹⁵⁰ Posner, *Offer?*, *supra* note 41, at 1668.

Posner still believes, however, that empiricism deserves an increased role in modern jurisprudence, but what precisely is the proper role of empiricism under Posner's counsel? What does Posner mean by "empiricism?"

A. *Read the Fine Print*

Described in the abstract, who could contend much with pragmatism's premises: that judges should be more intellectually curious, sensitive to the consequences of their decisions and make the most "reasonable" decisions they can "all things considered?" When an idea is so generally appealing, our vigilance usually prompts us to read between the lines. It is only in specific examples of allegedly proper pragmatic adjudication that we see what Posner means by "empiricism," and thus can evaluate pragmatism's normative usefulness.

Posner offers numerous examples of how a pragmatic focus on policy and consequences simply makes the greatest sense. In order to appreciate the message of his examples it is helpful to divide them into two (admittedly simplistic, but helpful) categories: first, the low hanging fruit—cases that do not give rise to genuine methodological disputes because the formalism mocked in these examples is unrealistically stilted; and second, the tough cases—the ones that matter because they give rise to the most heated controversies, and are thus the primary focus of current methodological debates.

As an example of the first category, a favorite of Posner's are early oil and gas cases dealing with the so-called "rule of capture," which held that fugitive resources on private property could not be "owned" by the surface estate owner until he reduced them to possession.¹⁵¹ The rule originally applied to so-called "ferae naturae"—wild animals. Early oil and gas cases reveal courts' struggle in determining to what extent the rule of capture should apply to untapped oil and gas.¹⁵² To Posner, these cases show the pitfalls of reason by analogy, a typical formalist device: the courts formalistically concluded that because oil and gas are "fugitive"—a feature of "ferae naturae" that inspired the original rule of capture—as opposed to static like trees, the rule should also apply to oil and gas. Reasoning by analogy, then, prematurely curtailed consideration of the policy perils of treating oil and rabbits similarly. For example, a formalistic approach overlooks the reality that because extracting oil and gas requires expensive initial investment, possessory rights in untapped oil and gas makes the greatest sense, as the rule of capture approach diminishes incentives for prospective drillers to extract the oil society

¹⁵¹ See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

¹⁵² See, e.g., *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204 (Ky. 1934).

needs.¹⁵³ The relevant distinctions between rabbits and oil are not necessarily lost on one employing strict reasoning by analogy. They are instead rendered irrelevant because the distinctions Posner highlights are relevant only to one who concerns himself with the incentives he creates in crafting a new rule of property law.

But it has been said that “we are all [legal] realists now.”¹⁵⁴ Even among modern day “formalists,” one would be hard pressed to find a true Langdellian who willfully blinds himself to anything but the most “traditional” legal materials.¹⁵⁵ So, if what is meant by “empiricism” is simply the idea that a judge should be cognizant of the incentives she creates, or that she should be open to social science research in deciding cases, that’s not controversial as far as it goes.

But lest any reader entertain the false comfort the term “empiricism”—with its faint halo of detached scientificity—might engender, consider how “empiricism” operates in cases implicating the most controversial types of modern issues. A good example is Posner’s discussion of whether, post-9/11, a flag-burning statute should be sustained despite the Supreme Court’s decision in *Texas v. Johnson*, which established that flag burning is constitutionally protected speech.¹⁵⁶ Operating on the premise that “[t]he natural approach for a pragmatic judge to take to a novel free-speech case is to compare the social pluses and minuses of the restriction on speech that the plaintiff is challenging,”¹⁵⁷ Posner asserts:

freedom of speech is not absolute but is and should be relative to changes in circumstances, [including] . . . changes in value perceptions. . . . [I]n the wake of the September 11, 2001 terrorist attacks . . . [t]he social importance of the flag is suddenly much greater than it seemed to be, or perhaps was, a decade ago. The dangers that beset the nation today . . . make the burning of the American flag seem obscene. . . . The issue is offensiveness, not danger. But offensiveness is . . . a common basis for permitted restrictions of freedom of speech, and like danger it is relative to circumstances. This “relativism” has, I contend, constitutional significance for the pragmatist. *But a better word than relativism would be empiricism.*¹⁵⁸

What does “empiricism” have to offer regarding the criminalization of interracial marriage?

¹⁵³ See OVERCOMING LAW, *supra* note 38, at 520. See also HOW JUDGES THINK, *supra* note 5, at 186–87.

¹⁵⁴ Leiter, *supra* note 115, at 267.

¹⁵⁵ Though Posner unsurprisingly does find him. See HOW JUDGES THINK, *supra* note 5, at 180–87 (invoking, and attacking, the approach of professor Lloyd Weinreb, who apparently supports an antiquatedly pure form of reasoning by analogy).

¹⁵⁶ 491 U.S. 397, 418 (1989).

¹⁵⁷ LPD, *supra* note 39, at 358.

¹⁵⁸ *Id.* at 366–67 (emphasis added).

Was the Court wrong to uphold [miscegenation laws'] constitutionality in 1883 and to duck the issue in 1956? . . . In 1956, just two years after the decision in *Brown* . . . outlawing public school segregation had outraged the South—inciting charges that mixing black and white children in schools would lead inevitably to miscegenation—a decision outlawing laws against miscegenation would have been one judicial bombshell too many.¹⁵⁹

Here we see Posner's empiricism at work. Posner's "practical reasoning"—to be distinguished from abstract formalist or moral reasoning (which is apparently less "practical")—"is a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction."¹⁶⁰ To Posner, it is hard-nosed reality that striking down miscegenation laws would have been "one judicial bombshell too many," or that, post-9/11, "the social importance of the flag is suddenly much greater."

Interestingly, when other judges base decisions on these same sorts of "empirical" hunches, Posner criticizes them for being insufficiently empirical. Take Justice Breyer's dissent in the contentious school voucher case of *Zelman v. Simmons-Harris*.¹⁶¹ There, the majority sustained under the Establishment Clause a program whereby the State of Ohio issued tuition vouchers to poor parents, who could use them to purchase private school education for their children.¹⁶² In his book *Active Liberty*,¹⁶³ Justice Breyer explains that his dissent was motivated by his belief that "the administration of huge grant programs for religious education" presented excessive "potential for religious strife."¹⁶⁴ Posner rejects this reasoning:

This is a conjecture; and it ignores the fact that, unless a voucher program was permitted to go into effect, we would never be able to verify or falsify the conjecture. We would never learn whether, for example, the provision of additional money for private education . . . would stimulate more secular competition for religious schools by providing more money for secular private schools. It is now more than five years since the Supreme Court upheld school vouchers, and there are no signs of the religious strife that Breyer predicted.

Zelman is the answer to someone who might wish to defend Breyer's casual attitude toward assessing consequences on the ground that speculation is the best a judge can do. One thing the

¹⁵⁹ *Id.* at 66.

¹⁶⁰ PROBLEMS, *supra* note 26, at 73.

¹⁶¹ 536 U.S. 639 (2002).

¹⁶² *Id.* at 643–45.

¹⁶³ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

¹⁶⁴ *Id.* at 121–22.

judge can do is allow social experiments to be conducted so that measurable consequences can be observed.¹⁶⁵

But what spirit of empiricism and experimentation inspires Posner's reckoning that invalidating miscegenation laws in 1956 would have been "one judicial bombshell too many," or that the "social importance of the flag is suddenly much greater" now such that allowing its desecration would yield social costs the act did not exact pre-9/11? What happened to the call to "allow social experiments to be conducted so that measurable consequences can be observed?" Would not an invalidation of miscegenation laws in 1956 have provided us earlier insight into whether the fear of social chaos in response to controversial court decisions is as well-founded as Posner thinks it is? Might that, in turn, allow us to better gauge in future cases whether the risk of such chaos truly countervails against protecting the individual right at stake through invalidating the legislation at issue? If the answer is that pragmatism counsels that such an "experiment" would have been too risky, why does such reasoning not render Justice Breyer's fear of religious strife just as pragmatic? After all, human history teaches that religious strife can be among the most socially destructive.¹⁶⁶

As another elephant in the room, Posner criticizes the elements of Breyer's free speech test (the "impact upon the public's confidence in, and ability to communicate through, the electoral process," and the "importance" of a challenged law's "electoral and speech-related benefits,"¹⁶⁷) as "so indefinite that [it] cannot guide decision."¹⁶⁸ Yet, Posner is so freewheeling in invoking the vague specter of social disruption, the risk of which cannot be gauged in any objective sense, and therefore cannot guide decision except to stoke the psychological idiosyncrasies of judges the same way the abstract pieties Posner derides do.

While likely not intentional, the most conspicuous feature of Posner's writing on the nature of judging and the alleged practical superiority of pragmatism has been his tendency to so frequently, casually, and arbitrarily oscillate between value and fact as to blur the line between the two—but only when defending allegedly pragmatic results. Posner's "no nonsense" analytical vigilance is out in full force when a formalist's reasoning is under the microscope. Through empiricism, so long as the judge doing the intuiting is a pragmatist judge,¹⁶⁹ she may

¹⁶⁵ Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1713 (2006) (book review) [hereinafter Posner, *Gauntlet*].

¹⁶⁶ Something Posner has himself emphasized. See RICHARD A. POSNER, LAW AND LITERATURE 135 (3d ed. 2009) ("We moderns have also learned that intense religious feeling can undermine social peace.").

¹⁶⁷ BREYER, *supra* note 163, at 49.

¹⁶⁸ Posner, *Gauntlet*, *supra* note 165, at 1706.

¹⁶⁹ While Posner dismisses the utility of others' abstractions as too vague and vacuous to guide decisions, the pragmatist's mind, in its unique dexterity, is

piggyback her subjective value judgments on “empiricism” and elevate her intuition to the stratum of “just the facts ma’am.”¹⁷⁰ It seems the distinction between pragmatic empiricism, and the conceptualistic “fluff” of other approaches, is one without a difference.¹⁷¹

Dan Farber has observed that, in his writings, Posner “sometimes seem[s] to be arguing in favor of the truth of a philosophical position” but “at other times, Posner seems merely to be presenting a viewpoint . . . not in the expectation that it could be proved true, but in the hope that it will be found attractive.”¹⁷² Professor, and former federal judge, David Levi states that the only empiricism Posner employs in his book *How Judges Think* is “armchair empiricism,” and that Posner’s “generalizations about the ways of the judge and the world are ex cathedra pronouncements that generally lack any identified objective support outside of his own experience and belief.”¹⁷³ According to Levi, despite Judge Posner’s emphasis on empiricism, “it would appear that his dataset of judges is a set of one—himself.”¹⁷⁴ Is it fair to assert that Posner’s criticism of formalism reduces to the simple complaint that other judges do not always share his intuitive premises or personal temperament? Is Jeffrey Rosen’s statement that “Posner is offering his own personality as a substitute for methodology”¹⁷⁵ mere polemic hyperbole or does it

apparently able to weigh imponderables: “Weighing imponderables’ sounds like an oxymoron (since ‘imponderable’ is from the Latin *ponderare*, meaning ‘to weigh’), but isn’t quite, because often a judge can know, even without quantification, that one interest is greater than another just as one can rank competing employees by their contributions to their firm without being able to quantify the contributions.” *Id.*

¹⁷⁰ See Posner, *Role of the Judge*, *supra* note 131, at 1066 (Posner’s call for a more “fact”-centered jurisprudence: “[By ‘facts,’] I mean the kind of background or general facts that influence a legislative decision . . . [such as] *life experiences*.” (emphasis added)).

¹⁷¹ Posner’s vacillations between fact and value, as illustrated in the concrete examples I discuss, appear to be practical manifestations of the *conceptual* contradiction created by Posner’s simultaneous embracing of greater empiricism and rejection of foundationalism. While I reiterate that my focus is not the philosophical coherence of legal pragmatism, Stanley Fish makes a good point from a philosophical angle: “[W]e see that the basic realist gesture is a double, and perhaps contradictory, one: first dismiss the myth of objectivity as it is embodied in high sounding but empty legal concepts (the rule of law, the neutrality of due process) and then replace it with the myth of the ‘actual facts’ or ‘exact discourse’ or ‘actual experience’ or a ‘rational scientific account.’ That is, go from one essentialism, identified with natural law or conceptual logic, to another, identified with the strong empiricism of the social sciences. . . . Steeped as he is in the writings of Peirce, Wittgenstein, Kuhn, Rorty, and Gadamer (not to mention Fish), he should be immune to the lure of empiricist essentialism, but [Posner] is not.” Fish, *supra* note 83, at 1459–60.

¹⁷² Farber, *supra* note 109, at 679.

¹⁷³ David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1792–93 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

¹⁷⁴ *Id.* at 1793.

¹⁷⁵ Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 582 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)).

encapsulate Posner's teachings when distilled from the admittedly impressive, but ultimately obfuscatory, interdisciplinary explorations?

It is common for Posner, and other pragmatists, to accuse others of misunderstanding pragmatism's important nuances. Ronald Dworkin, one of the most outspoken critics of pragmatism, labels pragmatism "activism" at worst, and relatively indifferent to precedent at best.¹⁷⁶ But Dworkin, Dan Farber writes, is "quite mistaken."¹⁷⁷ In fact, it seems many critics of pragmatism are confused in that they allegedly exaggerate the degree to which pragmatism encourages results-oriented judging. Critics allegedly mistakenly conflate pragmatism with "forms of instrumentalism such as utilitarianism."¹⁷⁸ According to Farber, even those "more sympathetic to pragmatism" share this same misunderstanding.¹⁷⁹ Margaret Jane Radin accuses Dworkin of "gerrymander[ing] the word 'pragmatism' to mean crass instrumentalism."¹⁸⁰ And Posner laments "the

¹⁷⁶ Dan Farber attributes the following definition of pragmatism to Ronald Dworkin, an opponent of pragmatism: "In its most 'virulent' form, Dworkin says, pragmatism becomes activism: '[a]n activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture.' The activist would 'ignore all these in order to impose on other branches of government his own view of what justice demands.' The less virulent pragmatist, Dworkin observes, does pay some attention to precedent, not for its own sake but because of the social interest in legal stability and predictability." Farber, *supra* note 8, at 1344 (footnotes omitted) (quoting DWORKIN, *supra* note 3, at 378).

Dworkin's characterization of Posner's pragmatism seems less harsh when one appreciates the degree to which Posner expressly disavows deliberative democracy and rejects the notion that "every adult . . . has a moral right to participate on terms of equality in the governance of . . . society" in favor of a process characterized by a "competitive power struggle among members of a political elite . . . for the electoral support of the masses." LPD, *supra* note 39, at 130–31. Interestingly, Brian Leiter has recounted a casual conversation with Posner in which Leiter questioned Posner on the basic problem of democratic legitimacy arising from Posner's support of overt legislating by judges. Posner purportedly responded that even congressional legislation, although "so-called authority," merely contains only "nuggets of wisdom" but are "not really binding." Leiter, a legal realist, characterized Posner's view as "radical." See Brian Leiter, Remarks at Northwestern University (n.d.), http://mms.at.northwestern.edu:8000/content/tools/video_clip/FlowPlayerDark.swf?config=%7Bembedded%3Atrue%2CvideoFile%3A%27mp4%3Ausers%2Fbgt108%2Fcollection15%2Fphilosophy%2Fvideo.mp4%27%2CstreamingServerURL%3A%27rtmp%3A%2F%2Fvideo.at.northwestern.edu%2Ficap-vod%2F%27%2CinitialScale%3A%27fit%27%2CcontrolBarBackgroundColor%3A%270x999999%27%2CautoBuffering%3Atrue%2CautoPlay%3Afalse%7D (last visited Feb. 1, 2012).

¹⁷⁷ Farber, *supra* note 8, at 1344.

¹⁷⁸ *Id.* at 1345.

¹⁷⁹ *Id.* at 1344.

¹⁸⁰ Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1722 (1990).

fallacy that [pragmatism] is too easy because it lacks the discipline of legal formalism—lacks in fact *any* structure or discipline.”¹⁸¹

No doubt, stated in the abstract, pragmatism is not freewheeling judicial activism because it counsels giving some weight to the systemic consequences of decisions. The problem is, because pragmatism can be used to legitimize any outcome a judge believes yields a social net gain, the functional differences between judicial activism and pragmatism seem theoretical at best. Dan Farber is correct when he states “legal pragmatism is easier to exhibit than to summarize,” although for a reason he probably does not accept.¹⁸² The reason is that pragmatism means whatever a particular adherent wants it to mean; it all depends on what she finds to be the most “reasonable” method of adjudicating a case with an eye toward consequences. So, for example, even though Posner’s pragmatism rejects the notion of a fundamental right to privacy—because he rejects the notion that, epistemically, any right can be confidently classified as “fundamental”—Dan Farber, a fellow pragmatist, defends *Roe v. Wade* because “it seems clear that the Court was correct in classifying procreative rights as *fundamental*.”¹⁸³ Farber also thinks that Posner “goes too far in rejecting respect for the past (including original intent) as an independent factor in decision” because courts need to tell “a believable story about how [they are] carrying forward the project of American constitutionalism.”¹⁸⁴

Thus, Farber is not inclined to agree with characterizing pragmatism as crass instrumentalism because his conception of pragmatism takes greater account of systemic consequences than Posner’s, just as most forms of formalism characteristically do. But the very fact that pragmatists adhere to such widely different premises about the appropriate “pragmatic” considerations, and that no controversy ensues about whether such premises are faithful to pragmatism “the method,” highlights the fact that pragmatism means simply deciding cases based on whatever the judge concludes represents the best social policy, and “empiricism” is the primary intellectual subterfuge for that. Thus, as Michael Sullivan and Daniel Solove assert, “what passes for legal pragmatism . . . is often a brand of commonplace reasoning that is more complacent than critical. Many neopragmatists are little more than realists who aim to account for current problems descriptively and empirically.”¹⁸⁵ Brian Tamanaha argues that calls by pragmatists for a greater appreciation of “context” in adjudication in large part is for purposes of “advancing the critical [legal studies] political agenda. . . . The broader objective, though it is usually left implicit, is to nudge the

¹⁸¹ LPD, *supra* note 39, at 63.

¹⁸² Farber, *supra* note 8, at 1377.

¹⁸³ *Id.* at 1367 (emphasis added).

¹⁸⁴ Farber, *supra* note 109, at 686.

¹⁸⁵ Sullivan & Solove, *supra* note 32, at 691.

legal system towards a more substantive justice stance,” which “means doing what is ‘right’ . . . even if that goes against the weight of the applicable legal rules.”¹⁸⁶

Posner himself has noted that “today’s legal pragmatism is so dominated by persons of liberal or radical persuasion as to make the movement itself seem . . . a school of left-wing thought.”¹⁸⁷ Of course, Posner is no dyed-in-the-wool realist, and he’s certainly no “crit,” so he’s correct that, strictly speaking, pragmatism has “no inherent political valence,”¹⁸⁸ but this is cold comfort. The key word is “inherent.” Legal pragmatism may be a politically empty vessel, but nature hates a vacuum. Indeed, Posner’s animation of his pragmatism illustrates how tempting it is to fill the void.

B. One Man’s Empiricism Is Another Man’s Burkeanism

Were Posner merely content with urging judges to make the most reasonable decisions they can, all things considered, and to inform their sense of reasonableness with greater intellectual curiosity, his pragmatism would be unassailable. But in expounding so much on his pragmatism, and in offering numerous examples of proper pragmatic adjudication, Posner exhibits what seems to be a need not only to urge greater reasonableness but to define reasonableness for the rest of us, and thus betrays that his pragmatism indeed prescribes ends. And his inability to do the latter in a manner that provides helpful guidance to judges seeking to apply Posnerian pragmatism reveals that the “ends” prescribed are defined primarily by something other than true empiricism.

Our first hint of this is when he repeats that “pragmatism does not prescribe results,” but then, in explaining the proper application of pragmatism, criticizes judges for not applying pragmatism correctly based on the result reached. For example, Posner notes that the Court in *Roe v. Wade* took a relatively pragmatic approach, but that its pragmatism “was executed ineptly,”¹⁸⁹ because it “prematurely nationalized an issue best left to simmer longer at the state and local level until a consensus based on experience with a variety of approaches to abortion emerged.”¹⁹⁰ In another piece, Posner condemns a district judge’s grant of an injunction

¹⁸⁶ Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 335–36 (1996). See also *id.* at 355 (“[M]ost current references to pragmatism consist of little more than attempts to boost credibility for a particular position by borrowing from the status enjoyed by pragmatism.”).

¹⁸⁷ Posner, *Offer?*, *supra* note 41, at 1658; accord Radin, *supra* note 180, at 1726 (“It is time for the openness and critical spirit of pragmatism to infiltrate pragmatist legal theory. Feminism can lead the way.”).

¹⁸⁸ Posner, *Offer?*, *supra* note 41, at 1658–59.

¹⁸⁹ HOW JUDGES THINK, *supra* note 5, at 243.

¹⁹⁰ Posner, *Offer?*, *supra* note 41, at 1668.

as an example of “myopic pragmatism.”¹⁹¹ According to Posner, the judge’s decision was based not on a restrained reading of precedent, but rather on the constructive incentive he predicted his ruling would create (a quintessentially pragmatic approach); nevertheless, the district judge failed to give adequate weight to countervailing pragmatic considerations.¹⁹² It seems Posner indeed has certain ends in mind when it comes to the nitty-gritty.

According to Nancy Levit, “[a]t bottom, [Posner’s] practical reason becomes an apology for Posner’s brand of politics.”¹⁹³ To his credit, Posner is not a categorical anything, but conspicuous in his writing are strong streaks of Burkean conservatism. A common thread in almost all of his specific examples of proper (or improper) pragmatic adjudication is a heavy emphasis on social stability, incrementalism,¹⁹⁴ a relatively high degree of deference to executive power in times of perceived crisis, an (arguably excessive) moral agnosticism toward past judges’ failures to protect individual rights, and an under-empathy for those who bear the burdens of the status quo. Beyond the examples already provided of Posner’s emphasis on social stability, his positions on *Korematsu v. United States*, *Plessy v. Ferguson*, and *United States v. Virginia* are illustrative of Posner’s (admittedly faint-hearted) Burkean temperament.

Regarding the national security context, consider Posner’s defense of *Korematsu*,¹⁹⁵ wherein the Court upheld the internment of all Japanese Americans on the West Coast during the Second World War:

[Regarding] whether President Roosevelt was mistaken to issue the order[,] [t]o answer that question we have to think ourselves into the minds of the American people three months after Pearl Harbor. . . . In these parlous circumstances it was natural, maybe inevitable, to resolve all doubts in favor of taking whatever measures

¹⁹¹ See Posner, *Pragmatic Adjudication*, *supra* note 94, at 17.

¹⁹² *Id.* at 17–18.

¹⁹³ Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494, 518 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

¹⁹⁴ For the first two, see Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 880 (2006) (“To actually implement the narrow originalist interpretation of the Commerce Clause set forth in Justice Thomas’s *Lopez* concurrence . . . would involve social and political disruption on a revolutionary scale—something no Burkean could contemplate outside the most extreme circumstances. . . . [F]idelity to the whole of our constitutional tradition mandates not a return to first principles but rather a strategy of ‘compensating adjustments’ designed to preserve our foundational commitment to federalism. This incremental approach should seek to narrow national power at the margins, but only to the extent that modern social and institutional realities permit this to be done without undue disruption.” (footnotes omitted)). No doubt Burkeanism has its virtues. But, as we see in this example, that the disruption be “undue” is crucial to support this reasoning, yet determining what “undue” means, and what institutional “realities” are, can be utterly a matter of intuition and personal temperament.

¹⁹⁵ *Korematsu v. United States*, 323 U.S. 214 (1944).

of self-defense seemed feasible; for it may well be vital to morale in wartime that a nation's leaders show themselves resolute, unflinching, and even brutal in the prosecution of the war.¹⁹⁶

Richard Epstein has criticized Posner over the latter's allegedly pragmatic take on *Korematsu*. After discussing the factual context of the decision and historical evidence uncovered since, Epstein notes "[i]t is no wonder that *Korematsu* has no (other) defenders today, and that a presidential apology, a congressional commission, and a reparations statute all rest on the unhappy conclusion that national hysteria and not national security drove the internment decision."¹⁹⁷ Of course, the Posnerian response to this might be that "hindsight is always 20/20"; the fact that contemporary detractors of *Korematsu* are so far removed from the exigencies that motivated the Court's deference merely illustrates how non-judges have the luxury of approaching controversial issues with moralistic stridence.¹⁹⁸ But Epstein's point is more than just moral indictment of the *Korematsu* Court. It is that Posner's treatment of the decision illustrates not a detached spirit of experimentation and open-mindedness but rather Posner's sometimes instinctive illiberalness. As Epstein puts it, "[w]e should all be better off if our sense of pragmatism were broad enough to allow us to acknowledge past national mistakes"¹⁹⁹ In this sense, Epstein concludes, "Posner's peculiar brand of pragmatism fails the most pragmatic test. It doesn't work."²⁰⁰

The point is, it is not merely shrill hubris to retrospectively criticize a decision like *Korematsu*; *it's pragmatic*. If we truly seek to glean all the lessons we can from past attempts to deal with difficult problems, we ask not whether we would have made the same decisions as our predecessors *were we in their shoes*; rather, we ask whether we would have made the same decisions, period. The former question leads us only to excuse, or to Burkean exaltation of "tradition." The latter leads us to contemplate how we might refine our responses to national emergencies in future like cases. The reluctance to criticize past decisionmakers, while admirable to the extent it reflects humility and an appreciation for context in

¹⁹⁶ Posner, *Legal Pragmatism Defended*, *supra* note 40, at 689.

¹⁹⁷ Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 657–58 (2004) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)) (footnotes omitted).

¹⁹⁸ See LPD, *supra* note 39, at 299 ("What is true is that when a nation is surprised and hurt there is a danger that it will overreact—yet it is only with the benefit of hindsight that a reaction can be separated into its proper and excess layers. In hindsight we know that interning the Japanese-American residents of the West Coast did not shorten World War II. But was this known at the time?"); Posner, *Legal Pragmatism Defended*, *supra* note 40, at 687 ("[Regarding *Korematsu*,] I am reluctant to make hindsight judgments, especially judgments designed to make me look more intelligent and more morally sensitive than the people of earlier epochs.").

¹⁹⁹ Epstein, *supra* note 197, at 658.

²⁰⁰ *Id.*

appraising the conduct of others, can easily devolve into moral complacency.²⁰¹

When we look to Posner's defense of *Korematsu* we see that Posner seems uninterested in gleaning from the decision any possible lessons about striking the healthiest balance between civil liberties and national security. We see only justification through an acceptance—perhaps through perceived inevitability—of certain mistakes rather than an effort to avoid repeating them. It is thus in the national security context that we see what Dan Farber calls Posner's occasional “odd[] oblivious[ness] to notions of human dignity and to the related inherent value of the rule of law,” which “sometimes resembles some form of moral tone-deafness.”²⁰² Perhaps by way of some streak of “authoritarian personality” (as Posner himself might put it)²⁰³ we get the tendency to reduce the security/liberty dilemma down to simplistic dichotomies: the familiar national-disaster-versus-temporary-bending-of-legal-niceties quip.²⁰⁴

²⁰¹ While the past is indeed an important pool of wisdom that should be tapped, as Jeremy Bentham famously quipped, “a preceding generation . . . could not have had as much experience as the succeeding generation,” and thus its wisdom is often not the “wisdom of gray hairs” but rather “the wisdom of the cradle.” BENTHAM'S HANDBOOK OF POLITICAL FALLACIES 44–45 (Harold A. Larrabee ed., 1952).

²⁰² Farber, *supra* note 109, at 687.

²⁰³ I use this phrase neither to psychoanalyze Judge Posner (which I'm unqualified to do), nor to discount the seriousness of his thoughts by reducing them to nothing but the product of raw and irrational neurosis, but rather because Posner himself introduces the concept of authoritarian personality into the debate by discussing possible predispositions of formalists. Interestingly, while he suggests that formalist inclinations are manifestations of authoritarian personality, HOW JUDGES THINK, *supra* note 5, at 100–04, Posner seems to tacitly admit to an authoritarian personality himself. He describes the authoritarian personality as one that causes “a person to react particularly strongly to threats that seem aimed at society at large . . . as distinguished from merely personal threats,” and that stresses “order and stability.” *Id.* at 100. Thus, “[s]uppose a judge was at an impressionable stage in his development during the disorders of the Vietnam War era. If he has an authoritarian personality, the disorders appalled him and probably drove him into the Republican camp.” *Id.* at 101. In a video interview available on the Internet, Posner, in discussing what influences his pragmatic jurisprudence, notes his “ideological development,” which was largely influenced by the fact that he reacted “very negatively to the riots and protests of the Vietnam period.” See Richard Posner, *Interpreting the Law*, BIG THINK (Dec. 18, 2007), <http://bigthink.com/ideas/4331>. According to Posner, these types of experiences can have “different effects on people depending on . . . deep psychological factors which are—biological.” *Id.*

²⁰⁴ See, e.g., LPD, *supra* note 39, at 300–01 (“The United States is a nation under law, but first it is a nation. Would it have been worthwhile to lose the Civil War merely to prevent the violation of the Constitution? Was not Lincoln correct that to save the Constitution it might be necessary to violate it? Is it not vital to morale in wartime that a nation's leaders show themselves resolute, and is not brushing aside legal niceties that might interfere with the determined prosecution of the war one way of showing this?” (footnotes omitted)).

Regarding *Plessy v. Ferguson*, Posner concludes that “[i]nvalidating segregation . . . might have burnished the Court’s record in history, but at the cost of underscoring the Court’s weakness, and perhaps encouraging future defiance of its decisions. A court . . . cannot get too far ahead of public opinion.”²⁰⁵ This take on *Plessy* is consistent with Posner’s view, noted above, that the Court in 1956, in light of the controversy surrounding its *Brown* decision just two years prior, was correct in refusing to review the constitutionality of anti-miscegenation laws simply because “a decision outlawing laws against miscegenation would have been one judicial bombshell too many.”²⁰⁶ Likewise, in a hypothetical involving whether the Court should strike down laws forbidding incest between two adults (assuming for the sake of argument that a fundamental right is implicated in the hypothetical), Posner notes that although

the bad consequence [of sustaining such a statute] would be forbidding a harmless intimate relationship that might be indispensable to the happiness of the participants[,] . . . the pragmatic judge would be most reluctant to invalidate such a statute [because] . . . [h]orror at incest is a brute fact about present-day American society that, were the statute invalidated, would . . . cause a degree of public upset disproportionate to the benefits of invalidation to the very occasional would-be participants in such a relationship.²⁰⁷

That the risk of agitating certain segments of society is a sufficient reason to forgo guarding the rights of individuals is a common streak in the “realist” temperament of the Burkean. But no “empirical” truth commands that a pragmatic judge weigh the rights of individuals in this manner. It is arbitrary, reminiscent of the “truths” formalists claim to find in natural law. In the incest example, Posner provides nothing but his intuitive non-sequitur that “public upset” would outweigh protection of an individual right (again, assuming for the sake of argument that a fundamental right is implicated). Rather than being “pragmatic” in any verifiable sense of the term, the emphasis on social stability seems no more than an outgrowth of a personal temperament that perhaps exaggerates the social disruption that might result from social division.

Posner’s Burkean instinct to avoid boat-rocking of established institutions, even at the expense of forgoing his alleged pragmatic impulses (experimentation, etc.), comes out in his position on *United States v. Virginia*,²⁰⁸ which deserves extended discussion. In *Virginia*, the Court struck down the Virginia Military Institute’s (VMI) long-standing

²⁰⁵ Posner, *Legal Pragmatism Defended*, *supra* note 40, at 688–89.

²⁰⁶ LPD, *supra* note 39, at 66.

²⁰⁷ *Id.*, at 65–66.

²⁰⁸ 518 U.S. 515 (1996).

male-only admission policy.²⁰⁹ In his discussion of the case, Posner first scolds the majority for overindulging its indignance over the historically unequal treatment of women, noting that “[i]ndignation about historical injustice often reflects ignorance of history.”²¹⁰ Posner then turns to what he terms “the issue” of the case, which is the empirical matter of “whether excluding women from VMI is likely to do more harm to women, whether material, psychological, or even just symbolic . . . , than including them would do to the mission of training citizen-soldiers.”²¹¹

Posner notes the lack of empirical data available to help answer this question, stating “[n]o one knows what effect incorporating large numbers of women into the nation’s armed forces will have on military effectiveness.”²¹² Because of the little data we have, “judges should tolerate continued experimentation . . . in public education.”²¹³ These statements are perplexing. Allowing VMI to *continue* the age-long practice of excluding women is not to “continue experimentation,” but rather to *delay* experimentation. How does Posner expect to acquire empirical data about the effects of sexually integrated adversative military education if schools employing the method don’t admit women? Indeed, the VMI context seems the ideal petri dish for pragmatic experimentation. And it is no response to argue that institutions implicating national defense are not proper fora for such experimentation, as Posner himself notes that VMI’s “military irrelevance” was what made the Court especially inclined to reach its holding; that is, VMI plays an “extremely peripheral role in the defense of the nation,”²¹⁴ such that the Court could embark on its sex equality crusade without having to worry about serious national security repercussions.

What might be the benefits to the nation if, as the Court required, we proceed with the experiment? Might we find that women are far more able to suffer the adversative method than previously thought, or that the additional admittees help keep the officer ranks full during a war against terrorism? Interestingly, as to the first consideration, Posner states:

Suppose 10 percent of men were well suited for adversative training and “only” 9 percent of women. Then an absolute exclusion of women would be a blunt instrument for excluding the unqualified. But if instead the percentages were 10 percent and 0.1 percent, and if alternative, more refined screens [for admission other than sex] were infeasible, the exclusion would make compelling sense.²¹⁵

²⁰⁹ *Id.* at 519.

²¹⁰ PROBLEMATICS, *supra* note 2, at 166.

²¹¹ *Id.* at 169.

²¹² *Id.* at 170.

²¹³ *Id.* at 173.

²¹⁴ *Id.* at 170.

²¹⁵ *Id.* at 168.

So, assuming that the primary justification for excluding women from VMI would be their ability to handle the training, if 90% of women are able to handle what men can handle, such would support the Court's decision, but if only 1% are so able, such obviously would not.

In a footnote, Posner recognizes one study's finding that, in the wake of the Court's decision, the dropout rate for women at VMI was 23% compared to 16% for men.²¹⁶ The difference in dropout rates is obviously significant, but significant enough? Posner attempts to moot this question by asserting that "a concern with the consequences of mixing the sexes in the unusual setting of a military academy is unrelated to whether women are able to function as well in that setting as men are."²¹⁷ "Unrelated?" But, again, Posner just several paragraphs later characterizes "the issue" as being "whether excluding women from VMI is likely to do more harm to women" than good to VMI's mission.²¹⁸ Obviously, then, if women are able to excel in a harsh military academy atmosphere, such informs the value of one of the two key variables in Posner's own equation: the degree of harm suffered by women via admission into VMI.

Aside from this glaring contradiction, another reason why Posner's "unrelated" statement is problematic is because it suggests that VMI's exclusion of women would be justified even if we knew that women could tolerate the psychological and physical rigors of its training regimen. In emphasizing the "tension" that has arisen among some in the military in response to sex-integrated training, and general "increased grumbling in military and national-security circles,"²¹⁹ it seems what Posner is saying is that exclusion would be justified *solely* to avoid aggravating prejudices in the military.

The primacy in Posner's mind of avoiding cultural disruption within the military, and his discounting of the individual interests at stake for women, illustrates once again what seems to be an intuitive tendency to err on the side against upsetting the status quo. His glaring abandonment of the experimental spirit—made even more strange by his attempt to characterize that abandonment as experimental in its own right—demonstrates that, at base, Posner's position on the issue is not one of true pragmatism; it's visceral conservatism.

²¹⁶ *Id.* at 171 n.162 (citing Wes Allison, *Testing Their Freedom at VMI*, RICHMOND TIMES-DISPATCH, Mar. 22, 1998, at C1).

²¹⁷ *Id.* at 167.

²¹⁸ *Id.* at 169.

²¹⁹ *Id.* at 170.

V. THE TURN TOWARD FIDELITY

What will be the legacy of the type of legal pragmatism espoused by Posner?²²⁰ Pragmatism no doubt, at least *theoretically*, can be a genuinely empiricism-focused and experimental prescriptive model,²²¹ and thus less ideologically loaded and intuition-driven than the species so far advanced in its defense (whether such a jurisprudence is desirable is another matter—there are reasonable arguments that it is not). It would be characterized by adherents' constant willingness to adjust their perspectives based on an open-minded, humble and self-conscious hospitality to new information regarding, for example, the Framers' premises and intentions, as well as information that might generate greater empathy for relevant groups,²²² rather than a jurisprudence of hunches and non-sequiturs about how things inevitably "are" that hitchhike on the current fashionableness of empiricism. In this sense, Michael Sullivan and Daniel Solove are correct when they note that, "[w]hen seen in its full colors rather than faded Posnerian pastels, pragmatism is *radical*. Its ideas unsettle many of the institutions and 'realities' that Posner takes as given."²²³

²²⁰ Of course, this paper is ultimately not about Posner, per se, but merely uses his pragmatism as a sample of that which characterizes current academic definitions of good judging. But, as others have noted, a glance at his judicial opinions reveals that perhaps Posner's academic writing does not do his actual judging justice. Chad Flanders, in critiquing *How Judges Think*, describes Posner as a "humanistic judge," and thus "we may in the end wonder whether Posner's own predictive theory of judging has a place for a judge so deep, careful and creative as Posner is." Chad Flanders, *A Review of How Judges Think by Richard A. Posner*, 3 LAW & HUMAN, 118, 118 (2009). Dan Farber notes that "Posner seems drawn by his desire to be hard-headed into occasional insensitivity toward certain moral values. Posner's work as a judge shows that he himself is not insensitive to these values, but they seem oddly shortchanged in his theoretical account." Farber, *supra* note 109, at 676. As further evidence, compare Posner's seeming dismissal of fundamental rights and indifference toward the jurisprudential notion of "individual dignity" with his seeming approval of the outcome of *Lawrence v. Texas*, 539 U.S. 558 (2003), wherein the Court struck down a Texas law effectively banning homosexual intercourse. See also his arguably unpragmatic opinion for the Seventh Circuit in *Edmond v. Goldsmith* invalidating under the Fourth Amendment a remarkably effective drug interdiction roadblock. 183 F.3d 659 (7th Cir. 1999), *aff'd sub nom.* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Posner likes to argue that a look at how he actually decides cases should ease some of the handwringing about his theoretical pragmatism; perhaps the best response to this is that his theoretical pragmatism goes farther than his actual jurisprudence, and thus the former is aspirational, even for him.

²²¹ For example, see Brian Tamanaha's call for a more "realistic" pragmatic socio-legal studies. TAMANAHA, *supra* note 9, at 8.

²²² "What leads some pragmatists into complacency and over-respect for the status quo is partly the failure to ask, Who is 'we'? And what are 'our' material interests? Why does it 'work' for 'us' to believe this? It is not necessary for pragmatists to make this mistake." Radin, *supra* note 180, at 1711.

²²³ Sullivan & Solove, *supra* note 32, at 691–92.

But we must take pragmatism for what it has been, and what it is. And what it has been, and what it remains, is a catch-all sentiment for the post-modernist skepticism that fidelity to abstractions of political theory can render adjudication “legitimate” in some fairly discernible sense of the term. Hence the free-for-all as to what “legitimate” actually means. Perhaps what pragmatism unintentionally teaches us, through its search for an alternative to fidelity, is that those approaches that are characterized by fidelity are the least-worst of the options available, not because they actually work in the way they purport to—all but the most ardent originalists actually believe they do—but because they exalt the *effort* by individual judges to remain faithful to principles of political theory meant to keep them humble. And the effort is what it’s all about.

In this vein, Brian Tamanaha notes, simply enough, that although “[v]iewing the law through the prism of one’s personal beliefs is perhaps unavoidable,” it is not inevitable that judges will abandon their sincerity in *attempting* “to figure out what the law requires.”²²⁴ The key is “the attitude and commitment of judges to live up to their obligation to follow the law.”²²⁵ “Follow the law” is, of course, the type of “pious” “law day” rhetoric that pragmatists and their siblings recoil from. But this re-idealization of the legal process at its best is likely to be the most significant legacy of pragmatism and the post-modern realism imbued with it. It begins when those who are perhaps temperamentally disinclined to think of law as nothing but politics are no longer distracted from the realist charge of formalism’s indeterminacy. Indeed, neo-formalists for the most part happily accept the realist descriptive account of law and judging,²²⁶ but are reticent to resign prescriptively to “law as politics.”

The reinvigoration of fidelity in normative jurisprudence as a natural and rather predictable response to pragmatism takes several forms; although this paper will not attempt to catalogue them, several are illustrative and worth noting.

Professor Solum has written about the “aretaic turn” in constitutional theory, inspired by the increasing influence of virtue ethics

²²⁴ Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 SYRACUSE J. INT’L L. & COM. 131, 151 (2005). See also Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 CHI. L. REV. 815, 819 n.15 (2008) (“One can only applaud a *general* attitude among judges that permission to bring their politics into the courtroom would destroy the rule-of-law enterprise. Even if we can be confident that politics’ traces may inevitably be found in a judge’s work, because she is at the end of the day human . . . , this is an element we may expect her to work to suppress and should hardly wish to encourage in her conscious performance of tasks.”).

²²⁵ Tamanaha, *supra* note 224, at 151.

²²⁶ See Sunstein, *supra* note 94, at 644.

on legal thought.²²⁷ Like realism, virtue jurisprudence rejects prescriptive methodologies for their interminable flaws, and also refuses to gauge the quality of judging based on whether various sorts of substantive justice are realized. Rather, it seeks to refocus our gaze to those personal virtues that most predispose judges to make good decisions. Of course, deciding what those virtues are is an indeterminate game, but one we perhaps must play.

The most central virtue among those Professor Solum offers is “a special concern for fidelity to law and for the coherence of law.”²²⁸ Professor Solum expounds on what it means to possess the virtue of “lawfulness,” invoking Aristotle’s conception of “justice” as ultimately embodying

the assumption that every community requires the high degree of order that . . . comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one’s part in bringing it about that one’s community possesses this stable system of rules and laws.²²⁹

For purposes of constitutional adjudication, this leads to an “aretaic constitutional formalism,” as the virtues he deems crucial compel an adherence to *stare decisis*, an adherence to the plain meaning of relevant text, respect for original meaning, intratextualism, and a willingness to observe “default rules” of adjudication.²³⁰

Of course, one can argue that Professor Solum might put excessive emphasis on stability, and too little emphasis on a willingness to destabilize the status quo to achieve “justice.” But that’s neither here nor there. While he does not expressly say so, Professor Solum inescapably sketches his conception of judicial virtue in the only way one can plausibly distinguish general personal virtue from virtuous judging specifically: by the terms of the political document that created Article III power, and the political project Article III power exists to serve. In this sense, Professor Solum’s virtues amount to a fidelity to the very premises of political theory at the heart of normative formalism like originalism.

Paul Horwitz is another scholar pushing down the virtue ethics path. While seemingly embracing Professor Solum’s general position, however, he purports to slightly part ways, asserting:

In my view, constitutional virtue does not convincingly demand that the virtuous judge be a formalist. Perhaps more controversially, there is no reason to think that a virtuous judge cannot be [one of Posner’s] constrained pragmatist[s] [P]ragmatism strikes me

²²⁷ Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004).

²²⁸ *Id.* at 516.

²²⁹ *Id.* at 517 (quoting RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 106 (2002)).

²³⁰ *Id.* at 520–21.

as an approach that better responds to and accounts for the myriad complexities of judging, for which no action guide is possible; and its *constrained* nature . . . suggests that it need not be a free-for-all and, indeed, will be suitably hedged in by the very questions of virtue and character that a sound virtue jurisprudence places at the center of the judicial enterprise.²³¹

It is interesting to juxtapose this defense of Posner's pragmatism within the confines of virtue ethics with Professor Horwitz's latter emphasis on the importance of the judicial oath in the aretaic exercise:

[T]he judicial oath, and the formalities attendant upon swearing it, ties the judge's character intimately to his or her office, rendering every decision in office both one that has official weight and must be undertaken consistently with the judge's official duties, and one that has about it a sense of personal moral obligation. Properly understood and seriously considered, the oath can be a forceful reminder of what virtuous judging demands. It can also be a constraint for the potentially incontinent or imperfectly virtuous judge.²³²

If Professor Horwitz were an unequivocal Posnerian pragmatist, he probably wouldn't think that virtue ethics would have much work to do. Implicit in his comments, then, is the nagging feeling that Posner's pragmatism can play a little too fast and loose in the wrong hands (not necessarily in Posner's), and thus a prudence cautions him toward the fidelity that the oath embodies. It is this tension that is noteworthy: while the label "formalist" should not be stretched so thin as to cover anyone who believes in taking the oath of office seriously, positions that look to the sentiment of fidelity like that expressed in the oath represent the increasing trend of commentators gravitating toward the fidelity inherent in most types of formalism, even in disclaiming the label "formalism," perhaps due to its connotation of naïveté among academics and its association with politically conservative jurists.

As such, it matters little for present purposes whether it's true that Posner's pragmatism is consistent with virtue ethics jurisprudence. It theoretically could be, but my concern, like Posner's, is not theory per se, but theory's practical effects. As a practical matter, it is difficult to see how, *given the context in which virtue ethics is becoming more prominent in legal thought*, one could conclude that virtue ethics could inspire a judicial attitude consistent with the essentials of pragmatism as Posner has explicated them. Virtue ethics in law is largely a product of the angst felt by those who, while perhaps not sympathetic to the views of substantive justice that politically conservative formalists often hold, hold fast to the belief that legitimate adjudication demonstrates more than a superficial degree of respect for exalted political morals derived from political

²³¹ Paul Horwitz, *Judicial Character (And Does It Matter)*, 26 CONST. COMMENT. 97, 154–55 (2009) (book review).

²³² *Id.* at 163–64 (footnotes omitted).

theory (e.g., the morally proper relationship between the government and the individual, the limited propriety of judicial review in a democratic system of government, etc.).

Thus, a “pragmatic” jurisprudence modified by the fidelity inherent in taking the literal meaning of the oath of office more seriously yields at least a type of pragmatism that gravitates away from its roots and toward the virtues of formalism. While such a pragmatism cannot be termed “formalism” in a traditional sense, it nevertheless represents a pull toward a soft formalism that insists on a significant role for fidelity in the ideal judicial attitude.

The pull of fidelity illustrated in Professor Horwitz’s comments reveals another important fact: this is not about liberal versus conservative. Over the past several decades, it has been primarily liberal scholars who have utilized the forgiving nature of pragmatism to argue for social change through adjudication, with conservatives on the other side lobbying for originalism and the like. This is not a surprise, given that popular types of formalism, such as originalism, not-so-coincidentally tend to favor politically conservative outcomes. But scholars not necessarily identified with conservative politics or jurisprudence have come to realize that conservatives need not be allowed to hog the fidelity stage.

For example, Professor Fleming has written that we should conceive of “fidelity in terms of honoring our aspirational principles rather than merely following our historical practices and concrete original understanding, which no doubt have fallen short of those principles.”²³³ As such, “fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.”²³⁴ Professor Sunstein proposes “soft originalism,” which in constitutional cases, means to “take the Framers’ understanding at a certain level of abstraction or generality.”²³⁵ “Soft originalism” best characterizes the method used by Professor Tribe in arguing over the appropriate level of generality on which to contemplate rights granted in the Bill of Rights, which naturally leads to a more expansive meaning of the Amendments.²³⁶ And Randy Barnett’s originalist take on the Ninth Amendment, which is far more willing to recognize unenumerated rights than most conservative originalist readings of the Amendment would, is probably best termed “hard” originalism.²³⁷

²³³ Fleming, *supra* note 146, at 1354 (emphasis omitted).

²³⁴ *Id.*

²³⁵ Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 313 (1996).

²³⁶ See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

²³⁷ See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

The focus on fidelity is nothing new, but it is increasing, and it is revealing itself in new permutations. Pragmatism, and related approaches, that eschew fidelity as a useful component of judging will likely continue to inspire even more permutations. Whether termed “formalist,” “neo-formalist,” or even “faint-hearted pragmatism,” such approaches serve to satisfy what appears to be an interminable feature of American legal culture: the need to conceive of law, and the legal process, as an ideal defined primarily by principles of political theory, and perhaps the recognition that the only check on judicial power is the confirmation of judges who take those principles seriously.

VI. CONCLUSION

Results matter. It seems the only argument is over *which* results matter most. That those Posner terms “formalists”—or, if you like, “legalists”—look to results to justify their perspectives makes the qualitative divide between Posner and his alleged antitheses illusory. Thus, when Posner describes pragmatism as the American judicial ethos, he perhaps underestimates just how correct he is—pragmatism describes virtually all judges, even the “legalists” from whom Posner struggles to distance himself. Certainly, there is a difference between a judge who, in deciding cases, prioritizes systemic or “rule of law” considerations, and one who does not; a meaningful difference at that. But that difference cannot be definitively sketched in terms of “pragmatism,” “formalism,” “legalism,” and the like, because each of these concepts collapses into the other depending on who’s doing the judging.

This word game is not ultimately what is important; it is important, however, to recognize that it is little more than that—a word game. The point is that pragmatism is a distraction from the reality that it is invariably used as a mode of justifying intuitive views of substantive justice or sensible results. This increasingly obvious fact about pragmatism and its siblings is leading many to question whether it’s fruitful for the language of legal culture to consist primarily of appeals to intuitive justice under the thin guise of “pragmatism,” or whether legal culture should look back and ask whether it threw out a baby with the formalist bathwater.

To the legal realist or pragmatist who argues that the legitimacy of a formalist methodology is gauged by the degree to which it yields verifiably correct answers to the hardest legal questions,²³⁸ there never was a baby in the bathwater; only the murky suds of fidelity dogma used as a

²³⁸ See, e.g., Cotter, *supra* note 4, at 2083–84 (“[T]here may be a reasonably good *pragmatic* case for approaching grand theory with caution: namely, that experience thus far suggests that grand theory either leads to absurd results in some cases or fails on its own terms by not producing a definitive answer that can be logically deduced from the central principle.” (footnotes omitted)).

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cover for arbitrary judging. But to legal commentators who continue to contemplate the judicial enterprise as properly disciplined by principles of political theory ("democracy," "judicial restraint," "institutional legitimacy," etc.) the indeterminacy problem is a red herring. The banality of the red herring, combined with the perceived need for fidelity in any feasible construct of Article III legitimacy, is producing a soft formalism, one that aspires to keep law an ideal while being wise enough not to promise a science.