CONSTITUTIONAL PRAGMATISM, THE SUPREME COURT, AND DEMOCRATIC REVOLUTION

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I. INTRODUCTION

At first glance, two concepts that do not seem related are revolution and pragmatism. Even a non-violent democratic revolution connotes ideological passions, as well as the dramatic replacement of one regime by another. By contrast, pragmatism suggests, in ordinary parlance, a non-ideological effort aimed at achieving positive results, with no requirement of transformation.[1] Yet this is a highly incomplete notion of pragmatism.

This paper will respond to these misconceptions by illustrating how the U.S. constitutional revolution was dependent on different types of pragmatism. This is true of some other nations' revolutions as well. The paper will also identify and map the various types that can be connected to the U.S. constitutional revolution. The types include common sense, transitional, political, democratic, economic, empirical, common law, flexible, critical, and comprehensive pragmatism. With each type of pragmatism connected to revolution, the paper will show how its legacy can also be related to certain parts of the U.S. Supreme Court's jurisprudence. After all, constitutionalized judicial review ended up being a fundamental aspect of the revolutionary break with the British monarchy.

The paper will then discuss two types of constitutional pragmatism that are not consistent with a revolutionary impulse. These are prudential and efficiency-oriented pragmatism. The paper will fill an important gap

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1. The Merriam-Webster dictionary defines pragmatism as "a practical approach to problems and affairs." It gives the example of a policy that "tried to strike a balance between principles and pragmatism." *Pragmatism*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/pragmatism (last visited Apr. 15, 2012). Thus, pragmatism is contrasted, wrongly or rightly, with the kind of fundamental principles that are at the base of ideological passions. Interestingly, the philosopher Immanuel Kant was one of the first to use a similar term, in a somewhat different way, and yet he is celebrated as an idealist moral philosopher. LOUIS MENAND, THE METAPHYSICAL CLUB 227 (2001). The term also has Greek roots given Aristotle's discussion of practical wisdom and ethics. Richard Kraut, *Aristotle's Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 6 (Mar. 29, 2010), *available at* http://plato.stanford.edu/entries/aristotle-ethics/.

in the scholarly literature as constitutional pragmatism has been under-theorized and criticized, without an awareness of this typology.

At its most general level, constitutional pragmatism means that the Supreme Court should be less formalistic, and should candidly acknowledge that the traditional modalities of constitutional interpretation do not answer the hardest constitutional questions. As Justice Oliver Wendell Holmes wrote, "The life of the law has not been logic; it has been experience."[2] Consequences are key, though I will show that moral principles can also matter. Among the few prominent scholars who support a pragmatic approach are Richard Posner[3] and Daniel Farber.[4] Yet pragmatism does a better job of describing how the influential, and at times revolutionary, U.S. Supreme Court decides cases than either originalism or living constitutionalism—two of the more popular theories.

That's why Mark Tushnet has characterized U.S. constitutional interpretation in terms of eclectic pragmatism,[5] and Brian Tamanaha has argued that more judges are pragmatists than any other category.[6] Indeed, Justice Kagan said she would be a pragmatic judge, at her confirmation hearings, and Justice Alito gave that impression as well.[7] In addition, Justice Breyer has authored a book advocating the workable Constitution.[8] Justice Sotomayor has taken a pragmatic approach in her cases, and Justice Scalia's "soft originalism" acknowledges that stare decisis is important for pragmatic reasons. Moreover, the Justices must write coalition opinions that often cannot reflect foundational views. Also, lawyers and judges are pragmatists who rely on as many tools as possible in argu-

2. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (2009).

3. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1 (2003).

4. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332–33 (1988) (arguing that legal pragmatism constitutes an adequate foundation for constitutional law).

5. Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 7 (Jeffrey Goldsworthy ed., 2006).

6. Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 490 (2007); *see also* RICHARD A. POSNER, HOW JUDGES THINK 230 n.2 (2008).

7. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 82, 122, 177, 178, 270 (2010) (statement of Elena Kagan, Solicitor General of the United States), ("I would look at this very practically and very pragmatically, that sometimes some approach—one approach is the relevant one and will give you the best answer on the law, and sometimes another."); Edward Lazarus, *What Kind of Justice Will Samuel Alito Be? A Recent Death Penalty Decision Provides Some Insights*, FINDLAW (May 11, 2006), http://writ.news.findlaw.com/lazarus/20060511.html ("But Alito's opinion declaring South Carolina's rule unconstitutional did not fulfill any of these fears. Instead, it reflects much of the persona Alito ascribed to himself at his hearings—namely, that he was a plain-spoken, pragmatic, and precedent-oriented judge.").

8. *See generally* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

ing for, or reaching, a result.[9] And many of the framers were legally trained.

This typology is part of a larger project on pragmatism in constitutional thought. The paper is mainly descriptive and somewhat exploratory. Hopefully, the project can help scholars, judges, and others discuss constitutional pragmatism more intelligently, as well as see its complexity and ubiquity. Indeed, there is much room for additional work. Political scientists, for example, could use this typology to code Supreme Court cases, and examine in more detail how pragmatism has been employed.

A caveat is necessary. This paper will not explore philosophical pragmatism in depth (e.g., the distinctions among Charles Pierce, William James, John Dewey, and Richard Rorty). That's already been done by numerous scholars. Indeed, Thomas Grey has made clear that a legal pragmatist need not be a philosophical one.[10] At the same time, there are connections. Louis Menand and others have examined the close philosophical ties between Holmes and James.[11] Holmes's values skepticism is connected to the legal realist school, which has roots in pragmatist philosophy.[12] Similarly, John Dewey's more optimistic and "experimental" pragmatism has influenced legal theorists.[13] The paper will, however, examine the strengths and weaknesses of the differing types of constitutional pragmatism, especially from a revolutionary context. The paper comes at an interesting time as President Obama has been described as a constitutional pragmatist.[14]

II. TYPOLOGY

A. Common-Sense Pragmatism

In 1835, Alexis de Tocqueville wrote that Americans rejected the European aristocracy in favor of an egalitarian view rooted in the Puritans.[15] Everyone should have the chance to prosper given the right work

9. Jack M. Balkin & Sanford Levinson, *Law & the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 184 (2006) ("Lawyers are rhetorical opportunists and pragmatists: They are always looking for new ways to impress and persuade their audiences, and to bestow authority and legitimacy on themselves and on the institutions and practices they seek to defend.").

10. *See* Thomas C. Grey, *Freestanding Legal Pragmatism*, *in* THE REVIVAL OF PRAGMATISM 254 (Morris Dickstein ed., 1998).

11. *See* MENAND, *supra* note 1, at 217.

12. *Id.* at 438.

13. *See id.* at 360; *see also* Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807, 815 (2009); Dorothy Evensen et al., *Where Have You Gone John Dewey?: Locating the Challenge to Continue and the Challenge to Grow as a Profession*, 108 PENN ST. L. REV. 19, 26 (2003).

14. *See, e.g.*, Christopher Hayes, *The Pragmatist*, THE NATION (Dec. 29, 2008), http://www.thenation.com/article/pragmatist; *see also* Alexandra Starr, *Students Saw in Professor Obama a Pragmatist, Not an Ideologue*, N.Y. TIMES (Sept. 19, 2008), http://www.nytimes.com/2008/09/19/world/americas/19iht-pragmatist.1.16306854.html?pagewanted=all.

15. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 32–35 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835 & 1840).

ethic, individual character, etc.[16] This ethos was partly responsible for America's burgeoning middle class. He also suggested that Americans disliked pretense, intellectual or otherwise.[17] De Tocqueville was describing the common-sense temperament of many Americans. This practical sensibility was actually fundamental to the colonist's decision to revolt and is also central to present American attitudes. Moreover, this sensibility has found its way into the Supreme Court's opinions.

1. Revolution

Thomas Paine's popular 1776 pamphlet "Common Sense" helped light the revolutionary fuse.[18] It argued for separation from Britain in a persuasive, clever, and yet accessible manner that resonated with the educated class. Paine said, "I offer nothing more than simple facts, plain arguments, and common sense."[19] Interestingly, Paine was a commoner.[20]

The pamphlet was pragmatic in other ways. It was propaganda designed to gain support from the French, as well as the American citizenry.[21] The pamphlet even specified how a new government should be organized.

This excerpt from the Introduction shows Paine's rhetorical skills:

> The cause of America is, in a great measure, the cause of all mankind. Many circumstances have, and will arise, which are not local, but universal, and through which the principles of all lovers of mankind are affected, and in the event of which, their affections are interested. The laying a country desolate with fire and sword, declaring war against the natural rights of all mankind, and extirpating the defenders thereof from the face of the earth, is the concern of every man as to whom nature hath given the power of feeling; of which class, regardless of party censure, is THE AUTHOR.[22]

16. De Tocqueville noted:

> [I]n America the aristocratic element, always weak since birth, is, if not destroyed, at least weakened, so that it is difficult to assign it any influence whatsoever in the course of affairs. Time, events, and the laws have, on the contrary, rendered the democratic element not only preponderant there, but so to speak unique. No influence of family or corporation is allowed to be perceived; often one cannot even discover any individual influence however long lasting. America therefore presents the strangest phenomenon in its social state. Men show themselves to more equal in their fortunes and in their intelligence or, in other terms, more equally strong than they are in any country in the world and than they have been in any century of which history keeps a memory.

Id. at 51–52.

17. *Id.* at 540–41.

18. *See* THOMAS PAINE, COMMON SENSE (1776), *available at* http://www.earlyamerica.com/earlyamerica/milestones/ commonsense/text.html.

19. *Id.*

20. HARVEY J. KAYE, THOMAS PAINE AND THE PROMISE OF AMERICA 18 (2005).

21. *See* PAINE, *supra* note 18.

22. *Id.*

The pamphlet criticized the British king's detachment:

> There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the business of a king requires him to know it thoroughly, wherefore the different parts, unnaturally opposing and destroying each other, prove the whole character to be absurd and useless.[23]

Moreover, he wrote, in a scientific vein:

> . . . [T]here is something very absurd, in supposing a continent to be perpetually governed by an island. In no instance hath nature made the satellite larger than its primary planet, and as England and America, with respect to each Other, reverses the common order of nature, it is evident they belong to different systems: England to Europe—America to itself.[24]

He adds that "[c]ommon sense will tell us, that the power which hath endeavored to subdue us, is of all others the most improper to defend us."[25] Paine is saying the monarchy's injustice is obvious. The Declaration of Independence echoes this sentiment when it says, "We hold these truths to be self-evident."[26]

Paine invoked the Bible frequently. "That the Almighty hath . . . entered his protest against monarchial government is true, or the scripture is false."[27] In the appendix, Paine wrote that "we have every opportunity and every encouragement before us, to form the noblest, purest constitution on the face of the earth. We have it in our power to begin the world again. A situation, similar to the present, hath not happened since the days of Noah until now."[28] These Bible references would have resonated with his audience.

He discussed constitutional principles as well:

> I take the liberty of rementioning the subject, by observing, that a charter is to be understood as a bond of solemn obligation, which the whole enters into, to support the right of every separate part, whether of religion, personal freedom, or property. A firm bargain and a right reckoning make long friends.[29]

23. *Id.*
24. *Id.*
25. *Id.*
26. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)
27. PAINE, *supra* note 18.
28. *Id.*
29. *Id.*

Robin West has written eloquently, however, that Paine was not endorsing constitutional judicial review here.[30] Harvey Kaye has said that Paine was the revolution's only real voice of radical democracy.[31]

As Sophia Rosenfeld has shown in her intellectual history of common sense, Paine drew heavily from the Scottish Enlightenment philosophers who subsequently influenced drafters of the U.S. Constitution like Madison.[32] Moreover, Philadelphia delegate James Wilson was Scottish.[33] These philosophers were empirically minded and critical, yet humane, optimistic, and rights-oriented.

2. Cases

U.S. Supreme Court Justices have frequently relied on common-sense arguments. Justice Potter Stewart said of obscenity, "I know it when I see it."[34] The Court later ruled that a jury must determine what is obscene using the "community standard."[35] Justice Scalia often criticizes the views of the elites as against the wisdom of ordinary people.[36] More recently, the Justices are relying on ordinary dictionaries in defining the words of a statute, rather than trying to assess what the congressional drafters intended or to use specialized legal references.[37] Several critics have argued this could lead to "dictionary shopping."[38] And U.S. private law consistently employs the "reasonable person" standard.

The U.S. Supreme Court in *J.D.B. v. North Carolina*[39] recently issued a 5–4 decision in which the majority relied on common sense. The Court ruled that the police had failed to provide the *Miranda* warning to a thirteen-year-old who had been removed from his classroom and questioned in a conference room for thirty minutes.[40] He confessed to committing some thefts.[41] The government argued there was no "custody" so

30. *See* Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413, 1415 (2003) ("Pleasing and even natural though such an interpretation may be, however, my first contention in this Article will be simply that it is an untenable reading of Tom Paine's philosophy. Neither Paine nor his famous utterance can be drafted fairly to the cause of judicial review or, more generally, to court–centered constitutionalism.").

31. KAYE, *supra* note 20; *see also* Joseph J. Ellis, *'Thomas Paine and the Promise of America': Founding Father of the American Left*, N.Y. TIMES (July 31, 2005), http://www.nytimes.com/2005/07/31/books/review/31ELLISL.html?pagewanted=all.

32. SOPHIA ROSENFELD, COMMON SENSE: A POLITICAL HISTORY 176 (2011).

33. *Id.*

34. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

35. Miller v. California, 413 U.S. 15, 24 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

36. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.")

37. *See* Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not for Big Words*, N.Y. TIMES, June 13, 2011, at A11.

38. *See, e.g., id.*

39. 131 S. Ct. 2394 (2011).

40. *Id.* at 2399, 2403, 2418; *see also* Miranda v. Arizona, 384 U.S. 436, 467–70 (1966).

41. *J.D.B.*, 131 S. Ct. at 2399–400.

Mirandizing was not needed.[42] Justice Sotomayor said that the child's age had to be taken into account in making the custody determination.[43] She used the word "commonsense" five times to justify her ruling, though she also relied on other legal arguments.[44]

She began by writing:

> This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.[45]

The Sotomayor opinion, however, also relies on empirical studies, the American legal tradition of treating youth differently, other cases, and constitutional values.[46] Justice Sotomayor nonetheless concludes:

> In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the commonsense to know that a 7-year-old is not a 13-year-old and neither is an adult.[47]

Justice Alito dissented. He explained that *Miranda* actually overturned the Court's previous fact-specific, case-by-case approach. Thus, Sotomayor was reopening the slippery slope:

> Under today's new "reality"-based approach to the doctrine, perhaps these and other principles of our *Miranda* jurisprudence will, like the custody standard, now be ripe for modification. Then, bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.[48]

Alito is therefore using a different pragmatic objection to be discussed later in this paper—efficiency.

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42. *Id.* at 2402–04

43. *Id.* at 2399.

44. *Id.* at 2399, 2403.

45. *Id*. at 2398–99 (citation omitted). Interestingly, other Justices have used two words, "common sense," CSX Transp. Inc. v. McBride, 131 S. Ct. 2630, 2641 (2011) (Ginsburg, J.), contrary to Justice Sotomayor who views this phrase as only one word. This shows the difficulty of reaching agreement on basic matters.

46. *J.D.B.*, 131 S. Ct. at 2400–08.

47. *Id.* at 2407.

48. *Id.* at 2418 (Alito, J., dissenting). Interestingly, Andrew Coan has authored a commentary that is consistent with Justice Alito's characterization of Justice Sotomayor's approach. Andrew B. Coan, *Towards a Reality-Based Constitutional Theory*, 88 WASH. U.L. REV. (forthcoming 2011), *available at* http://lawreview.wustl.edu/commentaries/toward–a–reality–based–constitutional–theory/.

For example, the ruling could mean that police officers and courts will have to determine a suspect's intelligence and other personal qualities, in assessing the need for Mirandizing. Common sense will not help because

> the judge will be required to determine whether the differences between a typical 16 ½-year-old and a typical 18-year-old with respect to susceptibility of the pressures of interrogation are sufficient to change the outcome of the custody determination. Today's opinion contains not a word of actual guidance as to how judges are supposed to go about making that determination.[49]

Justice Sotomayor, however, has the better argument. Judges and police officers determine an individual's mental capacity in many circumstances. Moreover, police officers can ensure clarity by using the *Miranda* warning when there is doubt.

Common sense can also support conservative results. In *Gonzales v. Carhart*,[50] Justice Kennedy upheld a federal law banning partial birth abortions by stating:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
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> . . . .
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> . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she did not know; that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[51]

For the four dissenters, Justice Ginsburg responds that "the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from 'severe depression and loss of self-esteem.'"[52] This debate shows that one person's common sense can be another person's gender stereotype.

As seen, common sense can be a powerful tool. Yet it can be subjective in a way that differs from scientific evidence. For example, while progressives celebrate Thomas Paine's commitment to radical democracy, Glenn Beck claims Paine's legacy in a book called *Glenn Beck's*

49. *J.D.B.*, 131 S. Ct. at 2416 (Alito, J., dissenting).
50. 550 U.S. 124 (2007).
51. *Id.* at 159–60.
52. *Id.* at 183.

Common Sense,[53] as does the Tea Party.[54] Sophia Rosenfeld has said the concept can be invoked to promote useful or dangerous forms of populism and anti-elitism.[55] Nonetheless, the idea is seeing a resurgence.[56]

B. Transitional Pragmatism

One aspect of many democratic constitutional revolutions is transitional pragmatism. The term refers to government or court actions that approach rule of law boundaries, usually because of exigent circumstances or regime discontinuities.[57] The U.S. is a good example, but there are foreign situations as well. Even a few U.S. Supreme Court decisions have a transitional quality.[58] An analogy can be drawn to the idea of transitional justice.

1. Revolution

Several major events in American constitutional history pushed the legal envelope. These include approval of the Constitution, the Louisiana Purchase, the Emancipation Proclamation, approval of the Civil War Amendments, the New Deal, certain American military actions, and more.

a. The Constitution

Some scholars have argued that the framers of the U.S. Constitution exceeded their authority.[59] They were supposed to solve the nation's commerce problems, not create a new charter. Yet this was not their sole excess. The U.S. Constitution only had to be ratified by nine states, which contradicted the Articles of Confederation requirement that consti-

53. GLENN BECK & JOSEPH KERRY, GLENN BECK'S COMMON SENSE: THE CASE AGAINST AN OUT-OF-CONTROL GOVERNMENT, INSPIRED BY THOMAS PAINE 11 (2009).

54. *See, e.g.*, COMMON SENSE CAMPAIGN—TEA PARTY 2011, http://www.commonsensecampaign.org/ (last visited Nov. 19, 2011) (demonstrating a Tea Party group's use of common sense as a campaign theme).

55. ROSENFELD, *supra* note 32, at 228.

56. BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 114, 122 (2010) (discussing the necessity of wisdom in decision making as opposed to non-discretionary rule following); PHILLIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 22–31 (1994) (arguing that in search of certainty, law has moved from common sense decision making to strict adherence to statute); Mark Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 58–60 (2001) (arguing that the "hunch theory" of judicial decision making presents a practical solution to the explosion of fact and indeterminacy of the law). Truran and Howard are discussing different issues and probably have distinct views on judicial discretion; however, both invoke common sense. *But see* DUNCAN J. WATTS, EVERYTHING IS OBVIOUS: ONCE YOU KNOW THE ANSWER 7–11 (2011) (arguing that common sense is not easy to decipher and recognize).

57. Another possibility was to use the term illegality, rather than transitional, but that doesn't seem to fit. These exigent circumstances mean the legal regime is either in flux or under such tremendous pressure that a clear notion of legality is infeasible.

58. *See* i*nfra* notes 83–88.

59. *See, e.g.*, Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476–486 (1995) (discussing the Federalists' role in creating a strong central government at the expense of individual state sovereignty).

tutional amendments be unanimous.[60] Moreover, the Articles required that amendments be ratified by state legislatures, not state conventions.[61] Bruce Ackerman describes the framing as a constitutional moment because of the extraordinary transition that was occurring.[62]

Many foreign constitutions have similar histories. Regarding eighteenth century France, Jon Elster explained:

> . . . Constitution-makers do not always respect the instructions from their upstream creators, including instructions about downstream ratification. And a constraint that can be ignored is no constraint. . . . In France, the constituent assembly decided to ignore the instructions of their constituencies with regard to both the voting procedures and the King's veto.[63]

Moving to the twentieth century, Hungary drafted a new Constitution that had to be approved by the former communist Parliament. As Istvan Pogany said:

> It remains a singular irony of this entire process of constitutional reform that the bulk of the law providing for the democratization of the political process in Hungary, for the recognition of human rights and fundamental freedoms, for the establishment of a Constitutional Court . . . should have been adopted by a legislature which in 1989 had not been democratically elected.[64]

Similarly, in South Africa, the transition to democracy began when the apartheid government's racially divided, tri-cameral parliament approved an interim constitution that was drafted by unelected elites in

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60. *Id.*; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 32–60 (1998). Akhil Amar strongly disagrees. Akhil Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L. J. 1997, 2012 (2006) ("In my view, the Articles of Confederation were a mere treaty whose repeated violations by virtually all states legally justified exit from the Articles if a supermajority of states so agreed, as provided by the Constitution's Article VII."). *But see* Michael Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 344–45 (2005) (critiquing Amar's view). Green also says of the founding that

> there are three possible revolutions at issue here, each of which Amar denies occurred: (1) a revolutionary creation of one American legal system out of the state legal systems at the time of the Articles of Confederation; (2) a revolutionary recreation of the state legal systems through the dissolution of the Articles; and (3) a revolutionary creation (or recreation) of the American legal system out of the state systems with the ratification of the Constitution.

Id. at 348. Green therefore also is saying that Ackerman's view of one constitutional moment at the founding is not complete. *See id.*

61. Ackerman & Katyal, *supra* note 59, at 478–79.

62. ACKERMAN, *supra* note 60, at 160.

63. Jon Elster, *Forces and Mechanisms in the Constitution Making Process*, 45 DUKE L. J. 364, 374–75 (1995).

64. VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 279 (2d ed. 2008). *See also id.* at 287 (quoting Arato regarding the "temporary lawlessness" that existed in Eastern European transitions). Hungary is experiencing constitutional difficulties now as the government seeks to restrict rights and the power of judicial review. *See, e.g.*, Judy Dempsey, *Hungarian Parliament Approves New Constitution*, N.Y. TIMES (Apr. 18, 2011), http://www.nytimes.com/2011/04/19/world/europe/19iht-hungary19.html.

collaboration with old regime representatives.[65] This interim charter paved the way for an elected coalition executive, and a separate, elected parliament. This new parliament was then charged with drafting the final constitution. Yet the racist, illegitimate nature of the tri-cameral parliament cannot be doubted.[66] Moreover, the final constitution had to meet certain criteria created by apartheid officials and other group elites.[67]

b. Other events

In 1800, the U.S. made the Louisiana Purchase from France and opened a huge Western frontier. Ironically, the strict constitutional constructionist, President Thomas Jefferson, signed the treaty despite writing to John Breckenridge, "The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."[68] Moreover, the Constitution did not explicitly authorize this kind of land acquisition by treaty. And the Constitution did not allow the President to create new states.[69]

In addition, the U.S. knew that Napoleon had already signed a treaty with Spain agreeing not to cede the land to another nation.[70] But practical interests won out. It's worth noting that there are powerful arguments in favor of the constitutionality of the Louisiana Purchase, but Jefferson's willingness to go forward was certainly not based on them.

During the Civil War, there were many questionable actions. President Lincoln suspended habeas corpus without congressional authority.[71] Through the Emancipation Proclamation, Lincoln freed the slaves in the rebellious states by executive order, yet the Constitution only seemed to allow the states to do that.[72] Of course, Lincoln invoked his Commander-

65. MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 28 (2009).

66. *See generally In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.) (regarding the South African transition). Strong legal positivists, however, might disagree that there were legality gaps in any of these nations.

67. KENDE, *supra* note 65, at 34.

68. Letter from Thomas Jefferson, President, United States of America, to John C. Breckenridge (Aug. 12, 1803), *available at* http://teachingamericanhistory.org/library/index.asp?document=1915.

69. *See generally* Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343 (2002) (asserting the illegality of the Louisiana Purchase).

70. *Id.* at 380.

71. *Ex parte* Merryman, 17. F. Cas. 144, 148–49 (C.C.D. Md. 1861) (No. 9,487) (questioning President Lincoln's suspension of the writ); *see generally* Michael Kent Curtis, *Lincoln, The Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 ME. L. REV. 1 (2007) (describing how President Lincoln relied on the necessity doctrine to suspend habeas corpus without congressional authority).

72. Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1144 (2001).

in-Chief authority since he had strategic motivations to acquire additional soldiers, and to create instability in the Southern states, etc. As U.S. Supreme Court Justice Robert Jackson later said, the Constitution is not a "suicide pact." But Lincoln came close to rewriting the Constitution.

Bruce Ackerman and others have concluded the Civil War Amendments were enacted improperly.[73] The Military Reconstruction Act oppressed the South, though for understandable reasons. As Ackerman shows, some Southern whites were disenfranchised, and the typical state deliberative role in the amendment process was curtailed by presidential pressure.[74] Indeed, the U.S. Supreme Court seemed ready to declare Reconstruction unconstitutional, but Congress removed the Court's jurisdiction as described in *Ex parte McCardle*.[75] Of course, supporters argued that the Reconstruction Act and the Civil War Amendments fulfilled the promise of the U.S. Revolution. Even Ackerman says they were a higher form of lawmaking.[76] But they were also designed strategically to denude the South of certain powers.[77]

Ackerman has also argued that the "switch in time," where the Supreme Court suddenly started approving the constitutionality of FDR's New Deal programs, was a constitutional moment.[78] These rulings permitted transition to a new administrative state. Lastly, several American military forays, that affected the international balance of power, were executed without any congressional declaration of war or the equivalent, which was quite convenient for the President.[79]

2. Cases

Several Supreme Court decisions have transitional pragmatic elements, rather than following customary legal conventions.

The Court did not use accepted legal reasoning in *Bush v. Gore*[80] because it announced the decision had no precedential value.[81] That does not fit with the rule of law, even given the exigent circumstances. More-

73. ACKERMAN, *supra* note 60, at 99–119; *see also* Douglas Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 556 (2002) (arguing that the Fourteenth Amendment was not constitutionally enacted and may not be a part of the Constitution).

74. ACKERMAN, *supra* note 60, at 110, 164.

75. 74 U.S. 506, 512–14 (1869).

76. ACKERMAN, *supra* note 60, at 172.

77. *See* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1764 (2005) (referencing the pragmatic qualities of amendments to the Constitution).

78. ACKERMAN, *supra* note 60, at 314–15.

79. *See* Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POLICY (Mar. 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war?page=0,0 (discussing instances where the President engaged in war-like activity without the consent of Congress).

80. 531 U.S. 98 (2000) (per curiam).

81. *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes presents many complexities.").

over, the case was a transitional moment in American presidential regimes, with some even calling it a *coup d'état*.[82]

One of the Supreme Court's most bizarrely reasoned cases was *Bolling v. Sharpe*,[83] which ignored the absence of an equality provision in the Fifth Amendment, and adopted the confusing doctrine of reverse incorporation.[84] The Court, however, was being pragmatic, as it could not allow the federal government to support racial segregation after deciding *Brown*. The decision was therefore part of a changing social dynamic. Of course, transitional pragmatism is not a recommended constitutional interpretive method. It's more like the last available alternative.

There are many critics of the Court who attack other decisions as lawless. Thus, conservatives say *Roe v. Wade*[85] has no legal basis. Moreover, Justice Scalia has frequently criticized his liberal colleagues as acting out their personal preferences in cases involving gay rights.[86] And many liberals have decried *Citizens United v. Federal Election Commission*[87] and *Parents Involved in Community Schools v. Seattle School District No. 1*.[88] Yet these cases do not involve transitional settings, and the presence of detailed legal reasoning in the decisions means they do not approach lawlessness. For all their imperfections, these cases are far more persuasive than *Bolling*.

C. Compromise Pragmatism

Scholars have long debated whether controversial Supreme Court decisions are really politics dressed up in legal terminology. Certainly the framers were politicians of the first order. And the Court does follow the election returns.[89] Moreover, according to Otto van Bismark, "politics is the art of the possible."[90] Thus, it's important to examine the role of compromise pragmatism, and especially compromise, in our constitutional democracy.

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82. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 634 (2002) ("One often hears the sardonic remark that George W. Bush 'won' his election five to four. But even a unanimous court could not have conferred legitimacy on a judicial coup d'état, achieved by stopping and displacing an election.").

83. 347 U.S. 497 (1954).

84. *Id.* at 498–99.

85. 410 U.S. 113 (1973) (holding that the right to terminate a pregnancy is protected by a privacy interest inherent in the Fourteenth Amendment's Due Process Clause).

86. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

87. 131 S. Ct. 876 (2010) (striking down campaign finance laws as restrictions against speech).

88. 551 U.S. 701 (2007) (striking down voluntary school desegregation plans).

89. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901) ("No matter whether the country follows the flag or not, the Supreme Court follows the election returns.").

90. THE YALE BOOK OF QUOTATIONS 86 (Fred R. Shaprio ed., 2006). By contrast, Groucho Marx said, "Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly, and applying the wrong remedies." *Groucho Marx Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/g/groucho_marx_3.html (last visited Jan. 9, 2012).

1. Revolution

Pepperdine Law Review devoted a 2011 volume to compromise and constitutionalism. Compromise is clearly crucial in constitutional design.[91] In Philadelphia, the larger states allowed the smaller states equal representation in the U.S. Senate.[92] Moreover, constitutional ratification turned on drafting a Bill of Rights that Madison did not think was a good idea or necessary. But he made the concession.[93] Similarly, in South Africa, the African National Congress revolutionaries did not want a Bill of Rights for years, but they compromised in the end.[94] Compromise also has a downside as shown by the inclusion of slavery in the U.S. Constitution. Yet the democratic constitutional revolutions in the U.S. and South Africa could not have taken place without such compromises.

Two more examples from South Africa show this. The first was the inclusion of the controversial Truth and Reconciliation Commission in the constitution. This conciliatory approach endorsed the communal resolution of bitter disputes, not international criminal prosecutions and revenge.[95] South Africa also left the old legal framework in place despite the system's connection to oppression, and the presence of many Afrikaner office holders.[96] The ANC, however, believed that the alternative would be politically destabilizing and could undermine their reformist and rebuilding goals.[97]

Similarly, on the reconciliation topic, many commentators on the U.S. actions, after overthrowing Saddam Hussein's Iraqi regime, argued that the Coalition Provisional Authority should not have ousted all of Hussein's Baathist party members from their positions, as technically qualified replacements were lacking.[98] This political decision hindered the transition to democracy and created lingering animosities.

2. Cases

Many U.S. Supreme Court decisions reveal politically pragmatic results, sometimes because of political pressures. The U.S. Supreme Court's "switch in time" on FDR's New Deal legislation was perhaps the

91. *See* Sandy Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 823 (2011).

92. *Id.* at 828. This is often referred to as the "Great Compromise." *See* CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 114 (2002).

93. Levinson, *supra* note 91, at 823.

94. KENDE, *supra* note 65, at 29.

95. *See* RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 132–33 (2001).

96. *See* JENS MEIERHENRICH, THE LEGACIES OF LAW: LONG RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000, at 288–89 (2008).

97. *See id.* at 276–77.

98. *See, e.g.*, Arthur MacMillan, *Legacy of US "Mistakes" in Iraq Palpable*, THE TELEGRAPH (Feb. 1, 2010, 11:54 AM), http://www.telegraph.co.uk/expat/expatnews/7127472/Legacy-of-US-mistakes-in-Iraq-palpable.html. Admittedly, this was not a simple democratic revolution because the U.S. invaded Iraq, but the lesson is the same.

most famous example.[99] In *Marbury v. Madison*,[100] Chief Justice Marshall ruled for his political opponent, President Thomas Jefferson, who refused to allow delivery of a signed and sealed judicial commission to Mr. Marbury.[101] However, the ruling established the power of constitutional review.[102] Jefferson won the battle, but Marshall won the war. The decision was also politically pragmatic in that Marshall faced impeachment had he ruled against Jefferson.[103]

The *Dred Scott v. Sanford*[104] case appears to have been Justice Taney's political attempt to resolve the nation's slavery dilemma by his obiter dictum that Congress could not prohibit slavery in the federal territories, that slaves could not sue in federal courts, and that slave owners had due process rights because slaves were chattel.[105] This solution, however, failed, landing *Dred Scott* in the pantheon of the U.S.–constitutional-law anti-canon—like the *Lochner* decision.[106]

Chief Justice Warren obtained a unanimous vote in *Brown* by agreeing not to state that education was a fundamental constitutional right.[107] Then, in *Brown II*,[108] the Court only required district courts to implement the remedy "with all deliberate speed."[109] This was an overly cautious compromise based on fears of violent backlash and fears that the public would reject the Court's authority. *Brown II* actually allowed Southern states to remain more intransigent.

In *Regents of the University of California v. Bakke*,[110] Justice Powell walked a tightrope.[111] He wrote that affirmative action should get strict scrutiny, but that a carefully crafted diversity based plan could be

99. WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN 154 (1995). *But see* BARRY CUSHMAN, RETHINKING THE NEW DEAL: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 4 (1998) (rejecting the politically motivated "switch in time" view of the Court's change in voting patterns on FDR's social welfare legislation).

100. 5 U.S. (1 Cranch) 137 (1803).

101. *Id.* at 162.

102. *Id.* at 177.

103. *See* PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 207 (1997).

104. 60 U.S. 393 (1856).

105. *Id.* at 411, 427, 451–52.

106. CASS R. SUNSTEIN, RADICALS IN ROBES 85 (2005). *But see* DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM I (2011) (drawing similarities between *Dred Scott* and *Lochner*).

107. *See* James Wilson, *Why a Fundamental Right to a Quality Education Is Not Enough*, 34 AKRON L. REV. 383, 387 (2000) (discussing the constitutional protections implicitly afforded to education).

108. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

109. *Id.* at 301.

110. 438 U.S. 265 (1978).

111. *See id.* at 291, 316.

constitutional.[112] This approach was later vindicated in *Grutter v. Bollinger*.[113]

Interestingly, none of the three Justices who authored the plurality in *Planned Parenthood, Inc. v. Casey*[114] may have personally supported the abortion right.[115] Yet, they tried to craft a grand compromise that vindicated the right, while granting the states more license to discourage abortions. *Casey* also openly discussed the political danger to its institutional integrity of reversing *Roe*.[116] *Casey*, though, has not dampened emotions.

In *Lawrence v. Texas*,[117] the Court affirmed the right of homosexuals to have sex in private.[118] Yet the Court never adopted a level of scrutiny. This omission was almost certainly needed to retain the required votes. That compromise reflects what Cass Sunstein calls an incompletely theorized agreement.[119] Moreover, Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sibelius* is another example as he said the tax argument supported the health mandate, but the Commerce Clause did not.[120] He also upheld the mandate but struck down the Medicaid requirement.[121]

Another notion of compromise pragmatism has recently come to the fore. Several constitutional scholars have argued the U.S. Supreme Court's most revolutionary decisions actually followed public opinion. Michael Klarman argued that public opinion had already turned in favor of *Brown* by 1954.[122] Barry Friedman has questioned the existence of any countermajoritarian dilemma.[123] Jeffrey Rosen has a similar thesis.[124]

112. *Id.*

113. 539 U.S. 306, 334 (2003). The 5–4 decision in *Grutter* upheld the affirmative action plan. However, Justice O'Connor, who authored the opinion, has since been replaced by Justice Alito. Justice Alito, generally opposes affirmative action plans. Moreover, there is a case modeled on *Grutter* that has reached the U.S. Supreme Court. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), cert granted, 132 S.Ct. 1536 (2012). This means the Supreme Court could overturn *Bakke* and *Grutter* soon. Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 16, 2011, at SR4 (debating the constitutionality of the University of Texas School of Law's affirmative action plan).

114. 505 U.S. 833 (1992).

115. *See id.* at 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."). There is language in the plurality opinion that indicates ambivalence.

116. *Id.* at 845–46.

117. 539 U.S. 558 (2003).

118. *Id.* at 585.

119. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

120. 132 S.Ct. 2566, 2600–01 (2012).

121. *Id.* at 2608.

122. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–46 (2004).

123. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 375 (2009).

124. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH, HOW THE COURTS SERVE AMERICA 6 (2006).

Some have explained this trend by indicating the Court seeks to avert backlash. Orly Lobel has asserted that constitutional litigation itself is a compromise since elites comply with the legal system's rules, with the goal of minimizing grass roots activism.[125]

Richard Pildes and Justin Driver have challenged this public opinion thesis, arguing that there is no adequate proof that the public supported *Brown*.[126] Certainly extreme Southern and Northern (Boston) reactions showed opposition. Such decisions were therefore revolutionary and acted as social movement catalysts, even if they still needed support from the politicians and federal troops.

Political or compromise pragmatism seems troubling as a method of constitutional interpretation in that we want the Court to decide cases based on legal criteria. Yet there is nothing fundamentally inconsistent between the rule of law and the idea that the Court must be sensitive to real world implications. Moreover, such compromise is often essential for democratic revolutions.

D. Democratic Pragmatism

Justice Breyer's judicial opinions promote participation in the political process. Appropriately, his first book as a Supreme Court Justice was called *Active Liberty*. The book responded in part to Justice Scalia's book on originalism.[127] Breyer's method has roots in Benjamin Constant, and in John Dewey's pragmatism.

1. Revolution

The American constitutional revolution was about popular sovereignty. But political and other considerations precluded implementation of pure democracy. Thus, the framers adopted a Republican deliberative form of government. The Federalist Papers, for example, contain lengthy discussions on how pure democracy would risk the dangers of faction, etc.[128] Further, Benjamin Constant wrote that the framers sought liberty beyond negative freedom from government interference.[129] The framers sought "an active and constant participation in collective power" or active liberty.[130]

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125. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 949–56 (2007).

126. Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?,* 2010 SUP. CT. REV. 103, 121–23 (2010); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 758 (2011).

127. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at vii (Amy Gutman ed., 1997).

128. THE FEDERALIST NO. 10 (James Madison).

129. BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, *in* POLITICAL WRITINGS 309, 327 (Biancamaria Fontana ed. & trans.,1988).

130. STEPHEN BREYER, ACTIVE LIBERTY 5 (2005). Several other scholars have promoted political deliberation as important and as being justified by the republican roots of the U.S. Constitu-

The pragmatist philosopher and educator, John Dewey, sought to promote civic engagement:

> The trouble . . . is that we have taken democracy for granted; we have thought and acted as if our forefathers had founded it once and for all. We have forgotten that it has to be enacted anew in every generation, in every year, in every day, in the living relations of person to person, in all social forms and institutions. Forgetting this . . . we have been negligent in creating a school that should be the constant nurse of democracy.[131]

Dewey did not believe there was an absolute truth that answered life's grandest questions. He had an optimistic vision, however, that contrasted with Holmes's pragmatism.[132] Breyer's view that the Court can work with Congress echoes some of Dewey's optimism.

2. Cases

In Breyer's second book since coming to the Court, *Making Our Democracy Work*, he discusses several controversial Supreme Court cases where there were risks that the President or the public would resist taking.[133] He suggests the Court needs to be restrained. He also advocates proportionality analysis, or balancing, as how the Court should candidly weigh state versus individual interests.[134] He has used this method in two recent dissents.[135] The method derives from foreign constitutional sources, though he doesn't mention that, perhaps for "political" reasons.[136]

In the famous Second Amendment case, *District of Columbia v. Heller*,[137] Breyer dissented when the Court ruled that there was an individual, not a collective, right to bear arms.[138] The Court used heightened scrutiny to strike down a D.C. law restricting firearm possession.[139] Breyer, however, said the state's interest outweighed the individual interest given the history of crime, violence, and accidents in D.C.[140]

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tion. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 130–31 (1996).

131. 2 JOHN DEWEY, *Education and Social Change*, *in* THE LATER WORKS, 1925–1953, at 408, 416 (Jo Ann Boydston ed., 1987)

132. MENAND, *supra* note 1, at 4 (describing how Holmes' experiences in the civil war reduced his optimism about life).

133. *See* BREYER, *supra* note 8, at 9–10.

134. *Id.* at 163–64.

135. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 369 (2009) (Breyer, J., dissenting); Ewing v. California, 538 U.S. 11, 32–33 (2003) (Breyer, J., dissenting).

136. Even Justice Scalia has acknowledged that his originalism must have room for stare decisis for "pragmatic" reasons. SCALIA, *supra* note 127, at 140.

137. 554 U.S. 570 (2008).

138. *Id.* at 595, 681.

139. *Id.* at 571.

140. *See id.* at 634.

More recently, the Supreme Court struck down a California law banning the sale of extremely violent video games to minors.[141] Breyer's dissent acknowledged that the law should receive strict scrutiny because it was content discriminatory. But his strict scrutiny still involved balancing:

> I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech related harm . . . out of proportion to the benefits that the statute seeks to provide."[142]

He found that adults could still purchase the games, and kids could still play them. Moreover, the law facilitated the ability of parents to raise their children in the manner they see fit. The law also reduced the likelihood that children would see these horrific videos. Both cases show Breyer upholding the democratic process and supporting active liberty.

The complication, however, is that Breyer's judgments are not always pro-democracy. For example, he voted to strike down a popular Minnesota tuition voucher plan that sought to remedy inferior schools.[143] Breyer also voted to strike down a law banning partial birth abortions, despite overwhelming public support.[144] A few years later, the Court upheld a revised version of the ban.[145] In addition, his balancing test allows judicial subjectivity to creep into the analysis. Nonetheless, he would respond that certain laws must be struck down as violating the Constitution.[146]

E. Economic Pragmatism

The U.S. constitutional revolution sought to remedy the economic problems caused by the Articles of Confederation. Historian Charles Beard even argued that the framers were motivated by financial interests.[147] More recently, Judge Richard Posner has argued that the Supreme Court should use economic based pragmatism in constitutional interpre-

141. Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2742 (2011).

142. *Id.* at 2766 (Breyer, J., dissenting) (alteration in original) (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 841 (2000) (Breyer, J., dissenting)).

143. Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002).

144. Sternberg v. Carhart, 530 U.S. 914, 945–46 (2000).

145. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

146. For example, Breyer argued in *Zelman* that the law overwhelmingly benefitted sectarian religious schools and therefore violated the Establishment Clause. He found the majority's willingness to dismiss this concern as formalism. Thus, his opinion can certainly be viewed as having a pragmatic, realistic quality consistent with his writings. *See Zelman*, 536 U.S. at 727–28.

147. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 75–76 (1912).

tation.[148] Economics may be the dismal science, but it also can be a revolutionary one. It should be made clear, however, that Beard and Posner had very different views on normative economics.[149] Indeed, Posner's ideas have evolved over time, as will be shown.[150] Posner is certainly aware, however, of their iconoclastic qualities.[151]

1. Revolution

Historian Charles Beard argued that the U.S. Constitution was not about the high ideals of democracy or the rights of man:

> The makers of the federal Constitution represented the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey and North Carolina, and stoned their houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defense, prevent fluctuations in the currency created by paper emissions, and control the propensities of legislative majorities to attack private rights.
>
> . . . .
>
> . . . The radicals, however, like Patrick Henry, Jefferson, and Samuel Adams, were conspicuous by their absence from the convention.
>
> . . . [The Convention was convened] to frame a government that would meet the *practical issues* that had arisen under the Articles of Confederation.[152]

Beard's view dominated American scholarship up to the 1950s.

Eventually, other historians argued that the relatively wealthy framers still had divided interests.[153] More recently, American popular histo-

148. RICHARD POSNER, *supra* note 3, at 76–79. Another scholar calls Posner a democratic pragmatist, not an economic pragmatist. *See* Ilya Somin, *Richard Posner's Democratic Pragmatism*, 8–9 (George Mason Law and Econ. Research, Working Paper No. 04–09, 2004), *available at* www.law.gmu.edu/faculty/ papers/docs/04-09.pdf. Somin's description seems less appropriate given Breyer's greater emphasis on democracy. Somin's differing label shows the slippery nature of Posner's pragmatism.

149. For an interesting comparison of Beard with Posner, see Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 72 (1987).

150. *See* Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 595 (2007) (labeling Posner's pragmatism as economic and as focusing on a kind of reasonableness assessment).

151. *See* POSNER, *supra* note 3, at 47–49 (pragmatism rejects formalism and artifice, and insists on candor and critique).

152. CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION 75–76, 88 (1999) (emphasis added).

rians have portrayed the framers as men of great wisdom, not as grand property owners. But Beard's views of economically pragmatic framers remain influential.

2. Cases

Judge Richard Posner is the most famous legal pragmatist. He argues that the traditional constitutional interpretive tools, such as framer's intent, text, precedent, etc. rarely answer the toughest legal questions. Moreover, these tools are subject to the personal vagaries of individual judges, such as politics, ambitions, institutional concerns, and the like.

Posner therefore advocates economic pragmatism as a descriptively accurate and normatively desirable approach.[154] He seeks to arrive at the best possible consequences in a case, and economic analysis is a valuable tool along the way. For example, he writes:

> The significance of economics for the study of judicial behavior lies mainly in the consilience of economics with pragmatism. The economist, like the pragmatist, is interested in ferreting out practical consequences rather than engaging in a logical or semantic analysis of legal doctrines.[155]

Posner also distinguishes sensible pragmatists from other kinds.[156]

Part of what Posner means by economic analysis is cost–benefit assessment. Here's an example of how he treats the Court's major 1973 abortion decision:

> There may be no objective method of valuing the competing interests. But analysis can be made more manageable by pragmatically

153. *See* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 93 (1958). Professor Akhil Reed Amar is a more recent opponent of Beard. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 472–73 (2005).

154. POSNER, *supra* note 3, at 78.

155. POSNER, *supra* note 6, at 238 (footnote omitted). Interestingly, Justice Scalia dissented in the Supreme Court's recent California prison overcrowding structural injunction case, which affirmed an order releasing prisoners after many years. He suggests that the facts and empirical information provided by the plaintiffs was a mere cover for the judge's policy preferences. Brown v. Plata, 131 S. Ct. 1910, 1954–55 (2011) (Scalia, J., dissenting) ("But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have 'found' that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make 'factual findings' without inserting their own policy judgments, when the factual findings *are* policy judgments. What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded "factual findings" entitled to deferential review, the policy preferences of three District Judges now govern the operation of California's penal system.")

156. *See* POSNER, *supra* note 6, at 239. For another important book on the topic, see MICHAEL SULLIVAN, LEGAL PRAGMATISM: COMMUNITY, RIGHTS, AND DEMOCRACY (John J. Stuhr ed., 2007). Sullivan's pragmatism is far different from that of Posner. *Id.* at 48–49.

> recasting the question as not which of the competing interests is more valuable but what are the consequences for each interest of deciding the case one way rather than the other. If one outcome involves a much smaller sacrifice of one of the competing interests, then unless the two are of very different value that outcome will probably have the better overall consequences. That was the approach the Supreme Court took in *Roe v. Wade*, in balancing the mother's interest against the state's interest in fetal life, though the approach was executed ineptly.[157]

He responds to moralist critics by arguing that alternatives do no better, yet contain a false rhetoric of certitude.[158] Candor matters.

Judge Posner also argues that hard cases are fundamentally about public policy. This is a revolutionary statement for a judge to make.[159] It resembles attitudinal theories about the Court held by many political scientists. Yet Posner argues that difficult cases still "[p]erhaps can be answered with a fair degree of objectivity by judges armed with basic economic skills and insights."[160]

Posner says there are constraints. Pragmatist judges should generally use narrow reasoning.[161] He also has "external" and "internal" limits. For example, judges are part of a "labor market" where they must comply with internal rules, vocabulary, and reasoning like everyone else. They cannot toss a coin to make decisions. Legalism is part of pragmatism.

Posner says his pragmatism would have helped resolve *Clinton v. Jones*.[162] The Court refused to grant President Clinton immunity, or a stay, regarding the Paula Jones sexual harassment lawsuit.[163] The Court relied on the principle that no one is above the law in a democracy.[164] But the Court's view that such a lawsuit would not distract from the President's ability to carry out his duties was naïve. Judge Posner writes that "a Court consisting of politically savvy Justices would have decided the case the other way—and that, I am content to argue, would not have been "wrong" either."[165] The *Clinton* case ended up leading to the salacious Starr report, and a wasteful politically motivated impeachment

157. POSNER, *supra* note 6, at 242–43.
158. *See id.* at 252–55.
159. *See* Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think*, 108 MICH. L. REV. 859, 860–65 (2008) (expressing concern over Posner's statements of how judges are really another form of policy maker). *But see* David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1794–95 (2009) (arguing that Posner says nothing radically new in the book about judging). Interestingly, both Sutton and Levi were federal judges at the time they authored their book reviews.
160. POSNER, *supra* note 6, at 77.
161. *See id.* at 246–47.
162. *See id.* at 250.
163. 520 U.S. 681, 706–07 (1997).
164. *See id.* at 707.
165. POSNER, *supra* note 6, at 250.

proceeding. Posner, however, supported the *Bush v. Gore* ruling as preventing possible chaos.[166]

Interestingly, Judge Posner has critiqued two other pragmatic books. He has argued that Breyer's *Active Liberty* relies on Athenian process-based constitutionalism. Yet Posner rejects the idealization of process and says our institutions are rooted in the British common law tradition as modified by republicanism.[167] Posner also critiques Breyer's balancing "fuzziness."[168]

Moreover, he critiques David Beatty's book, *The Ultimate Rule of Law*, despite Beatty saying proportionality "makes pragmatism the best it can possibly be."[169] Posner says that Beatty only focuses on the consequences for the people involved, not the institutions.[170] Posner concludes that his own legal pragmatism is disciplined by "a structure of norms and doctrines, commonly expressed in standards such as negligence, good faith, and freedom of speech that tells judges what consequences they can consider and how," unlike that of Beatty.[171]

Judge Posner's admission that judges make law is useful. Unfortunately, his exalting of economics over other methodologies reveals his own biases. Some of the flaws in his earlier economic views are revealed in one of his recent books.[172] Moreover, recent research casts doubt on the rational individualistic homo economicus.[173] In the end, Posner selects the best consequences as key, but judges' values often influence the assessment.

F. Empirical Pragmatism

Empirical pragmatism involves the use of data or measurement to resolve constitutional issues. This section could have encompassed Posner's economic pragmatism, but the empirical focus here is broader. This section is timely given the trends towards empiricism in American legal

166. *See* POSNER, *supra* note 3, at 356. Posner, in this book, uses some powerful language defending pragmatism:

> At least the pragmatic judge will not fool himself that he is the master of an esoteric art that enables judges to reason their way to the resolution of even the most difficult legal issues. He will recognize his ordinariness—will recognize that he has no pipeline to truth, that he is not Apollo's oracle . . . .

Id. at 351.

167. *See* POSNER, *supra* note 3, at 329.

168. *See id.* at 340. Posner has also vigorously criticized the writings of the former Chief Justice of the Israeli Supreme Court in support of proportionality. *See id.* at 362–68.

169. *Id.* at 355 (quoting DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 187 (2004)).

170. *Id.* at 361–62.

171. *Id.* at 362. David Luban criticizes Posner as vigorously as Posner questions Beatty. DAVID LUBAN, LEGAL MODERNISM 127, 171–73 (1994).

172. ,RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 1–3 (2009).

173. *See* DAVID BROOKS, THE SOCIAL ANIMAL: THE HIDDEN SOURCES OF LOVE, CHARACTER, AND ACHIEVEMENT (2011).

scholarship. The roots of empirical constitutionalism extend from John Locke to the use of statistics in modern constitutional litigation.[174]

1. Revolution

The U.S. Revolution owes much to empiricism and other Enlightenment ideas, which prompted the colonists' skepticism about monarchy.[175] In particular, John Locke, the British philosopher, physician, and scientist, rejected the Cartesian ideal that people were born with innate ideas. Locke saw people as born with a tabular rasa, in which the sensory impressions of experience led to knowledge.[176] Locke also advocated the social contract theory, but not Hobbes's absolutism.[177] Most importantly, Locke said that revolution could be justified in certain cases.[178]

The Declaration of Independence borrows from Locke's *Second Treatise on Human Understanding* in referencing "the long train of abuses."[179] In addition, the Declaration's reference to "life, liberty, and the pursuit of happiness" echoes Locke's statement that everyone has the right to defend their "Life, health, Liberty or Possessions."[180]

Locke's social contract views influenced Hamilton, Jefferson, and Madison, perhaps the Constitution's primary author. Locke's arguments in favor of separation of powers, separation of church and state, and the right to property all found their way into the nation's charter.

2. Cases

The Court has treated empirical evidence inconsistently. The famous advocate, and later Supreme Court Justice, Louis Brandeis authored the "Brandeis brief," which contained almost no case citations. Instead the brief referenced statistics showing, for example, how much

174. Several articles address similar themes. *See e.g.*, Coan, *supra* note 48; Timothy Zick, *Constitutional Empiricism: Quasi Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003).

175. *See* MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 11–15 (1978).

176. William Uzgalis, *John Locke*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2 (May 5, 2007), http://plato.stanford.edu/ entries/locke/. Modern science, however, has suggested things are not so simple.

177. *See id.* at § 3.

178. *See id.* at § 5.

179. *See* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 46–47 (1998) (observing not only the similarity of "train of abuses" language, but the similarity of "the thrust of his argument"); *see also* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 135–137 (1997) (contemplating that the "long train of abuses" language echoed Locke as well as other thinkers at the time).

180. *See*, CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 27 (1945) (Jefferson had read Locke several times); *see also* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 229–230 (1978) (comparing Jefferson language with the "Lockean tread"). Wills argued, however, that the Declaration was rooted strongly in the Scottish Enlightenment, not just in Locke's views. Wills's position, however, has been vigorously contested. *See e.g.*, Ronald Hamowy, *Jefferson and the Scottish Enlightenment*: *A Critique of Garry Will's* Inventing America: Jefferson's Declaration of Independence, 36 WM. & MARY Q. 503 (1979).

women suffered in the early twentieth century workplace.[181] One of these briefs was filed in the 1908 case of *Mueller v. Oregon*,[182] where the Court upheld the protective legislation for women.[183]

By contrast, the Court rejected statistical information around the same time in *Lochner v. New York.*[184] There, it examined a law that limited baker work hours based on data that showed negative health effects.[185] The majority found this evidence insufficient to prove that being a baker was inherently dangerous, like being a coal-miner.[186] The Court also did not want to open other industries to regulation.[187] Holmes, however, dissented and said that the Court was improperly constitutionalizing the free market.[188] The irony was that Holmes was a free marketer. Also in dissent, Justice Harlan said the data adequately supported the law.[189]

In *Brown v. Board of Education*,[190] the Court relied on social science to strike down racial segregation. Psychologist Kenneth Clark showed white-colored dolls and black-colored dolls to black and white elementary children who attended segregated schools.[191] The white children preferred the white dolls.[192] Surprisingly, the black children said the same thing.[193] Clark concluded this proved that segregation made black children feel inferior.[194] Separate but equal was not equal.

Unlike the *Lochner* Court, the *Brown* Court relied on the scientific or statistical data presented. The evidence also made the Court's conclusions seem objective. The problem, though, is that social science today views Kenneth Clark 1950s tests as methodologically inadequate.[195]

Roe v. Wade had empirical elements.[196] Justice Blackmun reasoned that women had a right to abortion before viability because the medical community used viability as the point when life began.[197] He conducted his research at the Mayo Clinic library and was a former Mayo General

181. Orin Kerr, *The Original "Brandeis Brief*," THE VOLOKH CONSPIRACY (May 4, 2011, 1:38 PM), http://volokh. com/2011/05/04/the-original-brandeis-brief/.
182. 208 U.S. 412 (1908).
183. *See id.* at 423.
184. 198 U.S. 45, 76 (1905).
185. *Id.* at 59.
186. *Id.* at 55.
187. *Id.* at 59–60.
188. *Id.* at 75 (Holmes, J., dissenting).
189. *Id.* at 65–74 (Harlan, J., dissenting).
190. 347 U.S. 483 (1954).
191. *See id.* at 484–85.
192. *See id.*
193. *See id.*
194. *See id.* at 495.
195. Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 61 (1978).
196. 410 U.S. 113, 134–35 (1973).
197. *Id.* at 162–64.

Counsel.[198] Scholars have questioned this "scientific" view because they thought the viability line would shift over time, as doctors got better at keeping premature babies alive.[199] Interestingly, this line has not shifted much. Pro-life groups, however, are relying on empirical evidence to purportedly show that a fetus feels pain beyond twenty weeks old.[200]

While *Brown* and *Roe* were liberal majority opinions relying on empirical data, *Craig v. Boren*[201] reached a liberal result but showed *Lochner*'s data skepticism. The Court struck down a law that allowed women, but not men, between ages eighteen and twenty-one to drink a low alcohol beer. The statistics showed that eighteen- to twenty-one-year-old males were ten times more likely to be arrested for drinking and driving than their female counterparts. Justice Brennan, however, responded:

> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.[202]

In *McCleskey v. Kemp*,[203] the Court upheld the Georgia death penalty despite a multi-variate regression analysis showing systemic racial bias.[204] The Court said the study did not prove discriminatory intent affected Warren McCleskey's particular sentence.[205] Moreover, our legal system accepts that each jury is different.[206] Ironically, the Court later credited simplistic data, when it declared the death penalty constituted cruel and unusual punishment as applied to minors[207] or the mentally retarded.[208] The data involved counting how many states had such laws in the books.

As previously mentioned, the U.S. Supreme Court struck down a California law that banned violent video games from children.[209] Justice Scalia rejected the adequacy of psychological studies introduced by the state because they showed no causation between utilizing these video

198. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 27, 90 (2005).

199. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 855 (6th ed. 2009).

200. Steven Ertelt, *Pro-Lifers Welcome First Fetal Pain Abortion Ban Lawsuit*, LIFENEWS.COM (Sept. 1, 2011, 10:23 AM), http://www.lifenews.com/2011/09/01/pro-lifers-welcome-first-fetal-pain-abortion-ban-lawsuit/.

201. 429 U.S. 190 (1976).

202. *Id.* at 204.

203. 481 U.S. 279 (1987).

204. *Id.* at 286–87, 312–13.

205. *Id.* at 297.

206. *Id.* at 294.

207. *See* Roper v. Simmons, 543 U.S. 551, 568–70 (2005).

208. *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

209. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741–42 (2011).

games and violent behavior.[210] At most, they showed some correlation.[211] He said such videos are no worse than the gruesome violence in children's fairy tales.[212] Further, parents can limit child access by using the video industry rating system.[213]

Justice Breyer responded that the Court should defer to the legislature because

> [t]here are many scientific studies that support California's views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure change overtime, have found that increased exposure to violent video games causes an increase in aggression over the same period.
>
> Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games.
>
> Surveys of 8th and 9th grade students have found a correlation between playing violent video games and aggression.
>
> Cutting edge neuroscience has shown that "virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior."
>
> And "meta-analyses," *i.e.*, studies of all the studies, have concluded that exposure to violent video games "was positively associated with aggressive behavior, aggressive cognition, and aggressive affect"[214]

Leading pediatric organizations, including the AMA, endorsed a joint statement on the dangers of these games.[215] Breyer said these studies explain "in a commonsense way" that video games are more harmful than films or television because the games involve "acting out" the violence.[216] To summarize, the Court has been inconsistent in its treatment of empirical data. Yet such data has mattered in some revolutionary cases like *Brown* and *Roe.*

210. *Id.* at 2739.
211. *Id.*
212. *Id.* at 2736.
213. *See id.* at 2740–41.
214. *Id.* at 2768 (emphasis in original) (citations omitted).
215. *Id.* at 2769–70. There is an interesting article discussing the difficulty of studying the effects of porn or violent entertainment on children. Brian Palmer, Bush v. Gore*: Is it Worse for a Child to See Pornography or Graphic Violence?*, SLATE (June 28, 2011, 5:02 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/06/bush_v_gore.html.
216. *See Brown*, 131 S. Ct. at 2786 (emphasis omitted). This commonsense reference resembles Justice Sotomayor's opinion previously discussed.

G. Common-Law Pragmatism

Some argue that constitutional adjudication resembles the common law. The judges examine cases one by one, look at precedent, and then consider moving the law forward incrementally based on gradually changing community values. The common law does not favor courts announcing grand principles or using deductive reasoning. Recently, David Strauss advocated common law constitutionalism in *The Living Constitution*.[217]

1. Revolution

There are many views regarding the ideological origins of the American Revolution. John Locke is at the center, but it's harder after that. Bernard Bailyn's *Ideological Origins of the American Revolution* offered five possibilities: classical antiquity, Enlightenment rationalism, the British common law, New England puritanism, and republicanism (sometimes called radical Whiggism).[218] Bailyn's inclusion of the common law is interesting because that was the underlying legal framework in Britain, which the American Revolution revolted against. Garry Wills would likely add the Scottish Enlightenment.[219]

James Stoner[220] and Michael McConnell[221] support a common law view of the revolution.[222] The colonists fought the revolution to redeem their natural rights as British citizens.[223] Stoner and McConnell rely for historical support on writings by Coke and Blackstone.[224]

Supporters of this view assert that the Declaration of Independence and the Constitution drew on these traditions. They criticize Bailyn for overemphasizing republicanism. Stoner also critiques the Locke emphasis:

> The influence of Locke on the doctrine of natural rights and revolution is unimpeachable, and Locke's theory, however much it echoed and then influenced English practice, begins as a theory of abstract right. But at least as much as Locke ever intended, into that theory

217. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 2–3 (2010).

218. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23–35 (1967).

219. *See* WILLS, *supra* note 180, at xiii–xiv.

220. *See* JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 8–9 (1992).

221. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 175 (1998).

222. *See generally* Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 184–91 (2009); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007).

223. McConnell, *supra* note 221, at 196.

224. STONER, *supra* note 220, at 11–68, 162–75; McConnell, *supra* note 221, *passim*.

> were integrated doctrines and practices of English common lawyers and their notion of an ancient constitution . . . .[225]

Stoner likewise argues that Paine's *Common Sense* and Dickinson's *Letters to a Farmer* have common law roots.[226] Stoner's views, however, are contested.[227]

2. Cases

David Strauss relies on some of Justice Holmes's reasoning about the common law,[228] but Strauss has a more progressive bent. Strauss also invokes Edmund Burke to argue that constitutional precedents are valuable intellectual capital.[229] He then says of the common law:

> The . . . attitude is an inclination to ask "what has worked in practice?" It is a distrust of abstractions when those abstractions call for casting aside arrangements that have been satisfactory in practice, even if the arrangements cannot be fully justified in abstract terms. The world is a complicated place; no body of theory can fully account for it. If a practice or an institution has survived and seems to work well, those are good reasons to preserve it; that practice probably embodies a kind of rough common sense, based in experience, that cannot be captured in theoretical abstractions.[230]

Strauss shows how the U.S. Supreme Court's endorsement of certain types of affirmative action relied on support from moderately conservative businesses and the military, both of which found such policies useful in a globally competitive environment.[231]

Strauss then discusses the California Supreme Court decisions nullifying the privity in contract requirement.[232] There was a complex interaction between a changing society, popular sentiments, expectations about the roles of corporations, etc. Similarly, in the constitutional arena, the Court's views about free speech, and racial segregation, evolved over time. Strauss says *Brown* was a kind of "common law overruling" of

225. STONER, *supra* note 220, at 189.

226. *See id.* at 190.

227. *See, e.g.*, Barry Alan Shain, *An Unconvincing Defense*, FIRST PRINCIPLES (June 2, 2008), http://www. firstprinciplesjournal.com/articles.aspx?article=79 (critiquing Stoner's overreliance on common law). *But see* 2 EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with the Colonies (March 22, 1775)*, *in* THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 100–03 (John C. Nimmo ed., 1887) (supporting the common-law view).

228. *See generally* OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW AND THE COMMON LAW (Kaplan Publ'g 2009)
(1897) (laying out Justice Holmes's views on the common law).

229. *See* STRAUSS, *supra* note 217, at 41.

230. *Id.*

231. *See id.* at 42, 44. The Court's reliance on stare decisis in the abortion decision, *Casey*, has a common-law quality.

232. *Id.* at 81–82.

Plessy v. Ferguson[233] based on the NAACP's lengthy litigation campaign.[234]

Several critiques are possible. Strauss's evolutionary theory doesn't describe the Supreme Court's sudden reversals of a nineteenth century legal tender ruling or the Court's 1937 switch in time on the New Deal. Also, in *Lawrence v. Texas*, the Court outlawed restrictions on gay sex that had been allowed less than twenty years earlier.[235] Even Strauss concedes these cases are like de facto constitutional amendments.[236] Moreover, there is something troubling about using private law norms, which facilitate profit making, to govern public law principles.

H. Flexible Pragmatism

The Supreme Court is frequently deferential in assessing the constitutionality of actions taken by the other government branches, especially given changing social circumstances. In *McCulloch v. Maryland*,[237] the Court gave a broad definition of the Necessary and Proper Clause[238] that allowed for a Bank of the United States to serve a new nation.[239] Chief Justice Marshall said this was a constitution being expounded, not a code. The Court's previously discussed "switch in time" cases allowed FDR's administrative state to be created. The Court's liberal approach to delegation doctrine is a further example. Another well-known, flexible separation-of-powers case was *Morrison v. Olson*,[240] which upheld the constitutionality of the independent counsel statute, even though the law created a powerful and unorthodox Executive Branch position.[241]

By contrast, the Court was strict in *INS v. Chadha*[242] and in *Clinton v. City of New York*,[243] which involved the legislative veto and line-item vetoes, respectively. The Court upheld rigid interpretations of bicameralism and presentment in those cases.[244] During the Korean War, Justice Jackson authored a very pragmatic opinion in *Youngstown Steel & Tube Co. v. Sawyer*,[245] which took account of three possible types of wartime situations.[246] Yet he ultimately reasoned that President Truman lacked the authority to seize domestic steel mills.

233. 163 U.S. 537 (1896).
234. *See* STRAUSS, *supra* note 217, at 85.
235. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
236. *See* STRAUSS, *supra* note 217, at 116.
237. 17 U.S. 316 (1819).
238. U.S. CONST. art I, § 8, cl. 18.
239. *McCulloch*, 17 U.S. at 324–46.
240. 487 U.S. 654 (1988).
241. *See id.* at 659–62.
242. 462 U.S. 919 (1983).
243. 524 U.S. 417 (1998).
244. *See Clinton*, 524 U.S. at 421; *Chadha*, 462 U.S. at 951.
245. 343 U.S. 579 (1952).
246. *See id.* at 635–38 (Jackson, J., concurring). It is possible that rigorous formalism may also be the most pragmatic approach in some cases.

Subsequent developments, however, have vindicated the dissents in some of the above cases. Many scholars now think that Justice Scalia's formalistic dissent was right in *Morrison* because of the massive amount of power and money that independent counsel Ken Starr later wielded while investigating sexual shenanigans and perjury by President Clinton.[247] Moreover, despite *Chadha*, an informal system of legislative vetoes remains because it is so useful.[248]

Overall, this kind of pragmatism is consistent with a revolutionary impulse because it allows for institutional change to be accepted in certain cases.

I. Critical Pragmatism

Feminists,[249] Africanists,[250] and some other legal scholars[251] have supported critical pragmatism. It has been contrasted with complacent pragmatism.[252] The American Revolution certainly required a critical capability, though not in a post-modern sense.

1. Revolution

In 1987, during bi-centennial celebrations of the U.S. Constitution,[253] Justice Thurgood Marshall gave a famous speech criticizing the document and the framers.[254] He argued that the Constitution (and revolution) was forever tainted by treating slaves as three-fifths of a person and therefore as sub-human.[255] He said this showed why the Constitution had to be seen as a living and evolving document.[256] His speech was the kind of critique that fits with this strand of pragmatism.

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247. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 24–27 (1998).

248. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 121–22 (1992).

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

250. *See* Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 409–10 (2000) (discussing how critical pragmatism can be used to attack gender hierarchies).

251. *See, e.g.*, Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 147–48 (1996) (detailed discussion of critical pragmatism, as opposed to constructive pragmatism).

252. Irma J. Kroeze, *Doing Things with Values II: The Case of Ubuntu*, 13 STELLENBOSCH L. REV. 252, 262–63 (2002).

253. The U.S. Constitution is frequently treated as sacred as are its drafters. *See, e.g.*, Ozan Varol, *The Origins and Limits of Originalism: A Comparative Study*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912202 (explaining that there is a cult of personality in the United States built around the framers and the Constitution, and that Turkey, among other nations, has a similar situation).

254. Thurgood Marshall, Remarks at The Annual Seminar of the San Francisco Patent and Trademark Ass'n, (May 6, 1987), *available at* http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm.

255. *Id.*

256. *Id.*

2. Cases

The basic premise of critical pragmatism is that constitutional law appears to use objective legal criteria, such as precedents, but that the courts are actually protecting powerful groups. Critical pragmatists want the Court to shed this pretense and use the law to achieve justice, especially for the subjugated and vulnerable groups that need protection. These scholars reject legal formalism and do not see law as easily separable from politics. They also focus on the factual context of cases and seek to undermine hierarchical paradigms. The Supreme Court has only used an approach like this a few times.

For example, in *West Coast Hotel Co. v. Parrish*,[257] the Court upheld a minimum wage law for women.[258] This overturned *Lochner* by rejecting freedom of contract. The Court instead recognized there was a huge imbalance of power between employee and employer, especially given the Great Depression.[259] Moreover, the law assured that women received a living wage, rather than the community having to subsidize unconscionable employers by providing welfare later.

The 1950s and 1960s Warren Court issued numerous decisions that favored the vulnerable. The most famous was *Brown.* When Chief Justice Burger took over, this trend continued, to some extent, as the Court issued *Goldberg v. Kelly*.[260] *Goldberg* repudiated older notions of property and ruled that welfare benefits were a constitutional entitlement in the right circumstances.[261] And in *Romer v. Evans*,[262] the Court said laws against discrimination should be presumed part of the status quo, in a case that involved gay people.[263]

The Constitutional Court of South Africa has been far more transformative. This makes sense as its constitution was designed to reverse the legacy of apartheid.[264] Thus, that Court has outlawed the death penalty, vindicated socio-economic rights, authorized gay marriage, and took many other measures to bring about substantive equality.[265] Certainly, critical pragmatism is consistent with the goal of bringing about a democratic revolution. Moreover, it shows that constitutional pragmatism is connected to moral principles.

257. 300 U.S. 379 (1937).
258. *Id.* at 398–400.
259. *Id.* at 400 ("The bare cost of living must be met.").
260. 397 U.S. 254, 267–71 (1970).
261. *Id.* at 270.
262. 517 U.S. 620 (1996).
263. *Id.* at 623.
264. S. AFR. CONST., Preamble 1996.
265. *See generally* KENDE, *supra* note 65.

J. Comprehensive Pragmatism

Dan Farber's notion of constitutional pragmatism "essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy."[266] Farber is holistic:

> Pragmatism provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case. Ideally, all of these factors point to the same outcome. When they conflict, the only recourse is to make the best decision possible under the circumstances. Although this methodology, if it can even be called one, may seem quite open-ended, pragmatists argue that in concrete cases it is often possible to identify the most reasonable resolution to such conflicts. Decisions are channeled by the professional training and experienced judgment of the judge, which do not provide unlimited leeway and may in fact be felt as coercing a single "right answer."[267]

Moreover, Farber argues that any foundational method has significant gaps.[268]

Farber's arguments, however, still raise the question of what guides a judge in utilizing these different tools other than personal preferences?[269] Farber says that judges should "decide cases, try to construct theories, and determine what level of generality works best. The pragma-

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266. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) [hereinafter Farber, *Legal Pragmatism*]. Farber coauthored a book that critiqued the most prevalent foundational constitutional theories and seemingly endorsed pragmatism, subject to further development. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS, at x (2002). Their sequel, however, did not develop a robust pragmatic approach, but instead relied more on the constraints that exist by virtue of legal convention, as well as the importance of judicial character. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 4–7 (2009). Stephen Griffin is not a pragmatist but shares the pluralistic impulse behind Farber's approach. Stephen Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1758–62 (1994); *see also*, Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

267. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century* 1995 U. ILL. L. REV. 163, 169 (1995) (footnotes omitted).

268. *Id.*

269. Richard Fallon has published one of the most famous articles discussing how the Supreme Court should choose between differing interpretive modalities in particular cases. He says there is no algorithm, but he does develop an order of priority starting with the text as the most important. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1243–46 (1987). Fallon rejects pragmatism, and is no living constitutionalist a la Thurgood Marshall or Ronald Dworkin. He has another fascinating article on a similar theme. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999). Fallon helped develop the distinction between constitutional interpretation and constitutional construction or implementation. More recently, William Van Alstyne has criticized living constitutionalism by highlighting its numerous variants. *See* William Van Alstyne, *Clashing Visions of a "Living" Constitution: Of Opportunists and Obligationists*, 2011 CATO SUP. CT. REV. 13, 18 (2011). *But see*, Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 595–96 (1999) (disagreeing with Fallon's rejection of pragmatism and endorsing a contextual pragmatism for constitutional interpretation).

tist would like as much system as possible but is agnostic about how much this will really turn out to be."[270] The judge should focus on context and consequences. Pragmatism can also rely on moral principles in the right cases.[271] He adds that it's easier to demonstrate pragmatism than explain it.[272]

Interestingly, Farber's pragmatism is based on his view of tradition. Thus, *Roe v. Wade* was correct because it reflected a social consensus and tradition against the fetal interest trumping the woman's, especially if the woman's life or health is at stake.[273] He also says that pragmatism would candidly wrestle with the key issue of the status of fetus, presumably unlike Justice Blackmun's opinion.[274] He asserts that abortion restrictions are largely unenforceable in practice, except against the poor or minorities who can't travel.[275] And he expresses concern over the Court's institutional legitimacy, if it were to reverse itself on abortion. What is fascinating is how closely the Supreme Court's decision in *Planned Parenthood v. Casey* followed Farber's logic, in discussing the absence of changed circumstances and in showing concern over the Court's reputation.[276]

Farber also discussed why *Lochner* was unworkable:

> Given [the] background of pervasive and accepted governmental intervention, the idea of a natural right to be free from all governmental interference is simply foreign to our culture. We can hardly imagine what our lives—or property ownership, for that matter—would be like without this pervasive aspect of our society. To say that we were born with economic liberty but are now enslaved by government regulation seems as eccentric as saying that "fish were born to fly but everywhere they swim."[277]

Farber's article is a bit dated. For example, it makes no mention of the usefulness of foreign constitutional law, which Farber (and Breyer) has discussed recently. But the article boldly challenges the Supreme Court's formalism. In that way, it is revolutionary.

K. Prudential Pragmatism

Phil Bobbitt famously described six modalities of constitutional interpretation including prudentialism.[278] This paper will use the term to focus on the Court's cautious tendencies. Edmund Burke could be con-

270. Farber, *Legal Pragmatism*, *supra* note 266, at 1349.
271. *Id.* at 1343.
272. *Id.* at 1377.
273. *Id.* at 1372.
274. *Id.* at 1370–72.
275. *Id.* at 1375.
276. *See* Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992).
277. Farber, *Legal Pragmatism*, *supra* note 266, at 1359.
278. Phillip Bobbitt, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8, 93 (1982).

sidered the philosophical parent. The leading proponent of such an approach, former Yale Law School Dean Alexander Bickel, was a Burke enthusiast and judicial conservative, though a political liberal.

Bickel argued that the courts were the "least dangerous branch" because of the "passive virtues."[279] These include the Court's use of the political question doctrine and justiciability limitations such as standing, mootness, and ripeness. The major criticism of these doctrines is that the Court can easily manipulate them. Stare decisis is also cautious as it means that courts should follow their earlier decisions. This supposedly ensures stability. Yet in *Casey*, the Court upheld *Roe v. Wade* on stare-decisis grounds, but then jettisoned *Roe*'s trimester framework.[280]

From a comparative perspective, the Constitutional Court of South Africa has developed a rights jurisprudence with both transformative and cautious elements. For example, the Court has ruled that the South African Constitution's socio-economic rights provisions are judicially enforceable, but has often deferred to the legislature to develop remedies in particular cases.[281]

Certain other approaches to constitutional interpretation are prudential. James Bradley Thayer argued that the Court could not strike down a law unless it was clear beyond question that the law was unconstitutional.[282] Adrian Vermeule has updated this analysis.[283]

Cass Sunstein argues that the Supreme Court should generally be minimalist rather than announce broad principles.[284] This promotes democracy and institutional integrity. He also introduced the idea of "incompletely theorized agreements," namely that the nine members of the Court will not frequently agree on broad principles.[285] Yet, Sunstein has been criticized as inconsistent since he supports some of the Court's broad rights rulings.[286]

Prudential pragmatism does not support revolution. Instead, it justifies the status quo. Some of President Obama's left-wing critics have

279. Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 197–98 (1962).

280. *See Casey*, 505 U.S. at 872–73.

281. KENDE, *supra* note 65, at 260–71 (2009); Gov't of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) at 106–08 (S. Afr.) (holding that the government violated the constitutional right to access adequate housing, and that the legislature must therefore develop programs to assist the homeless).

282. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

283. *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

284. CASS SUNSTEIN, ONE CASE AT A TIME, at xi–xiv (1999).

285. Sunstein, *supra* note 119, 1746–51 (1995).

286. *See generally* CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993). It must be acknowledged, however, that minimalism and incompletely theorized agreements can support a living constitution. They can be used to justify progressive results, but on narrow grounds. Some have argued that this is Sunstein's real strategy. Thus, minimalism does not always have to support the status quo.

even blamed him for following Sunstein's views on constitutional issues rather than those of more liberal scholars.[287]

L. Efficiency-Oriented Pragmatism

The Supreme Court has also been pragmatic when it examines whether a possible ruling will create inefficiencies. For example, the Supreme Court frequently relies on the administrative convenience rationale to reject rights claims, as in cases like *Korematsu v. United States*[288] and *Railway Express Agency Inc. v. New York.*[289] The Court's concern with the slippery slope problem, in cases like *Washington v. Davis*[290] and *DeShaney v. Winnebago County Department of Social Services*,[291] is similar. As Justice Brennan said, though, the slippery slope concern is akin to saying that there can be "too much justice."[292]

Thus, efficiency oriented pragmatism is another status quo oriented doctrine with no revolutionary implications.

CONCLUSION

This paper has examined pragmatism through the lens of democratic constitutional revolutions. It concludes that there are many types of pragmatism.[293] Some are essential components of revolutions, while a few are not. The paper also shows how these types of pragmatism are an influential part of the Supreme Court's constitutional jurisprudence. This paper does not argue that the Court should reject the more traditional modalities in constitutional interpretation, such as precedent and text. It also does not exclude the relevance of moral considerations. Yet the paper is sympathetic to the claim that pragmatic considerations are and should frequently be dispositive. This would indeed be revolutionary.

287. *See, e.g.*, Justin Driver, *Obama's Law*, THE NEW REPUBLIC, June 9, 2011, at 10.

288. 323 U.S. 214, 223 (1944) (holding that mass internment of the Japanese was justified by national security concerns).

289. 336 U.S. 106, 110 (1949) (finding that a ban on vehicle advertising was justified by traffic concerns).

290. 426 U.S. 229, 242 (1976) (ruling that disparate impact suits under the Equal Protection Clause would expose the government to numerous lawsuits).

291. 489 U.S. 189, 196–97 (1989) (arguing that state liability, absent a duty to protect, would expose the government to numerous lawsuits).

292. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J. dissenting).

293. Most of them share what Karl Llewellyn has called a "situation sensitive" contextual focus. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 268–74 (1960); *see also,* Patrick J. Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result" Jurisprudence?*, 32 FORDHAM L. REV. 51 (1963) (summarizing the legal realist Llewellyn's notion of situation sense). Interestingly, most of the pragmatisms discussed in this paper also share an appreciation for the importance of judicial candor and for narrow decisions, where possible.