

Overcoming Posner

Overcoming Law. By Richard A. Posner.* Cambridge: Harvard University Press, 1995. Pp. x, 597. \$39.95.

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At a conference on judicial biography held at the New York University Law School last May, Judge Richard Posner unsettled and discomfited the assembled scholars by questioning the value of the entire genre. Judicial biography, Posner argued, is an enterprise “beset by profound epistemological problems” and an “uneasy relation with truth.”¹ Ideological biographies, which measure the subject against an ideal judicial philosophy, presuppose a level of consensus that may not exist. Essentialist biographies, which assume a hidden layer of personality lying beneath the faces judges present to the world, rely on the fiction that preferences, values, and traits of character can be reduced to a coherently organized essence. What is interesting about most judges is their opinions and their votes, not their mostly mundane lives, and so Posner concluded that scholars might do well to abandon the project of full-scale judicial biographies entirely, devoting themselves instead to less time-consuming studies of a judge’s opinions, philosophy, style, and influence. But “[i]t is a curious property of judicial biography,” Posner conceded, “that the more political the judge, the more illuminating the biography is likely to be.”²

After reading *Overcoming Law*,³ Posner’s dazzling collection of recent essays, it is hard not to conclude that an essentialist biography of Richard Posner would be, by Posner’s own standards, very illuminating. For the judicial pragmatism that Posner advocates in his book is based on a rejection

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1. Richard A. Posner, *Judicial Biography* 3 (Apr. 22, 1995) (unpublished manuscript, on file with author).

2. *Id.* at 19.

3. RICHARD A. POSNER, *OVERCOMING LAW* (1995) [hereinafter *OVERCOMING LAW*].

of theory and an exaltation of judicial personality. "The adjectives that I have used to characterize the pragmatic outlook—practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental—are not the ones that leap to mind when one considers the work of, say, Ronald Dworkin."⁴ They are, however, adjectives that leap to mind when one considers the temperament of Richard Posner, and to some extent Posner is offering his own personality as a substitute for methodology. He goes on to argue that "judicial decision precedes articulate theory," that "instinct can be a surer guide to action than analysis," and that judges should "accept[] the role of personal values in adjudication [asking] only that they be yoked to empirical data."⁵

When the time comes, Posner's biographer should not have to delve very deeply into Posner's charming and witty personality to identify the values at the core of his own judicial philosophy. Posner describes himself as a classical liberal in the tradition of Mill;⁶ throughout the book, he insists on the centrality of facts over values, aspiring "to nudge the judicial game a little closer to the science game."⁷ Posner imagines the judge in general, and himself in particular, as a heroic social scientist, ranging confidently across disciplines, selecting with wise and shrewd judgment the steps required to sustain the welfare of democratic society.⁸

And yet Posner's romantic focus on the individual act of judging is so, well, *romantic* that it is hard to reconcile with the broader claims of his pragmatic methodology. As a pioneering scholar of law and economics, Posner prefers to think in terms of legal systems, treating individual judges and individual cases as little more than tiny points of data to be collected and studied as a whole. In his masterful chapter on the economics of judging, for example, his utility function for predicting what judges would maximize if they did more than the minimum amount of work (reputation, prestige, avoiding reversal)⁹ is especially entertaining. When formulating a constitutional

4. *Id.* at 11.

5. *Id.* at 194–95.

6. *Id.* at 23.

7. *Id.* at 8.

8. Posner's biography might look something like Winston Churchill's portrait of the Earl of Rosebery, Liberal prime minister from 1894–95:

As the franchise broadened and the elegant, glittering, imposing trappings faded from British Parliamentary and public life, Lord Rosebery was conscious of an ever-widening gap between himself and the Radical electorate. The great principles "for which Hampden died in the field and Sidney on the scaffold," the economics and philosophy of Mill . . . were no longer enough. One had to face the caucus, the wire-puller and the soap-box; one had to stand on platforms built of planks of all descriptions. He did not like it. He could not do it. He would not try. He knew what was wise and fair and true. He would not go through the laborious, vexatious and at times humiliating processes necessary under modern conditions to bring about these great ends. He would not stoop; he did not conquer.

WINSTON S. CHURCHILL, *GREAT CONTEMPORARIES* 8 (1937).

9. *OVERCOMING LAW*, *supra* note 3, at 109–44.

methodology, by contrast, Posner becomes a giddy acolyte of Holmes, and he insists that heroic judicial personalities must be given free rein. But not every judge is always Holmes (not even Holmes was always Holmes),¹⁰ and one of the goals of a judicial pragmatist should be, presumably, to organize a legal system that will expose legal doctrine to critical analysis over time. By exalting the bounded rationality of individual judges, Posner undermines his broader effort to identify doctrinal principles that can usefully guide and constrain the development of the law as a whole.

Rather than try to provide a comprehensive account of the impressive range of Posner's essays, I would like to focus on Posner's argument that personal values supported by empirical data are a legitimate substitute for constitutional theory in its various incarnations. This is hardly the most novel argument in the book. Nevertheless, Posner's argument that empiricism can resolve many, although not all, difficult legal problems is a central theme of the collection, and it is exemplified by the book's combative title. Is Posner convincing when he claims to have overcome law by retreating into the cool objectivity of facts? Despite the sparkle of the individual essays, I do not think he is convincing, and his proposed methodology of constitutional pragmatism, in addition to being hard to defend as a matter of democratic legitimacy, also seems unpragmatic on its own terms.

Part I evaluates the touchstone of Posner's pragmatism, the elusive "reasonableness" standard, and argues that it is neither very reasonable nor very pragmatic. Part II argues that Posner's confident distinction between facts and values is hard to reconcile with questions of democratic legitimacy, as well as being philosophically simplistic. Part III suggests that Posner's pragmatism is impractical on its own terms, both because individual judges are not very good fact-finders and because the judiciary as an institution is better equipped to look backward, at text and doctrine and history, rather than forward, speculating about the empirical consequences of its decisions. Part IV attempts to defend constitutional theory against some of Posner's criticisms, suggesting that public choice analysis, although it yields important insights, is ultimately an arid and incomplete framework for understanding moments of constitutional transformation.

I. REASONABLENESS

In its discussion of pragmatism in statutory and constitutional cases, *Overcoming Law* largely parallels Posner's more detailed discussions in *The*

10. See *infra* notes 43–47 and accompanying text.

Problems of Jurisprudence.¹¹ The centerpiece of Posner's methodology in the earlier book was the amorphous standard of reasonableness:

I can think of no better approach than for judges to conceive of their task, in every case, as that of striving to reach the most reasonable result in the circumstances—which include though are not limited to the facts of the case, legal doctrines, precedents, and such rule-of-law virtues as stare decisis . . . substituting the humble, fact-bound, policy-soaked, instrumental concept of “reasonableness” for both legal and moral rightness.¹²

Posner refused to say how, exactly, judges should mix these various virtues to reach the most “reasonable” result, although he acknowledged the relevance of prudential virtues, such as sensitivity to the limits of judicial knowledge and the desirability of stability in law.¹³

In *Overcoming Law*, Posner again invokes the ideal of reasonableness to buttress his conclusion that judicial decisions should be made and evaluated purely in light of their consequences. He cites Cardozo's maxim that “[t]he final cause of law is the welfare of society.”¹⁴ Cardozo does not mean, Posner emphasizes, that judges “are free to substitute their own ideas of reason and justice for those of the men and women whom they serve.”¹⁵ Instead, he says, quoting Cardozo, “the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.”¹⁶

But Posner's definition of reasonableness turns out to be very different from Cardozo's definition. Cardozo was arguing for strenuous judicial restraint. He urged judges to suppress their own personalities and to project themselves sympathetically into the collective conscience of the people. After quoting Holmes's dissent in *Lochner v. New York*,¹⁷ Cardozo emphasized that in constitutional interpretation, “[t]he personal element, whatever its scope in other spheres, should have little, if any, sway in determining the limits of legislative power.”¹⁸ Statutes should be sustained, he emphasized “unless they are so plainly arbitrary and oppressive that right-minded men and women could

11. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter *PROBLEMS OF JURISPRUDENCE*].

12. *Id.* at 130 (footnote omitted).

13. *Id.* at 131.

14. *OVERCOMING LAW*, *supra* note 3, at 391 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921)).

15. *Id.* (quoting CARDOZO, *supra* note 14, at 88–89).

16. *Id.* (quoting CARDOZO, *supra* note 14, at 89).

17. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

18. CARDOZO, *supra* note 14, at 90.

not reasonably regard them otherwise.”¹⁹ Cardozo was also relatively confident that there are objectively right answers to legal questions:

It is the customary morality of right-minded men and women which [the judge] is to enforce by his decree. A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into what the Germans call “Die Gefühlsjurisprudenz,” a jurisprudence of mere sentiment or feeling. A judicial judgment, says Stammler, “should be a judgment of objective right, and no subjective and free opinion; a verdict and not a mere personal fiat.”²⁰

Cardozo, of course, was writing about constitutional interpretation in the shadow of *Lochner*, at a very specific time and place. Faced with the choice between James Thayer²¹ and Justice Peckham,²² he inclined toward Thayer. But Cardozo’s confident references to the “customary morality of right-minded men and women” are a peculiar model for Posner, whose world view is grounded in the idea of social dissensus. The most joyfully savage passages in *Overcoming Law* are directed at Herbert Wechsler’s high-handed notion of neutral principles,²³ at the grandiose idea that right-minded judges, through skills of craft, can resolve bitterly disputed social problems without engaging the “messy world of empirical reality.”²⁴ The fact that Posner can invoke Cardozo on behalf of a “reasonableness” standard that represents, in many ways, all that Posner rejects shows the endless elasticity of the standard itself.

Although Posner shares Cardozo’s suspicion of sentiment, furthermore, he is far more skeptical than Cardozo of attempts to suppress the judicial personality. One of Posner’s most appealing methodological principles is his insistence on judicial candor, his impatience with the pomposity and dissimulation that surrounds so many judges. And Posner’s readiness to “accept[] the role of personal values in adjudication [asking] only that they be yoked to empirical data,”²⁵ is based on his premise that personality inevitably shines through the adjudicative process, and should therefore be acknowledged frankly, so that it can be appropriately discounted.

Posner is also more skeptical than Cardozo about the claim that there are objectively right answers to legal questions. His skepticism seems to increase as he moves from common law adjudication to statutory interpretation to

19. *Id.* at 91.

20. *Id.* at 106–07 (footnote omitted).

21. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) (arguing for strenuous judicial restraint).

22. See *Lochner*, 198 U.S. at 45 (arguing for judicial activism).

23. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

24. *OVERCOMING LAW*, *supra* note 3, at 74. See generally *id.* at 70–80 (criticizing Wechsler).

25. *Id.* at 194–95.

constitutional interpretation, as the prospect of social consensus becomes increasingly remote. In common law adjudication, he emphasizes the importance of social and political consensus as the source of a weak objectivity: "To sound a recurrent note in this book, consensus is a necessary condition for legal objectivity in all but the weakest sense."²⁶ Thus, Posner has argued, the objectivity and legitimacy of the common law is a function of the degree to which social consensus supports its purposes. But the most difficult common law cases arise, of course, when social consensus is hard to discern. By invoking consensus as a touchstone in indeterminate cases, Posner has been criticized as a radical skeptic masquerading in pragmatist's clothes.²⁷

In statutory interpretation, Posner's notion of reasonableness becomes more problematic as the prospect of social dissensus becomes even more acute. In *The Problems of Jurisprudence*, he contrasted common law, rooted in consensus, with statutory law, which draws on a more contested set of values,²⁸ and he endorsed a "consequentialist" theory of interpretation, purposive rather than literal, more concerned with pragmatic consequences than statutory text, dedicated to "imaginative reconstruction"²⁹ rather than plain meaning. In his new book, Posner goes out of his way to exacerbate the concerns often expressed about the judicial pragmatist as superlegislator. His earlier writing had at least paid lip service to the importance of interpreting written texts in light of the intentions of their drafters. "[T]he judge," he observed in one essay, "will be alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretive function."³⁰ *Overcoming Law*, however, seems more skeptical about the relevance of the intentions of framers and drafters in textual interpretation. Under pressure from the social choice and interest group theories of politics, he writes, "it becomes unclear where to locate statutory meaning, problematic to speak of judges discerning legislative intent, and uncertain why judges should seek to perfect through interpretation the decrees of the special-interest state."³¹ Judges are bound by written texts, Posner concludes, only in the following sense:

In approaching an issue that has been posed as one of statutory interpretation, pragmatists will ask which of the possible resolutions has the best consequences, all things that lawyers are or should be interested in considered, including the importance of preserving language as a medium of effective communication and of preserving

26. PROBLEMS OF JURISPRUDENCE, *supra* note 11, at 126.

27. See Jack Knight & James Johnson, Political Consequences of Pragmatism (June 1994) (unpublished manuscript, on file with author).

28. PROBLEMS OF JURISPRUDENCE, *supra* note 11, at 128.

29. *Id.* at 273.

30. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983).

31. OVERCOMING LAW, *supra* note 3, at 400.

the separation of powers by generally deferring to the legislature's policy choices.³²

In constitutional interpretation, finally, Posner's conception of "reasonableness" becomes most elastic of all. He is skeptical about the possibility of communing with the customary morality of right-minded men and women, and he quotes a passage from John Rawls that sounds very similar to Cardozo's appeal to public morality:

"The justices [of the Supreme Court] cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse."³³

Posner goes on to reject Rawls's earnest appeal: "The values that all reasonable and rational people in our society endorse make too thin a gruel to resolve the difficult cases."³⁴ Furthermore, Posner objects, "[i]f a judge can reason only from the meager set of premises that *all* reasonable people in the United States can be expected to share, the creative judge is an oxymoron."³⁵ Instead, Posner urges judges to resist Rawls's effort (which is also Cardozo's effort) to place limits on political (including judicial) discourse, because "[t]he great judges have enriched political thought and practice precisely by bringing controversial values, whether of an egalitarian, populist, or libertarian cast, into the formation of public policy [using] their judicial office to stamp the law with a personal vision."³⁶ Posner concludes that "[m]ost judges can handle

32. *Id.* Posner has omitted, in his book, the sentence that followed this one in the original version of the essay:

Except as may be implied by the last clause, pragmatists are not interested in the authenticity of a suggested interpretation as an expression of the intent of legislators or of the framers of constitutions. They are interested in using the legislative or constitutional text as a resource in the fashioning of a pragmatically attractive result.

Richard Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1664 (1990). Nevertheless, the vague injunction to preserve "language as a medium of effective communication" seems too cagey to reassure critics who are concerned that Posner's theory of statutory interpretation leads inevitably to the same kinds of political and ethical judgments that make his vision of common law reasoning problematic.

33. OVERCOMING LAW, *supra* note 3, at 196-97 (quoting JOHN RAWLS, POLITICAL LIBERALISM 236 (1993)).

34. *Id.* at 197.

35. *Id.*

36. *Id.*

facts better than they can handle theories."³⁷ For this reason, he "do[es] not object to judges' stretching clauses—even such questionable candidates as the Due Process Clause—when there is a compelling practical case or imperative felt need for intervention. This was Holmes's approach, and later that of Cardozo, Frankfurter, and the second Harlan."³⁸

So there is an oddly unreasoned quality to Posner's conception of constitutional reasonableness. He celebrates the fact that "instinct can be a surer guide to action than analysis," and adds that "our deepest values—Holmes's 'can't helps'—live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification."³⁹ And yet he seems to suggest that irrational "can't helps" can be "yoked to empirical data" even when they cannot be rationally justified: "It is a comfort to a judge to know that he does not have to ratify a law or other official act or practice that he deeply feels to be terribly unjust, even if the conventional legal materials are not quite up to the job of constitutional condemnation."⁴⁰ In an odd concluding passage, Posner substitutes iconolatry for argument:

It is easy for legal professionals, and intellectuals of every stripe, to ridicule so pragmatic an approach. . . . They can ridicule it for its shapelessness, its subjectivity, its noncognitivism, its relativism, its foundationlessness, and its undemocratic character unredeemed by pedigree or principle. But the alternatives are unpalatable (to continue the digestive metaphor); and maybe what was good enough for Holmes should be good enough for us.⁴¹

The jarring spectacle of Posner glorifying Holmes and belittling reason is disappointingly mystical for a judge who has set out to debunk and overcome "all that is pretentious, uninformed, prejudiced, and spurious in the legal tradition."⁴²

And which Holmes does Posner have in mind when he says that what is good enough for the great man should be good enough for us? Although some have painted Holmes as the quintessential pragmatist,⁴³ Posner himself acknowledges that Holmes believed in policy analysis but was too lazy to do it properly,⁴⁴ which is perhaps why he was able to combine radical skepticism

37. *Id.* at 195.

38. *Id.* at 192.

39. *Id.* (footnote omitted).

40. *Id.*

41. *Id.*

42. *Id.* at 21.

43. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

44. See PROBLEMS OF JURISPRUDENCE, *supra* note 11, at 252.

about democracy with radical self-restraint. A New England aristocrat who was uninterested in reading newspapers, whose aphorisms got the better of his syllogisms, and who preached about the importance of statistics without bothering to use them in his opinions, seems like an odd model for Posner. His unpublished dissent in *Buchanan v. Warley*,⁴⁵ where he was reluctant to join a unanimous Court in striking down residential segregation laws, is “of a piece with most of his work in the area of race relations,”⁴⁶ and it shows the dangers of constitutional pragmatism. For once judges have shrugged off the constraints of text and history, they are just as free to constrict constitutional rights as to expand them, as Posner’s other model, the second Justice Harlan, did when he decided that the Sixth Amendment right to a jury trial was not essential to “fundamental fairness.”⁴⁷ At the very least, there is something excessively casual about Posner’s repeated invocations of Holmes without bothering to engage the contradictions in his legacy. If Posner’s constitutional methodology is nothing more than a license for judges to ventilate their personal instincts, as long as they can be weakly justified by facts, then he has not so much overcome the rule of law as sidestepped it entirely.

II. LEGITIMACY

But perhaps this unfairly paints Posner as a nineteenth-century activist; perhaps it fails to appreciate the seriousness of his attempt to distinguish between facts and values. Posner urges judges, in constitutional cases, to ignore theory, to shy away from values, and to focus primarily on facts:

The responsible judge will not be content with a naked statement of values. He will not ignore objections, or fail to test the consistency of his values by exploring hypothetical cases within the semantic domain of his statement. And he will seek to inform himself through empirical inquiry more searching than is normal in judicial opinions. Prudence dictates that before you react strongly to something you try to obtain as clear an idea as possible of what that something is.⁴⁸

Posner’s exaltation of facts over values is interestingly counterintuitive. Perhaps the problem with judges adjudicating on the basis of values is that they will impose contested values on the people. If they adjudicate on the basis of facts, by contrast, they will still be imposing values on the people, but the

45. 245 U.S. 60 (1917). Holmes’s unpublished dissent appears in Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 512–13 (1982).

46. Schmidt, *supra* note 45, at 511.

47. *Duncan v. Louisiana*, 391 U.S. 145, 186–87 (1968) (Harlan, J., dissenting).

48. OVERCOMING LAW, *supra* note 3, at 192–93.

values may be less troubling, since they may be less contested. This consequentialist justification of fact-based adjudication in constitutional cases recalls Posner's defense of pragmatism in common law cases. Because pragmatism is based on social consensus and will lead to socially desirable consequences, argues Posner, the appealing consequences may increase the legitimacy of judicial decisions.

But the notion that judicial decisions based on facts are likely to be less controversial than those based on values is very hard to accept. In the constitutional controversies that come before courts, little social consensus, by definition, exists. Posner notes that

personal values, while influenced by temperament and upbringing, are not independent of adult personal experience. Research—into facts, not just into what judges have said in the past—can substitute for experience, enlarge and correct the factual materials on which temperament and outlook react, and thus bring home to a judge the realities of a law against contraception or against abortion or against sodomy.⁴⁹

The argument calls to mind some of the valiant defenders of the jurisprudence of Harry Blackmun, who argue that careful study of briefs and trial records increased the Justice's understanding of the "real world."⁵⁰ But whether a judge's empirical research is rigorous or superficial, it can hardly cool the political controversy over questions such as abortion and sodomy. Partisans on both sides are unlikely to abandon their deeply held beliefs merely because a judge has investigated empirical data more thoroughly than they have. Posner's faith in facts is oddly similar, in the end, to the high-handed rationalism of his antagonist Ronald Dworkin, whose constitutional theory is based on the notion that if people thought more carefully about constitutional issues, they would realize that they actually share Dworkin's intuitions, rather than remaining wedded to their own.⁵¹

Given Posner's skeptical, if not contemptuous, view of democracy, it would be especially implausible for him to argue that judicial opinions based on facts are likely to be less politically controversial than judicial opinions based on values. He is nicely withering, for example, about the sentimentalism

49. *Id.* at 195.

50. *See, e.g.*, Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 *YALE L.J.* 23, 24 (1994) ("The Court's sprawling docket exposed him to a broader, more brutal slice of life than he had ever known.").

51. *See, e.g.*, RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 13, 20 (1993) ("Almost everyone who opposes abortion really objects to it, as they might realize after reflection, on the detached rather than the derivative ground. . . . But you may nevertheless find my suggestion arrogant, because it seems to claim to understand people's views about abortion better than they do themselves.").

of a civic republican theorist such as Joshua Cohen, who speaks of “consensus” as the goal of deliberative democracy:

He is thinking of political democracy on the model of a faculty meeting, where homogeneous and highly educated people deliberate in leisurely fashion over matters of which they have first-hand knowledge. Democracy doesn't work that way in polities of millions. It is nonparticipatory: except in the occasional referendum, people vote for representatives rather than for policies. In its practical operation ignorance is pervasive, selfishness is salient, and at times a disinterested malevolence is at work.⁵²

Maybe so. But then it seems unlikely that the capricious citizenry, when confronted with the cool reason of empirical argument, will be inclined to set their differences aside.⁵³

Perhaps Posner is making an argument not about the rationality of citizens but about the credibility of judges and law professors. They might be able to defend *Griswold v. Connecticut*,⁵⁴ for example, more convincingly against charges of judicial usurpation if they could demonstrate that Connecticut's ban on the use of contraceptives was “[s]ectarian in motive and rationale, capriciously enforced, out of step with dominant public opinion in the country, genuinely oppressive, a vestige maintained by legislative inertia.”⁵⁵ But Posner skirts over the fact that any view of consequences is value-laden and contingent on ideas of the good or the right. There are no relevant facts, really, that would allow a conscientious judge to resolve the contraception question to the satisfaction of all sides. It is odd, furthermore, for Posner to suggest that national consensus produces objectivity: Democratic agreement, after all, is not necessarily objective. A cool-eyed factual inquiry may indeed reduce the gap between the sweeping generalizations of judges and the actual values of

52. OVERCOMING LAW, *supra* note 3, at 26 (characterizing Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17, 23 (Alan Hamlin & Philip Pettit eds., 1989)).

53. Although Posner's thesis is normatively open to question, it may be descriptively accurate. In other words, it may be plausible to argue that most American judges most of the time are, in fact, pragmatic, and that the overall drift of American law has been, as Holmes argued, in accordance with the “felt necessities of the time,” public opinion, and the like. But even as a descriptive matter, many judges appear to convince themselves that they are scrupulously following originalism, or Dworkinian integrity seeking, or some other “legitimate” theory of judicial decisionmaking, even as their decisions appear to others to be self-deluded or nakedly political. In his remarkable “postbehavioralist” intellectual history of police power jurisprudence from the Civil War to the New Deal, for example, Howard Gillman argues that the *Lochner*-era judges who struck down laws interfering with freedom of contract, far from brazenly imposing a personal laissez-faire ideology, were, in their own minds at least, scrupulously applying the formalist nineteenth-century categories that distinguished “class legislation” from laws enacted for public purposes. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 3, 11 (1993). In any event, the descriptive question is an empirical (and psychological) question, and Posner offers little empirical or psychological evidence to support his broad claim about the judicial process.

54. 381 U.S. 479 (1965).

55. OVERCOMING LAW, *supra* note 3, at 194.

citizens, but it hardly answers the legal question about whether or not a particular clash over values violates the Constitution.

All of this suggests that, jurisprudentially, Posner is surprisingly casual, and that his confident insistence on the distinction between facts and values is surprisingly crude. It is unclear whether his pragmatism is simply fact/value positivism, or skepticism, or some kind of Holmesianism, or Rortyism with better research assistants. In his chapter "What are Philosophers Good For?" Posner criticizes Rorty for lacking the "solid grasp of social science"⁵⁶ that makes rigorous discussion of social problems possible. At the same time, Posner accepts Rorty's skepticism about the existence of ultimate, objective truths as "basically sound,"⁵⁷ and he rejects Rorty's critics, who argue that there is not enough consensus in American society to permit rational choice among competing moral or political perspectives, as "factually incorrect."⁵⁸ The vast philosophical literature questioning the coherence of the fact/value distinction, much of it dominated by the same pragmatists whom Posner cites with approval,⁵⁹ receives the treatment of a breezy conversation in the faculty lounge.

If Posner is wrong that judicial decisions based on facts are likely to be more legitimate than judicial decisions based on values, then it seems hard to think of a theory of legitimacy that could reconcile his pragmatic methodology with judicial review in a liberal democracy. Constitutional theory, at least for the generation of Alexander Bickel and John Hart Ely,⁶⁰ was obsessively concerned with questions of judicial legitimacy, and competing theories still stand or fall on their success in resolving the countermajoritarian difficulty. Originalists claim that "[d]emocratic legitimacy requires that constitutional law conform to a mental state (original intent or understanding) ascribed to the governed (through the consent expressed by ratification) at a specified time (the founding)."⁶¹ Processualists, by focusing on constitutional procedures rather than substance, insist that they are not imposing substantive values on citizens who are powerless to object, but are merely sustaining democratic legitimacy by protecting the process of democratic decisionmaking.⁶² And future-oriented fundamental values proponents, from Alexander Bickel to William Brennan, claim that they are declaring forward-looking principles that will later be ratified by a grateful nation and thus serve as the basis for

56. *Id.* at 455.

57. *Id.* at 450.

58. *Id.* at 453.

59. For attacks on the distinction between facts and values, see HILARY PUTNAM, *THE MANY FACES OF REALISM* 62–71 (1987); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* at xvi (1982); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 363–65, 387 (1979). For a spirited defense of the fact-value distinction, see J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 64–73 (1977).

60. The most recent generation of constitutional theorists is more hermeneutic, more interested in the question of whether disciplined interpretation is possible.

61. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.* 1119, 1129 (1995).

62. *Id.* at 1132.

consensus that did not exist at the time of decision.⁶³ Or, to put the argument another way, “doctrinal interpretation portrays courts as merely instruments of the law . . . historical interpretation portrays courts as merely the instruments of an original democratic will,” and fundamental values interpretation portrays them as oracles of national consensus yet to be born.⁶⁴

Posner’s “policy-soaked” pragmatism, by contrast, has no convincing response to the countermajoritarian difficulty. The federal courts, after all, are not the Office of Management and Budget. But instead of attempting to answer critics of *The Problems of Jurisprudence*, who complained that Posner’s ill-defined brief for judges as policymakers raised serious questions of democratic legitimacy,⁶⁵ Posner belittles the pragmatic value of the criticism:

What practical, palpable, observable difference does [a disagreement about constitutional theory] make to us? What, for example, are the stakes when lawyers debate whether some theory of judicial action comports with “democratic legitimacy”? How do we recognize “democracy” anyway? What difference does it make whether one thinks that judges found the current doctrines of constitutional law in the Constitution or put them there?⁶⁶

What Posner rejects, in short, is the notion that agreement on theory is essential to legitimacy. He thinks constitutional theory is uninteresting and foolish because it does not constrain judges in any meaningful way and because the Constitution can survive perfectly well even if theories of legitimacy are contested or ignored. Judges with dramatically different theories of interpretation, such as Richard Posner the pragmatist and Frank Easterbrook the strict constructionist, turn out, in practice, to vote together in most cases, so why should we take very seriously the self-serving reasons they offer to explain their decisions? The question of whether or not judicial decisions will be obeyed, furthermore, is independent of the quality of their reasoning, and the reasons judges give to justify their decisions are usually pretentious window dressing designed to conceal their true motives. Why not dispense with the misguided project of constitutional theory altogether?

Perhaps because Posner’s alternative is unpersuasive on its own terms. Consider first Posner’s claim that judges can instrumentally achieve all of the public goods associated with the rule of law—stability, disinterestedness, predictability, equal treatment of similarly situated litigants, and so forth—without bothering about theories of legitimacy. This may be true, in

63. *Id.* at 1133–34.

64. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 37 (1995).

65. See, e.g., Eric Rakowski, *Posner’s Pragmatism*, 104 HARV. L. REV. 1681, 1693–94 (1991) (book review).

66. *OVERCOMING LAW*, *supra* note 3, at 7.

theory, but it is hardly clear that whatever resulted could be called a democracy. The rule of law and its associated virtues, after all, can flourish in political systems that look very different from the American system of written constitutionalism and popular sovereignty. It would be easy enough to imagine a benign autocrat, along the lines of Lon Fuller's Rex, who set out to design and administer a utopia of legality in which all rules were perfectly clear, consistent with one another, known to every citizen, never retroactive, stable through time, would demand only what is possible, and were scrupulously observed by everyone charged with their administration.⁶⁷ But it is not possible to imagine Fuller's Rex as an Article III judge in a liberal democracy. To make the point less hypothetically, the rule of law can also flourish under institutional arrangements, such as parliamentary sovereignty, that the American Founders explicitly rejected. In his classic treatise on the British Constitution, A.V. Dicey insisted that parliamentary sovereignty reinforces the rule of law, since, among other things, Parliament itself never exercises direct executive powers.⁶⁸ But this does nothing to answer the positivist questions that Posner ignores: What are the sources of law, rather than its practical effects? Who can legitimately make it? And under what circumstances should judges feel free to overturn the decisions of democratic legislatures?

Posner's indifference to questions of democratic legitimacy seems cavalier, even for a scholar who is skeptical of the constitutionalist tradition. At the very least, an American judge who does not even try to give a persuasive account of her role in a liberal democracy will be subject to withering professional criticism. And professional criticism is important to Posner: He has suggested that a decision should be considered principled, rather than result-oriented, "if and only if the ground of decision can be stated truthfully in a form the judge could avow without inviting near-universal condemnation by professional opinion."⁶⁹ Of course, "near-universal" condemnation may be setting the bar too high. In an age of scholarly dissensus, there are few decisions that would be condemned by a bipartisan tribunal of, say, Bruce Ackerman, Ronald Dworkin, Frank Easterbrook, Richard Epstein, Michael McConnell, Laurence Tribe, and Mark Tushnet. But if this is really the standard Posner means to set, then his "consensus" standard is as coy as Dworkin's notion of constitutional "fit":⁷⁰ so elastic in theory that it is designed never to be satisfied in practice.

67. See LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969).

68. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 406-09 (10th ed. 1959).

69. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 *IND. L.J.* 1, 8 (1983).

70. In *Life's Dominion*, for example, Dworkin acknowledges two modest restraints on judges. Any interpretation of the Constitution, he says in a distinction developed more carefully in *Law's Empire*, should be subjected to two tests: the test of justice and the test of "fit." And the most just interpretation, "the one whose principles seem to us best to reflect people's moral rights and duties," should be preferred unless "actual legal practice is wholly inconsistent with the legal principles it recommends." DWORKIN, *supra* note 51, at 111; see also RONALD DWORKIN, *LAW'S EMPIRE* 66 (1986) (discussing stages of interpretation of

The fact that judges of different stripes often agree on interpretive theories but disagree on outcomes—Hugo Black and Antonin Scalia were both purported originalists, for example—does not mean that theories of legitimacy have no practical importance. In many important cases, competing theories of legitimacy will indeed determine the outcome.⁷¹ Some judges, such as John M. Harlan, and some scholars, such as Gerald Gunther, are highly regarded in the legal profession even though their writings lack the trappings of high constitutional theory, but both Harlan and Gunther are highly attentive to questions of legitimacy and to the role of unelected judges in a constitutional democracy.

Posner's refusal to engage questions of democratic legitimacy exacerbates fears that his methodology would lead inevitably to judicial activism, in the sense of encouraging judges to second-guess the policy conclusions of legislators. Guided by social choice criticisms, Posner can hardly conceal his contempt for the legislative process, which he says

is buffeted by interest-group pressures to a greater extent than the judicial process is, and for this and other reasons statute law is much less informed by sound policy judgments than the realists in the heyday of the New Deal believed The judge who acts on his conception of sound policy is apt to be working at cross-purposes with the legislature⁷²

Some scholars have invoked the Arrow Impossibility Theorem to support broad congressional delegation of lawmaking power to administrative agencies, relying on technocrat expertise to replace the irrationality of democratic decisionmaking.⁷³ But it would be hard to imagine a democracy in which unelected judges, without the benefit of a congressional mandate, took it upon themselves aggressively to second-guess the empirical conclusions of Congress.

Judicial pragmatism, of course, is not necessarily inconsistent with self-restraint. A pragmatic judge might insist on conducting independent empirical inquiries into the reasonableness of a legislature's conclusions and still be inclined to give the legislature the benefit of the doubt because of her pragmatic goal of cutting back the power of the courts in relation to other

law). When push comes to shove, however, legal practice does not seem to constrain Dworkin in meaningful ways.

71. Compare the concurring and dissenting opinions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

72. *OVERCOMING LAW*, *supra* note 3, at 393.

73. See generally JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 36–46 (3d ed. 1992) (discussing theories of administrative agency behavior). Of course, administrative agencies, if composed of multiple decisionmakers, are also vulnerable to the Arrow critique. See Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2131 (1990).

governmental institutions.⁷⁴ But this pragmatic goal would tell the judge nothing about *when* the power of the courts should be reduced, and when judicial intervention is not only justified but compelled. Since at least the New Deal, in cases involving the constitutionality of economic legislation, judges have self-consciously abdicated their role as independent fact-finders, even in the face of statutes whose stated objectives and real objectives are transparently at odds.⁷⁵ The project of independent empirical inquiry is so inherently aggressive, and the likelihood that legislatures (especially state legislatures) have acted sloppily or irrationally is so great, that a pragmatist such as Posner might find it hard, in practice, to restrain himself from substituting his own judgment for that of the political branches by following the facts to their logical conclusion.

III. FACTS

Perhaps the strongest challenge to Posner's exaltation of facts over values is that it is wildly impractical on its own terms. The average judge is not institutionally or intellectually equipped to conduct rigorous empirical analysis.⁷⁶ Nor is she prepared to assimilate the vast interdisciplinary literature produced by social scientists and legal scholars who, Posner thinks, should cheerfully volunteer their services as purveyors of facts to the judiciary. ("In any sensible division of responsibilities among branches of the legal profession, the task of conducting detailed empirical inquiries into the presuppositions of legal doctrines would be assigned to the law schools."⁷⁷) And institutional concerns clearly matter to Posner, for they are at the center of his attacks on the constitutional theories of Ronald Dworkin and John Hart Ely. Posner concludes his essay on Dworkin by observing that "few judges are equipped to create or even evaluate comprehensive political theories, that our judges are generally not appointed on the basis of their intellectual merit,"⁷⁸

74. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1659–61, 1665–71 (1995) (Breyer, J., dissenting) (canvassing 167 scholarly reports and articles to conclude that Congress rationally could have concluded that "guns and education are incompatible"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting) (discussing reasonableness of Oklahoma legislature's decision to make ice manufacturer a public utility requiring license).

75. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (upholding Oklahoma law forbidding opticians, but not ophthalmologists or optometrists, from fitting or replacing lenses, although "law may exact a needless, wasteful requirement in many cases").

76. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 247–48 (1970) (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part). Brennan noted:

The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable."

Id.

77. OVERCOMING LAW, *supra* note 3, at 210. *But see infra* text accompanying note 89.

78. OVERCOMING LAW, *supra* note 3, at 194.

and that “[m]ost judges can handle facts better than they can handle theories.”⁷⁹ But can they really? If all judges were as able as Posner, the question might be closer, but the fact-finding that Posner has in mind is far more ambitious than most judges are trained to perform.⁸⁰

Perhaps a concrete example will drive the point home. Consider the question of the constitutionality of set-asides for minority contractors, which Posner addresses in passing. A pragmatist and a formalist would begin from entirely different premises. The question for a hard-core formalist is whether the Privileges or Immunities Clause, Equal Protection Clause, and Due Process Clause of the Fourteenth Amendment, interpreted in light of their text and history, contain a principle that can plausibly be thought to forbid the racial classification at issue. So a formalist would be interested in historical questions, such as whether the privileges and immunities of citizens of the United States were originally understood to include public benefits extended to all citizens on equal terms, and in questions of analogy and translation, such as whether being hired by the government to build highways should be considered, in a post-New Deal world, a generally available benefit of citizenship. The answers to the historical questions might be jarringly idiosyncratic. For example, school segregation might be unconstitutional, but set-asides for minority contractors might be constitutional under a historical reading of the Fourteenth Amendment.⁸¹ But pragmatic questions—such as whether or not set-asides for minority contractors are likely, in fact, to achieve their stated goals of remedying past discrimination in the construction industry or increasing the number of minority-owned firms—would be entirely off-limits.

The pragmatist has a much more daunting task. In a recent case, Posner briefly sketched his approach to the question:

The contractors point out that the remedial objective which persuaded the Supreme Court to uphold the set-aside program challenged in the *Fullilove* case may be a fiction when it is applied to a liberal northern state with a relatively small minority population, such as Wisconsin, that does not even attempt to ascertain the existence of a legacy of discrimination that might justify favored treatment for highway construction firms owned by blacks, or Hispanics, or American Indians, or Asians, or women. But this is just

79. *Id.* at 195.

80. Indeed, Posner himself is contemptuous of many of his colleagues for relying too heavily on law clerks. *Id.* at 57. This makes his exaltation of the individual judge as Herculean fact-finder all the more surprising. In one sense, of course, Posner does not disagree that judges at present are not equipped to use social science in their decisions; his normative thesis is that the legal system, including the law schools, should reorient its thinking away from theory and toward facts, including those revealed by social science inquiry. But to the extent that Posner's model relies on a massive restructuring and reorientation of the entire legal system and the institutions that support it, “pragmatic” is not the adjective that comes to mind.

81. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389–90, 1462–64 (1992).

to argue that set-aside programs such as this, upheld on their face in *Fullilove*, are, as administered, the practice of cynical racial or interest-group politics. Maybe so. If so, the program violates the Constitution.⁸²

For Posner, in short, the constitutional question turns on the empirical questions, but the empirical questions are not so easy to answer.⁸³ Imagine the range of inquiries that a conscientious pragmatist would have to address: Did Congress consider evidence of discrimination against Hispanics and Asians and women, or just against Blacks? Is the evidence, in fact, more convincing in conservative Southern states than in liberal Northern states? Are the differences so substantial that Congress should not be entitled to legislate a national rule?⁸⁴ Is there more or less danger of interest group politics when a federal statute is applied in a state with a small minority population? And given the difficulty of establishing that the remedial premises of the statute are a complete fiction, how much evidence of state-by-state discrimination should Congress have to provide to ensure that facially constitutional laws will not be struck down as applied?

In his criticisms of John Hart Ely's political-process theory, Posner seems to acknowledge that judges are ill-equipped to resolve the range of social science questions presented by the affirmative action cases. Ely claims that judges and lawyers "are better equipped to deal with questions of process rather than substance."⁸⁵ "This would be correct," says Posner,

if Ely were speaking at the level of trials. But he is speaking of the design of political institutions. About this level of political governance lawyers and judges know as much or as little as they know about our society's fundamental values. The effects of apportionment, the political dynamics of affirmative action, the conditions for effective minority politics, the significance of conflicting interests within a group, the force of inertia in the political process—these and other matters central to the construction and evaluation of a

82. *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991) (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

83. Posner does not always distinguish crisply between empirical questions that relate to legislative purpose and empirical questions that relate to the effects of a statute in the future. Courts may be better equipped to answer the former than the latter. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1143-60 (1986).

84. For example, the Solicitor General's brief in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), reveals that there is a slightly higher percentage of Indians, Eskimos, and Aleuts in Colorado than in the United States as a whole (0.9% of the population as opposed to 0.8%), but slightly lower percentages of Asians and Pacific Islanders (1.8% as opposed to 2.9%). Brief for Respondents at 41a, *Adarand* (No. 93-1841). Does this make the program, on its face, less narrowly tailored for Indians and Eskimos than for Pacific Islanders? Or should a conscientious pragmatist take it upon herself to investigate the comparative history of discrimination against Indians and Asians in Colorado and the United States before making a constitutional judgment?

85. OVERCOMING LAW, *supra* note 3, at 306 (characterizing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

participation-oriented representation-reinforcing jurisprudence are issues in social science. They are not issues of “process” rather than “substance” in any sense relevant to lawyers’ capacities.⁸⁶

But surely Posner’s criticisms apply with even more force to his own methodology. The pragmatist must delve far more deeply than the representation-reinforcing proceduralist into issues of social science that are beyond her expertise. “Neither philosophers nor lawyers . . . have by virtue of their professional training and experience the ability to advise on issues of social policy,”⁸⁷ Posner concedes in his essay “What Are Philosophers Good For?” But as he makes clear throughout the book, his conception of the appropriate range of social science analysis in constitutional analysis is very broad indeed.⁸⁸ Posner’s own scholarly interests are wonderfully interdisciplinary. For example, in his chapter “The Triumph and Travails of Legal Scholarship,” he belittles Judge Harry Edwards’s lament that law schools produce useless and impractical scholarship. Posner chastises Edwards for failing to account for the contribution of law and economics to antitrust law, environmental regulation, and proof of commercial damages; for failing to discuss the relevance of Bayesian probability theory and cognitive psychology to the rules of evidence, jury instructions, and burdens of proof; for ignoring the impact of feminist jurisprudence on rape law and the impact of political scientists on reapportionment cases; and for remaining mute on the growing literature, informed by philosophy, literary theory, and public choice analysis, on constitutional and statutory interpretation.⁸⁹ It is hard not to sympathize with poor Judge Edwards, who is surely far less guilty of what Posner calls the “philistinism of the highly educated”⁹⁰ than most of us, but Posner’s criticism suggests that the kind of education he thinks is necessary for informed, pragmatic decisionmaking is beyond the range of the most gifted scholars, let alone the most gifted federal judges.

Posner criticizes his colleague David Strauss for failing to explore the practical consequences of a decision in favor of Joshua DeShaney, who claimed that the state’s failure to protect him from the brutal abuse of his father deprived him of liberty without due process of law:⁹¹

[O]ne block east of [the University of Chicago Law School is] the university’s School of Social Service Administration, the nation’s premier school of social work. A two-minute walk would have

86. *Id.* at 206–07.

87. *Id.* at 446.

88. For example, see Posner’s ambitious essay titles: “Have We a Constitutional Theory?” “Pragmatic or Utopian?” “Biology, Economics, and the Radical Feminist Critique of *Sex and Reason*,” “Obsessed with Pornography,” and “The Legal Protection of the Face We Present to the World.”

89. OVERCOMING LAW, *supra* note 3, at 96–97.

90. *Id.* at 97.

91. See *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 191–93 (1989).

brought Strauss into the presence of experts with whom to explore the practical consequences of a decision the other way in *DeShaney*. One block east of the law school is the university's School of Public Policy Studies, where Strauss could have consulted experts in public administration and finance⁹²

Posner goes on to insist that legal scholars, unlike judges, have a public responsibility to immerse themselves in the social science literature because judges do not have "the time or the resources required for competent empirical research."⁹³ For example, Brandeis waded into empirical analysis in some of his dissents, Posner notes, "without conspicuous success."⁹⁴ But if the greatest judicial pragmatist of this century was not able to produce competent empirical research, why should the average judge, with far more limited abilities, do any better? And if legal scholars are unwilling, and judges are unqualified, to do the hard and lonely work that Posner thinks is necessary for rigorous adjudication, then Posner's methodology seems far more impractical than the alternatives he assails.

The weak criticism of Posner's pragmatism, then, is that good empirical work is hard to find and that appellate judges are just as likely to be bad fact-finders as they are bad political philosophers. But there is a stronger criticism, and it is rooted in the well-worn institutional concerns of Hart and Sacks.⁹⁵ As a general matter, legislatures are better equipped than courts to engage in the forward-looking, policy-soaked enterprise of fact-finding, and courts are better equipped than legislatures to engage in the backward-looking enterprise of doctrinal and historical analysis.⁹⁶ This is a comparative advantage, not an absolute advantage: Even if some judges turn out to be better fact-finders than some legislators (or even some legislatures), the legal-process school's insights about "institutional competence"⁹⁷ suggest that the judicial branch should continue to interpret the past, rather than speculating about the future, because it is the only branch of American government with the training and resources to look backward rather than forward. In attempting to dismiss the entire project of backward-looking constitutional theory, from Dworkin to Ely to

92. OVERCOMING LAW, *supra* note 3, at 209.

93. *Id.* at 210.

94. *Id.* at 210 n.11.

95. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 366-68 (tentative ed. 1958).

96. See, e.g., Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1872 (1987) ("If we ask what subject matter judges as a class are most knowledgeable about (aside from doctrine), it is surely politics. It is not physics, chemistry, biology, engineering, economics, social psychology . . ."). As a result, Regan argues, judges are better equipped to evaluate the purposes, rather than the likely effects, of public policies.

97. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2032-33 (1994); cf. *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part) ("Judicial deference is based, not on relative factfinding competence, but on due regard for the decision of the body constitutionally appointed to decide.").

Bork, as misguided, Posner is pushing the courts into a realm where they are not really equipped to compete.

IV. THEORY

So Posner's pragmatism is not very pragmatic. In addition to being hard to reconcile with democracy, it requires a degree of empirical rigor and prophetic ability that is virtually impossible for run-of-the-mill Article III judges to achieve. But are the constitutional theorists whom Posner rejects any more convincing than the anticonstitutional theory of Posner himself? Posner claims that judicial pragmatism, which he defines as the "philosophy of living without foundations,"⁹⁸ is less implausible than constitutional theory in its various incarnations. At least five essays in Posner's book are dedicated to the proposition that constitutional theory is both unnecessary and impossible.⁹⁹ Posner is especially dismissive about the work of legal positivists, originalists, and neo-originalists, from Robert Bork to Bruce Ackerman and Akhil Amar, who argue with Hamilton in *The Federalist* No. 78¹⁰⁰ that judges who pay attention to the text and history of the Constitution are authentic oracles of popular sovereignty because the Constitution was adopted by the people of the United States:¹⁰¹

This is artificial even apart from the framers' well-known distrust of popular government (remember that in the original Constitution, only the House of Representatives was to be elected directly). Everyone who voted for the Constitution is long dead, and to be ruled by the dead hand of the past is not self-government in any clear sense.¹⁰²

Stated this breezily, the "dead hand" answer begs the question. It was precisely because the Framers distrusted popular government, and because they were concerned about what Posner calls agency costs, that they put so much faith in written constitutions. Posner refuses to engage Hamilton's distinction between a Constitution, ratified in the name of the people, and ordinary laws, passed by their selfish and self-interested representatives. When a court invokes the Constitution to strike down a statute, according to Hamilton's

98. *OVERCOMING LAW*, *supra* note 3, at 29.

99. Although Posner's attack on the impossibility of constitutional theory is a recurring theme of *Overcoming Law*, he launches his most concentrated assault in the five essays that form part two, "Constitutional Theory."

100. *THE FEDERALIST* No. 78, at 467-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

101. Posner discusses Bork in "Bork and Beethoven." See *OVERCOMING LAW*, *supra* note 3, at 237-55 (criticizing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)). Posner discusses Amar in "Have We a Constitutional Theory?" See *id.* at 211-14 (criticizing Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 *HARV. L. REV.* 1359 (1992)). I criticize Posner's analysis of Ackerman below. See *infra* notes 126-38 and accompanying text.

102. *PROBLEMS OF JURISPRUDENCE*, *supra* note 11, at 137-38.

theory, it does not impose the dead hand of the past on the people of today. Instead, it enforces the last intense and authentic expression of the people's will over the ephemeral expression of their fallible delegates.

There are responses to Hamilton's theory that might deflate it on its own terms. For example, what if public choice problems prevented current popular majorities, with similarly deep and intense and unselfish preferences, from ruling simply because they were unable to muster the supermajority support necessary to amend the Constitution?¹⁰³ And the dead hand objection becomes increasingly hard to answer the older an amendment grows. An originalist, perhaps, might respond to a pragmatist by emphasizing the comparative advantage of strict constructionism over constitutional pragmatism: The original understanding of even the most radical constitutional amendments, including the Bill of Rights and the Civil War amendments, was so narrow, from a modern point of a view, that scrupulous originalism is more likely to lead modern judges to judicial restraint than to judicial activism.¹⁰⁴ For this reason, originalism is less likely than pragmatism to usurp current democratic preferences. Even the most tendentious originalists fall back on this weak justification when they resort to consequentialist arguments about democracy and self-restraint.¹⁰⁵

If judicial restraint is the goal, of course, one might wonder, with Posner, why it is necessary to go through the dreary charade of combing the historical record in the first place. Why not just defer without the fuss? One answer, perhaps, is that mindless deference in all circumstances would be lawless and would fail to give proper respect to the constraints of a written constitution. By sticking relatively close to constitutional text, history, and structure, and by eschewing extratextual speculation about the effects of their decisions in the future, judges can avoid what Posner identifies as the pitfalls of pragmatism—"its shapelessness, its subjectivity, its noncognitivism, its relativism, its foundationlessness, and its undemocratic character unredeemed by pedigree or principle"¹⁰⁶—while preserving the written constitution as an instrument of fundamental law. That, for a pragmatist, might be justification enough for repudiating pragmatism in the constitutional sphere.

Posner's refusal to distinguish between preferences expressed in ordinary legislation and preferences expressed in constitutional amendments is endemic,

103. See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 766 (1992). For additional references to the critiques of originalism in light of the dead hand problem, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 770 nn.105-08 (1991).

104. See, e.g., Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331, 1334 (1985) (arguing that Constitution, strictly construed, does not prevent government from doing anything except impairing obligation of contracts, and that Court got that wrong, too).

105. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863-64 (1989).

106. OVERCOMING LAW, *supra* note 3, at 192.

of course, to social choice theory. Arrow's Impossibility Theorem holds that the social ranking of any two options in democratic decisionmaking reflects only the way in which individuals rank those two options and does not depend on how individuals might rank either option against other possibilities.¹⁰⁷ One justification for this independence criterion is that it ensures the exclusion of information about the intensities with which various preferences are held.¹⁰⁸ And yet, by refusing to entertain the possibility that some preferences may be held much more intensely than others, social choice theory is unable to entertain the possibility that some public values in American society, such as the protection of fundamental civil and political rights enshrined in the Constitution, may be considered higher in quality, and "hierarchically incommensurable,"¹⁰⁹ with lower, nonconstitutional values, such as economic efficiency.

Perhaps because he is in the thrall of the economist's view of democratic preferences as perfectly commensurable, Posner does not explore the distinction between ordinary politics and constitutional politics in any detail, nor does he explore whether social criticisms of the former apply with equal force to the latter. In passing, he notes the only comprehensive attempt to apply public choice theory to the constitutional amendment process, by Donald Boudreaux and A.C. Pritchard, which argues that constitutional amendments are "most likely to be sought when an interest group, anticipating *future* opposition to its preferred policy, wishes to embody it in an enactment that will be difficult to repeal."¹¹⁰

The narrow empirical claim that constitutional amendments are a form of interest group legislation rather than public-spirited reflection is open to question on public choice grounds alone. Because transformative constitutional amendments, like those adopted during the Founding and Reconstruction, tend to be framed at a high level of generality, and to remain in effect for a long time, it is harder for interest groups to anticipate how they will be affected in the future. Thus the problem of political rent seeking, which arises when ordinary legislation confers different benefits on different groups, either by benefitting a select few and imposing costs throughout the community, or by benefitting the community and imposing costs on a select few, is less likely to arise during periods of constitutional politics.¹¹¹ The influence of an interest

107. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59 (2d ed. 1963).

108. Pildes & Anderson, *supra* note 73, at 2133-34.

109. *Id.* at 2147.

110. OVERCOMING LAW, *supra* note 3, at 217 n.5 (citing Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111 (1993)).

111. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 285-86 (1962). Of course, rent seeking hardly disappears during periods of constitutional politics, as the recent debate over the balanced budget amendment shows. But perhaps the procedural difficulty of Article V amendments makes it harder for the rent seekers to prevail.

group, furthermore, tends to be strongest when the group is trying to block rather than obtain legislation, when the group's goals are narrow and involve low-visibility issues, and when the group is able to move the issue to a favorable forum, such as a sympathetic congressional committee.¹¹² Interest groups will have a harder time dominating debates over constitutional amendments, which tend to be highly visible, where the public can more easily obtain reliable information, and where battles are fought in a series of institutionally competitive arenas, beginning with both houses of Congress and ending in the state legislatures.

The most important insights of social choice theory do not appear to cast much light on the amendment process. For example, public choice scholarship is pessimistic about the integrity and viability of majority rule in legislatures. As Posner has argued, public choice theory has made statutory interpretation problematic by undermining the notion of a coherent legislative purpose.¹¹³ Although legislators have individual preferences, it is sometimes hard for them to aggregate their preferences into coherent, collective choices. Legislators with control over the agenda can ensure that only proposals with minority support are adopted (if no proposal has the support of a majority); strategic behavior such as logrolling, which involves the trading of votes on one issue for desired votes on another, can also make it harder to talk about coherent legislative intentions.¹¹⁴

Of course, the distinction between ordinary politics and constitutional politics should not be overstated: Both have self-interested aspects and public-spirited aspects, and, in both cases, the public-spirited aspects tend to be slighted by the reductionism of public choice theory, which sees all political expression through the lens of the Fable of the Bees.¹¹⁵ Nevertheless, the most important political-process defects that public choice theory identifies—logrolling, agenda control, and the difficulty of aggregating preferences—apply with less force to constitutional politics than to normal politics. After constitutional amendments are approved by both houses of Congress, they are presented to the states as a single text, which may either be accepted or rejected. Thus, the dangers of logrolling, sequential consideration of proposals, and unrelated riders are substantially reduced. Moreover, the social choice problem of “cyclical majorities” that cannot choose among three

112. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 887 (1987) (citing KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314–17, 395–98 (1986)) (assessing challenges to legislative ability to represent public as whole, rather than special interest groups).

113. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 774 (1987).

114. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

115. For an example of agenda control, cycling, and logrolling, one can hardly do better than the passage of the Fifteenth Amendment. See generally WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965). On the other hand, the passage of the 1964 Civil Rights Act—an example of normal politics—showed the polity at its best.

or more mutually exclusive alternatives is less likely to materialize when a single proposal is presented for a yes-or-no vote.¹¹⁶ Most important of all, the Article V amendment procedure, which requires a proposal by two-thirds of both houses of Congress and ratification by the legislatures of three-fourths of the states,¹¹⁷ is designed to ensure far greater deliberateness, popular engagement, and “due process of lawmaking,”¹¹⁸ and less free-riding rent seeking by interest groups, and pork-barrel politics, than one finds in ordinary politics.

A judge faces distinctive problems, of course, when she tries to extract a coherent public understanding from a constitutional amendment. Judge Easterbrook’s conclusion in statutory cases—that judges should enforce the deal embodied in the written product, rather than searching for the collective “intent” or “design” of the legislature as a whole¹¹⁹—may be hard to translate into the constitutional realm: Can we really speak of a single deal when construing an amendment that has been passed by both houses of Congress and thirty-eight state legislatures? Similarly, Posner’s “communication” theory of legislation, which compares judges to military officers attempting to decode obscure commands from their legislative superiors,¹²⁰ may be harder to apply to constitutional interpretation, where the sovereign people in whose name the constitution is ratified do not have a single purpose that they are attempting to communicate. Nevertheless, the command metaphor is more apt in the constitutional than the statutory sphere, since the constitutional text, according to the Hamiltonian conceit, represents the intention of the people rather than the intention of their servants. Therefore, a constitution seems more like a command from superior (the people) to agent (judges and legislators) than an ordinary statute does.

Although their reductionism yields useful insights, Boudreaux and Pritchard’s treatment of the Reconstruction amendments shows the ultimate aridity of the public choice approach. It also highlights the dangers of Posner’s decision to view constitutional interpretation through an essentially pragmatic lens. The Thirteenth, Fourteenth, and Fifteenth Amendments, they suggest,

reflect attempts by the dominant coalition of the Republican Party to lock in future political support through the Constitution while its opposition was still disenfranchised. Section Two of the Fourteenth Amendment, as well as the Fifteenth Amendment, promised a steady stream of electoral support for the Republicans, while Section Three of the Fourteenth Amendment promised to limit the Democratic

116. See ARROW, *supra* note 107, at 94–95.

117. U.S. CONST. art. V.

118. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (arguing that Due Process Clause is purely procedural and substantive restriction on legislative activity).

119. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 n.57 (1982).

120. See PROBLEMS OF JURISPRUDENCE, *supra* note 11, at 269–70.

Party's competitiveness by barring its most likely candidates for office.

. . . . Moreover, protecting the rights of property and contract for blacks created a larger base from which politicians could extract wealth, while at the same time it impaired the political base of the Democratic Party. It is exceedingly difficult to extract rents from individuals who are kept in bondage.¹²¹

There is something really distasteful about the last sentence. Of course, parts of the Fourteenth Amendment were motivated by self-dealing and partisan gerrymandering. Section Two,¹²² for example, which many Republicans saw as the most important section of all, was indeed a partisan measure designed to ensure that the reconstituted Southern states would not profit from their defeat by swamping Congress with a new Democratic majority. And the Fifteenth Amendment, which provided that the right to vote should not be abridged on account of race,¹²³ but purposely left intact poll taxes, literacy tests, and other qualifications intended to disenfranchise Blacks, might also be seen as an unfortunate sacrifice of principle for political expediency.¹²⁴

But it is crude, and historically inaccurate, to reduce the constitutional revolution of the Civil War to nothing more than partisan politics. The three Reconstruction amendments synthesized and expressed more than three decades of abolitionist thought,¹²⁵ and they never could have been proposed or ratified without the combination of high idealism and crude opportunism that characterized the program of the Radical Republicans. And where, after all, is the reference to race? If the Fourteenth Amendment were centrally about self-dealing, would not the Republicans have been careful to say so explicitly?

Posner, although less reductionistic than Pritchard and Boudreaux, is skeptical for different reasons that the Reconstruction amendments represent a well-informed, public-spirited consensus. His essay on Bruce Ackerman's neo-Hamiltonian theory of dualist democracy, "Legal Positivism without Positive Law," makes familiar criticisms of Ackerman's most vulnerable arguments—including Ackerman's characterization of the New Deal as an

121. Boudreaux & Pritchard, *supra* note 110, at 144 (footnotes omitted).

122. U.S. CONST. amend. XIV, § 2.

123. *Id.* amend. XV, § 1.

124. EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869*, at 156 (1990) ("The drafters understood that the only new requirement they were adding was that any qualification for voting has to be applied equally to all races. Such a requirement might have little practical impact; it was, however, all that was attainable at the time.").

125. *See generally* JACOBUS TENBROEK, *EQUAL UNDER LAW* (rev. ed. 1965) (discussing antecedents of Fourteenth Amendment and focusing on doctrine and political activities of organized abolitionist movement).

example of a “structural constitutional amendment”¹²⁶—but fails to grapple very seriously with the underlying theory of dualism itself:

[T]he original Constitution can fairly be thought a considered expression of informed public opinion. Not so Ackerman’s two subsequent “constitutional moments.” The Reconstruction amendments do not on their face appear to revolutionize the relation between the national government and the states; their principal thrust is to abolish the racial caste system of the southern states. The amendments were vague enough that aggressive judges, without being laughed out of court, could transform them from a protection of the freedom of black people against oppression by the southern states to a protection of economic freedom from state regulation anywhere. But Ackerman has not shown that this diversion actualized the popular will expressed in the amendments.¹²⁷

As a purely textual matter, Posner’s claim that the “Reconstruction amendments do not on their face appear to revolutionize the relation between the national government and the states” is open to question. The first section of the Fourteenth Amendment, which says that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside,”¹²⁸ does appear to transform the relationship between the national government and the states by creating a constitutional definition of national citizenship and giving the federal government power to enforce it. It is also arguable that the second sentence of the Amendment—“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”¹²⁹—is a fairly clear statement of the revolutionary intention that the sponsors of the Amendment made explicit during debates in the Thirty-Ninth Congress: to make the restrictions of the Bill of Rights binding on the states.

Posner’s Achilles’ heel is that, like Pritchard and Boudreaux, he is not very interested in constitutional history. He praises Robert Bork for concluding that the Privileges or Immunities Clause cannot properly be invoked to impose the Bill of Rights against the states,¹³⁰ but he ignores more recent scholarship arguing that John Bingham and Jacob Howard, the sponsors of the

126. See *OVERCOMING LAW*, *supra* note 3, at 215–28 (criticizing 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)).

127. *Id.* at 220 (footnote omitted).

128. U.S. CONST. amend. XIV, § 1.

129. *Id.*

130. Posner’s only other citation to support this position is David Currie’s work concluding that the Privileges or Immunities Clause was primarily an antidiscrimination guarantee without substantive content. *OVERCOMING LAW*, *supra* note 3, at 246 n.12 (citing DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 344–51 (1985)). He ignores the more comprehensive treatment by John Harrison, who embraces Currie’s nondiscrimination view of the Privileges or Immunities Clause, but still acknowledges that it was widely understood to incorporate the Bill of Rights. See Harrison, *supra* note 81, at 1451–56.

Amendment, intended it to have precisely the effect Posner and Bork say it was not intended to have, and that their view was shared by other Radical Republicans.¹³¹ Posner goes on to say that deriving the doctrine of incorporation from the Privileges or Immunities Clause would make the Due Process Clause of the Fourteenth Amendment superfluous, since the Due Process Clause of the Fifth Amendment, which would be incorporated along with everything else, is identical to the Due Process Clause of the Fourteenth Amendment, except that it does not refer to the states. He ignores the obvious answer: that the rights incorporated by the Privileges or Immunities Clause are only extended to citizens, and John Bingham, who was exquisitely sensitive to the citizen/alien distinction, added the Due Process Clause of the Fourteenth Amendment to protect all persons, citizens and aliens alike.¹³²

The truth is that the framers of the Civil War amendments were motivated by a variety of purposes, some noble and public-spirited, others partisan and self-dealing, but all are reflected in the amendments' majestic generalities. In part because of its generality, the Fourteenth Amendment has a revolutionary and fundamental character in a way that the Twenty-Sixth Amendment¹³³ does not, even though the Twenty-Sixth Amendment must have enjoyed broader popular support when it was proposed in 1971 than the Fourteenth Amendment did in 1866. By opening themselves up to a range of possible interpretations through their choice of general language, the framers of the Fourteenth Amendment signalled that they were drafting an amendment of principle, rather than of ordinary politics, and their choice, having been signalled, deserves respect. Posner's economistic refusal to distinguish between constitutional politics and ordinary politics, and between transformative amendments and ordinary amendments, fails to account for the "expressive significance" of constitutional choices, which cannot be meaningfully represented by consequentialist preference rankings.¹³⁴

One reason Posner does not seem very interested in constitutional history, or in distinguishing between ordinary politics and constitutional politics, is that he is not very confident that democracy is possible under the best of circumstances. Throughout the book, he invokes public choice theorists who argue that free-rider problems and the difficulty of aggregating preferences prevent democratic politics from expressing a genuinely mobilized, well-informed popular will. "The popular will," says Posner, citing the economic

131. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 60–61, 88–89 (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1232–38 (1992); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 69–94 (1993).

132. Amar, *supra* note 131, at 1234.

133. U.S. CONST. amend. XXVI (lowering minimum voting age to 18).

134. Cf. Pildes & Anderson, *supra* note 73, at 2151–57 (arguing that expressive conceptions of constitutional rights cannot be captured by consequentialist models).

errors of the New Deal, "can be mistaken," although he is willing to concede that

the fact that it *is* the popular will might be enough to confer legitimacy upon it. But you need an *argument* that democracy is normative, and Ackerman makes none and would have trouble making one since he wants courts to feel free to override current democratic preferences on the basis of a wave of popular emotion that crested more than half a century ago.¹³⁵

To characterize the principles embodied in, for example, the Reconstruction amendments as "a wave of popular emotion" again begs the question. Ackerman's argument is that the popular emotion that culminates in constitutional principles is more refined, more intense, better informed, and less selfish than the popular emotion that culminates in ordinary legislation, and, for this reason, it deserves normative priority. But Posner, perhaps because of the prism of social choice theory, refuses to engage the distinction between preferences that are more or less intense or refined.

This is not the place to accept Posner's challenge and make a normative argument for democracy. Other scholars have convincingly defended democracy against the aridity of the social choice view, noting that the values people care about in democratic politics are both plural and incommensurable, and therefore cannot be adequately expressed through preference rankings nor considered in isolation from the social institutions that shape them.¹³⁶ When some beliefs are held much more intensely than others, then individual choices cannot be ranked with perfect consistency; trading off one value for another may be acceptable in some contexts and not in others.¹³⁷ Furthermore, much of the empirical evidence supporting the economic theory of legislation is open to question.¹³⁸

But surely the burden should be on Posner to make a normative argument *against* democracy and to defend the social choice critique of constitutional (as opposed to ordinary) politics far more convincingly than he has done. For it is Posner, and not the constitutional theorists he assails, who claims to have overcome law by immersing himself in the acid bath of facts. And yet it turns out that what Posner wants to overcome is not only law, but democracy itself. The reason he thinks that agreement about constitutional theory is not necessary to democratic legitimacy is because democratic legitimacy, in the end, does not interest him very much at all.

135. OVERCOMING LAW, *supra* note 3, at 222.

136. *See, e.g.*, Pildes & Anderson, *supra* note 73, at 2142.

137. *Id.* at 2158.

138. *See, e.g.*, Farber & Frickey, *supra* note 112, at 895-901 (reviewing empirical evidence).

V. CONCLUSION

Richard Posner is the most prolific and creative judge now sitting on the federal bench. The essays in *Overcoming Law*, like everything he writes, are exhilarating in their range and wit and candor. One feels slightly abashed, therefore, to finish the book full of unstinting admiration for its component parts and at the same time unconvinced by his brief for constitutional pragmatism as an overarching methodology. But as Posner himself acknowledges, “[t]he argument game is different from the critique-of-argument game, just as the judicial game is different from the critique-of-judging game. More broadly, the theory game is different from the practice game.”¹³⁹

Posner seems more successful, in the end, as a critic and a judge than as a theorist purporting to guide the decisions of other judges and critics. I, for one, would cheerfully surrender custody over my fundamental rights and liberties to the supremely reasonable Richard Posner, but I am less inclined to give similar discretion to many of his judicial colleagues. Posner asks us to trust judges to make decisions on the basis of social consequences rather than constitutional principles, and not to worry about reconciling this aggressive vision with democracy because democracy itself, which he calls the “special-interest state,”¹⁴⁰ is irrational, incoherent, and at times malevolent. To reject his invitation, one need only have a less arid conception of democracy, or a more pragmatic conception of the empirical abilities of most federal judges, or both.

139. *OVERCOMING LAW*, *supra* note 3, at 134–35.

140. *Id.* at 400.



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