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Book Review

Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism

Michael Sullivan[†] and Daniel J. Solove^{††}

Law, Pragmatism, and Democracy. By Richard A. Posner.* Cambridge: Harvard University Press, 2003. Pp. 398. \$35.00.

INTRODUCTION

“[P]ragmatist theory of law is, like much pragmatist theory, essentially banal.”¹ So wrote Thomas Grey at the dawn of pragmatism’s renaissance in legal theory.² Even Richard Rorty, the philosopher frequently credited with reviving pragmatism more generally, concurs.³ For Grey and Rorty, pragmatism is banal because it “is the implicit working theory of most good

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1. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989).

2. The early 1990s witnessed a marked increase in legal academics’ interest in pragmatism. See, e.g., Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

3. See Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 89 (Michael Brint & William Weaver eds., 1991) (“I think it is true that by now pragmatism is banal in its application to law.”).

lawyers.”⁴ As Rorty writes, “Pragmatism was reasonably shocking seventy years ago, but in the ensuing decades it has gradually been absorbed into American common sense.”⁵

Richard Posner could not agree more. For well over a decade, Posner has been the leading proponent of legal pragmatism. His latest book, *Law, Pragmatism, and Democracy*, is the most comprehensive account to date of his pragmatic vision of the law and democracy. Posner proclaims that “pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role.”⁶ For Posner, pragmatic adjudication boils down to “reasonableness”;⁷ it is “[n]ebulous and banal, modest and perhaps even timorous—or maybe oscillating unpredictably between timorous and bold.”⁸

Pragmatism could not ask for a more influential spokesperson. As Ronald Dworkin has noted, “Richard Posner is the wonder of the legal world.”⁹ Not only has he been the chief judge of the Seventh Circuit Court of Appeals, but he is also one of the most prolific and frequently cited legal scholars of our age.¹⁰ Thus, Posner naturally occupies a position at the forefront of legal debates, and he has rapidly become the steward of pragmatism in the law.

A distinctly American brand of philosophy, pragmatism emerged at the turn of the twentieth century from thinkers such as Charles Peirce, William James, and John Dewey. Although they differed in many respects, classical pragmatists generally viewed philosophy as a tool to grapple with life’s problems.¹¹ Pragmatists assessed the success of a philosophy not in terms of

4. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990); see also Rorty, *supra* note 3, at 89 (quoting Grey).

5. Rorty, *supra* note 3, at 90.

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

7. *Id.* at 59.

8. *Id.* at 73.

9. Ronald Dworkin, *Philosophy and Monica Lewinsky*, N.Y. REV. BOOKS, Mar. 9, 2000, at 48, 48.

10. A recent study undertaken by Fred Shapiro, Associate Librarian for Public Services and Lecturer in Legal Research at Yale Law School, has discovered that Posner is the most cited contemporary author of nontreatise legal books and articles. As of 1999, Posner had 7981 citations, while the next-most-cited author, Ronald Dworkin, had 4488. *Published but Not Perished*, AM. LAW., Dec. 1999, at 107, 107.

11. Pragmatists like Dewey are careful not to insist on necessary and sufficient conditions for calling something a pragmatic theory. Calls to provide necessary and sufficient conditions for pragmatism risk converting it into the very positions it seeks to repudiate. In Dewey’s view, it is “better to view pragmatism quite vaguely as part and parcel of a general movement of intellectual reconstruction.” JOHN DEWEY, *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT*, at iv (1910), *reprinted in* 17 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, at 39, 40 (Jo Ann Boydston ed., 1981). Otherwise, one would have to define pragmatism “in terms of the very past systems against which it is a reaction” or “regard it as a fixed rival system making like claim to completeness and finality.” *Id.*, *reprinted in* 17 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra*, at 40. This is problematic since “one of the

its correspondence to ultimate eternal truths, but based upon its usefulness as a practical tool to yield better, more satisfying experiences.

Following the classical pragmatists, Posner's account of pragmatism rejects philosophy as a method for securing unshakeable foundations for knowledge. Pragmatism, according to Posner, rejects the agenda for philosophy beginning with Plato, which is "the task of discovering by speculative reasoning the truths that would provide secure foundations for scientific knowledge and moral, political, and aesthetic beliefs."¹² Pragmatists recognize that knowledge is "local" and "perspectival" and is "shaped by the historical and other conditions in which it is produced."¹³ Posner's pragmatism also evaluates proposals "by the criterion of what works," seeking "to judge issues on the basis of their concrete consequences for a person's happiness and prosperity."¹⁴

Yet beyond sharing these basic positions, Posner parts ways with the classical pragmatists. Posner concludes that he has "found little in classical American pragmatism or in either the orthodox or the recusant versions of modern pragmatic philosophy that law can use."¹⁵ Therefore, Posner introduces what he calls "everyday pragmatism," which he contends "has much to contribute to law."¹⁶ Everyday pragmatism is a "pragmatic mood,"¹⁷ in which "[t]he everyday pragmatist uses common sense to resolve problems."¹⁸ As Posner understands it, pragmatism is a form of antifoundationalism that rejects formalism. In his book *Overcoming Law*, Posner writes that

[a]ll that a pragmatic jurisprudence really connotes—and it connoted it in 1897 or 1921 as much as it does today—is a rejection of the idea that law is something grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.¹⁹

On this account, pragmatism is a relatively commonplace set of ideas and should hardly be shocking to the contemporary mind. Heavily influenced by pragmatism, legal realism largely succeeded in dispelling the formalist vision of the law as resting upon fixed and immutable

marked traits of the pragmatic movement is just the surrender of every such claim." *Id.*, reprinted in 17 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra*, at 40.

12. POSNER, *supra* note 6, at 29-30.

13. *Id.* at 5.

14. *Id.* at 50.

15. *Id.* at 49.

16. *Id.*

17. *Id.*

18. *Id.* at 52.

19. RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995).

principles.²⁰ Brian Leiter sums it up: “[A]s the cliché has it . . . ‘we are all [legal] realists now’”²¹ Although pragmatism shares legal realism’s antifoundationalism, pragmatism differs from realism, Posner argues, because it “lacks the political commitments of the realists and the crits.”²² Rather, “pragmatism is more a tradition, attitude, and outlook than a body of doctrine”; it is more of a mood than a substantive philosophy.²³ Posner insists that pragmatism has “no inherent political valence.”²⁴

Building upon his account of pragmatism, Posner goes on to discuss democracy. He rejects models of deliberative democracy that emphasize encouraging citizens to become involved in political life and engaged in discourse about the issues of the day. According to Posner, deliberative democracy, which he terms “Concept 1 democracy,” is unrealistic because people will never display the civic-mindedness and interest necessary to engage in fruitful political discourse.²⁵ In contrast, he embraces the theory of democracy advanced by Joseph Schumpeter, which he terms “Concept 2 democracy,” where elite leaders represent the people, who in turn remain largely disengaged from political life and function only as a check on egregious abuses of power.²⁶ According to Posner, Concept 2 democracy should be preferred to Concept 1 democracy on pragmatic grounds.

For the most part, Posner’s theory of pragmatism has been attacked externally, mainly by theorists unsympathetic to pragmatism, such as Ronald Dworkin, David Luban, and many others.²⁷ While these critics staunchly disagree with his policy conclusions, and some criticize his account of pragmatism as overly vague or unclear,²⁸ Posner’s theory

20. See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 972-75 (1999).

21. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

22. POSNER, *supra* note 6, at 84.

23. *Id.* at 26.

24. *Id.* at 84.

25. *Id.* at 135.

26. *Id.* at 158-78.

27. E.g., Lynn A. Baker, “Just Do It”: *Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992), reprinted in PRAGMATISM IN LAW AND SOCIETY, *supra* note 3, at 99; Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718 (1998); David Luban, *What’s Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43 (1996); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535.

28. Although not discussing pragmatism in depth, Jeffrey Rosen does acknowledge that “Posner’s pragmatism is not very pragmatic.” Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 601 (1995) (reviewing POSNER, *supra* note 19). Numerous commentators have criticized Posner for being vague about what he means by pragmatism. See, e.g., Brian E. Butler, *Posner’s Problem with Moral Philosophy*, 7 U. CHI. L. SCH. ROUNDTABLE 325, 341-42 (2000) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)) (“Posner’s invocation of the pragmatist is unhelpful because his description of the pragmatic judge’s aim . . . is so bland as to be almost universally beyond reproach.”); Frank S. Ravitch, *Can an Old Dog Learn New Tricks? A Nonfoundationalist Analysis of Richard Posner’s The Problematics of Moral and Legal Theory*, 37 TULSA L. REV. 967, 980 (2002) (reviewing POSNER, *supra*) (“What

remains largely unchallenged from within the pragmatic tradition. In this Review, we part company with those critics of Posner who attack his views from a philosophical position external to pragmatism. Instead, we contest Posner's account of pragmatism—and its relationship to elitist democracy—from within the pragmatic tradition. We contend that Posner's views are problematic not because they are pragmatic, but because they are often not pragmatic enough.

In Part I, we put Posner's account to the pragmatic test by examining its implications. We argue that Posner's pragmatism offers little help when it comes to evaluating and selecting ends, which is crucial for resolving legal and policy disputes. We suggest that this failure results from Posner's attempt to excise pragmatism's theoretical dimension. In Posner's hands, pragmatism stands for hard-nosed “common sense” and “reasonableness,” rejecting what he views as pie-in-the-sky abstract theories of reform. But what passes for legal pragmatism in this “revival” and “renaissance” is often a brand of commonplace reasoning that is more complacent than critical. Many neopragmatists are little more than realists who aim to account for current problems descriptively and empirically. Such accounts of pragmatism provide convenient straw men for critics to attack, while at the same time privileging entrenched institutions and the status quo.

In contrast, we return to the thought of the classical pragmatists to offer an alternative vision of pragmatism built primarily upon the ideas of John Dewey.²⁹ This account better integrates theory and practice and provides more meaningful guidance about the choice of ends. We contend that although Posner adopts many of the ideas of the classical pragmatists, he diverges in crucial ways that lead him to have internal inconsistencies with his own pragmatic commitments and to end up employing forms of reasoning against which the pragmatists strongly cautioned. Posner finds himself in this position because the pragmatic ideas upon which he founds his theory have far more potent and revolutionary implications than Posner is willing to entertain. Posner begins on the pragmatic path, but he will not commit to it fully, perhaps because pragmatism is anything but banal. When seen in its full colors rather than faded Posnerian pastels, pragmatism

is Legal Pragmatism according to Posner? After reading the book I still do not have a clear answer beyond vague calls for reaching the ‘best answer,’ considering consequences, and making things better.”); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597, 600 (2000) (reviewing POSNER, *supra*) (“Finally, Posner’s writing—like that of almost all self-styled pragmatists—turns slippery and evasive (by analytical standards) when the time comes to explain what ‘pragmatism’ amounts to.”).

29. Although typically self-styled pragmatists view their thought self-consciously in relationship to the work of James and Dewey, some contemporary pragmatists, such as Jules Coleman, locate the source of their indebtedness in other thinkers. Coleman draws upon later accounts of pragmatism developed in the works of authors such as Wilfrid Sellars, W.V.O. Quine, Donald Davidson, and Hilary Putnam. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 6 n.6 (2001).

is *radical*. Its ideas unsettle many of the institutions and “realities” that Posner takes as given.

In Part II, we turn to Posner’s theory of democracy. Surprisingly, in light of Posner’s insistence that pragmatism has no political valence, Posner attempts to use pragmatism to reach his conclusion that Concept 2 democracy is normatively superior to Concept 1 democracy, a conclusion with deep political valences. We demonstrate that Posner’s justification for Concept 2 democracy is not pragmatic, for it not only has inconsistencies with Posner’s own version of pragmatism but also radically diverges from some of the most fundamental notions of the classical pragmatists. Having built his theory on pragmatic ideas, Posner must deal with their implications, which we argue undermine his theory of democracy. Additionally, we contend that pragmatism *does* have a political valence—one that links it more closely with Concept 1 democracy than Concept 2.

I. PRAGMATISM

Posner has two goals in writing his book. He aims to explore the implications of pragmatism in law and to discuss the relationship between legal pragmatism and democracy.³⁰ The central thrust of pragmatism for Posner is the rejection of “pieties” and “conceptualisms.” “Among the conceptualisms rejected are moral, legal, and political theory when offered to guide legal and other official decisionmaking.”³¹

Although acknowledging roots in a lineage of classical pragmatists and adopting many of the key ideas of these thinkers, Posner breaks ranks with them, advocating a brand of pragmatism he calls “everyday pragmatism.”³² Posner labels the contemporary philosophical tradition that has grown out of pragmatism as “orthodox,” and concludes that “orthodox pragmatism has little to contribute to law at the operational level. It has become a part of technical philosophy, in which few judges or practicing lawyers take any interest.”³³ The problem with orthodox pragmatism stems from a problem with philosophy more generally. Philosophy, for Posner, has little of use to say about legal and political issues. Therefore, “appeals to pragmatism to guide adjudication and other governmental action should largely be cut loose from philosophy.”³⁴ Posner goes on to critique Richard Rorty, John Dewey, and other theorists who hope to “enable philosophers to make a constructive contribution to the solution of practical social

30. POSNER, *supra* note 6, at 2.

31. *Id.* at 3.

32. *Id.* at 4.

33. *Id.* at 41.

34. *Id.* at 4.

problems, including legal problems.”³⁵ For Posner, this task is not feasible.³⁶ The problem, in short, is philosophy, and Posner attempts to skim off the top of pragmatism several of its key ideas and discard the rest.

The end product is “everyday pragmatism,” a leaner, more useful, more practical pragmatism. As Posner describes it, “Everyday pragmatism is the mindset denoted by the popular usage of the word ‘pragmatic,’ meaning practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers.”³⁷

According to Posner, “Everyday pragmatists tend to be ‘dry,’ no-nonsense types. Philosophical pragmatists tend to be ‘wets,’ and to believe that somehow their philosophy really can clear the decks for liberal social policies, though this is largely an accident of the fact that John Dewey was a prominent liberal.”³⁸ Pragmatism’s “core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans.”³⁹

Posner observes that pragmatism “is not hostile to all theory. . . . [It] is hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.”⁴⁰ In contrast, “theories that seek to guide empirical inquiry are welcomed in pragmatic adjudication.”⁴¹ Although the pragmatist is open-minded to insights from a variety of disciplines,⁴² she should be wary of philosophy, which for Posner is little more than “intellectual pretension” that isn’t helpful in grappling with legal and policy issues.⁴³ Therefore, the Posnerian pragmatist should reject philosophical theory as having no role to play in the law.

Posner is not alone in his view that pragmatism urges the abandonment of philosophical theorizing. Indeed, pragmatism is often criticized for being antitheoretical. For example, Steven Smith argues that “[l]egal pragmatism is best understood as a kind of exhortation about theorizing.”⁴⁴

This thin account of pragmatism runs into serious problems, however, when it comes to guiding the normative ends we should adopt. These

35. *Id.* at 13. Interestingly, Posner refers to Dewey as “Professor Dewey” as he criticizes Dewey’s more radical ideas about democracy and politics. *See id.* at 112.

36. *See id.* at 13.

37. *Id.* at 49-50.

38. *Id.* at 12.

39. *Id.* at 3.

40. *Id.* at 60.

41. *Id.* at 77.

42. As Daniel Farber notes, “In the legal context, pragmatism implies a certain degree of eclecticism. 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.” Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 169.

43. POSNER, *supra* note 6, at 50.

44. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 411 (1990).

problems emerge most explicitly when Posner discusses how the pragmatic judge should adjudicate cases. In articulating his account of pragmatic adjudication, he describes pragmatism as a method that is helpful in analyzing whether the means we select can further our ends. But Posner's pragmatism has little to say about the normative ends we choose to adopt. Critics of pragmatism often attack pragmatism on this basis, dismissing it as empty. Pragmatism, on this account, is nothing more than a tool that can be used by anybody to achieve whatever ends they have in mind. But as we demonstrate, pragmatism can have something to say about our normative ends. Although Posnerian pragmatism rings hollow, a thicker account of pragmatism amounts to much more.

A. *Means and Ends*

Posner begins his account of pragmatic adjudication by defending it against charges that it counsels judges to ignore precedent and decide cases simply based on their personal views about the best outcome. Ronald Dworkin, legal pragmatism's well-known nemesis, argues that pragmatism is disrespectful of the past in general, and precedent in particular. In *Law's Empire*, he writes, "The pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do."⁴⁵ Dworkin views the pragmatist as focused almost exclusively on expediency, and he is not alone in this view.⁴⁶

Posner emphatically and correctly rejects this account of pragmatic adjudication. He notes that it is true that the pragmatic judge does not feel any special duty to follow past precedent: "The pragmatist values continuity with past enactments and decisions, but because such continuity is indeed a social value, not because he feels a sense of duty to the past."⁴⁷ This does not imply that the pragmatist will simply do whatever she pleases, without any respect for precedent. Rather, "[l]egal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty."⁴⁸ Posner correctly contends that the pragmatist has instrumental reasons for adhering to precedent. Failure to follow precedent will undermine the stability of the legal system, which depends upon predictability and fairness (understood as treating like cases alike).⁴⁹

45. RONALD DWORKIN, *LAW'S EMPIRE* 161 (1986).

46. See, e.g., Luban, *supra* note 27, at 44.

47. POSNER, *supra* note 6, at 71.

48. *Id.* at 60.

49. Of course, it is still no easy matter to determine whether or not a precedent applies along the formalist model. One has to determine that the present facts are similar in the relevant way to the facts of the past case, and there can be, therefore, great difficulties in predicting the action of the courts even if they maintain a staunch commitment to taking precedent seriously.

Moreover, past decisions may helpfully inform our present investigations. Thus, Dworkin and other critics of pragmatic adjudication fail to recognize that the pragmatist has good reasons to respect precedent.

Further, Posner argues that “[p]ragmatic adjudication is not, as its ill-wishers charge, a synonym for ad hoc decisionmaking, that is, for always deciding a case in the way that will have the best immediate consequences Such an approach would be unpragmatic in disregarding the adverse systemic consequences of ad hoc adjudication.”⁵⁰ In other words, concludes Posner, “[s]hortsighted’ is not part of the definition of ‘pragmatic.’”⁵¹

Nevertheless, despite Posner’s dispute with critics such as Dworkin, it turns out that they *all* share an impoverished notion of pragmatism rooted in a similar mistake. After Posner refutes the argument that judges should respect precedent for its own sake, he then goes too far in the other direction. He argues that “[t]he past is a repository of useful information, but it has no claim on us. The criterion for whether we should adhere to past practices is the consequences of doing so for now and the future.”⁵² Posner’s insistence that the past has no claim on us is problematic, especially in our constitutional democracy. It conjures up images of the judge arriving on a scene armed with a storehouse of “facts” from the past, and then rendering her choice in light of whatever ends she has in mind. The origin of these ends apparently does not need to be accounted for. Dworkin has a valid criticism when he argues that, for adjudication in a constitutional democracy, these ends *do* need to be accounted for. Thus, both Posner and Dworkin view the pragmatist judge as deciding according to unjustified ends.

Although Posner does recognize that the pragmatic judge must determine which consequences “are good and which bad, let alone how much weight to place on each consequence,” and that “goodness and badness are to be determined by reference to human needs and interests,” he also suggests that “nothing in consequentialism or pragmatism helps to determine them.”⁵³ Therefore, “different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently.”⁵⁴ The solution is thus a diverse judiciary because “[s]uch a judiciary is more representative, and its decisions will therefore command

50. POSNER, *supra* note 6, at 60. Margaret Radin offers a critique of Dworkin along similar lines. See Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY, *supra* note 3, at 127, 145-47.

51. POSNER, *supra* note 6, at 60.

52. *Id.* at 6.

53. *Id.* at 71.

54. *Id.*

greater acceptance in a diverse society than would the decisions of a mandarin court.”⁵⁵

If pragmatism cannot help us assess the goodness and badness of our ends, then it seems fair to say that the pragmatist simply accepts (or inherits) her ends uncritically. This reduces the contribution of pragmatism to merely aiding the selection of means to achieve particular ends. When asked about which ends to choose, Posner has nothing to say.⁵⁶ For him, pragmatism is value-neutral and “has no moral compass.”⁵⁷ As Posner has stated time and again, pragmatism has “no inherent political valence.”⁵⁸ The notion that pragmatism is neutral harkens back to William James, who wrote that pragmatism “stands for no particular results. It has no dogmas, and no doctrines save its method.”⁵⁹

This account of pragmatism is shared by many neopragmatists as well as their critics. For example, Brian Tamanaha has stated that “pragmatism is empty of substance,” and he contends that “[p]ragmatism does not say what the good is, how to live, what economic or political system to develop, or anything else of that nature.”⁶⁰ Lynn Baker’s critique of the pragmatism of Richard Rorty goes even further, suggesting that contemporary pragmatism not only lacks substance, but is also merely an exhortation to privilege action over theory: “In the end, pragmatism appears to be useful in achieving progressive social change to the extent that one profits from statements such as, ‘There is no method or procedure to be followed except courageous and imaginative experimentation.’ Or, as the Nike people say, ‘Just do it.’”⁶¹

It is this account of pragmatism that Dworkin critiques, and rightly so. Dworkin is correct that we must justify the legitimacy of the ends we select to guide our adjudication. Since citizens do not vote on every issue, and

55. *Id.* at 120 (footnote omitted).

56. *See id.* at 105-06.

57. *Id.* at 55.

58. *Id.* at 84; *see also* POSNER, *supra* note 19, at 393.

59. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 54 (1907).

60. Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 328 (1996).

61. Baker, *supra* note 27, at 718 (quoting Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231, 242 (1991)), *reprinted in* PRAGMATISM IN LAW AND SOCIETY, *supra* note 3, at 115. In another example of this critique, Alan Ryan, in his *New York Times* review of *Law, Pragmatism, and Democracy*, concludes that Posner’s “argument is an elegant illustration of what is lost by Pragmatism’s abandonment of principle.” Alan Ryan, *The Legal Theory of No Legal Theory*, N.Y. TIMES, Sept. 14, 2003, § 7, at 20. In Coleman’s recent examination of pragmatism (on a point where we believe that Coleman’s pragmatism, indebted as it is to Quine and Sellars, also shares much with Dewey), he aptly recognizes the tight relationship between pragmatism and principle that belies Ryan’s critique. Coleman writes: “In saying that pragmatism recognizes *explanation by embodiment* as a legitimate form of philosophical explanation of a practice, I mean that in certain kinds of practices, the inferential roles of concepts may be seen to hang together in a way that reflects a general principle.” COLEMAN, *supra* note 29, at 8.

since we are bound by a Constitution that circumscribes our ordinary lawmaking, it is important for judges to demonstrate the legitimacy of the principles, ends, and ideals they invoke. To do so, they need to explain at least two things: (1) why they believe that one set of ends provides a better account of our present practices and of who we are as a People, and (2) what the implications of that account are for addressing the present problems we face and our choices about who we as a People will become.⁶²

Dworkin's concerns have merit, but his critique is misplaced when he speaks of pragmatism beyond Posner's account. The inability of Posner's pragmatism to respond effectively to this critique stems from Posner's view of the relationship between theory and practice—as though “everyday” practice is somehow without theoretical dimensions. But as we argue below, pragmatism need not adopt this view, and hence, need not lead us to this dead end.

B. *Theory and Practice*

1. *The Role of Philosophical Theory*

At the heart of Posner's pragmatism is a particular understanding of the relationship between theory and practice. For Posner, theory has little to offer practice, and he has engaged in an ongoing quest to attack academic theorists. Posner is building on work from his 1999 book, *The Problematics of Moral and Legal Theory*,⁶³ in which he attacked legal and moral theory, and his 2001 book, *Public Intellectuals: A Study of Decline*,⁶⁴ in which he argued that public intellectuals are increasingly unhelpful in grappling with legal and policy issues. In *Law, Pragmatism, and Democracy*, Posner uses his notion of everyday pragmatism to argue that whereas disciplines like economics, sociology, and biology are useful in the law, philosophy is more of a hindrance than a help. According to Posner, academics are insulated from the “real” world and tend to become easily infatuated with empty abstractions such as justice, fairness, and equality. Posner argues that “academic philosophy” is “a field that has essentially no audience among judges and lawyers—let alone among politicians—even when philosophy is taken up by law professors . . . who think it *should* influence law.”⁶⁵ Legal pragmatists reject “abstract theorizing of which professors of constitutional

62. See J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 180 (1999) (“Constitutional stories constitute us as a people with a purpose and a trajectory: They remind us what we have done in the past and therefore what we should be doing today. They explain to us where we have been and therefore where we should be going.”).

63. POSNER, *supra* note 28.

64. RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2001).

65. POSNER, *supra* note 6, at 11.

law are enamored, in which decisions are evaluated by reference to abstractions common in law talk such as fairness, justice, autonomy, and equality.”⁶⁶ Further, Posner argues, when pragmatists examine a constitutional issue, such as “whether per-pupil expenditures on public school education should be equalized across school districts,” the pragmatist avoids “question-begging vacuities (such as ‘equality’ and ‘fundamental rights’).”⁶⁷ “What sensible person,” he asks, “would be guided in such difficult, contentious, and fact-laden matters by a philosopher or his law-professor knock-off?”⁶⁸

One can understand Posner’s concerns. Much theoretical academic work participates in a private conversation far removed from the pressing social problems of the day. Philosophical discourse, whether in academic philosophy or in legal theory, can be overly abstract, filled with jargon, and disconnected from current practice. The result is an insular world in an ivory tower, where academics talk mostly among themselves, producing a parade of half-baked ideas and impractical suggestions for reform.

In making this criticism, Posner echoes Dewey, who also staunchly criticized the academy for theorizing abstractly without attempting to connect theory to current practice. Dewey attacked theorizing that “becomes arbitrary, aloof—what is called ‘abstract’ when that word is used in a bad sense to designate something which exclusively occupies a realm of its own without contact with the things of ordinary experience.”⁶⁹ Dewey criticized philosophy that attempted to treat itself as something more lofty than other forms of knowledge, as “a realm of higher Being” with “air purer than that in which exist the making and doing that relate to livelihood.”⁷⁰ Like Dewey, Posner is right to criticize academic theorists who view their theorizing as a higher and purer activity than disciplines that employ empirical methods of analysis.

Dewey was very critical of academic departments for creating pseudoproblems—taking problems from general experience and converting them into philosophical puzzles with a life of their own, disconnected from their origins in experience.⁷¹ Philosophy should begin in ordinary life with

66. *Id.* at 79.

67. *Id.* at 79-80.

68. *Id.* at 80.

69. JOHN DEWEY, EXPERIENCE AND NATURE 9 (Open Court Publ’g Co. 2d ed. 1929) (1925), reprinted in 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 3, 17.

70. JOHN DEWEY, THE QUEST FOR CERTAINTY 14 (1929), reprinted in 4 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 3, 11-12.

71. See DEWEY, *supra* note 69, at 27-28, reprinted in 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 34 (“Empirical method finds and points to the operation of choice as it does to any other event. Thus it protects us from conversion of eventual functions into antecedent existence: a conversion that may be said to be *the* philosophic fallacy, whether it be performed in behalf of mathematical subsistences, esthetic essences, the purely physical order of nature, or God.”).

the concerns, pressures, and facts of contemporary existence.⁷² For Dewey, “Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers and becomes a method, cultivated by philosophers, for dealing with the problems of men.”⁷³ Accordingly, Dewey believed a “first-rate test” of the value of any philosophy consists in its answer to this question: “Does it end in conclusions which, when they are referred back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful?”⁷⁴

If a philosophy is to meet this challenge, it must take as its starting point the problems generated by our everyday practices. Likewise, a philosophy of law, as Dewey observes, “cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there.”⁷⁵ Thus, as a pragmatist, Posner is right to suggest that those interested in improving legal methods and procedures should not look to academic philosophy or law departments for ready-made answers. He is also right to insist that constructive solutions usually require in-depth investigations of the facts.

Posner also astutely argues that work should be done in what he calls the “empirical lowlands.”⁷⁶ As Posner observes, “The theoretical uplands, where democratic and judicial ideals are debated, tend to be arid and overgrazed; the empirical lowlands are fertile but rarely cultivated.”⁷⁷ The uplands are thus theoretical discourses that ask questions about the nature of justice, equality, and the good. The lowlands are efforts to explore empirically the results of our social practices. It is one thing to argue about the justification for policies such as affirmative action by sparring over competing conceptions of fairness, but more important to the pragmatist is understanding the consequences of such rhetoric in practice.⁷⁸ What results are produced by affirmative action policies? Posner, like Dewey, thinks that theoretically minded individuals concerned with questions of justice and the

72. See JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 25-27 (1920), reprinted in 12 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, at 77, 94 (Jo Ann Boydston ed., 1976).

73. John Dewey, *The Need for a Recovery of Philosophy*, in CREATIVE INTELLIGENCE: ESSAYS IN THE PRAGMATIC ATTITUDE 3, 65 (1917), reprinted in 10 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 3, 46.

74. DEWEY, *supra* note 69, at 9-10, reprinted in 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 18.

75. John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73, 77 (Julius Rosenthal Found., Northwestern Univ. ed., 1941), reprinted in 14 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 115, 117.

76. POSNER, *supra* note 6, at 3.

77. *Id.* at 3-4. Despite this observation, Posner continues to produce work in the “theoretical uplands” that calls for more work in the lowlands.

78. See, e.g., IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 315-87 (2001) (discussing the empirical effects of affirmative action at FCC auctions).

like could accomplish much more by investigating these conceptions in the context of particular practices. Not only would they help to ameliorate present problems, but they would also be submitting their ideals to the test of experience. Indeed, law is an excellent field for the pragmatist since it provides a forum to investigate concretely the meaning of our ideals.

But Posner then takes a wrong turn. He equates philosophy exclusively to the work of academic departments in universities, and then he rejects philosophy wholesale. The practice of philosophy, however, is much broader than the practice of professors in academic institutions, and even the philosophy of the academy is far from monochromatic. Whether someone is a philosopher is a function of the questions she asks and the writing she does, not whether she is employed by a philosophy department. Philosophy is not the exclusive domain of academic philosophers; rather, it is the development of intelligent, critical, and reconstructive methods for approaching the problems of lived experience. Philosophy is something that everyone does or at least can do, not an insular club that only those in the ivory tower can join. Therefore, although the academic practice of philosophy often can be overly technical and disengaged from the problems of society, this does not imply that philosophy should be abandoned.⁷⁹

Posner's account of pragmatism, as rejecting a role for philosophical theory, stems in part from a misunderstanding of the pragmatic

79. Pragmatists like John Lachs have taken a different approach, based in part on a different understanding of the reasons for academic insularity. Lachs believes that the insularity is less a function of the subject matter that academics discuss, and more a function of institutional structures that reward and punish their behavior. Instead of concluding, as Posner does, that academic discussions are insular and therefore unimportant, he concludes that they are important but insulated. Accordingly, his recommendation is not to have the public ignore the academy, but rather to have the academy stop ignoring the public:

If encouraging intellectuals to engage in public debate does not work, we may have to make it mandatory. . . . In the long run, intellectuals have to understand that they are on the payroll of the community in order, among other things, to warn us about our ways, to help us see our practices in perspective, to present arguments against what we are bent on doing, and, again and again, to present interesting alternatives. Their job is to shake up state and institutional orthodoxies, instead of working to preserve them.

JOHN LACHS, *A COMMUNITY OF INDIVIDUALS* 8-9 (2003).

In fact, even in the academy there have been considerable reconstructive projects involving the environment, health, art, education, politics, and to a lesser extent, law. *E.g.*, LARRY HICKMAN, *JOHN DEWEY'S PRAGMATIC TECHNOLOGY* (1992) (developing the basis for a pragmatic criticism of modern approaches to understanding technology); RICHARD SHUSTERMAN, *PRAGMATIST AESTHETICS: LIVING BEAUTY, RETHINKING ART* (Rowman & Littlefield 2000) (1992) (exploring how pragmatist conceptions of aesthetics provide for richer imaginative and critical relationships to present art forms); BETH J. SINGER, *PRAGMATISM, RIGHTS, AND DEMOCRACY* (1999) (developing the implications of a theory of rights within a pragmatist tradition); SHANNON SULLIVAN, *LIVING ACROSS AND THROUGH SKINS: TRANSACTIONAL BODIES, PRAGMATISM, AND FEMINISM* (2001) (developing Dewey's notion of "transaction" and its consequences for understanding gender); Glenn McGee, *Pragmatic Method and Bioethics*, in *PRAGMATIC BIOETHICS* 27 (Glenn McGee ed., 1999) (arguing that reconstructing the classic theory/practice dualism in the context of bioethics will enable recognition of the lack of neutrality of the bioethicist, "a community member who is intractably involved and invested and has particular interests").

reconstruction of the theory/practice relationship. Under the traditional model of the theory/practice relationship, philosophical theory is seen as offering a foundation for practice. One should learn the theory and then put it into practice. But pragmatists, such as Dewey, never expected theory to guide practice in this way and never pretended that practice was independent of theory. Rather than embrace this dualism, the classical pragmatists sought to make practice more intelligent and more critical, in part by recognizing its theoretical dimension. This does not require theoretical reason capable of determining its goals outside of historical practices; rather it requires a critical and reconstructive approach to social institutions and practices. As Thomas Grey notes, “[T]hought always comes embodied in practices—culturally embedded habits and patterns of expectation, behavior, and response.”⁸⁰

Insofar as the language of “justice” has been dominated by Kantian moralists who believe that our regulative ideals are the product of pure reason, then one can understand Posner’s reservations.⁸¹ Terms like “justice” and “freedom” are not backed up by reference to Platonic forms, but are the products of our human experience and contested history.⁸² We don’t look to theory to tell us what “democracy,” “justice,” “equality,” and “freedom” mean. We look to our experience of past practices. Under this view, “theory” is a statement of the insights, often generalized, formed as a result of the success and failures of these practices. As Dewey observed, “[W]e institute standards of justice, truth, esthetic quality, etc., in order that different objects and events may be so intelligently compared *with one*

80. Thomas C. Grey, *What Good Is Legal Pragmatism?*, in PRAGMATISM IN LAW AND SOCIETY, *supra* note 3, at 9, 12.

81. Dewey shared this concern:

[M]any moral theories, some of them of considerable prestige in philosophy, have interpreted moral subject-matter in terms of norms, standards, ideals, which, according to the authors of these theories, have no possible factual standing. “Reasons” for adopting and following them then involve a “reason” and “rational” in a sense which is expressly asserted to be transcendent, *a priori*, supernal, “other-worldly.”

John Dewey, *Ethical Subject-Matter and Language*, 42 J. PHIL. 701, 711 (1945), *reprinted in* 15 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 127, 139.

82. As the person credited for the inception of American pragmatism, Charles S. Peirce, has pointed out, pragmatism has a theory of meaning that insists that to understand a concept is to understand the conceivable sensible effects of that concept. This does not mean one cannot use words such as “justice,” “fairness,” and “equality,” but that one must understand the meaning of the terms not by reference to Platonic forms, but by reference to the practical consequences they entail. CHARLES PEIRCE, *How To Make Our Ideas Clear*, in 1 THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS, 1867-1893, at 132 (Nathan Houser & Christian Kloesel eds., 1992); *see also* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 305 (1997) (“[P]ragmatism clearly has nothing against distinctions, definitions, coherence, abstract argument, or theoretical edifices: it is at least an open question whether or not these tools of the intellect are or are not useful for human purposes.”).

another as to give direction to activities dealing with concrete objects and affairs”⁸³

The risk with Posner’s antiabstraction strategy is that it silences meaningful community discussion. Terms such as “justice” and “equality” are not only used in the academy, but also are part of popular social discourse. Many people talk about intrinsic goods and understand freedom as the ability to fulfill their desires.⁸⁴ Whereas Dewey offers us tools to reconstruct the meaning of these terms by giving priority to experience, Posner advises us to avoid the terms. The result may be that they remain to do mischief having been insulated from critical attention.

By eliminating philosophical theorizing, Posner discards pragmatic tools for transforming existing institutions, customs, and social norms. Without a role for philosophical theorizing, Posner’s pragmatism looks less to opportunities for criticism and reconstruction of unsatisfactory practices, the two hallmarks of the Deweyan pragmatic approach,⁸⁵ and more to opportunities for affirmation and acquiescence to the status quo. Such an account of pragmatism leads critics such as David Luban to conclude that “[p]ragmatism represents in the arena of conceptual change what Burke represents in that of political change: a cautionary voice protesting those who seek to overthrow the amassed wisdom of generations on no better basis than the trifling speculations of philosophers.”⁸⁶

Because it rejects any way to discuss the selection of ends, Posnerian pragmatism has little choice but to accept uncritically the dominant ends of society. This result is rather ironic considering Posner’s claim that pragmatism has no political valence. Since Posner’s pragmatism lacks the tools to engage in more radical social reform, it becomes a rather conservative philosophy in the Burkean sense. It ends up inhibiting the kinds of philosophical inquiries necessary to question the status quo. Therefore, the effects of Posnerian pragmatism are anything but neutral.

83. JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* 216 (1938), *reprinted in* 12 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, *supra* note 11, at 1, 216-17. As Margaret Radin correctly argues, “[I]deal theory is also necessary, because we need to know what we are trying to achieve. In other words, our visions and nonideal decisions, our theory and practice, paradoxically constitute each other.” Radin, *supra* note 50, at 129.

84. *See, e.g.*, Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 *CONST. COMMENT.* 675, 690 (1999) (reviewing POSNER, *supra* note 28) (“[M]oral conceptualism is an intellectual tumor that Posner would like to remove. But as with certain tumors, it is doubtful that we can excise every trace of these moral conceptions from the legal mind without fatally impairing vital functions.”).

85. *See* John J. Stuhr, *Democracy as a Way of Life*, in *PHILOSOPHY AND THE RECONSTRUCTION OF CULTURE: PRAGMATIC ESSAYS AFTER DEWEY* 37, 40 (John J. Stuhr ed., 1993) (observing that for Dewey, “philosophy is inherently criticism and reconstruction” (citations omitted)).

86. DAVID LUBAN, *LEGAL MODERNISM* 138 (1994).

2. *Philosophical Theory and Ends*

Posner's pragmatism fails to point us toward productive inquiries for resolving legal and policy issues, for these issues involve the choice of ends. In contrast to Posner's account, Deweyan pragmatism provides for a more fruitful inquiry into our selection of ends. Under this account of pragmatism, unlike Posner's, philosophy plays an essential role. Dewey sees philosophy as critical inquiry, which aims to unsettle status quo assumptions and then provide guidance for projects of social reconstruction. Dewey observed that we often act out of habit, which is "an ability . . . formed through past experience."⁸⁷ While we need habit in order to function, habit can restrict the "reach" of our intellect, and can "fix its boundaries."⁸⁸

Social customs are aggregations of habits; they "persist because individuals form their personal habits under conditions set by prior customs."⁸⁹ The problem with customs is that they can be "inert" and can readily lead "into conformity, constriction, surrender of scepticism and experiment."⁹⁰ Maintaining institutions without change can lead to social stagnation. The goal of philosophical inquiry is thus to make habits "more intelligent," by which Dewey means "more sensitively percipient, more informed with foresight, more aware of what they are about, more direct and sincere, more flexibly responsive than those now current."⁹¹ Rather than be controlled by habit and custom, we must strive toward the intelligent control of habit.⁹² This involves criticizing current institutions and finding ways to reconstruct them. Of course, Dewey observed, we cannot abandon our institutions, as this would lead to "chaos and anarchy"; rather, we must "make over these institutions so that they serve under changing conditions."⁹³

As a pragmatist, Posner is wrong to shrug off the hard work of justifying the ends our legal system pursues. The pragmatist *does* have something to say about our ends. The pragmatist justifies her value commitments, in part, by analyzing their historical genesis. Guiding ideals

87. JOHN DEWEY, HUMAN NATURE AND CONDUCT 66 (1922), *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 4, 48.

88. *Id.* at 172, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 121.

89. *Id.* at 58, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 43.

90. *Id.* at 64, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 47.

91. *Id.* at 128, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 90.

92. *Id.* at 20, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 17-18.

93. John Dewey, *Evolution and Ethics*, 8 MONIST 321, 335 (1898), *reprinted in* 5 JOHN DEWEY: THE EARLY WORKS, 1882-1898, at 34, 48 (Jo Ann Boydston ed., 1967).

such as “fairness,” “justice,” and “freedom” must be critically examined by looking to past experience. Posner complains that such ideals are empty abstractions, useless for assisting us in decisions.⁹⁴ Yet they are rendered useless not because they are abstractions, but because insufficient effort is made to critically explore their genesis and the consequences of their deployment in various contexts.

Pragmatists are committed to finding substantive sustenance for their guiding ideals through experiential inquiry. This requires difficult historical investigation and interpretation.⁹⁵ There is no guarantee that one account will emerge as superior to all others, although many accounts, upon careful investigation, are shown to be wanting. If a particular view of justice or democracy is to be favored, it should be favored because of its past consequences and in light of its anticipated future consequences. Those in disagreement over political ends need not refrain from invoking considerations of justice, freedom, equality, and democracy, but they must not let matters rest there. They must explain the experiential basis for their choices. Given an assessment of our past experiences and practices, why should we prefer an account of democracy that tries to increase the participation of all citizens? Alternatively, why should we prefer to minimize the participation of most citizens? This is the discussion that we need to have.

The pragmatist need not be a shallow empiricist who has something to say about means but nothing much to say about ends. The pragmatist need not eschew philosophical theorizing or discussion of regulative ideals. Far from being a mere method that provides little guidance as to our normative ends, pragmatism facilitates philosophical debates about them in ways that avoid appealing to hollow abstractions. Pragmatism is thus an invitation to a different kind of debate, a debate that the Posnerian pragmatist ignores.

Posner is mistaken, therefore, when he proposes that there is nothing useful to be done in terms of critically assessing our value commitments. He appears to view ends as little more than mere tastes. As a result, he does not seem to believe that discussion about our ends will be very fruitful. This is why Posner ultimately recommends a diverse judiciary; at least different ends can be represented, even if discussing them won't lead us anywhere.

If Posner simply treats the selection of ends as the product of a judge's individual choice, those ends become insulated from critical scrutiny. Pragmatism, by contrast, demands the critical assessment of our ends.

94. POSNER, *supra* note 6, at 76, 79-80.

95. As James Gouinlock points out in his seminal study on Dewey's philosophy of value, one consequence of Dewey's naturalism is the recognition that ends are part of historical processes and must be investigated as such. See JAMES GOUINLOCK, JOHN DEWEY'S PHILOSOPHY OF VALUE 81 (1972) (“[E]nds are always ends of a [historical] process. They are not discontinuous substances or events existing independently in nature.”).

Where did they come from? What conditions were they responding to? What have been the results? Who has benefited from their adoption? Who has suffered? Have they been democratically selected?

As a result, the pragmatist would understand that any view of the best future must be informed by a view of who we are as a People—and this depends upon an interpretation of our history.⁹⁶ As Justice Holmes correctly noted, the obligation to history is not a duty (as Dworkin would have it) but a necessity.⁹⁷ Pragmatists recognize that ends are not ahistorical. Dewey noted that “personal desire and belief [are] functions of habit and custom.”⁹⁸ We do not get our ends from some a priori source; they emerge from experience. And our values originate not just from our own experience, but from collective social experience, which has a long history and is embodied in our current habits, customs, and traditions. In this way, the past perpetuates itself; it has a hold on us.⁹⁹ We cannot simply wipe the slate clean or assume a “*tabula rasa* in order to permit the creation of a new order.”¹⁰⁰ We adopt the ends we do often because they are transmitted to us by our parents, education, and culture. Dewey argued that we must consider the history of any social end in both directions: its past and its future. “We must consider it with reference to the antecedents which evoked it, and with reference to its later career and fate.”¹⁰¹ We must look to the genesis of a particular end because

[i]t arises in a certain context, and as a reaction to certain circumstances; it has a subsequent history which can be traced. It maintains and reinforces certain conditions, and modifies others. It becomes a stimulus which provokes new modes of action. Now when we see how and why the belief came about, and also know what else came about because of it, we have a hold upon the worth

96. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1350 (1988) (“For a pragmatist the analysis must start—but not finish—with an examination of our constitutional text, history, and traditions.”).

97. Holmes wrote:

The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881).

98. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 161-62 (1927), reprinted in 2 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra* note 11, at 235, 336.

99. *Id.*, reprinted in 2 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra* note 11, at 336.

100. *Id.* at 162, reprinted in 2 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra* note 11, at 336.

101. John Dewey, *The Evolutionary Method as Applied to Morality* (pt. 2), 11 PHIL. REV. 353, 359 (1902), reprinted in 2 JOHN DEWEY: *THE MIDDLE WORKS*, 1899-1924, *supra* note 72, at 3, 26.

of the belief which is entirely wanting when we set it up as an isolated intuition.¹⁰²

Since ends do not emerge from a transcendent realm, the pragmatist should not simply accept her own ends uncritically. She must subject them to critical inquiry. According to Dewey, criticism occurs when we look “to see what sort of value is present” and “instead of accepting a value-object wholeheartedly . . . we raise even a shadow of a question about its worth.”¹⁰³ This involves understanding the origins of our ends, the reasons for their existence, and whether these reasons warrant continued allegiance today. Through pragmatic criticism, we may discover that particular ends have merely survived through inertia or that the reasons for their existence no longer apply to our present situation.

Therefore, to the extent that pragmatism is an “attitude,” it is one that is radical, for it is skeptical and experimental. The pragmatic temperament is one that is constantly prodding and questioning; it focuses on change and transformation. Although the pragmatist need not be committed to radical ends, she is committed to a radical kind of criticism and experimentation. This does not mean that pragmatism must reject the status quo, but it does mean that the pragmatist must be wary of accepting inherited ends uncritically. Far from being mundane and banal, pragmatism takes up the hard work of removing the blinders of existing habits, customs, and conventions by testing accepted beliefs and “truths.” The result of this attitude is a critical edge.

C. *The Implications of Legal Pragmatism*

In a number of examples sprinkled throughout the book, Posner attempts to demonstrate how his legal pragmatism works in practice by addressing specific legal and policy issues. Posner tackles a wide variety of topics, including *Bush v. Gore* and the 2000 election deadlock, the Monica Lewinsky scandal, antitrust law, *Clinton v. Jones*, judicial review, and liberty and security after September 11. In many instances, Posner claims that his conclusions are pragmatic, but this characterization becomes dubious when his reasoning is considered more carefully. In particular, we focus on his discussions of judicial review and liberty versus security.¹⁰⁴

102. *Id.*, reprinted in 2 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 26-27.

103. DEWEY, *supra* note 69, at 324, reprinted in 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 299.

104. We have selected these discussions because Posner has discussed many of his other examples more extensively in other books. For example, Posner has discussed *Bush v. Gore* in RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); antitrust law in RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001); and

Posner attempts to reach legal and policy conclusions from his pragmatism, but it is too thin to justify his conclusions, and Posner often ends up contradicting his own pragmatic approach. In contrast, the alternative account of pragmatism we have developed in previous Sections suggests more productive forms of inquiry into these issues. Our goal is not to engage in a direct debate with Posner over his conclusions, even though we would probably reach different ones. Rather, we aim to critique the way that Posner goes about reaching his conclusions, his method of reasoning and analysis.

1. *Judicial Restraint Versus Judicial Activism*

Posner argues that an “implication for law of Dewey’s epistemology is that courts should either have no power to invalidate legislation or exercise it only in extreme circumstances, when faced by a law patently unconstitutional or utterly appalling.”¹⁰⁵ This is the language of judicial restraint, and Posner is alluding to Justice Holmes’s famous “puke test,” which holds laws unconstitutional only when they are so despicable that they make one puke. For Posner, “By invalidating legislation, courts prevent political experimentation.”¹⁰⁶ “In Dewey’s intellectual universe, invalidating a statute is not just checking a political preference. It is profoundly rather than merely superficially undemocratic It places expert opinion over the distributed intelligence of the mass of the people and prevents the emergence of the best policies through intellectual natural selection.”¹⁰⁷ Thus, Posner argues that Deweyan pragmatists on their own terms must support judicial restraint.

This conclusion is false, and the argument that leads to it is invalid. In contrast to Posner, who speaks in a generalized, ahistorical manner, the Deweyan pragmatist would be reluctant to conclude that judicial restraint, or any judicial style, would be better at all times and in every situation throughout history. Holmes judged at a different point during our history; perhaps in his time judicial restraint was a pragmatic response. But it certainly doesn’t mean that judicial restraint is always demanded by pragmatism. To justify judicial restraint, the pragmatist would examine why it is best *at this particular point in our history*. Ironically, just a few pages earlier in the book, Posner seems to recognize this point. He extols Chief Justice John Marshall as an exemplar of pragmatism in judging.¹⁰⁸ Posner

the Clinton scandal in RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999).

105. POSNER, *supra* note 6, at 121.

106. *Id.*

107. *Id.* at 122.

108. *See id.* at 86.

defends Marshall against attacks that he was too formalistic and relied more on rhetoric than reason.¹⁰⁹ “Marshall created judicial review as a pragmatic response to the inevitable crisis over the role of the judiciary in the constitutional scheme.”¹¹⁰ Marshall, whose judicial style certainly cannot be described as judicial restraint, nevertheless was pragmatic according to Posner because he had an “extraordinary fit with his times.”¹¹¹

If Posner is correct about Marshall, then it certainly does not follow that the pragmatist should favor judicial restraint over activism in principle. Instead, if Posner were to argue pragmatically for judicial restraint, he would need to justify why, based upon past experience and an analysis of our current problems, judicial restraint is the most appropriate response at this time in our history. In light of the analysis of Marshall, one would expect Posner to recognize that judicial restraint might not be appropriate in all contexts, for all cases.

Posner seems to argue that since pragmatism advocates experimentation in general, legislative experimentation should receive deference from pragmatist jurists. But even if one were to accept such a commitment to experimentation at face value, it would not follow that judicial experimentation should be ruled out. Pragmatic experimentation has no less value when it is practiced by the judiciary, and Posner provides no reason why it should be limited merely to legislation.

Beyond this, one must be careful not to turn a commitment to experimentation into its opposite. The claim of the classical pragmatists was that scientific methods work better for grappling with our problems than adherence to absolutes. It would be ironic to maintain an absolutist commitment to experimentation in the name of pragmatism. The fact that pragmatists recognize the experimental method’s virtues does not mean they endorse experimentation in all forms and contexts. The pragmatic commitment to experimentation, for example, doesn’t lead pragmatists to favor the Nazi experimentation on humans. Pragmatism is a commitment to an experimental method, one that keeps testing its conclusions in experience. It is not a commitment to experimentation for its own sake.

Striking down a law, even one that is “experimental,” can still be a pragmatic response. For example, legislatures can fail to be democratic. As Posner himself recognizes, interest groups can have an overly strong influence on legislation.¹¹² Or legislatures can fail to adopt the appropriate

109. *See id.* at 92.

110. *Id.* at 91 (quoting ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM 168 (2000)). For a discussion of contemporary jurisprudential accounts of judicial review, see LIPKIN, *supra*.

111. POSNER, *supra* note 6, at 92.

112. *Id.* at 198.

means to achieve the stated end of a law.¹¹³ Judges, in part due to the relatively insulated nature of the judiciary, can subject laws to critical scrutiny when powerful lobbies seek to prevent legislatures from doing so. As one of us has written elsewhere, the judiciary has the potential “to make institutions more democratic and humane, to force officials to base their policies on the best empirical research of the day, to be guided by democratic values, to be more humble and skeptical of their own practices.”¹¹⁴ Additionally, Daniel Farber observes that “[f]or the pragmatist . . . the question of the advisability of judicial review turns on its usefulness for promoting a flourishing democratic society—democratic not just in the sense of ballot casting but also in the sense that citizens are in charge of the intelligent development of their lives.”¹¹⁵ Thus, both judicial activism and restraint can be pragmatic, even democratic, responses to the problems of the present.

2. *Liberty Versus Security*

Posner also applies his pragmatism to an extensive discussion of civil liberties and security.¹¹⁶ Posner contends that civil libertarians are unpragmatic when they treat “our existing civil liberties—protections of privacy, of the freedom of the press, of the rights of criminal suspects, and the rest—as sacrosanct and insisting therefore that the battle against international terrorism must accommodate itself to them.”¹¹⁷ Posner engages in a cost-benefit analysis between liberty and security, and concludes: “A pragmatist would say [civil liberties] *should* be curtailed to the extent that the beneficial consequences for the safety of the nation . . . outweigh the adverse impact on liberty.”¹¹⁸ Echoing Chief Justice Rehnquist, Posner argues that although civil liberties should be “curtailed in time of war or other national emergency,” civil libertarians wrongly fear that this curtailment will serve as a “precedent in time of peace.”¹¹⁹ Posner writes: “The events of September 11 revealed the United States to be in greater jeopardy from international terrorism than had been

113. See, e.g., Rosen, *supra* note 28, at 596 (“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.”).

114. Solove, *supra* note 20, at 1018.

115. Farber, *supra* note 96, at 1347-48.

116. See POSNER, *supra* note 6, at 292-321.

117. *Id.* at 296.

118. *Id.* at 298.

119. *Id.* at 304.

believed by most people until then It stands to reason that such a revelation would lead to our civil liberties being curtailed.”¹²⁰

Posner seems to be suggesting that civil libertarians are unpragmatic because they adhere to rights as absolutes. Posner attacks a caricature of the civil libertarian argument, since many civil libertarians are pragmatists, not absolutists. Posner also attacks civil libertarians when they offer “historical examples of supposed overreactions to threats to national security.”¹²¹ In contrast, he argues that history reveals that government officials have “disastrously underestimated these dangers” rather than exaggerated them.¹²² He elaborates:

Actually, the lesson of history is the opposite. Officialdom has repeatedly and disastrously underestimated these dangers—whether it is the danger of secession that led to the Civil War, or the danger of a Japanese attack on the United States that led to the disaster at Pearl Harbor, or the danger of Soviet espionage in the 1940s that accelerated the Soviet Union’s acquisition of nuclear weapons and by doing so emboldened Stalin to encourage North Korea to invade South Korea in 1950, or the installation in 1962 of Soviet missiles in Cuba that precipitated the Cuban missile crisis, or the outbreaks of urban violence and political assassinations in the 1960s, or the Tet Offensive of 1968 in the Vietnam War, or the Iranian Revolution of 1979 and subsequent taking of American diplomats hostage, or the catastrophe of September 11, 2001.¹²³

But these examples do not simply involve a tradeoff between liberty and security. They are failures of foreign intelligence or political judgment. The point of the civil libertarians is that the government has often overreacted in curtailing liberty in times of crisis. Posner’s examples involve the failure to anticipate security threats. Without demonstrating how curtailing liberty would have improved our ability to avert these events, Posner’s examples have little relevance.

Posner then contends that to the extent that the government did overreact by curtailing liberty in times of crisis, we should not be concerned, since “[t]he curtailment of civil liberties in the Civil War, World War I (and the ensuing ‘Red Scare’), World War II, and the Cold War did not outlast the emergencies.”¹²⁴ But curtailments of liberties harmed thousands of innocent citizens, sometimes quite severely. Just because the

120. *Id.* at 298.

121. *Id.* at 296.

122. *Id.* at 298.

123. *Id.* at 298-99.

124. *Id.* at 304.

government eventually realizes it overreacted and apologizes doesn't set everything right. Apologies are meaningful when they guide future action.

In light of a history marred by frequent misguided responses to threats, a pragmatic response would counsel caution. For example, in the early years of J. Edgar Hoover's reign over the FBI, from 1919 to 1920, the government rounded up over 10,000 suspected communists, many without warrants.¹²⁵ In 1942, in the name of national security, the government rounded up around 120,000 people of Japanese descent living on the West Coast and imprisoned them in internment camps.¹²⁶ In a series of cases, including *Korematsu v. United States*,¹²⁷ the Court upheld the internment as constitutional under "most rigid scrutiny."¹²⁸ Few today would defend *Korematsu*, but Posner, who is candid and unafraid to take controversial positions, appears to support it. He asks: "If the Constitution is not to be treated as a suicide pact, why should military exigencies not influence the scope of the constitutional rights that the Supreme Court has manufactured from the Constitution's vague provisions?"¹²⁹

The internment, however, has long been acknowledged to have been a terrible mistake. Even the United States government has formally apologized.¹³⁰ Posner responds that we must be wary of lessons we draw from the twenty-twenty vision of hindsight; just because the government's fears that Japanese Americans were engaged in dangerous acts of espionage later proved to be false does not mean that at the time of the internment the government was unjustified in taking action. But there was not much evidence to support the government's claims that the internment was necessary or even that there was a significant threat posed by Japanese Americans. Given historical tendencies of racial prejudice and the dangers of making racial distinctions, the decision to carry out the internment should have been viewed with great skepticism, especially considering the fact that German Americans were not subjected to similar treatment. Instead of analyzing the facts, however, the Supreme Court simply deferred to the judgment of the government officials, accepting their claims about the danger posed by Japanese Americans without critical scrutiny and without demanding supporting evidence.¹³¹ Even if Posner is right to worry

125. See CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 75-76, 83, 93 (1991).

126. ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 38 (2001); see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945).

127. 323 U.S. 214 (1944).

128. *Id.* at 216.

129. POSNER, *supra* note 6, at 294.

130. See COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982).

131. The analysis of the Court in *Korematsu* was based in large part on the factual analysis in an earlier case, *Hirabayashi v. United States*, 320 U.S. 81 (1943). In *Hirabayashi*, the Court

about the ease with which backward-looking criticism ignores the fears of the moment, this does not imply that we must affirm those fears as legitimate.

In addition to the Red Scare and Japanese internment, the McCarthy-era hunt for communists during the 1950s has also been shown to have been a severe overreaction. Recently released transcripts of secret Senate hearings suggest that McCarthy may have deliberately misled the public about the threat.¹³² The anticommunist movement resulted in terrible harm to many individuals. Those exposed as communists faced retaliation in the private sector, with numerous journalists, professors, entertainers, and others fired from their jobs and blacklisted from future employment.¹³³ Ellen Schrecker notes that federal agencies exaggerated “the danger of radicalism” because of the “desire to present themselves as protecting the community against the threat of internal subversion.”¹³⁴ Historians also argue that the anticommunist movement was not merely a response to security concerns, but also a means for carrying out the right-wing agendas of opportunistic politicians.¹³⁵

The pragmatist seeks to avoid these mistakes from occurring again; she does not view them as inevitable. She studies the past to see if there are better ways to distinguish the true threats from the manufactured ones. In the past, government officials have seized upon fears of national security to pursue their own personal agendas and prejudices. At the very least, an examination of our history should make us more guarded and skeptical when the government seeks to eliminate liberty in the name of security.

After September 11, the pattern appeared to be recurring. The government rounded up thousands of people, restricted attorney-client confidentiality, instituted military tribunals, secretly detained and interrogated people, and increased electronic surveillance.¹³⁶ Posner, however, takes issue with those public intellectuals such as Bruce Ackerman, Jeffrey Rosen, Michael Dorf, Ronald Dworkin, and Jack Balkin who stepped forward to support civil liberties.¹³⁷ He criticizes them for

concluded that it “is not for any court to sit in review of the wisdom of [government officials’] action or substitute its judgment for theirs.” *Id.* at 93.

132. See, e.g., Sheryl Gay Stolberg, *Transcripts Detail Secret Questioning in 50's by McCarthy*, N.Y. TIMES, May 6, 2003, at A1.

133. See ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS 76-86* (1994); see also Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 13-71 (1991).

134. SCHRECKER, *supra* note 133, at 10.

135. See, e.g., *id.* at 92-94.

136. See STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* (2002).

137. See POSNER, *supra* note 6, at 311-15. For the articles Posner critiques, see Bruce Ackerman, *Don't Panic*, LONDON REV. BOOKS, Feb. 7, 2002, at 15; Jack M. Balkin, *Using Our Fears To Justify a Power Grab*, L.A. TIMES, Nov. 29, 2001, at B15; Ronald Dworkin, *The Threat*

being unpragmatic because legal thinkers simply lack the expertise to understand international terrorism and to assess security risks adequately.¹³⁸ But instead of offering a pragmatic evaluation of the full range of consequences to these governmental actions, Posner merely states abstractly that “liberty” must be sacrificed to protect “security.”¹³⁹

Posner appears to assume that liberty and security must be mutually exclusive, an assumption that is far from correct. Historically, America has remained safe and secure despite its traditional support of civil liberties. Might our tradition of civil liberties *contribute* to our safety? Not only may curtailments of liberty bring us no greater security, but they also may lead to insecurity. The pragmatist would certainly entertain this question and would not be so fast to assume a dichotomous tradeoff between liberty and security.

In fact, following the historical pattern in which Posner finds comfort, the Inspector General of the Department of Justice recently reported that the government overreacted after September 11 and improperly rounded up numerous individuals.¹⁴⁰ For Posner, this does not present much of a problem, because overreaction is what normally happens in times of crisis. The pragmatist, unlike Posner, would not confuse explanation for excuse. Pragmatists would look to history and think about how we could better grapple with crises and the tendency to respond with misguided measures that often involve the use of racial and ethnic categories.

D. *Reconstructing Legal Pragmatism*

Posner presents pragmatism as a move away from abstract philosophical theorizing and toward common sense. In his view, pragmatism amounts to antifoundationalism coupled with a commitment to “reasonableness” and being “realistic.” Posner has attempted to strip pragmatism down to the bone, but in doing so he has distorted pragmatism to such an extent that it not only diverges from the ideas of the classical pragmatists, but runs counter to them. Posner’s rejection of philosophical theory renders his pragmatism unable to tell us anything about how to choose our ends. At most, then, Posnerian pragmatism can help us focus on selecting the most efficient means to achieve our given ends; it amounts to little more than an exhortation to be more empirical in assessing the

to *Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44; Jeffrey Rosen, *Holding Pattern: Why Congress Must Stop Ashcroft’s Alien Detentions*, NEW REPUBLIC, Dec. 10, 2001, at 16; and Michael C. Dorf, *What Is an “Unlawful Combatant” and Why It Matters*, WRIT, Jan. 23, 2002, at <http://writ.news.findlaw.com/dorf/20020123.html>.

138. POSNER, *supra* note 6, at 316.

139. *Id.* at 296-97.

140. See Eric Lichtblau, *U.S. Report Faults the Roundup of Illegal Immigrants After 9/11*, N.Y. TIMES, June 3, 2003, at A1.

efficiency of our means. But legal and policy issues often cannot be resolved without examining our ends. This is especially true with the kind of contentious public law issues that Posner often addresses. Posner reaches conclusions on these issues, but as we demonstrated, he does not reach them pragmatically—even on his own terms.

The deficiencies of Posner's pragmatism are caused in large part by his characterization of guiding ideals such as justice, equality, and freedom as mere empty abstractions, and his subsequent refusal to engage them. This is a form of the theory/practice dualism, and it ends up supporting a very conservative view of the everyday practices in which we engage, such as the appropriate distribution of opportunities and resources. In his zeal to attack insular academic philosophical theorizing in particular, Posner inexplicably rejects philosophical questioning about our guiding ideals in general. But everyday practices have a theoretical dimension; guiding ideals are internal to our practices, not transcendent abstractions. Posnerian pragmatism thus insulates existing practices from critical examination, inhibiting the ability to transform them.

In doing so, Posner's pragmatism departs dramatically from the pragmatic tradition championed by William James and John Dewey. Pragmatism does not reject a role for moral theorizing but recommends instead that we critically reconstruct our normative ideals by testing them in experience. The fact that ideals are not fixed absolutes but are subject to revision and change doesn't expose the bankruptcy of ideals; nor does it mean that we should abandon any discussion of ideals or ends, since they are essential for guiding our inquiries and practices. It means instead that, as pragmatists, we must be willing to bring our ideals back down to earth, to recognize their origin in past experience, and to subject them to criticism and reconstruction as we employ them in present experience under changed circumstances.

In this manner, pragmatism is not empty and devoid of substance. Pragmatism has substantive commitments that are not separable from method. In other words, no method of inquiry is neutral. All inquiry begins with a particular direction, some preconceived notion of what is being sought. Inquiry is thus not a wide open process that can lead anywhere. To embark on an inquiry (or to adopt a method of inquiry) is already to head in a particular direction. The starting points of pragmatic inquiry are certain critical stances toward the status quo. This does not mean that one must reject the status quo, but it requires an inquiry into certain assumptions and basic social institutions that Posner will not undertake. In the end, one of the consequences of Posner's pragmatism is that it discourages understanding debate over social ends as a worthwhile critical activity, and therefore entrenches past results, insulating dominant social structures from criticism.

These points become more salient when Posner turns to using his pragmatism to justify a theory of democracy. As we demonstrate in Part II, Posner fails to show how his account of democracy follows from his pragmatism, and he ends up justifying his theory in profoundly unpragmatic ways. In contrast, we demonstrate the more fruitful and productive types of inquiry into democracy that pragmatism has to offer.

II. DEMOCRACY

After articulating his account of pragmatism, Posner devotes the core of his book to discussing democratic theory. He contrasts two concepts of democracy, which he refers to as “Concept 1” and “Concept 2” democracy. Posner defines Concept 1 democracy, which is often called “deliberative democracy,” as “political democracy conceived of as the pooling of different ideas and approaches and the selection of the best through debate and discussion.”¹⁴¹ According to Posner, Concept 1 democracy views all legally competent adults as having an equal “moral right” to participate in societal governance.¹⁴² Citizens have the responsibility to be informed about the issues, engage in open-minded dialogue with other citizens, and “base [their] political opinions and actions (such as voting) on [their] honest opinion, formed after due deliberation, of what is best for society as a whole rather than on narrow self-interest.”¹⁴³

Among the Concept 1 theorists that Posner identifies are John Rawls, Jürgen Habermas, Cass Sunstein, Amy Gutmann, and Dennis Thompson.¹⁴⁴ The most notable Concept 1 theorist is John Dewey,¹⁴⁵ who developed an extensive theory of democracy in many of his works, including *The Public and Its Problems*,¹⁴⁶ *Liberalism and Social Action*,¹⁴⁷ *Individualism Old and New*,¹⁴⁸ *Democracy and Education*,¹⁴⁹ and *Freedom and Culture*,¹⁵⁰ as well as in numerous essays and portions of other books.¹⁵¹

141. POSNER, *supra* note 6, at 106-07; *see also id.* at 130-31.

142. *Id.* at 131.

143. *Id.*

144. *Id.* at 14; *see also* AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., MIT Press 1989) (1962); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

145. POSNER, *supra* note 6, at 186.

146. DEWEY, *supra* note 98, *reprinted in* 2 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, *supra* note 11, at 235.

147. JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* (1935), *reprinted in* 11 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, *supra* note 11, at 1.

148. JOHN DEWEY, *INDIVIDUALISM OLD AND NEW* (1930), *reprinted in* 5 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, *supra* note 11, at 41.

149. JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916), *reprinted in* 9 JOHN DEWEY: *THE MIDDLE WORKS, 1899-1924*, *supra* note 72, at 1.

In contrast to Concept 1, Posner advances an alternative notion of democracy, which he calls “Concept 2” democracy. Concept 2 democracy is based on Joseph Schumpeter’s theory of “elite democracy.”¹⁵² Concept 2 democracy is representative democracy, in which the bulk of the population has little political involvement except for casting a vote every now and then. “Concept 2 rejects the idea that democracy is self-government.

150. JOHN DEWEY, *FREEDOM AND CULTURE* (1939), reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 63.

151. See JOHN DEWEY, *SOC’Y FOR ETHICAL CULTURE, DEMOCRACY AND EDUCATION IN THE WORLD OF TODAY* (1938), reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 294; John Dewey, *Creative Democracy—The Task Before Us*, in JOHN DEWEY & THE PROMISE OF AMERICA 12 (Progressive Educ. Ass’n, Progressive Educ. Booklet No. 14, 1939), reprinted in 14 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 224; John Dewey, *Democracy in Education*, 4 ELEMENTARY SCH. TCHR. 193 (1903), reprinted in 3 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 229; John Dewey, *The Democratic Faith and Education*, 4 ANTIOCH REV. 274 (1944), reprinted in 15 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 251; John Dewey, *The Need of an Industrial Education in an Industrial Democracy*, in 17 MANUAL TRAINING & VOCATIONAL EDUC. 409 (1916), reprinted in 10 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 137; John Dewey, *A Liberal Speaks Out for Liberalism*, N.Y. TIMES MAG., Feb. 23, 1936, at 3, reprinted in 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 282; John Dewey, *The Basic Values and Loyalties of Democracy*, AM. TCHR., May 1941, at 8, reprinted in 14 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 275; John Dewey, *The Challenge of Democracy to Education*, PROGRESSIVE EDUC., Feb. 1937, at 79, reprinted in 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 181; John Dewey, *Education, Democracy, and Socialized Economy*, SOC. FRONTIER, Dec. 1938, at 71, reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 304; John Dewey, *The Future of Liberalism*, SCH. & SOC’Y, Jan. 19, 1935, at 73, reprinted in 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 289; John Dewey, *Practical Democracy*, NEW REPUBLIC, Dec. 2, 1925, at 52 [hereinafter Dewey, *Practical Democracy*] (reviewing WALTER LIPPMANN, *THE PHANTOM PUBLIC* (1925)), reprinted in 2 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 213.

This list is far from exhaustive. Oddly, of the vast amount of work Dewey devoted to his democratic theory, Posner focuses almost exclusively on *The Public and Its Problems*. In fact, Posner rarely cites to any other works by John Dewey except a few essays by Dewey in law reviews, such as, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); and John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924). Even when discussing Dewey’s metaphysics, citations to Dewey’s most famous works—such as *Experience and Nature*, *The Quest for Certainty*, *Logic: The Theory of Inquiry*, *Human Nature and Conduct*, and *Reconstruction in Philosophy*—are virtually nonexistent. The omission of *Experience and Nature* is particularly unusual, since this was a book Justice Holmes (one of Posner’s model judges) had read and praised very highly. Holmes “remarked that, though ‘incredibly ill written,’ it had ‘a feeling of intimacy with the inside of the cosmos that I found unequalled. So methought God would have spoken had He been inarticulate but keenly desirous to tell you how it was.’” ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 341 (1991) (quoting 2 HOLMES-POLLOCK LETTERS, 1874-1932, at 287 (Mark DeWolfe Howe ed., 1941)).

152. POSNER, *supra* note 6, at 130. Posner cites Schumpeter as the central theorist of Concept 2 democracy, but surprisingly does not comment upon Dewey’s debates with Walter Lippmann, who argued in favor of elitist conceptions of democracy using many of the same reasons Posner provides. See LIPPMANN, *supra* note 151; WALTER LIPPMANN, *PUBLIC OPINION* (1922). Dewey had numerous debates with Lippmann. See Dewey, *Practical Democracy*, *supra* note 151, reprinted in 2 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 213; John Dewey, *Public Opinion*, 30 NEW REPUBLIC 286 (1922) (reviewing LIPPMANN, *supra*), reprinted in 13 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 337. For a discussion of these debates within the historical circumstances of the time, see WESTBROOK, *supra* note 151, at 293-318.

Democracy is government subject to electoral checks.”¹⁵³ Interest groups and elites run the show. “Successful [political] candidates are not random draws from the public at large. They are smarter, better educated, more ambitious, and wealthier than the average person.”¹⁵⁴

Despite its reliance on elites, Concept 2 democracy is populist, Posner argues, because it takes people as they are: Ordinary people simply don’t have the expertise or time to be engaged in a robust political life. “Concept 2 is the democracy of interests and so of responsiveness to public opinion, to what people want as distinct from what political theorists think they should want or under different (better?) social or political conditions would want.”¹⁵⁵ Therefore, the goal of Concept 2 democracy is that “the interests (preferences, values, opinions) of the population, whatever they may happen to be, be represented in government.”¹⁵⁶

Posner prefers Concept 2 democracy based on what he believes are pragmatic grounds. Concept 2 democracy, says Posner, is “the democracy of the pragmatists, more precisely of the everyday pragmatists.”¹⁵⁷ To justify why Concept 2 is better from the standpoint of pragmatic theory, Posner makes two general arguments.

First, he contends that Concept 2 is a “more accurate description of American democracy than Concept 1.”¹⁵⁸ Posner criticizes Concept 1 democracy as being too idealistic and elitist. Concept 1 democracy is not feasible; it is a utopian dream.¹⁵⁹ It does not take people as they are; it wants people to be more educated, more concerned about politics, more civic-minded. Posner contends that Concept 2 is more realistic than Concept 1. Concept 2 is “unillusioned about democracy.”¹⁶⁰ It “best describes the American political system today.”¹⁶¹ Concept 1 democracy “places expert opinion over the distributed intelligence of the mass of the people and prevents the emergence of the best policies through intellectual natural selection.”¹⁶² Concept 1 theorists “envision moral argument on political questions as taking place on a philosophical plane,”¹⁶³ which is at a level of sophistication beyond the comprehension of most American citizens. In short, Concept 1 democracy is modeled on “a faculty workshop.”¹⁶⁴

153. POSNER, *supra* note 6, at 164.

154. *Id.* at 154.

155. *Id.* at 165.

156. *Id.*

157. *Id.* at 143.

158. *Id.* at 130.

159. *See id.* at 164-65.

160. *Id.* at 145.

161. *Id.* at 147.

162. *Id.* at 122.

163. *Id.* at 132.

164. *Id.* at 143.

In contrast, Concept 2 does not have a “preconceived, idealized model of democracy to which to compare the practice of American or any other existing democracy.”¹⁶⁵ Concept 2 “is inclined to take for granted the features of democratic practice lamented by Concept 1 democrats.”¹⁶⁶ To sum up, “Concept 1 democracy” is “loftier,” “idealistic, theoretical, and top-down,”¹⁶⁷ whereas “Concept 2 democracy” is “realistic, cynical, and bottom-up”—it is “pragmatic.”¹⁶⁸

Second, Posner argues that Concept 2 is “normatively superior” to Concept 1.¹⁶⁹ Concept 2 enables people to pursue their private interests without being overly sidetracked; it allows the more educated experts to run the show; it maintains a firm political stability; and it enables the public to check the governing elites if they completely ignore the public’s interests.¹⁷⁰ “Democracy as pictured by Concept 2 democrats is not self-rule. It is rule by officials who are, however, chosen by the people and who if they don’t perform to expectations are fired by the people at the end of a short fixed or limited term of office.”¹⁷¹

Since Posner justifies his choice of Concept 2 democracy based on pragmatism, he attempts to explain why Dewey, one of the leading pragmatic theorists, chose Concept 1. Posner argues that Dewey’s views of democracy are entirely separate from his pragmatic ideas. Thus, Posner contends, Dewey’s political views “have no organic relation to his philosophy” and belong instead “to his career as a public intellectual.”¹⁷² This move is essential for Posner, because Posner accepts many of Dewey’s pragmatic ideas yet eschews Dewey’s liberal political philosophy. According to Posner, Dewey’s faith in deliberative democracy was misplaced, for Dewey wanted people “to think about political questions the way scientists think about scientific ones—disinterestedly, intelligently, empirically,” but he “succumbed to the intellectual’s typical mistake of exaggerating the importance of intellect and of associated virtues such as commitment to disinterested inquiry.”¹⁷³ A pragmatist, Posner concludes, should embrace Concept 2 because it is more realistic and practical than Concept 1, and because it works better.

Posner’s account of democracy is deeply flawed on many levels. More importantly for Posner’s project, his account of democracy is not pragmatic at all—even on Posner’s own terms. Moreover, although Dewey’s specific

165. *Id.* at 162.

166. *Id.*

167. *Id.* at 130.

168. *Id.*

169. *Id.*

170. *Id.* at 182.

171. *Id.* at 144.

172. *Id.* at 98.

173. *Id.* at 107-08.

views of democracy and particular instantiations of Concept 1 democracy may not ineluctably follow from Dewey's pragmatic philosophy, this does not mean that pragmatism is neutral toward whatever concept of democracy or theory of political governance one might adopt. On the contrary, there is an organic relation between Dewey's political views and his philosophy, for his politics arises from the results of his pragmatic inquiry.

A. *The Possibility of Democratic Deliberation*

Posner's justification of Concept 2 democracy begins with a descriptive argument that Concept 1 is idealistic and unattainable. Posner thinks he is being pragmatic in his assessment of Concept 1, and uses his descriptive argument that Concept 1 is unrealistic to buttress his normative choice for Concept 2. "The big difference is that Concept 2, because of its greater realism, provides a stronger framework for appraisal of practical improvements in our democratic system."¹⁷⁴ Posner's logic is as follows: Since Concept 2 is realistic, and since it more accurately describes the status quo than Concept 1, Concept 2 is thus superior. But this logic has numerous flaws. First, just because Concept 2 is more easily attained or more reflective of the dominant ideals in the status quo doesn't make it more desirable. Second, Posner appears to set up a false dichotomy between Concept 1 and Concept 2, as if these are the only choices. The pragmatist would find this quite ironic, since pragmatists, especially Dewey and James, criticized starting out with overly narrow sets of choices.¹⁷⁵ Even if Concept 1 is in fact unattainable, this does not warrant selecting Concept 2 unless it is the only remaining choice.

Nevertheless, Posner's critique about the plausibility of Concept 1 does have important implications. Regardless of the merits of Concept 2, the unattainability of Concept 1 may be grounds to reject it. On Posner's account, "advocates of Concept 1 ask for the moon."¹⁷⁶ And because of this, most Concept 1 theorists are profoundly disappointed when they discover that people are not sufficiently civic-minded and politically informed: "The theorist of deliberative democracy prescribes conditions of knowledge, attention, and public-spiritedness that the people cannot or will not satisfy in their political life."¹⁷⁷ In short, Posner's argument is that the pragmatist is too sober and realistic to be fooled by the idealistic illusions behind Concept 1.

174. *Id.* at 248.

175. See, e.g., WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 184, 206-08 (New York, Longmans, Green & Co. 1897).

176. POSNER, *supra* note 6, at 188.

177. *Id.* at 157.

This argument basically consists of two claims. The first is a claim about human capacity and potential. People are not (and will never be) civic-minded in the way Concept 1 proponents want them to be. Second, Posner argues that democratic deliberation as Concept 1 envisions is impossible. Posner believes both of these arguments are pragmatic. In our discussion below we provide an alternative view that challenges this account. We suggest that conclusions about human capacity are premature in light of the insufficiency of present efforts to engage individuals and groups in wide-ranging community debate. We also argue that pragmatic democracy depends upon such efforts.

1. *Human Capacity and Potential*

John Dewey observed that all social and political philosophies “involve a certain view about the constitution of human nature.”¹⁷⁸ Posner’s democratic theory is founded upon a very cynical understanding of human nature. His view of human nature becomes apparent in his critique of Concept 1 democrats, whom Posner strongly chastises for being too idealistic about the capabilities of American citizens to engage in meaningful public discourse. According to Posner, in reality, “[t]he United States is a tenaciously philistine society. Its citizens have little appetite for abstractions and little time and less inclination to devote substantial time to training themselves to become informed and public-spirited voters.”¹⁷⁹

Posner contends that political issues are becoming too complicated and numerous for the public to understand them.¹⁸⁰ Moreover, people are increasingly apathetic and uninterested in politics: “[E]ven people who bother to vote often lack much interest in or knowledge of the issues and candidates.”¹⁸¹ For Posner, most people are selfish and individualistic: “[M]ost citizens are interested not in what is best in some sense for the nation or the world but rather in what is best from the standpoint of their self-interest.”¹⁸²

Posner claims that most Concept 1 theorists recognize these limitations on human nature and thus are bound to fall into despair: “Concept 1 democrats are thus in a bind. Realism requires them to prefer representative to direct democracy. But realism teaches that elected representatives cannot be depended on to deliberate in the public interest. Realism is Concept 2 democracy.”¹⁸³

178. DEWEY, *supra* note 150, at 13, *reprinted in* 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 72.

179. POSNER, *supra* note 6, at 164.

180. *Id.* at 151.

181. *Id.*

182. *Id.* at 192-93.

183. *Id.* at 154.

This sort of “realism,” however, is not consistent with Posner’s other statements about pragmatism. Posner notes that pragmatists understand that all knowledge is local and perspectival. In *The Problems of Jurisprudence*, Posner states that he embraces pragmatism because it recognizes the “localness” of human knowledge” and “the consequent importance of keeping diverse paths of inquiry open.”¹⁸⁴ In *The Problematics of Moral and Legal Theory*, Posner notes that “doubt rather than belief is the spur to inquiry; and doubt is a disposition that pragmatism encourages, precisely in order to spur inquiry.”¹⁸⁵ In *Law, Pragmatism, and Democracy*, Posner claims that pragmatism is antifoundationalist and that “[w]e cannot hope to know the universe as it really is.”¹⁸⁶

If knowledge is local and perspectival, however, then the pragmatist cannot simply begin uncritically with the “facts.” Posner’s pragmatist is skeptical about theory, but not about facts. But although Dewey and other pragmatists argued that philosophy begins with problems in experience, this does not mean that we should always take these perceived problems at face value. We must be critical about how we assess the facts of a situation.¹⁸⁷ Facts, Dewey observed, “are not self-sufficient and complete in themselves. They are selected and described . . . for a purpose.”¹⁸⁸ The “facts” are selected based on our interests and in response to particular problems in experience. What we perceive as a “fact” is related to our purposes. Posnerian pragmatism is skeptical about theory because it is infused with ideology, yet facts also deserve scrutiny given the nature of their selection.

When Posner’s realism is applied to human nature, he views human capabilities as having fixed limitations. For example, Posner writes: “Like populists, [pragmatists] take people as they find them; anything else would be unrealistic.”¹⁸⁹ He states that “Concept 1 democracy is unworkable. It hopelessly exaggerates the moral and intellectual capacities, both actual and potential, not only of the average person but also of the average official (including judge) and even of the political theorists who seek to tutor the people and the officials.”¹⁹⁰ This leads Posner to conclude that reforms to increase political deliberation are not feasible.¹⁹¹

Posner’s conception of human nature becomes even more evident when he writes about Schumpeter’s view that

184. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 465 (1990).

185. POSNER, *supra* note 28, at 264.

186. POSNER, *supra* note 6, at 5.

187. See DEWEY, *supra* note 69, at 31-32, *reprinted in* 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 38; DEWEY, *supra* note 83, at 70-71, *reprinted in* 12 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 76.

188. DEWEY, *supra* note 83, at 113, *reprinted in* 12 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 116.

189. POSNER, *supra* note 6, at 155.

190. *Id.* at 144.

191. *Id.* at 163.

society is composed of wolves and sheep. The wolves are the natural leaders. They rise to the top in every society. The challenge to politics is to provide routes to the top that deflect the wolves from resorting to violence, usurpation, conquest, and oppression to obtain their place in the sun.¹⁹²

Posner goes on to state that “Schumpeter’s theory of democracy is realistic in its recognition that these people exist, that they will be the rulers whatever the structure of government.”¹⁹³ Posner chastises Concept 1 democrats for failing to realize this: “What Plato failed to recognize in urging that philosophers should be the kings, and what Plato’s descendants among deliberative democrats fail to recognize in urging government by discussion, is that a political system that does not enable the natural rulers to rule cannot survive.”¹⁹⁴

The view that everyone in society can be categorized into “wolves” and “sheep” is remarkably reductive. Posner offers no sociological or empirical support for this conclusion. It is apparently part of the Posnerian metaphysics that human beings are inherently one of these two types. Somewhat surprisingly, the Posnerian pragmatist has taken a strong position in the nature versus nurture debate, concluding that nature wins all the time. In Posner’s view, society doesn’t help shape who becomes wolves or sheep; the wolves are born wolves and the role of society is to treat them accordingly.

It is far from a truism, however, that a person is simply born a “wolf” or a “sheep.” Even if one were to employ this dichotomy, one would expect that which people turn out to be the wolves would depend on the structure of a given society. Posner talks about “natural leaders,” but this way of talking implies that there is a particular leadership skill, a view that has much more in common with the Platonism Posner rejects.¹⁹⁵ It seems much more likely that the skills that contribute to effective leadership in a particular society will vary greatly with its makeup and history. In fact, earlier on in the book Posner points out that the skills of a successful judge are not universal qualities that work in all situations, but rather particular qualities that work well at a given time and place:

Pragmatists, whose orientation is historicist rather than timeless, will reject [the] view that the qualities of a good judge are historically constant. It was the extraordinary fit between [Justice John] Marshall’s suite of qualities and the volatile historical setting

192. *Id.* at 183.

193. *Id.* at 184.

194. *Id.*

195. *See id.* at 30 (“The simplest definition of pragmatism is that it is the rejection of Platonism root and branch.”).

in which he worked that mainly explains his success and his greatness.¹⁹⁶

Pragmatically, it makes little sense to talk about “natural” leaders. Why can a society not survive if it fails to allow the “natural rulers” to rule? If the point is that some are, by nature, fit to rule and some are not, then on what *empirical* basis does this conclusion rest? On the surface, this claim has more of the ring of Plato’s noble lie, which classifies people into three natural types,¹⁹⁷ than of a pragmatic investigation of the consequences of different social treatment of individuals with particular character traits. If the point is that some people are so willful and self-interested that they will derail the larger social structure if not made leaders, then the claim seems patently false. We have many mechanisms of social control and a wide variety of rewards and punishments to prevent dissatisfied individuals from harming society. One would expect Posner as pragmatist to argue instead that people with different traits would be effective rulers at different times, depending on the makeup of the society in which they live.

Ironically, Posner seems to place his view of human nature in the mouths of Concept 1 theorists, whom he views as elitist:

From the perspective of many (of course not all) of the faculty of those departments, the average voter is ignorant, philistine, provincial, selfish, excessively materialistic, puritanical (or libertine—depending on which end of the political spectrum the faculty member making the judgment occupies), superficial, vulgar, insensitive, unimaginative, complacent, chauvinistic, superstitious, uneducable, benighted politically, prone to hysteria, and overweight.¹⁹⁸

Posner writes as if only the Concept 1 democrats are elitist and as if this charge doesn’t apply to his advocacy for Concept 2. But he seems to assume as true the vision of the American people he attributes to Concept 1. Whereas Concept 1 democrats may lament the fact that many voters do not rise to their ideals, they nevertheless recognize that the voters have the potential to be civic-minded and intelligent. Posner seems to deny even this.

Posner claims that “Concept 2 is thus more respectful of people as they actually are.”¹⁹⁹ But what are people “actually”? For Dewey, people are not fixed entities, but a growth process occurring over an entire lifespan.²⁰⁰ The

196. *Id.* at 92.

197. See PLATO, *THE REPUBLIC* 93-94 (Allan Bloom trans., Basic Books 2d ed. 1991).

198. POSNER, *supra* note 6, at 155-56.

199. *Id.* at 165-66.

200. DEWEY, *supra* note 69, at 224-25, *reprinted in* 1 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra* note 11, at 210.

individual, observes Dewey, is not “something complete, perfect, finished, an organized whole of parts united by the impress of a comprehensive form,” but is “something moving, changing, discrete, and above all initiating instead of final.”²⁰¹ Dewey observes that only certain “innate needs,” such as those for food and drink are unchangeable.²⁰² And even these needs are fixed only in the most general sense, for “what kinds of food are wanted and used are a matter of acquired habit influenced by both physical environment and social custom.”²⁰³ Defenders of the status quo have often wrongly asserted that social reform is impossible because human nature cannot be changed. For example, Dewey notes that Aristotle viewed slaves as having “an inherently slavish nature” and “would have regarded efforts to abolish slavery from society as an idle and utopian effort to change human nature where it was unchangeable.”²⁰⁴ Pragmatists like Dewey are open-minded about human nature, viewing it experimentally, as something that is growing and changing. Viewing human nature as fixed “diverts attention from the question of whether or not a change is desirable and from the other question of how it shall be brought about.”²⁰⁵

While many Americans do not rise up to the ideals of Concept 1 theorists, it is not clear that Posner paints an accurate picture of the American people. The reality is far more complex. On certain issues, people may be provincial and selfish, but on others they may be more civic-minded. Unpragmatically, Posner grounds his conception of human nature in a set of *ipse dixits* supported only by his own speculative judgments and intuitions.²⁰⁶

201. *Id.* at 177, reprinted in 1 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 167; see also DEWEY, *supra* note 87, at 139-40, reprinted in 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 97.

202. John Dewey, *Does Human Nature Change?*, 52 ROTARIAN 8, 8 (1938), reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 286, 286.

203. *Id.* at 9, reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 287.

204. *Id.*, reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 287.

205. *Id.* at 59, reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 293. As Robin West writes,

The early liberals' greatest substantive mistake, Dewey charged, was a direct consequence of this methodological failure to see that their vision of human nature and their definition of the good life were derived from the historically contingent conditions against which they perceived the individual as embattled: social and legal restraints on the alienability of labor, land, and commodities and legal and political inequalities of status.

Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 696-97 (1985).

206. We are not the first to critique Posner for failing to practice what he preaches. See Linda E. Fisher, *Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. REV. 455, 457-58 (2001) (“[Posner’s] writings repeatedly emphasize the need for judicial self-restraint, deference to other branches of government, and the prudence of generally following precedent, but his own judicial practice can exhibit lack of restraint and an unwarranted arrogation of power. His use of empirical data can be undisciplined, and his opinions sometimes

To the extent that the American people are apathetic toward political issues, the pragmatic response is not to view their apathy as an immutable reality. Political apathy is not an innate quality in human nature but a product of social institutions. Pragmatists seek to understand the way that the structure of American political life has influenced how people participate. Instead of taking the current “reality” as a given, pragmatists would experiment with different means to enhance the meaningfulness of political participation. Lack of political engagement may not stem from an inherent disinterest in politics; it might stem from a lack of avenues for participating meaningfully in public life. A pragmatic approach would focus on the future and recognize the need to create conditions for people to become engaged.²⁰⁷

2. *Democratic Deliberation*

Beyond his bleak, deterministic, and unpragmatic account of human nature, Posner also makes another (so-called) pragmatic argument for the conclusion that Concept 1 is doomed. According to Posner, democratic deliberation is impossible. He contends that “sober proponents of Concept 1 democracy realize that deliberation is not effective in bridging fundamental disagreements.”²⁰⁸ Moreover, Posner argues, “debates over moral and political philosophy are notoriously inconclusive—I would go further and call them indeterminate and interminable—and in any event far above the head of the average, or for that matter the above-average, voter.”²⁰⁹ Therefore, Posner concludes, “[o]nly intellectuals believe . . . that discussion can resolve deep political or ideological conflicts.”²¹⁰

Why can’t people engage in meaningful dialogue? One reason, Posner posits, is religion: “Since so many Americans . . . are religious, and religious belief is a showstopper so far as public debate in our society is concerned, it is doubtful that deliberation over fundamental political goals and values is feasible outside our leading universities, the ethos of which is secular.”²¹¹ But this conclusion is not obvious. Many individuals with deep

range well beyond the issues that are before the court.”); Ravitch, *supra* note 28, at 974-75 (critiquing Posner for failing to carefully analyze data and basing his analysis on unanalyzed assumptions); Rosen, *supra* note 28, at 601 (noting that Posner’s pragmatism is unpragmatic).

207. For example, the work of Paul Schwartz examines how “cyberspace has a tremendous potential to revitalize democratic self-governance at a time when a declining level of participation in communal life endangers civil society in the United States.” Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1610-11 (1999). Schwartz argues that the realization of the democratic potential of the Internet depends in part on the protection of privacy online. Schwartz’s work thus provides an example of a future-oriented focus on the ways in which we can guide new technologies in enhancing self-government.

208. POSNER, *supra* note 6, at 135.

209. *Id.* at 133.

210. *Id.* at 138.

211. *Id.* at 137.

religious commitments participate in political debates (e.g., Martin Luther King, Jr.). Just because people are religious does not mean that they will be unable to find common ground with others for the purposes of many political discussions.²¹² Moreover, the use of religious arguments in political debates does not automatically serve as a “showstopper”—only certain kinds of intolerant fundamentalist religious arguments are anathema to public discourse.²¹³

Posner’s central attack on democratic deliberation is based on a strong skepticism, which Posner claims is pragmatic. People have different positions, and there is no way to privilege one view over another, since doing so would assume some theory of objective truth, which, as Posner claims, the pragmatist rejects. Therefore, Posner concludes, not much meaningful deliberation can occur, and theory can do little useful work. The Posnerian pragmatist is a skeptic who doubts “that anyone has a handle on the really big truths, especially those of a moral, religious, or political cast.”²¹⁴ As a result, “pragmatists are inclined to throw up their hands and say, let the people decide such matters because there are no trustworthy experts on them.”²¹⁵ “The problem of democracy, as of government generally, is to manage conflict among persons who, often arguing from incompatible premises, cannot overcome their differences by discussion.”²¹⁶

Therefore, Posner argues, democracy ends in a vote, which “is the antithesis of deliberation and the mark of its failure.”²¹⁷ “Voting in a sense marks the failure of deliberative democracy, the failure to have achieved consensus through deliberation.”²¹⁸ Posner contends that “the Concept 2 democrat applauds the use of voting to resolve political disagreements because it is quick and nearly costless and because the most serious of those disagreements cannot be resolved by discussion anyway.”²¹⁹ Voting is inevitable in a democracy, Posner believes, because discourse and deliberation don’t (and can’t) really function. “But in a morally heterogeneous nation like the United States, many issues can be resolved

212. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

213. As Jürgen Habermas argues,

While religious toleration is basic to a democratic constitutional state, in this way religious consciousness itself undergoes a learning process. With the introduction of a right to freedom of religious expression, all religious communities must adopt the constitutional principle of the equal inclusion of everyone. They cannot merely benefit from the toleration of the others, but must themselves face up to the generalized expectation of tolerance, with all the consequences this entails.

Jürgen Habermas, *Intolerance and Discrimination*, 1 INT’L J. CONST. L. 2, 6 (2003).

214. POSNER, *supra* note 6, at 105.

215. *Id.* at 105-06.

216. *Id.* at 112.

217. *Id.* at 187.

218. *Id.* at 222.

219. *Id.* at 223.

only by the force surrogate that is majority vote.”²²⁰ Therefore, democracy for Posner is a “competitive struggle for the people’s vote and not discussion and decision among the people themselves.”²²¹ Democracy through voting is simply another means by which the powerful get their way, a nonviolent instantiation of might makes right. This is a very bleak vision. With democracy, we have just found a surrogate to avoid violence—nothing more.

To be successful for Posner, debate apparently must result in total consensus and complete resolution of an issue. Since he believes that such resolution is impossible, debate must be endless, and any ending is thus a failure and abandonment of the discussion. Posner is wrong to assume that all deliberation must end in a decision. As Dewey observed, “All deliberation is a search for a *way* to act, not for a final terminus.”²²² Voting is often not the end of debate. It is just a decision being made despite continuing disagreement and dialogue.

Just because issues and elections are decided by a vote and everybody is not in agreement does not mean that deliberation and discussion play no role or have somehow failed. Posner demands too much from deliberation, and he creates a caricature of what Concept 1 democrats hope deliberation can achieve. Despite its flaws, political discourse is hardly dead in America. People do discuss and debate politics. Deliberation does influence how people vote. People change their minds based on discussions they have with others. Public debate often forces individuals to explain inconsistency or accept the consequences of their commitments. Ideas do percolate and spread throughout society. While these conversations may not always rise to a grand level of sophistication, they certainly occur.

Pragmatism makes a radical break with philosophers who assume, like Kant, that practical ends must be generated by pure reason. It also diverges from theorists like Posner who, unable to embrace a Kantian theoretical project, forego theoretical criticism altogether and thereby privilege present dominant ideologies. As William James observed, pragmatism stands between the “tough-minded” and the “tender-minded.”²²³ Tough-minded empiricists focus on “facts in all their crude variety,” whereas tender-minded rationalists focus on “abstract and eternal principles.”²²⁴ For James, pragmatism is a way to combine “willingness to take account of [facts]” with “intellectual abstraction.”²²⁵

220. *Id.* at 138.

221. *Id.* at 178 (quoting ALBERT WEALE, *DEMOCRACY* 98 (1999)).

222. DEWEY, *supra* note 87, at 193, *reprinted in* 14 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, *supra* note 72, at 134.

223. JAMES, *supra* note 59, at 12.

224. *Id.* at 9.

225. *Id.* at 20.

As explained by James, the tough-minded are best described as “materialistic,” “pessimistic,” “sceptical,” and “going by ‘facts,’”²²⁶ many of Posner’s defining traits. Like the tough-minded empiricist, Posner rejects any role for philosophical theory. From a Deweyan perspective, Posner’s brand of empiricism views the world as “already constructed and determined.”²²⁷ “An empiricism which is content with repeating facts already past,” wrote Dewey, “has no place for possibility and for liberty.”²²⁸ We are what we are, Posner seems to be telling us, and we should not only accept this, but embrace it. The pragmatist would almost surely disagree. More often than not, immediate and unquestioning surrender is the least pragmatic approach.

Posner wrongly believes that deliberation must lead to consensus in order to have value. But deliberation furthers important values even when it does not produce consensus. For one thing, there is value in clarifying the conflict, not just in resolving it.²²⁹ Second, to the degree that we fail to recognize the divergence of viewpoints in our community, we are handicapped in our attempts to bridge the gaps. The failure to understand different perspectives can lead to hasty solutions based on inadequate descriptions of the problem. Third, in many contexts, individuals are at least as concerned with being heard as they are with instantiating their view of the “right answer.”

B. *Problems with Concept 2 Democracy*

In addition to arguing that Concept 1 democracy is not attainable, Posner also makes a more affirmative case for his claim that Concept 2 is “normatively superior.”²³⁰ Posner notes that “Concept 2 democrats often find redeeming value in features of American democracy that Concept 1 democrats deplore.”²³¹ But Posner’s Concept 2 democracy is not obviously pragmatic.

Posner is emphatic in his praise for Concept 2, which he grounds in his pragmatism. He proclaims that ours is the “most successful political system since the Roman Empire!”²³² But what are the normative criteria for

226. *Id.* at 12.

227. John Dewey, *The Development of American Pragmatism*, in 2 *STUDIES IN THE HISTORY OF IDEAS* 353, 365 (Dep’t of Philosophy of Columbia Univ. ed., 1925), reprinted in 2 *JOHN DEWEY: THE LATER WORKS, 1925-1953*, *supra* note 11, at 3, 12-13.

228. *Id.*, reprinted in 2 *JOHN DEWEY: THE LATER WORKS, 1925-1953*, *supra* note 11, at 12.

229. See J.M. BALKIN, *CULTURAL SOFTWARE* 133 (1998) (“We can try to use the beliefs of others as a partial check on our own. When we do this, our goal is not necessarily to reach agreement with others; rather, it is to use the project of explaining disagreement as a means of broadening our understanding of the social world.”).

230. POSNER, *supra* note 6, at 130.

231. *Id.* at 171.

232. *Id.* at 182.

success? One could say glibly that Concept 2 democracy is better because it works, but whether Concept 2 “works” depends upon the normative goals we have, which in turn depend upon a theory of the good. One could also contend that Concept 2 democracy is better because it is more efficient, but again, since “efficiency” can only be evaluated in light of ends one wants to achieve, those ends are precisely the question at stake. Without knowing what one’s ends are, one cannot evaluate whether a social structure is efficient in achieving them. What are the ends that democracy should achieve? This brings us back again to the need for a theory of the good.

So what is Posner’s theory of the good? Posner doesn’t tell us explicitly. Instead of a theory of the good, Posner offers a number of goals he believes democracy should achieve. He believes democracy should:

- (1) cost “very little . . . in time, money, and distraction from private pursuits commercial or otherwise”;
- (2) allow people to “punish at least the flagrant mistakes and misfeasances of officialdom”;
- (3) “assure an orderly succession of at least minimally competent officials”;
- (4) “generate feedback to the officials concerning the consequences of their policies”;
- (5) “prevent officials from (or punish them for) entirely ignoring the interests of the governed”;
- (6) “prevent serious misalignments between government action and public opinion”; and
- (7) avoid “placing electoral minorities at substantial risk of having their property rights or other liberties curtailed by the democratic majority.”²³³

Posner does not offer an extensive justification of this vision of democracy, although it is hard to argue with these goals, since they are taken for granted in most formulations of democracy. What democratic theory wouldn’t prevent officials from “*entirely* ignoring the interests of the governed”?²³⁴

Yet this is a remarkably thin set of goals for a working democracy. In fact, Posner’s normative ends for democracy can be boiled down to two

233. *Id.*

234. *Id.* (emphasis added).

goals: (1) promoting freedom for people to pursue their private interests, and (2) promoting political stability. Since Posner views Americans as essentially selfish atomistic individuals who just want to be left alone and not be bothered by politics, the point of a democratic system is to prevent obstacles from getting in their way. Indeed, the overarching concern that ties together the majority of the goals Posner lists is a commitment to stability, the keys to which involve ensuring the orderly succession of officials and allowing for minimal checks when the officials really get out of hand (punishing “flagrant mistakes” or “entirely ignoring” the public interest, and preventing gross disparities between the government and public opinion). Furthermore, Posner wants to protect against the tyranny of the majority, and one suspects he has in mind the instability that might be created when the majority wants to encroach on the property rights of the wealthy elite minority. Posner also argues that “Concept 2 democrats also don’t lose sleep over the possibility that an election might be won by a candidate who got fewer votes than his competitor, provided the margin is small. They worry more about deadlocked elections that produce delay or make Presidential succession uncertain.”²³⁵ In the good Posnerian society, stability is a central value.

It will not surprise readers familiar with Posner’s longstanding support for markets that the goals of freedom to pursue private interests and stability are also important preconditions to a free market. In fact, when the smoke clears, it is a particular conception of the free market, and not democracy, that Posner seems most interested in fostering. Throughout the book, Posner extols the virtues of markets over political life: “Commercial activity and private life are not only more productive of wealth and happiness than the political life; they are also more peaceable, which in turn reinforces their positive effect on wealth and happiness.”²³⁶ Politics “is often a zero-sum or even a negative-sum game. Economic competition is more likely to be a positive-sum game.”²³⁷ On Posner’s account, political life is nasty and brutish and disruptive, akin to a kind of war, whereas market activity is constructive and encourages civil relations.

But is market activity really better than political life? Posner writes: “Markets are a means of enabling potentially antipathetic strangers to transact peaceably with one other; and a superficial relationship, in which all the deep issues are bracketed, is the most productive basis on which to deal with strangers.”²³⁸ What kind of society would we be if all our interactions were like this? For many, the good life consists of more than having “superficial” relationships with others in society. It consists of

235. *Id.* at 172.

236. *Id.* at 173.

237. *Id.* at 174.

238. *Id.* at 31.

discussing and debating the “deep issues.” For Posner, only the intellectual elites can enjoy this type of deeper existence. But it is far from true that people generally don’t enjoy political discussions or any sort of political participation.

Moreover, market activity can be nasty and disruptive. Many political decisions concern the regulation of market activity, for the market left alone can result in malfeasance and failures. Reining in commerce is a divisive issue in political life. The shape of the market itself cannot be resolved without recourse to politics.²³⁹ Therefore, Posner is wrong to assume a dichotomy between commercial and political life, viewing the market as some sort of insular paradise when, in fact, it is always already deeply infused with politics.

C. Dewey, Pragmatism, and Democracy

1. *The Illusion of Neutrality*

Posner has stated time and again that pragmatism has “no inherent political valence.”²⁴⁰ Posner is not alone in this conclusion. According to Richard Rorty, pragmatism “is neutral between alternative prophecies, and thus neutral between democrats and fascists.”²⁴¹ Since pragmatism on this account has no political valence, Posner argues that there is no connection between the pragmatic ideas of John Dewey and his political philosophy: “The connection between the liberal-visionary and the pragmatic is purely historical and contingent. It happens that John Dewey and some other pragmatist philosophers were also left-leaning political visionaries.”²⁴² Posner’s contention that Dewey’s political views “have no organic relation to his philosophy”²⁴³ is a necessary step in his justification of Concept 2 democracy, for he takes many of Dewey’s basic pragmatic ideas but desires to use them to support a very different vision of democracy than Dewey, who was a Concept 1 democrat.

If Posner is correct in his claim that pragmatism has no political valence, then it is puzzling how he can claim that Concept 2 democracy is the “democracy of the pragmatists.”²⁴⁴ It is difficult to imagine how an

239. See THOMAS HOMER-DIXON, *THE INGENUITY GAP* 244-45 (2000) (“The relationship between government and the market is decidedly symbiotic. . . . Even in the most laissez-faire capitalist economies, markets float on a sea of complex institutions, regulations, and government interventions.”).

240. POSNER, *supra* note 6, at 84; POSNER, *supra* note 19, at 393.

241. Richard Rorty, *The Professor and the Prophet*, 52 *TRANSITION* 70, 75 (1991) (reviewing CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* (1989)).

242. POSNER, *supra* note 6, at 46.

243. *Id.* at 98.

244. *Id.* at 143.

inherently apolitical pragmatic method can be linked to one theory of democracy over another. Posner thus must resort to a variety of unpragmatic contortions to free himself from this logical bind. We have argued that Posner's justification for Concept 2 democracy rests upon dubious foundations that resemble the type of reasoning pragmatism rejects.

Although Posner contends that there is no connection between Deweyan democratic theory and pragmatism, he is mistaken. Of course, pragmatists have reached very different, sometimes mutually exclusive, political views. But the fact that pragmatists can arrive at different political conclusions does not imply that pragmatism is completely neutral as to which conclusions one might reach.

Pragmatism refuses to accept on face value claims about methods being "neutral." Rather, pragmatism recognizes that our critical investigations are infused with value commitments. No neutral determination is possible. Under this account, the point of philosophy is less a matter of securing objective truth and more a matter of facilitating effective growth in the face of particular problems. Pragmatism is not a method purified of experience. Pragmatism does not start out from some Archimedean point; it begins with commitments, which have certain valences. Pragmatism asks particular kinds of questions and suggests we abandon other types of questions. As Dewey argued,

[T]he conviction persists—though history shows it to be a hallucination—that all the questions that the human mind has asked are questions that can be answered in terms of the alternatives that the questions themselves present. But in fact intellectual progress usually occurs through sheer abandonment of questions together with both of the alternatives they assume—an abandonment that results from their decreasing vitality and a change of urgent interest. We do not solve them: we get over them.²⁴⁵

Since all questions guide the focus of our intellectual attention, they lead us in particular directions.

For Dewey, pragmatism is not simply a tool external to democracy, and it would be a mistake to use pragmatism to determine the ideal democratic structure. This is not the type of question pragmatism suggests we investigate. For the pragmatist, there is no ideal democratic structure;

245. JOHN DEWEY, *The Influence of Darwinism on Philosophy*, in *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT*, *supra* note 11, at 1, 19, reprinted in 4 JOHN DEWEY: *THE MIDDLE WORKS, 1899-1924*, *supra* note 72, at 3, 14. Richard Rorty follows this strategy. See RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM*, at xiv (1982) ("So pragmatists see the Platonic tradition as having outlived its usefulness. This does not mean that they have a new, non-Platonic set of answers to Platonic questions to offer, but rather that they do not think we should ask those questions anymore. . . . They would simply like to change the subject.").

rather, a democracy is a process whereby a community continually seeks to define itself as it moves into the future. A democracy is therefore not static, but continually evolving. Moreover, democracy is more than just a set of political structures; it is a way of making certain decisions about the future of the community. Dewey believed that democratic decisionmaking should be pragmatic. Pragmatists certainly agree that pragmatism is a more productive method of engaging our problems than other methods. Even Posner makes this argument, for his book is endorsing pragmatism, not merely describing it. To the extent that pragmatism is successful in this way, then not only individuals, but also entire communities, should engage in pragmatic inquiry. Democracy thus should consist of pragmatic inquiry at a community-wide level. Under this view, pragmatic democracy is, like pragmatism, a commitment to a form of inquiry—the endorsement of experimental method on the social and political stage.

For Dewey, democracy is “a way of life, social and individual.”²⁴⁶ John Stuhr explains Dewey’s conception of democracy as “a form of *life* rather than a form of *government* alone.”²⁴⁷ Democratic government is “a means for realizing democratic ends in individual lives and social relationships.”²⁴⁸ Under this view, democracy does not primarily consist of institutions or government structures: “Democracy exists only on paper and in statute unless individuals enact it in their own transactions day by day and face-to-face in local communities. That is, a society of individuals can become a democracy only as those individuals act democratically.”²⁴⁹ As Dewey observed, “[D]emocracy is much broader than a special political form, a method of conducting government, of making laws and carrying on governmental administration by means of popular suffrage and elected officers.”²⁵⁰

Thus, even if our government has a democratic structure, we are not democratic unless we live our lives democratically. This injunction has consequences for the way we approach our democratic inheritance. We should not see democracy as something that has been accomplished simply by the choice of an appropriate set of representative governmental structures that can be passed down from generation to generation. Instead, the meaning of democracy must change continually with changes in lives

246. John Dewey, *Democracy and Educational Administration* (Feb. 22, 1937), in *AM. ASSOC. OF SCH. ADM’RS, NAT’L EDUC. ASSOC., OFFICIAL REPORT: NEW ORLEANS CONVENTION* 48, 49 (1937), *reprinted in* 11 *JOHN DEWEY: THE LATER WORKS, 1925-1953*, *supra* note 11, at 217, 217.

247. JOHN J. STUHR, *PRAGMATISM, POSTMODERNISM, AND THE FUTURE OF PHILOSOPHY* 51 (2003).

248. *Id.*

249. *Id.* at 64.

250. Dewey, *supra* note 246, at 49, *reprinted in* 11 *JOHN DEWEY: THE LATER WORKS, 1925-1953*, *supra* note 11, at 217.

“and cultural conditions,”²⁵¹ and this reconstruction is democratic only to the extent means are found to fully involve all members of the community in this reconstruction.

While Posner’s thin account of pragmatism seems insufficient for generating substantive ends, a thicker account of pragmatism recommends that a community pragmatically reconstruct its ends.²⁵² On this thicker account, democracy and pragmatism go hand in hand. As Hilary Putnam observes, for Dewey democracy is “not just a form of social life among other workable forms of social life; it is the precondition for the full application of intelligence to the solution of social problems.”²⁵³ Certain characteristics of democracy facilitate the community’s engaging in pragmatic inquiry about the future shape of its democracy. Pragmatic inquiry enables a community to make itself more democratic. Pragmatism and democracy are thus mutually reinforcing.

2. *Pragmatism’s Valences*

The account of Deweyan pragmatism we sketched in Part I recognizes that pragmatism is not neutral. Of course, this account of pragmatism does not imply a specific theory of political philosophy. But it does have valences. In order to ask what political future pragmatism recommends, we must also ask in what political culture pragmatic forms of inquiry about the political future can best be carried out. The answer to this latter question leads us in the direction of what we call a “general democratic culture.”

First, as discussed in Part I, pragmatism subjects existing institutions and the status quo to ongoing critique, since it recommends that we critically examine our ends. When one commits oneself to a thorough use of pragmatic method, certain conclusions are ruled out in advance, such as a politics informed by supernatural or transcendental ideals, or a politics that arbitrarily excludes particular viewpoints. Supernaturalism and absolutism conflict with the general approach of the pragmatic method, which is to subject our ideals, ends, and conclusions to the test of experience. Indeed, it is this commitment that in part motivates Posner’s rejection of philosophical theory, for much philosophical theory has traditionally harbored ideological commitments that were then foisted upon the unaware from the altar of theory. But the fear of ideology can lead to cures that are worse than the disease. Although Posner claims to adhere to a neutral

251. STUHR, *supra* note 247, at 72.

252. For a discussion of the method that such pragmatic reconstruction might take, see JAMES CAMPBELL, *THE COMMUNITY RECONSTRUCTS: THE MEANING OF PRAGMATIC SOCIAL THOUGHT* 38-58 (1992).

253. Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1671 (1990).

pragmatic method without political valences, the results of his application of this method are deeply ensconced in ideology. Posner's pragmatism does have a particular political valence—one that favors the dominant ends of the status quo. The result is that while Posnerian pragmatism rejects supernaturalism and absolutism, it starts with an unquestioning acceptance of current institutions. Ironically, it winds up in a similar posture to supernaturalism and absolutism, for in each of these instances certain issues are insulated from critical scrutiny.

Second, under Deweyan pragmatism, democracy depends upon deliberation. Democratic deliberation is the way we establish shared meanings and determine the ends of a community. It is important to distinguish between individual and community ends. Individuals can readily choose their own ends, but for communities, the task is more difficult. This is because a community's ends depend on the identity of the community, which must be ascertained by examining the history of that community and soliciting input from across the community as a whole. Examining community identity leads us to ask: Who are we becoming? How are we growing? Do we want to continue in this fashion? Who do we want to become? There is no movement into the future that does not presuppose a judgment about the past and present. Pragmatists therefore need to encourage public deliberation about our identity since there is no way to determine what is better or worse without reference to that identity.

Since community rather than individual ends are at issue, dialogue becomes essential. Community ends are determined collectively, and doing so requires communication. This dialogue does not need to be an academically sophisticated discourse; rather, pragmatism merely requires that people participate in a discussion of the meaning of ends understood in the context of present circumstances. These are philosophical discussions not because they take place in universities, but because they ask about the good life under present social conditions. A pragmatic approach to democracy is one that understands itself as part of existing political conversations about the nature and ends of the community.

Third, since experience is social and meanings are constituted through communication, efforts to describe experience and formulate an account of social problems must seek contributions from a wide range of participants in social experience. As William Caspary observes, "Dewey is, above all, a participatory democracy theorist."²⁵⁴ According to Dewey, a citizen must have "a responsible share according to capacity in forming and directing the activities of the groups to which [she] belongs."²⁵⁵ Under Dewey's theory,

254. WILLIAM R. CASPARY, *DEWEY ON DEMOCRACY* 8 (2000).

255. DEWEY, *supra* note 98, at 147, *reprinted in* 2 JOHN DEWEY: *THE LATER WORKS*, 1925-1953, *supra* note 11, at 327.

participation is a highly valued end.²⁵⁶ For Posner, in contrast, participation has no value unless it can achieve results that benefit one's self-interest.

Beyond being valuable in and of itself, participation is valuable instrumentally as well. According to Dewey, self-government "is educative," for it "forces a recognition that there are common interests."²⁵⁷ Thus, the purpose of democracy is not to take the people as they are. The value of democratic participation is to educate people, to enable them to realize common interests and see themselves as part of a community.

Dewey's experimental method does not simply consist of presenting hypotheses; rather, it requires testing proposals to resolve present problems by seeing how they work in experience. Interpreting the social meaning of a particular set of experiments requires recourse to the larger community. As Posner himself notes, different individuals' experiences lead them to approach problems in different ways, and some approaches work better than others for particular problems.²⁵⁸ Accordingly, we increase our chances of finding effective solutions to social problems by looking to a broad range of contributors.

Therefore, in contrast to Posnerian pragmatism, the account of pragmatism we offer openly acknowledges that it is not completely neutral. Although pragmatism does not point to precise resolutions for our debates, it does send us in a particular direction based on the types of questions it recommends we investigate. It puts on the table for debate a wide range of issues, especially the identity of a community and its ends. It requires dialogue, for the task of determining a community's ends cannot be achieved without communication. And it relies on the participation of the community, not merely upon a group of elites who impose their own ends upon the community.

Since democracy depends upon the widespread participation of a community in a dialogue over its ends, the pragmatist pays special attention to questions concerning the conditions for effective community discussion. Posner rejects such questions as hopeless and doomed because it is not realistic to achieve complete community engagement. But these are precisely the ways in which a community pragmatically resolves the more specific political arrangements it shall adopt. Because this account of

256. In *The Public and Its Problems*, Dewey observes:

Wherever there is conjoint activity whose consequences are appreciated as good by all singular persons who take part in it, and where the realization of the good is such as to effect an energetic desire and effort to sustain it in being just because it is a good shared by all, there is in so far a community. The clear consciousness of a communal life, in all its implications, constitutes the idea of democracy.

Id. at 149, reprinted in 2 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 328.

257. *Id.* at 207, reprinted in 2 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 364.

258. POSNER, *supra* note 6, at 101-02.

pragmatism suggests that we engage in a critical examination of the dominant ends of society, and that we must do so through dialogue and through broad community participation, it points us more toward Concept 1 democracy than Concept 2. This does not foreclose us from embracing some features of Concept 2, but it certainly rejects the insular nature of Concept 2, which leaves too few avenues for dialogue and community engagement.

One might object that this account of pragmatism and its relationship to democracy is circular, as the community's project of shaping its democracy depends, in part, on the existence of a general democratic culture. Despite the circularity, the circle is not vicious. The general democratic culture required is quite broad and does not come close to the level of specificity required in the project of determining what particular form a democracy shall take. But the general democratic culture, as we have defined it, is not independent of the more particular forms of democracy that the community adopts. Indeed, the community's specific democratic arrangements shape its general democratic culture. How, then, can a community with political arrangements that do not facilitate a general democratic culture ever transform itself through pragmatic inquiry into a more robust democracy? The answer is that a democracy need not be perfect (or even close to perfect) to engage in pragmatic inquiry. Certainly there have been many democracies that have not begun democratically; this did not mean that they were doomed. Dewey's pragmatic method counsels us constantly to remake our democracy; we do not just pass it along like a dead object. The key point is for a community to keep attempting to engage in democratic pragmatic inquiry and to think of ways to help facilitate it. Such a democracy is achieved not by establishing an ideal political structure, but through the sustained incremental development of the capacities of citizens for developing shared values. Democracy, on this view, is akin to an activity that one improves through practice. Democracy is something that a community *does*, not merely a particular set of rules and structures.

3. *Toward a Thicker Account of Democracy*

Although our account of pragmatism points us toward certain broad features of Concept 1, more work is necessary to develop thicker accounts of democracy. In other words, while the pragmatic method has substantive valences, it does not dictate the specific contours of a democratic theory. It points us in a general direction. Commitment to pragmatic method does not entail, *prima facie* and in advance of application, a commitment to a particular politics or narrow conception of democracy. On the contrary, these conceptions are what one discovers and constructs through such investigation. Central to Dewey's pragmatism is a commitment to inquiry

into one's present social and cultural conditions. Empirical inquiry does not form its conclusions in advance of experience.

Therefore, Posner is partially correct when he claims that Dewey's politics was "historical and contingent."²⁵⁹ Indeed, Dewey's politics was the result of his best efforts to inquire into the problems of the times and formulate proposals to ameliorate them. Naturally, Dewey's political conclusions bear a historical relationship to the problems of Dewey's day. But this fact does not support Posner's conclusion that Dewey's politics bears no "organic relationship" to Dewey's pragmatism.

Regardless of whether Dewey's specific policy recommendations were the most productive responses to the problems he examined, the important point is that pragmatism recommends a certain kind of discussion. It requires considering the competing views of our history and explaining why some views should be seen as superior. Whether or not there is an "organic relationship" between the application of pragmatic method and the development of a particular politics is not a matter of drawing out the logical entailments of pragmatic method. Instead, it is a matter of assessing the historical record of the actual application of that method in attempts to respond to a given set of problems.

Pragmatic democratic inquiry would lead us to ask: What are the pressing problems of the day? What are the relevant community ends? What means can we use to achieve these ends? The inquiry would also go deeper to ask: To what extent are the community ends contested? What is the pedigree of the prevailing community ends? How did these ends become the prevailing ones? For what purposes were these ends originally adopted? Do the reasons these ends were adopted still have currency today? To the extent that there are competing accounts of a community's ends, can common ground be discovered?

The pragmatist would also recognize that answering these questions pragmatically at the community level requires certain features of a democratic culture—ones that may need significant improvement. The quality of our pragmatic inquiry into the above questions depends upon the quality of our democratic culture. To improve that culture, the pragmatist would explore ways to improve public deliberation and civic participation. For example, the pragmatist would look to improving education, which enables individuals to assess experience critically and share their assessments with others. The pragmatist might also examine how to promote new means of communication to enable democratic discussions to take place.²⁶⁰

259. *Id.* at 46.

260. For a provocative discussion of the resources and challenges of this project in the age of the Internet, see CASS SUNSTEIN, *REPUBLIC.COM* 191-202 (2001).

One might object that such projects are not pragmatic because they are often engineered by elites. Deweyan democracy, however, need not be antagonistic to elites so long as elites see their role as guiding and advising the public rather than running the show with minimal public involvement.²⁶¹ Thus, intellectuals must avoid engaging in isolated conversations with each other and attempt to engage in more inclusive public debates.

Posner would also respond that these projects are too utopian because too many people do not want to participate and are not educated enough to do anything but vote. But as discussed earlier in this Part, the pragmatist does not simply accept human nature as given. Democracy, for Dewey, is about the “maturing and fruition of the potentialities of human nature.”²⁶² Dewey’s view of human nature is inspired in part by Darwin, for Dewey recognizes that people constantly adjust and adapt to their environments.²⁶³ Pragmatists consciously grapple with the challenge of developing human potential rather than allowing it to remain adrift.

Dewey’s response is that institutions must be changed; further experimentation is needed in order to help enable society to become more democratic. In this way, Dewey was idealistic about democracy. He believed that a commitment to democracy makes “claims upon our future conduct” and therefore it “*is an ideal*.”²⁶⁴ Dewey would not view the charge that Concept 1 is idealistic as troubling at all; he would say that this is precisely the point of democracy. As Stuhr puts it,

[A]s an ideal, democracy is not simply “unreal.” As an ideal, it is—or may be or may become—a deep commitment, grasped by imagination, that draws lives together, makes meaningful our efforts, and directs our actions. As an ideal, it is generated through imagination, but it is not “made out of imaginary stuff.” . . .

To describe democratic life as an ideal . . . is not so much to state a present fact as it is to recommend a future course of action, an admittedly radical course of action.²⁶⁵

261. See BRUCE KUKLICK, *A HISTORY OF PHILOSOPHY IN AMERICA 1720-2000*, at 190 (2001) (noting that for Dewey, “the role of experts was to gain knowledge, but the public had to determine the problems to be investigated”).

262. DEWEY, *supra* note 150, at 125, reprinted in 13 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 152.

263. See JAMES CAMPBELL, *UNDERSTANDING JOHN DEWEY 37-38* (1995). Posner repeatedly discusses the influence of Darwin on pragmatism. See POSNER, *supra* note 6, at 4-5, 10, 31-32.

264. STUHR, *supra* note 247, at 55.

265. *Id.* at 56 (internal quotation marks omitted).

The normative goal of democracy for Dewey was the realization of people's full capacities.²⁶⁶ For Dewey, then, unlike Posner, one cannot simply take human beings and social institutions as one finds them:

The foundation of democracy is faith in the capacities of human nature; faith in human intelligence, and in the power of pooled and cooperative experience. It is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action.²⁶⁷

In the end, Dewey was committed to using the power of intelligence to bring about a better society capable of facilitating the growth of individuals. He was convinced that the form and commitment to inquiry that had so decisively enabled us to increase our control over nature in the realm of science and technology might also be used to improve the political governance of society. But he knew that assessment of this claim would have to await the results of trying to put it into practice. From Dewey's point of view, it was far too early to pronounce pragmatic attempts at reconstruction as failures or successes, because by and large they simply had not been tried. This remains true today. Even as Posner recommends our realistic acquiescence to the status quo, his claims that aspirations for a more deliberative society are too utopian seem driven more by his affirmation of the present than by any demonstration that improvement is not possible.

CONCLUSION

In *Law, Pragmatism, and Democracy*, Posner has set out his most thorough account of legal pragmatism to date. Posner views ideals as useless and philosophical theorizing as empty. Lacking any meaningful approach for scrutinizing social goals, pragmatism thus devolves into an efficiency exercise. The task of the pragmatist becomes merely finding the appropriate means to achieve our given ends. While this search for means may take a critical form, Posner's account has little to say about the selection of ends. Accordingly, his attack on abstract ideals becomes, in effect, an endorsement of such ideals, since it leaves unreconstructed the dominant moral ideals of present society.

266. DEWEY, *supra* note 147, at 56-57, reprinted in 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 41.

267. Dewey, *supra* note 246, at 50, reprinted in 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 219.

It is not surprising, therefore, that in his theory of democracy, Posner is not interested in promoting methods for the community to develop shared ideals. Rather, the pressing need is for a set of elite managers to serve as efficiency experts, whose goal is to find the most efficient means to achieve our inherited ends. Posner's view has significant consequences for thinking about the nature of democratic community. Since people are not encouraged to make any effort to form a community on the basis of shared ideals, the dominant normative ideals of society are left to drift haphazardly. Society becomes little more than the collective actions of atomistic individuals. Thus, as with the market, Posner views the equilibrium that emerges from individuals who pursue their own private interests as sufficient to generate the larger social ethos.

Posner's pragmatism, having eschewed attempts to evaluate ends critically and having effectively pronounced its agnosticism about community ends, leads naturally to a vision of democracy as principally an efficient mechanism for dispute resolution. This vision of democracy is conservative not only because it privileges the inherited demands of the present, but even more because it rules out as misguided the projects of reconstructing community identity through public deliberation. In contrast, the pragmatism of the early pragmatists, especially Dewey, encourages us to approach our present problems more radically. We should subject both means and ends to critical inquiry and empower communities to engage in self-formation by reconstructing the settled habits and ideals that constitute the status quo. For Dewey, "The end of democracy is a radical end. For it is an end that has not been adequately realized in any country at any time. It is radical because it requires great change in existing social institutions, economic, legal and cultural."²⁶⁸

Posner is right in his general view that pragmatism has much to offer to law, as well as to democracy. Its contribution, however, is not a rejection of philosophical theory but a transformation of how we relate theory to practice. Far from being banal or timorous, far from accepting our current practices and institutions as given realities, pragmatism subjects them to criticism and reconstruction. Unfortunately, Dewey's provocative suggestions for reconstruction were never fully developed with respect to jurisprudence. We hope that increasing interest in legal pragmatism will facilitate this worthwhile experiment.

268. John Dewey, *Democracy Is Radical*, COMMON SENSE, Jan. 1937, at 10, 11, *reprinted in* 11 JOHN DEWEY: THE LATER WORKS, 1925-1953, *supra* note 11, at 296, 298-99 (emphasis omitted).