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RICHARD POSNER'S DEMOCRATIC PRAGMATISM

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Judge Richard A. Posner is both the most cited legal academic of all time¹ and possibly the most influential living federal judge below the level of the Supreme Court.² His most recent book, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), is a major contribution to the ongoing debate over the best conception of democracy and the role of judicial review within it.

Posner urges that political and legal decision makers should be guided by what he calls “everyday pragmatism” rather than worry about “abstract” moral considerations (chs. 1-2). He links this conception of pragmatic government to an unromantic theory of democracy that rejects more demanding and idealistic views currently embraced by many political theorists and legal scholars. In contrast to “deliberative democracy” and other theories that require a high level of disinterested political involvement on the part of citizens, Posner follows Joseph Schumpeter (1950) in defending a theory of democracy limited to “a competitive power struggle among members of a political elite . . . for the electoral support of the masses” (130). He further argues that judicial review should be based on a combination of pragmatism and adherence to his limited conception of democracy, rather than following “formalist” theories of adjudication, which demand strict adherence to the text of the Constitution, legal precedent, or the “original intent” of the Framers (chs. 6-10).

Judge Posner makes a large number of powerful points, and his critiques of alternative theories are often devastating. He is less persuasive in defending the central theses of this book: his theories of pragmatism, democracy, and judicial review.

Posner's version of pragmatism is both too narrow and too broad. Its excessive narrowness resides in Posner's failure to come to grips with the fact that the pragmatic soundness of an action cannot be assessed without a prior determination of whether the results it accomplishes are normatively desirable. This latter judgment cannot itself be a purely pragmatic one, but requires some sort of normative theory of ends. On the other hand, Posnerian pragmatism is also too broad because it is not clear which, if any, considerations can be excluded from its scope. A theory that incorporates everything ultimately proves nothing.

Posner's model of democracy likewise suffers from important deficiencies. While he is surely correct in claiming that Schumpeterian democracy is a superior alternative to the unrealistic visions of deliberative democrats, he is too quick to conclude that it is the best currently available version. Posner's defense of democracy by way of Schumpeter does not sufficiently consider the shortcomings exposed in recent scholarship in political science and economics. As a result, Posner fails to adequately refute the possibility that Schumpeterian democracy might function better if the powers of democratic legislatures were much more severely restricted than he considers desirable.

Finally, Posner's argument that judicial decision making should be based on his theories of pragmatism and democracy suffers from the limitations of those theories themselves. It also has additional shortcomings of its own, including the likely inability of judges to implement those theories. As Posner himself partly acknowledges, judges may often serve democracy better by staying within the bounds of formalism.

In this review, I focus far more on my differences with Posner than on points of agreement.. But not only does Posner make many valid and fascinating points, particularly in criticizing opposing views; the range and scope of his analysis is (as his readers have come to expect) impressive. Indeed, the need to limit my focus to those aspects of his book on which I have some claim to expertise--primarily theories of

democracy and judicial review--prevents me from doing justice to such elements of Posner's analysis as his discussion of John Dewey's pragmatic political thought (ch. 3) and his critique of the legal theories of Hans Kelsen and F. A. Hayek (ch. 7).

Pragmatism without Purpose

In formulating his theory of pragmatism, Posner distances himself from the analytically sophisticated "philosophical pragmatism" advocated by William James, John Dewey and other philosophers (ch. 1). Instead, he defends what he calls "everyday pragmatism" (49-56).

Posner defines his preferred version of pragmatism as "a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities" (59). Realizing that this formulation is "incomplete and unspecific" (ibid.), Posner amplifies it by providing a more detailed list of the implications of pragmatism for judicial and political decision making. The most important items on Posner's list are his claim that pragmatic decision-makers may take into account broad systemic effects as well as case-specific ones; and his insistence that pragmatists must focus on empirical evidence of effectiveness, rather than on "abstract moral and political theory" (59-60). Unfortunately, Posnerian pragmatism both underestimates the utility of "abstract" theory, and—ironically--fails to be sufficiently specific to serve as a "pragmatically" useful guide to judicial decision making.

The most important difficulty with Posnerian pragmatism is that, despite the insistence on making decisions based on "facts and consequences" (59), it provides no way to decide which facts and consequences are desirable and which are not. Without an answer to this question, pragmatism cannot serve as a guide to decision making at all, much less as a guide superior to alternative theories.

To take an extreme example, the Holocaust was a pragmatically defensible policy *if* we accept the desirability of the goal of exterminating the Jews of Europe. Condemnations of the Holocaust are necessarily based on a rejection of its ends, rather than on a critique of the efficiency of the means.

Posner of course recognizes that “the most common criticism of pragmatism” is its “lack of a moral compass” (55). Yet he argues that this is not a disabling weakness. In a culturally diverse society such as the United States, government policy cannot be constrained by any overarching moral theory, but must instead be controlled by “psychological, career, and institutional factors” (56).³ When people disagree over fundamental moral questions, moral theory is unlikely to provide a meaningful constraint for policy makers.

In making this claim, Posner unfortunately conflates the *causal* influence of moral theory with its *evaluative* role. It is surely true that “psychological, career, and institutional factors” do more to constrain the actions of real-world policymakers and judges than do theories of morality. However, without the latter, we cannot know whether or not the direction in which the former push policy is a desirable one. Even if Posner is right to claim that moral philosophy has no meaningful influence whatsoever on the formulation of public policy (Posner, 1999a, ch. 1), it may still be a useful evaluative tool for determining which policies are ethically defensible. Theories of human rights may be utterly useless in persuading Hitler, Stalin, or Saddam Hussein to stop engaging in acts of mass murder, but that in no way reduces their usefulness in determining whether the removal of those dictators from power is morally justified.

Posner may well be on firmer ground in claiming that disagreement over fundamental moral issues is ineradicable, and that scholars are far from finding anything approaching the one “right” moral theory that is clearly superior to all others (chs. 1-2; see also Posner 1999a). He is particularly compelling in criticizing legal scholars, such as Ronald Dworkin (1977 and 1986), who urge that judges base their decisions directly on philosophical theories of morality (46, 119-23; see also Posner 1999a).

Although, like Posner, I am not a moral philosopher, I share his doubt that practitioners of that or any other discipline are likely to produce the One True Theory of Morality anytime soon. And even if the right theory were found, Posner is surely correct to doubt that real-world judges lack the expertise and detachment necessary to apply moral philosophy to actual cases in an objective manner (119-20). That does not, however, prove that logical reasoning based on moral theory cannot show that one policy is preferable to another, or that one conception of the role of government in society is preferable to available

alternatives. So long as moral theory can (sometimes) perform these more limited functions, it will remain an essential adjunct to pragmatic, instrumental reasoning of the sort favored by Posner. The latter is useless without at least some measure of the former.

Yet even if Posner is right to completely reject the utility of “abstract” moral theory (ch. 1), it does not follow that he has successfully shown the superiority of pragmatism over its alternatives. If there is no way to objectively analyze the moral desirability of conflicting policy options, then why should we care which one is adopted? And why should we care whether the decision is guided by “pragmatic” criteria or by other considerations? Posner denies that his theory of pragmatism necessarily collapses into moral relativism (e.g., 11-12). He argues that a pragmatist might still condemn cultural practices or public policies if they are based on erroneous factual assumptions or if they lead to harmful consequences (12, 42-43, 53). However, these replies to the charge of relativism beg the question. If there are no objective answers to disputed moral questions, why should we consider it wrong to base public policy on factual errors? Similarly, how can we judge the desirability of a policy or judicial decision based on its “consequences” (59) if we have no way of telling which consequences are desirable and which are not?

The Impracticality of Pragmatism

Having just criticized Posnerian pragmatism for being excessively dismissive of “abstract” moral philosophy, it may seem disingenuous to turn around and criticize it for not being sufficiently concrete. Yet that is what I am going to do.

Posner urges policy makers, particularly his fellow judges, to adopt a pragmatic approach to making decisions; yet too often he fails to adequately describe precisely what such an approach entails. The most serious problem along these lines is Posner’s failure to clearly specify what points a pragmatic judge can properly *exclude* from consideration.

Throughout his discussion of pragmatism, Posner at pains to show that almost any important concern can be incorporated into the theory. In response to critics who claim that pragmatic judges might

ignore the systemic consequences of individual decisions, Posner assures us that “legal pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences” (59). He quickly qualifies this statement by observing that systemic considerations should be decisive “only in exceptional circumstances” (ibid.), but fails to explain why this is a necessary consequence of his theory. A few pages later, Posner concedes that his theory of pragmatism provides

no algorithm for striking the right balance between [systemic] rule-of law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard. In fact, there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered. (64)

These vague guidelines do not even rule out traditional legal formalism—presumably the ultimate antithesis of pragmatism. According to Posner, pragmatism “implies a respectful attitude by judges not only toward constitutional and statutory text but also towards precedents” (63). Indeed, he goes so far as to claim that it “requires judges ordinarily to treat text and precedents as the most important materials of judicial decision, for they are the materials on which the community necessarily places its principal reliance in trying to figure out what the ‘law’ is, that is what judges will do with a legal dispute if it arises” (ibid.).

A theory that tells us to consider “all things” (64) and does not even rule out the alternative that seems to be its principal rival is not a helpful guide to decision making, judicial or otherwise. To consider everything is ultimately to consider nothing. Having rightly criticized exclusive reliance on “abstract moral and political theory,” (59) Posner presents us with a theory that is often more vague and abstract than those he attacks. “The ultimate criterion of pragmatic adjudication,” Posner claims, “is reasonableness” (59). But “reasonableness” is no more a self-explanatory concept than are such terms as “fairness” and “equality,” whose invocation by judges Posner criticizes because “they have no definite meaning” (66).

In any real-world decision-making process, there is an almost infinite range of considerations that *could* be taken into account. A useful theory of decision must be able to tell us which of these should be ignored entirely, and provide some guidance as to how to balance the remaining considerations against each other. Posnerian pragmatism fails in both tasks—indeed, largely even fails to attempt them. In order to take a stab at them, Posner would have to provide a much more specific definition of “reasonableness,” and also some criterion for weighing the potential consequences of a decision. Yet this, of course, would require precisely the kind of appeal to “abstract moral and political theory” that Posner resists (59).

If Posner or any pragmatist scholar *were* to provide us with a more specific theory of how to evaluate consequences, that theory, rather than pragmatism itself, would be doing the main work of determining what decision to make in any given instance. Such is the dilemma of pragmatism: without an extrinsic moral theory, it yields no determinative guidance. But once such a theory is provided, it, not pragmatism itself, becomes the true guide to decision-making.

Posner’s Critique of Deliberative Democracy

Posner’s analysis of democracy, contained in the middle third of his book, is much more compelling than his theory of pragmatism. Although he links the two (43, 130-31), they are nonetheless distinct. One can reject Posnerian pragmatism and accept his vision of democracy, or vice versa.

Posner distinguishes between two broad approaches to democracy, which he calls “Concept 1” and “Concept 2” (ch. 4). Concept 1 includes theories of democracy that demand a great deal of participants in the democratic process. It holds that “every adult who is not profoundly retarded has a moral right to participate on terms of equality in the governance of society,” but that such participation implies commensurate “moral duties (1) to take sufficient interest in public affairs to be able to participate in government intelligently, (2) to discuss political issues in an open-minded fashion . . . and (3) to base

one's political opinions and actions . . . on one's honest opinion . . . of what is best for society as a whole rather than narrow self-interest" (131).

Concept 1 is derived from theories of "deliberative democracy" currently popular among many legal scholars and political theorists.⁴ While there are many different versions of what Posner calls Concept 1 democracy, he is surely correct to believe that they have in common a demanding set of requirements for popular participation in the democratic process, including a high level of knowledge and analytical sophistication and an absence, or at least severe curtailment, of self-interested motives (Somin 1998, 438-39).

Posner's Concept 2 Democracy is a derivative of Joseph Schumpeter's theory of democratic participation. It requires merely that voters have the ability to replace political leaders through periodic elections (130-31, 143-54; Schumpeter 1950, ch. 22). Posner emphasizes that Concept 2 democracy does not require that voters be well informed or that they have public-spirited motives (130).

It comes as little surprise to longtime students of Posner's work that he forcefully defends Concept 2 democracy while excoriating Concept 1. He denounces the desire of Concept 1 deliberative democrats to "model democracy on a faculty workshop" (143). Posner's argument provides a defense of the existing American political system, which of course fits the Concept 2 Schumpeterian ideal--if "ideal" it can be called--far more closely than it does even the least demanding of Concept 1 theories.

Posner's critique of Concept 1 democracy is more compelling than his defense of Concept 2. He contends that Concept 2 theories of deliberative democracy are both unrealistic and, as a result, potentially dangerous were attempts made to implement them.

As Posner recognizes, empirical research demonstrates that the majority of citizens have astonishingly low levels of political knowledge (151-52, 168-69). Most of them lack even very basic knowledge of political parties, candidates, and issues, much less the far more sophisticated knowledge necessary to meet the demands of deliberative democracy (Delli Carpini and Keeter 1996; Somin 1998; Somin 2004). Approximately 30 percent of adult American citizens are "know-nothings" who possess little or no useful political knowledge of any kind (Somin 2004; Bennett 1988; Bennett 1996). In addition to lacking

factual knowledge, few ordinary citizens observe the rigorous rules for political participation laid down by deliberative democrats. Depending on the particular theory, these may require voters to consider opposing points of view in an unbiased manner; set aside prejudice and self-interest; and abjure all reliance on religious principles in making political judgments.⁶ In light of this kind of evidence, Posner argues powerfully that deliberative democracy is both remote from real world democratic government and unattainable through any feasible reforms (162-64). It is “essential[ly] utopian” (164).⁷

Perhaps the most interesting of Posner’s criticisms of Concept 1 democracy is that its adherents often end up advocating the concentration of power in nondemocratic institutions such as government bureaucracies and the judiciary. “The theorist of deliberative democracy,” Posner explains, “prescribes conditions of knowledge, attention, and public-spiritedness that the people cannot or will not satisfy in their political life. And so he is tempted to give up on the people and embrace rule by experts, judicial or bureaucratic, whom he deems capable of deliberation--experts much like himself” (157). Many academic supporters of deliberative democracy have indeed advocated considerably expanded powers for courts, bureaucrats or both.⁸ A particularly telling example is Supreme Court Justice Stephen Breyer’s claim that cognitive and deliberative defects in electoral and legislative processes justify centralization of environmental and safety regulatory authority in the hands of a single expert agency deliberately insulated from most political pressure (Breyer 1993).

As Posner explains, such concentration of power in nondemocratic institutions is problematic for a variety of reasons, particularly the classic danger that the unrepresentative elites who control these institutions may neglect the needs and interests of the public (155-68). Furthermore, it is far from clear that courts and government bureaucracies actually do engage in the kind of rigorous deliberation favored by advocates of Concept-1 democracy, though they probably approximate it more closely than ordinary voters do. As Posner--himself a highly experienced judge--points out, real-world judges rarely if ever decide cases using the methods favored by theorists of Concept 1 democracy (138-39). Even many defenders of deliberative democracy recognize that real-world government bureaucracies also fail to live up to deliberative ideals (Breyer 1993; Sunstein 2002). For this reason, some of them hope to replace or

supplement existing bureaucracies with ones that are more expert, more centralized, and more insulated from the political process (ibid.). Of course, this solution to the dilemma of inadequate deliberation carries with it serious dangers of its own and may not really solve the “problem” at all.

Posner’s Problematic Defense of Schumpeterian Democracy

Posner’s defense of Concept 2 democracy is far less convincing than his arguments against Concept 1. It is, however, valuable as one of the strongest recent defenses of real world American democracy. Posner’s contribution is an important one despite the fact that he is mistaken to claim that our present version of Schumpeterian democracy has “no wholehearted academic defenders” besides himself (182). In fact, views similar to Posner’s have been advanced by, among others, leading political scientists such as William Riker (1982), Morris Fiorina (1981), and V. O. Key (1966); and by economist Donald Wittman (1995).⁹

Posner’s Concept 2 democracy is, in fact, closely related to the theory of “retrospective voting” (Fiorina 1981; Key 1966; Norpoth 1996). Posner and other defenders of the theory recognize that most voters cannot meet the stringent cognitive requirements of deliberative democracy. But they argue that citizens do have sufficient knowledge and sophistication to vote out leaders who are performing poorly or contrary to the electoral majority’s wishes. As Posner puts it, voters are competent enough to “punish at least the flagrant mistakes and misfeasances of officialdom, . . . to generate feedback to officials concerning the consequences of their policies, to prevent officials from entirely ignoring the interests of the governed, and to prevent serious misalignments between government action and public opinion” (182).

In reaching that conclusion, however, Posner overlooks a substantial body of research. Effective retrospective voting requires that most voters (1) have some understanding of which problems are caused by government policies or can be alleviated by it, (2) know which incumbent officeholders are responsible for which issue areas, (3) know what happened with respect to those issues during the

incumbent's term, and (4) be able to determine whether the incumbents' policies were the best available under the circumstances, or whether their opponents' ideas might have fared better.¹⁰ If, for example, voters do not know which elected officials are responsible for a given policy area, they will not know whom to "punish" in the event of policy failure (182). Similarly, voters cannot punish incumbents' "flagrant mistakes and misfeasances" (ibid.) if they don't know what the incumbents' policy is in those areas.

Public-opinion scholars have consistently found that the majority of American citizens lack the knowledge necessary to meet the requirements of adequate retrospective voting.¹¹ It is particularly important to recognize that voters often don't know which officials are responsible for which policies, and also don't know what policies are in place to address important and highly publicized problems.¹² Large numbers of voters at election time do not even know which party is currently in power (and thus deserves "punishment" for perceived failure in office). For example, only 50 percent of Americans knew that the Republican party held a majority in the Senate before the closely contested 2000 election (Somin 2004). Immediately after the almost equally close 2002 congressional election, only 32 percent knew that Republicans had had control of the House of Representatives prior to the balloting (ibid.).¹³

Such deep ignorance is likely to be difficult to remedy because it is largely rational. Due to the very low significance of any single vote, there is a vanishingly small benefit to acquiring political knowledge in order to vote in an informed way (Downs 1957, ch. 13). Even if a voter makes a tremendous effort to become highly informed, there is almost no chance that his or her well-informed vote will actually swing the electoral outcome in favor of the "better" candidate or party. The acquisition of political information is a classic collective action problem, a situation in which a good (here, an informed electorate) is undersupplied because any one individual's possible contribution to its production is insignificant, and because those who do not contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.¹⁴

If most citizens really do remain ignorant of politics primarily because of rational considerations rather than because of lack of opportunity or ability to acquire information, it follows that the problem of

political ignorance is likely to persist. Thus, rational ignorance is the best explanation for the striking fact that voters' low knowledge levels have remained remarkably stable for the last five decades, despite tremendous increases in education levels and the availability of information (Delli Carpini and Keeter 1996; Somin 1998, 442-46; Somin 2004). The disturbing persistence of voter ignorance lends added weight to Posner's critique of deliberative democracy as unrealistic. But it also cuts against his own defense of our present version of Schumpeterianism.

To be sure, voters are not *completely* ignorant, and they do often know enough to punish those failures of incumbents that are extremely large, easy to understand, and highly publicized (Somin 1998, 427). This fact may explain Amartya Sen's famous finding that no democratic government has ever allowed a mass famine to take place among its own people (Sen 1999, 178).¹⁵ But most policy failures are far more complex and less easily noticed than a mass famine. In any event, the serious alternative to Posnerian Concept 2 democracy is not a dictatorial regime that can victimize its people with impunity, but a democratic government with much more limited powers than modern states currently have.

Posner recognizes that "public ignorance about political matters is staggering" (191n.84), but he fails to consider the fact that it extends to precisely the kind of information that voters need to have in order to meet even the minimal demands of his own theory. In his brief consideration of the issue of political ignorance, he claims that the problem is greatly alleviated by the fact that voters can rely on "information shortcuts" such as party and interest-group affiliation to make up for their ignorance (ibid., 191). This argument is often made by political scientists and economists,¹⁶ and Posner cites some of the relevant literature (ibid., 191-93). Unfortunately, he neglects a spate of recent work showing that information shortcuts are far less effective than advocates claim, and often actively mislead voters rather than helping them.¹⁷ Even some scholars who had previously been among the strongest advocates of shortcut theories now recognize that they are not adequate substitutes for basic political knowledge (e.g., Popkin and Dimock 1999). A recent review of the literature notes "signs of an emerging consensus" among scholars that "there is a level of basic knowledge below which the ability to make a full range of reasoned civic judgments is impaired" (Galston 2001, 218).

To be sure, Posner need not agree with recent criticisms of shortcut theories, and he certainly should not accept those criticisms just because they are currently gaining ground among scholars in the field. The academic majority can be wrong. It is, however, unfortunate that Posner endorses information shortcuts as a critical element of his Concept 2 theory without considering the numerous criticisms of them.

In addition to arguing for the efficacy of shortcuts, Posner also claims that political ignorance is not very important because voters really need to pay attention only “at historical turning points, such as 1860, 1932, 1934, 1964, and 1980, when big gaps yawn open between the parties and people feel strongly about which electoral outcome will best serve their interests” (169). This claim ignores the fact that voter knowledge affects not only the electorate’s decision to pick one major-party candidate over another, but also the parties’ decisions on which candidates and issue positions to put forward in the first place. Even if there is not much difference between the major party candidates in most elections--and this is far from self-evidently true--it does not refute the point that candidates and policy positions chosen might well have been different if the parties were facing a well-informed electorate.

A second problem with Posner’s claim that voter knowledge is important only at critical turning points is that political ignorance does not seem to decline during these times. For instance, political knowledge did not increase significantly during the New Deal period of massive crisis and constitutional change (Somin 2003). Many of the major new policies adopted during that period were in part intended to exploit voter ignorance (*ibid.*).

Since Posner focuses on the issue of political knowledge only briefly (158-63, 168-69, 186-93), it may seem like nitpicking to emphasize this question so much. However, the adequacy of voter knowledge is a critical underpinning of both his normative defense of Concept-2 democracy and his attempt to defend the claim that our political system does not need “radical reform in order to function well” (182).

Posner also fails to adequately address a second major shortcoming of Schumpeterian democracy: the danger of interest-group domination. Even in a hypothetical society with much higher political knowledge levels than our own, some interest groups are likely to be far more effective than others

because of their lower collective-action costs.¹⁸ Indeed, the smaller a group is and the more its interests are distinct from those of the general public, the easier it should be, other things being equal, for it to organize as an effective lobbying force (e.g., Olson 1965; Ackerman 1985).

Although the problem of interest group power is conceptually distinct from that of voter ignorance, the two are mutually reinforcing. If voters have little knowledge of public policy, they are likely to be unaware of harmful interest group activity, and therefore to be unable to unseat politicians who use government power to benefit interest groups at the expense of the general public. There may also be a causal mechanism in the opposite direction: from interest-group power to political ignorance. Interest group lobbying may have helped to perpetuate an education system that does a poor job of transmitting basic political knowledge.¹⁹

As one of the originators of modern economic interest-group theory (Posner 1974), Posner is aware of this defect in Concept-2 democracy (197-200), but he downplays it by claiming that, “as there is no evidence that nondemocratic regimes are less susceptible to [interest group] pressures, the frictions that interest groups create should be considered the ineliminable transaction costs of government” (199).

This approach to the problem is not entirely persuasive. Critics of the modern democratic state’s vulnerability to interest groups seek to replace it not with some form of dictatorship, but with a democratic government possessing only strictly limited powers. Such stringent limitations on power, enforced in part by the kind of strong judicial review Posner opposes (211-12), might be able to limit the scope of harmful interest-group exploitation of the democratic process.²⁰

The interrelated problems of voter ignorance and interest-group power suggest that Posner’s theory of Concept 2 democracy is less a defense of present political arrangements than an aspirational program that may require extensive political change to implement. Posner is undoubtedly right to claim that his theory is far less utopian than that of Concept 1 deliberative democracy, but he fails to recognize that his view may be considerably more optimistic than the evidence warrants.

Schumpeterian Democracy vs. Pragmatism

One of the main purposes of Posner's book is to combine the theories of pragmatism and Concept-2 democracy into a set of recommendations for the scope of judicial review.

Posner claims that pragmatism and Concept 2 democracy are mutually reinforcing (184-85). By implication, judges seeking to apply the two theories are unlikely to encounter many cases in which they contradict each other. Yet such contradictions can easily arise, given that the outcome that pragmatism counsels in any particular case will depend on an evaluation of the consequences of alternative decisions. As we have seen, Posnerian pragmatism does not by itself provide a coherent framework for determining which consequences are desirable and which ones are not. Depending on the situation, it is easy to imagine many instances in which "pragmatic" judges might make a good-faith decision that undermines democracy for the sake of advancing some other goal they consider more important.

For example, Posner criticizes the Supreme Court's decision to create a constitutional right to abortion in *Roe v. Wade* on the grounds that it undermines democracy and precludes state "experimentation" in the regulation of abortion (124-27). Yet a judge with a different normative perspective from Posner's might believe that protecting women's right to choose is so important that even modest restrictions on it should be considered a far worse outcome than any harm caused by a reduction in democratic experimentation. Nothing in Posner's theory enables him to demonstrate that this alternative view of *Roe* is wrong.

Posner does try to cabin the scope of judicial policymaking by arguing that judges should be reluctant to invalidate new, experimental public policies because such decisions risk "stifl[ing] . . . potentially worthwhile social experimentation" (79). If this claim is accepted, the antidemocratic implications of Posner's pragmatism might be lessened. But it is hard to accept, because the danger of stifling "worthwhile" experimentation must be weighed against the threat that harmful policies will become institutionalized and impossible to reverse. Such slippery-slope processes are a classic element of legal thought; while sometimes overblown, slippery slopes are also often very real (Volokh 2003). In

situations where the danger of irreversible institutionalization is especially great, there is a strong consequentialist case for judges to act against dangerous new policies as swiftly as possible (ibid.).

A second tension between Concept-2 democracy and pragmatism stems from the vast scope of discretion created by the latter. Pragmatism rejects the binding authority of traditional legal materials such as text and precedent, but also fails to provide a coherent framework for weighing the consequentialist merits of the alternative decisions a court could make. As a result, it would often have the effect of leaving judges with no basis for decision beyond their own policy preferences.

To be sure, Posner and others have argued that formalism, textualism, originalism, and other traditional approaches to jurisprudence also fail to control judicial discretion (e.g. 270-74; Posner 1990). I will not here attempt to canvas the vast literature on formalism and its alternatives, except to say that a theory that at least attempts to set stringent limits on the range of considerations that judges can take into account may achieve more constraint than Posnerian pragmatism, which sets almost none.

Extreme legal realists may be right to claim that all jurisprudential theories are mere facades that judges use to provide cover for decisions based on policy preferences alone.²² Yet this argument, even if valid, fails to provide any support for Posner's theory. If extreme legal realists are right, then it doesn't matter what theory judges adopt because the cases will be decided the same way regardless. In such a scenario, there is no reason to prefer Posner's theory to any other.

The Question of Judicial Restraint

Posner contends that pragmatism and Concept-2 democracy counsel judicial restraint in overruling legislation (211-12). As Posner puts it, "Concept 2 democrats, being more comfortable with our actual existing democracy than either its left-wing or right-wing critics, can be expected to be less activist than either wing" (ibid.). By contrast, "skeptics about the democratic process" are also more likely to be "skeptical about its most characteristic processes, namely legislation and executive discretion" (211).

Any link between Concept 2 democracy and judicial restraint is, however, heavily dependent on Posner's assumption that voter ignorance and interest-group power are not such serious problems that they prevent a political system from living up to even the limited ideals of Schumpeterian democracy. But if widespread voter ignorance and interest-group power ensure that a large proportion of all legislation, perhaps even the majority, reflect deviations from Schumpeterian democracy rather than examples of its proper functioning,²³ the implication of Concept 2 theory for judicial review may be greater judicial intervention than Posner is willing to support. As Posner notes (211), the more pessimistic we are about the legislative process, the lower the threshold level of quality judicial intervention has to meet before a consequentialist analysis would endorse it.

What is true of Posner's theory of Concept 2 democracy is also true of his broader theory of pragmatic adjudication. Whether or not a pragmatic consequentialist should endorse judicial overruling of legislation depends in large part on our judgment of the quality of legislative output. Posner argues that pragmatic judges should make such decisions based on an assessment of their likely consequences. Setting aside the question of how consequences should be evaluated from a normative standpoint, Posner fails to show that direct application of consequentialist reasoning by the judiciary is in fact likely to produce "good" consequences, however defined. Although Posner contends that judges should take account of evidence generated by social science in making pragmatic decisions (76-79), he also notes that "judges often know few [contextual and social scientific facts] . . . and therefore fall back on hunch, intuition, and personal experiences that may be misleading" (76). He concludes that "how to make judges better informed is a great challenge to the American judiciary" and proposes "concerted attention to remedies" for this problem (*ibid.*).

As Posner recognizes, it is unlikely that the United States will get a judiciary expert in social scientific analysis any time soon. Although Posner himself is a distinguished exception, most American judges have few or no social science qualifications, and this state of affairs is likely to continue. Indeed, a judiciary staffed by highly trained academics might be undesirable even if it were feasible.²⁴ It may be, that "hunch, intuition, and personal experience" (76) will sometimes make up for judges' lack of

systematic knowledge, but it seems unlikely that such seat-of-the-pants tools will be sufficient in the vast majority of cases involving difficult public policy issues.

Posner is in the position of arguing for a pragmatic consequentialist approach to judicial decision-making while simultaneously acknowledging that most judges lack the expertise necessary to apply such an approach. Recognition of this dilemma may contribute to Posner's recommendation that judges should follow traditional legal methods in deciding most cases (63). Yet this does not fully alleviate the problem because, in Posner's framework, the decision either to follow formalist methodology or to reject it must itself be based on pragmatic (consequentialist) considerations (63-64).

Given judges' lack of training in making such decisions, and the low probability of radically improving the situation, advocates of judicial pragmatism should perhaps rethink their rejection of judicial formalism. At least in the area of constitutional interpretation, formalist methodology has a major consequentialist benefit that cannot be captured by a direct judicial application of consequentialism. Under the U.S. Constitution, formal amendments cannot become part of the constitutional text without ratification by two-thirds of each house of Congress, and three-quarters of all state legislatures. This supermajority requirement alleviates the problems of voter ignorance and interest group power that bedevil ordinary legislation. A supermajority requirement ensures that legislation cannot easily be adopted at the behest of a narrow interest group; similarly, amendments cannot be adopted solely by exploiting the ignorance of the majority of the electorate, because the supermajority requirements cannot be met without also gaining support from a large part of the more knowledgeable minority within the electorate.²⁵

By adhering to the text and original intent of the Constitution without attempting an independent analysis of consequences, judges can enforce an interpretation of law that reduces the influence of the two most serious weaknesses of the modern democratic state. This doesn't mean that text and original intent should *always* be decisive, or that judges should *never* be influenced by other considerations. It does, however, suggest that the case for legal formalism--at least in constitutional cases--is stronger than Posner believes.

Conclusion

The apparent failure of Posner's theory of pragmatism, democracy, and judicial review should not obscure the soundness of many of the individual points in his book; nor should it be allowed to detract from the power of many of his criticisms of alternative positions. As noted above, Posner presents a powerful critique of Concept 1 deliberative democracy and of those academic works that advocate basing judicial review on Concept 1 democratic theory. Nonetheless, the central theses of Posner's wonderfully provocative book--his defenses of pragmatism, Schumpeterian democracy, and the use of these two theories to guide judicial review--remain unproven. The modern democratic state has more serious flaws than Posner is willing to admit, and a pragmatism without a "moral compass" (55) is not an adequate theory of judicial review.

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¹ A 2000 study finds that Posner has almost twice as many academic citations as the second-most cited legal scholar, Ronald Dworkin (Shapiro 2000, 423 Table 6).

² Determining judicial citation rates is a complex endeavor. Nonetheless, Judge Posner comes out ahead on many citation-based measures of judicial influence (Landes, et al. 1998). These measures utilize the citation rates of his opinions in opinions written by other judges (Ibid.).

³ Posner's argument that moral theory is ineffective as a constraint on public policy is more fully developed in Posner 1999a, ch. 1.

⁴ For leading examples of works advocating deliberative democracy and other similar theories, see, e.g., Gutmann and Thompson 1996; Bohannon 1996; Cohen 1997; Sunstein 1993 and 2001; and Nino 1996. For criticisms, see, e.g., Sanders 1997; Stokes 1998, and Somin 1998, 438-42.

⁶ For examples of various restrictions on political participation advocated by deliberative democrats, with citations to the relevant literature, see Posner's discussion (158-63) and Somin (1998, 438-39).

⁷ I have criticized deliberative democracy on related grounds myself (Somin 1998, 438-42).

⁸ See citations listed by Posner (155-57, 160-62). For recent examples of this tendency among deliberative democrats and other scholars with a stringent conception of democracy, see, e.g., Dworkin 1996; Sunstein 1993, 2001, and 2002; and Rubinfeld 2001.

⁹ Posner does cite Wittman's work (191 n.84), but not similar works by the leading political scientists listed above.

¹⁰ This formulation is adapted from Somin (2004). See also Somin (1998, 426-27).

¹¹ For the most thorough study, see Delli Carpini and Keeter (1996). For my own work, see Somin (1998) and Somin (2004).

¹² See, e.g., sources cited in Note 8.

¹³ Ignorance of party control of Congress is not a new phenomenon. See, e.g., Bennett and Bennett 1992.

¹⁴ Much of the preceding paragraph is adapted from Somin (2004).

¹⁵ The qualification is important because democratic nations have, on occasion, allowed mass famines to take place in their colonial possessions when the afflicted populations were not represented in the colonial power's legislature. Famines in India under British rule are a well-known example (Sen 1999).

¹⁶ For two well-known works see Popkin 1991 and Wittman 1995. For more extensive citations to the literature defending information shortcuts, see Somin 1998, 419-29.

¹⁷ For a nontechnical summary of this trend in the literature and its implications, see Galston 2001.

¹⁸ For the classic analysis, see Olson 1965.

¹⁹ For the argument that many failures of the public-education system can be traced to the power of interest groups such as teachers' unions, see, e.g., Lieberman 1994. Galston (2001) argues that the education system does a poor job of teaching basic political knowledge, despite evidence that alternative curricula might increase knowledge.

²⁰ The best-known modern work making this case is Buchanan and Tullock 1962.

²² For a thorough social scientific defense of this position, see Segal and Spaeth (2003).

²³ For the argument that voter ignorance ensures that a high proportion of legislation does not reflect meaningful popular democratic control over government, see Somin (2004). In this article, I contend at some length that the knowledge prerequisite for democratic control are generally lacking even relative to the comparatively modest demands of Schumpeterian theory (*ibid.*).

²⁴ Posner himself has expressed opposition to the idea of a judiciary composed primarily of academics (Posner, speech at Northwestern Law School, November 2002).

²⁵ For detailed analysis of the benefits of supermajority rules embedded in the Constitution, see McGinnis and Rappaport 2002.