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Judicial Pragmatism: Strengths and Weaknesses in Common Law Adjudication, Legislative Interpretation, and Constitutional Interpretation, 52 UIC J. Marshall L. Rev. 369 (2019)

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JUDICIAL PRAGMATISM: STRENGTHS AND WEAKNESSES IN COMMON LAW ADJUDICATION, LEGISLATIVE INTERPRETATION, AND CONSTITUTIONAL INTERPRETATION

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Abstract

Judicial pragmatism is a judicial methodology known for its future-looking mode of analysis, empirically-based decision making, and openness to judicial activism. In terms of strengths, judicial pragmatism helps to (1) maximize wealth and efficiency, (2) resolve truly novel cases, and (3) account for legislative shortcomings. In terms of weaknesses, judicial pragmatism poses the risks of (1) judicial tyranny, (2) overdependence on the social sciences, and (3) marginalization of important moral values. Although judicial pragmatism has generally been accepted as a helpful analytical approach, questions still remain over the extent to which it is helpful to judges in common law adjudication, legislative

interpretation, and constitutional interpretation. The area in common law adjudication where judicial pragmatism offers promise is where the facts in the case are truly novel and the application of traditional common law rules is inefficient. In legislative interpretation, judicial pragmatism offers promise where the statute is vague, provides no instruction on how to interpret the statute, and has indicia of “delegation” of lawmaking authority to the courts. Finally, the area in constitutional interpretation where judicial pragmatism offers promise is where the issues involve truly novel facts and pressing social needs that are indirectly covered by the Constitution.

I. INTRODUCTION

By the time Judge Richard Posner retired from the United States Court of Appeals for the Seventh Circuit on September 2, 2017, he voiced many concerns about the federal judicial system in his academic writings.¹ He continued to criticize the overly “formal” and “reactionary” tendencies of some judges when adjudicating cases.² In common law adjudication, for example, Judge Posner claimed that judges too often focus on antiquated precedents and rigid procedures instead of deciding cases based on more “sensible” resolutions.³ Judge Posner also claimed that in constitutional interpretation, the judiciary is too fixated on “backward-looking” rather than “forward-looking” modes of analysis.⁴ In the realm of legislative interpretation, Judge Posner contended that judges too often defer to rigid procedures and strict readings of legislative texts to the detriment of more sensible interpretations.⁵

To overcome these so-called “problems of jurisprudence,”⁶ Judge Posner proposed that the judiciary adopt “judicial pragmatism.”⁷ In broad terms, judicial pragmatism is a

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1. RICHARD A. POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* 21 (2017) [hereinafter POSNER, *THE FEDERAL JUDICIARY*] (criticizing several aspects of the federal judicial system).

2. *Id.* at 54–55; Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

3. POSNER, *THE FEDERAL JUDICIARY*, *supra* note 1, at 80.

4. *Id.* at 50.

5. *Id.*

6. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454–55 (1990) [hereinafter POSNER, *THE PROBLEMS OF JURISPRUDENCE*] (criticizing several aspects of modern American law).

7. *Id.* at 387 (stating that jurisprudence is greatly in need of a shift in

jurisprudential approach with three core characteristics. First, judicial pragmatism aims to decide cases in ways that would best serve the interests of the present and future.⁸ Although pragmatist judges consider history when adjudicating cases, they have no “ethical duty” to adhere to precedent as an end in itself.⁹ Second, judicial pragmatism rests on the belief that better judicial decisions result when judges are better informed in relevant empirical studies.¹⁰ When deciding antitrust cases, for example, pragmatist judges look to educate themselves in economic theories before making a final decision.¹¹ Finally, judicial pragmatism envisions judges as more than just rule applicers; pragmatist judges must sometimes be “rule makers,” especially where there are gaps in the law or glaring perversities in legislation.¹²

Although judicial pragmatism has generally been accepted as a helpful analytical approach, questions still remain over the extent to which it is helpful to judges in common law adjudication, legislative interpretation, and constitutional interpretation. On one hand, supporters praise judicial pragmatism’s ability to maximize wealth and efficiency.¹³ Supporters also tout the approach’s ability to handle complex factual scenarios and account for legislative shortcomings.¹⁴ On the other hand, critics challenge judicial pragmatism on the grounds that it promotes judicial tyranny, unpredictability, and unintelligibility in the law.¹⁵ Critics also argue that judicial pragmatism marginalizes important abstract values, given its tendency to concentrate primarily on tangible factors such as wealth.¹⁶ Furthermore, even Judge Posner expressed concerns about the ability of judges to “analyze and absorb the theories and

direction toward pragmatic analysis).

8. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4 (1996) [hereinafter Posner, *Pragmatic Adjudication*].

9. Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 684 (2004) [hereinafter Posner, *Legal Pragmatism Defended*]. See also Posner, *Pragmatic Adjudication*, *supra* note 8, at 5 (stating that pragmatist judges do not regard the “maintenance of consistency with past decisions as an end in itself”).

10. Posner, *Legal Pragmatism Defended*, *supra* note 9, at 684.

11. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 3 (1976) [hereinafter POSNER, ANTITRUST LAW] (stating that the antitrust field is in need of a thorough rethinking among judges and that the essential intellectual tool for the process of rethinking is the science of economics).

12. Posner, *Pragmatic Adjudication*, *supra* note 8, at 19.

13. Peter F. Lake, *Posner’s Pragmatist Jurisprudence*, 73 NEB. L. REV. 545, 625–27 (1994).

14. Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1658 (1990) [hereinafter Posner, *What Has Pragmatism to Offer Law?*].

15. Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 MICH. L. REV. 819, 829–33 (2018).

16. Posner, *Legal Pragmatism Defended*, *supra* note 9, at 684.

data of social science.”¹⁷ Because many judges are neither trained nor experts in such matters, they may be unable to answer judicial pragmatism’s call for empirically-based decision making.¹⁸

This Article attempts to contribute to this debate by arguing that judicial pragmatism is an especially helpful tool in some areas of the law, but not so much in others. Judicial pragmatism is especially helpful in factually novel cases where traditional categories of law do not neatly apply. This Article proceeds in Part II with an overview of the core characteristics of judicial pragmatism. Part III reviews the common strengths and weakness of judicial pragmatism, as described in the existing body of literature. Part IV analyzes the extent to which judicial pragmatism is a helpful tool in common law adjudication, legislative interpretation, and constitutional interpretation. Finally, Part V concludes with a review of the implications of this study.

II. JUDICIAL PRAGMATISM EXPLAINED

Judicial pragmatism is associated with philosophical pragmatism, an early 20th century American movement that offered an unconventional approach to elicit meaning and truth.¹⁹ Philosophical pragmatism advances the view that the meaning of doctrine is equivalent to the “practical effects or experimental results of adhering to it.”²⁰ If a doctrine produces useful predictions or beneficial innovations over the long term, then the doctrine is “true” and meaningful, according to philosophical pragmatism.²¹ For example, philosophical pragmatism views science and the scientific method as prime examples of true and meaningful doctrine because they produce concrete, empirical, and useful results.²²

Judicial pragmatism similarly values practicality, experimentation, and success-based reasoning, but is distinguishable from philosophical pragmatism in that judicial pragmatism conceptualizes “pragmatism” in a more modern sense.²³ Rather than engaging in abstruse “philosophical hair-splitting,” judicial pragmatism focuses more on “the bottom line,” “what works,” and the maximization of wealth and efficiency.²⁴ In broad terms, judicial pragmatism is a jurisprudential approach with three core characteristics: (1) a future-looking mode of

17. Posner, *Pragmatic Adjudication*, *supra* note 8, at 9.

18. *Id.*

19. Brian Bix, JURISPRUDENCE THEORY AND CONTEXT 282 (2015).

20. *Id.* at 283.

21. *Id.*

22. *Id.*

23. *Id.* at 284.

24. *Id.* at 284–85.

analysis,²⁵ (2) empirically-based decision making,²⁶ and (3) an openness to judicial activism.²⁷

A. *Future-Looking Mode of Analysis*

Judicial pragmatism aims to best serve “present and future needs” when deciding cases.²⁸ Specifically, it conceptualizes law as an instrument that serves ongoing human needs.²⁹ Instead of looking backwards to restore a preexisting equilibrium of rights in a corrective justice sense, pragmatist judges look forward to determine which resolutions are the most sensible.³⁰ Because traditional legal forms are sometimes inapplicable in modern day cases, pragmatist judges rely more on the facts of a present case to determine the most sensible resolution.³¹

A sensible resolution is commonly associated with wealth maximization, according to judicial pragmatists.³² Sensible resolutions offer more wealth to both the parties and society.³³ Some cases readily determine which resolution generates the most “wealth.” For example, in cases concerning requests for a remittitur, pragmatist judges weigh the costs and benefits of granting the remittitur versus the costs and benefits of ordering a new trial limited to damages.³⁴ The more sensible resolution is the one that provides maximum net gains.³⁵ In other cases, by contrast, wealth-maximizing resolutions may be harder to determine. These cases often involve considerations of intangible factors.³⁶ For example, in statute of limitation cases, the tradeoff between rendering substantive justice to the plaintiff and maintaining the law’s certainty and predictability is difficult to balance and quantify.³⁷ Although cases concerning intangible factors present more challenging tradeoff inquiries, pragmatist judges agree that

25. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5.

26. Posner, *Legal Pragmatism Defended*, *supra* note 9, at 684.

27. Posner, *Pragmatic Adjudication*, *supra* note 8, at 13, 19.

28. *Id.* at 5.

29. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1667.

30. *Id.* at 1657.

31. Posner, *Pragmatic Adjudication*, *supra* note 8, at 7–8.

32. *See* Lake, *supra* note 13, at 623–27 (reviewing several of Judge Posner’s works that advocate resolutions which maximize wealth).

33. *Id.* at 637.

34. *See* *Davis v. Consol. Rail Corp.*, 788 F.2d 1260, 1267 (7th Cir. 1986) (stating that the policy behind the device of remittitur is to provide just economy between the litigants); *Strickland v. Owens Corning*, 142 F.3d 353, 360 (6th Cir. 1998) (same).

35. *Id.*

36. *See* Lake, *supra* note 13, at 595 (describing how issues concerning intangibles such as the promotion of human dignity are difficult to measure for Judge Posner and judicial pragmatists).

37. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5.

resolutions should focus on wealth maximization.³⁸

Judicial pragmatism also advances the view that judges have no “ethical duty” to adhere to legal precedents.³⁹ Because pragmatist judges prioritize present and future needs, they “do not regard the maintenance of consistency with past decisions as an end in itself.”⁴⁰ To be sure, pragmatist judges still rely on the past to determine the purpose and scope of rules.⁴¹ They also value precedential information for the sense of direction they provide for subsequent cases.⁴² But because judicial pragmatists decide cases with an eye towards the future, they rely on historical and legal precedents only to the extent that doing so brings about better results in present cases.⁴³

As a forward-looking judicial methodology, judicial pragmatism prioritizes present and future needs when adjudicating cases. Judicial pragmatism aims to satisfy present and future human needs by directing judges to consider which resolution would provide the most wealth and efficiency to both litigants and society. Although judicial pragmatists do not entirely reject the value of history and legal precedent, they are willing to depart from the past if doing so best serves present and future human needs.

B. Empirically-Based Decision Making

Judicial pragmatism rests on the belief that better judicial decisions result when judges rely on “theories and data of social science.”⁴⁴ Like philosophical pragmatism, judicial pragmatism values scientific methods of analysis.⁴⁵ Although pragmatist judges understand that complete objectivity is impossible in adjudication, they still strive to be objective by deciding cases in ways that are testable, duplicable, and backed by empirical data.⁴⁶

Studying the social sciences ensures that pragmatist judges have a more objective understanding of the facts. Because the search for sensible resolutions for cases requires pragmatist judges to concentrate more on the facts than the law, an objective understanding of the facts is essential.⁴⁷ In antitrust cases, for example, a pragmatist judge looks to economic theories and data to

38. See Lake, *supra* note 13, at 550.

39. Posner, *Legal Pragmatism Defended*, *supra* note 9, at 684.

40. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 9.

45. *Id.* at 1.

46. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1663–64 (noting that pragmatists persistently derive knowledge from observation and empirical analysis); Lake, *supra* note 13, at 559–60 (stating that pragmatism focuses on the continual testing and retesting of accepted truths).

47. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5.

help determine whether a business has restrained interstate commerce.⁴⁸ Without a firm grasp of the findings from economic studies, judges risk making decisions that are out of touch with the realities of the economic world.⁴⁹

By contrast, judicial pragmatists are less interested in abstract values and moral theories because, unlike scientific data, abstract values and moral theories are often subjective and indeterminate.⁵⁰ Decisions based on abstract conceptions of moral philosophy provide little practical use in the real world.⁵¹ While imperfect in ensuring objectivity, social sciences promote experimentation and discovering solutions, and are more useful to solving real-life issues. In cases concerning abortion laws, for example, judicial pragmatists claim that decisions should be made less on the basis of normative arguments.⁵² Instead, decisions should be reached on the basis of the factual effects of abortion laws on women, children and the family.⁵³

Judicial pragmatists rely on social science theories and data to decide cases more objectively. Because the social sciences are rooted in empirical analysis, judges informed in social sciences are better able to make decisions in touch with real-life modern developments. Accordingly, judicial pragmatism relies less on abstract values and moral theories due to their subjective and less scientific nature.

C. Judicial Activism

Pragmatist judges are more than just rule appliers; they are sometimes “rule makers.”⁵⁴ Especially when the law is ambiguous or perverse, pragmatist judges often act as more than just “faithful agent[s] of the legislature” and instead apply their own interpretations of the law.⁵⁵ For example, when a law is ambiguous and the legislature fails to address the ambiguities, pragmatist judges take it upon themselves to interpret the law in ways they think is most sensible.⁵⁶ Pragmatist judges might also look to apply

48. POSNER, *ANTITRUST LAW*, *supra* note 11, at 3 (stating that the science of economics is essential to rethinking the substantive and administrative aspects of terms such as “restraint of trade” and “monopolize”).

49. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1667–68.

50. *See* Lake, *supra* note 13, at 624 (describing how abstract, intangible, policy analysis is incompatible with cost-benefit analysis under judicial pragmatism).

51. *Id.*

52. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1668 (noting that legal pragmatism cannot answer the normative question whether abortion should be restricted, but that legal pragmatism can say something about the efficiency and consequences of such restrictions).

53. Posner, *Pragmatic Adjudication*, *supra* note 8, at 9.

54. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1657.

55. *Id.* at 1658.

56. *Id.*

their own sensible interpretations of the law when the legislature is so “buffeted by interest groups” that the existing body of law is not “informed by sound policy judgments.”⁵⁷ Under such situations, pragmatist judges feel justified to convert themselves from rule-apppliers to rule-makers.

Pragmatic adjudication does not necessarily mean “lawless” adjudication.⁵⁸ Judicial pragmatists agree that judicial lawmaking is secondary to the lawmaking powers of the legislature.⁵⁹ Even Judge Posner acknowledged that judges engage in “judicial tyranny” when judges issue orders with no basis in law and merely based on the belief the orders will have good results.⁶⁰ But when the law is unclear, perverse, or outright absent, pragmatic considerations may compel judges to take action.⁶¹ This is especially apparent, according to judicial pragmatists, when the legislature has been overly slow or evasive in addressing the judiciary’s concerns.⁶²

III. STRENGTHS AND WEAKNESSES OF JUDICIAL PRAGMATISM

Supporters and critics of judicial pragmatism have had much to say about the pragmatic approach. The alleged strengths and weakness of judicial pragmatism are well recorded in the existing body of literature. In terms of strengths, judicial pragmatism is known for (1) maximizing wealth and efficiency, (2) resolving truly novel cases, and (3) accounting for legislative shortcomings. In terms of weaknesses, judicial pragmatism poses the risks of (1) judicial tyranny, (2) overdependence on the social sciences, and (3) marginalization of important moral values.

A. Strengths

One commonly accepted strength of judicial pragmatism is its tendency to maximize wealth and efficiency.⁶³ According to Judge Posner, pragmatic adjudication aims to uphold the Pareto principle, whereby decisions are judged “Pareto superior” if they leave someone better off and no one worse off.⁶⁴ This judicial approach is

57. *Id.*

58. Posner, *Pragmatic Adjudication*, *supra* note 8, at 17.

59. *Id.*

60. *Id.*

61. *Id.* at 19.

62. POSNER, *THE FEDERAL JUDICIARY*, *supra* note 1, at 414–15.

63. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 22.7 (9th ed. 2014) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*] (describing how efficiency is promoted as inefficient rules continuously get reevaluated in courts).

64. Lake, *supra* note 13, at 637. The Pareto concept is named after Vilfredo Pareto who applied the principle in studies of economic efficiency and wealth

appealing because pragmatic decisions together in the aggregate leave society better off.⁶⁵ Serving the “social welfare” is an important policy objective, according to Judge Cardozo.⁶⁶ By contrast, decisions based on strict legal forms can be slow, inefficient, and costly to society.⁶⁷ In contract law, for example, formal requirements to perform under a contract may be inefficient if breaching the contract and paying damages instead would leave the contracting parties better off.⁶⁸ The pragmatic concept of “efficient breach” is one of many examples of pragmatic approaches that has helped individuals maximize time, money, and opportunities.⁶⁹

Another strength of judicial pragmatism is the ability to resolve novel cases. Because pragmatist judges emphasize facts more than law, they are better equipped to resolve factually novel cases where traditional legal concepts do not neatly apply.⁷⁰ Pragmatist judges find sensible resolutions for new cases by examining the facts with help from the social sciences, rather than by plugging those facts imperfectly into traditional legal categories.⁷¹ For example, when underground oil reserves first became commercially accessible, pragmatist judges looked to the teachings of natural resources economists and oil and gas engineers to determine the best judicial approach for deciding oil ownership.⁷² Such an approach helped avoid the problems that formalist judges faced when they struggled to associate underground oil with traditional property-law categories, such as the doctrine of *ferae naturae*.⁷³

distribution. *Id.* The Pareto principle is commonly used by state planners and economists looking to maximize the efficient use of state resources. *Id.* Judge Posner cites the Pareto principle to highlight judicial pragmatism’s ability to maximize wealth. *Id.*

65. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 517 (1980).

66. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 71–72 (1921).

67. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1656–57 (noting that formalist ideas may not serve the social welfare because it is too backward looking rather than forward looking).

68. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985).

69. *Id.*

70. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5–8. (reviewing two example cases involving novel facts in which traditional legal categories do not neatly apply: commercialization of underground oil and surrogate motherhood contracts).

71. *Id.* at 9–10.

72. *Id.* at 6–7.

73. Edward Cantu, *Posner’s Pragmatism and the Turn Toward Fidelity*, 16 LEWIS & CLARK L. REV. 69, 103–04 (2012) (noting Judge Posner’s criticisms of the use of the *ferae naturae* doctrine in commercial underground oil cases). The doctrine of *ferae naturae* states that a wild, undomesticated animal is not subject to a person’s absolute ownership unless that person obtains absolute

Furthermore, judicial pragmatism accounts for legislative shortcomings. According to Judge Posner, “American courts cannot, if they want ‘the best results,’ leave all rulemaking to legislatures, for that would result in legal gaps and perversities galore.”⁷⁴ Legal “gaps” in the law arise when legislation is unclear or silent as to a relevant issue.⁷⁵ Another legislative shortcoming takes place when the legislature neglects its lawmaking duties and instead becomes preoccupied with constituents.⁷⁶ Judges might also feel compelled to act when the legislature gives the judiciary “guidance that is defective in one way or another, and then does nothing by way of remedy when the problem comes to light.”⁷⁷ Under such scenarios, according to Judge Posner, pragmatist judges have no choice but to apply their own sensible interpretations of the law.⁷⁸

B. Weaknesses

A weakness of judicial pragmatism is that it poses the risk of judicial tyranny. As a matter of constitutional structure, pragmatist judges go beyond their constitutional mandate when making law or policy.⁷⁹ Pragmatist judges effectively “usurp[] the role of ‘other’ political branches” when they decide cases based not on legal forms or precedent, but on what they think is “sensible.”⁸⁰ Such decision-making powers, critics claim, “drain the ability of the people, through their elected representatives, to resolve social problems.”⁸¹ Another danger of granting such decision-making powers to judges is that the outcome of cases become less consistent and predictable.⁸² The uniformity of the law and equal treatment of litigants cannot be upheld, according to legal formalists, if judges have the power to decide cases based on their sensibilities rather than on laws fixed by precedent and legislation.⁸³ People across the U.S. need a common “starting point” of the law to “coordinate and

control over the animal by, for example, capturing or killing it. *Id.* Judge Posner claimed that analogizing underground oil with wild animals was improper and formalistic. *Id.* He criticized cases like *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204 (Ky. 1934) that applied the *ferae naturae* doctrine in commercial underground oil cases. *Id.* at 103.

74. Posner, *Pragmatic Adjudication*, *supra* note 8, at 19.

75. See CARDOZO, *supra* note 66, at 14 (stating that the gap-filling role of judges is to clear up ambiguities and discover meaning in legislative texts). An example of a judge performing a gap-filling function is when a judge determines the precise meaning or intent of a vaguely written statute.

76. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 801 (1963).

77. *Id.* at 792.

78. Posner, *Pragmatic Adjudication*, *supra* note 8, at 19–20.

79. Thapar & Beaton, *supra* note 15, at 826.

80. *Id.* at 827.

81. *Id.* at 833.

82. *Id.* at 829.

83. *Id.* at 832–33.

organize their lives around shared and certain principles.”⁸⁴

Another weakness of judicial pragmatism concerns the capacity of judges to apply theories and data from social sciences. Because most judges are neither trained nor experts in those fields, it may be unrealistic to expect judges in each case to quickly and accurately familiarize themselves with complex data and empirical methods.⁸⁵ A particular problem that might arise in this context is overreliance by judges on “gut reactions” and “hunches.”⁸⁶ Judges might, for example, select specific datasets based on intuition, even though those datasets pose a risk of mistake and unfairness to the parties.⁸⁷ Justice Brandeis may have made such an error, according to Judge Posner, when he attempted to study and apply economic theories and data in some of his decisions.⁸⁸ Justice Holmes has similarly been criticized for his decision to permit the sterilization of the mentally handicap based on his understanding of social and biological theories concerning eugenics.⁸⁹

Another weakness of judicial pragmatism is the tendency to marginalize important moral values. By focusing primarily on wealth maximization and efficiency, judicial pragmatism neglects how wealth is often unequally distributed.⁹⁰ Judicial pragmatism helps maximize wealth in terms of absolute gains, but in terms of relative gains, it often channels wealth to some individuals more so than to others.⁹¹ Furthermore, with its emphasis on tangible factors, judicial pragmatism tends to discount moral values such as liberty, due process, and dignity.⁹² For example, regarding slavery, even pragmatists acknowledge that it follows from the concept of wealth maximization that pragmatist judges would be inclined to rule in favor of free labor and indentured servitude over free will, liberty and self-determination.⁹³ The strict “cost-benefit wealth

84. *Id.* at 829.

85. Posner, *Pragmatic Adjudication*, *supra* note 8, at 9.

86. *Id.*

87. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263 (2012).

88. Posner, *Pragmatic Adjudication*, *supra* note 8, at 9.

89. *Id.*; *see* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (holding that sexual sterilization of mentally handicap inmates under Virginia law did not violate the Constitution). This case concerned a Virginia state law which allowed for the sexual sterilization of inmates at a mental institution in order to promote the “health of the patient and the welfare of society.” *Buck*, 274 U.S. at 205. The issue before the Supreme Court was whether the state law violated the due process and equal protection rights of the inmates under the Fourteenth Amendment. *Id.* Justice Holmes upheld the state law on the grounds that the inmates’ rights were not violated because the sterilizations took place only “after months of observation” by institution officials. *Id.* at 207. In addition, Justice Holmes affirmed the value of the law in order to “prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.” *Id.*

90. Lake, *supra* note 13, at 631.

91. *Id.* at 631–35.

92. *Id.* at 595–96.

93. *Id.* at 631.

maximization calculus” also might support the practice of “torture or coercion” if it produces the desired results more efficiently.⁹⁴ Because judicial pragmatism prioritizes wealth and efficiency over abstract values, it may support some immoral practices that “[moralists] would find utterly reprehensive.”⁹⁵

IV. JUDICIAL PRAGMATISM IN COMMON LAW ADJUDICATION, LEGISLATIVE INTERPRETATION, AND CONSTITUTIONAL INTERPRETATION

A. Common Law Adjudication

Common law adjudication is known for its emphasis on stare decisis and judge-made law.⁹⁶ When statutes and the Constitution are silent, the judge acts as a “living oracle of the law” by looking to the common law for the rule that fits the case.⁹⁷ Specifically, common law judges look to factually-similar precedent cases and use analogical reasoning to help determine the outcome of the new case before them.⁹⁸ The factual circumstances or “type situation” of past cases are important,⁹⁹ but so is the past judge’s interpretation of those facts under the law, history, justice, and the “*mores* of the day.”¹⁰⁰ Judges move the common law forward using both the “head and heart.”¹⁰¹ Because no two cases are identical, common law judges make new law in the sense that they apply precedent cases to new cases, which then serve as new precedents for similarly situated future cases.¹⁰² The accretion of case law in this manner forms the basis by which the common law both develops and maintains consistency,¹⁰³ which is an important objective of

94. *Id.* at 632.

95. *Id.*

96. See CARDOZO, *supra* note 66, at 14, 18–19 (reviewing the judge-made law process and describing how judges identify and apply rules from common law that fit their case); Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747, 779 (2006).

97. See CARDOZO, *supra* note 66, at 18–19 (citing Judge William Blackstone’s vivid phrase).

98. See Cunningham, *supra* note 96, at 747–48 (describing common law as an iterative system in which cases create legal results available for use in succeeding cases).

99. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 402 (1960).

100. See CARDOZO, *supra* note 66, at 31 (reviewing some of the factors judges consider in common law adjudication).

101. William Brennan, *Reason, Passion, and “The Progress of the Law”*, 10 CARDOZO L. REV. 3, 10 (1988).

102. See CARDOZO, *supra* note 66, at 20–21 (describing stare decisis and how judges examine, compare, and apply past cases to make the “right and wrong of tomorrow[’s cases]”).

103. See Cunningham, *supra* note 96, at 747–48 (stating that common law is an iterative process consisting of repeated dispute resolution in discrete cases).

common law adjudication.¹⁰⁴

The common law's emphasis on consistency, however, does not mean that the common law remains fixed.¹⁰⁵ Common law judges "change" the law when they enter judgment in a new case not in accordance with the ruling of a similarly situated past case.¹⁰⁶ The change may be warranted because the "test of experience" may prove that the past ruling is wrong or unjust,¹⁰⁷ or modern developments in society, such as the "great inventions that embodied the power of steam and electricity," call for reformation.¹⁰⁸ If the law of precedent cases "cannot prove their worth and strength," then they may be "sacrificed mercilessly and thrown into the void."¹⁰⁹ In this sense, the common law "works itself pure" by correcting itself for its past mistakes.¹¹⁰

1. *Strengths of Judicial Pragmatism in Common Law Adjudication*

Judicial pragmatism offers several advantages if applied in common law adjudication. First, judicial pragmatism would help guide the oracles of common law to those precedent cases that offer the most efficient resolutions.¹¹¹ Because the factual circumstances of a new case are never the same as those of past cases, common law judges have room to decide which precedent cases are most helpful.¹¹² Here, a common law judge applying the pragmatic approach would avoid those cases that failed to prove their worth over the course of time in terms of efficiency and wealth-maximization.¹¹³ With no ethical duty to abide by those precedents as an end in itself,¹¹⁴ a judge may throw them "into the void."¹¹⁵ Instead, the common law judge applying the pragmatic approach

forming links over time).

104. See CARDOZO, *supra* note 66, at 21–22 (stating that judgments in common law have important generative power as legal precedents which serve as the "source from which new principles or norms may spring to shape sentences thereafter").

105. *Id.* at 28.

106. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 635–36 (1990).

107. CARDOZO, *supra* note 66, at 22–23.

108. *Id.* at 62.

109. *Id.* at 22.

110. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U.L. REV. 1551, 1552 (2003) (citing Lord Mansfield's famous quote describing the common law's self-healing nature).

111. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 63, at § 22.7 (explaining the value of promoting efficiency in the law).

112. CARDOZO, *supra* note 66, at 23.

113. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 63, at § 22.7 (describing how efficiency is promoted as inefficient rules continuously get reevaluated in courts).

114. Posner, *Pragmatic Adjudication*, *supra* note 8, at 5.

115. CARDOZO, *supra* note 66, at 22.

would select the case that best serves the interests of the present and future in terms of wealth and efficiency.¹¹⁶ Given that the common law is often criticized for developing slowly and inefficiently, judicial pragmatism would help push the common law forward rather than restrain it to the past.¹¹⁷

Furthermore, judicial pragmatism's reliance on the theories and data of social science enables common law judges to determine which precedent to apply in a new case and which precedent to avoid or overrule.¹¹⁸ Because pragmatist judges study the social sciences to ensure that they have a more objective and empirical understanding of the facts, a common law judge applying the pragmatic approach could better detect when a precedent case is or is not factually on point.¹¹⁹ Sometimes the social sciences may disprove factual assumptions of a precedent line of cases and call for its redirection or demise.¹²⁰ For example, in *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson*'s "separate but equal" doctrine after learning from social science experiments that "separate" was inherently *not* "equal."¹²¹ Other times, the social sciences may reveal that another line of cases previously considered unrelated actually applies to the present case.¹²² For example, after realizing the inapplicability of the traditional "ferae naturae" doctrine to commercial underground oil, some courts shifted to applications of other property law doctrines concerning water law, air law, and mineral law.¹²³ By guiding common law judges towards the most factually relevant precedents, judicial pragmatism enhances the common law's ability to enhance the law and "work[] itself pure."¹²⁴

116. See Lake, *supra* note 13, at 623–27 (reviewing several of Judge Posner's works that advocate judgments which generate wealth and efficiency).

117. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 63, at § 22.7 (stating that rules get more efficient rules as inefficient rules get reevaluated and replaced).

118. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1663–64 (reviewing the sequence pragmatic judges go through in common law adjudication when deciding which rule to apply).

119. See Posner, *Pragmatic Adjudication*, *supra* note 8, at 6–7 (stating in an example how the pragmatic judge particularly studies the facts and then decides which law would produce the best result when applied).

120. *Id.* at 9–12.

121. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494–95 (1954) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896)).

122. Wm. E. Colby, *The Law of Oil and Gas*, 31 CAL. L. REV. 357, 371–72 (1943) (explaining how various property law doctrine may apply in novel property cases).

123. *Id.* at 375–77 (explaining how one court applied fluid and mineral law principles to distinguish another case that applied the *ferae naturae* doctrine).

124. See Zywicki, *supra* note 110, at 1552 (describing how a goal of common law is to self-correct itself by amending inefficient rules).

2. Weaknesses of Judicial Pragmatism in Common Law Adjudication

Judicial pragmatism comes with risks if applied in the common law context. First, a common law judge applying the pragmatic approach might neglect precedent cases that stand for important moral values.¹²⁵ By emphasizing efficiency and wealth-maximization, judicial pragmatism undermines the common law judge's duty to review the law and facts of a case in accordance with social welfare, justice, and the "heart."¹²⁶ Judicial pragmatism may obstruct the vision of the "oracles" of the law with a set of normative blinders. For example, a common law judge applying the pragmatic approach would see precedent cases that best promote wealth and efficiency, but be unable to see how the gains from applying those cases are often unequally distributed.¹²⁷ Furthermore, a common law judge applying the pragmatic approach might neglect the normative values of consistency and uniformity.¹²⁸ By allowing common law judges to select cases that best serve the interests of the present and future in terms of efficiency and wealth-maximization, judicial pragmatism diverts judges from *stare decisis's* pursuit for historical consistency and predictability.¹²⁹

Applying the pragmatic approach in common law adjudication also poses the risk of judges misconstruing important facts. Because common law judges are not trained experts in the social sciences, having them study social science theories and data might actually distort, rather than inform, their decisions.¹³⁰ Pragmatic judges might mistakenly overestimate the differences and underestimate the commonalities between the present and the past and, repudiate the factual assumptions of an important line of precedent of cases.¹³¹ Under such a scenario, judges would inappropriately overturn important precedents and undermine the consistency and predictability of the common law.¹³² Instead of allowing the common law to "work itself pure," pragmatist judges who inappropriately overrule precedent cases would make the common law less pure.¹³³

125. Lake, *supra* note 13, at 631–32.

126. See Brennan, *supra* note 101, at 10 (stating that a goal of common law judges should be to move the law using both their minds and their heart); CARDOZO, *supra* note 66, at 30–31.

127. Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 477–81 (1974).

128. Thapar & Beaton, *supra* note 15, at 832–33.

129. See *id.* at 820–21 (criticizing judicial pragmatists for discounting precedent and creating unpredictability).

130. See Posner, *Pragmatic Adjudication*, *supra* note 8, at 9 (acknowledging that "judges are not trained to analyze and absorb the theories and data of social science").

131. *Id.*; see also *id.* at 17 (describing how a court mistakenly understood the facts and misapplied preexisting rules of law).

132. *Id.* at 17–18.

133. See Zywicki, *supra* note 110, at 1552 (suggesting that the common law

B. Legislative Interpretation

When interpreting legislation, judges have less room to work within the “fissures” in a statute than they do in the common law.¹³⁴ Judge-made law is secondary and subordinate to legislative law.¹³⁵ Although there is no uniform, clearly established method by which judges interpret legislation, there are several generally accepted guiding principles.¹³⁶ First, courts generally agree that statutory interpretation begins with the plain and ordinary meaning of the text.¹³⁷ The “text should not be construed strictly” or leniently but rather reasonably, “to contain all that it fairly means.”¹³⁸ Focusing on the text prevents judges from letting personal and political preferences affect their judicial decisions.¹³⁹ Second, when the meaning of the text is not clear, the judge should then consider the legislation “in context.”¹⁴⁰ Considering legislation in context includes considering the intent of the legislators, the purpose of the statute, the legislative history, and the placement of the statute within its overall statutory scheme.¹⁴¹ Ultimately, the role of judges when considering contextual factors is to fill in the “gaps” of legislation; it is not to create new legislation altogether.¹⁴²

Statutory interpretation methodology, however, has limitations. First, the text of legislation is sometimes unclear.¹⁴³ Legislators might intentionally write the text of statutes ambiguously and make compromises to get it ratified.¹⁴⁴ Some legislators might just be guilty of drafting a poorly-written statute.¹⁴⁵ Another challenge concerns how to balance and weigh the contextual factors of a statute.¹⁴⁶ One judge, for example, might

would not be able to self-correct itself if efficient, instead of inefficient, rules get amended).

134. CARDOZO, *supra* note 66, at 71.

135. *Id.* at 14.

136. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14–15 (1997).

137. The Supreme Court has begun statutory interpretation by looking to the plain and ordinary meaning of the text in several recent cases. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Hughes v. U. S.*, 138 S. Ct. 1765, 1775 (2018); *Wis. Cent., Ltd. v. U. S.*, 138 S. Ct. 2067, 2070–71 (2018).

138. SCALIA, *supra* note 136, at 23.

139. Frank B. Cross, *The Significance of Statutory Interpretative Methodologies*, 82 NOTRE DAME L. REV. 1972, 1974 (2007).

140. *King*, 135 S. Ct. at 2483 (2015).

141. *See* Cross, *supra* note 139, at 1972–79 (reviewing several methods of statutory interpretation).

142. CARDOZO, *supra* note 66, at 14.

143. *See* Cross, *supra* note 139, at 1973–74 (stating that textual uncertainty is a reason why interpretive tools are needed).

144. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 25 (5th ed. 2015).

145. *Id.*

146. *See* Cross, *supra* note 139, at 1975 (stating that legislative meaning and

place more weight on the purpose of a statute, while another judge might focus more on legislative history.¹⁴⁷ Because there is no uniform methodology, judges might purposely rely on some contextual factors more so than others for no other reason than to support their opinions.¹⁴⁸ They might, in Justice Scalia's words, "look over a crowd and pick out their friends."¹⁴⁹ Furthermore, the intent or purpose of a statute may also be unclear.¹⁵⁰ More than one intent or purpose may exist and the intended effect of some statutes may be driven by immoral or corrupt motivations.¹⁵¹ Lackluster communication between the legislature and judiciary has also hindered legislative interpretation.¹⁵²

1. *Strengths of Judicial Pragmatism in Legislative Interpretation*

Interpreting legislation from a pragmatic perspective offers several advantages. When the text of legislation is unclear, a resolution can still be found through sensible and realistic interpretations of the statute.¹⁵³ Judges applying the pragmatic approach begin by considering multiple factors, including the text of legislation, the purpose of the statute, and corresponding case law to make a more informed decision.¹⁵⁴ Sometimes as a practical matter, judges might not begin their analysis with the text at all.¹⁵⁵ For example, in Sherman Act cases, according to Judge Posner, some judges do not analyze a challenged practice by first comparing the practice with the language of the Act and then move on to analyze the case law.¹⁵⁶ Rather, they often start with the case law and may never return to the statutory language—to "restrain trade or commerce" or to "attempt or conspire to monopolize."¹⁵⁷ Judge Posner accepts this approach in statutory interpretation because it is often unrealistic for judges to find a resolution through the text alone.¹⁵⁸ While reasonably worded on paper, a statute may sometimes be impractical to apply in reality.¹⁵⁹ Other times,

intent are often malleable and unprecise).

147. *Id.*

148. *Id.* at 1978.

149. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

150. CHEMERINSKY, *supra* note 144, at 25.

151. *Id.*

152. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113 (1921).

153. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) [hereinafter Posner, *Statutory Interpretation*].

154. *Id.* at 807–10.

155. *Id.* at 808.

156. *Id.*

157. *Id.*

158. *Id.* at 808–09.

159. Posner, *Statutory Interpretation*, *supra* note 153, at 808–09.

literally reading a statute may lead to absurd results and, therefore, justify a more sensible interpretation.¹⁶⁰

Interpreting legislation from a pragmatic perspective would also allow judges to take necessary action where the legislature has been slow or silent.¹⁶¹ When the legislature does nothing to rectify old statutes that struggle with modern application, a pragmatic judge might “update” the statute to “fit the modern applications that were unforeseen . . . by the enacting Congress.”¹⁶² For example, when Title VII was enacted in 1964, the term “sex” meant “man” or “woman,” and the legislation did not mention “sexual orientation.”¹⁶³ But now the language of Title VII has been updated by judges to include “sexual orientation” within the definition of “sex.”¹⁶⁴ Updated interpretations are more in tune with present needs and understandings and not restrained by an unchanging commitment to history.¹⁶⁵ When the legislature provides defective or no instructions on how to interpret a statute, waiting for the legislature to provide guidance would be inefficient and costly.¹⁶⁶ In such a situation, pragmatic judges would rectify the deficiencies by applying their own sensible interpretations of the law.¹⁶⁷

2. *Weaknesses of Judicial Pragmatism in Legislative Interpretation*

Several disadvantages are associated with the pragmatic approach to legislative interpretation. The most apparent disadvantage is lack of judicial restraint.¹⁶⁸ Disparate conclusions result when judges interpret the same statute based on what they think is sensible without adhering to the plain meaning of the text.¹⁶⁹ Textual interpretations restrict judges from letting their personal views and political preferences affect their judicial decisions.¹⁷⁰ Binding judges to the text prevents judges from strategically and conveniently selecting external sources of information to support their opinions.¹⁷¹ Furthermore, as a structural matter, interpreting statutes beyond the plain meaning

160. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1340 (2018).

161. *Id.* at 1340–41.

162. *Id.* at 1340.

163. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 353 (7th Cir. 2017) (en banc) (Posner, J., concurring) (reviewing the meaning of Title VII when it was enacted in 1964).

164. *Id.* (Posner, J., concurring).

165. *Id.* at 352.

166. POSNER, THE FEDERAL JUDICIARY, *supra* note 1, at 414–15.

167. *Id.*

168. SCALIA, *supra* note 136, at 41–44.

169. *Id.*

170. *Id.* at 23–25.

171. *Id.*

of the text presents serious separation of powers concerns.¹⁷² Going against the text would violate the judiciary's obligation to apply the law created by legislators who represent the will and voice of the people.¹⁷³ It would be undemocratic for unelected judges to apply their own idiosyncratic interpretations of legislation.¹⁷⁴

Another disadvantage of the pragmatic approach to legislative interpretation is that the judge, by updating statutes without legislative approval, inappropriately engages in lawmaking.¹⁷⁵ Such judicial activism violates the principle of separation of powers and would lead to inconsistent and unpredictable litigation of statutes.¹⁷⁶ Although the weight of a statute's historical meaning might not be as pertinent in modern times, judges with more flexibility to update the meaning of statutes may undermine the uniformity of the law and equal treatment of litigants.¹⁷⁷ As a prudential matter, the legitimacy and prestige of the judiciary would then be in jeopardy.¹⁷⁸ Moreover, judges might also inappropriately update the law based on serious misunderstandings of the needs and values of modern society.¹⁷⁹ Because many judges are not trained experts in keeping up with social developments,¹⁸⁰ it may be more prudent for judges to defer updating statutes to the legislature.

C. *Constitutional Interpretation*

The founding fathers of the U.S. wrote the Constitution in 1788 as the "supreme law of the land." The Constitution aims to preserve separation of powers between the Executive, Legislative, and Judicial Branches,¹⁸¹ and to protect the individual liberties of the people.¹⁸²

Lawyers and judges frequently debate how the Constitution should be interpreted based on four common interpretations.¹⁸³ First, originalists interpret the Constitution by focusing on the original meaning and rights expressly stated in the text or clearly

172. CHEMERINSKY, *supra* note 144, at 22.

173. *Id.*

174. *Id.*

175. Thapar & Beaton, *supra* note 15, at 824–25.

176. *Id.* at 819–21.

177. *Id.* at 832–33.

178. *Id.* at 833.

179. See Posner, *Pragmatic Adjudication*, *supra* note 8, at 9 (noting several instances when judges made questionable judgments based on what they thought were the social mores of their day).

180. *Id.*

181. CHEMERINSKY, *supra* note 144, at 1–3.

182. *Id.* at 4–6.

183. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 6–7 (2012) (mentioning and framing the rest of the book along the four doctrines of originalism, living constitutionalism, process theory, and pragmatism).

intended by the framers when the Constitution was written.¹⁸⁴ The purpose of the originalist approach is to ensure neutrality in judicial review by requiring judges to adhere to a single, uniform standard.¹⁸⁵ The original meaning of the text cannot be changed unless the Constitution gets amended.¹⁸⁶ Second, living constitutionalists believe the Constitution was meant to be updated over time.¹⁸⁷ The text can be infused with modern meanings outside the four corners of the document to ensure that constitutional protections remain up-to-date with modern developments.¹⁸⁸ Third, political process theorists interpret the Constitution by evaluating not the substantive outcomes of legislative processes, but the legislative process itself.¹⁸⁹ Although “substance” and “process” are sometimes difficult to distinguish, political process theorists believe that judges should intervene only where certain legislative processes are found to violate the Constitution.¹⁹⁰ Finally, pragmatists interpret the Constitution by relying more on facts and less on the text and history.¹⁹¹ Based on the facts, pragmatists generally determine whether a contested law or practice is constitutional by balancing the needs of the state with the needs of the individual.¹⁹²

1. *Strengths of Judicial Pragmatism in Constitutional Interpretation*

The pragmatic approach to constitutional interpretation offers several advantages. First, with its emphasis on facts, the pragmatic approach is well-suited to resolve factually novel cases.¹⁹³ Because the text and intent of the framers could not foresee everything, applying the pragmatic approach would allow judges to determine whether an unenumerated right is or should be protected by the Constitution based on the facts and not on history.¹⁹⁴ For example, with respect to the Second Amendment issue whether individuals have a constitutionally protected right to possess a handgun outside the context of militias in *D.C. v. Heller*, Justice Breyer applied the

184. *Id.* at 36–39.

185. *Id.* at 40–42.

186. CHEMERINSKY, *supra* note 144, at 18.

187. WILKINSON III, *supra* note 183, at 12–13.

188. *Id.* at 13–18.

189. *Id.* at 62–65.

190. *Id.* at 65–69.

191. *Id.* at 82–84; Richard A. Posner, *Constitutional Law from a Pragmatic Perspective*, 55 U. TORONTO L.J. 299, 299–300 (2005) [hereinafter Posner, *Constitutional Law from a Pragmatic Perspective*].

192. Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 300.

193. WILKINSON III, *supra* note 183, at 84–85.

194. Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 301–02.

pragmatic approach.¹⁹⁵ Specifically, he weighed the facts in the case and concluded that the factual realities of both gun violence and the state's interest in keeping society safe outweighed the individual's interest in firearm possession.¹⁹⁶ According to Justice Breyer, history was the "beginning" but balancing the facts provided the "end" for the constitutional inquiry.¹⁹⁷ Resolving the case based on historical analysis was troublesome because history is often indeterminate and can be interpreted in multiple ways.¹⁹⁸ Given the unresolved, heated disagreements within the Court over the historical meaning of the Second Amendment,¹⁹⁹ Justice Breyer's balancing approach would have allowed the Court to decide the novel issue based on the empirical facts.²⁰⁰

Another advantage of applying the pragmatic approach to constitutional interpretation is that it allows judges to efficiently respond to important social issues not expressly covered by the Constitution.²⁰¹ Rather than waiting for an all but impossible constitutional amendment, a pragmatic judge would consider whether the issue could be resolved based on sensible interpretations of the Constitution.²⁰² For example, in religious freedom cases, the Supreme Court has applied "sensible and realistic" interpretations of the Establishment Clause of the First Amendment.²⁰³ In *Everson v. Bd. of Educ.*, the Court remarked that it would be insensible to conclude that a state's policy of providing public bus fare reimbursements to students attending both Catholic and public schools "established" the Catholic religion.²⁰⁴ Similarly, in *Sch. Dist. of Abington Twp. v. Schempp*, the Court stated that a sensible reading of the Establishment Clause indicated that a state law requiring students to read from the Bible each morning impermissibly "established" a religion.²⁰⁵ Although the

195. *D. C. v. Heller*, 554 U.S. 570, 689–91 (2008) (Breyer, J., dissenting).

196. *Id.* (Breyer, J., dissenting).

197. *Id.* at 687 (Breyer, J., dissenting).

198. *Id.* at 636–38 (Stevens, J., dissenting).

199. *Id.* (Stevens, J., dissenting).

200. *Id.* at 689–90 (Breyer, J., dissenting).

201. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 14, at 1664 (noting how pragmatists are interested in using constitutional text as a resource in the fashioning of a pragmatically fashionable result). *See also id.* at 1667 (stating that pragmatism would enable the Constitution to adapt to its altered environment as society changes).

202. *Id.* (stating that judges need the "instrumental sense that is basic to pragmatism" in order to adapt the Constitution to new environments).

203. *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970).

204. *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947) (holding that the state's use of tax-raised funds to purchase bus fare for Catholic school students did not equate to the state establishing the Catholic religion because the state did not support only Catholic school students, given that the state also purchased bus fare for students attending non-Catholic public schools).

205. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306–07 (1963) (Goldberg, J., concurring) (stating that the state's practice of requiring students to read from the Bible each morning inhibited religious freedom, constituted

Establishment and Free Exercise Clauses are silent as to what activities violate religious freedom, the Court addressed important social concerns by applying “sensible and realistic” interpretations of the Clauses.²⁰⁶

2. *Weaknesses of Judicial Pragmatism in Constitutional Interpretation*

The pragmatic approach comes with risks if applied in Constitutional interpretation. First, the pragmatic approach’s emphasis on the facts and not on history makes the approach inconsistent and unpredictable.²⁰⁷ By discounting the role of history, the approach diverges from a uniform standard that restrains judges from improperly deciding cases in an idiosyncratic or possibly politically-charged manner.²⁰⁸ The pragmatic approach’s emphasis on balancing the facts case-by-case also limits the precedential value of each case.²⁰⁹ A Supreme Court holding determined by balancing the unique facts of a case would provide limited and narrow guidance to lower courts.²¹⁰ Furthermore, applying the pragmatic approach with emphasis on facts would not be helpful if the judge actually misinterprets the facts.²¹¹ For example, the main weakness of Justice Breyer’s interest-balancing approach in *D.C. v. Heller* was that his understanding of the facts was difficult to verify. It was not factually certain that gun violence in public was severe enough to warrant denial of the right to possess handguns outside the context of militias.²¹² Because judges are not trained experts in testing factual claims under rigorous empirical analysis, they may underestimate or overestimate some of their factual assumptions.²¹³

Another risk of the pragmatic approach to constitutional interpretation is the risk of overlooking or neglecting important moral values.²¹⁴ By interpreting a provision based on what he or she thinks is “sensible,” a pragmatist judge may consciously or unconsciously undervalue the moral interests of others.²¹⁵ For example, in religious freedom cases, a government regulation that

state-sponsored establishment of religion, and did not fall within any “sensible” or acceptable concept of religious accommodation).

206. *Walz*, 397 U.S. at 671.

207. WILKINSON III, *supra* note 183, at 87–97.

208. *Id.* at 94–97.

209. Thapar & Beaton, *supra* note 15, at 832–33.

210. *Id.*

211. Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 302.

212. *Heller*, 554 U.S. at 631–34.

213. Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 302.

214. WILKINSON III, *supra* note 183, at 93–94.

215. *Id.*

prohibits students from reading the Bible each morning in school might appear to some individuals like an effort to avoid “establishing” a religion while to others it may look like an effort to deny “free exercise.”²¹⁶ Because a “sensible” reading of the First Amendment might not be “sensible” to others, deciding the case based on a judge’s “sensible” interpretation of the Establishment and Free Exercise Clauses might underappreciate some important moral values.²¹⁷ Deciding a case based on a judge’s “sensible” interpretation of the Constitution might also allow judges to insert their personal ideological views into the Constitution.²¹⁸ The judge might replace a more appropriate interpretation of the Constitution with his or her personal interpretation under the guise of empirical analysis and common sense.²¹⁹ Without a uniform standard to determine what is sensible, a judge applying the pragmatic approach could deceptively impose his or her understanding of “common sense” onto the Constitution.²²⁰

V. CONCLUSION: PROMISING AREAS FOR JUDICIAL PRAGMATISM

Judicial pragmatism is a judicial methodology known for its future-looking mode of analysis, empirically-based decision making, and openness to judicial activism. In terms of strengths, judicial pragmatism helps to (1) maximize wealth and efficiency, (2) resolve truly novel cases, and (3) account for legislative shortcomings. In terms of weaknesses, judicial pragmatism poses the risks of (1) judicial tyranny, (2) overdependence on the social sciences, and (3) marginalization of important moral values. Although judicial pragmatism has generally been accepted as a helpful analytical approach, questions still remain over the extent to which it is helpful to judges in common law adjudication, legislative interpretation, and constitutional interpretation.

The area in common law adjudication where judicial pragmatism offers much promise is where the facts are truly novel and applying traditional common law rules is inefficient. In agency law, for example, an agency relationship is traditionally defined in common law as a relationship in which by mutual consent one

216. Compare *Schempp*, 374 U.S. at 205 (ruling that the Bible reading requirement violated the Establishment clause), *with id.* at 308–09 (Stewart, J., dissenting) (claiming that majority’s holding jeopardized the Free Exercise Clause).

217. WILKINSON III, *supra* note 183, at 93–94.

218. Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 302.

219. WILKINSON III, *supra* note 183, at 93–94.

220. *Id.* See also Posner, *Constitutional Law from a Pragmatic Perspective*, *supra* note 191, at 302 (stating that judges wrongfully engage in policy making when politics rather than the law guide their reasoning).

person or entity, the agent, undertakes to act on behalf of another person or entity, the principal, subject to the principal's control.²²¹ However, when applied in intellectual property in today's information age, the traditional definition of an agency relationship has been troublesome and inefficient.²²² For example, the relationship between inventors of intellectual property and users of the intellectual property has created confusion regarding who should be viewed as the agent and who should be viewed as the principal.²²³ The designation that each party receives is crucial as a matter of incentives and efficiency.²²⁴ For example, if the user is designated the principal, then the inventor may have less incentive to create new intellectual property and the efficiency of innovation would decrease.²²⁵ Here, the pragmatic approach would offer much help because judges would study novel facts with help from well-established findings from the social sciences, and then determine the most sensible way of designating the agency relationship that would maximize wealth and efficiency.

Furthermore, in legislative interpretation, judicial pragmatism offers promise where the statute is vague, provides no instruction on how to interpret the statute, and has indicia of "delegation" of lawmaking authority to the courts.²²⁶ For example, in trademark law, the Lanham Act provides nationwide legal protection for federally registered trademarks and provides remedies for their infringement by unauthorized usage that creates a likelihood of consumer confusion.²²⁷ The meaning of the phrase "create a likelihood of consumer confusion" is not clear and the legislature provided little instruction on interpretation.²²⁸ Whether an unauthorized use of the trademark creates a likelihood of consumer confusion has largely been "delegated" to the judge to decide.²²⁹ If a judge applied the pragmatic approach in this context, the judge could determine whether there is "consumer confusion" based on sensible factual determinations made through empirical studies.²³⁰ The judge's actions would also not be as threatening to the principle of separation of powers because the statute implicitly

221. *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981).

222. Richard Gruner, *Intangible Inventions: Patentable Subject Matter for an Information Age*, 35 LOY. L.A. L. REV. 355, 429 (2002).

223. *Id.*

224. *Id.*

225. *Id.*

226. See Gluck & Posner, *supra* note 160, at 1340–42 (reviewing the benefits of avoiding absurdity, advancing common sense, and updating language when interpreting a statute).

227. Application for registration; verification, 15 U.S.C. § 1051, et seq., (2012).

228. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd.*, 34 F.3d 410, 414 (7th Cir. 1994).

229. *Id.* at 414–15.

230. *Id.* at 414.

“delegates” authority to the judge to decide.²³¹ Antitrust law and the Sherman Act is another area where it might be promising to apply the pragmatic approach. Like the Lanham Act, the Sherman Act is often viewed as having overly general language, little instruction from the legislature on how to interpret it, and an indicia of delegation of authority to the courts.²³² Sensible interpretations of the statute and empirical findings about the realities of monopoly power in the economy have allowed many judges to apply the Sherman Act efficiently and in an up-to-date fashion in the modern world.²³³

Finally, the area in constitutional interpretation where judicial pragmatism offers promise is where the issue involves novel facts and pressing social needs not expressly but indirectly covered by the Constitution. For example, issues concerning abortion and homosexuality have become prominent in society, and the Constitution is silent with respect to these issues. Yet the Supreme Court, in recognizing the sensible needs of society, has recognized some rights in these areas in part by relying on sensible interpretations of constitutional provisions indirectly related to the subject matter. For example, with respect to abortion, even though the Constitution is silent about a woman’s right to get an abortion, the Court recognized such a right in *Roe v. Wade* in part by drawing a sensible connection between abortion and the right to privacy and liberty through the Fourteenth Amendment.²³⁴ According to Judge Posner, such a holding would not have been reached without a pragmatic approach to reviewing the facts concerning the practical needs of women, families, and the state.²³⁵

Although judicial pragmatism is not without weaknesses, it has played an important role in many important cases. With a better understanding of its strengths and weaknesses, the judiciary can, according to Judge Posner, overcome many of the “problems of jurisprudence.”²³⁶

231. *Id.*

232. See Gluck & Posner, *supra* note 160, at 1342 (stating that the Sherman Act is a good example of a statute that is overly general and in need of updating).

233. See Posner, *Statutory Interpretation*, *supra* note 153, at 808 (reviewing how pragmatic judges have interpreted the Sherman Act).

234. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 391–92 (1992).

235. *Id.* at 391.

236. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 6, at 387 (stating that jurisprudence is greatly in need of pragmatic analysis).

