LAW, PRAGMATISM AND CONSTITUTIONAL INTERPRETATION: FROM INFORMATION EXCLUSION TO INFORMATION PRODUCTION

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I. Introduction

In this paper I argue that through an analysis of Richard Posner's *How Judges Think* as well as Michael Dorf and Charles Sabel's "A Constitution of Democratic Experimentalism," a conception of the legal process, and the judge's position within it, as an information production system is offered that is true to the tradition of philosophical pragmatism (especially that of John Dewey). This is in contrast to Antonin Scalia's jurisprudential theory, "public meaning originalism," that offers an explicitly information excluding conception of the status of the judge. Through an examination of a defining opinion for Scalia's interpretive philosophy, *Heller*, a United States Supreme Court opinion that interprets the Second Amendment's "right to bear arms" clause, and the expressed aims of the jurisprudential theories of Scalia, Posner, Dorf and Sabel, I claim that a pragmatic conception of law as an information producing device is attractive and compatible with both rule of law virtues and democratic governance. This conclusion becomes quite apparent from an analysis of the features of democratic experimentalism. While this analysis is somewhat parochial, being attached to cases and theorists writing within the United States legal tradition and a somewhat peculiar American fixation on guns, it is hoped that the move from a picture of law from purposive information exclusion to a more active position in social experimentation might be translatable to other contexts.

II. *District of Columbia v. Heller*, 554 U.S. 570 (2008)

Heller is as of this moment the defining opinion for Scalia's jurisprudential philosophy, and therefore, it seems for the contemporary Supreme Court.[1] The facts were, indeed, close to perfect for implementation of his theory. There was a clear Constitutional text; the "bear arms" clause of the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed"), and very few (if any) precedents to worry about. Further, the facts were quite simple: the District of Columbia had a set of codes that made it extremely difficult to legally posses a handgun. A one-year license was possible but rare and only allowed via being issued by the chief of police. Heller, a D.C. special police officer applied for a permit and was refused. He filed suit under the Second Amendment. The District Court dismissed, the Court of Appeals for the D.C. Circuit reversed and the Supreme Court granted certiorari.

The majority opinion, written by Scalia, reads as if the Court has officially adopted his originalist methodology. As it states, "In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Of course for him this is the normal meaning of the founding generation. Through investigation of the textual structure of the amendment as well as the normal meaning of the text at the time of the founding the majority opinion finds that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[2]

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[1] *District of Columbia v. Heller*, 554 U.S. 570 (2008) Note: Heller is only available as a "slip" opinion; its pagination will change when the opinion is officially published. In the slip opinion the opinion and each dissent starts at page 1.

[2] Ibid, p. 3.

The Court does this by offering a reading of the text based upon the following analysis. First, the Court divides the text into a "prefatory clause" and an "operative clause." Then it explains that, "apart from the clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."[3] Therefore, it seems, if the original meaning of the operative clause is reasonably and fairly clear, reference to the prefatory clause becomes unnecessary. The Court's analysis of the "operative clause" is a tortured wonder. First, the "right of the people" is found to be unambiguously a right of individuals, not of collective or any type of corporate rights. Therefore the Court finds a strong presumption that the Second Amendment Right is exercised individually and belongs to all Americans. Next, "to keep and bear Arms" it is found that the meaning of "arms" in the 18th century was no different than today's meaning. In addition, "to bear" is found by the Court's majority to mean to "carry" for the purpose of "confrontation."[4] From this it is concluded that "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia."

To bolster such an analysis a public meaning originalism points to public historical sources. Scalia claims that these sources show that the Second Amendment codified a pre-existing right that had "nothing whatever to do with service is a militia."[5] Further, the Court finds that the phrase "security of a free state," the word "state" means "the people composing a particular nation or community." To support this reading the opinion then switches away from Constitutional text and surveys post-ratification summaries and treatises, pre-Civil War case law, post Civil War legislation and constitutional commentators and earlier Supreme Court precedents. From this Scalia concludes, "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment."[6] Therefore, the Court holds "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster."[7] The Court affirmed the judgment of the Court of Appeals and the D.C. handgun "ban" was found unconstitutional. Importantly, the opinion also noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Not only this, but the Court also accepts that the holding should be limited to the types of weapons in common use at the time.

Both Stevens and Breyer wrote dissents. Stevens starts his by defining the issue as whether the Second amendment protects any gun rights for nonmilitary purposes. He also states that, "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a standing army posed an intolerable threat to the sovereignty of the several States."[8] Further, Stevens argues that *Miller*, the Court's only relevant precedent, also situated the right to bear arms in the context of a "reasonable relationship" to

[3] Ibid, p. 4.
[4] Ibid, p. 10.
[5] Ibid, p. 20.
[6] Ibid, p. 53.
[7] Ibid, p. 56-57, citations omitted.
[8] Ibid, p. 2.

militia activity. As to the first part of the constitutional text in question, instead of "prefatory clause," he labels it a "preamble" and finds that it shows the purpose of the Amendment was the preservation of militias, that militias were thought necessary to the security of a free state, and that such militias must be well-regulated.[9] Stevens notes that the majority opinion ignores the preamble so it can pretend to "find" its preferred reading but that only through ignoring the preamble's content the majority can make such a reading compatible with the shortened text. Stevens further notes that even this truncated compatibility is questionable given the majority's inconsistent reading of such terms as "the people."[10]

Breyer starts his dissent by accepting that the majority's opinion is incorrect on its own originalist grounds and claims that it was incorrect because it ignored constitutionally legitimate limitations to Second Amendment rights. Breyer rejects originalist methodology and advocates instead an explicit "interest balancing inquiry."[11] Given this interpretive methodology, a methodology that encourages the use of social data, he then offers a detailed statistical survey of gun related social issues and argues that because of the importance of the issues and the amount of uncertainty in the results of various legislative policies judges should defer to legislators. Breyer notes that, deference to legislative judgment is appropriate where the judgment has been made by a local legislature with particular knowledge of local problems and workable solutions. Further, Breyer argues that room should be made for local experiments when solutions are not clearly apparent.

Reaction to *Heller* was overwhelmingly negative, except from within the guns rights crowd (and, as will become apparent from a close reading it was not much of a victory for them either). Some found that its version of "law office history" smelled of partialist advocacy and yet ultimately and of necessity the final result rested upon non-originalist indeed pragmatist and consequentialist grounds.[12] Others noted how naïve the picture of history and meaning must be for an originalist to come up with a determinate meaning, with Mark Tushnet describing such history as based on a "simulacrum of historical inquiry" that results in "history-in-law" that ignores contested truths. Tushnet notes that because Scalia has to ignore these contested truths and come up with a single determinant meaning he has to dismiss much actual historical evidence that would make his purported objective and certain conclusions more tentative.[13] This claim is especially true if, as seems plausible, Samuel Issacharaoff is correct in stating that, "there is every reason to believe that constitutional terms were deliberately vague so as to garner agreement when the specifics could not be worked out." This was a situation where "The Framers were embarking on a bold venture into representative democracy, with few historical milestones to guide how the various pieces would hold together" therefore, "They were specific when they could be and aspirational when they reached the limits of their understandings or their ability to agree."[14] Another damning claim, made by Reva Siegal, was that, though the rhetoric was of judicial humility in the face of a clear textual mandate the actuality of the matter was that originalism was "a

[9] Ibid, p. 5.
[10] Ibid, p. 9.
[11] Ibid, p. 10.

[12] See Rory K. Little, "*Heller* and Constitutional Interpretation: Originalism's Last Gasp," *Hastings Law Journal* 60 (2009): 1415-1430. 1417-1419, and Saul Cornell, "Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*," *Ohio State Law Journal* 69 (2008): 625-640. Carnell claims that the *Heller* decision actually demonstrates that "plain meaning originalism has no coherent, historical methodology. It is little more than the old law-office history dressed up in the latest legal-academy fashions (p. 626).
[13] Mark Tushnet, "*Heller* and the New Originalism," *Ohio State Law Journal* 69 (2008): 609-624, at 610, 619.
[14] Samuel Issacharaoff, "Pragmatic Originalism?" *New York University Journal of Law & Liberty* 4 (2009): 517-534, at 530-531.

species of popular constitutionalism" and actually functions "as conservatives' living constitution" because it "gave jurisprudential expression to the coalition politics of the New Right."[15] Finally, multiple commentators have noted that the real "operative" aspects of the majority's opinion (to use their own preferred wording) are "pragmatic" or "functionalist" and fail to be grounded in accepted originalist tools. Indeed, lower courts will pretty much only need to look at the pragmatic exceptions in order to decide later cases (though *Heller* offers virtually no guidance for lower courts in figuring out what they should do).[16] As it stands, the case represents a bright-line and universal rule that stand for the minimal content that virtual "bans" of handguns are unconstitutional and then just offers a laundry list of exceptions with no explanation as to why they pass constitutional muster. There is no guidance as to how to move from this minimal baseline to the exceptions in a reasoned or principled manner.

Of great interest for this paper is Posner's *New Republic* critique.[17] In this piece Posner is, as always, admirable for his candor. He finds that *Heller* is "questionable in both method and result" and is evidence of a Supreme Court that "exercises a freewheeling discretion strongly flavored with ideology." He sees the textual decoupling strategy used by the majority as textual evasion, argues that the context of the Second Amendment's ratification gives strong support to the accuracy of Stevens' dissent, and notes that at the time of the constitution's ratification the reigning conception of textual construction was that of Blackstone which was "loose," "flexible" and "nonliteral." He also points out the fact that the Constitution's great expositor, John Marshall, was also a "loose constructionist." Further, Posner notes that at the time of ratification "arms" meant "muskets" but the Court properly ignores this detail because "using that detail in a modern interpretation would be 'preposterous.'"

Ultimately Posner is at a loss to explain *Heller* (as well as *Citizens United*) as anything but a version of "payback" or "turnabout is fair play" in response to earlier liberal courts using loose interpretation. But Posner also offers other reasons to worry about the *Heller* opinion rather than just its factual inaccuracy and unexplained looseness. First, Posner allows that it might be important to use a loose construction of the Constitution when the group seeking the enlargement "does not have good access to the political process to protect its interests." But, he observes, gun advocates are not without such access. Second, "*Heller* gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation." Posner's final verdict on the opinion; It was all "fig-leafing" and a snow job.

Addendum: One would think that in the light of this criticism, indeed criticism coming from figures even to the right of the Court's political preferences, that the Court would back off of its conclusions.[18] That was not the case. In fact two years later in *McDonald v. City of Chicago* 561 U.S. 3025 (2010)(Alito Opinion) the Court doubled down and extended the *Heller* holding to states under the Due Process clause (thereby further supporting Posner's "turnabout" analysis). Scalia's concurrence reiterated his originalist interpretation in *Heller* and, though noting the imperfection of originalist

[15] Reva B. Siegal, "*Heller* and Originalism's Dead Hand – In Theory and Practice." *UCLA Law Review* 56 (2009): 1399-1424, at 1399-1402.

[16] See, for example, Josh Blackman, "The Constitutionality of Social Cost," *Harvard Journal of Law & Public Policy* 34 (2011): 951-1042 at 956; "the most significant portions of *Heller* for the lower courts are based on the same pragmatic-and not originalist-consideration of asserted social costs that may stem from gun ownership."

[17] Richard A. Posner, "In Defense of Looseness" *The New Republic*, August 27, 2008, (http://www.tnr.cxom), last accessed 10/24/2011.

[18] See, for example, Richard A. Epstein, "A Structural Interpretation of the Second Amendment: Why *Heller* is (Probably) Wrong on Originalist Grounds," *Syracuse Law Review* 59 (2008): 171-183.

methodology, argued that it was still the "best means available" to constrain judicial excess.[19] Stevens in dissent noted the irony that the Second Amendment was "directed at preserving the autonomy of the sovereign States and its logic therefore 'resists' incorporation by a federal court *against* the States" and critiqued Scalia's purportedly "objective" and "neutral" method as one that just ignores all the important and ultimately determining threshold questions that need to be answered in order to start, including for instance what level of generality the analysis should be framed and what "vision of democracy" Scalia holds.[20]

III. Scalia: Excluding Information in order to Constrain

In order to see why Scalia doesn't think Stevens, but especially Breyer and Posner are wrongheaded in their critiques it is important to understand that Scalia's legal formalism rests upon an ideology that might be summed up as "exclude in order to bind." Indeed, the chief claimed virtue of Scalia's own interpretive scheme is that it excludes so many other factors from what the judge can legitimately notice when interpreting a statute or constitutional text. In contrast to this virtuous exclusion and hemmed in quality of his interpretive stance, Scalia argues that the legal profession has an unfortunate idea of the "great judge" that encourages a picture of the judge as "the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose the rule."[21] This ideal exacerbates what he sees as a grave danger in Constitutional interpretation, which is that a judge will mistake his or her own preferences for official Constitutional doctrine. Scalia sees a problem with this in relationship to democratic governance. This is because the common law judge's "attitude" is wrong for an "age of legislation" where "most new law is statutory law."[22] Indeed, he claims that when it comes to statutory interpretation "attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation."[23]

More troubling, Scalia's description of the American legal profession is that it has "no intelligible theory" of its most common activity, that of statutory interpretation. Once the question is set, though, Scalia finds encouraging evidence that when interpreting a statute most practitioners "look for a sort of 'objectified' intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[24] This is as it should be because a broader version "is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[25] These, of course, are the basic tenants of his "public meaning" originalism. And this is because in a government of laws, not of men, "It is the *law* that governs, not the intent of the lawgiver."[26] As Scalia sees it, "It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[27]

As Scalia puts it, "one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws."[28] For Scalia, "A text should not be construed strictly, and it should

[19] *McDonald* at 14.
[20] Ibid, p. 51, 56
[21] Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), at p. 9.
[22] Ibid, p.13.
[23] Ibid, p. 14.
[24] Ibid, p. 17.
[25] Ibid, p. 17.
[26] Ibid, p. 17.
[27] Ibid, p. 22.
[28] Ibid, p. 23.

not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[29] This is an admittedly formalist doctrine – and Scalia proudly accepts that description for his theory of interpretation because in his opinion, "The rule of law is *about* form."[30] Once this simple theory is accepted, Scalia thinks that some of the great tricks of the legal trade can be eliminated. Most importantly, there is legislative history. Scalia is adamant that legislative history should not be used as dispositive in statutory interpretation because legislative history is easily manipulated and therefore a likely source of false information.

Scalia thinks the same interpretive doctrine is even more appropriate for Constitutional issues. And this is, in his view, contrary to standard practice. Scalia notes that in a standard constitutional law class the text of the actual text of the Constitution will take a back seat to Supreme Court cases, and that "the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean."[31] And this is wrong because it is "not the way of construing a democratically adopted text."[32] One great worry that Scalia expresses here is that any such constructed constitutional interpretation is, once promulgated virtually irreparable. One of the most egregious types of such a stance is that of "the living constitution" where it is held that the Constitution needs to be interpreted in a flexible and evolutionary manner so it can "provide the 'flexibility' that a changing society requires."[33] Ironically, Scalia sees the result of such a stance towards the Constitution as resulting in the creation of less flexibility through a promulgation of multiple restrictions upon democratic government. For example, there is the exclusion of prayer at public school graduations.[34] Or, more importantly for Scalia, there are various Court-created (in his view) erosions on property rights or the fact that gun laws are limiting our right to bear arms in contradistinction to the Founders expressed wishes.[35]

Ultimately, the great virtue of textualism for Scalia is that "the originalist at least knows what he is looking for: the original meaning of the text."[36] Of course Scalia also acknowledges that there are problems with originalism. But Scalia thinks that even when meaning might be somewhat difficult to discern, "the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to the change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them."[37]

But Scalia's textualist originalism does not exhaust his jurisprudential philosophy. It is supplemented with a conception of "the rule of law as a law of rules." As Scalia puts it, "Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact

[29] Ibid, p. 23.
[30] Ibid, p. 25.
[31] Ibid, p. 39.
[32] Ibid, p. 40.
[33] Ibid, p. 41.
[34] Ibid, p. 41.
[35] Ibid, p. 43.
[36] Ibid, p. 45.
[37] Ibid, p. 45-46.

pronouncement."[38] As in the originalist stance that Scalia adopts, this conception of law of rules is justified by its link to democratic values; "In a democratic system, of course, the general rule of law has a special claim to preference, since it is the normal product of that branch of government most responsive to the people."[39] Best, according to him, is to follow the law as written. But as Scalia noted above, originalist meanings can often be quite difficult or impossible to determine. This is not fatal to Scalia's originalism, though, because, "the value of perfection in judicial decisions should not be overrated," indeed, "it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment."[40] So, in cases where original meaning is indeterminate or contested, the judge should work towards an appearance of equal protection because, "The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well."[41] Therefore, it is "Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision."[42]

Further, rules have another great virtue, predictability. Indeed, for Scalia, because having rules that have the appearance of equal protection is so central a value to the rule of law, "There are times when even a bad rule is better than no rule at all."[43] This is, once again, attached to his picture of judicial humility, "Only by announcing rules do we hedge ourselves in."[44] But, somewhat paradoxically, "While announcing a firm rule of decision can thus inhibit courts, strangely enough it can embolden them as well. Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will."[45] Indeed, for Scalia the conception of the "rule of law as the law of rules" is so central to a properly functioning legal system that, "we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law" and "To reach such a stage is, in a way, a regrettable concession of defeat …the unfortunate practical consequences … equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."[46] But this point is not arrived at very often because, "It is rare, however, that even the most vague and general text cannot be given some precise, principled content – and that is indeed the essence of the judicial craft."[47]

Importantly, Scalia allows for a little post-originalist contamination in his methodology in the use of *stare* decisis, but, as he puts it, "*stare decisis* is not *part* of my originalist philosophy; it is a pragmatic *exception* to it."[48] This is because a more pure use of textual originalism is too strong a medicine to swallow, and therefore he

[38] Scalia, "The Rule of Law as a Law of Rules, *The University of Chicago Law Review* 56 (1989): 1175-1188: p. 1176.
[39] Ibid, p. 1176.
[40] Ibid, p. 1178.
[41] Ibid, p. 1178.
[42] Ibid, p. 1178.
[43] Ibid, p. 1179.
[44] Ibid, p. 1180.
[45] Ibid, p. 1180.
[46] Ibid, p. 1182.
[47] Ibid, p. 1183.
[48] Scalia, *A Matter of Interpretation*, p. 140.

admits when it comes to originalism he is often "faint-hearted." But, to return to his textual originalism, Scalia notes that, "Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text."[49]

In a nutshell, this can be thought of as the "Scalia two-step." First, use the original text and common understandings of the time in which statute or constitution was ratified to determine the meaning of the language in question. Second, if the meaning cannot be made determinate create a clear rule of law in order to facilitate both predictability and clarity, therefore limiting the possibility of future judicial interference with democratic governance. If this rule is problematic, expect that the legislative branch will fashion a proper, democratic, remedy. His interpretive method is ultimately, therefore, justified by an appeal to its democratic virtues. This is because:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well. The purpose of constitutional guarantees – and in particular those constitutional guarantees of individual rights that are at the center of this controversy – is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.[50]

IV. Posner: Including Information in Interpretation

If for Scalia the whole point of an interpretive legal philosophy is to constrain the judge through a drastic limitation of the legally cognizable facts and policies choices, for Posner such a theory is both descriptively inaccurate and functionally unworkable as an ideal. Indeed, he advocates for a more informationally rich description of judicial decision-making both because he thinks it more descriptively accurate and because it would bring about more predictable, informed and desirable judicial decisions. Richard Posner's *How Judges Think* is a sustained argument for the conclusion that American judges, especially federal judges, necessarily are "*constrained* pragmatists" who utilize a much broader set of information in order to arrive at their legal decision. This conflicts with what he sees as the official party line of the legal profession, one that Scalia clearly advocates for, which he labels "legalism." He argues that given the personal, professional and institutional constraints that American judges face, legalism is unworkable, indeed irresponsible and a type of "professional mystification" adopted in a way that exaggerates the disinterested and professional aspects of legal practice, and that, therefore, judges have to be (conscious or not) constrained pragmatists.[51] Posner claims that as "the judiciary's 'official' theory of judicial behavior" legalism, though false as a description of what judges actually do, determines much in the way of judicial opinion writing, legal education and appellate advocacy.

[49] Scalia, "The Rule of Law," p. 1184.

[50] Scalia, "Originalism: The Lesser Evil, *The University of Cincinnati Law Review* 57 (1989): 849-865, p. 862.

[51] Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008), p. 3. Posner is aware that his critique might not work in civil law jurisdiction where codified law and a professionalized and careerist judiciary is involved.

Posner gives multiple conceptions of "legalism." Because of this it seems best to treat it in a "family resemblance" manner as encompassing a group of factors that combined tend towards a specific legalist stance. One instantiation of the legalist idea that Posner highlights is Scalia's originalism. Another comes from the confirmation hearings for Chief Justice John Roberts where Roberts described the judge's role, even the Supreme Court justice's, as that of "merely an umpire calling balls and strikes."[52] Legalism starts with such a picture of judicial neutrality but also includes slogans such as "a government of laws not men" and "the rule of law," which Posner derides as standard "Law Day" rhetoric. Legalists further claim that judicial decisions "are determined by 'the law' conceived of as a body of preexisting rules found stated in canonical legal materials" or, if not preexisting then, "derivable from those materials by logical operations."[53] Such a decision making process does not rely on any traits personal to the judge or extrinsic to the legal materials and therefore treats law as an "autonomous discipline" running on rules specific to its own internal legal logic.[54] Because of this doctrine, and "Since the rules are given and have only to be applied, requiring only (besides fact-finding) reading legal materials and performing logical operations, the legalist judge is uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy judgments."[55] For the legalist, the orthodox tools such as reasoning from precedent, adopting deterministic rules, including canons of construction of such rules (such as originalism), and argument from analogy are enough to decide, that is fully determine, even the most difficult case. Further, explicitly using any other facts or tools to help decide is to allow extra-legal issues to improperly intrude. At its most extreme, Posner thinks that legalism encourages a position where lawyers "are like mathematicians in wanting to manipulate symbols" and attempt to "think words not things."[56]

Posner admits that legalism does do a lot of the mundane work of the courts, but notes that as one reaches the appellate level legalist tools become less and less useful because, "There are too many vague statutes and even vaguer constitutional provisions, statutory gaps and inconsistencies, professedly discretionary domains, obsolete and conflicting precedents, and factual aporias."[57] In such cases the orthodox legalist tools are inadequate to properly "determine" and outcome. And because the cases that reach appellate levels are more often the cases that legalist tools cannot decide, and are also the cases that are most determinative of the further development of the law, legalist tools give out right where the most difficult and important cases begin. Here is where an "open area" of what Posner describes, importantly as "*involuntary* freedom" is identified where judges have "decisional discretion."[58] Once again, right where the most difficult and influential decisions are required, judges not having the ability to refuse to decide, the legalist tools offer the least amount of guidance. Returning to Roberts' claim to be merely calling balls and strikes, Posner writes, "Roberts knows that when legalist methods of judicial decision making fall short, judges draw on beliefs and intuitions that may have a political hue" and this is because, "the judicial imperative is to decide cases, with reasonable dispatch, as best one can. The judge cannot throw up his hands, or stew indefinitely, just because he is confronted with a case in which the orthodox materials of judicial decision making, honestly deployed, will not produce an acceptable result."[59] For Posner this

[52] Hearing on the Nomination of John Roberts to Be Chief Justice of the Supreme Court before the Senate Judiciary Committee, 109 Cong., 1st Sess. 56 (Sept. 12, 2005). Posner states that no judge really believes this and therefore that this statement is "a blow to Roberts' reputation for candor." Ibid, p. 81.
[53] Ibid, p. 41.
[54] Ibid, p. 42.
[55] Ibid, p. 42.
[56] Ibid, p. 248, 244.
[57] Ibid, p. 47.
[58] Ibid, p. 9.
[59] Ibid, p. 79.

conclusion shows that judges cannot, because of their professional role and responsibilities, rest in legalist materials. Further, by following legalist ideology and focusing exclusively on orthodox legalist materials, the legal profession is left with a situation where "nothing in their training equips them to deal with the nonroutine case."[60]

Once again, the argument is that legalist tools do not handle the toughest cases and therefore the orthodox tools are too limited to do all of the work that they are expected to do. This is not to argue that they should be ignored or rejected, just that these tools have severe limitations that, when ignored, get in the way of the development of better and more effective legal decision-making right where it is most desperately needed. This limitation has been noted by other legal theorists, one being Scalia, and various tools of a legalist quality have been offered. The most notable are those Posner describes as comprehensive judicial philosophies such as Scalia's "originalism." Such philosophies are meant to patch up the open areas of involuntary judicial freedom through a sort of meta-rule that constrains the judge and, once again, determines a correct decision based upon purely orthodox legal materials. Posner is not convinced that such strategies work. In fact he sees such stances as being in all actuality either rationalizations or rhetorical weapons.[61]

As rationalizations, such philosophies both allow the judge greater ability to "fig-leaf" decisions that match personal preferences. This is seen, for example in how the search for a constraining authentic and foundational "Ur text" meaning for a statute of constitutional clause actually allows for greater "manipulation of meaning in the name of historical reconstruction or intellectual archeology."[62] (Posner finds this to be best thought of as a form of Sartrean bad faith where legalists "seek to deflect blame for any resulting cruelties or absurdities by pleading that the law made them do it."[63] As rhetorical weapons, such comprehensive theories help bolster the legalist ideals behind the "Law Day" banner so as to help judges avoid scrutiny for their uninformed policy choices. More directly, Posner notes that there are various competitors for such a meta-rule, for instance his own "law and economics" option (which he properly notes is controversial as a normative stance), Scalia's originalism, Dworkin's "law as integrity," or Stephen Breyer's "active liberty,"[64] and that all of these are unable to command the substantive agreement necessary (short of the use of coercive force) for the legalist's required systemic closure.

Posner finds originalism, as a variant of the "strict construction school" of constitutional and statutory interpretation, an especially absurd version of legalist ideology. First, he sees it as an ideology purportedly based upon democratic ideals but in reality based upon hostility to big government, indeed a non-democratic hostility at that.[65] Originalism as a form of strict construction, that is, because its cramps the manner of judicial interpretation, creates both overbroad and overnarrow results, ignores changes in context and blinkers the judge from the realities of the legislative process or any other helpful facts outside of its quite narrow allowed data-set, generates often

[60] Ibid, p. 77.
[61] Ibid, p. 13.
[62] Ibid, p. 104. This claim was made quite forcefully by Edward H. Levi in his classic *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), where he notes in relationship to the British unwritten constitution that "the influence of constitution worship" combined with a written constitution can give "great freedom to a court" so much so that through going back to the text the court can give itself "a freedom greater than it would have had if no such document existed," p. 59.
[63] Posner, *How Judges Think*, p. 104, 252-253.
[64] Breyer's "active liberty" is, of course, exemplified in his *Heller* dissent, is critiqued by Posner as ideology posing as pragmatism in *How Judges Think*, and is detailed in various legal realms in Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005).
[65] Posner, *How Judges Think*, p. 202.

insurmountable roadblocks for government by placing "an unbearable information load on our legislatures."[66] Such an interpretive strategy would, because of its severely constricting the information a judge can legitimately utilize, seem to impose a requirement of virtual omniscience on the legislative branch requiring the anticipation of all ambiguities and future changes in society. If such omniscience is lacking (as it clearly is) adoption of this type of interpretive strategy would require constant legislative and constitutional amendment. But, of course, "The legislative process is inertial, legislative capacity limited, the legislative agenda crowded, and as a result amending legislation is difficult and time-consuming."[67] These problems are further compounded when strict constructionist methodologies such as originalism are used to interpret the "220-year-old Constitution" where legislative correction would have to proceed through the elaborate process of constitutional amendment. To make his point Posner lists a parade of absurdities that seem likely to be required by such a method:

A strict construction of the equal protection clause of the Fourteenth Amendment is that it forbids affirmative action (unequal benefits) but not the racial segregation of public schools (mere separation); of the Sixth Amendment that it requires jury trials in courts-martial; of the First Amendment that it abolishes the tort of defamation and forbids the criminalizing of criminal solicitations, the legal protection of trade secrets, and the censorship of military secrets; of the Second Amendment that is entitles Americans to carry any weapon that one person can operate, including shoulder-launched surface-to-air missiles; of the Fifth Amendment that it permits evidence obtained by torture to be introduced in federal criminal trials provided the torture was not conducted in the courtroom itself; of the Eleventh Amendment that it permits a person to sue in the federal court of the state of which he is a citizen though no other state; and of Article I, section 8, that Congress cannot establish the Air Force as a separate branch of the armed forces or regulate military aviation at all.[68]

Cases deciding along these lines would, indeed, create a lot of extra work for a legislative branch that seems less than omniscient and as overburdened as it is.

Therefore, because of the limits of legalism and the absurd consequences and implausibility of the adoption of any of the possible comprehensive judicial philosophies Posner argues that American judges are necessarily pragmatists. That is, the American judge, because he or she is confronted with a demanding caseload that must be decided and a set of legalist tools that are incomplete at best and obstructionist at worst, must have recourse to purpose and consequences, two tools outside of the orthodox legalist toolkit, in order to decide cases in a reasonable and effective manner. Of course the legalist regards this as allowing extra-legal materials into the mix, therefore diluting the purity of the law and allowing "politics" to taint the legal process. Posner, in response, first notes that multiple descriptive theories of law (he references nine) in contemporary academia find that politics, as well as many other factors, influence legal decisions.[69] This is a scandalous finding for the legalist.

But, importantly, this is not a problem for the pragmatist judge because Posner rejects the law versus politics dualism. Indeed, Posner embraces the fact that law, especially appellate and constitutional law, is inextricably political. But the accusation of "political" must be analyzed. As he puts it, "partisan politics is not

[66] Ibid, 198, 202.
[67] Ibid, p. 201. Posner makes the further point that if it is found that legislative amendment is feasible then it may be used to fix mistakes following from other interpretive strategies, such as loose construction, as well as the results of strict construction.

[68] Ibid, p. 202.
[69] Ibid, p. 19.

the only politics."[70] Judges, that is, may use political ideas to help decide tough cases but not be following some local or partisan political agenda. For instance, a judge might believe that American law rests upon Lockean property rights, and therefore have a strong "political" interpretation of the Constitution that does indeed influence his of her vote, without being a devoted and party-following Republican. Further, as Posner notes, it is highly unlikely that any judge makes a decision by thinking "what would George Bush (or Ronald Reagan, Barack Obama, etc.) want me to decide?" Indeed, it seems correct to say, as Posner does, that "Virtually all judges would be distressed to be regarded as politicians in robes, because if they thought of themselves in that light they could not regard themselves as being good judges."[71] Further, the pejorative accusation of political judging rests upon the legalist belief that the autonomous and unique tools of law are sufficient to decide the tough cases – and this is now taken as patently absurd and resting upon a mistaken picture of law and the judges' role. Indeed, the main problem with the accusation of political judging once legalism is rejected is not that political factors should be excluded, or that it is descriptively inaccurate, but that it ignores all the other supposedly non-legal factors that also are involved in determining a judges' decision.

For Posner, "'Law' in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions."[72] This material includes legalist tools, but also must includes vast materials foreign to the legalist view. For instance, there are market incentives and institutional norms. Some of these norms are professional. Judges are socialized through their law school training and their membership in the legal profession and therefore have institutionalized norms and limits attached to the role of judge that they inhabit - a judge cannot take bribes decide cases by flipping a coin, appeal to partisan political affiliation, etc. - that create powerful constrains upon what is allowable.[73] Therefore, the desire to have the reputation of being a "good judge" is a powerful limit on reasons that a judge will think acceptable to offer.[74] Many limits also come from broader social norms; indeed, Posner argues that the pragmatist judge's chosen consequences are determined by "the prevailing norms of particular societies.[75]

This suffices to overcome the legalist claim that if the limits of legalism are relaxed and consequentialist reasons are allowed into judicial decision-making, "everything is permitted."[76] For Posner, therefore American judges are not properly seen as willful legislators, they are in fact *involuntary* and occasional legislators, reluctantly legislating in the open area where and when legalist tools give out. The pragmatist judge is not engaged in an ad hoc anything goes process of willfully imposing unconstrained and possibly idiosyncratic consequentialist ideals on otherwise clear areas (where the legal equivalent of balls and strikes are defined in advance). The pragmatist judge is reluctantly but necessarily a pragmatist because the other options are false and result in absurd and costly decisions that ultimately force the legislative branch into a position that requires virtual omniscience to function. In contrast to this, the pragmatist judge, by looking to context, purpose and consequences, "shares out the information burden between legislators and judges."[77]

[70] Ibid, p. 73.
[71] Ibid, p. 61.
[72] Ibid, p. 7-9.
[73] Ibid, p. 61.
[74] Ibid, p. 61. Mark Tushnet makes this point in his article "*Heller* and the Critique of Judgment," *The Supreme Court Review*, Vol. 2009 (2008): 61-87, p. 82. Therein he makes the argument that legal training develops an implicit "legal judgment" that is very much habitual. Therefore "Put simply, training socializes people into understanding what it means to be a good lawyer. Some possibilities, conceptually available, are taken off the table through socialization."
[75] Posner, *How Judges Think*, p. 241.
[76] Ibid, p. 1.
[77] Ibid, p. 198.

Ultimately, the pragmatist judge is not lawless, but the conception of a legally correct decision under legal pragmatism is indeed more flexible, less determinate, and attached to the idea of a "zone of reasonableness" within which decision-making is constrained.[78] This is best seen in the following passage where Posner describes what might be thought of as a pragmatist, non-correspondence theory of legal decision making; "when we say that a judge's decisions are in conformity with 'the law,' we do not mean that we can put his decision next to something called 'law' and see whether they are the same. We mean that the determinants of the decisions were things that it is lawful for judges to take into account consciously and unconsciously."[79] Therefore, American judges are "*constrained* pragmatists" because they are "boxed in…by norms that require of judges impartiality, awareness of the importance of the law's being predictable enough to guide behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes."[80] They are also boxed in by systemic functions and limits as well as professional, institutional and social norms.

V. Dorf and Sabel: Law as an Information Producing Machine

Posner's argument that American judges are necessarily constrained pragmatists is founded upon the judge's need for more information than that allowed for within a legalist framework such as Scalia's. In this sense if Scalia's system is premised upon the idea of "exclude information in order to bind," then Posner's pragmatism slogan might be thought of as "include information for the sake of effectivity and efficiency." This is a huge distinction. But what if a court system could be part of a system that aims for information production? Michael Dorf and Charles Sabel, in "A Constitution of Democratic Experimentalism," construct a conception of "democratic experimentalism" using Deweyan pragmatism that while compatible with traditional United States governmental organization would dramatically change the understanding of how government, and therefore the court system, ought to function.[81] Further, it is seen as an information and knowledge producing system.

The system offered is explicitly constructed on ideas taken from Deweyan pragmatism. First, they note that the "reciprocal determination of means and ends" is inevitable due to the "pervasiveness of unintended consequences" that makes it impossible to come up with "first principles that survive the effort to realize them."[82] Second, as with the pragmatists, they also note that doubt properly understood and utilized is a spur towards creative solution. Third, Dorf and Sabel also accept that the inquiry following from doubt is "irreducibly social," indeed our understanding of our individual projects "depends on how others interpret and react to them."[83] Fourth, Dorf and Sabel adopt ideals from classical pragmatism because "As a theory of thought and action through problem solving by collaborative, continuous reelaboration of means and ends, pragmatism suggests that advances in accommodating change in one area often have extensive implications for problem solving in others."[84] One of the most important implications is that it questions a clear-cut distinctions and essentialist understandings of political branch functions and fixed conceptions of the line between public and private.

Because of the flexible nature of pragmatism and a questioning of essentialist ideas of democracy, law and the public/private split, "Democratic Experimentalism" as a program can look to private firms for possible solutions to problems of democratic governance. And

[78] Ibid, p. 86.
[79] Ibid, p. 44.
[80] Ibid, p. 13.
[81] Michael Dorf and Charles Sabel, "A Constitution of Democratic Experimentalism," *Columbia Law Review* 98 (1998): 267-473.
[82] Ibid, p. 284-285.
[83] Ibid, p. 285.
[84] Ibid, p. 286.

this is exactly what Dorf and Sabel do. They argue that because markets have become "so differentiated and fast changing that prices can serve as only a general framework and limit on decisionmaking," innovative private firms have had to "resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange."[85] Specifically, these firms have adopted "federated" and open strategies of benchmarking, simultaneous engineering and learning by monitoring.[86] Benchmarking entails "An exacting survey of current or promising products and processes which identifies those products and processes superior to those the company presently uses, yet are within its capacity to emulate and eventually surpass."[87] Simultaneous engineering on its part entails "Continuous adjustment of means and ends and vice versa, as in pragmatism, the means and end of collaboration among the producers." Further, because "the exchanges of information required to engage in benchmarking, simultaneous engineering, and error correction also allow the independent collaborators to monitor one another's activities closely enough to detect performance failures and deception before these latter have disastrous consequences" this type of collaboration encourages "learning by monitoring."[88] Group discussion becomes central in pooling plans, problems and perspectives.[89] Further, this type of organization yields flexibility in purpose and output as well as creates self-reinforcing habits of inquiry and transparency. Dorf and Sabel term a political system built along the same lines as the new firm a "directly deliberative polyarchy."[90]

In this system of democratic experimentalism the roles of various branches remain somewhat distinct, but their functions are partially reconceived. Governmental activity would be presumptively local.[91] Congress would encourage and allow subunits to experiment as to means and, to a lesser extent to ends, "on condition that those who engage in the experiment publicly declare their goals and propose measures of their progress, periodically refining those measures through exchanges among themselves and with the help of correspondingly reorganized administrative agencies." Congress would also ensure that information, such as the results of various experiments in governance, would be made generally available, therefore create an information resource of successful and unsuccessful regulatory choices. Administrative agencies would be chiefly charged with assisting subunits in experimentation as well. More specifically, with congressional authorization they could set regulatory standards (most likely following "rolling best-practice rules") and encourage effective benchmarking.[92]

Most significant for this paper, the conceptualization of the role of the courts also changes in democratic experimentalism. Courts function to make sure that the experiments fall within the broad aims authorized in Congress' legislation, respect the rights of citizens and are performed in a properly systematic and transparent manner. Communities would get freedom and support for their experiments, but in return for this liberty they must develop a record of options and choices considered (which would be virtually automatic given the benchmarking, simultaneous engineering and learning by monitoring). A court would look at the possibilities revealed by the process in order to decide whether or not any rights or policies are unlawfully thwarted. A party challenges governmental choices in court by pointing out better choices revealed in other experiments in governance, "In this way the vindication of individual rights encourages mutual learning and vice

[85] Ibid, p. 286.
[86] Ibid, p. 297.
[87] Ibid, p. 287.
[88] Ibid, p. 287.
[89] Ibid, p. 302.
[90] Ibid, p. 288.
[91] Ibid, p. 343.
[92] Ibid, p. 345.

versa, and judges' discretion in applying broad principles is schooled and disciplined by actual experimentation with possibilities they could have never imagined."[93] Courts would not eliminate traditional doctrines but would have to embrace two ideals in order to function properly within democratic experimentalism. First, courts would have to combine a sense of "fundamental legal norms" with an understanding that these norms can properly be exposed to experimental elaboration. This "does away with the spurious precision of once-and-for-all decisions."[94] Second, "experimentalist courts defer to the political actors' exploration of means and ends only on the condition that the actors have in fact created the kind of record that makes possible an assessment of their linking of principle and practice."[95]

Therefore "Judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them."[96] This type of review would, therefore, function at a "metalevel."[97] The virtue of this is that the process creates data so, as opposed to courts currently that have to act as if empirical questions are questions of pure reasoning, the court within democratic experimentalism will have data to work from. So, for example, under a statute authorizing experimentalist administration, the courts do not themselves supply authoritative meaning; the agencies and other actors jointly provide the baseline through rolling best-practice standards."[98] Judges therefore function less as a referee and more as part of an active problem-solving process.[99] Ultimately, "as a matter of substance, experimentalist judging focuses on the permissibility of reasons, and responses to threats to fundamental legal norms. As a matter of procedure, experimentalist judging focuses on participation; but where traditional procedural jurisprudence seeks the eternal requisites of fair process, experimentalist courts ask whether the parties whose actions are challenged have satisfied their obligation to grant those rights of participation revealed to be most effective by comparison with rolling best practices elsewhere."[100]

Citizens continue to evaluate their representatives through voting in general elections, but elections can be informed through the use of the benchmarking information from their district as well as those similar that the full process of democratic experimentalism produces. The same governmental process that encourages the development of benchmark information in furtherance of solutions to current political issues creates a record that can help inform votes. Further, citizens serve a more active stakeholder role on various governance councils in more directly democratic venues. Importantly, this change in election and local citizenship activities undercuts abstract ideological debate and the polarization of two-party elections by having most decisions rooted in local problem-solving procedures. Therefore, "Experimentalism links benchmarking, rulemaking, and revision so closely with operating experience that rulemakers and operating-world actors work literally side by side-but, to repeat, in plain view of the public-and thus, largely overcome the distinction between the detached staff of honest but imperfectly informed experts and the knowledgeable but devious insiders the regulate."[101]

[93] Ibid, p. 288.
[94] Ibid, p. 395.
[95] Ibid, p. 389.
[96] Ibid, p. 390.
[97] Ibid, p. 400.
[98] Ibid, p. 397.
[99] Ibid, p. 401.
[100] Ibid, p. 403.
[101] Ibid, p. 355.

One fear that Dorf and Sabel anticipate is that it will be claimed that democratic experimentalism as outlined above improperly trivializes rights and therefore will not offer proper protection for them. This is, of course a standard critique of any remotely consequentialist theory of rights, and one that has been deployed against pragmatism repeatedly. Dorf and Sabel embrace the fact that under democratic experimentalism rights are a product of history, context and social understandings. Indeed, "our rights do not lose their majestic and independent authority when we come to acknowledge that in some sense we chose them. Because our rights are part of who we are, they shape, explicitly or not, all the manifold projects by which we determine the future of our polities."[102] First, and correctly, they claim "this conception of political rights and personhood as mutually defining is a variant of the pragmatist idea of the joint determination of individuality and sociability."[103] Further, "Thus understood, rights, far from estranging us from one another, are a crucial part of the common ground of mutual recognition upon which we raise our individuality."[104] In response to the demand that rights be more certain, more founded upon something undoubtable, Dorf and Sabel respond that such a demand is an unsatisfiable and that ultimately, "however characterized…rights are inevitably experimentalist."[105] Indeed, "Experimentalism does not name an alternative to the identification of Platonic rights. It names an organized, considered alternative to a haphazard mixture of metaphysical nonsense and ungrounded speculation about empirical matters."[106] So, "we do not face a choice between experimentation or no experimentation. The status quo is an ongoing, albeit haphazard, experiment. Between that kind of experiment and a more democratically and systematically organized one, we think the choice is easy."[107]

VI. From Information Exclusion to Information Production

Heller as decided starkly shows the result of Scalia's information exclusion-based jurisprudence. First, it excludes the prefatory clause, then any broader context, then any legislative record to find intent, and finally rests upon the ability to identify an independently existing identifiable discrete meaning locatable in historical records. This meaning is then used to derive a decision without any recourse to social facts, changing circumstances, or consequences in general. Further, as he notes, this first part of the two-step is often difficult so he follows this with a strong presumption in favor of rules even if the rule chosen is not fully attached to an identifiable original meaning and therefore potentially causes substantive distortion. This is because Scalia believes rules hedge judicial discretion in and therefore keep the judge in role, that is applying democratically produced rules in neutral fashion to specific cases. It is interesting to note in this regard the information excluding aspects of this stance not only allow the judge to not notice the effects of a decision (good or bad), but also explains Scalia's blinkered analysis of what he means by democracy. As a judge, and given his conception of his role, that is none of his business.

It must be admitted that this conception of the law and the judge's role within it is attractive. First, if accurate, it can explain and justify the everyday picture of American law, and give a real clear meaning to such slogans as "the rule of law as the law of rules" and to the often heard critique of decisions as evidence of judicial activism. Second, given the institutional position of a judge, and the purported institutional limits of the court system, it explains how justified decisions can be made

[102] Ibid, p. 448.
[103] Ibid, p. 448.
[104] Ibid, p. 449.
[105] Ibid, p. 452.
[106] Ibid, p. 457.
[107] Ibid, p. 469.

without the societal information that other branches of government can more easily make effective use of.

Unfortunately for Scalia's picture, though, the identification of original meaning is probably a pipe dream. First, in the case of the United States Constitution, the context would rather point to a document meant to be loosely understood, full of aspirational and vague terminology that would have to be filled in later with meaning. Indeed, given the nature of the document it would be fully reasonable to expect that the founder's expected future generations to fill in the general words with content that functioned best for the later times. Further, of course, the historical data available is radically incomplete. Finally, from a pragmatist point of view, Scalia's originalism rests upon a sort of "myth of the given" in the sense that he appears to believe that a specific univocal original meaning can often be identified outside of the specific inquiry, the specific controversy, in question.

Beyond the problems with originalism there is the assumption that rules are better at constraining a judge and that these are also better for democratic government. As Posner notes, this seems to be an empirical claim, but claims like this are always offered without any empirical support, and are therefore really unsupported legalist dogma.[108] Indeed, again from a pragmatist point of view this fixation upon rules looks a lot like the misguided and pathological quest for certainly that Dewey so effectively critiqued. Finally, when the two-step originalism and rule picture Scalia offered got its seemingly perfect moment in *Heller*, the actual legal traction of the decision rested largely upon the "pragmatic" exceptions to the legally determined rule. In other words, for all the purported virtues of the information excluding picture of law he offers, it seems that more information than legally proper under his jurisprudential philosophy was necessary even in the ideal case.

Of course this is all as Posner would predict. He sees legal ideals such as Scalia's to be too trapped in legalist ideology and full of rhetorical, "Law Day" flourishes that are better explained as professional mystification than descriptive or even in best-case scenarios such as *Heller*, normative accuracy. Posner offers instead a conception of the judge as constrained pragmatist forced into an open area of involuntary freedom due to the fact that legalist materials and legalist comprehensive judicial philosophies such as Scalia's are inherently unable to function as demanded. Instead of the willful discretion of the common-law Mr. Fix-it judge that Scalia fears, Posner highlights the inherent insufficiency of the materials that Scalia thinks are determinative. A judge has to "affix" a decision in the sense that controversies must be settled and therefore if legalist materials are insufficient then other materials, and other information, must do the job. Further, of course, Posner highlights the absurdly naïve picture of legislative process that Scalia's jurisprudence requires. The constrained pragmatist judge, to the contrary, is expected to utilize as accurate a conception of legislative ability as possible.

Posner argues that the legally necessary materials are multiple and diverse, but that this isn't really the problem that Scalia and legalist in general think it is once a more descriptively accurate picture of judicial decision-making is accepted. Here is where another aspect of Scalia's philosophy appears to a pragmatist to be fatal in fact. Through developing what I noted as a "non-correspondence" conception of law where multiple factors determine a legal decision and not the process of holding a decision up against something called "law" in order to test the accuracy of the correspondence, Posner highlights how often much of the legalist system relies upon an intuitive acceptance of something very close to a correspondence picture of legal decision-making.

[108] Ibid, p. 179.

Ultimately, Posner's constrained pragmatist is constrained not only by the need to decide a heavy caseload in a timely fashion without certain guarantees, but the judge is also hemmed in by professional norms and general social values and beliefs. Therefore, even in an "information including" system of law only a small set of possible reasons and possible decisions will be actually possible. These decisions fall within a "zone of reasonableness." Posner thinks it actually a virtue that a judge has to admit that the zone of reasonableness does not determine a specific result but only a family of acceptable possibilities. In this case the judge cannot fully hide behind "the law" and therefore must admit to personal responsibility for the actual decision. This would, he thinks, properly give the judge a feeling of skating on thin ice and, therefore, tend to move judges in general toward a more modest position.[109] It would also, it seems, encourage the judge to want to know more about facts and specific policy options. So, instead of beating judges over the head with legalist materials, lawyers would be moved towards emphasizing the consequentialist stakes (both short and long term) of possible decisions.

As to *Heller*, certainly Breyer's dissent has more in common with Posner's constrained pragmatist judge than either the majority opinion or the Stevens dissent (which serves largely as a *reductio ad absurdum* to Scalia's claims to meaning, truth, knowledge, certainty, constraint, etc). Breyer emphasizes social statistics relating to gun use, the difficulty of knowing what policies are more effective in specific situations and the need to allow for as large an area of social experimentation as possible so as to let local governments try various options in the face of serious social problems. This seems fully compatible with Posner's constrained pragmatist judge. Further, Breyer argues that there are conflicting aims in the Constitution and that, therefore, the Court's opinion is overly absolutist in its picture of just one of the enumerated rights, and maybe not even the most important of the rights (especially given the changed circumstances from the royal tyranny of revolutionary times to the crimes of the modern inner city – aspects Scalia's system cannot notice). This, of course, is an argument for looking to purpose over a more literalist reading (a strategy which is plainly true of the Court's jurisprudence in relationship to other rights such as, for example, free speech and equal protection). On the other hand, it is not so clear that Posner's judge would immediately turn to balancing tests to decide. All-in-all, though, Breyer's dissent would almost assuredly fit within the constrained pragmatist judge's zone of reasonableness.

Would the same be true of the majority's decision? Certainly the methodology would be seen as a sham – as it should be from a pragmatist's point of view. What about the result? In all actuality the result was not much of note. First a relatively miniscule bright-line rule is announced to the effect that a virtual ban of hand guns for personal protection is unconstitutional. Beyond that, the Court offers a set of exceptions that seem completely ad hoc and founded upon nothing but previous general legislative enactment. Posner's constrained pragmatist would want a more developed argument here. But, of course, the Court's legalist tools have no argument to offer here, and so the Court goes silent right where the real need for even the most basic legal guidance begins. Therefore, the constrained pragmatist would have a difficult time seeing any virtue to the *Heller* decision, and would wonder how the Court thought that this offered any but the most minimal constraint to lower court judges. Te most predictable result seems to be more litigation in the lower court with less guidance as to what short of an absolute ban is allowed.

But the constrained pragmatist judge would be constrained in another way less than ideal – that is, constrained in the type of information offered the court

[109] Ibid, p. 249-253.

even if the attorney's on either side decided to use facts instead of more legalist arguments in their cases. This is because, just as the originalist judge ends up with a result pre-packaged on both sides, and therefore a type of "history in law," the constrained pragmatist would get a type of "nothing but the facts of the case" in that each side would be willing to only offer those options that clearly favored their side. The virtue of Dorf and Sabel's democratic experimentalism is that it would, if effective, solve this problem and actually enlist the court system in the production of a more thorough set of information in regards to the policies and rights at issue.

In the case of *Heller*, it is difficult to know from the Court's opinion what options were considered. Under the governance scheme offered in democratic experimentalism a record of options considered (benchmarking), and why specific policies were chosen would be most likely the largest part of the Court's data. Upon a challenging of the law, the lower court would use normal legalist tools to decide an easy case. But given a more difficult case, the record developed by the local government through the use of benchmarking, data collection and policy options generated, as well as results from the locality and others dealing with the same issues, would be available in order to ensure that principle and practice were sufficiently linked. The role of the judge here is not to solve controversial problems through the somewhat arbitrary settling via a clear rule (this didn't work so well in *Dred Scott*), but rather to encourage democratically transparent and accountable problem solving where the rules of law come from democratic processes and not a judicial oligarchy with their own less than fully informed preconceptions. This offers a democratic and experiment-encouraging rule of law that discounts judicial rules in favor of greater information production and policy testing. There isn't the certainty purportedly offered by Scalia's jurisprudential theory, but this is a virtue given the dogmatic hubris so apparent in Scalia's purported modesty. Of course one might see exclusion of information (judicial ignorance?) to be a doubtful virtue to begin with. But as to what a judge under the democratic experimentalist system would decide we have no idea – because as it stands, the court system did not produce the information necessary to make such a choice. Of course if Dorf and Sable are correct, that information would be produced if the court were seen as an active participant in the process of producing informed democratic decision-making.

VII. Conclusion

In this paper I have argued that through an analysis of Richard Posner's *How Judges Think,* as well as Michael Dorf and Charles Sabel's "A Constitution of Democratic Experimentalism," a conception of the legal process, and the judge's position within it as an information production system is offered that is true to the tradition of philosophical pragmatism and compatible with both rule of law virtues and democratic governance. Instead of a picture of virtuous judicial ignorance through knowledge exclusion, a conception of law premised upon knowledge production offers a better hope for a just and democratically responsive legal system in a complex and interconnected world. While this analysis is somewhat parochial, being attached to cases and theorists writing within the United States legal tradition, as well as the somewhat ridiculous position of guns within American social ideology, it is hoped that the move from a picture of law from purposive information exclusion to a more active position in social experimentation might be usefully translatable to other contexts.