

5-10-2019

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Recommended Citation

Richardson, Stephen (2019) "Constitutional Theory & The Political Process," *Pepperdine Policy Review*: Vol. 11 , Article 8.
Available at: <https://digitalcommons.pepperdine.edu/ppr/vol11/iss1/8>

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Constitutional Theory & The Political Process

By: Stephen Richardson

Abstract

Constitutional Theory is at the center of legal and political debates in the United States. In recent decades, legal scholars and politicians alike increasingly treat their respective theories of interpretation as articles of faith. From *originalism*, to *textualism*, to treating the constitution as a “living document,” many contend that their theory is better than the others and offers the most suitable answers to raging constitutional debates. This paper tests that popular convention by examining how the Constitution was written, and whether there is indeed any one way to interpret it. I will then compare and contrast two dominant theories of interpretation; *Originalism* and *Legal Pragmatism* to show their strengths and weaknesses. Further, I will examine four landmark Supreme Court cases to outline examples of where both theories got it right and wrong. This analysis will reveal that both theories lead to destructive results when presiding judges ignore important political realities of their day and rule based on ideological or theoretical leanings. Conversely, it will show that both theories lead to constructive results when the presiding judges take political realities into account and consider the consequences of their rulings. Thus, the main argument of this paper is that political realities should never be divorced from judicial rulings. This analysis will also show that the *political process* is integral to sound jurisprudence, and that the constitutional framers left room for this in the way they wrote our most sacred document.

Keywords:

Constitutionalism, Constitutional Theory, Theories of Interpretation, Originalism, Legal Pragmatism, Jurisprudence, Supreme Court, Political Process, American Politics, Political Realities

Introduction

Any student of American Law ought to be able to readily answer the question “What is Constitutional Theory” in a satisfactory manner. A working definition can be reduced to “theories and debates about how the Constitution should be interpreted.”¹ The three dimensions of these interpretations are The *Prescriptive*, i.e. “telling people what to do;”² the *Descriptive*, i.e. “what the evidence shows;”³ and the *Normative*, i.e. “what ought to be the case.” Through all the debate, ambiguity and nuance, various “theories of constitutional interpretation” arise to give legal scholars and policy makers a range of lenses through which they can analyze constitutional questions from. *Originalism* and *Legal Pragmatism* remain both dominant and controversial forces in this field.

Proponents of any one theory often contend that their specific approach is best and serves a “one-size-fits-all” purpose for settling constitutional debates. I, however, argue that this is inherently misguided and misses the whole point of constitutional theory. I contend that the Constitution was left vague, broad, and/or ambiguous in certain areas explicitly for the purpose of creating versatility in interpretation. This is particularly important to note because the architects of the Constitution disagreed on many points,⁴ and the question of who exactly qualifies as a constitutional framer lacks a clear answer.⁵ It can be assumed then, that vague passages in the Constitution are purposefully constructed as such. Accordingly, many clauses lack one definitive meaning, making singular interpretations either impossible or self-serving to the interpreter, if not both.

The debate over certain interpretations should, and largely does, reflect the political realities of the time, because it is the *political process* itself that decides which interpretation prevails. For instance,

¹ Michael J. Gerhardt, Stephen M. Griffin, Thomas D. Rowe, Jr., Lawrence B. Solum, “Constitutional Theory: Arguments and Perspectives.” *LexisNexis*, 2013. 4-7.

² David A. Strauss, “What is Constitutional Theory?” *California Law Review*. Vol 87. (1999). 582.

³ *Ibid.*

⁴ Thomas E. Baker, “Constitutional Theory in a Nutshell.” *William & Mary Bill Rights Journal*. Vol. 13 (1). 2004. 74.

⁵ Baker, “Constitutional Theory in a Nutshell.” 74.

the political realities of the 1980s gave rise to *Originalism*— a theory that was previously obscure, and certainly never prominent.⁶ Perhaps the Founding Fathers never intended for the Constitution to provide answers for every question that may arise in the political process of the future. There is certainly no evidence that this was the intention of even a majority of framers, much less that of the entire body. Any claim to the contrary is sorely lacking in evidence and is likely the result of injecting modern debates, void of meaningful context, into political history. Instead, the Constitution was almost assuredly drafted to serve as a framework for guiding the political process, which comes to these conclusions by its own devices. To be clear, there are no obvious explanations for the issue at hand, and no one has all the answers. The point of this paper is to illustrate just this, and that to claim the opposite is folly at best. The ambiguous nature of the Constitution and its framing are the very things that make both a Supreme Court and constitutional interpretations necessary.

To reach truly insightful conclusions when reading the Constitution, there ought to be a pluralistic tension between *originalist* and *pragmatic* interpretations. This tension is present so that we remain true to our roots and to the spirit of what was intended when the Constitution was written. Only after reflecting honestly on these roots can we make practical departures from original intent when needed, to respond to the needs of the present. If a purely *originalist* approach prevailed in all manners of law and politics, we would never move forward, and many debates would be left unresolved. If a purely *pragmatist* approach prevailed in the same way, judges and lawyers would have a license to depart from the “spirit of the law” as they see fit, effectively acting as unelected legislators. In short, either extreme would result in consequences too radical and/or too disruptive for the political system to endure.

⁶ Originalism first arose in 1980, and then became a prominent theory of interpretation throughout that decade, being at the center of much legal and constitutional debate from then until the present day. See: Bret Boyce, “Originalism and the Fourteenth Amendment.” *Wake Forest Law Review*, Vol. 33 (4). 1998. 910-913.

To reconcile this, *pluralistic* interpretations ought to prevail, so as to fit the best aspects of a given theory in proper contexts, resulting in the most constructive outcome. To illustrate these points, I will give a brief explanation of both *originalism* and *legal pragmatism*. In doing so, I will show how neither can be used in isolation to settle constitutional debates. After this, I will examine several Supreme Court rulings and state; (1) their relation to either theory and (2) their influence on the legal-political order. Lastly, I will conclude with the lessons learned from examining these two theories and four Supreme Court cases.

Originalism

Originalism is a constitutional theory which contends that meaning of the Constitution's various passages are fixed in time, and that these definitions are both knowable and provable.⁷ Central to this theory is the "fixation thesis," which maintains that a constitutional clause's original meaning is fixed and does not change over time or with evolving socio-political contexts.⁸ The only way the meaning can be changed, according to this theory, is through formal constitutional amendments - what is known as "Big C" Constitutionalism.⁹ Originalists believe that it is not their duty to "make law" but to interpret it in the most strict and principled way possible, regardless of the consequences that may follow.¹⁰

Originalists would say that judges ought to make the proper decision regardless of where that decision takes them.¹¹ This is a "let the chips fall as they may" approach that values the integrity of principled judicial decision-making over achieving desirable outcomes. This notion manifests itself in the "constraint principle," one which holds that judges should be bound by the original meaning of the text, assuming that the original meaning can be deduced.¹² Further, *originalists* contend that judges are not

⁷ Lawrence B. Solum, "What is Originalism? The Evolution of the Contemporary Originalist Theory." *Georgetown University Law Center*, May 2, 2011. 1-3

⁸ Solum, "What is Originalism?" 1-3.

⁹ Michael J. Gerhardt et. Al, "Constitutional Theory: Arguments and Perspectives." 33-38.

¹⁰ Randy E. Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism." *75 U. Cin. L. Rev.* 7-24 (2006). 9-11.

¹¹ *Ibid.*

¹² Solum, "What is Originalism?" 1-3.

free to disregard this meaning of the text, assuming that this true meaning can be demonstrated empirically.

The problem with this approach is the presumption that; (1) there is a truly empirical way to interpret the text begin with and (2) that any passage has only one meaning. *Originalists* further suppose that this meaning can be shown beyond reasonable doubt. But what “original” meaning is one to deduce? Is it the “*original intent*” which is the intention of the writers, or the “*original public meaning*,” which is the way it would have been understood by the public at the time of its writing?¹³ Moreover, what if these two contradict? What if the framers of the constitution disagreed on specific clauses (which we know to be true in many cases)¹⁴ – which interpretation do you abide by? How does one determine which framer is more credible?¹⁵ How does one determine which original interpretation is best if there are more than one (which there are in several cases)?¹⁶ What if a clause is so ambiguous or vague that one cannot possibly come to a definitive answer? These are major hurdles for *Originalists*, and the source of much criticism levied at them. Quite often, originalist rulings are justified by cherry-picked pieces of historical data, or the willful disregard of contemporary evidence. Such is the danger of abiding by this theory in all cases – it must be tempered or even abandoned at times, something Justice Scalia has been ironically criticized for in doing by more strict and loyal originalists.¹⁷

Legal Pragmatism

Legal Pragmatism is a bit of a paradox in that it is a constitutional and legal theory that rejects theoretical frameworks. Daniel A. Farber, a prominent legal theorist, contends that “Constitutional law needs no grand theoretical foundation. None is likely ever to be forthcoming, and none is desirable.

¹³ Bret Boyce, “Originalism and the Fourteenth Amendment.” *Wake Forrest Law Review*, Vol. 33 (4). 1998. 915-918.

¹⁴ *Ibid.* 915.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Randy E. Barnett, “Scalia's Infidelity: A Critique of ‘Faint-Hearted’ Originalism.” *75 U. Cin. L. Rev.* 7-24 (2006). 13-16.

Instead, legal pragmatism is a sufficient basis for constitutional law.”¹⁸ He then goes on to describe legal pragmatism as a method of “solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and source policy.”¹⁹ The goal of the *pragmatist* is to find the ruling or outcome that is the most constructive, or rather, least disruptive for society, and one which best preserves the integrity of judicial precedent and the legal order.²⁰ In this way, it is very consequentialist, as the ruling’s results are heavily considered.

Due to the absence of theory, heavy reliance on real world application and emphasis on consequences, *Legal Pragmatism* is essentially the antithesis of *Originalism*. Originalist rulings follow the theory regardless of where it leads to, while pragmatist rulings try to create the least radical, least disruptive, and most constructive outcome. *Legal pragmatism* is often criticized as being unprincipled and prone to abuse, but this criticism is unfair. Richard Posner, one of the most influential legal scholars of the past century, has famously been the biggest proponent of this theory in recent decades. According to Posner, there are Eight Principles of *legal pragmatism*:²¹

1. *The duty to decide is the primary duty of a judge*
2. *Law is not limited to materials already in existence—judges will have to make law*
3. *When materials do not yield answers, judge’s rule is legislative and must be both followed and used in future*
4. *No master logical or empirical methods or theories are available for judge’s decision-making (there is no one universally right way to interpret the constitution, ex: originalists do not believe that only a man could be president although it says “he” in the constitution)*

¹⁸ Daniel A. Farber, “Legal Pragmatism and the Constitution.” 72 *Minn. L. Rev.* (1988). 1332.

¹⁹ *Ibid.*

²⁰ Michael J. Gerhardt et. Al, “Constitutional Theory: Arguments and Perspectives.” 68-72.

²¹ *Ibid.* 70-71.

5. *Must bear in mind not only the consequences of a decision for the parties but also the effects on such systemic values as continuity, predictability, and stability of legal rules and decisions*
6. *If consequences are unknowable, judges need rules for dealing with uncertainty (ex: burden of proof)*
7. *Ignore social standing, personal merits, and political influence of parties when making a decision*
8. *A judicial opinion should state the true grounds of the judge's decision*

As can be seen, this theory is anything but a device for the fickle and self-serving as it is as at times portrayed. There are indeed guiding principles and criteria by which to determine the best (or least disruptive) outcome. There are, however, valid reasons to be worried about *judicial activism*,²² as the first principle insinuates that a judge must take a stance, and the second clearly states “judges will have to make law.” For those judges wishing to take passive stances and make the least impactful decisions, *legal pragmatism* would not be the best guiding theory.

US Supreme Court Cases: Where Originalism Got It Right

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

The landmark Supreme Court case *Heller* is widely seen as one of the most important Supreme Court decisions in recent years, and as a triumph of conservative ideals over unprincipled liberalism. Most importantly, *Heller* showed how the original meaning of the Second Amendment is still relevant today. The outcome of this case proves that *originalism* has its merits and that the “spirit of the law” in its original inception can be adapted to fit modern realities. This was the first Supreme Court case to decide if the Second Amendment guaranteed an individual the right to keep and bear arms for self-defense. The court

²² Many judges, politicians and legal scholars warn of judicial activism – Judges imposing their own will and opinion onto the law, under the guise of constitutional theory. See: Baker, “Constitutional Theory in a Nutshell.” 73.

ruled precisely that, thereby setting a new precedent for subsequent jurisprudence and political norms across the United States.

The central question in this case was “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”²³ Justice Scalia first tackles this question by dissecting the text of the Second Amendment under the presumption that it was meant to be understood by the voters of the American founding period, as held in *United States v. Sprague (1931)* and *Gibbons v. Ogden (1824)*.²⁴ Scalia states that the Amendment has two clauses: a prefatory clause, which announces the purpose of the second clause, and the *operative*, which in turn gives the command or purpose of the Amendment.²⁵ The function of the *prefatory* clause is to clarify the *operative* without limiting or expanding the scope of the latter. Justice Scalia provides contemporary evidence to show that this was the norm at the time, making a compelling case for his interpretation.²⁶ With all this in hand, Justice Scalia stated that another way of wording the Amendment is, “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”²⁷

With this clarification, one can argue that the purpose of the people’s right to keep and bear arms is to serve in a “well regulated” militia - but is this really the case? To answer this, Justice Scalia again draws from contemporary evidence. He cites several examples from the 18th century of the phrase “the right to bear arms” used in unambiguous ways to denote the right to carry weapons outside of a militia or other martial purposes.²⁸ Examples of this include nine state constitutional provisions written in the late 18th and early 19th centuries “which enshrined a right of citizens to ‘bear arms in defense of

²³ “District of Columbia, et al., Petitioners V. Dick Anthony Heller.” *Supreme Court of the United States*, June 26, 2008. 1.

²⁴ *Ibid.* 3.

²⁵ *Ibid.* 3-6.

²⁶ *Ibid.* 3-7.

²⁷ *Ibid.* 3.

²⁸ *Ibid.* 11.

themselves and the state' or 'bear arms in defense of himself and the state.'"²⁹ Thus, it can be deduced that the original meaning of *operative* clause included the right for private citizens to defend themselves *and* the State, while not being limited to service in a militia.

There were two final hurdles that Justice Scalia had to overcome: the original meaning of "well regulated militia," and "Security of a Free State." To the former, Scalia notes that the phrase "The Militia" appears five times in the text of the constitution (three times in Article I section 8, once in Article II section 2, and once in Amendment V) and this, along with the Second Amendment, makes for a total of six mentions.³⁰ Scalia then goes on to convincingly argue that the former five mentions denote a Militia already in existence, rather than one to be raised by Congress as with an Army or Navy.³¹ "The Militia" Scalia argues, therefore refers to every able bodied man; adapted to modern times this essentially means every qualified citizen.³² Scalia argued that Congress may limit this, as legal limitations are the legislator's prerogative, but outright bans on the possession of firearms, and categorical limitations based on an individual's identity, are not. Finally, "Security of a Free State" was found to simply mean the "security of a free polity" which the court argued the Second Amendment is conducive with.³³

Justice Scalia concluded the majority opinion of the court with a very powerful and insightful statement:³⁴

"Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence

²⁹ Heller, 11.

³⁰ Ibid. 9, 11-12.

³¹ Ibid. 22-23.

³² Ibid. 22-23.

³³ Ibid. 24.

³⁴ Ibid. 64.

is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct. We affirm the judgment of the Court of Appeals.”

In doing so, he outlined precisely why this decision is shining example of how the *originalist* interpretation ought to be employed: to *preserve the integrity* of judicial rulings, and with it, our constitutional rights. No attempt was made to uproot the political order, nor to take us back in time with a *regressive* ruling. Instead, the controversial ambiguity of a supposedly anachronistic Amendment was settled by this clarification. Further, the scope was kept *narrow* so as to refrain from becoming overly political. Instead, the court opts to stay in the legal realm, so as not to encourage a runaway judiciary ruling with unchecked *judicial activism*. The case settled the legal question in a legal manner, and a constitutional question in a constitutional manner, while the political question was left to the political process. This was constitutional theory done correctly, a watershed moment in American judicial history, and a modern bedrock of American jurisprudence.

US Supreme Court Cases: Where Originalism Got It Wrong

McCutcheon v. Federal Election Commission, 572 U.S. 536 (2014)

The infamous *Citizens United (2010)* ruling and its lesser-known yet more dangerous succeeding case on the same topic (campaign finance restrictions) may ultimately prove to be among the most destructive rulings since the *Lochner* era.³⁵ *McCutcheon* builds off *Citizens United (2010)* and takes the ruling a step further. Chief Justice Roberts argued that aggregate contribution limits on donations to political campaigns violate the Free Speech Clause of the First Amendment, striking down *Section 441* of

³⁵ In reference to: *Lochner v. New York, 198 U.S. 45 (1905)* which today is universally condemned as one of the worst Supreme Court decisions in US History, ranking similarly to *Dred Scott (1857)*. In recent decades there has been fierce legal debate about what went wrong, and what constitutional theory is to blame. Please see: Daniel A. Farber, “Legal Pragmatism and the Constitution.” 1355-1356.

the *Federal Election Campaign Act (FECA)*.³⁶ Ultimately, what the court got wrong was the application of the First Amendment's original meaning to modern circumstances. My goal in this analysis is not to give the one true meaning of the First Amendment and how its original intention translates to the present, but to show how the majority opinion erroneously asserted to do just that.

Chief Justice Roberts states that the interest at stake is an "individual's right to engage in political speech" and that "the whole point of the First Amendment is to protect individual speech that the majority might prefer to restrict, or that legislators or judges might not view as useful to the democratic process."³⁷ Roberts further went on to argue that the government does not have a strong enough interest in regulating "political speech" to prevent *quid pro quo* corruption – or rather, that he did not see sufficient evidence of this interest.³⁸ Roberts argued that the "only legitimate governmental interest for restricting campaign finances" was preventing corruption or the appearance of it – and by that, he meant overt corruption that was plain to see.³⁹

The court argued that "spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption."⁴⁰ Further, Chief Justice Roberts denied that spending large sums on behalf of a candidate generates "influence over or access to elected officials or political parties."⁴¹ The majority therefore rejected a modern political truism that political candidates are beholden to their larger donors. This reasoning was articulated by distinctly differentiating *quid pro quo* corruption from "general influence."⁴² The court argued that the latter must be protected in order to "safeguard basic First

³⁶ "McCutcheon et al. v. Federal Election Commission." *Supreme Court of The United States*, Argued October 8, 2013—Decided April 2, 2014. 1-2.

³⁷ *Ibid.* 3.

³⁸ *Ibid.* 4.

³⁹ *Ibid.* 3-4.

⁴⁰ *Ibid.* 4.

⁴¹ *Ibid.*

⁴² *Ibid.*

Amendment rights,” and that it is better to “err on the side of protecting political speech rather than suppressing it.”⁴³

It is apparent that this majority opinion undermines nearly two hundred years of legislative acts, which limits the influence of money in politics, and willfully denies political reality.⁴⁴ Furthermore, this majority opinion uprooted centuries of American jurisprudence which has aimed to stymie the noxious influence of quid pro quo corruption in the political arena. In this sense, the ruling truly does seek an *originalist* meaning, as it wishes simply to bypass modern legislation and jurisprudence deemed inconvenient to the end-goal of freeing up campaign contributions. This was indeed a case of *judicial activism*, which is ironic considering that most fierce critics of that phenomenon are originalists. Cass Sunstein, a leading constitutional theorist, outlines the dangers of this logic, saying that movements to original intent are movements too radical if it contradicts well accepted political norms.⁴⁵ If we were to *truly* adopt the meaning of constitutional text as when it was written, then we would make radical breaks from current tradition and what we have come to accept.⁴⁶ Uprooting entrenched political norms is what Sunstein would consider improper conservatism – and more akin to *regressivism*, as it simply undoes political and/or legal developments, including breakthroughs in civil rights.⁴⁷

What *exactly* our founding fathers intended when they gave us the right to freedom of speech and of the press is not exactly clear, as contemporary discourse on the subject is broad and obfuscating, or even contradictory at times. “Free speech” and “freedom of expression” as we think of them today did not even exist in the 18th or 19th centuries, but were instead born in the 20th century – and becoming

⁴³ McCutcheon, 4.

⁴⁴ Ronald Collins and David Skover, “When Money Speaks: The McCutcheon Decision, Campaign Finance Laws, and the First Amendment.” *Top Five Books LLC*, April 3, 2014. 16-17.

⁴⁵ Michael J. Gerhardt et. Al, “Constitutional Theory: Arguments and Perspectives.” 74-81.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

entrenched into American jurisprudence only as recently the 1960s.⁴⁸ What is clear however, is that open discourse, accountability, and scrutiny of the Government *by the press* was seen by the constitutional framers as essential to preserving the integrity of the political order. In that way, the First Amendment was clearly designed as a mechanism to check corruption in government, elections and in the wider political process. That is a reality that Chief Justice Roberts clearly tried his best to skirt around and skew in order to justify a ruling he had already decided. George Mason famously stated at the Constitutional Convention in 1787, “If we do not provide against corruption, our government will soon be at an end.”⁴⁹ Perhaps our “originalist” Justices would be better served by spending more time reading what the constitutional framers actually said.

Today, corruption is seemingly the norm, as money continues to poison our politics while drowning out the voice of the common man.⁵⁰ It is simply far-fetched to argue that the First Amendment provides for this *out of mere principle* for “political speech.” Chief Justice Roberts did not make a compelling case by any measure, as his arguments were dubious at best and almost entirely lacking in contemporary evidence. The Court abided by Justice Scalia’s philosophy of making the (supposedly) principled ruling regardless of where it takes you, as the majority clearly did not care about the consequences of their decision. This was a political question that should have been left to the legislature to decide, as they already had in outlawing such actions to begin with. Justice Scalia has often stated that constitutional rights come with limitations, and that there’s a process for legislators to properly enact them. In this case, that very process was overruled and undermined, creating a controversial and harmful effect on American politics by a judiciary that ruled with an astonishing lack of self-awareness.

⁴⁸ Beverley Gage and Tom Goldstein, “Schenck v. United States 1919.” *C-SPAN: Landmark Cases*. November 2, 2015. <http://landmarkcases.c-span.org/Case/5/Schenck-v-United-States>.

⁴⁹ Ronald Collins and David Skover, “When Money Speaks: The McCutcheon Decision, Campaign Finance Laws, and the First Amendment.” 16-17.

⁵⁰ *Ibid.* 15-17.

US Supreme Court Cases: Where Legal Pragmatism Got It Right

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Brown v. Board of Education is hailed as one of the most important Supreme Court rulings in US history, declaring segregation in public schools a violation of the Fourteenth Amendment's Equal Protection Clause. It is a shining example for *legal pragmatism*, as it constructively settled a fierce constitutional and political debate without destabilizing the legal or political order. Further, the court convincingly adapted the original meaning of the Fourteenth Amendment to meet modern realities, creating the desired outcome. The court's clever ruling proved to be a pivotal moment of legal discourse and entrenched new norms that are not only still in effect today, but also form bulwarks of civil rights.

Randy Barnett, a prominent legal scholar and famous proponent of *Originalism* argued that the court in *Brown* could not reach the desired outcome in this case by appealing to the original meaning of the Fourteenth Amendment, and therefore had to change its meaning.⁵¹ This argument is not unfounded, as it is indeed difficult to argue that there was not a very specific purpose to the 14th Amendment when it was passed.⁵² Barnett later concedes, however, that the "privileges and immunities" clause refers to both "natural liberty rights *and* the extra procedural protections of individuals provided by the Bill of Rights."⁵³ Barnett explains that this means there is indeed some breadth to the text, which gives discretion for judges who rule on matters related to this Amendment.⁵⁴ "Some breadth" and "discretion" are critical concepts for our purposes in evaluating *Brown*, because the court took some liberties with the meaning of the text, but nothing radical nor far-fetched. The fact that Barnett, a notoriously ardent proponent of *Originalism*, defends the Court's logic in *Brown* provides strong evidence for its merit. Indeed, Barnett

⁵¹ Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism." 21.

⁵² The Fourteenth Amendment was passed specifically to protect the citizenship and political rights of freed slaves. The original intent of this amendment has one of the narrowest scopes of all 27 Amendments, and yet it has been used very broadly in the 20th and 21st centuries.

⁵³ *Ibid.* 23.

⁵⁴ *Ibid.*

goes into detail about how the court made the right decision despite the fact that “original intent” had nothing to do with the ruling.

Justice Warren’s famous line “separate educational facilities are inherently unequal” invoked the Equal Protection Clause of the Fourteenth Amendment despite the fact that that is not what the clause was intended for. The clause in question was written with freed slaves in mind, who were in need of more basic political protections - not the right to attend desegregated schools. This however, does not mean that Justice Warren overstepped his bounds - instead he adapted the original meaning of the text to fit modern political realities. This was done properly and constructively through the use of a *shallow* opinion with a *narrow* scope. The opinion was *shallow* because it was not about morality or race, but about the right to education. The scope was *narrow* because it was tailored to the case at hand (desegregation in public schools) without touching a wide-range of issues (such as Jim Crow laws) which would have generated more resistance. Further proof of his argument’s merit is the fact that this was one of the few unanimous (9-0) decisions in US history, entrenching it into jurisprudence and making it extremely difficult to counter at a later date, if not impossible. All of this taken together has made *Brown* a critical Supreme Court ruling, and one that legal scholars will continue to study for generations to come.

US Supreme Court Cases: Where Legal Pragmatism Got It Wrong

Roe v. Wade, 410 U.S. 113 (1973)

Roe v. Wade is one of the most controversial Supreme Court decisions of the last century for a variety of reasons. For the purposes of this paper, I will look at the legal and political reasons, while side-stepping questions of political morality. *Roe* is indeed a pragmatic ruling because the court used every tool at its disposal to come to its view that the (presumed) right to privacy under the Due Process clause

of the 14th Amendment extends to women's decision to have abortions.⁵⁵ The court drew upon legal reasoning as well as medical; i.e., it took a stance on when life begins.⁵⁶ Further, in its ruling the court answered a political question that was raging at the time: "does the state have a compelling interest in protecting the life of the fetus?"⁵⁷ Thus, the court exercised a *deep* opinion with a *wide* scope, and this is where the court's ruling was flawed.

Pragmatic rulings ought to have both *shallow* opinions, so as to avoid unnecessary controversy and *narrow scopes*, so as to keep the ruling tailored to the case at hand instead of being applied to a wide range of cases with few similarities. The purpose of *legal pragmatism* is to preserve the integrity of the legal and political order, not to polarize both the electorate and the legislature. Critics of abortion often argue that *Roe* is responsible for inflaming the political debate on abortion, even though it largely settled the legal and constitutional question. The political debate over abortion that has raged in the United States over the last five decades has become so intense that many commentators and even some politicians openly condemn *Roe* as an illegitimate ruling.⁵⁸ This Supreme Court ruling has subsequently served as a political flash-point and a rallying call for more extreme advocates on both sides of the issue.

This debate does not preserve the integrity of the legal and political order, as pragmatic rulings ought to and what the court attempted. Rather, it serves as a catalyst for controversy that weakens legal-political order by sparking battles that ultimately tear at the social fabric. The outcome of this ruling is the opposite of what was intended: to settle the abortion debate. It accomplished the opposite of what *pragmatic* rulings are supposed to accomplish: come to the most constructive conclusion in order to meet modern demands. In this way, *Roe* has proven to be a failure. There is an old legal maxim which states

⁵⁵ Farber, "Legal Pragmatism and the Constitution." 1332-1333.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 1333.

⁵⁸ Alex McBride, "Roe v. Wade (1973)." December, 2006.

https://www.thirteen.org/wnet/supremecourt/rights/landmark_roe.html.

“hard cases make bad law,” and that certainly applies here. Dr. Darren Staloff, an expert on constitutionalism, personally told me that “the best tradition in American jurisprudence in such cases is to refuse to settle the issue, punt the ball back to the public sphere of politics, and hope for either a legislative solution or a constitutional amendment.”⁵⁹ Concerning *Roe* and the debate over abortion, it is easy to see how that would have been the best course of action. However, because *Roe* is settled in jurisprudence and because it was reaffirmed by *Planned Parenthood v. Casey* (1992), it has achieved “super-precedent” status, meaning that it is entrenched in legal-political norms. Despite the flawed nature of its ruling, any attempt to overturn this decision will prove to be extremely disruptive to the legal-political order and would most assuredly produce harmful results.

Conclusion

The reasonings behind these Supreme Court rulings and their outcomes are evidence of two themes throughout this paper. The first is that a dogmatic reliance on any theory of interpretation will invariably produce negative outcomes. A judge must adapt the “spirit of the law” to the realities of the present but must also stay true to the text, lest we venture too far into uncharted territory. Second, political questions are best left to the political process; but if the Supreme Court must arbitrate as the final opinion, they ought to do so in the least impactful way possible. We have seen the negative effects of *deep* opinions with *wide* scopes in rulings such as *Dred Scott* (1857), *Plessy v. Ferguson* (1896), and most recently, *Roe v. Wade* (1973) – all of which created more tension than they resolved. Conversely, we are currently living through the consequences of decisions too radically regressive to be helpful to modern society such *Citizens United* (2010) and *McCutcheon* (2014). The negative outcomes from these rulings – both *Pragmatic* and *Originalist* - were either too much to bear, or are approaching that threshold, and we ought to learn from these examples. The lesson to learn is a preference for *pluralistic* rulings that

⁵⁹ Dr. Darren Staloff in a personal email to me on November 22, 2017.

contribute the least to partisan entrenchment, while producing the most constructive impact on the integrity of the legal-political order. Rulings that lead to disruptive and damaging results ought to be avoided, even if it's the constitutional theory one adheres to most often that takes the judge to that conclusion.