THE FATE OF NEW YORK PUBLIC EDUCATION IS A MATTER OF INTERPRETATION: A STORY OF COMPETING METHODS OF CONSTITUTIONAL INTERPRETATION, THE NATURE OF LAW, AND A FUNCTIONAL APPROACH TO THE NEW YORK EDUCATION ARTICLE

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> *The virtues of one generation are not sufficient for the next, any more than the accumulations of knowledge possessed by one age are adequate to the needs of another.*[1]

> *I believe that education is the fundamental method of social progress and reform. I believe that all reforms which rest simply upon the enactment of law, or the threatening of certain penalties, or upon changes in mechanical or outward arrangements, are transitory and futile.*[2]

The importance of education in American society and the government's responsibility to provide every child with the opportunity to receive an education is one of the centerpieces of the *Brown v. Board of Education* legacy.[3] Three generations after *Brown*, communities no longer struggle over the specific issue of busing,[4] but rather on deficient resources and ineffective educational systems that perpetuate racial and socioeconomic

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[1] JANE ADDAMS, *A Modern Lear*, *in* THE JANE ADDAMS READER 163, 170–71 (Jean Bethke Elshtain ed., 2002).

[2] John Dewey, *My Pedagogic Creed*, 54 SCH. J. 77 (1897), *available at* http://www.infed.org/archives/e-texts/e-dew-pc.htm [hereinafter Dewey, *Pedagogic Creed*].

[3] 347 U.S. 483 (1954). Writing for the majority, Chief Justice Warren declared that "education is perhaps the most important function of state and local governments." *Id.* at 493.

[4] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–31 (1971) (authorizing busing as a corrective measure for previously segregated public schools); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955) (requiring various desegregation remedies, such as school transportation).

isolation and a substandard quality of education.[5] The underlying social and political promises of *Brown* raise the question as to what extent government must act to guarantee children a quality education. Without an explicit mandate in the Federal Constitution, the majority of educational responsibility falls to the states.[6]

In 1894, New York State constitutionalized education under Article XI of the New York State Constitution, known as the Education Article, which states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[7] Due to the Education Article's imprecise and general language, the New York State judiciary has struggled to interpret the Article and identify the extent of the state's role in public education under the constitutional mandate.[8] The New York Court of Appeals has employed an originalist method of interpretation in Education Article disputes,[9] finding that plaintiffs maintain a cause of action only in certain extreme circumstances.[10]

Beginning in the 1970s, attempts by educational advocates to bring suits under the Education Article continually failed.[11] Finally, in 2003, advocates achieved a monumental victory in *Campaign for Fiscal Equity, Inc. v. State* (*CFE II*), ending a thirty year journey to uncover the substantive rights embedded in the Article.[12] In *CFE*

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[5] *Compare Brown*, 347 U.S. at 493–94, *with* Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1246 (N.Y. 2003) (Smith, J., dissenting).

[6] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973) (holding that education is not a fundamental right under the Federal Constitution in an equal protection claim).

[7] N.Y. CONST. art. XI, § 1.

[8] *See, e.g.*, *Paynter*, 797 N.E.2d at 1228; Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647, 648 (N.Y. 1995); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366, 368–69 (N.Y. 1982).

[9] *See* Paynter *ex rel.* Stone v. State, 735 N.Y.S.2d 337, 346 (App. Div. 2001) (Green, J., dissenting) (criticizing the approach adopted by the Court of Appeals). Justice Green stated that the conclusion of the majority "rests upon an overly narrow conception of the State's obligation under the Education Article to offer all children the opportunity of a sound basic education." *Id.* (internal quotation marks omitted).

[10] *See, e.g.*, *Levittown*, 439 N.E.2d at 363–64.

[11] *Id.* at 369–70 (overturning *Board of Education, Levittown Union Free School District v. Nyquist*, 408 N.Y.S.2d 606 (Sup. Ct. 1978), which held that New York's funding system violated the Education Article). Public interest groups which include the NAACP Legal and Educational Fund, Inc., Public Education Fund, New York Civil Liberties Union, Educational Priorities Panel, and the Campaign for Fiscal Equity, have sought to reform the New York State educational system, a central focus being the state finance system.

[12] 801 N.E.2d 326, 348 (N.Y. 2003). *CFE I* was the prelude case to *CFE II*. In *CFE I*, the court refined the standard and requirements for an Education Article claim. Campaign for

II, the New York Court of Appeals held that the state finance system failed to provide New York City public schools with the necessary resources to obtain a sound basic education in violation of the Education Article.[13] While the New York State legislature and governor failed to meet the court's deadline to implement the necessary measures to cure the system's infirmities, and appealed many recommended reforms, on November 20, 2006, the Court of Appeals uttered its final word in the *CFE* case and held that the State must increase funding of New York City public schools, setting the floor at a minimum of $1.93 billion, despite education advocates' request for an increase of at least $4.7 billion.[14] This lengthy litigation took the New York courts to the brink of a constitutional crisis, confronting the very spirit of separation of power principles.[15]

However, despite the legal victory in the *CFE* case, the Court of Appeals' narrow interpretation of the Article has left it without a framework to adapt to the rising standard of education and the changing social milieu, and, thus, to meet the needs of poorly performing students in the state.[16] The court is unwilling to expand the parameters of the article's reach. The recent cases, *Paynter ex rel. Stone v. State* and *New York Civil Liberties Union v. State* (*NYCLU*), which this Article considers, presented unique claims questioning whether state policies that potentially promote socioeconomic isolation and state nonfeasance are actionable under the Education Article. The Court of Appeals decidedly dismissed both cases for failure to state a claim, leaving a portion of the state

Fiscal Equity, Inc, v. State (*CFE I*), 655 N.E.2d 661, 670 (N.Y. 1995). While in *CFE II*, the court, after a lengthy development of the record, determined that the facts met the standard of unconstitutionality. *CFE II*, 801 N.E.2d at 348.

[13] *CFE II*, 801 N.E.2d at 348.

[14] *See* Campaign for Fiscal Equity, Inc. v. State, 2006 WL 3344731, at *9 (N.Y. Nov. 20, 2006) (ordering the legislature to provide New York City schools with the necessary minimum funding).

[15] *Id.* at *7. The Court of Appeals noted that "[w]e are the arbiters of our State Constitution. Yet, in fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government." *Id.* (citation omitted); *see also* Campaign for Fiscal Equity, Inc. v. State, 814 N.Y.S.2d 1, 2 (App. Div. 2006) ("Our disagreement with the dissent lies only in our adherence to well-established constitutional doctrine that it is for the Governor and the Legislature, not the courts, to adopt a dollar-specific budget.").

[16] *See generally* Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1226–29 (N.Y. 2003); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982). The courts in *Paynter* and *Levittown* upheld the strict Education Article standard and dismissed the plaintiffs' cause of action in the face of overwhelming student failure. *Paynter*, 797 N.E.2d at 1226–29; *Levittown*, 439 N.E.2d at 368.

student population with minimal recourse.[17] What set *Paynter* and *NYCLU* apart from *CFE II* and its predecessors is that the former two cases potentially prefigure the next wave of Education Article cases, where the funding system is not the sole source of academic failure or, alternatively, where academic failure continues despite an adequately funded school system.

When the issues of *Paynter* and *NYCLU* or other creative theories resurface, the fate of New York public education will simply come down to a matter of interpretation. The method a jurist employs is one of the most decisive factors in determining law (a second factor being how the jurist actually applies the method). However, constitutions do not provide detailed instruction manuals. No explicit meta-method exists to help jurists identify the *correct* method of interpretation. Therefore, how does a jurist construct and choose a method of interpretation? Methods are pulled from different sources—a common denominator among them is that methods are devised from epistemic examinations and conceptions of social organization. An individual or group's perception and belief as to how a social entity should function and operate directs the construction of a methodology—i.e., a method is built to accomplish and insure a certain social vision. The question should not then be what the universal correct method is, but whether a method is defensible and useful.

Through an examination of the Education Article jurisprudence, specifically *Paynter* and *NYCLU*, this Article will look at two methodologies, originalism and pragmatism, and then outline a functional approach to the Education Article based on pragmatic principles that seek to promote greater empirical inquiry and adaptation to the educational needs of each generation. Part I provides an overview of the *Paynter a*nd *NYCLU* decisions and describes the formulaic test applied to the Education Article established via an originalist analysis. Part II defines and explores the roots and basis for originalism. The discussion then moves into examining various shortcomings of the methodology, particularly in relation to the Education Article. Part III looks at classical pragmatism and Justice Oliver Wendell Holmes Jr.'s jurisprudential theories. While Holmes did not consider himself a devoted pragmatist, his ideas, nevertheless, follow in line with that

[17] N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005), *rehearing denied by* 831 N.E.2d 971 (N.Y. 2005); *Paynter*, 797 N.E.2d at 1226–29.

method of thought. He offered a functional approach to legal interpretation, which instructed jurists to look at the practicality of legal rules. His approach arose, as with classical pragmatism, during a period of time where older concepts of social organization, based in natural law doctrine, had grown increasingly ineffectual. Pragmatism and Holmes's functionalism were in fact a response to new, unconventional visions of the social entity that looked to the welfare and interests of the majority or collective, as opposed to the individual. Finally, Part IV sketches an alternative functional approach to the New York Education Article rooted in particular tenets of Holmes's approach to law.

I. OVERVIEW OF *PAYNTER* AND *NYCLU*

A. Paynter *ex rel.* Stone v. State

In *Paynter ex rel. Stone v. State*, fifteen students in the Rochester City School District ("RCSD") brought an action on behalf of 37,000 students in the RCSD against the State of New York, the RCSD, and all twenty-four suburban school districts within Monroe County (the "School Districts") pursuant to the Education Article and Equal Protection Clause of the New York State Constitution, 42 U.S.C. § 1983, and Title IV of the Civil Rights Act of 1964.[18]

Under section 3202(1) and (2) of the Education Law, New York State instituted residency requirements and nonresident tuition requirements for students in each district.[19] Within the RCSD, approximately ninety percent of the students are poor "as measured by their eligibility for federal free and reduced price lunch programs" and about eighty percent are African-American or Hispanic.[20] The plaintiffs alleged that the demographic make-up of the RCSD and the students' inability to afford transportation to schools in other districts led to the substandard academic

[18] 797 N.E.2d at 1227.

[19] N.Y. EDUC. LAW § 3202 (McKinney 2001) reads in relevant part:

> 1. A person over five and under twenty-one years of age . . . is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition. . . .
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> . . . .
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> 2. Nonresidents of a district, if otherwise competent, may be admitted into the school or schools of a district or city, upon the consent of the trustees or the board of education, upon terms prescribed by such trustees or board.

Id.

[20] Paynter *ex rel.* Stone v. State, 720 N.Y.S.2d 712, 714 (Sup. Ct. 2000).

performance of the plaintiff class, which the defendants failed to ameliorate.[21]

The Supreme Court of New York dismissed all claims against the RSCD and the School Districts for failure to set forth adequate allegations and remedies.[22] The Supreme Court dismissed the plaintiffs' Education Article claim against the State, but held that the plaintiffs' cause of action against the State pursuant to the New York State Equal Protection Clause and Title IV of the Civil Rights Act of 1964 could move forward.[23] On appeal, since the plaintiffs failed to brief the issues surrounding the Equal Protection Clause and 42 U.S.C. § 1983 claims, the New York Appellate Division concluded that the plaintiffs had abandoned those causes of action.[24] The Appellate Division then dismissed the remaining causes of action in the complaint.[25] The plaintiffs appealed the Appellate Division's decision on the Education Article claim, but the New York Court of Appeals affirmed, holding that the plaintiffs failed to state an Education Article claim against the State.[26]

The Court of Appeals in *Paynter* followed the rule established in *Levittown* and expanded upon in *CFE I,*[27] in order to determine whether the plaintiffs stated a cause of action under the Education Article.[28] According to *Levittown*, the Education Article ensures New York State students the constitutional right to a "sound basic education" and "minimal acceptable facilities and services," which a plaintiff must allege that the State deprived him of in order to bring a cause of action.[29] A sound basic education consists of the "'basic literacy, calculating, and verbal skills'" that allow students to "'eventually function productively as civic participants capable of voting and serving on a jury.'"[30] Accordingly, this output requirement (i.e., a right to basic skill sets) entitles children to inputs consisting of minimum facilities and services, such as adequate physical facilities, instrumentalities of learning, and

[21] Paynter *ex rel.* Stone v. State, 797 N.E.2d at 1227.
[22] *Paynter*, 720 N.Y.S.2d at 717.
[23] *Id.* at 717, 719.
[24] Paynter *ex rel.* Stone v. State, 735 N.Y.S.2d 337, 340 (App. Div. 2001).
[25] *Id.* at 344–45.
[26] *Paynter*, 797 N.E.2d at 1226–27.
[27] *See id.* at 1228 (citing *CFE I*, 655 N.E.2d 661, 666–67 (N.Y. 1995); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982)).
[28] *Paynter*, 797 N.E.2d at 1228.
[29] 439 N.E.2d at 368–69.
[30] *Paynter*, 797 N.E.2d at 1228 (quoting *CFE I*, 655 N.E.2d at 666).

trained teachers.[31] The Court of Appeals in *CFE I* refined the pleading standard set forth in *Levittown* and stated that a plaintiff must meet two elements to successfully plead a cause of action under the Education Article: (1) deficient inputs and outputs and (2) a causal link between the state action and student failure.[32]

The Court of Appeals held in *Paynter* that the plaintiffs failed to meet both the input requirement and causality prong. The plaintiffs did not allege that the students' substandard academic performance was due to the State's failure to provide the minimum essentials.[33] Instead, the plaintiffs argued that the cause of academic failure was the demographic composition of the RCSD.[34] In other words, the students were the deficient input, a consequence of section 3202, which instituted residency requirements and nonresident tuition requirements for students in each district.[35] While the court recognized the disadvantaged demographic composition of the RCSD and the students' substandard academic performance, it stated that mere "allegations of academic failure alone, without allegations that the State somehow fail[ed] in its obligation to provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article."[36] Without more, the plaintiffs' allegations also failed to establish a causal link between the demographic input and substandard academic performance output.[37] According to the court, other environmental factors, such as poor parental support or lack of health care, could have caused poor student performance in the RCSD.[38]

The court went on to note that it could not accept the plaintiffs' theory because it would make the State responsible for the demographic make-up of every district and require remedies that threaten the role of local control in education.[39] The *Levittown* court held that the Education Article did not eliminate local control in education, but only intended to organize a delivery system of

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[31] *See id.* at 1228; *CFE I*, 655 N.E.2d at 666.

[32] *See CFE I*, 655 N.E.2d at 667.

[33] *Paynter*, 797 N.E.2d at 1228–29.

[34] *Id.* at 1229.

[35] *See* N.Y. EDUC. LAW § 3202(1), (2) (McKinney 2001); *Paynter*, 797 N.E.2d at 1229.

[36] *Paynter*, 797 N.E.2d at 1229.

[37] *See id.* (declaring that the State fulfills its constitutional obligation under the Education Article, regardless of substandard student performance, if it provides adequate classroom resources).

[38] *Id.*

[39] *Id.* at 1229–30.

education under state authority.[40] Therefore, the *Paynter* court concluded that section 3202 could not be considered an input since it would require the State to redraw district lines, which would alter the substance of the system and subvert local control.[41]

Judge Smith, the lone dissenter in *Paynter*, argued that by interpreting the complaint liberally and offering it all favorable inferences, the plaintiffs met the input/output test under the Education Article.[42] First, the plaintiffs met the output requirement by alleging that they were deprived of the opportunity to receive a sound basic education, as evidenced by their overwhelming academic failure.[43] Second, while the plaintiffs did not allege specific recognized input deficiencies, Judge Smith nonetheless claimed that the court should have reasonably inferred that a resource allocation problem affecting the quality of education existed from the demographic composition of the RCSD and the substandard academic results.[44] Judge Smith reasoned that the plaintiffs should have been allowed to show that the resources—state inputs—made available under the educational financing system were inadequate to provide them with a sound basic education.[45]

Moreover, the dissent claimed that Education Law section 3202 should be considered as evidence of causation to survive dismissal.[46] If the demographic composition of the RCSD, a product of section 3202, prevented students from gaining a sound basic education, then the State had an obligation to remedy the problem.[47] Aside from allegations of deficient state funding in *Levittown* and *CFE I*, Judge Smith contended that other reasons for the State's failure to provide a sound basic education may exist.[48] According to Judge Smith, *Levittown* did not hold that the State's only responsibility was to guarantee that the school system was appropriately and lawfully funded, but rather it held that the Education Article also did "not mandate that educational opportunities be equal

[40] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982).

[41] *Paynter*, 797 N.E.2d at 1229–30.

[42] *Id.* at 1246 (Smith, J., dissenting).

[43] *Id.*

[44] *See id.*

[45] *Id.* at 1247.

[46] *Id.*

[47] *Id.* at 1248.

[48] *See id.*

throughout the state."[49] Therefore, if other state laws prevented children from receiving a sound basic education, the State had a responsibility to remedy the problem.[50] While permitting section 3202 of the Education Law to be an input may interfere with local control, as the majority feared, Judge Smith maintained that local control has always been secondary to larger state interests.[51]

B. New York Civil Liberties Union v. State

In *NYCLU*, the plaintiffs, a civil rights association and a group of students, brought an action against the State of New York for failure to provide a sound basic education, as mandated under the Education Article, to twenty-seven schools outside the City of New York.[52] The plaintiff asserted that in the face of extensive academic failure, the State failed to take corrective actions to mend and maintain the inadequate schools by providing essential facilities and services.[53] The plaintiffs sought a declaratory judgment and an injunction to order the State to assess the sources of failure in the deficient schools and provide the requisite resources to carry out necessary reforms.[54]

Relying on the commands of *Levittown* and reaffirmed in *Paynter*, the New York Court of Appeals dismissed the claim for failure to state a cause of action.[55] The court concluded that the plaintiff failed to demonstrate a causal link between the academic failure and state action.[56] The plaintiffs did not allege that the State's failure to provide specific input essentials caused the academic failure.[57] Instead, the allegation was more an indictment of State nonfeasance or misfeasance; that is, the State action—the input—was state inaction.[58] The Court of Appeals held that an Education Article claim "requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail."[59]

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[49] *Id.*
[50] *Id.*
[51] *See id.* at 1249.
[52] 824 N.E.2d 947, 949 (N.Y. 2005).
[53] *Id.*
[54] *See id.* at 949–50.
[55] *Id.* at 951.
[56] *Id.* at 950.
[57] *Id.*
[58] *See id.*
[59] *Id.*

Even if the causation and input requirements were satisfied, the court maintained that the plaintiffs also failed to meet the output requirement because they did not allege district-wide failure.[60] The court noted that under *Levittown*, the Education Article was intended to preserve a state-local partnership where localities had the right to participate in the governance of their schools.[61] School districts were a manifestation of this partnership. The court concluded that ordering the State to remedy select institutions in a district would bypass and subvert the rights of localities.[62] Therefore, academic failure had to exist district-wide under the output requirement.

C. Conclusion

While offering an intelligent and important critique, Judge Smith, in *Paynter*, might have adopted an alternative strategy—namely, challenging the rule set forth in *Levittown* and *CFE I*.[63] The formulaic input/output requirements promulgated in *CFE I* do not adequately adjust to the rising needs of students. As evidenced in *Levittown*, *Paynter*, *NYCLU*, and *Cuomo*, the New York Court of Appeals has been reluctant to hold the State responsible when it provides the minimum essential inputs and a large percentage of students graduate high school either illiterate or with third- to fifth-grade literacy skills.[64] The definition of "a sound basic education" has expanded since *Levittown*, but the input requirement has not kept pace with its output counterpart, preventing many plaintiffs from bringing lawsuits.[65] In *Levittown*, the court found that the State met the minimum input requirement because the legislature established a system of free schools and enacted various educational provisions.[66] The court in *CFE I* outlined a more expansive input list of educational services that included physical facilities,

[60] *Id.* at 951.

[61] *Id.*

[62] *Id.*

[63] *See* Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1231 (N.Y. 2003) (Smith, J., dissenting); *see also CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982).

[64] *See, e.g.*, *N.Y. Civil Liberties Union*, 824 N.E.2d at 951; *Paynter*, 797 N.E.2d at 1229; Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647, 648 (N.Y. 1995); *Levittown*, 439 N.E.2d at 369.

[65] *See, e.g.*, *CFE I*, 655 N.E.2d at 666; *Levittown*, 439 N.E.2d at 369.

[66] *See Levittown*, 439 N.E.2d at 368–69.

instrumentalities of learning, and teaching standards,[67] but stopped short of expanding the State's involvement beyond educational services in favor of preserving local control.[68] Under the current *CFE I* minimum inputs standard, poorly performing students who receive the minimum essentials will continue to receive an inadequate education and have no judicial remedy,[69] especially in light of a political process that has historically provided nominal assistance.[70]

The output/input equation is born out of the court's adherence to the preservation of local control. The scope of both requirements act to shield the interests of localities. Allegations of deficient outputs must point to district-wide academic failure, and the input requirements cannot excessively swell beyond educational services without threatening the domain of local control. In fact, the input requirement is the more determinative force of the two requirements. Input and output measurements do not correspond and adjust concurrently. Outputs—the definition of a sound basic education—may expand (and have expanded as the standard of education has risen since the 1890s with each generation),[71] but inputs are capped at educational facilities and services. Therefore, the Court of Appeals will not allow expanded outputs to affect inputs, a result that distorts the educational environment. For example, under the current formula, if the standard of education rises to a level that requires students to possess complex mathematical, literary, and analytical skills to adequately function and participate in society,[72] the State will have no greater responsibility than it does today—leaving the burden on local communities, which contradicts constitutionalizing education in the first place. The current framework is becoming increasingly ineffective and antiquated in light of the changing milieu.

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[67] *See CFE I,* 655 N.E.2d at 666.

[68] *See id.* The *CFE I* court upheld the reasoning for the test established in *Levittown* and only permitted the cause of action to proceed because the plaintiff claimed that the State's actions were extremely inadequate and deficient. *Id.* at 665, 667–68.

[69] *See, e.g.*, *Paynter*, 797 N.E.2d at 1226–29.

[70] *See* Paynter *ex rel.* Stone v. State, 735 N.Y.S.2d 337, 347 (App. Div. 2001) (Green, J., dissenting).

[71] *See CFE II*, 801 N.E.2d 326, 331 (N.Y. 2003) (stating that a high school education is "all but indispensable" for students to gain employment due to the rise in service level positions, which require more advanced skills).

[72] *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 302 (2006) (quoting Princeton economist Alan Blinder who stated that "'the U.S. and other rich nations will have to transform their educational systems so as to produce workers for the jobs that will actually exist in their societies'").

II. ORIGINALISM: DEFINED, APPLIED, AND CRITIQUED

A. A Brief Definition and Its Application to the Education Article

The majority's preservation of local control is based on an "originalist" interpretation of the Education Article.[73] Originalism is the methodology of constitutional interpretation that attempts to capture the intended meaning of a constitution at the time it was written.[74] Originalists view constitutional meaning as static and unalterable. In *South Carolina v. United States*, the U.S. Supreme Court articulated the basic premise of this approach: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[75] Originalism's metaphysics is an exercise in formalism. A jurist seeks to discover and convert legal principles—presumably embedded within the framers' intentions and constitutional text—into axiomatic logical rules that can be deductively applied to facts. The input/output requirements exemplify this axiomatization by originalism. Appealing to the framers' original intent seemingly offers a reliable and legitimate criterion on which to base judicial determinations—which, originalists argue, non-originalist methods fail to provide.[76]

Originalism has roots in Madisonian thought. James Madison questioned, "[w]ould not a Government so often revised become too mutable to retain those prejudices in its favor which antiquity inspires, and which are perhaps a salutary aid to the most rational Government in the most enlightened age?"[77] He feared frequent revision would more likely produce tyrannical factions.[78] Therefore,

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[73] *See* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982).

[74] *See* Antonin Scalia, U.S. Supreme Court Justice, A Theory of Constitution Interpretation, Remarks at Catholic University of America (Oct. 18 1996), *available at* http://www.courttv.com/archive/legaldocs/rights/scalia.html (last visited Jan. 14, 2007) [hereinafter Scalia, Remarks]; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) [hereinafter Scalia, *Originalism*]; Antonin Scalia, U.S. Supreme Court Justice, Constitutional Interpretation the Old Fashioned Way, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005), *available at* http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm [hereinafter Scalia, Constitutional Interpretation].

[75] South Carolina v. United States, 199 U.S. 437, 448 (1905).

[76] *See* Scalia, *Originalism*, *supra* note 74, at 862–63.

[77] Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *available at* http://www.juntosociety.com/i_documents/jm_tj.htm.

[78] *See id.*

one solution rested in ensuring that "[t]he improvements made by the dead form a charge against the living who take the benefit of them. This charge can not otherwise be satisfied than by executing the will of the dead accompanying the improvements."[79] Under Madison's intimation for ancestral sovereignty, the living are subject to a perpetual constitution and may only utilize the amendment process to alter present conditions.

In *Paynter* and *NYCLU*, the majority noted that the court in *Levittown* determined that the drafters only intended to assign the State a limited role in education.[80] While the Education Article was adopted to organize education under state control opposed "'to the unsystematized delivery of instruction then in existence within the State,'"[81] the drafters apparently did not seek to require the State to establish a system that provided equal educational opportunities statewide, due to the variable contributions local governments made to their school districts.[82] In *Levittown*, the majority claimed that the

> constitutional language . . . makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district. Nor is there any provision either that districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so . . . .[83]

The *Levittown* court additionally pointed out that the Education Article's language did not explicitly abolish the role of local control in education.[84] And in *Paynter*, the Court of Appeals concluded that a greater State role in education, which permitted broad inputs, would potentially lead to the downfall of the local control of education and undermine the drafters' intentions.[85]

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[79] *Id.*

[80] *See* N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 951–52 (N.Y. 2005); Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1229–30 (N.Y. 2003); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982).

[81] *Paynter*, 797 N.E.2d at 1235 (Smith, J., dissenting) (quoting *Levittown*, 439 N.E.2d at 368).

[82] *Levittown*, 439 N.E.2d at 368.

[83] *Id.*

[84] *Id.*

[85] *Paynter*, 797 N.E.2d at 1229–30.

B. Epistemological Deficiencies

Originalism, however, creates an epistemological crisis that undermines the legitimacy of a judicial conclusion. While originalism intends to provide an objective method of analysis by examining issues historiographically, the methodology ignores what Keith Jenkins would describe as the epistemic limitations of historical analysis. First, a method devoted to locating past intentions raises evidentiary problems in that "no historian can cover and thus re-cover the totality of past events because their 'content' is virtually limitless."[86] Second, Jenkins indicates that historical accuracy cannot exist because there is no historical answer key or text to verify interpretations; instead, confirmation only occurs through comparison to another historian's variation.[87] Lastly, Jenkins contends that any historical narrative is unavoidably a product of the historian's personal perceptions.[88] While attribution requirements restrain the historian from devising unreasonable conclusions, the historian's personal views still "shape the choice of historical materials, and . . . determine what [he] make[s] of them."[89] Therefore, since historical records are so indeterminate, originalist judges must continuously make difficult historical conclusions.

Interpreting the Federal Constitution offers a useful example of the epistemological fragility of historical analysis. Sometimes the framers did not debate issues, sometimes they could not agree, and sometimes they acquiesced. For example, in his closing speech to the Consitutional Convention, Benjamin Franklin stated: "From such an Assembly can a perfect production be expected? . . . I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best."[90] In *Federalist No. 37*, Madison also noted that the Constitution was a set of compromises where the delegates "were induced to accede to it, by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good."[91] A compact of compromises

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[86] KEITH JENKINS, RE-THINKING HISTORY 11 (1991).

[87] *Id.*

[88] *Id.* at 12.

[89] *Id.*

[90] Benjamin Franklin, Speech to the Federal Convention (Sept. 17, 1787), *reprinted in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 641, 642–43 (Max Farrand ed., rev. vol. II 1937).

[91] THE FEDERALIST NO. 37, at 185 (James Madison) (George W. Carey & James McClellan

indicates that the text does not necessarily indicate the parties' full intentions and further, no record, such as diaries or letters, may exist which would indicate the parties' private thoughts. But should courts even consider private thoughts? Additional historical questions also arise, such as, who are the framers? Are they the delegates at the Constitutional Convention, the delegates at the ratifying conventions of the states, the Federalists, or the Anti-Federalists?[92] The historical record of the framing period is packed with numerous irreparable and indeterminate evidentiary gaps and attempts to crystallize such history will inevitably cause varying interpretations of law.

Moreover, what were the Framers and the founding generation's intentions regarding original intent? Thomas Paine claimed that a present generation could not establish a perpetual charter over succeeding generations because:

> Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow.[93]

In a letter to Madison, Thomas Jefferson argued in favor of generational sovereignty: "I suppose to be self evident, '*that the earth belongs in usufruct to the living*': that the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, and reverts to the society."[94] The framing generation frequently posed political theory in terms of property law analogies, particularly since they held that the primary purpose of civic organization involved the protection of property rights. The legal concept of "usufruct," which Jefferson mentioned, refers to the rights and responsibilities of life tenants and actually indicates that the earth belongs to the living and future generations collectively.[95] Under the common law of future

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eds., 2001).

[92] *See* Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 74 (2004).

[93] THOMAS PAINE, THE RIGHTS OF MAN (1791), *available at* http://www.ushistory.org/Paine/rights/c1-010.htm.

[94] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THE PORTABLE THOMAS JEFFERSON 444, 445 (Merrill D. Peterson ed., 1975).

[95] "Usufruct" is defined as "[a] right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate

interests, a modern successor to usufruct principles, life tenants may use land to benefit themselves except when their actions threaten to commit waste;[96] they are not bound to the actions of former, but future owners. The prohibition against waste derived from natural law principles that demanded the preservation of the Divine's land—earth.[97] Therefore, under this theoretical scheme, upon the death of a generation, it relinquishes its power and rights over society as devoid of any property interests to maintain. The present generation's duty to the future thus provides the necessary checks against assigning posterity an impaired social system, while also granting the present with the freedom to govern its own affairs, and, if necessary, undue oppressive or useless social constructions instituted by the past.

In regards to the Education Article, alternative understandings of the drafters' intent indicate a broader interpretation. Judge Smith, in his *Paynter* dissent, argued that the drafters of the Education Article intended to establish a state-operated educational system, which ensured that "all the children of New York, not just the children of the wealthy, would have access to a sound education."[98] Judge Smith also maintained that New York education history from the late 1700s to the adoption of the Education Article in 1894 revealed a social and political preoccupation with developing measures and systems to provide an education to all children as a means of creating an informed and productive citizenry.[99] Similarly, the Court of Appeals' dissent in *Levittown* noted that, in 1894, the people of New York were "so united and agreed . . . that the first great duty of the State [was] to protect and foster its educational interests."[100] According to the *Levittown* appellate court, which upheld the plaintiff's Education Article claim, the drafters intended to establish a system of schools "which would produce individuals capable of dealing with the problems facing

over time." BLACK'S LAW DICTIONARY 1580 (8th ed. 2004).

[96] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 224–25 (4th ed. 1998).

[97] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8–9 (C.B. Macpherson ed., 1980). Locke insisted that "though [nature] be a *state of liberty*, yet *it is not a state of license*: . . . [where man] has not liberty to destroy himself, or so much as any creature in his possession." *Id.* at 9.

[98] Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1238 (N.Y. 2003) (Smith, J., dissenting).

[99] *See id.* at 1245–46. *See generally id.* at 1238–46 (detailing the historical development of New York's public schools from the 1700s through 1894).

[100] 439 N.E.2d 359, 371 (N.Y. 1982) (Fuchsberg, J., dissenting) (internal quotation marks omitted).

their own generation."[101] The appellate court viewed the Education Article as establishing a flexible standard, which would adapt to the needs of the next generation, not a standard determined by the interests of localities.[102] The court argued that the minimal educational skills in 1894 should not be "the prototype for the skills necessary to function in [contemporary] society."[103] Under this theory, the distribution of power between the state and local government would be dispersed according to the educational needs of the time.[104]

C. Disregards the Nature of Language

Originalism additionally suffers because the methodology is based on the premise that the meaning of language should remain static. The Framers' intentions are presumably drawn from the meaning of language as it existed at the time of memorialization; therefore, the meaning of constitutional text is fixed. This conclusion disregards the nature of language; i.e., meaning possesses a degree of mutability. Charles Sanders Peirce, a co-founder of pragmatism, intimated that language cannot be removed from the social engine and locked in a vacuum; it is affixed to the movement of time and place.[105] As personal and social knowledge develops, language acquires alternative and additional information that no individual of the past could have precisely anticipated. Peirce observed that "[s]ymbols grow. . . . Such words as *force, law, wealth, marriage,* bear for us very different meanings from those they bore to our barbarous ancestors."[106] He viewed words as organic extensions of human existence—they act as storage compartments and delivery devices for human ideas.[107] As a result, meaning is discovered through the process of *a posteriori* input.[108] This view requires jurists to consider words in light of their historical lineage.

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[101] 443 N.Y.S.2d 843, 863 (App. Div. 1981).

[102] *Id.*

[103] *Id.*

[104] *See id.*

[105] *See* Charles S. Peirce, *Some Consequences of Four Incapacities*, 2 J. SPECULATIVE PHIL. 140 (1868), *available at* http://www.peirce.org/writings/p27.html. Peirce argued: "Does not [the word] electricity mean more now than it did in the days of Franklin?" *Id.*

[106] CHARLES SANDERS PEIRCE, WHAT IS A SIGN? (1894), http://www.marxists.org/reference/subject/philosophy/works/us/peirce1.htm (last visited Jan. 14, 2007).

[107] *See* Peirce, *supra* note 105.

[108] Peirce believed that there is an inherent indeterminacy in the meaning of language where humans cannot fully uncover the full meaning of a word. *See id.*

Otherwise, if a court considers a word solely within the realm of its eighteenth-century denotations and connotations, the social changes that breathe new information and ideas into the meaning of words have little, if any, significance.

The term "education" is no exception. While this Article is not an examination of the history of American education, numerous changes have transpired in the field of education since the adoption of the Education Article in 1894. The twentieth century witnessed education become a central topic of national public debate. During the Progressive era, alternative education theories altered the landscape of academic curricula and institutions. Jane Addams began the Settlement House movement in America, which viewed education not as separate, but connected to life.[109] A curriculum should incorporate and build from students' life experiences.[110] John Dewey similarly articulated a model of education based on human experiences and social action.[111] Following World War II, the federal government became a permanent fixture in the area of education, enacting a variety of legislative bills that opened the coffers, such as the G.I. Bill, the Higher Education Act, and the No Child Left Behind Act.[112] The U.S. Supreme Court's rulings in *Brown* and its progeny also transformed the educational landscape.[113] Recently, the digital revolution and the rise of the globalized marketplace, as journalist Thomas Friedman contends, have required citizens to obtain more complex skill sets to compete

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[109] *See* Jane Addams, *A Function of the Social Settlement*, *in* PRAGMATISM: A READER 273, 281–82 (Louis Menand ed., 1997).

[110] *Id.* at 282.

[111] *See* Dewey, *Pedagogic Creed*, *supra* note 2.

[112] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1439–40 (2001) (aiming to improve the academic achievement of disadvantaged children); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1219 (1965) (helping to strengthen the educational resources of colleges and universities in addition to providing for financial assistance to students to attend postsecondary and higher educational institutions); Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-268, 58 Stat. 284, 287–91 (1944) (putting higher education within the reach of millions of veterans of World War II and later military conflicts).

[113] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation in public schools violates the Equal Protection Clause of the 14th Amendment). *See generally* Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (striking down salary increases and indefinite funding of remedial "quality education programs" as a remedy to racial discrimination); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (holding that the use of mathematical ratios was permissible as a starting point when remedying racial discrimination in schools); Green v. County Sch. Bd., 391 U.S. 430, 440–41 (1968) (invalidating the use of a freedom of choice plan as a means to effectuate desegregation in public schools); *Brown II*, 349 U.S. 294, 301 (1955) (reversing cases that upheld segregation in public schools and requiring transition to a racially nondiscriminatory school system).

in the new world economy.[114]

Another concern regarding meaning involves the nature of constitutional text, which is arguably meant to provide general directives for future generations to apply new meanings to old text. If the framers, for example, intended a fixed and specific interpretation of the constitutional text, wouldn't they have stipulated more exacting language? In interpreting the parameters of the Necessary and Proper Clause, Justice Marshall noted that "[t]o have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code."[115] He argued that future generations needed the ability to address the emergencies of their time, unforeseeable to the past, where future experiences would provide the requisite tools to tackle new problems.[116]

Consider also the Fourteenth Amendment in which the framers did not catalog a list of groups to protect under the Equal Protection Clause. The architects of the Civil War amendments articulated a general principle with the understanding that it could be applied to all citizens in varying circumstances.[117] While a framer's views may shape the contours of constitutional text, a court must also consult additional contemporary meanings.[118]

The Education Article is also a general prerogative. It instructs

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[114] *See* FRIEDMAN, *supra* note 72, at 274–75, 289–90.

[115] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[116] *Id.* at 415–16. Marshall claimed that it was "unwise . . . to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *Id.* at 415.

[117] In the *Slaughter-House Cases*, Justice Bradley remarked in his dissent:

> It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens . . . .
>
> The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government . . . and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation.

83 U.S. (16 Wall.) 36, 123 (1872) (Bradley, J., dissenting).

[118] Oliver Wendell Holmes, Learning and Science, Speech in Honor of Professor C.C. Langdell at the Harvard Law School Association (June 25, 1895), *in* COLLECTED LEGAL PAPERS 138, 138–39 (1920). Justice Holmes noted that:

> The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.

Id. at 139.

the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[119] The terms "provide" and "maintenance" do not intimate specific, normative state directives. One may view the language as leaving future generations with either an interpretive mystery or a set of ideas to develop and expand. Examining the intentions of the Education Article's drafters, as the New York courts' interpretive disagreements illustrate, offers no clear, definitive interpretation of the Article's substantive rights. Does the State only have to ensure minimum requirements are provided, as the majority seems to believe, or does the Article's terms impose a greater duty on the State to continually reevaluate and amend the system, such as when severe academic failure exists? As the *Brown* court indicated, this type of determination cannot be substantially determined through a recuperation of the past, but must be interpreted in light of contemporary mores.[120] Additionally as with the Civil Rights amendments, the framers of the Education Article constitutionalized the spirit and general importance of education for later generations to unfold and develop. The committee that drafted the Article expressed a commitment to developing a system of education to meet the educational needs of each generation.[121]

D. Contractual Dependency Problems

In order to justify binding the present to the intentions of a generation long past, originalism arguably relies on social contract theories which "see[] the Constitution as a valid and binding contract where the relevant parties have . . . freely and fairly

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[119] N.Y. CONST. art. XI, § 1.

[120] In its attempt to discern the 14th Amendment's intended effect on public education, *Brown* taught that the Court "cannot turn the clock back to 1868 when the Amendment was adopted . . . . [but] must consider public education in the light of its full development and its present place in American life throughout the Nation." Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

[121] REP. OF THE COMM. ON EDUC. AND THE FUNDS PERTAINING THERETO, 5 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK OF 1894, at 693, 695 (1900). The committee that drafted the Education Article noted that:

> Whatever may have been [the common schools'] value heretofore . . . their importance for the future cannot be overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before, and . . . too much attention cannot be called to the fact that the highest leadership is impossible without intelligent following, and that the foundation of our educational system must be permanent, broad and firm, if the superstructure is to be of real value.

Id.

agreed."[122] Colonial America maintained a long history of executing civic compacts dating back to the Mayflower Compact of 1620,[123] and the Founders were acutely familiar with and influenced by social contract theorists—John Locke in particular. Under Locke, man in a state of nature possesses a freedom of action,

> yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others . . . . [This] makes him willing to quit a condition, which, however free . . . he seeks out, and is willing to join in society with others . . . for the mutual *preservation* . . . which I call by the general name, *property*.[124]

Thus, freedom of action provides the power of consent, which man activates to form and enter civic government.[125] The Declaration of Independence overtly adapted Locke's contractarian principles: "Governments are instituted among Men, deriving their just powers from the consent of the governed."[126] Accordingly, governmental legitimacy sprang from the consent of its citizens.

However, pursuant to general contract law principles, a validly formed contract depends on the manifestation of mutual consent by all parties to the contract. At the time of ratification, the consenting parties did not represent the entire populace; voting was reserved for white male property owners over the age of majority.[127] Only a small fraction of society could vote to bind the whole. The question then arises whether the franchise limitations lessen the legitimacy of the Constitution? The common law doctrine of unconscionability also provides for the invalidation of inequitable and unconscionable contracts based on oppressive provisions and unequal bargaining powers as against public policy.[128] The disenfranchisement of many

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[122] R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 178 (2004).

[123] *See generally* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 17–117 (Stephen L. Schechter ed., 1990) (discussing the Mayflower Compact of 1620, Fundamental Orders of Connecticut of 1639, Ten Farms Covenant of 1665, New York Charter of Liberties of 1683 and 1691, New York City Charter of 1686, and the Albany Plan of Union of 1754). *See also* Wright, *supra* note 122, at 179.

[124] LOCKE, *supra* note 97, at 66.

[125] *Id.* at 46–48.

[126] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[127] *See, e.g.*, N.Y. CONST. of 1777, art. VII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2630–31 (Francis Newton Thorpe ed., William S. Hein & Co., Inc. 1993) (1909).

[128] The doctrine of unconscionability is viewed as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so

groups potentially created unjust advantages for those who favored the Constitution.

This analysis also undercuts an aspect of Justice Scalia's originalist approach, where in his attack against the living constitutional theory, he notes "the Constitution is not a living organism . . . it's a legal document, and like all legal documents, it says some things, and it doesn't say other things."[129] The enforceability of a legal document is commonly based on whether the parties followed the requisite formalities.[130] The failure to permit a significant portion of the population to consent effectively undermines the validity of the Constitution as a legal document. The Education Article also suffers from similar formality infirmities. When New York State ratified the Article in 1894, the State had not yet enfranchised women and numerous obstacles continued to obstruct minority groups and non-citizens' full participation.[131]

An additional problem with social contract theory concerns the issue of non-assenters and future generational consent. Dissenters during the founding period could have repatriated, but such action was not entirely practical and uncomplicated. Even more problematic is the issue of future generations. Upon a reasonable age of majority, no ceremony currently exists to determine whether a citizen consents to the Constitution, and repatriation is still unreasonable. Locke resolved the problem under the concept of tacit consent:

> [E]very man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his *tacit consent,* and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling [sic] freely on the highway;

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oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996); *see also* U.C.C. § 2A-108 (2003) (codifying the doctrine in statutory form).

[129] Scalia, Constitutional Interpretation, *supra* note 74.

[130] For example, wills, contracts, leases, trusts, and business entities require certain formalities to be considered valid.

[131] *See* N.Y. CONST. of 1777 art. VII; N.Y. CONST. of 1846 arts. II–III; N.Y. CONST. of 1894 art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 127, at 2630–31, 2656–58, 2697. New York State did not enfranchise women until 1917. *See* Karen M. Morin, *Political Culture and Suffrage in an Anglo-American Women's West*, 19 WOMEN'S RTS. L. REP. 17, 21 tbl.1 (1997).

> and in effect, it reaches as far as the very being of any one within the territories of that government.[132]

The new government in effect swallows up all land and individuals contiguous to the majority. A person who has entered the national borders consequently tacitly assents to the government.

Madison also favored the doctrine of tacit consent justifying it on a principle of conveniency, which viewed unanimous consent as unworkable and potentially hazardous to civic stability, as the Articles of Confederation proved.[133] Therefore, supermajority consent, as exhibited in Article VII and Article V of the Constitution, provided a more convenient method for civic creation, sustainability, and reformation. Madison claimed that tacit assent could be "inferred, where no positive dissent appears."[134] Yet, what type or degree of dissent is unclear? How is dissent within future generations handled? In the American Civil War, a form of mass social dissent, the confederacy was unable to secede peacefully, which begs the question whether citizenship is actually a product of explicit or implied consent or a result of coercion. Madison was not disillusioned by the potential perils of this doctrine: "[i]t seems less impracticable to remedy, by wise plans of Government, the dangerous operation of this doctrine, than to find a remedy for the difficulties inseparable from the other."[135]

Professor Michael Rozeff argues that "[t]acit consent is myth. What we really have is tacit submission."[136] A dissenter, whether an individual or group, who refuses allegiance to the civil compact and yet chooses to remain on national soil, is subject to governmental coercion. Henry David Thoreau, the famous American figure of civil disobedience, noted that prison was "where

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[132] LOCKE, *supra* note 97, at 64.

[133] Madison, *supra* note 77. The Articles of Confederation was the basic law of the country from its adoption in 1781 until 1789 and established a virtually impotent federal government with no coercive or enforcement power. Donald S. Lutz, *The Articles of Confederation*, *in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 227, 231 (Stephen L. Schechter ed., 1990). Article Eight required the unanimous consent of every state to amend the Articles. *Id.* at 228–29. Numerous attempts to amend the document failed. *See id.* at 229. *See generally* Jack N. Rakove, *The Collapse of the Articles of Confederation*, *in* THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 225, 225–45 (J. Jackson Barlow et al. eds., 1988) (discussing the history behind the demise of the Articles of Confederation as well as the sense of nationalism created by the Constitution).

[134] Madison, *supra* note 77.

[135] *Id.*

[136] Michael S. Rozeff, *Tacit Submission*, LEWROCKWELL.COM, Sept. 20, 2005, http://www.lewrockwell.com/rozeff/rozeff26.html.

the State places those who are not *with* her, but *against* her."[137] When he refused to pay his six year delinquent poll tax in opposition to the Mexican-American War, the state incarcerated him.[138] Again, pursuant to common law contract principles, consent compelled by coercion invalidates a contract as lacking the requisite meeting of the minds.

This Article does not intimate that the Constitution (or the Education Article) is illusory or illegitimate, but that its authority does not rest exclusively upon formalities; and therefore cannot be interpreted only with formulaic devices and calculations.

E. Restricts the Popular Will

Regardless of contractualism's ability to successfully bind successive generations, should each generation remain ethically bound to the past? Justice Scalia maintains that adhering to original intent is essential to social stability because the Constitution embodies assurances and protections that are rooted in the drafters' moral awareness, intended to protect society against potentially tyrannical future generations.[139] However, binding a present generation to the past may thwart the expression of the public will and endanger democracy, which would actually undermine the social stability the originalist method purports to advance. Madison, who shared similar concerns about future generational despotism, asserted in *Federalist No. 10* that factionalism posed the greatest threat to popular government.[140] While Madison believed frequent revision would allow factions to more easily gain advantages, the extended republic concept served as his central check against factional tyranny. Madison rejected

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[137] HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), *reprinted in* HENRY DAVID THOREAU, THE VARIORUM WALDEN AND THE VARIORUM CIVIL DISOBEDIENCE 325, 353 (Walter Harding ed., 1967).

[138] Walter Harding, *Introduction* to HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), *in* THOREAU, *supra* note 137, at 325, 325, 327.

[139] *See* Scalia, Remarks, *supra* note 74 ("[T]he whole purpose of the constitution [sic] is to prevent a future society from doing what it wants to do. . . . [S]ome things you don't want the majority to be able to change."); *see also* Scalia, *Originalism*, *supra* note 74, at 862 ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable."); Scalia, Constitutional Interpretation, *supra* note 74.

[140] THE FEDERALIST NO. 10, at 45 (James Madison) (Clinton Rossiter ed., 1999) (1961). Madison defined a faction as citizens "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 46.

any attempt to remove the causes of factions because the cure required "destroying the liberty which is essential to its existence . . . [and] giving to every citizen the same opinions, the same passions, and the same interests."[141] Moreover, the urge to create factious groups was an aspect of human nature unlikely to be absolutely removed.[142] He favored managing the effects of factionalism not through the promotion of moral considerations, but through an extended republic where a majority cannot successfully find itself outside provincial amalgamations.[143] A non-originalist method unbound from the past still conserves the extended republic as a check and allows society to benefit from the popular will of a present generation.

This is not to maintain that a present generation should turn away from the past, but that history does not culminate with the founding period. A constitution memorializes a collection of ideas of civic organization, developed since antiquity. If anything, a present generation should be ethically bound to expanding these ideas, which in a legal environment does not view a constitution merely as a legal document. In *Brown,* if the U.S. Supreme Court applied the original intentions of the Fourteenth Amendment and the precedent of *Plessy v. Ferguson*, it would have likely reaffirmed legal segregation leaving the civil rights movement to the whims of a disobliged political process. But by emancipating itself from the past, the Court could heed the popular will of 1954 and achieve a more just result.[144]

III. PRAGMATISM AND HOLMES'S FUNCTIONAL VIEW OF LAW

A. The Holmesian Maxim and Pragmatism Defined

Courts should apply a methodology more in line with the famous Holmesian maxim which describes the actual temperament of the law: "[t]he life of the law has not been logic; it has been experience."[145] Holmes's "experience" refers to "[t]he felt necessities

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[141] *Id.* at 46.

[142] *Id.* at 47.

[143] *Id.* at 51–52.

[144] *Compare* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation is a denial of equal protection), *with* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (holding that segregation does not violate equal protection).

[145] O. W. HOLMES, JR., THE COMMON LAW 1 (1881).

of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men"[146]—or also simply called *culture*.[147] Holmes rejected the possibility that the law could be reduced to a nomenclature of axiomatic principles obtained through deductive analysis or divine commands.[148] Instead, the law should be "open to reconsideration upon a slight change in the habit of the public mind," particularly situations "where the means do not exist for determinations that shall be good for all time."[149]

Holmes's judicial philosophy follows in the tradition of classical pragmatism,[150] which claims that there are too many epistemological uncertainties in thought for philosophy to uncover. According to William James, the pragmatic method seeks to liberate humans from useless ideas and abstractions.[151] Due to epistemic limitations of philosophy, James argued that ideas and principles should be viewed as tools for, not answers to, the metaphysical riddles of life valuated by their degree of utility.[152] The problem with the quest for ultimate truth is that the journey all too often leads to dogmatism, idolatry, and antagonism. Instead, James offered that "*ideas . . . become true just in so far as they help us to get into satisfactory relation with other parts of our experience*."[153] The pragmatic method, therefore, doesn't concretely and infinitely endorse any specific doctrine or result; instead, it promotes "[*t*]*he attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts*."[154]

Hence, the tenets of pragmatism encourage a forward-looking

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[146] *Id.*

[147] LOUIS MENAND, THE METAPHYSICAL CLUB 342 (2001) (noting that experience is everything that arises out of the "interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices").

[148] *See* Oliver Wendell Holmes, *The Path of the Law*, *in* PRAGMATISM: A READER 145, 154 (Louis Menand ed., 1997) (1897) ("The danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.").

[149] *Id.* at 155.

[150] Classical pragmatism refers to the work of William James, John Dewey, Jane Addams, and Charles Sanders Peirce. *See* Louis Menand, *Introduction* to PRAGMATISM: A READER xi, xi–xii (Loius Menand ed., 1997) (1907). Holmes is usually incorporated in this group despite the fact that he did not care for the term. *Id.* at xix–xx.

[151] *See* William James, *What Pragmatism Means*, *in* PRAGMATISM, *supra* note 150, at 93, 99, 104–05.

[152] *Id.* at 98.

[153] *Id.* at 100.

[154] *Id.* at 98.

approach to life. James professed that "[w]e don't lie back upon [ideas], we move forward, and, on occasion, make nature over again by their aid."[155] John Dewey recognized that while humans become stuck in habits and customs, many becoming institutionalized, "change is also with us and demands the constant remaking of old habits and old ways of thinking, desiring and acting."[156] Therefore, the pragmatic method promotes the expansion and development of ideas, disdaining anachronisms.[157] It asks the question why humans follow an idea and whether they should continue. In effect, it works to release ideas from the yokes of ideologies so they may intermingle with one another and potentially manufacture fresh and alternative ideas,[158] while obedience to anachronisms potentially threatens social growth and increases the likelihood of conflict.

B. The Ineffectiveness of Natural Law Principles and a Contrary Vision of Social Organization

The development of Holmes's jurisprudential philosophy coincided with the regression of natural law principles as a dominant ideology of social organization. During the era of mass production from the late 1800s through the early 1900s, natural law principles found themselves in the unfamiliar territory of struggling to adapt to and sustain the new milieu where class conflict between employers and employees, sometimes violent, challenged the stability of the social system—the exact type of situation pragmatism sought to avert. Pragmatism and Holmes's functionalism supported a view of social organization that stressed the interests and health of the collective or community as of primary importance which ran counter to natural law commands.

Natural law concepts extend back to antiquity. From the third century BCE to the second century AD, the Stoics' ethics resolved that "the individual life is good when it is in harmony with Nature. . . . [A] human life is only in harmony with Nature when the individual will is directed to ends which are among those of Nature."[159] Reason was the central instrument to understanding

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[155] *Id.*

[156] JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 49 (1935) [hereinafter DEWEY, LIBERALISM]; *see also* James, *supra* note 151, at 100–01.

[157] *See* DEWEY, LIBERALISM, *supra* note 156, at 49; James, *supra* note 151, at 100–01.

[158] *See id.*

[159] BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 254 (1945). In *The*

the process of nature and achieving the true end—the good life.[160] In the thirteenth century, Thomas Aquinas built upon and expanded the Stoics's teleological principle of the good life. According to Aquinas,

> the first precept of law, that *good is to be done and ensued, and evil is to be avoided.* All other precepts of the natural law are based upon this, so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.[161]

Aquinas logically concluded that, as with every substance of nature which seeks preservation of its own being, "whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law."[162] Hence, additional conclusions based on this deductive principle of human preservation would fall within the natural law enclave.[163] During the Enlightenment, Locke articulated the natural law maxim that provided the intellectual ammunition for the American revolutionaries: "The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent,* no one ought to harm another in his life, health, liberty, or possessions . . . ."[164]

Locke's concepts of the state of nature and natural law provide some of the first statements of classical liberalism which organized political and economic relations around the concept of the individual.[165] In nature, individuals are in "a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[166] From this premise, the individual is considered unified

Discourses, Epictetus stated: "But for us, to whom He has given also the faculty, these things are not sufficient; for unless we act in a proper and orderly manner, and conformably to the nature and constitution of each thing, we shall never attain our true end." EPICTETUS, THE DISCOURSES*, available at* http://classics.mit.edu/Epictetus/discourses.1.one.html.

160 Epictetus, *supra* note 159 ("For this reason, particularly, we need discipline, in order to learn how to adapt the preconception of the rational and the irrational to the several things conformably to nature.").

161 Thomas Aquinas, *The Summa Theologica I-II*, *in* THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 3, 45 (Dino Bigongiari ed., 1953).

162 *Id.* at 46.

163 *Id.*

164 LOCKE, *supra* note 97, at 9.

165 DEWEY, LIBERALISM, *supra* note 156, at 4–9; RUSSELL, *supra* note 159, at 600–01.

166 LOCKE, *supra* note 97, at 8.

and chief over his own existence. Society then is nothing more than a numerical, ready-made aggregate of consensual individuals forming the whole,[167] and government is only intended to play a limited, defensive role in enforcing positive law.[168] Consequently, positive laws that subject an individual to the collective are inherently resisted as potentially violative of an individual's natural rights. This concept of the autonomous individual supported a laissez-faire economic system that would come to dominate American life, particularly at the turn of the nineteenth century. Adam Smith, the famous economic liberal, believed humans should be free to govern their own property interests and economic affairs without state intrusion.[169] He suggested that the market place would naturally correct and regulate economic and social inequities and produce greater output when permitted to operate free of state interference.[170] Under an individualistic-based social system, self-interest thus becomes the guiding force of individual behavior.

The ideological principles of the founding period were intimately connected with these liberalist principles, the protection of private property serving as the primary driving force behind political documents and compacts. The Declaration of Independence visibly echoed Lockean property principles. The Northwest Ordinance of 1787, which provided the national policy and regulatory requirements for westward expansion, insured protection of property.[171] The framers of the U.S. Constitution equally concerned

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[167] John Dewey, *The Ethics of Democracy*, *in* PRAGMATISM: A READER 182, 184–85 (Louis Menand ed., 1997) [hereinafter Dewey, *Ethics of Democracy*].

[168] DEWEY, LIBERALISM, *supra* note 156, at 4.

[169] *See generally* ADAM SMITH, THE WEALTH OF NATIONS 400–02 (J.M. Dent & Sons Ltd. 1975) (1776). In response to tariffs, he noted that:

> To give the monopoly of the home market to the produce of domestic industry, in any particular art or manufacture, is in some measure to direct private people in what manner they ought to employ their capitals, and must, in almost all cases, be either a useless or a hurtful regulation.

Id. at 401.

[170] *See id.* at 400–02; ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 184–85 (D.D. Raphael & A.L. MacFie eds., 1976) (1759).

[171] Peter S. Onuf, *Commentary*, *The Northwest Ordinance of 1787*, *in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 249, 255–56 (Stephen L. Schechter ed., 1990). The second section of the Ordinance outlined the rules for property inheritance prior even to articulating the structural requirements for territorial governments. *The Northwest Ordinance of 1787*, *reprinted in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 259–60 (Stephen L. Schechter ed., 1990). "[T]he precedence of property rights," Peter Osnuf asserts, "over the elaboration of provisions for government reflects the fundamental premises of liberal social contract theory." Onuf, *supra*, at 255–56. Also of significant importance is section thirteen of the Ordinance which provided "for extending the fundamental principles of civil and religious liberty, which form the basis

themselves with economic rights providing several provisions aimed at protection of property rights, for example, the Contracts Clause, the Takings Clause, and the Due Process Clause.[172]

During the decades of the nascent republic, the Marshall Court established the precedent that it would utilize textual constitutional provisions and extra-textual principles of natural law to protect property rights from state intrusion.[173] Justice Marshall eventually crystallized a formalistic interpretation of the Contracts Clause to protect property rights without the need to invoke extra-textual provisions.[174] However, in the absence of explicit textual commands, the Marshall Court and its successors would still employ the unenumerated law of nature.[175]

From the 1890s to 1930s, in what is commonly referred to as the *Lochner* era, the U.S. Supreme Court expanded its protection of property against state intrusion with the creation of substantive due process under the liberty and property prong of the Fourteenth

whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments." *The Northwest Ordinance of 1787*, *supra*, at 262.

[172] U.S. CONST. art. I, § 10; U.S. CONST. amend. V.

[173] In the seminal case *Fletcher v. Peck*, the Georgia legislature sought to repeal the contracts of sale it entered; however, the original purchasers had sold much of the land to secondary buyers who claimed that the state could not invalidate their title to the land. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 87–89 (1810); *see* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 49–51 (1960). Ruling in favor of the secondary purchasers, Justice Marshall's basis for the decision was a mixture of the textual limitations under the Contracts Clause and extra-textual authority. *Id.* at 50–51. While he determined that an executory contract fell within the contours of the Clause, Marshall also claimed that the state action breached the "general principles which are common to our free institutions." *Fletcher*, 10 U.S. at 139. Marshall clearly invokes extra-textual natural law when he states "[i]t may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power." *Id.* at 135.

[174] *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819). In this case, the Court ruled that the charter of a private corporation constituted a contract which the State could not alter. *Id.* at 712. The Court based its decision on the textual commands of the Contract Clause only, without invoking natural law principles. *Id.* at 682–84; *see also* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 13 (1823) (holding that a compact between two states was a contract which a state could not interfere under the Contract Clause).

[175] James Ely notes that in *Terrett v. Taylor*, 13 U.S. 43 (1815), Justice Story was so "[o]utraged by Virginia's interference with vested property rights, but without an express constitutional provision which seemed applicable, Story looked to natural law principles implicit in the Constitution to restrain legislative authority." James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1050 (2000). Over sixty years later, in *Loan Ass'n v. Topeka*, the Court also applied natural law principles to restrict state action where no relevant constitutional text applied. 87 U.S (20 Wall.) 655, 662–63 (1874). In *Topeka*, a municipal law imposed a tax to finance bonds issued to attract private business to the area. *Id.* at 656–57. The Court nullified the municipal regulation as an invasion of private property rights, reasoning that "[t]here are limitations on such [state] power which grow out of the essential nature of all free governments." *Id.* at 663.

Amendment to secure the right to certain economic activities.[176] Initial attempts to protect property rights under the amendment had failed. In the *Slaughter-House Cases*, butchers challenged a state statute that granted a monopoly to a single company as an infringement on their right to practice a trade under the Civil War amendments.[177] Among other reasons, the Court held that the Fourteenth Amendment principally applied to the states in issues of civil right violations based on race since the amendment was adopted in response to emancipation.[178] In his dissent, Justice Bradley, however, offered that, while a state possesses a degree of power to regulate its citizenry, "there are certain fundamental rights which this [state's] right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves."[179] He concluded that the right to a calling was a fundamental right implicitly incorporated in the liberty and property prongs of the Fourteenth Amendment,[180] a viewpoint which would become the majority.

In 1897, in *Allgeyer v. Louisiana*, the Court abandoned the *Slaughter-House* analysis and announced a willingness to use the Due Process Clause to protect the freedom of contract.[181] The Court held that the liberty prong of the Due Process Clause may

> embrace the right of the citizen to be free in the enjoyment of all his faculties ; to be free to use them in all lawful ways ; to live and work where he will ; to earn his livelihood by any lawful calling ; . . . and for that purpose to enter into all contracts . . . essential to his carrying out to a successful conclusion the purposes above mentioned.[182]

But it was not until six years after *Allgeyer* that the Court distinctly

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[176] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53, 64 (1905) (striking down a New York State law that mandated a maximum number of work hours for bakers, while holding that the right to contract to sell labor is part of the liberty protected under the Fourteenth Amendment).

[177] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 43–44 (1872).

[178] The Court claimed that:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from . . . oppression[].

Id. at 71.

[179] *Id.* at 114 (Bradley, J., dissenting).

[180] *Id.* at 113–14.

[181] 165 U.S. 578 (1897).

[182] *Id.* at 589.

outlined the rule and themes of economic substantive due process rights in *Lochner v. New York*.[183] In *Lochner*, the Court invalidated a state maximum working-hours statute for bakers as interfering with the employers' and employees' freedom of contract.[184] The Court concluded that a state's police power was limited to legislation protecting "the safety, health, morals and general welfare of the public."[185] The Court determined that there was no evidence that triggered a valid exercise of the police power.[186] The bakers as a class were not incapacitated laborers and were able to assert their own rights.[187] The quantity of hours had a remote, if any, relation to public health or the health of bakers.[188] Further, there was no evidence that the class was subjected to coercion, whether by fraud or by force.[189] Therefore, the State could not prescribe paternalistic regulations to protect the class from the cost of their own actions.[190]

Jurisprudentially, the *Lochner* era is characterized by a commitment to a laissez-faire, unregulated economic system. The Court frequently employed economic due process to protect employers.[191] The Court's Commerce Clause jurisprudence during the period similarly rejected congressional attempts to regulate economic matters, many of which included labor issues, concluding that commercial production fell outside the purview of the Commerce Clause as a wholly intrastate activity left to individual state control.[192]

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[183] Lochner v. New York, 198 U.S. 45 (1905).

[184] *Id.* at 64.

[185] *Id.* at 53. The legislation must have a

> direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Id. at 57–58.

[186] *Id.* at 57.

[187] *Id.* at 57, 59.

[188] *Id.* at 64.

[189] *Id.* at 57.

[190] *Id.* at 61, 64.

[191] *See, e.g.*, Weaver v. Palmer Bros. Co., 270 U.S. 402, 415 (1926) (declaring a consumer protection law unconstitutional); Adkins v. Children's Hosp., 261 U.S. 525, 561–62 (1923) (holding a minimum wage law for women unconstitutional); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (declaring a state law protecting unionizing unconstitutional); Adair v. United States, 208 U.S. 161, 179–80 (1908) (declaring a federal law protecting unionizing unconstitutional).

[192] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895); *see also* Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918) (holding that Congress could not forbid child labor since the control of production was a state issue).

The convergence of social, political, and intellectual pressures eventually pushed the Court to abandon the conceptual, laissez-faire-based approach as impractical and ineffective, regardless of seeming to promote consistency, which would bring the *Lochner* era to a close.[193] In 1938, the Court promulgated the rational basis test in *United States v. Carolene Products Co.*, upholding the constitutionality of a legislative act that sought to regulate certain milk products.[194] Furthermore, in *NLRB v. Jones & Laughlin Steel Corp.* and its progeny, the Court announced a more practical approach to the Commerce Clause.[195] *Carolene Products* and *NLRB* were instrumental in permitting the Court to engage in a more functional legal approach based on empirical determinations. *Carolene Products* particularly provided an approach for the future—judicial deference to government economic regulation, with more exacting judicial scrutiny of legislation involving issues of insular minorities, voting, and free speech.[196]

By the time of *Carolene Products*, the theory of natural law and its laissez-faire liberal offspring struggled to provide the foundations and mechanisms for effective and productive social organization. The ideas essentially had become impractical and antiquated in the new milieu. The *Lochner* era transpired concomitantly with shifts in social and economic relations.[197] Labor and allied social reformers aggressively sought equality of opportunity and demanded protective regulation in areas such as child labor, minimum safety standards, minimum wage, and

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[193] Holmes was one of the Court's most prolific spokespersons castigating the adherence to laissez-faire principles in his dissents. In *Lochner*, Holmes claimed that the Constitution did not incorporate any type of economic theory. 198 U.S. at 75 (Holmes, J., dissenting). Regarding the Commerce Clause, Holmes stated: "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Swift & Co. v. United States, 196 U.S. 375, 398 (1905). When goods eventually and continually exit a state, production becomes a part of the "current of commerce among the States." *Id.* at 399.

[194] United States v. Carolene Prods. Co., 304 U.S. 144, 151, 154 (1938).

[195] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–42 (1937); *see also* Heart of Alanta Motel, Inc. v. United States, 379 U.S. 241, 258, 260–61 (1964) (declaring a federal law regulating local activities constitutional pursuant to the Commerce Clause); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (declaring a federal law regulating the price of wheat constitutional); United States v. Darby, 312 U.S. 100, 125 (1941) (declaring a federal minimum wage law constitutional).

[196] *Carolene Prods.*, 304 U.S. at 152. The infamous footnote four provided a method of judicial scrutiny of legislative enactments. *Id.* at 152 n.4.

[197] For an overview of the social, political, and economic climate during the period around the *Lochner* decision, see generally 7 HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ FAIRE 1897–1917, at 280–309, 366–79 (1951). *See also* MCCLOSKEY, *supra* note 173, 144–47, 151–57; HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 314–49 (1980).

maximum hours, while proponents countered that such laws were an unjust imposition on life, liberty, and property.[198] This struggle, although not a new phenomenon, appeared to reach an apex at the turn of the century.[199] During the period, labor demonstrations and campaigns escalated, frequently becoming violent and threatening social stability.[200] The unregulated marketplace allowed for the condensation of wealth and production into the hands of the minority, empowering an oligarchic private marketplace where labor maintained minimal power and was subject to the whim of the minority.[201]

An initial problem laissez-faire liberalism presented was the computation of property rights in an individual's labor. Locke taught that

> [t]he *labour*[*s*] of [man's] body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. . . . [His labor] excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to . . . .[202]

An individual owned the product of his work. In urban environments, the craftsman owned his tools, applied his labor, and produced what he needed or sold to others. In the rural landscape, the farmer retained the bounty of his plow for keep or sale.[203] However, as Bertrand Russell noted, this Lockean conception of property and labor was incompatible with industrialization because "how is any one to estimate what proportion of the total output is

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[198] *See* cases cited *supra* note 195.

[199] The labor movement was not a novel phenomenon in America; the movement had been fighting for egalitarianism since the early decades following ratification and, while quieted during the Civil War, regained momentum during the late decades of the century.

[200] Faulkner, *supra* note 197, at 280–309, 366–79. Some of the major labor campaigns that sparked violent social crisis were the Great Rail Strike of 1877, ZINN, *supra* note 197, at 240–46; the Haymarket Square incident in 1886, *see id.* at 263–66; the 1892 riots at Carnegie's steel plants, *see id.* at 270–71; the Pullman Strike of 1894, *see id.* at 273–75; the San Francisco general strike of 1934, *see id.* at 386–87; and the 1937 Flint sit-down strike, *see id.* at 390–91.

[201] For a discussion concerning the consolidation of business and the rise of monopolies, see Faulkner, *supra* note 197, at 153–75.

[202] LOCKE, *supra* note 97, at 19.

[203] *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 15, 20 (2005).

due to [a factory worker's] labour?"[204] Does a Ford Motor Company worker retain an ownership interest in the door jam he constructed, and if so, how does he negotiate the sale of such an interest, particularly when the non-skilled laborer is expendable?[205] Therefore, in a mass-producing unregulated economic system, workers possessed minimal, if any, bargaining power.

An additional effect of laissez-faire liberalism is that it promoted a psychology of self-interest, exclusivity, and a sense of possession. Blackstone said, "'[s]o great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the common good of the whole community.'"[206] Adam Smith famously espoused the hallmark statements of the ethic:

> It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities, but of their advantages.[207]
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> . . . .
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> . . . As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry. . . . He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own security ; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.[208]

While Smith believed that action based on self-interest would release productive energies, increase growth, and benefit society, John Dewey pointed out that classical liberalists

> overlooked the fact that in many cases personal profit can be better served by maintaining artificial scarcity and . . .

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[204] RUSSELL, *supra* note 159, at 636.

[205] *See id.*

[206] ZINN, *supra* note 197, at 256 (internal quotation marks omitted).

[207] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 7 (4th ed. 1850).

[208] *Id.* at 199.

> systematic sabotage of production. . . . [T]hey completely failed to anticipate the bearing of private control of the means of production and distribution upon the effective liberty of the masses in industry as well as in cultural goods.[209]

Self-interest combined with social power, in particular, increased the risk of exploitation, conflict, and unrest, even if such a social system appeared justified by natural law and was considered a source of equality.

The psychological consequence of the laissez-faire liberal ethic played itself out increasingly in the combative relationship between the owners of production and labor during the *Lochner* era. Looking at the Pullman Strike of 1894, the pragmatist Jane Addams noted that the strike arose out of each side's unchangeable adherence to its beliefs and cause, which isolated each from the collective interests of the whole.[210] George Pullman, the owner of the Pullman railroad cars, required many of his workers to live in the town of Pullman, where the company set unreasonable rents and various rules, such as outlawing saloons, to the dismay of his employees.[211] Pullman's isolated beliefs of righteousness and benevolence prevented him from directly inquiring into his workers' needs and reevaluating the utility of his paternalistic scheme.[212] At the same time, for the worker, the vision of emancipation of the workingman and a freedom to control his labor had spread, but "workingmen in the dawn of the vision [were] inclined to claim it for themselves, putting out of their thoughts the old relationships."[213] Therefore,

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[209] DEWEY, LIBERALISM, *supra* note 156, at 35–36.

[210] ADDAMS, *supra* note 1, at 163–65. The American Railroad Union (ARU) supported the Pullman workers in a nationwide boycott of any railroad company whose management refused to detach Pullman cars. Nick Salvatore, *Eugene V. Debs: From Trade Unionist to Socialist*, *in* LABOR LEADERS IN AMERICA 90 (Melvyn Dubofsky & Warren Van Tine eds., 1987). Efforts to arbitrate continuously failed. *Id.* The railroad companies joined forces to beat the strike and flatten the power of the ARU. *Id.* at 92. They hired strike breakers and dismissed workers associated with the strike. *Id.* The companies unfairly partnered with the federal government. *See id.* at 92–93. The attorney general deputized over 5000 U.S. Marshals to "fan out through Chicago with instructions to aggravate rather than ease potential trouble spots." *Id.* The government also charged the strikers with obstruction of the mail and conspiracy and obtained an injunction against the labor leaders. *Id.* at 93. Rioting eventually ensued, instigated by the new marshals, which required President Cleveland to send in federal troops to quell the strikers. *Id.*; *see also* MENAND, *supra* note 147, at 295–96; ZINN, *supra* note 197, at 274.

[211] MENAND, *supra* note 147, at 290; Salvatore, *supra* note 210, at 89; *see also* ADDAMS, *supra* note 1, at 166.

[212] *See* ADDAMS, *supra* note 1, at 166–67, 169–71.

[213] *Id.* at 174.

Addams concluded, any successful form of emancipation or paternalism could not be guided by a sense of exclusive possession, but must be inclusive of all to prevent violent conflict.[214] Parties needed to consider the views of the whole to determine the best course of action, no matter how great they believed their ideas or cause for themselves. Addams maintained, "[i]t is so easy for the good and powerful to think that they can rise by . . . pursuing their own ideals, leaving those ideals unconnected with the consent of their fellow-men."[215] She was advocating a need for intellectual flexibility, for people to evaluate the usefulness of their ideas and allow for modification when it benefits the whole.

Dewey also confronted the concepts of classical liberalism by inverting the principles of the ideology. Instead of viewing society as an aggregated mass of individuals who are sovereign units each possessing a morsel of the political power, he espoused a principle of social organization based on collectivity,[216] which in various ways mirrored Holmes's view of law.

Under classical liberalism, the individual enters society ready-made, but Dewey could not imagine what reference points individuals, prior to socialization, looked towards to develop their individuality—identity.[217] Outside of society, individuals were simply empty vessels, but through socialization, individuals were provided the raw materials to construct personalized identities.[218] Dewey argued that the laws of nature actually view individuals in association with one another, not separated.[219] He concluded that

> [s]ociety in its unified and structural character is the fact of the case; the non-social individual is an abstraction arrived at by imagining what man would be if all his human qualities were taken away. Society, as a real whole, is the normal order, and the mass as an aggregate of isolated units is the fiction.[220]

Individuals are always operating as a larger whole. From this

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[214] *See id.* Addams proclaimed that "the emancipation of working people will have to be inclusive of the employer from the first or it will encounter many failures, cruelties and reactions." *Id.*

[215] *Id.* at 175.

[216] *See* Dewey, *Ethics of Democracy*, *supra* note 167, at 184–87.

[217] *See* DEWEY, LIBERALISM, *supra* note 156, at 39–41.

[218] *See id.*

[219] *See* Dewey, *Pedagogic Creed*, *supra* note 2. At the micro-level, children do not enter life as fully completed beings, but undergo numerous modifications through their associations, initially with their caregivers. *See* DEWEY, LIBERALISM, *supra* note 156, at 41.

[220] Dewey, *Ethics of Democracy*, *supra* note 167, at 187.

proposition comes an alternative view of society, that of an interconnected social organism comprised of a common will.[221]

While a common will may seem unrealistic in a pluralistic society where multiple interests and opinions unmistakably operate and compete, for Dewey differences could be resolved within the unified whole through social participation and expression.[222] Dewey noted that "[t]he organism must have its spiritual organs; having a common will, it must express it. A national consciousness which does not give itself outward reality, which does not objectify itself, is like any other consciousness in similar plight—simply non-existent."[223] Therefore, society needed to promote and undo restrictions that prevent social participation and expression of the multitude. Participation and expression generate ideas and a body of knowledge that permits social reform and adaptation to modernity. Dewey maintained that an effective democracy allows society to bring "conflicts out into the open where their special claims can be seen and appraised, where they can be discussed and judged in the light of more inclusive interests than are represented by either of them separately."[224] In essence, he promoted a philosophy of practical action.[225]

Dewey's view of social relations neared the perspective and approach Holmes applied in his jurisprudence. As with Dewey, Holmes was not particularly concerned with the individual per se, but with the collective will. He considered the concept of individual natural rights as socially constructed.[226] Holmes noted that "a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."[227] He pointed out the social contradictions in rights discourse. For example, the right to life, seemingly the most ordained *a priori* entitlement, "is

[221] *See id.* at 192–93.

[222] *See* DEWEY, LIBERALISM, *supra* note 156, at 24–25. Dewey claimed that "[t]he problem under discussion is precisely *how* conflicting claims are to be settled in the interest of the widest possible contribution to the interests of all—or at least of the great majority. The method of democracy—inasfar as it is that of organized intelligence . . . ." *Id.* at 79.

[223] Dewey, *Ethics of Democracy*, *supra* note 167, at 193.

[224] DEWEY, LIBERALISM, *supra* note 156, at 79.

[225] *Id.* at 91–92.

[226] Oliver Wendell Holmes, *Natural Law*, *in* PRAGMATISM: A READER 173, 175–76 (Louis Menand ed., 1997) (1918). Holmes stated that a priori principles, such as natural law, are "determined largely by early associations and temperament, coupled with the desire to have an absolute guide. Men to a great extent believe what they want to—although I see in that no basis for a philosophy that tells us what we should want to want." *Id.* at 176.

[227] *Id.* at 175.

sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."[228] A "right" is then the product and creation of a judicial conclusion rather than some innate human quality or divine command.[229] And the law then is not the result of formulaic equations, but a social product; it is the offspring of what Holmes referred to as "experience"—the culture, history, and customs of a society examined inductively.

C. A Brief Look at Holmes's Jurisprudential Views

Holmes believed that laws should address the practical needs of each generation, which would require a functional approach to law. Such an approach evaluates and constructs laws based on the way they function in practice, considering the practical effects of the laws and how they address social concerns—very much an extension of pragmatism. James determined the utility of a principle through inductive examination, i.e., how the principle performs in a defined context. This Article briefly looks at three areas of Holmes's functionalist view of law: (1) law as forward looking, (2) law as a laboratory, and (3) law as a scale.

1. Law as Forward Looking

Holmes championed the law as forward looking. He maintained a similar contempt for anachronisms in the law, finding it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. . . . [and] still more revolting if the grounds upon which it was laid down have vanished long since."[230] Therefore, jurists should consider what legal rules seek to accomplish and how they will impact society, looking at the consequences of their decisions.[231] Holmes considered history, such as the framers' intentions, as an important imperative, but the "only interest in the past is for the light it throws upon the present."[232] History helps a jurist to examine the worth and utility of rules "because without it we cannot know the precise scope of rules . . . . [I]t is the first step toward an enlightened scepticism, that is,

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[228] *Id.* at 175–76.
[229] *See id.* at 175.
[230] Holmes, *supra* note 148, at 159.
[231] *See id.*
[232] *Id.* at 164.

towards a deliberate reconsideration of the worth of those rules."[233]

At the heart of a forward looking view arises, again, the nature of language. Echoing Peirce, Holmes believed that law must take into account present understandings and meanings. In *Missouri v. Holland*, he noted:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[234]

Holmes rejected the notion that constitutional meaning remains static and immutable. Characteristic of this view is also Holmes's pronouncement in *Gompers v. United States*:

> [T]he provisions of the Constitution are not mathematical formulas having their essence in their form ; they are organic living institutions . . . . Their significance is vital not formal ; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[235]

2. Law as a Laboratory

Constitutions provide opportunities for social experimentation. In his *Lochner* dissent, Holmes candidly argued that the Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views."[236] Therefore, as long as a reasonable person did not think a regulation improper, the Constitution allowed a majority to experiment legislatively.[237] For Holmes, a legal system was a laboratory for trial and error. In the course of its operation, the system helps to facilitate the expansion of knowledge and to discover the best course of life. In *Abrams v.*

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[233] *Id.* at 158.

[234] 252 U.S. 416, 433 (1920).

[235] 233 U.S. 604, 610 (1914).

[236] Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

[237] *Id.* at 76; *see also* Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) ("There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, . . . even though the experiments may seem futile or even noxious to me.").

United States, the petitioners were indicted under the Espionage and Sedition Act for printing leaflets protesting American policy towards Russia.[238] The Court found the speech unprotected and actionable under the Act.[239] In his seminal dissent, Holmes proclaimed

> the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[240]

Holmes was principally saying that as long as an action or legislation did not extend so far as to become harmful or unreasonable, society and the judiciary may support them as part of the grander social experimentation.

The U.S. Constitution and the state constitutions, therefore, establish the widest borders for the social experiment to operate and flourish, but within those broad borders, actors must be permitted to interact freely. The Constitution was not intended to establish absolute principles, but rather its provisions help guide legal inquiry and supply the structure for the social experiment. In *Truax v. Corrigan*, Holmes complained:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious . . . .[241]

Of course, the demarcation of boundaries is delicate, since too narrow a border obstructs experimentations, and one too broad potentially threatens social stability. But as with society and life itself, those boundaries are organic and shift with each generation. Dewey maintained that there may be certain directions that groups find harmful, but law shall allow certain unfavorable directions as a means of uncovering or developing ideas.[242]

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238 Abrams v. United States, 250 U.S. 616, 616–17, 619–20 (1919).

239 *Id.* at 624.

240 *Id.* at 630 (Holmes, J., dissenting).

241 *Truax*, 257 U.S. at 344 (Holmes, J., dissenting).

242 DEWEY, LIBERALISM, *supra* note 156, at 92–93.

3. Law as a Scale

Holmes required a mechanism to implement and restrain the threats of his forward-looking and laboratorial view of law, which he found in the balancing-of-interests test. Balancing would help to determine the borders of social action. Despite Holmes's insistence on the importance of historical examination, he sought a judiciary where the balancing-of-interests would replace the need for arduous, in-depth historical review.[243] In essence, balancing would keep the law up-to-date with the will of each generation. Balancing requires a jurist "to consider and weigh the ends of legislation, the means of attaining them, and the cost."[244] It was for this reason that Holmes argued that jurists should understand canons of economics, e.g., cost-benefit analysis.[245]

Balancing complemented Holmes's view of *rights* as socially constructed rather than as absolute and self-evident. In *Lochner*, he did not argue in favor of an economic right to contract; that is, it was not a rights discussion, but what the majority wanted:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. . . . A reasonable man might think it a proper measure on the score of health.[246]

For Holmes, the raw material inserted into the balance machinery was the composition of experience: facts, context, consequences, and circumstances, not concepts and principles disconnected from the very products it sought to administrate. In examining whether a state regulation of private property was a proper exercise of the police power or an invalid taking without just compensation, in *Pennsylvania Coal Co. v. Mahon*, Holmes, writing for the majority, phrased the balance analysis as follows: "[T]he question depends upon the particular facts. The greatest weight is given to the

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[243] Holmes, *supra* note 148, at 164. Holmes noted that "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." *Id.*

[244] *Id.*

[245] *Id.*

[246] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."[247] Implicitly, he was asking whether the taking was reasonable or whether the police power extended too far, which was similar to the question he raised in *Lochner*.[248]

Rights, then, do not automatically trump legislation (and vice versa), but must be balanced. Holmes's approach was a precursor to the rational basis test introduced in *Carolene Products Co*.[249] Later, courts would redefine and expand the balancing approach, establishing various levels of judicial review depending on the actions of the government.[250]

D. Criticisms: Legitimacy, Subjectivity, and Criterion

1. Legitimacy

A forward-looking methodology whose chief characteristic is the recognition of social change faces the problem of legitimacy. Justice Scalia argues that Justice Marshall, in *Marbury v. Madison*, decreed that determining the conflict between a constitutional provision and legislative enactment is the work of jurists.[251] Therefore, if a methodology professes an evolutionary view of the Constitution that adapts to changing social values, then constitutional interpretation should rest within the legislative branch, which is better equipped to ascertain and calculate current social attitudes, not the judicial branch.[252] Consequently, if a jurist refuses to view the Constitution as a static legal text, any alternative method employed lacks legitimacy.

However, Justice Scalia's premise that legitimacy stems from separation of powers is a narrow view of the law. Our legal system is very much a mixture of the judicial and political process. They

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[247] 260 U.S. 393, 413 (1922).

[248] *Id.*

[249] 304 U.S. 144, 152 (1938).

[250] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) (holding that intermediate scrutiny applies to gender based classifications); Craig v. Boren, 429 U.S. 190, 204 (1976) (holding that when intermediate scrutiny applies, the law must be substantially related to serving the important governmental interest); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–15 (1976) (holding that rational basis applies to classifications based on old age); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that strict scrutiny applies to inherently suspect classifications whether or not a fundamental right is impaired).

[251] Scalia, *Originalism*, *supra* note 74, at 854.

[252] *Id.*

are not separate functions, but are intimately intertwined. Judges have always been players in the development of the law, and potentially better served to determine the law because the judiciary is flexible and responds to actual cases and controversies brought from a varying pool of the citizenry.[253] Since many legal controversies involve close normative judgments, the controversy may need to be reassessed by the courts after it is submitted to society for evaluation, execution, and observation. A case will likely take a few years to return to the court, which may provide additional evidence on how to reexamine the matter.

The process of reevaluating stare decisis follows in this manner. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O'Connor stated certain inquiries to determine if a prior precedent is unworkable: (a) will uprooting the rule cause too serious, unjust consequences for people who relied on it; (b) will overruling the precedent affect the stability of the society; (c) has the law's growth since its announcement left it dismissed by society; and (d) have the social circumstances changed since the law's announcement, leaving the initial rule irrelevant[254]—a method that actually determines anachronisms. Therefore, social acceptance has as much, if not more, to do with legitimacy as Justice Scalia's conceptual framework. In *Brown*, the Court obviously engaged in public policy determinations, largely left to the legislature, since the framers' intentions were unclear and precedent favored the prior doctrine of "separate, but equal." So does the case violate the rule of law? *Brown* prevails not because of its legal accuracy, "but on the fact that it has indeed been accepted by the country."[255]

Additionally, legitimacy is established through democratic

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[253] Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 75–80 (1991). Professor Siegel notes that at the end of the eighteenth century

> [H]istorist jurists observed that legal development had always taken place, and should always take place, through juristic activity. Lawmaking through juristic activity, they said, was better than lawmaking through legislation because it drew from the wisdom of the ages, not the speculation[] of just the present generation; it was more flexible and responsive to social needs than lawmaking through legislative activity because courts are always in session and are more accessible to the common person; and it was administered by a body of individuals whose long training made them uniquely qualified to focus the learning of the past on the needs of the present. In general, juristic activity imitates the mechanism of change in nature: large changes are accomplished by the slow accumulation of small variations.

Id. at 76–77.

[254] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 862–64 (1992).

[255] Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 768 (2004).

procedures. Louis Menand indicates that a pragmatic approach is justified by "shift[ing] the totem of legitimacy from premises to procedures."[256] Adherence to legal procedures and processes legitimizes a result. We may not agree with certain legal conclusions, but if democratic procedures were employed to reach the result, we are better able to accept it. This is similar to Holmes's view of rights—rights do not necessarily pre-exist judicial conclusions, but result from them.

2. Subjectivity

While a functional legal approach allows courts to remain flexible and adapt to societal changes, it also appears to permit subjectivity to exist and operate unchecked. Judges can easily apply their personal preferences while claiming to adjudicate objectively. A lack of objective principles in the pragmatic method has led opponents to criticize the method as judicial legislation,[257] such as creating unenumerated rights and interfering with the states' prerogatives.

Holmes rejected the notion of an objective jurist governed by the laws of logic.[258] While any judicial conclusion can be phrased in logical verbiage, "[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment."[259] The reason for a judicial conclusion, therefore, did not rest in the universe of a formulaic method, divorced from reality, but within a culture where a "decision can do no more than embody the preference of a given body in a given time and place."[260] Holmes did not necessarily advocate that jurists look inward to personal values when applying "experience," but was referring to the life history of society—"the name for everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, [and] prejudices."[261] Jurists actually should attempt to turn their attention to external indicators without incorporating personal values.

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[256] MENAND, *supra* note 147, at 432.

[257] S*ee* Scalia, *Originalism*, *supra* note 74, at 863; *see also* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

[258] Holmes, *supra* note 148, at 154.

[259] *Id.* at 154–55.

[260] *Id.* at 155.

[261] MENAND, *supra* note 147, at 341–42.

Nevertheless, the pursuit of absolute objective inquiry void of subjectivity is likely futile; no mechanism exists to prevent internal values from entering a conclusion, regardless of the employed method. Originalist jurists are not immune from subjective considerations; they must make normative judgments about history and how to frame the issue of a particular case, which then guides the area of the framers' past that is inspected. This was Professor Jenkins's argument regarding historical analysis—the historian, never divorced from his own perceptions, must make judgment calls.[262]

Moreover, as with the issue of legitimacy, procedural safeguards, as opposed to principles, help protect against overreaching subjectivity.[263] Jurists understand the role of disinterestedness, which judicial recusal is an expression, and are expected to respect stare decisis. The legal system also provides the opportunity for each side to be heard and the right to multiple appeals to different jurists to review potential errors.

3. Criterion

Justice Scalia argues that non-originalism fails from a want of a defined criterion, such as framers' intent, to control and check the reach of judicial power.[264] Without a legitimate criterion, he deduces that jurists may employ any imperative, whether internal or external, which consequently generates an illegitimate judicial conclusion and threatens social stability.[265] Justice Scalia maintains that since non-originalist theories offer no better criterion than framers' intentions, the originalist method is superior.[266] First, this skeptical teleological outlook of the law and society is unproven. Again considering *Brown*, the Court based its decision on social science data and policy considerations, and the decision was eventually accepted by society.[267] Second, what if framers' intentions are unclear and undetectable? To what criterion

[262] *See* JENKINS, *supra* note 86, at 12.

[263] MENAND, *supra* note 147, at 432.

[264] Justice Scalia stated "What is the criterion that governs the Living Constitutional judge? What can you possibly use, besides original meaning? . . . There is none other. . . . The worst thing about the Living Constitution is that it will destroy the Constitution. . . . [T]he Constitution will mean what the majority wants it to mean." Scalia, *Constitutional Interpretation*, *supra* note 74.

[265] *Id.*

[266] *See* Scalia, *Originalism*, *supra* note 74, at 863–64.

[267] *See* Ellmann, *supra* note 255, at 768.

does an originalist jurist resort? Originalism is limited to one specific area; the method provides no reinforcement criteria when the unavoidable indeterminacy of historical examination arises. Thirdly, a functional method does offer a criterion: induction and balancing of facts, circumstances, culture, and history. While such a criterion is composed of a vaster universe than original intent, the methodology nonetheless is a standard which, unlike originalism that looks away from indeterminacies, openly acknowledges, anticipates, and incorporates them into the method. This is the point behind Holmes's jurisprudence. He sought to pull back the curtain on formalistic approaches and expose the true character of the law, viewing it as an incomplete organic extension of human existence tied to time and place.

IV. A FUNCTIONAL APPROACH TO THE EDUCATIONAL ARTICLE

The New York Court of Appeals should adopt a functional rule that maintains children shall receive the current standard of education and abolish the "sound basic education" standard. The latter is a standard devoid of any meaning. The Court of Appeals simply consolidated the three words together and created a phrase without any historical lineage that provides minimal meaning. The standard is ornamental, in that it looks and sounds elaborate, but lacks functionality and practical application. In fact, there is no such thing as a "sound basic education."

Under the proposed functional rule, however, a court develops a standard of education based on empirical and contemporary considerations. To bring a cause of action, a party must only allege that a student's academic performance does not meet the current standard of education and demonstrate that some state action was a cause. However, the list of causes is not restricted. The proposed rule replaces the input/output and causation elements that made pleading a cause of action difficult with a two-part inquiry: identification and balancing.

Under the identification stage, a plaintiff must develop the record to identify (i) the current standard of education, (ii) whether the standard is met, and (iii) what state action (or inaction) requires redress. A court should determine the standard of education through a process of induction from the circumstances of time and place. This approach allows courts to incorporate the shifting standard of education throughout history. If a court finds that the standard is not met and state action is alleged, the next step in the

analysis is balancing. A court should weigh the state action against the degree of failure. The greater the failure, the greater the presumption against the action. Upon finding a regulation invalid, a court may then consider remedies, such as reducing local control.[268]

This proposed two-part inquiry—identification and balancing—allows courts to scrutinize education laws and policies, such as residency and non-residency tuition requirements established by section 3202 and state nonfeasance, as a cause, even though they threaten local control. While local control is a significant policy, which a court should weigh heavily, the policy is not immune to judicial authority and does not govern the legal conclusion. School district boundaries and education laws and policies are created by state action, not by local governments. When an education law or policy adversely affects students and deprives them of an opportunity to gain an education, only the state has the authority and means to correct the problem.[269] Local governments have no power to cure damaging state educational laws.

Permitting the *Paynter* plaintiffs to allege that section 3202 is an input may interfere with local control; however, "[t]here is nothing sacrosanct about district lines."[270] In 1894, New York State had 11,000 school districts whereas in 1982, there were approximately 700 school districts.[271] Moreover, reliance on local control has decreased nationwide since the early 1900s.[272] In 1920, 83.2% of school funding was local, and by 2002, that figure dropped to 42.8%.[273] The amount of nonfederal funds New York State assigns for public education is consistently below the national average.[274]

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[268] *See* Paynter *ex rel.* Stone v. State, 797 N.E.2d 1225, 1230 (N.Y. 2003). In *Paynter*, the majority's discussion of remedies at the pleading stage was entirely premature, even under the current rule, especially since the plaintiffs never requested the state to redraw district lines. *See id.*

[269] Paynter *ex rel.* Stone v. State, 735 N.Y.S.2d 337, 347 (App. Div. 2001) (Green, J.P., dissenting).

[270] *Paynter*, 797 N.E.2d at 1249 (Smith, J., dissenting).

[271] *See* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyqusit, 439 N.E.2d 359, 366, 368 (N.Y. 1982).

[272] *See* CITIZENS BUDGET COMMISSION, CAN NEW YORK GET AN *A* IN SCHOOL FINANCE REFORM? 9 tbl.3 (2004), *available at* http://www.cbcny.org/CBC_School_ Finance_Reform_11-04.pdf.

[273] *Id.* at 9 & tbl.3.

[274] *Id.* at 10 & tbl.4; *see also* EUNICE P. AVE ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATS., DOCUMENTATION FOR THE NCES COMMON CORE OF DATA, NATIONAL PUBLIC EDUCATION FINANCIAL SURVEY (NPEFS), SCHOOL YEAR 2001–02, FISCAL YEAR (FY) 2002, at I-2 tbl.2 (rev. 2005), *available at* http://nces.ed.gov/ccd/pdf/stfis02gen1c.pdf (providing the revenue figures for 2001 and 2002).

Further, since the scope of benefits from public education is broad and stretches out beyond the borders of localities and even the state, New York State must assume greater responsibility for education. The State Constitution made the state, not the local school districts, accountable for meeting educational needs.[275] The drafters may have valued local control; however, the Education Article does not explicitly carve out a protection for local control. The Education Article, however, does openly authorize the State to centralize education under its control and assure a system "wherein all the children of this state may be educated."[276] Therefore, if state laws or policies prevent the delivery of the current standard of education, "it is the State's responsibility . . . to remove such impediments."[277]

V. CONCLUSION

In *Paynter* and *NYCLU*, the New York Court of Appeals ducked an opportunity to establish a rule that would meet the educational needs of all New York State students. While the drafters of the Education Article did not outline comprehensive state directives, they recognized the important responsibility of the State in education. Without specific constitutional clarity, the Court of Appeals must recognize the general ideas imbedded in the Education Article and adopt a functional approach to the Article. Such an approach will not necessarily guarantee a victory for plaintiffs, but will at least allow them to survive the dismissal stage and develop a record of facts to be weighed against the competing interests of each party.

[275] *Paynter*, 797 N.E.2d at 1248 (Smith, J., dissenting).

[276] N.Y. CONST. art. XI, § 1; *Paynter*, 797 N.E.2d at 1231 (Smith, J., dissenting) (quoting N.Y. CONST. art. XI, § 1).

[277] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 527–28 (Sup. Ct. 2001), *rev'd*, 744 N.Y.S.2d 130 (App. Div. 2002).