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May 6, 2009: Judicial Pragmatism and Justice Souter's Replacement

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Title: Judicial Pragmatism and Justice Souter's Replacement

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5/6/2009--There was a very revealing quote attributed to "former colleagues and students" at the University of Chicago in the New York Times article by Jodi Kantor last Sunday that discussed President Obama's possible choice for the Supreme Court. Kantor wrote, "Mr. Obama believes the court must never get too far ahead of or behind public sentiment... ." This sentiment is called "pragmatic" in the article and I guess it could be considered that. The context of the article was selecting the next nominee for the Supreme Court and President Obama might be signaling that his choice will not be very controversial. But there is also here a theory of constitutional interpretation at work and it is not one I thought Obama shared. It is the understanding that the people own the Constitution. Their understanding of what the Constitution means is ultimately the proper standard by which to judge decisions of the courts. This view, an organic view of the role of the courts, is not today accepted by either the left or the right. From the point of view of a Justice Scalia, the role of the courts is to interpret constitutional language in terms of its original language (that is what he claims; he does not always do this and rarely explains why not). From the point of view of the left, the role of the courts might be said to be the protection of fundamental rights more or less independent of history. We can see the different approaches at work in the realm of gay marriage. The conservative says that Equal Protection did not include gays when it was adopted (thus ignoring the question of why it now protects women). The liberal says that marriage is a fundamental right and gays should constitute a protected class. The organic constitutionalist asks whether America is ready for an immediate national solution to the issue of gay marriage, and answers, no.