

## Experimentation in Art and Law

*Transcribed by Nancy J. of Rev.com, August 23, 2018.*

For those interested, here's how to cite this transcript or episode for academic or professional purposes:

Weber, Eric Thomas, Anthony Cashio, and Brian Butler, "Experimentation in Art and Law," Philosophy Bakes Bread, Episode 45, Transcribed by Nancy J. of Rev.com, WRFL Lexington 88.1 FM, Lexington, KY, September 18, 2017.



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**Weber:** Hey, everybody. Thanks for listening to WRFL Lexington, 88.1 FM. It is about 2:04 p.m. and this is Eric Weber here, joining you live in the studio, about to play you a pre-recorded episode of Philosophy Bakes Bread. This is episode number 45, and it is with the great Brian Butler, Dr. Brian Butler, of the University of North Carolina at Asheville. I hope you enjoy this episode, and please do reach out to us, 'cause we love hearing from you. And, thanks especially, for listening to WRFL Lexington, 88.1 FM.

**Cashio:** Hello, everyone, and welcome to Philosophy Bakes Bread, Food for Thought About Life and Leadership.

**Weber:** A production of the Society of Philosophers in America. AKA, SOPHIA. I'm Dr. Eric Thomas Weber.

**Cashio:** I'm Dr. Anthony Cashio. A famous phrase says that philosophy bakes no bread, that it's not practical. But, we, and Sophia, on this show aim to correct that misperception.

**Weber:** Philosophy Bakes Bread airs on WRFL Lexington, 88.1 FM, and is distributed as a podcast next. Listeners can find us online at [philosophybakesbread.com](http://philosophybakesbread.com), and we hope you'll reach out to us on Twitter at [philosophybb](https://twitter.com/philosophybb), on Facebook at Philosophy Bakes Bread, or by email, at [philosophybakesbread@gmail.com](mailto:philosophybakesbread@gmail.com).

**Cashio:** Last but not least, you can leave us a short recorded message with a question or a comment, or you know, bountiful praise. We like to talk about our bountiful praise, I enjoy it, that we may be able to play on the show. You can reach us at 859-257-1849. That's 859-257-1849.

**Cashio:** On today's show, we're super excited, very excited to be joined with Dr. Brian Butler. Welcome, Brian. How are you doing today?

**Butler:** Pretty good. Thanks for having me. I appreciate it.

**Cashio:** It's just our pleasure. Brian is the Thomas Howerton Distinguished Professor of Humanities, and Professor of Philosophy at the University of North Carolina, Asheville. He's just down the road from me. What a great position that is. Brian's written quite a bit about American Philosophy and a tradition that is known as experimentalism. We're going to be talking about experimentalism a bit today. He's just released an exciting new book called *The Democratic Constitution, Experimentalism and Interpretation* with the University of Chicago Press. Big congratulations to that, Brian. Well done.

**Weber:** Indeed.

**Butler:** Thank you. I was happy to see it come out.

**Weber:** Well, in addition to Brian's great writing, he was also the project director in 2010 for a large grant from the National Endowment for the Humanities, the We the People grant program they have, which focused on Black Mountain College, an artistic and educational legacy. Congratulations on that impressive grant, Brian.

**Weber:** We're going to talk with you today about your work on democratic experimentalism both in your new book as well as with respect to Black Mountain College. For our listeners, Black Mountain College was founded in 1933 in North Carolina, as an experimental college that had a central place for art and the liberal arts education that they provided. John Dewey's philosophy of education was also fundamental as an inspiration for the college.

**Cashio:** It's not what most people think of as a traditional higher education institution, so it's kind of fun to talk about it. But first, Brian, we always begin with a segment we call Know Thyself, and so we want to see how well you know yourself, a little test right off the bat. We can do that, right. We are going to invite you to tell us about yourself, and do you know yourself and maybe a little bit about your background and then we'll go on and we'll ask you about how you got into philosophy and what philosophy means to you and so on. Brian, who are you?

**Butler:** Yeah. Scary. I probably don't know myself real well as people would tell me, but that being said, I started out in college as an art major in Los Angeles. I lived downtown. I was a painter and started writing for a bunch of the magazines in LA on art and ended up thinking, gosh, maybe I should know what I'm talking about. I'm not sure how I picked philosophy for that knowing what I'm talking about section when it comes to art, but walked over when I was doing a Masters in Painting, walked over the philosophy department and the chair of the philosophy department at Claremont Graduate School, I said, I'd like to do a Master's here. He said, "That's only a matter of nomenclature, art and philosophy. Come on over." I started a Master's and then when I finished the Master's I thought, well, I might as well continue, so I accidentally did a PhD in philosophy.

**Cashio:** Accidentally?

**Butler:** Yeah, accidentally.

**Cashio:** You just tripped. Oops. Oops, a PhD in philosophy.

**Butler:** Strangely enough, I found that Dewey was the most interesting theorist when it came to art and luckily at Claremont there were a couple people, Roth, and others like them doing pragmatism, wrote dissertation on Richard Rorty and ended up teaching in Chicago at one of the Chicago city colleges, watched my significant other go to law school, thought that would be an interesting way to put philosophy into practice, maybe bake some bread, something like that. Went to the University of Chicago law school. Got out and decided that I would rather be a philosophy professor or a philosophy performance artist, rather than a lawyer and ended up here at the University of North Carolina Asheville.

**Cashio:** Performance artist. I like that. I'm going to put that on my business card now.

**Weber:** What was it about the potential future in law that you thought that life would look like and what made philosophy more attractive to you?

**Butler:** Well, luckily the University of Chicago, of course, is a highly academic law school. I mean that as a good thing, not a bad thing. You may say that around people in law school and they'd frown at you, but they're very smart people doing very interesting work. I did a couple summer internships in law firms and saw that ... Let's say that attorneys, especially those that make good money earn their money and they earn their money by being basically working for a client and the client is all. I like being a little more independent than that. My second year I did an internship while I worked as a research assistant for Judge Posner, Richard Posner.

**Cashio:** Wow.

**Butler:** I found that to be much more interesting. I wasn't a great intern. He probably was glad to get rid of me. That being said, it was a great experience, and he's one of, of course, the brilliant minds. I also there got to work with Martha Nussbaum and people like that. Just learned real quickly that philosophy is a pretty good life if you can make it pay.

**Cashio:** That's a big if, huh?

**Weber:** That's right. Our listeners know a little bit about who Martha Nussbaum is because we had her on the show on an episode, I think it was episode 19 on anger and forgiveness. Can you tell our listeners just a little bit about who Richard Posner is because that is a very big deal that you got to work for him.

**Butler:** Well, of course, he just retired a couple of days ago. He's probably the most cited judge in American legal history. He never made it to the Supreme Court because he was a free thinker in the sense that he would advocate in reason to the positions that he thought were reasonable. Very famous for kind of being the figurehead of law and economics movement, but also, quite interestingly, in his retirement letter he said that he was most proud of his bringing pragmatism into theories of law and legal reasoning, and that's where I think he's evolved. He was a very interesting pragmatist in terms of legal reasoning.

**Weber:** Now, you mentioned two things that people don't really know much about necessarily. You mentioned something about the law and economics, and there is a tradition of that. Maybe you can say a word about what that tradition is and then you also mentioned bringing pragmatism into law. So, we'll then want to ask you what's pragmatism and what does it mean for that to be applied to law?

**Butler:** Okay, well, so there are different types of law and economics, but Posner's probably book on law and economics is the central text for the Chicago School of Law and Economics, which is based upon Coase and the idea of transaction costs. The basic theory is that law should mimic a market where markets break down, and what you look for are transaction costs or areas, sticky parts of a market. So, the judge really just tries to find the efficient spot to go to and he certainly was a figurehead in that movement, but I think he's found that it doesn't cover all aspects of legal decision making and what law should cover, and that's why he evolved toward a pragmatic picture of law and legal decision-making. His version of pragmatism has changed. It used to be the idea of just kind of a basic common-sense pragmatism of what works and attorneys constantly think that they're being pragmatists in that way. I think it's evolved into a much more sophisticated version of pragmatism, which is an experimental testing of means and is a testing of concepts in terms of what their outcomes are, but also an evolution of concepts in terms of what their outcomes should be, interestingly.

**Cashio:** All right. That's good. I want to talk about your art background.

**Butler:** Yeah.

**Cashio:** Yeah. That seems pretty interesting to me. What drew you to art and what kind of medium in art were you doing?

**Butler:** I guess this is perfect for your show. When I was leaving high school I wanted to major in one of two things. I wanted to major in philosophy or in art and my father, who was an academic, a sociologist said, "Don't major in philosophy. They don't do anything."

**Cashio:** He was a sociologist, you said?

**Butler:** Yeah.

**Cashio:** Good comment.

**Butler:** Oh, he's an excellent sociologist and he did a lot of stuff that was very important and, of course, I have a lot of that sociology in me. I think that's why I even come up with democratic experimentalism as a theory of constitutional adjudication, but obviously I had to do both. So, ultimately I returned back to philosophy. The art side was always important to me and I guess I was in junior high and I had the honor of working with Harry Sternberg and Françoise Gilot. Françoise Gilot, if you don't know her, was the mother of Paloma Picasso, and had studied with Matisse. I just ended up being kind of surrounded, accidentally once again, with some incredible artists and just loved the way art surrounded us. Of course, if you have the Deweyan picture of art, the media, then you end up seeing art everywhere.

**Butler:** One of the things as a junior high school ... This ties in with Black Mountain College, one of the things that happened when I was doing summer school with Harry Sternberg is he brought out this book that totally changed my life. He pulled out this huge double-folio book and started thumbing through the pages and showing ... We had a class of maybe 20 people. These were color experiments by a guy named Josef Albers, and the experiments were showing how color changed in different contexts. This inspired me to both care about philosophy deeply and about art deeply, and the two have never been separate for me. But, of course, ironically, Albers was one of the main characters at Black Mountain College, so I arrived here and got to be part of

that tradition, a tradition that heavily influenced me from pretty much the earliest times I can remember.

**Cashio:** This was all in junior high?

**Butler:** Right at the end of junior high, yeah.

**Cashio:** That's impressive education there.

**Weber:** Right. What's an example of color changing based on context. What do you mean by that, Brian?

**Butler:** Well, say, if you think of Josef Albers, he's the square guy, so the Homage to the Square Series is very famous. Any contemporary and modern art museum will have a bunch of his Squares. The story behind the Squares is what's interesting. He would take those colors straight out of the tube and on the back of these paintings it's annotated which tubes, what colors and in what order, and he'll show you how if you put this red against this blue you'll get certain color effects and if you put that blue against say a gray you'll get drastically different color effects including halo effects and various illusions. For him it was very important to notice that colors change according to the other colors they're around. In substance he said, "Colors are sociable and they change in their social context with other colors."

**Weber:** Wow. Fascinating.

**Butler:** Therefore, you ... He was an experimentalist. Whenever you see one of those squares it becomes much more interesting to me to know that it wasn't him kind of maybe trying to express his harmonic picture of color, but to take color somewhere that he wasn't able to predict. Each Homage to the square was a new experiment in how colors socially work together. To me that makes them very interesting.

**Weber:** That's fascinating.

**Cashio:** You said that Josef Albers got you interested in both art and philosophy, kind of really pushed young Brian in that direction. I guess my question for you is a fun question to ask everyone, what is philosophy?

**Butler:** I've always ... Since I've done degrees in philosophy, art and law whenever I get interviewed anywhere when I was trying to get jobs they'd say what are you really?

**Cashio:** Make up your mind, man.

**Butler:** Hell if I know. The problem is, the one thing I'm scared of is people that police borders. To say that right now is kind of interesting. I've always worried about people that want to make sure philosophy is pure, that we're not doing something else. I'm pretty lazy and sloppy when it comes to what is and what is not philosophy. A person I knew said that he had gone into philosophy because you can pursue a question that you find interesting as far as you want to. I think as opposed to the various -ologies where you're somewhat stuck with certain ways of pursuing questions, I think of philosophy as one of the most interesting parts of it is the permission to pursue it as far as you can using whatever process or whatever techniques you

think are relevant. Maybe it's more pluralistic. It's more open. It has more permissions as long as you're serious about it than any of the other academic disciplines.

**Weber:** Philosophy is one of the most open disciplines in a way, right?

**Butler:** I would hope. That's the way I do it. Luckily I'm allowed. I don't think it's practiced that way at many places.

**Weber:** Indeed.

**Butler:** For those of us that are lucky to be at places that allow that, I think it's great.

**Weber:** Well, this is wonderful. Thank you so much everybody for listening to Philosophy Bakes Bread. This has been our first segment with Brian Butler. I'm Eric Weber and my cohost is Anthony Cashio. We're going to come back after a short break to talk with Brian about his new book, *The Democratic Constitution, Experimentalism and Interpretation*. We'll be right back.

**Cashio:** Welcome back to Philosophy Bakes Bread. This is Anthony Cashio and Eric Weber, and we are here today speaking with Brian Butler. In this next segment we'll talk about your new book, *Brian. The Democratic Constitution, Experimentalism and Interpretation* just came out, so we're excited to talk about that. In the next segment we'll ask you about a special case of experimentalism and to tell us maybe a little bit about the story of Black Mountain College. Does that sound good to you?

**Butler:** Sounds great.

**Cashio:** Let's get to it.

**Weber:** Brian, we like to start off with the big picture. What led you to write this book and what's it about?

**Butler:** Okay, well, having been a pragmatist in terms of what I've been studying for a long time and doing my PhD on, when I went to law school I was lucky enough to work with basically the chief pragmatist within the legal academy, Richard Posner. Now, of course, what pragmatism means changes with different people and Posner's pragmatism and mine might be slightly different. At the time that I worked for him, certainly it was different. He had a very minimal version of it. I had a more Deweyan version. I think he slowly evolved toward that. When I came out, of course, I'd been doing legal philosophy and legal philosophy, for a long time, at least in my opinion, has been trapped between the legal positivists and a certain set of debates and a kind of Dworkinian interpretists. Those debates were incredibly narrow.

**Weber:** Brian, before we get too far, some listeners won't really know what pragmatism is and then there's some other words we just heard we'll want to ask you about, but why don't we start with pragmatism because it came up a couple of times. What is that?

**Butler:** Well, you know, the pragmatism I'm doing comes from mainly John Dewey and the idea is that ideas are tools and the way to test an idea is in its results in the world. Therefore, you can't really go for so-called a priori ideas, ideas that have an essential content outside of the context of the world and outside of the context of activity. A lot of pragmatism finds its meaning,



I think, in contrast with earlier kind of platonic ideas, ideas of knowledge before experience and ideas of essences in terms of concept. So, there might be an essential concept of law. Law might be something drastically different from say an election might be drastically different from raw power and if we can just investigate the concept of law we could come up with some essential characteristics of what law is where as the pragmatist would say, well, let's take the concept of law first. Let's look at how it's practiced. We can distill a certain set of ideas from how it's practiced, but we can't think of that as a timeless essence, but instead we think of it as a working hypothesis and we have to start thinking about, what would we want out of law? What aspects of law are avoidable or unfortunate?

**Butler:** You look at ends in view, you look at your means and you're constantly testing them in terms of practices and results in the world as opposed to thinking you can find essential concepts outside of all of that empirical evidence and practice and experimental investigation.

**Weber:** All right. So, there's a narrow form of pragmatism that Posner exhibited and then you have a perhaps more thorough-going one that you accept. Is that right?

**Butler:** I think within the legal academy there were slogans like all attorneys were pragmatists and that might be that you have an aim in view, right, win the case and you'll use whatever tools get you there in the most efficient way possible. This is kind of an incredibly narrow picture of pragmatism. A broader picture of pragmatism thinks of concepts as tools and as being tested in experience, but that the experiences are broader and the aims are broader than individual cases and so, in law, you might want to say, what are the aims? Maybe the aims are democratic. That would be my version of it when it comes to the Constitution. If the aims are to create a stronger democracy, it's a very much broader pragmatism than the aims are to win the specific case. In Deweyan pragmatism, generally sets pragmatic inquiry, experimental inquiry, within the process of creating a broader democracy.

**Weber:** Very nice.

**Cashio:** And so this is what your book is about, like taking this sort of pragmatic approach towards thinking about constitutional law?

**Butler:** Yeah, and so the positivists, the legal positivists, tried to come up with what would be an essential difference between law and say legislation. The difference was that you can find it in a type of pedigree. So, where would legal pedigree come from, and generally they found it in judges, for instance, or in statutes. So, law has a certain pedigree. The Dworkinian response was no law as an interpretive concept and we need to interpret it in the best of all possible lights and he constructs a very elaborate morally-based interpretive structure and he leaves out empirical evidence. He thinks that that's non-law based because it's non-principled. I found that that tradition within legal philosophy to me was incredibly narrow. At first it believes that there's some essential core to law. That's something that we have to figure out. It's not something we can take as a given. Secondly, it reduced constitutional law questions to questions of say, is it interpretive? Do judges make law? These all were based upon interesting assumptions about the philosophy of language. To me, pragmatism brings in a bunch of more interesting more tools that actually inform law better, and so I tried to construct a pragmatic theory of constitutional law based upon the aim of creating a stronger more vigorous democracy.

**Weber:** All right, Brian. So, the positivists you were talking about are people who will sort of focus on empirical matters and sort of notice that there are certain statutes and so forth and sort

of make claims about law based on that. Tell me if I'm getting this right. And, let's say the pragmatists or the people who value ethics in connection with law will sort of emphasize that, that law is supposed to help us do something good for the world. Is that one of the ways of differentiating these two traditions?

**Butler:** Well, the positivists and H.L.A. Hart would be the positivists that we would look to, wanted to be able to differentiate law from other things as an empirical process, but they still wanted it to be an essential concept. In other words, it's very important that law would be different from all kinds of other social institutions, find out what it is and ultimately they looked at sources of law as the judge. Where does the pedigree come from? Dworkin says, well, that doesn't work because there are these larger principles that are out there and still decide between law and non-law and he thought only ethical principles could count. Pragmatists would include all of that, but they would argue that there are other sources of law as well and that you can't assume that there's an essence of law even if, say, the Dworkinians and the Hartrians, use whatever words you want, would agree that they had figured out what the concept of law is, the pragmatists would say, well, that might explain empirical fact, but it doesn't explain what law could be, right?

So, the meliorism of pragmatism, the pragmatism always trying to use concepts that make the world a little better, could bring in empirical data, is much broader and more experimental once again. It's interesting that the legal positivists and the people that follow Dworkin are very fearful of using too much empirical evidence to explain what law is and especially to explain how cases should be determined. One of the arguments that I make is for law to be properly informed it has to become much more empirically informed, experimental in the world.

**Cashio:** Is that what you mean by democratic experimentalism? It seems to be a key part to your book, right, this democratic experimentalism. Is it doing democracy using these empirical data? Were you going to say a little bit more about what that means? I guess I'm not clear about what it is about the way we practice democracy that's not experimental.

**Butler:** Or democratic. It's interesting. One of the big problems in constitutional law is the anti-majoritarianism, the idea that we've created this document and it saves us from democratic process. Say people vote in something that seems to go against one of our basic civil rights, the court steps in and says, well, we can have democracy up to the point where it infringes up on rights and overturns the law as unconstitutional. Dewey would find that very strange because one of Dewey's basic underlying premises is that you can't use non-democratic means to support democracy. Democracy should be democratic in its procedures as well as in its aims. So, I said, well, let's take this seriously. How can we be happily using anti-majoritarianism if we believe in democracy? So, I tried to construct a picture of constitutional law that was, as you say, democratic all the way down.

**Weber:** Yeah. That's part of what we need to know about, Brian, because does this mean, in other words, that you would favor the majority getting to trample on the rights of the minority? Is that democratic?

**Butler:** Yeah. You don't want that extreme, obviously. You don't want it to have democratic excess, but what is democratic excess and I think we might want to worry as well about say, some technocratic excess and authoritarian excess, so how do you mix those all together. There are some theorists, Charles Sabel, the one that I find most thorough on this, that created this



idea of constitutional democratic experimentalism that has the Madisonian checks and balances idea, the idea that the states are democratic laboratories of experimentation and that we should prioritize the local over to the top-down hierarchy. That would be more democratic, but then we have to worry about the fact that obviously locality can be the source of biases and prejudices.

**Cashio:** Oh yeah.

**Butler:** So, the idea in democratic experimentalism is you allow for local experimentation, but the experimentation has to be attached to experimental evidence. So, if they say we're trying to alleviate, I don't know, some kind of social problem in this region, that has to be attached to an actual empirical and experimental data-driven process. What the courts do is the courts, at their best, under constitutional law, is they still do some of the basic, we understand these rights to be most important, but those rights are informed by the experiments. The content of the rights are formed by the legislative experiments in the various local regions, and they coordinate and they force evidence. They force empirical evidence. That's their main goal. Instead of coming with rule-based decision-making their basic goal is to force the localities to create empirical evidence that proves that they are actually aiming for their express, their ostensive of aims and they're not using this as a way to legislate hierarchies and stuff like that, privilege.

**Cashio:** Let's go back to this local thing. So, you want localities to look for evidence, so it has to be evidence. The experimentalism is centered around evidence.

**Butler:** Uh-huh.

**Cashio:** Is that correct? But isn't that kind of seeding authority, then, to those who come up with the evidence.

**Butler:** Yes.

**Cashio:** If I could give evidence that abortion is bad for my community or that gay marriage is bad for my community or that certain immigrants are bad for my community, wouldn't that give me then the grounding to have a democratic majority that says, no more immigration into my community?

**Butler:** There are clearly big-time debates that are conceptual in nature. What are the values that we are trying to support? Some of those will be just clearly not compatible with constitutional prohibitions, but a lot of them won't. A lot of them will be very difficult choice-making. So, if you think of Roe versus Wade and the abortion, this probably is an incredibly difficult one and I did not face that in the book. I did push the concept through a bunch of relatively central Supreme Court cases to see what would happen. I did gun rights. I did taking jurisprudence. I did Citizens United, Brown and Obergeffel. I tried to test the theory according to whether it would have intuitively positive effects or negative, and what I found was kind of interesting is, is that for instance, in Obergeffel, the case that found marriage rights for same-sex couples, what was so interesting about the case is that because they refuse to look or generally refuse to look at empirical evidence, they couldn't go to the most obvious aspects of the case, which is unequal treatment and empirical ways that distinctly deprived people in same-sex marriages or in same-sex relationships from access to medical care and retirement benefits and these kind of things.

**Butler:** If you did localized empirical evidence it seems to me that what would have bubbled up is clear empirical evidence that it burdened people unequally instead of the giant rhetoric on both sides of the actual case, which came up with things like intrinsic dignity and stuff and it was a swearing contest on both sides that did look like sheerly it ended on which political side the justices were on. The empirical evidence to me was much stronger. This also worked for Brown versus Board of Education, which, in fact, the official story, which is Brown, maybe an activist case, that came up with the proper ending is false. In fact, it's probably the most democratic experimental case in the history of United States jurisprudence according to my analysis, therefore, serves as an exemplary experimental case. On the other end, Citizens United and various other cases, ignore empirical evidence to come down with their conceptual claims and their conceptual claims are in some sense word magic. So, back to the issue, the fear that bad values would be instantiated in democratic voting, I think it's a real one. I think it's one that has to be faced.

**Butler:** My claim ultimately, at least the one I want to make, is that we either believe in democracy or not and what I see, and I've seen this, I think, in the state of North Carolina, is we have the legislature that plays to their base knowing that the courts will save them. And so, therefore, they don't have to have the hard debates and people can vote their prejudices.

**Weber:** Interesting.

**Butler:** My claim is that if the court had to live on empirical evidence and it had to grow up through lots and lots of cases, yes it would be slow and people would have to live in positions of discrimination and prejudice as they do now, but that at least people would have to take their votes more seriously and ultimately it might mean that we have more informed and more intelligent and more just voting. That might be naive, but.

**Weber:** Well, we'll let the listeners decide about that. We've got two more segments with Brian Butler. Thanks everybody for listening to Philosophy Bakes Bread. We're going to come back in the next segment to talk about a particular democratic experiment about Black Mountain College. Thanks everybody for listening. We'll be right back.

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**Cashio:** Welcome back everyone to Philosophy Bakes Bread. It is your privilege this day to be listening to me, Anthony Cashio, and Eric Weber and it is our privilege to be talking with Brian Butler of the University of North Carolina Asheville. We've been talking about his recent book, The Democratic Constitution, experimentalism and interpretation. In this segment we're going to ask Brian about something that seems completely different, but it's actually not. It's about a great democratic experiment in higher education that took place at Black Mountain College, which is just 20 minutes outside of Asheville, right down the interstate. It's a beautiful place if you ever get to go there. I've been there several times. It's really beautiful. Brian, what was Black Mountain College? Can you tell us about it? What's so special about it?

**Butler:** It's interesting because it is an inspiration for my theory of law, so it relates to it. Black Mountain College was created when John Andrew Rice was fired from Rollins College for being a little bit of too much of a gadfly against the president of the college. So, he decided that he

wanted to create his own college that was based on John Dewey's ideas of democracy and see how these things relayed. He wanted to create a college that had no trustees, that was democratically ruled, that gave the students a place in the democracy, but was basically owned by the professors. They were looking around for a location and they found that the Blue Ridge Assembly in Black Mountain College could be rented because the assembly members would be there only during the summer. So, they could have the location for all winter. They basically created a college in one week.

**Cashio:** One week?

**Butler:** Yes. It was an experimentalist college based on John Dewey's ideas of education and democracy, but funny enough, John Andrew Rice was a classics major at the University of Chicago, was a Dewey student, and his big part of the school was to teach a class called Plato. Plato, I've read some of the student notes from the Plato class and Plato turned out to be kind of a radical, progressive democrat, strangely enough. Not quite sure he was teaching them to be Plato scholars as much as to think about what democracy would look like and what education for democracy would look like. He was very worried that American education was infected by European ideas of education, which were premised upon hierarchy and authority. So, he was trying to create a new version of education that was premised upon democratic community.

**Butler:** One of the first things that he did when he created the college was the thought that it would be a liberal arts college, but it would be a liberal arts college where the curriculum was centered upon doing, not just thinking and he needed an art professor. He consulted people at the Museum of Modern Art and they suggested that a Bauhaus master that might want to move to America to get away from certain things that were going on in Europe, and they talked to this guy named Josef Albers, which we talked about earlier when he did the Homage to the Square, and Josef Albers agreed to come with his wife, Anni, who is a great artist herself, and they arrived at Black Mountain College and stayed there for quite a long time creating a curriculum that rested upon an experimental learning of art and theory and creating a modern democratic education.

**Cashio:** How did this play out in practice, this experimental curriculum? I mean, they worked it out in a week and the students just showed up and they were like, just go take this class if you feel like it? I've always tried to imagine how is it different, I guess? It's like, if you're a student showing up to Black Mountain College what could you expect?

**Butler:** It was a bunch of chaos and it was always underfunded because they never had a really good development side to the budget.

**Cashio:** That's not that different.

**Butler:** That's true. They had faculty-student meetings that would last for hours and sometimes it would be attrition. Sometimes it would be agreement. There was a lot of faction, but there was very free curriculum. The school was never accredited, so they didn't have to worry about the accreditation committees coming in and telling them certain things. That allowed it to be kind of just an experimental hotspot in theory and art and it unraveled in the fifties, mostly because of a lack of funding, but also because maybe, just maybe, sometimes it's good to have some academic structure. At first, it seemed to thrive on the idea that each teacher would bring in what they could bring and the students would have a say in what kind of classes should be offered, though the curriculum was meant to be semi traditional since there was some breadth requirements and

all of that, but less hierarchy was always kind of the main goal and more of a communal atmosphere. They say that more of the learning went on at the cafeteria and at night than necessarily in the classes.

**Weber:** Interesting. So, Brian, when we refer to an experiment, we're thinking about having some theory, addressing some issue we want to answer and know more about and then we run the experiment and we test something and we test our hypothesis and see what resulted. That's one way, anyway, in thinking about experiments. Is that the wrong way to think about this experiment or is it right and if so what's the thesis, what's the observation we're trying to explain or learn about and how did the experiment go?

**Butler:** It was an experiment in education in the sense that they reinvented campus culture and campus hierarchy. The hypothesis maybe was that the hierarchical version of education with trustees. Funny enough, they used the word rector because they thought that was less authoritative than say president. Nowadays I think it rings the opposite direction. The idea was that they would own their own college and that they would see if that education would create a more democratic citizen. In some sense the hypothesis failed. I don't think we see any democratic leaders that came out of Black Mountain College. In some sense I think it succeeded in the sense that you have a bunch of culture people that went off into various aspects of American culture that tried to create more democratic media. In that sense the hypothesis was to create individuals that had a more democratic, a more egalitarian picture of say culture, probably it was a success. That would be maybe the way I would explain it.

**Weber:** Interesting.

**Butler:** As an experiment. There's a great book, Duberman's book on Black Mountain College that calls it an experiment in community, and it's a very powerful book. It's a great way to learn more about Black Mountain College in terms of an experiment.

**Cashio:** Nice. What was the name of the book again? Experiments in what?

**Butler:** Duberman's Black Mountain College, An Experiment in Community. He reads it. It's very sixties. He reads it as kind of early proto hippie. Pro to post-modern at the same time. It's a brilliant book, though.

**Cashio:** You indicated that a lot of people left Black Mountain College and kind of went out and started creating art and getting involved in other mediums. Can you say a little bit more specifically about what the legacy of the college is?

**Butler:** It's, of course, more thought of nowadays as a huge legacy in art. A couple of the graduates, students at Black Mountain College that are very famous would be, say, Cy Twombly and Robert Rauschenberg. Rauschenberg is very kind of influential in terms of visual sampling and kind of post-abstract expressionists. Of course, a lot of the expressionists went through Black Mountain College mostly to teach. You had Franz Kline and Willem de Kooning, Elain de Kooning and Robert Motherwell. These people went through Black Mountain College. For instance, if you know Robert Rauschenberg, he did combines and some of the most famous ones are in the Museum of Modern Art. When he was at Black Mountain College, his job, he worked for Josef Albers, his job was to go to the dump and pick up art materials. They were very poor at Black Mountain College and so they would pick up whatever ...

**Weber:** Whatever they could pick up.

**Butler:** If you look at his work you think, gosh, this is almost a logical entailment from the combination of a suspicion of hierarchical ideas and materials and going to the dump to find things that could be put together in kind of experimental ways. Cy Trombly a little bit different than that. You also have Ray Johnson who did a bunch of kind of mail art and that who was a heavy influence on this guy named Andy Warhol and then you have John Cage. John Cage come to Black Mountain College and did some of the first sampling pieces, analog samplings, splicing together pieces of tape, and the earliest happening in America, at least that's the way it's usually talked about where there was a performance piece, but it was a performance piece that had a lot of chance elements, and so it was an experiment and nobody knew what would come out of it. They just put it together as a giant artistic experiment and Cage, of course, is a great example of that. A lot of his most experimental work seemed to have been inspired by his time at Black Mountain College.

**Weber:** Brian, I've got a question for you, which I think connects the subject matter of the last section on the democratic Constitution with what we're talking about here with Black Mountain College. There's a sense in which the worries that philosophers like Plato had about democracy was that democracy will go and do all kinds of crazy things, right. So, the founders in the United States were really careful and wise to worry about some of the dangers of democracy falling apart or doing terrible things and so they got together and created rules of the game about what a society can do and how it's going to run and so forth. It would have democratic character, but it would have to have this kind of constitution and framework, which says you can't just do anything you want with democracy. In a sense, a constitution is, in a way, a limit on what democratic rule can do and how. That's one way to think about it anyway. It sounds as though part of the problem for Black Mountain College was that they didn't have enough in the way of rigidity in terms of rules of the game of a constitution for what this college was going to be and how it would function. Is that the wrong way to think about it or is it right? Is a constitution contrary to democracy or is it consistent? Is it supportive or is it against democratic impulse?

**Butler:** Yeah. I think it's a great question. I think of one of the people that was at Black Mountain College that doesn't get talked about that much is M.C. Richards, and when she was asked about the school closing in 1956 or 1957, depending on who you talk to and how you define closing, she said, "No, it lived it's life." It lived it's life and it was time for other things to arrive. Some people say, well, it failed. It fell apart. Well, maybe it lived a good life. It created an incredible cultural legacy for the United States, for the world and then it was time for it to move on and other things to arrive, and it may be the same with constitutions. My fear, and I think if you look at our constitution as an incredible experiment constructed in the moment of all kinds of conflicting pressures, with some failures involved in it. I don't think we want to be polite about that. What we want to say is it's been pretty amazingly effective in some ways. Is it a set of game rules or was it a set of democratic procedures because they couldn't imagine better ones at the time?

**Butler:** I think it's probably better to think of it, think of this, separating the Bill of Rights from the Constitution. Then it was mostly a set of democratic procedures with some checks. You know, let's be worried about democratic excess, but let's be worried about authoritative excess. Let's be worried about the excess of technocrats. Let's not fixate on a set of permanent game rules, but let's get a procedure for change and experiment and growth and at the same time to avoid excesses. Then you put the Bill of Rights, the Bill of Rights changes the Constitution to something that's a lot more static that sounds like a set of game rules. Let's not be polite about



some of those game rules. Some of those game rules we can put a euphemistic interpretation on, a forward-looking one that seems to relate to our pictures of justice today, not their pictures of whatever it was property at their time, but a lot of those were, it looked like, put in to protect the south from the north and certain institutions of the south that we can politely talk about such as slavery. If we have a little bit less fear that progress would eliminate certain types of property and certain types of discrimination and prejudice, the Constitution without the Bill of Rights might look like a democratic experimentalist doctrine, but then had a moment of crisis in terms of fearing where democracy would take us.

**Weber:** Very interesting. I appreciate this notion that maybe Black Mountain College wasn't a failure in that it had lived out its life. When we think about colleges and universities they are some of the oldest institutions in the world, right, and so when you think about them, one that closes seems like a failure, but maybe this one wasn't. That's really interesting. Well, we've got one more segment with Brian Butler. Thanks, everyone, for listening to Philosophy Bakes Bread, and we're going to come back with Anthony Cashio, my cohost. I'm Eric Weber. We have more questions for Brian Butler to close us out and finish up this interview. Thank you so much everybody for listening. We'll be right back.

**Cashio:** Welcome back everyone to Philosophy Bakes Bread. This is Anthony Cashio and I'm here with my cohost Eric Weber and today we are talking with Brian Butler. He's the author of the recently-released, *The Democratic Constitution, Experimentalism and Interpretation*. The last segment we were talking about the democratic experiment in higher education that took place at Black Mountain College, which I still think is just a wonderful, crazy thing that happened in America. Maybe only in America. I don't know. In this last segment we're going to end with some final big-picture questions, some light-hearted thoughts, a pressing philosophical question for our listeners as well as info on how to get a hold of us with your comments and questions and so on. Brian, I actually have a small-picture question before we get to the big-picture question. Say our listeners are in Asheville or they're visiting Asheville, it's a beautiful place, if you've never been you should definitely go, and they want to find out more about Black Mountain College, is there a place they can go to to learn more about it and kind of its legacy and what happened there?

**Butler:** Thanks for that question. Yeah. There's the Black Mountain College Museum and Art Center, which is, I think, an incredible resource for this. There's also the North Carolina State Archives, which are just right outside of Asheville, and then while you're here you can also visit the two sites of the college. The college was in two different places. They still exist. I've been chair of the Black Mountain Museum and Art Center it seems like ten years now, or co-chair, which I've been for the last few years, and very proud of our little museum here and all of the work it does to keep the legacy alive and to further the legacy. In fact, we're going to be moving into a new 6,000-square-foot building.

**Cashio:** Oh wow. Nice.

**Butler:** This upcoming year. We'll have a couple more shows in our two spaces now in downtown Asheville and then we will be moving into a new big, fancy new building coming up very soon. [crosstalk 00:53:04]

**Cashio:** Congratulations. That's good. It seems like a perfect blend of your philosophical interest and your artistic background all coming together.



**Butler:** It's a great tradition to be able to get attached to. The museum is just full of wonderful people. So, please visit it and learn about it.

**Weber:** When you're talking about museums and thinking about our history, that's fascinating and we can learn a lot from it, so the big-picture question I have for you, Brian, to start us off anyway in this last segment, is about what we can learn for today, either about Black Mountain College or about what you learned in writing your book on the Democratic Constitution, Experimentalism and Interpretation and so forth. What do either your book or lessons we can learn from Black Mountain College have to teach us about present problems for democracy today?

**Butler:** Well, thanks for that question. I guess what I've kind of learned from Black Mountain College and dealing with John Dewey and trying to democratize law is that I do believe we're in a time of democratic crisis. I think I want to go back to Jane Addams and say, before we start allowing these worries to get in the way of democracy, when most of these worries are coming from people that are more worried about their own property or their own privilege or this is what Jane Addams says, is the cure for democracy's failings is more democracy. I think that's at least worthy of an attempt. Democracy, of course, is not just winner-take-all elections. Democracy is people having a say in their own rules and their own governments and winner-take-all elections are just one form of that, a form that may end up being dysfunctional in certain contexts. To me, it's having imagination to try to engineer better democracies, not to try to lay upon the past and hope that the past ideas of democracy will solve present problems.

**Cashio:** Very nice. I like that. Brian, a lot of our listeners, they might be listening, they're hearing about the Supreme Court and the Constitution and sort of Black Mountain College. All of these things maybe seem kind of distant to them. They're kind of ideas that are fun to think about and realities that are kind of far away, but you know, I know that for pragmatism in a democratic experimentalism and for John Dewey, it was something that had to do with the everyday life. So, I'm wondering if you have maybe some advice or some ways to think about it for our listeners that they can go about engaging in democratic experimentalism in their everyday life, some sort of practical actionable things that they can do in their lives right now or at least begin to think about right now that they can begin to sort of, as you put it, democracy is the cure for more democracy. How can they become more democratic?

**Butler:** I like the way you put it. Democracy has to be social before it's political is kind of the Jane Addams, John Dewey picture and that means that we do. We need to be re-engineering our daily lives to be more democratic before we can expect democratic ideas to filter up as opposed to the opposite. That's a great question. I personally believe that kind of the idea that society is built upon a social contract, which is the idea of consensual mutually-beneficial exploitation seems to be a really weird way to try to get to proper relationships that are just and respectful. This is where philosophy maybe does bake bread is that we need to consistently be looking for ways to create a more respectful egalitarian community-based set of habits available to us. Yeah. It's a difficult one. It's a difficult one, especially when all of our giant vocabulary words at this point or giant theories seem to be theories based upon distancing and contract, right. It's tough.

**Weber:** Very interesting. Well, you've just sort of touched on one of the final big-picture questions we like to ask, that comes from the inspiration for this show. Would you, Brian, say as the old saying goes, say that philosophy bakes no bread or would you say that it does? Why and how? Can you tell us a little bit more about that?

**Butler:** Well, you know, once again, just being a dogmatic pragmatist, pragmatists don't ... It's supposed to be fallacious dogmatic pragmatist.

**Cashio:** That's a lot of big words right there.

**Butler:** I know. The idea is you can't escape theory. Theory is determining how we think about things every day. Theory done right is one of the most practical things in the world. We bake bread because we think that it's a necessity and, of course, sometimes aesthetically quite pleasing, etc., etc. You can't separate concepts from daily life and you can't bake bread without basic rules and things like this. There's just no way around the two. So, of course, it does. Of course it does. The problem is that we can be easily misled with bad philosophy. The only cure for bad philosophy is more philosophy.

**Cashio:** Ideally more [crosstalk 00:58:30] philosophy.

**Butler:** What's that? Ideally what?

**Cashio:** Ideally good philosophy.

**Butler:** Ideally good philosophy. Yes.

**Cashio:** What makes philosophy bad? What makes philosophy bad? What could be bad philosophy?

**Butler:** Concepts can make us blind. Every concept is neutral. No concept is totally innocent. We have to be very careful that the concepts that we're comfortable using aren't making us blind to things that are out there, and I think that's the fear.

**Cashio:** That's good. So, like, when our philosophy leads us to be myopic and cuts off possibilities in ways of seeing the world, then it's bad philosophy.

**Butler:** Right. It seems to me that the philosophy of law that was constructed between the legal positivist and the Dworkinians is much more easily critiqued when you notice what it allows us not to notice. You go, oh, isn't it interesting. All of this stuff is out here that's really socially important, and you're telling me that if I'm being true to law I don't even have to notice it. To me that's very scary and that's where democratic experimentalism tries to sneak it back in.

**Weber:** I feel I'd be remiss if we didn't emphasize where this word comes from that you've used several times, Dworkinian. There's a guy named Ronald Dworkin, and among other things, he thought that ethics and values and morality, that that's important for law in a way that the positivists sort of disagreed with in terms of thinking about foundations of law and understanding what law is, right?

**Butler:** Absolutely.

**Weber:** So, Ronald Dworkin. So, Dworkinian, that's where that word, everybody, comes from.

**Butler:** Yes. He wanted law to be principle, but his version of principle excludes a bunch of things, so that's the problem I have.

**Cashio:** Well, Eric and I strongly believe that good philosophy is one that is open, that is humble and that is humorous as humble and humor we kind of think go tougher, and to that end, I'd kind of like to wrap up the show with what we call philoso-funnies. The name is so bad that we have to laugh at it. We're going to ask you, Brian, there's a serious side, but we also look to the lighter side, so we have philoso-funnies. We're just going to play a quick little track right here.

**Weber:** Say philosophunnies.

**3-Year Old Sam:** Philosophunnies.

**Weber:** Say philosophunnies.

**3-Year Old Sam:** Philosophunnies.

**Cashio:** That is stinkin' cute. That's always so cute.

**Weber:** That's right, Brian. We want to know if you've got either a funny fact or a story either about philosophy or about experimentalism in democracy or about Black Mountain College? Have you got a funny story or a joke to tell us, anything about any of that for our philosophunnies segment?

**Butler:** Well, I'm going to give a story. I've been, for many years, going to the Atlantic Coast Pragmatist Workshop Group as both of you have, and there was one year where I was here in Asheville and we had what was just a hilarious moment where we had at least a one-hour argument over an example that William James uses about a squirrel going around a tree at a campfire. The question was, was the squirrel going around the tree or not. William James basically says it depends on what you're trying to figure out, right? In other words, if there's some cash value for deciding whether it's going around the tree or not, then you'll decide whether it's going around the tree or not. We had an interesting one-hour discussion, a bunch of pragmatists in the room, where they were trying to figure out whether the squirrel was really going around the tree or not, which, of course, as far as I could tell, James deflated that question to why are you asking the question.

**Cashio:** That was James' whole point.

**Butler:** Yeah. What could possibly be the difference as to whether you say the squirrel is going around it or not? It was just one of those surreal moments, and everybody in the room was really, really bright and yet it was hilarious to watch the one-hour debate where not one person said, why would you ask that question? Pragmatists can be totally up in the clouds just like any other philosopher.

**Cashio:** We can get sidetracked too, huh?

**Butler:** Yeah. It's great. It's not necessarily a laugh-out-loud funny.

**Cashio:** No. It's good.

**Butler:** It's one of those experiences that I think just was definitely worth witnessing.

**Weber:** It's humbling. We have to laugh at ourselves a little bit. It's important.

**Butler:** Absolutely.

**Cashio:** Maybe a little.

**Weber:** Well, Brian, before each episode we gather a couple jokes as well just to make sure we've got a little chuckle at the end here. Anthony, you want to do the first one?

**Cashio:** Yeah. This one comes from the late great Johnny Carson. All our jokes will have a theme, you'll pick up pretty quick. Democracy is buying a big house you can't afford with money you don't have to impress people you wish were dead, and unlike communism democracy does not mean having just one ineffective political party. It means having two ineffective political parties or maybe more.

**Weber:** We've got a couple little jokes about democrats and republicans. Question. How many Republicans does it take to change a light bulb? Answer. None. If liberals would just leave it alone it would change itself.

**Cashio:** Oh boy. How many Democrats does it take to screw in a light bulb?

**Weber:** I don't know. How many?

**Cashio:** Just one. Then it gets really screwed.

**Weber:** Here's the famous Mark Twain line. If voting made any difference they wouldn't let us do it.

**Cashio:** He didn't go to Black Mountain College. I like that one. [crosstalk 01:04:16] All right. Last but not least, we do want to take advantage of the fact that we have powerful social media that allow two-way communications even for programs like radio shows, so we want to invite our listeners to send us their thoughts about big questions that we raise on the show.

**Weber:** That's right. Given that, Brian, we want to know if you've got a question you propose we ask our listeners for a segment we call, You Tell Me. Have you got a question for them?

**Butler:** So, how does democracy relate to evidence? What type of evidence should be allowed in democracy and what type of evidence should be excluded?

**Weber:** Oh. That's a nice question.

**Cashio:** Very good. How does democracy relate to evidence.

**Weber:** Great question. Indeed.

**Cashio:** It seems like a no-brainer, but as you've shown, it's not quite so clear, is it?

**Weber:** Right.

**Cashio:** Not quite so clear at all.

**Butler:** It's a difficult one, yeah.

**Cashio:** All right. Well, thank you everyone for listening to this episode of Philosophy Bakes Bread. We're your hosts, Dr. Anthony Cashio and Dr. Eric Weber. We are so grateful to have been joined today by Dr. Brian Butler. Thank you again, Brian. It's been a really wonderful and enlightening conversation, so thank you for joining us.

**Butler:** Thank you. I really appreciate it.

**Cashio:** We hope you listeners also enjoyed it and will think about joining us again and consider sending us your thoughts about anything you've heard today, that you'd like to hear about in the future or about specific questions we've raised for you, especially this question about democracy and evidence and the relationship between them.

**Weber:** That's right. Remember everyone. You can catch us on Twitter, Facebook and online at our website at [philosophybakesbread.com](http://philosophybakesbread.com) and there you'll find transcripts for our many episodes. Thanks to Drake Bolling, an undergraduate philosophy student at the University of Kentucky. Thank you Drake.

**Cashio:** Oh yes. Thank you Drake.

**Weber:** One more think, folks, if you want to support the show and to be more involved in the work of the Society of Philosophers in America, SOPHIA, the easiest thing you can do is to go learn about us on our website, [philosophersinamerica.com](http://philosophersinamerica.com), and consider joining the society.

**Cashio:** And if you are enjoying the show, and we hope you are, we would appreciate it if you would take a second to rate us and review us on iTunes or Google Play or wherever you're finding this podcast. It means a lot to us and it really helps us spread the message.

**Weber:** That's right.

**Cashio:** Get out there and bake some bread. Of course, as always, you can email us at [philosophybakesbread@gmail.com](mailto:philosophybakesbread@gmail.com) and you can also call and leave a short recorded message. We love it when people call with a question or comment that we may be able to play on the show. We've done a lot of little breadcrumb episodes or short episodes based on these phone calls. You can reach us at (859)257-1849. That's (859)257-1849. Join us again next time on Philosophy Bakes Bread, Food for Thought About Life and Leadership.

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