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FAITH IN REASON: THE PROCESS TRADITION IN AMERICAN JURISPRUDENCE

*Neil Duxbury**

Even the most cursory survey of the history of jurisprudence reveals a remarkable tendency on the part of legal philosophers to develop concepts, for want of a better word, which are purportedly foundational to the existence of a legal system. Positivists and natural lawyers alike have long been committed to the search for that special concept which stands as the *fons et origo* of law.[1] Legal philosophers typically frame this search in terms of a quest to discover something singular; and when they do try to conceive of a legal system as founded on a plurality of concepts, their assertions, though often highly enlightening,[2] are more frequently considered to be inordinately complex or abstruse.[3]

This obsession with singularity in the search for foundations seems to be reflected in philosophy generally. Adam Smith noted the propensity for philosophers "to account for all appearances from as few principles as possible."[4] He observed, for example, that Epicurus, in studying human virtues, considered prudence to be "the source and principle of all the virtues,"[5] as if "every virtue" could be reduced "to this species of propriety only."[6] This propensity for explanation by reduction has been a primary feature of American jurisprudence. Since Langdell, American jurisprudence generally has been domi-

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1 The classic positivist example is HANS KELSEN, PURE THEORY OF LAW (2d ed. 1967). A good, fairly recent natural law example is DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT (1986).

2 For a classic example, see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

3 I explore this matter in my doctoral dissertation. Neil Duxbury, Phenomenological Jurisprudence: An Ontological Sketch (1987) (unpublished Ph.D. dissertation, 2 vols., University of London, London School of Economics and Political Science).

4 ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 299 (D.D. Raphael & A.L. Macfie eds., Liberty Press 1976).

5 *Id.* at 296.

6 *Id.* at 299.

nated by the quest to discover some concept or theme which, more than any other, makes sense of the legal universe or of particular parts to it. Legal realism, it is commonly said, seriously undermined this quest in so far as it challenged formalist sensibilities. In fact, realism was a rather half-hearted and largely unsuccessful attack on formalism. Indeed, post-realist commentators have tended to find in the literature of realism a "radical" impetus which was neither as pronounced nor as sincere as is commonly believed.[7] Part of my objective here is to dispel another common misconception about American jurisprudence, that the field of American legal thought traditionally labelled "process" jurisprudence, emerged as a post-war response to legal realism. I hope to show that such an assumption is incorrect. Certainly process jurisprudence began to flourish once the mood of realism began to wane, but that did not mark the birth of the process perspective. Historically, the process-oriented approach to the study of law parallels, if not precedes, legal realism itself.

Locating process jurisprudence historically is only a minor part of my agenda. My primary aim is to try to make sense of process jurisprudence. What was process jurisprudence about? What was it for? The simple answer to these questions is that process jurisprudence exemplifies the emergence of reason as the dominant ideological and theoretical motif in American legal thought. Process jurisprudence, that is, marks the beginning of American lawyers attempting to explain legal decision making not in terms of deductive logic or the intuitions of officials, but in terms of reason, which is embodied in the fabric of the law itself. By finding faith in reason, it has been remarked, process jurisprudence illustrates how postwar American legal theorists turned their attention "to the task of finding an objective basis for legal decisionmaking."[8]

The problem with such a statement is that it conveys the impression that the jurisprudence of process is the jurisprudence of reason, end of story. In fact, within the process tradition, reason has not remained a static concept. As process thinking has developed, the language of reason has changed. Process writers have employed and refined, in different ways and at different times, key themes such as

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[7] *See generally* Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 OXFORD J. OF LEGAL STUD. 354 (1991) [hereinafter *Twilight*]; Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175 (1991); Neil Duxbury, *Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. OF LEGAL STUD. 11 (1990); Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137 (1992) [hereinafter *American Legal Realism*].

[8] James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 703 (1985).

principle, purpose, integrity, and prudence, to articulate and promote the idea of reason immanent in law. Understanding the process tradition demands an appreciation of how the significance and the import of such themes changes over time. Only by treating process jurisprudence as an evolving body of thought, might we recognize its significance in the context of American law.

Charting the historical evolution of process jurisprudence proves difficult. Retrospective rationalization of the subject has, quite simply, stripped it of its nuances. Such rationalization is perhaps a necessary consequence of writing history.[9] Yet, even if this is so, the past surely can be rationalized with differing degrees of subtlety and care. With process jurisprudence, such qualities have often been in rather short supply. Commentators have been content to lump names and works and themes together and hold them up as representative of some vaguely conceived process "school."[10] They have tended, furthermore, both to give that school a date of birth and to write its obituary.[11] At one level, such initiatives are not unwelcome, for they facilitate the focusing of thought. At another level, however, they are highly problematic, because they gloss over the complexity of the matter being studied. Certain themes recur throughout the literature of process jurisprudence, and as a result, these themes are regarded as dominant and definitive within the process tradition. Although this is a fair and sensible conclusion to reach, it is a conclusion which can be pushed further. That certain themes recur is only half of the story. In the process of recurrence, those themes may take on a new dimension, or even a new life.

It would not be entirely inappropriate to characterize the process tradition with a phrase (by no means unproblematic, as we shall see in due course) borrowed from one of its most notable proponents, as an

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[9] *See* PAUL VEYNE, WRITING HISTORY: ESSAY ON EPISTEMOLOGY 44-46, 110-11 (Mina Moore-Rinvolucri trans., 1984); MICHAEL OAKESHOTT, *The Activity of Being an Historian*, *in* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 137 (1962).

[10] The most renowned, and indeed useful, example is Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 128 n.26 (1974). The writer who first suggested the existence of a process school has since retracted that claim. *Compare* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 404 n.1 (1976) [hereinafter WHITE, THE AMERICAN JUDICIAL TRADITION] *with* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) [hereinafter *Evolution*], *reprinted in* G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978).

[11] *See, e.g.*, Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161, 178 (1989). "The legal process school flourished in the 1950s and 1960s, but its intellectual vitality was sapped thereafter, as the disorders of the late 1960s and early 1970s showed that one could not presume that fundamental social agreement existed." *Id.*

example, that is, of "the maturing of collective thought."[12] Process jurisprudence was never packaged as a discrete theory. Rather, it evolved slowly, through subtle and gradual refinement. It is instructive, in this regard, to compare process jurisprudence with that other classic jurisprudential tendency of the post-realist era, policy science. While policy science was very much a manufactured affair—a conscious effort by Harold Lasswell and Myres McDougal to develop a pedagogic framework which would move American legal thought onwards from realism—process jurisprudence just came about and caught on. There was no grand, initiating text.[13] Indeed, when, in the 1950s, the classic work of the process tradition—Henry Hart and Albert Sacks's *The Legal Process*[14]—appeared, process-oriented legal thought was already fairly well established in the United States. To claim that *The Legal Process* "appeared" is actually something of an overstatement. Although widely circulated and used as teaching materials in many American law schools, Hart and Sacks's manuscript was never published, indeed, it was never completed, a fact that conceals an immense irony.

The difference between policy science and process jurisprudence is akin to the difference between the person who is too eager to be liked and the person who exudes natural charm. Lasswell and McDougal worked hard, published widely, and were ultimately unsuccessful in promoting their master plan for the post-realist law school. Process jurisprudence, in contrast, was founded on attitude rather than on strategy. It was a fairly low-key attitude, an attitude which tended to bubble to the surface of, rather than to dominate, the works of those who shared it. Yet this attitude lent itself perfectly to the tackling of legal problems. Those who adopted the process attitude were concerned not so much with developing a distinct theory as with cultivating their attitude to cast light on what they considered to be the principal problems in the creation and application of law. It was through such cultivation that this general attitude came ever so gradually to be refined. And it is because process jurisprudence is premised on nothing more specific or substantial than an attitude that it proves to be remarkably difficult to pin down.

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[12] Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

[13] Quite the opposite was the case with policy science. *See* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

[14] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958) (unpublished manuscript, on file with author) [hereinafter THE LEGAL PROCESS].

It may seem odd to conceive of a major area of American legal thought in this way. I would insist, nevertheless, that if we are to understand the process tradition, it is the only way. To trace the history and significance of process jurisprudence is to trace the development of a particular attitude towards law. It is an attitude about the point and the value of law, about the social role of the lawyer and the law school, and about the purpose of legal scholarship. It is an attitude premised, in every instance, on the belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria that gives sense and legitimacy to their legal activities. Different exponents of process thought adopt and express this attitude in different ways, and some are more explicit than others. The point to be stressed is that the attitude exists and that it is embedded in modern American jurisprudential discourse. Understanding the process tradition demands not just that we pinpoint the key figures, themes, and texts of that tradition, but that we identify and chart the development of the attitude on which the tradition is founded. It requires, in other words, that we see the process perspective not as a legal school, but as a peculiar facet of American legal culture.

To conceive of the process tradition in this manner is, of course, to create problems. It would be much easier to write a history of process jurisprudence beginning with its emergence in response to realism, and ending with the inability of its proponents to come to terms with the judicial activism of the Warren Court. This history has already been written, and indeed written well.[15] This history, however, fails either to convince or to do justice to its subject matter. For, if process jurisprudence is the expression of a particular attitude about law, which is embedded in American legal culture, then we cannot simply give it a beginning, a middle, and an end. One of the most important questions is how, if at all, this attitude continues to feature in contemporary legal thought. To write a history of the process tradition is not necessarily to confine its relevance to the past.

There is one final introductory point to be made about process jurisprudence conceived as a cultural attitude. American legal realism has been the subject of controversy ever since it was first identified as a distinct intellectual phenomenon. To suggest, however, that realism illustrates some of the earliest efforts of American lawyers to forge explicit links between law and the social sciences would court no controversy at all. Nothing so definite can be asserted about the process tradition. At the heart of process jurisprudence generally rests

[15] *See generally Evolution*, *supra* note 10.

the assumption that the social sciences will normally prove enlightening when adopted to study law.[16] But where many so-called legal realists regarded the effort to utilize social scientific methods as something of an issue in itself, proponents of process thought tended (and still tend) to undertake such an effort in a rather less self-conscious fashion. For legal realists, the appeal to the social sciences had, if nothing else, novelty value. But for those writing in the wake of realism, the novelty had generally worn off. Although, by the 1940s, many lawyers remained convinced that the adoption of interdisciplinary perspectives on law might generate fresh insights into its machinery and operation, simply to profess to adopt such a perspective—a common strategy of the so-called realist—no longer caused any great shakes. Linking law with social science was no longer tantamount to breaking new jurisprudential ground.

For this reason, the literature of the process tradition is characterized by, among other things, a decidedly casual attitude towards the social sciences. One of the basic sentiments behind process thinking is that, although profitable connections might be made between law and social science, the mere existence of these possible connections is hardly deserving of fuss. Consequently, social scientific perspectives rarely, if ever, take center stage in process literature and an interdisciplinary ethos features in only a very informal and unobtrusive sense. Proponents of process jurisprudence have been occasionally inspired rather than significantly guided by nonlegal scholarship. Where so-called realists would often structure their analyses around specific branches of the social sciences, such as psychology or institutional economics, process writers have tended to borrow ideas ad hoc from particular philosophical and social scientific movements and texts. To put the matter simply, process writers have made no special effort to be "social scientific"; while respect for the social sciences is a feature of their basic attitude, no general attempt has been made to use the social sciences to develop an overall process strategy.

The most significant consequence of this absence of strategy, from a historical point of view, is that the intellectual foundations of process jurisprudence are difficult to locate with any degree of precision. Although legal realism seems to defy definition, it is at least possible to develop some sense of where most realists were coming from, because they tended to parade their particular social scientific predilections. Given that exponents of the process tradition have for the most part avoided linking their jurisprudential inquiries with broader social scientific initiatives, it is very difficult to conceive of

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16 *See, e.g.*, THE LEGAL PROCESS, *supra* note 14, at 116.

that tradition in a general intellectual, as opposed to specifically legal, context. The connections between process-orientation in law and process-orientation in other disciplines are largely speculative. That process writers themselves have not made these connections could be because they do not believe these connections exist, or because it seemed unnecessary to make them explicit. Yet, for the purposes of historical analysis, it is important to identify these potential connections. Only by doing so might we appreciate that the process tradition is the reflection of a general intellectual tendency; that, in the United States during this century, jurisprudence has not been alone in developing a distinctively rationalist vocabulary of process.

I. THE STIRRING OF PROCESS

It might be argued that, in American jurisprudence, this vocabulary of process was already emerging during Langdell's era. Certain of those who were responsible for popularizing the case method—James Barr Ames and William Keener at Harvard are signal in this respect[17]—promoted it as a technique by which to demonstrate, not simply the existence of essential legal principles, but, more fundamentally, that these principles are integral to a general process of legal reasoning. Teaching the case method in this fashion demanded that law students possess not only the ability to identify the substantive legal rules and principles at the heart of a particular case, but also the insight to evaluate the importance of those rules and principles as they relate to the reasoning of that case. Conceived in this way, the study of law became the study of a procedure by which judges, rather than simply apply doctrine in a mechanical fashion, use doctrine in the process of reasoning towards a decision.[18]

This "modernized" version of the case method survived into the realist era, and indeed bore some influence on realist legal thought. In 1937, Max Radin observed that

> the "case system," as it was devised and applied by the masters of that method, was not meant merely as an orderly arrangement of propositions, ticketed with case-names, each proposition being recorded in the student's mind as the "rule" that the case "stands for." . . . [T]he method as a mnemonic device for legal propositions is one thing and the method as a training in the technique of a lawyer is another. It may serve both purposes.[19]

[17] *See* HARVARD LAW SCHOOL ASSOCIATION, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 81 (1918).

[18] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 56 (1983).

[19] Max Radin, *The Education of a Lawyer*, 25 CAL. L. REV. 676, 679-80 (1937).

Working from the proposition that "[t]he only technique that can be taught in law schools is that of dialectic,"[20] Radin explores the possibility of adapting the case method, as a "method of dialectic,"[21] to the "goal of making a large and coherent system of many of the classes and subclasses of the law."[22] The case method, he insists, "is in part an excellent device" for fulfilling "this larger purpose" behind legal study "if it is really used as it professes to be."[23] While all forms of dialectical training and technique will probably always remain inadequate to the task of teaching justice,[24] the case method, suitably modified, may nevertheless assist students in cultivating their skills of reasoning and argument, and provide "the kind of general training that enables them to speak the language and understand the ideas of those who guide and control the community, the kind of education that a few generations ago was called the education of a gentleman."[25]

Thus, the case method was promoted by Radin as a pathway to legal integrity. Although dialectical training may never satisfactorily impart the meaning of justice, immersion in such training compels the law student to respect and to develop the ability to reason like a lawyer. Cultivating such ability is not only essential to professional legal competence, it also demands recognition of "the fact that the lawyer's task is ultimately concerned with justice."[26] For it is in the hope of securing justice that lawyers engage in legal reasoning. This, for Radin, is the reality of law. He insists, therefore, that "any legal teaching that ignores justice has missed most of its point. . . . 'Realists' who ignore this fact should abandon the pretence that they are realists."[27]

It is not clear why Radin believed that dialectical teaching cannot impart a sense of justice. Nor is it a necessary reality of law that the interests of justice will be served by legal reasoning. Yet, for all that his argument is problematic, it must, for two reasons, be treated as significant. First, in offering such an argument, Radin to some extent undermines the popular mid-century caricature of realism as a legal philosophy unconcerned with justice.[28] Second, as will become clear in due course, his argument—particularly in so far as it links

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[20] *Id.* at 681.

[21] *Id.*

[22] *Id.* at 682.

[23] *Id.*

[24] *Id.* at 690.

[25] *Id.* at 691.

[26] *Id.* at 688. On the historical connection between professionalism and justice in American law, see SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900, at 206-39 (1991).

[27] Radin, *supra* note 19, at 688.

[28] For an analysis of this caricature, see generally *American Legal Realism*, *supra* note 7.

reason both with justice and with professional legal competence—anticipates certain themes which would come to feature prominently in process thinking. More generally, it might be observed that Radin and other realists anticipated the move towards process thinking by conceiving of law primarily in procedural as opposed to substantive terms. "There is a sense," Radin remarked, "in which procedure is the essence of the law."[29] "Everything that you know of procedure," Karl Llewellyn told his students at Columbia, "you must carry into every substantive course. You must read each substantive course, so to speak, through the spectacles of that procedure. For what substantive law says should be means nothing except in terms of what procedure says that you can make real."[30] That so-called realists could be found voicing such sentiments is hardly surprising, since process-orientation rests at the foundations of realist legal thought. Holmes's classic predictivist view of law, for example, entails conceiving of right and duty as "the hypostasis," as he would have it,[31] of a process whereby people are adjudged to be legally entitled or responsible for their actions and omissions.[32] Realism was anything but divorced from the trend towards process-orientation in early-twentieth century American legal thought.[33]

Yet if this is so, why is legal realism not commonly treated as process jurisprudence? Why, indeed, is the move towards process thinking regarded generally as a response to the failure of realism? The short answer to these questions is that, in process jurisprudence, "process" is a distinctly more sophisticated idea than it ever was either in the literature of legal realism or in the teachings of Langdellian innovators such as Ames and Keener. Furthermore, throughout both the Langdellian and realist periods of American legal thought, the notion of process was incidental rather than central to jurisprudential initiatives. An important implication attaches to these assertions. To claim that, between the Langdellian and realist periods, there emerged a somewhat casual tendency in American jurisprudence to conceive of law as a process is not to claim that there emerged at this time a distinct jurisprudence of process. Rather, it is

Of course, not all mid-century legal philosophers subscribed to the caricature. *See generally* EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE (1941).

29 Max Radin, *The Achievements of the American Bar Association: A Sixty Year Record*, 26 A.B.A. J. 19, 23 (Jan. 1940).

30 KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 18 (1951); *see also* KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 45 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) (1933).

31 Oliver W. Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1919).

32 *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

33 *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 20 (1986).

to claim that, in the context of American law, process thinking preceded the development of a specific process jurisprudence. Though neither Langdellianism nor legal realism are illustrative of this jurisprudence, they represent what we might call the stirring of process thought. The theme of process had been put into play.

The question remains, however, as to how this theme came to characterize a distinct approach to jurisprudence. To answer this question requires that we identify the emergence of another basic concept in American legal thought, the concept of principle.

II. THE ANIMATION OF PRINCIPLE

In an address delivered to the New York State Bar Association in January 1937, almost a decade after his appointment as Dean of the Yale Law School, Robert Maynard Hutchins, by then President of the University of Chicago, reflected on the failure of that broad jurisprudential initiative which he was largely responsible for nurturing throughout his two years in New Haven. Legal realism, he observed, had proved to be "a realism in name only,"[34] having "produce[d] a descriptive type of education, in which no effort is made to communicate principles."[35] The formulation and promotion of principles had, during the 1930s, become something of a pet obsession for Hutchins. In his controversial monograph, *The Higher Learning in America*, first published in 1936, he lamented the emergence in the United States of the "anti-intellectual university,"[36] the university bereft of an "ordering principle."[37] The time had come, he believed, for universities to turn their attention again to the study of first principles and the general pursuit of truth. Whereas, in the medieval university, theology was the discipline around which such pursuit was ordered, in modern America, as in ancient Greece, the pursuit was to be rooted in metaphysics.

> In metaphysics we are seeking the causes of the things that are. It is the highest science, the first science, and as first, universal. It considers being as being, both what it is and the attributes that belong to it as being. The aim of higher education is wisdom. Wisdom is the knowledge of principles and causes. Metaphysics deals with the highest principles and causes. Therefore metaphysics is

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[34] Robert M. Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357, 364 (1937).

[35] *Id.* at 362.

[36] ROBERT M. HUTCHINS, THE HIGHER LEARNING IN AMERICA 27 (1967). On the controversy surrounding this book, see HARRY S. ASHMORE, UNSEASONABLE TRUTHS: THE LIFE OF ROBERT MAYNARD HUTCHINS 161-64 (1989).

[37] HUTCHINS, *supra* note 36, at 94.

the highest wisdom.[38]

Metaphysics points the way towards first principles, and the demonstration of such principles, Hutchins believed, must be a process of rational demonstration, of convincing all rational persons that these principles are truly universal, a priori principles.[39] Just as the search for principles could enrich American higher education generally, so it could do the same for jurisprudence in particular. For it is through the discovery and articulation of principles that American jurisprudence might become invested with a rational dimension which had been absent throughout the realist era.

According to Hutchins, it is the "duty of the legal scholar" to formulate and develop legal principles "in the light of the rational sciences of ethics and politics."[40] While his own efforts at formulating and developing such principles proved (as at least one legal realist intimated[41]) to be rather bland,[42] the fact that he made such an effort, that he regarded principles as the key to understanding "man as a rational animal engaged in making and administering laws,"[43] is significant. It shows Hutchins not only turning his back on realism, but also proposing a task which would, in time, become central to process jurisprudence—that task being the development of principles in order to demonstrate the pivotal place of reason in law.

Hutchins's turn to principles is hardly surprising. Edward Purcell has told the story of how, in the United States prior to the Second World War, the specter of totalitarianism prompted "a passionate reaffirmation of traditional political principles,"[44] which embody the conviction "that democracy [is] both rationally and morally the best possible form of government."[45] The discovery of rationality through the formulation and development of principles was very much an intellectual strategy of the period; and few adopted the strategy in a

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[38] *Id.* at 87.

[39] *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 149 (1973); John H. Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, *in* JUDGE CHARLES EDWARD CLARK 81, 82-83 (Peninah Petruck ed., 1991).

[40] ROBERT M. HUTCHINS, NO FRIENDLY VOICE 48 (1936).

[41] *See* Radin, *supra* note 19, at 688.

[42] *See* Hutchins, *supra* note 34, at 365-66 (offering examples of principles such as "that law is work of practical reason in the regulation of social conduct" and "that the law is a body of rules promulgated and enforced by those who are vested with the political authority to do so"). While Hutchins presents such statements as "basic principles in the philosophy of law," *id.* at 365, it is not at all obvious that they are principles. Rather, they seem simply to be characterizations of law as an activity.

[43] *Id.* at 367.

[44] PURCELL, *supra* note 39, at 138.

[45] *Id.* at 5.

more forthright fashion than did Hutchins.[46] But what is remarkable about the manner in which Hutchins developed this strategy is that, certainly regarding American jurisprudence, he seemed wholly inattentive to precedent: that is, he failed—or at least appeared to fail—to notice that the discovery of rationality in law through the articulation and development of principles was by no means anything new.[47]

Whereas legal realists had been essentially unconcerned with principles, Langdellian law professors, Hutchins argued, had been content simply to encourage the discovery of core doctrinal principles without so much as attempting to demonstrate how they might be "intimately and inextricably connected with moral principles."[48] Thus, Langdellianism and realism alike suppressed "the intellectual content and the intellectual tradition of the law."[49] In asserting as much, Hutchins seemed to be assuming that the entirety of late-nineteenth and early-twentieth century jurisprudence could be clustered under the banners of Langdellianism and realism. Yet this is not so. Certain early-twentieth century jurists developed what can only vaguely be termed a middle-ground between Langdellianism and realism. One of the general characteristics of this middle-ground was the idea that principles often play an important role within the legal process. Indeed, it is in the works of certain of these middle-ground jurists, as we might call them, that we find the first signs of a distinct jurisprudence of process emerging in American legal thought.

The notion of principles underscoring the law makes one of its earliest appearances in the work of John Chipman Gray. In *The Nature and Sources of the Law*, a text which seems to have influenced more process writers than it did legal realists, Gray argues that judges will be compelled to seek out "sound ethical principles"[50] where the sources of the law are silent. "When a case comes before a court for decision," he observes, "there may be no statute, no judicial precedent, no professional opinion, no custom, bearing on the question involved, and yet the court must decide the case somehow."[51] In such an instance, the judge "must find out for himself; he must determine what the Law ought to be; he must have recourse to the principles of morality."[52] It is thus that moral principles form, as it were, an extra

46 *See generally* ASHMORE, *supra* note 36, at 165-75; PURCELL, *supra* note 39, at 139-58.

47 *See, e.g.*, JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (1916); ROSCOE POUND, LAW AND MORALS (1926).

48 Hutchins, *supra* note 34, at 368.

49 *Id.* at 360.

50 GRAY, *supra* note 47, at 286.

51 *Id.* at 285.

52 *Id.*

source, or subsource of the law. As Gray puts it, "a source of the Law, not the only source, but a source and a main source, is found in the principles of ethics. These principles, therefore, are legitimately a part of Jurisprudence."[53]

Gray, here, is formulating in a rather tentative fashion an idea which, in due course, would acquire an especial significance in process jurisprudence: the idea, that is, that "principles" provide solutions to hard cases. Where, owing to the absence of an applicable rule, reprehensible conduct appears not to be legally punishable, judges, Gray argues, must reach a decision by considering the consequences of that conduct.[54] Consideration of consequences will require that the judge base his or her decision on a principle. But "[w]hat is the import of this word 'principle'?"[55] Gray raises, but does not answer this question. Rather, he commits himself to a circular argument: resort to principle demands that the judge considers the consequences of relevant conduct; but assessment of consequences demands the invocation of principle. Consequences determine principle, in other words, and principle defines consequences.

The theme of principle takes on a little more shape in the writings of Roscoe Pound. On various occasions, and especially in his earlier work, Pound observed that, throughout history, the growth and direction of legal systems have been influenced by moral principles concerning what is considered fair and just.[56] In his later writings, this observation is offered more often as a comment on the present rather than on the past. "By principles," Pound wrote in 1941, "I mean authoritative starting points for legal reasoning. . . . They furnish a basis for reasoning when a situation not governed by a precise rule comes up for consideration as to what should be made for it."[57] Principles, in other words, become active in hard cases, precisely the point which had been made by Gray. Pound, however, pushes the analysis slightly further. "You cannot frame a principle with any assurance on the basis of a single case,"[58] he maintains, for, within the judicial process,

> [w]e have continually competing starting points, sometimes a number of them. All these starting points for legal reasoning are

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[53] *Id.* at 292.

[54] *Id.* at 271.

[55] *Id.*

[56] *See, e.g.*, POUND, *supra* note 47, at 56-57; Roscoe Pound, *The Limits of Effective Legal Action*, 3 A.B.A. J. 55, 61 (1917).

[57] Roscoe Pound, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 249, 257 (Julius Rosenthal Foundation ed., 1941).

[58] Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 330 (1940).

> equally authoritative, and the court must choose from among them, but as it chooses from among them and develops one, and if it does its job properly, it does develop such starting points, we get gradually a line of decisions which work out a principle applicable over a very considerable field of law . . . and when that principle has become worked out in that way, established in that way, there is something that has authority.[59]

Encapsulated in this statement is the recognition that principles may conflict. And Pound's point is that it is for the courts to eradicate any such conflict by deciding which principles should apply to which areas of legal doctrine. Such decisions are unlikely to be made within any one case or by any one judge, because only as judicial thought matures over time does it become clear which principles should be included and which excluded from any particular area of doctrine. Once judicial thought begins to mature on the matter of which principles are appropriate where, reason begins to surface in the law. "When a principle has been worked out through this process of judicial inclusion and exclusion, as you look back over the course of development, you can see every case in that line would be decided exactly as it was by the principle finally formulated."[60] To cultivate legal principles, in other words, is to uncover reason in the law.

Pound sees principles as performing a rather more ambitious role in the law than did Gray. And yet, like Gray, he only tells us what principles are by outlining what they do: principles fill in the gaps where the positive law is found wanting. "These principles, like rules, conceptions and standards, are instrumentalities by which we are able to achieve justice in the adjustment of relations, in the ordering of conduct."[61] No indication is given as to what a principle actually is. Pound leaves the concept, as it were, unanimated.

Others seemed more intent on injecting life into the concept. In his classic, much underestimated volume of lectures, *The Nature of the Judicial Process*,[62] Benjamin Cardozo proposed a jurisprudence of realism tempered by principle. "I take judge-made law as one of the existing realities of life," he claimed.[63] "There, before us, is the brew."[64] Yet "*[s]ome* principle, however unavowed and inarticulate

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59 *Id.* at 324, 330.

60 *Id.* at 331.

61 *Id.* at 340.

62 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). For an explanation of the proposition that the text is both a classic and underestimated, see RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 20-32 (1990).

63 CARDOZO, *supra* note 62, at 10.

64 *Id.* at 10-11.

and subconscious, has regulated the infusion."[65] For "[t]he judge, even when he is free, is still not wholly free. He is not to innovate at pleasure."[66] Rather, "[h]e is to draw his inspiration from consecrated principles."[67]

Anticipating Pound, Cardozo argues that these principles emerge through the maturing of judicial thought. "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[68] Within the judicial process, "principles themselves are continually retested";[69] and when earlier decisions or lines of decisions appear wrong, they may be reformulated.[70] When a principle is reformulated, it "becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured."[71] And, over time, this principle will be tested further and perhaps even reformulated again. Such is the nature of the judicial process: "principles that have served their day expire, and new principles are born."[72] It is through the testing and reformulation of principles that judicial reasoning evolves.

Principles are not only the key to understanding how judicial reasoning evolves, they may also explain the different directions in which it evolves. For this reason it is important, Cardozo argues, to appreciate "[t]he directive force of a principle."[73] Again anticipating Pound, he concedes that principles may conflict and that, where they do, judges may be forced to make a choice.[74] Unlike Pound, however, he does not let the matter rest there. It is of fundamental importance, Cardozo insists, to try to understand precisely how judges make that choice. That is, what gives one principle more directive force than another?[75] In endeavoring to answer this question, Cardozo turns his attention to a case which would eventually become one of the classic heuristic tools of process jurisprudence: *Riggs v. Palmer*.[76]

In *Riggs v. Palmer*, the Court of Appeals of New York was faced

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65 *Id.* at 11.
66 *Id.* at 141.
67 *Id.*
68 *Id.* at 29.
69 *Id.* at 23.
70 *Id.* at 23-25.
71 *Id.* at 48.
72 *Id.* at 167.
73 *Id.* at 30.
74 *Id.* at 31.
75 *Id.* at 40-44.
76 22 N.E. 188 (N.Y. 1889); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 23-45 (1981); THE LEGAL PROCESS, *supra* note 14, at 89-110 (analyzing *Riggs v. Palmer*); POSNER, *supra* note 62, at 29 (claiming that "Cardozo is a precursor of Ronald Dworkin").

with the question of whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. Though "[i]t is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed . . . give this property to the murderer,"[77] Justice Earl observed,

> all laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.[78]

Since "[t]hese maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills,"[79] the murderer in this case, it was decided, could not inherit.

For Cardozo, the decision illustrates the directive force of principle. At least two other principles, which would have upheld the title of the murderer, could conceivably have been chosen by the Court. First, "[t]here was the principle of the binding force of a will disposing of the estate of a testator in conformity with law."[80] Second, "[t]here was the principle that civil courts may not add to the pains and penalties of crimes."[81] Why were neither of these principles chosen? That is, why did the court opt for the principle that people should not be permitted to profit from their own wrongs? The simple answer, for Cardozo, is that this principle was chosen because it "led to justice."[82]

> [I]n the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. . . . The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership.[83]

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[77] THE LEGAL PROCESS, *supra* note 14, at 89 (quoting Riggs v. Palmer, 22 N.E. 188, 188 (N.Y. 1889)).

[78] THE LEGAL PROCESS, *supra* note 14, at 89-91 (quoting Riggs v. Palmer, 22 N.E. 188, 188-90 (N.Y. 1889)).

[79] THE LEGAL PROCESS, *supra* note 14, at 91.

[80] CARDOZO, *supra* note 62, at 41.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 42-43.

In time, process writers would find more in the decision in *Riggs v. Palmer*. For his own part, Cardozo, in turning to the decision, had advanced the concept of principle significantly within jurisprudence. Whereas Gray had argued that principles may be invoked where sources of law remain silent, Cardozo demonstrated that they may prove decisive where such sources are not silent but simply inadequate to resolve the problem at hand. Whereas Pound merely argued that judges must choose among competing principles, Cardozo made at least a rudimentary attempt to explain how this choice comes about. Finally, Cardozo, by framing his explanation around *Riggs v. Palmer*, had brought the concept of principle to life. Principles were no longer mysterious jurisprudential abstractions. Rather, they could be seen to be encapsulated in some of the classic maxims of common law and equity.

In advancing the concept of principle, Cardozo raised more questions than he answered. Clearly the decision in *Riggs v. Palmer* accorded with the notion that people should not profit from their own wrongdoing. But was this a legal principle? A moral principle? Both? Indeed, was it a principle? The court in *Riggs* treated the unjust enrichment maxim as a fundamental maxim of the common law, dictated by public policy. So was the refusal to sanction unjust enrichment a legal policy rather than a moral principle? What is the difference between a policy and a principle anyway?

The policy-principle distinction had not yet acquired any significance for American jurists, although it was only a matter of time before it would. The reason that it would eventually become significant is implicit in Cardozo's own analysis. Cardozo conceived his task to be one of explaining the "principled" nature of the judicial process: judges, he insisted, never make law purely by instinct, for there is always some principle underscoring their decisions. However, he also argued that judges, in reaching decisions, choose principles which will lead to justice being done.[84] But how is this choice to be made? That is, by what criteria are judges to choose which principles will best facilitate justice? Is the choice of principle itself a matter of principle? Cardozo's answer is nothing if not hesitant: "History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go."[85] It is in this way that Cardozo undermines his own argument. Judicial decisions cannot be based entirely on subjec-

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[84] *Id.* at 40-43.

[85] *Id.* at 43.

tive instinct because they will always be founded on principle. However, the choice of principle will itself be a matter of subjective judicial instinct—a matter, that is, of how any particular judge conceives of justice. Cardozo equates principles with justice, and justice with individual sentiment, so that principles cannot be said to be neutral. And since principles cannot be said to be neutral, "principled" decisions, in Cardozo's terms, cannot be objective decisions.

Much of the significance of Cardozo's jurisprudence rests in what he did not do. If he had conceived of justice as founded in reason rather than in sentiment, his conception of principle would have had an entirely different complexion. As it stands, his jurisprudence entails a view of principles as tools which enable judges to give effect to their own versions of justice. Conceived in this way, principles actually reinforce rather than temper a particular realist legal world-view. Of course, if principles could be shown to be founded in reason, they would serve to invalidate this world-view. Possibly this explains why critics of realism such as Pound and Hutchins adverted to a link between principle and reason in law. But whereas Pound and Hutchins did little more than sketch this link, other critics of realism attempted actually to cultivate it.

Without doubt, the most important critic of realism to do so was Lon Fuller. Before turning to Fuller, however, it is important to take account of the jurisprudential initiatives of John Dickinson. Apart from his doctoral dissertation—a study of administrative law, written under the joint supervision of Pound and one of the key figures of the process tradition, Felix Frankfurter[86]—Dickinson's major academic work was a series of articles which he produced during the late 1920s and early 1930s.[87] Throughout these articles there is a basic anti-realist thrust. Legal realists, Dickinson argued, underestimated the significance of rules and overestimated the importance of prediction in law.[88] More generally, and like many others of his period, he regarded realism to be a "nihilistic theory," according to which "law is simply whatever government does."[89] Dickinson seems at least im-

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[86] *See* WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 171 (1982); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927).

[87] Dickinson's academic career was fairly short-lived. *See* George L. Haskins, *John Dickinson, 1894-1952*, 101 U. PA. L. REV. 1 (1952).

[88] *See* John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052 (1931); John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931). I discuss Dickinson's criticisms of legal realism in *American Legal Realism*, *supra* note 7, at 140-44.

[89] John Dickinson, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 89, 98 (Julius Rosenthal Foundation ed., 1941).

plicitly to have undertaken the very task which, in his view, legal realism dismissed as pointless: the task, that is, of demonstrating the existence of determinate legal foundations.

Identifying such foundations, Dickinson insists, is no easy feat. Commonly, custom has been "thought to supply the basis of most new rules of law."[90] Yet such a conclusion ought to be resisted, for the vitality of a custom usually means that it is in no need of legal enforcement. "It is only when a custom is breaking down, and thus either meeting with resistance [*sic*] or coming into conflict with other customs that the need arises for enforcement of it by adjudication."[91] Thus, we must look elsewhere if we are to discover a primary generative source of the law. This source, Dickinson believes, is in fact constituted by certain core legal principles. "Out of the seething welter of human interests and desires,"[92] he observes, the law

> seems to have selected certain great fundamental ones for recognition and protection—the interest of bodily security, the interest of reputation, the interest of private property, the interest of being able to rely on the good faith of others. The fact that the law sanctions these fundamental interests and places its authority behind them is expressed in its broadest and most basic principles—the principles that the right to life and property will be protected, that contracts will be enforced, and the like.[93]

Whereas Cardozo characterizes principles simply in terms of certain classic legal maxims, Dickinson conceives of them in a slightly more precise fashion, as legal stipulations of fundamental moral beliefs. Like both Cardozo and Pound, he concedes that principles may conflict. The choosing of one principle over another or others, however, cannot be explained by Cardozo's notion of directive force. Two competing principles may appear to be equally fundamental to the same legal dispute. For example, freedom of expression may violate privacy, and, in the case of disputes for which the law presently provides no answer, "difficulties develop because competing interests have an unexpected habit of expressing their conflict precisely in the form of an apparent conflict between . . . accepted fundamental principles of the law."[94] The fact is, Dickinson argues, that "[t]he broad general principles of the law have a significant habit of traveling in pairs of

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[90] John Dickinson, *The Law Behind Law: II*, 29 COLUM. L. REV. 285, 296 n.25 (1929) [hereinafter *The Law II*]; *cf.* John Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113, 138-41 (1929) (custom may assist in discussing or explaining rules of law, but it does not explicitly state them).

[91] *The Law II*, *supra* note 90, at 296-97 n.25.

[92] *Id.* at 296.

[93] *Id.*

[94] *Id.*

opposites."[95] In such instances, neither principle can be said to possess directional force.

> Each is a general expression of the fact that the law will protect a certain kind of human interest; but, the conditions of human life and association being what they are, every such interest if carried beyond a certain point is bound to come into conflict with some other interest or interests of a kind which the law also protects,—and will thus come into conflict with a competing legal principle of equal validity.[96]

Since principles are indeterminate, Dickinson argues, they cannot be laws. They are, however, in a very specific manner, the foundations from which laws emerge. The judicial formulation of a legal rule entails striking a balance between two competing principles, that is, "drawing a line somewhere between two opposing general principles and saying that each shall be valid only up to the line and that beyond it the other shall prevail."[97] The matter of where the line is drawn will be "determined by considerations of policy,"[98] and such considerations will themselves be arbitrary, for there is no coherent system of policy underlying the rules of the common law.[99] Indeed, often it will be the case "that the scheme of policy followed by one judge or generation of judges was not the same as that of all other contemporary judges or other generations of judges. Each adds new views, new appreciations, new values. These are drawn not from within the law but from without."[100]

In presenting this argument, Dickinson, like Cardozo, appears unwittingly to commit himself to a realist conception of judicial creativity: judges, when forced to strike a balance between fundamental principles, do so by considering issues of policy, and these considerations reflect their general attitudes, values, and beliefs. But Dickinson tries to hold back from reaching quite this conclusion. Judges, "in bringing new law into existence," do not "create law out of nothing."[101] Rather, "they are generally concerned, when devising a new rule, to frame one which can be made by some process of reasoning, facile or tortuous, to appear as a necessary logical deduction from some already established rule."[102] In other words, the process of bal-

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95 *Id.* at 298.
96 *Id.*
97 *Id.* at 299.
98 *Id.* at 302.
99 *Id.* at 303.
100 *Id.* at 304.
101 *Id.* at 308.
102 *Id.* at 315.

ancing principles is not simply a matter of resorting to policy, but also a matter of respecting legal reason and tradition. It is precisely this, Dickinson argues, that explains the "superiority of much judge-made law over that of the statutory variety," since respect for precedent "is a necessity from which legislatures are of course free."[103] Indeed, it is for the courts, through the mechanism of judicial review, to "bring[ ] legislative rules within the confines of some rational order and mak[e] them accountable to general principles which can reasonably be anticipated and acted upon."[104] Whereas legislatures create law on the basis of policies, courts create law on the basis of principles, which, though weighed in accordance with policies, generate reason and consistency in law.

Gray, Cardozo, and Pound regarded principles to be foundational to the legal process, that is, rules emerge from principles, and in the hard case scenario, where no applicable precedent exists, it is by resorting to principles that judges are able to develop new rules. Dickinson accepts the broad outline of this thesis, but also qualifies it substantially. It is in the process of qualifying it that he anticipates certain further features of process thinking as it would emerge from the 1940s onwards. Not all rules, according to Dickinson, emerge from principle. Only common law rules do so. Legislation, in contrast, emerges from policy. Thus, we encounter for the first time in American jurisprudence the distinction between policy and principle. The distinction, for Dickinson, is significant, since law founded on policy is deemed to be somehow "inferior" to law founded on principle. The court, he argues, is the forum of principle and, by extension, the forum of reason. It is through the process of judicial review that law founded on policy is subjected to principled, that is, "rational" scrutiny.

With Dickinson, certain of the basic themes and premises of process jurisprudence began to take shape. In particular, the theme of principle itself—conceived to be peculiar to judicial reasoning and distinct from policy—was accorded a more precise juridical role than had been attributed to it in the writings of Gray, Cardozo, and Pound. Despite this, however, the significance of principle as a jurisprudential theme still remained somewhat unclear. Like Pound, Dickinson had connected principle with reason in only the most casual fashion: the fact that the same principle may form a *fil conducteur* linking a line of cases, it was assumed, demonstrates reason at the core of common law doctrine. This assumption remained unelaborated. Whereas, in later

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[103] *Id.*

[104] Dickinson, *supra* note 89, at 104.

decades, process jurists would attempt to connect reason and principle with more precision, Dickinson and Pound, and to a lesser extent Hutchins also, seemed to make the connection in order to distance themselves from legal realism. Once this distance had been established, there was no need to develop the connection any further. For these writers, the resort to principle was essentially a strategy of avoidance rather than an attempt to develop a new jurisprudence. Accordingly, the connection between principle and reason was not especially significant to them. Only with the development of a new jurisprudence in which the theme of principle featured centrally would the connection acquire significance. That new jurisprudence, process jurisprudence, would eventually be initiated by Lon Fuller.

III. PRINCIPLE, PURPOSE, AND PROCESS

Fuller was both a critic and an advocate of realist legal thought. As a perspective on law focusing primarily on judicial behavior, he argued, realism was peculiarly unrealistic, since "[t]here is no such thing as a field which consists simply of judicial behavior; it is in fact a greater phantom than Austin's sovereign, which at least had the merit of corresponding to something in the ordinary man's thinking about law."[105] Nevertheless, he insisted, realism had "done an immense service to American legal science in inculcating in it a healthy fear of such very real demons as Reified Abstractions, Omnibus Concepts, and Metaphors Masquerading as Facts."[106] Fuller's own realist sentiments are most evident in his works on the law of contracts. In his seminal, co-authored article of 1936, *The Reliance Interest in Contract Damages*, he sought to demonstrate that remedies, rather than being determined by pre-existing legal rights (the traditional Langdellian view), in fact determine rights.[107] In his contracts casebook of the following decade, Fuller consolidated this thesis by presenting remedies before formation and consideration[108]—an arrangement which suggests "that he had accepted, if only in part, the realists' critique of the late nineteenth and early twentieth century doctrinal universe."[109]

More important than the fact that Fuller saw both problems and

[105] LON L. FULLER, *Lecture II*, *in* THE LAW IN QUEST OF ITSELF 45, 59 (1940).

[106] Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

[107] Lon L. Fuller & William Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936-37); Lon L. Fuller & William Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1936-37).

[108] LON L. FULLER, BASIC CONTRACT LAW (1947); *see also* Karl Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 882-83 (1979) (book review).

[109] Alfred S. Konefsky et al., *In Memoriam: The Intellectual Legacy of Lon Fuller*, 30 BUFF. L. REV. 263 (1981); *cf.* ROBERT S. SUMMERS, LON L. FULLER 131 (1984).

merits in legal realism is the fact that he avoided developing his own jurisprudence in its shadow. In his Rosenthal Lectures, delivered at Northwestern University in April 1940, only months after securing a permanent post at the Harvard Law School, Fuller outlined his own basic philosophical perspective on law. Realism—or, as he would have it, the basic error of realism—clearly inspired that perspective, but only partially. Legal positivism, of which realism is but one example, was his main object of criticism. The problem with legal positivism generally, Fuller argued, rests in "its objective of some clear-cut distinction between law and morality."[110] By failing "sufficiently to realize that . . . in the moving world of law, the *is* and the *ought* are inseparably [linked],"[111] legal positivists, realists included, denied the moral quality, and hence the reality, of law. "[T]o distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us."[112] In truth, "[t]he facts most relevant to legal study will generally be found to be what may be called moral facts."[113] The primary task of jurisprudence is to account for this moral dimension of the law, to try to make sense of law in "its ethical context."[114] This demands that "is" and "ought" be seen to melt into one another. It demands, in short, "a revival of natural law."[115]

Fuller's natural law theory, as is well known, is a secular theory, premised on the key concepts of reason, morality, and purpose rather than on the notion of an absolute author of the law.[116] In the early 1940s, and particularly in his Rosenthal Lectures, Fuller was more concerned with demonstrating why it is important to develop—as distinct from actually developing—such a theory. The call for a natural law revival came not simply because positivism was the dominant jurisprudential perspective in the United States and Europe, but because, in Fuller's view, the political implications of legal positivism were unacceptable. "We live,"[117] he observed,

> in a period when major readjustments in our economic and social order have become necessary. . . . Since many of these necessary changes have to be brought about by legislative and administrative decree, the power of governmental fiat is being stretched to the

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[110] Fuller, *supra* note 106, at 85.

[111] *Id.* at 64.

[112] *Id.* at 10.

[113] *Id.* at 65.

[114] *Id.* at 60.

[115] *Id.* at 116.

[116] *See* SUMMERS, *supra* note 109, at 151.

[117] FULLER, *supra* note 105, at 115.

> utmost. . . . It would seem that the present is a time when our social structure requires to be held together by a cement firmer than that supplied by the abstract principle of respect for law as such.[118]

The gist of Fuller's argument is that, by failing to account for the moral dimension of law, by conceiving the reality of law to be nothing more than the authorized exercise of power, positivist jurisprudence equates law with fiat. And if law is simply fiat, any coercive order, be it within a system of democracy or within a system of tyranny, is a valid legal order. Hence, positivism accommodates dirigisme, and even despotism.

Abandoning positivism in favor of natural law would mean not only reorienting jurisprudence but also recognizing and revising the politics of jurisprudence. For there would be no point in calling for a revival of natural law theory if that theory turned out to embody the same political implications as legal positivism. Cultivating a jurisprudence which embraces morality, Fuller believed, entails the recognition that legal institutions ought to be founded upon the values of individual freedom and democracy; the recognition of these values requires in turn the recognition of reason at the heart of the law.

> In my opinion, democracy must be founded . . . on a faith that in the long run ideas are more important that the men who form them. . . . [I]t is only in a democratic and constitutionally organized state that ideas have a chance to make their influence felt. . . . In a dictatorship, on the other hand, the chief requisite for the success of an idea is that it serve the interests of those who have enough power to make it effective. . . . It is my belief that our society will not survive unless . . . we can reattain an atmosphere in which a man can gain a respectful audience for his views on the institution of private property in spite of the fact that he happens to own a house and lot. This atmosphere will only be regained when we have again come to believe that reason can have something to say concerning legal and social institutions. Some minimum faith in ideas is necessary to give practical significance to the doctrine of free speech and free thought.[119]

Reason is thus a fundamental, possibly the fundamental,[120] legal value. It is antithetical to tyranny. It goes hand in hand with liberal democracy. Through reason, human tolerance flourishes. To revive

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[118] *Id.* at 115-16.

[119] *Id.* at 122-26; *cf.* Lon L. Fuller, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 113, 124-25 (Julius Rosenthal Foundation ed., 1941).

[120] *See* Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 437 (1978).

natural law is to abandon the positivist vision of law as pure fiat and to rediscover faith in reason. In law, there must be room for both fiat and reason.

As the 1940s progressed, Fuller elaborated this thesis. "When we deal with the law," he wrote in 1946, "we inevitably see that it is compounded of reason and fiat, of order discovered and order imposed, and that to attempt to eliminate either of these aspects of the law is to denature and falsify it."[121] Jurisprudence must concern itself with "the whole view of law,"[122] of law as both reason and fiat, despite the tendency of legal philosophers of the past "to hold exclusively to one branch of the antinomy."[123] For all that he champions what he terms the whole view, however, Fuller, possibly because of his own predisposition towards natural law, seems generally more inclined to the analysis of reason rather than fiat. Judicial activity, he argues, is predicated on reason;[124] it "cannot be predicted, or even talked about meaningfully, except in terms of reasons that give rise to it."[125] In producing a reasoned decision, moreover, the judge, instead of acting on "personal predilections," is attempting "to discover the natural principles underlying group life, so that his decisions might conform to them."[126] To appeal to such principles is to invoke "external criteria, found in the conditions required for successful group living, that furnish some standard against which the rightness of [the judge's] decisions should be measured."[127] Thus, "the basic problem of the judicial process remains that of discovering and applying those principles that will best promote the ends men seek to attain by collective action."[128]

For Fuller, then, the themes of reason and principle are interconnected. In a moment, we shall see that his recognition of this interconnection took him down a specific jurisprudential path. However, before we develop this point, a more general observation might be made. Fuller believed that the values of clarity, candor, and integrity should reign supreme in legal scholarship.[129] These values are extolled throughout his writings. This in itself is hardly remarkable.

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121 Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 382 (1978). A version of this paper was first delivered to The Association of the Bar of the City of New York in October 1942.

122 *Id.* at 395.

123 *Id.* at 391.

124 *Id.* at 384.

125 *Id.* at 386.

126 *Id.* at 378.

127 *Id.* at 379.

128 *Id.* at 380.

129 Almost any of his works could be cited in support of this assertion. *See, e.g.*, Lon L.

What is remarkable, however, is the manner in which these values surface and are realized in his writings.

Fuller realizes these values by developing a technique which previously had scarcely been used in American jurisprudence, the technique of reasoning by analogy and allegory. By using this technique throughout his jurisprudential writings, Fuller is able, gradually, to unfold his ideas rather than simply to offer them neatly packaged. It is a technique which makes his writing engaging, yet often very difficult to quote. The plight of King Rex—the story that Fuller presents to demonstrate his famous notion of the internal morality of law[130]—exemplifies his use of this technique. So too does his article, *The Case of the Speluncean Explorers*.[131] In that article, Fuller presents an imaginary case in which a group of explorers, having become trapped in a cave, cast dice to decide which of their number should be killed in order to provide food for their survival. Once rescued, the survivors, on the basis of a statute which provides that whoever " 'shall willfully take the life of another shall be punished by death,' "[132] are sentenced to hang. Fuller presents us with the opinions of a fictional Supreme Court which considers whether or not this sentence should be upheld or set aside. One Justice concludes that it should be set aside, but does not elaborate any reasons for his conclusion.[133] Another concludes that the sentence should be set aside because that would reflect the wishes of public opinion.[134] Yet another concludes that the sentence should be affirmed since it accords with the law of the land.[135] Still another is unable to reach a conclusion, and withdraws from the case.[136] Fuller's fifth judge, Justice Foster, argues that the sentence ought to be set aside because reason shows it to be wrong.[137] Fidelity to law, Justice Foster argues, demands not slavish, but intelligent fidelity: "[e]very proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose."[138] Interpreting the statute in this case in

Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631, 635 (1958).

[130] *See* LON L. FULLER, THE MORALITY OF LAW 33-94 (1964). Guido Calabresi is another great exponent of this technique. *See generally* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

[131] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

[132] *Id.* at 619.

[133] *Id.* at 616-19.

[134] *Id.* at 637-44.

[135] *Id.* at 631-37.

[136] *Id.* at 626-31, 644.

[137] *Id.* at 620-26.

[138] *Id.* at 624.

terms of its purpose rather than its literal wording, Foster concludes, forces the recognition that it permits of exceptions such as self-defense.[139]

The Case of the Speluncean Explorers illustrates how, for Fuller, jurisprudence entails not simply formulating ideas about law, but ensuring that those ideas unfold within a process of reasoning. The implication is that jurisprudence must be founded on reason if it is to promote reason. Given this view, it is hardly surprising to find that Fuller himself subscribed to the position which he accords to his fictional Justice Foster. Purposes, he argues, are a defining feature of human nature.[140] Most human actions of any complexity are purposive actions; understanding them requires that they be interpreted in terms of their underlying purposes.[141] This is as true of law as it is of any form of human activity. The creation and application of law is a purposeful enterprise.[142] Legal rules and institutions characteristically serve a multiplicity of purposes.[143] If we are properly to understand law, we must interpret it by reference to those purposes.[144] For we can only know what a law means if we appreciate what it is supposed to be for. We are back to Fuller's basic thesis, the "is" and the "ought" are not separate entities. Facts cannot be divorced from values:

> [I]n a sufficiently homogeneous society certain "values" will develop automatically and without anyone intending or directing their development. In such a society it is assumed that the legal rules developed and enforced by courts will reflect these prevailing "values." . . . [A] court is not an inert mirror reflecting current mores but an active participant in the enterprise of articulating the implications of shared purposes.[145]

Judges, then, must engage in the purposive interpretation of legal rules. Such an argument was by no means novel to Fuller. Learned Hand, for one, had been advocating the purposive interpretation of law since the mid-1940s.[146] By the end of that decade, affirmation of the purposive perspective had become quite common in American

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139 *Id.* at 624-25.

140 *See* Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 472 (1954) (reviewing EDWIN W. PATTERSON, JURISPRUDENCE, MEN, AND IDEAS OF THE LAW (1953)).

141 Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 700 (1956).

142 FULLER, *supra* note 130, at 145.

143 *See* LON L. FULLER, THE ANATOMY OF LAW 54-58 (1968).

144 Fuller, *supra* note 131, at 662.

145 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 378 (1978).

146 *See, e.g.*, Borella v. Borden Co., 145 F.2d 63, 64-65 (2d Cir. 1945).

legal literature.[147] The principal reason for this rests in the significance of the perspective in relation to legislation. Felix Frankfurter saw this more clearly than did anyone else. As early as 1930, Frankfurter had written that "[t]he *Index to State Legislation* recently published by the Congressional Library reads like an inventory of all man's secular needs and the means for their fulfillment."[148] Like his Harvard colleague of that period, James Landis, he recognized that the legal profession and the law schools alike remained, as Landis put it, committed to "the traditional method of developing law purely from earlier judicial precedents," even though legislation was "assuming both a volume and a creative aspect of purpose that makes it impossible to ignore."[149] Landis in particular bemoaned the "cavalier treatment of legislation"[150] within the American legal tradition. "Legislation is presumed immune to 'principle'; its judgments" are taken to "represent merely the political pressure of a special class."[151] Landis insisted that statutes may be founded on both policy and principle.[152]

Frankfurter offered a similar argument but adopted a slightly different tack. Writing in 1947, he suggested that the rapid growth of statutes in modern times requires that judges become more accomplished in the art of interpretation. Looking over the opinions of Holmes, Brandeis, and Cardozo, he remarked, one finds that "the statutes presented for their interpretation became increasingly complex."[153] One finds also in their opinions the recognition "that laws are not abstract propositions" but "expressions of policy arising out of specific situations and addressed to the attainment of particular ends."[154] For these three Justices, "a statute was expressive of purpose and policy."[155] So too for Frankfurter:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out

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[147] *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 104 (1949); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 411, 413-14 (1950); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

[148] FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 29 (1930).

[149] James M. Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 219 (1934).

[150] *Id.* at 233.

[151] *Id.* at 222.

[152] *Id.* at 215-30.

[153] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947).

[154] *Id.* at 533.

[155] *Id.* at 532.

> of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate . . . . [T]he purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however ineptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.[156]

Interpretation of a statute, then, demands an estimation of its purpose. Since that purpose is unlikely to be "directly displayed in the particular enactment,"[157] however, judges must be wary of importing into the statute—for example, through the "[s]purious use of legislative history"[158]—an incongruous or bogus purpose. "[O]ne is admonished to listen attentively to what a statute says. One must also listen carefully to what it does not say."[159] Thus it is that, for Frankfurter, the purposive interpretation of statutes is part and parcel of a more general philosophy of judicial restraint.[160] Rather than facilitating unfettered judicial discretion, the search for purpose demands that the judge acts with integrity and circumspection. "[L]aws have ends to be achieved,"[161] and the judge must strive to remain faithful to those ends. "Perhaps the most delicate aspect of statutory construction," Frankfurter suggests, "is not to find more residues than are implicit

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[156] *Id.* at 538-39.

[157] *Id.* at 539.

[158] *Id.* at 543.

[159] *Id.* at 536.

[160] For a statement of this philosophy, see Felix Frankfurter, *John Marshall and the Judicial Function*, *in* GOVERNMENT UNDER LAW 6, 20-21 (A.E. Sutherland ed., 1956):

> Only for those who have not the responsibility of decision can it be easy to decide the grave and complex problems they raise, especially in controversies that excite public interest. This is so because they too often present legal issues inextricably and deeply bound up in emotional reactions to sharply conflicting economic, social and political views. It is not the duty of judges to express their personal attitudes on such issues, deep as their individual convictions may be. The opposite is the truth; it is their duty not to act on merely personal views . . . . Of course, individual judgment and feeling cannot be wholly shut out of the judicial process. But if they dominate, the judicial process becomes a dangerous sham.

Id.; *see also* Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 11-12 (1962):

> [Frankfurter's] teaching has been of the integrity of the judicial process, of the essential importance of sound procedures, of judicial self-restraint, and of the intellectual humility of the judge . . . . [T]he integrity of the judicial process requires a deep awareness on the part of the judge of the limitations on his own power of decision, and of the necessity, except within narrow and ultimate limits, of seeking to avoid decision on grounds of personal belief, or even of personal convictions.

Id.

[161] Frankfurter, *supra* note 153, at 538.

nor purposes beyond the bounds of hints."[162] "[C]onstruction must eschew interpolation and evisceration,"[163] and "[f]or judges at least it is important to remember that continuity with the past is not only a necessity but even a duty."[164] Simply stated, the purposive approach constrains rather than liberates; "the courts . . . are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation."[165]

Fuller, unlike Frankfurter, did not develop the purposive perspective to support the philosophy of judicial restraint. For Fuller, the purposive interpretation of statutes—indeed, of laws generally—is simply a feature of adjudication which had commonly been overlooked by jurists working in the positivist tradition. "[A]djudication is a form of social ordering institutionally committed to 'rational' decision,"[166] Fuller claims, and a judge cannot be committed to rational decision making if he or she interprets law literally rather than purposively. There is, nevertheless, more to adjudication than just purposive interpretation. Indeed, according to Fuller, there is a peculiar "integrity" about adjudication as a form of social ordering;[167] and the demonstration of this integrity demands that adjudication be seen not, primarily, in terms of purposive interpretation, but in terms of institutional competence, reason, and principle.

Fuller develops this thesis in his article, *The Forms and Limits of Adjudication*. Though published in 1978, shortly after his death, Fuller circulated a first draft of this article among members of the Legal Philosophy Discussion Group at Harvard Law School as early as 1957.[168] Along with reciprocity and organization by common aims, Fuller argues in this article, that adjudication is a basic form of social ordering. While rationality inheres in all social ordering,[169] its presence in adjudication is peculiar. "[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[170] Furthermore, as a specifically legal activity—as opposed, say, to refereeing a sport or judging a competition—adjudication requires that

[162] *Id.* at 535.
[163] *Id.* at 533.
[164] *Id.* at 535.
[165] *Id.* at 533.
[166] Fuller, *supra* note 145, at 380.
[167] *Id.* at 364; *see also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).
[168] Fuller, *supra* note 145, at 353.
[169] *Id.* at 360.
[170] *Id.* at 364.

decisions be "reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments."[171] In short, adjudication, as a legal phenomenon, demands a particular institutional context which supports a particular type of rationality:

> Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason.[172]

Having highlighted rationality as an integral feature of adjudication, Fuller returns again to the interconnection between reason and principle which occupied him during the 1940s. Since adjudication is "a process of decision in which the affected party's participation consists in an opportunity to present proofs and reasoned arguments,"[173] that party, "if his participation is to be meaningful," must "assert some principle or principles by which his arguments are sound and his proofs relevant."[174] Principles are fundamental to the adjudicative process, for it is only by resorting to principles that disputing parties are convincingly able to assert their rights within its peculiar institutional framework. Fuller demonstrates this point by resorting to his favorite method of reasoning, the imaginary scenario:

> We may see this process . . . in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim "a right" to the raise. He may argue the fairness of the principle of equal treatment and call attention to the fact that Joe, who is no better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right.[175]

Within the peculiar institutional framework of the adjudicative process, then, principles are foundational to legal reasoning, for they

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[171] *Id.* at 365.
[172] *Id.* at 366-67.
[173] *Id.* at 365.
[174] *Id.* at 369.
[175] *Id.*

mark the distinction between arbitrary demands and legal rights. "A right is a demand founded on a principle."[176] Thus "adjudication is institutionally committed to a 'reasoned' decision, to a decision based on 'principle.' "[177]

It is in Fuller's writings that we can see a distinct "process" perspective on law beginning to gel. By emphasizing reason as well as fiat in law, by demonstrating the essential irrationality of non-purposive legal interpretation, by reinforcing the interconnection of reason and principle and, most importantly of all, by arguing that adjudication is an institutionally discrete, rationalistic, rights-oriented, and hence principle-based process of decision making, Fuller contributed significantly to the construction of a distinctive post-realist process jurisprudence. He "put a strong intellectual mark on the Harvard Law School," wrote Fuller's erstwhile student and colleague, Albert Sacks, in 1978.[178] "[H]is impact on me and others . . . lay in convincing [us] that his questions were right—that they had to be faced and that they deserved careful thought."[179]

IV. THE BROADER SCENE

It is important, however, to appreciate that although Fuller's contribution to the development of process thinking was highly significant, it was not altogether unique. As we have already seen, he was not the first American jurist to conceive of the interconnection between principle and reason; rather, he simply brought that interconnection into sharper focus. Likewise, we have seen that Fuller was not alone in advocating a purposive approach to legal interpretation. And we shall see in due course that the image of adjudication as a legal activity governed by peculiar criteria of rationality and integrity was illustrative of a more general belief, shared by many law professors of the 1950s, that judicial and legislative functions may and indeed ought to be treated as institutionally distinct. Fuller, very simply, was not the first to sound the major themes of process think-

[176] *Id.* at 404. It is tempting here to draw comparisons between Fuller's position and that held by Ronald Dworkin. We shall consider Dworkin in relation to the process tradition in due course. At this point, it is worth noting that Robert Summers claims that "Fuller does not specifically address himself to what Dworkin calls legal principles." SUMMERS, *supra* note 109, at 51. For an examination of how Fuller is echoed by Dworkin, see CHARLES COVELL, THE DEFENCE OF NATURAL LAW: A STUDY OF THE IDEAS OF LAW AND JUSTICE IN THE WRITINGS OF LON L. FULLER, MICHAEL OAKESHOT [SIC], F. A. HAYEK, RONALD DWORKIN AND JOHN FINNIS 43, 60-61, 63, 180 (1992).

[177] Fuller, *supra* note 145, at 374.

[178] Albert M. Sacks, *Lon Luvois Fuller*, 92 HARV. L. REV. 349, 349 (1978).

[179] *Id.* at 350.

ing. His achievement was to show how those themes fit together, how they comprise a distinct jurisprudence.

Such was the modesty of Fuller that he would have been quick to dissociate himself from any claims that he had pioneered a "process" perspective on law.[180] Indeed, just as Albert Sacks paid tribute to Fuller's inspirational role at Harvard, Fuller, as early as 1940, acknowledged his intellectual indebtedness to Sacks's academic collaborator, Henry Hart.[181] Certainly, between Fuller and Hart, intellectual inspiration seems to have cut both ways. Fuller's voice can be heard throughout the *Legal Process* materials,[182] and is most dominant where Hart and Sacks reproduce excerpts from the 1957 draft of *The Forms and Limits of Adjudication* and "draw heavily upon Professor Fuller's analysis."[183] Fuller was eager to stress the path-breaking significance of *The Legal Process*. It was in those materials, he insisted, that institutional competence was first raised as a distinct legal problem. Fuller observed that "instead of asking, 'What is the rule?' or even, 'What is the best rule?' " Hart and Sacks raised, in an unprecedented fashion, the question: " 'What is the nature of the basic problem and how shall we choose among the various procedures of social ordering that might be applied to it?' "[184] Fuller, Sacks, and Hart, and Hart in particular, demonstrated that the question of "who should do what?"—that is, "which institution within the legal process might be considered best equipped to deal with which problems?"—ought to be treated as a fundamental question of modern jurisprudence.[185]

Fuller was certainly right to emphasize the importance of Henry Hart's work. For it is in that work that the notion of "process" itself begins to take shape. Whereas in Fuller's writings, process jurisprudence takes the form of analytical legal philosophy, in Hart's writings, it emerges as doctrinal critique premised on a specific conception of what the legal process is and how it ought to function. Hart, a pro-New Deal lawyer who, in 1937, had supported Franklin D. Roosevelt's Court Packing plan on the assumption that a larger Supreme Court would be a more "enlightened" Court,[186] co-authored

180 On Fuller's modesty, see Erwin N. Griswold, *Lon Luvois Fuller—1902-1978*, 92 HARV. L. REV. 351, 352 (1978).

181 *See* SUMMERS, *supra* note 109, at 6.

182 *See, e.g.*, THE LEGAL PROCESS, *supra* note 14, at 98, 111, 121, 206, 447-48.

183 *Id.* at 421-26, 686.

184 Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971).

185 *See* FULLER, *supra* note 130, at 180.

186 *See* G. Edward White, *Closing the Cycle*, 33 J. LEGAL EDUC. 449, 450 (1983). On Hart

a series of articles with Felix Frankfurter in the mid-1930s which warned against the erosion of the very legal ideal which conservatives believed the Court Packing plan was intended to undermine: the ideal, that is, of the separation of powers.[187] Frankfurter and Hart argued that legislation and adjudication are institutionally distinct activities, and must remain so:

> A Court the scope of whose activities lies as close to the more sensitive areas of politics as does that of the Supreme Court must constantly be on the alert against undue suction into the avoidable polemic of politics. Especially at a time when the appeal from legislation to adjudication is more frequent and its results more far-reaching, laxity in assuming jurisdiction adds gratuitous friction to the difficulties of government. . . . Inevitably, fulfillment of the Supreme Court's traditional function in passing judgment upon legislation, especially that of Congress, occasions the reaffirmation of old procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running.[188]

Frankfurter and Hart observed that "[t]he volume of litigation of which the Court now disposes at a single term would startle the shades of Marshall and Taney even as they would have hampered the eloquence of Clay and Webster."[189] "It is not enough, however, for a court to dispose of a huge volume of litigation with despatch."[190] The Supreme Court has a more fundamental duty not to overstep its mark by assuming the power to make policy. The fulfillment of this duty demands judicial restraint:

> As governmental problems become more and not less complicated, as the dislocating impact of technological advances becomes more powerful and less imperceptible, as the forces of economic interdependence demand more and more determination and ingenuity for the maintenance of a simpler but perhaps socially more satisfying society, the deep wisdom of the Court's self-restraint against undue or premature intervention, in what are ultimately political controversies, becomes the deepest wisdom for our times.[191]

Thus, as early as the mid-1930s, one of the fundamental messages of

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and the New Deal, see also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 322 (1978).

[187] *See* Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245 (1933); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238 (1934); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68 (1935) [hereinafter *Supreme Court, 1934*].

[188] *Supreme Court, 1934*, *supra* note 187, at 90-91.

[189] *Id.* at 107.

[190] *Id.* at 69.

[191] *Id.* at 107.

process jurisprudence was being voiced. The message is simple to summarize: adjudication is a peculiar type of institutional activity which does not embrace policy making; and if the integrity of adjudication is to be preserved, judicial self-restraint must dominate the courts. The first half of this message is to be found in Fuller's reflections on adjudication. The message in its entirety was heard and accepted by many post-realist law professors.

Most, though by no means all, of those responsible for promoting this message were Harvard Law School professors. Various commentators have remarked that when Erwin Griswold succeeded James Landis as Dean of the School in July 1946, the Harvard faculty became increasingly committed to the teaching of law as a craft.[192] The meaning of such a comment is far from clear, not least because it implies that the Langdellian approach to teaching was somehow "craftless." What is clear, however, is that the remark is rarely intended as a compliment. By teaching law as a craft, Ralph Nader has written, the Harvard Law School under Griswold's deanship cultivated "a process of engineering the law student into corridor thinking and largely non-normative evaluation."[193] "This process," according to Jerold Auerbach, "entailed a highly stylized mode of intellectual activity that rewarded inductive reasoning, analytical precision, and verbal felicity."[194] Above all, teaching law as a craft meant training students to think like lawyers.[195]

Certainly, process jurisprudence, as it evolved at Harvard, would have contributed to such training. For it is premised on the idea that law involves special techniques to be mastered. Mastery of these techniques, according to Frankfurter, demands both natural and artificial reason.[196] "[T]he only sure safeguard against crossing the line between adjudication and legislation," he insisted, "is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."[197] More generally, by emphasizing the question of which institution is best equipped to deal with which legal

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[192] *See, e.g.*, KALMAN, *supra* note 33, at 219; JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 78 (1978).

[193] Ralph Nader, *Law Schools and Law Firms*, 75 CASE & COM. 30, 30 (1970). For a criticism of Nader on this point, see Carl A. Auerbach, *Some Comments on Mr. Nader's Views*, 75 CASE & COM. 39, 39 (1970).

[194] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 276 (1976).

[195] *See id.*; Nader, *supra* note 193, at 31.

[196] On natural and artificial reason, see *Prohibitions Del Roy*, 77 ENG. REP. 1342, 1343 (1907); *see generally* John U. Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 LAW Q. REV. 330 (1968).

[197] Frankfurter, *supra* note 153, at 535.

problems, process jurisprudence requires students to recognize and appreciate the place and the role of each and every institution within the legal process. As Henry Hart and Herbert Wechsler wrote in the preface to their casebook of 1953, *The Federal Courts and the Federal System*, "we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government."[198] This does not mean, however, that process jurisprudence is simply a descriptive or taxonomic exercise. It is equally an exercise in legal critique.

The style of critique to be found in process jurisprudence is very distinctive. Different organs have different tasks to perform within the legal process; and it is for students and scholars not only to identify those tasks, but also to ascertain whether or not they are being performed properly. Jurisprudence, in other words, is conceived as quality control. From the late 1940s through to the 1960s, process jurisprudence flourished as many academic lawyers took it upon themselves to act as quality assessors. The product of the Supreme Court was subjected to especial scrutiny. This was something different from legal realism. "To say that judges make law," the Harvard professor, Paul Freund, remarked in 1949, "is not the end but only the beginning of sophistication."[199] Post-realist jurisprudence must depart from the truism that judges make law and begin instead with the question of how they make law. Freund's view was that judges must cultivate "morality of mind—by understanding self-restraint, and the even-handed application of principle."[200] Writing in the same year, Edward Levi of the University of Chicago Law School suggested that judges, in making law, ought to furnish their decisions with reasons.[201] From a contemporary perspective, such a suggestion might seem no less bland than the proposition that judges make law. In the late 1940s, however, at the time when process jurisprudence was beginning to find its feet, the suggestion could hardly have been more insightful or significant; it was not at all obvious that judges consistently endeavored to furnish their decisions with reasons.

For those who were preoccupied with quality control, the initiatives of the Supreme Court were the primary cause for concern. In-

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198 PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973). On the same theme, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

199 PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 3 (1977).

200 *Id.* at 75.

201 *See* LEVI, *supra* note 147, at 53.

deed, the development of process jurisprudence from the 1950s onwards can be charted in large measure by looking to the series of forewords, initiated by the *Harvard Law Review* in 1951, in which leading (usually Harvard-based) legal scholars of the period would analyze the work of the Supreme Court during the preceding term. In the first of these forewords, Harvard law professor Louis Jaffe suggested that the Court needed to break decisively from its immediate past. "The Roosevelt Court in which the Black-Murphy-Douglas-Rutledge bloc held a pivotal position [had manipulated] constitutional doctrines and statutory interpretation to forward its program of social reform."[202] During this era, "the Court's work was not law but politics."[203] While, under Chief Justice Vinson, the court had moved away from this work, Jaffe argued, it was still not entirely cured of the bad habits which it had acquired during the New Deal era.[204] In particular, the Court paid too little attention to "the stating of reasons" while displaying "an excess of passion for immediate results, a naive expectation that if only institutions were correctly devised and men were of good will, all things could be quickly put right."[205] Jaffe's assessment was basically diagnostic and descriptive. As the 1950s progressed, however, the *Harvard Law Review* forewords would become increasingly more critical.

There was a reason for this. It is well known that the appointment of Earl Warren as the successor to Chief Justice Vinson in September 1953 marked the beginning of a new period of judicial activism in the United States Supreme Court. In due course, we shall have cause to consider the activism of the so-called Warren Court. For the moment, however, it is sufficient simply to note that, during the 1950s, process jurisprudence evolved largely as a critical analysis of specific Warren Court initiatives. Whereas the Vinson Court had been criticized in certain quarters for taking too few cases,[206] many writers associated with the process tradition felt that the Warren Court emphasized judicial expediency at the expense of reason. In the

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202 Louis L. Jaffe, *The Supreme Court, 1950 Term— Foreword*, 65 HARV. L. REV. 107, 107 (1951).

203 *Id.*

204 *Id.* at 114.

205 *Id.* at 110.

206 *See, e.g.*, Fowler V. Harper & Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do in the 1952 Term*, 102 U. PA. L. REV. 427 (1954); Fowler V. Harper & George C. Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

first foreword of the Warren era, Albert Sacks criticized the Court for its extensive use of the summary opinion. Justices were too eager, he complained, to hand down "per curiam opinions in which the reasons for the decision are either omitted or set forth in a few sentences."[207] "Since," in such opinions, "the Court's reasoning processes are not fully set forth, the observing critic can never be wholly confident that he has taken into account all possible reasons for the Court's choice of a summary statement."[208] "The difficulty is not in the result reached, but in the absence of explanation of what was decided."[209] The problem of putting expediency above reason was readdressed by Sacks's colleague, Ernest Brown, in his foreword to the 1957 term. Brown lamented "the Court's increasingly frequent practice of granting certiorari and simultaneously reversing the decision of a federal court of appeals or a state supreme court without briefs or arguments upon the merits."[210] The quality of the Court's work, he insisted, is dependent on the quality of its procedures.[211]

By the latter half of the 1950s, quality control was being preached at Yale as well as Harvard. "The Court's product has shown an increasing incidence of the sweeping dogmatic statement," wrote Yale law professors Alexander Bickel and Harry Wellington, in 1957.[212] "[O]pinions have, of late, often said very little and have carried an air of assertion, as opposed to one of deliberation and rational choice."[213] While "decision by assertion"[214] may make for swift and efficient adjudication, it undermines "the Court's real strength,"[215] its ability to engage in reasoned elaboration. Not only is "the elaboration of reasons"[216] a judicial strength; more importantly, it ought to be treated as a judicial duty. If an organ such as the Supreme Court is free from any duty to give reasons, if it need "not attempt to gain reasoned acceptance for [its] result[s]," it can hardly be said to "make law in the sense which the term 'law' must have in a democratic society."[217] If a court feels compelled to articulate reasons supporting the

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207 Albert M. Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96, 99 (1954).

208 *Id.* at 99-100.

209 *Id.* at 103.

210 Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77, 77 (1958).

211 *Id.*

212 Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

213 *Id.*

214 *Id.* at 14.

215 *Id.* at 4.

216 *Id.* at 5.

217 *Id.*

law which it creates, then it will not create law arbitrarily. In short, reason fosters accountability and restraint.

Having promoted the virtue of reasoned elaboration, Bickel and Wellington failed, ironically, to develop their own argument in a sufficiently elaborate fashion. A court may provide detailed reasons for its decisions and yet still make bad law; for even detailed reasons may prove to be inadequate reasons. Precisely what sort of reasons, then, ought any court to produce? "[T]he right reasons,"[218] according to Bickel and Wellington. But what are "right reasons"? This was a question process jurisprudence had yet to answer. Bickel and Wellington turned their attention instead to a problem which other process writers had already tackled with confidence, the problem of statutory interpretation. As with the articulation of reasons, they argued, the purposive interpretation of statutes fosters judicial restraint. For such interpretation allows not the importation of any old purpose into the words of a statute, but only "a purpose which may reasonably be imputed to 'those who uttered the words.' "[219] The same point was advanced, albeit from a different angle, by Louis Jaffe. Judicial discretion in the interpretation of statutes, he argued, should be exercised only in those instances where the court is uncertain of the clear purpose of the statute.[220] Where courts fail to heed this injunction, they undermine "the integrity of the legal system."[221]

Although Bickel and Wellington each contributed further to the development of process jurisprudence during the 1960s and 1970s, it is, for two reasons, worth reflecting at this point on their collaboration in the 1950s. First, it seems ironic that what would become the classic phrase of process jurisprudence, "reasoned elaboration," was first put into circulation not at Harvard, as one would expect, but by two Yale law professors. Not that Bickel and Wellington were typical of the Yale faculty. Both were Harvard law graduates. Bickel had clerked for Justice Frankfurter during the 1952 Term. Wellington had clerked for him during the 1955 Term. Only after Frankfurter had failed in his efforts to secure for him a permanent position on the Harvard faculty did Bickel accept his post at Yale.[222] For Fred Rodell, ever the conspiracy theorist, Bickel and Wellington were liv-

218 *Id.* at 38.

219 *Id.* at 17.

220 Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 261 (1956).

221 *Id.* at 274.

222 *See* Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 528 (1976). On Bickel's intellectual indebtedness to Frankfurter, see Alfred S. Konefsky, *Men of Great and Little Faith: Generations of Constitutional Scholars*, 30 BUFF. L. REV. 365, 377-81 (1981).

ing proof of Frankfurter's efforts to "Harvardize" the Yale Law School in the postwar years.[223] While Rodell's view betrays more about him than about postwar Yale, it is nevertheless true that Bickel and Wellington were displaced Harvardians, developing "Harvard-style" jurisprudence in New Haven rather than in Cambridge.

The second point to consider is Bickel and Wellington's emphasis on the link between reason and democracy. By stressing this link, they advanced a line of thought which was already being developed by other process writers. In the early 1950s, Herbert Wechsler of the Columbia Law School had argued that the American federal system is uniquely suited to the preservation of democracy.[224] However, because federal intervention into state affairs is primarily a matter for congressional determination, the Supreme Court must be seen to play an essentially subordinate role in settling the balances of federalism.[225] Where the Supreme Court does break free from congressional control, Wechsler noted, is in the area of civil liberties, where the Court must determine the scope of those constitutional restraints which serve to protect individuals from the interventions of federal and state government.[226] It was in this area, many process writers felt, that the Warren Court fared particularly poorly in articulating reasons for its decisions. Bickel and Wellington were among the first to argue that, no matter how laudable certain of the Court's decisions might seem, where the Court fails to articulate reasons, it neglects the requirements of democracy.

Unfortunately, as we have already seen, although Bickel and Wellington argued that reason ought to be regarded as essential to adjudication in a democracy, they failed to explain what reason might mean. Clearly there was a gap here that needed to be filled. Filling this gap required no new substantive developments in process jurisprudence. It demanded simply a return to the interconnection of reason and principle. By the end of the 1950s, Henry Hart had grasped the connection which needed to be made: adjudication in a democracy must be founded on reasons, and it is in the character of reasons that they involve an appeal to principle. In his foreword to the 1958 Term, he commented that:

> too many of the Court's opinions are about what one would expect could be written in twenty-four hours. . . . [F]ew of the Court's opinions, far too few, genuinely illumine the area of law with

223 For an account of Rodell's Harvard-phobia, see *Twilight, supra* note 7, at 385-87.

224 Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

225 *Id.* at 559-60.

226 *Id.* at 560 n.59.

> which they deal. . . . Issues are ducked which in good lawyership and good conscience ought not to be ducked. Technical mistakes are made which ought not be made in the decisions of the Supreme Court of the United States.[227]

The Court was doing too much and doing it badly. Concerned more with expediency than with the maturing of their collective thought, the Justices of the Warren era were producing

> [o]pinions which . . . lack the underpinning of principle which is necessary to illumine large areas of the law and thus to discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. . . . [T]he Court is predestined in the long run . . . to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law and impersonal and durable principles for the interpretation of statutes and the resolution of difficult issues of decisional law.[228]

Neither logic, nor experience, but "reason is the life of the law."[229] Reason demands the articulation and development of those principles which maintain the integrity and the workability of the legal system as a whole.[230] Never before had the process perspective been expounded in such a strident fashion. Thurman Arnold dismissed Hart's *Foreword* as complacent, Ivory Tower bunkum, a collection of "pompous generalizations dropped on the Court from the heights of Olympus."[231] There can be no such thing as a maturing of collective judicial thought, Arnold insisted, because judges, of necessity, differ in their thoughts.[232] To assume otherwise is to demonstrate "an ignorance of the rules of elementary psychology."[233] Dean Griswold was quick to jump to his colleague's defense. "[M]any times," he confessed, "clearly held views of mine have been radically changed by discussions with associates or colleagues. . . . To me 'the maturing of collective thought' is a profound reality."[234] This assertion supported rather than refuted Arnold's point, because Griswold had identified

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227 Hart, *supra* note 12, at 100.

228 *Id.* at 99.

229 *Id.* at 125.

230 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402 (1958).

231 Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1299 (1958).

232 *Id.* at 1312.

233 *Id.* at 1313.

234 Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 85 (1960).

not the maturing of collective thought, but the maturing of his own thought.

In fact, the question of whether or not thought can ever be said to mature collectively was a fairly trivial one. There were other, more fundamental problems which needed to be resolved. The meaning and the import of "principle" within the process tradition remained ambiguous, as also did the concept of "process" itself. Certain process writers focused on "the legal process," arguing, for example, that within that process, "each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make."[235] Others were concerned not with the general theme of institutional competence, but specifically with the idea that a Supreme Court decision ought, in a democracy, to be based on a "process of reasoning."[236] Thus it was that, within the process tradition as it evolved in the 1950s, the term process acquired a dual meaning. This in itself ensured that the ideology of process jurisprudence remained indistinct. Certainly, process jurisprudence was prodemocratic. The work of Bickel and Wellington had demonstrated that much. Since, however, process was an imprecise, protean concept, it seemed difficult if not actually impossible to demonstrate how process jurisprudence was rooted in democratic thought. Elaborating the democratic character of process jurisprudence demanded a more considered analysis of the concept of process. That analysis came, in the late 1950s, in the form of Hart and Sacks's *The Legal Process*, a text which deserves careful analysis. Before we turn our attention to that text, however, it is worth considering the manner in which, in American political science during the middle period of this century, process became a central theme of democratic theory.

V. PROCESS AND POLITICAL SCIENCE

It is often said that, in the years following the United States' entry into the Second World War, American social thought underwent a profound transformation. By the late 1930s, the reality of liberal democracy clearly contradicted the expectations of liberal democratic theory.[237] The time was ripe for the emergence of a new type of the-

235 Hart, *supra* note 230, at 426; *see generally* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 13-14 (1974).

236 Bickel & Wellington, *supra* note 212, at 18.

237 *See generally* PURCELL, *supra* note 39, at 235-66. A good illustration of the mid-century crisis of democratic thought may be found in a series of articles, stressing the need of a more credible theory of democracy, written by successive presidents of the American Political Science Association. *See* William Anderson, *The Role of Political Science*, 37 AM. POL. SCI. REV. 1 (1943); Robert C. Brooks, *Reflections on the "World Revolution" of 1940*, 35 AM. POL.

ory, one which would at once affirm the status quo and revive confidence in liberal democratic values. Faith in rational consensus was a primary feature of this new type of theory. Generally resistant to calls for widespread economic and social change, social theorists of the postwar era placed little emphasis on economic and social inequalities and highlighted instead the democratic values of freedom, toleration, and above all, the idea that where social conflict surfaces, the institutional framework of American society will always accommodate a "reasonable" compromise.[238]

This "rhetoric of reasonableness," as one commentator has called it,[239] reinforced an image of the United States which, in truth, belonged to the previous century. "I do not think that it is as easy as is supposed," de Tocqueville wrote in 1839, "to uproot the prejudices of a democratic people, to change its belief, to supersede principles once established by new principles in religion, politics, and morals."[240] American democracy, he observed, demands shared experience, received wisdoms, and "a settled order of things."[241] Many mid-twentieth century social theorists were offering essentially the same observation that, despite differences of opinion on particulars, there existed a broad agreement that postwar America enjoyed social stability owing to widespread political and cultural consensus. These social theorists, as Edward Purcell has explained,

> viewed the consensus as morally good. If Americans did enjoy such cultural agreement and if it was the basis of the nation's democratic tradition, then its rejection courted destruction of democracy. Political action that was to be both rational and effective had to be carried out within the terms of that cultural agreement.[242]

Not only did postwar social theory emphasize consensus, it suggested also that any opposition to that consensus must be unreasonable and

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SCI. REV. 1 (1941); Robert E. Cushman, *Civil Liberty After the War*, 38 AM. POL. SCI. REV. 1 (1944); Clarence A. Dykstra, *The Quest for Responsibility*, 33 AM. POL. SCI. REV. 1, 25 (1939); Frederick Ogg, *American Democracy—After War*, 36 AM. POL. SCI. REV. 1 (1942).

238 *See* PURCELL, *supra* note 39, at 254-55.

239 MICHAEL P. ROGIN, THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER 278 (1967).

> To argue that discussion can resolve all differences, in an apparent spirit of tolerance and democracy, implies that no legitimate conflict of interest or opinion exists. Those who seek to organize and exert pressure in opposition to those with power then become illegitimate. . . . The rhetoric of reasonableness, whether employed by group leaders, national politicians, or liberal intellectuals, can too easily be turned against thoroughgoing political opposition.

Id.

240 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257-58 (1990).

241 *Id.* at 262.

242 PURCELL, *supra* note 39, at 256.

thus politically illegitimate.[243] In essence, faith in rational consensus entailed a commitment to liberal democracy as the only viable political ideal.[244]

The vocabulary of process featured significantly in the development of the rational consensus perspective. Not that process had previously been a concept alien to American social thought. As early as 1908, in *The Process of Government*, Arthur Bentley wrote:

> [I]n government we have to do with powerful group pressures which may perhaps at times adjust themselves through differentiated reasoning processes, but which adjust themselves likewise through many other processes, and which, through whatever processes they are working, from the very flesh and blood of all that is happening. It is these group pressures, indeed, that not only make but also maintain in value the very standards of justice, truth, or what not that reason may claim to use as its guides.[245]

For Bentley, group pressure, rather than processes of reasoning, is the key to understanding political reality. To chart the role of group pressure within the governmental process is to demonstrate that politics is founded on power rather than on reason. "When the groups are adequately stated, everything is stated."[246] Reason, in contrast, is but "soul stuff."[247] and as such is impossible to study empirically. This rejection of reason as the touchstone of political reality impressed many political scientists of the Progressive era.[248] By the 1940s, however, it was becoming clear that the Bentley-inspired approach to the study of political power was seriously inadequate. By denying the validity of reason within politics, Bentley and those who followed in his footsteps were in effect suggesting that the governmental process may legitimately be influenced by groups pressing for the implementation of "irrational," anti-democratic policies. The equation of political reality with group power, furthermore, implied that the governmental process is open to legitimate domination by one group, or by a collection of groups which share the same political

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243 *See id.* at 257; ROGIN, *supra* note 239, at 278.

244 *See* PURCELL, *supra* note 39, at 258 ("Rationality meant that all 'ideologies' were mythical and had to be abandoned.").

245 ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES 447 (1908).

246 *Id.* at 208.

247 *Id.* at 176.

248 *See, e.g.*, CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927); WALTER LIPPMANN, THE PHANTOM PUBLIC (1930); *see generally* RAYMOND SIEDELMAN, DISENCHANTED REALISTS: POLITICAL SCIENCE AND THE AMERICAN CRISIS, 1884-1984, at 60-100 (1985).

perspective. Bentley's account of the American governmental process had failed to capture its essentially democratic nature. The question of how political power is exerted within a system of democracy remained, in effect, unanswered.

In attempting to answer this question, political scientists of the 1940s gradually moved away from the group pressure perspective as advocated by Bentley and his followers. They nevertheless kept faith with the idea that the struggle to exert power is at the heart of the political process. This did not mark an immediate reinstatement of reason in political science. In *Politics, Parties, and Pressure Groups*, first published in 1942, V.O. Key argued that the function of the major political parties in the United States is not primarily to provide voters with a choice at the polls, but to mediate between the claims of competing interest groups within the political system. Governmental action, he insisted, is determined by pressure group power, not by popular will; indeed, the electorate does little more than determine who should fill a particular office.[249] This vision of the American governmental process seems no less bleak than that presented by Bentley. Unlike Bentley, however, Key regarded the American governmental process as the embodiment of democratic norms and values. While the impact of elections on governmental activity may be minimal, he argued, "these occasional interventions of the electorate into the direction of government are in a sense the characteristic that differentiates democracies from other forms of government."[250] Within a democracy, citizens at least have the right to choose their government, even if they cannot determine governmental policy.

This argument was developed rather more emphatically by the Harvard professor of economics, Joseph Schumpeter. In *Capitalism, Socialism and Democracy*, another political science text which appeared in 1942, Schumpeter argued that "[t]he principle of democracy . . . merely means that the reins of government should be handed to those who command more support than do any of the competing individuals or teams."[251] "[T]he democratic method," he insisted, "is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[252] Although a democracy cannot function satisfactorily unless the bulk of the population agrees on the fundamentals of the existing institutional structure, it is nonetheless

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249 *See* V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 256 (1942).

250 V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 637 (2d ed. 1947).

251 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 273 (1942).

252 *Id.* at 269.

incorrect to assume that democratic government must reflect some abstract, "rational will" of the people.[253] The simple fact is that there is no such rational will: political opinions are formed not rationally, but by advertising, "sloganeering," and other manipulative techniques.[254] It is for this reason that the political system of a democratic society resembles a free-enterprise system, in which pressure groups compete to manipulate political opinion by promoting their own causes and advancing the interests of their supporters.[255] For Schumpeter, the absence of rationality from the governmental process does not undermine but rather affirms its democratic character, for it ensures that elites must compete for power within the electoral framework.[256]

By the following decade, political scientists were beginning to build on Schumpeter's theory of the democratic political process. In doing so, however, certain of them promoted the very interconnection of reason and politics which Schumpeter himself had eschewed. In *The Governmental Process*, published in 1951, David Truman, a professor of government at Columbia University, cited Bentley rather than Schumpeter as his principal inspiration.[257] Like Bentley, he considered the role of interest groups to be the key to understanding governmental activity. Yet there is a sense in which his work could hardly have been further distanced from Bentley's. For Truman, the key to understanding the governmental process rests in the interaction among interest groups. Such groups tend to regulate one another because their memberships often overlap, and also because they subscribe to the same basic democratic standards, attitudes and beliefs—what Truman terms the "rules of the game."[258]

> [T]he "rules of the game" are interests the serious disturbance of which will result in organized interaction and the assertion of fairly explicit claims for conformity. In the American system the "rules" would include the value generally attached to the dignity of the individual human being, loosely expressed in terms of "fair deal-

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[253] *Id.* at 301.

[254] *Id.* at 250-64.

[255] *See id.* at 282; *but cf.* David M. Ricci, *Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought*, 32 J. POL. 239, 256-58 (1970).

[256] *See generally* Gottfried Haberler, *Schumpeter's Capitalism, Socialism and Democracy after Forty Years*, *in* SCHUMPETER'S VISION: CAPITALISM, SOCIALISM AND DEMOCRACY AFTER FORTY YEARS 69 (1981).

[257] DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION at ix (1951). Truman's own work was inspirational to a later generation of political scientists. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969); *see generally* Darryl Basken, *American Pluralism: Theory, Practice, and Ideology*, 32 J. POL. 71 (1970).

[258] TRUMAN, *supra* note 257, at 159.

> ing" or more explicitly verbalized in formulations such as the Bill of Rights . . . . Violation of the rules of the game normally will weaken a group's cohesion, reduce its status in the community, and expose it to the claims of other groups.[259]

The prevalence of overlapping membership and general respect for the "rules of the game" thus requires interest groups to share the same standards of restraint and institutional competence. This requirement, furthermore, guarantees a general political consensus. As Truman explains:

> [M]ultiple memberships in potential groups based on widely held and accepted interests . . . serve as a balance wheel in a going political system like that of the United States. . . . Without the notion of multiple memberships in potential groups it is literally impossible to account for the existence of a viable polity such as that in the United States or to develop a coherent conception of the political process.[260]

It is in this way that Truman commits himself to the postwar rational consensus perspective. In essence, he argues, the governmental process of the Unites States is comprised of a collection of elites which—because they overlap in membership and share the same broad procedural norms—promote political consensus rather than tension. The assumption is that consensus will be shared by all reasonable people. Thus it is that Bentley's "soul stuff" is reintroduced into American political science:

> [Truman's] argument is based on the tacit assumption that reasonable men agree on what constitute the fundamental procedures of democracy. In the abstract the assumption is tenable, but it is considerably less so when procedure is entangled in substantive issues which are deeply controversial. . . . Consensus on the meaning and scope of freedom of speech . . . is inevitably transformed into sharp disagreement when this right is exercised by the Communist, the bigot, the bookseller of obscene material, the picket, or the employer speaking to a captive labor audience. . . . So it is with most procedural rules; they cannot be extricated from the substantive interests and values with which they interact without being disembodied of their essential meaning.[261]

Since he treats the governmental process as a collection of elites bound together by overlapping membership and by a "rational" respect for the same procedural norms, Truman is unable to explain

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259 *Id.* at 512-13.

260 *Id.* at 514.

261 PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE 52-53 (1967).

how elites themselves might be kept within constitutional bounds. He has no answer, as he puts it, "to the ancient question: *quis custodiet ipsos custodes*?"[262] It is enough, for him, that the consensus which exists among elites upholds the democratic system. Other social theorists of the period were decidedly less sanguine. C. Wright Mills, for example, was of the view that the American elite structure obstructs rather than promotes real democracy.[263] Certainly the "consensus of elites" perspective on the governmental process was in need of elaboration. That elaboration came in 1956, in the form of Robert Dahl's, *A Preface to Democratic Theory*. Building on the insights of Bentley, Schumpeter, and Truman, Dahl contends that power in the United States is held by a plurality of competing interest groups.[264] No one group enjoys a monopoly of control; indeed, the governmental process is characterized by neither majority nor minority rule, but by "minorities rule."[265] Competition among a wide variety of interest groups, all of which are in a "minor" (i.e., non-advantaged) position within the governmental process, is the defining characteristic of American democracy. Indeed, the distinction between "democracy (polyarchy)" and "dictatorship," according to Dahl, is the distinction "between government by minority and government by minorities. As compared with the political processes of a dictatorship, the characteristics of polyarchy greatly extend the number, size, and diversity of the minorities whose preferences will influence the outcome of governmental decisions."[266]

By introducing the concept of "minorities rule" into interest group theory, Dahl highlights the problems which his forebears had failed to solve. Like Schumpeter and Truman, he regards democratic government to be an essentially self-regulatory process, the competition among interest groups serving as a form of internal constraint. The fact that competing groups may find themselves in conflict is accorded no real significance. "Constitutional rules" may "help to determine what particular groups are to be given advantages or handicaps in the political struggle,"[267] but "in so far as there is any general protection in human society against the deprivation by one group of the freedom desired by another, it is probably not to be found in constitutional forms."[268] More likely, Dahl argues, it is to be found in

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262 TRUMAN, *supra* note 257, at 535.

263 C. WRIGHT MILLS, THE POWER ELITE 3 (1956).

264 ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 131 (1956).

265 *Id.* at 132.

266 *Id.* at 133.

267 *Id.* at 137.

268 *Id.* at 134.

the American political system itself; for it is "a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision."[269] Even the Supreme Court reflects and promotes the values of this system. "To consider the Supreme Court of the United States strictly as a legal institution," Dahl claimed in 1957, "is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy."[270] Law, quite simply, must be seen to be at the service of politics.

In claiming as much, Dahl is not endeavoring to be contentious. For, like Truman, he regards the democratic system to be founded on a consensus of political beliefs.

> Without such a consensus no democratic system would long survive the endless irritations and frustrations of elections and party competition. With such a consensus the disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement.[271]

The foundation of the democratic system in consensus ensures, in other words, that it is able to accommodate and provide solutions for all social problems. Again like Truman, Dahl considers the political consensus on which democracy is founded to be a rational consensus. "[T]he chances are," he observed in 1961, "that anyone who advocates extensive changes in the prevailing democratic norms is likely to be treated . . . as an outsider, possibly even as a crackpot whose views need not be seriously debated."[272]

The message which Dahl was promoting—that the United States is blessed with a well nigh perfect liberal democratic system,[273] a system which political scientists must do their utmost to perpetuate[274]—was by no means unique to him. It was the basic message of

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269 *Id.* at 137.

270 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957).

271 DAHL, *supra* note 264, at 132-33.

272 ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 320 (1961) [hereinafter WHO GOVERNS?]. More recently, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 8-9 (1989).

273 "[T]he common view seems to be that our system is not only democratic but is perhaps the most perfect expression of democracy that exists anywhere." WHO GOVERNS?, *supra* note 272, at 316.

274 "[E]ven if universal belief in a democratic creed does not guarantee the stability of a democratic system, a substantial decline in the popular consensus would greatly increase the chance of serious instability." *Id.* at 325.

postwar, rational consensus theory. "[D]emocracy is vastly more unified in America,"[275] wrote the Harvard historian Louis Hartz, reflecting on the rise of the democratic idea in Europe. "We have made the Enlightenment work in spite of itself.... We have implemented popular government, democratic judgment, and the equal state on a scale that is remarkable by any earthly standard. There are problems here, but no 'crisis,' no question of 'survival.' "[276] The only major problem of American democracy, Hans Morgenthau reflected, concerned its promotion abroad. "How can the area of equality in freedom be expanded beyond the territorial limits of the United States? How can equality in freedom be offered to the world as a model to emulate? The answer," he suggested, demands "the opening of a new cultural frontier" within which American democracy may serve "as a model of equality for the nations emerging from colonial and semi-colonial status, and as a model of freedom for the nations living under autocratic rule ...."[277] "For if America is the bizarre fulfillment of liberalism, do not people everywhere rely upon it for the retention of what is best in that tradition?"[278]

Just as social theorists were celebrating the maturity and potential universality of the American democratic ethos, so too they were celebrating the exhaustion of "ideology." "The ideologist—Communist, existentialist, religionist—wants to live at some extreme,"[279] wrote Daniel Bell in 1957,

> and criticizes the ordinary man for failing to live at the level of grandeur. One can try to do so if there is the genuine possibility that the next moment could be actually, a "transforming moment" when salvation or revolution or genuine passion could be achieved. But such chiliastic moments are illusions.[280]

By the end of the 1950s, intellectuals in the West had recognized the illusory nature of ideology. "The point is," Bell observed, "that ideol-

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275 Louis Hartz, *The Rise of the Democratic Idea*, *in* PATHS OF AMERICAN THOUGHT 37-39 (Arthur M. Schlesinger, Jr. & Morton White eds., 1963); *see also* John P. Roche, *American Liberty: An Examination of the "Tradition" of Freedom*, *in* ASPECTS OF LIBERTY: ESSAYS PRESENTED TO ROBERT E. CUSHMAN 129, 162 (Milton R. Konvitz & Clinton Rossiter eds., 1958) ("American liberty, in short, has become a positive goal of national public policy, rather than a fortuitous consequence of fragmentation, pluralism and social conflict.").

276 Louis Hartz, *Democracy: Image and Reality*, *in* DEMOCRACY IN THE MID-TWENTIETH CENTURY: PROBLEMS AND PROSPECTS 13, 29 (William N. Chambers & Robert H. Salisbury eds., 1960).

277 HANS J. MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS 300-01 (1960).

278 LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 308 (1955).

279 DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES 301 (1967).

280 *Id.*

ogists are 'terrible simplifiers.' Ideology makes it unnecessary for people to confront individual issues on their individual merits. One simply turns to the ideological vending machine, and out comes the prepared formulae. And when these beliefs are suffused by apocalyptic fervor, ideas become weapons, and with dreadful results."[281] "[T]he new generation," he concluded, "finds itself seeking new purposes within a framework of political society that has rejected, intellectually speaking, the old apocalyptic and chiliastic visions."[282]

Bell refrains from turning his observations on the exhaustion of ideology into an advertisement for American democracy.[283] It is clear, nevertheless, that he attributes the failure of ideology not only to utopianism but also to the resilience of the democratic political framework. Like Truman and Dahl, he argues that "[d]emocratic politics means bargaining between legitimate groups and the search for consensus."[284] And since democracy is rooted in the notion of consensus, ideology, whether illusory or not, has no useful role to play within the American political system. Ideology appeals to emotion.[285] Democracy, in contrast, being founded in consensus, demands reason. Thus, political scientists of the 1950s eschewed ideology and endeavored instead to demonstrate how American democracy is founded on a rational consensus of political beliefs. As Purcell has remarked, political science became oriented towards "working out efficient techniques for reaching those values upon which there was a broad consensus. The existing social structure was the criterion of political rationality."[286]

Postwar political scientists, then, in studying the process of democratic government, regarded American democracy as a rational phenomenon, the product of widespread rational consensus. For these so-called "process theorists,"[287] reason informs political activity in a democracy just as, for process jurists such as Bickel and Wellington, it informs, or certainly ought to inform, judicial activity in a democracy. Though they demonstrated it in different ways, political and legal process theorists of the 1950s shared the same basic faith in reason as the cornerstone of democracy.

Before returning to the matter of how that faith informed jurisprudence, it is worth considering briefly how it also found its way into

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281 *Id.* at 405.
282 *Id.* at 404.
283 *See id.* at 422.
284 *Id.* at 121.
285 *Id.* at 404.
286 PURCELL, *supra* note 39, at 258.
287 *See* Ricci, *supra* note 255, at 262-63.

the philosophy of John Rawls. For the early writings of Rawls demonstrate perhaps better than anything else how the rationalistic orientation of process jurisprudence was but a reflection of broader intellectual concerns. In his article, *Outline of a Decision Procedure for Ethics*, published in 1951, Rawls attempted to describe the essential characteristics of a rational—by which he means a principled—decision-making process. "[I]n ethics,"[288] he asserts,

> we are attempting to find reasonable principles which, when we are given a proposed line of conduct and the situation in which it is to be carried out and the relevant interests which it effects, will enable us to determine whether or not we ought to carry it out and hold it to be just and right.[289]

The determination of whether or not particular principles are reasonable and just demands that they be subjected to what Rawls terms a "process" of "explication."[290] A satisfactory explication of principles will demonstrate that, "if any competent man were to apply them intelligently and consistently to the same cases under review, his judgments, made systematically nonintuitive by the explicit and conscious use of the principles, would be . . . identical, case by case, with the considered judgments of [a] group of competent judges."[291] In this way, Rawls anticipates the concept of reasoned elaboration. "[A]n explication," he insists, "must be comprehensive,"[292] and "must be stated in the form of principles"[293] as opposed to rules.[294] The formulation of reasonable principles through the process of explication is essential, furthermore, to the "integrity"[295] of adjudication: that is, "a judgment in a particular case is evidenced to be rational by showing that, given the facts and the conflicting interests of this case, the judgment is capable of being explicated by a justifiable principle (or set of principles)."[296]

Rawls concludes his article by formulating, in a "provisionary" manner, "what are hoped to be satisfactory principles of justice."[297] By the late 1950s, he was able to formulate these principles in a less tentative fashion.[298] The two principles which he expounds—that

[288] John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 178 (1951).
[289] *Id.*
[290] *Id.* at 184.
[291] *Id.*
[292] *Id.* at 186.
[293] *Id.*
[294] *Id.* at 195.
[295] *Id.* at 182.
[296] *Id.* at 187.
[297] *Id.* at 191.
[298] *See* John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 165-66 (1958).

each person is to have an equal right to the most extensive liberty, compatible with a similar liberty for others, and that inequalities are to be arranged so that they might reasonably be expected to be to everyone's advantage and attach to positions and offices open to all—were, of course, to become central to modern liberal political philosophy.[299] What concerns us here, however, is not the unfolding of Rawls's theory of justice, but the fact that, in his early work, we can find the same interconnection between reason and principle which we find in process jurisprudence. Rawls too was arguing that official decision makers must clarify and elaborate the principles on which their decisions are based if they are to uphold the integrity and rationality of the adjudicative process. This is not to claim that process jurisprudence was inspired by Rawlsian philosophy, or vice versa. Rather, it is to reiterate the point that process jurisprudence was but an instance of a more general postwar intellectual tendency. Like Rawls—and indeed, to a lesser extent, like Truman and Dahl—process jurists were attempting to demonstrate that rationality inheres in the particular process being studied. Rationality of process, we might say, was an *idée force* of the postwar period.

VI. THE LEGAL PROCESS

It has been said often, by a variety of legal scholars, that Henry Hart and Albert Sacks's *The Legal Process* is the classic text of postwar process jurisprudence.[300] While such a statement is undoubtedly correct, it is also potentially misleading. For the manuscript is only part of the message: *The Legal Process* is not just a text but a course, a classroom experience. As Hart and Sacks state in the preface to their materials, its contents are intended to serve "[a]s vehicles of class discussion."[301] The course grew out of a seminar in Legislation which Hart began teaching at Harvard in the late 1930s.[302] Hart's "approach to the course extended beyond legislation to law-making generally; indeed, his principal early emphasis was on the law-making function of the courts."[303] In the academic year 1954-1955, in collaboration with Sacks, Hart began transforming this course into a much

299 *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 54-117 (1972).

300 *See, e.g.*, William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 962 (1989); John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 461 n.8 (1979).

301 THE LEGAL PROCESS, *supra* note 14, at v.

302 Memorandum from Albert M. Sacks to The Committee on Legal Education 1 (1958 or 1959) (on file with author). It should be noted that Hart was the "senior editor" of the *Legal Process* materials. *See* THE LEGAL PROCESS, *supra* note 14, at 111 n.2.

303 Sacks, *supra* note 302.

broader second-year elective survey course, initially entitled "The American Legal System"[304] and eventually retitled "The Legal Process: Basic Problems in the Making and Application of Law."[305] The course became the most popular second-year "perspective" course at the Harvard Law School.[306] "[F]or most Harvard students," wrote Martin Mayer in 1966, it is "the centerpiece of their programme."[307]

The popularity of *The Legal Process* was not confined to Harvard. In 1958, when the last version of the manuscript was compiled, six other American law schools adopted it for use.[308] Ten years later, it was being taught in some twenty-five schools besides Harvard.[309] To this day, there are law professors in the United States who run courses based on the *Legal Process* materials.[310] What makes this remarkable is the fact that, though Hart and Sacks considered publishing their manuscript,[311] they never did so. Indeed, they were very modest about its scope. "The essential method [of these materials],"[312] they wrote:

> is nothing more than an application of the method of teaching law first popularized by Christopher Columbus Langdell in the 1870s. The only difference is that Langdell's casebooks had nothing but concrete problems, and left the student to work out the implications for himself. In keeping with the general softness of the age,

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[304] *See* SELIGMAN, *supra* note 192, at 82.

[305] Precisely when Hart and Sacks's course became the "Legal Process" course I have been unable to ascertain. I know of one edition of the materials, in the possession of Dr. Nigel Simmonds of Corpus Christi College, Cambridge, which is dated 1957 and is some 200 pages shorter than the 1958 edition. What is clear is that Hart and Sacks anticipated producing further editions of the manuscript. *See* THE LEGAL PROCESS, *supra* note 14, at 1037.

[306] *See* KALMAN, *supra* note 33, at 224; SELIGMAN, *supra* note 192, at 82.

[307] MARTIN MAYER, THE LAWYERS 88 (1966).

[308] Sacks, *supra* note 302, at 1.

[309] Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 725 n.74 (1968).

[310] Letter from Peter Teachout, Professor of Law, Vermont Law School, to Neil Duxbury, Faculty of Law, University of Manchester (July 22, 1992) (on file with author) ("I . . . still offer a course based on the Hart and Sacks materials. It's always interesting to me the extent to which today's students still respond very positively to these materials and to the course . . . . The course seems to offer an education that students find of enduring relevance.").

[311] Sacks, *supra* note 302, at 1 ("We are now in the course of a revision of these materials that can be sent to the Foundation Press."). Sacks appears to have toyed with the idea of publishing a version of *The Legal Process* almost up until the end of his life. *See* Norman Dorsen, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 11, 13 n.12 (1991). Publication of the materials is still not an impossibility. Two American law professors, William Eskridge and Philip Frickey, have volunteered to edit the materials with a view to publication. The Foundation Press, the estates of Hart and Sacks, and the Harvard Law School are apparently amenable to this idea. *See* Letter from William N. Eskridge, Jr. to Neil Duxbury, Faculty of Law, University of Manchester (Nov. 1, 1992) (on file with author).

[312] THE LEGAL PROCESS, *supra* note 14, at v.

these materials try to give the student a lift on his job.[313]

The difference to which Hart and Sacks pointed was in fact more significant than they assumed. With the proliferation of so-called "Cases and Materials" texts in the 1930s, legal instruction in the United States came gradually to center less on specific cases and more on general legal problems. As Karl Llewellyn wrote in the introduction to his casebook of 1930, "the focus of law study is the problem situation, not the illustrative case."[314] By the following decade, American lawyers were distinguishing the traditional Langdellian case method from the "problem method." "Problems can be assigned in connection with casebook study," wrote David Cavers in 1943. "Discussion in class can be centered on the problems and the cases introduced as they become relevant to the problems under discussion."[315] Cavers observed also, however, that although certain realists espoused the problem method, they failed to embrace it. "[T]he Realists have fitted their aspirations into the framework of the casebook system."[316] Emphasis on cases rather than on problems remained their priority. This is evident from a classic realist text such as Wesley Sturges's *Cases and Materials on the Law of Credit Transactions*, in which specific doctrinal problems are illustrated in the main through the comparison of apparently contradictory judicial decisions.[317] In *The Legal Process*, by contrast, specific cases are used to illustrate general problems concerning law creation and application.[318] Hart and Sacks were attempting to invoke the pedagogic strategy which realism had only promised.

This is not the only way in which *The Legal Process* constitutes a response to the failures of realist legal thought. Hart and Sacks heard and heeded the basic realist message that law is "a pervasive aspect of social science."[319] But they "reject the teaching of [that] vast body of literature which has accumulated during the last half century seeking to equate the methods of the various social sciences, and in particular of law, with the method of the natural sciences."[320] Following Fuller,

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313 *Id.* at v-vi.

314 KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES at xviii (1930).

315 David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 456 (1943).

316 *Id.* at 453.

317 *See* WESLEY A. STURGES, CASES AND MATERIALS ON THE LAW OF CREDIT TRANSACTIONS 29 (4th ed. 1955).

318 *See* THE LEGAL PROCESS, *supra* note 14 *passim*; *see also* SELIGMAN, *supra* note 192, at 82.

319 THE LEGAL PROCESS, *supra* note 14, at 2, 198.

320 *Id.* at 116.

they argue that, in equating social science with natural science, so-called realists

> have tried to construct a science of society and of law based scrupulously upon the "isness" of people's behavior—of the behavior of judges, legislators, and other public officials as well as of ordinary private citizens—while at the same time rigorously separating questions of how people ought to behave.[321]

Conceived as a social science, law, they insist, is a normative—or, more precisely, a purposive—process.[322]

This assertion rests at the core of Hart and Sacks's jurisprudence. "[T]he ultimate test of the goodness or badness of every institutional procedure and of every arrangement which grows out of such a procedure," they argue, "is whether or not it helps to further th[e] purpose" of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man."[323] Since "societies are made up of human beings striving to satisfy their respective wants under conditions of interdependence,"[324] the basic purpose of legal institutions is to "maximiz[e] the total satisfactions of valid human wants."[325] The American constitutional framework is fundamental to the realization of this purpose: "The Constitution of the United States and the various state constitutions commit American society, as a formal matter, to . . . the objective of maximizing the total satisfactions of human wants."[326] Thus it is that, although Hart and Sacks frame their purposive perspective on law in normative terms—as a matter, that is, of what the primary objective of legal institutions ought to be—they are in fact attempting to explain what law actually is. They are arguing not that American legal institutions ought to, but that they do, pursue the goal of maximization. "Almost every, if not every, institutional system gives at least lip service to the goal of maximizing valid satisfactions for its members generally."[327] The desirability of maximizing the satisfaction of valid human wants is considered, accordingly, to be a matter of rational consensus, an "entirely objective fact."[328]

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321 *Id.* at 117.

322 *Id.* at iii ("law as an on-going, functioning, purposive process").

323 *Id.* at 110-11.

324 *Id.* at 4.

325 *Id.* at 114.

326 *Id.*

327 *Id.* at 115.

328 *Id.* at 111. On the consensus-oriented nature of Hart and Sacks's jurisprudence, see also G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1027 (1972); G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J.

The legal process, then, is committed to the goal of maximization. This, for Hart and Sacks, is a matter beyond debate.[329] What is for debate, however, is the question of how the legal process might best pursue this goal.

> For if human life and the forms of social organization are concerned essentially with the purposive pursuit of human ends . . . [m]ust [the decision maker] not inevitably, at least with problems of any novelty, make a choice among the possible purposes to be pursued and the possible ways of accomplishing them? And how can the observer of decisions understand the actions of the decision-maker unless he takes account of these choices and tries to appraise their soundness?[330]

It is in this way that Hart and Sacks set out their jurisprudential stall. Realist jurisprudence had emphasized the indeterminate, unprincipled nature of judicial decision making. Fuller and various other process jurists of the 1940s and 1950s regarded adjudication as a peculiar type of institutional activity, an activity which, if it is to command respect, must be based in reason, and which, if it is to be based in reason, must be principled. Between the two jurisprudential traditions, preoccupation with the common law prevailed. Neither legal realism nor process jurisprudence had attempted to grapple with, among other things, legislation and administrative regulation. This is where Hart and Sacks broke decisively from the past. Adjudication, they recognized, is but one form of institutional activity within the legal process. Sometimes, within that process, legislatures, administrative agencies, arbitrators, even private parties themselves, may be better suited than the courts to deal with particular disputes. When considering disputes, the basic question which the lawyer must ask is, "what kind of settlement will serve best to prevent the recurrence of similar controversies in the future?"[331] One of the central aims of process jurisprudence is to train lawyers to be able satisfactorily to answer this question.[332]

It is to this end that Hart and Sacks develop a variation on the concept of institutional competence which first surfaced in the work

819, 829 (1986). There are indications in *The Legal Process* that Hart and Sacks were aware of certain postwar rational consensus theories. *See* THE LEGAL PROCESS, *supra* note 14, at 739 (referring to TRUMAN, *supra* note 257, at 346-50). It is clear, furthermore, that their primary jurisprudential inspiration, Lon Fuller, was familiar with the work of Robert Dahl. *See* Fuller, *supra* note 140, at 480.

329 *See* THE LEGAL PROCESS, *supra* note 14, at 111.

330 *Id.* at 117-18.

331 *Id.* at 16.

332 *See id.* at 869.

of Fuller.[333] "[T]he central idea of law," they contend, is "the principle of institutional settlement."[334] "That principle requires that a decision which is the due result of duly established procedures be accepted whether it is right or wrong, at least for the time being."[335] The task of legal education is to enable students to recognize which procedures ought to apply to which problems. "In relation to every one of the concrete problems which are posed [in these materials]," they claim, "it will be relevant to ask: what is the nature of the knowledge which is useful in solving this problem, and how could more useful knowledge be secured?"[336] Such discernment is the prerequisite of legal expertise, imagination, and craft.[337] "Lawyers . . . have again and again to consider whether to invoke the procedures of private or of judicial settlement or, often alternatively, of legislative or administrative settlement."[338] The ability of legal professionals to discern which institutions are suited to which types of settlement is necessary for the maintenance of "an efficient legal system"[339] and for "rationalizing the fabric of its law as a whole."[340]

> The lawyer's business in any given institutional system is to help in seeing that the principle of institutional settlement operates not merely as a principle of necessity but as a principle of justice. This means attention to the constant improvement of all of the procedures which depend upon the principle in the effort to assure that they yield decisions which are not merely preferable to the chaos of no decision but are calculated as well as may be affirmatively to advance the larger purposes of the society.[341]

One of the primary institutional distinctions to be highlighted, according to Hart and Sacks, is that which exists between public and private government. "[I]n pursuit of the ultimate goal of maximizing the satisfactions of valid human wants, the law finds many a tool besides force that suits its purpose,"[342] for "there are other ways than the way of coercion to control a society."[343] The state may, for example, adopt a "hands-off" strategy so that the resolution of a particular

333 This concept is sometimes mistakenly attributed to Hart and Sacks. *See, e.g.*, Patrick Macklem, *Of Texts and Democratic Narratives*, 41 U. TORONTO L.J. 114, 142 (1991).

334 THE LEGAL PROCESS, *supra* note 14, at 4.

335 *Id.* at 119.

336 *Id.* at 120.

337 *Id.* at 200.

338 *Id.* at iii.

339 *Id.* at 230.

340 *Id.* at 105.

341 *Id.* at 6.

342 *Id.* at 881.

343 *Id.* at 134.

problem is left to the process of private ordering.[344] Indeed, private ordering, the use of "self-applying regulation"[345] by private individuals in the government of their own activities, is the principal method of social control in a democratic society. "Overwhelmingly the greater part of the general body of the law is self-applying, including almost the whole of the law of contracts, torts, property, crimes, and the like. Under such a scheme of control, only the trouble cases come before officials, and these only after the event. . . ."[346] The prevalence of private ordering, for Hart and Sacks, is the sign of an efficient legal system: "[a]lmost every scheme of individualized regulation includes some self-applying elements. Again and again, efficient administration suggests the desirability of maximizing these elements."[347] Public regulation of private activity ought, accordingly, to be permitted only where the processes of private ordering are found wanting.[348] It is in this way that Hart and Sacks commit themselves to a form of utilitarian laissez-faire liberalism which they consider to be integral to the American polity.

> Basic in the American system is the assumption that every normal person counts one in determining the objectives of primary control. . . . Basic also, in the structure of this system, is the reflection of this assumption in the equal distribution of personal capacity to be [the] subject of primary liberties, duties, and powers, and to exercise rights of action and defend actions in vindication of them . . . .
>
> Given these basic equalities, it follows that every normal member of the society has the same personal capacity to exercise private powers, and thereby to command the backing of society for his own personal arrangements. Every such member has the same personal capacity to be the subject of duties and to exercise liberties. In principle, every such member is supposed to have the same personal capacity in the political processes of the system, both as a potential office holder and as a unit, counting one, in the ultimate institutional procedure of the election.[349]

Individuals, then, enjoy basic equalities and liberties which ought generally to be left unfettered by public control. For it is precisely these equalities and liberties which facilitate the goal of maximizing the satisfaction of valid human wants. Hart and Sacks recognize that, with

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344 *Id.* at 870-71.
345 *Id.* at 134.
346 *Id.* at 133.
347 *Id.* at 872.
348 *See id.* at 184, 213, 289, 300, 406, 533.
349 *Id.* at 309.

regard to "questions of equality of economic opportunity,"[350] the freedom of the individual to satisfy his or her wants may suffer "under the discipline of a market" which is biased towards other buyers and sellers potentially able to offer more favorable terms.[351] They insist, however, that this constraint on personal freedom operates only in the economic domain.[352] Thus, one of the major arguments of realist jurisprudence—that the freedom of the individual is a freedom to try to limit the similar freedoms of other individuals[353]—is reduced to a minor academic insight. Realism, very simply, is assumed to reveal remarkably little about the legal world.

This assumption emerges more clearly in Hart and Sacks's analysis of the courts and the legislature as distinct legal institutions. One of the questions which recurs most frequently in *The Legal Process* is that of whether particular legal problems are to be resolved within the common law or the legislative framework.[354] "[A] sound theory of the distribution of institutional responsibility as between the courts and the legislature"[355] demands the recognition that each must refrain from trying to perform functions for which it is not competent.[356] "Sound legislation"—or "wise legislation," as Hart and Sacks sometimes call it[357]—must be "the product of a sound process of enactment."[358] This process

> ought to be an *informed process*, in the sense that key decisions are not made until relevant information has been acquired. It ought to be a *deliberative process*, in the sense that key decisions are not made until there has been a full interchange of views and arguments among those making the decisions. And it ought to be an *efficient process*, in the sense that all legislative proposals ought to be disposed of in the time available, with the more significant ones receiving proportionately more time.[359]

Since, however, the interpretation of legislation is a primary function of the courts,[360] it is in the courts that the test of soundness is especially important.

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[350] *Id.*

[351] *See id.* at 207.

[352] *Id.* at 309.

[353] *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

[354] *See, e.g.*, THE LEGAL PROCESS, *supra* note 14, at iv, 10, 105, 407, 487, 515, 535, 603.

[355] *Id.* at 515.

[356] *See id.* at 386, 403.

[357] *Id.* at 834.

[358] *Id.* at 715.

[359] *Id.* at 715-16.

[360] *Id.* at 140.

Hart and Sacks purport to favor neither common law nor legislation,[361] yet they seem to display a peculiar preference for the judicial decision. Whereas courts create law, legislatures create policy.[362] If the courts function properly, furthermore, a good deal of policy need not be enacted.[363] Indeed, courts are to be criticized when they "pass the buck to the legislature and avoid taking an open and honest responsibility of their own for the growth of the law."[364] But what does it mean to say that a court is not functioning properly or is shirking its responsibility to maintain the growth of the law? What is the appropriate test here? Over and over again, Hart and Sacks propose the test unequivocally. When considering a judicial opinion or the decision of a court, the question to be asked is: "Is it sound?"[365] This test is not one of procedural soundness, as it is with legislation. Rather, it concerns "soundness of . . . reasoning."[366] "[S]ound grounds"[367] of decision are "reasoned grounds of decision."[368] Such grounds are essential to "the integrity . . . of the judicial function in the legal system,"[369] for it is only through the development of sound reasoning that a decision might turn out to be "*the* right answer"[370] to a particular legal problem.

So, what makes a judicial decision sound? In answering this question, Hart and Sacks develop certain of the basic themes of process jurisprudence which had already been put into play by Fuller and

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361 *Id.* at 536. ("[T]he determination of whether legislatively-developed law in the form of an enactment is to be preferred to judicially-developed law in the form of reasoned grounds of decision is inherently discretionary.").

362 *Id.* at iv.

363 *See id.* at 817.

364 *Id.* at 488.

365 *Id. passim*. The criterion of soundness features prominently not only in Hart and Sacks's *Legal Process* materials, but also in their examination questions. As examples, consider: Henry M. Hart & Albert M. Sacks, *The American Legal System: Processes of Law Making (1st Semester), in* EXAMINATIONS OF THE LAW SCHOOL OF HARVARD UNIVERSITY 1956-57, at 29, 35 (1957) (Problem III: "Comment on the soundness of the result reached and the interpretive technique employed by the majority"); Henry M. Hart & Albert M. Sacks, *The Legal Process (1st Semester), in* EXAMINATIONS OF THE LAW SCHOOL OF HARVARD UNIVERSITY 1958-59, at 35, 39 (1959) (Problem IV: "Comment on the soundness of the interpretive techniques employed in the following decision"); Henry M. Hart & Albert M. Sacks, *The Legal Process (1st Semester), in* EXAMINATIONS OF THE LAW SCHOOL OF HARVARD UNIVERSITY 1959-60, at 31, 33, 38 (1960); Henry M. Hart & Albert M. Sacks, *The Legal Process (A) (Jan. 11, 1972), in* EXAMINATIONS OF THE LAW SCHOOL OF HARVARD UNIVERSITY 1971-72, at 275, 280 (1972) (Problem III: "Discuss the soundness of the Court's holding and reasoning").

366 THE LEGAL PROCESS, *supra* note 14, at 247, 585.

367 *Id.* at 606.

368 *Id.* at 871.

369 *Id.* at 617.

370 *Id.* at 168 (italics in original).

other process writers of the 1940s and 1950s. They begin by observing that rules are but one form of legal directive. "Many legal arrangements cannot feasibly be cast in the form of a rule, however inchoate. And often another form is deliberately chosen as preferable .... This provision is of the type commonly known as a standard."[371] Standards are legal directives which entail a qualitative or moral appraisal of human behavior by reference to supposedly ideal behavior in a comparable situation. Thus it is that, within a legal system, there exist general standards of recklessness, due care, and the like. Such standards may be rendered more specific—for example, due care may be defined as "that care which a reasonably prudent person, with opportunities and capacities for observation of the actor, would have exercised in a like situation"—so as to give them "the form and precision of a rule."[372] Even taken together, however, rules and standards do not constitute "the whole framework of legal arrangements in an organized society. Notably, to be contrasted with rules and standards are principles and policies."[373]

> Principles and policies are closely related, and for many purposes need not be distinguished from each other. A *policy* is simply a statement of objective. *E.g.*, full employment, the promotion of the practice or procedure of collective bargaining, national security, conservation of natural resources, etc., etc., etc. A *principle* also describes a result to be achieved. But it differs in that it asserts that the result *ought* to be achieved and includes, either expressly or by reference to well understood bodies of thought, a statement of *the reasons why* it should be achieved. *E.g.*, *pacta sunt servanda*—agreements should be observed; no person should be unjustly enriched; etc., etc.[374]

"Primarily, principles and policies are used and useful as guides to the exercise of a trained and responsible discretion."[375] The judicial use of principles, however—given their normative nature and their foundation in reason—demands more than just discretion; it demands also "the power of reasoned elaboration."[376] This means, first of all, that the judge "is obliged to resolve the issue before him on the assumption that the answer will be the same in all like cases" and, secondly, that, where statutory interpretation is necessary, he must "relate his decision in some reasoned fashion to the . . . statute out of which the

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[371] *Id.* at 157.
[372] *Id.* at 157-58.
[373] *Id.* at 159.
[374] *Id.*
[375] *Id.* at 160.
[376] *Id.* at 161.

question arises. He is not to think of himself as in the same position as a legislator taking part in the enactment of the statute in the first place."[377] Reasoned elaboration thus determines "the permitted scope of discretion."[378] While policy may influence judge-made law and statutory law alike, the former, unlike the latter, is guided by the rationalizing force of principle.[379]

Reasoned elaboration, then, is integral to adjudication.[380] It is in this way that adjudication may be distinguished not only from legislation, but also from other institutional activities within the legal process. "[A]n arbitrator's award or an administrative order," for example, "is unexplained by any articulate findings or reasons."[381] Similarly, apart from in the area of restitution, the reporters of the first Restatements failed satisfactorily to articulate reasons for their various proposals.[382] In claiming as much, however, Hart and Sacks are not implying that reasoned elaboration is the hallmark of all judicial decision making. While "the reasoned elaboration of decisional law"[383] may be essential to the pursuit of substantive justice,[384] while it is inevitably a general feature of the common law process[385]—while, indeed, a "reasoned answer" to a legal problem "will always be possible"[386]—the courts are remarkably prone to producing "intellectual nonsense"[387] and making "a lamentable botch"[388] of the task. That a "court's obligation is to decide . . . on reasoned grounds"[389] does not mean that it always does so. Often—and especially when confronted with a "hard case"[390]—a court will struggle to articulate a "statement of general principle"[391] which is "rationally defensible."[392] This is why Hart and Sacks urge the study of "processes of reasoning."[393] It is important, they insist, to look "not only to the rightness or wrong-

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377 *Id.*
378 *Id.* at 164.
379 *Id.* at 177-78 (on "judicially developed principles" and "statutory policies").
380 *Id.* at 665.
381 *Id.* at 361.
382 *Id.* at 761-62.
383 *Id.* at 594.
384 *See id.* at 70, 166, 648.
385 *See id.* at 588-89.
386 *Id.* at 669.
387 *Id.* at 488.
388 *Id.* at 286. In particular, see Hart and Sacks's excoriating critique of the Vinson Court's decision in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). THE LEGAL PROCESS, *supra* note 14, at 1041-76.
389 THE LEGAL PROCESS, *supra* note 14, at 138.
390 *Id.* at 397.
391 *Id.* at 100.
392 *Id.* at 101.
393 *Id.* at 104.

ness of the particular result but to the validity of the process by which the court arrived at it."[394] In short, the presence or absence of reasoned elaboration in a judicial decision is the primary indication of whether or not it is sound.

Reasoned elaboration is not, however, the only indicator of judicial soundness. For a different criterion of soundness applies with regard to the judicial interpretation of statutes. "The principle of institutional settlement . . . forbids a court to substitute its own ideas for what the legislature has duly enacted."[395] It is nevertheless naive and indeed irrational for courts to assume that statutes in general can be read literally, as if their wording admits of but one meaning.[396] If "the integrity of language, as a healthy functioning social institution"[397] is to be maintained in the courts, judges must appreciate that "meaning depends upon context."[398] "*An essential part of the context of every statute is its purpose*. Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."[399]

A statute is not only a purposive act. It is commonly a rational purposive act. "The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear."[400] If the courts are to develop a "sound method of statutory interpretation,"[401] they must be committed to ascertaining such purposes. This requires that they consider—"with [the] mind in neutral,"[402] as it were—"the history and general scheme of the statute."[403] Furthermore, "[t]he purpose of the statute must always be treated as including not only an immediate purpose or group of related purposes but [also] a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole."[404] Only by "striv[ing] to develop a coherent and reasoned pattern of applications intelligibly related to the general purpose" of a statute,[405] and by endeavoring to demonstrate how this purpose is "calculated to serve the ultimate purposes of

394 *Id.* at 1148.
395 *Id.* at 1225.
396 *See id.* at 1156, 1173-74, 1369-71.
397 *Id.* at 1226.
398 *Id.* at 1412.
399 *Id.* at 1156.
400 *Id.* at 1157.
401 *Id.* at 1203.
402 *Id.* at 1275.
403 *Id.* at 169.
404 *Id.* at 1414.
405 *Id.* at 1417.

law," might the courts "formulate a sound and workable theory" of statutory interpretation.[406]

Thus it is that, for Hart and Sacks, "soundness"—meaning both reasoned elaboration and the purposive interpretation of statutes—is the key to demonstrating the essential rationality of the legal process. Though the legislature, administrative agencies, and other legal institutions may demand their own criteria of soundness, it is within the common law framework that one discovers the concept at its most refined. For in its pursuit of soundness, Hart and Sacks suggest, borrowing an image used by Lon Fuller, the common law system is able "to work itself pure."[407] That is, judicial activity motivated by personal instinct or by considerations of policy is purged from the system and replaced by judicial activity founded on reason. By turning away from discretion and emphasizing reason, Hart and Sacks effectively bid farewell to the realist legal tradition. Commenting on legal realism in 1931, Morris Cohen observed that "[i]t has become a fashion nowadays to belittle the reasons people give for their conduct."[408] By the 1950s, such reasons were, once again, all the rage.[409]

Although faith in reason had become fashionable, it was nevertheless difficult to preach convincingly. For the concept of "soundness" is itself unsound. The pursuit of soundness, Hart and Sacks insist, is essential to the development of law as a purposive enterprise. That is, both reasoned elaboration and purposive statutory interpretation are supposed to facilitate the basic goal of maximizing the satisfactions of valid human wants. Yet such a goal does not exist. Reasoned elaboration may yield conflicting principles, applicable to the same legal problem, which appear to be equally persuasive when judged by the basic criterion of maximization. As Duncan Kennedy explains, the principle that a " 'man should pay damages when he has been at fault' cannot be 'weighed' against [the principle that] '[d]amages should be allocated among actors so as to maximize deterrence' unless we are willing to ascend simultaneously two distinct hi-

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406 *Id.* at 1201.

407 *Id.* at 100. Fuller used the phrase "working itself pure" in FULLER, *supra* note 105, at 140. This image was used as early as the eighteenth century by Lord Mansfield. According to Mansfield: "A statute can seldom take in all cases, therefore the common law that works itself pure by rules drawn from the fountain of justice is for this reason superior to an Act of Parliament." Omychund v. Barker, 26 Eng. Rep. 15, 33 (1744). Jurists associated with the process tradition continue to be attracted to the image. *See* RONALD DWORKIN, LAW'S EMPIRE 400-03 (1986).

408 Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 366 (1931).

409 *See* WHITE, THE AMERICAN JUDICIAL TRADITION, *supra* note 10, at 293.

erarchies of purpose."[410] The choice of principle, very simply, depends on how the goal of maximization is defined.[411]

Indeterminacy similarly infects the purposive interpretation thesis. As Richard Posner has argued, Hart and Sacks's insistence that legislation be treated generally as the product of rational purposive activity—"of reasonable men pursuing reasonable purposes reasonably"—is unrealistic for the reason that, since the 1950s, "the spectrum of respectable opinion on political questions has widened so enormously that even if we could assume that legislators intended to bring about reasonable results in all cases, the assumption would not generate specific legal concepts."[412] Furthermore, as Posner and various proponents of public choice theory have demonstrated,[413] many statutes represent not a general public interest, but the particular goals of private interest groups. To interpret such statutes as rational purposive acts embodying Hart and Sacks's general goal of maximization would, if anything, be to overlook their purpose. To put the matter simply, Hart and Sacks developed an inadequate model of the legislative process.[414]

The assumption that there exists a general goal of maximization which is to be realized through the development of a set of legal institutions with their own areas of competence and criteria of soundness

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[410] Duncan Kennedy, Utopian Rationalism in American Legal Thought III, at 44 (June 1970) (unpublished mimeograph on file with author).

[411] *Id.* at 46. As Kennedy explains,

> it should be clear that the judge making a good faith effort to reach the correct decision through reasoned elaboration can perfectly consistently mount the two hierarchies of values implied in two different results until he reaches the choice between ideologies, and that he can then make the choice according to which system will, in his earnest opinion, serve to maximize valid human satisfactions. This choice once made, one or the other of the resolutions of the specific problem will in all probability appear quite distinctly "correct."

Id.

[412] Richard A. Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986). In the same vein, see also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 294 (1990). For some reflections on how Posner's jurisprudence is indebted to the process tradition, see Neil Duxbury, *Pragmatism Without Politics*, 55 MOD. L. REV. 594 (1992).

[413] *See* Posner, *supra* note 412, at 193. The relevant public choice literature is voluminous. For a selection, see Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990); Steven Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80 (1987); Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527 (1990). For a critique of public choice, see Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

[414] *See* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 39-40 (1983).

indicates the consensus orientation of Hart and Sacks's jurisprudence. Their perspective, according to one commentator, "rested on the complacent, simplistic assumption that American society [of the 1950s and 1960s] consisted of happy, private actors maximizing their valid human wants while sharing their profound belief in institutional competencies."[415] Arguments such as this are not uncommon. The *Legal Process* materials, it has been claimed, were "perfectly attuned to the end-of-ideology politics of the Cold War."[416] The principle of institutional settlement which is so central to those materials has been conceived as an attempt to rationalize the existing American power structure, as if that structure were inevitable.[417] By invoking the principle of institutional settlement, it has been said, Hart and Sacks introduced "institutional formalism" into American jurisprudence.[418] The essential premise of this formalism is the idea that legal institutions have their own specialized areas of competence beyond which they ought not to stray;[419] and the most notable consequence of accepting this premise is a commitment to judicial restraint.[420] That is, while the articulation of policy is regarded to be the function of the democratically elected branches of government, the executive and the legislature, the courts are expected to defer to that policy through purposive statutory interpretation while engaging in their own creative function of developing sound common law principles through the process of reasoned elaboration.

These arguments are significant and, for the most part, well founded. Yet, to some extent, they are also exaggerated. For they underplay the critical thrust of the *Legal Process* materials. Hart and Sacks may have been complacent in assuming the adequacy of the existing American institutional framework, and they were certainly wrong to assume a general social consensus concerning the goal of maximization. But it was not their claim that all is well with the legal world. We have already seen that reasoned elaboration was, for them, a legal ideal rather than a reality—an ideal, indeed, of which the courts often fell short. Furthermore, the argument that their jurispru-

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415 Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18, 30 (David Kairys ed., 1st ed. 1982).

416 AUERBACH, *supra* note 194, at 260.

417 *See* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1183-87 (1985).

418 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 254 (1992).

419 *See* Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 90-91 (1989); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 518-19 (1988).

420 *See* Ackerman, *supra* note 10, at 123-24.

dence promotes judicial restraint is only partially correct. The notion of institutional competence without doubt denotes restraint. Hart and Sacks were arguing, after all, that the courts ought to restrain themselves from performing those functions for which they are not competent. But there is also a sense in which this argument denotes activism. For it is Hart and Sacks's belief that, so long as judges respect the principle of institutional competence, they ought to engage in the reasoned elaboration of principles as actively as possible in order to achieve substantive justice for the parties to any particular dispute.[421] Process jurisprudence is not entirely antithetical to judicial activism.[422] And although other proponents of the process perspective, as we shall see, were far more committed to promoting judicial restraint, Hart and Sacks themselves remained ambivalent.

In depicting the jurisprudence of Hart and Sacks as somehow "conservative,"[423] critics have tended to underestimate its intellectual significance. "[B]y the end of the 1960s," one commentator has observed, *The Legal Process* "seemed oddly out of touch with reality."[424] Yet, to this day, it remains inspirational. "[M]ost legal scholars," it has been suggested, "consciously or not, have followed its path."[425] Certainly public law scholarship in the United States remains heavily indebted to Hart and Sacks.[426] Indeed, some contemporary public lawyers, endeavoring to refine classic *Legal Process* themes such as purposive statutory interpretation and institutional specialization, purport to be developing a "new legal process" perspective on public law.[427] However one may regard this, it is clear

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421 *See* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 396 n.64 (1973).

422 The classic example of process-oriented judicial activism is Justice Harlan Fiske Stone's infamous *Carolene Products* footnote. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). *See also* Ackerman, *supra* note 10, at 124. *See generally* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 320 (1989).

423 The depiction appears throughout the literature dealing with *The Legal Process*. *See, e.g.*, SELIGMAN, *supra* note 192, at 79.

424 Mensch, *supra* note 415, at 25.

425 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 249 n.20 (1982).

426 *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707-08, 725-26 (1991).

427 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY chs. 3, 7 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 239-49 (1983). *See generally* A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071 (1988). Certain proponents of this "new" legal process perspective have been criticized for building on a distinctly narrow conception of the "old" legal process perspective. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 923 (1989).

that *The Legal Process*, whatever criticisms may be levelled at it, continues significantly to influence American legal thought.

Why, then, has there been a tendency for critics to dismiss *The Legal Process* as an anachronism? The reason for this is very specific. In attempting to uncover institutional integrity and rationality at the heart of the legal process, Hart and Sacks seemed to be restoring order to the legal world in the aftermath of realism.[428] So-called realists had posed, but of course had not solved, the problem of the limits of judicial power. If judges could not rely on determinate principles and processes of reasoning, as certain realists claimed, what institutional or structural mechanisms existed to check the scope of their discretion? If this discretion was unfettered, what, if anything, was there to prevent an unelected federal judge from using the judicial forum to promote his or her own policy preferences at the expense of the policies of Congress and the state legislature?[429] In advocating institutional competence, reasoned elaboration and purposive interpretation, Hart and Sacks were offering an answer to these questions. Their answer was that if the courts accept and respect these criteria, then the problem of how to limit judicial power disappears, for the courts will limit themselves. The burning question, of course, was: did the courts abide by Hart and Sacks's criteria?

In the 1950s and 1960s, even Hart and Sacks would have hesitated to answer this question affirmatively. Certainly some judges, albeit unselfconsciously, were aspiring towards the ideals of soundness.[430] In the eyes of most process writers, however, this aspiration had eluded the Supreme Court under Chief Justice Warren during this period. The Warren Court demonstrated a basic commitment to broadening the scope of the rights which attach to American citizenship.[431] It was a commitment which process jurists by and large considered admirable. The problem was that the Court seemed to be concerned primarily with securing results. The Court, however, appeared insufficiently concerned with the reasoned elaboration of principles supporting those results. Yet this, for process jurists, was the prerequisite of sound adjudication.

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[428] *See* Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 416 (1983) ("One way to describe the considerable achievement of *The Legal Process* is to see it as repairing the damage inflicted by legal realism.").

[429] *See* Akhil R. Amar, *Law Story*, 102 HARV. L. REV. 688, 694 (1989); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 663-64 (1985); Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, *in* JUSTIFICATION: NOMOS XXVIII, at 71, 82-83 (J. Roland Penn & John W. Chapman eds., 1986).

[430] *See* WHITE, THE AMERICAN JUDICIAL TRADITION, *supra* note 10, at 293-316.

[431] *See* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 8, 12 (1970).

Thus it was that process jurists found themselves on the horns of a dilemma. Warren Court decisions tended to be morally correct yet jurisprudentially unsatisfactory. What was to be done? In the *Legal Process* manuscript, Hart and Sacks evaded the problem. The Warren Court's commitment to liberalism without rationalism was not considered to be an issue for concern. In *Brown v. Board of Education*,[432] decided in 1954, the Court, distinguishing the principle of "separate-but-equal,"[433] held that racial segregation in public schools—even where black schools are not demonstrably inferior to white schools—denies black children the equal protection of the laws guaranteed by Clause 1 of the Fourteenth Amendment. By declaring state-supported discrimination against racial minorities to be unconstitutional, the Court secured a victory for "simple justice."[434] But was *Brown* a "sound" decision? Hart and Sacks offered no enlightenment. In *The Legal Process*, they failed so much as to mention the case.[435]

This omission is significant, for it highlights a fundamental problem of process jurisprudence which Hart and Sacks had neglected to confront: namely, if a court is able to produce laudable results without elaborating its reasons for those results, why treat the requirement of soundness seriously? If those working within the process tradition could not offer a plausible answer to this question, their faith in reason would prove ill-founded. The survival of process jurisprudence demanded that someone grasp the nettle.

VII. THE APOGEE OF PRINCIPLE

In his Supreme Court Foreword of 1954, Albert Sacks, commenting on *Brown*, observed that "[t]he outstanding feature of the decision lies in the triumph of a principle—a principle which the court must have found to be so fundamental, so insistent, that it could be neither denied nor compromised"—namely, the principle that "the Constitution requires equal treatment, regardless of race."[436] The problem with this "principle" is that it no more justifies the decision in *Brown* than it does the "separate-but-equal" formula which had been adopted in *Plessy v. Ferguson*.[437] The principle behind *Brown*, it may be assumed, not only upholds racial equality but also denies the

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[432] 347 U.S. 483 (1954).

[433] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[434] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

[435] *See* Eskridge, *supra* note 300, at 965 n.106.

[436] Sacks, *supra* note 207, at 96.

[437] 163 U.S. 537 (1896).

legitimacy of state-imposed racial segregation. The Warren Court failed, in *Brown*, to articulate any such principle.

In his famous Holmes Lectures, delivered at the Harvard Law School in 1958-59, Herbert Wechsler used this failure on the part of the Court as an opportunity to argue the case for developing "neutral principles of constitutional law."[438] The decision in *Brown* was not, however, his initial point of focus. Wechsler first directed his attention to the views of Learned Hand who had, in his Holmes Lectures of the previous year, argued that the Supreme Court's power to review the constitutionality of acts undertaken by other branches of national and state government can neither be found in, nor inferred from, the words of the Constitution. "[T]his power," he argued, "is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation."[439] If the Court had not assumed the power to keep legislators and administrators within their prescribed limits, the American system of government "would have collapsed."[440] This was a distinctly qualified endorsement of the Supreme Court's power of judicial review as established by Chief Justice John Marshall in *Marbury v. Madison*.[441] There is no judicial power to review the actions of government officials, Hand argued, but only to intervene in those cases where the language of the Constitution shows that the official has transcended his or her authority. In those instances where the Supreme Court does assume the power to review legislative and administrative action—and especially in those instances where it assesses the constitutionality of federal and state laws in relation to the broad strictures of the Fifth and Fourteenth Amendments—it adopts the undemocratic role of "a third legislative chamber."[442]

Wechsler takes issue with Hand's attempt to qualify *Marbury v.*

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[438] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[439] LEARNED HAND, THE BILL OF RIGHTS 15 (1958).

[440] *Id.* at 29. Hand explained that:

> The courts were undoubtedly the best "[d]epartment" in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling.

Id.

[441] 5 U.S. (1 Cranch) 137, 177 (1803). *See generally* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1991).

[442] HAND, *supra* note 439, at 55.

Madison. "I have not the slightest doubt," he begins, "respecting the legitimacy of judicial review."[443] According to Wechsler, the judicial power to review the constitutionality of official actions is grounded in the Constitution itself. Indeed, Article VI of the Constitution—the Supremacy Clause[444]—makes such review a matter not of judicial discretion but one of "duty."[445] The Supreme Court is obliged, in other words, to scrutinize official actions which appear to offend against constitutional limitations. But if this is so, what is to prevent the Court from assuming the role of a "third legislative chamber"? Wechsler's answer is that the Court is not vested with a complete discretion to read policy preferences into the Constitution, its constitutional interpretations are "to be made and judged by standards that should govern the interpretive process generally."[446] These standards must be "framed in neutral terms . . . . Only the maintenance and the improvement of such standards and, of course, their faithful application can . . . protect the Court against the danger of the imputation of a bias favoring claims of one kind or another in the granting or denial of review."[447]

So, what are these standards? According to Wechsler, they are "criteria that can be framed and tested as an exercise of reason and not merely as an act of wilfulness or will."[448] The elaboration of such standards demands the recognition that a court is not "free to function as a naked power organ,"[449] but that it must decide cases with regard for genuine principles of law.[450] Thus it is that the "reasoned

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443 Wechsler, *supra* note 438, at 2.

444 U.S. CONST. art. VI, § 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

445 Wechsler, *supra* note 438, at 6.

446 *Id.* at 9.

447 *Id.* at 9-10.

448 *Id.* at 11.

449 *Id.* at 12.

450 *Id.* at 15. Wechsler states:

> I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?

Id.

explanation" of neutral principles is considered by Wechsler to be "intrinsic to judicial action."[451] More than this, such explanation is exclusively "the province of the courts."[452] As the sole forum of principle, "[t]he courts have both the title and the duty . . . to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does."[453] Courts may be entrusted with this duty precisely because "they are—or are obliged to be—entirely principled."[454] In deciding a case in a principled fashion, a court must provide "reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result that is involved."[455] Principles prevent the court from functioning as a naked power organ.

Presented in outline, Wechsler's thesis—premised on the belief that the reasoned elaboration of principles is a task to which the courts alone are institutionally competent—seems hardly an advance on the jurisprudence of Hart and Sacks. Like Hart and Sacks, Wechsler is preoccupied with processes of reasoning.[456] Apart from his insistence that principles are general and capable of neutral application,[457] he seems simply to recite the established process faith. In professing this faith, furthermore, Wechsler tends, as Hart and Sacks do, to veer between the descriptive and the normative: sometimes principled decision making is treated as fact, other times as a desideratum. But whereas for Hart and Sacks this mixing of the normative and the descriptive suggests genuine ambivalence, with Wechsler the mixture is deliberate. Wechsler argues that courts sometimes do decide cases in a genuinely principled fashion, while at other times they do not, though they ought to. All too often, in matters of constitutional adjudication, the Supreme Court did not.[458] It was in making this latter claim—a claim which Hart and Sacks had been reluctant to advance—that Wechsler added a critical and indeed controversial dimension to process jurisprudence.

Wechsler argues that during the first half of this century, and

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451 *Id.* at 15-16.

452 *Id.* at 16.

453 *Id.* at 19.

454 *Id.*

455 *Id.*

456 *Id.* at 9-20. As Wechsler put it, "[t]he virtue or demerit of a judgment turns entirely on the reasons that support it." *Id.*

457 A meaning which, as Wechsler recognized, is not entirely captured by the phrase "neutral principles." *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW at xiii (1961). For a review of Wechsler's book, see Ernest J. Brown, Book Review, 62 COLUM. L. REV. 386, 387 (1962).

458 Wechsler, *supra* note 438, at 20.

especially during the New Deal era, the Supreme Court paid little attention to principles. In so far as it did consider principles, "some of the principles the court affirmed were strikingly deficient in neutrality, sustaining, for example, national authority when it impinged adversely upon labor . . . but not when it was sought to be employed in labor's aid."[459] Many of the great early-twentieth century dissenting opinions—Holmes in *Lochner v. New York*[460] is the classic example—were powerful precisely because they demonstrated the inability of the Court to "present an adequate analysis, in terms of neutral principles, to support the value choices it decreed."[461] "The poverty of principled articulation" on the part of the Court, especially during the 1930s, also explained its lamentable lack of self-restraint.[462] But Wechsler's primary concern is not with the past. The failure to articulate principles when considering constitutional matters was as much a sin of the Court in the 1950s as it had been in the 1930s.

To demonstrate this point, Wechsler considers various decisions in which, during the 1940s and 1950s, the Supreme Court held racial discrimination to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Brown* is the most famous of these decisions, though the others—upholding the right of black voters to vote in primary elections[463] and outlawing the state imposition of racially restrictive covenants[464]—are anything but unimportant. In Wechsler's opinion, all of the decisions had "the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."[465] Yet none of them, he insisted, were genuinely principled.

Brown was especially problematic. The problem, for Wechsler, rests not in the result but in "the reasoning of the opinion."[466] The Supreme Court had reached its decision "on the ground that segregated schools are 'inherently unequal,'" having "deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development."[467] It was far from obvious, however, that evidence existed which validated this ground.

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459 *Id.* at 23.
460 198 U.S. 45 (1905).
461 *Id.* at 24.
462 *Id.* at 24-25.
463 Smith v. Allwright, 321 U.S. 649 (1944).
464 Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).
465 Wechsler, *supra* note 438, at 27.
466 *Id.* at 32. Others have disagreed with Wechsler and found *Brown* to be soundly reasoned. *See, e.g.*, Richard A. Givens, *The Impartial Constitutional Principles Supporting* Brown v. Board of Education, 6 How. L.J. 179, 180 (1980).
467 Wechsler, *supra* note 438, at 32.

In reality, Wechsler argued, an integrated school may be a racially hostile school, a school in which blacks suffer by being made to feel inferior. Where segregation exists, on the other hand, such hostility may be absent and blacks may enjoy a "sense of security."[468] "Suppose that [in such circumstances] more Negroes in a community preferred separation than opposed it? Would that be relevant to whether they were hurt or aided by segregation as opposed to integration?"[469] In offering this argument, Wechsler was not attempting to justify segregation. His argument, rather, is that the reasoning in *Brown* fails to explain why segregation is wrong in principle. It was an expedient rather than a principled decision, as were the segregation decisions which followed in its wake.[470]

Basically, the Supreme Court had known how it wanted to tackle the issue of segregation but, for want of a principle, it had failed to do so sincerely. But what principle might it have invoked? For Wechsler, the fundamental issue was not equal facilities but free association.[471] The denial of this freedom, he argues, disadvantages both blacks and whites.[472] When, Wechsler recounts, he himself was joined in litigation by a black lawyer, "he did not suffer more than I" in knowing that segregation restricted the choice of places at which they could lunch together.[473] Since the removal of segregation is for the benefit of blacks and whites alike, the principle of free association appears—though Wechsler is highly tentative on this matter—to be a truly neutral one.[474]

Wechsler's essay on neutral principles begins with a polite criticism of Hand and ends with a polite criticism of *Brown*. It was the latter criticism which attracted controversy. The principle of free as-

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468 *Id.* at 33.

469 *Id.*

470 *See, e.g.*, New Orleans Park Ass'n v. Detiege, 358 U.S. 54 (1958); Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. Atlanta, 350 U.S. 879 (1955); Baltimore v. Dawson, 350 U.S. 877 (1955).

471 Wechsler, *supra* note 438, at 34.

472 *Id.* ("I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt he must carry but also in the benefits he is denied.").

473 *Id.*

474 *Id.* Wechsler explains:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.

Id.

sociation was presented in a rather perfunctory and ham-fisted fashion. That whites may lose out from segregation hardly means that they "suffer" from it as much as do blacks. In failing to recognize as much, Wechsler seemed somewhat naive and complacent to observers. "Professor Wechsler's whole argument," one commentator has observed, "depends on his refusal to consider that the Court might have based its decision on a determination that Negroes are intentionally made to feel inferior through the mechanism of segregation."[475] This does not mean, however, that he was "defending the legality of racial domination."[476] He applauded the result in *Brown*, but questioned its lack of reasoning.

While recognition of this fact is crucial if one is properly to understand Wechsler's thesis,[477] many critics have failed to do so. "If the cases outlawing segregation were wrongly decided," wrote Charles Black apropos of Wechsler in 1960, "then they ought to be overruled."[478] It was never Wechsler's claim that an unprincipled decision is a wrong decision—only that such a decision is insufficiently reasoned. Other critics took issue with his thesis by arguing that there ought to be more rather than less unprincipled decision making. "We need the unprincipled decision," insisted Charles Clark, "to mark judicial progress, of the kind in fact which has been a glorious heritage of the Court's history."[479] Yet Clark noted also that, in the law school at least, the neutral principles thesis was gaining in popularity. Even Karl Llewellyn, he lamented, seemed by the 1960s to have been taken in by this "new mythology of the judicial process."[480] Certainly, many scholars were—and indeed still are—swayed by Wechsler's thesis.[481] Llewellyn, however—though he had suggested as early as 1940 that principles are important for the promotion of

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475 Ira M. Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CAL. L. REV. 104, 112 (1961).

476 Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561, 565 (1988).

477 *See* Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 30-33 (1959).

478 Charles L. Black, Jr., *The Unlawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

479 Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 665 (1963).

480 Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 268 (1961).

481 *See, e.g.*, STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 38 (1991); Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 66-67 (1962); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

judicial "soundness"[482]—was not one of them.[483] The call for neutral principles, he insisted, was nothing more than a jurisprudential objection to "a Warrenish type of broad generalization."[484]

In regarding the neutral principles thesis as somehow opposed to the initiatives of the Warren Court, Llewellyn was basically echoing Clark and others. To embrace neutral principles, Clark insisted, is to eschew judicial creativity.[485] Others were even more forthright in offering this criticism. "Professor Wechsler's argument," Eugene Rostow proclaimed, "is an attack on the integrity of the Supreme Court."[486] Judicial review, he argued, must be exercised vigorously if constitutional law is to reflect and support democratic values.[487] This, of course, is precisely what the Warren Court was attempting to do. For Justice Black, the duty of the Court was not only to enforce the Constitution but also to ensure its evolution by investing it with new meanings in new settings.[488] Yet he hesitated to call himself a judicial activist.[489] Black was reluctant to embrace judicial activism because he knew that it could be put to both good and ill purposes.[490] The Supreme Court of the 1930s had adopted the very type of activism from which he distanced himself—the importation of policy preferences into the Constitution—when it struck down major New Deal enactments. Earlier in the century, in *Lochner*,[491] the Supreme Court had practiced precisely such activism when it interpreted the Consti-

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482 Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 589 (1940).

483 *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 388 (1960).

484 *Id.* at 389.

485 Clark, *supra* note 479, at 661; Clark & Trubek, *supra* note 480, at 270.

486 Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123, 139 (1962).

487 *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 199-200 (1952).

488 *See* HUGO L. BLACK, A CONSTITUTIONAL FAITH at xvi (1969); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 703 (1963).

489 BLACK, *supra* note 488, at 20. As Black wrote,

> if it is judicial activism to decide a constitutional question which is actually involved in a case when it is in the public interest and in the interest of a sound judicial system as a whole to decide it, then I am an "activist" in that kind of case and shall, in all probability, remain one. . . .
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> When I get to the other meaning of "judicial activism," however, namely, one who believes he should interpret the Constitution and statutes according to his own belief of what they ought to prescribe instead of what they do, I tell you at once I am not in that group.

Id.

490 *See* HOWARD BALL & PHILIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 79, 283 (1992).

491 Lochner v. New York, 198 U.S. 45 (1905).

tution as a Social Darwinist document.[492] Quite simply, during the early decades of this century, judicial activism had meant "anti-progressivism." It was precisely such activism against which Holmes and Brandeis so often dissented.

Wechsler and other process jurists regarded judicial activism in precisely this light. In *Lochner*, they found a judicial decision devoid of reason and principle, a decision based purely on policy preference.[493] In *Brown*, they found a different policy preference—a preference for racial integration rather than for laissez faire and natural selection. While the preference voiced in *Brown* was, for Wechsler and others, far more favorable than that voiced in *Lochner*, it was a preference all the same. Where a politically appointed judiciary decides cases on the basis of policy preference, there is always the possibility that preferences will change with the political climate. And where such change occurs, judicial activism will come to serve different political ends. That is why Wechsler appealed for neutral principles of constitutional law. Having clerked for Justice Stone in the early 1930s, he had witnessed first hand the Supreme Court's activism in its exercise of constitutional review.[494] Although, by the Warren era, judicial activism was being employed to serve different, more laudable ends, there was no reason that it should always stay that way. Activism could just as easily be used to curb rather than to promote civil liberties.[495]

The appeal for neutral principles of constitutional law was thus an appeal for institutional competence and judicial restraint.[496] The peculiar task of the judge, in matters of constitutional adjudication, is not simply to promote a particular value or reach a specific result but to produce a decision founded on articulated neutral principles. Without doubt—indeed, as *Brown* proved—a decision may be just without being founded on such principles; but so long as a court eschews principles when engaging in judicial review, it risks assuming the role of a naked power organ. That the Court of the Warren era happened to be pursuing admirable policies did not mean that it would always do so.

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[492] *See id.* at 75-76 (Holmes, J., dissenting).

[493] *See, e.g.*, Louis Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 658 (1961); McCloskey, *supra* note 481, at 68.

[494] *See Resolution of the Faculty*, 78 COLUM. L. REV. 947 (1978).

[495] *See* Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 602 (1979) ("In some sense, all American constitutional law for the past twenty-five years has revolved around trying to justify the judicial role in *Brown* while trying simultaneously to show that such a course will not lead to another *Lochner* era.").

[496] *See* Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640, 658-59 (1972); Henkin, *supra* note 493, at 656.

Policies may be good or bad; but principles of constitutional law ought to be neutral. In arguing as much, Wechsler was certainly urging judicial restraint in constitutional adjudication; but this does not mean that he was necessarily arguing for judicial conservatism. Just as the outcome of judicial activism may be, as in *Lochner*, the promotion of conservative policies, the outcome of judicial restraint—fostered by the demand for neutral principles—may be progressive, enlightened decision making. Wechsler's view of *Brown*, after all, is that the Court could have reached the result that it did—indeed, ought to have reached the result that it did—by developing a neutral principle. Neutral principles are not necessarily conservative principles.[497] In advocating neutrality, Wechsler was not urging judicial antiprogressivism but rebelling against the tradition of activism as epitomized by *Lochner*.

In another, rather more problematic sense, however, Wechsler was in fact developing the tradition of *Lochner*. For *Lochner* itself not only exemplified judicial activism but also embodied a peculiar constitutional requirement of neutrality. As Cass Sunstein explains, in *Lochner*,

> the Court's concern was that maximum hour legislation was partisan rather than neutral—selfish rather than public-regarding. It was neutrality that the due process clause commanded, and neutrality was served only by the general or "public" purposes comprehended by the police power. If the statute could be justified as a labor or health law, it would be sufficiently public to qualify as neutral. Since no such justification was available, it was invalidated as impermissibly partisan . . . . The legislative result was thus unprincipled . . . .[498]

The primary legacy of *Lochner*, according to Sunstein, is the peculiar conception of constitutional neutrality which it bequeathed to modern legal thought. If the case is viewed in this light—in terms of its neutrality as opposed to its activism—then Wechsler's neutral principles thesis may be regarded as part of this legacy. For it is a thesis which, in Sunstein's view, "has a powerful *Lochner*-like dimension."[499] That is, for Wechsler, "[t]he existing distribution of power and resources as between blacks and whites should be taken by courts as simply 'there;' neutrality lies in inaction; it is threatened when the Court

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497 *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 55 (1980).

498 Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 878-79 (1987) (footnote omitted).

499 *Id.* at 895.

'takes sides' by preferring those disadvantaged."[500] It is by tracing neutrality from *Lochner* to Wechsler that Sunstein is able to demonstrate that the latter is a continuation of, as well as a reaction against, the jurisprudence of the former.

Given this jurisprudential connection, it is perhaps unsurprising to find that, as the Supreme Court did in *Lochner*,[501] Wechsler developed a conception of neutrality which was regarded generally to be inadequate for the purposes of constitutional analysis. Even those who applauded his call for neutral principles felt that he had "not carried the idea of neutrality far enough."[502] Some critics feared that if courts were to become preoccupied with the development and application of such principles, they might lose sight of the primary purpose of adjudication: the securing of just outcomes.[503] Yet Wechsler himself was careful not to suggest that a principled decision is somehow necessarily a "right" decision.

> I have never thought the principle of neutral principles offers a court a guide to exercising its authority, in the sense of a formula that indicates how cases ought to be decided . . . . That an adjudication be supported or at least supportable in general and neutral terms is no more than a negative requirement. A decision is not sound unless it satisfies this minimal criterion. If it does, but only if it does, the other and the harder questions of its rightness and its wisdom must be faced.[504]

A principled decision, in other words, is a sound, though not necessarily a correct, decision. But if neutral principles do not of necessity lead to correct results, why should a court try to abide by them? Wechsler's answer is that even if a judicial opinion seems wrong, if it is principled it will command respect.[505] This claim—premised, as it is, on the idea that faith in reason is somehow more significant than faith in justice—cut no ice with those who welcomed Warren Court activism. The problem was not simply that Wechsler demonstrated a misplaced conception of judicial priorities, but that he failed to elabo-

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500 *Id.*

501 *See id.* at 903.

502 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971).

503 *See* Black, *supra* note 431, at 24; Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 7 (1963).

504 Herbert Wechsler, *The Nature of Judicial Reasoning*, *in* LAW AND PHILOSOPHY: A SYMPOSIUM 290, 299 (Sidney Hook ed., 1964).

505 Wechsler, *supra* note 438, at 26. Others have argued that neutral principles are a necessary condition of "legitimacy" in constitutional adjudication. *See* Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1127 (1980).

rate what those priorities were. It seems not insignificant to note here that, in *The End of Ideology*, Daniel Bell acknowledges Wechsler "for many suggestions."[506] For Wechsler implicitly subscribes to the very notion of consensus which lies at the heart of that book. As various critics have noted, precisely what Wechsler means by "neutral principles"—or even "general principles of neutral application"—is far from clear. This is due, in part, to his failure to define either neutrality or generality for the purposes of constitutional adjudication.[507] "Neutrality" and "generality" are assumed by Wechsler to have meanings shared by all reasonable people.[508] Thus courts are considered able to resolve constitutional issues on grounds of "adequate neutrality and generality."[509] The concept of adequacy is simply taken to be unproblematic.

Many critics of Wechsler have taken him to task for making this assumption.[510] Others, however, have attempted to make light of the assumption by arguing that it is not Wechsler's claim that there exist principles of constitutional law which are inherently and uncontroversially neutral, but only that courts, in engaging in constitutional adjudication, may and indeed ought to develop general principles which can be applied in a logical and consistent fashion.[511] This interpretation of Wechsler is certainly faithful to his thesis, but it by no means renders the notion of neutral principles unproblematic since it is still possible that principles may conflict. That is, there may exist two general principles of constitutional adjudication which can be applied by a court with equal consistency to the same issue in order to produce equally sound decisions. In such circumstances, which principle is the court to choose? Wechsler himself implicitly acknowledged this difficulty when he confessed that he was unable adequately to explain

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506 BELL, *supra* note 279, at 450. Both Bell and Wechsler were professors at Columbia University at that time.

507 *See, e.g.*, Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 187-88 (1968); David A.J. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1084-85 (1977); Benjamin F. Wright, *The Supreme Court Cannot be Neutral*, 40 TEX. L. REV. 599, 600 (1962).

508 *See* Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571, 584 (1960); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 594 (1963); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983).

509 Wechsler, *supra* note 438, at 15.

510 *See, e.g.*, Ray D. Henson, *A Criticism of Criticism: In Re Meaning*, 29 FORDHAM L. REV. 553, 559 (1961); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 665, 677 (1960).

511 *See* Deutsch, *supra* note 507, at 188; Henkin, *supra* note 493, at 653.

why, with regard to segregation, freedom to associate is constitutionally more important than freedom not to associate.[512] To the answer that freedom not to associate exists only in the private domain, that "in public, we have to associate with anybody who has a right to be there,"[513] there is the reply that freedom to associate appears in fact not to exist as a constitutionally protected right.[514] The point illustrates a fundamental problem with Wechsler's thesis: namely, the notion of constitutional adjudication according to neutral principles is found wanting when, to use Wechsler's own words, "some ordering of social values is essential." An example of the shortcomings of neutrality, according to Wechsler, is where "there is an inescapable conflict between claims to free press and a fair trial."[515] To emphasize, as Wechsler himself does, "the role of reason and of principle in the judicial . . . appraisal of conflicting values"[516] is to fail to confront this problem. Where there exists a conflict of values, it is possible that there will also exist conflicting yet equally "neutral" principles. To choose one principle over another in such a situation is to prefer one value over another. "The virtue or demerit of a judgment turns," Wechsler contends, "entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees."[517] In the case, however, where there exist competing values which may be upheld through the reasoned explanation of equally valid competing principles, how is one to determine adequacy?[518] Again, Wechsler takes the concept to be unproblematic.

The neutral principles thesis, then, is not a comprehensive guide to correct constitutional adjudication.[519] Even a court dedicated to the application of neutral principles may sometimes be faced with a hard case which, for all the reasoning in the world, can be decided only by preferring one value or policy over another. Respect for neutral principles, very simply, does not entirely preclude judicial activism provided the notions of federalism and separation of powers are adequately considered. "Of course," Wechsler argued, "the courts ought to be cautious to impose a choice of values on the other branches or a state, based upon the Constitution, only when they are

512 Wechsler, *supra* note 438, at 34.

513 Black, *supra* note 478, at 429.

514 *See* Martin P. Golding, *Principled Decision Making and the Supreme Court*, 63 COLUM. L. REV. 35, 58 (1963).

515 Wechsler, *supra* note 438, at 25.

516 *Id.* at 16.

517 *Id.* at 19-20.

518 For a development of this point, see Golding, *supra* note 514, at 48-49.

519 For a different slant on this argument, see Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1013, 1021 (1978).

persuaded, on an adequate and principled analysis, that the choice is clear."[520] The problem which the neutral principles thesis left untouched, however, concerned what the courts are supposed to do when the choice is not clear. The implication was that, in such circumstances, a Wechsler Court would be forced to assume the role of the Warren Court. Yet if this were so, process jurisprudence had proved to be a traitor to the notion of judicial integrity. Wechsler, it seemed, had attempted but had failed to grasp the nettle of Warren Court activism. If it were persuasively to demonstrate the undesirability of such activism within a democratic system, the process perspective on constitutional adjudication would require further fine tuning.

VIII. THE JURISPRUDENCE OF PRUDENCE

What sort of fine tuning was required? In his *Foreword* to the *1960 Term*, Alexander Bickel suggested that the development of process jurisprudence demanded the refinement of the principle of institutional settlement. It is one thing to insist that, unlike the legislative and executive branches, the courts ought to be guided by principle. But it is quite another to determine precisely "when and in what circumstances"[521] ought they to be so guided. The neutral principles thesis, Bickel observed, "is tied to the conviction . . . that there is no escape from the exercise of jurisdiction which is given."[522] Such a conviction, he suggests, is misplaced.

"No good society can be unprincipled," Bickel observes, "and no viable society can be principle-ridden."[523] There exists no neat dividing line between principle and expediency, and many constitutional issues—racial segregation, for example—entail both. Though we may often believe that the courts ought to deal with such issues in a principled fashion, it may be that these issues resist a principled solution.[524] Certainly, "it is for legislatures, not courts, to impose what are merely solutions of expediency. Courts must act on true principles, capable of unremitting application. When they cannot find such a principle, they are bound to declare the legislative choice valid."[525] But what is to happen when the resolution of a constitutional problem "require[s]

520 Wechsler, *supra* note 438, at 25.

521 Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41 (1961).

522 *Id.* at 48.

523 *Id.* at 49.

524 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 64-65 (1986).

525 *Id.* at 58.

principle and expediency at once[?]"[526] With regard specifically to constitutional adjudication, "how does the [Supreme] Court, charged with the function of enunciating principle, produce or permit the necessary compromises?"[527] According to Bickel, the Court has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or—and this is where he departs from Wechsler—it may do neither.[528]

Thus Bickel refines the neutral principles thesis. Whereas Wechsler failed to explain what a court ought to do when faced with a hard case in which the making of a policy choice seems inevitable, Bickel offered an unequivocal solution: the court ought to do nothing. In cases which raise political questions, for example, the Supreme Court may decline to adjudicate on the ground that the particular issue is "not ripe" for judicial solution.[529] By staying its hand, the Court avoids "sap[ping] the quality of the political process"[530] and yet is able also to "guard its integrity."[531] That is, "in withholding constitutional judgment, the Court does not necessarily forsake an educational function, nor does it abandon principle. It seeks merely to elicit the correct answers to certain prudential questions that . . . lie in the path of ultimate issues of principle."[532] In short, by adopting a passive stance towards certain constitutional issues, the Court neither favors expediency nor stands in the way of principle. Rather, it exercises prudence.[533]

The Supreme Court, then, ought "to evolve, to defend, and to protect principle."[534] But it must not do so indiscriminately. If a constitutional issue appears not to be ripe for principled decision, then the Court, as the forum of principle, ought not to sacrifice its integrity by producing a decision.[535] There may be virtue, in other words, in judicial passivity. But it is a strange kind of virtue. It is unlikely, in the wake of *Brown* and the other racial segregation cases, that the American public would have appreciated the tactics of the Supreme Court had it adopted Bickel's strategy and stayed its hand when faced with "unripe" constitutional issues. "A Court 'staying its hand' is,

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526 *Id.* at 69.
527 *Id.*
528 *See id.*; Bickel, *supra* note 521, at 50.
529 Bickel, *supra* note 521, at 74.
530 *Id.*
531 *Id.* at 77.
532 BICKEL, *supra* note 524, at 70.
533 Bickel, *supra* note 521, at 51.
534 *Id.* at 77.
535 For a more general discussion, see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569-99 (1985).

after all, failing to invalidate."[536] It is improbable that the public would be sufficiently sophisticated in matters of law and government "to perceive that 'staying its hand' falls short of 'legitimation.' "[537] Furthermore, if, as Bickel suggests it ought to have done,[538] the Court had stayed its hand over the matter of racial segregation, if it had neither legitimated nor declared unconstitutional statutes prohibiting integration, then it would effectively have upheld the status quo in the South.[539] Passivity would have been not so much a virtue as a vice, an insidious strategy of avoidance.[540]

For all this, however, Bickel's refinement of Wechsler found favor with many of those jurists who insisted that good judicial decision making is distinguished not by results but by sound processes of reasoning. Certain of those who had been calling for a "principled" Supreme Court began to appeal instead for a "prudent Court."[541] By suggesting that the Court may justifiably pass over hard cases, Bickel appeared to have removed the chink in the armor of process jurisprudence. A Bickel Court, unlike a Wechsler Court, would adjudicate only those constitutional matters which permit the reasoned elaboration of principles. If the task of the Supreme Court was conceived in this manner, then the work of the Warren Court appeared to be even more lamentable than process jurists had already suggested, for the court was not only unprincipled but imprudent.

While the neutral principles thesis embodies a rejection of legal realism and judicial activism, Wechsler himself—always a hesitant rather than a forthright critic[542]—would have considered it distinctly unscholarly and *infra dig* to attack either realism or the Warren Court directly. Bickel had no such inhibitions. Fred Rodell—for

536 Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7 (1964).

537 *Id.*

538 BICKEL, *supra* note 524, at 194. For further explanation of Bickel's philosophy of restraint, see Alexander M. Bickel, *A Communication: Paths to Desegregation*, THE NEW REPUBLIC, Nov. 4, 1957, at 3, 22-23.

539 *See* Gunther, *supra* note 536, at 24.

540 For further information on this theme, see MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 144-45 (1966); Richard Epstein, *The Active Virtues*, 1985 REG. 14, 18.

541 McCloskey, *supra* note 481, at 70; *see also* ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 283 (1972); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 256 (1962); Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 175-76 (1964).

542 Most of the critical points to be found in Wechsler's *Toward Neutral Principles of Constitutional Law*, *supra* note 438, at 1, are phrased as rhetorical questions. *See, e.g.*, *id.* at 4-5, 7. On Wechsler's style of scholarship, see also Warren E. Burger, *Herbert Wechsler*, 78 COLUM. L. REV. 951 (1978).

whom realism and judicial activism (particularly that of the Warren Court) represented all that is good about the law[543]—filled many a newspaper column denouncing Bickel as the arch-defender of "judicial inertia."[544] Yet Bickel himself was not averse to producing his fair share of journalistic polemic.[545] He excoriated those lawyers who supported Warren Court activism because they agreed with the results which were being reached. What, he wondered, would these pro-activists do when—as inevitably it would—the outlook of the Supreme Court changed?[546] Justices Black and Douglas, he observed, had lamented the unprincipled activism of the Roosevelt Court in the 1930s, and yet, by the 1950s, they were subscribing to that very activism.[547] Quite simply, judicial activism appeared to be a philosophy for good times.[548] Yet supporters of that philosophy would soon cry foul if the policies of the Court were to change for the worse.[549]

Thus it is that, for Bickel, support for judicial activism is a sure route to inconsistency and even hypocrisy. Proponents of activism want to have their cake and eat it too. The folly of legal realism reveals as much. So-called realists, he argued, demonstrate "a complete lack of interest in the process by which the work [of the Supreme Court] is achieved, or in the proper role of that process in a democratic society . . . . They consider only the outcome of a case."[550] Realists thereby ignore the broader picture: the problem of achieving and maintaining integrity and rational consistency throughout the judicial process as a whole. It was lack of faith in reason that especially irked Bickel. "The Court is to reason, not feel," he insisted, "to explain and justify principles it pronounces to the last possible rational

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543 *See* Fred Rodell, *For Every Justice, Judicial Deference is a Sometime Thing*, 50 GEO. L.J. 700 (1962); Fred Rodell, *Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment—Or, How to Hide the Melody of What You Mean Behind the Words of What You Say*, 47 GEO. L.J. 483 (1959).

544 *See* Fred Rodell, *Alexander Bickel and the Harvard-Frankfurter School of Judicial Inertia*, SCANLAN'S, May 1970, at 76, 76-77; Fred Rodell, *The Supreme Court and the Idea of Progress*, N.Y. TIMES, Apr. 26, 1970, § 7 (Book Review), at 3; Fred Rodell, *The Warren Court*, YALE DAILY NEWS, Mar. 2, 1970, at 2-3.

545 Bickel was a regular contributor to *Commentary* and a contributing editor of *The New Republic*.

546 *See* Alexander M. Bickel, *Law and Reason*, THE NEW REPUBLIC, Nov. 3, 1958, at 18-19.

547 *See* BICKEL, *supra* note 524, at 90-91.

548 *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 26-27 (1975).

549 Bickel was, of course, not the only process jurist of the 1960s to find fault with activism. *See, e.g.*, LOUIS L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

550 BICKEL, *supra* note 524, at 81-82.

decimal point."[551] "[H]is real disapproval was not for any opposing principle but for lack of principle: for humbug, hypocrisy, unthinking subservience to power."[552] As early as 1949, only one year out of law school, he suggested that it is the duty of federal courts, in resorting to admiralty jurisdiction, to articulate their reasons for doing so.[553] Throughout his writings on judicial review there runs more or less constantly the idea "that the process of constitutional adjudication, though one of subtle human and institutional demands, nevertheless could be and often [is] a process of disinterested and open-minded rational analysis guided by evidence and existing legal rules."[554] In extolling reason, Bickel, like other process jurists of his generation,[555] was keeping faith with what he regarded to be a tradition of judicial candor and integrity typified by Brandeis and Frankfurter.[556] The erosion of that tradition had begun with the advent of the Warren Court.

Indeed, the tradition came to an end for Bickel with Frankfurter's retirement from the Court in 1962. "Since October, 1962," he observed, "there has been a new Supreme Court in Washington .... Such a retirement as that of Justice Frankfurter does more than merely change a vote; it alters the entire judicial landscape."[557] The Court without Frankfurter would be even more activist, more innovative, more sweeping in its decisions. It would become "Hugo Black writ large."[558] Thus it was that, from the early 1960s onwards, Bickel's opposition to Supreme Court activism gradually intensified. In his Holmes Lectures of 1969, the year in which Warren Burger was appointed as Chief Justice, he wrote that "[i]t would be intellectual megalomania not to concede that the Warren Court, like Marshall's, may for a time have been an institution seized of a great vision, that it

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551 BICKEL, *supra* note 548, at 26.

552 Anthony Lewis, *Foreword* to ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS at vii, xi (1978).

553 Alexander M. Bickel, *The Doctrine of Forum non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12, 20 (1949).

554 Purcell, *supra* note 222, at 529-30.

555 *See, e.g.*, PAUL A. FREUND, ON LAW AND JUSTICE 63-162 (1968).

556 *See* BICKEL, *supra* note 552, at 23-25; Purcell, *supra* note 222, at 527-32. On the Brandeis-Frankfurter "tradition," see LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); BRUCE A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982). For a critique of candor and integrity as adjudicative criteria, see Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 404-06 (1989).

557 ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 162 (1965).

558 BICKEL, *supra* note 548, at 9.

may have glimpsed the future, and gained it."[559] Dominated by "the Hugo Black majority,"[560] however, the Court had been increasingly at fault "for erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history."[561] The Burger Court, in Bickel's opinion, was not quick to cure itself of these ills: the decision in *Roe v. Wade*[562] in 1973, for example, was proof that the Court remained just as guilty of expediency, just as unprincipled, as it had been two decades earlier in *Brown*.[563]

By remaining committed to activism, furthermore, the Court was at least partially responsible for Watergate. According to Bickel, those implicated in the scandal

> had been led into their error by the toleration that much liberal opinion had shown for the zealotry of the Left, for draft-dodgers and demonstrators of all sorts . . . . Watergate [was] . . . a reproach to that large body of liberal opinion which had tolerated lawlessness, and ended by infecting even the righteous with it.[564]

The blame for Watergate, in other words, was to be laid not at the feet of the perpetrators, but at the feet of a mismanaged legal system. For it was that system which, manipulated by liberals, had turned good men into bad men. "Watergate is evidence of a weakened capacity of our legal order to serve as a self-executing safeguard against this sort of abuse of power."[565] Indeed, "much of what happened to the legal and social order in the fifteen years or so before Watergate was prologue."[566] Very simply, Watergate was the price to be paid for abandoning the tradition of judicial candor and integrity.[567] Advocates of judicial activism were unpersuaded by this argument. Not only was it premised on a distrust of liberals; it was premised also on the viability

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559 BICKEL, *supra* note 552, at 100.

560 BICKEL, *supra* note 557, at 172.

561 BICKEL, *supra* note 552, at 45.

562 410 U.S. 113 (1973).

563 *See* BICKEL, *supra* note 548, at 28. For an excellent study of the subtle jurisprudential differences between the Warren and Burger Courts, see Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

564 Alexander M. Bickel, *Watergate and the Legal Order*, 57 COMMENTARY 19 (1974).

565 *Id.* at 20.

566 *Id.*

567 *See id.* at 25. *See also* AUERBACH, *supra* note 194, at 302-03. For more of Bickel's views on Watergate, see BICKEL, *supra* note 548, at 91-93; Alexander M. Bickel, *How Might Mr. Nixon Defend Himself?*, THE NEW REPUBLIC, June 1, 1974, at 11-13; Alexander M. Bickel, *Impeachment*, THE NEW REPUBLIC, Nov. 10, 1973, at 9-10; Alexander M. Bickel, *The Tapes, Cox, Nixon*, THE NEW REPUBLIC, Sept. 29, 1973, at 13-14; Alexander M. Bickel, *What Now?*, THE NEW REPUBLIC, Nov. 3, 1973, at 13-14.

of neutral principles. Yet in truth, as Bickel himself conceded, it seemed to be impossible to ascertain if in fact the Supreme Court had ever been more genuinely principled, in the Wechslerian sense, than it had been throughout the Warren era.[568] "If past Courts have also systematically failed to meet the requirements of principled decision making," one critic observed, "does this not suggest that the requirements themselves . . . are fatally unrealistic?"[569] Furthermore, if a genuinely principled Court has never existed, there is no reason to believe that such a Court could have prevented the occurrence of Watergate.

In his commitment to "the utility of the principle of the neutral principles,"[570] Bickel, like Wechsler, demonstrates a faith in rational consensus.[571] Neutral principles, he insists, are a prerequisite to the "elaboration of any general justification of judicial review as a process for the injection into representative government of a system of enduring basic values."[572] Since "the good society . . . will strive to support and maintain" such values, the reasoned elaboration of neutral principles by the courts in matters of constitutional adjudication will, in such a society, find favor with "most of the profession and of informed laity."[573] By developing and applying neutral principles, and by demonstrating also where it intends to stay its hand, a court may contribute to "the evolving morality of our tradition."[574] The genuinely principled court will "enforce as law only the most widely shared values."[575] Engaged in "a continuing colloquy with the political institutions and with society at large,"[576] it will serve as both a leader and as a register of public opinion, "declar[ing] as law only such principles as will . . . gain general assent."[577]

When, accordingly, a court engages in the reasoned elaboration of principles—or when it refuses to undertake such elaboration because it considers a constitutional issue to be "unripe"—it reinforces basic, shared democratic values. Bickel's insistence, however, that ra-

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568 BICKEL, *supra* note 552, at 45.

569 J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 778 (1971).

570 BICKEL, *supra* note 524, at 55.

571 *See id.* at 18-19. Bickel, it should be noted, was familiar with the writings of Truman and Dahl. *Id.*

572 *Id.* at 51.

573 *Id.* at 27.

574 *Id.* at 236.

575 *Id.* at 239.

576 *Id.* at 240. *Cf.* John Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113, 131-35 (1985).

577 BICKEL, *supra* note 524, at 239.

tionalism may serve the interests of democracy does not, by his own estimation, make him a "liberal." His reflections on Watergate alone indicate that liberalism, for him, was something of a cause for disenchantment. Near the end of his life, he attempted to express this disenchantment in philosophical terms. The tradition of "liberal" constitutional interpretation in the Supreme Court, which Bickel identifies primarily with Hugo Black, has its intellectual origins, he argues, in the broader tradition of liberal contractarianism as epitomized by Locke, Rousseau, and, in more recent times, Rawls. The contractarian model "rests on a vision of individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract."[578] "Society," according to the liberal contractarian, "must bend to these rights."[579] Thus it is that contractarianism "is committed not to law alone but to a parochial faith in a closely calibrated scale of values. It is moral, principled, legalistic, ultimately authoritarian. It is weak on pragmatism, strong on theory."[580]

The primary problem with contractarianism, from Bickel's point of view, is that it is antithetical to the values of process jurisprudence. Liberals are content to dispense with principle and procedural consistency in order to secure what they consider to be morally desirable results.[581] But without regard for principle and consistency, a constitutional system is open to abuse.[582] It is for this reason, Bickel argues, that constitutional adjudication ought to be founded on a different philosophy, the philosophy of Burkean conservatism.[583]

Bickel finds in the writings of Edmund Burke the respect for process values which he considers to be absent from liberal contractarian thought. Like Bickel and other process jurists, Burke acknowledged the principle of institutional settlement:

> The constituent parts of a state are obliged to hold their public faith with each other, and with all those who derive any serious

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[578] BICKEL, *supra* note 548, at 4.

[579] *Id.*

[580] *Id.* at 5.

[581] *Id.* at 30 ("For the contractarian liberal is a moralist, and the moralist will find it difficult to sacrifice his aims in favor of structure and process, to sacrifice substance for form. Yet process and form, which is the embodiment of process, are the essence of the theory and practice of constitutionalism.").

[582] *See id.* at 11. *See generally* Robert K. Faulkner, *Bickel's Constitution: The Problem of Moderate Liberalism*, 72 AM. POL. SCI. REV. 925, 934 (1978).

[583] For a discussion of Bickel as Burkean conservative, see Robert H. Bork, *Alexander M. Bickel, Political Philosopher*, SUP. CT. REV. 419 (1975); Maurice J. Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025 (1976); Nelson W. Polsby, *In Praise of Alexander M. Bickel*, COMMENTARY, Jan. 1976, at 50-54.

> interest under their engagements, as much as the whole state is bound to keep its faith with separate communities. Otherwise competence and power would soon be confounded, and no law be left but the will of a prevailing force.[584]

It is not in the capacity of "men of theory"[585] to prevent law from dissolving into force; for no theory of law can accommodate all human prejudices and desires. According to Burke, "[t]he nature of man is intricate . . . and therefore no simple disposition or direction of power can be suitable to man's nature, or to the quality of his affairs."[586] This insight, according to Bickel, illustrates the poverty of liberal contractarian theories. Premised, as they are, on the notion that it is possible to determine in the abstract the nature and scope of human rights, such theories "always clash with men's needs and their natures . . . and any attempt to impose them would breed conflict, not responsive government enjoying the consent of the governed."[587] Burke elaborates the point:

> The pretended rights of these theories are all extremes . . . . The rights of men are in a sort of *middle*, incapable of definition, but not impossible to be discerned. The rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes, between evil and evil. Political reason is a computing principle; adding, subtracting, multiplying, and dividing, morally and not metaphysically or mathematically, true moral denominations.[588]

Computation, then, not theory, prevents the dissolution of law into force. Bickel argued this point as passionately as did Burke. We can neither live nor govern, he insisted, "in submission to the dictates of abstract theories."[589] For government demands pragmatism, and pragmatism in constitutional affairs requires that the courts endeavor to elaborate and balance principles. "The computing principle is still all we can resort to, and we always return to it following some luxuriant outburst of theory in the Supreme Court, whether the theory is of an absolute right to contract, or to speak, or to stand mute, or to be

584 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 105 (1968).

585 *Id.* at 128.

586 *Id.* at 152-53.

587 BICKEL, *supra* note 548, at 23.

588 BURKE, *supra* note 584, at 53. For a discussion of Burke's conception of rights, see NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 77-95 (Jeremy Waldron ed., 1987).

589 BICKEL, *supra* note 548, at 25.

private."[590] Burke's philosophy revealed to Bickel that the fundamental problem of constitutionalism is not judicial activism, but the liberal contractarian theory on which such activism is invariably founded. Eschewing principle and process, such theory inevitably encourages ideological relativism.[591] It allows for either the rejection or the promotion of judicial activism depending on the political climate of the time. In short, liberalism breeds jurisprudential inconsistency.

IX. The Persistence of Process

Although, in recent times, various American legal theorists of differing ideological persuasions have argued that process jurisprudence encourages "conservative" as opposed to "liberal" legal scholarship,[592] only Bickel, of all the major process jurists, attempted actually to develop a conservative philosophy of law. In fact, few constitutional theorists have followed Bickel's path to Burke,[593] and even Bickel himself insisted that Burkean conservatism "belongs to the liberal tradition."[594] Even though his legal philosophy has remained unfashionable, nevertheless, Bickel's basic perspective on judicial review has been inspirational. In developing his theory of constitutional adjudication, he sharpened the focus of process jurisprudence. His argument that the courts ought to practice passivity as well as principled restraint reanimated the Wechslerian ideal of determining apolitical criteria according to which the Supreme Court may decide constitutional cases. In criticizing the activism of both the Warren and Burger Courts, he emphasized more forcefully than any of his intellectual predecessors the basic process belief that to practice or to advocate political as opposed to principled adjudication is to promote a form of jurisprudential dishonesty. Judicial activism, Bickel insisted, can only ever be as good or as welcome as the policies which it implements. Those who liked such activism when the result was the outlawing of state-imposed segregation but disliked it when the outcome was the invalidation of legislation imposing a maximum working day had failed to develop a rational philosophy of constitutional adjudication. Thus it was that Bickel railed against legal realists, judicial activists,

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[590] *Id.* at 24.

[591] *Id.* at 11.

[592] *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 186-212 (1987); Paul M. Bator, *Legal Methodology and the Academy*, 8 HARV. J.L. & PUB. POL'Y 335, 338-39 (1985).

[593] *Contra* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 187-93, 342-43, 353-55 (1990) (one of the few theorists who uses the same path to Burke as Bickel does).

[594] BICKEL, *supra* note 548, at 25.

liberals—all of whom, he insisted, lacked a coherent guiding philosophy. The Supreme Court was following, and indeed was being applauded for following, the whim of politics. Product was being elevated above process. Integrity in adjudication was being sacrificed in the pursuit of expedient results. Resisting the politicization of law demanded faith in reason and principle. Bickel exemplified and promoted that faith.

The manner in which Bickel promoted process jurisprudence is significant. While other lawyers within the process tradition applied the tenets of their faith to specific legal issues,[595] Bickel, inspired by Wechsler, developed process jurisprudence into a general philosophy of judicial review. In doing so, he offered a new approach to the question of what role, if any, judicial review ought to play in a representative democracy. "The very essence of democratic government," de Tocqueville observed, "consists in the absolute sovereignty of the majority; for there is nothing in democratic states that is capable of resisting it."[596] Judicial review however is, in essence, a countermajoritarian institution: that is, whenever a judge declares a statute to be unconstitutional, an unelected official is invalidating a policy adopted by elected representatives of the people. What then justifies the existence of judicial review? For Bickel, judicial review is a necessary bulwark against the potential tyranny of majority rule. "Of all political institutions," de Tocqueville claimed, "the legislature is the one that is most easily swayed by the will of the majority."[597] "In America," furthermore, "the authority exercised by the legislatures is supreme; nothing prevents them from accomplishing their wishes with celerity and irresistible power."[598] Nothing, that is, apart from the judiciary. Only by maintaining an apolitical judiciary, independent of the legislative and executive branches, de Tocqueville argued, might American government sustain a representative democracy without incurring the risk of tyrannical majority rule.[599] Bickel refines this argument. Such a judiciary, he insists, if it is to constrain the potential tyranny of majoritarianism, must be entrusted with the power to review the constitutionality of legislative action. In exercising its power of review, however, the judiciary must practice prudence—that is, it must be prepared to elaborate and to apply neutral principles of constitutional adjudication when appropriate, and will-

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[595] Consider, for example, Harry Wellington on collective bargaining. *See* HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968).

[596] DE TOCQUEVILLE, *supra* note 240, at 254.

[597] *Id.*

[598] *Id.* at 257.

[599] *Id.* at 261.

ing to stay its hand when not. When judges disregard prudence, they adjudicate politically. To adjudicate politically is to sacrifice judicial independence. Thus it is that judicial review guided by prudence is essential to the maintenance of democratic government.

In recent times, many American constitutional theorists have followed Bickel's lead in attempting to define and justify the role of the courts in protecting minority interests within a democracy.[600] For example, in endeavoring "to advance a principled, functional, and desirable role for judicial review in our democratic system," Jesse Choper argues that "the Court must exercise this power in order to protect individual rights, which are not adequately represented in the political processes. When judicial review is unnecessary for the effective preservation of our constitutional scheme, however, the Court should decline to exercise its authority."[601] This is, of course, classic Bickel. But it is important here to appreciate the precise nature of his influence. The originality of Bickel's jurisprudence lies not in his recognition that the judicial protection of minority interests is consistent with the preservation of democratic government, but in his thesis that, within a democracy, such protection demands a prudent judiciary. The notion that the courts may legitimately protect minority interests was sounded as early as 1938 in footnote four of *United States v. Carolene Products*.[602] In that footnote, Justice Stone suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality" where the courts are called upon to determine the validity "of statutes directed at particular religious . . . or national . . . or racial minorities."[603] In such instances, he explained, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry."[604] The problem with such a claim, in terms of Bickel's jurisprudence, is that it appears to be a call for judicial activism. After all, on the basis of

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600 *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 206-07, 254-55 (1976); Frank I. Michelman, *Politics and Values or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977). *But compare* Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981) (taking issue with process-based responses to the limiting of political minorities' constitutional claims).

601 JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 2 (1980).

602 304 U.S. 144, 152-53 n.4 (1937).

603 *Id.*

604 *Id.*

what principle might a court determine that one statute affecting the interests of a "discrete and insular minority" (whatever that might be taken to mean[605]) be subject to more exacting judicial scrutiny than another? *Carolene Products* thus posed a fundamental difficulty for constitutional scholars writing after Bickel: namely, how might the judicial protection of minorities be justified in a principled fashion? The problem is basically the same as that which Wechsler had raised with regard to *Brown*. If process jurisprudence was to persist in the post-Bickel era, proponents of the faith would have to develop a theory of judicial review founded on principle, and yet able to accommodate the type of activist, minority-protecting constitutional adjudication epitomized by *Carolene Products*.

Credit for the development of such a theory belongs principally to John Hart Ely. According to Ely, the duty of the Supreme Court in protecting the interests of minorities "lies at the core of our system."[606] As "comparative outsiders in our governmental system," appointed judges are "in a position objectively to assess claims . . . that either by clogging the channels of [political] change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are."[607] Judicial review exists, accordingly, both to eradicate "stoppages in the democratic process"[608]—for example, by invalidating legislation which restricts voting rights—and to ensure the representation of minority interests. A minority which "keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable,"[609] is likely to require the protection of the courts. Indeed, it would be a discredit to the democratic process if such legislative classifications were impervious to constitutional review, that is, if the courts were precluded from protecting "those who can't protect themselves politically."[610]

Judicial review, then, is regarded by Ely to be an integral feature of "an open and effective democratic process."[611] In engaging in such review, the role of the courts is not to enforce particular political values, but to guarantee the integrity of that process. It is for the courts,

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605 *See* Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77 (1980).

606 ELY, *supra* note 497, at 135.

607 *Id.* at 103.

608 *Id.* at 117.

609 *Id.* at 152.

610 *Id.*

611 *Id.* at 105.

guided by "the general contours of the Constitution,"[612] to "keep the machinery of democratic government running as it should" by ensuring that "the channels of political participation and communication are kept open" and that majority rule does not result in minority oppression.[613] In this way, Ely radically reorients process jurisprudence. Previous process jurists had conceived integrity to be a legal or, more narrowly, an adjudicative quality. For Ely, in contrast, integrity is a political quality which constitutional adjudication serves, or ought to serve, to promote. Therefore, integrity is no longer something which judicial activism undermines. Indeed, judicial activism may epitomize integrity. The Supreme Court often protects the integrity of the political process, for example, when it invalidates legislation on the basis of open-textured provisions of the Constitution such as the Equal Protection Clause.[614] The Warren Court exemplified the judicial protection of political integrity when it outlawed state-imposed segregation. For in doing so, it was, in Ely's terms, attempting to remedy a malfunction in the democratic process whereby "representatives beholden to a representative majority [were] systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system."[615]

Thus Ely squares process jurisprudence with judicial activism. The courts demonstrate integrity in constitutional adjudication, he insists, when they strike down statutes which cut off the channels of political change and when they facilitate the representation of minority interests. Such adjudication, he argues, is consonant with the premises of American representative democracy. While the scope of process jurisprudence is accordingly extended, however, it is by no means rendered indiscriminate. In fact, Ely's theory offers an answer to the great constitutional problem of modern times, which is how "to find a way of approving *Brown* while disapproving *Lochner*."[616] Unlike *Brown*, *Lochner* contributed nothing to the maintenance of the democratic process; the decision served neither to unblock closed channels of political participation nor to combat minority oppression. Yet the fact that Ely is able to distinguish *Brown* from *Lochner* in this way reveals a basic flaw in his thesis. For, in arguing that the function of judicial review is to remove political blocks and imbalances

[612] *Id.* at 101.
[613] *Id.* at 76.
[614] *See id.* at 30-32.
[615] *Id.* at 103.
[616] *Id.* at 65.

from the democratic process, he commits himself to a markedly narrow conception of representative democracy.

The Constitution, Ely argues, is for the most part unconcerned with substantive values—indeed, the choice of such values "is left almost entirely to the political process."[617] Rather, the Constitution "is overwhelmingly concerned . . . with procedural fairness in the resolution of individual disputes . . . [and] with ensuring broad participation in the processes and distributions of government."[618] Judicial review, as Ely conceives it, serves to protect these "process" rights by upholding the constitutionally guaranteed rights of participation in the political process and fair representation. But how are courts to uphold such rights if not by making substantive value choices? With regard to the right of political participation, for example, "[d]eciding what kind of participation the Constitution demands requires analysis . . . of the character and importance of the interest at stake—its role in the life of the individual as an individual."[619] Such analysis demands precisely the type of "judgment call"[620] which Ely regards to be the job of the political process.[621] Accordingly, for all that his theory is an attempt to demonstrate precisely the opposite, judicial review appears invariably to involve the importation of substantive value preferences into the Constitution.[622]

The preferences towards which Ely's own theory tilts are discernible from his analysis of minority representation. Although he finds problems with Justice Stone's image of a "discrete and insular minority," he retains the concept for the reason that hostility and stereotyping in general "social intercourse" often grow out of the perception of a particular minority as discrete and insular.[623] The use of judicial review to invalidate legislative classifications which discriminate against such minorities is essential "to the amelioration of cooperation-blocking prejudice."[624] But what of minorities—victims of poverty, for example—that are neither discrete nor insular? Are they

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617 *Id.* at 87.

618 *Id.*

619 Tribe, *supra* note 605, at 1069.

620 To take a term from Ely. *See* ELY, *supra* note 497, at 103.

621 *See* Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 234-35 (1981).

622 On this point, see further P.P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 91-116 (1990); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Mark V. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

623 ELY, *supra* note 497, at 161.

624 *Id.*

also to be protected?[625] Not according to Ely. Although "a law need not necessarily discriminate explicitly against a disfavored group" in order to attract judicial scrutiny, he argues,

> failures to provide the poor with one or another good or service . . . generally result . . . from a reluctance to raise the taxes needed to support such expenditures . . . . A theory of suspicious classification will thus be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with.[626]

For Ely, then, the judicial protection of minorities is classification-bound. The fact that specific legislation may disadvantage the poor, for example, ought not to be a valid reason for judicial review, since "the poor" do not constitute a discrete and insular minority. The problem with Ely's position on the scope of constitutional adjudication is not that he excludes the poor in particular, but that he feels compelled to draw a line. For this in itself demonstrates the value-laden nature of judicial review. Precisely what groups ought to qualify as minorities deserving of special protection within the representative system is a matter of choice. That choice may depend upon whether or not eligible minorities must be discrete and insular. It may also depend on what the words "discrete and insular" are taken to mean. Even once the courts have determined what constitutes a minority deserving of special protection, the actual protection of any such minority entails not only the invalidation of a law which appears to offend against the integrity of the democratic process, but also the affirmation of the particular minority right. As Laurence Tribe explains:

> [t]he crux of any determination that a law unjustly discriminates against a group is not that the law emerges from a flawed process, or that the burden it imposes affects an independently fundamental right, but that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity. Necessarily, such an approach must look beyond process to identify and proclaim fundamental substantive rights.[627]

So it is that Ely's theory fails to remain faithful to its own premises. If there is a basic reason for this, it is that Ely wants the best of both worlds. He attempts to develop a process-based theory of judicial review which embraces activism while remaining faithful to the classic Wechslerian ideal of keeping constitutional adjudication dis-

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625 On this point, see generally Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985).

626 ELY, *supra* note 497, at 62.

627 Tribe, *supra* note 605, at 1077.

tinct from politics. The way in which Ely endeavors to get the best of both worlds is by redefining process. By his definition, "process" is no longer the process of judicial reasoning or the institutions which make up the legal process, but the democratic process, the integrity of which judicial review must serve to protect. Ultimately, his theory fails because he is incapable of explaining how the institution of judicial review might maintain the integrity of that process without promoting value preferences. Sustaining Ely's conception of integrity means abandoning integrity as conceived by Wechsler and Bickel. Even the democratic process itself turns out to be a peculiar value-construct. As much as Ely eschews consensus-oriented theories of constitutional adjudication,[628] he treats as uncontroversial his own assumption that judicial review is limited to protecting the constitutional rights of political participation and fair representation.[629] In fact, judicial review within a democracy operates to protect a distinctly broader framework of rights.

Such an insight might properly be termed "Dworkinian." Ely's theory of judicial review, according to Ronald Dworkin, proves unpersuasive for three primary reasons. First, Ely assumes that his own narrow conception of the democratic process "is the right conception—right as a matter of 'objective' political morality—and that the job of the Court is to identify and protect this right conception."[630] Secondly, Ely mistakenly supposes that judges might adopt his theory "without facing issues that are by any account substantive issues of political morality."[631] Thirdly, he fails to explain how "a 'process' theory of judicial review will sharply limit the scope of that review."[632] Criticisms along these lines have been outlined above. For his own part, Dworkin not only elaborates these criticisms but argues that they uncover a basic fact about judicial review: namely, that "[i]f we want judicial review at all—if we do not want to repeal *Marbury v. Madison*—then we must accept that the Supreme Court must make important political decisions."[633] The fundamental question facing American constitutional theorists, in other words, is not whether to retain the power of judicial review, but—given that it has been retained—precisely how the Court ought to exercise the power. More simply—indeed, as Dworkin puts it—the problem at the heart of constitutional jurisprudence is: what reasons will constitute "good rea-

628 *See* ELY, *supra* note 497, at 63-69.
629 *See* Parker, *supra* note 621, at 235.
630 RONALD DWORKIN, A MATTER OF PRINCIPLE 59 (1986).
631 *Id.* at 66.
632 *Id.* at 67.
633 *Id.* at 69.

sons" for the exercise of judicial review?[634]

Dworkin's own answer to this question is well known. The Supreme Court, in exercising the power of judicial review, ought to reach decisions based on principle rather than on policy. Decisions based on arguments of principle are decisions concerned not with the question of how the general welfare of the community is best promoted, but with the question of what rights people have under the constitutional system. "Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right."[635] In reaching principled decisions, a court ought to protect not only constitutional rights but also moral rights, for "[t]he nerve of a claim of right" is not that it is embodied in the Constitution, but "that an individual is entitled to protection against the majority even at the cost of the general interest."[636] Where no constitutional right exists, for example, a person still has the right "to be treated with the same respect and concern as anyone else."[637] Indeed, for Dworkin, the root principle of government is that people must be treated with equal concern and respect.[638] As a political ideal, "integrity"—his key jurisprudential theme in recent years—requires "that government pursue some coherent conception of what treating people as equal means."[639] In the context of adjudication, furthermore, "integrity requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles."[640] "The adjudicative principle instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."[641]

Outlined thus, Dworkin's jurisprudence prompts a definite sense of déjà vu. The distinction between principle and policy, the notion of adjudication as a principled activity, the concern with integrity, the presumption of a rational consensus—these are the hallmarks of process jurisprudence. Even Hercules, Dworkin's superhuman judge, fits the role of the supreme reasoned elaborationist.[642] It would be wrong, however, to align Dworkin squarely with the process tradition. Cer-

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634 *Id.*

635 DWORKIN, *supra* note 76, at 82.

636 *Id.* at 146. *See also* Ronald Dworkin, *The Jurisprudence of Richard Nixon*, 17 N.Y. REV. BOOKS, at 27, 30-31 (1972).

637 DWORKIN, *supra* note 76, at 227.

638 *Id.* at 272.

639 DWORKIN, *supra* note 407, at 223.

640 *Id.* at 217.

641 *Id.* at 225.

642 *See* DWORKIN, *supra* note 76, at 116-17; DWORKIN, *supra* note 407, at 400.

tainly in his earlier writings Dworkin implicitly distances himself from that tradition. Roscoe Pound's vague characterization of principles as starting points for legal reasoning, for example, seemed to exasperate him. "[I]t is not enough," Dworkin argued, simply "to call attention to these principles and to show how they have grown from ancient times."[643] Having merely identified and charted the emergence of certain foundational legal principles, Pound had "stopped at the beginning . . . he did not put to himself the challenge of setting out clearly the views he opposed, and of studying what he had to show to oppose them."[644] In his early work, Dworkin was no less critical of Lon Fuller.[645]

> Professor Fuller faces a dilemma. He wants to show that making even bad law requires some compliance with principles of morality. When he produces principles compliance with which is indeed necessary to law, they turn out to be strategic or criterial rather than moral principles. When he insists on considering them moral principles (or substitutes for them principles which are moral) he is no longer able to show that compliance with them is necessary to law.[646]

By the early 1960s, Dworkin was developing his own conception of principles. It is by the application of principles (as distinct from both policies and rules)—principles such as "no man shall profit by his own wrong"—that judges are able to decide hard cases.[647]

Some commentators discern in Dworkin's discussion of principles—and particularly in the distinction that he makes between principles and policies[648]—more than a hint of Hart and Sacks.[649] According to Vincent Wellman, "Dworkin's view on law and judging are fundamentally the same as those outlined" in *The Legal Process*.[650] Yet, having made this claim, he proceeds to argue that "Dworkin's distinction between principles and policies is more ele-

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643 Ronald Dworkin, *The Case for Law—A Critique*, 1 VAL. U. L. REV. 215, 217 (1967). In this work, Dworkin criticizes Roscoe Pound, *The Case for Law*, 1 VAL. U. L. REV. 201 (1967).

644 Dworkin, *supra* note 643, at 217. Dworkin appears to hold in much higher estimation the work of Pound's student, John Dickinson. *See id.* at 217-18; STEPHEN GUEST, RONALD DWORKIN 5 (1992).

645 It is interesting to note that, as a student at Harvard in the 1950s, Dworkin did not take any of Fuller's courses. *See* GUEST, *supra* note 644, at 5.

646 Ronald M. Dworkin, *The Elusive Morality of Law*, 10 VILL. L. REV. 631, 638 (1965). In the same vein, see also Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965).

647 *See* Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 634-35 (1963).

648 *See* DWORKIN, *supra* note 76, at 22.

649 *See* Eskridge & Peller, *supra* note 426, at 731.

650 Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413, 414 (1987).

gant than that offered by Hart and Sacks."[651] In fact, he uncovers as many differences as similarities between their respective jurisprudential models. Other commentators regard as significant the fact that "Dworkin graduated from the Harvard Law School in 1957, at the apogee of legal process's formative period."[652] Yet Dworkin never took the *Legal Process* course.[653] By his own account, his only experience of Hart and Sacks's process perspective was vicarious, derived, as it was, from conversations with his former colleague at Yale Law School, Harry Wellington.[654]

Wellington began teaching the *Legal Process* materials after he had sat in on Albert Sacks's course in the early 1960s, while they were both visiting professors at Stanford.[655] "What especially interested me in *The Legal Process*," he recollects, "was the way in which the material addressed the limits of law and the allocation of responsibilities among legal institutions."[656] Wellington also regarded as important Hart and Sacks's treatment of principles and policies as distinct types of legal criteria.[657] In an essay "dedicated to the memory of Henry M. Hart, Jr.," published in 1973,[658] he lamented that "[l]awyers are not especially concerned . . . to distinguish principles from policies."[659] The distinction, he insists, is crucial, for it is the key to keeping adjudication separate from politics. A judicial institution charged with the task "of finding the society's set of moral principles and determining how they bear in concrete situations . . . would be sharply different from [an institution] charged with proposing policies."[660]

> The latter institution would be constructed with the understanding that it was to respond to the people's exercise of political power . . . . The former would be insulated from such pressure. It would provide an environment conducive to rumination, reflection, and analysis. "Reason, not power" would be the motto over its

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651 *Id.* at 425.

652 Eskridge & Peller, *supra* note 426, at 731 n.72.

653 Letter from Ronald Dworkin, Professor, Oxford University, to Neil Duxbury, University of Manchester (June 12, 1992) (on file with author).

654 *Id.* Dworkin wrote: "We talked a great deal about legal theory, and I might well have imbibed some of the legal process mystique from him." *Id.*

655 Letter from Harry H. Wellington, Dean, New York Law School, to Neil Duxbury, University of Manchester (July 7, 1992) (on file with author).

656 *Id.*

657 *Id.*

658 Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 221 n.* (1973).

659 *Id.* at 222.

660 *Id.* at 246.

door.[661]

Wellington thus not only dedicated his essay to Hart but also echoed him: the courts ought to be the forum of principle, and the articulation of principle is the pathway to reason.[662]

This echo of Hart and Sacks certainly emanates from the writings of Dworkin as well as from those of Wellington. With Dworkin, however, it is very much one echo among many. Whereas the connection which Wellington makes between reason and principle is clearly derived from *The Legal Process*, for example, Dworkin finds the connection at the heart of modern liberal philosophy.[663] Rawls's theory of justice, he observes, entails "choice conditions . . . constructed so as to reflect . . . principles of reasonableness suited to the political culture of Western liberal democracies."[664] In identifying the connection of reason and principle in Rawls's work, Dworkin in effect highlights the intellectual overlap between the liberal philosophical tradition and the process tradition. Preoccupation with "neutrality" is another example of this overlap.[665] Owing to its foundation in each of these traditions, Dworkin's legal philosophy is illustrative of the fact that process jurisprudence is wrapped up in a more general intellectual culture. Far from being an exclusive characteristic of process jurisprudence, faith in reason—and the "principled" articulation of that faith—has motivated the endeavors of many jurists, philosophers, and political scientists alike. It is for precisely this reason that process jurisprudence cannot be conceived in a straightforwardly "causal" fashion. Certainly some process jurists influenced or were influenced by others. But there is much more to the process tradition than merely a network of influences. The tradition must be understood primarily as the embodiment of an attitude concerning the importance of rationality within a democracy. Process jurisprudence is the principal effort of American lawyers to try to make something of that attitude, to give it energy, focus and direction. It is, in essence, an attempt by lawyers to turn into theory a faith which they hold in common with other American intellectuals.

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661 *Id.* at 246-47.

662 On Wellington's use of the policy-principle distinction, see Laurence E. Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315, 381-84 (1983).

663 On rationalism and liberal philosophy, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 28-32 (1991).

664 Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 14 (1987).

665 *See* Sunstein, *supra* note 481, at 48-52.

CONCLUSION

Many American lawyers appear nowadays to have abandoned the faith in reason that characterizes process jurisprudence. This strain of legal philosophy has been dismissed by some as little more than a vision of a legal utopia, of a system in which all official action is rational action, identifiable as such by virtue of the fact that it reflects democratic values rooted in consensus.[666] Certainly the rationalistic premises of process jurisprudence invest it at times with an other-worldly quality. Hart and Sacks, for example, developed a wholly benign image of the legal process. Their vision is one of judges, legislators, administrators, and other legal officials as essentially honest, rational agents, compelled to act reasonably because that is what the principle of institutional settlement demands.[667] Even if their vision of law as procedure grounded in reason were a reality, it would by no means be welcomed by all. Many proponents of critical legal studies, for example, take the view that law cannot and, indeed, even if it could, should not be rational, neutral, and detached from politics.[668] For many critical legal theorists, this is the primary lesson of legal realism.

Yet legal realism failed.[669] Whereas realism was weak in opposition to tyranny, process jurisprudence was premised on the rationality of democracy. Inevitably, the latter prospered as the former fell from grace. As I have tried to show, however, process jurisprudence did not emerge in response to legal realism. The process tradition in fact evolved alongside realism rather than in reaction to it. Without doubt, the process perspective was at its most vital during the post-World War II years. It was during this period that the rationalistic premises of process thinking—in law as in political science and philosophy—served to legitimate and promote the very democratic ideals which, on the European continent, had been undermined by fascism and communism. In the post-war years, we might say, process jurisprudence found its forte. But process thinking had been around in American jurisprudence at least since the time of Langdell.

My aim here has been to trace the evolution of process thinking in American jurisprudence. In tracing this evolution, I have sought to demonstrate how the theme of reason has acquired paradigmatic sta-

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666 *See, e.g.*, KELMAN, *supra* note 592, at 186-212.

667 This criticism of Hart and Sacks is developed specifically with regard to legislative activity by William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

668 *See, e.g.*, Rodriguez, *supra* note 427, at 944.

669 Thurman Arnold, *Judge Jerome Frank*, 24 U. CHI. L. REV. 633, 635 (1957) ("realism, despite its liberating virtues, is not a sustaining food for a stable civilization").

tus in American legal thought. The emergence of faith in reason has, I believe, been a rather more subtle development than has commonly been assumed. To attribute the growth of this faith exclusively to the challenge of legal realism is far too simplistic. Rather, faith in reason lies at the heart of American legal culture. The history of process jurisprudence is a history of American lawyers endeavoring to uphold and protect this faith. It is a history of lawyers attempting to uncover reason immanent in law. From the process perspective, the integrity of the legal system depends on its foundation in reason. When the integrity of the legal system is apparently threatened—for example, where a court faced with a hard case appears to be compelled to reach a political rather than a principled decision—process theorists attempt to bolster integrity by modifying the meaning of "process." Thus it is that we find successive proponents of the process perspective refining the basic process framework in the effort to preserve the image of adjudication as an apolitical activity. Process jurisprudence transpires in this way to be the very antithesis of legal realism. If so-called realists were concerned with telling it—"law"—as it is, process jurists are concerned primarily with explaining how it ought to be. For, regardless of how it might appear to work in reality, law, from the process perspective, must always be understood in the light of the faith: as an institutionally autonomous activity founded in reason.