In a book published several years ago, *Judicial Policy Making and the Modern State*, we argued that policy making is a standard and legitimate function of modern courts, as standard and well-accepted as fact-finding or the interpretation of authoritative texts. The case study we provided in support of this argument involved the prison reform cases decided between 1965 and 1990, which we uncontroversially described as the high-water mark of judicial policy making in American history. We did not, however, advance any claim about whether judicial policy making, either in the prison reform cases or in general, is actually effective. All we claimed is that it is a standard and legitimate function of the courts.

This, of course, leaves an important question open. Judicial policy making may be standard and legitimate, but is it a good idea? This question is a crucial one in assessing the value of litigation against the government. Modern litigants very often go to court because they want to obtain a decision that declares new public policy, and they sometimes obtain such a decision whether they wanted it or not. It is simply not conceivable that courts could be prohibited from making public policy to some extent. No modern nation has a judicial system subject to this prohibition, not even those that claim they do, like

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** Claire Sanders Clements Dean's Chair, Boalt Hall School of Law, University of California at Berkeley.
2 Id. at 13.
3 Id. at 26.
4 This is a proposition that is commonplace in all standard histories of the common law. See, e.g., LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY (1965) (stating law is a reflection of social interests); OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Howe ed. 1963) (1881) (asserting the life of the law is, in part, intuitions of public policy); SIR HENRY SUMNER MAINE, ANCIENT LAW (Transaction Publishers 2002) (1866) (proposing law evolves according to social development). However, what is taken for granted—indeed celebrated as its genius—by historians of the common law remains highly problematic for students of modern administrative and constitutional law. One consequence is a dearth of theorizing about judicial policy making in the modern era.
France. As virtually every political scientist who has studied the matter has asserted, and as even most legal scholars are willing to concede, policy making inheres in the basic structure of a modern judiciary. For the foreseeable future, therefore, any discussion of litigation against the government must incorporate the fact that such litigation will regularly induce the judiciary to make public policy.

Perhaps the strongest defense of this position is Owen Fiss' claim that as "coordinate branches" of government the federal courts have not only a right, but an obligation to make policy. He argues that the Constitution "creates the agencies of government, describes their functions, and determines their relationships," but that in addition it "also identifies the values that will inform and limit this governmental structure." "Adjudication," he maintains, "is the social process by which judges give meaning to our public values." There is, he believes, a need for courts "to give [these values] specific meaning, to give them operational content, and, where there is a conflict, to set priorities." Although he believes that this has always been the function of constitutional adjudication, he acknowledges that in the modern administrative state, this task has become more important and has led to a new form of constitutional adjudication, whose task is the structural reform of large-scale organizations and particularly government bureaucracies. Indeed for him, the special task of contemporary constitutional adjudication is to protect against the threats to our constitutional values that are posed by the operations of large-scale organizations, and to develop new types of remedies that are expansive enough to restructure and transform organizations that threaten basic constitutional values. "Structural reform litigation" represents an important advance in adjudication. It acknowledges the bureaucratic character of the modern state and the important public dimension that judicial power can play in controlling it.

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6 See, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1932) (asserting that judges base decisions on submerged psychological factors); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997) (stating judges' decisions reflect class biases); GLENDON SCHUBERT, THE JUDICIAL MIND (1965) (stating that judicial decision making reflects judges' ideologies); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (stating that judicial decision making reflects judges' attitudes); SHAPIRO, supra note 5 (stating that courts are the agents of the dominant regime).
8 Id. at 1.
9 Id. at 2.
10 Id. at 1.
11 Id. at 44.
12 Id. at 44-46.
13 Id. at 2.
For Fiss, there is no dilemma as to whether individuals should have the power to sue government. He has an expansive normative position that provides a vigorous defense of structural reform adjudication, one that empowers individuals to sue government. However in his robust defense of the new "form" of adjudication, Fiss fails to identify the "limits" that would bound this activity.

I. THE PROMISE AND PROBLEM OF NEW LEGAL PROCESS

A. The Origin of New Legal Process

In assessing the desirability of judicial policy making, it must be assumed that policy making per se is desirable. Policy making is defined by Ronald Dworkin as the effort by government actors to produce socially desirable results. More specifically, it is a conscious effort by government actors to intervene in the social and economic spheres to improve the citizenry's quality of life. Such efforts are the defining feature of the administrative state, and constitute the rationale for the structure of modern government. Political and legal theorists may disagree about their content and extent, but only Robert Nozick argues that the government should not make policy at all.

The question, then, is not whether government should make public policy, but how it should do so. In the context of litigation against government, the question is whether public policy should be made by courts. For any legal scholar, this issue, namely the issue of whether a particular task should be performed by the courts, will bring to mind the mode of analysis known as legal process. Legal process was the academy's response to legal realism, which was itself a response to formalism. Formalism argued that common law, or legal doctrine, embodies general, logically coherent legal principles that transcend politics, and can thus be asserted against political decision makers.

14 Id. at 17, 18-24.
16 Id. Public policy can thus be distinguished from foreign policy, which governments have always done, and is essentially uncontroversial; that is, no one, not even Nozick, argues that government should not engage in conscious efforts to manage its relationship with foreign governments. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (defending the ultraminimal state, but granting the state a role in foreign policy).
17 See generally NOZICK, supra note 16 (asserting state action inevitably violates individual rights). Friedrich A. Hayek condemns economic planning, but he acknowledges, however grudgingly, the desirability of policy making in other areas. See FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 87 (1960).
18 See generally Thomas C. Grey, Langdell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983) (discussing the impact of Langdell's creed "law is a science"); Dennis Patterson, Langdell's Legacy, 90 NW. U. L. REV. 196 (1995) (comparing Langdell's approach with modern interdisciplinary legal analy-
The realists responded that such principles do not exist; law is always the creation of a specific governmental agent, and is thus subordinate to politics. In addition, they asserted, doctrine is generally incoherent, and cannot prevail over established political authority. This response comported with the views of social scientists, and possessed the political virtue of discouraging the sort of counterproductive judicial imperialism that the courts of the period frequently indulged in, but it had a corrosive effect on the possibilities of legal scholarship. It threatened to subsume the field into social science, thereby requiring legal scholars to become social scientists of law, a task for which they were eminently unqualified.

Legal process, which flourished in the decades following World War II, enabled legal scholars to rehabilitate doctrinal scholarship. In essence, they conceded that law is subordinate to politics, but then argued, in a crucial move, that there exists a purely procedural principle that transcends politics, namely, that particular governmental institutions have distinctive areas of competence. The legislature and the executive are properly assigned the task of making public policy, both because they reflect the popular will and because they can call upon trained specialists. But once policy is stated in terms of rules, the courts are properly assigned the task of determining whether particular persons have obeyed or violated those rules, because such determinations depend on reasoned arguments and must be made by following formal procedures. Polycentric issues, such as resource allocation decisions that involve trade-offs between many different programs, are best left to the policy making branches, but contests...
between two parties regarding the interpretation of a rule are properly assigned to the judiciary. This argument had the great virtue of conceding the now-virtually unassailable point that legal doctrine is subordinate to politics, yet defining an area of government decision making where doctrine remained determinative and relatively autonomous. It thus rehabilitated the sort of doctrinal analysis that formed the core of legal scholarship, providing it an independent, albeit circumscribed, range of operation.

During the 1970s and 1980s, legal process was subjected to a sustained attack. Since then, however, it has been resuscitated by a movement generally described as new legal process, and it is this movement, clearly one of the most important in contemporary scholarship, that explains why the question of whether a particular task should be performed by courts still brings legal process analysis to mind. The dominant criticism of legal process, and the one that led to its need for its resuscitation, was its failure to recognize that legislatures, agencies and courts are all political actors. Legal process scholars assumed that government officials were all public-oriented, that their primary goal was to devise optimal solutions to policy problems and that the choice between them could thus be made on the basis of their institutional capacity alone. Courts, in Lon Fuller's view, would experience difficulty solving polycentric problems because all the parties affected by the solution to the problem would not be present in court, and all the information necessary to solve the problem would not be available to the judge. The legislature was a preferable decision maker in this situation, Fuller thought, because these sources of information would be available. Legislatures, Hart and Sacks declared, are generally “made up of reasonable persons pursuing reasonable purposes reasonably.” Similarly, where institutional considerations favored judicial resolution, legal process scholars assumed that the judiciary would be able to take advantage of those considerations to reach public-oriented results.

Both law and economics and critical legal studies challenged these comfortable assertions. The law and economics movement was based on rational actor theory, and thus incorporated public choice, which is the rational actor theory’s approach to politics. According to this theory, elected officials, being rational actors like everyone else, are primarily motivated by the desire to maximize their individual self-

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23 See, e.g., id. at 394-405 (providing a discussion of polycentric issues and problems of adjudication).
24 Id. at 404-05.
25 Id. at 399-400.
26 HART & SACKS, supra note 21, at 1415. This well-known statement was made in the context of what a court interpreting a statute should assume, but it was stated as a plausible approximation, not a counterfactual one to be believed for reasons other than its validity.
interest. This means that legislators and the chief executive will try to maximize their chances of being re-elected and thereby retain their desirable positions, while administrators will attempt to maximize the budget of their agencies, or perhaps their individual discretion.

The Critical Legal Studies movement (hereinafter "CLS"), loosely based on neo-Marxist or post-Marxist analysis, viewed public officials as acting to preserve the position and privileges of the upper class. Critical race theory and feminist theory, as successors to CLS, offered parallel arguments that public officials were acting to preserve the privileged position of whites, or males, and ignoring or suppressing more broadly based claims for equality.

New legal process represents an effort to resuscitate the legal process school analysis in light of this critique. Abandoning the assumption that public officials are all public-oriented, it attempts to incorporate both the public choice insight that these officials are motivated by individual self-interest and the CLS insight that they are motivated by class bias. In the view of new legal process scholars, these insights do not alter the basic contours of the problem that the legal process school originally addressed.

Government will still ex-

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27 See, e.g., Anthony Downs, An Economic Theory of Democracy (1957) (stating that parties tailor policies to maximize votes); Morris P. Fiorina, Congress: Keystone of the Washington Establishment (2d ed. 1989) (arguing that legislators' votes reflect desire to be re-elected); Mancur Olson, The Logic of Collective Action: Public Good and the Theory of Groups (1965) (stating that free rider effects mean that many interests are not represented).


32 See, e.g., Neal Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1994) (using economic analysis to fit function with form); William N. Eskridge, Jr., Politics without Romance: Implications of Public Choice Theory for Statutory Inter-
ist, self-interested and biased though its officials may be; indeed, the
same public choice and CLS insights that undermine the asserted
neutrality of government provide strong empirical evidence that the
government will not retreat from exercising its control over society.
Given this continued control, decisions must be made by one institu-
tion or another. Thus, the legal process effort to determine which
institution is in the best position to make these decisions remains an
important one.

But that determination is not nearly as easy as the original legal
process school assumed; it must take into account a much more
complex motivation structure. In particular, it must take into ac-
count the desire of chief executives and legislators to be re-elected,
the particularized motivations of administrators, the class biases of all
officials and a variety of other motivations, which may be of less inter-
est to public choice and CLS because they are not a source of cyni-
cism, but which are nonetheless important. Because public choice
and CLS are both essentially interdisciplinary movements, the new
legal process' incorporation of their insights also represents a partial
incorporation of social science into legal scholarship. It thus cap-
tures the greatest methodological virtue of legal realism and reme-
dies the greatest methodological defect of legal process. It manages
to reassert, once more, the coherence of law as a field of scholarly
endeavor without succumbing to the disciplinary insulation that
marred prior efforts to achieve this goal.

Some characteristic works of the new legal process school illus-
trate the nature of its analysis, and the reason for its continued rele-
vance to the question of whether courts should be public policy mak-
ers. In Imperfect Alternatives, Neil Komesar argues that the regulation
of social systems can be implemented by politics, that is, the executive
and legislature, by the market or by the courts. As his title suggests,
each alternative has its disadvantages; the political branches are sub-
ject to special interest group pressures, the market generates exten-
sive transaction costs, while litigation is expensive and courts are
crowded. It is a bit unfair to his subtle and innovative analysis to say
that he differs from the original legal process school by asking which
institution is the least worst in a given situation, rather than asking
which institution is the best, but that characterization does capture
the fact that Komesar pursues the inquiry about comparative institu-

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33 See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL
INTRODUCTION (1991) (examining the influence of rational choice theories in public law schol-
arship).

35 See generally KOMESAR, supra note 32.

36 Id.
tional competence without any reliance on the claim that institutions have purely public-oriented motivations.  

William Eskridge, in an article entitled *Politics Without Romance*, grounds part of his theory of statutory interpretation on the type of legislation that the court is interpreting.  

Using the public choice analysis of the diffusion or concentration of both costs and benefits, Eskridge argues that the political process is the most reliable when statutes involving diffuse costs and diffuse benefits are at issue, because the majoritarian political process will operate.  

It is the least reliable in connection with statutes that involve concentrated costs and benefits, or diffuse costs and concentrated benefits, because special interests will tend to dominate. Courts, therefore, should interpret the latter type of statute more stringently. In effect, Eskridge recommends that decision making authority should be shifted from legislatures to courts when such statutes are involved, or, to put the point in new legal process terms, that legislatures are less competent to make decisions in these situations, and courts, by virtue of their insulation from politics, possess a comparative institutional advantage.

A final example is Cass Sunstein’s article, *Leaving Things Undecided*. Sunstein counsels the Supreme Court to avoid issuing definitive decisions in a variety of circumstances so that other political branches and social processes have more latitude to address the issue. The article naturally brings to mind one of the classics of the original legal process school, Alexander Bickel’s *The Least Dangerous Branch*, in which Bickel argues that the Court, being “counter-majoritarian,” should use the “passive virtues” to avoid decision and allow the political process to function. This book has been so assiduously attacked since its publication that it justifies the mixed metaphor of being called a magnet, rather than a target, for criticism. Two of the leading criticisms, reflecting both public choice and CLS concerns, are that the political branches are not reliably majoritarian, and that the Court cannot be trusted to engage in such stra-

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56 Id.

57 Eskridge, supra note 32, at 319-24.

58 This analysis also plays a prominent role in Komesar’s book. See Komesar, supra note 32, at 123-38.

59 Eskridge, supra note 32, at 278-79.

60 Id. at 284-85.


62 Id. at 10-28.

63 See Bickel, supra note 21, at 116-23. The passive virtues include among others, the powers to decline jurisdiction, to avoid issues for lack of ripeness, to decide issues on procedural grounds and to awake the political question doctrine. Id. at 111-98.

teric behavior on behalf of higher principle.\footnote{See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (criticizing Bickel's thesis for being attractive but lethal).} Sunstein incorporates these criticisms by grounding his recommendation on participatory democracy, rather than majoritarianism. In his analysis, the Court is not required to manipulate the legal process with the skill of a maestro at his violin, but only recognize when it has gotten itself into deep and muddy waters. It does not defer to some ideal majoritarian decision maker, but to the complex interplay of government officials, interest groups and public opinion that constitutes the essence of our political process. Perhaps most significantly, Sunstein’s deference is not a strategy designed to produce an optimal solution, but an effort to preserve the process by which society feels its way through an uncertain situation to an unknown outcome.

**B. The Discourse and Audience of New Legal Process**

The new legal process school thus appears to offer a convincing solution to the issue of judicial policy making and the desirability of litigation against the government. Like its predecessor, it counsels that the courts should make public policy only when they possess some identifiable institutional advantage in doing so over the executive and legislature. In contrast to its predecessor, however, new legal process incorporates a much more complex and defensible analysis of the rival institutions and, to a more limited extent, of the courts themselves. It would appear to lead to a somewhat expanded role for courts, because it recognizes many more institutional disadvantages of the political branches, specifically their ideological biases and their vulnerability to interest group pressure. At the same time, it acknowledges the ideological biases of the courts themselves, and thus restricts this expansion to a relatively narrow compass.

There is, however, a complex issue lurking just below the surface of this analysis that at least partially undermines its coherence, and leads to somewhat different conclusions. Legal scholarship, for the most part, is normative, that is, its discursive voice is to offer recommendations to legal decision makers about the way to perform their assigned task in an optimal manner. There is, of course, descriptive legal scholarship, such as legal history or legal sociology, but the work that constitutes the major portion of the field, and that gives it a distinctive voice, is essentially prescriptive. The assumption that underlies this approach is that the decision maker thus addressed is capable
of listening. This is a theoretical assumption, not an empirical one. There is no requirement that actual decision makers in fact attend to legal scholarship; the scholarship is primarily directed to other scholars, and its influence on society is measured by criteria other than direct impacts on particular decision makers. What is required is that the decision makers being addressed could conceivably follow the recommendations, that they are the sort of people to whom such recommendations would make sense. It is the theoretical possibility of a response, not its actuality, that establishes the conditions for the discursive voice that legal scholarship adopts. This frees the scholarly discourse from any crude dependence on direct influence, but raises two further questions that are not as readily resolved. First, what kind of decision maker is being addressed, and second, what is the particular role of this decision maker?

Current debate, not only in legal scholarship but in social science and psychology as well, centers on whether decision makers, or people in general, are instrumentally rational, ideological, principled, emotional, or irrational. Public choice, being derived from rational actor theory, argues that people are instrumentally rational, by which it means that they will adopt behaviors designed to maximize their individual self-interest, and that they will generally adopt the behavior best designed to do so, subject to cognitive and informational limits. CLS, being loosely derived from Marxism, argues that people are ideological and will adopt behaviors designed to benefit their social class. The legal process belief that decision makers act reasonably, that is, to advance the public interest, is based on the idea that people are motivated by principle, or alternatively, by the desire to acquit themselves well in the performance of their assigned tasks. Surprisingly, given the methodological naïveté of the legal process school, this conclusion garners strong support among social scientists, whether they view it as a dominant motivation, as do Erving Goffman, Harold Garfinkel and Pierre Bourdieu, or whether they see it as mixed with ideological motivations, as do Anthony Giddens and Robert Merton. In recent years, however, it has been challenged by

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70 See generally Robert Merton, Social Theory and Social Structure (1968).
Antonio Damasio, Robert Frank and Robert Shiller, among others, who have emphasized the motivational role of the emotions, and by cognitive psychology and new institutional sociology, which emphasize various forms of irrationality.

The normative focus of legal scholarship is to frame recommendations that will benefit society in general. When a legal scholar argues that a case should be decided, a statute drafted or a policy enforced in a particular way, she is arguing that her recommended mode of action would benefit society as a whole. In order to combine this normative focus with the discursive practice of addressing government decision makers, she must assume that these decision makers are principled, or public oriented. It is only under this assumption that their motivations will align with general social benefit. This assumption, of course, is the one that the legal process school adopted. The ability to align the legal scholar's public orientation with their traditional discursive voice was a major reason for the legal process school's original success, and a major reason for its subsequent revival. The revived legal process school acknowledges self-interested and ideological motivations, and its methodological sophistication is much greater than its predecessor, but it has been able to draw support for its assumption from other disciplines, and use that perspective to contain the insights that public choice and CLS allowed to dominate all other considerations.

To illustrate the normative focus of legal scholarship, one can contrast the field with a body of legal writing that has a different audience, and, as a result, a different focus. This is the variety of articles, treatises and form books that tell practicing lawyers how to win a case, or more generally, how to do their job in an effective manner. The topics of these two bodies of legal writing, while not identical, overlap to a considerable extent. There are both scholarly articles and practitioner manuals that deal with the Civil Rights Act, the Clean Air Act, the Truth in Lending Act, and the decisional law of torts or trusts. But lawyers, unlike government decision makers, are not supposed to act in a manner that benefits the public; they are supposed to act to benefit their client. Legal writing directed toward them, therefore, can be just as prescriptive as writing directed toward

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officials, but the prescriptions will not be designed to tell the audience how to maximize the public good; they will be designed to tell the audience, that is, practicing lawyers, how to win their case or negotiate an advantageous deal. In Habermas' terms, they are written in strategic discourse, not communicative discourse. This difference in prescriptive stance, resulting from a difference in audience, is sufficient to distinguish the two bodies of legal writing. To put the matter most simply, legal writing whose audience is lawyers is simply not considered scholarship. Law professors sometimes write practitioner treatises, or articles directed to practitioners, but these works are not considered legal scholarship. They are not cited by scholars, except occasionally as evidence of attorney attitudes, and they do not contribute to a scholar's reputation. An assistant professor at any major law school whose tenure file consisted entirely of practitioner-directed work would be denied promotion. Standard scholarship is designed to benefit society in general, and must thus be directed to public-oriented decision makers.

But precisely which decision makers are being addressed by this scholarship? Traditionally, legal scholarship was addressed to the courts. Legal realists, particularly to the extent that they incorporated social science methodology, sometimes departed from this approach and spoke in generally descriptive terms, but this reflected the unsatisfactory character of their work to which the legal process school responded. Part of the appeal of the legal process school resided in its ability to restore the normative voice that the legal realism had partially undermined. Once the realist assertion that judges were deciding cases on the basis of whim, inherited mythology or personal psychology was rejected, and their public-oriented motivation was reasserted, legal scholars could return to their traditional pattern and address recommendations to judges in public-oriented terms.

Law and economics and CLS, although they cast themselves as a general attack on the legal process school, left this mode of discourse relatively unscathed. The public choice analysis that accompanied law and economics mounted a convincing attack on the legal process assumption that legislatures consist of "reasonable persons pursuing reasonable purposes reasonably;" instead, public choice scholars insisted, the legislators are trying to maximize their chance of re-election. CLS mounted an equally convincing attack on the ground that legislators were trying to implement particular political ideologies. Indeed, the current debate in political science is between these two views, not between either view and some standard of reasonableness.

57 HART & SACKS, supra note 21, at 1415.
But while both movements were prepared to abandon the behavioral assumptions that legal process made regarding legislators, they were not willing to do so with respect to judges. Public choice-oriented legal scholars were notably shy about ascribing self-interested motivations to judges, although a few halfhearted attempts have been made. In most cases, these scholars simply assumed that judges could act in the public interest, perhaps because the constitutional rules regarding job tenure and salary protection had insulated them sufficiently from the need to take action to preserve their positions. As a result these scholars frequently continued to cast their work as recommendations to judges about the proper way to decide cases. What gave this work its law and economics orientation was that the scholars recommended that judges decide on the basis of efficiency. In addition, when interpreting statutes or administrative actions, judges were counseled to take the self-interested motivations of these officials into account. But law and economics scholars assumed that the judges could be addressed with such public-oriented recommendations, that judges would decide on the basis of efficiency, or take legislative motivations into account because these considerations would produce the best policy for the nation as a whole.

CLS scholars were not at all shy about applying their analysis to judges. They argued that judges, like elected officials, would carry out their assigned functions to systematically suppress the claims of economically disadvantaged groups. The result is that judicially created legal doctrine, like statutes or executive decisions, would be designed to preserve the economic status quo and to reject claims that would lead to social reform and economic justice. Having reached this conclusion, however, the CLS response was to continue addressing arguments to judges in the hope of shaming them into abandoning their class biases and deciding cases on the basis of the principles that they asserted, rather than class interest. This was the source of the CLS turn to French deconstruction, a theory which has no inherent political orientation, but can be used to reveal contradiction and

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59 See U.S. Const. art. III, § 1.

60 See, e.g., Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983) (recommending that judges should interpret statutes to implement the bargain established by the legislature, on the assumption that judges would be motivated to do so rather than acting to preserve their jobs); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev 223 (1986) (recommending that judges should interpret statutes to make them more public oriented).
self-delusion in the theory being observed. In other words, CLS preserved the traditional discourse of legal scholarship by assuming that judges, although reflecting the same class-bias as legislators, could nonetheless be persuaded to abandon those biases by reasoned argument. Critical race theory and feminist theory make the same assumption. Instead of using deconstruction, however, they use the more familiar methodology of pointing out the internal contradictions between our government's stated principles and its actual performance. They can do this because racial and gender equality can be derived from indigenous American principles, such as equality of opportunity, but class equality cannot be.

New legal process scholars have been able to build on this belief, which is central to the discourse of legal scholarship and essentially unchallenged by the otherwise virulent critics of the original legal process school, that judges are public-oriented decision makers. As a result, they can continue to address public-oriented prescriptions to judges, not necessarily because the judges are expected to respond directly, but because judges are the sorts of public officials for whom a discourse of this sort makes sense. The works by Komesar, Eskridge and Sunstein cited above are all based on this premise; all address the judge, in whole or part, and all adopt a public-oriented prescriptive discourse. As stated above, these works incorporate many of the public choice or CLS insights about the complex motivation structure of executive and legislative officials and avoid the Panglossian simplicity of the original legal process school. They might even concede, although this is not made explicit, that judges can be subject to similarly complex motivations. But they assume that judges are sufficiently public-oriented so that a prescriptive, public oriented discourse can be addressed to them. In other words, they assume that judges have some interest in optimal, public-oriented decision making. This is an entirely plausible assumption and, as stated, it can draw support from much of modern sociology. It is, however, an assumption, and the new legal process analysis of comparative institutional competence is dependent on it, and bound by its limitations.

C. The Dilemma of New Legal Process Analysis

Consider the dilemma of a conscientious federal judge, confronted with a prison reform case in the late 1960s when the judicial reform effort was just getting underway. The judge believes, as almost every reasonable person does today, that the conditions in American prisons at that time, and particularly in Southern prisons, are morally offensive and in need of reform. Following the analysis of new legal process, or indeed the old legal process that still prevailed at the time, the judge also believes that he is not the proper decision maker to reform the prisons. The comparative institutional advan-
The privilege lies with the legislature, which can hold hearings, authorize wide-ranging investigations, freely obtain advice from recognized prison experts and allocate resources, while balancing those resource expenditures against other priorities such as education, housing and crime prevention. If the legislature is uncertain about particular strategies, it can defer the choice of those strategies to the administrative agencies that it will authorize to implement its program. The judge, according to legal process analysis, cannot do any of these things, and is reduced to dealing with the complex, polycentric problem of prison reform in the context of an adversarial lawsuit.

The dilemma is that the legislature and executive are disinclined to act. This is often the occasion for legal process scholars to recommend judicial action, but the basis of that recommendation must be some institutional disability on the part of the reluctant institutions that indicates a structural defect in our majoritarian political system. Such structural defects are identified by what is known among constitutional law scholars as The Footnote, that is, footnote four of the majority opinion in *United States v. Carolene Products Co* 61 These defects are the existence of a "discrete and insular minority," such as African-Americans, who is not able to participate fully in the political process because other groups will not ally with it, or because the denial of a fundamental right, such as the right to vote, disables political participation. In either case, the political branches fail in their representative functions, and the courts can validly intercede. The structural defect eliminates the comparative institutional advantage that formerly belonged to legislature and executive, and gives the politically insulated court the comparative advantage in their place.

But prisoners are not a discrete and insular minority. They have not acquired their identity by birth or some other factor beyond their control. They are prisoners because they violated duly promulgated laws, and were convicted in accordance with the dictates of due process. Nor are the rights that they are claiming, and were ultimately granted, fundamental rights. Certain rights that prisoners claim, such as the right of access to a lawyer or a law library have this character, but these rights, although sometimes violated, were not the ones at issue in the prison conditions cases. 62 The real issue in the cases

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61 304 U.S. 144, 152 (1938) (noting that discrimination against a discrete and insular minority might elevate scrutiny).

62 See Bounds v. Smith, 430 U.S. 817 (1977) (holding that the fundamental constitutional right of access to courts requires authorities to assist inmates in preparation and filing of legal papers by providing prisoners with adequate law libraries or assistance from legally trained persons); Johnson v. Avery, 393 U.S. 483 (1969) (invalidating state prison regulation preventing inmates from assisting illiterate or poorly educated prisoners with habeas corpus petitions); Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969) (invalidating prison regulation prohibiting
involved the totality of their treatment—food, medical care, living conditions, discipline—and was unrelated to the political or legal process. The overarching point is that the manner in which criminals are punished cannot be viewed as a breakdown in the political process; instead, it is a basic function of the political process. To declare that the political process in a democratic society is defective in deciding how to punish those who violate its laws is to reject democracy as a form of government, for punishment, which goes back to the Code of Hammurabi, is perhaps the oldest and most characteristic form of government activity.

These political considerations are connected to more technical consideration about institutional competence. Institutions in the legal process view, and certainly in the new legal process view, are designed by human beings for particular purposes. Thus, an institution such as the executive or legislature that is designed to respond to political demands will be given capabilities that are consonant with those demands, specifically the capability to make new public policy. In contrast, an institution such as the judiciary, that is designed to determine whether particular cases fit within the categories established by an existing policy, will not be given policy making capabilities, but rather the capabilities needed for interpreting and applying a prevailing rule. When the courts stray beyond their proper limits and take over a task assigned to one of the political branches, they not only interfere with the process of majoritarian decision making, but they also do a poor job with the task they have arrogated to themselves. The proverbial fish out of water, they cannot function in an area for which they were not designed.

Thus, legal process suggests that the legislature and executive, not the courts, are the optimal decision makers regarding prison conditions. These are the institutions that are competent to address the

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prisoners from assisting other inmates with legal preparation). See also Raymond V. Lin, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279 (1983) (summarizing the scope of prisoners' right of access to lawyers). But see Lewis v. Casey 518 U.S. 343 (1996) (limiting prisoners' access to legal materials). For a discussion of reductions—but not elimination—of these rights, see Feeley & Rubin, supra note 1, at 380-88. The prison conditions cases were much more sweeping in scope and in many instances resettled in orders that placed entire prison systems under the continuous and sustained supervision of federal judges. See, e.g., Holt v. Sarver (Holt I), 300 F. Supp. 825 (E.D. Ark. 1969) (holding, for the first time, that an Arkansas prison failed to discharge its constitutional duty to protect inmates and that the conditions of cells and facilities constituted cruel and unusual punishment). See generally Feeley & Rubin, supra note 1, at 51-144 (providing a number of case studies and comparisons).

Because legal process analysis so often combines these two considerations, it is worth emphasizing that they are not the same thing. Both an elementary school student and Shaquille O'Neal are forbidden to play college basketball because they would disrupt the jurisdictional rules that define the field, but the elementary school student would also impair the performance of the college team, while Shaquille would not.
issue, and there is no recognizable political breakdown, as defined by legal process, that would preclude them from doing so. The problem is that the legislature and the executive are not acting, that the grotesquely inhuman conditions in the prisons continue year after year, and there is no other decision maker on the scene who is willing to intervene. Under these circumstances, the judge may reason thus: "I may not be the optimal decision maker in this situation, but I am better than nothing. The situation demands action from someone. I may not be able to do as good a job as the political branches can do in theory, but I can certainly do a better job in reality, since these branches aren't acting at all." It may not be possible to reconstruct the mental process of the federal judges who decided the prison reform cases, but the language and substance of their opinions suggest that this is exactly the way they thought.

If this is the case, however, it creates both substantive and methodological difficulties for the new legal process school. With respect to substance, one of the defining elements in new legal process is comparative institutional analysis, the inquiry into the particular institution that is best suited to solve a particular problem. It would be easy enough to condemn the federal judges who decided the prison cases on the basis of this approach, to declare that they should not have acted because they were not the optimal institutional decision maker. But this response is troublesome. Serious abuses of human rights were being perpetrated in our nation, and the courts possessed the authority and ability to intervene. The executive and legislature might have been able to resolve the problem more effectively, but they were not taking action, and there was no realistic likelihood that they would do so in the foreseeable future.

Perhaps the courts should have desisted and waited for the political branches to acknowledge their optimal institutional capacities. There were indeed some state initiated efforts to reform the prisons, and Congress did enact the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), but the failure of the state-level efforts, the nonenforcement of CRIPA by the executive, and Congress' subse-

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3 See FEELEY & RUBIN, supra note 1, at 381-82 (describing the lack of enforcement by the Department of Justice under the Reagan, Bush, and Clinton administrations).
quent passage of the Prison Litigation Reform Act of 1995, which severely limited judicial reform efforts, suggest that the courts would have been waiting a long, long time. To recommend such forbearance would have left generations of prisoners suffering under conditions that virtually everyone in this country recognizes as inhuman, and that virtually no one would choose to re-institute. The recommendation, moreover, ignores the phenomenological position of the federal judges. There they were. The injustices were obvious, no one else was taking action, and they were in a position to do so. Was it really conscionable to desist on the fairly abstract ground that another institution could do a better job, if only it were willing to do that job, which it wasn't? Would we really want the kind of people who would make such arguments populating the federal judiciary?

The second difficulty that the judge's dilemma creates for the new legal process movement is methodological, as opposed to substantive. Like most legal scholarship, new legal process adopts a mode of discourse that addresses recommendations to government officials on public-oriented grounds. Arguments that courts should defer to the political branches in circumstances where they are not the best institutional decision maker are naturally addressed to the judiciary, the most common audience for legal scholarship in general. But precisely what should the scholar say to a judge who acknowledges that she is not the best decision maker, but argues that she is the best available, since the theoretically superior institutions have refused to act? It would be easy enough to condemn the judge, on comparative institutional grounds, but that seems to undervalue the rather convincing moral position that she can assert in favor of her intervention. To endorse this intervention, however, appears to allow strategic considerations into the analysis, and thereby to undermine the theoretical basis for the discourse. The scholar then is adopting the voice of a policy advocate for a particular position, and seeking the best strat-

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67 Pub. L. No. 104-134, 110 Stat. 1328-66 (1996) (codified at 42 U.S.C. § 1997). The Act follows a similar, but more limited effort, as the Helms Amendment to the Violent Crime Control and Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1827 (1994) (codified at 18 U.S.C. § 3626). The Prison Litigation Reform Act prohibits federal courts from ordering changes in prisons and jails unless the court first finds that an inmate's federal rights have been violated, and then requires that the relief be narrowly drawn and employ the least intrusive means to correct the violation. Court orders ordering relief must be terminated after two years unless the court makes an affirmative finding that the relief still meets the required conditions. Consent decrees, as well as court-ordered relief, must conform to the required conditions. The Act was specifically designed to restrict judicial prison reform efforts.

68 See generally EDMUND HUSSERL, CARTESEAN MEDITATIONS 53, 116-17 (Dorion Cairns trans., 1993); Id. at 17 ("[T]his life is continually there for me. Continually, in respect of a field of the present, it is given to conscious perceptuality . . . .") (emphasis in original); EDMUND HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY 91-96 (R. Boyce Gibson trans., 1962).
JUDICIAL POLICY MAKING

egy for achieving that position at a given time. He is setting the sign-
ificance of the political opposition to prison reform at naught, with
no explicit rationale for doing so, and trying to circumvent that op-
position by appealing to the sensibilities of the judiciary. A discourse
of this sort seems to abandon the entire project of comparative insti-
tutional analysis for the very different project of seeking the institu-
tion that will best enable a particular political actor to achieve its
purpose.

Another way to state this methodological dilemma is to note that
 scholarship endorsing the judge’s assessment of the political situation
appears difficult to distinguish from writing that directs recommen-
dations to a prison reform advocate. There is some published legal
literature of this sort and, in any case, it is easy to imagine. It would
begin from an unquestioned premise that the prisons need to be re-
formed and then assess various strategies that advocates could use to
achieve this objective. Quite plausibly, it could observe that there was
no political support for prison reform in the executive and legislative
branches, and that the judiciary was the most promising alternative.
As noted above, however, practitioner-oriented writing of this sort is
not considered legal scholarship; the reason is that it does not take a
broad-based, public-oriented perspective, but rather offers strategic
advice to one particular participant, representing one particular
point of view.

We can now return to the original inquiry. In assessing whether
litigation against the government is socially desirable as a means of
regulating our society, it is necessary to determine whether we want
courts to make public policy. The comparative institutional analysis
of the legal process school appears to be the most natural way for le-
gal scholars to approach this question. Legal process has dominated
legal scholarship for the last fifty years, nearly as long as legal formal-
ism and legal realism combined. It was subjected to a spirited attack
by law and economics and CLS, but it has rallied to reassert itself as
the leading, albeit not exclusive, approach. Comparative institutional
analysis is arguably the single most important theme in the legal
process school, and the role of courts in relation to the politically ac-
countable branches is certainly the most important application of this
theme. But the prison conditions cases suggest two serious difficul-
ties with this widely endorsed approach. First, it does not seem to
speak to the real situation that often faces real judges; it seems insen-
sitive to the moral demand for action that they perceive in critical
situations involving human rights or other serious concerns. Second,
any effort to adapt it to this purpose appears to undermine the

69 See cases and discussion infra note 62.
methodology that underlies most legal scholarship, and certainly the legal process school.

II. A REVISED LEGAL PROCESS ANALYSIS OF JUDICIAL POLICY MAKING

A. From Institutions to Methodologies

One way to preserve the valuable insights of new legal process, while addressing the real concerns of judges in situations such as the prison conditions cases, is to relax the requirement of optimality. Rather than asking whether a particular institution is the optimal choice in a given situation, the scholar would ask whether that institution is an adequate choice. Thus, a judge, when faced with a morally compelling issue, would begin by asking the legal process question of whether there was another institution that could optimally address the issue. If she concluded that there was such an institution, however, this would not conclude her inquiry. She would then ask whether there was a realistic possibility that this optimal institution would address the issue in the foreseeable future. If she concluded that there was no such possibility, she would then ask whether the courts would be pretty good at addressing the issue, even though they were not optimal. If the answer to this latter question was yes, she would proceed.

An approach of this sort bears some relationship to the economic concept of the second best, to Herbert Simon's concept of satisficing and to Charles Lindblom's idea of "muddling through." The purpose of these concepts is to factor some of the limitations inherent in real human situations into the optimality analysis of economics or public policy. Real-world decision makers may be daunted by the complexities of subjecting every available alternative to a full cost-benefit analysis, and may prefer to consider a more limited range of options, accepting the possibility that they may overlook the best option so long as they can find one that is satisfactory. This suggestion has proven controversial, particularly in economics, because most economic analysis is grounded on the principle of maximization. The objection is less relevant to policy analysis, where maximization is

70 Id.
71 See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS xxvii (2d ed. 1957).
72 See Charles E. Lindblom, The Science of "Muddling Through," 19 PUB. ADMIN. REV. 79 (1959) (contrasting successive limited comparisons, the likely method of administrative decision making, with the rationale comprehensive method, the theoretical method embraced by legal scholars).
73 Id.
a much vaguer notion, and still less relevant to legal scholarship, where it plays a relatively minor role.

Nonetheless, the comparative institutional analysis of legal process relies on the idea of optimality, and it may appear that relaxing this requirement would undermine the entire approach. What is left, after all, if the new legal process scholar no longer tries to determine whether the institution in question is the optimal one to make a particular decision, and asks only whether it is pretty good at doing so? How many times would this irresolute approach ever possess discriminating power; how many times would it actually counsel a public official against doing what he wants? Perhaps a sufficiently developed legal process analysis could plausibly be seen as able to convince a government decision maker that he was not the optimal person to make a given decision, but would it ever be possible to convince that he would not at least be pretty good?

At the technical level of institutional capability, the answer to this quandary lies in the distinction between institutions and decision making styles. While new legal process, benefiting from both law and economics and CLS, has developed a more sociologically sophisticated approach to institutions than its predecessor, it has failed to revise at least one major element of legal process naïveté. This is the categorical approach to institutions, the tendency to treat them as monolithic and unselfconscious. Courts possess one style of decision making, reasoned argument, and are not capable of altering or modifying this approach. Legislatures possess another style, polycentric policy making, that is similarly uniform and unalterable. Thus, the choice between institutions, according to the legal process school, is identical to the choice between decision making styles, and the two choices can be treated as equivalent. The origin of this view is not difficult to discern; it is the separation of powers concept that legal process scholars believed to be embedded in the Constitution. In fact, the textual support for this principle is thin and, as we argued in our book, the justification for it in a modern administrative state is highly questionable. For present purposes, the important point is that the separation of powers principle, whether or not it is constitutionally required, loomed so large in the thinking of the original legal process scholars that it distorted their view of institutions.

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71 The leading modern statements of this position are BICKEL, supra note 21, and Fuller, supra note 21, at 377-78 (discussing the inherent principles which will make federalism work).

75 FEELEY & RUBIN, supra note 1, at 326-27.
Legal process was undoubtedly correct to draw attention to varying institutional capabilities in making decisions, but its proponents overstated their case in their effort to establish it. Complex institutions like Congress or the federal judiciary, to say nothing of the entire executive or administrative apparatus, act in a wide variety of different ways and regularly reassess their modes of action. Confronted with a particular problem, they may well react in ways that display much greater similarities than the categorical analysis of legal process would suggest. Thus, to allocate a decision to a given institution is not necessarily to choose a particular decision making style. The difference between institutional performances will rarely be the difference between stellar quality and total incapacity, but rather will be measured in subtle gradations of ability.

There are several important reasons why the reactions of different institutions to a particular problem might overlap, rather than diverge. First, the complex institutions of a modern administrative state display a wide range of capacities and modes of action. To begin with the most obvious example, administrative agencies combine all three of the functions that are traditionally regarded as being characteristic of the three branches of government; they make policy, often by means of regulations that are functionally indistinguishable from legislation, they implement policy, the legislature’s or their own, and they adjudicate the legal status of individuals under a prevailing policy. This is one of the features of modern government that indicates the obsolescence of the separation of powers concept, as it is virtually inconceivable that the combination of powers in the administrative agency could be eliminated. It creates an inherent ambiguity in the comparative institutional analysis of legal process, since it means that there is no particular category of decision that lies outside the core functions of an administrative agency. Certain specific decisions, such as the impeachment of the President or the appointment of ambassadors, are assigned to other institutions by the Constitution, and criminal trials are generally regarded as beyond the scope of agency authority, but one hardly needs legal process, or new legal process, to explain such exceptions. Some legal scholars have tried to argue, by means of the nondelegation doctrine, that agencies should not be permitted to engage in broad-based policy making, but this position has been definitely rejected by the Supreme Court, even in its current incarnation.

Congress also engages in a number of activities that go beyond the law making role ensconced in high school civics books. The oversight it exercises over administrative agencies, a process that occupies a large proportion of its time and determines its committee structure, is an essentially executive function. To justify it as being preliminary to legislation represents nothing more than an effort to salvage an outmoded distinction through the use of wordplay. Moreover, Con-
gress has created an agency under its direct control, the General Accounting Office, to expand its oversight capacities. With respect to judicial functions, the Constitution assigns Congress responsibility for conducting impeachment trials. In carrying out its executive oversight function, it frequently relies on hearings that are largely adjudicatory in character. The law-making process itself often proceeds through hearings that bear a close resemblance to court proceedings, rather than through the type of policy analysis that Fuller's image of polycentric decision making seems to conjure up.

Most important, for present purposes, are the various roles adopted by the courts. As virtually every political scientist who studies courts asserts, courts make public policy. They often do so, moreover, by promulgating rules, and while it is true that they do not always make policy by stating rules, it is also true that courts sometimes state rules even when they are merely interpreting a statute. The Supreme Court attempted to distinguish such rule making from adjudication, and forbid it, but it soon abandoned the effort. Courts also engage in a wide variety of administrative functions; they not only administer their own operations, but they also administer bankrupt estates, issue structural injunctions and then supervise compliance, and hire and supervise special masters to carry out these functions. At the federal level, formulation of both the Rules of Civil Procedure and Sentencing Guidelines are the responsibility of agencies located within the judicial branch. In short, there is no simple correspondence between institutions and decision making styles in the modern state.

A second factor that tends to decrease the relative advantages of different institutions is that institutions are composed of people. It is

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76 See 31 U.S.C. §§ 701-704 (creating the agency independent of the executive branch).
77 See U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cls. 6-7.
78 See Fuller, supra note 21, at 393-405 (discussing adjudication and its ability to solve polycentric situations).
80 FEELEY & RUBIN, supra note 1, at 4, 25.
easy enough to say, or write, that the legislature passed such-and-such a statute, or that the bureau of prisons did so-and-so, but legislatures and bureaus cannot really act; it is the people comprising them who are the real actors. If these people are members of a single political culture, as they are in the United States, their actions will tend to display a certain similarity, despite the differences in their institutional setting. Asked to develop fair procedures for placing prisoners in administrative segregation, for example, an American legislator and an American judge are both likely to think in terms of due process. Due process is our dominant principle for achieving fairness in any situation where individuals are being punished for disobeying a prevailing rule; it is part of our general legal culture, and one does not need to be a member of any particular institution to understand and favor it. This is not to say that people’s institutional setting does not make a difference—it does—but only that it does not make as dramatic a difference as an analysis of that setting, in the abstract, might suggest.

The particulars of American government tend to decrease institutional differences still further. To begin with the judiciary, which has been the focus of the legal process school’s analysis, it is notable that there is no separate career track for judges in the United States, as there is in many European countries. Rather, judges are selected in mid-career from the ranks of practicing attorneys, law professors, government administrators and, occasionally, legislators. Thus, their backgrounds are quite similar, and sometimes identical, to those of the relatively large number of law-trained legislators or administrators and they will often share a basic outlook with individuals in other parts of government. In particular, American judges tend to be pragmatic, with a solid understanding of political realities, an aversion to excessively complex doctrinal arguments, and a willingness to modify pre-existing doctrine in the interest of workable results and general perceptions of justice.

Even when courts reach decisions that are at odds with majority opinion, they are likely to be allied with important and powerful political groups that also influence the legislature and executive. Thus, the substantive due process decisions in the early twentieth century were arguably in conflict with the majority opinion that stood behind Progressive legislation, but they were aligned with the views of propertyed interests that still wielded substantial influence.\textsuperscript{82} Similarly,

\textsuperscript{82} See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (striking down an Oklahoma law regulating ice businesses); Adkins v. Children’s Hosp. of D.C., 261 U.S. 525 (1923) (striking down District of Columbia’s minimum wage law); Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923) (restricting application of Kansas law to fix meat-packing indus-
Brown v. Board of Education\textsuperscript{83} may not have commanded a majority when it was decided, but it was certainly consonant with liberal views that were important at the time, and dominant thereafter. The decision that was generally regarded as the very worst, and most disruptive, that the Supreme Court ever made, Dred Scott v. Sandford,\textsuperscript{84} was probably in conflict with majority views when it was decided in 1857, but that majority was a rather narrow and bitterly contested one, as the Civil War was soon to prove.

In The Hollow Hope, Gerald Rosenberg argues that courts cannot produce significant social change, the expectation that they can do so being his hollow hope.\textsuperscript{85} Most controversially, perhaps, he argues that Roe v. Wade\textsuperscript{6} did not constitute a significant reform because state legislatures were moving toward legalized abortion immediately prior to the Supreme Court decision, and would have done so rapidly in its absence. The evidence that he marshals to support this point also supports the argument that judicial attitudes are not dramatically different from those of legislatures or executives. But the conclusion that he draws reflects the tendency of legal process scholars to overstate their case. If one expects the Court, because of its institutional position, to take action that no other part of government could conceivably adopt, if one expects it to declare abortion constitutionally protected in 1857, or declare inequality of income unconstitutional in 2002, then one’s hopes will indeed be hollow. In the United States, however, institutional differences between the judiciary and other parts of government cannot be measured in such apocalyptic terms. They exist, but they are incremental, reflecting shifts of emphasis rather than dramatic discontinuities.

Finally, and perhaps most important, is the disadvantaged institution’s own awareness of its disadvantages. The fact that courts were not the optimal institutions to reform American prisons is clear to any knowledgeable observer. But this was equally clear to the courts that carried out the process of reform. In virtually every case, the court was acutely conscious of its own limitations, and acutely conscious that it was acting because the preferable government institutions—the prison administrators, the governor, the state legislature—had refused to act. In virtually every case, courts were extremely reluctant to devise their own solutions, but rather reached out to adopt standards that had been developed by corrections professionals such

\[\text{try wages); Lochner v. New York, 198 U.S. 45 (1905) (striking down New York statute regulating the work hours of bakers).}\]

\textsuperscript{83} 349 U.S. 294 (1955) (striking down segregated public schools as unconstitutional).

\textsuperscript{84} 60 U.S. 393 (1856) (holding a slave is not a citizen and had no right to access the courts).


\textsuperscript{86} 410 U.S. 113 (1973) (striking down state anti-abortion statutes as unconstitutional).
as the U.S. Bureau of Prisons or the American Correctional Association. Many courts employed corrections professionals as special masters, and relied heavily on these masters to both find facts and design remedies. Other courts anxiously sought to resolve the litigation by consent decree, so that the new procedures would be developed by the corrections officials themselves, rather than the court.

Because they were so acutely conscious of their institutional disadvantages, those disadvantages were greatly reduced. The actions just described are not only evidence of institutional circumspection and self-abnegation; they are also effective strategies for combating the reason for such circumspection and self-abnegation. After all, what would the governor or the legislature have done, operating in its most characteristic, legal process-sanctioned mode? First, they might have appointed a corrections professional to visit the prisons and gather information, overcoming the prison officials’ reluctance to host this visiting professional with threatened legal sanctions. Then the legislature might have held a hearing, or the governor might have created a commission that held hearings, with other corrections professionals from well-regarded systems, such as the U.S. Bureau of Prisons, or from national organizations such as the American Correctional Association, in attendance.

In short, the legal process’ assumption that each governmental institution employs a distinctive decision making style is unwarranted. Because these institutions are complex, because they are staffed by individuals with similar perspectives, and because these individuals are themselves aware of the issues raised by legal process, each institution is capable of deploying a wide range of styles. It may be the case that there is some gain in efficiency or effectiveness in relying on a particular institution for the decision making style that is traditionally associated with it. But these gains are likely to be marginal, or incremental, rather than the dramatic ones envisioned by the legal process school. Perhaps courts are better at adjudication, or at reasoned argument, than agencies, perhaps legislatures are better at high-level policy making than courts or agencies, but this difference would need to be established by a detailed, fine-tuned analysis; it cannot simply be asserted as an obvious conclusion.

Where legal process analysis does offer more dramatic results is in the analysis of comparative decision making styles. If an agency or a legislature is going to adjudicate the legal status of an individual, it needs to gather evidence and reach a reasoned decision that applies the prevailing rules to the situation at hand. In addition to these efficiency-based considerations, it needs to ensure fair treatment by satisfying the requirements of due process. If a court is going to engage in policy making, it must develop mechanisms to define the problem, generate alternative solutions and evaluate those alternatives. Conducting adjudications by inquisition, of the sort Congress carried out
during the McCarthy era, or making policy through reasoned argument from precedent is highly undesirable. If government institutions were committed to a particular style of decision, the comparative institutional analysis of legal process would yield definitive results; since they are not, legal process has the most to offer as a comparative analysis of decision styles. Rather than telling a hypothetical constitution drafter how to allocate responsibility and telling each institution whether to decide or defer, legal process can tell these institutions what sort of approaches they should adopt if they decide to act.

This alternative interpretation of legal process analysis is already well represented in legal literature. To mention just two examples, Peter Strauss argues, on grounds similar to those stated above, that the most useful concept in a modern administrative state is the separation of functions, not the separation of powers.\(^8\) Powers are inevitably combined in the administrative agency; the question is whether functions, such as prosecution and adjudication or policy making and implementation, should be separated within the general framework of the agency. In his analysis of regulation, Stephen Breyer asserts that there is no single optimal methodology, but rather that different problems are best addressed by different regulatory approaches.\(^8\) Inefficiency or ineffectiveness occurs in cases of regulatory mismatch, that is, when the legislature chooses or the agency applies the wrong methodology. Both these sources, and many others, point to an analysis that avoids global characterizations and focuses on the specific methodologies that government institutions employ. In doing so, they suggest that it is the decision making method, not the institution, to which comparative analysis most usefully applies.

\textbf{B. A Theory of the Second Best}

The shift from institutions to decision making methodologies resolves at least part of the quandary that confronted federal judges in the prison cases. If the legislature or the executive had been prepared to remedy the morally unacceptable conditions that prevailed in American prisons, and particularly Southern prisons, during the 1960s, the judges would have been well advised to defer to these decision makers. According to the revision of legal process suggested above, the basis for this deference is not a categorical prohibition against judicial policy making, but a much milder suggestion that the


legislature and executive would probably be more effective in deploying the methodologies that policy analysis demands. Because the political branches were not prepared to act, however, the task of making new public policy for prisons fell to the courts. There is no reason why the courts should decline to carry out this task, at least where a moral imperative for doing so exists. But in doing so, courts should not rely on the same methodology that they use to apply a well-established policy to specific cases. Rather, they should use the same policy making techniques that the legislature and executive would, or at least should, have used.

This resolution, however, only addresses the technical capacity of different governmental institutions. It does not fully answer the related, more political argument that the legal process school has advanced, that is, the argument that certain decisions are committed to certain institutions, either because these institutions are politically accountable, or because they are not politically accountable. It would be wrong, according to this view, for an unelected court to make policy, even if it would do an equally good, or even better job, and it would be wrong for a politically accountable executive body to adjudicate the legal status of individuals, even if it could do so just as accurately and as fairly as a court. As stated above, this is not a reiteration of the argument about the technical capacities of these institutions, but about their political role in our general system of government.

Although the political argument is distinct from the technical one, it is partially answered by the same considerations that were stated above with respect to the technical capacities of institutions. It is simply a caricature to depict the courts as an autocratic bull in the majoritarian china shop of public policy, or the executive branch as a political bull in the court’s equally delicate doctrinal shop. Because institutional roles already overlap to a considerable extent, because these institutions are staffed by people with similar attitudes and backgrounds, and because these individuals are aware of their institutional limitations, there is no necessary reason why courts cannot be sensitive to public view, or why an executive agency cannot carry out fair adjudications. Moreover, the fact that these institutions can function in this matter also provides an argument why they should not categorically defer to each other. Since courts are somewhat responsive to public opinion, an agency need not treat its own responsiveness in that arena as disqualifying it from the field of adjudication. Since agencies, and even the legislature, are often somewhat insulated from public opinion, either through conscious effort or as a result of interest group pressure, courts need not regard their own partial insulation as a prohibition against making public policy.

These considerations are not a complete answer to the political component of the comparative institutional analysis because there is
a further difficulty that is not present in the technical component. An allocation of political authority means that the result a particular decision maker reaches, even if that result is inaction in the face of a moral demand, is the result that the system, or the system designer, really wants. The ability of another decision maker to act as competently or effectively is irrelevant to this consideration because the issue at stake is the need for action in the first place. Of course, if a court can argue that the legislature’s or executive’s inaction results from a defect in the political system, a “Footnote Four” problem such as the presence of discrete and insular minorities or the breach of fundamental rights, it has a higher law basis for its action. If such considerations are absent, or if they are not accepted as a basis for intervention, then the argument for judicial action appears to rest on an ideological, non-public-oriented ground. An advocate who was already committed to prisoners’ rights, for instance, would not hesitate to demand judicial intervention in these circumstances. But for someone adopting a broader, public-oriented position, the allocation of political responsibility seems to take precedence over any particular policy position. This does not mean, of course, that the designated decision maker is always right, that its decision always represents the desirable result. What it does mean, however, is that arguments about whether a decision is right or wrong should be directed to that designated decision maker.

This problem is closely linked to the issue of the scholar’s role. The public-oriented discourse of prescriptive legal scholarship seems to be aligned with the view that favors allocation of responsibility over a specific policy position. Scholars are expected to prescribe optimal public policy for the most effective way to achieve a pre-defined goal. A prisoners’ rights attorney would certainly seek out any decision maker who was sympathetic to the cause of reform. Legal writing directed to such advocates would take a similar position; it might say, for example, that if the legislature and executive refused to act, the attorney should try to circumvent them by going to the courts, and then proceed by recommending various devices or arguments to convince the courts not to defer, such as not bringing the issue of deference to the judges’ attention. But scholars are not supposed to adopt such a stance. Their task is to determine whether prison reform represents optimal social policy, and the allocation of responsibility is an important, and perhaps decisive, factor in that determination, certainly not one that should be circumvented or ignored.

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See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1935) (discussing the need for a more exacting judicial scrutiny when a statute may involve prejudice against “discrete and insular minorities”).
Here again, however, the concept of the second best solution can be invoked, in this case, on the scholar's behalf. The best prescription for a public-oriented position is to speak to the government as a totality, or to all its decision makers as a group. "This is the proper institution to address this issue," the scholar might say, "and this is what it should do." On the basis of the same evidence that the judges relied on, however, the scholar might conclude that those optimal institutions are unwilling to act and will continue to be unwilling for the foreseeable future. This, of course, does not invalidate their prescriptions, but it can be viewed as opening up another discursive possibility, that is, to address a second best decision maker who is prepared to act. If the action can be justified on independent moral grounds, then the recommendation has value. Its value is derived from the same consideration that motivates the judge—that judicial action might not be the best solution, but it is better than nothing.

Such a recommendation may resemble a recommendation to an advocate to use whatever means available to achieve his goal, but this is not equivalent. The scholar's recommendation does not abandon all public-oriented considerations in favor of a pre-established position. Rather it maintains its public orientation but factors a political reality into the analysis. This would not lead the scholar to prescribe judicial action under any circumstances the way the advocate would; it simply removes the legal process argument that only the optimal decision maker should take action, and allows the scholar to prescribe action that is otherwise justified. It speaks to the judge's actual position, acknowledging her subjective sense that a remedy is desirable and that no other decision maker is likely to provide it.

Moreover, the fact that the recommendation to a judge represents a second best solution is one that can become part of the scholar's analysis. As stated above, a judge's sense that she is not the optimal decision maker can suggest to her that she proceed with caution, and perhaps take public opinion into account. Scholars can contribute to judicial awareness of this possibility, and alter their own recommendations accordingly. This is a much less dramatic divergence from a purely public-oriented stance than Bickel's passive virtues.90 Bickel recommended that judges avoid reaching decisions for the purpose of preserving the legitimacy of their institution, but he never quite explained why the preservation of the court's legitimacy, as opposed to the legitimacy of the government in general, is in the public interest.91 The most plausible explanation is that the courts should save their legitimacy for a rainy day. Apart from the fact that legal process

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90 See generally BICKEL, supra note 21, at 111-98 (discussing the role of passive virtues in determining the involvement of the courts for an issue).

91 Id. at 29-33.
scholars never offered any suggestions about when it would be rainy enough to expend some of their carefully saved moral capital, the difficulty with this is that it places the legitimacy of the courts above other values, thereby transforming the scholar into a political advocate for judicial legitimacy. The recommendation that judges proceed cautiously and pay attention to public opinion, in contrast, retains public interest as the primary consideration. It simply allows for the satisfaction of that interest by means of a second best solution.

Thus, the new legal process analysis can be used to decide whether judges should make public policy and whether litigation against the government is a desirable mechanism of governance. There are strong arguments, however, for modifying the analysis by allowing for second best solutions, and public-oriented legal scholars can incorporate these modifications without compromising their discursive stance. These modifications involve shifting the focus of attention from institutions to decision making styles, and factoring political conditions into both the judge’s decision to take action and the scholars’ recommendations to judges on this issue. The way these modifications operate in a real situation can be illustrated by examining the prison reform cases. The prison conditions cases serve as a good test for the issues raised above for several reasons. Indeed, they represent one of the most dramatic examples of judicial policymaking in American history. Furthermore because they were bounded by a relatively brief time period, they provide a convenient case study with which to explore the issues discussed above.

C. The Prison Reform Cases

Prison conditions reform litigation began in earnest in 1965 in Arkansas when “writ writers” at the Cummins Prison Farm filed several pro se habeas corpus petitions in the court of E. Smith Henley, the federal judge for the Eastern District of Arkansas, alleging that they were being held in unconstitutional conditions and requesting their release. Judge Henley, in whose district the prison was located, was well-familiar with the long history of scandal and the conditions in the prison. He consolidated the petitions and appointed two experienced lawyers to represent the petitioners. Their reformulated complaint stated that the prisoners were being denied their rights under the Eighth and Fourteenth Amendments, in violation of Section 1983 of the Civil Rights Act of 1871. The petition alleged that the Superintendent of Cummins Prison Farm had failed to provide adequate medical care, had exposed them to unduly harsh working

conditions, had subjected them to severe corporal punishment, and had denied them access to the courts. Prison officials did not contest most of these claims, and immediately transferred the complaining inmates to better facilities, dismissed the guards named in the complaint, and promised to improved regulations governing the administration of the prison. However they were firm on their need to maintain discipline and to oversee inmates' communications to the outside world, including the courts. Judge Henley entered a judgment on the uncontested matters, and then addressed the outstanding issues in his opinion. He expressed concern about the use of corporal punishment and the lack of standards governing its use, and suggested that the Department of Corrections adopt regulations restricting its use. But he did not prohibit its use. However, Judge Henley did find for the prisoners who had suffered reprisals for filing complaints with the court. He enjoined officials from intercepting inmates' communications with the courts and from taking reprisals against inmate writ writers. However, his opinion concluded with a note of good will. "[T]he record in this case," he wrote, "reflects that respondent [the superintendent of the prison] has undertaken with some success to ameliorate the condition of Penitentiary inmates in a number of areas of prison life. For his efforts in that connection respondent is entitled to a full measure of credit."

Noting that prison officials had voluntarily corrected the other problems raised in the prisoners' petition, Judge Henley saw no need to issue an order in these areas. Indeed, he expressed his hope that the problems in the prison had been resolved, and noted that the "[c]ourts cannot take over the management of the prisons, and they cannot undertake to review every complaint made by a convict about his treatment while in the prison." Rather than resolving problems, however, this small victory triggered a flood of new petitions from inmate writ writers.

Two cases eventually developed, though neither was handled by Judge Henley. The first was Jackson v. Bishop, handed down in 1967; the second was Courtney v. Bishop, handed down a year later. In Jackson, two judges, Oren Harris and Gordon E. Young, jointly heard

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94 Talley, 247 F. Supp. at 685.
95 Id. at 687.
96 Id. at 690.
97 Id. at 689.
98 Id. at 690.
99 Id. at 691.
100 Id. at 691-92.
101 Id. at 686.
103 409 F.2d 1185 (8th Cir. 1969) (refusing to recognize inmate plaintiff's claim of cruel and unusual punishment).
Despite testimony that revealed widespread beatings, the use of the notorious "Tucker telephone" and other abuses, they dismissed the inmates' complaints, saying that the courts should not second-guess decisions of prison administrators. However, on appeal Judge Harry Blackmun, then of the Eighth Circuit Court of Appeals, vacated the district court's judgment, and ordered it to enter a decree enjoining corporal punishment in its entirety. In his expansive opinion, Judge Blackmun drew heavily on the testimony of James V. Bennett, the former and longtime director of the Federal Bureau of Prisons, and Fred T. Wilkinson, director of the Missouri Department of Corrections. Both had argued that corporal punishment was "unusual" because only two states still permitted it, and "cruel" because "[w]hipping creates other penological problems and makes adjustment to society more difficult." In *Courtney*, also a consolidation of a number of separate petitions, attorneys for the petitioners drew heavily on testimony in both *Talley* and *Jackson* as well as findings from a recently completed report issued by the Arkansas State Police that documented extensive problems in the prisons to mount a sweeping attack on the state's correctional system. They challenged the process for imposing solitary confinement, treatment in solitary confinement, and the crowded, dangerous and dirty conditions in the prisons. Taken as a whole, petitioners maintained, these problems constituted cruel and unusual punishment. Judge Harris dismissed the petition, and a panel of judges on the Eighth Circuit upheld him, reaffirming a belief that "[t]he law to be applied is well settled. Lawful incarceration necessarily operates to deprive a prisoner of certain rights and privileges he would otherwise enjoy . . . ."

These two cases began amidst an escalating scandal over abuses in the state's prisons: beating of prisoners with leather straps, continued use of the "Tucker telephone," brutal inmate-trustees, forced labor, a virtual absence of security in the overcrowded barracks housing inmates, lack of medical care, pervasive violence, lack of any meaningful oversight or regulations, and rumors of unreported deaths of in-

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104 *Jackson*, 268 F. Supp. at 806.
105 *Id.* at 815. The court did enjoin the use of crank telephones, teeter board, and strap until regulations were promulgated. *Id.* at 816.
107 *Id.* at 575.
108 *Id.* at 580. Judge Blackmun chose to "draw no significant distinction between the word 'cruel' and the word 'unusual' in the Eighth Amendment," but still had "no difficulty" finding the use of the strap to be both. *Id.*
109 *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir. 1969).
110 *Id.* at 1186.
111 *Id.* at 1187.
112 *Id.* at 1186.
113 *Id.* at 1187.
mates. Long acknowledged to be a problem, conditions in the state’s prisons gained salience when they were exposed in the report prepared by the Arkansas State Police and issued by outgoing governor, Orville Faubus, in January 1967. Received by the new Republican governor Winthrop Rockefeller on his first day in office, this report precipitated his campaign for prison reform.  These revelations and this campaign helped establish the context for the continuing litigation and provided an added impetus for prison litigators and no doubt for the judges as well.

The small and partial victories in these initial cases paved the way for still more complaints, although they were slender reeds on which to build court-ordered reform.  Talley was essentially a settlement without any judicial findings, although Judge Henley did insist on the need to protect prisoners against retaliation for exercising their rights.  Jackson had been dismissed outright, but on appeal Judge Blackmun used sweeping language to reinstitute the case and to order an end to corporal punishment.  In Courtney the district court judge dismissed the complaint and was upheld on appeal by a panel that used sweeping language to insist that the courts lacked authority to deal with the issues.

Still, the small victories in some of these cases were enough to pave the way for more complaints, and enough for Judge Henley in 1969 to consolidate them in a case known as Holt v. Sarver.  Although named as the defendant, this case was allegedly encouraged by the new commissioner of corrections, C. Robert Sarver.  As it developed, it eventually expanded to include all prisoners in the Arkansas prison system; it was the nation’s first systemwide “totality of conditions” case. Thus, in a series of rulings beginning in 1965 and continuing until 1982, each more expansive than the previous one,

114 This history is recounted in Feeley & Rubin, supra note 1, at 53-59.
116 Jackson v. Bishop, 404 F.2d at 572, 579.
117 Courtney v. Bishop, 409 F.2d at 1187.
119 Interview with A.L. Lockhart, Comm’r, Arkansas Dep’t of Corrections, Cummins Prison Farm, in Grady, Ark. (Jan. 2, 1992). For an extended account of this development, see Feeley & Rubin, supra note 1, at 51-54.
Judge Henley and his successor Judge G. Thomas Eisele presided over hearings that explored virtually every facet of prison life and administration, and issued remedial orders that affected each of them. In these cases, well-regarded correctional administrators with national reputations testified that conditions in the state’s prisons were wholly out of line with modern correctional practice.121 They failed to meet standards followed by the federal prison system and the standards of other related organizations.122 The method of discipline through whippings had long been abandoned by virtually all other states. Practices in Arkansas prisons fell well below those in prison systems of most other states and the federal prison system.123 Indeed, this was mild criticism. What the state called administrative punishment was sadism.124 What the state called “discipline” was torture.125 What the state called “guards” were inmate trustees who ruled by fiat and force.126 What the state called “solitary confinement” consisted of cramming as many as eleven prisoners in a single cell for prolonged periods under conditions that were “hazardous to health” and “degrading and debasing.”127 What the state called work was labor enforced at the end of a gun barrel or the lash of a belt.128 In light of such testimony, Judge Henley eventually held that the “totality of the conditions” in the state’s prisons violated the Eighth Amendment’s prohibition against “cruel and unusual punishment.”129 At some point, it became clear to him that his task was not to hold the correctional system to its own standards—it had none—but the more fundamental task of establishing standards. He had to bring the Arkansas prisons into the twentieth century, to oversee the creation of a modern prison system. In so doing he had to dismantle the entrenched plantation model under which Arkansas prisons had long operated. His challenge was to alter a way of life, a taken-for-granted

125 Holt II, 309 F. Supp. at 373-76.
126 Holt I, 300 F. Supp. at 832-33.
sense of what a prison was and ought to be. He had to reconstitute the idea of a prison. Although since the first case, *Talley v. Stephens*, a reform-minded governor had appointed two different reformers sympathetic to court-ordered reform to head the state’s prisons system, as an institution the department had neither the vision nor the capacity to establish and administer a modern prison system. Its several prisons were still run as largely independent units, anchored in the plantation model, and still expected to operate at no or small cost to the state. The challenge was not even one of structural reform; what was required was near total transformation. The normative orientation of the prison system needed to be replaced and a new vision had to be institutionalized and then implemented.

This task required Judge Henley to make policy, to establish a set of new goals and purposes for the institution, and then to devise ways to implement this plan. Although he had initially fumbled with ways to tackle this task through an expansive use of “due process,” eventually he came to understand the Eighth Amendment’s prohibition against cruel and unusual punishment as a grant of power that authorized him to formulate penal policies and then implement them. Although he, and later other judges in other conditions cases, struggled to say that they were merely “applying” the Constitution, his actions belie this. Up until then the Eighth Amendment had rarely been interpreted by the courts, and in those few instances when it had, the issues dealt with capital and other forms of punishment, not conditions of confinement. Had Judge Henley restricted himself to “interpreting” legal doctrine, he would have confronted a string of cases dating back to at least 1871, when the Virginia Supreme Court had ruled that a convicted felon, “as a consequence of his crime, not only forfeited his liberty, but all his personal rights... he is for the time being the slave of the State. He is *civiliter mortuus*...”  

By the time Judge Henley handed down his first systemwide decision in *Holt v. Sarver* in 1969, not much had changed. The courts had ceased to use such crude terms, but the substance of their policies was much the same as it had been in 1871. Until 1961, the “hands off doctrine” meant that prison inmates were without recourse to challenge their conditions of confinement. The Eighth Amendment’s prohibition against “cruel and unusual punishment” provided no

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132 *Monroe v. Pape*, 365 U.S. 167 (1961) brought about the change. In that case the Supreme Court held that officials could be sued for violating constitutionally protected rights if they were acting “under color of law.” That case precipitated an avalanche of claims against police and eventually against prison officials. *Id.*
guidance, and indeed the Thirteenth Amendment expressly exem-
pted convicted felons when it abolished slavery and involuntary
servitude. At best the Eighth Amendment was a vague and general
admonition. It had been written before prisons were established as
institutions for mass incarceration for ordinary offenders, and had
not been discussed at any length at the Constitutional Convention
(and to the extent it had been, was brought up in the context of pro-
hibiting drawing and quartering). Until Judge Blackmun’s opinion
for the circuit court in *Jackson* and Judge Henley’s rulings in *Holt I*,
the prevailing wisdom was that judges should not second-guess the
discretionary judgments of prison administrators.

But armed with this new self-imposed authority he derived from
the Eighth Amendment, Judge Henley “took charge” in much the
same way that the head of a new administrative agency might take
charge following legislation establishing the agency and authorizing
it to develop policy within the scope of its mandate. The term “total-
ity of conditions” that the courts came to use to describe the nature
of the constitutional violations in prisons succinctly and accurately
captured the challenges faced by Judge Henley and other judges in
the prison conditions cases. It was the totality of the conditions—
virtually every facet of prison life and administration—that offended
their sensibilities, and they had to devise ways to effect changes that
brought about root and branch changes.

Once Judge Henley embraced this administrative perspective, he
was free to both formulate and then implement new policies. In do-
ing so, he violated the conventional understanding of the rule of
law—he made policy rather than interpreted it. He oversaw the for-
mulation of detailed plans to implement this policy, and then he
oversaw the implementation of these plans. He did this by identify-
ing general goals and then asking corrections officials to work out de-
tailed plans to implement them, and to provide schedules for their
implementation. As he had in his first case, *Talley v. Stephens*, Judge
Henley took pains to praise corrections officials when they made pro-
gress or made an effort, but he also quietly admonished them to try
harder when they failed.

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135 U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment reads, “Neither slavery nor
involuntary servitude, except as a punishment for crime whereof the party shall have been duly
convicted, shall exist within the United States, or any place subject to their jurisdiction.”

136 LARRY BENKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975) (recounting
Framers’ intention to abolish torture); Anthony Grannucci, “Nor Cruel and Unusual Punishment
Inflicted:” The Original Meaning, 57 CAL. L. REV. 839 (1969) (argues Framers misunderstood Eng-
lish prohibition, which proscribed excessive punishment but not torture per se).

137 Jackson v. Bishop, 404 F. 2d. 571 (8th Cir. 1968).

At the outset the Commissioner of Corrections, the Governor and key legislative leaders all welcomed the court's intervention, energy, and leadership. Despite this, Judge Henley continued to face innumerable obstacles. The Plantation Model was deeply ensconced in the state's correctional system and in the state more generally. As willing as he was to accommodate to the court, the corrections commissioner lacked the staff and the budget to embrace a modern vision of corrections. When asked to prepare reports for implementing even the simplest of changes, he readily agreed, but his agency lacked staff to do the planning or even drafting a report. Although the top leadership in the Department accepted, and even welcomed the court's intervention, line staff deeply resented and resisted the idea of reform. Furthermore, everyone, including Judge Henley, failed to anticipate just how massive a challenge prison reform would be. If pressed hard enough, corrections officials could address one portion of the court's multifaceted directives, but almost always this was at the expense of backsliding in other areas. Furthermore, the more the court and the Department worked to solve problems, the more problems it found. For instance, an early order required that the prisons provide safe and secure housing for inmates. The Department of Corrections readily agreed to this. But, it was quickly revealed that the Department could not comply with the order. It had not the guards; it depended upon inmate prison trustees, recruited from among the most violent and brutal inmates, to maintain order in the housing units. The Department simply did not have anyone else to perform this function. Judge Henley's response was to expand his order in a way that addressed the state legislature: increase the budget, get rid of inmate trustees, and hire free-world guards. Money was appropriated, guards were hired. But then there were new problems: how to train them? What were the criteria for selection? Once hired and trained, there needed to be a system of supervision. All this in turn led to the need to develop a personnel office to institutionalize recruitment and promotion, handle complaints of racial discrimination, and the like. Even then problems persisted. Prisoners were housed in large open barracks with three-tiered bunks pushed tightly together. It was virtually impossible for guards to police such space. The prison needed a different design, more space, and a system by which to classify prisoners. It had none of these, and indeed was experiencing unprecedented growth just as the court was declaring that the prison needed to provide prisoners with more and more

137 Interview with G. Thomas Eisele, District Judge, Eastern District of Arkansas, Little Rock, Ark., (Jan. 3, 1992) (recounting cooperation of correctional officials with the court at the outset of the litigation). For a detailed account of the case, see Feeley & Rubin, supra note 1, at 59-70. The discussion in this paragraph draws from that account.
secure space and more services. Similarly, the court’s request to develop an inmate classification system precipitated a host of problems: an operational classification system required a trained staff, separated housing, programming, and the like. The correctional system had none of these. Such problems were repeated endlessly with issues relating to heating and ventilation, sanitation, meal services, administrative discipline, health care, fire safety, and the like. The solution to one problem revealed a seemingly endless chain of other problems, any one of which was capable of derailing meaningful improvements. Furthermore, such problems were compounded by a chronic lack of funding, dilapidated facilities, understaffing, and a rapidly growing prison population.

Problems like these are all too familiar to heads of all sorts of public agencies—schools, hospitals, transportation authorities and welfare departments. They are the sorts of challenges that legislators and executives face every day. However, they are a strange agenda for judges. But Judge Henley—and other judges who followed in his wake—were not unaware of this. Judge Henley adopted the style and the techniques of an administrator, and proceeded to tackle the problems. He broke large problems down into component parts and proceeded step by step to overcome them. He combined the carrot and the stick, expressing sympathy and admiration for overworked and underfunded correctional officials, commending legislative leaders for providing more funding, and prodding sluggish officials into more prompt actions. All the while, he expanded the reach of his concerns, increased his demands for reports detailing plans and documenting progress and insisted upon more detail.

As the initial good will and enthusiasm of corrections officials gave way to exhaustion and tedium, and some time after Judge Henley was appointed to the Seventh Circuit Court of Appeals, a new District Court Judge, G. Thomas Eisele, eventually appointed a corrections expert to monitor compliance to the court’s orders. The title “monitor” however is a misnomer. Although technically appointed to report on the department’s compliance to the court’s orders, the court-appointed monitor was instrumental in drafting many of the court’s orders and in designing many of the department’s implementation plans in addition to investigating and writing up his findings on compliance. He was in effect the judge’s special assistant, a well-

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138 It may not have been entirely fortuitous that Judge Eisele was assigned the case after Judge Henley, who sometime before had been appointed to the Seventh Circuit Court of Appeals, decided to relinquish it. A few years earlier, Judge Eisele had been Governor Winthrop Rockefeller’s campaign manager and later chief of staff immediately after delivery of the State Police Report documenting widespread abuses in the state’s prisons. He had played a central role in shaping the Governor’s plans for prison reform. See FEELEY & RUBIN, supra note 1, at 74-76 for a more detailed description of Eisele’s role.
regarded corrections expert who had both the time and knowledge to understand problems and suggest solutions to the department and to his boss. This increased capacity of the court solved some problems but exacerbated others; as before, efforts to solve one problem led to the discovery of a host of new problems. And with increased capacity, both criticism and problems increased. As with the experience with Judge Henley, the initial enthusiasm of corrections officials for the monitor eventually gave way to irritation and resistance as he kept finding new problems to complain about. Still Judge Eisele persevered, overseeing the continuing, expanding and renamed case until 1982, when it was finally dismissed.

During this period, the Arkansas Department of Corrections was transformed. It repudiated the feudal-like Plantation Model; no one in power—corrections commissioners, legislators or the governor—publicly embraced the idea that prisoners were slaves of the state, or that prisoners should be forced at the end of a shotgun to work in the fields. State officials no longer endorsed the principle that prisons should return a profit for the state, or that prisoners should be deprived of medical care or subjected to control by inmate trustees. Perhaps this remnant of the Old South would have faded away for other reasons, as it apparently did in Florida. But there is no doubt that in Arkansas the proximate cause for the transformation was intervention by the federal courts. Judges Henley and Eisele embraced a vision of the prison as a public agency, grounded in principles of bureaucratic accountability and guided by the rehabilitative philosophy of contemporary corrections. This is not to suggest that the Arkansas correctional system was fully transformed in practice, that it constitutes a model of bureaucratic accountability, or that it is run on the principles of the rehabilitative ideal. It most certainly is neither. Prisons throughout the United States remain brutal institutions, permitting inmates to be subjected to sexual predators and violence. Yet, Arkansas' prison system is no longer a world apart from prison systems in other states; it is organized as a public agency, as a "system," and its commissioner, wardens and staff are accountable to rules and regulations as are personnel in other public agencies. It has free world guards, provides medical services for its inmates and provides safer and more secure housing than it once did. Although serious problems in Arkansas prisons, as in prisons elsewhere, persist, no one would doubt that conditions in the state's prisons were mark-

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139 For a detailed account of the actions of the court and their impact on Arkansas's prison system, see Feeley & Rubin, supra note 1, at 54-79; Harris & Spiller, supra note 128.


141 Id. at 642.
edly better in 1982 when the protracted litigation came to an end\textsuperscript{142} than they were in the mid-1960s, when \textit{Talley v. Stephens} was decided.\textsuperscript{143}

What happened in Arkansas was replicated elsewhere to greater and lesser degrees. The greatest challenge, and the most complex cases, arose in the South. Since the Civil War, southern prisons had operated on a distinctive model, the Plantation Model. By 1980, federal courts had declared conditions in prisons in Mississippi, Florida, Louisiana, and Alabama to be unconstitutional in whole or in part, and by 1985, prisons or entire prison systems in at least thirty-three states had been added to this list.\textsuperscript{144} By the mid-1990s this figure had risen to forty-eight of the fifty-three separate jurisdictions in the United States.\textsuperscript{145} In addition, conditions in countless numbers of county jails were subject to sweeping court orders. These cases varied widely in scope. Many involved single institutions, although often the single largest prison in the state. Several involved entire prison systems. The Eighth Amendment conditions cases affected virtually every facet of prison life and administration. The cumulative impact was that the federal courts developed a comprehensive code for prison administration, covering such diverse matters as residence facilities, sanitation, food preparation and dietary consideration, clothing, medical care, discipline, staff hiring, libraries, work and education.\textsuperscript{146}

In the litigation in some of these states, corrections commissioners and state officials were largely cooperative and judges played an even less intrusive role than did Judges Henley and Eisele.\textsuperscript{147} However in others, judges faced fierce resistance at every step of the way, from initial complaint, to the finding of liability, to the implementation of remedial orders. In Texas, for instance, both the Texas Department of Corrections and statewide elected officials not only thought the court obtuse and meddlesome, it thought that its actions were wholly

\textsuperscript{142} Id. at 643.
\textsuperscript{143} For an assessment of changes in this and prisons subject to state-wide conditions suits, see \textcite{FEELEY RUBIN, supra note 1, at 362-88}.
\textsuperscript{144} National Prison Project, \textit{Status Report}, updated January 1995, 1-2 (listing all system-wide and other major prison conditions cases and the states they were filed).
\textsuperscript{145} Id.
\textsuperscript{146} See for instance the long list of matters covered by the court or the reports of the case compliance monitor in \textit{Finney v. Mabry}, 534 F. Supp. 1026, 1050 (E.D. Ark. 1982). For a general discussion of the cumulative effects of the prison conditions cases see \textcite{FEELEY AND RUBIN, supra note 1, at 366-75}.
\textsuperscript{147} See, e.g., \textcite{BRADLEY STEWART CHILTON, PRISONS UNDER THE GAEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS} (1991) (providing an account of a negotiated settlement in an expansive conditions case with a minimum of judicial involvement).
unwarranted.\footnote{148} Texas, they maintained, not only operated a good prison system, it was exemplary. Outside the South, the most expansive conditions cases were confined to a handful of the larger and older individual prisons, and were made in the context of a correctional system that espoused the modern vision of correctional administration embraced by the courts, even if they fell short in implementing it. It was more a matter of holding prison officials to their own standards rather than dismantling a wholly outmoded vision and reconstituting another one.

Despite their extensive involvement in virtually every facet of the administration of huge prison systems—far more extensive in detail than in the school desegregation cases—there were no great and bitter confrontations with public officials. The courts were not denounced as usurpers of states' rights. There were no standoffs at the prison gates. There were no fire bombs thrown through the windows of the judges' homes.\footnote{149} Indeed, there was widespread, though quiet and somewhat reluctant, recognition that what the judges were doing was long overdue. Individual commissioners of corrections often complained bitterly about a particular ruling or the arrogance of a particular judge or special master, but on the whole the national corrections establishment accepted, if not embraced, the effort. After all, in their "takeover" of the prisons, federal judges did not attempt to devise their own correctional policies; they turned to the correctional establishment itself for guidance. They relied on those correctional officials widely acknowledged as leaders in their field as expert witnesses, consultants and special masters. Institutionally, the courts turned to correctional institutions for guidance and instruction. The American Correctional Association provided standards for correc-


\footnote{149} Perhaps the greatest controversy occurred in Texas. Right up through trial, the Texas Department of Corrections (TDC) denied the existence and use of "building tenders," inmate trustees used to guard other prisoners. Even after overwhelming documentation of their use, the TDC continued to deny their existence. The state's attorney general who was arguing the case for the TDC and was also about ready to announce his decision to run for governor was on the verge of mounting a head-on attack on the court over this issue when Steve Martin, a TDC lawyer who had begun his career as a guard in Texas prisons and was now coordinating the litigation for the Department, quietly informed him that the claims were true. This revelation undermined the credibility of the TDC in the eyes of other state officials and paved the way for more productive negotiations in dealing with the complex issues raised by the suit. For an account, see Feeley & Rubin, \textit{supra} note 1, at 88-89; Martin & Ekland-Olson, \textit{supra} note 148, at 196-98.
tional administration that the judges incorporated into their orders, and the Federal Bureau of Prisons served as a model of accountability and management. These norms embraced by the courts were not alien to corrections officials; they were their own norms. The courts did little more than require that prison officials honor the standards that they themselves had formulated and embraced.

III. JUDGES AS SUCCESSFUL POLICY MAKERS

Overall, the prison conditions cases must be regarded as a success. Almost all of the important prison conditions cases have been at the trial court level, and the handful of appellate court rulings on the subject have generally reaffirmed the lower court decisions, at most trimming back here or there on remedial orders and at times lowering the amount of court-ordered fees for the plaintiffs' attorneys. Neither the United States Supreme Court, nor state legislatures nor Congress has seriously attempted to undo what these trial courts have ordered. Indeed, judicial policy making has been a success because its goals have been embraced by both correctional leadership and by the other branches of government at all levels. Across the country, Congress, state legislatures and county supervisors have appropriated funds to pay for the new facilities and services ordered by the courts, and have sought to institutionalize standards embraced by the courts. Some states have enacted legislation authorizing population caps on prisons to assure that state prisons will not exceed court-ordered maximums. Many state and local officials have drafted detailed regulations, incorporating professional standards and procedures drawn on by the courts for the operations of their custodial facilities. At the national level, the Congress in 1981 enacted the Civil Rights for Institutionalized Persons Act (CRIPA), which encouraged states to adopt professional standards for their prisons and expanded the authority of the Department of Justice to investigate and bring suit against those prisons not complying with these standards. Even before that, beginning in the late 1960s, the Department of Justice through the Law Enforcement Assistance Administration had sponsored national commissions to establish standards for the administration of criminal justice, including prisons, and had given its blessing to the "minimum standards" project sponsored by the American Bar Association. And as we have pointed out above, the American

152 American Correctional Association, supra note 150.
Correctional Association had for many years promulgated standards for prison administration and actively promoted their adoption by their members. Numerous state correctional departments had come to incorporate these standards into their own regulations. Similarly, a long list of associated organizations—among them the American Medical Association, the American Correctional Association, the American Architectural Association, the American Public Health Association, the Joint Committee on Accreditation of Hospitals, the National Fire Protection Association and a host of other associations—had developed standards relating to the activities of their members in designing, providing or maintaining services in prisons and other types of custodial facilities. These standards too were often incorporated into state regulations. Finally, on the national level, both the Law Enforcement Assistance Administration, created by an act of Congress in 1968, and the National Institute of Corrections, created by Congress in 1981, were in part efforts to promote national standards for criminal justice administration. No doubt their creation was designed in part to stave off or minimize judicial intervention, but in doing so, they nevertheless contributed to the nationalization of expectations about the administration of criminal justice.

Thus, the courts' involvement in establishing correctional policy must be seen as part of the broader trend to establish national norms for the administration of criminal justice. The courts have been partners in a process that has taken place on many fronts. In some areas, as in the prison conditions litigation, courts may have taken the lead. But even then, they did not move far out in front; they deferred to the views of national corrections leaders, and when state officials evinced a willingness to take the lead, judges tended to recede into the background and allow the other branches to manage the changes. However they participated in the changes, the courts were certainly not alone; their project was eventually embraced by all branches of government at both the national and state levels.

Perhaps one important measure of success of the prison condition cases is that from hindsight, it is difficult, if not impossible to imagine the courts not extending "rights" to prisoners and tackling the problems of conditions in the prisons. However the idea might be phrased, the idea that prisoners are "slaves of the state" simply cannot hold after the "rights revolution." Nor is it really conceivable that the

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154 See, e.g., AMERICAN CORRECTIONAL ASSOCIATION COMMISSION FOR CORRECTIONS, A PROGRESS REPORT 3 (April 1977); AMERICAN MEDICAL ASSOCIATION (AMA) STANDARDS FOR HEALTH SERVICES IN JAILS (1979).


157 For an extended discussion of this trend, see FEELEY & RUBIN, supra note 1, at 366-75.
conditions and practices in prisons—unlike schools, mental hospitals and the military—could be wholly off limits to the courts. In an era when every other facet of the criminal process has been subjected to judicial scrutiny and national norms, it is difficult to conceive that prisoners and prisons could be exempt.

By arguing that the prison conditions cases were successful because in retrospect they appear to be almost inevitable or "natural," we do not mean to be Pollyannaish, to suggest a unilinear pattern of progress, or to claim that the judges always "got it right." American prisons remain terrible places in comparison to prisons in Northern Europe. By the 1980s, the mood of the country had changed, and the national agenda had changed. In particular the nation was getting tough on crime. And there is no doubt that judges occasionally overplayed their hands or that cases were not terminated in a timely enough fashion. No systemwide suits had been successful for years, and courts began terminating long-standing court orders and consent decrees. In 1996 Congress enacted the Prison Litigation Reform Act ("PLRA") which has made it significantly more difficult for prisoners to bring claims in federal courts. This consolidation of conservatism is important and represents a significant shift in American politics. It has had a substantial impact on American prisons. In 2001, there were over two and one-half as many people in state and federal prisons in the United States than there were in 1985, and although prisons have been built at a record rate, overcrowding persists. However, these developments have not done much to dismantle the core elements of the national policies on prison conditions formulated by the federal courts in the 1970s and 1980s. Indeed in many respects these policies are now more firmly entrenched than ever. Courts continue to enforce core principles of the conditions cases, and at times even expand them in some areas, most notably to women's prisons, juvenile facilities and local jails. Policies initially generated by federal judges are now written into state regulations and


159 Although they frequently lapse into a conservative polemic against "activist" federal judges, in their book Democracy by Decree: What Happens When Courts Run Government, Ross Sander and David Schoenbrod provide examples of excesses when judges become too aggressive in micromanaging structural reform cases and when cases are not terminated in a timely fashion. However when they offer suggestions for ways to prevent these problems, they fall back on traditional conceptions of the judicial role offered by the legal process school and thus offer little by way of valuable advice. See Ross Sander & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003).


162 See, e.g., Feeley & Rubin, supra note 1, at 382-88.
rules governing corrections. Correctional departments everywhere are better organized and more responsive to prisoners' rights. And litigation and the threat of litigation continues to encourage correctional agencies to take greater care. Perhaps the most significant feature of the 1996 PLRA is that it places time limits on remedial orders, and makes it somewhat easier to modify existing court orders and consent decrees. But the courts themselves had already been wrestling with these issues. And as important as the PLRA is, it does not cut back on any of the substantive standards that the courts have imposed on correctional administrators.

Despite this success, there is no question that the judges in the conditions cases violated well-understood limitations on judicial decision making. In particular, they violated two well-entrenched theories that constrain judicial decision making: the pillars of legal formalism (the principles of the rule of law, federalism and the separation of powers), and the legal process school's prohibition against deciding polycentric issues. They ignored the principle of the rule of law when they took the Eighth Amendment as a grant of authority to make policy rather than merely to interpret preexisting rules. They ignored principles of federalism when they barged headlong into an area traditionally regarded as the responsibility of the states. And they violated the principle of the separation of powers when they in effect created and then implemented an administrative code for the operation of prison. Additionally, they violated the principles of legal process when they ignored the admonition that function follows form and embraced polycentric problem solving. An observer from Mars would have been hard-pressed to distinguish the activities of these judges from those of an aggressive administrator who had been delegated responsibility by a legislature to make and implement new policy.

The judges in the prison conditions cases also violated constraints suggested by comparative institutional analysis of the new legal process movement. The courts clearly did not defer to the branch that is "least worst in a given situation." No one would seriously argue that federal judges had any institutional advantage over other branches in understanding and making policy about prison conditions. What they did was to act when no other branches could or would act. Thus we come back to the question we posed at the outset, "Were the judges good enough?" In the discussion immediately above, we have shown that they were. So the question is now, "Why?"

Earlier, we suggested that these questions could be answered by reexamining and relaxing the assumption of optimality, by asking not

164 See KOMESAR, supra note 32.
which institution is best (or least well) equipped to make policy in a given area, but instead asking whether an institution is “adequate” to the task. This seems to have been a question the judges in the prison conditions put to themselves. When no other branch was prepared to act, they appear to have asked, “Are we adequate to the task?” Initially as an institution, the judiciary was not certain. Judges certainly did not dive in headlong to deal with the prison conditions cases with great relish. They readily and continuingly acknowledged that they were not the optimal decision makers, and that other institutions were in far better positions to effect policy than they were. However, when they saw that the other branches had not acted—and were not likely to act—they concluded that they were “good enough.” They seemed to recognize what neither the old nor the new legal process movements saw, that there is no simple correspondence between institutions and decision making styles.

The courts were adequate in part because their approach was pragmatic, cautious and incremental—in part because prisoners and policy making were not wholly alien to them. Although prisons were strange territory to most judges, by the time the conditions cases arose, the courts were readily familiar with the practice of extending rights to various disadvantaged groups. Prisoners’ rights were the last in a long list of those to whom the courts had extended protections: racial and ethnic minorities, criminal defendants, welfare recipients, students and soldiers. It was but a small step to recognize this additional group as possessors of rights.

And when the courts did act, they moved carefully. Like many other high-level political appointees, they were generalists and were likely to have had broad experience in governmental affairs. They knew how to proceed cautiously and where to look for advice. They turned to conventional sources for their understanding of prisons. They depended heavily on the testimony of well-regarded corrections’ leaders, who served as expert witnesses. And like any reform administrator, they appointed special assistants, here called special masters, to serve as their eyes and ears and advise them how to proceed. More generally, they embraced a conventional model of prisons as envisioned by the American Correctional Association and other national organizations. These are the same sources that a reform-minded governor or administrator would turn to if confronted with the same problems.

It is hardly surprising that judges in these cases would embrace such conventional views. They have had careers in public life. Most have had extensive experience in administering public policies. As a group in background, experience, attitude and values, they are virtually indistinguishable from state governors, their senior advisors, attorneys general, heads of major state agencies and influential legislators. Indeed, but for fate, many of the judges handling these cases
might have been governors or heads of agencies overseeing corrections or key advisors to governors or influential legislators with oversight for corrections, or in any of a number of other important policy making positions. This, after all, is the recruiting ground for American judges. Ultimately, it is this common background, common set of experiences and common approach to diagnosing and solving problems that shape judges' visions, constrain their actions, and lead them, even when most aggressively making policy, to embrace norms that are conventional. In arguing this, we do not mean to claim that policy in the American political process is always, or inevitably, consensual. Most certainly it is not. But in most if not all areas, realistic policy choices are severely constrained. Fragmentation of the governmental process almost assures that this is the case. Nor do we mean to claim that judges will inevitably be good policy makers. The annals of law are replete with stories of idiosyncratic judges doing stupid things. But individual judges rarely if ever make "policy." Our concern is with the judiciary as an institution. Foolish rulings, even by the highest courts, have a way of being distinguished or narrowed or simply forgotten. Foolish cases by lesser judges if not overturned on appeal may lead to individual catastrophe, but not necessarily bad policies.

Ultimately, both the success of judges as policy makers and the constraints on them as policy makers emerge from the same source. As government officials imbricated in the complex, fragmented American political system, they not only share similar public experiences and the same pragmatic perspective with other government officials, but they also operate under the same sorts of constraints. To be effective, their policies must nest within a larger set of policies. Their part must fit within a larger accepted whole. If it fails in these regards, a policy made by the judiciary, like such a policy made by other officials, is likely to fail. There is, no doubt, ample evidence of such failure of judicial policy making, as there is in other areas of policy making. But on the whole, judicial policy makers would rather succeed than fail, and as a consequence judicial policy making is subject to self-imposed constraints that, we believe, are more powerful and more effective than the more commonly understood restraints proffered by the legal process school in either its older or newer variations.