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RISING ABOVE PRINCIPLE*

GEOFFREY C. HAZARD, JR.†

INTRODUCTION

In case no one has noticed, it should be reported that these days some very intense debates are going on in political and legal philosophy. These debates concern what our society should be like and how decisions about it should be made, and particularly who should make those decisions. One of the primary issues of these debates is the legitimacy of what lawyers and judges do, particularly appellate judges and more particularly Supreme Court justices. The Supreme Court is often treated as a proxy for the legal system, and with good reason, for the function of the Supreme Court is a distillate of what American courts do and that in turn implicates what the American legal system does.

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The phrase “our society” sometimes is used to refer to Western capitalist society; I use it to denote American society, in particular.

See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) (defending the liberal assumption that neutral philosophical principles exist and can be used to reach agreement on questions of value); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (favoring a decisionmaking process that looks to individual human rights rather than to collective social goals); R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986) (advocating legal rules designed to maximize social wealth); Brest, Who Decides?, 58 S. CAL. L. REV. 661 (1985) (questioning right of judiciary to make constitutional choices given impossibility of literalist interpretation of text); Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063 (1981) (concluding that no defensible criteria exist by which to select the “fundamental rights” that form the basis of judicial review); Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (arguing that interpretation of legal text is not a wholly subjective process and that rule of law is both possible and legitimate); Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017 (1981) (suggesting that literalist readings and original intent analyses alone provide inadequate guidance for constitutional interpretation); Singer, The Players and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1981) (arguing that the absence of objective principles does not preclude society from making meaningful political choices); Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS. L. REV. 975 (concluding that legal rulings are inevitably subjective and that no objective theory of legal rights can be relied upon); Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561 (1983) (stating that objective legal theory simply rationalizes social relationships determined through political power).

The question of the legitimacy of courts, particularly the Supreme Court, has always been a rich topic for legal academic debate. See, e.g., A. BICKEL, THE LEAST
On this occasion, we will join these debates by focusing on the legitimacy of courts, particularly appellate courts, and specifically the Supreme Court, as a proxy for the legal system as a whole. In doing so, however, we at once confront the fact that the legitimacy of courts is inseparable from the legitimacy of other institutions of our society. For example, a common criticism used by both the left and right to attack the legitimacy of appellate courts is that they are engaged in undemocratic lawmaking, inasmuch as they certainly are constituted undemocratically and they evidently are engaged in lawmaking. Implicit in this criticism is the notion that other decisional processes, particularly that of legislation, are democratic and for that reason legitimate.

Yet, in other equally intense debates in political philosophy, the legitimacy of the legislative process is itself in question, on the grounds that the legislative process is not in fact democratic and, worse, that much of modern legislation would be illegitimate even if it were democratically adopted. In these debates, philosophers of the left sometimes conclude that the legislature should be abolished and that government should function through inclusively participatory communitarianism—the restoration of democracy as supposedly experienced in the Greek polis, but with women, young people, and servants included.

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4 See, e.g., H. Dean, Judicial Review and Democracy 5 (1966) ("Of all the charges against judicial review, undoubtedly the most serious and persistent is that it is incompatible with the principles of democracy. The Supreme Court, its critics claim, is a veritable aristocracy of the robe, functioning as a super-legislature, yet neither chosen by the people nor politically responsible to them."); T. Higgins, Judicial Review Unmasked 30-42 (1981) (criticizing the judiciary for policymaking without the mandate of the people or responsibility to the nation).

5 See Fried, Liberalism, Community, and the Objectivity of Values (Book Review), 96 Harv. L. Rev. 960 (1983) (reviewing M. Sandel, Liberalism and the Limits of Justice (1982)). "For Sandel this view [communitarianism] is an affirmation of an earlier, pre-Enlightenment conception of the person, of community, and of the good, a conception in which reflection can deliver the truth about our shared proper ends." Id. at 175-78. "And it is a conception that recalls 'the possibility that when politics [as a type of communitarian endeavor] goes well, we can know a good in common that we cannot know alone.'" Id. at 183.

6 See Cornell, Toward a Modern Postmodern Reconstruction of Ethics, 133 U. DANGEROUS BRANCH (1962) (defending judicial review as a legitimate check on legislatures). Compare H. Commager, Majority Rule and Minority Rights (1943) (concluding that democratic majorities can be trusted to protect minority rights adequately and that judicial intervention unwisely constrains legislatures) and Thayer, The Origin and Scope of the American Doctrine Constitutional Law, 7 Harv. L. Rev. (1893) (stating that broad judicial review power makes legislators complacent about respecting citizens' rights) with C. Black, The People and The Court: Judicial Review in a Democracy 32 (1960) (preferring judicial review and "government of law through men, and not of men without law") and Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952) (judicial protection of individual rights guarantees the legitimacy of political choices made by the electorate). These days, however, the debate has escaped from the law school classroom and is at large in the classrooms of other academic disciplines and in public forums.

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Some philosophers of the right also arrive at the conclusion that the legislature should be abolished. However, the "brave new world" they contemplate is not a community after the Greek model but a monadic world peopled by solipsists, sustained by a market that is impersonal not only functionally but literally. By any of these analyses, courts are illegitimate.

The issues in the debates in legal philosophy over the legitimacy of courts these days are thus inseparable from the issues in political philosophy concerning the legitimacy of legislation, to say nothing of the legitimacy of the modern administrative bureaucracy that everyone loves to hate. At the same time, however, the legitimacy of courts cannot be assessed in terms of generally accepted principles of political philosophy, because among the intelligentsia, at least, there are no such political principles. Indeed, all of the debates in legal philosophy about the legitimacy of courts ultimately reveal themselves to be debates over principles of political philosophy because these principles are the fundamental terms needed before any discussion of questions of legal philosophy can proceed. Hence, discussions of such mundane topics as labor law quickly move to an examination of the foundations of Western civilization.

Such being the state of debate between the academic angels, why should we fools enter into it? We could better occupy ourselves with more modest questions, such as rules of corporate governance or contract doctrine—issues that we used to think could be considered in a dispassionate lawyerlike way and resolved in technically coherent legal terms. Regrettably, there is no such refuge. Questions of corporate governance and contract doctrine, and of course everything else in the law these days, implicate disagreements over basic political principles.

PA. L. REV. 291, 315 (1985) (describing Alistair McIntyre's Neo-Aristotelianism, which rejects Aristotle's exclusion of groups such as women and servants from the life of the community).

7 See R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (arguing that only a minimal political state can be justified morally and that a more extensive state violates the rights of individuals).

8 See id. at 232-75 (arguing that individuals have no obligation to respond to the needs of others).

9 Even in the least exacting of these ideal world views, courts could be considered legitimate only on the basis of the pre-Realist assumption that courts apply law transparently and without effect on its content.


11 See, e.g., Gabel & Feinman, Contract Law as Ideology, in THE POLITICS OF
Thus, no answer can be formulated for the question of the legitimacy of courts because no terms can be securely postulated in which the question could be answered. A search for an acceptable answer to the question of the legitimacy of courts these days therefore will lead to no generally acceptable conclusion. On that basis, we could now end what would constitute the shortest Roberts Lecture on record. Be not relieved, however, for we shall press on. Even if the question of the legitimacy of courts cannot be satisfactorily answered at least we can recognize it as an important question.

The legitimacy of courts has been an issue ever since the conjunction of two propositions became established. The first proposition is a matter of constitutional law: courts should be independent from primary political authority, whether that authority reposes in a king or a legislature. In the current debates over the legitimacy of courts, it seems to be assumed that the fundamental antinomy is between democratic process and judicial process. This is a much too narrow and historically confined view of the problem. Consider the dispute in the early seventeenth century between Lord Coke and King James. Coke, personifying judicial process, was accused by King James and his friends of interfering with fundamental and legitimate political process. But the legitimate political process in which Coke interfered was not democratic political process but regal-aristocratic political process. We are perhaps led to infer that it is in the nature of genuine judicial process to interfere with prevailing political process, whatever that political process might be. The proposition of constitutional law is nevertheless that courts must be sustained in such interference, up to a point. The debate concerns that point's location.

The second proposition is one of legal fact: courts, however neutrally they seek to act, make law as well as apply it. The truth of this proposition was recognized by King James, as noted above. It has been

Law, supra note 10, at 172-73 (objecting to the theory of contract recently advocated by right wing politicians as “utopian” and unrealistic in light of social, economic, and political realities).

This proposition was established early in American constitutional doctrine. See The Federalist No. 78 (A. Hamilton) (M. Dunne ed. 1901). “[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.” Id. at 100.

See, e.g., Lord Coke’s famous statement in Dr. Bonham’s Case, 8 Co. Rep. 114a, 118, 77 Eng. Rep. 646, 652 (1610), that “the common law will controul Acts of Parliament” when the acts contravene “common right and reason.”

The French courts that tried faithfully to administer that country’s law after the Revolution of 1789, and the Cuban courts that failed to appreciate the new regime in that country after 1961 serve as further examples of judicial process interfering with political, though not democratic, process.
evident in this country’s political history for nearly two hundred years, let us say since Marbury v. Madison. It has been recognized in legal philosophy for about one hundred years, let us say since Holmes’ argument in The Common Law. From the fact that courts make law, it follows that courts are engaged at least partly in the same activity as kings or legislatures—that is, they exercise discretion in the exercise of authority. And from this proposition, it follows that courts cannot in fact be wholly independent from primary political process, whichever political process that might be.

Hence, we are dealing with an irreconcilable contradiction between constitutional principle and institutional fact. Courts, particularly the Supreme Court, must be beyond politics. That is the constitutional principle. But they are political institutions. That is the institutional fact. In this country we have lived with this contradiction more or less consciously since our national government was founded. Why is the contradiction so distressing just now?

I. RECENT CONSTITUTIONAL HISTORY

The current crisis of legitimacy arises from the series of decisions over the last thirty years emanating from the Warren Court that are collectively referred to as examples of what is now called “judicial activism.” The number of cases is too great and their subject matter too various even to summarize. But they are epitomized by three principal cases. The leading case of the 1950’s, indeed of the century, is of course Brown v. Board of Education. The leading case of the 1960’s could be said to be Gideon v. Wainwright. That of the 1970’s is unquestionably Roe v. Wade. All of these cases had profound social, as well as legal, consequences.

Each of these cases involved the legal claims of people who stood in a legally second class position, a position that was the product of social disparagement reinforced by legal institutions. Before Brown, blacks in a large part of the country were legally prohibited from access to many public institutions, notably the principal public schools, and in most parts of the country had little legal protection in equal access to such private institutions as employment and use of real property.

15 5 U.S. (1 Cranch) 137 (1803).
Before Gideon, in many parts of the country a person accused of crime who did not have money, or whose family did not have money, could be sent to prison pretty much at the mercy of the prosecution.\textsuperscript{21} Before Roe, in almost all of the country it was a crime for a woman to have an abortion, or for a doctor to administer one, except under extraordinary circumstances.\textsuperscript{22}

Blacks were limited to second class citizenship because they were regarded as second class people.\textsuperscript{23} Persons accused of crime were left without legal representation and thus committed to the mercy of prosecutors because they were regarded as unworthy people. Women who wanted abortions were committed to underground and often amateur surgery because they were regarded as shameful, or at least shamefully careless.

For most of us today, it is difficult fully to envision the condition of things before these cases were decided. About half of today's population had not yet been born in 1950.\textsuperscript{24} Of those who had been born before 1950, my sense is that most lived in places and ways where few blacks were to be seen, where criminals were unknown except through the newspapers, and where there were no abortions to speak of. In the perception of most Americans, the American scene was that in which many of them actually grew up and in which many still seem to dwell—a small town tableau set to Lawrence Welk music.

Of course, the world was not that way for many people—it never had been and never would be. Richard Wright, among other prominent

\textsuperscript{21} The necessity for counsel in a criminal case is too plain for argument. No individual who is not a trained or experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea or marshal and present all of the factual and legal considerations which have a bearing upon his defense.


\textsuperscript{23} See Cordell, \textit{Before Brown v. Board of Education—Was It All Worth It?}, 23 \textit{How. L.J.} 17 (1980) (remarks of LaDoris H. Cordell at the commemoration of the 25th anniversary of \textit{Brown v. Board of Education}) (noting that in many of the major post-Civil War cases, black parties' claims to equal public education were defeated, not because the logic of their arguments differed from that of \textit{Brown}, but because blacks were simply considered unworthy of education).

\textsuperscript{24} In 1984, approximately 133 million of the 236 million residents of the United States were under the age of 35. \textit{Statistical Abstract of the United States} 27 (106th ed. 1986).
blacks, has made known what it was to be black even after slavery. Anyone in those old days who had been involved in criminal justice at the grass roots level, as had Chief Justice Warren and Justice Black for example, knew what an indigent was up against in a criminal prosecution. Similarly, Theodore Dreiser in An American Tragedy had long since revealed the social and legal consequences that could follow from abortion being illegal. But these social conditions and their legal consequences, to the extent they were perceived at all, were generally regarded as necessary, or perhaps inevitable, or at least peripheral to matters of proper social concern, or at the very least unspeakable. On the political agenda of the majority, the issues of black citizenship, the rights of the criminally accused, the practical impact of criminal abortion statutes on women—these social issues were, as the phrase is today, non-issues. And, in general, they were legal non-issues as well.

All this was transformed by the pattern of decisions of the Warren Court. In the three decades between 1954 and today, the Supreme Court undercut the constitutional foundation of legalized segregation, the constitutional foundation of penal incarceration without benefit of counsel, and the constitutional foundation of legal condemnation of a willing adult’s endeavor to obtain an abortion. Without those constitutional foundations, the laws on these matters could not stand and, without the support of law, the conventions of social disapproval concerning those matters also could not stand. Blacks have become citizens under the law even though they are still the victims of pervasive discrimination. Indigent criminal defendants have equal procedural citizenship and sometimes more. And the question of abortion has be-

25 See R. Wright, Black Boy (1945); R. Wright, Native Son (1940).
26 See Gideon, 327 U.S. at 344 (commenting on the “vast sums of money” governments spend to prosecute defendants).
28 Of course, this pattern of decisions includes cases decided by the Burger Court, as for example the Roe decision in 1973.
29 Median income for blacks with some college education is lower than for white high school dropouts. At every level of educational achievement, blacks earn far less than whites. Black unemployment is at twenty-one percent, a figure not matched by whites since the early 1930’s. Since the early 1970’s, black unemployment has been over double the white rate. For every one hundred dollars earned by the typical white family, the typical black family earns fifty-six dollars.

30 See, e.g., Washington v. Texas, 388 U.S. 14 (1967) (The sixth amendment guarantee of a defendant’s right to have compulsory process for obtaining witnesses in her favor applies to the states); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Due
come the subject of appropriately serious moral discourse as well as bitter political controversy.\textsuperscript{32}

The Supreme Court's decisions of course were not the only factors in bringing about these normative transformations. Quite the contrary, the Court moved in company with many like-minded social actors and in directions and at a pace that was at least tolerable to most sectors of the national community. But the changes in law powerfully influenced the change in mores. Deprived of the support of law, racial segregation could not sustain itself as a comprehensive system of private preference. The prosecution of crime was prevented from grinding to a halt only because court orders and legislative appropriations provided criminal defendants with the assistance of counsel. After abortion became lawful, most women experiencing an unwanted pregnancy revealed that their preference was for an abortion, morally fearful as that is, even when their own religious commitments were otherwise.\textsuperscript{33} In these developments, it became manifest that the terms of the law can have profound social significance, particularly where law determines the legitimacy of transactions of ordinary daily life, such as the conduct of public education, the administration of criminal justice, and the professional practice of medicine.

In surveying the changes in mores to which Supreme Court lawmaking so greatly contributed, we should also remember changes that the Court did not further despite being urged to do so by various advocates. The most obvious instance is abolition of the death penalty. The Supreme Court moved toward abolishing the death penalty\textsuperscript{34} but then receded.\textsuperscript{35} The death penalty thus is still legal, although it would be

\textsuperscript{31} Some of the heaviest criticism directed towards the Warren Court has focused on the line of cases that transformed criminal procedure and expanded the rights of the accused. For an analysis of the criticism of this line of cases, particularly Miranda v. Arizona, 384 U.S. 456 (1965), see C. Lytle, The Warren Court and Its Critics 73-93 (1968).

\textsuperscript{32} See generally Pearson & Kure, The Abortion Controversy: A Study in Law and Politics, 8 Harv. J.L. & Pub. Pol'y 427 (1985) (examining the political reaction to Roe and concluding that Supreme Court decisions both affect and are affected by the political climate).

\textsuperscript{33} During the time period between 1972 and 1982, the ratio of abortions per 1000 live births rose from 184 to 426. \textit{Statistical Abstract of the United States}, supra note 24, at 66.

\textsuperscript{34} See Furman v. Georgia, 408 U.S. 238 (1972) (holding that discriminatory application of death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments).

\textsuperscript{35} See Gregg v. Georgia, 428 U.S. 153 (1976) (holding that capital punishment does not violate the Constitution when jury is instructed to consider mitigating factors
both inaccurate and macabre to say that it is alive and well. Another failed initiative is the equalization of subventions for public education, even though that proposition was high on every list of egalitarian reforms. Another constitutional path not taken was judicialization of involuntary participation in the Vietnam War, notwithstanding the good legal arguments for such a legal pathway. Thus, there were many other lawmaking adventures that the Warren Court was invited to pursue but which it declined, thereby earning the retrospective derision of the contemporary left on top of the already accrued outrage of the right. In total substantive effect, the product of the Warren Court therefore was a “mixed bag.”

II. THE LEGITIMACY OF JUDICIAL LAWMAKING

Even at the time the Warren Court’s momentous decisions were being handed down, it was noticed that these decisions represented a change in the law. Before Brown v. Board of Education, public education could be legally separate but equal; after Brown it could not. Before Gideon v. Wainwright, an accused generally could be sent to prison without assistance of counsel; after Gideon, she could not go to prison unless she had some kind of a lawyer. Before Roe v. Wade, a woman obtaining and a doctor providing an abortion lawfully could go to jail. After Roe, except in rare cases they could not.

Questions inevitably were raised, as they had been raised in the
past, as to whether it was legitimate for the Supreme Court to have made these changes in the law. Many different expositions were offered on the subject. The term "exposition" is used advisedly, because the arguments were conducted on different levels of legal and political discourse, as well as in different terminologies and tones of voice. It seems possible, however, to group these expositions into four categories. These categories are certainly not the only ones that can be used, but they may help in analyzing the classic debates over the legitimacy of judicial lawmaking. These four categories can be called respectively "legal precedent," "right outcome," "legal realism," and "legal process."

A. Legal Precedent

The first exposition about judicial legitimacy is "legal precedent." This exposition asserts that judicial decisions, in particular controversies, and judicial decisions in general are legitimate because they are intelligible in terms of precedent, either through the derivation actually employed by the court or through some other derivation that could be devised. When this argument is made honestly, which is not always the case, it must also entail frank recognition that the decisions in question were not compelled by precedent. That is, being intelligible in terms of precedent is not the same thing as being compelled by precedent.

No one can seriously argue that the decisions in Brown or Gideon or Roe were compelled by precedent. The same is true of the Marbury v. Madison and Dred Scott v. Sandford decisions, and indeed all important decisions of questions of law. Rarely is this concession made openly—although such a concession is the necessary predicate of any serious discussion—because it is widely supposed that the concession is

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46 For a critique of judicial activism and proposals for constitutional reform by a federal judge, see Wilkey, Judicial Activism, Congressional Abdication, and the Need for Constitutional Reform, 8 HARV J.L. & PUB. POL’Y 503 (1985). Justice Rehnquist, dissenting in Roe, also questioned the legitimacy of the expansion of judicial power:

But the Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under [the rational relation] standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one. Roe, 410 U.S. at 171, 173 (Rehnquist, J., dissenting).

46 See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163-64 (1921) (describing the judicial process as “a process of search and comparison” that yields outcomes in a majority of cases that are dictated by reason).

47 5 U.S. (1 Cranch) 137 (1803).

fatal to sustaining the legitimacy of judicial lawmaking. Those who attack a judicial decision on the ground that it changes the law consider that they have made a devastating point. But the point is devastating only if it is assumed that the court's legitimate function is limited to applying the law as it was understood when originally expounded, whenever that was.

There are analysts of American law, some of them purporting to be serious, who go so far as to imply that a decision is illegitimate simply because it goes measurably beyond precedent. This is the essence of the proposition now being given currency that constitutional interpretation is bound by the "original intent" of the Founding Fathers. Supreme Court decisions are criticized for having wandered from the beacon of original intent, still glimmering through the mists of nearly two hundred years of political experience. That position is not a new position, however. The original appearance in this country of the "original intent" thesis coincided with the Supreme Court's first decisions of really controversial constitutional issues, such as Marbury. And consider the force of the original intent thesis among those in whose lifetime, indeed in whose personal political experience, the Constitution had been drafted and ratified. In the context of Marbury, original intent meant the intent of the very people who adopted the document. Yet of Marbury it was said by Thomas Jefferson, who was certainly in a position to know the original intent, that the decision was "merely an obiter dissertation of the Chief Justice."

Although it thus seems evident that there was no settled original intent back at the beginning, we are invited to believe that an authentic original intent has since revealed itself. That could be, for historiography more than once has supplied what mere history is unable to

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49 See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8 (1971) ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights."); Linde, Judges, Critics and the Realist Tradition, 82 Yale L.J. 227, 254 (1972) ("[T]he judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text . . . "). But see Brest, The Misconceived Quest for Original Understanding, 60 B.U.L. Rev. 204, 238 (1980) ("To put it bluntly, one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago.").

50 Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), reprinted in 1 S.C. Hist. & Genealogical Mag. 1, 9-10 (1900).

51 Cf. Brest, supra note 49, at 209-17 (concluding that an individual's intent may be indeterminate and that individual and institutional intentions may conflict).
More fundamentally, the original intent thesis, if taken seriously, entails repudiating all significant Supreme Court decisions—Marbury, Martin v. Hunter’s Lessee, Dred Scott, Plessy v. Ferguson, United States v. Nixon, along with Brown, Gideon, and Roe. What is more, that would be the consequence even if all these pivotal decisions had gone the other way. Significant decisions of the Supreme Court, whichever way they go, are significant precisely because they enhance or suppress possibilities immanent in existing law. The Supreme Court, as well as the American judicial system as a whole, is an important institution because it makes that kind of decision.

There is an additional objection to the original intent thesis, one that is epistemologically more fundamental. Once the Supreme Court, or any court for that matter, has made a decision, for example Marbury, the problem in subsequent interpretation is no longer that of finding original intent as a matter of first impression. The problem is transformed by the decision itself. It becomes a problem of deciding what the Constitution means given Marbury. And after the decision in Martin, the problem becomes that of deciding what the Constitution means given both Marbury and Martin. The process has continued through the accumulation of constitutional doctrine over two hundred years. One is reminded of the aphorism, now attributed to Yogi Berra, that there is only one chance to make a first impression. The Supreme Court had, at most, only one opportunity to decide original intent as an original proposition, and that opportunity is long since gone.

That the original intent thesis is untenable is not merely a question of preference among possibilities in interpretation. It is a question of epistemology, particularly the nature of historical knowledge. In the same way that we cannot now perceive the American Revolution without reference to the French Revolution or the Russian Revolution, we cannot now perceive the original intent of the Founding Fathers without reference to our knowledge of subsequent history. It is our very knowledge of subsequent history that leads us to recognize that the meaning of a prior event may be of present interest or consequence. Otherwise, these days we might be just as interested in the original

52 See D. Richards, TOLERATION AND THE CONSTITUTION 30 (1986) ("Legal interpretation, as a form of historical reconstruction, does not merely call for a critical historiography of the facts of legal history. It requires as well that those facts . . . be interpreted in a normative way, so as to provide the best theory of the values of the tradition.").

53 14 U.S. (1 Wheat.) 304 (1816).
54 163 U.S. 537 (1896).
intent of the Articles of Confederation of the Southern Confederacy as in the original intent of the Constitution of the United States.

There are, of course, other considerations suggesting why the notion of original intent is implausible. Not the least is that those clauses of the Constitution whose meaning is now generating controversy re- pose in a document that has other clauses whose meanings have undergone indisputable change. The most obvious such change in the Constitution's meaning is in its original references to blacks. In the original intent of the Constitution, slaves were regarded as noncitizens and for electoral purposes as only three-fifths persons. The meaning of every clause in a document that was written on such a premise surely must be reconsidered when that premise is radically modified. A less obvious change occurred in the method of selecting senators. Originally, the Senate was chosen by indirect election, with full awareness that indirect election was not as democratic as direct election. As an indirectly elected component of government, the Senate had a stronger claim to being preserver of certain antimajoritarian constitutional values than after it was transformed into a directly elected component. A similar point can be made concerning the atrophy of the Electoral College, a body that was originally constituted for selection of the President but which has now become simply a register of the state-by-state popular vote. Is it not possible that the preservation of constitutional government requires an undemocratic component and that the Supreme Court has increasingly had to fulfill that function as the elected branches became more democratic?

The rules for construing documents—any legal documents—recognize that a change in conditions may require a change in interpretation. No one has demonstrated why the Constitution should

56 See U.S. Const. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.").

57 This is a corollary to Justice Holmes' vision of the Constitution as an organism, a being developing over time. See Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism . . . ").

58 Compare U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ") with U.S. Const. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ").


60 See M. Cohen, Law and the Social Order: Essays in Legal Philosophy 130-31 (1933); Sands, Statutory Construction and National Development, 18
be placed beyond the purview of this fundamental rule. Moreover, no one has demonstrated how, even if this were desired, the Constitution could be placed in such hermetic repose. Argument for rigid conformity to precedent undermines the common law system itself. Common law decisionmaking proceeds by reasoning from a past authoritative concrete decision to an outcome in a present concrete situation over a bridge of improvised generalization. The decisions themselves are law, but the bridging generalization becomes law only if and to the extent it is later reaffirmed. Establishing a precedent requires at least three decisions: an original decision, which constitutes potential precedent; a second decision, which uses the first as a precedent; and a third decision, which holds that the second decision correctly considered the first decision a proper precedent. This retrospective and aggregative appraisal of precedent is the essence of the common law and of constitutional adjudication by the Supreme Court.⁶¹

If all this is true, to say that a decision departs from precedent is to make an empty point. Conversely, to say that a new decision is clearly intelligible in terms of precedent is to make a very forceful point. It is forceful because nothing more than this is necessary to satisfy the requirements of precedent under American law.⁶² In short, a decision that is intelligible in terms of precedent is not lawless except in hyperbole.

Perhaps this is why most serious critics of the Warren Court do not specifically criticize such decisions as Brown and Gideon. It may also be why critics of Roe may have a serious point, although not the point they usually try to make. Roe is justly subject to criticism on grounds of legitimacy not just because it went beyond precedent, but because it can fairly be said that it went too far beyond precedent. Roe tried to effectuate through the medium of a single judicial decision a greater change in the law than is permitted under our constitutional system. By making such an extensive change, the Court foreclosed the usual opportunities for assimilation, feedback, modification, and possible retreat—opportunities that are afforded in a decisional process involving shorter and more cautious doctrinal steps.⁶³ The Court's endeavor in Roe was constitutionally inappropriate in the same sense that

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⁶¹ See Holmes, Codes and the Arrangement of Law, 5 AM. L. REV. 1 (1870).
⁶² See B. CARDOZO, supra note 46, at 163-64 (stating that "static" precedents, or precedents that provide a judge with certain knowledge of controlling law, predominate, and that consequently most cases are "destined . . . to affirmation without opinion").
⁶³ This process was recognized by the Court as desirable during the course of the development of the law on capital punishment. In Gregg v. Georgia, 428 U.S. 153 (1976), three Justices refused to hold capital punishment unconstitutional in part on
it would be inappropriate for Congress to replace the present income tax with a comprehensive value-added tax without intermediate gradu-
ated changes, or for the Supreme Court to have abolished the "sepa-
rate but equal" doctrine and ordered that segregated school systems had to be dismantled overnight. The requirements of precedent go this far. But they do not go much further.

B. Right Outcome

The second exposition of the legitimacy of judicial decisions is that of the "right outcome." The right outcome exposition justifies judicial de-
cisions in the same terms as would be used to justify the enactment of controversial legislation by Congress such as the National Labor Relations Act of 1935, the Tonkin Gulf Resolution of 1964, or the National Environmental Policy Act of 1969. These and other congressional enactments imperfectly but authoritatively determined major social policy issues in the teeth of widespread political opposition and deep uncertainty as to the wisdom of the choices being made. But according to the right outcome exposition, most of these choices should be regarded as right because they are substantively defensible exercises of Congress's acknowledged lawmaking powers. The statutes chosen were the product of exercising those powers and the outcomes, in Holmes' phrase, reflected the "felt necessities of the time."

The ground that

[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal demo-
cratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.

Id. at 176.

64 See Shakow, Taxation Without Realization: A Proposal for Accrual Taxation, 134 U. PA. L. Rev. 1111, 1179-81 (1986) (Transition problems would include frustration of expectations and implementation concerns.).

65 See Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955) (describing courts of equity as characterized by "practical flexibility in shaping . . . remedies" and instructing lower courts to act "with all deliberate speed" in fashioning their orders).


69 A contemporary example can be found in the current public debate over granting military aid to the contras in Nicaragua. Both the House and the Senate have agreed to authorize such aid, thus determining major social policy even though public sentiment is less than enthusiastic. See H.R. 5052, 99th Cong., 2d Sess. (1986), enacted as part of Continuing Resolution for Fiscal Year 1987, Pub. L. No. 99-591, 100 Stat. 1783.

70 O.W. HOLMES, supra note 16, at 5.
The same could be said of controversial decisions by the Supreme Court. Yet the right outcome exposition now enjoys little support in respectable legal and political theory because it is subject to very serious and valid objections if it is relied upon alone.\textsuperscript{71} The primary objection is, of course, that for any decision or pattern of decisions there is a counterpart negative exposition—that the decisions in question constitute the "wrong outcome." This objection is generally regarded in legal academic circles as a devastating counter. Critics assert that the right outcome exposition offers no criterion by which to evaluate whether the outcomes reached by courts are indeed right.\textsuperscript{72} In contrast, decisions by Congress can be said to be right at least in the sense that they reflect majority sentiment.

But the objection to the right outcome exposition has considerably less force than first appears. Consider that we can intelligibly assess whether Congress has reached a right outcome in particular legislation even though congressional decisions clearly represent the legal expression of majority sentiment. We can say, and do say, that Congress was wrong in going to war through the Tonkin Gulf Resolution. We can say, and do say, that the President and Congress were wrong to cut taxes and raise defense spending at the rates they did in 1981.\textsuperscript{73} If in this way we can intelligibly say that on a particular occasion Congress reached a wrong outcome independent of the fact that the decision had the sanction of majority representation, we can likewise say that the Supreme Court reached a right outcome independent of that sanction. That is, there is more than one level of political, historical, and moral discourse on which to assess acts of Congress or the Court.

Although the wrong outcome label can be as readily given to a legislative or judicial act as the right outcome label, making a case that the Warren Court's decisions reached the wrong outcome is not so easy. Very few of the serious constitutional critics of Warren Court judicial

\textsuperscript{71} See, e.g., Kidwell, A Caveat, 1985 Wis. L. Rev. 615 (Cases must set intelligible standards as well as reach the right outcome.). \textit{But see} Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 270 (1986) ("When we assess legal theories, the better a particular theory explains cases where we are confident of the right outcome, the more confident we will be with the answers it suggests for those cases at the margin where our intuitions are less secure.").

\textsuperscript{72} See Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. PA. L. Rev. 933 (1983) (Neither right outcomes nor principles from which such outcomes could be derived can be coherently identified.). \textit{But see} B. CARDOZO, supra note 46, at 112 (listing "the accepted standards of right conduct" as one of the forces that shape the law).

\textsuperscript{73} Of course, I do not mean to say that all citizens would agree that these congressional and presidential actions were wrong. Rather, I merely mean to indicate that despite majority support for an action by government, it is meaningful for one to say that the action was wrong.
activism, and judicial activism in general, have criticized the outcomes in question except for that in Roe. These critics sometimes base their forbearance on the ground that outcome is irrelevant, asserting that the real issue is the legitimacy of the process and not the merits of the decisions themselves. Yet it is not at all clear why the right outcome is irrelevant to legitimacy.

Perhaps the point becomes clearer if we consider a common characteristic of legislatures and courts: they are both institutions of government. In our sober moments we recognize that institutions of government enjoy an efficacy and legitimacy that is only contingent, however permanently authoritative they purport to be. The contemporary world is populated with failing governmental institutions, such as the budgetary processes in Brazil and the United States and the electoral process in the Philippines. Political history is largely the study of such failures; for example, the failure of the royal administration of the ancien régime and the failure of the legislature of the Weimar Republic. All incumbents in governmental institutions are mindful of these facts. "Uneasy lies the head that wears a crown"—or a senatorial toga or a judicial robe.

In other terms, and specifically with reference to the judiciary, we may be helped by referring to H.L.A. Hart's distinction between primary and secondary rules. Primary rules are those regulating relationships in the community—attendance at school, for example. Secondary rules are those that constitute the authorities who specify what the primary rules are. Article III of the Constitution, for example, is a

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74 See, e.g., Ely, Toward a Representation-Reinforcing Mode of Judicial Review, 37 Md. L. Rev. 451, 485-87 (1978) (Courts exist to "referee" the political process rather than to dictate substantive outcomes.). For a critique of Ely's theory with respect to equal protection doctrine, see Baker, Neutrality, Process, and Rationality: Flawed Interpretations in Equal Protection, 58 Tex. L. Rev. 1029, 1046-49 (1980) (Ely's political process theory is deeply ambiguous because value choices are necessary to choose among possible processes.).

76 See Amaral, The Debt Crisis From the Point of View of a Debtor Country, 17 N.Y.U. J. Int'l. L. & Pol'y 633, 637 (1985) (Brazilian recovery from the debt crisis is inhibited by the lack of control over crucial variables.); Note, Experimenting with Orthodox Economics in Brazil, 17 N.Y.U. J. Int'l. L. & Pol'y 651, 651-52 (1985) (Debt crisis adjustment policies have generated recessions and inordinately high socio-economic costs.).

78 See A. Schick, Congress and Money: Budgeting, Spending and Taxing 566-68 (1980) (Deficits and spiraling expenditures remain in spite of attempts at stern budget discipline and spending cutbacks.).

77 See Observers of Vote Cite Wide Fraud by Marcos, N.Y. Times, Feb. 10, 1986, at A1, col. 1 (Thirty government vote counters left their jobs, saying returns were being falsified; international observers reported "[o]ccurrences of vote-buying, intimidation and lack of respect for electoral procedures.").

78 W. Shakespeare, King Henry IV, Part II, III.i.30.

secondary rule that constitutes the Supreme Court. With this distinction in mind, we should observe that every decision concerning a primary legal issue in H.L.A. Hart’s dichotomy also implicates the secondary rule on the basis of which the decision is purported to be made. In Kelsen’s terminology, every application of a norm implicates the grundnorm.

Putting the point another way, every act of government, including every act of the legislatures and every act of the courts, proceeds from a dual agenda. One agenda comprises the immediate business to be done—the hearings to be held, the cases to be decided, the bills to be debated, and so on. The other agenda includes the business of staying in business. A few years ago, a noteworthy political scientist did an interesting study of Congress, subtitled The Electoral Connection. His basic proposition was that the most consistently predictive independent variable in the behavior of congressmen was concern about getting reelected. Some nonacademic observers might put that insight on a par with rediscovery of the law of gravity. But if the proposition is obvious as applied to legislatures, why do legal philosophers have such difficulty accepting that it may be equally applicable to courts?

Of course, we should be uneasy accepting the proposition that judges in deciding cases are concerned not only with resolving the merits but also with keeping their jobs. The ideal of judging—the conception of the role—is that a judge does not consider such things; justice is supposed to be blind. The reality is and must be, however, that a judge who does not consider such things is a fool. The necessity that a judge as well as a legislator be mindful of the political viability of the judicial

80 Article III provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. Article III is a secondary rule for Hart because it “specif[ies] the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” H.L.A. HART, supra note 79, at 92.

81 See H. KELSEN, THE PURE THEORY OF LAW 8 (1934).


83 See id. at 13.

84 Obviously, in light of Article III, federal court judges are not primarily concerned with keeping their jobs. They have a correlative concern, however, in maintaining the legitimacy of their courts and reputations, such that no judge or court can be said to be interested solely in resolving the merits of each case decided.

Those judges who are elected have the dual problem of being concerned about reelection and maintaining the legitimacy of their courts. A recent advertisement aired on Florida television stations urged voters to vote for an incumbent judge on the basis of his approach to law and order. The advertisement asked: “Do you want revolving door justice?” This illustrates precisely the conflict between the supposed blindness of the judiciary and its practical need to curry the favor of society.
institution is not institutional hypocrisy; it is constitutional necessity and, ultimately, human tragedy.

I hope I shall not be misunderstood, although I am certain I will be. I do not suggest that achieving the right outcome is decisive of legitimacy. I say only that it is not irrelevant. And I therefore assert that it is a factor in assessing legitimacy.

C. Legal Realism

The third exposition concerning the legitimacy of judicial lawmaking is legal realism—at least there used to be an exposition known as legal realism. Legal realism now appears to be dead, although only temporarily. In essence, legal realism asserted that the decisions of courts were not fully explicable through reference to the terms of the decisions themselves. In moderate form, the realist thesis was that reference to the text of a decision should be augmented by consideration of circumstantial factors such as the economic, political, and social characteristics of the controversy and the anticipated economic, political, and social consequences of the decision. In radical form, the realist thesis was that reference to the text was essentially irrelevant and that a judicial decision could be understood only in terms of its consequences.

85 See L. Kalman, Legal Realism at Yale, 1927-1960, at 188-228, 230 (1986) (discussing the gradual convergence of the Yale realist and Harvard case method approaches to teaching law and concluding, "Intellectually, realism ha[s] not proved significant; pedagogically, it ha[s] not fulfilled its promise."); Hutchinson & Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 Stan. L. Rev. 199, 205 (1984) ("The Realist revolution was in fact nothing more than a palace revolution; it was an important, but simply evolutionary, phase in American legal thought.").

86 See Twining, Talk About Realism, 60 N.Y.U. L. Rev. 329, 363 (1985) ("The possibilities for analytical development of the notion of 'realism' are by no means exhausted . . . .").

87 See, e.g., Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 464 (1930) ("I have argued that the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine . . . having purposes, not values in itself; and that the clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior . . . ."); Twining, supra note 86, at 383 ("In order to understand law the study of rules alone is not enough; . . . see it as it works; think in terms of total pictures and total processes."). See generally L. Kalman, supra note 85, at 3-10 (discussing the idiosyncratic nonlegal factors identified by realists as influences on judicial decisions).

88 See Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265, 278 (1978) ("Realism] sees legal reasoning as a purposive or instrumental, rather than a purely deductive, enterprise, and it asserts that proper judicial action requires and may legitimately involve inquiry into the social policies intended to be served by legal rules and the practical social consequences of a court's decisions.").
Furthermore whether moderate or radical, realism theorized that a decision was not compelled by precedent, but expressed a choice on the part of the judges who made the decision. That is, the function of judging in its very nature is what is now called "activist."

There is obviously an affinity between the right outcome exposition and the legal realist exposition. Both deny that a judicial decision is intelligible simply on its own terms or simply in terms of prior judicial decisions. But legal realism has a frame of reference that is sometimes much narrower and sometimes much larger than outcome analysis. In its narrow frame of reference, legal realism addressed its attention to how a judicial decision is attained, whatever might be its consequences in the out-of-court world. In these terms, legal realism disputed that judges decided cases simply on the basis of the formal legal reasoning that appeared in judicial opinions. The informing disciplines of this narrower view were psychology and epistemology.

In its larger frame of reference, legal realism addressed its attention to the legal process as a whole in historical terms and asserted that judicial decisions are not the product of the judges' secret purposes but the product of historical compulsion of which the judges themselves are the instruments. Its informing discipline was historical determinism, Marxian or otherwise. In contrast to both of these versions of realism, the right outcome theory hypothesizes that a judicial decision involves an element of choice even if the choice is constrained by time and circumstance; the informing discipline is politics as expounded by both Aristotle and Machiavelli, for example.

As we look back on it, legal realism was inconsistent, redundant, and shallow. It was inconsistent on the question of whether the content of judicial decisions was significant. Realism said that a judicial

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89 See generally E. Purcell, The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 74-94 (1973) (discussing the realist critique of traditional legal thought).


91 See Note, Critical Legal Studies as an Anti-Positivist Phenomenon, 72 Va. L. Rev. 983, 997 (1986) (asserting that legal realist epistemology and methodology fall within the Enlightenment tradition).

92 See, e.g., E. Purcell, supra note 89, at 161-63 (critiques of realism asserting that it led to "triviality and confusion").
decision involved normative choice by the judges rather than the dictate of precedent. But if that was a truth about one judicial decision, it was a truth about all judicial decisions. The implications of this fact do not appear to have been fully appreciated. If all decisions involve normative choice by judges, and if those choices are made over time and in sequence, then it would seem that a judge's prior choices would necessarily affect, if they did not wholly determine, the range of choice in subsequent decisions, assuming a judge seeks consistency. Just because a judge has a choice it does not follow that every choice proceeds upon a tabula rasa. A prior decision might not be a binding precedent, as the realists believed, but it is at least a psychological event in the life of the judge and an historical datum in the judge's work.

Realism was redundant because it made its basic point over and over again. The best explanation for the realists' failures to develop a jurisprudence much beyond a critique of formalism may be that their message was not universally accepted. Many formalists did not reject the realists; they simply ignored them. In response to such a lack of response, the realists thought they had a full-time and seemingly necessary enterprise reiterating their message.

More significantly, the debate between realism and formalism roughly corresponded to an underlying substantive conflict between political reformers and political conservatives over what the law was and ought to be. Many conservatives adhered to formalism like the Old Believers of Czarist Russia, hoping that if the old faith were preserved, then old times would be restored. Out of the same concern, the realists wanted to eradicate the old faith. The connection between substantive conservatism and legal formalism was broken only in the 1960's with the emergence of neoclassical economic analysis of law, which was substantively conservative, but in a sense more realist than realism.

The vacuousness of realism was long ago noticed and attacked by Morris Cohen, among others. Legal realism is now attacked by its

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93 See M. Cohen, supra note 60, at 215 (discussing contemporary recognition that law reflects social conditions and warning of danger that law will as a result be seen as completely lacking in principles of decision); Cohen, Book Review, 22 CORNELL L.Q. 171 (1936) (reviewing E. Robinson, LAW AND THE LAWYERS (1935)) (criticizing contemporary lack of understanding of the need for positive assumptions and hypotheses to guide the search for answers to legal problems).

94 See, e.g., Hook, Abstractions in Social Injury, 34 ILL. L. REV. 15 (1939) (commenting on the indeterminacy of social science concepts); Hook, supra note 90 (commenting on the nafveté of Arnold's analysis of social ideals); see also J. Auerbach, UNEQUAL JUSTICE 165 (1976) (Realism was criticized during the 1930's for its relativism, its affinity for the New Deal, and for its focus on judicial lawmaking.); Hutchinson & Monahan, supra note 85, at 204 (Realist scholarship "‘was essentially negative and iconoclastic; it lacked any . . . positive political program.'").
intellectual offspring, the members of The Conference on Critical Legal Studies (CLS). How sharper than a serpent’s tooth it is/To have a thankless child!" Even more galling is that the CLS critique of legal realism rests also on substantive grounds. It is said that the realists after all had a substantive program, indeed a pernicious substantive program. In national politics, legal realism was associated with Roosevelt and the New Dealers, as well as being associated with such figures as Holmes and Cardozo in the judiciary and Corbin and Llewellyn in legal academia. The substantive program is said to have been palliative liberalism: politically shrewd members of the ruling class effecting superficial change in the law as a means of enervating lower class discontents and thereby perpetuating the hegemony of the ruling class.

The old liberal realists writhe under this critique. They remember their intense struggles with the old conservatives in the domains of both legal philosophy and practical politics. But the members of CLS have a point. The old liberal realists tended to be middle-class intellectuals, and they had some sense of political direction if not a wholly coherent political program. Legal theory and the political program in legal realism converged at the theoretical level on the question of the mutability of common law doctrine and the constitutional validity of reformative economic legislation. They converged at the level of practical politics in cases involving legislation that changed common law rights in economic

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96 W. Shakespeare, King Lear, I.i.297-98.

97 See J. Auerbach, supra note 94, at 164-66; Hutchinson & Monahan, supra note 85, at 204. See generally White, supra note 90, at 999, 1013-26 (discussing development of legal realism and its relationship with the New Deal).

98 See, e.g., Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984). Gordon criticizes legal realism as a doctrine that reserved the opportunity to change for “an elite of policymakers” and comments:

How ironic it is that the country whose People, by their official ideology, have delegated only limited powers to their State; whose political origins lie in revolutionary protests organized by “the people out of doors,” crowds explicitly claiming legal status and legitimacy; and whose history is so full of mass reform movements should have produced such a Tory legal literature, narrowly focused on official agencies, especially the courts, and almost completely indifferent to extra-institutional law-making.

Id. at 70 & n.34.

99 See, e.g., Frank, Realism in Jurisprudence, 7 AM. L. Sch. Rev. 1063, 1064 (1934) (“For the New Deal, as I see it, means that . . . we are moving in a new direction. We are to be primarily interested in seeking the welfare of the great majority of our people and not in merely preserving certain traditions and folkways, regardless of their effect on human beings.”).
 relationships, particularly the master-servant relationship.\footnote{100}

The legal realist critique asserted that common law doctrine is not immutably inherited through precedent but is an expression of present political preferences.\footnote{101} Hence, the received common law, particularly the law governing the master-servant relationship, was a proper subject of judicial reformulation. By parallel analysis, constitutional doctrine also is not immutably inherited through precedent but, like the common law, is the expression of present political preferences.\footnote{102} Constitutional law likewise is subject to reexamination, particularly constitutional law having to do with the scope of legislative power to revise common law rights. Legal realism thereby legitimated a judicial activism wherein the courts modified constitutional doctrine to allow legislatures to modify the master-servant relationship and legal aspects of other economic relationships. This development was epitomized in the difference in outcome—but also the difference in legal doctrine—between Moorehead v. New York ex rel. Tipaldo\footnote{103} in 1936 and West Coast Hotel Co. v. Parrish\footnote{104} in 1937. American political historians still describe the constitutional transition manifested in those two decisions as the "switch in time that saved the nine."\footnote{105}

This relationship between realist legal theory and the Progressive-New Deal political program is a key to the theory of legitimacy of judicial lawmaking that was implicit in realism. Legal realist theory held that courts make law, both common law and constitutional law, whereas the Progressive-New Deal political program held that the law made by courts was unjust and should be displaced by juster law made

\footnote{100} The prime example of such legislation is, of course, the National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (1982)).

\footnote{101} See Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 833-34 (1935) ("'Social Policy' will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent . . . ."); Klare, supra note 88, at 278-79 ("The Realists did not call for the demise of the rule of law, but they did urge candor about the ethical and political character of all legal decisions . . . .").

\footnote{102} See M. COHEN, supra note 60, at 140-50 (criticizing "the invention of a new [constitutioinal] doctrine previously unknown to jurisprudence, to wit, that the right to make contracts is itself property" and attributing the prevalence of the doctrine to the influence of powerful industrial interests on the selection of judges).

\footnote{103} 298 U.S. 587 (1936) (Court adheres to holding in Adkins v. Children's Hosp., 261 U.S. 525 (1923), that state may not set minimum wages for women because such a law violates due process and freedom of contract.).

\footnote{104} 300 U.S. 379 (1937) (Court overrules Adkins and holds that a state minimum wage law for women does not violate due process.).

\footnote{105} Letter from Edward Corwin to Homer Cummings (May 19, 1939) (available in Corwin Manuscripts, Princeton University), quoted in G. GUNTHER, CONSTITUTIONAL LAW 533 (10th ed. 1980).
by the legislatures. Essentially, the realists wanted the nondemocratic branch—the judiciary—to change constitutional law to permit the democratic branch—the legislature—to change the common law. In the strategic relationship between courts and legislatures concerning economic legislation, particularly labor law, judicial activism was legitimate precisely because it facilitated democratic majoritarianism.

This same relationship did not obtain, however, when it came to certain other constitutional problems, particularly those relating to the interests of political minorities. The same democratic majority that liberal realists wanted to press down on employers was also inclined to press down on socialists, blacks, aliens, drifters, atheists, and religious zealots. There seemed to be an endemic tendency for American popular government to assert state control not only in economic relationships but in religious and cultural matters as well. In “social issues,” that tendency conflicted substantively with the views of liberal legal realists.

The resulting dilemma was recognized in the famous footnote four in United States v. Carolene Products Co. and epitomized in the Flag Salute Cases. In the Flag Salute Cases, the Supreme Court first decided, in 1940, 8-1, that the democratic majority could require an affirmation of secular faith on the part of a child whose religious tutelage held such an affirmation to be an anathema. Only three years later, the Court decided, 6-3, that imposing such a requirement was beyond the constitutional power of the democratic majority. The Court held that freedom of religious expression enjoyed a preferred constitutional position but did not explain very well then, and has not explained very well since, why economic legal interests are subject to pervasive majoritarian regulation while other legal interests are not.

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106 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (military order excluding Japanese-Americans from designated areas); Cantwell v. Connecticut, 310 U.S. 296 (1940) (state law criminalizing solicitation by religious organization without certificate granted on discretionary basis); Hague v. CIO, 307 U.S. 496 (1939) (police authority to deny public meeting permits applied only to Communists); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (state laws restricting blacks’ choice of state universities).

107 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).


109 See Barnette, 319 U.S. at 641-42.

110 The Court held in Barnette:

The right of a State to regulate, for example, a public utility may well
This is where and why liberal legal realism has been hoist with its own petard in legal and constitutional theory. As a matter of legal theory, realism held that the judiciary could reinterpret the Constitution so that legislative majorities could work their will in economic matters.\footnote{Cases in which the Supreme Court allowed Congress to work its will in economic matters include West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (overruling prior decisions invalidating minimum wage laws as violative of due process), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (construing the National Labor Relations Act to allow it to operate within the sphere of constitutional authority).}

As a matter of constitutional theory, realism held that judicial activism was legitimate for this very reason. At the same time, those who shared liberal realism as a legal philosophy held that the Constitution was also subject to a reinterpretation under which legislative majorities could not work their will in matters of expression\footnote{See Cohen v. California, 403 U.S. 15, 24 (1971) ("The usual rule is that governmental bodies may not prescribe the form or content of individual expression.").} and other social issues such as racial\footnote{See Loving v. Virginia, 388 U.S. 1, 11-12 (1967) ("We have consistently denied the constitutionality of [legislative] measures which restrict the rights of citizens on account of race.").} and sexual discrimination.\footnote{See Reed v. Reed, 404 U.S. 71, 77 (1971) ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged [legislative action] violates the Equal Protection Clause.").}

Since all human activity conceptually has been and continues to be both economic and expressive, the position of the liberal realist depended on an isolation of economics that no economic analyst, right or left, would regard as coherent.\footnote{But see Llewellyn, Book Review, 31 COLUM. L. REV. 1215 (1931) (reviewing M. GISNET, A LAWYER TELLS THE TRUTH (1931)) (criticizing the organizational structure of the bar as a machine that turns aspiring leaders into "specialized adherents of the Haves" and denies to non-white-collar individuals access to rights granted under existing law); see also W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 380 (1973), wherein it is noted: Thus it is best to discount as misleading allegations that 'the' realists . . . espoused extreme versions of economic determinism . . . . It should be abundantly clear that Karl Llewellyn never espoused such views; if passages supporting such interpretations . . . are to be found in the writings of one or more individuals who might reasonably be identified as 'realists,' it would not be difficult to show that they were untypical or peripheral to the main concerns of the core members of the realist movement.}

\footnote{Id. at 639.}


\footnote{The Court has carried out this distinction by applying different levels of scrutiny to economic legislation and legislation relating to fundamental rights. Compare Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (Economic legislation receives rational scrutiny.) with Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Voting rights legislation receives higher scrutiny.).}
Various escape routes from this dilemma have been sought. One was the bizarre embrace of what might be called "neo-original intent" on the part of Justice Black.\footnote{See Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960).} This required what Justice Black considered to be strict adherence to the language of constitutional passages, particularly the first and fifth amendments, while also entailing radical ahistorical transposition of these passages from one context to another.\footnote{See A. BICKEL, supra note 3, at 88-90.} Thus, Justice Black found that the Bill of Rights, a 1791 by-product of ratification of one basic act of national union, to be literally incorporated in the fourteenth amendment, an 1867 by-product of a second basic act of national union.\footnote{See Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting) (insisting that full incorporation of all Bill of Rights guarantees was the "original purpose" of the fourteenth amendment).} Once he had transposed the Bill of Rights into the fourteenth amendment, Justice Black sought to apply it literally.\footnote{See A. BICKEL, supra note 3, at 86.} Thus, he asserted that the first amendment was a clear and peremptory command, excluding the possibility of judicial weighing or balancing.\footnote{See, e.g., New York Times v. United States, 403 U.S. 713, 714, 717 (per curiam) (Black, J., concurring) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.")}. In my view, the initial transposition lacks any legal or historical basis. Why, for example, should the states be obliged to retain either the classic grand jury procedure, as required by the fifth amendment, or the rule that a jury verdict be unanimous? Yet one can understand the philosophical considerations that drove Justice Black to this refuge. It provided a definite constitutional text in terms of which the Supreme Court could legitimately perform certain lawmaking functions.

Another escape route from realism's emptiness exists—one that is analytically similar to the route followed by Justice Black, but which proceeds in a different and even more far-reaching direction. This route has been taken by Justice Brennan. If I understand him, Justice Brennan's basic proposition is that the due process and equal protection clauses are imperatives that control all or almost all relations between a citizen and the government. The due process clause requires prima facie that all authoritative interaction between a citizen and the government be conducted according to the adjudicative model. If a citizen is to be deprived of a benefit conferred by government, then that deprivation must be predicated on a quasi-judicial hearing involving articulated positions, confrontations, evidence, and argument.\footnote{See Goldberg v. Kelly, 397 U.S. 254 (1970) (The termination of important government benefits requires that a pretermination hearing be held that provides for}
required in revocation of a driver’s license,\textsuperscript{128} termination of welfare benefits,\textsuperscript{124} nonrenewal of a position in government employment,\textsuperscript{125} and so on. In principle, the same procedure would be required in conferring benefits in the first place, for example, the awarding of government contracts.

Along a parallel line, the equal protection clause operates substantively and requires that any set of benefits conferred on one defined group of citizens must also be conferred on all other citizens, unless a "rational basis" for drawing a distinction between the two classes exists.\textsuperscript{128} What constitutes a rational basis for distinction is, of course, a matter for judges to determine. The principle of equal protection is violated by almost all classifications based on race and most, if not all, classifications based on gender. It is also violated by many classifications correlated with socio-economic position, particularly those associated with residence. Thus, nonresidents cannot be denied benefits that are conferred on residents,\textsuperscript{127} and persons residing in one location in the state may not be deprived of benefits enjoyed by those living in another locality.\textsuperscript{128} The same principle can apply to detriments imposed by the government, for example, the death penalty and restrictions on abortion.

No elaboration is needed to indicate the radical tendency implicit in this approach. To require that all relationships between a citizen and the government be judicialized through the due process clause is

\textsuperscript{125} See Perry v. Sindermann, 408 U.S. 593, 604 (1972) (Brennan, J., dissenting in part); Board of Regents v. Roth, 408 U.S. 564, 604 (1972) (Brennan, J., dissenting).
\textsuperscript{126} See Katzenbach v. Morgan, 384 U.S. 641 (1966) (legislative classification concerning voting upheld when a possible basis for law exists other than invidious discrimination); see also Oregon v. Mitchell, 400 U.S. 112, 229 (1970) (Brennan, J., dissenting) (provisions of Voting Rights Act constitutional if based on any possible state of facts which might reasonably be conceived as justifiable).
\textsuperscript{127} See, e.g., Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (stating that the right of interstate travel insures "new residents the same right to vital government benefits in the states to which they migrate as are enjoyed by other residents"); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that inhibiting migration into a state by the creation of a one year waiting-period before a nonresident of that state can receive welfare is constitutionally impermissible).
\textsuperscript{128} See Memphis v. Greene, 451 U.S. 100, 135 (1981) (Marshall, J., dissenting) (stating that a city may not disadvantage a predominantly black section of the city by closing a street); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (White, J., dissenting) (arguing that inability of poor school districts to raise local revenues because of revenue-raising method embodied in state system violates the equal protection clause).
substantially to transform their character, maybe for the better but perhaps not. Correlatively, to require that all government benefits and burdens be allocated on a basis that judges consider rational is virtually to make the judiciary an upper legislative house in economic redistribution.

Considering Justice Brennan's constitutional theory in terms of legal theory, his theory is inadequate because it fails to take account of its own implications. If the benefits of low-level government employment must be allocated by a judicialized procedure, then why not also allocate those of higher level employment similarly? If the burden of losing a driver's license or a welfare benefit can be imposed by a judicialized procedure, then may the assignments of military personnel to war zones likewise be imposed? Lines can be drawn between these situations, but they cannot be drawn by judicialized procedure itself. The due process theory, therefore, does not and cannot define the scope of its own application.

Similar problems attend Justice Brennan's equal protection analysis. Whether an individual is being legally treated equally or unequally can be determined only by identifying the relevant characteristics of the individual that are to be taken into account. If the only relevant attribute is that individual X is black and individual Y is Caucasian, then the equal protection analysis gets off to a firm start; race is a suspect category. That was all that needed to be said of the school segregation confronted in Brown. But other characteristics of individuals X and Y may differ, for example, their weight or test scores. Nothing in the principle of equality determines whether such differences are a legitimate basis for differential treatment of individuals one of whom, in the phrase, happens to be black. This argument also applies to an alien, a woman, or a resident of a particular community. If the principle of equality does not resolve that question, then in a wide if not infinite array of legal cases we are back to square one.

Out of difficulties of this sort has come still another approach, expressed by my colleague Professor Owen Fiss, among others. This

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129 See Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945 (1982).
131 See Baker, supra note 72, at 944-45 (Judgments about violations of the equal protection clause necessarily require socially or economically value-laden theories about the appropriate normative content of equality.).
thesis combines legal theory and constitutional theory in the following way: As a matter of legal theory, judges ex officio express views on a wide range of socially controversial issues that are systematically different from the views of nonjudges. These views affect the way judges understand and apply legal rules, including the rules in the Constitution. This difference in outlook was understood by the Framers and undergirds article III of the Constitution. Therefore, when the people of the United States adopted the Constitution, they intentionally created a branch of government that has lawmaking powers but that systematically incorporates a counterdemocratic tendency.

I happen to think that this theory is essentially correct, although not at all in the same way or for the same reasons as Professor Fiss. He evidently has in mind a judiciary composed of judges who think very much like Justice Brennan—opposing capital punishment, favoring equalization of school funding, and so on down the political agenda. Moreover, Professor Fiss seems to have in mind that the judiciary should intervene in virtually all relationships that have a legal element, including private contract for example. In terms of legal and constitutional theory, however, this position could be stated in its minimal scope in the following manner:

(1) The Constitution confers on judges the authority to nullify certain legal and governmental relationships. That may not have been the "original intent," but it has been accepted ever since the holding in *Marbury* came to be accepted, whenever that was.

(2) Judges tend to resolve certain problems arising in legal and governmental relationships different from the way in which those problems are resolved by people who are not lawyers. This difference results partly from legal process and partly from the intellectual, moral, and political reorientation entailed in becoming a lawyer and eventually a judge.

(3) The different resolutions that result when judges resolve problems, as compared with how others resolve such problems, operatively is what constitutes legal process.

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133 See id. at 5-17.
134 See id.
135 Cf. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978). My argument emphasizes that the Supreme Court functions as both a court and a policymaking body. This duality stems from the Court's composition as well as its jurisdiction. In addition to the justices' proficiency in the law and practical affairs—something that differentiates their decisionmaking processes from those of nonlawyers—the justices' "constituency," life tenures, and the plurality environment in which they operate enhance their ability to function in this dual role. See id. at 17-27.
That, of course, sounds like a form of legal realism; indeed, it is. But what is the nature of this peculiar legal outlook? This may be discovered by examining legal process, which is the last exposition to be considered.

D. Legal Process

The term to describe this fourth exposition, "legal process," comes from the title of the famous unpublished work by Professors Hart and Sacks. In the narrowest sense, the term "legal process" refers to the conception of legal process revealed in those materials. In a broader sense, the term includes the process revealed in Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System*; in Herbert Wechsler's famous lecture, *Toward Neutral Principles of Constitutional Law*; and in Lon Fuller's *The Forms and Limits of Adjudication*. These works may be roughly reordered according to their breadth of scope. The lecture by Professor Wechsler was addressed to Supreme Court decisionmaking and particularly to *Brown*; the treatise by Hart and Wechsler is addressed to the function of the federal courts in our legal system; Fuller's work undertook to define the essence of adjudication as such; and Hart and Sacks sought to contrast adjudication, as defined in approximately the same way, with the legislative process. Thus, these expositions of legal process differ considerably in their scope, or at least in their ostensible scope. No doubt they also differ philosophically in important respects. Nevertheless, they are fundamentally alike in their exposition of the nature of adjudication and, therefore, of the function of courts generally and of the Supreme Court in particular.

Their common thesis builds upon a contrast between adjudication, properly so-called, and the legislative process. This is the basic theme of the materials of Hart and Sacks on legal process and is implicit in


187 The legal process consists of the procedural devices set up by a community to settle questions of group concern. Because the questions arising in a complex modern society are too unwieldy for any single individual or group of individuals to handle, different procedures and personnel with various qualifications are needed to facilitate the decisionmaking process. See id. at 1-9.


that of Fuller. At least two important contrasts are made: (1) between the legislature's constitutional source of authority as compared with that of the judiciary; and (2) between the decisional process of the judiciary as contrasted with that of the legislature. This set of concurrent contrasts is the key to the legitimacy of the judiciary.

As to the first of these contrasts, the legislature may be assumed to be legitimate because it is constituted by vote of the electorate. On the premises that the electorate's vote more or less reflects majority sentiment and that majority sentiment is a sufficient basis of legislative authority, the legislature is legitimately constituted. That being so, the legislature's product—legislation—is legitimate per se and no inquiry need be made into the rationality of the legislative process. At the same time, however, Hart and Sacks not very covertly suggest that the legislative process is more or less irrational—or perhaps postrational—a moral and intellectual black box where logrolling,\(^2\) pork barrelling,\(^3\) substantive compromise, and other bad things happen.\(^4\)

The federal judiciary, in contrast, is constituted by mere appointment. Hence, the judiciary lacks the democratic majoritarian sanction, and it is not legitimate by virtue of its constitutive rule. Fortunately, however, the judiciary has another basis of legitimacy, i.e., its process—the legal process. The characteristics of the legal process can be identified directly by reference to adjudicative technique. The essence of that technique is articulated reasoning from determinate premises on the basis of facts established by legitimate procedure and of argumentation openly presented and examined. The characteristics of legal process can also be identified by comparison with the legislative process; legal process does not involve log rolling, pork barrelling, and substantive compromise.

The theory of legal process can concede, and does concede, that adjudication can go and actually does go awry much of the time. Indeed, Hart and Wechsler's treatise is arguably a sustained demonstration of the judiciary's tendency to err.\(^5\) But error in execution only

141 See M. Jewell & S. Patterson, The Legislative Process in the United States 106 (4th ed. 1986) (discussing logrolling, or exchange of political favors, as one of the unwritten rules of the legislative process).

142 The term "pork barrelling" describes the process by which "legislators put their hands into a metaphorical barrel and pull out 'pork' with which to satisfy the ravenous appetites of greedy constituents." R. Luce, Legislative Problems: Development, Status and Trends of the Treatment and Exercise of Lawmaking Powers 351 (1935). It most commonly occurs during the preparation of appropriations bills.

143 See generally id. at 695-732 (discussing a wide range of problems with and criticisms of the legislative process).

144 See Hart & Wechsler, supra note 138, at xix-xx.
validates the legitimacy of the paradigm.

The full explication of the paradigm is found in Fuller's *Forms and Limits of Adjudication*. Fuller makes two claims, one of which essentially coincides with that of Hart and Sacks, the other of which goes well beyond. Fuller concurs with Hart and Sacks about the character and unique rationality of adjudication. In addition, he sharpens the definition by saying that adjudication is rational as a consequence of its being "bipolar," that is, involving two opposed sides presenting evidence and argument before a neutral arbiter. As he says: "[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor." And again: "The results that emerge from adjudication are subject . . . to a standard of rationality that is different from that imposed on the results of a [contractual] exchange. . . . [T]he same observ-...

But beyond this, Fuller asserts that certain kinds of conflicts, controversies, or disputes are in their nature bipolar, that is, where one side argues one way and another side argues the other way and between which a neutral arbiter can choose. These conflicts are to be contrasted with polycentric problems. A polycentric problem is one that has two or more centers—hence "polycentric." Such a problem, according to the laws of geometry, must also have more than two sides. For this reason, such a problem cannot properly be committed to the adjudicative process because that process is bipolar.

Thus Fuller claims, along with Hart and Sacks, that adjudication is a uniquely rational process and further claims that certain types of problems are uniquely susceptible to resolution according to this process. It follows implicitly, if not explicitly, that problems lacking this susceptibility—polycentric problems—have no business in the courts. Furthermore, it follows that the proper jurisdiction of the courts can be determined by inspection of the kind of problem presented for resolution. Consequently, Fuller claims that an analytic method exists for determining which social controversies are properly justiciable.

In my view, enormous difficulties arise out of Fuller's thesis and by the same token out of that of Hart and Sacks. So far as Professor

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145 See Fuller, supra note 140, at 367.
146 Id. at 364.
147 Id. at 367.
148 See id. at 395.
149 See id. at 394-95.
150 See id. at 394-404.
Fuller's thesis is concerned, let me only say that I have always thought, since I first read his draft paper in 1959 or 1960, that he had the thing about bipolar controversies precisely backward. It is not that problems are inherently bipolar or polycentric, to be assigned on that basis to various decisionmaking procedures. Rather, it is that decisionmaking procedures can be either bipolar or multilateral, and that problems can be formulated in terms of whichever decisionmaking procedure is to be employed. Thus, I believe that any problem of social conflict can be formulated as a bipolar legal controversy for resolution by bilateral disputation. Correlatively, in my view, every bipolar problem has polycentric aspects, whether or not any attention is paid to them in any given decisionmaking context. As I said, however, that is for another day.

The fact remains that the Fuller thesis was accorded great respect, partly in deference to its author and partly on account of the respectability of those holding similar views. Moreover, the Fuller thesis gained added significance when read in conjunction with the title of Professor Wechsler's lecture, *Toward Neutral Principles of Law*, and what Professor Wechsler was heard to say in that lecture.

I put it this way because my reading of Professor Wechsler's lecture suggests that what he said was not quite what he was heard to say. What he actually said had primarily to do with the scope and implications of the ruling in *Brown*. As I read him, Professor Wechsler's point was that if blacks had a right not to be segregated, that implies that blacks had a right to associate with whites. If blacks had such a right of association, then on principles of equality—"neutral principles"—whites also had a right to associate with whites. But if white people wished to exercise this right by associating exclusively with whites, or with groups in which the number and kind of participating blacks was kept within the white people's limits of toleration, how could a right of free association be made available to both whites and blacks?

If this is what Professor Wechsler actually said, then it remains a fundamental challenge to the intelligibility and feasibility of some of the themes in *Brown*. These implications were foreseen by Professor Wechsler but realized by many others only twenty years later when *Milliken v. Bradley* presented itself. Be that as it may, the matter for

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151 That this is correct is demonstrated if not asserted in an admirable article by a colleague of Fuller, Melvin Eisenberg. See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv. L. Rev. 637 (1976).

152 See *H. Wechsler*, supra note 139, at 46-47.

153 See id. at 47.

154 418 U.S. 717 (1974). The Court refused to approve Detroit's desegregation plan, one that called for an interdistrict remedy instead of an intradistrict one, because
present discussion is in the relationship between what Professor Wechsler was understood to say, on the one hand, and the legal process exposition of Fuller, Hart, and Sacks, on the other.

The exposition of Fuller, Hart, and Sacks, it will be recalled, was that adjudication had a unique rationality; that adjudication entailed a neutral interposition between contending parties; and that the controversies fit for adjudication could be identified by reference to their bipolar structure. Hart and Wechsler had exhibited in their treatise on federal jurisdiction, particularly their analysis of the decisions of the Supreme Court, what certainly could be called a unique rationality. The substance of Professor Wechsler's lecture on Neutral Principles suggested that the Supreme Court could and should exercise such rationality. The title of his lecture suggested that the exercise of such rationality would have the quality of neutrality.

If these propositions are reshuffled, then they can be laid out in the following order:

(1) The process of adjudication, including Supreme Court adjudication, is legitimate because it has a unique rationality and neutrality;

(2) Controversies properly susceptible to adjudication are identifiable by analytic technique independent of the subject matter of the controversy;

(3) Therefore, when the Supreme Court decides cases that are properly justiciable, it acts with neutral rationality and is legitimate for that reason.

Now, if taken at face value and for all that it implies, this exposition suffers many dubieties. First, legal process may be rational in some sense, but it is not the only decisional process that is rational in some sense. This has always been apparent to nonlawyers. Second, not all distinctively legal controversies are presented in court, so legal process of some kind occurs in decisional structures that are not bipolar. Indeed, the works of Hart, Sacks, and Fuller themselves are examples of a reasoning about legal matters that is unilateral rather than bipolar in structure. Yet again, the notion of neutrality as a characteristic of a legal principle is different from the notion of rationality or even generality. And so on.

I wish here to consider only two points about the legal process exposition. First, its most extravagant claims actually appear to have

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it concluded that such a plan would have imposed a wholly impermissible burden on outlying districts not shown to have committed any constitutional violation.
been accepted in some legal circles, certainly some circles at Harvard Law School. A new term made its appearance—the "principled decision." It has now been absorbed into wider usage and appears in judicial opinions. The term "principled decision" is, of course, a term of approbation: Who would argue that a principled decision is not better than an unprincipled one? But "principled decision" is also considered an analytic concept. A principled decision can be distinctly identified.

Such a decision is not, of course, identified according to whether it purports to rest on principle or recites propositions that sound like principles. Many unprincipled decisions do that. A principled decision is identified by whether it actually rests on principle.

This notion seems to me simply wrong. In the first place, we have to recognize that a principle is simply a verbal construct and that the formulation of verbal constructs is susceptible to infinite variation, all of which can be principles in formal terms. Among other things, a normative proposition can be stated in a way that is formally a general principle but whose application can be recognized as singular if empirical reference is made to the real world. Legislatures learned that trick long ago. For example, all kinds of strange legal propositions have been made applicable to counties in Pennsylvania with a population of over 1,200,000. Correlatively, any given judicial outcome can be subsumed under a premise that formally includes a set larger than the specific instance at hand but which, in fact, has application only to that case.

It is for this reason that one cannot take at face value a decision's own assertion that it is based on principle. Reference has to be made to the rest of the world to which the principle might apply. But no a priori criteria exist for determining which aspects of that world are relevant in making such a reference to reality. This might be called the objective difficulty in trying to determine whether a decision is

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186 Cf. Fuller, supra note 140, at 372-81 (exploring the sources of "principles," upon which "reasoned" decisions have been founded). Fuller notes the ambiguity often associated with any principle: "To demand of a court that it simply resolve such issues 'fairly' is to ask the court to decide something about which the parties themselves could not agree and for the determination of which no standard exists." Id. at 373. Fuller provides examples of other such principles—"good faith," "equity," and "fair practice"—and notes that they "provide little beyond a vocabulary for stating legal results." Id.

principled.

A subjective difficulty also exists. It is impossible to say with certainty whether a decision is really based on principle or has been reached for expedient or utilitarian reasons. If the decisionmaker wishes to dissimulate, then a decision based on expediency can be presented as one of principle, and no one can know otherwise simply by studying the terms of the decision. At the same time, every real world decision has practical consequences even when the decisionmaker, in fact, is oblivious to them or has acted wholly on principle. Moreover, closet idealists exist in this utilitarian world who carefully disguise decisions based on principle in the language of utilitarian calculus.

The practice of trying to differentiate authentically principled decisions from pseudo-principled decisions nevertheless continues. It has given the Critical Legal Studies movement a vocation, which many might think is bad enough. Worse than that, the emptiness of the endeavor has given legal principle a bad name. It is therefore well to recall the much more limited statement of the function of principle that appeared in Professor Wechsler’s *Neutral Principles* lecture:

> To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?188

The requirements of this much more modest formulation are that the principles be of “adequate” generality and that the principles so invoked be tested by considering their application to “other” instances that could plausibly be subsumed in their terms. The prescription thus refers to two aspects of a legal premise. The first is whether the premise is sufficiently inclusive so that it may not be criticized as merely tailored to the case at hand; in other words, that it is not so narrowly drawn that it evidently can apply only to Philadelphia or only to the South or only to lower class neighborhoods. The second dimension is that the formulation of the premise be taken seriously by its authors in their role as judges whose lives have a future. That is, the principle must be promulgated on the understanding that it will be applied in the future to situations that come within its descriptive scope, however dis-

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similar those situations may be in other respects. Professor Wechsler illustrated this by asking whether it was not "the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed."\textsuperscript{159}

Both of these dimensions of principle are highly indeterminate. To say that a rule purporting to be a rule of law must have adequate generality offers no criterion by which to determine what degree of generality is adequate. As a matter of the logic and epistemology of normative generalization, clearly no such governing principle can be formulated except perhaps in Kantian terms, which are notoriously vacuous. Moreover, the requirement of consistency in the future depends on the existence of a principle for determining consistency. But again, no governing principle is offered for making that determination, nor do I see how one could be formulated. All that could be meant, therefore, is that legal rules should be of suitable generality, leaving it to some unspecified process to determine suitability.

Hence, the demand for neutral principles is a modest demand. But it is not empty. Implicit in the requirement of adequate generality and the requirement of consistency of application are two operational criteria. One is that the court satisfy some kind of audience that a present decision involving Philadelphia does not in fact apply only to Philadelphia. This means that the court must assume that an audience exists; that the audience has a view of the real world in terms of which it can consider the court's pronouncement of law; and that whether the audience will be persuaded by the court's analysis is contingent upon whether the court's explanation is given in terms that the audience can accept. It is, therefore, a requirement of persuasiveness in utterance. I do not know why it cannot be called, in classic terminology, a requirement of judicial rhetoric.

The other criterion is that the court be ready to satisfy the audience that it is serious. That test is presented when the principle is tendered back to the court in a later case in an argument by a different party. The question then is whether the court will actually stand by what it has said. This is a requirement of persuasiveness through action. In the vernacular, it is "putting your money where your mouth is." In more elegant terms, it is commitment and integrity.

\textsuperscript{159} Id.
CONCLUSION

I have presented four expositions of the legitimacy of judicial decisions and by extension the legitimacy of law itself. I do not ask you to choose among them. Quite the contrary, I ask you to accept the possibility that they are all correct even though each may be incomplete.

That is to say, at least four dimensions exist to the judicial process and to any particular judicial decision. One is that the decision must be intelligible in terms of precedent. It must link what is now being done and said in the law with what has been said and done in the past. A second dimension is that the decisions in general must arrive at the right outcome. They must be fit and meet in some broad moral and utilitarian sense, not only according to the law’s own life history but also according to the life history of the society in which the decisions are made. A third dimension is that the decisions indeed involve value choices by the judges. The choices are not unconstrained, of course—quite the contrary. At the margin at any given time, however, there exists leeway, as Llewellyn called it. And fourth, a decision entails a commitment to the future. Of course, when the future arrives, it will have become the present. The task will then recur of making new choices within constraints that are intelligible in terms of precedent, and that in aggregate are the right outcome. And so it goes.

Judging is not simply autonomous action by the survivors of a race for preferment for judicial office. It is action within constraints imposed by the past and by present political reality that limit not only choice as to outcome but also choice as to the principles according to which outcomes can be reached. And then the question of the future arises. There is an anecdote, I believe not apocryphal, of a colloquy in the United States Senate. One of the members of that august body was inveighing heavily upon the principle of the matter under consideration. And so was another, except that a different principle was being advanced. And so another. After some time, another senator is said to have interrupted: “Surely, gentlemen, we must rise above principle.”

I believe that the same is required of judges. The notion of a principled decision entails a linkage between a statement of law by the judge—a primary rule in H.L.A. Hart’s terminology—and an additional implicit assertion about judges’ own lives and their own future action. From an external vantage point, the law may be, as Holmes said of it, nothing more than “prophecies of what the courts will do in fact.”

All others, in addition to the judges themselves, are necessarily

confined to that vantage point, but a judge also has an internal vantage point. From the judge's perspective, judicial decisionmaking is not merely a prediction any more than the statement, "I will be there tomorrow" is merely a prediction. Nor is a judicial decision simply a process of analysis. It is a promise by the judges of what they will do tomorrow and the day after that. Moreover, it is not simply a personal promise but one undertaken ex officio. If the judges keep their promise, then the people can know how government authority will be exercised in the future and can order their lives accordingly. In a world easily given to fraud and exploitation, that is something. It seems to me that it is above principle.