

To: Participants in the Northwestern/ABF Legal History Seminar

From: Professor Kunal M. Parker, University of Miami School of Law

Re: The Turn to Process in American Legal Thought, 1870 – 1970 (February 2022)

Thanks very much for taking the time to read my work. In what follows, I try to provide some background.

The Larger Book Project. For the past several years, I have been working on a book project on the “turn to process” in American legal, political, and economic thought that took place between roughly 1870 and 1970. The book is structured as follows: an introduction; a chapter on the nineteenth-century background in law, political science, and economics; three extended essays, one each devoted to law, political science, and economics; and a conclusion. A draft of the completed manuscript has been completed and is currently undergoing review.

What you have before you is the essay on the transformation of American legal thought, 1870 - 1970. I assume in this essay some basic familiarity with traditional common law thinking (the claim of the common law to represent the custom of the community, the claim of the common law judge to be a “living oracle” who declared the law of the community, the common law’s calibration of continuity and change through incremental change, etc.). All of this is covered in a prior chapter of the book manuscript. You can get a sense of how I have thought about these issues in a previous book, *Common Law, History, and Democracy in America, 1790 – 1900: Legal Thought Before Modernism* (Cambridge University Press, 2011).

It goes without saying that I am only tracing here a particular development: there are other accounts to be given of American legal thought over this period. It also goes without saying that I would be delighted to talk about this essay as it fits into the overall structure of the book.

The Problem; Modernism. Briefly put, the large problem that interests me in the book is the following: how did twentieth-century American legal, political, and economic thinkers respond to the modernist crisis of the foundations of knowledge that occurred around the end of the nineteenth century?

“Modernism” itself is not discussed in the essay you have before you. As we all know, it is an enormously complex subject. Very briefly, here is how I understand it for purposes of this project. Most scholars agree that there was a modernist crisis of foundations—attributable to multiple sources, intellectual and otherwise—in the late nineteenth and early twentieth centuries. In different national settings, across various areas of endeavor from literature to law, physics to political science, and art to economics, thinkers began to question received notions of truth, logic, morality, rationality, and aesthetics.

Often represented in the language of becoming “conscious” of spurious foundations (this was, after all, the era of the beginnings of modern psychology), this questioning was frequently grounded in an anti-foundational historical sensibility. Received notions of truth, morality, and rationality were demolished by showing that they were “merely” historical, that they had arisen in historical time, and that for that reason they were changeable. At the same time, modernist psychology threw into question man’s ability to know rationally, drawing attention to various non-rational bases of knowledge (intuition, the subconscious, etc.). Various twentieth century philosophical developments—Logical Positivism is perhaps the best example—were attempts to work through this modernist problem of knowledge.

In the decades around 1900, the modernist crisis of knowledge flung American legal, political, and economic thinkers into (what they perceived as) an uncertain and changing world, one no longer capable of being understood in terms of the intellectual foundations and orderings bequeathed to them by their nineteenth-century forebears. How did they respond?

One response—discernible in early twentieth century Legal Realism, political science, and institutional economics—was to ground law, politics, and economics in *other* disciplines. Law, politics, and economics could be interpreted, for example, as history, psychology, sociology, etc. Such a response was fully part of the push to replace traditional legal, political, and economic orderings with the regulatory state.

But another response—a classic modernist one—is the one that interests me in this book. In a world shying away from given truths, ends, and foundations, modernist thinkers were increasingly turning towards means, methods, processes, procedures, and techniques. Where truths were difficult to identify, they would instead seek ways of getting at truths. I show in the body of the book how law, politics, and economics were recast or reconfigured as means, methods, processes, procedures, and techniques (what I broadly call the “turn to process”), often in ways that could coexist with—or oppose--the regulatory state.

Some of the questions I explore: What did it mean for twentieth-century law, politics, and economics to be recast or represented as ways, means, processes, procedures, and techniques? How did legal, political, and economic thinkers identify the methods and techniques that their disciplines would become? How were these methods related to the older foundational truths that these thinkers had allegedly repudiated? With what effect? How, finally, does this project change our current understanding of twentieth-century legal, political, and economic thought?

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ESSAY A

LAW

BECOMING PROCEDURE

“Procedure is to law what scientific method is to science.” In re Gault, 387 U.S. 1 (1967).

“But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is.” Alexander Bickel, 1977

I. THE COMMON LAW IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

As the United States transitioned to a complex, large-scale, urban-industrial economy in the decades following the Civil War, the common law’s individual-oriented, rights-centered, fault-based doctrines seemed increasingly inadequate for dealing with systemic problems such as regulating public utilities, curbing monopolies, reducing the cost of industrial accidents, and managing capital-labor conflict. Rather than reflecting the customs of a unified community, such doctrines appeared to reinforce the fractures of an increasingly divided and unequal society.

From various quarters, to address this crisis of legal knowledge, there were calls for government to intervene. Congress responded, *inter alia*, by passing the Interstate Commerce Act (1887), which created the Interstate Commerce Commission, and the Sherman Antitrust Act (1890). States advanced legislative and administrative initiatives of their own.¹ In the face of such legislative and administrative initiatives, two different (but mutually reinforcing) intellectual developments had the effect of entrenching common law sensibilities. Both served to imbue common law arrangements with the aura of inevitability.

First, like legal thinkers in other major Western countries at the same time, American legal thinkers began to reimagine law in ways that emphasized its logic, rationality, order, and

¹ Interstate Commerce Act (1887), 24 Stat. 379 (1887); Sherman Antitrust Act, 26 Stat. 209 (1890).

symmetry. Historians have dubbed this conceptualistic late nineteenth-century style of legal thinking “Classical Legal Thought.”² A structuring principle was that there was a clean difference between public law and private law, it being understood that the former should interfere as little as possible with the latter. Taking the common law of tort, property, and contract to be the core of private law, Classical Legal thinkers set to work, reducing these areas of law to their major doctrinal premises, excising their inconsistencies, uncovering their hidden logics. One of the major consequences of their labors was that private law categories came to be seen as possessing clear boundaries and intrinsic meanings. Legal conclusions followed ineluctably, automatically, and “scientifically” once problems had been located in this or that legal category. The professionalization of American law schools after 1870, and especially the introduction of the case method that allowed students to trace lines of legal development through a succession of cases, played a major role in this enterprise.

Second, even as late nineteenth-century legal thinkers were reducing the common law to logic, rationality, order, and symmetry, many were active contributors to what might be called an American Historical School. Subscribers to the American Historical School built upon the teachings of the Romantic-era German Historical School associated with Friedrich Carl von Savigny. Arguing against the push to codification in post-Napoleonic Germany, Savigny had argued that law was not made, but instead emerged spontaneously in the manner of language. Following this line of thinking (but also building upon older common law ideas and newer anthropological and historical scholarship), thinkers of the American Historical School emphasized the ontological priority of custom, argued that it arose “spontaneously” or “unconsciously,” and insisted that legislators and administrators could only tamper with it at their peril. Not surprisingly, the “spontaneously”- or “unconsciously”-arisen customs that American legal thinkers discerned all too often bore a striking resemblance to the private law doctrines of the common law. Thinkers of the American Historical School found powerful confirmation in influential late nineteenth-century philosophies of history, whether Sir Henry Maine’s idea that societies moved over time from a regime of “status” to one of “contract” or Herbert Spencer’s theory that societies moved from a “military” (political) state to an “industrial (social) one. Both, but especially Maine’s account, had special valence in a post-slavery society where free labor had

² My understanding of Classical Legal Thought is derived from Morton J. Horwitz, *The Transformation of American Law, 1870 – 1960* (New York: Oxford University Press, 1992), p. 16.

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only recently replaced slave labor. How could one justify interfering with freedom of contract and property if history itself pointed towards its triumph?³

During this period, following the teachings of Kent and Story, many federal judges considered the U.S. Constitution to be informed by the common law. When “interpreting the Constitution,” U.S. Supreme Court Justice David Brewer observed in 1905, “we must have recourse to the common law.”⁴ The mutually reinforcing lessons of Classical Legal Thought and the American Historical School captured the imagination of conservative federal judges opposed to redistributive legislative and administrative solutions to the country’s large-scale social and economic problems. The narrative of how federal judges stymied public efforts to regulate *laissez faire* is well-known and does not merit extended discussion here. But it is worth discussing late nineteenth- and early twentieth-century “substantive due process” jurisprudence because it is crucial to understanding what followed.

Early twentieth century substantive due process involved joining common law contract and property ideas to the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. In 1897, the U.S. Supreme Court declared for the first time that the Due Process Clause of the Fourteenth Amendment protected “liberty of contract” and that state legislation could therefore not unduly restrict the right of individuals to contract freely.⁵ This decision effectively constitutionalized common law contract rights. Thereafter, the Court sought to prevent legislative interference with labor contracts, overwhelmingly in ways that redounded to the benefit of employers. In the infamous case of *Lochner v. New York* (1905), a case that became emblematic of the substantive due process era, the Court struck down a New York law that regulated the length of the work day in bakeries.⁶ Thereafter, the Court struck down federal and state statutes that prohibited employers from (a) dismissing employees who had joined unions and (b) requiring as a condition of employment that employees not join unions (so-called “yellow dog contracts”).⁷ A

³ For an extensive discussion of the American Historical School, see Kunal M. Parker, *Common Law, History, and Democracy in America, 1790 – 1900* (New York, Cambridge University Press, 2011), Chapter 6.

⁴ *South Carolina V. United States*, 199 U.S. 437, 449 (1905) (Brewer, J.).

⁵ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

⁶ *Lochner v. New York*, 198 U.S. 45 (1905). Thereafter, the Court tacked in inconsistent ways. For example, it allowed the regulation of maximum hours for women, but disallowed the regulation of women’s wages. *Muller v. Oregon*, 208 U.S. 412 (1908); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

⁷ *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915).

few years later, the Court declared that unions that sought to organize employees who had signed yellow-dog contracts could be found liable for tortious interference with a contract.⁸

Even as it sided with employers against employees and unions in the name of “liberty of contract,” the Court sought to constitutionalize rights to returns on private property. In the late nineteenth and early twentieth centuries, fixing the rates charged by railroads, grain elevators, and public utilities was deemed crucial to ensuring economic stability, limiting excessive private gains, and protecting small producers and consumers. However, in *Smyth v. Ames* (1898), the Court insisted that the Due Process Clause of the Fourteenth Amendment limited how much rates could be regulated. Constitutional protections for private property, the Court stated, dictated that an enterprise be entitled to “a fair return upon the [fair] value of that which it employs for the public convenience.”⁹ While the standards for determining the constitutionality of rate regulation would change over time, growing ever more muddled, the *Smyth v. Ames* decision and its progeny meant that courts could review administrative rate-setting decisions on substantive grounds.

From the late nineteenth century through the mid-1930s, the Court invalidated state legislation in approximately 400 cases, over 200 of which were decided on the basis of the Due Process Clause of the Fourteenth Amendment.¹⁰ Meanwhile, for almost half a century following *Smyth v. Ames*, litigation surrounding the valuation of corporations’ investments and the calculation of rates of return thereupon stymied administrative agencies, resulting in the expenditure of millions of dollars. Through decisions like *Lochner v. New York* and *Smyth v. Ames*, the Court created a climate hostile to legislative and administrative management of businesses and capital-labor relations. This climate reigned in elite law schools as well. Recalling his time as a law student at Columbia Law School in the 1920s, the mid-century legal scholar Herbert Wechsler characterized the early twentieth century legal mindset as follows: “The conservative view, which was dominant in the profession and in the courts, essentially had these characteristics: it was anti-legislative; it was anti-administrative; it glorified the common law as

⁸ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

⁹ *Smyth v. Ames*, 169 U.S. 466 (1898), 547. For a contemporary treatment, see Charles M. Hough, “Due Process of Law—Today,” 32 *Harvard Law Review* 218 (1919). For an extensive scholarly discussion, see Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge, Mass.: Harvard University Press, 1998), Chapter 5.

¹⁰ Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca: Cornell University Press, 1984), p. 37.

administered by the courts. What's more, the conservative position viewed the common law as Langdell had viewed it—basically, as a closed system.”¹¹

Yet even as common lawyerly federal judges and the professoriate stymied legislative and administrative attempts to curb the excesses of *laissez faire*, a profound siege on age-old common lawyerly modes of thought was under way from within the very heart of the American legal establishment. Beginning in the 1870s, imbued with a modernist historical sensibility, legal thinkers such as Oliver Wendell Holmes, Jr. began to interrogate the foundations of the common law. In the decades that followed, prominent judges owned up to the psychological underpinnings of their own decision-making, suggesting that, far from being Blackstonian “living oracles,” they were no different from other human decision-makers. Under attack, the various (old and new) foundations of the common law—its claim to embody the custom of the community, its antiquity and continuity, the vaunted special abilities of the common law judge, its embodiment of rationality, logic, and morality—crumbled.

As a consequence, common law doctrine could no longer rest on its own self-given foundations. The common law's meaning—and law's meaning more generally--would have to come from elsewhere, from outside itself. In the early twentieth century, as part of this search for meaning, law would be contextualized and explained in terms of history, politics, economics, sociology, and psychology. For some legal scholars who styled themselves as Legal Realists, law as a self-justifying body of knowledge simply did not exist. It vanished into the larger empirical study of society.

For many, this loss of law's distinctive meaning had consequences for which body should be entrusted with law-making. The traditional foundations of the common law had been invoked precisely to justify its autonomy vis-à-vis monarch and legislature. But with those foundations eroded, why should common lawyerly arrangements be entitled to any special respect? Were not democratically-elected legislatures--and the expert-dominated administrative agencies and commissions they created--*better* equipped to provide the solutions that society needed?

¹¹ Norman I. Silber & Geoffrey Miller, “Toward ‘Neutral Principles’ in the Law: Selections from the Oral History of Herbert Wechsler,” 93 *Columbia Law Review* 854 (1993), 857 – 58. The reference to Langdell is to Christopher Columbus Langdell (1826 – 1906), who served as the Dean of the Harvard Law School from 1870 to 1895. Langdell is credited with pioneering the first law casebook and the case method of teaching and is also often taken to represent Classical Legal Thought.

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Modernist legal thinkers were thus confronted with the problem of reconstructing legal knowledge after the loss of the common law's foundations. If law could no longer be grounded in truth, was it nothing other than a means to an end? Would it simply dissolve into administration? Beginning in the early twentieth century, we see modernist legal thinkers begin to fashion law into a process, method, or technique with a specific bit of law—legal procedure—at its core. Legal knowledge would be less a body of substantive truths than a distinctive “procedural” way of doing things. In the nineteenth century, as we have seen, an eternal and unchanging “substantive” law had been distinguished from a man-made and changeable “procedural” law. In the twentieth century, procedure would become the model for law in general, the very ontology of law.

The context in which law's self-transformation into a distinctive “procedural” way of doing things is most clearly revealed are the debates surrounding the administrative state extending all the way up to the New Deal. By the mid-1930s, prominent New Dealers such as James Landis were arguing that law and administration were distinct processes, methods, or techniques, each with their advantages and disadvantages, each good for some things and not others. They successfully managed to represent law a process, as something that could be compared with other processes. Even common lawyerly opponents of the administrative state came to share this understanding. Thus, Roscoe Pound would argue that the common law itself (including what would once have been labelled substantive doctrine) was a kind of process, method, or technique, an able competitor of administration. But even proponents of the administrative state such as Landis, while they argued that law and administration were distinct processes, would insist that law burrow into the administrative state as procedure.

Law's new role as a distinctive way of doing things with legal procedure at its core extended well beyond the administrative state. After traditionalist common lawyerly federal judges “retreated” before the New Deal in 1937, and as the administrative state became an established feature of the landscape, American constitutional law would assume a self-consciously deferential, “procedural” role vis-à-vis democracy. Unlike in the late nineteenth and early twentieth centuries, when substantive, common law-inflected constitutional commitments had subverted legislatures and administrative agencies, post-New Deal constitutional law's new self-appointed role vis-à-vis democracy (at least on some readings and certainly never without debate and struggle) was recast as that of ensuring the integrity of the democratic process.

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However, even as law in general was transformed into process, method, or technique, older, pre-modern common law sensibilities infused the new technical orientation. A creature of modernist and pre-modern sensibilities, then, law as process, method, and technique was used not only to open up law-making to legislation and administration, but to instantiate a highly common lawyerly temporality, one that sought to slow down the pace of legal change and emphasize continuity. This is most clearly seen in the constitutional jurisprudence of Felix Frankfurter. In the 1920s and 1930s, Frankfurter had been at the forefront of thinking about how law should accommodate legislatures and administrative agencies by transforming itself into procedure. After his elevation to the U.S. Supreme Court in 1939, Frankfurter became the Court's greatest proponent of law's procedural role vis-à-vis legislation and the administrative state even as he displayed common lawyerly hostility to legal innovation.

In the post-World War II period, law's turn to process reached its apogee with the Legal Process School centered around the Harvard Law School. Legal Process thinkers painted a picture of the modern American polity as nothing more than a set of processes, methods, and techniques (legislative, administrative, judicial, and so on), even as they insisted upon the primacy of the procedural "coordinating" role of law. Legal scholarship in the 1950s and 1960s took the form of studying and comparing the different processes—law, administration, mediation, arbitration, and so on—in terms of their fitness for the different contexts of the modern world. Law itself could be broken down, reduced to the technique of "reasoned elaboration." But Legal Process scholars did not abandon their common lawyerly roots. Mid-century legal thinkers such as Lon Fuller, embarking on a reclaiming of the idea of morality for law, would argue that it was common lawyerly proceduralism that best exemplified law's morality.

As the Warren Court launched its constitutional "revolution," many Legal Process scholars began to express concern over what they considered the Court's cavalier treatment of process and procedure, its refusal to articulate principles they considered intellectually rigorous, and its failure to defer to democratic majorities. Perhaps the most prominent of these critics was the constitutional theorist (and Frankfurter law clerk) Alexander Bickel, whose commitment to proceduralism combined powerfully with common lawyerly incrementalism, exemplifying the conservative turn that process thinking took in the 1950s and 1960s. But if critics such as Bickel found fault with the Warren Court's methods of decision-making, was it correct to think that the

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Warren Court had resurrected an outmoded idea of law as truth, had restored to law its eroded foundations? There is considerable evidence that the Warren Court “revolution” was itself a combination of modernist proceduralism combined with common lawyerly incrementalism. While the prestige of process thinking would begin to wane during the 1970s, it (and the larger anti-foundational turn out of which it emerged) would have a lasting impact on American law.

This essay is organized as follows. Part II examines the modernist attack on the common law’s foundations as well as coeval early attempts to reconstruct legal knowledge as process, method, and technique with legal procedure at its core. A major part of this section focuses on the pre-World War II debates over the administrative state. Part III explores post-New Deal constitutional jurisprudence and the emerging “procedural” role of constitutional law. This section focuses prominently on the modernist and common lawyerly jurisprudence of Justice Felix Frankfurter. Part IV examines the emergence of the post-World War II Legal Process school of jurisprudence. Part V offers a brief discussion of the decline of process thinking and the career of legal thought after its transformation into means.

II. THE LOSS OF FOUNDATIONS AND THE RISE OF PROCESS: AMERICAN LEGAL THOUGHT FROM THE LATE NINETEENTH CENTURY THROUGH THE NEW DEAL

The Loss of Foundations

Scholars often trace the beginnings of the modernist critique of law in the United States to the late nineteenth-century writings of Oliver Wendell Holmes, Jr. They have advanced various explanations for Holmes’ particular brand of skeptical thought, ranging from his Civil War experiences to the activities of the Harvard College Metaphysical Club of which he was a member to the impact of Darwinist-Spencerian thought. What is clear is that Holmes sought rigorously in the name of history to undermine the common law’s traditional foundations.

Holmes’ now-little read masterpiece, *The Common Law* (1881), began with lines that are a classic statement of how law’s claim to embody an ahistorical logic—an idea he associated with Classical Legal thinkers such as Harvard Law School’s Dean Christopher Columbus Langdell—was unsustainable:

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The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹²

Holmes followed up on this opening statement by showing that a variety of common law rules and doctrines that purportedly rested on logic, reason, and morality were in fact little more than an accumulation of historical blunders, inadvertent switches of substance and procedure, and clumsy transpositions from one context to another. However, in *The Common Law*, Holmes still cleaved to the traditional claim that, *qua* “living oracle,” common law judges effortlessly read the customs of the community. Even if common law rules are not grounded in logic, reason, or morality, he tells his reader, they somehow embody “felt necessities” and “intuitions of public policy, avowed or unconscious.”¹³

Holmes’ confidence in the abilities of the common law judge would erode over the next two decades. Shortly after the publication of *The Common Law*, Holmes was appointed to the Massachusetts Supreme Judicial Court, a position he held until 1902. As sitting judge, confronted with social disputes that permitted of no easy legal resolution, he began to question how faithfully the common law judge could declare public policy for the entire community. In his dissenting opinion in *Vegelahn v. Guntner* (1896), a case in which the majority enjoined a labor picket, Holmes impugned the majority’s claim to express the views of the community in blunt terms: “Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them.”¹⁴ The allegation was that being versed in the doctrines of the common law and little else was no longer sufficient to resolve the pressing disputes of the day.

In “The Path of the Law” (1897), Holmes drove home the point about the increasing inadequacy of traditional common law knowledge. Antiquity and continuity could no longer serve as grounds of law in a society buffeted by change:

¹² Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown 1881), p. 1.

¹³ I advance this argument in Parker, *Common Law, History, and Democracy*, Ch. 6. . Morton Horwitz makes the point that, in *The Common Law*, Holmes’ continued to cling to the idea that common law judges could declare the customs of the community. See Horwitz, *Transformation of American Law, 1870 – 1960*, Ch. 4.

¹⁴ *Vegelahn v. Guntner*, 167 Mass. 92 (1896), 106 (Holmes, J., dissenting).

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It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁵

Common law judges had no choice but to cede to modern expert knowledge: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”¹⁶ It is not surprising, then, Holmes would call in this period for “conscious” over “unconscious” lawmaking. In his famous essay “Privilege, Malice, and Intent” (1894), he would write: “The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.”¹⁷ For Holmes’ readers, the point was clear: “conscious” legislative deliberation was preferable to the “unconscious” lawmaking of the common law judge.

During the first three decades of the twentieth century, whether as proponents of Sociological Jurisprudence, Legal Realism, institutional economics, or otherwise, critics extended these Holmesian insights. Especially common were attempts from many different angles to demolish the conceptualist style of Classical Legal Thought. Critics pointed out that deductive styles of legal reasoning—for all their pretension to embody truth, logic, and rationality--could not paper over the fact that judges were always making specific (and, by implication, political) choices about individual disputes. Perhaps the most famous rendering of this point came from Holmes himself after his appointment to the U.S. Supreme Court. In his celebrated dissent in *Lochner v. New York*, Holmes observed that the protection for “liberty” in the Due Process Clause of the Fourteenth Amendment did not in any way lead irresistibly to the majority’s invalidation of the New York labor law at issue in the case. He stated: “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”¹⁸ In an academic register, anti-conceptualist legal scholars like Wesley Hohfeld and Robert Lee Hale would follow suit, taking apart legal ideas of “rights” and the meanings attached

¹⁵ Oliver Wendell Holmes, Jr., “The Path of the Law” (1897), in *Collected Works*, 3, p. 399.

¹⁶ Holmes, “Path of the Law,” *Collected Works* 3, p. 399.

¹⁷ Oliver Wendell Holmes, Jr., “Privilege, Malice, and Intent” (1894), in Sheldon Novick ed., *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Chicago: University of Chicago Press, 1995) (hereinafter, *Collected Works*), 3, p. 377.

¹⁸ *Lochner v. New York*, 198 U.S. at 76 (Holmes, J., dissenting).

thereto. A favorite target was the public-private distinction, a keystone in the edifice of Classical Legal thought, that critics argued could not hold up because the private power growing out of contract and property rights was a creature of public power and, as such, should not be walled off from regulation.¹⁹

In the 1920s and 1930s, critics of Classical Legal Thought also turned to modern psychology. The general thrust of their arguments was that common law judging was far from the rational, scientific, syllogistic process that Classical Legal thinkers had made it out to be.²⁰ In their critiques, scholars frequently drew attention to the importance of the non-rational elements involved in judging. In 1925, Max Radin suggested that judges reasoned like everybody else on the basis of “type-situations.”²¹ In 1928, the Legal Realist Hessel Yntema observed: “[O]f the many things which have been said as to the mystery of the judicial process, the most salient is that the decision is reached after an emotive experience in which principles and logic play a secondary part. The function of juristic logic and the principles which it employs seem to be like that of language, to describe the event which has already transpired.”²² More important, prominent sitting judges spoke openly about their own methods of judging in ways that reinforced such views. For example, in 1929, federal Judge Joseph Hutcheson would write that, in deciding hard cases, he would “wait for the feeling, the hunch--that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.”²³ At a time when judges were frequently charged with

¹⁹ See, e.g., Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 *Yale Law Journal* 16 (1913) and “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 26 *Yale Law Journal* 710 (1917). Hale’s views, elaborated over a long career beginning in the pre-World War I period, are summed up in Robert Lee Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952).

²⁰ Karl Llewellyn located the origin of this tendency as follows: “In 1920, as a result of James Harvey Robinson’s *Mind in the Making*, a Freudian interpretation of judicial opinions broke upon the little world of legal scholarship: an opinion was seen as not at all a reasoned justification; it was instead a ‘mere rationalization,’ a term which for fifteen years or more meant (i) false, (ii) tricky, and (iii) a cover for the nastiest imaginable hidden motives, with carte blanche to anybody to fill in without evidence.” Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), p. 12.

²¹ Max Radin, “The Theory of the Judicial Decision: or How Judges Think,” 11 *A.B.A. J.* 357 (1925), p. 360.

²² Hessel Yntema, “The Hornbook Method and the Conflict of Laws,” 37 *Yale Law Journal* 468 (1928), 480. See also Charles Grove Haines, “General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges,” 17 *Illinois Law Review* 96 (1922); W. Underhill Moore, “The Rational Basis of Legal Institutions,” 23 *Columbia Law Review* 609 (1923); Herman Oliphant, “A Return to Stare Decisis,” 14 *American Bar Association Journal* 71 (1928); Jerome Frank, “Are Judges Human?,” 80 *University of Pennsylvania Law Review* 17 (1931 – 32).

²³ Joseph C. Hutcheson Jr., “Judgment Intuitive: The Function of the Hunch in Judicial Decision,” 14 *Cornell L. Rev.* 274 (1929), p. 278.

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importing political prejudice into law, some prominent judges even suggested that the line that separated judicial and legislative decision-making was blurry at best. In 1921, Justice Benjamin Cardozo, later to be appointed to the U.S. Supreme Court, put it thus:

If you ask how [the judge] is to know when one interest outweighs the another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and [the judge's]. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. *Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. . . . None the less, within the confine of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.*²⁴

There could be few more potent ways of undermining the traditional foundations of the common law than having judges themselves admit that, far from being clothed in the aura of “living oracles,” their decision-making methods were not significantly different from those of legislators and, indeed, of all other men.

The extent to which law's traditional foundations had eroded in the early decades of the twentieth century is evident from the way leading early twentieth century legal thinkers spoke, thought, and wrote about law. For them, law had come to be divorced from notions of justice, morality, and right. By 1930, the Legal Realist Karl Llewellyn was famously informing incoming law students at Columbia Law School that law was simply what officials did: “[T]he people who have the doing in charge, whether they be judges or sheriffs or clerks or jailors or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*”²⁵ In the same lectures, Llewellyn downplayed the idea that law rested upon timeless foundations, whether reason, truth, or justice:

You may have missed in this discussion the common idea that the law is right, that rules of law are to be obeyed because they are right, that men have duties to uphold the law. Such ideas are not missing because they have been overlooked. They are left out because you may fairly be expected to be well aware of them already. They

²⁴ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 113 – 15 (emphasis added).

²⁵ Karl N. Llewellyn, *The Bramble Bush: On Our Law and its Study* (New Orleans: Quid Pro Quo Books, 2012) (1930), pp. 12 – 13 (emphasis in original).

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are left out, too, because they contain truth so partial, so faulty, as to cry out for revision in the light of some such analysis as I have been presenting. . . . Let me say this about rightness of the law. That if most people did not stand behind the officials, however passively, there would be little law to talk about.”²⁶

This sense that the law was divorced from justice, morality, and reason was of a piece with many critics’ loss of faith in the ability of traditional substantive legal doctrine, first, to explain how society actually functioned, and, second, to come up with solutions to pressing current problems. If the former critique pointed to a dissolution of law’s self-given meaning in the name of other social sciences, the latter urged the displacement of law by legislation and administration.

Many prominent legal scholars in the 1920s and 1930s turned to other disciplines in order to understand law. As Felix Cohen put it in 1937: “In writing the life-history of a legal rule one does not reach the end of the story when the rule is obeyed or disobeyed. There remains to be told the meaning of obedience or disobedience, in terms of social institutions and customs, in terms of the material things over which law gives control, in terms of human habits, modes of thought, fears, hopes, pleasures, and pains.”²⁷ Frequently, scholars in the disciplines to which legal thinkers turned were aggressive proselytizers, insistent on peddling their own versions of law’s truth. For example, the Yale Law School professor Thurman Arnold collaborated with Yale psychologist Edward Robinson, who had an appointment at the law school. In 1935, Robinson triumphantly proclaimed that psychology was the “real” ground of law: “We may conclude, then, that it will be a fundamental principle of the new philosophy of law, to recognize that every important legal problem is at bottom a psychological problem and that every one of the many traditions about human nature which are to be found in legal learning needs to be gone over from the standpoint of modern psychological knowledge.”²⁸ Turning to other disciplines brought with it the risk, Robinson warned, that traditional common lawyerly legal knowledge might dissipate entirely. Carefully delimited strategic collaborations between law and other disciplines were not possible:

Theologians and jurists have from the first had a notion that the view of man and nature provided by the natural scientists could be kept in check, that it could be a mere technique of achieving ends selected by superscientific forms of reasoning. Yet, as the years have gone by, we have seen theological and juristic doctrines being

²⁶ Llewellyn, *Bramble Bush*, pp. 22 – 23.

²⁷ Felix S. Cohen, “The Problems of a Functional Jurisprudence,” 1 *Modern Law Review* 3 (1937-1938), p. 23.

²⁸ Robinson, *Law and the Lawyers*, p. 51 (citations omitted).

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slowly worn down and disfigured by the very intellectual instrument that was supposed to be used for their own purposes. The nonscientific mind, instead of gaining increased control over nature by the mastery of the scientific method, has found itself thrown into utter confusion.²⁹

If this vein of thinking were followed to its conclusion, law would eventually dissolve into psychology, sociology, political science, or economics. If few legal academics went down this path in a thorough-going way, some early twentieth century legal scholars, Walter Wheeler Cook and Underhill Moore among them, eventually came to subscribe to precisely such an approach as they turned from legal doctrine to empirical social science.³⁰

It followed that many critics also complained that judges and lawyers trained in the traditional way simply got things wrong as they attempted to make sense of concrete social problems. They urgently needed the help of those trained in the social sciences. “Not a little of the world-wide discontent with our present legal order,” Roscoe Pound observed in 1912, “is due to modes of juristic thought and juridical method which result from want of ‘team-work’ between jurisprudence and the other social sciences.”³¹

An example was the ruling in *Smyth v. Ames*, discussed above, which required as a matter of constitutional law that administrative agencies not set rates below such a point that an enterprise was unable to get a “fair return” upon the “fair value” of its investment. In coming up with this formula, the Court seems to have conceived of property as a thing or *res* with a determinate value. But this made no sense to contemporary economists, for whom value did not inhere in a thing. The legal scholar Robert Lee Hale, who had a doctorate in economics, spent much of his career demonstrating the incoherence of the “fair return upon a fair value” standard. First, there was simply no objective measure of “fair value.” To settle upon this or that measure of “fair value” was thus no determination of fact, but a policy choice. Second, and more revealing of judges’ ineptitude in the matter, “value” for economists was necessarily a function of the present value of returns. Thus, there was no way of holding constant “fair value” and then deciding upon a “fair return”: the former was simply a function of the latter. Hale’s overall conclusion from a career of

²⁹ Robinson, *Law and the Lawyers*, p. 16.

³⁰ The key text here is John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1993). For a psychological account of law, see Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935).

³¹ Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence: Part III: Sociological Jurisprudence,” 25 *Harvard Law Review* 489 (1912), p. 510.

studying public utility rate-setting was that courts should abandon the *Smyth* standard and leave the regulation of utilities to the experts.³² This pointed, as so much critique did, in the direction of the administrative state.

By the time of the New Deal, the truths and methods of the common law had been under attack for close to half a century. A sense of disciplinary loss of self was potent. Few critics believed that the common law judge declared the customs of the community, or that he reasoned rationally, or that his pronouncements stood for justice and morality, or that the doctrines he propounded even made sense in a society in urgent need of transformative change. The shift of law-making away from courts and towards legislatures and the administrative agencies they created seemed urgent and unavoidable. But what then was law to be?

The Turn to Process

The problem of what law was to be after the loss of its traditional foundations was recognized in Germany in the decades around 1900. Criticizing the formalist, conceptualist jurisprudence of his contemporaries, in *Der Zweck im Recht* (1884), translated into English as *Law as Means to an End*, the celebrated German legal thinker Rudolf von Jhering had stated explicitly: “The sense of right has not produced law, but law the sense of right. Law knows but one source—the practical one of purpose.”³³ Law was, Jhering was suggesting, a means to an end. Its pretended foundations (“the sense of right”) were add-ons or afterthoughts. But this gave rise to a dilemma, which the legal philosopher Fritz Berolzheimer expressed in 1908 as follows:

If all law has in view the welfare of society, then law abdicates in favor of administration; the idea of political expediency displaces the idea of right. Under the domination of theory of purpose [Jhering’s theory] we have indeed rules of law (*Gesetze*) but no law.³⁴

³² The discussion about Hale’s critique of *Smyth* is drawn from Fried, *Progressive Assault on Laissez-Faire*, p. 177.

³³ Rudolf von Jhering, *Der Zweck im Recht* (Leipzig: Breitkopf & Hartel, 1884), I, xiv, quoted in Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence: II,” 25 *Harvard Law Review* 140 (1911), p. 141 (translation by Pound).

³⁴ Fritz Berolzheimer, *Rechtsphilosophische Studien* (Munich: Beck, 1908), p. 143, quoted in Pound, “Scope and Purpose of Sociological Jurisprudence: II,” 25 *Harvard Law Review* at p. 146 (translation by Pound).

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As recounted by Roscoe Pound in 1911, this little exchange between Jhering and Berolzheimer captures the problem of law as it would unfold in the early decades of the twentieth century.

As modernist legal thinkers stripped law of its traditional foundations, such that law no longer embodied truth, morality, rationality, or the customs of the community, law in the United States came repeatedly to be represented as a means to an end. Despite the much discussed differences between the Progressive-Era Sociological Jurisprudence of Roscoe Pound, on the one hand, and New Deal-Era Legal Realism of Karl Llewellyn, Jerome Frank, and others, on the other, the sense that law should be a means to an end (rather than an end in itself) pervades both “schools” of legal thought.³⁵ In 1912, in his celebrated articles on “Sociological Jurisprudence,” Roscoe Pound had deplored “the backwardness of law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal thought and popular thought on matters of social reform.”³⁶ The implication was clear: law’s purpose was to meet social ends. In 1930, Karl Llewellyn urged students to use law as a tool; it was “a piece of your environment, a condition of your living—like the use of money—with which you must reckon if you want to get where you would want to go.”³⁷ The lawyer, Llewellyn insisted, was “a specialized technician.”³⁸ Even certain members of the U.S. Supreme Court explicitly adopted the new instrumental view of law. In 1936, U.S. Supreme Court Justice Harlan Fiske Stone observed: “We are coming to realize more completely that law is not an end, but a means to an end”³⁹

Berolzheimer’s point was that, if law was merely a means to an end, there would be nothing to distinguish it from administration. For legal thinkers, then, the question rapidly became: how was law to differ from administration? If both were means to an end, what *kind* of means was law to be? As they sought to differentiate law from administration, law’s turn to process—with legal procedure at its core—took form. Slowly, the aura of “procedure” would come to cover

³⁵ For an attempt to map the differences between Sociological Jurisprudence and Legal Realism, see White, *Patterns of American Legal Thought*, Ch. 2 (“From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America”).

³⁶ Pound, “Scope and Purpose of a Sociological Jurisprudence: III,” 25 *Harvard Law Review* at 510.

³⁷ Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New Orleans: Quid Pro Quo Books, 2012) (1930), pp. 14 - 15.

³⁸ Karl Llewellyn, quoted in Laura Kalman, *Legal Realism at Yale, 1927 – 1960* (Chapel Hill: University of North Carolina Press, 1986), p. 8.

³⁹ Harlan F. Stone, “The Common Law in the United States,” 50 *Harvard Law Review* 4 (1936), 20.

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substantive law. The common law itself would come to be represented as a process, a method, or technique.

Dominated as it had been by common law courts, the Anglo-American legal world had responded to the rise of the administrative state in the late nineteenth century with hostility.⁴⁰ A great deal of this hostility had to do with the substantive anti-*laissez-faire* mandates of the early administrative agencies and commissions. A lot had also to do with the apprehension that the emerging administrative state was procedurally troubling. Before the Civil War, as mentioned earlier, Francis Lieber had expressed misgivings about French *jugements administratifs* in the years before the Civil War. In the late nineteenth century, however, it was the British legal thinker Albert Venn Dicey who became the most authoritative exponent of suspicion of administrative agencies because they removed adjudication of disputes between individuals and the state from courts, which offered the full panoply of procedural protections, and placed them within agencies themselves, where procedural protections were insufficient. This seemed to Dicey to be fundamentally contrary to “the rule of law,” which he defined as the rule “that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land”⁴¹ Dicey’s views were echoed by conservative common lawyers, often arguing on behalf of business interests, on both sides of the Atlantic.

By the early twentieth century, however, forward-thinking modernist lawyers had come to realize that the administrative state, if it could not be forestalled, could be an opportunity. But in order for this opportunity to be realized, law would have to transform itself. Towards the end of his career, Felix Frankfurter recalled something he had written to himself in 1913, as he considered leaving government to assume a professorship at the Harvard Law School. In Frankfurter’s note, we have an adumbration of how modernist lawyers were conceptualizing a new “procedural” role

⁴⁰ The secondary literature on the administrative state is extensive. In my discussion here, I have relied chiefly upon (and have followed leads provided by) Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900 - 1940* (New York: Oxford University Press, 2014); Joanna Grisinger, *The Unwieldy Administrative State: Administrative Politics Since the New Deal* (New York: Cambridge University Press, 2012); and G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000). For a useful shorter overview, see Reuel Schiller, “‘Saint George and the Dragon’: Courts and the Development of the Administrative State in Twentieth-Century America,” 17 *Journal of Policy History* 111 (2005).

⁴¹ Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (2d ed.) (London: Macmillan & Co., 1886), p. 174. See also Albert Venn Dicey, “Development of Administrative Law in England,” 31 *Law Quarterly Review* 148 (1915).

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for law in the administrative state even as they saw in that role new professional opportunities for themselves:

The problems ahead are economic and sociological, and the added adjustments of a government under a written constitution, steeped in legalistic traditions, to the assumption of the right solution of such problems. To an important degree therefore, the problems are problems of jurisprudence,--not only the shaping of a jurisprudence to meet the social and industrial needs of the time, *but the great procedural problems of administration and legislation, because of the inevitable link between law and legislation, the lawyers' natural relation to these issues, the close connection between all legislation and constitutional law, and the traditional, easily accountable dominance of the lawyer in our public affairs. In the synthesis of thinking that must shape the Great State, the lawyer is in many ways the coordinator, the mediator, between the various social sciences.*⁴²

As the administrative state grows, Frankfurter tells us, the lawyer as procedural specialist becomes “the coordinator, the mediator, between the various social sciences.”

As the problem of law in the administrative state presented itself to lawyers as a problem of procedure, the 1920s became an era of major studies of procedure in the early administrative agencies. Financed by the Commonwealth Fund, many of these studies were undertaken by associates of Felix Frankfurter and focused on the procedural strengths and shortcomings of agencies. For example, Gerard Carl Henderson's *Federal Trade Commission* (1924) was an intensive study that emphasized the various procedural defects in the Commission's proceedings, ranging from inadequate separation of prosecutorial and adjudicatory functions to the practice of having trial attorneys prepare the findings to the failure to issue fully developed findings justified by reasons that could provide better guidance to lawyers.⁴³

⁴² *Felix Frankfurter Reminisces; Recorded in Talks with Dr. Harlan B. Phillips* 81 (Harlan B. Phillips ed.) (New York: Reynal & Co., 1960), (emphasis added). See also Felix Frankfurter, “The Task of Administrative Law,” 75 *University of Pennsylvania Law Review* 614 (1926-27). In this article, Frankfurter welcomed the administrative state, but insisted that “safeguards . . . be institutionalized through machinery and processes,” including “a flexible, appropriate, and economical procedure . . .” *Id.* At 618.

⁴³ Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (New Haven: Yale University Press, 1924). As noted by Daniel Ernst, the other Frankfurter students and associates who undertook such studies were: Eleanor Bontecou on federal rule-making; John Cheadle on the U.S. Customs Service; William McCurdy on the U.S. Post Office; Edwin Patterson state insurance commissions; I. L. Sharfman on the Interstate Commerce Commission; and William Van Vleck on immigration. See Ernst, *Tocqueville's Nightmare*, p. 20. Not all of these studies were brought to completion, but some were. See Edwin W. Patterson, *The Insurance Commissioner in the United States: A Study in Administrative Law and Practice* (Cambridge, MA.: Harvard University Press, 1927); William C. Van Vleck, *The Administrative Control of Aliens: A Study in Administrative Law and Procedure* (New York: Commonwealth Fund, 1927); I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administration Law and Procedure*, 4 vols. (New York: Commonwealth Fund, 1931 – 37).

The turn to procedure rapidly extended beyond the new administrative agencies to the courts themselves. Studying procedure was explicitly represented as law's becoming "conscious" of something crucial about itself that had for too long not received adequate attention. *The Labor Injunction* (1930), Felix Frankfurter and Nathan Greene's detailed study of the procedural device that had so harmed the cause of organized labor, expressed the sentiment as follows: "This is less an analysis of the judicial process than an invitation to self-consciousness in its exercise. But not until the process becomes conscious are its materials and methods susceptible of scientific judgment."⁴⁴

There was considerable support for the study of procedure in courts. The results could be revealing. For example, *Criminal Justice in Cleveland* (1922), a study supervised by Roscoe Pound and Felix Frankfurter, revealed that the role of the municipal prosecutor was arguably more significant in the administration of justice than that of the judge.⁴⁵ Studies of the criminal justice systems in Missouri and Illinois followed.⁴⁶ The U.S. Supreme Court itself did not escape notice. Felix Frankfurter's and James M. Landis' landmark study, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928), pointed out that "[t]he history of the Supreme Court, as of the Common Law, derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court's procedure, in the comprehensive meaning of the term."⁴⁷ The authors emphasized that "[t]he story of . . . momentous political and economic issues lies concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts."⁴⁸

This study of procedure was conjoined with a relative dethroning of substance. In discussing how he taught constitutional law, the Harvard Law School scholar Thomas Reed Powell argued that "many of the formulae announced by the [U.S. Supreme Court] are insufficient reasons for [the Court's] decisions" and that scholars had instead to focus "on process, process, process,

⁴⁴ Felix Frankfurter & Nathan Greene, *The Labor Injunction* (New York: The Macmillan Company, 1930), p. 26.

⁴⁵ Roscoe Pound & Felix Frankfurter eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: Cleveland Foundation, 1922).

⁴⁶ See the discussion in Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003), p. 303.

⁴⁷ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* xxxvi (New Brunswick, NJ.: Transaction Publishers, 2007) (1928).

⁴⁸ Frankfurter & Landis, *Business of the Supreme Court* xxxvii. For another procedure-oriented account of the U.S. Supreme Court, see Felix Frankfurter, "The Supreme Court of the United States" (1934), in Archibald MacLeish et al eds., *Law and Politics: Occasional Papers of Felix Frankfurter* (New York: Harcourt, Brace, 1939), pp. 21 – 33.

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on particularities, particularities, on cases, cases, cases, on the contemporary court, on resolving competing considerations, on watching for practicalities not likely to be expressed in opinions in which the court pretends that the case is being decided by its predecessor rather than by itself.”⁴⁹ Not surprisingly, in the hotbed of Legal Realism that was Yale Law School in the 1920s, Robert Maynard Hutchins and Charles E. Clark attempted to erect an institute to be devoted entirely to the study of procedure.⁵⁰

For many early twentieth-century legal thinkers, procedure came to be a focus of study because it was increasingly seen as the very ground of law. As it lost its older foundations (antiquity, rationality, logic, morality, custom), as part of its disciplinary recovery of self, law gave itself its own, new ground: procedure. This was not history or sociology or psychology or economics or politics, but something that been part of law all along, even though it had not been seen as such as law’s ground. To be sure, even as legal thinkers represented procedure as a ground of law, they always represented procedure as a method or instrument, a way of going about things, a means of getting to results. Thus, in 1927, Charles E. Clark, widely considered the most important influence on the Federal Rules of Civil Procedure, wrote: “In the old days of the common law, the rules of pleading seemed often to exist merely that the practitioners of the science might demonstrate their skill. . . . Perhaps everyone would now concede that rules of pleading exist simply as means to an end and not as an end in themselves”⁵¹

That law’s new foundation inhered in legal procedure is made clear by the way in which New Deal lawyers conceived of a place for law in the New Deal administrative state. As is well known, New Dealers faced considerable opposition from orthodox voices in the legal establishment.⁵² The conservative wing of the U.S. Supreme Court invalidated critical parts of the New Deal.⁵³ The judicial philosophy that informed these decisions drew from Classical Legal

⁴⁹ Quotes from Thomas Reed Powell in Kalman, *Legal Realism at Yale*, p. 51.

⁵⁰ Kalman, *Legal Realism at Yale*, p. 105. See also the detailed discussion of procedure studies in John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1993), p. 17, 82 – 98.

⁵¹ Charles E. Clark, “Procedural Fundamentals,” 1 *Connecticut Bar Journal* 67 (1927), p. 67.

⁵² In a 1934 congressional hearing, the president of the American Bar Association characterized the rise of administrative agencies as a “cancerous growth” and argued that they represented a violation of the constitutional bedrock principle of separation of powers. Quoted in Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham & London: Duke University Press, 1995), p. 49.

⁵³ In 1935, the Court invalidated a protocol establishing quotas for the petroleum industry on the ground that the congressional legislation authorizing the protocol had delegated too much power without adequate guidance to the executive. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). That year, the Court also struck down the National

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Thought and the American Historical School, as both had shaped the common law, often displaying blatant disregard for the social and economic contexts in which rules were to operate. Economic data—a hallmark of the new knowledge employed by the administrative state to replace traditional legal knowledge—were summarily dismissed in the middle of the economic crisis as little more than an “ostentatious parade of irrelevant statistics.”⁵⁴ In the face of such opposition, New Deal lawyers would argue that traditional legal knowledge should cede much to social scientific experts. For the administrative state to be legally acceptable, however, they would insist on a core of procedural safeguards.

At the same time, in New Dealers’ discussions about the relationship of law to the administrative state, we can discern how the aura of procedure had begun to extend to *all* of law, turning law—including substantive law—into “process.” We can see this in James Landis’ *The Administrative Process* (1938), a major defense of the administrative state published just after the Court appeared to “retreat” before the New Deal in 1937.⁵⁵

Landis was the archetypical New Dealer, a student and co-author of Felix Frankfurter, Chairman of the Securities and Exchange Commission from 1934 to 1937, and Pound’s successor as Dean of the Harvard Law School. Striking a Frankfurterian note, Landis sought appease critics who saw the administrative state as a threat to the rule of law:

The rise of the administrative process represented the hope that policies to shape [diverse] fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the ‘supremacy of law.’ Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord,

Industrial Recovery Act on the ground that the Act’s grant to the executive of the right to establish wage and labor codes for industries was an unconstitutional delegation of legislative power. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In 1936, the Court invalidated key tax provisions of the Agricultural Adjustment Act on the ground that Congress had exceeded its constitutional taxing powers and encroached upon matters of entirely local concern. *United States v. Butler*, 297 U.S. 1 (1936). The Court also attacked the newly-created Securities and Exchange Commission, not on constitutional grounds, but in terms that made clear its disapproval, comparing the Commission’s practices to “intolerable abuses of the Star Chamber.” *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 28 (1936). Thereupon, the Court invalidated the Bituminous Coal Conservation Act, which regulated coal industry wages and prices by offering compliers tax refunds, on the ground that the activities regulated by the Act involved “production” and not “commerce,” and therefore lay beyond Congress’ constitutional power to regulate interstate commerce. *Carter v. Carter Coal Co.*, 289 U.S. 238 (1936).

⁵⁴ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), 599 (opinion of McReynolds, J.).

⁵⁵ In *West Coast Hotel Co. v. Parrish* (1937), the Court sustained minimum wage legislation, departing from much of its earlier jurisprudence reading “liberty of contract” into the Due Process Clause. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Thereafter, the Court also upheld important pieces of New Deal legislation, including the National Labor Relations and Social Security Acts. The Court’s hostility to the administrative state abated.

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makes known through the voice of many instruments the vision that has been given him of man's destiny upon this earth.⁵⁶

Landis would essentially endorse Justice Brandeis' conception of a role for law in the administrative state. In *St. Joseph Stock Yards Co. v. United States* (1936), Brandeis had written in dissent: "The supremacy of law demands that there shall be opportunity to decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."⁵⁷ Brandeis' view, Landis observed, was a "protest against the insistence on the part of the majority of the Court of a right to review findings of fact made by an administrative agency."⁵⁸

But is Landis' representations of law and administration that are of greater interest here, because they reveal how the focus on procedure had given rise to a new view of law generally, how all of law had come to be viewed as procedure of a certain kind. For Landis, rather than standing for substantive values, law and administration were simply methods, each distinct ways of getting to ends, each with their particular advantages and shortcomings. The judicial process, he argued, had once been the best approach to solving problems. However, the rise of industrialism and democracy had brought about "the need for methods of government different in kind from those which had prevailed in the past."⁵⁹

The judicial process was a generalist approach. Yet modern problems demanded specialization that common law judges did not, and could not be expected to, possess: "If the issues for decision are sociological in nature, the answers must be on that plane. If the problem is a business problem, the answer must be derived from that source."⁶⁰ Furthermore, certain areas of industrial life required continuous supervision, which the judicial process could also not provide efficiently. Perhaps most important, the judicial process typically rested upon individual initiative to press claims. Judges, lacking a power to investigate independently, had to decide only based on the record presented to them.

⁵⁶ James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938), p. 155.

⁵⁷ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936).

⁵⁸ Landis, *Administrative Process*, p. 124.

⁵⁹ Landis, *Administrative Process*, p. 7. For an account that follows the same line of thinking, see Walter Gellhorn, *Federal Administrative Proceedings* (Baltimore: Johns Hopkins University Press, 1941).

⁶⁰ Landis, *Administrative Process*, p. 31.

By contrast, the administrative process was designed precisely to concentrate and apply specialized knowledge, to supervise industries or specific areas of social and economic life on a continuous basis, to allow for the initiation of action in situations where private claims would not be brought, and to launch investigations.⁶¹ When it came to dealing with large-scale social and economic problems, furthermore, the results of these two processes were different: “The ultimate test of the administrative is the policy that it formulates; not [as in the judicial process] the fairness as between the parties of the disposition of a controversy on a record of their own making.”⁶² For Landis, the answer was clear: “*The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and the legislative processes.*”⁶³

Under the general pressure of thinking of all law as a process with legal procedure at its core, the common law in this period itself came to be imagined as a kind of technique. Perhaps the most striking illustration of this are the writings of Roscoe Pound who, by the time of the New Deal, had become a staunch opponent of the administrative state and a staunch defender of the common law.⁶⁴ In *The Spirit of the Common Law* (1921), Pound hailed the “vitality and tenacity [of the] Anglo-American legal tradition we call the common law.”⁶⁵ But the common law for Pound looked very different from what it had been for a nineteenth-century lawyer.

For Pound, the common law was in the first instance a way of proceeding rather than a collection of substantive doctrines. He put it thus: “Although [the common law] is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or supersede them.”⁶⁶ As a way of proceeding, Pound argued, the common law furnished resources for curbing the excessive legal individualism that underlay decisions such as *Lochner*.

The common lawyerly ideas of “liberty of contract” constitutionalized in *Lochner*, Pound argued, represented a corruption of the common law tradition. The true common law was radically

⁶¹ See Landis, *Administrative Process*, ch. 1.

⁶² Landis, *Administrative Process*, p. 39.

⁶³ Landis, *Administrative Process*, p. 46 (emphasis added).

⁶⁴ G. Edward White notes that Pound was not initially opposed to administrative agencies as a form of governance. See White, *Constitution and New Deal*, p. 104.

⁶⁵ Roscoe Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Co., 1921), p. 1.

⁶⁶ Pound, *Spirit*, p. 1.

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different from its traditional rival, the Roman law. As Pound put it, “[t]he central idea in the developed Roman system is to secure and effectuate the will. All things are deduced from or referred to the will of the actor.”⁶⁷ This Roman law idea had infiltrated American legal thinking and led to the strong contract law ideology that animated *Lochner*. But the common law tradition enshrined not the will of the individual actor, but rather the feudal legal *relation*—master-servant, landlord-tenant, bailor-bailee, principal-agent—which allowed for much greater flexibility in crafting rights, duties, warranties, and the like. If this had once been a substantive component of the common law, in Pound’s hands, this was substance rendered means, precisely because it was not the actual content of any particular set of relations, but rather the technique of the relation as a way of solving new problems, that was the point. Pound credited the feudal idea of the legal relation for giving the American legal system “a fundamental mode of thought, a mode of dealing with legal situations and with legal problems which gives wholly different results, a mode of thought which has always tempered the individualism of our law”⁶⁸

Pound’s rendering of the common law as a process, method, or technique was an attempt to represent it as a competitor or alternative to the administrative state. The common law could mitigate the excesses of *laissez faire* as well as any administrative agency or commission could. Pound’s opposition to the administrative state would mount in the 1930s, but his hope of reconfiguring the substantive common law as a method that could effectively compete with the administrative method never amounted to much. He would have to be content with Landis’ solution to the problem of law in the administrative state, namely, that of procedure.

The larger point should be clear. By the 1930s, as the common law’s traditional foundations eroded, law had come to be seen not as truth, morality, rationality, logic, or custom, but as a process, method, or technique with legal procedure as its core. This view would drive legal thinkers to re-present old truths as processes, methods, and techniques, as the discussion of Pound’s reconfiguring substantive common as a method illustrates. It is not surprising, then, to find Karl Llewellyn writing in 1940 that law was not so much “*what* courts have decided” as it was “*how* they go about deciding cases, and *how* they use the authorities *with* which they work,

⁶⁷ Pound, *Spirit*, p. 21.

⁶⁸ Pound, *Spirit*, p. 15.

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and how and why those authorities themselves came into existence.”⁶⁹ Law’s distinctiveness lay not its substantive *what*, but its “procedural” *how*.

III. PROCESS IN THE 1940S AND THE MODERNIST COMMON LAW JURISPRUDENCE OF FELIX FRANKFURTER

As America was drawn into World War II, many of the debates of the 1930s intensified. The war resulted in a massive expansion of the administrative state’s presence in society and economy. Although the constitutionality of the New Deal was no longer in question, this expansion meant that the administrative state remained a subject of contestation. Legal thinkers injected passion into their arguments about the administrative state by invoking Nazism and Stalinism. In 1940, Roscoe Pound explicitly equated the rise of the administrative state with the “[r]evival of absolutism” in Europe.⁷⁰ Supporters of the administrative state, by contrast, saw the retreat of the U.S. Supreme Court after 1937, and the expansion of the administrative state, as crucial to defeating absolutism. Thus, Robert Jackson wrote: “The preservation of democracy on this continent might well depend on an effective government through which it may function. If we are now able to organize our economy effectively to support national defense against totalitarianism, it will be because it no longer can be slowed up by the obstacles to effective government which were interposed in the path of our national defense against depression.”⁷¹

Through the 1940s, the critical vocabulary through which to debate the administrative state—and hence to mark the place of law in the administrative state—remained that of procedure.⁷² In *Federal Administrative Proceedings* (1941), Walter Gellhorn argued that administrative law [was entering] into its “third great phase,” where “concern is addressed chiefly not to constitutional

⁶⁹ Llewellyn, “The Crafts of Law Re-Valued” (1942) in *Jurisprudence*, p. 318 (emphasis in original). For Llewellyn, realism itself was not a “philosophy,” but a “technology.” Karl Llewellyn, *The Common Law Tradition*, 509 – 510, quoted in Schlegel, *American Legal Realism*, pp. 2 -3.

⁷⁰ Roscoe Pound, *Contemporary Juristic Theory* (Claremont: Ward Ritchie Press, 1940), p. 1. For an earlier effort connecting the administrative state to fascism, see Rufus C. Harris, “Idealism Emergent in Jurisprudence,” 10 *Tulane Law Review* 169 (1936).

⁷¹ Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (New York: Vintage, 1941), p. xv.

⁷² The legal historian Joanna Grisinger observes: “Administrative procedure became a subject of partisan politics and a way for parties to talk about bureaucracy.” Grisinger, *Unwieldy Administrative State*, p. 14. See also Reuel E. Schiller, “Reigning in the Administrative State: World War II and the Decline of Expert Administration,” in Daniel R. Ernst & Victor Jew eds., *Total War and the Law: The American Home Front in World War II* (Westport: Praeger, 2002).

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divisions of power, not to appropriate boundaries of judicial review, but to the procedure of administration itself. The problem is to develop methods which give assurance that matters will receive full and fair administrative consideration, so that the determinations when made will not be ‘arbitrary,’ but will reflect wise and informal deliberation.”⁷³

Pushed by the American Bar Association, passed by Congress, and vetoed by President Roosevelt in 1940, the Walter-Logan bill was a key part of the attack on the New Deal administrative state and sought to hem administrative discretion with more extensive procedural requirements and judicial review. Critics were not deterred by the bill’s failure and eventually secured a victory with the 1946 Administrative Procedure Act (“APA”), which remains the omnibus statute for the regulation of administrative agencies.⁷⁴ The APA required that agencies publish their decisions; segregate prosecutorial and adjudicatory roles; and afford parties the possibility of contesting decisions made against them. How one viewed the APA depended on how one viewed the administrative state. Some argued that the APA accomplished little because courts and agencies were already doing what it required. The administrative law scholar Kenneth Culp Davis wrote that the APA’s impact was “much more political than legal.”⁷⁵ By contrast, those who endorsed the APA saw it, to quote Senator Patrick McCarran of Nevada, as a “bill of rights” for the administrative state.⁷⁶

The fact that the “bill of rights” for the administrative state was imagined by a prominent politician to consist almost entirely of additional *procedures* is revealing of the direction U.S. constitutional law itself was taking around the same time. Just as law had adopted a procedural role vis-à-vis the administrative state, constitutional law would adopt a largely procedural role vis-à-vis the polity as a whole. If the U.S. Supreme Court had once invalidated democratic choices in the name of substantive legal truths such as “liberty of contract” and “fair return upon fair value,” its post-New Deal self-appointed role became, in important part, that of guardian of the processes through which politico-legal power would be exercised.

⁷³ Gellhorn, *Federal Administrative Proceedings*, p. 43.

⁷⁴ After a period of deference to administrative agencies during the 1930s, Reuel Schiller suggests that federal courts began to review administrative agencies more aggressively during the 1940s. See Reuel E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” 106 *Michigan Law Review* 399 (2007); Schiller, “Saint George and the Dragon,” 17 *Journal of Policy History* at 118.

⁷⁵ Quoted in Grisinger, *Unwieldy Administrative State*, p. 61.

⁷⁶ Quoted in Grisinger, *Unwieldy Administrative State*, p. 60.

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After 1937, as the Court appeared to be ceding ground to administrative agencies and the non-legal expert knowledges they would bring to bear, it adumbrated a new orientation for constitutional law. In a post-*Lochner* world, the Court would interfere in the business of democracy only upon a breakdown of the democratic process. In the famous footnote 4 of *United States v. Carolene Products* (1938), Justice Stone observed:

It is unnecessary to consider now [i.e., in the case at hand] whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote . . . ; on restraints upon the dissemination of information; on interferences with political organizations . . . ; as to prohibition of peaceable assembly

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry (citations omitted).⁷⁷

Two features of this celebrated footnote are worth highlighting. *First*, the Court's language reveals the pervasiveness of the language of process in legal discourse in its rendering of democracy as itself a "political process." *Second*, the footnote suggests the ease with which substantive commitments could be rendered grist for the mill of process. We have seen above how Roscoe Pound was able to re-characterize substantive common law commitments as techniques, methods, and processes. For its part, the *Carolene Products* majority was announcing that voting, disseminating information, political organization, peaceful assembly, and the protection of minorities were all part of the "political process" and, *as such*, would be proper subjects of scrutiny under the Fourteenth Amendment.

In keeping with this new processual orientation for constitutional law, in the landmark case of *Smith v. Allwright* (1944), the Court dealt a major blow to racial bars to voting by declaring the Texas Democratic Party's all-white primary state action in violation of the Fourteenth Amendment. The Court announced its commitment to fixing broken political processes as follows: "[The U.S. Constitution's] grant to the people of the opportunity for choice is not to be nullified

⁷⁷ *United States v. Carolene Products*, 304 U.S. 144, 152 (1938), fn 4.

by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”⁷⁸

However, voting was hardly the only individual right to be subsumed within the idea of process. Free speech was also recast in terms of process. At the dawn of the twentieth century, the U.S. Supreme Court had treated free speech as subject to regulation as part of the government’s police power. At this time, as legal historian Laura Weinrib has shown, labor groups had begun to conceive of free speech rights as a crucial part of the labor struggle.⁷⁹ In 1917 and 1918, however, Congress enacted legislation that criminalized speech that would hamper the war effort or otherwise imperil the government.⁸⁰ Modern First Amendment jurisprudence began in a series of famous opinions authored by Justices Holmes and Brandeis in prosecutions brought under this legislation. In 1919, in his celebrated *Abrams* dissent, Holmes characteristically made clear that it was the contingency of truth itself that justified First Amendment protections for different truths:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That any rate is the theory of our Constitution.⁸¹

In a world in which one could never be sure whether one possessed the truth, one could in final analysis rely upon nothing but “the competition of the market”—itself a process—which the Constitution supposedly was to safeguard from political interference. It was a short step from to viewing free speech itself as a means. Justice Brandeis’ concurring opinion in *Whitney v. California* (1927) defended free speech as a “means indispensable to the discovery and spread of political truth”⁸²

By the time of the *Carolene Products* footnote a decade later, “dissemination of information” was explicitly represented as crucial to the proper functioning of the “political process,” the defense of which the U.S. Supreme Court pledged to undertake. In the aftermath of

⁷⁸ *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

⁷⁹ Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (Cambridge: Harvard University Press, 2016).

⁸⁰ Espionage Act of 1917, 40 Stat. 217 (1917); Sedition Act of 1918, 40 Stat. 553 (1918).

⁸¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁸² *Whitney v. California*, 274 U.S. 357 (1927), p. 375 (Brandeis, J., concurring).

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World War II, this sense of free speech as political process was advanced as the key distinction between the United States and totalitarian polities. In *Free Speech And Its Relation to Self-Government* (1948), an influential series of lectures delivered at various venues, the President of Amherst College, Alexander Meiklejohn, insisted that “[c]ontrol by a self-governing nation is utterly different in kind from control by an irresponsible despotism.”⁸³ Because self-governing communities imposed limits upon themselves, these limits were worthy of respect. But the legitimacy of these self-imposed limits rested, in final analysis, upon a process that allowed for the full airing of different viewpoints. For Meiklejohn, political speech (but not all other kinds of speech) was important not in and of itself, but because, as an adjunct to democratic thinking and voting, it formed part of a the “method of political self-government.”⁸⁴

In the pre-World War II period, legal thinkers who pushed the idea that law should be imagined in terms of process, method, and technique had tended to subscribe to the agenda that culminated in the New Deal. If procedure was the new foundation of law, it was also always seen as means to ends and, as such, was invested with a measure of flexibility and manipulability.

In the 1940s, however, investments in process, method, and technique increased. In part, this had to do with American legal thinkers’ acute awareness during the war years of the perils of both anti-foundational and foundational thinking. On the one hand, the confrontation with Fascism, Nazism and Stalinism led many to turn on the anti-foundational skepticism of Oliver Wendell Holmes, Jr., seeing in it a philosophy that could justify the horrors of totalitarianism.⁸⁵ In 1940, Lon Fuller was insisting that “[t]he *ought* . . . is just as real, as a part of human experience, as the *is*, and the line between the two melts away in the common stream of telling and retelling into which they both flow.”⁸⁶ On the other hand, many legal thinkers remained cognizant of the dangers of foundational thinking in the United States and insisted that it was foundational thinking, and not its opposite, that had led to the situation in Europe. As Legal Realist Jerome Frank put it: “It is only where government officials are deemed to be semi-divine that people have any excuse for ignoring the unavoidable personal factor in government. It is for that reason that the belief that

⁸³ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper & Bros., 1948), p. 16.

⁸⁴ Meiklejohn, *Free Speech*, p. 25.

⁸⁵ See, e.g., Francis E. Lucey, “Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society,” 30 *Georgetown Law Journal* 493 (1942). The authoritative treatment here is Purcell, *The Crisis of Democratic Theory*. See also David Ciepley, *Liberalism in the Shadow of Totalitarianism*.

⁸⁶ Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966) (1940), p. 9 (emphasis in original).

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government can ever consist of perfect creatures is alien to a democracy. That false belief is the core of the philosophy of dictatorship; it is the basis of ‘personal government’ in its most extreme and pernicious form.”⁸⁷ Insisting upon process allowed one, however precariously, to live between these two dangers. The deliberate imprecision of common law modes of thought became especially helpful in navigating this precariousness. In the post-New Deal state of agencies and commissions, expert knowledges, and large-scale solutions to socioeconomic problems, law’s role as guardian and embodiment of processes and procedures would thus be as suffused with modernist anti-foundational sensibilities as with the pre-modern methodologies and temporalities of the common law. Nowhere is this curious fusion more spectacularly on display than in the jurisprudence of Felix Frankfurter after his appointment to the U.S. Supreme Court in 1939.

Before the beginning of World War II, as we have seen, Felix Frankfurter, his students, and his protégés had played a critical role in thinking through law’s turn to process in order to accommodate the new scientific knowledges that were to dominate the administrative state. As a close affiliate of Franklin Roosevelt and a self-proclaimed heir to the legacy of Holmes and Brandeis, upon his appointment to the Court in 1939, Frankfurter emphasized that constitutional review of legislative and administrative action should be minimalist, deferential, and proceduralist. For example, in *Driscoll v. Edison Light & Power Co.* (1939), Frankfurter insisted that the Court should not meddle in the substantive rate-setting work of commissions, because commissions possessed the expertise—as courts did not—to calibrate conflicting social values. Rate setting did not raise “questions of an essentially legal nature in the sense that legal education and lawyer’s learning afford peculiar competence for their adjustment.” But what *were* questions of an “essentially legal nature”? Frankfurter did not hesitate: “The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process.”⁸⁸ Consistent with the foregoing, in 1949, the administrative law scholar Louis Jaffe described Frankfurter on the Court as “forever disposing of issues by assigning their disposition to some other sphere of competence. His world is the urban world of the division of labor, of the specialist, the expert. He is the craftsman conscious and proud of the illusive niceties germane to

⁸⁷ Jerome Frank, *If Men Were Angels: Some Aspects of Government in a Democracy* (New York: Harper & Brothers, 1942) (1930), pp. 3 – 4 (emphasis omitted).

⁸⁸ *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122 (1939) (Frankfurter, J., concurring).

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his own skill and, in consequence, scrupulous in his regard for the integrity of impinging spheres of competence.”⁸⁹

But Frankfurter’s proceduralist modernism was no straightforward affair. Frankfurter’s “urban world of the division of labor, of the specialist, the expert,” the demarcations of which he made it his task to discern, was also a world acutely sensitive to that which lay *beyond* “conscious” determination. As such, as we shall see, it entailed a return to the common law.

As stated earlier, “consciousness” in decision-making had long been a hall-mark of the modernist legal approach. Going all the way back to Holmes, an extended line of modernist legal thinkers had urged Americans to shed the mystical common law approach where the judge spoke for the community in favor of the supposedly more “conscious” decision-making of legislatures and administrative agencies. In *The Public and its Government* (1930), Frankfurter had himself repudiated the world of *Lochner* by insisting that “feeling and rhetoric [were] blind guides for the understanding of contemporary political issues.”⁹⁰ He had asserted: “[I]f by science we mean an intellectual procedure and a temper of mind, there must be science in government, because science dominates society.”⁹¹

Even as Frankfurter subscribed to this way of thinking, however, an embrace of the imprecise, the felt, the non-rational—in short, the edges or limits of the “conscious”—imbues his writings. Thus, in 1930, Frankfurter had written that “modern forms of democracy” had to be understood in terms of “the insight into the dark recesses of man’s nature, which pioneers like Freud and Jung are slowly making possible.”⁹² In his reminiscences, he griped: “I should think you historians—my talk slips so easily into an attack on historiography and journalism, the chief miseducators of people—but I should think you historians fail, as much as you fail in anything, in recapturing that impalpable thing, what was in the air.”⁹³ And yet again: “You damned sociologists, you historians who want to get it all nice and fine on paper, you haven’t learned how much in this world is determined by non-syllogistic reasoning, or without conscious exploration of a problem with a view to reaching a logical conclusion. You fellows haven’t learned that. You

⁸⁹ Louis L. Jaffe, “The Judicial Universe of Mr. Justice Frankfurter,” 62 *Harvard Law Review* 357, 359 (1949).

⁹⁰ Felix Frankfurter, *The Public and Its Government* (New Haven: Yale University Press, 1930), p. 152.

⁹¹ Frankfurter, *Public and Its Government*, p. 151.

⁹² Frankfurter, *The Public and its Government*, p. 129.

⁹³ *Felix Frankfurter Reminisces*, p. 57.

think that we're just rationalistic—not merely reasonable, but rationalistic—automata of a logical process.”⁹⁴

We might interpret Frankfurter's heightened awareness of the importance of “conscious” decision-making alongside his attunement to the limits of “conscious exploration of a problem” as a highly modernist position, two sides of the same coin. After all, what is more “conscious” than exploring and emphasizing the limits of “consciousness”? Many modernist thinkers, as suggested above, had done the same.

In Frankfurter's case, however, the modernist attunement to “consciousness” and its limits as he plumbs his own method merges effortlessly with the older “unconscious” languages of the common law. Even as he supported the expanded sphere of legislative and administrative activity, Frankfurter never turned his back on the common law. Instead, he announced proudly: “I'm bred in the law. I'm a common lawyer.”⁹⁵ Even as he insisted that law should play a largely procedural role in the modern state, he repeatedly emphasized the role that discretion, imprecision, vagueness, indeterminacy, and a Burkean commitment to continuity and tradition should play in the shaping of that procedural role. For Frankfurter, the lines that separated different spheres of competence were always blurred, few rights were absolute, and the meaning of constitutional Due Process (which underlay the structure of the mid-twentieth century “proceduralist” state) remained impossible to map with precision. Procedure, but more specifically the judge's role in assuring procedural correctness, would play a critical role in *preserving* a common lawyerly vagueness in the polity.

Achieving vagueness was grueling. Frankfurter took great pains to bring into being, through language itself, a sense of the tortured task of judging in a world of many plausible alternatives (what he called a “balance of imponderables”) in which deference to and oversight of democratically- and administratively-arrived at decisions were imperatives.⁹⁶ The following is a typical expression of his anguish at the judicial and textual absolutism displayed by his frequent antagonist, Justice Hugo Black: “We are charged here with the duty, always delicate, of sitting in judgment on state power. We must be fastidiously careful not to make our private views the

⁹⁴ *Felix Frankfurter Reminisces*, p. 10.

⁹⁵ *Felix Frankfurter Reminisces*, p. 248.

⁹⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), 652 (Frankfurter, J., dissenting).

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measure of constitutional authority.”⁹⁷ Elsewhere, Frankfurter called for “the severest intellectual detachment and the most alert self-restraint”; what made for a great judge was “scrupulous observance . . . of the professed limits of this Court’s power to strike down legislation”⁹⁸

Frankfurter’s heightened awareness of the travails of using law to curb democracy grew out of being a professed Progressive/New Dealer vehemently against the regime of *Lochner* and from his strong modernist process-oriented sense of the differences between the work of courts, legislatures, and administrative agencies. Yet his sense of the difference between the processes was not simply about which process was best fitted to which end. It would have appealed to a traditional common lawyer. Like a very long line of common lawyers, Frankfurter distinguished between a stable and enduring Constitution (“law”) and episodic and ephemeral legislation (“politics”):

[J]udges are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. *For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.*⁹⁹

At the same time, however, Frankfurter was insistent that constitutional strictures should never be static, insisting that the U.S. Constitution “was made for an undefined and expanding future, and a people gathered, and to be gathered, from many nations and of many tongues”¹⁰⁰ Thus, the Constitution should simultaneously change and not change, blending identity and difference as the common law had always done. Indeed, before his judicial appointment, Frankfurter had lauded the common law’s capacity for “insensible” change. In 1939, like a long line of common lawyers, he had written that “the Court’s influence [had] been achieved undramatically and imperceptibly, like the gradual growth of a coral reef, as the cumulative product of hundreds of cases, individually unexciting and seemingly even unimportant, but in their total effect powerfully telling in the pulls and pressures of society.”¹⁰¹

⁹⁷ *Bridges v. California*, 341 U.S. 252 (1941), 293 (Frankfurter, J., dissenting).

⁹⁸ *United States v. Lovett*, 328 S.Ct. 303 (1946), 319 (Frankfurter, J., concurring).

⁹⁹ Felix Frankfurter, “Some Reflections on the Reading of Statutes,” 47 *Columbia Law Review* 527, 534-35 (1947) (emphasis added).

¹⁰⁰ *Baumgartner v. United States*, 322 U.S. 665 (1944), 673 (quoting *Hurtado v. California*, 110 U.S. 516, 530, 531).

¹⁰¹ Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1939), pp. 3-4.

In the post-New Deal state, this common law temporality of “insensibility” was to be instantiated through a focus on law as procedure. Procedure allowed common lawyerly courts to manage the rate of legal change, especially when it came to the development of constitutional law, because it always allowed for a deflection of substantive questions. As such, a skillful deployment of procedure could keep law suspended, just as common lawyers had always sought, between continuity and change. In 1934, Frankfurter had written with satisfaction: “The Court has . . . evolved elaborate and often technical doctrines for postponing if not avoiding constitutional adjudication.”¹⁰² Shortly after his appointment to the Court, he came up with the noteworthy dictum: “[T]he most fundamental principle of constitutional adjudication is not to face constitutional questions, but to avoid them, if at all possible.”¹⁰³ A decade later, Frankfurter would openly express suspicion of change: “The rational process of trial and error implies a wary use of novelty and a critical adoption of change.”¹⁰⁴

The deployment of procedural expertise as an instrument of common lawyerly incrementalist imprecision is on frequent display in Frankfurter’s approach to the Due Process Clauses of the Fifth and Fourteenth Amendments, the constitutional underpinning of the entire turn to law as process. *Contra* the attempt of Justice Black and others to specify the meaning of the Due Process Clause as incorporating the Bill of Rights, Frankfurter underscored the “wisdom [of] our predecessors in refusing to give a rigid scope to this phrase.”¹⁰⁵ Due Process was a real concept. Crucially, however, it was imprecise:

Judicial review of that guarantee of the Fourteenth Amendment [“Due Process”] inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large.¹⁰⁶

¹⁰² Felix Frankfurter, “The Supreme Court of the United States” (1934) in Archibald MacLeish & E.F. Prichard eds. *Law and Politics: Occasional Papers of Felix Frankfurter, 1913 – 1938* (New York: Harcourt, Brace & Co., 1939), p. 25.

¹⁰³ *United States v. Lovett*, 328 U.S. 303 (1946), p. 320 (Frankfurter, J., concurring).

¹⁰⁴ *Radio Corporation of America v. United States*, 341 U.S. 412, 425-27 (1951).

¹⁰⁵ *Malinski v. New York*, 324 U.S. 401 (1945), 414 (Frankfurter, J., concurring).

¹⁰⁶ *Malinski v. New York*, 324 U.S. 401 (1945), 416-417 (Frankfurter, J., concurring).

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Thus, in a common lawyerly vein, Frankfurter would argue that Due Process referred to “the notions of justice of English-speaking peoples” and was incapable of authoritative formulation as though it were “prescriptions in a pharmacopoeia.” However, striking a distinctly modernist note, Frankfurter would insist elsewhere that constitutional Due Process was itself a “process,” “a delicate process of adjustment”¹⁰⁷

All of this vagueness—the use of proceduralism to postpone decision, the refusal to specify outlines—made Due Process a “feeling.” Frankfurter observed that Due Process was “respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization”¹⁰⁸ The British Constitution, for which he had immense regard, was a “feeling which has the support of the country expressed through a firm majority of the House of Commons.”¹⁰⁹ Shortly before he ascended to the bench, Frankfurter had written of the U.S. Supreme Court: “In [establishing norms of judicial conduct] it acts less as an organ of technical law than as an exemplar of the highest ethical sense realizable through political institutions. What is decisive is the Court’s feeling for the integrity of the judicial process.”¹¹⁰ When it came to figuring out what constituted a “case or controversy”—a foundational constitutional limitation on the jurisdiction of the federal courts—Frankfurter struck a similar note when he maintained that only the “expert feel of lawyers” could do the needful.¹¹¹ (It is important to observe here that Frankfurter was not the only modernist legal thinker of the time to focus on “feeling.” In his 1942 essay “American Common Law Tradition and Democracy,” Karl Llewellyn also argued that the “juice” of the “craft-tradition” of the common law “lies in the realm of the *felt*”).¹¹²

In final analysis, for Frankfurter, judging was itself an activity insusceptible to being fully accounted for: this was yet another area where his modernist and common lawyerly leanings, shot through with proceduralism, bled into one another. As a modernist committed to laying bare the judicial method with full “consciousness,” Frankfurter asserted: “[J]udgment is not drawn out of

¹⁰⁷ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 1663 (1951) (Frankfurter, J., concurring).

¹⁰⁸ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

¹⁰⁹ Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court*, (Cambridge: Harvard University Press, 1938), p. 68.

¹¹⁰ Felix Frankfurter & Henry M. Hart, Jr., “The Supreme Court at October Term, 1932,” 47 *Harvard Law Review* 245 (December 1933), p. 277.

¹¹¹ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

¹¹² Llewellyn, “American Common Law Tradition and Democracy” (1942) in *Jurisprudence*, p. 302.

the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit.”¹¹³ The judge had to be something of an artist: “The . . . demand upon [the judge]—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.”¹¹⁴

While recognizing the limits of “conscious” judicial lawmaking, however, Frankfurter could also adopt the vocabulary of the traditional common law judge who claimed, *qua* Blackstonian “living oracle,” to speak for the community. In *Haley v. Ohio* (1948), Frankfurter joined the Court in concluding that the police had compelled a confession from a fifteen-year old African American boy in violation of the Due Process Clause. To decide whether or not a confession was freely given, Frankfurter maintained, required a “psychological judgement that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue . . .”¹¹⁵ As the judge “divined” the “deep, even if inarticulate” feelings of the community, in a “gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,” the Due Process Clause would come to have meaning.¹¹⁶

Nothing reveals the effortless coming together of mid-century modernist legal thinking with pre-modern common law sensibilities than Frankfurter’s confidence in his own gift—the gift of a twentieth-century Blackstonian “living oracle”—for “divining” his way through the “feeling” that was Due Process. Indeed, finding that another judge possessed the gift of “divining” was, for Frankfurter, the highest compliment he could bestow. As he put it in his fawning book on Oliver Wendell Holmes, Jr.: “Other great judges have been guided by the wisdom distilled from an active

¹¹³ Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 *Columbia Law Review* 527, 532 (1947).

¹¹⁴ Felix Frankfurter, The Judicial Process and the Supreme Court (1954) in Philip Elman ed., *Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939 - 1956* (Harcourt, Brace & Co.: New York, 1956), p. 39.

¹¹⁵ *Haley v. Ohio*, 332 U.S. 596 (1948), 603 (Frankfurter, J., concurring). Indeed, Frankfurter maintained: “Our Constitutional system makes it the Court’s duty to interpret those feelings of society to which the Due Process Clause gives legal protection.” *Ibid.*, at 605.

¹¹⁶ *State of Louisiana ex. Rel. Francis v. Resweber*, 329 U.S. 459 (1947), 471 (quoting *Davidson v. City of New Orleans*, 96 U.S. at 104) (Frankfurter, J., concurring).

life; Mr. Justice Holmes was led by the divination of the philosopher and the imagination of the poet.”¹¹⁷ It is not at all surprising that Justice Hugo Black, Frankfurter’s literalist opponent on the Court in the 1940s, characterized the Frankfurterian position as that of giving the Court “boundless power under ‘natural law’ periodically to expand and contract constitutional standards to confirm to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and “fundamental principles of liberty and justice.”¹¹⁸ If Black’s use of the term “natural law” reveals the serious paucity of his understanding of Frankfurter, his frustration is not incomprehensible.

Frankfurter’s common lawyerly insistence on the blurriness of boundaries and the indeterminacy of Due Process, when combined with his New Dealer’s readiness to defer to other public authorities and his use of languages of process and procedure to delay and postpone, soon won him a reputation as a “conservative” on the Court.¹¹⁹ As a general matter, he tended to be less insistent than his brethren that administrative agencies employ procedures closely tracking judicial norms.¹²⁰ But occasionally his deference to legislatures and agencies could go further. In *Minersville School Dist. v. Gobitis* (1940), Frankfurter rejected a First Amendment challenge brought on behalf of children who were Jehovah’s Witnesses who were expelled from public school because they refused to recite the Pledge of Allegiance to the national flag. Frankfurter characterized the purpose underlying the flag salute requirement in florid Burkean language:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.

This Burkean rhetoric fit perfectly with Frankfurter’s processual orientation. Courts, Frankfurter insisted, had no “controlling competence” in deciding upon the means that the state employed to produce “common feeling.” Indeed, the “subtle process” of securing loyalty lay well beyond their province.¹²¹ Another agency was in control of that process. To find otherwise “would in effect make us the school board for the country. That authority has not been given to this Court, nor

¹¹⁷ Frankfurter, *Mr. Justice Holmes and the Supreme Court*, pp. 24 - 25.

¹¹⁸ *Adamson v. California*, 332 U.S. 46 (1947), 69 (Black, J., dissenting).

¹¹⁹ See, e.g., Fred Rodell, “Felix Frankfurter, Conservative,” *Harper’s Magazine* Vol 183, pp 449 – 459 (October 1941),

¹²⁰ This point is made in Nathaniel L. Nathanson, “Mr. Justice Frankfurter and Administrative Law,” 67 *Yale Law Journal* 240, 253 (1957 – 58).

¹²¹ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) 596, 598.

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should we assume it.”¹²² In the infamous case of *Korematsu v. United States* (1944), brought to test the constitutionality of Japanese internment during World War II, Frankfurter was even more deferential when he wrote in a separate concurring opinion: “If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. . . . To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.”¹²³ Frankfurter adopted a similarly deferential stance in *Colegrove v. Green* (1946), where his opinion resisted jurisdiction of a suit contesting gross disparities in the size of Illinois congressional districts on the ground that the question was “of a peculiarly political nature, and therefore not meet for judicial determination.”¹²⁴

At the beginning of the 1950s, Frankfurter’s frequent claim to operate on the basis of “feeling” was also put to the service of a stance that many would perceive as hostile to organized labor and to administrative agencies. The Wagner Act of 1935 had provided that that the National Labor Relations Board’s (“NLRB”) findings of fact “if supported by the evidence, shall be conclusive.”¹²⁵ The Court had read the term “evidence” as used in the Wagner Act to mean “substantial evidence.”¹²⁶ As the 1940s progressed, however, increased congressional animus towards administrative agencies in general, and towards the NLRB in particular, led to a changed standard of review in both the Administrative Procedure Act of 1946 and the Taft-Hartley Act of 1947. The APA required that reviewing courts rely upon “the whole record,” while the Taft-Hartley Act required reliance upon “substantial evidence on the record considered as a whole.”¹²⁷ Many read the language in the APA and in Taft-Hartley as simply restating existing law or, in other words, as changing nothing. However, in *Universal Camera Corp. v. National Labor Relations Board* (1951), Frankfurter explored the shift in language from the Wagner Act to the APA and Taft-Hartley Act and concluded that there was a change in “mood” that required greater

¹²² *Minersville School District v. Gobitis*, 310 U.S. at 598.

¹²³ *Korematsu v. United States*, 323 U.S. 214 (1944), 225 (Frankfurter, J., concurring).

¹²⁴ *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

¹²⁵ Act of July 5, 1935, Section 10(e), 49 Stat. 449, 454, 29 U.S.C. Sec. 160(e).

¹²⁶ *Washington Coach Co. v. Labor Board*, 301 U.S. 142 (1937).

¹²⁷ APA, 60 Stat. 237, 5 U.S.C. Sec. 1001 et seq, Section 10; Taft-Hartley Act of 1947, 61 Stat. 136, Sec. 10(e), 29 U.S.C. (Supp. III), Section 141 et seq.

judicial scrutiny of administrative decision-making. He put it thus: “It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation, that mood must be respected, even though it can only serve as a standard for judgment, and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.”¹²⁸ In so doing, he was, of course, opening up NLRB decisions to greater judicial supervision. Frankfurter’s conception of a “mood” appears to have come from Judge Learned Hand. In 1930, Judge Learned Hand had written that constitutional provisions regarding Due Process “represented a mood, rather than a command”¹²⁹ But how was a congressional “mood” that could not be reduced to “rigid rules” to be translated into judicial action? Frankfurter’s answer was, as usual, “feeling”: “Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.”¹³⁰

Perhaps the most conservative (and anguished) expression of Frankfurter’s judicial philosophy came towards the end of his career in his dissent in *Baker v. Carr* (1962), the case in which the majority repudiated his position in *Colegrove v. Green* and launched the Warren Court’s voting rights jurisprudence. *Baker v. Carr* involved a challenge to voting apportionment practices in Tennessee. Briefly put, although the state of Tennessee was required under its constitution to reapportion its voters every decade based on a census, it had not reapportioned its population for six decades. The result, predictably enough, was vast disparities in the voting power of the state’s electoral divisions, particularly as urban populations grew. A group of Tennessee voters claiming that they were denied equal protection of the laws under the Fourteenth Amendment by reason of the dilution of their votes brought suit. The lower federal court dismissed the suit on the ground that it lacked subject matter jurisdiction and that the plaintiffs had failed to state a claim upon which relief could be granted. However, Justice Brennan’s majority opinion found that the federal courts possessed jurisdiction, that the plaintiffs possessed standing, and that the claim was

¹²⁸ *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), 487.

¹²⁹ *Daniel Reeves, Inc. v. Anderson*, 43 F.2d 679, 682 (2d. Cir. 1930). In a 1955 Harvard Law School address commemorating the two hundredth anniversary of the birth of John Marshall, Frankfurter approvingly quoted Hand for this proposition. Felix Frankfurter in Philip Elman ed., *Of Law and Men* (New York: Harcourt, Brace & Co., 1956), p. 19.

¹³⁰ *Universal Camera Corp.*, 340 U.S. at 490.

justiciable. With respect to the last claim, the majority held that “this challenge to an apportionment presents no nonjusticiable ‘political question,’” and then proceeded at considerable length to explore the “political question” doctrine without, however, ruling on the merits.¹³¹

Consistent with the logic of *Carolene Products*, Justice Clark’s concurring opinion argued that federal judicial relief was required because of the effective breakdown of all other political and judicial processes in Tennessee that might afford relief:

The people [of Tennessee] have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result, and the Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint, this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.¹³²

But to this invocation of process thinking, Frankfurter counterposed his own version, joining the languages of common lawyerly tradition and of modernist process: “Disregard of inherent limits in the effective exercise of the Court’s ‘judicial power’ . . . presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined.”¹³³ The “judicial process [was] ill-adapted” to solve “broad issues of political organization historically committed to other institutions”¹³⁴ And the “political question” doctrine that the majority was upending was no innovation, but represented “long judicial thought and experience.”¹³⁵

Far from thinking of the judicial process as a last resort for plaintiffs when other processes had broken down, which is what the logic of the *Carolene Products* footnote might suggest, Frankfurter suggested that preserving the integrity of different processes might be more important than providing legal relief whenever a non-legal process broke down. The legal process could simply not solve all problems. He called for “a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of

¹³¹ *Baker v. Carr*, 369 U.S. 186 (1962), 198.

¹³² *Baker v. Carr*, 369 U.S. at 259 (Clark, J., concurring).

¹³³ *Baker v. Carr*, 369 U.S. at 267 (Frankfurter, J., dissenting).

¹³⁴ *Baker v. Carr*, 369 U.S. at 289 (Frankfurter, J., dissenting).

¹³⁵ *Baker v. Carr*, 369 U.S. at 280 (Frankfurter, J., dissenting).

legislative power.”¹³⁶ Moreover, the plaintiffs’ Fourteenth Amendment argument might also be wrong. History was on the side of Tennessee when it came to disproportion and inequality in voting apportionment:

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellant’s words ‘the basic principle of representative government’—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today.¹³⁷

By the early 1960s, in other words, Frankfurter’s sense of the distinctions among different governmental processes and the need to keep them from impinging upon one another, combined with a common lawyerly hostility to innovation, had taken precedence over the need to find judicial solutions for those without other recourse.

IV. THE LEGAL PROCESS SCHOOL AND THE WARREN COURT

In the post-World War II period, law’s turn to process reached the height of its influence with the rise of the American Legal Process school. Several of the most important exponents of the American Legal Process school—Alexander Bickel, Paul Freund, Edward H. Levi, Henry Hart, Philip Kurland, Albert Sacks, Herbert Wechsler, Harry Wellington—were linked to Felix Frankfurter and often wrote to vindicate his positions. At the Harvard Law School of the 1950s, where Legal Process thinking reigned supreme, a student recalled: “Felix Frankfurter was God.”¹³⁸

¹³⁶ *Baker v. Carr*, 369 U.S. at 270 (Frankfurter, J., dissenting).

¹³⁷ *Baker v. Carr*, 369 U.S. at 301 (Frankfurter, J., dissenting).

¹³⁸ Quoted in William M. Wiecek, “American Jurisprudence After the War: ‘Reason Called Law,’” 37 *Tulsa Law Review* 857, 862 (2002). On the Legal Process School generally, see William M. Eskridge, Jr. & Philip P. Frickey, “An Historical and Critical Introduction to *The Legal Process*” in Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, li-cxxxvi (William Eskridge & Phillip Frickey eds.) (Westbury: Foundation Press, 1994) (1958 tent. ed.); Neil Duxbury, “Faith in Reason: The Process Tradition in American Jurisprudence,” 15 *Cardozo L. Rev.* 601 (1993 -94); Duxbury, *Patterns of American Jurisprudence*, ch. 4; Horwitz, *Transformation of American Law, 1870 -1960*, ch.9; Gary Peller, “Neutral Principles in the 1950s,” 21 *University of Michigan Journal of Law Reform* 561 (1987-88). There are other sources, too numerous to canvas here.

The key text of the Legal Process school was Henry Hart's and Albert Sacks' *The Legal Process*, a set of teaching materials employed in many American law schools in the 1950s, 1960s, and 1970s. The starting premise of the materials was that modern, complex polities such as the post-war United States were necessarily characterized by a plethora of different "substantive understandings and arrangements" which presupposed or rested upon a plethora of "constitutive or procedural understandings" for solving the range of questions that would necessarily arise.¹³⁹

The founding of substance upon procedure was, precisely, the point. From emerging out of the crisis of law's foundations to find a place in the new state, procedure had become the foundation of the state. Hart and Sacks famously put it thus: "These institutionalized procedures and the constitutive arrangements establishing and governing them are obviously *more fundamental* than the substantive arrangements in the structure of a society, if not in the realization of its ultimate aims, since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."¹⁴⁰ A key concept was what Hart and Sacks called the "principle of institutional settlement." For Hart and Sacks, this "principle" stood for the constitutive proceduralism that channeled substantive decisions to different institutions and actors in the politico-legal system instead of abandoning them to "the play of raw force"¹⁴¹ Among the different institutions and actors were legislatures, courts, administrative agencies, and individuals. *The Legal Process* offered extensive treatments of the processes followed by the first three. Once decision-making had been correctly assigned to the right institution or actor, and the right internal procedure followed, that was by and large the end of the inquiry. The following line recurs in more or less different ways throughout the text: "The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."¹⁴²

Given the significance of institutional settlement, processes, and procedures, it is not surprising that the authors of the *Legal Process* exhorted readers to think of all substantive law as a function of this or that institution, process, or procedure. "Rights" were nothing other than

¹³⁹ Hart & Sacks, *Legal Process*, p. 3 (emphases omitted).

¹⁴⁰ Hart & Sacks, *Legal Process*, pp. 3-4 (emphasis added).

¹⁴¹ Hart & Sacks, *Legal Process*, p. 4.

¹⁴² Hart & Sacks, *Legal Process*, p. 4.

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“corollaries and expressions of the principle of institutional settlement and of the system of procedures through which the principle is carried out”¹⁴³ In the early twentieth century, legal thinkers had attacked the individual rights ideology of cases such as *Lochner v. New York* by revealing their lack of rational, moral, logical, or customary foundations. By the 1950s, they were arguing that substantive rights were an effect of procedures.

The foregoing established what counted as authentically legal knowledge. *The Legal Process* was unequivocal about what it considered important for law students to know: procedure, rather than substance.

*Knowledge of the procedures by which particular types of decisions are made and of the doctrines which determine their settling effect is root knowledge, with a ramifying and pervasive bearing on legal problems of every kind. Moreover, it is attainable knowledge. The mass of substantive law in the United States is beyond the capacity of any lawyer or law student to master In contrast, any law student or practitioner can reasonably set himself the goal of mastering the main outlines, and the respective functions and interrelationships, of the various procedures of official and private settlement, and the principle doctrines and practices which govern their operation and determine their effect. In the long run, these procedures and the accompanying doctrines and practices will come to be seen as the most significant and enduring parts of the whole legal system, because they are the matrix of everything else.*¹⁴⁴

Meanwhile, the legal professional had “to help in seeing that the principle of institutional settlement operates not merely as a principle of necessity but as a principle of justice”; this would entail seeking “the constant improvement of . . . procedures”¹⁴⁵

This turn to procedure in *The Legal Process* was a confession of the difficulty of specifying substantive ends. It was also a gesture towards the consensus thinking of the period: one might disagree on substance, but one could agree on processes, methods, and techniques. Elsewhere, Henry Hart had written: “[T]he first recourse of law, in dealing with intractable questions, is to seek not final answers, but an agreeable procedure for getting acceptable answers. People are bound to disagree . . . about the substance of answers. . . . But philosophers and ordinary men alike can agree that if some answer is better than no answer at all a way must be found to get an

¹⁴³ Hart & Sacks, *Legal Process*, pp. 128-29.

¹⁴⁴ Hart & Sacks, *Legal Process*, p. 6 (emphasis added).

¹⁴⁵ Hart & Sacks, *Legal Process*, p. 6.

answer.”¹⁴⁶ Furthermore, proceduralism assured a measure of predictability. The *Legal Process* made this point clearly: “Even though the substance of a decision cannot be planned in advance in the form of rules and standards, the procedure of decision commonly can be.”¹⁴⁷

Hart and Sacks were, of course, aware that their commitment to the primacy of procedure was not a “fact” but a choice: “When the principle of institutional settlement is plainly applicable, we say that the law ‘is’ thus and so, and brush aside further discussion of what it ‘ought’ to be. Yet the ‘is’ is not really an ‘is’ but a special kind of ‘ought’”¹⁴⁸ Having gestured cursorily in this direction, however, they did not dwell on this point at great length. Any discussion of “oughtness” that underlay their procedure foundationalism was effectively buried under the sheer bulk of the “isness” of their treatment of institutions, processes, and procedures.

In *The Legal Process*, then, the entire American politico-legal system was represented as so many procedures and processes founded upon the master grid of the “principle of institutional settlement.” At the same time, like other legal thinkers before them, Hart and Sacks were at pains to distinguish the legal process from other processes (administrative, legislative, and so on). In focusing upon law’s distinctiveness, Hart and Sacks were not only telling the reader what law could and could not accomplish, but also setting forth an ideal for law. Given their general eschewal of substantive questions and their preference for proceduralism, Hart and Sacks expressed their ideal for law as itself a kind of “how to”—in short, a procedure or protocol—for legal decision-making. Legal decision-making was (or ought to be) characterized by what they called “reasoned elaboration,” which entailed (a) treating like cases alike and (b) interpreting statutes and crafting decisions in terms of some underlying (preferably explicitly stated) general principle or policy.¹⁴⁹ Other prominent legal thinkers of the time advanced similar formulations. In 1965, arguing that the “distinctive legal element in an adjudication lies in its appeal to reason,” Herbert Wechsler offered up a “how to” for “reason”: “[t]he problem must be fairly stated and correctly analyzed in its relation to the language and the concepts of the Constitution”; “[h]istory must be weighed”; “the normal claims of continuity . . . demand consideration”; “changes that have taken place in life and law” need to be factored in.¹⁵⁰ “Reason” could be attained, in other

¹⁴⁶ Quoted in Eskridge & Frickey, “Historical and Critical Introduction,” in Hart & Sacks, *Legal Process*, p. lxxxiv.

¹⁴⁷ Hart & Sacks, *Legal Process*, p. 154.

¹⁴⁸ Hart & Sacks, *Legal Process*, p. 5.

¹⁴⁹ Hart & Sacks, *Legal Process*, pp. 147 - 49.

¹⁵⁰ Herbert Wechsler, “The Courts and the Constitution,” 65 *Columbia Law Review* 1001 (1965), p. 1012.

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words, through the following of a set of steps. As questions of substance were set aside, in other words, procedures kept generating procedures.

The idea of “reasoned elaboration” or “reason” as a “how to” for law that distinguished law from other ways of doing things gained considerable currency in the 1950s and 1960s. In *Harvard Law Review* “Forewords” in the 1950s and 1960s, scholars regularly castigated the Court for its failure to live up to the standards of “reasoned elaboration” or variations thereupon. In their 1957 Foreword, for example, Alexander Bickel and Harry Wellington criticized the Warren Court for its predilection for “the sweeping dogmatic statement, [for] the formulation of results accompanied by little or no effort to support them in reason, in sum, [for] opinions that do not opine and [for] *per curiam* orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.”¹⁵¹ Perhaps the reasons for such lapses were problems of logistics? In his 1959 “Foreword,” Henry Hart offered up an elaborate analysis of how cases made it to the U.S. Supreme Court, how much time the Court had per case, and therefore how little time the Court devoted to deliberating on any individual case. What was needed, Hart insisted, was more time for deliberation.¹⁵² To be sure, legal scholars were not restricted to *Harvard Law Review* “Forewords” to level their critiques. In 1957, Lon Fuller insisted: “We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.”¹⁵³ Herbert Wechsler’s famous 1959 discussion of “neutral principles” maintained that “[a] principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”¹⁵⁴

As Legal Process thinkers chided the Court for what they deemed its inadequacies, their understanding of the mid-century American polity as founded upon procedures and processes set the terms for legal scholarship. Especially at the Harvard Law School, legal knowledge in this period was to an important degree knowledge of different processes and procedures. Building on

¹⁵¹ Alexander Bickel & Harry Wellington, “Legislative Purpose and the Judicial Process: The Lincoln Mills Case,” 71 *Harvard Law Review* 1, 3 (1957).

¹⁵² See Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices, 1958 Term*, 73 *Harvard Law Review* 84 (1959-1960). For a trenchant response, see Thurman Arnold, “Professor Hart’s Theology,” 73 *Harvard Law Review* 1298 (1959 – 1960).

¹⁵³ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harvard Law Review* 353, 367 (1978-79).

¹⁵⁴ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 *Harvard Law Review* 1 (1959), 19.

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the model established by James Landis in the 1930s, professors spent countless hours thinking and writing about the merits of this or that procedure or process relative to this or that end. Lon Fuller's scholarship in the 1950s and 1960s—with titles such as “The Forms and Limits of Adjudication,” “Mediation—Its Forms and Functions,” “The Implicit Laws of Lawmaking,” “The Role of Contract in the Ordering Processes of Society Generally,” and so on—are suggestive of the genre.¹⁵⁵ So are David Shapiro's “The Choice of Rulemaking or Adjudication in the Development of Administrative Policy” and Abram Chayes' “The Role of the Judge in Public Law Litigation,” published in the *Harvard Law Review* in 1965 and 1976, respectively.¹⁵⁶ Harry Wellington's *Labor and the Legal Process* (1968) is another good example. Scanning key developments in labor law, Wellington repeatedly points to the limits of the judicial process in resolving various issues in labor law. The bottom line: courts were good at some things, but not at all.¹⁵⁷

Despite their focus on the procedures of the post-war state, the common law was all too present in the thinking of Legal Process scholars. In this regard as well, there was something of a reversal that underscores the procedural fundamentalism of the period. In the early twentieth century, as we have seen, legal thinkers had turned to procedure as a consequence of, and in order to effect, law's—and especially the common law's--disassociation from rationality, logic, and morality. Now, however, as revealed in the writings of legal philosopher Lon Fuller, the common law, proceduralism, and “morality” were brought together.

Today, Fuller is perhaps best known for his celebrated postwar debate with the British positivist legal philosopher, H.L.A. Hart.¹⁵⁸ Following a long line of Anglo-American positivists going back to Hobbes, H.L.A. Hart emphasized the distinction between “law” and “morals.” “Law” consisted of the pronouncements of the sovereign and “rules of recognition” served to identify that sovereign. In *The Morality of Law* (1964), Fuller, by contrast, insisted upon the “morality” of law. Unless law met the dictates of “morality,” he argued, law was not “law” at all,

¹⁵⁵ These articles were published at various times and are collected in Kenneth I. Winston ed., *Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham: Duke University Press, 1981).

¹⁵⁶ See, e.g., David L. Shapiro, “The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,” 78 *Harvard Law Review* 921 (1965); Abram Chayes, “The Role of the Judge in Public Law Litigation,” 89 *Harvard Law Review* 1281 (1976).

¹⁵⁷ Harry H. Wellington, *Labor and the Legal Process* (New Haven: Yale University Press, 1968).

¹⁵⁸ The initial confrontation was H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 71 *Harvard Law Review* 593 (1958); Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” 71 *Harvard Law Review* 630 (1958). Thereafter, Hart published *The Concept of Law* and Fuller published *The Morality of Law*. Hart's review of Fuller's book appeared at 78 *Harvard Law Review* 1281 (1965).

but something else, even if it happened to be promulgated by the sovereign. Here, Fuller was building upon his wartime critiques of Holmesian skepticism. Now, he would argue that there had been numerous pronouncements by the Nazi regime that, albeit issued by a sovereign, could not possibly merit the name of “law.” Indeed, all kinds of sovereigns—from the Nazis to the Soviets to western democracies—were more or less guilty of such shortcomings. Accordingly, a “morality of aspiration” should push every sovereign to promulgate its pronouncements in terms that better approximated “morality.” But what constituted law’s “morality”?

Fuller distinguished sharply between what he called law’s “internal morality” and law’s “external morality.” The former inhered within law as a technique, as it were, while the latter might be an end—say, distributive justice or racial equality—that one might set forth for law to achieve. As a legal thinker following upon the anti-foundational modernist turn of the early twentieth century, Fuller was fully aware of the dangers of, and hence wary of the lure of, “external morality.” It was law’s “internal morality” that interested him. Toward the opening of *The Morality of Law*, Fuller outlined eight components of law’s “internal morality”: (1) the promulgation of a genuine rule as opposed to an *ad hoc* decision; (2) the publishing of rules; (3) the avoidance of retroactive legislation; (4) making rules comprehensible; (5) the avoidance of promulgating rules contradicting each other; (6) the avoidance of promulgating rules that were impossible to obey; (7) the avoidance of changing rules so frequently that parties could not organize their behavior around them; and (8) lack of correspondence between the rules as announced and the way they were applied.¹⁵⁹

The family resemblance between Fuller’s understanding of law’s “internal morality,” on the one hand, and “reasoned elaboration,” “neutral principles,” and other post-war formulations, on the other, should be evident. As Fuller envisioned it, law’s “internal morality” was a procedural or “thin” one, a “morality” of method or technique that distinguished law from other methods or

¹⁵⁹ Lon L. Fuller, *The Morality of Law* rev. ed. (New Haven: Yale University Press, 1969) (1964), pp. 38 – 39. In an earlier essay, Fuller had recommended what he called “eunomics,” which he defined as “the science, theory, or study of good order and workable arrangements. Eunomics involves no commitment to ‘ultimate’ ends.” Lon L. Fuller, “American Legal Philosophy at Mid-Century,” 6 *Journal of Legal Education* 457 (1953-54), p. 477. Interestingly, later in the same essay, Fuller labeled Robert A. Dahl’s & C.E. Lindblom’s *Politics, Economics and Welfare* (1953) as “a pioneering essay in eunomics” that showed that “political science and economics seem to be moving toward common ground, elections and markets being seen as specific techniques by which individual choice is given social effect.” Fuller, “American Legal Philosophy at Mid-Century,” p. 480. I discuss Dahl and Lindblom extensively in the next chapter. Fuller’s explored his interest in eunomics further in the series of essays collected in Winston ed., *The Principles of Social Order*.

techniques. Fuller made this very clear in his discussion of the relationship between law's "internal morality" and the natural law tradition. It is important to quote him at length.

Do the principles expounded in my [discussion of law's 'internal morality'] represent some variety of natural law? The answer is an emphatic, though qualified, yes.

What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as 'the enterprise of subjecting human conduct to the governance of rules.' These natural laws have nothing to do with any 'brooding omnipresence in the skies.' Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. . . . *They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.*

. . .

As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law. *What I have called the internal morality of law is in this sense a procedural version of natural law The term 'procedural' is . . . broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.*¹⁶⁰

Fuller was imbuing Legal Process thinking with morality (in his essay "Means and Ends," he would also employ the phrase "technological natural law").¹⁶¹ Furthermore, even though he insisted that law's "internal morality" was neutral towards substantive ends, towards the end of *The Morality of Law*, he hinted that law's "internal morality" might play some role in reaching results dictated by "external morality." The "morality" of the legal process, in other words, would favor some substantive results over others. By way of example, Fuller offered various instances of racial statutes, both in South Africa and in the United States, that offended "external morality" but also "internal morality" (such statutes could be vague, lead to contradictory results, etc.).¹⁶² Laws that offended standards of "internal morality" were, in final analysis, "an affront to man's dignity as a responsible agent."¹⁶³

¹⁶⁰ Fuller, *Morality of Law*, pp. 96 – 97 (emphasis added).

¹⁶¹ Lon Fuller, "Means and Ends," in Winston ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller*. p. 49.

¹⁶² Fuller, *Morality of Law*, pp. 160 – 61.

¹⁶³ Fuller, *Morality of Law*, p. 162.

Fuller lamented that the larger Western jurisprudential tradition had paid altogether too little attention the law's "internal morality." Of course, it was to be expected that the Anglo-American positivist tradition would largely ignore it. But most natural law thinkers had ignored it as well, because most were concerned with substantive natural law, rather than with the "procedural" variety that Fuller was emphasizing. There was, however, one "significant exception," which Fuller characterized as "a literature that arose in England during the seventeenth century, a century of remonstrances, impeachments, plots and civil war, a period during which existing institutions underwent a fundamental reexamination."¹⁶⁴ Briefly put, of all the legal traditions of the West, in Fuller's rendering, it was the common law tradition as it had been reformulated in the seventeenth century leading all the way up to the American Revolution that had been most intensely concerned with the "internal morality" of the law.

Fuller thus argued that the common law tradition had prefigured everything he was talking about. He advanced a reading of *Bonham's Case*, in which Lord Coke had insisted that the common law could control or limit Parliamentary statutes. *Bonham's Case* had frequently been read, Fuller suggested, as an instance of substantive natural law limiting the law-giving authority of Parliament. However, he continued, it was really an insistence that Parliament respect law's "inner morality": "[N]otice how heavily it emphasizes procedures and institutional practices."¹⁶⁵ Indeed, Fuller would also read the claim of the common law to constitute the custom of the community as fulfilling, *avant la lettre*, the stricture that laws be adequately publicized. "Over much of its history the common law has been largely engaged in working out the implications of conceptions that were generally held in the society of the time. This large measure of coincidence between moral and legal demands reduced greatly the force of the objection that the rules of the common law were, in contrast with those of a code, difficult of access."¹⁶⁶ In other words, what common lawyers such as Blackstone had once attributed to the oracular powers of common law judges was now being represented as (moral) procedure. It was this "procedural" moralism of the common law tradition that underlay the U.S. Constitution itself, with its "procedural" restrictions on the power of government.

¹⁶⁴ Fuller, *Morality of Law*, p. 99.

¹⁶⁵ Fuller, *Morality of Law*, p. 100.

¹⁶⁶ Fuller, *Morality of Law*, p. 50.

In the 1950s and 1960s, as Legal Process thinkers such as Fuller were thus “moralizing” process and procedure, and yoking them to the hallowed tradition of common lawyerly checks on political power, interest in process and procedure also grew for urgent political reasons. As McCarthyism grew in prominence, those who had earlier adopted positions for or against the administrative state had come to realize, as the administrative law scholar Walter Gellhorn put it, that “the administrative process is not a stream running always in the same direction, but, rather, a mechanism capable of being steered.”¹⁶⁷ If the administrative state could limit economic freedoms, it could also curtail political freedom and invade citizens’ privacy. As Morton Horwitz has argued, this realization brought about a switch in liberal and conservative positions, with the former now insisting on the importance of legal and procedural protections and the latter newly supportive of more flexible administrative and extra-judicial modes of proceeding.¹⁶⁸ For example, the legal scholar Charles Reich’s landmark 1964 article, “The New Property” drew attention to the plethora of different economic interests (licenses, public benefits, and so on) that had been created by government programs. Such economic interests, as Reich was well aware, were highly vulnerable to McCarthy-era abuses, such that individuals accused of Communist affiliations were summarily dismissed or forfeited legal benefits and privileges. Calling such interests “new property,” Reich argued that they should be defended from arbitrary extinguishment through more robust procedural protections.¹⁶⁹

The increased interest in procedure and process was also attributable to the growing apprehension that administrative agencies, even as they grew in number and scope, were subject to regulatory capture. In 1960, in a report commissioned by President-elect John F. Kennedy, none other than James Landis drew attention to this danger. There was a widespread perception, Landis reported, that administrative agencies had an “industry orientation” pursuant to which “the regulatees have become the regulators.”¹⁷⁰ He continued: “[T]he Interstate Commerce Commission has frequently been characterized as railroad-minded, the Federal Communications Commission as dominated by the networks, while the actions of the Federal Power Commission

¹⁶⁷ Walter Gellhorn, *Individual Freedom and Governmental Restraints* (Baton Rouge: Louisiana State University Press, 1956), p. 5.

¹⁶⁸ Horwitz, *Transformation of American Law, 1870 – 1960*, p. 240 – 41.

¹⁶⁹ Charles Reich, “The New Property,” 73 *Yale Law Journal* 733 (1964).

¹⁷⁰ James M. Landis, *Report on Regulatory Agencies to the President-Elect* (Washington: Government Printing Office, 1960), p. 70.

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speak for themselves.”¹⁷¹ In 1964, in remarks delivered following Landis’ death, Louis Jaffe criticized Landis’ *The Administrative Process* as being “somewhat too cavalier in its disregard of the teachings of tradition, and somewhat blind to the truth that tradition speaks not only of the past but of the future.”¹⁷² Landis’ enthusiasm was warranted given the moment in which he wrote, Jaffe suggested, but it was impossible to share that enthusiasm three decades later.¹⁷³

But another crucial set of developments that renewed an interest in process, procedure, and common lawyerly modes of thinking—and that compelled the attention of Legal Process thinkers—was the U.S. Supreme Court’s decision in *Brown v. Board of Education* (1954) and the decisions that followed in its wake.¹⁷⁴ Many Legal Process thinkers were profoundly disturbed by *Brown* and its progeny because the cases seemed in their view to revive the repudiated judicial overreaching of the *Lochner* era and failed to abide by the proceduralism and “reasoned elaboration” that had been engineered to avoid the perils of *Lochner*.

In his 1959 Holmes Lecture at the Harvard Law School, Herbert Wechsler argued that the *Brown* decision could not be justified on its facts, did not take into account too many scenarios that might weaken its reasoning, and failed to rest on a true “neutral principle” that could transcend the result. Wechsler identified the applicable “neutral principle” as freedom of association. If blacks wanted integration regardless of whether separate facilities were equal, Wechsler argued, did not that not violate whites’ freedom of association?: “Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?”¹⁷⁵ Wechsler also worried about the Court’s extension of *Brown* to various public facilities in the form of *per curiam* decisions.¹⁷⁶ If

¹⁷¹ Landis, *Report on Regulatory Agencies to the President Elect*, p. 71.

¹⁷² Louis L. Jaffe, “James Landis and the Administrative Process,” 78 *Harvard Law Review* 319 (1964 – 65), 320.

¹⁷³ The two preceding paragraphs are drawn from Horwitz, *Transformation of American Law, 1870 - 1960*, chapter 8.

¹⁷⁴ 347 U.S. 483 (1954).

¹⁷⁵ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” in *Principles, Politics, and Fundamental Law: Selected Essays* (Cambridge, Mass.: Harvard University Press, 1961), p. 47. For contemporaneous critiques, see Louis H. Pollak, “Racial Discrimination and Judicial integrity: A Reply to Professor Wechsler,” 108 *University of Pennsylvania Law Review* 1 (1959); Charles L. Black, “The Lawfulness of the Segregation Decisions,” 69 *Yale Law Journal* 421 (1959 – 1960). Charles E. Clark, “A Plea for the Unprincipled Decision,” 49 *Virginia Law Review* 660 (1963).

¹⁷⁶ Wechsler listed the following: *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54, *affirming per curiam* 252 F.2d 122 (5th Cir. 1958); *Gayle v. Browder*, 352 U.S. 903, *affirming per curiam* 142 F. Supp. 707 (M.D. Ala. 1956); *Holmes v. City of Alabama*, 350 U.S. 879, *reversing per curiam* 223 F.2d 93 (5th Cir. 1955); *Mayor & City Council v. Dawson*, 350 U.S. 877, *affirming per curiam* 220 F.2d 386 (4th Cir. 1955); *Muir v. Louisville*

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Brown had been justified on the ground that education was uniquely important, how could it be extended without explanation to recreational facilities? This was not “process of law,” Wechsler argued, “the process that alone affords the Court its title and its duty to adjudicate a claim that state action is repugnant to the Constitution”¹⁷⁷

Such critiques continued over the next decade as the Warren Court “revolution” gathered momentum. By 1969, employing breathtakingly clear Legal Process language, Philip Kurland (a former Frankfurter clerk) was wondering in dismay “whether, as the Warren Court has moved toward the legislative mode and away from the judicial mode of carrying on its business, it has endangered the capacity to perform its peculiar function.”¹⁷⁸ Faith in law rested on confidence in the “purity of its process,” Kurland argued, and the Warren Court had harmed itself precisely by “imitating the legislature by providing that its decisions in certain criminal cases, where it avowedly changed the meaning of the Constitution from what it had been, would have only prospective effect.”¹⁷⁹

Perhaps the most prominent critic of the Warren Court was another Frankfurter law clerk, Legal Process scholar, and constitutional theorist, Alexander Bickel. In Bickel’s writings, we see Frankfurter’s brand of proceduralism—with its modernist and common lawyerly embrace of vagueness, continuity, delay, and gradualism—find its fullest and most conservative expression.¹⁸⁰

Bickel shared many of leanings of the Legal Process school, but the path he forged for himself was unique. Reflecting the Legal Process school’s sense that law consisted of articulating “neutral principles,” Bickel argued that courts in general, and the U.S. Supreme Court in particular, were bound to act on “principle”: “When it strikes down legislative policy, [a court] must act

Park Theatrical Ass’n, 347 U.S. 971 (1954), *reversing per curiam* 202 F.2d 275 (6th Cir. 1953). Wechsler, “Neutral Principles,” p. 31.

¹⁷⁷ Wechsler, “Neutral Principles,” p. 31.

¹⁷⁸ Philip B. Kurland, “Toward a Political Supreme Court,” 37 *University of Chicago Law Review* 19, 20 (1969 – 1970).

¹⁷⁹ Kurland, “Toward a Political Supreme Court,” 37 *University of Chicago Law Review* at 46, 32 (citations omitted from first reference).

¹⁸⁰ The ensuing discussion of Bickel is taken entirely from Kunal M. Parker, “How Law Should Avoid Mistakes: Alexander Bickel’s Modernist Jurisprudence of Mood” in Austin Sarat et al. eds., *Law’s Mistakes* (Amherst: University of Massachusetts Press, 2016). There were many critiques of Bickel’s thinking at the time he wrote. See e.g., Gerald Gunther, “The Subtle Vices of the ‘Passive Virtues’—A Comment on Principle and Expediency in Judicial Review,” 64 *Columbia Law Review* 1 (1964).

rigorously on principle, else it undermines the justification for its power.”¹⁸¹ But how were binding legal “principles” to be identified and chosen? Here Bickel adopted a modernist view that drew from, but built upon, Frankfurter. “Principle,” Bickel insisted, was an “evocative, not definitional” term; it was an “attempt[] to locate meaning, not to enclose it.”¹⁸² Ultimately, nothing could point in any definitive justificatory way to the source of a binding legal “principle.” Constitutional text, precedent, and history were merely “empirical aids.” They were “sources of inspiration, instigators of reflection, producers of mood. . . . [T]hey are the setting for judgment and they condition it, but they are not its wellspring.”¹⁸³ Legal “principles” thus emerged, not from a process of rational intellection, but from a “mood.”

Given the Frankfurterian “mood”-like ground from which legal “principles” arose, it is not surprising that Bickel’s recommended manner of the application of “principles” would also be such as to instantiate a “mood.” For Bickel, “mood” was a kind of method.

Rather than advocating the use of legal “principles” as a blunt weapon against democratic politics, Bickel endorsed what he called “the exquisite balance” between adhering to a legal “principle” and also keeping that “principle” in abeyance through recourse to common lawyerly procedural devices.¹⁸⁴ This was the “secret of the [Court’s] ability to maintain itself in the tension between principle and expediency.”¹⁸⁵ Legal “principles” were thus always to coexist with, indeed should only be realized through, compromise, deferral, and delay. As Bickel put it:

[I]t is not true that in our society we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line. There are exceptions Most often, however, and as often as not in matters of the widest and deepest concern, such as the racial problem, both requirements exist most *imperatively* side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to *affect* the policy of expediency (emphases added).¹⁸⁶

¹⁸¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (New Haven: Yale University Press, 1986) (1962), p. 69.

¹⁸² Bickel, *Least Dangerous Branch*, p. 199.

¹⁸³ Bickel, *Least Dangerous Branch*, p. 236.

¹⁸⁴ Bickel, *Least Dangerous Branch*, p. 155.

¹⁸⁵ Bickel, *Least Dangerous Branch*, p. 69.

¹⁸⁶ Bickel, *Least Dangerous Branch*, p. 64 (emphasis added).

Nothing better exemplifies this position than Bickel's assertion (quoting Brandeis) that "[t]he most important thing we do is not doing."¹⁸⁷ "Not doing" was not, of course, abandoning the legal "principle." It was rather a technique for letting the legal "principle" become "mood," operate as a force of vagueness, ambiguity, and imprecision, act as a kind of slow contagion in the world that could disappear or take hold. Thus: "A sound judicial instinct will generally favor deflecting the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion."¹⁸⁸ We should recognize this for what it is: a use of procedure to let the judge balance continuity and change and to capture the views of the community.

Bickel's emphasis on the salutary vagueness, imprecision and "mood"-like quality of legal "principles," both in their origin and in their application, did not necessarily give rise to consistent readings (one could, at any rate, disagree with him reasonably). *Lochner* and its progeny were dismissed as an error: "Serving this value [*laissez faire*] in the most uncompromising fashion, at a time when it was well past its heyday, five Justices, in a series of spectacular cases in the 1920s and 1930s, went to unprecedented lengths to thwart majority will. The consequence was very nearly the end of the story."¹⁸⁹ But Bickel defended *Brown*: "I would assert that the rightness of the Court's decisions in the *School Segregation Cases* can be demonstrated I would deny, however, that any similar demonstration can be or was mounted . . . to show that a statute setting maximum hours or minimum wages violates fundamental presuppositions of our society."¹⁹⁰ Similarly, ever faithful to Frankfurter, he denied the status of valid legal "principle" to what was increasingly becoming his *bête noire*, the Warren Court's post-1960 voting rights jurisprudence and the one man-one vote rule: "The principle of the *School Segregation Cases* is one that judges may hold and proclaim with present certainty, although pragmatic compromises may remain necessary for a time. But one cannot with like moral confidence proclaim the principle of equal individual representation, holding everything else to be a temporary if necessary evil."¹⁹¹

¹⁸⁷ Bickel, *Least Dangerous Branch*, p. 71.

¹⁸⁸ Bickel, *Least Dangerous Branch*, p. 176.

¹⁸⁹ Bickel, *Least Dangerous Branch*, p. 45.

¹⁹⁰ Bickel, *Least Dangerous Branch*, pp. 237 – 238.

¹⁹¹ Bickel, *Least Dangerous Branch*, p. 192.

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From the mid-1960s until his death, Bickel became increasingly conservative. It is this Bickel that Robert Bork, who served as Solicitor General of the United States the time of Bickel's death, would hail for his contribution to "the reconstitution of a conservative intellectual tradition in this country."¹⁹²

In part, Bickel's conservatism was the result of a visceral reaction to the nihilistic tone of some of the protest movements of the late 1960s and early 1970s. In his last book, *The Morality of Consent* (1975), Bickel quoted from a pamphlet issued by the Yippies

Burn your money. You know life is a dream and all our institutions are man-made illusions, effective only because you take the dream for reality. Break down the family, church, nation, city, economy, turn life into an art form and theater of the soul. What is needed is a generation of people who are freaky, crazy, irrational, sexy, angry, irreligious, childish, and mad . . . who lure the youth with music, pot, and acid . . . who redefine the normal. . . . Burn your houses down and you will be free.¹⁹³

To a Legal Process thinker who had worked so very hard to find responses—namely, the imprecision of law as "mood," the balance between "principle" and expediency—to the problem of law's place in democracy after the loss of its foundations, the Yippies' bold rhetoric, and especially their willingness to throw caution to the winds, embrace an uncompromising stand, and call for wholesale destruction, was nerve-wracking. Bickel's fear and anger are evident in his response.

Our recent revolutionists have offered us hatred. They despise and dehumanize the persons, and they condemn the concerns and the aspirations, of the vast majority of their countrymen. They have offered for the future, so far as their spokesmen have been able to make clear, the Maypole dance and, in considerable tension, if not contradiction, a vision of 'liberated' masses adjuring profit, competition, personal achievement, and any form of gratification not instantly and equally available to all. . . . Suppose millions upon millions of us cannot be persuaded that we would be happier if we freed ourselves of the achievement ethic . . . , have those seized of a higher vision the right to coerce us into conforming to it?¹⁹⁴

¹⁹² Robert H. Bork, "Alexander M. Bickel, Political Philosopher," 1975 *Supreme Court Review* 419 (1975), p. 419.

¹⁹³ Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), p. 140 (quoting Jason Epstein, *The Great Conspiracy Trial* (New York: Random House, 1970), p. 310).

¹⁹⁴ Bickel, *Morality of Consent*, pp. 140 – 141.

For his success in “getting” the 1960s, the historian Laura Kalman tells us, Alexander Bickel was hung in effigy by Yale Law School students.¹⁹⁵

The largest part of Bickel’s ire was directed at the jurisprudence of the later years of the Warren Court. Various developments—massive resistance to desegregation in the South, the complexities of desegregation efforts in the North and, most especially, the revolution in voting rights jurisprudence inaugurated by *Baker v. Carr*—made Bickel question the direction taken by the Court. His frustration took the form of an explicit embrace of the philosophy of Edmund Burke. He began *The Morality of Consent* by describing two traditions that “diverged in response to the impact of the French Revolution on political thought.” These were the contractarian tradition associated with Locke and Rousseau, on the one hand, and the Whig tradition associated with Burke, on the other. The latter, Bickel argued, “is my own model.”¹⁹⁶

For Bickel, the Warren Court of the mid-1960s and after erred precisely by giving up the common lawyerly and modernist method of “mood” that Bickel felt was essential for legal “principles” to take effect. In *The Supreme Court and the Idea of Progress* (1970), originally delivered as the Oliver Wendell Holmes Lectures at Harvard Law School in October 1969, the *leitmotif* of Bickel’s critique of the Warren Court was that the Court “imagine[d] the past and remember[ed] the future.”¹⁹⁷ By this intriguing phrase, Bickel meant that the Warren Court had been thoroughly seduced by a teleological or foundational understanding of history.¹⁹⁸ Such an understanding of history had led the Court to “imagine the past,” in other words, to construct a past for itself that did not correspond to the facts.¹⁹⁹ At the same time, it led the Court to “remember the future,” to work towards bringing into being a future already known, rather than

¹⁹⁵ Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill: University of North Carolina Press, 2005), p. 2.

¹⁹⁶ Bickel, *Morality of Consent*, p. 3. Bickel’s Burkeanism should be associated with the revival of Burkeanism in the post-World War II period. See, e.g., Russell Kirk, “Prescription, Authority, and Ordered Freedom,” in Frank S. Meyer ed., *What is Conservatism* (New York: Holt, Rinehart & Winston, 1964), p. 37.

¹⁹⁷ Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 2nd. ed. (New Haven: Yale University Press, 1978) (1970) p. 13.

¹⁹⁸ This phrase was taken from Lewis B. Namier, *Conflicts: Studies in Contemporary History* (London: Macmillan, 1942), p. 70.

¹⁹⁹ By the time of *The Supreme Court and the Idea of Progress*, Bickel was even accusing his heroes, Brandeis and Frankfurter, of “imagining the past.” He put it thus: “But Brandeis and Frankfurter, while democrats and pragmatists, were also moralists and reformers. They tried valiantly to avoid getting caught in the old medieval enterprise, and to find the necessary revealed truths by the method of reason elsewhere than in themselves. They sought the truths they needed in the past. Like the eighteenth century philosophers, they soon saw, however, that the past had to be imagined if it was to be of any use.” Bickel, *Supreme Court and the Idea of Progress*, pp. 23 - 24.

one that could unfold on its own terms. The Court's embrace of teleological history was doing violence to the manifold complexities of past, present, and future that Bickel felt could only be approached through the poetic, proceduralist, and common lawyerly modality of "mood."

What was the animating logic of the Warren Court's teleological history, according to Bickel? In the opening chapter of *The Supreme Court and the Idea of Progress*, entitled "The Heavenly City of the Twentieth Century Justices" (a riff on the title of the historian Carl Becker's well-known 1932 history of the eighteenth century philosophers, *The Heavenly City of the Eighteenth Century Philosophers*), Bickel contemptuously characterizes the Court's historical teleology as follows:

The Justices of the Warren Court thus ventured to identify a goal. It was necessarily a grand one—if we had to give it a single name, that name . . . would be the Egalitarian Society. And the Justices steered by this goal . . . in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably.²⁰⁰

In subscribing to this overtly foundational philosophy, the Warren Court was engaged in a "heedless break with the past . . ." ²⁰¹ At the same time, Bickel complained about "the rate at which the Court has wreaked itself upon . . . society . . . and the rate at which . . . society as a whole seems to be hurtling towards its future."²⁰² An altogether excessive number of legal "principles" was now being deployed to strike down democratically-generated legislation. "Principles" had to be few in number, Bickel insisted, and had to be defined in the "narrowest possible compass."²⁰³ They had to be "coherent, analytically warranted, principled declarations of general norms . . ." ²⁰⁴ From the Burkean standpoint that Bickel was increasingly coming to adopt, the Court appeared, like the French Revolutionaries, always to be indulging in "some luxuriant outburst of theory."²⁰⁵ Indeed, the Court of *Griswold v. Connecticut* (1965), which struck down anti-contraception legislation, was not that different in its overreaching from the *Lochner* Court, which had struck down labor laws: "On a linear plane we are not so far from where we started."²⁰⁶

²⁰⁰ Bickel, *Supreme Court and the Idea of Progress*, pp. 13 – 14.

²⁰¹ Bickel, *Supreme Court and the Idea of Progress*, p. 87.

²⁰² Bickel, *Supreme Court and the Idea of Progress*, pp. 100.

²⁰³ Bickel, *Supreme Court and the Idea of Progress*, p. 95.

²⁰⁴ Bickel, *Supreme Court and the Idea of Progress*, pp. 96.

²⁰⁵ Bickel, *Morality of Consent*, p. 24.

²⁰⁶ 381 U.S. 479 (1965); Bickel, *Supreme Court and the Idea of Progress*, p. 41.

Nothing secured society from convulsive change better than scrupulous attention to procedure, which, as we have seen, had become the very ontology of law. Procedural safeguards, Bickel argued, “were relatively well-defined by a less than usually imagined past.”²⁰⁷ In *The Morality of Consent*, Bickel wrote in defense of the “hard-core of procedural provisions, found principally in the Bill of Rights” that possessed a “relative definiteness of terms” and “definiteness of history.”²⁰⁸ The Warren Court had congratulated itself for “cutting through legal technicalities, in piercing through procedure to get to substance. But legal technicalities are the stuff of law, and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is.”²⁰⁹

Even as Bickel was attacking the Warren Court for its seemingly wanton disregard of procedure and process, however, the Warren Court “revolution” was in important part a revolution of procedure and process rather than of substance. Many of those writing in the late 1960s and early 1970s would see in the *oeuvre* of the Warren Court precisely an instantiation of Legal Process theory. Writing in 1974, Bruce Ackerman wrote that, “[w]hile it is far too soon to comprehend fully how this emphasis on process will ultimately affect the law in practice, there can be little doubt that its impact has already been profound.”²¹⁰ Ackerman pointed to the various efforts of the Warren Court that had been directed at fixing defective legal and political processes. As he put it: “the political process, the criminal process, and, more recently, the processes of civil and administrative litigation have been revolutionized to assure at least some access for all citizens.”²¹¹ Indeed, some progressives might even have been disappointed by the Court’s preference for doling out procedural protections instead of substantive ones. For example, in the landmark case of *Goldberg v. Kelly* (1970), the Court acknowledged that “[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”²¹² Notwithstanding such

²⁰⁷ Bickel, *Supreme Court and the Idea of Progress*, p. 32.

²⁰⁸ Bickel, *Morality of Consent*, p. 29, quoting Felix Frankfurter, *Law and Politics* ed., Edward F. Prichard, Jr. and Archibald MacLeish (New York: Harcourt, Brace & Co., 1939), pp. 10, 12.

²⁰⁹ Bickel, *Morality of Consent*, p. 121.

²¹⁰ Bruce A. Ackerman, “‘Law and the Modern Mind’ by Jerome Frank,” *Daedalus*, Vol. 103: 119 – 130 (1974), p. 123.

²¹¹ Ackerman, p. 124. For a discussion of attempts to open up the administrative process to outsiders, see Reuel E. Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945 – 1970,” 53 *Vanderbilt Law Review* 1389 (2000); Schiller, “‘Saint George and the Dragon,’” 17 *Journal of Policy History*, at 119 – 120.

²¹² *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

rhetoric and the vigorous welfare rights movement of the late 1960s, however, federal courts never ruled that welfare was a substantive constitutional right. *Goldberg* required only that welfare recipients threatened with termination of benefits be provided “minimum procedural safeguards”: adequate notice, the right to be heard in a pretermination hearing, the right to confront adverse witnesses, the requirement that the decision be based on the evidence adduced.²¹³

Neither was it so clear that the Warren Court always operated in ways contrary to Frankfurterian common lawyerly and “mood”-like modes. Michael Klarman’s masterful discussion of the *Brown* case makes this clear at least in the context of school segregation in the 1950s. While *Brown v. Board of Education (Brown I)* declared that mandatory school segregation was unconstitutional, when it came to the remedies (*Brown II*), Klarman argues, the Court deliberately opted for vagueness and imprecision in order to appear accommodating to the segregationist South.²¹⁴ The results might have been disastrous—and the Court hardly saved itself from virulent criticism—but Klarman’s argument is that the Court attempted to create what Bickel might call a desegregationist “mood” and to let matters unfold. It is surely noteworthy that, as the Court pondered the remedy to be afforded in *Brown*, Felix Frankfurter was insisting that “how we do what we do in the Segregation cases may be as important as what we do.”²¹⁵

Even in the charged area of voting rights, some would also argue that the Warren Court was acting precisely as a common law court might do, sensing where the sentiments of the community lay and articulating them before the community itself was able to. Commenting on *Baker v. Carr* (and contrary to what many Legal Process scholars argued), the Harvard political scientist Robert McCloskey suggested that courts might be better positioned than legislatures to fix broken processes: “There is a vast difference between the question whether the constituent power has had a fair opportunity to make a decision and the question whether the decision itself was substantively fair. It is comparable to the difference between asking whether a man had a fair hearing before he was hanged and asking whether it was just whether to hang him at all. The one question is the kind that courts can handle as well, and sometimes better, than the ‘political’

²¹³ *Goldberg v. Kelly*, 397 U.S. at 267.

²¹⁴ Michael J. Klarman, *Brown v. Board of Education and the Civil Rights Movement* (New York: Oxford University Press, 2007), Chapter 4.

²¹⁵ Quoted in Klarman, *Brown v. Board of Education*, p. 81.

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agencies of government.”²¹⁶ At the same time, however, McCloskey turned Frankfurterian common lawyerly arguments about “mood” and “feel” on their head when he observed: “The tendency suggested by early reactions to the reapportionment decision . . . may warrant the conjecture that the Court here happened to hit upon what the students of public opinion might call a latent consensus.”²¹⁷

VI. CONCLUSION

The Burger Court continued the focus on process in matters of constitutional law. William Eskridge and Philip Frickey have written of the Burger Court’s emphasis on standing, mootness, and ripeness as “procedural techniques to postpone or deflect hard substantive issues.”²¹⁸ Perhaps the grandest summation of Legal Process theory as applied to constitutional law, one that sought to read the entire Warren Court *oeuvre* as an instantiation of the theory, was John Hart Ely’s *Democracy and Distrust* (1980). Ely’s rendering came down to the following: “the general theory is one that bounds judicial review under the Constitution’s open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.”²¹⁹ To be sure, various substantive doctrines would be subsumed within the idea of processes of participation, which it was the Court’s duty to protect.

Even as Ely was writing, however, Legal Process theory had begun to slip in prestige and dominance. Critics of the Legal Process school argued that the distinction between substance and procedure could simply not hold up. In the 1970s and 1980s, critiques of process theory that

²¹⁶ Robert G. McCloskey, “The Supreme Court: 1961 Term: Foreword: The Reapportionment Case,” 76 *Harvard Law Review* 54 (1962), p. 74.

²¹⁷ McCloskey, “The Supreme Court: 1961 Term: Foreword,” pp. 58-59.

²¹⁸ As examples, they point to *Allen v. Wright*, 468 U.S. 737 (1984); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *O’Shea v. Littleton*, 414 U.S. 488 (1974); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (*per curiam*). See Eskridge & Frickey, “Historical and Critical Introduction,” in Hart & Sacks, *Legal Process*, p. cxvi, footnote 294.

²¹⁹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), p. 181. For Ely’s sense that the Warren Court’s work was an instantiation of the logic of the *Carolene Products* footnote, see Ely, *Democracy and Distrust*, p. 75. See also Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980).

followed this line of argument abounded.²²⁰ Here, by way of example, I shall focus on Harvard Law School professor Richard Parker's trenchant critique of John Hart Ely's work in an essay entitled "The Past of Constitutional Theory—And its Future" (1981). Parker wrote of the dominance of process theory during his student days: "When we first studied constitutional law—sometime around a decade ago—the conventional theory that I have described was pretty much all we were given in the way of constitutional theory. And, even at that, it was still at a relatively nebulous stage of development. Without any apparent alternative to it, without any very clear sense of its defining contours, we were trapped inside it. Controversies about subsidiary issues like the justification of judicial review, judicial 'activism' versus 'deference,' 'neutral principles,' 'balancing,' and so forth took up our energy."²²¹ In his brief essay, Parker offered a devastating deconstruction of the distinction between "process" and "substance," echoing the disillusionment with the pluralist democratic theories of the 1950s that American political scientists had been expressing since the 1960s (discussed in the next essay). Parker asked what it meant to place faith in the political process when the country's substantive inequalities were so profound that the majority of Americans were either unable or unwilling to participate. To structure a theory of judicial review as Ely had done premised on the correction of political processes that excluded "discrete and insular" minorities was to ignore how the country's political processes effectively excluded the majority itself. Parker's judgment was harsh: "When closely examined, . . . [process theory] turns out . . . to be an exercise in apologetics. Proceeding from the conventional assumption that our polity may sometimes malfunction, but is otherwise basically sound, it obscures our biased, withered politics in a fog of apologetic rhetoric."²²²

By the time Parker was writing, as is well known, other movements in legal theory—the rights-based jurisprudence of Ronald Dworkin, law and society, law-and-economics, and Critical Legal Studies—were also on the ascendant. A conservative legal movement, the efforts of which would bear fruit in the twenty-first century, was also under way. It is worth noting that, in the 1970s and 1980s, the common law tradition would remain crucial for the major antagonists in law

²²⁰ See, e.g., Mark Tushnet, "Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies," 57 *Texas Law Review* 1307 (1979); Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," 89 *Yale Law Journal* 1063 (1979 - 1980); Paul Brest, "The Substance of Process," 42 *Ohio State Law Journal* 131 (1981).

²²¹ Richard D. Parker, "The Past of Constitutional Theory—And its Future," 42 *Ohio State Law Journal* 223 (1981), p. 235 – 36.

²²² Parker, "The Past of Constitutional Theory," p. 253.

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schools, namely, Critical Legal Studies and law-and-economics. Critical Legal Studies scholars would find in the common law a fertile ground for working out their critiques of law, just as law-and-economics scholars would argue that the traditional common law best realized the teachings of economics.²²³ But the larger point is that neither one of these rival schools was able entirely to move past the turn to process that followed upon the attack on law's foundations in the decades around 1900. They might reject the mid-twentieth century turn to process and procedure as a kind of refuge from the dissolving forces of history, but they could not cease, by virtue of that rejection, to think of law as a means. It is fitting, then, to close with an observation by Duncan Kennedy that appears near the end of his well-known 2006 "Three Globalizations" essay: "Even in Clausewitz's famous formulation, war is politics *by other means*, not 'just' politics. . . . *If law is politics, it is so, again, by other means, and there is much to be said, nonreductively, about those means.*"²²⁴

²²³ See, e.g., Duncan Kennedy, "The Structure of Blackstone's *Commentaries*," 28 *Buffalo Law Review* 205 (1979); George L. Priest, "The Common Law Process and the Selection of Efficient Rules," 6 *Journal of Legal Studies* 65 (1977).

²²⁴ Duncan Kennedy, "Three Globalizations of Law and Legal Thought," in David M. Trubek & Alvaro Santos eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), p. 72 (emphasis added).