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An Institutional Approach to Legal Indeterminacy

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Michael C. Dorf*

Abstract

For over a generation, academic jurisprudence and constitutional theory have attempted to reconcile, on the one hand, the rule of law and the Constitution's fundamentality with, on the other hand, the fact that legal and constitutional rules frequently do not produce determinate answers to concrete controversies. The approach of radical democrats who would abandon judicial review is unacceptable to all those who believe that some judicially enforceable limits on politics are needed to prevent majoritarian tyranny. At the same time, however, constitutional theories that attempt to justify judicial review have limited utility; at best they strike a compromise between the tyranny of the majority and the counter-majoritarian difficulty. Academic jurisprudence faces a parallel dilemma. Under close scrutiny, both positivism and its principal alternative turn out to adopt the same strategy for coping with legal indeterminacy: each claims that the law's areas of ambiguity are small; yet neither theory nor any of the leading approaches to constitutionalism proposes concrete measures to minimize the impact of legal indeterminacy.

Drawing inspiration from the Legal Process approach of Hart and Sacks, this Article proposes that instead of devising justifications for judicial review or explanations of the task of judges, theorists would do better to design institutions that reduce the domain of legal indeterminacy. Where Hart and Sacks proposed deference to politically accountable actors, however, this Article advocates deep collaboration with the other institutions of government. Departing from the Legal Process assumption that courts must defer to one of a fixed menu of institutions, this Article develops a model of "experimentalist" courts and agencies that are always in transition. That model is based in part on the explosive emergence of "problem-solving courts," nominally judicial bodies that are more akin to decentralized administrative agencies than to conventional adjudicators. The model is also based on some hints in Supreme Court doctrine that suggest a role for appellate courts in using the opportunity of legal indeterminacy to create the pre-conditions for local deliberation about the content of legal norms.

* Professor of Law, Columbia University School of Law. This Article emerged out of numerous discussions and an ongoing collaboration with Charles Sabel, whom I credit as a co-author of many of the ideas and even some of the prose contained herein, except of course that all errors are my own. I am also very grateful to Jean Cohen, Jamison Colburn, Barry Friedman, Archon Fung, Bradley Karkkainen, Dara O'Rourke, Susan Sturm, William Simon, and Jeremy Waldron for helpful comments and suggestions, and to Candice Aloisi, Laura Faer and David Gold for excellent research assistance.

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I. Introduction

Nearly simultaneously but nearly independently, academic jurisprudence and constitutional theory have run into the same dead end. For law in general and a constitution in particular to be legitimate requires, at a minimum, that they grow from procedures or rest on principles that are, if not universally recognized as legitimate, at least widely acknowledged as such. But in practice it is exceptionally difficult to establish such legitimating procedures or principles for two reasons: complexity and moral diversity. Even if there can be agreement on high order procedures—such as “count every vote”—or principles—such as “treat people equally”—the maddening complexity of the world and the fact of moral pluralism often render agreement on specifics impossible.

For over a generation, the debates in jurisprudence and constitutional theory have struggled to reconcile the fact of considerable legal indeterminacy with, respectively, law generally and constitutional legitimacy in particular. In its bare essentials, the problem can be formulated as follows: If the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require; similarly, if the content of a constitutional right (or other constitutional provision) can only be determined by extensive deliberation, then the Constitution does not entrench rights (or other principles) in the sense of providing foundational assurances.

Put another way, indeterminacy opens the way to discretion, and both the law and the Constitution are meant to be the master, not the servant, of authoritative caprice. Otherwise, why bother writing down the law or the Constitution? Yet we must, and in

fact we do, have a legal order—in the sense of a more-or-less functioning democracy, more-or-less constrained by fundamental rights and the rule of law. Thus, jurisprudence and constitutional theory have come to an impasse.

This Article denies that much progress can be made by further theorizing about the nature of law and constitutions as they are, as opposed to re-imagining legal and constitutional institutions. Although the basic structures of American government are virtually unamendable,¹ there remains considerable room for creative thinking about how law can serve the people. The rise of the administrative state in the twentieth century, after all, occurred without formal amendments to the constitutional text, even though its opponents saw the transformation as a betrayal of the Constitution’s twin structural pillars of federalism and separation of powers. Courts have not been and should not be expected to be the leading players in matters of institutional design, but neither are courts irrelevant. In the case of the administrative state, they (eventually) acquiesced to the New Deal,² while in other instances—such as the democratization of state democratic processes in the apportionment decisions³—courts were the leading actors. The lesson of these great changes is that the current stalemate is a peculiarity of our time, not an inevitable feature of our system of government or the nature of law. Asking why theory has reached its current standstill points the way toward more fruitful questions of institutional design.

¹ See Robert Alan Dahl, *How Democratic is the American Constitution?* (2002) (answering, in essence, “not very” to the question posed by the book’s title).

² In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court accepted a broad view of Congressional power under the Commerce Clause, while in *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935), the Court accepted that an executive agency exercising quasi-legislative and quasi-judicial powers could be insulated from Presidential oversight.

³ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

But to understand how we have reached the current impasse requires that we first ask what became of the last great synthesis. Today, constitutional theory and jurisprudence are generally conceived as distinct fields. Jurisprudents consider themselves philosophers specializing in law, while constitutional theorists tend to be law professors developing approaches to constitutional interpretation by abstracting from their experience working with concrete doctrinal questions. To be sure, the disciplines are not hermetically sealed: some thinkers—such as Ronald Dworkin and Jeremy Waldron—are active in both fields, occasionally conceptualizing constitutional interpretation as a specific application of general principles. But for the most part, the two bodies of literature do not talk with one another, even though both constitutional theory and jurisprudence address the same central problem of domesticating discretion.

Not all that long ago, however, constitutional theory and academic jurisprudence were understood as the same enterprise, an effort to account for and legitimate law, given two conflicting impulses. On the one hand, in the wake of legal realism, the notion that judges mechanically apply a disembodied entity called the law was untenable. Yet on the other hand, in the wake of Nazism, fascism, and communist totalitarianism, Americans and others in the democratic West were understandably unwilling to let go of the idea of using law not only to regulate private actors but also to circumscribe government power itself.⁴

Scholarship of the post-World-War-II era wrestled with the conflicting impulses engendered by legal realism and totalitarianism. In the American legal academy, the

⁴ Even amidst our current fears of terrorism, we hear virtually no voices calling for the abandonment of constitutional limits on government power, although we do hear calls for a re-interpretation of those limits to allow for (in some instances, very much) greater restrictions on liberty in the name of order than were formerly thought permissible.

response was a synthesis that lasted for nearly two decades, and has continuing influence even today. That synthesis was the “Legal Process School,” which took its name from a set of teaching materials for a Harvard Law School course offered by Henry Hart and Albert Sacks in the 1950s and 1960s.⁵ It aimed to show how the legal process—including constitutional as well as sub-constitutional elements, public law and private law—domesticated judicial and other forms of official discretion. *The Legal Process* portrayed the master task of the judge as allocating decision-making authority among competing institutions in recognition of the judiciary’s own limitations. Those limitations were captured by the concept of *institutional settlement*, which holds that judges should defer to decisions taken by other actors, so long as those decisions are reached according to fundamentally fair procedures.⁶

The Hart and Sacks synthesis broke down under two sets of pressures. First, *Brown v. Board of Education*⁷ and the civil rights revolution that it catalyzed revealed that beneath the placid surface of the American institutional settlement lay grievances that could not be addressed by adjusting the allocation of power among existing institutions, especially given that these institutions were themselves implicated in oppression. Second, what Hart and Sacks billed as the light hand of market-perfecting regulation came to be seen by critics of the administrative state as bureaucratic shackles. Thus, under attack from both the left and the right, and seemingly outpaced by events, the Hart and Sacks synthesis shattered into fragments.

⁵ See Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. and Philip P. Frickey, eds. 1994) (prepared from the 1958 Tentative Edition).

⁶ See *id.* at 4.

⁷ 347 U.S. 483 (1954).

In private law, the utilitarian impulse that had informed *The Legal Process* was channeled into the hard-edged law and economics movement, while the commitment to principled adjudication spawned “internal” accounts of the law. No longer confident in the ability of judges or other actors to co-ordinate vast swaths of activity, the increasingly academically oriented post-*Legal Process* scholars of private law contented themselves with working out the internal logic of particular fields, such as torts or contracts,⁸ while either succumbing to or resisting the imperialism of law and economics.⁹

Meanwhile, the task of explaining what distinguished law from the exercise of raw power was parceled between academic jurisprudence and the emerging field of constitutional theory. The latter sub-discipline was only just emerging in the 1960s because the post-New Deal institutional settlement gave judges only an extremely limited role in constitutional matters. The canonical lesson that New Dealers like Felix Frankfurter and (for a time anyway) Hugo Black drew from the excesses of the pre-1937 Court was that courts should defer to legislatures, full stop.¹⁰ But with each new decision of the Warren Court, progressive constitutional scholars in the legal academy found the New Deal settlement increasingly inadequate, and it is barely an exaggeration to say that

⁸ See, e.g., Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (2001) (torts).

⁹ For the classic manifesto of the law-and-economics movement in torts, contracts, and beyond, see Richard Posner, *Economic Analysis of Law* 6 (1st ed. 1972) (describing both the normative and descriptive role of economic analysis of law). For an example of an early account of torts that was strongly guided by economic analysis, see Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 135 (1st ed. 1970). For a recent account of torts that resists the siren song of law and economics, see Coleman, *supra* note 8.

¹⁰ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 649-67 (1943) (Frankfurter, J., dissenting) (urging deference to political actors wherever reasonable minds might differ, even with respect to assertedly fundamental rights such as freedom of speech and conscience); *Griswold v. Connecticut*, 381 U.S. 479, 523 (Black, J., dissenting) (1965) (protesting that prior to the majority’s decision, the post-New Deal Court had “returned to the original

the only question of constitutional scholarship over the last half century is how we can justify decisions like *Brown v. Board of Education*,¹¹ *Reynolds v. Sims*,¹² and (in some accounts) *Roe v. Wade*,¹³ without also justifying decisions like *Lochner v. New York*,¹⁴ *Dred Scott v. Sandford*,¹⁵ and (in most of those same accounts) *Bush v. Gore*.¹⁶ Numerous answers have been proposed, but none has satisfied more than its proponent and a handful of fellow travelers.

If academic jurisprudence in this same period has seemed less fraught, that is only because it deals in what, from the vantage of outsiders, must appear to be desiccated abstractions. At bottom, however, the question that Ronald Dworkin posed to H.L.A. Hart—*Where is the place of principles in your account of law as a system of rules?*¹⁷—raises the same fundamental issue (or at least its mirror image) with which constitutional theory has struggled: Once we acknowledge with Dworkin that relatively indeterminate principles inevitably form a substantial portion of what we know as the law, how can we render legitimate judicial decisions taken in the name of law but decided in substantial measure by the judge himself?¹⁸

constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”)

¹¹ 347 U.S. 483 (1954).

¹² 377 U.S. 533 (1964).

¹³ 410 U.S. 113 (1973).

¹⁴ 198 U.S. 45 (1905).

¹⁵ 60 U.S. 393 (1856).

¹⁶ 531 U.S. 98 (2000).

¹⁷ See Ronald Dworkin, *Taking Rights Seriously* 59 (1977) (suggesting that he had “shown that any fundamental test for law, if it is to include principles as well as rules of law, must be more complex than the examples Hart offers as specimens of a rule of recognition.”)

¹⁸ This, to be sure, is not Dworkin’s own question, but as Part III explains, his work urgently asks it.

This Article argues that thinkers in academic jurisprudence and constitutional theory have run out of creative answers to this, their shared fundamental question. It observes two basic limitations in the current debate.

First, where Hart and Sacks saw the law as a method of coordinating society's capacities to solve problems, and thus understood their job as one of describing how various legal actors communicate with one another, much of the contemporary debate focuses on how some single decision maker goes about his solitary task. Dworkin's panoptic Hercules, isolated on Mount Olympus, is only the most obvious example of this attitude. A return to the Hart and Sacks focus on the interaction of varied actors as the heart of the legal process is long overdue.

Second, contemporary debate also reflects a limitation of the Legal Process method itself. For all of their sophistication about interactions among various institutions, Hart and Sacks assumed that in the original Madisonian architecture as supplemented by the New Deal administrative state, the United States had generated all of the institutions necessary to resolve the conflicts likely to emerge. Perhaps this assumption was tenable in the early 1950s, but it did not remain so for very long.

The assumption that sound policy and sound legal decision making are simply matters of allocating authority among a fixed menu of institutions is linked in the Hart and Sacks method (and in the work that has followed it) to a further assumption—that the appropriate means and ends of public institutions are more or less fixed. For example, administrative agencies and courts take their ends as given from outside, from either the legislature or the Constitution. And the means available to each institution are exactly what fixes the institution. A court is an arena of reason-giving, so a court resolves issues

by that means: reason-giving. A legislature is an arena in which the means of deciding questions is by voting; an agency by applying expertise; and so on. What is not explored in the Hart and Sacks materials is the possibility that means and ends might be reciprocal—in a continual state of disequilibrium.

This Article argues that the way past the current impasse is to return to Hart and Sacks's commitment to a legal decision-making process that is deeply informed about the institutions with which legal actors interact, while at the same time jettisoning the Legal Process view that the ends and means of governmental institutions are largely static. When faced with gaps in the law, judges need not simply choose between the Scylla of deference and the Charybdis of usurpation. Instead, there are forms of institutionalizing the exploration of indeterminacy that can subject it to legal and constitutional discipline, even while extending the scope of possibilities explored.

Parts II and III of this Article re-tell the story of post-War constitutionalism and jurisprudence as grappling unsuccessfully with what I shall call the *indeterminacy problem*: *law* differs from *will* in that law is abstract,¹⁹ but the law's very abstraction limits its ability to guide concrete decisions taken in the law's name. This is no mere analytic problem. Law speaks in abstract terms for a variety of quite practical reasons: because the lawmakers wished to delegate authority to those charged with administering the law; because of the sheer impossibility of anticipating every contingency; or because consensus could not be secured on more specific language.

This last source of ambiguity is particularly problematic for constitutional interpretation. Given profound disagreement, any foundational set of procedures or

¹⁹ See Friederich A. Hayek, *The Constitution of Liberty* 148-61 (1960).

principles sufficiently abstract to secure consensus and thereby work their way into a popularly chosen constitution will be too abstract to resolve the most acute subsequently-arising constitutional controversies.²⁰ Part II catalogues the largely unsuccessful efforts of constitutional theorists over the last half-century to solve or circumvent the indeterminacy problem.

Part III addresses the parallel failure in academic jurisprudence. The indeterminacy problem in academic jurisprudence can be seen in the debate over how to understand the legal role played by open-ended, i.e., general, principles. In the process of showing how the indeterminacy problem has thwarted progress in academic jurisprudence, Part III draws attention to a previously-overlooked connection between the work of H.L.A. Hart and that of (Henry) Hart and Sacks.

This last linkage serves as the bridge to the affirmative project, which is the subject of Part IV. Elsewhere, Charles Sabel and I have described an emerging ensemble of new public problem-solving institutions that together comprise what we call “democratic experimentalism.”²¹ In democratic experimentalism, local units of government are broadly free to set goals and to choose the means to attain them. Within these units, citizens²²—acting as individuals, through stakeholder organizations, and

²⁰ For an excellent account of the indeterminacy problem in constitutional interpretation, using somewhat different terminology, see Frank I. Michelman, *Brennan and Democracy* 5, 48-51 (1999) (describing the “paradox of constitutional democracy”).

²¹ Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

²² Most rights protected by the U.S. Constitution are held by “persons” rather than the narrower category of “citizens.” Compare U.S. Const., Amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”) with *id.* (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”). I use the term “citizen” in the text to indicate that the rights at issue include rights of political participation, which, consistent with existing doctrine, may be limited to citizens. See, e.g., *Foley v. Connelie*,

through (relatively) local elected officials—engage in a form of practical deliberation that permits the discovery of novel solutions to their shared problems, thereby at least partially relaxing the grip of familiar political animosities, though in the process opening the way to new conflicts—and in any case not tending to pacification or complete harmonization of interests. Concurrently, legislative bodies or regulatory agencies use the pooled experience of relatively local actors to set and ensure compliance with framework objectives. These framework objectives shape and in turn are shaped by means of performance standards based on information about current best practices that regulated entities provide in return for the freedom to experiment with solutions they prefer. Although nowhere fully realized, Sabel, myself, and others have argued that the ideal of democratic experimentalism bears a sufficient similarity to the emerging institutions to warrant studying them as a group.²³

435 U.S. 291, 296 (1978) (“it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions.”). I do not mean to deny that many of the rights of citizens are also rights of non-citizens.

²³ See Charles F. Sabel et al., *Beyond Backyard Environmentalism*, in *Beyond Backyard Environmentalism* 3, 8-9 (Joshua Cohen & Joel Rogers eds., 2000); Dorf and Sabel, *supra* note 21; Michael C. Dorf and Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831, 831-83 (2000); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, *Politics and Society*, Vol. 29, No. 1 (March 2001); Bradley C. Karkkainen et al., *After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Protection*, 44 *Am. Behavioral Scientist* 692, 705-08 (2000); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *Geo. L.J.* 257 (2001); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *Colum. L. Rev.* 903 (2002); Archon Fung et al., *Realizing Labor Standards*, *Boston Review*, Feb./March 2001, available at <http://bostonreview.mit.edu/BR26.1/fung.html>; Archon Fung, *Street Level Democracy*, presented at the American Political Science Assoc. Annual Meeting (August 1999), available at wywsiwyg://72/http://www.archonfung.net/docs/index.htm; James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, at <http://www.law.columbia.edu/sabel/papers.htm> (last visited June 1, 2003); Charles F. Sabel, *Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions* (Feb. 28-29, 2000) (paper presented at The Conference on Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations) available at

Courts too play an important role in this emerging architecture. Experimentalist trial courts, sometimes called “problem-solving courts,”²⁴ are structured along the same lines as their administrative counterparts. For example, drug courts, to date the most widespread exemplars of problem-solving courts, serve primarily to monitor the performance of defendants and treatment providers. As I explain below, the affinity of experimentalist courts with (experimentalist) agencies means that there are fewer occasions for the judiciary to confront the indeterminacy problem, even as it raises concerns about why courts are needed at all.²⁵

Experimentalist appellate courts, as I model them, differ in a crucial respect from constitutional and other courts as conventionally understood within the academic debate: when experimentalist courts must resolve the most contentious questions the legal system poses, they give deliberately incomplete answers. Thus, in prospect at least, the experimentalist appellate courts that declare rights based on irreducibly ambiguous authority deliberately include ambiguity in their own pronouncements by announcing frameworks for resolution, rather than anything like comprehensive blueprints. They declare, for example, that employers are vicariously liable for sexual harassment by their employees absent an adequate program of prevention and remediation, but they leave to

<http://www.law.columbia.edu/sabel/papers/Design.html>; Charles F. Sabel & Rory O’Donnell, *Democratic Experimentalism: What To Do About Wicked Problems after Whitehall (and What Scotland May Just Possibly Already be Doing) Part 6* (Feb. 28-29, 2000) (paper presented at the OECD Conference on “Devolution and Globalization: Implications for Local Decision-Makers”), at <http://www.law.columbia.edu/sabel/papers/glasPO.html> (on file with the North Carolina Journal of International Law and Commercial Regulation). For a summary and critique, see William H. Simon, *Solving Problems Versus Claiming Rights: The Pragmatist Challenge to Legal Liberalism* (draft on file with author) (describing the “Columbia School” of legal pragmatism).

²⁴ See *infra*, Part IV(A).

²⁵ See *infra*, Part IV(B).

employers in the first instance the task of formulating such programs.²⁶ Or they announce that criminal suspects are entitled to safeguards to prevent undue coercion in interrogation but leave to local determination the decision of what safeguards to employ.²⁷ As these examples drawn from Supreme Court precedents illustrate, pragmatist principles sometimes inform current practice, so that the transformation envisioned here does not require wholesale reinvention.

But can it be that the solution to the problem of ambiguous constitutional and other legal texts is for the courts themselves to render ambiguous decisions? Yes and no. Obviously, courts can avoid the charge of arbitrariness by declining to resolve contests over constitutional meaning, leaving politicians and legal actors to supply their own interpretations. But whether this approach goes under the heading of the “thin constitution,”²⁸ or “minimalism,”²⁹ it is not so much a solution to the problem of ambiguity as a surrender to it.

²⁶ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (holding “that an employer is vicariously liable for actionable [sexual harassment] caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim”); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (same). For an account of these decisions as nascently experimentalist, see Michael C. Dorf, *The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 78-79 (1998). See *infra*, Part IV(D)(1).

²⁷ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.”); *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (citing *Miranda* for this proposition). This understanding of *Miranda* is advanced in Michael C. Dorf and Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61 (2001), as well as Dorf and Sabel, *supra* note 21 at 452-57. See *infra*, Part IV(C)(2).

²⁸ Mark Tushnet, *Taking the Constitution Away from the Courts* 9-14 (2000).

²⁹ In recent years, Cass Sunstein has championed minimalism. See, e.g., Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, at ix (1999); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996). His prescription for courts to

Accordingly, in declining to provide comprehensive solutions, experimentalist courts are in some sense “minimalist,” but their role is not merely *less* than that of conventionally understood courts; it is also substantially *different*.³⁰ Experimentalist appellate courts self-consciously rely on the participation of effected actors to explore the implications of the framework rules that they create, and use the record of such actors’ efforts continually to refine such framework rules.³¹

My proposed “solution” to the twin problems of complexity and moral diversity is necessarily a partial one. Inevitably, even framework rules revised in light of experience will conflict with some citizens’ views, values or policy preferences. Some will think, for example, that any application of the Fifth Amendment right against self-incrimination to police practices (as opposed to in-court testimony) is unwarranted. Others will object to any inference of a prohibition on sexual harassment from a statute prohibiting (only) sex discrimination. No degree of attention to institutional detail will resolve stubborn disagreement over first-order moral questions. Yet one should not underestimate the power of direct deliberation among citizens of diverse backgrounds and views to produce workable accommodations—and even to prompt rethinking of seemingly unshakeable

leave matters undecided sometimes works in constitutional law, where there is a clear default rule: if the Constitution has nothing to say on a subject, the government may do what it wants. However, in other areas of law, such as the myriad (often-ambiguous) rules governing relations among private actors, there is no such default. When conflict arises, it takes an affirmative decision to resolve it.

³⁰ To put this point somewhat tendentiously, C.J. Peters misclassifies me as a minimalist. See C.J. Peters, *Assessing The New Judicial Minimalism*, 100 Colum. L. Rev. 1454 , 1468-1520 (2001).

³¹ This statement is partly descriptive and partly aspirational. As noted above, there is now a budding movement of problem-solving courts, in which the actors, including judges, see their roles in experimentalist terms. For the most part, however, that attitude remains confined to trial judges—so that problem-solving courts have not to date much grappled with the question of how to extend the experimentalist outlook to the law-creating appellate level. See generally, *infra*, Part IV.

first-order beliefs. Yes, some fundamental differences will remain. Moral diversity and complexity are facts of life. The question is what one does about these facts.

Parts II and III of this Article argue that legal ambiguity and its consequences cannot be swept under the rug. Part IV contends, however, that this fact should not occasion willful blindness or despairing of the possibility of law. Rather, it should invite consideration of the institutional structures best suited to fleshing out the details of ambiguous legal texts given commitments to popular sovereignty as well as rights. This Article argues for a particular set of structures, but I hope that even those who remain skeptical of these experimentalist structures will recognize that the problems of constitutional theory and jurisprudence can best be addressed if understood, as they were understood not all that long ago, as problems in institutional design.

II. The Indeterminacy Problem in Constitutional Theory

Most modern theories of constitutional interpretation strive to overcome or circumvent what Alexander Bickel termed the “counter-majoritarian difficulty.”³² In

³² Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). It has been suggested that in fact the United States Supreme Court only occasionally acts in a counter-majoritarian fashion, more commonly reaching results that closely parallel public opinion. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957) (“the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 590-609 (1993) (noting that constitutional doctrine typically turns to majoritarian sources to define rights and that the substance of rights and that some of the Supreme Court’s most popular decisions have had majority support); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 Va. L. Rev. 1, 6 (1996) (challenging “the myth of the heroically counter-majoritarian Court”). See generally Barry Friedman, *Modeling Judicial Review* (draft on file). But even if the Court is not quite so counter-majoritarian as its critics contend, there remains the problem of justifying those counter-majoritarian decisions it does make. Certainly these decisions are sufficiently numerous that those constitutional theorists who fret about the counter-majoritarian difficulty are concerned about a real problem.

Marbury v. Madison,³³ Chief Justice John Marshall rooted the Supreme Court’s power of judicial review in the very idea of a written Constitution. Article III confers jurisdiction on the Court to decide constitutional cases, Marshall noted, so the judiciary can only be true to its duty “to say what the law is” if it has the power to set aside those acts inconsistent with the “supreme Law of the Land.”³⁴ Yet Marshall’s assumption that this duty entails the power to prefer the judiciary’s interpretation to that of other government actors begs the very question it seeks to answer.³⁵

When the Supreme Court rules that a practice violates the Constitution, it removes the issue from the realm of majoritarian politics, absent the extraordinarily cumbersome process of constitutional amendment. For this reason, Bickel observed that judicial review is “at least potentially a deviant institution in a democratic society.”³⁶ How have theorists responded?

This Part casts the leading theoretical approaches to constitutional law as responses to Bickel’s counter-majoritarian difficulty, or, if you prefer, the indeterminacy problem. Although the Part provides only a bare sketch of each approach, that should suffice to show that no “solution” has been found, if by solution one means an approach to judicial construction of the Constitution that overcomes the indeterminacy problem while remaining true to the basic goals of constitutionalism.

A. Radical Majoritarianism

³³ 5 U.S. 137 (1803).

³⁴ *Id.* at 180.

³⁵ See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 21-22.

³⁶ See Bickel, *supra* note 32 at 128

For some radical democrats, the solution appears straightforward: we must do away with judicial review.³⁷ Citizens of good faith, all professing strong commitments to liberty, equality, and democracy disagree fundamentally over what those commitments entail in practice. For example, they disagree about whether affirmative action remedies denials of equality or itself denies equality, whether women choosing to have abortions exercise their constitutional liberty or abridge a constitutional right to life of fetuses, and whether government support of religion affirms or undermines basic principles of tolerance, to name just three divisive controversies. Where constitutional language is ambiguous, radical democrats assert that it is better to count the votes of the people's legislative representatives than the votes of life-tenured judges.³⁸

Enlisting the indeterminacy problem in his own cause, the radical democrat further observes that the difficulty cannot be overcome by better drafting. The same moral diversity that makes particular judicial interpretations of liberty, equality, and democracy controversial will typically preclude a super-majority consensus from forming on specific constitutional language—and super-majorities are needed to distinguish constitutionalism from the radical democracy these critics prefer. Moreover, even if consensus can be reached on particulars, complexity will often render that consensus

³⁷ See Tushnet, *supra* note 28; Jeremy Waldron, *Law and Disagreement* (1999). Radical democrats take aim at judicial review of the sort practiced in the United States—i.e., constitutional decisionmaking by the courts that cannot be reversed except by a difficult-to-enact constitutional amendment. These criticisms might bear differently on the more modest sorts of judicial review practiced in Canada and the United Kingdom. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *Am. J. Comp. L.* 707 (2001). As used in this Article, the term “judicial review” generally refers to the American practice, which might more properly be termed “judicial supremacy.” See Jeremy Waldron, *Judicial Supremacy*, in Mark Graber (ed.) *Marbury v. Madison: Documents and Commentary* (CQ Press, 2002, forthcoming); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 *N.C. L. Rev.* 773, 783-84 (2002).

irrelevant. For example, a detailed free speech principle will not specifically address technologies not in existence when it is formulated, once again leaving interpreters to revert to general norms.

The radical democrat offers a powerful critique. Nevertheless, the critique has not made, and is unlikely to make, much headway. Americans, like citizens of nearly all of the world's free societies, have come to believe that democracy is consistent with, indeed dependent upon, the existence of a rights-protecting institution that is somewhat independent of ordinary politics. That judgment seems based less on a calculation of the costs and benefits of judicial review—weighing *Dred Scott v. Sandford*³⁹ and *Lochner v. New York*,⁴⁰ say, against *Brown v. Board of Education*⁴¹ and *Gideon v. Wainwright*⁴²—than on a first principle of institutional design. Citizens of modern democracies professing their faith in human rights and constitutions distrust even their own elected legislators to protect the interests of the vulnerable against the appetites of the politically powerful. Judicial review, in this account, is a Ulysses contract, a pre-commitment pact, or hedge, entailing a modest diminution in the principle of majority rule in order to restrain government overreaching. Thus, when Dworkin contrasts a constitutional conception of democracy that includes judicial review with a majoritarian conception that does not,⁴³ he expresses what has become the global conventional wisdom. The radical

³⁸ See Waldron, *supra* note 37, at ch. 5, esp. 90-91 (concluding that judicial decisions are just as “arbitrary” as legislative ones, but less representative).

³⁹ 60 U.S. 393 (1856).

⁴⁰ 198 U.S. 45 (1905).

⁴¹ 347 U.S. 483 (1954).

⁴² 372 U.S. 335 (1963).

democrat sacrifices constitutionalism in the name of democracy and in so doing arguably sacrifices democracy itself.

My point here is not to choose sides in the debate between radical democrats and constitutionalists but to highlight how the radical democrat completely surrenders to the indeterminacy problem. The only decision procedure by which the radical democrat can imagine that courts could resolve disputes over ambiguous text is preference aggregation, and if there is to be preference aggregation, the radical democrat sees no reason to aggregate the preferences of judges rather than legislators acting as conduits for their constituents.⁴⁴

B. Judicial Restraint and Minimalism

The often-praised but rarely-practiced philosophy of judicial restraint is a relatively close cousin of radical democracy. The approach is captured by the doctrinal requirement that courts reviewing legislative acts must accord them a “presumption of constitutionality.”⁴⁵ Where the constitutional text admits of more than one interpretation, courts ought to grant significant weight to the interpretation given to it by officials accountable to the people. James Bradley Thayer articulated this view in the late

⁴³ See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 29-31 (1996) (“[T]he majoritarian process encourages compromises that may subordinate important issues of principle. Constitutional legal cases, by contrast, can and do provoke a widespread public discussion that focuses on political morality.”).

⁴⁴ Given the pathologies identified by Condorcet, Arrow, and Buchanan, one might think that the logical end point of the radical democrat’s argument is government by popular referendum, but (romantic?) fondness for legislative deliberation usually tempers his radicalism in this regard.

⁴⁵ See *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987); *United States v. National Assoc. of Radiation Survivors*, 468 U.S. 1323, 1324 (1984); *United States v. Di Re*, 322 U.S. 581, 585 (1948).

nineteenth century,⁴⁶ and virtually all commentators on constitutional law have endorsed some version of it. In strong form, the position amounts to nearly complete deference to political actors,⁴⁷ at the limit merging with the views of radical democrats.

In its more modest versions, judicial restraint is clearly a compromise between, on the one hand, the twin facts of complexity and moral diversity, and, on the other hand, the need for judicial review in the first place. Thayer's philosophy attempted such a compromise at the retail level, asking in each case whether the Constitution clearly circumscribes government action. Bickel's own suggestion that the Court should exercise the "passive virtues" by avoiding divisive controversies that would undermine its position in public opinion fits within the Thayerian tradition,⁴⁸ as does Cass Sunstein's suggestion that the Court should be (and as a matter of observed fact is) "minimalist" in the sense that it leaves the political process considerable breathing space.⁴⁹

Sunstein also argues that the Court should be minimalist in a second sense: it should not try to root its decisions in principles stated at a high level of abstraction. Here Sunstein appears to invert the problem of moral diversity. He claims that agreement on particulars may sometimes be possible—e.g., that there is no constitutional right to

⁴⁶ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). The view was hardly original with Thayer, of course. It was quite arguably the conventional wisdom in the early Republic. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 7-8 (1983).

⁴⁷ See Lino Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 Tex. L. Rev. 789, 791 (1997).

⁴⁸ Bickel, *supra* note 32, at 111; Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 40 (1961); see also Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312, 416 (1997) (defining the passive virtues as "the strategic use by courts (particularly the Supreme Court) of justiciability doctrines and other procedural techniques to avoid deciding issues the Court believes are best deferred to a later date.").

⁴⁹ See *supra*, note 29.

physician-assisted suicide—even if agreement on higher-order reasons is not—e.g., in the physician-assisted suicide case, the Justices offered several competing rationales for the ruling.⁵⁰

But if minimalism is an answer to the indeterminacy problem,⁵¹ it founders on Dworkin’s idea of “justificatory ascent.”⁵² What makes judicial resolution of contested questions of law necessary is precisely the fact that they are contested—that there can be plausible arguments produced for a variety of results. But if this is so, a legal culture that demands reasons as the warrant for judicial decision making will require judges to appeal to more general principles to justify the minimalist intuition that one rather than another outcome is appropriate. If minimalism sometimes manages to duck the sorts of hard questions around which moral or other consensus breaks down, “justificatory ascent is always, as it were, on the cards: we cannot rule it out *a priori* because we never know when a legal claim that seemed pedestrian and even indisputable may suddenly be challenged by a new and potentially revolutionary attack from a higher level.”⁵³

On the evidence, this is no mere theoretical worry, for minimalism has not fared much better in practice than in theory. In the twentieth century, the Supreme Court Justices who most epitomized the Thayer/Bickel/Sunstein attitude were Frankfurter and the second Harlan. They practiced a version of retail restraint. When they chose to err

⁵⁰ See Cass R. Sunstein, *Leaving Things Undecided*, supra note 29, at 20-22; Sunstein, *Legal Reasoning and Political Conflict*, supra note 29, at 5.

⁵¹ This is a doubtful proposition. There can be broad consensus favoring a very general principle like liberty, disagreement about whether liberty should be understood to go no further than the traditions of positive law or in evolving terms, and then consensus again on some particular applications such as the right to physician-assisted suicide—even as there is widespread disagreement about other applications.

⁵² See Ronald Dworkin, *In Praise of Theory*, 29 *Ariz. St. L.J.* 353, 356 (1997).

⁵³ *Id.* at 357-58.

on the side of allowing the political process to take its course—as they did, for example, when they opposed applying most provisions of the Bill of Rights to the states⁵⁴—they essentially acted as radical democrats, and were thus legitimately subject to the criticism of radical democracy. On the other hand, when they occasionally voted to intervene in the political process—as, for example, when Justice Harlan voted to invalidate a Connecticut ban on contraceptive use⁵⁵—they opened themselves up to the opposite criticism of judicial subjectivity. Why, critics asked, are the practitioners of retail restraint willing to intervene in this case notwithstanding textual ambiguity but not other cases? As Gerald Gunther famously remarked in his aptly titled, “The Subtle Vices of the ‘Passive Virtues,’” Bickelian ducking of the hard issues amounts to “100% insistence on principle, 20% of the time.”⁵⁶

To put the point somewhat less tendentiously, retail restraint is a crude sort of split-the-difference compromise: sometimes it sacrifices rights for majoritarian decisionmaking, while other times vice-versa, but it provides no systematic account of which side of the balance to favor in any given case. The best retail restraint can offer is reliance on judicial craft—a store of largely tacit understandings to which the practiced judge turns to decide when to exercise and when to abjure authority. In this respect, retail

⁵⁴ See *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, F., concurring) (opposing incorporation of the Bill of Rights via the Fourteenth Amendment because, among other things, it would “tear up by the roots much of the fabric of law in the several states”)

⁵⁵ See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds of a challenge to the Connecticut ban on birth control that was subsequently invalidated in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

⁵⁶ Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 3 (1964).

restraint is aligned with the approach of Hart and Sacks⁵⁷ (which is unsurprising given Frankfurter's role in the creation of, and lionization within, the Legal Process school).⁵⁸ Part III contends that Hart and Sacks were right to focus on the allocation of decision-making authority among institutions, but also that their reliance on craft—as well as their assumption that the New Deal state included all possible useful institutions—was a limitation of their method. It is likewise a limitation of judicial restraint practiced at the retail level.

C. Process Theories

Despite frequent rhetorical invocations of the principle of judicial restraint, since the overruling of *Lochner*, Supreme Court doctrine has more frequently attempted the compromise between majoritarianism and rights at the wholesale level, by designating specific categories of cases in which the political process is likely to be untrustworthy as falling outside the presumption of constitutionality. In a famous footnote to an otherwise obscure case, Chief Justice Stone suggested that the presumption of constitutionality ought to be suspended: when laws infringe specific provisions of the Bill of Rights; when, as in the case of laws infringing freedom of information or the right to vote, ordinary legislative processes cannot be expected to correct the defect; and when prejudice against minorities curtails their ability to utilize the democratic process to effect

⁵⁷ See William N. Eskridge, Jr. and Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 34 n.27 (1994) (locating Bickel squarely within the Hart and Sacks framework).

⁵⁸ See Joseph William Singer, *Legal Realism Now*, 76 Calif. L. Rev. 467, 507-08 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986)) (associating Frankfurter—and Brandeis—with the majoritarian strand of the legal process school).

change.⁵⁹ As elaborated by John Hart Ely and other theorists building upon the footnote, the counter-majoritarian practice of judicial review thus employed in the service of the democratic process avoids the charge that it is undemocratic.⁶⁰

Note that process theory is explicitly framed as a response to Bickel—and thus as a response to the indeterminacy problem as well. Does it succeed? Process theory explains why the courts are justified in invalidating egregious affronts to any plausible conception of democracy—such as profoundly rotten boroughs and entrenched racial apartheid. But egregious affronts to democracy tend to be recognized as such only in retrospect. If matters were otherwise, judicial review would be unnecessary, because democracy would purge itself of the offending practices. Thus, there may be agreement in principle that the courts should protect the Bill of Rights and the integrity of the political process, but given complexity and moral diversity, there will be disagreement over particulars, such as whether legislated limits on campaign contributions and expenditures infringe constitutionally protected political expression or foster equal political participation (or do both, and if so, how to resolve the conflict).

Still, even if validated only after the fact, so long as judicial review is invoked only to overturn what come to be seen as egregious violations of democratic principles, perhaps process theory can cabin judicial review. But the area falling outside the presumption of constitutionality in Chief Justice Stone's footnote encompasses many of the most contentious questions courts face, including affirmative action, gay rights, school prayer, limits on pornography, and so on. Even the abortion right, which Ely himself thought an unwarranted constitutional inference by the Burger Court because it is

⁵⁹ See *United States v. Carolene Products. Co.*, 304 U.S. 144, 152 n.4 (1938).

a substantive right unconnected to clear constitutional text or the political process, can be and has been recharacterized as protecting equal political participation within the process theory framework.⁶¹

Process theory thus highlights but does not resolve the indeterminacy problem. Democratic procedures cannot be used to determine the ground rules for democracy without begging all the important questions, but at the same time, extra-majoritarian mechanisms for setting the ground rules also cannot validate themselves.

D. Fundamental Values

Process theories of the sort advanced by Ely typically seek to legitimate judicial protection of democracy-enforcing rights and to de-legitimate judicial enforcement of other constitutional rights.⁶² Yet even the *Carolene Products* footnote by its terms extends to substantive rights protected by the Bill of Rights, such as the right to free exercise of religion, that have no direct bearing on the mechanics of democracy. Fundamental values theorists argue that the judicial role properly extends to protecting

⁶⁰ See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

⁶¹ See Ruth Bader Ginsburg, Essay: *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985) (“Overall, the Court’s *Roe* position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”); Laurence H. Tribe, *Abortion: The Clash of Absolutes* 105 (1990) (“Although the Court in *Roe* relied solely on the liberty clause of the Fourteenth Amendment, any restriction that prohibits women from exercising the right to decide whether to end a pregnancy would, in the absence of a truly compelling justification, deny them the ‘equal protection of the laws’ also guaranteed by the Fourteenth Amendment. . . . A law that discriminates in such a forceful way against an entire group of people and that poses such an obvious danger of majoritarian oppression and enduring subjugation must not be permitted unless it is needed to serve the most compelling public interest.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 912 (1992) (opinion of Stevens, J.) (“*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.”).

⁶² See Ely, *supra* note 60, at 14-15; Cass R. Sunstein, *The Right to Die*, 106 Yale L.J. 1123, 1123, 1146-63 (1997).

individuals against interference with a zone of autonomy that the government has no legitimate business regulating.⁶³

Fundamental values approaches pose a serious challenge to process theory, which relies on drawing sharp distinctions between: process and substance; equality and other norms; and enumerated and unenumerated rights. Process theory's critics have challenged each of these distinctions. Laurence Tribe noted that procedural protections invariably serve underlying substantive values.⁶⁴ Peter Westen argued that equality norms are empty absent a substantive normative framework.⁶⁵ And Ronald Dworkin challenged the distinction between enumerated and unenumerated rights as resting on an incoherent view of meaning.⁶⁶

But while these scholars have demonstrated process theory's flaws, they themselves have not made much progress in addressing the indeterminacy problem. Let us grant that constitutions are (of necessity) meant to protect substantive as well as procedural norms. The question remains: when faced with social disagreement (because of complexity or moral diversity or both), how should courts go about giving meaning to ambiguous text?

Dworkin, who unabashedly advocates a "moral reading" of the Constitution, gives the following answer: Judges should interpret the abstract moral language of the

⁶³ See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1 (1995). For present purposes, I lump together with fundamental values theorists those thinkers who believe there is no counter-majoritarian difficulty because majority rule is itself suspect. See, e.g., Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 74-78 (1989).

⁶⁴ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063 (1980).

⁶⁵ See Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537 (1982).

⁶⁶ See Dworkin, *supra* note 43, at 72-83.

Constitution—including terms such as “due process,” “liberty,” and “equal protection,”—as enacting abstract moral principles.⁶⁷ What of the fact that people disagree about the particular entailments of these abstract principles? Such disagreement, Dworkin contends, does not show that there is no right answer to these questions, any more than disagreement about what killed the dinosaurs demonstrates that there was no cause of their extinction. This view that there are right answers even in hard cases is Dworkin’s response to the indeterminacy problem in constitutional law; it is also his answer to the claims of legal realism and legal positivism in jurisprudence more broadly (as discussed in Part III below).

Upon inspection, however, the right-answers thesis, even if correct, does not respond to the indeterminacy problem. Suppose there is a correct answer to the question whether the Equal Protection Clause prohibits most forms of affirmative action. There remains the problem of ascertaining what that answer is. Dworkin asks judges charged with this task “to find the best . . . understanding of what equal moral status for men and women really requires . . . that fits the broad story of America’s historical record.”⁶⁸ Yet that is precisely what people disagree about. The metaphysical claim that there is a right answer to this question does no work unless tied to some mechanism for finding that answer. And without an argument about institutional competence, Dworkin certainly cannot at this point say that the decision mechanism is adjudication by the courts, because it is precisely the view of law as whatever-the-authorities-say-it-is that his right-

⁶⁷ See *id.* at 7.

⁶⁸ See *id.* at 11.

answers thesis aims to dislodge. The right-answers thesis simply does not address the fact of moral diversity.⁶⁹

Nor does the right-answers thesis respond to the problem of complexity. The indeterminacy problem undercuts Dworkin's view of law as integrity even in cases that do not pose any obvious moral question because integrity has almost no purchase on concrete problem solving. Tellingly, as to the hard questions of institutional allocation of power and empirical method, Dworkin has nothing to say.⁷⁰ These are all what he disparagingly calls mere "policy" questions.⁷¹

⁶⁹ See Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 Colum. L. Rev. 133, 146-52 (1997) (reviewing Dworkin, *supra* note 43 and Dennis Patterson, *Law and Truth* (1996)).

⁷⁰ Well, perhaps not quite nothing. In *Freedom's Law*, Dworkin states that "[t]he best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are" Dworkin, *supra* note 43, at 34. Strikingly, Dworkin does not *argue* that constitutional adjudication (as opposed to constitutional decision making by popularly elected legislatures) is best calculated to produce the best answers, only that this could be true, and that if it were true, that would provide a sufficient basis for our adhering to the allocation of authority we have inherited from the Marshall Court. See *id.* at 34-35.

⁷¹ Ronald Dworkin, *Law's Empire* 221-4, 243-4, 310-12, 338-9 (1986).

E. Originalism

Judges and constitutional scholars who call themselves originalists would answer the pragmatist objection by denying that there is very much indeterminacy in the Constitution, provided that it is interpreted to reflect the original understanding of those who framed and ratified it. Two rationales typically support this view. First, originalists argue that their method of interpretation allows less room for judicial discretion than other methods because the search for historical meaning looks outside of the judges' values to an objective past reality. Second, originalists often invoke a concrete version of social contract theory: because the Constitution's status as law derives from its ratification by the People, it should be interpreted to mean what the People thought it meant when they adopted it.⁷²

Yet some of the most well-rehearsed objections to originalism can be restated as the problems of moral diversity and complexity.⁷³ With respect to moral diversity, originalists downplay the difficulty of discerning a common understanding of constitutional text the meaning of which was hotly contested even when it was first adopted.⁷⁴ Meanwhile, complexity manifests itself as the problem of changed circumstances. Many of the problems we face today were unknown to the framers'

⁷² See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 37-44 (ed., Amy Gutmann, 1997); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143-60 (1990).

⁷³ Some, but not all. Consider two objections not described in the text. One is the paradox that the framers and ratifiers themselves did not intend or expect subsequent generations to treat original meaning as an interpretive touchstone. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). A second is that originalism often leads to unacceptable results. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1771 (1997).

⁷⁴ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 213-17 (1980).

generation, and thus they had no expectations with respect to these matters. And where the framers' generation did not provide a concrete answer, we are left to our own ambiguously guided devices.

Nonetheless, rather than abandon original meaning, many constitutional practitioners and theorists argue that the task of the interpreter is “to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know,”⁷⁵ or to “translate” the original understanding to accommodate the modern world.⁷⁶ It should be apparent, however, that weak originalism of this sort foregoes any claim to determinacy that strong originalism may make, for the process of translation necessarily depends upon what the interpreter deems worth keeping and what she discards.⁷⁷ Thus, weak originalists justify their approach by modifying the social contract theory of strong originalism. Weak originalists acknowledge an important role for each generation of Americans in constructing constitutional meaning, and see the job of the interpreter as synthesizing their written and unwritten contributions.⁷⁸ And for that reason, weak originalists must turn to some other, unspecified theory to address the indeterminacy problem.

F. Critical Theories

With historical roots in the legal realism of the early 20th century, critical legal scholars challenge the claim that the conventional material of constitutional jurisprudence

⁷⁵ *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1985) (Bork, J.).

⁷⁶ See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395 (1995).

⁷⁷ See Michael Klarman, *Anti-Fidelity*, 70 *S. Cal. L. Rev.* 381, 408-11 (1997).

⁷⁸ See Bruce A. Ackerman, *We the People: Foundations* 92-104 (1991).

—text, structure, original understanding, precedent, and so forth—play the dominant role in constitutional interpretation. In most important cases, these materials do not uniquely determine a correct answer, and accordingly the Court chooses the answer most consistent with the Justices’ own values or politics.⁷⁹ To the “crits,” the Court’s controversial 5-4 decision resolving the 2000 Presidential election was only the latest and most dramatic confirmation that law, especially constitutional law, is simply politics.

More generally, critical scholars argue that courts reinforce existing power structures in society, often acting as a vehicle of class, race, gender and other forms of subordination.⁸⁰ Some critical scholars argue that given the impossibility of neutral interpretation, courts ought to be honest about their value choices and, in essence, make better ones.⁸¹ Other critical scholars question whether constitutional law can be anything other than a means of oppression.⁸² In an age of conservative judicial activism, this doubt may lead some critical scholars to embrace radical democracy.⁸³ This division in the critical movement itself has deep roots in American constitutional thinking, dating back at least to the mid-19th century debate among abolitionists over whether to reform

⁷⁹ See, e.g., Mark V. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* 193 (1988).

⁸⁰ See, e.g., Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (1977).

⁸¹ For example, before Mark Tushnet became a radical democrat, he explained that if he were on the Supreme Court, he would vote so as “to advance the cause of socialism” and then write an opinion “in some currently favored version of Grand Theory.” Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411, 424 (1981)

⁸² See Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 Fordham L. Rev. 1761, 1763 (1997) (noting that “instrumental fidelity to the Constitution is the reason for black critical race scholars’ disagreement with white critical legal studies scholars over the significance of rights”); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. Rev. 765, 776 (1992).

⁸³ See Tushnet, *supra* note 28.

the Constitution's acceptance of slavery to accord with the supposedly deeper American values of liberty and equality or to denounce the Constitution as a pact with the devil.⁸⁴

Whatever may be said in favor of critical approaches to constitutional interpretation, note that they do not attempt to solve or even ameliorate the twin problems of complexity and moral diversity. Critical legal studies is probably best understood as either celebrating or capitulating to the indeterminacy problem.

G. Eclecticism

Although individual Supreme Court Justices from time to time vow allegiance to one or another of the theoretical approaches discussed above, the Court has never adopted a single interpretive methodology. In part this reflects the dynamics of a multi-member body, but more fundamentally, it reflects the complexity of life and the breadth of subjects regulated by the Constitution. How could any interpretive approach be satisfactory in all contexts? Constitutional theorists who emphasize the impracticability of any single approach are eclectics or pluralists.⁸⁵

All constitutional practitioners and theorists are partly eclectic at the level of deciding cases. They accept the necessity of looking at more than one source of law, consulting text, history, precedent, and other sources. Whole-hearted eclectics go on to deny the capacity of any overarching theory of constitutionalism to legitimate the practice of judicial review and provide interpretive guidance.

⁸⁴ See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1708-09 (1997) (contrasting the views of William Lloyd Garrison and Frederick Douglass).

⁸⁵ See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (1996); Laurence H. Tribe, *Comment*, in *A Matter of Interpretation*, *supra* note 17 at 65, 73.

Some eclectics then argue that it is a mistake to seek any theoretical foundations for judicial review beyond the work-a-day material of lawyers. On this view, the counter-majoritarian difficulty is at most a problem for political theorists rather than lawyers. In support of their approach, these eclectics claim that the justification of a practice such as judicial review is necessarily external to that practice.⁸⁶

Nonetheless, because so much of constitutional doctrine focuses on the proper judicial role, we might think that the justification of that role is both internal and external to constitutional practice.⁸⁷ Moreover, even if lawyers did not themselves worry about the counter-majoritarian difficulty, that would hardly answer the basic objection, which is a claim that the lawyer class has usurped power that rightfully belongs to the people at large.⁸⁸

Accordingly, other eclectics address the counter-majoritarian difficulty head-on. They contend that by focusing on multiple sources of legitimacy, their approach imposes substantial constraints on judges. Yet “if judicial reasoning takes place on many axes rather than just one, judges would appear to have even more degrees of freedom than a linear image suggests.”⁸⁹ Eclectics can respond “that in the context of judicial decision-making, additional dimensions do not invariably yield additional degrees of freedom; often they impose additional constraints.”⁹⁰

⁸⁶ See Philip Bobbitt, *Constitutional Interpretation* 8-9 (1991).

⁸⁷ See Dorf, *supra*, note 73, at 1789-90.

⁸⁸ The academic version of this charge indicts the Supreme Court rather than the lawyer class generally. See generally Larry Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4 (2001); Tushnet, *supra* note 28.

⁸⁹ Michael C. Dorf, *Courts, Reasons and Rules*, 19 *Quinnipiac L. Rev.* 483, 502-03 (2000).

⁹⁰ *Id.* at 503.

Perhaps that answer shows why eclecticism constrains judges to a somewhat greater extent than single-minded approaches to constitutional interpretation, such as originalism. Eclectics acknowledge the partial indeterminacy of the law, while claiming that the full toolbox of conventional legal arguments suffices to keep judicial discretion within acceptable bounds. This is ultimately a craft-based solution, and thus susceptible to the critique of craft offered below.⁹¹

H. Back to the Indeterminacy Problem

Although the foregoing typology is hardly exhaustive, it sufficiently captures the dominant approaches to constitutional interpretation to illustrate, if not strictly prove, that theorists have not found a way around the indeterminacy problem. Is it unsolvable? Among theorists who take the problem seriously, Frank Michelman comes closest to providing a framework, if not a complete solution. Consider his approach.

Michelman's recent work is both broader and narrower than the accounts discussed above. It is broader—and appropriately so—because Michelman understands his task as providing an account of democracy, not just judicial review. This is appropriate because it situates the question of judicial review in its proper institutional context. How can one legitimate the counter-majoritarian practice of judicial review

⁹¹ The careful reader of these footnotes will note a tension between the position espoused here and one I have sometimes taken elsewhere. The short explanation is that the author wears multiple hats. This is an article about what jurisprudence and constitutional theory might become; the other works are situated in debates about the law as it is. I realize that the separation of the descriptive and the normative assumed in the previous sentence is itself a contested position within the very debates described; the long answer would nonetheless defend the distinction but that would require a very long footnote indeed. Cf. Simon Singh, *Fermat's Enigma: The Epic Quest to Solve the World's Greatest Mathematical Problem* 60-62 (1997) ("I have discovered a truly remarkable proof which this margin is too small to contain").

without some understanding of what makes majoritarian practices themselves democratic?⁹²

But Michelman's account is also narrower than those considered thus far in that he does not offer a full-blown theory of constitutional interpretation. Instead, he sketches its outline by specifying the requisites of constitutional democracy.⁹³ To be legitimate, Michelman argues, a constitutional democracy must ensure both that the people be self-governing and that the higher law guaranteeing the democratic character of lawmaking itself be protected from popular abuses through the supervision of a separate institution, typically a constitutional court. Two primary methods are available for articulating the rules of a democratic polity so defined,⁹⁴ and each, Michelman shows, has defects that mirror those of the other.⁹⁵ As these defects are anticipated by the discussion so far, they can be summarized succinctly.

⁹² See Michelman, *supra* note 20, 11-62 (considering various theories of democracy in order to understand why we value the establishment of democratic political arrangements and how we can justify judicial lawmaking).

⁹³ See *id.* at 6 ('Democracy' appears to mean something like this: Popular political self-government—the people of a country deciding for themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organize and regulate their political association. 'Constitutionalism' appears to mean something like this: The containment of popular political decision-making by a basic law, the Constitution . . . designed to control which further laws can be made, by whom, and by what procedures. It is, of course, an essential part of the notion of constitutionalism that the basic law must be untouchable by the majoritarian politics it is meant to contain.'')

⁹⁴ See *id.* at 10 ("There are in circulation two main variations on this theme. One construes democracy as a matter of people actually having certain specific kinds of legal rights, the other construes it as a matter of the procedures we use to decide what legal rights people are to have. Each variation, providentially, has a champion among constitutional theorists Ronald Dworkin for democracy-as-rights, Robert Post for democracy-as-procedure.'')

⁹⁵ See *id.* at 35 ("For Professor Dworkin . . . democracy on the level of the basic laws is, as we have seen, a strictly substantive standard—but one that seems, as such to be achingly incomplete. For Professor Post following that line of thought, democracy on the level of the basic laws is, as we are about to see, a procedural standard—but one that turns out, in spite of good intentions, to be hooked on substance.'')

One approach, associated with the work of Dworkin, is, as we have seen, substantive.⁹⁶ Deliberators detached from the passions of everyday life—constitutional judges, high and high-minded public servants, senators on their august days, and so forth—might reason from the constitutional text and prior judicial decisions to a full specification of the rights and duties of citizens who regard each other as, say, free and equal beings. Suppose the deliberators are successful at this manifestly Herculean task of articulating just the principles that we, the People, believe should govern us. They then run squarely into the indeterminacy problem. The principles they have labored to define remain uncontroversial just so long as they are not applied to the interpretation of actual (new) cases. Once they are put to use, controversial indeterminacies in their meaning are likely to become evident.

It is just this difficulty that leads many constitutionalists to the procedural approach, associated with the work of Habermas and, on this side of the Atlantic, with Ely, the minimalists, and the radical democrats (and which Michelman associates with the work of Robert Post).⁹⁷ Yet this alternative fares no better. Instead of focusing on the articulation of constitutional values, the proceduralist aims to set the terms of full and fair participation by all citizens in democratic decision making. The responsive democracy that results will decide for itself what it values. The difficulty is that every choice of participatory procedure can be challenged, and must accordingly be defended, in the name of a principle. (Recall our discussion of minimalism above.) Justifications, as we know, ascend. This justificatory ascent takes the procedurally inclined polity just

⁹⁶ See *id.* at 17 (“According to Dworkin, the standard “democratic,” as meant for application to a country’s basic laws, is best conceived as a cluster of primary, substantive requirements, not of secondary, procedural ones.”)

⁹⁷ See *supra* note 95.

where it was—wisely, given the failure of the substantive approach—disinclined to go: investigation of first principles.

We might conclude from these circling failures that articulation of democratic ideals is simply not a useful instrument of critical, democratic self reflection. If so, we might shift attention from utopia to dystopia, joining the many who ask whether our polity is still self governing enough to be called democratic at all. (The nearly universal answer, even after *Bush v. Gore*, is obviously, and unhelpfully, yes.) Or, learning from the reverses, we can revise our standard of democratic legitimacy to distinguish our modest concerns for self rule as political responsiveness broadly conceived from more ambitious concerns for procedural and substantive coherence.

And it is just such a redefinition of standards that Michelman proposes when he suggests we agree *epistemically* that a constitutional democracy is legitimate if it meets two conditions. The first is that its abstract commitments be substantively good ones. Securing agreement on the canonical formulation of such conditions is not problematic because, by definition, our commitments are stated at a sufficiently high level of abstraction to command universal or near-universal assent—fairness, equality, liberty, and dignity, for example.⁹⁸ The second condition is that those empowered to interpret the higher law—the Supreme Court and the judiciary more generally in the American case—expose themselves and other institutions to the “full blast” of opinions and interests in society.⁹⁹

⁹⁸ Michelman’s list includes “toleration, freedoms of conscience and thought, respect for human dignity, equality of concern and respect for every person, free and open public discourse in a system of rule by the governed, and the rule of law.” Michelman, *supra* note 20, at 56.

⁹⁹ See *id.* at 60 (“[T]his maximum feasible effort to get the basic laws and their major interpretations right would have to include arrangements for exposing the empowered basic-law

The first condition allows us to identify with our democracy. The second allows us a measure of participation in its actual lawmaking. Seen together these epistemic conditions shift the focus from the coherence of any one set of principles to the coherence of sets of institutions, each of which may embody many different principles. It is a rough but serviceable attempt to make our standard for judging democracy a kind of critical heightening of the things our democratic institutions can (be made to) do. Indeed, given that the “full blast” condition emerges from, and must respond to the indeterminacy problem, the only way to make use of the principle is to try and learn from the experience of institutions that in some sense apply it.

As Michelman is an American constitutional theorist, and as we have seen ad nauseam, such theorists are given to think in the shoes of justices of the Supreme Court, it is perhaps not wholly surprising that his own proposal for improving American democracy focuses on the disposition of the Justices. Thus the constitutional judge will exercise her powers most in conformity with the two conditions when she embraces what Michelman calls *romantic* constitutionalism:¹⁰⁰ the view that individuals can transcend the limits of their personality if society will make the social contexts that both shape and obstruct the flourishing of their identity susceptible to revision.¹⁰¹ Toleration for the

interpreters to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone’s opinions and articulations of interests, including your own.”)

¹⁰⁰ Id. at ch. 2 (“Brennan’s Democratic Liberalism, Justice Brennan and Liberal “Romance”).

¹⁰¹ Lenin and the Bolsheviks believed that the coercive power of the state could create a “new Soviet man.” Geoffrey A. Hosking, *Russia and the Russians: A History* (2001); Rex A. Wade, *The Bolshevik Revolution and Russian Civil War* (2001). History proved them wrong, but that hardly shows that human nature is completely incorrigible. Indeed, as students of political organizing understand, contrary to Bolshevik assumptions, citizen participation in ordinary politics is *more* likely to lead to personal transformation than is the butt of a gun held by members of the people’s supposed vanguard. See Ross Gittel & Avis Vidal, *Community Organizing: Building Social Capital As a Development Strategy* 174-176 (1998); Bill Moyers, *Introduction to Mary Beth Rogers, Cold Anger: A Story of Faith and Power Politics* i, iv (1990); Clarence N.

clash of principle and for the jostling of competing designs for living is both a sign and an instrument of this heightening of revisability.

Michelman argues that Justice Brennan embodied this type of romantic constitutionalist in his willingness to give room to dissident, even offensive views in his interpretation of the right of free speech; in his willingness to allow minorities to pursue remedies through courts or expressive boycotts that they might have pursued through political parties, circumstances allowing; and in his unwillingness to defer to official claims of expertise in disputes between citizens and bureaucrats.¹⁰²

But what of the full blast of criticism of the Supreme Court itself? Although the Court's precedents extend protection to speech critical of the Court no less than to speech critical of other government actors,¹⁰³ in recent years the Court has showed itself to be quite impervious to the blast. Justices who exhibit sharp ideological divisions find common ground for the proposition that they and they alone are entrusted with discerning the Constitution's meaning. Thus, the liberals cite public opposition to *Roe v. Wade* as a reason to resist overruling that decision,¹⁰⁴ while the conservatives insist that Congress's power "to enforce the provisions of" the Fourteenth Amendment grants only the power to

Stone, et. al., *Building Civic Capacity: The Politics Of Reforming Urban Schools* 79 (2001); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward A Grassroots Movement for Economic Justice*, 54 *Stan. L. Rev.* 399, 459- 494 (2001).

¹⁰² See *id.* at 68 (“[T]he core of romantic constitutionalism lies in two, linked, commitments: to respect for individual human personality under a certain romantic conception of it, and to pursuit of a certain, emancipated state of persons-in-society.”)

¹⁰³ See *United States v. Grace*, 461 U.S. 171 (1983) (invalidating a ban on sidewalk demonstrations in front of the Supreme Court building).

¹⁰⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (“to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.”).

enforce the Court's (idiosyncratic) interpretation of that magisterially ambiguous text.¹⁰⁵

Whatever else one might say about American constitutionalism, surely a polity that allows a Supreme Court to divine the meaning of the Constitution almost exclusively from the Court's own past divinations must flunk the "full blast" test pretty miserably.

What is to be done? We might begin by noting that it was not always this way. As Larry Kramer observes in a recent article, in the original conception of the constitution as higher law, judicial enforcement played second fiddle to popular implementation through politics.¹⁰⁶ In the early decades of the nineteenth century, Kramer finds, before resolution of contested interpretations of the Constitution came to be almost automatically a matter for judicial review, the concerned branches or departments argued out the meaning among themselves. Was this broader deliberation but the first step down a path so constrained by the notion of a written constitution that utter judicial supremacy (or its more restrained, New Deal cousin) was a necessary outcome? Or could departmentalism have been the starting point for a widening form of constitutional review that would have come, somehow, to engage the polity in a continuing discussion of constitutional values? The rediscovery of departmentalism tells us that the road to where we are was less direct than many may have thought, and may

¹⁰⁵ See *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (holding that Section Five of the Fourteenth Amendment did not confer upon Congress the power to enact the Americans with Disabilities Act in light of the Court's view that disability is not a suspect classification); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that Section Five of the Fourteenth Amendment did not confer upon Congress the power to enact the Age Discrimination in Employment Act in light of the Court's view that age is not a suspect classification).

¹⁰⁶ Kramer writes: "The legislature and the judiciary are, [according to the early view,] the people's 'servants.' As such, they must, with proper intentions and exercising their best judgment, try to comply with the constitution. If conflicts arise, however, it is 'the people' who constitute the authoritative 'tribunal' to whom such conflicts must be submitted." Kramer, *supra* note 88, at 32 (2001) (quoting a "remonstrance" printed as an appendix to *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 99-108 (1793)).

have branched at crucial points as well. But without further discoveries it cannot tell us more, and so its value is as a goad to our imagination in conceiving alternatives and, as ever, a warning against the shimmer of false necessity that obscures and sanctifies the institutions we know.

Oddly, though, neither Kramer nor Michelman has proposed how new institutions might be created, or old ones re-imagined, so as to displace judicial hyper-supremacy with something closer to popular constitutionalism. Each understands his task as criticizing the Supreme Court Justices in the hope that they will see the light and thus stay their own hands. Given our history, this strategy is an uncertain gamble at best. More broadly, it reflects the dilemma of American constitutionalism: even the most thoughtful critics of our current practices are unable or unwilling to think about the problem as one of institutional design. Accepting our institutions as more or less fixed, they vainly implore the actors to do what they have been doing until now, only more humbly.¹⁰⁷

The next Part argues that nearly the exact same pattern holds in academic jurisprudence: dispassionate analysis of the central problem—explaining how decisions that resolve ambiguities in the law can be justified by the law—reveals its intractable nature; yet the standard proposals do little to change the troubled institutions.

III. Academic Jurisprudence

With apologies to those who live within the world of academic jurisprudence, this Part paints with an even broader brush than the preceding discussion of constitutional

¹⁰⁷ The reader can decide for herself whether this charge applies to the author's own work, see, e.g., Dorf and Friedman, *supra* note 27 at 67 (pleading for humility from the Justices and other actors), and if so, whether that work (as well as Michelman's, Kramer's and others') might

theory. It will suffice for present purposes to focus on the main point of contention among the principal antagonists, leaving aside intermediate positions and some substantial matters of nuance.

This Part examines in turn H.L.A. Hart's positivism, Dworkin's critique of positivism, and Hart's embrace of what is sometimes called "soft positivism" in his response to Dworkin. I argue that soft positivism, understood as a synthesis of the Hart/Dworkin debate, entails a view about the institutional allocation of power remarkably close to the one articulated by (Henry) Hart and Sacks in *The Legal Process*. Somewhat surprisingly in light of their leading roles on opposite sides of the Atlantic, the parallels between Hart's work and that of Hart and Sacks have largely been overlooked by Anglo-American jurists—perhaps because the views espoused by Hart and Sacks are closer in some important particulars to the views of H.L.A. Hart's chief critics, Dworkin and Lon Fuller, than to those of H.L.A. Hart. Nonetheless, I find important connections between soft positivism and the legal process school of thought. Exploring these connections lays the groundwork for an account of the virtues and limits of *The Legal Process* as a response to the indeterminacy problem.

A. Classical Hartian Positivism

H.L.A. Hart's *The Concept of Law* frames much of the current debate in Anglo-American jurisprudence. Hart aimed to provide a descriptive, i.e., positivist account of law that was not tied to any particular legal system. He rejected the Austinian model of

nonetheless be defended as a wakeup call to the consumers of Supreme Court opinions disguised as a recommendation urged on the Court.

law as orders of the sovereign backed by threats.¹⁰⁸ In its place he offered a view of law as consisting of primary rules directed at citizens as well as other primary actors and secondary rules directed at government officials.¹⁰⁹ Grounding the whole apparatus, Hart argued, is the ultimate rule of recognition, which “provides criteria for the assessment of the validity of other rules” but is not itself valid in light of any other rule.¹¹⁰

Hart’s nuanced and powerful account of law has provided much grist for the mill of academic jurisprudence. I focus here on one important feature—its treatment of ambiguity or what Hart called “open texture.”¹¹¹ Hart imagined himself to be offering a middle position between formalism and thoroughgoing legal realism. As against formalism, he acknowledged that complexity renders impossible the attainment of one hundred percent precision of any rule stated in an ordinary human language.¹¹² But as against legal realism, he maintained that “the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules”¹¹³ Hart contended that most rules—of law as well as rules governing other activities such as sports contests—have a “core of settled meaning” that enables participants and observers to distinguish between courts applying rules and a system in which the law is whatever the final authority proclaims it to be.¹¹⁴

¹⁰⁸ H.L.A. Hart, *The Concept of Law* 18-49 (2d ed. 1994).

¹⁰⁹ See *id.* at 94-99.

¹¹⁰ *Id.* at 107.

¹¹¹ *Id.* at 128.

¹¹² See *id.* at 128-35.

¹¹³ *Id.* at 135.

¹¹⁴ See *id.* at 144.

Hart quite explicitly equated the open texture of the law with the discretion of the final authority charged with interpreting the law. Wherever there is open texture, he believed, the “law leaves to courts a law-creating power”¹¹⁵ Ambiguity, in other words, means the absence of law. Yet where the more radical legal realists and their intellectual heirs—who took the same view of ambiguity—inferred that law is therefore nothing but power, Hart saw no fundamental difficulty. Why not? Because Hart believed as an empirical matter that in most legal systems, the area of open texture is small relative to the areas of settled meaning. In reference to the United States Constitution, he stated: “At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the center to supply standards of correct judicial decision.”¹¹⁶

Hart did not in fact offer any evidence to support this empirical claim. Consistent with his goal of providing a conceptual account of law in general rather than a contingent account of a particular legal system, Hart supported his empirical claim by reference to his general view about rules and language: that rules by their nature have a clear core and an ambiguous periphery.¹¹⁷ Hart took this proposition to be self-evident or at least so much a matter of common sense that it could be illustrated with a few examples rather than demonstrated in any systematic way.

In fact, one can find empirical support for Hart’s view. As critics of legal realism have often noted, a focus on adjudicated cases, especially those in appellate courts, yields

¹¹⁵ *Id.* at 145.

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 123 (“All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything we are prepared to call a rule it is possible to

a distorted picture of the law. Recall that Hart offered an account of *law*, not just adjudication. The law operates even—perhaps especially—when no adjudication occurs. Most criminal cases result in guilty pleas,¹¹⁸ most civil cases result in settlement,¹¹⁹ and most citizens conform their conduct to the demands of the civil and criminal law without court action ever commencing. Thus, Hart was arguably justified in his belief that, viewed in its entirety, the law’s areas of open texture are sufficiently small as to leave the law’s legitimacy intact.¹²⁰

We shall shortly return to Hart, and to his claim that the law’s areas of open texture are sufficiently small to avoid rendering government authority illegitimate, but first let us turn to Hart’s principal critic.

B. Law as Integrity

distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies.”)

¹¹⁸ See U.S. Department of Justice: Bureau of Justice Statistics, Criminal Case Processing Statistics: Summary of Findings, available at <<http://www.ojp.usdoj.gov/bjs/cases.html>> (“Ninety-six percent of convictions occurring within 1 year of arrest were obtained through a guilty plea. About 3 in 4 guilty pleas were to a felony.”) See also U.S. Department of Justice: Bureau of Justice Statistics, Federal Justice Statistics: Summary Findings, available at <<http://www.ojp.usdoj.gov/bjs/fed.html>> (“cases were terminated against 76,952 defendants during 2000. Most (89%) defendants were convicted. Of the 68,516 defendants convicted, 64,939 (or 95%) pleaded guilty or no-contest.”)

¹¹⁹ See U.S. Department of Justice, Bureau of Justice Statistics, Civil Justice Statistics: Summary of Findings, available at <<http://www.ijp.usdoj.gov/bjs/civil.html>> (“The 1992 Civil Justice Survey of State Courts estimated that only 3% of 762,000 tort, contract and real property disposed of were resolved by jury (2%) or bench trial (1%).”); See also U.S. Department of Justice Bureau of Justice Statistics, Civil Justice Statistics, available at <<http://www.ijp.usdoj.gov/bjs/civil.html>> (“Of the 96,284 tort cases that were terminated in U.S. district courts during fiscal years 1996 and 1997, 3,023 or 3% were decided by a completed jury or bench trial.”).

¹²⁰ To be sure, high plea bargain rates may reflect defendants’ fears of long sentences should they go to trial, high settlement rates may reflect the high cost of civil litigation, and, at least where the law tracks social norms, individuals’ compliance with the law may be an epiphenomenon of their

Where Hart conceptualized his brand of positivism as a third way between the excesses of formalism and legal realism, Ronald Dworkin understands his own enterprise—law as integrity—as a different sort of third way: an alternative to positivism on the one hand and thoroughgoing instrumentalism on the other.¹²¹ According to Dworkin, judges resolve cases by selecting the interpretation that puts the law as a whole in its best light, where best is understood to include both consistency with past decisions (“fit”) as well as principles of political justice.¹²² I put Dworkin’s affirmative exposition of law as integrity and his critique of instrumentalism to one side and focus here on the essentials of his disagreement with Hart.

Dworkin contends that the law’s areas of what Hart called open texture are larger than Hart acknowledged. Centrally, Dworkin claims that knowing the law is not merely a matter of ascertaining what unique rule applies to a given situation. The law, for Dworkin, consists of both rules that have an on/off character and principles that have weight.¹²³ Often more than one principle of law will have salience, and the job of the decision maker will then be to see which principle has the greatest weight in context. Dworkin therefore denies the positivist’s *sources thesis*—the idea that the law can be identified by its source or pedigree without reference to its content. What makes a particular statement of law true for Dworkin, is that it puts the law as a whole in its best

compliance with the social norms. Nonetheless, it is difficult to imagine that the law’s relative clarity has nothing to do with parties’ willingness to resolve disputes without final adjudication.

¹²¹ See Dworkin, *supra* note 71, at 225 (describing law as integrity as a “third conception of law,” which “denies that statements of law are either backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism”). Some of Dworkin’s recent work could be read to suggest that he no longer thinks of his view as a third way, but I would argue that Dworkin is better read as consistent over time. See Dorf, *supra* note 69, at 141–43, 168 (reading *Freedom’s Law* in light of *Law’s Empire*).

¹²² See Dworkin, note 71, at 225–75.

light, and the best light, recall, is defined by reference to principles of political justice whose truth (Dworkin believes) does not depend on their emanation from an authoritative source.

Dworkin also denies Hart's claim that when the law is open-textured, judges exercise discretion or lawmaking authority. Even in the very hardest cases (however numerous they may be), Dworkin notes that judges do not believe themselves to be exercising discretion. Rather, in such cases they follow the law, although doing so does not mean following *rules*. Following the law, for Dworkin, means interpreting the law according to the principle of integrity—and that is true in both easy cases and hard cases.¹²⁴

Dworkin's refusal to recognize any deep distinction between hard cases and easy cases has been criticized for overstating the role of interpretation in law (and in life). According to one commonsensical critique, interpretation is an activity of clarification; where, as in easy cases, there is no ambiguity, there is no need for clarification, and thus no need for interpretation.¹²⁵ On the other hand, surely it counts in favor of Dworkin's view that legal practice generally recognizes no sharp boundary between easy and hard cases.¹²⁶

The claim that hard and easy cases are not different in kind underwrites Dworkin's further argument that even in hard cases judges apply the law, rather than their own discretion. But in order for this to count as more than a quibble about words,

¹²³ See *id.*, at 46.

¹²⁴ See *id.* at 265-66, 353-54.

¹²⁵ See, Patterson, *supra* note 69, at 87.

¹²⁶ There are exceptions, of course, such as legal sanctions for bringing objectively frivolous cases. See, e.g., Fed. R. Civ. Proc. 11.

Dworkin must claim not only that law operates in both easy and hard cases but that law operates in roughly the same manner in easy and hard cases. For Dworkin is not merely interested in attaching the word “law” to what judges do in hard cases; he wants the word to connote determinacy rather than what he sees as the alternative: discretion. And that is why the right-answers thesis (discussed above in connection with Dworkin’s constitutional views) is crucial to Dworkin’s disagreement with Hart.

Nonetheless, it is worth noting that both Hart and Dworkin build their accounts as responses to the indeterminacy problem. They share the view that ambiguity is the enemy of law. Where Hart would therefore minimize the place of ambiguity in law, Dworkin—by recourse to the right answers thesis—would deny it entirely.¹²⁷

C. Soft Positivism

Hart did not, during his lifetime, offer a systematic response to his critics, but following his death, a new edition of *The Concept of Law* was published, including a postscript consisting of Hart’s long-awaited reply to Dworkin. In the Postscript, Hart denies that Dworkin’s claims undermine Hart’s own account. He adopts a position he calls “soft positivism.”¹²⁸

Hart observes that his own conceptual apparatus is meant to be a description of any legal system. Legal positivism, Hart claims, is an external enterprise. Dworkin’s interpretive account, by contrast, is an internal one. If it turns out that in some particular

¹²⁷ To be clear, I am not making a causal claim about Dworkin’s beliefs. For all I know, he adopted the right-answers thesis because he believes in the existence of objective moral truths. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *Phil. & Pub. Affairs* 87 (1996).

¹²⁸ Hart, *supra* note 108, at 250.

legal system, the rule of recognition treats some moral norms as legal norms simply in virtue of their content, then the external observer can describe that fact, even though some internal participants in this particular legal system would be obliged to look to the content of a norm to ascertain whether it is a legal norm. Hart readily concedes in the Postscript what he also acknowledged in the original edition of *The Concept of Law*: that as a matter of observed fact, in the United States, the ultimate criteria of legality incorporate moral principles.¹²⁹ Thus, the Hartian can give an external descriptive account of a legal system, which is experienced internally as Dworkinian.¹³⁰ As Hart pithily sums up his point, “[d]escription may still be description, even when what is described is an evaluation.”¹³¹

A substantial literature addresses the question whether positivism can be reconciled with Dworkin’s interpretivism in this way without sacrificing positivism’s essential elements.¹³² Dworkin himself thinks not. He takes the view that if positivism is to have anything interesting to say, it must be committed to the possibility that the law can be identified independent of its content—i.e., the sources thesis. Accordingly, Dworkin argues that in order for Hart’s theory to encompass Dworkin’s own approach, Hart’s theory must be a hollow shell.¹³³

¹²⁹ Id. at 247 (postscript); Id. at 72 (main text).

¹³⁰ Id. at 243-4 (postscript).

¹³¹ Id. at 244 (postscript).

¹³² For example, most of the essays in the two issues of *Legal Theory* devoted to the Postscript address some form of this question. See *Legal Theory, Special Issue: Postscript to H.L.A. Hart’s The Concept of Law, Part I*, Vol. 4, No. 3 (1998); *Legal Theory, Special Issue: Postscript to H.L.A. Hart’s The Concept of Law, Part II*, Vol. 4, No. 4 (1998).

¹³³ See Dworkin, *supra* note 17, at 45 (“Positivism, on its own thesis, stops short of just those puzzling, hard cases that send us to look for theories of law.”) Although written long before Hart’s Postscript was published, in this respect, Dworkin anticipated Hart’s reply.

Interestingly, the leading contemporary positivist, Joseph Raz, also believes that Hart's embrace of soft positivism is inconsistent with positivism's deeper commitments, although he would characterize them differently from Dworkin. In Raz's view, allowing that the law can sometimes be identified by its content rather than its source would prevent the law from having the only sort of authority it can legitimately claim.¹³⁴ Other "hard positivists" like Scott Shapiro have offered different grounds for thinking soft positivism self-contradictory,¹³⁵ while the leading contemporary soft positivist, Jules Coleman, articulated a defense of soft positivism (which Coleman calls "inclusive legal positivism") before Hart himself did.¹³⁶

The question whether Hart's account of law can accommodate the possibility of legal rules identifiable by their content rather than their source is an important one in jurisprudence, but for present purposes it is a side issue. My principal concern here is how Hart and his critics respond to the indeterminacy problem. In the Postscript, Hart reaffirms that: (a) the law includes areas of open texture;¹³⁷ (b) judges called upon to decide questions falling within the areas of open texture exercise discretion;¹³⁸ and (c) these areas are sufficiently small as not to call into question the positivist picture of law

¹³⁴ See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979).

¹³⁵ Scott J. Shapiro, *On Hart's Way Out*, 4 *Legal Theory* 469, 476 (1998) (arguing that by accepting, in response to Dworkin, that "the rule of recognition could specify moral worth as a condition on legal validity," Hart "offended his [own] view that the primary function of the law is to guide conduct").

¹³⁶ See Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. Leg. Stud.* 139 (1982), reprinted in Jules L. Coleman, *Markets, Morals and the Law* 3-27 (1988).

¹³⁷ Hart, *supra* note 108, at 251.

¹³⁸ *Id.* at 252; *id.* at 272 ("The sharpest direct conflict between the legal theory of this book and Dworkin's theory" concerns whether judges have discretion in hard cases.).

or to render law fundamentally indeterminate.¹³⁹ Because (a) is offered as a point of agreement with Dworkin, I only consider claims (b) and (c) here.

With respect to the question whether judges have discretion in hard cases, Hart concedes that judges speak and write as if they are “always concerned to discover and enforce existing law,” but, he asks rhetorically, “how seriously is this to be taken?”¹⁴⁰ Hart’s response to Dworkin is, in other words, to endorse legal realism! This is remarkable because so much of *The Concept of Law* takes aim at legal realism. Indeed, as Brian Leiter observes, there is a widely held belief among jurisprudents that chapter 7 of *The Concept of Law* exposed legal realism as “a jurisprudential joke, a tissue of philosophical confusions.”¹⁴¹ Yet in the Postscript, Hart invokes a central tenet of legal realism to criticize Dworkin’s view that judges use the law even in hard cases.

Hart avoids fully endorsing legal realism by once again relying on his claim that the law’s areas of open texture are relatively small. But as noted above, he does not attempt to prove this claim in *The Concept of Law*; nor does he offer any empirical support in the Postscript. Might Hart rely in part on the argument, described in section A of this Part, that much law does not give rise to adjudication?

This is a plainly inadequate response to the question of what *judges* do. The indeterminacy problem does not entail complete indeterminacy of legal norms. However, given complexity and moral diversity, it does entail that the sorts of cases that lead to adjudication will be just the ones where lawmakers have been unable to produce rules that lead to determinate answers—either because the circumstances could not be

¹³⁹ Id. at 251.

¹⁴⁰ Id. at 274.

anticipated or because of the impossibility of securing agreement among citizens with diverse conceptions of the good.

To put the point in more practical terms, in an easy case, one side or the other is likely to concede, so the courts feed on a diet of hard cases. If Hart's account is right, then in most cases in which a court is asked to make a legal decision, and in nearly every case in which an appellate court is asked to make a decision, the court resolves the matter by exercising its discretion. But if so, then most of what courts do is decide cases where, in Hart's view, the judge exercises discretion rather than applying the law as received.

Meanwhile, as we saw in Section B of this Part, Dworkin's solution—that in both easy cases and hard cases judges use the same approach to try to find the right answer that has a real existence—“solves” the indeterminacy problem only in some metaphysical sense. Dworkin has no useful practical prescriptions given the facts of complexity and diversity.

In the Postscript, Hart fleshes out his own answer, which is arguably implicit in the main body of *The Concept of Law*. Hart characterizes the zone of the judge's discretion—even in hard cases—as small. He writes: “not only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are *interstitial* as well as subject to many substantive constraints.”¹⁴²

¹⁴¹ Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics* 278, 278 (2001) (arguing that Hart's argument misunderstands the point of legal realism).

¹⁴² *Id.* at 273.

This response should sound familiar from our discussion of judicial restraint and eclecticism in constitutional law. Like those who preach these approaches, Hart believes that judicial power, properly understood and exercised as a craft, leaves judges a tolerably small range of options so that we need not worry about the legitimacy of their decisions.

D. The Legal Process

The exegesis to this point has aimed at recharacterizing the Hart/Dworkin debate as turning on a disagreement about metaphysics and nomenclature, but not practical details. At the metaphysical level, Dworkin contends that there are right answers in hard cases but he offers no account of what legitimates a judge in preferring one rather than another controversial answer in a hard case. Thus, a Dworkinian judge decides cases *as though* he were exercising discretion, regardless of whether, for metaphysical purposes, one calls the decision an exercise of discretion. And although Dworkin would likely resist characterizing his theory in these terms, one can see his principle of integrity—the requirement that decisions fit within the overall structure of the legal system including its past decisions—as doing much the same work as Hart’s assertion that the law’s areas of open texture are relatively small. In both accounts, judges are constrained by formal and informal limits on their power.¹⁴³

¹⁴³ This is a point I have already made about Hart. See *supra* TAN 114-117. Here is a statement by Dworkin to the same effect:

[C]onstitutional interpretation is disciplined . . . by the requirement of constitutional *integrity* . . . [Judges] must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.

Dworkin, *supra* note 43, at 10.

Critics of Dworkin have argued that integrity as he applies it is virtually no constraint at all—that Dworkin’s principles of political justice almost always swamp criteria of fit. In response, one could argue, “Do as Dworkin says, not as he does.”¹⁴⁴ But that then leaves the question of where one might look for an account of precisely how a Dworkinian other than Dworkin himself goes about showing that the requirement of fit constrains judicial discretion within acceptable bounds.¹⁴⁵ In this respect, Dworkin and Hart are left in the same position. Each claims that the practices of Anglo-American adjudication sufficiently constrain judges so as not to call into question the legitimacy of those practices, but neither offers a persuasive argument to support the claim. Hart offers no argument at all, simply making the claim as though it were self-evident, while Dworkin’s account tends to undermine rather than support the conclusion that integrity operates as a substantial constraint on subjective value choice by judges.

There is, however, an account of law, indeed a whole school of thought, that purports to show how the legal process constrains judicial discretion within tolerable bounds even while permitting the effectuation of the law’s human ends. I refer, of course, to the Legal Process School. For Hart and Sacks, the purpose of judges, indeed of law itself, is to allocate decision-making authority among competing institutions. In those cases that fall within the courts’ own circumscribed domain of ultimate decision making, the Legal Process view treats the distinctive comparative advantage of the

¹⁴⁴ James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L. Rev.* 1335, 1349 (1997).

¹⁴⁵ Fleming argues “that Dworkin’s theory of fidelity as integrity is the best conception of fidelity, but would concede that Dworkin himself may not always satisfactorily do the fit work that his own theory calls for.” *Id.* Fleming himself has not attempted to fill this gap in any comprehensive manner.

judiciary as its ability—using the defining tools of legal craft—to render decisions according to principle rather than whim.¹⁴⁶

That Dworkin’s work falls within the Hart and Sacks tradition has been widely noted.¹⁴⁷ As William Eskridge and Gary Peller have observed, “Dworkin’s theory relies on the legal process distinction between ‘policies’ and ‘principles’ and on the importance of coherence arguments in law.”¹⁴⁸ Perhaps because of this association,¹⁴⁹ the connections between H.L.A. Hart’s positivism and the Legal Process School have been largely overlooked.

No doubt, H.L.A. Hart’s famous debate with Lon Fuller¹⁵⁰ has also played a role in obscuring the resonance between *The Legal Process* materials of Hart and Sacks and H.L.A. Hart’s *The Concept of Law*. In the 1940s and 1950s, Fuller and Henry Hart

¹⁴⁶ See Hart and Sacks, *supra* note 5, at 143–44 (contrasting the exercise of discretion by the judiciary with that by executive officials). Herbert Wechsler, who collaborated with Henry Hart on what was in many ways the companion text to *The Legal Process*, *The Federal Courts and the Federal System* (1st ed., 1950), famously referred to such principles as “neutral.” See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 17 (1959). Although the Hart and Sacks materials consistently advance a view of law that is deeply proceduralist, they do not insist on the neutrality of the principles the courts employ.

¹⁴⁷ See, e.g., William N. Eskridge, Jr. and Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in Hart and Sacks, *supra* note 5, at cxvii; William N. Eskridge, Jr. and Gary Peller, *Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 731 (1991) (observing a “close link between Dworkin’s theory and the legal process synthesis”); Vincent Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 Ariz. L. Rev. 413, 413 (1987) (“Dworkin’s approach to a number of problems in legal theory can be linked to what legal scholars call the Legal Process School.”).

¹⁴⁸ Eskridge and Peller, *supra* note 147, at 731.

¹⁴⁹ The extent to which Hart and Sacks influenced Dworkin has perhaps been exaggerated. As Neil Duxbury observes, although an “echo of Hart and Sacks certainly emanates from the writings of Dworkin . . . it is very much one echo among many.” Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 Cardozo L. Rev. 601, 703 (1993).

¹⁵⁰ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 612-15 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 631-32 (1958).

formed a veritable “mutual admiration society.”¹⁵¹ It was thus natural for jurists and legal historians to assume that Hart and Sacks shared Fuller’s anti-positivist credo, that “to distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us.”¹⁵² Yet that assumption was in error, for as early as 1950, Henry Hart had “spun away from Fuller’s natural law view . . . and toward a new kind of positivism,”¹⁵³ that closely resembles the soft positivism of H.L.A. Hart’s postscript.¹⁵⁴

Accordingly, if we put aside the alignments of familiar debates, we can see how *The Legal Process* bids to do the work of constraining discretion that *The Concept of Law* assumes takes place but does not describe in any detail.¹⁵⁵ We can see in *The Legal*

¹⁵¹ Eskridge and Frickey, supra note 147, in Hart and Sacks, supra note 5, at lxxxiii.

¹⁵² Lon L. Fuller, *The Law in Quest of Itself* 10 (1940). Fuller also anticipated Dworkin’s idea of law as a chain novel, providing the analogy of the retelling of a story by one who has heard it. See id. at 8-9.

¹⁵³ Eskridge and Frickey, supra note 147, in Hart and Sacks, supra note 5, at lxxxv. See also Albert M. Sacks, Lon Luvois Fuller, 92 Harv. L. Rev. 349, 349 (1978) (stating that Fuller’s “views fit most comfortably among natural law thinkers”). But cf. Frederick Schauer, *Fuller on the Ontological Status of Law*, in Willem J. Witteveen & Wibren van der Burg, *Rediscovering Fuller: Essays on Implicit Law* 124, 126-28 (Amsterdam 1999) (noting the shared commitment of Fuller and H.L.A. Hart to the possibility of evaluating law by the independent standards of morality).

¹⁵⁴ To be sure, there are passages of *The Legal Process* that appear to take aim at the positivist project of separating law and morality. See Hart and Sacks, supra note 5, at 107-10. But they do so in a peculiar fashion. Hart and Sacks say that the distinction between law, as reflected in an institutional settlement, and morals, is really a distinction “between one aspect of morals in relation to law and another. For the proposition that settled law should be respected, until it is duly changed—that a decision is in some sense ‘right’ simply because it has been duly made—is itself an ethical concept.” Id. at 109. In other words, where the principle of institutional settlement operates, law and morals are inseparable but only because Hart and Sacks believe that there is a moral duty to obey the law. If one puts aside that moral duty, which is controversial among positivists and natural lawyers alike, it becomes clear that Hart and Sacks admit of the possibility of separating law and morality, and it is only that possibility to which soft positivism is committed.

¹⁵⁵ Eskridge and Frickey recount that in the 1956-57 academic year, H.L.A. Hart attended a Harvard legal philosophy discussion group featuring most of the major players in public law, including (Henry) Hart and Sacks. Both Harts presented papers on discretion, to be discussed

Process an effort to operationalize what H.L.A. Hart would (very shortly) afterwards call the rule of recognition. In the opening pages of *The Legal Process*, (Henry) Hart and Sacks write of the procedures used by every society to allocate decision-making authority: “Implicit in every such system of procedures is the central idea of law—an idea which can be described as *the principle of institutional settlement*.”¹⁵⁶ That principle means simply “that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.”¹⁵⁷

It is not much of an overstatement to say that the principle of institutional settlement performs precisely the same role in *The Legal Process* as the Rule of Recognition performs in *The Concept of Law*. Each grounds the authority of law in social acceptance of a master rule or principle—recall that H.L.A. Hart’s Postscript contends that the Rule of Recognition need not be a rule as opposed to a principle—allocating authority among various institutional actors. The rule of law is, in each account, the submission to duly constituted authority.

Where H.L.A. Hart insists on the *existence* of a Rule of Recognition, in *The Legal Process*, Hart and Sacks offer guidance in how in any given setting, one moves from the general principle of institutional settlement to deciding what institutional actor has authority to take a decision in some particular case, and whether that actor’s decision falls

together. See Eskridge and Frickey, *supra* note 147, in Hart and Sacks, *supra* note 5, at c-ci. Although H.L.A. Hart’s paper has been lost, based on a memorandum that was preserved, Eskridge and Frickey speculate that it probably contended (as a concession) “that much discretion could not be controlled by law.” *Id.* at ci.

¹⁵⁶ Hart and Sacks, *supra* note 5, at 4.

¹⁵⁷ *Id.*

within the bounds of its authority. The answer, understandably, is complex, but at bottom it amounts to legal craft.

The first step in the Hart and Sacks conception of legal craft is an awareness of the problem-solving limitations of the judiciary. Thus, the *punchline* of the case study with which *The Legal Process* opens—the case of the spoiled cantaloupes—is a judicial decision to defer to agency decision making, even though the court plainly would have chosen a different outcome if viewing the case *de novo*.¹⁵⁸ But deference is not the end of the story, for courts must decide which institution to defer to in any given case—legislature or administrative agency; federal, state, or local body; public or private actor—and sometimes they must decide not to defer, especially when there is some defect in the decision-making process employed by the entity seeking deference.

Accordingly, as the academic literature generally acknowledges, within the Hart and Sacks framework, ascertaining the proper allocation of authority is the very point of law and thus, also the master skill of legal policymakers, lawyers, and ultimately judges.¹⁵⁹ Yet strikingly, *The Legal Process* materials nowhere state the meta-principle

¹⁵⁸ See Hart and Sacks, *supra* note 5, at 57-58 (reproducing *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60 (1st Cir. 1948)). We know the court would have reached a different result if left to its own devices because it in fact did just that in *L. Gillarde Co. v. Joseph Martinelli & Co.*, 168 F.2d 276 (1st Cir. 1948), reproduced in Hart and Sacks, *supra* note 5, at 53-56, before reversing itself in response to a submission by the federal Department of Agriculture in connection with a petition for rehearing.

¹⁵⁹ See, e.g., Eskridge and Frickey, *supra* note 147, in Hart and Sacks, *supra* note 5, at xciii (“Where private ordering does not work well enough, Hart and Sacks contemplate an interaction between private and public institutions, with their roles allocated according to their relative ‘competence’ to handle the matter” and “through the choice of rules versus standards”); Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 *Yale J.L. & Human.* 171, 214 (2000) (describing the Hart and Sacks view of law as “a system of allocation”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 636-37 (1996) (referring to the “relatively subjective Hart and Sacks methodology [of] determin[ing] a ‘reasonable’ allocation of interpretive authority”). The same point has been made with respect to other classic texts of the legal process school. See, e.g., Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *Vand. L. Rev.*

of institutional allocation of decision-making authority. As Eskridge and Frickey note, “[l]egal process thinkers had no theory of law’s ‘professional culture’ that suggested how it constrains judges.”¹⁶⁰ But this was not a careless omission by Hart and Sacks. Instead of providing a theory, their materials *exemplify a method*. Only by absorbing the lessons of all 1380 pages of the published edition, which Hart and Sacks themselves still regarded as tentative, can the aspiring lawyer/policymaker/judge begin to acquire the subtle, tacit knowledge that enables him to play his chosen role.

Thus, to return to our main theme, the discretion of a judge who has learned the lessons of *The Legal Process* will be safely bounded. Hart and Sacks offer Dworkin a picture of law in which the requirements of fit are tight enough to assuage doubts about law’s legitimacy, even without the metaphysical aid of the right-answers thesis. At the same time, by encompassing allocational decisions within the lawyer’s toolbox, *The Legal Process* appears to make good on H.L.A. Hart’s claim that the law’s areas of open texture are manageably small.

The problem, conventional wisdom holds, is that the Hart and Sacks method doesn’t work. From the right, public choice theory challenged the central premise of the Hart and Sacks approach to statutory interpretation—that there is such a thing as a legislative purpose beyond the compromises among the competing goals of the competing interest groups who sought or fought the legislation in question.¹⁶¹ From the

953, 962 (1994) (“As defined by Hart and Wechsler, the central, organizing question of Federal Courts doctrine involves allocations of authority.”)

¹⁶⁰ Eskridge and Frickey, *supra* note 147, in Hart and Sacks, *supra* note 5, at cxx.

¹⁶¹ See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 540 (1983) (“Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.”); William M. Landes & Richard A.

left, within a decade after its publication, *The Legal Process* was attacked as hopelessly naïve in its assumption that American law could be deemed fair on procedural grounds without attention to how, in both substance and procedure, it systematically favored the interests of the strong over the weak.¹⁶² The upshot of both the right and left critiques was that *The Legal Process* approach functioned only so long as there was a broad consensus about social goals—as there arguably was in the decade and a half after the Second World War—but could not deal with the fractious world that followed.¹⁶³

That, at any rate, is the more or less conventional narrative. Yet these criticisms are ultimately unfair to the Hart and Sacks project. Most prominently, their method does not assume consensus. Quite the opposite, as scholars whose primary focus was private law, they were well aware of both the ubiquity of conflict and the diversity of interests in human affairs. They understood that law must accommodate the often competing interests of producers, distributors, wholesalers, retailers, and consumers, taking account of the parallel competition among federal, state, and local regulators acting through legislative, executive, administrative, and judicial channels. The whole idea of understanding law as a system for allocating authority reflects the centrality of conflict in the Hart and Sacks view.

Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 877 (1975) (describing “the economist’s version of the interest-group theory of government”).

¹⁶² For a summary of the criticism, focusing on student papers by, among others, Duncan Kennedy and Roberto Unger, see Eskridge and Frickey, *supra* note 147, in Hart and Sacks, *supra* note 5, at cxviii-cxxi. In form, Kennedy’s and Unger’s critiques closely resemble the criticism that would later be leveled against John Hart Ely’s procedural account of constitutional law. See *supra*, text accompanying notes 60–61.

¹⁶³ See Eskridge and Frickey, *supra* note 147, in Hart and Sacks, *supra* note 5, at cxviii-cxxv. Because Eskridge and Frickey see the Hart and Sacks method as dependent upon consensus, they view its revival in the 1980s as reflecting a movement back towards moderation in public life. See *id.* at cxxxv-cxxxvi.

To be sure, critics of the regulatory state can object that the Hart and Sacks method makes the unrealistic assumption of panoptic knowledge on the part of the regulator, and there is considerable truth in this criticism. Their New Deal faith in the expertise of administrators as neutral scientists has not worn well. Yet even here, the criticism goes too far. For one thing, Hart and Sacks saw the domain of regulation as small, generally preferring private ordering in the first instance.¹⁶⁴

In addition, it is hardly clear that the solutions proposed by the right are preferable to those proposed by Hart and Sacks. Hart and Sacks generally believed that effective regulation requires intimate familiarity with and accommodation of the practices of the regulated actors.¹⁶⁵ In private law, this translated into an approach that is something like that of the Uniform Commercial Code (“U.C.C.”), which gives primacy to merchant practice.¹⁶⁶ In public law, it meant purposivism in statutory interpretation.¹⁶⁷

By contrast, in both domains, the right now urges formalism. In private law, formalism is proposed as a means of providing economic actors with clear end-game rules that reduce uncertainty and promote efficiency.¹⁶⁸ The best developed and most

¹⁶⁴ See Hart and Sacks, *supra* note 5, at 161 (restating “[t]he thesis that private ordering is the primary process of social adjustment, in the dynamics of a legal system”).

¹⁶⁵ See, e.g., *id.* at 118 (“A cardinal principle in dealing with every type of legal arrangement is to keep steadily in view the kinds of people to whom the directions of the arrangement in question are initially addressed—who the people are, in other words, who are expected to act or refrain from acting in accordance with the arrangement if it works successfully, and under what circumstances they are to act.”); *id.* at 199 (“Directions have to be understood in light of the circumstances in which they are given, and one of the most significant of all circumstances is the position of the person who is supposed to carry out the direction.”)

¹⁶⁶ See U.C.C. §§ 1-205, 2-202, 2-316, 2-504, 2-723 (2000).

¹⁶⁷ See Hart and Sacks, *supra* note 5, at 1121 (asking rhetorically whether “every statute is, of necessity, a purposive act [such that] no statute can be properly interpreted without considering the purpose which ought to be attributed to it”).

¹⁶⁸ See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. Chi. L. Rev. 781, 785 (1999) (“suggest[ing] that the type of flexibility that the Code potentially

careful such account is given by Lisa Bernstein, who grounds her tentative proposals in empirical studies of merchant practices regarding various commodities.¹⁶⁹ But whether her findings apply to the special-purpose goods that account for an increasing proportion of economic activity in a world of flexible production remains to be seen. In any event, even if the work of Bernstein and others calls into question Karl Llewellyn's assumptions in drafting the U.C.C., it leaves the Hart and Sacks approach largely intact, for they saw the law's role as largely facilitating private transactions—and, perhaps in contrast to Llewellyn, they had no objection to enforcing formal rules in circumstances where such enforcement had demonstrable benefits.

In public law, the right urges formalism as a means of disciplining legislators. For example, Justice Scalia's crusade against the use of legislative history in statutory interpretation aims at reforming legislative practices that, he and his fellow travelers say, enable interest groups to obtain the benefits of legislation without the full measure of legislative enactment.¹⁷⁰ Yet it hardly follows that courts, in the name of respect for the decisions of the elected branches, are the appropriate institution to discipline the

promotes is one that often makes contractual parties worse off"); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757, 763-64 (1995); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. Legal Stud. 377, 407-08 (1997); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U Pa L Rev 1697, 1724 (1996).

¹⁶⁹ See Bernstein, *supra* note 168, at 715 (hay, grain and feed, textiles, and silk); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U Pa L Rev 1765, 1769-71 (1996) (grain and feed); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992) (diamonds).

¹⁷⁰ See Scalia, *supra* note 72, at 34; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 687-88 (1997).

legislative process.¹⁷¹ Symbolism aside, legislative practices, to say nothing of the administrative practices that also fall within the purview of judicial canons of construction, are complex and refractory. It is for just this reason that so much of the Hart and Sacks material addresses matters of institutional detail. Even with a strong inclination to defer to the appropriate institutional settlement, a judge operating within the Hart and Sacks paradigm attempts to learn the details of the legislative process that produced a statute, the administrative process that produced a rulemaking or adjudication pursuant to that statute, and the sphere of primary activity (such as the trade in fresh cantaloupes) regulated. It may turn out that in certain contexts, application of this method will lead an astute judge or legislator to favor formalism, but for Hart and Sacks, that is always because of particulars, rather than a general commitment to formalism.

If the right has not proved the superiority of a thoroughgoing formalism over the Hart and Sacks approach,¹⁷² neither has the left advanced its own program. And that is

¹⁷¹ Nor is it clear that judicial efforts to discipline legislative practices are consistent with the primacy that formalists (and others) purport to give to legislation. See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C.L. Rev. 1254, 1271 (2000) (noting that the formalist “willingness to review legislative judgments appears to conflict with the deference that the courts in general, and [formalists] in particular, accord legislative judgments in a wide variety of contexts.”) But cf. Jane S. Schacter, *MetaDemocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 613-46 (1995) (arguing that courts should adopt interpretive methods that promote particular conceptions of democracy, although not championing formalism as her own preferred conception of democracy).

¹⁷² Viewed from the institutional perspective, formalism’s superiority could only be demonstrated by an approach that recognized the complexity of the world in which either formal rules or flexible principles must operate. In my view, Adrian Vermeule states the best set of arguments along these lines. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74 (2000). As I read Vermeule, however, his endorsement of thoroughgoing formalism is provisional and would be defeasible in particular domains in which functionalism (or some other non-formalist) approach were demonstrably superior. In this respect, his view simply reverses the Hart and Sacks presumption in favor of functionalism. Vermeule does not disagree with their view that the interpretive approach should fit the circumstances; he simply believes that formalism is a better default than functionalism.

largely because, as we saw in our discussion of critical approaches to constitutional interpretation, the left has no program—in the sense of an approach to adjudication that faithfully seeks to render adjudication legitimate. Duncan Kennedy's *A Critique of Adjudication*¹⁷³ is instructive. Throughout the book, Kennedy treats Hart and Sacks as laying the groundwork for Dworkin's coherentism, which Kennedy relentlessly criticizes.¹⁷⁴ At the end of the day, however, Kennedy can propose only three options: One can passively lament; one can pretend to accept the law's claims to autonomy while surreptitiously advancing a particular (left) ideological agenda; or one can struggle to bring the law's deep ambiguity into the open.¹⁷⁵ This counsel of despair is hardly an alternative to the Hart and Sacks method, even if one thinks (as I do not) that it thoroughly discredits that method.

The great strength of the Hart and Sacks approach, which enables it to withstand attacks from both the right and the left, is its emphasis on the law as a vehicle for coordinating the activities of actors with diverse interests and skills. Hart and Sacks anticipated a time, our own, when one of the master skills of the lawyer would be coordinating the activities of and cooperating with others, including many non-lawyers. In this sense, they partially anticipated a new, emerging conception of a professional, for *The Legal Process* was meant as a sophisticated training device for aspiring legal professionals. In the traditional conception, professionals bring to bear highly specialized skills on highly specialized problems; in the new model envisioned here, professionals (including lawyers) are generalists, whose principal skill is their ability to collaborate

¹⁷³ Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (1997).

¹⁷⁴ See *id.* at 33, 35, 75, 118, 120, 123-24, 196.

¹⁷⁵ See *id.* at 374-76.

across disciplinary boundaries to solve problems.¹⁷⁶ But Hart and Sacks only just barely hinted at this new role, as the next section explains.

E. Limits of The Legal Process Paradigm

In one important respect, the new conception of legal professional (which I have described elsewhere)¹⁷⁷ is continuous with the conception one might extrapolate from the Hart and Sacks materials, for it takes as a starting point the implicit sub-text of *The Legal Process*: An appropriate resolution of a legal problem requires a good understanding of how that problem looks from the perspective of all the actors involved. Yet in important respects, Hart and Sacks did not break with the old model of the professional.

Hart and Sacks conceptualized the understandings necessary for lawyers to collaborate across disciplinary boundaries as *tacit*. That is why, recall, *The Legal Process* does not set out the lawyer's skills so much as it exemplifies them. However, tacitness renders the lawyer's art opaque to outsiders. And that opaqueness may prevent law from performing its necessary legitimating function.

I can put this point in a way that returns us to the main currents of jurisprudence. Recall that H.L.A. Hart thought it so obvious that the law's areas of open texture were tolerably small that he felt no need to justify this belief. Hart and Sacks offer an account of law that perhaps validates H.L.A. Hart's assumption. It does so through craft.

How so? Even in the aftermath of legal realism and critical legal studies, relatively few practicing lawyers think that law in general or constitutional law in particular is so indeterminate as to call into question every judicial exercise of power in

¹⁷⁶ See Dorf and Sabel, *supra*, note 23 at 859-65.

the law's name. To be sure, lawyers can be a cynical lot, and thus most will be critical of particular decisions—but this fact only underscores my claim: criticism typically assumes a departure from some correct outcome or range of outcomes; were law profoundly indeterminate, there would be no such baseline against which to measure failure.¹⁷⁸

The predominant view in the profession, in other words, asserts that a skilled lawyer knows the range of legitimate outcomes, even in hard cases. If asked to articulate the general principles that limit the law's areas of open texture to a tolerably small domain, he may well be dumbstruck; and yet he is equally likely to be able to invoke his entire range of training and experience in the law. Learning to think like a lawyer, in this view, means learning to provide what Hart and Sacks called “reasoned elaboration” of some particular allocation of institutional authority or judgment. But to see that this process sufficiently fixes the range of outcomes to avoid illegitimacy requires the sort of familiarity with specific cases that can only be acquired by careful study (of, for example, *The Legal Process*) and years of experience.

Accordingly, the knowledge that the discretion of judges is satisfactorily cabined is available to lawyers but not to the general public. And that fact itself raises questions about the possibility of legitimate power in a democracy where most citizens lack legal training.

Perhaps this objection can be answered. One might point, uneasily, to the naïve formalism of the general public: As any experienced teacher of first-semester law

¹⁷⁷ See *id.*

¹⁷⁸ See Michael C. Dorf, *Is There a Distinction Between Law and Politics? Yes, and the Bush v. Gore Decision Proves It* (Dec. 27, 2000), available at <http://writ.findlaw.com/dorf/20001227.html> (“If law were just politics, it would be meaningless to criticize a judicial decision as political, and all the Court's decisions would seem equally ‘political’ to observers.”)

students knows, to an even greater extent than the most devoted acolyte of Hart and Sacks, most of the lay public believe that there are techno-professional methods available for discerning the proper resolution of most legal disputes, even if they also believe that knowledge of such methods is the quasi-exclusive domain of the initiates.¹⁷⁹

This solution—the people believe in the gods and the gods exist, but the people’s belief in them rests only on a leap of faith—is, at best, uncomfortable. It is made considerably worse by doubts about the nature of the gods. Hart and Sacks assumed that the sorts of conflict that law was needed to resolve would occur principally along economic lines: management versus labor; producer versus consumer; and so forth. When new lines of conflict emerged—most prominently in the form of the Civil Rights movement and successor rights movements—it became clear that deference to one or another existing institutional settlement would pit substantive justice against the notion of a circumscribed judicial role. Issues of racial inequality had, of course, been central to the entire American experience, but it was not until the Warren Court that the vindication of the fundamental rights of citizens (other than property rights) came to be understood as a basic function of courts.

On these questions, however, *The Legal Process* was at best silent. The 1957 materials make no mention of *Brown v. Board of Education*, decided just three years earlier. And on the question of apportionment, which was soon to become the second

¹⁷⁹ In my experience, students arrive at law school as naïve formalists. Much of their legal education aims to convert them into cynical legal realists, but the process does not take. Many may flirt with radical realism, but most end up believing that constraint comes from the tacit lawyer’s craft.

great front of the Warren Court's assault on judicial passivity, Hart and Sacks strongly implied that courts should do nothing about patently undemocratic legislatures.¹⁸⁰

The conventional account of Hart and Sacks faults them on this score for defining legal legitimacy in solely procedural terms, a move, it is said, characteristic of the post-World War II era. In this account, Legal Process School thinkers wanted to retain the modernist legacy of legal realism, while at the same time distancing their sociological jurisprudence from Nazism, fascism, and communist totalitarianism. The solution was a sharp distinction between is and ought, between procedure and substance.¹⁸¹ On this view, Hart and Sacks could not condemn racial apartheid on substantive grounds; thus, Henry Hart's collaborator Herbert Wechsler was left unsuccessfully trying to muster the energy to justify *Brown* in terms of a procedural right of association.¹⁸²

There is some truth to this line of analysis and criticism. The Hart and Sacks materials were rooted in the assumptions of their age.¹⁸³ But at the same time the criticism rests on something of a mischaracterization of *The Legal Process*. Hart and

¹⁸⁰ The materials appear at pages 672-86. Although Hart and Sacks do not formally endorse a position, their rhetorical questions suggest, to this reader at least, a disposition similar to Justice Frankfurter's:

Is there any escape from the conclusion that the composition of a state legislature is a constitutional problem in the elementary sense of having to do with the basic structure of the body politic? Does it not then follow that the problem is appropriate for solution only by the basic process of constitution making? Should a people who lack the political wisdom to establish a sound constitution for themselves expect to be able to shuffle off their deficiencies simply by running for help to the Magi on the bench?

Id. at 686.

¹⁸¹ See Gary Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J.L. Ref. 561, 566-86 (1988).

¹⁸² See Wechsler, *supra* note 146, at 31-35.

¹⁸³ However, as noted above, I disagree with the suggestion by Eskridge and Frickey that The Legal Process was rooted in a belief that American politics had reached a broad consensus. See *The Legal Process*, *supra* note 5, at xcvi (calling *The Legal Process* "the classic exposition of the post-war consensus in public law"). The classic general work is Louis Hartz, *The Liberal Tradition in America* (1955).

Sacks were well aware that judgments about procedural fairness rested upon and implicated substantive value judgments, as, for example, their embrace of purposivism in statutory interpretation clearly reflects. Where they went wrong was their assumption—perhaps reasonable in its time—that America had generated all of the institutions necessary to resolve the conflicts likely to emerge, or at worst, that the needed institutions could be found among the menu of arrangements throughout the world.¹⁸⁴

What Hart and Sacks did not contemplate was the possibility of new sorts of public institutions whose job it is, not to resolve legal ambiguity, but to foster continual deliberation and experimentation. The next Part of this Article sketches these new institutions, with an emphasis on how their judicial version can address the indeterminacy problem. Before offering my account of experimentalist judging, however, I should note that the limitations of the Hart and Sacks I have identified are not offered as a criticism of them in particular. On the contrary, as I have endeavored to show above, *all* of the participants in the constitutional and jurisprudential debates have long assumed that the institutions of democracy are fixed, and that the central questions are always: first, in which institution should the discretion necessary to resolve legal ambiguity be lodged? And second, how can any such allocation be squared with the competing goals of constraining overzealous government and constraining overzealous judicially imposed limits on government? By focusing attention on the details of allocational decisions, Hart and Sacks permit us to see the fixity assumption, and its limits, more clearly than the other thinkers we have examined.

¹⁸⁴ Accordingly, in the final section on the case of the spoiled cantaloupes, Hart and Sacks pursue “The Problem from an Olympian Point of View.” Hart and Sacks, *supra* note 5, at 67. It turns out that the gods on Olympus, as envisaged by Hart and Sacks, compare the institutional

To see the fixity assumption and its limits in the Hart and Sacks approach, let us return to the core of that approach by considering how the concept of *institutional settlement* does double duty in *The Legal Process*. The principle of institutional settlement is, as explained above, simply Hart and Sacks's statement of H.L.A. Hart's positivist credo: primary and secondary actors alike must defer to decisions reached by duly authorized institutions following proper procedures, regardless of the content of those decisions. Beyond this general principle, Hart and Sacks also frequently refer to *particular* institutional settlements. Used in this way, an institutional settlement refers to the resolution of some concrete question, such as whether the buyer or seller bears the risk of loss due to spoliation in the absence of contractual agreement. Combining these two principles, we see that *the* principle of institutional settlement means that *particular* institutional settlements "ought to be accepted as binding upon the whole society unless and until they are duly changed."¹⁸⁵

For present purposes, the crucial word here is "until," which reveals the fixed quality of law as Hart and Sacks envision it. Of course, the law changes, but—like the market in standard economic models—the law as envisioned by Hart and Sacks moves instantaneously from one equilibrium to the next.

Nor is this static quality a mere accidental and thus easily removed piece of the Hart and Sacks architecture. Rather, it is essential to their purposivist, and thus, coherentist picture of law.¹⁸⁶ Coherentism requires a judgment about what interpretation

arrangement in the United States with what then existed in western Europe and the Soviet Union. Id.

¹⁸⁵ Id. at 4.

¹⁸⁶ To see why purposivism entails coherentism, contrast the former with the public choice account of lawmaking, in which the law is rarely more than an *incoherent* bundle of

makes the law best hang together. Yet such a judgment seems impossible if the law is in a constant state of disequilibrium. A system in disequilibrium is, almost by definition, one that does not hang together coherently. At least temporary fixity appears necessary for coherence.

Coherentism thus understood also entails tacitness. Suppose Judge Earl says that notwithstanding the absence of any prohibitory statutory language, a grandson who poisons his grandfather is not legally entitled to the inheritance otherwise due him.¹⁸⁷ Judge Gray disagrees. How can one show that Judge Earl is correct, that the principle that no one should profit from his own wrong should prevail over the seemingly plain language of the statute and thus the equally lofty principle of legislative primacy? The coherentist answer, argued at length by Dworkin,¹⁸⁸ (operating in this sense more or less within the Hart and Sacks paradigm) is to appeal to other principles the listener holds dear, and to show, step by step, why Judge Earl's answer is preferable to Judge Gray's.

At the end of the day, however, coherentist arguments are rarely decisive, for it is always possible to assert that some other set of answers hangs together as well or better when organized by some other set of principles. That coherentism broadly conceived is nonetheless a widely used, perhaps the most commonly used, methodology in American law, reveals that there are widely shared understandings about what makes a set of arguments and outcomes cohere with one another. But those shared understandings

compromises. By contrast, the purposivist lawyer or judge assumes that there is a coherent, unifying account of any given statute, and ultimately, of the law generally, from which particular applications can be derived.

¹⁸⁷ See *Riggs v. Palmer*, 115 N.Y. 506, 514 (1889). See Hart and Sacks, *supra* note 5, at 68-102.

¹⁸⁸ See, e.g., Dworkin, *supra* note 71, at 225 (“The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author . . . expressing a coherent conception of justice and fairness.”)

cannot be expressly articulated—for if they could, then they could be argued as such in the effort to induce the listener to adopt one rather than another coherentist solution. The shared understandings that make coherentism possible are, in other words, necessarily tacit.

Thus we can identify the linked assumptions of the Hart and Sacks paradigm:

(1) The task of the judge is to identify and defer to institutional settlements;

(2) Those settlements are fixed, at least until formally changed using the authoritative procedures (such as constitutional amendment, enactment of new legislation, or promulgation of new regulations) available for changing institutional settlements;

(3) The static nature of the law in between changes in institutional settlements enables the judge to identify the best answer to any legal question through coherentism, asking what outcome will best reflect the set of institutional arrangements taken as a whole, a method Hart and Sacks call “reasoned elaboration,” and that Dworkin calls “integrity”;¹⁸⁹

and

(4) Coherentism is made possible through the tacit skills that lawyers and judges¹⁹⁰ acquire by study (of, among other things, *The Legal Process*) and experience.

The synthesis embodied in *The Legal Process* is both elegant and powerful, more so perhaps than any of the work that builds on or criticizes it. And it works, in the sense

¹⁸⁹ For the Dworkinian version, substitute “put the law in its best light” for “best reflect the set of institutional arrangements taken as a whole.”

¹⁹⁰ As a form of traditional legal education, the Hart and Sacks method prepares students for becoming judges rather than attorneys, even though most students were not expected ever to serve as judges.

that it does as good a job as possible at rendering law legitimate given the core assumptions listed above. The next Part asks what constitutional theory and jurisprudence might become if these assumptions are relaxed. What is the nature of legal authority when ambiguity opens the way to ongoing collaboration among institutional actors including, but not limited to courts—collaboration in which the institutions’ respective means and ends reciprocally redefine one another?

IV. Toward Experimentalist Judging

This Part describes and assesses what I call experimentalist judging. It begins by describing a broad class of institutions that go by the name of problem-solving courts.¹⁹¹ These are courts of first impression that take their objective to be solving the social problems that underlie the tip of the various icebergs that appear for adjudication in the form of concrete controversies involving criminal conduct, drug addiction, family breakdown, and so forth. In a previous article, Sabel and I described drug courts—to date the most widespread form of problem-solving court—as an instance of nascent experimentalism.¹⁹²

After asking whether problem-solving courts are really courts, this Part sets forth an emerging model of experimentalist *appellate* judging.¹⁹³ Building on existing Supreme Court doctrine in the areas of sexual harassment and criminal procedure, I explain how appellate courts can simultaneously exercise their power to disentrench

¹⁹¹ A collection of practitioner and other perspectives on problem-solving courts was recently published in a symposium issue of the *Fordham Urban Law Review* titled “Problem Solving Courts, Book IV.” 29 *Fordham Urb. L.J.* 1751 (June 2002).

¹⁹² See Dorf and Sabel, *supra*, note 23, *passim*.

problematic practices while leaving room in their decisions for local actors to experiment with a range of solutions. This Part aims to show how both the trial and appellate versions of experimentalist judging simultaneously fall within the Hart and Sacks paradigm—as a means of coordinating activity across professional and institutional boundaries—and breaks with that tradition—by assuming neither that government institutions are static nor that the courts that interact with them must operate by reference to necessarily tacit principles.

The Part concludes by explaining how experimentalism can respond to the indeterminacy problem. First I draw a distinction between “big” cases—those that appear to require panoptic knowledge on the part of the judge, thereby presenting the complexity problem—and “hard” cases—those that call for resolving questions about which people fundamentally disagree, thereby presenting the moral diversity problem. I explain that experimentalism is primarily a strategy for attacking big cases, but that some seemingly hard cases will, based upon practical experience, prove to be big cases, and thus amenable to experimentalist solutions. In the end, the approach I favor is similar to that of Hart and Dworkin in that it attempts to minimize the domain of legal indeterminacy; however, where Hart and Dworkin ask us to take this proposition on faith, experimentalism aims to craft institutions that, among their other virtues, in fact shrink the domain of the indeterminacy problem.

A. Experimentalist Courts of First Impression

¹⁹³ The account builds on some of my earlier work. See Dorf, *supra* note 26, at 51-79; Dorf and Sabel, *supra* note 21, at 388-419; Dorf and Friedman, *supra* note 27, at 107.

Suppose you are a trial judge whose docket mostly consists of misdemeanor and non-violent felony charges. What is your job? The traditional answer is straightforward: you mete out justice. Sometimes you adjudicate guilt or innocence; more frequently, you conduct a colloquy to ensure that the defendant's guilty plea is voluntary; and by whichever route a defendant's guilt is determined, you impose a sentence—time served in jail pending trial, probation, community service, restitution, or perhaps some additional weeks or months in jail. Over time, however, you notice that many of the defendants appearing in your courtroom have been there before. You might want to impose ever-stiffer sanctions, but the prisons are already crowded with inmates who have committed violent offenses, and in any event, a lengthy prison sentence strikes you as disproportionate to the offense in most instances. Thus, you rely on your familiar repertoire of unsuccessful responses to the revolving door of arrest—arraignment—guilty plea—sentence—release—and re-arrest.

In the late 1980s and 1990s, the frustrating circumstances just described led increasing numbers of judges, prosecutors, and policymakers to explore the long-discarded notion that at least some criminals can be rehabilitated.¹⁹⁴ Because the majority of lawbreakers are also illegal drug users, efforts initially focused on drug addiction as a substantial factor contributing to crime. With support from studies showing that drug treatment is more cost-effective than imprisonment,¹⁹⁵ drug courts

¹⁹⁴ See Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 12-31 (1981) (discussing the history of rehabilitation); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-rehabilitationism, and Judicial Collectivism*, 29 *Fordham Urb. L. J.* 2063, 2079 (2002); Herbert Morris, *Persons and Punishment*, 53 *The Monist*, No. 4, at 475 (1968).

¹⁹⁵ See generally C. Peter Rydell & Susan S. Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (1994) (finding that drug treatment was substantially more cost-effective than domestic enforcement, source-country control or interdiction); Anne Swern, Office of the District

emerged as an alternative to cycling non-violent offenders through the conventional criminal justice system. The Justice Department under the Clinton Administration provided seed money for states and localities to establish such courts, a policy that has continued under President Bush, so that as of early 2002, there were 785 operating drug courts, with another 453 in the planning stage.¹⁹⁶

What is a drug court? Glossing over important local variations, it is a court that closely monitors treatment for drug-addicted defendants brought before it. After the defendant pleads guilty (or in some jurisdictions is found guilty at a trial on the merits) the court sentences him to a treatment program chosen by the court's clinical staff based on an assessment of the defendant's needs. The judge and court personnel then closely monitor the defendant's progress in treatment, using a system of graduated rewards for successes and punishments—including, ultimately, the threat of imprisonment—for failures. Defendants who complete their course of treatment "graduate" in a ceremony that typically expunges the predicate conviction.

Now suppose that you are a drug court judge. What is your job? "Meting out justice" is at best a small piece of what you do. You are fundamentally a problem solver. Collaborating with your court's own clinical staff, service providers, prosecutors, defense attorneys, the police, and others, you attempt to reduce the personal and social cost of crime committed by drug addicts. But if you are a problem solver, you will not be

Attorney, Kings County District, DTAP: Drug Treatment Alternative-to-Prison, Eleventh Annual Report 30 (2001).

¹⁹⁶ As of January, 2002, nationwide, 442 drug courts had been operating for over two years (five of these currently inactive), 354 courts had been recently implemented (six of these inactive), and 469 were in the planning phase (sixteen of which are temporarily inactive). OJP Drug Court Clearinghouse and Technical Assistance Project, Summary of Drug Court Activity by State and County, available at <http://www.American.edu/justice/publications/drgchart2k.pdf> (January 17, 2002).

content with evidence that your approach to non-violent crime fares better than the revolving-door system in the courtroom down the hall.¹⁹⁷ “Better than a broken system” is a low bar indeed.

Accordingly, you will want to know how you can ensure effective treatment. You will want to keep close tabs on the treatment providers to which you refer defendants. You need to know that the services promised are being provided, but that alone is insufficient. You got into the drug court business because you thought that conventional courts did not address the underlying social problems—in this instance, addiction—that lead to criminal conduct. Which forms of treatment, provided by whom, under what circumstances, to what client population, do best at retaining clients? At keeping them drug-free? At reducing crime? To answer such questions requires that you have access to rich information about clients and providers.

Thus, drug courts use sophisticated databases to track client performance. In my prior article on drug courts, Sabel and I observed that drug court clinical staff also used information about clients to monitor treatment providers, but not systematically.¹⁹⁸ Judges and case workers would notice over time that clients assigned to a particular provider frequently missed their court dates despite reports that the client was attending sessions, and in response, an inquiry would be initiated or referrals would be diverted.

¹⁹⁷ Although more, and more rigorous, evaluations must be undertaken, the most comprehensive studies show drug courts to be effective. See Steven Belenko, Natl. Center on Addiction and Substance Abuse (CASA) at Columbia University, *Research on Drug Courts: A Critical Review 2001 Update 4*, available at http://www.casacolumbia.org/usr_doc/researchondrug.pdf (last visited July 26, 2002); Adele Harrell et al., *Breaking the Cycle of Drugs and Crime: Findings from the Birmingham BTC Demonstration*, 1 *Criminology and Public Policy* 2, 189-216 (2002). See also John S. Goldkamp et al., *An Honest Chance: Perspectives on Drug Courts*, available at <http://www.ojp.usdoj.gov/dcpo/publications/honestchance> (last visited Aug. 19, 2002) (Drug Court Program Office publication, April 2002) (reporting generally favorable findings from focus groups of drug court participants in six locations).

Now, at least one important player in the drug court movement, the Center for Court Innovation—the research and development arm of the New York State Unified Court system, which also runs a number of demonstration projects—is taking steps to systematize monitoring of service providers. That project aims to develop a provisional monitoring protocol for drug courts and other problem-solving courts nationwide.¹⁹⁹

Now imagine that the full-fledged monitoring regime exists and observe the role of the drug court. The court superintends drug treatment for its clients while simultaneously acting to improve the quality of services through a networked form of learning. Successful innovations in one treatment provider set new benchmarks by which other providers are measured. Because drug courts are themselves part of a national network, the successful innovations both in service provision and in the monitoring of service provision rapidly diffuse around the country by virtue of the continual ratcheting up of performance benchmarks: a treatment standard that may have been acceptable in the early days of drug courts is superseded by a more demanding one, as documented experience reveals which practices succeed and which (by relative standards) fail.

Drug courts and other problem-solving courts designed along similar lines avoid what I identified above as the limitations of the Hart and Sacks paradigm: fixity and tacitness. The design principles of problem-solving courts do not assume, as in the Hart and Sacks paradigm, that there is a distinctive, fixed capacity of courts, whether it is the capacity for “reasoned elaboration” or something else. Problem-solving courts are always a work in progress. They take as given that the performance of service providers can always be improved, and the very conditions of openness and revisability in light of

¹⁹⁸ See Dorf and Sabel, *supra*, note 23 at 865-68.

experience upon which problem-solving courts insist in the actors they evaluate, apply as well to problem-solving courts themselves. Accordingly, neither the actors problem-solving courts monitor nor the courts themselves are fixed.

Nor is the master skill of the problem-solving court tacit in the sense of resistant to formal articulation. In the Hart and Sacks approach itself, the skills necessary for courts to make sense of the complexities of the institutions with which they interact are tacit. The Hart and Sacks judge is a traffic cop who directs decisionmaking authority through a dizzyingly busy intersection, but has difficulty articulating exactly how he makes his own decisions. The best he can do is to provide rich examples of the method—i.e., the Hart and Sacks materials—or a list of factors to be organized by such open-ended concepts as reasonableness. By contrast, almost no decision made by a problem-solving court requires the application of unguided judgment. Court sessions serve mostly as an opportunity for the judge to verify that the exhaustive information on the progress of each defendant (or other “client” subject to the problem-solving court’s jurisdiction) comports with his or her own perception and to ritualize the imposition of graduated rewards or punishments. There is very little judging in the sense of making a non-mechanical decision. To put the point bluntly, problem-solving courts “solve,” or rather, they avoid, the problem of discretion by undertaking different activities from conventional courts.

B. Are Problem-Solving Courts Really Courts?

¹⁹⁹ I serve as an informal consultant on this project.

Undertaking different activities from conventional courts enables problem-solving courts to avoid a set of difficulties associated with conventional courts, but perhaps only at the unacceptably high cost of rendering them unable to perform the necessary social function that courts serve. This is no mere theoretical worry, as a recent appellate ruling in Oklahoma illustrates. In *Alexander v. State*,²⁰⁰ the defendant pled guilty to drug possession and illegal firearm possession charges and agreed to complete a drug court program. After repeatedly testing positive for cocaine and being given additional opportunities to comply with program rules, he was terminated from the program. On appeal to the Court of Criminal Appeals, the defendant argued, *inter alia*, that the drug court judge was biased because he served as “part of the treatment team.”²⁰¹ Although the appeals court denied relief because the defendant had waived the objection by not presenting it at the trial level, the appeals court agreed with the general thrust of the defendant’s claim, prescribing that in future cases, a drug court participant facing ejection from his program (and therefore a prison term), should be able to have the termination proceeding adjudicated by a judge who is not a member of his treatment team.²⁰² A concurring judge went so far as to say that drug courts violated the Oklahoma Constitution’s separation-of-powers requirement by mixing legislative, executive, and judicial functions.²⁰³ The *Alexander* case therefore raises two related questions: First, is it appropriate for drug courts to undertake the activities that they do when these activities could be, perhaps more appropriately, located in the executive branch of government?

²⁰⁰ 48 P.3d 110 (Okla. Crim. App. 2002).

²⁰¹ *Id.* at 112.

²⁰² *See id.* at 115.

²⁰³ *See id.* (Lumpkin, J., concurring specially).

And second, assuming that the answer to the first question is the one given by the majority in *Alexander*—namely, a qualified yes—is the participation of the judiciary in collaborative problem-solving inconsistent with the ideal of neutrality associated with adjudication?

These questions take on greater urgency when we realize that, if we deem the drug court experiment a provisional success, there is no reason not to apply the model to other domains. Successful treatment for drug-addicted misdemeanants and non-violent felons has already led to calls for prison-based drug courts or their equivalent for violent offenders. Moreover, drug treatment may ameliorate the problems that give rise to cases in family court, housing court, and juvenile court, to name just three problem-plagued specialty jurisdictions. Likewise, addiction is not the only social problem that leads to legal action. Solving such social problems will often require government to deliver an array of medical, employment, housing, and general counseling services. Although courts addressing these issues may lack the ability to threaten parties with imprisonment, they do have at their disposal other sticks, not to mention carrots, with which to induce compliance with their orders.

Therefore, it does not take a great leap of the imagination to envision a not-so-distant future in which much of what front-line courts do is monitor the delivery of services. To be sure, conventional courts would still be needed to resolve contested questions of law and fact, but even now, the high percentage of cases resolved by plea or settlement shows that such contested questions are the exception rather than the rule.

If most, or at least a substantial portion, of what courts come to do is solve social problems by monitoring the provision of services, one might justifiably ask what makes

these problem solvers courts, as opposed to administrative agencies. Of course, the problem-solving courts would not look like conventional top-down bureaucracies;²⁰⁴ they would instead be federated agencies that address issues through what might be called “coordinated decentralization.”²⁰⁵ Even so, the emerging problem-solving courts do not resolve contested questions of fact or law; from the conventional perspective, they operate purely in the remedial phase but not by one-time decrees.

Perhaps the closest analogue in the conventional understanding is of the judge supervising a structural injunction.²⁰⁶ But of course, that model has been widely regarded as problematic because running schools, prisons, and other complex institutions taxed both the resources and legitimacy of the courts.²⁰⁷ The best that can be said for structural reform litigation is that where the need for reform is urgent and politically accountable institutions do not act, as in the case of prisons, courts may legitimately step in. Yet even if we count prison reform, some school desegregation, and a few other instances of judicially-led structural reform as modest successes, that hardly justifies converting courts into nothing but managers of complex social change. Even the most enthusiastic

²⁰⁴ See Dorf and Sabel, *supra*, note 23 at 832-33.

²⁰⁵ Michael C. Dorf, *The New Centralizers*, FindLaw’s Writ, available at <http://writ.findlaw.com/dorf/20020612.html> (June 2002).

²⁰⁶ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, *The Supreme Court 1975 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); Susan P. Sturm, *The Promise of Participation*, 78 Iowa L. Rev. 981 (1993); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo. L.J. 1355 (1991).

²⁰⁷ See Donald L. Horowitz, *The Courts and Social Policy* 17-19 (1977) (questioning whether the courts have the resources and capacity to engage in social policymaking); Fiss, *supra*, note 206, at 5-6, 17 (arguing that changes in the forms of adjudication have been seized upon by opponents of structural reform to question the legitimacy of the courts’ role in conducting institutional reorganization); Sturm, *supra*, note 206, at 1378-1410 (identifying and responding to critiques of the legitimacy of court-ordered public law remedies). But see Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State* (1998).

defenders of structural reform litigation recognize that courts are at best “sub-optimal decision makers” in these contexts.²⁰⁸

A defense of problem-solving courts would therefore have to begin by differentiating them from courts enforcing structural injunctions. Along the dimension of efficacy, several distinctions come to mind. First, problem-solving courts act on one individual at a time rather than attempting to redesign whole institutions at a time. Second, the litigants who choose to appear before problem-solving courts come there recognizing that they need assistance in solving their problems rather than kicking and screaming, as was typically the pattern of the public institutions sued in structural reform litigation. Third, problem-solving courts are considerably more modest than courts engaged in structural reform. A problem-solving court faces fewer competency obstacles than a court overseeing structural reform because the former does not itself run any institutions, nor does it place itself atop a hierarchical organization of personnel resentful of its authority. A problem-solving court is, recall, the hub through which the best practices of the providers it monitors—the spokes—learn to improve their respective performance.²⁰⁹

But if these distinctions suggest that problem-solving courts can succeed where courts engaged in structural reform sometimes stalled, there is a similarity that raises urgent questions. Just as courts that attempted to run complex social institutions such as

²⁰⁸ Malcolm Feeley and Edward Rubin, *Judicial Policy Making and Sub-Optimal Decisions: Revising the New Legal Process Analysis of Courts* (draft of Mar. 18, 2002) (on file with the author).

²⁰⁹ One can give an account of experimentalist judging which sees it as an improvement of, rather than a break with, structural reform litigation. See, e.g., Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. Pa. L. Rev. 805 (1990). For my purposes here, I am less interested in the precise relation of experimentalist judging and earlier structural reform litigation than I am in characterizing the former.

schools and prisons prompted the question of why such tasks should be undertaken by the judiciary rather than legislative, executive, or administrative bodies, so problem-solving courts prompt the same question: why courts? If the problem-solving apparatus I am calling a problem-solving court need not be located in the judicial branch, why not spin it off into an administrative agency—albeit one that operates through coordinated decentralization rather than hierarchy?

The short answer is that for some purposes, courts have institutional advantages that other, administrative, bodies lack. First, they have what champions of problem-solving courts describe as the convening power,²¹⁰ i.e., the ability to bring together the various actors needed to craft effective solutions to multi-dimensional problems. This is a polite way of saying that judicial decrees are backed by the threat of force, a point that is perhaps ultimately true of administrative action as well, but not nearly so directly. The convening power is thus parasitic on courts' coercive power.²¹¹

Second, unlike other actors in the legal system, courts are perceived as neutral parties that lack a direct stake in the outcome of litigation or substitutes for litigation. Neutrality or its perception permits courts to function as honest brokers when problem solving becomes a matter of negotiation. In addition, the courts' perceived neutrality, when combined with such quasi-mystical symbols of judicial power as the robe and gavel, lends prestige to the courts, thereby enabling courts to command respect where other actors might not.

²¹⁰ See Remarks of Hon. Jo Ann Ferdinand, *The Judicial Perspective*, 29 Fordham Urb. L.J. 2011, 2012 (2002).

²¹¹ See, e.g., Derek A. Denckla, *Forgiveness as a Problem-solving Tool in the Courts*, 27 Fordham Urb. L.J. 1613, 1614 (June 2000).

Third, courts have what might be called a *disentrenching* capacity.²¹² The ability to declare a state of affairs unlawful, even where a court does not have a solution ready to hand, enables courts to force other actors to address their problems immediately. En route to becoming a full-fledged problem-solving court that is the hub of some wheel of services and actors, a disentrenching court can impose a “penalty default,” a state of affairs so unpalatable to all parties that they have no choice but hammering out some solution that is, from the perspective of the default, a pareto optimal improvement.²¹³ The disentrenching power is especially important in circumstances—unlike those of drug courts and other problem-solving front-line courts—in which there is no administrative apparatus associated with the judiciary itself. In such circumstances, the court’s disentrenching decision can call into existence an experimentalist process in other institutions. I examine this phenomenon more closely in connection with appellate judging in sub-Part D below.

The three advantages that experimentalist courts possess relative to other institutions—the convening power, perceived neutrality, and the disentrenching power—are real, but, one might worry that courts retain these strengths only so long as they act primarily *as courts*—i.e., as traditional resolvers of disputes. This is the worry of the concurring judge in *Alexander*, writ large. Once courts become active problem solvers enmeshed in the messy business of ordering real-world institutions, they will no longer be perceived as neutral, and once the perception of neutrality goes, that will also signal the

²¹² James Liebman, et.al., *Destabilization Rights: How Public Law Litigation Succeeds* 15 (unpublished draft, on file with the author).

²¹³ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L. J. 87, 25, 91-93 (1989); Bradley C. Karkkainen, *Toward a Smarter NEPA*, 102 Colum. L. Rev. 903, 936 n.141 (2002).

end of the courts' convening and disentrenching powers, both of which depend upon the willingness of other actors to accept the courts' coercive authority. Or so you might think if you accepted the view of Hart and Sacks that courts are distinctively reason-giving institutions.²¹⁴

If stated as an analytic claim, this last objection misses the mark. One could take simple measures such as the one adopted by the *Alexander* majority—where termination from the program is a possibility, giving each client a right to go before a judge who has not previously worked on his case—that would effectively address claims of improper bias. A legal order that employed such safeguards whenever the coercive power of the state was needed to enforce the edicts of problem-solving courts could, in principle, persist indefinitely. One could even imagine that the public would continue to accept the legitimacy of problem-solving courts' coercive power even long after the actual exercise of such power in problem-solving courts and traditional courts had become truly exceptional.

Yet the traditionalist's objection is not so easily dismissed, for it ultimately poses a question about actual, not perceived, legitimacy. Organizing and coordinating problem-

²¹⁴ Chayes attributed just such a view to Fuller, who, Chayes claimed, argued that the ability of courts to resolve the messy questions that arise in public law litigation is

parasitic on the legitimacy and moral force that courts have developed through the performance of their inherent function, adjudication according to the traditional conception. A certain limited amount of such parasitism can be accommodated, but too much undermines the very legitimacy on which it depends, because the nontraditional activities of the judiciary are at odds with the conditions that ensure the moral force of its decisions.

Chayes, *supra* note 193 at 1304) (citing Lon Fuller, *The Forms and Limits of Adjudication* 94-101 (unpublished manuscript on file with the Harvard Law School Library, subsequently published with minor revisions at 92 Harv. L. Rev. 353 (1978)). I read Fuller as more open to the possibility of courts performing such roles, but limiting the term "adjudication" to their resolution of disputes through conventional means.

solving actors is the activity in which problem-solving courts engage, but it is also the activity in which other actors—in particular, administrative agencies superintending systems of coordinated decentralization of the sort I described above—engage.²¹⁵ To give a very concrete example, there is no reason to think that judges rather than prosecutors must be the people responsible for diverting defendants to drug treatment, and indeed, in some jurisdictions, diversion to drug treatment has been organized by prosecutors.²¹⁶ More generally, administrative agencies exercising their prosecutorial discretion can play much the same role as problem-solving courts. So, the traditionalist is really asking, what makes a problem-solving court a court rather than an (admittedly newfangled) administrative agency superintended by a person wearing a robe? If there is no functional distinction, why not place problem-solving courts in charge of all of our administrative agencies? If we were to do that, the traditionalist concludes, then surely the advantages that accrue to courts would dissolve, as “court” would simply be a different word for “agency.”

²¹⁵ See Feeley and Rubin, *supra* note 208, at 29 (noting that courts, legislatures, and agencies, “[c]onfronted with a particular problem, . . . may well react in ways that display much greater similarities than the categorical analysis of legal process would suggest.”)

²¹⁶ Indeed, such programs often co-exist with court-based diversion. In Brooklyn, New York, for example, there is currently a felony drug court, a misdemeanor drug court, a community court in the community of Red Hook that handles mostly drug cases, and a prosecutorial drug treatment program funded by a federal grant through the Drug Elimination Technical Assistance Program (“DETAP”) of the Department of Housing and Urban Development. Interview with Dana Fox, Center for Court Innovation (July 23, 2002). See generally N.Y. State Comm’n on Drugs and the Courts, *Confronting the Cycle of Addiction and Recidivism: A Report to Chief Judge Judith S. Kaye* Section III (2000) (discussing the effectiveness of prosecutor-based programs throughout New York State). See also Press Release, NDAA, Nation’s Prosecutor’s Support the “Prosecution Drug Treatment Alternative to Prison Act” (Feb. 13, 2001), available at http://www.ndaa-apri.org/newsroom/pr_prosecution_drug_treatment.html (last visited Aug. 12, 2002) (announcing the National District Attorneys Association’s approval of the principles underlying prosecutor-based drug-treatment programs and the virtues of the PDTAPA specifically).

I want to respond to this objection by adopting it, subject to an important caveat. First, to pile on: both the Administrative Procedure Act and the Supreme Court's procedural due process jurisprudence recognize that within the American legal system, resolving high-stakes disputes demands procedural forms that are both fair and likely to result in accurate determinations.²¹⁷ One can think that courts have sometimes gone too far in imposing procedural obligations on agencies,²¹⁸ without doubting that agencies can and sometimes constitutionally must operate just like courts.²¹⁹

But now the caveat: The independence of the judiciary relative to administration means that even if experimentalist courts and agencies are functionally indistinguishable, there are circumstances in which the formal location of authority in the judiciary makes a difference. I can explain how in a roundabout way by foreshadowing the remaining sub-

²¹⁷ See Administrative Procedure Act (APA), 5 U.S.C.A. §§ 551-559, Pt. I, Ch. 5, Subch. II, References and Annotations; *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (mandating trial-like procedures as a precondition for the termination of welfare benefits).

²¹⁸ In the area of administrative law, commentators located the worst excesses in decisions of the United States Court of Appeals requiring trial-like procedures for rulemaking. See Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 Admin. L. Rev. 567, 586-7 (1992); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L. J. 1385, 1397 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 301-02 (1998); see also Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487, 1488 (1983). Among the cases most frequently criticized are: *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C.Cir. 1973), cert. denied, 417 U.S. 921 (1974); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C.Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C.Cir. 1973); and *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C.Cir. 1972). In constitutional law, *Mathews v. Eldridge*, 424 U.S. 319 (1976), which applied a balancing test to measure the legality of procedures for determining eligibility for disability benefits, is probably best understood as narrowing the circumstances under which full-blown trial-like adversarial process is required.

²¹⁹ Consider the fact that states are not formally bound by the federal doctrine of separation of powers. See *Mayor of Philadelphia v. Educational Equal. League*, 415 U.S. 605, 615 (1974); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). Accordingly, a state could locate the responsibility for much adjudication in administrative agencies rather than in courts. However, were a state to re-name its criminal courts "administrative agencies," it would not escape the procedural requirements that the Supreme Court has applied to state courts via the Fourteenth Amendment Due Process Clause.

Parts of this Part, which concern appellate adjudication, for the indeterminacy problem—my ultimate concern—is largely a problem for appellate courts, the courts charged with resolving legal ambiguity. Problem-solving trial courts do not resolve legal ambiguity in the sense of selecting one of a range of possible meanings as *the meaning* of the law. Appellate courts (usually) do,²²⁰ and in so doing they encounter the indeterminacy problem.

Since the Civil War, succeeding generations of legal scholars have repeatedly discovered that courts have no special ability to divine the true meaning of ambiguous legal texts. Consider Holmes' attack on formalism, legal realism, critical legal studies, and even, ironically, contemporary forms of "textualism," which begin with the public choice theorist's assumption that legislative enactments have no deeper meaning beyond the compromise among interest groups and end in a narrow formalism of their own. Each of these successive movements denied, in whole or in part, that judges do anything different from politicians when they ascribe meaning to ambiguous legal texts.

The intellectual history I have condensed into the previous paragraph is, of course, the source of the difficulties in constitutional theory and academic jurisprudence explored in Parts II and III of this Article: how to cope with legal indeterminacy. Notice, however, that legal indeterminacy is generally experienced as the source of a genuine dilemma. With a very small number of exceptions, theorists do not simply give up on the idea of adjudication. And that is because courts have their uses. Upholding the rule of law, protecting human rights, guaranteeing the pre-conditions of democracy—these are

²²⁰ But not always. Pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), courts reviewing agency action ask whether the agency has adopted a reasonable interpretation of the statute it is charged with enforcing, not whether the agency's interpretation is the best as judged by the court's lights. See *id.* at 844.

all slogans, to be sure, but they are not mere slogans. The indeterminacy problem poses a genuine dilemma precisely because of a collective judgment that we want a distinctive institution—the courts—devoted to these aims. The question is how to achieve that goal. In Parts II and III, I suggested that most of the contemporary approaches fail because they understand the problem as one of theoretical justification or critique, rather than as a problem of institutional design. However, I certainly did not mean to suggest that the indeterminacy problem is (as radical democrats would have it) a reason to give up on the idea of a distinct institution devoted to aims that the political process is ill-suited to address.

What has this to do with problem-solving courts? Just as our inability to draw a sharp distinction between political and legal reasoning does not warrant abandoning the quest for judicial approaches to coping with the indeterminacy problem, so too, our inability to draw a sharp distinction between the activities of problem-solving courts and administrative agencies operating by similar principles in addressing the same or similar problems, does not warrant abandoning the idea that some social problems might usefully be tackled by courts, even if those courts are structured in much the same way as agencies.

In particular, for some class of interactions between citizens and the state, or among citizens, the perception and reality of a neutral decision maker will be very important to the legitimacy of the decisions taken. To be sure, agencies can be made to function according to norms of due process that ensure neutrality. They can, for example, separate the prosecutorial and adjudicative functions; conduct hearings at which there is an opportunity for the cross-examination of witnesses; and issue written opinions

explaining the reasons for their decisions. However, where—as in meting out remedies based on negotiated pleas—the government must exercise coercive power in response to something other than an adjudication of contested facts, these mechanisms for making the decision maker appear neutral are unavailable. In other words, the trappings of the judiciary may be most needed precisely where the decision maker is acting least like a traditional adjudicator.

Skeptical readers will object to the apparent sleight of hand. Do I really mean to say that problem-solving courts must be courts because if we called them what they really are—administrative agencies—the public would not stand for it? No, that is not what I mean to say. My point is that even if in their actual operation problem-solving courts are largely indistinguishable from administrative agencies, the path by which people enter into the monitoring regime that is a problem-solving court places boundaries on the sort of institution it can be.

Consider two schematic examples. First, suppose that Smith, a drug addict, decides to seek treatment for his addiction. He goes to a well-functioning administrative agency that coordinates drug treatment in the jurisdiction in which Smith resides. Smith accepts an intrusive monitoring regime replete with carrots and sticks because that is the price of eligibility for public funding. The agency in charge of this monitoring regime will look much like a drug court (without the possibility of using jail as a stick), but few will think that it needs to be a court.

Now suppose that Jones is arrested for shoplifting and is brought before a court. Jones's lawyer learns that Jones is a drug addict who steals to support his habit. She asks Jones if he would be willing to plead guilty to the charged offense, enter a drug treatment

plan, and accept an intrusive monitoring regimen, in exchange for avoiding imprisonment. At the moment that Jones makes his choice, the state is exercising the full force of its coercive power,²²¹ and that fact distinguishes Jones from Smith. Whereas we can presume that Smith's decision to enter treatment was voluntary, the threat of criminal sanctions means that we need safeguards to ensure that Jones's decision is voluntary. One could imagine an administrative law judge doing the job, but in our legal culture, courts are the institutions that connote neutrality. The perception in large part makes the reality.

When I say that courts are neutral, I am deliberately borrowing one of the most despised terms of the Hart and Sacks paradigm. The generation that followed Hart and Sacks vociferously objected to the "neutral principles" espoused by Herbert Wechsler,²²² Henry Hart's long-time collaborator. They were correct, of course, that legal principles are not neutral in the sense of divorced from contentious political questions. Yet that is not quite what Wechsler meant, for "neutral principles" was always something of a misnomer. Wechsler did not argue that principles themselves are neutral, but that a responsible judge applies principles neutrally. If he invokes the principle, say, that statutes should be construed to avoid constitutional questions when that principle helps him reach a result he favors on policy grounds, he cannot dismiss that principle when it leads to results he disfavors on policy grounds. "Neutral application of principles" is a fairer rendition of what Wechsler had in mind.

²²¹ Cf. Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986) (observing that legal interpretation occasions violence).

²²² See Wechsler, *supra* note 146. Characteristic of the critique from the left are Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983), and Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1152, 1182-87 (1985).

To be sure, the critique from the left takes aim even at neutral application of principles. Authoritative text contains ambiguities and, crucially, the law contains a great many, often conflicting, principles,²²³ so that a skilled judge can purport to be applying principles neutrally even while deciding cases based on political preferences. That, in a nutshell, is the critical diagnosis in light of the indeterminacy problem.

If, however, one is not prepared to endorse the radical indeterminacy thesis, then Wechsler's aspiration seems quite modest. Judges, he said, should mean what they say when they explain their decisions by principles. They cannot (and in my view should not) entirely separate their policy views from their application of legal principles, but neither should they act as partisans. The widespread acceptance of this view was demonstrated by the outrage engendered by the Supreme Court's decision in *Bush v. Gore*: academics who might be skeptical of the possibility of neutral principles roundly condemned the Court for departing from the rule of law, accusing the Justices of "acting as political proponents for candidate Bush, not as judges."²²⁴

In short, there remains broad consensus that part of what it means to act as a judge is to maintain a degree of neutrality, in the sense of not having a stake in the outcome. Especially in an era when the power of administrative agencies is rationalized as flowing from the political accountability of the executive officials who supervise

²²³ The classic article, making this point with respect to canons of statutory construction, is Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950).

²²⁴ See <http://www.the-rule-of-law.com/index.html>. For a skeptical view of this form of criticism of the Court, see Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. Colo. L. Rev. 923, 946-50 (2001).

administration,²²⁵ it will be much easier to create the perception and reality of neutrality by making judges rather than bureaucrats responsible for protecting the rights of citizens subject to the coercive power of the state—even if the judges, having exercised that gatekeeping function, run their institutions in much the same manner as parallel administrative agencies are run.

The *Alexander* case holds that a judge cannot simply change hats when he shifts from the superintending role back to the gatekeeping role, and that is probably a sensible precaution to avoid the appearance of bias. Similar precautions can be, and generally are, taken by problem-solving courts to ensure compliance with due process norms at other stages of the proceedings.²²⁶ Thus, the preliminary evidence suggests that courts can become problem-solving institutions without necessarily sacrificing the qualities that make them valuable as courts.

²²⁵ This justification appears most clearly in the work of those espousing the theory of the unitary executive. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Charles Fried, *Order and Law: Arguing the Reagan Revolution--A Firsthand Account* 170 (1991); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 93-119 (1994) (endorsing the unitary executive somewhat more hesitantly). But even those scholars who reject the theory of the unitary executive typically root much of the legitimacy of administrative action in politics rather than, as an earlier era would have had it, expertise. See David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (arguing that agency interpretations of statutes should only receive judicial deference when they emanate from the higher, politically accountable ranks of the agency); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001) (observing increased Presidential supervision of administrative agencies during the Clinton Administration). Although critical of the trend towards equating administration with the Presidency, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 649-50 (1984) (“the agencies to which rulemaking is assigned,” as opposed to the President, possess “ultimate decisional authority”), my colleague Peter Strauss is a characteristically keen observer of the general trend. See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L. Rev. 745 (1996).

²²⁶ See Eric Lane, *Due Process and Problem Solving Courts*, unpublished manuscript on file with the author (concluding, based upon three case studies and other material that “with certain cautions problem solving judging and lawyering . . . need not be in conflict with due process standards.”)

C. Appellate Judging in a World of Experimentalist Institutions

Should problem-solving courts continue to play an increasingly large role in the American judiciary, they will greatly ease the legitimacy questions raised by the indeterminacy problem. By deciding less, courts will have fewer opportunities to make controversial choices. Nonetheless, contested cases of fact and law will remain.

Judicial resolution of contested questions of fact raises few legitimacy questions. Although courts exercise enormous power in resolving contests over facts, that power has rarely engendered much controversy—probably because courts appear to be among the best institutions we have for ascertaining certain kinds of facts. When called upon to make judgments about discrete past events, the courts’ neutrality relative to political actors gives them a marked institutional advantage. Broadly speaking, our legal culture accepts that facts, unlike values, are simply “out there” to be found.²²⁷

The courts’ role in resolving contested legal questions, however, raises the indeterminacy problem, and experimentalist judging of the sort I described in the previous sub-Part does not appear to provide any direct leverage on that problem.²²⁸ Questions about the meaning of ambiguous legal provisions do not present themselves as problems in the delivery of social services. Accordingly, a model of appellate experimentalist judging must look rather different from experimentalism a problem

²²⁷ For critical discussion of the fact/value distinction, see Hilary Putnam, *The Many Faces of Realism* 62-71 (1987); Richard Rorty, *Consequences of Pragmatism* xvi (1982); Richard Rorty, *Philosophy and the Mirror of Nature* 363-65, 387 (1979). I do not mean to take a position on the validity of the fact/value distinction. Below I suggest that as a practical matter, disagreement over values—moral pluralism—is often closely connected to disagreement over factual questions and the clash of interests. See *infra* Part IV(D).

²²⁸ As I argue in the next sub-Part, however, locating experimentalist trial judging in a larger experimentalist system does provide an indirect means for attacking the generality problem.

solving in courts of first instance. In this sub-Part, I outline experimentalist appellate judging as review of decisions by experimentalist institutions such as problem-solving courts. In the remaining two sub-Parts I explain how experimentalist appellate judging might address the indeterminacy problem in a world that is not thoroughly experimentalist.

Let us begin with the question of appellate review of decisions made by problem-solving courts. As cases like *Alexander* illustrate, appeals courts can examine whether a problem-solving court has complied with due process norms. However, as was true in *Alexander* itself, appellate review is typically limited by the fact that the parties who appear before problem-solving courts—and especially drug courts—typically waive the right of appeal. The standard plea colloquy in which a criminal defendant accepts responsibility for his conduct includes this waiver along with that of other procedural rights. A client who is unhappy with his court-mandated treatment can negotiate, through his defense attorney, for some other course of treatment—for example, outpatient rather than inpatient in the case of clients who need to maintain their jobs or tend to family obligations—but the final say remains with the trial court judge. There is usually no appeal to a higher authority.

Although most drug courts and other problem-solving courts do not currently provide for appeals of treatment decisions, there is no reason in principle why they could not. The current dearth of appellate procedures probably results from two features of drug courts. First, as I just noted, drug court clients accept their treatment program as a matter of contract; accordingly, lawyers and others accustomed to the ancien régime may believe that there is nothing to appeal. If a client does not like his course of treatment, he

does not have to accept it. Second, and perhaps more fundamentally, architects of and participants in problem-solving courts may take the view that appeals to higher authority are a form of adversarial behavior, best left in the zero-sum world of litigated cases rather than in the collaborative new world. In my own interactions with personnel in the problem-solving courts, I have found that this attitude is widespread (though hardly universal).

Neither causal explanation for the absence of appellate review amounts to a justification. It may well be true that drug court clients have no right to drug treatment, but that does not mean that they could not be provided with a legal right, by law or as part of the contract they sign upon entering treatment, to effective treatment and judicial review.

The cultural explanation, I believe, accurately describes the attitude of many of the actors involved in collaborative problem-solving processes that have grown up where command and control formerly reigned. Onetime antagonists—environmentalists and industry; labor and management; prosecutorial drug warriors and defense attorneys—who see negotiation, mediation, or deliberative collaboration as superior to deadlocked adversarial processes can lose sight of the fact that power and interests do not simply vanish in non-adversarial settings. Given the opportunity, the strong can still oppress the weak, capturing decentralized collaborative processes in much the same way that they can capture top-down administrative processes.

Champions of collaborative problem solving such as myself have three linked answers to the risk that the non-adversarial processes will simply reproduce external power hierarchies. First, we can complain about the yardstick. It is true that power

disparities load the dice against the weak, but that fact is hardly uniquely true of collaborative processes. The poor and weak do not hire powerful lobbyists to do their bidding in the halls of Congress or the Administration, nor do they have the resources to fund expensive litigation. Traditional forms of litigation and politics afford the weak only formal equality. Therefore, unless one thinks that no social problems can be addressed until after a redistributionist revolution, the relevant question about collaborative processes is not whether they afford opportunities for the powerful to oppress the weak but whether they provide more such opportunities than conventional adversarial processes.

And that takes me to the second response: collaborative decision making typically emerges precisely where adversarial processes fail because none of the parties can clearly identify their interests or go it alone. Because neither the strong nor the weak are monolithic entities, commonalities of interest cross these categories. As Sabel and I put the point:

[T]he pursuit of new alliances can reveal novel solutions to complex problems, just as the exploration of novel solutions can give rise to new constellations of harmonious interests [and] these possibilities are likely to be especially salient in periods of disorientation marked by the kind of volatility and diversity that recommend experimentalism. Alliances and confusion do not nullify the bargaining disadvantage of inequality, but they can transform what might appear to be an insurmountable obstacle to any but radically redistributive reforms into one of the many considerations that would need to be addressed by

experimentalist means in making participation in experimentalist deliberation as fair and comprehensive as it can be.²²⁹

The third answer to the problem of power imbalances is, frankly, to attempt to remedy them through procedural rules. For example, to prevent collaborative ecosystem governance from becoming a mechanism by which corporate and landowning interests simply weaken environmental rules to suit themselves, it may be necessary for environmentalists to retain a right to sue. This de facto exit right enhances the environmentalists' voice in the collaborative process.²³⁰ More generally, one might characterize collaborative processes or "soft law" as parasitic upon adversarial or "hard law," at least in the sense that the latter provides for a penalty default.

If a right to participate backed by a right to sue is sometimes necessary to ensure the evenhandedness of collaborative processes, it will rarely be sufficient. As Archon Fung argues, groups such as environmentalists and labor organizations must figure out how to exercise their "countervailing power" within collaborative processes.²³¹ Merely threatening to walk or to sue is not a strategy for solving problems, even if it does effectively guarantee a seat at the table.

In the context of problem-solving courts, those who exercise countervailing power—criminal defense attorneys—appear to have solved the problem of how to cooperate with their traditional adversaries. They continue to press for their clients' interests, with the difference that they tend to accept a broader definition of client interest. The compromise is with client autonomy. Whereas a defense attorney acting

²²⁹ Dorf and Sabel, *supra* note 21, at 409-10.

²³⁰ See generally Albert O. Hirschmann, *Exit, Voice and Loyalty* (1970).

within the traditional zealous advocacy model pursues any lawful aim of the client, a defense attorney operating within a drug court accepts that it will sometimes be in the client's best interest to receive court-mandated treatment, even if zealous advocacy might result in a technical diminution in the degree of control the court exercises over the client. In the end, the decision remains with the client, but by conceptualizing her role as part of a problem-solving team that includes the client, the prosecutor, the judge, and the clinical staff, the defense attorney inevitably takes a less adversarial position.

But if defense attorneys have mastered the art of collaboration, they and their clients remain vulnerable to abuse, absent some form of procedural guarantee. A drug court client who consistently violates the rules of the court or his treatment provider is subject to discipline, including, ultimately, expulsion from the program and imprisonment. What happens if the client upholds his end of the bargain but the treatment provider does not? A well-functioning problem-solving court monitors treatment providers to detect and prevent poor practices. But what if the court is not well functioning? Surely it is not a sufficient answer to say that the defendant can "exit" by subjecting himself to prison. Such an exit right punishes the client without imposing any substantial cost on the court. By contrast with an environmental organization's threat to sue or a union's threat to strike, the defendant's exercise of his traditional countervailing power—insisting on utilizing the conventional adversary system—is no threat at all. Effective countervailing power for a drug court client must take a different form.

And that is where a right of appeal might be useful. What question would an appeals court reviewing treatment decisions from drug courts address, given that the trial

²³¹ See Archon Fung, *Collaboration and Countervailing Power: Making Participatory Governance Work* (draft on file with author).

court itself does not itself resolve contested questions of law or fact? In short, whether the drug court is doing its job. Does the trial court monitor service providers to detect and prevent abuses? Does it continually update and upgrade the level of treatment it provides by demanding that relatively poor performers adopt methods employed by more effective performers? In performing these functions, does the problem-solving court perform at roughly the level of the best problem-solving courts in jurisdictions with comparable populations? In short, the appellate court would apply to the trial-level problem-solving court the same monitoring techniques as the problem-solving court applies to the service providers it monitors. In that way, just as an experimentalist trial court's monitoring of individual clients' performance is, *ipso facto*, a form of monitoring of treatment providers, so the appellate court's adjudication of individual claims of inadequately monitored treatment would be, *ipso facto*, a form of monitoring of the trial court.²³²

The foregoing sketch of appellate review of problem-solving courts also describes appellate review of problem-solving or experimentalist institutions more generally—for recall that in their practical operation, problem-solving courts act no differently from experimentalist administrative agencies. Accordingly, whether reviewing the activities of problem-solving courts or other problem-solving institutions, appellate courts would mirror the activities of those institutions at one remove, i.e., at a meta-level. Where a front-line problem-solving institution monitors the provision of services, reviewing courts monitor the monitoring of the provisions of services. Therefore, and for the same

²³² Note that I characterize the client's claim in terms of a right to adequately monitored treatment rather than a claim to adequate treatment, building in a requirement that clients exhaust their trial court remedies. The exhaustion requirement has an exact parallel in judicial review of agency action, the subject to which the text next turns.

reasons, just as front-line problem-solving courts rarely resolve contested questions in the sense of choosing one from a number of possible outcomes, so appellate courts would rarely resolve contested questions of law in the sense of choosing one rather than another meaning of authoritative text.

Describing problem-solving appellate courts as, in effect, meta-problem-solving courts thus casts them as a solution to, or at least a circumvention of, the indeterminacy problem. If lawmakers increasingly address social problems by creating open-ended problem-solving institutions, rather than by directing solutions through authoritative but ultimately indeterminate instructions, the domain of the indeterminacy problem will correspondingly shrink.

D. Experimentalist Appellate Review in Conventional Cases

In my judgment, public institutions will become increasingly experimentalist. However, I could be mistaken, and even if I am right about the long term, the law as it exists contains numerous authoritative yet ambiguous instructions. Moreover, no complete legal system can be thoroughly experimentalist. Some classes of problems demand categorical, i.e., command-and-control, approaches, leaving us with an indeterminacy problem in at least a limited domain.²³³ Accordingly, two questions frame the balance of my discussion of experimentalism: First, is there a role for experimentalist appellate review of non-experimentalist front-line institutions? And second, what

²³³ See Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* 178 (2002) (acknowledging that “reflexive law,” Cohen’s term for something like what I call experimentalism, is not a panacea suited to all domains).

purchase, if any, does such review have on the indeterminacy problem? I address these questions in this sub-Part and the next one.

In this sub-Part, I briefly describe two areas of law in which the Supreme Court has, perhaps unwittingly, provided illustrations of how a court can interpret ambiguous but authoritative commands by calling into existence a system of experimentation, rather than—or at least in addition to—by laying down specific rules. The examples, as foreshadowed in the Introduction, are the regulation of workplace sexual harassment and coercive interrogation. The modest aim of this Part is simply to make plausible the claim that our legal culture, despite its association of law with authoritative commands, already has room for a different conception of law as invitation to problem solving.

1. Sexual Harassment

Title VII of the 1964 Civil Rights Act bars covered employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”²³⁴ Although Title VII presents courts with questions of statutory interpretation, the body of anti-discrimination law of which Title VII is a part may rightly be called a “super-statute,” defined by William Eskridge and John Ferejohn as “one of the baselines against which other sources of law—sometimes including the Constitution itself—are read.”²³⁵ An examination of the Supreme Court’s approach to Title VII’s application to sexual

²³⁴ 42 U.S.C. § 2000e-2(a)(1) (1994);

²³⁵ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1216 (2001). See also *id.* at 1237–1242 (discussing the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.)).

harassment thus can shed light on the indeterminacy problem in constitutional as well as statutory interpretation.

One could argue that sexual harassment is not a species of sex discrimination, and lower courts were initially unreceptive to claims that what we now call sexual harassment by supervisors counted as sex discrimination by employers.²³⁶ However, by the time the issue reached the United States Supreme Court, these doubts had been resolved, and the interpretive move from sex discrimination to sexual harassment was seen as an easy one. Two unanimous Supreme Court decisions confirm that Title VII applies to workplace sexual harassment, whether the harassment takes the form of an employer's demand that the employee submit to a quid pro quo or creates a hostile work environment.²³⁷

The difficult and divisive questions concern application and scope.²³⁸ Precisely what acts constitute sexual harassment? Can the law distinguish between, on the one hand, sexual harassment, and the other hand, voluntary office romance or (at the boundary of hostile environment claims) protected employee speech? What steps must a business take to prevent and remedy employee-on-employee harassment, without blocking innocuous or protected activities? These would appear to be exactly the sorts of questions that the indeterminacy problem tells us courts cannot solve except by choosing one from a range of contested meanings.

²³⁶ See Elvia R. Arriola, "What's the Big Deal?": *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 Colum. Hum. Rts. L. Rev. 21, 40-44 (1990); Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 59-77 (1979).

²³⁷ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²³⁸ Among the best recent academic efforts to address these questions are Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 Stan. L. Rev. 691 (1997) and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (1998).

And yet, the Supreme Court has not taken that course. Whenever it has been asked to formulate a categorical rule—for example, that same-sex sexual harassment is not covered by Title VII—it has rejected that approach in favor of the generality of the statutory prohibition.²³⁹ Because, “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed,”²⁴⁰ the Court has repeatedly declined to formulate “a mathematically precise test.”²⁴¹ Even the Court’s definition of hostile environment is circularly opaque: “an environment that a reasonable person would find hostile or abusive.”²⁴²

One might worry that the net effect of the Court’s failure to specify a standard in more detail simply delegates the harassment determination to juries.²⁴³ Yet that is not exactly what the Court has done either, because two further decisions establish that vicarious liability attaches unless the employer has “exercised reasonable care to avoid harassment and to eliminate it when it might occur.”²⁴⁴ To oversimplify, sexual harassment law now places courts in the role of monitoring employers’ monitoring of their workplaces.

As I observed shortly after the Supreme Court decisions establishing the employer’s affirmative defense to vicarious liability for employee-on-employee

²³⁹ See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998).

²⁴⁰ *Id.* at 81-82.

²⁴¹ *Harris*, 510 U.S. at 22.

²⁴² *Id.* at 21.

²⁴³ See *id.* at 24-25 (Scalia, J., concurring) (expressing this concern but finding no alternative within the existing framework).

²⁴⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998). Accord *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

hasrassment, those decisions provided an opportunity for the Equal Employment Opportunity Commission (“EEOC”) “and similar state agencies [to] take the lead in disseminating the most successful strategies for preventing and combating sexual harassment.”²⁴⁵ Since then, the EEOC has established enforcement guidelines that provide employers with substantially greater guidance than the Court’s precedents as to what a harassment prevention and remediation policy must look like to prevent vicarious liability.²⁴⁶

Although the EEOC guidelines are of some use, they do not take advantage of the experimentalist potential in the Court’s constructive ambiguity. For one thing, as the footnotes to the EEOC guidelines indicate, they are drawn almost entirely from litigated cases. While litigated cases can be useful in establishing minima—e.g., an employer may face liability if it fails to publicize its harassment policy or to clearly designate a person to whom employees can complain—litigation will typically occur against just those employers whose policies are at the border of legality. Employers wishing to avoid litigation as well as liability will prefer to receive guidance drawn from best practices, not merely from minimally acceptable practices.

Accordingly, the EEOC guidelines could be improved by drawing upon the experience of firms that have actually reduced the frequency and severity of incidents of sexual harassment. As Susan Sturm documents in case studies involving three quite

²⁴⁵ Dorf, *supra* note 26, at 77.

²⁴⁶ See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (Jun. 18, 1999), available at <http://www.eeoc.gov/docs/harassment.html#VC1>.

different workplaces,²⁴⁷ successful systems typically integrate harassment prevention and remediation with other operations and rely on detailed data to develop outcome measures that are used to hold individuals and units accountable.²⁴⁸ As Sturm also observes, because harassment policies must be customized to particular workplaces,²⁴⁹ the law shapes but does not determine their content.²⁵⁰

Because each workplace is in some sense unique, EEOC guidelines that drew upon the experience of firms like those Sturm discusses could not be exact prescriptions. Nonetheless, EEOC pooling and promulgation of effective approaches would be valuable. As Sturm notes, under the conventional compliance approach, an employer has a perverse incentive not to discover whether its employees are harassing one another, because if it does, it may become liable for the harassment. The Supreme Court's vicarious liability rule, like strict liability rules generally, realigns incentives. Under existing doctrine, an employer is liable for not knowing, because ignorance signals an inadequate policy of detection and remediation. The doctrine thus encourages a problem-solving approach.²⁵¹ At the same time, although the EEOC has yet to make full use of the doctrine's potential, because the very lawfulness of a firm's conduct depends upon the firm's adoption of a successful detection and remediation program, such programs can become a matter of public record, thus avoiding the possibility that firms would horde information about their harassment policies as though they were trade secrets.

²⁴⁷ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 492-519 (2001) (describing approaches at Deloitte & Touche, Intel, and Home Depot).

²⁴⁸ See *id.* at 519-20.

²⁴⁹ See *id.* at 519.

²⁵⁰ See *id.* at 520.

Finally, in pointing to the limitations of the EEOC response to date,²⁵² I do not mean to suggest that administrative action is crucial. As Sturm observes, attorneys, insurers, union as well as non-union employee associations, and other intermediaries are already acting to translate the promise of Supreme Court doctrine into a problem-solving regime.²⁵³ Sturm is no doubt correct in cautioning that the regime remains incomplete and subject to being undermined by legal and other change,²⁵⁴ but on the whole, her assessment of the conditions that make an experimentalist appropriate for what she terms “second generation problems” seems a fair description of a wide range of problems that the law regulates:

Any rule specific enough to guide behavior will inadequately account for the variability, change, and complexity characteristic of second generation problems. General rules, unless linked to local structures for their elaboration in context, provide inadequate direction to shape behavior. . . . Externally-imposed solutions also founder because they cannot be sufficiently sensitive to context or integrated into the day-to-day practice that shapes their implementation. Yet, internally-generated solutions are often insufficiently attentive to their normative implications, or to the connection between those local practices and the general antidiscrimination norm.²⁵⁵

²⁵¹ See *id.* at 476.

²⁵² Accord *id.* at 551 (remarking that the EEOC operates “most effectively as an enforcement agency.”).

²⁵³ See *id.* at 522-37.

²⁵⁴ See *id.* at 537-53.

²⁵⁵ *Id.* at 475-76.

If I am right that many of our most vexing policy questions involve such “second generation problems,” then the approach taken by the Supreme Court in its sexual harassment cases can serve as a more general model for combining externally-imposed and internally-generated solutions.

2. Prophylactic Rules in Constitutional Criminal Procedure

In *Miranda v. Arizona*,²⁵⁶ the Supreme Court held that custodial interrogation is inherently coercive and therefore, that police officers interrogating suspects must follow safeguards designed to ensure both that the suspect is informed of his right to remain silent in the face of questioning and that that right, if asserted, “will be scrupulously honored.”²⁵⁷ The Court also appeared to prescribe a traditional command-and-control rule, stating,

the following measures are required. [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.²⁵⁸

Failure to comply with this rule, the Court made clear, would bar the introduction of any evidence obtained as a result of the interrogation in a state or federal trial of the suspect.²⁵⁹

²⁵⁶ 384 U.S. 436 (1966).

²⁵⁷ *Id.* at 479.

²⁵⁸ *Id.*

²⁵⁹ *See id.*

Despite its seemingly categorical requirement, the *Miranda* Court also stated that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. The Court stated:

Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.²⁶⁰

Thus, for example, a state could substitute a requirement that all confessions be videotaped for the Court's default rule requiring notification of a right to counsel. Congress and the states could avoid liability in the form of exclusion of evidence by complying with what Barry Friedman and I have called *Miranda's* "safe harbor,"²⁶¹ or they could devise their own safeguards.

The notion of a safe harbor, or, as the Court and some commentators referred to it, a "prophylactic rule,"²⁶² should have been straightforward, but the Court's disingenuous use of the concept muddied the waters. In decisions following *Miranda* and in cases involving the parallel exclusionary rule the Court had crafted for unlawful searches and seizures, Justices who were hostile to the underlying limits on police conduct invoked the prophylactic nature of those limits to justify cutting them back²⁶³—even when the state

²⁶⁰ Id. at 490.

²⁶¹ Dorf and Friedman, *supra*, note 27, at 82.

²⁶² See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 439 (1974); David Huitema, *Miranda: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 Yale L & Policy Rev 261, 269-70 (2000); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988) (*passim*).

²⁶³ See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (declining to suppress the fruits of interrogation that "departed only from the prophylactic standards later laid down . . . in *Miranda*," but "did not abridge respondent's constitutional privilege against compulsory self-

had made no effort to substitute alternative procedures for the Court's default. Thus, prophylactic rules came to be seen by their critics as a kind of optional constitutional doctrine, created by judicial whim, and therefore illegitimate.²⁶⁴ Eventually, the critics took aim at *Miranda* itself, arguing that Congress could overrule and had in fact overruled *Miranda in toto*. At that point, the Court balked,²⁶⁵ concluding "that *Miranda* announced a constitutional rule that Congress may not supersede legislatively."²⁶⁶ Yet the Court made no serious effort to reconcile its own intervening decisions treating *Miranda* as something less than a constitutional rule.²⁶⁷

Viewed through the lens of legal realism, the academic debate about prophylactic rules is almost silly. Of course courts, in interpreting ambiguous constitutional text, must create doctrines that are not strictly commanded by it. In this sense, prophylactic rules are, as David Strauss observes, ubiquitous.²⁶⁸ To borrow an apt phrase from Richard

incrimination"); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (declining to exclude unlawfully obtained evidence from a grand jury proceeding because, in the Court's view, the "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.")

²⁶⁴ See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 N.W. U. L. Rev. 100 (1985) (challenging the legitimacy of prophylaxis and related doctrines). But see Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) (anticipating much of Grano's critique and offering a tentative response); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883 (1986) (responding less tentatively).

²⁶⁵ See *Dickerson v. United States*, 530 U.S. 428 (2000) (invalidating 18 U.S.C. § 3501, which made the admissibility of a confession turn on its voluntariness).

²⁶⁶ *Id.* at 444.

²⁶⁷ The failure of any of the seven Justices in the *Dickerson* majority to attempt to explain the post-*Miranda* decisions may have been the product of papered-over differences among these Justices. See Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 Mich. L. Rev. 879, 893 (2001).

²⁶⁸ See Strauss, *supra* note 262, *passim*. Accord Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 448-49 (1987).

Fallon, constitutional doctrine, as an overlay on the terse constitutional text, is necessary for “implementing the Constitution.”²⁶⁹

While I share the view that prophylaxis is legitimate, I want to resist the effort to assimilate all constitutional doctrine to the prophylactic category. What is distinctive about *Miranda*, I want to claim, is not the fact that it infers a constitutional command from ambiguous constitutional text. That is simply conventional constitutional interpretation. What makes *Miranda* interesting is the form of the constitutional command it infers. It states the condition of constitutionality in the form of a performance standard rather than a design standard. *Miranda* says: If the government conducts custodial interrogation, it must use safeguards that are at least as effective as the canonical warnings. *Miranda* does not require the canonical warnings, but instead uses them as a benchmark against which alternatives are to be measured.

Nonetheless, *Miranda* has not served as the backbone of a regime for judging the legality of experiments in alternative means of safeguarding the right against coercive interrogation because there has been remarkably little in the way of such experimentation. At least two factors probably explain the absence of experimentation.

First, the *Miranda* benchmark is not a penalty default but a default with which the police have grown quite comfortable. Indeed, there is some evidence that the police have learned how to provide the warnings in a manner that actually discourages suspects from exercising their rights to silence and counsel.²⁷⁰ Accordingly, law enforcement has little incentive to adopt alternative safeguards that might be more difficult to implement.

²⁶⁹ Richard H. Fallon, Jr., The Supreme Court 1996 Term—Foreword: *Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997).

²⁷⁰ See Richard A. Leo and Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397, 431-50 (1999).

Second, even if *Miranda*'s safe harbor is sub-optimal, law enforcement authorities are understandably reluctant to deviate from it for fear that any alternative they adopt would be deemed unacceptable by the courts, leading to the invalidation of convictions obtained in reliance on confessions produced using the alternative safeguards. After all, the Court's invitation to experimentation in *Miranda* provided little guidance as to the dimensions along which it or lower courts would judge whether alternative safeguards were "fully as effective" as the safe harbor set out in the opinion. Suppose that, as compared with advising suspects of a right to counsel, videotaping of all interrogation led, on average, to fewer complaints of undue police pressure but also produced more confessions. Would the decrease in complaints indicate that videotaping was more effective than the right to counsel or would the increased confession rate signal increased, albeit subtle, coercion? No doubt the experience under competing regimes, including review of the videotapes themselves, would bear significantly on this question, but before adopting an alternative set of safeguards such as videotaping, a jurisdiction cannot know how the experiment will unfold.²⁷¹ That, after all, is the very point of experimentation.²⁷² Yet without some assurance *ex ante* that a good faith but ultimately unsuccessful experiment will not result in an *ex post* sanction, no jurisdiction will take the risk of deviating from the safe harbor—unless perhaps the safe harbor is a truly draconian

²⁷¹ We do not currently have data on this question because the states that require videotaping of all interrogation, Alaska and Minnesota, require it in addition to the full complement of *Miranda* warnings. See *Stephan v. State*, 711 P.2d 1156, 1157 (Alaska 1985); *State v. Scales*, 518 N.W. 2d 587, 592 (Minn. 1994).

²⁷² One need not agree with the Court's decision to uphold a Los Angeles ordinance requiring sexually-oriented businesses to operate at a distance from one another to see the logic of Justice O'Connor's statement in that case that a government body "considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 1736 (2002) (plurality opinion).

penalty default of the sort that courts will be understandably reluctant to impose in many contexts.

Thus, *Miranda* suggests but does not put in place a model of experimentalist appellate judging capable of calling into existence a more general experimentalist regime. The elements of this model are: (1) The specification of a safe harbor, compliance with which satisfies a legal obligation; (2) the recognition that alternative approaches are permissible so long as they are as effective at safeguarding the underlying legal principle (whether a constitutional right or something else) as the safe harbor; and (3) temporary immunity from liability for good faith efforts to construct an alternative approach that, judged *ex ante*, has a reasonable probability of equaling the safe harbor. Elements (1) and (2) are already present in existing law, while element (3) would require courts to engage in what I have called “provisional adjudication,”—resolving a legal question for the time being, subject to being overruled on something less than the standard ordinarily required to depart from *stare decisis* should experience demonstrate a superior solution.²⁷³ Employing provisional adjudication would require courts to acknowledge that the point of legal doctrine is not to implement the “real” or “true” meaning of ambiguous text but to solve practical problems, whose character may only become apparent over time.

Although the general concept of provisional adjudication would allow courts to lower as well as raise provisional standards, it is primarily the latter shift—ratcheting up constitutional or other legal requirements—that connects provisional adjudication to experimentalist judging. A fully functional model of experimentalist appellate

²⁷³ See Dorf, *supra*, note 26 at 60-73.

adjudication would thus include a fourth element: (4) As experience with alternative regimes accumulates over time, courts could displace the initial benchmarks they set with new, more stringent ones that have been successfully deployed in experimenting jurisdictions. To return to our schematic example, if several states substituted videotaping of interrogation for a right-to-counsel warning with demonstrably superior results, videotaping would replace the right-to-counsel warning as the safe harbor. Of course, that decision itself would be provisional, subject to being supplanted in response to still further experience.

* * *

Taken together, the Court's sexual harassment doctrine and (to the extent it survives the decision upholding *Miranda* in *United States v. Dickerson*,²⁷⁴) the concept of prophylactic rules in constitutional criminal procedure and beyond, provide two important lessons. First, as my extrapolations from these doctrines indicate, they suggest a model for experimentalist appellate judging even when the front-line institutions whose decisions are being reviewed are not (yet) themselves structured along experimentalist lines. Second, because my proposed extrapolations are not wild departures, the examples suggest that a regime of experimentalist appellate judging is not utterly fantastic but can be fashioned from existing doctrinal tools.

E. From Hard Cases to Big Cases

Experimentalism as I have described it would appear to address the indeterminacy problem in two ways. First, problem-solving trial courts and appellate courts hearing

²⁷⁴ 530 U.S. 428, 440 (2000).

challenges to the efficacy of problem-solving trial courts have fewer occasions to resolve contested questions of law and fact than do conventional courts, and thus fewer occasions to confront the indeterminacy problem. Second, appellate courts that call into existence experimentalist regimes by crafting their judgments as provisional performance standards rather than as once-and-for-all resolutions of contested meaning can overcome the bounded rationality generally thought to limit institutions like courts in their ability to address complex social problems.

Nonetheless, experimentalism does not appear to address the portion of the indeterminacy problem that arises out of moral diversity. Is affirmative action consistent with “the equal protection of the laws?” Do abortion restrictions deprive women of “liberty . . . without due process of law?” Do publicly-funded vouchers redeemable at parochial schools constitute “an establishment of religion?” How can different structures for decision making provide broadly acceptable answers to such fundamentally contested questions?

The short answer is that experimentalism cannot eliminate the problem of moral diversity. However, that does not mean that it has no purchase on the problem. To see how experimentalism sometimes addresses moral diversity, consider two accounts of normative reasoning. The first account is modeled on a debating society. Each of the participants in the debate begins by figuring out what she thinks about the controversy at issue. Participants may consult religious authority, or they may turn to the writings of moral philosophers and attempt, after consulting their own moral intuitions, to arrive at a reflective equilibrium. The debaters then come together and butt heads. If the process is

functioning at its best, a collective reflective equilibrium or accommodation may be reached, but if not, the position that attracts the most votes prevails.

This first conception of moral reasoning fairly characterizes the conventional view of judicial resolution of moral questions. Dworkin's account is revealing. Hercules' efforts to find the result that best fits with prior law as organized by the best understanding of moral and political principles occur in, as it were, a metaphorical armchair. Rather than go out into the world or even discuss cases and principles with his colleagues, Hercules can learn all he needs to know by reading prior decisions as well as works of moral philosophy, and by thinking hard about what he has read. Collective deliberation plays almost no role.

Moreover, even if we imagine conventional appellate courts engaged in moral deliberation, the image that comes to mind is simply a sort of interactive search for a reflective equilibrium. The process, which I have called "Socratic deliberation," closely tracks discussion in a law school classroom, except without the feeling that there is a single puppeteer leading the marionettes down an unseen path.²⁷⁵ Whatever its virtues for training students how to trace the implications of their moral intuitions, Socratic dialogue typically cannot, in the end, resolve first-order value disagreement, which perhaps explains why the legal academic literature on the subject constructs multi-member courts as places in which judges individually decide outcomes and then aggregate what are taken to be preferences.²⁷⁶

²⁷⁵ See Dorf, *supra*, note 26 at 33-43.

²⁷⁶ See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1982); Lewis A. Kornhauser and Lawrence Sager, *Unpacking the Court*, 96 Yale L.J. 82 (1986); Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 Yale L.J. 717 (1979).

Now contrast a second, quite different, conception of normative reasoning. In this conception, people come together or are thrust together, to solve their common problems. Instead of asking “vouchers: pro or con,” they ask what can be done to improve education. Rather than reasoning from first principles to a list of what is and what is not impermissible sexual harassment, they work toward the common goal of a workplace in which all employees can concentrate on doing their jobs effectively.

Practical deliberation does not depend on homogeneity of values or persons. Indeed, it is striking that responses to workplace sexual harassment provide a leading example of practical problem solving, given the diversity of the American workplace. As Cynthia Estlund observes, “[i]n the workplace, and often only there, citizens must find ways of cooperating on an ongoing basis, over weeks or years, outside of and often counter to traditional racial, ethnic, or sexual hierarchies.”²⁷⁷ To cooperate, of course, is not necessarily to agree, and it is precisely for that reason that experimentalism—by imagining law as a pathway to cooperative problem solving rather than as a tool for adjudicating conflicting claims—promises a path around the problem of moral diversity.

In contrasting, on the one hand, normative reasoning by introspection and Socratic dialogue with, on the other hand, practical problem-solving around value-laden issues, I do not mean to suggest that the latter can wholly supplant the former as a method of adjudication within the courts. The idea, instead, is that where legal ambiguity appears to raise divisive issues, the courts need not necessarily take it upon themselves to choose one rather than another side in the contest. They can instead fashion doctrines that give

²⁷⁷ See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1, 4 (2000).

front-line actors primary responsibility for working out the practical meaning of contested terms, thereby (partly) circumventing the indeterminacy problem.

The indeterminacy problem manifests itself in two kinds of cases: what I will call hard cases and big cases. A hard case is hard because fleshing out ambiguous legal text calls for a controversial moral judgment. Abortion, affirmative action, euthanasia, gay rights, school prayer, and other issues caught up in the culture wars present hard cases. Big cases, by contrast, tax the administrative capacities of courts. Electoral redistricting, prison reform, school desegregation, and other tasks that do not seem readily amenable to supervision by less-than-panoptic courts present big cases. One might think that experimentalism—as a mechanism for courts to overcome their bounded rationality by monitoring without superseding the efforts of local actors—is at least a partial answer to the charge that courts cannot handle big cases; yet that seemingly technocratic solution would not apply to hard cases.

The sexual harassment example is meant to suggest that experimentalism can address hard cases as well as big cases. There was perhaps no hotter hot-button issue in the 1990s than sexual harassment. The subject of numerous works of popular fiction,²⁷⁸ sexual harassment scandals rocked each branch of the national government, nearly defeating a Supreme Court nominee,²⁷⁹ ending a Senatorial career,²⁸⁰ and leading to the

²⁷⁸ See, e.g., *Disclosure* (Warner Bros. 1994) (film); David Mamet, *Oleanna* (1993) (play).

²⁷⁹ See Jane Mayer and Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* 6 (1994) (describing the conflicting testimony of Anita Hill and Justice Thomas as having “become part [of] an active battlefield in America’s culture wars.”).

²⁸⁰ See Senate Select Committee on Ethics, S. Rep. 104-137, 104th Cong., 1st Sess. 40 (Sept. 5, 1995) (the “Packwood Report” accompanying a committee resolution to discipline Senator Robert Packwood).

impeachment (though not removal) of the President.²⁸¹ And yet during that period the Supreme Court, with remarkably little fanfare, managed to fashion doctrine that holds the promise of constructive local problem-solving around the issue.

To put the point slightly differently, there is no sharp division between hard cases and big cases. Consider school desegregation. For roughly the decade after *Brown v. Board of Education*,²⁸² the decision was understood as a hard case, with academic efforts focusing on justifying the Court's adoption of the moral principle that racial apartheid contravenes the constitutional guarantee of equal protection of the laws.²⁸³ When that point became obvious to nearly everyone, *Brown* morphed into a big case. Then the question became: Given massive resistance to desegregation in the South during the first decade after *Brown*, and persistent *de facto* racial segregation since then, can the courts really alter large-scale social institutions.²⁸⁴

Yet, as perhaps should have been obvious all along, *Brown* was always both a hard case and a big case, and the features that made it hard were tied up with the features that made it big. *Brown* was a big case because dismantling *de jure* segregation meant taking apart and replacing school assignment systems affecting tens of millions of schoolchildren. That daunting challenge led the Court in the first instance to provide

²⁸¹ See Referral to the United States House of Representatives pursuant to 28 U.S.C. § 595(c), submitted by the Office of the Independent Counsel (Sept. 9, 1998) (the Starr Report), available at <http://thomas.loc.gov/icreport/>.

²⁸² 347 U.S. 483 (1954).

²⁸³ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 429-30 (1960) (justifying *Brown* on common sense grounds); Wechsler, *supra*, note 146 at 22, 34 (confessing an inability to find a justification).

²⁸⁴ See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) (providing a negative answer to the question in his title). But cf. Stephen L. Carter, *Do Courts Matter*, 90 Mich. L. Rev. 1216, 1221 (1992) (reviewing Rosenberg, *supra*) (while generally

public school officials with some breathing space through the formula of “all deliberate speed.”²⁸⁵ The fact of segregation’s entrenchment was both what made the case big—it would be difficult to disentrench—and a reflection of the fact that the case was, by the lights of the population circa 1954, hard—for *de jure* racial segregation could not have been so firmly entrenched throughout the South were there a national consensus that the practice was an affront to the moral principle of equality.

In pointing out that *Brown* was both a hard and a big case, I do not mean to imply that an experimentalist approach in 1954 would have caused Southern resistance to the decision to evaporate. On the contrary, sometimes—as in *Brown*—the moral import of a legal command will be so clear to the judge that, notwithstanding vociferous disagreement by many in the population at large, fidelity to law requires choosing what will be received as a controversial path. Experimentalism, in short, does not eliminate that portion of the indeterminacy problem that arises out of moral diversity. Nevertheless, I want to suggest that even in such cases, moral diversity may be less of an issue than it appears. If effective remedial structures are adopted—remedial structures that address the problems that made the case not only hard but also big—then the process of hammering out practical solutions can have an impact on how people understand the underlying value. Practical deliberation, in other words, can work around value differences, and in the long run, even change them.

agreeing with Rosenberg’s assessment, observing that he “gives short shrift to [*Brown*’s] vital importance as a confidence-building device for those who were fighting for reform.”)

²⁸⁵ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

To take one more cut on the problem, we might think of experimentalist judging as operating in what would traditionally be understood as the remedial domain.²⁸⁶ Because the typical problem for courts in selecting remedies is one of institutional competence, the remedial character of experimentalism would again suggest that it is a strategy for dealing with complexity rather than moral diversity. Yet the distinction between rights and remedies is itself artificial. As Daryl Levinson nicely puts the point: “Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”²⁸⁷ If experimentalism is a strategy for enabling courts to overcome the complexity that bedevils the selection of a remedy, it is, *ipso facto*, a strategy for announcing—or perhaps for facilitating the unfolding of—rights, notwithstanding the problem of moral diversity.

But not always. My strategy for showing that experimentalism could have utility in hard as well as big cases has been to show how the distinction between the two categories is not always so clear. However, I must admit that there are some cases that are simply hard without being big, and that therefore may not be amenable to experimentalist solutions.

For example, the question whether the First Amendment protects a right to burn an American flag as a means of expressing disapproval of government policy—to which the Supreme Court answered yes by a five-to-four margin in 1989²⁸⁸—was a hard but not a big question. By saying the case was hard I do not mean that it presented especially difficult issues of doctrine. Prior precedent had established that laws targeting expressive

²⁸⁶ See *supra*, Part IV(B).

²⁸⁷ See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 858 (1999).

conduct because of hostility to the speaker's message are subject to exacting judicial scrutiny,²⁸⁹ and flag desecration did not fit into any of the Court's previously announced categorical exceptions to freedom of speech.²⁹⁰ Nonetheless, the closeness of the vote in the Court, and the strong negative political reaction to the decision,²⁹¹ demonstrated that the case was hard in the sense that matters from the perspective of the indeterminacy problem: most Americans did not think that the First Amendment's protection for "freedom of speech" encompassed the right to burn an American flag, and the constitutional text was hardly a sufficient basis for showing them to be wrong.

The flag-burning case was not big, however. The Court's invalidation of the Texas statute and its subsequent invalidation of a similar federal statute²⁹² did not require the judiciary to root out a deeply entrenched social practice, nor to set up or oversee some large administrative apparatus. It simply excised a crime from the statute books, and for that reason there was no occasion for the Court to establish any remedial scheme at all.

Much the same might be said about a case like *Griswold v. Connecticut*,²⁹³ which invalidated a ban on contraceptive use. *Griswold* actually was hard in the doctrinal sense: Given the constitutional text's failure to mention contraception or a general right

²⁸⁸ See *Texas v. Johnson*, 491 U.S. 397 (1989).

²⁸⁹ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (reserving mid-level scrutiny for incidental restrictions on expressive conduct where "the governmental interest is unrelated to the suppression of free expression"),

²⁹⁰ See *Johnson*, 491 U.S. at 430 (listing, *inter alia*, obscenity, libel, and fighting words) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

²⁹¹ A constitutional amendment that would have given Congress and the states the power to prohibit flag desecration passed the House of Representatives in 1995, but twice failed to garner the necessary two-thirds majority in the Senate. See Katharine Q. Seelye, *House Easily Passes Amendment to Ban Desecration of Flag*, N.Y. Times, June 29, 1995, at A1; Helen Dewar, *Senate Falls Short on Flag Amendment*, Wash. Post, Dec. 13, 1995, at A1.

²⁹² See *United States v. Eichman*, 496 U.S. 310 (1990).

²⁹³ 381 U.S. 479 (1965).

of autonomy, the challenge for the Court was to justify a penumbral right of privacy without seeming to license, as the dissent accused the majority of licensing, the sort of open-ended judicial power of the *Lochner* era.²⁹⁴ And *Griswold* was also hard in the sense that there was moral opposition to contraceptive use. However, by 1965, when the case was decided, the number of people who strongly believed the government ought, on moral grounds, to forbid contraceptive use, was sufficiently small that the Court's decision engendered nothing like the resistance to *Brown* or to *Griswold*'s most famous successor in the privacy line of cases, *Roe v. Wade*.²⁹⁵

I shall return to *Roe* momentarily, but first I want to pause over a point that may seem too obvious even to mention: Whether a case is hard in the sense of bringing into play the problem of moral diversity is always a contingent social fact. Slavery was a hard question in 1856 but is easy today—and not simply because the Constitution now contains the Thirteenth Amendment. Arguments that the ante-bellum Constitution prohibited slavery were a staple of (one branch of) abolitionist discourse.²⁹⁶ In a counterfactual world in which slavery died out without a Civil War and without the Reconstruction Amendments, eventually the near-global consensus against slavery surely would have found expression in American constitutional law. To be sure, in such a world, a few curmudgeons would argue on originalist grounds that slavery remained compatible with the Constitution, but without a substantial moral or material investment in slavery as an institution, legal elites and the society at large would be justified in

²⁹⁴ See *id.* at 514-15 (Black, J., dissenting).

²⁹⁵ 410 U.S. 113 (1973).

²⁹⁶ See Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in 2 *Life and Writings of Frederick Douglass*, 467–80 (P. Foner ed., 1950), *reprinted in*

dismissing such arguments. The shift in popular opinion over time would have transformed slavery from a hard to an easy question, in much the same way that in our actual world, shifting public opinion over time has transformed the constitutionality of *de jure* segregation from a hard to an easy question.²⁹⁷

Slavery on the eve of the Civil War, of course, was not merely a hard question. It was also a big question. Suppose that instead of invalidating the Missouri Compromise in *Dred Scott*, the Supreme Court had invalidated slavery. The Court would have stood no realistic chance of implementing its decision, no matter what means it might have chosen. That is not to say that the antebellum Court acted correctly in making its peace—and then some—with slavery. When faced with an undeniable evil that a substantial fraction of one’s fellow citizens do not recognize as evil, one may have a moral duty to act in contravention of the norms of one’s profession.²⁹⁸ But that problem is not peculiar to the law or judging. In a society not on the verge of civil war and in which the spirit of tolerance prevails, even on most issues as to which there is substantial moral disagreement, one will not find the sort of moral certainty that might be thought to justify civil disobedience by judges and others.

Perhaps abortion and a handful of other profoundly divisive moral issues are to our age what slavery was in the nineteenth century; they create such polarization and depth of feeling that no judicial resolution—not even a decision not to decide—will be

Paul Brest & Sanford Levinson, *Process of Constitutional Decisionmaking* 207–11 (3d ed. 1992). See also *supra*, TAN 84.

²⁹⁷ Cf. Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 *Calif. L. Rev.* 791, 801-07 (2002) (arguing that social and attitudinal change typically must precede wholesale changes in the law’s treatment of categories of persons).

²⁹⁸ See Dworkin, *supra*, note 71, at 106-07 (asking whether an ethical judge in Nazi Germany could perform his job).

broadly viewed as legitimate, even by those who would have preferred a different outcome. If so, however, that is a contingent historical fact about these moral issues at this moment in time. The intractability of some moral questions is certainly not an indictment of experimentalism.

The advantage I claim for experimentalism is two-fold. First, in those cases that are primarily big, i.e., those cases where the judiciary's competence but not its moral authority seems doubtful, experimentalism offers courts a mechanism for coordinating local learning without having to superintend a top-down bureaucracy. Second, in those hard cases in which the Court's resolution of the central issue does not simply put an end to some practice, an experimentalist approach—by devolving deliberative authority for fully specifying norms to local actors—can soften (though not eliminate) the sting for those on the losing end of the initial decision. By giving citizens an opportunity to participate in the local elaboration of a general norm adopted by the Court—such as the norm against sexual harassment—experimentalism responds to the indeterminacy problem.

Finally, to the extent that the problems of complexity and moral diversity are often inextricable, my analysis suggests that experimentalism may be a superior institutional response to the indeterminacy problem than one of the standard alternatives—judicial/legislative dialogue. Various critics of judicial supremacy have taken the Court to task for its arrogation to itself of the sole power of constitutional interpretation.²⁹⁹ The milder form of this criticism (which I myself have made) urges the Court to give greater deference in its own decisionmaking processes to legislative

²⁹⁹ See Kramer, *supra*, note 88, at 5; Waldron, *supra*, note 37, at 90-91.

judgments.³⁰⁰ Harsher forms would either strip the courts of the power of judicial review or, as in Canada, make their decisions subject to a legislative override.³⁰¹ Yet to the extent that the problems bedeviling judicial resolution of ambiguity are rooted in complexity, the refractory nature of our social problems is likely to pose difficulties for any centralized decision maker, whether it is a court, the legislature itself, or a traditionally hierarchical administrative agency to which a legislature delegates power. The crucial question for addressing complexity, in other words, is not whether the task goes to courts, legislatures, or agencies, but whether whichever institution is charged with the relevant task adopts problem-solving methods equal to the challenge. And given the connections between complexity and moral diversity, that observation is likely to be true of many divisive moral controversies as well as seemingly more technical questions.

V. Conclusion

For over a generation, constitutional theory and academic jurisprudence have struggled to explain how judicial resolution of contests over the meaning of ambiguous legal texts can be justified as the application, rather than the creation, of law. That struggle has reached the point of diminishing returns. It is time to ask whether more progress might be made by looking, not for alternative accounts of what the courts do, but for alternative activities in which the courts might engage.

Drawing on the magisterial work of Hart and Sacks, I have argued that the key question is how courts can engage deeply with the other institutions of our public life. Departing from that same work, I have suggested that the answer should not assume that

³⁰⁰ See Dorf and Friedman, *supra*, note 27 at 67, 81-83.

institutions are fixed or that the process of interaction is one that operates by tacit rather than explicit principles. Problem-solving courts as they are beginning to develop to tackle drug addiction and other issues, as well as problem-solving institutions more broadly, point the way toward an understanding of the legal process as the collective search for practical solutions, rather than a largely inward-looking quest for the “true” meaning of legal texts.

To be fair to Hart and Sacks, they also understood legal institutions—including appellate courts—as first and foremost problem-solving rather than truth-seeking bodies. The Legal Process was an effort, after all, to absorb the lessons of legal realism, not to repudiate realism. The limits of the Hart and Sacks approach can be found in its both too-modest and too-ambitious conception of the role courts properly play in an ensemble of problem-solving institutions.

The Hart and Sacks notion of an institutional settlement was too modest in its assumption that courts should simply to defer to institutional settlements. Hart and Sacks did not recognize that courts have the capacity to disentrench broken or rotten systems. That fact, perhaps more than anything, explains why, despite holding liberal political views, Hart and Sacks were so uncomfortable with the Warren Court’s landmark decisions on malapportionment and racial segregation. They could not imagine a role for courts as catalysts of social change that the courts themselves would only indirectly superintend.

The excessive modesty of the Hart and Sacks approach was parasitic upon its excessive ambition. In the kinds of cases that were committed to judicial resolution, they

³⁰¹ Tushnet, *supra* note 28, at 127, 163-65.

believed in the power of reasoned elaboration to produce appropriate outcomes. Yet reasoned elaboration provides no answer to the indeterminacy problem, and one senses that Hart and Sacks knew as much. That is why they cabined the domain of reasoned elaboration by requirements that courts defer to institutional settlements on multiple fronts: private actors relying on market principles; administrative agencies applying expertise; local, state, and national elected bodies and officials expressing the popular will. By deferring on nearly all sides, courts could keep the domain of reasoned elaboration tolerably small. Is it a coincidence that H.L.A. Hart made the identical move in explaining how it is that legal indeterminacy does not swamp the legal system? Note, however, that Hart thought that judges in hard cases exercise discretion, in the Postscript describing reasoned elaboration (by a different name) as simply a form of post-hoc rationalization for the exercise of discretion. It is difficult to resist the conclusion that Hart and Sacks held the same view. They understood that one man's reasoned elaboration is another man's caprice, and thus, wherever possible, subordinated reasoned elaboration to deference to institutional settlements.

Described at a sufficiently high level of generality, my own preferred approach to the indeterminacy problem is the same as that of Hart, Dworkin, and Hart and Sacks. All of us believe that the job of justifying law is one of showing how the law's area of what Hart called open texture are sufficiently small that they do not undermine law's authority. There are, however, crucial distinctions between experimentalism and the other approaches. Where Hart and Dworkin took the law's relative determinacy as an article of faith, experimentalism treats legal indeterminacy as a real problem calling for a real institutional approach. In that respect, experimentalism resembles the Legal Process

approach. But where the Legal Process approach to other institutions was to defer to their processes, experimentalism is more activist in the sense that it asks those institutions to justify the deference they demand by producing a record of performance that can withstand comparative assessments. And where the Legal Process school extolled the power of reasoned elaboration by judges to divine correct answers to questions of principle, experimentalism, wherever possible, resorts to deliberation about practical problems by ordinary people. Experimentalism is, in that sense, deeply democratic.