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# Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process (Book review)

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## Book Review

### Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process

CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY. By William N. Eskridge, Jr.† and Philip P. Frickey.‡ St. Paul, Minnesota: West Publishing Co., 1988. Pp. xlvii, 937. \$35.95.††

Reviewed by A. Michael Froomkin\*

Legislatures, and the statutes they produce, are the poor cousins of legal education. Statutory construction, not to mention statutory drafting, are to be learned by osmosis, if at all. These subjects rarely have their own places in the curriculum, and when they do, they are vastly outnumbered by common-law courses. Nowhere is this more evident than in the traditional first-year curriculum. This absence creates the presumption that judges and courts are what law is all about. Even in later semesters, the subject of article I of the Constitution remains the least- and worst-studied branch of government, despite its potential for being the most dangerous branch.<sup>1</sup>

Jerome Frank traced the legal academy's fixation on courts and common law to the ravings of one "brilliant neurotic"—Langdell.<sup>2</sup> Whatever its source, the fixation is reinforced by the relative contempt in which the academy seems to hold the political marketplace of the legislature. From a pedagogic standpoint, the study of legislation loses out because the subject is difficult and the issues subtle and recursive.

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†† Hereinafter cited by page number only.

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1. "[I]t is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates." THE FEDERALIST NO. 51, at 356 (J. Madison) (B. Wright ed. 1961).

2. Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 (1947).

Additionally, the casebooks available tend to be traditional, even stodgy, and innocent of advances in political, economic, and literary theory.

William Eskridge and Philip Frickey have diagnosed a market opportunity, and they have filled it with a book that is well written, lavish in case and source material, and so much better than anything else now available that it deserves to become the standard text in this too-small field. Eskridge and Frickey have assembled a large volume of varied material, and they present it with fairness, pith, and verve. *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* surely will become an indispensable reference work for any student of legislatures, statutes, or applied public choice. Indeed, the book's greatest value may be as an intelligent, jargon-free guide to scattered cases, sources, and commentaries.

*Statutes and the Creation of Public Policy* is not an ordinary "cases and materials" legal textbook; it seeks to serve several different pedagogic markets. The result is certainly comprehensive, covering everything from the gestation of a statute to its lingering death by desuetude. Along the way the authors devote at least a significant part of a chapter to each of the following subjects: alternate means for organizing a legislature, the regulation of elections, the perils of direct democracy, statutory drafting, the implementation of statutes, and the legislative process in action. Furthermore, the authors' breezy style makes the material, which could have been very heavy, seem easy to read and often engaging.

This Review will not attempt to cover the authors' treatment of these disparate subjects. In general their treatment is clear and comprehensive, with the exception of the short chapter on legislative drafting.<sup>3</sup> Rather, this Review will focus on the debate over the right way to read statutes, and on what *Statutes and the Creation of Public Policy* tells us about the contribution of New Legal Process to this debate.<sup>4</sup> In the process of searching for a useful—or, better yet, useful and principled—way of construing statutes, almost all the topics canvassed in *Statutes and the Creation of Public Policy* can be drawn into play.<sup>5</sup>

3. Eskridge and Frickey concede that their treatment of legislative drafting is unsatisfactory. See p. 829.

4. The authors do not claim to belong to any school. Indeed, as their preface notes, they "have borrowed . . . from . . . public choice theory, traditional political science, and literary theory [and from] law and economics, legal history, critical legal scholarship, and what might be called the 'new legal process' scholarship." P. xvii. Nevertheless, the structure of the work, particularly the decision to conclude with Dean Calabresi's proposed solution to the problem of statutory desuetude, see pp. 882-84, makes their affinity with the New Legal Process clear. Cf. Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 237-49 (1983) (coining the term "New Legal Process" and describing the common characteristics of adherents).

5. The authors discuss jurisprudence—the theory of the creation and application of statutes—in chapter 3 and include a fairly detailed history of the subject. A somewhat different version of

## The Most Dangerous Branch

The book suggests that Eskridge and Frickey have a view, or possibly two closely related views,<sup>6</sup> about how courts should read statutes. Their perspective has not distorted their presentation of contrasting points of view, which is relentlessly fair, but it has affected what they consider relevant and interesting, and it may have scrambled the book's organization. In particular, Eskridge and Frickey give surprisingly short shrift to the implications of their analysis for the doctrine of separation of powers: they seem unconcerned about whether the doctrine implies constraints on the ability of courts to use tools of statutory construction in a creative manner. As a result, their book may overstate the case for judicial activism. In fairness to Eskridge and Frickey, and to the New Legal Process for which *Statutes and the Creation of Public Policy* may become a handbook, two things need to be said: the book does not attempt to proselytize its readers, and the old Legal Process did not address the separation of powers issue particularly well either.

Because a systematic background in legislation or legislative process is not part of the typical lawyer's background, this Review begins with an overview of the fundamental principles that should guide a systematic discussion of legislation. The Review then turns to an assessment of the place of the New Legal Process in this discussion.

### I. The Importance of Representational Theory

Every act of statutory interpretation contains an implicit theory about the function and nature of the legislative author.<sup>7</sup> Eskridge and Frickey describe well the varying theories of representation that most reasonably apply to our polity.<sup>8</sup> Following Hanna Pitkin,<sup>9</sup> Eskridge and Frickey detail three useful metaphors<sup>10</sup> for what representatives should do.<sup>11</sup> The first view sees legislators as substitutes for their constituents—legislators should mirror their constituencies, and the legislature should look like the electorate in miniature. The second view, the agency the-

parts of this chapter appear in Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

6. The authors are refreshingly candid when they disagree with each other. See, e.g., pp. 418-19.

7. Theories of textual interpretation borrowed from modern literary theory imply that the legislature is largely irrelevant. See *infra* text accompanying notes 71, 92-96.

8. This account should have been the philosophical foundation for the rest of the book, but unfortunately it remains at most latent throughout.

9. See generally H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967) (discussing three different views of representation).

10. Each of these theories can be asserted normatively or positively; that is, different persons in different times and places have claimed that one or more of these theories describe the way things are or should be. For present purposes, it suffices to view them as normative theories.

11. See p. 94.

ory, holds that representatives should do what their constituents would want them to do, regardless of the legislators' preferences. The third view, espoused by Edmund Burke,<sup>12</sup> among others, declares that representatives should act as trustees for their constituents. Each of these views, whether adopted singly or in combination, will have profound consequences for how one reads statutes. The authors treat the interplay and conflict between these fundamental political views only in their discussions of specific issues. The fullest discussions appear in the sections on campaign financing and logrolling, but nowhere do the authors step back and attempt a coherent overall view.<sup>13</sup>

The power of these simple political metaphors becomes clear in Eskridge and Frickey's discussion of the "toothless and inefficacious"<sup>14</sup> means by which legislatures in the United States have sought to define and regulate bribery and other improper attempts to influence the legislative process.<sup>15</sup> Whether one views as corrupt a legislator's promise to vote in exchange for money, a campaign contribution, or some political quid pro quo will depend upon one's "theory of politics."<sup>16</sup> The trustee view might see most deals as corrupt, while the agency view might object only to those that enrich the legislator personally.<sup>17</sup> Furthermore, if one adopts the view from *Buckley v. Valeo* that money spent on political campaigns is a form of political speech,<sup>18</sup> then the mirror metaphor implies that the system works properly when legislators trade their votes for campaign funds.

A similar calculus would affect one's view of lobbying activities.<sup>19</sup> Unfortunately, the authors' treatment of this issue is less complete.<sup>20</sup>

12. See E. BURKE, *Speech to the Electors at Bristol*, in 2 THE WORKS OF EDMUND BURKE 89 (3d ed. 1869).

13. They assert that the mirroring ideal would favor proportional representation, so that minorities are reflected in equal number to their presence in the electorate; that agency theory "would favor frequent elections, so that the representative's votes could be periodically reviewed by her constituents; [and that] trusteeship theory would . . . favor . . . a system that would choose wise people." Pp. 94-95.

14. P. 165.

15. See pp. 165-68.

16. P. 167 (citing Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 805-06 (1985)).

17. Pp. 167-68. In this context, the authors excerpt *People ex rel. Dickinson v. Van de Carr*, 87 A.D. 386, 390, 84 N.Y.S. 461, 464 (1903) (holding that reinstatement of employee on alderman's request was a "bribe"). In the notes, they contrast the protections offered by the speech and debate clause, U.S. CONST. art. I, § 6, cl. 1, then note the clause's invocation in the Abscam prosecutions. See pp. 170-72.

18. 424 U.S. 1, 17 (1976) (per curiam).

19. Eskridge and Frickey describe lobbying activities, then discuss them in terms of constitutional protections, pluralist theory, and Pitkin's version of the republican theory. See pp. 174-78.

20. Instead, they tell the reader to "consider the republican perspective" as she reads the materials. P. 177.

## The Most Dangerous Branch

Buried in the text, however, are interesting raw materials for further investigation. The richest source is the notes that follow the discussion of the Federal Regulation of Lobbying Act.<sup>21</sup> These materials allude to lobbying by federally funded institutions, which, although prohibited,<sup>22</sup> is practiced routinely; the potentially discriminatory effects of unrestricted lobbying on poor persons who have less to spend on such activities; and transnational lobbying.<sup>23</sup>

The three normative models of representative purpose and behavior make an excellent prism through which to view statutes. It is not enough, however, to have a theory of the function and purpose of legislators and legislatures. To construe statutes in a principled and consistent manner,<sup>24</sup> one must understand how the legislative product is produced. In other words, one needs positive as well as normative theory. This understanding requires more than a technical knowledge of the mechanics of passing a bill, but requires a theory of what motivates and activates the legislative process.

## II. Substantive Models of Legislation and Statutory Interpretation

One of the greatest virtues of *Statutes and the Creation of Public Policy* is its extensive but relatively jargon-free handling of public choice and other modern political and economic techniques. Eskridge and Frickey suggest three useful "substantive models" of American legislation,<sup>25</sup> each of which melds positive and normative claims: Madison's view of legislation as control of faction;<sup>26</sup> modern pluralism's acceptance, if not celebration, of interest groups, elaborated in a "transactional model";<sup>27</sup> and the authors' favorite, a "republican alternative."<sup>28</sup> The authors suggest that the 1964 Civil Rights Act<sup>29</sup> exemplifies the Madisonian paradigm,<sup>30</sup> while the Smoot-Hawley Tariff of

21. 2 U.S.C. §§ 261-269 (1982); see pp. 189-94.

22. Such lobbying is prohibited by 18 U.S.C. § 1913 (1982). The cases mentioned in the notes are *National Treasury Employees' Union v. Campbell*, 654 F.2d 784, 790 (D.C. Cir. 1981) (holding that 18 U.S.C. § 1913 does not envision a private right of action), and *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 826 (S.D. Iowa 1982) (same).

23. See pp. 187-89.

24. One interesting question might be why one feels these desires; they are unargued assumptions of *Statutes and the Creation of Public Policy* and of this Review.

25. Pp. 37-38.

26. See pp. 38-40. Following convention, the authors refer to pluralism as a Madisonian theory, see, e.g., p. 46, but rightly note that "Madison himself would probably be horrified at modern pluralist theory," p. 47.

27. See pp. 46-56.

28. See pp. 61-64.

29. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 1971 (1982)).

30. See p. 28.

1930<sup>31</sup> illustrates the pluralist vision of interest groups dominating a legislature.<sup>32</sup> In turn, the republican model foreshadows the updating of the classic Hart and Sacks formulation of legal-process analysis.<sup>33</sup>

Thus armed with one or more of these models of legislation, one can fashion a theory for interpreting a statute when its meaning, application, or constitutional validity is contested. Eskridge and Frickey at least note most of the theories already on offer. They also provide the tools for organizing these existing theories according to their positive assumptions about legislatures. These tools allow one to do intellectual triage according to the assumptions about human nature and politics that one finds most palatable or realistic, rather than considering only which theory lends itself to partisan purposes. Perhaps because this is a casebook, however, the authors rarely do this analysis for the reader.

### A. *Positive and Normative Pluralism*

The positive theory of pluralism assumes factions are a fact of political life, views power as dispersed, and, therefore, sees conflict as inevitable.<sup>34</sup> The normative theory views this as a largely desirable state of affairs, because different groups are able to bargain for what they most desire and because tyranny is less likely, and concludes that the government's role is to regulate the bargaining among interest groups.<sup>35</sup>

1. *Pessimistic Pluralism.*—Eskridge and Frickey dub modern social choice theorists “pessimistic pluralists”<sup>36</sup> because they marry a gloomy positive theory to traditional normative (Madisonian) pluralism. According to pessimistic pluralists, certain types of interest groups have great difficulty entering the political marketplace because groups do not

31. Tariff Act of 1930, ch. 497, 46 Stat. 590, 672, *stricken by* Pub. L. No. 87-456, § 101(a), 76 Stat. 72 (1962).

32. See pp. 40-46. Industries seeking protection banded together to demand a tariff and persuaded Congress to pass the Smoot-Hawley Act. Their leverage was so great that “[t]o an amazing degree the hearings were permitted to take whatever direction was given to them by the witnesses themselves . . . [T]he language of the hearings often was . . . in the style and manner of equals [Congressmen and witnesses] engaged in negotiation.” P. 42 (quoting E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* 38-43 (1935)).

33. See generally H.M. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958) (unpublished manuscript) (arguing that legislators should be deliberative, informed, and efficient and act for the public's welfare).

34. *Statutes and the Creation of Public Policy* contains a whirlwind tour of pluralism that quickly but sufficiently touches major positive and normative bases. See pp. 46-51. The material offers a good, but telegraphic, introduction to a complicated area. This introduction is a particular advantage of this text because other casebooks usually ignore both the positive and normative theories of pluralism.

35. Pp. 55-56.

36. P. 48.

## The Most Dangerous Branch

form as easily as traditional pluralists assume.<sup>37</sup> Furthermore, the legislature may delegate complex or controversial decisions to administrative agencies, which are more likely to favor organized groups.<sup>38</sup> As a result, the social choice resulting from the legislative (in)action may not reflect the majority's wishes. Indeed, the majority may not have formed sufficiently defined wishes for politicians to be able to satisfy them.

2. *The Transactional Model.*—Eskridge and Frickey's "transaction" model (supply and demand for legislation) is actually an elaboration<sup>39</sup> of strands of social choice theory: the transactional model combines the social choice view that groups form as a result of myriad private economic calculations, labeled the "demand side," with the Mayhew<sup>40</sup> and Fiorina<sup>41</sup> model of the vote-seeking legislator, the "supply side." Organized groups have the power to demand more benefits from legislators, while the disorganized tend to lose out, even from programs ostensibly designed to help them.<sup>42</sup> The authors use this model to explain why legislators intentionally may pass ambiguous legislation:

[T]he most efficacious response [to pressure from the demand side] is for the legislator to act so that each of the conflicting groups will believe it has won. . . . [P]assing an ambiguous bill which delegates policy responsibility to an administrative agency is the ideal way for a legislator to avoid making a choice and thereby to enhance the prospects for reelection.<sup>43</sup>

Similarly, the model illustrates why pretending to solve a problem may be better than a real solution: passage of a symbolic law gives a victory

37. Pp. 48, 56; see M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 165-67 (1965).

38. P. 49; see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-85 (1975).

39. The authors attribute the elaboration of the model to M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL PROCESS* (1981). The description of the transactional model relies heavily on Hayes's analysis. See p. 51.

40. D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5-7 (1974).

41. M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 50-52 (1977).

42. The authors observe:

[P]ublic assistance—allegedly a redistributive policy—is essentially regulatory in that it delegates broad discretion to welfare administrators. Public housing and urban renewal are, according to Hayes, blatantly distributive in that they benefit builders and lending groups at the expense of the unaware and unorganized poor. Finally, Medicare is actually only slightly redistributive, since it applies primarily to the aged, is based on a regressive financing system, and delegates authority to administrators who exhibit perhaps untempered bias to the medical profession.

P. 56. Of course, none of this is inconsistent with standard pluralism, so long as one believes that the allegedly benefited groups get *something*; the advantages to others are part of the logrolling necessary to build a coalition. For one view of how special interest groups manipulate public-assistance legislation, see DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEXAS L. REV. 993, 999-1000 (1988).

43. P. 54.



(of sorts) to those who requested it, and poor information may allow them to think the victory is more than symbolic. Yet the law need not impose real costs on others, who can thus ignore it.

### B. *The Republican Vision*

Eskridge and Frickey present the model of republican virtues as an outgrowth of attacks on the pessimistic pluralists and particularly on the transactional model.<sup>44</sup> Empirical evidence challenges the pessimistic pluralists' descriptions of the demand side of the legislative process as simply responsive to organized groups,<sup>45</sup> and questions whether interest groups really are key players given their poor organization, financing, and the tendency of divergent groups to cancel each other out.<sup>46</sup> The most recent empirical study cited by the authors, however, generally finds that special interests do wield great, but not absolute, power.<sup>47</sup>

The authors adopt a similar view of the pessimistic depiction of the supply side of legislation. Their republican virtues model reacts to the pluralist visions by stressing the ideological and public-spirited elements of statute creation.<sup>48</sup> Interest groups are relegated to "formulat[ing] and debat[ing] policy alternatives," a role they share with other institutional actors.<sup>49</sup> The authors' exemplar is John Kingdon, whose model places elected public officials at the center of lawmaking.<sup>50</sup> Kingdon's model also includes what neo-conservatives have called the "new class"—bureaucrats, academics, and the media—but gives them a lesser role in setting policy, although the model admits they control its implementation. In Kingdon's model, organized pressure groups exert little influence over elected officials, who are responsive to public opinion at large.<sup>51</sup> The Kingdon model holds that government action is likely only

44. Other attacks on pluralism, which get noted but not explored in great depth, term it an opiate of the people, see, e.g., Cunningham, *Pluralism & the Class Struggle*, 35 *Sci. & Soc'y* 385, 415-16 (1975), discussed at p. 61, or a rejection of Madisonian virtues, i.e., the Beard and Pocock debates, discussed at p. 63, along with more recent works of Bruce Ackerman and Cass Sunstein.

45. P. 57.

46. *Id.*

47. See pp. 57-58 (citing K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 310-14 (1986) (finding that earlier studies underestimated the power of organized groups to ameliorate proposals that they oppose)).

48. See pp. 56, 58-59. The authors cite R. RIPLEY, *CONGRESS: PROCESS AND POLICY* (1975), and A. MAASS, *CONGRESS AND THE COMMON GOOD* (1980), a wildly optimistic work.

49. P. 59.

50. See J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984). The authors discuss Kingdon's theory at pp. 59-61.

51. As the authors note, Kingdon's theoretical base is the garbage can model of organizational choice, in which actors' preferences are defined imperfectly, and legislative problem-solving processes are unclear. Kingdon views the government as resembling an organizational garbage can in which problems and strategies just float around, sometimes meeting, sometimes not. See p. 59. Compare Cohen, March & Olsen, *A Garbage Can Model of Organization Choice*, 17 *ADMIN. SCI. Q.*

## The Most Dangerous Branch

if there is a coupling between advocates of a new policy initiative, entrepreneurs concerned about a particular problem, and political receptivity.<sup>52</sup> Kingdon's model may be an accurate description of the political process, but as refracted through Eskridge and Frickey, it is sufficiently general so that by itself the model of republican virtues provides little guidance to positive analysis. Of course, if legislation is usually the result of happenstance, this model would have important normative implications.

### *C. The Substantive Models in Action: The Problem of Committee Reports*

Together these three models—the two pluralisms and republicanism—pack a surprising amount of power. For example, consider whether courts should examine committee reports (a form of legislative history) when constraining ambiguous statutes.<sup>53</sup> Eskridge and Frickey state that “[c]ommittee reports appear particularly well-suited for the authoritative role they play.”<sup>54</sup> Committees write the legislation, “and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.”<sup>55</sup> The authors admit, however, that committee reports are highly manipulable documents.<sup>56</sup>

Had the authors applied their own models to this question, they would have reached more nuanced conclusions. Reliance on committee reports makes sense if one adopts either the traditional or updated (garbage can model) republican vision. An optimistic pluralist might argue that most of the negotiation between the various interests occurs in committees. A pessimistic pluralist might fear that organized interests can capture committees and cause them to act at the expense of the commonwealth. If one assumes that interest groups can pack a committee, then one might be particularly skeptical of a committee report and prefer to

1 (1972) (describing the garbage can model in which choices are made “when the shifting combinations of problems, solutions, and decision makers happen to make action possible”) with N. MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 23-24 (M. Lerner trans. 1950) (discussing accession to power through *fortuna*).

52. J. KINGDON, *supra* note 50, at 211.

53. The authors cite judicial statements, e.g., *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (criticizing courts' “routine deference” to committee reports), and legislative statements disputing the propriety of various extrinsic aids. See pp. 715-17. The authors, however, do not go beyond these statements to consider the implications of a pluralist or republican conception of the polity, nor do they apply the competing visions of the legislature as mirror, agent, or trustee.

54. P. 709.

55. *Id.*

56. See p. 710.

rely only on floor debates.<sup>57</sup>

The metaphors for representation provide a more obscure analysis, but one worth considering. If the legislature is a mirror of the citizenry, a committee is a reliable source only as far as it mirrors the legislature. To evaluate a committee's reliability, courts would have to inquire into the selection and composition of the committee. Perhaps big committees are more reliable sources of legislative history than small committees because they are more likely to mirror the citizenry. If the legislature is an agent, and the committee an agent of the agent, courts have less reason to avoid relying on committee reports. Similarly, if the legislature is a trustee, committee reports might well be reliable. Of course, this oversimplifies the issue because our Congress actually embodies a mixed type of representation.

#### D. *Critiques of Pluralism and Republicanism*

Eskridge and Frickey depict the normative critique of pluralism (and of the authors' brand of republicanism) as having political, philosophical,<sup>58</sup> and historical<sup>59</sup> components. They focus on the political critique, which asserts that pluralist theory legitimates a regime in which the powerless are and remain unorganized. Pluralism condemns the have-nots to remain behind. The pluralist conception of government as referee discourages social action programs that could redress structural inequities and reifies the status quo.<sup>60</sup>

Although Eskridge and Frickey treat the question only briefly, they suggest that a positive pluralist has two choices. She can be a normative pluralist and let the squalid market operate freely, or she can reject the potential for squalor and support an interventionist judicial strategy that

57. Eskridge and Frickey report that courts ordinarily treat floor debates with greater suspicion than committee reports. P. 717. The authors quote Dickerson's comment that floor debates are "[a]mong the least reliable kinds of legislative history." *Id.* (quoting Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983)).

58. The authors have the good grace to admit that they give short shrift to philosophical critiques of pluralism. *See* p. 62. Short shrift, though, is better than nothing, and their two pages, pp. 61-62, at least flag the existence of communitarian philosophies. Specifically, they cite M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982), and Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073, as examples of philosophical critiques. In addition, they flag the existence of justice-first "deontological liberalism," *see* J. RAWLS, *A THEORY OF JUSTICE* 30 (1971), which also rejects pluralism's individual-rights, even libertarian, starting point.

59. The authors depict, but wisely do not attempt to decide, the historical debate about the extent to which the Constitution embodies pluralist ideas or a more republican view of "public virtue." *See* pp. 63-64.

60. This criticism is central to attempts by proponents of Critical Legal Studies to "trash" mainstream complacency about the political process. The CLS view that preferences are not exogenous, but can be shaped by ruling orthodoxies, appears to be crossing over into non-CLS legal writing. *See, e.g.,* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131 (1986).

## The Most Dangerous Branch

redistributes rights to ensure fair outcomes in the political process. A republican empiricist will shape her policy choices according to the degree of faith she has that independent representatives will be good trustees.<sup>61</sup>

Esckridge and Frickey note the tension between the pessimistic pluralist view of the democratic process as the aggregation of private interests, and the agency and trustee views that depend on the existence of a discernible public interest.<sup>62</sup> While rejecting all these views, the authors nonetheless partially rehabilitate legislators by suggesting that they sometimes act altruistically<sup>63</sup> out of a desire to “have ‘status’ within government and to make some positive contribution to what they consider good public policy.”<sup>64</sup>

### III. New Legal Process as Evolutionary Product

As the “new” in its name indicates, the New Legal Process does not exist in a vacuum. Rather, it is an entrant into an ongoing debate the extent and importance of which reflect the ever-increasing role of statutes in the nation’s legal landscape.

In an extended treatment of problems of judicial review,<sup>65</sup> statutory construction, and statutory interpretation, Esckridge and Frickey adeptly summarize many of the interpretive theories that have held sway in this country at one time or another. Their account has three parts. First, the authors recount the transformation of our legal environment from a system based on common law to a system based on statutes, and the result-

61. P. 61.

62. See p. 94.

63. Or, at the very least, they act in a manner not fully explained by the desire to be reelected at all costs.

64. P. 58 (citing R. FENNO, CONGRESSMEN IN COMMITTEES 159-60 (1973)).

65. Should “the apparent presence or absence of legislative deliberation” affect a court’s determination of the constitutionality of a statute? P. 336. In part the answer depends upon the court’s normative theory of government. The very act of constitutional adjudication seems opposed to normative pluralism. This is the countermajoritarian dilemma. The authors address this issue by outlining some approaches to statutory construction in the shadow of the Constitution. See pp. 340-67. Chief among them is the guide to constitutional adjudication suggested in the *Carolene Products* footnote, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), which the authors treat as an attempt to institutionalize procedural pluralism by guaranteeing minority rights and the public’s access to information.

Another response, which may be less widely known, requires Congress to act with unusual explicitness if it wishes to legislate within a constitutional penumbra. Esckridge and Frickey cover the three major brands of this view: Professor Tribe’s theory of structural due process, see Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975), which the authors illustrate with an excerpt from *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); Justice Linde’s theory of judicial enforcement of legislative procedural requirements, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); and Justice Stevens’s occasional elliptical suggestions concerning the need for a legislative “blueprint” to support legislation on constitutionally suspect matters, see *Fullilove v. Klutznick*, 448 U.S. 448, 534-35 (1980) (Stevens, J., dissenting). See pp. 340-67.

ing effect on jurisprudence.<sup>66</sup> In this account, Legal Process appears as the culmination of a jurisprudential adaptation to this new environment. Second, the authors account for the growth of competing approaches to Legal Process. After rejecting a "strict textualist" approach as simplistic,<sup>67</sup> Eskridge and Frickey outline modern approaches to the "art"<sup>68</sup> of statutory interpretation, most notably those emanating from a law and economics perspective. The most sustained treatments are reserved for (1) the Legal Process view,<sup>69</sup> (2) Judge Posner's argument that courts should attempt an "imaginative reconstruction" to "reproduce the interpretive answer that would have been reached by the legislature *originally* enacting the statute,"<sup>70</sup> and (3) a "dynamic approach" based on current literary theory, in which statutes have no fixed meaning.<sup>71</sup> Finally, the authors give the first textbook account of the emerging New Legal Process approach, which apparently seeks to counter criticisms of Legal Process by altering its philosophical and political underpinnings more than by altering its conclusions.

#### A. *A Short History of Legisprudence*

Under the Blackstomian common-law view, statutes were political blemishes on the majesty of the common law, legislative excretions that courts were to respect but narrowly construe.<sup>72</sup> By contrast, in the more holistic civil-law approach, all law, and perhaps more importantly all legal principles, derive from legislatively created codes. Eskridge and Frickey characterize the American experience as a drift away from common law toward statutes. This trend began with the Field Codes and Pound's sociological jurisprudence, which were followed by the reception of statutes into the main body of the law.<sup>73</sup> The authors treat legal real-

66. See pp. 241-47.

67. See p. 571. "[S]tatutory interpretation cannot be appropriately undertaken by a mechanical application of rules . . . . The proper interplay among statutory language, legislative purposes, extrinsic material such as other statutes and legislative history, and the particular facts of the case at hand may not be discerned by any formula." P. 570. All statutory interpretation may indeed be fundamentally ad hoc, but this conclusion casts doubt on the need for the preceding hundreds of pages about what happens to statutes before they wind up in court, and it is an unprepossessing introduction to the formal consideration of the subject. What is more, it may not be entirely true. For example, consider the throwaway line that precedes the rejection of formalism cited above: "[A]ny conflict between the legislative will and the judicial will must be resolved in favor of the former." *Id.* (quoting R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 8 (1975)).

68. P. 570.

69. See p. 571.

70. P. 572 (emphasis added).

71. See *id.*

72. See pp. 241-61.

73. That is, statutes became accepted as a source of principles that could inform judicial decisions. P. 244.

## The Most Dangerous Branch

ism as a detour on the way to Hart and Sacks, whom the authors see as great systematizers armed with an organizing concept: “[L]aw is . . . a purposive activity, a continuous striving to solve the basic problems of social living.”<sup>74</sup> Under this Legal Process view, statutes are as much a source of law as are judicial decisions.

### B. *Legal Process*

The Hart and Sacks theory of Legal Process views every statute as a purposive act designed to achieve an ascertainable objective. The fundamental assumption is that “pluralism characterizes our political system and will yield rational, purposive statutes so long as the legal process is functioning properly.”<sup>75</sup> Furthermore, “[t]he legal process vision of separation of powers rejects the notion that one and only one branch makes policy (though it obviously accepts the notion that the legislative choices, when made, are entitled to deference) . . . .”<sup>76</sup> The interpreter’s job, therefore, is to discern what purpose to *attribute* to the statute. Hart and Sacks confess this task to be difficult at times, but never admit it to be impossible. They ease the endeavor by relaxing the requirement that the statute reflect actual legislative intent. Legislative intent is worthy of respect, but the court must determine what the statute is designed to do and then apply the statute to the facts at hand in light of current conditions.<sup>77</sup> Armed with an attribution of the statute’s general purpose, the court can adapt the text of the statute to changing circumstances without, one assumes, too much concern for the embarrassments of specific language. Although this may appear to be a caricature, it is not; the Supreme Court itself has reasoned in a similar fashion.<sup>78</sup>

Typical of the fair-mindedness of *Statutes and the Creation of Public Policy* is the authors’ willingness to illustrate the vices of Legal Process as well as its virtues, despite their apparent preference for the Legal Process

74. P. 245 (quoting H.M. Hart & A. Sacks, *supra* note 33, at 1156).

75. P. 323. Oddly, at times Eskridge and Frickey assume that Hart and Sacks had a republican vision of the legislative process (a rational, public-spirited creation of public values). See p. 767. In fact, the Hart and Sacks vision of the legislative process is rooted firmly in optimistic pluralism. See, e.g., pp. 409-10. If their vision has a republican strand, it is in their account of the courts’ role in the formation of statutory purposes.

76. P. 263. Eskridge and Frickey claim the authority of Montesquieu and the Framers for this view, arguing that concentration of all policy-making power in the legislature would be the sort of tyranny they feared. *Id.*

77. Pp. 571-72, 575-77; Brest, *The Misonceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 218 (1980); H.M. Hart & A. Sacks, *supra* note 33, at 1156-57, 1410-16.

78. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892) (construing a statute that forbade inducing immigration by the promise of employment “of any person . . . in any way” as not applying to an Anglican minister). But see *TVA v. Hill*, 437 U.S. 153, 194-95 (1977) (construing endangered species legislation so as to prevent operation of a virtually completed federal dam).

view. The authors cleverly depict both vices and virtues through the irreverent juxtaposition of the Supreme Court's *Moragne v. United States Marine Lines*<sup>79</sup> with *Flood v. Kuhn*,<sup>80</sup> a case that reached an opposite result two years later. *Moragne* concerned widows and orphans; *Flood* concerned baseball players. Otherwise, both cases were about a group of people trapped by a legal rule that, because of earlier and now anomalous Supreme Court decisions, denied them a benefit available to almost every other member of the class to which they belonged. In *Moragne* the Supreme Court found for the sailors' widows with wrongful death claims, but in *Flood* the Court rejected the antitrust claims of the disappointed baseball players.

Eskridge and Frickey describe the Court's willingness to update the statute in *Moragne* as the natural outgrowth of Legal Process thinking,<sup>81</sup> but they also give earlier examples of similar reasoning<sup>82</sup> and note modern critiques.<sup>83</sup> Scholars disagree about the long-term effect of *Moragne* decisions: the law and economics model suggests that parties will simply adjust their expectations and their contracts. Ultimately, the rule courts fashion in applying an aging statute to new circumstances will make no difference. Legal Process suggests that the rule will matter because the legislature may be unable to react.<sup>84</sup> Eskridge and Frickey suggest that a more harmful influence may be a new congressional reluctance to pass limited statutes for fear that the courts will analogize them into more general application.<sup>85</sup>

### C. *Competing Contemporary Approaches to Statutory Interpretation*

1. *Law and Economics.*—Unlike the old Legal Process, law and economics theories of statutory interpretation are rooted in pessimistic pluralism. When depicting and discussing the law and economics view, Eskridge and Frickey rightly devote the most space to the writings of Judge Richard Posner. Judge Posner's view differs from that of Hart and

79. 398 U.S. 375 (1970). In *Moragne*, the Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which held that in maritime law no action for wrongful death lay in the absence of a statute. See pp. 247-56.

80. 407 U.S. 258 (1972). In *Flood*, the Court refused to overturn *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1955), because Congress had, by allowing them to stand for so long a time, supposedly evinced a desire that baseball, unlike other organized sports, not be subject to federal antitrust laws. See pp. 292-307.

81. See pp. 246-47.

82. See pp. 256-59.

83. See pp. 260-61.

84. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 59 (1982).

85. See p. 261.

## The Most Dangerous Branch

Sacks in three ways. First, Posner emphasizes the importance of a good faith historical inquiry, using extrinsic aids, to discern the “values and attitudes” of past legislatures.<sup>86</sup> Second, Posner emphasizes the importance of fidelity to what the judge concludes were the desires of the legislators who enacted the statute.<sup>87</sup> Finally, and most importantly, Posner rejects the assumption of Hart and Sacks that legislatures are rational or that legislation is purposive. Instead, he prefers the legal realist and pessimistic pluralist visions that embrace the possibility of subterfuge, compromise, and chaos.<sup>88</sup> In place of Hart and Sacks’s focus on an interpolated purpose, Posner proposes that courts be sensitive to the extent to which the legislature intended to use the statute as a vehicle to delegate problem-solving authority to courts. Courts should fill in gaps, and even make federal common law, if it appears that Congress so intended.<sup>89</sup> But if it appears that Congress had a clear purpose, however narrow or silly, Posner—in the spirit of law and economic’s reverence for contracts—believes that courts must respect these done deals.

Judge Easterbrook would carry this argument further, advocating close to strict textualism in all cases.<sup>90</sup> Easterbrook believes that our government was designed to govern least, and that this design is wise. He thus sees no conflict between his normative agenda and the predicted outcome of his view of the courts’ role. By contrast, Posner’s argument is almost Aristotelian, holding that legal texts have different functions and intentions (one might say excellences) than do literary ones<sup>91</sup> and hence should be read in a different manner.

2. *Dynamic Statutory Interpretation.*—Both the Legal Process and the law and economics views claim that fidelity to some legislative work product is both possible and good. Modern literary theories, by contrast, challenge the positive claim that texts have determinate or determinable meanings, a skepticism adopted into jurisprudence by Ronald Dworkin.<sup>92</sup> In what he calls “dynamic statutory interpretation,” Eskridge has

86. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286 (1985), *excerpted* at p. 598.

87. *Id.*

88. *See id.* at 288-89, *excerpted* at pp. 599-600.

89. An interesting effect of this vision is that it appears to privilege statutes arising out of “liberal” or “progressive” or “New Deal” congresses, which presumably desired expansive constructions, over those passed in less optimistic eras. *See id.* at 287-90, *excerpted* at pp. 598-600.

90. *See* Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544-52 (1983), *excerpted* at pp. 602-07. *But see* Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-15 (1984) (advocating a more balanced approach to statutory interpretation), *excerpted* at pp. 612-13.

91. P. 614; *see* Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1374 (1986).

92. *See* R. DWORKIN, *LAW’S EMPIRE* 313-54 (1986); R. DWORKIN, *How To Read the Civil*



wedded this skepticism to a normative assertion that courts should forsake the "fetish of legislative intent"<sup>93</sup> and instead update aged statutes to fit changed constitutional and social mores.<sup>94</sup> He asserts that "as the societal, legal, and constitutional context of the statute changes, our interpretation of the statute may change,"<sup>95</sup> although he offers imprecise guidelines for when such updating is proper.<sup>96</sup> Eskridge and Frickey do note that many Supreme Court opinions appear to depend on a dynamic reading of the statute, and that state supreme courts often take a similar approach to state laws.<sup>97</sup>

3. *"Plain Meaning" and Formalism.*—One hoary view that Eskridge and Frickey perhaps write off too quickly is the "plain meaning" rule. The authors note that the Supreme Court still relies on this concept at times,<sup>98</sup> but they find more time for the devastating attacks on plain meaning by Hart and Sacks and by legal realists (e.g., Max Radin<sup>99</sup>) than they do for consideration of plain meaning's virtues.<sup>100</sup>

At least two arguments favor a plain meaning—even strict construction<sup>101</sup>—approach to statutes. Professor Mashaw's unpublished *Rosenthal Lectures*<sup>102</sup> advance one such view. Mashaw takes a middle view between Radin's complete rejection of legislative intent and the Legal Process idea that statutes have rationally formed guiding principles. Mashaw suggests that the most deeply pessimistic positive pluralism leads to the conclusion that every coalition which formed to pass a statute was temporary.<sup>103</sup> Only the plain meaning of the statute, therefore, is worthy of a court's respect. Presumably, that plain meaning was all that the coalition could achieve. Giving the victors in that legislative battle

*Rights Act*, in A MATTER OF PRINCIPLE 316, 319-24 (1985); Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527, 541-43 (1982); pp. 614-16.

93. P. 626.

94. Pp. 616-17; see also Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) ("Statutes . . . should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context.").

95. P. 616.

96. See p. 617.

97. See p. 627.

98. See pp. 592-94.

99. See Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 338 (1942); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

100. See pp. 572-74.

101. It is not necessarily reactionary to distrust judges—it depends on how much one trusts judges not to be a tool of the class from which the large majority of them originate. Even a person who is purely result-oriented must decide whether the process that produces judges is more or less likely to produce a class favorable to her policy preferences than is the process that produces legislation.

102. J. Mashaw, *Positive Theory and Public Law* (Feb. 1986) (unpublished manuscript).

103. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORGANIZATION 81, 87-88 (1985).

## The Most Dangerous Branch

more than they achieved would be as disrespectful of the popular will as denying them what they had plainly won.

A plain meaning approach to statutes offers a simple, if not invariably accurate, formula for determining how much the victorious coalition managed to obtain through the political process. More sophisticated formulae require judges to make complex interpretive judgments about how much a given Congress probably knew, and what its expectations were. The Supreme Court's evolving approach to statutory interpretation exacerbates this problem. *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*<sup>104</sup> provides a good example of the Supreme Court's sensitivity to the dynamic effect of changes in its method of reading statutes. In *Curran*, the Supreme Court reasoned that when Congress amended the Commodity Exchange Act<sup>105</sup> in 1974, courts were freely implying rights of action. Because Congress must be presumed to know the decisional background to statutes, the Supreme Court concluded that Congress must have wanted the courts to keep on implying private rights of action in the same class of cases, otherwise it would have told them to stop.<sup>106</sup>

Some formalists argue that neither the judicial nor the executive branches should enjoy great discretion. The Court's role is to police the excesses of other branches: to prevent legislatures from shirking the tough policy decisions, to stop agencies from overreaching their mandates, and to exercise the self-restraint to avoid becoming a legislative council of revision.<sup>107</sup> To the positive claim that the legislature will do a lousy job, or not do its job at all, this camp offers a simple normative reply: Good.

Formalism, however, is equally compatible with a different solution, one that vests the greatest discretion in administrative agencies by focusing on structural concerns without resorting to the device of plain meaning.<sup>108</sup> In this view, the role of the courts is to ensure that the legislature be clear about what issues it is committing to the agencies and perhaps to

104. 456 U.S. 353 (1982).

105. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (amending Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1982)).

106. See *Curran*, 456 U.S. at 377-82. Judge Posner has a different view:

As an original matter we might question [the presumptions that Congress knows the decisional background against which it amends statutes and that if it had wanted courts to stop it would have said so]. They might be thought to impute to Congress greater knowledge of case law than is realistic to suppose it has, to underestimate the degree to which Congress is content to avoid deciding questions (such as the question whether courts would have continued implying private rights of action . . .), and to equate legislative inaction to action.

*Bosco v. Serhant*, 836 F.2d 271, 275 (7th Cir. 1987) (Posner, J.) (discussing *Curran*).

107. E.g., Schauer, *Formalism*, 97 YALE L.J. 509, 521 n.42, 543-44 (1988).

108. See Mashaw, *supra* note 103, at 95-99.

give some guidance about what issues an agency should consider when fulfilling its mandates. In an article that is particularly sensitive to structural constitutional concerns, Professor Diver has suggested that in some situations, such deference to agencies is the only appropriate course.<sup>109</sup> Structural formalists believe the Supreme Court must particularly avoid becoming an administrative tribunal of last resort.<sup>110</sup> To the positive response that administrative agencies will not do a good job, this camp counters by suggesting that the alternatives are worse.<sup>111</sup> Perhaps better administrative techniques or the adoption of self-policing incentive-based systems of operation<sup>112</sup> can resolve some of the criticisms that the positive response directs at the agencies.

#### D. *New Legal Process*

Into this debate comes the New Legal Process. Reflecting the latest in political science theory, the New Legal Process breaks with Hart and Sacks in abandoning an optimistically pluralist model of the political system. Rather, the underlying positive conception is substantially pessimistic, even hi-tech.<sup>113</sup> To positive pessimistic pluralism, the New Legal Process weds normative republicanism:

[T]here are several common themes [among New Legal Process scholars]. One is antipluralist: Legislation must be more than the accommodation of exogenously defined interests; lawmaking is a process of value creation that should be informed by theories of justice and fairness. Another theme is that legislation too often fails to achieve this aspiration and that creative lawmaking by courts and agencies is needed to ensure rationality and justice in law. A final theme is the importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy.<sup>114</sup>

109. See Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 593-94 (1985).

110. Another related argument is that plain meaning operates like a burden of proof in evidence. Burdens of proof exist so the trier of fact can make a decision in the absence of persuasion. We are accustomed to applying these burdens on parties who seek to prove adjudicative facts. Perhaps courts could settle controversies over legislative facts the same way. Indeed, some separation of powers views may demand no less. Other separation of powers views strike a different balance. For example, the Supreme Court often has suggested that when a statute is unclear, but the Court believes that Congress intended to address a problem, the Court will defer to an agency's expertise in applying the statute. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

111. See Diver, *supra* note 109, at 585.

112. See, e.g., Stewart, *supra* note 38, at 1696-97 (discussing the failure of the traditional model of administrative law and analyzing replies to the criticism that agencies use their discretion to favor organized interests).

113. See *supra* note 51.

114. Pp. 330-31.

## The Most Dangerous Branch

Indeed, this conversation is all that stands between a legal process view and the charge of elitism.<sup>115</sup> Perhaps elitism is no longer a vice, particularly when its proponents profess to demonstrate such a “substantive commitment to progressive, fair, and just law.”<sup>116</sup>

The New Legal Process vision leads Eskridge and Frickey to make four powerful claims:

(1) In their view, the New Legal Process endorses legislative retroactivity by analogy to judicial retroactivity and by appeal to “prudence.”<sup>117</sup>

(2) The authors also approve of judicial prospectivity,<sup>118</sup> reasoning by analogy to legislative action and by appeal to “fairness.”<sup>119</sup>

(3) According to the New Legal Process, statutes do not fix a legislative “will”; rather, they are delegations by the legislature to the court to make interpretations that change with the times,<sup>120</sup> delegations that the legislature is free to correct, retroactively if necessary.<sup>121</sup>

(4) The executive has meaningful lawmaking power independent of delegations from Congress.<sup>122</sup>

115. The relation between pluralist and republican representative theories on the one hand and academically popular theories of judicial review on the other is somewhat complicated. See pp. 399-423. *Statutes and the Creation of Public Policy* gives the most attention to Cover’s republican “paideic” concept of the polity, p. 399, and Sunstein’s decidedly unpluralist suggestion that “naked preference” statutes are unconstitutional, p. 406. Following these is an excerpt from a Supreme Court decision allowing windfall retirement benefits only to certain railroad employees, a redistribution that lacked republican virtues. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), *excerpted* at pp. 401-06. As even Sunstein admits, asking courts to overturn statutes that are in the public interest invites some doubt about whose idea of the public good applies. P. 408. A republican theory that applied the majority’s idea of the public good would collapse into a perverted pluralism. But applying minorities’ ideas of the public good also may lead to undesirable results. Indeed, Professor Ackerman suggests that the concept developed in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), is misguided procedurally. See pp. 408-09 (discussing Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985)). According to Ackerman, the “discrete and insular minorities” protected by *Carolene Products* are those already most likely to form organized groups because their small size allows them to overcome “free rider” concerns that dissuade others from political participation. P. 408. In the Ackerman formulation, a *Carolene Products* approach makes sense only as part of the war against prejudice, not as part of a plan to improve pluralism. Pp. 408-09.

116. P. 332.

117. See p. 264.

118. Judicial prospectivity is announcing a rule that will apply to all future cases, but that will not apply to the parties before the court.

119. See pp. 263-64.

120. *Id.* The rationale for this view is presumably *Moragne v. United States*, 398 U.S. 375 (1970). See pp. 259-61. Just how radical the authors intend to be is hard to tell, as they qualify their claim that statutes are delegations to courts by saying that this is “especially” true of “important statutes such as the Sherman Act and civil rights laws which leave many gaps for courts to fill.” P. 264.

121. Pp. 263-64.

122. “In the post-New Deal world,” the doctrine that the executive has no meaningful lawmaking power “is probably the silliest . . . . Legal process theory has been most successful in inerring the doctrine of limited executive delegation.” P. 264.

At least the second of these assertions has precedent,<sup>123</sup> and the first<sup>124</sup> and the third seem to have some support.<sup>125</sup> The case for the fourth is harder to make.<sup>126</sup> In any event, the persuasiveness of the New Legal Process seems to depend upon wholesale adoption of all four propositions. Eskridge and Frickey do not always succeed in making a sufficiently strong case.

The assertion that statutes are delegations by the legislature to the court to make interpretations that change with the times is persuasive for "common law statutes"<sup>127</sup> such as the Sherman Act<sup>128</sup> and section 301 of the Taft-Hartley Act.<sup>129</sup> In these statutes Congress explicitly has asked the courts to resolve a complex matter in common-law fashion. But even if one finds an implicit delegation in acts creating common-law like remedies (for example, section 1933 of the Civil Rights Act<sup>130</sup>), this delegation cannot explain holdings such as *Moragne*.<sup>131</sup> Courts can employ other possibly principled distinctions to justify their actions. For instance, they might rely on the difference between cases involving a statutory precedent and those involving a constitutional precedent.<sup>132</sup> Yet even taken together, these techniques do not reach as far as either Legal Process school would have courts go. Of all the techniques that courts can use to explain their more creative efforts, only one—reading meaning into forms of legislative silence—shows the promise of reaching broadly

123. See pp. 267-69 (discussing current status of judicial prospectivity and the issues surrounding its application).

124. Eskridge and Frickey introduce retrospective legislation via a fascinating case, *Jawish v. Morlet*, 86 A.2d 96 (D.C. 1952). In *Jawish*, the court held that a minimum wage statute invalidated in 1923 by *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), sprang back to life in 1937 in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), when the Supreme Court overturned the legal theory on which the 1923 decision had been decided. The *Jawish* court held that the statute had always been the law, although in the interim "just about everybody was fooled." 86 A.2d at 97 (citing *Warring v. Colpoys*, 122 F.2d 641, 646 (D.C. Cir.), cert. denied, 314 U.S. 678 (1941)). *Jawish* is not about retrospective legislation as the holding states plainly that the law was always there. In any case, it seems odd to refer to a 1918 law as applying retroactively to an offense committed in the 1950s. If there was retroactivity in *Jawish*, it was created by a court.

125. See *infra* text accompanying notes 127-30.

126. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawbreaker. . . . [T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952).

127. P. 291; see R. POSNER, *supra* note 86, at 288.

128. 15 U.S.C. §§ 1-7 (1982).

129. 29 U.S.C. § 185 (1982); see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); see also *Federal Sovereign Immunity Act*, 28 U.S.C. §§ 1602-1611 (1982) (setting forth guidelines for federal and state court treatment of foreign states' use of sovereign immunity defense).

130. 42 U.S.C. § 1983 (1982); see *Smith v. Wade*, 461 U.S. 30, 34 (1983); pp. 278-92.

131. See *supra* note 79.

132. Justice Brandeis made this distinction in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting); see p. 303.

## The Most Dangerous Branch

enough to meet the structural demands of the Legal Process vision.<sup>133</sup>

### IV. New Legal Process and the Separation of Powers

Whether or not the Hart and Sacks view of Legal Process was as momentous an achievement as *Statutes and the Creations of Public Policy* suggests, little question remains that the theory confronted the doctrinal problems of its day, problems such as federalism and strict constructionism, which at times masked racism. Today, however, the Hart and Sacks view may be showing signs of strain when confronted with new doctrinal issues, particularly the issue of separation of powers. The New Legal Process ably heads off criticism that the positive assumptions about pluralism are too optimistic by showing how similar conclusions follow from a far more pessimistic set of beliefs about political reality. But this alone is not enough to make the theory persuasive in the face of new concerns.

The doctrinal problems with the New Legal Process approach to statutes, like the Hart and Sacks version, become visible when one seeks to apply New Legal Process to a real-life problem such as the severability of statutes.<sup>134</sup> Given the authors' four organizing ideas about Legal Process,<sup>135</sup> severability becomes a technical issue rather than a fundamental matter of constitutional principle. Severability, rather than forming the centerpiece of a discussion of the structures and relationships in the balance of power between the branches, only appears briefly in a short note.<sup>136</sup> Eskridge and Frickey present the Supreme Court's latest pronouncement on severability as the Court's resolution of the technical issue: "Unless it is evident that the Legislature would not have enacted

133. One way to describe the divide between the New Legal Process view and other views is to focus on the apparent assertion of New Legal Process that when courts update a statute they are not forming policy, but rather recognizing that a policy—or a national mood, a legislative mood, or something else external to the judicial branch—has changed. To an outsider, this discretion seems functionally equal to the right to make policy. A New Legal Process adherent might admit that in our scheme courts have the power to make new policy, but answer that courts do not have the right to do so and that we must trust them not to do it. And in any event, if courts go seriously overboard, the legislature will be there to check them. The distinction between power and right often has been advanced in the context of the jury's power to nullify the law. The current consensus seems to be that while the jury may have the power, and perhaps even the right, to nullify the law, the state does not inform the jury of the right so as not to encourage it to use the power. See, e.g., Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 55. To the extent that scholars accept New Legal Process, we cannot expect judges to remain ignorant of their power. The positive assumption underlying *The Federalist* is that those who have power will use it, and someday will abuse it. Subsequent developments offer meager grounds for reassessment.

134. Severability has become a matter of great importance, particularly since *INS v. Chadha* threatened to invalidate more than 200 statutes. See 462 U.S. 919, 967 (1983) (White, J., dissenting) (noting that the decision sounded "the death knell for nearly 200 other statutory provisions").

135. See *supra* text accompanying notes 117-22.

136. P. 277.

those provisions which are within its power, independently of that which is not, the invalid part [alone] may be dropped . . . ."<sup>137</sup> If this decision is a principled one, it has substantial implications for the Court's philosophy of representation, an issue that ultimately ought to be inextricable from one's view of the proper separation of powers.

Esckridge and Frickey's cavalier treatment of severability follows from their relative unconcern with fundamental structural features of the Constitution.<sup>138</sup> Not only is their view void of the constitutional dynamics that should shape the debate, but it represents a lost opportunity for arguing that only New Legal Process can explain the Supreme Court's behavior. A pluralist theory cannot explain the Court's severability rulings, because severing risks ripping *quid* from *quo*. Neither a mirror, nor an agency, nor even a trustee theory of the legislature adequately explains how a court can approach the task of identifying which clauses in a bill a legislature might have passed independently of the others. To this day, the Court has never offered a constitutionally satisfactory explanation of its severability decisions. Of all the Pitkin and Esckridge-Frickey theories, only two support the Court's liberal severability doctrine. One adopts an excessively sanguine view of legislators as good republican trustees, in which case almost every line of every bill stands on its own as being in the public interest. The other theory argues, as I think Esckridge and Frickey would, that the legislature's passage of the statute is a delegation to the court. The court then has the dual role of self-denial of the statute on constitutional grounds and implementation of the statute. The court implements the statute through some unspecified combination of its reading of the legislative will at the time of passage, and passage of time on the legislative—or national—will.

137. *Alaska Airlines v. Brock*, 107 S. Ct. 1476, 1480 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)); see p. 277.

138. *Statutes and the Creation of Public Policy* never discusses the heart of article I, which details the "legislative powers herein granted." See U.S. CONST. art. I, § 1. This omission may represent the assumption—possibly unfounded—that constitutional law classes will cover article I. But in this choice, the authors make structural constitutional analysis, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN AMERICAN CONSTITUTIONAL LAW* 67-97 (1969), and comparative institutional assessments between the three branches much more difficult, see, e.g., Diver, *supra* note 109, at 574-82 (comparing abilities of courts and agencies to interpret statutes); Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988) (using structural constitutional analysis to discuss judicial abilities); Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191, 213-14 (1987) (comparing judicial and legislative decision making); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 364, 367-68 (1984) (same). This omission hampers the examination of separation of powers concerns. For example, unlike other parts of the Constitution, article I specifies both the substantive powers and the internal institutional rules that will govern the branch being constituted. This fact is significant: The Constitution gives Congress the greatest powers, and it therefore spells out in the greatest detail the formal procedures that Congress must observe to exercise that power.

## The Most Dangerous Branch

Although New Legal Process comports with the Court's severability decisions, it cannot justify them. New Legal Process works from a functional view of separation of powers that the Court has rejected in other contexts.<sup>139</sup> Strong tension exists between this view, which seems to explain what the Court is doing, and the Court's rhetoric. Those who admit that the Court is always political may not be troubled by the contradiction between separation of powers logic and statutory action. Legal technicians may find a hairsplitting distinction between institutional problems, which the Court treats as separation of powers issues, and statutory construction, which apparently it does not. I doubt, however, that such a distinction exists.<sup>140</sup> If it does not, and we wish to continue to believe that the court is more than a third chamber of the legislature,<sup>141</sup> then we have cause for alarm. This alarm is neither raised nor resolved in *Statutes and the Creation of Public Policy*.

The extent to which one trusts the courts may reflect one's politics and one's generation. Tomorrow's liberals may join today's conservatives in their lack of faith in the ability of courts to fix things, particularly if the Burger and Rehnquist Courts become the most familiar examples of what a Supreme Court is like. The link between liberalism and faith in the courts may in any case be peculiarly American: in England, for example, the left has rightly viewed the bench as an obstacle to social reform.<sup>142</sup> Overall, our national experience with courts provides at least as much support for the hypothesis that judges tend to be reactionary as it does for the view that they will be liberal; the view that they will be enlightened philosopher-kings finds predictably little support.

The New Legal Process concludes that courts are vested with discretion to recognize policy. The price of rejecting this conclusion is high—devotees would say too high. The price is a rigid approach to aging statutes, one requiring Congress to update statutes, or at least to delegate explicitly the updating authority to other institutions. This approach im-

139. See *INS v. Chadha*, 462 U.S. 919, 944-46 (1983) (striking down one-house veto despite efficiency and convenience claims); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62-68 (1982) (rejecting characterization of bankruptcy courts as "legislative courts"); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers . . ."). But see *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986) (holding that resolution of a separation of powers claim should be guided by "practical attention to substance" rather than "doctrinaire reliance on formal categories").

140. See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 899 (1975); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 273 (1982).

141. Cf. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978) (adopting premise that the Supreme Court is a policy-making body).

142. See, e.g., J. GRIFFITH, *POLITICS OF THE JUDICIARY* 52 (1977) (noting that the British left views judges, and thus law itself, as greatly biased in favor of the rich and powerful).



poses high short-term costs on society. Certainly many individuals will suffer inequities, and often these individuals are precisely those who were disadvantaged initially, whose misfortune led to the statute's enactment. The delay inherent in this rigid approach will block worthy projects and allow unworthy, dangerous activities to continue. The strongest argument of the New Legal Process is this: Just as the Constitution is not a suicide pact, so too it does not require that we treat the fever of aging statutes with the jurisprudential equivalent of a nostrum. To this strong argument one can only respond by asking whether the Constitution as it now stands envisions such sweeping rule by judges. Must support for the increased power of the federal state lead directly to disproportionately increased power for unelected judges?

## V. Conclusion

Statutory immersion can cause serious depression. Not only are the statutes unclear, but the most plausible theories for how they got to be that way suggest that the cures may be as painful as the disease. Indeed, the most radical theories suggest that statutes have no meanings at all. The Legal Process school, new and old, thus presents an attractive temptation: courts will rescue us the morning after what Gilmore called our "orgy of statute-making."<sup>143</sup> My fear is that these elegant concoctions of the Legal Process schools will prove to be no more than the hair of the dog.

It is possible to imagine the shape of some persuasive arguments that Legal Process is more than patent medicine. One might offer a structural analysis to explain why courts are competent to enjoy the sort of policy discretion advocated by the Legal Process schools.<sup>144</sup> One could create a separation of powers analysis to explain how, under our Constitution (with whatever theories of representation it embodies), courts are vested with what appears to be legislative power. Perhaps because Eskridge and Frickey have written a casebook and not a tract, neither of these arguments appears explicitly in *Statutes and the Creation of Public Policy*. Instead, the book makes clear the need for reform of some sort, and it also makes clear that some scholars believe this reform can and should be run by the courts. On this point, the case remains unproved.

143. G. GILMORE, *THE AGES OF AMERICAN LAW* 40 (1977).

144. See Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *YALE L.J.* 1006, 1042-52 (1987) (arguing that constitutional insulation of judges from the excesses of private-regarding and public-regarding pressures makes them most qualified to resolve disputes between competing social visions); see also *supra* note 138 (citing authors who use structural analysis).

## The Most Dangerous Branch

Professors Eskridge and Frickey have made a significant contribution to the teaching of legislation and to clear thinking by those who breathe life into the laws. As it stands, *Statutes and the Creation of Public Policy* examines the subject comprehensively and lays foundations for debates that should enrich its readers both in and out of the classroom.