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Legal Indeterminacy and Institutional Design

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LEGAL INDETERMINACY AND INSTITUTIONAL DESIGN

MICHAEL C. DORF*

For over a generation, constitutional theory and academic jurisprudence 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—Dworkin's "law as integrity"—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

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develops a model of "experimentalist" courts and agencies that are always in transition. This 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 preconditions for local deliberation about the content of legal norms.

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I

INTRODUCTION

Nearly simultaneously and yet independently, constitutional theory and academic jurisprudence have run into the same dead end. For laws in general and constitutions in particular to be legitimate requires, at a minimum, that they have grown from procedures or rest

on principles that are widely, if not universally, recognized as legitimate. In practice, however, 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 diversity often render agreement on specifics impossible.

For over a generation, the fields of 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 judicial discretion, and both the law and the Constitution are meant to be the master of those in authority, not the servant of their 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. Given the apparent inconsistency between theoretical legitimacy and actual legal practice, 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. Instead, I propose that we reimagine our 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

¹ “[T]hree, and possibly four, structural elements in our constitutional system. [federalism, the presidency, unequal representation in the Senate, and possibly the electoral college] are not, realistically speaking, open to change in the foreseeable future.” Robert A. Dahl, *How Democratic is the American Constitution?* 143, 143-46 (2001) (answering, in essence, “not very” to question posed by book’s title).

structural pillars of federalism and separation of powers.² Courts have not been (and should not be expected to be) leading players in matters of institutional design, but neither have they been irrelevant. In the case of the administrative state, they (eventually) acquiesced to the New Deal,³ while in other instances—such as the democratization of state processes in the apportionment decisions⁴—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.

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 understood 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: domesticating discretion.

Not all that long ago, however, American constitutional theory and academic jurisprudence were understood as the same enterprise—an effort to account for and legitimate law, given two historical phenomena: the ascendancy of legal realism in America and of totalitarian regimes abroad. On the one hand, legal realism rendered untenable the formalist notion that judges mechanically apply a dis-

² For a relatively recent restatement of constitutional objections to the New Deal and the decisions upholding it, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1233-37 (1994) (objecting to “The Death of Limited Government” in decisions ratifying New Deal state); *id.* at 1237-49 (objecting to “death” of nondelegation doctrine, unitary executive, independent judiciary, and separation of powers).

³ In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937), the Supreme Court accepted a broad view of congressional power under the Commerce Clause, while in *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), the Court accepted that an executive agency exercising quasi-legislative and quasi-judicial powers could be insulated from presidential oversight.

⁴ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that Constitution's Equal Protection Clause requires equal apportionment by population in electoral districts for state legislatures).

embodied entity called “The Law.” But on the other hand, in the wake of Nazism, fascism, and communist totalitarianism, Americans and others in the democratic West were unwilling to let go of the idea of using judicially enforceable rules of law not only to regulate private actors but also to circumscribe government power itself.⁵

Scholarship of the post–World War II era wrestled with these conflicting impulses. In the American legal academy, the response was a synthesis that lasted for nearly two decades and has continuing influence today. That synthesis was the “Legal Process School,” which took its name from a set of teaching materials for a Harvard Law School course first offered by Henry Hart and Albert Sacks in the 1950s.⁶ 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 decisionmaking 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 “duly established procedures.”⁷

The Hart-Sacks synthesis broke down under two sets of pressures. First, *Brown v. Board of Education*⁸ and the civil rights revolution it arguably 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.⁹ Thus, under attack

⁵ Even amid 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 reinterpretation 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.

⁶ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (prepared for publication from 1958 Tentative Edition).

⁷ *Id.* at 4.

⁸ 347 U.S. 483 (1954) (holding de jure racial segregation in public schools unconstitutional).

⁹ Some critics viewed regulation as often or even usually inefficient, because agencies sought to solve problems within their jurisdiction without paying sufficient attention to the costs of their interventions. See, e.g., Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11-14 (1993) (criticizing performance of Environmental Protection Agency). The inefficiency of regulation was also explained by another changed perception: Government actors came to be seen (again, by some) as self-interested rather than as selfless public servants. See Gary S. Becker, *A Theory of Competition Among*

from both the left and the right, and seemingly outpaced by events, the Hart-Sacks synthesis shattered into fragments.

In private law, the utilitarian impulse that had informed *The Legal Process* was channeled into the harder-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 government actors to coordinate vast swaths of activity, and 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,¹⁰ while either succumbing to or resisting the imperialism of law and economics.¹¹

Meanwhile, the task of explaining what distinguished judicial interpretation of ambiguous legal norms from the exercise of raw power was parceled between academic jurisprudence and the emerging field of constitutional theory. The latter subdiscipline was only just emerging in the 1960s, because the post-New Deal institutional settlement gave judges an extremely limited role in constitutional matters. The canonical lesson that New Dealers like Justices 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.¹² But with each new decision of the Warren Court, progressive constitutional scholars in the legal academy found the New Deal settlement increasingly inadequate, and thus the central question of constitutional scholarship over the last half century has

Pressure Groups for Political Influence, 98 Q.J. Econ. 371, 373 (1983) (arguing that policies are products of competition among pressure groups); James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 3-9 (1962) (constructing theory of collective choice).

¹⁰ See, e.g., Jules L. Coleman, *Risks and Wrongs* 6-12 (1992) (presenting account of tort law that rejects market paradigm while incorporating insights of economic analysis).

¹¹ For the classic manifesto of the law and economics movement in torts, contracts, and beyond, see Richard A. Posner, *Economic Analysis of Law* 6-8 (1st ed. 1972) (describing both normative and descriptive role of economic analysis of law). For an early account of torts 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 10.

¹² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 523 (1965) (Black, J., dissenting) (protesting that prior to majority’s decision, post-New Deal Court had “‘returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws’” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963))); *W. Va. 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).

been how we can justify decisions like *Brown v. Board of Education*,¹³ *Reynolds v. Sims*,¹⁴ and (in some accounts) *Roe v. Wade*,¹⁵ without also justifying decisions like *Lochner v. New York*,¹⁶ *Dred Scott v. Sandford*,¹⁷ and (in most of those same accounts) *Bush v. Gore*.¹⁸ 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—*What is the place of principles in your account of law as a system of rules?*¹⁹—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 judges themselves?²⁰

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 decisionmaker goes about the solitary task of resolving ambiguity. Dworkin's panoptic Hercules, isolated on Mount Olympus, is only the most obvious example of this attitude.²¹ Restoring Hart and

¹³ 347 U.S. 483 (1954).

¹⁴ 377 U.S. 533 (1964).

¹⁵ 410 U.S. 113, 153 (1973) (holding that constitutional right of privacy includes "a woman's decision whether or not to terminate her pregnancy").

¹⁶ 198 U.S. 45 (1905) (holding that state maximum-hours law violated right to freedom of contract entailed by Fourteenth Amendment).

¹⁷ 60 U.S. (19 How.) 393 (1856) (holding that African Americans are not citizens of United States for purposes of bringing suit in federal court).

¹⁸ 531 U.S. 98 (2000) (holding that state court's order to recount disputed ballots violated Equal Protection Clause).

¹⁹ See Ronald Dworkin, *Taking Rights Seriously* 59 (1977) ("[A]ny 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.").

²⁰ This, to be sure, is not Dworkin's own question, but, as I explain below, his account of adjudication may be best understood as an effort to rationalize judicial inferences from ambiguous authority. See *infra* notes 166-69 and accompanying text.

²¹ See Ronald Dworkin, *Law's Empire* 239, *passim* (1986).

Sacks's focus on the interaction of varied actors to the heart of our analysis of the legal process is long overdue.

Second, contemporary debate also reflects a limitation of the Legal Process method itself. For all their sophistication about interactions among various institutions, Hart and Sacks assumed that the original Madisonian architecture, supplemented by the New Deal administrative state, supplied all the institutions required to resolve any conflict 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 Hart and Sacks's method (and in the work that has followed them) to a further unstated 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 alone: reason-giving. A legislature is an arena in which questions are decided by voting; an agency by applying expertise; and so on. Barely explored in the Hart and Sacks materials is the possibility that means and ends might be reciprocal—in a continual state of disequilibrium. A court or agency attempting to satisfy a general legislative mandate may discover that the problem as defined by the legislature—such as nonviolent crime, to give an example I develop below²²—can only be addressed by focusing on factors outside the original mandate—such as drug addiction, to continue the example—resulting in a legislative redefinition of the problem, which in turn calls for another iteration of practical efforts, which in turn leads to further refinements of the problem, and so on, *ad infinitum*.

This Article argues that the way past the current impasse is to return to Hart and Sacks's commitment to a legal decisionmaking 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 and ambiguities in the law, judges need not simply choose between the Scylla of deference and the Charybdis of usurpation. Trial courts can address some broad social problems without directly taking over responsibility for running institutions like prisons, schools, and police forces, while appellate courts need not themselves fill the gaps in constitutional and other open-ended legal

²² See *infra* Part IV.A.

norms; they can instead (or at least additionally) instigate reform by other actors.

Parts II and III of this Article retell the story of post-War constitutionalism and jurisprudence as an (ultimately unsuccessful) attempt to surmount what I shall call the *legal indeterminacy problem*. Glossing over an important philosophical and jurisprudential debate, by legal indeterminacy I mean simply that in more than a trivial number of cases that come before the courts, “[l]egal norms may not sufficiently warrant any outcome.”²³

I do not claim that law is ever *completely* indeterminate. Even ambiguous legal norms rule out some possibilities. Nonetheless, at least where unelected judges are the actors charged with specifying the content of legal norms, indeterminacy poses a problem so long as the range of plausible interpretations is not trivially small. For judges will have difficulty explaining how the law rather than their own inclinations leads them to adopt one plausible interpretation rather than another.

The indeterminacy problem appears to be built into the nature of the legal enterprise. *Law* differs from *will* in that law is abstract: Whereas a tyrant issues orders one at a time, according to no general rule or standard, a government under law specifies, in advance and through rules or standards of general applicability, how concrete cases will be resolved.²⁴ Yet the very feature of law that allows it to operate at the wholesale rather than the retail level—its abstraction—limits its ability to guide concrete decisions taken in the law’s name.²⁵ This is no mere analytic problem. Law speaks in ambiguous terms for a variety of quite practical reasons: because the lawmakers wished to delegate authority to those charged with administering the law;

²³ Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549, 578 (1993).

²⁴ For a useful discussion of abstraction as a definitive element of law, see F.A. Hayek, *The Constitution of Liberty* 148-61 (1960) (describing transition from commands and customs to laws).

²⁵ Legal indeterminacy is thus problematic in part because it means that judicial decisions are unpredictable. See Coleman & Leiter, *supra* note 23, at 580-85 (addressing claim that “set of legal reasons is insufficient uniquely . . . to explain or predict” outcomes). The worry about legal indeterminacy is not, however, limited to questions of predictability. Suppose it were possible to “account for . . . ninety percent of Chief Justice Rehnquist’s bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party.” Mark V. Tushnet, *A Republican Chief Justice*, 88 Mich. L. Rev. 1326, 1328 (1990) (reviewing Sue Davis, *Justice Rehnquist and the Constitution* (1989)). That kind of predictability would tend to prove rather than disprove the law’s indeterminacy, for it would suggest that something other than law is generating judicial outcomes. Accordingly, legal indeterminacy is a worry insofar as judicial decisions are not simultaneously predictable and, in some sense, attributable to 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 principles sufficiently abstract to secure consensus and thereby work its way into a popularly chosen constitution will be too abstract to resolve the most acute subsequently arising constitutional controversies.²⁶ 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 of reimagining a substantial portion of the work of the courts in a way that shrinks the domain of the indeterminacy problem. That project 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."²⁷ In democratic experimentalism, local units of government are broadly free to set goals and to choose the means to attain them. Within these units, citizens²⁸—acting as individuals, through stakeholder organizations and 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

²⁶ 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 "paradox of constitutional democracy").

²⁷ Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 314-22 (1998).

²⁸ 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 ("[N]or 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*, 435 U.S. 291, 296 (1978) ("[I]t 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 noncitizens.

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 are shaped in turn by means of performance standards based on information about current best practices provided by regulated entities. And these entities provide such information in return for the freedom to experiment with solutions they prefer. Sabel, myself, and others have argued that although it is nowhere fully realized, the ideal of democratic experimentalism bears a sufficient similarity to the emerging institutions to warrant studying them as a group.²⁹

²⁹ See Dorf & Sabel, *supra* note 27, at 283-84 (arguing that democratic experimentalism can be seen in “the practices of state and local governments, Congress, administrative agencies, and the Supreme Court”); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831, 837-38 (2000) [hereinafter Dorf & Sabel, *Drug Treatment Courts*] (discussing experimentation in drug treatment courts); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 *Pol. & Soc’y* 73 (2001) (discussing reforms of Chicago public schools and police department); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *Geo. L.J.* 257, 260, 262-63 (2001) (presenting EPA’s Toxic Release Inventory as “watershed” for use of “performance monitoring and benchmarking as regulatory tools”); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *Colum. L. Rev.* 903, 907-08 (2002) (describing “epistemologically . . . modest, pragmatic, and empirically grounded approach” of recent environmental regulatory tools); Bradley C. Karkkainen et al., *After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Regulation*, 44 *Am. Behav. Scientist* 692, 702-08 (2000) (discussing “Habitat Conservation Plans” as example of democratic experimentalism); Charles Sabel et al., *Beyond Backyard Environmentalism*, in *Beyond Backyard Environmentalism 3* (Joshua Cohen & Joel Rogers eds., 2000) (discussing experimentation in environmental regulations); Archon Fung et al., *Realizing Labor Standards*, *Boston Rev.*, Feb.-Mar. 2001, at 4 (proposing model for strengthening labor standards with goal of increasing transparency of public debate on how workplaces operate in global economy); Archon Fung, *Street Level Democracy: Pragmatic Popular Sovereignty in Chicago Schools and Policing* (July 30, 1999) (unpublished manuscript, <http://www.archonfung.net/papers/SLD99.pdf>) (discussing reform of Chicago public schools and police department); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, http://www.civilrightsproject.harvard.edu/research/reseg02/liebman_sabel.pdf (last visited Mar. 10, 2003) (discussing “new form of collaboration between courts, legislatures, and administrative agencies on the one side and between these organs of government and new forms of public action on the other”); Charles F. Sabel, *Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions*, at <http://www.law.columbia.edu/sabel/papers/Design.html> (last visited Mar. 10, 2003) (arguing that new institutions “allow allocation of a single language of practical reason in which questions regarding the performance and the coordination of particular tasks can be addressed by disciplines with similar syntax”); Charles F. Sabel & Rory O’Donnell, *Democratic Experimentalism: What To Do About Wicked Problems After*

Democratic experimentalism—as the name suggests—is principally a model of participatory administration. Nonetheless, courts also play an important role in this emerging architecture. Experimentalist trial courts, sometimes called “problem-solving courts,”³⁰ 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.³¹

Experimentalist appellate courts, as I model them, differ in a crucial respect from appellate 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, experimentalist appellate courts that declare rights based on irreducibly ambiguous authority deliberately include ambiguity in their own pronouncements by establishing 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 employers in the first instance the task of formulating such programs.³² Or they announce that criminal suspects are entitled to safeguards to prevent undue coercion in interrogation but leave to local

Whitehall (And What Scotland May Just Possibly Already Be Doing) (Feb. 2000) (unpublished manuscript, on file with *New York University Law Review*) (discussing school reform in Chicago). For a summary and critique, see William H. Simon, *Solving Problems Versus Claiming Rights: The Pragmatist Challenge to Legal Liberalism* (Apr. 24, 2003) (unpublished manuscript, on file with *New York University Law Review*) (describing recent legal pragmatist scholarship).

³⁰ See *infra* Part IV.A., notes 227-28 and accompanying text.

³¹ See *infra* Part IV.B.

³² See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (holding employer vicariously liable for supervisor’s actionable sexual harassment, “subject,” however, “to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (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) (arguing that recent sexual harassment decisions signaled “to the lower courts and the body politic that they must take these matters seriously, even if . . . [the appropriate remedy] cannot be determined by a judicially created, one-size-fits-all legal rule”) and *infra* Part IV.D.1.

determination the decision of what safeguards to employ.³³ As these examples drawn from Supreme Court precedents illustrate, experimentalist 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”³⁴ or “minimalism,”³⁵ it is not so much a solution to the problem of ambiguity as a surrender to it.

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*.³⁶ Experimentalist appellate courts self-consciously rely on the participation of affected actors to explore the implications of the framework rules that they create and use the

³³ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“Our decision in no way creates a constitutional straitjacket 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.”); see also *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (noting that *Miranda* Court held that legislators not constitutionally precluded from crafting effective alternatives to *Miranda* warnings). This understanding of *Miranda* is advanced in Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61, 82 (arguing that *Miranda* should be understood “not as mandating specific procedures, but as laying down a right [namely, the accused’s right to remain silent] and creating a safe harbor for those charged with respecting it Other actors are then encouraged to develop alternative ways to achieve these goals.”), as well as in Dorf & Sabel, *supra* note 27, at 452-57. See *infra* Part IV.D.2.

³⁴ Mark Tushnet, *Taking the Constitution Away from the Courts* 9-14 (1999) (arguing that Constitution should be rendered nonjusticiable on ground that “procedural” or “thick” provisions are self-executing and rights guarantees or “thin” provisions should be left to politically accountable actors whose views better reflect those of the people than do judges’ views).

³⁵ In recent years, Cass Sunstein has championed minimalism. See, e.g., Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996) [hereinafter Sunstein, *Legal Reasoning*]; Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996) [hereinafter Sunstein, *Leaving Things Undecided*].

³⁶ To put this point somewhat tendentiously: C.J. Peters misclassifies me as a minimalist. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum. L. Rev. 1454, 1468-69 (2000).

record of such actors' efforts continually to refine such framework rules.³⁷

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 "sex discrimination" and nothing more. 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 first-order beliefs. Forced together to solve problems to which ideology provides no obvious solution, or to which ideological solutions have manifestly failed, citizens may find that their commitment to solving problems is by itself sufficient to bridge their other differences. 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 difficulty should not occasion willful blindness or cause us to despair of the possibility of law. Rather, it should invite consideration of the institutional structures best suited to treating ambiguous legal texts as invitations to practical problem solving, constrained by commitments to popular sovereignty as well as to 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.

³⁷ This statement is partly descriptive and partly aspirational. As noted above, there is now a budding movement of problem-solving courts in which the participants, 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 grappled much with the question of how to extend their experimentalist outlook to the law-creating appellate level. See *infra* Part IV.

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.”³⁸ Given the indeterminacy problem, in contested cases the Supreme Court’s preferred interpretation typically will be only one of several plausible understandings. When the 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.”³⁹ How have theorists responded?⁴⁰

This Part casts the leading theoretical approaches to constitutional law as responses to Bickel’s counter-majoritarian difficulty. Each of the following theories offers an approach to constitutional interpretation that purports to cabin judicial discretion, thus minimizing the consequences of the indeterminacy of constitutional norms, or to explain why the costs of judicial discretion are justified by the benefits of judicial review. Although this Part provides only a bare

³⁸ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16, passim (1962).

³⁹ *Id.* at 128. 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) (“[T]he 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.”); 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”); Barry Friedman, *Mediated Popular Constitutionalism* 5 (Feb. 20, 2003) (unpublished manuscript, on file with *New York University Law Review*) (“[W]hat the complainants miss is that consistent with the concept of popular constitutionalism, the rules . . . adopted by the judiciary necessarily must fall within a range acceptable to popular judgment over time.”). 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.

⁴⁰ In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 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.” *Id.* at 177, 180. 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. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *Duke L.J.* 1, 21-22.

sketch of each approach, it 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 retaining a substantial role for the judiciary in checking abuses by the other branches of government.

A. *Radical Majoritarianism*

For some radical democrats, the solution appears straightforward: We must do away with judicial review.⁴¹ 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 truly 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.⁴²

Enlisting the indeterminacy problem in their cause, radical democrats further observe that the difficulty cannot be overcome by attempts at better drafting. The same moral diversity that makes particular judicial interpretations of liberty, equality, and democracy controversial will typically preclude a supermajority consensus from forming on specific constitutional language—and supermajorities are needed to distinguish constitutionalism from the radical democracy these critics prefer. Moreover, even if consensus can be reached on

⁴¹ See generally Tushnet, *supra* note 34; Jeremy Waldron, *Law and Disagreement* (1999) [hereinafter Waldron, *Law and Disagreement*]. 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 difficult-to-enact constitutional amendments. 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) (describing development of constitutional model situated between American form of judicial review and full legislative supremacy). 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 Power and Popular Sovereignty*, in *Marbury versus Madison: Documents and Commentary* 181 (Mark A. Graber & Michael Perhac eds., 2002); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 *N.C. L. Rev.* 773, 783-84 (2002) (contrasting judicial review, which allows courts to refuse to give force to action, with judicial supremacy, which gives courts power to compel adherence to court decisions).

⁴² See Waldron, *Law and Disagreement*, *supra* note 41, at 88-118 (concluding that judicial decisions are just as “arbitrary” as legislative ones).

particulars, complexity will often render that consensus 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.

Radical democrats offer 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*⁴³ and *Lochner v. New York*,⁴⁴ say, against *Brown v. Board of Education*⁴⁵ and *Gideon v. Wainwright*⁴⁶—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 precommitment 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,⁴⁷ he expresses what has become the global conventional wisdom. Radical democrats sacrifice constitutionalism in the name of democracy and in so doing arguably sacrifice democracy itself.

My point here is not to choose sides in the debate between radical democrats and constitutionalists but to highlight how radical democrats completely surrender to the indeterminacy problem. The only decisionmaking procedure by which radical democrats can imagine that courts could resolve disputes over ambiguous text is preference aggregation, and if there is to be preference aggregation, radical democrats see no reason to aggregate the preferences of judges rather than those of legislators acting as conduits for their constituents.⁴⁸

⁴³ 60 U.S. (19 How.) 393 (1856).

⁴⁴ 198 U.S. 45 (1905).

⁴⁵ 347 U.S. 483 (1954).

⁴⁶ 372 U.S. 335 (1963) (holding that right to counsel is fundamental right of indigent defendant in criminal trial).

⁴⁷ See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 30-31 (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.”).

⁴⁸ Given the pathologies identified by public choice theorists, see generally Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*

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.”⁴⁹ 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 nineteenth century,⁵⁰ 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,⁵¹ at the limit merging with the views of radical democrats.

In its more modest versions, judicial restraint is 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,⁵² as does Cass Sunstein’s suggestion that the Court should be (and as a matter of observed fact is) “mini-

(1997) (summarizing and showing limits of arguments that legislation and regulation are not public-regarding), one might think that the logical end point of the radical democratic argument is government by popular referendum, but (romantic?) fondness for legislative deliberation usually tempers radical democrats’ radicalism in this regard.

⁴⁹ *Walters v. Nat’l Ass’n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984); see also *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987); *United States v. Di Re*, 332 U.S. 581, 585 (1948).

⁵⁰ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893). The view hardly originated 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) (noting support for Thayer’s theory in early Supreme Court cases).

⁵¹ See Lino A. Graglia, “Constitutional Theory”: The Attempted Justification for the Supreme Court’s Liberal Political Program, 65 *Tex. L. Rev.* 789, 791 (1987) (“[W]hy should the American people prefer to have fundamental issues of social policy decided by the United States Supreme Court . . . in the guise of enforcing the Constitution rather than by the decentralized process of representative self-government contemplated by the Constitution?”).

⁵² Bickel, *supra* note 38, at 111-98; 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 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”).

malist” in the sense that it should leave the political process considerable breathing space.⁵³

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 physician-assisted suicide—even if agreement on higher-order reasons is not—e.g., in the physician-assisted suicide case,⁵⁴ the Justices offered several competing rationales for the ruling.⁵⁵

Thus understood, minimalism is not obviously responsive to the indeterminacy problem in every case. There can be broad consensus favoring an abstract 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. Moreover, minimalism of the second sort founders on Dworkin’s idea of “justificatory ascent.”⁵⁶ 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 decisionmaking will require judges to appeal to more general principles to justify the 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.”⁵⁷

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

⁵³ See *supra* note 35.

⁵⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding physician-assisted suicide ban against substantive due process challenge); see also *Vacco v. Quill*, 521 U.S. 793 (1997) (upholding physician-assisted suicide ban against equal protection challenge).

⁵⁵ See Sunstein, *Legal Reasoning*, *supra* note 35, at 5-6; Sunstein, *Leaving Things Undecided*, *supra* note 35, at 20-21.

⁵⁶ See Ronald Dworkin, *In Praise of Theory*, 29 *Ariz. St. L.J.* 353, 356-57 (1997).

⁵⁷ *Id.* at 357-58.

second Harlan. They practiced a version of “retail restraint.” When they chose to err 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 states⁵⁸—they essentially acted as radical democrats, and were thus legitimately subject to 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 use⁵⁹—they opened themselves up to the opposite criticism of judicial subjectivity. Why, critics asked, are practitioners of retail restraint willing to intervene, notwithstanding textual ambiguity, in this case 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.”⁶⁰

In other words, retail restraint is a crude sort of split-the-difference compromise: Sometimes it sacrifices rights for majoritarian decisionmaking, and at other times the tradeoff works in the opposite direction, 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 restraint is aligned with the approach of Hart and Sacks⁶¹ (which is unsurprising given Justice Frankfurter’s role in the creation of, and his lionization within, the Legal Process School).⁶² Part III contends that Hart and Sacks were right to focus on the allocation of decisionmaking authority among institutions, but also that their reliance on craft—as well as their assumption that the New Deal state included all possible useful insti-

⁵⁸ See *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (opposing incorporation of Bill of Rights via Fourteenth Amendment because, among other things, it would “tear up by the roots much of the fabric of law in the several States”).

⁵⁹ See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (opposing Court’s dismissal on jurisdictional grounds of challenge to Connecticut ban on birth control, and arguing, on merits, that due process “includes a freedom from all substantial arbitrary impositions and purposeless restraints”).

⁶⁰ 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).

⁶¹ See William N. Eskridge, Jr. & 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).

⁶² See Joseph William Singer, *Legal Realism Now*, 76 *Cal. L. Rev.* 465, 507-08 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927-1960* (1986)) (associating Justices Frankfurter and Brandeis with the majoritarian strand of Legal Process School).

tutions—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 even 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 change.⁶³ 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.⁶⁴

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 courts are justified in invalidating egregious affronts to any plausible conception of democracy—such as profoundly rotten voting districts 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). At the time cases involving most such issues come before the court, there is division over whether process theory authorizes judicial intervention.

⁶³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁶⁴ See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

Still, even if validated only after the fact, so long as judicial review is invoked only to overturn practices that *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 thought an unwarranted constitutional inference by the Burger Court because it is 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.⁶⁵

Process theory thus highlights but does not resolve the indeterminacy problem. Democratic procedures cannot be used to determine the ground rules for democracy because this only raises the question of how to validate the democratic procedures for determining the ground rules, and so on ad infinitum. But at the same time, extra-majoritarian mechanisms for setting the ground rules also cannot validate themselves; they will invariably rely on just the sort of controversial moral judgments (about democracy) that process theory is meant to avoid.

D. Fundamental Values

Process theories of the sort advanced by Ely typically seek to legitimize judicial protection of democracy-enforcing rights and to de-

⁶⁵ Laurence Tribe, for example, writes that

[a]lthough 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.

Laurence H. Tribe, *Abortion: The Clash of Absolutes* 105 (1990). See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 912 (1992) (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 386 (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.").

legitimize judicial enforcement of other constitutional rights.⁶⁶ Yet 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.⁶⁷ Fundamental values theorists argue that the judicial role properly extends to protecting individuals against interference with a zone of autonomy that the government has no legitimate business regulating.⁶⁸

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.⁶⁹ Peter Westen argued that equality norms are empty absent a substantive normative framework.⁷⁰ And Ronald Dworkin challenged the distinction between enumerated and unenumerated rights as resting on an incoherent view of meaning.⁷¹

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

⁶⁶ See Ely, *supra* note 64, at 14-15 (concluding that Due Process Clause has been improperly read to "incorporat[e] a general mandate to review the substantive merits of legislative and other governmental action"); Cass R. Sunstein, *The Right to Die*, 106 *Yale L.J.* 1123, 1123, 1146-52, 1162 (1997) (arguing that Due Process Clause does not grant substantive right to physician-assisted suicide).

⁶⁷ See *Carolene Products*, 304 U.S. at 152 n.4.

⁶⁸ See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1, 3 (1995) (defining "right of autonomy" as consisting of "protection of basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life"). For present purposes, I lump together with fundamental values theorists those thinkers who believe the counter-majoritarian difficulty is exaggerated, because they, like the fundamental values theorists, posit that majority rule has no presumptive priority over other values. See, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 *Colum. L. Rev.* 531, 532-35 (1998) (arguing that political accountability has been erroneously tied to majoritarianism and should be understood as separate constitutional value justifying judicial review); Erwin Chemerinsky, *The Supreme Court*, 1988 *Term—Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 74-76 (1989) (arguing that constitutional text and Founders did not intend to make majoritarianism "primary premise" of U.S. democracy).

⁶⁹ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1067-72 (1980).

⁷⁰ See Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537 (1982).

⁷¹ See Dworkin, *supra* note 47, at 76-81 (declaring that distinction rests on confusion between reference and interpretation).

question remains: When faced with social disagreement (because of complexity or moral diversity or both), how should courts go about choosing one rather than another interpretation of the substantive norms a constitution protects?

Dworkin, who unabashedly advocates a “moral reading” of the Constitution, gives the following answer: Judges should interpret the abstract moral language of the Constitution—including terms such as “due process,” “liberty,” and “equal protection”—as enacting abstract moral principles.⁷² 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.⁷³ 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 of 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.”⁷⁴ Yet that is precisely what people disagree about.⁷⁵ The metaphysical claim that there is a right answer to this question does not help 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

⁷² See *id.* at 7.

⁷³ Michael Moore, who unabashedly defends moral realism, nicely puts the parallel by asking the skeptic to “take whatever skeptical question you direct to morals and ask it of scientific fact. If such skepticism does not make you doubt the existence of oak trees and the like, then it should not make you skeptical of moral entities and qualities such as rights, obligations, and goodness.” Michael S. Moore, *Remembrance of Things Past*, 74 *S. Cal. L. Rev.* 239, 246 (2000). Dworkin’s more recent work could be characterized as endorsing moral realism as well. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *Phil. & Pub. Aff.* 87, 89 (1996) (“Any successful—really any intelligible—argument that evaluative propositions are neither true nor false must be internal to the evaluative domain rather than [independent of] it.”).

⁷⁴ Dworkin, *supra* note 47, at 11.

⁷⁵ See Waldron, *Law and Disagreement*, *supra* note 41, at 187 (“Different judges will reach different results even when they all take themselves to be pursuing the right answer, and nothing about the ontology of right answers gives any of them a reason for thinking his own view is any more correct than any other.”).

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-answers thesis aims to dislodge. The right-answers thesis simply does not address the fact of moral diversity.⁷⁶

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 very little purchase on concrete problem solving. Tellingly, as to the hard questions of institutional allocation of power and empirical method, Dworkin has nothing to say;⁷⁷ these he disparages as mere "policy" questions.⁷⁸

E. Originalism

Judges and constitutional scholars who call themselves originalists would address the indeterminacy problem 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.⁷⁹

⁷⁶ See Michael C. Dorf, Truth, Justice, and the American Constitution, 97 Colum. L. Rev. 133, 150-51 (1997) (reviewing Dworkin, *supra* note 47; Dennis Patterson, Law and Truth (1996) (arguing that Dworkin's approach glosses over fact of judges' and others' disagreement on hard cases).

⁷⁷ 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 47, at 34. Strikingly, Dworkin does not argue that constitutional adjudication (as opposed to constitutional decisionmaking by popularly elected legislatures) is best calculated to produce the best answers, only that this could be true. Dworkin suggests that if it were true, there would be a sufficient basis for our adhering to the allocation of authority we have inherited from the Marshall Court. See *id.* at 34-35.

⁷⁸ See Dworkin, *supra* note 21, at 221-24, 243-44, 310-12, 338-40.

⁷⁹ 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 (Amy Gutmann ed., 1997) (declaring that constitutional interpretive methods that rely on current meaning as opposed to original meaning are akin to common-law style interpretation in their distortion of balance between social order and individual rights); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143-60 (1990) (arguing that originalism allows judges to define and apply constitutional principles in neutral manner).

Yet some of the most well-rehearsed objections to originalism can be restated as the problems of moral diversity and complexity.⁸⁰ 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.⁸¹ Meanwhile, complexity manifests itself as the problem of changed circumstances. Many of the problems we face today were unknown to the Framers' 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,"⁸² or to "translate" the original understanding to accommodate the modern world.⁸³ 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 worth discarding.⁸⁴ 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.⁸⁵ And for that reason,

⁸⁰ Some, but not all. Consider two objections not described in the text of this Article. 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) (noting that originalism does not solve, and may amplify, counter-majoritarian difficulty).

⁸¹ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 213-17 (1980) (describing difficulty in determining identity, interpretive intent, and intended specificity of those who adopted Constitution).

⁸² *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J.).

⁸³ See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995) (describing forms of "translation" relying on changed social and economic facts or changed law that allow new decisions to preserve fidelity to prior understandings).

⁸⁴ See Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381, 408-11 (1997) (illustrating that level of generality of original understanding is normative question).

⁸⁵ See, e.g., 1 Bruce A. Ackerman, *We the People: Foundations* 92-104 (1991) (discussing synthesis of and dialogue between Reconstructionist and founding constitutional principles).

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 twentieth century, critical legal scholars challenge the claim that the conventional materials of constitutional jurisprudence—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.⁸⁶ To the "crits," the Court's controversial 5-4 decision resolving the 2000 presidential election⁸⁷ was only the latest and most dramatic confirmation that law, especially constitutional law, is simply politics.⁸⁸

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.⁸⁹ 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.⁹⁰ Other critical scholars question whether constitu-

⁸⁶ See, e.g., Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 193 (1988) (describing legal realist attack on classical legal rules).

⁸⁷ See *Bush v. Gore*, 531 U.S. 98 (2000).

⁸⁸ A subtle form of the critical view appears in Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *Yale L.J.* 1407 (2001). Balkin notes that on the surface, *Bush v. Gore* looks like a validation of legal realism or Critical Legal Studies. However, he then suggests that the opposite might be true: The very fact that the case could be so clearly and widely recognized as "political" rather than legal shows that, contrary to the assumptions of the "crits," there is a line between law and politics—one that the Court overstepped in *Bush v. Gore*. Balkin finds this analysis unpersuasive, however, because it shows only that the Court wrote a sloppy opinion (perhaps because of the press of time); given more time, the Court could have written an opinion that, though still politically motivated, would have been legally plausible. *Id.* at 1441-47.

⁸⁹ See, e.g., Morton J. Horowitz, *The Transformation of American Law, 1780-1860*, at 254 (1977) ("Not only had the law come to establish legal doctrines that maintained the new distribution of economic and political power, but, wherever it could, it actively promoted a legal redistribution of wealth against the weakest groups in the society."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1356-66 (1988) (arguing that critical analysis typically focuses insufficient attention on racial subordination).

⁹⁰ Joseph Singer asks how, given the impossibility of any theory making value choices for us, judges should make value choices. He answers:

The desperation with which people ask this question rests on the assumption that legal rules obtain whatever legitimacy they have by being chosen in a way that is *essentially different* from the way in which we make everyday moral decisions. By now it should be clear that I do not think that there *is* a differ-

tional law can be anything other than a means of oppression.⁹¹ In an age of conservative judicial activism, this doubt may lead some critical scholars to embrace radical democracy.⁹² This division in the critical movement itself has deep roots in American constitutional thinking, dating back at least to the mid-nineteenth-century debate among abolitionists over whether to reform 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.⁹³

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

ence. And this revelation should not be experienced as leaving us helpless; rather, it should be experienced as empowering us.

Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1, 62 (1984). Such forthrightness may be admirable but it is not the universal prescription of critical scholars. For example, Mark Tushnet once 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). Perhaps in practice, however, Tushnet's approach would not differ so much from Singer's, as Tushnet was quick to add: "The answer I give today would not necessarily be the one I would give were I a judge, for that fact itself would signal that political circumstances had changed drastically." *Id.* at 425.

⁹¹ 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) ("[T]he Constitution appears to be fundamentally at odds with progressive ideals and visions.").

⁹² See Tushnet, *supra* note 34 (proposing making Constitution nonjusticiable and instituting instead system of populist constitutional law).

⁹³ See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703, 1708-10 (1997) (contrasting views of William Lloyd Garrison and Frederick Douglass).

theorists who emphasize the impracticability of any single approach are eclectics or pluralists.⁹⁴

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. Wholehearted eclectics go on to deny the capacity of any overarching theory of constitutionalism to legitimate the practice of judicial review and provide interpretive guidance.

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.⁹⁵

Nonetheless, because so much of constitutional theory focuses on the proper judicial role, we might think that the justification of that role is both internal and external to constitutional practice.⁹⁶ 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.⁹⁷

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.”⁹⁸ Eclectics can respond that “in the context of judicial decisionmaking, additional dimensions do not invariably

⁹⁴ See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 143-52 (1996) (describing pluralist approach); Laurence H. Tribe, Comment, in *A Matter of Interpretation*, supra note 79, at 65, 73 (expressing doubt “that any defensible set of ultimate ‘rules’ exists”).

⁹⁵ See Philip Bobbitt, *Constitutional Interpretation* 8-10 (1991) (“[N]one of the conventional legal approaches in addition to precedent that support the constitutionality of judicial review can establish its legitimacy, because each depends on assumptions about the appropriate form of argument that can only be validated as a consequence of constitutional review.”).

⁹⁶ See Dorf, supra note 80, at 1789-90.

⁹⁷ The academic version of this charge indicts the Supreme Court rather than the lawyer class generally. See generally Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4 (2001) (asserting that Court increasingly views itself as singular legitimate authority on constitutional interpretation and discounts views of political branches and citizens); Tushnet, supra note 34.

⁹⁸ Michael C. Dorf, *Courts, Reasons, and Rules*, 19 *Quinnipiac L. Rev.* 483, 502-03 (2000).

yield additional degrees of freedom; often they impose additional constraints.”⁹⁹

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.¹⁰⁰

H. Back to the Indeterminacy Problem

Although the foregoing typology is hardly exhaustive, it sufficiently captures the dominant approaches to constitutional interpretation to illustrate 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 legitimize the purportedly counter-majoritarian practice of judicial review without some understanding of what makes majoritarian practices themselves democratic?¹⁰¹

⁹⁹ *Id.* at 503.

¹⁰⁰ See *infra* Part III.E. The careful reader of these footnotes will note a tension between the position espoused here and my prior efforts to identify and justify an eclectic approach to constitutional interpretation. See Dorf, *supra* note 80 (endorsing non-social contractarian version of eclecticism); Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 *Geo. L.J.* 1857 (1997) (same); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 *Cal. L. Rev.* 593 (1999) (arguing that eclectic approach does not need to rank sources of meaning in order of importance). The short explanation for the apparent tension 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 marvelous demonstration of this proposition which this margin is too narrow to contain.”).

¹⁰¹ See Michelman, *supra* note 26, at 11-62 (considering various theories of democracy in order to understand why we value establishment of democratic political arrangements and how we can justify judicial lawmaking).

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. 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.¹⁰² Two primary methods are available for articulating the rules of a democratic polity so defined,¹⁰³ and each, Michelman shows, has defects that mirror those of the other.¹⁰⁴ As these defects are anticipated by the discussion so far, they can be summarized succinctly.

One approach, associated with the work of Dworkin, is, as we have seen, substantive.¹⁰⁵ 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 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 the principles 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

¹⁰² See *id.* at 5-6 (“‘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.”).

¹⁰³ See *id.* at 10 (articulating two variations as “democracy-as-rights,” championed by Dworkin, and “democracy-as-procedure,” championed by Robert Post).

¹⁰⁴ See *id.* at 35 (describing substantive democracy model as “achingly incomplete” and procedural democracy model as nonetheless “hooked on substance”).

¹⁰⁵ 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.”).

democrats. Yet this alternative fares no better. Instead of focusing on the articulation of constitutional values, proceduralists aim to set the terms of full and fair participation by all citizens in democratic decisionmaking. 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 substantive principle. (Recall our discussion of minimalism above.)¹⁰⁶ Justifications, as we know, ascend. This justificatory ascent takes the procedurally inclined polity just where it was disinclined (wisely, given the failure of the substantive approach) to go: into an investigation of first principles.

We might conclude from these circling failures that articulation of democratic ideals simply is 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 failures, 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 that we might 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.¹⁰⁷ The second condition is that any institutions empowered to interpret the higher law—the Supreme Court and the judiciary more generally in the American case—expose themselves to the “full blast” of opinions and interests in society.¹⁰⁸

¹⁰⁶ See *supra* Part II.B.

¹⁰⁷ 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 26, at 56.

¹⁰⁸ 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 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.”).

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 nauseum, 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 judicial powers most in conformity with the two conditions by embracing what Michelman calls *romantic* constitutionalism:¹⁰⁹ the view that individuals can transcend the limits of their personalities if society makes the social contexts that both shape and obstruct the flourishing of identities susceptible to revision.¹¹⁰ Toleration for the clash of principles and for the jostling of competing designs for living is both a sign and an instrument of this heightening of revisability.

Michelman suggests that Justice Brennan embodied this type of romantic constitutionalism 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

¹⁰⁹ Id. at 68-71.

¹¹⁰ Lenin and the Bolsheviks believed that the coercive power of the state could create a “new Soviet man.” Geoffrey Hosking, *Russia and the Russians: A History* 434-35 (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* 174-76 (1998) (discussing value of and ways to encourage community participation); Clarence N. Stone et al., *Building Civic Capacity: The Politics Of Reforming Urban Schools* 7-8 (2001) (highlighting need for “altering relationships” in order to effect lasting policy changes); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward A Grassroots Movement for Economic Justice*, 54 *Stan. L. Rev.* 399, 458-93 (2001) (arguing for politically engaged community economic development); Bill Moyers, *Introduction to Mary Beth Rogers, Cold Anger: A Story of Faith and Power Politics*, at i, i-iv (1990) (describing small-scale political organizing as means to self-empowerment).

official claims of expertise in disputes between citizens and bureaucrats.¹¹¹

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,¹¹² 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, in defense of abortion rights, the Court cites public opposition to *Roe v. Wade* as a reason to resist overruling that decision,¹¹³ while, in defense of states’ rights, the Court insists that Congress’s power “to enforce . . . the provisions of” the Fourteenth Amendment¹¹⁴ grants only the power to enforce the Court’s (idiosyncratic) interpretation of that magisterially ambiguous text.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ In the early decades of the nineteenth century, before res-

¹¹¹ See Michelman, *supra* note 26, at 68, 78-84 (“[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.”).

¹¹² See *United States v. Grace*, 461 U.S. 171 (1983) (invalidating ban on sidewalk demonstrations in front of Supreme Court building).

¹¹³ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o 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.”).

¹¹⁴ See U.S. Const. amend. XIII, § 5.

¹¹⁵ See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Section Five of Fourteenth Amendment does not confer upon Congress power to enact Americans with Disabilities Act in light of Court’s view that disability is not suspect classification); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that Section Five of Fourteenth Amendment does not confer upon Congress power to enact Age Discrimination in Employment Act in light of Court’s view that age is not suspect classification).

¹¹⁶ Although Michelman’s book takes the form of a tribute to the late Justice Brennan, I do not read Michelman as suggesting that the Court—either during Brennan’s tenure or since—satisfied the “full blast” criterion.

¹¹⁷ Kramer, *supra* note 97, at 41 (“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

olution of contested interpretations of the Constitution came to be almost automatically a matter for judicial review, the concerned branches or departments argued out 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 such 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 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.

Neither Kramer nor Michelman has proposed how new institutions might be created, or old ones reimagined, 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.¹¹⁸

The next Part argues that nearly the exact same pattern holds in academic jurisprudence: Dispassionate analysis of the central problem—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.

submitted.”) (quoting “Remonstrance” printed as an appendix to *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 99-108 (1793)).

¹¹⁸ Readers can decide for themselves whether this charge applies to the author’s own work, see, e.g., Dorf & Friedman, *supra* note 33, at 67 (pleading for humility from Justices and other actors), and if so, whether that work (as well as that of Michelman, Kramer, Tushnet, and others) might be defended nonetheless as a wakeup call to the consumers of Supreme Court opinions that is disguised as a recommendation urged on the Court.

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 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 H.L.A. 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*. Surprisingly, Anglo-American jurists have largely overlooked these important parallels between the work of H.L.A. Hart and that of Hart and Sacks, despite their leading roles on either side of the Atlantic. This might be the case because, in other important respects, Hart and Sacks's views share more with those of H.L.A. Hart's chief critics, Dworkin and Lon Fuller (the latter himself a "member" of the Legal Process School) than they do with those of H.L.A. Hart. Nonetheless, I find important connections between soft positivism and the Legal Process school of thought. These connections lay 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*

In *The Concept of Law*,¹¹⁹ H.L.A. Hart framed 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 J.L. Austin's model of law as orders of the sovereign backed by threats.¹²⁰ In its place he offered a view of law as consisting of primary rules of obligation, directed at citizens as well as at other primary actors, and of secondary rules, followed by government officials.¹²¹ Grounding the whole apparatus, Hart argued, is its ultimate rule, its "rule of recognition," which "pro-

¹¹⁹ H.L.A. Hart, *The Concept of Law* (2d ed. 1994).

¹²⁰ *Id.* at 18-71 (arguing that coercion model fails to account for existence of power-conferring rules, application of law to sovereign, various sources of law, and role of law in deliberative lives of individuals).

¹²¹ See *id.* at 91-94.

vides criteria for the assessment of the validity of other rules” but is not itself capable of validation by reference to any other rule.¹²²

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—Hart’s treatment of legal rules’ ambiguity, what he called their “open texture.”¹²³ Hart offered a middle position between strict formalism and thoroughgoing legal realism. With the legal realists, Hart recognized that complexity renders unattainable the formalist dream of realizing one-hundred percent precision for any rule stated in ordinary human language.¹²⁴ But 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.”¹²⁵ Hart contended that most rules formulated in ordinary language—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.¹²⁶

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.”¹²⁷ Ambiguity, in other words, means the absence of law. Yet Hart denied the lesson that more radical legal realists and their intellectual heirs drew from this insight, namely, that law is simply disguised power. How could he deny this? 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 U.S. 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 centre to supply standards of correct judicial decision.”¹²⁸

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

¹²² *Id.* at 107.

¹²³ *Id.* at 128.

¹²⁴ See *id.* at 128-35. “If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. . . . Plainly this world is not our world. . . .” *Id.* at 128.

¹²⁵ *Id.* at 135.

¹²⁶ See *id.* at 143-44.

¹²⁷ *Id.* at 145.

¹²⁸ *Id.*

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.¹²⁹ Hart took this proposition to be either self-evident or so much a matter of common sense that it required only illustration by a few examples rather than demonstration in any systematic way.

In fact, one can find support for Hart's view. For one thing, Hart's views of law are really just a special application of ordinary language philosophy.¹³⁰ We know from our everyday experience with an ordinary language such as English that most words have a core of settled meaning and a periphery of ambiguity, and that ambiguities can often be resolved by understanding context. Constitutions, legislation, administrative rules, and judicial decisions written in ordinary language, one might think, would have the same character.

Hart's view of law as such is also empirically defensible. As critics of legal realism have often noted, a focus on adjudicated cases, especially those in appellate courts, yields a distorted picture of the law.¹³¹ Recall that Hart offered an account of *law*, not just adjudication. The law operates even—perhaps especially—when no adjudica-

¹²⁹ See *id.* at 123 (“All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt. . . .”).

¹³⁰ See Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 *SMU L. Rev.* 75, 95 (1999) (“Hart adopted the Wittgensteinian idea that all rules are silent with regard to some possible set of applications. The core applications were the equivalent of the ‘standard instances,’ which Wittgenstein thought proved that the language user knew how to use the rule.”). For a useful introduction to how philosophers think about various forms and sources of indeterminacy, as well as their relevance to legal questions, see generally Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 *Cal. L. Rev.* 509 (1994).

¹³¹ As Frederick Schauer argues, “the Realist wants to claim that most positivist legal sources do not resolve appellate cases,” but, even if this is so, given the selection bias of looking only at cases that reach the appellate level, the picture of law that emerges “scarcely diverges from what a sophisticated positivist might also believe.” Frederick Schauer, *Judging in a Corner of the Law*, 61 *S. Cal. L. Rev.* 1717, 1730 (1988). For an argument that published appellate decisions are actually a particularly poor place to look for evidence of judicial discretion because of the checking function of panels and publicity, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J. Legal Stud.* 257, 263-64 (1995). Ironically, legal realists themselves bemoaned legal education's focus on appellate cases to the near exclusion of other (historical and social science) materials and attempted, with some success, to reform it. See Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 *Case W. Res. L. Rev.* 457, 461-62 (1999) (describing Legal Realists' curricular reforms of 1920s and 1930s).

tion occurs. Most criminal cases result in guilty pleas,¹³² most civil cases result in settlement,¹³³ 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.¹³⁴

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

Whereas 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 to thoroughgoing instrumentalism on the other.¹³⁵ 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

¹³² See Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Case Processing Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/cases.htm> (last revised Feb. 28, 2002) ("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 Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Justice Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/fed.htm> (last revised Jan. 24, 2003) ("Cases were terminated against 77,145 defendants during 2001. Most (89%) defendants were convicted. Of the 68,533 defendants convicted, 65,168 (or 95%) pleaded guilty or no-contest.").

¹³³ See Bureau of Justice Statistics, U.S. Dep't of Justice, Civil Justice Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/civil.htm> (last revised Oct. 1, 2001) ("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%). . . . 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.").

¹³⁴ 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 compliance with 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.

¹³⁵ See Dworkin, *supra* note 21, at 225 (describing "law as integrity" as "third conception of law," which "denies that statements of law are either the 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; I have argued, however, that Dworkin is better read as consistent over time. See Dorf, *supra* note 76, at 141-43, 168 (reading *Freedom's Law* in light of *Law's Empire*).

well as principles of political justice.¹³⁶ I will 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 denies two claims that he attributes to positivists. First, 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 both of rules that have an on/off character and principles that have the additional dimension of "weight or importance."¹³⁷ Second, Dworkin denies the positivists' *sources thesis*—the idea that the law can be identified by its source or pedigree without reference to its content. Courts routinely apply principles such as "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong,"¹³⁸ even though they emanate from no official source. What makes a particular statement of law true in a given context, according to Dworkin, is that it puts the law as a whole in its best light,¹³⁹ and the best light, recall, is defined by reference to principles of political justice,¹⁴⁰ not just pedigree, which yield determinate, "right" answers.¹⁴¹

Dworkin therefore denies Hart's claim that when the positive law is indeterminate, judges exercise discretion or lawmaking authority. To begin with, Dworkin observes, even in the very hardest cases (however numerous they may be), judges do not believe themselves to be exercising discretion. Rather, in such cases they speak as though they are following the law, even if doing so does not mean following *rules*. Dworkin thinks that judges correctly understand the nature of their enterprise. 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.¹⁴²

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

¹³⁶ See Dworkin, *supra* note 21, at 225-75 (laying out argument for law as integrity).

¹³⁷ See Dworkin, *supra* note 19, at 24-28.

¹³⁸ *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

¹³⁹ See Dworkin, *supra* note 21, at 167-75, 186-224.

¹⁴⁰ See *supra* text accompanying note 72.

¹⁴¹ See *supra* note 73 and accompanying text.

¹⁴² See Dworkin, *supra* note 21, at 265-66, 353-54.

no need for interpretation.¹⁴³ 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.¹⁴⁴

The claim that easy and hard cases are not different in kind underlies Dworkin's further argument that even in hard cases judges apply the law, rather than their own discretion (in H.L.A. Hart's sense). But in order for this to count as more than a quibble over words, Dworkin must claim not only that law operates in both easy and hard cases, but also 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 thesis¹⁴⁵ is crucial to Dworkin's disagreement with Hart.

Nonetheless, it is worth noting that both Hart and Dworkin build their accounts of law on responses to the indeterminacy problem. They share the view that ambiguity is the enemy of law. Whereas Hart minimizes the place of ambiguity in law, Dworkin—by recourse to the right-answers thesis—denies it entirely.¹⁴⁶

C. *Soft Positivism*

H.L.A. Hart did not, during his lifetime, offer a systematic response to his critics. After his death, however, a new edition of *The Concept of Law* was published, including a postscript containing Hart's long-awaited reply to Dworkin.¹⁴⁷ In the *Postscript*, Hart denied that Dworkin's claims undermined his account. To deflect Dworkin's critique, Hart adopted a position sometimes called "soft positivism."¹⁴⁸

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

¹⁴³ See Patterson, *supra* note 76, at 87. Patterson goes on to argue that "[i]f all understanding were interpretation, then each interpretation would itself stand in need of interpretation, and so on, infinitely regressing to infinity." *Id.* at 88.

¹⁴⁴ There are, however, exceptions, such as legal sanctions for bringing objectively frivolous cases. See, e.g., Fed. R. Civ. P. 11(b).

¹⁴⁵ See *supra* notes 71-78 and accompanying text.

¹⁴⁶ Dworkin does not deny that the law frequently uses terms that *appear* ambiguous and about which there exists profound disagreement. But Dworkin believes that controversy sparked by moral language in the law can be definitively and correctly resolved; this is so because Dworkin believes that moral claims are objectively true or false. See *supra* note 73.

¹⁴⁷ Hart, *supra* note 119.

¹⁴⁸ *Id.* at 250.

internal to the legal system he describes. If it turns out that in a particular legal system the rule of recognition incorporates some moral norms as legal norms, then the external observer can describe the social fact of incorporation. Internal participants in this particular legal system, by contrast, would be obliged to look to the content of a norm to ascertain whether it is a legal norm. In fact, Hart reminds us in the *Postscript*, he had already embraced this position in the original edition of *The Concept of Law*, where he acknowledged that in the United States the ultimate criteria of legality incorporate moral principles.¹⁴⁹ Thus, the Hartian can give an external descriptive account of a legal system that is experienced internally as Dworkinian.¹⁵⁰ As Hart pithily sums up his point, “[d]escription may still be description, even when what is described is an evaluation.”¹⁵¹

A substantial literature addresses the question of whether positivism can be reconciled with Dworkin’s interpretivism in this way without sacrificing positivism’s essential elements.¹⁵² 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.¹⁵³

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

¹⁴⁹ See *id.* at 247 (*Postscript*); *id.* at 72 (main text).

¹⁵⁰ *Id.* at 243 (noting that “a morally neutral descriptive jurisprudence [may] record but not . . . endorse or share” the incorporation of moral principles into a particular legal system).

¹⁵¹ *Id.* at 244.

¹⁵² For example, in the two issues of *Legal Theory* devoted to the *Postscript*, most of the essays address some form of this question. See generally Special Issue: *Postscript* to H.L.A. Hart’s *The Concept of Law*, Part I, 4 *Legal Theory* 249 (1998); Special Issue: *Postscript* to H.L.A. Hart’s *The Concept of Law*, Part II, 4 *Legal Theory* 381 (1998). Compare Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 107-19 (2001) (defending “soft” or “inclusive positivism”), with Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 199-204 (1994) (insisting only “hard positivism” which does not incorporate moral principles satisfies conditions of legitimate authority).

¹⁵³ See Dworkin, *supra* note 19, 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. For Dworkin’s latest rejoinder, see Ronald Dworkin, *Thirty Years On*, 115 *Harv. L. Rev.* 1655, 1656 (2002) (reviewing Coleman, *supra* note 152) (arguing that soft or inclusive positivism “is not positivism at all, but only an attempt to keep the name ‘positivism’ for a conception of law and legal practice that is entirely alien to positivism”).

those commitments differently from Dworkin. In Raz's view, allowing that the law can sometimes be identified by its content, rather than by its sources alone, undermines the law's claim to the only legitimate source of authority it can have.¹⁵⁴ Other "hard positivists" like Scott Shapiro have found soft positivism self-contradictory on different grounds,¹⁵⁵ while the leading contemporary soft positivist, Jules Coleman, defended a version of soft positivism (which Coleman calls "inclusive legal positivism") before Hart himself did.¹⁵⁶

Whether Hart's account of law can accommodate the possibility of legal rules identifiable by their content rather than by their source is an important question in jurisprudence, but for our 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 reaffirmed his commitment to the views that: (a) the law includes areas of open texture;¹⁵⁷ (b) judges called upon to decide questions falling within the areas of open texture exercise discretion;¹⁵⁸ and (c) these areas are sufficiently small so as not to call into question the positivist picture of law or to render law fundamentally indeterminate.¹⁵⁹ Because (a) is offered as a point of agreement with Dworkin, I only consider claims (b) and (c) here.

With respect to the question of whether judges exercise discretion in hard cases, Hart concedes that judges speak and write as if they are "always concerned to discover and enforce existing law," but asks rhetorically, "how seriously is this to be taken?"¹⁶⁰ Hart's response to Dworkin, in other words, is to endorse one of the main tenets of 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 jurists that Chapter Seven of *The Concept of Law* exposed legal realism as "a jurisprudential joke, a

¹⁵⁴ See Raz, *supra* note 152, at 211-14.

¹⁵⁵ See Scott J. Shapiro, *On Hart's Way Out*, 4 *Legal Theory* 469, 476 (1998) (arguing that by accepting that "the rule of recognition could . . . specify moral worth as a condition on legal validity," Hart "offend[ed] his [own] view that the primary function of the law is to guide conduct").

¹⁵⁶ See Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. Legal Stud.* 139, 148-56 (1982), reprinted in Jules L. Coleman, *Markets, Morals and the Law* 3-27 (1988).

¹⁵⁷ Hart, *supra* note 119, at 251.

¹⁵⁸ *Id.* at 252 ("[Where] the law fails to determine an answer either way. . . the courts must exercise the restricted law-making function which I call 'discretion.'"); *id.* at 272 ("The sharpest direct conflict between the legal theory of this book and Dworkin's theory arises from my contention that . . . the law is . . . partly indeterminate or incomplete.").

¹⁵⁹ See *id.* at 251-52.

¹⁶⁰ *Id.* at 274.

tissue of philosophical confusions.”¹⁶¹ 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.¹⁶² But as noted above, he does not attempt to substantiate 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 the complete indeterminacy of legal norms. However, given complexity and moral diversity, it does entail that the sorts of cases that come to be adjudicated will be just the ones where lawmakers have been unable to produce rules that lead to determinate answers—either because the case was unanticipated or because representatives of citizens with diverse conceptions of the good could not agree on language sufficiently precise to resolve it.

To put the point in more practical terms: In an easy case, one side or the other is likely to concede relatively early in the contest. Therefore, courts—and appellate courts especially—feed on a diet of hard cases. If Hart’s account is right, then in most cases in which a court is asked to reach a legal decision (and in nearly every case in which an appellate court is asked to reach a decision) the court resolves the matter by exercising its discretion. But if this is 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, which 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 (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:

[N]ot only are the judge’s powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but

¹⁶¹ Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics* 278, 278 (2001) (arguing that Hart failed to understand or dispose of legal realism).

¹⁶² See Hart, *supra* note 119, at 274 (endorsing view that judge’s law-making task is “interstitial”).

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.¹⁶³

This response should sound familiar from our discussion of judicial restraint¹⁶⁴ and eclecticism¹⁶⁵ 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. Therefore, we need not worry about the legitimacy of their decisions.

The exegesis to this point has aimed at recharacterizing the Hart/Dworkin debate as turning on a disagreement about metaphysics and nomenclature, but not on practical details. At the metaphysical level, Dworkin contends that there are right answers in hard cases, but he offers no mechanism by which a judge may persuade those who reasonably dissent from the judge's view. Thus, a Dworkinian judge decides cases *as though* he were exercising discretion, regardless of whether, for metaphysical purposes, one insists that the decision is not 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.¹⁶⁶

Critics of Dworkin have argued that integrity as he applies it is virtually no constraint at all—that Dworkin's own principles of political justice almost always swamp criteria of fit.¹⁶⁷ In response, one

¹⁶³ Id. at 273.

¹⁶⁴ See *supra* Part II.B.

¹⁶⁵ See *supra* Part II.G.

¹⁶⁶ This is a point I already have made about Hart. See *supra* text accompanying notes 123-28. 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 47, at 10 (emphasis omitted).

¹⁶⁷ For example, Michael McConnell has suggested that, by contrast with “[t]he Dworkin of Fit[,] . . . [t]he Dworkin of Right Answers . . . insists that text, history, and unwelcome precedent must be interpreted at a sufficiently abstract level that they do not interfere with the judge's ability to . . . produce the best answers, defined philosophically.” Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L. Rev.* 1269, 1270 (1997).

could argue, “Do as Dworkin says, not as he does.”¹⁶⁸ But Dworkin does not even *say* how it is that the requirement of fit constrains what looks to a non-Dworkinian like judicial discretion.¹⁶⁹ 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 choices of judges.

D. The Legal Process

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 decisionmaking authority among competing institutions. In those cases that fall within the courts’ own circumscribed domain of ultimate decisionmaking, the Legal Process view treats the distinctive comparative advantage of the judiciary as its ability—using the defining tools of legal craft—to render decisions according to principle rather than discretion or subjective policy judgment.¹⁷⁰

That Dworkin’s work falls within the Hart and Sacks tradition has been widely noted.¹⁷¹ As William Eskridge and Gary Peller have

¹⁶⁸ James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L. Rev.* 1335, 1349 (1997).

¹⁶⁹ Fleming argues that “Dworkin’s theory of fidelity as integrity is the best conception of fidelity,” *id.*, but concedes 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.

¹⁷⁰ See Hart & Sacks, *supra* note 6, at 143-44 (contrasting exercise of discretion by judiciary with that by executive officials). Herbert Wechsler, who collaborated with Henry Hart on what is 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) (arguing that Constitution should be interpreted “so far as possible . . . by standards that transcend the case at hand”). 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. See Hart & Sacks, *supra* note 6, at 144 (conceding that judicial decisionmaking involves value judgments).

¹⁷¹ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in Hart & Sacks, *supra* note 6, at li, cxvii (noting that Dworkin has “followed” Hart and Sacks’s “distinction between principle and policy”);

observed, "Dworkin's theory relies on the legal process distinction between 'policies' and 'principles' and on the importance of coherence arguments in law."¹⁷² Perhaps because of this association,¹⁷³ 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 Fuller¹⁷⁴ 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 formed a veritable "mutual admiration society."¹⁷⁵ 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."¹⁷⁶ 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"¹⁷⁷ that closely resembled the soft positivism of H.L.A. Hart's *Postscript*.¹⁷⁸

William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 731 (1991) (observing "close link between Dworkin's theory and the legal process synthesis"); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 Ariz. L. Rev. 413, 413 (1987) (arguing that "Dworkin's approach to a number of problems in legal theory can be linked to what legal scholars sometimes call the Legal Process school").

¹⁷² Eskridge & Peller, *supra* note 171, at 731.

¹⁷³ 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).

¹⁷⁴ See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) (defending positivism from criticisms of its insistence on distinguishing positive law from law as it ought to be); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958) (criticizing Hart for ignoring internal "morality of order" necessary to creation of law itself).

¹⁷⁵ Eskridge & Frickey, *supra* note 171, at lxxxiii.

¹⁷⁶ 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.

¹⁷⁷ Eskridge & Frickey, *supra* note 171, 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 and Institutional Design* 124, 126-28 (1999) (noting shared commitment of Fuller and H.L.A. Hart to possibility of evaluating law by independent standards of morality).

¹⁷⁸ 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 & Sacks, *supra* note 6, at 107-10. But they do so in a peculiar fashion. Hart and Sacks say that the distinction between law,

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.¹⁷⁹ We can see in *The Legal Process* an effort to operationalize what H.L.A. Hart would (very shortly) afterwards call the “rule of recognition.”¹⁸⁰ In the opening pages of *The Legal Process*, (Henry) Hart and Sacks write of the procedures used by every modern society to allocate decisionmaking 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*.”¹⁸¹ 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.”¹⁸²

It is not much of an overstatement to say that the principle of institutional settlement performs 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 allocating authority among various institutional actors. The rule of law is, in each account, the submission to duly constituted authority.¹⁸³

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, 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.

¹⁷⁹ Eskridge and Frickey recount that in the 1956-1957 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. Eskridge & Frickey, *supra* note 171, at c. Both Harts presented papers on discretion, to be discussed together. *Id.* at c-ci. Although H.L.A. Hart’s paper has been lost, Eskridge and Frickey speculate, based on a memorandum that was preserved, that it probably contended (as a concession) “that much discretion could not be controlled by law.” *Id.* at ci.

¹⁸⁰ Hart, *supra* note 119, at 94.

¹⁸¹ Hart & Sacks, *supra* note 6, at 4.

¹⁸² *Id.*

¹⁸³ It is nonetheless a bit of an overstatement to equate Hart’s rule of recognition with the principle of institutional settlement in Hart and Sacks. For the rule of recognition is a social fact that may be good or bad—recall that Hart wants to give a sociological, i.e., descriptive, account of law—whereas Hart and Sacks defend the principle of institutional settlement in normative terms. Accordingly, I do not claim that Hart and Sacks were positivists. See Brian Leiter, *Positivism, Formalism, Realism*, 99 *Colum. L. Rev.* 1138, 1155-58 (1999) (reviewing Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (1998)) (challenging Sebok’s claim that Hart and Sacks held positivist commitments).

Whereas H.L.A. Hart insists on the *existence* of a rule of recognition, in *The Legal Process* Hart and Sacks offer guidance on how in any given setting, one moves from the general principle of institutional settlement to deciding which institutional actor has authority to make a decision in some particular case, and whether that actor's decision falls 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 punch line of the case study with which *The Legal Process* opens—the case of the spoiled cantaloupes—is a judicial decision to defer to agency decisionmaking, even though the court plainly would have chosen a different outcome if reviewing the case *de novo*.¹⁸⁴ But deference is not the end of the story, for courts must decide to which institution to defer 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 decisionmaking 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.¹⁸⁵ Yet strikingly, *The Legal Process* materials nowhere state the meta-principle of institutional allocation of decisionmaking authority. As Eskridge and Frickey note, “[l]egal process thinkers had no theory of law’s ‘profes-

¹⁸⁴ See Hart & Sacks, *supra* note 6, 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 & Sacks, *supra* note 6, at 53-56, before reversing itself in response to a submission by the Federal Department of Agriculture in connection with a petition for rehearing.

¹⁸⁵ See, e.g., Eskridge & Frickey, *supra* note 171, 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 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.* 953, 962 (1994) (“As defined by Hart and Wechsler, the central, organizing question of Federal Courts doctrine involves allocations of authority . . .”).

sional culture' that suggested how it constrains judges."¹⁸⁶ 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 aspiring lawyers/policy-makers/judges begin to acquire the subtle, tacit knowledge that enables them to play their chosen roles.

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 does not 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 competing interest groups who sought or fought the legislation in question.¹⁸⁷ From the 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.¹⁸⁸ 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.¹⁸⁹

¹⁸⁶ Eskridge & Frickey, *supra* note 171, at cxx.

¹⁸⁷ 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. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 877 (1975) (describing "the economists' version of the interest-group theory of government").

¹⁸⁸ For a summary of the criticism, focusing on student papers by, among others, Duncan Kennedy and Roberto Unger, see Eskridge & Frickey, *supra* note 171, 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 64-65.

¹⁸⁹ See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 260 (1976) (describing *The Legal Process* as "perfectly attuned to the end-of-ideology politics of the Cold War"); Eskridge & Frickey, *supra* note 171, at cxviii-cxxv

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, Hart and Sacks 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.

To be sure, right-wing 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.¹⁹⁰ 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.¹⁹¹

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.¹⁹² In private law, this translated into an approach that is some-

(describing end of consensus in 1960s and rise of scarcity theory of economics in 1970s as fostering public choice theory of politics, "the most serious challenge to the legal process approach"). 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 cxxv-cxxvi.

¹⁹⁰ Although I have characterized the criticism of Hart and Sacks for placing too much faith in bureaucratic expertise as coming from the "right," liberals also fear the growth of unchecked administrative power. See, e.g., Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 *Iowa L. Rev.* 941, 1012 (1999) ("Public bureaucracy and expertise . . . have not dealt with many of the problems the New Deal reformers hoped to curtail—especially, the growing powerlessness of individual's [sic] in a society dominated by large impersonal conglomerates of power.").

¹⁹¹ See Hart & Sacks, *supra* note 6, at 161 (restating "[t]he thesis that private ordering is the primary process of social adjustment, in the dynamics of a legal system").

¹⁹² 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."); see also *id.* at 119 ("Directions have to be understood in the light of the circumstances in which they are given, and one of the most significant of all the circumstances is the position of the person who is supposed to carry out the direction.").

thing like that of the Uniform Commercial Code (U.C.C.), which gives primacy to merchant practice.¹⁹³ In public law, it meant purposivism in statutory interpretation.¹⁹⁴

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.¹⁹⁵ The best developed and most careful such account is given by Lisa Bernstein, who grounds her tentative proposals in empirical studies of merchant practices regarding various commodities.¹⁹⁶ 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.¹⁹⁷

¹⁹³ See U.C.C. §§ 1-205, 2-202, 2-316, 2-504, 2-723 (2000) (prescribing deference to “courses of dealing” and “usages of trade” in various contexts).

¹⁹⁴ See Hart & Sacks, *supra* note 6, at 1121 (asking rhetorically whether “the enactment of 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”).

¹⁹⁵ See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. Chi. L. Rev. 781, 785 (1999) (suggesting “that the type of flexibility that the Code potentially 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, 770 (1999) (arguing that because “relationship-creating and relationship-preserving norms are likely to differ in content and structure from the optimal endgame norms for a tribunal to apply in the event of a dispute, . . . merchants do not want either their relationship-specific courses of performance and courses of dealing or their every-day customary practices . . . written into the law” (footnotes omitted)); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. Legal Stud. 377, 406-08 (1997) (arguing that although “the average efficiency of the practices identified by commercial norms will increase over time,” there is “no basis for inferring that commercial practices will be even nearly optimal on average”); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1698 (1996) (criticizing “the view that the norms of closely knit groups are efficient” and arguing for laws that differ from custom on ground “that under a variety of plausible conditions, the state—in particular, its legislatures and courts—produces rules that are more efficient than group norms and, furthermore, that help correct the deficiencies of group norms”).

¹⁹⁶ See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1769-70 (1996) (grain and feed); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115, 115 (1992) (diamonds); Bernstein, *supra* note 195, at 715 (hay, grain and feed, textiles, and silk).

¹⁹⁷ See Hart & Sacks, *supra* note 6, at 139 (“Innumerable legal rules do manage th[e] miracle of successful operation in many if not most of their applications.”). I say “perhaps in contrast to Llewellyn” because although Llewellyn was a well-known rule-skeptic, see,

In public law, the right urges formalism as a means of, among other things, 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.¹⁹⁸ 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 legislative process.¹⁹⁹ 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.

e.g., 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, 401 (1950) (making famous argument that "there are two opposing canons [of statutory construction] on almost every point"), the U.C.C. does include a goodly number of rules, notwithstanding its preference for industry practice.

¹⁹⁸ See Scalia, *supra* note 79, at 34 ("[T]he more courts have relied upon legislative history, the less worthy of reliance it has become. . . . One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate'—or, even better, insert into a committee report."); John F. Manning, Textualism as a Nondelegation Doctrine, 97 *Colum. L. Rev.* 673, 687-88 (1997) (noting that textualist judges like Justice Scalia believe that "once legislators become aware that legislative history influences courts, they and their agents (the staff) will try to achieve desired outcomes through the lower-cost mechanism of legislative history" (footnote omitted)).

¹⁹⁹ 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.* 1253, 1271 (2000) (noting that 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, Metadecocracy: 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 formalist interpretive methods).

If the right has not proved the superiority of a thoroughgoing formalism over the Hart and Sacks approach,²⁰⁰ neither has the left advanced its own program. And that is largely because, as we saw in our discussion of critical approaches to constitutional interpretation,²⁰¹ 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*²⁰² is instructive. Throughout the book, Kennedy treats Hart and Sacks as laying the groundwork for Dworkin's coherentism, which Kennedy relentlessly criticizes.²⁰³ Ultimately, 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 ideological agenda; or one can struggle to bring the law's deep ambiguity into the open.²⁰⁴ 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 across disciplinary boundaries to

²⁰⁰ 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.

²⁰¹ See *supra* Part II.F.

²⁰² Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (1997).

²⁰³ See *id.* at 33-35, 75, 118, 120-24, 196.

²⁰⁴ See *id.* at 374-76.

solve problems.²⁰⁵ But Hart and Sacks only just barely hinted at this new role, as the next Section explains.

E. The Limits of the Legal Process Paradigm

In one important respect, the new conception of the legal professional (which I have described elsewhere)²⁰⁶ is continuous with the conception one might extrapolate from the Hart and Sacks materials, for it takes as a starting point the implicit subtext of *The Legal Process*: An appropriate resolution of a legal problem requires a thorough 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. Above I suggested two lines of argument that might support Hart's view: first, that law partakes of the same relative clarity as ordinary language; and second, that much of law's clarity operates hidden away in cases that never arise.²⁰⁷ Hart and Sacks offer an account of law that perhaps validates H.L.A. Hart's assumption in a third way. 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 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.²⁰⁸

²⁰⁵ See Dorf & Sabel, *Drug Treatment Courts*, supra note 29, at 859-65 (contrasting old and new conceptions of "profession" with respect to drug treatment courts).

²⁰⁶ See *id.*

²⁰⁷ See supra notes 132-34 and accompanying text.

²⁰⁸ See Michael C. Dorf, *Is There a Distinction Between Law and Politics? Yes, and the Bush v. Gore Decision Proves It* (Dec. 27, 2000), at <http://writ.news.findlaw.com/dorf/20001227.html> ("If law were just politics, it would be meaningless to criticize a judicial

The predominant view in the profession, in other words, asserts that skilled lawyers know 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, they may well be dumbstruck; and yet they are equally likely to be able to invoke an 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.²⁰⁹ 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 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.²¹⁰

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

decision as political, and all the Court's decisions would seem equally 'political' to observers."). The critics have a response here as well: What fixes the range of legitimate outcomes is convention, not logic. See Singer, *supra* note 90, at 22 ("Convention, rather than logic, tells us that judges will not interpret the Constitution to require socialism."). What this answer shows, however, is not clear, because no one—and certainly not Hart and Sacks—asserted that law's determinacy depends on logic alone. Given the conventional nature of language itself, how could it?

²⁰⁹ Hart & Sacks, *supra* note 6, at 143.

²¹⁰ 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 lawyer's craft.

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 1958 materials make no mention of *Brown v. Board of Education*, decided just four years earlier. And on the question of apportionment, which was soon to become the second 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.²¹¹

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.²¹² 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 right of association.²¹³

²¹¹ See Hart & Sacks, *supra* note 6, at 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.

²¹² See Gary Peller, *Neutral Principles* in the 1950's, 21 U. Mich. J.L. Reform 561, 566-86 (1988) (noting that Legal Process School thinkers "chang[ed] the focus for critical evaluation from the substance to the process").

²¹³ See Wechsler, *supra* note 170, at 31-35 ("Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands [the latter]? I should like to think there is, but I confess that I have not yet written the opinion.").

There is some truth to this line of analysis and criticism. The Hart and Sacks materials were rooted in the assumptions of their age.²¹⁴ But at the same time, the criticism rests on something of a mischaracterization of *The Legal Process*. Hart and 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.²¹⁵

What Hart and Sacks did not contemplate was the possibility of new sorts of public institutions whose job it would be, not to resolve legal ambiguity, but to foster continual deliberation and experimentation.²¹⁶ The next Part of this Article sketches these new institutions, with an emphasis on how their judicial version might ameliorate the indeterminacy problem. Before offering my account of experimentalist judging, however, I should note that the limitations of the Hart and Sacks model that 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 judges bent on imposing limits on other government actors? By focusing attention on the details of allocational

²¹⁴ 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 Eskridge & Frickey, *supra* note 171, 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) (arguing that spectrum of politics is considerably narrower in United States than in Europe because, while true conservatism and socialism are viable forces in latter, in United States all serious political opinion begins with liberal premises of free markets and democracy).

²¹⁵ Accordingly, in the final section on the case of the spoiled cantaloupes, Hart and Sacks pursue “The Problem from an Olympian Point of View.” See Hart & Sacks, *supra* note 6, at 67-68. It turns out that the gods on Olympus, as envisaged by Hart and Sacks, compare the institutional arrangement in the United States with what then existed in western Europe and the Soviet Union. *Id.*

²¹⁶ See Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 254 (1992) (characterizing “focus on ‘institutional competence’ as the basis for the distribution of legal tasks among various legal actors” as one of most distinctive features of Hart and Sacks).

decisions, Hart and Sacks permit us to see the “fixity” assumption, and its limits, more clearly than the other thinkers we have examined.²¹⁷

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,²¹⁸ 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 concepts, 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.”²¹⁹

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.²²⁰ Coherentism requires a judgment about what interpretation 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

²¹⁷ Cf. Duxbury, *supra* note 173, at 667 (“Hart and Sacks may have been complacent in assuming the adequacy of the existing American institutional framework, and they were certainly wrong to assume a general social consensus concerning the goal of maximization. But it was not their claim that all is well with the legal world.”).

²¹⁸ See *supra* text accompanying notes 174-83.

²¹⁹ See Hart & Sacks, *supra* note 6, at 4.

²²⁰ 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 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.

coherently. At least temporary fixity appears necessary for coherence.²²¹

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.²²² Judge Gray disagrees. How can one show that Judge Earl is correct—that the principle that no one should profit from one's 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 Dworkin²²³ (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.

Ultimately, 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.²²⁴ 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 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.

²²¹ Unless, perhaps, one thinks that law's dynamism itself arises out of efforts by judges to smooth over local variations as agents of the law working itself pure. See Dworkin, *supra* note 21, at 400-03 (arguing that judge's obligation to interpret legal practice as whole can give rise to changes in prevailing view of extant law). Still, even if such processes account for some of the law's dynamism, it is difficult to believe that the project of fostering integrity—rather than the constantly changing circumstances of human interactions and conflicts—accounts for most of the law's dynamism.

²²² See *Riggs v. Palmer*, 22 N.E. 188, 190-91 (N.Y. 1889); see also Hart & Sacks, *supra* note 6, at 68-102 (exploring similar fact pattern).

²²³ See, e.g., Dworkin, *supra* note 21, 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.").

²²⁴ There is also the problem of what is sometimes called "bad coherence," the notion that coherence may be achieved around a principle that is morally unattractive. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. Cal. L. Rev. 1699, 1705-11 (1990) (proposing that feminism and pragmatism can correct tendency of institutions to cohere around oppressive principles). For an argument that coherence theories that accept precedent will inevitably tend toward bad, or at least morally arbitrary, coherence, see Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369, 400-02 (1984) (describing "ripple effects" to highlight how "dominant theory of precedent is morally arbitrary").

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”;²²⁵ and
4. coherentism is made possible through the tacit skills that lawyers and judges²²⁶ 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 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

²²⁵ For the Dworkinian version, substitute “put the law in its best light” for “best reflect the set of institutional arrangements taken as a whole.”

²²⁶ As a form of traditional legal education, the Hart and Sacks method prepares students for becoming judges rather than attorneys, even though most students are not expected ever to serve as judges.

the name of problem-solving courts.²²⁷ 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.²²⁸ Drug courts in particular and problem-solving courts in general arose to address concrete failures on the ground, rather than as a response to the institutional limitations of courts as such; nevertheless, their emerging architecture can address some of those limitations, even as it raises further questions about the kind of institutions problem-solving courts are.

After asking whether problem-solving courts are really courts, this Part sets forth an emerging model of experimentalist *appellate* judging.²²⁹ 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 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 break 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

²²⁷ A collection of practitioner and other perspectives on problem-solving courts was recently published in a symposium issue of the *Fordham Urban Law Journal*. Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 *Fordham Urb. L.J.* 1751 (2002).

²²⁸ See Dorf & Sabel, *Drug Treatment Courts*, *supra* note 29.

²²⁹ The account builds on some of my earlier work. See Dorf, *supra* note 32, at 51-79 (proposing “reforms that would enable the Court to do a better job of adjusting its interpretations of authoritative text to new, unforeseen, and changing circumstances”); Dorf & Friedman, *supra* note 33, at 107 (arguing that Court should revise constitutional standards in light of experience of political actors); Dorf & Sabel, *supra* note 27, at 388-404 (discussing role of courts in experimentalist model); *id.* at 452-69 (describing “pragmatist” understanding of rights in existing doctrine and in experimentalist model).

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 taken by both (H.L.A.) 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

Suppose you are a trial judge whose docket mostly consists of misdemeanor and nonviolent 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—re-arrest.

In the late 1980s and 1990s, the frustrating circumstances just described led increasing numbers of judges, prosecutors, and policy-makers to explore the long-discarded notion that at least some criminals can be rehabilitated.²³⁰ 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 imprison-

²³⁰ See Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 12-31 (1981) (discussing history of rehabilitation); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *Fordham Urb. L.J.* 2063, 2079, 2082 (2002) (maintaining that “[b]y 1970 . . . the rehabilitative ideal was in theoretical and empirical shambles” but describing reemergence of rehabilitative ideal beginning in late 1980s); Michael Vitiello, *Reconsidering Rehabilitation*, 65 *Tul. L. Rev.* 1011, 1012 (1991) (observing that criticisms of rehabilitation beginning in 1960s struck such responsive chord that by late 1980s “almost everyone involved in the criminal justice system ha[d] rejected the rehabilitative ideal”).

ment,²³¹ drug courts emerged as an alternative to cycling nonviolent 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 late 2002, there were 946 operating drug courts, with another 441 in the planning stage.²³²

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 the defendant to a treatment program chosen by the court's clinical staff based on an assessment of the defendant's needs and in consultation with the defendant. 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 content with evidence that your approach to nonviolent crime fares better than the revolving-door system in the courtroom down the hall.²³³ “Better than a broken system” is a low bar indeed.

²³¹ See generally C. Peter Rydell & Susan S. Everingham, RAND, *Controlling Cocaine: Supply Versus Demand Programs* (1994) (finding drug treatment substantially more cost-effective than domestic enforcement, source-country control, or interdiction); Drug Treatment Alternative-to-Prison Program, at <http://www.brooklynda.org/DTAP/DTAP.htm> (last visited May 16, 2003) (noting that DTAP program resulted in tax savings of \$25.9 million) (on file with *New York University Law Review*).

²³² See OJP Drug Court Clearinghouse and Technical Assistance Project, U.S. Dep't of Justice, *Summary of Drug Court Activity by State and County 53* (Nov. 26, 2002), <http://www.american.edu/justice/publications/drgchart2k.pdf>.

²³³ Although more, and more rigorous, evaluations must be undertaken, the most comprehensive studies show drug courts to be effective. See Steven Belenko, Nat'l Ctr. on Addiction and Substance Abuse at Columbia Univ., *Research on Drug Courts: A Critical Review: 2001 Update*, at 4 (June 2001) (citing evaluations of drug courts that show reduced drug use and criminal activity during program participation, and favorable but less clear results in post-program long-term outcomes), available at http://www.casacolumbia.org/usr_doc/researchondrug.pdf; see also John S. Goldkamp et al., *Crime and Justice Research Institute, An Honest Chance: Perspectives on Drug Courts* (Apr. 2002).

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 a prior article on drug courts, Sabel and I observed that drug court clinical staff used information about clients to monitor treatment providers, but not systematically.²³⁴ 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. 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.²³⁵

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 by 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

(reporting generally favorable findings from focus groups of drug court participants in six locations), available at <http://www.ncjrs.org/html/bja/honestchance>; Adele Harrell et al., *Breaking the Cycle of Drugs and Crime: Findings from the Birmingham BTC Demonstration*, 1 *Criminology & Pub. Pol'y* 189 (2002) (finding significantly lower rates of arrest, crime, and self-reported drug use among felony defendants participating in pretrial intervention program).

²³⁴ See Dorf & Sabel, *Drug Treatment Courts*, *supra* note 29, at 865-68.

²³⁵ I serve as an informal consultant on this project.

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. Moreover, the very conditions upon which problem-solving courts insist in the actors they evaluate—openness and revisability in light of experience—apply as well to problem-solving courts themselves. Accordingly, neither the actors that 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 being 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 yet who nonetheless has difficulty articulating the exact basis for his or her own decisions. The best such a judge 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 the judge’s 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, avoid, the problem of discretion by undertaking different activities than conventional courts.

But the invocation of problem-solving courts does not appear to carry us very far toward a solution to the indeterminacy problem. This is because indeterminacy is mostly an issue for appellate courts, whereas problem-solving courts are trial courts—and even conventional trial courts do very little in the way of norm generation. Mostly they approve plea bargains or settlements, sometimes they adjudicate factual questions, and when they resolve questions of law, their rulings

typically set no precedent binding on anyone other than the immediate parties to the case (who can seek reversal on appeal, in any event). A better account of how problem-solving courts respond to the indeterminacy problem would have to grapple with the suspicion that such courts bear a troubling similarity to judges supervising structural injunctions.²³⁶ And of course, the structural injunction has been widely regarded as problematic because running schools, prisons, and other complex institutions taxes both the resources and legitimacy of the courts.²³⁷

The best that can be said for conventional 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.²³⁸ 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

²³⁶ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976) (describing and evaluating public law litigation model as compared with traditional conception of adjudication); Owen M. Fiss, *The Supreme Court, 1975 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979) (discussing structural reform model of constitutional adjudication that uses injunction as method of implementing public values); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 *Geo. L.J.* 1355 (1991) (discussing practical and theoretical aspects of remedies in public law litigation) [hereinafter Sturm, *A Normative Theory*]; Susan P. Sturm, *The Promise of Participation*, 78 *Iowa L. Rev.* 981 (1993) (addressing third-party participation in structural injunctions).

²³⁷ See Donald L. Horowitz, *Brookings Institution, The Courts and Social Policy* 17-19 (1977) (questioning whether courts have resources and capacity to engage in social policymaking); Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998) (discussing and responding to critiques of court-ordered prison reform); Fiss, *supra* note 236, at 5-6, 17 (arguing that changes in forms of adjudication have been seized upon by opponents of structural reform to question legitimacy of courts' role in conducting institutional reorganization); Sturm, *A Normative Theory*, *supra* note 236, at 1378-1409 (identifying and responding to critiques of legitimacy of court-ordered public law remedies).

²³⁸ The textual reference to "conventional" structural reform litigation is meant to distinguish the approach of courts, circa 1970, that attempted to run failed institutions from a more recent wave of judicial supervision of failed institutions that relies on the tools of experimentalism. In the latter approach, following a finding of liability, a court, together with the parties and other affected actors, creates an institutional process for the continual articulation of performance standards that requires the creation of a public record to be judged against the performance of other, similarly situated actors. For an account of this new form of structural reform litigation, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* (forthcoming Feb. 2004) (describing recent successful efforts to reform prisons, schools, and mental health services in response to litigation). In important respects, this new wave of structural reform litigation parallels the emergence of problem-solving courts. Where the former uses the tools of experimentalism to reform existing social and governmental institutions, the latter uses those same tools to reform the court system itself—albeit in a way that implicates large-scale social problems.

most enthusiastic defenders of structural reform litigation recognize that courts are at best “sub-optimal decision makers” in these contexts.²³⁹ The same appears to be true of problem-solving courts: In a well-functioning criminal justice system, the probation office would closely monitor defendants’ compliance with court edicts, including requirements for drug treatment; likewise, if one were to begin from scratch, one might locate responsibility for drug treatment in an effective social services agency rather than within the criminal justice system.

A defense of problem-solving courts must therefore begin by differentiating them from courts enforcing traditional structural injunctions. The most important distinction is that problem-solving courts act on individuals rather than attempting to redesign whole institutions at a time. The brief against conventional structural reform litigation begins with the fact that institutions like prisons, schools, and police forces have their own mechanisms of accountability that courts displace without legitimacy or expertise. That brief simply does not apply to contemporary problem-solving courts. Focusing on individuals’ drug treatment, drug courts do not issue orders to state or local bodies charged with addressing drug addiction. Moreover, 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 providers it monitors—the spokes—learn to improve their respective performances.²⁴⁰

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

²³⁹ See Malcolm Feeley & Edward Rubin, *Judicial Policy Making and Sub-Optimal Decisions: Revising the New Legal Process Analysis of Courts* (Mar. 18, 2002) (unpublished manuscript, on file with *New York University Law Review*) (arguing that much of courts’ work in structural reform litigation would be better accomplished by administrative agencies, but that, given legislative or administrative failure to act, courts act legitimately in this context).

²⁴⁰ 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) (providing account of judging with experimentalist features in context of prison reform). For my purposes here, I am less interested in the precise relation between experimentalist judging and earlier structural reform litigation than I am in characterizing the former.

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 what might be called “coordinated decentralization” rather than hierarchy?

Answering these questions will illustrate how even though problem-solving courts emerged for reasons independent of the theoretical worries addressed in Parts II and III of this Article, they provide a partial response to the indeterminacy problem. The complexity of the modern world renders legal indeterminacy problematic because, *inter alia*, it suggests that courts lack competence to implement large scale social reform, especially where authoritative text does not command the solutions they decree. Why, given the intractability of our common problems, should courts prefer their own interpretations to those of other actors? If we can give an account of problem-solving courts that legitimates their activities, we will have simultaneously explained how, despite complexity, courts can act legitimately even where the law’s authoritative pronouncements appear to leave open spaces. Thus, I turn next to these linked questions.

B. Are Problem-Solving Courts Really Courts?

The question *Why courts?* poses no mere theoretical worry, as a recent appellate ruling in Oklahoma illustrates. In *Alexander v. State*,²⁴¹ 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.”²⁴² Although the appeals court denied relief because the defendant had waived the objection by not requesting the judge’s recusal 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

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

²⁴² *Id.* at 112.

who is not a member of his treatment team.²⁴³ 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.²⁴⁴ 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? 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 nonviolent 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 the 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, there will remain categories of disputes that call for conventional judicial decisionmaking: A claims B breached a contract; C claims D committed an intentional or negligent tort; the State charges defendant with murder. Conventional courts would still be needed to resolve contested questions of law and fact in the relatively small percentage of such cases that are not resolved by settlement or plea. But even in the subject matter areas just mentioned, as one moves from relatively simple, one-time bilateral disputes, to questions involving multiple parties over time, it is not difficult to imagine that some of the most important work of the courts will be remedial or problem solving. Structuring long-term relationships between contracting parties, pro-

²⁴³ See *id.* at 115.

²⁴⁴ See *id.* at 115-16 (Lumpkin, J., concurring specially).

viding compensation to victims of mass torts, and addressing the aggregate costs of crime are not the sorts of problems that courts have traditionally addressed, or at least they are not the sorts of problems that courts have traditionally addressed well. This is the domain of experimentalist courts or agencies.

Is there any justification for choosing experimentalist courts rather than experimentalist agencies? The short answer, as with other broken institutions, is necessity. As a matter of first principle, there will often be no good reason to prefer problem-solving courts to problem-solving agencies; in fact, the latter may be the more appropriate tool. However, politics and legislative inertia will often prevent the creation of an appropriate agency—which leaves courts to fill the gap.

The somewhat longer answer is that for some purposes, courts have institutional advantages that administrative bodies lack. First, courts have what champions of problem-solving courts describe as the *convening power*: the ability to bring together the various actors needed to craft effective solutions to multi-dimensional problems.²⁴⁵ This is a polite way of saying that judicial decrees are backed by the threat of force; this may ultimately be true of administrative action as well, but not nearly so directly. The convening power is thus parasitic on courts' coercive power.²⁴⁶

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 at least the perception of it, 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.

²⁴⁵ See *The Judicial Perspective*, 29 *Fordham Urb. L.J.* 2011, 2012, 2013-14 (2002) (remarks of Judge Jo Ann Ferdinand) (describing how defense counsel, police officers, district attorneys, and drug treatment providers are “freed from their traditional constraints” in Brooklyn Treatment Court, allowing them to “really work together”).

²⁴⁶ See, e.g., Derek A. Denckla, *Forgiveness as a Problem-Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law*, 27 *Fordham Urb. L.J.* 1613, 1614 (2000) (“[T]he research into drug courts suggests that courts have something unique to bring to the table when it comes to successful treatment and accessing other services: coercion.”).

Third, courts have what might be called a *disentrenching* capacity.²⁴⁷ The ability to declare some course of conduct unlawful, even where a court does not have a solution ready at hand, enables courts to force other actors to address their problems immediately.²⁴⁸ 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 to hammer out some solution that is, from the perspective of the default, a Pareto improvement.²⁴⁹ 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 Section D below.

The three advantages that experimentalist courts possess relative to other institutions—the convening power, perceived neutrality, and the disentrenching power—may be real, but one might worry nonetheless that courts retain these strengths only so long as they act primarily *as courts*—i.e., as traditional resolvers of disputes.²⁵⁰ This is

²⁴⁷ Sabel & Simon, *supra* note 238, at 53-64 (explaining how courts can disrupt familiar patterns of behavior in failing institutions and thus instigate experimentalist process of reform).

²⁴⁸ Agency adjudication could, in principle, play this disentrenching role, but agency adjudication tends to focus more narrowly. Were an administrative agency to attempt to declare, for example, that a state’s system of public education or welfare violated the state constitution, its legitimacy surely would be questioned to an even greater degree than would a parallel declaration by a state court. As Helen Hershkoff observes in the course of defending a role for state courts in enforcing state constitutional positive rights, such courts can fashion remedies with “guidance from external sources of information.” Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1182 (1999). Of course, agencies can seek such external guidance too, but “[i]n just the last fifty years, state courts have revolutionized legal rules affecting family relations, products liability, and tort immunities,” *id.* at 1181, which cannot be said of (federal or state) agencies. Courts thus have the ability to disentrench on a much greater scale than agencies do.

²⁴⁹ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91-95 (1989) (introducing concept of penalty default rules); Karkkainen, *supra* note 29, at 936 n.141 (defining penalty default in regulatory context).

²⁵⁰ One might also worry that judges are not particularly well trained for the task of solving social problems. Most law school courses teach students how to think analytically about doctrine rather than as practical problem-solvers or as evaluators of social science research, see Dorf, *supra* note 32, at 33-43, whereas the practical training provided in law school clinics and the like typically prepares graduates for the functions they will perform in traditional courts, even if those functions are defined to include skills such as mediation and negotiation rather than just courtroom advocacy. See Dorf & Sabel, *Drug Treatment*

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. Once the perception of neutrality disappears, that will also signal the 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.²⁵¹

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 that would effectively address claims of improper bias: Where termination from the program is a possibility, provide each client with a right to go before a judge who has not previously worked on his or her case. 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 long after the actual exercise of such power in problem-solving courts and traditional courts had become truly exceptional.

Courts, *supra* note 29, at 861. I would give three responses to this worry. First, judges sitting in problem-solving courts do not act alone; they are assisted by teams of professionals across a variety of disciplines, including social workers, medical staff, police, and other lawyers. Indeed, in my own observations of drug courts I have been struck by the degree to which the clinical director—typically a social worker—appears to be the person running the courtroom. Second, even if judges come to problem-solving courts without any special training, as in other specialized courts, they may develop expertise over time. Cf. Edward R. Morrison, *Bankruptcy Decision-Making: An Empirical Study* 26-28 (Feb. 28, 2003) (working paper, on file with *New York University Law Review*) (finding that bankruptcy judges in Northern District of Illinois made generally wise liquidation decisions despite fact that many were appointed with no prior bankruptcy experience). Third, if problem solving becomes an increasingly important part of what lawyers do, then law schools will have to modify their curricula.

²⁵¹ 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 236, at 1304 (citing Lon L. Fuller, *The Forms and Limits of Adjudication* 94-101 (unpublished manuscript, on file with 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 courts' resolution of disputes through conventional means.

Yet the traditionalist's objection is not so easily dismissed, for it ultimately poses a question about actual, not perceived, legitimacy. In other words, even if the people could be "fooled" into thinking that courts were doing nothing extraordinary in solving social problems, if that role is nonetheless inconsistent with the basic premises of self-government, then there remains a legitimacy deficit. Organizing and coordinating problem-solving actors are the activities in which problem-solving courts engage, but they are also the activities in which other actors participate, in particular, administrative agencies superintending systems of coordinated decentralization of the sort I described above.²⁵² To give a concrete example, there is little 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.²⁵³ 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 the problem-solving work of 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."

I want to respond to this objection by adopting it, subject to an important caveat. First, consider the French experience. In France, the leading adjudicative organs are the Conseil d'Etat and the Conseil

²⁵² See Feeley & Rubin, *supra* note 239, 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").

²⁵³ Indeed, such programs often coexist 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 of the Department of Housing and Urban Development. Telephone Interview with Dana Fox, Associate Research Director, 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* § 3 (June 2000), available at <http://207.29.128.2/addictionrecidivism62000.html> (discussing effectiveness of court- and prosecutor-based programs throughout New York State). See also Press Release, Nat'l Dist. Attorneys Ass'n, Nation's Prosecutors Support the "Prosecution Drug Treatment Alternative to Prison Act" (Feb. 13, 2001) (announcing National District Attorneys Association's approval of principles underlying prosecutor-based drug-treatment programs and virtues of Prosecution Drug Treatment Alternative to Prison Act specifically), available at http://www.ndaa-apri.org/newsroom/pr_prosecution_drug_treatment.html.

Constitutionnel. The former is technically an administrative body while the latter is not a court either.²⁵⁴ Nevertheless, the judgments of both bodies (and especially those of the former) are respected in much the same way that judicial decisions are respected in the United States.²⁵⁵

Second, 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.²⁵⁶ One can think that courts have sometimes gone too far in imposing procedural obligations on agencies²⁵⁷ without

²⁵⁴ See Mitchel de S.-O.-l'E. Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 Harv. L. Rev. 689, 692 n.9 (1998).

²⁵⁵ See Nicolas Marie Kublicki, An Overview of the French Legal System from an American Perspective, 12 B.U. Int'l L.J. 57, 70 (1994) ("[T]he Conseil d'Etat is the most respected and visible court in France."); id. at 82 ("[A]lthough a fundamental systemic difference exists between American and French constitutional review, the end result of such review [by the Conseil Constitutionnel] in France seems quite close to that in the United States.").

²⁵⁶ See Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000); *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (mandating trial-like procedures as precondition for termination of welfare benefits).

²⁵⁷ In the area of administrative law, commentators have located the worst excesses in decisions of the U.S. Court of Appeals for the District of Columbia Circuit requiring trial-like procedures for rulemaking. See Keith Werhan, The Neoclassical Revival in Administrative Law, 44 Admin. L. Rev. 567, 586-87 (1992) (asserting that procedures imposed in "hybrid rulemaking" cases depended upon "judges' sense of what was necessary to ensure a full and fair ventilation of the issues"); see also Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1397 (1992) (arguing that interest groups sought judicial protection from administrative rulemaking via "procedural, structural, and analytical trappings that have the predictable effect of slowing down the agency"); 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, 300-02 (claiming that D.C. Circuit decisions imposing burdens upon rulemaking process contributed significantly to decline in use of rulemaking as policymaking tool); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1488 (1983) (commenting upon leading role of D.C. Circuit in judicial creation of agency rulemaking procedures in 1960s and 1970s). Among the cases most frequently criticized are: *Mobil Oil Corp. v. Fed. Power Comm'n*, 483 F.2d 1238 (D.C. Cir. 1973) (requiring cross-examination procedures to produce "substantial evidence" in informal rulemaking); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (mandating written responses to specific comments in notice-and-comment rulemaking), cert. denied, 417 U.S. 921 (1974); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (remanding EPA proceeding for more detailed record, including opportunity for cross-examination); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972) (finding ordinary APA standards for agency explanation inadequate for judicial review of some clean air regulations). 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, id. at 334-35, is probably best understood as narrowing the circumstances under which full-blown trial-like adversarial process is required.

doubting that agencies can and sometimes constitutionally must operate just like courts.²⁵⁸

But now the caveat: The independence of the American judiciary relative to administrative agencies 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 Sections 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,²⁵⁹ and in so doing they encounter the indeterminacy problem.

Since the Civil War, succeeding generations of legal scholars have repeatedly claimed that courts have no special ability to divine the true meaning of ambiguous legal texts. Consider Holmes's 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 asserted, in whole or in part, that when judges ascribe meaning to ambiguous legal texts, they are engaged in a form of politics.

The intellectual history I have condensed into the previous paragraph reveals a preoccupation with the same 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, theo-

²⁵⁸ Consider the fact that states are not formally bound by the federal doctrine of separation of powers. See *Mayor of Phila. v. Educ. 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 (assuming, of course, that such an arrangement did not violate state constitutional separation-of-powers requirements). However, were a state to rename 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.

²⁵⁹ But not always. Pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 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.

rists 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 preconditions of democracy—these are 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 the goal of having such an institution, notwithstanding the indeterminacy problem. 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 decisionmaker 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;²⁶⁰ 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 decisionmaker appear neutral are unavailable. In other words, the trappings of the judiciary may be most needed precisely where the decisionmaker is acting least like a traditional adjudicator.

²⁶⁰ See 5 U.S.C. § 554(d) (2000) (prescribing such procedures in agency adjudication).

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 constituted by 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,²⁶¹ 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,²⁶² Henry Hart's

²⁶¹ Cf. Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986) (observing that legal interpretation occasions violence).

²⁶² See Wechsler, *supra* note 170. Characteristic of this critique are Gary Peller, *The Metaphysics of American Law*, 73 *Cal. L. Rev.* 1151, 1182-87 (1985) (arguing that legal discourse itself is not neutral and critiquing Hart and Sacks' Legal Process theory), and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781 (1983) (arguing that liberalism is inconsistent with theories of neutral principles and interpretivism).

long-time collaborator. They were correct, of course, that legal principles are not neutral in the sense of being 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 even-handedly.²⁶³ If a judge invokes the principle, say, that statutes should be construed to avoid constitutional questions when that principle helps reach a result the judge favors on policy grounds, the judge cannot dismiss that principle in another case merely because it leads to results disfavored on policy grounds. “Neutral application of principles” is a fairer rendition of what Wechsler had in mind.

To be sure, the critique takes aim even at neutral application of principles. Authoritative text contains ambiguities and, crucially, the law contains a great many, often conflicting, principles,²⁶⁴ 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.”²⁶⁵

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

²⁶³ See Wechsler, *supra* note 170, at 19 (acknowledging role of “value choice” in adjudication, while insisting on giving of “reasons that in their generality and their neutrality transcend any immediate result that is involved”).

²⁶⁴ 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*, *supra* note 197 (arguing that, because various divergent canons of construction are accepted, court may reach range of “correct” results).

²⁶⁵ See Law Professors’ Statement on *Bush v. Gore*, <http://www.the-rule-of-law.com/archive/supreme/statement.html> (last visited Apr. 18, 2003). For a skeptical view of this form of criticism of the Court, see Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 *U. Colo. L. Rev.* 923, 946-50 (2001) (suggesting that claims of partisanship may be ineffective and equally applicable to Court’s critics).

the power of administrative agencies is rationalized as flowing from the political accountability of the executive officials who supervise administration,²⁶⁶ 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 shifting 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.²⁶⁷ Thus, the preliminary evidence suggests that courts can become problem-solving institutions without necessarily sacrificing the qualities that make them valuable as courts.

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 ease the legitimacy questions raised by the indeterminacy problem. By deciding less,

²⁶⁶ This justification appears most clearly in the work of those espousing the theory of the unitary executive. See, e.g., Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 132-70 (1991) (articulating vision of accountable government involving clear separation of powers and unitary executive); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994) (providing textual and originalist argument that agencies cannot exercise executive power without presidential oversight); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 93-119 (1994) (endorsing 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 & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 *Sup. Ct. Rev.* 201 (arguing that agency interpretations of statutes should receive greater judicial deference when they emanate from higher, politically accountable ranks of agency); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001) (observing increased presidential supervision of administrative agencies during 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) (arguing that "agencies to which rulemaking is assigned," as opposed to 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) (addressing history and developing political character of rulemaking since enactment of APA).

²⁶⁷ See Eric Lane, *Due Process and Problem Solving Courts* 6 (June 2000) (unpublished manuscript, on file with New York University Law Review) (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").

courts will have fewer opportunities to make controversial choices. More importantly, by addressing large-scale social problems through means other than direct decree aimed at institutions that are nominally accountable in other ways, they will escape the critique of the traditional structural injunction. But what about the residual (though in some sense core) role of courts in resolving contested questions of fact and law?

Because it fits the traditional understanding of the role of courts relative to the political branches, judicial resolution of contested questions of fact raises fewer legitimacy questions than judicial resolution of contested questions of law. 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.²⁶⁸

The courts' role in resolving contested legal questions, however, raises the indeterminacy problem, and experimentalist judging of the sort I described in the previous Section provides at best a partial and indirect response to that problem.²⁶⁹ 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 as problem solving in courts of first instance. In this Section, I outline experimentalist appellate judging as the review of decisions by experimentalist institutions such as problem-solving courts. In the remaining two Sections I explain how experimentalist appellate judging might address the indeterminacy problem in a world that is not thoroughly experimentalist.

²⁶⁸ But see Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 *U. Chi. L. Rev.* 1095, 1111 (1987) (reviewing Susan Estrich, *Real Rape* (1987)) ("There is no such thing as a value-neutral fact."). For a critical discussion of the fact/value distinction, see generally Hilary Putnam, *The Many Faces of Realism* 63-71 (1987); Richard Rorty, *Philosophy and the Mirror of Nature* 363-65, 387 (1979); Richard Rorty, *Pragmatism and Philosophy*, in *Consequences of Pragmatism*, at xvi (1982). 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 diversity—is often closely connected to disagreement over factual questions and the clash of interests. See *infra* Part IV.D.

²⁶⁹ See *supra* Part IV.B. As I argue in the next Section, however, locating experimentalist trial judging in a larger experimentalist system does provide an indirect means for attacking the generality problem. See *infra* Part IV.E.

Let us begin with the question of appellate review of decisions made by problem-solving courts. As cases like *Alexander*²⁷⁰ illustrate, appeals courts can examine whether a problem-solving court has complied with due process norms.²⁷¹ However, as was true in *Alexander* itself, appellate review is limited by the fact that the parties who appear before problem-solving courts—and especially before drug courts—typically waive the right of appeal. Standard plea colloquies in which criminal defendants accept responsibility for their conduct include this waiver along with that of other procedural rights.²⁷² A client who is unhappy with the court-mandated treatment can negotiate, through his or her 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 at present provide for appeals of treatment decisions, there is no reason in principle why these decisions should not be reviewable. 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 the course of treatment, the client 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 legal right to drug treatment, but that does not mean that they could not be provided with a 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

²⁷⁰ *Alexander v. State*, 48 P.3d 110 (Okla. Crim. App. 2002).

²⁷¹ See *supra* text accompanying notes 239-42.

²⁷² See, e.g., Fed. R. Crim. P. 11(c)(4) (requiring that court inform defendant, and determine that defendant understands, that in pleading no contest he or she waives right to trial).

processes that have grown up where command-and-control formerly reigned. Onetime antagonists—environmentalists and industry; labor and management; prosecutorial anti-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 nonadversarial 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 nonadversarial processes will simply reproduce external power hierarchies. First, we 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 decisionmaking 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. . . . [T]hese 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.²⁷³

²⁷³ Dorf & Sabel, *supra* note 27, at 409-10.

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.²⁷⁴ 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.²⁷⁵ 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. Whereas a defense attorney acting 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 the defense attorney's role as part of a problem-solving team that also 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. Drug court clients who consistently violate the rules of the court or of their treatment providers are subject to discipline, including, ultimately, expulsion from the program and imprisonment. What happens if clients uphold their end of the bargain, but treatment providers do not? A well-functioning problem-solving

²⁷⁴ See generally Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970).

²⁷⁵ See Archon Fung, *Collaboration and Countervailing Power: Making Participatory Governance Work* (Aug. 2002) (unpublished manuscript, on file with *New York University Law Review*).

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 defendants can “exit” by subjecting themselves 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 or her 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 court itself does not 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 other words, the appellate court would apply to the trial-level problem-solving court the same monitoring techniques that the problem-solving court applies to the service providers it monitors. In this 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.²⁷⁶

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. Whereas a front-line problem-solving institution monitors the provision of services, reviewing courts would monitor the monitoring of the provisions of services. Therefore, and for the same reasons, just as front-line problem-solving

²⁷⁶ 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 I next turn. See *infra* Part IV.D.

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. For example, it would be dangerous to phrase prohibitions on murder, rape, slavery, and other intentional offenses against the person, as well as some minimum regulatory standards, in experimentalist terms. Categorical rules clearly have their place,²⁷⁷ and the indeterminacy problem will appear at the boundary of such rules.²⁷⁸ Accordingly, two questions frame the balance of my discussion of experimentalism: First, is there

²⁷⁷ See Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* 17 (2002) (acknowledging that “reflexive law,” Cohen’s term for something like what I call experimentalism, is not panacea suited to all domains).

²⁷⁸ For example, the Thirteenth Amendment is a categorical prohibition against slavery, U.S. Const. amend. XIII, but the indeterminacy problem arises with respect to the question of how much freedom Congress has to provide remedies for what it defines as violations of that Amendment. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court upheld expansive congressional legislative power under Section Two of that Amendment to abolish the “badges and incidents of slavery.” *Id.* at 439 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)), 440-41. Does that ruling survive the Court’s more recent decisions narrowly construing congressional power under Section Five of the Fourteenth Amendment to provide remedies for purported violations of its Section One? See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating Americans with Disabilities Act to extent it authorizes suits against states because Congress failed to demonstrate “pattern of discrimination by the States” and damages remedy therefore was not “congruent and proportional” to alleged Fourteenth Amendment violations); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating suits against states under Age Discrimination in Employment Act for similar reasons). In my view, there should be a substantially greater role for experimentalism in defining the bounds of congressional power to enforce the Civil War Amendments than the Court’s jurisprudence formally recognizes. See Dorf & Friedman, *supra* note 33, at 85-98 (discussing congressional power in context of *Dickerson v. United States*, 530 U.S. 428 (2000)).

a role for experimentalist appellate review of non-experimentalist front-line institutions? And second, what purchase, if any, does such review have on the indeterminacy problem? I address these questions in this Section and the next one.

In this Section, 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 by—or at least in addition to—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 Section 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 an 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 . . . compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”²⁷⁹ 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.”²⁸⁰ An examination of the Supreme Court’s approach to Title VII’s application to sexual 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.²⁸¹ However, by the time the issue reached the Supreme Court, these doubts had been resolved, and the interpretive move from sex discrimination to sexual harassment was

²⁷⁹ 42 U.S.C. § 2000e-2(a)(1) (2000).

²⁸⁰ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1216 (2001); see also *id.* at 1237-42 (discussing Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000a-2000h (2000))).

²⁸¹ See Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 59-77 (1979) (discussing early cases addressing claim that sexual harassment constituted sex discrimination under Title VII); 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) (same).

seen as an easy one. Two unanimous Supreme Court decisions confirmed that Title VII applies to workplace sexual harassment, whether the harassment consists of an employer's demand that the employee submit to a quid pro quo or creates a hostile work environment.²⁸²

The difficult and divisive questions concern application and scope.²⁸³ Precisely what acts constitute sexual harassment? Can the law distinguish between, on the one hand, sexual harassment, and on 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.

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.²⁸⁴ 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,”²⁸⁵ the Court has repeatedly declined to formulate “a mathematically precise test.”²⁸⁶ Even the Court's definition of “hostile environment” is circularly opaque: “an environment that a reasonable person would find hostile or abusive.”²⁸⁷

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.²⁸⁸ Yet that is not exactly what the Court has done either, because two further decisions establish that vicarious lia-

²⁸² See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (holding that plaintiff need not demonstrate psychological injury to maintain Title VII claim); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that “hostile environment” claims are actionable under Title VII).

²⁸³ 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) (analyzing theoretical link between sexual harassment and sexual discrimination) and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998) (challenging “sexual desire-dominance paradigm” of Title VII).

²⁸⁴ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

²⁸⁵ *Id.* at 81-82.

²⁸⁶ *Harris*, 510 U.S. at 22.

²⁸⁷ *Id.* at 21.

²⁸⁸ See *id.* at 24-25 (Scalia, J., concurring) (expressing this concern but finding no alternative within existing framework).

bility attaches unless the employer has “exercised reasonable care to avoid harassment and to eliminate it when it might occur.”²⁸⁹ 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 harassment, 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”²⁹⁰ 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.²⁹¹

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 a perusal of the footnotes to the EEOC guidelines indicates, the guidelines are drawn almost entirely from litigated cases.²⁹² While litigated cases can be useful in establishing minima—e.g., an employer may face liability if it fails to publicize its harassment policy²⁹³ or to clearly designate a person to whom employees can complain²⁹⁴—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 different workplaces,²⁹⁵ successful systems typically integrate harassment prevention and

²⁸⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998); accord *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (stating that one element of employer’s defense to vicarious liability claim is “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior”).

²⁹⁰ Dorf, *supra* note 32, at 77.

²⁹¹ See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (June 18, 1999), <http://www.eeoc.gov/docs/harassment.html>.

²⁹² *Id.*

²⁹³ See *id.* at § 5.C.1.

²⁹⁴ See *id.* at § 5.C.1.c.

²⁹⁵ 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).

remediation with other operations and rely on detailed data to develop outcome measures that are used to hold individuals and units accountable.²⁹⁶ As Sturm also observes, because harassment policies must be customized to particular workplaces,²⁹⁷ the law shapes but does not determine their content.²⁹⁸

Because each workplace is in some sense unique, EEOC guidelines that draw upon the experience of firms like those Sturm discusses would not be exact prescriptions. Nonetheless, EEOC pooling and promulgation of guidelines outlining effective approaches would be valuable. 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.²⁹⁹ 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, although the EEOC has yet to make full use of the doctrine's potential.³⁰⁰ At the same time, 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 hoard information about their harassment policies as though they were trade secrets.

Finally, in pointing to the limitations of the EEOC's response to date,³⁰¹ 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.³⁰² Sturm is no doubt correct in cautioning that the regime remains incomplete and subject to being undermined by legal and other change,³⁰³ but on the whole, her assessment of the condi-

²⁹⁶ See *id.* at 519-20.

²⁹⁷ See *id.* at 519.

²⁹⁸ See *id.* at 520.

²⁹⁹ See *id.* at 539 (observing that "due process" or compliance approach "does not encourage employers to design systems that will bring problems to the surface").

³⁰⁰ Cf. *id.* at 479 ("[T]he Supreme Court has outlined a framework that is capable of providing for dynamic interactions between general legal norms and workplace-based institutional innovation that promotes effective problem solving.").

³⁰¹ See *id.* at 551 (remarking that EEOC "struggle[s] primarily with how to function most effectively as an enforcement agency").

³⁰² See *id.* at 522-37.

³⁰³ See *id.* at 537-53.

tions that make an experimentalist approach 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.³⁰⁴

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.³⁰⁵

2. *Prophylactic Rules in Constitutional Criminal Procedure*

In *Miranda v. Arizona*,³⁰⁶ 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 suspects are informed of their right to remain silent in the face of questioning and that that right, if asserted, “will be scrupulously honored.”³⁰⁷ The Court also appeared to prescribe a traditional command-and-control rule, stating:

[T]he 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.³⁰⁸

³⁰⁴ *Id.* at 475-76.

³⁰⁵ The regulation of corporate wrongdoing has long included a limited version of the approach described in the text. Under federal sentencing guidelines, an organization that has in place “an effective program to prevent and detect violations of law” may have its criminal sanction reduced if, despite the program, an offense occurs. U.S. Sentencing Comm’n, Guidelines Manual § 8C2.5(f) (2002).

³⁰⁶ 384 U.S. 436 (1966).

³⁰⁷ *Id.* at 479.

³⁰⁸ *Id.*

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.³⁰⁹

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: "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."³¹⁰ 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,"³¹¹ 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,"³¹² 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 or to the exclusionary rule invoked the prophylactic nature of those limits to justify cutting them back³¹³—even when the state 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.³¹⁴ Eventually, the critics

³⁰⁹ See *id.*

³¹⁰ *Id.* at 490.

³¹¹ Dorf & Friedman, *supra* note 33, at 82.

³¹² 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. & Pol'y Rev.* 261, 269-70 (2000); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190 *passim* (1988).

³¹³ See, e.g., *Tucker*, 417 U.S. at 446 (declining to suppress 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-incrimination"); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (declining to exclude unlawfully obtained evidence from grand jury proceeding because *Miranda's* "judicially created remedy [is] designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

³¹⁴ See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 *Nw. U. L. Rev.* 100 (1985) (challenging constitutional 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) (antici-

took aim at *Miranda* itself, arguing that Congress could overrule and had in fact overruled *Miranda* in toto. At that point, the Court balked,³¹⁵ concluding “that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.”³¹⁶ Yet the Court made no serious effort to reconcile its own intervening decisions treating *Miranda* as something less than a constitutional rule.³¹⁷

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.³¹⁸ To borrow an apt phrase from Richard Fallon, constitutional doctrine, as an overlay on the terse constitutional text, is necessary for “implementing the Constitution.”³¹⁹

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* 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 safe-

pating much of Grano’s critique and offering tentative response); Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 883 (1986) (responding less tentatively).

³¹⁵ See *Dickerson v. United States*, 530 U.S. 428 (2000) (invalidating 18 U.S.C. § 3501, which made admissibility of confession turn on its voluntariness).

³¹⁶ *Id.* at 444.

³¹⁷ 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) (suggesting that direct confrontation of post-*Miranda* cases might have splintered 7-2 majority). Whatever the explanation, the Court must now confront the apparent inconsistency between its post-*Miranda* decisions and *Dickerson*. See *United States v. Patane*, 304 F.3d 1013, 1019-23 (10th Cir. 2002) (holding that Supreme Court decisions permitting introduction of evidence that is “fruit” of *Miranda* violation do not survive *Dickerson*), cert. granted, 123 S. Ct. 1788 (2003).

³¹⁸ See Strauss, *supra* note 312; accord Stephen J. Schulhofer, Reconsidering *Miranda*, 54 U. Chi. L. Rev. 435, 448-49 (1987).

³¹⁹ Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54 (1997).

guarding 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 safe harbor with which police have grown quite comfortable. Indeed, there is some evidence that police have learned how to provide the warnings in a manner that actually discourages suspects from exercising their rights to silence and counsel.³²⁰ Accordingly, law enforcement has little incentive to adopt alternative safeguards that might be more difficult to implement.

Second, even if *Miranda*'s safe harbor is suboptimal, law enforcement authorities understandably are 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.³²¹ That, after all, is the very point of experimentation.³²² 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

³²⁰ See Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397, 431-50 (1999) (detailing techniques employed by interrogators to induce *Miranda* waivers).

³²¹ 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, 1157-58 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

³²² 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.*, 535 U.S. 425, 439-40 (2002) (plurality opinion).

harbor—unless perhaps the safe harbor is itself a truly draconian 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. specification of a safe harbor, compliance with which satisfies a legal obligation;
2. recognition that alternative approaches are permissible so long as they are as effective at safeguarding the underlying legal interest (whether a constitutional right or something else) as the safe harbor; and
3. temporary immunity from liability or other legal penalty 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.³²³ 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 become apparent only 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 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

³²³ See Dorf, *supra* note 32, at 60-73.

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 *Dickerson v. United States*³²⁴) 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 materials.

E. From Big Cases to Hard Cases

Experimentalism as I have described it would appear to address the indeterminacy problem in three ways. First, problem-solving trial courts are not susceptible to the standard, competency-based critique of structural reform litigation, for although problem-solving courts do address large-scale social problems, they do not substitute themselves for other institutional decisionmakers, instead acting on individual cases to prompt reform by others. Second, both problem-solving trial courts and appellate courts hearing 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. Third, 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 decisionmaking 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

³²⁴ 530 U.S. 428 (2000).

no bearing 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.³²⁵ 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's 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.³²⁶

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 elsewhere 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.³²⁷ Whatever its virtues for training students how to trace the implications of their moral intuitions, in the end, Socratic dialogue typically cannot 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.³²⁸

³²⁵ See John Rawls, *A Theory of Justice* 42-45 (rev. ed. 1999) (describing "reflective equilibrium" as end state of process whereby one adjusts one's general philosophical account in light of one's particular judgments and/or adjusts one's particular judgments in light of one's general philosophical account).

³²⁶ See Gerald J. Postema, "Protestant" Interpretation and Social Practices, 6 *Law & Phil.* 283 (1987) (describing and criticizing Dworkin's theory of "Protestant" interpretation where individuals articulate principles to put practice in "best light").

³²⁷ See Dorf, *supra* note 32, at 33-43 (noting similarities between Socratic method in law school classrooms and common-law methodology).

³²⁸ See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *Harv. L. Rev.* 802 (1982) (noting that Supreme Court, which decides cases by majority vote, is subject to

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.”³²⁹ 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 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 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

Arrow’s Impossibility Theorem and other defects that arise from aggregating preferences through voting); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *Yale L.J.* 82 (1986) (examining aggregation of judgments of multi-member courts to conclude that results might be consistent but not coherent); 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) (applying public choice theory to analyze judicial decisionmaking).

³²⁹ Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1, 4 (2000).

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,³³⁰ sexual harassment scandals rocked each branch of the national government, nearly defeating a Supreme Court nominee,³³¹ ending a senatorial career,³³² and leading to the impeachment (though not removal) of the President.³³³ 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*,³³⁴ 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.³³⁵ When that point became obvious to nearly everyone, *Brown* morphed into a big case. Then the question became:

³³⁰ See, e.g., *Disclosure* (Warner Bros. 1994); David Mamet, *Oleanna* (1992).

³³¹ See Jane Mayer & Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* 6 (1994) (describing conflicting testimony of Anita Hill and Justice Thomas as having "become part [of] an active battlefield in America's culture wars").

³³² See S. Rep. No. 104-137 (1995) (report of Senate Select Committee on Ethics accompanying, and recommending adoption of, resolution expelling Senator Robert Packwood); Katharine Q. Seelye, *Packwood Says He is Quitting as Ethics Panel Gives Evidence*, N.Y. Times, Sept. 8, 1995, at A1.

³³³ See Office of the Indep. Counsel, Referral to the United States House of Representatives pursuant to Title 28, United States Code § 595(c) (1998) (report by Independent Counsel Kenneth Starr informing Congress that President Clinton committed acts, including committing perjury while defendant in sexual harassment lawsuit, that may constitute grounds for impeachment), available at <http://thomas.loc.gov/icreport/> (last visited March 15, 2003).

³³⁴ 347 U.S. 483 (1954).

³³⁵ See, e.g., 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 170, at 34 (confessing inability to find justification).

Given massive resistance to desegregation in the South during the first decade after *Brown*, and persistent nationwide de facto racial segregation since then, can the courts really alter large-scale social institutions?³³⁶

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 to provide public school officials with some breathing space through the formula of “all deliberate speed.”³³⁷ 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, where, as was true of segregation in the 1950s and 1960s, entrenched opposition means that offending actors are likely to resist a legal norm absent continual coercion, neither full-fledged experimentalism nor a wait-and-see approach like *Brown II*’s “all deliberate speed” is likely to succeed. 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

³³⁶ See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) (providing negative answer to question in title); Stephen L. Carter, *Do Courts Matter?*, 90 Mich. L. Rev. 1216, 1221 (1992) (reviewing Rosenberg, *supra*) (generally agreeing with Rosenberg’s assessment, though observing that he “gives short shrift to [*Brown*’s] vital importance as a confidence-building device for those who were fighting for reform”).

³³⁷ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

how people understand the underlying value. Practical deliberation, in other words, can work around value differences, and in the long run, even change them.

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.³³⁸ 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.”³³⁹ 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 of whether the First Amendment protects the 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 1989³⁴⁰—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 conduct because of hostility to the speaker’s message are subject to exacting judicial scrutiny,³⁴¹ and flag desecration did not fit into any of the Court’s previously announced categorical exceptions to freedom of speech.³⁴² Nonetheless, the closeness of the vote in the Court, and the strong negative

³³⁸ See *supra* Part IV.B (illustrating remedial function of problem-solving courts, in contrast to that of other bodies).

³³⁹ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 858 (1999).

³⁴⁰ See *Texas v. Johnson*, 491 U.S. 397 (1989).

³⁴¹ 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”).

³⁴² 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))).

political reaction to the decision,³⁴³ 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 statute³⁴⁴ did not require the judiciary to root out a deeply entrenched social practice, nor to set up or oversee some large administrative apparatus. These decisions simply excised crimes 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*,³⁴⁵ which invalidated a state 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 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.³⁴⁶ *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*.³⁴⁷

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 antebellum Constitution prohibited slavery were a staple of (one branch of) aboli-

³⁴³ 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 Helen Dewar, Senate Falls Short on Flag Amendment, Wash. Post, Dec. 13, 1995, at A1; Katharine Q. Seelye, House Easily Passes Amendment to Ban Desecration of Flag, N.Y. Times, June 29, 1995, at A1.

³⁴⁴ See *United States v. Eichman*, 496 U.S. 310 (1990).

³⁴⁵ 381 U.S. 479 (1965).

³⁴⁶ See *id.* at 514-15 (Black, J., dissenting).

³⁴⁷ 410 U.S. 113 (1973).

tionist discourse.³⁴⁸ 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 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.³⁴⁹

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.³⁵⁰ 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 any judicial resolution—even a decision not to decide—will be viewed as illegitimate by a great many citizens. If so, however, that is a contingent historical fact about these moral issues at this moment in time. The

³⁴⁸ See Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (1860), in 2 *The Life and Writings of Frederick Douglass* 467, 468 (Philip S. Foner ed., 1950) (“I . . . deny that the Constitution guarantees the right to hold property in man . . .”); see also *supra* note 93 and accompanying text.

³⁴⁹ Cf. Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 *Cal. L. Rev.* 791, 801-07 (2002) (arguing that social and attitudinal change typically must precede wholesale changes in law's treatment of categories of persons).

³⁵⁰ See Dworkin, *supra* note 21, at 105-07 (asking whether ethical judge in Nazi Germany could perform job).

current intractability of some moral questions is certainly not an indictment of experimentalism.³⁵¹

The advantage I claim for experimentalism is twofold. First, in those cases that are primarily big, that is, 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.³⁵² 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 judgments.³⁵³ 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.³⁵⁴

To be sure, there is a version of the dialogic solution that bears a substantial resemblance to experimentalism as I have described it. A court might find that some challenged law or practice violates constitutional or other legal norms and order the legislature to adopt some solution, without specifying the precise contours of that solution. The German Constitutional Court's 1975 and 1993 abortion rulings³⁵⁵ and

³⁵¹ I put to one side the question whether the intractability of some moral questions is a reason to prefer hard positivism—which denies that courts should make moral judgments in discerning the law's content—over other approaches to legal interpretation.

³⁵² See Kramer, *supra* note 97, at 13-16 ("There is . . . a world of difference between having the *last* word and having the *only* word: between judicial supremacy and judicial sovereignty."); cf. Waldron, *Law and Disagreement*, *supra* note 41, at 90-91 (arguing that judicial decisionmaking is no less arbitrary than legislative decisionmaking).

³⁵³ See Dorf & Friedman, *supra* note 33, at 67, 81-83.

³⁵⁴ See Tushnet, *supra* note 34, at 127 (describing Canada's procedures for legislative override of judiciary's constitutional decisions); *id.* at 163-65 (asking what world without judicial review would look like).

³⁵⁵ In *Judgment of Feb. 25, 1975*, BVerfG, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, the court ruled that West German legislation permitting abortion

the Vermont Supreme Court's 1999 ruling on same-sex unions³⁵⁶ follow this pattern. In my view, this approach will often be preferable to a command-and-control judicial decree, but it is still not identical to experimentalist appellate decisionmaking as I have described it.

Perhaps a legislature can, in response to a judicial order, craft a workable once-and-for-all-time solution to a morally divisive question like abortion or same-sex marriage. But to the extent that the problems bedeviling judicial resolution of ambiguity are rooted in complexity, the refractory nature of many of our social problems is likely to pose difficulties for any centralized decisionmaker, 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 task adopts problem-solving methods equal to the challenge. 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.

was insufficiently protective of the rights of fetuses, and ordered that, absent other adequate means of protecting fetal life, the government was duty-bound to punish abortion criminally. See *id.* at 46-48. After unification, in *Judgment of May 28, 1993*, BVerfG, 88 BVerfGE 203, the Constitutional Court reaffirmed its 1975 ruling but found that, for the most part, the government could meet its duty without employing criminal sanctions. For a thorough, English-language explanation of the decisions, see Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 *Am. J. Comp. L.* 273 (1995).

³⁵⁶ See *Baker v. State*, 744 A.2d 864, 886-87 (Vt. 1999) (ordering legislature to provide same-sex couples with opportunity "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples," but leaving legislature "reasonable period of time" to craft solution and choice whether to allow for same-sex marriage or some version of domestic partnership not formally denominated marriage).

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 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, Hart and Sacks 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 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 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 nearly the identical move in explaining how it is that legal indeterminacy does not swamp the legal system? Note, however, that H.L.A. Hart thought that judges in hard cases exercise discretion, in his *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 person's reasoned elaboration is another person'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 is sufficiently small that it does not undermine law's authority. There are, however, crucial distinctions between experimentalism and the other approaches. Whereas 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.