LEGISLATION SCHOLARSHIP AND PEDAGOGY IN THE POST-LEGAL PROCESS ERA†

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Legal academe's approach to the systematic study of "legislation" resembles Congress' attitude toward balancing the federal budget: everyone agrees that it is a good thing, but laments that it is not done. A growing body of opinion bemoans legislation's "second class" status as an academic discipline and advocates substantially enhanced scholarly interest in the subject.[1] We join this collective lament and endorse a more systematic and creative approach to teaching and writing about legislation.

The most obvious justification for greater academic attention to legislation is the twentieth century's "orgy of statute making," which has transformed our polity into one where law is not only primarily statutory, but also is increasingly "statutorified."[2] The elective curriculum at most law schools reflects this development by offering specialized courses in subjects which revolve around one or more statutes—taxation, labor law, bankruptcy, sales law, corporate and securities law, to cite but a few examples. These courses can teach students a great deal about working with statutes, but they do not approach statutes as a systematic topic of inquiry and do not teach general skills of dealing with legislatures and their statutory products. For example, a sales law course typically examines the Uniform Commercial Code

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1. *See, e.g.*, Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803 (1984). *See also* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 336-39 (1985); Grad, *Legislation in the Law School*, 8 SETON HALL LEGIS. J. 1 (1984); Johnstone, *Some Thoughts on Legislation in Legal Education*, 35 MERCER L. REV. 845 (1984); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) [hereinafter Posner, *Statutory Interpretation*].

2. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977); G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

(UCC) in some detail and explores the rich interrelationships among the various provisions. As such, this course not only fails to teach students any general theory for interpreting statutes, but also (standing alone) may even inadvertently mislead students since few legal problems involve statutes as nicely integrated as the UCC. In our view, a better scholarly and pedagogical balance between general theory and particular substantive law is needed. A legislation survey course should contribute to better student understanding both of the overall dynamics and theory involved in statutory lawmaking and of such special statutory subjects as sales law, taxation, and so forth. Optimally, the legislation course should be "theory-driven" by scholarship examining the systemic features of statutory law and lawmaking.

A more subtle justification for intensified attention to legislation as an academic discipline is its importance for the central endeavor of legal education—the teaching of legal reasoning. Reasoning from a statute is not the same as reasoning from a judicial opinion. A court spells out a principled basis for its decision while legislatures often just offer imperative language and little explanation. Law students must be able to master both types of legal reasoning to become competent attorneys. Yet the first-year law school curriculum, in which legal reasoning is a major focus, emphasizes courses requiring close analysis of judicial opinions and typically offers few, if any, courses requiring similar scrutiny of statutes.[3] Furthermore, legal scholarship abounds with analyses of Supreme Court decisions, but neglects similar analysis of important enactments of Congress. The implicit message legal education is sending to law students is that reasoning from statutes is less important, or less interesting, or less intellectual than reasoning from judicial decisions. Legislation scholars have shown, however, that reasoning from statutes involves just as many challenging issues as reasoning from judicial opinions.[4]

A final justification for an academic emphasis on statutory stud-

3. The primary "statutory" course—civil procedure, which is dominated by the Federal Rules of Civil Procedure or an equivalent state code—is usually taught like the common law courses of torts, contracts, and property, with an emphasis on case law rather than the Rules. Indeed, many civil procedure teachers pay little attention to the language and interesting history of the Rules.

4. *See* Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41 (1937); Landis, *Statutes as Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). *Cf.* Moragne v. United States Marine Lines, 398 U.S. 377 (1970) (reasoning from statutory developments to overrule a Supreme Court admiralty precedent); J. MERRYMAN, THE CIVIL LAW TRADITION (1969) (civil law reasoning from statutes).

ies is their importance for general theories of law. Scholarly and pedagogical attention to the nature of law should be as much "legisprudential"[5] as "jurisprudential." An ambitious course in legislation will not only give students a greater appreciation for the different sources of law and their interrelationships, but also will introduce students to different philosophies of law now competing for scholarly acceptance. It is noteworthy that the current, prevailing "legal process" philosophy of law was classically embodied in the teaching materials compiled by Henry Hart and Albert Sacks (Hart & Sacks) in the 1950's, which were and remain an excellent introduction to legislation.[6] Today, alternative philosophies of law—including the law and economics movement, critical studies, and the "new" legal process—challenge the legal process consensus. This challenge has particularly important ramifications in the field of legislation. In short, legislation is where much of the intellectual "action" is in legal scholarship, and ought to be in legal education.

This Article is largely a dilation of this last point. Inspired by new developments in the academic study of legislation, law schools ought to devote more attention to the subject. The old methods of teaching legislation, derived from the legal process philosophy, are outdated in several respects; new methods and pedagogical theories promise to make legislation an increasingly important subject in the law school curriculum. We hope to be a part of this movement through the publication in 1987 of our teaching materials entitled *Statutes and the Creation of Public Policy*.[7] Our primary goal in this Article is to identify the problems with the legal process methods of thinking about and teaching legislation, and to suggest some of the contours of the agenda for legislation scholarship and pedagogy in this "post-legal process era."

The first part of this Article describes the long-dominant Hart & Sacks legal process approach to legislation. Legislation as an aca-

5. Julius Cohen coined this term to describe the theoretical study of the legislative (as opposed to the judicial) aspect of legal philosophy. Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983); Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950).

6. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). Four of the nine chapters—well over half the materials—relate to key areas of legisprudential concern: the political process (chapter four), legislatures and the legislative process (chapter five), the executive branch and the administrative process (chapter six), and statutory interpretation (chapter seven).

7. We have circulated chapters of W. ESKRIDGE & P. FRICKEY, STATUTES AND THE CREATION OF PUBLIC POLICY in draft form for the last year. West Publishing Company will publish our materials in 1987.

demic discipline will long be indebted to Hart & Sacks, but after thirty years their approach is no longer persuasive to a growing body of legal scholars. We examine the post-legal process approaches to legislation scholarship and teaching in the second and third parts of this Article. Scholars have significantly expanded the agenda for legislation by reconceptualizing legal doctrine through models and insights from other academic disciplines and by criticizing the ideological assumptions of the Hart & Sacks approach. Because the post-legal process theories we describe are still in the process of becoming, our description of them will be rather tentative and speculative. Our description does not purport to be comprehensive. We want to explore some of the provocative new ideas and approaches, not to set forth a systematic synthesis or assessment. Indeed, the two of us do not agree on all matters of the new legisprudence. We do agree, though, that the post-legal process approaches promise to make legislation one of the most interesting areas of legal academic inquiry in this generation.

I. LEGAL PROCESS SCHOLARSHIP AND PEDAGOGY OF LEGISLATION

The 1950's was a great and creative period for legislation scholarship and pedagogy. Several new legislation casebooks were published, and the legal process materials were developed by Hart & Sacks at the Harvard Law School.[8] The legal process materials were an ambitious attempt to show how public policy evolves from the interaction of the various branches of government, each branch acting within the realm of its "institutional competence." The philosophy of Hart & Sacks' materials reflected the spirit of the legal community in the 1950's. On the one hand, the legal community had tired of the corrosive skepticism about legal rules and doctrine preached in the 1920's and 1930's by many of the "legal realists." The anti-formalism of these realists was met by a yearning in the 1950's for consensus about the rules of the profession. On the other hand, the profession also wanted to view itself as reformist and progressive and was willing to accept the realist critique of many of the old rules and doctrines. The legal process materials satisfied these antipodal desires by making three working assumptions that have influenced the direction of legis-

8. We focus on the Hart & Sacks materials because they are such a sophisticated embodiment of the approach to legislation in the 1950's and, more importantly, because they have been so widely influential.

lation scholarship and pedagogy for a generation.[9]

The first assumption is that all the branches of government act pursuant to rational purposes which can be discovered from the context of their action. Hart & Sacks believed that "[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."[10] It is perhaps natural to characterize judicial decisions as rationally purposive, for judges' written opinions set forth a reasoned justification, but Hart & Sacks also attributed rational purposes to the legislature. "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible," posited the materials.[11]

This "rationality assumption" was critically important to Hart & Sacks because it reaffirmed the objectivity, indeed the legitimacy, of legal rules. Some of the legal realists had mocked the determinacy and objectivity of formal rules. For example, the realists derided the reliability of established maxims of statutory interpretation and advocated a more honest confession from judges that they were creating law as much as implementing it.[12] Hart & Sacks recognized the appeal of the realists' anti-formalist, policy-oriented approach, but believed that the law also needed to have determinate answers in order for like cases to be treated alike and for people to respect the authority of law. Their resolution of this dilemma is a brilliant hybrid of deductive, formalist rules and inductive, anti-formalist policy. Because "every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective," ambiguities can be intelligently resolved, first, by identifying that purpose and the policy or principle it embodies and, then, by deducing the result most

9. Our discussion of these assumptions is based upon our understanding of the Hart & Sacks materials, for nowhere do the authors set forth all of these assumptions. Hence, our enterprise involves an element of speculation. We have also benefitted from discussions with Gary Peller, who has a work in progress which analyzes the Hart & Sacks approach historically and jurisprudentially.

10. H. HART & A. SACKS, *supra* note 6, at 162. *See* Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983) (basic Hart & Sacks idea that justice results from cooperation of the branches of government to solve a problem).

11. H. HART & A. SACKS, *supra* note 6, at 1156. *See id.* at 1414-15 (when interpreting a statute, a court should assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably"); *id.* at 1200 (similar rule of interpretation).

12. For excellent examples of the realists' skepticism about formal rules of statutory interpretation, see Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

consonant with that principle or policy.[13]

A second legal process assumption is the centrality of procedure. In the legislative process, the qualities extolled by Hart & Sacks are (1) an "informed process," in which key decisions are only made after all relevant information has been collected; (2) a "deliberative process," in which decisions are not made until the legislators have fully discussed the evidence and the policy implications; and (3) an "efficient process" that dispatches all proposed legislation after due consideration and gives deliberative priority to the most important issues.[14] Obviously, similar qualities are critical to the judicial and administrative processes. Although Hart & Sacks' "proceduralist assumption" conceded to the legal realists that lawyers have no special expertise in uncovering the best substantive policy, it declared that lawyers can master the field of procedure. Moreover, an emphasis on procedure enhances the legitimacy of law. One may debate endlessly the correctness of a policy judgment, but Hart & Sacks believed that if the decisionmaker has followed the regularized procedures for formulating that policy, that alone lends the result some degree of credibility.

A corollary which follows from the proceduralist assumption is Hart & Sacks' famed "principle of institutional settlement":

> Implicit in every such system of procedures is the central ideal of law—an idea which can be described as *the principle of institutional settlement* . . . . The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed . . . .
>
> When the principle of institutional settlement is plainly applicable, we say that the law "is" thus and so, and brush aside further discussion of what it "ought" to be. Yet the "is" is not really an "is" but a special kind of "ought"—a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for

13. H. HART & A. SACKS, *supra* note 6, at 166-67. *See id.* at 1148-79; Weisberg, *supra* note 10, at 233-36. Note that Hart & Sacks were somewhat torn between doctrinal and realist approaches to statutory issues. On the one hand, they were scornful of fast and simple doctrinal answers and insisted upon a thorough contextual examination to uncover the right answer in hard cases. *E.g.*, H. HART & A. SACKS, *supra* note 6, at 1149-58. On the other hand, they found that legal rules—including the oft-lampooned "canons of statutory construction"—yielded determinate and correct answers in the easy cases and were useful contextual guideposts in the hard cases. *See id.* at 1221.

14. H. HART & A. SACKS, *supra* note 6, at 715-16. *See* Ackerman, Book Review, DAEDALUS, Winter 1974, at 119, 123-24 (reviewing J. FRANK, LAW AND THE MODERN MIND (1930)).

> making decisions of that kind "ought" to be accepted as binding upon the whole society unless or until it has been duly changed.[15]

Consequently, although Hart & Sacks were rational and reformist—the law ought to be applied in an objectively justifiable manner and ought to be subject to change—their legal process approach in practice may support the status quo. The fairness or justice of existing rules and allocations of power requires no continuing defense under the legal process philosophy; once the "duly established" mechanisms of government have spoken on a legal issue, its resolution is the "right" answer until that resolution is altered through the duly established procedures.

A third assumption, not explicit in the legal process materials, is a political theory assumption underlying the other two. Political theory in the 1950's accepted pluralism as the best description of our polity. Pluralism posits that government exists to resolve clashes among conflicting interests; hence, legislation is, in large part, the political system's accommodation of the demands of the various interest groups. In the 1950's, many influential political theorists believed that the legislature produced generally good public policy because a variety of interests (representing a variety of views) would form around all salient issues and an informed legislature could then make rational choices.[16] We believe that Hart & Sacks at least implicitly accepted this "optimistic pluralism assumption." Hart & Sacks were quite familiar with the leading pluralist texts of their decade,[17] and their materials concede that "most enactments" of the legislature are in response to pressure by organized interests.[18] But the materials all but ignore the effect of interest group pressures on the legislative product and, instead, emphasize the deliberative procedures of legisla-

15. H. HART & A. SACKS, *supra* note 6, at 4-5 (emphasis in original).

16. *See, e.g.*, W. BINKLEY & M. MOOS, A GRAMMAR OF AMERICAN POLITICS (1950); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951). Theodore Lowi has summarized the assumptions of what he calls "interest group liberalism": (1) organized interests are homogeneous and easy to identify; (2) organized interests emerge in every sector of society and adequately represent most of those sectors, so that one group will protect society against malign policies sought by other groups; (3) the role of government is to ensure access to all interest groups and to reach compromises accommodating the interests of all. T. LOWI, THE END OF LIBERALISM 51 (2d ed. 1979).

17. *E.g.*, H. HART & A. SACKS, *supra* note 6, at 727 (citing W. BINKLEY & M. MOOS, *supra* note 16); *id.* at 739 (citing D. TRUMAN, *supra* note 16); *id.* at 747 (citing V. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (4th ed. 1958)). *See also id.* at 736 (statement of pluralist philosophy).

18. *Id.* at 829. *See also id.* at 2 (characterizing some law as responsive to special group demands and some law as responsive to overall needs of the community).

tion. The suggestion that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment" epitomizes the Hart & Sacks philosophy.[19] Probably inspired in part by contemporary political theory, they assumed that notwithstanding the pressure of politics, the legislature is perfectly capable of producing rational, purposive policies, so long as the legislature follows informed, deliberative, and efficient procedures.

Hart & Sacks were not thoroughgoing pluralists, however, for they envisioned a significant lawmaking role for courts. (Most pluralists, we think, emphasize the legislative process.) Indeed, their materials overwhelmingly emphasize the methods of judicial lawmaking—the common law, statutory interpretation, and judicial review—where a "one-person lobby" can prevail through a reasoned appeal to the public interest.[20] The tension between Hart & Sacks' concessions to pluralism and their faith in the judicial process generates a central concern of legal process thought: to legitimate judicial lawmaking. In a sense, the academic technique and philosophy of the legal process materials meet that concern in dozens of specific problems and questions. Hart & Sacks' pluralism is one in which all departments of government cooperate in the creation of public policy, each department acting within its realm of institutional competence. In the reasoned pluralism of Hart & Sacks, courts naturally have a significant role because they apply the law and, hence, have a duty to continue the deliberative process (reasoned elaboration) by which the law remains purposive and fair.

Hart & Sacks' three assumptions and their academic agenda have dominated the study of legislation in the last generation. The central aspiration of the legal process materials—that the law be made as coherent and rational as possible through procedural justifications consistent with political pluralism—has, by and large, driven most legislation scholarship. For example, it is indisputable that the legitimacy of judicial review has captured the imagination of scholars since the 1950's. On the heels of Hart & Sacks, Alexander Bickel in the early 1960's posed the "countermajoritarian difficulty" with the War-

19. *Id.* at 715. The materials pose the question: "To what extent should the legislative process be a rational process, whereby policy and factual information become the basis of carefully reasoned solutions; and to what extent ought the process rather to reflect the relative strengths of the pressures of competing interest groups?" *Id.* at 716. The preferred answer is, we think, apparent from the question.

20. *See id.* ch. 3 (common law), ch. 6 (administrative law), ch. 7 (statutory interpretation) and ch. 9 (remedies for unlawful official action).

ren Court's judicial activism.[21] Whenever a judge declares a statute unconstitutional (as the Court did frequently), an unelected official is overturning a policy adopted by the elected representatives of the people. In a pluralist democracy, such a countermajoritarian action requires substantial justification for it to be legitimate. This question has been the subject of intensive debate for twenty years. The most celebrated resolutions of the countermajoritarian difficulty, by John Hart Ely and Jesse Choper, are strikingly consistent with the old Hart & Sacks assumptions: judicial review is justified to help make the political process work the way Hart & Sacks assumed it would work—with all groups given access to the process and no information suppressed.[22]

The scholarship relating to statutory interpretation has, similarly, followed the leads suggested by Hart & Sacks. Although the Supreme Court itself only sometimes adopts the Hart & Sacks assumption about purposive and rational legislative action, commentators often accept it as established orthodoxy. In fact, virtually all of the important scholarly commentary defends the legitimacy of interstitial judicial lawmaking through creative statutory interpretation.[23] Even more pronounced is the scholarly interest in the use of legislative history (a portion of Hart & Sacks' contextual evidence) to illuminate the policies and purposes underlying ambiguous statutes.[24] A veritable explosion of scholarship has urged state courts to consult legislative history.[25]

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21. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1573-79 (1985).

22. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980). See also M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982), and Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981), for sophisticated analyses of the synthesis of Choper and Ely. See also the works of Judge Robert Bork, cited *infra* note 47, which criticize the legitimacy of judicial activism.

23. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); J. HURST, DEALING WITH STATUTES (1982); S. MERMIN, LAW AND THE LEGAL SYSTEM (2d ed. 1982); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

24. Recent articles, citing much of the earlier work, include Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

25. *See, e.g.*, Allison & Hambleton, *Research in Texas Legislative History*, 47 TEX. B.J. 314 (1984); Rhodes & Seereiter, *The Search for Intent: Aids to Statutory Construction in Florida—An Update*, 13 FLA. ST. U.L. REV. 485 (1985); Comment, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571 (1984); Comment, *Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid*, 15 U.S.F. L. REV. 241 (1981).

It is striking that most of the legislation scholarship of the last generation has approached the subject from a judicial standpoint, just as Hart & Sacks did. The same appears to be true of legislation pedagogy. A review of current legislation casebooks[26] and of Robert Williams' recent article surveying the teaching of the subject[27] suggests that most legislation courses are proceduralist and static in orientation, seek purposive coherence in the law, and generate intellectual discussion around the legitimacy of judicial lawmaking in a pluralist polity. If the casebooks are any guide, courses in legislation typically cover the procedures of legislation, the relationship of statutory law to case law, and the interpretation of statutes by courts.[28] The course is treated as a congeries of different topics, united only by the process through which statutes are made and interpreted. The orientation of Hart & Sacks' materials still seems to dominate the discipline, even in the classroom.

Perhaps most ironic is that the materials on legislation tend to be *case*books—mainly collections of cases which deal in some way with statutes.[29] Williams has noted that "[t]he case method, and even the presentation of statutes in modern cases and materials books, too often depict statutes only in brief excerpts that have become the focal point of an individual case."[30] Judge Richard Posner, who recently joined the ranks of legislation teachers, has complained that legislation casebooks devote too much attention to specialized procedural topics such as reapportionment, which can be taught through interesting Supreme Court cases, and too little attention to political and economic theories about legislation, which must be taught through descriptive analysis.[31]

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26. O. HETZEL, LEGISLATIVE LAW AND PROCESS (1980); H. LINDE, G. BUNN, F. PAFF & W. CHURCH, LEGISLATIVE AND ADMINISTRATIVE PROCESSES (2d ed. 1981); C. NUTTING & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION (5th ed. 1978); H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION (4th ed. 1982).

27. Williams, *supra* note 1.

28. This generalization is not true of H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *supra* note 26. That casebook does not deal with statutory interpretation and focuses mostly upon lawmaking by administrative agencies and by legislatures.

29. This generalization is somewhat less true of the two more recent sets of materials, O. HETZEL, *supra* note 26, and H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *supra* note 26, than of the other materials. Our own materials on legislation, W. ESKRIDGE & P. FRICKEY, *supra* note 7, contain more than a few cases, but we have a higher ratio of text to cases than the other works. It is interesting that H. HART & A. SACKS, *supra* note 6, does not slavishly rely on cases and introduces students to a rich variety of legal materials.

30. Williams, *supra* note 1, at 827.

31. *See* R. POSNER, *supra* note 1, at 337.

Such complaints indicate that thoughtful scholars have grown restive with the classical legal process approach to teaching and writing about legislation. At the most general level, scholars object to the tendency of legislation casebooks to lack any "integrating force either of peda[g]ogical purpose or intellectual structure" and to their "failure to conceive of 'legislation' as the study of legislatures as lawmaking institutions."[32] As an academic discipline, legislation needs to develop, first, an identity and, then, comprehensive theories that explain the practical, constitutional, and institutional role of legislative law. More specifically, some legal scholars have questioned the assumptions of the classical legal process approach, frequently by importing insights from other disciplines (especially public choice theory, political philosophy, and literary theory). This scholarship suggests that there may no longer be an academic consensus in favor of the various legal process assumptions. As the underlying assumptions are questioned or analyzed in different ways, novel and more systematic approaches to legislation are emerging among scholars.

The remainder of this Article is devoted to these exciting new developments, for they affect both the scholarship dealing with legislation and the teaching of the subject. We start with the academic critiques of the legal process approach, which question the very structure of that approach to legislation and suggest different intellectual frameworks for thinking about the subject. Our materials on legislation draw upon these new approaches and offer students and professors at least two competing visions of the discipline.[33] We conclude this Article with some of the more practical innovations in teaching the subject which are suggested by the new academic approaches and the collective experience of legislation professors in the last decade.

II. POST-LEGAL PROCESS LEGISLATION SCHOLARSHIP

The assumptions of institutional rationality, proceduralism, and optimistic pluralism that lie at the heart of the traditional legal pro-

32. Stewart, Book Review, 11 HARV. J. ON LEGIS. 550, 552 (1974). Within the severe limitations of a "study aid" format, Professor Jack Davies, a former state senator, has made substantial effort to address some of the concerns noted by Stewart. *See* J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL (2d ed. 1986).

33. We attempt in W. ESKRIDGE & P. FRICKEY, *supra* note 7, to introduce students in the early chapters to the economic theory of legislation (in which statutes are viewed as essentially deals between legislators and interest groups) and the public values theory of legislation (in which statutes are viewed as constitutive, public-seeking actions by the body politic). Throughout the materials, we suggest how different legal and constitutional issues might be approached by each theory.

cess view of legislation have been subjected to strong critique in the last decade and can no longer be considered uncontroversial (as they arguably were in the 1950's). On the one hand, law and economics scholars have challenged the traditional legal process assumption that legislatures act in a purposive way to create balanced public policy and have questioned the legitimacy of the degree of judicial lawmaking contemplated by legal process theory. Law and economics scholars view legislation as the product of political, often unfair, compromises which, nonetheless, must be enforced by courts. On the other hand, critical scholars have challenged the traditional legal process assumptions that even judge-made law is rational and objective and that procedures should be legitimating devices.[34] Many critical scholars, like many law and economics scholars, find legislation political and, hence, potentially unfair. Unlike most law and economics scholars, however, critical scholars conclude that such law is illegitimate and unworthy.

These and other critiques have disturbed legal process thinkers who strive for rational justice and progressive law reform. The response of what Robert Weisberg calls the "new legal process"[35] school of legal scholars has been to urge an increasingly activist role for courts and agencies to articulate and enforce modern "public values" (some prefer "common values") in our legal system. The new legal process scholars focus on the traditional legal process topics, but move beyond the traditional legal process assumptions of legislative rationality, proceduralism, and optimistic pluralism to advocate an anti-pluralist vision of governmental legitimacy based on a dialectic of social justice.

A. Law and Economics Legisprudence

The Hart & Sacks vision of legislation is grounded in the belief that reasonable people acting according to regular procedures will reach a purposive, reasonable result. For the legal community in the 1950's, this belief was largely untested. Today, an impressive body of

34. Unlike law and economics scholars, critical scholars have not written much that is specifically aimed at legislation as an academic discipline, but we think their primary insights about legal rules and reasoning are applicable to legislation as well. (Perhaps, too, some critical scholars might sensibly observe that the categorization of academic disciplines into pigeonholes only beclouds understanding.) While we do not pretend to be experts in the impressive conceptual body of critical legal literature, we believe that our enterprise in this Article would be seriously unbalanced without a sensitive discussion of some of the principal lines of critical thought.

35. *See generally* Weisberg, *supra* note 10.

"public choice" scholarship undermines this optimistic pluralism assumption. Public choice scholarship applies principles of market economics to explain institutional and political behavior and decisionmaking.[36] The public choice approach assumes that people are "egoistic, rational utility maximizers" in political as well as economic arenas.[37] Under the public choice vision of legislation, many, if not most, important public problems are not resolved by the legislature. Even when the legislature does act on an important issue, the resulting statute "tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent. . . . What may be called public policy is the equilibrium reached in [the political] struggle at any given moment."[38] The legislature is a political battlefield; most of its activity is no more purposive than the expedient accommodation of special interest pressures. "It is hard to imagine a more effective way of saying that Congress has no mind or force of its own" than the prognosis of public choice theory.[39]

Judge Richard Posner has been the scholar most responsible for introducing this rich body of economic literature to the legal profession and developing a legisprudence based on it. Although he has not yet published a complete theory on the subject, we gather from Judge Posner's writings and his legislation course at the University of Chicago that his theory would look something like the following account.[40]

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36. Leading public choice works include J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1966); D. MUELLER, PUBLIC CHOICE (1979); M. OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION AND SOCIAL RIGIDITIES (1982); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). The public choice literature is surveyed and updated in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. __ (forthcoming 1987); J. Mashaw, Positive Theory and Public Law (Feb. 1986) (Rosenthal Lectures, available at Northwestern Univ. Law School).

37. D. MUELLER, *supra* note 36, at 1.

38. E. LATHAM, THE GROUP BASIS OF POLITICS 35-36 (1952). Professor Latham's book was an early exponent of 1950's pluralism, which grew out of political science, rather than political economics, and thus predated most public choice scholarship. Although the quotation in the text represents a foundational insight for both public choice and pluralist theory, we recognize that these approaches have descriptive and normative differences. *See* Farber & Frickey, *supra* note 36.

39. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 37 (1960).

40. The next several paragraphs are our "imaginative reconstruction" of Judge Posner's theory of legisprudence based upon R. POSNER, *supra* note 1; Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87) [hereinafter Posner, *Legal Formalism, Legal Realism*]; Posner, *Statutory Interpretation*, *supra* note 1; Pos-

Although public choice legisprudence starts with the assumption that people will behave in their rational self-interest, Judge Posner is willing to assume that people do not always act as rational self-maximizers—for example, because participants in the political process may gauge their self-interest on incomplete information, and because sometimes political actors will behave ideologically or altruistically. He also assumes that democracy, government by majoritarian choice, is the preferred form of government. The first question is: why not make all of our political choices by a direct vote of the citizenry (direct democracy)? At least three problems inhere with such a government: (1) high transaction costs associated with obtaining agreement of so many people; (2) failure to register voters' "intensity" of preference; and (3) the danger of bad decisions because participants will generally be poorly informed and temporary and arbitrary majorities might assemble. The second and third problems can be alleviated by requiring unanimity or a supermajority to make policy, but that greatly increases the magnitude of the first problem.

Because of these problems with direct democracy, a sizeable democracy will adopt a "representative" form of government. The problems of high transaction costs, poor information, and intensity of preferences can be greatly ameliorated in the legislature by the use of specialized subgroups, especially committees. The danger of temporary majorities enacting short-sighted laws can be reduced by establishing procedural hurdles to legislation— for example, by including requirements that two different legislative chambers and an executive officer approve a proposal before it becomes a law, that determined minorities can obstruct proposals that are very harmful to them (e.g., by filibusters or opposition in committee), and that an independent judiciary may strike down unconstitutional laws and mitigate harsh laws by interpreting them to render them less oppressive.

In this construct, the operation of the legislature resembles a market, in which statutes are deals between buyers and sellers and, hence, are governed by supply and demand market forces.[41] The demand pattern in this market is determined by the degree and nature of

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ner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Posner & Landes, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); R. Posner, Outline of Rational Model of Legislative Process (Spring 1986) (handout in Judge Posner's course on Legislative Process).

41. The following discussion draws heavily on M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); J. WILSON, POLITICAL ORGANIZATIONS (1973), as well as the sources cited *supra* notes 36 & 40.

interest group organization and activity, which itself is determined by the perceived incidence of costs and benefits of potential legislation. For example, widely distributed benefits, such as the protection afforded all of us by criminal laws, do not normally stimulate the creation of interest groups in favor of such legislation because each beneficiary has only a small stake in the benefit and, consequently, will not bestir herself to invest any time, money, or energy to obtain the benefit. Those who do seek such legislation will be subject to the "free rider problem." Because the benefits of "public goods," such as safety from crime, cannot be restricted to the group promoting them, each person has an incentive to "free ride" on the efforts of others. Accordingly, groups will tend not to form around the issue, and legislation usually will not be demanded. For similar reasons, legislation with widely distributed costs (such as an incremental increase in taxes or the rate of inflation) will not systematically stimulate group formation to oppose such legislation. In contrast, the existence of concentrated benefits or costs—subsidies or taxes falling upon a smaller and well-defined group of actors—will tend to stimulate interest group formation because each beneficiary or cost payer has a substantial stake in the outcome and has both incentive and opportunity to coordinate her efforts with those similarly situated.

The supply pattern in the legislation market is determined by the costs and benefits of different types of legislation to legislators. Public choice theory assumes that the primary motivation of the legislator is to be re-elected. Because people tend to remember the ways one has hurt them rather than the good things one does for them, the favors a legislator does for a group count less than the harms to which the legislator contributes. Therefore, the last thing a legislator wants to do is anger important interest groups. In public choice argot, the legislator prefers "nonconflictual" demand patterns in which there is substantial consensus among interested persons and groups. Thus, the legislator will want to do nothing if opposition to legislation is organized (as in concentrated-cost laws), but will be willing to grant subsidies to organized groups paid out of general revenues (concentrated-benefit laws) when the general public is largely unaware of what is happening. Unhappily, the legislator cannot always avoid conflictual demand patterns, either because an issue is politically salient or organized groups are on both sides. In that event, the legislator has every incentive to work out some compromise statute that satisfies

as many interest groups as possible, or even to delegate the sensitive decisions to agencies.

As a result of these supply and demand forces, the legislature will pass a great many statutes which serve little more than the interests of powerful and well-organized interest groups. For the same reasons, fewer "public interest" laws will be passed, namely, those laws correcting market failures (supplying public goods), responding to broadly accepted concepts of distributive justice (e.g., civil rights laws), or articulating some public sentiment (e.g., laws against obscenity).

This descriptive feature of Judge Posner's legisprudence is a coherent conceptualization of legislation.[42] It is also an important countervision to Hart & Sacks' idealized vision of legislation as a product of rational and purposive activity. Legislators do indeed act in purposive ways, but the purposes are most often self-interested rather than public-interested ones, one might argue from public choice theory. The consequences of accepting such a countervision are significant. Once one believes that the legislature does not typically create law for the public good, one becomes much more interested in structural reform in the existing system (e.g., a constitutional amendment to balance the budget) and alternative forms of majoritarian lawmaking (e.g., direct democracy). Legislative procedures take on fresh meaning as opportunities for manipulation and strategic behavior instead of opportunities for deliberation and information collection. The patterns of statute creation become more interesting for the legal scholar. How pervasive is the influence of interest groups, and when do they form? What is their effect on the legislative agenda? These topics are unique to the study of legislation and have been slighted by legal process scholarship. One role for legislation scholarship in the post-legal process era is to explore these subjects under more realistic assumptions than those of traditional legal process theory.[43]

By challenging the Hart & Sacks rationality and optimistic pluralism assumptions, Judge Posner has suggested a greatly expanded

42. Most law and economics scholars would probably accept this description as accurate, though some (probably including Judge Posner) feel as we do that substantial caution should be exercised in informing legal theory by the use of public choice models that are not yet completely tested. *See* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. __ (forthcoming 1987); Farber & Frickey, *supra* note 36.

43. Legal scholars are beginning to explore these issues. *See* Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987).

agenda for legislation scholarship. This is not Judge Posner's only contribution, nor his only disagreement with Hart & Sacks' vision of legislation. Hart & Sacks conceptualized legislation as part of a grand legal process which produces rational, coherent law; judicial elaboration and review of legislation is just another part of the grand process. Once the rationality of statutory law is deflated, though, the rational judicial process becomes more vulnerable to the countermajoritarian difficulty. If the lawmaking enterprise itself is arational and incoherent, judicial activism in the name of rationality and coherence becomes increasingly problematic. Legal process theorists might respond that a realistic view of the legislative process ought to make us more willing to accept judicial activism, so that more coherence and rationality can be made out of the law. Judge Posner criticizes such judicial activism as inconsistent with a more pessimistic pluralism.

At least implicitly in his publications, Judge Posner raises normative or constitutional questions which strike at the heart of the legal process justifications for judicial activism.[44] By reading judicially created rational purposes into statutes, which for the most part are political compromises, are courts not transgressing their constitutional role in our polity? By asserting broad power to declare statutes infringing on certain "fundamental" rights unconstitutional, are courts not simply substituting their political preferences for those of the majoritarian legislature? However "superior" judicial rationality might be, suggests Judge Posner, the role of courts is to give effect to the political compromises found in statutes. In most instances, courts should be "agents" charged with enforcing the bargains reached between the legislature and interest groups. While agents often must interpret their instructions creatively to meet new circumstances, their role—the judge's role—is clearly a subordinate one in our government.[45]

Such a constitutional approach, which is at least implicit in most of Judge Posner's legisprudential writings, is rooted in a pessimistic pluralism quite at odds with the optimism of Hart & Sacks. According to this pessimistic view, a pluralist society will generate an inevita-

44. We are mainly thinking of Posner & Landes, *supra* note 40. We acknowledge that Judge Posner's constitutional assumptions have evolved since the publication of that article in 1975. *See* R. POSNER, *supra* note 1.

45. Posner, *Legal Formalism, Legal Realism*, *supra* note 40, suggests that judges are like military field commanders: their main role is to implement orders from those in overall command, but that subordinate role still entails a good deal of judgment and creative thinking.

ble process of nonrational decisionmaking, due to pressure group activity, strategic behavior by groups and legislators, and agenda manipulation. But this pessimist still prefers the ills of pluralism over a system with more rational social choices, because a pluralist political system fosters stability and moderation and distributes political satisfaction broadly.[46] This "pessimistic pluralism assumption" militates against an active judiciary that would disrupt the deals made by interest groups and legislators by declaring them unconstitutional, for such activism threatens to reduce overall satisfaction with the political game.[47]

For similar reasons, Judge Posner is uncomfortable with Hart & Sacks' approach to statutory interpretation. Because many statutes do not really have a public-interested purpose (or do have a complex array of different and not entirely consistent purposes), Hart & Sacks' approach of "attributing" purposes to statutes is often nothing more than imposing judicial values in the place of legislative ones, thus again disrupting the orderly working of the political system. To assure the stability of the system, Judge Posner urges that courts should "imaginatively reconstruct" the probable intent of the enacting legislature in most, but not all, cases of statutory interpretation.[48] Although similar approaches have been discussed by scholars and judges in the past,[49] Judge Posner has brought fresh theoretical insight to the topic.

Other law and economics theorists disagree with Judge Posner's theory of constitutional law and statutory interpretation. Much of the disagreement can be traced to different political theory assumptions. Some law and economics scholars accept the descriptive features of public choice theory but have normative objections to the policy consequences of unrestrained pluralist government. Thus, Richard Ep-

46. For an interesting recent explanation of this pessimistic pluralism, see Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

47. Thus, most law and economics scholars probably agree, at least in large part, with Judge Bork's restrictive approach to judicial review. *See* Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

48. *See* R. POSNER, *supra* note 1, at 286-93. Judge Posner's approach is a moderate and flexible one, for he favors judicial lawmaking when the enacting legislature has no identifiable intent or when the legislature has implicitly delegated expansive authority to courts to fill in statutory gaps. His recent article, *Legal Formalism, Legal Realism*, *supra* note 40, insightfully explores the considerable lawmaking discretion courts have under his theory.

49. Among the sources for this method cited in R. POSNER, *supra* note 1, at 287 n.64, are Judge Learned Hand, Lon Fuller, Ronald Dworkin, and William Blackstone.

stein vigorously argues for expansive judicial review of economic legislation to correct the tendency of government to expropriate private goods and pass rent-seeking laws.[50] Epstein grounds his argument on normative and constitutional objections to special interest laws. His overall political vision is a laissez-faire polity in which most clashes of interest are resolved in the private sector. Somewhat similarly, Judge Frank Easterbrook argues that statutes must be interpreted very narrowly: unless an issue is "expressly" resolved on the face of the statute, the statute is simply irrelevant to resolution of the issue.[51]

Still other law and economics scholars reject the normative consequences of public choice behavior but nonetheless favor an activist government, in which political action does contribute to an overall public good. For example, Jonathan Macey argues that Hart & Sacks' purpose-of-the-statute approach to statutory interpretation is supported, rather than undermined, by public choice theory—if one views the Constitution as creating an activist government which makes rational political decisions.[52] For similar reasons, one of us argues that public choice theory supports a "dynamic" approach to statutory interpretation, based upon current facts and policies as well as original legislative expectations, when circumstances have materially changed since the statute's enactment.[53]

While the normative consequences of Judge Posner's economic legisprudence have stimulated intense scholarly debate, his legisprudence has already accomplished three remarkable and positive things. First, it has laid the descriptive groundwork for an alternative vision of the legislative process and has generated a constructive debate over the validity of certain assumptions made by traditional legal process theory. Additionally, it has raised political theory questions that may redefine the agenda of legisprudence. For example, the pessimistic pluralism apparently accepted by Judge Posner would suggest that legal process scholars have relied too much on courts to make

50. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE CONSTITUTION (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 711-15 (1984). Epstein has a work in progress on the Commerce Clause in which he argues for a narrower interpretation of affirmative federal power under that provision.

51. *See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

52. *See* Macey, *supra* note 23.

53. *See* Eskridge, *supra* note 42. *See also* Eskridge, *Overruling Statutory Precedents*, pt. II(C) (draft Feb. 1987) (arguing that public choice theory supports a more flexible approach to *stare decisis* of statutory precedents than that now followed by the Supreme Court).

policy or to "correct" the policy choices made by the legislature. Perhaps Judge Posner's most important contribution to legisprudence is his insistence that the unique features of the legislative process and statutes be given more academic attention and that statutory law, and its concomitant political compromises, be treated with more deference by other branches of government.

B. Critical Legisprudence

Just as law and economics scholars have drawn upon extralegal public choice scholarship to criticize Hart & Sacks' legal process approach, "critical scholars"[54] have drawn upon extralegal scholarship in the fields of philosophy, literary criticism, and leftist political theory. Critical scholars especially concentrate on challenging the legitimacy of law. The concern that law be considered legitimate is central to Hart & Sacks' legal process approach. The claim to legitimacy is based in part on the rationality assumption—the various participants in the legal process address the law in a fair and impartial manner and solve new problems by a rational and fair expansion of existing policy. The proceduralist assumption complements the rationality assumption as a basis for the law's legitimacy. Hart & Sacks appeared confident that if regular procedures are followed the resulting policy would not only be legitimate, but ordinarily rational ("good") as well. Hart & Sacks' vision of a well-ordered, objective, rational legal process was shattered for many intellectuals by the developments of the 1960's, and, in the late 1970's, they began to build a strong radical case against both the rationality and proceduralist assumptions.

Hart & Sacks implicitly claimed that all law, legislative as well as judicial, is (or can be) rational, objective, and neutral. Law and economics scholars assert a dichotomy between rational, objective, neutral judge-made law (at least if judges act appropriately) and arational, subjective, political legislature-made law. Many critical scholars, in turn, claim that *all* law, legislative as well as judicial, is ultimately arational, subjective, and political—and therefore not legitimate under the legal process assumptions. At the most general level, Roberto Unger and Mark Tushnet contend that the whole "rule of law" idea exposes the ideological inconsistency within liberal, plural-

54. We use this term to include members of the Critical Legal Studies (CLS) movement founded in the late 1970's, feminist scholars (many of whom are members of CLS), and unaffiliated leftist critics of the modern legal culture.

ist society.[55] In a pluralist society whose members have conflicting desires, a rule of law cannot really be neutral (i.e., avoid making substantive value choices), for a neutral rule of law could not resolve the conflicts among the various interests in society. Yet, once one admits that the rule of law is not neutral, one admits that law subordinates the wills of some citizens to the wills of others—which is in tension with the liberal assumption that the will of some cannot be preferred over that of others. The purported "rule of law" is incoherent; it is a reified convention to obscure the domination of society by elite interests (those whose wills are systematically preferred under the "rule of law").

Tushnet and Paul Brest argue that a similar incoherence is at the root of legal process constitutional scholarship.[56] The central dilemma in our constitutional system arises from the fact that on most issues the polity is committed both to majority rule and to the protection of minority rights. The dilemma is that there is no neutral way to draw the line between majority rule and minority rights. These critical scholars deploy this dilemma to deflate traditional legal process justifications for countermajoritarian judicial review of statutes. A central point of their scholarship is that judicial review itself is essentially a political issue and cannot be neutrally defended. Richard Parker flips the dilemma explored by Brest and Tushnet and posits that there is no neutral justification for deference to the will of the legislature, either.[57] The traditional justification for deference is that the elected legislature represents the majority will better than the nonelected judiciary, but Parker questions the factual basis for this justification. He argues that the vast majority of the electorate is utterly passive and that, to the extent they express political preferences, those preferences are so conditioned by their relative ignorance and inequality as to be meaningless. Under these circumstances, what compelling reason is there for courts, or anybody, to defer to legislative policies?

Many critical scholars claim that law is political and contingent; the rules laid down by the legal process could be entirely different if

55. *See* R. UNGER, KNOWLEDGE AND POLITICS (1975); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

56. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Tushnet, *supra* note 55; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

57. *See* Parker, *supra* note 22, at 239-57.

different political values were held by those in power. Even legal reasoning is typically nothing more than window-dressing for political choices. For example, Duncan Kennedy's article on "form and substance" demonstrates how conventional (supposedly objective and rational) legal argumentation arbitrarily conflates and alternates between principles of liberalism (individualism) and altruism (collectivism).[58] The traditional legal process answer to such attacks has been that whatever political choices are made by the legal process are at least made openly and according to accepted procedures to which everyone has adequate access. Critical scholars respond that such proceduralism is not only misleading, but reactionary. Thus, Parker attacks the proceduralism inherent in legal process theory. Process theory, Parker argues, is structurally biased: it fallaciously assumes that formal access to the political process usually entails meaningful access (which makes it incorrect), and it diverts attention away from malign power structures and inequality in society (which makes it evil).[59] The mythology of societal consent perpetuated by process theory obfuscates the urgency of law reform and pacifies the victims of oppression.

Gary Peller, another critical scholar, argues that the legitimacy which Hart & Sacks believed would flow from the rationality and proceduralist assumptions is a false and oppressive legitimacy. Inspired by post-structuralist literary theory, Peller has developed the "law is nothing but politics" critique of legal process theory in particularly radical directions.[60] Peller argues from the contingency of all linguistic constructs that any formulation of rules involves political choices and potential political oppression. As an example of the power of language to create a false consciousness, Peller deconstructs the central tenet of legal process formalism—the principle of institutional settlement, the notion that "regularized and peaceable methods of decision" must be scrupulously followed in order to avoid "disintegrating resort to violence."[61] This principle traditionally has been ac-

58. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). *See also* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

59. *See* Parker, *supra* note 22, at 249-57.

60. *See* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985). For background on post-structuralist theory, see H. BLOOM, J. DERRIDA, G. HARTMAN & H. MILLER, DECONSTRUCTION AND CRITICISM (1979); J. CULLER, ON DECONSTRUCTION (1982).

61. *See* Peller, *supra* note 60, at 1183-87 (deconstructing the principle of institutional settlement, quoted *supra* in text accompanying note 15).

cepted as noncontroversial because of its creation of two dichotomies—peace versus violence and order versus disorder—and its association of peace with order. The principle, observes Peller, "not only asks the reader to prefer peace to violence, the aspect of the principle which establishes its appeal, but further asks the reader to associate violence with disorder and peace with order," which does not logically follow.[62] That is, peace and order are not necessarily connected. Disorderly but nonviolent protests against the War in Vietnam subserved the cause of peace, while the orderly obedience of thousands of Americans to the morally bankrupt consequences of the legal process contributed to violence. Disorderly but nonviolent protests against racism contributed to the disruption of violent but orderly oppression of blacks in the South. The resonance of Peller's indictment of legal process formalism flows from the reverberations of the 1960's—from the lunch counter sit-ins of 1961 to the Watergate denouement in 1974.

Like law and economics scholars, critical scholars have made significant and insightful criticisms of traditional legal process assumptions. Indeed, their criticisms are more fundamental than those of law and economics scholars and dramatically raise the stakes of the legisprudential debate. But unlike law and economics scholars, critical scholars have not discussed affirmative visions of legisprudence very much. If their criticisms were accepted, what would be the consequences for legisprudence? We do not know, but we can identify three important effects that critical thought might have on legislation scholarship.

First, like Judge Posner, critical scholars seek to expand the agenda of legislation scholarship beyond the traditional topics of judicial review and statutory interpretation. Thus, critical studies suggest that the desirability of a representative democracy and the proper concept of representation, which have received virtually no attention from legal scholars, ought to be central issues. If one accepts the critical scholars' argument that all legal standards are essentially subjective and political choices, it is important to focus on who makes the political decisions. Many of the inadequacies of the current legal order may be attributable to political decisionmaking by a very narrow elite group.[63] For example, critical scrutiny of the law of rape sug-

62. *Id.* at 1184.

63. *See* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982). *See also* P. BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE (1980).

gests that its many differences from other crimes cannot be explained by reference to rational and objective criteria. They can best be explained as the reification of male-generated sexual stereotypes.[64] The rules of rape law are *not* the rules which would have been created by a community of women and men more sensitive to the degradation of the various forms of sexual oppression.

If our representative democracy has created and perpetuated inadequate laws in part because of the structures of representation, how can those malign structures be changed? Critical scholars might explore the possibilities and limitations of direct popular lawmaking in response to such a question. Or they might advocate novel approaches to the concept of "representation" in our democracy: should the old idea that the legislature be a "microcosm" of society be revived,[65] or should certain groups in the legislature be proportionally represented?[66] Or critical scholars might call for a genuine reconstitution of our society to encourage broader citizen participation in the community's public discourse.[67] Do lawyers have a constructive role in alerting the community to political problems and rousing people from passivity? What strategies might be useful in organizing the dispossessed and the public to demand more just law?

Second, the work of critical scholars ought to impel some rethinking of existing legislation doctrine.[68] Several critical scholars have argued that judicial review is essentially a political mechanism and, hence, ought to be utilized in progressive ways.[69] Critical rethinking of judicial review does not necessarily mean more active re-

64. Thus, "nontraditional" rape, in which sexual relations are coerced but the woman does not physically (and often with great danger to herself) resist, is very frequently not punished. That occurs, not because the defendant's conduct is in any defensible sense not criminal, but because legislatures and courts are decisively influenced by stereotypes: "normal" sex involves male aggression and mild female resistance, so "criminal" sex must involve a lot more resistance, namely, the harsh physical resistance one boy would use in fighting off another boy in the playground. Estrich, *Rape*, 95 YALE L.J. 1087, 1105, 1128-32 (1986). *See also* Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

65. *Cf.* Letter from John Adams to John Penn, in 4 THE WORKS OF JOHN ADAMS 205 (1850).

66. *See* Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984).

67. *See* Brest, *supra* note 56; Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

68. We readily admit that many critical scholars, especially those who are members of CLS, are powerfully anti-doctrinal. But that position itself may exert a gravitational pull on future shapers of doctrine, just as the most negativist legal realists influenced the positive theories of their colleagues.

69. *See supra* notes 55-59 and accompanying text.

view, however. For example, Jeff Blum argues that the Supreme Court should relax its strict scrutiny of laws regulating campaign finance, because first amendment values are implicated on both sides of the issue: the value of more expression cuts against such legislation, but the value of equality of political access cuts in favor of it.[70]

Although critical scholars have not written much on statutory interpretation, their general works suggest that statutory interpretation be reconceptualized. Unger's deconstruction of the polity created by classical liberalism argues that both the nineteenth century formalist theory of adjudication *and* Hart & Sacks' purposive theory of adjudication are incoherent under liberal assumptions.[71] Both formalism and purposivism make false claims to legitimacy, for both pretend to yield rules which permit statutory interpretation to proceed in a neutral and predictable manner, while the very process of deciding a case—with real parties and equities affecting the judgment—undermines that aspiration to neutrality and generality. All of the various doctrines of statutory interpretation, Unger suggests, only mask liberalism's incoherent oscillation between the pretense of neutrality and equal treatment and the desire to do justice in individual cases.[72] A sensitive reading of the critical literature leaves one with profound skepticism about the validity of any of the prevailing approaches to statutory interpretation.

In place of existing theories of statutory interpretation, some critical scholars might advocate an "anti-theory": interpreting statutes is just as political a process as enacting them.[73] There is no greater political justification for an interpretation in any given case beyond the social justice of that result. Hence, the question whether affirma-

70. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983). *See also* Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

71. R. UNGER, *supra* note 55, at 92-97.

72. Indeed, the history of Anglo-American statutory interpretation reveals a cyclical alternation between doctrinal rules that promise objectivity and certainty and equitable rules that promise justice and flexibility. *See* Blatt, *A History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 801-02, *passim* (1985) (as the title indicates, an historical approach to statutory interpretation influenced by Duncan Kennedy's work).

73. *See* Hutchinson & Morgan, *The Semiology of Statutes* (Book Review), 21 HARV. J. ON LEGIS. 583, 593-95 (1984) (reviewing D. MIERS & A. PAGE, LEGISLATION (1982)); Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade* (Book Review), 82 COLUM. L. REV. 1752, 1761-64 (1982) (reviewing G. CALABRESI, *supra* note 2) [hereinafter Hutchinson & Morgan, *Calabresian Sunset*]. *See also* Hutchinson, *Part of an Essay on Power and Interpretation*, 60 N.Y.U. L. REV. 850 (1985).

tive action is permissible under the civil rights laws or the Constitution could *not* be answered by a false objectivism. Rather, the answer to the interpretive questions arises out of the moral and consequentialist arguments about the justice of affirmative action. Nineteenth century French jurist François Gény advocated a method of "free interpretation" to arrive at a just result.[74] Under free interpretation, the judge engages in a broad inquiry into the discussions surrounding the statute, moral philosophy, and even personal ethics in order to decide a case. If one accepts anything like the deconstructionists' theory of language, as Peller and other critical scholars do, even the language of the statute ought not prevent the judge from engaging in this sort of free-from-form inquiry.

Third, and most important, critical scholarship should challenge lawyers to rethink the underlying political assumptions of our legisprudence. Hart & Sacks and the law and economics scholars basically accept the precepts of pluralism (government exists to ensure societal peace and stability) and liberalism (with its focus on the self-contained individual). Critical scholars have challenged this vision of our polity in many different ways. For example, they reject the liberal vision of what human beings are like. People are neither self-contained nor rational maximizers, nor are their "interests" simplistically materialist and exogenously defined. Instead, people are animated by a congeries of nonrational desires. Their "interests" are social as well as personal; indeed, it may be impossible to define a person's ends as self-contained, because people are strongly influenced by their social and historical context.[75] Given the focus on community and social goods, critical scholarship suggests strongly that attitudes and values are subject to change through politics. Much of the critical agenda employs this positive vision of government to alert society to transform its inhuman modes of oppression and anomie.

While critical scholars indict the current rule of law ideology and the elitist structures it shields, they have an equally strong positive message. Law and politics (synonymous for many critical scholars) can help create community just as it can destroy community. This entails a redefinition of what "law" is "for." Joseph Singer, for exam-

74. *See* F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899) (2 volumes). We are informed that Roberto Unger's forthcoming legal treatise will explore an approach to statutory interpretation that is very open-ended.

75. *See* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073.

ple, argues that the goal of legal theory should not be determinacy, objectivity, or certainty (the legal process, pluralist hallmarks of statutory law), but rather should be "edification."[76] Singer assumes that the law is pulled toward formalism and its concomitant certainty to ensure that society knows what the law is. Uncertainty about what exactly the law is will leave us without fair means of regulating private conflicts, or even of knowing how to behave, and will encourage predatory conduct by the government and private power centers. Singer contends that legal rules do not protect us against these horribles and that, in truth, the main value of legal rules is constitutive: the formulation of rules is how we create and express shared values. Singer and perhaps other critical scholars envision the role of the lawyer as a facilitator of community-wide discourse which generates values over time.

C. *The Legisprudence of the New Legal Process*

Today, although many legal scholars are profoundly unhappy with the vulnerability of Hart & Sacks' assumptions to the challenges of the law and economics and critical scholars, many remain committed to the ideal of a legal process that seeks law reform and justice. These progressive scholars have responded to the challenge in a variety of ways; the directions they have taken have created a "new" legal process which self-consciously pursues substantive as well as procedural justice.[77] Although responses to the attacks on legal process vary greatly, they have several common themes. One is anti-pluralist: legislation must be more than the accommodation of exogenously defined interests; lawmaking is a process of value creation that should be informed by theories of justice and fairness. Another theme is that legislation too often fails to achieve this aspiration, and, thus, creative lawmaking by courts and agencies is needed to ensure rationality and justice in law. A final theme is the importance of dialogue or conversation as the means by which innovative judicial lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy.

Many of the new legal process scholars reject pluralism as the underlying political theory of our representative democracy. Scholars

76. *See* Singer, *The Player and the Cards: Nihilism & Legal Theory*, 94 YALE L.J. 1 (1984).

77. Much of the discussion of the new legal process in this Section is indebted to conversations with Cass Sunstein and Robert Weisberg, and to Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985), and Weisberg, *supra* note 10.

have questioned pluralism both historically and normatively. Bruce Ackerman argues that the Constitution itself does not assume the simple pluralism of traditional legal process and law and economics theory.[78] While the Framers were aware of the inevitability of "factions" (interest groups), they sought to design a government controlled by the legislative representatives, rather than by such factions. A central insight of Ackerman's essay is its recognition of two political traditions in United States history: one, a liberal and pluralist tradition assuring citizens that their private expectations and dealings would be protected; and, second, a republican tradition giving citizens an opportunity to articulate "public values" that guide private conduct and express the moral dimension of our polity. Cass Sunstein goes one step further than Ackerman and argues that the historical evidence supports the view that the republican tradition is the dominant tradition and that public values should inform legislation (and its implementation) at all levels.[79] In short, mounting historical evidence indicates that pluralism is not part of the "original bargain" of the Constitution. If pluralism is to be the basis for our government, it must be justified politically.

The historical evidence adduced by Ackerman and Sunstein has been accompanied by a powerful analytical attack on pluralism. As a descriptive matter, scholars such as Ackerman and Jerry Mashaw argue that many statutes cannot be explained as mere deals between private groups and the legislature.[80] For example, public choice theory is a poor explanation for the civil rights revolution in legislation during the 1960's: although opposition to such legislation was both well-organized and intense, substantive change was not only accomplished by the 1964 Civil Rights Act, but that first major statute triggered a wide-ranging wave of related statutes which have transformed American values. Similarly, the environmental protection statutes of the late 1960's and early 1970's and the deregulation of the late 1970's are better explained by public-seeking theories of politics than by in-

78. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

79. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). *See also* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

80. *See* J. Mashaw, *supra* note 36, at 44-51; Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985); Farber & Frickey, *supra* note 36. *See also* J. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984) (political science theory rejecting the private-seeking explanations of public choice theory).

terest group theory. Perhaps the typical process of statute-creation—or evolution—is one which is more "public-regarding" than public choice theory has assumed.

As a normative matter, new legal process scholars tend to view pluralism as an unworthy vision of our polity and to endorse a transforming role for law. The republican tradition has suggested that lawmaking ought to be viewed as an ongoing constitutive activity. Frank Michelman's recent article on modern republicanism sets forth a positive vision of "freedom as self-government."[81] Inspired by Robert Cover's notion of a "paideic community" formed by strong interpersonal bonding through our shared commitment to a specific moral tradition and its ongoing elaboration, Michelman envisions law as a process by which we actualize our potential, which can only be done through a process of community discussion. His republican colleague, Sunstein, argues that our interests (which he calls "preferences") are not exogenous to the political process; rather, they are defined, in part, through the political process. Thus, legislation has the power to transform private preferences, and it is wrong to accept preferences as the inevitable starting point for lawmaking (as pluralism typically does).[82] Preferences derived from existing legal rules or from motivational distortions are two examples Sunstein invokes to argue for the constitutive role of legislation.

The republican tradition has been a major philosophical impetus for anti-pluralist discussion among new legal process scholars. Ronald Dworkin has derived a similar anti-pluralist approach from modern analytical philosophy. Dworkin distinguishes between a pluralist "rulebook community," in which citizens generally agree to obey rules created by the government, and a "community of principle," in which citizens see themselves governed by basic principles, not just political compromises.[83] The latter is a worthier sense of community, Dworkin argues, and legislation as well as adjudication must be evaluated by its contribution to the principled integrity of the community. Dworkin's vision of government is almost utopian in its rejection of pluralist premises.

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81. *See* Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 26, *passim* (1986). This important article appeared after we had written this Article; hence, we have not given it the complete discussion it deserves.

82. *See* Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). *See also* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 617 (1985).

83. R. DWORKIN, LAW'S EMPIRE 209-11 (1986).

While advocating legislation which contributes to the common good and transforms private preferences, new legal process thinkers realize that the actual process of legislation often transforms private preferences imperfectly. This recognition has generated theories to justify activist judicial review. For example, a recent article by Ackerman both debunks and radicalizes traditional legal process justifications for judicial review.[84] Citing the celebrated footnote four of the *Carolene Products* case, traditional legal process scholars have defended judicial review as most appropriate when laws adversely affect "discrete and insular minorities," who are likely to have been inadequately represented in the process of enactment.[85] But Ackerman argues from public choice theory that discrete minorities are precisely those which are most likely to form organized interest groups and, hence, may sometimes be overrepresented in the political process. Rather than discard the formula altogether, however, Ackerman suggests that participatory protection be extended to other types of groups that truly seem to have been denied access to the political process, including groups that are discrete and diffuse (women), or anonymous and somewhat insular (homosexuals), or both diffuse and anonymous (victims of poverty). Moreover, Ackerman rejects the traditional legal process vision of courts as simply a "perfecter of pluralist democracy" and advocates an alternative vision in which courts "are pluralism's ultimate critics. In exercising their critical function, courts insist that there are certain substantive principles—*Carolene* calls them 'prejudices'—that pluralist politicians are simply not allowed to bargain over in normal American politics."[86]

Like Ackerman, in order to ensure rationality and justice in law, many other scholars are willing to abandon the notion that all political choices must be made by the majoritarian legislature. Certain critical "public values" simply cannot be bargained away, and much of the process of political norm-creation must or should occur in the courts.[87] In an innovative twist on the majoritarian assumption, Robert Burt argues that some political controversies simply cannot be resolved in the majoritarian legislature, namely, those in which the majority wants to purge or segregate a minority from the community. In those cases, the best opportunity for a solution which saves the

84. *See* Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

85. *See, e.g.*, J. ELY, *supra* note 22, relying on United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

86. Ackerman, *supra* note 84, at 741.

87. *See generally* M. PERRY, *supra* note 22; L. TRIBE, CONSTITUTIONAL CHOICES (1985).

political community from itself is an active judicial scrutiny that forces the legislature to justify its decision.[88]

A growing body of scholarship focuses on ways, other than constitutional judicial review of statutes, in which courts can, and should, perform essentially "legislative" responsibilities. Like longstanding legal process work, this body of scholarship analyzes or defends the legitimacy of judicial lawmaking. Unlike prior legal process work, new legal process scholarship proceeds in wide-ranging new directions, based upon a more open pessimism about the rationality of the legislative process. For example, Guido Calabresi has taken one of the key problems of statutory interpretation—how to apply an old statute in radically new circumstances—and has suggested a novel way of approaching it. He argues that courts ought to "overrule" obsolescent statutes in the same manner they overrule obsolescent common law precedents.[89] This thesis stands traditional legal process theory on its head, but creatively argues from basic proceduralist and rationality assumptions to make its case.

Other new legal process theorists have gone beyond the proceduralist assumptions of traditional theory; they more explicitly emphasize the demands of substantive justice and the evolutive rather than formal nature of legitimacy. Like Calabresi, Ronald Dworkin has dealt with the problem of aging statutes, and he argues that judges can advance progressive social policy without imposing their own values onto statutes.[90] Unlike Calabresi and other new legal process thinkers, Dworkin approaches the problem through a general theory of law and strongly argues that there are "right" answers. In Dworkin's ideal community of principle (noted above), "integrity in legislation" requires lawmakers to try to make the total set of laws morally coherent. Like justice and fairness, integrity in the law contributes to the coherence of the body politic, the moral community that bonds the nation together. The courts' role is to interpret authoritative

88. *See* Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984).

89. *See* G. CALABRESI, *supra* note 2. Calabresi's thesis has stimulated an impressive commentary. *See, e.g.*, Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126 (1982); Hutchinson & Morgan, *Calabresian Sunset, supra* note 73; Lindgren & Schlegel, *Thinking About Statutes: Hurst, Calabresi, Twining & Miers* (Book Review), 1984 A.B. FOUND. RES. J. 458; Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534 (1982); Weisberg, *supra* note 10.

90. Dworkin does not inevitably fit into the legal process school of thought and might more naturally be termed a "rights" theorist. Weisberg, *supra* note 10, treats him as a representative of the new legal process, and we tentatively follow that lead because Dworkin's recent work on constitutional and statutory interpretation fits the new legal process agenda to a substantial extent.

statements of law (the Constitution, statutes, common law precedents) in light of the underlying principles of the community. Thus, in the "hard cases" of statutory interpretation, the best interpretation is the one that is most consonant with the underlying values of society and makes the statute the best statute it can be (within the limitations imposed by the language).[91]

Dworkin's writings on statutory interpretation reject the conservative dimensions of traditional legal process doctrine, which has often been invoked to bind courts to the original intent or purpose of the enacting legislature. While traditional doctrine treats statutes as static texts, Dworkin views statutes as "chain novels," in which each interpretation of the statute changes it somewhat, and each new interpreter brings a new perspective to the statute.[92] One of us has pursued this anti-doctrinal theme to argue that historical legislative expectations ought to have little persuasive value when societal or legal circumstances have decisively changed. In such cases, courts ought to interpret statutes "dynamically," that is, in light of current policies and goals.[93]

While Calabresi and Dworkin have tackled traditional legislation issues to validate and defend innovative judicial lawmaking, Owen Fiss has created an entirely new area of inquiry through his writings on the "structural injunction."[94] Structural injunctions are judicial orders requiring public or private institutions to restructure themselves in order to achieve compliance with statutory or constitutional standards. Structural injunctions are more like legislative statutes than ordinary judicial orders. Like a statute, a structural injunction typically affects the rights and obligations of groups (as in class actions); it is also an ongoing and sometimes virtually endless legal instruction to the regulated entities, and it sets forth imperative commands. Fiss defends extensive use of structural injunctions on grounds of justice. The values for which our society stands are defined by what we do for the dispossessed—prisoners, mental patients,

91. *See* R. DWORKIN, *supra* note 83, at 313-54; Dworkin, *Is There Really No Right Answer in Hard Cases?*, *reprinted in* R. DWORKIN, A MATTER OF PRINCIPLE 119 (1985); Dworkin, *How to Read the Civil Rights Act*, *reprinted in id.* at 316.

92. Dworkin's chain novel concept explicitly relies on the "Newer Criticism" in literary theory. *See* Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982), *reprinted in* 9 CRIT. INQUIRY 179 (1982) and THE POLITICS OF INTERPRETATION (W. Mitchell ed. 1983); Dworkin, *How Law is Like Literature*, *reprinted in* R. DWORKIN, A MATTER OF PRINCIPLE 146 (1985).

93. *See* Eskridge, *supra* note 42.

94. *See generally* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); O. FISS, INJUNCTIONS ch. 3 (1973); O. FISS & D. RENDLEMAN, INJUNCTIONS ch. 9 (2d ed. 1984).

the homeless. Public choice theory, and everyday observation, indicate that the legislature and the executive pay insufficient attention to problems affecting marginalized groups such as these. Courts, on the other hand, by their independence from interest group and other political pressures and their professional commitment to rational problem solving, are in a good position to attack structural institutional problems and "to give meaning to our public values."[95] Thus, through the use of structural injunctions, a court could ensure a justice that the legislature or executive would ignore.

What is striking about many new legal process thinkers is not only their substantive commitment to progressive, fair, and just law, but also their faith in the judicial process to contribute to such law.[96] Other new legal process thinkers, though equally committed to substantive justice, would not rely exclusively on courts to carry on the public dialogue. Progressive administrative law scholars such as Mashaw and Richard Stewart start from the fact that most public law in the United States today is made by bureaucrats, not judges. And this is not necessarily bad, insofar as administrative law fosters a deliberative approach to agency lawmaking, for agencies have greater resources and political leeway to achieve worthy public goals than courts have.[97] While courts should be available to monitor structural problems, administrative innovation must come from within the executive, not the judicial, branch of government. Sunstein and Peter Strauss, for example, have proposed an increase in the authority of the Office of Management and Budget over the regulatory process as a more effective way to assure that federal policies are carefully deliberated and updated.[98]

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95. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979). *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

96. Whereas Hart & Sacks wrote in a decade that was still somewhat suspicious of judicial activism (the memory of the Four Horsemen who bedevilled the New Deal was still fresh), the new legal process thinkers revere the era of the Supreme Court's civil rights activism. The "negative example" of the 1950's was the Supreme Court's nostalgic decisions in *Lochner* and *Debs*, both ultimately overridden by progressive legislation. In contrast, the negative example of the 1980's is the reactionary legislative resistance to desegregation, ultimately overridden by judicial activism and legislative support for that activism.

97. *See* J. MASHAW, BUREAUCRATIC JUSTICE, MANAGING SOCIAL SECURITY DISABILITY CLAIMS 11-20, *passim* (1983); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1711-90 (1975); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981). *See also* J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM (2d ed. 1985).

98. *See* Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38

A central dilemma addressed by new legal process thinkers is the tension between their aspiration that law be positive, public-seeking, and coherent and their realization that legislated law typically falls short of this aspiration. This dilemma raises the countermajoritarian difficulty once more, since new legal process thinkers favor expansive lawmaking roles for judges and agencies. Unlike traditional legal process thinkers, however, they readily admit that judicial and administrative law is more than interstitial. The new legal process response to the countermajoritarian difficulty is to minimize its importance by rethinking the nature of lawmaking. Their reconceptualization rejects a view of lawmaking as a series of one-shot declarations of rules and, instead, sees lawmaking as a dialectic and evolutive process. Many of the new legal process thinkers embrace the idea that law is the rules that evolve from the norms accepted by the interpretive community. Lawmaking is a continuous process of discussion, punctuated perhaps by the enactment and interpretation of statutes but mainly animated by an ongoing dialogue of interested and informed observers. The legitimacy of law derives not from its formal source, but rather from its capacity for enlightening us and advancing the moral and economic dialectic of our society. Law is conversation rather than coercion.[99]

Different conceptions of the justification for legal authority fundamentally divide the different schools of legisprudence. Hart & Sacks apparently accepted "positive law" theory—the law created by the duly constituted institutions must be obeyed—but tried to make the legal process seem "reasonable" and consistent with natural law and subject to some ameliorating judicial freedom. Law and economics scholars and critical scholars have argued that Hart & Sacks' position is incoherent because of its ambivalence. By refusing to rest the legitimacy of law completely on either form or substance, traditional legal process ends up justifying law that is neither formally legitimate nor substantively just. Law and economics scholars generally accept the positivist theory of law; their legisprudence is, on the whole, formalistic. Critical scholars generally accept a natural law theory (law is only justified by its social justice); their legisprudence is, on the

ADMIN. L. REV. 181, 188-94 (1986); Sunstein, *Factions, Self-Interest and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 292-95 (1986).

99. This point is made in Tushnet, *supra* note 77, at 1521. For examples of this tendency in new legal process thought, see, e.g., B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); Burt, *supra* note 88; Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Fiss, *supra* note 95.

whole, anti-formalistic. New legal process scholars are torn between formalism and anti-formalism. On the one hand, they view the law as dynamic, moral, and answerable to the community. On the other hand, they tend to view the community rather narrowly (perhaps limited to legal interpreters) and justify their approaches according to the conventions of the legal world.[100] In other words, their vision of the law is a carefully defined natural law vision, but their justifications appeal to a profession which believes that legal authority is ultimately rooted in positivism.

III. POST-LEGAL PROCESS LEGISLATION PEDAGOGY

Overall, the post-legal process era has presented legislation scholars with three challenges: first, to reexamine some of the assumptions traditionally made about the legislative and political process; second, to rethink much of the legal process doctrine of statutory interpretation and judicial review; and, third, to expand the academic inquiry to include topics such as direct democracy, the nature of representation, statutory obsolescence, the evolution of statutory schemes over time, the choice of enforcement schemes, and so forth. The post-legal process era has likewise presented a pedagogical challenge to legislation scholars. This pedagogical challenge is to present at least some of the fruits of this scholarly effort to law students. As we have discovered in talking with other legislation professors and in constructing our own materials, the pedagogical challenge presents both exciting opportunities and frustrating problems.

The exciting opportunities derive both from approaching legislation from different perspectives and from rethinking legal doctrine. For example, in the first chapter of our materials, we present students with two different models of the legislative process: an interest group model suggested by public choice theory and pluralist political philosophy, and a public values model suggested by political science studies and republican political philosophy. Students typically find these alternatives to the legal process vision to be interesting ways to think about legislation, and we use those models to examine and critique traditional rules and doctrine throughout the book.[101]

100. For examples, see S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

101. There are nine chapters in the book. They use the theoretical start of the first chapter to examine structures of representation (chapter two), the relationship between statutory law and case law (chapter three), judicial review (chapter four), implementation of statutes (chapter five), direct

The problem confronting the law professor who wants to present the post-legal process perspectives to law students is that the law professor's old friend (and crutch), near-absolute reliance on the case method, is often unsuitable. Whatever its virtues in other law school courses, the case method cannot address some legislation topics at all and skews the overall coverage of the course in favor of topics such as statutory interpretation. In addition, the case method artificially narrows what are, in our view, the most interesting legisprudential inquiries. Public choice theory, legal history, literary theory, critical theory and philosophy, and political science studies of political institutions all deserve at least some serious consideration in assessing the nature and role of statutes in our public law. The broad insights and provocative challenges that lie outside the narrow ambit of judicial decisions not only encourage students constantly to reevaluate legal doctrine, but also should inform each student's reconstruction of her own legisprudential outlook.

Deemphasizing cases in favor of other types of teaching materials can be unnerving to both law students and their instructors. Some students will not be interested in legal history, political science, jurisprudence, and the like, while others may question the practical value of studying abstract theory. Law professors may find the theoretical materials provocative (or so we hope), but then may find themselves unable to think of interesting ways to teach them. Whatever may be its drawbacks, the case method is an easy way to teach because a case offers an accessible, oftentimes interesting and amusing, context in which to talk about legal reasoning. For these reasons, our experience has been that legislation materials work best if, from the outset, they stimulate student interest and build lawyering skills in an obvious fashion. In short, theory must be presented in as concrete and accessible way as possible.

After several experiments—many of which were quite unsuccessful—we have settled on a basic format which combines provocative theory and concrete interest. We have written a substantial amount of text explicating the differing approaches to legislation in the post-legal process era, because we believe that the options available in public law theory are largely animated by different descriptions and beliefs about legislation. The most interesting inquiries cannot begin until students have been exposed to these descriptive and normative

democracy (chapter six), statutory interpretation (chapter seven), legislative drafting (chapter eight), and statutory obsolescence (chapter nine).

possibilities, and that exposure necessarily entails explication of legal and extralegal theory. Yet, because textual readings may not interest the student, we have tried to keep the explanatory text as short as possible and have carefully tailored it to three types of "concretizing devices."

One concretizing device is case studies of statutes. Chapter one of our materials traces the political and social background of the Civil Rights Act of 1964, its path through the legislative labyrinth, and the dramatic personal and political struggle that finally led to enactment. This case study has the great benefit of stimulating student interest in the course. More important, the case study teaches students a lot about legislative procedure, since the Civil Rights Act had to contend with most of the barriers that have been placed in the legislative steeplechase. Most important, the case study provides a context that the professor can use to explain and criticize the various models of the legislative process that are explicated in chapter one. Such a discussion can then segue into the only judicial decision we reproduce in the chapter, *United Steelworkers v. Weber*,[102] which involves the interpretation of Title VII of the Act. *Weber* ties in with the case study and provides an exciting context in which to discuss not only the different visions of legislation, but also the way in which statutes might evolve over time.

Our second concretizing device is judicial decisions, though we do not use as many of them as other legislation materials have done. We chose the cases in our book because of their pathbreaking nature, stimulating or dramatic facts and issues, or ease in teaching. With few exceptions, the cases are not the mere embodiment of rules and doctrine; instead, they are designed to be discussion points, in which the insights of the surrounding text can be used to criticize the methodology or assumptions of the judicial authors. For example, chapter two of our materials examines the structures of representation, briefly presents the leading theories of representation, and relates the theories of representation to the different visions of legislation explained in chapter one.[103] The chapter then turns to practical legal issues, starting with voting rights. We use two recent Supreme Court decisions to

102. 443 U.S. 193 (1979).

103. For example, a pluralist vision of legislation would tend to see legislators as agents or brokers who must be responsive to the interests of the electorate (or at least that part of the electorate which is organized). The republican vision of legislation would tend to see legislators as leaders of enlightened public opinion.

focus the discussion: *Mobile v. Bolden*,[104] involving minority vote dilution, and *Davis v. Bandemer*,[105] involving partisan gerrymandering. These cases involve exciting issues and interesting facts, but their main value is to show how one's political theory assumptions affect one's approach to these cases. For example, an adherent of the pluralist vision of our polity would be more likely to tolerate some minority vote dilution than an adherent to the republican vision, because the latter would be more concerned about unfairness in the representative process. The interconnection of the legal issues and political theory offers a variety of rich classroom experiences, we believe.[106]

Provocative, teachable cases can make the pedagogical task substantially easier and more satisfying. Some of the cases we use, such as *Weber, Moragne v. United States Marine Lines*,[107] and *Flood v. Kuhn*,[108] are well-known teaching delights because of their dramatic facts and unconventional legal reasoning. Other, less notorious, cases which have stimulated student interest and amusement answer such questions as:

- Whether a state law allowing only grocery stores of small size or run by a family to remain open on Sundays is constitutional.[109]
- Whether a municipal gay rights ordinance can be repealed by a popular initiative.[110]
- Whether a statute outlawing the immigration of aliens under contract to provide services has an unwritten exception for Christian clergy.[111]
- Whether a statute requiring penalty payments to seamen discharged without cause justifies an award of over $300,000 when the employer wrongfully refused to pay $412 in back wages and the seaman promptly found work elsewhere.[112]
- Whether an Alaska lands statute creates an easement across federal wilderness lands in Montana.[113]
- Whether a tomato is a fruit or a vegetable for purposes of a tariff

104. 446 U.S. 55 (1980).

105. 106 S. Ct. 2797 (1986).

106. The remainder of chapter two uses a similar heuristic technique to assess some of the important pressures on the representative system—lobbying, bribery, and campaign finance—as well as the legal response to those pressures.

107. 398 U.S. 375 (1970).

108. 407 U.S. 258 (1972).

109. *See* Goodman v. Kennedy, 459 Pa. 313, 329 A.2d 224 (1974).

110. *See* St. Paul Citizens for Human Rights v. City Council of St. Paul, 289 N.W.2d 402 (Minn. 1979).

111. *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

112. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982).

113. *See* Montana Wilderness Ass'n v. United States Forest Serv., 655 F.2d 951 (9th Cir. 1981)

schedule.[114]

The results reached by courts in several of these cases are surprising and should provoke wonderful student discussions.

The third main concretizing device we use is problems, which are normally found at the end of each section of each chapter. Problems can substitute for judicial decisions when there are no good cases from which to teach. For example, in chapter two, we reproduce federal statutes and Senate rules which regulate lobbying activity.[115] Unfortunately, there have been virtually no intelligible judicial decisions making sense of these statutes,[116] so we offer a series of problems in which students must decide what conduct is permitted, and what reporting must be done for permitted conduct. The problems are not exceedingly difficult (and the teacher's manual will suggest the answers we should reach), but they teach students the importance of reading statutes carefully and the necessity of sometimes drawing more coherence out of a statutory scheme than the legislature has put into it.

Other legislation teachers will, we are sure, find other concretizing devices successful as well. One potentially valuable strategy is to incorporate legislative drafting into the course.[117] Our materials have only a short treatment of legislative drafting because it is a topic deserving a full course and is the subject of excellent materials developed by Reed Dickerson.[118] Similarly, legislative internships give students hands-on experience with legislation and would complement our more theoretical course. Guest lectures by, or panel discussions including, legislators, their staff, or lobbyists can reinforce the normative and descriptive lessons of legislation theory. Computer-assisted instruction could be an effective—and even fun—way of teaching legislative procedure and perhaps other topics, without spending much

(superseding earlier unpublished opinion which we also include in the materials), *cert. denied*, 455 U.S. 989 (1982).

114. *See* Nix v. Hedden, 149 U.S. 304 (1893).

115. Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1982); Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., 18 U.S.C., 28 U.S.C. and 39 U.S.C.); Standing Rules of the Senate, Rules 35, 37-38 (1981).

116. In United States v. Harriss, 347 U.S. 612 (1954), the Supreme Court made a mess out of federal lobbying law. We reproduce the Court's decision because it is an integral part of the law and because law professors enjoy making sport of the Court's confused effort.

117. Alex Aleinikoff has developed drafting exercises which he used with our legislation materials, and in our published version of the materials we shall borrow some of his ideas.

118. *See* R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (2d ed. 1986) (treatise); R. DICKERSON, MATERIALS ON LEGAL DRAFTING (1981) (classroom materials).

class time on the subject. Student observation of legislative debates or committee hearings could also be interesting and useful.[119]

Our basic pedagogical strategy reflects the approaches that many of our colleagues and we have found to be successful with students and to be intellectually stimulating to scholars in this new post-legal process era.[120] By venturing beyond the traditional method, this strategy allows us to address some topics not traditionally found in legislation courses: minority vote dilution and the debate over proportional representation; arguments suggested by law and economics, critical, and new legal process scholars favoring more stringent judicial review of statutes; direct democracy as an alternative to representative government; and the various techniques available to legislatures, agencies, and judges to deal with aging statutes.[121] Of course, our materials also cover in some detail the topics that are traditionally examined in a legislation course, but we believe that the theoretical perspective of the materials makes these topics more interesting and accessible to students.

In particular, we believe that statutory interpretation, the most traditional legislation topic of all, should be informed by broad theory and infused with intellectual enthusiasm. Statutory interpretation is potentially as dry as dust, an argument over words. But it is also potentially very exciting, and we have tried to make it so. At the beginning of our chapter on interpretation, we develop three different contextual approaches to statutory interpretation: the traditional legal process purpose-of-the-statute approach; Judge Posner's imaginative reconstruction of original intent; and the models of dynamic interpretation in which the statute's meaning changes over time. This alone shows students that more is at stake in statutory interpretation than just word-crunching and that, depending upon their perspectives, different interpreters will reach very different results. The re-

119. The Cable Satellite Public Affairs Network (C-SPAN) televises such debates and hearings in Congress. Comparing a C-SPAN video-taped debate or hearing with the published record would highlight, with more force than any secondary description could do, the inadequacies of the Congressional Record and printed committee hearings as an authoritative source of federal legislative history.

120. Among the past and present teachers of legislation with whom we have discussed such issues are Alex Aleinikoff, Ann Bateson, Marsha Cohen, Mike Fitts, Bill Luneburg, Burke Marshall, Richard Posner, Robert Weisberg, and Robert Williams.

121. While we think all these topics are fascinating, we do not advise trying to cover all of them in one course. We believe that there should be at least two legislation courses in the law school curriculum—one covering the political process and the other dealing with statutory interpretation and related issues.

mainder of the long chapter explores the various rules of statutory interpretation in light of the new legisprudential debates. In the process, students learn a lot of useful doctrinal information. More importantly, they learn some judgment. In the real world of public law, in which meaning is imported from a variety of contingent sources, the most practical skill is also the most intellectual one: recognizing, dealing with, and sculpting from legal uncertainty.

CONCLUSION

Our outline of the agenda for post-legal process legislation scholarship and pedagogy is hardly comprehensive. Yet it suggests that a more systematic, legisprudential approach is needed to understand current thinking about public law, and especially legislation. If the assumptions of Hart & Sacks' synthesis are questionable on either normative or empirical grounds, legal academics face the substantial challenge of reconceptualizing important areas of law. That challenge is all the more compelling because of the variety of approaches that are strongly pressed. The academic enterprise demands that we seriously consider the discordant theories of our colleagues, reexamine heretofore-settled issues of the legal process, and attempt responsive scholarship. Our students demand (or should demand) sophisticated intellectual preparation for the legal world of competing assumptions and ideologies. A general course in legislation—or, better yet, several courses—ought to be an ideal opportunity for scholars and teachers to develop and impart their insights in this uncertain new world beyond legal process.