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Neutral Principles in the 1950's

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Is it alternatively defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it? In the context of a charge that segregation with equal facilities is a denial of equality, is there not a point in Plessy in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"? Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?  

In his widely celebrated article, Toward Neutral Principles of Constitutional Law, Herbert Wechsler set forth the analytic structure that, with refinement, has defined the centrist position in constitutional law for some three decades. Reflecting the "process theory" perspective, he focused attention on whether the Supreme Court utilized the proper institutional procedures for decision making, defined by Wechsler as reasoning by "neutral principles." His basic theme was that, because the judiciary is not elected, it should not upset value choices made by the democratically elected legislature. Unless the Court could justify its decisions according to reasons that are neutral to competing groups and interests, it must defer to legislative choice. Any other course would render the Court no more than a "naked power organ."

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2. Id. at 19.
After setting forth this general theory, Wechsler offered examples from Supreme Court decisions to show how it would be applied. The passage I have quoted is the culmination of Wechsler's argument that *Brown v. Board of Education*³ and other decisions outlawing racial segregation were illegitimate because the controversy lacked a “principled” resolution. According to Wechsler, the ultimate issue involved the freedom of association, but there was no neutral way to choose in *Brown* between the freedom to associate interracially and the freedom not to associate interracially. The case presented a fundamental value choice, and therefore its resolution was beyond the institutional competence of the Court.

I am interested in how this way of thinking about constitutional law, if not the particular analysis of *Brown*, managed to become the dominant approach for mainstream analysis. In the context of the racial and sexual domination that marked everyday life in the United States in the 1950's, how could Wechsler, an eminent and sophisticated lawyer and scholar, find it plausible to think that, assuming “equal facilities,” any inequality flowing from the “enforced separation” of American racial apartheid might be “solely” in the minds of blacks who “choose” to “‘put that construction upon it,’” or that the inequality of gender roles was not manifest in “females who resent it”? From what perspective could it seem coherent to assume that racial segregation in public schools was not part of a broad structure of social inequality? In what conception of the world was the distribution of wealth, jobs, political power, intellectual prestige, educational opportunity, housing, and social status that continues to reflect the objective face of institutionalized American racism irrelevant to the question of equality in public education?

I want to try to reimagine the contours of the intellectual culture within which Wechsler’s arguments could seem persuasive, or even plausible. There are, at the outset, a couple of factors that make this task challenging. First, most of us trained in law since the 1960’s find it difficult to conceive of the basis for the purportedly “principled” concern about *Brown* voiced by Wechsler and other fifties legal scholars. Even if we doubted whether reality matched the rhetoric, the *Brown* decision was presented to us not simply as a fact of equal protection doctrine, but, beyond that, as a key symbol of the open and democratic character of American society, as evidence of the ability of law to respond to legitimate claims for freedom and liberty and to

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restrain the worst forms of social domination and oppression. Against this contemporary backdrop, Wechsler's concern with the institutional integrity of the Supreme Court seems hollow and abstract, hard to distinguish from the "principled" commitment to "states' rights" claimed by the most vociferous and racist southern opponents of the Warren Court reforms. And in our cultural context, Wechsler's support of the constitutional legitimacy of racial segregation in public schools by reference to the "obviously" benign and uncontroversial character of gender segregation seems to undermine his position rather than to justify it.

But it is not only the hindsight of a transformed social context that makes Wechsler's decision to oppose Brown hard to grasp. The second important factor is that, in terms of the American intellectual discourse of the 1950's, Wechsler was part of a community of white, male legal scholars who actually represented a liberal and progressive force in academia. My guess is that Wechsler and other mainstream scholars in the 1950's voted for Adlai Stevenson against Eisenhower, opposed McCarthyism, had fought for and defended the New Deal against right-wing traditionalists, were outraged by the idea of racial segregation, and generally saw themselves as forward-thinking and open-minded. Yet Wechsler posed the issue of the constitutionality of school segregation in this remarkable way. Speaking the rhetoric of institutional legitimacy, a significant number of northeastern, white, liberal lawyers joined with white, southern, never-say-die segregationists in questioning the Court's authority and legitimacy in Brown. The point of departure for this Essay is the task of understanding how this paradoxical coalition came about.

The simplest explanation of how Wechsler and other fifties legal scholars could have perceived themselves as liberal and tolerant and yet have found Brown so controversial is that, for them, Brown symbolized the Supreme Court engaged in "value-imposition," the polar opposite of deciding by "neutral principles." In this account, the danger of "value-imposition" framed their understanding of constitutional law because of the way that they interpreted and identified the evils of the Lochner era of constitutional jurisprudence. As they saw it, the problem in the liberty-of-contract cases was that the Court imposed its own political preferences for laissez-faire economic policies in its

4. Lochner v. New York, 198 U.S. 45 (1905) (striking down state statute limiting work hours of bakery employees as violating the liberty of contract guaranteed by the due process clause).
interpretation of the Constitution. If the "counter-majoritarian difficulty" rendered illegitimate the *Lochner* Court's choice of the free market over economic regulation, it was also implicated in the *Brown* Court's preference for integration over segregation. In doctrinal terms, if the legislature had the constitutional authority to pass economic social welfare legislation, it must also have had the authority to enact other kinds of social welfare legislation, including regulation of the association between races. If we take Wechsler at his word, he felt the pain of segregation and personally supported integration. But standing for democracy meant not being result-oriented when applying the criteria for distinguishing legitimate from illegitimate exercises of the power of judicial review. The opposition to *Lochner* demanded opposition to *Brown* as a matter of integrity and principle. Through the trajectory of "judicial activism," progressive defenders of the New Deal became the conservative opponents of the Warren Court.

This standard account of why *Brown* was controversial to mainstream fifties lawyers makes some sense. It seems clear that, despite professed "personal" sympathies with the result, the *Brown* decision evoked fear on the part of those who had just struggled against the conservative legal establishment over the constitutional legitimacy of the New Deal, that the Court might exercise judicial review in reactionary ways. But this interpretation still doesn't really explain the particular manner in which Wechsler and others perceived the critical issues.

First of all, there is an obvious paradox here: Wechsler expressed concern that the Court would overstep its institutional bounds and interfere with the legislature in the context of a case presenting one facet of racial apartheid, an institutionalized form of broad-scale social domination. But Wechsler never addressed the possibility that the public school segregation at issue in *Brown*, and the general lack of voting rights for blacks, might at least implicitly impugn the democratic character of the legislature itself. As a result, Wechsler never addressed the possibility that the "neutral principles" boundaries of judicial review, derived from the desire not to interfere with democratic decision making, rested on a substantive judgment about the democratic

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5. This phrase was first used by Alexander Bickel. A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

6. "In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess." Wechsler, *supra* note 1, at 34.
character of social life. Understanding why this possibility did not occur to Wechsler requires a fuller consideration of the dominant intellectual discourse of the fifties than the simple reference to the perceived dangers of "Lochnerizing" permits.

In addition, there was no analytic necessity that *Lochner* itself be interpreted in institutional terms, as a judicial encroachment on the legislative prerogative to choose among competing economic policies. There was plenty of legal realist scholarship available on which to rest substantive objections to the *Lochner* approach—namely, that the *Lochner* Court's rhetoric that it was protecting a free market of individual liberty was a sham because market power was inevitably socially produced, in part by the very rules of contract, property, and tort that were supposed to provide merely a neutral framework for transactions. Seeing *Brown* and *Lochner* as presenting similar issues of institutional legitimacy meant having already chosen the institutional focus as the critical organizing category for constitutional scholarship. It meant having already identified "judicial activism" as the main flaw of *Lochner*, rather than, say, the injustice and incoherence of associating "liberty" with the "free market" of working life in the United States at the turn of the century. To understand how Wechsler could believe that the most important principles of the rule of law demanded that racial segregation be constitutionally upheld, we need to consider the more general way that the fifties legal scholars perceived and categorized the world so that the issues presented in *Lochner* and *Brown* seemed to them naturally (read nonideologically) grouped around the common theme of "the counter-majoritarian difficulty" and the common focus on institutional legitimacy.

In this Essay, I explore the intellectual setting within which Wechsler believed that defending freedom also required defending the legality of racial domination. I argue that the key to understanding this apparent paradox is to grasp the ideological/cultural complex of the 1950's within which mainstream American intellectuals in law and in other disciplines came to terms with the disintegration of the traditional, "old order" paradigms of the late nineteenth and early twentieth centuries by means of an intense and overriding distinction between controversial issues of values and noncontroversial questions of framework and structure within which substantive conflict would take place. On that distinction rested their conviction that their own work, and intellectual work generally, transcended ideology and politics.

But this context cannot alone explain the positions that Wechsler and other fifties scholars took. Wechsler was not sim-
ply a product of his time, somehow trapped within the conceptual apparatus of post-War thought patterns. There are always choices made in scholarship, choices that can’t be reduced to the impact of social forces, cultural context, or the logic of conceptual development. I will show that there was no analytic or historical necessity that the fifties scholars view law in the particular way that they did. And even within the categories of the fifties discourse, there was always enough indeterminacy so that, if only intellectual coherence was at stake, Wechsler could have come to the exact opposite conclusion on any particular issue, including Brown.

I believe that the sense of myopia and repressiveness we get when we read the passage that opens this essay is not merely a result of the march of time and the progress of our cultural enlightenment. There was something deeply conservative about Neutral Principles when it was written. And there was something deeply conservative about the proceduralist paradigms around which mainstream American intellectuals in the 1950’s coalesced, regardless of how liberal and tolerant their rhetoric might have sounded then (or now). The ethnocentrism reflected in Wechsler’s suggestion that black and female victims of social domination might simply “choose” to see it that way was imbedded in the ways that Wechsler and other (white and male) fifties intellectuals more generally perceived and understood their social world. There is no way to separate these assumptions from their “intellectual” theories about constitutional law, administrative agencies, or the appropriate boundaries of federal/state relations. To understand Neutral Principles, it is necessary to understand how the legal thought of the fifties was constructed on the basis of a fundamentally apologetic social ideology.

I. THE CENTRAL DISTINCTION BETWEEN PROCESS AND SUBSTANCE

To account for the way that Wechsler and other white legal scholars interpreted the world so that it made sense simultaneously to perceive themselves as liberal and tolerant and yet to find problematic legal judgments that purported to dismantle racial apartheid, it is necessary to locate Neutral Principles within the wider setting of 1950’s mainstream legal discourse. Wechsler’s work should be seen as part of the intellectual project undertaken by the first generation of post-War scholars—including Felix Frankfurter, Henry Hart, Alexander Bickel,
Lon Fuller, Albert Sacks, and Harry Wellington—who together constructed the "legal process" approach to law, changing the focus for critical evaluation from the substance to the process of decision making.\(^7\)

The fifties lawyers came on the scene in the midst of a rupture between old-line liberty-of-contract traditionalists and the legal realists. The traditionalists still viewed law in the formal Willistonian imagery, as a set of neutral, abstract background principles facilitating the free choice of individuals in their private, market sphere. The legal realists asserted that the abstract principles were indeterminate, and that policy judgment was inevitably necessary in order to determine the actual application of any of the principles.

The central jurisprudential project of the fifties thinkers was to incorporate legal realist intellectual sophistication into the mainstream of American legal discourse while avoiding the most corrosive aspect of the realist message—that there was no analytically defensible way to distinguish law from politics. Their intellectual strategy had two basic dimensions: first, they acknowledged the realist point that there was no neutral, determinate basis for deciding the social issues arising in cases; second, the fifties writers immediately domesticated this concession by limiting its application to the realm of "substance." At the level of "process," however, neutral, apolitical, reasoned—that is, legal—discourse was still possible (hence the name "process theory").

The result of their efforts was an incredibly elegant and symmetrical model of legal legitimation that seemed to transcend the fighting issues of the thirties and the forties. The process approach seemed to show how a commitment to democratic principles was consistent with the power of common-law judges and administrative agency officials to make law. It appeared to reflect realist sophistication about the inevitability of policy

judgments while nevertheless distinguishing law from politics. And it provided a way to conceive of the administration of the welfare state within the parameters of a general theory of law. It was, in short, the last great attempt at a grand synthesis of law in all its institutional manifestations. Tying together process theory in each of its institutional analyses was the view of law articulated by Henry Hart and Albert Sacks as the "principle of institutional settlement."

A. The Principle of Institutional Settlement

[T]he central idea of law . . . [is] the principle of institutional settlement. . . . [W]hen the principle . . . 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 decision of "ought"—a statement that . . . a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding upon the whole society unless and until it is duly changed."

The late-fifties editions of leading law reviews are filled with an amazing number of articles on jurisdiction, standing, ripeness, mootness, choice of law, federal/state comity, and procedural issues generally. It is as if the table of contents of Hart and Wechsler's *Federal Courts* casebook suddenly became the intellectual agenda for a whole generation of legal scholars. At first glance, it is puzzling why so many scholars who professed concern about justice and fairness in society, and who were by and large liberal reformist in their political outlook, spent so much time and effort on these apparently technical and procedural questions that today seem far removed from the substantive social issues of their time—issues, say, of racial oppression, or the concentration of corporate power, or the post-War institutionalization of the ideology and material reality of the patriarchal nuclear family.

This focus on jurisdiction and procedure is explicable in terms of a new conception of law and the legitimate boundaries of legal

discourse, an organizing agenda that marks the unity of fifties legal consciousness and the unique contribution that fifties thinkers made to jurisprudential study. This new outlook animates the “principle of institutional settlement” as articulated by Hart and Sacks, and the Hart and Wechsler Federal Courts casebook was (and still is) the paradigm for this legal approach.

The general idea was that legal analysis did not depend on a choice between competing substantive visions of the content of law, and that legal theory no longer need be seen as presenting fundamental alternatives of a positivist or normative view of legitimacy. Thus, there would be nothing particularly “legal” at stake in the determination of whether negligence or strict liability would be the standard for evaluating product liability in tort, of whether the appropriate conception of contract would encompass reliance interests or promissory estoppel theory, or of whether the essential form of the “rule of law” was a formally realizable rule or an instrumental standard, a principle or a policy.

The legitimacy of law would not turn on the resolution of these kinds of questions, because they concerned merely the content of legal doctrine. Instead, as the principle of institutional settlement suggests, the fifties legal scholars believed that it was possible to distinguish legitimate and illegitimate exercises of official power while simultaneously transcending the centuries-old debate between positivism and natural law, between the “is” and the “ought” of legal criticism, through the adoption of a new perspective, one that focused attention on the question whether a particular decision was the “duly arrived at result” of “duly established procedures” for resolving disputes of that kind. The attention to jurisdiction, standing, mootness, federalism, and the like flowed from a commitment to the idea that these issues were the core concern of legal legitimacy because they were the ways to determine whether “duly established procedures” had been observed.

The fifties writers rejected traditional legal positivism out of a conviction that legitimate and illegitimate exercises of power could be distinguished by something more meaningful than a genealogy leading to a sovereign; “the ‘is’ is not really an ‘is’ but a special kind of decision of ‘ought.’” And they rejected traditional normative theories of justice with the idea that this legitimation could not occur by comparing the content of legal decisions to the content of independently derived theories of justice. The “ought” that distinguished process theorists from positivists was not a full-blown natural law, but a “special kind of decision
of 'ought'”—a determination not that a particular exercise of power was "right" in any normative sense, but rather that the appropriate institution had used the procedures that made that institution appropriate for deciding the kind of issue it had decided.

This turn in the approach to legal legitimacy placed a whole new set of topics at the center of scholarly inquiry. Suddenly, the *Erie* case in particular and choice of law issues in general would command the attention of the most "rigorous" legal scholarship. The choice of law doctrine represented in paradigm form the central questions of law generally—not whether one jurisdiction's rules or another should be chosen because they were substantively superior, but rather which laws should govern because the grid for the distribution of institutional decision-making power made one jurisdiction rather than the other the proper forum to resolve the issue.

Henry Hart's celebrated dialogue on the power of Congress to curtail federal court jurisdiction was an exemplar of legal reasoning for the fifties generation because the most important issues of legal legitimacy concerned the relationships between decision-making institutions—relationships between courts and legislatures, courts and administrative agencies, the sphere of private ordering and regulatory agencies, state courts and federal courts, etc. Thus, the critical focus of a truly "legal" analysis came down to the question "who decides?"—which institution's determination would govern in case of conflict. The principled analysis of this issue would then yield the "special kind of 'ought'" that was supposed to distinguish the rule of law from the mere application of force while simultaneously preserving the traditional distinction between law and politics. Procedural and jurisdictional legitimacy could be neutrally and apolitically determined, even if substantive legitimacy could not. To the extent that the boundaries of scholarship were themselves defined by the norms of neutrality and objectivity, a focus on issues of procedural legitimacy would address the particularly "legal" aspects of dispute resolution in a particularly "scholarly" way.

The proceduralist focus provided the basis for a uniquely "legal" form of ethical criticism flowing from the terms of the "principle of institutional settlement." The Harvard Law Re-

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view Forewords of the late fifties and early sixties reflected this critical bite of the process discourse. The Supreme Court was continually chastised, not for the content of decision making, but for the procedures: per curiam decisions were illegitimate because they failed to reflect the "duly established procedures" of judicial decision making, the "reasoned elaboration" of pre-existing principles, purposes, and policies through published opinions. Even Nazi law was found illegitimate, not for its vicious content, but for the failure to follow the procedural norms of notice and individual adjudication that were contained within the "principle of institutional settlement," transformed by Lon Fuller into the "inner morality of law."

The process-oriented scholarship consisted of various analyses of institutional procedures and interrelationships, informed by the underlying assumptions of the "principle of institutional settlement" that, once their work was completed, the legal scholars would have identified an encompassing calculus of institutional procedures and then matched them with a corresponding typology of social issues so that each social dispute would receive the appropriate dispute-resolution process. Wechsler helped complete the institutional competence calculus by working out its implications in constitutional law. Because the process approach made the legislature, by virtue of its democratic character, the ultimate authority over lawmaking by other institutions—courts, administrative agencies, and private parties—working out a theory of judicial review was pivotal to the completion of a systematic, process-oriented theory of American law.

If professional acceptance is the criterion, the fifties writers were incredibly successful. For nearly two decades, the process approach went virtually unchallenged in the world of legal scholarship. The premises of process theory became the background assumptions for a whole generation of scholars who believed the basic message that it was possible to talk about legal issues in neutral, apolitical ways, and that ideology was outside the realm of their legal discourse. And even today, when it is clear that any consensus that might have once existed as to the appropriate framework for legal theory has disintegrated, the process approach continues to form the background assumptions for most

centrist legal scholars who take the institutional focus of process theory as their starting point.

Within the belief structure symbolized by the "principle of institutional settlement," we can begin to make sense out of the focus by Wechsler and other fifties scholars on issues of institutional procedures rather than on substantive justice. By analyzing Brown in terms of whether the Court provided "neutral principles," rather than in terms of whether the result was right as a matter of justice, morality, or politics, the fifties scholars assumed that they were respecting the borders between law and politics on the one hand, and scholarship and advocacy on the other. Even those scholars who disagreed with Wechsler's conclusion that Brown was unprincipled tended to accept without question Wechsler's terms of argument within which the decision was deemed illegitimate unless it was supported by a neutral, impersonal, and essentially ahistorical reasoning process. Through the process/substance distinction, as reflected in the "principle of institutional settlement," what really mattered to the legitimacy of an institutional judgment was precisely whether appropriate procedures were followed, not whether the right result was achieved. The refusal to allow one's personal preferences to sway one's professional judgment meant focusing on process rather than substance and not being result-oriented with respect to scholarly criticism.

But the commitment to this kind of proceduralism itself requires explanation. If I have accurately described the centrality of the process/substance distinction for mainstream legal scholars, the next issue is why the distinction was so appealing in the fifties. In particular, we need to consider why the fifties thinkers so readily accepted the idea that substantive decision making was inevitably value-laden and political, and why they were so confident that simply changing the focus from substance to procedure would avoid issues of ideology and politics.

B. The Roots of Process Theory: Post-War Intellectual Culture 14

The focus on institutional procedures rather than substantive results was a response to two overriding constraints that the fif-

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14. This discussion of the intellectual background for fifties legal thought obviously summarizes and simplifies the issues. My approach, concentrating on the epistemological challenge of modernism and the centrality of the rise of fascism to intellectual discourse,
ties legal scholars would have felt: first, the deep assumption of the relativity of knowledge and values within which it appeared that any substantive vision of justice would be controversial and therefore outside the boundaries of legitimate legal analysis; and second, the need to legitimate the realm of law generally, and the power of courts in particular, as something nobler than the "raw" exercise of force. The first limitation flowed from the basic acceptance in American intellectual culture of the modernist critique of traditional nineteenth century social thought in the first decades of the twentieth century; the second was rooted in the challenge to the legitimacy of relativism in modernist thought presented by the rise of fascism in Europe. The history of how these two factors achieved the particular significance that they had in the fifties is, of course, a long story in itself. I want here simply to describe in broad outline form the way that mainstream American intellectual culture in the post-War years was unified around a self-image of tolerance, pluralism, and modernist sophistication, within which the distinction between process and substance could seem to play a progressive and liberal role.

1. Traditionalism, modernism, and realism— The sense of deadlock that legal scholars in the forties and early fifties felt was mirrored in other disciplines as well. The split between legal realists and legal traditionalists was merely one facet of a broader rupture in American intellectual culture between two fundamentally opposed visions of the nature of knowledge, truth, and society. Similar controversies had occurred in philosophy, economics, psychology, political theory, anthropology, and sociology since the twenties, although at different particular times and with a somewhat different spin according to the internal rhetoric of the discipline. Within each field, there was one group of scholars identified as traditionalists who generally followed the nineteenth-century methodology, and who were confident about the ability of reason to provide objective and universal knowledge about the world. Posed against the traditionalists were modernists who criticized the "metaphysics" of the traditionalists and offered instead a science "relative to consequences rather than antecedents."\(^{15}\)

Some idea of the depth of the assault on traditional intellectual categories implied by the new modernist paradigms can be

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has been influenced by the excellent discussion in E. Purcell, The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973).

gained from considering the changes within the field of philosophy. Throughout the nineteenth century, epistemology had always been the foundational discipline of Anglo-American intellectual categories. The basic idea was that philosophy was, in general, the ground of all other knowledge because, in the tradition dating back to Plato and Aristotle, it had always provided the tests to distinguish true knowledge from false, reality from illusion, reason from will, the universal from the merely contingent. Epistemology, the study of knowledge, was then, in turn, the foundational discipline for philosophy and for the great synthetic theories of the eighteenth and nineteenth centuries. The procedure was to start from some uncontroversial truth (the paradigm here is "I think therefore I am," or "man is by nature rational and selfish"), and then through the rationalist tools of analysis and synthesis to build from the basic truth up to a grand theory in whatever discipline one was working. This kind of large-scale theory, derived independent of the historical contingency of time and place, could then become an objective, universal truth, applying regardless of time and place, regardless of context. Flowing from the faith in the ability of a rationalist epistemology to distinguish truth from falsehood, an entire, integrated body of knowledge about society, ethics, government, and economics could be developed in and grouped into the category "political economy."

The modernist vision\textsuperscript{16} contrasted sharply with this picture of the organization of knowledge. The challenge to the traditionalists was, in a sense, completely symbolized by the creation of a new field of study, the sociology of knowledge. The very possibility of conducting a sociology of knowledge implied that epistemology could not be a foundational discipline for distinguishing true knowledge from falsity because what one took as knowledge was itself contingent and contextual, a derivative function of the social group in which one found oneself. Beliefs in the ultimate nature or value of things were not products of a rational epistemology, but instead were historically contingent and socially conditioned. And it was not just sociology that showed the con-

\textsuperscript{16} The rise of what I am calling "modernism" is associated with various social and political changes in the West in the 20th century. This is not an account of the causes of the challenge to traditionalist paradigms, nor an explanation of why the attack took the particular form that it did. I am simply trying to set the terms of the intellectual discourse within which the fifties thinkers in law found themselves situated. In particular, I am not suggesting that the content of the intellectual ideas themselves demanded a particular stance with respect to the social issues of their time; in fact, I believe the opposite.
tingency of belief. The rise of the social science paradigm in both anthropology and psychology seemed to confirm the relativistic premises of the sociology of knowledge. The very idea that one could construct a sociology of knowledge and a comparative anthropology of belief structure suggested a radical reordering of intellectual priorities. Epistemology, the study of knowledge, had to be subsidiary to the study of the society which produced that knowledge, rather than the other way around. Understanding the realm of the category "knowledge" meant first understanding how what was called knowledge functioned in a concrete social context in which particular assertions were taken as true and others as false. It meant understanding the contingency of tests of truth throughout history and according to different kinds of social experience.

Within American philosophy, the modernist position was presented as pragmatism—the renunciation of the epistemological project of rationalist philosophy in favor of a practical, functional inquiry. The pragmatists focused their critique on what they saw as the inherent formalism and essentialism of the traditionalist "metaphysics." The belief that there was something in the world, "truth," that could be identified in its essence through the process of contemplative reflection, then used to distinguish knowledge from myth, was itself a form of mythology. In its place, the pragmatists asserted a pluralist and instrumental vision of a lower-case truth that was contextual and relative rather than universal and absolute. Just as the sociology of knowledge contextualized truth to social relations, so within philosophy the pragmatists contextualized truth to social interest. Epistemology was no longer the grounding, foundational discipline that would gatekeep at the boundaries of truth and falsity because truth and falsity were not absolute, essential concepts. Instead, truth was subordinate to the question of function. The possible truth of a hypothesis had to be tested to see how useful it was in explaining things and to determine what its consequences were in the world of experience. There was no purpose in abstract musings about universalized concepts like Truth or Knowledge. All that led to was a complementary set of rational concepts capturing the metaphysical, otherworldly "true essence" of things but having nothing to do with reality—a formal, logical, and useless system of internally coherent thought.¹⁷

¹⁷. See, e.g., J. Dewey, Reconstruction in Philosophy (1920); W. James, The Meaning of Truth (1909); W. James, Pragmatism (1907).
The critique of the traditionalists generally followed this "antiformalist" or "antimetaphysical" rhetoric in the various fields. The traditionalists were characterized as something like neo-Aristotelean essentialists by modernists who placed context prior to essence. The modernists saw social, historical, psychological, and cultural conditioning where the traditionalists constructed objective theories of ethics and grand visions of Truth and Justice. The study of government would be transformed from political economy to political science and positive economics, behaviorism was posed against the nineteenth-century rationalistic psychology, ethics and epistemology were subsidiary to sociology and anthropology, and the method of rationalist reflection was challenged by the method of empirical observation.

Within legal thought, the legal realists made the modernist critique. In legal discourse, the traditionalist nineteenth-century commitment to large-scale, integrated theories of society took the form of a unified vision of law that centered around the public/private distinction of classical liberal political thought. According to the legal traditionalists, the legitimacy of contract, tort, and property law rested on the idea that these common-law doctrines were merely the neutral framework within which individuals pursued their own interests. The common-law fields together were presented as a private sphere of liberty within which individual legal actors were conceived to have chosen, either explicitly or implicitly, whatever legal consequences would be imposed. This private sphere was contrasted with a public sphere, within which government could legitimately regulate so long as it legislated in the public interest. The private sphere was the realm of individual choice, the public sphere the realm of social regulation. The judiciary's role was to enforce this boundary by distinguishing between duress and free will within contract law, and by keeping the government out of the private sphere in constitutional law.

According to the traditionalist imagery, this boundary enforcement could proceed neutrally and apolitically because it followed from the essential characteristics of free choice itself. It was therefore legitimate, for example, that the Lochner Court found unconstitutional legislation limiting the workday hours in a bakery because such labor-reform legislation violated the public/private line. It introduced the public power of the state into the private contractual choice of an employee and an employer. Only in cases where the common law itself would find a lack of free choice—that is, where the common law would find duress, fraud, or incompetency—could the legislature regulate. The pro-
tection of the economic free market was neutral because the market was a reflection of individual freedom to choose ends, as determined by the neutral doctrines of the common law. Interference with the market or (and this was the same thing) with the common law was therefore interference with liberty itself.18

Following the general lines of the modernist challenge in the broader intellectual field, the legal realists attacked the traditionalist identification of individual liberty with the doctrines of the common law. The critique largely centered on the demonstration that the principles through which the traditionalists defined the realm of contract, property, and tort were analytically indeterminate. According to the realists, the "free market" that the traditionalists would protect was the result of social power, not private will. The purportedly neutral common-law rules could all be reread as particular policy choices because, for every rule, there was a counterrule pointing in the opposite direction; for every precedent, there was a different one suggesting a contrary resolution.19 The choice, then, of the rule or the counterrule was a policy choice. Each could analytically apply in any given case. The rules were really standards, the principles really policies, the "free market" really just a particular form of regulation, private choices really reflections of public power, and the image of "a rule of law rather than men" really a sham. The realists argued that the traditionalists could only avoid the public and political implications of legal doctrine by means of "formalism," conceived as a kind of essentialism. Thus, the traditionalist protection of the "liberty of contract" depended on a particular metaphysical belief that "contract" and "free will" were real things in the world that could be neutrally and apoliti-


19. The classic realist casebook was organized according to the rule/counterrule structure itself. See F. KESSLER, & M. SHARP, CONTRACTS: CASES AND MATERIALS (1953). Powerful examples of realist critique of the neutrality of precedential and rule-based argument are K. LLEWELLYN, The Bramble Bush: Some Lectures on Law and Its Study 73-76 (1930); Cohen, The Ethical Basis of Legal Criticism, 41 YALE L. J. 201 (1931).
cally identified because they had certain essential characteristics. The application of the common-law doctrines of competency, duress, fraud, and consideration were supposed to answer neutrally the question of free will because, according to the realists, the traditionalists believed that the common-law categories transcendentally matched up with distinctions that existed in the world itself. The traditionalists, in short, engaged in "transcendental nonsense." 20

Just as the modernist tradition represented by the sociology of knowledge contextualized knowledge to social relations, and just as pragmatic philosophy took truth as contextual to social purpose, so the realists fundamentally challenged the traditionalists by placing their vision of the freely contracting individual in the context of a legally influenced social context. The private, individual free will that was supposed to characterize the consent to contract actually was exercised within the context of a public, social distribution of wealth. The terms at which one would agree to a contractual exchange were influenced by the bargaining power one had. And the bargaining power one had, was in turn, a function of the legal rules relating to the distribution of property and entitlements, a distribution that could not itself be referred back to any ground in individual will. The traditionalists' notion that law could be understood according to an integrated, unified perspective centering around the public/private distinction was a sham because the private realm that was supposed to provide the ground for the approach was itself an effect of public power. 21

According to the realist critique, the traditionalist image that law enforced preexisting private rights was circular. The rights were themselves a result of the legal decision to protect the freedom of one party at the expense of the security of the other. Legal decisions could not be based on rights because rights were the result of the determination of where to draw the particular line between the conflicting rhetoric of freedom to act and security from injury. The supposedly neutral and facilitative common-law doctrines were actually particular decisions of public policy and specific exercises of social power. Private consent occurred within this context of publicly determined bargaining.


power. What to characterize as free will instead of duress was itself a policy decision about how to regulate the economic field. The traditionalists’ principles could not be applied except through the sub rosa mediation of policy judgments, because none of the abstract principles had any necessary, essential correlates in particular doctrinal rules.

The realist antidote to the “metaphysics” of the traditionalists was, like the modernist movement in other fields, a heavy dose of behavioralism and functionalism. Thus, “law” could not be identified in any a priori way, through any essentialist concept of its true meaning. Instead, it could only be observed in action, in seeing how officials actually responded to disputes. The value of a legal decision could not be determined by a rationalistic test of conceptual coherence, but instead depended on how the rule functioned in practice, on its social consequences.\(^{22}\)

Like the rupture between traditionalists and modernists in the more general intellectual culture, the opposition between the realists and the traditionalists proceeded within polar terms of argument that appeared to reflect a threshold impasse between two diametrically conflicting views of law and social life: where the traditionalists saw rules, the realists saw standards. Where the traditionalists saw private choice, the realists saw public power. The traditionalist conviction that law consisted of neutral, background principles was challenged by the realist demonstration that the law was rooted in social policy. The traditionalist dedication to essential form was opposed by the realist focus on observable function. The traditionalist invocation of law as protecting private rights was challenged by the realist vision of law as distributing public power.

2. The symbolic role of fascism— The rise of fascism in Europe interrupted this struggle over intellectual premises between the traditionalists and the modernists and gave it a new, heightened, and dramatic urgency. American intellectuals began to feel that something beyond theoretical posturing was at stake, that the intellectual conflict had real-world implications in the immediately pressing context of broad social repression by the Nazis. The debate between traditionalists and modernists soon reflected an overriding preoccupation with the question of which stance was better poised to oppose the fascist challenge. The

manner in which this debate was resolved, and the way that American intellectuals diagnosed the ideological causes of authoritarianism, constitute a critical turning point in the construction of the self-identity of mainstream American intellectuals. John Dewey’s pragmatic compromise between the traditionalist conviction that moral authority depended on belief in the objectivity of truth and ethics and the modernist assertion that such issues were necessarily contextual and relative became, by the fifties, the broad filter through which the first generation of post-War intellectuals in America would understand both their roles as intellectuals and the general legitimacy of American society.

The normative basis for opposition to fascism posed a particular ideological dilemma for pragmatic and social-science-minded modernists in intellectual life generally, and for realists in law particularly. In the political context of the pre-War period, the modernist assumptions of the social construction of knowledge and belief had always been associated with the politically liberal and progressive symbolism of social welfare ideology. But the rise of fascism led to charges that linked the modernist mindset with isolationist politics. If value and justice were truly relative, and concepts like right and wrong simply the products of culture, then from what vantage point could modernists condemn the Nazis? If the pragmatic test of truth were accepted, then was Italian fascism to be judged favorably because it pragmatically “worked,” i.e., the trains ran on time? What good was a philosophy that said truth depended on what “works” in the world, but then couldn’t take any position on the issue how “works” would be defined? If human behavior was scientifically predictable according to social conditioning, then why couldn’t the formation of tastes, ends, and values all be scientifically molded for the best social world? At what point could social science stop short of its totalitarian implications? And if, as the realists suggested, there were no moral or ethical absolutes with which to evaluate law, if law was simply “the prophecies of what the courts will do in fact,” as Holmes asserted, then the realists were actually saying that law is whatever those in power say it is, that might makes right.

In the interstices of traditionalist polemics against modernism was the implicit charge that the rhetoric of the science of society

echoed the discourse of fascism itself, with its emphasis on the ability of technocratic science to fashion the best society and the master race. In the emotionally intense setting of World War II and the struggle against fascism, the Anglo-American traditionalists accused the modernists of moral vacuity in the face of the greatest evil that the modern world had experienced. The modernists had to answer the charge that their conception of a science of society was fundamentally immoral because science could serve any master, even Nazis.

It is important to emphasize here that, even within the conceptual terms of the debate with traditionalists, the modernist American intellectuals had various ways available to them to understand the relationship between their theoretical commitments and their political and existential opposition to fascism. The particular way that they articulated the evils of authoritarianism was not determined by the logic of their conceptual apparatus, nor by any essential characteristics of fascism itself. It reflected, instead, a social and political choice to interpret the issues of their time in one particular way, to the exclusion of other plausible views of their social environment.

There were, at the outset, three principal alternatives analytically available to respond to the traditionalist claim that modernism was guilty of moral relativism. One route would have been to continue carrying out the most radical implications of the modernist attack on the legitimacy of the old order by reflexively extending the premises of the social sciences, say of sociology or anthropology, to the social sciences themselves. Here one could imagine the sociology of sociology, and then the sociology of the sociology of sociology, with no stopping point. Taking seriously the premise of the social construction of knowledge would have quickly exposed the infinite regress contained within the methodological assumption that the social scientist could have objective, scientific knowledge about what a society called "objective, scientific knowledge." The functionalism of the social sciences would have begun to look like a kind of formalism within which certain observational categories—a kinship economy or a dispute-resolution process—took on the status of universal, essentialist functions, that is, a priori assumptions, filtering the social scientist’s experiences and observations. In short, this development from the modernist critique of the old order would have understood the significance of the critique to lie in the demonstration that the claim to authority under the mantle of a true knowledge, whether rationalist or of the social science variety, was false. Knowledge was necessarily socially con-
structured and could always be constructed differently, and therefore there could be no distinction between knowledge and politics.

Continuing the modernist critique would have led to critical reflection about the ideological functions played by the historical claim to knowledge and truth in the economy of social power in Enlightenment culture. In law, the realist critique of formalism and essentialism would have extended from the particular liberty of contract approach to the more general ideological role that the claim to neutral legal decision making played in justifying various forms of social power. The extension of the modernist critique would have opposed fascism while remaining critical towards other forms of false authority claimed under the mantles of Reason and Science. Rather than interpreting fascism as the result of “irrational” nationalism, emotionalism, racism, and mob action, it would have emphasized the ways that the Nazis themselves justified their authority through the rhetoric of Science and technocracy.

A second possible response to the charge of moral relativism would have been to take the modernist positions as representing a new, objective vision of truth and society, an actual correction of the “mistakes” of the traditionalists. This alternative would have met the charge of ethical relativism by claiming an objective basis for the resolution of ethical questions. The modernists then would have turned idealism on its head by reversing the traditionalists’ metaphors of ontology, epistemology, and causation. Rather than consciousness preceding existence, the modernist ontology would understand social existence as the ground of consciousness. Consciousness would be seen as relative to social relations. In psychology, economics, and political theory, the constituent unit of analysis would be the social institution rather than the individual, and the assumption would be that the individual was, in a sense, a function of social environment rather than a free-standing rational unit. Indeed, this kind of competing substantive vision was implied in the empirical method itself, in the assumption that the facts preceded the theory rather than the other way around. This response would have posed modernists against fascism through the rhetoric of a true science that found in the nationalism and irrational mobs of the Nazis evidence of a lack of scientific objectivity and dispassion. In law, the reversal of the traditionalist metaphors of understanding would have substituted the social group for the focus on the individual, the public for the private, policy for principle, and function for form. The realist analytic would have been taken as
the basis for a social-welfare view of law that would be legitimate because it would follow the model of the social sciences generally.\textsuperscript{25}

The third alternative, the one chosen by the American intellectual mainstream, rejected both of these options. Instead of either continuing to contextualize claims of knowledge to social ideology, or offering the process of contextualization itself as the foundation for a substantive social theory based on the group and the social structure rather than the individual, the mainstream fifties thinkers answered the criticism of relativism by making the fact/value distinction a foundational organizing principle for post-War intellectual discourse. John Dewey’s response to the charge that the modernist movement was implicated in the rise of authoritarianism\textsuperscript{26} shows how this turn toward a reinterpreted positivist analytic\textsuperscript{27} provided a new center for American intellectual rhetoric. His defense of pragmatism was echoed in the way that the modernists would be institutionalized within each particular field of the humanities and social sciences, including law.

Dewey brilliantly turned the relativist and instrumental premises of the modernists into a virtue rather than a vice. According to Dewey, value-relativism did not lead to condoning the fascists. Quite the opposite. It was philosophical absolutism, the ar-

\textsuperscript{25} In fact, something like this generally tracked the way that the critique of idealism proceeded in continental intellectual life. The rise of concentration on social theory as the new foundational discipline, and the implication of socialism in particular, or the idea of the social welfare state in general, as the substantive political theory flowing from the modernist critique was evidence of this. The strength in Europe of Marxism, existentialism, and structuralism as substantive visions defensible on grounds of the observation of human history and the social world is comparable. Here the idea was that all knowledge was socially constructed, but that ideologies could be themselves distinguished and evaluated—in the Marxist tradition, false consciousness could be distinguished from true; in the existentialist tradition, bad faith could be distinguished from authenticity; and in the Freudian tradition, the true unconscious structure could be distinguished from the repressions and distortions of consciousness.

\textsuperscript{26} See J. \textsc{Dewey}, Freedom and Culture (1939); see also J. \textsc{Dewey}, supra note 17. See generally E. \textsc{Purcell}, supra note 14, at 197-266.

\textsuperscript{27} I am not suggesting that Dewey was a classic positivist in the sense that he believed in a pure realm of facts, separate and divorced from values. Rather than seeing facts and values as occupying two divorced realms, with the realm of facts privileged as objective and true, Dewey’s pragmatism, as it became embedded in American intellectual culture, separated facts and values by making the realm of reason subsidiary to the realm of values. Here, in contrast to classic positivism, values were privileged as the frame within which facts were interpreted or gathered. Or, to put it in other terms, reason was conceived as instrumental. Despite these important differences between Dewey and the classic positivists, I have chosen to characterize Dewey’s ideology as “positivist” in order to emphasize the way that it preserved the centrality of the fact/value distinction even as it changed the hierarchical relationship between the terms.
rogance that one has the true vision of things, that supported the fascists' notion that they could legitimately impose their vision on others. The social science approach, the functionalist methodological focus, and the pragmatic epistemology all shared a relativism about ultimate truth and an agnosticism about ends. Values and ends were outside the realm of knowledge. They were the givens with which the pragmatic scientist would work, but about which the scientist could say nothing, lest objectivity be compromised.

But rather than suggest a thoroughgoing relativism, the conviction that values and ends were beyond the grasp of social science actually carried within itself an intermediate kind of normative premise (something like the "special kind of decision of 'ought'"): the commitment that an open, democratic society was superior to a closed, totalitarian one. The philosophical conclusion that values were necessarily relative rather than absolute itself suggested certain truths: open and free inquiry was preferable to dogmatically held or imposed belief; diversity and tolerance were preferable to conformity and repression; and democracy was preferable to dictatorship.

Democracy, in Dewey's imagery, was precisely the experimental, open-ended method of pragmatism and social science reflected in social, institutional form. The laboratory of democracy, the experimental laboratory of values, would choose the purposes and ends to be pursued in social life. The assumption of relativism would mean that no particular value choices would ever harden into social dogma. Instead, they would always exist as hypotheses, to be tested according to democratic choice and discarded if the voters decided that they didn't work.

The pragmatic approach made no claim to knowledge at the level of substantive politics. It was open to differences in goals, ends, and values because it was committed to free and open inquiry. The free society was experimental, open to different visions for social life, tolerant of the differences in the ends of different people, and ultimately tolerant of the differences in people themselves. At a deep metaphorical level, absolutism in intellectual work was linked to the concept of the pure master race, the essential human, in fascist ideology.

Rather than choose between the fundamentally different visions of the traditionalists and the modernists, Dewey made the fact/value distinction the main feature of a discursive peace treaty that divided up the territories of intellectual and political life into a realm of instrumental reason and a realm of irreducible value conflict. Rather than pose the modernist methodology
as an alternative substantive vision, Dewey neatly suggested that the modernists, in fact, had transcended substantive debate itself. Substantive debate occurred at the level of ends, values, purposes, and goals, all outside the realm of the new instrumental reason that would apply only to means, not to ends themselves. The distinctions between fact and value and ends and means would thus, in turn, provide the boundaries between politics and science, the social field and the intellectual one.\(^\text{28}\)

Dewey’s synthesis of the relativist assumptions of modernist thought with an intellectual justification for opposition to authoritarianism did more than simply provide a coherent response in the ongoing debate about ethics occasioned by the rise of fascism. It also subdued the feeling of opposition and rupture between modernists and traditionalists by placing their differences within the terms of a broader consensus. The radical threat that the modernist paradigm initially posed in intellectual life was to call into question the possibility of any form of rational discourse free from the influence of social structure, of politics. If knowledge had no essential attributes, but instead was a function of contingent cultural beliefs, then intellectual work itself would appear to be political, deciding which forms of belief to privilege as truth and which to marginalize as mythology. But Dewey’s rhetoric rescued the distinction between reason and politics by making the claims to reason more modest and subordinate. In Dewey’s discourse, modernist reason was instrumental, but it still occupied a realm separate from mere belief and opinion.

The humanist pragmatism that Dewey advocated was more than a philosophical position. In the period immediately after the Second World War, it became the cultural framework that defined for mainstream American intellectuals their roles as intellectuals and, more generally, their conception of the difference between freedom and domination. Within this self-understanding, standing for liberty and freedom against the forces of domination and oppression represented by fascism specifically meant not taking a stand on substantive issues of politics and

\(^{28}\) The differences in the resolution of the critique of traditionalists between America and Europe would be traced to an original and historic “American exceptionalism” that had from the beginning reflected the attitude of pragmatic, nonideological trial and error; America seemed to have a deep consensus on the procedures for resolving disputes rather than a tie to any particular ideology. See D. Boorstin, The Genius of American Politics 1-35 (1953). America represented “the end of ideology” itself. D. Bell, The End of Ideology: On the Exhaustion of Political Ideas in the Fifties (1960).
the distribution of social power. Intellectuals would respect the boundary between knowledge and politics by a steadfast value-neutrality, refusing to privilege one belief structure over another. Through the interpretation that linked European fascism (and later communism) to philosophical absolutism, they imagined that the preservation of liberty and freedom depended on ensuring that no substantive vision of truth or justice would be favored. Being enlightened and "open-minded" meant not having an ideology. Being democratic meant encouraging pluralism. And being mature and realistic meant suppressing the more radical implications of the old order's disintegration.

In the context of the fifties, this stance was aligned with many seemingly liberal and progressive positions. Intellectuals argued for free speech, against McCarthyism, for free and open inquiry in scholarly research and in public discourse, for an end to religious indoctrination in schools, for tolerance of dissent and cultural nonconformity. It was legitimate to take such stands in their professional roles because these issues concerned the structure and procedures that made a free, pluralist society possible. These were the ethical absolutes that were contained within the notion that there were no ethical absolutes. On the other hand, it was a political question whether there ought to be significant redistribution of wealth or social power in American society, whether socialism or capitalism ought to reign. The commitment to freedom and democracy meant understanding that such questions were to be decided through open debate in the social field. The new consensus that defined the intellectual mainstream in the fifties was accordingly marked by a division between a commitment to the procedural freedom symbolized by free speech and open inquiry and a refusal to take a stand on substantive social issues.

II. The Analysis of Institutional Competence under Process Theory

A. The Confidence in Consensus

Are the positions which have been taken thus far in these materials conventional and generally accepted? Might a representative chairman of the Republican National Committee, for example, be expected to agree with them? A chairman of the Democratic National Commit-

This passage appears at the end of the section of the Hart and Sacks Legal Process materials devoted to the "principle of institutional settlement." 30 It is remarkable for the grand confidence it reflects in the way that the "principle of institutional settlement" resolved the antinomies that had divided the several preceding generations of mainstream legal scholars. This imagery of consensus about the uncontroversial character of the process approach to law mirrors Dewey's confidence in his more general resolution of the rupture between traditionalists and modernists because, in terms of the new intellectual culture they helped construct, the process-theorists of the fifties were embarked on the same project as Dewey.

Like Dewey, the fifties legal scholars were faced with the apparent necessity of taking a stand on the fundamentally opposed visions of law and social life represented by the traditionalists and realists. Like Dewey, they associated the socially oriented modernist approach with intellectual sophistication and progressive politics, but needed to find a way to answer critics who identified realism with moral and ethical relativity in the face of fascism. And like Dewey, they resolved the intellectual impasse by refusing to choose, instead seeming to transcend the whole debate through a larger, more general vision: the distinction between process and substance. Their immense confidence in the wide appeal of the principle of institutional settlement flowed from the fact that Hart and Sacks imagined that they were part of a great wave of historic change linked up with and confirmed

29. H. HART & A. SACKS, supra note 8, at 123.
30. Id. at 1-123. Their discussion is striking in that they pay a great deal of attention to methodological and epistemological issues as they had been articulated in the social sciences and the humanities—in the first full set of text notes the legal process student is informed of the basic purposes of social life (to maximize the sum total of satisfaction of valid human wants with a roughly acceptable distribution), the appropriate differences in the "nature of knowledge" between natural science and social science, and the reasons why Holmes's positivist image of law through a bad man's eyes was misguided. It is therefore no accident that in their vision of consensus they explicitly include so many academics from other fields.
by the transformations within other intellectual disciplines. They believed they accomplished for law a decisive turn in understanding, one that made the intellectual sophistication represented by a "younger professor of anthropology" reflecting "the most recent trend of thought in this field" consistent with a pluralistic tolerance of substantive differences that extended all the way from mainstream Republicans to party Communists.31

The process/substance distinction articulated in the "principle of institutional settlement" seemed an ingenious solution to the dilemma that the fifties lawyers perceived. On the one hand, the rise of European fascism made it imperative that the rule of law in "free" countries be distinguished from the rule of force in authoritarian society. But, in their view, the only available substantive theory with which to distinguish law from politics was the traditionalist approach tying the very idea of a rule of law to the particular market-oriented common law doctrines reigning at the turn of the century. The traditionalist view of legal legitimacy would require the resurrection of *Lochner* and the repudiation of the New Deal.

Realism appeared more politically progressive and intellectually sophisticated. The realist demonstration of the inevitable policy dimensions of legal argument helped to legitimate the progressive social welfare programs of the thirties as no different in kind from the economic regulation implicit in the enforcement of the old common law. The problem, however, was that the realists simultaneously impugned the law/politics distinction itself, just at the moment when the rule of law was being presented as the key difference between democratic and totalitarian societies. If all legal decision making was policy, then the characterization of judicial action as "the rule of law rather than men" seemed illegitimate.

The fifties thinkers believed that, in the process approach, they had found a framework that could legitimate the basic structure of American legal institutions while transcending the stalemated debates between realists and traditionalists that had dragged on in one form or another since the thirties. They thought that they had created a truly pluralist and pragmatic discourse for critical evaluation of law, one that would at once reflect the intellectual sophistication of the realist debunking of

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31. In light of the fact that they were writing a coursebook, their attention to the social sciences is also striking, confirming the sense that they were aware of, and took themselves to be taking a stand on, the struggles between traditionalists and modernists that had divided the various fields.
formalist" decision making while investing American legal institutions after the New Deal and the war against fascism with a legitimacy that would mark off the "free world" ruled by law from the "authoritarian" one ruled by will.

The polarization of legal thought in the 1930's and 1940's had made it appear that some fundamental choice was necessary. But just as the fact/value distinction served as a territorial truce line in the more general intellectual conflict, so Hart and Sacks were sure that the process/substance distinction was the geographic foundation for a pluralist tolerance of both the traditionalist and realist visions of law. Just as Dewey had rendered the modernist relativism acceptable by limiting it to the priority of ends and values, so the fifties legal scholars made legal realism acceptable by editing out its most radical implications, by domesticating the realist critique to the realm of substance.

The process-theorists could then integrate a tamed realism back into the mainstream of legal thought. The sophistication of realism would be utilized to articulate the content of law and would be reflected in the notion that any legal question was potentially open to "policy" analysis and the methodology of "balancing" interests. With respect to the judiciary in particular, there was an explicit concession that what courts did was often no more than policy-making. On the other hand, the delegitimizing implications of the realist work could be avoided by keeping realism in its place, by making ultimate questions of legal legitimacy depend on a vision of process divorced from substance and thereby protected from the corrosion of realist critique.

Through the distinction between process and substance, the fifties theorists could walk a pluralist middle ground between the traditionalist belief in ethical objectivity and the realist implication of relativism. On the one hand, the principle of institutional settlement reflected the acknowledgment that, as the realists had suggested, there was no a priori, transcendental content to law. In terms of substance, there was only the positive fact that a particular decision had been made by a particular institution. The relativity of value premise of modernism would be taken to mean that the identification of legitimate legal decisions could not turn on a substantive theory because any such theory would encompass value judgments. Hence the notion in the principle of institutional settlement that "when the principle
... is plainly applicable, we say that the law 'is' thus and so, and brush aside further discussion of what it ought to be.”32

On the other hand, the traditionalist identification of law with value-free neutral principles was reflected in the conviction that, in the realm of procedure, neutral, value-free reasoning was possible. That is, it was still possible to assert that an institutional decision “‘ought’ to be accepted as binding...unless and until it is duly changed.” While substantive decision making might ultimately be political, procedural analysis could be both normative and neutral.

Once the distinction between process and substance was properly understood, no fundamental choice between what appeared to be the polar terms of legal debate was necessary because, according to the process rhetoric, the stalemate between realists and traditionalists was based on a shared misconception that the legitimacy of law depended on its content. The process/substance distinction would transcend the whole struggle by seeing the critical issues of law on a “more fundamental” plane, a vantage point from which the battle between realists and traditionalists could be subsumed to the level of substance, outside the boundary of useful legal analysis.

The process approach to law presented an image of pluralism within the content or substance of law as well—law could include both rules and standards, principles and policies, private decision making and social regulation, a mixed sphere of both individualistic and collectivist norms, both sides of the traditionalist and realist opposition. Rather than base the legitimacy of law on these substantive choices, Hart and Sacks asserted that the “institutionalized procedures for the settlement of questions of group concern” were “obviously more fundamental than the substantive arrangements in the structure of a society...since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively.”33

In short, the fifties process-theorists reconceived the relationship between law and politics in a way that closely mirrored the reconceived relationship between reason and values as articulated by Dewey. Just as reason was both a source of values (in the sense that free and open inquiry would lead to at least provisional truths) and simultaneously merely instrumental and subordinate (in the sense that all reasoning was necessarily situated within a framework of values and therefore was subsidiary

32. H. Hart & A. Sacks, supra note 8, at 4.
33. Id. at 3.
to that framework), so in the Hart and Sacks conception law, conceived of as institutional procedures, was both the “source of the substantive arrangements” and, simultaneously, merely instrumental in the sense that law was subsidiary to politics. Institutional procedures were merely the “means” that could serve any content for law. Society might, for example, choose a capitalist, socialist, or social welfare economic policy. The procedures within which such choices were made and implemented were conceived as both the neutral source for, but analytically separate from, such political decisions themselves.

The incredibly quick acceptance of the process approach across the legal field reflected the sense on the part of post-War legal scholars that they had found a way to pull everything back together, that their intellectual commitments were fundamentally consistent with their moral and political beliefs, so that understanding the principle of institutional settlement in law in turn meant being able to demonstrate what was wrong with Nazism (and right with America) without having to resort to necessarily unprovable moral judgments. They could reject the traditionalist conception of law and yet preserve the distinction between law and politics necessary to their understanding of the difference between a regime of law and an authoritarian regime of imposed values. The distinction between law and politics would survive with law playing a subordinate role to democratic choice, just as, in the more general mainstream intellectual culture, the distinction between reason and values survived by making reason serve an instrumental role. And just as Dewey’s articulation of a humanist pragmatism served as a generative moment for the unification of mainstream American intellectuals, so the distinction between process and substance served as a generative moment for the self-understanding of what would count as “common sense” in legal thought.

B. The Structure of Institutional Legitimacy

It would be useful at this point to outline the actual framework for thinking about institutional decision making that the process-theorists utilized. I will again use the Hart and Sacks Legal Process materials as the main source for this description. While other process writers might have developed the analysis of particular institutions with greater sophistication, the Legal Process text was by far the most ambitious attempt to describe American law comprehensively, including all of its major institu-
tional settings and accounting for the various permutations of interrelationships between institutions. In fact, the only major institutional relationship not treated within the comprehensive vision of the *Legal Process* was the category of judicial review of legislation, the subject of Wechsler's *Neutral Principles* and of the next section of this Essay.

Hart and Sacks rested their framework for institutional analysis on the starting premise of the relativity of value. First, they rejected the notion that the objectivity of law might be rooted in a substantive social theory. Hart and Sacks asserted that, while the realists were correct that law was a social science, the realists failed to understand that social science was fundamentally different from natural science because the "science of society" dealt with people engaged in purposeful activity. Their purposes could never be determinately and objectively identified and ranked, and thus social science involved an ethical dimension not involved in natural science's impersonal observation of inanimate objects. The methodology of law was, like all social sciences, necessarily "judgmental" and "prudential" rather than empirical and positivist.

But the fact that substantive decision making was necessarily inexact and somewhat subjective did not mean that legal analysis could not be ethically neutral. The ethical dimension of law was not substantive, but procedural. As Hart and Sacks put it, the very notion of law necessarily involves an ethical premise that "defiance of institutional settlements touches . . . the very foundations of civilized order, and that without civil order morality and justice in anybody's view of them is impossible." The idea of a substantive relativity of value, in short, contained

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34. *Id.* at 121.

35. *Id.* at 116.

36. *Id.* at 120. But that element of ethical judgment necessary to the study of law would not disqualify law as a science. Although knowledge about legal institutions could never be as positive and determinate as natural science's knowledge about inanimate matter, it also would not be totally indeterminate. "The science of society builds upon a vast reservoir of human experience and human reflection about the experience" that "makes plain that what is involved is a process of interaction between social ends and social means." *Id.* at 121. Since social means are fixed in terms of the context of a particular society, the range of possibility for the social scientist is considerably narrowed. Moreover, as the social scientist considers the aims of the social institutions with which he is concerned, his inquiry is narrowed still further. Any remaining doubt about the social purposes can ultimately be resolved by the principle of institutional settlement itself. "By continuation of this process, the practicable range of choice . . . reaches a point at which the extremes of choice, however far apart they might seem, are relatively close together as compared with the range of choices that, as an original matter, might have been thought to be open," *id.* at 122, although "the course of action finally chosen will also have to be selected by an act of judgment," *id.* at 123.
the ground for an objective analysis of procedures through which substantive visions could compete peacefully, just as, for Dewey, the notion of value relativity contained the justification for democracy, open debate, free and open inquiry, and tolerance of nonconformity.

The normative charge of the fifties approach was contained within this realm of process. Because a commitment to the procedure of institutional settlement was implicated in the relativity of value premise itself, an institutional decision was entitled to respect regardless of its substance, so long as the appropriate procedures for resolving a dispute had been observed. The key issue in process theory accordingly would be how to identify the appropriate procedures for resolving various kinds of social disputes. Once such procedures were identified, it would be possible to assert neutrally the application of the normative prong of the "principle of institutional settlement," the notion that a particular decision "ought to be respected."

The idea of democracy was central. Because social decision making was at its heart "prudential," there could be no fixed test for the legitimacy of the substance or content of law. Rather than follow the traditionalist attempt to carve out a "public" realm of social life within which the legislature could regulate, distinct from a realm of "private" liberty from which the legislature would be kept out, the process-theorists implicitly accepted the social welfare implications of realist work in assuming that the range of questions across the substantive field were rooted in issues of social policy. There was no analytic separation between a private sphere characterized by neutral, framework principles and a public sphere characterized by social policy. Because there was no neutral, determinate way to evaluate substantive policy differences, they were ultimately "left to be made by count of noses at the ballot box."37

The combination of relativistic and objectivist approaches not only defined the separate realms of process and substance, but also characterized the discourse within the procedural realm itself. Alongside the democratic rhetoric, which was based on the assumption of ultimate relativity, was a discourse of dispute resolution based on an objectivist, social-science vision of functional adaptation. The animating idea was that social disputes and institutional procedures could be categorized easily into a small set of types. Process-theorists justified procedures employed by various institutions through the idea that they were

37. Id. at 123.
specially adapted to the particular kinds of issues that they considered. Hart and Sacks began their study in the *Legal Process* materials anthropologically, by noting the universal need in every society for some dispute-resolution procedures. In complex modern societies, "different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions." 38 The process-theorists imagined that there could be a kind of natural, functional correlation between different kinds of disputes and different kinds of institutions, so that the categories of dispute could be matched up with the kinds of institutional procedures corresponding to them. Combined with the premise of general democratic supremacy, this functional correlation between types of social disputes and various modes of "institutional competence" was the basic regulative principle driving the organization of the *Legal Process* materials.

Once one understands the basic idea of a dual commitment to democracy rooted in relativist assumptions and to other institutional procedures based on objectively functional criteria, the actual institutional framework that was supposed to follow from these premises can be outlined fairly easily. First, at the most general level, substantive issues involving preferences, values, and ends were within the special competence of the legislature. If the legislature had spoken on such an issue, courts would follow the legislative resolution because, under the principle of institutional settlement, the legislature was competent to decide those kinds of issues according to its democratic procedures. There would be a functional correlation between the nature of the dispute and the kind of procedure that had been utilized to resolve the dispute. "Duly established procedures for making decisions of that kind" would have been followed.

The fifties theorists accordingly shared the realists' opposition to *Lochner* and the liberty of contract approach, but not on the basis of any substantive or ethical opposition either to the market ideology of liberty of contract or to the market reality of sweatshops and ghettos. Such substantive opposition to *Lochner* would lack neutrality since it would inevitably involve a value judgment. Instead, the fifties scholars opposed *Lochner* on what they saw as neutral procedural grounds. Precisely because the choice between the free market and regulation involved a value choice, the proper *procedure* to resolve that issue was the democratic process of the legislature. The inevitable fact that sub-

38. *Id.* at 3.
stantive value judgments would be contentious and controversial, entailed a rational consensus about the functional necessity for appropriate institutional procedures to resolve substantive disputes.

Similarly, the role of courts in the system of dispute resolution could be deduced from the institutional characteristics of the judiciary. Under the institutional competence calculus, the relative competence of courts was marked by their ability to engage in what Hart and Sacks termed the method of "reasoned elaboration."39 "Reasoned elaboration" referred to a sense of craft within which the judiciary could elaborate principles and policies contained within precedent and legislation to reach a reasoned, if not analytically determined, result in particular cases. In general, if an issue was capable of a reasoned resolution, the judiciary had jurisdiction to decide the issue so long as the legislature had not already spoken. On the other hand, if an issue was not capable of "reasoned elaboration," that is, if it involved mere "preference" or "sheer guesswork,"40 then it was beyond the competence of the judiciary and therefore outside the functional jurisdiction of the courts.41

The process-theorists' image of the judiciary acting in either a common-law or statutory interpretation capacity contrasted sharply with the focus on the "counter-majoritarian difficulty" at the constitutional review level. The judiciary as painted by Hart and Sacks was starkly activist. Common-law judges were

39. Id. at 165-68, 487.
40. Id. at 123; see also H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 HARV. L. REV. 1 (1957).
41. The dispute between traditionalists and realists over the essential characteristics of law was resolved by a contextualizing pluralism within the contours of the judicial function. Sometimes a rule would be appropriate for the resolution of a particular kind of case, other times a standard would be appropriate. Nothing in the concept of law could tell you in advance which would be appropriate where; it was a "prudential" decision that depended on figuring out how the relevant social purposes could best be effectuated in the particular situation. Similarly, there was nothing in the concept of law or courts that determined whether reasoning should proceed from deontological principles or utilitarian policies. Again, it depended on a prudential decision made in the context of a particular fact situation. The realist focus on policy and the traditionalist focus on principle would be pluralistically joined within the method of "reasoned elaboration." Similarly, some social issues would best be left to the realm of "private ordering"; others might require a form of official regulation. The determination of the market/regulation issue did not have to be made on an all-or-nothing basis because these kinds of decisions were also contextual, not essentialist. And thus in the field of contracts, for example, the strange combination of individualist premises, represented by classical contract doctrine, and collectivist premises, reflected in the protection of reliance interests and the general extension of duties beyond the terms of individual consent, could continue side by side because no fundamental choice between individualism and collectivism was necessary.
not limited to the application of neutral principles. Instead, they could also identify and help implement social policy. Rather than conceive legislation from the classical perspective as an exceptional, limited incursion into the grand common law, Hart and Sacks advocated that legislation be read in the same way as common-law precedent, as revealing principles and policies from which the judiciary might reason to a result in a particular context. The rigid common law of the traditionalists could be reformed by judges acting as deputy legislators in bringing the legal doctrines in line with the more general policies and principles of social life reflected in legislation. Cardozo was a hero.

The legitimacy of this activist and reformist judicial power at common law as a "special kind of decision of 'ought'" was based on both functionalist and democratic imagery. The functional justification for an activist common-law judiciary proceeded from the same analysis that revealed the need for institutionalized dispute resolution in the first place. It was structurally impossible for the democratically elected legislature to consider every particular social dispute that arose. Given the procedures of democratic decision making in representative central bodies, the legislature could consider only the most pressing and most general disputes that had been left unresolved in other institutions. The legislature basically operated as a second-line dispute-resolution forum. But there was a functional necessity for a front line of institutionalized dispute resolution to rule on the mass of conflicts that arose day-to-day in society, and that was the special role of the common-law courts.

This functional justification itself was ultimately rooted back to the legislature. The lack of traditional, rulelike boundaries to the power of common-law judges was justified by the fact that courts were only acting interstitially. The legislature could always change the common law if the courts took a path with

42. And since the method of "reasoned elaboration" marked the boundaries of judicial competence, the judiciary, when working in a statutory interpretation mode, would attribute reasonable purposes to the legislature and try to carry those purposes out in consequentialist fashion. See Eskridge & Frickey, supra note 7, at 695.

43. The courts' particular institutional competence was based in publicly having to rationalize decisions; the judiciary's "duly established procedure for making decisions" was the method of "reasoned elaboration" of the preexisting principles and policies reflected in judicial or legislative precedents. Accordingly, just as the special democratic character of the legislature made it institutionally competent to be the ultimate arbiter of substantive issues for which there was no possible neutral and objective resolution, the special rationalization process of the judiciary made it institutionally competent to decide issues that were capable of reasoned, if ultimately only "prudential," resolution.
which the legislature strongly disagreed, and the issue was of sufficient general interest. Courts could accordingly see themselves as something like deputy legislators. They were engaged in the same general, interrelated system of institutional settlement, responding to the same social purpose to maximize the total satisfactions of cooperative group life. They also had been implicitly delegated the authority to decide issues according to the means of "reasoned elaboration" whenever the legislature, through statutory generality or statutory silence, left its wishes subject to interpretation.

A similar "institutional competence" analysis determined when other institutions' decisions were legitimate under the terms of the "principle of institutional settlement." For example, the functional competence of an administrative agency was characterized by its ability to acquire expertise over a specialized range of social life. The agency's democratic legitimacy flowed from seeing agencies, like courts, as deputy legislatures making law interstitially, always subject to legislative correction and acting within the limits as defined by the legislature. Just as the legislature implicitly delegated authority for frontline dispute resolution to the courts, it often preferred to legislate through broad standards implemented by an expert group of administrators responsible for crafting intermediate regulations to carry out the legislature's general purposes. Just as the implicit delegation of substantive decision making power to courts was interpreted as a delegation to the method of "reasoned elaboration," so the delegation of substantive decision making to administrators was interpreted as an implicit delegation to the method of "expertise." An agency decision was entitled to respect under the principle of institutional settlement so long as the "duly established procedures" of decision making were followed, that is, so long as the agency decision reflected the expertise that functionally and democratically established its jurisdictional limitations. 44

Similarly, the private sphere that the traditionalists had glorified as the realm of liberty and freedom, and that the realists had derided as a sham, was reconceived by Hart and Sacks as simply another set of institutional procedures particularly ap-

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propriate for specific kinds of social transactions. The chief characteristics of this realm of "private ordering" were its flexibility and decentralization; under the procedures of private ordering, arrangements could be closely tailored to the specific needs of the individual parties. It was always hoped that social issues could work themselves out without the need for official state intervention, but shortsightedness and overreaching on the part of economically strong parties, and the need for standardization and coordination of complex social arrangements, sometimes made regulation imperative. If judicial, legislative, or administrative regulation was necessary, there was no qualitative conceptual or rhetorical hurdle to overcome to legitimate such intervention. Instead, regulation was simply another form of institutional interrelationship in the web of interlocking and complementary governing arrangements that formed the process-theorists' description of power in American society.45

The grid of institutions described by Hart and Sacks (private ordering, legislation, administrative regulation, executive regulation, and judicial lawmaking through the common law and statutory interpretation) formed the basic framework for the process-theory approach. While other writers worked out the process analytic in particular institutional contexts (labor law, administrative law, and federal courts were the areas of greatest concentration), the great significance of the Legal Process text lay in the possibility it held out that a seamless, symmetrical, and comprehensive vision of American law was still possible, regardless of the disintegration of the grand nineteenth-century models under the modernist and realist attacks.

By focusing on institutional context, the process-theorists accomplished a transformation of how the category "law" was understood. Throughout American history, law had been conceived in mainstream discourse as a unified concept. Accordingly, when the legitimacy of law was impugned, it was always typically challenged in all of its manifestations. An attack on the power of judges in the Jacksonian period, for example, was conceived to include both common-law and constitutional judges. When the realists attacked the supposed neutrality of legal reasoning, they criticized law in both constitutional and common-law contexts. And when conservative opponents of the New Deal claimed that lawmaking by administrative agencies was illegitimate, they utilized a concept of law gleaned from notions of how the judiciary should act. The process focus challenged this unified vision of

45. H. HART & A. SACKS, supra note 8, at 207-365.
law by contextualizing what "law" meant according to the particular setting in which law was made. This conceptual turn opened up the possibility that the test of the legitimacy, say, of agency decisions need not be the same as the test for the legitimacy of common-law decisions. It revealed a sophisticated understanding that "agreements" in the so-called private market were a particular form of lawmaking. And, more starkly, this kind of contextualizing meant that the test for the legitimacy of common-law or statutory interpretation lawmaking would not be the same as the test for the legitimacy of the judiciary when acting in a constitutional review capacity. The issue of "judicial activism" would, of course, survive. But the connection between the legitimacy of constitutional review and other judicial roles was severed. Which brings us back to Wechsler.

III. THE SPECIAL ROLE OF JUDICIAL REVIEW

[W]hether you are tolerant . . . of the ad hoc in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.

. . . [l]t has become a commonplace to grant what many for so long denied: that courts in constitutional determinations face issues that are inescapably "political" . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone.

. . . But what is crucial, I submit, is not the nature of the question but the nature of the answer that may validly be given by the courts. No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action—however

much we may admire such a reasoned exposition when we find it in those other realms.\textsuperscript{47}

A theory of judicial review was critical for the completion of the fifties institutional competence approach. The issue would have been important in any event within process theory because it involves the relationship between two major decision-making institutions. Its significance was exponentially increased because the process-theorists put enormous weight on the legitimacy of the legislature within the general institutional framework. It was the legislature’s democratic character that made it appropriate as the final arbiter of substantive decision making and the root of the legitimacy of the other decision-making institutions, such as common-law courts, administrative agencies, and courts engaging in statutory interpretation, whether acting interstitially or as deputy legislators.

Moreover, the “institutional competence” of the judiciary at the constitutional law level was necessarily different from the judiciary’s competence in other roles. If “reasoned elaboration” was the loose, flexible kind of decision making that characterized common-law adjudication and statutory interpretation in the Hart and Sacks model, it lost its claim to legitimacy where it no longer played merely an interstitial role. In the judicial review context, there was no functional basis, such as the need for a front line of dispute resolution in the absence of legislative consideration, that could justify the exercise of judicial power. And, of course, it could not have the democratic legitimacy suggested by the image of an implicit delegation from the legislature, since judicial review confronts legislative action itself. The functional distinction between roles explains how the fifties scholars could view judicial action in common-law and statutory interpretation roles and administrative action as legitimately activist and reformist and yet be staunchly opposed to judicial activism at the level of constitutional law.

The image of the “counter-majoritarian difficulty” captures the issues that formed the starting point for most fifties constitutional scholars. They accepted the realist idea that all substantive decision making involved controversial value choices and viewed the laboratory of democracy as the final arbiter of substantive value. Therefore, there seemed to be no basis for the exercise of judicial review, except perhaps where the legislature had violated a clear and determinate constitutional provision.

\textsuperscript{47} Wechsler, \textit{supra} note 1, at 15-16.
Wechsler was writing in a context in which this narrow view of judicial review was quickly becoming the consensus in legal scholarship. The great debates between Hand, Wechsler, and Bickel about the power of judicial review all took place within the discourse of process theory. Although they worked out their arguments differently, Hand, Wechsler, and Bickel all defined judicial power through a comparison of the institutional competence of the legislature and the judiciary. They all concluded that the democratic character of legislative decision making dictated a severely constrained realm of judicial review.

This kind of approach to constitutional law is still so familiar to us that it may be difficult to see that, in terms of the traditionalist constitutional law analytic that it replaced, the process perspective represented a major transformation of discourse. The traditionalists had always tried to derive the power of judicial review directly from a substantive political theory. They conceived the function of judicial review in geographic terms, to protect a sphere of private rights from the substantive reach of the legislature. And thus their articulation of the appropriate realm of judicial review was based on an analytic distinction between public and private areas of social life. The scope of judicial review flowed naturally from the definition of legal rights contained in a substantive political theory. It needed no other justification than the neutrality and objectivity of the view of the private realm of freedom that it protected. The realist demonstration of the inevitably public context within which so-called private rights were exercised, and the logic of the New Deal social welfare ideology, stood directly opposed to the traditional vision of the role of constitutional law because it belied the substantive premise for a delineation of a realm of private rights divorced from social power.

The fifties constitutional theorists reflected their realist sophistication by rejecting the possibility that a substantive theory of rights could determine the proper scope of judicial review. Instead, they focused on procedure rather than on substance, on institutional competence rather than on any distinction between public and private areas of social life. The power of judicial review was inferred from the structure of the separation of powers rather than dictated by the text of the Constitution. See L. Hand, The Bill of Rights (1958). Bickel responded to their positions in The Least Dangerous Branch. A. Bickel, supra note 5, at 46-65. Wechsler began his lecture by disputing Hand's premise, finding textual support for judicial review in the supremacy clause and the notion that the Court was obligated to adjudicate any case within its jurisdiction.

48. The Neutral Principles article was first presented as the 1959 Holmes Lecture at Harvard. The previous year Learned Hand had used the same forum to make his argument that the scope of judicial review should be severely circumscribed because the power was inferred from the structure of the separation of powers rather than dictated by the text of the Constitution. See L. Hand, The Bill of Rights (1958). Bickel responded to their positions in The Least Dangerous Branch. A. Bickel, supra note 5, at 46-65. Wechsler began his lecture by disputing Hand's premise, finding textual support for judicial review in the supremacy clause and the notion that the Court was obligated to adjudicate any case within its jurisdiction.
private right and public power. The task of constitutional theory was to develop the boundaries for the institutional competence of the judiciary when acting in the special role of judicial review, just as Hart and Sacks had identified the appropriate boundaries for the judiciary at common-law and in statutory interpretation modes.

Wechsler's solution, reflected in the passage that opens this section, utilized all the main elements of the process approach. Initially, he echoed the more general rhetoric through which the fifties scholars domesticated the realist argument that all law involved political judgments. While acknowledging that "courts in constitutional determinations face issues that are inescapably 'political,' " Wechsler limited that concession to the realists by placing it within the broader context of the principle of institutional settlement. The boundaries of judicial competence represented by the sphere of "political questions" did not envelop the whole of constitutional law, but merely the particular kinds of issues that were not amenable to resolution according to the court's functional method, the reasoned elaboration of neutral principles. The "political question" doctrine was thus only a particular, doctrinal instance of the more general institutional settlement calculus within which any institution's jurisdiction to determine an issue ran out at the point where its procedures were not functionally adapted to the particular conflict. Political issues merely required the judiciary to do what it must do generally in judicial review: interpret the Constitution to determine which institution was the "duly established" one for the resolution of that particular kind of dispute.

The notion that broad judicial deference to legislative judgment avoided controversial constitutional issues was therefore, in Wechsler's view, incoherent. There was no conceptual way for the courts to avoid, at least implicitly, passing on the constitutionality of legislation as it carried out the judicial function of adjudication. Even as the judiciary appeared not to rule on "political questions," deference to the legislature involved an implicit judicial determination that the Constitution gave the legislature the authority to decide the particular issue.

The realist's assertion that there was no way to avoid making a judgment on the legality of a challenged exercise of power was correct. "No decision" was really a decision. But constitutional review did not need to be "inevitably political" because the judiciary could decide on principled, proceduralist grounds: "[W]hat

49. Wechsler, supra note 1, at 15.
is crucial . . . is not the nature of the question but the nature of the answer that may validly be given by the courts.” Although the substantive issues underlying all constitutional determinations present “a choice among competing values,” there was a principled way to review the constitutionality of legislation through “the type of reasoned explanation . . . intrinsic to judicial action.” Thus, the determination that a “political question” was presented meant that the issue was beyond the institutional competence of the Court because it was not amenable to reasoning through neutral principles. Conversely, when the Court could give neutral principles in support of its determination, constitutional review would be legitimate and not antidemocratic because, by definition, value judgments would not be at stake.

Instead of a constitutional theory based on the content of decisions, Wechsler offered one based on the procedures that the Court must observe in coming to decisions. Such procedures would distinguish the legal character of courts from the political character of legislatures. Politics was the realm where principles were merely instrumental “manipulative tools,” used in ad hoc and result-oriented fashion to further a particular substantive interest. Law, on the other hand, was genuinely principled because it rested on the process of “reasoned explanation,” on “reasons quite transcending the immediate result.” While legislatures might conduct a consequentialist analysis of “gains and losses,” the courts, when exercising the power of judicial review, could not be utilitarian or consequentialist. While common-law courts might consider both policy and principle, courts engaged in constitutional review confronted the policy choices of a democratically elected legislature and therefore could consider only “neutral principles,” not policy judgments. The judiciary in this context needed criteria “that can be framed and tested as an

50. Id.
51. Id.
52. This distinction between reason and will reflected the rejection of what Wechsler perceived as the illegitimate positivism of the realists that led to the notion that might makes right. “Those who perceive in law only the element of fiat . . . will not join gladly in the search for standards . . . [nor will those who] frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests . . . they support.” Id. at 11.

Like the process-theorists generally, Wechsler was drawing a distinction between process and substance as the basis for constitutional interpretation: a result-oriented constitutional theory was illegitimate because it could not be neutral—it was inevitably tied to “interests” that the proponent wanted to hinder or advance, and it conceived of the court in simply positive terms, as a “naked power organ.”
exercise of reason and not merely as an act of willfulness or will."  

Wechsler then applied these standards to particular constitutional cases. First, like others, he criticized the Supreme Court's resolution of various desegregation and obscenity cases in which the Court had acted per curiam. Because the Court's functional legitimacy was tied to the reasons given for its decisions, judgments that offered no reasons for its results could not be legitimate. Those were the easy cases of illegitimate decision making under the proceduralist analytic.

Wechsler next praised the Court's broad reading of Congressional power in the commerce clause decisions since the mid-thirties. Because there was no basis for principled distinctions about the range of federal legislative power, the interpretation of the commerce clause was like a "political question," outside the realm of constitutional review because its resolution required judgments of value and expediency. And he found the Supreme Court's abandonment of the Lochner-era liberty-of-contract approach legitimate because he could find no principled and neutral basis upon which to distinguish permissible and impermissible regulation of the economy.

Finally, in the discussion with which his article is most closely associated, Wechsler criticized the Court's decisions in the white primary cases, in Shelley v. Kraemer, and in Brown v. Board of Education according to the same test of legitimacy: the analysis of whether the kind of issue that the Court considered

53. Id. at 11. This kind of foundation for the power of judicial review would, of course, be looser than that suggested by Hand. While Hand warned that enforcement of the Constitution beyond the clear text and its history would make the Court a "third legislative chamber," without the legitimacy of democratic procedures, L. Hand, supra note 48, at 42, Wechsler emphasized that the text was rarely clear and, in any event, neither text, history, nor precedent could make constitutional interpretation totally determinate because the legitimacy of judicial action always depended on the strength of the reasons articulated for the decision through the method of reasoned elaboration. Constitutional provisions did not embody "finite rule[s] of law," but instead "special values" which were susceptible to "adaptation and adjustment" when necessary. Wechsler, supra note 1, at 19. In short, Wechsler was not a substantive formalist; he perceived the content of constitutional law in terms of general standards rather than traditional determinate rules. The appropriate role for the critic was to determine whether the method of principled resolution was satisfied, whether the Court stayed within its institutional competence. The legitimacy of judicial review turned not on the content of the issues resolved, but "on the kinds of answers given to the questions posed." Id. at 16.

54. In any event, the states were represented in Congress, and thus the process of Congressional decision making could be counted on to reflect state interests. See Wechsler, supra note 1, at 24.


56. 334 U.S. 1 (1948).

was amenable to resolution by neutral principles. Wechsler asserted his personal support for the results of the antisegregation decisions, saying they "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years." But the test of their legitimacy, if one were truly committed to the rule of law rather than expediency, was not whether one agreed with the content of the results or with the value choices they reflected, but rather whether they rested on the appropriate procedure for resolving constitutional disputes, that is, the procedure of reasoning through neutral principles.

The determination that "private" political parties were subject to constitutional norms in the white primary cases, and the conclusion that state court enforcement of racially restrictive residential covenants was unconstitutional in *Shelley v. Kraemer*, both failed this test because the Court did not even discuss how the requisite state action was involved. Wechsler rejected the argument that constitutional norms should be extended beyond official government action because many so-called private parties—like giant corporations—wielded power comparable to that of formal state agencies. Such a functionalist analysis of the character and degree of power exercised by various groups in society was beyond the judicial competence because it could not be resolved on a principled basis. The issues involved questions of judgment, and therefore the determination of how far to extend constitutional norms beyond official state action should be dealt with by legislation "where there is room for drawing lines that courts are not equipped to draw."

Wechsler’s critique of the *Brown* decision then followed from these same premises. *Brown* was illegitimate because it rested on factual contingencies or value judgments rather than on neutral principles. The finding that segregated schools were "inherently unequal" was not principled ground for the constitutional ruling because it was fact-specific to the sociological testimony in the particular case. Expert witnesses in other school cases testified in contrary ways, and, in any event, Wechsler contended that the social-science evidence was relative to the specific research upon which the conclusion of inequality and harm rested and to the specific questions that the expert was asked.

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58. Wechsler, *supra* note 1, at 27.
59. 334 U.S. 1 (1948).
Wechsler speculated that the decision really was not based on the sociological evidence of harm to black children from segregation, but instead rested on the view that racial segregation must necessarily entail denial of equality to the minority, "the group that is not dominant politically and, therefore, does not make the choice involved." But this ground also could not be principled, because it either made constitutionality turn on the subjective motive of the legislature or on the subjective interpretation of the legislation by those subject to it, who "choose" to see segregation as inequality or who "resent" segregation. A principled analysis would make the constitutional determination turn on the objective character of the legislation itself. If there were objectively equal facilities, Wechsler argued, the question whether racial segregation entailed inequality necessarily depended on one's point of view, implicating a value choice that the judiciary did not have the institutional competence to make.

According to Wechsler, *Brown* actually involved a "conflict of human claims" in the application of the "freedom to associate." Legislated segregation denied freedom to associate to those who wished it, but integration forced association on those for whom interracial association might be "unpleasant or repugnant." What was involved was a conflict between different social interests, a conflict that no neutral principle could resolve.

IV. THE FORMALISM OF PROCESS

I have described some features of the conceptual and cultural history underlying Wechsler's rhetoric in order to recover the sense of how Wechsler and the other fifties lawyers could believe that their commitment to procedural and institutional analysis was not only neutral and uncontentious but simultaneously liberal and progressive, inspired by an authentic devotion to democracy and the rule of law and posed against the forces of dictatorship and oppression. Central to the way that American legal discourse was reorganized in the fifties were the ideas that a commitment to democracy made a substantive theory of justice unnecessary, and that a focus on procedural legitimacy made the rule of law possible. In the context of the post-War discourse of American intellectuals, Wechsler's procedural and institutional

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61. *Id.* at 33.
62. *Id.* at 34.
63. *Id.*
focus in constitutional theory is recognizable as part of a much wider phenomenon: the coalescence of an entire generation of mainstream scholars around a single discourse to determine the basic legitimacy of power in the United States. The fifties intellectuals rested their resistance to the more radical, antiauthoritarian implications of the disintegration of the old order, and their faith that American social power was distinguishable from the mere rule of force and could be legitimated on an apolitical normative basis, on the distinction between process and substance.

I have tried to make the Neutral Principles argument comprehensible in light of the idea that legitimate legal analysis must take place within the contours of the overriding distinction between process and substance and within a normative understanding of the functional limitations of various institutionalized modes of dispute resolution. In this description, Wechsler's opposition to Brown appears to flow automatically from the determination that the case involved value judgments. Given the premise of "equal facilities," there was no objective basis upon which to find inequality in Brown. Given no objective, value-free basis on which to decide, the case presented a "political question" outside the jurisdiction of the judicial competence when acting in the constitutional review context.

But this image of analytic necessity, the idea that Wechsler's opposition to Brown was determined by the conceptual structure of post-War intellectual discourse, is illusory. The rhetoric of process theory could only be appealing if one already possessed a particular outlook and attitude toward the legitimacy of the social arrangements of American society such that one could believe that the norms that characterized the rhetoric of process discourse also characterized day-to-day life in the institutions that the fifties writers considered. Some link had to be made between process theory as a utopian possibility and process theory as an accurate description of the ordinary workings of American social life. Rather than being the "source" for substantive value choices made in American institutional life, the intense commitment by fifties scholars such as Wechsler to proceduralism was the effect of a particular, and benign, view of American society within which the possibility of social domination had been defined away. The normative prong of the process approach resolved the antinomy between the "is" and the "ought" that characterized the rupture between previous generations of legal scholars by simply conflating the "is" with the "ought," by assuming that the abstract norms of democratic choice and cul-
tural tolerance were also concrete characteristics of American society.

The resolution of the traditionalist/realist debate through the process approach was an ingenious compromise between the formalism of the traditionalists and the relativism that realism threatened only if the process/substance distinction could actually be drawn, only if proceduralist analysis could proceed normatively because it was divorced from the inevitable controversy of substantive decision making. But the process/substance distinction could not have dictated the positions that Wechsler and others took because the distinction was analytically indeterminate; in order to apply the institutional competence analytic, one had to make substantive political and ethical judgments about the permissible range and extent of institutional power.

The confidence on the part of the fifties legal scholars that the distinction between process and substance transcended the old antinomies between the traditionalists and realists was misplaced. The very same issues that the fifties scholars thought they were avoiding through the geographical delineation between a relativist, policy-based substantive realm and a normative, but neutral and determinate, procedural realm reemerged in the actual application of the proceduralist solution. In other words, even accepting at the abstract level the notion that a meaningful inquiry into the legitimacy of a particular exercise of power could consist of a jurisdictional analysis of whether an appropriate forum, employing appropriate procedures, had resolved a dispute, there was still no way to implement the approach in concrete instances without reverting either to an empty formalism that bore the discredited tradition of Lochner-era essentialism, or to a functionalist determination of procedural legitimacy that always implicated the very substantive issues that process-theorists had conceded were inherently political.

I will develop this argument by focusing on Wechsler's treatment of Brown. Here I return to the questions that opened this essay: Why didn't the actual distribution of wealth, jobs, political

64. Now, at the outset, the concentration on Wechsler's opposition to Brown may seem too easy a target for critique, given the near-universal acceptance of Brown in our contemporary context, and the fact that later process-theorists, most notably John Hart Ely, have refined the analytic so that at least the result in Brown is rendered compatible with the basic process/substance distinction. But Wechsler's analysis of the Brown decision reveals endemic characteristics of process theory that mark the approach whatever the specific institution under analysis. Moreover, it is important to focus on the reigning image of legislative legitimacy because the fifties theorists and later scholars following their intellectual agenda made the democratic character of the legislature the ground for
Social power, intellectual prestige, educational opportunity, housing, and social status between whites and blacks in fifties America prove the inequality that Wechsler could not find from the fact of segregated schools in *Brown*. More generally, why wasn’t the fact that the school segregation in *Brown* was only a part of a pervasive social structure of state-supported institutionalized racism enough to justify the Court’s conclusion that segregated public schools were part of the social subordination of blacks?

The quick answer to these questions should be clear at this point. The determination whether broad scale social domination of blacks existed—so that the segregation in *Brown* would be seen as part of a larger social inequality—was a value question. Therefore, it was beyond the judicial competence to decide.

It is important to emphasize this point. Wechsler was not asserting that broad-scale racial domination did not exist. He was saying that such inquiries into social, historically contingent power relations between groups were inherently political and value-laden. As Wechsler posed the issue of equality, it was either explicable in terms of an objective, principled comparison of concrete facilities such as school buildings, or it depended on the personal and subjective, even psychologically based, reactions of blacks who “choose to put that construction upon” racial segregation and women who “resent” gender segregation. The imagery of choice and psychological resentment contrasted with the imagery of the comparison of facilities in the same way that values contrasted with facts. The “equal facility” comparison could be factual and objective, not a matter of individual opinion, psychology, or will.65 Because any determination whether segregation was part of a system of social inequality would inevitably require the consideration of subjective factors, it would necessarily involve a substantive evaluation of society that the judiciary, by virtue of its elite, unelected character, was not competent to perform. Because value judgments were outside the judicial competence in the constitutional role, the only principled way to resolve the case was to treat it like a “political question” and therefore neutrally to decide, on institu-

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65. It is hard to believe that Wechsler was actually implying that racial domination was all in the heads of blacks in the 1950’s; instead, by individualizing as choice or psychological reaction the way that blacks and women understood segregation, Wechsler was trying to highlight the contingent and subjective nature of any evaluation of power in society.
tional competence grounds, that the legislature was the appropriate institution to resolve the issue. The concept of democratic self-determination meant that the judiciary could not pretend to decide neutrally issues that were really political in that they depended on a *choice* to interpret the social world in one way rather than another. In upholding the constitutionality of school segregation, the Court would not be ruling on the value question whether such segregation involved a denial of equality, but instead would be holding that the issue was not amenable to judicial procedures of dispute resolution.

Now, at this point, one could argue with the way that Wechsler categorized the world he described. Even if one believes that it is noncontroversial to assume a fundamental distinction between “objective” facts and “subjective” feelings, represented in Wechsler’s rhetoric as the contrast between “concrete facilities” and “choice” or “resentment,” it seems already to reveal a particular ideology for Wechsler to assert as a real possibility in 1958 that the identification of racial domination depended on subjective feelings rather than objective facts, that it was controversial to describe race relations in fifties America as marked by “inequality.” But rather than focus on Wechsler’s particular categorization, I want to proceed by assuming that Wechsler properly characterized the question of inequality as “subjective,” as not susceptible of neutral, principled resolution. The issue here is what was supposed to follow from that premise.

In Wechsler’s discourse, it followed automatically that if there was no neutral way for the judiciary to resolve the issue of racial segregation, it was to be left to the legislature. But there was, in fact, no necessary analytic link from the proposition that it was a value question whether school segregation was a form of social inequality to the conclusion that deference to legislative judgment was in order. Even on its own terms, Wechsler’s institutional analysis was ultimately incomplete and flawed. According to the principle of institutional settlement, deference to another institution’s resolution of a particular issue depended on a determination that “duly established procedures for making decisions of that kind” had been followed. Finding that the issue in *Brown* involved a value judgment constituted merely half the analysis—before deference to the legislature was in order, the judiciary would have to decide that the legislature actually employed the procedures that made it competent to decide the issue, that is, that the legislature was truly democratic. Just as an administrative agency decision was not entitled to deference if the processes of expertise were not applied, so a legislative decision
was not entitled to deference under the principle of institutional settlement if the processes of democracy did not characterize the legislative decision.

Recall that, in the imagery of "the counter-majoritarian difficulty," the basis for the Court's limited competence in the role of judicial review was inferred from a comparison of the relative competence of the judiciary and the legislature. The constitutional court was confined to a principled, value-free analysis because it lacked the democratic legitimacy that the legislature enjoyed, and therefore when it confronted legislative choices, it could not legitimately impose its own values.

But if the legislature were not democratic, there would be no basis for deference to the legislature and conversely no justification for the limitation of the judicial role to a "neutral" analysis. The key issue was how the democratic character of the legislature would be identified. The identification of appropriate judicial procedures itself rested on that determination.

It is striking that the fifties constitutional law theorists who made the "counter-majoritarian difficulty" the centerpiece of their entire theoretical approach never bothered to consider the legitimacy of legislative action. Although Wechsler's argument for "neutral principles" reflected his commitment to an institutional competence analysis, and although his analysis concluded that the lack of a principled resolution required deference to the legislature, he failed to complete the analysis by applying the institutional competence calculus to the legislature itself. The limitation of the judiciary to "neutral principles" flowed from the democratic character of the legislature, but the institutional analysis as carried out in the fifties always stopped short of considering whether the actual basis for this deference existed.

One explanation for the failure even to consider the basis for the legitimacy of legislative action in the fifties is that, framed in terms of their reaction to authoritarianism, the fifties lawyers

66. A. BICKEL, supra note 5, at 16.
67. Not until John Hart Ely's refinement of process theory in the mid-seventies did a process theorist in constitutional law even begin to set forth a critical framework for distinguishing between legislation that deserved deference because it reflected the democratic processes that made the legislature competent to decide substantive issues and legislation not entitled to respect because it called the legislature's democratic legitimacy into question by "closing the channels of political change" or by burdening a "discrete and insular minority" structurally unable to protect itself in pluralist, interest group politics. See J. ELY, DEMOCRACY AND DISTRUST (1980). While not directly the subject of this Essay, it is worth noting that, although Ely's work constitutes a massive refinement of process theory, it also exposes the status-quo-oriented bias of the approach. See generally Parker, supra note 7.
simply took it as an article of unquestionable faith that American society was fundamentally democratic. They simply assumed the democratic legitimacy of the legislature and built the rest of their institutional calculus around that assumption.

But the failure of the process-theorists to consider the legislature's legitimacy reflects a myopia in process theory that runs deeper than the specific historical context of the reaction to fascism. Instead, it is merely one facet of the more general tendency on the part of the fifties generation of legal scholars to present their stance as neutral and apolitical based on suppression of the very possibility of social domination from their vision. In each application of process theory, they employed an institutional formalism to avoid the analytic problem that the legitimacy of an institutional process depended on a substantive determination of the justice of a particular institutional decision. This formalism assumed away the possibility that the institution in question might not actually work as imagined in the grid of institutional competence theory.

Had Wechsler addressed the issue of the procedural legitimacy of the legislature, he would have confronted the problem that the substantive issue in *Brown*—whether segregated public schools were part of a social structure of domination and inequality—was implicated in the institutional competence determination whether the legislature could be characterized as democratic. There was no neutral way to decide the case on the basis of relative institutional processes because, in the identification of "democracy," process and substance overlapped. If the segregation of public schools was part of a state-supported institutionalized domination of blacks, the conclusion that the legislature was democratically legitimate was impugned unless democracy was consistent with such a widespread social domination that the concept lost its coherence as a legitimizer of social decision making. By advocating deference to legislative judgment, Wechsler was implicitly taking a substantive stand on the issues as he identified them. He assumed that social domination of blacks either did not exist or that such a racial regime did not impugn the legitimacy of the legislature.

An analysis of the democratic legitimacy of the legislature would have exposed the inevitable indeterminacy and circularity of the process analytic. If the determination of the institutional legitimacy of the legislature ultimately depended on a substantive and value-laden analysis of the actual power relations existing in society, the limitation of the judiciary to a neutral principles analysis meant that the judiciary would never be able to
determine whether the legislature was in fact democratic, or whether society was instead rife with social and political domination. The institutional competence analysis ultimately rested on this analytic loop—the judiciary had to defer to legislative value judgments because the judiciary was unelected and therefore incompetent vis-à-vis the legislature to make value choices, but the democratic character of the legislature, the ground for the deference, could never be determined by the courts because it depended on the resolution of issues of value that were beyond the judicial competence. The limitations on the judiciary that were inferred from the democratic nature of the legislature prevented the judiciary from determining the democratic legitimacy of the legislature in order to justify those limits in the first place. The determination of the institutional legitimacy of the legislature, from which the circumscribed power of judicial review was inferred through the "counter-majoritarian difficulty," was beyond the competence of the judiciary given the "counter-majoritarian difficulty."

This analytic circularity is most obvious in Wechsler's treatment of the white primary cases. Wechsler's complaint about the Court's holdings in *Smith v. Allwright* and *Terry v. Adams* that major political parties could not exclude blacks from voting in primaries to choose candidates for state-sponsored elections was that the Court failed to show how the requisite state action was manifest, since the parties were at least formally private. Wechsler reflected his realist sophistication in his openness to the possibility that other "power aggregates in our society" might functionally exercise power similar to the state and therefore should be subject to the same constitutional norms. In short, there was no formal, on/off bright line that distinguished state power from private power. It was a question of degree and function rather than of essential characteristics. But precisely because it was a question of degree, a policy determination, the Court was incompetent to decide the issue. Instead, under the typology of institutional competence analysis, the constitutional-review Court was to defer to legislative balancing "where there is room for drawing lines that courts are not equipped to draw."

In the dynamic of Wechsler's argument, the realist sophistication about the limits of substantive formalism—here the inabil-

68. 321 U.S. 649 (1944).
69. 345 U.S. 461 (1953).
70. Wechsler, supra note 1, at 31.
71. Id.
ity to identify the difference between the private and public realms except through consequentialist applications of public policy—was immediately grafted onto a normative theory of institutional formalism, ironic and bizarre in the white primary context because the very issue under consideration concerned the democratic legitimacy of a legislature that was a product of racially exclusive election schemes. Only by assuming at the abstract, schematic level of institutional competence analysis that policy questions belonged in the legislative domain could Wechsler have failed to notice the circularity of his argument.

The problem was that, just as the realists showed that the traditionalist concepts of free will and duress were analytically indeterminate, and therefore that their application in any particular context required a policy judgment, so the procedures that were supposed to legitimate decision making by various institutions under process theory were indeterminate and could only be applied through sub rosa substantive judgments. For example, the conclusion that the legislature was democratic rested on the judgment that life in American society was open and free enough to be called "democratic," just as the traditionalist conclusion that particular contracts were the result of free will rather than social power rested on the judgment that economic life was based in individual choice rather than structural constraint. But there was no analytic reason why process theory could not be applied in dramatically different, and critical, fashion—if one started the institutional competence analysis under the principle of institutional settlement by first considering the competence of the legislature, and if one determined that democracy was inconsistent with the pervasive social domination of blacks, then there would be no basis for the limitation of the judiciary to neutral principles and no basis for questioning the institutional legitimacy of the Court in a case like Brown.

The very same substantive issues that a democratic institution was supposed to decide, given the modernist premise of the impossibility of an objective theory of substantive justice, were implicated in the determination of whether the legislature was a democratic institution. And this wasn't simply true in the dramatic context of Brown, where the connection between the substantive issues in the case and the institutional legitimacy of the legislature seems, at least in retrospect, obvious. Take, for another example, the issue of the distribution of wealth, the very paradigm of the kind of subject matter that was within the unique competence of the legislature because it involved political and ideological controversies that, after the realist attack,
process-theorists were convinced had no principled resolution. Given the controversial nature of economic policy about, say, rates of subsidy and taxation, the institutional grid of process theory assigned the issue to legislative resolution. But the distribution of wealth was also implicated in the determination of whether democracy existed in the first place, and thus whether any legislative resolution of such issues about the distribution of wealth was legitimate and worthy of respect as a "special kind of decision of 'ought.'" Before deferring to the legislature on economic issues, the Court would have to conclude that the existing distribution of wealth was consistent with democratic self-determination. The substantive controversy for which one wanted democratic resolution was implicated in the determination of whether democracy existed in any particular context, unless one was willing to say democracy was consistent with any distribution of wealth, no matter how lopsided and regardless of what degree of privation it implied for those at the bottom.

This analytic loop was not limited to consideration of the legitimacy of the legislature. It was endemic to process theory in all of its institutional contexts, because it reflected the re-emergence, within the process approach, of the opposition between formalism and functionalism that the process-theorists thought they had transcended through the distinction between process and substance. There was no neutral way to distinguish between substantive issues that made a theory of procedural neutrality attractive were always potentially implicated in determining the procedural legitimacy of any particular institutional decision. For example, the "duly established procedures" of collective bargaining were centered around the duty to bargain in good faith. Process-theorists working in labor law drew a sharp distinction between the legitimate enforcement of the procedures of collective bargaining and the illegitimate imposition of substantive terms on management or labor. But one couldn't know whether each side bargained in good faith unless one could distinguish an employer's good faith negotiation from a bad faith desire to bust the union. And that determination in turn might rest on whether the employer had rejected a substantive union proposal that was reasonable in the circumstances. Similarly, one couldn't know whether an administrative decision was entitled to respect until it was determined whether expertise was applied, and one couldn't determine whether expertise was applied until one distinguished substantive decisions that would be foolish by expert standards from decisions that would be reason-
able by expert standards. In the process approach to federalism issues, one couldn’t tell whether state-court determinations of federal law should stand unless one determined that the federal issues received a “full and fair hearing,”72 but one couldn’t determine the fairness of the hearing unless one determined whether the state judiciary was hostile to federal claims, and one couldn’t determine that without looking to the actual substantive disposition of the federal issues.

The application of the premises of process theory could require the very substantive choices that the focus on process was supposed to avoid. The procedural attributes that were supposed to define the competence of the various modes of social decision making—“democratic decision making,” “good faith bargaining,” “expertise,” “a full and fair hearing”—were themselves indeterminate standards. There was no analytic reason they could not be applied in a functionalist, realist manner to pierce the external formalities of institutional legitimacy. In the collective bargaining context, for example, a determination of procedural legitimacy could consist of either the formal, external manifestation of bargaining—the fact that labor negotiators sat in a conference room together and spoke to each other—or it could extend to a functional evaluation of whether the substantive proposals offered and rejected were reasonable or whether they manifested a true purpose to subvert the bargaining requirement and the institution of labor/management self-determination. In the administrative review context, the principle of institutional settlement might be satisfied by the fact that “experts” with appropriate credentials decided a particular issue in the discourse of scientific jargon, or it could require a determination whether an administrative decision was truly “expert” or simply a substantive blunder.

But process-theorists couldn’t allow procedural legitimacy to turn on the content of a decision. The whole reason for the focus on process in the first place was the belief that there was no neutral method to evaluate substance. In order for process theory to appear value-neutral, institutional legitimacy had to be identified in a way that respected the foundational distinction between process and substance, and therefore that stopped short of a functionalist review that required consideration of the substantive merits of institutional decisions in order to determine their procedural legitimacy.

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72. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 456-57 (1963); Peller, supra note 7, at 675.
Accordingly, the resolution of the rupture between the traditionalists and realists through the principle of institutional settlement ultimately depended on limiting the reach of realism to the realm of substance and on utilizing the formalist method of the traditionalists in evaluating institutional legitimacy, so that questions of degree, value, and judgment would be kept out of the institutional analysis. The fifties scholars rescued the law/politics distinction from the realist assault by simply transferring the traditionalist formalism from the level of substance to the level of procedure. The competence of a particular institution was identified through some external, objective criterion rather than through any functional analysis of whether the institution worked according to characteristics that made it legitimate in the institutional competence grid. Thus, democracy was identified with the fact that people vote, rather than with any quality of the day-to-day life in society or with the way that legislatures resolved substantive issues. Federal judicial neutrality was associated with life tenure rather than with the content of particular judgments. Good faith bargaining was identified by the objective fact of labor and management negotiators meeting in a conference room rather than through consideration of the substantive offers made or rejected. And administrative legitimacy was identified by a determination that relevant issues had been considered rather than through a determination whether the actual agency decision was grounded in expertise or not.

CONCLUSION

It was no accident, then, that Wechsler posed the issues in Brown according to a pivotal dichotomy between the objective facts of a comparison of facilities and the subjective, individual reactions of women and blacks. Such a distinction between objectivity and subjectivity was merely the echo of the shared attempt, continuous from Lochner to the fifties process-theorists, to distinguish an objective and determinate law from subjective politics. In the traditionalist ideology, subjectivity had been associated with the private market, and the key issue of legal thought was the identification and enforcement of the separation between public and private realms. The jurisprudential significance of the process approach lay in showing that the disintegration of belief in the public/private distinction, the centerpiece of the traditionalist image of the role of law, did not in and of itself entail the rejection of the notion of an imper-
sonal and neutral authority under the rule of law. Instead, law could be made consistent with the substance of social welfare ideology by redefining the realms of subjectivity and objectivity according to the character of an assertion rather than a geographical division of social life. In the fifties, the subjectivity of a question became a justification for legislative resolution, rather than a reason for limiting the reach of public power.

But the preservation of the rule of law simultaneously required a return to the same kind of formalism as the realists identified in traditionalist ideology. Just as the _Neutral Principles_ article can be seen as motivated by a central opposition to the _Lochner_ approach, it also simultaneously reproduced that methodology. Just as the _Lochner_ Court interpreted the social power of the bargaining context as individual free choice, so Wechsler interpreted the social power of American racism as the subjective perception of its victims. Just as the _Lochner_ Court legitimated the enforcement of contracts based on the presumption of individual choice, so Wechsler legitimated the enforcement of segregation as the presumed free choice of voters. And just as the _Lochner_ Court associated the status quo of social relations with economic liberty, so the fifties scholars associated democratic liberty with the status quo of life in the United States. The fifties generation did not see that their legal approach depended on the same structure of formalism as the _Lochner_ approach because, like the _Lochner_ Justices, they convinced themselves that the institutions of American life actually worked in practice the way that they worked in the models of their theory. And thus they constructed the conceptual categories of process theory such that the reality of social domination in American life would be irrelevant to the procedural analysis because it had been assumed away as a value question for the legislature, just as the reality of social power in the contracting process was assumed away in _Lochner_ through a belief in the objective nature of the common-law distinctions between free will and duress, fraud and incompetency. Where the _Lochner_-era lawyers tried to make the rule of law consistent with the liberal assumption of the subjectivity of value through the assumed neutral framework of the economic marketplace, the mainstream lawyers in the fifties tried to make the rule of law consistent with the modernist premise of value relativism through the assumed framework of the democratic marketplace. And just as the liberty of the economic realm was identified through the formal externality of contractual consent, the rules of offer, acceptance, and formal consideration, so the liberty of the political
marketplace was identified in the fifties through the formal act of voting. The fifties writers, in short, made the essence of the rule of law the inability to identify social domination.

There was nothing within the terms of the principle of institutional settlement, nor in the general process theory analytic, that demanded that they be applied in the formalist and uncritical manner utilized by Wechsler and other fifties legal scholars. Simply given the analytics of institutional legitimacy, the procedural matrix could have been conducted as a critique of the ways in which the actual workings of American legal institutions failed the tests as set forth by the fifties scholars, just as there was nothing within the traditionalist categories of public and private or free will and duress that demanded, as a matter of analytic necessity, that those concepts be applied in a way that legitimated rather than impugned economic relations at the turn of the century.

But it would be a mistake, I think, to conclude that Wechsler and the other fifties scholars simply erred by lapsing into a formalist application of the institutional legitimacy calculus. The alternative was a functionalist, substantive review that would have required taking substantive positions on the issue of the distribution of social power. The process rhetoric was so appealing in the fifties precisely because it was capable of being applied formalistically, without regard to the actual conduct of social relations in American society.

In short, there was nothing historically or analytically determined about the structure of the legal rhetoric that the fifties writers constructed. In terms of the intellectual context in which they found themselves, there were alternatives that included the possibility of continuing the realist and modernist critique of authority or the possibility of pursuing an objective theory of social justice based on the primacy of the group and the community. And in terms of the sense that the proceduralist paradigms were conceptually dictated by the particular conundrums of intellectual debate in the thirties and forties, the fact of the matter is that the change in focus from substance to procedure did not, and could not, solve the analytic difficulties that motivated the fifties theorists because the very same issues reasserted themselves in any application of the process analytic.

I have presented the intellectual context of the 1950’s in order to show why the process-oriented legal framework seemed to the fifties writers to transcend the sense of rupture and opposition within intellectual and legal thought. But this context could not have dictated the direction that they took. Instead, the process
rhetoric reflected a social and political choice on the part of the fifties generation to repress the corrosive analytics of the realists in favor of a vision that would legitimate, rather than impugn, the legitimacy of American legal institutions.

To be sure, there was something noble and inspiring in the rhetoric of Wechsler and the other process-theorists, in the image of a commitment to the higher principles of the rule of law regardless of the outcome of particular cases. There was much that was progressive and egalitarian in the antielitist rhetoric through which Wechsler and other constitutional theorists placed the values of democratic self-determination above the power of the Supreme Court. And in the context of the struggle with legal traditionalists, the creation of a rhetoric that could legitimate social welfare legislation against the claims of liberty of contract adherents was a progressive move.

But the fifties approach simultaneously reflected an ethnocentrism that contradicted the pluralist and liberatory tone of the rhetoric. It was, ultimately, no great paradox that Wechsler and other northeastern intellectuals were joined in a coalition with racist Southerners in questioning the Court’s legitimacy in Brown, because it was a precondition of finding persuasive the process-oriented descriptions of American life that one experience social life as basically free and democratic, rather than as marked by social domination and oppression. Despite its progressive and sophisticated tone, the process rhetoric was the language through which socially comfortable and intellectually sophisticated white northerners translated their own social assumptions into language that was culturally acceptable in their environment because it did not bear the obvious baggage of bigotry. But Wechsler’s assertions that blacks might simply “choose” to see racial segregation as inequality, that female “resentment” of male-imposed gender segregation was irrelevant to the determination of inequality, and that the concentration camps in which Japanese-Americans were incarcerated in the forties might have been “a blessing to its victims, breaking down forever the ghettos in which they had previously lived,”73 were not marginal and accidental to his analytic argument about judicial review. They were part and parcel of the apologetic vision of American society upon which the process approach rested. In contrast to the democratic and antielitist rhetoric of Wechsler’s text, there was a subtext in which elitism reasserted itself in the

73. Wechsler, supra note 1, at 27.
rejection of the interpretation of social events offered by those directly involved—by blacks, women, and Japanese-Americans.

More than a jurisprudential or analytic project, the rhetoric that the fifties process-theorists created was the reflection of the way that a particular group in American culture came to terms with the disintegration of the old paradigms of social legitimacy. In this sense, process theory is more accurately understood as the cultural ideology through which mainstream, predominantly white, male, and economically secure American intellectuals in the post-War period filtered their perception of their social environment. In the context of the thirties and forties, when the critical issue in law seemed to be the legal and ethical legitimacy of the social welfare state, the process resolution could appear pluralist and inclusive. In later years, with the controversy over the Vietnam War, the process rhetoric would become more and more obviously partisan as American participation in the war was justified through the rhetoric of protecting a democracy that was identified, again, through the formal fact that people voted (often under the shadow of bayonets) rather than through any critical evaluation of the quality of life in South Vietnam. But the discourse about the Vietnam War only brought into wider view what was already contained within the process analytic in the 1950's, an unwillingness on the part of mainstream American intellectuals to identify social domination.

Wechsler did not only help to complete the process-oriented work of fifties scholars. He also, simultaneously, helped to undermine it. The Neutral Principles article exposed the politically conservative underbelly, as well as the intellectual contradictions, of the fifties resolution. The process-oriented approach was presented as a reflection of a principled consensus about the basic legitimacy of American legal and political institutions. Wechsler's work suddenly brought to the forefront the fundamental conceptual weakness of the whole strategy: while process theory rested on the ability to differentiate in neutral, apolitical, and uncontroversial fashion between issues of institutional and procedural legitimacy and issues of substantive justice, Wechsler revealed the way that these questions were inextricably bound together, how substance could not be divorced from process. Wechsler's article revealed in stark form that when the process-theorists were talking abstractly about the competence of the "legislature" resting upon its "democratic" or "representative" procedures, they had in mind the actual "legislatures" as they existed in the United States in the 1950's, in Topeka and Baton Rouge and Richmond and Washington. The Neutral Principles
article made clear that the "rule of law" that would symbolize the free world in the post-War era was perfectly consistent with broad-scale social domination. While the process rhetoric survives in our contemporary intellectual context, after Wechsler's work legal scholars could never again recover the generative sense that some transcending analytic structure would unproblematically work out the contradictions that the realists exposed.

We are still within the culture of this disintegration today. We are close enough to Wechsler's time to recognize the ideology that sees in the ideas of neutrality, free speech, fair procedures, and cultural tolerance the basis for a vision of freedom without the necessity of making substantive, political decisions about what is just or unjust. And we have witnessed enough recent history to know that this liberal and progressive rhetoric can quickly turn reactionary when its benign assumptions about social life are challenged.