ALEXANDER BICKEL AND THE DEMISE OF LEGAL PROCESS JURISPRUDENCE

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> *"No good society can be unprincipled; and no viable society can be principle-ridden."*
>
> —Alexander Bickel

INTRODUCTION

Alexander Bickel, who passed away in 1974 at the age of 49, has many admirers but no obvious heirs in legal academia or on the bench.[1] That Bickel's name conjures up a sense of an ending is not a novel observation.[2] But I want to explore a specific sense in which Bickel brought to

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1 *See Alexander M. Bickel Dies; Constitutional Law Expert*, N.Y. TIMES, Nov. 8, 1974, at 42.

2 For Anthony Kronman, Bickel was the final expositor of a humble "philosophy of prudence" in law, an approach replaced in the legal academy by abstract political philosophy *cum* Constitutional theory. *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1567–68 (1985). For Peter Teachout, Bickel was among the last to articulate a grounded and "ethically integrated vision" of liberalism in touch with the common

a close an era in American law: He was the last great thinker of the mid-century American approach to law known as the Legal Process School. The Legal Process School dominated the elite legal academy during the decade running roughly between 1953 and 1963, and it was the last jurisprudential approach to enjoy something like general hegemony in legal scholarship.[3] The end of the Legal Process consensus thus ushered in the great Balkanization of American jurisprudence. Since its demise in the mid-1960s, a variety of jurisprudential approaches have proliferated, and jurists and legal scholars have worked within a multiplicity of sometimes-siloed, sometimes-warring jurisprudential approaches.[4] Understanding Bickel's thought can help us understand why the Legal Process consensus cracked and thus how we arrived at the jurisprudential pluralism of the past half-century.

Legal Process jurisprudence—as developed by Lon Fuller, Henry Hart, Albert Sacks, and Herbert Wechsler—embedded a strict norm of principled adjudication within a larger consequentialist and pragmatic theory of law as governance.[5] Devotion to "reasoned elaboration" and "neutral principles" in adjudication is probably the most well-known feature of Legal Process jurisprudence.[6] Less well known but increasingly recognized is the Legal Process commitment to certain substantive and qualitative ends of individual and group life.[7] These latter commitments put the Legal Process School firmly in the lineage of American Pragma-

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law and Burkean tradition. *See* Peter R. Teachout, *The Burden of the Liberal Song*, 62 IND. L.J. 1283, 1336 (1987) (reviewing RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (1986) and BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984)). For Richard Posner and Brad Snyder, Bickel was the last in a noble line of Constitutional thinkers who preached judicial restraint. *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 533 (2012); Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2136 (2014).

[3] *See, e.g.*, Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U. L. REV. 1, 21–34 (1999).

[4] *See id.* at 21 (describing various jurisprudential approaches at play in contemporary American law).

[5] *See* Williams N. Eskridge Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 865–66 (2013).

[6] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 145 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1995); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959). Alexander Bickel adopted the Hart and Sacks Legal Process materials as a young professor at Yale Law School, a fact that indicates both Bickel's deep familiarity with the materials and Bickel's own clear identification with Legal Process jurisprudence. *See* Letter from Albert Sacks to Alexander Bickel (Apr. 2, 1957) (on file with Manuscripts & Archives, Yale University Library) (expressing how "very happy" Sacks is that Bickel will use the Legal Process materials and arranging for their copy and shipment to New Haven for that purpose).

[7] HART, JR. & SACKS, *supra* note 6, at 1–2.

tism and an even older "prudentialist" tradition of statecraft.[8] Over the course of the 1950s and early 1960s, Legal Process thinkers developed and refined their demand for principled adjudication, but they never gave up on their commitment to pragmatic governance through law.

It was Alexander Bickel who recognized and explored the tension between the demands of principled adjudication and the imperatives of pragmatic governance through law.[9] The country, Bickel believed, could tolerate only so much principled decision-making: "No good society can be unprincipled; and no viable society can be principle-ridden."[10] Therefore, Bickel argued, the Supreme Court had to rein itself in, not by rendering *un*principled decisions on the merits, but rather by avoiding certain decisions altogether via prudent invocation of the "passive virtues."[11] Bickel convinced himself that the realm of principle—namely, judicial decisions on the merits—could be defended against results-oriented decision-making through the use of various justiciability doctrines and avoidance canons.[12] But once Bickel starkly drew out the (always latent) tension between principled decision-making and pragmatic governance, the Legal Process center could no longer hold. As Gerald Gunther put it, Bickel was effectively advocating "100% insistence on principle, 20% of the time."[13]

After Bickel, legal thinkers lined up either with principle or with pragmatism. On the left, the early liberal defenders of the Warren Court tended to justify the Court's actions by pointing concretely to the beneficial results the Warren Court had, in their view, achieved.[14] Later, legal liberals such as Frank Michelman and Ronald Dworkin borrowed heavily from political theory to spin out sophisticated arguments for principled liberal judicial activism.[15] At the same time, members of the late 1960s New Left who went on to develop Critical Legal Studies mocked the pretentions of reason and "neutral principle" and instead embraced an

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8 See Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013), for the connections between Legal Process jurisprudence and American Pragmatism. *See generally* Kronman, *supra* note 2, at 1573 (description of Bickel's connection to the prudentialist tradition).

9 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 64 (2d ed. 1986).

10 *Id.*

11 *See* Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–42 (1961).

12 BICKEL, *supra* note 9.

13 Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3, 24 (1964).

14 *See, e.g.*, J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 771 (1971).

15 *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

explicitly results-oriented jurisprudence of substantive equality, solidarity with the oppressed, and interpersonal respect.[16] Meanwhile, there were both principled and pragmatic developments on the right as well. In the early 1970s, Bickel's colleague and friend Robert Bork argued that commitment to principled judging entailed strict adherence to the original meaning of legal texts, thus spurring the development of originalism in Constitutional law and textualism in statutory interpretation.[17] At the same time, Law & Economics emerged as a straightforwardly consequentialist jurisprudence focused on prescriptive efficiency.[18] The pluralism of the contemporary field of jurisprudence in large measure reflects the implosion of Legal Process jurisprudence in the 1960s.

To contextualize this account within the larger history of normative jurisprudence, it helps to distinguish between two broad types of normative theories of adjudication: (a) principled-rationalist theories that emphasize the judge's duty of fidelity to authoritative principles and doctrines and (b) consequentialist-pragmatic theories that emphasize the judge's obligation to fashion effective and value-enhancing outcomes.[19] This dichotomy is of course too simplistic to cover all normative theories of adjudication, but for the purposes of this article, the following short description of these two types of normative theories should suffice.

Principled-rationalist theories see the judge's institutional role as relatively circumscribed and encourage the judge to concentrate on correctly identifying existing doctrine and applying it impartially and logically to legal disputes as they come before the court.[20] The principled-rationalist judge aims for coherence, impartiality, and logical rigor in legal decisions and believes that judicial decisions are ultimately only as good as the articulated reasons given for them. Principled-rationalist thinkers see legal decision-making as sharply distinguishable from all-things-considered policymaking.[21] Langdellian formalism and Justice

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16 *See* Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 515 (2009) (describing the CLS vision as "a world in which people treated each other with true equality and respect and affection and kindness, and in which people saw each other as fully human and beautiful, rather than as cogs in a machine or as self-interested monads out for their own gain . . ."); *see also* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 589 (1988) (critiquing Legal Process jurisprudence generally and Herbert Wechsler's promotion of "neutral principles" in particular).

17 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

18 *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1973).

19 *Compare* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988), *with* ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20–37 (1982). The clash between these two jurisprudential approaches mirrors the fundamental debate in moral philosophy between consequentialism and deontology.

20 *See* Schauer, *supra* note 19, at 510.

21 *See id.* at 537 (explaining how formal decision-making pursuant to legal rules might differ from "all things considered" decision-making).

Scalia's brand of textualism are paradigmatic examples of principled-rationalist theories of adjudication.[22]

On the other hand, consequentialist-pragmatic theories see the judge as relatively unconstrained by existing doctrine and encourage the judge to promote effective real-world outcomes in accord with some set of values.[23] The consequentialist-pragmatic judge aims for positive outcomes, effective governance, and practical solutions.[24] For the pragmatic judge or critic, judicial decisions are ultimately only as good as their effects on real-world conditions, and therefore judges ought to broadly consider social values, outcomes, and workability as they decide cases. Roscoe Pound's sociological jurisprudence and efficiency-maximizing versions of normative law and economics are paradigmatic examples of consequentialist-pragmatic theories.[25]

Legal Realism of the 1920s and 1930s is generally identified as promoting consequentialist-pragmatic theories of adjudication.[26] Some Realists, like Felix Cohen, clearly advocated for normative theories of adjudication in the consequentialist-pragmatic vein.[27] But, for the most part, Realists eschewed normative theory and instead criticized the descriptive view that what judges were actually doing in deciding cases matched up to the principled-rationalist model.[28] Realists argued that, in fact, judging and legal decision-making more generally inevitably consisted of far more than the "mechanical" application of rules to facts. For Realists, the myth of mechanical jurisprudence covered up the substantial

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22 See ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 170–74 (1993), for a discussion of Christopher Columbus Langdell's "geometry of law." Justice Antonin Scalia promoted his version of textualism as an explicitly formalistic theory of law. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed., 1997) ("*of course it's formalistic*!"). The principled-rationalist category I am describing here is similar to what Richard Posner called "legalism." *See* RICHARD A. POSNER, HOW JUDGES THINK 7–8 (2008).

23 *See* SUMMERS, *supra* note 19, at 20–37.

24 *See id*. Robert Samuel Summers's "pragmatic instrumentalism" is another term similar to my use of "pragmatic consequentialism."

25 *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I,* 24 HARV. L. REV. 591, 595 (1911) (laying out the precepts of sociological jurisprudence); Jules Coleman, *The Normative Basis of the Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice, 34 STAN. L. REV. 1105 (1982) (reviewing RICHARD POSNER, THE ECONOMICS OF JUSTICE (1983)) (discussing the normative basis of efficiency maximization).

26 *See, e.g.*, Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

27 *See, e.g.*, Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 25 (1937) ("In the field of legal criticism, or normative jurisprudence, functionalism is simply a development of utilitarianism.").

28 *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931) (arguing for a "*temporary* divorce of Is and Ought for purposes of study" among the elements of Legal Realism).

discretion that judges actually have in choosing among potentially relevant rules, potentially relevant facts, and potentially relevant modes of interpretation in each case.[29]

Legal Process jurisprudence of the mid-twentieth century is often identified as a reaction against the consequentialist-pragmatic bent of Legal Realism.[30] As I detail in Part II, Legal Process thinking did have a principled-rationalist side to it, and Legal Process theorists did criticize some aspects of Legal Realism. But Legal Process jurisprudence was also a post-War refinement of the consequentialist-pragmatic strands of Legal Realism.[31] How did Legal Process jurisprudence include both principled-rationalist and consequentialist-pragmatic strands? Simply put, it embedded a principled-rationalist theory of adjudication inside a consequentialist-pragmatic general theory of the legal process.

In Part I, I trace the pragmatic law-as-governance orientation of Legal Process jurisprudence and emphasize the continuity between Roscoe Pound's Sociological Jurisprudence, reform-minded Legal Realism, and Legal Process jurisprudence. Legal Process thought was far from the value-free, drily proceduralist caricature that its critics made it out to be;[32] rather, it was steeped in American Pragmatism and committed to the maximization of substantive ends and "valid human wants."[33] For Hart & Sacks, the legal process was no more and no less than the method of purposive governance in a complex society in which different types of disputes were channeled into different types of dispute-resolution mechanisms.[34]

In Part II, I summarize the more well-known rationalist side of Legal Process, exemplified by Henry Hart's demand for "reasoned elaboration"[35] of doctrine and Herbert Wechsler's search for "neutral principles"[36] of Constitutional law. Legal Process authors repeatedly took the Supreme Court to task for failing, in their view, to demonstrate the logical rigor and principled decision-making they demanded of

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29 *See, e.g.,* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) ("Holmes, Gray, Pound, Brooks Adams, M. R. Cohen, T. R. Powell, Cook, Oliphant, Moore, Radin, Llewellyn, Yntema, Frank, and other leaders of modern legal thought in America, are in fundamental agreement in their disrespect for 'mechanical jurisprudence,' for legal magic and word-jugglery.").

30 *See, e.g.*, Wetlaufer, *supra* note 3, at 4 ("The legal process school . . . arose in the early 1950s as a reaction against certain of the more skeptical . . . aspects of legal realism . . .").

31 *See also* David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 648 (2016) (describing "Process theory as a post-New Deal, post-War elaboration of certain Realist themes . . .").

32 *See, e.g.*, Peller, *supra* note 16, at 589 (arguing that Legal Process made "ultimate questions of legal legitimacy depend on a vision of process divorced from substance . . .").

33 HART, JR. & SACKS, *supra* note 6, at 113.

34 *Id.* at 104.

35 *Id.* at 162.

36 Wechsler, *supra* note 6, at 16.

judges. The demand for "neutral" rationality in court opinions is the most well-known and heavily criticized legacy of Legal Process jurisprudence. I explain how the Legal Process authors' "faith in reason" differed from traditional legal formalism and was connected to the larger purposive goals of Legal Process jurisprudence.

In Part III, I introduce the case of *Naim v. Naim* to demonstrate how the latent tension between the pragmatic and principled sides of Legal Process thought came to a head.[37] The petitioner in *Naim* directly challenged the constitutionality of Virginia's anti-miscegenation statute, and the case reached the Supreme Court on appeal one year after the decision in *Brown v. Board of Education* and in the midst of Southern "massive resistance" to that decision.[38] The Justices and most elite legal commentators agreed that the Virginia law could not withstand post-*Brown* Constitutional scrutiny.[39] Nevertheless, there was genuine fear among a number of Justices and commentators that a Supreme Court decision to strike down the anti-miscegenation statute would provoke even greater outrage among those resisting *Brown* and endanger the eventual implementation of school desegregation.[40] The Justices eventually dismissed the case pursuant to a terse per curiam opinion, thus avoiding a ruling on the constitutionality of such laws at that time.[41]

Alexander Bickel forthrightly acknowledged the contrasting demands of principle and prudence presented by *Naim v. Naim*, and he approved of the Court's reticence in refusing to reach the merits of the dispute.[42] As I describe in Part IV, Bickel went on to develop his "passive virtues" thesis in the years after *Naim* in large part to justify the Court's avoidance of cases like *Naim*.[43] For Bickel, prudent application of the Court's power of judicial review often required the Court to abstain from issuing substantive decisions on the merits.[44] Prudent passivity, Bickel argued, allowed the Court to balance the two defining imperatives of Legal Process jurisprudence: principled-rationalist decision-making and consequentialist-pragmatic statesmanship.[45]

In Part V, I show how the passive virtues thesis failed to hold together the dual commitments to principle and pragmatism that defined the Legal Process. It did not persuade the burgeoning critics of Legal

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37 *See* 350 U.S. 891 (1955).

38 *See* 347 U.S. 483 (1954).

39 *See infra* Part III.

40 *See* 347 U.S. 483 (1954).

41 *See Naim*, 350 U.S. at 891. Of course, twelve years later, the Court eventually struck down anti-miscegenation statutes in *Loving v. Virginia*. 388 U.S. 1, 2 (1967).

42 *See* BICKEL, *supra* note 9 at 174.

43 *See infra* Part IV.

44 *See* BICKEL, *supra* note 9, at 174.

45 *Id.*

Process jurisprudence, nor did it convince Bickel's fellow Legal Process stalwarts.[46] Indeed, in spite of its long afterlife, it is hard to find a contemporaneous reviewer who found the passive virtues thesis a persuasive answer to the problem raised by cases like *Naim v. Naim*. Rather, Bickel's sophisticated attempt to paper over the tension between principled adjudication and pragmatic governance only highlighted the failure of the Legal Process approach to reconcile the two poles of normative jurisprudence. By the mid-1960s, the Legal Process approach was no longer ascendant in the academy, and normative jurisprudence became ever more polarized between consequentialist-pragmatic approaches on the one hand and principled-rationalist approaches on the other.

I. THE CONSEQUENTIALIST-PRAGMATIC SIDE OF LEGAL PROCESS

A. Realist Instrumentalism

Instrumentalism–the conception of law as a means to an end–was one of the major themes of the "revolt against formalism" in early-twentieth century legal thought.[47] Oliver Wendell Holmes's essay *The Path of the Law* was the canonical opening salvo in the war against fastidious formalism; in it, Holmes famously criticized an overly rationalist and conceptualist understanding of law ("the fallacy of logical form") and instead suggested that "considerations of social advantage" were the true driving force in law.[48] A little over a decade later, Roscoe Pound's criticism of what he called "mechanical jurisprudence" and promotion of his own brand of "sociological jurisprudence" was perhaps the clearest expression of the new instrumentalism.[49] Pound summed up the difference between his instrumentalist view of law and Langdellian formalism when he wrote that law "must be judged by the results it achieves, not by the niceties of internal structure."[50] Pound argued that learning law ought to include a "study of the actual social effects of legal institutions and legal doctrines" and a "study of the means of making legal rules effective."[51] Pound's contemporary, Benjamin Cardozo, similarly held that "the final

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46 *See infra* Part V.

47 *See generally* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

48 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

49 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140, 154 (1912).

50 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908) ("[I]t must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.").

51 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV. 489, 513-14 (1912).

cause of law is the welfare of society,"[52] and that judges may legitimately weigh the "comparative importance or value of the social interests"[53] involved in cases and endeavor to find a pragmatic balance among them. Legal rules must, Cardozo wrote, "justify their existence as means adapted to an end."[54]

In their criticism of arid rationalism and their embrace of instrumentalism, Holmes, Pound, and Cardozo set the stage for the Legal Realists of the 1920s and 1930s. The Legal Realists did not all agree on how judges should decide cases; indeed, Llewellyn famously called for a "*temporary* divorce of Is and Ought,"[55] believing that an unsentimental descriptive project of determining "what the law is" should precede any normative project to determine "what the law should be" and "how judges should decide cases." Nevertheless, the Realists uniformly shared an instrumentalist view of law. They insisted on an "evaluation of any part of law in terms of its effects"[56] and a "conception of law as a means to social ends and not as an end in itself; so that . . . any portion of law needs reexamination to determine how far it fits the society it purports to serve."[57]

The upshot of Realist instrumentalism was the idea that the realm of law, private law as well as public, is fundamentally part of the larger policy-making and policy-executing structure of society.[58] While formalists had worked hard to distinguish the realm of law—especially the core private law subjects of property, contracts, and torts—from the realm of politics,[59] Realists saw the political and legal arenas as overlapping parts of society's policy-making apparatus. As the Realists saw it, judges routinely make legislative judgments, judge-made doctrines in private law are themselves public policy decisions, and judicial decisions are best understood as acts of state officials backed by force.[60] One of the key

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52 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65–66 (1921).

53 *Id.* at 112.

54 *Id.* at 98.

55 Llewellyn, *supra* note 28, at 1236. Among the Realists, Felix Cohen stood out for his insistence that the descriptive and normative projects of Realism could not be separated or chronologically sequenced. *See* Cohen, *supra* note 29, at 849. Accordingly, he went the furthest in sketching out a normative Realist jurisprudence. *See* FELIX S. COHEN, ETHICAL SYSTEM AND LEGAL IDEALS (1933).

56 Llewellyn, *supra* note 28, at 1237.

57 *Id.* at 1236.

58 *Id.* at 1253.

59 *See generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

60 All of these insights predate Legal Realism, of course, and can be found in Oliver Wendell Holmes's writing. *See* Holmes, Jr., *supra* note 48, at 457, 466 ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.") ("There is a concealed, half conscious battle on the question of legislative policy . . . .").

themes of Legal Realism then was that law is an aspect of governance, not an autonomous realm of logical deduction and abstract ratiocination. Post-War Legal Process thinkers embraced and advanced this theme of law as instrumental governance.

B. Legal Process Consequentialist-Pragmatism

All of the major Legal Process authors—Hart, Sacks, Wechsler, Fuller, and Bickel—accepted both the critique of formalism and the instrumentalist conception of law associated with Legal Realism. Hart and Sacks' Legal Process materials reflect a consequentialist-pragmatic understanding of law with roots in the tradition of American Pragmatism. Take Hart and Sacks' definition of law as an "ongoing, functioning, purposive process."[61] The idea that the process of law is *ongoing* corresponds to the Realist conception of "law in flux."[62] The notion that law is *functioning* and *purposive* is, of course, a restatement of the Realist view of "law as a means to social ends."[63] What is novel in Hart and Sacks is the identification of law as a process. To the extent that the Realists had a working definition of law as such, it derived from Holmes's dictum that "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[64] Felix Cohen, one of the more philosophically-oriented Realists, approvingly described Holmes's goal as the "redefinition of every legal concept in empirical terms, *i.e.* in terms of judicial decisions."[65] On the Realist view, law was best understood empirically, as "patterns of judicial behavior" rather than a set of logically coherent propositions waiting to be discovered.[66] Just as William James rejected both empiricist and rationalist definitions of truth,[67] Hart and Sacks rejected both the *empiricism* of the Realist conception of law and the *rationalism* of the Langdellian or Formalist conception of law against which the Realists rebelled.[68] Instead, Hart and Sacks' definition of law as an "ongoing, functioning, purposive process" reflects the Pragmatist tendency to look for dynamic and interactive processes where empiricists see static substances and rationalists find ethereal abstractions.[69]

For Hart and Sacks, a merely empirical study of judicial behavior is a poor basis on which to build a useful understanding of law.[70] They saw

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61 HART, JR. & SACKS, *supra* note 6, at cxxxvii.

62 Llewellyn, *supra* note 28, at 1236.

63 *Id.*

64 Holmes, Jr., *supra* note 48, at 460–61.

65 Cohen, *supra* note 29, at 828.

66 *Id.*

67 *See generally* WILLIAM JAMES, PRAGMATISM (Thomas Crofts & Phillip Smith eds., Dover Publications Inc. 1995) (1907).

68 HART, JR. & SACKS, *supra* note 6, at cxxxvii.

69 *Id.* at cxxxvii.

70 *Id.* at lviii.

the Realist desire to "construct a science of society and of law based scrupulously on the 'isness' of people's behavior" as misguided and a misunderstanding of how to acquire knowledge in the social sciences.[71] Instead, Hart and Sacks believed that studying social practices, like law, is fundamentally different from studying the natural world and demands "modes of inquiry and reflection which are sharply at variance with the procedures conventionally thought to be appropriate in the natural sciences."[72] They ridiculed the idea that one could best understand the behavior of "either official or private decisionmakers" in a purely empirical fashion, "as if they were so many amoebae spread out on a glass under a microscope."[73] Rather, one must understand that "the science of society is essentially a judgmatical, or prudential, science," quite distinct from the natural sciences.[74] This requires understanding that the "forms of social organization are concerned essentially with the purposive pursuit of human ends."[75] The study of law, on this account, cannot be reduced to empirical observations about the behavior of certain officials or laypeople, but must take into account the ends and means, the values and policies, pursued by participants in a dynamic normative process.[76]

At the highest level of generality, Hart and Sacks wrote, there are "three main objectives of every [legal] system's efforts."[77] These are: (1) to avoid the "disintegration of social order and the consequent destruction of the existing benefits of group living," (2) "to maximize the total satisfactions of valid human wants," and (3) the "*pragmatic necessity* of a currently fair division."[78] The first of these goals is the simple baseline requirement of social order. The latter two express the positive aim of providing for the satisfaction of as many "valid human wants" as possible while respecting each individual's fair claim on such satisfaction. This account of law is broadly consequentialist in form, though it is not a species of utilitarianism. First, it takes the "individual worth of every human being" and the fair apportionment of satisfactions as non-negotiable elements of the good.[79] This is not a maximization-only account. Second, it is not agnostic or neutral about the ends that human beings might pursue; it allows for evaluation of the validity of any "human wants" in light of other wants and available means. As Charles Barzun has illuminated, the Hart and Sacks Legal Process materials "advance . . .

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71 *Id.* at 107.
72 *Id.*
73 *Id.* at 108.
74 *Id.* at 107.
75 *Id.* at 108.
76 *See* Barzun, *supra* note 8, at 5–7.
77 HART, JR. & SACKS, *supra* note 6, at 104.
78 *Id.*
79 *Id.* at 106.

a naturalistic, non-skeptical moral theory that is consequentialist in structure"[80] but is not a simple instrumentalism that takes ends as givens or that is immune to thoughtful criticism. Rather, as good Pragmatists, Hart and Sacks believed that ends and means mutually interact, and that both are subject to revision in light of experience.[81] In raising the question of what exactly makes a human want "valid" or invalid, Hart and Sacks provide only a very thin answer, but it is consistent with this Pragmatist view. "Some wants," they write, "can readily be shown to be inconsistent with other more widely held and more intensely felt wants" and "[c]ertain wants . . . can be seen to be more basic than others, in the sense that their satisfaction is a prerequisite to satisfying the others."[82]

Elsewhere in the Legal Process materials, Hart and Sacks describe the "social problem" as "'establishing, maintaining, and perfecting the conditions necessary for community life to perform its role in the complete development of man.'"[83] This formulation of the social problem also provides a general metric for assessing the workings of the legal process writ large and any part of it. "[T]he ultimate test of the goodness or badness of every institutional procedure and of every arrangement which grows out of such a procedure," they write, "is whether or not it helps to further this purpose."[84] In other words, good law is a process that furthers the social conditions within which human beings may cultivate and satisfy their "valid wants."

The foregoing discussion is, of course, much more philosophical than the bulk of the Legal Process materials, which famously began with a prosaic case about spoiled cantaloupes.[85] But it is imperative to recognize the Pragmatist background of Legal Process thought to understand the eventual story of its demise. To that end, let me summarize the key points: Hart and Sacks understood law as a pervasively normative process and held that both the practice of law and the study of law (which is *part* of the practice) required practitioners and scholars to morally evalu-

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80 Barzun, *supra* note 8, at 19.

81 *See id.* at 43 (describing the Legal Process materials as "a set of problems and materials designed to show the students how to reason from ends to means and back to ends"). *See, e.g.*, Eskridge, Jr., *supra* note 5, at 897–98 (describing Legal Process theory as "a pragmatic, multifaceted meta-theory that requires the state to evaluate as well as facilitate people's lives, organizations, and institutions of cooperation").

82 HART, JR. & SACKS, *supra* note 6, at 111 ("What, for example, *are* valid human wants?").

83 *Id.* at 102.

84 *Id.*

85 *Id.* at 10–68 ("The Case of the Spoiled Cantaloupes"). Of course, it turns out that there is nothing prosaic at all about the issues raised by the case of the spoiled cantaloupes—the discussion of which metastasizes out to encompass multiple sites of law-making and legal application.

ate the ends and means implicit in all legal phenomena.[86] Far from promoting a value-free proceduralism or eschewing controversial debates about substance, Hart and Sacks believed that reflecting and choosing among ends, as well as means, is inevitably part of all decision-making in the legal process.[87] Hart and Sacks pitched the ultimate ends of the legal process at a very high level of generality—maintenance of the social order, maximization of valid desires, and allocational fairness—but insisted that all legal phenomena, substantive as well as procedural, must be evaluated in terms of how well they furthered these ultimate substantive aims.[88]

II. THE PRINCIPLED-RATIONALIST SIDE OF LEGAL PROCESS

While the consequentialist-pragmatic orientation of Legal Process jurisprudence may strike many readers as surprising, the principled-rationalist side of Legal Process thought is better known.[89] These two sides of Legal Process thought are linked in the origin story Hart and Sacks told to explain the great diversity of institutions, officials, and decision-making procedures found within the legal process of any modern society.

The story begins, state-of-nature-like, with individuals recognizing their interdependence and forming "groups for the protection and advancement of their common interests."[90] Communal living requires "understandings about the kinds of conduct which must be avoided if cooperation is to be maintained . . . and the kinds of affirmative conduct which is required if each member of the community is to make his due contribution to the common effort."[91] In short, communal living requires substantive norms of conduct to achieve communal goals. But substantive norms do not simply arise, clarify, enforce, or modify themselves: a community must have mechanisms for creating such norms, clarifying their content, modifying or changing them as necessary, and enforcing violations thereof.[92] In short, "*substantive* understandings or arrangements about how the members of an interdependent community are to conduct themselves in relation to each other and to the community necessarily imply the existence of what may be called *constitutive* or *procedural* understandings or arrangements about how questions in connection

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86 Barzun, *supra* note 8, at 33 (describing two senses in which the study of law "requires making decisions based on value judgments").

87 HART, JR. & SACKS, *supra* note 6, at cxxxvii.

88 *Id.*

89 *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205 (1995) ("[P]rocess jurisprudence exemplifies the emergence of reason as the dominant ideological and theoretical motif in American legal thought.").

90 HART, JR. & SACKS, *supra* note 6, at 2.

91 *Id.* at 3.

92 *Id.*

with arrangements of both types are to be settled."[93] Without such constitutive or procedural arrangements, there would be no peaceable way to resolve disputes over the creation, definition, enforcement, or modification of substantive norms; the community would be at constant risk of a "disintegrating resort to violence" whenever disputes arose with respect to any substantive norm.[94]

Hart and Sacks suggest that "in a very small community, it might be possible to have a single community organ, such as a council of elders, with undifferentiated authority to settle every kind of question of community concern."[95] But once communities grow larger and more socially and technologically complex, "the questions demanding settlement are too numerous for any single individual or group of individuals to handle."[96] Crucially, "different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions."[97] Thus, complex societies such as ours generate a variety of institutions, each with its own internal decision-making procedures, to deal with different sorts of social decisions. The result is what we call the legal system: an "interconnected system of procedures adequate, or claiming to be adequate, to deal with every kind of question" arising from communal life.[98]

The origin story that Hart and Sacks tell reveals several major themes of Legal Process jurisprudence:

First, one can see the Pragmatist bent of Hart and Sacks as they describe the origin of the legal process in terms of human attempts to achieve their goals (their ends) given the "fact" of human interdependence.[99] The *raison d'etre* of the legal process is to help people living communally to pursue their purposes or substantive objectives. Hence, Legal Process theory's ultimately pragmatic evaluation of all legal process asks: is it fulfilling the aims for which it exists?[100]

Second, Hart and Sacks insist that the constitutive and procedural rules of a society are "obviously more fundamental than the substantive arrangements in the structure of a society, if not in the realization of its ultimate aims, since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."[101] Procedural and constitutive rules determine the methods by

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93 *Id.*
94 *Id.* at 4.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 2 ("the fact of these interdependence with other human beings").
100 *See id.* at 102 ("The Ultimate Objectives of the Decisions").
101 *Id.* at 3-4.

which a society makes, clarifies, enforces, and changes its substantive norms, and therefore procedural and constitutive rules are, to borrow a phrase, 'lexically prior' to substantive rules.[102] Hence Legal Process theory's focus on studying with great care the constitutive and procedural arrangements of the legal process, which are the procedural norms that allow for the making and application of substantive norms.[103]

Third, Hart and Sacks are sensitive to the great variety and differing competences of institutions and officials tasked with carrying out the dispute resolution functions of a complex society. For them, one of the enduring challenges of any legal system is allocating decision-making authority such that the institutions tasked with deciding certain questions have the competence and internal procedures suitable to making decisions of that kind. For Hart and Sacks, the task of the legal profession writ large is to ensure the efficacy of the system by channeling disputes to the proper decision-making authority and to ensure that each official institution develops and follows appropriate decision-making procedures.[104] As they saw it, a legal process that allocates decision-making authority among a variety of institutions, each suitable to making the particular decisions assigned to it, has the best chance of aligning social means with social ends.[105]

It is this third theme that leads to the familiar, but often misunderstood, Legal Process insistence on rationality and neutrality in adjudication.[106] The legal process in our system differentiates among a number of specialized institutions, most conventionally among the legislative, executive, and judicial branches. Broadly speaking, the three branches of government are responsible for lawmaking, enforcement, and adjudication. The Legal Process School insisted that all such official institutions are part of the legal process, and Legal Process jurisprudence was notable in its serious attention to the legislative and regulatory processes, in

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102 See JOHN RAWLS, A THEORY OF JUSTICE 33 (1971), for Rawls' explanation of his conception of "lexical ordering."

103 "[N]o social question can be intelligently studied without a sensitive regard to the distinctive character of the institutional system within which the particular question arises." HART, JR. & SACKS, *supra* note 6, at 6.

104 *See id.*; *see also* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1988)) ("The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made.").

105 *See* HART, JR. & SACKS, *supra* note 6, at 4.

106 The argument here is not that there is any logical inexorability between the pragmatist roots of Legal Process jurisprudence and the rationalism of its theory of adjudication. Indeed, as I argue later, I think there is great tension between the two. In this Part, I aim to show only how Legal Process authors understood the connection between their big-picture pragmatism and their demands for rational-principled adjudication.

addition to the traditional court-centric agenda of legal academia.[107] Nevertheless, Legal Process authors were lawyers and law professors still very much steeped in the common law tradition, and they were particularly attuned by their legal training and professional expectations to the work of courts.[108] Even though Legal Process thinkers saw courts as only one among the many types of institutions critical to the legal process, and though they advocated greater attention to non-court institutions, they were operating within the institutional structure of American legal academia, which has been focused on case law and courts since its inception. Unsurprisingly, what the Legal Process authors had to say about adjudication, the work of judges, received and continues to receive the most attention in American law schools.

What are courts good for, and how should they approach disputes? Hart and Sacks, Lon Fuller, Herbert Wechsler, and eventually Alexander Bickel all endeavored to answer these fundamental questions about the function of adjudication within the larger set of legal processes. The first great work of the era of Legal Process hegemony was arguably the federal courts casebook edited by Henry Hart and Herbert Wechsler published in 1953.[109] In light of the great expansion of federal and administrative power associated with the New Deal and World War II, the casebook sought to raise anew long-standing questions about federalism and separation of powers issues along with questions about the proper allocation of authority among federal and state institutions as well as among the different branches of the federal government.[110] At the same time, Hart and Wechsler wrote in the Preface: "we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government."[111]

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107 *See, e.g.*, William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) ("Legal process transformed public law discourse, legitimating the modern regulatory state without sacrificing its flexibility in a dynamic world.").

108 Reflecting on the Legal Process materials themselves, Anthony Sebok concluded that "[a]lthough Hart and Sacks are explicitly not court-centered, their book is implicitly but aggressively 'adjudication-centered.'" *See* Anthony J. Sebok, *Reading the Legal Process*, 94 MICH L. REV. 1571, 1579 (1996) (reviewing HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994)) (arguing that Hart, Jr. & Sacks privileged judicial adjudication over other dispute resolution mechanisms).

109 *See generally* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

110 Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994) ("As defined by Hart and Wechsler, the central, organizing question of Federal Courts doctrine involves allocations of authority: Who ought to have authority to give conclusive determinations of which kinds of questions?").

111 HART, JR. & WECHSLER, *supra* note 109, at xii.

Additionally, the editors sought to "pose throughout problems of the organization and management of the federal courts."[112] In its major themes, then, the Hart and Wechsler casebook perfectly reflected the Legal Process School's broad interest in the allocation of authority among the full range of legal-political processes available as well as its more traditional legal-academic focus on the place of *courts* and their internal workings within that larger set of processes. It was, after all, a casebook aimed at law students and despite the inclusion of notes and some legislative materials, it consisted overwhelmingly of appellate court opinions served up for study and scrutiny.[113]

If Hart and Wechsler posed "the issue of what courts are good for" in their federal courts casebook, they and their fellow Legal Process thinkers spent much of the next decade attempting to answer the question.[114] Because this aspect of Legal Process thought has been mined in great detail before,[115] here I will simply summarize the Legal Process view of adjudication in my own words: for Legal Process thinkers, courts are "good for" resolving concrete disputes between two people or entities about past behavior pursuant to the authoritative norms of the relevant society.[116] The job of courts, then, is to listen to the pleas of the litigants, identify the authoritative social norms (or "general directives") at stake in the dispute and then reason from those norms to a resolution of the dispute.[117] Moreover, courts are obliged to articulate the reasoning processes that: (1) leads them to identify certain norms as authoritative and relevant to the dispute at hand and (2) connects those authoritative norms to the court's actual resolution of the particular dispute. In other words, a functioning court has and publicly provides *reasons* for its decisions.[118]

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112 *Id.*

113 *Id.*

114 *Id.*

115 *See, e.g.*, DUXBURY, *supra* note 89, at 205–99.

116 *See, e.g.*, HART, JR. & SACKS, *supra* note 6, at 163 (stating that courts are good at resolving "controversies arising out of past events").

117 *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978), the first draft of which was circulated during the 1956–57 academic year. *See* Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 669 n.17 (2013) (noting that Fuller presented a draft version of this article as part of the Legal Philosophy Discussion Group at Harvard Law School in the 1956–57 academic year).

118 Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 657 (1993) ("Fuller and various other process jurists of the 1940s and 1950s regarded adjudication as a peculiar type of institutional activity, an activity which, if it is to command respect, must be based in reason, and which, if it is to be based in reason, must be principled."); Fuller, *supra* note 117, at 366 ("Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.").

By unpacking this simplified version of what courts are good for, we can gain a better understanding of the Legal Process view of adjudication. First, there is a recognition that multiple norms may be relevant to a given dispute, and there is a possibility of conflict or tension among them. Second, authoritative norms of general directives—what we might generically call legal doctrine—come in different forms. While concrete rules may require nothing more of the judge "than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*,"[119] many legal doctrines come in the more general form of standards (e.g., "due care"), principles ("no person should be unjustly enriched"), or policies ("full employment").[120] When dealing with norms of these more general sorts, legal decisionmakers cannot help but make choices about how such general directives ought to guide decision-making in concrete cases. There is therefore an irreducible amount of discretion in legal decision-making, discretion that requires judges to make normative and prudential decisions among authoritative directives and about how best to realize the relevant norm(s) in the context of concrete cases.[121]

Where Legal Realists emphasized the indeterminacy implicit in judicial discretion, Legal Process authors took that indeterminacy for granted but insisted that judicial decision-making was still distinct from other types of official decision-making (e.g., legislative or executive) and not reducible to mere whim or fiat. In exercising their decision-making authority, judges do not mechanically deduce the right answers, as formalists might have it, or simply choose the option they find most congenial to their worldviews or personalities, as Realists might have it.[122] Rather, Legal Process theorists saw judges as engaging in "reasoned elaboration" of their decisions. For Hart, reasoned elaboration entailed, at minimum, that a judge is "obliged to resolve the issues before him on the assumption that the answer will be the same in all like cases" and that the judge is "obliged to relate his decision in some reasoned fashion" to the extant authoritative norms (directives) most relevant to the facts of the dispute.[123] It is not the formalist idea that a judge can and should logically deduce the one right answer to the question; rather, it is the idea that a judge's job is to articulate the connection between the resolution of *this* case with authoritative norms and with the resolution of other relevant cases. The Legal Process "faith in reason" was not faith that judges can and will always reach the uniquely correct answer to legal problem,

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119 HART, JR. & SACKS, *supra* note 6, at 139.

120 *Id.* at 140–42.

121 *See generally* Shaw, *supra* note 117.

122 *See* HART, JR. & SACKS, *supra* note 6, at 143.

123 *Id.*

but faith that judges exercise reasoned judgment in choosing among logically permissible resolutions to the disputes before them.[124]

Herbert Wechsler's famous and often misunderstood call for "neutral principles" in constitutional law reflected the same concern with reasoned judgment. Seeking to explain the function of adjudication, among other legal decision-making processes, Wechsler wrote 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."[125] Legislatures need not explain how each legislative decision adheres to more general principles and how it is consistent (or not) with other legislative decisions.[126] Legislatures may well decide to treat each new issue *ad hoc*[127] and give inconsistent reasons for adopting various statutes.[128] A legislator may cite to principles in a merely instrumental way—"instrumental in relation to results that a controlling sentiment demands at any given time."[129] Courts are different, Wechsler believed. They are institutions that decide cases pursuant to principles,[130] which they must articulate and be prepared to apply neutrally to the full domain of relevant cases. Unlike other parts of the legal-policy apparatus, courts "decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply[.]"[131] In other words, courts are institutions that strive for consistency in their decisions—consistency to extant principles and consistency with other decisions.[132]

Note that the neutrality Wechsler associated with judicial decision-making is emphatically not a neutrality with respect to the substantive values at stake in a given dispute. The neutrality that Wechsler insisted upon was neutrality in the *application* of the judge's chosen principle to all cases to which it reasonably applies, regardless of the judge's pre-

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124 *Id.* at 144 ("*[D]iscretion* means the power to choose between two or more courses of action each of which is thought of as permissible."); *see also* Shaw, *supra* note 117, at 713.

125 Wechsler, *supra* note 6, at 15.

126 *Id.* at 15–16.

127 *Id.* at 6.

128 Fuller, *supra* note 117, at 367 ("We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.").

129 Wechsler, *supra* note 6, at 14.

130 Wechsler's use of the term principle does not have the specificity of Hart, Jr. & Sacks' particular meaning for principle. Wechsler uses the term "principle" to refer to any general directive or norm.

131 Wechsler, *supra* note 6, at 15.

132 Wechsler later described the thesis of his Holmes lecture as thus: "My submission was, in short, that the distinctive legal element in an adjudication lies in its appeal to reason—reason stated in a principle fairly susceptible of general and neutral application . . . ." Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1012 (1965).

ferred outcome or which litigants may benefit or suffer as a result.[133] As Henry Monaghan put it, "[w]hat Herb [Wechsler] insisted upon was not so much that the governing principle should be neutral, but that the applicable principle should be neutrally and generally applied."[134] Wechsler, like Hart and Sacks (and like the Realists before them), affirmed that substantive value choices are implicit in judicial decision-making;[135] judges must make value choices when articulating principles and when applying principles to concrete cases, and there is no guarantee that even a principled judge will choose wisely or correctly among substantive values.[136] The key for Wechsler, as for Hart and Sacks, is that a judge, unlike other official decisionmakers, endeavors to provide reasons for such choices, reasons that transcend the particular case at issue. The *sine qua non* of judicial decision-making for Legal Process authors is the articulation of reasons.[137]

The Legal Process authors understood courts to have this distinctive function within the larger legal-policy process, but they did not claim that all courts in fact fulfill this function adequately, much less per-

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133 As I have suggested elsewhere, it would have been more accurate had Wechsler titled his article "Toward the Articulation and Neutral Application of Principles in Constitutional Law" because his argument is that the job of judges is to both (a) clearly choose and articulate the principle(s) justifying their decisions and (b) be prepared to apply those principles neutrally, i.e., even when doing so would go against the judges' own preferred outcome. *See* Wolitz, *supra* note 31, at 668 n.242; *see also* Ernest J. Brown, Book Review, 62 COLUM. L. REV. 386, 387 (1962) (reviewing HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961)) ("Possibly 'the neutral application of general principles' or 'the neutral application of constitutionally based principles (or values)' would be more explicit of his idea, if less arresting.").

134 Henry Paul Monaghan, *A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1373 (2000).

135 Wechsler, *supra* note 6, at 25 ("some ordering of social values is essential"); *see also* Wechsler, *supra* note 132, at 1013–14 ("The principle of neutral principles does not purport to yield a formula that makes it easy to decide hard cases or dispenses with the agony of judgment in arriving at decisions . . . Nor does it exclude value judgments from interpretation, as some others have alleged.").

136 Wechsler also believed that important social values may conflict in incommensurable ways, making any final determination of what constitutes the right choice among values virtually impossible. *See* Wechsler, *supra* note 6, at 25 ("there is an inescapable conflict between claims to free press and a fair trial"). Adherence to principle alone, while a prerequisite of good judging, does not on its own guarantee that the judge will or can choose correctly among values. Herbert Wechsler, *The Nature of Judicial Reasoning*, *in* LAW AND PHILOSOPHY: A SYMPOSIUM 290, 299 (Sidney Hook ed., 1964) ("That an adjudication be supported or at least supportable in general and neutral terms is no more than a negative requirement. A decision is not sound unless it satisfies this minimal criterion. If it does, but only if it does, the other and the harder questions of its rightness and its wisdom must be faced.").

137 Wechsler, *supra* note 6, at 19–20 ("The virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . ."); Fuller, *supra* note 117, at 372 ("[A]djudication is institutionally committed to a 'reasoned' decision, to a decision based on 'principle.'"); Duxbury, *supra* note 118, at 664 ("In short, the presence or absence of reasoned elaboration in a judicial decision is the primary indication of whether or not it is sound.").

fectly.[138] Some courts fulfilled their principled-rationalist adjudicative function better than others did, and many Legal Process articles were critical evaluations of attempts by courts, in particular the U.S. Supreme Court, at giving reasons for their decisions. Especially during the Golden Age of Legal Process thought between 1953 and 1963, the thinkers most associated with the Legal Process school practiced a brand of legal scholarship Neil Duxbury aptly deemed "quality control" jurisprudence.[139] This brand of scholarship, represented best in the annual *Harvard Law Review* Forewords, subjected court opinions to the exacting Legal Process standards of reasoned and principled decision-making—and often found the courts wanting.[140] In 1957, Alexander Bickel and Harry Wellington took the Supreme Court to task for an "increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine."[141] A court's "real strength" lies in "the arena of reason," they wrote, and though they hastened to add that they were not necessarily criticizing the *results* of the Court's work, they were criticizing the (lack of) *reasoning* offered for those results.[142]

Henry Hart's 1958 Term Foreword argued that the justices were deciding too many cases too quickly and therefore producing too many poorly reasoned and unilluminating opinions.[143] "[W]hat matters about Supreme Court opinions is not their quantity but their quality," he wrote.[144] And such quality, Hart charged, was too often lacking, as he accused the Court of producing too many "opinions which do not explain" and issuing too many "ipse dixit" per curiam decisions with virtually no opinion at all.[145] "Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do."[146] Unfortunately, Hart wrote, the

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138 Duxbury, *supra* note 118, at 667.

139 *Id.* at 636 ("quality control"); Shaw, *supra* note 117, at 680 (using the term "Golden Age" to describe the post-War era when Legal Process jurisprudence "achieved consensus") (quoting William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2049 (1994)). When I refer to the Golden Age of Legal Process, I mean the decade between 1953 and 1963.

140 Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 476 (1995) ("The focus on reasoned elaboration was often paired with an examination of the technical ability or craftsmanship of the Court's opinions.").

141 Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV L. REV. 1, 3 (1957).

142 *Id.* at 4.

143 Henry M. Hart, Jr., *The Supreme Court, 1958 Term, Foreword: Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

144 *Id.*

145 *Id.* at 98.

146 *Id.* at 99. For Hart, the Supreme Court's unique institutional role meant that it had an even higher obligation than a normal court to elaborate the reasons for its decisions, for the

"Court is trying to decide more cases than it can decide well," and the result is that the work-product of the Court is "about what one would expect could be written in twenty-four hours."[147] Chiding the Court further, Hart wrote: "the American people are entitled to better judging than this."[148] And Hart ended his jeremiad against the Court with a prophecy that "the time must come when it is understood again, inside the profession as well as outside, that reason is the life of the law and not just votes for your side."[149]

Most famously, in his 1959 Holmes Lecture at Harvard Law School, Herbert Wechsler criticized the Court's reasoning in a trio of high-profile civil rights cases, including *Brown v. Board*.[150] Wechsler, who was a great champion of civil rights and racial equality,[151] made clear that he approved of the norms the Court had endorsed.[152] Nevertheless, he argued that the Court's reasoning in *Brown* and in the other cases failed the test of principle.[153] Wechsler's Holmes lecture, reprinted in the *Harvard Law Review*, has been credited with setting the agenda of constitutional theory for the next fifty years.[154] For our purposes, it is emblematic of the severity of Legal Process theory's principled-rationalist account of adjudication. Even when faced with decisions he thought had "the best chance of making an enduring contribution to the quality of our society of any that [he] kn[e]w in recent years," Wechsler did not relax the Legal Process demand for reason, rigor, and principled decision-making.[155]

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raison d'etre of an ultimate federal court is precisely to clearly lay down principles of federal law that can be followed throughout the federal and state court systems. He also noted that the structure of the Supreme Court, as a multi-member collegial body, was meant to stimulate "the maturing of collective thought," *id*. at 100, not merely a collection of individual opinions. Hart argued that the opinions of the Court, as well as some of the Court's internal decision processes, indicated that such "collective deliberation" was given short shrift. *Id.* at 124.

147 *Id.* at 100.

148 *Id.* at 122.

149 *Id.* at 125. This riff on Holmes's famous dictum—"[t]he life of the law has not been logic: it has been experience"—perfectly encapsulated the Legal Process view of adjudication and how it differed both from formalism and Legal Realism. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). Where formalists saw logical inexorability in adjudication and Realists saw the assertion of will, Legal Process authors saw the process of "reasoned elaboration."

150 *See generally* Wechsler, *supra* note 6.

151 *See generally* Anders Walker, *"Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934–1964*, 40 LOY. U. CHI. L.J. 385, 388 (2009) (describing Herbert Wechsler's enduring commitment to African American civil rights).

152 *See* Wechsler, *supra* note 6, at 26–27. However, it is worth pointing out that other Legal Process authors praised the reasoning, and not just the result, of *Brown v. Board*, with Albert Sacks extolling the opinion's vindication of principle. *See* Albert M. Sacks, *The Supreme Court, 1953 Term, Foreword*, 68 HARV. L. REV. 96, 96–99 (1954).

153 Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 512–13 (1997).

154 *See id.* at 505.

155 Wechsler, *supra* note 6, at 27.

To sum up, all of these classics of Legal Process jurisprudence charged the Court with failing to adequately justify its decisions on principle or on reason. The conventional wisdom that Legal Process jurisprudence was critical of the Warren Court and demanded ever-greater "reasoned elaboration" from the Court is correct. But it would be a mistake to see the principled-rationalist theory of adjudication propounded by the Legal Process authors as the entirety of Legal Process thought; rather, it was embedded within a broader consequentialist-pragmatic account of the legal system writ large. As detailed in Part I, Legal Process authors believed that the ultimate worth of the legal process was substantive, namely how well it satisfied the valid ends of the citizenry. It fell to Alexander Bickel to attempt to reconcile the consequentialist-pragmatic and principled-rationalist sides of Legal Process thought.

III. ALEXANDER BICKEL AND *NAIM V. NAIM*

A. *Bickel Before* Naim

Alexander Bickel was born in 1924 in Bucharest, Romania.[156] His father, Solomon Bickel, was a Jewish Romanian lawyer and a prominent Yiddish literary figure.[157] In response to rising anti-Semitism, the family emigrated to the United States in 1939 and settled in New York City.[158] Bickel quickly acculturated and excelled in his studies and, like so many overachieving immigrants before him, enrolled at City College of New York.[159] His studies were interrupted by his World War II service in the

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156 *Alexander M. Bickel Dies; Constitutional Law Expert*, *supra* note 1. As Bickel wrote about Justice Frankfurter, so one might write about Bickel: "it is relevant . . . to remark on the fact that Felix Frankfurter . . . started life in the United States as an immigrant Jewish boy." Alexander M. Bickel, *Justice Frankfurter at Seventy-five*, THE NEW REPUBLIC, Nov. 18, 1957, at 7, *quoted in* Alfred S. Konefsky, *Men of Great and Little Faith: Generations of Constitutional Scholars*, 30 BUFF. L. REV. 365, 377 (1981).

157 *See generally* Moyshe Lemster, *Bikl, Shloyme*, THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, (July 27, 2010), http://www.yivoencyclopedia.org/article.aspx/bikl_shloyme. Solomon Bickel was also known by the names Shlomo or Shloyme Bikl. Alexander Bickel's mother was Yetta Schaefer Bickel. Alexander was an only child. Alexander's cousin, the statistician Peter Bickel, recalled that the household of Shlomo and Yetta Bickel was "full of intellectual and literary discussion." Ya'acov Ritov, *A Random Walk with Drift: Interview with Peter J. Bickel*, 26 STAT. SCI. 150, 158 (2011). Abram Chayes described Bickel as inheritor of "the secular Jewish intellectual tradition. His father [Shlomo], sitting in a sunny, mote-filled apartment surrounded by stacks of pamphlets on desks, tables, and floor, wrote literary criticism in Yiddish for *Der Tag*, a socialist paper now long defunct." Abram Chayes, *Alexander M. Bickel: A Personal Remembrance*, 88 HARV. L. REV. 693, 693 (1975).

158 *See* Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 843–44 (1994).

159 *Id.* at 844.

Army as a machine gunner in France and in Italy.[160] He returned after the war and graduated from City College in 1947 before moving on to Harvard Law School.[161]

After graduation from Harvard, Bickel clerked for Justice Frankfurter during the 1952 Term of the Supreme Court.[162] The two men developed a special bond, and Frankfurter—already the "godfather" of the Legal Process school—became a lifelong mentor of Bickel.[163] It was during the 1952 Term that the consolidated segregation cases, including *Brown v. Board*, were first argued in front of the Court.[164] Frankfurter famously urged that the cases be held over for rehearing the following term,[165] and early in the 1952 Term, he assigned his clerk Bickel the task of writing a comprehensive memorandum detailing the original understanding of the Fourteenth Amendment with respect to racial segregation in public education.[166] Bickel worked on the memo over the course of a year, completing it only in the summer of 1953 just before leaving his clerkship.[167] Bickel's 66-page memorandum canvassed the historical record surrounding the adoption of the Fourteenth Amendment and ultimately concluded that the original understanding of the Fourteenth Amendment with respect to racial segregation in public school was "inconclusive."[168] Meanwhile, Frankfurter prevailed on the other Justices to hold over the case until the next term, and with Bickel's help, Frankfurter drafted the five questions submitted to the parties for additional briefing in argument.[169] These questions focused on the same issue as Bickel's memo—the original understanding of the Fourteenth Amendment—as well as the modalities of enforcing any potential desegregation decision from the Court.[170]

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160 *Alexander M. Bickel Dies; Constitutional Law Expert*, *supra* note 1. Abram Chayes noted that, as a soldier in 1944, Bickel "landed at Anzio in the first wave and had his shoelaces cut by enemy fire." Chayes, *supra* note 157, at 693.

161 *See Alexander M. Bickel Dies; Constitutional Law Expert*, *supra* note 1.

162 *Id.*

163 Frankfurter and Bickel shared a similar biography as teenage Jewish immigrants who excelled at City College and Harvard Law School before entering legal academia. Indeed, Frankfurter had chosen Bickel to eventually write his (Frankfurter's) biography. Richard Polenberg, *On Doing Legal Research At 'America's Library,'* 4 GREEN BAG 2d 95, 98 (2000).

164 *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 23 (1998).

165 *See id.* at 23–24.

166 RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 599 (1975).

167 *Id.* at 653–54.

168 Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 389–90 (2013).

169 *Id.* at 388–89.

170 *See* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 8 (2004).

Though Bickel had left his clerkship by the time the case was reargued and decided, his yearlong immersion in the issues raised by *Brown v. Board* gave him a special connection to that landmark case. Bickel was a lifelong defender of the *Brown* decision, even as he became a harsh critic of the Warren Court for many of its post-*Brown* decisions.[171] Bickel's first major law review article was a reworking of the historical memorandum he had drafted for Justice Frankfurter.[172] It was Bickel's memorandum that had provided the Justices with the argument that the original meaning of the Fourteenth Amendment was inconclusive and thus unhelpful to the resolution of the case.[173] In his subsequent article, Bickel had nothing but praise for the "noble march" to the *Brown* decision, the "importance" of the decision, and the Court's "oracular authority" reflected in the brief, unanimous opinion.[174]

There has been substantial academic commentary on the way Legal Process authors responded to, or failed to respond to, *Brown v. Board*.[175] And for good reason—*Brown* was the symbolic beginning of the Warren Court, of judicial endorsement of the African American civil rights movement, and of a new era of rights-centric legal liberalism, all of which posed serious challenges to the Legal Process understanding of the American legal system. Nevertheless, it bears recalling that, despite Wechsler's famous misgivings about the reasoning of the opinion, all of the major Legal Process authors supported the result in *Brown*, and all were committed to racial egalitarianism and to the broader aims of the Civil Rights movement.[176] The suggestion that Legal Process theory could not accommodate itself to *Brown v. Board* or to the larger movement for racial equality is not sustainable. But disagreement regarding a different civil rights case did profoundly affect the course of Legal Process jurisprudence, and it is to that case and its aftermath that I will now turn.

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171 BICKEL, *supra* note 9, at 126.

172 Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

173 Reflecting implicitly on the importance of his own historical memorandum to the ultimate result in *Brown*, Bickel wrote, "history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." *Id.* at 65.

174 *Id.* at 1–2.

175 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2049–50 (1994); Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 999–1000 (1999); Peller, *supra* note 16, at 589.

176 For Albert Sacks's and Henry Hart Jr.'s commitment to the civil rights cause, see Eskridge, Jr. & Frickey, *supra* note 175, at 2050 n.114–15 and accompanying text.

B. Naim v. Naim

A native of Canton, China, Ham Say Naim was a cook and sailor on a British merchant ship that docked at Norfolk, Virginia in 1942.[177] Naim decided to jump ship and start a new life based in Norfolk.[178] A decade later, in 1952, Naim met and courted a white woman named Ruby Elaine Lambeth who had recently relocated to Norfolk from Michigan.[179] The couple moved in together and soon decided to marry.[180] Understanding that their marriage would be barred by Virginia's anti-miscegenation statute, Naim and Lambeth decided to take a day-trip to Elizabeth City, North Carolina to seek a marriage license there instead.[181] A North Carolina judge married the couple on June 26, 1952, and the newlyweds returned to their home in Norfolk later that afternoon.[182]

A little over a year later, however, the couple's marriage was falling apart, and Ruby wanted to end it.[183] She filed for divorce in the circuit court of the City of Portsmouth, Virginia, alleging marital infidelity.[184] In the alternative, she asked the circuit court to annul the marriage because it violated the Racial Integrity Act of 1924, Virginia's anti-miscegenation statute.[185] Ham Say Naim's attorney David Carliner recognized

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177 Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 129 (1998).

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* Interestingly, North Carolina also had an anti-miscegenation statute on the books at that time; in fact, the North Carolina state Constitution itself contained a provision declaring that "all marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive are, hereby, forever prohibited." N.C. CONST. art. XIV, § 8 (1883). But North Carolina's constitutional and statutory bans on interracial marriages applied only to marriages between those deemed white and those deemed Negro. *See id.*; *see also* Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s-1960s*, 32 AKRON L. REV. 557 (1999). As a result, it did not apply to the marriage of an ethnically Chinese (or Asian) person and a white person. For a discussion of the "ambiguous" racial classification of Ham Say Naim as a Chinese American in the Jim Crow South, see LESLIE BOW, Partly Colored: Asian Americans and Racial Anomaly in the Segregated South 51–54 (2010).

182 Dorr, *supra* note 177, at 129.

183 *Id.* at 130. A divorce or annulment would also have repercussions for Ham Say Naim's immigration status, as he was then attempting to extend his visa and naturalize as the spouse of an American citizen.

184 *Id.* at 131.

185 *Id.* Virginia first banned marriages between whites and non-white by statute in 1691, and such inter-racial marriages had been continuously illegal ever since. In 1924, the Virginia General Assembly updated Virginia's anti-miscegenation law as part of a larger eugenics program that also included the compulsory sterilization act at issue in *Buck v. Bell*. 274 U.S. 200 (1927). The Racial Integrity Act of 1924 created only two racial classifications—"white" or "colored" (non-white)—and banned all marriages across the color line. The law made it a felony to attempt to marry across the color line or to attempt to evade the restriction by mar-

that, if the judge chose to annul under the Racial Integrity Act, the case might afford an opportunity to challenge the constitutionality of anti-miscegenation laws nationwide.[186] Consequently, he vigorously fought the divorce petition in circuit court while also challenging the legality of an annulment. After a day of testimony, the circuit court judge chose to grant an annulment, holding the marriage "void" under the terms of the Racial Integrity Act.[187] This was exactly the result that Naim's attorney had sought, as it allowed Naim to make the constitutionality of the Racial Integrity Act itself the main issue on appeal.[188]

On appeal, the Virginia Court of Appeals upheld the constitutionality of the Racial Integrity Act.[189] Writing a little over a year after the *Brown v. Board* opinion, the Virginia high court struck a defiant tone, stating that "'the preservation of racial integrity is the unquestioned policy of this State'" and "'that it is sound and wholesome.'"[190] It then noted that over half of the states had anti-miscegenation laws on the books[191] and that every court that had adjudicated the issue, save one, had found such statutes constitutional.[192] The Virginia Court of Appeals cited a number of pre-*Brown* cases, including *Plessy v. Ferguson*, to support its contention that equal political and civil rights did not extend to social rights such as intermarriage.[193] With respect to *Brown v. Board*, the Virginia court emphasized that *Brown*'s holding was limited to the field of "public education" which the Supreme Court had declared "the very foundation of good citizenship."[194] Interracial marriage, the Virginia court argued, was not only *not* the foundation of good citizenship, but "[i]n the opinion of the legislatures of more than half the States it is harmful to good citizenship."[195]

The Virginia Court of Appeals concluded its opinion with a vigorous defense of the wisdom of the Racial Integrity Act and the inviolabil-

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rying in another jurisdiction. *See* Loving v. Virginia, 388 U.S. 1 (1967). As Philip Reilly observed, "[t]he Virginia Racial Integrity Act, passed at the zenith of the American eugenics movement, was the most restrictive of all the white supremacy laws." Philip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928-1930*, 16 AM. J. MED. GENETICS 483, 491 (1983).

186 Dorr, *supra* note 177, at 130–31.

187 *Id.* at 133.

188 *Id.* at 135. In addition, Carliner attacked the jurisdiction of the circuit court to annul the marriage on the basis of race. *Id.* at 131.

189 Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).

190 *Id.* at 752 (quoting Wood v. Commonwealth, 166 S.E. 477, 477 (Va. 1932)).

191 *Id.* at 753.

192 *Id.* At the time the Virginia Supreme Court of Appeals heard the *Naim* case, 29 states had some anti-miscegenation statute on their books. *See* Dorr, *supra* note 177, at 139.

193 *Naim*, 87 S.E.2d at 754.

194 *Id.* at 755.

195 *Id.*

ity of states' rights.[196] It held that it was well within the state's Constitutional authority to "to prevent the obliteration of racial pride" and to fight against "the corruption of blood."[197] Indeed, Justice Archibald Chapman Buchanan wrote for the Virginia Court, "[r]egulation of the marriage relation is . . . distinctly one of the rights guaranteed to the States and safeguarded by" the Tenth Amendment.[198] The Virginia court's opinion was, of course, part of establishment Virginia's broad reaffirmation of racial segregation in the face of *Brown v. Board* and thus an element of the larger movement of white Southerners that would come to be known as "massive resistance."[199] Ham Say Naim's attorney, David Carliner, well understood the racial politics into which he was wading, and he believed that his appeal would find a much warmer reception at the U.S. Supreme Court.[200]

At the time, a case like *Naim v. Naim*—in which a state's highest court upheld the validity of a state statute against a claim that the statute violates the federal Constitution—allowed for an appeal to the U.S. Supreme Court as a matter of right, as opposed to the discretionary certiorari process.[201] Once Naim's attorney properly filed the appeal, as he did in the fall of 1955, the Supreme Court had mandatory jurisdiction over the case.[202] The Court had issued *Brown II* in May of that year,[203] and it now confronted a facial challenge to a state anti-miscegenation statute. All of the Justices and interested parties understood the symbolic charge of the issue of inter-racial marriage. For those defending racial segregation, interracial sex, marriage, and procreation were the ultimate taboos. Fear of miscegenation or "race mixing" was a common trope in pro-

196 See *id.* at 756.

197 *Id.*

198 *Id.*

199 On massive resistance, see for example, OGLETREE, JR., *supra* note 170, at 126–34.

200 *See* Dorr, *supra* note 177, at 147.

201 *See* 28 U.S.C. § 1257 (1952) (distinguishing cases to be reviewed by the Supreme Court by way of appeal from those to be reviewed by way of a writ of certiorari). Before filing with the U.S. Supreme Court, Carliner learned that in November of 1954, six months after *Brown I*, the U.S. Supreme Court had denied certiorari to a case challenging Alabama's anti-miscegenation statute. Jackson v. Alabama, 348 U.S. 888 (1954). Carliner's decision to file an appeal, rather than a petition of certiorari, was influenced by seeing the Court deny certiorari in the Alabama case. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 227 (2009).

202 Still a recent law school graduate, Carliner reached out to more well-known civil rights attorneys to join him on the brief, including representatives from the American Civil Liberties Union, the American Jewish Congress, the Association on American Indian Affairs, the Association of Immigration and Nationality Lawyers, and the Japanese-American Citizen League. *See* Dorr, *supra* note 177, at 147 n.121. Conspicuously missing from the appeal was any participation from the NAACP, reflecting that group's view that litigation over inter-racial marriage was a distraction. *See* PASCOE, *supra* note 201, at 228–29. The Solicitor General's office also refused to join as amicus curiae despite Carliner's attempt to enlist its support. Dorr, *supra* note 177, at 147–48.

203 Brown v. Bd. of Educ., 349 U.S. 294 (1955) (decided May 31, 1955).

segregation rhetoric and in resistance campaigns against school integration.[204] Though there had been some easing of miscegenation laws in the western United States in the 1940s,[205] the anti-miscegenation taboo was still very strong and was not confined to Southern states. National public opinion was overwhelmingly against marriage between whites and blacks,[206] and twenty-nine states maintained some version of an anti-miscegenation statute in 1955.[207] It is difficult to overstate the sensitivity of the miscegenation issue throughout American history and, especially, in that immediate post-*Brown* moment.

During the first two weeks of November 1955, the Justices and their clerks debated what to do regarding *Naim v. Naim*.[208] Justice Burton's clerk laid out the dilemma in a memorandum to the Justice: "In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time . . If cert. were involved our course would be clear. But what to do here?"[209] Nevertheless, the clerk ultimately concluded with some hesitation, that, because "the appellant has tapped our obligatory jurisdiction," the Court should note probable jurisdiction and set the case for oral argument.[210] Still, he reiterated that his "hesitation springs from the feeling that we ought to give the present fire a chance to burn down."[211]

It was Justice Frankfurter who took the opposite position and urged the Court to dismiss the case.[212] Frankfurter conceded that the issue was not "obviously insubstantial" and that it presented a "conflict between moral and technical legal considerations."[213] But he noted that the Court had not always accepted jurisdiction in mandatory appeals and that "the Court's practice has assimilated appeals to certiorari."[214] Given the "body of legislation involved, both North and South" and "a momentum of history, deep feeling, moral and psychological presuppositions," he argued that "the issue has not reached that compelling demand for con-

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204 *See generally Naim*, 87 S.E.2d at 753-756.

205 California's Supreme Court struck down California's anti-miscegenation statute in 1948 in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). Oregon's legislature repealed that state's anti-miscegenation law in 1951. *See* PASCOE, *supra* note 201, at 238–39.

206 Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx%20 (showing 4% approval of marriage between whites and blacks in 1958).

207 *See* Dorr, *supra* note 177, at 139.

208 *Id.* at 150–54.

209 *Id.* at 149.

210 *Id.* at 149–50.

211 DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 61 (1980).

212 Dorr, *supra* note 177, at 151–52.

213 *Id.*

214 *Id.* at 152.

sideration which precludes refusal to consider it."[215] Finally, he stressed that a decision to strike down state anti-miscegenation statutes would "very seriously . . . embarrass the carrying-out of the Court's decree of last May"—that is, the desegregation order of *Brown II*.[216]

In a conference on November 4, 1955, the Justices took an initial vote on whether to note probable jurisdiction.[217] Five Justices—Frankfurter, Clark, Harlan, Minton, and Burton—voted to dismiss, while four Justices—Douglas, Black, Reed, and Warren—voted to note probable jurisdiction and accept the case.[218] But the Justices agreed to consider the issue for another week before taking any action.[219] During that week, Justice Frankfurter and Justice Clark worked together to draft a proposed order of dismissal, hoping to win over some of the Justices inclined to hear the case.[220] Their draft dismissal noted the inadequacy of the record before the Court with regard to the litigant's citizenship and vaguely alluded to ancillary issues that might obviate constitutional review.[221] A week later, the Justices met again and, at this second meeting, Chief Justice Warren and Justice Reed agreed to switch sides, making it seven Justices against hearing the case.[222] For reasons that remain obscure, however, the Court's resulting per curiam opinion did not outright dismiss the case but rather remanded it to "the Supreme Court of Appeals [of Virginia] in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion."[223] The two-sentence order provided only the following reason for remand: "inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case . . . ."[224]

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215 *Id.*

216 Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 187 (2014/2015).

217 Dorr, *supra* note 177, at 153.

218 *Id.* In a memo to Justice Harlan, one of his clerks counseled the Justice to vote against hearing the case. *Id.* at 150. But instead of providing a legal argument in favor of dismissal, the clerk's memo noted that the case came to the Court on appeal rather than through the certiorari process. *Id.* at 151. "How can you say there's no substantial federal question here?" the clerk asked. *Id.* at 150.

219 *Id.* at 153.

220 *See* PASCOE, *supra* note 201, at 230; Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 65 (1980).

221 The two issues that Justice Clark's draft pointed to as requiring more elaboration were the citizenship of the parties at the time of their marriage and a potential Full Faith and Credit Clause challenge. Hutchinson, *supra* note 220, at 65.

222 *Id.* And while Justice Black had prepared a draft dissent to the dismissal, he did not issue a dissent to the remand that the Court issued on November 4, 1955. *Id.* at 65–66.

223 Naim v. Naim, 350 U.S. 891 (1955).

224 *Id.*

On remand, the Virginia Court of Appeals issued a defiant opinion in January of 1956, reiterating its previous opinion in the case and rejecting the U.S. Supreme Court's suggestion that there was any factual or legal inadequacy in the record of the case.[225] Moreover, the Virginia Court of Appeals held that there was no provision in Virginia law allowing for the remand of the case back down to the circuit court for any further proceedings.[226] Accordingly, the Court of Appeals simply reaffirmed its earlier disposition of the case finding the marriage of the litigants "void."[227] In short, the Virginia Court of Appeals firmly rejected the Supreme Court's invitation to reopen the case.[228]

Naim's attorney David Carliner again appealed the Virginia Court of Appeals' decree back up to the U.S. Supreme Court.[229] And, again, the Justices struggled with the question of whether to hear the case and schedule oral argument or, if not, how to dismiss the case from the docket.[230] It was a replay of the debate from four months earlier. Meeting twice in March of 1956, the Justices again split on the same five-to-four lines.[231] Chief Justice Warren even drafted a sharp dissent to any potential dismissal, criticizing dismissal as "completely impermissible in view of this Court's obligatory jurisdiction and its deeply rooted rules of decision . . . ."[232] In the end, however, the four Justices in favor of hearing the case acquiesced to the position of Frankfurter and the majority.[233] On March 12, 1956, on the very same day that Rep. Howard Smith of Virginia introduced the Southern Manifesto in a speech on the floor of the House of Representatives,[234] the Supreme Court issued a second and final per curiam opinion, bringing the *Naim* litigation to a close.[235] The

225 Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956).

226 *Id.*

227 *Id.*

228 The Virginia Court of Appeals opinion was so dismissive of the Supreme Court's remand that, at least to this reader, it has echoes of *Martin v. Hunter's Lessee*. 14 U.S. 304 (1816) (insisting on U.S. Supreme Court appellate jurisdiction over Virginia state court case involving a federal claim). Unlike *Martin v. Hunter's Lessee*, however, in *Naim v. Naim*, the U.S. Supreme Court shied away from a fight with the Virginia Court of Appeals and left its defiant ruling on the books. Naim v. Naim, 350 U.S. 985 (1956) (dismissing *Naim v. Naim* from the Court's docket).

229 *See* PASCOE, *supra* note 201, at 231.

230 *See* Dorr, *supra* note 177, at 156.

231 *Id.* at 158.

232 *Id.* at 158 n.170.

233 *Id.* at 158.

234 *See The Southern Manifesto of 1956,* UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, http://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/ (last visited Feb. 7, 2019).

235 350 U.S. 985 (1956).

case was "devoid of a properly presented federal question," the Court tersely held.[236] No dissenting opinions were published.

IV. BICKEL'S PASSIVE VIRTUES DEFENSE OF *NAIM V. NAIM*

Because the Justices ultimately dismissed the case, *Naim v. Naim* was a non-event in terms of the development of legal doctrine. But in terms of the development of legal theory, the debates over *Naim v. Naim* had far-reaching consequences. *Naim v. Naim* divided Legal Process authors, and it exposed the latent tension between the principled-rationalist side and the consequentialist-pragmatic side of Legal Process. Alexander Bickel's passive virtues thesis was, in large part, a response to the dilemmas posed by *Naim v. Naim*.[237]

A. Developing the Passive Virtues

As the memoranda circulated by Justice Frankfurter and the Supreme Court clerks revealed, the immediate dilemma raised by *Naim v. Naim* was evident to everyone who supported *Brown* and the larger movement for racial equality. On the one hand, a Supreme Court decision validating anti-miscegenation laws was unthinkable; on the other hand, a Supreme Court decision striking down such statutes would be incredibly incendiary. Twenty-nine states maintained anti-miscegenation laws through 1955,[238] and the social taboos against interracial sex and interracial marriage were strong all over the country.[239] For opponents of desegregation, interracial marriage—with its connotations of interracial sex and mixed-race children—represented the gravest evil of racial integration.[240] *Brown* itself was often denounced by segregationists as the first step in a campaign to "mongrelize" the white race,[241] the same worry that had spurred passage of Virginia's Racial Integrity Act during an earlier moment of racial panic.[242] As Frankfurter argued in his internal memorandum, the Court had a "responsibility in not thwarting or

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236 *Id.* at 985. The Court would wait another eleven years before ruling on the constitutionality of the Virginia anti-miscegenation statute. *See* Loving v. Virginia, 388 U.S. 1 (1967). An unanimous Court struck down all bans on interracial marriage. *Id.* at 2. In the *Loving* opinion, the Court once again relied on Alexander Bickel's 1953 memorandum in finding the original intention of the Fourteenth Amendment with respect to anti-miscegenation statutes "inconclusive." *Id.* at 9.

237 *See generally* Bickel, *supra* note 11.

238 *See* Dorr, *supra* note 177, at 139.

239 Newport, *supra* note 206.

240 *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA 60 (1944) (identifying the "bar against intermarriage and sexual intercourse involving white women" as the racial norm white Americans found most important).

241 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321 (2004).

242 *See* Dorr, *supra* note 177, at 124–29.

seriously handicapping the enforcement of its decision in the segregation cases," and a decision to strike down Virginia's Racial Integrity Act would, he feared, do precisely that by inflaming the opposition.[243] With respect to the Court's role in the civil rights movement, the central dilemma of the case was what we would today call the specter of backlash.[244]

But for Legal Process theorists, the dilemma of *Naim v. Naim* was even more profound. The possibility of backlash raised the question of whether the Court should act pragmatically or whether it should act only according to principle. For proponents of racial equality, as the Legal Process theorists all were, a consequentialist-pragmatic orientation implied that the key question posed by *Naim v. Naim* was whether a decision striking down anti-miscegenation statutes would further the larger cause of racial equality or, alternatively, generate a backlash that would impede it. A principled-rationalist orientation, on the other hand, suggested that the key question posed by *Naim v. Naim* was whether the rationale, the principle, underlying the *Brown* decision also precluded the existence of anti-miscegenation statutes. There would be no dilemma if striking down the Racial Integrity Act would both conform with *Brown* (principle) and further the cause of racial equality (pragmatism). But in those immediate post-*Brown* days, when opposition to the decision was gaining strength across the South and enforcement had yet to begin, it was reasonable to conclude—as Frankfurter and Bickel did—that principle and pragmatism pointed in opposite directions. The principle of racial equality mandated the legalization of interracial marriage; pragmatism cautioned against any such ruling.[245]

The Court, as we saw, tried to find a way out of the dilemma by dismissing the case for being "devoid of a properly presented federal question."[246] The Court's decision to avoid deciding *Naim v. Naim* did not attract much public attention at the time, but it did not go entirely

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243 *See* David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968*, 82 ST. JOHN'S L. REV. 1, 12 (2008) (quoting Frankfurter's memorandum).

244 For a contemporary argument that the Court misjudged the consequences of white backlash in its *Naim* deliberations, see Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525, 530–31 (2012) (arguing that if the Court had had the courage to strike down anti-miscegenation statutes in 1955, then "[t]he inevitable right-wing backlash might have been less ferocious and less able to tap middle-class indignation").

245 It is noteworthy that in his memo, Justice Frankfurter spoke not in terms or principle versus pragmatism, but rather in terms of "technical" versus "moral" considerations. *See* Dorr, *supra* note 177, at 151–52. The technical consideration was nothing other than the mandatory jurisdiction of the Court with respect to the case on appeal, and the moral consideration was the protection and eventual enforcement of *Brown*.

246 Naim v. Naim, 350 U.S. 985, 985 (1956).

unnoticed among legal commentators either.[247] The first high-profile assessment of the Court's actions with respect to *Naim* came in Wechsler's famous Neutral Principles lecture.[248] While Wechsler faulted the Court for failing to articulate a neutrally-applicable principle in *Brown*, he also criticized the Court's avoidance of the *Naim* case. "I take no pride in knowing," Wechsler wrote, "that in 1956 the Supreme Court dismissed [*Naim v. Naim*] . . . on procedural grounds that I make bold to say are wholly without basis in the law."[249] Indeed, Wechsler implied that, on the merits, *Naim* presented an easier case than *Brown*, for the uncontroversial Constitutional principle of freedom of association surely justified allowing two willing adults to enter into a marriage with one another regardless of race.[250] But, of course, the Supreme Court never reached the merits, and Wechsler's criticism of the Court was precisely that the Court invoked bogus "procedural grounds" to dismiss the case, grounds "wholly without basis in the law."[251] For Wechsler, principled-rationalist adjudication required the U.S. Supreme Court to take jurisdiction of the case and strike down the Virginia anti-miscegenation statute.[252]

Alexander Bickel was also paying attention to the Court's response to *Naim v. Naim* and to the dilemma it posed.[253] And it was Bickel who saw most clearly the challenge that the case posed to the dual lodestars of Legal Process theory.[254] Indeed, Bickel's most important contribution to legal theory was in large part a response to the dilemma posed by *Naim*. Writing the *Harvard Law Review* Supreme Court Foreword for the 1960 Term, Bickel first introduced in print the concept of "the passive virtues."[255] Bickel began by noting that the "volume of the Supreme Court's business [was] steadily on the rise"[256] and that the Court was

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247 *See* Charles Fairman, *The Supreme Court, 1955 Term*, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 98 (1956) (noting the Court's "avoidance and summary treatment" of the issues raised in Naim v. Naim).

248 Wechsler, *supra* note 6, at 16.

249 *Id.* at 34.

250 *Id.* Wechsler argued that "freedom of association" is less apt with respect to school segregation because both whites and Blacks could make "freedom of association" arguments: Blacks demanded the freedom to associate with whites, but whites demanded the freedom to associate only with whites and not with Blacks. *Id.*

251 *Id.* Recall that the then-operative statute governing appeals from a state's highest court to the U.S. Supreme Court mandated Supreme Court appellate jurisdiction in cases, such as *Naim*, when the state's highest court upholds a state law against the claim that the state law violates the federal Constitution. *See* 28 U.S.C. § 1257 (1952).

252 Louis Pollak wrote one of the first academic criticisms of Wechsler's Neutral Principles lecture, but Pollak agreed with Wechsler that the Court "clumsily retreated from passing on Virginia's anti-miscegenation statute." Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 12 (1959).

253 BICKEL, *supra* note 9, at 71.

254 *Id.*

255 *See generally* Bickel, *supra* note 11.

256 *Id.* at 40.

remarkably unified in its "value judgments concerning civil rights and liberties."[257] Where there was more significant disagreement, Bickel suggested, was in determining "when, whether, and how much" to adjudicate.[258] While the Court was in general agreement, Bickel argued, on substantive questions of "which principles" it found in the Constitution,[259] the Justices were more divided on questions of "when and in what circumstances" the Court ought to articulate and apply such principles.[260] Accordingly, Bickel wrote, his Foreword would be less about "the Bill of Rights and the [F]ourteenth [A]mendment" and more about "the uses and nonuses of techniques of withholding ultimate constitutional adjudication . . . ."[261] In other words, his Foreword would be about the precise issue the Justices faced in *Naim v. Naim*—whether or not to adjudicate a particular dispute on the merits and thus reach the Constitutional claim at issue.

Bickel acknowledged that black letter jurisdictional doctrine ostensibly governed such questions: both the Constitution and Congressional statutes set out the jurisdiction of the federal courts in general and of the Supreme Court in particular.[262] He noted, too, Justice Marshall's admonition in *Cohens v. Virginia* that the Supreme Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[263] And then he set up his older Legal Process confrere Herbert Wechsler as the foil by identifying Wechsler with Justice Marshall's position. Both Marshall and Wechsler, Bickel wrote, believed that the Court may not " 'escape from judicial obligation' " when the relevant Constitutional text and legitimate jurisdictional statutes granted the Court jurisdiction to decide a case.[264] Bickel had a different view.

First, Bickel argued, the Wechsler position could not explain the actual practices of the Court—in fact, Bickel pointed out, the Court often refused to reach the merits of cases over which it had jurisdiction.[265] Sometimes, it did so pursuant to justiciability doctrines such as standing or the political questions doctrine, and in some cases, the Court simply

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257 *Id.* at 41. Bickel implies that he was in substantive agreement with the Court's civil rights and civil liberties decisions.

258 *Id.* at 40.

259 *Id.* at 41. Bickel noted in particular "the Court's unity in disposing of what is surely the single most important issue to come before it, at least in this century," namely racial segregation. *Id.*

260 *Id.*

261 *Id.* at 40.

262 *Id.* at 43.

263 *Id.* at 43 (quoting Cohens v. Virginia, 19 U.S. 264, 404 (1821)).

264 *Id.* at 43 (quoting Wechsler, *supra* note 6, at 9). Bickel did not explicitly refer to Wechsler's criticism of the Court's action in *Naim v. Naim*, but Wechsler's criticism of the Court's avoidance of *Naim* was implicitly the target of Bickel's attack.

265 *Id.*

denied certiorari or dismissed an appeal for lack of a federal question, as it did in *Naim*. Each of these mechanisms of avoidance raised its own issues, but, Bickel argued, all were difficult to reconcile with Wechsler's view that the Court is obliged to adjudicate cases over which it has jurisdiction.[266] Moreover, echoing Henry Hart's Foreword from two years before, Bickel noted that there was a practical imperative for the Court to adjudicate on the merits only the number of cases to which it could devote sufficient attention.[267] Wechsler's view, Bickel argued, made it difficult to achieve even such an obvious necessity as a manageable docket.[268] The upshot of Wechsler's view, Bickel wrote, was that either the Court would embark on "a rampant activism that takes pride in not 'ducking' anything" or "the consequence [would be] an effort to limit the power of review and render it tolerable through a radical restriction of the category of substantive principles that the Court is allowed to evolve and declare . . . ."[269] In other words, Bickel predicted that a Court that followed Wechsler's view would involve itself recklessly in many more controversies than it could reasonably manage, leading eventually to a radical constriction of the Court's formal jurisdiction by Congress or even by Constitutional amendment. Such a constriction in the Court's formal jurisdiction would be hugely damaging, Bickel believed—not just to the Court's authority but to the American system of government which relies on the Court for the exposition of principle.[270] In sum, Bickel was arguing that Wechsler's uncompromising views on justiciability would, in the long run, undercut Wechsler's own plea for truly principled adjudication.[271]

Bickel fully endorsed Wechsler's view that judicial decisions, including Supreme Court Constitutional decisions, must be principled.[272] And Bickel correctly understood that Wechsler's "neutral principles" were not uncontroversial or value-free principles, but rather principles that "the Court must be prepared to apply across the board, without compromise."[273] Wechsler and Bickel were both staunch advocates of the

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266 *Id.* at 46.

267 *Id.* at 47.

268 *Id.*

269 *Id.*

270 *Id.*

271 In general, one might describe the different views of Bickel and Wechsler thus: While Wechsler worried that the Court's decisions regarding racial segregation were not sufficiently justified in principle, Bickel worried that the Court would be tempted to inject too much principle into this sensitive area of social policy.

272 Bickel, *supra* note 11, at 51 ("[W]e have a right to expect adjudications on the merits to be principled."); *see also id.* at 58 ("Our point of departure, like Mr. Wechsler's, has been that judicial review is the principled process of enunciating and applying certain enduring values to our society.").

273 *Id.* at 48.

Legal Process view that the unique function of the judicial branch is to render principled decisions.[274] As Bickel put it, the judiciary is "charged with the function of enunciating principle."[275] But Bickel, a good Legal Process theorist, also pointed out that the judicial arena of principle is not hermetically sealed from the larger arena of governance, and governance of a "large and heterogeneous" society requires "the arts of compromise" and "ways to muddle through."[276] The legal-political system as whole, in other words, is an arena of expediency and compromise—an arena of pragmatic governance. As Bickel memorably put it, "[n]o good society can be unprincipled; and no viable society can be principle-ridden . . . [B]oth requirements exist most imperatively side by side: guiding principle and expedient compromise."[277] For Bickel, our multi-branch Constitutional democracy recognizes those dual imperatives insofar as it contains both political branches tasked with pursuing expedient compromise and a judicial branch tasked with articulating and upholding principle. The clash comes when the judicial branch is called upon to pass principled judgment on the pragmatic compromises of the political branches. The difficulty, in other words, is the American practice of judicial review.[278]

Judicial review, Bickel argued, is where the clashing imperatives of expediency and principle meet head-to-head.[279] If Wechsler's view is correct and the Court is obliged to reach the merits of every case of judicial review within its jurisdiction, then the Court would be forced to uphold on principle—or strike down on principle—every pragmatic compromise of the political branches that is properly challenged. For Bickel, both options are problematic, for striking down the pragmatic compromises of the political branches raises the counter-majoritarian difficulty and upholding such compromises gives a principled stamp of approval to the compromises of the political branches.[280] Bickel was a staunch believer in the legitimacy of judicial review and the authority of the Court to choose either path.[281] The problem, for Bickel, was one of proportion. A Court that struck down too many pragmatic compromises

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274 *Id.*

275 BICKEL, *supra* note 9, at 69.

276 Bickel, *supra* note 11, at 49.

277 BICKEL, *supra* note 9, at 64.

278 Bickel is well known for coining the term "counter-majoritarian difficulty" to describe a related dilemma of judicial review, namely its tension with majoritarian democracy. *See id.* at 16–23. Here my focus is not on the clash between democracy and judicial review, but rather on the clash between principled-rationalist adjudication and consequentialist-pragmatic governance on the other.

279 Bickel, *supra* note 11, at 50.

280 *Id.*

281 Both Bickel and Wechsler rejected the position of Learned Hand, who had argued against judicial review entirely in his 1958 Holmes Lecture.

would be bucking democratic preferences too often, and a Court that upheld too many pragmatic compromises would be legitimating (as principled) policies that were in fact merely expedient (i.e. unprincipled). Because sustained majorities may not be denied for long in a democratic system, Bickel believed that the greater danger was thwarting the will of the majority too often.[282]

Bickel considered his breakthrough insight to be that there was in practice a third option available to the Court—withholding judgment on the merits—and that this third option had large, if "passive," virtues of its own.[283] Recognizing this third option provides the Court with breathing room to determine, with respect to each case, whether it presents a dispute better resolved *at this moment* by principled adjudication or whether it presents a dispute better managed *at this moment* by the available political processes. Crucially for Bickel, choosing the latter option—that is, avoiding adjudication on the merits—does not constitute an abandonment of principle, for the Court maintains its authority to articulate and adjudicate according to principle at a more appropriate time.[284] Moreover, in staying its hand, the Court avoids putting the imprimatur of principle on the status quo produced by the political branches.[285] Sometimes, Bickel suggested, the exigencies of political compromise—the balance of social forces—meant that unprincipled policies were unavoidable *for a time*.[286] The Court's role when facing such unavoidable or politically necessary compromises was not to demand the impossible by striking them down but rather to pointedly withhold the Court's stamp of approval.

Bickel quoted heavily from Justice Jackson's dissent in *United States v. Korematsu* to make his argument.[287] Justice Jackson wrote that the detention of citizens of Japanese descent after Pearl Harbor posed a danger to liberty, but that "a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself."[288] For "once a judicial opinion . . .

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282 BICKEL, *supra* note 9, at 64 ("[T]he absolute rule of principle is also at war with a democratic system.").

283 *Id.* at 69 ("The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation . . . It may validate . . . *Or it may do neither*.").

284 *Id.* at 70–71.

285 Bickel cited *Korematsu v. United States* as the clearest example of a time when the Court mistakenly legitimated on principle a political decision. Bickel, *supra* note 11, at 49 (quoting Korematsu v. United States, 323 U.S. 214, 245–246 (1944)) (Jackson, J., dissenting).

286 BICKEL, *supra* note 9, at 240 ("The first wisdom . . . is that the moment of ultimate judgment need not come either suddenly or haphazardly. Its timing and circumstances can be controlled [by the Court].").

287 Bickel, *supra* note 11, at 49 (quoting *Korematsu*, 323 U.S. at 245–46) (Jackson, J., dissenting).

288 *Id.*

rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens."[289] The Court's order legitimating, on principle, racial discrimination "has a generative power of its own," Justice Jackson wrote.[290] This was precisely Bickel's point. The "disaster" of the *Korematsu* case,[291] as far as Bickel and Justice Jackson understood it, was not only that the Court left in operation an immoral executive order. The executive order was indefensible, but it was the executive branch's genuine political determination and the thus the executive branch's responsibility.[292] The disaster was that the Court legitimated, on principle, a policy of racial exclusion that was manifestly at odds with Constitutional principles of equal protection and due process.[293]

Bickel argued that there was another virtue to declining to reach the merits of cases like *Korematsu* and *Naim*.[294] In its refusal to grant its blessing to an unprincipled political compromise, Bickel wrote, the Court could "engage[ ] in a Socratic dialogue with the other institutions and with society as a whole" regarding acceptable resolutions of the underlying social dispute.[295] When the Court withholds ultimate judgment, it can continue to perform an "educational function" vis-à-vis the other branches, "framing . . . conditions to invite a responsible legislative decision."[296] That is, the Court's temporary avoidance of a principled decision, Bickel argued, may spur the political branches to redouble their efforts toward a compromise more in tune with principle, potentially obviating the need for the exercise of judicial review at all.[297] Because of the counter-majoritarian difficulty, Bickel thought that it was generally better for the political branches to reach political arrangements consistent with Constitutional principle *without* judicial intervention, "if possible."[298] By staying its hand for a time, the Court could continue to coax

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289 *Id.*

290 *Id.*

291 *See* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 491(1945) (by upholding the exclusion order, the Court "converts a piece of war-time folly into political doctrine, and a permanent part of the law").

292 *Id.*

293 *Id.*

294 Bickel, *supra* note 11, at 50.

295 *Id.*

296 *Id.* at 64.

297 *Id.*

298 *Id.* at 74–75. Ironically, Bickel's concrete example of a political dilemma best resolved by the political branches was Connecticut's then-existing ban of the use of contraception, which, he wrote, was not yet ripe for review "because the Court should not sap the quality of the political process by exercising initial as opposed to reviewing judgment." *Id.* at 74. "The people of Connecticut," he wrote, "might enjoy freedom from birth-control regulations without being guaranteed it by the judges, and it is better that way, if possible." *Id.* at 74–75. As things

the political branches toward arrangements satisfactory both in terms of principle and in terms of expediency.

If passivity was at times the best posture for the Court, as Bickel argued, how were the Justices to know when a case called for principled adjudication and when it called for "the techniques and allied devices for staying the Court's hand"?[299] To this question, Bickel's answer was prudence.[300] Determining whether to reach the merits of a case or to hold off marks the point at which the Court "is most a political animal," Bickel admitted.[301] Nevertheless, Bickel argued, the Court's decision about whether to reach the merits of a case must not be made on a mere "whim" or even pursuant to ordinary "expediency."[302] As "an institution that represents decency and reason," the Court ought to be guided in such decisions by the virtue of practical wisdom or, to use Bickel's preferred term, "prudence."[303] There was no principled answer, Bickel proclaimed, to the question of when and in what cases to invoke principle.[304] In our legal-political system, both "guiding principle and expedient compromise" must have their places, but determining the scope of each imperative was not itself amenable to principled or technical determination.[305] Rather, Bickel maintained, judges must cultivate the virtue of practical wisdom, or prudence, to help them navigate the terrain between pragmatic governance and principled adjudication.[306]

Let me place Bickel's argument in relation to both the concrete case of *Naim v. Naim* and the larger dualism of Legal Process thought. The connection between the Court's action in *Naim v. Naim* and Bickel's promotion of the passive virtues is straightforward. Bickel cited to *Naim* explicitly in his *Harvard Law Review* Foreword and subsequent book.[307] He held up the Court's action in *Naim* as a praiseworthy example of the Court's prudence in not reaching the merits of a case over which it held formal jurisdiction. A judgment on the merits legitimating Virginia's Racial Integrity Act "would have been unthinkable,"[308] Bickel wrote. "But," he asked rhetorically,

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turned out, of course, the married people of Connecticut won the liberty to use contraception only through the decision of the Supreme Court four years after Bickel wrote. Griswold v. Connecticut, 381 U.S. 479 (1965).

299 Bickel, *supra* note 11, at 51.

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 BICKEL, *supra* note 9, at 205 (conceding that the "passive devices" are "not themselves principled" and that the "variables that render them decisive cannot be contained in any principles").

305 Bickel, *supra* note 11, at 49.

306 *See infra* Part B for more on Bickel's view of prudence.

307 BICKEL, *supra* note 9, at 276 n.30.

308 *Id.* at 174.

> . . . would it have been wise, at a time when the Court had just pronounced its new integration principle, when it was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to 'mongrelization of the race' and that this was the result the Court had really willed, would it have been wise, just then, in the first case of its sort, on an issue that the Negro community as a whole can hardly be said to be pressing hard at the moment, to declare that the states may not prohibit racial intermarriage?[309]

Here, in one long sentence, we have a summary of the arguments Justice Frankfurter, among others, made for dismissing the case despite the Court's mandatory jurisdiction over the appeal. What Bickel supplied was the larger theory justifying the Court's decision to withhold principled judgment in the case. For Bickel, the Court was wise to exercise prudent restraint in *Naim v. Naim*, for it thereby avoided the Scylla of acceding to expediency (upholding the law) and the Charybdis of counter-productive principled purity (striking down the law). Bickel conceded that, in staying its hand, the Court failed to deliver justice to the immediate litigants in *Naim*.[310] But, having already expressed the principle of racial equality in *Brown v. Board*, Bickel endorsed the Court's decision to leave, for the time being, the issue of anti-miscegenation statutes to the political branches to work out in the shadow of *Brown*. For Wechsler, the Court's dismissal of *Naim* was unprincipled—"wholly without basis in the law"[311]—and therefore a mistake. For Bickel, *Naim v. Naim* was a textbook showcase of the Court's passive virtues, of prudent restraint in response to one of the most politically sensitive issues in American life.[312]

But the dilemma of *Naim v. Naim* posed profound problems—not just for post-*Brown* racial egalitarians, but for Legal Process thought more generally. Bickel was as much a proponent of principled-rationalist adjudication as his Legal Process peers Henry Hart, Herbert Wechsler, and Lon Fuller.[313] At the same time, Bickel and his Legal Process peers also took a consequentialist-pragmatic view of the legal system as a whole.[314] As Bickel put it, "both requirements exist most imperatively

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309 *Id.*

310 *Id.* at 172–74.

311 Wechsler, *supra* note 6, at 34.

312 *See also* William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law,"*, 37 TULSA L. REV. 857, 878 n.112 (2013) (criticizing "Bickel's lame defense of the amoral opportunism of *Naim's* evasion . . . .").

313 Eskridge Jr., *supra* note 5, at 902.

314 *Id.*

side by side: guiding principle and expedient compromise."[315] *Naim v. Naim* was a case in which guiding principle seemed to demand that the Court strike down the Virginia law and expedient compromise suggested leaving it in place. How was a good Legal Process theorist to decide between the two? Bickel believed that his solution allowed the Court to choose the pragmatic path—leaving the law in place—without betraying its commitment to principle.[316] It was Bickel's invocation of prudence that allowed for such an elegant solution to the dilemma. So it is to Bickel's articulation of prudence that we now turn to understand how he tried to reconcile the clash between the two lodestars of Legal Process thought.

B. Bickelian Prudence

The key to understanding Bickel's place in Legal Process thought is his elaboration of the concept of prudence. As Anthony Kronman perceptively argued, it was Bickel's "belief in the value of prudence" that gave coherence to Bickel's various writings—on judging, on democracy, and on American Constitutionalism.[317] For present purposes, though, I will focus on the crucial role that prudence played in Bickel's confrontation with the dual demands of principle and pragmatism (or expedience, as Bickel often termed it).[318] The architects of Legal Process theory, Henry Hart and Albert Sacks, did not dwell on the incongruity between their consequentialist-pragmatic vision and their demand for reasoned elaboration from courts. For Hart and Sacks, the allocation of authority among the variety of legal-policy institutions in the complex American system allowed for a principled-rationalist judiciary to operate within a larger consequentialist-pragmatic (and democratic) framework.[319] Courts, in their view, had a special duty to resolve certain disputes, generally over past behavior, and to articulate the reasons justifying their decisions. But the legislature, the traditional executive branch, and the growing administrative state were institutions better suited, in their various ways, to the development of forward-looking, goal-oriented law and policy.[320]

Bickel accepted this vision and fiercely defended the judiciary as the arena of principle, but he also recognized that a judiciary that is called upon to legitimate or strike down the pragmatic arrangements of the political branches should not close its eyes to the pragmatic impera-

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315 Bickel, *supra* note 11, at 49.
316 *Id.*
317 Kronman, *supra* note 2, at 1569.
318 Bickel, *supra* note 11, at 51.
319 HART, JR. & SACKS, *supra* note 6, at 144–59.
320 *Id.*

tives driving the political system.[321] By all means, the Court must protect its role as the enunciator of principle, Bickel argued, but the Court cannot maintain its role as the oracle of principle by riddling society with more principled opinions than the society will bear. According to Bickel, the Court must temper—and, in fact, has often tempered—its enunciation of principle with restraint.[322] For Bickel, prudence is the virtue—the "intellectual capacity and . . . temperamental disposition"[323]—that the Justices must cultivate if they are to make wise decisions when cases like *Naim v. Naim* force them to determine whether to make a principled decision on the merits or, alternatively, to leave the articulation of principle for another day.

As Bickel explained, prudence is not the absence or antithesis of principle.[324] Rather, a prudent person is able to defend and, when possible, promote principled ideals in the real world of "complex, historically evolved institutions" and amid the "unruliness of the human condition."[325] Prudence includes sensitivity to the particular conditions one confronts, such that one is able to surmise when and in what fashion to advance the cause of principle. It requires great patience and a "high tolerance for accommodation and delay . . . ."[326] The prudent person accepts that compromise and half-measures—illogical and messy arrangements—may be the best one can accomplish at the moment, that a gap between the ideal and the real will always remain, that "out of the crooked timber of humanity, no straight thing was ever made."[327] Prudence allows for the "definition of principled goals" but "the art of the possible in striving to attain them."[328] Citing Edmund Burke, Bickel wrote that "a politics of theory and ideology, of abstract, absolute ideas was an abomination" whereas "'every virtue, every prudent act, is founded on compromise.'"[329] A rigid insistence that reality bend to abstract principle, an all-or-nothing approach, a moralizing attitude, a de-

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321 BICKEL, *supra* note 9, at 131. Bickel also recognized that principled arguments play a role, sometimes a decisive one, in the political branches as well. *Id.* at 267–68. But, in general, there is nothing wrong with the political branches focusing pragmatically on satisfying wants and needs, rather than principles. *Id.* For Bickel, such expediency has no place in adjudication on the merits.

322 Bickel, *supra* note 11, at 51.

323 Kronman, *supra* note 2, at 1569.

324 *See* Bickel, *supra* note 11, at 51 ("The antithesis of principle in an institution that represents decency and reason is not whim, nor even expediency, but prudence.").

325 Kronman, *supra* note 2, at 1569 (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 11 (1975)).

326 *Id.*

327 ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 48 (1st ed. 1990) (paraphrasing Immanuel Kant).

328 BICKEL, *supra* note 9, at 68.

329 ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 19 (1975).

mand for perfection—these are all the enemies of prudence, Bickel argued.

For Bickel, prudence is simply "good practical wisdom"[330] with a "skeptical suspicion of abstract arguments and an affectionate (though not uncritical) regard for the organic mysteries of established institutions."[331] Prudence is not a kind of technical knowledge one can learn from books, nor a kind of abstract reasoning one can perfect like mathematics; rather, it is a virtue that must be cultivated by experience and cannot itself be reduced to rules or algorithms. Moreover, the prudence that Bickel promoted implies a deep humility about one's own ability to reach correct decisions and effect lasting change. Prudence, in other words, comes with a "consciousness of one's *own* limits in solving a problem."[332] There are limits to our knowledge, limits to our persuasive ability, limits to our discipline, and limits to the sheer amount of change we can effect or tolerate. Prudence connotes a humility regarding the scope of our own moral, physical, and intellectual powers.

For Bickel, it is prudence that reconciles the Legal Process demands for principled adjudication and pragmatic governance. It is a question of balance. Too few principled decisions, and the Court fails to keep the polity in meaningful relation to its ideals. Too many principled decisions, and the Court invites derision, resistance, and ultimately obsolescence. For Bickel, the great danger to be avoided was a society unmoored from its principles, and he believed that judicial decisions lacking principle *or* a surfeit of principled decisions constituted two alternative paths to that outcome. It is clear why a Court that hands down unprincipled decisions, decisions that represent mere will or whim, would fail in its function to provide principled adjudication. But an overabundance of principle would lead to much the same result, according to Bickel, for "there must eventually be a limit to the number of judicially-pronounced principles that the political institutions will have the will to make their own and the energy to execute."[333] If the Court continues to issue such pronouncements beyond that limit, it "will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication."[334] For Bickel, then, only prudence in choosing when, how often, and in what circumstances to render principled decisions allows the Court to inject as much

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330 *Id.* at 23.

331 Kronman, *supra* note 2, at 1572.

332 Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 62 n.347 (2011).

333 ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94–95 (2d ed. 1978).

334 *Id.* at 95.

principle into the political system as the system can bear—no more and no less.

Prudently withholding judgment in cases such as *Naim v. Naim* is, according to Bickel, precisely what allows the Court to render authoritative decisions such as *Brown v. Board*. As Bickel put it, "there is a natural quantitative limit to the number of major, principled interventions the Court can permit itself per decade."[335] Coming on the heels of *Brown v. Board*, a judgment on the merits in *Naim v. Naim* would have been one principled intervention too many, at least in the realm of race relations. The apocryphal comment attributed to Justice Clark after the Court disposed of *Naim v. Naim* captures the Bickelian insight in an even more pithy way: "[o]ne bombshell at a time is enough."[336]

To recap Bickel's argument: the Court represents the arena of principle, and its main function is to declare and fairly apply principles when it chooses to adjudicate disputes. But the Court has no obligation to adjudicate every dispute that comes within its technical jurisdiction. Indeed, because the legal-political system as a whole also requires pragmatic compromise, there are times when the prudent course of action for the Court is *not* to decide disputes before it on the merits. The Court errs when it reaches out to resolve a dispute imprudently and ends up either legitimating unprincipled political compromises or demanding more principled action from the political branches than those branches can possibly deliver. In such cases, the Court should employ the various justiciability doctrines and other lawful techniques of avoidance—the "passive virtues"—and bide its time. By prudently withholding principled adjudication on the merits in some cases, the Court is able to protect its function as the arena of principle while granting due respect to pragmatic compromises generated by the political and more democratically legitimate branches. In this way, the passive virtues reconcile the dueling imperatives of Legal Process thought (principled-rationalist adjudication and consequentialist-pragmatic governance) and the dueling imperatives of Constitutional democracy (principled judicial review and democratic consent).

V. THE CENTER CANNOT HOLD

Bickel's articulation of the passive virtues, both in the *Harvard Law Review* and in *The Least Dangerous Branch*, garnered widespread attention and provoked extended academic discussion that continues to this day.[337] There are two striking features of the reception of Bickel's work

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335 *Id.* at 94.

336 *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 193 (1964).

337 Bickel's *Harvard Law Review* Foreword ranked 73rd on the 1996 list of most-cited law review articles. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-

in the legal academy: there has been almost unanimous praise for Bickel's analytical brilliance and historical sensibility, and there has been almost unanimous rejection of the "passive virtues" as a solution to reconciling consequentialist-pragmatic and principled-rationalist methods of judging. First and most importantly, Bickel's fellow Legal Process thinkers largely criticized the "passive virtues" thesis because, in their view, it betrayed the principled-rationalist model of adjudication that Legal Process was intent on defending. Then, Bickel's thesis came under attack from legal liberal scholars who thrilled to the Warren Court's progressive decisions and advocated ever more ambitious rights-based legal reform. By the mid-1960s, it was clear that Legal Process academic hegemony had passed, and normative jurisprudence was again divided between those who were determined to hew closely to the principled-rationalist tradition and those who embraced consequentialist-pragmatism.

A. Reaction Within Legal Process

The most direct and critical assessment of Bickel's passive virtues thesis came from his Legal Process School contemporary Gerald Gunther, who wrote a long review of *The Least Dangerous Branch* in the *Columbia Law Review*.[338] Gunther, a student of Henry Hart at Harvard and later a close colleague and friend of Herbert Wechsler at Columbia, was as thoroughly ensconced in Legal Process jurisprudence as Alexander Bickel, and their personal and professional careers ran along similar tracks.[339] Setting the tone that would dominate most criticism of Bickel's

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KENT L. REV. 751, 762 (1996) (noting that its citation count was artificially low because the article was adapted into a book chapter in *The Least Dangerous Branch*). Three of Bickel's articles were among the top 100 most-cited law review articles on the 1996 list. *Id.* at 760. By 2012, Bickel's name was not to be found on the top 100 list. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1497–98 (2012). In 2000, Fred Shapiro listed Bickel eighth on a list of the most cited legal scholars. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000).

338 Gunther, *supra* note 13, at 1.

339 Gunther, like Bickel, came to the United States from Europe as part of a Jewish family fleeing anti-Semitism; Gunther's family fled Usingen, Germany, in 1938 after *Kritallnacht*—the year before Bickel's family left Romania. Both Bickel and Gunther were part of the second wave of Legal Process scholars made up largely of the early students of Lon Fuller and Henry Hart. Gunther graduated from Harvard Law School in 1953, a few years after Bickel, and Gunther then served as a clerk for Second Circuit Judge Learned Hand and U.S. Supreme Court Chief Justice Earl Warren. *See* KATHLEEN SULLIVAN, *Gerald Gunther*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 241 (Roger K. Newman ed., 2009). During his Supreme Court clerkship, Gunther played an important role in drafting the opinion in *Brown II*, just as Bickel had played a role in the research leading to *Brown I*. Gordon Davidson et al., *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education II, 79 ST. JOHN'S L. REV. 823, 874 n.70 (2006). Gunther went on to an eminent career as a Constitutional law scholar, first at Columbia Law School, where he taught alongside Herbert Wechsler, and then at Stanford Law School. SULLIVAN, *supra* note 339; *see also* Ruth Bader Ginsburg, *Memories of Gerald Gunther*, 55 STAN. L. REV. 639, 639 (2002) (describing a Federal Courts course she took at Columbia Law School co-taught by Wechlser and Gunther in 1958).

work, Gunther began and ended his review by praising Bickel's contribution for its importance, its "depth and substance," and its "over-all quality."[340] Gunther noted that Bickel followed in the tradition of Henry Hart and Herbert Wechsler and that Bickel aimed to be a great defender of the principled nature of adjudication, demanding "generality and . . . neutrality" from judicial decisions.[341] Gunther admired this aim and cheered Bickel's defense of principled-rationalist adjudication against more discretionary, results-oriented theories, e.g., those expressed by the provocative Realist Thurman Arnold.[342] But, Gunther argued, the content of Bickel's passive virtues thesis actually did violence to the ideal of principled adjudication and moreover rested on false assumptions about the public meaning of various court actions.

Where Bickel argued that the Court could protect the realm of principle best by foregoing adjudication on the merits in some politically charged cases, Gunther countered that the decision to forego adjudication on the merits would itself be an unprincipled decision based on conjecture about political consequences.[343] Bickel had, of course, anticipated this response and admitted that the decision whether to reach the merits of a case or to avoid it could not itself be a purely principled determination, but was rather a matter of prudence.[344] By allowing prudential concerns a place on the front end (e.g., in determining justiciability), Bickel argued, the Court could keep out unprincipled concerns from the sacred core of adjudication, namely decisions on the merits.[345] But Gunther rejected the view that there was a relevant distinction between justiciability decisions and decisions on the merits, for both sets of decisions are governed by law and therefore must be decided by principle.[346] The doctrines that make up the passive virtues—e.g., standing, ripeness, mootness, political questions, the various avoidance doctrines—are themselves doctrines derived from the Constitution and Congressional statutes.[347] They are not, Gunther emphasized, empty vessels inviting unconstrained judicial discretion, no matter how prudently exercised. By

340 Gunther, *supra* note 13, at 1, 24.

341 *Id.* at 3.

342 *Id.* at 4–5 (agreeing with Bickel's criticism of Thurman Arnold's article, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960)).

343 *Id.* at 7.

344 BICKEL, *supra* note 9, at 205 (conceding that the "passive devices" are "not themselves principled" and that the "variables that render them decisive cannot be contained in any principle . . . .").

345 *Id.*

346 Gunther, *supra* note 13, at 15 ("[T]he problem is, after all, one of principles—principles no less so because they pertain to jurisdiction.").

347 *Id.* at 16 ("Bickel's manipulative use of jurisdictional doctrines is the ultimate outgrowth of a tendency to blur the fact that jurisdiction under our [s]ystem is rooted in Article III and congressional enactments . . . .").

viewing justiciability and avoidance doctrines as mere techniques of avoidance, Gunther argued, Bickel debased them as law and fell into the abyss of "'unchanneled, undirected, uncharted discretion.'"[348] Each technique is a doctrine with its own Constitutional or statutory basis and thus, Gunther argued, judicial decisions invoking such doctrines must be as principled as decisions on the substantive merits of the case. In short, Gunther argued, if adjudication is the realm of principle, that realm includes both adjudication on the merits and adjudication of justiciability and related issues; Bickel's attempt to excise the avoidance doctrines from principled adjudication was, Gunther held, indefensible.[349]

Gunther seized on Bickel's reaction to the Court's dismissal of *Naim v. Naim* as a particularly egregious example of the implications of Bickel's passive virtues thesis. "Bickel's cavalier amalgamation of certiorari and appeal," Gunther wrote, "is a vast if not mischievous overstatement, in fact and in law."[350] Because the *Naim* case arrived at the Supreme Court as a mandatory appeal pursuant to the Judiciary Act of 1925, the Court could not treat it as it would a petition for certiorari. Indeed, under the operative statute, even a summary dismissal of a mandatory appeal, such as *Naim*'s, "does not mean that the Court has avoided adjudication;" rather, Gunther argued that a summary dismissal is itself a decision on the appeal, not a denial of adjudication.[351] More pertinently, Gunther argued, there was simply no legal basis for the view that the Court had any discretion to summarily dismiss the appeal. The issue was properly before the Court on mandatory appeal, and the Constitutionality of anti-miscegenation statutes was certainly a substantial federal question. "No doubt there were strong considerations of expediency against considering the constitutionality of anti-miscegenation statutes in 1956," Gunther granted.[352] But where, he demanded, was there any basis in law for dismissing the mandatory appeal? Bickel's praise of the Court for effectively ducking the question on appeal was, Gunther charged, tantamount to "disregard of legislative power under Article III" to set the terms of the Supreme Court's appellate jurisdiction.[353] Despite Bickel's professed investment in dialogue between the Court and Congress, Gunther argued, Bickel's praise of the Court's "lawless" dismissal of the *Naim* appeal indicated contempt for Congress and its legitimate role in setting the Court's appellate jurisdiction.[354]

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348 *Id.* at 10.
349 *Id.* at 15.
350 *Id.* at 11.
351 *Id.* at 11.
352 *Id.* at 11–12.
353 *Id.* at 12.
354 *Id.* at 12 ("[Bickel's] disregard of legislative power under Article III is difficult to reconcile with his ambition to preserve the integrity of constitutional principles.").

Moreover, Gunther argued, the summary dismissal of the *Naim* appeal did nothing to protect the Court's authority to develop Constitutional principles in the future, for the principle readily applicable to state anti-miscegenation statutes had already been announced in *Brown*.[355] All the Court was called upon to do in *Naim* was apply the principle of racial egalitarianism to state statutes that blatantly contradicted that principle. Of course, it may have been more expedient for the Court to stay silent on the issue of anti-miscegenation statutes, but a failure to apply clear principle should not be praised *as a defense of principle*, Gunther argued, writing:[356]

> Here, surely, the vice of the 'passive virtues' extends beyond the blithe disregard of principles essential to jurisdictional doctrines; here, surely, Bickel inevitably compromises the very principle—the impermissibility of racial classifications—that he purports to protect; here, surely, he endorses past Court disregard of its *raison d'etre* and asks that the disregard continue.[357]

Gunther, in sum, spoke up for the principled-rationalist side of Legal Process jurisprudence and charged Bickel with apostasy for calling for unprincipled concerns to dominate judicial decisions involving the avoidance doctrines.[358] Allowing concerns of prudence or expediency into one realm of adjudication, Gunther wrote, infects "the integrity" of all adjudication, for the Court is thereby treating all cases as opportunities for unprincipled disposition.[359] Gunther, therefore, charged Bickel with

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355 *Id.* at 23. In fact, Gunther described the principled articulated in *Brown* as one holding that "'race is not an allowable criterion for legislative classification.'" *Id.* Resolution of the *Naim* case, as Gunther saw it, did not require the articulation of any new principles but merely the application of the very principle that Bickel praised the Court for articulating in *Brown*. *Id.* at 23–24.

356 *Id.* at 23–24.

357 *Id.* at 24.

358 Gunther's severe criticism of Bickel's work did not occasion any personal or professional break between the two men. Gunther sent Bickel an early draft of his review and suggested that Bickel might want to write and publish a reply. *See* Letter from Gerald Gunther to Alexander Bickel (Dec. 2, 1963) (on file with Manuscripts & Archives, Yale University Library). On the top of a Columbia Law Review reprint of the review that Gunther sent to Bickel, Gunther wrote by hand, "For Alec Bickel – Who knows that my expressions of admiration are not disingenuous, not gestures. With warm and high regard, Gerry." Letter from Gerald Gunther to Alexander Bickel (Feb. 15, 1964) (on file with Manuscripts & Archives, Yale University Library). Bickel read Gunther's review and wrote back to Gunther, calling it a "first-rate job" and a "powerful paper." Letter from Alexander Bickel to Gerald Gunther (Dec. 5, 1963) (on file with Manuscripts & Archives, Yale University Library). Bickel went on to say, "You score some points – no doubt about that – although I think I could crank up the answers from my point of view." *Id.* Nevertheless, Bickel wrote, he would not write or publish a response to Gunther's review because "[i]t would take a full scale article to do so, and I mustn't give the time for that." *Id.*

359 *Id.* at 10.

propagating a "virulent variety of free-wheeling interventionism"[360] under the "seductively attractive" guise of techniques of judicial restraint.[361] In his most pithy phrase, Gunther accused Bickel of "100% insistence on principle, 20% of the time."[362]

Other Legal Process figures, most prominently Herbert Wechsler, adopted Gunther's powerful criticism of Bickel's passive virtues thesis. Writing a couple of years later, Wechsler took Bickel to task for praising *Naim v. Naim* and other "anomalous departures from judicial duty."[363] Wechsler noted that what Bickel really seemed to be advocating was for the Supreme Court to have full discretionary control over its docket.[364] And if that were the real aim, Wechsler suggested, then the proper way to proceed was to call on Congress to reform the Judiciary Act of 1925 so as to eliminate mandatory appeals, not, as Bickel had done, to urge the Court to manipulate various justiciability and avoidance doctrines.[365] As Wechsler put it, "the masters of prudential judgment," namely the political branches, "thus far have considered that law rather than prudence ought to be the measure of the duty to decide."[366] Unless and until Congress and the President make that legislative change, the Court may not unilaterally place its own prudential determination over the clear statutory duty to decide cases on the merits. "[T]he need for principled decision as to what is subject to adjudication," Wechsler wrote, "seems to me no less than that for principled adjudication of the merits of the issues that the Court decides."[367] Like Gunther, Wechsler complimented the "wealth of insight"[368] and "subtle study" Bickel brought to the discussion of adjudication,[369] but ultimately he made clear that, for him, the

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360 *Id.* at 25.

361 *Id.* at 24.

362 *Id.* at 3.

363 Herbert Wechsler, *Bickel: The Least Dangerous Branch: The Supreme Court at the Bar of Politics; Bickel: Politics and the Warren Court*, 75 YALE L.J. 672, 676 (1966) (reviewing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) and ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1965)).

364 *Id.* at 675.

365 *See id.* Congress did eventually eliminate the kind of mandatory appeal that applied to the *Naim* case. *See* Supreme Court Case Selections Act of 1988, Pub. L. 100–352, 102 Stat. 662 (1988) (codified at 28 U.S.C. §1257).

366 Wechsler, *supra* 363, at 675.

367 *Id.*

368 *Id.* at 676.

369 *Id.* at 677. In a letter to Bickel in 1961, Wechsler described Bickel's *Harvard Law Review* Foreword as "your magnificent Foreword" and noted that "[w]e have needed this for a long time." Letter from Herbert Wechsler to Alexander Bickel (Nov. 3, 1961) (on file with Manuscripts & Archives, Yale University Library). But Wechsler also mentioned "crucial points on which you leave me unpersuaded." *Id.*

passive virtues thesis constituted a betrayal of principled adjudication, not its defense.[370]

B. The End of an Era and the Post-Process World

Bickel's elucidation of the passive virtues thesis remains a touchstone of Constitutional analysis to this day.[371] His sensitive elucidation of the justiciability and avoidance doctrines remain canonical, as does his sensitivity to the potential political consequences of such decisions. Nevertheless, one must conclude that the passive virtues thesis was a failure in its grander jurisprudential mission of reconciling the two imperatives of Legal Process thought: principled-rationalist adjudication and consequentialist-pragmatic governance. In the story of Legal Process jurisprudence, Bickel's passive virtues thesis represents an end of a line, not a new birth. And, chronologically speaking, it comes at the tail end of the decade-long Legal Process Golden Age running from 1953 to1963. There are of course different ways to date the emergence and demise of the Legal Process approach to law, and certainly the major themes and concerns of Legal Process were percolating in American legal thinking long before 1953 and continued to do so long after 1963.[372] Legal Process never died, or if it did, it has been resurrected in multiple waves of "New Legal Process" movements that have emerged in the last half-century.[373] But a number of developments in 1962 and 1963 heralded the end of the Golden Age of Legal Process, its era of intellectual hegemony.

Bickel published *The Least Dangerous Branch*, his book-length articulation of the passive virtues thesis, in 1962.[374] August 1962 saw the retirement from the Supreme Court of Bickel's great mentor and the symbolic godfather of Legal Process, Justice Frankfurter. Fittingly,

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370 *See also* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 n.14 (1973) ("On the question of whether the 'case or controversy' and allied doctrines must be as principled in their content as the substantive constitutional doctrines themselves, I stand squarely with Professor Gunther.").

371 There was an upsurge in interest in Bickel and the passive virtues as the marriage equality cases wound their way through the courts. *See, e.g.*, Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 200 (2013); Orin Kerr, *The Timing of the Same-Sex Marriage Case and Bickel's Passive Virtues*, VOLOKH CONSPIRACY (Mar. 27, 2013, 12:56 AM), http://volokh.com/2013/03/27/the-timing-of-the-same-sex-marriage-case-and-bickels-passive-virtues; Gil Kujovich, *An Essay on the Passive Virtue of* Baker v. State, 25 VT. L. REV. 93, 97–98 (2000).

372 Eskridge, Jr. & Frickey, *supra* note 175, at 2051 (1994) ("Between 1963 and 1973, the socio-political conditions for the legal process synthesis ended."); *see also* Duxbury, *supra* note 118 (Duxbury on Legal Process outside the Golden Age)

373 *See, e.g.*, Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)).

374 BICKEL, *supra* note 9.

Frankfurter's final opinion was his dissent in *Baker v. Carr* in which he cautioned that judicial interference into "political entanglements" such as legislative apportionment would ultimately harm the authority of the Court.[375] Symbolically, Frankfurter's retirement from the Court marked the end of the "early" Warren Court, and it also meant that a certain tradition of judicial restraint—one tracing back via Justice Brandeis and Justice Holmes to Harvard Law professor James Bradley Thayer—no longer had representation on the Court.[376] After Frankfurter's retirement, the Warren Court moved further leftward, became even bolder in its civil liberties decisions, and grew into a full-fledged "cultural phenomenon."[377] Far from heeding Frankfurter's and Bickel's warnings, the Court between 1962 and 1969 made landmark rulings in areas as disparate as legislative apportionment, criminal procedure, free speech, religious freedom, and the right to privacy.[378] Legal Process authors, including Bickel, became ever more critical of the Warren Court as the 1960s progressed, and the defenders of the Warren Court became perforce critics of the Legal Process approach to law.[379]

The year 1963 brought another harbinger of the demise of Legal Process jurisprudence in the aborted Holmes Lectures delivered by Henry Hart.[380] Hart was the first—and remains the only—sitting member of the Harvard Law School faculty to be invited to give the prestigious Holmes Lectures, traditionally a series of three lectures delivered over successive evenings.[381] Hart took the opportunity to rearticulate the basic jurisprudential premises of his approach to law, and the first two lectures largely tracked arguments that he and Albert Sacks developed in the Legal Process materials.[382] On the third night, when he turned specifically to the role of adjudication in the larger legal process, Hart began by emphasizing the need for judges to employ reason in their decisions

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375 *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

376 Snyder, *supra* note 2, at 2133–34; Posner, *supra* note 2, at 533.

377 *See* Mark Tushnet, *The Warren Court as History: An Interpretation*, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 3–4 (Mark Tushnet ed., 1993).

378 *See generally* HORWITZ, *supra* note 164.

379 *See, e.g.,* Wright, *supra* note 14, at 769 (a broadside against the Legal Process approach in general and specifically against Alexander Bickel's 1969 Holmes Lectures, later published as THE SUPREME COURT AND THE IDEA OF PROGRESS (1970)). Laura Kalman and others have written in detail about the relationship of Legal Process theory and the Warren Court. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996). My argument is complementary to the conventional account that the Legal Process did not survive its encounter with the Warren Court, but I am emphasizing the internal intellectual tensions in Legal Process jurisprudence that Bickel exposed, rather than the external shock of Warren Court rulings and Sixties left radicalism.

380 *See* Eskridge, Jr. & Frickey, *supra* note 175, at 2046 n.92.

381 Usually, the lectures are delivered by an eminent judge or visiting academician. *See, e.g.*, *Waldron delivers Holmes Lectures at Harvard Law School*, N.Y.U. LAW (Oct. 12, 2009), http://www.law.nyu.edu/news/waldron_holmes_lectures.

382 *See* Barzun, *supra* note 8, at 18–19.

and to be sensitive to the underlying social purposes of legal doctrine.[383] In short, he restated the Legal Process commitment to both principled-rationalist adjudication (reason) and consequentialist-pragmatic jurisprudence (purpose). Shortly thereafter, Hart confessed that he had realized just the evening before that the general resolution to the dilemmas of adjudication, which he had planned to present, was in fact unsatisfactory.[384] Instead, to the astonishment of the audience, Hart stopped his lecture cold and took a seat.[385] As a symbolic ending to the era of Legal Process hegemony, it is hard to imagine a more dramatic scene.[386]

Lon Fuller's Storrs Lectures at Yale Law School in the spring of 1963, published the following year as *The Morality of Law*, stands as the last masterwork of the Golden Age of Legal Process.[387] Of course, the Legal Process authors continued to write and produce thereafter, and Legal Process jurisprudence continues as a major theoretical approach to American law until this day.[388] But the sense that the Legal Process approach represented a new consensus, a dominant spirit of legal analysis, did not survive the end of 1963.[389] Indeed, no new consensus ever emerged.

It is well beyond the scope of this article to trace all of the post-1963 twists and turns in American legal theory. But a few brief observations are in order. The decade following 1963 saw the emergence of a group of liberal legal scholars who were animated by their passionate defense of the Warren Court and their sense that the Supreme Court ought to go even further to push the country in a liberal direction. This new wave of legal liberals rejected the hand-wringing of the Legal Process authors regarding judicial activism.[390] The implicit and often explicit goal of their scholarly efforts was to supply intellectual justifications for judicial leadership in liberal social change. One exam-

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383 Michael J. Henry, *Hart Converses on Law and Justice*, HARV. LAW REC., Feb. 28, 1963, at 7-8; *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 56 (1982).

384 *See* BOBBITT, *supra* note 383, at 57.

385 *See* Eskridge, Jr. & Frickey, *supra* note 175, at 2046 n.92.

386 *See* Jack Balkin, *Tribe Says "No Mas,"* BALKINIZATION (May 22, 2005, 8:52 PM), https://balkin.blogspot.com/2005/05/tribe-says-no-mas.html.

387 *See generally* LON L. FULLER, THE MORALITY OF LAW (1964).

388 *See* Wetlaufer, *supra* note 3, at 21–34 (describing Legal Process as one of the six standard theoretical approaches within contemporary legal academia).

389 In their study of the *Harvard Law Review* Forewords, Mark Tushnet and Timothy Lynch observed that "[a]n abbreviated intellectual history of the Forewords might argue that legal process theory dominated until 1963 . . . ." Tushnet & Lynch, *supra* note 140, at 474.

390 *See* Wright, *supra* note 14, at 769. They also received support from at least one unreconstructed Realist from the previous generation. *See* Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963) (arguing against the Legal Process insistence on rigorous principled-rationalist adjudication and in particular against Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*).

ple of the new liberal legal confidence arrived in 1971 with the publication of a scathing attack on Bickel's work by the famously liberal D.C. Circuit judge J. Skelly Wright.[391] The indictment of Bickel by Wright was a clear declaration by the new legal liberals that they were no longer operating within the Legal Process paradigm and were no longer in thrall to Legal Process concerns. A "new generation of lawyers—the new professors as well as judges and practitioners," Wright wrote, "see no point in querulous admonitions that the Court should restrain itself from combatting injustice now in order to preserve itself to combat a coup later on."[392] For the new post-Process generation of lawyers, Wright argued, "there was no theoretical gulf between the law and morality; and, for them, the [Warren] Court was the one institution in the society that seemed to be speaking most consistently the language of idealism which we all recited in grade school."[393] For Wright, it was the apparent real-world achievements of the Warren Court, not the dry subtleties of Legal Process thought, that resonated with the younger generation. Of that generation, Wright said:

> They have seen that affairs can be ordered in conformance to constitutional ideals and that injustice—to which *they* are prepared to give powerful meaning—can be routed. They have seen that it can be done: the Warren Court did it and the heavens did not fall.[394]

Though rights-focused legal liberalism became one of the major operating systems of post-Process jurisprudence, it never dominated the academy with the same security that Legal Process did during its Golden Age. Even at the time Wright was writing in 1971, the Warren Court itself was already history, and Burger Court "retrenchment" was taking the wind out of the legal liberal "faith" in the courts. Over the course of the 1970s, new movements in legal thought emerged in opposition to both Legal Process jurisprudence and rights-based legal liberalism. On the left, Critical Legal Studies grew out of New Left dissatisfaction with both standard legal liberalism and the Legal Process legacy. On the right, a new emphasis on textualism and originalism emerged alongside a burgeoning Law and Economics movement. The newer movements themselves could be roughly divided between those that valorized principled-rationalist adjudication and those that promoted consequentialist-pragmatic judging.

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391 *See generally* Wright, *supra* note 14, at 769.

392 *Id.* at 804.

393 *Id.*

394 *Id.* at 805.

Though they shared no methodology or ideological affinity, Critical Legal Studies and Law and Economics were both unabashedly consequentialist-pragmatic in orientation. Critical Legal Studies authors were clear that their analytic work was part of a larger social agenda, "to transform the practices of the legal system to help make this a more decent, equal, solidary society—less intensively ordered by hierarchies of class, status, 'merit,' race, and gender—more decentralized, democratic, and participatory."[395] And though Law and Economics purported to distinguish between its positive and normative agendas, the concept of efficiency served as both an explanation of the history of legal doctrine and a guidepost for its further development.[396] Law and Economics understood most doctrinal analysis as epi-phenomenal to the pragmatic working out of efficiency-maximizing rules, and on the normative side, Law and Economics was ruthlessly concerned with how judicial decisions did or did not incentivize maximum efficiency. A more thoroughly consequentialist-pragmatic theory is difficult to conceive.[397]

On the other hand, originalism and textualism as well as new philosophically rigorous rights-based approaches offered new ways forward for those drawn to principled-rationalist modes of adjudication. Robert Bork's early advocacy of originalism in Constitutional interpretation was a very conscious attempt to double-down on the principled-rationalist tradition of Legal Process and reject what Bork saw as a judicial and academic drift to consequentialist-pragmatic modes of judging. Indeed, Bork wrote *Neutral Principles and Some First Amendment Problems* in partial response to J. Skelly Wright's broadside against Bickel and the Legal Process "mandarins."[398] Where Wright faulted Bickel for giving up on the transformative potential of the Court, Bork faulted Bickel and other Legal Process authors for being insufficiently principled. "We have not carried the idea of neutrality far enough," Bork argued.[399] What Bickel and Wechsler demanded, Bork correctly noted, was merely "neutrality in the *application* of principles."[400] Bork argued that judges "must be neutral as well in the *definition* and the *derivation* of principles."[401] Bork objected, in other words, to any judicial discretion in the development and articulation of Constitutional values, discretion that Wechsler

395 Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 197 (1987).

396 Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 776 (1975).

397 Law and economics understands reason not as a judicial technique for arriving at decisions rationally related to pre-existing doctrinal norms, but rather as an instrumental technique for maximizing results, such as welfare, efficiency, or wealth. *See* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 789 (1990).

398 Bork, *supra* note 17, at 4.

399 *Id.* at 7.

400 *Id.*

401 *Id.*

and Bickel both found ineradicable and implicit in the judicial function. Bork claimed that adherence to the historically fixed meaning of the text was the only way to eradicate judicial discretion and thus the only way to truly adhere to neutral principles in Constitutional adjudication.[402] "[D]evotion to principle requires that we follow where logic leads," Bork wrote, in a perfect distillation of the principled-rationalist worldview,[403] and devotion to principle, Bork argued, required that judges must neutrally apply only those values clearly enunciated in the texts they interpret.[404] That, in a nutshell, was the judicial philosophy behind originalism in Constitutional interpretation and textualism in statutory interpretation, two approaches championed by Justice Antonin Scalia and still major forces in American legal academia and on the bench.

Finally, while the early Warren Court defenders such as J. Skelly Wright and Charles Cook cheerfully argued for just results over rational rigor, a later strand of more philosophically sophisticated legal liberals developed theories of adjudication that were themselves principled-rationalist in orientation. The emblematic figures of this strain of post-Process legal liberalism include Ronald Dworkin, John Hart Ely, Frank Michelman, Ernest Weinrib, and Bruce Ackerman.[405] As Laura Kalman pointed out, the end of the Warren Court coincided with a turn to political philosophy among many liberal legal academics.[406] The publication and quick canonization of John Rawls' *A Theory of Justice* signaled a revival of normative liberal political theory, and many legal academics looked to this field to find a rigorous grounding for the rights-centric liberalism associated with the Warren Court.[407] Dworkin's 1977 *Taking Rights Seriously* is a representative work of this genre, as its central theme is that the rational working out of rights-based arguments can and will yield correct answers to even the most difficult legal problems.[408] For our purposes, what is striking about Dworkin and this cohort of thinkers is that they believed liberal results could be derived from rigorous principled-rationalist judging; unlike Bork and Scalia, the rationalism of these latter legal liberals was anchored in liberal political theory rather than in authoritative legal texts.

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402 *Id.* at 8 ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

403 *Id.* at 6.

404 *Id.* at 8.

405 *See generally* DWORKIN, *supra* note 15; *see generally* HART, JR. & SACKS, *supra* note 6; *see generally* Michelman, supra note 15.

406 KALMAN, *supra* note 379, at 62.

407 *Id.* at 62–63.

408 *See generally* DWORKIN, *supra* note 15.

CONCLUSION

It would be an overstatement to pin the demise of any major jurisprudential approach to any single figure or to purely intellectual developments. More than other intellectual endeavors, legal theory is responsive to outside developments in law, politics, economics, and culture. Nevertheless, the narrative I have laid out above suggests a largely internal story of Legal Process decline in which the work of Alexander Bickel played a crucial, though unintended, role. The increasingly rigorous Legal Process demands for principled-rationalist adjudication sat uneasily alongside the larger consequentialist-pragmatic legal philosophy of Hart, Sacks, Fuller, and Wechsler; Bickel forthrightly confronted the stresses between these two sides of Legal Process thought, and he attempted to reconcile them through the concept of prudence generally and the passive virtues thesis more particularly. But the proposed resolution failed to bind together strict adherence to principle and to results-oriented pragmatism, and instead of solving the paradox at the heart of Legal Process theory, Bickel succeeded only in exposing it.

A satisfactory reconciliation of the two approaches to law—the principled-rationalist and the consequentialist-pragmatic—may be impossible, but perhaps the lesson of Bickel's thought is that both approaches are endemic to the enterprise of law, and any jurisprudence that wholly neglects one for the other will fail to take the law seriously.