Structures of Judicial Decision-Making from Legal Formalism to Critical Theory
Structures of Judicial Decision-Making from Legal Formalism to Critical Theory

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SUMMARY OF CONTENTS

Table of Cases xv
Table of Secondary Authorities xix
Preface xxxvii
Acknowledgments xliv

Introduction 3

PART 1
TRADITIONAL PROCESS

SECTION A
LOGICAL METHOD 31

Chapter 1 Legal Formalism 37
Chapter 2 Scalian Textualism 61

SECTION B
POLICY METHOD 85

Chapter 3 Legal Realism 89
Chapter 4 Sociological Jurisprudence 111
Chapter 5 Legal Process 133

SECTION C
A PHILOSOPHICAL SYNTHESIS 155

Chapter 6 Philosophical Foundations 157
Chapter 7 Levels of Judicial Analysis 169
SUMMARY OF CONTENTS

PART 2
CRITICAL PROCESS

SECTION A
Critical Theory

Chapter 8 Critical Theory: Central Element
Chapter 9 Critical Theory: Operational Elements

SECTION B
Critical Process

Chapter 10 Structure of Critical Process
Chapter 11 In re Kulko v. Superior Court
Chapter 12 In re Brown v. Board of Education

Epilogue
Index
# Contents

Table of Cases ........................................... xv
Table of Secondary Authorities ....................... xix
Preface .................................................. xxxvii
Acknowledgments ........................................ xlix

**Introduction**

- A. The Structure of Process ......................... 3
- B. Western Tradition ................................ 4
- C. Policy and Judicial Policy-Formulation ....... 12
  - 1. Definition of Policy ............................ 13
  - 2. Judicial Policy-Formulation ..................... 15

**Part 1**  
**Traditional Process**

**Section A**  
**Logical Method** ................................ 31

**Chapter 1**  
**Legal Formalism** ................................ 37

- A. Overview ........................................... 37
- B. The Rise of Legal Formalism ................. 40
- C. Loaded Syllogisms ............................... 47
- D. Case Illustrations ................................. 51
- E. Criticisms ........................................... 55

**Chapter 2**  
**Scalian Textualism** ................................. 61

- A. Overview ........................................... 61
- B. Basic Approach .................................... 63
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.</td>
<td>Statutory Textualism</td>
<td>66</td>
</tr>
<tr>
<td>D.</td>
<td>Constitutional Textualism</td>
<td>71</td>
</tr>
<tr>
<td>E.</td>
<td>Criticisms</td>
<td>74</td>
</tr>
<tr>
<td><strong>Section B</strong></td>
<td><strong>Policy Method</strong></td>
<td>85</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>Legal Realism</td>
<td>89</td>
</tr>
<tr>
<td>A.</td>
<td>Background</td>
<td>89</td>
</tr>
<tr>
<td>B.</td>
<td>Shaping Forces</td>
<td>91</td>
</tr>
<tr>
<td>1.</td>
<td>Major Legal Force</td>
<td>91</td>
</tr>
<tr>
<td>2.</td>
<td>Major Nonlegal Forces</td>
<td>94</td>
</tr>
<tr>
<td>C.</td>
<td>Structure and Illustrations</td>
<td>99</td>
</tr>
<tr>
<td>1.</td>
<td>Unwritten Law</td>
<td>99</td>
</tr>
<tr>
<td>2.</td>
<td>Written Law</td>
<td>102</td>
</tr>
<tr>
<td>D.</td>
<td>Criticisms</td>
<td>106</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>Sociological Jurisprudence</td>
<td>111</td>
</tr>
<tr>
<td>A.</td>
<td>Background</td>
<td>111</td>
</tr>
<tr>
<td>B.</td>
<td>Basic Approach</td>
<td>112</td>
</tr>
<tr>
<td>1.</td>
<td>Criticism of Legal Formalism</td>
<td>112</td>
</tr>
<tr>
<td>2.</td>
<td>Criticism of Legal Realism</td>
<td>114</td>
</tr>
<tr>
<td>C.</td>
<td>Structure</td>
<td>115</td>
</tr>
<tr>
<td>D.</td>
<td>Illustrations</td>
<td>118</td>
</tr>
<tr>
<td>1.</td>
<td>Common Law Setting</td>
<td>118</td>
</tr>
<tr>
<td>2.</td>
<td>Statutory Setting</td>
<td>120</td>
</tr>
<tr>
<td>3.</td>
<td>Constitutional Setting</td>
<td>124</td>
</tr>
<tr>
<td>E.</td>
<td>Criticisms</td>
<td>125</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>Legal Process</td>
<td>133</td>
</tr>
<tr>
<td>A.</td>
<td>Background</td>
<td>133</td>
</tr>
<tr>
<td>1.</td>
<td>Landis</td>
<td>134</td>
</tr>
<tr>
<td>2.</td>
<td>Hart and Sacks</td>
<td>135</td>
</tr>
<tr>
<td>B.</td>
<td>Components of Legal Process</td>
<td>137</td>
</tr>
<tr>
<td>1.</td>
<td>Purposive Action</td>
<td>137</td>
</tr>
<tr>
<td>2.</td>
<td>Institutional Settlement and Reasoned Elaboration</td>
<td>137</td>
</tr>
<tr>
<td>C.</td>
<td>Structure and Illustrations</td>
<td>140</td>
</tr>
</tbody>
</table>
1. Common Law Setting 140
2. Statutory Setting 143
3. Constitutional Setting 146
D. Criticism 149

SECTION C
A Philosophical Synthesis 155

Chapter 6 Philosophical Foundations 157
A. Introduction 157
B. Human Temperaments 157
  1. Pragmatism and Nominalism 157
  2. Positivism 164

Chapter 7 Levels of Judicial Analysis 169
A. Introduction 169
B. Judicial Temperaments 169
  1. Level 1: Judicial Positivism 169
  2. Level 2: Judicial Pragmatism 172
  3. Level 3: Judicial Nominalism 174
C. Summary 183

PART 2
Critical Process

SECTION A
Critical Theory 187

Chapter 8 Critical Theory: Central Element 193
A. A Brief History 193
B. Anti-Objectivism and Subordination 199
  1. The Poker Game 200
  2. Unconscious Bias 201
  3. Insider Privilege 208
  4. Transparency Phenomenon 211
  5. Interest-Conversion Principle 213
C. Conclusion 214
Chapter 9  Critical Theory: Operational Elements
A. Deconstruction and Reconstruction 217
B. Equality Models 218
  1. Assimilation 218
  2. Pluralism 224
  3. Special Rights/Accommodation/Empowerment/Acceptance 226
C. Criticalist Epistemologies 231
  1. Rational/Empirical 232
  2. Standpoint 233
  3. Postmodernism 238
  4. Positionality 240

Section B
Critical Process 243

Chapter 10  Structure of Critical Process 245
A. From Legal Criticism to Judicial Theory 245
B. Limitations on Process 246
C. Two-Step Process 248
D. Institutional Legitimacy 251

Chapter 11  In re Kulko v. Superior Court 257
A. Facts 257
B. Symmetrical Equality Model 258
  1. Subordination Question 258
  2. Internal Critique 259
C. Asymmetrical Equality Model 260
  1. Subordination Question 260
  2. Internal Critique 263
D. Hybrid Equality Model 266
  1. Subordination Question 266
  2. Internal Critique 267

Chapter 12  In re Brown v. Board of Education 271
A. Back to 1954 272
B. Symmetrical Equality Model 272
CONTENTS

1. Subordination Question 273
2. Internal Critique 275
C. Asymmetrical Equality Model 281
   1. Subordination Question 281
   2. Internal Critique 284
D. Hybrid Equality Model 288
   1. Subordination Question 288
   2. Internal Critique 289

Epilogue 295
Index 297
## Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alden v. Maine, 119 S.Ct. 2240 (1999), 59</td>
<td>59</td>
</tr>
<tr>
<td>Allgeyer v. Louisiana, 165 U.S. 578 (1897), 50</td>
<td>50</td>
</tr>
<tr>
<td>Atkins v. Children's Hospital, 261 U.S. 525 (1923), 122–123</td>
<td>122–123</td>
</tr>
<tr>
<td>Baehr v. Māko, (1996) WL 694235 (Hawaii Cir. Ct.), 221</td>
<td>221</td>
</tr>
<tr>
<td>Black &amp; White Taxicab &amp; Transfer Co. v. Brown &amp; Yellow Taxicab &amp; Transfer Co., 276 U.S. 518 (1928)</td>
<td>126</td>
</tr>
<tr>
<td>Block v. Hirsh, 256 U.S. 135 (1921), 54</td>
<td>54</td>
</tr>
<tr>
<td>Bob Jones University v. United States, 461 U.S. 574 (1983)</td>
<td>219</td>
</tr>
<tr>
<td>Bolling v. Sharpe, 347 U.S. 497 (1954), 280</td>
<td>280</td>
</tr>
<tr>
<td>Borgnis v. Falk Co., 133 N.W. 209 (1911), 116, 121–122</td>
<td></td>
</tr>
<tr>
<td>Bowen v. Income Producing Mgmt., Inc., 202 F.3d 1282 (10th Cir. 2000)</td>
<td>119</td>
</tr>
<tr>
<td>Briggs v. Elliot, 98 F.Supp. 529 (1951), 103</td>
<td>103</td>
</tr>
<tr>
<td>Buck v. Bell, 274 U.S. 200 (1927), 93, 103, 129</td>
<td>129</td>
</tr>
<tr>
<td>Bunting v. Oregon, 243 U.S. 426, (1917), 56</td>
<td>56</td>
</tr>
<tr>
<td>Burger King v. Rudzewicz, 471 U.S. 462 (1985), 257</td>
<td>257</td>
</tr>
<tr>
<td>Burnham v. Superior Court of California, 495 U.S. 604 (1990), 257</td>
<td>257</td>
</tr>
<tr>
<td>Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996), 33–34, 54, 56, 79, 81, 123, 151</td>
<td></td>
</tr>
<tr>
<td>City of Richmond v. Croson, 488 U.S. 469 (1989), 177, 276</td>
<td></td>
</tr>
<tr>
<td>Cooper v. Aaron, 358 U.S. 1 (1958), 18, 254, 281</td>
<td></td>
</tr>
<tr>
<td>Coy v. Iowa, 487 U.S. 1012 (1988), 73</td>
<td>73</td>
</tr>
<tr>
<td>Dred Scott v. Sandford, 60 U.S. 393 (1856), 11, 37, 130, 178</td>
<td></td>
</tr>
<tr>
<td>Erie Railroad Co. v. Thompson, 304 U.S. 64 (1938), 126</td>
<td></td>
</tr>
<tr>
<td>Evans v. Romer, 517 U.S. 620 (1996), 222</td>
<td>222</td>
</tr>
<tr>
<td>Ex Parte Virginia, 100 U.S. 339 (1880), 276</td>
<td>276</td>
</tr>
<tr>
<td>Frontiero v. Richardson, 411 U.S. 677 (1973), 259</td>
<td>259</td>
</tr>
<tr>
<td>Gaines v. Canada, 305 U.S. 337 (1938), 274</td>
<td>274</td>
</tr>
<tr>
<td>German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914), 54</td>
<td></td>
</tr>
<tr>
<td>Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968), 18, 254, 276</td>
<td></td>
</tr>
<tr>
<td>Griswold v. Connecticut, 381 U.S. 479 (1965), 20–22, 152</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES

Holy Trinity Church v. United States, 143 U.S. 457 (1892), 68–69, 77, 124
Hyenes v. New York Central Railroad Co., 231 N.Y. 229 (1921), 85
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), 257
Ives v. South Buffalo Ry. Co., 94 N.E. 431 (1911), 122
Kulko v. Superior Court, 436 U.S. 84 (1978), 257–269
Losee v. Buchanan, 51 N.Y. 476 (1873), 43
Ma v. Reno, 208 F. 3d 815 (9th Cir. 2000), 150
Mapp v. Ohio, 367 U.S. 643 (1961), 146
Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), 108
Maryland v. Craig, 497 U.S. 836 (1992), 72
McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), 274
Microsoft Corp. v. United States, 2001 U.S. LEXIS 9509 (U.S. Oct. 9, 2001), 58
Missouri v. Jenkins, 495 U.S. 33 (1990), 279
Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1977), 177
Muller v. Oregon, 208 U.S. 412 (1908), 19, 54, 56
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), 73
National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964), 144
New York v. United States, 505 U.S. 144 (1992), 78
Plessy v. Ferguson, 163 U.S. 537 (1896), 37, 77, 104–105, 125, 130, 271, 276, 284, 287
Pollock v. Farmers Loan and Trust Co., 157 U.S. 429 (1895), 52
Reed v. Reed, 404 U.S. 71 (1971), 259
Regents of the University of California v. Bakke, 438 U.S. 265 (1978), 198
Reynolds v. Bank of America National Trust and Savings Association, 33 Cal. 2d 49 (1959), 21
Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), 145, 151
Robinson v. Shell Oil Co., 519 U.S. 337 (1997), 81
Rochin v. California, 342 U.S. 165 (1952), 146
Roe v. Wade, 410 U.S. 113 (1973), 20–21, 117
San Mateo County v. Southern Pacific Railroad Co., 116 U.S. 138 (1885), 48
Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886), 48–49
Scott v. Georgia, 39 Ga. 321 (1869), 129
Shelley v. Kraemer, 334 U.S. 1 (1948), 89, 97
Sipuel v. Oklahoma, 332 U.S. 631 (1948), 274
Slaughterhouse Cases, 83 U.S. 36 (1873), 38
St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1995), 212
Swift v. Tyson, 16 Pet. (U.S.) 1, 10 L.Ed. 865 (1842), 126
Sweatt v. Painter, 339 U.S. 629 (1950), 274
Taylor v. Illinois, 484 U.S. 400 (1988), 80
United States v. Hall, 472 F.2d 261 (5th Cir. 1972), 105
<table>
<thead>
<tr>
<th>Case</th>
<th>Page, Year, Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waco Cotton Oil Mill of Waco v. Walker, 103 S.W. 2d 1071, (1937)</td>
<td>119</td>
</tr>
<tr>
<td>Washington v. Davis, 426 U.S. 229 (1976), 177, 228</td>
<td></td>
</tr>
<tr>
<td>Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), 259</td>
<td></td>
</tr>
</tbody>
</table>
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TABLE OF SECONDARY AUTHORITIES


<table>
<thead>
<tr>
<th>Secondary Authority</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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<td></td>
</tr>
</tbody>
</table>


**TABLE OF SECONDARY AUTHORITIES**


TABLE OF SECONDARY AUTHORITIES  xxv

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TABLE OF SECONDARY AUTHORITIES


TABLE OF SECONDARY AUTHORITIES


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### TABLE OF SECONDARY AUTHORITIES

<table>
<thead>
<tr>
<th>Author</th>
<th>Title and Details</th>
</tr>
</thead>
</table>
TABLE OF SECONDARY AUTHORITIES

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<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volkmer, Walter E.</td>
<td>The Passionate Liberal: The Political and Legal Ideas of Jerome Frank</td>
<td></td>
</tr>
<tr>
<td>White, Morton</td>
<td>Social Thought in America: The Revolt Against Formalism</td>
<td>Beacon Press, 1957.</td>
</tr>
<tr>
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</tr>
</tbody>
</table>
Preface

For any given legal problem there are any number of ways to find a solution. Some judges search for solutions syllogistically, often exaggerating the transparency of text (legal formalism, Chapter 1), while others purport to seek solutions through close, logical readings of authoritative text (Scalian textualism, Chapter 2). Still other judges look for answers in the social ends of law, largely determined by the judge's personal sense of justice (legal realism, Chapter 3), by well-defined community needs (sociological jurisprudence, Chapter 4) or by existing governmental or social arrangements (legal process, Chapter 5).

Sometimes these traditional judicial methods fail to see life beyond their individual structures, effectively leaving scores of Americans without a judicial means of resolving their social problems. These Americans have two choices: forget about finding judicial answers to their pressing problems; or, refusing to accept what might be called “juridical subordination,” search for new judicial approaches. This book pursues the latter course. One of the book’s major objectives is to create a process of judicial decision-making that speaks to the needs and norms of millions of Americans. The objective here is to move the judiciary in the same direction as millions of citizens whose values are legitimate yet effectively outside the scope and concern of traditional judicial theories (“critical process,” Chapters 8–12).

Another objective of this book is to construct or redesign several intellectual structures that not only deepen our understanding of traditional process, but also help to create critical process. These structures render fascinating juxtapositions that shed new light on familiar judicial theories and light the way for new theories. There is something in this book for both the “traditionalist” and the “criticalist.”

In Section A of this Preface, I shall overview these structures and indicate the order in which topics are presented in the book. Section B closes out the Preface with a discussion of one of the intellectual structures employed in the book. This discussion appears here rather than in the body of the book because it is less juridical than the other structures. Taken as a whole, these in-
intellectual frameworks attempt not only to strengthen the chain of our jurisprudential knowledge, but also to add links to it.

A. Overview

1. Juridical and Politico-Economic Structures

The first juridical structure presented in the book is very basic. It views judicial decision-making as a linear movement from Point A (the dispositive issue of a case) to Point B (the judge's reasoning and, hence, the most important part of the process) to Point C (the judgment, or decision, in the case). Intended for the uninitiated, this very simple way of looking at judicial decision-making is broached in the Introduction.

The Introduction also launches a second and more probing juridical structure. This structure views each judicial model as an expression of either the “logical method” (Part 1, Section A) or the “policy method” (Part 1, Section B). As its name implies, the logical method is judicial reasoning committed to a logical reading and application of authoritative text. Here, the judge sees her institutional role as maintaining a level of consistency with prior rules. In contrast, a judge proceeding under the policy method envisions her institutional duty in consequentialist terms. She is self-consciously attuned to the results of her decisions, and, as presented in this book, engages policy on multiple levels: “policy-making”; “policy-discovery”; and “policy-vindication.” A new definition of judicial “policy-making” is forged from this reconceptualization of the judicial policy-formulation function (Introduction, Section C).

Taken together, the logical method and policy method describe the actual and, arguably, permissible range of judicial decision-making in Anglo-American law (Introduction, Sections A & B).

Viewing traditional process through the prism of the logical method or policy method creates possibilities for critical process. Critical process is structured as the latest, but undoubtedly not the last, articulation of the policy method. Those familiar with critical theory will instantly recognize the significance of this exercise. Critical theory is transformed from a theory of legal criticism, its current state, into a theory of judicial decision-making, sometime judges can actually use in finding effective answers to problems that impact upon the lives of people of color, women, and homosexuals (collectively called “outsiders” in critical theory).

---

1. I am indebted to my colleague Walter Raushenbush for suggesting this term in lieu of the potentially misleading “policy-crafting.”
Critical process should also prove useful to mainstream democratic theorists, who seek to find better ways for us to live our democratic lives. Although they have largely ignored critical theory, transforming critical theory into judicial theory should clarify its democratic message and potential beyond mere protest.

A third juridical structure presented in this book is the most complex, and ambitious. It synthesizes traditional process into three increasingly assertive levels of judicial analysis: “Level 1,” or judicial positivism; “Level 2,” or judicial pragmatism; and “Level 3,” or judicial nominalism (Part 1, Section C). While critical process translates into the policy method quite effortlessly, it does not find easy expression among the traditional levels of judicial analysis. Critical process fits, if at all, somewhere between Levels 2 and 3. Although not a perfect fit, critical process reveals interesting insights into its purpose, its value, and its operation when viewed within this structure (Part 2, Section B).

The use of philosophical methods in this book requires some explanation in light of the on-going debate between legal philosophers and legal theorists. Glimpses of that debate appear in the pages of this book. Some legal philosophers believe that any discussion of legal theory (including judicial theory) that does not delve deeply into underlying philosophical method is not to be taken seriously. Following the lead of the legendary legal philosopher H.L.A. Hart, whose ambition was to reshape legal philosophy in the image of academic philosophy, these legal scholars are essentially “doing philosophy” within the context of the law. Not surprisingly, they do not take seriously legal theories that, in their view, lack philosophical pedigree. Included in this group of “second-rank” theories are legal realism and critical theory. However, as we shall see, there is some difference of opinion among legal philosophers as to whether legal realism is completely devoid of philosophical method.

Legal theorists take issue with this view of what counts as important legal theory. They criticize legal philosophers for taking such a narrow view, one that would have us dismiss or discount the writings of such influential legal theorists as Lon Fuller and Judge Richard Posner. Indeed, it is said that Hart himself, who debated Fuller in the pages of the *Harvard Law Review* in 1958,
did not take Fuller seriously as a legal philosopher. Similarly, some books written by legal philosophers scarcely mention Judge Posner, arguably our greatest scholarly jurist since Justice Oliver Wendell Holmes. Rather, legal theorists argue that theory about law can stand on its own, that it can and should be judged on its own terms. For them, the test for good legal theory is the extent to which it brings fresh thinking to the table.

Other legal theorists—critical theorists—also take strong exception to the legal philosophers’ narrow view of legal theory. They argue that to try to pigeonhole twenty-first century life experiences into nineteenth or even twentieth century conceptualizations is rather perverse. Legal theory, they argue, should be useful; it should be empowering.

While this book discusses philosophical methods underlying several judicial techniques, it does not necessarily subscribe to the notion that good legal theory must have deep philosophical roots, or that legal theory devoid of philosophical method is “junk theory.” This book takes the view that any theory about law or legal institutions is worth our time and effort if it is “good” theory, which is to say it is descriptively accurate or prescriptively sound. Thus, legal realism, critical process (or critical theory), Judge Posner, and certainly Lon Fuller should be taken seriously because they yield “good” legal theory. Legal realism, for example, is descriptively accurate in cases like Brown v. Board of Education, the Supreme Court’s historic 1954 decision that overturned state school segregation statutes. Similarly, critical process should be studied because it is descriptively accurate in a whole range of cases. Critical process has value even though some legal scholars might not find it prescriptively sound.

A fourth and final intellectual structure that helps increase our understanding of traditional process and critical process is politico-economic rather than juridical. It attempts to distinguish between “progressive” and “nonprogressive” judicial decision-making. As this framework is nonjuridical, it is presented in the last section of this Preface (Section B) rather than in the book’s chapters where it would not keep good company with the more technical discussion of jurisprudence.

2. Structure of the Book

The Introduction attempts to establish a baseline for a technical study of the structure of judicial decision-making: a judge’s movement from dispositive issue (Point A) to judgment (Point C) through either the logical method, the policy method or both (Point B). After discussing the historical roots of both judicial methods, the Introduction ends with a reconceptualization of the pol-
icy method. Here an attempt is made to identify and classify the several levels at which judges actually engage policy.

Part 1 (Traditional Process) is written in three sections. Section A (Logical Method) and Section B (Policy Method) discuss the five traditional judicial models mentioned at the beginning of the Preface. Legal formalism (Chapter 1) and Justice Scalia’s brand of textualism (Chapter 2) are presented as individual expressions (or attempted expressions) of the logical method. Legal realism (Chapter 3), sociological jurisprudence (Chapter 4), and legal process (Chapter 5) are organized under the policy method. As a basis for comparison, each traditional judicial model is applied to Brown v. Board of Education. This discussion should prove useful not only in sharpening our understanding of the differences among the individual traditional judicial models, but also in crystallizing our appreciation of the differences—great differences—between traditional process and critical process. Finally, Section C (A Philosophical Synthesis) concludes Part 1 with an attempt to synthesize the five traditional judicial models into three levels of judicial analysis: Level 1/judicial positivism; Level 2/judicial pragmatism; and Level 3/judicial nominalism (Chapter 7). This intellectual structure builds upon a prior discussion of philosophical presuppositions that give conceptual shape to traditional judicial analysis (Chapter 6).

Part 2 (Critical Process) is divided into two sections. The first, Section A, is a detailed discussion of critical theory, focusing on its central message, “anti-objectionism” (Chapter 8), and its operational elements, the “subordination question” and the “internal critique” (Chapter 9). The second section, Section B, transforms critical theory from its current state as a theory of legal criticism into a theory of outsider-oriented judicial decision-making. Critical theory is thus transformed into critical process. Reflecting the intellectual diversity among critical theorists, this unique process of judicial decision-making is fashioned into three “equality models,” termed “symmetrical,” “asymmetrical,” and “hybrid.” Once critical process is constructed, its institutional legitimacy is discussed (Chapter 10). Then, as a way of illustrating the judicial potential of critical process beyond civil rights, the birthplace of critical theory, critical process is applied to a routine legal problem in civil procedure (Chapter 11). Finally, critical process, like traditional process, is applied to Brown v. Board of Education (Chapter 12). This discussion highlights the value and uniqueness of critical process, including the failure of traditional process to meet the needs of outsiders.

These applications of critical process are by no means intended to be definitive. They are at best tentative and illustrative of the type of discourse and rigorous analysis one can expect to find when applying critical process.
B. The Meaning and Means of Progress

The judge’s movement from Point A to Point C (Introduction), the logical/policy method dichotomy (Part 1, Sections A & B), and the levels of judicial analysis (Part 1, Section C) offer juridical frameworks for understanding the two judicial processes presented in this book—traditional process and critical process. In the remaining pages of this Preface, I shall discuss another conceptual scheme that is less technical than the others. It is based on the distinction between “progressive” and “nonprogressive” judicial decision-making.

This distinction is implicit in each judicial model discussed in this book. Indeed, each judicial theory is typically classified as one or the other. Legal formalism (Chapter 1) and Scalian textualism (Chapter 2) are frequently described as “nonprogressive” judicial models whereas legal realism (Chapter 3) is usually characterized as “progressive.” Similarly, sociological jurisprudence (Chapter 4) is often seen as “progressive” and legal process (Chapter 5) as “nonprogressive.” Finally, criticalists routinely describe their work as “progressive.”

In American society, the term “progressive” implicitly leans toward the political left. But this characterization begs many questions, such as: What form of liberalism does progressivism take? Is conservatism necessarily nonprogressive? Is it possible that Scalian textualism can be conservative yet both progressive and nonprogressive, or that sociological jurisprudence can be progressive in a way that is different from legal realism?

The chart appearing on the backside of the book’s front cover is an attempt to provide a response to these and similar questions. It estimates the politico-economic implications of each judicial model discussed in the book. A more detailed discussion of the chart follows.

As used in this book, the word “progressive” describes a government whose laws, policies, or practices seek to move society forward socially, economically, politically, culturally or spiritually. “Progressive” suggests a journeying forward, a gradual betterment, a changing from old to new, continual improvements, social evolution. The ultimate goal is to create an increasingly enlightened government—one that is wiser and kinder in its treatment of its citizens. While this is but a working definition, it will suffice for present purposes.

A government can attempt to achieve progressive outcomes through many politico-economic strategies. For example, a government can pursue such outcomes through Lockean principles—free markets and protection of “natural rights,” which John Locke defined as “life, liberty, and property”—or, in other words, through what Thomas Jefferson called “an empire of liberty”—a be-
lief in “the people, in their ability to elevate themselves in society.”

This politico-economic strategy describes a noninterventionist government, what we have come to know as classical liberalism. The term “noninterventionist” is a bit of a misnomer, however, because government intervention is in fact welcomed to the extent that it protects fundamental rights or lays the groundwork for private enterprise. But, clearly, there is a distrust of government, a sense that the government’s power and importance must be minimized, lest it threaten fundamental rights and inhibit free markets. This minimalist mindset is exhibited in Lochnerian jurisprudence (legal formalism).

Another means of achieving progressive outcomes is through welfare liberalism, sometimes referred to as the “welfare state” or Benthamite utilitarianism. This strategy calls for a maximalist government, which can be defined as a government that intervenes in economic markets or social arrangements to rescue the individual from poverty, illness, ignorance, or inequality. “The first duty of a State,” President Franklin Roosevelt insisted, “is to promote the welfare of the citizens of that state. It is no longer sufficient to protect them from invasion, from lawless and criminal acts, from injustice and persecution,


5. See, e.g., Ball and Dagger, Political Ideologies and Their Democratic Ideal, supra note 4, at pp. 59–61.

6. See Chapter 1, Section B, infra.

7. “Natural rights” for Jeremy Bentham was “nonsense, nothing counting except the practical.” Roland N. Stromberg, European Intellectual History Since 1789 (New York: Meredith Publishing Company, 1968), p. 53. Sweeping away tradition, and “requiring laws and institutions to justify themselves on the practical grounds of welfare achieved,” utilitarianism “assumed that the sum of individual happiness is the social optimum...The Benthamite principle of social welfare as the sum total of units of individual happiness...was the driving force behind a series of liberal acts [that] culminated in the great political Reform Bill of 1832, [bringing] to Great Britain the equivalent of the French Revolution, by peaceful means.” Ibid. at pp. 52–53. The lack of commitment to traditions and the desire for experimentation should be contrasted with Burkean conservatism discussed shortly. In addition, Bentham’s utility principle should be compared and contrasted with laissez-faire. Both were closely related in that they sought to get rid of special privilege and inequalities, but they were not “necessarily logically linked.” Ibid. at p. 53. “Bentham’s instincts were in part to be a more active, positive reformer than the laissez-faire credo indicated.” Ibid. at p. 52. See also Ball and Dagger, Political Ideologies and Their Democratic Ideal, supra note 4, at pp. 96–97.

8. See Ball and Dagger, Political Ideologies and Their Democratic Ideal, supra note 4, at p. 75. See also ibid. at pp. 74–78.
but the State must protect them, so far as lies in its power, from disease, from
ingnance, from physical injury, and from old-age want. Thus, the individ-
ual is rescued not just from society, but also from himself. Such inequalities
warrant the ministrations of the government, maximalists argue, because they
are socially constructed.

9. The American President, supra note 4, at p. 192.
10. This argument is a modification of what Isaiah Berlin calls the “idealized model”
of egalitarian thought, which offers an alternative, albeit more aggressive, ground on which
to justify welfare liberalism:

... [S]o long as there are differences between men, some degree of inequality
may occur; and that there is no kind of inequality against which, in principle, a
pure egalitarian may not be moved to protest, simply on the ground that he sees
no reason for tolerating it, no argument which seems to him more powerful than
the argument for equality itself—equality which he regards not merely as an end
in itself, but as the end, the principal goal of human life. I do not suppose that
extreme equality of this type—the maximum similarity of a body of all but in-
discernible human beings—has ever been consciously put forward as an ideal by
any serious thinker. But if we ask what kinds of equality have in fact been de-
manded, we shall see, I think, that they are specific modifications of this absolute
ideal, and it therefore possesses the central importance of an ideal limit or ide-
alized model at the heart of all egalitarian thought.

Books Foundation, 1990), p. 107. Classical liberals, on the other hand, hold to a very dif-
f erent view of equality:

... There are those who believe that natural human characteristics either can-
not or should not be altered and that all that is necessary is equality of political and
judicial rights. Provided that there exists equality before the law, such normal dem-
ocratic principles as that of one man, one vote, some form of government arrived
at by consent (actual or understood) between the members of the society, or at any
rate the majority of them, and finally, a certain minimum of liberties—commonly
called civil liberties—deemed necessary in order to enable men freely to exercise
the legal and political rights entailed by this degree of equality, then, according to
this view, no interference in other regions of activity (say, the economic) should
be permitted....If it is complained that in a society where a large degree of politi-
cal and legal equality is ensured, the strong and the clever and the ambitious may
succeed in enriching themselves, or acquiring political power, ‘at the expense of’
—that is to say, in such a way as to keep these goods from—other members of the
society, and that this leads to patent inequalities, liberals of this school reply that
this is the price for ensuring political and legal equality, and that the only method
of preventing economic or social inequalities is by reducing the degree of political
liberty or legal equality between men....[W]e are told, with considerable empirical
evidence, that to count men for one and only one in every respect whatever is
impracticable, that the full degree of, let us say, legal and political equality often
results in economic and other forms of inequality, given the different endowments
Clearly, classical liberalism and welfare liberalism hold contrasting views regarding the proper relationship between the individual and the state. While classical liberals see government as a threat to individual freedom and prosperity, welfare liberals see government as an enabler of individual freedom and prosperity. While classical liberals fundamentally believe it is not the government’s business to take care of the downtrodden or to undermine self-reliance in any other way, welfare liberals fundamentally believe the government should be involved in solving people’s problems. Thus, the distinction comes to this: small government and civil liberties versus big government and civil liberties.\(^{11}\)

Several judicial theories embrace welfare liberalism. Legal realism encourages judicial initiation of maximalist laws and policies.\(^{12}\) In a slightly different approach, sociological jurisprudence supports welfare liberalism created through legislative initiatives rather than by judicial decision-making.\(^{13}\) Finally, critical process prescribes a judicial process that is totally committed to welfare liberalism as a judicially initiated strategy.\(^{14}\) The similarity between critical process and legal realism is quite apparent.\(^{15}\)
Sometimes governments attempt to achieve progressive outcomes through conservative means, specifically individual conservatism and Burkean conservatism. Like classical liberalism, both forms of conservatism are minimalist strategies. Individual conservatism, sometimes called Reagan conservatism after former President Ronald Reagan, envisions a government that seeks to reduce its size and scope so as to free individuals to maximize personal wealth and happiness through self-reliance, honesty, and idealism. With its emphasis on unregulated capitalism, individual accountability, and distrust of government, this strategy is functionally indistinguishable from classical liberalism. Indeed, President Reagan's administration received classical liberals with open arms. Legal formalism certainly has a Reagan ring to it.

Bearing the name of the philosopher Edmund Burke, Burkean conservatism is not nonprogressive as is often supposed. As Roland Stromberg points out, Burke "was certainly not opposed to change, if properly carried out, and his own career, that of a person of humble birth, consisted of one passionate crusade after another....Burke may well be viewed as the founder of a real science of social reform, rather than as a hidebound conservative." Change for Burke is properly executed if it is done in an orderly fashion with due deference to a society's traditions. A severe critic of the French Revolution, Burke believed government's role was to "make[,] ordered liberty possible by preventing people from doing just about anything they happen to desire." Thus, unlike Reagan conservatives or classical liberals, Burkean conservatives do not regard government as a threat to liberty. This does not, however, make them maximalists. Indeed, Burkean conservatives maintain a basic indisposition toward large government. Yet, they are more concerned with social and political stability than

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18. See Chapter 1, Sections C & D, infra. Again, this describes a minimalist government, not a noninterventionist government. It was, for example, the Reagan and Bush governments, Haynes Johnson argues, that laid the groundwork for the rugged dot-com individualism of the booming 1990s by investing in scientific research. See Haynes Johnson, The Best of Times: America in the Clinton Years (New York: Harcourt, 2001).
20. Ball and Dagger, Political Ideologies and Their Democratic Ideal, supra note 4, at pp. 96. See also ibid. at p. 97.
with providing opportunities for personal profit or unfettered liberty. Also, unlike welfare liberals, Burkean conservatives are reformers, not innovators. They seek to move society forward in a safe and orderly manner. Overall, Burkean conservatism describes the politico-economic implications of legal process.

Our final judicial model, Scalian textualism, is also unquestionably conservative, but in more than one way. Justice Scalia’s statutory textualism seems progressive in a Reagan-conservative way—he sees government as a threat to individual liberty. Justice Scalia’s constitutional textualism is, however, more difficult to locate. On the one hand, Justice Scalia champions the “Dead Constitution.” This is a belief in constitutional text frozen in time (1791 to be precise); a belief that the future lies in the past; a belief that our best days are behind us. The desire for the good old days is the essence of classical conservatism. It demonstrates an unmistakable preference for a nonprogressive government—a kind of extreme minimalism when compared with other minimalist judicial models.

On the other hand, Justice Scalia justifies his constitutionalism not only on the basis of his belief in devolution, but also on the basis of his desire to protect liberty. This would suggest classical liberalism or Reagan conservatism and, hence, a progressive characterization of Justice Scalia’s constitutional textualism. A close call, but Justice Scalia’s sense of devolution seems to dominate his constitutional textualism.

21. Indeed, Samuel Coleridge, a conservative who “built on Burke’s foundations in England” and whose “influence flowed down through the nineteenth century as a strong philosophic source of British enlightened Toryism,…believed in government regulation of manufacturers, government aid to education, the duty of the state to enhance the moral and intellectual capabilities of its citizens in all sorts of positive ways.” Stromberg, *European Intellectual History Since 1789*, supra note 7, at p. 46. “British and European conservatism has been an enemy of laissez-faire.” Ibid. British Prime Minister Margaret Thatcher is most responsible for bringing individual, or Reagan, conservatism to England in the 1970s and 1980s, so much so that individual conservatism is sometimes called “Thatcher conservatism” as well as Reagan conservatism. See, e.g., Ball and Dagger, *Political Ideologies and Their Democratic Ideal*, supra note 4, at pp. 94.

22. See, e.g., Ball and Dagger, *Political Ideologies and Their Democratic Ideal*, supra note 4, at p. 97.

23. See Chapter 5, infra.

24. See Chapter 2, Section C, infra.

25. See Chapter 2, Section D, infra.

26. See, e.g., Ball and Dagger, *Political Ideologies and Their Democratic Ideal*, supra note 4, at pp. 91–92.

27. See Chapter 2, Section D, infra.

28. See ibid.
With this understanding of the politico-economic implications of each judicial model, summarized on the backside of the front cover of this book, we now move to a more technical, juridical discussion of jurisprudence.
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