Structures of Judicial Decision Making from Legal Formalism to Critical Theory

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Revised Second Edition

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and
In Memory of
Paul C. Wohlmuth

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Preface

There are any number of ways of finding a solution to any given legal problem. 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-

tellectual 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";[1] 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 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, something 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,[2] 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.[3] 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,

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2. See, e.g., Cass R. Sunstein, *Designing Democracy* (New York: Oxford University Press, 2001); Amy Gutmann & Dennis Thompson, Democracy and Disagreement (Cambridge: Harvard University Press, 1997); Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993); *Deliberative Democracy,* Jon Elster, ed. (Cambridge: Cambridge University Press, 1998); Jurgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1992).

3. See, e.g., Chapter 3, Section B2, infra, & Chapter 7, Section B3, infra.

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 policy

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-objectivism" (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."[4] This politico-economic strategy describes a noninterventionist government, what we have come to know as *classical liberalism*.[5] 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).[6]

Another means of achieving progressive outcomes is through *welfare liberalism*, sometimes referred to as the "welfare state" or Benthamite utilitarianism.[7] 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.[8] "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,

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4. Philip B. Kunhardt, Jr., Philip B. Kunhardt III, and Peter W. Kunhardt, *The American President* (New York: Riverhead Books, 1999), pp. 259–60. See also ibid. at pp. 262–70; Terrance Ball and Richard Dagger, *Political Ideologies and Their Democratic Ideal* (New York: Harper Collins, 1991), pp. 60–61.

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] culminat[ed] 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 ignorance, from physical injury, and from old-age want."[9] Thus, the individual 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.[10]

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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 indiscernible 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 demanded, 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 idealized model at the heart of all egalitarian thought.

Isaiah Berlin, "Equality," in *Introduction to Great Books* 2nd Series (Chicago: The Great Books Foundation, 1990), p. 107. Classical liberals, on the other hand, hold to a very different view of equality:

> ... There are those who believe that natural human characteristics either cannot 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 democratic 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 political 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]

> of men, and that only in an absolutely uniform, robot-like society, which no one wants, can this be effectively prevented. Those who believe this commonly maintain that the only inequality which should be avoided is an inequality based on characteristics which the individual cannot alter—unequal treatment based, for instance, on birth, or color, which human beings cannot alter at will. Given that all human beings start off with equal rights to acquire and hold property, to associate with each other in whatever ways they wish, to say whatever they will, and all the other traditional objectives of liberalism, and with no special rights or privileges attached to birth, color, and other physically unalterable characteristics, then even though some human beings, by skill or luck or natural endowment, do manage to acquire property or power of ascendancy which enables them to control the lives of others, or to acquire objects which the others are not in a position to acquire, then, since there is nothing in the constitution of the society that actually forbids such acquisitiveness, the principle of equality has not been infringed.

Ibid. at pp. 107–9.

11. Thomas Jefferson, Andrew Jackson, Calvin Coolidge, and Ronald Reagan are among our classical liberal presidents, while Theodore Roosevelt and Franklin Roosevelt are among our welfare-liberal presidents. Obviously, party affiliation does not necessarily determine one's politico-economic stance. See *The American President*, supra note 4, at pp. 260–61, 277.

12. See Chapter 3, Sections B & C, infra.

13. See Chapter 4, Sections B, C, & D2, infra.

14. See Part 2, infra.

15. See, e.g., Richard Delgado and Jean Stefanic, *Critical Race Theory: An Introduction* (New York: New York University, 2001) pp. 1–11, 150.

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.[16] 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.[17] Legal formalism certainly has a Reagan ring to it.[18]

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."[19] 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."[20] 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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16. See Peggy Noonan, *When Character Was King* (New York: Viking, 2001) (discussion Reagan conservatism).

17. See, e.g., Midge Decter, *An Old Wife's Tale: My Seven Decades in Love and War* (New York: HarperCollins Publishers, 2001) (wife of famous neoconservative Norman Podhoretz discussing their conversion from liberalism to neoconservatism in the wake of the 1960s and the warm embrace with which President Reagan and his friends greeted them and other political converts).

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).

19. Stromberg, *European Intellectual History Since 1789*, supra note 7, at pp. 16–17.

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.[21] Also, unlike welfare liberals, Burkean conservatives are reformers, not innovators. They seek to move society forward in a safe and orderly manner.[22] Overall, Burkean conservatism describes the politico-economic implications of legal process.[23]

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.[24] 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.[25] The desire for the good old days is the essence of *classical conservatism*.[26] 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.[27] 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.[28]

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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 Margatet 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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